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Rabbi Lamm, the Fifth Amendment, and Comparative Jewish Law

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"The Fifth Amendment and Its Equivalent in the Halakha"

Rabbi Norman Lamm's 1956 article, "The Fifth Amendment and Its Equivalent in the Halakha,"[1] provides important lessons for scholarship in both Jewish and American law. Sixty-five years after it was published, the article remains, in many ways, a model for interdisciplinary and comparative study of Jewish law, drawing upon sources in the Jewish legal tradition, American legal history, and modern psychology. In so doing, the article proves faithful to each discipline on its own terms, producing insights that illuminate all three disciplines while respecting the internal logic within each one. In addition to many other distinctions, since its initial publication, R. Lamm's article has received the attention of scholars, has been republished, and has been cited in several judicial opinions—among them, two United States Supreme Court opinions, including the landmark *Miranda v. Arizona*.[2] As such, the article stands as a prime illustration of the potential promise of exploring Jewish law through the prism of modern thought and applying Jewish legal principles to contemporary issues.

At the same time, however, the legacy of R. Lamm's article is neither simple nor monolithic. Notwithstanding its well-deserved reception and undeniable merit, a close look at the article in broader context may also reveal some of the potential perils latent in attempts to draw too close a connection between classical Jewish legal sources and contemporary modes of thought. For example, although the citation to the article in the *Miranda* decision is not only notable but, to some degree, quite remarkable, the Supreme Court's reliance on R. Lamm's discussion of Jewish law may be misplaced, if not arguably inaccurate. Likewise, R. Lamm's innovative references to Freudian psychology to explain the ban on self-incrimination in Jewish law may raise questions of its own regarding the prudence and effectiveness of adopting a particular scientific or philosophical

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position to understand a Jewish legal principle. Thus, alongside its exemplary methodology and abiding value, the article may also provide cautionary lessons for the future study of comparative Jewish law.

Rambam and the Supreme Court: Promise and Peril

Throughout the article, R. Lamm's analysis displays distinctive characteristics that contribute to producing an effective approach to the study of comparative Jewish law. In fact, the article employs a methodology that may serve more generally as a model for comparative legal scholarship, avoiding some of the pitfalls that, not infrequently, accompany such efforts. Perhaps most importantly, it carefully and accurately presents, explores, and explains the rule against self-incrimination in Jewish law, on its own terms, before attempting to draw comparisons and lessons to be applied to the American legal system.

For example, the article makes clear that unlike American law, which empowers criminal suspects with a privilege against self-incrimination, Jewish law categorically prohibits the use of a criminal defendant's confession as evidence against the defendant. Likewise, in considering a rationale for the outright ban on self-incrimination in Jewish law, R. Lamm turns to no less an authority than Rambam, who, alongside his legal discussion in *Mishneh Torah*, offers a salient suggestion for the underlying reasons behind the rule, premised upon profound insights into the human mind. R. Lamm's analysis thereby steers clear of the tendency, sometimes found in comparative law scholarship, to reinterpret—or rewrite—the substance of one legal system to facilitate a facile comparison to another system.

If anything, remaining true to Jewish law on its terms allows for a more fruitful application of Jewish legal principles to the American legal system. As R. Lamm's article notes, Rambam emphasizes that the rule against self-incrimination is based on a divine decree. Yet, his comparisons to American law focus on Rambam's psychological exposition of the conceptual underpinnings behind Jewish law's ban on self-incrimination, relying primarily on Rambam's explanation that: "Perhaps this person's mind is sick in this matter; perhaps he is one of those who are perturbed and bitter of soul, who wish for death, who pierce their bellies with swords and throw themselves off roofs. Perhaps this man thus comes and confesses to a crime which he did not commit" (*Hilkhot Sanhedrin* 18:6).

Accordingly, R. Lamm's approach eschews attempts to superficially—and artificially—transplant principles of Jewish law onto American law. Rather than imposing particularistic theological concepts, such as divine

origins of the law, that are inconsistent with, if not inimical to, the values and assumptions of the American legal system, he relies on Rambam's more universal understanding of the human condition,[3] which provides lessons that can be applied in a manner that is consistent with the internal logic of American law as well.

The effectiveness of R. Lamm's approach is borne out in numerous citations to the article by American courts and scholars, demonstrating that R. Lamm successfully developed a methodology that did not seek to transplant—but instead, accurately and thoughtfully translated—concepts drawn from the Jewish legal system in a way that was applicable to the workings of the American legal system. Most famously, the article was cited, alongside a reference to Rambam's view, in the landmark United States Supreme Court decision, *Miranda v. Arizona*, at the outset of an important section of the majority opinion authored by Chief Justice Earl Warren. The citation to the article in *Miranda* is rather notable, appearing as it does in an opinion written by one of the court's most prominent chief justices, in one of the most well-known cases in the history of the United States.

In retrospect, the legal doctrine the *Miranda* case established—requiring that police issue "*Miranda* warnings" when conducting a custodial interrogation—may seem somewhat underwhelming, if only because of its familiarity. At the time the case was decided, however, the rule was fairly revolutionary in upending common police procedure, and to this day, the opinion has engendered not a small amount of controversy and criticism. Thus, Chief Justice Warren's citation to R. Lamm's article emerges as all the more remarkable, placed in a footnote documenting the declaration that: "We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times."[4] The substance of the footnote references Rambam's view that the Jewish law against self-incrimination is based in the Torah, followed by a reference to R. Lamm's article. It would seem that, conscious of just how groundbreaking the new rule would prove to be, Chief Justice Warren looked back to Jewish legal history to find a particularly powerful antecedent to Fifth Amendment rights, tracing to Rambam and, in turn, to biblical sources.

The significance of R. Lamm's article becomes even more apparent in light of its timeliness, both in 1956, when it was first published, and a decade later when it was cited in *Miranda*. At the start of the article, he introduces the substantive discussion of self-incrimination with a number of paragraphs depicting the history and importance of the Fifth Amendment,

described as "embattled... questioned, attacked and defended in the past," and most immediately implicated by "the Communist issue." As a direct response to McCarthyism and the associated encroachments on the American right against self-incrimination, R. Lamm called on Jewish tradition to lodge a bold protest against the recent past and to offer a similarly bold challenge for the future. A decade later, Chief Justice Warren took up R. Lamm's challenge, relying on Jewish law in seizing the opportunity to expand the contours of Fifth Amendment protections.

In this reading, situated within broader societal and legal context, the article stands as a prime example of the promise and potential for comparative Jewish legal scholarship. It draws upon traditional and authoritative texts in Jewish law and philosophy to address an urgent matter of vital importance in American law and society. Through a comparative and contrasting analysis of the rule against self-incrimination it provided both a rear-view perspective on a dark episode in recent American history and a more positive roadmap for the future of the American legal and societal landscape.

Yet, without discounting the impressive quality and widespread influence of "The Fifth Amendment and Its Equivalent in the Halakha," upon close examination, the references to Jewish law in *Miranda* may illustrate some of the limitations—if not the perils—of comparative Jewish legal scholarship. Specifically, in support of the proposition that the "roots" of the American privilege against self-incrimination "go back into ancient times," the footnote in *Miranda* declares that Rambam "found an analogue to the privilege grounded in the Bible," then quotes, verbatim and without further comment, a translated segment of the discussion in *Mishneh Torah*: "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree."[5] The footnote concludes with the citation to R. Lamm's article.

These references, and the opinion's accompanying reliance on Jewish legal sources, raise a number of methodological questions. For example, the assertion that the "roots" of the privilege against self-incrimination "go back into ancient times"—apparently implying that the Fifth Amendment is somehow an outgrowth of the ban on self-incrimination in Jewish law—is premised upon a historically dubious and conceptually unnecessary and inapposite claim.

On a historical level, somewhat surprisingly—though perhaps not crucially—the opinion implicitly accepts at face value Rambam's statements that under Jewish legal theory, the rule is a divine decree and, therefore, is of ancient and biblical vintage. In any event, the opinion arguably and tenuously identifies the rule in Jewish law as the basis for the American

privilege against self-incrimination, a position that is not documented in the opinion and runs contrary to most historical studies. Although finding ancient origins for the *Miranda* warnings, or at least for the Fifth Amendment, might have been helpful for buttressing the legitimacy of the majority's holding, the opinion does not provide historical evidence for this claim.

Perhaps even more problematic, on a conceptual level, the opinion in *Miranda* appears to advocate that the American legal system should adopt a rule regarding self-incrimination in accordance with Jewish legal doctrine. If so, the analysis falls short, on at least two separate but related grounds: First, substantively, the rule that was established in *Miranda* bears relatively little resemblance to the Jewish law against self-incrimination. As R. Lamm developed at length in his article, the Talmudic rule precludes the evidentiary use of confessions against the criminal defendant, regardless of its voluntariness—indeed, even contrary to the express wishes of the confessant. In sharp contrast, *Miranda* continues to permit the admissibility of voluntary criminal confessions, even when obtained through various forms of aggressive and adversarial police interrogation, pursuant to the issuance of *Miranda* warnings. In fact, American prosecutors depend heavily on the use of confessions as one of the most valuable pieces of inculpatory evidence against criminal defendants. It would seem anomalous to rely upon a rule that categorically bans confessions to derive a policy that merely mandates that a confession be deemed voluntary before being offered into evidence.

Second, Chief Justice Warren's methodology raises even more questions, attempting to apply and seemingly import into the American legal system a principle that the footnote describes as a "divine decree." It might have been expected that, like R. Lamm, Chief Justice Warren would emphasize Rambam's psychological explanation for the ban on self-incriminatory confessions in Jewish law, which grows out of an account of the human condition relevant to the contemporary American legal system as well. Instead, unlike R. Lamm's methodology, which focused on the conceptual underpinnings of the Jewish law and its applicability within the internal logic of American jurisprudence, Chief Justice Warren appears to mechanically transplant a religious rule by referencing its divine authority—neither exploring its underlying rationale or justification, nor explaining its substantive or conceptual connection to American legal thought.

To be sure, it should be appreciated that a jurist as distinguished as Chief Justice Warren expressed and demonstrated such interest and admiration for the Jewish legal system.[6] At the same time, it should be recognized that, in forgoing the kind of careful approach employed in R. Lamm's

article, the comparative law analysis in *Miranda* presents an incomplete picture of Jewish law on its own terms, while applying Jewish law in a superficial way that remains inconsistent with basic tenets of the American system. As such, the opinion in *Miranda* may illustrate some of the limitations, and even the potential peril, of the comparative Jewish law project.[7]

Rambam and Freud: Promise and Peril

Among many other salient features of "The Fifth Amendment and Its Equivalent in the Halakha," a discussion of Sigmund Freud and Karl Menninger stands out as particularly notable, again providing a strong case for the potential promise of comparative Jewish legal analysis. After presenting a careful summary of Jewish law on its own terms, including both the doctrinal and psychological bases for the ban on criminal confessions in the Jewish legal system, the article proceeds with an analysis of Rambam's rationale for the rule through a comparison to modern psychology. In looking to contemporary insights to enrich our understanding and appreciation of an area of traditional Jewish law and philosophy, the article follows the path forged by countless generations of scholars who have revisited and explored important aspects of Jewish law and tradition through the prism of ongoing scientific and philosophical advances.

The article's doctrinal analysis of Jewish law is built upon foundational sources, including, most fundamentally, the Talmudic exposition of the directive that an individual is one's own closest relative and, therefore, is precluded from offering self-incriminatory testimony (*Sanhedrin* 9b, *Ketubot* 18b). As the article adds, however, "[b]ehind this Talmudic derivation… lie deeper motives as expounded by [Rambam] and generally accepted by later Talmudists." After quoting Rambam's view, the article observes that "[d]espite his obvious hesitancy and his ultimate reliance on Biblical authority, which requires no further explanation, [Rambam's] rationale of the Halakhic point of view on self-incrimination is grounded on psychological considerations."

Having thereby established the validity and cogency of offering a psychological explanation for the Talmudic rule against self-incrimination, the article extends and updates the analysis to incorporate contemporary psychology as well. Concluding that Rambam "must have intuitively sensed the fact that the propensity toward suicide is much more widespread than one might believe at first sight," the article asserts that Rambam "anticipated by some seven hundred years, albeit in rudimentary fashion, a major achievement of psychoanalysis."

Against this backdrop, the article compares Rambam's position to Freud's "theory of the Death Wish or Death Instinct," which, "when it reaches its ultimate expression and is redirected towards the self, appears as suicide." Moreover, the article suggests, consistent with Karl Menninger's refinement of Freud's ideas, Rambam "intuitively grasped a more elaborate understanding of the Death Wish as manifesting itself also as a focalized or partial self-destruction." Thus, the article maintains, "modern psychoanalytic theory supports [Rambam's] explanation of the Halakhic view on self-incrimination, an explanation which relies on the universality of the instinct of self-destruction."

Finally, the article takes this analysis one step further, claiming that Jewish law "goes even deeper than either Menninger or [Rambam] dared in this respect." Indeed, the article notes that the Talmudic ban on self-incrimination extends beyond scenarios in which the confessant would face criminal punishment, to include situations when the consequence would be the disqualification of the confessant as a witness in the future. Accordingly, the article contends, Jewish law recognizes that "the Death Wish expresses itself in more subtle ways than heretofore realized—namely, in the disparagement of the self, in sordid public confession, especially of the kind that has recently found expression in the writings and records of the more morbid self-confessed ex-Communists." In short, "[i]t is this broader view of the Death Wish and its universality that we must recognize in the Halakha, if its legal principle on self-incrimination is to have a psychological foundation."

In many ways, R. Lamm's discussion of Rambam and Freud reinforces the article's display of the potential promise of comparative Jewish law, again incorporating some of the most important features necessary for effective comparative study. First, the article carefully and accurately depicts Jewish law on its own terms, primarily through the Talmud and *Mishneh Torah*. Second, the article relates traditional Jewish law and philosophy to vital matters of contemporary American law and social policy, in a manner that is consistent with the internal logic of modern scientific and societal assessments. As a result, the article presents a fresh way of looking at multiple disciplines, including, among others, Jewish law and philosophy, psychology, and American law, politics, and sociology.

Still, R. Lamm's reliance on Freud and Menninger to understand the Talmud and Rambam may raise further questions, pointing to additional elements of potential peril—or at least indicating an additional need for caution—in the study of comparative Jewish law. As impressive as R. Lamm's analysis remains, his proposed rationale for a divinely mandated and enduring rule in the Jewish legal system turns, in large part, on

substantial adoption of the findings of early twentieth-century psychoanalytic theory. Freud's theories, however, in this area and others, have long been the subject of intense controversy, and are far from being universally accepted. Notwithstanding the scholarly appeal and the intellectual achievement of reconciling Jewish law and philosophy with scientific advances, and despite the abiding importance of attempts to mine the wisdom behind the rules of the Torah, the effort to find too close a correlation between divine law and humans' inherently limited grasp of the world and human nature may bring about concomitant risks that should not be underestimated or ignored.

The legacy of R. Norman Lamm's scholarship on Jewish and American law, and the lessons it carries for their comparative study, go far beyond the import and impact of this one article. Subsequent to its publication in 1956, R. Lamm employed a similar methodology to address numerous matters of vital significance to the American legal system, including, among others, privacy and the Fourth Amendment and the separation of governmental powers. Each of these works merits attention of its own, likewise contributing to the recognition of the ongoing relevance of R. Lamm's work and the potential promise (and peril) of comparative Jewish law for examining current, unfolding, and enduring events and controversies in American law, society, and politics.[8]

[1] Norman Lamm, "The Fifth Amendment and its Equivalent in the Halakha," *Judaism* 5 (Winter 1956), 53–59; reprinted in an expanded form as "Self-Incrimination in Law and Psychology: The Fifth Amendment and the Halakhah" in *Faith and Doubt*, chapter 10.

[2] Supreme Court of the United States. *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] R. Joseph B. Soloveitchik suggested that, in accordance with Rambam's psychological rationale, the rule against criminal confessions applies universally in the context of Noahide Law as well; cited in Hershel Schachter, *Mi-Pininei ha-Rav* (Flatbush Beth Hamedrosh, 2001), 225.

[4] Supreme Court of the United States. *Miranda*, 458.

[5] Supreme Court of the United States. *Miranda*, n. 27.

[6] Chief Justice Warren's reliance on Jewish law in *Miranda* appears to have grown largely out of his widely-reported 1957 visit to the Jewish Theological Seminary, where he attended lectures and spoke with scholars. Among other lectures, Warren attended a talk by Prof. Saul Lieberman, which, in the words of the *New York Times*, "included the Jewish legal view of self-incrimination, involved in the Fifth Amendment, that has posed a vexing question in American constitutional law... that under Jewish law... he cannot incriminate himself because of the rabbinical concept that if a man testifying against himself is a repentant sinner he is beyond court jurisdiction." In something of a preview to the *Miranda* opinion, the article further reported that

Warren "observed that the American Constitutional protection 'is, perhaps, not as sacred as in ancient times'" but that a "measure of protection exists here, nevertheless," and that "it showed how much of the common law could be traced back to Judaic origin." Richard Amper, "Warren Studies Talmudic Law Here," *New York Times* (September 14, 1957).

Another report of the visit likewise anticipated both the substance and the language of the *Miranda* opinion, stating that Warren "was quick to point out that the common-law attitudes on self-incrimination and double jeopardy had their roots in Judaic law which rejected self-incrimination in favor of repentance as a juridical device and which further regarded punishment itself as a primary evil to be avoided by confession." Newton M. Roemer, "Chief Justice Warren Studies Talmud," *New Jersey State Bar Journal* 1 (Fall 1957), 15.

In a 1975 interview, Prof. Louis Finkelstein reflected, at length, on his decades-long friendship with Earl Warren, which included Warren's visit to JTS and many discussions about Jewish law and American law—among them, conversations about self-incrimination. "Finkelstein interview by Amelia Fry" (October 30, 1975), Earl Warren Oral History Project, Regional Oral History Office, The Bancroft Library, University of California. Berkeley.

[7] I have previously addressed additional aspects of the potential promise and peril of applying Jewish law to the American law of confessions, including a consideration of a more extensive quotation from R. Lamm's article by Supreme Court Justice William O. Douglas, in *Garrity v. New Jersey*, 385 U.S. 493 (1967), a case decided one year after *Miranda*. Samuel J. Levine, *Jewish Law and American Law: A Comparative Study* (Touro College Press, 2018), vol. 1, 11–19, 139–160.

[8] Among these, see, Norman Lamm, "The Fourth Amendment and its Equivalent in the Halachah," *Judaism* 16 (Summer 1967), 300–312; reprinted in an expanded form as "Privacy in Law and Theology" in *Faith and Doubt*, chapter 11. On the legal battle around Nixon's Watergate tapes see, Norman Lamm, "The Talmud and the Tapes," *Sh'ma* 3:60 (November 2, 1973); reprinted in *Seventy Faces*, vol. 2, and his "addendum" to this article in *Sh'ma* 4:73 (May 3, 1974).