

EXCAVATING MIRANDA

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INTRODUCTION

Sixty years after it was decided, *Miranda v. Arizona*¹ remains one of the most significant and renowned cases—as well as, arguably, one of the most controversial cases—in the history of the United States.² Chief Justice Earl Warren's majority opinion,

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¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² See, e.g., Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000 (2001) (“*Miranda v. Arizona* is the most well-known criminal justice decision — arguably the most well-known legal decision — in American history. . . . [B]eyond the borders of the United States, the *Miranda* warnings may be more well known than virtually any other feature of the American criminal justice system.”); Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 787 (2013) (“In 1966, the Supreme Court decided what would become its most well known opinion ever in a criminal case: *Miranda v. Arizona*.”); George C. Thomas III, *Lost in the Fog of Miranda*, 64 HASTINGS L.J. 1501,

establishing the eponymous *Miranda* warnings for custodial interrogation of criminal suspects, has prompted voluminous and continuing commentary, among both critics and supporters.³ This Article is part of an ongoing project⁴ exploring a particular aspect of Chief Justice Warren's majority opinion: a footnote referencing Jewish legal sources,⁵ documenting an important passage at the start of a pivotal section of the opinion.⁶

Building on previous scholarship addressing both the general application of Jewish law to the issue of self-incrimination and the specific reliance on Jewish legal sources in *Miranda*,⁷ this Article

1502 (2013) (describing *Miranda* as the Warren Court's "most sweeping — and probably most controversial — criminal procedure case"); Recent Case, *Vega v. Tekoh*, 142 S. Ct. 858 (2022) (*mem.*), 135 HARV. L. REV. 1496 (2022) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("Perhaps no other Supreme Court rule is as 'embedded in . . . our national culture' as the eponymous warnings of *Miranda v. Arizona*.")); Leading Case, *Vega v. Tekoh*, 136 HARV. L. REV. 430 (2022) ("*Miranda v. Arizona* is perhaps the best-known criminal justice decision in American history . . .").

³ See, e.g., Leo, *supra* note 2, at 1000 ("Since it was decided in 1966, the *Miranda* decision has spawned voluminous newspaper coverage, political and legal debate, and academic commentary."); cf. 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.1(a) (4th ed.) ("No area of constitutional criminal procedure has provoked more debate over the years than that dealing with police interrogation.").

⁴ See, e.g., Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, with Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 LOY. L.A. INT'L & COMP. L. REV. 257 (2006) [hereinafter Levine, *An Introduction to Self-Incrimination in Jewish Law*], reprinted in 1 SAMUEL J. LEVINE, JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY 127-46 (2018); Samuel J. Levine, *Applying Jewish Legal Theory in the Context of American Law and Legal Scholarship: A Methodological Analysis*, 40 SETON HALL L. REV. 933 (2010) [hereinafter Levine, *Applying Jewish Legal Theory*], reprinted in 1 LEVINE, *supra*, at 6-26; Samuel J. Levine, *Miranda, Dickerson, and Jewish Legal Theory: The Constitutional Rule in a Comparative Analytical Framework*, 69 MD. L. REV. 78 (2009) [hereinafter Levine, *Miranda, Dickerson, and Jewish Legal Theory*], reprinted in 1 LEVINE, *supra*, at 147-60; Samuel J. Levine, *Rabbi Lamm, The Fifth Amendment, and Comparative Jewish Law*, TRADITION, Summer 2021, at 146 [hereinafter Levine, *Rabbi Lamm, The Fifth Amendment, and Comparative Jewish Law*]; Samuel J. Levine, *Rethinking Self-Incrimination, Voluntariness, and Coercion, Through A Perspective of Jewish Law and Legal Theory*, 12 J.L. SOC'Y 72 (2011) [hereinafter Levine, *Rethinking Self-Incrimination*].

⁵ See *Miranda*, 384 U.S. at 458 n.27.

⁶ See *id.* at 458.

⁷ For some of the classic scholarship in this area, see, for example, AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW (1970); Arnold Enker, *Self-Incrimination*, in JEWISH LAW AND CURRENT LEGAL PROBLEMS 169 (Nahum Rakover ed., 1984) [hereinafter Enker, *Self-Incrimination*]; Arnold Enker, *Self-Incrimination in Jewish Law (A Review-Essay)*, in 4 DINÉ ISRAEL, at cvii (1973) [hereinafter Enker, A

aims to excavate *Miranda* through a systematic analysis of Chief Justice Warren's citations to Jewish law and their relevance to the rule that was announced in the majority opinion. Toward that goal, Part I of this Article raises a series of questions about the substance, accuracy, and conceptual cogency and coherence of the references to Jewish legal sources. This Part then proposes answers to each of these questions, which, in turn, raise additional questions of their own.

In an effort to address these additional questions, Part II further excavates *Miranda*, uncovering the basis of Chief Justice Warren's knowledge of the sources of Jewish law cited in the opinion. Specifically, the references to Jewish law in *Miranda*, along with the views expressed and the wording employed in the key passage of the opinion these sources document, grew out of Chief Justice Warren's visit to the Jewish Theological Seminary of America ("JTS") in New York City, in 1957. A close look at contemporaneous newspaper reports of the visit, including both details of the lectures Chief Justice Warren attended and direct quotations from his reactions to the Jewish legal principles he discovered, reveal a striking analogue, in both content and language, to the section in *Miranda* that cites and relies on Jewish law.

Analyzing this material in the context of the rule that was established in *Miranda*, this Part finds broader implications in the majority opinion and further hypothesizes the possibility that Chief Justice Warren had more ambitious goals for Fifth Amendment jurisprudence, beyond the protections against self-incrimination provided by the introduction of *Miranda* warnings. Such a reading of the majority opinion is consistent with Chief

Review Essay] (reviewing KIRSCHENBAUM, *supra*); Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988). For more recent scholarship, see, for example, Becky Abrams Greenwald, Note, *Maimonides, Miranda, and the Conundrum of Confession: Self-Incrimination in Jewish and American Legal Traditions*, 89 N.Y.U. L. REV. 1743 (2014); David C. Flatto, *Evidently Not: Why Confessions Are Excluded in Jewish Criminal Jurisprudence*, 39 J.L. & RELIGION 173 (2024); Graham James McAleer, *Witness for the Self: Miranda v. Arizona's Political Theology*, 36 TOURO L. REV. 1079 (2021); Levine, *An Introduction to Self-Incrimination in Jewish Law*, *supra* note 4, at 258-59 n.4. In addition to *Miranda*, a substantial number of American cases have cited Jewish law on the issue of self-incrimination. *See id.*

Justice Warren's reaction to his visit to JTS, helps illuminate the references to Jewish law in *Miranda*, and finds further support in the way Justices Harlan and White, in their *Miranda* dissents, characterized Chief Justice Warren's majority position.

Finally, Part III suggests that excavating the implications and intentions underlying the *Miranda* opinion may have particular resonance for current efforts to expand the contours of the privilege against self-incrimination. At the time *Miranda* was decided, the *Miranda* warnings were viewed by some as a welcome breakthrough in protecting the rights of criminal suspects who were subjected to custodial interrogation, but by others as unduly restrictive on law enforcement. Within that environment, given the almost immediate backlash that was leveled against *Miranda*, if Chief Justice Warren did, in fact, intend further expansion of these protections, there was little chance he would succeed. Sixty years later, however, the legal landscape has changed, and within the current climate of criminal justice reform, accompanied by the growing awareness of the problem of false confessions, the possibility of expanding upon the protections in *Miranda* might be closer to fruition.

The Article concludes with the observation that it may seem ironic—or perhaps fitting—that excavating *Miranda* after nearly sixty years, through an exploration of Jewish law going back thousands of years, helps serve as an inspiration for moving forward on implementing the potential implications of Chief Justice Warren's majority opinion by expanding the promise of the protections established in *Miranda*.

I. THE MAJORITY OPINION'S CITATIONS TO JEWISH LAW

Chief Justice Warren's majority opinion in *Miranda v. Arizona*⁸ may be properly characterized as epic, owing both to its fifty-four-page length and its landmark status. Following the first twenty pages, consisting of descriptions of the issue, the holding, and the lower court decisions under review, the opinion turned to Section II. Chief Justice Warren opened this key section of the opinion with the declaration that: "We sometimes forget how long it has taken to establish the privilege against self-incrimination,

⁸ 384 U.S. 436.

the sources from which it came[,] and the fervor with which it was defended. Its roots go back into ancient times.”⁹ To document the final sentence in this passage, Chief Justice Warren added a footnote:

Thirteenth century commentators found an analogue to the privilege grounded in the Bible. “To sum up the matter, the principle that no [person] is to be declared guilty on [their] 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).¹⁰

A number of questions immediately arise with respect to the substance, accuracy, and conceptual cogency and coherence of the citations to Jewish legal sources. Attempted answers to each of these questions, in turn, raise additional questions of their own.

To analyze these questions, as a threshold matter, it is first necessary to identify the seemingly cryptic—if not esoteric—sources that are referenced in the footnote and to assess the possible relevance of their content to the issues addressed in *Miranda*. As it turns out, despite their ostensibly obscure origins, uncovering the sources cited in the footnote is among the least challenging aspects of the analysis.

The first source, “Maimonides, *Mishneh Torah* (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6,” is readily identifiable as a section of one of the most monumental works of Jewish legal scholarship, authored by a leading medieval legal authority and philosopher, Moses Maimonides, restating and explicating thousands of years of Jewish legal tradition.¹¹ The second source, “Lamm, *The Fifth Amendment and Its Equivalent in the Halakhah*, 5 *Judaism* 53 (Winter 1956)[,]” is clearly a reference to a journal article published in 1956. Its author, Rabbi Norman Lamm, was a prominent scholar of Jewish legal

⁹ *Id.* at 458.

¹⁰ *Id.* at 458 n.27.

¹¹ See generally ISADORE TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES (*MISHNEH TORAH*) (1980).

philosophy who would later serve as President of Yeshiva University.¹²

As to the content and possible relevance of these sources to the issues in *Miranda*, the footnote includes a verbatim quotation from Maimonides' *Mishneh Torah*: "To sum up the matter, the principle that no [person] is to be declared guilty on [their] own admission is a divine decree."¹³ Clearly, like *Miranda*, this passage addresses the issue of legal safeguards against self-incrimination. Similarly, the very title of Rabbi Lamm's article, *The Fifth Amendment and Its Equivalent in the Halakhah*,¹⁴ demonstrates an obvious nexus to *Miranda*,¹⁵ focusing on a parallel between the Fifth Amendment and "the *Halakhah*"—the Hebrew term for Jewish law.¹⁶

Thus, the first—and perhaps the most basic and straightforward—question, pertaining to the identity and possible relevance of the footnoted references to Jewish legal sources in *Miranda*, may be resolved with a straightforward answer: the footnote is included for the purpose of citing two significant sources of Jewish law, one a groundbreaking medieval work and the other the work of a leading contemporary scholar, both of which address the central issue in *Miranda*.

Upon further examination, however, questions arise as to the substance and the salience of these references in the context of a footnote intended to document Chief Justice Warren's assertion that the "roots" of the privilege against self-incrimination "go back into ancient times."¹⁷ After all, neither of the cited sources is an ancient work; one was written in medieval times and the other just ten years prior to *Miranda*. Rather, the footnote documents the attribution of ancient origins to the privilege with the

¹² See generally *Rabbi Norman Lamm Memorial Volume*, TRADITION, Summer 2021.

¹³ MAIMONIDES, *MISHNEH TORAH*, Book of Judges, Sanhedrin 18:6.

¹⁴ Norman Lamm, *The Fifth Amendment and Its Equivalent in the Halakhah*, JUDAISM, Winter 1956, at 53.

¹⁵ See Levine, *Rabbi Lamm, The Fifth Amendment, and Comparative Jewish Law*, *supra* note 4.

¹⁶ For a discussion of the term "*halakha*," see Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465, 468 n.9, 484, reprinted in 2 SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* 1-41 (2018).

¹⁷ *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

observation that “[t]hirteenth century commentators found an analogue to the privilege grounded in the Bible.”¹⁸

It should be noted from the outset that the allusion to “[t]hirteenth century commentators” may be subject to its own critique: Maimonides lived most of his life in the twelfth century, and just a few years into the thirteenth century, he was more of a codifier than a commentator, particularly with respect to his authorship of the restatement-like *Mishneh Torah*—the title of which is, in fact, translated in the footnote as “Code of Jewish Law”—and he was, of course, but one individual.¹⁹

More to the point, on a substantive level, it is not clear that the cited quotation supports Chief Justice Warren’s ascription of ancient origins to the privilege against self-incrimination. The original passage from *Mishneh Torah* states: “To sum up the matter, the principle that no [person] is to be declared guilty on [their] own admission is a divine decree.”²⁰ The inference drawn by Chief Justice Warren, that Maimonides “found an analogue to the privilege grounded in the Bible,”²¹ relies upon the unstated presumption that Maimonides’ characterization of the rule as a “divine decree” indicates a biblical origin.

Although this is certainly a plausible understanding of Maimonides’ position, likely consistent with the view of most scholars who have, accordingly, attempted to identify biblical verses that support this conclusion,²² it remains surprising that Chief Justice Warren adopted this view categorically and without further explanation. Though similarly justifiable, it also seems similarly surprising that Chief Justice Warren relied on this reading of Maimonides—and, for that matter, on Maimonides’ own unexplicated assertion of a divine decree—as documentation of the opinion’s unequivocal declaration that the privilege has “roots” in “ancient times.”²³

¹⁸ *Id.* at 458 n.27.

¹⁹ See TWERSKY, *supra* note 11, *passim*.

²⁰ MAIMONIDES, *supra* note 13.

²¹ *Miranda*, 384 U.S. at 458.

²² See, e.g., *Numbers* 35:30; *Deuteronomy* 17:6; *Deuteronomy* 19:15. For works in English analyzing biblical sources for the prohibition against self-incrimination, see KIRSCHENBAUM, *supra* note 7, at 25-33; Rosenberg & Rosenberg, *supra* note 7, at 974-84.

²³ *Miranda*, 384 U.S. at 458.

Instead, Chief Justice Warren might have been expected to rely on a more explicit source for the ancient Jewish rule protecting against self-incrimination. The Talmud, which—unlike *Mishneh Torah*—was completed in ancient times,²⁴ plainly states that a criminal defendant may not be subject to criminal punishment on the basis of self-incriminatory statements.²⁵ Indeed, the Talmud is the first source of Jewish law that expressly articulates the rule against self-incrimination.²⁶

Though it is, of course, possible that Chief Justice Warren was not aware of the Talmudic discussion, the Talmud would seem to serve as a more likely and preferable citation for him to select in support of attributing ancient roots to the privilege against self-incrimination. After all, the Talmud has greater authority than Maimonides' *Mishneh Torah*, is more widely known and accessible, and qualifies in its own right as an ancient source.²⁷ Thus, Chief Justice Warren's apparent insistence to rely, instead, on Maimonides suggests the prospect of a specific motivation to draw upon *Mishneh Torah* rather than the Talmud.

In any event, even if the sources in the footnote provide support for an ancient analogue to the privilege against self-incrimination, further questions surround the accuracy of the proposition that the "roots" of the privilege against self-incrimination "go back into ancient times."²⁸ The term "roots," presumably used advisedly and precisely, would seem to connote that the ancient rule provided the origins—the "roots" out of which the current privilege against self-incrimination developed and grew. Though some researchers accept the plausibility of a historical connection between the rule in Jewish law and the Fifth Amendment, most scholars have found that, notwithstanding conceptual similarities, the notion of a direct line from the ancient Jewish rule to the modern American privilege remains unconvincing.²⁹

²⁴ See generally ADIN STEINSALTZ, THE ESSENTIAL TALMUD (Chaya Galai trans., 1976).

²⁵ See Babylonian Talmud, Sanhedrin 9b.

²⁶ See Levine, *Rethinking Self-Incrimination*, *supra* note 4, at 75-77.

²⁷ See STEINSALTZ, *supra* note 24.

²⁸ *Miranda*, 384 U.S. at 458.

²⁹ See, e.g., KIRSCHENBAUM, *supra* note 7, at 19-21; LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 439-40 (2d ed. 1986).

To be sure, perhaps Chief Justice Warren would not be expected to closely research and cite the historical evidence and debates that constitute an area of contention even among scholars. Still, in light of the absence of substantial evidence in favor of such a historical proposition, it seems surprising that, without offering any evidence to corroborate his position, Chief Justice Warren stated definitively that “[i]ts roots go back into ancient times.”³⁰ Apparently, Chief Justice Warren deemed it important to find not only a conceptual analogue to the privilege in ancient law, but a historical origin as well.

Taking this critique a step further, whatever the historical accuracy of the premise that ancient Jewish law—in the form of biblical law—was a direct antecedent to the Fifth Amendment, a more central question relates not to the premise of this claim but to the legal proposition that Chief Justice Warren seemed determined to thereby derive and apply to American law: the American legal rule, established in *Miranda*, mandating *Miranda* warnings for custodial interrogation. Beyond the historical questions, a close examination of the rule against self-incrimination in Jewish law casts doubt on conceptual comparisons between the Jewish and American legal systems in this area as well.

As the quotation from Maimonides delineates, under Jewish law, “no [person] is to be declared guilty on [their] own admission.”³¹ Yet this quotation, while accurate on its face, may not capture the full extent of the rule in Jewish law. Unlike the Fifth Amendment and, for that matter, the rule established in *Miranda*, the Jewish legal system does not merely protect a criminal defendant from being forced to confess guilt. As the quotation from Maimonides further indicates, a person may not be

(noting that “[w]hether the existence of the right against self-incrimination in Talmudic law in any way influenced the rise of the right in Anglo-American law is an intriguing question” but concluding that “the answer, if based on evidence rather than speculation, must be negative”); Enker, *Self-Incrimination*, *supra* note 7, at 169 (concluding that “exaggerated claims have been and are being made for the sources of self-incrimination in Jewish law”); *Moses v. Allard*, 779 F. Supp. 857, 870 (E.D. Mich. 1991) (“[S]ome commentators contend that the nexus between the ancient Jewish law and the modern privilege is tenuous at best.”).

³⁰ *Miranda*, 384 U.S. at 458.

³¹ MAIMONIDES, *supra* note 13.

convicted based on their own admission of guilt. In fact, under Jewish law, even a fully voluntary confession—including, for example, a confession initiated on the part of the suspect—is inadmissible as evidence against the criminal defendant.³² Thus, on a basic conceptual level, it becomes difficult to characterize the rule in Jewish law, which prescribes an outright and absolute ban on the evidentiary use of confessions against criminal defendants, as an “analogue” to the American legal system’s “privilege” against self-incrimination, which may be exercised or waived at the discretion of the confessant.

Indeed, relying on the rule in Jewish law as an analogue to the rule announced in *Miranda* seems inapposite, if not wholly misplaced. Though *Miranda* represented a substantial step forward in the American legal system’s protection of the rights of criminal defendants,³³ requiring the issuance of *Miranda* warnings remains a far cry from prohibiting the use of self-incriminatory statements. Once the warnings are given, any confessions elicited from the defendant “can and”—most likely—“will be used”³⁴ against them. In fact, according to common and conventional wisdom, the confessions then emerge as among the most powerful, most probative, and most convincing—and, therefore, among the most prejudicial—forms of evidence, highly indicative of guilt.³⁵ In sharp contrast, under Jewish law, a

³² See Levine, *Rethinking Self-Incrimination*, *supra* note 4, at 75-79.

³³ See, e.g., Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 499 (2005) (“The *Miranda* decision represented a monumental departure from the past, in several important respects.”).

³⁴ See *Miranda*, 384 U.S. at 469.

³⁵ See, e.g., Leo et al., *supra* note 2:

[C]onfessions have long been considered among the most dispositive types of evidence in criminal cases. Historically known as the “queen of proofs,” they have been described as “uniquely potent,” “inherently prejudicial,” and “the gold standard in evidence.” In *Bruton v. United States*, Justice White, in dissent, observed that a confession is “probably the most probative and damaging evidence that can be admitted.” In *Colorado v. Connelly*, Justices Brennan and Marshall noted that, “no other class of evidence is so profoundly prejudicial.” “Triers of fact accord confessions such heavy weight in their determinations that ‘the introduction of a confession makes the other aspects of trial in court superfluous, and the real trial, for all practical purposes,

criminal confession has no evidentiary value at all against the defendant.

In light of this fundamental difference, it seems anomalous for Chief Justice Warren to portray the rule in Jewish law as a helpful analogue toward the development of the rule in *Miranda*. On the contrary, whatever rhetorical or persuasive insight Chief Justice Warren intended to draw from a conceptual comparison to Jewish law is arguably undermined by the substantive contrast between the two systems, which, in this context, might only highlight the relatively minimal protections afforded a suspect through the institution of *Miranda* warnings.

As a possible response to this question, perhaps Chief Justice Warren concluded that notwithstanding the substantive differences between the rules, as a result of which the rule established in *Miranda* appears somewhat lacking in its protection of criminal defendants, the reference to Jewish law might still provide support for an expansion of Fifth Amendment rights beyond the status quo ante that existed in the legal landscape prior to *Miranda*. If so, however, a closer look at the sources and the doctrine cited in the footnote in *Miranda*, referencing Jewish law, raises yet further questions that go to the heart of comparative legal analysis.

Most of the footnote is dedicated to describing and quoting the view of Maimonides.³⁶ Upon examination of the original source, however, it quickly becomes apparent that the quoted passage constitutes but a brief section of a more extensive discussion that explains, at some length—in a manner that is unusual for the code-like *Mishneh Torah*—the psychological rationale underlying the rule against self-incrimination in Jewish law.³⁷

occurs when the confession is obtained.” As social science research from a variety of methodologies has demonstrated, confessions exert a strong biasing effect on the perceptions and decision making of criminal justice officials and lay jurors alike, tending to define the case against a defendant and usually overriding any contradictory information or evidence of innocence.

Id. at 771-72 (footnotes omitted); see also *infra* note 102.

³⁶ MAIMONIDES, *supra* note 13.

³⁷ See HERSHEL SCHACHTER, ERETZ HATZVI 237-49 (1992).

Specifically, in the words of Maimonides, confessions are excluded from evidence against the criminal defendant because:

[P]erhaps this person's mind is sick in this matter; perhaps [they are] one of those who are perturbed and bitter of soul, who wish for death, who pierce their bellies with swords and throw themselves off roofs. Perhaps this [person] thus comes and confesses to a crime [they] did not commit.³⁸

To the extent that Chief Justice Warren aimed to rely on Jewish law and the work of Maimonides in *Mishneh Torah* as a means of persuasive reasoning for the purposes of developing and expanding the contours of American legal doctrine, the philosophical and psychological analysis provided by Maimonides would seem to provide a far more preferable quotation, if not the highly obvious choice.

As a basic matter of comparative legal analysis and in an effort to apply a concept or insight from the Jewish legal system to the American legal system, the concept or insight drawn from Jewish law must potentially fit within the internal logic of the American legal system as well.³⁹ For example, in advocating for limiting the implementation of capital punishment in the American legal system, a cogent comparative legal analysis might rely, in part, on those sources in Jewish law that prescribe an abolition of the death penalty out of a concern for erroneous convictions and executions.⁴⁰ Because the American legal system

³⁸ MAIMONIDES, *supra* note 13.

³⁹ See generally Levine, *Applying Jewish Legal Theory*, *supra* note 4; Samuel J. Levine, *Capital Punishment and Religious Arguments: An Intermediate Approach*, 9 WM. & MARY BILL RTS. J. 179 (2000).

⁴⁰ Cf. Levine, *Capital Punishment and Religious Arguments*, *supra* note 39:

Using capital punishment as an example, this Essay aims to suggest an intermediate approach to the application of religious thought to American legal issues. This Essay posits that American law should not grant religious principles an intrinsic measure of legal authority in answering American legal questions. At the same time, religious thought should not be rejected as a source of reasoning in American legal analysis. Thus, this Essay supports an approach that allows religious arguments to be considered and possibly adopted on the basis of their potential relevance and logic vis-a-vis American legal thought. While such an approach places certain limitations on the

shares a similar concern over the possibility of wrongful convictions and executions, the logic behind opposition to the death penalty in the Jewish legal system makes sense in the context of the American legal system as well. Even if such a comparative law analysis may not result in a similar ban on capital punishment in the American legal system, the insight from Jewish law helps illuminate and provoke further consideration of these issues within American law.

As a contrasting example, a comparativist would not propose an argument in favor of limiting the consumption of pork under American law on the basis of the prohibition on consuming pork in the Jewish legal system. The divine rationale for the ritual proscription on the consumption of pork in Jewish law does not find a parallel within the logic of the American legal system.⁴¹ Accordingly, a properly formulated comparative law analysis would reject a transplant of this sort from one legal system to another.

Thus, in the context of *Miranda*, we might have expected a cogent and persuasive comparative law analysis, advocating for the expansion of Fifth Amendment rights, to rely on psychological insights such as those provided by Maimonides—which are universally applicable to the human condition writ large, and may be particularly relevant to the issues of voluntariness and coercion central to the innovation of *Miranda* warnings. Indeed, the psychological aspects of Maimonides' discussion are the subject of the other source cited in the footnote in *Miranda*—the journal article authored by Rabbi Norman Lamm, who explains and

influence of religious principles in American law, at the same time this mode of analysis does not automatically exclude religious arguments that have relevance independent of their religious significance. Therefore, this approach likely allows for widespread use of religious ideas in American legal discourse, as religious ideas are acceptable to the extent that they present ideas that are helpful in considering questions arising in American legal thought.

Id. at 181; see also Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L.J. 1037 (1998), reprinted in 1 LEVINE, *supra* note 4, at 83-98.

⁴¹ Cf. Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 458-61 (1997).

updates Maimonides' view through the lens of twentieth-century scientific advances.⁴²

Moreover, just one-half year after *Miranda* was decided, in *Garrity v. New Jersey*,⁴³ a case that further expanded the contours of the privilege against self-incrimination, Justice Douglas' majority opinion quoted several paragraphs of Rabbi Lamm's reprinted article to document the psychological coercion that may contribute to a suspect's decision to confess to criminal conduct.⁴⁴ In contrast, Chief Justice Warren's opinion in *Miranda* cited the passage from Maimonides describing the rule in Jewish law as a "divine decree,"⁴⁵ without offering further explanation or engaging in a comparative law analysis. Thus, the footnote in *Miranda* seemingly—and surprisingly—sets forth a relatively unpersuasive argument for a formalistic transplant of a rule from the Jewish legal system, again akin to advocating for a prohibition on the consumption of pork in American law on the basis of a similar prohibition in Jewish law.⁴⁶

⁴² See generally Lamm, *supra* note 14.

⁴³ 385 U.S. 493 (1967).

⁴⁴ See *id.* at 497-98 n.5 (quoting Norman Lamm, *The 5th Amendment and Its Equivalent in Jewish Law*, DECALOGUE J., Jan.-Feb. 1967, at 1, 10, 12).

⁴⁵ *Miranda v. Arizona*, 384 U.S. 436, 458 n.27 (1966).

⁴⁶ See Levine, *Rethinking Self-Incrimination*, *supra* note 4, at 81:

[T]he Court should not simply and simplistically transplant a rule from another system into American law. Nor should the Court limit its comparative jurisprudence to legal systems that are nearly identical, in theory, or in substance, to American law. Indeed, comparative law studies often benefit from a careful analysis of both the differences and similarities between legal systems.

Nevertheless, the Court's methodology in *Miranda* seems to undermine the value of any reliance on the reasoning of Maimonides and Rabbi Lamm. Rather than emphasizing these scholars' philosophical and psychological insights, the Court cited Maimonides' theological depiction of the categorical ban on criminal confessions as based in a "divine decree." The Court's methodology leaves open questions regarding the relevance of this principle to the Court's conclusion that, in the American legal system, voluntary criminal confessions are admissible.

See also KIRSCHENBAUM, *supra* note 7, at 134-37 (stating that, for the rules of self-incrimination in Jewish law to "be used intelligently" in contemporary consideration of

Finally, perhaps the most intriguing question about the citation to Jewish law in the footnote in *Miranda*—at once, perhaps the least relevant on a substantive level but also the most interesting on a human level—seeks to uncover how Chief Justice Warren became familiar with the rule against self-incrimination in Jewish law.

As the next part of this Article suggests, the answer to this question, intriguing in its own right, might help provide answers for many of the other questions pertaining to the citations as well. More generally, taken together, these answers might help illuminate additional implications of Chief Justice Warren's majority opinion in *Miranda* and possibly suggest broader goals underlying his approach, while at the same time prompting and promoting further reflection upon the future of self-incrimination in the American legal system.

II. THE ORIGINS AND IMPLICATIONS OF CHIEF JUSTICE WARREN'S CITATIONS TO JEWISH LAW IN *MIRANDA*

A. *The Origins of Chief Justice Warren's Citations to Jewish Law*

In attempting to answer the question of how Chief Justice Warren became familiar with the rule against self-incrimination in Jewish law, from the outset, it seems highly unlikely that at the time *Miranda* was being decided, Chief Justice Warren

the issue, "certain factors must be mentioned and dealt with," including: "whether the fact that the Jewish ancients lived a rather uncomplicated life in smaller, relatively homogeneous groupings—both geographically and sociologically—allowed for features in their judicial system that may strike us as starry-eyed and impractical"; and "that the Rabbis believed sincerely that [humans] could not and [were] not commanded to solve all problems of law-enforcement" as "Divine Justice and Divine Retribution were realities in the world-view of the Rabbis," and thus "the liberal judicial procedure and heavy protection of the rights of the accused in Jewish law were coupled with a deep religious confidence that the criminal will eventually receive . . . just deserts and that justice will triumph"); Enker, *A Review Essay*, *supra* note 7, at cxxii (concluding that "the Jewish Law treating confessions is not particularly relevant to the [contemporary] confessions debate, primarily because the procedural and evidentiary premises of the Jewish legal system which developed these rules are so radically different from our own that the legal issues posed are equally different"); Rosenberg & Rosenberg, *supra* note 7, at 1042-46.

coincidentally happened to be reading through translated works of Maimonides. Likewise, it does not seem particularly plausible that, for some reason, Chief Justice Warren decided to study the rule against self-incrimination in Jewish law as part of researching the history of the privilege against self-incrimination—and, that among sources documenting thousands of years of Jewish legal history, he turned to a translation of Maimonides' voluminous *Mishneh Torah* and chanced upon the passage that he then cited in the footnote in *Miranda*. Although Rabbi Lamm's article, also cited in the footnote, would have provided a much more accessible finding source for the quoted passage from Maimonides' *Mishneh Torah*, it does not seem much more likely that in 1966, Chief Justice Warren was reading through back issues of the journal *Judaism*, where Rabbi Lamm's article had been published ten years earlier, in 1956.⁴⁷

It would seem somewhat more likely that Chief Justice Warren relied on clerks to research the history of the privilege against self-incrimination, and perhaps his clerks were familiar with this area of Jewish law. Though indeed one of Chief Justice Warren's clerks was responsible for the historical research related to *Miranda*,⁴⁸ there is no indication that the clerk was knowledgeable about Jewish law, and there is little reason to imagine that, in the course of researching the history of the privilege, the clerk was any more likely to have searched for sources in Jewish law and to have found the translated passage in *Mishneh Torah*.

As it turns out, any speculation over how Chief Justice Warren became familiar with the rule against self-incrimination in Jewish law is unnecessary, and the answer to the question does not involve Chief Justice Warren's reliance on the research of clerks or the chance occurrence of a serendipitous discovery of the passage in *Mishneh Torah*. Instead, it was Chief Justice Warren who educated himself about the rule against self-incrimination in Jewish law during a 1957 visit to the Jewish Theological Seminary of America ("JTS") in New York, which he undertook for the express purpose of studying areas of Jewish law that are

⁴⁷ See generally Lamm, *supra* note 14.

⁴⁸ E-mail from Ken Ziffren, Esq., to author (Jan. 3, 2019, at 16:10 ET) (on file with author).

relevant to the American justice system.⁴⁹ Details of the visit and his reactions to the topics he studied, reported contemporaneously in a number of newspaper articles, shed further light on Chief Justice Warren's perceptions and understanding of Jewish law. Perhaps more intriguingly, taken together, these reports also provide a preview to Chief Justice Warren's reliance on Jewish law in *Miranda*.

The visit to JTS was at the invitation of Chief Justice Warren's friend,⁵⁰ Dr. Louis Finkelstein, Chancellor of JTS, in response to his expressions of interest in ancient Jewish jurisprudence.⁵¹ Chief Justice Warren attended a three-day symposium, which ran from September 13 to September 15, 1957, addressing "The Law as a Moral Force."⁵² On the second day of the symposium, he was joined by "surprise guests" former President Harry S Truman and former First Lady Bess Truman.⁵³

Notably, among other presentations, Chief Justice Warren attended a lecture by Dean Saul Lieberman. The *New York Times* reported:

[The lecture] included the Jewish legal view of self-incrimination, involved in the Fifth Amendment that has posed a vexing question in American constitutional law.

He explained that under Jewish law . . . a defendant . . . cannot incriminate [them]self because of the rabbinical concept that if a [person] testifying against [them]self is a repentant sinner[,] [they are] beyond court jurisdiction.⁵⁴

⁴⁹ See Richard Amper, *Warren Studies Talmudic Law Here*, N.Y. TIMES, Sep. 14, 1957, at 1, 10.

⁵⁰ In a 1975 interview, Dr. Finkelstein reflected on his decades-long friendship with Earl Warren, including Warren's visit to JTS and many of their discussions about Jewish law and American law. See Interview by Amelia Fry with Louis Finkelstein (Oct. 30, 1975) (on file at the Earl Warren Oral History Project, Regional Oral History Office, The Bancroft Library at the University of California, Berkeley).

⁵¹ See Richard Amper, *The Trumans Join Judaic Law Class*, N.Y. TIMES, Sep. 15, 1957, at 65 [hereinafter Amper, *The Trumans*]; see also Richard Amper, *Warren Pleads for Moral Unity*, N.Y. TIMES, Sep. 16, 1957, at 22 [hereinafter Amper, *Warren Pleads for Moral Unity*]; Interview with Louis Finkelstein, *supra* note 50, at 2-10.

⁵² See Amper, *Warren Pleads for Moral Unity*, *supra* note 51, at 22.

⁵³ See Amper, *The Trumans*, *supra* note 51, at 65.

⁵⁴ Amper, *supra* note 49, at 10.

Thus, significantly, Chief Justice Warren's knowledge of the rule against self-incrimination in the Jewish legal system grew out of his own intellectual curiosity and scholarly dedication. As a result of his interest and his efforts, he had the opportunity to learn of the rule directly from one of the leading Talmudic scholars of the time. Chief Justice Warren's reaction to the lecture is likewise significant, as well as perhaps telling, as an indication of the impact studying the rule in Jewish law had on his thinking about self-incrimination in the American legal system.⁵⁵ As further reported in the *New York Times*, "[a]t the close of the session Mr. Warren observed that the American Constitutional protection 'is, perhaps, not as sacred as in ancient times.' A measure of protection exists here, nevertheless, he said."⁵⁶

Although the article does not elaborate on these observations, it appears that Chief Justice Warren contrasted not only the nature of the protection in the two systems—"sacred" versus secular—but also the manner and degree of protection afforded in each system. Specifically, his reflections on the lecture contrast the absolute protections in Jewish law, prohibiting the evidentiary use of criminal confessions, with the "measure of protection" that existed under American constitutional provisions.⁵⁷

Thus, as early as 1957, Warren openly noted—and expressed concern over—the relatively limited degree of protections provided by the Fifth Amendment, a concern that he would seek to remedy, in part, years later in *Miranda*. In addition, Chief Justice Warren's observations, reported in the *New York Times* article, serve as both a source for the positions he later propounded and a preview to the language he later employed in his majority opinion in *Miranda*. It was then, that he first developed his attribution of the origins of protections against self-incrimination to "ancient times."⁵⁸

Moreover, in response to the lecture, Chief Justice Warren first formulated another aspect of his thinking that he would

⁵⁵ Dr. Finkelstein later recalled that after the lecture, Chief Justice Warren remarked: "This lecture has been so interesting, so instructive, that I can't understand how it is nobody knows about it, that this is kept almost as a secret among you specialists in the field." Interview with Louis Finkelstein, *supra* note 50, at 4.

⁵⁶ Amper, *supra* note 49, at 10.

⁵⁷ *Id.*

⁵⁸ *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

articulate explicitly years later in *Miranda*. According to the *New York Times*, Chief Justice Warren “expressed his thanks for the lesson in Jewish law and said it showed how much of the common law could be traced back to Judaic origin. He cited the lecturer’s references to protections against double jeopardy and self-incrimination.”⁵⁹ Chief Justice Warren’s reactions to the lecture thereby offer a direct antecedent to his finding in *Miranda* that Jewish law functioned as one of the “sources” of the privilege against self-incrimination.⁶⁰

Finally, yet another report of the visit included language that anticipated both the substance and the wording of the *Miranda* opinion, noting that Chief Justice Warren “was quick to point out that the common-law attitudes on self-incrimination and double jeopardy had their roots in Judaic law which rejected self-prejudice in favor of repentance as a juridical device and which further regarded punishment itself as a primary evil to be avoided by confession.”⁶¹ Significantly, nearly ten years before *Miranda*, Chief Justice Warren acknowledged the “roots in Judaic law” of modern attitudes on self-incrimination.⁶²

Thus, as a basic historical matter, excavating *Miranda* helps uncover the origins of a key passage in the opinion and helps illuminate the reasoning that informed Chief Justice Warren’s approach. More ambitiously, by further excavating *Miranda*, the next part of this Article explores additional implications latent in the majority opinion and further hypothesizes the possibility that Chief Justice Warren favored broader limitations on self-incrimination in the American legal system—particularly when elicited through police interrogation—beyond the protections provided through the *Miranda* warnings.⁶³ This hypothesis may

⁵⁹ Amper, *supra* note 49, at 10.

⁶⁰ *Miranda*, 384 U.S. at 458.

⁶¹ Newton M. Roemer, *Chief Justice Warren Studies Talmud*, 1 N.J. ST. BAR J. 1, 15 (1957).

⁶² *Id.*; cf. *Miranda*, 384 U.S. at 458.

⁶³ To be sure, this hypothesis does not suggest that Chief Justice Warren favored an outright ban on criminal confessions in American law, similar to the rule in Jewish law, or an absolute prohibition on police interrogation. Indeed, Dr. Finkelstein later recalled Chief Justice Warren’s response to the lecture he attended on the topic of self-incrimination in Jewish law:

As for instance, when our professor said that in Jewish law self-incrimination is forbidden to the extent that if a [person] has confessed to a crime [they] can't be punished, no matter what evidence you have against [them]. And Warren said. "Well, we can't live under such a system. That's not practical for us. It might have been practical in Palestine thirty-five hundred years ago in a simple society. Here it would be totally impractical.

Interview with Louis Finkelstein, *supra* note 50, at 14-15; cf. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996):

The Warren Court did not intend that the required warnings would put an end to the textbook psychological tactics it deplored nor did the Warren Court intend to lower the confession rate. Although identifying the aims of any court decision is an inherently problematic endeavor, the most plausible reading of *Miranda* is that it sought quite simply to mandate a set of warnings that, prior to any interrogation, provide custodial suspects with informed knowledge both of their constitutional rights and of the uses to which any statements they make to police might be put.

Id. at 649 (footnote omitted); see also *id.* at 649 n.164 (quoting Stephen Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 561 (1996)):

If the *Miranda* Court's goal was to reduce or eliminate confessions, the decision was an abject failure. Plainly, however, the Warren Court had no such thought in mind; it explicitly structured *Miranda*'s warning and waiver requirements to ensure that confessions could continue to be elicited and used. *Miranda*'s stated objective was not to eliminate confessions, but to eliminate compelling pressure in the interrogation process.

Nevertheless, there is reason to hypothesize, on the basis of the implications of the language and logic of the majority opinion in *Miranda*, that Chief Justice Warren may have favored broader limitations on self-incrimination in the American legal system, beyond the protections provided through the *Miranda* warnings. In fact, according to Dr. Finkelstein, as early as 1971, after he had retired from the Court, Warren expressed concern about subsequent Supreme Court decisions impacting the rights of criminal defendants. Dr. Finkelstein recalled:

I asked him if he thought the court might sometime reverse some of the decisions that had been rendered by the Warren Court. He thought that that was most unlikely. . . . [T]hey could change the reapportionment one or the desegregation one. However, they might weaken some of the decisions that had been rendered in defense of—to protect—[t]he rights of the accused[.]

find support in Chief Justice Warren's responses to his visit to JTS, may offer a more cogent reading of his references to Jewish law in the majority opinion in *Miranda*, may prove consistent with the *Miranda* dissenters' understanding of his views as well as the way some contemporary commentators read the opinion, and may help promote further reconsideration of the role of confessions in the American criminal justice system.

B. Implications of Chief Justice Warren's Citations to Jewish Law

Identifying and articulating additional implications of the majority opinion, including the hypothesis that Chief Justice Warren favored broader protections against self-incrimination beyond those provided by *Miranda* warnings, might help answer some of the questions raised above regarding seemingly anomalous elements of the opinion and the references to Jewish law in *Miranda*.⁶⁴ In particular, this reading of *Miranda* might better explain why Chief Justice Warren insisted on attributing

....

He felt that they might be whittled away.

....

He felt that they might be whittled away in part but that they could not be undone altogether.

Interview with Louis Finkelstein, *supra* note 50, at 2; cf. Michael Vitiello, *Miranda Is Dead. Long Live Miranda*, 54 TEX. TECH L. REV. 59, 75 (2021) ("We can only guess at how the Warren Court, had membership on the Court not changed so quickly, would have implemented *Miranda*. But, as the post-Warren Courts have narrowed *Miranda*, *Miranda* protects the wrong suspects.").

Along similar lines, according to one contemporaneous report of Chief Justice Warren's reaction to the lecture he attended on the ban on self-incrimination in Jewish law: "He felt that Talmudic ethical values were as valid today as ever because without their moral force, our legal system would collapse under the weight of the very police force which would be required ostensibly to support it." Roemer, *supra* note 61; see also Interview with Louis Finkelstein, *supra* note 50, at 11 (declaring that when Warren began his public career as an assistant district attorney, "[i]t was then that he became interested in the rights of the accused, because he saw that firsthand, and saw how important it was to protect the accused").

⁶⁴ See *supra* Part I.

ancient and divine roots to the privilege against self-incrimination; why he cited Maimonides' *Mishneh Torah* instead of the Talmud; why he relied on Maimonides' characterization of the rule against self-incrimination in Jewish law as a divine decree rather than referencing Maimonides' psychological explanations for the rule; and why he juxtaposed the protections provided by *Miranda* warnings with the conceptually dissimilar and absolute protections against self-incrimination in Jewish law.

As an initial matter, it is clear from Chief Justice Warren's comments following his visit to JTS that he was particularly taken with both the scope of the protections against self-incrimination provided in the Jewish legal system and the "sacred" and "ancient" authority of these laws.⁶⁵ Moreover, he seemed to contrast the significance of the degree of protections in ancient Jewish law against the "measure of protection" that was found in American law.⁶⁶ Accordingly, to the extent that Chief Justice Warren favored broader protections, even beyond those offered by *Miranda* warnings, and given his appreciation for a sacred and ancient rule that likewise goes further than *Miranda*—it is fitting that the passage in *Miranda* expressly states that the "roots" of the privilege "go back to ancient times"⁶⁷ and that the footnote quotes the passage from Maimonides' *Mishneh Torah* supporting the proposition that the origins of the law are both ancient and sacred.⁶⁸

Perhaps for the same reasons, Chief Justice Warren decided not to quote the Talmudic discussion of the ban on self-incrimination in Jewish law. Although the Talmudic text may arguably be characterized as ancient, it is certainly not as ancient as the Bible.⁶⁹ Moreover, unlike the passage in *Mishneh Torah*, the Talmudic dictum that precludes criminal confessions does not identify the sacred authority of the rule.⁷⁰

A similar understanding may explain why the footnote did not quote the discussion in *Mishneh Torah* that presents a

⁶⁵ Amper, *supra* note 49, at 10.

⁶⁶ *Id.*

⁶⁷ *Miranda*, 384 U.S. at 458.

⁶⁸ *Id.* at 458 n.27 (citing MAIMONIDES, *supra* note 13).

⁶⁹ See STEINSALTZ, *supra* note 24, at 3.

⁷⁰ See Babylonian Talmud, *supra* note 25.

psychological explanation for the rule against self-incrimination,⁷¹ even though it may seem a better fit for a comparative law analysis between Jewish law and American law, and as such, it was cited at length in *Garrity*.⁷² Perhaps Chief Justice Warren was not looking to the Jewish legal system for the purpose of presenting a persuasive analysis of conceptual comparative law. Instead, he was aiming to uncover the ancient origins and sacred nature of the law, neither of which is demonstrated through Maimonides' psychological approach. Furthermore, perhaps Chief Justice Warren was concerned that the psychological emphasis might be seen as detracting from the ancient and sacred aspects of the law, and he therefore eschewed the psychological explanation, first offered by Maimonides in medieval times, which might potentially be viewed as inconsistent with ancient perspectives.

Along these lines, to the extent that Chief Justice Warren's intention—if not in *Miranda* itself, then perhaps as part of a long-term goal—was to develop even broader protections for the privilege against self-incrimination, he might have preferred the bright-line rule presented in the passage he quoted from Maimonides, referencing the outright ban on criminal confessions in Jewish law.⁷³ In contrast, the psychological rationale for restricting confessions may be seen as lending itself to exceptions and qualifications, instead facilitating a case-by-case application. In fact, in his concurring opinion in *Miranda*, Justice Clark critiqued and rejected the majority's bright-line rule in favor of a case-by-case consideration of custodial interrogation.⁷⁴ Relying on the bright-line rule in Jewish law was perhaps part of Chief Justice Warren's response to such a critique, designed to buttress both *Miranda* and any further expansions of Fifth Amendment privilege.

This understanding of Chief Justice Warren's aims and intentions may also better explain the seeming disconnect between the two rules he was comparing in *Miranda*. The establishment of *Miranda* warnings represented a landmark in

⁷¹ See MAIMONIDES, *supra* note 13.

⁷² *Garrity v. New Jersey*, 385 U.S. 493, 497 n.5 (1967).

⁷³ See MAIMONIDES, *supra* note 13.

⁷⁴ See *Miranda v. Arizona*, 384 U.S. 436, 499-504 (1966) (Clark, J., dissenting in part and concurring in result).

Fifth Amendment jurisprudence and a leap forward in the protection against self-incrimination in the American legal system.⁷⁵ Still, these protections fall so far short of the absolute ban on confessions in Jewish law as to render their comparison somewhat problematic. If anything, the juxtaposition of the two rules seems to highlight the relatively minimal protections afforded under *Miranda*.⁷⁶

Perhaps, though, Chief Justice Warren was setting the stage for a further development in American law that would incorporate broader protections against self-incrimination. If nothing else, as a practical matter, *Miranda* was not the case where such a goal could be accomplished. As it turned out, even the establishment of *Miranda* warnings was highly controversial, barely achieving the majority position of the Court and prompting the sharp criticism of one concurring justice, three dissenters, much of the law enforcement community, and many scholars.⁷⁷ In hindsight, even

⁷⁵ See Ronald J. Rychlak, *Baseball, Hot Dogs, Apple Pie, and Miranda Warnings*, 50 TEX. TECH L. REV. 15, 15 (2017) (“When the United States Supreme Court first adopted the *Miranda* rule, it was new and exotic.”).

⁷⁶ See *supra* Part I.

⁷⁷ See, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 19, 19 n.57 (2004) (citing Justice Harlan’s *Miranda* dissent as well as a number of “especially prominent assaults” leveled on *Miranda* by legal scholars); cf. Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69 (1989):

It is disheartening that, at this late date, serious scholars still contend that the appropriate means for resolution of the tension between state security and individual dignity is disincorporation of the fifth amendment to allow interrogation of suspects by magistrates, or a return to a variant of the ad hoc, totality-of-the-circumstances test for determining the voluntariness of confessions. The former turns the accusatorial system on its head, even though it is designed to prevent de facto inquisitorial examinations by the police. The latter is a time-tested prescription for failure. While we do not denigrate government’s need to deal effectively with criminal conduct, there is scant evidence that *Miranda* is either an impediment to effective law enforcement or, more specifically, a significant obstacle to conviction.

Even so, *Miranda* apparently has become a scapegoat for all the intractable criminal law problems facing this country. Crime abounds, and we do not know what to do about it. Why people commit crimes, how to stop them, how to sentence them, and how to control the scourge of drugs are all unanswered

the gains in *Miranda* continued to be challenged on numerous grounds, including the argument (left unresolved until the year 2000) that mandating *Miranda* warnings did not have constitutional authority⁷⁸—in addition to a series of subsequent Supreme Court decisions that curtailed the effects of *Miranda*.⁷⁹

Finally, this understanding of the additional implications of the *Miranda* opinion—along with the accompanying hypothesis regarding the possibility of Chief Justice Warren’s broader intentions—offered on the basis of excavating the sources of his knowledge of Jewish law and the logic of his citations to Jewish legal sources, is also consistent with the way the dissenting

questions. On a gut level at least, the problem of crime appears insoluble. Yet the public demands action. In the absence of meaningful solutions, critics seem to say, let us be rid of legal technicalities such as exclusionary rules that ostensibly allow criminals to evade justice. Let *Miranda*, not crack, serve as public enemy number one. Better still, tie them together casually. There is more crack because of *Miranda*; therefore, *Miranda* must go. But if, after *Miranda* is gone, the same problems still persist, what constitutional guarantee will have to be sacrificed next?

Id. at 114-15 (footnotes omitted).

⁷⁸ See *Dickerson v. United States*, 530 U.S. 428 (2000); see also Levine, *Miranda*, *Dickerson*, and *Jewish Legal Theory*, *supra* note 4, at 78.

⁷⁹ See Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1521 (2008) (“In the more than four decades since *Miranda* was decided, the Supreme Court has effectively encouraged police practices that have gutted *Miranda*’s safeguards, to the extent those safeguards ever truly existed. The best evidence now shows that, as a protective device, *Miranda* is largely dead.”); *id.* at 1524 (“I have long been an advocate of the *Miranda* decision and its theoretically bright-line rules. This research has changed my beliefs. After a more comprehensive review of police training materials, social science literature, and post-*Miranda* decisions, I have concluded that little is left of *Miranda*’s vaunted safeguards and what is left is not worth retaining.”); cf. *Dickerson*, 530 U.S. at 441-42 (noting “the fact that we have, after our *Miranda* decision, made exceptions from its rule” and citing several cases); Rosenberg & Rosenberg, *supra* note 77, at 81-82 (“Despite calls to overrule *Miranda*, the Justices have declined to do so. Instead, the Burger and Rehnquist Courts have settled on a policy of chilling containment of the controversial ruling. In a variety of ways, the Court has undercut the decision, hollowing out its core while maintaining a pretext of viability.” (footnotes omitted)). See generally Alfredo Garcia, *Is Miranda Dead, Was it Overruled, or Is it Irrelevant?*, 10 ST. THOMAS L. REV. 461, 461-64 (1998); Alfredo Garcia, *Regression to the Mean: How Miranda Has Become a Tragicomical Farce*, 25 ST. THOMAS L. REV. 293, 293-95 (2013); Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965, 980-91 (2012); Leo et al., *supra* note 2, at 808; Vitiello, *supra* note 63, at 76-79.

Justices in *Miranda* characterized his approach.⁸⁰ Justice Harlan, in a dissent joined by Justices Stewart and White, asserted that although the “fine points” of the rule designed by the majority were “far less clear than the Court admits,” he nevertheless found “the tenor” of the majority opinion to be “quite apparent.”⁸¹ According to Justice Harlan, “[t]he new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion.”⁸² Instead, he declared, “the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward ‘voluntariness’ in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.”⁸³

Though Justice Harlan’s characterization of the “tenor,” the “thrust,” and the “aim” of the majority opinion remains open to debate and may prove overstated, his reaction may reveal underlying characteristics and implications latent in Chief Justice Warren’s position. Indeed, though unstated as such in the opinion, the inclusion of a reference to the rule against self-incrimination in Jewish law supports a reading of the majority as potentially inclined toward a broader expansion of protections against self-incrimination, incorporating policies that, at least arguably, “discourage any confession at all.”⁸⁴

Moreover, Chief Justice Warren’s reliance on an ancient religious law, grounded in a divine decree that included an

⁸⁰ Cf. Rosenberg & Rosenberg, *supra* note 77, at 75-81 (analyzing the underlying attitudes in the majority and dissenting opinions in *Miranda*). Rosenberg & Rosenberg state:

On the whole, therefore, it is fair to say that although the *Miranda* majority and dissent disagreed sharply concerning the value of confessions and their utility in the criminal justice process, both sides concurred in the view that a sweeping change was in the offing—if not a world devoid of confessions, at least one in which confessions were far less central in enforcement of the criminal law.

Id. at 81.

⁸¹ *Miranda v. Arizona*, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

outright ban on self-incrimination,⁸⁵ rings of the kind of “utopian” view that Justice Harlan found present in the majority opinion.⁸⁶ Thus, Justice Harlan’s reading of the opinion is consistent with the hypothesis that, indeed, Chief Justice Warren intended *Miranda* warnings to be a gradual step toward a broader expansion of the right against self-incrimination. In short, it may be possible to suggest that these aspects of the majority opinion, though seemingly anomalous and subject to criticism by Justice Harlan, were a feature rather than a bug.

Justice White’s dissent, joined by Justices Harlan and Stewart, goes even further in identifying and critiquing not only the logic of the majority opinion, but also the broader yet unstated premise underlying Chief Justice Warren’s expansion of Fifth Amendment rights.⁸⁷ As Justice White flatly put it, “The obvious underpinning of the Court’s decision is a deep-seated distrust of all confessions.”⁸⁸ In support of this proposition, Justice White argued:

As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not.⁸⁹

Finally, Justice White concluded, “This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself.”⁹⁰

Here too, though, perhaps these elements of the majority opinion, which the dissent found to raise troubling implications, were instead part of a larger goal to further expand the protections against self-incrimination afforded to a criminal

⁸⁵ See *id.* at 458 n.27 (majority opinion) (quoting MAIMONIDES, *supra* note 13).

⁸⁶ *Id.* at 505 (Harlan, J., dissenting).

⁸⁷ *Id.* at 526-45 (White, J., dissenting).

⁸⁸ *Id.* at 537.

⁸⁹ *Id.* at 537-38.

⁹⁰ *Id.* at 538.

suspect, beyond those offered through the *Miranda* warnings.⁹¹ In fact, as it turns out, “a deep-seated distrust of all confessions”⁹² is consistent with both the bright-line rule in Jewish law and the psychological rationale for the rule proposed by Maimonides and elucidated in Rabbi Lamm’s article.⁹³

III. IMPLICATIONS FOR THE FUTURE

Finally, it may be worthwhile to consider possible applications of this reading of Chief Justice Warren’s majority opinion in *Miranda*, to excavate even further the potential implications of a position that favors a broader expansion of the privilege against self-incrimination, beyond those provided by the

⁹¹ Contemporary scholars likewise argued that *Miranda* would abolish the use of criminal confessions altogether. See, e.g., Christopher Dinkel, *Embracing Miranda’s Mandate: Improving Confessional Reliability and Fairness Through Legislative Action*, 57 CRIM. L. BULL. 198, 212 n.90 (2001) (stating that “critics at the time certainly feared that the decision would effectively abolish the use of confessions in criminal cases”); *id.* (citing Sam J. Erwin, Jr., *Miranda v. Arizona: A Decision Based on Excessive and Visionary Solicitude for the Accused*, 5 AM. CRIM. L.Q. 125, 128 (1967) (“*Miranda* has left the police handcuffed.”)); Raymond L. Spring, *The Nebulous Nexus: Escobedo, Miranda, and the New 5th Amendment*, 6 WASHBURN L.J. 428, 442 (1967) (“[T]he court has allowed its moral judgment to force it beyond interpretation of the Constitution and into the realm of amendment.”); see also Mark Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1010 (1988) (“[S]ome authorities may have feared that *Miranda* would mean the end of confessions . . .”).

⁹² *Miranda*, 384 U.S. at 537 (White, J., dissenting).

⁹³ See generally MAIMONIDES, *supra* note 13; Lamm, *supra* note 14.

Notably, both dissenting opinions, though generally critical of the majority’s historical and comparative law analysis, do not address Chief Justice Warren’s references to Jewish law. For example, Justice Harlan found that: “The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of the accused as against those of society when other data are considered.” See *Miranda*, 384 U.S. at 521-22 (Harlan, J. dissenting). Of course, the Jewish legal system, cited in the majority opinion but left unmentioned in Justice Harlan’s dissent, offers a counterexample of a law that has a broader conception of the rights of the accused. Similarly, at the start of his dissent, Justice White declared that: “The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment.” *Id.* at 526 (White, J., dissenting).

Thus, both Justice Harlan and Justice White blithely omitted any acknowledgment of Chief Justice Warren’s citations to Jewish law and their significance, thereby arguably undermining the strength of their critique of the majority opinion’s historical and comparative analysis.

Miranda warnings. At the time *Miranda* was decided, whatever long-term goals or preferences informed Chief Justice Warren's views—in the words of the dissenters, whatever unstated “tenor,” “thrust,” “aim,”⁹⁴ or “underpinning”⁹⁵ might be found latent in the opinion—it would have seemed unlikely to fathom a further extension of the protections against self-incrimination.

After all, even the establishment of *Miranda* warnings, which do not otherwise work to limit the use of voluntary confessions as a powerful and highly probative form of evidence, proved markedly controversial. In addition to the immediate objections of four justices accompanied by protests among much of the law enforcement community at the time, *Miranda* faced an almost immediate backlash.⁹⁶ Subsequent Supreme Court decisions soon curtailed the extent and effects of the protections that *Miranda* had provided, while some critics challenged its very constitutional legitimacy—an argument left unresolved until a divided Supreme Court finally settled the matter in the year 2000.⁹⁷ Thus, even if he had hoped to pursue a broader agenda to further expand the right against self-incrimination, there is little reason to believe that Chief Justice Warren would have had any chance of success.⁹⁸

⁹⁴ See *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting).

⁹⁵ See *id.* at 537 (White, J., dissenting).

⁹⁶ See, e.g., Berger, *supra* note 91, at 1008 (“In 1966, *Miranda* provoked a storm of opposition from police and prosecution sources, and a spirited defense from civil rights advocates and the academic community.”); Godsey, *supra* note 33, at 502 (“The curative benefits of *Miranda* were fleeting, as a newly constructed Court began turning back the clock to the due process era shortly after *Miranda* was decided.”); Michael Vitiello, Arnold Loewy, Ernesto Miranda, Earl Warren, and Donald Trump: Confessions and the Fifth Amendment, 52 TEX. TECH L. REV. 63, 71-75 (2019) (documenting “*Miranda*’s Backlash”).

⁹⁷ See *Dickerson v. United States*, 530 U.S. 428 (2000).

⁹⁸ See Michael Vitiello, *Introducing the Warren Court’s Criminal Procedure Revolution: A 50-Year Retrospective*, 51 U. PAC. L. REV. 621, 625 (2020) (“The Court’s criminal procedure revolution came at a cost. By 1968, 63 percent of Americans believed that the courts were too lenient on criminal defendants. The *Miranda* decision was especially troubling to many Americans. Indeed, in some states this revolution led to the call to ‘IMPEACH EARL WARREN,’ as some billboards demanded. Many Americans also blamed the Supreme Court for increasing crime rates during that period. And crime rates were arising rapidly. Members of Congress reacted with numerous committee hearings into the causes of crime. In 1968, Congress purportedly ‘overruled’ *Miranda* in the far-reaching Omnibus Crime Control and Safe Street Act. Not surprisingly, the Supreme Court became a campaign issue during the 1968 Presidential election.” (footnotes omitted)).

In recent years, however, much of the criminal justice landscape has changed—including popular, scholarly, and judicial attitudes toward criminal justice generally and attitudes toward criminal confessions in particular. This change in attitudes might provide the backdrop for the consideration of similar changes broadening the scope of protections governing the use of criminal confessions.

One of the most significant changes in attitudes toward criminal confessions stems from the growing awareness of the problem of false confession, casting doubt on the formerly undisputed evidentiary value of self-incriminatory statements.⁹⁹ What was once accepted as conventional wisdom and viewed as common sense is no longer taken for granted.¹⁰⁰ Indeed, the

⁹⁹ See Brian Cutler, Keith A. Findley & Danielle Loney, *Expert Testimony on Interrogation and False Confession*, 82 UMKC L. REV. 589, 590 (2014) (“We now know that both the perception of virtual infallibility of the justice system and the intuitive sense that no one would confess to a serious crime he or she did not commit were false. The DNA exonerations of the past few decades and the study of false confessions have demonstrated both that error in criminal cases is real and more common than ever believed and that false confessions are one of the leading contributors to wrongful conviction.”); Leo et. al., *supra* note 2 (“[A]n estimate of the frequency or rate of false confessions would be pure guesswork. We also do not know the frequency or rate at which false confessions lead to wrongful conviction. Nevertheless, false confessions, and wrongful convictions based on false confessions, occur with troubling frequency and regularity in the American criminal justice system. Hundreds of proven (i.e., indisputable) false confessions have been documented in recent decades, the vast majority of them for murder and other serious felony cases. And, as we have seen, seventy-three to eighty-one percent of the time when false confessions are introduced at trial, the defendant has been wrongfully convicted. More than twenty-five percent of the now more than 300 postconviction DNA exonerations since 1989 involved cases with false confessions. Because they are rarely publicized or reported in the media and because of the difficulty of unequivocally establishing the ground truth when they are, the hundreds of proven false confessions that have been documented in the last two decades are believed to be the tip of a much larger iceberg, as many have pointed out. The proverbial iceberg may be shockingly large if, as Sam Gross and his colleagues have speculated based on what we do know, the number of wrongfully convicted prisoners in the last fifteen years is in the ‘tens of thousands.’” (footnotes omitted)).

¹⁰⁰ Eugene R. Milhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1 (2008):

Confessions are uniquely powerful evidence of guilt at a criminal trial. Common sense suggests that a person will not willingly confess to a crime unless the person is guilty. This assumption is widely accepted by police, prosecutors, defense attorneys, and judges. Juries are especially likely to accept confessions at face value. As one commentator put it, “confession

question of why an innocent person would ever confess, which in the past was posed as a rhetorical question, is now a question that

evidence is a prosecutor's most potent weapon—so potent that . . . 'the introduction of a confession makes the other aspects of a trial in court superfluous.'" The Supreme Court, lower courts, various legal commentators, and psychological studies have recognized the singularly decisive impact of confession evidence.

Id. at 4-5 (footnotes omitted); *see also id.* at 8:

Several reasons have been offered to explain why jurors are unlikely to believe that a defendant who confessed could nonetheless be innocent. First, jurors are prone to commit a "fundamental attribution error," which leads them to misattribute the cause of the confession to being internal to the confessor (e.g., actual guilt) while discounting external situational factors (e.g., police coercion, desire for notoriety, protection of the real perpetrator). Second, because confessing appears to conflict with a defendant's self-interest, jurors assume that the defendant would not falsely confess absent police misconduct. Third, jurors tend to attach greater credibility to testimony based on personal knowledge, and a defendant's confession, more than other types of evidence, ostensibly exhibits first-hand knowledge of the crime at issue. For all these reasons, jurors attach overwhelming weight to confessions, even in the face of other evidence that discredits them.

Id. (footnotes omitted); *see also* Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871 (2008):

[A] confession of guilt is considered "among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession." The high probative value attributed to confessions derives from the widespread belief that people are unlikely to confess to crimes they did not commit. It is common sense to expect self-serving behavior in others, and the strong disincentives to self-incriminate lead many to conclude that confessions are a highly reliable proof of guilt and that false confessions are an extremely rare occurrence. Ironically, it is these very elements that give rise to the danger of using confessions: Wrongful conviction. It is the persuasiveness of a confession as evidence of guilt that has made false confessions one of the most common sources of erroneous proof of guilt.

Id. at 874 (footnotes omitted); *see also supra* note 35.

calls out for answers, as part of an effort to prevent false confessions in the future.¹⁰¹

The increasing realization that innocent suspects might confess to crimes they did not commit harkens back to Maimonides' insights into the psychology and possible motivations behind false confessions.¹⁰² Despite the establishment of *Miranda* warnings, the kind of psychological coercion that gave rise to *Miranda* often remains an inherent feature of custodial interrogation,¹⁰³ prompting the need for broader protections

¹⁰¹ See, e.g., Tonja Jacobi, *Miranda 2.0*, 50 U.C. DAVIS L. REV. 1 (2016):

Scholars have identified three different kinds of false confessions: (1) “voluntary” false confessions; (2) “compliant” false confessions; and (3) “internalized” or “persuaded” false confessions. Voluntary false confessions arise without pushing or prodding from police, sometimes out of a “pathological need for attention or self-punishment, feelings of guilt or delusions, the perception of tangible gain, or the desire to protect someone else.” Compliant false confessions occur when “the suspect acquiesces in order to escape from a stressful situation, avoid punishment, or gain a promise or implied reward.” Internalized false confessions involve “innocent but vulnerable suspects, exposed to highly suggestive interrogation tactics, [who] not only confess but come to believe they committed the crime in question.”

Id. at 11-12 (alteration in original) (footnotes omitted).

¹⁰² See generally MAIMONIDES, *supra* note 13; see also Levine, *An Introduction to Self-Incrimination in Jewish Law*, *supra* note 4; Levine, *Rethinking Self-Incrimination*, *supra* note 4.

¹⁰³ See, e.g., Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 910 (2004) (“As psychological methods of interrogation have evolved over the years, they have become increasingly sophisticated, relying on more subtle forms of manipulation, deception, and coercion.”); *id.* at 918-19 (“The primary psychological cause of most false confessions is, therefore, the investigator’s use of improper, coercive interrogation techniques. Although the phenomenon of interrogation-induced false confessions is counter-intuitive, it can be easily understood once the techniques, logic, and effect of modern interrogation are methodically analyzed and explained.”); Henderson & Krishnamurthi state:

Miranda is rightly considered a watershed case of criminal procedure. The Court looked to actual policing practice to recognize what amounted to a regime of flagrant rights violation, and then took the unprecedented step of setting forth a specifically tailored solution. But as pivotal as it must have seemed, *Miranda* has come to be seen by many as a failure. That is in large

part because of the operation of “consent.” *Miranda* requires that an interrogation subject be warned, such that the request for interrogation be informed, and, theoretically, that any given permission thus must be voluntary. Yet the empirical evidence reveals that these warnings do little to stem the tide. Some of the very same techniques law enforcement use to psychologically coerce confessions are deployed to psychologically coerce waiver of one’s *Miranda* rights, taking us back to square one.

Stephen E. Henderson & Guha Krishnamurthi, *A Wolf in Sheep’s Attire: How Consent Enfeebles Our Fourth Amendment*, 85 OHIO ST. L.J. 33, 63-64 (2024) (footnotes omitted); see also Guha Krishnamurthi, *The Case for the Abolition of Criminal Confessions*, 75 SMU L. REV. 15, 39 (2022) (“The atmosphere of the interrogation and the investigation may itself be so overwhelming that a defendant feels compelled to confess.”); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1827 (1987) (“Although *Miranda* warnings may seem adequate from the detached perspective of a trial or appellate courtroom, in the harsh reality of a police interrogation room they are woefully ineffective.”); Rosenberg & Rosenberg, *supra* note 7, at 1043-44 (“Inability to choose freely whether to assist the prosecution in securing one’s own conviction—no matter how reliable or ostensibly imperative that assistance may be—is by any other name coercion.”); Rosenberg & Rosenberg, *supra* note 77, at 109-10 (“It is our view, however, that suspects who are in custody cannot make truly voluntary or noncompelled confessions Although *Miranda* focused on the inherent coerciveness of custodial interrogation, it is custody in and of itself that is coercive.” (emphasis in original)); Schulhofer states:

[W]hatever one may think of *Miranda*, it is clear—and uncontroversial—that pressure need not rise to the level of overbearing physical or psychological coercion, in the due process sense, before it is sufficiently compelling to violate the Fifth Amendment.

. . . .

. . . [A] formalistic showing of compulsion by legal process or official punishment cannot be essential Indeed, as the *Miranda* Court noted . . . the “interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.” As a result, the typical custodial police interrogation, even if not brutally coercive in the due process sense, will readily (perhaps almost invariably) violate the Fifth Amendment bar on the use of compelling pressure, at least in the absence of safeguards sufficient to dispel that pressure.

Schulhofer, *supra* note 63, at 551-53 (quoting *Miranda v. Arizona*, 384 U.S. 436, 457 (1966)); see also Lance H. Selva, William L. Shulman & Stephen Reid, *Reliability Assessments as a Condition for the Admissibility of Confessions in Tennessee*, 40 LAW & PSYCH. REV. 81, 92-93 (2016) (“Though *Miranda* went far in attempting to protect the

against self-incrimination implicit in aspects of Chief Justice Warren's majority opinion.

Over the years, scholars have proposed a variety of responses to the abiding problem of false confessions,¹⁰⁴ from changes in methods of interrogation¹⁰⁵ through sentencing considerations,¹⁰⁶

privilege against self-incrimination, it did not go far enough in confronting various forms of psychological pressure. There has been little systemic reform of the interrogation process since the *Miranda* decision, notwithstanding the concerns raised by commentators, legal scholars, and social scientists over the fundamental fairness of our legal system that has evidenced a frequency of wrongful convictions and, more recently, numerous false confessions.”); Weisselberg, *supra* note 79, at 1529 (“How are interrogations conducted today? Does the contemporary process of interrogation still support the legal conclusion that custodial interrogations contain inherently compelling pressures that undermine the Fifth Amendment privilege? I believe that, as a general matter, the answer is yes. Present-day investigators are better trained than their 1960s counterparts, but the basic psychological approach to interrogation described in the *Miranda* decision remains prevalent in the United States.”); Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001).

¹⁰⁴ See, e.g., Cutler, Findley & Loney, *supra* note 99, at 590 (“As wrongful convictions and false confessions become widely recognized as problems confronting the criminal justice system, courts struggle with mechanisms to prevent such errors. As one appellate court recently declared, ‘[i]t is this court’s opinion that it is time . . . to tackle the false confession issue.’” (alteration in original) (quoting *State v. Jerrell C.J.*, 674 N.W.2d 607, ¶ 32 (Wis. Ct. App. 2003), *aff’d*, 699 N.W.2d 110 (Wis. 2005))).

¹⁰⁵ See, e.g., Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 730 n.120 (1988) (citing proposals that “provide[] for the questioning of the suspect before trial by the magistrate, the prosecutor, or the police at the initial appearance or a preliminary hearing”); Godsey, *supra* note 33, at 473 (proposing “the ‘objective penalties test,’ based on the self-incrimination clause, in which the touchstone for admissibility would be compulsion rather than voluntariness, “ which “would hold inadmissible confessions that had been obtained by imposing an objective penalty in any form on the suspect to punish silence or provoke speech”); Leo, *supra* note 63, at 681-82 (“I will argue that substantive due process requires that we legally mandate the electronic-recording of custodial interrogations in all felony cases.”); Ogletree, *supra* note 103, at 1830 (“I would propose the adoption, either judicially or legislatively, of a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney. If, after conferring with counsel, a suspect desires to make a statement, it may be used against her. Any statements made without the assistance of counsel, however, would be inadmissible.”).

One article, authored in 2016, “catalogs and assesses the main branches of reform of *Miranda* that have been considered over the last fifty years.” Jacobi, *supra* note 101, at 7. The article delineates three categories of proposed reforms: (1) “rules attempting to promote a more genuine understanding of suspects’ rights . . . includ[ing] changing the content of the warnings to make them more informative and standardizing the procedure of giving the warnings”; (2) “rules designed to better deter police coercion . . . includ[ing] establishing a per se rule of exclusion, requiring that an attorney be present

and all points between.¹⁰⁷ Some of the more self-consciously radical proposals have called for a ban on the admissibility of self-incriminatory statements elicited through police interrogation,¹⁰⁸

at all interrogations, and requiring greater transparency in police procedures”; (3) “rules that change the substance of *Miranda* to better reflect its overarching aims . . . includ[ing] . . . prohibiting police deception, and reconsidering the jurisprudence of waiver.” *Id.* at 7-8. The article recommends that:

Miranda 2.0 should consist of: warning suspects how long they can be interrogated for; delivering the warnings via a non-police intermediary, preferably a pre-approved audio-visual recording; recording all interrogations; varying the strength of warnings according to characteristics that make suspects differently susceptible; and reforming and simplifying the rules of waiver.

Jacobi, *supra* note 101, at 7-8. *But see, e.g.*, Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda’s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685, 687 (2017).

¹⁰⁶ See, e.g., Fisher & Rosen-Zvi, *supra* note 100, at 873 (“We suggest increasing the cost of confessions relative to other types of evidence by imposing a ‘penalty’ on the state for using confessions to convict, in the form of a reduced sentence.”); Scott W. Howe, *Moving Beyond Miranda: Concessions for Confessions*, 110 NW. U. L. REV. 905, 961 (2016) (“I have urged a supplemental system of sentencing concessions for custodial admissions.”).

¹⁰⁷ See, e.g., Cutler, Findley & Loney, *supra* note 99, at 590 (“This article examines the need and bases for expert testimony on false confessions in criminal cases.”). See generally Kelsey S. Henderson & Lora M. Levett, *Can Expert Testimony Sensitize Jurors to Variations in Confession Evidence?*, 40 LAW & HUM. BEHAV. 638 (2016); Leo et. al., *supra* note 2, at 818-19 (“[N]umerous legal scholars have voiced their support for pretrial reliability hearings to screen unreliable confession evidence.”).

¹⁰⁸ See, e.g., Tracey Maclin, *A Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at Miranda v. Arizona*, 95 B.U. L. REV. 1387, 1389-90 n.7 (2015) (“Some scholars have proposed banning police interrogation because it is coercive.” (first citing OTIS H. STEPHENS, JR., *THE SUPREME COURT AND CONFESSIONS OF GUILT* 205 (1973) (stating that only a ban on police interrogation would eliminate the coercion that prompted *Miranda*); then citing Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 60-61 (1968) (suggesting that barring police interrogation may be required to end coercion of suspects); then citing Rosenberg & Rosenberg, *supra* note 77, at 110-11 (arguing for a ban on custodial confessions); and then citing Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 21, 46 (1961) (arguing that police questioning is “irreconcilable with the privilege”)).

“More recently, in a 1988 article, Professor Donald Dripps wrote that he is *against* police interrogation as employed in America, *and* against the privilege of self-incrimination.” Maclin, *supra*, at 1390 n.7 (citing Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 702 (1988)); see also Rosenberg & Rosenberg, *supra*, at 112 (“Stated another way, this alternative does no more than go beyond *Miranda* by substituting for

or even an outright ban on the evidentiary use of criminal confessions.¹⁰⁹

Even now, with the current changes in attitudes toward confessions, the possibility of abolishing confessions or substantially curtailing police interrogations seems highly unlikely. And yet, perhaps these and similar proposals, once deemed extreme and unthinkable, may have a chance to enter into conversation and thereby have the capacity to effect change. Excavating *Miranda* in a way that uncovers the underlying implications of the opinion, if not the unstated intentions of Chief Justice Warren, may provide a mechanism for expanding the conversation, and in so doing, may offer a framework for expanding the right against self-incrimination beyond the contours of *Miranda*.¹¹⁰

its warning and waiver system a per se rule of inadmissibility that extends to ostensibly volunteered statements made in custody. In short, this is a modest but helpful proposal.”); Vitiello, *supra* note 96, at 65 (“I propose a different alternative. The Court should outlaw all custodial interrogation.”).

¹⁰⁹ See Henderson & Krishnamurthi, *supra* note 103, at 64; see also Guha Krishnamurthi, *Diversity in Decision-Making in the Criminal Justice System*, 61 S. TEX. L. REV. 483, 485 (2021) (describing “the extreme solution of abolishing confession evidence”); cf. Rosenberg & Rosenberg, *supra* note 77, at 112-13 (“Indeed, there is an even more drastic proposal that could be made—namely, that all confessions, whether voluntary or compelled, reliable or spontaneous, and whether made in custody, in court, or to government officials, be deemed inadmissible in evidence in criminal proceedings—that is, that confessions be considered of no evidentiary value. We have a philosophical predilection for such a position, which reflects the ancient Talmudic rule. We recognize, however, that this position may be considered in tension with the fifth amendment prohibition, which is directed solely to compelled self-incriminating testimony.”).

¹¹⁰ Cf. Rosenberg & Rosenberg, *supra* note 77, at 114-15 (“This proposal to eliminate the use of custodial confessions is not a Swiftian gesture. It is only the nature of the contemporary national debate concerning *Miranda* that may make it appear so. In the criminal law area at least, jurisprudence seems to be backing into the future. . . . If nothing else, we hope that this proposal can help to move the debate to a slightly more reasonable position on the ideological spectrum. After all, the evolving content of the due process clause in no small measure reflects this country’s maturation as a civilized society. Surely the movement from the early decisions prohibiting physical brutality in the extraction of confessions to *Miranda*’s prophylactic rules bespeaks that truth. The trend has been to give more not less, to go forward not back, to refine rights rather than coarsen them. In this sense, the Warren Court was mainstream, and the Burger and Rehnquist Courts are aberrational. History dictates that we should examine how to strengthen fifth amendment protection rather than eviscerate it.”).

CONCLUSION

Sixty years since it was decided, *Miranda v. Arizona*—both groundbreaking and controversial in its time—remains the subject of ongoing discussion and debate. Chief Justice Warren’s majority opinion continues to fascinate scholars—both supporters and opponents—who offer various and often conflicting accounts of its meaning, impact, and implications. Among other striking aspects of the opinion, the references to Jewish law seem particularly surprising, if not anomalous, and perhaps somewhat misplaced.

Excavating the origins of Chief Justice Warren’s knowledge of these sources of Jewish law may help us uncover—or rediscover—some of the implications of the majority opinion that were apparent to—or suspected by—critics of the opinion, including Supreme Court justices, contemporary scholars, segments of the law enforcement community, and the general public. Specifically, Chief Justice Warren’s personal expressions of appreciation for the outright ban on confessions in the Jewish legal system—which he developed in his 1957 visit to the Jewish Theological Seminary of America—coupled with the opinion’s characterization of biblical law as the root of the privilege against self-incrimination, raises the implication of an intention to broaden Fifth Amendment protections beyond those provided by the *Miranda* warnings.

Although further expansion of the right against self-incrimination, beyond *Miranda*, might have been viewed as unimaginable in 1966, perhaps the current climate of criminal justice reform, focused in part on the problem of false confessions, provides an atmosphere for consideration of proposals that once seemed outside the realm of possibility. It may seem ironic, or perhaps fitting, that excavating *Miranda* after sixty years, through an exploration of Jewish law going back thousands of years, may help serve as an inspiration for moving forward on expanding the promise of the protections established in *Miranda*.