Learning from Others: The U.S. Legal Profession and Comparative Law

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Samuel J. Levine, **Jewish Law and American Law – A Comparative Study** (2018).

Over the past fifty years, the study of the legal profession has become a robust and exciting field, featuring rich doctrinal, empirical and theoretical inquiries as well as interdisciplinary insights. The growing body of scholarship includes globe-spanning comparative studies, ranging from the past and present of somewhat similar common law systems (several recent jots have covered fascinating regulatory trends and de-regulation developments in the UK), to more distinct legal professions.[1]

Samuel Levine's two-volume book, *Jewish Law and American Law—A Comparative Study*, makes an important contribution to comparative law studies of criminal and constitutional law (volume 1), and analyses of law and narrative, legal history and law and public policy (volume 2). Lawyers, law students, and scholars of the legal profession are likely to be particularly interested in Section Five of volume 1, consisting of five chapters comparing the Jewish and U.S. legal systems. In a concise and enlightening fashion, Professor Levine explores numerous legal profession topics, offering contextual insights and raising ideas for future analysis.

In Chapter 12, Levine examines the practice of law as a religious calling. In a day and age in which many critics, from within and outside of the profession, lament the demise of the practice of law as a calling and its transition into a client-centered business, the author's analysis of life as a religious calling, work as a religious calling, and the practice of law as a religious calling is timely. Following in the great tradition of Max Weber,[2] Thomas Shaffer,[3] and more recently, Rob Vischer,[4] Levine reflects on the ways in which religious faith and values may guide a contemporary law practice as a calling. Religious and secular readers alike will find stimulating the author's examination of specific ways in which religious insights may inform practical legal decisions, such as choosing clients and selecting objectives to advocate for, representation of low income clients, vindicating civil rights, and the meaning of serving justice. For example, Levine writes:

> [I]n the area of criminal law, the prosecutor may find that the obligation to serve justice is consistent with concepts in Jewish Law and tradition emphasizing the importance of the human role in bringing justice to God's world. At the same time, however, the criminal defense attorney may embrace the role of counseling, comforting, and guiding those who are in many ways often among the most vulnerable in society, consistent with religious imperatives to assist the needy and the downtrodden.[5]

Chapter 13, titled *A Look at American Legal Practice through a Perspective of Jewish Law, Ethics and Tradition*, is a must-read for both theorists and practitioners. The former will enjoy revisiting, from a comparative law perspective, one of the fundamental debates underlying the quest for a theory of law practice—whether lawyers should follow a unique role-morality (which is to say, follow a morality and rules of conduct specific to the roles they occupy as lawyers) or whether, instead, lawyers ought to default to common morality. To the extent that Bill Simon's classic "Standard Conception"[6] of lawyers' hired-gun role-morality accurately describes contemporary law practice and Steve Pepper's amoral autonomy-enhancing theory[7] and Brad Wendel's fidelity to the law account[8] justify lawyers' adherence to role-morality, it is intriguing to learn from Levine about Jewish law's rejection of role-morality and its adoption of religious common morality as a foundation for law practice. The latter, often troubled by the proliferation of lawyers' jokes and their being held in low esteem by society,[9] may learn from the negative attitudes faced historically by Jewish lawyers,

the reasons for them, and how to come to terms with—and even improve—their relationship with the public.

Chapter 14, *Taking Ethics Codes Seriously*, develops a compelling, comparative-critical perspective from which to assess the clear trend in U.S. lawyers' ethics codes—from the ABA Canon, to the Model Code, and now the Model Rules—of moving away from broad, open-ended aspirational standards to mandatory rules of conduct. In short, Levine joins other critics who argue that the "legalization" of the rules governing the legal profession results in legal "ethics" rules devoid of ethics and calls for the interpreting these rules consistent with broad ethical principles grounded in the Torah or the U.S. Constitution. Chapter 15, in turn, delves into the particular example of prosecutors' obligation to "seek justice." Levine criticizes the modern narrow, rule-oriented construction of the duty, pursuant to which decisions such as whether to prosecute, disclosure of exculpatory evidence and the cross-examination of truthful witnesses can and should be made exclusively with reference to specific rules of conduct and controlling case law. Demonstrating his call for a construction of prosecutors' duty to seek justice as a broad interpretive theory, above and beyond specific rules, Levine shows how broad provisions and principles "provide methodological guidelines for determining the mode of legal analysis appropriate for resolution of…difficult ethical issues,"[10] adding that "[t]he conceptual framework for choosing among conflicting harms in Jewish law may offer a normative analogue for considerations of similar issues, representing some of the most difficult ethical challenges facing the American prosecutor, in the effort to carry out the obligation to seek justice."[11]

Consider the following example. Should the "mother of the criminal defendant, who has undeniably—and unsuccessfully—committed perjury in an attempt to serve as an alibi witness on behalf of her son" be prosecuted?[12] Levine dismisses as dissatisfactory a narrow approach that might explain a decision not to prosecute the mother on practical grounds, such as limited prosecutorial resources. Instead, he argues, "it may be helpful to evaluate the ethical alternatives available to the prosecutor on the basis of a normative analysis," grounded in a commitment to justice.[13]

> The decision to pursue perjury charges against the defendant's mother may satisfy the letter of the criminal statute, thus satisfying the prosecutor's ethical obligation to prosecute and seek the conviction of those who have broken the law. Nonetheless, such a result may not…satisfy principles of [justice. A] decision not to file charges may seem appropriate in light of the apparent lack of substantial moral culpability on the part of the defendant's mother….Thus, the prosecutor faces an ethical dilemma….At best, the prosecutor can choose to balance competing harms, opting for a method of ethical decision-making that achieves a relative sense of justice, under the circumstances.[14]

Levine's point, to be sure, is not to suggest that there is a "right" or "wrong" way to resolve particular difficult ethical questions. Rather, he cautions against prosecutors' assertions of compliance with narrowly construed rules of conduct to deny the existence of difficult moral questions in the exercise of prosecutorial discretion. Instead of hiding difficult ethical questions behind bright-line rules, Levine calls for acknowledging the questions and using higher-level principles and considerations of justice to resolve them.

Section Five ends with a provocative call for adopting board ethical obligations to shape and guide lawyers' practice, in addition to, and as a framework within which, to interpret particular rules of professional conduct. Some readers may disagree with Professor Levine's religious sources of ethical content, yet nonetheless command his commitment to tackling head-on the difficult challenges of construing and debating values, ethics, morality, and justice in a pluralistic society.[15]

Jewish Law and American Law—A Comparative Study eloquently demonstrates the profound value of comparative law, showing how the U.S. legal profession may learn from other legal professions and ways of practicing law.

1. A personal favorite is Lucien Karpik, French Lawyers: A Study in Collective Action, 1274-1994 (2000).

2. **The Protestant Ethic and the Spirit of Capitalism** (2001).
3. **Faith and the Professions** (1987), among other contributions.
4. **Martin Luther King Jr. and the Morality of Legal Practice—Lessons in Love and Justice** (2012).
5. Pp. 226-27, internal citations omitted.
6. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 **Wis. L. Rev.** 29.
7. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 **Am. B. Found. Res. J.** 613.
8. W. Bradly Wendel, **Lawyers and Fidelity to the Law** (2010).
9. Marc Galanter, **Lowering the Bar, Lawyer Jokes & Legal Culture** (2005).
10. P. 307.
11. P. 320.
12. *Id.*
13. *Id.*
14. Pp. 320-21.
15. Robin L. West, **Teaching Law—Justice, Politics, and the Demands of Professionalism** (2014).

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