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## MORALITY AND THE LAW

### I

The question whether law and morality are separate and rival systems of social cohesion or whether law is merely the enforceable part of the moral code has once more become topical during the last few years although the issues were debated in the late 1800's between John Stuart Mill and James F. Stephen and in the Medieval period by Maimonides and Yehuda Halevi. Today they are being raised anew by Lord P. Devlin and H. L. Hart.

Lord Devlin's view is that the common positive morality of a particular society is the "cement" which binds it together.<sup>1</sup> Society is therefore justified in taking the same steps to preserve its moral code as it does to protect its government and other essential institutions. Prosecution of vice, therefore, is as legitimate as the suppression of treason and sedition. When the law is enforced, the court, in meting out punishment, acts as the voice of society in stating "the emphatic denunciation by the community of a crime." Failure to punish acts of immorality, even where there is no obvious harm done to others, will be interpreted as encouraging the practice of vice. The law is forced to "condemn or condone."

In opposition, Hart states<sup>2</sup> that the function of the law in society is to preserve public order and prevent the exploitation of others. He maintains that, as the Wolfenden Report puts it,<sup>3</sup> there must remain a realm of private morality which is "not the law's business." The state's power should be used only in order to prevent harm to others. The denunciatory theory of punishment and the "condemn or condone" dilemma which it engenders are rejected as incompatible with this position.

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The main argument against the Devlin view, according to Hart,<sup>4</sup> is its unrealistic monolithic conception of society. Modern society is morally a plural structure comprising a number of different mutually tolerant moralities. The failure to recognize this produces a conservative tendency favoring the preservation of the moral status quo and discouraging any change in moral public opinion because it threatens society's existence.

Devlin, on the other hand, has claimed that his views have been caricatured by Hart. He concedes that any change *can* threaten society's existence, but it does not follow that every change does or will do so. He too admits that morality may change but states that the law is prepared to meet it by the use of the jury system through which public opinion makes itself felt in the Law Courts, and by the doctrine of "the reasonable man" to whom lawyers refer as the arbiter of moral decisions at any particular time.<sup>5</sup>

There *is* a certain conservatism involved in Devlin's concept of morality in society, which reveals itself quite clearly when we consider that at a time of great moral change "the reasonable man" of the lawyers turns into a myth since it will be very difficult to find a man who represents society as a whole. This would be true as well of a random selection of men to form a jury. However unsatisfactory these methods of determining the moral conscience of society may be, they are nonetheless convenient ways of dealing with the inevitable problem of laying down the law in a democratic society.

Despite their differences, both views clearly regard the law as an instrument of social cohesion and in spite of the Mill-Hart rejection of the enforcement of positive morality as a legitimate function of the law, they will surely agree that social morality also serves as an instrument of social cohesion.

Nearer to the heart of the problem seems to be the issue of the morality of the individual versus the morality of society, the question whether society has a "positive" or a "negative" function *vis-a-vis* the individual. The Mill-Hart view emphasizes the liberty of the individual which has to be given up only reluctantly in order to contribute to social stability; the Stephen-Devlin view stresses the importance of social existence within

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which the individual develops his natural abilities and pursues his moral ideals. The "cement" view seems to be associated with a positive notion of the function of social legislation in developing and perfecting the individual, whereas the opposing view clearly presupposes a negative conception of social legislation *vis-a-vis* individual liberty.<sup>6</sup> Hence, a major part of the controversy concerns itself with the very ancient question whether society is "natural" to man or whether it is only a second best alternative to the "state of nature" which men are reluctantly forced by circumstances to adopt.

A similar divergence of opinion in medieval Jewish philosophy may throw some light on the present controversy. The "cement" theory of Devlin is implied by Maimonides' view of the law, the Torah and society, whereas Mill's minimal concept of social morality is similar to Yehuda Halevi's view of morality.

In Chapter 40 of the second part of his *Guide to the Perplexed*,<sup>7</sup> Maimonides, after agreeing with Aristotle that man is naturally a social being, goes on to point out that as the highest form in creation, mankind has the largest variety of individuals, with differences very much more marked than any other species in the animal kingdom. Hence, the pursuit of man's natural social state involves special problems, and entails a much more specific need of leadership to promote the well-being of society and regulate the affairs of men. It also requires that the natural variety of the human species should be counter-balanced by the uniformity of legislation. Hence, law (and the Torah, which is the ideal legal codex) though not a *product* of nature is nevertheless not foreign to nature. The Almighty gave the human species properties such that men can acquire the capacity for ruling others. Some are gifted with the ability to become inspired legislators; these are the prophets and law-givers. Other men are gifted with talents which make them capable of becoming enforcers of the law; these are the kings and temporal rulers. The abilities which qualify one to be a law-maker are quite different from those which qualify one to be a law-enforcer. The former have to do with a grasp and understanding of metaphysical matters; the latter with the ability to administer and execute. In the last resort true law-making is a matter of

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prophetic inspiration or revelation. For this reason many societies claim prophetic sanction for their legal and moral codex. Maimonides provides us with some rough and ready rules by which we may distinguish which laws are truly prophetic and which are not. He assumes that most of the legislation in different societies which aims at promoting true ideals and correct notions of the Creator, etc., was originally revealed to mankind in early antiquity.<sup>8</sup> He notes the natural tendency of kings to pretend to be the source of the law and not merely its enforcers.

For Maimonides, prophecy has primarily a political function. This conception of prophecy is shared by many Muslim thinkers with whose writings Maimonides is familiar, and scholars have pointed out that the idea probably stems ultimately from Plato.<sup>9</sup> Certainly there is something very reminiscent of Greek political thinking in Maimonides' insistence that social and moral legislation serve primarily as means to the inculcation of true opinions.

It would not be inappropriate to use the term "cement" to describe Maimonides' notion of the function of law in society. Maimonides does not distinguish between the legal codex and the moral codex of any society. He regards the two as identical or, at any rate, to suppose that the one is merely part of the other. The Torah revealed to the Jewish people is the perfect legal codex for all times, legislating not only for the "welfare of the body," abolishing the wrongs done by one man to another, but also for the "welfare of the soul," providing a way of life grounded upon the most profound metaphysical truths and ideals. Any society requires *mishpat* or social justice (which is of the realm of "welfare of the body") as its foundation. A good society must build further upon this foundation by pursuing moral and metaphysical truths and ideals. The perfect society which achieves and embodies the highest moral and metaphysical truths could only be established through prophetic inspiration.

The celebrated Spanish Jewish poet and thinker, Yehuda Halevi (1085-1141) views the Torah differently. In his thought<sup>10</sup> the political function of the prophet is minimized. The realm of revealed religion is the realm of the truly spiritual, the supernatural — above the natural social order. What is specific about

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the Torah is not that it offers the codex for a perfect society, but that it prescribes a mode of behavior which reflects and embodies a pursuit of spiritual aims. Law in societies to Halevi is merely a practical necessity. He described natural social morality very negatively as a sort of honor among thieves.<sup>11</sup> Without law society would fall apart. However the existing moral law in societies has no intrinsic affinity with the revealed law of the Torah, even though the latter, in prescribing a mode of life which nurtures the growth of religious sensitivity and the pursuit of the spiritual, covers part of the ground catered for by the moral law of societies.

### II

It is clear that Maimonides regards the Torah as a divinely-inspired legal and moral code perfect in every respect. His theory would seem to allow for the possibility of moral change in actual societies.<sup>12</sup> But his supposition seems to be that such change should be regarded as progress towards or regress from the perfect ideal code furnished by the Torah. But what about the recipients of the Torah themselves, the Jewish people — are they now freed from moral uncertainty?

It is commonly supposed that the Torah constitutes a perfect code of behavior which prescribes a single unambiguous pattern of life. Popular opinion takes easily, therefore, to the Maimonidean idea of the Torah as a divinely-inspired legal and moral codex. And many suppose, at any rate, that a religiously-inspired moral code frees mankind from moral uncertainty. This is only half the truth. No codex is so complete that it covers every eventuality. But more than this — it may be doubted whether the Torah can be regarded as a legal or moral codex at all. In any case the conception of the Torah as constituting a perfect codex of law and morals establishing a single eternally-unchanging pattern of behavior is true neither in theory nor in practice.

Analyzing theory first we see that even the notion that the Torah is a prophetically-revealed ideal permanent legal and moral codex, somehow outside the realm of changing social conditions, has to be mitigated by the idea of *Torah Shebeal Peh*. This immensely-important theological idea has from earliest

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times been interpreted by some of its expositors in such a way as to introduce a certain dynamic element into the idea of *Halakhah* — which may be roughly equated with “Torah in practice.” Thus the *Talmud Yerushalmi* quotes R. Yannai as saying “If the Torah had been given in such a way as to be all neatly cut up we could have found no place for the foot to stand.”<sup>13</sup>

This dynamic element which posits the maximum flexibility in the application of the law to practical cases and therefore demands of the jurist that he be capable of “permitting the forbidden for 150 different reasons,”<sup>14</sup> is often obscured by the semi-popular notion of every eventuality of the Torah having been expressly revealed in advance to Moses, our teacher.<sup>15</sup> Perhaps it was. But if so it was revealed in this way *only* to Moshe. Tradition tells us that some *Halakhot* were forgotten during the period of mourning after Moshe’s death.<sup>16</sup> From the uncertainties with which our leading Halakhists have been faced in all periods of Jewish history, we can be quite sure that many more Halakhot have been forgotten since then. In fact, for all generations subsequent to that of Moses, Torah for the Jewish people is not a closed law-book. The Heavenly Torah may indeed cover every possible eventuality; but what the revealed Torah (*Shebikhtav* and *Shebeal Peh*) says about any particular eventuality has in fact to be *discovered* by the *talmid chacham* through his study and investigation. If different *talmidei chachamim* seem to discover different Halakhot referring to the same case, so that they argue with each other about the correct ruling, it may well be the case that “Both opinions may be the words of the living G-d.”<sup>17</sup> The *talmid chacham* is governed by the texts, by the traditional canons of interpretation, by what he has learned from his own teachers; but all this is subject to his own *shikul ha-daat* — his own judgment and understanding. It is at this point that his own *chochma* — his capacity to be wise — comes to the fore. And Reason under these circumstances may even be regarded as a form of revelation, since it is by means of Reason that the Divine Law is revealed.<sup>18</sup>

In the course of centuries of Jewish life, leading halakhists and interpreters of Jewish law have in their jurisprudential outlooks veered to and fro from the “idealism” of a fixed static con-

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cept of the Torah to an extreme "pragmatic" and pliable concept of an ever-changing and dynamic Torah.<sup>19</sup> Maimonides provides an example of the former; the Polish Halakhists of the 16th and 17th centuries provide examples of the latter.<sup>20</sup> But wherever one stands on the scale between extreme "idealism" and extreme "pragmatism," the concept of *Torah Shebeal Peh* introduces a dynamic element into the theory of the Halakhah that makes it very difficult, if not impossible, to regard the Torah as a finished codex. The written sources are never detailed enough to cover explicitly all eventualities, nor are they sufficiently clear to be easily and unambiguously applied. To the extent that the Torah is something like a codex, it would be comparable to one which has never been completed, and of which new details are continually being filled in, necessitating sometimes the rephrasing of some of the older sections. But that is no codex at all.

And if we move from the theory of Halakhah to a consideration of its practice, it becomes evident that the Halakhah does not possess and never has possessed a codex in the strict sense. No Halakhic compendium, and certainly not the *Shulkhan Arukh*, has ever been presented in such a way as to supersede its predecessors. What is at most claimed by the authors of these Halakhic compendia is that they are attempting to offer a digest, a summary or a guide to the main principles of Biblical-Talmudic law, as understood by the great interpreters and jurists of all subsequent ages until the author's own day. The authoritative work, therefore, is not claimed to be the author's own work but rather all the preceding material which he has summarized, and in the last resort, the Torah itself.<sup>21</sup>

The non-institutional nature of Judaism, especially since the destruction of the Temple, has further brought it about that Halakhic authority has always been more or less decentralized and charismatic, depending on the fame, piety and personality of individual *Poskim* (jurists). This has created a situation in which different practices and rulings have been allowed to co-exist side by side in many communities, even from the *Mishnaic* period. Such a situation is not necessarily pathological as we sometimes are tempted to say, but on the contrary characteristic

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of Halakhah from time immemorial. It is at this point that practice and theory have met in requiring the recording of *Daat Yachid*, individual opinions, in all Halakhic works from the time of the Mishna so that the *Posek* should be able to rely upon such dissenting individual opinions *Beshaat Hadchak* — at a time of need. The *Halakhah* is *meant* to be flexible, if and when necessary.<sup>22</sup>

But this means in practice that although the Halakhah has always acted as the basic guide for moral behavior providing the direction for all that is characteristic of Jewish life, both at the social and the individual level, its guidance and direction have always in practice been to some extent subject to changing social and moral conditions.<sup>23</sup> Jewish communities have been faced with different conditions, requiring the guidance of Halakhic authorities in solving the problems arising with the changing conditions. Halakhic authorities themselves have lived in such communities and have personally been subjected to different social and moral pressures. Of course the *Posek* has always tried, and we may safely suppose, has succeeded, with *Siyata Dishmaya* — the help of Heaven — in rising above these pressures and being “objective” in rendering an unbiased decision which is *D’var Tora*. Nonetheless, it remains a fact that the personal element has been at work — with divine *Hashgachah*, we may again safely assume — in influencing any particular jurist. The meta-Halakhic outlook of the great *Poskim* is therefore a matter of considerable significance. Hence the overriding emphasis placed on the piety and *yirat shamayim* of the *Posek*. If given the utmost saintliness and objectivity, it can nonetheless be shown that in spite of the enormous amount of common feeling and approach by the great *Poskim* of all periods, prevailing opinions and different appraisals of current moral problems, can and have brought about important differences in the decisions of different *Poskim*, we must simply accept this, theologically speaking, as *Hashgachah*, the Divine Providence, at work in guiding the way Torah is to be practiced for each generation.

Thus as opposed to the notion of a perfect and explicit moral code which we need only accept and apply, we, the bearers and supporters of Jewish tradition, are in the position of maintaining

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that it is possible to ascertain the law as it ought to be, and as G-d has ordered it, only by means of the fallible human instrument of reason.<sup>24</sup> Unlike Devlin we do not find that we have to resort, for our purposes, to public opinion. The democratic process of the popular vote is neither relevant nor necessary for Jewish tradition in order to ascertain what our attitude ought to be concerning any moral problem whether it be the question of autopsies, the justifiability of strikes, or our attitude to Zionism. We rely rather, or, at any rate, claim rather to rely, on our *talmidei chakhamim*, an elite of trained and educated men, who have the requisite *yirat shamayim* — fear of Heaven — and personal qualities to command our respect. This *does* have the effect of entrusting matters of Halakhic guidance to an oligarchy. But it is not a clearly-defined oligarchy, since membership is, at any rate nowadays, not decided upon by any universally-recognized formal process. Moreover, the voice of our *talmidei chakhamim* is not unanimous. Different *Poskim* have different views about even the most crucial issues, so that clarity and uniformity of practice seem to emerge only after a long period of time.

But “public opinion,” or, at any rate, the opinion of the traditionally observant Jewish masses, does have its say after all in the matter of moral guidance. For we are all to some extent the selectors of this oligarchy of *Gedolim*, the great Rabbis and *Poskim* whom we accept as our guides. The authority of officiants, who actually hold Rabbinical positions in Jewish communities throughout the world, has been increasingly undermined in the modern world largely because for a variety of different reasons less and less of them are recognized by the religiously observant Jewish masses as qualifying for membership within that ill-defined oligarchy which guides us. It has always been the case that the authority of the *Posek* has depended primarily upon the respect which he commanded amongst fellow students of the Torah by virtue of his learning and piety, and amongst the observant Jewish masses by virtue of his personal charismatic qualities.

Thus there is an element of “public opinion” in the discovery of the Divine Law of the Torah, perfect and eternal though it

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may be. A religiously inspired moral code of the kind which the Torah is taken ideally to provide is by no means "dogmatic" or single-voiced and inflexible with respect to the moral uncertainties of this or of any other age. The Torah guides us and directs us, of course. And the area of uncertainty facing the bearers of Jewish tradition is considerably smaller and such more circumscribed than the area of uncertainty facing much of contemporary society which has cut itself away from the traditional guidelines of the past. But the uncertainties in these circumscribed areas which face the observant Jewish masses of contemporary society, in an age of rapid change and confusion, are sometimes matched by the uncertainties and differing opinions of our religious guides in whom we place our trust. To ask for more than this would not only be unrealistic. It would also, I think, be wrong in principle. *Lo Bashamayim Hi* — The Torah is no longer in Heaven,<sup>25</sup> but rather in the hands of fallible human beings. It is apparently the Almighty's wish that we too should have some share in the unfolding of the meaning of the Torah in order to participate in the task of *Tikun Olam Bemalchut Shaday*, establishing the kingdom of G-d on earth. This is the path of moral progress, for us, as for the rest of mankind.

### NOTES

1. P. Devlin, *The Enforcement of Morals* (Oxford University Press, 1965).
2. H. L. A. Hart, *The Morality of the Criminal Law* (Jerusalem, Magnes Press and Oxford University Press, 1965), pp. 31-41. A bibliography of the Hart-Devlin controversy is given after the Table of Contents (pp. xiii-xiv) of Devlin's *The Enforcement of Morals*.
3. Report of the Committee on Homosexual Offences and Prostitution (CMD 247), 1957, commonly referred to as "The Wolfenden Report."
4. *The Morality of the Criminal Law*, pp. 31-41.
5. *The Enforcement of Morals*, pp. 13 ff.
6. See Hart's discussion of "The Moderate and the Extreme Thesis" in *Law, Liberty and Morality* (Oxford University Press, 1963), pp. 48-52.
7. See also *Guide to the Perplexed* III 27. For more detailed treatment of this topic cf. L. Strauss *Philosophic and Gesetz* (Berlin, 1935), and Strauss' article in REJ, C (1936), 1-37; also Julius Guttman, *Philosophies of Judaism*

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(Holt, Rinehart and Winston, New York, Chicago and S. Francisco, 1964), pp. 179-180, and E. Rosenthal's "Maimonides' Conception of State and Society" in *Moses Maimonides VIII Centenary Volume* edited by I. Epstein (London, Soncino Press, 1935).

8. *Yad Hachazakah, Hilkhoh Melakhim IX, 1 and 14.*

9. E. Rosenthal, *loc. cit.*

10. Yehuda Halevi *Kuzari*, ed. by H. Hirschfeld (Leipzig 1887).

11. See III, 7 and II, 48. See L. Strauss, "The Law of Reason in the Kuzari," *Proc. of the American Academy for Jewish Research*, vol. XIII, 1941-2, pp. 47-96.

12. This is suggested by his remarks concerning the sacrificial cult in *Guide III 32*, where he writes that "it would in those days have made the same impression as a prophet would make at present if he called us to the service of G-d and told us in His name that we should not pray to Him, etc." (Friedlander's translation). cf. however remarks by S. W. Baron in his paper "The Historical Outlook of Maimonides," *Proc. of the American Academy for Jewish Research*, Vol. VI, 1934-35, p. 108.

13. *Talmud Yerushalmi Sanhedrin, 4:2*, and *Midrash Tehillim 12*. My treatment of the very complicated topic of *Torah Shebeal Peh* must necessarily be very sketchy here.

14. *Talmud Bavli Sanhedrin 17a and b*. Compare the comments here of R. Tam (*Tosafot "sheyodea letaher"*), of the Meiri and the Maharsha. Also the Rema in *She'elot Utshuvot HaRema 124*.

15. Based on the *Sifra* (ed. Weiss 112c), T. B. *Eruvin 21b* and *Megilla 19b* and the T. Y. *Chagigah 1*.

16. T. Bavli, *Temurah 16a*.

17. T. B. *Eruvin 13b*. See here specially the comments of the Maharal, *Beer Hagolah* (Habeer Harishon).

18. See the *Shelah* (Shnei Luchot Habrit) of R. Isaiah b. Abraham Horovitz in *Bet Chochmah*; R. Chaim of Volozhin in *Nefesh Hachayim*, iv, 3.

19. This subject deserves far more detailed treatment than it has so far been accorded to my knowledge.

20. See C. H. Ben-Sasson *Hagut Vehanhagah* (Jerusalem, Mossad Bialik, 1959), Chapter 2.

21. I have been influenced in my argument here by the article of E. Goldman in "Deot," *Bitao Ha'akademaim Hadatiim Beyisrael*, Jerusalem, Winter 5723, No. 22.

22. *Tosefta Eduyoth*.

23. Examples of this are referred to in the article by Goldman *loc. cit.* Many writers have tried to show the influence of social and historical conditions on the Halakhah and often this has been exaggerated in order to back up the disputable thesis that the Posek must "live with the times" and take contemporary conditions into consideration in giving his rulings. It is worth noting that this very ambiguous thesis constitutes a meta-halakhic ideology which certainly does not follow from the fact that social and historical conditions have influenced the Halakhah in the past.

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24. See Devlin loc. cit., pp. 92-93; the emphasis on the creative function of "Chochma" follows a very venerable tradition. See introduction *Kidmat Ha'emek* of the Netziv (Naftali Zvi Yehuda Berlin) to *Haamek Sheelah*.

25. See T. Bavli, *Bava Metzia* 59b.

[Note: Since this paper was delivered, Basil Mitchell's *Law, Morality and Religion in a Secular Society* (Oxford University Press, 1967) has come to my notice. My remarks in the first part of the paper would have benefited from Mitchell's perceptive discussion of the Hart-Devlin controversy. January 1968].