

Business Law & Ethics:
Advanced Seminar in American and Jewish Perspectives

Prof. Chaim Saiman
Spring 2017
Harvard Law School
Two credit seminar
Thurs. 3-5 PM

The seminar is designed for students with prior background in Jewish law and its sources. The sessions will explore selected topics in Jewish commercial and business law as viewed from the perspective of American law and general jurisprudence. In the first few weeks we will study several topics (*suygot*) that will serve as a model for the type of analysis in play. We will focus not only on the content of the law, but how it developed, how it is studied, who it is directed towards, how it regulates in theory, and significantly, how it regulates in practice. The assignment of each week will center on rabbinic sources and paired with scholarship and American legal sources. In the final few weeks of the semester, students will present their own work and comment/critique the papers of their classmates. The course will assume basic facility in halakhic sources. Graduates of yeshiva day schools & those with equivalent skills are well-positioned to succeed in this course.

The primary objective of this course is for students to write and present a paper that analyzes halakhic sources in a way that combines classical halakhic methods with substantive American law, the jurisprudential, comparative and historical methods developed in the legal academy and the wider university. Papers may come from any area that falls under a broad definition of business law and can focus on substantive, methodological, conceptual or historical analysis of Jewish and American/western law.

Finally, an ongoing theme will be how to best compare Jewish law with modern legal systems. After all, much of halakhah's commercial law plays a far greater role in the talmudic study hall (*beit midrash*) than in either the *beit din* (rabbinical court) or in marketplace itself. Moreover, in the modern era, halakhah's formal the methods of rulemaking and enforcement are notoriously sparse, whereas the structure of the administrative state is vast. Finally, halakhah applies to small and homogenous group of co-religionists that are connected through social, familial and communal ties, whereas modern systems are designed to regulate millions of transactions between diverse parties who share few common cultural assumptions. Focusing on these questions will not only improve our understanding of what halakhah is and how it functions, but also shed light on how modern commercial law is structured and enforced.

Course Readings:

The readings for each session are comprised of primary sources collected by the professor and paired with secondary sources that will be posted online. Students should expect the primary sources to serve as the main locus of class discussion, while the secondary material will provide historical, jurisprudential or philosophical background that will enrich and enhance the analysis of the primary texts. Many sources will be translated but some will be in Hebrew. I will make myself available each week to assist students in preparing Hebrew sources. Students are also encouraged to pair up in study partners to prepare for class.

COURSE EXPECTATIONS AND GRADING: Your grade will be based on the following:

Class participation:	20%
Paper presentations:	20%
Paper respondent	10%
Seminar paper:	50%

ATTENDANCE AND PARTICIPATION: Given that this is a small and discussion oriented class, attendance, preparation and participation factor in considerably. Please read the assigned reading before class and be prepared to discuss the reading in class. Classroom participation will count for 20% of your grade. Your grade will be based upon the following criteria:

- Preparation: Everyone is required to read any assigned material for each class session before the class meets and to prepare at least two questions/comments on the assigned reading. You will not be required to submit these questions/comments – but you should bring them with you to class.
- Participation: Each student should contribute to the class discussion, during each class meeting. Comments that speak directly to the course material and engage directly with comments/questions raised by other class members are particularly valued.

PAPER PRESENTATIONS: Your presentations count for 20% of your grade will be evaluated according to the following criteria:

- Clarity in articulating your thesis (i.e., your conclusion of your argument, the claim you are defending in the paper)
- Structure of presentation (e.g., explain your thesis, explain your reasoning in support of the thesis, address counterarguments, identify points of weakness, uncertainty or limitations to your argument)
- Grasp of the relevant literature and ability to explain how your argument fits within the existing debates regarding your topic.

- Success in sparking interest in your topic and fielding questions from the paper respondent and the audience.

PAPER RESPONDENT: Each student will be assigned to serve as the primary respondent for the paper of a fellow student. Your job will be to raise relevant questions, comments and critiques of the paper and to lead the classroom discussion. Roles will be assigned as the semester progresses.

SEMINAR PAPERS: You must write a paper of approximately 25 pages, double-spaced (approximately 6,500 - 8,000 words, not including footnotes). While your grade for the paper will be primarily based upon the quality of your final submission, you must also meet the deadlines highlighted and set out below in the schedule below. You may select any topic related to the broad themes of the course. Further details regarding the timing of topic selection, abstract, outline and drafts will be spelled out at the outset of the semester.

TENTATIVE SYLLABUS¹

Introduction: The Nature of halakhic civil Law

- R. Shimon Shkop, SHAARI YOSHER Sect. 5
- Hanina ben-Menahem, *Is Talmudic Law a Religious Legal System*, 24 J. L. & Religion 379 (2008-2009)

Regulations

- Wage and employment law (*halanat skhar sachir*)
 - Bava Metza 110-112 with related sources, code provisions, *responsa* and commentaries
 - Brishan Rogers, *Toward Third-Party Liability for Wage Theft*
 - Susan Schneider, *Notes on the Migrant and Seasonal Agricultural Protection Act*
 - Selection federal and state regulatory materials
- Legally mandated altruism: The duty to rescue property (*hashavat aveida*)
 - Bava Metza 30-32 with related sources, code provisions and commentaries
 - Luke Ch. 10
 - *Glenn v. Savage*, 140. Or. 567 (1887)
 - *Mills v. Wyman*, 20 Mass. 207 (1835)
 - French Crim. Code Art. 223-6
 - Restatement of Restitution § 20 & 21
 - David Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*
 - Optional: Dagan, *In Defense of the Good Samaritan*
- Debtor/Creditor regulations (*givyat milveh*)
 - Tur/SA to Hoshen Mishpat 97 with *responsa* and commentaries
 - Edward Fram, IDEALS FACE REALITY (149-163)
 - Menahem Elon, *Personal Freedom in Jewish Debt Collection Law* (Selections)
- Competition Law
 - Bava Batra 21-22 with related sources, *responsa* and commentaries

¹ The syllabus represents the overall conceptual plan for the semester. It includes a number of readings that will be designated as optional. For the exact assignments for each session, as well as information to guide your preparation, please see Canvas. **In any case of conflict between what is listed below and what I post on Canvas, please follow Canvass.**

- o Barry Wimpfheimer, NARRATING THE LAW (124-146)
- o *Free Market Competition in Jewish Law* in WINDOWS ON JEWISH LEGAL CULTURE Vol 2 pp. 280-324 (selections)
- o Neil Netanel, FROM MAIMONIDES TO MICROSOFT (1-2; 71-73; 83-101)

Private Law

- Contract law & damages
 - o Bava Batra 93, Bava Kamma 98, Bava Metzia 104 with related sources, code provisions *responsa* and commentaries
 - o Fuller & Purdue, *The Reliance Interest in Contract Damages*
 - o Daniel Markovitz, *The Expectation Remedy and the Promissory Basis of Contract*
- The basis of tort and restitution liability (*ze nehene vzeh lo haser*)
 - o Bava Kamma 20-21 with related sources, code provisions *responsa* and commentaries
 - o Hanokh Dagan, UNJUST ENRICHMENT (109-129)
 - o *Unjust Enrichment* in WINDOWS ON JEWISH LEGAL CULTURE Vol 2 pp. 237-280 (selections)

Courts and Adjudication

- *Pshara* and arbitration
 - o Sanhedrin 6-7 with related sources code provisions, *responsa* and commentaries
 - o Haim Shapira, *The Debate Over Compromise and the Goals of the Judicial Process*, 27 Dine Israel (2010).
 - o Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*.
 - o Owin Fiss, *Against Settlement*
 - o David Luban, *Settlements and the Erosion of the Public Realm*
 - o *Circuit City v. Adams*, 532 US 105 (dissent as well)
- Is there any *Din Torah* (substantive Jewish law) is there in a “din torah” (rabbinical court decision)? *Dina demalkhuta, minhag sokharim, pshara* and choice of law clauses.
 - o Yona Reiss, *Contracting Around Torah Law* (Heb.)
 - o E. Quint, §369 *Dina DeMalchuta Dina* in A Restatement of Jewish Civil Law (Vol. 9, 301-350)
 - o Jay Berkovitz, PROTOCOLS OF JUSTICE (selections)
 - o Michael Broyde, RELIGIOUS ARBITRATION (selections)
 - o Saul Berman, BOUNDARIES OF LOYALTY (selections)

