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# The Talmudic Rule Against Self-Incrimination and the American Exclusionary Rule: A Societal Prohibition Versus an Affirmative Individual Right

Suzanne Darrow-Kleinhaus

If . . . you establish everything according to the laws of the Torah . . . and act only in accordance with how the Torah punished, . . . the result would be that world society would perish, for we would need witnesses and forewarning . . . . The result would be that the world would be desolate . . . .

Rabbi Shlomo ben Aderet (*Rashba*).<sup>1</sup>

“These technicalities are basic to the kind of society we are.”

William J. Brennan, Jr. on the Bill of Rights.<sup>2</sup>

## I. INTRODUCTION

In responding to yet another cry from the American press that the Fourth Amendment’s Exclusionary Rule was a technicality that allows criminals to go free, Justice Brennan exclaimed:

Honestly, you in the media ought to be ashamed of yourselves to call the provisions of the Bill of Rights ‘technicalities.’ They’re not. They’re very basic to our existence as the kind of society we are. We are what we are *because* of those guarantees, and this Court exists to see that those guarantees are faithfully enforced. *They are not technicalities!* And no matter how awful may be the one who is the beneficiary time and time again, guarantees have to be sustained, even though the immediate result is to help some very unpleasant person. Those ‘technicalities’ are there to protect all of us.<sup>3</sup>

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1. Aaron M. Schreiber, *The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Criminal Law, Jewish Law and the United States Supreme Court*, 11 PACE L. REV. 535, 548 & nn.89 &-90 (1991) (quoting *Rashba* in 3 RESPONSA RASHBA NO. 393 & Trans. Of a Responsum of Rabbi Shlomo ben Aderet, published by Kaufman in 8 JEWISH Q. REV. 228 (1895)).

2. Nat Hentoff, quoting Justice Brennan, *Search and Seizure: Fragile Liberty* in REASON & PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE 143 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

3. *Id.* at 147.

Justice Brennan was passionate about protecting the rights of individuals. He saw the Bill of Rights, most notably the Fourth, Fifth, and Sixth Amendments to the Constitution, as providing the individual with a shield of protection against the power of the government. These Amendments were specifically adopted to guard against the particular evils of unjustified government intrusions upon individual liberty, privacy, and property by the arbitrary and excessive abuse of power. Only a faithful and diligent watch could protect these fundamental rights from those who would willingly sacrifice them for the temporal gains of efficient law enforcement and the promotion of social order.<sup>4</sup> Hence, the "guarantees" of the Bill of Rights were not mere technicalities but were themselves the source of fundamental individual liberties.<sup>5</sup> Justice Brennan recognized the inherent tension in American society between individual liberties and community safety and the concomitant need to be vigilant in protecting the rights of the individual from the power of the government. He found such protection in the Exclusionary Rule to the Fourth, Fifth, and Sixth Amendments. But this protection was far from absolute. Rather, it was subject to numerous exceptions and with each exception, the protection it afforded the individual was in danger of further erosion. In contrast, Jewish law would seem to provide just such an absolute protection. Where what is lacking in American law is a coherent approach that affords consistent protection to the individual from the state, at least in the exercise of its law enforcement powers in seeking a confession of guilt, "[t]he Talmudic rule against confessions, with its . . . absolute bar in all criminal (and quasi-criminal) cases, . . ." would appear to provide "just such a unitary approach."<sup>6</sup>

Is it possible, therefore, to conceive of the Talmudic rule against self-incrimination as the ultimate "Exclusionary Rule?" Would Justice Brennan consider it a true safeguard of individual liberty against the power of the State? Or is the Talmudic prohibition really the tool of the society to be used to protect it from the transgressions of the individual?

In seeking answers to these questions, this paper will compare the Talmudic rule against self-incrimination to the American Exclusionary Rule for the Fifth Amendment. It will contrast the Talmudic principle that no man may render himself an evil person with the American privilege against self-incrimination. In discussing the Talmudic prohibition against confessions in criminal cases, I will trace its Biblical and Mishnaic origins and consider its scope,

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4. William J. Brennan, Jr., *My Life on the Court*, *supra* note 2, at 21. "Continuous hard work is needed if we are to realize the true potential of our Constitution and its Bill of Rights. To paraphrase Thomas Jefferson, eternal vigilance is the price of liberty and dignity — two of the true measures of freedom."

5. *See, e.g.*, *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392 (1920). The Court opined that the Fourth Amendment would be reduced to a mere "form of words" if the Court did not prohibit the use of evidence obtained from an illegal search and seizure "at all," in addition to prohibiting its use before the Court.

6. Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 964 (1988).

exceptions, and rationale. In considering the Exclusionary Rule to the Fifth Amendment, I will assess the justifications for the Rule and evaluate its exceptions.

Finally, I will suggest that while Justice Brennan would no doubt have great admiration for the Talmudic prohibition against self-incrimination, it is likely that he would not consider it as protective of the liberty of the individual as the Bill of Rights.<sup>7</sup> For while the Talmudic rule and the American rule appear to be strikingly similar, they are in fact fundamentally different. The Talmudic rule operates as a monolithic, societal prohibition whereas the American rule is an affirmative, individual right. The consequences that flow from this essential distinction make all the difference.

## II. THE TALMUDIC RULE AGAINST SELF-INCRIMINATION

As a general rule, Jewish law forbids the use of any self-incriminating testimony, whether given voluntarily or elicited by official interrogation.<sup>8</sup> The Biblical foundation for the rule is to be found in two sources. According to Deuteronomy 19:15: "One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth; at the mouth of two witnesses, or at the mouth of three witnesses, shall a matter be established."<sup>9</sup>

This pentateuchal requirement of two witnesses constitutes the exclusive method for determining guilt in criminal proceedings. It would seem, however, that the verse allows for the possibility that a confessing defendant could be counted as one of the two witnesses required to convict. But that possibility is ruled out in another Biblical source. Deuteronomy 24:16, the other Biblical foundation for the Talmudic prohibition against confessions provides: "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin."<sup>10</sup>

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7. Justice Brennan commented that "[a]s I have said many times and in many ways, our Constitution is a charter of human rights and human dignity. It is a bold commitment by a people to the ideal of dignity protected through law." *Supra* note 4, at 18.

8. Rosenberg & Rosenberg, *supra* note 6, at 974.

9. There are two other Scriptural verses which deal with the two-witness requirement. First, *Numbers* 35:30 provides: "Whoso killeth any person, the murderer shall be slain at the mouth of witnesses; but one witness shall not testify against any person that he die." Second, *Deuteronomy* 17:6 states: "At the mouth of two witnesses, or three witnesses, shall he that is to die be put to death; at the mouth of one witness he shall not be put to death." These two verses were directed specifically to capital cases. *Id.* at 975 & n.75. (As explained in n.75 all Biblical translations and texts are taken from the Soncino Press edition entitled *THE PENTATEUCH AND HAFTORAHS* (J. Hertz, 2d ed., 1960)).

10. Rosenberg & Rosenberg, *supra* note 6, at 976. The authors cite in n.77 the *Rashi Commentary on Chumash, Deuteronomy* 24:16, at 120. The commentary notes: "'Fathers shall not be put to death' — i.e. by the evidence of their children. But if you say it means 'for the sin of their children', then it would be redundant for it goes on to state 'every man shall be put to death for his own sin' . . . . Like Rashi's interpretation, the discussion of this verse in the Gemara shows the dangers of Biblical literalism. 'The Gemara questions: 'Whence is this law [prohibiting testimony of kinsmen] derived? — From what our Rabbis taught: *The fathers shall not be*

Once again, a literal reading of this passage would seem to be concerned solely with preventing conviction based on consanguinity. Rashi tells us that the Sages, on the authority of the oral tradition, interpreted the law as also relating to the exclusion of testimony by relatives.<sup>11</sup> The Rabbis then went on to inquire, "who is closer to a person than himself?" They concluded that the accused was his own kinsman and that his confession was precluded in criminal matters.<sup>12</sup>

These two passages from Deuteronomy, when taken together, provide a Scriptural basis for the proposition that the testimony of the accused could not be included in determining whether there were the prescribed number of witnesses needed to establish guilt.<sup>13</sup> Thus, even if there was one witness or other evidence corroborative of the defendant's guilt, his confession remained inadmissible. The confession, if indeed there was one, was simply irrelevant.<sup>14</sup>

The rule against self-incrimination is deduced rather than explicitly stated in the Torah. It is derived from the broad, general requirement of two witnesses to convict and the specific prohibition against testimony by kinsman. One might well ask why the bar against confessions was left to be deduced rather than stated explicitly. It has been suggested that the answer to this question is "ultimately unknowable" and simply "part of the larger question of the basis for the division between written and oral law in Judaism."<sup>15</sup> Perhaps, the more appropriate question to ask might be what the two-witness rule, as interpreted by the rabbis, tells us about society's expectations of its members' obligations in the criminal process. Using the two-witness rule, the Sages made it extremely, if not practically impossible, to convict anyone of a crime.<sup>16</sup> It can

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*put to death for . . . the children.* What does this teach? Is it that fathers shall not be executed for sins committed by their children and vice versa? But is it not already explicitly stated, *Every man shall be put to death for his own sin*? Hence, *Fathers shall not be put to death on account of [their] children*, must mean, fathers shall not be put to death on the testimony of their sons and similarly, *and sons shall not be put to death on account of fathers*, means, nor sons on the testimony of their fathers.' (quoting *Babylonian Talmud, Sanhedrin* 27b, (I. Epstein ed., Hebrew-English ed., 1960)) [hereinafter "B. Talmud"] *Id.* n.77.

11. *Id.* at 976.

12. *Id.* The authors quote in n.165 the passage from Rashi: "'Raba said' — A person is not disqualified from testifying by his own admission, for a person is related to himself. Therefore, a person cannot make himself a 'rasha.' That is to say, regarding testimony about himself he does not become a 'rasha,' for indeed the Torah disqualified a relative from testifying. And the sodomizer is killed, for we partition the statement, and we believe him about the confederate, and we do not believe him about himself to disqualify him from testifying." (quoted from B. Talmud, *Sanhedrin* 9b (Rashi commentary)).

13. *Id.*

14. *Id.* at 977 & n.80.

15. *Id.* at 978.

16. *Id.* at 980. Penal laws were strictly construed. There was a requirement of two witnesses to convict; these witnesses had to be qualified, meaning that they had to be adult men with no interest in the outcome who were not themselves incompetent or evil and were not related to the defendant or to each other. Moreover, the witnesses had to give advance warning to the suspect that he was about to commit a punishable offense and then observe that the defendant had in fact committed the crime. Circumstantial evidence was not probative of guilt. *Id.* at 1028.

be argued that the practical result of this rule is an affirmation of the sanctity of each individual's life, no matter how evil his conduct might appear.<sup>17</sup>

In addition, the connection between the kinsmen testimonial rule and the prohibition against self-incrimination may be deduced to yield a fundamental rule defining the individual's relationship to the state. According to Irene and Yale Rosenberg, while it "may appear paradoxical that the prohibition, whose nature is quintessentially individualistic, effectively permitting the accused to hold the state at bar unless it can convict by extrinsic evidence, should be inferred in part from a doctrine based on family relationships," the connection between family and individual rights may be a way

of asserting that the primary unit of the social order is the family, not the state, or that liberty for the person can best be achieved through the family network. Creating a testimonial bar for kinsmen may have been a way of preserving the privacy interests of the family and its constituent members against governmental invasion.<sup>18</sup>

In their analysis of the derivation of the prohibition against self-inculpatory statements from the family-based kinsman rule, the Rosenbergs may well have captured the essential paradox surrounding the relationship of the individual to the society. For while the Torah teaches that a person is unique,<sup>19</sup> he or she is not an isolated individual but rather a link to those who have come before and to those who are to follow. The individual is caught, as it were, in the web of family connections. The individual's relationship to the state, therefore, is through his family. Is it possible that the intended beneficiary of the Talmudic prohibition is the family and not the individual, but that the only means to accomplish this end is through the individual? If, as the Rosenbergs suggest, the "connection here between family and individual rights may be a way of asserting that the primary unit of the social order is the family, and not the state, or that liberty for the person can best be achieved through the family network,"<sup>20</sup> then the testimonial bar is a means of preserving the privacy interests of the family as the primary social unit against governmental invasion, and not a means of preserving the privacy of its individual members.

#### *A. Civil and Criminal Admissions*

Jewish law can be seen as divided into two parts: civil and criminal.<sup>21</sup> In criminal law, which includes fines and penalties, "the basic principle is that a man's statements regarding himself cannot be used to bring about his convic-

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17. *Id.* at 980.

18. *Id.* at 982-83.

19. *Id.* at 982. (citing in n.98, B. Talmud, *Sanhedrin* 37a: "Whoever saves one life, it is as if he has saved the whole world.").

20. *Id.*

21. AARON KIRSCHENBAUM, *SELF-INCRIMINATION IN JEWISH LAW* 103 (1970).

tion and punishment (by death, lashes or fines) and to disqualify him from acting as a witness or from taking an oath in court."<sup>22</sup> In civil law, the basic principle is that a man's admission of an obligation is equivalent to the testimony of one hundred witnesses.<sup>23</sup> The effect of confessions in civil cases involving monetary compensation was, therefore, to render the defendant absolutely liable whereas with regard to penalties the effect was quite the opposite - to render the defendant immune from liability for the fine.

This differing treatment of confessions emerged during the Mishnaic era. Interestingly, it is through the framework of debates concerning civil litigation that the bar against self-incrimination in criminal cases was affirmed. One example of this indirect confirmation of the rule barring admissions in criminal matters appears in an early Mishnaic discussion of admissions in cases involving fines. In such proceedings, a defendant's confession in an action against a thief to recover a multiple of the value of the stolen goods rendered the defendant immune from liability for the fine.<sup>24</sup> By contrast, an admission of indebtedness in a civil monetary proceeding was treated as a binding concession of liability, the maxim being that "a man's admission of his own liability is equivalent to one hundred witnesses."<sup>25</sup>

American law, on the other hand, does not distinguish between "civil" and "criminal" confessions. While the Fifth Amendment ostensibly refers to a "criminal case," the privilege against self-incrimination nonetheless may be invoked in any proceeding, civil or criminal, if the evidence that would be produced there might incriminate the speaker in a future criminal proceeding.<sup>26</sup> It would appear, therefore, that the Talmudic prohibition is not as absolute a bar against confession as first supposed, nor is it necessarily the "unitary approach" some would suggest.<sup>27</sup> Instead, by treating confessions differently

22. *Id.*

23. Rosenberg & Rosenberg, *supra* note 6 (citing in n.120, THE TOSEFTA, *Bava Mezia* 1:10, at 74-75: "A man's admission of his own liability is equivalent to one hundred witnesses.").

24. *Id.* (citing in n.119, B. Talmud, *Kethuboth* 41a: "This is the general rule: whosoever must pay more than the cost of damage done does not pay on his own admission." The rationale of this rule is that any person who has committed an act punishable by fine is not obligated to pay the fine if he confessed to such misconduct, although he remains liable for any prescribed compensatory damages.).

25. KIRSCHENBAUM, *supra* note 21, at 79. Kirschenbaum relates the suggestions of a number of rabbinical scholars as to how the rule that a man's admission of liability had the power of one hundred witnesses in monetary matters may be understood. According to Rabbi ibn Leb, the credibility of the confessing litigant is not at issue: his confession is construed as a manifestation of willingness to obligate himself to pay the other party the specific sum to which he has "confessed," almost as if he were paying a debt or giving a gift. R. Aryeh Leib HaKohen argues against this position and concludes: "the power of a man's admission of liability is an independent, axiomatic principle of Jewish law; just as the Torah has commanded any Jewish tribunal to accept as final and as definitive the testimony of two unrelated, unbiased and uncorrupted eye-witnesses, so must it accept and grant similar status to the self-admitted liability of a litigant."

26. *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

27. Rosenberg & Rosenberg, *supra* note 6, at 964.

based on whether it is a civil or criminal matter, a "confessing" defendant under Jewish law meets with different results.

An explanation for these differing results is that the court is acting in a different capacity in civil and criminal proceedings. A defendant is allowed to testify against himself in a civil matter involving mere monetary restitution because the court is making an objective decision about entitlement to property.<sup>28</sup> In this case, the court is merely confirming the existence of the debt that was based on the acts of the parties themselves. The obligation was incurred when the defendant borrowed money from the plaintiff. A court order requiring payment of this pre-existing liability on the basis of an admission is not punishment. It is simply recognition of what the defendant owes.<sup>29</sup>

In criminal proceedings, however, the court is creating liability where none previously existed. In this case, the defendant's confession could not be received into evidence. The effect of confessions in cases involving fines or penalties was to exempt the defendant from liability for the fine. In effect, the prohibition against inculpatory statements with respect to fines conferred immunity on the confessing defendant.

### B. Disqualification of Witnesses

The texts from Mishnaic times, therefore, treated confessions either in the context of their admissibility or to the extent to which they conferred immunity. The Gemara's treatment of self-incrimination offered a different perspective, that of disqualification of witnesses.

Jewish law considers a person guilty of certain offenses a "rasha," or "wicked person" and bars him from testifying as a witness.<sup>30</sup> In criminal cases, there is no question of using the defendant's confession to convict him. The accused who confesses simply cannot be found guilty on that basis.<sup>31</sup> The

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28. The expropriary powers of the sages in monetary matters was plenary. "[T]he judge may at all times expropriate money from its owner, destroy it, or give it away, disposing of it in any way which in his judgment will halt the breakdown of religion, repair its breaches, or bring to terms the defier of the Law. Thus it is written in the *Book of Ezra*: 'Whosoever come not within three days, according to the counsel of the princes and the elders, all his substance should be forfeited.' From this we infer that it is within the jurisdiction of the court to confiscate property." *The Code of Maimonides, Judges, Sanhedrin* 24:6, (hereinafter "Maimonides").

29. KIRSCHENBAUM, *supra* note 21, at 38. "[I]n simple monetary matters it was the original act of the (losing) litigant which created his (presently adjudged) liability. . . ." Kirschenbaum traces the scriptural authority for these rules regarding money matters to the following: (1) For the inability of admission of guilt to bring about liability to monetary fines, the Talmud finds scriptural support from *Exodus* 22:8, "[H]e whom the judges shall condemn shall pay double," suggesting that only he whom the judges condemned was to be penalized; he who condemns himself cannot be so penalized; (2) For the rule that in cases involving simple monetary restitution a man's own admission of guilt has the power of one hundred witnesses, the Talmud is silent. Rashi on *Qiddushin* 65b implies it from *Exodus* 22:8.

30. Rosenberg & Rosenberg, *supra* note 6. (Citing in n.162, *Exodus* 23:1, "put not thy hand with the wicked to be an unrighteous witness." On this scriptural basis, persons guilty of Biblical offenses such as robbery are disqualified as witnesses.).

31. *Id.* at 988.



question of disqualifying his testimony, however, is different: the issue is whether by confessing to a crime, a person renders himself a rasha who may not act as a witness at trial. Thus, in this instance, disqualification and not conviction is at stake.<sup>32</sup>

The Gemara Sages debated this question whether a person whose testimony would be self-incriminating is disqualified from serving as a witness. In the Sanhedrin of the Talmud, Rabbi Joseph said:

If a man says that so-and-so committed sodomy with him forcibly, he himself with another witness can combine to testify to this crime. If, however, he admits that he acceded to the act, he is a rasha, a wicked man disqualified from acting as a witness, since the Torah says: 'Put not thy hand with the wicked to be an unrighteous witness.'<sup>33</sup>

Raba, however, said: "Every man is considered a kinsman unto himself, and no one can render himself a rasha."<sup>34</sup>

In translating this passage to read that "no man may render himself a rasha," as opposed to the more usual translation, "no man may incriminate himself," the intent is to "emphasize the particular nuance that the Amoraim felt when they used the term."<sup>35</sup> When R. Joseph calls the confessed sodomizer a "rasha," he is using the term technically, as the "term for one whose criminal, sinful or immoral act has disqualified him from acting as a witness in a Jewish court."<sup>36</sup> The point that Raba is making is "that no man can render himself disqualified to act as a witness in court on the basis of his own confession to any criminal, sinful or immoral act that would so disqualify him."<sup>37</sup>

Raba's rule has been seen to have its practical advantages. Since acting as a witness was a major responsibility,<sup>38</sup> such responsibility could be avoided by confessing to some violation of the law which would disqualify the confesant by branding him a rasha. Raba's rule would eliminate this escape. Raba would allow the offender to testify but only as to his accomplice's acts and not his own. Because the witness is not testifying as to his own misconduct, he has not rendered himself an evil person and he is, therefore, not disqualified from testifying.<sup>39</sup> By rejecting his voluntary statement of self-incrimination, a

32. KIRSCHENBAUM, *supra* note 21, at 51.

33. *Id.* at 50.

34. *Id.*

35. *Id.* at 51.

36. *Id.*

37. *Id.*

38. In capital cases, witnesses were expected to initiate the execution of the defendant who was found guilty on the basis of their testimony. *Id.* (citing *Deuteronomy* 17:7).

39. Rosenberg & Rosenberg, *supra* note 6, at 1000. The passage from Rashi is as follows: Raba said: A person is not disqualified from testifying by his own admission, for a person is related to himself. Therefore, a person cannot make himself a 'rasha,' that is to say, regarding testimony about himself he does not become a 'rasha,' for indeed the Torah disqualified a

reluctant person could be compelled to perform his duty as a witness. Apparently, while Rabbi Joseph would disqualify the witness based on his incriminating statement, Raba would bifurcate his evidence, allowing the witness to testify but accepting that portion implicating the accused.<sup>40</sup>

Other Talmudic debates support this view that Rabbi Joseph would disqualify the witnesses while Raba would bifurcate their testimony. The Gemara Sages, in commenting on a Mishnaic discussion of the types of persons who are disqualified as witnesses said that both lenders and borrowers of money with interest are precluded from testifying. The Gemara describes this case:

Two witnesses testified against Bar Binithus. One said, 'He lent money on interest in my presence.' The other said, 'He lent me money on interest.' [In consequence,] Raba disqualified Bar Binithus [from acting as witness]. But did not Raba himself rule: A borrower on interest is unfit to act as witness? Consequently he is a transgressor, and the Torah said: Do not accept the wicked as witness? — Raba here acted in accordance with another principle of his. For Raba said: Every man is a relative in respect to himself, and no man can incriminate himself.<sup>41</sup>

Bar Binithus could be convicted of lending money on interest — but only on the basis of testimony from two competent witnesses. In this case, however, the testimony of the second witness disclosed that he himself was a rasha because he had violated prohibition against borrowing money on interest and if such testimony were excluded, Bar Binithus could be neither convicted nor disqualified as a witness. Because Bar Binithus was disqualified, it is evident that he had been convicted and that to secure conviction, Raba must have used the bifurcation theory, accepting the witness's testimony that Bar Binithus had lent money on interest, but rejecting that portion of the testimony that the loan was to the witness himself.<sup>42</sup>

An interesting result of Raba's bifurcation theory, which insures that a reluctant person is compelled to perform his duty as a witness, might be to protect the society. By failing to hold that self-incriminating statements disqualified a witness, Raba would allow use of this individual's statements to

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relative from testifying. And the sodomizer is killed, for we partition the statement, and we believe him about his confederate, and we do not believe him about himself to disqualify him from testifying. *Id.* n.165.

40. *Id.* at 1001.

41. *Id.* (quoting B. Talmud, *Sanhedrin* 25a).

42. *Id.* at 1002. See also Maimonides, *Judges, Evidence* 12:2, at 108. Maimonides writes: [I]f A testifies that B loaned money on interest, and C testifies, 'He [B] made a loan to me on interest,' B is disqualified on the evidence of A and C. As to C, though he admits that he contracted a loan on interest, he cannot incriminate himself. He is accounted trustworthy with regard to B, but not with regard to himself.

catch a criminal.<sup>43</sup> If the basis of the Talmudic prohibition against self-incrimination is seen as a protection of the individual for the larger purpose of benefiting the society, then by bifurcating testimony, the society is simultaneously protected from the corruption or impurities of the individual whose testimony would render him a "rasha" and the "guilty" person against whom the testimony is used to convict.

Whatever the result, the issue in this case is the "disqualification" of testimony and not the use of such testimony to "convict" the witness. While Rabbi Joseph and Raba differ about whether a self-incriminating statement requires disqualification of the witness, "neither of these Gemara Sages is suggesting that a confession may be used to convict the declarant of any crime. Plainly, under Talmudic law, it may not."<sup>44</sup>

### C. *The Scope of the Talmudic Prohibition*

The Talmudic rule against self-incrimination was neither all encompassing nor inflexible. As discussed, the prohibition was completely inapplicable in purely civil monetary cases. In addition, Talmudic law may have made the prohibition against self-incrimination inapplicable even in criminal cases. The rabbinical courts were empowered to suspend certain procedural guarantees and, in certain situations, they could prescribe punishments not ordinarily allowed by law. These powers existed in two settings. First, the rabbinical courts could take such action in times of emergency, when there was deemed to be a substantial threat to the community as a whole.<sup>45</sup> An example of such a threat would be where there was widespread public disregard for the law resulting in general misconduct and violence. Faced with such emergency conditions, the rabbis were authorized to dispense with evidentiary safeguards,

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43. Rosenberg & Rosenberg, *supra* note 6, at 1009. The authors put it quite colorfully: "Raba's bifurcation approach in Sanhedrin 9b would prevent an accomplice from torpedoing the case against the defendant simply by coming forward to testify as to both his own criminal conduct and that of the accused." In further explication of Raba's bifurcation theory, they posit that Raba's theory would "require the trier of fact to accept the testimony of the alleged accomplice as to his confederate's guilt, provided that the accomplice was found otherwise qualified to be a witness. It does, however, assure that cases will not be automatically dismissed when there are only two witnesses to the act, including the accomplice." *Id.* at 1014-15.

44. *Id.* at 1006. Raba's bifurcation theory ultimately prevailed. For when the Talmud itself does not decide a particular controversy between Gemara Sages, it provides that the law is in accord with a later opinion except when a disciple disagrees with his teacher. This rule only applied up to the generation of Raba. From Raba's time forward, the later opinion prevails, even in the case of a student who challenges his teacher. *Id.* at 1016-17.

45. "[T]he court, even if it be inferior . . . is authorized to dispense for a time even with these measures. For these decrees are not to be invested with greater stringency than the commands of the Torah itself, which any court has the right to suspend as an emergency measure. Thus the court may inflict flagellation and other punishments, even in cases where such penalties are not warranted by the law, if in its opinion, religion will thereby be strengthened and safeguarded and the people will be restrained from disregarding the words of the Torah. It must not, however, establish the measure to which it resorts as a law binding upon succeeding generations, declaring, 'This is the law.'" Maimonides, *Judges, Rebels*, 2:4.

including the prohibition against self-incrimination and the need for two witnesses, and could dispense punishments, including the death penalty, that were not otherwise prescribed for such misconduct.<sup>46</sup>

The exercise of emergency authority was circumscribed; it was of limited duration and scope. Maimonides noted that “whatever measure [the court] adopts is only a temporary one and does not acquire the force of a law, binding for all time to come.”<sup>47</sup>

The second situation in which the rabbinical courts were empowered to suspend procedural safeguards was in specified cases involving murderers and certain repeat offenders. Two Mishnahs are applicable to this exception. They focus on the individual wrongdoer who may otherwise escape punishment because of procedural defects. In both Mishnahs, the court is empowered to imprison the wrongdoer, give him bread and water to shrink his intestines, and then feed him barley bread “until his stomach bursts.”<sup>48</sup> The “barley bread” exception was applicable in two instances: first, in the case of the habitual offender and second, in the case of one who commits murder in the absence of witnesses.<sup>49</sup> In this instance, the disregard of procedural requirements appears to have been limited to cases in which factual guilt was obvious.<sup>50</sup> Whether the rule against self-incrimination was among the guarantees suspended in these proceedings is not entirely clear.<sup>51</sup>

For our purposes, the “emergency” authority of the courts is important because it shows that the procedural safeguards in the Jewish criminal system were not absolute, but instead, were subject to modification and even wholesale abandonment where appropriately justified. And the justification was always the same: to protect the society. In this effort, the court was empowered to suspend Biblical laws safeguarding the rights of the individual if the stability or safety of the society was at stake. Thus, the individual is subordinate to

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46. B. Talmud, *Sanhedrin* 46a; R. Eliezer ben Jacob said: “I have heard that the Beth Din may, [when necessary,] impose flagellation and pronounce [capital] sentences even where not [warranted] by the Torah; yet not with the intention of disregarding the Torah but [on the contrary] in order to safeguard it. It once happened that a man rode a horse on the Sabbath in the Greek period and he was brought before the court and stoned, not because he was liable thereto, but because it was [practically] required by the times. Again it happened that a man once had intercourse with his wife under a fig tree. He was brought before the Beth din and flogged, not because he merited it, but because the times required it.”

47. Maimonides, *Judges*, *Sanhedrin* 24:4, at 73.

48. Rosenberg & Rosenberg, *supra* note 6, at 1022. The authors cite the two Mishnahs in n.236: First: “He who was twice flagellated [for two transgressions, and then sinned again,] is placed by Beth Din in a cell and fed with barley bread, until his stomach bursts.” Second: “One who commits murder without witnesses is placed in a cell and [forcibly] fed with bread of adversity and water of affliction.” (quoting Mishnah, *Sanhedrin* 9:5, at 396, reprinted in B. Talmud, *Sanhedrin* 81b. (As noted in nn.48 & 236 Mishnah citations and translations are from *The Mishnah* (H. Danby trans. 1933 and are accompanied by parallel citations to the page on which the material appears in the B. Talmud).

49. Rosenberg & Rosenberg, *supra* note 6, at 1022-24.

50. *Id.* at 1026-27.

51. *Id.* at 1027.

the society and even the prohibitions that seem most protective of the individual in his relations with the state are subject to suspension when that society needs protection from the individual.

In addition to the emergency authority of the rabbinical courts to suspend the prohibition against confession, there was yet another forum in which the prohibition was apparently inapplicable: the Jewish royal courts.<sup>52</sup> Joshua and David both carried out ostensibly confession-based executions.<sup>53</sup> Maimonides attempted to explain them either on the basis that they involved emergencies or that they were permitted to be inflicted by state law by exercising their royal prerogatives. Yet elsewhere, in describing the powers of royal courts, Maimonides writes:

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52. Maimonides, *Judges, Sanhedrin* 18:6, at 52-53; *Kings and Wars* 3:8-10, at 213-14.

53. In the book of Joshua, it is related that after the conquest of Jericho, Joshua declared the city, its inhabitants and all the possessions therein *herem*, devoted to the Lord and forever removed from secular use. (*Leviticus* 27:28-29). When Akhan ben Karmi secretly took from the *herem*, the Israelites were punished by an unexpected defeat in battle. The Lord declared that there is the curse of the *herem* in their midst and they must be tested until the culprit is found and executed. The culprit was identified by means of some kind of lot cast before the Holy Ark as each tribe and member therein was brought near. Joshua said to Akhan: "My son, give, I pray thee, glory to the Lord, God of Israel, and make confession unto Him and tell me now what thou hast done; hide nothing from me." Akhan answered Joshua: "Of a truth I have sinned against the Lord, the God of Israel, and thus and thus have I done. . . ." And Akhan related what he had done and Joshua sent messengers to the tent and found the silver and gold that Akhan had hidden there. (*Joshua* 7:19-21). In punishment, Akhan and all that belonged to him were stoned to death and burned to destruction and buried under stones. "And the Lord turned from the fierceness of His anger." (7:19-21). Here, then, is a scriptural account of acceptance of a criminal confession. Joshua's acceptance of the criminal confession is in conflict with the normative rabbinical criminal procedure which rests exclusively on the testimony of two eyewitnesses. The Talmudic rabbis looked upon Joshua's "action with regard to Akhan . . . as an act of emergency, due to extraordinary circumstances — the violation of the *herem* and the challenge to the authenticity of the instrument whereby the Land would be divided — which may never be utilized as a precedent." KIRSCHENBAUM, *supra* note 21, at 66. Kirschbaum posits, on the other hand, that "it is clear that the crucial source of conviction was the Lot" and not the confession. *Id.* at 28. Joshua's desire that Akhan confess goes to the concept of atonement. "Biblical law asked the criminal who had been condemned to death to make a public confession of his sin and to praise God. Although not necessary for conviction, it was necessary for atonement, for the penitential confession transformed the execution from mere punishment to expiation." *Id.* at 30.

In the first chapter of Second Samuel, the story is told of the Amalekite stranger who came from the camp of the defeated Israelites and informed David of the deaths of Saul and Jonathan. When asked by David how he came to know of their deaths, the man answered that at the request of the wounded king, "I stood beside him, and slew him . . . ." (1:10). David subsequently put the young man on trial and had him executed. David said: "Thy blood be upon thy head for thy mouth hath testified against thee saying: 'I have slain the Lord's anointed.'" (1:13-16). Two explanations are offered for David's action: Maimonides regards it as an emergency act but does not specify the emergency. *Id.* at 66. Levi Gersonides suggests that the emergency faced by David was that the people should not take regicide lightly — that the situation created by the Amalekite stranger represented a clear and present danger to the stability of David's rule and one which warranted the invocation of emergency measures. *Id.* at 67. A second interpretation given by Maimonides is that Joshua and David were exercising their royal prerogatives. This system of the secular law of the king was recognized by Jewish law. *Id.* at 67-68.

If a person kills another and there is no clear evidence, or if no warning has been given him, or there is only one witness, or if one kills accidentally a person whom he hated, the king may, if the exigency of the hour demands it, put him to death in order to insure the stability of the social order. He may put to death many offenders in one day, hang them, and suffer them to be hanging for a long time so as to put fear in the hearts of others and break the power of the wicked.<sup>54</sup>

Whatever the authority in Jewish law, whether the rabbinical court or the secular law of the king, the ability to suspend the individual's rights in favor of the larger society graphically illustrates the major difference between the American and Jewish legal systems. While American law focuses on the individual, both in granting rights and in imposing responsibilities, Jewish law focuses on the community and the individual's commitment to the community.<sup>55</sup>

#### D. *The Rationale for the Talmudic Prohibition*

In examining the Talmudic rule against self-incrimination, the question naturally arises as to why Jewish law would embrace a rule that denied use of an individual's incriminating statement to secure conviction. The Biblical requirement that guilt be established through two or more witnesses need not have precluded the admissibility of the defendant's admission. Nor did the Scriptural prohibition against the testimony of kinsmen require that the accused be included in that category.<sup>56</sup>

The Talmudic scholars gave no specific indication of its underlying rationale.<sup>57</sup> Nonetheless, scholars and commentators have offered their explanations for the inadmissibility of self-incriminating statements. Maimonides suggested the possibility that the defendant might have been "confused in mind" when he made the confession, asserting either as an example of such confusion or as a separate basis, that an innocent person might confess because he was suicidal.<sup>58</sup> Maimonides' ultimate conclusion, however, was that the prohibition was a divine decree.

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54. Maimonides, *Judges, Kings and Wars* 3:10, at 214.

55. Beth C. Miller, *A Comparison of American and Jewish Legal Views on Rape*, 5 COLUM. J. GENDER & L. 182, 183-84 (1996).

56. Rosenberg & Rosenberg, *supra* note 6, at 1027.

57. For the orthodox Jew, the question of rationale is not an issue. It is accepted on faith. Jewish law embodies an absolute prohibition against the use of confessions in criminal and quasi-criminal cases because God has so decreed and the interpretations of the two-witness rule and the kinsmen rule come from the oral law. *Id.* n.256.

58. Maimonides, *Judges, Sanhedrin* 18:6, at 52-53. "The Sanhedrin . . . 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

Conceivably, Maimonides may be explaining that because there are instances of disturbed or suicidal individuals who have a compulsion to confess falsely, "a divine decree in the form of a prophylactic rule prohibiting self-incrimination in all cases was necessary."<sup>59</sup> While this rationale would seem to raise only reliability concerns, I would propose that it is suggestive of a comprehensive societal protection from the corruption of individuals; the society is protected from the evils which might ensue from accepting confessions from the mentally disturbed or those who would simply lie, whatever their reason. Through the operation of the prohibition, the community is able to fulfill its obligations to its members because there is an obligation of every Jew to try to prevent others from violating a commandment.<sup>60</sup> Judaism teaches that every Jew has some responsibility for the conduct of every other Jew,<sup>61</sup> thus, the community itself would be responsible if an individual were to violate its laws. In accepting a false confession, the community would therefore be a participant in the individual's violation of a commandment.

Other suggested rationales for the prohibition include but are not limited to the following: that confessions might lead to torture; that they were unreliable; that the prohibition is but "one strand of an entire fabric of protections afforded the accused in the Jewish criminal justice process;<sup>62</sup> that the prohibition acts to "assure preservation of the spectrum of procedural and evidentiary safeguards established by the Torah, [thus assuring] that no shortcuts would be taken in the fact-finding process;"<sup>63</sup> that since the prohibition is absolute, it precludes waivers and "insures that all procedural protections are not merely apparent, but real;"<sup>64</sup> fourth, "although a man's property was his own, his life belonged to God" and to confess to a crime in a capital case "would be to enable the accused to commit a form of suicide;"<sup>65</sup> and that it "serves as a

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to a crime that he had not committed, in order that he might be put to death. To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree."

59. Rosenberg & Rosenberg, *supra* note 6, at 1034.

60. Steven F. Friedell, *The "Different Voice" in Jewish Law: Some Parallels to a Feminist Jurisprudence*, 67 IND.L.J. 915, 942 (1992); B. Talmud, *Shevuot* 37a-b; see also B. Talmud, *Sanhedrin* 27b; The expression used is that all Jews are sureties for one another.

61. *Id.*

62. Rosenberg & Rosenberg, *supra* note 6, at 1027.

63. *Id.* at 1031.

64. *Id.* at 1032.

65. *Id.* at 1037. The authors cite the rationale offered by the Radbaz, a sixteenth century Talmudic scholar and Kabbalist, in n.296: "[In the case of] one who comes to court and says, 'Punish me,' we do not punish him. And thus we say in Jewish law: a man may not make himself a rasha [evil person]. The [suicide] rationale that our rabbi [Maimonides] gave [as a basis for the prohibition against self-incrimination] does not apply [in the case of] lashes. Therefore he [Maimonides] wrote . . . that it is a divine decree, and we do not know the reason. It is possible to look for a reason, [to wit:] Because a person's soul does not belong to him, but is the possession of the Holy One Blessed Be He, as it is said, 'Behold, all souls are Mine.' *Ezekiel* 18:4. Therefore, a person may not give a confession concerning something that is not his, and [this is why] flogging is the same as killing [and included in the confession rule]. But his money is his, and . . . we say [in this context] that a party's confession is the equivalent of

fence around the two-witness rule and other commandments relating to the sanctity of human life.”<sup>66</sup>

### III. THE EXCLUSIONARY RULE FOR THE FIFTH AMENDMENT

The American counterpart to the Talmudic prohibition against self-incrimination is the Fifth Amendment’s guarantee that no person shall be compelled in any criminal case to be a witness against himself.<sup>67</sup> Born of the concern that the people needed protection from the power of the government, the Bill of Rights to the Constitution was adopted to safeguard individual liberties.<sup>68</sup>

Particularly odious to the American Founding Fathers was the conviction of an innocent person because of a “forced confession.” Whether born of the belief that compelled testimony was a means by which “New England magistrates, who claimed divine authority, enforced compliance with an established church” or a shield against the “evils that lurk[ed] in the shadows of a new and untried sovereignty,”<sup>69</sup> the Fifth Amendment privilege pro-

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one hundred witnesses . . . . A man is not permitted to kill himself, and thus a man is not permitted to confess that he committed a sin that would make him liable to death, because his soul is not his own. And beside all this, I agree that it is a divine decree of the Master of the World concerning which one must not speculate.” Maimonides, *Mishnah Torah, Hilchot Sanhedrin* 18:6 (Radbaz commentary).

66. Rosenberg & Rosenberg, *supra* note 6, at 1039. The argument is that even if confessions were accepted in evidence only when corroborated, we might in time forget that our lives are not our own to be given away freely and this might in turn lead to permitting confessions to form the sole basis for conviction. Hence, the total exclusion of such self-incriminating statements serves as a fence around the rule.

67. U.S. CONST. amend. V, “No person shall . . . be compelled in any criminal case to be a witness against [oneself] . . . .”

68. Dumas Malone, *Jefferson, Hamilton, and the Constitution*, in THOMAS JEFFERSON A PROFILE 167 (Merrill D. Peterson ed., 1967). In discussing Jefferson’s concerns about the new Constitution, Malone stated that Jefferson believed that, “Individuals needed to be protected against their rulers, against any rulers.” This was the basis for the adoption of the Bill of Rights.

69. MCCORMACK ON EVIDENCE 163-64 (John William Strong ed., 4th ed., 1992); *see also* George Horowitz, *The Privilege Against Self-Incrimination — How Did It Originate?* 31 TEMP.L.Q. (1958) for a discussion of the origins of the privilege. The author traces the history of the privilege in the late 1600’s and sets forth Wigmore’s “History of the Privilege.” Horowitz finds Wigmore’s explanation that the emergence of the privilege was a result of the Court of Star Chamber and the High Commission for Ecclesiastical Causes “inadequate” as the “source of [the] notion that an accused person should not be required to incriminate himself.” *Id.* at 124-25. Instead, Horowitz states that the source lies in Talmudic law and that it was Rabbinic jurisprudence that was one of the “main streams that converged to form the unique Common law doctrine against self-incrimination.” *Id.* at 125. Horowitz’s theory is that the Jewish law and the legal activity of Edward Coke, as barrister and judge, combined in 17th century England to develop the doctrine against compulsory self-incrimination.” *Id.* In summary, he concludes first, that “Jewish law was most probably an indirect, ‘subterranean’ influence which seeped into the stream of social thought and ferment in England of the 16th and 17th centuries. The works of brilliant English Hebraists during this period especially of John Selden described the Jewish law against self-incrimination;” and, second, “[T]he privilege is not good legal logic but is a religious principle of humanness and mercy engrafted on the Common law as it developed greater regard for the Rights of Man.” *Id.* at 143. *See also* Simcha Mandelbaum, *The Privilege Against Self-Incrimination in Anglo-American and Jewish Law*, 5 AM. J. COMP.



vides the individual with protection against the risk of legal criminal liability.<sup>70</sup>

Enforcement of this Constitutional privilege is through the Exclusionary Rule: where a confession or admission made by an accused is not voluntarily given, the United States Supreme Court has ruled it inadmissible. This suppression of evidence flows from two separate and distinct Fifth Amendment guarantees — the privilege against compulsory self-incrimination and the due process clause. The constitutional guarantee of due process requires fundamental fairness in government proceedings. In defining “compulsion,” the Court has drawn on due process concepts of “voluntariness.” The justifications for a “voluntary” confession are threefold: first, the use of an involuntary, coerced admission is intrinsically antithetical to the promise of due process fairness. Coerced confessions are unfair in that they threaten to produce unreliable admissions and potentially convict innocent persons.<sup>71</sup> Moreover, they are the product of methods a civilized society traditionally abhors — techniques that exploit the weak and threaten the autonomy of the individual. Second, suppressing involuntary statements creates a strong disincentive for coercive tactics, thus comporting with the American concept of justice as “an accusatorial and not an inquisitorial system.”<sup>72</sup> Finally, the due process requirement of suppression stems from a “constitutional entitlement to freedom from unfair judicial procedures. The exclusion of involuntary statements cannot be a mere future-oriented deterrent measure, for it is an inherent, inseparable element of the Fifth and Fourteenth Amendment rights.”<sup>73</sup> The suppression of coerced statements is “based on a personal, constitutional exclusionary right”<sup>74</sup> and is not, therefore, subject to the Court’s cost-benefit balancing it reserves for judicially-created exclusionary rules.<sup>75</sup>

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L. 115, 119 (1956) (reaching a similar conclusion that the doctrine protecting against self-incrimination existed long before such a doctrine was established in the common law so as to strongly suggest a link between the doctrine in Jewish law and the common law.).

70. MCCORMACK ON EVIDENCE, *supra* note 69, at 171.

71. Jewish law shares this concern that there be no coercion of the individual. The practical effect of the blanket prohibition against confession, even where it is “voluntarily,” is that “police brutality is unheard of because the police authorities gain nothing from a confession, and the accused loses nothing by such a confession. Torture as a method of investigation is virtually unheard of in Jewish history. Indeed, who knows — perhaps the obviation of torture as a judicial tool was the very intention of the biblical Lawgiver and of the rabbinic interpreter.” KIRSCHENBAUM, *supra* note 21, at 19.

72. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

73. James J. Tomkovicz, *The Messiah Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C.L. REV. 751, 761 (1989).

74. *Id.* at 762.

75. The Exclusionary Rule (most frequently referred to in connection with the Fourth Amendment wherein evidence secured in violation of the Amendment’s prohibition against unreasonable searches and seizures is inadmissible in a criminal trial of the person whose rights were violated) has been a source of intense debate since its inception over a hundred years ago when the United States Supreme Court first excluded evidence in *Boyd v. U.S.*, 116 U.S. 616 (1886). At the heart of the debate is the question of whether the application of the exclusionary rule is too high a price for society to pay for the protection of its constitutional guarantees of

Suppression of evidence was an integral component of the landmark decision of *Miranda v. Arizona* in which the Court added real substance to the protections of the Fifth Amendment by creating a mechanism to insure that an accused's statements to the police be given voluntarily.<sup>76</sup> This includes a right to counsel that attaches to protect the suspect's privilege against compulsory self-incrimination. Until *Miranda* warnings or a waiver is shown, no evidence obtained as a result of the interrogation can be used against the defendant. While *Miranda* warnings were seen as required to protect the right against compelled self-incrimination guaranteed by the Fifth Amendment, these constitutional underpinnings were cut by the Court in a subsequent decision.

In *Michigan v. Tucker*, the Court ruled that the *Miranda* warnings were procedural safeguards and not constitutional rights themselves.<sup>77</sup> Moreover, *Miranda*-based exclusion is to serve primarily deterrence goals, much as it does in search and seizure cases. The implications of such a decision are far-reaching: by severing the Constitutional base to the *Miranda* warnings, the scope of the *Miranda* Exclusionary Rule would be significantly narrower than the Fifth Amendment coerced confession Exclusionary Rule. As a result, Congress would have the authority to overrule *Miranda* and implement its own procedures and it is likely that *Miranda* would not apply in state prosecutions.

Indeed, the *Miranda* holding has been eroded by subsequent Court decisions where it has recognized circumstances in which *Miranda* warnings are not required prior to custodial interrogation. These include when public safety

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individual liberty and privacy when it allows criminals to go free as a result of illegally seized evidence. A primary justification for the rule is the "imperative of judicial integrity" and fidelity to the Constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961). A second justification for the Exclusionary rule is that it is of constitutional origin so that if the Court were to allow the use of evidence obtained as the result of an illegal search and seizure, it "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks v. U.S.*, 232 U.S. 383, 394 (1914). A third justification for the exclusionary rule is the deterrence rationale. Today, the Court's position is to see the Rule solely as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrence effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Each search and seizure incident becomes subject to a cost-benefit analysis — the loss of highly probative evidence as opposed to the increased deterrence of police misconduct. Employing this strictly utilitarian approach, the Court has refused to apply the Rule to those situations where its deterrent effect would be minimal. This holding has serious implications for if the Exclusionary Rule is not "part and parcel" of the Fourth Amendment, but merely a remedy devised by the Court to deter government misconduct, it can be narrowed in scope or even abolished.

76. *Miranda v. Arizona*, 384 U.S. 436 (1966). In reaching its decision, the Court discussed the origins of the privilege against self-incrimination, noting that the roots of the privilege "go back into ancient times." *Id.* at 458. The Court noted in n.27 that "[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.'" Maimonides, *Judges, Sanhedrin*, 18:6.

77. *Michigan v. Tucker*, 417 U.S. 433 (1974).

is at issue,<sup>78</sup> when the suspect is not aware that he is speaking to a law enforcement officer and gives a voluntary statement,<sup>79</sup> and when routine questions are asked of the defendant during booking.<sup>80</sup> The Court has further limited the scope of the *Miranda* Exclusionary Rule through adoption of an impeachment exception which allows a prosecutor to use statements at trial to impeach a defendant's credibility even though the statements had been taken in violation of *Miranda*.<sup>81</sup> The Court has also allowed use of an accused's pre-*Miranda* silence to impeach a defendant,<sup>82</sup> although it has ruled that to allow use of post-*Miranda* silence to impeach trial testimony would be fundamentally unfair.<sup>83</sup> The Court has suggested further limits on the reach of *Miranda* by implying that derivative fruits of the poisonous tree might be immune from exclusion.<sup>84</sup> While these exceptions pose a serious threat to the integrity of the individual's rights under the Fifth Amendment, they do not detract from the fundamental nature of the right itself.

After 30 years, *Miranda* remains a controversial decision. Critics insist it should be abolished because it hampers law enforcement efforts at combating crime. Empirical studies, however, do not support the assertion that *Miranda* has had an adverse impact on confession and conviction rates.<sup>85</sup> Still, *Miranda* imposes social costs. First, it increases the likelihood that potentially guilty suspects will choose to invoke their right to terminate the interrogation

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78. *New York v. Quarles*, 467 U.S. 649, 655 (1984). A rape suspect was apprehended by police in a small grocery store. When the officers frisked the suspect, they found an empty gun holster. The officer, believing the gun was likely to be on the premises, asked the suspect where it was before reading the suspect his rights. The suspect answered and the police recovered the gun. Under *Miranda*, this questioning was a violation of the suspect's Fifth Amendment right to be free from self-incrimination. The Court, however, recognized an exception to *Miranda* where there is a public safety concern. In this respect, there is a great similarity between the rationale for the American public safety exception to *Miranda* and the Jewish Law "emergency" exception to the Talmudic prohibition against self-incrimination, a similarity which is not lost on this writer.

79. *Illinois v. Perkins*, 496 U.S. 582 (1990). An undercover officer posed as a fellow inmate to elicit incriminating statements from an incarcerated suspect. The Court held that the officer did not have to give the suspect *Miranda* warnings before questioning because *Miranda* applied in the context of a police-controlled environment where compulsion was likely. In this setting, the suspect had no reason to believe he was facing a custodial interrogation so the idea of coercion could not play a role in the suspect's willingness to speak.

80. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

81. *Harris v. N.Y.*, 401 U.S. 222 (1971).

82. *Fletcher v. Weir*, 455 U.S. 603 (1982).

83. *Doyle v. Ohio*, 426 U.S. 610 (1976).

84. *Oregon v. Elstad*, 470 U.S. 298, 299 (1985). The failure to issue *Miranda* warnings taints only the statements which flow directly from that failure and absent any government compulsion, does not taint any subsequent statements secured after a proper *Miranda* warning is given.

85. Richard A. Leo, *Journal of Criminal Law and Criminology*, 86 J. CRIM. & CRIMINOLOGY 621, 676-77 (1996). The critics base their arguments on methodologically weak and outdated studies and because they were so long ago, they tell nothing about the current effects of *Miranda* on police practices. More empirical research would be necessary to evaluate current impact. In the study conducted by this author, there was no "statistically significant relationship between a suspect's response to *Miranda* warnings and his likelihood of being convicted."

and not cooperate further with police; second, even if a suspect confesses, the confession may nevertheless be excluded if it was the result of an improper *Miranda* warning; and third, *Miranda* does appear to result in slightly lower conviction rates.<sup>86</sup> Despite its costs, however, *Miranda* does offer social benefits. It has led police to treat suspects with greater care, fairness, and restraint. *Miranda* warnings also provide guidelines to police and offer some limit to their interrogation discretion.<sup>87</sup> And perhaps most important, *Miranda* serves as a symbol of justice. It reflects a societal commitment to moral and constitutional restraints on police practices in custodial questioning. Certainly, *Miranda* must remain more than a symbolic gesture to be a genuine safeguard of individual freedoms and herein lies the tension between reality and illusion so endemic to American society. While the Burger and Rehnquist Court decisions have chiseled away at *Miranda* protections, leaving only a promise of rescue to the person claiming the constitutional privilege,<sup>88</sup> the American public continues to believe that the *Miranda* ideal of justice holds some genuine protection for the potentially innocent victim of police overreaching.

Still, *Miranda* has endured and not just in America's popular culture. While it must have pained today's Supreme Court to so hold, it nonetheless concluded in *Dickerson v. United States* that *Miranda* is a constitutional decision and the criminal defendant's privilege against self-incrimination is a constitutional right.<sup>89</sup> In *Dickerson*, the Court took up the case of a criminal defendant who moved to suppress statements made to the Federal Bureau of Investigation on the grounds that he had not received *Miranda* warnings before being interrogated. The District Court granted his motion and the Government made an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit, in a divided vote, reversed the suppression order. It agreed with the District Court's conclusion that the defendant had not received *Miranda* warnings but it held that 18 U.S.C. § 3501, which makes the admissibility of such statements turn solely on whether they were made voluntarily, was satisfied in this case. The court then concluded that *Miranda* was not a constitutional holding and therefore Congress could, by statute, determine admissibility.<sup>90</sup>

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86. *Id.* at 677.

87. A year long *Newsday* study found that the 94% confession rate obtained by Suffolk County homicide detectives when compared with rates in other states (54% in Maryland and 74% in Illinois) astonished expert Gerald M. Caplan, the former director of the federal government's National Institute of Justice. "If I was the police commissioner and there was a 94% confession rate, I'd get the internal affairs department to see what's wrong." Thomas J. Maier & Rex Smith, *Questionable Procedures Taint Murder Defendants' Confessions*, *Newsday* (New York), Dec. 3, 1984, at 4.

88. JOHN F. DECKER, *REVOLUTION TO THE RIGHT CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA* 78 (Garland Publ'g 1992) (citing Ronald K.L. Collins, *Is Miranda Crumbling?* 11 NAT'L L.J. 15 (1989)).

89. *Dickerson v. U.S.*, 530 U.S. 428 (2000).

90. *United States v. Dickerson*, 166 F.3d 667 (4<sup>th</sup> Cir. 1999).

Thus, the Supreme Court was called upon to determine whether *Miranda* and its progeny was constitutionally-based so as to preclude Congress from invading its province by legislation. And it did. The Supreme Court held that *Miranda* announced a constitutional rule that Congress could not supersede legislatively.<sup>91</sup> Still, the Court refused to let the decision rest on that basis. Rather, the Court stated that “[w]hether or not we would agree with *Miranda*’s reasoning and its resulting rule [w]ere we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”<sup>92</sup>

Despite the Court’s words of reservation, the result is the same: *Miranda* and its progeny have been given constitutional protection. In so doing, the Court was compelled to consider previous decisions that made exceptions to the rule. In considering such cases as *New York v. Quarles*<sup>93</sup> and *Harris v. N.Y.*,<sup>94</sup> the Supreme Court reasoned that “[t]hese decisions illustrate the principle – not that *Miranda* is not a constitutional rule – but that no constitutional rule is immutable.”<sup>95</sup>

It would appear that those who would do away with *Miranda* as a source of constitutional rights have been judicially silenced — at least for the foreseeable future.<sup>96</sup> Still, the continuing *Miranda* debate merely reflects the general societal debate that exists for a government of law “based upon the dignity and individuality of the individual soul.”<sup>97</sup> The problem is that the same government charged with protecting the rights of the individual against unjustified government intrusions, is simultaneously charged with meeting the needs of the general society for efficient law enforcement and the promotion of social order. This is not a simple task nor is there necessarily any agreement about how to achieve the balance needed between these two opposing interests. But on one thing there is agreement: American government must uphold the law. As Justice Brandeis warned in his dissenting opinion in *Olmstead v. U.S.*:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher . . . . [I]t teaches the whole people by its example. Crime is conta-

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91. *Dickerson*, 530 U.S. at 440.

92. *Id.* at 443.

93. 467 U.S. 649 (1984). Here the Court recognized an exception to *Miranda* where there is a public safety concern. *See supra* note 78.

94. 401 U.S. 222 (1971). An impeachment exception allows a prosecutor to use statements at trial to impeach a defendant’s credibility even though the statements had been taken in violation of *Miranda*. *See supra* note 81.

95. *Dickerson*, 530 U.S. at 441.

96. Most notably, Paul G. Cassell, *amicus curiae* in *Dickerson v. U.S.* He has been called “the man who would undo *Miranda v. Arizona*.” Terry Carter, *The Man Who Would Undo Miranda*, 86 A.B.A. J. 44 (2000).

97. Jerome J. Shestack, quoting Justice Brennan in *Universal Values and International Law*, *supra* note 2 at 291.

gious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.<sup>98</sup>

Justice Oliver Wendell Holmes, concurring with Brandeis' observation said: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."<sup>99</sup>

For America, then, there can be no "suspension" of the law in times of social emergency. Rather, the "emergency" would exist for the society should the government suspend the law. This is because the authority of the government is derived from the consent of the people and it exists in their service.<sup>100</sup> It is precisely this principle of human worth and dignity which infuses the Constitution and distinguishes American law from all others. American law places the rights of the individual at its center, rights to which the individual is entitled to against the government.<sup>101</sup>

#### IV. CONCLUSION

It is this unique relationship between the individual and government in American law which distinguishes the American Fifth Amendment privilege from the Talmudic prohibition against self-incrimination. While it has been argued that where "Anglo-American law recognizes a 'privilege,' Jewish law

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98. *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928).

99. *Id.* at 471 (Holmes, J., dissenting).

100. Justice Brennan reflected on the worldwide influence of the Constitution at the Columbia Law School Bicentennial Celebration: "There must be something about the Constitution's substance that accounts for its worldwide appeal. Three distinct characteristics of American constitutionality coalesce to distinguish our Constitution as a human rights charter. First, is the very premise on which the Constitution is based — that government springs from the People. Second, is the Constitution's enumeration of specific rights that are guaranteed against government intrusion. Third, and in my view most important, is the Constitution's implementation of a mechanism — judicial enforcement — that makes those enumerated rights meaningful." *Quoted in* Jerome J. Shestack, *Universal Values and International Law*, *supra* note 2, at 287.

101. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 430-31 (2d ed. 1986). "By stating the principle [against self-incrimination] in the Bill of Rights, which was also a bill of restraints upon government, [the founding fathers] were once again sounding the tocsin against the dangers of government oppression of the individual; and they were voicing their conviction that the right against self-incrimination was a legitimate defense possessed by every individual against government. Tough-minded revolutionists, the equal of any in history in the art of self-government, they were willing to risk lives and fortunes in support of their belief that government is but an instrument of man, its sovereignty held in subordination to his rights." Moreover, the Constitution was a reminder of their view that "the citizen is the master of his government, not its subject." This analysis is particularly insightful and useful to our discussion in yet another respect for it highlights most graphically the essential difference between American and Jewish law. In American law, the "citizen is the master of his government" because it exists as a creation of the people and derives its legitimacy from their consent; in Jewish law, the basic assumption is that the laws "emanated from a command by God. A Jew's basic approach to law is that the law is something that must be observed in order to keep the Jewish community's bargain with God." Friedell, *supra* note 60, at 937.

created a 'natural right.'"<sup>102</sup> I would suggest that quite the opposite is true. The Talmudic prohibition against self-incrimination is not a natural right belonging to the individual but rather it is the right of the society to protect itself, although it is by necessity exercised through the individual. Whereas the American Bill of Rights exists solely to protect the individual from the government and the tyranny of the majority (whatever the "exceptions" might be, this remains the goal of the Bill of Rights), the Talmudic prohibition serves to protect society from being corrupted by the individual.

As noted previously, American society is willing "to let criminals go free"<sup>103</sup> to protect the basic civil rights of all individuals. Jewish law, on the other hand, is willing to suspend the rule that protects individuals in times of emergency to protect the society.<sup>104</sup> American law allows for a waiver of the privilege; Jewish law does not.<sup>105</sup> The idea that the individual can choose to waive a privilege does not necessarily negate the value of that privilege. Instead, it serves only to reinforce the importance of the individual in his relation to the state. In American law, it is the individual who exercises the choice, no one else.<sup>106</sup> In Jewish law, the society, in effect, chooses for the individual in that nobody, ever, may confess to a criminal act.

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102. Simcha Mandelbaum, *The Privilege Against Self-Incrimination in Anglo-American and Jewish Law*, AM. J. COMP. L. 5, 118 (1956).

103. This rallying cry continues in full force but not necessarily in full effect: The *Dickerson* Court cited as one of the disadvantages of the *Miranda* rule that "statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Dickerson*, 530 U.S. at 444.

104. In sharp contrast to this view of suspension in times of emergency, was Justice Brandeis' view that government intrusions upon the privacy of the individual in violation of the Fourth and Fifth Amendments were "immaterial" even if the "intrusion was in aid of law enforcement. Experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent." Moreover, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. U.S.*, 277 U.S. at 479 (J. Brandeis, dissenting).

105. LEVY, *supra* note 101, at 434. The Talmudic rule "was an absolute and could not be waived or relinquished." The Fifth Amendment right, on the other hand, can be voluntarily waived. Moreover, the right is not limited to criminal proceedings: it can be asserted in civil cases, in grand jury proceedings, legislative and administrative hearings, and police stations, if the testimony he would give might be used against him in a criminal proceeding. In addition, the Fifth Amendment right can be invoked by any person subpoenaed or otherwise compelled to testify in any formal proceeding. This means that the right may be invoked by a witness and not just a criminal defendant.

106. *Id.* at XV. It is in this sense, therefore, that the American "privilege" is more accurately a "right." According to Levy, "[a]lthough the legal profession customarily refers to the right against self-incrimination as a 'privilege,' I call it a 'right' because it is one. Privileges are concessions granted by the government to its subjects and may be revoked." Continuing, Levy quotes James Madison: "In the United States, the people, not the government, possess the absolute sovereignty . . . . Hence the great and essential rights of the people are secured . . . not by laws paramount to prerogative, but by constitutions paramount to laws." In concluding, Levy states: "Although the right against self-incrimination originated in England as a common-law privilege, the Fifth Amendment made it a constitutional right, clothing it with the same status as other rights, like freedom of religion, that we would never denigrate by describing them as mere privileges."

But this is not to diminish in any way the remarkable societal accomplishment of the Talmudic prohibition. Despite the few instances in which the procedural safeguards were suspended, "[t]he Gemara Sages fashioned exceptions within the framework of a panoply of safeguards that were both more comprehensive and more stringent than those of any society before or after."<sup>107</sup>

There is no question that both legal systems are concerned with the inviolability of the individual and the rights preserving the integrity and dignity of the human being. I would suggest that the difference between the two systems, despite their common celebration of the fundamental freedom of the individual, lies in the direction in which the obligation between the individual and the society flows. In American law, the Bill of Rights provisions impose active obligations on the judges to protect individual liberties, often in seeming contradiction to the general "good" of the society.<sup>108</sup> In Jewish law, the relationship between the individual and society is one of mutual responsibility, where the individual, as a member of the community, is responsible to the community and the community is responsible to its members.<sup>109</sup> The Talmudic guarantee serves to protect the society as well as the individual from confessions which might harm them both.

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107. Rosenberg & Rosenberg, *supra* note 6, at 1027.

108. Bernard Schwartz, *How Justice Brennan Changed America*, *supra* note 2, at 33. Justice Brennan "believed that the Bill of Rights provisions protecting personal liberties imposed . . . active obligations on the judges." See also, Lyle Denniston, *Federalism, The "Great Design," and the Ends of Government*, *supra* note 2, at 264 for a discussion of Justice Brennan's understanding of the American federalist system. Harvard law professor Laurence H. Tribe summarized Brennan's beliefs in the constitutional scheme as flowing from "an elementary constitutional truth, the truth that human beings are, of course, the intended beneficiaries of our constitutional scheme." *Id.*

109. Jewish society adopts a jurisprudence that emphasizes obligations and relationships - it is a communitarian spirit of the law. The emphasis is on responsibility and relationships rather than on individual rights. Friedell, *supra* note 60, at 942-44.



