

## Jewish Law and American Legal Theory

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Below is a tentative syllabus for the course. This syllabus will be adjusted to reflect the needs and wishes of the participants once we have a chance to get to know one another. We have listed a few optional readings, in some sessions, for those who are hungry for them. They are truly optional. Please try to do the readings in advance of the first session so that we can begin to work. The readings are not yet finalized for some sessions. We are providing this syllabus in non-final form so that you can get a sense of the class.

You must obtain copies of the following two books:

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press)

Joseph B. Soloveitchik, *Halakhic Man* (Philadelphia: Jewish Publication Society of America, 1983)

### I Session One

#### A. Why Compare Jewish and American Legal Theory?

Robert Cover, "Obligation: A Jewish Jurisprudence of the Social Order," *Journal of Law and Religion* 5 (1987), pp. 65-74

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

For the novices in Jewish Law:

David M. Feldman, *Birth Control in Jewish Law* (New York: New York University Press, 1968), pp. 3-18

Hanina Ben-Menahem, "Jewish Law," *International Encyclopedia of the Social & Behavioral Sciences*

#### B. Is Jewish Law "law" and what is law? Is Jewish law "religious" law and what is religious?

H. L. A. Hart, *The Concept of Law* (2<sup>nd</sup> ed.; Oxford: Clarendon Press, 1994), pp. 1-17; 79-91; 100-117; chapter 7

Primary Sources:

1. On the Duty to Obey Law: The Oven of Akhnai, *Bava Metz'ia* 59a, and *Walker v. Birmingham*, 388 U.S. 307

2. On Controversy and Pluralism in Jewish Law: primary sources pp. 1-5

### II. Sessions Two and Three

#### A. Introduction to Classical Schools of Legal Thought: Positivism, Natural Law, Formalism, The Common Law

H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958), pp. 593-629

Lon Fuller, "Positivism and the Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71 (1958), pp. 631-72  
 Ernest Weinreb, "Legal Formalism: On the Immanent Rationality of Law," *Yale Law Journal* 97 (1988), pp. 949- 1016 (optional)  
 Goodman, "Maimonides' Philosophy of Law," *Jewish Law Annual* 1, pp. 72-107.  
 Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?" in Marvin Fox (ed.), *Modern Jewish Ethics: Theory and Practice* (Columbus: Ohio State University Press)  
 Arthur Jacobson, "Hegel's Legal Plenum," *Cardozo Law Review* 10 (1989), 877-904

Primary Sources:  
*Bava Metz'ia* 83a  
*Sanbedrin* 21b

B. The Third Theory of Law

Ronald Dworkin, "The Model of Rules," *Chicago Law Review* 35 (1968), pp. 14-46

III. Sessions Four Through Seven

The Rule of Law, The Rule of Texts, The Rule of Persons

A. The Rule of Law versus the Rule of Persons

1. Rabbi versus Prophet
2. Rabbi versus "Kingly Functions" – exigency jurisdiction, individualized rulings
3. The Interpreting Judge – source of authority and extent of trust

Hanina Ben-Menahem, "Appoint for Yourself a Teacher – The Personal and the Impersonal," in D. Biale and R. Westman (eds.), *Amos Funkenstein Memorial Volume* (Toronto: University of Toronto Press, 1997)

Paul Kahn, *The Reign of Law* (New Haven: Yale University Press, 1997), pp. 18-34

Hanina Ben-Menahem, *Judicial Deviation in Talmudic Law: Governed by Men, not by Rules* (Chur, Switzerland: Harwood Academic Publishers, 1991) (optional)

Richard Posner, "What Has Pragmatism to Offer Law?" *Southern California Law Review* 63 (1990), pp. 1653-70

Primary Sources: pp. 6-12

B. The Rule of Law versus the Rule of Texts – On Judicial Constraint and Interpretation

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press)

Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), pp. 87- 98; 224-275; 379-392

Ronald Dworkin, "Law as Interpretation," *Texas Law Review* 60 (1982), pp. 527-586

Stanley Fish, "Working on the Chain Gang," and "Wrong Again" in *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Oxford: Clarendon Press, 1989)

Ken Kress, "Legal Indeterminacy," *California Law Review* 77 (1989), pp. 283-337  
Phillip Bobbitt, *Constitutional Interpretation* (Cambridge, MA: Blackwell), pp. 162- 170

#### IV. Sessions Eight and Nine

##### A. Community, Canon, and Consent

How do texts and legal opinions become canonical? How do methodologies become canonical?  
Readings TBA

##### B. Feminist Jurisprudence

Dennis Patterson, "Postmodernism/Feminism/Law," *Cornell Law Review* 77 (1992), pp. 254- 316  
Joseph B. Soloveitchik, *Halakhic Man* (Philadelphia: Jewish Publication Society of America, 1983)

#### V. Session Ten

##### A. Tradition, Time, and Change

Jack Balkin, "Constitutional Interpretation and the Problem of History," *NYU Law Review* 63 (1988), pp. 911-954  
Stanley Fish, "On Change," in *Doing what Comes Naturally*  
Walter F. Murphy, "Merlin's Memory: The Past and Future Imperfect of the One and Future Polity," in Sanford Levinson (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995), pp. 163-190  
Bruce Ackerman, "Higher Lawmaking," in Levinson (ed.), *Responding to Imperfection*, pp. 63-87  
David Luban, "Legal Traditionalism," *Stanford Law Review* 43 (1991), pp. 1035-1060

#### VI. Sessions Eleven and Twelve

##### A. Using Jewish Law to Expand American Legal Theory

Robert Cover, "Nomos and Narrative," *Harvard Law Review* 97 (1983), pp. 4-68  
----, "Bringing the Messiah Through the Law: A Case Study," in J. Pennock and J. Chapman (eds.), *Religion, Morality, and the Law* (New York: New York University Press, 1988), pp. 201-217  
----, "The Folktales of Justice: Tales of Jurisdiction," *Capitol University Law Review* 14 (1985), pp. 179-204

##### B. A Rejoinder

Suzanne Last Stone, "In Pursuit of the Countertext: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," *Harvard Law Review* 106 (1993), 813-94