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## **“You Shall be Holy”:**

### **Messianism and the Concept of Morality in Jewish Law**

Ilan Dunsky\*

At a time when the law is subject to increasing challenges from all sides, it is important to examine the underlying philosophy of the legal institution. In doing so, it is equally important to remember that the law, as it exists today in Canada, is largely the product of liberalism, and though that ideology is very elastic and flexible, there are other ways of understanding the world and thus the law. This paper will examine one such alternative: Jewish law, which, though not widespread, has endured for three and one half thousand years, and which, through its derivative religions, Christianity and Islam, has had a profound effect on the thought of a large part of the world.

In discussing Jewish law from the vantage point of the late Twentieth Century, it is necessary to note that while many of the concepts in Jewish jurisprudence have parallels in Western legal thought, there are also many differences. The very concept of ‘law’ is one such example, and will be discussed in this paper. Further, the concept of the state in Western jurisprudence does not really exist at all in Jewish law and must for the purposes of comparison, be replaced by related concepts such as community or society.

In addition to these conceptual difficulties, the temporal span of the subject must be considered. According to most commonly accepted estimates, the Jews began their recorded history early in the second millennium B.C.E..<sup>1</sup> A part of Jewish law thus has its origins in the middle bronze age.<sup>2</sup> As might be expected, over the course of so many years, the law underwent a number of changes. It is therefore inaccurate to speak of one monolithic corpus of Jewish law. There is an enormous volume of Jewish law; the law covers such interesting and relevant areas as human rights and the environment. In a paper of this length it would be impractical to attempt a synthesis of the subject. Discussion in this paper will be limited to an examination of two principal assumptions and beliefs underlying Jewish law: the concept of morality and the relationship between the law and messianism.

Throughout its development, Jewish law has demonstrated a pre-occupation with morality. It will be shown how this morality has developed from a narrow concept to a general one, given to increasingly liberal and humanistic interpretations. The relationship between the law and messianism, or the idea of human perfection, gives Jewish law a characteristic which is alien to liberal thought; unlike Western jurisprudence, Jews see the law as an agent of human evolution.

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### LAW AND MORALITY

The word 'Bible' comes from the Greek word for book. In Hebrew, the Bible is known as the *Tanach*, an acronym derived from the Hebrew words for its three components, the Pentateuch, Prophets, and Writings. The initial 'T', the *Torah*, or Pentateuch, contains the first five books of the Bible. To Jews it is the most important part of the Bible. According to the foundation myth of the Jews the *Torah* was handed down to Moses at Mount Sinai. It is significant that the word *Torah* has simply come to mean 'law' in Hebrew. The concept of law has been, and is, central to the Jewish understanding of life. It has been suggested that "...few civilizations have been so pre-occupied with law as have the Jews".<sup>3</sup> The study of law is itself, to the Jews, a holy act. There is a legend that even God spends one quarter of the day studying the law, and another quarter teaching it to children.<sup>4</sup> The importance of the concept of law to the Jewish world view is also evidenced in the expression, derived during the Jewish people's nearly two thousand years of statelessness, that the Jew is at home wherever there is the *Torah*.

The centrality of the law in Jewish civilization is related to its ubiquity in Jewish life. In contrast, the liberal view of the law is essentially negative; the law serves to control human behaviour, to prevent Hobbes' "war of every man against every man", or Locke's poor state of nature. It serves to protect human life and property so that a stable society may emerge and enrich itself. Essential though the law may be to the creation of civil society, to the classical liberal philosophers it entailed a form of control, a restraint of freedom necessary to limit what they considered humanity's destructive and violent impulses. Human nature was not only believed to be fundamentally selfish and competitive, it was also held to be immutable. Thus the law was not seen as a positive good in itself, as it had been for example by Plato, but rather as a regrettably necessary institution. Further, because the law restrains freedom, it was to be limited to regulating only that which was necessary to establish order and protect industry.<sup>5</sup>

In contrast to liberalism, and in agreement with Plato, Judaism has always considered the law to be a vehicle toward human fulfillment. It is therefore expansive. In addition to the positivist concept of law as command by the duly constituted ruler backed by sanctions, Jewish jurisprudence recognizes morality and intellectual and moral progress as law. Under Judaic law, morality is actionable at law.<sup>6</sup> The law is a nearly unrestricted term, covering every aspect of human existence, not merely to secure life and property, but to "oversee the uses to which both are put".<sup>7</sup> Further, human nature is seen as evolving. The law is, therefore, not limited to controlling the rougher edges of human behaviour, but exists to change humanity and restructure it along lines of morality, integrity and fairness. Nor is the goal of the law limited: it is perfection. It is perhaps the Jews' single greatest contribution to the world that they developed the concept of one God, representing an absolute standard of moral and intellectual perfection to which humanity aspires, together with the conviction that humanity *could*, eventu-

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ally, and with much effort, reach that goal. To the Jews, the law is not a limiting force, but a liberating one.

As a result of this view, there is a fundamental divergence between Jewish and liberal jurisprudence. Modern jurisprudence, at least in its positivist incarnation, allows for the possibility of 'unjust' laws, which nevertheless create obligations so long as they are promulgated by a legitimate government according to proper procedure. This is so because positivist jurisprudence does not recognize morality as law, unless it is expressly made so. This is not an acceptable view in Jewish jurisprudence; a law is valid only if just, and is only just if it is moral. Indeed, there is no separation between the two concepts in Jewish jurisprudential writings:

Judaism regards the law as both the embodiment of the good... and the primary method to inculcate it. What emerges within Judaism is a view of the law that gives it a central role in both defining the content of morality and infusing it into human behaviour. 8

It is not the legitimacy of the government, nor the procedure followed, nor the sanction attached thereto, which creates the obligation, but the existence of a moral imperative. Without this imperative, there is no obligation to obey beyond the 'mere' avoidance of a sanction or force. According to Judaism, an unjust law is no law at all. This fusion of law with morality has the interesting effect that, unlike under the common law, ignorance of the law constitutes a valid defence to a criminal charge. An act is generally not considered immoral unless it is done with an immoral intention.

It follows logically that Judaism recognizes the legitimacy of civil disobedience and, in fact, considers civil disobedience to be an obligation in the face of an unjust law. 9 The Bible applauds civil disobedience in several instances, and there are reports by both Josephus and Philo of Alexandria of 10 000 Jews staging a 'sit-in' on the road from Acre to Jerusalem in 41 C.E. to prevent statues of the Roman Emperor Caligula from being installed in the Temple. Incidentally, this episode provides an example of a success for Jewish law; the Roman commander, Petronius, turned his men back rather than order a slaughter. 10

The commitment to morality went so far as to admit of situations where even the Jewish law, which itself defined morality, could be broken to ensure an even greater moral act. The saving of life, for instance, ranks higher than any other law, with the exception of those prohibiting murder, adultery, incest and idolatry. Any law outside of those four could be broken in order to save a life. 11 Similarly, civil disobedience, to the point of risking death, was permitted only to protest laws violating the prohibition of murder, incest and idolatry. 12 The preservation of life is considered so important that there is a story that God grieves over executed murderers, and even over the Egyptian

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soldiers whom He drowned in the Red Sea during the flight of the Israelites from Egypt.

The view that true justice must be based on morality, and that morality itself can mean even more than what the Jewish law sets out, was adopted early on and is included in the Bible. The word 'law' is rarely used alone. It is usually accompanied by terms such as 'truth' or 'righteousness', which emphasize morality rather than 'black letter' law.<sup>13</sup> Further, judges were instructed to use equity rather than a strict application of the law. Maimonides considered literal interpreters of the law to be "poor in knowledge".<sup>14</sup> In fact, the Talmud considered that "Jerusalem has fallen (to Rome) because people there adhered strictly and rigidly to the *Torah rules of law* and would not act according to the principles of equity" (emphasis added).<sup>15</sup>

### SOURCES : NATURAL LAW AND THE SOCIAL CONTRACT

#### Natural Law

It may be surprising, given the emphasis on morality rather than 'law', that there is a controversy in Jewish jurisprudence over whether Judaism recognizes a concept of Natural Law, or whether all morality comes from God and is therefore positive command. To recognize a role for Natural Law is to allow that there is some law which exists independently of God, a thought which derogates from God's omnipotence. For this reason, Maimonides rejected Natural Law as a source of obligation. However, there is a substantial amount of evidence supporting the existence of a Jewish Natural Law tradition. Such a tradition was recognized by both Hugo Grotius and John Selden in the Seventeenth Century.<sup>16</sup> Both referred to the Noachide Code, a list of seven commandments given to Noah after the Flood. The first six commandments prohibited idolatry, blasphemy, murder, adultery, robbery and the eating of a living animal. The seventh ordered the establishment of a court system.

What removes the Noachide Code from the realm of positive law is the fact that it is binding on all nations, not only on the Jews. This is not simply because Noah was, in a sense, the second founder of the human race, but because these rules are held to be deducible from reason. The Talmud states that, among all commandments, these seven would have been deduced had they not been commanded.<sup>17</sup> For this reason, of all Judaism's laws, only these are binding despite ignorance of the law on the part of the offender.<sup>18</sup>

Indication of a Natural Law tradition also comes from legend. For example, Cain is punished for the murder of Abel, a sanction which pre-dates the promulgation of any law. When Cain asks God whether he is morally responsible for his brother ("am I my brother's keeper?"), the answer is clearly "yes". God's reply indicates a morality pre-existing positive law. Nor is God necessarily exempt from the operation of Natural Law, at least in general terms. There is a persistent, if

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unorthodox, tradition in Jewish legend of taking God to court for injustices committed in the world. Ezekiel and Job both accuse God of being unjust and demand that He stop. 19 In a similar manner, Abraham denies God the right to be unjust, berating Him with the argument "Shall not the Judge of the Earth deal justly?"<sup>20</sup>

### The Social Contract

The dominant body of Jewish law is 'Positive' in thrust. The first corpus of law is contained in the text of the Bible, particularly in the *Torah*, which can be viewed as the 'constitutional' document of the Jewish nation. The *Torah* contains several legal codes, all claiming divine provenance, but shows unmistakable signs of a distinctly human society progressing from a "rude and savage" nomadic tribalism to a "refined and humane" urban civilization. <sup>21</sup>

There is a parallel here between the Covenant and the remarkable legal fiction of the social contract. While the two myths are not identical (one being a covenant between a nation and God, the other between individuals), they are similar in that they ground the origin of law in consent, thus giving it a moral force it could not otherwise possess. The Jewish covenant with God, however, goes far beyond the scope of the social contract. The liberal social contract entailed a limited cession of sovereignty from individuals to the state, to the extent necessary for the maintenance of public order. The Covenant, agreed to at Sinai, when the Israelites accepted the *Torah*, represents the voluntary commitment of a nation to an all-embracing code of behaviour, an absolute standard of right and wrong. All of Jewish criminal, contract, tort, property, family, business and religious law (save the Noachide Code, whatever concept of Natural Law morality is accepted, and the obligation to circumcise male children), has its origins within the structure of the Covenant.<sup>22</sup> Given the breadth of the agreement, the Covenant must be understood as the adoption of a particular vision of human life and living. It is not merely a contract. It is "a paradigmatic statement...a world view", declaring each covenantor's acceptance that he or she is not an isolated individual but a participant in a community involving "a whole host of relationships".<sup>23</sup> Each covenantor becomes responsible to the community for her or his actions, not because this is natural, nor because God commands it, but because each person has voluntarily accepted this responsibility. It is for this reason that each generation is obliged to act as though it has itself come out of Egypt and has been present at Sinai; each generation must symbolically re-commit itself to the Covenant.<sup>24</sup>

This *Weltanschauung* is based on a belief which was revolutionary at a time when other cultures fatalistically believed that human life depended on the whims of capricious gods.<sup>25</sup> The covenantal world view affirms that humanity possesses free will; we have a choice to do good or evil, to act justly or unjustly, and that these choices *matter* to other individuals, and especially to God. What we do and how we behave, is considered to effect the very moral order of the world. <sup>26</sup> The Covenant thus represents a view in which human beings are *important*, both

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individually and in the aggregate, in which the purpose of life is moral and intellectual progress, and in which the goal of human perfection is attainable. The Jewish world view rejects both despairing nihilism and the liberal conception of human beings as essentially atomized individuals. It understands and measures individuals in terms of a series of relationships - to other individuals and to all of humanity - and sets this against a vision of humanity perfected by adherence to an absolute moral order. At the same time, it recognizes the inherent worth of every individual as the chooser of her or his own destiny. There may be only one proper way to behave, but every person is free to accept or reject that path.<sup>27</sup>

To speak narrowly of a 'proper way to behave' is, however, somewhat misleading in the context of Jewish law. The *Torah* obviously cannot legislate for every conceivable situation. It refers to a great many specific situations - tradition recognizes 613 - and contains an array of more general guidelines for moral behaviour. The explicit commandments presumably are those which were considered to be the most important or the most common. Thus, there are specific orders to give equal justice to rich and poor, male and female, free person and slave. Animals and slaves, as well as the free, are to be rested on the Sabbath. Having escaped from slavery in Egypt, the Israelites came to impose severe restrictions on that practice. The command to be just to strangers is emphasized repeatedly. <sup>28</sup> Strict rules of charity are set out (the Hebrew word for charity shares the same root as that for 'righteousness'). <sup>29</sup> A duty to rescue is set out (in contrast to the principle of nonfeasance in the common law). <sup>30</sup> Employer/employee relations are also considered in some detail (an early form of labour law). <sup>31</sup>

The most famous and important of the explicit laws are the Ten Commandments, which were engraved on Moses' two stone tablets. It is significant that the first two commandments deal with the existence of God and the prohibition of idolatry. As indicated previously, although the existence of a personal God is stressed throughout the Jewish tradition, the *concept* of God also exists to represent the standard of intellectual and moral perfection to which humanity aspires, and which the Jews claim as the ultimate end of human existence. Conversely, paganism and idolatry represent the negation of such a standard and goal. In Jewish thought they symbolize a world view devoid of meaning and purpose; they are incapable of inspiring moral progress. <sup>32</sup> In addition to their literal meaning, the first two commandments are affirmations of the covenantal view of the world - a sort of constitutional preamble. The third commandment, to "remember the Sabbath day and keep it holy", provides for a weekly re-affirmation of the principles upon which the Covenant is based.

Beyond the *Torah's* specific commands are provisions such as to do "what is right and good", or to "pursue justice". <sup>33</sup> These statements of intent were later stressed by the Biblical prophets during the era of the dual monarchy after 925 B.C.E. The prophets emphasized the spirit of the Covenant, rather than the 'black letter' law (although they sought to return the nation to the Covenant, not abrogate it).<sup>34</sup> The prophet

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Amos declared that God preferred piety to prayer, justice to sacrifice. This implied adherence to an even higher standard of behaviour and morality than that called for by the *Torah's* specific commands- a likely reason that the prophets were frequently feared and despised by the kings and the ruling class of the two Israelite Kingdoms. At the same time the prophets served to remind the nation that the commitment to morality was permanent: "This is My covenant with them, says the Lord...from this time forth and forever". 35

In spite of these reminders, it sometimes seemed as though the Covenant had been repudiated. In 722 B.C.E., after a three-year siege of the capital, Samaria, the northern Kingdom of Israel fell to Assyria, and its ruling, educated class was deported and lost forever. Although the southern Kingdom, Judah, survived the Assyrian onslaught, it experienced increasingly difficult times after 609 B.C.E.. Caught between a temporarily resurgent Egypt and the expanding Babylonian Empire, the last king of the Davidic dynasty was killed and Jerusalem was destroyed in 586 B.C.E. The bulk of the population was deported to Babylon, thus removing the *quid pro quo* of the Covenant: the maintenance and protection of the Israelites in their land. The prophet Habakkuk expressed incomprehension that the Covenant seemed to be broken, "Yahweh, how long shall I cry for help, and thou wilt not hear? Or cry to thee, 'violence!', and thou wilt not save?" 36 The prophet Jeremiah considered that the Covenant had ceased as the Israelites had "...walked every one after the imagination of his evil heart..." (he later relented and promised a return to the Covenant).37

For these reasons when, after only fifty years, the Persians conquered the Babylonians and allowed the Jews to return to Jerusalem, it was believed that in gratitude the Covenant should be renewed. The scribe Ezra edited the various legal and historical books which had survived, and set out much of what is now the Bible. The Temple was rebuilt, though on a much smaller scale, and scholars were sent out to teach the law to the people. The Covenant was accepted by a majority vote. The people once again bound themselves to it. 38 However, this time it was interpreted with subtle differences. Increased exposure to outside influences, and the poverty and political insignificance of the Jewish vassal province which centered around Jerusalem, led to an increased emphasis on the individual's, rather than the nation's, place within the moral order. The Covenant was henceforth to be understood in a far more personal way than before; the laws considered more directly binding on every individual person.

The books of Job and Ecclesiastes, showing the influence of Persian and, especially, Greek thought reflect this change. Both wrestle with the problems of suffering and the seeming insignificance of individuals. Both end with an affirmation of a duty to live morally. Job speaks of God as follows:

(destroying) both the blameless and the wicked. When disaster brings sudden death, He mocks at the calamity



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of the innocent. The Earth is given over into the hands of the wicked; He covers the face of its judges.<sup>39</sup>

Nevertheless, Job refuses to "curse God and die". His reason is simply stated: "I clothed myself in Justice and it suited me" <sup>40</sup>. The lesson of Job is clear: every covenanted individual is responsible for adhering to the good, despite personal tragedy; every person is responsible for contributing to moral progress.<sup>41</sup> This too is the lesson of Ecclesiastes, an almost existential book which begins with the possibility that life has no meaning, but ends affirming that individuals create their own meaning by making a conscious choice to pursue, or not to pursue, justice and morality. <sup>42</sup> It is this interpretation of the Covenant, developed after one period of exile in Babylon, which the Jews carried with them into their next period of legal development, at the beginning of a far longer exile.

### The Talmudic Period

Concurrent with the Biblical law, there existed a body of 'Oral Law', or custom, which developed over the centuries. So long as the Jews were in one area, there was no perceived need to codify this law. Disaster prompted codification. The Hasmonean Jewish Kingdom (established in 165 B.C.E., after a 'war of liberation' against the Seleucid Greeks who had acquired the territory due to Alexander's defeat of Persia) was destroyed by civil war and Roman occupation by Pompey in 63 B.C.E.. After a three year revolt from 66-70 C.E., Jerusalem was again destroyed, the second Temple burned down, and the legal academies restricted. From 132-135 C.E., the Jews staged yet another revolt against Rome and this resulted in large-scale massacres and deportations. Jerusalem, renamed, Aelia Capitolina, was forbidden to the Jews.

Under these conditions, it was considered necessary to codify the law to ensure its survival. An academy was set up in Tiberias to debate the oral law and interpret it in accordance with both the Covenantal Code and changed conditions. This was initially done between 90 and 220 C.E. and resulted in a collection known as the *Mishna*. Between 220 and 500 C.E., further discussions and codification took place in both Tiberias and in Babylonia (the area known today as Iraq). The codified deliberations included majority and minority views on each question, and were recorded in two separate collections called the Jerusalem and Babylonian Talmuds. They immediately supplanted the Bible as the principle legal books of the Jews, thus completing a significant shift in Jewish law away from relative legalism based on divine law, towards a more liberal interpretation of the law. This was a problem because Deuteronomy had specifically commanded that no amendments be made to the law.<sup>43</sup> The Talmudic academies solved the problem of amending the word of God by interpreting archaic provisions out of existence, and grafting new concepts onto old laws.

There arose a remarkable notion in the Talmudic academies that human interpretations of the law outweighed divine ones. A story

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in the Babylonian Talmud relates how several Rabbis were arguing over the correct interpretation of a particular law. One of them finally called on God to testify in support of his interpretation, to which the others replied that "the law is not in heaven: it has been handed down to us at Mount Sinai, and we no longer take notice of heavenly voices...decisions are to be taken by majority vote". 44 This rather aggressive affirmation of human precedence completed the transformation of the law from a divine to a human institution which had begun nearly immediately after Sinai, had gathered pace after the return from Babylon, and, particularly after direct contact with the Greeks, had been established with Alexander's defeat of Persia. 45

This *coup d'état* enabled the Talmudic academies to diminish the effect of strict law when it was incompatible with equity. They wrote that "the courts may intercede in instances where the actions of one party, while superficially legal...border on the callous and inhumane". 46 In 'seizing' the ultimate interpretive power, the academies gave courts the authority to substitute some Biblical commandments for others in their adjudications. The legal fiction of substitution held, for example, that a person who acted with humility could be considered as having performed the sacrifices at the Temple, an act incapable of fulfillment given the destruction of the Temple. Using the same doctrine the Talmud equates the honouring of evil with idolatry. 47 These developments stressed behaviour over ritual.

Many archaic laws were changed at this time. The death penalty, specifically mandated in the *Torah* for thirty-six crimes, including failure to respect one's parents, was virtually eliminated through a creative manipulation of the rules of evidence, which required a nearly impossible combination of proof before allowing a court to impose it. The *Mishna* considers it to be a harsh excess for a court to impose the death penalty, even once in its seven year term. The minority view goes so far as to suggest that the punishment be meted out "...every seventy years". 48 The *Lex Talionis*, - an eye for an eye, tooth for a tooth- which, ironically, was originally meant to *restrict* unlimited revenge feuds, was also believed to be excessive and was reinterpreted to mean the *monetary value* of a tooth, eye or life. 49 Without enumerating all of the changes made to the law during the Talmudic Period, it is sufficient to stress that as a rule, general principles of morality were applied to legal cases, so that, in modern terminology, equity became the rule and strict application of the law the exception. The Talmud approvingly quotes Hillel, considered the greatest Rabbi of all (and, according to modern scholarship, a possible influence on, if not actual teacher of, Jesus), 50 as saying that all of Jewish law consists of only one basic rule: "Do not unto others as you would not have them do unto you: that is the law. All the rest is explanation". 51

### The Post-Talmudic Period: the Commentaries

Since the close of the Talmudic period, change in the law has been achieved chiefly through the use of 'Commentaries'- scholarly

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explanations of Talmudic and Biblical sources. The Commentaries continued the movement away from strict application of the law towards the principles of the Covenant. The Talmud refers to this as reading "within the line of the law"; what we would today call "reading between the lines".<sup>52</sup> Nachmanides (1194-1270 C.E.) wrote that "...one should do the right and the good in all matters...beyond the requirement of the law".<sup>53</sup> The Sixteenth Century Rabbi Joshua Val-Katz went further, stating that the judge "must not always decide according to strict *Torah* law ...(but rather) according to principles of equity".<sup>54</sup>

An example of the radical departure from strict Bible law is the change in the legal position of women. This position was greatly improved under both the Talmudic and the post-Talmudic regimes, rising from a position of near-slavery to one closer to, although admittedly not one of full, equality.<sup>55</sup> Under the earliest legal codes, a young girl was liable to be sold by her father as a slave. In Jewish law the enslaved daughter had to be freed at puberty and she could not be maintained in slavery if raped. In the event that she was raped, the offender was required to marry her. Although these laws had been abandoned long before the advent of the Talmudic period, the Talmudic academies nevertheless took steps to provide real protection at law for women. They instituted marriage contracts between husband and wife, and provided women with automatic liens on their husbands' estates in case of divorce. They declared that a man who beat his wife became liable to her for damages in case of injury. Finally, in the Eleventh Century the commentator Gershom of Mainz prohibited divorce without the consent of the woman.<sup>56</sup> Though these protections seem weak today, they compare rather favourably with comparable legal protections existing at those times in most other societies.

The period of the commentators reached its pinnacle with the works of Moses Maimonides (1135-1204 C.E.). A philosopher, legal codifier, scientist, writer and personal physician to Saladin in Cairo, Maimonides attempted nothing less than the complete harmonization of Jewish religion and law with the principles of reason and the philosophy of Aristotle.<sup>57</sup> He identified reason with morality and law, and saw God as representing pure reason as well as morality. As he believed that it was possible for humankind to reach many of the *Torah's* conclusions about intellectual progress and morality through reason, he contributed to Judaism's emphasis on human thought and relations rather than on divine contemplation. Although Maimonides never minimized the importance of God as a real being, he nevertheless tended to speak of "feeding the hungry and clothing the naked" concurrently with, and sometimes in the same paragraph as, laws concerning religious ritual, on the grounds that the hungry could not contemplate justice.<sup>58</sup> As a result of his unorthodox methodology he was sometimes accused of selectively ignoring certain aspects of the law and of inventing rationalizations with no authorities in support of his contentions. Notwithstanding these accusations, the quality of his work passed into the canon of Jewish jurisprudence. The importance of his contribution has

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been so great that it is said, "from Moses to Moses, there was none other like Moses".

### APPLICATION OF THE LAW

#### Law and the Messianic Ideal

It is evident that Jewish law has a far more active role in Jewish life than is allowed by liberal jurisprudence. As the principal agent of human progress, the law serves as the link by which human imperfection is divinely perfectible. Joseph Blenkinsopp has suggested that the entire "...Deuteronomic programme...(relates) cultic fidelity with the task of creating a just society" through proper application of Jewish law. 59

There is also a hierarchy of more limited goals in Jewish law. The first, intrinsic to whatever concept of Natural Law is accepted, although not explicit in the Covenant, is the necessary ordering of human society. This ordering, held to be the result of an innate human desire for community, is reminiscent of Aristotle. The law creates conditions in which civilized life is made possible. 60 Historically, these conditions are situated roughly in the time before the reception of the *Torah* at Sinai.

The second stage of legal development is the ordering of society "along principles of morality, integrity and fairness". 61 This formulation should be considered in connection with the increasing social and political reforms characteristic of the period of the Judges (c. 1200-1010 B.C.E.) but more particularly of the Monarchy (c. 1010-586 B.C.E.). During these stages the full aim of Jewish law becomes apparent. The religious-legal duty of the Jews is not just to create a more just society, but to create a *perfect* one, in other words, to reform the world by example. This is the meaning of election. Being the 'chosen people' entails extra obligations, not rights.

It must be emphasized that the Jewish messianic ideal is fundamentally different from the Christian one; Judaism has no concept of Original Sin. The Jew, like the Christian, sees humans as created in the image of God. By having eaten from the 'Tree of Knowledge' human beings are not, however, born in sin. Rather, we have obtained a measure of God's intellect. We are therefore considered to be capable of creation as well as destruction, and of choosing between the two. This power includes the ability to change, as well as to transcend human nature. The first act of Creation aside, humans are deemed to be *by themselves* capable of continuous re-creation. 62 It is this ability which renders the moral and intellectual perfection of humanity possible. What it is essential to remember is that it is *humanity* which perfects itself. In the Jewish tradition, the messiah is a human being, not a divinity, who is to rule on Earth, not in Heaven.

What emerges from the philosophy underlying Jewish religion and law is a daring goal of homotheosis: humanity becoming like God.

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There is in fact a long tradition in Judaism of competition with God, parts of which have been alluded to in the discussion above. Indeed, the very name Israel means "to contend with God". The competition is not meant to be acrimonious; it is compared to the competition between children and parents.<sup>63</sup> In fact, the Bible itself commands us to emulate and attempt to become like God: "You shall be holy, for I, the Lord thy God, am holy".<sup>64</sup> The ideal of *homotheosis* is the ultimate goal of Jewish religion and law: the creation on Earth of a morally and intellectually perfect, creative humanity, living in a perfectly just society, ruled by a perfectly just king.<sup>65</sup> The messianic age is therefore not at all a break with history, it is simply the end result of human evolution, brought about by adherence to Jewish law.<sup>66</sup>

### The 'State' in Jewish Law

(a) The Legislative Branch: The concept of the State is not fully developed in Jewish law. This may partly be a result of the fact that for eighteen centuries the Jews had no state of their own. It is also likely that in the formative period of the Jewish people it would have been considered presumptuous to install a permanently organized human government beneath God. The fact that the laws in their origin predated the state would have served to diffuse any perceived need for a legislative branch of government. In time this situation changed and a limited legislative power was granted to the courts, a power rather akin to the (undeclared) power of common law courts to 'legislate' changes to the common law. Finally, as discussed previously, a large degree of legislative power was 'usurped' by the Talmudic academies and their successors, the Commentators.

(b) The Executive: While it was considered necessary to have a government strong enough to implement the law, the fear was that a strong executive would be tempted to rule in the manner of a despotic monarch and would be unconcerned with the law which had been accepted at Sinai. This tension was manifest in the reluctance of the prophet Samuel to appoint a king when the people demanded one, and in his eventual appointment of Saul, who was a shepherd from the smallest and weakest of the tribes. The reluctance of the Twelve Tribes to unite under a strong executive monarchy was also the primary reason for the breakup of David's Israelite Empire after the death of Solomon in 926 B.C.E..

In order to prevent the emergence of an excessively strong executive, rules were devised to check the power of the king. This led to what Chaim Weizman, the first President of the modern state of Israel, called "the mother of constitutional government".<sup>67</sup> The king, or in several instances the Queen, was bound to obey the Covenant. Not only was the sovereign emphatically not above the law, he or she obtained legitimacy only insofar as he or she upheld and enforced the covenantal laws and standards. King Solomon is supposed to have declared that "only by justice is the throne established".<sup>68</sup>

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There existed a list of legal obligations to guide royal action. The Sovereign must be a "man of the people", refrain from keeping too many horses, abstain from keeping numerous wives, 69 refrain from accumulating wealth, and read Deuteronomy daily. 70 In addition to legal checks, the activities of the monarch were to be checked by the prophets. The prophets were commanded by law to act as consciences, or "mirrors to Kings", praising good acts and publicly criticizing injustice. 71 The moral authority of a constitutional monarch ruling under a just Constitution (the *Torah*) was illustrated by the famous Eighteenth Century Rabbi of Berdichev, Russia, who pointed out that despite a huge standing army, the living Tsar was unable to prevent smuggling, while the Jewish law was still respected by Jews despite the fact that Moses had been dead for three thousand years and the Jews stateless for seventeen centuries. 72

(c) The Judiciary: The institution of a judiciary is considered of vital importance in Jewish law, more so than the executive. It is believed to be so important that it is the seventh and final component of the Noachide Code, and is thus binding on all humanity. The great commentator Rashi (1040-1105 C.E.) considered that although different nations established different legal systems, all were required by Natural Law to establish court systems to enforce equitable laws. 73 As noted, there is little legislative power under Jewish law. It is the courts which, by and large, fulfill the legislative function. The judiciary in its application of the law is considered to advance the perfection of law. The Talmud equates judgeship with the human process of self-creation: "Whoever renders a true and just decision, it is as if he had become a partner with God in the work of creation". 74

The creation of a sophisticated court system dates to the return of the Jews to Israel from Babylon in 444 B.C.E.. A Great Sanhedrin of seventy-one judges sitting in Jerusalem operated as the Supreme Court, while lesser Sanhedrins were established throughout the countryside with the jurisdiction of each level clearly defined. In addition to adjudication and reforming the law, the Great Sanhedrin had supervisory responsibilities. Only it could appoint the King, the High Priest, and lesser judges. Only it could declare war, barring emergency situations of self-defence. It was the Great Sanhedrin, then, which replaced the prophets as the counterweight to the power of the Executive during the era of the Second Temple.

(d) Enforcement : The fact that Jewish law regulates nearly every aspect of human life, from the largest moral questions to the minutiae of daily routine, may render the impression that it tends toward a totalitarian control of human life. This is not the case. Many aspects of the law are not meant to be enforced. Apart from the practical impossibility of enforcement, because the law is equated with morality, it was believed that an act could only be moral if it were done voluntarily and out of love for the law, rather than out of fear. 75 Although this does not apply to the law as a whole - sanctions are set out for many of the crimes defined

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in the various legal codes - it has consistently been held that certain aspects of the law should not be enforced at all, including belief in the law itself. Unlike in Islam, there is in Judaism no punishment for apostasy. "There is no catechism in the Judaic tradition, nor is there any inquisition into the content or sincerity of the individual adherent's belief". 76 Thus, Judaism leaves some matters of morality to the conscience of the individual. While in the Ninth Century B.C.E., the Chief Temple Priest Jehoiada set guards at the entrance to the Temple to prevent access to the 'impure' (unwashed), a Fourth Century scholar cogitates: if "one has suffered a pollution...(and) is so minded, he bathes; if he is otherwise minded, he does not bathe. Does anyone see him, or does anyone know to tell him he ought?" 77 Similarly, the Sixteenth Century Rabbi, the Mahalel of Prague, considers the more substantive issue of freedom of speech, in a manner reminiscent of John Stuart Mill:

Even if one's words are directed against faith and religion, do not tell a man not to speak... Otherwise there will be no clarification of religious matters... One should tell a person to express whatever he wants. The elimination of the opinions of those opposed to religion undermines religion and weakens it. 78

The lack of enforcement in many areas of the law underlies a major difference between the Jewish and the liberal conception of 'law'. The liberal view is bound to the concept of rights which are held by individuals against other individuals and against the state. The state may not make laws which interfere with these rights, and each individual has a duty not to exercise her or his rights to the detriment of other individuals. This right/duty dichotomy flows from a political and legal philosophy which maintains antagonistic views of the relationships between individuals, and between individuals and the state. This fosters the liberal notion that a law which is considered binding, is only *law*, if it carries with it a sanction for failure to obey.

The dichotomy between rights and duties does not exist in Jewish law. As indicated previously, a law is considered binding only if it orders society and contributes to the moral and intellectual progress of humanity. There is no perceived conflict between law and freedom. The law is held to lead to human freedom, to a moral and intellectual perfection approaching Divine stature. Rather than seeking to protect individuals from one another and from the state, Judaism considers humanity to be joined in a community of individuals sharing a collection of interpersonal debts. Jewish law attempts to encourage "impulses to co-operation and friendship and not... impulses to assert rights, demand duties, and threaten force." 79 Each person is considered to be an individual. Each has the free will to cooperate or not to cooperate in the building of the community, and each is responsible for that choice, both to the community and to God (or, if one prefers, to the common vision of what humanity can achieve). 80 In modern terms, Jewish law lies somewhere between liberalism and corporatism, or communitarianism.

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There is no contradiction, within the Judaic tradition, in the fact that a law may not be enforced by the state, but may still be binding law.

The emphasis on the community of all humankind is the essential reason for obeying the law. It is not the only reason. At a simple level, God is said to materially reward those who obey the law. As Meir Tamari has pointed out, in a religion with only a weak tradition of an afterlife, the sole external reward for virtue has generally been material well-being (although the reward, of course, depends upon God's will).<sup>81</sup> Other reasons for adhering to the law range from the basic need to maintain order thus making civilized life possible,<sup>82</sup> and to the need to maintain the hope of progress in an evil world.<sup>83</sup>

The Jewish foundational myth of election reinforces the importance of obeying the law. Upon accepting the Covenant, the Jews made themselves responsible for upholding the law in order to reform the world by example. Human perfection and the just world are only possible, though, through the *voluntary* adherence of individuals to the law. Every individual's choice to adhere to or disregard the law therefore effects all humanity. While an individual who chooses to adhere to the law may not be individually rewarded, humanity as a whole gains. Conversely, disobedience of the law 'writ large' is a violation of the covenanted individual's duty to advance the standard of absolute morality. Individuals who choose not to obey the law thereby commit an act of destruction, setting the world back towards idolatry and anarchy.<sup>84</sup>

## SIGNIFICANCE OF JEWISH LAW

Jewish law represents a fundamentally different approach to life and law than does liberalism. It holds that human beings are possessed of free will, capable of both good and evil. It believes that humanity is rational and perfectible. It affirms that we cannot conceive of ourselves solely as individuals or as members of a group if we are to succeed in the realization of 'world community'. In combination these tenets represent a cohesive vision which is both optimistic and challenging. The genius of the institution of Jewish law is the flexible means it has implemented in seeking to achieve its absolute and unchanging goal. The stress on reasoning and 'principle', as opposed to the 'letter of the law', has saved Jewish legal thought from stultifying formalism and irrelevance. It was thus possible for Rabbi Simeon b. Gamaliel to write of the Talmud that "the world endures by virtue of three things: justice, peace and truth"<sup>85</sup>, without having to fully define just what justice, peace and truth entailed.

To this writer it appears that Jewish law has two advantages which, paradoxically, are also disadvantages. The first is that for much of its existence, and for nearly the entire period of its greatest change and adaptation, Jewish law did not face the pressure of implementation by a state. In its first one thousand years, when the Jewish law did exist as the law of a 'nation-state', it was relatively modern in comparison to other legal codes of that time. From the Talmudic period onwards, the law was applied to a relatively small group of people spread throughout



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the area of three, and then six continents. As it did not have to face the stress of national implementation, it was free to preoccupy itself with absolute morality. It did not have to expect human beings, with their weaknesses and appetites, to succeed in adhering totally to the law. In its broader ambit it emphasized the role of law as a guide to moral behaviour, rather than detail a complete civil and criminal code. The focus of the law became the development and refinement of the means towards the end of absolute morality. Jewish law seems to have shared the same attitude that Judaism has always had with regards to the Messiah: the Messiah will come, certainly, absolutely, but not within planning range; we had better begin to learn to live together in the meantime.

The second advantage/disadvantage of Jewish law is that it has always applied to a small and relatively homogeneous group of people. When Rabbi Simeon b. Gamaliel refers to the abstract notions of justice, peace and truth, most Jews in antiquity would have had a shared understanding of the concepts. The holy days established under Jewish law reinforce these collective conceptions. Passover, the most significant holiday in Judaism celebrates the freedom of the Israelites from slavery and their acceptance of the law. The annual requirement in law that each Jew recount the story of the Exodus and the reception of the law strengthens the bonds to the law and to the community. 86 The disadvantage of this is the reduced applicability of that law to those outside the group. Ironically, the same elements which bring Jews to accept their self-imposed duty to the world also mitigate against the applicability of the covenantal world view beyond the group.

This is not to argue that Jewish law has not had a profound effect upon the world. Through its derivative religions, Christianity and Islam, Judaism's moral codes are today applied, to a greater or lesser degree, over many peoples across the world. Harold Berman and other legal scholars have documented the debt that modern Western law owes to religion, specifically to Christianity and through it, to Judaism, for having provided it with a moral code. Without this, scholars claim, Western law would have neither authority nor cohesiveness. 87

In the end, however, if Jewish law is to be considered anything more than a cultural fossil, it must stand on its own rather than be respected for its contribution to other legal traditions. Jewish law is possibly the first example of a jurisprudential tradition which does not accept that human nature is static. Although Plato would concur, his opinion was 'lost' to Western philosophy until the writings of Jean-Jacques Rousseau in the Eighteenth Century. A formidable array of thinkers, from Aristotle onwards, including the classical liberals, held that human nature was fixed and immutable. While opinions diverged as to whether that nature is 'good' or 'bad', the notion of immutability necessarily limited the scope of human action. The belief of liberalism that human nature will *always* and fundamentally be self-interested and competitive is, in essence, a 'fallen vision'. While no one could deny the indisputable success of liberalism in influencing Western life, it is nevertheless true that in its moral outlook, it is rather limited.

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On the other hand, the lasting legacy of Jewish law is the utopian vision of the perfectly just world. Given the sorry state of human affairs, particularly in this century, one might conclude that the liberals are right and that the idea of a just world is a fallacy. However, Judaism's astounding and unshaken faith, in the face of history's dismal record, that humanity *can* reform itself and progress to perfection, and even homotheosis, remains strong. In an age of nuclear weapons and widespread human persecution the importance of grounding law in morality, truth, and the pursuit of perfection, both in the individual, but more importantly in the communal sense, must be reconsidered. It is in many ways apt that we, as lawyers, remember the words of the long-dead psalmist, who from a distance of 2,500 years, tells us with absolute conviction, that "The law which is perfect, perfects the soul". 88

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1. All historical dates in this paper are taken from H. Kinder and W. Hilgemann, *The Penguin Atlas of World History*, Penguin Books, Harmondsworth, England, 1987.
2. J. Blenkinsopp, *Wisdom and Law in the Old Testament: The Ordering of Life in Israel and Early Judaism* (London: Oxford University Press, 1983) at 83.
3. E.N. Dorff and A. Rosett, *A Living Tree: The Roots and Growth of Jewish Law* (Albany: State University of New York Press, 1988) at 2.
4. *Infra*, at 14.
5. See T. Hobbes, *Leviathan* (Oxford: Clarendon Press, 1967); J. Locke, *The Second Treatise on Government*, 3rd ed. (Oxford: Blackwell, 1966).
6. H.J. Laks, "Three Proposals Regarding the Relationship of Law and Morality in the Halakhah" (1989) 8 *Jewish Law Annual* 53.
7. L.E. Goodman, "Maimonides' Philosophy of Law" (1978) 1 *Jewish Law Annual* 72.
8. Dorff and Rosett, *supra*, note 3, at 257.
9. M.R. Konvitz, "Conscience, Natural Law and Civil Disobedience in the Jewish Tradition" in Shlomo Shoham, ed., *Of Law and Man: Essays in Honour of Haim H. Cohn* (Tel Aviv: Sabra Books, 1971) at 159-160.
10. *Ibid.* For his part, Petronius was sentenced to death by Caligula, who fortunately was himself overthrown and killed before the decree was carried out.
11. J. D. Bleich, "Judaism and Natural Law" (1988) 7 *Jewish Law Annual* 5 at 12-13.
12. Konvitz, *supra*, note 9 at 167.
13. J. Bazak, "The Meaning of the Term 'Justice and Righteousness' in the Bible" (1989) 8 *Jewish Law Annual* 5 at 7.
14. I. Twersky, *Introduction to the Code of Maimonides* (New Haven: Yale University Press, 1980) at 386, quoting Maimonides.
15. Bazak, *supra*, note 13 at 10.
16. Bleich, *supra*, note 11 at 5.
17. D. Novak, "Natural Law, Halakhah, and the Covenant" (1988) *Jewish Law Annual* 43 at 47.
18. Bleich, *supra*, note 11 at 30-31.
19. Blenkinsopp, *supra*, note 2 at 46-61.
20. Genesis 18:25. "God has threatened to destroy Sodom, and Abraham uses this "Natural Law" argument to stop him. After bargaining, they agree that if Abraham can find only ten (down from 50) good people, Sodom will be saved."
21. G. Horowitz, *The Spirit of Jewish Law: a Brief Account of Biblical and Rabbinical Jurisprudence* (New York: Central Book Company, 1973) at 1.
22. The obligation to circumcise males comes from an earlier covenant, between God and Abraham.
23. D. Sturm, "American Legal Realism and the Covenantal Myth: World Views in the Practice of Law" (1980) 31 *Mercer L. Rev.* 487 at 503.

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24. This command is contained in the Passover *Haggadah*, or story.
25. Joseph Yahuda, *Law and Life According to Hebrew Thought* (London: Oxford University Press, 1932) at 32.
26. Dorff and Rosett, *supra*, note 3 at 96.
27. *Ibid.*, at 106. Also note Isaiah 5:1-7, "And He hoped for Justice, but behold, injustice; For equity, but behold, iniquity!"
28. M. Galinski, *Pursue Justice: the Administration of Justice in Ancient Israel* (London: Nechdim Press, 1983) at 2-3.
29. Horowitz, *supra*, note 21 at 106-111.
30. *Ibid.*, at 132.
31. *Ibid.*, at 132-133.
32. Yahuda, *supra*, note 25 at 15.
33. Deuteronomy 6:18, 16:20.
34. "Law and Morality", in *Encyclopedia Judaica*, vol. 10 (Jerusalem: Keter Publishing House, 1971) at 1479.
35. Isaiah 59:21.
36. Blenkinsopp, *supra*, note 2 at 49.
37. Jeremiah 6:12.
38. Horowitz, *supra*, note 21 at 24.
39. Job 9:22-24.
40. Galinski, *supra*, note 28 at 9.
41. Blenkinsopp, *supra*, note 2 at 52-61.
42. *Ibid.*, at 65-66.
43. Deuteronomy 4:2.
44. H. H. Cohn, *Human Rights in Jewish Law* (New York: Ktav Publishing House, 1984) at 119.
45. R.P. Booth, "Early Jewish Law and University Education" [1986] Denning L.J. 29 at 36.
46. Laks, *supra*, note 6 at 56.
47. "Law and Morality", *supra*, note 34.
48. E.B. Quint and N.S. Hecht, *Jewish Jurisprudence: Its Sources and Modern Application* vol. 1 (Chur, Switzerland: Harwood Academic Publications, 1980) at 36-37.
49. Horowitz, *supra*, note 21 at 9.
50. *Ibid.*, at 10.
51. *Ibid.*, at 29.
52. *Ibid.*, at 7a-7b.
53. Dorff and Rosett, *supra*, note 3 at 251.
54. Bazak, *supra*, note 13 at 10.
55. Horowitz, *supra*, note 21 at 253-255.
56. *Ibid.*, at 48, 253-258.
57. Twersky, *supra*, note 14 at 361-362.
58. *Ibid.*, at 433, also Goodman, *supra*, note 7 at 100.
59. Blenkinsopp, *supra*, note 2 at 97.
60. Goodman, *supra*, note 7 at 73-75.
61. Bazak, *supra*, note 13 at 6.
62. J.W. Chapman, "Religion, Morality, and the Law" in *Nomos XXX* (New York: New York University, 1988) at 249.
63. For example, the Talmud story justifying the humanization of legal interpretive authority referred to at page 13 ends by asserting God's joy at his "children's" coming of age, as it were.
64. Leviticus 19:2.
65. Goodman, *supra*, note 62 at 86-87; also I. England, "The Interaction of Morality and Jewish Law" (1988) 7 *Jewish Law Annual* 114, at 120-121.
66. Chapman, *supra*, note 62 at 201.
67. C. Weizman, Address to the United Nations General Assembly, 1949, quoted in Horowitz, *supra*, note 21 at 72.
68. Proverbs, quoted in Galinski, *supra*, note 28 at 8.
69. Legend relates the consequences of King Solomon's failure on this point. It is said that on the day he married the Princess of Egypt, a reed grew out of the Mediterranean, upon which Rome was established, leading eventually to the destruction of Jewish independence for nearly two thousand years!
70. Yahuda, *supra*, note 25 at 182-184.

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71. Deuteronomy 17:14-20.
72. M. Tamari, *"With all Your Possessions: Jewish Ethics and Economic Life"* (New York: The Free Press, 1987) at 13.
73. Bleich, *supra*, note 11 at 18; see also *supra*, note 27.
74. L. Jacobs, "Tur, Preface to *Hoshen Mishpat*- Translation and Commentary" (1987) *Jewish Law Annual* 94.
75. Bleich, *supra*, note 11 at 29.
76. Goodman, *supra*, note 7 at 96.
77. Booth, *supra*, note 45 at 33.
78. Cohn, *supra*, note 44 at 128.
79. H.J. Berman, "Symposium: The Secularization of the Law" (1980) 31 *Mercer L. Rev.* 401 at 405.
80. D. Daube, *Studies in Biblical Law* (New York: Ktav Publishing House, 1969) c.4.
81. Tamari, *supra*, note 51 at 29.
82. Bleich, *supra*, note 11 at 15.
83. Jacobs, *supra*, note 74, quoting the Talmud.
84. Blenkinsopp, *supra*, note 2 at 45.
85. Jacobs, *supra*, note 74.
86. Goodman, *supra*, note 7 at 96-97.
87. Berman, *supra*, note 79; also H.J. Berman, *The Interaction of Law and Religion* (Nashville: Abingdon Press, 1974).
88. Psalm 19.