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Introduction, Legal Scholarship in Jewish Law

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INTRODUCTION

In recent years, Jewish law has gained significant prominence in American legal scholarship, producing a substantial body of literature exploring the Jewish legal system, both on its own terms and in comparative perspective. In particular, the past few decades have seen a marked increase in the number of articles published in American law reviews addressing substantive, procedural, and conceptual aspects of Jewish law, often in the context of broader considerations of important, unsettled, and controversial issues in American legal thought.¹

A number of factors have contributed to the growing attention to Jewish law in American legal scholarship. For example, in some ways, the willingness among American law professors to focus closely and carefully on aspects of Jewish legal and religious practice has coincided with a more general openness to and acceptance of new and emerging perspectives within society, the law school community, and the broader academy. Alongside other multiculturalist movements, Jewish legal perspectives may be viewed by some scholars as a potentially valuable but somewhat underappreciated source for exploring and reconsidering aspects of American legal thought.²

More recently, Law and Religion has blossomed as a field of study among American legal scholars. Of course, religion has always played an important role in American law and culture, as evidenced by the primacy of the Religion Clauses in the Bill of Rights, guaranteeing the free exercise of religion and protecting against the establishment of religion by the government.³ Yet, as a distinct area of study, Law and Religion has expanded Free Exercise and Establishment Clause analysis beyond the contours of other modes of constitutional analysis. With the emergence and growth of varieties of American religious practice and belief—and nonbelief—courts and legal scholars have faced the challenge of adopting new understandings of the place of religion in American law and society. In turn, these changes

¹ See, e.g., sources cited in Samuel J. Levine, *Applying Jewish Legal Theory in the Context of American Law and Legal Scholarship: A Methodological Analysis*, 40 SETON HALL L. REV. 933 (2010); Samuel J. Levine, *Emerging Application of Jewish Law in American Legal Scholarship: An Introduction*, 23 J.L. & RELIGION 43 (2007–2008); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (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 (1993).

² See Edward H. Rabin, *The Evolution & Impact of Jewish Law*, 1 U.C. DAVIS J. INT'L L. & POL'Y 49, 56 (1995).

³ See U.S. CONST. amend. I.

have prompted judges and scholars to examine, more closely and with greater precision and sophistication, the substance of religious doctrine and practice.⁴

Jewish law has played a notable role in these developments as well, on at least two different levels. First, a number of landmark cases decided by the United States Supreme Court and other courts have implicated and impacted, both directly and indirectly, Jewish religious practice and principles.⁵ To properly adjudicate and evaluate these issues, judges and scholars have often found it necessary to look at Jewish law, in greater detail and on its own terms, rather than relying on more generic approaches to Jewish religious doctrine. Second, on a broader level, legal scholars have relied on careful consideration of Jewish law and legal theory as part of a growing effort to rethink and reformulate the contours of religious legal theory.⁶

Although the turn to the Jewish legal model in American legal scholarship may be striking, it may not prove especially surprising that the Jewish legal system has the potential to play a significant role in American legal theory. Indeed, relying on a number of salient features of Jewish law and legal theory, American legal scholars have recognized that the Jewish legal system provides valuable comparisons and contrasts that can help illuminate both substantive and conceptual aspects of American law.

By its nature, the scope of Jewish law addresses every area of human endeavor, set forth in a legal system that has developed over thousands of years and has spanned geographical locations throughout the world. Jewish law includes a complex body of doctrine addressing such areas as torts, contracts, property, criminal law, criminal and civil procedure, labor law, and family law, among many other topics. As a result, the Jewish legal system often provides a direct contrast case for American legal scholars who are examining a substantive area of American law. Indeed, owing to the breadth and depth of the Jewish legal system and Jewish legal history, it is not uncommon to find that Jewish legal authorities have anticipated, at times by thousands of years, specific questions raised within contemporary American law.⁷ In other instances, when Jewish law does not offer a substantive response to a specific issue arising in the American legal system, American legal scholars sometimes look to the Jewish legal system to

⁴ Marie A. Failinger, *Twenty-Five Years of Law and Religion Scholarship: Some Reflections*, 30 *TOURO L. REV.* 9 (2014).

⁵ See, e.g., Daniel G. Ashburn, *Appealing to a Higher Authority?: Jewish Law in American Judicial Opinions*, 71 *U. DET. MERCY L. REV.* 295 (1994).

⁶ See sources cited *supra* note 1.

⁷ See, e.g., 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); Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 *N.Y.U. L. REV.* 955 (1988).

provide a conceptual analog or a philosophical insight that can be compared with or contrasted against American law.⁸

To be sure, a sizeable portion of the Jewish legal system relates to areas of ritual observance that have little, if any, substantive parallel in the American legal system. Among numerous other examples, these categories of Jewish law address matters such as the Sabbath and holidays, prayer and Temple sacrifices, dietary restrictions, and ritual purity. Yet even in these areas, Jewish law may provide a valuable model for American law, offering insights that prove to be conceptual and analytical, as well as doctrinal. Over the course of millennia, Jewish legal authorities have employed thoughtful methodologies to respond to ever-changing circumstances, adapting and applying seemingly settled legal rules and principles in the context of new and often unanticipated settings and scenarios. These methodologies may be particularly relevant for American legal scholars confronted with similar challenges of adapting legal doctrine to address innovative and unsettled issues in the American legal system.⁹

The emergence of Jewish law as an important field of study in the American legal academy has yielded several notable developments in American legal education, including the establishment of institutes of Jewish law at several law schools,¹⁰ the inclusion of collections of Jewish legal materials at law school libraries,¹¹ and the adoption of courses in Jewish law at dozens of law schools across the United States.¹² Yet, of all of

⁸ See, e.g., Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, with Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 LOY. L.A. INT'L & COMP. L. REV. 257 (2006).

⁹ See, e.g., Samuel J. Levine, Miranda, Dickerson, and *Jewish Legal Theory: The Constitutional Rule in a Comparative Analytical Framework*, 69 MD. L. REV. 78 (2009); Samuel J. Levine, *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).

¹⁰ These institutes include: The Berkeley Institute for Jewish Law and Israel Studies at UC Berkeley School of Law; The DePaul University College of Law Center for Jewish Law & Judaic Studies; The Institute of Jewish Law, Boston University School of Law; The Jewish Law Institute at Touro College/Jacob D. Fuchsberg Law Center; The Tikvah Center for Law & Jewish Civilization at New York University Law School; and The Yeshiva University Center for Jewish Law and Contemporary Civilization at Cardozo School of Law.

¹¹ These include the Gruss Library at New York University Law School and The Abraham Goldstein and Lillie Goldstein Judaica Collection at Touro College/Jacob D. Fuchsberg Law Center.

¹² See, e.g., Sherman L. Cohn, *Yale Rosenberg: The Scholar and the Teacher of Jewish Law*, 39 HOUS. L. REV. 872 (2002); Samuel J. Levine, *Teaching Jewish Law in American Law Schools: An Emerging Development in Law and Religion*, 26 FORDHAM URB. L.J. 1041 (1999) [hereinafter Levine, *Teaching Jewish Law*]; Samuel J. Levine, *Teaching Jewish Law in American Law Schools—Part II: An Annotated Syllabus*, 2 CHI.-KENT J. INT'L & COMP. L. 1 (2002) [hereinafter Levine, *Teaching Jewish Law—Part II*]; Rabin, *supra* note 2; Jeffrey I.

the recent developments, the most significant illustration of the growing attention to Jewish law in the American legal academy may be the increasing volume of scholarly literature appearing in American law reviews that focuses or relies on Jewish law.

In the past, a number of scholars have compiled bibliographies collecting and, at times, briefly annotating, lists of selected works on Jewish law published in American law reviews and other English sources.¹³ David Hollander has now taken these efforts several steps further, producing a comprehensive and annotated list of articles related to the Jewish law that have appeared in American law reviews. This monumental effort, which serves as yet another demonstration of the current importance of Jewish law within the American legal academy, is not limited to recent legal literature. Instead, through years of painstaking work, Hollander undertook and accomplished the ambitious task of searching through materials going back more than a century, uncovering and rediscovering articles that tell the story of a field of scholarship that, since its earliest appearances, has continued to grow, often in both scope and sophistication.

No less impressive is the skillful manner in which David Hollander, a law librarian as well as a lawyer, has organized this bibliography, identifying common themes and, accordingly, grouping articles into categories that will prove familiar to American legal scholars. Finally, Hollander's annotations of the articles go beyond mere summaries, offering both helpful digests and thoughtful comments, thereby providing the researcher with invaluable guidance as to the relevance and utility of an article toward a given research project. In short, Hollander has produced a remarkable resource that will prove indispensable in the ongoing study of Jewish law among American legal scholars.

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¹³ See, e.g., PHYLLIS HOLMAN WEISBARD & DAVID SCHONBERG, *JEWISH LAW: BIBLIOGRAPHY OF SOURCES AND SCHOLARSHIP IN ENGLISH* (1989); Chad Baruch & Karsten Lokken, *Research of Jewish Law Issues: A Basic Guide and Bibliography for Students and Practitioners*, 77 U. DET. MERCY L. REV. 303 (2000); Levine, *Teaching Jewish Law*, *supra* note 12; Levine, *Teaching Jewish Law—Part II*, *supra* note 12; Phyllis Holman Weisbard, *Basic Books and Periodicals on Jewish Law: A Guide for Law Librarians*, 82 LAW LIBR. J. 519 (1990).