SECTION ONE: FOUR ARTICLES ON JEWISH VALUES AND THE ISSUE OF TORTURE *by Melissa Weintraub*

-Ain Adam Mesim Atsmo Rasha | אין עדם משים עצמו רשע
The Bar against Self-Incrimination as a Protection against Torture in Jewish and American Law

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

A person may not incriminate himself. (**אין עדם משים עצמו רשע**)
—Babylonian Talmud, Sanhedrin 9b

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

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

Nonetheless, these are the very protections that have come under attack in the shady legal framework erected since Sept. 11th to justify new Army interrogation practices.

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

■ *Doctrine against Self-Incrimination in Jewish Law*

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

Jewish law, by contrast, is almost categorical in its ban of self-incriminating statements, declaring confessions inadmissible as evidence whether voluntary or involuntary, in-court or out-of-court, spontaneous or extorted. As two scholars of comparative Jewish and American law note, the *halakha's* rigid proscription against self-incrimination makes "the Warren Court's progressive decision" appear "moderate, if not minimal."[3]

The prohibition against self-incrimination is derived from two Biblical verses: "One witness shall not rise up against a man for any iniquity… At the mouth of two witnesses… shall the matter be established" (Deut. 19:15; cf. Num. 35:30 and Deut. 17:6); and "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers…" (Deut. 24:16).

The sages read the first verse literally; a person may not be convicted on the basis of one witness' testimony, even when confirmed by circumstantial evidence.[4] From the second verse, the rabbis derive the law excluding the testimony of relatives (BT Sanhedrin 27b). *On the basis of this second rule, Rava sets forth the principle that becomes the basis of the ban on self-incrimination; a person may not incriminate himself since he is his own kinsman.* Like his relatives, he may not join in the prosecutorial process, serving—through a self-indicting confession—as one of the two witnesses necessary to determine guilt (BT Sanhedrin 9b; see below) …

The ban against self-incrimination is elaborated on in the Talmud, where Rava extrapolates from the principle to determine that a person may not disqualify himself from serving as a witness on the basis of his own confession to a crime:[5]

> R. Joseph again said: If a man says that so and so committed sodomy with him against his will, he himself with another witness may combine to testify to the crime. If, however, he admits that he acceded to the act, he is a wicked man [and therefore disqualified from acting as witness] since the Torah says: *Put not your hand with the wicked to be an unrighteous witness* (Ex. 23:1). Rava said: Every man is considered a relative to himself, and no one may incriminate himself. (BT Sanhedrin 9b; Cf. BT Sanhedrin 25a)[6]

The ban against self-incrimination was extended in later *halakhic* codes to non-capital criminal cases:

> No man becomes ineligible [to be a witness] on his own admission of religious delinquency. For example: if a person appears in court and says that he has stolen or robbed or loaned money on interest, although he has to make restitution on his own admission, he is not disqualified as a witness. Likewise, if he says that he has eaten *nevelah*[7] or cohabited with a woman forbidden to him, he is not disqualified—unless there are two witnesses who testify against him—for no man may incriminate himself. (Rambam, Hilkhot Edut 12:2)

> It is a scriptural decree that the court shall not put a man to death or flog him on his own admission [of guilt]. This is done only on the evidence of two witnesses. (Rambam, Hilkhot Sanhedrin 18:6)

Jewish authorities seem to have adopted a near consensus position that in criminal cases, where punishment, excommunication, or even public reputation were at stake, guilt must be independently established on the testimony of two outside witnesses. A person may not play a role in prosecuting himself.

■ *Self-Incrimination in Jewish Law as Preventive Measure against Torture?*

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

The Talmud itself does not explicate the prohibition. The Rambam famously offers a psychological explanation of a possible ulterior motive for incriminating oneself: "It is possible [a defendant] was confused in mind when he made the confession. Perhaps he was one of those who was in misery, bitter in soul, who long for death…" (Hilkhot Sanhedrin 18:6). The Rambam questions the trustworthiness of confessions, given the complexity of human psychology, and its periodic masochistic and self-destructive drives…

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

Saul Lieberman's biographer reports that he taught:

> The purpose of the rule [banning self-incrimination] was to eliminate the possibility of forced confessions and testimony motivated by fear…[Early Jewish law] insisted on a strict standard for the admission of evidence and *eliminated the possibility of torture to compel confessions* at a time when torture and other cruel practices prevailed in the Roman court:[8]

Many other scholars echo Lieberman's hypothesis:

> *Torture as a mode of investigation is virtually unheard of in Jewish history.* The police authorities gain nothing from confession and the accused loses nothing by such confession. Perhaps the obviation of torture as a judicial tool was the very intention of Biblical law and rabbinic interpretation [prohibiting self-incrimination].[9]

> It is to the everlasting glory of the rabbinic tradition that centuries before enlightened citizenries began to protest against police brutality in the interrogation of suspects and to clamor for its cessation, Jewish law proclaimed unequivocally that confessions extorted by words of inducement or by means of threats, though they appear to be true, may not be used to incriminate, convict, or punish anyone.[10]

> Whether confessions were barred because they would lead to torture; or because they were unreliable; or because sick minds might falsely accuse themselves; or because their prohibition served as a mechanism for assuring preservation of all the other procedural safeguards; or as a guarantee of equal treatment for all persons accused of crime; or because the use of confessions would lead to laxness in fact-finding; or because man's life and body were not his to forfeit; or because of the uniqueness and dignity of man; or because of a recognition that in dealing with the state there could be no real free choice; or because it was deemed morally reprehensible to allow a person to convict himself; or because the privilege reflected a divine and ineffable understanding of mankind—whatever the rationale, acceptance of the absolute prohibition was a remarkable societal accomplishment.[11]

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

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

■ *The Influence of Jewish Law on U.S. Constitutional Protections*

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

Remarkably, in the classic Fifth Amendment case, *Miranda v. Arizona*—dealing with the interrogation of suspects in police custody and made famous through Hollywood renditions of the police warnings it enshrined—Chief Justice Warren traces the origins of this humane law to the *halakhah*[12]…

■ *Conclusion*

While there are important differences between Jewish law and contemporary American law on the subject of self-incrimination—American law prohibits involuntary confessions, whereas Jewish law categorically bars all confessions—both legal systems in effect uphold the fundamental doctrine of presumed innocence, refusing to presuppose the conclusion they set out to establish by subjecting defendants to harsh interrogation on mere suspicion. Both systems view coerced confessions as inherently untrustworthy.[13] Both bespeak a profound respect for the inviolability and dignity of the human personality, refusing to bully a person, physically or psychologically—regardless of what crime he has committed—into involuntarily and perhaps falsely inculpating himself.

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

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

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

NOTES

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

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

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

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

5 .Jewish law bars a *rasha*—a person guilty of certain offenses—from testifying as a witness, on the basis of the verse "put not your hand on the wicked to be an unrighteous witness" (Ex. 23:1). Cf. M. Sanhedrin 3:3 and Rambam, Hilkhot Edut 10:1-5.

6. The complex disagreement between R. Joseph and Rava seems to be over the admissibility of "split testimony." That is, R. Joseph argues that the court may not admit testimony from a person who confesses to deliberate wrongdoing, whereas Rava argues that a person's testimony may be bifurcated; his self-incriminatory statement must be disregarded by the court—given the prohibition against self-incrimination, which Rava states as a general rule—while his testimony against his fellow wrongdoer may be admitted as evidence. Ironically, and perhaps cunningly, the court, according to Rava, admits a person's testimony against his co-conspirator by refusing his testimony against himself, through which he might have been declared a *rasha*; because he may only himself be convicted on the basis of two *extrinsic* witnesses, he may testify against his accomplice. Rashi ad. loc. BT Sanhedrin 25a and BT Yevamot 25a-25b.

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

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

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

10. Aaron Kirschenbaum, *Self-Incrimination in Jewish Law,* Burning Book Press, 1970, p. 129.

11. Rosenberg and Rosenberg, ibid. p. 1041.

12. A second Supreme Court case elaborating on the Fifth Amendment also references the *halakhah.* See *Garrity v. New Jersey,* 385 U.S. 493 (1967).

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