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Volume 1

Acknowledgments

The chapters in these volumes were written over the course of fifteen years and originally published as individual articles, with most appearing in law journals across the United States. The chapters are collected here, organized sequentially by topic, with each chapter building on the previous chapter. As such, the volumes can be studied as a single work, while at the same time, each chapter can be read and understood on its own. It should be noted that, although the chapters have been lightly edited for inclusion in this collection, they are not presented chronologically, and there remains some repetition in material among the chapters, as well as occasional variation in writing style and citation form. A list of references to the original articles is provided below.

I would like to briefly express my appreciation to family, friends, teachers, and colleagues, who have offered me advice and encouragement over the years, in connection with these chapters and beyond. Among countless others, Russell Pearce, Thomas Shaffer, Kent Greenawalt, Judge Loretta Preska, and the late Abraham Abramovsky provided thoughtful guidance and support, and in my capacity as Director of the Jewish Law Institute at Touro Law Center, I have had the pleasure of working alongside a terrific staff and faculty, under the leadership of Deans Lawrence Raful, Patricia Salkin, and Harry Ballan. In connection with these volumes, I would also like to thank Michael Shmidman, Editor at Touro College Press, as well as Alessandra Anzani, Senior Editor, and Kira Nemirovsky, Production Editor, at Academic Studies Press.

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Introduction

Recent decades have seen the emergence of comparative law, both as an important area of American legal practice and as a significant field of academic study in American law schools and universities. The increasing attention to comparative law may be the result of a number of interrelated factors, such as a growing awareness and acceptance of various forms of multiculturalism, an acknowledgment of the impact of international developments on the practice of law, and a general recognition that the nations of the world, their religions, and their legal systems have become interconnected in new and exciting ways, accompanied by both challenges and corresponding opportunities.

The comparative study of Jewish law and American law stands out as a particularly notable avenue of inquiry, gaining substantial prominence among legal scholars and garnering considerable interest among broader audiences. The Jewish legal system, produced over the course of thousands of years and spanning geographical locations across the world, provides analogues and counter-models for substantive, procedural, and conceptual aspects of American law, including important, unsettled, and controversial issues in American legal thought and practice. Indeed, in light of the wide-ranging scope of Jewish law, addressing every area of human behavior, it may not prove surprising that American legal scholars and, at times, American courts, have turned to Jewish legal thought to help illuminate complex areas of the American legal system.

These volumes contribute to the growing field of comparative Jewish and American law, presenting twenty-six chapters, grouped in eight sections and organized by topic, including an introductory section and seven substantive sections. The first section offers a general introduction to the comparative study of Jewish and American law, considering methodological issues related to the place—and increasing prominence—of Jewish law in both the American law school curriculum and American legal scholarship.

This section also includes chapters that provide a comparative overview of the role of interpretation and legislation in the two legal systems.

Subsequent sections turn to specific areas of substantive and conceptual comparison. Topics in these sections range from complex doctrinal discussions of capital punishment and self-incrimination, to applications of Jewish law in American legal practice, to more conceptual considerations of constitutional theory and the relationship between law and public policy. Still other sections add an interdisciplinary component, looking at legal history and connections between law and narrative.

The chapters in these volumes are characterized by a number of distinct features. For example, the chapters are written, in form and content, in a manner that is intended both to appeal to legal scholars and to be accessible and of interest to a more general audience of educated and intellectually curious readers. In addition, the chapters are faithful to Jewish law on its own terms, while at times applying comparative methods to offer fresh perspectives on complex issues in the Jewish legal system. Finally, through careful comparative analysis, nearly all of the chapters turn to Jewish law to provide insights into substantive and conceptual areas of the American legal system, particularly areas of American law that are complex, controversial, and unsettled.

Section One

The Comparative Study of Jewish Law and American Law: An Introduction

CHAPTER 1

Teaching Jewish Law in American Law Schools: An Emerging Development in Law and Religion

INTRODUCTION

In recent years, religion has gained increasing prominence among both the legal profession and the legal academy. Through the emergence of the "religious lawyering movement,"[1] lawyers and legal scholars have demonstrated the potential relevance of religion to many aspects of lawyering. Likewise, legal scholars have incorporated religious thought into their work through books, law journals, and classroom teaching relating to various areas of law and religion.[2]

1 The term "religious lawyering movement" was coined by Professor Russell Pearce. See Russell G. Pearce, *Symposium, Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 Fordham L. Rev. 1075 (1998). For a history of the movement, see Samuel J. Levine, *Introductory Note: Symposium on Lawyering and Personal Values—Responding to the Problems of Ethical Schizophrenia*, 38 Cath. Law. 145 (1998); Pearce, supra.

2 There are numerous examples of the increased interest in law and religion, in books, law journals and the classroom. The term "law and religion" is a broad one, which may encompass

The aim of this chapter is to discuss one particular aspect of these efforts, the place of Jewish law in the American law school curriculum.[3] Specifically, I will briefly outline three possible models for a course in Jewish law in an American law school and consider some of the advantages and disadvantages of each model. I will then describe the structure I have chosen, in an attempt to synthesize these models, for the seminars in Jewish law that I have taught, over the course of twenty years, at a number of law schools across the United States.[4]

MODEL ONE

In the first model, a Jewish law course serves as a course in comparative law, emphasizing conceptual foundations of the Jewish legal system. Focusing on substantive areas of law that find their parallels in the American legal system, this model analyzes different concepts through comparisons and contrasts to American law. Such an approach has at least two apparent advantages. First, students who may be unfamiliar with Jewish law are likely to have some familiarity with and/or interest in the substantive areas of American law discussed. Indeed, one of the aims of this model is for students to appreciate the way a study of each legal system can illuminate an understanding of the other.

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many areas, including Free Exercise and Establishment Clause issues. Although such issues are certainly relevant to this chapter, I focus here on the direct or indirect influence of religious concepts on the substance of the law, rather than discussing religion as the subject of constitutional law. Of course, a better understanding of religion on its own terms should ideally inform and improve Free Exercise and Establishment Clause jurisprudence as well.

3 Approximately thirty to forty American law schools include courses in Jewish law as part of the curriculum. See Edward H. Rabin, *Symposium: The Evolution and Impact of Jewish Law, Foreword*, 1 U.C. Davis J. Int'l L. & Pol'y 49, 56 (1995); Jeffrey I. Roth, *Fraud on the Surviving Spouse in Jewish and American Law: A Model Chapter for a Jewish Law Casebook*, 28 Case W. Res. J. Int'l L. 101, 101 n.1 (1996).

4 It should be noted that there may exist numerous models for a course in Jewish law at American law schools, in addition to variations and hybrids of many of these models. Thus, my descriptions here provide somewhat simplified models for the purpose of sparking further and more complex discussion of the issues I have delineated. Moreover, the suitability of any of the models in a particular setting depends on a number of variables, some of which I acknowledge in the text, including the background of the students, the background of the teacher or teachers, the availability of appropriate course materials, and the academic environment and philosophy of the school. Each of these variables finds a wide range of realities in the different law schools throughout the United States that offer courses in Jewish law. For a collection of syllabi from Jewish law courses in American law schools, see https://www.tourolaw.edu/JewishLawInstitute/?pageid=736

Second, this model may be appropriate for the curriculum in many law schools, as it contains a strong comparative law component.[5] One possible disadvantage to this model is that a teacher of such a course would be expected to have a working knowledge of, if not expertise in, both Jewish and American law.

MODEL TWO

A second model envisions Jewish law as a course in international law, to the extent that Jewish law impacts the legal system in the modern State of Israel. This model allows students to see the application of Jewish law within a modern secular nation, thereby providing an apparent contrast to the American ideal of law that separates church and state. In addition, the subject matter in this model, involving matters that affect the civil law of the State of Israel, may focus on issues that have direct analogues in American jurisprudence. Such a course might be a particularly good fit for a law school curriculum, as it deals with both comparative and international law.[6] However, these strengths may actually suggest inherent weaknesses in the model, as a teacher of such a course would have to be competent to teach both Jewish law and specific modern legal systems. Moreover, an emphasis on the modern State of Israel might detract from the study of the system of Jewish law on its own terms.

MODEL THREE

A possible response to these concerns suggests a third model, which examines Jewish law with little, if any, reference to other legal systems. Because the subject matter is restricted to Jewish law, this model may offer the opportunity for students to study the Jewish legal system in a more comprehensive and systematic manner. Likewise, placing the focus of the course on a single legal system allows for a teacher whose knowledge of other legal systems, though potentially helpful, would seem generally unnecessary. Students in such a course, however, must

5 The advantages of the comparative study model are reflected in part in the increasing reliance on the Jewish legal system in American law journals. See generally David Hollander, *Legal Scholarship in Jewish Law* (2017).

6 The late Menachem Elon, a former Israeli Supreme Court Justice, was a leading proponent and practitioner of this method, in both his scholarship and the Jewish law courses he taught in various American law schools. See, e.g., Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. Int'l L. & Pol. 221, 239-43 (1985).

be prepared to engage in the study of a legal system that may be unfamiliar to them, relying on their own ability to make comparisons and contrasts to areas of American law. In addition, the subject matter of this model may not find as clear a place within a law school curriculum, though it might complement a curriculum offering courses in Islamic law or Canon law.[7]

MODEL FOUR

The syllabi for the seminars in Jewish law that I have taught at American law schools reflect my attempt to synthesize these different models, with the aim of helping students appreciate the relevance of Jewish law to a broad range of legal issues. As most of the students who enroll in these courses have little or no background in Jewish law, we begin with a discussion of the sources and structure of Jewish law, from both a historical and a conceptual perspective. In an effort to make the students more comfortable with this material, I rely primarily on articles in American law journals. While I try to draw parallels to American legal structure and history whenever possible, this part of the course primarily provides an opportunity for a broad understanding of the mechanics of Jewish law through an examination of the Jewish legal system on its own terms.

We continue the introductory stage of the course with a look at interpretation and legislation in Jewish law. Through examples of both civil law and ritual law, I seek to demonstrate that these two components of the Jewish legal system share a common analytical framework and are inextricably linked. We thus continue the process of looking at Jewish law on its own terms by relying on the works of scholars of Jewish law, although a number of the examples I select yield obvious comparisons to issues in American law, in both substance and methodology. Likewise, discussions of legal authority lead to comparisons to the structure and function of the American judiciary and legislatures.

After these lessons, students usually feel that they have obtained a working knowledge of the Jewish legal system, sufficient to allow them to undertake explicit comparison of substantive areas of law in the two systems. Therefore, the next stage of the course consists of discussions of criminal law, capital punishment, self-incrimination, confidentiality and abortion in Jewish law and American law. Most students already have a substantial interest in, if not a familiarity with, these areas of law. In addition, they often gain a new perspective on American law as a result of examining the contrast cases in Jewish law. In keeping

7 Indeed, some law schools offer courses in Jewish law as part of a program in law and religion.

with the comparative component of the course, materials for these subjects are drawn from both American law journals and works of Jewish law.

The final stage of the course looks at the intersection of Jewish law with modern legal systems, particularly the United States and the State of Israel. Focusing on American *get* laws and kosher fraud laws involves American constitutional law, which, in turn, is compared and contrasted with the dynamic of incorporation of Jewish law in certain areas of Israeli law. Moreover, the Israeli model introduces an international component to the course and exemplifies the differences between Jewish law and the law of the modern, secular State of Israel.

My syllabus thus offers but one attempt to synthesize elements of potential models for a course in Jewish law in American law schools, consistent with my goals in teaching the course. The substance and style of Jewish law courses vary widely in schools offering such a course. It is my hope that, as both the legal profession and the legal academy increasingly continue to recognize the importance of religion in the lives and work of lawyers, Jewish law courses and scholarship will be seen as an integral part of the interface of law and religion.

CHAPTER 2

Applying Jewish Legal Theory in the Context of American Law and Legal Scholarship: A Methodological Analysis

INTRODUCTION

In the past few decades, Jewish legal theory has gained increasing prominence as both an area of study in law schools and a field of scholarship among the American legal academy.[1] Dozens of American law schools include courses on Jewish law in the curriculum.[2] Several law schools have established centers dedicated to the study of Jewish law,[3] while other schools include discussions of Jewish law as an important component of centers and programs on law and religion.[4] The prominence of Jewish legal theory in American legal scholarship

1 Samuel J. Levine, *Emerging Applications of Jewish Law in American Legal Scholarship: An Introduction*, 23 J.L. & Religion 43, 43 & n.1 (2007).

2 See generally Chapter 1 in this Volume; Sherman L. Cohn, *Yale Rosenberg: The Scholar and the Teacher of Jewish Law*, 39 Hous. L. Rev. 872 (2002); Samuel J. Levine, *Teaching Jewish Law in American Law Schools - Part II: An Annotated Syllabus*, 2 Chi.-Kent J. Int'l & Comp. L. 1 (2002) [hereinafter Levine, *Teaching Jewish Law, Part II*]; Edward H. Rabin, *Symposium: The Evolution and Impact of Jewish Law - Foreword*, 1 U.C. Davis J. Int'l L. & Pol'y 49 (1995); Jeffrey I. Roth, *Fraud on the Surviving Spouse in Jewish and American Law: A Model Chapter for a Jewish Law Casebook*, 28 Case W. Res. J. Int'l. L. 101 (1996); Alan M. Sokobin, *A Program in Comparative Jewish Law*, 33 U. Tol. L. Rev. 795 (2002).

3 These institutes include The Berkeley Institute for Jewish Law and Israel Studies; The DePaul University College of Law Center for Jewish Law & Judaic Studies; The Institute of Jewish Law, Boston University School of Law; The Jewish Law Institute, Touro College Jacob D. Fuchsberg Law Center; The Yeshiva University Center for Jewish Law and Contemporary Civilization, Cardozo School of Law; and The Tikvah Center for Law & Jewish Civilization, New York University.

4 These programs include The Center for the Study of Law and Religion, Emory University School of Law; The Institute on Religion, Law & Lawyer's Work, Fordham University School

has been even more pronounced, giving rise to an extensive body of literature exploring both Jewish law on its own terms and its potential applications to American law.[5]

In light of these developments, this chapter briefly considers the current state of the field of Jewish law and Jewish legal theory within the context of the American legal academy. Specifically, the chapter suggests that it may be instructive to step back and focus on a methodological assessment of these developments, taking into account a number of salient features of the Jewish legal model. These aspects of Jewish law both complicate and enrich the application of Jewish legal perspectives to issues of American law and public policy.

First, the Jewish legal system has developed over the course of thousands of years, functioning within a broad range of societal and geographical settings, amidst benign and, all-too-often, belligerent and oppressive circumstances.[6] This historical experience has resulted in the production of a voluminous library of legal literature, with contributions from virtually every generation and, over time, nearly all parts of the world.[7] Therefore, an attempt to consider the approach of the Jewish legal system to an issue of significance in the American legal system might require an initial effort to grapple with the various primary and secondary sources of Jewish law that address the issue directly and indirectly. Through the course of millennia—and up to this day—scholars

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of Law; The Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics, Pepperdine University School of Law; The Notre Dame Law School's Program on Church, State & Society; and the University of San Diego Law School's Institute for Law and Religion..

5 See generally Chapters 1 and 3 in this Volume; Levine, supra note 1; Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 Harv. L. Rev. 813 (1993).

6 See *An Introduction to the History and Sources of Jewish Law*, at xvi (N.S. Hecht et al. eds., 1996); 1 Menachem Elon, *Jewish Law: History, Sources, Principles: Ha-Mishpat Ha-Ivri* 1 (Bernard Auerbach & Melvin J. Sykes trans., The Jewish Publ'n Soc'y 1994) (1988).

7 For helpful introductions to the history, sources, and structure of Jewish law, see *An Introduction to the History and Sources of Jewish Law*, supra note 6; Irving A. Breitowitz, *Between Civil Law and Religious Law: The Plight of the Agunah in American Society* 307-13 (1993); Menachem Elon et al., *Jewish Law (Mishpat Ivri): Cases and Materials* (1999); 1 Elon, supra note 6; David M. Feldman, *Birth Control in Jewish Law: Marital Relations, Contraception, and Abortion as Set Forth in the Classic Texts of Jewish Law* 3-18 (1968); *Jewish Law and Legal Theory* (Martin P. Golding ed., 1993); Aryeh Kaplan, *The Aryeh Kaplan Reader* 211-19 (1985); Aaron Kirschenbaum, *Equity in Jewish Law: Halakhic Perspectives in Law: Formalism and Flexibility in Jewish Civil Law* 289-304 (1991); Nahum Rakover, *A Guide to the Sources of Jewish Law* (1994); Aaron M. Schreiber, *Jewish Law and Decision-Making: A Study Through Time* (1979); Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. Int'l L. & Pol. 221 (1985); Steven F. Friedell, *Aaron Kirschenbaum on Equity in Jewish Law*, 1993 BYU L. Rev. 909 (book review).

have explored Jewish law on its own terms, providing instrumental and arguably indispensable studies and insights into ways Jewish law might help illuminate contemporary American legal thought.

Second, the Jewish legal system addresses nearly every aspect of human endeavor, from the seemingly mundane to the profound, from ritual to interpersonal activities, from civil and commercial law to criminal law.[8] The scope of the Jewish legal system not only adds to the volume of legal material that constitutes the corpus of Jewish law but also serves as a reminder of the underlying religious character of the Jewish legal system, premised upon express and implicit theological principles that infuse and affect the function of the law.[9] Although it is possible to debate the extent to which, as both a descriptive and normative matter, religion informs American law,[10] it is not plausible to picture

8 See, e.g., Aryeh Kaplan, *The Handbook of Jewish Thought* 78 (1979) ("The . . . commandments . . . penetrate every nook and cranny of a person's existence, hallowing even the lowliest acts and elevating them to a service to God. . . . The multitude of laws . . . sanctify every facet of life, and constantly remind one of [one's] responsibility toward God."); Joseph B. Soloveitchik, *Halakhic Man* 20, 22 (Lawrence Kaplan trans., Jewish Publ'n Soc'y of Am. 1983) (1944) (observing that "there is no phenomenon, entity, or object in this concrete world" beyond the grasp of *halacha*, and noting that "just a few of the multitude of hala[c]hic subjects" include "sociological creations: the state, society, and the relationship of individuals within a communal context"; "laws of business, torts, neighbors, plaintiff and defendant, creditor and debtor, partners, agents, workers, artisans, bailees"; "family life"; "war, the high court, courts and the penalties they impose"; and "psychological problems . . . ."); id. at 93-94 (explaining that *Halacha* (i.e., Jewish law) "does not differentiate between the [person] who stands in [the] house of worship, engaged in ritual activities, and the mortal who must wage the arduous battle of life"; rather it "declares that [a person] stands before God not only in the synagogue but also in the public domain, in [one's] house, while on a journey, while lying down and rising up," and that "the marketplace, the street, the factory, the house, the meeting place, the banquet hall, all constitute the backdrop for the religious life"); Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 Harv. L. Rev. 306, 322 (1961) ("The . . . mode of dress, . . . diet, dwelling, behavior, relation with [others], . . . family affairs, and . . . business affairs were all prefixed and premolded, in a national cloak, in a set of laws that was clear, severe, strict, detailed, that accompanied [an individual] day by day, from cradle to grave."). See also Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 Tex. Tech L. Rev. 1199, 1199 (1996) ("The religious individual faces the constant challenge of reconciling religious ideals with the mundane realities of everyday life. Indeed, it is through the performance of ordinary daily activities that a person can truly observe such religious duties as serving G-d and loving one's neighbor.").

9 See, e.g., *Introduction to Jewish Law and Legal Theory*, supra note 7, at xiii, xiii; Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. Int'l L. & Pol. 221, 227 (1985).

10 For discussions of the relationship between religion and American law and politics, see Robert Audi, *Religious Commitment and Secular Reason* (2000); Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993); Kent Greenawalt, *Private Consciences and Public Reasons* (1995); Kent Greenawalt, *Religious*

the American legal system as a consciously religious—let alone Jewish—system of law. Therefore, in addition to challenges that generally confront attempts to apply the laws of foreign legal systems in the context of American law,[11] greater

Convictions and Political Choice (1988); Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (1991); Michael J. Perry, *Morality, Politics, and Law* (1988); Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (1997); *Religion and Contemporary Liberalism* (Paul J. Weithman ed., 1997); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DePaul L. Rev. 499 (1998); *Symposium, Law and Morality*, 1 Notre Dame J.L. Ethics & Pub. Pol'y 1 (1984); *Symposium, Religion and the Judicial Process: Legal, Ethical, and Empirical Dimensions*, 81 Marq. L. Rev. 177 (1998); *Symposium, Religion in the Public Square*, 42 Wm. & Mary L. Rev. 647 (2001); *Symposium on Religion in the Public Square*, 17 Notre Dame J.L. Ethics & Pub. Pol'y 307 (2003); *Symposium, Religiously Based Morality: Its Proper Place in American Law and Public Policy*, 36 Wake Forest L. Rev. 217 (2001); *Symposium, The Role of Religion in Public Debate in a Liberal Society*, 30 San Diego L. Rev. 849 (1993); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 Cornell L. Rev. 747 (1993).

11 The ongoing debate among prominent justices, judges, and scholars over reliance on foreign authority in American constitutional interpretation provides a poignant illustration of some of the complexities confronting efforts to apply foreign law in the context of the American legal system. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 567, 576-78 (2005); id. at 622-28 (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003); id. at 598 (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); id. at 324-25 (Rehnquist, C.J., dissenting); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. Rev. 639 (2005); Stephen Breyer, Assoc. Justice, U.S. Supreme Court, *Keynote Address at the Ninety-Seventh Annual Meeting of the American Society of International Law* (Apr. 4, 2003), in 97 Am. Soc'y Int'l L. Proc. 265, 265-66 (2003); Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. Rev. 1335 (2006); Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 Harv. J.L. & Pub. Pol'y 223 (2006); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539 (2001); Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, *A Decent Respect to the Opinions of Humankind: The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address at the Ninety-Ninth Annual Meeting of the American Society of International Law* (Apr. 1, 2005), in 99 Am. Soc'y Int'l L. Proc. 351, 355 (2005); Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109 (2005); Ronald J. Krotoszynski, Jr., *"I'd Like To Teach the World To Sing (In Perfect Harmony)": International Judicial Dialogue and the Muses - Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 Mich. L. Rev. 1321, 1322-25, 1335-36, 1356-58 (2006); John O. McGinnis, *Foreign to Our Constitution*, 100 Nw. U. L. Rev. 303 (2006); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 Stan. L. Rev. 131 (2006); Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31 (2005); *Symposium, Global Constitutionalism*, 59 Stan. L. Rev. 1153 (2007); Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 Minn. L. Rev. 1275 (2006); Melissa A. Waters, *Getting Beyond the Crossfire Phenomenon: A Militant Moderate's Take on the Role of Foreign Authority in Constitutional Interpretation*, 77 Fordham L. Rev. 635 (2008); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L.J. 487 (2005).

challenges may face any effort to apply concepts from a religious legal system, particularly the Jewish legal system.

These characteristics of Jewish law may suggest the need to employ an effective methodology for applying a given principle from Jewish legal theory to American law and public policy. Specifically, such an analysis may require a methodology that: (a) carefully and accurately depicts the principle, as understood within Jewish legal theory, in a way that is faithful to the Jewish legal system on its own terms; (b) considers carefully the extent to which the principle incorporates theological underpinnings that are particular to the Jewish legal model and, accordingly, may not be suitable in the context of the American legal model; and (c) applies the lessons from the Jewish legal system only to the extent that they make sense within the internal logic of the American legal system, thus remaining faithful to American jurisprudence as well.

This chapter illustrates the promise and potential limitations posed by this methodology through a close look at perhaps the most prominent references to Jewish law in the history of the American legal system: the United States Supreme Court's citations to the rule against self-incrimination in Jewish law.[12] This chapter compares the Court's reliance on Jewish law in

12 See *Garrity v. New Jersey*, 385 U.S. 493, 497 n.5 (1967); *Miranda v. Arizona*, 384 U.S. 436, 458 n.27 (1966). For examples of other American cases citing Jewish law in the context of discussions of self-incrimination, see *United States v. Gecas*, 120 F.3d 1419, 1425 (11th Cir. 1997); *United States v. Huss*, 482 F.2d 38, 51 (2d Cir. 1973); *Moses v. Allard*, 779 F. Supp. 857, 870 (E.D. Mich. 1991); *Roberts v. Madigan*, 702 F. Supp. 1505, 1517 n.20 (D. Colo. 1989); In re Agosto, 553 F. Supp. 1298, 1300 (D. Nev. 1983); *State v. McCloskey*, 446 A.2d 1201, 1208 n.4 (N.J. 1982); *People v. Brown*, 86 Misc. 2d 339, 487 n.5 (N.Y. Nassau County Ct. 1975).

For examples of references to the Jewish law of self-incrimination in American legal scholarship, see Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 433-41 (2d ed., Macmillan Publ'g Co. 1986) (1968); Chapters 7 and 8 in this Volume; Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in R. H. Helmholz et al., *The Privilege Against Self-Incrimination: Its Origins and Development* 181, 279 n.28 (1997); Cheryl G. Bader, *"Forgive Me Victim for I Have Sinned": Why Repentance and the Criminal Justice System Do Not Mix - A Lesson from Jewish Law*, 31 Fordham Urb. L.J. 69, 88 (2003); Isaac Braz, *The Privilege Against Self-Incrimination in Anglo-American Law: The Influence of Jewish Law,* in *Jewish Law and Current Legal Problems* 161 (Nahum Rakover ed., 1984); Debra Ciardiello, *Seeking Refuge in the Fifth Amendment: The Applicability of the Privilege Against Self-Incrimination to Individuals Who Risk Incrimination Outside the United States*, 15 Fordham Int'l L.J. 722, 725 (1992); Suzanne Darrow-Kleinhaus, *The Talmudic Rule Against Self-Incrimination and the American Exclusionary Rule: A Societal Prohibition Versus an Affirmative Individual Right*, 21 N.Y.L. Sch. J. Int'l & Comp. L. 205 (2002); Malvina Halberstam, *The Rationale for Excluding Incriminating Statements: U.S. Law Compared to Ancient Jewish Law,* in *Jewish Law and Current Legal Problems*, supra, at 177; George Horowitz, *The Privilege Against Self-Incrimination - How Did It Originate*?, 31 Temp. L.Q. 121, 125