

The Privilege of Self-examination
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The arraignment of Johnny Peanuts was my first personal experience of the Fifth Amendment privilege against self-incrimination.

It happened on a July morning in Manhattan nearly fifty years ago. I was a summer assistant in the United States Attorney's office for the Southern District of New York. Johnny Peanuts, accused of Mafia crimes, had been arrested early that morning. The FBI agents hid in his bushes in front of his home. They nabbed him as he came out for the morning paper.

At his arraignment, the magistrate began by asking him, "What is your name?" He replied, to that question, and every other question put to him that day, "I refuse to answer on the grounds that the answer might tend to incriminate me."

I knew that he had the right to do that under the Fifth Amendment of United States Constitution. I was not sure then, though, that the privilege against self-incrimination was a good idea. At that time, I thought, "If he is innocent, why should he not answer? And if he is guilty, why should the law permit him to conceal his guilt by remaining silent?"

I have learned more about the privilege since the arraignment of Johnny Peanuts. Today, I have no doubt the privilege is not only a good idea; it is an essential element of a civilized society. The privilege against self-incrimination protects all of us against the temptation of police and prosecutors to force people to confess, including to crimes they have not committed.

Today I will talk about three questions.

First, what is the history in American law of the privilege Johnny Peanuts claimed?

Second, how does that privilege compare to the similar privilege in Jewish law?

Third, relating specifically to Rosh Hashanah and Yom Kippur: we enjoy a privilege not to incriminate ourselves. During these days, however, we must acknowledge our sins. Is the privilege not to be a witness against ourselves contradicted by this most central purpose of these High Holy Days?

First, the history.

In 1689, the English Parliament enacted a law declaring the rights and liberties of British subjects. That law became known there as the Bill of Rights. It declared important rights of the people, including the right not to be compelled to testify against themselves.

One hundred years later, in 1789, we here adopted the United States Constitution. Eight of the states already had their own constitutions by then that included declarations of the rights of citizens. In the Massachusetts Constitution, for example, article 12 states that no subject shall be compelled to accuse or furnish evidence against himself. That privilege against self-incrimination remains part of the Massachusetts Constitution today.

When the United States constitution was adopted, however, it contained no protections against arbitrary government action and therefore no privilege against self-incrimination. The delegates who adopted that constitution felt that these were matters that could be left to the states. But the people who gathered in conventions in each state to decide whether to ratify the new constitution did not trust the new central government they were about to create. Rather, they insisted that there be a Bill of Rights attached to the new constitution.

As a result, a group of ten amendments was adopted in 1791. The fifth of these, now known simply as the Fifth Amendment, provides for a number of rights of the people including the following: “No person shall be compelled in any criminal case to be a witness against himself.”

In 1966 the United States Supreme Court decided a case called Arizona versus Maranda. Ernesto Miranda was an indigent Mexican defendant. He was arrested and interrogated by police. He confessed. His confession was used against him to help convict him.

The Supreme Court reversed his conviction. In its decision the court established a new standard for police behavior when questioning a suspect after arrest. That standard is familiar to all of us from movies and television as “Miranda warnings,” named for the name of the defendant in that case. The court said that, when a suspect is in custody, the suspect must be warned before any questioning that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to an attorney whether retained or appointed.

The court based its decision on the history of protections against self-incrimination. The most ancient precedent cited by the court was the work of Moses Maimonides. In footnote 27 of the Miranda decision, the court said, “Thirteenth century commentators found an analogue to this privilege, grounded in the Bible.” Then the court quoted Maimonides as follows: “To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.”

So that is the history of the privilege in American law, ending with the Miranda decision. Jewish law, however, to which the Court referred in Miranda, provides an even broader privilege against self-incrimination than American law.

Under American law, the accused has a privilege not to testify against himself. He cannot be forced to testify. He is permitted, however, to testify against himself voluntarily. If he does that, the confession may be used as evidence against him.

The protection provided in Jewish law goes further. In Jewish law, the accused is not permitted to testify at all until the court has already determined from independent evidence that it appears the accused has committed the offense charged. In such a case, the accused

may testify if he wishes. If he begins to say anything that hurts his own case, however, even unwittingly, the court must silence him.

I know five reasons for this attitude in Jewish law protecting the accused from his own testimony against himself.

First, the Torah requires two eyewitnesses for every conviction. The rabbis in the Talmud construed this law to exclude any other mode of proof, including the confession of the accused.

Second, Maimonides believed that we should not let people confess for capital crimes because they might just be melancholy or depressed people who wanted to commit suicide in this way.

Third, all souls belong to God. Nobody should be allowed to forfeit his life by his own admission, because his life is not his own to dispose of.

Fourth, if confessions were given any value, courts might be inclined to overrate them, and the police might not do their proper job of finding out the truth with other evidence.

Fifth, if confessions are permitted, there will always be a temptation to try to force confessions by torture. We saw that pattern of abuse in practices by our own police before the Miranda case, and, sadly, even in our own time with the abuses carried out at Guantánamo.

We have seen that American law and Jewish law provide, for very good reasons, that a person has a privilege not to incriminate himself. Now we come to Rosh Hashanah. What do we find? It seems that we are required to incriminate ourselves.

One of the first prayers we say on Rosh Hashanah and one of the last on Yom Kippur is the Avinu Malcheinu. The first line of that prayer is, “Our Father, our King, we have sinned before you.” We also say, “May our prayer come before You; verily, we have sinned.” And we say in the Ashamnu prayer, “We have trespassed, we have dealt treacherously, we have robbed.” And so on.

We are not supposed to have to incriminate ourselves. Yet that’s exactly what we do every year at this time. Or is it?

I find three essential differences between the privilege against self-incrimination and our practice in confessing our sins during these days.

First, we are communicating with God, not a court or a prosecutor. Second, we are confessing communally, in the plural, as a group, not individually. And third, our purpose is repentance, not a determination by the police or some other agency or even God as to whether we are guilty or innocent.

As a kind of proof of the first point, that the privilege against self-incrimination does not apply in dealings between us and God, I have reviewed the transcript of the proceedings in the first four crimes prosecuted in the Torah. I refer to the stealing of the apple and the murder of Abel.

You might ask, “Did he say four crimes? That sounds like only two.” But any decent prosecutor could easily find four crimes in those events.

Cain would be charged with murder. I imagine that Eve would be accused of larceny under one hundred dollars. Adam’s alleged crime is receiving stolen property. And Adam, Eve and the snake would be charged as co-conspirators in a conspiracy to commit theft.

Now, how did God go about investigating and prosecuting these cases? God confronted the accused and asked them what they did. You will find the transcript of those interrogations in the book of Genesis. Here is a brief summary.

God asks Cain, “Where is your brother Abel?” Cain responds, “I do not know. Am I my brother’s keeper?” And God replies, “What have you done?”

Similarly, God interrogates first Adam, then Eve, then the snake, regarding the eating of the forbidden apple. God asks Adam, “Did you eat of the tree from which I had forbidden you to eat?” When Adam blames Eve, God then asks Eve, “What have you done?” Eve then identifies the snake as the culprit, and God proceeds to punish the snake without asking any more questions.

No Miranda warnings were given. At no time did God suggest that the accused could remain silent.

You could object that God couldn’t follow Jewish law because the Torah had not yet been given or because there were not enough people in the world at that time to find two eyewitnesses for each offense. But the true reason, applicable to our prayers on Rosh Hashanah on Yom Kippur, is that God was not engaged in the prosecution of a crime when God questioned the accused. God was rather investigating sins and seeking repentance, the purpose we have today as we confess our sins.

I mentioned a second distinction: that our duty to confess our sins arises from the fact that we speak communally, not individually. Imagine how odd our prayers would sound in the singular. Suppose that Avinu Malcheinu began, “My Father, My King, I have sinned, I have trespassed, I have dealt treacherously.”

Rather than confessing individually to crimes, during Rosh Hashanah and Yom Kippur we acknowledge as a community that we have sinned. By our joint actions or omissions, we have permitted conditions to exist that are sinful, such as homelessness, poverty and racism.

Finally, our purpose is not to determine guilt or innocence for a crime. Instead we enjoy in these High Holy Days a privilege I call the privilege of self-examination. That privilege is essentially different from the privilege against self-incrimination in three ways.

The privilege against self-incrimination protects all of us from potential abuses of prosecutors and courts. The privilege of self-examination gives us an annual search warrant. We use that search warrant to search our own souls and our own behaviors in the ending year and vow to do better in the year that is beginning.

The privilege against self-incrimination is a protection of the individual that enlightened human societies have devised in the interest of all. The privilege of self-examination permits us to work on achieving our own highest visions of ourselves.

The purpose of the privilege against self-incrimination is to ensure a just and proper determination of guilt in the criminal courts. The purpose of the privilege of self-examination is to provide each of us with a process for repentance, for teshuvah.

As we stand on the threshold of the new year, I hope that each of us will freely exercise our privilege of self-examination. And I wish us all a Shanah Tovah.