

Professor Weiler: It is my first pleasurable duty, apart from welcoming you all, to once again acknowledge our recognition and gratitude to the Gruss family and the Gruss Foundation for not only endowing the Chair, but making it such that the endowment would also enable us to pursue a lot of other activities in the context of Jewish law at NYU Law School. Second, I would like to recognize our outgoing scholar in residence Rabbi Dr. Gidon Rothstein. There will be a new scholar in residence next year. Finally, we have engaged in an expansion of our library and a variety of other activities, which take place under the auspices of the Gruss Program.

That was the hors d'oeuvres, now to the real meal. It is a pleasure to welcome this year's annual Gruss lecturer Professor Moshe Halbertal. Moshe Halbertal is Professor of Jewish Thought and Philosophy at the Hebrew University and, since last autumn, at NYU Law School. He will be giving the Gruss lecture this evening for the first time in this new capacity – not as a visitor but as a member of the faculty at NYU Law School. He is also a fellow at the Shalom Hartmann Institute. He received his Ph.D. from the Hebrew University in 1989. He was Fellow at the Society of Fellows at Harvard University and he has been a Visiting Professor at Harvard Law School, University of Pennsylvania Law School, and a Visiting Professor at NYU Law School until he was appointed to the faculty. He is an author of many books, of which I'll mention a few. One of them is called *Idolatry*, co-authored with Avishai Margalit, which I very-very warmly recommend – if you are going to read one thing by him that would be one of my favorites – and *People of the Book: Cannon, Meaning, and Authority*, both published by Harvard

University Press. He is also the author of the books *Interpretative Revolutions in the Making* and *Between Torah and Wisdom: Rabbi Menachem he-Meiri and the Maimonidean Halakhists*. His last book, published in Hebrew, is *Concealment and Revelation: The Secret and Its Boundaries in Medieval Jewish Tradition*, which was also a theme he picked up when he made a presentation to Ronald Dworkin's Legal Theory Workshop last year here at NYU Law School.

One other thing – I am sure you wouldn't want me to mention it – but Moshe Halbertal is the recipient of the Bruno Award of the Rothschild Foundation. That is the Israeli equivalent of the MacArthur Genius Awards. It is a great pleasure to welcome and invite Moshe.

Professor Halbertal: Thank you Joseph for the warm reception. It is an honor and pleasure to be here. My subject is self-incrimination and confession in Jewish law. I want to start with some general remarks about confession. Confession is a very complex speech act and it pervades, and is present, in different forms of social and cultural practices. It has a very serious presence in law. It is very hard to think of an indictment in criminal law today that doesn't have some elements of self-incrimination in it. It has a very deep presence in religion. It's attached to atonement and in present day practices it is endowed with enormous therapeutic importance. After all, the therapeutic process is a process of self-disclosure, in some ways confessional. It is also emerged as a literary genre and since Rousseau's *Confessions* it became a mode of writing. We endow confession with such force as if the burden of secrecy is greater than the potential of

shame. It is a bridge to self-revelation, it is an act that is supposed to close the gap between what's real and what's apparent.

I'd say there's almost an epidemic of confession, in the public and popular culture of talk shows, etc. I heard the following story that someone comes to a priest and says, "I must confess to you, I was for years stealing from the poor, exploiting the needy." So the Catholic priest, says, "Why are you coming now if you did it for years?" And he says, "Well I am a Jew." So the priest asks him, "So then why are you coming altogether?" He says, "Well, I'm telling everybody." Confession is, therefore, a very complex subject, very and deeply pervasive. What I would like to capture in my talk is the complexity of this subject within Jewish legal practices, but also within the process of repentance.

Let me start with something which is actually closer to what we learn here at the law school: self-incrimination in the legal criminal practice. In American law there is a very serious discussion about self-incrimination, but it's mainly about how can we define voluntary self-incrimination. A while ago, I was reading Peter Brooks' book *Troubling Confessions*, which is a wonderful contribution to the problem of what is voluntary confession. After all, admission has to be voluntary. And it is clear to us that there are different forms of coercion that need not be physical. There are ways of extrapolating admission without force but it's not clear if it is voluntary. For example, promises that are given to the potential confessor may be false, like claims that are made to the suspect that there is other evidence, etc. After reading Peter Brooks' book, you end up with the impression that in what is called, ironically, the interview room, it is very hard to imagine

that there is anything voluntary in that set-up. It is a complex problem of how someone can define "voluntary."

But when we come to Jewish law, it takes a very hostile attitude to self-incrimination altogether even if it is clearly voluntary. Self-incrimination is not accepted as criminal evidence in Jewish law and I want to spend some time trying to investigate why. Maimonides in his Code of Jewish Law says the following, "The court, however, is not in power to inflict the penalty of death or flagellation on the admission of the accused for it is possible that he was confused in mind when he made the confession. Perhaps he was one of those who are in misery, blithering souls who long for death, thrust the sword into their bellies... perhaps this was the reason that prompted him to confess to a crime he had not committed in order that he might be put to death." To sum up the matter, the principle that no man is to be declared guilty in his own admission – that's the ruling Jewish law. Maimonides claims that the reason for it is that self-incriminatory acts are completely unreliable. The way he speaks about it is: maybe this is a suicidal act.

But we can actually cast doubt on self-incrimination not only because of that. Guilt has a force to break causal chains, guilt has omnipotent power. I know some people who are guilt virtuosi who think that just by their wishing to harm someone it causes harm. And then the assumption of guilt is very common even if you didn't do anything. Also the need for self-sacrifice, which is I think underrated in present-day culture. The need to stand out even in a negative perverse fashion might motivate a false confession. The desire to become a scapegoat, and to take upon oneself to redeem and atone the

community and exorcise the sin from its midst might also play a central roll in volunteering incrimination. Therefore, we have plenty of reasons to assume that confession and self-incrimination have no evidentiary reliability, and that is Maimonides' position. In that respect criminal Jewish law is completely different. It rules out self-incrimination as an acceptable evidence altogether. And Maimonides claims that the reason for it is that it's an untrustworthy; it has very little to do with truth.

I want to examine the Talmudic discussions concerning self-incrimination. When we examine them, we come actually to slightly different conclusions than Maimonides. As I will try to show the Talmud might have given other principled reasons why confession is inadmissible which are not based on the problem of their trustworthiness. This issue might be apparent in a set of cases in the Talmud where self-incrimination and confession implicate another person's legal status, not only the one who makes the admission. A classic case in the Mishnah is the case of Agunah. Agunah is a woman whose husband is not there, we don't know where he is, and she is incapable of marriage because it's not clear that her husband died, but on the other hand she cannot get divorced. The Mishnah presents a case in which there comes a person and says, "Your husband is dead, I killed him." Now the Mishnah mentions a debate. According the majority opinion, she is permitted to be married, it's acceptable. The court doesn't incriminate him because this is an act of self incrimination. (And he is not allowed to marry her. Naturally that's understandable because that would cast doubt on the nature his evidence). That's the majority opinion. This position seems to contradict Maimonides reasoning because if self-incrimination is all about doubting the truthfulness

of the confession, why should the majority opinion in the Mishnah change her status following his admission to be a murderer? The minority view in the Mishnah -Rabbi Judah - says that if he says I killed him, she cannot be married, you cannot trust this statement to allow her marriage.

Presumably the position of Rabbi Yehuda fits Maimonides approach. Yet, when we look at the Talmud's reasoning, why Rabbi Judah says that this is an unacceptable testimony, we come into something which is I believe very deep about confessions in general. In the Talmud *Yerushalmi*, Rabbi Yehuda's opinion is explained in the following manner: "I killed him," you don't accept it. Why? If he killed him and he is a murderer, a murderer cannot bring testimony. This is why you don't accept this testimony." The Talmud introduces here what I would call the "crook" paradox which threatens every confession. If we believe the confessor, that he killed the husband, then he cannot be a witness. A murderer cannot be a witness. This argument resembles the famous "liar paradox." When someone comes in and says, "I am a liar," it is a paradoxical moment. If you believe it, can you believe it? Now someone comes and says to the aguna: "Your husband is dead. I killed him." Well, if you killed him then there is a good reason why not to believe you. I remember reading Rousseau's *Confessions*. This is the classic literary statement about confession. I must say I disliked the book when I read it, and some of my reaction to the book had to do with the fact that his confession is even more implicated in the "crook paradox." Rousseau claims that his motivation for writing a confession was that he once stole a ribbon – he was a servant in a household – he stole the ribbon of the master and he failed to confess, and because of his failure a maid was accused and harshly treated. And now he is confessing about it. Rousseau following his

own admission is in a deeper trouble than the self incriminating murderer, because he is actually confessing about a failure to confess. If we believe the confessor that he failed to confess, why should we believe him in this confession? Every act of confession is implicated in that self-contradiction. It seems therefore that Talmud's explanation, even of Rabbi Yehuda's argument, diverts from Maimonides' reason that the problem is merely the untrustworthiness of confession. In some ways the reverse is true, because the confessor might be right, this is a reason actually why not to believe him.

The Babylonian Talmud mentions another reason for the majority opinion in the Mishnah – that the confessor is not considered to be a murderer because self-incrimination is not accepted, but the wife should be allowed to marry. This opinion that sheds different light on the status of self incrimination is brought in the name of Ravah: "Every man is considered a relative to himself and no one can incriminate himself." According to this reasoning the statement of the confessor is divided in to two. The court doesn't accept the fact that he is a murder as legally valid, and yet it allows the woman to get married. The reason for such a division is that a man is considered a relative to himself. What does that mean? It means that the issue at stake is different than reliability. The rejection of self incrimination is based on the argument that the legal system would not allow someone to harm himself through its own laws. It is about immunity from self-harm and preserving the autonomy of the person in relationship to the legal stature.

The Talmud rejects confessions as valid evidence in criminal procedure. Maimonides claimed that the reason for it is that this rejection is based upon casting doubt on the reliability of such admissions. Yet the examination of the Talmudic reasoning on the matter illuminates two reasons that might point to a different direction

than Maimonides'. The first is what I call the "crook paradox" or the "liar paradox" where in some ways the confessor is rejected as a witness because he is believed. The other reason has to do with the fact that the confessor is granted immunity, by the legal system itself from incriminating himself through the legal system. And this is why the Talmud says – and that's the ruling of the Medievals as well – that when someone makes a self-incriminatory act that has legal implications to others his statement is divided. He is believed vis-à-vis the other person and testimony concerning himself is rejected.

I want to follow now in the next stage in my conversation on confession. As I said, it has no evidentiary force in Jewish law but it has a different place in the procedure of criminal justice. I want to begin with a semantic point about the term *lehodot*, "to confess" in Hebrew. The term *lehodot* in Hebrew actually has two meanings. *Lehodot* could mean "to admit," like in a court but it also could mean "to thank," "to acknowledge." If we look at the semantic uses of the term within Jewish law we see how this ambiguity is played. Confession in Jewish law in capital punishment cases is not made before indictment because it doesn't have any evidentiary force. It is made after the indictment. In its description of the procedure of execution the Mishnah says, "When he is about ten cubits away from the place of stoning..." – the victim is now being taken away from the court to be executed, ten cubits away from the place of execution, – "...they say to him, 'confess'." The verdict has been given, now confession starts. "For such is the practice of all who are executed that they first confess, for he who confesses has a portion in the world to come. Even so, this is the case that we found in the case of Achan, that Joshua said to him: "My son, give, I pray thee, glory to the Lord, the God of

Israel and give Him thanks." And Achan answered Joshua and said, "Of the truth I have sinned against the Lord the God of Israel and this is what I have done."

According to the Mishnah confession has a different roll in the criminal procedure. It is not about providing evidence because that would not be accepted. After the verdict is completed the suspect is asked to confess and here "confess" is not "to admit" but "to acknowledge." The confession functions basically as the way in which the suspect internalizes the verdict, he says, "I have sinned." By this speech act he is redescribing himself in the courts terms, he adopts the point of view of the law as his own self identity. Confession as acknowledgment is connected to atonement it is a practice that opens the possibility of readmission to the legal order by accepting its terms and evaluations.

It is interesting to note the Mishnah struggles with the problem of a possible disparity between the suspect's self perception and the verdict of the court. What happens if the suspect thinks that the verdict was wrong? An interesting opinion is introduced in the name of one of the sages: "Rabbi Judah says that if he knows that he is a victim of false evidence he can say, 'May my death be expiation for all my sins but this.' The Sages said to Rabbi Judah, 'If so, everyone will speak likewise in order to clear himself.'" According to the opinion of Rabbi Judah the law itself provides the suspect with a formula that casts doubts on the verdict that the court issued. This is an important point since we know that forced confessions are the ultimate measure of brutal political systems to assert the power of the sovereign. The sovereign is not only able to crash his opponents he can make them accept his values and terms of guilt and innocence. In our examination of the role of self-incrimination and confession in Jewish law, we have

therefore discovered two moments. First, a denial of the force of confession prior to indictment and a place for confession after indictment, which actually plays on the different meanings of the term *lehodot*, in Hebrew, which is either "to admit" or "to acknowledge."

I wish to shift the attention of the role of confession from criminal procedure to repentance. In its earliest attachment to atonement the term *lehodot* implies a third meaning which is prior to admission or to acknowledgment, which I think is the earlier and the deepest meaning of this act of confession outside of the criminal law related to repentance. The earlier archaic meaning of confession is actually "to throw." This is apparent from the passage in Leviticus which is one of the first statements of the confessional act. On the Day of Atonement, Yom Kippur the High Priest puts his hands upon the scapegoat and confesses. But the term is interesting. It says the following, "Aaron [the High Priest] shall lay both of his hands upon the head of the live goat, and confess over him all the iniquities of the children of Israel, and all their transgressions, all their sins and he should put them upon the head of the goat and shall send him away by the hand of an appointed man into the wilderness. And the goat shall bear upon him all their iniquities unto a land which is cut off."

Basically, what is confession? Confession is an act of transference. The priest who puts his hands upon the head of the goat "confesses upon" him the inequities of Israel. This understanding of confession is tied to the metaphor of sin as a burden. And in some ways therapeutically this is actually the act of confession as transforming, transferring the burden. But one thing that is clear in this act is that the earlier use of

confession is neither "to admit" nor "to thank" but "to remove." God is the carrier of sins and the act of confession is to remove the burden of sin from you to the sacrificial agent or to God himself. Confession is that act of removal.

In its long history confession developed into a full verbal articulation of the inner process of repentance. I wish to move further and examine some issues central to the practice of confession, especially as they emerge in the liturgical uses as an expression of self inquiry transformation and reconciliation. Maimonides will serve us again as the starting point of this short inquiry since he provides the classical definition of confession in relationship to repentance. In the first chapter of the Laws of Repentance, Maimonides says the following, "With regard to all precepts of the Torah, affirmative or negative, if a person transgressed any one of them, either willfully or in error, and repents and turns away from his sin, he is under the duty to confess before God, blessed by He." And he gives the proof text from Scripture why this is the case. Then he gives you the formulation of the confession: "How does one confess? The penitent says, 'I beseech thee, O Lord, I have sinned, I have acted perversely, I have transgressed before thee and have done thus and thus, and I repent and am ashamed of my deeds, and I will never do this again.'" That is the basic structure of a confessional formula. First of all, it has an interlocutor. Every confession has an interlocutor; it is done before God evoking his presence. The approach before God begins with a formula of plea "anna" since the sinner has to gain the privilege of appearing before God prior to the reconciliation that will be only an outcome of the confession. After positing the presence of God the confessor names his past act as a sin. The first movement in this appeal is sharing coordinates of description, sharing terms of evaluation recognizing a past act as a sin. Then the second

act after the re-description is regret, "I regret this." And the third act is future acceptance, "I would not do it again." And it says you have to enumerate the sin, etc. For Maimonides, the confession means a verbal articulation of the inner process of repentance.

It seems to us that unlike the case of self incrimination, confession in regard to repentance is unproblematic. The steps that Maimonides described seem to mirror the basic fundamental elements of confession. Yet the examination of two debates in the Talmud about confessions are actually shedding some suspicion on that act altogether. I want to understand the nature of that suspicion which, to a certain degree, they are connected to: the problem of confession in self incrimination. The Talmud mentions two debates about the practice of confession: "Our Rabbis taught, As for the sins which one has confessed on one Day of Atonement, he should not confess them on another Day of Atonement." One confession is enough unless the offence was repeated. This limit is postulated against what we call the "obsessive confessor." A sinner confesses one time, if he didn't repeat the sin, it is enough. The Talmud mentions very interesting text to prove this limitation. If someone repented and confessed and keeps confessing the sin he didn't repeat it is with regard to him that the Scripture says, "As a dog that returns to his vomit, so is the fool who repeats his folly." This statement captures something deep about the practice of the genre of confession: the relationship between self-indulgence and confession. In the verbal act there is some type of nostalgia to the act itself. And this statement from the Scripture is an attempt to constrain it: you did it once, its fine. If you didn't do it again and you keep on repeating confessing, it is like a dog that returns to his vomit.

Against this opinion the Talmud quotes a counter view which encourages a repetitive confession: Rabbi Eleazar ben Jacob said, "He is the more praiseworthy." This is a praise for the repetitive confession. Why? As it is said, "For I know my transgressions and my sin is ever before me." Here is the tension between the nostalgia for sin verbally practiced by repeating confessions, and the fragility of repentance that forces the sinner to always remember that that act was done. The sinner has to keep on naming it, regretting it, etc. The first opinion which was accepted as the norm is fascinating in its limitation on confession as an ongoing practice.

In the next passage the Talmud pursues the subject of confession through a second debate. I was always puzzled by this passage until I looked at some confessional liturgy to explain it. "It is obligatory to confess the sin in detail, explicitly. These are the words of Rabbi Judah ben Baba." This opinion strikes us as intuitive. Confession is about explicating the sin; it is an act of introspection. The sinner has to name what was done, regret it and commit himself not to repeat it. It seems like the most fundamental aspect of what enables the introspection needed for repentance. Yet another view is stated in this debate: Rabbi Akiva said, "This is not necessary," [to detail and mention the sin] As it is said, "Happy is he whose transgression is covered, whose sin is pardoned." According to Rabbi Akiva's opinion, when a sinner confesses he shouldn't detail the sin. This opinion always puzzled me, What sort of confession is that? The whole point of confession is actually in individuating the sin, in naming it, and regretting it. What is a possible motivation for the opinion that the particular sin ought not to be mentioned? It indeed runs against Maimonides' ruling and Maimonides' commentators are actually

bothered: how could he rule against Rabbi Akiva's opinion? But he rules against it because it is counterintuitive to say that there is a confession without detailing the sin.

An examination of early liturgical formulas of confession may provide the key to understanding what seemed to be counterintuitive. I found that these formulas all follow Rabbi Akiva's idea of confession and I think they reveal deep concern about some self-defeating aspects of confession. These formulas are preserved in the current liturgy on Yom Kippur, I will read them from the sidur of R. Saadiya Gaon: "God, you know the secrets of the world and that which is concealed in the recesses of every living thing. You investigate all the rooms, all the chambers of the inner. There's nothing hidden from you. Nothing is a shield. We pray to you that you will forgive us for all our iniquities and our sins." The striking feature of this formula is that it begins the confession with a disclaimer; it is actually confessing about confession. Why? Confession after all is an act of disclosure. "Here I come to disclose before you..." Standing in front of God as the interlocutor and making such a gesture is very presumptive because it assumes a hidden sphere. The confessor reveals nothing, he has to confess about coming to confess, since the assumption of the existence of a hidden concealed space is the condition that enables sin. Confessing as disclosure is therefore a repetition that reinforces the framework and state of mind that enabled sin. It is for this reason, that the confession formula establishes an ambiguous tone in its first gesture, and for that same reason the sinner never enumerates and individuates the sin he just acknowledged to what is known. Such a gesture might be at root of his repentance.

Other formulations of confession follow the same pattern of beginning with questioning the act of confession itself as the first gesture of confession. They provide in turn another complex argument from Rabbi Akiva's opinion that sets a rather severe limit on the practice and nature of confession. This formula is another early formulation which appears in different variations in contemporary liturgy as well: "What should we tell You, the One who resides in heaven? Our iniquities are too many to count and our sins too numerous to be counted." Here is another argument against individuating. It is not about the presumptiveness of the act of disclosure, but it is the presumptiveness of the act of individuation. It raises another deep tension inherent in the speech act of confession.

Individuating the sin is a move from shame to guilt. One of the differences between guilt and shame is that guilt is a stain—a stain to be washed. Shame, on the other hand, colors the whole self. This is why the reaction to shame is not to wash the stain, but to disappear. Shame as noted by philosophers attacks the whole self it is not about what the person did but about who he is. By not detailing the sin the formula leads the confessor to the description of himself as a sinner rather than a person who committed a particular sin. Yet there is another motivation concerning the problem of individuation which is far deeper. This concern emerges in reading for example Rousseau's confession. He says, "I did so and so. I declare it. I challenge you readers and audience to be courageous and do the same thing. It is about authenticity. I emerge now before you." Well, the assumption is that if I did so and so, the rest is fine. After all, if I wanted to deceive you or myself I should have stayed silent altogether. The liturgical formula we just read that follows R. Akiva's opinion against detailed confession points to that suspicion concerning individuation.

The examination of confessional formulas reveals thus a complex structure of second order confession. These formulas begin with a liturgical gesture that points to an ambiguity in the practice and the subsequent content of them reveal the sources of the ambiguity. The normative prescription to avoid detail is justified in these formulas in two ways by questioning disclosure and by rejecting individuation. This ambiguity creates a connection, though loose, with the rejection of the confession as valuable evidence in criminal procedure. Self incrimination is rejected with the halakhic tradition for different reasons. As we saw Maimonides formulates the doubts that we cast upon such acts and the way their reliability is questioned. The Talmudic discussion about self incrimination, in particular concerning implication to another party, reveals more basic rejections of self incrimination. The first, which postulates the immunity a person has from acting against himself through the law, is attached to the protection of the integrity of the self confronting the law. The second argument exposes a tension with in confession that seems to connect the rejection of self incrimination with the ambiguity towards confession as a form of repentance. Confession is under the shadow of the confessor paradox, which states that if we believe the confession it is a reason, why not to believe it. A genuine confession is hard to achieve it is therefore imperative to confess about this before confessing. Given the prevalence of confession in present day law and culture this set of complex reflections, drawn from talumdic tradition, might serve a deeper understanding of such a pervasive speech act.