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## **Rethinking Self-Incrimination, Voluntariness, and Coercion, Through a Perspective of Jewish Law and Legal Theory**

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# RETHINKING SELF-INCRIMINATION, VOLUNTARINESS, AND COERCION, THROUGH A PERSPECTIVE OF JEWISH LAW AND LEGAL THEORY

SAMUEL J. LEVINE\*

## Introduction

This Essay briefly explores the relevance of Jewish law and legal theory in an analysis of the American law of criminal confessions.<sup>1</sup> Specifically, through an examination of the substance and possible rationale of the rule against self-incrimination in Jewish law, the Essay considers the concepts of voluntariness and coercion in

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An earlier version of this Essay was presented as a public lecture at Wayne State University Law School on October 26, 2010, at the invitation of Ruby Robinson, Paul Dubinsky, and the Jewish Law Students Association. I thank Ruby and Paul for organizing my visit, and I thank Steve Winter and the faculty, administration, and students at Wayne State for their hospitality and helpful conversations. I also thank Judge Gerald Rosen, Chief Judge of United States District Court for the Eastern District of Michigan and Adjunct Professor of Law at Wayne State, for introducing me to his class and attending the lecture. Finally, I thank Jason Eggert and Heather Amico for inviting me to publish this Essay in the *Journal of Law in Society*.

<sup>1</sup> I have explored some of these issues in previous articles. See, e.g., Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, With Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 LOY. L.A. INTL. & COMP. L. REV. 257 (2006) [hereinafter, Levine, *An Introduction to Self-Incrimination in Jewish Law*]; Samuel J. Levine, *Applying Jewish Legal Theory in the Context of American Law and Legal Scholarship: A Methodological Analysis*, 40 SETON HALL L. REV. 933 (2010) [hereinafter Levine, *Applying Jewish Legal Theory*]; Samuel J. Levine, Miranda, Dickerson, and Jewish Legal Theory: The Constitutional Rule in a Comparative Analytical Framework, 69 MD. L. REV. 78 (2009).

the context of the American constitutional right against compelled self-incrimination.<sup>2</sup>

Part I of the Essay provides a survey of primary and secondary sources in Jewish law that delineate the categorical ban on criminal confessions in the Jewish legal system. This section focuses on the work of legal philosophers who explained the rule based on

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<sup>2</sup> For references to the Jewish law of self-incrimination in American legal scholarship, see, e.g., Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, in *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* 168 (Nahum Rakover ed., 1984); PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW & LITERATURE* 72 (Univ. of Chicago Press 2000); 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 *TEMPLE L.Q.* 121, 125 (1958); LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 433-441 (1968); Simcha Mandelbaum, *The Privilege Against Self-Incrimination in Anglo-American and Jewish Law*, 5 *AM. J. COMP. L.* 115, 116-118 (1956); Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 *N.Y.U. L. REV.* 955 (1988); Bernard Susser, *Worthless Confessions: The Torah Approach*, 130 *NEW L.J.* 1056 (1980); Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game Theoretic Analysis of the Fifth Amendment Privilege*, 114 *HARV. L. REV.* 431, 452 n.70 (2000); Michelle M. Sharoni, *A Journey of Two Countries: A Comparative Study of the Death Penalty in Israel and South Africa*, 24 *HASTINGS INT'L & COMP. L. REV.* 257, 263 (2001); Erica Smith-Klocek, Note, *A Halachic Perspective on the Parent-Child Privilege*, 39 *CATH. LAW.* 105, 109 (1999); Gregory Thomas Stremers, *The Self-Incrimination Clause and the Threat of Foreign Prosecution in Bankruptcy Proceedings: A Comment on Moses v. Allard*, 70 *U. DET. MERCY L. REV.* 847, 854-55 (1993); Aaron M. Schreiber, *The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Criminal Law, Jewish Law and the United States Supreme Court*, 11 *PACE L. REV.* 535, 550 (1991).

psychological insights identifying forms of internal compulsion that may lead to false admissions of guilt. Building on this survey, Part II looks at two United States Supreme Court cases, *Miranda v. Arizona*<sup>3</sup> and *Garrity v. New Jersey*,<sup>4</sup> that referenced Jewish law in addressing issues of voluntariness in the American law of self-incrimination.<sup>5</sup> Comparing and contrasting the methodologies used in the two majority opinions, this part develops a conceptual framework for the application of Jewish law and legal theory to American law. Through this framework, part II finds that the methodology in *Garrity* effectively relies on psychological insights from Jewish legal theory to add depth to the Court's understanding and interpretation of American law.

Part III takes the analysis one step further, suggesting that the methodology in *Garrity* offered a potential model for courts to further develop the doctrine of voluntariness in criminal confessions. This model would have allowed courts to expand the contours of coercion, taking into account a broader understanding of the effect of internal psychological coercion on the voluntariness of confessions. Instead, this part argues, the Supreme Court missed the opportunity to develop such a doctrine, when presented with the 1986 case, *Colorado v. Connelly*.<sup>6</sup> Finally, the Essay concludes that, in light of recent studies documenting the troubling prevalence of false confessions that are not the result of physical coercion, American courts should rethink the issue of voluntariness in the context of self-incrimination, to adopt a

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<sup>3</sup> 384 U.S. 436 (1966).

<sup>4</sup> 385 U.S. 493 (1967).

<sup>5</sup> For other cases citing Jewish law in the context of discussions of self-incrimination, *see, e.g.*, *In re Agosto*, 553 F. Supp. 1298, 1300 (D. Nev. 1983); *Moses v. Allard*, 779 F. Supp. 857, 870 (E.D. Mich. 1991); *People v. Brown*, 86 Misc. 2d 339, 487 n.5 (Nassau County Ct. 1975); *Roberts v. Madigan*, 702 F. Supp. 1505, 1517 n.20 (D. Colo. 1989); *State v. McCloskey*, 446 A.2d 1201, 1208 n.4 (N.J. 1982); *U.S. v. Gecas*, 120 F.3d 1419, 1425 (11th Cir. 1997); *U.S. v. Huss*, 482 F.2d 38, 51 (2d Cir. 1973).

<sup>6</sup> 479 U.S. 157 (1986).

more expansive understanding of ways in which both external and internal forms of psychological coercion impact criminal confessions.

### I. Self-Incrimination in Jewish Law: A Brief Survey<sup>7</sup>

In tracing the development of a doctrine in the Jewish legal system, it is usually helpful to begin with the oldest, most basic, and most authoritative source of law--the written Torah.<sup>8</sup> However, while the Torah enumerates laws that relate to criminal and civil procedure, including various laws of testimonial evidence,<sup>9</sup> the text of the Torah does not expressly address the issue of self-incrimination.

Instead, the first sources of Jewish law that discuss the rules of confessions are found in the Talmud, the authoritative collection of centuries of post-Biblical legal deliberations, enactments, and rulings.<sup>10</sup> The Talmud draws a distinction between a criminal confession and a monetary concession: in the case of a commercial dispute, a concession to an obligation is admissible as demonstrable

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<sup>7</sup> This section borrows, in part, from Levine, *An Introduction to Self-Incrimination in Jewish Law*, *supra* note 1. For more extensive substantive discussions of the rule in Jewish law, *see, e.g.*, AARON KIRSCHENBAUM, *SELF-INCRIMINATION IN JEWISH LAW* (Burning Bush Press 1970); Arnold Enker, *Self-Incrimination in Jewish Law--A Review Essay*, 4 DINE ISRAEL cvii (1973) (reviewing KIRSCHENBAUM, *supra*).

<sup>8</sup> For discussions of the sources of Jewish law, and the central function of the written Torah, *see, e.g.*, Irving A. Breitowitz, *Sources of Jewish Law*, in BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY 307-13 (1993); Menachem Elon, *The Basic Norm and the Sources of Jewish Law*, in JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 228-39 (Bernard Auerbach & Melvin J. Sykes trans., 1994); Aaron Kirschenbaum, *A Historical Sketch of the Sources of Jewish Law*, in EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW: FORMALISM AND FLEXIBILITY IN JEWISH CIVIL LAW 289-304 (1991); Samuel J. Levine, *An Introduction to Legislation in Jewish Law, With References to the American Legal System*, 29 SETON HALL L. REV. 916 (1999); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997).

<sup>9</sup> *See, e.g.*, Deuteronomy 17:6; 19:15-19.

<sup>10</sup> For a helpful introduction to the Talmud, *see* ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* (Chaya Galai trans., 1976).

evidence of the party's civil liability. Indeed, while the burden of proof in Jewish law typically calls for the credible testimony of two witnesses, and as a procedural matter parties did not offer testimony, the Talmud declares that the probative value of a civil admission is the equivalent of "one hundred witnesses."<sup>11</sup> This rule is not particularly surprising when viewed through the prism of a similar dynamic in American law: in a civil dispute, if one of the parties offers a reliable concession to the other side's claim, the dispute will presumably be resolved in accordance with the concession, with little if any need for further evidence or deliberation.

However, Jewish law prescribes a diametrically opposing rule for criminal confessions. The Talmud states categorically that a criminal defendant's confession is not admissible as evidence against the defendant.<sup>12</sup> In this regard, Jewish law differs starkly from the American legal system, in which a lawfully obtained criminal confession is among the most effective pieces of evidence a prosecutor can offer against a criminal defendant. In fact, as a practical matter, if an American jury finds a confession reliable, it might be said—to paraphrase the Talmud's characterization of a civil admission in Jewish law—that in an American court, a criminal defendant's confession is as probative as the testimony of 100 witnesses.<sup>13</sup>

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<sup>11</sup> See, e.g., TALMUD BAVLI, *Bava Metzia* 3b.

<sup>12</sup> See, e.g., TALMUD BAVLI, *Sanhedrin* 9b. See also HERSHEL SCHACHTER, ERETZ HATZEVI 237-249 (1992).

<sup>13</sup> As Justice Brennan put it:

Our distrust for reliance on confessions is due, in part, to their decisive impact upon the adversarial process. Triers of fact accord confessions such heavy weight in their determinations that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained." . . . No other class of evidence is so profoundly prejudicial. . . . "Thus the decision to confess before trial amounts in effect to a waiver of the right to require the state at trial to meet its heavy burden of proof."

Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (citations omitted).

Indeed, scholars have described

The Talmud provides a brief explanation for the outright ban on criminal confessions, premised on the principle that, under Jewish law, relatives to the parties in a case are disqualified from offering testimony.<sup>14</sup> As an extension of that principle, the Talmud posits that because a person is one's own (closest) relative, a criminal defendant is likewise disqualified from testifying.<sup>15</sup> The Talmud then concludes with a statement that roughly translates to "a person may not incriminate one's self."<sup>16</sup>

While the Talmudic rule against the admissibility of criminal confessions is both clear on its face and categorical, the basis for the rule is less apparent. Notwithstanding the Talmud's technical derivation of the rule, founded upon principles of witness disqualification, later Jewish legal authorities delved further into the matter, in an attempt to uncover underlying sources and rationales behind the Talmud's outright ban on criminal confession.

One of the most important of these discussions is the analysis provided by the medieval Jewish legal authority and philosopher Moses Maimonides.<sup>17</sup> In the *Mishne Torah*, his landmark restatement of Jewish law, Maimonides declares unequivocally that the ban on

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a growing body of research demonstrating the power of confession evidence to substantially prejudice a trier of fact's ability to even-handedly evaluate a criminal defendant's culpability. As both experimental and field studies have demonstrated, criminal officials and jurors often place almost blind faith in the evidentiary value of confession evidence--even when, as in all the cases in this study, the confession was not accompanied by any credible corroboration and there was compelling evidence of the defendant's factual innocence.

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 *N.C. L. Rev.* 891, 996 (2004).

<sup>14</sup> See TALMUD BAVLI, *Sanhedrin* 9b.

<sup>15</sup> See *id.*

<sup>16</sup> *Id.*

<sup>17</sup> For a discussion of Maimonides and the *Mishneh Torah*, see ISADORE TWERSKY, *INTRODUCTION TO THE CODE OF MAIMONIDES (MISHNEH TORAH)* (22 Yale Judaica Series, Leon Nemoy et al. eds., 1980).

criminal confessions is grounded in a "scriptural decree."<sup>18</sup> Nevertheless, Maimonides offers a possible rationale for the rule, raising the concern that a criminal defendant might confess because of having "confused mind" in the matter.<sup>19</sup> As Maimonides further explains, a defendant may suffer from an extreme form of depression that leads to suicidal tendencies, expressed through a false confession to a capital crime.<sup>20</sup>

Centuries later, in a commentary on the *Mishne Torah*, Rabbi David ben Zimra [Radbaz] focused on the distinction between criminal confessions and monetary admissions.<sup>21</sup> Radbaz noted that Jewish law recognizes individuals' authority over their own possessions, including the autonomy to give their property to others. Accordingly, he reasoned, a civil defendant has the autonomy to admit to and incur a monetary obligation. In contrast, because the human body is considered sacred, it remains outside the province of the individual's autonomy. Hence, Jewish law includes prohibitions on suicide or damaging one's own body, likewise precluding a criminal confession that would bring about capital or corporal punishment.<sup>22</sup>

Rabbi Norman Lamm offered a modern gloss on these principles in a 1956 article comparing the psychological insights provided by Maimonides and Radbaz to those propounded by Freud and Menninger in the twentieth century.<sup>23</sup> As Rabbi Lamm put it, Maimonides "anticipated by some seven hundred years, albeit in rudimentary fashion, a major achievement of psychoanalysis[.]"

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<sup>18</sup> MAIMONIDES, *MISHNE TORAH*, Laws of Sanhedrin 18:6. *See also* MAIMONIDES, *MISHNE TORAH*, Laws of *Eduth* 12:2.

<sup>19</sup> MAIMONIDES, *MISHNE TORAH*, Laws of Sanhedrin 18:6.

<sup>20</sup> *Id.*

<sup>21</sup> *See supra* text accompanying notes 11-12.

<sup>22</sup> *See* RADBAZ, *Commentary*, in MAIMONIDES, *MISHNE TORAH*, Laws of Sanhedrin 18:6.

<sup>23</sup> Norman Lamm, *The Fifth Amendment and Its Equivalent in the Halakhah*, 5 *Judaism* 53, 56 (1956).



Freud's theory of the "Death Wish" or "Death Instinct,"<sup>24</sup> while Radbaz seems to evoke Menninger's observation that psychological forces at times result in "a variety of forms of partial or chronic self-destruction," including "self-injury and self-mutilation."<sup>25</sup> Whichever theory is applied, Rabbi Lamm emphasizes that: "[w]hile certainly not all, or even most criminal confessions are directly attributable, in whole or in part, to the Death Instinct, the Hala[c]ha is sufficiently concerned with the minority of instances, where such is the case, to disqualify all criminal confessions and to discard confession as a legal instrument."<sup>26</sup>

## II. Applying Jewish Law to the American Law of Criminal Confessions: A Conceptual Framework

Building on the explanations for the rule against criminal confessions in Jewish law, this Essay now considers possible applications of the rule in American law, by drawing a contrast between two United States Supreme Court cases: *Miranda v. Arizona*<sup>27</sup> and *Garrity v. New Jersey*.<sup>28</sup> Notably, although the majority opinions in both of these cases cited Rabbi Lamm's article, the opinions implement and illustrate different methodological approaches to applying Jewish legal theory to issues in American law.<sup>29</sup>

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<sup>24</sup> *Id.* at 56.

<sup>25</sup> *Id.* at 57.

<sup>26</sup> *Id.* at 59. For other discussions of the views of Maimonides and Radbaz in contemporary scholarship, see, e.g., KIRSCHENBAUM, *supra* note 7, at 62-68, 72-77; Rosenberg & Rosenberg, *supra* note 2, at 1032-41; HERSHEL SCHACHTER, MIPNINEI HARAV 225 (2001).

<sup>27</sup> 384 U.S. 436 (1966).

<sup>28</sup> 385 U.S. 493 (1967).

<sup>29</sup> For a more complete elaboration of this section, see Levine, *Applying Jewish Legal Theory*, *supra* note 1.

In *Miranda*, Chief Justice Earl Warren included a reference to Jewish law at the start of section II of his landmark majority opinion. In support of the assertion that the “roots” of the privilege against self-incrimination “go back into ancient times[,]”<sup>30</sup> the opinion states, in a footnote, that “[t]hirteenth century commentators found an analogue to the privilege grounded in the Bible.”<sup>31</sup> Specifically, the footnote quotes Maimonides’ conclusion that: “[t]o sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.”<sup>32</sup> The footnote then concludes with a citation to Rabbi Lamm’s 1956 article.<sup>33</sup>

Although the footnote relies on important sources of Jewish law, there remain questions as to the relevance of these sources in the context of the Court’s opinion. In *Miranda*, the Court detailed the prevalence of police interrogation techniques that violated the Constitution. The Court found that these techniques included both blatant and more subtle forms of psychological coercion, rendering the suspects’ responses insufficiently voluntary, in violation of the Fifth Amendment.<sup>34</sup>

Significantly, however, the Court responded to this problem by instituting *Miranda* warnings, a remedy designed to insure the voluntariness of criminal confessions.<sup>35</sup> Under this rule, once the suspect’s statement has been established as voluntary, the confession remains admissible as evidence and, by all accounts, constitutes one of the most powerful pieces of evidence available to a prosecutor.<sup>36</sup> In

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<sup>30</sup> *Miranda*, 384 U.S. at 458.

<sup>31</sup> *Id.* at 458 n.27.

<sup>32</sup> *Id.* (quoting Laws Concerning the Sanhedrin and the Penalties Within Their Jurisdiction, in *The Code of Maimonides (Mishneh Torah): Book Fourteen: The Book of Judges treatise 1, ch. 18, P 6, at 53* (3 Yale Judaica Series, Julian Obermann et al. eds., Abraham M. Hershman trans., 1977) (1949)).

<sup>33</sup> *Id.* (citing Lamm, *supra* note 23).

<sup>34</sup> *Miranda*, 384 U.S. at 448-458.

<sup>35</sup> *Id.* at 467-79.

<sup>36</sup> *See supra* note 13.

light of the stark contrast to the rule in Jewish law, which, as a religious matter, bans criminal confessions entirely the Court's references to Maimonides and Rabbi Lamm seem somewhat anomalous.

To be sure, the Court should not simply and simplistically transplant a rule from another system into American law. Nor should the Court limit its comparative jurisprudence to legal systems that are nearly identical, in theory, or in substance, to American law. Indeed, comparative law studies often benefit from a careful analysis of both the differences and similarities between legal systems.

Nevertheless, the Court's methodology in *Miranda* seems to undermine the value of any reliance on the reasoning of Maimonides and Rabbi Lamm. Rather than emphasizing these scholars' philosophical and psychological insights, the Court cited Maimonides' theological depiction of the categorical ban on criminal confessions as based in a "divine decree."<sup>37</sup> The Court's methodology leaves open questions regarding the relevance of this principle to the Court's conclusion that, in the American legal system, voluntary criminal confessions are admissible.

In *Garrity v. New Jersey*,<sup>38</sup> a case decided less than a year later, the Court employed a different methodological approach. Like *Miranda*, *Garrity* revolved around a question of whether an interrogation technique violated the constitutional right against self-incrimination.<sup>39</sup> This time, the suspects were police officers who were

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<sup>37</sup> *Miranda*, 384 U.S. at 458 n.27 (quoting Laws Concerning the Sanhedrin and the Penalties Within Their Jurisdiction, in The Code of Maimonides (Mishneh Torah): Book Fourteen: The Book of Judges treatise 1, ch. 18, P 6, at 53 (3 Yale Judaica Series, Julian Obermann et al. eds., Abraham M. Herschman trans., 1977) (1949)).

<sup>38</sup> 385 U.S. 493 (1967).

<sup>39</sup> Although *Garrity* was decided under the Due Process Clause of the Fourteenth Amendment, the Court's voluntariness analysis resembled and relied on the Fifth Amendment analysis in *Miranda*. For a critical analysis of the Court's increasing application of the Due Process Clause in place of the Self-Incrimination Clause to decide the issue of the voluntariness of confessions, see Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465 (2005). See also Lawrence Herman, *The*

told that they had the right to refuse to answer, but that such refusal would subject them to dismissal from their positions.<sup>40</sup> The Court found this line of questions impermissibly coercive, rendering inadmissible any confessions. In his majority opinion, Justice William Douglas emphasized that “[c]oercion that vitiates a confession . . . can be ‘mental as well as physical’”<sup>41</sup> and “[s]ubtle pressures may be as telling as coarse and vulgar ones.”<sup>42</sup> Applied to the facts of the case, the Court concluded: “We think the statements were infected by the coercion inherent in this scheme of questions and cannot be sustained as voluntary under our prior decisions.”<sup>43</sup>

Once again, as in *Miranda*, the opinion in *Garrity* includes a footnote referencing Jewish law on self-incrimination.<sup>44</sup> However, in sharp contrast to the brief and somewhat inapposite depiction of Jewish law in *Miranda*, the footnote in *Garrity* consists of an extensive quotation from Rabbi Lamm’s article, providing a more complete, more relevant, and more effective application of Jewish legal theory.

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*Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497 (1992); Michael J. Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57 (2002).

<sup>40</sup> *Garrity v. New Jersey*, 385 U.S. 493, 494 (1967).

<sup>41</sup> *Id.* (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)).

<sup>42</sup> *Id.* at 496 (citing *Haynes v. Washington*, 373 U.S. 503 (1963); *Leyra v. Denno*, 347 U.S. 566 (1954)).

<sup>43</sup> *Id.* at 497-98. For a critique of the Court’s analysis in *Garrity*, see Steven D. Clymer, *Compelled Statements From Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309 (2001). For an argument that “[t]he promises of *Garrity* . . . were never fully realized for law enforcement officers [,]” see Byron L. Warnken, *The Law Enforcement Officers’ Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452, 475 (1987). For a more recent critique and analysis of *Garrity* and its progeny, see Peter Westen, *Answer Self-Incriminating Questions or Be Fired*, 37 AM. J. CRIM. L. 97 (2010).

<sup>44</sup> *Garrity*, 385 U.S. at 497-98 n.5 (quoting Norman Lamm, *The 5th Amendment and Its Equivalent in Jewish Law*, DECALOGUE J., 1, Jan.-Feb. 1967, at 1).

The footnote opens with Rabbi Lamm's threshold observation distinguishing between the outright ban on criminal confessions in the Jewish legal system and the admissibility of voluntary confessions in American law.<sup>45</sup> Next, the footnote moves to Rabbi Lamm's explanation for this distinction, emphasizing the concern voiced by Maimonides and others for the psychological forces that, at times, compel a suspect to offer a false confession. As a result, Rabbi Lamm explains, Jewish law mandates an outright ban on all criminal confessions.<sup>46</sup> Moreover, the footnote quotes Rabbi Lamm's qualification that, in contrast, because the Constitution's concern is limited to forced confessions, American law need not preclude all criminal confessions from evidence.<sup>47</sup>

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<sup>45</sup> *Id.* at 497 n.5 (quoting Lamm, *supra* note 44, at 10):

It should be pointed out, at the very outset, that the Halakhah does not distinguish between voluntary and forced confessions . . . . And it is here that one of the basic differences between Constitutional and Talmudic Law arises. According to the Constitution, a man cannot be compelled to testify against himself. . . . The Halakhah . . . does not permit self-incriminating testimony. It is inadmissible, even if voluntarily offered. Confession . . . is simply not an instrument of the Law. The issue [in Jewish law], then, is not compulsion, but the whole idea of legal confession.

<sup>46</sup> *Id.* at 497 n.5 (quoting Lamm, *supra* note 44, at 12):

The Halakhah . . . is . . . concerned with protecting the confessant from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts. . . . While certainly not all, or even most criminal confessions are directly attributable, in whole or in part, to the Death Instinct, the Halakhah is sufficiently concerned with the minority of instances, where such is the case, to disqualify all criminal confessions and to discard confession as a legal instrument.

<sup>47</sup> *Id.* at 497 n.5 (quoting Lamm, *supra* note 44, at 12):

[T]he Constitutional ruling on self-incrimination concerns only forced confessions, and its restricted character is a result of its historical evolution as a civilized protest against the use of torture in extorting confessions. The Halakhic ruling, however, is much broader and discards confessions in toto, and this because of its psychological insight and its concern for saving man from his own

Whatever the merits of the holding in *Garrity*,<sup>48</sup> the Court's reliance on Jewish law is both clear and effective. Unlike the sweeping scope and ambition of the opinion in *Miranda*, the Court's ruling in *Garrity* did not address broad questions regarding the origins and contours of the constitutional protection against self-incrimination. Instead, the *Garrity* opinion was limited to the specific issue of the manner of coercion that renders a confession inadmissible. In this context, the psychological insights from Jewish law provide a valuable theoretical foundation for the recognition that coercion takes various forms—including, as the Court put it, not only “coarse and vulgar ones” but “subtle pressures” as well.<sup>49</sup> More generally, comparing favorably with the substantive and largely mechanical approach in *Miranda*, the conceptual approach in *Garrity* presents a helpful framework for the application of Jewish law to issues in American law.<sup>50</sup> In particular, the references to Jewish legal theory in *Garrity*

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destructive inclinations.

<sup>48</sup> See *supra* note 43.

<sup>49</sup> *Id.* at 496.

<sup>50</sup> Although other American cases have also cited Jewish law in the context of criminal confessions, see *supra* note 5, the 1991 case of *Moses v. Allard*, decided by Chief Judge Gerald Rosen of the United States District Court for the Eastern District of Michigan, likely includes the most extensive discussion of Jewish law on the issue of self-incrimination. See *Moses v. Allard*, 779 F. Supp. 857, 870 (E.D. Mich. 1991). Notably, similar to the conceptual framework applied in *Garrity*, Judge Rosen's approach incorporates a close look at the substance of the rule in Jewish law and its conceptual underpinnings, as well as the historical record.

*Allard* involved the question of whether the Fifth Amendment protects a witness against being compelled to testify in an American court in a civil case, when the compelled testimony could be used in a foreign criminal prosecution against the witness. See *id.* Judge Rosen's opinion describes the case as:

one of those relatively rare instances in judicial decision-making in which precedent provides no compelling answers in one direction or the other, but rather requires inquiry into, and analysis of, the philosophy and policy that underlies and supports one of this nation's most widely accepted and fundamental constitutional rights. Indeed, because there do not appear to be any definitive precedential beacon lights to clearly illuminate a decisional path, it

helped the Court reframe and reconceptualize the issue of coercion in the American law of criminal confessions, to arrive at a more nuanced, more effective, and more satisfying understanding, interpretation, and determination of the constitutional requirement of voluntariness.

### III. The Framework Applied: The Missed Opportunity of *Colorado v. Connelly*<sup>51</sup>

The conceptual framework applied in *Garrity*, which added depth and meaning to the United States Supreme Court's understanding of coercion, carries the potential for a wide-ranging rethinking of the concept of voluntariness in criminal confessions. The Court's analysis in *Garrity* acknowledged that the Constitution protects against both obvious and more subtle forms of pressure, such as the threat of dismissal from employment. Taking this principle a

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seems to the Court that the inquiry must begin in the first instance with the history and underlying tenets of the privilege.

*Id.*

The opinion then offers a historical review of the privilege, beginning with a careful description of Jewish law in this area, stating that the rule against self-incrimination "was an absolute and could not be waived or relinquished." *Id.* Next, the opinion observes that "the theological and jurisprudential underpinnings for this rule are somewhat unclear." *Id.* Alluding to the explanations of Maimonides, Radbaz, and Rabbi Lamm, Judge Rosen notes that:

It may have been that a self-accusatory statement was considered untrustworthy or that a person who would incriminate himself was not considered of sound mind, and, thus, could not form the *intent* to incriminate himself. Or, it may have been that self-incrimination in a criminal matter was likened to attempted suicide, a practice prohibited under Jewish law on the theory that the individual's body belongs to God and not to the individual.

*Id.*

Finally, the opinion emphasizes that "some commentators contend that the nexus between the ancient Jewish law and the modern privilege is tenuous at best" and that "[t]he connection to medieval English law . . . is less than clear." *Id.*

<sup>51</sup> 479 U.S. 157 (1986). I thank Steve Winter for suggesting the conceptual relevance of Jewish legal theory to the issues of voluntariness and coercion in *Connelly*.

step further in other cases, courts might apply the psychological insights from Rabbi Lamm's article to recognize forms of internal and psychological coercion that should likewise render inadmissible any resulting statements. However, when these issues were brought before the Supreme Court in the 1986 case of *Colorado v. Connelly*,<sup>52</sup> the Court's holding largely ignored the reality and significance of internal psychological coercion, resulting in a missed opportunity to advance and develop the Court's jurisprudence in this area.<sup>53</sup>

In *Connelly*, the Court considered the admissibility of the confession of a criminal suspect who was later diagnosed as having suffered from chronic schizophrenia and having been in "a psychotic state" at the time of his confession.<sup>54</sup> Among other findings, a psychiatrist testified that the suspect had been hearing the "voice of God" and was "[r]eluctantly following the command of voices" when he decided to confess to the crimes.<sup>55</sup> The psychiatrist concluded that the suspect was suffering from "command hallucination" that affected his "volitional abilities; that is, his ability to make free and rational choices," and that his confession was the result of "psychosis."<sup>56</sup>

Based on this testimony, the Colorado trial court suppressed the suspect's confessions on the grounds that they were "involuntary" and not the product of the suspect's "free will."<sup>57</sup> The Colorado Supreme Court affirmed, likewise holding that a statement is admissible only if it is "the product of a rational intellect and a free will."<sup>58</sup> The court emphasized that "the absence of police coercion or

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<sup>52</sup> *Id.*

<sup>53</sup> For a discussion that acknowledges the inconsistency between *Garritty* and *Connelly*, while favoring the approach in *Connelly*, see Clymer, *supra* note 43, at 1342-47.

<sup>54</sup> *Connelly*, 479 U.S. at 161.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 162.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (quoting *People v. Connelly*, 702 P.2d 722, 728 (Colo. 1985)).



duress does not foreclose a finding of involuntariness. One's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure."<sup>59</sup> Although the Colorado Supreme Court did not cite either *Garrity* or Jewish legal theory, the court's approach was consistent with Rabbi Lamm's explanation of Jewish law. The court acknowledged that, notwithstanding the absence of external coercion, a criminal confession that is the product of internal psychological coercion should be deemed involuntary and inadmissible as evidence.<sup>60</sup> Thus, when the case was brought before the United States Supreme Court, it presented an opportunity for the Court to adopt a similar approach, precluding the use of criminal confessions that are the result of internal psychological coercion.

Instead, the United States Supreme Court reversed, holding that the constitutional protections against involuntary confessions are triggered only in instances of "police conduct causally related to the confessions..."<sup>61</sup> To be sure, the Court conceded that "as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus."<sup>62</sup> However, the Court insisted that "this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'"<sup>63</sup> Thus, rather than applying psychological insights that allow for a more nuanced understanding of the importance of protecting criminal defendants from their own involuntary confessions, the Court simply concluded that, in the absence of government coercion, the Constitution does not protect against involuntary confessions.

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<sup>59</sup> *Id.* (quoting *People v. Connelly*, 702 P.2d 722, 728 (Colo. 1985)).

<sup>60</sup> *Id.* at 162-63.

<sup>61</sup> *Id.* at 164.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

The majority opinion in *Connelly* prompted a number of concurring and dissenting opinions, including a strong dissent written by Justice Brennan and joined by Justice Marshall.<sup>64</sup> Justice Brennan's dissent takes issue with both the majority's analysis of earlier cases and, more importantly, rejects the premise that the Constitution guards against involuntary confessions only when they are the result of police coercion:

The absence of police wrongdoing should not, by itself, determine the voluntariness of a confession by a mentally ill person. The requirement that a confession be voluntary reflects a recognition of the importance of free will and of reliability in determining the admissibility of a confession, and thus demands an inquiry into the totality of the circumstances surrounding the confession.<sup>65</sup>

As Justice Brennan powerfully argued:

Today's decision restricts the application of the term "involuntary" to those confessions obtained by police coercion. Confessions by mentally ill individuals or by persons coerced by parties other than police

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<sup>64</sup> See *id.* at 174 (Brennan, J. dissenting). In addition, *Connelly* quickly prompted extensive scholarly criticism. See, e.g., Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59 (1989); George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231 (1988); Noel Moran, *Confessions Compelled by Mental Illness: What's an Insane Person To Do?* *Colorado v. Connelly*, 107 S. Ct. 515 (1986), 56 U. CIN. L. REV. 1049 (1988); Scott A. McCreight, Comment, *Colorado v. Connelly: Due Process Challenges to Confessions and Evidentiary Reliability Interests*, 73 IOWA L. REV. 207 (1987). More recently, one scholar declared that, in *Connelly* the Court "turn[ed] 200 years of confession law on its head." Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAP. L. REV. 623, 627 (2007). See also Claudio Salas, Note, *The Case for Excluding the Criminal Confessions of the Mentally Ill*, 16 YALE J.L. & HUMAN. 243 (2004).

<sup>65</sup> *Connelly*, 479 U.S. at 176.

officers are now considered “voluntary.” The Court's failure to recognize all forms of involuntariness or coercion as antithetical to due process reflects a refusal to acknowledge free will as a value of constitutional consequence. But due process derives much of its meaning from a conception of fundamental fairness that emphasizes the right to make vital choices voluntarily. . . . This right requires vigilant protection if we are to safeguard the values of private conscience and human dignity.<sup>66</sup>

Like the decisions of the Colorado State Courts, Justice Brennan's opinion calls for a more thoughtful appreciation of the doctrine of voluntariness. Justice Brennan emphasized the need “to recognize all forms of involuntariness or coercion”<sup>67</sup> as inconsistent with constitutional protections against self-incrimination. As Rabbi Lamm observed 30 years before *Connelly*, and as Maimonides explained more than 700 years earlier, internal forms of psychological coercion can be as real and compelling as external coercion. As Justice Brennan declared, admitting confessions that are the result of internal psychological forces violates the values of due process and fundamental fairness. The majority's failure to adopt a similar approach represents a missed opportunity to develop the doctrine underlying an important constitutional protection. More generally, the Court missed an opportunity to apply a conceptual framework from Jewish law in a way that strengthens and adds meaning to an area of the American legal system.

### Conclusion

In recent years, scholars have documented and explored the ongoing problem of false confessions in the American criminal justice system.<sup>68</sup> In the words of Brandon Garrett, the author of an important

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See, e.g., Drizin & Leo, *supra* note 13; Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051(2010); Saul M. Kassin, et. al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3

recent study on the phenomenon of false confessions: “There is a new awareness among scholars, legislators, courts, prosecutors, police departments, and the public that innocent people falsely confess . . . .”

<sup>69</sup> Yet, as Garrett further observes: “False confessions present a puzzle: How could innocent people convincingly confess to crimes they knew nothing about?”<sup>70</sup> Or, as Peter Brooks has put it: “How can someone make a false confession?”<sup>71</sup>

Various responses have been offered to these questions. Significantly, a number of these responses have incorporated insights into human psychology similar to those found in Jewish legal sources dating back to Maimonides. For example, Garrett notes the forms of psychological coercion that are applied in police interrogations: “Scholars increasingly study the psychological techniques that can cause people to falsely confess and have documented how such techniques were used in instances of known false confessions . . . .”<sup>72</sup>

Brooks goes a step further, drawing expressly on Jewish law.<sup>73</sup> Relying in part on the insights that Maimonides and Rabbi Lamm derive from the Talmudic ban on self-incrimination, Brooks provides a complex and nuanced understanding of psychological factors that may contribute to the decision to confess falsely:

Precisely because the false referentiality of confession may be secondary to the need to confess, a need produced by the coercion of interrogation or the subtler coercion of the need to stage a scene of exposure as the only propitiation of accusation, including self-accusation for being in a scene of exposure. Or, as Talmudic law has recognized for millennia, confession may be the product of the death-drive, the production of

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(2010).

<sup>69</sup> Garrett, *supra* note 68, at 1052-53.

<sup>70</sup> *Id.* at 1052.

<sup>71</sup> BROOKS, *supra* note 2, at 21.

<sup>72</sup> Garrett, *supra* note 68, at 1053.

<sup>73</sup> BROOKS, *supra* note 2, at 21.

incriminating acts to assure punishment or even self-annihilation, and hence inherently suspect because it is in contradiction to the basic human instinct of self-preservation. Or, as Freud would have it, unconscious guilt may produce crime in order to assure punishment as the only satisfaction of the guilt.<sup>74</sup>

The United States Supreme Court has likewise recognized the potential relevance of Jewish legal theory in considering the American law of self-incrimination, referencing Jewish law in both *Miranda v. Arizona*<sup>75</sup> and *Garrity v. New Jersey*.<sup>76</sup> In fact, in *Garrity*, the Court relied directly on insights from Jewish legal sources to support its careful analysis of forms of subtle psychological coercion in the American legal system.<sup>77</sup> However, when faced with the opportunity to develop a more nuanced jurisprudence of voluntariness and coercion in criminal confessions, the Court failed to acknowledge the extent to which both external and internal forces might impact an admission of guilt. In light of the ongoing problem of false confessions, the Court should rethink the current law of self-incrimination, including the decision in *Colorado v. Connelly*.<sup>78</sup> To

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<sup>74</sup> *Id.* Cf. Salas, *supra* note 64, at 266 n. 136-137 (quoting RAYMOND DEPAULO, JR., & KEITH RUSSEL ABLOW, *HOW TO COPE WITH DEPRESSION* 16 (1989) ("A depressed person puts herself down by making comments such as 'I'm such a failure; I wonder how you stay with me.' . . . A depressed person may also accept blame for problems that do not exist or are clearly not his or her fault.")).

<sup>75</sup> 384 U.S. 436, 458 n.27 (1966).

<sup>76</sup> 385 U.S. 493, 497-98 n.5 (1967).

<sup>77</sup> *Id.* at 497-98 & n.5

<sup>78</sup> 479 U.S. 157 (1986). Cf. Godsey, *supra* note 64:

It may take years for social scientists and psychiatrists to fully understand why and how often false confessions occur. For now, however, we know that false confessions are a problem, we know that many innocent people have been convicted as a result of false confessions, and we know that, because of *Colorado v. Connelly*, courts have no constitutional grounds on which to deal with this problem.

that end, it may be appropriate for the Court to look once again to the insights provided by Jewish law and legal theory.

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*Id.* at 629.