

Ain Adam Mesim Atsmo Rasha:
The Bar against Self-Incrimination as a
Protection against Torture in Jewish and American Law

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No person shall be compelled in any criminal case to be witness against himself.
-Fifth Amendment to the U.S. Constitution

A person may not incriminate himself (*ain adam mesim atsmo rasha*).
-Babylonian Talmud, Sanhedrin 9b

In 1994, the U.S. joined 140 nations in ratifying the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, an international agreement that prohibits torture and obliges signatories to take action to prevent physical or mental "cruel, inhuman, or degrading treatment" within their jurisdictions. The Senate made a reservation to the treaty defining "cruel, inhuman, or degrading" as conduct prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. In other words, the Senate agreed to adhere to the Convention insofar as it bans conduct already deemed unconstitutional under American federal law.¹

The Fifth, Eighth, and Fourteenth Amendments assure protection against physical or psychological abuse on the part of governmental agents - even if performed in the service of thwarting crime or terror - and they have generated a long history of case law that delineates clear red lines of permissible governmental action. They form the foundational rights safeguarded by American constitutional democracy, regularly cited in Supreme Court decisions as constitutive of our legal tradition since the early days of the Republic.² The Supreme Court has long used strong language to denounce physical or psychological cruelty on the part of law enforcement officials - whether to extract information, inflict punishment, or intimidate or coerce defendants - as "revolting," "shocking," and "alien" to the most sacred values on which America was founded and characteristic rather of the repressive regimes of America's totalitarian enemies.

Nonetheless, these are the very protections that have come under attack in the shady legal framework erected since Sept. 11th to justify new Army interrogation practices. In areas under American sovereignty - and for American citizens overseas - the Pentagon has

PT¹ TPThe legal analysis in this introduction is largely drawn from two articles by Seth Kreimer: "Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror," 6 U. PA. J. Const. L. 278 (2003) and "'Torture Lite,' 'Full Bodied' Torture and the Insulation of Legal Conscience," Forthcoming.

²See for example, *Culombe v. Connecticut* 367 U.S. at 581 (1961) for a summary of "[a] cluster of convictions, each expressive in a different manifestation of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it. Among these are the notions that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by the officials charged with the investigation of crime. This principle, branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber, was well known to those who established the American governments."

made it clear that military personnel remain bound by the Convention Against Torture and the U.S. Constitution. One remaining ill-defined issue, however, is whether protections under the Convention Against Torture – as well as the Geneva Conventions – apply to non-citizens held overseas in detention facilities like Guantánamo Bay. Attorney General Alberto Gonzales, in his confirmation hearing before the Senate in January 2005, asserted that "aliens interrogated by the United States outside the United States enjoy no substantive rights" under the Convention.³ In a press conference shortly thereafter, when asked directly whether Gonzales's statements indicated that "cruel, inhuman, and degrading treatment is not specifically forbidden so long as it's conducted by the CIA and conducted overseas," President Bush seemed to evade the question and instead confirmed his support of Gonzales as reflecting administration policy.⁴

In designating non-citizens in U.S. custody as beyond the scope of the Convention Against Torture's protections, Gonzales acknowledged one of the many legal loopholes through which the administration has arguably paved the way to widespread abuses of detainees not only in Guantánamo, but in Abu Ghraib and Bagram, in the famed global migration of newly sanctioned American interrogation techniques.

Despite this legal confusion, an April 2003 Working Group Memorandum of the Defense Department concluded that the U.S. remains bound by the Convention Against Torture to reject torture categorically and "cruel, inhuman, and degrading treatment" insofar as it would violate American constitutional standards, that is, as constrained by the Fifth, Eighth, and Fourteenth Amendments. An amendment adopted by the Senate – and opposed by the Administration – explicitly provided that "*no person in the custody or under the physical control of the United States shall be subject to torture or cruel, inhuman or degrading treatment prohibited by the Constitution or treaties.*"

³ From the Senate Judiciary confirmation hearing: "SEN. DURBIN: Then the follow-up question...was whether or not it is legally permissible for U.S. personnel to engage in cruel, inhuman, or degrading treatment that does not rise to the level of torture.

MR. GONZALES: Senator, our obligations under the Convention Against Torture with respect to cruel, inhumane and degrading conduct, as you know, is under Article 16, I believe. As you know, when the Senate ratified the Convention Against Torture, it took a reservation and said that our requirements under Article 16 were equal to our requirements under the Fifth, Eighth and 14th Amendment. As you also know, it has been a long-time position of the executive branch, and a position that's been recognized and reaffirmed by the Supreme Court of the United States, that aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth and 14th Amendment. So as a legal matter, we are in compliance. But let me just emphasize we also believe that we are -- we want to be in compliance as a substantive matter under the Fifth, Eighth and 14th Amendment." A transcript of the confirmation hearing is available at: <http://www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html?pagewanted=57&ei=5070&en=c3abfbf628bdaebf&ex=1121918400>

Cf. "Gonzales OK could be seen as OK for torture rules," *San Francisco Chronicle*, Feb. 2, 2005. <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/02/02/MNGMUB49FL1.DTL&type=printable>

⁴From a Jan. 28, 2005, White House Press conference, shortly after Gonzales's confirmation hearing:

"Q: Mr. President, I'd like to ask you about the Gonzales nomination, and specifically, about an issue that came up during it, your views on torture. You've said repeatedly that you do not sanction it, you would never approve it. But there are some written responses that Judge Gonzales gave to his Senate testimony that have troubled some people, and specifically, his allusion to the fact that cruel, inhumane and degrading treatment of some prisoners is not specifically forbidden so long as it's conducted by the CIA and conducted overseas. Is that a loophole that you approve?"

THE PRESIDENT: Listen, Al Gonzales reflects our policy, and that is we don't sanction torture. He will be a great Attorney General, and I call upon the Senate to confirm him." A transcript of the press conference is available at: <http://www.whitehouse.gov/news/releases/2005/01/20050126-3.html>

This section will focus on the protections secured by the Fifth Amendment and its antecedents in – and influence by - two thousand years of Jewish law.

Protections against Torture under the Fifth Amendment in U.S. Precedent

*It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.*⁵

*It is not admissible to do a great right by doing a little wrong... It is not sufficient to do justice by obtaining a proper result by irregular or improper means. Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the danger of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said: 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists you are not so likely to use your wits.'*⁶

The Senate in 1994 left it up to federal courts to determine the extent of U.S. obligations under the Convention Against Torture in terms of the Fifth, Eighth, and Fourteenth Amendments. U.S. Supreme Court applications of the Fifth and Fourteenth Amendments alone suggest that these obligations are quite expansive, protecting suspects against interrogational coercion by categorically barring confessions extorted through force.

The aspirations of the Fifth Amendment's protections were not realized until the 1960s.⁷ Until then, the "third degree" – a euphemism for what today would be called police brutality – was still standard in U.S. interrogation rooms. A 1936 foundational case, *Brown v. Mississippi*, presents a situation in which defendants had confessed to a crime after being tied to trees and whipped. The Court stated that the police had used "revolting methods" and that confessions must be "voluntary" and elicited through "due process" to be admissible as evidence. A series of cases after *Brown* has given concrete shape to this abstract principle, extensively delineating the scope of banned psychological and physical treatment. Police interrogators may not strip off a defendant's clothes and keep him naked for several hours.⁸ They may not use threats, deceits, or pressures, such as threatening to bring in a defendant's ill wife or cut off financial aid to his children if he refuses to cooperate.⁹ They may not isolate a defendant so that friends and family cannot contact him,¹⁰ introduce a psychiatrist who obtains a confession through deceitful questioning,¹¹ threaten a suspect with death, or perform a mock execution.¹² They may not interrogate a

PT⁵ TPJustice Stevens, *Chavez v. Martinez*, 538 U.S. 760 (2002), concurring in part and dissenting in part.

PT⁶ TPIV National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement 5* (1931), cited in *Miranda v. Arizona*, 384 US 436 (1966).

PT⁷ TPThis material is in large part drawn from: Jerome H. Skolnick, "American Interrogation: From Torture to Trickery," *Torture*, Oxford University Press, 2004.

PT⁸ TPMalinski v. *New York*, 324 U.S. 401 (1945) deals with a case in which a defendant was held naked for three hours while being questioned in a hotel.

PT⁹ TPRogers v. *Richmond*, 365 U.S. 534 (1961) and *Lynnum v. Illinois*, 372 U.S. 528 (1963)

PT¹⁰ TPWard v. *Texas*, 316 U.S. 547 (1942)

PT¹¹ TPLeyra v. *Denno*, 347 U.S. 556 (1954).

PT¹² TPBeecher v. *Alabama* 389 US 35, 36 (1967) deals with a case in which a police chief threatened a suspect: "If you don't tell the truth I am going to kill you," and then an officer fired a rifle next to suspect's ear.

suspect for nine days with little food or sleep, or for 36 consecutive hours with no sleep.¹³ As the Court determined in *Chambers v. Florida*: "This Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."¹⁴

In 2002, a year into the war on terror, the Supreme Court heard a case in which police had interrogated a defendant, Oliverio Martinez, for forty-five minutes after shooting him in the face. The police interrogated Martinez before he was read his Miranda rights and while receiving medical treatment for life-threatening wounds, moving in and out of consciousness, and screaming in pain.¹⁵ The Solicitor General defended police conduct in terms of the need for "law enforcement to confront imminent threats," and presented the "ticking bomb" scenario¹⁶ – often invoked since Sept. 11 to justify torture and "torture lite" – to bolster his argument that police must be free to do what they must when "seeking life-saving information." Five of the six opinions in the case rejected this logic, upholding the Court's long commitment to due process and rejection of physical brutality on the part of governmental agents, regardless of exigent circumstances.¹⁷

Psychological pressure may still exist in U.S. interrogation rooms, but physical violence, once standard fare, has all but disappeared, despite arguments before the Supreme Court that police could not protect the public without "breaking" the resistance of suspects resistant to disclosing information.¹⁸ Through its applications of the Fifth and Fourteenth

PT¹³ *TPC Lewis v. Texas*, 386 US 707, 709-710 (1967) and *Ashcraft v. Tennessee*, 322 U.S. 143, 150-151 (1944).

PT¹⁴ *TP Chambers v. Florida*, 361 U.S. 227 (1940).

PT¹⁵ *TP Chavez v. Martinez*, 538 U.S. 760 (2002). A struggle ensued when police attempted to handcuff Martinez, a suspected drug dealer, the year before. Martinez and the police contest how the struggle escalated into a shooting, but agree that during the struggle, Martinez was shot in the face, resulting in permanent paralysis and loss of vision. The officers, during their hospital interrogation, obtained a taped confession in which Martinez admitted to grabbing the gun of one of the officers during the struggle.

¹⁶ The "ticking bomb" hypothetical presents some version of the following scenario: A captured fanatic has set a hidden nuclear device in the heart of a major metropolis, set to go off within hours. The authorities are certain that the prisoner in their hands is the perpetrator whose knowledge could avert the catastrophe and spare thousands of innocents, even a whole nation, and the non-violent devices of their most expert interrogators have not yielded enough information to locate and deactivate the bomb. The interrogators decide to override their own moral opposition to torture in order to try to save thousands of innocent lives.

PT¹⁷ TP See Kreimer, "Too Close to the Rack and the Screw," *ibid.* pp. 290-294. The Court upheld Martinez's Fourteenth Amendment claim about due process violations but a slim majority rejected his Fifth Amendment claim (5-4) since the information from his interrogation was not introduced at trial and the majority believed that treatment of Martinez did not rise to the level of abuse. J. Thomas defended the police interrogation by maintaining that the police did not interfere with Martinez's medical treatment and conducted the interrogation in order to investigate "whether there had been police misconduct...evidence that would have been lost if Martinez had died without the authorities hearing his side of the story." J. Thomas nevertheless added: "Our views about the proper scope of the Fifth Amendment's Self-incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial." The dissenters disagreed that Martinez's interrogation had not been abusive: "To tell our whole legal system that when conducting a criminal investigation police officials can use severe compulsion or even torture with no present violation of the right against self-incrimination can only diminish a celebrated provision of the Bill of Rights" (J. Kennedy, dissenting in part and concurring in part).

¹⁸ *Culombe V. Connecticut*, 367 U.S. 568 (1961): "The argument that without such interrogation it is often impossible to close the hiatus between suspicion and proof, especially in cases involving professional criminals, is often pressed in quarters responsible and not unfeeling. It is the same argument that (367 U.S. 568, 588) was once invoked to support the lash and the rack. Where it has been put to this Court in its extreme form, as justifying the all-night grilling of prisoners under circumstances of sustained, week-long terror, we have rejected it. *Chambers v. Florida*, 309 U.S. 227,

Amendments, the Supreme Court has succeeded in deterring police from engaging in physically coercive interrogations and compelled them to seek evidence and information through non-violent means,

Upholding the U.S. treaty obligation to abide by the Convention Against Torture according to constitutional standards – that is, on the basis of the standards articulated by the Supreme Court in its interpretations of the Fifth and Fourteenth Amendments – would preclude usage of most of the degrading methods currently authorized in Abu Ghraib, Guantanamo, and Afghanistan.

Jewish law not only anticipates the Fifth Amendment right against self-incrimination – the linchpin of these constitutional protections – but is explicitly cited by the Supreme Court as one of its influences.

Doctrine against Self-Incrimination in Jewish Law

In American law, the right against self-incrimination is a privilege, intended by its framers and interpreters to provide a legal shield against police brutality and physical and mental coercion in interrogation. This constitutional right excludes involuntary confessions made under duress or without proper warning; a deliberate confession or guilty plea, however, may be submitted as evidence and serve as the basis for conviction.

Jewish law, by contrast, is almost categorical in its ban of self-incriminating statements, declaring confessions inadmissible as evidence whether voluntary or involuntary, in-court or out-of-court, spontaneous or extorted. As two scholars of comparative Jewish and American law note, the *halakha's* rigid proscription against self-incrimination makes "the Warren Court's progressive decision" appear "moderate, if not minimal."¹⁹

The prohibition against self-incrimination is derived from two Biblical verses: "One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sins; at the mouth of two witnesses, or at the mouth of three witness, shall the matter be established" (Deut. 19:15; cf. Num. 35:30 and Deut. 17:6); and "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every person shall be put to death for his own sin" (Deut. 24:16).

The sages read the first verse literally; a person may not be convicted on the basis of one witness's testimony, even when confirmed by circumstantial evidence.²⁰ From the second verse, the rabbis derive the law excluding the testimony of relatives (BT Sanhedrin

240-241. *The Constitution proscribes such lawless means irrespective of the end.*" See <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=367&invol=568>.

¹⁹Irene M. Rosenberg and Yale L. Rosenberg, "In the Beginning: The Talmudic Rule Against Self-Incrimination," 63 *New York University Law Review* 955, p. 965.

²⁰TPThis rule is codified in Rambam, *Hilkhot Edut* 5:1, who states that the two-witness rule applies in both civil and criminal matters.

27b).²¹ *On the basis of this second rule, Rava sets forth the principle that becomes the basis of the ban on self-incrimination; a person may not incriminate himself since he is his own kinsman.* Like his relatives, he may not join in the prosecutorial process, serving – through a self-indicting confession – as one of the two witnesses necessary to determine guilt (BT Sanhedrin 9b; see below).

Sources dating from the second century C.E. already suggest that a person may not be convicted on the basis of a confession to a capital crime. While arguably implied in the Mishnah, the embryonic form of the prohibition is stated in the Tosefta and Sifrei:

Tosefta, Sanhedrin 9:4

If the accused should say, 'I am able to speak in my own defense,' he is to be heard. '...against myself,' he is to be silenced with a reprimand.²²

Tosefta, Shevuot 3:8

Shall we say that just as in capital cases a person's confession [may not be used as the basis of conviction], so too in civil cases? [No]. The Torah teaches that if a person injures another, he must pay.

Sifrei Devarim Piska 188 (Finkelstein edition), cf. Tosefta Shevuot 5:4

R. Yosi said:...Whereas a defendant may not join a single witness to convict himself of a capital crime, yet this same defendant could render himself liable to an oath [i.e., where he acknowledges liability to his creditor's claim on him].

Both the Tosefta and the Sifrei distinguish between monetary cases – in which liability may be determined on the basis of a confession²³ – and capital cases, in which confessions are excluded as evidence. The texts seem to take for granted the inadmissibility of confessions in a capital crime.²⁴

PT²¹ TP"Whence is this law [prohibiting testimony of relatives] derived? — From what our Rabbis taught: 'The fathers shall not be put to death on account of the children' (Deut. 24:16). What does this teach? Is it that fathers shall not be executed for sins committed by their children and vice versa? But is it not already explicitly stated, 'Every man shall be put to death for his own sin?' Hence, 'fathers shall not be put to death on account of children,' must mean, fathers shall not be put to death on the testimony of their sons, and similarly, 'sons shall not be put to death on account of fathers,' must mean, nor sons on the testimony of their fathers" (BT Sanhedrin 27b).

²²Cf. M. Sanhedrin 5:4. The Mishnah states explicitly that the accused – after the testimony has been heard but prior to conviction – may make arguments in his own favor, but unlike the Tosefta, it does not state that he may not confess or make arguments against himself. Rather than a ban on self-incrimination, the Mishnah and Tosefta may here be articulating a more general rule that at this stage of the deliberative process, immediately prior to verdict, neither a defendant nor witnesses may prejudice the judge against the accused.

PT²³ TPElsewhere, the Tosefta in fact states that in a monetary case, a confession is equivalent to the testimony of one hundred witnesses (T. Baba Metzia 1:10).

PT²⁴ TPTTo add another layer of complexity, if a confession in a monetary compensation case renders the defendant liable, and in a capital case a confession is dismissed as evidence altogether, the Mishnah states that in a civil case, a confession removes liability for a fine over and above compensation fees (M. Ketubot 3:9): "This is the general rule: whoever pays more than the actual cost of the damage he has done need not pay it on his own evidence." Rosenberg and Rosenberg speculate that this difference may reflect the idea that in a civil case, a person may restore himself and his social relationships through a combination of compensation and repentance (as reflected in a confession), whereas in a capital crime, punishment is independent of contrition, and grave enough that a person must be removed from the conviction process. See Rosenberg and Rosenberg, *ibid.* pp. 991-998. Corroborating their hypothesis, a person convicted of a capital crime is encouraged to confess *post-conviction* – once his confession would serve an expiatory

The ban against self-incrimination is elaborated on in the Talmud, where Rava extrapolates from the principle²⁵ to determine that a person may not disqualify himself from serving as a witness on the basis of his own confession to a crime.²⁶

BT Sanhedrin 9b (Cf. BT Sanhedrin 25a)

R. Joseph again said: If a man says that so and so committed sodomy with him against his will, he himself with another witness may combine to testify to the crime. If, however, he admits that he acceded to the act, he is a wicked man [and therefore disqualified from acting as witness] since the Torah says: *Put not your hand with the wicked to be an unrighteous witness* (Ex. 23:1). Rava said: Every man is considered a relative to himself, and no one may incriminate himself.

The complex disagreement between R. Joseph and Rava seems to be over the admissibility of "split testimony."²⁷ That is, R. Joseph argues that the court may not admit testimony from a person who confesses to deliberate wrongdoing, whereas Rava argues that a person's testimony may be bifurcated; his self-incriminatory statement must be disregarded by the court – given the prohibition against self-incrimination, which Rava states as a general rule – while his testimony against his fellow wrongdoer may be admitted as evidence. Ironically, and perhaps cunningly, the court, according to Rava, admits a person's testimony against his co-conspirator by refusing his testimony against himself, through which he might have been declared a *rasha*; because he may only himself be convicted on the basis of two *extrinsic* witnesses, he may testify against his accomplice.

rather than an evidentiary or inculpatory function (M. Sanhedrin 6:2). Cf. Aaron Kirshenbaum's thesis that the "confession" to which this latter Mishnah refers is not a confession of sin but a public praise of God similar to R. Akiva's recitation of the *shema* in his moment of martyrdom. See *Self-Incrimination in Jewish Law*, Burning Book Press, 1970, p. 46.

PT²⁵ TP Arnold Enker submits that Jewish law includes two distinct self-incrimination rules with two different derivations and divergent implications: 1) a person may not serve as a witness against himself, deduced from the Biblical requirement of two witnesses for conviction; and 2) a person may not disqualify himself as a witness, derived from the idea that a relative may not serve as a witness. See "Self-Incrimination in Jewish Law – A Review Essay," *Dine Israel* IV, pp. CVII-CXXIV. For a lengthy critique of Enker's argument, see Rosenberg and Rosenberg, n. 79 and n. 180. Cf. Kirshenbaum pp. 50-58; Kirshenbaum, Rosenberg and Rosenberg – and arguably most traditional commentators, though they don't address the point explicitly – treat the Talmudic rule prohibiting a person from disqualifying himself as a witness as an extension of the rule prohibiting a person from incriminating himself in a criminal trial.

PT²⁶ TP Jewish law bars a *rasha* – a person guilty of certain offenses – from testifying as a witness, on the basis of the verse "put not your hand on the wicked to be an unrighteous witness" (Ex. 23:1). M. Sanhedrin 3:3 lists some of the offenses that the Mishnah sees as disqualifying a person from serving as a witness. The Rambam elaborates on this list at great length in *Hilkhot Edut* 10:1-5.

PT²⁷ TP See Rashi ad loc.: "A person is not disqualified from testifying by his own admission, for a person is related to himself. Therefore, a person cannot make himself a *rasha*. That is to say, regarding testimony about himself, he does not become a *rasha*, for indeed the Torah disqualified a relative from testifying. But the sodomizer is killed, for we partition the statement; we believe him about his fellow, and we do not believe him about himself to disqualify him from testifying." Other Talmudic texts citing the same disagreement between R. Joseph and Rava reinforce the idea that their dispute is indeed about the issue of *palginan be-diburra* (split testimony). See BT Sanhedrin 25a and BT Yevamot 25a-25b.

The ban against self-incrimination was extended in later *halakhic* codes to non-capital criminal cases. The Rambam bars a person from inculpating himself in a wide variety of criminal and quasi-criminal matters:

Rambam, Hilkhhot Edut 12:2

No man becomes ineligible [to be a witness] on his own admission of religious delinquency. For example: if a person appears in court and says that he has stolen or robbed or loaned money on interest, although he has to make restitution on his own admission, he is not disqualified as a witness. Likewise, if he says that he has eaten *nevelah*²⁸ or cohabited with a woman forbidden to him, he is not disqualified – unless there are two witnesses who testify against him – for no man may incriminate himself.

Rambam, Hilkhhot Sanhedrin 18:6

It is a scriptural decree that the court shall not put a man to death or flog him on his own admission [of guilt]. This is done only on the evidence of two witnesses.

Jewish authorities seem to have adopted a near consensus position that in criminal cases, where punishment, excommunication, or even public reputation were at stake, guilt must be independently established on the testimony of two outside witnesses. Even in a case in which a person's confession has served as the basis for testimony against his accomplice, the court must accumulate extrinsic testimony against him to convict him, for a person may not play a role in prosecuting himself, whether voluntarily or through coercion.

Self-Incrimination in Jewish law as Preventive Measure against Torture?

Why does Judaism designate such an extraordinarily demanding rule that deprives confessions - what many believe to be the most infallible verification of guilt – of any legal status in a trial? What is the rationale for this unique law, seemingly unparalleled in its reach in any other legal system?

The Talmud itself does not explicate the prohibition. The Rambam famously offers a psychological explanation of a possible ulterior motive for incriminating oneself: "It is possible [a defendant] was confused in mind when he made the confession. Perhaps he was one of those who was in misery, bitter in soul, who long for death...Perhaps this was the reason that prompted him to confess to a crime he had not committed in order that he might be put to death" (Hilkhhot Sanhedrin 18:6). The Rambam questions the trustworthiness of confessions, given the complexity of human psychology, and its periodic masochistic and self-destructive drives.²⁹ Rabbi David ben Zimra (Radbaz) suggests that a person is permitted to confess in a monetary rather than a criminal case

²⁸The term '*nevelah*' is used to refer to an animal that died by some means other than proper ritual slaughter (*shekhita*).

²⁹Rambam's psychological insight is especially interesting in light of recent studies that torture – in particular the "disorientation" methods currently used by the U.S., and once used by the KGB and British in Northern Ireland (stress positions, hooding, sensory bombardment, isolation, sleep deprivation) – induces temporary states of psychosis, psychological instability, and frequently, false confessions. See John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture*, New York, 2000, pp. 6, 45, 127, and 170.

because money is our possession as human beings, whereas life belongs to God, and cannot be surrendered voluntarily. The Rambam, perhaps dissatisfied with his own psychological conjecture, concludes: "The principle that no man is declared guilty on his own admission is a divine decree," that is, a non-rational rule exceeding human understanding.

Many contemporary scholars, recognizing the historical context of Roman persecution and torture in which the law was formulated, present an alternative, persuasive thesis. Perhaps the *halakha* developed a strict prohibition against self-incrimination – part of an elaborate and rigorous complex of procedural safeguards – as a way of repudiating the Roman system of justice, with its official brutality and violations of privacy, human dignity, and due process. Jewish law constructs an accusatorial rather than inquisitorial judicial framework; the Jewish court must build a case against the accused and may not shortcut the fact-finding process by physically coercing a confession, as did the Roman and medieval European courts.

Saul Lieberman's biographer reports that he taught:

The purpose of the rule [banning self-incrimination] was to eliminate the possibility of forced confessions and testimony motivated by fear...[Early Jewish law] insisted on a strict standard for the admission of evidence and *eliminated the possibility of torture to compel confessions* at a time when torture and other cruel practices prevailed in the Roman court.³⁰

A slew of other scholars echo Lieberman's hypothesis:

Torture as a mode of investigation is virtually unheard of in Jewish history. The police authorities gain nothing from confession and the accused loses nothing by such confession. Perhaps the obviation of torture as a judicial tool was the very intention of Biblical law and rabbinic interpretation [prohibiting self-incrimination].³¹

It is to the everlasting glory of the rabbinic tradition that centuries before enlightened citizenries began to protest against police brutality in the interrogation of suspects and to clamor for its cessation, Jewish law proclaimed unequivocally that confessions extorted by words of inducement or by means of threats, though they appear to be true, may not be used to incriminate, convict, or punish anyone.³²

PT³⁰ TPEmphasis added. Elijah J. Schochet and Solomon Spiro, *Saul Lieberman: The Man and His Work*, Jewish Theological Seminary Press, 2005, pp. 209-210.

PT³¹ TPEmphasis added. Isaac Braz, "The Privilege Against Self-Incrimination in Anglo-American Law: The Influence of Jewish Law," *Jewish Law and Current Legal Problems*, ed. by Nahum Rakover, Library of Jewish Law, 1983, p. 163

PT³² TPAaron Kirschenbaum, *Self-Incrimination in Jewish Law*, Burning Bush Press, 1970, p. 129

Whether confessions were barred because they would lead to torture; or because they were unreliable; or because sick minds might falsely accuse themselves; or because their prohibition served as a mechanism for assuring preservation of all the other procedural safeguards; or as a guarantee of equal treatment for all persons accused of crime; or because the use of confessions would lead to laxness in fact-finding; or because man's life and body were not his to forfeit; or because of the uniqueness and dignity of man; or because of a recognition that in dealing with the state there could be no real free choice; or because it was deemed morally reprehensible to allow a person to convict himself; or because the privilege reflected a divine and ineffable understanding of mankind – whatever the rationale, acceptance of the absolute prohibition was a remarkable societal accomplishment.³³

Whether a moral eschewal of torture was the *rationale* for the prohibition against self-incrimination, its *effect* was to eradicate, by rendering purposeless, torture and lesser forms of intimidation of suspects in order to induce confessions. Given the surrounding inquisitorial legal cultures in which Jews lived throughout the centuries – and in which Jews were often themselves the victims of torture – it is all the more remarkable that Jewish law sustained a nearly absolute interdiction against accepting confessions as evidence of culpability.

Not until seventeenth century English common law - and then, arguably, in part through the influence of Jewish law - did another legal system adopt a principle similar to the ban articulated by Jewish law, perhaps as early as the second century C.E. In our time, the principle has become one of the prideful hallmarks of Anglo and American jurisprudence, and one of the primary constitutional bulwarks against torture and other forms of interrogational coercion in the criminal justice system.

The Influence of Jewish Law on U.S. Constitutional Protections Against Governmental Abuse

The Fifth Amendment – the privilege in American law against compulsory self-incrimination – imposes a constitutional check against governmental cruelty and coercion. It reflects an American repugnance towards the "fishing expeditions" associated with inquisitorial justice systems, upholding an absolute right of due process and thorough fact-finding rather than trial by ordeal and forced confessions.

Remarkably, in the classic Fifth Amendment case, *Miranda v. Arizona* – dealing with the interrogation of suspects in police custody and made famous through Hollywood renditions of the police warnings it enshrined – Chief Justice Warren traces the origins of this humane law to the *halakhah*. "We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times," writes Judge Warren, citing the Rambam's Mishneh Torah and an article on the subject of self-

PT³³ TPRosenberg and Rosenberg, *ibid.* p. 1041.

incrimination in Jewish law by Rabbi Norman Lamm. A second Supreme Court case elaborating on the Fifth Amendment cites the same article and quotes from it at length.³⁴

The Supreme Court is seemingly not the first court to be influenced by the Jewish law on this subject. A series of articles demonstrate that the *halakhic* self-incrimination prohibition found its way into English common law.³⁵ Dating from the late seventeenth century, this now fundamental principle of common law is relatively recent and without precedent in the prior law of England. It seems to have been a response to the oppressive Court of Star Chamber, which secretly and coercively interrogated Puritans and other religious dissenters, compelling them to make incriminating confessions under oath. It also coincided with the publication of works by English Hebraists such as John Selden – a member of Parliament who published books on Jewish law and brought the rabbinic doctrine against self-incrimination to the knowledge of his contemporaries.³⁶ Arguably, the Latin maxim *nemo tenetur seipsum accusare* – Lord Coke's distortion of church canon law, which was absorbed into the English common law and eventually into the language of the American Supreme Court³⁷ – was a direct translation of the Talmudic pronouncement: "A witness may not accuse himself."

PT³⁴ TP" In summary, therefore, the 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 destructive inclinations," quoted in *Garrity v. New Jersey*, 385 U.S. 493 (1967). See Norman Lamm, "The Fifth Amendment and its Equivalent in *Halakhah*," 5 *Judaism* (1956).

PT³⁵ TPSee Jonathan Fisher, "Self-Incrimination at Common Law – Its Origin in Jewish Law," *Jerusalem City of Law and Justice*, ed. by Nahum Rakover, The Library of Jewish Law, pp. 461-474, Isaac Braz, "The Privilege against Self-Incrimination in Anglo-American Law: The Influence of Jewish Law," *Jewish Law and Current Legal Problems*, ed. by Nahum Rakover, The Library of Jewish Law, pp. 161-168, and G. Horowitz, "The Privilege against Self-Incrimination – How did it Originate?" *Temple Law Quarterly*, 31, pp. 121-144.

PT³⁶ TPCiting the Rambam, Selden writes: "By an old law, moreover, it became established that no person should be delivered up to be executed or for punishment (by lashes) by his own confession, but only by the testimony of others. Undoubtedly, so that, out of feelings of powerlessness and because of the malicious and bold attack of his accusers, he, having been persuaded unwittingly, should not be pressured falsely into confessing altogether to the charge of which he was accused, for the sake of avoiding a wretched and troublesome trial," quoted in Braz, *ibid.* pp. 166-167.

³⁷An 1896 Supreme Court case that cites this maxim and explains its common law origins is worth quoting at length for its eloquent rejection of interrogational coercion as anathema to the American constitution: "The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admission of confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, *the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials... made the system so odious as to give rise to a demand for its total abolition.* The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts to a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that *a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment*" (emphasis added), *Brown v. Walker*, 161 U.S. 591 at 596-597 (1896).

As Israeli Supreme Court Justice Benamin Halevi comments, in a case in modern Israel: "With the reception of the common law in this country... the principle [has] returned to its original home."³⁸

Conclusion

While there are important differences between Jewish law and contemporary American law on the subject of self-incrimination – American law prohibits involuntary confessions, whereas Jewish law categorically bars all confessions – both legal systems in effect uphold the fundamental doctrine of presumed innocence, refusing to presuppose the conclusion they set out to establish by subjecting defendants to harsh interrogation on mere suspicion. Both systems view coerced confessions as inherently untrustworthy.³⁹ Both bespeak a profound respect for the inviolability and dignity of the human personality, refusing to bully a person, physically or psychologically – regardless of what crime he has committed - into involuntarily and perhaps falsely inculcating himself.

It is no secret that Jews have historically often been the victims of a lack of juridical and procedural safeguards. English and American law adopted the principle of self-incrimination – denouncing the rack and screw as abhorrent to Anglo-American values - on the urging of groups who had themselves been subjected to religious persecution and placed at the mercy of arbitrary and repressive legal systems. Perhaps the depth of Jewish law's commitment to an accusatorial rather than inquisitorial system of justice reflects the victimization of our history – and the drive to never inflict what had so often been ruthlessly inflicted upon the Jewish people.

Should the due process protections enshrined in Jewish and American criminal justice systems apply to suspects of crime but not terror? Should different rules apply to the detention and interrogation of prisoners of war and domestic criminals? The Senate, in ratifying the Convention Against Torture, set a constitutional standard for the U.S. obligation to refrain from both torture and "cruel, inhuman, and degrading treatment." In doing so, the United States determined that the military interrogation room must abide by the same standard as that enforced in the police precinct, unless the United States determines that its treaty obligations apply only in relation to its own citizens.

Perhaps the legal architects of the black hole in which political detainees have been swallowed in the "war on terror" should join the American Supreme Court in learning a few lessons from a long history of humane and prudent Jewish precedent.⁴⁰

PT³⁸ *TPKiryati v. Attorney General* (1964) 18(3) PD 477

³⁹As Justice William Rehnquist puts it in a recent majority opinion upholding *Miranda*: "A confession forced from the mind by the flattery of hope or the torture of fear comes in so questionable a shape... that no credit ought to be given to it, and therefore it is rejected." *Dickerson v. U.S.*, 530 U.S. 428 at 433 (2000)

⁴⁰One could argue that the prohibition against self-incrimination in Jewish law is an internal criminal justice matter and does not mandate the same treatment towards prisoners of war. There is, however, no separate area of Jewish law treating "battlefield ethics." Given the historical realities of the Jewish people during previous eras of *halakhic* development, it is not surprising that there is much more extensive treatment of internal criminal justice issues than of proper ethical conduct during war. It is the assumption of this piece that to develop Judaism's positions on "battlefield ethics" issues, we must extrapolate from general principles of Jewish ethics and apply them to the military situation.

[The law against self-incrimination in American and Jewish law] is a noble principle, protecting the frightened and confused threatened by the awesome power of the state, placing practical limits on governmental power which make it fruitless to try to torture or connive admissions, preserving respect for the legal process, frustrating bad laws and procedures, especially in the political and religious area, standing as a bulwark against the fishing expeditions of inquisitorial legal systems, spurring competent investigation by the authorities, forcing them to prove their case, and finally, requiring government to leave the individual alone unless it has a good, independent case. Brandeis said it well when he said that a responsibility of government is to be an 'exemplar in keeping the law.'⁴¹

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This is especially necessary in a discussion of torture, for the interrogation room lies at the crossroads between the battlefield and the courtroom, and is often justified with criminal defenses – like the "necessity" defense in a "ticking bomb" situation.

⁴¹Joseph B. Glaser, "The Fifth Amendment – Some Help from the Past," *Jewish Law Association Studies*, Vol. I, ed. by B.S. Jackson, Global Academic Publishing, 1985, p. 40