

American Legal Theory and Jewish Law
Professor Suzanne Last Stone

Princeton University
Syllabus

Topic One. Why Compare Jewish Law and American Legal Theory? **Feb. 4**

Robert Cover, "Obligation: A Jewish Jurisprudence of the Social Order", *J. of Law and Religion* 5, pp. 65-74.

Sanford Levinson, "The Constitution in American Civil Religion," *Supreme Court Review* 1979, pp. 123-151.

Fania Oz Salzberger, "The Jewish Roots of the Republic," *Azure* 12 (optional)

Saul Touster, "A View From the Hilltop," *33 Buffalo Law Rev* 571 (optional)

Topic Two. What is Law? Views From Within Anglo-American Jurisprudence **Feb. 11 and 18**

H.L.A. Hart, *The Concept of Law*, pp. 1-17; 79-99; 100-117.

Ronald Dworkin, "The Model of Rules I" in *idem, Taking Rights Seriously* (Harvard University Press, 1977), 14-45

Gerald Postema, "The Philosophy of the Common Law," in Jules Coleman and Scott Shapiro eds., *Oxford Handbook of Jurisprudence and Philosophy of Law*, 588-622

Arthur Jacobson, "Hegel's Legal Plenum," *Cardozo Law Review* (optional)

Topic Three. Is Jewish Law 'Law'? **Feb. 18 and 25**

Seth Schwartz, *Imperialism and Jewish Society, 200 B.C.E. to 640 C. E.*, pp. 103-128

Beth Berkowitz, *The Invention of Execution, Introduction and Chapter One Hanina Ben-Menahem, Is Talmudic Law a Religious Legal System?* (Cardozo Law School working paper)

Bernard Jackson, "Jewish Law or Jewish Laws?" *Jewish Law Annual*, vol.9

Suzanne Last Stone, "On the Interplay of Rules, Cases, and Concepts in Rabbinic Legal Literature," *Dine Israel* 24 (2007) 125-155

Yair Lorberbaum, "Reflections on the Halakhic Status of Aggadah," *Dine Israel* 24 (2007), pp. 11-27 (optional)

Lenn Goodman, *Maimonides' Philosophy of Law*, *Jewish Law Annual* vol. 1, pp. 72-107 (optional)

Primary Sources :

1. On law and truth: The Oven of Akhnai, *Baba Metzia* 59a
2. On Halakhic Knowledge, Controversy, and Pluralism in Jewish law: (hand-out by instructor)

Topic Four. The Relationship of Law to Morality in Anglo-American Jurisprudence and Jewish Law **March 3 and 10**

- A. The Anglo- American Debate:
H.L.A. Hart, "Positivism and the Separation of Law and Morals," 71 Harvard Law Review (1958), 593-629.
H.L.A. Hart, The Concept of Law, pp. 238-276 (The Postscript)
Lon Fuller, "Positivism and the Fidelity to Law: A Reply to Professor Hart," 71 Harvard Law Review (1958) 631-72.
Ernest Weinrib, "Legal Formalism: On the Immanent Rationality of Law," Yale Law Journal 97, 949- 1016 (optional).
- B. The Jewish Legal Debate:
Moshe Silberg, "Law and Morals in Jewish Jurisprudence," 75 Harvard Law Review 306 (1961)
Aharon Lichtenstein, "Does the Jewish Tradition Recognize an Ethic Independent of Halakha?" in Modern Jewish Ethics
David Weiss Halivni, "Can a Religious Law Be Immoral?" in Arthur Chiel, ed., Perspectives on Jews and Judaism: Essays in Honor of Wolfe Kelman (1978)
Moshe Halbertal, Halakha and Morality: The Case of the Apostate City," S'vara 3 (1993)

Primary Sources:

Babylonian Talmud, Bava Metzia 83a
Hand-out by instructor

Topic Five. The Rule of Law, The Rule of Texts, The Rule of Persons **March 24, 31**

- A. The Rule of Law versus the Rule of Persons: On Judicial Discretion
Paul Kahn, The Reign of Law, pp. 18-34
Richard Posner, "What Has Pragmatism to Offer Law?" Southern California Law Review 63, pp. 1653-7 (optional)
Hanina Ben-Menahem, Judicial Deviation in Talmudic Law: Governed by Men, Not by Rules (Boston University, 1991), pp. 5-18; 80-98; 141-79
Hanina ben Menahem, "The Second Canonization of the Talmud," Cardozo Law Review (2006)
- B. The Rule of Law versus the Rule of Texts – On Interpretation
Robert Post, "Theories of Constitutional Interpretation," Representations 30 (1990), 13-41
Ronald Dworkin, "Law as Interpretation," Texas Law Review 60, pp. 527-586
Ronald Dworkin, Law's Empire, pp. 87- 98; 224-275; 379-392.
Jack Balkin, Constitutional Interpretation and the Problem of History, NYU Law Review 63, pp. 911-954

Paul Kahn, Political Time: Sovereignty and the Transtemporal Community, *Cardozo Law Review* 28

Stanley Fish, "Working on the Chain Gang," "Wrong Again," "On Change," in *idem*, *Doing What Comes Naturally?*

Phillip Bobbitt, *Constitutional Interpretation*, pp. 162- 170; Phillip Bobbitt, "From Constitutional Fate: Theory of the Constitution" in Sanford Levinson and Steven Mailloux (eds.), *Interpreting Law and Literature: A Hermeneutic Reader* (Northwestern University Press, 1988), 363-81

Murphy, "Merlin's Memory." in Sanford Levinson, *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, pp. 163-190

Noam J. Zohar, "Midrash: Amendment Through the Molding of Meaning," in *Responding to Imperfection*

Samuel Levine, "Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts," *Hastings Constitutional Law Quarterly*, vol.24, pp. 444-508

Azzan Yadin, *The Old Textualism* (Cardozo Law School working paper paper)

Topic Six: Feminist Jurisprudence April 7

Dennis Patterson, *Postmodernism, Feminism, Law*, *Cornell Law Review* 77, pp. 254- 316

J.B. Soloveitchik, *Halakhic Man*

Suzanne Last Stone, "Justice, Mercy and Gender in Rabbinic Thought," in Hava Tirosh-Samuelson ed., *Women and Gender in Jewish Philosophy*

Jeffries Murphy and Jean Hampton, *Forgiveness and Mercy* (optional)

Primary Source:

Babylonian Talmud, *Yevamot* 78b -79a

Topic Seven: Why Compare American Legal Theory and Jewish Law? A Reprise

A. Using Jewish Law to Expand American Legal Theory April 14 and 28

Robert Cover, *Nomos and Narrative*, *Harvard Law Review* 97, pp. 4-68

Robert Cover, *Bringing the Messiah Through Law*, in *Nomos*, pp. 201-217

Robert Cover, *Folktales of Justice*, *Capitol University Law Review* 14, pp. 179-204

B. A Rejoinder

Suzanne Last Stone, *The Pursuit of the Countertext: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, *Harvard Law Review* 106, pp. 813- (1993)