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# Jewish People Policy Planning Institute

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### *Major Shifts – Threats and Opportunities*

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## The United States

### 11. THE INFLUENCE OF JEWISH LAW ON THE U.S. LEGAL SYSTEM

In recent years, American Jewish scholars in a variety of fields of Jewish study have been engaged in the process of retrieving the Jewish tradition and making it relevant for a wider, secular and even non-Jewish audience. The Hebrew Bible has been resuscitated as an intellectual resource for political theorists, and *Midrash*, the distinctive rabbinic exegesis of scripture, has been re-introduced as an intellectual resource for literary theorists. This phenomenon is worthy of comment, for it indicates a shift in the relationship between American Jewish intellectuals and Jewish culture — a shift that is a part of the larger anti-assimilationist trend in American academia. By far the most interesting development in the recent turn to Jewish sources by American scholars is the emergence of Jewish law (*halacha*) in American legal culture.

Over the past three decades, Jewish law has become a familiar subject in American legal discourse. Citations of Jewish legal sources are commonplace in American judicial opinions, including those authored by the most prestigious sector of the judiciary, the federal appellate court. American law reviews routinely publish articles on Jewish law. Special legislation in various states has been enacted to deal with the dilemma of Jewish women seeking a Jewish divorce, and cases on the subject appear in nearly every treatise and casebook on family law. The most significant development, however, is the

appearance of a small but significant body of scholarship that draws on the history, philosophy, or interpretive techniques of Jewish law to advance American legal theory itself. This overview analyzes this shift in attitude toward Jewish legal sources in the American legal environment.

Sporadic presentations of the major principles of Jewish law have appeared in American legal periodicals since the inception of the genre. In the classical era of liberal legal scholarship, from the late 19th century to the middle of the 20th century, these presentations either looked for the Jewish roots of American law or presented Jewish law as an exemplar of then-prevailing Western liberal legal ideas. As the American sociologist Gerald Auerbach has argued, from the 1880's through the 1960's, American Jewish acculturation largely involved the transfer of allegiance from a sacred to a secular legal system, from the Torah to the Constitution. According to Auerbach, this assimilative process was aided by the creative discovery of a unitary "Judeo-American" legal tradition. As Jewish lawyers asserted that the American legal system was the finest flowering of the Jewish legal tradition, Jewish legal scholars also discovered that the "twentieth century ideals of America had been the age-old ideals of the Jews". In short, Jewish law was stripped of its distinctiveness and was viewed as merely an historical precursor of American law.

During this period, the judicial branch of the American legal system on occasion also

paid lip service to Jewish law. Indeed, citations from the Bible and Jewish law in judicial opinions of this period have a distinctly assimilative quality. Jewish law was cited primarily as part of the process of assimilating a new group into America. As the nation progressed from an Anglo-American country to a Christian country to a Judeo-Christian country with the influx of new immigrant groups, American jurists embarked on the invention of a unitary "Judeo-Christian" ethical tradition. In line with the then-prevailing view in America of Judaism as merely a private religion, Jewish legal sources were treated primarily as reflections of moral, ethical, and religious values, rather than as legal norms.

However, anyone who has glanced through recent judicial opinions or through the law journals of the past two-and-a-half decades cannot fail to notice the startling increase of citations of Jewish sources in public American legal discourse. The canon of Jewish legal sources cited in American judicial opinions has grown to encompass not only the Bible and the Talmud, but also the *Mishna*, Maimonides' *Mishne Torah*, Yosef Karo's *Shulchan Aruch*, and even Menachem Elon's magisterial *Principles of Jewish Law*. These citations no longer appear solely in state court opinions or decisions authored by Jewish judges; they appear in the heart of federal appellate opinions authored by non-Jewish judges, such as Judge Michael McConnell, a recent candidate for the United States Supreme Court. Moreover, these Jewish sources have been divorced from Christian religious values. They are no longer cited as evidence of a unitary Judeo-Christian ethic, but as distinctly legal sources in their own right.

This change in the pattern of citation of Jewish law in American judicial opinions can be attributed to several factors. First, the Jewish composition of the American legal profession has altered. Jews, who are well-versed in the Jewish legal tradition, including Jews from the most Orthodox denominations, have entered the legal profession in increasing numbers. In addition, these new members of the legal profession have joined together to create advocacy organizations for the Jewish community. As part of their mandate, these organizations submit *amicus* briefs to the courts, in particular to the United States Supreme Court, in which the Jewish legal position on a question before the court is presented.

Second, under the aegis of multiculturalism, America has become increasingly receptive to the citation of particularist sources in public discourse. With the emergence of multiculturalism, Judaism is no longer viewed solely as a private religion or as an adjunct to Christianity, and *halachic* sources are no longer viewed as part of a unitary Judeo-Christian ethic. Rather, these sources are seen as the distinctive legal sources of a national or cultural group.

Third, globalization has produced intensified argument about the receptivity of American legal culture to foreign sources of law. The United States Supreme Court recently divided, in the case of *Roper*, over the question whether, consistent with the Constitution, the death penalty could be applied to juveniles. A significant aspect of the controversy was the majority opinion's citation to practice in enlightened European countries. In his dissenting opinion, Justice Scalia chastised the majority for diluting the distinctiveness of American legal and especially

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constitutional culture. The majority opinion, however, asserts that the court should look for enlightenment from any source. In this context,

Jewish law, which has been stripped of its former characterization as merely private religion, takes its place as a civilizational legal system, alongside other legal systems that may offer enlightenment about the proper legal norm.

Finally, Jewish law has made its way into the mainstream of American judicial opinions and American legal consciousness because more and more members of American society lead lives in which Jewish law and American law intersect. The chief example is Jewish women who seek divorce both under American and Jewish law. The figure of the *agunah* (the Jewish woman who is chained to a dead marriage because her husband refuses to provide a *get* or Jewish divorce) is a familiar one in American law. Increasing exercise of power by Jewish-American interest groups has led to the adoption of numerous ameliorative laws and judicial doctrines designed to redress the situation. New York has passed two special statutes to deal with the problem, one requiring anyone petitioning for a divorce to attest that he or she has removed all barriers to the remarriage of his or her spouse, and the other essentially allowing the judge to impose financial penalties for failure to furnish a *get*. In addition, various judicial doctrines allow the judge to rescind separation agreements in which financial consideration is given in order to obtain the *get*, permit tort actions for intentional infliction of emotional distress based on withholding a *get*, and

read into the *ketubbah* an implicit provision to submit to rabbinical arbitration. These ameliorative laws are designed to align Jewish women with all citizens of the state, who divorce under conditions of equality. As such, they constitute an alternative vehicle for reform of Jewish law. While the *agunah* is perhaps the most vivid example of the necessary interpenetration of Jewish and American law, others also abound.

Developments within the American legal academy are even more far-reaching. A new genre of Jewish-American legal scholarship has appeared. If the attraction of Jewish law once lay in its perceived similarity to the American liberal legal model, it now lies in its perceived difference from that model. Jewish law is invoked as a "contrast case". It is described explicitly or implicitly in this new literature as anti-hierarchical, egalitarian and communitarian; as jurisprudence written in a feminist voice (though not by females), based on reciprocal obligations rather than rights, and a case study of the redemptive possibilities of legal interpretation. In short, the Jewish legal tradition has come to represent precisely the model of law that many contemporary American theorists propose for American society. Thus, American legal theorists are interested in understanding rabbinic texts as law specifically in order to develop and articulate an expanded vision of "what is law".

A variety of institutional factors have conjoined in the last two decades to foster this transformation. First, the environment of the American legal academy itself has undergone a remarkable change over the past several decades, paralleling its leap from a primarily professional training ground to a full-fledged academic insti-

tution. Law professors now routinely come to the legal academy after completing doctorates in various fields of the humanities, notably literature, philosophy and religion. With the rise of this new identity, the legal academy has expanded its repertoire to include not only matters of practice, policy and doctrinal analysis, but also the theory of law itself.

Second, this new consciousness coincides with the legal academy's loss of confidence both in the moral and intellectual basis of authoritative and supposedly neutral legal interpretation and in liberal political theory generally, with its attendant alienation of the individual from communitarian forms of social life. These concerns, which reflect larger trends in philosophy and literary theory, have led to a search for alternative models to liberal legal theory. The turn to the Jewish legal model is also a somewhat belated response to the call in the 1970's for a reconstruction of legal theory grounded specifically in law and religion, a reconstruction that acknowledges the transformative power of law to enrich human existence and the role of religion in shaping the social reality upon which legal theory is based.

It is within this triply charged institutional setting of theoretical preoccupation, Constitution worship, and search for alternative models that religion in general and Jewish law in particular have emerged as subjects of general intellectual inquiry. Thus, within the American legal academy, interest in Jewish law stems from the ways in which it is perceived to be different from and a challenge to Western liberal legal models and to classical accounts of law. The *halacha* has become another tool to use in the theoretical criticism of law and its appeal lies precisely in

its characterization as an alternative religious legal model. In contrast to the approach of both the traditionalist and that of contemporary academic students of rabbinic texts, this turn to the Jewish legal model assumes that one can ask jurisprudential questions about the *halacha* that are asked about other functional legal systems. Is the *halacha* a system of social order, as is classical liberalism, or is it aspirational? How is a legal system organized around duties different from one organized around rights? Can a legal system operate in a decentralized fashion, without order imposed from above by a Supreme Court? What alternative political system does the *halacha* envision? How does the *halacha*, which has developed within the overarching institutional structure of other legal systems, interact with these other legal systems? And, in contrast to the approach of the Israeli school of *Mishpat Ivri* (Hebrew Law), this turn to the *halachic* model does not seek to efface the religious element of Jewish law. Rather, legal theorists are interested in understanding whether the religious element of Jewish law affects its operation or partially accounts for its particular approach to judicial discretion, the concept of objectivity in law, social order, or the autonomy of law.

Finally, in the past two decades, two important American legal theorists have produced work that has had an unprecedented effect on the study of Jewish law in the American legal academy, one directly and the other indirectly. In 1983, Robert Cover, a prominent constitutional theorist at Yale Law School, published a lengthy essay in the Harvard Law Review entitled "Nomos and Narrative". The

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***The halacha's appeal lies in its characterization as an alternative religious legal model***

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essay juxtaposed two views of law: one as a system of social order and the other as a system of meaning. In describing the latter, Cover cited a host of biblical sources, although he did not discuss rabbinic sources or allude to Jewish law at great length. Cover's overall purpose in writing this essay was not to advance the field of Jewish law, but rather to give a new account of "what is law". The essay quickly entered the mainstream of legal thought, influencing the work of numerous constitutional theorists who were largely unaware of the connection between Cover's work and Jewish law. For those who became aware of its underpinnings, however, the essay essentially served to legitimize the field of Jewish law as an intellectual resource in the study of American law.

Indeed, many of Cover's arguments could have been developed without resort to Jewish law, but it was precisely the relationship between the theoretical issue Cover was addressing and central features of the Jewish legal system that stimulated it. Cover wished to address an inner American constitutional debate over the connection between constitutional interpretation and constitutional authority. A central part of his argument was that law cannot be defined solely in terms of official state organs. For him, the *halacha* provides a transparent example of how law can exist apart from a state or a Supreme Court. Second, the status of dissenting or rejected opinions within Jewish law provided an important illustration of Cover's insistence that "law" is not synonymous with an authoritative interpretation. In short, Cover's essay rested on precisely the opposite viewpoint: that the rabbinic endeavor must be understood as law and that its vision of law should be incorporated

into American constitutional theory. His work dramatized the relevance and utility of Jewish law for generating new ideas in American legal theory and constitutional law and it gave specialists in Jewish law an expanded vision of the larger theoretical issues at stake in analyzing *halacha*.

Ideas also flow in the opposite direction, however. Just as Jewish law expands and transforms constitutional theory; new theoretical models emerging from the American legal academy have begun to enrich the description of Jewish law. One of the potentially richest theoretical models of law in analyzing *halacha* is that offered by Ronald Dworkin, the pre-eminent Anglo-American legal philosopher of the twentieth century. Dworkin is not himself familiar with Jewish law, although he recently gave a public lecture on the topic, an event that further served to legitimize the field of Jewish law as an important subject of American public intellectual inquiry.

Dworkin has developed what has come to be known as the third theory of law, bridging the classical two theories of positivism and naturalism. His is the first interpretive, as opposed to analytic, account of law and, as such, particularly suitable for adaptation to the Jewish legal model. Dworkin claims that American law does not consist solely of rules; it also consists of more open-ended principles, specifically, moral and political principles imbedded in the Constitution at its inception. Professor Dworkin's explication of the role of principles in law provides scholars with a vocabulary to investigate the legal role of scriptural ideals such as man's creation in the image of God and rabbinic statements about the purpose of the law (such as pursuing paths of

peace, the dignity owed all humans, or sanctifying the name of God) and even of the *aggadah* in judicial interpretation. Essentially, Dworkin has offered scholars of Jewish law a way to go beyond a positivist or source-based description in which Jewish law is simply the application of a set of known divine norms to new situations, while at the same time not relying on traditional natural law theories, which have never been of much use to describe a system that posits revelation as the basic source of law. It offers a way to describe how the answer to a legal question is re-discovered even in a revealed legal system through the creative interpretive process.

The affinity between Dworkin's theory and Jewish law raises an interesting question: Why does the theory of someone who has devoted his life work to a description of Anglo-American law so resonate with scholars investigating the Jewish legal system, separated as they are in time and space and influence (the one secular and the other divine)? One answer to this question reverts to the relationship of the Torah to the Constitution. Are the two startlingly similar projects, as an earlier generation of Jewish lawyers insisted? In contrast to civil law systems, in which law is primarily the product of statutory enactments, both the American and Jewish legal systems are structured around a single, central, authoritative text with an ongoing history of interpretation that has inspired great allegiance over time. Moreover, American constitutionalism is set within a common law system and common law jurisprudence, which emphasizes casuistic development and the pivotal role of the judge, it tends to produce jurisprudential theories as or even more suitable for comparison with or adaptation to Jewish law than those provided by

civil law systems — the systems which provided the jurisprudential frameworks that shaped the early generation of great Jewish law scholars.

The affinity between the two systems, however, is more than structural; it is also historical. There are peculiar resonances between *halacha* and American constitutionalism that can be traced to the deep religious roots of the American experience. These roots originate with the Puritans' conscious effort to model American legal culture around the Hebrew Bible and with the central idea of a covenantal society. That effort has engendered a feeling deeply held among many that a moral vision must underlie American law, just as it underlies Jewish law.

## 12. GROWING HISPANIC STANDING AND THE POLITICAL ARENA IN THE U.S.

The growth of the Hispanic population is changing the face of the United States and stands at the center of animated political debate in both houses of the U.S. Congress over immigration rules. The impact of the demographic change and questions of domestic identity and international relations that accompany it present a challenge for the Jewish community to seize the potential opportunity via policy and strategy. The Hispanic community in the U.S. is approaching a critical mass likely to be of key importance to the Jewish community in regard to its relationship with the changing face of broader U.S. society, as well as how this new face of America relates to Jews, the Jewish community, and Israel. The medium-to-long range impact may include U.S. public opinion and acceptance of Jews and the political influ-