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Marie A. Failingner
Mitchell Hamline School of Law

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**BOOK REVIEW ESSAY: JEWISH AND AMERICAN LAW: A
COMPARATIVE STUDY. (VOLS. 1 AND 2) BY SAMUEL J.
LEVINE**

*Marie A. Failinger**

Samuel J. Levine, Professor of Law and Director of the Jewish Law Institute at Touro Law Center, has spent a significant part of his scholarly career introducing non-rabbinic and non-Jewish legal academics to the stories, insights, and arguments of Jewish law that resonate with comparable American jurisprudential debates. These articles have now been collected into two volumes, the first introducing an apologia for the study of Jewish law and American legal similarities and differences, and an introduction to the basic assumptions of what we would call judicial and legislative interpretation, as well as themes that Levine has encountered in his areas of expertise in American law, particularly criminal law and legal ethics. This volume also contains chapters on capital punishment, self-incrimination, and the respective roles of justice and mercy in criminal sentencing. Chapters also raise constitutional conundrums such as the place of the Ninth Amendment and unenumerated rights in our jurisprudence and the relative value of rules versus standards in the adjudication of constitutional rights. Because Prof. Levine has been very involved in the American professional responsibility, it is probably no surprise that the longest section of this volume is on ethical and professionalism issues that arise in law practice, engaging important questions such as the prosecutor's duty to do justice, law as a calling, and the aspirational/mandatory debate on what should be part of the lawyers' code of ethics.

Volume two of this set takes a very different turn, beginning with an exploration of the centrality of narrative to the discussion of Jewish law, including engagement with the work of Yale law professor Robert Cover. This volume also presents five historical essays,

*Professor of Law, Mitchell Hamline School of Law.

ranging from the role of Jewish lawyers in early 20th century public interest litigation and the backstory of *Goldman v. Weinberger* to a story of the preservation of an anti-Semitic narrative in American casebooks, a glimpse into the preservation of Jewish law during the Holocaust, and a fascinating comparison between a 19th-century Jewish school of jurisprudence known as the Brisker movement and the law and economics edifice first constructed by Richard Posner.

Levine's work as a whole is laudable for the way in which he takes up the comparative task. In my many years as the editor of the *Journal of Law and Religion*, I learned how difficult it is for writers extensively educated in one legal tradition to be able to find the sweet spot between oversimplifying that tradition and remaining faithful to its complexity in a way that excludes readers who have not learned the basics of the tradition. Levine's essays are fully accessible to readers who have no prior knowledge of Jewish law, yet he also does not attempt to translate complex terms into comparative American language or modes of thought that would obscure the complexity of the ideas behind them.

Second, Levine avoids the two traps of what University of Pennsylvania Law School emeritus professor Howard Lesnick might call triumphalism, suggesting that Jewish law is superior and should replace American legal norms; or of equivalence, implying that there is no significant difference between concepts in each system which have comparable features. Instead, his work puts each legal system "in dialogue" with the other, pointing out resonances in each system that call forth more critical engagement with the other. In his first chapter, *Teaching Jewish Law in American Law Schools*, Levine notes that Jewish law is sometimes taught as if it were a course in comparative law, with a focus on conceptual foundations (Model one); or an international law course with a focus on the law of Israel (his Model two), or as an internal system with no comparative focus (his Model Three.) Levine notes that in his teaching, as this book set nicely illustrates, he has attempted to synthesize these models by describing the sources and structures of Jewish law, the way in which Jewish law is interpreted, and then a comparison of specific issues in Jewish law such as capital punishment. Accordingly, the first chapters of this book are devoted to showing how NOT to use Jewish law, comparing two brief references to Jewish law in *Miranda v. Arizona*¹, and *Garrity*

¹ 394 U.S. 436 (1966).

v. New Jersey,² (chapter 2); a primer on interpretive methodologies and rules in Jewish law including the problem of locating authority in Jewish interpretation (chapter 3); and the distinctive way in which Jewish law understands *takanot*, or legislation, including the idea that some legislation is necessary to “put a fence around the Torah,” to safeguard against violation of even more important norms in Jewish law, but that this concern also may limit the justification for regulating human conduct.

Chapter two in Volume 1 explores some of the reasons for caution in suggesting that these two systems are alike, or importing the insights of one to the other, noting the historically lengthy and theologically comprehensive nature of Jewish law. Levine suggests a methodology that may avoid the traps of triumphalism or equivalence: one that

- (a) carefully and accurately depicts the principle, as understood within Jewish legal theory, in a way that is faithful to the Jewish legal system on its own terms; (b) considers carefully the extent to which the principle incorporates theological underpinnings that are particular to the Jewish legal model and, accordingly, may not be suitable in the context of the American legal model, and (c) applies the lessons from the Jewish legal system only to the extent that they make sense within the internal logic of the American legal system, thus remaining faithful to American jurisprudence as well.³

What is particularly interesting about Levine’s work is that, at first glance, some of these comparators might seem to have nothing in common, suggesting Levine’s creative and critical eye as he has moved back and forth between his religious law work and his American secular law teaching and scholarship. For example, not everybody would think to consider the parallels between the Ninth Amendment’s penumbral protections and the Deuteronomic exhortation to ‘do the just and the good,’ or consider the relationship between Prof. Kathleen Sullivan’s distinctions between rules and standards, and the rabbis’ interpretive approaches to the question whether one may drink vinegar on Yom Kippur. These are but two of

² 385 U.S. 493 (1967).

³ 1 SAMUEL J. LEVINE, *JEWISH AND AMERICAN LAW: A COMPARATIVE STUDY* 10 (2018).

the innovative comparisons Levine makes in his attempt to discern parallel methods of approaching difficult legal issues.

The style and level of abstraction in these chapters vary widely. In addition to the Sullivan chapter, which takes up the rules versus standards debate in a complex way, other chapters engage complex intellectual problems, such as Robert Cover's attempt to describe the relationship between the normative worlds and narratives that give meaning to legal rules and institutions. A similar chapter in Volume 2 is Levine's comparison of the attempt of the law and economics movement to use scientific methods to classify and abstractly describe the flow of legal decisions "on the ground" with the attempts of the Brisker school to classify and establish abstract rules in order for Jewish rabbis to understand and predict the application of the body of traditional responsa to new cases. Side by side with these difficult intellectual problems, Levine offers a close reading of rabbinical decisions, mimicking their method of proceeding by describing facts and specific identification of issues—e.g., not simply whether Jews may eat meat or matzo but at what specific times. Some of these chapters are evocative narratives, for example, a compelling account of how a Jewish rabbi in the ghetto helped to keep his community's hope alive by helping them keep Jewish law through practical interpretation; and a careful historical trail of the way a Russian anti-Semitic tale about a son's "trial" for trying to kill his father ended up in a much-used American criminal law book discussing the law of attempts.

As befits a collection of articles written over two decades for a variety of purposes, Levine's work is most appropriate as a reader for a course in comparative law or as a resource tool rather than as a thematic work intended to make one comprehensive argument. The chapters not only vary widely in length but in comprehensiveness—in some cases, they fully complete an argument or set of points, such as the methods of legislation chapter, while in a few other chapters, they simply introduce a problem or theme, leaving the working out of that problem for a later discussion, which may leave the reader hanging a bit. And, because Levine re-visits some themes, particularly those in professionalism, over time, a few of the chapters are redundant to others.

The text offers a number of uses, whether as a set of interpretive problems in a comparative course about Jewish law, or a set of insights about specific American law cases in constitutional, criminal and

professional responsibility law, or a way to think differently about some of the conceptual problems that recur (and have been debated, but not resolved) in American jurisprudence. Prof. Levine also has done a masterful job of footnoting and indexing the topics that he covers, notably for those interested in the U.S. jurisprudence in this comparative discussion, a very healthy sampling of the American law review articles and cases on his topics. The book is well worth having on the bookshelf of anyone who wants to think about what we can learn from Jewish law, the ethos of Jewish life, or religious legal systems generally, that make our study of our own secular legal systems and culture more incisive and critical.