

# Intellectual Property Law and Jewish Law: A Comparative Perspective on Absolutism

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David L. Lange & H. Jefferson Powell, *No Law: Intellectual Property in the Image of an Absolute First Amendment*. Palo Alto: Stanford University Press, 2009. Pp. 456. \$27.95.

## INTRODUCTION

One's theory of law matters. The approach one takes to how the law develops and should be applied influences both the permissible content of legislation and its interpretation by the judiciary. In *No Law: Intellectual Property in the Image of an Absolute First Amendment*, Duke Law School professors David Lange and Jefferson Powell make the case for interpreting the First Amendment's language in absolute terms, so that the phrase "*Congress shall make no law . . . abridging the freedom of speech or of the press*"<sup>1</sup> should, in their view, be interpreted to mean exactly what it says. The authors bolster their absolutist perspective not by resort to originalism (124, 188-89), but rather by reliance on "text, structure, and [elegantly presented constitutional] history" (260).

The authors' absolutist perspective influences their views not only on what types of laws Congress can enact without running afoul of the First

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I wish to dedicate this Review to two individuals who, over the course of many years, have been markedly influential in shaping my thinking about Jewish law and theory: my synagogue Rabbi, Samuel Frint, and my colleague, Professor Steven Resnicoff. These rabbis come from the two different perspectives discussed in this Review, but they share a keen intellect and knowledge base which has benefitted me greatly in my academic and personal pursuits concerning Judaism.

<sup>1</sup> U.S. CONST. amend. I.

Amendment's seemingly clear language, but also on the appropriate theory of legal interpretation to be invoked in determining a given law's validity. In this regard, the authors are attracted to the interpretative framework of Justice Black, who advocated a fidelity to the text and a corresponding circumscription of the judiciary's power (247). The authors lament the reality that, in lieu of Justice Black's approach, the law in the United States has been far more influenced by the perspective of Justice Holmes, whose balancing-oriented ideology has shaped the course of First Amendment law since the early twentieth century. In the authors' view, an approach that calls for balancing the First Amendment's language against individual or society's modern-day sensibilities is a grave mistake, one that has cost us dearly particularly in the realm of intellectual property law. *No Law* gives the reader an opportunity to contemplate how life and law would unfold if the current balancing-oriented First Amendment theory of law was replaced with the authors' absolutist perspective. They rely on legal history—wonderfully rich legal history—to substantiate their overall point that an absolutist approach to the First Amendment comports with the history of the Amendment's constitutional interpretation. The fact that we are now at a “crisis point” in the application of intellectual property law necessitates a reversal of our current interpretative mode of the First Amendment, and history provides the justification for the return to an absolutist perspective under these circumstances.<sup>2</sup>

One of the reviewers on the dust cover remarked that *No Law* “will be one of the most important books about intellectual property published this decade.”<sup>3</sup> I agree. The authors' analytical abilities and knowledge reverberate consistently throughout the book, which also embodies impeccable research and an extraordinarily skilled presentation. *No Law* is a must-read for those interested in constitutional law, legal history, and, of course, intellectual property law. In the pages that follow, I explain why. Still, I find even more value in *No Law* that I also wish to explore here. Several years ago, one of the authors remarked to me that he thought Judaism somehow held the key to a proper understanding of copyright law, although he was not quite sure why or how. David Lange still may not realize the precise nature of the connection between his understanding of copyright law and Jewish law, but *No Law* amply illustrates its existence.

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2. In a recent law review article, Eugene Volokh noted that today, “few people call for undoing modern Free Speech/Free Press Clause doctrine generally and returning to the original meaning.” Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1083-84 & n.132 (2009) (arguing that “the original meaning of the First Amendment protects symbolic expression to the same extent that it protects spoken, written, and printed verbal expression”). *No Law*, therefore, represents a marked departure from the current trend in First Amendment discourse.

3. Professor Keith Aoki, University of California, Davis.

Judaism is a religion of law, which means that like all law, it must embody a theory of law as an analytical starting point. The classical thinkers of the Jewish tradition embraced a theory of law remarkably similar to the one propounded by the authors of *No Law*. Although there has always been a spectrum of thought in the classical Jewish tradition as to how much innovation can occur in Jewish law, many Jewish law scholars writing from an Orthodox perspective embrace a theory of law that feels very much like the one proposed by the authors of *No Law*. On the other hand, the Holmesian balancing approach to which they object has found a place in the self-denominated historical approach to Jewish law, represented by the Conservative Movement of Judaism. The adoption of one, or the other, of these theories markedly influences how Jewish law is interpreted by rabbinic authorities and Jewish law scholars. *No Law* amply illustrates the same point regarding the importance of a given theory of law in the context of First Amendment and intellectual property law.

To illustrate the real-world consequences of these disparate theories of law in the contexts of intellectual property and Jewish law, one can compare legal decisions involving the length of copyright protection and the ordination of gay rabbis, two completely unrelated topics. In *Eldred v. Ashcroft*,<sup>4</sup> the Supreme Court concluded that the 1998 Copyright Term Extension Act, which extended the term of copyright protection for most works to seventy years after the author's death, can be applied to existing copyrights. In critiquing this result, the authors of *No Law* argue that the case "is a deliberate and conscious denial that the First Amendment puts any external limitation on copyright law" (123). According to the authors, the Court never confronted "the fact that the 1998 Act applies directly and incontrovertibly to expression that in any other context would be protected by the First Amendment" (122). In First Amendment terms, *Eldred* is exceedingly objectionable to the authors because the decision perpetuates the very regime of copyright exclusivity that has been allowed to develop in the absence of an absolutist approach to the First Amendment. With respect to Jewish law, in 2006, a legal opinion by the Conservative Movement's law making body concluded that, notwithstanding the prohibitions of homosexuality contained in *Leviticus*<sup>5</sup> and the subsequent interpretative tradition, the ordination of openly gay rabbis is an acceptable choice according to Jewish law.<sup>6</sup> The parallel here is as

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4. 537 U.S. 186 (2003).

5. *Leviticus* 18:22, 20:13.

6. In 2006, the Committee on Jewish Law and Standards issued two contradictory majority opinions concerning whether gay individuals should be ordained as Conservative rabbis and whether the performance of commitment ceremonies for gay couples is permissible. See Elliot N. Dorff, Daniel S. Nevins & Avram I. Reisner, *Homosexuality, Human Dignity & Halakhah: A Combined*

follows: just as an absolutist view of the First Amendment precludes the type of exclusivity that has become the province of copyright law, an absolutist approach to Jewish law precludes the discretion to ordain openly gay rabbis. Although these examples are factually distinct, they are similar in that they both illustrate how a particular approach to text can influence a legal outcome.

Part I of this Review delineates the main points of *No Law's* thesis, especially as they relate to the discussion contained in this Review. This Part contains two major themes. Initially, Part I explores the book's position that although the operational significance of the First Amendment became clear only over time, its original adoption signified the Republic's commitment to search for legal rules that would guarantee the presence of free speech and a free press (210-211). This discussion also highlights the authors' treatment of the Sedition Act of 1798, when our fledgling nation had to consider seriously the meaning of freedom of expression for the first time (223). Significantly, the authors use the history in connection with the Sedition Act to prove that from the very beginning of the First Amendment's interpretation, judgment and creativity have been present (223).

The second theme of Part I is that the absolutist framework advocated by the authors has become undermined through the jurisprudence of Justice Holmes. Their discussion reveals how in "a Holmesian world, the First Amendment cannot be seen as an absolute prohibition on Congress, but only as a direction to Congress to effect a reconciliation between" social interests and individual rights (237-38).

Part II explores comparable themes from the standpoint of Jewish law, and illuminates more fully how *No Law's* theory of law is consistent with that of the classical tradition of Judaism. First, the discussion demonstrates that just as Lange and Powell are not originalists, classical Jewish law is not fundamentalist. Still, both approaches are absolutist in that they manifest heightened deference to the language of the text, as informed by history of the text's interpretation and application. Second, Part II explores a more recent historical approach to Jewish law that is comparable to the Holmesian perspective in that it takes into account

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*Responsum for the Committee on Jewish Law and Standards*, [http://www.rabbinicalassembly.org/teshuvot/docs/20052010/dorff\\_nevins\\_reisner\\_dignity.pdf](http://www.rabbinicalassembly.org/teshuvot/docs/20052010/dorff_nevins_reisner_dignity.pdf) (last visited July 20, 2009) (affirming ordination and performance of commitment ceremonies for gays but refraining from ruling on the halakhic status of gay relationships and instructing gays to avoid anal sex based on the biblical prohibition); Joel Roth, *Homosexuality Revisited*, [http://www.rabbinicalassembly.org/teshuvot/docs/20052010/roth\\_revisited.pdf](http://www.rabbinicalassembly.org/teshuvot/docs/20052010/roth_revisited.pdf) (last visited July 20, 2009) (reaching opposite conclusions regarding ordination and commitment ceremonies). For a discussion of how the Committee on Jewish Laws and Standards operates with respect to the issuance of multiple opinions, see David Fine, *The Committee on Jewish Law and Standards and Multiple Opinions*, [http://www.rabbinicalassembly.org/docs/CJLS\\_and\\_Multiple\\_Opinions.doc](http://www.rabbinicalassembly.org/docs/CJLS_and_Multiple_Opinions.doc) (last visited July 20, 2009) (noting that the opinions are considered advisory rather than binding).

extra-legal factors such as modern sensibilities in shaping the law. Interestingly, Rabbi Elliot Dorff, the current chair of the Conservative Movement's lawmaking body, has illustrated his historical theory of law through resort to the very debate showcased in *No Law*. Dorff writes: "[D]oes the First Amendment . . . ban Congress from *any* impediment to freedom of speech . . . or does it establish a general norm restraining Congress from banning freedom of speech *unless* there is some important social reason to do so."<sup>7</sup>

Part III of this Review provides a description of the absolutist framework contained in *No Law* in the context of copyright law, the main area of intellectual property that is impacted by the authors' proposal. After examining the authors' theory of law in this context, this Review assesses the benefits as well as the limitations of an absolutist theory of law by evaluating its application in the comparative context of both copyright and Jewish law.

#### I. AN ABSOLUTIST FIRST AMENDMENT THEORY AND ITS RIVAL

The self-denominated mantra of *No Law* is that "in protecting freedom of speech and press the Founders intended to insure that each of us would be free 'to think as you will and to speak as you think'."<sup>8</sup> According to the authors, this mantra incorporates "the fullest meaning of what it is to speak of freedom of expression in America" (85). Of all the intellectual property regimes, the authors see copyright law as the greatest offender with respect to the suppression of expression that otherwise would remain open for everyone (133). They lament how copyright law is pitted against the First Amendment "in a game the First Amendment is slated to lose" under the current legal analytical framework (123). Historically, copyright has not always loomed so large; the authors remind the reader that early on, "copyright actually protected against little more than outright appropriation of one publisher's work by another" (125). Moreover, provisions authorizing injunctive relief in either the Copyright or Patent Act did not appear until 1819, and were used infrequently until later that century (126, 129). The overall purpose of this historical discussion is to drive home the point that whatever the Framers thought with respect to the potential conflict between intellectual property and the First Amendment, their thoughts were shaped by intellectual property regimes lacking a marked resemblance to the more bloated regimes we

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7. ELLIOT N. DORFF, *THE UNFOLDING TRADITION: JEWISH LAW AFTER SINAI* 347 (2006). It should be noted that the Reform Movement of Judaism is not addressed in this Review for the simple reason that it does not regard Jewish law as binding, and therefore is not analytically relevant to this discussion.

8. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). See *NO LAW* at 85.

know today (126).

From the standpoint of the theory of law issue, the authors' starting point is fairly clear. They understand the First Amendment "as an absolute constraint upon congressional power" to abridge freedom of expression: "In the approach we take the right to appropriate is not to be seen as a matter for election, but rather as an inevitable consequence" of the Amendment itself (190). The language of the Amendment, in their view, is given an absolutist quality which stands in stark contrast to the current judicial model which "proposes that the Constitution should be interpreted generally through the application of a series of attenuated balances, each exquisitely contrived to enable the Court, acting in the role of deferential arbiter, to review Congressional acts as to their sufficiency within an otherwise evolving framework of the Constitution" (189-91).

#### *A. The Operational Significance of the First Amendment*

A theory of law must propose an understanding of what the terms of the text in question mean and address how this text should be understood today. An originalist would claim that the relevant meaning should be derived from an understanding of what the text meant at the time of its original composition.<sup>9</sup> With respect to the First Amendment specifically, the authors note that if the First Amendment were to be understood in these originalist terms, Blackstone's view of the Amendment as a narrow rule barring prior restraints would supply the obvious source of a settled fixed meaning among the Amendment's creators (201). Significantly, however, the authors take issue with this sort of originalist understanding of the First Amendment. Highlighting the absence of a record by James Madison or any other creator of the First Amendment as to what the words "Congress shall make no law . . . abridging the freedom of speech or of the press" actually means (198), they advocate for an "originalist-like" understanding which sees the words as authoritative but lacking a fixed, determinate meaning embedded in the words of the text. This approach is "originalist-like" because it sees the text as a meaningful provision capable of construction according to what the authors perceive as the affirmative purposes of the provision, namely to preserve the "individual's

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9. This interpretation of originalism as focusing on the understood meaning of the text at the time of its adoption has been termed "semantic originalism." See Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law Research, Working Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244> (discussing the history of originalism and furnishing a taxonomy of the various approaches to construction among self-described originalists). Originalism is an extraordinarily complex topic and a more detailed exploration of this area is beyond the scope of this Review. For a recent critique of originalism, see Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) ("[W]e can all care about framers' intentions, ratifiers' understandings, and original public meaning without being originalists.").

autonomy of thought and expression”<sup>10</sup> and the needs of a “politically free society” (210). Nevertheless, the boundaries of permissible “construction” are limited to effectuating the intended purposes and goals of the amendment and therefore do not allow the amendment’s meaning or interpretation to be formulated in accord with “whatever views one prefer[s] on personal or political grounds” (210).<sup>11</sup> In other words, the text itself has inherent meaning, a meaning that can be construed by subsequent generations; it is not an “empty vessel” into which meaning ha[s] to be poured” (210).

In terming the authors’ approach “originalist-like,” my intent is to reinforce that the boundaries they see as relevant include not only the language of the text and the prevailing popular practices at the time of the text’s adoption, but also constructions of the text shortly *after* the text’s adoption. The authors’ First Amendment theory of law is illustrated by their chapter on the Sedition Act of 1798, which is significant as the initial First Amendment “crisis” (212). The Act, in short, made it a crime to write or publish content against the government of the United States, and provided for a monetary punishment of up to \$5000 and a prison term of up to two years. A key issue in the partisan debates over the Act concerned the meaning of the speech and press clauses of the Constitution. The Federalist Party, which was the proponent of the Act, endorsed a Blackstonian interpretation of the First Amendment that understood the meaning of the text to preclude only the imposition of prior restraints.<sup>12</sup> Thus, the Act, “which made no effort to impose any form of prior censorship on expression,” left intact the liberty to which the First Amendment refers (216-17). Significantly, in advocating for the Act, the Federalists did not rely exclusively on the language of the First Amendment but also insisted their interpretation of the speech and press clauses “gave the fullest intelligible scope to free expression” (217). Under the Act, every individual retained the power to speak and write as he pleased, subject to the government’s power to impose after-the-fact liability.

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10. Leading First Amendment scholars have recognized the importance of an individual’s autonomy as a First Amendment value. See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990 (1978) (proposing a “liberty” model for First Amendment protection according to which speech is protected “because of the value of speech conduct to the individual”); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (developing an autonomy theory which maintains that the only true value served by the First Amendment is “individual self-realization”).

11. Cf. Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 413 (2007) (“To remain faithful to the Constitution when referring to underlying principles, *we must never forget it is a text we are expounding*. And it is the text, properly interpreted and specified in light of its underlying principles, *not the underlying principles themselves*, that are to be applied to changing facts and circumstances by means of constitutional doctrines.”).

12. See *supra* text following note 9.

The Republican Party's countervailing argument was that a law imposing subsequent liability for expression was no different from one that abridged expression because it would inevitably result in self-censorship. According to the Republican perspective—one to which the authors are clearly sympathetic—the First Amendment precludes any claim by the federal government to curtail the freedoms of speech and the press.<sup>13</sup> What is significant here is that both parties understood the First Amendment as a text designed “to achieve the goal of unreserved speech and thought,” but they differed in the degree to which Congress could enact measures in support of this objective. Thus, “[t]he controversy over the First Amendment’s meaning which the Sedition Act sparked was a debate over the logical scope of the Federalists’ innovative use of Blackstone” (285).

Two important themes emerge from the authors’ discussion of the Act. First, with respect to the constitutional arguments concerning the Sedition Act, “no one at the time viewed constitutional interpretation generally, or the construction of the First Amendment in particular, in the mode so common to twenty-first century constitutional lawyers— as a balancing of interests (. . .the individual’s free expression interests against the interests of the government)” (222). This observation sets up the authors’ next chapter that focuses on Justice Holmes and the birth of the balancing approach, a development to which they strenuously object. Second, the struggle over the Sedition Act revealed the absence of a mode of thought characterized by the belief in a determinate meaning of the text of the Amendment; instead, the need for interpretative creativity based on the “interpreter’s sense of the overall structure, purpose and meaning” of the language has been present from the beginning” (223). Significantly, this form of “originalist-like” analysis applauds interpretative creativity but only within a bounded framework.

### *B. Holmesian Balancing and Black’s Absolutism*

Following their discussion of the Sedition Act, the authors illustrate how the current perspective of the First Amendment came into being. They credit two of Justice Holmes’s opinions in the series of Espionage Act cases<sup>14</sup> as the primary forces for shaping the worldview of the First Amendment as a vehicle for “protecting individuals against certain exercises of governmental power” rather than as the authority for “disabling government from employing a certain power” (231). This shift

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13. The Sedition Act expired on March 3, 1801. The authors note, however, that the nation’s repudiation of it as “an unconscionable violation of the First Amendment” was even more significant than its natural expiration (p. 228).

14. *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).



is a significant one for it introduced and legitimized the now-prevailing notion of applying the First Amendment through a framework that balances the individual's right of free speech against "the urgency of the social need to restrict that speech" (237). The Court's free speech cases in the 1930's and 1940's further solidified its position that the "Constitution's protection of free expression is not absolute and that in determining its scope and application courts must take into account other pressing social interests" (241).

To the authors' dismay, this "Holmesian foundation" of First Amendment jurisprudence does not appreciate the unique, conceptual characteristics of the First Amendment, but rather understands it as a doctrine to be measured against the claims of other constitutional provisions, including the rights created by the Copyright Clause. In other words, an appreciation for the unique position of the First Amendment has been lost in modern intellectual thought. The authors devote a chapter to Justice Hugo L. Black as the voice of opposition to this trend. Justice Black's theory of constitutional interpretation required a fidelity to the particular text at issue that demanded that each text be considered according to its own terms. Thus, whereas the language of the Fourth Amendment requires a judicial determination of what constitutes an "unreasonable" search or seizure, "the First Amendment's text asks courts not to resolve a conflict between 'competing policies' but to enforce the precise resolution embedded in the language of the amendment" (247).

According to Black's theory of law, courts are given power to interpret, explain and expound upon the Constitution and the laws, but not to "alter, amend, or remake" them (250).<sup>15</sup> This is a significant distinction because it recognizes that even when a provision is absolute in its terms, "there can be difficulty and honest disagreement over what matters properly fall within the sphere of the provision's words" (251). Thus, how the "marginal scope of each individual amendment" can be "applied to the particular facts of particular cases" is a complex problem under Black's approach (251). Moreover, Black maintained a sharp distinction between protected speech and unprotected conduct, a difficult area as evidenced by the example of flag burning which Black believed to be conduct capable of prohibition, a conclusion not in keeping with the Court's subsequent determinations to the contrary.<sup>16</sup> In contrast, what was not complex for Black was the inappropriate result in *Beauharnais v. Illinois*,<sup>17</sup> in which the majority relied on judicial discretion to uphold a state statute that

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15. *Barenblatt v. United States*, 360 U.S. 109, 143-44 (1959) (Black, J., dissenting).

16. *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that flag-burning is protected expression); *United States v. Eichman*, 496 U.S. 310 (1990) (same).

17. 343 U.S. 250 (1952).

criminalized the libel of any racial or religious group. The majority's ruling resulted in the conviction of the defendant who had distributed a circular petitioning the city of Chicago to prevent further "encroachment" by black people on white people (247).<sup>18</sup> According to Black's dissent, the majority opinion abdicated "a straightforward application of the First Amendment's 'unequivocal command,'" in favor of imposing "its own interests-balancing judgment, both to define the scope of what speech deserves any protection at all and to evaluate—and uphold—a statute abridging expression" (249).

Overall then, "Black's insistence on the primacy of the constitutional text stemmed from a sophisticated concern about the function of a written Constitution, the role of the judiciary in our constitutional system, and the consequences of judicial review based not on the Constitution's language but on extra-textual abstractions" (250). Black's view was that "Courts have neither the right nor the power to review this original decision of the Framers [to protect speech and press] and to attempt to make a different evaluation of the importance of the rights granted in the Constitution" (252).<sup>19</sup> Moreover, Black's interpretation of the First Amendment extended not only to the judiciary, but also included a denial to all parts of the government to engage in such evaluations (263).

Ultimately, the authors attempt to craft a restatement of Black's absolutist theory of the First Amendment for the purpose of strengthening its muscle to ward off intellectual property's increasingly pronounced encroachment on free expression. The implications of their approach for intellectual property generally, and copyright in particular, will be discussed in Part III of this Review. At this stage of the discussion, however, it is important to provide some specifics on how they reformulate Black's theory, and why their reformulation is important from the standpoint of the overall theme of this Review—the importance of a particular theory of law in developing legal interpretation. In short, the authors propose "that the First Amendment should be uncoupled from the early-twentieth century mindset that conditions its current interpretation, and that constitutional law should return to the founding era's predominant understanding of the amendment as a ban on the exercise of a certain power rather than as a guarantee of individual liberty" (269).<sup>20</sup> They assert that when seen as "a structural clause limiting the scope of

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18. *Id.* at 253.

19. See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960).

20. In this regard, the authors' position differs from that of Justice Black, who "accepted Holmes's assumption that the First Amendment's central function is to protect individual rights" (p. 270). In addition, the authors note another limiting aspect of Justice Black's theory with respect to their thesis, as they candidly acknowledge that he never appeared to think specifically about the conflict between the First Amendment and intellectual property's monopoly on expression (p. 369, note 4).

Congress's power," rather than "a liberty protecting provision," the need to rely upon the "Holmesian weighing of government's interests against those of the individual simply does not apply" (270).

It is important for purposes of this Review to underscore two aspects of the authors' thesis. First, their overall conception is still "originalist" in the sense that their interpretation is steeped in early understandings of the First Amendment. Recall their discussion of the Sedition Act, in which they emphasize that both the Federalists and Republicans concurred that the federal government could not abridge the First Amendment's freedoms.<sup>21</sup> In keeping with this perspective, they see the First Amendment as embracing clearly set boundaries that are defined "by the logic of the power that the First Amendment forbids government to employ" (270). The key to the Amendment's interpretation, then, is found in these very boundaries that circumscribe the exercise of all branches of the federal government (271). Thus, the Amendment itself provides a structural limitation on power, a view that was reinforced by the earliest understandings of its scope. Indeed, it is the adoption of this bounded framework that drives the authors' absolutist orientation. *Understood through their absolutist lens, the First Amendment does not evolve to accommodate society, despite the fact that it can continue to be applied to address new social realities.*

Second, despite the originalist nature of the author's approach, they still claim a marked appreciation "for the importance of creativity and innovation in the interpretation of the First Amendment" (279). Since they reject the idea that the First Amendment embodies "a fixed and determinate meaning" (279), the need for resort to this interpretative creativity has been present from the very beginning. The comparative implications of these two aspects of their approach will surface in Part II's discussion of Jewish law.

The foregoing discussion has illuminated the extent to which the authors' theory of law embraces a radical departure from the current trend in constitutional interpretation. One aspect of their approach that I find particularly intriguing is its compatibility with the theory of law found in the Orthodox interpretation of the classical Jewish tradition. Part II investigates this comparison more fully, and reveals a parallel not only between Orthodox Judaism's approach to law-making and the authors' absolutist position, but also between the Holmesian balancing approach and the more recent historical approach to Jewish law.

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21. See *supra* text following note 13; see also NO LAW at 222.

## II. ABSOLUTISM IN THE JEWISH TRADITION AND ITS HISTORICAL COUNTERPART

Judaism is a religion of law—its basic premise is that God chose the Jewish people to receive the law and the observance of the law is—according to classical Judaism—considered binding upon Jews for eternity.<sup>22</sup> This Part examines two perspectives on Jewish law, known as *halakha*, which parallel the absolutist and balancing approaches discussed in the foregoing part.<sup>23</sup> For reasons that will become more apparent shortly, I designate the absolutist perspective with respect to Jewish law as the “Orthodox approach” and the Holmesian balancing counterpart as the “historical” approach.

As a general matter, it is important to emphasize that the Jewish community is not a monolithic entity, and therefore, it is not possible at this point in time to say that Judaism maintains a unified theory of law. Although there have always been factions and splinter groups among the Jews,<sup>24</sup> the Enlightenment and the challenges of modern society have resulted in the origination and development of more diverse beliefs and practices among Jews than ever before. Thus, it is impossible to speak of “Jewish unity” from a legal, theological or philosophical standpoint, and this diversity is indeed reflected in competing perspectives regarding how Jewish law does and should operate. Despite the different perspectives within the modern Jewish community concerning a theory of Jewish law, one point that is not contested is that historically, Jews believed that the law was derived from both a written and an oral component which, taken together, constitute “Torah law.”<sup>25</sup> As will be discussed below, however, important differences exist within Jewish communities as to the origin of these two sources of Jewish law. Moreover, these distinct perspectives regarding the origin of Torah law have resulted in differences concerning how scholars and rabbinic authorities think about the interpretation and application of Jewish law.

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22. See BYRON L. SHERWIN, *Philosophies of Law*, in IN PARTNERSHIP WITH GOD: CONTEMPORARY JEWISH LAW AND ETHICS 16 (1990); DAVID HARTMAN, A LIVING COVENANT: THE INNOVATIVE SPIRIT IN TRADITIONAL JUDAISM (1997).

23. In the following discussion, it is necessary to provide the reader with much information about Jewish law in a concise manner. Inevitably, I have omitted developments and areas that some will believe to be salient.

24. For a concise discussion of this phenomenon, see ELLIOT N. DORFF & ARTHUR I. ROSETT, A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW 227-45 (1988) [hereinafter A LIVING TREE]. See also LOUIS JACOBS, A TREE OF LIFE: DIVERSITY, FLEXIBILITY, AND CREATIVITY IN JEWISH LAW 93-109 (2d ed. 2000) (discussing the *halakha*’s response to the challenges of sectarianism).

25. Steven H. Resnicoff, *Autonomy in Jewish Law—In Theory and in Practice*, 24 J.L. & RELIGION 507, 517 (2009).

### *A. Absolutism Under the Orthodox Approach to Jewish Law*

Throughout much of Jewish history, a large number of Jews believed that the words in the Written Torah, which appear in the five books of Moses, were communicated directly from God to Moses.<sup>26</sup> This belief lies at the core of the law-making perspective discussed in this Part, and most Jews who self-identify as Orthodox maintain this view today. With respect to the Written Torah, Steven Resnicoff, writing from the perspective of an Orthodox scholar, has observed that “Jewish law, as understood by a majority of its most influential authorities, assumes that the words are God’s or, at least, the ones that God wants us to have.”<sup>27</sup> The classical Jewish tradition also assumed that, in addition to the Written Torah, God transmitted to Moses the Oral Torah,<sup>28</sup> which can be thought of, in part, as a type of guidebook to interpreting the text of the Written Torah. In fact, the Oral Torah, according to the tradition, functions in a variety of capacities, which include the supplementation of commands found in the Written Torah,<sup>29</sup> the clarification of language of the written text, and the resolution of seeming inconsistencies on the face of the text.<sup>30</sup> One significant function of the Oral Torah is to provide instruction as to when a particular verse of the Written Torah is to be understood according to a deeper, hidden meaning, rather than in a literal manner according to the terms of the text.<sup>31</sup> One of the most famous examples of a textual verse being interpreted differently from its facial language concerns the “eye for an eye” text in Exodus that, according to the traditional perspective, has never been construed literally according to Jewish law.<sup>32</sup> Instead, this language has been interpreted to require monetary compensation to an injured party rather than physical exaction.<sup>33</sup> Overall then, because the Written Torah is not readily intelligible absent the supplementations and instructions provided by the Oral Torah, the Jewish tradition believes that the Oral Torah is even more important than the Written Torah.<sup>34</sup>

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26. See LOUIS GINZBERG, *The Codification of Jewish Law*, in ON JEWISH LAW AND LORE 153 (Atheneum 1981) (1955) [hereinafter GINZBERG, *Codification*].

27. Resnicoff, *supra* note 25, at 510.

28. Elliot Dorff, *Judaism as a Religious Legal System*, 29 HASTINGS L.J. 1331, 1350 n.70 (1978).

29. For example, although the Written Torah prohibits “labor” on the Sabbath, see Exodus 31:14, the definition of what constitutes prohibited labor is supplied by the Oral Torah. See Resnicoff, *supra* note 25, at 515; David Novak, LAW AND THEOLOGY IN JUDAISM 22-23 (1974).

30. See Resnicoff, *supra* note 25, at 516 (discussing the apparent inconsistencies in the Written Torah involving circumcision and the Sabbath).

31. *Id.* at 517.

32. Exodus 21:22-25. See Resnicoff *supra* note 25, at 517-19.

33. See Resnicoff, *supra* note 25, at 518 & n.49; DORFF & ROSETT, *supra* note 24, A LIVING TREE, at 145-86, 319-326.

34. Resnicoff, *supra* note 25, at 507-08. See also DORFF & ROSETT, *supra* note 24, at 187-195 for a discussion of this theme in the Rabbinic literature.

According to the tradition, the Oral Torah is comprised of two primary components. First, as previously discussed, it contains basic explanations of and elaborations upon the laws that are believed to have been received directly from Moses and handed down from one teacher to the next throughout the generations.<sup>35</sup> Second, the Oral Torah is believed to contain specific hermeneutic rules as to how the early sages could derive Torah laws.<sup>36</sup> Moreover, in order to fully appreciate the traditional Jewish legal process, it is important to understand the nature of legal authority under the system created by the Oral Torah. Essentially, anyone who had received "Mosaic ordination"<sup>37</sup> was capable of rendering the most important types of legal decisions and had the authority to interpret the meaning of discrepancies within the text of the Written Torah. This situation continued until the middle of the fourth century C.E., when the chain of Mosaic ordination was broken.<sup>38</sup>

The Oral Torah eventually was written down as a result of concerns by the sages that the law could be forgotten given the massive efforts being made by the Romans to eradicate the teaching of Torah law. The Mishnah emerged around 200 C.E. as the agreed upon version of the Oral Torah.<sup>39</sup> The Mishnah contains Torah teachings, non-Torah laws such as rabbinical enactments and even local customs.<sup>40</sup> Although sometimes the Mishnah provided reasons for its rulings, usually it embodied a series of conclusions, and scholars were expected to reverse-engineer the rulings to determine how the proper interpretations were made.<sup>41</sup> At times, the meanings of the Mishnah were not clear, and frequently the application of the Mishnah's teachings to concrete cases was uncertain to rabbis of subsequent generations.<sup>42</sup>

After the publication of the Mishnah, the sages continued to comment upon the teachings of the Mishnah and for a time, on the Written Torah as well. Even after the chain of Mosaic ordination was broken, the sages<sup>43</sup>

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35. Resnicoff, *supra* note 25, at 519.

36. These hermeneutic rules are exceedingly complex and well beyond the scope of this Review. For a brief but informative overview, see *id.* at 520-21.

37. A sage with Mosaic ordination was considered a link in the chain of the Oral Torah that began with Moses, continued with Joshua, and stretched down throughout the generations. See *id.* at 522.

38. See also *infra* note 46.

39. The Mishnah was edited by Rabbi Yehudah, the Prince. See GINZBERG, *Codification*, *supra* note 26, at 161-62.

40. Jewish law refers to both Torah and non-Torah laws. See *infra* note 56. "The sages from the generation whose views are cited in the Mishnah are known as the "Tannaim." See Resnicoff *supra* note 25, at 527.

41. See GINZBERG, *Codification*, *supra* note 26, at 162 (noting that "the Mishnah simply undertakes to interpret and define the precepts of scripture without giving their substance" and was "intended as a code for the practical teacher" and as a "text-book for the student").

42. Resnicoff, *supra* note 25, at 527-28.

43. The sages of this period were known as "Amoraim." See GINZBERG, *Codification*, *supra* note 26, at 163.

continued to debate the meanings of the Mishnaic passages. The rabbinic academies in Israel and Babylonia were the loci of these debates, which spanned hundreds of years following the publication of the Mishnah. Eventually, these debates were written down and published, resulting in the production of the Babylonian Talmud around 500 C.E.<sup>44</sup>

It is almost universally agreed that the Babylonian Talmud is the central book of Jewish law and life.<sup>45</sup> Once the Talmud was redacted, Jewish law authorities regarded themselves as lacking the ability to reinterpret the meaning of the Written Torah itself in ways that would contradict that which the Babylonian Talmud had established as normative Jewish law.<sup>46</sup> The Talmud contains portions of the Mishnah and the subsequently produced text known as the Gemara, which was written to explain the reasoning behind the laws of the Mishnah, to apply it to specific cases, and to address new questions that arose after the editing of the Mishnah.<sup>47</sup> After the Babylonian Talmud was sealed, it became the basis for deriving Jewish legal rulings, despite the fact that the Written Torah still was regarded as the constitution of Jewish law.<sup>48</sup> Post-Talmudic rabbis lacked the authority to reinterpret the Written Torah in ways that would change established Jewish legal rules; they were only permitted to extrapolate from Talmudic decisions and apply these discussions to new applications. In other words, although legal development continued to be possible through innovative interpretation of the Talmud and creative conceptualization and application of the Talmudic principles, the established legal meaning of the Written Torah text was thereafter off limits.

Thus, traditional Orthodox legal authorities maintain that whenever the Babylonian Talmud “reached a consensus as to a particular Torah or non-

44. See Resnicoff, *supra* note 25, at 528 nn.112-13. An earlier Talmud, called the Jerusalem Talmud, also was redacted but it is not viewed with the same reverence as the Babylonian Talmud.

45. Resnicoff, *supra* note 25, at 528-29 (embracing an Orthodox perspective); Dorff, *supra* note 28, at 1334 n.9 (advocating the historical perspective).

46. See *infra* notes 47-51 and accompanying text. During this period, the supreme judicial authority for the Jewish people was the *Sanhedrin ha-Gadol*, which was composed of 71 rabbis with Mosaic ordination. The *Sanhedrin ha-Gadol* could issue Jewish legal rulings on Torah and non-Torah law, and could also enact rabbinic legislation, all of which was viewed as binding on the Jewish people. The Roman government abolished the *Sanhedrin ha-Gadol* in the fourth century, and since the chain of Mosaic ordination also had been broken, its re-establishment became impossible. Resnicoff, *supra* note 25, at 523-24. See also DORFF & ROSSETT, *supra* note 24, at 258-75 for a discussion of how the chain of tradition and authority was shattered with the demise of the Sanhedrin, and 303-319, 327-37 for a discussion of medieval and modern rabbinic attempts to establish judicial authority despite the break in this chain of authority from Sinai.

47. The Talmud contains much more than Jewish law in that it also reveals a type of Jewish view of the world. Rabbi Adin Steinsaltz fittingly captured this relationship in his description of the Talmud as “a conglomerate of law, legend, and philosophy, a blend of unique logic and shrewd pragmatism, of history and science, logic and humor.” ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* 4 (Chaya Galai trans., 1976). There are actually two different versions of the Gemara, corresponding to the two Talmuds. See *supra* note 44 and accompanying text; Dorff, *supra* note 28, at 1334 n.9.

48. 1 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 40 (1994).

Torah law, that conclusion became normative law, not to be changed by later authorities.”<sup>49</sup> Still, for reasons explored below, even the Talmud “failed to constitute a clear written code of Jewish law.”<sup>50</sup> Specifically, authorities acknowledge that it is extremely difficult to determine not only the circumstances in which the Talmud actually reached a consensus, but also the substantive content of any given consensus in certain situations.<sup>51</sup> This reality has resulted in many gray areas, which have become further complicated by distinct customs developed by the dispersed Jewish communities—pertaining to both ritual and non-ritual areas—that impacted and complicated the contours of the governing law.<sup>52</sup>

Significantly, however, even Orthodox authorities readily admit that in rendering legal decisions, the fact sensitive nature of legal decision-making sometimes requires that new situations be considered differently from those presented in the Talmud. Resnicoff writes that “[t]he continuous stream of significant economic, geographical, political, sociological and technological changes and scientific discoveries has . . . rendered the applicability of Talmudic rulings increasingly ambiguous and uncertain.”<sup>53</sup> As a result, throughout history rabbis attempting to apply many Jewish laws have done so only by resort to the examination and

49. Resnicoff, *supra* note 25, at 532.

50. *Id.* at 529.

51. *Id.* at 532.

52. *See id.* at 535. Resnicoff also observes that although “the Talmud may have had the last word with respect to many Jewish law rulings, it is far from clear that it should prevent changes in some types of customs.” *Id.* at 537-38. The interaction between law and custom is an extremely complex area of Jewish law. For informative discussions on custom, *see* SHERWIN, *supra* note 22, at 33-39; DORFF & ROSETT, A LIVING TREE, *supra* note 24, at 421-434; ELLIOT DORFF, FOR THE LOVE OF GOD AND PEOPLE: A PHILOSOPHY OF JEWISH LAW 245-276 (2007).

Following the sealing of the Babylonian Talmud, the development of Jewish law was impacted substantially by the creation of certain Jewish legal codes. In addition, throughout the centuries, rabbis also issued “*responsa*,” or legal decisions in response to questions presented by correspondents, and these *responsa* constitute another important component of Jewish law. Among the most important codes of Jewish law are the twelfth century work by Maimonides, the *Mishneh Torah*, and the sixteenth-century works by Yosef Caro, who prepared the *Shulhan Arukh* (the title of which means “the Set Table”) and the subsequent commentary called the *Mappah* (“The Tablecloth”) by Rav Moses Isserles. Caro’s Code reflected the customs and traditions of the Jews of Spanish descent (the Sephardic community), whereas Isserles’s commentary drew from the Eastern European (or Ashkenazic) tradition. Over time, the works of Caro and Isserles began to be published together, and newer printings of Caro’s Code also incorporated other commentaries. *See* Resnicoff, *supra* note 25, at 530-31. Historically, though, there was opposition to codifying Jewish law. *See, e.g.,* SHERWIN, *supra* note 22, at 32 (discussing the opposition of the sixteenth-century Polish halakhist Solomon Luria to Isserles). Renowned Israeli jurist Menachem Elon traces the struggles concerning the acceptance of Caro’s Code in his voluminous treatise on Jewish law. With respect to its eventual acceptance as binding law in both the Sephardic and Ashkenazic traditions, he emphasizes the importance of the many supplemental commentaries to the Code. 3 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1407-19 (1994). In addition, Elon observes that persecutions against European Jewry during the seventeenth century accelerated the perceived need for a codification of the law, which additionally facilitated its acceptance. *Id.* at 1420. Louis Jacobs has observed that the invention of the printing press also played a vital role in the *Shulhan Arukh*’s authoritative stance due to its unprecedented dissemination. JACOBS, *supra* note 24, at 153.

53. Resnicoff, *supra* note 25, at 532.



consideration of diverse circumstances “involving cultural, economic, medical, political, and psychological factors.”<sup>54</sup> Also, in issuing rulings, rabbis inevitably have been influenced by some of their personal approaches and perspectives on Jewish law’s priorities.<sup>55</sup> In practice, these complicating realities present challenges for the Orthodox view that “once the meaning of Torah law is established . . . that law, being divinely authored, cannot be overruled by a person simply because it offends that person’s sense of morals.”<sup>56</sup> This view asserts that a person’s own ethical views are an insufficient reason to depart from God’s clear command,<sup>57</sup> but its proponents sometimes recognize that the boundaries of God’s clear command are not always so readily clear. Thus, the Orthodox perspective draws a line between the prohibited changing of the law to accommodate new circumstances and the permissible application of the law to new situations, even if the practical applications and parameters of this distinction are not always clear.

The Orthodox perspective on the development of Jewish law shares a very similar absolutist orientation to the one articulated in *No Law*. In terms of Jewish law, the Written Torah does not provide the basis for absolutism. On the contrary, the tradition reveals that the text of the Talmud serves this function. In other words, Jewish law manifests the same type of “originalist-like” structure by resort to the boundaries set by the Talmud that define the parameters of the legal structure and the substantive limits of legal interpretation. Moreover, *according to this perspective of Jewish law, the Torah (here being defined as the Written and Oral law) does not evolve to accommodate society although it can forever be applied to address new social realities.*<sup>58</sup> Moreover, just as the authors of *No Law* emphasize the importance of creativity and innovation from the beginning of the First Amendment’s interpretation, so does the

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54. *Id.* at 533-34. For an interesting discussion of this process at work even in Talmudic times, see GINZBERG, *The Significance of the Halachah for Jewish History*, in ON JEWISH LAW AND LORE 77, 77-124 (Atheneum 1981) (1955) [hereinafter *The Significance of Halachah*] (documenting how the diverse positions of the schools of Talmudic Rabbis Hillel and Shammai were influenced by socio-economic factors). The role of socio-economic factors in the development of halakha has been documented by both Orthodox and historically oriented scholars. See, e.g., Daniel Sperber, *Paralysis in Contemporary Halakha?* 36 TRADITION 1, 10 (2002) (writing from an Orthodox perspective); JACOBS, *supra* note 24 (advocating an historical viewpoint).

55. Resnicoff, *supra* note 25, at 534.

56. *Id.* at 512.

57. *Id.* at 515.

58. *Cf. supra* text following note 21 (italicized sentence). It is important to note that Jewish law as a whole is comprised of Torah law (Written and Oral) and non-Torah law (such as rabbinic, local communal enactments, customs). See *supra* note 40 and accompanying text. Orthodox authorities maintain that the non-Torah law does evolve to accommodate a number of societal needs. See, e.g., Resnicoff, *supra* note 25, at 537-38 (discussing custom). As discussed in Part B below, those who take the historical approach would assert that even Torah law has evolved, and should evolve, to accommodate social needs. This point is a major source of disagreement between these two perspectives.

traditional perspective on Jewish law. The foregoing discussion illustrates how Jewish law rejects the idea of textual fundamentalism with respect to the Written Torah, resulting in the general view that the text itself lacks a "fixed and determinate meaning."<sup>59</sup> From the inception of the tradition, the Oral Torah depended on human agency to arrive at conclusions.<sup>60</sup> This dependence on human mediation illustrates the importance of interpretative creativity from the outset.<sup>61</sup>

### *B. Balancing Under the Historical Approach*

There is an alternative perspective on the origins and development of Jewish law that is important to discuss for purposes of this Review. Around the middle of the nineteenth century, a European rabbi named Zecharias Frankel began to articulate an historical approach to the study of Jewish law. Until this time, Jewish law was studied and interpreted only through the Talmud and the commentaries of subsequent rabbinic scholars. The historical study of the Jewish tradition also relies upon these primary sources, but in addition it incorporates "the same methods used to study other ancient civilizations such as cross-cultural studies, linguistic comparisons and analysis, and in the twentieth century, archeology."<sup>62</sup> Recall also that until this point halakha began with the premise that God verbally communicated to humanity instructions of substance through Revelation.<sup>63</sup> In contrast, the historical approach maintains that the Written Torah should not be understood as emanating from God directly but rather as the written product of human beings produced in specific times and places.<sup>64</sup>

According to many scholars who adhere to the historical perspective, God is still viewed as the ultimate author of the Torah because those who composed the actual text were believed to be inspired by God, or because human beings wrote the texts in response to their experiences of God.<sup>65</sup>

59. NO LAW at 279; see *supra* text following note 9.

60. Resnicoff, *supra* note 25, at 508.

61. There is yet another parallel between the theory of law articulated in *No Law* and the Jewish tradition. Judaism's legal system is based more on the concept of duties rather than on rights. Jewish law sees man's role as steeped in the performance of duties to God, and to his fellow human beings. See *supra* note 22 and accompanying text. In this respect, the overall conceptual structure of Judaism is similar to that proposed by the authors of *No Law*, who see the First Amendment largely in terms of circumscribing governmental power rather than as the authority for enhanced individual rights.

62. DORFF, *supra* note 7, at 48.

63. See *supra* notes 24-26 and accompanying text.

64. DORFF, *supra* note 7, at 50. Although the history of halakha reveals that both a conservative and a more progressive approach existed even in Talmudic times, see GINZBERG, *The Significance of Halachah*, *supra* note 54, at 77, the historical approach's view of Revelation introduced a new dynamic regarding the origin and consequent application of the law.

65. For a description of the various theories of revelation within the Conservative movement and their implications for how the forming of the text of the Torah is understood, see ELLIOT DORFF, CONSERVATIVE JUDAISM: OUR ANCESTORS TO OUR DESCENDANTS 96-150 (1996).

Those who maintain an historical approach to halakha posit that the Old Testament “was produced by a series of . . . inspired [human] authors who were influenced in their work by the conditions which obtained in their day.”<sup>66</sup> This perspective understands Revelation in a completely different way from the traditional Jewish perspective by defining it not as God’s direct communication to mankind but rather “as a complicated and complex process of divine-human encounter and interaction.”<sup>67</sup> Similarly, the historical approach does not see the Oral Torah as a series of direct commands that were also dictated by God but rather as the embodiment of the best judgment of inspired humans addressing situations in their particular times. The historical approach to the origin of the Written and Oral Torah results not only in a substantial theological shift from the Orthodox perspective, but also in a shift with respect to the law-making process itself. Notwithstanding the importance of the theological implications,<sup>68</sup> this Review is concerned with the impact of both approaches on the development and interpretation of Jewish law.

Zecharias Frankel is considered the ideological founder of the Conservative Movement of Judaism, which embraces the historical study of Jewish texts. Significantly, the Conservative Movement was rooted in the idea of “conserving” the tradition—with respect to implementing changes in the law the Movement places the burden of proof on those who desire change, rather than the other way around.<sup>69</sup> Although the Movement claims to regard halakha as binding upon Jews, the manner in which Jewish law is interpreted is undoubtedly more liberal as a general matter as a result of its historical orientation. For example, adherents of the historical school are sometimes willing to revisit and reject legal precedents that the Orthodox approach regards as conclusive,<sup>70</sup> such as rules regarded to have been settled by the Talmud.<sup>71</sup> According to the historical perspective, the rabbis of the Talmud may not be the final arbiters of Jewish law because the law, as a human system, must be seen to develop in response to changing human conditions.<sup>72</sup>

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66. JACOBS, *supra* note 24, at 224.

67. *Id.*

68. See SHERWIN, *supra* note 22, for an insightful discussion of the theological implications of the two philosophies of Jewish law discussed in this Review.

69. DORFF, *supra* note 7, at 50 (contrasting the Conservative movement with that of the Reform movement which is characterized by the orientation of change in the law rather than conservation). See *supra* note 6.

70. See *infra* notes 80-84 and accompanying text.

71. See *supra* notes 48-52 and accompanying text.

72. See JACOBS, *supra* note 24, at 222 (noting that the main difference between the two groups discussed in this Review “is on the question of how the halakhah came into being and how it developed”). In a similar vein, those who adhere to the historical approach typically understand the codes of Jewish law to furnish guidance, but not binding authority. SHERWIN, *supra* note 22, at 45 & n.115 (noting the Conservative movement’s position on this issue). See *supra* note 50.

As a general matter, the historical approach claims that decisions of Jewish law should be based on more than past legal precedents alone. According to Elliot Dorff, Jewish law “requires rabbis first to study those precedents within their historical contexts and then to weigh them together with contemporary circumstances (economics, demographics, etc.) and a host of other Jewish forms of expression (stories, theology, history, morals, etc.) to make a considered, wise and clearly Jewish judgment about what they think God wants of us now.”<sup>73</sup> In addition, Jewish law “mixes things up further by taking into account past and current Jewish customs.”<sup>74</sup> Another advocate of the historical approach has observed that an historical approach to halakha would be inclined to call for changes in the law when the status quo “results in the kind of injustice that reasonable persons would see as detrimental to Judaism itself.”<sup>75</sup> Because the boundaries of the law are more fluid by virtue of the operation of the historical approach, the theory and application of the law is more “messy.”<sup>76</sup> With respect to the historical approach, there exists a marked diversity of opinion on some issues regarding substantive applications of the law among the rabbinic and scholarly leaders of this group.<sup>77</sup> It sometimes happens that the Conservative Movement’s law making body, the Committee on Jewish Law and Standards (CJLS), issues two or more, and even contradictory opinions, on legal matters.<sup>78</sup> Further, individual congregational rabbis have the authority to determine how the law can best be applied in their respective communities.<sup>79</sup>

With respect to the introduction of socio-economic factors in the law-making process, the historical movement broke new, and very

73. DORFF, *supra* note 7, at 332.

74. *Id.* It is important to underscore that this view of Jewish law is one of many variations embraced by the Conservative movement. For a comprehensive treatment of theories of law within the Conservative movement, see DORFF, *supra* note 7. See also *supra* note 6.

With respect to the role of custom, it should be emphasized that the Orthodox view also sees custom as a source for developing Jewish law, but differences exist between the two approaches discussed in this Review as to the legitimacy of certain customs and their role in the law’s development. See *supra* note 52 and accompanying text.

75. JACOBS, *supra* note 24, at 221. In this regard, the views of Conservative thinkers in the United States were very influenced by Justice Benjamin Cardozo, who called for the consideration of socio-economic factors and changing *mores* into the lawmaking process. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

76. See DORFF, *supra* note 7, at 335.

77. For an insightful discussion of this diversity, see generally DORFF, *supra* note 7.

78. See *supra* note 6.

79. See DORFF, *supra* note 7, at 484. In doing so, Conservative rabbis consider the decisions of the CJLS and usually follow them, but individual rabbis have the authority to rule otherwise with the exception of three Standards of Rabbinic Practice (involving officiating at an intermarriage, requiring a Jewish writ of divorce before remarriage pursuant to Jewish law, and defining Jewish membership according to the mother’s religion or an halakhic conversion, see DORFF, *supra* note 6, at 405). Thus, whereas virtually no Orthodox rabbi would condone the use of automobiles or electricity on the Sabbath absent the presence of a legal exception, some Conservative rabbis would condone these practices while others would not. See *infra* notes 80-84 and accompanying text.

controversial, ground in 1950 when the CJLS issued an opinion allowing Jews to drive to the synagogue on the Sabbath in order to attend services, and permitting the use of electricity to enhance the enjoyment of the Sabbath.<sup>80</sup> This opinion was issued as part of an overall plan to revitalize Sabbath observance among Conservative Jews, and was intended to reintroduce the Sabbath in a way it could be observed by Jews living in the milieu of twentieth century America.<sup>81</sup> For example, the opinion highlights the social reality that most Jews do not live in walking distance to a synagogue, and the value judgment that “the positive values involved in the participation in public worship on the Sabbath outweigh the negative values of refraining from riding in an automobile.”<sup>82</sup> Equally significant, the articulated theory of the opinion emphasizes that, although it considers social realities, it also attempts to derive its conclusions from the received Talmudic and subsequent Jewish tradition.<sup>83</sup> It justifies its leniencies on both driving and the use of electricity “by applying halakhic precedents to the scientific processes by which electricity is produced and automobiles operate.”<sup>84</sup> This balancing of current realities with conclusions alleged to be derived from the tradition is characteristic of many of the legal opinions issued by the Committee on Jewish Law and Standards.<sup>85</sup>

Although advocates of both of the Orthodox and historical approaches would claim that certain things are simply beyond the boundaries of Jewish law, their distinct theories of law result in differences as to how these boundaries are drawn. Not surprisingly, there is a spectrum of thought within each camp, but the lines are clearly drawn between the camps. Those in the historical camp accuse the Orthodox of ignoring

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80. Morris Adler, Jacob Agus & Theodore Friedman, *A Responsum on the Sabbath*, in 3 PROCEEDINGS OF THE COMMITTEE ON JEWISH LAW AND STANDARDS OF THE CONSERVATIVE MOVEMENT, 1927-1970, at 1109 (David Golinkin ed., 1997) [hereinafter *Responsum*].

81. *Id.* at 1118 (“The program that we propose . . . is not to be regarded as the full and complete regimen of Sabbath observance, valid for all Jews for all times and for all places. On the contrary, it is aimed to meet the particular situation that confronts us, a situation without parallel in the long annals of Judaism.”).

82. *Id.* at 1118, 1120, 1129.

83. *Id.* at 1126-29 (discussing these aspects of the tradition). Notwithstanding the *Responsum* authors’ views that they factored the received tradition into account, the Orthodox strongly contest the idea that the received tradition can justify the use of an automobile or electricity on the Sabbath. See, e.g., L.Y. HALPERIN, SHABBAT AND ELECTRICITY (1993). Moreover, even some historically oriented scholars have disagreed with the views in a *Responsum on the Sabbath*. See, e.g., Ben Zion Bokser, *The Sabbath Halachah—Travel, and the Use of Electricity*, in 3 PROCEEDINGS OF THE COMMITTEE ON JEWISH LAW AND STANDARDS OF THE CONSERVATIVE MOVEMENT, 1927-1970, at 1153 (David Golinkin ed., 1997). Significantly, even the minority opinion by Rabbi Bokser was “not based on a legalistic interpretation but rather on sociological and psychological argument concerning the spirit and function of the Sabbath.” See David Aronson, *Discussion*, in 3 PROCEEDINGS OF THE COMMITTEE ON JEWISH LAW AND STANDARDS OF THE CONSERVATIVE MOVEMENT, 1927-1970, at 1169, 1171 (David Golinkin ed., 1997).

84. DORFF, *supra* note 7, at 486 (commenting on the *Responsum*).

85. *Id.*

historical realities and fostering stagnation in the law's development.<sup>86</sup> On the other hand, in the view of most Orthodox authorities, the historical approach itself violates Jewish law because it allows for changes in laws that have been settled by the sealing of the Talmud and by millennia of Jewish observance. These Orthodox rabbis and scholars claim that the advocates of the historical approach have breached the truly historical boundaries of the Jewish legal system and converted halakha into something distinctly *not* halakhic.<sup>87</sup>

The foregoing discussion leads to three important points that are most relevant for this Review. First, the Orthodox approach is absolutist in the way the authors of *No Law* define their theory of law. As to the degree of creativity present in the Orthodox approach, Louis Jacobs, although not a member of that camp, has documented how the post-Talmudic halakhic authorities, all of whom were operating according to an approach that currently would be classified as Orthodox, have continually demonstrated creativity and imagination in the application of the law.<sup>88</sup> Nevertheless, given that the Orthodox perspective is bounded by the parameters of the conventional halakhic system, the degree to which creativity can be exercised is limited to areas that are not settled by the Talmud (although recall that different views exist as to what the Talmud leaves open). The halakhic framework thus affords Orthodox halakhic authorities vital parameters and in this sense, the law is very much absolutist in its orientation.

The second point concerns the historical perspective. The operation of lawmaking under the historical perspective is very Holmesian in that the determination of what the law should be today typically is made by balancing precedent, including a healthy respect for the tradition, with a consideration of socio-economic factors that focus on the current circumstances. The previous discussion concerning the use of automobiles and electricity on the Sabbath amply illustrates this balancing process at work.

The third point allows for a general comparison between the First Amendment and Jewish law. Both areas of law have been characterized by the appearance of a balancing orientation in modern times. In the case of the First Amendment, Lange and Powell show that the balancing approach has overtaken the entirety of First Amendment jurisprudence. In the case of Jewish law, however, the situation is more complex. Orthodox

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86. JACOBS, *supra* note 24, at 223-231.

87. See Jonathan Sacks, *Creativity and Innovation in Halakhah*, in *RABBINIC AUTHORITY AND PERSONAL AUTONOMY* 123, 126-27, 132-33 & n.15 (Moshe Z. Sokol ed., 1992). Sacks asserts that it is impossible to combine "historical consciousness with halakhah". *Id.* at 141.

88. JACOBS, *supra* note 24. For an orthodox perspective on this same point, see Sacks, *supra* note 87, at 123. See also *supra* note 54 and accompanying text.

Jews who manifest a strong commitment to the absolutist orientation in their daily life constitute roughly ten percent of all those who self-identify as Jews in the United States.<sup>89</sup> In contrast, the balancing approach characteristic of the Conservative movement has a larger number of American adherents in theory,<sup>90</sup> although the actual practices of the majority of the laity do not comport with the movement's legal theory and ideology.<sup>91</sup> Part III will return to these themes by providing a comparative discussion of absolutism versus balancing with respect to Jewish law. Initially, however, Part III explores *No Law's* discussion of how, in practice, an absolutist approach to the First Amendment impacts intellectual property generally and copyright law in particular.

### III. ABSOLUTISM IN PRACTICE

#### A. *The First Amendment and Copyright*

The authors' constitutionally based grievance is simple: "Modern First Amendment thought has . . . failed to generate a model of the First Amendment that leaves the amendment with any significant role to play in constraining the deleterious effects of intellectual property on the range of free expression American law actually, as a matter of fact, tolerates" (286). The authors thus see intellectual property as shaped by modern understandings of the First Amendment. They mourn intellectual property's assault on free expression as a "crisis" that should trigger the need for the type of creativity and innovation which has been present from

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89. According to a National Jewish population survey, conducted in 2000-2001, 10.8% of Jews in America are Orthodox. See Roberta G. Sands, Steven C. Marcus & Rivka A. Danzig, *The Direction of Denominational Switching in Judaism*, 45 J. SCI. STUDY RELIGION 437, 439 (2006). See also BRUCE PHILLIPS, AMERICAN JUDAISM IN THE 21ST CENTURY 408 (2005). Worldwide, the percentage of Orthodox Jews is significantly larger according to the Jerusalem Center for Public Affairs, which estimates the percentage of Orthodox Jews as between 33-45%. See Daniel J. Elazar, *How Strong is Orthodox Judaism – Really?*, <http://www.jcpa.org/dje/articles2/demographics.htm> (last visited Aug. 15, 2009).

90. See Sands, Marcus & Danzig, *supra* note 89 at 439 (noting that 31.6% of American Jews are Conservative); Daniel Septimus, *The State of Conservative Judaism Today*, <http://www.jewishvirtuallibrary.org/jsourc/Judaism/conservstate.html> (last visited Aug. 15, 2009) (noting that 33% of American Jews identify as Conservative as of 2000).

91. As discussed earlier, the absence of Sabbath observance in the middle of the twentieth century was the impetus for the Sabbath Responsum, see *supra* notes 80-81 and accompanying text, but strong disagreement exists as to whether the level of observance among Conservative Jews has increased over the years. Compare Avram Hein, *Reflections on the Driving Teshuvah*, 56 CONSERVATIVE JUDAISM 21, 23 (2003) (arguing that Sabbath observance is even more lax today than fifty years ago), with David Fine, *id.* at 36 (citing statistical studies indicating that 42% of Conservative Jews regularly attend Sabbath services and 56% regularly celebrate the Sabbath at home). Regardless of whether nearly half of American Conservative Jews do in fact celebrate the Sabbath in some form, it is uncontested in the Conservative community that the vast majority of the laity do not keep the ritual law in accord with the Movement's standards. In fact, it has been posited by several authorities that many Conservative Jews who become serious about ritualistic observance defect to Orthodoxy. See PHILLIPS, *supra* note 89, at 409; Hein, *supra* note 91, at 30.

the very beginning in our understanding of the First Amendment. The law indeed is free to develop to deal with crises that may occur, but it must do so within the parameters of the First Amendment's structural boundaries.

The authors locate the relevant boundaries of First Amendment interpretation within Blackstone's framework of liberty of the press as foreclosing governmental monopoly over expression (300). The authors thus find it "intolerable that the First Amendment should be construed to permit the government to exercise powers that Blackstone's own logic and the constitutional reasoning shared by all participants in the 1798 Sedition Act debates condemn" (295). In general terms, intellectual property's increasing reliance on the use of prior restraints "is a clear and ongoing abridgment of freedom of speech and of the press" as those concepts were understood by the Framers (291-92). There is no need for a balancing mechanism in applying such an absolutist version of the First Amendment because no purported justifications by the government can support the creation or maintenance of a monopoly over expression (297).

More specifically, the authors are primarily concerned with the impact of copyright law since it is that body of law that confers a monopoly in expression "that otherwise would belong to the universe of discourses in which all are free to share and share alike" (305). Given the authors' position that the First Amendment bars the enactment of such monopoly-protective laws, even for the purpose of encouraging the promotion of progress, it appears as though their absolutist interpretation of the First Amendment would markedly undermine copyright's current structure and framework. Although they say at one point that under their approach intellectual property doctrines will retain "their present shape to a remarkable degree" (306), they also acknowledge that such will not be the case for copyright law (308).<sup>92</sup>

The authors suggest that the type of exclusivity for authors that can be tolerated under their vision of the First Amendment is one that might afford authors the exclusive rights to monetary entitlements deriving from a work's *commercial* exploitation. They also appear sympathetic to the conceptual theory supporting moral rights laws by manifesting a tolerance, and indeed even approval, for an exclusive right to recognition (311).<sup>93</sup> The heart of the authors' suggested legislative reform lies in the adoption of an unconditional right of appropriation for those who wish to use copyrighted works, subject to payment to the copyright holder of profits

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92. The authors note that in certain areas of intellectual property, such as utility patents and even trademarks, little is likely to be changed by their proposal. See NO LAW at 308-09.

93. I have written elsewhere in depth about the conceptual basis for moral rights. See ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (forthcoming 2010).



derived from net revenues (103, 319).<sup>94</sup> With respect to expression that has been “divulged,” the First Amendment bars any law that abridges expression, regardless of any meritorious defense or justification (312). They are comfortable with aspects of current copyright law such as certain provisions of the Digital Millennium Copyright Act barring unauthorized access to copyrighted works, and with other types of legal fences that protect “particular embodiments” of particular works (314).

The authors also readily acknowledge that their absolutist approach to the First Amendment will not, in practice, obviate the need for drawing lines (317). They suggest that fair use will continue to play a role, although that role is not clearly spelled out with sufficient clarity to enable to reader to understand exactly how this already amorphous doctrine will be applied in their world to come. Piracy, the authors assert, will likely decline since copyright law will no longer protect an author’s inherent right to prevent appropriations of expression. Again, however, it is unclear exactly how the law will safeguard the type of exclusivity in copyrighted works that the authors deem to be unobjectionable in their view. They acknowledge the murky waters in which they swim, however, and suggest that Congress is free to devise a system of “equitable apportionment of net revenues according to the value of the appropriated work in the commercial setting” (320). Thus, Congress’s provisions of adequate incentives furnish the raw material insuring continued production. Significantly, the authors envision that legislatively mandated incentives will be augmented, and perhaps even supplanted by, private contractual arrangements (323). They see no cause for worry or concern when it comes to ongoing production.

### *B. The Viability of Absolutism: A Comparative Perspective*

The foregoing discussion of the authors’ vision of how copyright law would operate according to their absolutist perspective reveals that the only thing they are absolute about is the fact that authors cannot maintain exclusive rights to *use* their copyrighted works. In a real sense, then, the law of copyright infringement would be replaced by a determination of whether to compensate an author in a given instance, and if so, how much. Thus, the broadly defined mechanics of fair use would seem to continue to play a role in copyright law, although *No Law* does not clarify exactly what this role would be or how it would work. In this sense, then,

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94. “What is forbidden by the First Amendment is exclusivity of the sort that arises, for example, when copyright, acting on behalf of a proprietor, opposes appropriation of an original work by others for the purposes of further expression, or when it conditions such an appropriation upon the payment of rents in excess of profits accruing from such an appropriation.” *NO LAW* at 137-38. The authors distinguish their proposal from a compulsory license in that under their framework, profits are only forthcoming if there is a net source of revenue.

*No Law* also reaffirms the ongoing need for drawing lines and the “messy” nature of the law’s development that will ensue even if their absolutist vision were to be adopted. This observation leads the reader to wonder whether the law, in practice, can ever be truly absolutist in its application. Specifically, even though in theory, the absolutist approach is confined by the structural boundaries of the First Amendment, in practice this approach will entail human judgment as to what constitutes a violation of the type of exclusivity the authors would prohibit. A fair question, then, is whether in the practical application of their absolutist standard the Holmesian balancing will inevitably creep into the mix.

Of course, the adoption of an absolutist standard does, in effect, have the advantage of setting seemingly clear parameters that delineate the boundaries of the law. From a societal perspective, there may be strong reasons to reinforce these boundaries, because without their existence, the law has the potential to take on a life of its own, apart from the original foundations that gave it meaning in the first place. This is, in short, the very nature of the objections the authors of *No Law* raise with respect to the Holmesian approach to the First Amendment. I suppose that whether one accepts this premise depends on how one views the original foundations of the law in the first place. This observation is true with respect to both the First Amendment and Jewish law, which shares the same type of struggle *No Law* documents in the context of the First Amendment and intellectual property law.

With respect to the development of Jewish law, it cannot be doubted that the stronger the adherence to the traditional halakhic system, the more likely it is that the system will be preserved. This observation, unremarkable in itself, begs the question of exactly what constitutes the system. The two approaches discussed in this Review share not only a different approach with regard to the operative theory of law, but also a distinct approach to the seminal issue of how that law came into being. It is not surprising that the scholarship produced by the Orthodox camp questions the authenticity of the law produced by those who advocate for the historical perspective.<sup>95</sup> Equally not surprising is the historical camp’s allegation that the Orthodox approach arrests the creativity and innovation of a legal system that it sees as the product of humanity encountering the Divine.<sup>96</sup> From a sociological standpoint, these academic discussions are further complicated by the reality that there has been an observed shift to the right among adherents of Orthodoxy in terms of an “increasing stringency” in halakhic observance.<sup>97</sup> At the same time, many who

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95. See *supra* note 87.

96. See *supra* note 86.

97. MARC SHAPIRO, THE LIMITS OF ORTHODOX THEOLOGY: MAIMONIDES’ THIRTEEN PRINCIPLES

affiliate with the Conservative Movement are ignorant of the classical tradition and lax in ritualistic observance.<sup>98</sup> This problem is complicated by socially charged positions taken by some of the Conservative movement's leadership, such as the one involving homosexuality discussed in the Introduction to this Review, that do not necessarily square with the perceptions of even some non-Orthodox Jews regarding the boundaries of the tradition.<sup>99</sup>

Despite the fact that the authors of *No Law* fail to provide all the answers to possible questions, their insistence on a boundary, and on the need for creativity of legal application notwithstanding this boundary, applies with equal force to the current discourse in Jewish law. The identification of a boundary necessitates painstaking research with respect to the tradition at issue. The authors' skill in presenting this research gives *No Law* much of its intellectual force and appeal. At the same time, their research also supports their ultimate determination that going forward, creativity must be exercised in applying the law despite the existence of the boundary they identify. In my view, the lesson of *No Law* for those attracted to the historical approach is the need for developing an even greater commitment to Jewish education among those who are affiliated with institutions supporting this approach to Judaism.<sup>100</sup> It is not possible to either opine on the optimal boundaries of the tradition, or to advocate for a particular creative stance regarding the law's application, without a clear appreciation for the past precedents. This is as true of Jewish law as it is of the First Amendment but, in the case of Jewish law, the need for more widespread education is especially important because Jewish law should impact the daily life of individual Jews. Therefore, they have a responsibility to become educated.

With respect to those maintaining the Orthodox approach, *No Law* illustrates the importance of invoking creativity in legal decision-making even when the decisions are bounded through an absolutist reading of text. Thus, an absolutist perspective still necessitates an ability to rethink

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REAPPRAISED 158 (2004). Haym Soloveitchik, writing specifically about the Ashkenazic community, see *supra* note 50, has documented how this shift to the right began in the 1950's and has since gained an increasing presence. Haym Soloveitchik, *Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy*, 28 TRADITION 64 (1993) (furnishing a sociologically-oriented analysis of the increased stringency phenomenon and positing the cause as an increasing emphasis on intellectual, textual learning as opposed to an absorption of the tradition through a "mimetic" approach). But see Hillel Goldberg, *Responding to "Rupture and Reconstruction"*, 31 TRADITION 31, 40 (1996) (disputing Soloveitchik's thesis but not the overall phenomenon and noting that historically, there have been other periods of "perceived textuality" and stringencies in practice).

98. See *supra* note 91 and accompanying text.

99. See Jennifer Siegel, *Gay Issues Roil Rabbis in Advance of Parley*, JEWISH DAILY FORWARD, Mar. 17, 2006, <http://www.forward.com/articles/6702>; see also *supra* note 6.

100. Cf. Ismar Schorsch, *Reflections on the Driving Teshuvah*, 56 CONSERVATIVE JUDAISM 21, 49 (2003) ("The key to the success of Orthodoxy in the last half century is serious, sustained Jewish education").

practices and assumptions that, while having become the norm in certain communities, are nonetheless not required by halakha.<sup>101</sup> As I interpret and filter the message of *No Law*, an important underlying premise of the book is that absolutism in and of itself is relative. Even an absolutist perspective must tolerate gray in the application, as society's conditions change. There is no getting around the fact that the human condition precludes complete absolutism.

#### CONCLUSION

I am quite certain that neither David Lange nor Jefferson Powell ever contemplated that their work would be the focal point of a comparative piece analogizing the theories of law they discuss with those at play in a completely distinct legal system such as Jewish law. I hope, however, that they both will be pleased to see the impact of their discussion in such an unrelated area. I had two objectives in writing this Review. First, to present and critique *No Law* for those who are interested in intellectual property and Constitutional law. Second, to illustrate that the overall premise of *No Law* has a broader force and application than the authors might have initially imagined. I wish to conclude by raising the following question for those who enjoy thinking about how law as a system should work: is it best to think in terms of any one theory of law, or does the law in practice require a blend of the absolute and the balance?

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101. See Resnicoff, *supra* note 25, at 545-46 (critiquing the current trend of Orthodox rabbis to issue rulings as binding law that unnecessarily encroach on personal choice but are alleged to be justified as appropriate according to halakha as well as "the Torah Viewpoint"). Although beyond the scope of this Review, the issue of female ritualistic participation is one area that contemporary mainstream Orthodoxy has refused to re-evaluate, despite the existence of halakhic arguments supporting a more liberal viewpoint. See Mendel Shapiro, *Qeri'at ha-Torah by Women: A Halakhic Analysis*, THE EDAH JOURNAL 1:2 (2001) (concluding, from an Orthodox perspective, that there are certain circumstances where women should be allowed to be called to the Torah and to read from the Torah despite Orthodoxy's refusal to entertain these possibilities). See also Michael J. Broyde, *Hair Covering and Jewish Law: Biblical and Objective (Dat Moshe) or Rabbinic and Subjective (Dat Yehudit)*, 42 TRADITION 97, 177 (2009) (concluding that there is a "firm foundation" in Jewish law for Torah-observant woman "who have a clear custom not to cover their hair").