LAW AS THE BASIS OF A MORAL SOCIETY

By erecting a wall of separation between law and morality, modern legal theory has helped precipitate the authority-crisis which afflicts contemporary institutions. In the long run, without recourse to some transcendent authority, no legal system can command respect. Law and order cannot be maintained simply through reliance on the power of sanctions. However important the feature of enforceability may be for the effectiveness of legal institutions, ultimately their legitimacy hinges not upon power but authority. Since under contemporary conditions the legal system is perceived as utterly lacking in transcendent support, it is difficult to see how the erosion of its authority can be halted.

In contrast with prevailing conceptions which divorce law from morality, Judaism provides an extremely close link between the two spheres. Unlike philosophical doctrines such as natural law theories or utilitarianism which ground law upon morality, in the Jewish scheme the reverse holds true. Morality ultimately derives its normative significance from the transcendent authority of the law which, in turn, serves as the matrix for the development of moral conceptions.

It must, however, be emphasized that by treating the law as the basis of morality we do not wish to align ourselves with the legalistic position according to which all ethical or moral questions are ultimately reducible to purely legal issues. To treat the law as the basis of morality is a far cry from regarding it as its very quintessence. There is no need to overreact to the charges of legalism.
by claiming that in every single instance of ethical decision-making we can be adequately guided by formal halakhic rules. As against several prominent contemporary Jewish ethicists, we shall attempt to show that Jewish morality contains features which go beyond the scope of any “law-ethics.”

The accent we place upon the extra-legal dimension, however, by no means detracts from the centrality and primacy of the law in the ethico-religious sphere. That already the Septuaginta rendered such a basic term as “Torah” with the Greek “Nomoi” (laws) provides conclusive evidence that already in antiquity the legal components of the Pentateuch were widely regarded as its most salient feature. Typically, throughout history, the Jewish religious community was relatively indifferent to purely theoretical theological concerns involving matters of dogma. What primarily agitated the community were questions pertaining to matters of practice. By the same token, traditionally the function of a rabbi was not to serve as a theological expert, but to provide authoritative guidance on legal questions. It is revealing that in reaction to the challenge of the Reform movement, the traditional Jewish community did not define itself as “Orthodox”—a term of derision that was foisted upon it by its antagonists. It chose the designation “gesetzes—treu” (loyal to the law) in order to make it clear that the basic issue dividing the two opposing camps was their respective position vis-a-vis the binding authority of the law.

The traditionalists assigned the law such a dominant position because they perceived it as the explicit command of the Divine Sovereign. Hence, the overriding authority of the law was deemed to be a function not of its content but of its transcendent source. Such an approach to the normative character of the law must, however, not be confused with Austin’s “Command Theory of the Law,” where the authority of legal institutions derives exclusively from the power vested in the sovereign. In Austin’s scheme, the law possesses only power but not authority, because of its power to command is exclusively a function of the enforceability through sanctions at the disposal of the sovereign. In Jewish law an entirely different situation prevails. The law possesses moral authority because God, unlike pagan gods, represents not merely supreme power but the highest moral authority conceivable. God is not only omniscient and omnipotent but also omnibenevolent. Hence, submission to His will is not simply surrender to absolute power but obedience to the supreme moral authority.

Jacques Elul² and Harold Berman³ have called attention to the
religious dimension which in primitive societies provided the law with the authority derived from a transcendent source which could command respect and reverence. To be sure, some philosophers, notably Kant, insist that the categorical authority of a moral law cannot depend upon theological support. It is, however, extremely dubious whether, in point of fact, autonomy can endow a law with the same kind of authority it possessed when it enjoyed the support of theological props. With the benefit of hindsight, we can convincingly argue that the Kantian doctrine that the law qua law commands respect is really a “survival” of a primitive era. As Mrs. Anscombe has shown, any kind of “law-ethics” patterned after the Kantian model fails to reckon with a fundamental problem. Once the element of a Divine legislator is eliminated, law can hardly be expected to command the kind of respect it bore when it was endowed with the authority of a Divine imperative.

Because of its theocentric nature, Jewish ethics attributes the “imperativeness” of the moral law to the property of being commanded by God. Thus, the foundation of morality is provided by specific legal norms, e.g., prohibitions against murder, incest, theft, not by overall principles from which various specific norms are deducible. As Nachmanides put it, the very meaning of a general ethical principle such as “Thou shall do what is good and right in the eyes of God” can be properly understood only if we have at our disposal sufficiently large numbers of concrete specific rules exemplifying the underlying principle as to enable us eventually to acquire an intuitive grasp of the principle itself.

It must be admitted that such an approach to morality runs counter to the philosophical bias towards monism. As a general rule, philosophers gravitate towards systems where specific moral norms and rules are deduced from or at least justified by reference to a single overall principle—e.g., greatest utility, rationality, etc. But as Stuart Hampshire has pointed out, the moral data available hardly warrant such an approach. The formation of our moral conscience usually begins with specific moral rules such as prohibitions against violence, theft, murder, etc. Overall basic moral principles such as the sanctity of life or the obligation to consider the welfare of others are only secondary. Such a pluralistic stance which emphasizes the primacy of particular ethical norms hardly will satisfy the philosopher’s quest for neatness. But it far more accurately describes the actual psychological processes that govern the evolution of conscience as external norms gradually become internalized. It should also be borne in mind that we have no assurance whatsoever that our various independent moral judgments are really compatible with one
another. It is quite likely that some of our criteria for evaluation of public morality may contradict some of our moral standards governing private morality. But be that as it may, we are unable to demonstrate the consistency of our various moral principles, let alone support the claim that they form a coherent system that can be deduced from a small set of postulates.

The doctrine that law functions as the source of morality obtains additional plausibility in the light of the close linkage between moral and legal concepts. Aristotle already discusses the view that justice represents a legal conception. But while he personally rejects this position, Walter Kaufmann in his Without Guilt and Justice goes so far as to discard justice as a moral value since, in his opinion, justice involves a legal rather than a moral frame of reference. But we wonder, whether, instead of dismissing altogether a moral value that has been regarded as well as one of the most essential characteristics of all morality, it would not have been preferable to accept the proposition that legal notions serve as the matrix of moral conceptions.

A good case can be made for the thesis that the very notion of a moral “ought” derives from a sense of obligation evoked by a law which is rooted in a transcendent realm. The very meaning of an absolute unconditional demand addressed to man, as opposed to a purely prudential requirement seems, as Martin Buber suggests, to point to a religious dimension. Contrary to the claims of the utilitarians, the notion of “ought” is not reducible to value terms, since, as Prichard has shown, it is by no means self-evident that we ought to strive for the greatest possible good. Viewed from the perspective of Jewish ethics, the notion of ought can be traced back to the imperative associated with the mitsvah, the transcendent command which underlies the legal system.

To avoid any misunderstanding, it should be emphasized that our analysis by no means implies the proposition that moral values are based upon law. Nothing we have asserted rules out the possibility of an ethic that is independent of or transcends halakhah (religious law). We have merely claimed that, from a Jewish perspective, the obligation to promote moral values rests upon a legal foundation — i.e., “to do what is good and right.” The actual determination of what in effect are the requirements of the good and the right may be left to the perceptions of the human conscience.

It should also be borne in mind that the relationship between law and morality is by no means one-sided. Considerable interaction occurs between the two respective domains. Moral perceptions engendered by the law, become, in turn, an important factor in legislation.
Numerous talmudic and post-talmudic enactments have been prompted by the concern for the improvement of social welfare (tikkun haolam) or "the ways of peace." Whenever the meaning of a biblical ordinance or the range of its applicability is in question, the Talmud employs as a hermeneutical device, for the purpose of eliciting the "real" meaning of the biblical text, the doctrine that "the ways of pleasantness" and "the ways of peace" are the hallmark of the entire Torah. It must, however, be realized that the Jewish doctrine of the primacy of the law, which, in turn, becomes the matrix of morality, operates with an entirely different set of premises than conceptions (such as advocated by utilitarian or "natural law" schools of thought) which ground the law not upon its own intrinsic transcendent authority, but upon that provided by underlying moral values, such as utility or justice.

The belief that the authority of the law is a function of its transcendent source rather than of its intrinsic or instrumental value is by no means incompatible with the proposition that adherence to the law produces highly desirable consequences. According to the Talmud, all the provisions of the Torah result in the attainment of peace. But, it is especially in the moral sphere, that the social utility of the law becomes most evident. In the words of Maimonides, morality promotes "civilized life and social intercourse."

_Din_ (administration of law) is portrayed by a well-known mishnah, as one of the pillars required for the preservation of human society. In the words of a Babylonian Amora, "He who renders a true judgment becomes a partner with God in the process of Creation." Conversely, _chamas_ (violence) poses the ultimate threat to social stability. Because of its debilitating effect upon the social fabric, its harmful consequences surpass the havoc wrought by other offenses (including even idolatry—the cardinal sin in a monotheistic religion). Since society cannot function without a system of law, _mishpatim_, (civil laws) are characterized by the Tannanim as the type of laws that ultimately would have been enacted by human society, even if they had not been the subject of Divine legislation.

_Dinim_, the establishment of the juridical system, is included among the seven Noahide laws which, unlike the provisions of the Sinaitic Covenant, are regarded as directed not only to the people of the Covenant, but to all segments of humanity. According to a well-known talmudic principle, Jews owe allegiance not only to their own religious code, but are also duty bound to respect the authority of the "law of the land." Some traditional scholars derive this principle from the provision of the Noahide code which mandates non-
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Jewish societies to establish juridical systems. Other justify the principle on the grounds that the violation of the law of the land will be tantamount to infringement of the property rights of the sovereign. Another explanation invokes the notion of implicit consent. By residing in a given territory, one implicitly obligates oneself to accept the social contract governing the inhabitants of the territory in question.22

Apart from these purely legal grounds, there are also pragmatic reasons dictating obedience to the "law of the land." Disintegration of the social order would result in utter chaos. "Human beings would devour each other alive."23 Hence, one should do everything in one's capacity to strengthen the social fabric of society.

With all deference to the "law of the land," there are, however, limits to its authority. Noncompliance or outright civil disobedience is warranted or mandated in a variety of situations. To begin with, obedience to the law of the land is enjoined by Jewish law only when the laws in question conform to the basic standards of fairness. No sanction is given to governmental procedures which in defiance of fairness and justice amount merely to "legalized violence."24 Moreover, even if a particular law cannot be faulted on the grounds of fairness, in case of conflict with Jewish law, the latter must take precedence (with the obvious exception of instances where, e.g., in monetary matters, Jewish law itself contains clauses stipulating that the "law of the land" should govern certain transactions).25 But it is one thing to attribute to Divine law overriding authority in the face of all competing claims whether emanating from different systems of law or from the magisterial commands of the human conscience, and another to assign to law a total monopoly in the moral economy. Treating the law as the matrix of moral perceptions is not equivalent to making the latter logically dependent upon the former. At the very most, we affirm a causal but not a logical dependence between law and morality. It must also be noted that obedience to the law is regarded merely as a necessary but not a sufficient condition of morality. A foundation is not a finished structure. The law constitutes merely the foundation of a multi-tiered morality that, beginning with fundamental moral obligations, rises to the loftiest heights of elitist ethical ideals. To be sure, even the legal system does not present us with a monolithic structure. There are legal obligations giving rise to correlative rights which can be claimed by recourse to juridical procedures. But other legal obligations, though giving rise to correlative rights, cannot be claimed through juridical procedures. In addition, there are various types of legal obligations such as the
requirement to make restitution to satisfy “heavenly demands” (*lazet yedei shamayim*), which do not give rise to any kind of correlative rights at all. Roughly speaking, a parallel structure can be noticed in the ethical sphere which consists of different levels. The lowest tier contains moral obligations (perfect duties) which create correlative rights on the part of others. Above it, are moral obligations that do not give rise to correlative rights (imperfect duties). From there, we proceed to various levels of higher ethical ideals which are deemed valuable but not as morally obligatory.

That a rigid formal legalism cannot possibly do justice to the Jewish religious ideal becomes evident in a talmudic statement which at first blush strikes us as if it could have been part of a Christian polemic against Jewish legalism. In blatant contradiction to all the stereotypes associated with Pharisaic mentality, the talmudic sages blamed the destruction of Jerusalem on the prevalence of a legal formalism which totally ignored extra-legal requirements. It must be admitted, that, in the opinion of a number of contemporary scholars, the talmudic statement itself makes no reference whatsoever to the realm of moral obligation that extends beyond the letter of the law. It has been claimed that the import of the statement is restricted to the juridical setting, enjoining judges to concern themselves, not only with formal legal principles, but also with considerations of equity. Be that as it may, post-talmudic authorities attach considerable weight to the performance of supererogatory acts as a halakhic demand. In other words, the halakhah itself stipulates that “legalism” be transcended in the quest for more advanced levels of piety.

One could, of course, argue that supererogatory acts, inasmuch as they reflect a halakhic demand, still come within the purview and scope of the law, just as concern for equity can be treated as an aspect of the juridical processes. Whether, in point of fact, supererogatory acts really can be regarded in a purely parajuridical or paralegal sense is a widely debated issue among contemporary ethicists. Proponents of “law-ethics” insist that the authority of the moral “ought” derives from the respect and reverence due to law. Aretistic (virtue-ethics) conceptions of morality, however, are under no constraint to subsume all and sundry types of moral requirements or ethical ideals under the rubric of law. Hence, they need not ascribe to supererogatory requirements a paralegal character.

In discussing the Jewish position, it should be noted that we encounter basically two different approaches. Nachmanides, for example, operates with the premise that the performance of
supererogatory acts is mandated by legal provisions. The verse "to walk in His ways" is cited as the biblical source of this religious duty. Maimonides, however, finds himself unable to operate with the notion of a law that makes no unconditional claim to obedience. It is for this reason that Maimonides rejects the notion of a law that mandates the performance of supererogatory acts. For Maimonides to "walk in His ways" remains a strictly legal obligation, but not of agent-morality. Instead, it emerges as a universally applicable binding provision of agent-morality, mandating the cultivation of virtuous states of character.* It is through *imitatio dei*—compliance with the commandment to cultivate virtuous dispositions—that one reaches the higher levels of ethical sensitivity, which, in turn prompt an agent to perform supererogatory acts. But while Maimonides supererogatory requirements, as such, transcend the realm of the law, they are, however, directly related to it, inasmuch as his entire system revolves around the paradeutic function of the law. Accordingly, it is obedience to the law which engenders desirable moral and intellectual attitudes. Obviously, Maimonides utilized the Aristotelian conception, according to which virtue is acquired by conduct that is in accordance with the requirements of virtue. Moral conduct is seen as a process of conditioning that aims at the cultivation of the virtuous states of character which distinguish the truly moral person. Maimonides adapts the Aristotelian approach to his own Jewish purposes. In his view, it is through obedience to the law, which includes provisions for the imitation of the conduct of appropriate role models, (i.e., scholars of the law) that one cultivates intellectual and moral values and thus advances on the road towards the "knowledge of the Lord." The concluding chapter of the *Guide* explicitly states that this "knowledge" largely refers to the attainment of moral virtues which, in turn, manifest themselves in ethical conduct. That such a goal is by no means an exclusive perogative of an intellectual elite is underscored by the concluding statement of his *Code.* This monumental *magnum opus*, which is intended for all segments of the community, reaches its grand finale with the quotation from Isaiah, "The world shall be full of the knowledge of the Lord even as the waters cover the sea."

Without subscribing to all the salient features of the Maimoni-

*It may be revealing that in his earlier *Sefer Hamitzvot*, Maimonides still included the performance of specific acts (such as visiting the sick, comforting the mourner, etc.) among the obligations deriving from the commandment "Ye shall walk in His ways." But in his *magnum opus*, which represents his mature outlook, the commandment applies only to the cultivation of moral states of character.
dean system, numerous medieval thinkers share his convictions with respect to the paradigmatic function of the law. With remarkable eisegetical ingenuity, they manage to read their own conviction into the midrashic statement that “the mitsvot were given solely for the purpose of ennobling creatures” and invoke this dictum as evidence supporting the thesis that in the final analysis the law is designed as a pedagogical device for the refinement of the human personality.

The pronounced emphasis upon agent-morality which we derive from the classical halakhic tradition runs counter to contemporary trends in Jewish thought. A considerable number of leading thinkers, such as Isaiah Leibowitz and Marvin Fox, claim that the area of Jewish ethics is coextensive with the requirements of Jewish law. In their view, it is impossible to speak of Jewish ethical positions with respect to issues where legally binding halakhic rules cannot be invoked as justification. In our opinion, such a one-sided “pan-halakhic” approach— to borrow A. J. Heschel’s felicitous term—represents a totally unwarranted concession to a narrow formalism, which clashes head-on with the Jewish ideal of seeking to relate the totality of human existence to the service of God. Although unavoidably tainted by subjectivity, moral perceptions cannot be dismissed as utterly irrelevant simply because they cannot be buttressed by explicit, formal rules of religious law. After all, the Torah mandates “to do what is right and good in the eyes of the Lord,” which, according to rabbinic interpretation, mandates consideration of prevailing notions of moral propriety. For that matter, the law itself, as pointed out by the author of Maggid Mishneh, must accommodate itself to the inevitable evolution of the notions of moral propriety in the wake of everchanging social, economic and cultural conditions. As Nachmanides pointed out, no finite set of specific regulations could possibly cover the requirements of all future contingencies. Pursuing a similar train of thought, Rabbi Zvi Yehuda Berlin observes that it was necessary for the Sinaitic Covenant not only to include specific legal rules, but also an overall elastic clause, “you shall become a holy people.”

In the light of the foregoing analysis, it can readily be seen that one simply cannot do justice to the requirements of the Jewish religious code, without making room for the operation of an intuitive moral faculty. But it is one thing to recognize the important function of conscience as a supplement to purely legal elements, and another to treat it as an overriding authority. Nowhere in Jewish law is there
any suggestion that the objection provisions of the law may be subor-
dinated to the dictates of the subjective conscience. The law itself is
the ultimate court of appeals.\textsuperscript{44} As we stressed previously, in a
theocentric system, moral requirements ultimately must be regarded
as possessing the property of being willed by God. This being the
case, conscience can never supersede the law, which, because of its
transcendent source, is regarded as the Will of God. All that con-
science can do is to supplement the law by (1) discerning Divine re-
quirements which are not explicitly formulated in the law and (2) help
determine the meaning and range of applicability of laws when their
formulation contains an element of ambiguity. According to
Bahyah, the function of conscience is to ascertain "the duties of the
heart" which should supplement "the duty of the limbs" which are
specified in the legal code.\textsuperscript{45} In the striking formulation of Meiri,
"The commandments apprehended by the human heart are like the
letters of the Torah Scroll."\textsuperscript{46} In other words, the authority of the
human conscience derives from the fact that its promptings are
regarded as a disclosure of God's will. To be sure, such an analysis of
the authority of conscience radically differs from the notion that con-
science imposes its own laws because it is endowed with autonomous
authority. Jewish morality rejects autonomy because of its theocratic
(rule of God) orientation. I employ the term "theocratic" rather than
the more common term "theonomous" because I find it necessary to
accommodate within the framework of law-ethics.\textsuperscript{47}

In view of the fact that moral intuitions play such a prominent
part in Jewish religious life, we reject the contention that Judaism
revolves exclusively around obedience to formal rules. Contra
Bultman, who alleges that Judaism recognizes no religious require-
ment unless one can find "through ingenious interpretation of the law
the necessary rules of conduct,"\textsuperscript{48} we contend that Judaism mandates
an ethics of responsibility\textsuperscript{49} as well as an ethics of obedience. That
the Jewish ideal of piety is all-encompassing becomes evident in the
talmudic comment that the verse "in all thy ways thou shalt
acknowledge Him" represents the most adequate formulation of the
ultimate goal of religious life.\textsuperscript{50} There are no religiously neutral
zones. In the words of Hillel, "All thy actions are to be performed for
the sake of Heaven."\textsuperscript{51} Obviously, performing an act for the sake of
Heaven does not imply that the act in question constitutes an instance
of a specific religious norm. In another paper,\textsuperscript{52} I have coined the
term "covenantal imperative" to designate what are intuitively
perceived religiously mandated responses to particular existential situations. The fact that these religious imperatives possess purely subjective validity in no way detracts from their significance. Objective standards of the law represent only the minimal requirements of piety. There is ample room for the exercise of individuality in the pursuit of religious excellence.

As opposed to objective moral norms which must be grounded in the law, subjective ideals reflect a continuous interaction between the various components that go into the makings of an individual’s ethos. To be sure, the law itself, because of its paraeutic function, functions as a matrix of religiously valid ideals. But the Aggadah (non-legal religious literature) can also play a major role in shaping an ethos which engenders religiously significant ideals. It was already noted by Rabbi Zvi Yehuda Berlin that biblical narratives are intended as a source not so much of historical information but of paradigmatic role models. From the “stories” of the Bible, there emerges a world view which profoundly affects our ethical perspectives. Obviously a Weltanschauung revolving around Creation, Revelation and Redemption contains beliefs and attitudes that are likely to produce a value system which sharply differs from a purely secular ethics. It must also be realized that moral questions call for the exercise of judgment in the effort to balance the competing claims issuing from a variety of prima facie obligations as well as conflicting values. There are no formal rules available to resolve moral dilemmas. This being the case, purely theoretical guidance hardly suffices; it is through the imitation of proper role models that one cultivates the capacity for making proper moral judgments. “Personal contact with the masters of the law is of greater value than their teachings.” Maimonides does not even attempt to define the nature of the various moral states of character one ought to cultivate. Instead, exposure to and imitation of the paradigmatic individuals is the only method through which the meaning of the commandment “to walk in His ways” can be clarified. Just as in the Nichomachean Ethics, Aristotle provides only an ostensive definition of virtue by pointing to the standards of virtuous persons who are renowned for their expertise in the conduct of life, so for Maimonides, the standards of “the ways of the wise” or “the ways of the pious” can be formulated only by reference to the standards exemplified in the conduct of the scholars of the law. This conclusively shows that for Maimonides the demands of agent-morality necessitate reliance upon purely intuitive factors which cannot be accommodated within the framework of a formal “law-ethics.”
NOTES

5. Nachmanides, Commentary to Pentateuch, *ad Deuteronomy 7:18*.
15. Maimonides, *Hilkhot Deot*, 7:8
16. *Avot* 1:18. See also the treatment of this mishnah with respect to the treatment of the centrality of Law in *Tur Chosen Mishpat*.
18. B.T. *Sanhedrin* 105a.
19. B.T. *Yoma* 67b. With respect to the special importance of civil law, also see Nachmanides, Bible Commentary to Deuteronomy 7:12.
20. B.T. *Sanhedrin* 56b.
24. *Encyclopaedia Talmudit*, *ibid*.
25. *Ibid*.
27. B.T. *Bava Metzia* 30b.
29. *Ibid*.
36. Marvin Fox, "Reflections on the Foundations of Jewish Ethics and their Relation to Public


38. Deuteronomy 7:18.

39. Sifri, Deuteronomy 72


41. Nachmanides, Commentary to Deuteronomy 7:18.


46. Meiri, B.T. Shabbat 105b.


50. B.T. Berakhot 63a.


52. Walter S. Wurzburger, loc. cit.


54. B.T. Berakhot 6b.