Compelled to Render Oneself Evil:

American Plea-Bargaining from a Jewish Law Perspective

Melissa Ivy Softness

ABSTRACT

This article proposes a solution to the United States criminal justice system's overuse of plea-bargaining to achieve high conviction rates at the expense of individual liberties. It provides a fresh look at the issue from the framework of Jewish law, a legal system that has been cited by the Supreme Court numerous times for its ancient wisdom. The article first outlines the sources and interpretations of Jewish law's ban on confessions, and applies this law to plea-bargains. Second, it discusses the history and legal implications of plea-bargaining in the United States. Third, it proposes that the United States look to Jewish law's exception to the ban on confessions for times of necessity, such as situations where there is widespread disregard for the law. Jewish law dictates that such exceptions be only temporary, which can be interpreted to reflect an understanding that such necessity indicates a deeper problem. Jewish law thus directs society to use the temporary exception as an opportunity to uncover the deeper problem and solve it, whereupon the safeguards must be reinstated. The article suggests that the War on Drugs may be the deeper problem that has led to widespread disregard of the law and has thus necessitated over-reliance on plea bargains. Finally, the article offers a potential solution to Jewish defendants subject to criminal proceedings in the United States.

INTRODUCTION

The Fifth Amendment to the United States Constitution's mandate that "no man… shall be compelled in any criminal case to be a witness against himself"[1] seems, if read literally, to be equivalent to the Talmud's proscription that "no man may render himself an evil person."[2] The two legal systems, however, apply this rule so dissimilarly that they can hardly be interpreted to have the same meaning. Whereas Jewish law forbids the use of *any* self-incriminating testimony, whether given freely or elicited by official interrogation, United States law prohibits

[1] U.S. Const., amend. V

[2] See, e.g., The Babylonian Talmud, Sanhedrin 18:6, in Mishneh Torah (Abraham M. Hershman trans., Yale Univ. Press 1949). See also Maimonides, Laws of Eduth, in Mishne Torah, supra.

self-incriminating testimony only when it is coerced, and even then the exceptions to this maxim render it toothless.[3] This paper explores guilty pleas, the ultimate form of self-incrimination.

Consider the following set of facts. A woman is arrested for possession of marijuana with intent to distribute. A large container of the substance was found near her person, and her appointed public defender tells her that there is a reasonable chance she could be found guilty at trial based on that evidence. She knows that the marijuana did not belong to her, and that she is innocent of the crime. She has been in jail for a month on the charge, and misses her children, who will be put in foster care if she does not return home. The public defender says that if she takes her chances at trial, she could be in jail several more months. If found guilty, she will face up to ten years in prison.

The public defender then tells her about the "gift" that the prosecution has offered: if she confesses to the crime, and pleads guilty to a lesser charge of possession at a pretrial hearing, she can return home to her children almost immediately and will receive only probation. A slap on the wrist compared to the alternative. The prosecutor adds a conviction to his career record without actually having to build or try the case. Is there really any question of which choice this woman will make? Judaism foresaw the problems inherent in such situations. The United States, in contrast, continues to ignore the injustice fostered by a system borne of convenience.

Part I of this paper will discuss the origins of the prohibition on self-incrimination in Jewish law. It will cover textual sources along with later interpretations and possible rationales for the rule. Part II will discuss the United States justice system's dependence on plea-bargaining, and argue that its reliance on voluntary confessions to facilitate convictions is unconstitutional because it utilizes coercion in reality. It will focus on the problems foreseen by

[3] *See* Rosenberg & Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U.L. REV. 955 (1988).

Judaism's prohibition and argue that these problems are, as predicted, a reality in the United States. Part III will consider American plea-bargaining in the context of the "necessity" exception to the Talmud's procedural safeguards, and argue not only that this exception cannot apply, but that existence of such necessity itself demands scrutiny of its underlying cause. It will suggest a culprit for that necessity and argue that Jewish Law can guide the United States in focusing on the deeper problem in order to heal the system and dispense with unconstitutional coping measures. Part IV will offer a potential resolution of the predicament faced by Jewish defendants subject to the United States' criminal justice system: whether it is permissible for Jews to violate the prohibition and plead guilty in a system where the alternatives are grim.

I. JEWISH LAW'S PROHIBITION ON SELF-INCRIMINATION

A. Origins of the Rule

The Talmud[4], Judaism's main source of Rabbinic law, states unequivocally that "No man may render him self an evil person."[5] Rather than a rule applied only to individual conduct, Mishnaic texts indicate that the concept was wholly embraced by the criminal justice system of the Talmudic era.[6] The state was not only forbidden to compel a man to testify against himself,

[4] The Talmud comprises the Sinaitic and rabbinic oral law of Judaism. It consists of the Mishnah and the Gemara. The Mishnah, which was reduced to writing in approximately 200 C.E., is a codification of basic Jewish law derived from Bibilical text and the law which had been transmitted orally during the preceeding centuries. The Gemara, often referred to in and of itself as the Talmud, is a series of commentaries and debates of the Sages in the Babylonian and Palestinian academies of learning over the next three centuries. See Rosenberg & Rosenberg, *supra* FN 1, at 967-970 (1988).
[5] Supra FN 2.
[6] A. Kirschenbaum, Self-Incrimination in Jewish Law 19 (1970).

but if he did so of his own accord, the testimony was rejected completely and had no status in a court of law.[7]

The law against self-incrimination derives from several sources in the Jewish texts. To understand its roots, we must first look at a more encompassing Talmudic decree, the two-witness rule. The Torah in Deuteronomy states that "one witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth; at the mouth of two witnesses, or at the mouth of three witnesses, shall a matter be established."[8] Scholars differed on the applicability of this passage to the prohibition on self-incrimination.[9] Some did not believe that the two-witness rule proscribed self-incrimination, as it does not state directly that the accused cannot be one of the required witnesses[10]. Rashi's[11] commentary on the Chumash, however, states that the prohibition on confessions is, in fact, derived from the connection between this passage and another found in Deuteronomy: "the fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin."[12] According to Rashi's interpretation, the passage indicates that relatives may not testify against one another. As a person is his own closest relative, it follows that self-incrimination is prohibited.[13]

From a logical standpoint, the two passages together provide the basis for the prohibition that the accused's own testimony cannot constitute evidence of his own guilt- the two required

---

[7] *Id.*
[8] Deuteronomy 19:15
[9] *See generally* Kirschenbaum.
[10] Rosenberg & Rosenberg, 976.
[11] Shlomo Yitzhaki (1040-1105), known as Rashi, was a medieval French rabbi. He authored a comprehensive commentary on the Talmud and the Tanakh, or the Hebrew Bible. Mindel, Nissan. [http://www.chabad.org/library/article_cdo/aid/111831/jewish/Rabbi-Shlomo-Yitzchaki-Rashi.htm "Rabbi Shlomo Yitzchaki- Rashi (4800-4865)"]. Chabad.org. Retrieved 2012-01-19.
[12] Deuteronomy 24:16
[13] *See* B. Talmud, Sanhedrin 9b; note 165 and accompanying text.

witnesses must be comprised of persons outside the accused's family, and cannot include the accused himself.[14] Thus, if there is a confession plus one other witness and corroborating evidence, this does not suffice, and guilt cannot be found. Even if there are two separate witnesses plus corroborating evidence, the accused's confession may not be included in the body of evidence against him.[15]

While the Talmud does not explicitly state that the two-witness rule and the prohibition against familial testimony should be interpreted together for the purpose at hand, the bases of both rules and their progeny, the bar on confessions, speaks to the propriety of this result. Both the two-witness rule and the bar on confessions reflect the philosophical viewpoint that that the individual must not be required or permitted to assist the government in his own prosecution.[16] This value is closely related to Judaism's ban on self-harm, discussed in more detail below and in Part IV. Both rules also constitute, within Judaism's criminal justice system, prophylactic assurances of reliability and trustworthiness in the fact-finding process. On a deeper level, as both reflect the Sages' efforts to make it very difficult to convict anyone of a crime, the rules are extremely concordant in their reflections of the Jewish belief in the sanctity of each individual's life, no matter how evil his conduct may appear.[17] These similarities in purpose and effect point to a reasonably probable correlation between the two laws.[18]

B. Rationales for the Divine Decree

[14] Rosenberg & Rosenberg, 977.
[15] *See* B. Talmud, Sanhedrin 9b; A. Kirschenbaum, at 114-115.
[16] Rosenberg & Rosenberg, 979.
[17] Rosenberg & Rosenberg, 980.
[18] *Id*.

This Talmudic command constitutes what is known in Judaism as a divine decree. The nature of a divine decree is that human beings cannot, with certainty, discern its rational basis.[19] However, Judaism encourages its scholars and students to delve into the meanings of such decrees in an attempt to understand their purposes.[20] The possible rationales scholars have discerned for the bar against self-incrimination are discussed below.

1. Procedural Safeguard of Equal Protection

One explanation for the prohibition is that the rule ensures that courts follow other procedural safeguards meant to protect accused individuals from society and from the courts themselves.[21] By preventing the courts from relying on confessions, the law ensured that the two-witness rule was followed and that no shortcuts were taken in the fact-finding process.[22] The necessity of a blanket ban in order to achieve this end was articulated by Rabbi Joseph ibn Migash[23], who stated "if confessions were accorded any probative value at all, courts might be inclined to overrate them, as King David did,[24] and be guilty of a dereliction of their own fact-finding task."[25] This reasoning reflects Judaism's concern with equal treatment under the law. Similarly to American doctrine, Judaic law operated under the notion that strict procedural

[19] *See* Maimonides, The Guide for the Perplexed, pt. 3, chs. 26, 31, at 310-12, 321-22. (M. Friedlander trans. 2d ed. 1904).
[20] *Id*.
[21] Rosenberg & Rosenberg, 1031.
[22] *Id.*
[23] Joseph ben Meir ibn Migash (1077-1141) was a Rabbi in Lucena. He authored over 200 Responsa, as well as a Talmudic commentary. Gottheil, Richard and Schloessinger, Max. http://www.jewishencyclopedia.com/articles/8006-ibn-migas-joseph-jehosef-ben-meir-ha-levi "Ibn Migas, Joseph (Jehosef) Ben Meir Ha-Levi"]. Jewish Encyclopedia. Retrieved 2012-01-17.
[24] 2 Sam. 1:16
[25] *See* 5 Encyclopedia Judaica, Confession 878, 878 (1971).

safeguards were essential to ensure that judges should not, in Rashi's words, "be lenient to one and harsh to the other."[26]

2. Getting Out of "Witness Duty"

The Talmud, in Sanhedrin, gives an explanation of the dictum that relates to practical concerns stemming from another mandate. Exodus 23:1 contains the rule that a *rasha*, or a wicked person, is disqualified from acting as a witness.[27] A person convicted of a crime was considered a *rasha*. Because acting as a witness brought considerable responsibility, such as performing the death sentence in capital cases, there was incentive to purposely disqualify oneself, and becoming a *rasha* was one way to do so.[28] The ban on self-incrimination kept this incentive from undermining the criminal justice system.[29]

If importance were to be placed on this explanation, the conflict between American and Jewish law would be lessened because American law does not disqualify witnesses who have been convicted of crimes.[30] Therefore, the practical considerations that demanded this solution in Talmudic times do not exist in American society. However, self-incrimination on its own creates such a plethora of harms that the ban's application to this singular function is most likely only ancillary to its overall purpose.

3. The Duty of Self-Preservation

[26] Deuteronomy 16:19-20; Exodus 23:6-8.
[27] On the basis of Exodus 23:1, 'put not thy hand with the wicked to be an unrighteous witness.'
[28] A. Kirschenbaum, Self-Incrimination in Jewish Law 19, 51 (1970).
[29] *Id*.
[30] It must be noted that though convicted criminals in the United States are not excluded from acting as witnesses in judicial proceedings, the Federal Rules of Evidence and similar codes in almost every state allow parties to educate the jury on certain elements of a witness's criminal history. This reflects an understanding that the information will shed doubt on the witness's truthfulness and have an effect on the jury's perception of their testimony.

The following explanation is most relevant to a Jewish defendant subject to American courts. David ben Solomon ibn Abi Zimra (the "Radbaz") spoke on the issue in the sixteenth century. He stated that confessions were absolutely inadmissible in criminal[31] cases "because a person's life is not his property but the property of the Holy One, his confession is of no effect in relation to something that is not his."[32]

The basis for the Radbaz's reasoning, like the proscription that his reasoning analyzes, derives from a Talmudic decree: "Our Rabbis taught: there are three partners in man, the Holy One, blessed be He, his father and his mother… When his time to depart from the world approaches, the Holy One, blessed be He, takes away his share and leaves the shares of his father and mother with them."[33] In other words, G-d creates man and gives him life.[34] Life is a conditional gift, or in legal terms, a bailment that is to be returned intact upon one's departure from the mortal world.[35]

This explanation gains credence when one considers Judaism's disparate treatment of confessions in criminal and civil cases. While confessions were absolutely prohibited in criminal proceedings, Mishnaic sources allow us to conclude that they could be permissibly considered in civil proceedings[36]. One explanation for this difference in treatment is that civil courts

[31] Jewish courts did not distinguish between criminal and civil matters in the same way as those of the United States, but rather between corporal and capital cases and civil or property cases. To avoid confusion, this paper refers to corporal and capital cases as "criminal" and civil or property cases as "civil."
[32] *See* Maimonides, Mishnah Torah (The Code of Law), Hilchot Sanhedrin (The Book of Judges) 18:6 (Radbaz commentary).
[33] Nidd. 31a.
[34] B. Eliash, *Body and Soul and Ownership Rights: The Jewish Law Perspective*, 12 TEL AVIV U. STUD. L. 267 AT 272 (1994).
[35] *Id*.
[36] Rosenberg & Rosenberg, 986. The Mishnaic sources discussed include The Tosefta, Sanhedrin 5:1-5, Shebuot 3:8.

confirmed, rather than created liability.[37] This explanation considers the separate purposes of criminal and civil proceedings, but in the context of this discussion, the separate consequences of the two systems are more relevant.

While civil courts are tasked with making the victim of harm as whole as he was before the harm at issue, criminal courts focus on punishment, retribution, and prevention of criminality. Punishments administered by criminal courts include not only loss of freedom and life, but the imposition of moral stigma as well. This is demonstrated in American courts through the use of criminal records that are absent from civil judgments. When one is convicted of a crime, the judgment cannot be entirely paid off and left in the past. It stays with the person for life, and society treats that person differently. This moral stigma constitutes harm to the self, and therefore, Judaism prohibits bringing it upon oneself. Civil consequences differ in that they generally call for repayment to the victim of the harm, and therefore cost the defendant only his property. Property is viewed in the Jewish tradition as belonging to the mortal self and not to G-d, and therefore can be disposed of at will with no moral consequence.

Maimonides[38] posited an explanation related to that of Radbaz, based on Judaism's early recognition of that human instinct known as the "Death Wish" in psychology.[39] Maimonides asserted that a blanket rule prohibiting self-incrimination was necessary to prevent suicidal, or

---

[37] Rosenberg & Rosenberg, 990.

[38] [38] Maimonides, or Moses ben Maimon (1135-1204), is known as a preeminent medieval Jewish philosopher and one of the greatest Torah scholars and physicians of the Middle Ages. Jacobs, Joseph. [<http://www.jewishencyclopedia.com/view.jsp?artid=905&letter=M&search=maimonides#ixzz1GVE5kJqV>. "Moses Ben Maimon"]. Jewish Encyclopedia. Retrieved 2011-03-13.

[39] Norman Lamm, *The Fifth Amendment and its Equivalent in the Halakhah*, 5 JUDAISM 53, 56 (1956).

"confused" individuals from committing that sin by confessing to crimes they did not commit.[40] The prohibition on suicide is a part of the same rule that states one may not harm his body, as it is on loan to him from G-d. One source of this rule is found in the Mishneh, which teaches that "Whosoever destroys a single soul of Israel, Scripture imputes [guilt] to him as though he had destroyed a complete world."[41]

Whichever explanation, if any, provides the basis for the Jewish rule against self-incrimination, the result is unchanged: a Jewish person may not confess to a criminal act. The ultimate form of confession is the guilty plea[42], and the criminal justice system in the United States is highly driven by plea-bargaining.[43] This creates a unique dilemma for American Jews who are subject to a law that is antithetical to their religion. The problems of the American plea-bargaining system, along with its history and theoretical underpinnings are discussed in the following section.

II. AMERICAN PLEA-BARGAINING: CONSTITUTIONAL FOR LACK OF A BETTER ALTERNATIVE

A. Proof by the Lowest Burden: An Affront to Due Process

In the United States' criminal justice system, many defendants accept a plea bargain at the pre-trial stage, when all that has been presented to the court is an account of their arrest. Prosecutors, in the name of efficiency, make recommendations in the early stages of the process that are much lower than what they would recommend following a trial. Knowing that defense

[40] The Code of Maimonides, Book 14: The Book of Judges, Sanhedrin 18:6, at 52-53 (A. Hershman trans. 1949).
[41] The Mishnah, Sanhedrin 4:5, at 388 (H. Danby trans. 1933), reprinted in The Babylonian Talmud, Sanhedrin 37a (I. Epstein ed. 1960) Translation from The Babylonian Talmud.
[42] Rosenberg & Rosenberg at 1031.
[43] *See generally* G. Gilchrist, *Plea Bargains, Convictions, and Legitimacy*, 48 AM. CRIM. L. REV. 143 (2011)

lawyers are obligated to explain the risks of trial to their clients, prosecutors hope that defendants will take this "gift" of a low sentence rather than risk the heavier sentence at trial. Both sides, and the court, avoid an expensive, lengthy trial. Prosecutors circumvent the risks of trying weak cases, and improve their conviction records. One downside, among many, is that defendants often plead guilty regardless of actual guilt, and this detracts from the accuracy and legitimacy of the justice system.[44] A related downside is that the constitutionality of this practice, despite the Supreme Court's approval, remains questionable.

The Due Process Clause of the Fourteenth Amendment protects the accused criminal defendant from conviction unless and until the state proves his guilt beyond a reasonable doubt.[45] A person accused of a crime "would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."[46] The Supreme Court in *In re Winship* held that an adjudication of criminal guilt could not be based upon the burden of proof used in a civil case, a preponderance of the evidence. A preponderance of the evidence is defined as evidence that makes the existence of a fact more probable than its nonexistence.[47] Probable cause, a standard even less demanding of proof than a preponderance of the evidence, requires only enough evidence that an officer of the law can reasonably make an arrest. In contrast to both, proof beyond a reasonable doubt is a much higher burden, requiring that a panel of fair-minded jurors believe in the defendant's guilt beyond any and all doubts that are reasonable. Based on this contrast, a criminal conviction resting upon probable cause is

[44] *See* Gilchrist, *supra* FN 43.
[45] In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970).
[46] Winship at 1072.
[47] Concrete Pipes & Prods. Of Calif., Inc. v. Construction Laborers Pension Trust for So. Calif., (1993) 508 U.S. 602, 622, 113 S.Ct. 2264, 2279.

troubling. In spite of this, the circumstances of many guilty pleas are, in practicality, convictions based on probable cause, rather than on proof beyond a reasonable doubt.

B. Voluntary or Compelled?

Unlike Judaism's blanket ban on confessions, the Fifth Amendment to the United States constitution prohibits only *compelled* confessions. The difference between the two systems, as stated by Justice Brennan, is that American law permits voluntary confessions because "we object not so much to convicting a man on the basis of evidence from his own mouth, but rather to the practice of compelling him to incriminate himself."[48] However, the question remains whether the plea-bargaining system, does, in reality, rely on compulsion due to the nature of the choices faced by defendants. This dilemma reflects the previously discussed argument by Jewish scholars that such compulsion can only be avoided entirely by a blanket ban on confessions. Understandably, many American scholars argue that the current system has strayed drastically from the ideal: sacrificing a degree of accuracy in favor of avoiding conviction of the innocent.[49]

As it stands, the pervasive use of plea-bargaining makes it very difficult to successfully question the propriety of the practice, especially when most people mistakenly believe that the criminal justice has always functioned in this manner. In reality, it was not until after the Civil War that state governments began to reward defendants for aiding in their own convictions.[50] Upon their introduction into our legal system, judges had similar responses to modern critics of plea bargaining.[51]

One such response echoed Jewish law's supposition that plea-bargaining leads to wrongful convictions. This occurrence is especially likely with regard to defendants who

[48] Picarillo v. New York, 400 U.S. 548 (1971).
[49] G. Gilchrist, *Plea Bargains, Convictions, and Legitimacy*, 48 AM. CRIM. L. REV. 143 (2011)
[50] A. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1 (1979)
[51] *Id.*

perceive themselves as victims of a judicial system in which the cards are stacked against them, and therefore plead guilty in spite of their actual innocence. In a 1904 case, the Louisiana Supreme Court found that "the accused accepted the certainty of conviction of what he took to be a minor offense not importing infamy… the thing was, what an innocent man might do who found that appearances were against him, and that he might be convicted not withstanding his innocence."[52] As a participant in the early stage of plea-bargaining, before its use was taken for granted, this judge observed the same issue that is fundamental to most analyses of Jewish law's prohibition: when a system exerts power over the individual, bartering with that individual for his freedom tends to be ineffective in a truth-seeking exercise.

The Supreme Court has considered the plea-bargaining system several times since its introduction into the United States criminal justice system and dramatic rise in the early twentieth century. One such case was *Shelton v. United* States, in which a federal defendant claimed that his guilty plea was involuntary because it was induced by prosecutorial promises.[53] The majority opinion by a panel in the Fifth Circuit Court of Appeals stated that "justice and liberty are not the subjects of bargaining and barter."[54] After the decision in his favor was reversed by the en banc Court of Appeals for the Fifth Circuit, Shelton appealed to the Supreme Court. The United States Supreme Court remanded the case, holding that the plea may have been improperly attained, and that the trial court had the burden of demonstrating that the guilty plea was voluntary.[55] Despite the widespread concerns of judges and other legal actors across the country, the Court declined to hold that prosecutorial promises amount to coercion and

[52] State v. Coston, 113 La. 718, 720, 37 So. 619, 620 (1904).
[53] Shelton v. United States, 356 U.S. 26 (1958).
[54] Shelton v. United States, 242 F.2d 101, 113 (5th Cir.), judgment set aside, 246 F.2d 571 (5th Cir. 1957) (en banc), rev'd per curiam on confession of error, 356 U.S. 26 (1958).
[55] Shelton v. United States, 356 U.S. 26 (1958).

render a guilty plea involuntary. In the next ten years, the Supreme Court declined to hear any cases involving the constitutionality of plea bargains.[56]

Years after the practice was too entrenched in the system to be eradicated without creating calamity, the Court in *North Carolina v. Alford*, along with several other cases decided the same year, held that such bartering for punishment does not violate the Constitution.[57] Due to the previously mentioned "necessity" of plea-bargains during this historical period, and, in turn, over-reliance on them, it seems as though the Court had little choice.

While this paper's narrow focus is on guilty pleas as opposed to confessions in general, it is worth noting the Supreme Court decisions that contemplated the acceptable level of coercion in confessions. The first of these opinions actually references the distinction between Judaism's and the United States' treatment of confessions.[58] In *Garrity v. New Jersey*, decided only a year after the *Miranda v. Arizona*, the Supreme Court considered the constitutionality of a police interrogation technique that threatened accused police officers with dismissal from their positions upon refusal to answer questions.[59] The Court found that there was coercion inherent in this technique, and Justice William Douglas emphasized in the majority opinion that "coercion that vitiates a confession… can be 'mental as well as physical'"[60] and "subtle pressures may be as telling as coarse and vulgar ones."[61] The Court held that as the statements were infected by

[56] A. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 37 (1979).
[57] Santobello v. New York, 404 U.S. 257 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).
[58] Levine, *Rethinking Self-Incrimination, Voluntariness, and Coercion, Through a Perspective of Jewish Law and Legal Theory*, 12 J.L. SOCIETY, 82 (2011).
[59] Garrity v. New Jersey, 385 U.S. 493, 494 (1967).
[60] *Id*. (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).
[61] *Id*. at 496 (citing Haynes v. Washington, 373 U.S. 503 (1963)).

coercion, they could not be sustained as voluntary. As the Fifth Amendment requires voluntariness, the situation required suppression of the coerced statements.[62]

It appeared probable, after *Garrity*, that the Court was embarking on a trend whereby coercion would be broadly and systematically stricken from the criminal justice system. However, the Court's decision in *Colorado v. Connelly* put an end to this possibility.[63] Holding that a criminal confession by a chronic schizophrenic who was in a "psychotic state" at the time of his confession did not violate the Fifth Amendment, the Court effectively narrowed *Miranda* and *Garrity*'s protections against coercion to instances of "police conduct causally related to the confessions."[64] This narrowing opened the door to any coercion that did not involve police conduct. For the purposes of this discussion, it reinforced the Court's permission for prosecutors to use every tool in their arsenal to elicit the ultimate confession, the guilty plea.

C. "Free Will" in American Law

The contrast between Judaic Law and American Law's disagreement on plea-bargaining may be understood in the light of their differing views on paternalism. In contrast to Jewish law, American law is far warier of paternalism, owing to the nation's history. American law, along with most of Western society, thus subscribes to the doctrine of *self-determination*, or the idea, articulated by Judge Benjamin Cardozo in 1914, that "every human being of adult years and sound mind has a right to determine what shall be done with his own body".[65] This means that when a person confesses to a crime and pleads guilty in the United States, knowing that they will lose life or liberty, this is acceptable because they have the right to consent to these

[62] *Id*.
[63] *See* Levine, *Rethinking Self-Incrimination, Voluntariness, and Coercion, Through a Perspective of Jewish Law and Legal Theory*, 12 J.L. SOCIETY, (2011).
[64] Colorado v. Connelly, 479 U.S. 157 (1986).
[65] B. Eliash, *Body and Soul and Ownership Rights: The Jewish Law Perspective*, 12 TEL AVIV U. STUD. L. 267 (1994).

consequences. Interestingly, in Jewish law, the prohibition against self-incrimination and self-harm in general fall under a set of laws that are sometimes called the "paternalistic laws."[66] It thus makes sense that many Americans believe that a defendant's right to plead guilty is fundamental to due process.[67]

Other areas of American law contradict this justification, however, such as those prohibiting suicide and those that deny the rights of persons who wish to sell their organs[68]. In those areas, American law seems to agree with Jewish law that humans do not have the sole right to do as they wish with their bodies. This incongruity owes to "[L]ong-standing traditions that have merged with sensitive taboos to create a hybrid of logical assumptions and secular, humanistic principles." In other words, American law struggles to apply its own doctrine of self-determination consistently in situations where doing so violates entrenched beliefs regarding the nature of life.

Even if one accepts the rationale that people ought to be permitted to do what they wish with themselves, and therefore guilty pleas must be allowed, this very concept of freedom is overborne when coercion is involved. The very nature of coercion is that it takes away one's freedom to make choices for oneself by imposing conditions that make certain choices untenable in order to encourage the choice the coercer wishes to elicit. The moment coercion becomes a factor in any process, that process cannot be said to be one that promotes freedom of choice. A Chicago trial judge in the early twentieth century noted that a guilty plea must not be "obtained

[66] H. Ben-Menahem, *Is Talmudic Law a Religious Legal System? A Provisional Analysis*, 24 J.L. & RELIGION 378 (2008-2009)
[67] *See* B. Fisher*, Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, ALBANY LAW REVIEW (2001)
[68] Eliash at 268.

by any direct or implied promises, however slight."[69] Most courts around this time similarly upheld only guilty pleas that evidenced no coercion.[70] A century later, every participant in the criminal justice system in the United States knows that this description is exactly what a plea bargain entails: a promise that if the defendant confesses, or accepts responsibility for a crime, the prosecutor will recommend a much smaller sentence than that same defendant will face at trial. When a choice is too clear, it must be questioned whether there is a choice at all.

III. NECESSITY: NOT AN EXCUSE

With the amount of criminal cases in nearly every jurisdiction in the United States, the criminal justice system would likely fall into chaos if the current plea-bargaining system was abandoned. In 2010, 95% of criminal defendants chose to plead guilty rather than face trial.[71] In this comparative analysis, the long-existing dilemma of an overburdened criminal justice system necessitates acknowledgment of Judaism's exceptions to the prohibition on confessions.

The main exception in the Talmudic courts was necessity. Judges were permitted to suspend the prohibition on self-incrimination, along with other procedural safeguards, in three situations: times of emergency, substantial threat to the community, or widespread disregard of the law.[72] The overflow of criminal cases in the United States may be seen as constituting the "widespread disregard of the law" that the Talmudic exception was granted to alleviate.

[69] People v. Arkins, 33 CHI. LEGAL NEWS 192 (Cook County Crim. Ct. 1901).
[70] A. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 22 (1979)
[71] *See* M. Smith, *Making the Innocent Guilty: Plea Bargaining and the False Plea Convictions of the Innocent*, 46 NO. 5 CRIM. LAW BULLETIN ART 4 (2010)
[72] *See* 1 E. Quint & N. Hecht, Jewish Jurisprudence: Its Sources and Modern Applications, at 139-213 (1980).

However, Maimonides noted that such exception was only permissible if used temporarily,[73] meaning it could not be codified in law as it has been in the United States.

Maimonides' condition of temporariness on the necessity exception can be understood as an awareness of the nature of circumstances so dire that they would invoke its use. Specifically, he understood that if existing conditions demanded suspension of such important laws as those that safeguarded individual rights, those conditions indicated a deeper problem. It follows that such temporary suspension was to be sustained only long enough to expose and ameliorate the underlying ill. Suspensions of procedural safeguards, such as the ban on confessions, were never meant, or allowed, to achieve the force of permanent law.

The condition of temporariness, and its justification, are wholly applicable to plea-bargaining in the United States. The fact that a Constitutional safeguard so essential as the ban on compelled confessions has been eroded in the United States does not prove that such erosion was a necessary change requiring the permanent force of law. It proves, rather, that some fault of the system brought about its necessity, and this fault must be explored and repaired. In other words, like Maimonides' instruction suggests, the criminal justice system should look to the cause of the flooding that necessitates over-reliance on guilty pleas, and then fix the problem and dispense with this lamentable measure.

Exposing the root of the problem that has led to the necessity of plea bargains is not difficult when one considers the plea-bargaining's birth in American history: The Prohibition Laws. Though the first instances of plea bargains in the United States most likely date back to the nineteenth century,[74] the 1920's witnessed their rise to prominence. Federal prosecutions

[73]The Code of Maimonides, Book 14: The Book of Judges, Sanhedrin 24:4, at 73 (A. Hershman trans. 1949).
[74] A. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 5 (1979).

under the Prohibition Act, by the time it was repealed, constituted nearly 8 times the total number of all federal prosecutions in 1914.[75] "Prohibition," as the era is called, marks the point in history that United States courts became absolutely dependent on guilty pleas for caseload management.[76] This connection is very revealing, as Prohibition remains famous for its legendary failure.[77] Not only did the government's ban on alcohol consumption result in its increase, rather than its intended decrease,[78] but alcohol actually became more potent, and thus more dangerous.[79] Worse, both the murder and assault-by-firearm rates rose throughout the period.[80] Not surprisingly, both rates fell steadily for ten years after Prohibition's repeal.[81]

History shows us that criminal legislation repugnant to a large portion of society will, at best, breed widespread disregard for the law. At worst, such legislation may lead to more devastating forms of crime and produce additional undesirable consequences. These unintended, yet unavoidable costs can be attributed to economics: when you reduce the supply of a product and add risk to its exchange, its price goes up as those willing to take on that risk demand more money for it. As it becomes more difficult to afford, many who need the product commit other crimes to acquire the money to buy it. Additionally, when the commercial activity must be shielded from the government, its merchants are without the benefit of law enforcement and instead resort to extrajudicial methods of enforcing their property rights. In other words, the illegality of the product itself leads to significant violence.

---

[75] A. Alschuler, *The Trial Judge's Role in Plea Bargaining (pt. 1*), 76 COLUM. L. REV. 1059, 1077 N. 65 (1976), citing National Comm'n on Law Observance and Enforcement, Report on the Enforcement of the Prohibition Laws of the United States 56 (1931).
[76] A. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 32 (1979).
[77] D. Boaz, *A Drug-Free America—Or a Free America*? 24 U.C. DAVIS L. REV. 617, 617 (1991).
[78] *Id*. at 617-618.
[79] *See* I. Fisher, *The Noble Experiment*, 78 (1930).
[80] *See* Ostrowski, *Thinking About Drug Legalization*, 121 POL'Y ANALYSIS, MAY 25, 1989, AT 1, 29-33.
[81] *Id*.

The Prohibition Statutes were repealed in 1930 and thus cannot be blamed for today's overburdened criminal justice system or the widespread use of plea bargains it demands. However, the laws that comprise the government's weapons in its "War on Drugs" have been compared to The Prohibition Statutes,[82] and that comparison applies readily to this analysis. Like alcohol prosecutions in the 1920's, drug prosecutions constitute an overwhelming percentage of all criminal prosecutions. The countless crimes that result from the illegal commerce also play a major role in overburdening the judicial system.

The War on Drugs represents, and exposes, a deep-seated problem in American society. It embodies the exact types of evils foreseen by Jewish scholars such as Joseph ibn Migash when they theorized that Judaism's ban on confessions was intended as a procedural safeguard to ensure equal protection under the law. Explicitly, the drug legislation of the past several decades has had an extremely disparate effect on racial minorities.[83] Though the white population in the United States uses illegal drugs far more than the black population, the black population is inordinately prosecuted and imprisoned for drug violations.[84] The consequences of this disparity are disturbing. They include denial of access to public benefits[85] and education,[86] along with other problems that ultimately contribute to debilitating marginalization of minorities.

The fact that the War on Drugs and its consequences generate both disparate treatment of minorities, and the judicial overflow that necessitates ubiquitous plea-bargaining, is far from

---

[82] *See generally*, Boaz.
[83] J. Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 257 (2009).
[84] *Id*. at 266.
[85] 21 U.S.C. §862a(a) (2006) places a lifetime ban on food stamps for felony drug offenders. The denial of public assistance to those who need it most severely limits the likelihood of successful reintegration into society for poor drug offenders. L. Eadler, *Purging the Drug Conviction Ban on Food Stamps in California*, 14 SCHOLAR 117, 117 (2011).
[86] *See generally* E. Blumenson & E. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61 (2002).

coincidental. This crisis of equal protection itself constitutes the problem that has necessitated suspension of procedural safeguards. As stated earlier in this section, Judaism allowed such suspension only temporarily, during which time the underlying problem was to be sought and remedied. Therefore, Jewish law would suggest that the United States address the malady engendered by the War on Drugs, rather than continue to use plea-bargaining to cope with its symptoms.

IV. WHAT'S A JEW TO DO? OPTIONS IN A PLEA-DRIVEN CRIMINAL JUSTICE SYSTEM

American Jews face a dilemma when they find themselves at the mercy of the criminal justice system in the United States. An observant Jew knows that by accepting a plea bargain, he violates a divine decree. By confessing to a crime and pleading guilty, he participates in bringing about his own conviction and punishment. He also participates in placing moral stigma, and thus additional harm, upon himself. However, Jewish law makes an exception to the prohibition on self-harm when it is necessary for the overriding good of the body as a whole.[87] In other words, when faced with two alternatives, both of which will cause self-harm, it may be permissible to inflict some self-harm in order to avoid the more harmful alternative. This exception is illuminated by many modern situations.

One potential circumstance in which a Jew must choose between two harmful alternatives is that of amputation.[88] The general rule makes it clear that one may not sever one's own limb. However, if an infection such as gangrene infects the limb, it has the potential to spread to the rest of the body and threaten more than just that limb. Such a situation would be excepted from the general rule, because by amputating the limb, the person saves the rest of the body.

[87] Maimonides, Hil. Mamrim, 2:4
[88] *Id*.

Another example of permissible self-harm is that of organ transplants.[89] In order to save the life of another, Judaism does not permit one to undergo surgery that puts one's own life in grave risk.[90] Nor does Judaism compel one to undertake even a slight risk to save another.[91] However, in cases where the risk to the donor is slight and the donation will save a life, it is permissible to risk self-harm to save that life.[92] In situations where a donor chooses to give an organ to a loved one, this choice can be understood to represent a judgment by that person that the loss of the loved one would be more harmful to the self than the risk involved in the surgery. In that sense, the person makes the choice to risk some self-harm to avoid a greater one.

Plea-bargaining generally presents a choice of whether to take one's chances at trial and risk greater punishment, or confess and take a lesser punishment. If one believes that their outcome at trial is likely to bring about greater harm to the self than the outcome of a plea bargain, this could trigger the exception to the rule against self-harm and, in turn, the prohibition on pleading guilty to a criminal act. There are many cases in which a Jewish defendant may weigh his options and determine that, all factors considered, the plea-bargain represents the lesser of alternate harms. The scenario described in the introduction to this paper is one that calls for this analysis and may qualify for the exception.

As Maimonides would remind us, however, humans cannot claim to accurately discern the intent of a divine decree, though it is worthwhile to explore the possibilities. This proposed exception to the divine decree is, therefore, not a divine decree itself. Rather, it derives from a hypothesis about G-d's own reasoning, namely that the prohibition on self-incrimination relates

[89] *See* J. David Bleich, Contemporary Halachic Problems, Volume 4 (1995).
[90] *Id.*
[91] *Id.*
[92] *Id.*

to the prohibition on self-harm. As this explanation is human-conceived, any resulting exception holds only possible validity. It therefore may not excuse deviations from the divine decree.

CONCLUSION

Though the United States judicial system has declined to apply Jewish law's prohibition on guilty pleas in the past,[93] this paper presents a novel reason why it should reconsider. The necessity exception foreseen by Talmudic law represents not an excuse to waver in a society's commitment to protecting individual rights, but rather an opportunity to ameliorate a profound societal mishap. This paper suggests that the United States take that opportunity, and remove the need for the plea-bargaining that violates a fundamental Constitutional right.

This paper also recognizes that such action is unlikely. In that event, American Jews will remain subject to a system that refuses to recognize the coercion inherent in its use of confessions, and thus its own hypocrisy. This dilemma generates a question that demands an answer: How can an observant Jew remain faithful to G-d's command while respecting the laws of his country? This paper is also an attempt to answer that question.

[93] *See generally* Levine, *Rethinking Self-Incrimination, Voluntariness, and Coercion, Through a Perspective of Jewish Law and Legal Theory*, 12 J.L. SOCIETY (2011).