

NOTES

MAIMONIDES, *MIRANDA*, AND THE CONUNDRUM OF CONFESSION: SELF-INCRIMINATION IN JEWISH AND AMERICAN LEGAL TRADITIONS

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This Note argues that both Jewish and American law express skepticism about self-incriminating statements based on concerns of reliability, respect for the individual, and the religious belief that confessions can be offered only to God. However, both traditions also recognize that certain circumstances necessitate the use of self-incriminating statements. This Note compares the two traditions to unearth a deep tension within legal and cultural conceptions of self-incrimination and confession. Specifically, the Note proposes that both Jewish and American law reflect conflicting desires—to simultaneously accept and reject self-incriminating statements. On the one hand, confessions appear to be powerful evidence of guilt, as well as a helpful part of the process of punishing and rehabilitating criminal offenders. On the other hand, confessions uncomfortably turn the accused into his own accuser, raising concerns about whether the confession was the result of unreliable internal self-destructive instincts or external coercion. Future decisions involving self-incriminating statements must be made with an awareness of both the benefits and the hazards of utilizing such statements.

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INTRODUCTION

Reliability and ethical concerns surrounding self-incriminating statements have plagued legal systems for centuries. In the United States, self-incriminating statements may not be involuntarily coerced or compelled. In the words of the Fifth Amendment, “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”¹ What are the roots of the privilege against self-incrimination? In *Miranda v. Arizona*,² Chief Justice Warren noted that the roots of the privilege go back to ancient times. Citing the Jewish philosopher Maimonides, the Court wrote, “[t]hirteenth century commentators found an analogue to the privilege grounded in the Bible. ‘To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.’”³

Given the different historical contexts in which ancient Jewish law and modern American law emerged and functioned, it is unsurprising that concerns surrounding self-incrimination are articulated differently in the two traditions. In Jewish criminal law, there is a seemingly complete ban on self-incriminating statements. In contrast, the American privilege against self-incrimination bars only involun-

¹ U.S. CONST. amend. V.

² 384 U.S. 436 (1966).

³ *Id.* at 458 n.27 (quoting THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, *Sanhedrin* ch. 18, para. 6).

tary or compelled self-incrimination, implying that most confessions, freely given, would be accepted.

Scholarship has focused on the distinctions between the Jewish and American iterations of the principle against self-incrimination.⁴ Scholars, for example, characterize Jewish law's approach as an absolute ban on confessions, contrasting it with the "timid and ineffectual" American *Miranda* protections.⁵ They argue that, while the Jewish rule against self-incrimination was "unique and all encompassing,"⁶ *Miranda* has been "*Tuckered to death*,"⁷ its progressive protection "all but snuff[ed] out"⁸ by later decisions and exceptions. They juxtapose the Jewish rule, in which "[n]o blurring of the bright line was permitted," with American protections "lacking . . . a coherent approach."⁹

This Note questions whether a comparison of Jewish and American law on self-incrimination can properly be described in such reductionist and dichotomous terms. Instead, the Note argues that the two legal systems are similar in a certain sense. Both systems express concerns about self-incriminating statements but also accept such statements in particularly demanding situations. Part I traces three long-standing rationales for the privilege against self-incrimination in both Jewish and American law: reliability; respect for the autonomy, self-determination, and privacy of the individual; and the religious belief that criminal confessions can be offered only to God. After Part I's explanation of why self-incriminating statements are not judicially accepted, Part II describes circumstances in Jewish and American law when self-incriminating statements *are* accepted.

⁴ See, e.g., LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 434 (1968) ("In Anglo-American jurisprudence the right exists only with respect to compulsory self-incrimination. . . . The rule of the Talmud was quite different."); Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self Incrimination*, 63 N.Y.U. L. REV. 955, 956 (1988) ("One way to rethink the problem of confessions and to gain new perspectives is to compare the modern American approach with one from the past, one that appears to be almost totally antithetical in conception and application [i.e., the Jewish rule]."); 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, 207 (2002) ("For while the Talmudic rule and the American rule appear to be strikingly similar, they are in fact fundamentally different.").

⁵ Rosenberg & Rosenberg, *supra* note 4, at 955–64.

⁶ *Id.* at 964.

⁷ *Id.* at 956 (referring to *Michigan v. Tucker*, 417 U.S. 433 (1974), in which the Court held that statements by a witness implicating the defendant were admissible even though the police were led to the witness by *Miranda*-defective statements by the defendant).

⁸ *Id.* at 959.

⁹ *Id.* at 1045, 964.

Part III uses the comparison of the two traditions to unearth a deeper understanding of the tensions within self-incrimination and confession. It suggests that both Jewish and American law reflect similar conflicting desires—to encourage and also to reject self-incriminating statements. On the one hand, confessions appear to be powerful evidence of guilt and a helpful part of the process of solving crimes and rehabilitating criminal offenders. On the other hand, confessions uncomfortably turn the accused into his own accuser, raising concerns about whether the confession was the result of unreliable internal self-destructive instincts or external coercion. This tension is also evident in the persistent cultural belief in the righteousness of confession alongside increased interest in the DNA-based exoneration of defendants who had falsely confessed.

I

THE IDEAL: REJECTING SELF-INCRIMINATING STATEMENTS

A. *Jewish Law*

First, a word of background on Jewish law. According to Jewish tradition, the divine revelation at Mount Sinai produced a written law (the Torah) and an oral law (summarized in the Talmud).¹⁰ The Talmud is comprised of the Mishnah and the Gemara. The oral law was handed down from generation to generation and memorized in order to explain the precepts of the written law.¹¹ However, as time went on, oral transmission became more difficult.¹² The majority view is that at the end of the second century CE, Rabbi Judah Ha-Nasi redacted the Mishnah, reducing to writing the *halakhic* (“legal”) parts of the oral law.¹³ The Babylonian Talmud, believed to have been compiled at the end of the fifth century CE,¹⁴ reflects the discussion that occurred in the Babylonian academies regarding the Mishnah, “a kind of précis of the typical debates of the talmudic sages.”¹⁵ In the post-

¹⁰ MENACHEM ELON ET AL., *JEWISH LAW (MISHPAT IVRI)* 5 (1999); ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* 3–4 (Chaya Galai trans., 1976).

¹¹ STEINSALTZ, *supra* note 10, at 13.

¹² ELON ET AL., *supra* note 10, at 6; *see also* STEINSALTZ, *supra* note 10, at 33 (explaining the reasons for the compilation of the Mishnah).

¹³ ELON ET AL., *supra* note 10, at 8; *see also* David C. Flatto, *The King and I: The Separation of Powers in Early Hebraic Political Theory*, 20 *YALE J.L. & HUMAN.* 61, 66 (2008) (“[The Mishnah] is a kind of digest of early rabbinic law that presumably functioned as a legal anthology or code for judges, teachers, and the larger traditional population.”).

¹⁴ ELON ET AL., *supra* note 10. Another version of the Talmud, known as the Jerusalem Talmud, was composed in the Land of Israel at the end of the fourth century CE. *Id.*

¹⁵ STEINSALTZ, *supra* note 10, at 61. For more information about the Talmud—including its origin, history, printing, reception, commentaries, and methodologies of

Talmudic period, legal authorities around the world continued to debate, interpret, and codify Biblical and Talmudic precepts. For example, Maimonides' *Mishneh Torah*,¹⁶ written in the twelfth century CE, is one of the most authoritative works published in this post-Talmudic period.¹⁷

In this Part, I explain the sources and rationales behind the privilege against self-incrimination in Jewish law. Maimonides described the rejection of self-incriminating statements based on the assumption that they may be false and unreliable. However, an examination of the Talmudic sources that predated Maimonides reveals a concern not only with reliability, but also with the privacy and autonomy of the individual who, even if reliably guilty of some forbidden act, should not be made to testify against himself. Finally, I present the explanation of Radbaz, a commentator on Maimonides, who explained the privilege based on the spiritual conception that humans cannot—even reliably or voluntarily—surrender their bodies and souls for punishment since both belong to God.

1. *The Unreliability of Confessions and the Psychological Impulses of Confessors*

Moshe ben Maimon, known in Hebrew as Rambam and in English as Maimonides (1138–1204), is one of the most important Jewish thinkers.¹⁸ He codified the privilege against self-incrimination in the criminal context in his treatise on Jewish courts. “It is a scriptural decree that the court shall not put a man to death or flog him on his own admission (of guilt). . . . To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.”¹⁹ Thus, confessions in the criminal context appear to be wholly rejected.

study—see the collection of excellent essays in PRINTING THE TALMUD: FROM BOMBERG TO SCHOTTENSTEIN (Sharon Liberman Mintz & Gabriel M. Goldstein eds., 2005).

¹⁶ Discussed *infra* Part I.A.1.

¹⁷ See, e.g., ISADORE TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES (MISHNEH TORAH) 20 (1980) (“[The *Mishneh Torah* is] unprecedented in terms of scope and structure, and . . . is decidedly unique in its multifaceted influence. In one broad generalization, we may say that the *Mishneh Torah* became a prism through which reflection and analysis of virtually all subsequent Talmud study had to pass.”).

¹⁸ See generally MOSHE HALBERTAL, MAIMONIDES: LIFE AND THOUGHT 3–4 (Joel Linsider trans., 2014) (“The oft-stated comparison between Moses son of Maimon and Moses our Teacher (that is, the biblical Moses) . . . is no exaggeration and contains more than a kernel of truth. . . . Maimonides belonged to the rare and unique species of religious reformers—even, one may say, of religious founders.”).

¹⁹ THE CODE OF MAIMONIDES, BOOK FOURTEEN: THE BOOK OF JUDGES, *Sanhedrin* ch. 18, para. 6, at 52–53 (Abraham M. Hershman trans., Yale Univ. Press 1977) [hereinafter MAIMONIDES: JUDGES].

The principle applies not only to self-incriminating statements made by defendants, but also to self-incriminating statements made by witnesses.²⁰ According to Jewish law, a witness is disqualified if he is found to be a *rasha*, a transgressor.²¹ In his treatise on evidence, Maimonides writes, “No man becomes ineligible [to be a witness] on his own admission of religious delinquency. . . . [N]o man can incriminate himself.”²²

Maimonides, in addition to codifying the rule against self-incrimination, does not just explain the rule as a divine decree that cannot be understood.²³ Rather, Maimonides offers a rationale for the rule—at least in the context of confessions by defendants. He writes:

The Sanhedrin [court] . . . is not empowered to inflict the penalty of death or of flagellation on the admission of the accused. For it is possible that he was confused in mind when he made the confession. Perhaps he was one of those who are in misery, bitter in soul, who long for death, thrust the sword into their bellies or cast themselves down from the roofs. 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.²⁴

Here Maimonides paints a vivid picture of the type of person who would confess to a capital crime: someone who is unstable, depressed, and suicidal—and not necessarily guilty. According to Maimonides,

²⁰ *But see* Arnold Enker, *Self-Incrimination in Jewish Law—A Review-Essay*, in 4 DINE ISRAEL cvii, cix (Zeev W. Falk & Aaron Kirschenbaum eds., 1973) (“[F]rom a legal point of view these two rules [the one concerning self-incriminating statements of defendants and the other concerning self-incriminating statements of witnesses] seem to me to raise completely different problems and to relate to totally different situations.”).

²¹ *See* 1 TALMUD BAVLI, *Sanhedrin* 24b–25a (Hersh Goldwurm ed., Mesorah Publications 1st ed. 1993).

²² MAIMONIDES: JUDGES, *supra* note 19, *Evidence* ch. 12, para. 2, at 108.

²³ Many interpret the term “scriptural decree,” which Maimonides uses here to describe the privilege against self-incrimination, to describe “a rule of law for which human beings are incapable of discerning a rationale.” Rosenberg & Rosenberg, *supra* note 4, at 1033. Such an explanation of the term “scriptural decree” in this context would seem odd, since Maimonides specifically offers a rationale for the rule. Yair Lorberbaum offers a more complete understanding of the term and differentiates between two meanings of “scriptural decree.” The first is a theological meaning that does indicate that a rule has no rationale or that the rationale is unknown. However, the second meaning of “scriptural decree,” according to Lorberbaum, is a jurisprudential meaning that indicates that the commandment being described does have a rationale, but that the commandment is “imperative” and “unconditional” and must be followed even when the rationale does not appear to apply. Yair Lorberbaum, *Two Concepts of Gezerat ha-Katuv: A Chapter in Maimonides’s Legal and Halakhic Thought, Part I*, in 28 DINE ISRAEL 123, 124 (Arye Edrei & Suzanne Last Stone eds., 2011); Yair Lorberbaum, *Two Concepts of Gezerat ha-Katuv: A Chapter in Maimonides’s Legal and Halakhic Thought, Part II: The Jurisprudential Sense*, in 29 DINE ISRAEL 101, 102–03 (Arye Edrei & Suzanne Last Stone eds., 2013).

²⁴ MAIMONIDES: JUDGES, *supra* note 19, ch. 18, para. 6, at 52–53.

the reason behind the law against self-incrimination is that we fear the admission may not be reliable. Maimonides believed some people suffering from intense depression might confess to crimes they did not commit in order to bring physical harm, including death, upon themselves.

Norman Lamm, a contemporary rabbi and past president of Yeshiva University, has expounded on this rationale and supplemented it with insight from modern psychoanalytic theory. As Lamm explains, Maimonides recognized what Freud, some seven hundred years later, described as the Death Wish or Death Instinct, “an inherent tendency of life to revert to its lifeless origin, which is the inorganic state, or death.”²⁵ Sometimes the Death Wish results in homicide; however, if frustrated, it may be “redirected towards the self”²⁶ and result in suicide. Similarly, Lamm cites Freud’s disciple, Karl Menninger, who explained that even if a person is not driven to actually take his own life, he may display other forms of self-destruction.²⁷ Often the internal impulses may cause a person to relegate the destruction to a third party, in this case the court, which would explain why one would confess to a crime instead of simply taking one’s own life. “Thus,” Lamm concludes, “modern psychoanalytic theory supports Maimonides’ explanation of the Halakhic view on self-incrimination, an explanation which relies on the universality of the instinct of self-destruction.”²⁸

2. *Critiques Based on Moral Considerations and Respect for the Individual*

In addition to Maimonides’ psychological rationale, other sources suggest additional rationales questioning the use of confessions. The principle against self-incrimination appears in the Talmud in the context of a debate about whether witnesses are disqualified on the basis of self-incriminating statements. Sanhedrin 9b deals with the testimony of a potential witness who has engaged in an illicit sexual act with the person on trial for committing the act.²⁹ One school of thought, attributed to Rabbi Joseph, is that if the witness testifies that the accused committed the act with him forcibly, the witness’ testi-

²⁵ Norman Lamm, *The Fifth Amendment and Its Equivalent in the Halakha*, 5 JUDAISM 53, 56 (1956). The Supreme Court twice cited this article and a subsequent version of the same: in footnote twenty-seven in the *Miranda* decision and in footnote five in *Garrity v. New Jersey*, 385 U.S. 493, 497 n.5 (1967).

²⁶ Lamm, *supra* note 25.

²⁷ *Id.* at 57.

²⁸ *Id.*

²⁹ For English translation and explanation, see *Sanhedrin* 9b in 1 TALMUD BAVLI, *supra* note 21.

mony is accepted.³⁰ However, if the witness admits that he acceded to the act, the witness is a *rasha*, a transgressor, according to his own testimony, and is disqualified from acting as a witness.³¹ In other words, according to Rabbi Joseph, a witness can be disqualified based on self-incriminating statements.

A second school of thought, articulated by Rava, is that a person cannot disqualify himself by establishing himself as a *rasha*.³² Since self-incriminating statements are rejected, the witness' testimony against himself (that he participated in an illicit act) is not accepted, the witness is not rendered a *rasha*, and his testimony regarding the defendant is accepted. Thus, he can join with another witness in testifying against the accused. This is accomplished through the legal concept that testimony is divisible.³³ According to Rabbi Joseph, testimony is not divisible; the court accepts all of the testimony or none of it. Rava, however, holds that testimony is divisible, and therefore he accepts the part of the witness' testimony that is not self-incriminating. Interestingly, here the rejection of the self-incriminating statement by the witness leads to the inclusion of testimony that is incriminating with regard to the defendant.³⁴

Similarly, the Talmud in Yevamot 25a and 25b addresses the concept of splitting self-incriminating testimony of witnesses.³⁵ Here, the Talmud deals with the issue of a woman whose marital status is ambiguous due to the undetermined fate of her husband.³⁶ If her husband is found to be dead, she is deemed a widow and may remarry. However, if her husband is alive but missing, she is still married and cannot remarry. The Talmud deals with the case of a witness who claims he knows the husband is dead because he (the witness) killed him. The majority view is that in such a case, the testimony of the witness is accepted and the woman may remarry, though she may not marry the witness.³⁷ However, Rabbi Judah says that if the witness testifies that he (the witness) killed the husband, the witness' testimony is rejected, and the woman may not remarry.³⁸

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at n.20.

³⁴ See Enker, *supra* note 20, at cix ("The rule rejecting a defendant's confession, then, results in the exclusion of otherwise probative evidence while the consequence of the rule rejecting a witness' confession is the inclusion of probative evidence that would otherwise have been excluded.")

³⁵ For English translation and explanation, see 1 TALMUD BAVLI, *Yevamot* 25a-b (Yisroel Simcha Schorr & Chaim Malinowitz eds., Mesorah Publications 1st ed. 1999).

³⁶ *Id.* at 25a.

³⁷ *Id.*

³⁸ *Id.*

The Talmud questions the majority approach: How can we accept the testimony of a witness who is an admitted murderer?³⁹ The Talmud reconciles the majority approach as one in line with the position of Rava from Sanhedrin, namely the position of divided testimony.⁴⁰ The majority holds that the court rejects the part of the testimony that is self-incriminating—that the witness murdered the husband—but accepts the part that is not self-incriminating—that the husband is dead.

Both views expressed in the Talmud suggest a more complex understanding of self-incriminating testimony than Maimonides offered. On the one hand, Rava and the majority view in Yevamot advocate splitting testimony, accepting the part of a witness' statement that is incriminating of others, but rejecting the part that is self-incriminating. However if, as Maimonides suggests, the testimony of one who confesses to committing a crime is unreliable, why do we accept any part of the testimony? On the other hand, according to Rabbi Joseph and Rabbi Judah, if the witness makes statements incriminating both himself and others, all of the witness' testimony is rejected because the testimony of a transgressor is invalid. However, by labeling the witness a transgressor, Rabbi Joseph and Rabbi Judah show that they believe the witness' statement that he has transgressed.⁴¹ In other words, Rabbi Joseph and Rabbi Judah reject the testimony of a confessing witness *because* they view the witness' statement as *reliable*. Both of these schools of thought, then, are in contrast to Maimonides' view, which, as we have seen, viewed confessions as inherently unreliable.

The positions in the Talmud point to an additional reason behind the rule against self-incrimination: that a person cannot disqualify himself from testifying by establishing himself a transgressor because "a person is considered related to himself."⁴² Testimony by relatives is not accepted.⁴³ Just like a person cannot testify regarding a relative, so

³⁹ *Id.* at 25b.

⁴⁰ *Id.* at n.2.

⁴¹ Professor Moshe Halbertal has described this as the "crook paradox." If you believe the witness, he is a murderer; if you don't believe the witness, he is a liar. Either way his testimony is specious. Halbertal notes that a similar element of self-contradiction is inherent in every confession. Moshe Halbertal, Annual Caroline and Joseph S. Gruss Lecture at New York University School of Law: Confession, Self-Incrimination, and Repentance in Jewish Law 6 (Spring 2004), available at <http://www.nyutikvah.org/gruss/documents/Confession.pdf>.

⁴² 1 TALMUD BAVLI, *Sanhedrin* 9b, *supra* note 21.

⁴³ See *Deuteronomy* 24:16 ("Parents shall not be put to death for children, nor children be put to death for parents: a person shall be put to death only for his own crime."). Rashi, an eleventh-century biblical commentator, explains that this means that fathers shall not be put to death by *the testimony of* sons, and vice versa. 5 RASHI, COMMENTARY ON THE

too a person cannot testify regarding himself, because one's closest relative is oneself. One could argue that here again is an argument about reliability. Just as we cannot trust the biased account of a person's relative,⁴⁴ we cannot rely on a person's own testimony because a person is not an objective or reliable source of information regarding himself. However, one could also argue that the rationale here is a deeper one: that a person cannot testify against a relative because the court should not turn family members against one another. The law creates a separation between a person's private family and the public forum in which those family members must testify against the accused.

Similarly, a person cannot testify against himself because "a person is considered related to himself" and it would be a gross encroachment on a person's dignity to allow him to make the case for his own physical punishment or death. As Professor Moshe Halbertal writes, "The rejection of self-incrimination is based on the argument that the legal system should not allow someone to harm himself through its own laws. It is about immunity from self-harm and preserving the autonomy of the person in relationship to the legal stature."⁴⁵ According to this view, a Jewish court does not reject confessions because they are unreliable, as Maimonides suggested, but because of the infringement on autonomy that comes from hinging an individual's punishment on his own statements.

3. *The Spiritual Approach: One Cannot Give What One Does Not Own*

Rabbi David ben Zimra (sixteenth century CE), also known as Radbaz, offers a more spiritual approach to the privilege against self-incrimination. According to Radbaz, criminal confessions are prob-

TORAH, *Deuteronomy* 24:16, at 253 (Yisrael Isser Zvi Herczeg trans., Mesorah Publications 1998). See also 1 TALMUD BAVLI, *Sanhedrin* 27b, *supra* note 21 (specifying which relatives are disqualified).

⁴⁴ According to the Sefer Hahinukh, a thirteenth-century work, the testimony of relatives is rejected based on reliability concerns.

God . . . wished that human justice should be executed only on the basis of the strongest and most authentic evidence, above all suspicion. To this end He disqualified the testimony of all relatives . . . Relatives are often together, and in each other's way. It is impossible that they should not occasionally fall out and if we were to believe their evidence against each other, perhaps prompted by the anger of the moment, they would betake themselves to the judge who would be off with their heads to the king. But when his anger subsided the relative would want to hang himself for what he had caused his kinsman.

SEFER HAHINUKH, *reprinted in* NEHAMA LEIBOWITZ, *STUDIES IN DEVARIM (DEUTERONOMY)* 239 (Aryeh Newman trans., 1980).

⁴⁵ Halbertal, *supra* note 41, at 7.

lematic because they involve the surrendering of one's life or body for punishment.⁴⁶ In Radbaz's view, a person may confess to a civil offense and render himself liable for a monetary punishment because a person's money is his to give. However, a person may not confess to a crime that would require giving up his body for punishment because his body and soul do not belong to him. According to Radbaz, a person's body and soul belong to God.⁴⁷ Just as it is prohibited for a person to take his own life, so too, a court may not kill or flog an offender based on his own statements.

In sum, while Maimonides was concerned about the truthfulness or accuracy of confessions, and the Talmud appears concerned with the moral consequences of convicting a man based on his own self-destructive testimony, Radbaz harbors a religious or spiritual concern that man cannot decide to destroy a life that God has created.

B. *American Law*

The U.S. Supreme Court has relied on the Fifth, Sixth, and Fourteenth Amendments to delineate the boundaries of American confession law. Based on these constitutional principles, the Court has excluded certain self-incriminating statements made by defendants from their criminal trials. Unlike the Jewish rule that on its face appears to exclude all confessions ("no man is to be declared guilty on his own admission"),⁴⁸ American law excludes only those self-incriminating statements that are involuntary, coerced, or compelled. This Part examines the same three rationales from Part I.A in the American law context.

1. *The Unreliability of Coerced Confessions: Explaining Voluntariness*

As in Jewish law, one of the concerns that underlie the privilege against self-incrimination in American law is reliability. However, in the American tradition, only involuntary confessions are seen as unreliable. In 1884, the Supreme Court recognized the common law rule prohibiting the use of confessions obtained by inducements, promises, or threats, and explained its reliability rationale.⁴⁹ "A confession, if freely and voluntarily made, is evidence of the most satisfactory char-

⁴⁶ AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 72–73 (1970).

⁴⁷ See *Ezekiel* 18:4 (describing all souls as belonging to God).

⁴⁸ *Supra* note 19 and accompanying text.

⁴⁹ *Hopt v. Utah*, 110 U.S. 574, 587 (1884) (affirming the murder conviction of the defendant who appeared to confess voluntarily, spontaneously, and in the absence of any threats or bribes from the police).

acter.”⁵⁰ However, “the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements . . . or because of a threat or promise”⁵¹ In other words, whereas voluntary self-incriminating statements are reliable because they are statements against a person’s interest that have been confessed only out of sheer and overbearing guilt about the truth of crimes committed, involuntary confessions are the product of fear or hope and are not reliable recitations of the truth.⁵²

Eventually, the voluntariness standard received constitutional support from the Due Process Clause of the Fourteenth Amendment. In *Brown v. Mississippi*,⁵³ a sheriff and “a number of white men” rounded up the defendants, described as “ignorant negroes,” and declared them guilty of murder.⁵⁴ In order to secure confessions, the “defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it.”⁵⁵ The Court found the defendants’ confessions involuntary and therefore inadmissible because they were secured only after brutal whipping and torture. Referring to the defendants’ “so-called confessions”⁵⁶ as “spurious”⁵⁷ and “extorted,”⁵⁸ the Court held that the defendants’ rights to due process were violated because “[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners.”⁵⁹ While the Court was troubled by the race-based brutality and blatant due process violations that the defendants suffered, it was also concerned that the spurious and extorted nature of the confessions rendered them completely unreliable.⁶⁰

⁵⁰ *Id.* at 584.

⁵¹ *Id.* at 585.

⁵² *Id.*

⁵³ 297 U.S. 278 (1936).

⁵⁴ *Id.* at 281 (quoting *Brown v. State*, 161 So. 465, 470 (Miss. 1935) (Griffith, J., dissenting)).

⁵⁵ *Id.* at 281–82 (quoting *Brown*, 161 So. at 470–71).

⁵⁶ *Id.* at 284 (quoting *Brown*, 161 So. at 465, 470–71).

⁵⁷ *Id.* at 283 (quoting *Brown*, 161 So. at 470–71).

⁵⁸ *Id.* at 284 (quoting *Brown*, 161 So. at 470–71).

⁵⁹ *Id.* at 286.

⁶⁰ “Whatever the social and political causes of the Supreme Court’s foray into state confessions cases, it has generally been assumed that the due process voluntariness test was initially concerned only with reliability. On this view *Brown* established, unremarkably, that physical torture impugns the trustworthiness of a resulting confession.” Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 337 (1998) (footnotes omitted).

The Court has rejected confessions produced from violence based upon reliability concerns in other cases as well. In *Stein v. New York*,⁶¹ for example, the Court wrote that the tendency “to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to . . . treat[] any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.”⁶² The Court described the Fourteenth Amendment as a “guarantee against conviction on inherently untrustworthy evidence,”⁶³ and explained that a coerced confession “vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence.”⁶⁴ Involuntary confessions are rejected, in other words, because they may simply be false.

2. *Beyond Reliability: Banning Coercive Confessions Because of Fundamental Values and Respect for Individual Rights*

In addition to the reliability thread that runs through the case law, the Supreme Court has also offered other rationales for rejecting self-incriminating statements. Characterizing the privilege against self-incrimination as “one of the great landmarks in man’s struggle to make himself civilized,”⁶⁵ the Court has described some of these other rationales as reflecting: “many of our fundamental values and most noble aspirations”;⁶⁶ “our sense of fair play which dictates a fair state-individual balance . . . by requiring the government in its contest with the individual to shoulder the entire load”;⁶⁷ and “our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life.”⁶⁸ These rationales share an emphasis not on the questionable accuracy of con-

⁶¹ 346 U.S. 156 (1953).

⁶² *Id.* at 182.

⁶³ *Id.* at 192.

⁶⁴ *Id.* Similarly, the Court notes, “[a] forced confession is a false foundation for any conviction.” *Id. But see* Samuel v. Frank, 525 F.3d 566, 571 (7th Cir. 2008) (citations omitted) (“Not all [coerced statements] are unreliable; their reliability may be established by corroboration, as when a coerced statement reveals a fact, say the location of the murder victim’s body, that only the murderer could have known. It is not a surprise when, forced to speak, a person speaks the truth.”).

⁶⁵ *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 55 (1964) (internal quotation marks and citations omitted).

⁶⁶ *Id.*

⁶⁷ *Id.* (internal quotation marks and citations omitted).

⁶⁸ *Id.* (internal quotation marks and citations omitted). For refutations of these policy arguments, see Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

fession evidence, but on the moral responsibility of the state to respect the autonomy, self-determination, and privacy of the individual.

For example, in determining whether confessions satisfy the Due Process voluntariness standard, the Court has focused both on the reliability of the statement and on whether it was the product of the defendant's "free will."⁶⁹ The Court relied upon various fact-specific factors, such as personal characteristics of the accused (his age, educational background, mental abilities)⁷⁰ and the level of deprivation or mistreatment by the police (including physical and psychological pressure)⁷¹ to decide whether the confession was voluntarily and freely

⁶⁹ See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (explaining that only those statements that a suspect makes "in the unfettered exercise of his own will" may be used against him); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (internal quotation marks and citations omitted) ("We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. If so, the confession cannot be deemed the product of a rational intellect and a free will."). See also *Watts v. Indiana*, 338 U.S. 49, 53 (1949) ("A confession by which life becomes forfeit must be the expression of free choice."); *Bram v. United States*, 168 U.S. 532, 549 (1897) (stating that for a statement to be voluntary, there must be proof that "the making of the statement was voluntary; that is to say . . . the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent").

There are a number of difficulties with the "free will" test. For one, it requires courts to conduct "sweeping inquiries into the state of mind of a criminal defendant who has confessed." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Such inquiries are not only time-intensive and subjective, but also necessarily inconclusive, given the elusive concept of free will. For this reason, in *Connelly*, the Court focused not on the defendant's state of mind, but on the conduct of the police. Because the defendant's confession was not influenced by any police misconduct—even if it was the product of unreliable hallucinations—the confession was admissible. Chief Justice Rehnquist noted that "[o]nly if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained." *Id.* at 166. Similarly, Judge Posner of the Seventh Circuit has noted that if the "overbearing of free will" test was taken seriously, "it would require the exclusion of virtually all fruits of custodial interrogation, since few choices to confess can be thought truly 'free' when made by a person who is incarcerated" and being interrogated. *United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990). According to Judge Posner, the correct approach is to ask "whether the government has made it impossible for the defendant to make a rational choice as to whether to confess," whether, in other words, the defendant can "weigh the pros and cons of confessing and go with the balance as it appears at the time." *Id.* According to Judge Posner, "[t]he police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties and so forth to the point where rational decision becomes impossible." *Id.* at 1130. While this test is clearer than the "overbearing of free will" test, the point of "rational decision" seems highly subjective and elusive as well.

⁷⁰ See *Culombe v. Connecticut*, 367 U.S. 568, 620 (1961) (illiterate mental deficiency); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960) (strong probability that the defendant was insane at the time he confessed); *Payne v. Arkansas*, 356 U.S. 560, 562, 567 (1958) (fifth grade education); *Fikes v. Alabama*, 352 U.S. 191, 196–97 (1957) (possibly mentally ill).

⁷¹ See *Payne*, 356 U.S. at 560, (accused denied food); *Watts v. Indiana*, 338 U.S. 49, 53 (1949) (suspect repeatedly interrogated by multiple officers throughout the night); *Haley v.*

offered by the defendant. Here, the emphasis is less on reliability and more on the moral belief that “men are not to be exploited for the information necessary to condemn them.”⁷² It is the state, not the defendant citizen, who must “produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.”⁷³ This is similar to the argument we extrapolated from the Talmud in Part I.A.2, namely, that the privilege against self-incrimination preserves the autonomy of the person in relation to the legal system.

In 1966, in the watershed decision of *Miranda v. Arizona*,⁷⁴ the Supreme Court “declared that the Fifth Amendment is the touchstone for determining the admissibility of any statements obtained through custodial interrogation by government officials.”⁷⁵ The Fifth Amendment states, “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”⁷⁶ The *Miranda* Court held that when a person is taken into custody and interrogated by the police, any self-incriminating statements are inherently compelled unless the suspect is given certain warnings.⁷⁷ The warnings that the Court required are the now-famous right to remain silent, right to know that statements made can be used in a court of law, and right to an attorney, either retained or appointed.⁷⁸ Thus, instead of having to dissect a suspect’s state of mind under a Due Process Clause voluntariness analysis, the Court set a bright line rule—the need for police to articulate specific warnings—that would be easier to apply.

A cursory look at *Miranda* and the Fifth Amendment reveals a strikingly different general principle than the one articulated in Jewish law. Although the Fifth Amendment only prohibits compelled self-incrimination (no one may be compelled to testify against himself), Jewish law is articulated as a blanket rejection of all self-incrimination (no one is to be declared guilty on his own admission). However, a closer look at *Miranda* reveals a more similar schema. Specifically, the *Miranda* Court assumed that all custodial interrogations were coercive environments, and therefore that all incriminating statements

Ohio, 332 U.S. 596, 598 (1948) (fifteen-year-old suspect questioned incommunicado throughout the night); *Ashcraft v. Tennessee*, 332 U.S. 143 (1944) (defendant deprived of sleep for thirty-six hours).

⁷² *Culombe*, 367 U.S. at 581.

⁷³ *Id.* at 582.

⁷⁴ 384 U.S. 436 (1966).

⁷⁵ STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 671 (9th ed. 2010).

⁷⁶ U.S. CONST. amend. V.

⁷⁷ *Miranda*, 384 U.S. at 467.

⁷⁸ *Id.* at 479.

made by suspects in the course of custodial interrogations (in the absence of warnings) were coerced and inadmissible.⁷⁹ A ban on all self-incriminating statements made during custodial interrogation sounds quite similar to a ban on confessions generally.

Moreover, it is possible that the *Miranda* Court assumed that by requiring police to warn every suspect in clear and unequivocal terms of his right to silence⁸⁰ and to counsel,⁸¹ suspects would, on the whole, cease making self-incriminating statements altogether. Indeed, in Justice Harlan's dissent in *Miranda*, he argued that, "the new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all."⁸² Similarly, Justice White wrote in dissent:

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him *in any way, whether compelled or not* . . . that it is inherently wrong for the police to gather evidence from the accused himself.⁸³

Of course, the dissenters' vision of *Miranda* is not universally accepted. The *Miranda* majority itself wrote explicitly, "[W]e do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement."⁸⁴ Nevertheless, it would be plau-

⁷⁹ *Id.* at 467 ("[W]ithout proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which . . . compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights").

⁸⁰ *Id.* at 468.

⁸¹ *Id.* at 471.

⁸² *Id.* at 505 (Harlan, J., dissenting) (emphasis added).

⁸³ *Id.* at 537-38 (White, J., dissenting) (emphasis added). See also Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1418, 1448 (1985) (arguing that "Miranda was intended to restrict, perhaps eliminate, virtually all police interrogation" because "[m]ost likely, as naive as it now appears, the Court expected the presence of counsel at the station house to be routine and the waiver of rights extraordinary"); Malvina Halberstam, *The Rationale for Excluding Incriminating Statements: U.S. Law Compared to Ancient Jewish Law*, in JEWISH LAW AND CURRENT LEGAL PROBLEMS 177, 186 (Nahum Rakover ed., 1984) (noting that *Miranda* and its progeny "come very close to an absolute bar on extra-judicial confessions").

⁸⁴ *Miranda*, 384 U.S. at 478. Some scholars have also argued that the interpretation of *Miranda* seeking to eliminate all police interrogation is exaggerated. Stephen A. Saltzburg,

sible and logical to assume that by rendering all custodial interrogations coercive and ordering police to clearly warn defendants of their right to silence and counsel, *Miranda* would drastically reduce the number of confessions obtained in criminal prosecutions.

Upon closer inspection, it appears the Jewish and American rules on self-incrimination are similar in that they both reflect a strong hesitance toward using confessions as evidence against the accused. Underlying the Court's resistance to confession is a restatement of the self-determination rationale. Its focus is on the right of the individual against the state.⁸⁵ The privilege is a "substantive right,"⁸⁶ and reflects the "respect a government—state or federal—must accord to the dignity and integrity of its citizens."⁸⁷ Thus, while the language of the Fifth Amendment prohibits only compelled self-incrimination, in *Miranda*, the Court revealed its discomfort with accepting self-incriminating statements more generally.

3. *The Religious or Spiritual Approach*

The privilege against self-incrimination in American law has been explained in spiritual and religious terms as well. Abe Fortas, before becoming a Supreme Court Justice, described the privilege as recognition that every person is "entitled to treatment as an individual in God's image, and not merely as a vessel of the state."⁸⁸ Just as Radbaz felt that a person's body and soul were not his to give, Fortas writes that a person's life is his "inviolable temple."⁸⁹ He describes the privilege as intangible, just like "man's immortal soul."⁹⁰ For Fortas, confession is so deeply private and powerful that it belongs only in a private exchange with God. "A man may be punished, even put to death, by the state; but . . . he should not be made to prostrate himself before its majesty. Mea culpa belongs to a man and his God. It is a plea that cannot be exacted from free men by human authority."⁹¹

Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat, 26 WASHBURN L.J. 1, 22 n.124.

⁸⁵ See *Miranda*, 384 U.S. at 460 ("Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen.").

⁸⁶ *Id.* (internal citation omitted).

⁸⁷ *Id.*

⁸⁸ Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. BAR ASSOC. 91, 96 (1954).

⁸⁹ *Id.* at 98.

⁹⁰ *Id.* at 100.

⁹¹ *Id.* This language has been cited with approval by circuit and district courts. See, e.g., *United States v. Gecas*, 120 F.3d 1419, 1459 (11th Cir. 1997) (Birch, J., dissenting); *Moses v. Allard*, 779 F. Supp. 857, 873 (E.D. Mich. 1991).

Similarly, scholars have also described the rationale behind the privilege in religious or spiritual terms. For example, Robert Gerstein has described the substance of confessions as “a special sort of information,” including “the admission of wrongdoing, the self-condemnation, the revelation of remorse.”⁹² According to Gerstein, these revelations should be regarded as “a matter between a man and his conscience or his God,” just as a person’s religious opinions are regarded as between himself and his God.⁹³ Gerstein analogizes self-condemnation in criminal law to self-condemnation in religious experience, where he identifies a similar emphasis on the privacy of confessions.⁹⁴ In this context, he cites Puritan leaders in the late sixteenth century who decried the practice of public confession: “Much more is it equall that a mans owne private faults should remayne private to God and him selfe till the lord discover them . . . the magistrate should [not] seeke into the offenses of his subjects and not by oathe to rifle the secretts of theare hearts.”⁹⁵

II

CONFRONTING REALITY: EXCEPTIONS WHEN SELF- INCRIMINATING STATEMENTS ARE ACCEPTED

A. *Jewish Law*

Although the Jewish rule on self-incrimination appears to be a blanket ban on confessions, this Part will explore various exceptions to the rule that have been utilized throughout history, namely the royal prerogative, the emergency exception, and the existence of corroborating evidence.

1. *Royal Prerogative*

Although some commentators locate biblical support for the privilege against self-incrimination,⁹⁶ the Bible also contains examples of individuals who are punished based on self-incriminating statements. For example, in 2 *Samuel* chapter one, the story is told about an

⁹² Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 *ETHICS* 87, 90 (1970).

⁹³ *Id.*

⁹⁴ *Id.* at 92–93. See generally Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 *OHIO ST. L.J.* 101 (1992) (tracing the history of the privilege against self-incrimination in English ecclesiastical courts).

⁹⁵ Gerstein, *Privacy and Self-Incrimination*, *supra* note 92, at 94.

⁹⁶ For example, some explain that the verse “a case can be valid only on the testimony of two witnesses or more,” *Deuteronomy* 19:15, shows that a defendant must be convicted only on the testimony of two witnesses, and therefore implies that the defendant’s own confession is not admissible. Rosenberg & Rosenberg, *supra* note 4, at 975–76.

Amalekite who recounts to David a narrative of King Saul's death.⁹⁷ After battle, the Amalekite appears before David and says that Saul and Saul's son Jonathan are dead:

I happened to be at Mount Gilboa, and I saw Saul leaning on his spear, and the chariots and horsemen closing in on him. He looked around and saw me, and he called to me. When I responded, 'At your service,' he asked me, 'Who are you?' And I told him that I was an Amalekite. Then he said to me, 'Stand over me, and finish me off, for I am in agony and am barely alive.' So I stood over him and finished him off . . . Then I took the crown from his head and the armlet from his arm, and I have brought them here to my Lord.⁹⁸

Immediately upon hearing the news, David weeps, mourns, and rebukes the young man for daring to kill King Saul.⁹⁹ Thereupon, David orders his attendant to kill the Amalekite, and says, "Your blood be on your own head! Your own mouth testified against you when you said, 'I put the Lord's anointed to death.'"¹⁰⁰

While David seems to have been convinced of the reliability of the confessing bearer of bad news, the reader of the story will know that in the previous chapter, the death of Saul was recounted differently:

Saul said to his arms-bearer, 'Draw your sword and run me through, so that the uncircumcised may not run me through and make sport of me.' But his arms-bearer, in his great awe, refused; whereupon Saul grasped the sword and fell upon it. When his arms-bearer saw that Saul was dead, he too fell on his sword and died with him.¹⁰¹

Here we may see, as Maimonides feared, that one of the fundamental problems with confessions is their unreliability.

The story of King David and the Amalekite allows us to explore several situations in which Jewish law allows acceptance of self-incriminating statements. Many commentators are quick to point out that there are various exceptions to the general rule against self-incrimination that could justify David's actions. One explanation is that David was not bound by the ordinary rules of criminal procedure

⁹⁷ According to the Bible, Saul was the first King of the Israelites, chosen by the prophet Samuel. Saul's ascendance as king transformed Israelite society from a loose tribal confederation to a monarchy. AARON M. SCHREIBER, *JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME 29–30* (1979). Biblical chronology places Saul's death in approximately 1000 BCE. *Id.* In spite of military and political power enjoyed by biblical kings, contemporaneous prophets "emphasized that even the king had to submit to biblical law and morality." *Id.* at 30. After Saul's death, David, a well-known warrior who had married Saul's daughter, became King of the Israelites. *Id.*

⁹⁸ 2 *Samuel* 1:6–10.

⁹⁹ 2 *Samuel* 1:11–12.

¹⁰⁰ 2 *Samuel* 1:16.

¹⁰¹ 1 *Samuel* 31:4–5.

because he was a king.¹⁰² Some rabbis relied upon this royal prerogative exception in the context of medieval Spain where the Spanish king gave Jewish communities the authority to adjudicate disputes between Jewish litigants.¹⁰³ In that time, the problem of Jewish informers, individual Jews who would submit allegations about other Jews to the secular authorities, posed a most serious danger to the Jewish community.¹⁰⁴ A report by a Jewish informer could bring fines and even expulsion upon an entire Jewish community.¹⁰⁵ It was in the case of one such informer that Shlomo ben Aderet (1235–1310), known as Rashba, used the “law of the king” reasoning to allow a loosening of the laws regarding acceptable evidence in a Jewish court. He writes: “[P]unishment is meted out by royal prerogative even on

¹⁰² See KIRSCHENBAUM, *supra* note 46, at 67–68 (citing Maimonides for an interpretation that David was exercising his “royal prerogative[],” a “system of secular law of the king, recognized by Jewish law”); see also SCHREIBER, *supra* note 97, at 236–37 (“It was widely held that the king had the ultimate responsibility for maintaining public order. . . . Accordingly, the king was viewed as having a very active role in the sanctioning process and was expected to impose whatever sanctions he felt necessary for public order, regardless of their illegality . . .”).

¹⁰³ A word about the historical application of Jewish law after the destruction of the autonomous Jewish Commonwealth in the Land of Israel is in order. During the Second Jewish Commonwealth (circa 500 BCE–70 CE), judicial power was exercised by a supreme court known as the (Great) Sanhedrin. SCHREIBER, *supra* note 97, at 237. Information regarding the Sanhedrin is obscure and contested. *Id.* at 238. What is known is that the Sanhedrin, located in Jerusalem, consisted of seventy-one members who oversaw religious, legal, and municipal affairs. A HISTORY OF THE JEWISH PEOPLE 250 (H. H. Ben-Sasson ed., 1976); Flatto, *supra* note 13, at 68. There were also “Small Sanhedrins,” which were courts of twenty-three judges, and local courts consisting of three judges. SCHREIBER, *supra* note 97, at 238–39. The smaller courts were abolished after the destruction of the Second Temple in 70 CE. *Id.* at 239. The Sanhedrin was abolished not long afterwards. *Id.* According to the Talmud, Jewish penal law—in its “classical hermeneutical” sense—was suspended when the Second Temple was destroyed in 70 CE. AARON KIRSCHENBAUM, JEWISH PENOLOGY: THE THEORY AND DEVELOPMENT OF CRIMINAL PUNISHMENT AMONG THE JEWS THROUGHOUT THE AGES at xviii (2013). However, according to Aaron Kirschenbaum, a “pragmatic, applied system of Jewish Penal Law” continued to flourish. *Id.* at viii. This practical law was a fluid system in which communal leaders and rabbinic courts meted out criminal sanctions that departed from those prescribed by the classical system. While some might view aspects of the pragmatic non-classical penal system as lacking “the divine aura that enhanced the classical hermeneutical punishments” or as merely “temporary palliatives,” the pragmatic system functioned “for hundreds and hundreds of years—in conjunction with and subservient to the law of the non-Jewish monarch who ruled over the areas in which Jews lived—as the penal law of the Jewish people, a kind of internal ‘law of action.’” *Id.* It is in the context of this pragmatic system that the laws of evidence were relaxed, including, occasionally, the ban on self-incrimination.

¹⁰⁴ See KIRSCHENBAUM, *supra* note 46, at 84–85 (describing the informer as “despised as a traitor and dreaded as an enemy of society”).

¹⁰⁵ Aaron M. Schreiber, *The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Christian Law, Jewish Law and the United States Supreme Court*, PACE L. REV. 535, 547 (1991).

the basis of the testimony of relatives and even on the basis of the confession of the accused himself . . . for royal justice seeks the truth only (regardless of procedure).”¹⁰⁶ “For if you do not grant this,” Rashba continues, “but insist strictly upon Torah law as fulfilled by the Sanhedrin [the chief Jewish court], the world would be destroyed.”¹⁰⁷

Rashba was able to use the exception of royal justice to suspend some of the traditional requirements of criminal procedure required by Jewish law. His language, though, also hints that the strict traditional rules were intended to be circumvented in certain situations. The rules, in other words, reflected an ideal: a judicial system in which no one ever had to be put to death. As Rashba notes, the Rabbinic sages had said that, “Every Sanhedrin that executes two times is called a murderous [court].”¹⁰⁸ And yet, a reality also existed in which dangerous crimes took place, and Jewish leaders needed to be able to respond. David did not have to stand by when a man confessed to murdering an Israelite king, and Rashba did not have his hands tied when the Jewish community of medieval Spain needed a way to deal effectively with informers who would bring destruction upon the community. While as a general rule self-incriminating statements were rejected, in circumstances such as these, they were allowed.

2. *Emergency Exception*

A second explanation of David’s actions and second exception to the rule against self-incrimination is that David was acting in the case of an emergency.¹⁰⁹ The Talmud says that as a rule, a court has the authority to impose extralegal penalties when the times demand it.¹¹⁰ This exception was also relied upon in medieval Spain. For example, Rabbi Isaac ben Shesheth Barfat [Perfet] (1326–1408), known as Ribash, expounded on the emergency doctrine in a letter to the officials of the Jewish community of Teurel, a city in the province of Aragon. The communal leaders wrote to Ribash regarding a Jewish

¹⁰⁶ Shlomo ben Aderet, Vol. III, No. 393. For English translation, see KIRSCHENBAUM, *supra* note 46, at 67, and SCHREIBER, *supra* note 97, at 382.

¹⁰⁷ KIRSCHENBAUM, *supra* note 46, at 67.

¹⁰⁸ SCHREIBER, *supra* note 97, at 382.

¹⁰⁹ See KIRSCHENBAUM, *supra* note 46, at 67 (pointing out this possible explanation). Maimonides himself refers to David and the Amalekite as a case of an emergency. See MAIMONIDES: JUDGES, *supra* note 19, ch. 18, para. 6, at 52 (“It is true that . . . David ordered the execution of the Amalekite stranger on the latter’s admission. But [that was an] emergency case[] . . .”).

¹¹⁰ 1 TALMUD BAVLI, *Sanhedrin* 46a, *supra* note 21. See also 1 EMANUEL B. QUINT AND NEIL S. HECHT, *JEWISH JURISPRUDENCE: ITS SOURCES AND MODERN APPLICATIONS* 179 (1980) (“There is substantial precedent for permitting courts to exercise exigency jurisdiction even in the absence of traditional evidentiary rules and safeguards.”).

informer who had confessed to reporting to the secular authorities. Ribash recognized that in capital cases, “according to the strict letter of the law no heed is paid to a confession . . . and his confession makes no difference.”¹¹¹ However, he writes, in light of the “emergency needs of the times,” and since “the times demand it,” the Jewish court may impose flagellation and pronounce capital sentences “even without full [Talmudically required] evidence.”¹¹²

As Ribash also notes in his letter, the very fact that the Jewish court was meting out punishments of flagellation and the death penalty at that time was because of the emergency doctrine. “[T]he fact that we do judge capital cases in these times, although capital jurisdiction has been suspended [Talmudically] is due to the emergency needs of the times.”¹¹³ Thus, the emergency exception was one that “permeated the judicial procedure of the authorities combatting crimes which were regarded as serious breaches of morality and public order” when the times demanded it.¹¹⁴ As with the royal prerogative exception, the emergency exception seems a realistic acknowledgment that no rule is ever appropriate at all times and places.

3. *Corroborating Evidence*

A third explanation of David’s actions in the Bible and an exception to the general rule against self-incrimination is that the case of the confessing Amalekite contained corroborating evidence—Saul’s crown and armllet. A similar case is found in 2 *Samuel*, chapter four, where David condemns two men to death on the basis of their admission to killing Ish-bosheth. When the two men, Rechab and Baanah, bring the head of Ish-bosheth to David, David responds by putting them to death.¹¹⁵ Here too we have a case of punishment based on self-incriminating statements, but with the added indicia of reliability of corroborating evidence—in this case the decapitated head of the victim.

Indeed, in modern day Israel (which, although a secular system, is informed by Jewish tradition) the rule is that a confession must be supplemented by an additional element of corroboration in order to convict a defendant.¹¹⁶ In *Al Bahiri v. State of Israel*, Chief Justice

¹¹¹ KIRSCHENBAUM, *supra* note 46, at 87.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 91.

¹¹⁵ See 2 *Samuel* 4:11 (“I will certainly avenge his blood on you, and I will rid the earth of you.”).

¹¹⁶ The Israeli legal system is a Western, secular, and liberal system and has traits of both common law and civil law systems. Ruth Levush, *How to Conduct Research in Israeli Law*, 28 INT’L J. LEGAL INFO. 127, 127 (2000). Religious law is a source of law “only by

Menachem Elon explained that the reason for the requirement that to suffice for a conviction there be “something in addition” to a defendant’s confession is to counteract Maimonides’ fear that “there may have been ‘internal pressure’ on the defendant, who may blame himself for a crime that someone else has committed.”¹¹⁷ Elon explained the modern rule as an outgrowth of the traditional Jewish rule. He wrote that while Jewish law originally “maintained that a defendant’s self-incriminating confession was absolutely inadmissible,” over the course of time, “with the changing needs of the times and of society, various changes were made towards easing the methods of proof in criminal law.”¹¹⁸ One of these major changes was the ability to convict a defendant based upon his confession, but only if there was “some measure of corroboration to support the veracity of the confession.”¹¹⁹

As with the other exceptions, the acceptance of confessions when accompanied by corroborating evidence seems to be a compromise approach that was meant to admit confessions when the court could be satisfied as to the reliability of the confession.¹²⁰ According to Elon, “This approach seems most appropriate both in terms of justice to the defendant, who should not be convicted if innocent, and in terms of finding the truly guilty parties, who should not be allowed to escape the legally prescribed punishment.”¹²¹ While the existence of

virtue of absorption by the secular state law.” *Id.* at 129. One exception to that characterization is matters of marriage and divorce, which are under the jurisdiction of rabbinical courts. *Id.* at 132. Despite the secular nature of Israeli law, certain Supreme Court justices, who are knowledgeable in Jewish law, sometimes discuss a comparison with Jewish law or look to it as a historical source. 4 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1730* (Bernard Auerbach & Melvin J. Sykes trans., 1994).

¹¹⁷ *CrimA Al Bahiri v. State of Israel 37(3) PD 169 [1983] (Isr.)*, as reprinted in ELON ET AL., *supra* note 10, at 206.

¹¹⁸ *Id.* at 208.

¹¹⁹ *Id.* at 208–09 (citation omitted).

¹²⁰ It is interesting that American law also requires corroborating evidence in addition to a confession. Most American jurisdictions adhere to a form of the *corpus delicti* rule, “which bars admission in evidence of a criminal defendant’s extrajudicial confession unless the prosecution shows, by evidence independent of the confession, that the crime charged was committed by someone.” Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti As a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385, 385 (1993). See also *Smith v. United States*, 348 U.S. 147, 152 (1954) (“The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court . . .”). Just as Maimonides explained the Jewish ban on confessions as protecting against confessions by suicidal individuals, the purpose of the *corpus delicti* rule was to prevent disturbed people from confessing to crimes that had not taken place. Mullen, *supra*, at 385. Interestingly, however, in keeping with the theme that runs through this Note, the rule has faced “dwindling vitality,” as exceptions were created and the quantum of evidence required diminished. *Id.* at 385–86.

¹²¹ ELON ET AL., *supra* note 10, at 209.

corroboration might satisfy Maimonides' accuracy concerns, it would not rebut the other rationales underlying the privilege against self-incrimination, namely, a person's inalienable right to privacy and autonomy, and the religious problems with allowing a person to take his own life via the criminal system.

To sum up, the basic Jewish law is that no one may be convicted on the basis of his confession. However, over time, the rule has been interpreted malleably in certain instances. Confessions were accepted based on royal authority, in times of emergency, and when enough other corroborating evidence was available.¹²² Interestingly, the exceptions were treated less like deviations and more like a reflection that Jewish law itself seems to expect and authorize the exceptions when necessary to meet overriding goals.¹²³

B. American Law

Although many viewed *Miranda* as a radical decision, and it created a bright line rule of exclusion for statements made by suspects in custodial interrogation not preceded by warnings and waiver, many further exceptions to the rule against self-incrimination beyond those enumerated in *Miranda* have developed. Some even argue that the exceptions have swallowed the rule.¹²⁴ Empirical studies have also

¹²² Kirschenbaum also notes other categories in which self-incriminating statements may be accepted. For example, self-incriminating statements may be accepted when the confessant does not realize that he is making self-incriminating statements (because he is uninformed of the law), and therefore he has no reason to lie. KIRSCHENBAUM, *supra* note 46, at 127. Similarly, self-incriminating statements may be accepted when the presumption of innocence of a particular defendant has been shattered:

Thus a married woman who is pregnant is not believed at all when she declares that she has been unfaithful to her husband. However, a declaration made by a betrothed or unmarried woman who is pregnant, that she had had sexual relations with a man forbidden to her . . . is believed . . . her pregnancy has destroyed her presumption of innocence The reasoning thus appears to be that once a person's presumption of innocence has been broken, the strict rules of evidence are relaxed; hence even self-incriminating statements are admitted as evidence.

Id.

¹²³ See SCHREIBER, *supra* note 97, at 398–99 (“Although talmudic decision-makers cited . . . various principles and rationales of law to justify the setting aside of biblical laws, it seems clear that their decisions were also based upon the perspective that the Bible itself expected and authorized this, where departure from the law was necessary in order to meet basic, overriding goals. . . . [I]t is clear in both theory and practice that traditional legal principles may be overridden to attain basic goals.”).

¹²⁴ See e.g., Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1841 (1987) (“Although the Court as yet has given no indication that it is willing to take the more controversial step of overruling *Miranda*, it has deeply eroded the foundation of the doctrine, leaving *Miranda* almost useless in its present application.”); Barry Friedman, *The Wages of Stealth Overruling*

shown that *Miranda* has had little effect on the overall ability of the police to obtain confessions.¹²⁵ This section will explore three exceptions to the *Miranda* exclusionary rule: impeachment, emergency, and the *Miranda*-endorsed exception of waiver. These exceptions describe situations in which self-incriminating statements made by a suspect during custodial interrogation without sufficient warnings can be used in court.¹²⁶

1. Impeachment

In *Harris v. New York* the Court limited *Miranda* by holding that while a defendant's *Miranda*-defective self-incriminating statements may not be used in the government's case-in-chief, those statements may be used to impeach the credibility of a defendant who chooses to testify.¹²⁷ In *Harris*, for example, the police had failed to warn the defendant of his right to counsel before interrogating him.¹²⁸ Therefore, while the defendant's subsequent incriminating statement could not be used as substantive proof of the offense of selling drugs, his statement was lawfully raised by the prosecution in its cross-examina-

(*With Particular Attention to Miranda v. Arizona*), 99 GEO. L.J. 1, 16–25 (2010) (explaining how *Miranda* was effectively overruled through a process of “stealth overruling”).

¹²⁵ See Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 19 n.99 (1986) (“The great weight of empirical evidence supports the conclusion that *Miranda*'s impact on the police's ability to obtain confessions has not been significant.”).

¹²⁶ It should also be noted that since *Miranda* only governs custodial interrogation, it does not apply to interrogations of suspects not in police custody, or to statements made by defendants who are in custody in the absence of police interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 297–98 (1980). For example, in *Innis*, the Court held that the respondent was not subjected to interrogation when police officers took him in a police vehicle without his attorney and stated, “there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.” *Id.* at 294–95, 302. The statement moved Innis to tell the officers that he would show them where the gun was hidden because he “wanted to get the gun out of the way because of the kids in the area in the school.” *Id.* at 295 (internal quotation marks omitted). Nonetheless, because the officers' comments were not “reasonably likely to elicit an incriminating response from the suspect,” the suspect's self-incriminating statements were not made in response to interrogation, and therefore were admissible. *Id.* at 301, 303.

¹²⁷ 401 U.S. 222, 224 (1971); see also *Oregon v. Hass*, 420 U.S. 714, 723 (1975) (holding that a defendant could be impeached with incriminating statements made after police denied defendant's request to contact a lawyer). The *Harris* court may have initially allowed impeachment use of inculpatory statements made after *Miranda*-defective warnings based on the understanding that the *Miranda* exclusionary rule was not required by the Constitution. See *id.* In *Dickerson v. United States*, the Court clarified that *Miranda* warnings are constitutionally required, but upheld the exceptions to *Miranda* that had developed in the case law as valid exceptions to a constitutional rule. See 530 U.S. 428, 432, 441 (2000).

¹²⁸ *Harris*, 401 U.S. at 224.

tion of Harris.¹²⁹ The Court justified the decision by stating that, “[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.”¹³⁰

Harris’ impeachment exception to *Miranda* is significant because impeachment evidence can be misconstrued as substantive evidence by juries.¹³¹ Thus, a defendant who has made a *Miranda*-defective confession is faced with a dilemma. Either the defendant may choose to testify on his own behalf, knowing that his confession may be read in court—even though it was offered without the proper *Miranda* warnings—or he may choose not to testify and face a greater chance of conviction.¹³²

2. *Emergency*

The emergency exception allows officers to question a suspect without *Miranda* warnings in the case of an emergency. Any incriminating statements that a defendant makes can then be used against him in court, even though *Miranda* warnings were not given. For example, in *New York v. Quarles*, two officers were approached by a woman who said she had been raped by a man carrying a gun.¹³³ With the victim’s assistance, the police were able to locate a suspect in a nearby supermarket.¹³⁴ While apprehending the suspect, the officer noticed the suspect’s shoulder holster was empty and asked him where the gun was.¹³⁵ The suspect gestured toward some empty cartons and said, “the gun is over there.”¹³⁶ The police uncovered the gun from one of the cartons. The defendant’s response to the officer’s question was later used at his trial. The Court, citing “overriding considerations of public safety,”¹³⁷ held that the officer was allowed to ask Quarles about the gun without warnings because the officer “needed an answer to his question not simply to make his case against Quarles but

¹²⁹ *Id.* at 225–26.

¹³⁰ *Id.* at 226.

¹³¹ See James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics*, 44 STAN. L. REV. 1301, 1333 (1992) (noting “the futility of distinguishing between impeachment and substantive uses of incriminating statements or otherwise limiting the inferential use of defendants’ statements” at criminal jury trials).

¹³² SALTZBURG & CAPRA, *supra* note 75, at 701 (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 160 (1966)). It should be noted, though, that defendants may often decide, and may be advised by counsel, not to testify for a variety of reasons, not only because of the potential use of a confession as impeachment evidence.

¹³³ 467 U.S. 649, 651–52 (1984).

¹³⁴ *Id.* at 652.

¹³⁵ *Id.*

¹³⁶ *Id.* at 652.

¹³⁷ *Id.* at 651.

to insure that further danger to the public did not result from the concealment of the gun in a public area.”¹³⁸

3. Waiver

Perhaps the biggest limitation to *Miranda* protection of criminal defendants—found in the *Miranda* decision itself—is that *Miranda* rights are waivable. Once a defendant waives his rights, any of his subsequent self-incriminating statements can be used in court, as long as the government can show that the waiver was voluntary, knowing, and intelligent.¹³⁹ In determining the boundaries of voluntary, knowing, and intelligent waivers, the Court has held that a defendant does not have to know the subject of the interrogation in order to waive.¹⁴⁰ Additionally, the Court has held that a defendant can validly waive his right to counsel, and his confession can be admitted, even though he was not told that an attorney hired by a family member was trying to contact him.¹⁴¹

The Court has found that a defendant waives his right to silence or to an attorney just by talking to the police.¹⁴² If a defendant wishes to invoke, rather than waive, his right to silence or counsel, the invocation must be “unambiguous” and “unequivocal.”¹⁴³ This means, as Justice Sotomayor pointed out in a stinging dissent in *Berghuis v. Thompkins*, that a suspect who wishes to invoke his right to remain silent must “counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police.”¹⁴⁴

¹³⁸ *Id.* at 657. Not every conversation between police and suspects about a gun will fall under the public safety exception. See *United States v. Jackson*, 544 F.3d 351, 360 n.9 (1st Cir. 2008) (finding that the public safety exception did not apply when officers asked the defendant about a gun in his home, when the defendant was outside of his home, surrounded by police officers); *United States v. Mobley*, 40 F.3d 688, 693 (4th Cir. 1994) (finding that the public safety exception did not apply when officers asked the defendant about the location of a gun when the defendant was naked and alone in his house).

¹³⁹ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.”).

¹⁴⁰ *Colorado v. Spring*, 479 U.S. 564, 573–74 (1987).

¹⁴¹ *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

¹⁴² See *Davis v. United States*, 512 U.S. 452, 460 (1994) (“Nothing in *Edwards* requires the provision of counsel to a suspect who consents to answer questions without the assistance of a lawyer.”).

¹⁴³ *Id.* 512 U.S. at 462, 455. The Court found there was no invocation of the right to counsel when the defendant said, “Maybe I should talk to a lawyer.” *Id.* at 455. See also *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010) (finding no invocation of right to silence after defendant was uncommunicative for almost three hours of police interrogation).

¹⁴⁴ *Berghuis*, 130 S. Ct. at 2266 (Sotomayor, J., dissenting). In *Berghuis*, the suspect was interrogated for two hours and forty-five minutes during which time he responded with

Finally, according to the language of *Miranda*, once a defendant invokes his right to silence or counsel, interrogation must cease.¹⁴⁵ However, subsequent case law has established that after a defendant invokes his right to silence, the police can continue to interrogate him after waiting two hours.¹⁴⁶

III

DUELING INTERESTS: EXPLAINING THE COMPARISON

While scholars have focused on the differences between the Jewish and American perspectives on self-incrimination, and some have pointed out ways in which the lessons of one tradition should be extended to the other,¹⁴⁷ this Note has highlighted certain similarities. Part I illustrated the parallels between the rationales offered for the privilege against self-incrimination in both systems. Both traditions express concerns about the reliability of confessions, as well as the human dignity and privacy concerns that arise when a person's word is used to convict him. Both traditions also contain strains of an argument that confession is so inherently private that it belongs in the realm of thoughts shared only with God. This Note has also argued that a broad reading of the *Miranda* decision, as envisioned by the

limited responses, such as “yeah,” “no,” or “I don’t know,” but did not affirmatively state that he wanted to remain silent or wanted an attorney. *Id.* at 2267 (internal quotation marks omitted). As the interrogation was reaching three hours, the officer asked Thompkins, “Do you believe in God?” Thompkins said, “Yes.” He was then asked, “Do you pray to God?” Thompkins said, “Yes.” The officer asked, “Do you pray to God to forgive you for shooting that boy down?” Thompkins answered, “Yes,” and looked away. *Id.* at 2257 (majority opinion).

¹⁴⁵ *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966) (holding that “[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease,” because he has exercised his Fifth Amendment privilege and further questioning would inherently constitute compulsion).

¹⁴⁶ *Michigan v. Mosley*, 423 U.S. 96, 102, 104 (1975) (holding that while a defendant's invocation of the right to silence must be “scrupulously honored,” it does not give rise to “permanent immunity from further interrogation” (quoting *Miranda*, 384 U.S. at 479)).

¹⁴⁷ See *supra* note 4 and accompanying text (describing scholarship focused on the differences between American and Jewish approaches to self-incrimination); see also 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, 70 (2003) (“This essay will critique the GJP’s [Georgia Justice Project, a criminal defense organization whose mission is to redirect the lives of its clients to achieve moral religious redemption] encouragement of confessions in the context of the secular American justice system via comparison with the treatment of confessions under ancient Jewish law.”); 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. INT’L & COMP. L. REV.* 257, 272 (2006) (“[A] conceptual approach to the application of Jewish law might motivate the rethinking and possible modification of the American law of confessions based on insights and lessons that arise out of an analysis of the Jewish law regarding self-incrimination.”).

dissents and perhaps even by the majority, looks similar to the Jewish ban on confession.¹⁴⁸

Part II described how, in both Jewish and American law, some jurists have relaxed the rules rejecting or limiting self-incriminating evidence, allowing more expansive forms of self-incriminating testimony to be considered in certain instances. Exceptions were made to the Jewish ban on confessions in cases of exigency, royal prerogative, and where corroborating evidence was available. So too, in American law, the Supreme Court created a number of exceptions to *Miranda*'s supposedly bright line rule of exclusion by allowing incriminating statements to be used in the cases of impeachment, exigency, and waiver.

While the similarities between Jewish and American law are intriguing and previously under-explored, I am careful not to overstate them. To start, the heritages of the two traditions are quite different. Jewish law has a three-thousand-year history during which Jews have lived in varying degrees of autonomy and political subservience, and in geographic areas across the globe. The American Constitution, by contrast, is less than three hundred years old, and is operational in U.S. courtrooms every day.¹⁴⁹ Moreover, the two rules are not identical. The Jewish approach derives from the principle that no one may render himself guilty on his own admission, which is certainly distinct from the American principle, that focuses on ensuring that confessions are voluntary and uncompelled. The exceptions to the Jewish and American rules are also distinct. While the Jewish exceptions from the Middle Ages related to Jewish informers,¹⁵⁰ a limited problem that posed extreme danger to the Jewish community, the American exceptions to the privilege against self-incrimination have more sweeping consequences. Most basically, for example, the waivability of *Miranda* rights, recognized by the *Miranda* Court itself, is a profound limitation on the rights to silence and to counsel.

This Note argues that both Jewish and American law—operating in markedly different times, places, and contexts—reflect a simultaneous attraction toward and repulsion from self-incriminating statements, revealing a tension inherent in the subject of confession. Underlying the complex history of the right against self-incrimination is “the law’s semi-conscious struggle to come to terms with the diffi-

¹⁴⁸ See *supra* notes 79–83 and accompanying text.

¹⁴⁹ As Professors Rosenberg and Rosenberg point out, attempting to equate Jewish and American law would be like “trying to stuff a whale into a molted snakeskin.” Rosenberg & Rosenberg, *supra* note 4, at 1041.

¹⁵⁰ See *supra* notes 104–05 and 109–11 and accompanying text.

cult, layered, perplexing notion of the speech-act that follows from the statement ‘I confess.’”¹⁵¹

The tension within confession law represents two different ways of looking at confessions. On the one hand, some view confession as an act that should be encouraged. They believe that through confession comes self-recognition, reflection, and hopefully reformation and rehabilitation.¹⁵² On the other hand, some view confessions as extremely intimate and private,¹⁵³ as well as suspicious and vulnerable to elicitation through coercion.¹⁵⁴ These two visions of confession are ever-present and always in tension, and this struggle is reflected in the law.

For some, confessions are virtuous. Justice Scalia, for example, in a scathing dissent in *Minnick v. Mississippi*,¹⁵⁵ felt that “even if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it.”¹⁵⁶ “More fundamentally,” he writes, “it is wrong, and subtly corrosive of our criminal justice system, to regard an honest confession as a ‘mistake.’ While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves.”¹⁵⁷ For Justice Scalia, confessions are desirable because they show that a person takes responsibility for his actions and recognizes his shortcomings in an effort to “do what is right.”¹⁵⁸ According to Justice Scalia, we should “rejoice

¹⁵¹ PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 30 (2000).

¹⁵² See, e.g., Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1390–91 (2003) (“Punishment seeks to teach by triggering and developing the offender’s sense of guilt. It tries to induce contrition and repentance so that the offender will repudiate his past wrongful act and avoid committing it again.”); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 333 (1998) (exploring the ways in which confession can bring “peace, joy, forgiveness, reconciliation, and a renewed sense of one’s identity” to a defendant, but can also bring criminal conviction and punishment).

¹⁵³ See *United States v. Nobles*, 422 U.S. 225, 233 (1975) (“The Fifth Amendment privilege . . . protects ‘a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.’” (quoting *Couch v. United States*, 409 U.S. 322, 327 (1973))); Gerstein, *supra* note 92, at 91 (analyzing the argument that the privilege is needed to protect privacy and noting that “it is not the disclosure of the facts of the crime, but the *mea culpa*, the public admission of the private judgment of self-condemnations, that seems to be the real concern”).

¹⁵⁴ See generally Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) (discussing the problem of police-induced false confessions).

¹⁵⁵ 498 U.S. 146 (1990).

¹⁵⁶ *Id.* at 166.

¹⁵⁷ *Id.* at 167.

¹⁵⁸ *Id.*

at an honest confession, rather than pity the ‘poor fool’ who has made it; and we should regret the attempted retraction of that good act, rather than seek to facilitate and encourage it.”¹⁵⁹

Justice Scalia’s view of confession is apparent in other aspects of American law and culture as well. As his dissent notes, the U.S. Sentencing Guidelines allow for a reduction in sentence if a defendant accepts responsibility for his actions and aids the government in its investigation.¹⁶⁰ Similarly, it is a common belief that if one makes a mistake or commits a bad act, the best course of action is to come clean and tell the truth.¹⁶¹ “Confession of misdeeds has become part of the everyday pedagogy of Western societies, normally with the understanding that recalcitrance in confession will aggravate punishment, while full confession will both cleanse the soul and provide possible mitigation of sanctions.”¹⁶² One need only turn on any television channel to view someone—either fictional or not—confessing to a misdeed.¹⁶³

This redemptive view of confession is apparent in Jewish tradition as well. At the beginning of the Book of Genesis, a number of people commit sins. First, Adam eats from the tree of knowledge, the only tree that was forbidden to him in the Garden of Eden.¹⁶⁴ Later, Adam’s son, Cain, kills his brother Abel.¹⁶⁵ Adam’s reaction when confronted about his sin is to shift blame to Eve: “The woman You put at my side—she gave me of the tree, and I ate.”¹⁶⁶ However, according to some traditions, unlike Adam’s passing the buck, Cain’s

¹⁵⁹ *Id.*

¹⁶⁰ U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2013).

¹⁶¹ As Judge Friendly writes of the privilege against self-incrimination, “[n]o parent would teach such a doctrine to his children; the lesson parents preach is that while a misdeed, even a serious one, will generally be forgiven, a failure to make a clean breast of it will not be.” The privilege runs counter to our sense of social morality and reality in which “[e]very hour of the day people are being asked to explain their conduct to parents, employers and teachers. Those who are questioned consider themselves to be morally bound to respond, and the questioners believe it proper to take action if they do not.” Friendly, *supra* note 68, at 680.

¹⁶² BROOKS, *supra* note 151, at 45.

¹⁶³ Professor Amy Adler, for example, has written about the cultural fascination with the show, *To Catch a Predator*. In a typical episode, she writes, a man caught engaging in an online sexual chat with a minor is made to grovel and confess before the cameras. Amy Adler, *To Catch a Predator*, 21.2 COLUM. J. GENDER & L. 130, 148–49 (2012). He is berated and reminded of the details of his unlawful conversation until he finally says: “Please stop . . . I confess, I’m guilty, there’s nothing to dispute.” *Id.* at 149 (internal quotation marks omitted). And, Adler adds, “It’s the best part of the show.” *Id.*

¹⁶⁴ *Genesis* 2:16–17 (“And the Lord God commanded the man, saying ‘Of every tree of the garden you are free to eat; but as for the tree of knowledge of good and bad, you must not eat of it’”).

¹⁶⁵ *Genesis* 4:8.

¹⁶⁶ *Genesis* 3:12 (internal quotation marks omitted).

response to his crime and punishment is confession and repentance.¹⁶⁷ A fascinating midrash, a rabbinic text, recounts an interaction between Adam and Cain, father-and-son criminals as it were.¹⁶⁸ According to the story, Cain appeared happy. His father asked him, “What happened with your judgment?” Cain responded, “I repented and am reconciled.” Suddenly Adam begins beating his head and exclaims, “How awesome is the power of repentance, and I did not know!”¹⁶⁹ The midrash underscores the power and importance of repentance, and highlights the cathartic and rehabilitative effect that confession and repentance can provide.¹⁷⁰

However, despite the possibly cathartic effect of confessions, both American and Jewish traditions contain other viewpoints heavy with the awareness that confessions can also be both undesirable and lethally misleading.¹⁷¹ In *Escobedo v. Illinois*,¹⁷² the Court noted that “a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.”¹⁷³ First, reliance on confessions—which are such powerful pieces of evidence—can lead to insufficient investigation of the crime and inadequate exploration of other evidence and suspects.¹⁷⁴ Second, reliance on confessions can encourage police misconduct. “The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer—that is, to a confession of guilt.”¹⁷⁵ A well-intentioned use of the seemingly incontrovertible evidence of

¹⁶⁷ See, e.g., RAMBAN (NACHMANIDES), COMMENTARY ON THE TORAH 91 (Charles B. Chavel trans., Shilo Publishing House 1976) (“The correct plain interpretation is that it is a confession. Cain said ‘It is true that my sin is too great to be forgiven’”).

¹⁶⁸ MIDRASH RABBAH, *Genesis* 22:13, at 191–92 (H. Freedman & Maurice Simon trans., Soncino Press 3d ed., 1983).

¹⁶⁹ *Id.*

¹⁷⁰ Though this Note is focused on the Jewish tradition, other faiths have a similar tradition. See, e.g., 1 *John* 1:9–10 (NIV) (“If we confess our sins, he is faithful and just and will forgive us our sins and purify us from all unrighteousness. If we claim we have not sinned, we make him out to be a liar and his word is not in us.”).

¹⁷¹ See *supra* Part I (discussing rationales for the privilege against self-incrimination in Jewish and American law).

¹⁷² 378 U.S. 478 (1964).

¹⁷³ *Id.* at 488–89.

¹⁷⁴ *Id.* at 489; see also *Haynes v. Washington*, 373 U.S. 503, 519 (1963) (“[H]istory amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . .”).

¹⁷⁵ *Escobedo*, 378 U.S. at 489 (citing 8 JOHN H. WIGMORE, EVIDENCE 309 (3d ed. 1940)).

confession, the reasoning goes, can grow into a system of abuse.¹⁷⁶ Therefore, according to the Court, “[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.”¹⁷⁷ The Court’s conclusions echo the centuries of both American and Jewish concern that systems founded on self-incriminating statements may prove fatally, fundamentally unsound.

Such concerns have been bolstered in recent years by advancements in the fields of scientific DNA analysis and psychology. According to the Innocence Project, there have been 316 convictions overturned in the United States based on DNA evidence.¹⁷⁸ In approximately 25% of those cases, “innocent defendants made incriminating statements, delivered outright confessions or pled guilty.”¹⁷⁹ In addition to the irrational self-destructive tendencies of the human psyche,¹⁸⁰ scholars have attributed false confessions to psychological techniques used by police officers, which can cause even innocent people to confess.¹⁸¹ According to Professors Richard Ofshe and Richard Leo, psychological interrogation techniques limit and control the alternatives available to suspects, and then rely on the natural human tendency to make “optimizing choices” given the available alternatives.¹⁸² In addition, the literature highlights that vulnerable populations—such as children and the mentally ill—are especially likely to falsely confess because they have undeveloped judgment, cannot fully appreciate and evaluate risks in decision-making, are easily persuaded, and are eager to please authority figures.¹⁸³

¹⁷⁶ *Escobedo*, 378 U.S. at 489.

¹⁷⁷ *Id.* (quoting 8 WIGMORE, *supra* note 175, at 309).

¹⁷⁸ *Know the Cases: DNA Exonerated Case Profiles*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited October 10, 2014).

¹⁷⁹ *Understanding the Causes: False Confessions*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited October 10, 2014).

¹⁸⁰ See Lamm, *supra* note 25, at 56 (expounding on Maimonides’ suicide by confession theory).

¹⁸¹ See Ofshe & Leo, *supra* note 154, at 985 (“The techniques interrogators use have been selected to limit a person’s attention to certain issues, to manipulate his perceptions of his present situation, and to bias his evaluation of the choices before him. . . . [I]f misused they can result in decisions to confess from the guilty and innocent alike.”).

¹⁸² *Id.* Ofshe and Leo write that investigators can elicit confessions from innocent suspects “either by leading them to believe that their situation, though unjust, is hopeless and will only be improved by confessing; or by persuading them that they probably committed a crime about which they have no memory and that confessing is the proper and optimal course of action.” *Id.* at 986.

¹⁸³ See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 1004 (2004). For example, the authors quote one learning-disabled sixteen-year-old who falsely confessed to a murder because, “They kept telling me I know you did it so why are you lying to me. They had me so upset I wasn’t

In sum, we are left with two ways of viewing confessions: as statements that provide important details about the commission of a crime and reflect a positive acceptance of responsibility by a defendant; and as unreliable statements that are too often attained by manipulation. Our sense of what confession is and does “hovers in a zone of uncertainty that has much to do with the multiform nature of confession and its uses for cleansing, amelioration, conversion, counseling, as well as conviction.”¹⁸⁴ As legal understanding moves ever forward, jurists must grapple with self-incriminating statements while keeping sight of this tension. Future decisions involving self-incriminating statements must be made with an awareness of the benefits of utilizing self-incriminating statements but also of the hesitations that have animated both traditions regarding such statements.

CONCLUSION

This Note has shown how two disparate legal systems struggle to strike a fair balance in applying the privilege against self-incrimination. On the one hand, there are many reasons to reject self-incriminating evidence—suspicions of unreliability, respect for personal integrity, the need for boundaries between state and individual, and the exceedingly private and self-destructive nature of confessions. On the other hand, self-incriminating evidence may be the missing piece in solving the puzzle of a crime. Weighed against the values of protecting the innocent and respecting the dignity of defendants are the values of reaching justice on behalf of victims and protecting society from perpetrators of violence. In addition, confessions can enable guilty defendants to admit their crimes and begin the process of rehabilitation. An examination of the American and Jewish legal systems reveals that, whichever values take precedence in a particular case, the decision whether to admit or reject a confession will always involve a conundrum: Do we believe the confessor that he has raped, murdered, or stolen but assert that he is now telling the truth? Or, do we refuse to accept that he is a rapist, murderer, or thief but find him to be liar?¹⁸⁵

thinking right . . . [I]f I said, yeah, I did it, I could go home. . . . [S]o I said I did it . . .” *Id.* at 190.

¹⁸⁴ BROOKS, *supra* note 151, at 87.

¹⁸⁵ See *supra* note 41 (describing Halbertal’s “crook paradox”).