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TEACHING JEWISH LAW IN AMERICAN LAW SCHOOLS: AN EMERGING DEVELOPMENT IN LAW AND RELIGION

Samuel J. Levine*

Introduction

In recent years, religion has gained an increasing prominence in both the legal profession and the academy. Through the emergence of the “religious lawyering movement,”¹ lawyers and legal scholars have demonstrated the potential relevance of religion to many aspects of lawyering. Likewise, legal scholars have incorporated religious thought into their work through books, law journals and classroom teaching relating to various areas of law and religion.²

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I thank Russ Pearce for inviting me to participate in the Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, held at Fordham University School of Law, December 7-9, 1998, and I thank the editors of the *Fordham Urban Law Journal* for soliciting this Essay.

This Essay is based in part on my participation in a panel discussion of the Association of American Law Schools Section on Jewish Law, conducted January 7, 1999, at the AALS Annual Meeting, in New Orleans. The discussion, titled *Perspectives in Teaching Jewish Law – Independently and as a Part of a Law & Religion Program*, was moderated by Professor Steven Resnicoff. Other panelists included Professors Michael Brody, David Cobin and Yale Rosenberg. Many of the concerns raised by both the panelists and the audience members are reflected in my thoughts here.

1. The term “religious lawyering movement” was coined by Professor Russell Pearce. See Russell G. Pearce, *Symposium, Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 FORDHAM L. REV. 1075 (1998). The current issue of the *Fordham Urban Law Journal* represents a further stage in this movement. For a history of the movement, see Samuel J. Levine, *Introductory Note: Symposium on Lawyering and Personal Values – Responding to the Problems of Ethical Schizophrenia*, 38 CATH. LAW. 145 (1998); Pearce, *supra*.

2. There are numerous examples of the increased interest in law and religion, in books, law journals and the classroom. The term “law and religion” is a broad one, which may encompass many areas, including Free Exercise and Establishment Clause issues. Although such issues are certainly relevant to this Essay, I focus here more on the direct or indirect influence of religious ideas on the substance of the law, rather than discussing the effect of religion as the subject matter of primarily constitutional concerns. Of course, a better understanding of religion on its own terms should ideally inform and improve Free Exercise and Establishment Clause jurisprudence.

The aim of this Essay is to discuss one particular aspect of these efforts, namely, the place of Jewish law in the American law school curriculum.³ Specifically, I will outline briefly three possible models for a course in Jewish law in an American law school and consider some of the advantages and disadvantages of each model. I then will describe the structure I have chosen, in an attempt to synthesize these models, for the seminar in Jewish law that I teach at St. John's University School of Law.⁴

I. Model One

In the first model, a Jewish law course serves as a course in comparative law, emphasizing conceptual foundations of the system of Jewish law. Focusing on substantive areas of law which find their parallels in the American legal system, this model analyzes the different concepts through comparisons and contrasts to American law. Such an approach has at least two apparent advantages. First, students who may be unfamiliar with Jewish law are likely to have some familiarity with and/or interest in the substantive areas of American law discussed. Indeed, one of the aims of this model is for students to appreciate the way a study of each legal system can illuminate an understanding of the other. Second, this model may be appropriate for the curriculum in many law schools, as it contains a strong comparative law component.⁵ One possible disadvantage to this model, when compared with other models that do

3. Approximately thirty American law schools include courses in Jewish law as part of the curriculum. See Edward H. Rabin, *Symposium: The Evolution and Impact of Jewish Law*, Foreword, 1 U.C. DAVIS J. INT'L L. & POL'Y 49, 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. INT'L L. 101, 101 n.1 (1996).

4. It should be noted that there may exist numerous models for a course in Jewish law at American law schools, in addition to variations and hybrids of many of these models. Thus, my descriptions here provide somewhat simplified models for the purpose of sparking further and more complex discussion of the issues I have delineated. Moreover, the suitability of any of the models in a particular setting depends on a number of variables, some of which I acknowledge in the text, including the background of the students, the background of the teacher or teachers, the availability of appropriate course materials, and the academic environment and philosophy of the school. Each of these variables finds a wide range of realities in the different law schools throughout the United States that offer courses in Jewish law.

5. The advantages of the comparative study model are reflected in part in the increasing reliance on the Jewish legal system in American law journals. See Appendix; see also Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 442-43 nn.3-11 (1997); 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, 817-19 nn.14-28 (1993).

not incorporate American law, is that a teacher of such a course would be expected to have a working knowledge of, if not an expertise in, both Jewish and American law as well.

II. Model Two

A second model envisions Jewish law as a course in international law, to the extent that Jewish law impacts the legal system in the modern State of Israel. This model allows students to see the application of Jewish law within a modern secular nation, thereby providing an apparent contrast to the American ideal of law that separates church and state. In addition, the subject matter in this model, involving matters that affect the civil law of the State of Israel, may focus on issues that have direct analogues in American jurisprudence. Such a course might be more appropriate for a law school curriculum, as it deals with both comparative and international law.⁶ However, these strengths actually may suggest inherent weaknesses in the model, as a teacher of such a course would have to be competent to teach both Jewish law and specific modern legal systems. Moreover, an emphasis on the modern State of Israel might detract from the study of the system of Jewish law on its own terms.

III. Model Three

A possible response to these concerns is the third model, which examines almost exclusively Jewish law, with little, if any, reference to other legal systems. Because the subject matter is restricted to Jewish law, this model may offer the opportunity for students to study the Jewish legal system in a more comprehensive and systematic manner. Likewise, placing the focus of the course on a single legal system allows for a teacher whose knowledge of other legal systems, though potentially helpful, would seem generally unnecessary. Students in such a course, however, must be prepared to engage in the study of a legal system that may be unfamiliar to them, relying on their own ability to make comparisons and contrasts to areas of law with which they are more familiar. In addition, the subject matter of this model may not find as clear a place within a law school curriculum as the other models, although it might com-

6. Menachem Elon, a former Israeli Supreme Court Justice, has been a leading proponent and practitioner of this method, in both his scholarship and the Jewish law courses he has taught in various American law schools. See, e.g., Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. INT'L L. & POL. 221, 239-43 (1985).

plement a curriculum offering courses in Islamic law or Canon law.⁷

IV. Model Four

The syllabus for the seminar in Jewish law that I teach at St. John's reflects my attempt to synthesize these different models, with the ultimate aim of helping students appreciate the relevance of Jewish law to a broad range of legal issues. As most of the students who enroll in the course have little or no background in Jewish law, we begin with a discussion of the sources and structure of Jewish law, from both a historical and a conceptual perspective. In an effort to make the students more comfortable with this material, I rely primarily on articles in American law journals. While I try to draw parallels to American legal structure and history whenever possible, this part of the course primarily provides an opportunity for a broad understanding of the mechanics of Jewish law through an examination of the Jewish legal system on its own terms.

We continue the introductory stage of the course with a look at interpretation in Jewish law. Through examples of both civil law and ritual law interpretation, I seek to demonstrate that these two components of the Jewish legal system share a common analytical framework and are inextricably linked. We thus continue the process of looking at Jewish law on its own terms by relying on the works of scholars of Jewish law, although a number of the examples I select yield obvious comparisons to issues in American law, in both substance and methodology. Likewise, discussions of authority in interpretation lead to comparisons to the structure of the American judiciary.

After these lessons, students usually feel that they have obtained a working knowledge of the Jewish legal system, sufficient to allow them to undertake explicit comparisons of substantive areas of law in the two systems. Therefore, the next stage of the course consists of discussions of criminal law, capital punishment, self-incrimination, confidentiality and abortion in Jewish law and American law. Most students already have a substantial interest in, if not a familiarity with, these areas of law. In addition, they often gain a new perspective on American law as a result of examining the contrast cases in Jewish law. In keeping with the comparative component

7. In fact, some law schools offer courses in Jewish law as part of a program in law and religion.

of the course, materials for these subjects are drawn from both American law journals and works of Jewish law.

The final stage of the course looks at the intersection of Jewish law with modern legal systems, particularly the United States and the State of Israel. Focusing on American *get* laws and kosher fraud laws naturally involves American constitutional law, which, in turn, is compared and contrasted with the dynamic of incorporation of Jewish law in certain areas of Israeli law. Moreover, the Israeli model introduces an international component to the course and exemplifies the difference between Jewish law and the law of the modern, secular State of Israel.

My syllabus offers one attempt to synthesize elements of some of the potential models for a course in Jewish law in an American law school, consistent with my goals in teaching the course. The substance and style of Jewish law courses vary widely in the different schools offering such a course. Nevertheless, it is my hope that, as both the legal profession and the legal academy continue to recognize increasingly the importance of religion in the lives of lawyers, Jewish law courses and scholarship will be seen as an integral part of the interface of law and religion.

APPENDIX

This Appendix presents a compilation of Articles, relating primarily to Jewish law, which have appeared in American law journals since 1995. The Appendix groups these Articles in broad categories, similar to those found in the Index to Legal Periodicals.

Admiralty

Steven F. Friedell, *Admiralty and the Sea of Jewish Law*, 27 J. MAR. L. & COM. 647 (1996).

Commercial Law

Yale L. Rosenberg, *A Codification, A Restatement and More*, 12 J. L. & RELIGION 323 (1995-96) (book review).

James Scheinman, *Jewish Business Ethics*, 1 U.C. DAVIS J. INT'L L. & POL'Y 63 (1995).

Leon Wildes, *A Modern Restatement of Jewish Civil Law*, 18 CARDOZO L. REV. 2037 (1997) (book review).

Constitutional Law

Burton Caine, "The Liberal Agenda": *Biblical Values and the First Amendment*, 14 TOURO L. REV. 129 (1997).

- Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781 (1998).
- Karen Ruth Lavy Lindsay, Comment, *Can Kosher Fraud Statutes Pass the Lemon Test?: The Constitutionality of Current and Proposed Statutes*, 23 U. DAYTON L. REV. 337 (1998).
- Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997).
- Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENTARY 511 (1998).
- Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951 (1997).
- Maimon Schwarzschild, *Pluralist Interpretation: From Religion to the First Amendment*, 7 J. CONTEMP. LEGAL ISSUES 447 (1996).

Courts

- Jeffrey I. Roth, *Three Aspects of the Rabbinate: Compensation, Competition and Tenure*, 45 DRAKE L. REV. 569 (1997).

Criminal Law

- Mark C. Alexander, *Religiously Motivated Murder: The Rabin Assassination and Abortion Clinic Killings*, 39 ARIZ. L. REV. 1161 (1997).
- Moshe A. Bleich & Daniel Pollack, *Search and Seizure in Schools: A Comparison of Historical Jewish Legal Source and Contemporary United States Law*, 7 IND. INT'L & COMP. L. REV. 379 (1997).
- Steven Davidoff, *A Comparative Study of the Jewish and the United States Constitutional Law of Capital Punishment*, 3 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 93 (1996).
- 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).
- Beth C. Miller, *A Comparison of American and Jewish Legal Views on Rape*, 5 COLUM. J. GENDER & L. 182 (1996).
- Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings: An 'Eye-for-an Eye' and the Death Penalty*, 1998 UTAH L. REV. 505 (1998).
- Irene Merker Rosenberg & Yale L. Rosenberg, "Perhaps What Ye Say is Based Only on Conjecture" — Circumstantial Evidence, Then and Now, 31 HOUS. L. REV. 1371 (1995).
- Daniel A. Rudolph, Note, *The Misguided Reliance in American Jurisprudence on Jewish Law to Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437 (1996).
- Kenneth Shuster, *Halacha as a Model for American Penal Practice: A Comparison of Halachic and American Punishment Methods*, 19 NOVA L. REV. 965 (1995).

Economics

Paige M. Malerman, *Book Review: Economic Public Policy and Jewish Law*, 9 TEMP. INT'L & COMP. L.J. 167 (1995).

Evidence

Jeffrey H. Miller, *Silence is Golden: Clergy Confidence and Interaction Between Statute and Case Law*, 22 AM. J. TRIAL ADVOC. 31 (1998).

Estate Planning and Probate

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. INT'L LAW 101 (1996).

Family Law

Ilene H. Barshay, *The Implications of the Constitution's Religion Clauses on New York Family Law*, 40 HOW. L.J. 205 (1996).

Heather Lynn Capell, Comment, *After the Glass Has Shattered: A Comparative Analysis of Orthodox Jewish Divorce in the United States and Israel*, 33 TEX. INT'L L.J. 331 (1998).

Charla Murakami, *Parent-Child Relations: A Comparison of Jewish and California Law*, 1 U.C. DAVIS J. INT'L L. & POL'Y 107 (1995).

Joel A. Nichols, Comment, *Louisiana's Convenient Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929 (1998).

Esther Rosenfeld, *Jewish Divorce Law*, 1 U.C. DAVIS J. INT'L L. & POL'Y 135 (1995).

Patti A. Scott, Comment, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L. J. 1117 (1996).

Jodi M. Solovy, Comment, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493 (1996).

Lisa Zornberg, *Beyond The Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. REV. 703 (1995).

Health Law & Policy

Darrel W. Amundsen, *The Ninth Circuit Court's Treatment of the History of Suicide by Ancient Jews and Christians in Compassion in Dying v. State of Washington: Historical Naivete or Special Pleading?*, 13 ISSUES L. & MED. 365 (1998).

Michael Brody, *Cloning People: A Jewish Analysis of the Issues*, 30 CONN. L. REV. 503 (1998).

Elliot N. Dorff, *Symposium on Cloning: Human Cloning: A Jewish Perspective*, 8 S. CAL. INTERDISCIPLINARY L.J. 117 (1998).

- Daniel Pollack et al., *Anderson v. St. Francis-St. George Hospital: Wrongful Living From an American and Jewish Legal Perspective*, 45 CLEV. ST. L. REV. 621 (1997).
- Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law*, 29 U. TOL. L. REV. 409 (1998).
- Steven H. Resnicoff, *Physician Assisted Suicide Under Jewish Law*, 1 DEPAUL J. HEALTH CARE L. 589 (1997).
- Alan Mayor 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).
- Stephen J. Werber, *Ancient Answers to Modern Questions: Death, Dying, and Organ Transplants — A Jewish Law Perspective*, 11 J. L. & HEALTH 13 (1996-97).

Human Rights

- David Novak, *Religious Human Rights in the Judaic Tradition*, 10 EMORY INT'L L. REV. 69 (1996).
- Stephen Wizner, *Repairing the World Through Law: A Reflection on Robert Cover's Social Activism*, 8 CARDOZO STUD. L. & LITERATURE 1 (1996).

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.-VLA J. L. & ARTS 203 (1998).
- Matthew I. Kozinets, *Copyright and Jewish Law: The Dilemma of Change*, 1 U.C. DAVIS J. INT'L L. & POL'Y 83 (1995).
- David Nimmer, *Adams and Bits: Of Jewish Kings and Copyrights*, 71 S. CAL. L. REV. 219 (1998).

International Law

- Louis Rene Beres, *Opposing the "Peace Process": Israel, Civil Disobedience and the Principle of a Higher Law*, 13 ARIZ. J. INT'L & COMP. L. 117 (1996).
- Melanne Andromecca Civic, *A Comparative Analysis of the Israel and Arab Water Law Traditions and Insights For Modern Water Sharing Agreements*, 26 DENV. J. INT'L L. & POL'Y 437 (1998).
- Raphael Cohen-Almagor, *Disqualification of Political Parties in Israel: 1988-1996*, 11 EMORY INT'L L. REV. 67 (1997).
- Kitty O. Cohen, *Temple Mount Faithful — Amutah Et Al. v. Attorney-General Inspector-General of the Police Mayor of Jerusalem Minister of Education and Culture Director of the Antiquities Division Muslim Waqf*, 45 CATH. U. L. REV. 861 (1996).
- Menachem Elon, *Law, Truth, and Peace: "The Three Pillars of the World"*, 29 N.Y.U. J. INT'L L. & POL. 439 (1997).

- Shelese Emmons, *Russian Jewish Immigration and Its Effect on the State of Israel*, 5 IND. J. GLOBAL LEGAL STUD. 341 (1997).
- Basheva E. Genut, Note, *Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel*, 19 FORDHAM INT'L L.J. 2120 (1996).
- Daniel Klein, Comment, *The Islamic and Jewish Laws of Usury: A Bridge to Commercial Growth and Peace in the Middle East*, 23 DENV. J. INT'L L. & POL'Y 535 (1995).
- Ruth Lapidoth, *Symposium: The Fundamental Agreement Between the Holy See and the State of Israel: A Third Anniversary Perspective: Freedom of Religion and of Conscience in Israel*, 47 CATH. U. L. REV. 441 (1998).
- Andrew Paine, Note, *Religious Fundamentalism and Legal Systems: Methods and Rationales in the Fight to Control the Political Apparatus*, 5 IND. J. GLOBAL LEGAL STUD. 263 (1997).

Jurisprudence

- Daniel J.H. Greenwood, *Akhnai*, 1997 UTAH L. REV. 309 (1997).
- Suzanne Last Stone, *Justice, Mercy, and Gender in Rabbinic Thought*, 8 CARDOZO STUD. L. & LITERATURE 139 (1996).

Legal History

- Calum Carmichael, *Gypsy Law and Jewish Law*, 45 AM. J. COMP. L. 269 (1997).
- David M. Cobin, *Freedom: Beyond the United States: A Brief Look at the Jewish Law of Manumission*, 70 CHI. KENT L. REV. 1339 (1995).
- Bernard S. Jackson, *Modelling Biblical Law: The Covenant Code*, 70 KENT L. REV. 1745 (1995).
- Bruce Ledewitz & Robert D. Taylor, *The Law of the Jubilee in Modern Perspective*, 22 VT. L. REV. 157 (1997).
- Assaf Likhovski, *The Invention of "Hebrew Law" in Mandatory Palestine*, 46 AM. J. COMP. L. 339 (1998).

Legal Theory

- Aaron Kirschenbaum, *Modern Times, Ancient Laws — Can the Torah Be Amended? Equity as a Source of Legal Development*, 39 ST. LOUIS U. L.J. 1219 (1995).
- Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 Utah L. Rev. 465 (1998).
- Edward H. Rabin, *Symposium: The Evolution and Impact of Jewish Law: Foreword*, 1 U.C. DAVIS J. INT'L L. & POL'Y 49 (1995).

Legislation

- Samuel J. Levine, *An Introduction to Legislation in Jewish Law, With References to the American Legal System*, 29 SETON HALL L. REV. 916 (1999).

Prisoners' Rights

- Yehuda M. Braunstein, Note, *Will Jewish Prisoners Be "Boerne" Again? Legislative Responses to City of Boerne v. Flores*, 66 FORDHAM L. REV. 2333 (1998).
- Daniel Pollack et al., *Goodwin v. Turner: A Comparison of American and Jewish Legal Perspectives on Procreation Rights of Prisoners*, 86 KY. L.J. 367 (1997).
- Eric J. Zogry, Comment, *Orthodox Jewish Prisoners and the Turner Effect*, 56 LA. L. REV. 905 (1996).

Professional Ethics

- Michael J. Broyde, *Practicing Criminal Law: A Jewish Analysis of Being A Prosecutor or Defense Attorney*, 66 FORDHAM L. REV. 1141 (1998).
- Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 TEX. TECH L. REV. 1131 (1996).
- Samuel J. Levine, *Introductory Note: Symposium on Lawyering and Personal Values- Responding to the Problems of Ethical Schizophrenia*, 38 CATH. LAW. 145 (1998).
- Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH. L. REV. 1199 (1996).
- Russell G. Pearce, *Executing the Wrong Person: The Professionals' Ethical Dilemmas: To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L.A. L. REV. 1771 (1996).
- Russell G. Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH L. REV. 1259 (1996).
- Arthur Gross Schaefer & Peter S. Levi, *Resolving the Conflict Between the Ethical Values of Confidentiality and Saving a Life: A Jewish View*, 29 LOY. L.A. L. REV. 1761 (1996).
- Marc D. Stern, *The Attorney as Advocate and Adherent: Conflicting Obligations of Zealousness*, 27 TEX. TECH L. REV. 1363 (1996).

Property

- Michael J. Broyde & Michael Hecht, *The Return of Lost Property According to a Jewish & Common Law: A Comparison*, 12 J. L. & RELIGION 225 (1995-96).