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Book Review

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JEWISH LAW (MISHPAT IVRI): CASES AND MATERIALS. (Casebook Series). By Menachem Elon, Bernard Auerbach, Daniel D. Chazin and Melvin J. Sykes. New York: Matthew Bender & Company, Inc. 1999. Pp. xxiv, 746. \$60.00. ISBN: 0-820-54093-5.

Jewish Law (Mishpat Ivri): Cases and Materials, written by four highly qualified authors, is the first and only published book truly dealing with this subject in traditional "casebook" form.¹ This book, divided into five primary Parts (Basic Characteristics of Jewish Law, The System of Jewish Law, Selected Topics, Human Rights, and Bioethics), is further sub-divided into thirty-seven Chapters. The organization and presentation is well suited to the traditional fifteen-week law school semester as it permits the Professor to address all or part of the materials without a detrimental effect upon student understanding of basic principles of Jewish law. Students will find substantial assistance in the Glossary which includes definitions of key terms and abbreviations such as "midrash" "M" (to designate a Mishnaic tract); basics such as Talmud and Torah; a listing of leading *Amoraim* by generation; and an index with major bibliographical facts for post-talmudic authorities cited in the text together with their acronyms.

This book unquestionably meets the major purpose for which it was written: "to develop a casebook in the form and style familiar to students in American law schools." (iii) Other objectives of this book can be derived from the sources, organization and emphasis of the text. These multiple objectives include: (1) explaining Jewish law, (2) defining the law's history and development, (3) presenting primary sources of Jewish legal principles, (4) providing an understanding of the logic utilized by the Sages, (5) illustrating the correlation between Jewish law and elements of Jewish religious practice,² (6) establishing that ancient Jewish law retains substantial viability in Israel, (7) teaching

1. Various scholars including Professors Sherman Cohen, David Sapperstein & Barry Freundel of Georgetown U.; Professor Ernest J. Weinrib of the U. of Toronto; & this reviewer have prepared teaching materials for courses in Jewish Law. See also Elliot Dorff & Arthur Rosett, *A Living Tree: The Roots and Growth of Jewish Law* (S.U.N.Y. 1988). This text, though valuable for law study, may be better suited to undergraduate or graduate studies.

2. The Preface, at iv, recognizes the relation of law and religion and indicates that no substantive law regarding the Jewish religion will be presented. However, as "Jewish law is a seamless web, there are significant relationships between the law applicable in these religious areas and the law applicable to the areas covered in this casebook." *Id.*

that despite its ancient roots, Jewish law can address modern issues, and (8) offering a comparison of Jewish law principles to principles of American law. Two more subtle objectives, of considerable magnitude, are to present a book with a focus on subjects, issues, policies and reasoning that (1) foster an interchange between Professor and student and among students and (2) place this study into meaningful historical context.

These objectives provide the book's greatest strength: strong and exciting materials soundly based in traditional and modern sources; and its greatest weakness: insufficient comparative law in regard to the American legal system. The comparative law objective was given a relatively low, though nevertheless significant, priority. On balance, the objectives are met. For many, this book represents an excellent choice as a classroom tool to instruct Jewish law. For some, myself included, it would be enhanced by inclusion of more American comparative law materials and hypothetical cases for use as a means of discussion. The addition of from 50-100 additional pages focused on American judicial decisions, statutes and secondary sources would not diminish the book's usefulness for a one-semester three credit hour course, though it could encourage Professors to selectively delete some Chapters.

As noted in the Preface, written by Professor and former Deputy President of the Supreme Court of Israel Menachem Elon, each subject area includes three distinct sources: Jewish legal sources *e.g.* Bible, Mishnah, Talmud, Commentaries; Israeli cases and statutes; and American judicial decisions and statutes. (iv) However, in some areas there is a paucity of primary American law sources. Among the seventy-seven major cases set forth, only fourteen come from American judicial sources. The American cases selected are well chosen. For example, the decisions contained in Chapter 27, "Privacy and Bodily Integrity," are *Griswold v. Connecticut*³ (the seminal right to privacy decision); *Roe v. Wade*⁴ (the seminal and controversial right to abortion decision); and *Whalen v. Roe*⁵ (which arguably sets an outer limit on privacy rights). Other opinions, such as *McConnell v. Commonwealth Pictures Corp.*⁶ (a well-known decision dealing with illegal contracts and public policy), are equally well selected. To some extent, the deficiency in the number of primary American cases is overcome through supplementation found in the authors' Notes. This criticism

3. *Griswold v. Conn.*, 381 U.S. 479 (1965).

4. *Roe v. Wade*, 410 U.S. 113 (1973).

5. *Whalen v. Roe*, 429 U.S. 589 (1977).

6. *McConnell v. Commonwealth Pictures Corp.*, 166 N.E.2d 494 (N.Y. 1960).

may be uniquely my own as it is predicated on my belief that a course in Jewish law should stress its comparative aspects. My less significant concern, the limited use of hypothetical discussion problems, also reflects a personal view. The authors' primary goal is "Jewish law (*Mishpat Ivri*)" rather than my objectives that stress a more comparative law orientation and a desire to encourage student discussion.

Much of the material in this text is drawn from, or related to, Elon's 1994 treatise, *Jewish Law (Ha-Mishpat Ha-Ivri): History, Sources, Principles*.⁷ This approach enables the reader to have ready access to fuller discussion of many of the topics addressed through a complementary and comprehensive set of materials. Elon further advises that many of the source materials are drawn "from judicial opinions rendered by me and other Justices of the Israeli Supreme Court." (iii) Indeed, sixty-two of the book's decisions are 1980-1994 opinions of the Supreme Court of Israel. This approach yields the perhaps unintended benefit of providing the reader with many opinions not otherwise available in translation from the Hebrew. Justice Elon authored the vast majority of these decisions. That few decisions predate 1980 reflects the fact that the use of Jewish law by Israeli courts was not mandated until that time. (Preface, v and more fully discussed in ch. 21) However, the absence of any post-1994 opinions is notable.

In many ways this book reflects the strong scholarly and practical experience of its authors. The materials and their presentation contain the contributions of Elon's three co-authors as well as "changes suggested by [Elon's] classroom experience with the original version." (iii) This book attains a remarkable level of sophistication that will challenge both Professor and student. As a good law school casebook should, its content will force students to maximize their potential for intellectual development.

The intellectual, legal, academic and scholarly elements of this book are pervasive. Perhaps its strongest example of intellectual strength is found in the opening Parts as they present the parameters of the development and structure of Jewish law and its system. These materials rely on a vast body of sources yet do not overwhelm the reader. The opening selection, a 17th Century Responsum, is an outstanding example of how traditional Judaic sources, lacking an equal protection clause, protect voting rights in areas analogous to poll tax and literacy test limitations. The Notes following this Responsum outline

7. Menachem Elon, *Jewish Law: History, Sources, Principles (Ha-Mishpat Ha-Ivri)* (Jewish Publication Socy. 1994).

the development of American law in these areas and ask the reader to compare the approach of the Responsum to Ronald Dworkin's concept that law consists not only of "rules of law," but of "principles of law." (10)

In these Parts, substantive explanation and case illustrations cross many fields of law and thus enable the reader to find and understand a number of underlying themes and values reflected in Jewish law. Full understanding of the themes presented requires careful reading and synthesis of the various topics presented. The textual portions of the book are presented in an accurate and concise manner that mandates close reading and synthesis. For example, the one-page discussion of *Ma'aseh* as legal precedent concludes as follows:

Ma'aseh as a legal source of Jewish law refers to an event, occurrence, or incident *per se*—that is, to the facts as they occurred in an actual case, but not to a "case" in the sense of a binding precedent *Ma'aseh* is considered a legal source because an action or an actual legal decision by a halakhic authority is viewed as a source from which to deduce principles that become part of the overall Jewish legal system." (91)

To appreciate the significance of this presentation, the reader must have an understanding of related principles and read this paragraph with great care. Similar care must be applied when reviewing Chapters 12-37 in the last three Parts of this book. Each Chapter contains a series of self-contained subject matter units dealing with core subjects such as Contracts, Torts, and Criminal law as well as more sophisticated topics such as Jurisprudence, Women's Rights and Freedom of Thought and Speech. With some appropriate exceptions, the Chapters are presented in a uniform manner consisting of (1) an opening section quoting basic sources, (2) decisional law, and (3) authors' notes which precede and/or follow the decisional law. This approach makes the book sound for use by first year students whose legal background is limited and also by upper division students who have a broader legal foundation. The soundness of this approach and the scope of each Chapter could be illustrated by review of any Chapter in these Parts. Chapter 33, dealing with "Euthanasia and the Right to Refuse Medical Treatment," was of great interest to this reviewer.⁸

8. The subject evokes substantial student interest and it represents my initial foray into substantial review of a Jewish law subject. See Stephen Werber, *Ancient Answers to Modern Questions: Death, Dying and Organ Transplants—A Jewish Law Perspective*, 11 J. L. & Health 13 (1996-1997).

The traditional sources cited in this Chapter nicely set the stage for discussion, as several distinguish between hastening of death and allowing death. The authors reproduce portions of the famous *Sefer Hasidim* by Judah the Pious that declares "We do not act to delay a person's death. For example, if someone is dying, and there is a man chopping wood near that house so that the soul cannot depart, we remove the woodchopper from there." (637) These principles can clearly be applied to persons who make life and death decisions in our time. The omission of Shulchan Aruch, *Yoreh De'ah*, (339:1 and Ketubot 104a) is surprising but does not significantly detract from the overall thoroughness of the presentation. The major decision of the Supreme Court of Israel, *Shefer v. State of Israel*,⁹ is set forth with only limited editing. (638-676; 592-607) A review of this decision, together with the additional sources cited at 676, more than suffices to establish the methods by which Jewish law, from its inception, can be applied to resolution of issues that are only now reaching American, Israeli and other courts. The reader is aided in understanding this relationship by inclusion of the *Washington v. Glucksberg*,¹⁰ and *Vacco v. Quill*¹¹ decisions which present the United States Supreme Court's constitutional approach to specific right to die issues. The essential lesson of this Chapter, that Jewish law can be located and interpreted to assist society in resolution of today's most difficult social/legal issues, is reinforced throughout the book.

This book is not only the first of its kind, it is also an outstanding contribution to law teaching that will be of substantial assistance to the growing number of professors teaching Jewish law in American law schools. The extensive presentation of Talmudic and other Jewish law sources, combined with the inclusion of Israeli court decisions, make this book an excellent research tool for both student and professor. Its use of authority and its notes represent scholarship that compares favorably to casebooks in other fields of law study. This book is very strong in terms of scope, writing, organization, classroom adaptability and interest. Its only flaws, if one accepts my premise as to what a Jewish law course should be, is that there is more need for (1) comparison to the American legal system, and (2) more extensive Notes including hypothetical cases to better focus discussion. A capable Professor can fill both of these limited gaps. The law school community needed a book of this type. Justice Elon and his colleagues have met

9. 48(I) P.D. 87 (1993).

10. 521 U.S. 702 (1997).

11. 521 U.S. 793 (1997).

this need. I applaud them for doing so with élan.

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