Topics in Comparison of American and Talmudic Law: Substantive Differences

PURPOSE AND SCOPE:

This comparative course is designed to:

1. Introduce students to the concepts, methods and contemporary issues in Comparative Law.
2. Focus on specific substantive differences between American and Talmudic law, and the ethical and practical considerations underlying them.

The current trend toward globalization has renewed interest in comparative law. The era of legal isolationism is coming to an end, and there has been an increased focus on the similarities between legal systems in forging global discourse across jurisdictions. By comparing the legal topics within the Jewish legal system with the American one, students will come to understand the societal and fairness concerns that go into fashioning any rule of law, and to better analyze – on an ideological plane – what the law should be.

This course is a follow-up to the foundational course Comparison of American and Talmudic Law, although the foundational course is not a prerequisite. In the foundational course, we looked at the foundational concerns with any legal system: what is the goal of a legal system and what should it be, what is the role of the central text (the Constitution or the Torah) and who has authority to interpret it, and whether there is room for pluralism within the American or Jewish legal systems.

This course will focus only on substantive issues – including abortion, capital punishment, and duress - and analyze the difference between the American legal approach and the halachic approach. The focus of the independent readings will be on primary sources including several cases and Talmudic excerpts. Through understanding the differences between the American and Jewish legal systems, students will develop a critical understanding – and concomitantly, an appreciation – for the nuances of the law as well as the legal structure as a whole.

REQUIREMENTS:

Students are expected to complete the assigned readings for each class and be prepared to engage in discussion about them. To facilitate the latter, each student should type up a brief (i.e. one or two paragraphs) response to the week’s readings – thoughts, ideas, points of interest, critiques, questions – to be circulated via email before each class to the instructor and other class participants. This is meant to be an informal forum and an opportunity freely to explore and express the ideas raised by the readings, so students will not be graded on the content of these responses. However, the prompt submission of these responses (i.e. prior to every meeting = at least an hour before) is considered to be an important part of participation in the class and will be graded as such.
There will be one final test at the end of the semester, applying the ideas that we discuss in class. Students will be given 4-6 complex fact patterns that they will need to analyze under American law and under Jewish law, and discuss the different ethical considerations that arise under each legal system as applied to these facts.

There will also be one final paper, approximately 10 pages, due at the end of the semester, to allow the student to better explore an additional aspect of comparative law in depth. Students will be able to choose from a list of suggested topics, or to come up with one on their own, that discusses a substantive topic of law in depth, and compares the treatment of the legal issue in both American and Talmudic law. Students will also have to present on their topic towards the end of the semester. Choice of topic should be determined in consultation with the instructor.

SYLLABUS:


   What types of evidence are allowed in Talmudic law? What types of evidence are allowed for the jury to hear in American law, and what types of evidence are excluded? Should a judge be activist in American law or Talmudic law? What is the justification for the jury system in American law, and why does Talmudic law reject such a system? How does the faith in the decision-maker affect the rules of evidence, and the role of the lawyer?

2. **Week 3: Ownership and the Right to Privacy:**

   When is something ownerless according to Jewish Law and American Law? How is something acquired according to Jewish law and American law? What is the principle underlying this distinction?

   Bava Meziah 21b-23a; Tosafot, Bava Meziah 26a s.v. v'nezel
   Moses Maimonides, Mishnah Torah, Theft and Abandonment 14:3.
   Shulhan Arukh, Hoshen Mishpat 260:9-10 and 262:3,7
   *Pierson v. Post*
   *Edmonds v. Ronella*, 73 Misc.2d 598, 342 N.Y.S.2d 408 (1973)
   *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (1959)
3. Civil Rights Unit
   a. Week Three: Background to Civil Rights

   Is the concept of assigning individual rights unique to American law or is there an equivalent in Jewish law? How have the American courts interpreted or extended these rights? Does Jewish law afford the same types of rights as American law? Does the development of civil rights jurisprudence in American law mirror the development in Jewish law?

   The Bill of Rights
   Barron v Baltimore, 32 U.S. 243, 250
   Duncan v. Louisiana, 391 U.S. 145 (1968),
   Bd. of Education v Earls, 536 U.S. 822 (2002),
   University of California v Bakke, 438 U.S. 265 (1978)
   Moshe A. Bleich & Daniel Pollack, Search and Seizure in Schools: A Comparison of Historical Jewish Legal Sources and Contemporary United States Law. 7 Ind. Int'l & Comp. L.Rev. 379 (1997)

   b. Week Four: Abortion

   How does Jewish law view abortion? How does American law view abortion? Are the issues the same in both legal systems, or are the issues different?

   Exodus 21:22-23; Rashi there
   Mishna Oholos 7:6
   Talmud Sanhedrin 72B
   Maimonides, Mishneh Torah, Laws of Murder 1:9
   Shulchan Aruch, Choshen Mishpat, 423:1
   Igros Moshe, Choshen Mishpat II: 69B.
   Ashkenazi, Rabbi Yehuda, Be'er Hetiv, Choshen Mishpat 425:2
   Roe v. Wade, 410 U.S. 113

   c. Week Five: The Right to Die

   Does one have the right to die? Should one have the right to die? How do American law and Jewish law view suicide? Is there a difference in conception between completed suicide and
attempted suicide? What about assisted suicide? What is the closest legal parallel to assisted suicide that the American courts rely on? What is the closest legal parallel to assisted suicide that the Jewish courts rely on?

I Samuel 31:4
II Samuel 17:23
Avoda Zara 17b-18a
Maimonides, Rotzeah, 2.2-3
Semachot, chapter 2 - faqs.org
Igros Moshe, Choshen Mishpat II, Volume 7, siman 73-4, p.311-315.

Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990),

d. Week Six: Homosexuality

How does Jewish law view homosexuality? How does American law view homosexuality? Is the dichotomy in American Law religiously grounded or are there other motivations?

Leviticus 18:3,18:22, 20:13
Genesis 9:22 and Rashi there
Sotah 13b
Kiddushin 82a
Sifra Aharei Mot 8:8–9
Maimonides, Mishneh Torah, Issurei Bi’ah 21:8–9, 22:2
Rav Moshe Feinstein, in Iggrot Moshe, Orach Chaim, Part 4, Responsa 115
Hernandez v. Robles, 7 NY3d at 356

Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003),
Tribe, Laurence H., Lawrence v. Texas: The Fundamental Right That Dare Not

4. Criminal Law Unit
   a. Week Seven: Elements to a Criminal Action

   What are the requirements to be criminally liable in American Law? What are the elements of a crime in Jewish law?

   *The Queen v. Dudley and Stephens*, Queen’s Bench Division 14 Q.B.D. 273 (1884)

   *Stephenson v. State*, 205 Ind. 141, 179 NE 633 (Supreme Court of Indiana, 1932)

   Maccoth 16a; Sanhedrin 42a; 74a; 81a

   Maimonides, Laws of Sanhedrin, chapter 12

   *Maccoth 16a; Sanhedrin 42a; 74a; 81a*, Maimonides, Laws of Sanhedrin, chapter 12


   b. Week Eight: Acts and Omissions

   When can you be guilty for a failure to act in American Law or Jewish Law? What are the different rationales for the differences between the legal systems? Why is there communal responsibility under Jewish law and not under American Law? What are the limits to communal responsibility under Jewish law?

   Leviticus 19:15-16

   B. Sanhedrin 73a; 74a

   B. Bava Mezia 62a

   Maimonides, Torts, "Murder and Preservation of Life" 1:14, 16

   Responsa Radbaz III, 1053 [628]

   *Pope v. State* 284 Md. 309, 396 A.2d 1054 (Maryland Court of Appeals, 1979)

   *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962)

   *Regina v. Stone and Dobinson* (1977) QB 354


   c. Week Nine: Defenses

   What defenses are available in Jewish law? What defenses are available in American law? Does Jewish law account for a “heat of passion” defense? How do the legal systems differ on self defense?

   Exodus 22:1-2

   Numbers Chapter 25

   Deuteronomy 19:6, Haamek Davar there
Sanhedrin 72a, 82b
Moed Kattan 17a, the Rashi there.
Eiruvin 41a
Berachot 32a
Shabbat 153a
Talmud Yerushalmi Sanhedrin 8:8
People v. Unger, 66 Ill. 2d 333, 362 NE2d 319  (Ill. Sup. Ct. 1977)
People v. Goetz, 68 N.Y.2d 96 (N.Y. 1986),
George P. Fletcher, Self-Defense As A Justification for Punishment, 12 Cardozo L. Rev. 859 (1991)

d. Week Ten: Capital Punishment

What are the different means of punishment under American law and Jewish law? What are the limitations on punishment? How has the Eighth Amendment Against Cruel and Unusual Punishment been applied as to Capital Punishment? How does Judaism view capital punishment? Is there a difference between having capital punishment “on the books” and how it’s applied? What types of punishments are allowed in Talmudic law?

Exodus 17:4, 8:22; Numbers 14:10
Leviticus 20:14, 21:9
Mishna Makkoth 7a
Mishna, Sanhedrin 45a; 52a; 52b
Pesachim (75a) and Ketubot (37a).
Maimonides, Mishneh Torah, Book of Judges, Sanhedrin, chapter XII
Francis v Resweber, 329 U.S. 459 (1947),
Ingraham v Wright, 525 F.2d 909 (1977)
Furman v Georgia, 408 U.S. 238 (1972)
Hudson v McMillan, 503 U.S. 1 (1992),
Roper v Simmons, 543 U.S. 551 (2005)
5. Week Eleven: Torts

What is negligence in Jewish law? What is negligence in American law? When are you responsible for your negligent behavior in Jewish law or American law? What intentional torts are recoverable under Jewish or American law? What is the rule of “strict liability” in Jewish and American Law?

Exodus 21:29-35
Mishna Baba Kama 1:1; 2:6
Baba Kama 27b, 55b, 98b, 100a, 117b
Garratt v. Dailey. 46 Wash 2d 197, 279 P.2d 1091 (Wash. 1955)
United States v. Carroll Towing Co. 159 F.2d 169 (2d. Cir. 1947)
Moore v. Regents of the University of California (51 Cal. 3d 120; 271 Cal. Rptr. 146; 793 P.2d 479.)
Palsgraf v. Long Island Railroad Co., 162 N.E. 99 (N.Y. 1928),
Foster v. Preston Mill Co., 268 P.2d 645, 647 (Wash. 1954.)
Golden vs Amory S. Ct. Mass. [1952]
Sandy v. Bushey, 124 Me. 320, 128 A. 513 (Me.1925)
Elie Mischel, Thou Shalt Not Go about as a Talebearer among Thy People: Jewish Law and the Private Facts Tort, 24 Cardozo Arts & Ent. L.J. 811 (2006-2007)

6. Week Twelve: Contracts

What is a contract in Jewish law and American law? What is required in order to be bound by the contract in Jewish law and American law? What conditions can be put into a contract without nullifying the entire contract under Jewish law and American law?

Bava Batra 47b-48a, 78a, 95a,168a
Bava Kama 116a
Bava Metzia Chapter 4, 50b, 66a-66b, 73b-74a, 104b, 109a
Gittin 55b, 58a-58b
Kiddushin 42b
Nedarim 27a-27b
Sanhedrin 24b
Weaver v. American Oil Co., 276 N.E.2d 144 (Ind.S.Ct.1971)
Williams v. Walker-Thomas Furniture, 350 F.2d 445, 449 (D.C. Cir.1965)

7. **Week Thirteen: Family Law**

*What are the Grounds for Divorce in New York? What are the grounds for divorce under Jewish Law? Why does New York not adopt the “irreconcilable differences” that exist in other states? Why is the halachic and constitutional controversy surrounding the New York Get Law?*

- Deuteronomy 24:1
- Gittin 33a (with Tosafot), 73a
- Ktubot 3a, Rashi there, Tosafot
- Bava Batra 48b
- Yevamot 110a, Rashi there
- Talmud Yerushalmi Gittin 4:2
- Responsa of the Rashba I:1206
- Darkei Moshe, Even Haezer 7:13
- Maimonides, Mishne Torah, Hilchot Ishut, 12th chapter
- Mishna Ktuvot 5:8-9, 7:6
- Gemara Ktuvot, 47b-48a, 58b, 61a,
- Domestic Relations Law §170; 236B

8. **Week Fourteen: Presentations of Paper Topics**
Paper Topics

The following are a list of suggested paper topics comparing American Law and Jewish Law. These are general topics that should be more narrowly defined in your paper. You may also choose another topic in a similar vein with prior approval from the Professor. The paper must be annotated and 10-15 pages in length.

This paper is due April 27, 2010. Students will present on their topics on May 4, 2010.

3. Bankruptcy Law: Compare Jewish Law perspective of the propriety of discharging personal debts with the American system.
4. Tort Law: Comparing between American Law and Jewish Law
   a. The intentional tort of assault/battery
   b. Strict liability
5. Trespass in American Law and Jewish Law
6. Adverse possession in American law and Jewish law
7. Criminal Law: Comparing rape between American Law and Jewish law
9. Corporate Law: To what extent is a corporation an independent entity in Jewish and American Law?
10. Employment Law: What are unconscionable terms of employment between Jewish Law and American Law?

Topics Must Be Approved by Professor