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RESEARCH ARTICLE

Evidently Not: Why Confessions Are Excluded in Jewish Criminal Jurisprudence

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Abstract

Of all the principles in classical Jewish law that stand out from a comparative legal perspective perhaps none is more notable than the ban on self-incrimination in criminal procedures. Contrary to the most basic evidentiary assumptions of other ancient legal systems, this principle differs fundamentally from the right to remain silent that is part of both early modern and modern legal systems. Only rabbinic jurisprudence incorporates an outright exclusion of criminal confessions. Despite receiving much scholarly attention over the centuries, this principle's fundamental justification relating to the rule of law and the public pursuit of justice has gone unnoticed. This article explores this salient jurisprudential perspective, and sheds new light on this principle by contrasting the Jewish legal approach with the primary modes of criminal adjudication that were adopted in the West. What emerges from this comparative analysis is that this seemingly anomalous principle actually reveals much about the core commitments and values of Jewish law. These, in turn, have substantial implications for certain contemporary legal practices and dilemmas.

Keywords: Jewish law; Western legal tradition; confessions; comparative criminal law; plea bargaining; rule of law; rabbinic jurisprudence; John Langbein; Fifth Amendment; jurisprudence

Introduction

Of all the principles in classical Jewish law that stand out from a comparative legal perspective, perhaps none is more notable than the ban on self-incrimination in criminal procedures, *ein adam mesim atzmo rasha* (literally, a person cannot incriminate himself).[1] Recorded in the Babylonian Talmud and with roots in earlier rabbinic literature, this principle runs contrary to the most basic evidentiary assumptions of other ancient legal systems. While various early modern and modern legal systems instituted and augmented certain important limits on self-incrimination and even underscored the centrality of these limits for the due process of law, their approach remains fundamentally different than the classical Jewish law principle. Only rabbinic jurisprudence incorporates an outright exclusion of criminal confessions.[2]

[1] See the following: *Babylonian Talmud*, Sanhedrin 9b; Yebamot 25b; Ketubot 18b, Sanhedrin 25a. I refer to this well-known principle as a conventional shorthand for the rabbinic ban on criminal confessions even though its specific context relates to a witness's (dis)qualifications. See also below, note 17 and accompanying text.

[2] See Aaron Kirschenbaum, *Criminal Confession in Jewish Law* (Jerusalem: Magnes Press, 2004), 11 [Hebrew].

To be sure, over the centuries the rabbinic ban was increasingly circumvented in practice. Due to changing social conditions that demanded a more flexible judicial procedure, great medieval halakhic authorities found ways to relax the rigid formalism of various rabbinic evidentiary rules. Appealing to the supererogatory powers afforded to the rabbinic court, or equitable procedures authorized under an alternate law of the king, they allowed for substantial elasticity in admitting evidence that was previously excluded. As a result, the testimony of relatives, women, or other disqualified groups was heard; the need for multiple witnesses was waived; and the requirement that witnesses must issue a prior warning to culprits was abandoned. In short, the formalism of classical Jewish law was supplanted by a pragmatic orientation,[3] which also recognized the need to operate on the basis of a suspect's confession.[4] Not surprisingly, this pragmatic mode of jurisprudence has continued to inform legal practice ever since. Thus, after the establishment of the modern state of Israel, even "Hebraic" jurists who sought to incorporate considerable features of Jewish law understood that confessions would remain a necessary component within the Israeli legal system.[5]

Notwithstanding this historical and perennial accommodation (or convergence), the underlying principle has continued to fascinate jurists and scholars. In fact, it has been cited by several US Supreme Court justices for its measured resemblance to the Fifth Amendment of the US Constitution.[6] Likewise, it has been the subject of judicial analyses among certain Israeli supreme court justices.[7] From a comparative legal perspective this seems well justified. One can make a compelling case that what captures the essence of a legal system are distinctive doctrines and institutions in their pure form, not ways they have converged with other systems over time.[8] Even if there has been an undeniable loosening of the rabbinic ban in practice for centuries now, it would be a missed opportunity to leave the ban languishing on the ancient book shelf. For one thing, there has been a notable call to recover some of its potential implications for contemporary practice in which police or prosecutors can be overzealous in eliciting confessions no matter what the cost.[9] Moreover, leaving the issue of implementation on the side for a moment, this principle reveals much about the core

[3] The locus classicus is *She'elot U-Teshuvot Ha-Rashba* [Responsa of Shlomo ben Avraham ben Aderet] (Jerusalem: Makhon Masoret Israel, 2000), no. 3:393, 4:311; and see the citation in Joseph Karo, *Beit Yosef*, *Hoshen Mishpat*, no. 388. See also 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," *Pace Law Review* 11, no. 3 (1991): 545–51.

[4] See Kirschenbaum, *Criminal Confession in Jewish Law*, 203–64, and especially his discussion of *She'elot U-Teshuvot Ha-Rivash* [Responsa of Isaac ben Sheshet Perfet], responsa nos. 234–39, at 235–46.

[5] See Kirschenbaum, *Criminal Confession in Jewish Law*, 408–15. Notably, however, there are rabbinic courts in Israel that have continued to exclude criminal confessions. See, for example, Plonit v. Ploni 835157/20 (Great Rabbinic Court, Jerusalem 2019) https://www.dintora.org/article/1581. See also Rafael Shlomo Dichovsky, "Self Incrimination Versus 'A Person Cannot Incriminate Himself,'" *Hamaayan* 62, no. 3 (2022): https://www.machonso.org/hamaayan/?gilayon=65&id=2150. I thank an anonymous reviewer for these references.

[6] See Miranda v. Arizona, 384 U.S. 436, 458 n.27 (1966); Garrity v. New Jersey, 385 U.S. 493, 497–98 n.5 (1967). See also Samuel J. Levine, *Jewish Law and American Law*, vol. 1, *A Comparative Study* (New York: Touro College Press, 2018), 10 n.12, citing several federal court opinions that refer to the rabbinic principle, including United States v. Gecas, 120 F.3d 1419, 1425 (11th Cir. 1997); United States v. Huss, 482 F.2d 38, 51 (2d Cir. 1973); Moses v. Allard, 779 F. Supp. 857, 870 (E.D. Mich. 1991); Roberts v. Madigan, 702 F. Supp. 1505, 1517n20 (D. Colo. 1989); In re Agosto, 553 F. Supp. 1298, 1300 (D. Nev. 1983); State v. McCloskey, 446 A.2d 1201, 1208 n.4 (N.J. 1982); People v. Brown, 86 Misc. 2d 339, 487 n.5 (N.Y. Nassau County Ct. 1975).

[7] See Kirschenbaum, *Criminal Confession in Jewish Law*, 408–15; see especially CA 4179/09 State of Israel v. Volkov (2010).

[8] See John Henry Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law," *Stanford Journal of International Law* 17, no. 2 (1981): 357–88; John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems*, 3rd ed. (Stanford: Stanford University Press, 2007), 127.

[9] See Justice Neal Hendel's opinion in CA 4179/09 State of Israel v. Volkov (2010).

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commitments and values of Jewish law, and these may also have enduring lessons for other systems and traditions.

Among traditional commentators, there have been several celebrated explanations of this Talmudic principle. There have also been numerous scholarly studies dedicated to it, including the magisterial study of Aaron Kirschenbaum.[10] Nevertheless, a fundamental justification for this principle (whether as it was initially conceived or as it crystallized and can be best justified)[11] or an implication of adopting such a principle has not received adequate attention.

A Talmudic Principle and Its Underlying Rationale

The primary source of the *ein adam mesim atzmo rasha* principle is a somewhat intricate Babylonian Talmudic passage in tractate Sanhedrin, which I will briefly summarize (the main takeaway is that the Talmud introduces such a principle).[12] Addressing whether a person is qualified to deliver testimony about a transgressor's violation in which the witness was also complicit, the Talmud records a debate: R. Yosef, a third-generation Babylonian sage, states that based on the content of his testimony, the witness has incriminated himself and therefore disqualified himself, while a leading fourth-generation Babylonian sage, Rava (whose opinion prevails) demurs: "Rava says: A person is his own relative and a person cannot incriminate himself."

Because the part of the testimony that pertains to the witness himself is inadmissible, as are all self-incriminating confessions, the witness remains qualified to deliver testimony concerning the transgressor's violation (the court bifurcates the testimony and admits the part that is admissible)."[13] From this and other sources,[14] rabbinic authorities have extrapolated a more sweeping rule that categorically bans a person from offering a self-incriminating confession in standard cases, or from being punished based on a confession. Various other Talmudic passages likewise conform to this principle, and the later commentators and digests of Jewish law treat this as an established rabbinic rule of evidence.[15]

[10] See, generally, Kirschenbaum, *Criminal Confession in Jewish Law* (citing numerous studies and references). See also Arnold Enker, "Self-Incrimination in Jewish Law—A Review Essay," *Dine Israel*, no. 4 (1973): cvii–cxxiv; Berachyahu Lifshitz, "Confessions in Capital and Monetary Cases," *Dine Israel*, no. 23 (2005): 199–215 [Hebrew]; Levine, *Jewish Law and American Law*, 1:11–19, 139–60 (including the references that he cites).

[11] The distinction is an important one worth underscoring. To take an example from the common law, the justification of the original function of the jury in eleventh- and twelfth-century England as a jury of presentment differs considerably from a modern justification of a jury trial within a democracy. Similarly, the original impetus behind the right to remain silent arguably differs from its modern justification. See, for example, a novel account of the latter in William J. Stuntz, "Self-Incrimination and Excuse," *Columbia Law Review* 88, no. 6 (1988): 1227–96. While in other writings I have focused on reconstructing the origins and development of rabbinic doctrines, here I offer a justification of the rabbinic ban that emerged. On the significance of the latter in the study of Jewish law, see Benjamin Porat, "The Philosophy of Jewish Law: A Methodological Reflection," *Dine Israel*, no. 30 (2015): 179–213 [Hebrew]. In terms of the origins and development of the rabbinic ban on criminal confessions, see my cautious formulation in note 17 and the nearby text.

[12] *Babylonian Talmud*, Sanhedrin 9b. In terms of the implications of this passage, see the seminal interpretation of Abraham ben Isaac of Narbonne (cited by various medieval commentators summarized in Kirschenbaum, *Criminal Confession in Jewish Law*, 152–54), who draws a fundamental distinction between the reflexive words of an involved party and the testimony of witnesses, which complements my primary thesis. I thank Ben Ohavi for emphasizing this point.

[13] *Babylonian Talmud*, Sanhedrin 9b.

[14] *Babylonian Talmud*, Yebamot 25b, Ketubot 18b, Sanhedrin 25a.

[15] Maimonides, *Mishneh Torah*, Laws of Divorce 13:10, Laws of Testimony 3:7, 12:2, Laws of Sanhedrin 18:6; *Arba Turim*, Even Haezer 17:7, Hoshen Mishpat 34:35, 46:37; *Shulchan Aruch*, Even Haezer 17:7, Hoshen Mishpat 34:25; see also *Shulchan Aruch*, Hoshen Mishpat 92:5.

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Although the exact origins and scope of this principle has been the subject of much scholarship,[16] whether this principle traces to biblical, pre-rabbinic, or Palestinian-rabbinic literature,[17] ultimately this rule took shape. Its underlying rationale and implications is my concern. What is worth noting is that notwithstanding the rule, in certain spheres or circumstances, rabbinic evidentiary regulations do allow for confessions or admissions of interested parties. Still, the general rule is that standard rabbinic criminal law bans confessions.

Among numerous attempts to rationalize or justify the rabbinic ban, two salient interpretations are most frequently cited. In the medieval period, Maimonides formulated the following novel explanation in his halakhic code:

> It is a scriptural decree that the court does not execute a person or give him lashes because of his own admission. Instead, the punishments are given on the basis of the testimony of two witnesses. Joshua's execution of Achan and David's execution of the Amalekite convert because of their own statements was a provisional ruling due to the exigences of the hour or the law of the king. The Sanhedrin, however, may not execute or lash a person who admits committing a transgression lest he become crazed concerning this matter. Perhaps he is one of those embittered people who are anxious to die and pierce their reins with swords or throw themselves from the rooftops. Similarly, we fear that such a person may come and admit committing an act that he did not perform, so that he will be executed. To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.[18]

Advancing a rather startling psychological account for why the court cannot rely on the veracity of a person's confession, Maimonides cautions that a desperate mindset can lead to a willful surrender to an unwarranted punishment.[19] (Note the currency of the concern about credibility that Maimonides vividly captures. With the increasing prevalence of dubious methods of interrogation and prosecution for soliciting confessions in contemporary practice, many legal commentators have wondered about their ultimate credibility.[20] In Israeli jurisprudence, Justice Neal Hendel in a 2010 opinion appealed to the classical formulation of Maimonides—emphasizing less the inherently dubious character of a confession and more about its potential for being manipulated and distorted—to buttress

[16] See the analysis and summary of prior scholarship in Kirschenbaum, *Criminal Confession in Jewish Law*, 121–57. While Kirschenbaum is skeptical that this principle evolved, I believe this is likely.

[17] One needs to evaluate whether this principle, or any iteration of it, exists in biblical, pre-rabbinic, and rabbinic literature (and practice) and whether there is a distinction in the latter between tannaitic and amoraic and Palestinian and Babylonian traditions. Within the rabbinic corpus, its applicability and scope should be explored within the realms of monetary law (*dine mamonot*), punitive fines (*kenasot*), corporal law (*malkot*) and capital law (*dine nefashot*), and in terms of the (dis)qualifications of witnesses (*psule edut*). In fact, it is likely that over time more than one principle became operative in these different contexts. For instance, it seems that the (dis)qualification of witnesses is a distinct principle (see note 18, below) that emerged in later Babylonian Talmudic times. A further indication of this may be the complex formulation of Rava in *Babylonian Talmud*, Sanhedrin 9b.

[18] Maimonides, *Mishneh Torah*, Laws of Sanhedrin 18:6. Arnold Enker importantly argues that Maimonides here is only addressing the penal rule, as opposed to the evidentiary rule of "*ein adam mesim atzmo rasha.*" Enker, "Self-Incrimination in Jewish Law," cvii–cxxiv; pace Kirschenbaum, *Criminal Confession in Jewish Law*, 170. See also Amihai Radzyner, "*Dine Qenasot": A Research in Talmudic Law* (Jerusalem: Hebrew University of Jerusalem, 2014), 461 n.42 [Hebrew].

[19] See Norman Lamm, "Self-Incrimination in Law and Psychology: The Fifth Amendment and the Halakhah," in *Faith and Doubt: Studies in Traditional Jewish Thought*, 3rd ed. (Jersey City: Ktav, 2007), 266–84.

[20] See Saul Kassin, *Duped: Why Innocent People Confess—and Why We Believe Their Confessions* (Guilford: Prometheus Books, 2022); Brandon L. Garrett, "The Substance of False Confessions," *Stanford Law Review* 62, no. 4 (2010): 1051–118.

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the claim that there is much to be skeptical about in a given confession.[21]) At the same time, Maimonides's placement of this paragraph after underscoring the fixed evidentiary standards of a conventional court and his opening and concluding emphasis that this ban is a formal decree may suggest that the suspect's credibility is not the sole basis for this ruling.[22]

In a gloss on the above passage,[23] a later sixteenth-century commentator, Rabbi David b. Zimra, known as Radbaz,[24] points out that Maimonides's rationalization does not explain all instances when the ban applies (such as cases of corporal, but not capital, punishment), which is why it ultimately leans on the authority of Scripture. But then Radbaz ventures beyond Maimonides and offers an additional rationale of his own (which he acknowledges is also incomplete). Invoking a theological argument rather than a psychological one, Radbaz posits that from a religious perspective a person does not have title over his own body and therefore cannot willingly sacrifice it or subject it to corporal punishment. In other words, it is the penal consequences that drives this rule.

A Problem of Credibility or Admissibility?

The fascinating explanation of the Radbaz (which bears relevance for modern questions of bodily autonomy)[25] has interesting support elsewhere in halakhic discourse and has rightly garnered much scholarly attention ever since.[26] His rationale has nothing to do with the question of credibility, which (at least in part) occupies Maimonides. For the Radbaz, it is not the probative value of a confession that is of concern but its implications. Note that we need not concur with Radbaz's specific explanation to follow his broader approach that the problem with a confession lies in admitting and operating with such evidence, even if it is reliable.

In fact, other rabbinic teachings (several of which are codified by Maimonides) seem to support the conclusion that a confession is per say credible, in several respects. Consider, for example, the license cited by Maimonides above to rely on a confession based on a provisional ruling due to the exigencies of the hour or under the law of the king. Elsewhere Maimonides elaborates on the flexibility of the procedures under such an exceptional circumstance or in an alternate royal venue, but even an elastic mechanism should not brook relying on specious evidence.[27] Evidently the problem with a confession is not a substantive concern but one of procedural clearance. According to some authorities, the same is true in the context of Noahide laws, where a court may rely on a confession as grounds for a capital punishment.[28] In certain circumstances or venues, rabbinic evidentiary rules do allow for confessions of interested parties.

Rabbinic law, moreover, openly acknowledges that in some spheres an admission or confession can be a sufficient, or even optimal, grounds for a judgment. A rabbinic maxim

[21] Justice Neal Hendel's opinion in CA 4179/09 State of Israel v. Volkov (2010).

[22] See also Yair Lorberbaum, "Two Concepts of Gezerat ha-Katuv: A Chapter in Maimonides's Legal and Halakhic Thought, Part II: The Jurisprudential Sense," *Dine Israel*, no. 29 (2013): 101–37, at 102–03.

[23] See Radbaz on Maimonides, *Mishneh Torah*, Laws of Sanhedrin 18:6.

[24] See Radbaz on Maimonides, *Mishneh Torah*, Laws of Sanhedrin 18:6.

[25] See, for example, Daniel Sinclair, "Patient Autonomy in the Dying Process and Brain Death: Jewish Law and Its Role in Recent Israeli Biomedical Legislation," *Hamline Law Review* 35, no. 1 (2012): 591–622, at 598–99.

[26] See, for example, Shlomo Yosef Zevin, *Le-or Ha-halakhah Be'ayot u-Verurim* [In Light of the Halakhah, Problems and Explanations] (Mevaseret Zion: Kol Mevaser, 2004), 410–28; Shaul Israeli, *Sefer Amud Ha-Yemini* [The Book of the Right Pillar] (Tel-Aviv: Moreshet, 1965), 132–33.

[27] See Gerald J. Blidstein, *Political Concepts in Maimonidean Halakha*, 2nd ed. (Ramat Gan: Bar-Ilan University Press, 1983), 133–49 [Hebrew].

[28] See the references in Moses Maimonides, Mishneh Torah, ed. Shabse Frankel, vol. 14, *Book of Shoftim* (Jerusalem: Hotzaat Shabse Frankel, 1998), 574 (commenting on Laws of Kings and Wars 9:14) [Hebrew].

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states that in matters of monetary or civil law an admission of an interested party is "tantamount to the testimony of a hundred witnesses," and in practice it carries even more probative weight.[29] The formulation is notable because rabbinic law generally operates with the axiom that the testimony of two or more witnesses is of equal weight from an evidentiary perspective (and therefore any conflicting testimony will be canceled out).[30] Nevertheless, rabbinic law privileges an admission as the ultimate form of evidence. While one can try to distinguish between monetary and criminal matters, it seems more likely that an admission or confession is presumptively credible but still remains inadmissible in the criminal sphere.

Indeed, even in the criminal sphere, if one extends the purview beyond the question of admissibility, one can discern how a reflexive statement is deemed to be a meaningful reflection of a person's mindset and is assigned significant value. Consider, for example, the astonishing rabbinic rule that establishes that a prerequisite for punishing a culprit with a capital punishment is that in advance of committing a crime (or transgression) he or she acknowledges receiving a prior warning from the witnesses and responds by willingly forfeiting his or her life to such a punishment.[31] Rabbinic law considers this declaration to be a sober expression of the culprit's mindset and a reflection of his or her criminal intent.

Another rabbinic regulation pertaining to a subsequent phase of criminal procedure relates more directly to a confession of guilt. After the court announces a capital verdict, the criminal must openly confess his or her crime before being executed at the gallows (which is at least a theoretical possibility under rabbinic law).[32] Here rabbinic law recognizes the value of a criminal's confession and mandates it as a necessary element of the penal process. Evidently, a confession is considered to be reliable and meaningful, at least in certain respects.[33]

The above sources seem to indicate that the exclusion of a criminal confession is not a function of its lack of credibility but a matter of inadmissibility.[34] Some commentators describe this latter alternative as a formal disqualification—that is, a procedural rule simply disallows such evidence—rooted in a scriptural decree (note the similar emphasis in the quotation from Maimonides above).[35] But even though the formalism of rabbinic evidentiary rules cannot be gainsaid, characterizing a provision as formalism per se is certainly an explanation of last resort. A more appealing account would aim to reconstruct an underlying rationale for this rule of inadmissibility (which is also a desideratum given the difficulties that remain with the respective explanations of Maimonides and Radbaz, notwithstanding their profundity and ingenuity), or at least explore its implications and effects. Here a comparative lens proves especially illuminating.

[29] See *Tosefta*, Bava Metsia 1:10; *Babylonian Talmud*, Shavuot 41b. See also Ritva on *Babylonian Talmud*, Bava Metsia 3a.

[30] See, for example, *Babylonian Talmud*, Ketubot 20a.

[31] See *Tosefta*, Sanhedrin 11:1; Maimonides, *Mishneh Torah*, Laws of Sanhedrin 12:2.

It should be noted that the above Tosefta—if read with the plausible inference suggested by Kirschenbaum (*Criminal Confession in Jewish Law*, 132)—would further support my primary thesis.

[32] See *Mishnah*, Sanhedrin 6:2. See also Netanel Dagan and David Sabato, "Between Celestial and Terrestrial Justice: The Duality of a Criminal Confession in Jewish Law," *Dine Israel*, no. 37 (2023): 1–32 [Hebrew]. For more on the relationship and contrast between penitential and juridical confessions, see Kirschenbaum, *Criminal Confession in Jewish Law*, 502–16; and Samuel J. Levine, "Rabbi Lamm, the Fifth Amendment, and Comparative Jewish Law," *Tradition* 53, no. 3 (2021): 146–54, at 153 n.6.

[33] The references in this paragraph pose considerable questions for the psychological account of Maimonides and at least suggest that the issue of credibility is not the entirety of the matter according to him.

[34] See Kirschenbaum, *Criminal Confession in Jewish Law*, 340–58. See also *She'elot U-Teshuvot Ha-Rashba* [Responsa of Shlomo ben Avraham ben Aderet], no. 2:231.

[35] See Kirschenbaum, *Criminal Confession in Jewish Law*, 341.

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A Comparative Perspective

In antiquity, the Talmudic principle against self-incrimination ran counter to the approach of classical jurisprudence, which operated under the famous Latin maxim, *Confessio regina probationum est* (a confession is the queen of evidence).[36] This adage was incorporated into Roman law—for example, in the fifth-century CE Theodosian Code: "If any person is about to pronounce sentence, he shall maintain such moderation that he shall not pronounce a capital sentence or a severe sentence against any person until such person has been convicted of the crime of adultery, homicide, or magic, *either by his own confession, or at any rate by the testimony of all witnesses* who have been subjected to torture or to questioning when such testimony is concordant and in agreement, pointing to the same end of the matter."[37] In other words, the code assigned superior weight to confessions over other forms of evidence.

Even as the classical approach continued to guide jurisprudence over the centuries, by the early modern period in England another doctrine was introduced that seemed to substantially close the gap with rabbinic law.[38] Formulated first by Chief Justice Coke,[39] the common law guaranteed a suspect a right to remain silent. With the adoption of the Bill of Rights, this protection was henceforth enshrined in the US Constitution.[40] Nearly two centuries later, the Warren Court offered a robust interpretation of this constitutional provision in *Miranda*[41] and made it a fixture in the popular imaginary. Notably, that decision cited the passage from Maimonides quoted above as a relevant precursor of the Fifth Amendment:

> 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.[42]
>
> Thirteenth 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, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, III Yale Judaica Series 52–53. See also Lamm, The Fifth Amendment and Its Equivalent in the Halakhah, 5 Judaism 53 (Winter 1956).[43]

Nevertheless, the Supreme Court's citation of the Talmudic ban (and its biblical underpinnings) should not obscure the profound difference between the constitutional and rabbinic doctrines.[44]

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[36] See John H. Langbein, "Torture and Plea Bargaining," *University of Chicago Law Review* 46, no. 3 (1978): 3–22, at 14.

[37] Clyde Pharr, ed., *The Theodosian Code and Novels and the Sirmondian Constitutions: A Translation with Commentary, Glossary, and Bibliography*, trans. Clyde Pharr, with Theresa Sherrer Davidson and Mary Brown Pharr (Princeton: Princeton University Press, 1952), 9.40.1, at 255 (emphasis added).

[38] See, generally, R. H. Helmholz et al., eds., *The Privilege against Self-Incrimination: Its Origins and Development* (Chicago: University of Chicago Press, 1997).

[39] See Stephen H. Randall, "Sir Edward Coke and the Privilege against Self-Incrimination," *South Carolina Law Quarterly* 8, no. 4 (1956): 417–53, at 444.

[40] See Leonard W. Levy, *Origins of the Fifth Amendment: The Right against Self-Incrimination* (New York: Oxford University Press, 1968).

[41] Miranda v. Arizona, 384 U.S. 436 (1966).

[42] *Miranda*, 384 U.S. at 458.

[43] *Miranda*, 384 U.S. at 458 n.27.

[44] This contrast has been emphasized by several commentators. See, for example, Levy, *Origins of the Fifth Amendment*, 434; Irene Merker Rosenberg and Yale L. Rosenberg, "In the Beginning: The Talmudic Rule against Self Incrimination," *New York University Law Review* 63, no. 5 (1988): 955–1050, at 956; Suzanne Darrow-Kleinhaus, "The Talmudic Rule against Self-Incrimination and the American Exclusionary Rule: A Societal Prohibition versus an

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While the Fifth Amendment offers a vital mechanism for a suspect's protection, it in no ways denies the binding legal weight of his or her confession. On the contrary, a confession is the most certain way of resolving matters of guilt, and almost all criminal procedures are resolved through a confession in one form or another. In this respect, the United States and all other Western regimes are fully in accord with the classical attitude that regards confessions (when credible and lawfully attained) as the ultimate form of proof.[45] But the rabbinic rule negates this option and establishes a categorial ban on confessions in standard criminal cases.

In elucidating the Talmudic principle, one recent commentator, Rabbi Adin Steinsaltz, essentially characterized it as an extension of the right to remain silent (even though he uses somewhat different terminology).[46] The constitutional right is a mechanism for protecting a suspect from the prosecutorial insistence that he or she testify about the matter at hand. Extending an absolute ban can be thought of as a way of assuring that a suspect is not subjected to any form of compulsion in this regard. But rather than merging these respective doctrines, in a fundamental sense, notwithstanding their limited affinity, they are animated by different values and concerns.

A key marker of this divergence is the fact that the constitutional doctrine is embedded in the Bill of Rights, and affirms a fundamental right to remain silent. As Robert Cover and other scholars have emphasized, this discourse is largely alien to rabbinic law, which is centered on obligations rather than rights.[47] Indeed, I would argue that the rabbinic doctrine that bans confessions does not enshrine a protection of a right, but rather grows out of a system of obligations or commitments to justice and the rule of law (interestingly, a recent Supreme Court case related to Miranda warnings may indicate the limits of a rights discourse in this sphere even in the United States).[48]

In order to grasp the fundamental commitments underlying or advanced by the rabbinic principle, one needs to consider its function within the larger mechanics of criminal adjudication in rabbinic jurisprudence. To bring this point into sharper relief, it is helpful to appeal once more to the foil of comparative materials approached through the lens of a couple of penetrating studies of leading legal historians. While at first blush they each address distinct questions of Western legal history that may seem far afield, their works brilliantly illuminate the primary modes of criminal adjudication that were adopted in the West.[49]

Affirmative Individual Right," *New York Law School Journal of International and Comparative Law* 21, no. 2 (2002): 205–27, at 207. But see Becky Abrams Greenwald, "Maimonides, Miranda, and the Conundrum of Confession: Self-Incrimination in Jewish and American Legal Traditions," *New York University Law Review* 89, no. 5 (2014): 1743–76, at 1743.

[45] Saul M. Kassin and Katherine Neumann, "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis," *Law and Human Behavior* 21, no. 5 (1997): 469–84, at 469.

[46] Adin Steinsaltz, *Ha-Talmud la-Kol* [The Essential Talmud], 2nd ed. (Jerusalem: Idanim, 1977), 122.

[47] Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order," *Journal of Law and Religion* 5, no. 1 (1987): 65–74. Similarly, a loose parallel to the right of "due process" is a rabbinic duty for judges to be deliberate in judgment (see *Mishnah*, Avot 1:1); and the right not to suffer "cruel and unusual punishment" is a rabbinic duty to punish without inflicting excessive pain (see *Babylonian Talmud*, Sanhedrin 45a).

[48] In Vega v. Tekoh, 142 S. Ct. 2095 (2022), the US Supreme Court refused to characterize a Miranda warning—which is a derivative of the Fifth Amendment—as a right, but rather as a constitutional rule; in light of the analysis presented herein, it is tempting to consider whether this can be reframed as a constitutional obligation or duty. See also Justice Kagan's dissent, in which she argues that *Miranda*'s constitutional rule clearly gives rise to a "correlative 'right[].'" Vega, 142 S. Ct. at 2108–09.

[49] Notably, these two penetrating studies, which I discuss in the following paragraphs, also disagree in certain fundamental respects. See, for example, the explicit criticism of John Langbein's account of the ordeals in James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008), 101–02.

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In a landmark study of the emergence of judicial torture, John Langbein sets out to resolve what essentially is a historical riddle:[50] Why was there a dramatic rise in the use of torture in criminal procedures from the middle of the thirteenth century onward (until the middle of the eighteenth century)? Painting in broad strokes, Langbein offers a stunning explanation relating to the primary modes of adjudication in Continental Europe. Up until the thirteenth century, a principal method of administering justice was through an elaborate system of ordeals that offered a foolproof mode of adjudication. But with the Fourth Lateran Council in 1215, ordeals were officially banned by the Catholic Church, which engendered a kind of crisis of how to find an adequate replacement for the irrefutable judgement of God. Here Langbein posits that a striking substitute emerged: the confession of a suspect (and this in turn necessitated an escalating use of torture, in order to elicit a confession). Explaining the underlying rationale behind this replacement, Langbein writes:

"The ordeals purported to achieve absolute certainty in criminal adjudication through the happy expedient of having the judgments rendered by God, who could not err. The replacement system of the thirteenth century aspired to achieve the same level of safeguard —absolute certainty—for human adjudication. Although human judges were to replace God in the judgment seat, they would be governed by a law of proof so objective that it would make that dramatic substitution unobjectionable—a law of proof that would *eliminate human discretion* from the determination of guilt or innocence."[51] Initially relying upon God and later on the suspect, Continental criminal procedure transitioned between two distinct modes of adjudication.

In England, James Whitman grapples with a different historical conundrum that relates to a third mode of adjudication of jury trials that prevailed within the common Law tradition.[52] In particular, Whitman seeks to uncover the origins of the "beyond a reasonable doubt" formula that became the governing standard for a guilty verdict by a jury in a criminal trial. As Whitman rightly points out, this widely known formula is actually rather obscure in meaning, and often difficult to comprehend for contemporary jurors in practice, which makes one wonder about its provenance. According to Whitman, the historical record traces to a surprising point of origin—a "forgotten world of premodern Christian theology, a world whose concerns were quite different from our own." As Whitman explains, "the reasonable doubt formula was originally concerned with protecting the souls of *the jurors* against damnation. … [C]onvicting an innocent defendant was regarded, in the older Christian tradition, as a potential mortal sin. The reasonable doubt rule was one of many rules and procedures that developed in response to this disquieting possibility … intended to reassure jurors that they could convict the defendant without risking their own salvation, so long as their doubts about guilt were not 'reasonable.'"[53]

In other words, the verdict of the jurors has a disclaimer attached to it denoting that they cannot preclude a remote possibility of error, which is a way of renouncing full responsibility. So the adjudicators hedge in formulating their final decision. For this discussion, what is most relevant is a third mode of adjudication that emerges. Rather than turning directly to God, as it were, or the suspect, justice is mediated by (human) adjudicators (more specifically, jurors), who do not assume full responsibility for their verdict.[54]

[50] John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago: University of Chicago Press, 1977).

[51] Langbein, "Torture and Plea Bargaining," 4 (paragraph break omitted).

[52] Whitman, *Origins of Reasonable Doubt.* For a critical evaluation of Whitman, see Barbara Shapiro, "The Beyond Reasonable Doubt Doctrine: Moral Comfort or Standard of Proof," *Law and Humanities* 2, no. 2 (2008): 149–73.

[53] Whitman, *The Origins of Reasonable Doubt*, 2–3.

[54] Although I refer to these as three modes of *adjudication*, the nomenclature is imprecise because formally they involve distinct processes of adjudication, adducing evidence, and arbitrating facts. Yet the degree of deference

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In all, this schematic overview of criminal adjudication in the West reveals three different approaches to reaching a verdict: relying on God, the suspect, or a qualified determination by third-party adjudicators. These alternative modes are especially illuminating from a comparative perspective. For all three constitute conspicuous paths *not* taken by rabbinic jurisprudence.[55]

Paths Not Taken in Rabbinic Jurisprudence

A rabbinic midrash commenting on the verses in Exodus 22:7–8, which instruct litigants to come "before the Lord [*ve-nikrav baal ha-bayit el Ha-Elokim*]," states "'before the Lord [that is, God, *Ha-Elokim*]'—I [may] understand that this means he should inquire of the [priestly] Urim and Thummim, therefore scripture teaches 'the one whom the judge condemns [*asher yarshiun elohim*]'—it refers exclusively to a judge [that is, a judge, *elohim*] who condemns."[56]

Openly rejecting the notion that litigants appeal to God (the biblical term *Lord* usually refers to God) for a verdict by way of an oracle from the priestly Urim and Thummim, the midrash instead emphasizes that jurisdiction belongs to (human) judges (who can also be referred to by the term *Lord*), a viewpoint espoused throughout rabbinic literature.[57] That the plain sense of the verse that (presumably) speaks of God is reinterpreted as a reference to judges makes this hermeneutic even more deliberate and revealing.

Significantly, a second midrashic tradition also explicates this same clause from Exodus as referring to judges and should be understood as complementing the above midrash: "'the one whom the judge condemns (*asher yarshiun elohim*)' (that is on the basis of the judge, and) not on his own basis."[58]

Denying culpability based on self-incrimination (the immediate context refers to imposing a punitive fine for larceny),[59] the midrash insists that a judge, and only a judge, may condemn a suspect. (Notably, this latter midrash assumes that once a suspect's confession is admitted this would preclude a judge from rendering a judgment.[60] From a comparative law

bestowed upon a confession renders it comparable to the other two processes. Indeed, Langbein also glosses over such formal differences in his account.

Not surprisingly, this schematic summary of the primary modalities of criminal adjudication has been criticized as an oversimplification. See, for example, Elizabeth Papp Kamali, *Felony and the Guilty Mind in Medieval England* (New York: Cambridge University Press, 2019), 170. Nevertheless, for the purposes of this article, it offers a powerful heuristic tool.

[55] I am referring to the mainstream of rabbinic jurisprudence, but there are alternate traditions recorded in this corpus. See, for example, Ephraim E. Urbach, "Halakhah and Prophecy," *Tarbiz* 18, no. 1 (1946): 1–27 [Hebrew]; Yochanan Silman, *Kol Gadol ve-lo Yasaf: Torat Yisrael ben Shelemut Le-Histhalmut* [A Great Voice that does not Cease: Israel's Torah, Between Completeness and Ever-Becoming-Completed] (Jerusalem: Magnes Press, 1999).

[56] H. S. Horovitz and I. A. Rabin, eds., *Mekhilta Rabbi Yishmael* [Mekhilta of Rabbi Ishmael] (Jerusalem: Bamberger and Wahrmann, 1960), 300.

[57] See Haim Shapira, "'For the Judgment Is God's': Human Judgment and Divine Justice," *Journal of Law and Religion* 27, no. 2 (2012): 273–328. See also Berachyahu Lifshitz, *The Halacha: By God or By Man* (Jerusalem: Bialik Press, 2018) [Hebrew].

[58] *Babylonian Talmud*, Bava Qamma 64b. See the similar, earlier tannaitic formulation in Jacob N. Epstein and Ezra Z. Melamed, eds., *Mekhilta Rabbi Shimon bar Yohai* [Mekhilta of Rabbi Simeon bar Yohai] (Jerusalem: Mekize Nirdamim, 1955), 204.

[59] While the immediate context is a punitive fine (*kenas*)—that is, a confession cannot be grounds for liability—*a fortiori* this is true for corporal or capital punishment—that is, a confession cannot be grounds for punishment. See also the surprising comment of Rashi on *Babylonian Talmud*, Makkot 5a, discussed in Kirschenbaum, *The Criminal Confession in Jewish Law*, 162–63. But see Radzyner, *"Dine Qenasot,"* 461–62.

Note that later Talmudic discourse advances an alternate understanding of the impact of a confession within the context of a punitive fine as leading to an exemption from liability, even if witnesses subsequently testify (so rather than excluding a confession from serving as the grounds for liability, it is processed to preclude liability). While this Talmudic tradition is a revisionist understanding of the underlying source, it becomes the more dominant position in later rabbinic halakhah. See Radzyner, *"Dine Qenasot,"* 453–88.

[60] See also the similar observations made by later rabbinic authorities cited by Radzyner, *"Dine Qenasot,"* 478.

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perspective, whether a confession leads to a dismissal of a trial or still necessitates subsequent adjudication by the court historically divided common law and civil law regimes, respectively.[61] It could be the midrash is operating with the common law assumption that a confession would obviate the need for a trial. Alternatively, the midrash operates with a realistic calculus that is skeptical of the value of adjudication maintained by civil law regimes following the "queen of evidence" of a confession.)

In other words, the two modes depicted by Langbein are explicitly precluded by the midrash. Administering justice does not authorize appealing to God, nor leaning upon the suspect, but rather calls for judges (and witnesses) to fulfill their mandate (the two counterexamples of the biblical tale of Achan or the matter of the Sotah under rabbinic law can arguably be thought of as a couple of exceptions that prove the rule).[62]

Moreover, according to the rabbis, the judges' (and witnesses') assumption of responsibility must be absolute and unqualified, which is all the more surprising given the divine source of the law.[63] Thus, the duty to implement divine justice is invested in human

[61] See John H. Langbein, "Understanding the Short History of Plea Bargaining," *Law and Society* 13, no. 2 (1979): 261–67, 267–68. In this context, too, it is worth recalling the Talmudic tradition cited above, in note 57, although on this understanding a confession closes the case by precluding liability. See Radzyner, *"Dine Qenasot,"* 474, 480–81.

[62] See, for example, Joshua 7:19–21; *Mishnah*, Sotah 1:3–5. Regarding the tale of Achan, see the fascinating commentary of Maimonides on *Mishnah*, Sanhedrin 6:2: "And know that Joshua's execution of Achan was a provisional ruling due to the exigences of the hour, since our veritable Torah does not impose capital punishment for a sinner based on his or her own confession, nor based on the prophecy of a prophet who states that so and so perpetrated an (illegal) act." While the Mishnah adduces the example of Achan as a model for a post-trial confession (see above, note 31 and the surrounding text), Maimonides clarifies that in the underlying biblical source, Achan is pronounced guilty based on his confession (Joshua 7:19–21), which is ordinarily inadmissible (a point he stresses again in his later work, the *Mishneh Torah*, quoted above in the text at note 18). Moreover, Maimonides further adds that prophecy is likewise ordinarily inadmissible, presumably because in the underlying biblical source Achan's guilt is also based upon divine indication (Joshua 7:11–18). In other words, Maimonides is drawing attention to the fact that the Achan tale was anomalous in two respects, relying on God and the suspect for judgment. Strikingly, Maimonides chooses to link a confession and prophecy as unacceptable modes of reaching a guilty verdict under classical Jewish law. From my perspective, their association is plain: both are invalid ways of deflecting responsibility from the court.

The matter of the Sotah may present a parallel phenomenon. This is a rare domain where halakhah allows a confession, and even seems to lean more on a confession than on witnesses. See especially *Mishnah*, Sotah 1:3–5, where the suspected woman's confession is registered as a way of determining what transpired before the option of adducing witness testimony, and the procedure of intimidation (*iyum*, see *Mishnah*, Sanhedrin 4:5) is applied to her rather than to the witnesses. See also Ishay Rosen-Zvi, *The Mishnaic Sotah Ritual: Temple, Gender and Midrash* (Leiden: Brill, 2012), 49–66. A conventional explanation would argue that the suspected woman's confession is admissible since it only has consequences for her ongoing marriage and monetary rights (that is, her *ketubah* payment, see also *Mishnah*, Nedarim 11:12). But this does not explain the predominance of her confession in the Mishnah (moreover, there may arguably be punitive implications for her confession, see, for example, Kirschenbaum, *The Criminal Confession in Jewish Law*, 126–27). Rather, the recourse to her confession seems to be a primary feature of the Sotah proceeding. Moreover, it is not coincidental that this is also the one area where halakhah authorizes appealing to God by way of an oracle.

Notably, then, like the biblical tale of Achan, the matter of the Sotah is another anomalous case in which relying upon God and the suspect are *both* available as modes of adjudication. As Maimonides intimates, these two modes operate analogously as extraordinary juridical proceedings. When one is allowed, so is the other. Their advantage presumably is the greater degree of certainty they offer (in the case of the Sotah, there is the underlying challenge of ascertaining whether an illicit conjugal act with intent has transpired). Their drawback is that they signify an abdication of the court's core responsibility. Accordingly, classical Jewish law forecloses both options under standard criminal procedures. Regarding confessions and the matter of the broken-necked heifer, see Kirschenbaum, *Criminal Confession in Jewish Law*, 359–63.

[63] Rabbinic literature does register the notion of a fear of rendering judgment in certain contexts, but at least in classical rabbinic literature this mainly confirms the supreme, if formidable, responsibility of judging. For further discussion and an analysis of certain important Talmudic developments, see Shapira, "'For the Judgment Is God's,'" 306–12. Over time, rabbinic judges increasingly refrained from judging matters of monetary (or civil)

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hands (which is how the "partnership" described in the Tosefta passage below is best understood):

> The judges should know … before Whom they are judging and who He is who is judging with them … And the witnesses should know … before Whom they are testifying and who He is who bears testimony with them … as it is written: "Then both the men between whom the controversy is shall stand before the Lord (Deuteronomy 19:17)," and also it is written, "God stands in the congregation of God, and in the midst of judges He judges (Psalm 82:1)." So again it is said concerning Jehoshaphat, "Consider what you do, for you judge not for man but for God (2 Chronicles 19:6)."[64]

Having underscored the divine dimensions of judging (and testifying), the source acknowledges that a person may hesitate to undertake such a daunting responsibility, recalling the reticence of Whitman's jurors. Therefore, the source concludes by reassuring a judge about the human quality of his anticipated judgment, an emphasis that is markedly different from the jurors' disclaimer: "And should a judge say, 'Why do I take this trouble?' Has it not been said, 'He is with you in the matter of judgment (2 Chronicles 19:6)'? Your concern is only with what your eyes see."[65]

In its execution, judging is a fully human endeavor.[66]

A conceptually related mishnaic source about witness testimony provides an even closer analog to the subject matter of Whitman's analysis. After underscoring the gravity of submitting erroneous testimony concerning a capital matter ("in capital cases the witness is answerable for the blood of him [that is wrongfully condemned] and the blood of his descendants"), the source raises similar unsettling questions to the Tosefta quoted above and offers a telling sequence of answers: "And if perhaps you [witnesses] would say, 'Why should we be involved with this trouble (i.e., of testifying)?' Was it not said, 'He, being a witness, whether he has seen or known, [if he does not speak it, then he shall bear his iniquity] (Leviticus 5:1).' And if perhaps you [witnesses] would say, 'Why should we be guilty of the blood of this man?' Was it not said, 'When the wicked perish there is rejoicing (Proverbs 11:10).'"[67]

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law and opted for compromise (*pesharah*) due to a fear of judging as well as changing social and historical circumstances. However, this development should probably be thought of less as an abdication of judicial responsibility than as a reliance on an alternate dispute resolution mechanism that was available or even encouraged (parenthetically, it could be that rabbinic reliance on an admission in the monetary sphere should be conceptualized in a similar manner). On the increasing recourse to compromise, see Shapira, "'For the Judgment Is God's,'" 321–26. For a different account, see Berachyahu Lifshitz, "Compromise," in *Mishpetei Eretz*, vol. 1, ed. Y. Ungar (Ofra: Mishpetei Eretz Institute, 2002), 137–51 [Hebrew], republished as Berachyahu Lifshitz, "Compromise," in *The Jewish Political Tradition over the Generations: A Memorial Volume for Daniel J. Elazar*, ed. Moshe Helinger (Ramat Gan: Bar-Ilan University Press, 2010), 83–104 [Hebrew].

[64] *Tosefta*, Sanhedrin 1:9. Note that the context of this passage is monetary (or civil) law, even though admissions are acceptable in this sphere, which is likely a function of the flexible or even transactional nature of this domain (which is also manifest in the role of compromise in this sphere, as referenced in the previous note). In terms of the significance of this passage for the purposes of my thesis, one can advance a kind of *a fortiori* argument. If even in the monetary (or civil) sphere there is a value in taking agency over the administration of justice (which ultimately can also be addressed through a compromise or an admission of a party), certainly in the capital (or criminal) sphere there is such a value (which is inalienable). For further analysis of this passage, see Shapira, "'For the Judgment Is God's,'" 295–97.

[65] *Tosefta*, Sanhedrin 1:9.

[66] See Christine Hayes, *What's Divine about Divine Law? Early Perspectives* (Princeton: Princeton University Press, 2015). In the rabbinic ideal, judges are meant to be sages of exemplary character, which can suggest to others that they have a greater capacity to assume agency over the administration of justice than do ordinary citizens.

[67] *Mishnah*, Sanhedrin 4:5.

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In other words, the source declares, offering testimony (and other related responsibilities) is a duty, and there is no option to decline this assignment or offer a disclaimer. Even if there are mortal consequences to testifying, the execution of justice (including retribution against the wicked) is its own reward.[68]

The Rabbinic Duty to Administer Justice

While these various sources have different shades of meaning, in the aggregate they suggest that the principal religious and social charge to judges and witnesses is to take agency over the administration of justice. Fulfilling this fundamental mandate necessitates that this duty is not shirked—not delegated to God, or foisted onto a suspect, or undertaken with qualifications or caveats—but assumed fully and unequivocally. When it comes to the rabbinic exclusion of a confession, then, it arises from the inalienable responsibilities of the guardians of justice, not as an extension of a suspect's rights. Shouldering this task serves both the aims of justice and a society committed to its pursuit.

In another context, Langbein focuses on the public good of having certain figures involved in the administration of justice.[69] For the rabbis, the public good achieved is not a civic education of those figures, but the moral and social good of an entrustment of justice to its proper and designated guardians—*proper* because judges are (one hopes) learned, (relatively) neutral, and have the capacity both to vindicate and incriminate;[70] and witnesses also warn a suspect, corroborate his or her mens rea, and initiate a legal proceeding (that is, in rabbinic jurisprudence they are more than a source of evidence, and they play an indispensable role that cannot be bypassed).[71] But perhaps just as importantly, judges and witnesses are the figures who are *designated* to execute justice on behalf of the public. Beyond the particulars of any given case, serving in this capacity reifies and expresses a larger public commitment to the pursuit of justice and the autonomy and competence of the public institutions of justice. It is these same values that presumably underlie the biblical injunction that devolves upon the public to "appoint judges and officers in all the gates of your land" (Deuteronomy 16:18).[72]

We can also reformulate this argument in modern jurisprudential terms relating to the institutional dimension of the rule of law, a subject of recent scholarship. Elaborating on a few threads in the writings of A. V. Dicey, Friedrich Hayek and even Joseph Raz, Jeremy Waldron has underscored the salience of the courts for securing the rule of law,[73]

[68] Admittedly, I am construing this last line in the manner described in the body above, rather than simply underscoring the point of retribution, which may be its more literal or minimal semantic.

[69] John H. Langbein, "On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial," *Harvard Journal of Law and Public Policy* 15, no. 1 (1992): 119–28, at 124.

[70] In rabbinic jurisprudence there is an ideal of vindicating a suspect, conventionally associated with Numbers 35:25. See, for example, Israel Z. Gilat, "On the Validity of the Duty of 'Hatra'a' in Jewish Criminal Law," *Bar-Ilan Law Studies* 6, no. 1 (1988): 217–59, at 217, 246–48.

[71] See the following: Amihai Radzyner, "The Warning of Witnesses, and the Commencement of Testimony," *Dine Israel*, nos. 20-21 (2000): 515–51; Orit Malka, "A Set of Witnessed: Testimony and Political Thought in Tannaitic Halakha" (PhD diss., Tel Aviv University, 2021); Orit Malka, "Witnesses, Judges: A Revolution Untold," *Law and History Review*, (forthcoming); Beth A. Berkowitz, *Execution and Invention: Death Penalty Discourse in Early Rabbinic and Christian Cultures* (New York: Oxford University Press, 2006).

[72] See *Sefer ha-Hinukh* (Jerusalem: Mekhon Yerushalayim, 2011), no. 491, which emphasizes that the public is charged to fulfill the commandment to appoint judges.

This charge presumably encompasses both monetary and capital courts, but the monetary sphere is more transactional and malleable, and it accordingly allows for admissions, at least in the form of a voluntary assumption of liability. See also notes 62 and 63, above.

[73] Jeremy Waldron, "The Rule of Law and the Importance of Procedure" in *Nomos*, no. 50 (2011): 3–31; Jeremy Waldron, "The Rule of Law and the Role of Courts," *Global Constitutionalism* 10, no. 1 (2021): 91–105, at 91.

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notwithstanding the surprising dearth of (explicit) attention to their role among various early modern and modern theorists[74] (an omission that is likewise glaring in the works of classical political thought).[75] According to Waldron, the integrity of the judicial system ultimately vouchsafes the dignity of litigants.[76] But rather than centering on the significance of courts for the individual (and, by extension, the potential affront to a suspect's dignity in (over-) leaning on a confession),[77] which is the tendency of a discourse that revolves around rights, I suggest broadening the scope of the argument from serving the litigant to the public at large. Establishing autonomous and prominent institutions of justice is vital for achieving and advancing a commitment to the rule of law within society.

Yet even if assuming agency and responsibility for administering justice is a paramount public virtue, one can ask why according to classical Jewish law the courts cannot at least admit a confession as a valid supplementary form of evidence (which, as noted, is the pragmatic orientation of the halakhah as it has taken shape over the ages). Here it is important to consider two interrelated factors. First, from the midrashic tradition quoted above, one discerns that for the rabbis the weight of a confession (as the "queen of evidence" or, in rabbinic parlance, which is "tantamount to the testimony of a hundred witnesses") is such that it obviates the need for any adjudication altogether, notwithstanding the continental pretenses to the contrary.[78] Second, it is precisely, if ironically, due to the impact of a confession that it must be excluded altogether. For if a confession can be admitted, it will soon become the dominant mode for conducting criminal procedures, and the principal role of judges and witnesses will be marginalized (a version of this concern was articulated in the Talmudic commentary of Rabbi Shimon Shkop).[79] A startling confirmation of these factors is the dramatic prevalence of plea bargaining in the West[80] (where the marginalization is a direct consequence of the "bargain")—in both adversarial and inquisitorial regimes—notwithstanding the right to remain silent, a phenomenon I discuss below. Ultimately the integrity of the judicial process—an indispensable ideal of rabbinic jurisprudence—calls for curbing confessions.

Some Critical Reflections on Contemporary Practices

The above analysis offers a deeper understanding of the values that are advanced by the anomalous rabbinic rule that bans a suspect's confession. Even if the halakhah itself recognizes the need to be more malleable in practice, and eventually admits confessions

[74] Waldron, "The Rule of Law and the Importance of Procedure," 7.

[75] See David C. Flatto, *The Crown and the Courts: Separation of Powers in the Early Jewish Imagination* (Cambridge, MA: Harvard University Press, 2020), 6.

[76] See Waldron, "The Rule of Law and the Importance of Procedure," 14–16.

[77] Moshe Halbertal seems to be emphasizing a related point when he speaks of preserving the autonomy of the suspect. Moshe Halbertal, "Confession, Self-Incrimination, and Repentance in Jewish Law" (Annual Caroline and Joseph S. Gruss Lecture, New York University School of Law, New York, 2004), as quoted in Greenwald, "Maimonides, Miranda, and the Conundrum of Confession," 1752.

[78] See the argument in notes 57–58 and in the text surrounding the notes. This may depend to some extent on whether a confession is a way of pleading guilty to a crime (or transgression), or speaks to some or all of the underlying facts, the degree of intent, the legal elements of a crime (or transgression), any justifications or excuses, and the like. See the Talmudic source cited in note 12. For modern jurisprudence, see the reference in note 79.

[79] See the citation in Joseph Rivlin, "Review of 'The Criminal Confession in Jewish Law' by Aaron Kirschenbaum," *Bar-Ilan Law Studies* 23, no. 3 (2007): 927–42, at 941 [Hebrew]; and Justice Neal Hendel's opinion in CA 4179/09 State of Israel v. Volkov, at 54 (2010).

[80] While there is an essential continuum between confessions and plea bargaining, there are also significant distinctions between these processes. See Brandon L. Garrett, "Why Plea Bargains Are Not Confessions," *William & Mary Law Review* 57, no. 4 (2016): 1424–27, at 1415.

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alongside other forms of evidence, the underlying commitments implicit in the Talmudic ban remain firm, and are as relevant as ever. Administering justice is the unique calling of the court (enabling what Martin Shapiro characterizes as the "triad structure of justice"),[81] and judges and witnesses are its principal actors.[82] Moving beyond rabbinic jurisprudence, the above analysis may also offer a critical perspective on certain contemporary practices in the West, including in modern-day Israel, where the legacy of Jewish law has formal doctrinal influence.[83]

Two such practices are plea bargaining and privatization of prisons.[84] The widespread, if controversial, practice of plea bargaining is a tool that surfaced in capital cases in the United States in the mid-nineteenth century.[85] Despite waves of criticism, including as recently as the late 1960s and early 1970s,[86] plea bargaining has become the prevailing mode of adjudicating criminal matters in the United States, accounting for a shockingly high figure of 97 percent of all federal criminal convictions according to one fairly recent tally.[87] Other modern regimes that initially looked askance on this practice have also increasingly come to rely upon it.[88] For instance, Israel has overcome its early reticence to plea bargaining to the

[81] Martin M. Shapiro, *The Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981).

[82] For a comparative perspective on the relationship between judges and witnesses in Roman-Canon law, see Marjan R. Damaska, *Evaluation of Evidence: Pre-modern and Modern Approaches* (Cambridge: Cambridge University Press, 2019), 59–68.

Perhaps one modern echo of this idea is the widespread evidentiary exclusion of polygraph tests. While the conventional explanations focus on the question of the reliability of such tests, or the risks involved in relying upon the operators' analyses of results, these are not entirely satisfactory as explanations for a categorical exclusion. It could be that there is a more fundamental intuition at play relating to the abdication of juridical responsibility that would be involved in outsourcing agency onto a device. I thank Ofer Malcai for drawing my attention to this matter.

[83] Admittedly, the actual influence of Jewish law on modern Israeli criminal law is minimal.

For more general background on the role of Jewish law in the modern state of Israel, see Daniel Sinclair, "Jewish Law in the State of Israel," in *An Introduction to the History and Sources of Jewish Law*, ed. N. S. Hecht et al. (Oxford: Clarendon Press, 1996), 396–419; Arye Edrei, "Judaism, Jewish Law, and the Jewish State in Israel," in *The Cambridge Companion to Judaism and Law*, ed. Christine Hayes (New York: Cambridge University Press, 2017), 337–64.

[84] I hope to elaborate further upon these two issues in another context.

[85] The literature is voluminous. An important range of perspectives from several decades ago can be found in "Punishment," symposium, *Yale Law Journal* 101, no. 8 (1992). For a more contemporary overview, which also includes a comparative dimension, see Gwladys Gilliéron, "Comparing Plea Bargaining and Abbreviated Trial Procedures," in *Oxford Handbook of Criminal Process*, ed. Darryl K. Brown, Jenia I. Turner, and Bettina Weisser (Oxford: Oxford University Press, 2018), 703–27; Mary E. Vogel, "Plea Bargaining under the Common Law," in Brown, Turner, and Weisser, *Oxford Handbook of Criminal Process*, 728–50. See also Mary E. Vogel, "The Social Origins of Plea Bargaining: Conflict and the Law in the Emergence of Plea Bargaining, 1830–1860," *Law and Society Review* 33, no. 1 (1999): 161–246, at 161; Mike McConville and Chester L. Mirsky, *Jury Trials and Plea Bargaining: A True History* (Oregon: Hart, 2005); Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993); Albert W. Alschuler, "Plea Bargaining and its History," *Columbia Law Review* 79, no.1 (1979): 1–6; Langbein, "Understanding the Short History." For an important, if contested, account that identifies a slightly earlier beginning to the American practice of plea bargaining in Essex County, Massachusetts, in the late 1700s, see George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford: Stanford University Press, 2003). For a moral evaluation and critique of certain practices of plea bargaining, see Richard L. Lippke, *The Ethics of Plea Bargaining* (Oxford: Oxford University Press, 2011).

[86] Vogel, "Plea Bargaining under the Common Law," 731–32 n.9. See also William Ortman, "When Plea Bargaining Became Normal," *Boston University Law Review* 100, no. 100 (2020): 1435–45, at 1435.

[87] Jed S. Rakoff, *Why the Innocent Plead Guilty and the Guilty Go Free and Other Paradoxes of Our Broken Legal System* (New York: Farrar, Strauss and Giroux, 2021), 20.

[88] See the following: Maximo Langer, "Plea Bargaining, Conviction without Trial, and the Global Administration of Criminal Convictions," *Annual Review of Criminology*, no. 4 (2021): 377–411; Gilliéron, "Comparing Plea Bargaining"; Vogel, "Plea Bargaining under the Common Law"; Carol A. Brook et al., "A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States," *William & Mary Law Review* 57, no. 4 (2016): 1147–49, at 1147.

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extent where it accounts for nearly 85 percent of guilty convictions (in district courts).[89] Even a model inquisitorial legal system such as Germany,[90] which vocally opposed what is ostensibly an adversarial construct in the past, has rapidly revised its criminal procedure to accommodate much plea bargaining.[91] While commissions, jurists and scholars have challenged the practice of plea bargaining, it remains a cornerstone of modern criminal procedure.

One especially thoughtful critic of plea bargaining is somebody who has witnessed its effects firsthand, US District Judge Jed Rakoff.[92] Rakoff has mostly focused on two problematic aspects of plea bargaining. The first is the oft-repeated issue of the reliability of confessions that are extracted under the weight of substantial pressure by the prosecutor. Indeed, the danger of aggressive prosecutorial practices even under a regime that enshrines a right to remain silent has been a repeated concern of both the courts and the legislature.[93] This concern dovetails with Rabbi Steinsaltz's interpretation of the Talmudic ban as a categorical measure meant to avert a risk along these lines, and it also echoes the disturbing cautionary tale of hollow confessions extracted by coercive excesses in Langbein's historical account of judicial torture. Rakoff's second criticism involves a more elementary concern that reliance on even truthful confessions in plea bargaining undermines the integrity of the judicial system. In Rakoff's formulation this is because a lack of a trial denies a suspect his or her day in court.

For Rakoff, the crux of the problem is thus a deprivation of a fundamental right. But marginalizing judicial institutions and processes imperils a society's commitment to justice, apart from whether this infringes on a given citizen's rights. As Justice Anthony Kennedy

[89] See Oren Gazal-Ayal, Keren Weinshall-Margel, and Inbal Galon, *Conviction and Acquittal Rates in Israel* (Haifa: University of Haifa, Israel's Courts Research Division Publications, 2012), http://elyon1.court.gov.il/heb/Research%20Division/Research%20-%20Eng.htm; Oran Gazal-Ayal and Keren Weinshall-Margel, "The Power of the Prosecution in Criminal Proceedings—An Empirical Study," *Mishpatim* 44, no. 3 (2014): 54–60, at 55.

[90] See the following: Gilliéron, "Comparing Plea Bargaining"; John H Langbein, "The Turn to Confession Bargaining in German Criminal Procedure: Causes and Comparisons with American Plea Bargaining," *American Journal of Comparative Law* 70, no. 1 (2022): 139–61; Jenia I. Turner, "Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons," *William & Mary Law Review* 57, no. 4 (2015): 1549–56, at 1549.

[91] A revealing comparison can be made between confessions under (the mostly inquisitorial system of) Jewish law and an inquisitorial regime like Germany. Germany (as do other continental systems) admits confessions but with the caveat that it is ultimately the judge who must determine the final verdict. From the vantage point of Jewish law, the impulse not to cede the role of the judge is admirable, even if the efficacy of such an arrangement is dubious. Recall that according to the midrashic tradition quoted above once a confession is admitted there is little room left to make a meaningful judicial determination. Such skepticism seems borne out by the transformation of Germany over the past decades from the "land without plea bargaining" to a place where plea arrangements—which privilege confessions without a pretense of extensive judicial involvement—are commonplace. Indeed, given the Germanic insistence on an indispensable lead role of an inquisitorial judge in reaching a verdict, the prevalence of plea bargains seems rather scandalous. Evidently this is why Klaus Tolksdorf, the former president of the German Federal Court of Justice, called the increasing use of plea deals "devastating for the reputation of justice." Reinhardt Müller, "BGH-Präsident Tolksdorf kritisiert 'Deals'" [BGH President Tolksdorf Criticizes "Deals"], *Frankfurter Allgemeine Zeitung*, January 30, 2009, https://www.faz.net/aktuell/politik/staat-und-recht/bgh-praesident-kritisiert-deals-in-strafprozessen-1757231.html. On the older German legal tradition of not plea bargaining, see John H. Langbein, "Land without Plea Bargaining: How the Germans Do It," *Michigan Law Review* 78, no. 2 (1979): 204–25.

Evaluating this transformation through the prism of Jewish law, a purist response would underscore the impossibility of admitting confessions and retaining meaningful judicial authority. A more pragmatic response would call for calibrating a better balance between them within the context of both standard criminal trials and plea bargains.

[92] Rakoff, *Why the Innocent Plead Guilty*.

[93] See, for example, David Alan Sklansky, "The Nature and Function of Prosecutorial Power," *Journal of Criminal Law and Criminology* 106, no. 3 (2016): 474–82, 480–81; Rachel Elise Barkow, *Prisoner of Politics: Breaking the Cycle of Mass Incarceration* (Cambridge, MA: Harvard University Press, 2019), 143–64.

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said in *Missouri v. Frye*, "plea bargaining ... is not some adjunct to the criminal justice system; it is the criminal justice system."[94] What that means is that most of criminal justice is left in the hands of the prosecutor, defense attorney, and suspect (the outsized role of the prosecutor is especially problematic, notwithstanding the important reconceptualization of this function that was offered by Gerard Lynch),[95] not those who are officially assigned with legal authority; and without the rigors, comprehensiveness, and protections of a trial. Indeed, often the entire plea bargaining process transpires outside the "shadow of trial,"[96] in a kind of extrajudicial, private arrangement. But because the context is not suitable for private, contractual, or alternative arrangements—it *is* a public concern (*a fortiori* from the important critique of settlements on similar grounds by Owen Fiss)[97]—this practice constitutes an abandonment of a core responsibility entrusted by society to the guardians of justice and the due process of law.[98]

Among trenchant criticisms of plea bargaining,[99]Albert Alschuler laments that this practice leads to an "abdication of judicial power" by not requiring judicial supervision over the process,[100] and Stephen Schulhofer objects to a problem of "agency" in the absence of representation of the defendant and the public.[101] To my mind, these vital concerns are raised in too narrow a manner. Fundamentally, plea bargaining undermines the integrity of the legal system by abdicating society's agency over the administration of justice.

While a wholesale reconstruction of contemporary criminal procedure to eliminate plea bargaining is neither feasible nor desirable (given its benefits in terms of efficiency and clemency, among other advantages), the prevalence of this procedure should surely make us balk. The implications of the above analysis are that plea bargaining should be appealed to more selectively[102] and not just because of questions of reliability (ironically, the more controversial Alford pleas in which a defendant maintains his or her innocence but pleads guilty based on accumulated evidence may be a less egregious shifting of the juridical burden).[103] Moreover, when plea bargaining is resorted to this process should

[94] Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott and William J. Stuntz, "Plea Bargaining as Contract," *Yale Law Journal* 101, no. 8 (1992): 1909–68, at 1912).

[95] Gerard E. Lynch, "Our Administrative System of Criminal Justice," *Fordham Law Review* 66, no. 6 (1998): 2117–51, at 2117.

[96] Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," *Harvard Law Review* 117, no. 8 (2004): 2463–547, at 2463.

[97] Owen M. Fiss, "Against Settlement," *Yale Law Journal* 93, no. 6 (1983): 1073–90, at 1073.

[98] Langbein, "On the Myth of Written Constitutions," touches on a similar concern when he argues that an over reliance on confessions—a bypassing of the Fifth Amendment if you will—leads to a gutting of the Sixth Amendment stipulation that *all* criminal trials be conducted by a jury.

[99] See also Carissa Byrne Hessick, *Punishment without Trial: Why Plea Bargaining Is a Bad Deal* (New York: Abrams Press, 2021); Douglas D. Guidorizzi, "Should We Really 'Ban' Plea Bargaining? The Core Concerns of Plea Bargaining Critics," *Emory Law Journal* 47, no. 2 (1998): 753–83, at 767–70.

[100] Albert W. Alschuler, "The Trial Judge's Role in Plea Bargaining, Part I," *Columbia Law Review* 76, no. 7 (1976): 1059–154, at 1059, 1065.

[101] Stephen J. Schulhofer, "Plea Bargaining as Disaster," *Yale Law Journal* 101, no. 8 (1992): 1979–2010, at 1987.

[102] More than fifty years ago, Chief Justice Warren Burger warned of the formidable challenges that would be confronted by reducing reliance on the plea-bargaining process: Warren E. Burger, "The State of the Judiciary—1970," *American Bar Association Journal* 56, no. 10 (1970): 929–34, at 929, 931. But others have recently challenged this claim. See, for example, Dan Canon, *Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class* (New York: Basic Books, 2022).

[103] Alford pleas are legally permissible in nearly all US federal and state courts (except in Indiana, Michigan, and New Jersey). Criticisms of this practice have been articulated by Stephanos Bibas, "Harmonizing Substantive Criminal Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas," *Cornell Law Review* 88, no. 5 (2003): 1361–411, at 1361; and Albert W. Alschuler, "Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas," *Cornell Law Review* 88, no. 5 (2003): 1412–24, at 1412. But others have defended it. See,

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arguably transpire under the auspices of the court.[104] Finally, other alternative reforms of criminal procedure that better maintain the role and integrity of the court (such as "trial bargaining") should be contemplated and perhaps pursued.[105]

Another contemporary development in criminal procedure that may warrant closer examination in light of this study relates to administering the punishment of incarceration. An increasingly common practice in the United States is to assign prisoners to privately run facilities.[106] This disturbing trend, which has engendered a substantial amount of attention and criticism, has been relied upon, if not openly sanctioned, throughout much of the West.[107] Interestingly, Israel has been a standout regime in challenging this practice, primarily on the grounds of human rights and basic dignity.[108] Others have raised constitutional concerns on the basis of the non-delegation doctrine[109] (a doctrine that has increasing traction in contemporary constitutional jurisprudence),[110] or what Barak Medina has described as the privatization of "core" governmental powers,[111] because here an executive power of punishing is being problematically delegated to private hands.[112]

Beyond a general objection of delegation, there is a more specific problem with outsourcing agency over the execution of penal justice. A society that undertakes a sober and comprehensive commitment to achieving justice must assume full responsibility for all phases of its administration up to and including the carrying out of punishment (all the more so because of the significance of the public condemnation of a wrongful action, which has been emphasized by Alon Harel).[113] Accordingly, it is the duty of designated public officials to implement all penal sanctions. Transferring this role to private actors is an abdication of responsibility and erodes the pillars of justice.

for example, Michael Conklin, "The Alford Plea Turns Fifty: Why It Deserves Another Fifty Years," *Creighton Law Review* 54, no. 1 (2020): 1–18, at 1. I thank Joel Johnson for drawing my attention to this matter.

[104] For further background, see Jenia I. Turner, "Judicial Participation in Plea Negotiations: A Comparative View," *American Journal of Comparative Law* 54, no. 1 (2006): 199–267, at 229.

[105] See Gregory M. Gilchrist, "Trial Bargaining," *Iowa Law Review* 101, no. 2 (2015): 609–56, at 609.

[106] See the contributions in "Special Issue on Private Corrections," ed. Daniel P. Mears and Andrea N. Montes, special issue *Criminology and Public Policy* 18, no. 2 (2019): 215–503; Kristen M. Budd, "Private Prisons in the United States," The Sentencing Project: Research and Advocacy for Reform, February 21, 2024, https://www.sentencingproject.org/reports/private-prisons-in-the-united-states; Lauren-Brooke Eisen, *Inside Private Prisons: An American Dilemma in the Age of Mass Incarceration* (New York: Columbia University Press, 2018).

[107] See Cody Mason, *International Growth Trends in Prison Privatization* (Washington, DC: Sentencing Project, 2013); Robert Kenter and Susan Prior, "The Globalization of Private Prisons," in *Prison Privatization: The Many Facets of a Controversial Industry*, ed. Byron Price and John Morris, 3 vols. (Santa Barbara: Praeger, 2012), 1:87–106.

[108] See HCJ 2605/05 The Human Rights Division, Academic Center of Law & Business v. Minister of Finance (2009) (Isr.). See also Brandy F. Henry, "Private Prisons and Human Rights: Examining Israel's Ban on Private Prisons in a U.S. Context," *Concordia Law Review* 4, no. 1 (2019): 198–212.

[109] See Angela E. Addae, "Challenging the Constitutionality of Private Prisons: Insights from Israel," *William & Mary Journal of Race Gender and Social Justice* 25, no. 3 (2018): 527–53, at 536–40; Judith Resnik, "Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century," *International Journal of Constitutional Law* 11, no. 1 (2013): 162–99, at 168.

[110] See the subtle discussion and notes in Mila Sohoni, "The Major Questions Quartet," *Harvard Law Review* 136, no. 1 (2022): 262–318, at 265 n.23, 290–315.

[111] Barak Medina, "Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization," *International Journal of Constitutional Law* 8, no. 4 (2010): 690–713.

[112] See also "State Punishment and Private Prisons," *Duke Law Journal* 55, no. 3 (2005): 437–546; Sharon Dolovich, "The Failed Regulation and Oversight of American Prisons," *Annual Review of Criminology* 5, no. 1 (2022): 153–77.

[113] Alon Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014), 65–106.

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Conclusion

The above analysis models one way that gleaning insights from Jewish law has the potential to meaningfully intervene in modern legal discourse. While rules of evidence, criminal procedure, and penology no doubt need to be adapted to meet functional concerns, there is a danger that pragmatic considerations may overwhelm foundational principles of justice. Such principles are at times powerfully rendered within Jewish tradition, with its emphasis on ideals and its secondary interest in practicalities. In the present article I explore an extraordinary principle of classical Jewish law, which advances a commitment to take full agency over the legal domain and avert the temptation to transfer this responsibility. Or to put it differently, an enduring legacy of Judaism, a religion of laws, is the supreme mandate to take charge of the administration of justice.

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