

THE FIFTH AMENDMENT AND ITS EQUIVALENT IN THE HALAKHAH

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The wide public attention focused on the Fifth Amendment in the recent past, and the vehemence with which it has been both attacked and defended, have prompted students of Jewish law to examine its equivalent in traditional Halakhah. A comparison of the principle of self-incrimination, as embodied in Constitutional Law and in the Halakhah, is revealing on the level of both theory and practical consequence.

The embattled Amendment, with its provision that "no person . . . shall be compelled in any case to be a witness against himself", is certainly one of the most fundamental and advanced principles of Anglo-American jurisprudence. Two great legal thinkers, Dean Griswold¹ and Supreme Court Justice Douglas,² writing separately, have recently referred to it in identical terms: an old friend and a good friend. Its significance in our whole tradition of liberty cannot be overrated. The law against

compelled self-incrimination dates back to the 12th century, and achieved real prominence and effectiveness when it was upheld by the House of Commons in "Freeborn John" Lilburne's quarrels with the infamous Star Chamber in the 17th century. It became part of the United States Constitution as the Fifth Amendment in 1791.

The Amendment has been invoked, questioned, attacked and defended in the past, but it was the Communist issue that, amid heated controversy, brought the long-accepted privilege against self-incrimination to the forefront of public discussion. This focus of attention has accomplished two things: it has shown its strength and it has revealed its weaknesses.

On the basis of these revelations and criticisms, it is interesting to note how a similar principle, antedating the Fifth Amendment by many centuries, has been treated in the Halakhah. Attempts have recently been made to investigate the practical side of the problem, especially with regard to the permissibility of "informing" (*messirah*).³ What we are here interested in, however, is the theoretical background, the rationale, of the same principle in both systems of law.

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¹ Erwin N. Griswold, *The Fifth Amendment Today*, (1955), p. 1.

² William O. Douglas, *An Almanac of Liberty*, (1954), p. 238.

³ Rabbi Tibor Stern, at the Annual Convention of the Rabbinical Council of America, as reported in the press (July, 1955).

It is hoped that no inferences will be drawn from this essay concerning the very real problem of enforcing the privilege within the framework of the nation's security requirements, the matter of "Fifth Amendment Communists" or any of the usual political issues that generally arise in such discussions.

The Halakhic principle is contained in the formula "*ein adam meissim atsmo rasha*", which means, literally, a man cannot represent himself as wicked. Most of the Talmudic discussion of this principle concerns, not so much self-incrimination which results in corporal punishment, as that which results in the disqualification of the confessor as a *bona fide* witness.⁴ It should be explained that, according to Talmudic Law, two categories of witnesses are disqualified in any case requiring their testimony. The first category is composed of relatives (within a certain degree of consanguinity) of either the principals, other witnesses or judges. The second category, called *passul* (disqualified), includes primarily those of unreliable character, (those who are "wicked" — i. e., transgressors). The Halakhic ruling on self-incrimination, therefore, covers even those cases where the confession merely disparages the confessor's character to the extent of disqualifying himself as a reliable witness.

It should be pointed out, at the very outset, that the Halakhah does not distinguish between voluntary and forced confessions, for reasons which will be discussed later. And it is here that one of the basic differences between Constitutional and Talmudic Laws arises. According to the Constitution, a man cannot be *compelled* to testify against himself. The provision against self-incrimi-

nation is a *privilege* of which a citizen may or may not avail himself, as he wishes. The Halakhah, however, does not *permit* self-incriminating testimony. It is inadmissible, even if voluntarily offered. Confession, in other than a religious context, or financial cases completely free from any traces of criminality, is simply not an instrument of the Law. The issue, then, is not compulsion, but the whole idea of legal confession.

This invalidation, by the Halakhah, of all criminal confessions, obviates one of the serious problems of the Constitutional principle regarding self-incrimination. Because the Fifth Amendment formulates the principle as a privilege, to be exercised at the discretion of the accused, there is a "natural" presumption of guilt⁵ attached to the one who does invoke the Amendment. This presumption which may, of course, be completely unjustifiable, has given rise to the opprobrious epithet "Fifth Amendment Communist". This inference of guilt may be unfortunate and regrettable, but it is a fact, and a direct result of the voluntary character of the Constitutional principle of criminal confession. It is an inherent flaw in the entire construction of the legal concept, for it stamps with suspicion anyone who, by its use, seeks to avoid the official consequences of self-incrimination. One can mention case after case where this "natural" presumption of guilt, by an exercised public, has proved much more punitive and damaging than a jury's adverse verdict would have been.⁶ In the

⁵ Griswold, *op. cit.* p. 19.

⁶ Douglas (*op. cit.* p. 239) writes that a person who seeks the protection of the Fifth Amendment "may ruin his reputation though he saves his neck."

⁴ *Sanhedrin* 9b and *Ketubot* 18b.

Halakhic system, however, no such "natural" presumption can logically arise, since there is no "claim of the privilege" by a defendant—he is automatically presumed innocent despite himself.

This difference between the Halakhah and the Constitution in the treatment of self-incrimination is a consequence of the different rationale and development of the principle in the two systems of law.

Historically, the Fifth Amendment was born out of a reaction against the use of torture as accepted procedure in legal trials. Its espousal has historical reasons and is based on solid humanitarian grounds—the abhorrence of torture as practiced by the Star Chamber. The Amendment protects, not only the accused, but society itself from the inner corruption that comes from legalizing brutality and sanctioning violence in place of good police work. It is, as Justice Douglas⁷ puts it, "part of our respect for the dignity of man". Dean Griswold⁸ calls it, simply, an "act of civilization". And Judge Fields⁹ thinks it is too obvious to have to explain. In general, then, the rationale for the Fifth Amendment is a humanitarian and moral one, which arose in response to definite historical stimuli, and is basically negative in character—it helps eliminate brutality and torture from legal proceedings. Its genesis was an act of protest, and its character has thus been indelibly stamped on its subsequent development. It remains a powerful force against compulsion, but has virtually nothing to say on the question of confession *per se*.

The Halakhic principle, on the other hand, has as its rationale certain pro-

found and positive considerations. Its unqualified rejection of legal confession, though formulated in technical language, is based upon a deep insight into the dangers of even voluntary confession and the mental processes of the confessor, rather than upon cumulative historical experience alone. And it, therefore, transcends the limits imposed on a law which comes about primarily in response to the pragmatic demands of experience.

The Talmud's technical derivation of the principle of "*ein adam meissim atsmo rasha*" is as follows:¹⁰ We have already mentioned the fact that according to the Halakhah the testimony of a relative to the accused, whether that testimony be favorable or unfavorable to him, is deemed invalid. The second proposition is formulated as "*adam karov eitsel atsmo*", literally, a man is related unto himself. Hence, a man's testimony about himself is as invalid as is that of any other close relative. The Talmudic derivation is, therefore, syllogistic and, on the face of it, seems purely technical, especially since the first proposition—the disqualification of a close relative—is derived by a hermeneutic interpretation of a Biblical verse.

Behind this Talmudic derivation, however, lie deeper motives as expounded by Maimonides and generally accepted by later Talmudists. This rationale, which can explain only the Halakhic, but not the Constitutional opinion on self-incrimination, is presented by Maimonides¹¹ as follows: It is by decree of Scripture that a *Beth Din* (a court) cannot execute or flog a man on his own confession, and can do this only on the testimony of two witnesses . . . the San-

⁷ Douglas, *op. cit.* p. 238.

⁸ Griswold, *op. cit.* pp. 7-8.

⁹ Quoted by Griswold, *ibid.*

¹⁰ *Sanhedrin* 9b.

¹¹ *Hil. Sanhedrin* 18, 6

hedrin can execute neither capital nor physical punishment upon one who confesses to a crime, because 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. (But whatever the reason may be), the principle of the matter is that it is a decree of the (Divine) King. Despite his obvious hesitancy and his ultimate reliance upon Biblical authority, which requires no further explanation, Maimonides' rationale of the Halakhic point of view on self-incrimination is grounded on psychological considerations. Simply put, it means that confession to a serious crime may sometimes be a veiled attempt at suicide.

It is interesting to view the opinion of Maimonides in the light of our modern knowledge of psychology, and particularly psychoanalysis. For Maimonides to have offered this psychological reason for a legal principle operative in such a large area of the law, he must have intuitively sensed the fact that the propensity toward suicide is much more wide-spread than one might believe at first sight. In this, he anticipated by some seven hundred years, albeit in rudimentary fashion, a major achievement of psychoanalysis.

In 1920, some twelve years after expressing his scepticism of the "aggressive instinct" as developed by Alfred Adler, Freud¹² elaborated his famous

¹² Freud's statements concerning the Death Wish can be found in his following works: *New Introductory Lectures on Psychoanalysis*, p. 147; *Beyond the Pleasure Principle*; "Mourning and Melancholia" in *Collected Papers*, vol. IV, p. 156 (Hogarth Press, London, 1925). A summary

theory of the Death Wish or Death Instinct. This instinct, according to Freud, is part and parcel of every human being's psychological constitution. It reveals itself generally as destructiveness, in its many varied forms, and, in extreme cases, in homicide. This Death Instinct is opposed by a Life Instinct, which psychoanalysis declared to be an amalgamation of what had previously been considered to be the two major instincts of man: self-preservation and sex. The Death Instinct is a sort of "repetition compulsion", an inherent tendency of life to revert to its lifeless origin, which is the inorganic state, or death. While the Death Instinct tries to disintegrate the organism in its regression, the Life Instinct (called Eros) is that which holds all living things together. This theory "endeavors to solve the riddle of life by the hypothesis of these two instincts, striving with each other from the very beginning."¹³

Now, because of a variety of reasons, this Death Wish, originally felt towards others, is usually frustrated and as a result is redirected towards the self. At times, therefore, this Death Wish when it reaches its ultimate expression and is redirected towards the self, appears as suicide. Suicide, then, is an introjected Death Wish. It is "turning against himself a death-wish, which had been directed against someone else . . . the unconscious of all human beings is full enough of such death-wishes even against those we love."¹⁴ It should be pointed out

of Freud's views on this subject may be found in an essay by Paul Federn in *The Psychoanalytic Review*, April, 1932, pp. 129-151.

¹³ Freud, *Beyond the Pleasure Principle*.

¹⁴ Freud, "The Psychogenesis of a Case of Homosexuality in a Woman" (1920) in *Collected Papers*, vol. II (Hogarth Press, London, 1925).

that, in addition to being an introjection of a death-wish originally intended for another person, suicide is frequently an abnormal means of atonement for an overwhelming feeling of guilt. In all these cases, of course, the reasons for the act are generally unknown to the person who commits it.

While it was Freud who suggested the drama of the two conflicting instincts, and the explanation of suicide as the total victory of the Death Instinct over Eros, it remained for his disciple, Karl Menninger, to develop the plot in this drama of conflict and tension. Usually, Menninger maintains,¹⁵ there is no total victory for either the Life or the Death Instinct. When the Death Instinct is only partially neutralized by the Life Instinct, what results is a variety of forms of partial or chronic self-destruction. A great number of "accidental" cases of self-injury and self-mutilation are explained by this hypothesis of partial neutralization of one instinct by the other. Frequently, the act of the destruction of the self or part of the self is relegated to an outsider, a second person, as in certain cases of martyrdom or polysurgery, which can be traced to neurotic sources.

Thus, modern psychoanalytic theory supports Maimonides' explanation of the Halakhic view on self-incrimination, an explanation which relies on the universality of the instinct of self-destruction. It is interesting to note that in the passage quoted above, Maimonides extends his psychological rationale for the law on self-incrimination to include cases involving either capital punishment or corporal punishment such as

flogging. One of his chief commentators, RaDBaZ,¹⁶ writes that it should be obvious that this explanation can only serve for a law involving capital punishment, but does not apply to confession for crimes punishable by flogging. This difference between Maimonides, in the literal readings of his decision, and RaDBaZ, recalls the essential difference between Freud's original theory and its expansion by Menninger. Evidently, Maimonides intuitively grasped a more elaborate understanding of the Death Wish as manifesting itself also as a focalized or partial self-destruction, a refinement which obviously eluded RaDBaZ.

But the Halakhah, if we are to accept this psychological rationale as valid, goes even deeper than either Menninger or Maimonides dared in this respect. The psychoanalysts concentrate on suicide and focal self-destruction, that is, physical harm to the body. While they do occasionally refer to "moral masochism",¹⁷ to the love of suffering which comes from self-disparagement rather than destruction of the ego, from self-humiliation rather than self-mutilation, the concept is undeveloped and its exact nature is undefined.

Maimonides, too, does not go far enough in establishing the psychological rationale as the central and sufficient theme for the whole Halahic construction of the law on self-incrimination. Maimonides confines his explanation to cases of death and flogging, which he codifies in the Laws of Sanhedrin.¹⁸ But the original Talmudic Law on self-incrimination deals not with corporal

¹⁶ On Maimonides, *Hil. Sanhedrin*, 18, 6.

¹⁷ Eric Fromm, *Escape from Freedom*, pp. 148, 149. See also Menninger, *op. cit.*, pp. 219 and 226.

¹⁸ Maimonides, *Sanhedrin*, 18, 6.

¹⁵ Karl Menninger, *Man Against Himself*, p. 82 ff. Compare Maimonides' "marei nefesh" with Menninger, pp. 41-7, on melancholiacs.

punishment, but with self-incrimination *per se*—what we have referred to above as “moral masochism”—whose only effect is the disqualification of the confessor as a *bona fide* witness on the basis of “*rasha*” (transgressor). This latter law Maimonides mentions, not in the Laws of Sanhedrin, where he presents the psychological basis for the stricture against self-incrimination, but in Laws of Testimony (*Eiduth*),¹⁹ where the decision is mentioned without any explanation or reason. Obviously, Maimonides did not feel that the Death Wish, while sufficiently widespread to warrant its recognition by the Halakhah in the forms of suicide and focal self-destruction, is operative in cases of confession which result in no more than disqualification of the confessor as a witness in any future case.

Yet, if that reason has validity for the one case, it must prove valid for all cases of the Halakhah involving self-incrimination. And this is so only if we extrapolate, and maintain 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. Thus, the sado-masochistic Death Instinct operates, not only by destroying or injuring the self physically, but even by casting aspersions on one's own character and exposing the ego to opprobrium in public. A recent case in point is that of the man who staged a great show of his confession of guilt as a Communist, only to turn later and stage an even greater show by compounding his first confession with a second confession

as a liar. There is still some doubt and controversy as to whether he is more Communist than liar. This much, however, is sure—his propensity for public confession is not without its deep psychological motives. The element of exhibitionism, which was so prominent in this case, is to be expected, according to Menninger,²⁰ as a natural concomitant of the masochistic expression of the Death Wish in any of its various forms. This extreme abuse of the self is to “moral masochism” what suicide is to physical masochism—the ultimate expression of the wish for death.

It is this broader view of the Death Wish and its universality that we must recognize in the Halakhah, if its legal principle on self-incrimination is to have a psychological foundation. The Halakhah recognizes the introjected Death Wish as expressing itself on three levels: as complete physical self-annihilation, when the confession is to a crime punishable by death; as partial self-destruction, when the confession is to a crime punishable by flogging (these two recognized by Maimonides); and finally, as “moral masochism” when the confession results in “*psul eiduth*”, in the confessor's disqualification as a *bona fide* witness, due to his self-assumed status as “*rasha*”.

The Halakhah, then, is obviously concerned with protecting the confessor from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts. It recognizes the fact that, in Menninger's pregnant phrase which serves as the title of his book, from which we have drawn so copiously in

¹⁹ Maimonides, *Eiduth*, 12, 2.

²⁰ Menninger, *op. cit.* p. 67 and Fromm, *op. cit.* p. 148.

this essay, we often find "man against himself". While certainly not all, or even most criminal confessions are directly attributable, in whole or part, to the Death Instinct, the Halakhah is sufficiently concerned with the minority of instances, where such is the case, to disqualify all criminal confessions and to discard confession as a legal instrument. Its function is to ensure the total victory of the Life Instinct over its omnipresent antagonist. Such are the conclusions to be drawn from Maimonides' interpreta-

tion of the Halakhah's equivalent of the Fifth Amendment.

In summary, therefore, the Constitutional ruling on self-incrimination concerns only forced confessions, and its restricted character is a result of its historical evolution as a civilized protest against the use of torture in extorting confessions. The Halakhic ruling, however, is much broader and discards confession in toto, and this because of its psychological insight and its concern for saving man from his own destructive inclinations.