

PEOPLE OF THE BOOK: JUDAISM'S INFLUENCE ON
AMERICAN LEGAL SCHOLARSHIP

My Journey from Judaism to Jewish Law

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My personal study of the Torah and the Talmud as an adult has enhanced my legal scholarship and helped shape my current thinking on legal theory. At the same time, my professional legal training and experience as a law professor has shaped my understanding of Judaism and provided a legal terminology and a lens by which to view the array of Jewish laws. A confluence of events helped shape my personal and professional journey.

The first series of events affected me personally. In 1999, I joined a new program, *Perek Yomi* (“A Chapter a Day”), sponsored by the United Synagogue of Conservative Judaism. The goal was to read a chapter of the Hebrew Bible or *Tanakh* (the Five Books of Moses, the Prophets, and the Writings) each day, to be completed in two and a half years. *Perek Yomi* provided the schedule and framework for personal study that I was seeking. In addition, I helped form a small study group with three other professional women to discuss the weekly reading and study questions. *Perek Yomi* was followed by *Mishnah Yomit* with the United Synagogue and then by commentaries and other texts selected by our study group, including Maimonides’ Book of Commandments (*Sefer Hamitzvoth*). Sometimes when studying, I discovered the support for something I had been taught to do without realizing it was dictated by the Torah or Talmud, such as feeding my pets before eating myself. Or I found the source for a famous quote, such as Hillel’s “If I am not for myself, who is for me, but if I am for my own self [only], what am I, and if not now, when?”

The second series of events affected me professionally. While I was engaged in personal study, I joined the Jewish Law Section of the American Association of Law Schools (AALS) and learned that a significant number of law schools offered courses in Jewish Law. In 2002, I started teaching a comparative law seminar on Jewish law, which I have taught annually since then. This seminar is a survey course that explores civil and criminal laws under Jewish law and the interrelationship between Jewish

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and American law. This seminar complements the other core courses and skills workshops that I teach on tax and business and estate planning. Since 2003, I have served as the Faculty Advisor for the Jewish Law Students Association at NSU Law. In 2008, I participated in a panel discussion on Teaching Jewish Law in American Law Schools for the Jewish Law Section at the AALS annual convention. These personal and professional events influenced my teaching, thinking, and scholarship.

Prior to *Perek Yomi* and prior to teaching my Jewish Law Seminar, my Jewish education occurred at home and at temple and focused on the religious, moral, and ethical aspects of Judaism. This included prayer and services, tradition and holidays, commandments and *tzedakah*. It included the importance of books and study, with special emphasis on how I should conduct myself. As a young child, I learned the basic rules of keeping a kosher home. My father was a *Kohen*, and I remember how after receiving silver coins for the redemption of his close friend's first born (*pidyon haben*), he returned them when the child was thirteen. I studied Hebrew at my temple, became a Bat Mitzvah, and continued religious and Hebrew classes through high school. I did not, however, study the intricacies of texts, such as the Torah or the Talmud. I also attended public school at a time when certain clubs and neighborhoods were restricted and I was part of a very small minority of students who were Jewish. Although my religious and secular educations were separate, being Jewish was an integral part of my identity. When I married, a rabbi performed the ceremony for purposes of Jewish and American law. When I adopted my son and later was divorced, a rabbi and a judge were involved in separate religious and secular proceedings.

My legal training placed religion in a realm that was protected by, but separate from, American law. Prior to teaching my Jewish Law Seminar, my understanding of Judaism fit nicely within the context of the First Amendment of the Constitution. Religion involved sincerely held beliefs, observances, and divine commandments. When I began researching American law for references to the Torah and Jewish law, I expected to find First Amendment cases that addressed whether a law was unconstitutional because it "established" a religion, or endorsed one over another, or because it unduly burdened the free exercise of religion. I was not prepared for the significant number of cases and articles that quoted from the Bible or Jewish law for reasons other than the First Amendment. For example, I was surprised to

see the Supreme Court trace the roots of the privilege against self-incrimination to ancient times, with a quote from Maimonides in the Mishneh Torah, and trace the history of the presumption of innocence back to Deuteronomy. Further, I was surprised to find quotes from the Five Books of Moses—sometimes from the King James Version—in Supreme Court opinions to support principles of equal justice. In addition, I was surprised to find that some prosecutors referenced the Bible to support capital punishment; and then I learned how that support was misplaced. Through my research, scholarship, and teaching, my perspective has changed from viewing Judaism as a religion that can be separated from American law to viewing it as a comprehensive legal system that includes what we would classify as civil, criminal, ethical, moral, and religious laws. Further, I have become aware of the extent to which some of these laws overlap with American law—sometimes operating in parallel with American law and sometimes deferring to or overriding American law.

This change in perspective has been gradual. My adult Jewish journey expanded my scholarship to include Jewish law and a comparative analysis of aspects of the American and Jewish legal systems, including analytic process, statutory construction, and the interrelationship between the systems. This required me to question which aspects of each system apply to the other, including whether words with common translations have the same meaning under both systems. For example, American law has three distinct and separate branches of government—the legislative, executive, and judicial branches. When I tried to apply this tripartite system to Jewish law, I had problems defining and separating the legislative and judicial branches. If I assumed the legislative branch was divine, represented by the laws revealed to Moses and written in the Five Books of Moses, this did not translate completely because Jewish law also includes the rest of the law that was given to Moses and that was to be passed down orally from generation to generation. Further if I assumed the judicial branch was represented by the sanhedrins and small courts (*batei din*), and its judges (*shoftim*), this also did not translate completely because the Great Sanhedrin also had legislative authority—the authority to build a fence around the Torah by enacting restrictions (*gezerot*). Thus, I appreciated the importance of ascertaining the meaning of terms and questioning whether English translations that use words that are terms of art under American law, such as judges, have the same meaning under Jewish law. Comparing Jewish law to American law also

caused me to question basic concepts of American law and whether they apply in Jewish law. For example, what defines common law and what differentiates it from statutory law? What is the role of the judiciary and do judges have legislative authority? Are the laws written in the Five Books of Moses statutes? Are the laws that were transmitted orally and preserved in the Talmud common law or are they comparable to statutes? What about rabbinic laws? Was the Great Sanhedrin comparable to a congress or a supreme court of original jurisdiction, or both?

My studies and scholarship also centered on the processes used in legal analysis. When researching American law, I often employ both a global and lineal process to find and understand the law. When applying the law to a set of facts, or outlining a plan based on the law and facts, I often proceed in a more lineal fashion. Researching and applying Jewish law seems to require an even more global process because of the interdependence and complementary nature of the written and oral laws. Laws on one subject may be found in different portions of the Five Books of Moses or in different portions of the Talmud, and may not necessarily be found in the book (*sefer*) or tractate (*masechta*) in the Talmud whose title seems to cover that subject matter. Further, the authority for laws on one subject matter in the Talmud may come from a provision of the *Torah* that may not appear to relate to that subject matter. I explored this process in an article published in 2005 entitled “*Jewish Law: Deciphering the Code by Global Process and Analogy*.”¹ For example, under Jewish law, the written law commands the appointment of judges in the Book of Deuteronomy, while the oral law states the composition and authority of the sanhedrins and courts based on a number of other provisions from the Five Books of Moses. A small sanhedrin was composed of twenty-three judges, with a majority of one being required to acquit but a super-majority of two being required to convict. The authority for these numbers included verses from four different chapters in two different books of the Bible, only one of which directly related to the judicial process. This authority related to a congregation (*edah*) judging whether a person had committed murder or whether that person was a manslayer to be delivered to a city of refuge. Another set of verses provided the meaning of the term congregation by reference to the ten spies who brought back an evil report on the land of Israel and another

¹ Donna Litman, *Jewish Law: Deciphering the Code by Global Process and Analogy*, 82 U. DET. MERCY L. REV. 563 (2005).

was based on the commandment not to follow a multitude to do evil. The Great Sanhedrin was composed of seventy-one, based on a different verse in a different chapter. Today, the process by which Jewish law is applied is even more complicated because there is no Great Sanhedrin, and thus no supreme judicial or supreme legislative body. By contrast, American law may proceed in a much more lineal fashion based on the hierarchy of laws from the Constitution to statutes to administrative or judicial authority. For example under American law, the United States Constitution vests power in one supreme court and in such inferior courts as Congress determines, and Congress enacts laws regarding the number of justices and district courts. Further, the Constitution addresses the authority of the courts, and Congress has supplemented this by legislation. Thus, the processes by which laws were created and interpreted under Jewish and American law have some significant differences.

My study of Jewish Law also led me to compare statutory construction under both systems. I was intrigued by the thirteen rules (*middot*) compiled by Rabbi Ishmael that are found in many daily prayer books. The more I studied these rules, the more I compared them to American rules of statutory construction and realized there were important similarities and differences. In 2012, I presented a paper comparing statutory construction under Jewish and American law at the Jewish Law Association's (JLA's) 17th International Conference on the Interaction of Jewish and Other Legal Systems. This presentation was followed by the publication of my paper by the Jewish Law Association in 2014, entitled: "*A Case on the Border between Jewish and American Rules of Statutory Construction: A Comparative Analysis.*"²

In order to compare the thirteen rules with American rules of statutory construction, I had to make certain assumptions. One assumption was that the laws in the written Torah would be considered statutes for purposes of the comparison. One important question was whether these rules were used to construct the statutes or to construe them after they were written. For example, an analogy known as a *gezerah shavah*, depends on the repetition of certain language in two places in the Five Books of Moses in order to trigger the application of language in one verse to another, with one or both references being superfluous in context.

² Donna Litman, *A Case on the Border between Jewish and American Rules of Statutory Construction: A Comparative Analysis*, in *THE INTERACTION OF JEWISH LAW WITH OTHER LEGAL SYSTEMS* 120-175 (Christine Hayes & Amos Israel-Vleeschhouwer eds., 2014).

Thus, the actual manner in which the language was written or constructed dictated the meaning of that language, with tradition teaching which specific provisions were interpreted under this rule of analogy. For example, the Torah states that Moses “died *there*” and Miriam “died *there*,” and further specifies that Moses died “by the mouth of G-d.” The Talmud confirms that Miriam died in the same manner as Moses and that we learn this through this type of analogy because both of their deaths were described by the superfluous phrase that he or she “died *there*.” This result is very different from how American statutes generally are construed. Under American law, if two statutes were constructed with the same language, with only one of them containing additional language, the omission of that language generally would be considered intentional. Thus, the additional language would apply only where expressed and would not apply by implication. This difference in interpretation reinforced the importance of understanding the rules that apply to a given legal system before deciding that a rule from another legal system could help interpret a provision in the given legal system. In addition, similar rules used to construe statutes are found in both systems, such as an inference by *kal vahomer* (from major to minor, or vice versa) and an inference *a fortiori*; although they often are applied differently. Sometimes, these inferences are designated by the phrase “how much more so.” While Jewish law may employ an inference by *kal vahomer* to apply a law from the Torah to a context not addressed in the Torah, American law may use an *a fortiori* inference to apply a judicial rule for one statute to another statute when both statutes are silent as to that rule. Thus, Jewish law may infer liability from the express case of a bailee to the case of a borrower; while American law may infer that a judicial rule addressing the consequence of failing to meet a deadline in one statute should apply to failing to meet a deadline in another statute. By exploring the application of these rules of construction, I have a greater appreciation of how laws are construed in both systems and the significance of how they are constructed.

Studying Jewish Law as a professor of American law also expanded my scholarship to include how Jewish and American laws on the same subject are applied contemporaneously. There are a number of areas in which Jewish law and American law operate in parallel systems with some overlap. One area involves estate planning for observant individuals, or individuals with observant beneficiaries, who may execute one set of documents for secular purposes and another set for religious purposes. Professor

Steven Resnicoff and I co-authored an article, entitled *Jewish and American Inheritance Law: Commonalities, Clashes, and Estate Planning Consequences*³ to discuss modern planning opportunities under these parallel laws. It is challenging to write a comparative law article based on two different systems, particularly when they developed over different periods of time with different types of authority. It also is challenging when concepts accepted in one system are not accepted in the other system. For example, both Jewish law and American law permit inter vivos gifts, including revocable gifts, but only American law permits testamentary gifts. One theory of comparing the systems is to discuss each separately and then compare them to determine what they have in common and where they differ. Another theory is to compare both systems based on the meaning and elements of one of the systems. Which is more effective depends on the purpose of the comparison and to whom the comparison will be communicated. Thus, one can look at Jewish law through the lens of American law to help understand the meaning of Jewish law and its application to American Jews.

Another area I have focused on in my teaching is whether the religious aspects of Jewish law can be separated from the secular aspects for purposes of American law. This is especially important given the increased interest in Jewish law and its citation in American case law and secondary sources. For example, the Decalogue contains a commandment prohibiting murder, with capital punishment being imposed under very limited circumstances when small sanhedrins were still in existence. This commandment is preceded by the verse that “G-d spoke all these words.” American law defines murder as a crime, and in some jurisdictions, it is subject to capital punishment or imprisonment for life. This raises the question of whether there is a difference between G-d commanding that one should not commit murder and that one who does so shall surely be put to death and society deciding that murder is wrong and that it should be punished. This question is relevant even though both Americans and Jews agreed to be subject to these respective laws. In addition, Jewish law provides an opportunity for a person who has been convicted of murder to confess for purposes of obtaining a place in the world to come. Thus, Jewish law has religious aspects to it that differ from a secular system that determines what is permitted or prohibited.

³ Donna Litman & Steven Resnicoff, *Jewish and American Inheritance Law: Commonalities, Clashes, and Estate Planning Consequences*, in WISDOM AND UNDERSTANDING – STUDIES IN JEWISH LAW IN HONOUR OF BERNARD S. JACKSON 166-192 (Leib Moscovitz & Yosef Rivlin eds., 2012).

In a court of law, citing Jewish law—or in particular, the Bible—may raise additional issues. One should question the significance of tracing an American law back to Jewish law or quoting the Bible to support aspects of American law, such as capital punishment. Is American law being compared to Jewish law because it may have been derived from it or because it may share some common aspects? If so, are the laws still similar and can Jewish law help provide an answer to a problem under American law? By contrast, if the purpose of citing Jewish law is because it is based on a higher authority or because it is supported by the belief of a judge, member of a jury, or other person citing the law, that is problematic. American law should not be based on the religious belief of an individual or group, regardless of whether one shares that belief. Thus, before one cites the Bible or Jewish law, one should consider whether the religious aspects can be separated from the secular aspects or whether the religious aspects are key to the strength of the authority. Exploring how other systems solve common problems can create models for reform and help create solutions. On the other hand, understanding the significance of the religious aspects and the beliefs involved is important in determining the validity of the comparison.

My personal and professional journey has progressed from knowledge of Judaism as a religion that is recognized under American law, to understanding Jewish law as a comprehensive body of law that includes a specific religion. My joint studies have enhanced my understanding of both Jewish law and American law, and their interrelationship, and have significantly influenced my legal scholarship.