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Letters to the Editor

Staten Island, New York

Of late, a spate of articles and letters have appeared in JEWISH LIFE and elsewhere comparing Jewish law to the common law. While this is a very gratifying development for many reasons, a caveat hinted at in Rabbi Wein's article ("Threading the Needle of Jewish Law," July 1967) should be heavily stressed to avoid some unfortunate errors. The so-called criminal law of the Talmud as applied to a ben-Yisroel is wholly inappropriate to a present day penal system. If directly applied, its leniency would result in a complete breakdown of law and order. Present-day penal laws are based in varying degrees on achieving three fundamental purposes: deterrence, retribution, and correction. Talmudic law, however, as applied to a ben-Yisroel, is unique in that its underlying purpose is in obtaining atonement (*kaparah*) for the defendant. It presupposes a high morality on the part of the society to which it is applied (See Wein, p. 36). Furthermore, the concept of the court as referee between two contestants is not as applicable in Jewish law as in common law. In the former, the function of the court is deemed to be more of a teacher in-

structing the litigants as to their duties rather than as an umpire in a contest. Direct comparisons, therefore, may be very dangerous.

Such an unfortunate comparison was made by Rabbi Norman Lamm who is mentioned by three letter-writers in the July-August issue as having

conclusively shown in his celebrated discussion of the Fifth Amendment and Halochah which was cited by Chief Justice Warren in the Miranda case, (that) the Torah view and the Supreme Court are harmonious.

Regrettably, that brilliant but unsound article failed to distinguish between a ben-Yisroel and a ben-Noach. In the case of the latter, as far as I can discover, a confession is admissible and may be sufficient to convict. (Sefer Hachinuch, Mitzva 28, 192; Medrash Rabbah (Noach) 34, 19; Yerushalmi, Kiddushin, Perek 1, Hal. 1.) After all, Miranda and Escobedo were bnei-Noach!

The current Supreme Court versus Public Prosecutor struggle is indeed complex. My own view, encapsulated, is that the Supreme Court in curbing

overzealous police and public prosecutors, is frustrating the moderates, so that all of them tend to abuse their remaining permissible powers. Procedure is stressed at the expense of substance. Tensions rise and the interest of public safety and accused innocents recede to the background while the rules of the game become paramount: arrest procedures, warrants, searches, questioning, etc., overshadow the issue of guilt or innocence.

The fault should be laid at the door of the legislatures that have failed to lay down workable ground rules in this area, leaving it to the courts to legislate as abuses mount. The core problem of democracy today is in the failure of legislatures to respond to the need for remedial legislation, and in reacting only to crises.

If divinely inspired Halochah is to be offered as a guide in solving any of these problems, we must be meticulously accurate in offering a realistic exposition of it instead of a sugary, sermonic, inapposite and idealistic statement of its rules.

REUBEN E. GROSS

RABBI LAMM REPLIES:

Mr. Gross has completely missed the point of my "unsound" essay on the Fifth Amendment. I obviously did not advocate the complete substitution of the Halochah for the Constitution as the legal code of the United States; even Israel has not yet adopted Halochah as its official law. Had I intended such far-fetched notions, Mr. Gross could readily have pointed to the disqualification of the Supreme Court Justices on the grounds of their not being Jewish. One could easily discover other such absurdities.

What I clearly had in mind, in addition to a comparative analysis for its own sake, was the suggestion that certain profound insights of the Halochah ought to be studied and adopted by American jurists. The legal concepts considered by the Halochah as applicable to Israelites are, in our view as traditional Jews, the product of divine wisdom, and hence ought to be emulated by all people. "For this is your wisdom and understanding in the sight of the peoples, that when they hear all these statutes they shall say, 'Surely this great nation is a wise and understanding people.'" (Deut. 4:6) Surely a proposal that American courts treat its citizens as bnei-Noach—in other words, as strangers in their own country—will not inspire admiration for the wisdom of the statutes of Judaism. An "understanding people" will suggest that other nations treat their citizens as Jewish law demands that Israel act towards bnei-Yisroel. Of course, Mr. Gross, in his excessive literalism, may consider this "a sugary, sermonic, inapposite, and idealistic statement" of the rules of Halochah, but if this is the price one must pay for making the wisdom of Judaism available to the rest of mankind, it is small indeed.

Having said this about the major element in his criticism, may I point out that Mr. Gross' assertions that confession by a ben-Noach is admissible "as far as I can discover," is not quite that certain. The references he cites are indeed discoverable in the Encyclopedia Talmudit, vol. I, p. 256a. However, a bit more serious exploration (even in the remainder of the same footnote containing these references!) would have yielded the further discovery that this

opinion is not unanimous. Thus, his reference to the Yerushalmi is valid only according to one of the two classical commentators, not the other. The reference to Bereshis Rabbah depends on which text one accepts (see Theodor's notes in his edition). The Chinnuch, it is true, considers confessions of a ben Noah valid; but the Meiri does not (see editor's notes to Meiri on Sanhedrin 57b). Such too is the opinion of the author of Chamra Ve'chaye (to San. 57b). Furthermore, in the view of the late R. Meshulam Roth, Maimonides too disqualifies confessions by benei Noah; see his Responsa Kol Mevasser, vol. II, no. 22, 3.

RABBI SAMUEL TURK REPLIES:

I agree with Mr. Reuben Gross's observation that the Torah's criminal law concerning an Israelite does not apply to a Noahide and that the equating of the two by Rabbi Lamm was not in order. I too pointed out in the rebuttal to my critics that to insinuate that American laws are or should be the same as those of the Torah borders on the naive. Washington, after all, is not Sinai.

This need not prevent us, however, from making certain comparisons and analyzing the patterns of approach towards crime taken by the Torah. Mr. Gross makes the valid assertion, which I too stressed in my article, namely, that the court procedures in criminal cases involving a Jewish person were heavily weighted in favor of the suspect and that they presupposed a high standard of morality in society as a whole. Because the non-Israelite community did not demand such a high standard, a Noahide was not entitled to the pro-

tection of such criminal procedures. When morality declined in the Jewish community as well, the Torah enabled the courts and the executive to temporarily suspend the statutory guarantees which favored the criminal suspect. Such suspension was maintained until the rate of crime declined to normal proportions.

The main point of my paper was that the Supreme Court was performing a disservice to the country in choosing to expand the constitutional rights of suspected and even known criminals at a time when bloodshed and violence are so rampant and the streets are not safe for law-abiding citizens. I suggested that the Supreme Court would be wise to follow the Torah's course in restricting rights in such dangerous times rather than expand them.

I cannot agree, however, with Mr. Gross's contention that the underlying purpose of Talmudic criminal law is to obtain atonement for the defendant. While the element of atonement was a factor in Jewish criminal law the factor of deterrence was equally important. The Torah says "And those which remain shall hear and fear and shall henceforth commit no more any such evil in thy midst." (Deuteronomy 19, 20). I also pointed out that one of the seven Noahide laws obligates the non-Jewish society to properly punish those guilty of bloodshed and to adequately protect the lives of all people and their property. This the government owes us even according to the laws of the Torah. We are, therefore, in the right when we demand from our government laws which will not tie the hands of law enforcement officers and which help to make jungles of our cities.