

# "IDEAL" AND "REAL" IN CLASSICAL JEWISH POLITICAL THEORY

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*This essay considers the degree to which Jewish political and legal theory allows — and, indeed, mandates — the recognition that the Torah legislates an ideal law which is not appropriate for situations of social and political stress, and the degree to which such situations are really the historical norm rather than the exception. The Talmud, it is shown, adumbrates this concept, but in a fairly marginal form. Maimonides places it at center stage of societal governance, apparently expecting that a Jewish society will of necessity be thrown back upon this option; but he also suggests guidelines for its regulation. R. Nissim of Barcelona (fourteenth century) both expands the concept and also relaxes the Maimonidean restrictions on its use. This final form of the doctrine receives a thorough critique at the hands of Isaac Abrabanel; but it also serves as the linchpin for much contemporary argument for the legitimacy of Israeli legislation from a classical Jewish perspective.*

The relationship of law and political theory to reality, that is, to the actual doings of people in society and to the concrete problems faced by societies, is undoubtedly complex. Are law and political theory to shape reality? Or is the reverse true, and both law and theory are to take their cue from society? This, of course, is a very abstract formulation of the issue. It is also an overly extreme and polarized formulation, for it is likely that the relationship of law and political theory to reality is dynamic and indeed dialectical. But however one refines the formulation, the problem remains. It is often at the heart of vigorous political dispute; it is also high on the scholarly agenda and is treated by both philosophers and historians, as well as by sociologists, anthropologists, and others. These, of course, ask whether the normative statement is borne out in historical reality.

Revealed, divinely-inspired law ostensibly need not face this dilemma. Such law, bestowed upon and obliging "all your generations," is assumed to be fundamentally stable, unchanging, perhaps eternal. Authoritative, it is intended to govern its society and shape it in its own image. We are not concerned here with whether neutral historians

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would accept this description, but rather with how the system looks to its adherents, “from the inside,” as it were, and according to its own logic. This logic does not claim that rules and regulations remain identical throughout history. It will argue, however, that variation largely reflects the application of the same unchanging principles and norms in varied circumstances so that the law remains true to itself and its structures, in the deepest sense.

While this logic of revealed law is a very simplistic description, omitting much and distorting much, it also contains much that is true. Yet, if this description fits most areas regulated by revealed law, it does not accurately render the career of revealed law in the polity or in governing the political sphere — even from the perspective of that law itself. Here theorists of the law argue that a two-tiered system exists, one that allows and even requires a wide gap between the tiers. In its fullest, medieval formulation, this theory speaks of ideal law for an ideal society, and realistic law for a real society. Ideal law is our familiar revealed law, the classical law known in both principles and details, and it is appropriate for an ideal society. Real law, on the other hand, derives its authority from the initial revealed law, but its actual content will be devised so as to guarantee social order in times of disorder, that is to say, in human history as we know it. A pithy expression of this theory was given in the fourteenth century by Solomon ibn Adret: “for if you base yourselves on the law of the Torah in this and similar situations...the world [i.e., society] would be destroyed.”<sup>1</sup> (It should be noted that for both Muslim and Jewish theorists, even ideal man and his society require law, as neither law nor political governance are the product of human corruption.)

Modern discussion of Islam has focused sharply (and oftentimes unsympathetically) on this postulate of a “two-tiered” system, which is quite widespread in classical Islamic political and legal theory. With the development of the Islamic state (and then, states) in the early medieval period, the actual governance of society departed further and further from the pristine rule of Islamic jurisprudence, just as its political structure resembled less and less the normative reality of the first *khalifs*. These phenomena were not castigated by Islamic theorists as violations of the divinely legislated order; rather, they were legitimated as necessary expressions of the “second tier” of the Islamic order itself. Modern scholars have documented the dimensions of the gap between the “ideal” and “real” tiers, and have then proceeded to censure the classical theorists for this “betrayal of the intellectuals,” a betrayal tailored to fit the contours of political power in the Islamic state.<sup>2</sup> For the basic departure from the ideal law of Islam opens a massive gap between the quasi-republican character of the ideal Muslim polity and the utterly personalist power with which the ruler is endowed. This legitimation of power, despite its opposition to the

ideal norms of Islamic life, has even been identified as a basic cause of Islamic political demoralization. For revealed law, being divine, can never be repealed or superceded; and the rationalization which underlies the "two-tier theory" may explain why the ideal revealed law is not functioning, but it will not successfully convince the believer that his society (and its spiritual leadership) has not betrayed its spiritual commitment.<sup>3</sup>

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It is difficult to summarize "Talmudic doctrine" on any topic, for this involuted and protean work does not easily lend itself to systematization, and certainly not to generalization and abstraction. Nor did the scholarly tradition inaugurated by the Talmud attempt to reduce its classical forbear to these dimensions; rather, it usually proceeded to apply the concrete Talmudic discussion to other concrete instances. Nonetheless, we shall attempt some generalizations in the light of the problematic of the "ideal" and the "real," focusing on phenomena which may reflect what we have called the "two-tiered theory." These phenomena range from the properly political to the jurisprudential, and highlight, as well, the different modalities of "reality" which Jewish history forced its theorists and legislators to confront. The structure which enables Talmudic rabbis to retreat from the definitive, "ideal," norms of the Torah is the rabbinic power of legislation (*takkanah*), which implies that the Torah can be "corrected" — expanded or contracted. The "two-tier theory" in the sphere of the political is then simply one expression of a classic and ubiquitous rabbinic device; *takkanah* both implies the theory itself and gives it the instrumentality by which it concretizes itself. Given the complexities of Talmudic literary history, it is likely that other forms also reflect rabbinic revision of the biblical system; scriptural exegesis, for example, often masks rabbinic legislation.<sup>4</sup> But inasmuch as we here seek to pinpoint the theory held by the rabbis, we prefer to work on material in which they consciously express their motivation rather than on those texts which are highly opaque to our problem.

The most dramatic exemplar of the "two-tier theory" does, in fact, concern the political sphere proper. Biblical anthropology, as is well known, sees all men as God's creatures, subject to His law. This anthropology produces a system of governance in which no ruler is absolute: the king is to share power with the "elders" or with the Sanhedrin, and he is, of course, subject to the same law as any other Israelite: "If he violates a positive command or a negative command he is treated as an ordinary individual."<sup>5</sup> But this principled norm crumbled in the face of monarchical power in early Roman times when, in the aftermath of

a confrontation with Alexander Yannai, it was decided that “the king may neither judge nor be judged.”<sup>6</sup> The king was thus placed beyond the reach of any humanly effective legal restraint. This surrender to brute power delivered a major blow to the Jewish political tradition, and we do not wish to minimize the force of the laconic Mishnaic regulation. But this retreat from the “ideal” (and it is not a singular retreat, for the non-political sphere offers other examples)<sup>7</sup> is limited in a way characteristic of the entire rabbinic tradition. For if the king is placed beyond the reach of justice — of human justice, that is, for in a traditional culture God was always the final and inescapable judge — he is simultaneously banished from participation in the judicial system. The Talmud claims that this is required by a moral symmetry: one who is not subject to the laws himself cannot judge others. Yet we can also see in this stance the attempt of a system, highly sensitive to the need to separate powers, to limit the power it cannot control. Characteristically, the rabbis attempt to preserve the integrity of the judicial system.

Having opened our discussion of the “two-tiered system” with materials concerning the monarch, it would seem natural to give pride of place to *Mishpat HaMelekh* (=the king’s law): the constellation of monarchic powers outlined in I Samuel 8, discussed in the Talmud, and ultimately codified in the medieval collections. But the fact of the matter is that *Mishpat HaMelekh* is not the overriding category it is sometimes claimed to be until medieval times, as we will see. Both Bible and Talmud apparently understand *Mishpat HaMelekh* as granting the monarch extraordinary powers in the pursuit of matters of state, primarily wars and taxation, as well as in the appropriation of personal servants. But there is little intimation that governance as a whole is beyond the rule of law or that the varied norms obliging the courts and the elders in, say, Exodus 21-22 can be voided. This, at least, is the Maimonidean reading of Bible and Talmud. Others such as the tosafists (and possibly Rashi) did in fact read the matter more broadly and so had difficulty squaring the powers granted the king with, say, Ahab’s need to stage a judicial murder in order to gain the vineyard of Naboth. Certainly, the Talmudic debate as to whether *Mishpat HaMelekh* itself is a bestowal of legitimate power or, rather, a prophetic warning to Israel of the evil monarchy would bring, is most relevant; the latter position clearly maintains that there can be no compromise with *any* of the biblical norms of justice even for reasons of state. Yet even if *Mishpat HaMelekh* is accepted as legitimate bestowal, it does not create a systematic, broad alternative to the normative law recognized by Bible and Talmud. Consequently, when this alternative does emerge in medieval theory, we are hard pressed to exhibit its Talmudic antecedents. This crux is symbolized by the

Talmudic (or at least the Babylonian Talmud's) insistence that the Davidic king "is judged," as we have just seen.<sup>8</sup>

The Talmud, of course, is most concerned with courts and what they do; consequently its major resolutions of the tension between the "ideal" and the "real" are to be found in this sphere. Here there are two types or areas of activity: first, there is the bestowal of broad prerogative or discretionary power; and second, there is a controlled relaxation of certain specified provisions of the rule-structure itself.

The parade examples for the Tannaitic bestowal of discretionary power in extraordinary situations tell of a Jew stoned to death for riding a horse on the Sabbath in Maccabean times, of a lashing administered to a groom who acquired his wife by publicly cohabiting with her, and of eighty witches who were tried and executed on a single day by Simeon b. Shetah. The imposition of more severe penalties than those imposed by the Torah and the suspension of normal procedure are allowed with full recognition that the sinner "is not worthy of such," but that "it is the demand of the hour," that is to say, historical and social conditions require exemplary and severe punishment "so as to safeguard the Torah."<sup>9</sup> Thus the Talmud explicitly articulates the distinction between the law as appropriate for the isolated individual and the law as an aspect of social governance and formation. (It is possible and the Talmud also allows, under this rubric, suspension of other procedural rules, such as those defining acceptable witnesses, the need for proper warning, etc.)<sup>10</sup>

Although this Talmudic doctrine of discretionary powers becomes quite central in medieval theory, as will be seen, it played a rather limited role in Talmudic thinking proper and it was not a generative structure. There are a small number of instances, located in *amoraic* Babylonia, which may reflect the doctrine (it is not mentioned specifically),<sup>11</sup> but this ought not obscure the fact that it does not sustain Talmudic discussion or provide a pivotal norm.<sup>12</sup> The Talmud as a whole is much too committed to the rule of law for it to expound the doctrine of discretionary powers.<sup>13</sup> Indeed, the Talmudic commitment to the law seems to be such that it does not even develop a functioning concept of equity.<sup>14</sup> But judges were allowed (or even expected) to apply statutory law selectively, based on their evaluation of the character and reliability of witnesses and parties to a dispute — which is also a form of discretionary power.<sup>15</sup>

Another, even broader, Talmudic phenomenon can be mentioned here. Talmudic legal analysis will frequently distinguish between sanctions: some are *kenas*, or "fines," while other payments are designated *mamon* (or *din*), or "compensation." The distinction between these two categories is variously defined, but on some occasions it is clear that *kenas* is levied because the offender is not liable for compensation

under Torah law, but the rabbis felt — often for reasons of policy — that payment should be made. This, it would seem, embodies some form of a “two-tiered theory,” where rabbinic legislation must accommodate a reality that ideal Torah law need not recognize.

On the whole though, the Talmud moves in another direction when it decides that “reality” is stronger than the situation for which the law was originally devised: it selectively — but universally — relaxes the rules. Here the major “reality” problems considered are economic pressures and the malfunctioning of the legal system itself in objective historical situations. Thus, witnesses in civil cases will not be subject to the rigorous questioning required by Torah law so as to ease collection of debts, thereby opening credit lines.<sup>16</sup> Significant reconstruction of the rules constitutive of courts is undertaken for similar reasons, when it becomes clear that requiring fully authorized judges would reduce the number of operating tribunals to an unacceptable number.<sup>17</sup>

Does the Talmud indeed know the “two-tier theory” expounded at the outset of this essay? The concept is certainly not formulated explicitly. Rabbinic enactment of new rules to supersede the Talmud-norms seem to acknowledge the fact that new situations warrant new regulations, but again it is nowhere stated that the Torah’s rules apply to a more “ideal” society or situation than do the rabbinic ones — though the new rabbinic rules are always devised so as to meet a problem which, in theory at least, did not exist for the Divine legislator. Talmudic bestowal of discretionary power does seem to imply at the very least that divine law is suited for less threatening times than those for which broad discretionary powers are the proper tactic. But as we have seen, this structure is not especially attractive to the Talmud, which does not seem to base social governance on discretionary prerogative. On the whole, then, the Talmud apparently considers Torah-law appropriate to a normal society, with the proviso that extraordinary situations demand more extreme measures. Rather than two broad and distinct categories, we have a spectrum which allows for variety.

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Maimonides massively expands the role of discretionary power in his scheme of political governance. Such power is applied to a far broader range of problems and it is distributed to a larger group of functionaries.<sup>18</sup> The significance of discretionary power for Maimonides is not measured, however, by these quantitative tests alone. Rather, Maimonides seems to take discretionary power as a central aspect of government, a frequently exercised function rather than a highly extraordinary event. In all this — the types of problems resolved by

discretionary power, the identity of its wielders, its overall role in the scheme of government and social control — Maimonides' account parallels that of major currents in Islamic law and theory. At the same time, he integrates discretionary power into the more normatively structured scheme of governance in a way which is quite congruous with a specifically Jewish view of the polity, a view which set the limits within which this power must function.

Discretionary power is granted, in the Maimonidean scheme, to the king as well as to the court.<sup>19</sup> It may be possible to infer this from Talmudic materials,<sup>20</sup> but it is more likely that the matter is much more basic and derives from the very heart of Maimonides' political vision. This recaptures something much closer to the biblical structuring of the state in which the king plays the central role in maintaining order. A similar situation exists with regard to the power granted the king to appoint judges (a power shared, of course, with the Great Court); here, too, one hears the resonance of biblical theory, though Talmudic precedent is not entirely lacking.<sup>21</sup> In both instances, the extent of monarchic power over and against that of the court is significantly increased. The reach of discretionary power, it would seem, is itself extended significantly by vesting it in the king.

But it is not merely a matter of lodging discretionary power with the king. For the use of discretionary power is now not an incidental activity but a significant element in the profile of both monarchy and the courts, and even more — a major component of their role in society. Maimonides makes this statement by the artful use of literary devices, of which he is a master, as well as by substantive rulings. He does not merely enable king and court to use discretionary power — he instructs them to do so, phrasing his rulings in the imperative. The phraseology repeats the value-saturated phrases used to describe the basic goals of government, phrases like "breaking the arms of the wicked," or more generally, "the mending of society."<sup>22</sup> With respect to the court, Maimonides assembles rulings dealing with all the various modes of discretionary power ranging from the court's obligation to decide civil cases on the basis of its own perceptions, despite testimony to the contrary, to its obligation to impose punishments of extraordinary severity even when normal standards of evidence are not met, to its obligation to impose *herem* and *niddui* (excommunication and isolation of varying degrees of severity), to expropriate property as a punitive device, and finally to engage in prophetic rebuke and chastisement. We shall have occasion to return in more detail to certain aspects of the twenty-fourth chapter of *Hilchot Sanhedrin*; suffice it to say that in this chapter, varied as its elements may be, Maimonides is intent on one overriding goal: the creation of the court as an organ capable of using discretionary powers frequently and powerfully. Maimonides thus suggests that neither the civil nor the religious order of society can survive if defended

by the more delicate normative structures alone. It is well worth noting, parenthetically, that Maimonides seems to have an abiding interest in the general issue of temporary, extraordinary, suspension of permanent, standard norms; for he explores this topic not only in connection with the court's role vis-a-vis society but also vis-a-vis the legal structure itself, insofar as both court and prophet may (and are expected to) temporarily suspend laws of the Torah and instruct the populace to violate its sacred norms, if judged necessary.<sup>23</sup>

One topic is especially singled out as warranting application of standards beyond those of the normal normative order — murder. Generally speaking, Maimonides views murder as especially worthy of punishment for, “although there are sins worse than bloodshed, none cause the destruction of civilized society as does bloodshed. Not even idolatry, nor sexual immorality, nor desecration of the Sabbath, is the equal of bloodshed.”<sup>24</sup> Thus, there exists a whole range of situations in which the court must judge the murderer innocent by its normal procedures — but is also expected to punish him severely in the interests of social order by applying another, much more functional, standard of judgment. Here are two examples: Maimonides rules that the king ought to disregard the normal rule requiring two witnesses to the act, and full acknowledgement by the would-be murderer of a warning before the act, in order to convict.<sup>25</sup> The rigorous and ideal norms obviously make it virtually impossible to convict any criminal. Second, while the fully normative structures do not convict for conspiracy or any act other than the physical and direct act of murder, Maimonides rules that both king and court may execute in such cases (again, “for the benefit of society” in the case of the king and “provided that circumstances warrant such action” for the court), and must “flog... imprison...and inflict severe punishment...in order to frighten and terrify other wicked persons, lest such a case become a pitfall and a snare....”<sup>26</sup> Islamic jurisprudence, confronted by similarly rigorous norms (in the laws of evidence, for example), also declared that its *mazalim* courts must act for the benefit of society and apply a more realistic standard of justice.<sup>27</sup>

Maimonides thought, then, that society could be maintained only by granting the organs of governance sweeping discretionary powers, which he expected would be used frequently — or at least would be a very visible deterrent. At the same time, it is difficult to discover any systematic categorization underlying this state of affairs. Maimonides does not speak of two bodies of law, each appropriate to different types of society or to different aspects of the same society. Indeed, since he is a legislator rather than a philosopher of law (in our context, of course), it may be unfair to expect him to produce such a conceptualization. Nor is the distinction between discretionary power and normative law institutionalized in the sense that different persons and bodies are



responsible for each. Both king and court wield discretionary powers; and if this seems confusing, it is merely part of the much larger problematic of separating the functions of king and court in Judaic political theory from biblical times on.<sup>28</sup> Maimonides does not distinguish, then, between "ideal" and "real." He does distinguish, explicitly and repeatedly, between instances where only individuals are affected and in which rigorous normative law is to be applied, and situations of great social resonance where the public good is involved and in which government must exercise its prerogative and set aside the norms that are usually operative.<sup>29</sup>

However effective all this may turn out to be, it is obvious that it also opens the door to despotism and tyranny. Prerogative power, writes John Dunn, "eludes that careful tissue of legal restraint which men have devised over the centuries for their protection against their rulers"; and even if this modern comment on Locke is probably not fully acceptable to a medieval Jew like Maimonides, it is clear that he, too, was aware of the abuses to which discretionary power lent itself.<sup>30</sup> Thus, the major statement on the discretionary power of the court concludes with a warning that judges remain sensitive to the human dignity of those they punish, and continues to rail against undue assertion of authority by communal leaders.<sup>31</sup> Yet all these admonitions do not fully solve the problem; they possess no sanction and their relevance is left totally to the evaluation and conscience of the judge or communal leader himself.

It is significant, therefore, that Maimonides' recommendation of discretionary power is not quite as radically unregulated and unchecked as one might assume from a superficial reading.

Maimonides clearly prefers to endow the court, rather than the king, with the prerogative of overriding normative law. He does extend this power to the king as well but, it would appear, in cases of bloodshed alone. In all other situations where discretionary power is allowed, he speaks — as does the Talmud — of the court. It is likely that Maimonides is wary of adding to the power already granted the king and that he hoped that the men who in general administered the law — judges — would not easily undermine it. From a more systematic point of view, the ability of the court (rather than the king) to absorb this major social function reflects the division of powers basic to Jewish political theory, which places all judicial responsibility in the hands of an independent judiciary.<sup>32</sup>

Moreover, the power to deal with extraordinary situations is not delegated to a judicial arm specially created for that purpose, a body of courts distinct from the normal framework of the judicial system and independent of its standards. This, of course, is the case with the Islamic *mazalim*, whose appointment by the *khalif* reflects the centralized structure of the Islamic polity.<sup>33</sup> In the *halakhic* regime,

discretionary power is to be integrated into the workings of the general court system (much as it is integrated by Maimonides, from a literary point of view, into his *Code*); it is viewed as an integral and fully legitimate aspect of Jewish law, requiring neither apology, subterfuge, nor a guilty conscience.<sup>34</sup> Maimonides does allow the king to appoint judges, parallel to the appointment of judges by the judiciary itself.<sup>35</sup> But while this procedure remains only too vague in both details and overall conception, certain points are clear: the king may appoint only fully qualified men to serve as judges and, more significantly, there is no reason to think that these apply a law any different from that of the court-appointed judges or that they are to constitute an independent system based on powers of prerogative. Maimonides' determination to keep the use of prerogative powers on a short leash, as it were, also influenced his development of the institution of the market-inspector. The Maimonidean *shoter* is, most probably, heavily indebted to the Islamic *muhtasib* in the range of his responsibilities; but Maimonides makes it clear that the *shoter* is a court-appointed official and he is quite reluctant to grant this official the power of summary punishment with which the *muhtasib* is endowed.<sup>36</sup>

These restraints on the actual use of discretionary powers ought to be supplemented by a number of more theoretical considerations, the broad thrust of which is to argue that even discretionary power must be defined by both law and morality. Put another way, Maimonides felt that the license to abandon the more rigorous normative structures did not necessarily impair the law's quest for truth or justice. Let us take as an example the overall relaxation of the normal rules of evidence: in cases guided by the public good the courts or king may punish, as we have seen, with less than the two witnesses mandated by biblical law, and even without the normal warning and acknowledgement by the accused. Actually, it is likely that *two* witnesses are not required — but that *one* is.<sup>37</sup> This, though, is not the heart of the point. Simply put, it is that Maimonides often indicates that one witness may lead a court to the truth no less than two, and that this requirement, along with that of warning and acknowledgement, may well be of a formal and even dogmatic nature. Thus, he will speak of cases in which “the testimony of the witnesses could not be sustained for some reason, preventing application of the penalty, such as the lack of prior warning or a contradiction in minor details — though it [the testimony] is true,” and the criminal ought to be punished.<sup>38</sup> It is assumed in a number of contexts that these aspects of the laws of evidence are basically formal and are not necessary for ascertaining the truth. One such indication — which bears other implications as well for our subject — is Maimonides' firm declaration that the fundamental and original basis of civil-law decisions is that “the judge should act in accordance with what he is inclined to believe is the truth when he feels strongly that his belief is

justified, though he has no actual proof of it," and that the current practice of deciding on the basis of "clear evidence" only, is the necessary result of a decline in both moral and intellectual levels.<sup>39</sup> Significantly, this discussion heads the twenty-fourth chapter in Laws of the Sanhedrin and is doubtless intended to give this chapter (in which discretionary power is laid out) its moral basis within the overall structures of Jewish law. Here are some other instances (among which are cases in criminal law): criminals can be disqualified as unfit witnesses even if they acted without warning and acknowledgement if it can be assumed that they knew the seriousness of their act;<sup>40</sup> a blood-avenger may act on the basis of testimony of a single witness;<sup>41</sup> a criminal may be imprisoned [*kipah*] even if the formal requirements are not met.<sup>42</sup>

All this means that Maimonides conceives of discretionary power as occupying a different level of the Jewish legal structure, but not as operating outside this structure *in toto*. Certain basic safeguards must be retained. And, not infrequently, discretionary power is used to outflank a legal formalism (or ideal) which endangers the public good. Maimonides does not seem to conceive of a discretionary power which sacrifices the totally innocent in the interests of the common good.

A second, more theoretical, consideration supports this analysis. It has been shown (and this was already known in the fourteenth century) that the basic pattern of discretionary power within the Jewish commonwealth is virtually identical with the normal functioning of the Noahide legal system which is expected to govern humankind as a whole. To be more precise, this is the pattern of discretionary power as Maimonides created it. For many of the norms mentioned earlier, such as the duty to punish conspirators or indirect actors and the possibility of punishment without warning or acknowledgement, are found only in the Talmudic discussion of Noahide law, and it is Maimonides who carries them over to Jewish discretionary law. Indeed, it is quite likely that Maimonides' entire edifice of monarchic powers identified Jewish and gentile governance as a single structure possessing similar goals and utilizing similar instruments.<sup>43</sup> (Parenthetically, we ought to recall that the concept of Noahide law became a major source for Grotius' discussion of international natural law through Maimonides.)

Obviously, the idea that Jewish society is regulated by both Noahide and Judaic law may suggest some sort of "two-tier theory," and we shall soon see how this becomes explicit in a fourteenth century interpretation of Maimonides. In our present discussion of whether discretionary power is bounded by some limiting mechanism, we ought to stress that the identification of discretionary power with Noahide law means that it reflects a normative structure, that it is morally legitimated, and that it is limited by this very structure. When Maimonides introduces the topic by assuring us, for example, that

conspirators to murder are in fact murderers and will be punished by God, he provides the moral basis for a human court's taking the matter into its own hands.<sup>44</sup> Without this basis, he suggests, neither Noahide law nor discretionary power would be free to act. Public safety is not an absolute criterion. Even if king and court are free to set aside both procedural and substantive rules of law when the good — either physical or spiritual — of society warrants it, they must remain within the broad consensus of moral values constituting society.

One further consideration ought to be kept in mind when we discuss the mechanisms limiting the use of discretionary power. Maimonides, it is most likely, thought that a king could be deposed (probably by the High Court, the Great Sanhedrin) for objective reasons.<sup>45</sup> It is fair to extrapolate, then, that while the king was charged with acting for the public good and was expected to exercise his prerogative power to that purpose, his activity was also subject to the scrutiny of the court. This scrutiny and the sanction it could deliver represent a constitutional control of the abuse of prerogative power by the king. Of course, this provides no solution to the abuse of this power by the court itself; and, as we have seen, the court's power of prerogative is more extensive than that of the king.

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...this leads to the following situations: first, that a criminal can be punished according to the dictates of true justice (*mishpat amiti*); and second, that even when no punishment is deserved according to true justice, he will be punished for the good of the public order and the need of the hour. Now the Lord distinguished between those responsible for each of these two tasks: The courts are to decide according to the true and just law....And since the political order cannot be perfected by this alone, the Lord commanded kingship so as to achieve this perfection.<sup>46</sup>

This is R. Nissim of Gerona, a fourteenth century legist and thinker, in his *Eleventh Homily*.<sup>47</sup> The ideas with which we are familiar are now explicitly proclaimed to be the ideological infrastructure of the legal and political structures. Here we find explicit conceptualization, firm systematization, and concrete institutionalization. It is all neatly packaged, with nary a loose end in the ribbon: two modes of social control, representing two distinct goals, and delegated to two distinct institutions. Ideal justice is to govern the relationship between individuals so long as it does not damage the rather coarser bonds of society; and a different type of rule, that of political justice, is to govern when social cohesion and public order must be guaranteed.

Let us summarize this doctrine in more detail and then suggest *its* ideological underpinnings. We have already noted the essential distinction between true justice and what is required for the good of society. It would be helpful were R. Nissim to have defined the *limits*, that is — to what lengths does society go in denying "true justice" so as to assure its safety and order, a point about which Maimonides may, perhaps, have been sensitive. But let us recall that R. Nissim is writing a sermon, not recording legal regulations. This fact goes far to explain, of course, why he found it necessary to conceptualize our topic to begin with, and to argue the legitimacy of the arrangements he discerned in the legal materials. Yet it is interesting that the issue of limits, as well as the question of the relationship between the two institutions of court and king, were not at the heart of his concern, which was, apparently, to produce a defense of the apparent duality and provide a Jewish model of political power. The two institutions are firmly distinguished and little overlap is allowed.

This systematization goes far beyond what we have seen until now, where courts handle discretionary power no less, and indeed more, than do kings. Indeed, R. Nissim is so committed to this conceptualization that he is forced to argue that "monarchy" is not a matter of personal identity but rather a power, and that this power is lodged in the courts when no king sits on the throne.<sup>48</sup> (Actually, this way of both eating your cake and keeping it too is not uncommon in discussions of our topic.) Finally, R. Nissim argues that monarchy is an institution common to both gentiles and the people Israel, for it too must create a stable political order. The ideal and practice of true justice, though, is a uniquely Jewish task for which no model exists in the gentile world (which, if meant in more than the abstract mode, is a rather nasty swipe at the society in which the author lived).

What are the Jewish sources of this rather elegant, if highly dualistic and schematized, model? Certainly, there is a very heavy Maimonidean input, especially as regards the concrete *halakhic* materials found in the *Homily*: in the need for strong governance and in the assumption that the usual normative structures are not fully adequate to this need — and hence in the overall weight attached to the use of discretionary powers; in the significance of the monarchy and its possession of discretionary powers; in the identification of Jewish and gentile modes of governance so far as social control is concerned. R. Nissim undoubtedly and correctly saw himself as an interpreter of Maimonides, perhaps as one who provided the explicit conceptualization which Maimonides, as legislator, had left beneath the surface. Yet it seems that Maimonides is less dualistic, on the whole, than is R. Nissim. He does not see the rigorously normative ideal, justice, over against which is reared the edifice of social justice. Nor does he project the sharp contrast of king and court which is central to Ran's

description. There is much more mesh and overlap, and this can be seen in the fact that, in Maimonides, the court is a basic exponent of both norms and prerogative. Perhaps, too, this is the reason that Maimonides shows sensitivity to the issue of limits, an issue which R. Nissim sees as too peripheral for discussion. For these and other reasons, we must dig elsewhere to lay bare R. Nissim's intellectual roots — in the direction of R. Yehuda Halevi.

The significance of Halevi is first felt on the literary and linguistic levels. At the very start of his *Homily*, R. Nissim approvingly cites the view that “even a band of robbers must abide by a standard of honesty” — which is virtually a verbatim quote of *Kuzari* 2:48.<sup>49</sup> Halevi goes on to develop the notion (which differs somewhat from his own discussion of the law appropriate to philosophers in 1:13, or the Maimonidean notions discussed earlier) of a social-ethical law appropriate to gentiles to which is then added the spiritual-ceremonial law given to Israel. More significant, though, is R. Nissim's description of the divine commands of religion as designed to “bring the divine overflow upon our people and to cleave to us... which is achieved by actions though they be far from rational understanding.”<sup>50</sup> This is Halevi's language, not Maimonides'. Most significant is the application of this characterization to the social norms contained in the Torah:

And so I think that just as the religious commands (*hukkim*) have no social function but are the cause of bringing upon us the divine overflow, so too the civil and criminal law (*mishpatim*) of the Torah is a cause of both our people's receiving the divine overflow and of its social order. And it is possible that this body of law is really directed to the higher goal rather than to the goal of social order, for that is achieved by the kind who we appoint.<sup>51</sup>

The norms of the Torah, then, are not merely ideal. “True justice” is defined as law which has no social function. This attempt to describe as much of the Torah as is possible as inaccessible to human needs and in that sense to practical reason is, of course, characteristic of Halevi.<sup>52</sup> We ought also to recall that the monarchy or its equivalent occupies a rather insignificant place in Halevi's understanding of the structure of leadership and authority in the people Israel, as the people of God.<sup>53</sup>

R. Nissim describes the normative structures of Jewish law as highly ideal and for that reason unable to control social reality. Consequently, he also disengages the institutional embodiment of the ideal law, the court, from society too. The massive vacuum which is thus created can be filled only by a monarchy which is liberated from the restrictive norms of the Torah. Paradoxically, the assertion that the Torah represents “true justice” and nothing less forces it to relinquish its social role and to deliver the task of governing society to a monarch whose power, it would seem, is limited only by his conscience.

Indeed, whatever advantages this arrangement may have held, R. Nissim is also aware of its dangers. So despite his assertion that the monarchy is commanded by God so that the Jewish people, as all other peoples, will be governed more efficiently than a regime of "true justice" would allow, R. Nissim pulls back. The people sinned by asking a king of Samuel, he agrees; they wished to be ruled by a king's political justice rather than by the "true justice" of the Torah and its courts, which would have brought "the divine influence" to rest upon them.<sup>54</sup> Then he adds that the limits set by the Bible to the king's wealth, and the command that the king write a Torah-scroll for himself, are attempts to control the monarch, "for since the king sees that he is not as subject to the laws of the Torah as is the judge, he requires greater warning lest he stray from the Law and lest he rise up arrogantly above his brethren, because of the great power which the Lord has given him."<sup>55</sup> R. Nissim doubtless realized that these traces would be easily snapped by a headstrong monarch, as Talmudic law had in fact been forced to concede; and, moreover, that the normative structure itself might not even provide a full remedy. So toward the end of the *Eleventh Homily*, R. Nissim gives another reason why the king ought not to lord it over his people. For, he says, citing R. Jonah of Gerona, "the king rules in proportion to the honor and recognition given by the masses, so that if they deprive him of all that honor, they will also be completely free of their king."<sup>56</sup> Or, to speak in terms of the overall structure, even the vast powers given the state are in the service of the people and the prudent ruler will always remember that.

What can we say about the historical backgrounds of this picture? Two contemporary perspectives ought to be suggested — that of the general, gentile, society within which R. Nissim's Jewish reality existed, and that of the Jewish community itself.

R. Nissim did not live in Muslim Spain, where the contrast of ideal and real states and their corresponding political correlates was a commonplace. Christian Spain knew, of course, the doctrine of the Two Cities, but that is quite a different matter. Yet Ran's sharp distinction between king and court — a distinction alien to the highly centralized Islamic political thought and, as we have seen, much sharper than that drawn in Maimonides — is not terribly remote from the Gelasian apposition of king and pope.<sup>57</sup> On the political level, R. Nissim's portrayal of the king ought to be read, perhaps, in the light of certain thirteenth-fourteenth century developments. The Civilians Bartolus and Baldus speak for a position according to which "the supreme and absolute authority of the prince is not under the law," and we can also recall the violent conflicts of Boniface VII and Philip the Fair, which were formulated in part, in terms of the power of the king to violate laws in cases of absolute necessity or the good of the state.<sup>58</sup> On the other hand, as Professor Elana Luria has noted, it is unlikely that R.

Nissim was unaware of the thirteenth century Unionist conflict in Aragon which issued in the Privilegio General of 1287, with its deposition clause, a conflict which flared up again in 1347-49.<sup>59</sup> These circumstances give added bite to R. Jonah Gerondi's comment cited above, as well as to Ran's general discussion of the election of kings.

What of the perspective provided by Jewish political history? R. Nissim is clearly intent on delivering power to its legitimate wielders, even power to overrule the laws of the Torah for the good of his society. Taken broadly, R. Nissim offers religious reassurance to the Spanish Jewish communities, agreeing that they could not assert effective social control if they abided by the stringent norms of Talmudic law. R. Solomon ibn Adret, an older contemporary of Ran, had said much the same thing in more pithy fashion; and R. Asher ben Yehiel also noted that the practices of Spanish Jewry were necessarily more remote from Talmudic law than those of his Ashkenazic brethren. Indeed, the doctrines of ibn Adret contribute to the whole picture. As pointed out by Daniel Gutenmacher in his recent doctoral dissertation,<sup>60</sup> Rashba had applied the Talmudic doctrine of Sanhedrin 46a, the doctrine of discretionary power, in two related ways: (a) he applied it to the community rather than restricting it to the court, thus duplicating a step taken by Ashkenazic legists some centuries earlier; and (b) approved of discretionary power not only as a mode of meeting specific, irregular forms of behavior that posed social dangers, but rather as the rule of government itself, as an ongoing activity maintained by the community. Thus Rashba speaks not only of the *judicial* responsibility of the community but also of its *legislative* and *administrative* tasks. These positions dovetail with the concern underlying R. Nissim's writing, a concern that the community be endowed with the power necessary for self-preservation. This reading stresses Ran's constitutional acknowledgement of legal pragmatism, rather than the institutional differentiation to which he devotes much attention. But should we suggest a narrower but more specific reading, according to which R. Nissim is an interested party delivering power to the courts, which were, of course, manned by his own fraternity, the clerical scholar-class? There is not much evidence for this position. There is little in the sermon which even hints at the institutional conflicts found in the Spanish Jewish community. It is far from clear that "monarchy" and "court" served as rigorous metaphors for loci of political power in the contemporary community; if the language of ibn Adret is an indicator, each served equally well in a more diffuse political tradition.<sup>61</sup> R. Nissim, moreover, goes so far as to suggest (in the passage given in note 54) that the court (!) is never endowed with the same broad prerogative in civil or criminal law as it is in the purely religious sphere — hardly the kind of admission an advocate of clerical power ought to make. Here, in fact, the moribund "monarchy" would have to be



revived and identified as the community itself for Ran's doctrine to have any practical effect!

Be all this as it may, R. Nissim has developed the distinction between the real and the ideal about as far as it will go in Jewish political theory. Curiously, his work is a focus of attention in today's Israel, as it offers religious legitimacy to a state which orders its society by norms that do not always dovetail with classic Jewish law.<sup>62</sup> Yet we may feel uneasy about the potential of this doctrine, which can so easily be used to justify virtually any abuse of centralized power; and R. Nissim was aware of this sinister potential. Detachment of the "real" from the "ideal" is a dangerous step; and we almost sense Machiavelli waiting in the wings. In that sense, the fifteenth century anti-monarchic critique of Abrabanel, a critique which includes R. Nissim among its targets, is a natural and indeed expected continuation of the trajectory we have studied.<sup>63</sup>

## Notes

1. *Responsa Rashba* 3:393; cited by R. Joseph Karo, *Beit Yosef to Tur, Hosen Mishpat* 2.
2. I have found the following, all dealing with Islamic political and legal theory, suggestive for the Jewish problematic as well: H. Gibb, "Constitutional Organization," in M. Khadduri, *Law in the Middle East*, I (Washington, D.C., 1955), pp. 3-28; R. Maydani, "Uqubat: Penal Law," *ibid.*, pp. 223-235; E. Tynan, "Judicial Organization," *ibid.*, pp. 235-278; M.H. Kerr, *Islamic Reform* (University of California Press, 1966); N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press, 1969). For a suggestive historical exploration, see I. Lapidus, "The Separation of State and Religion in the Development of Early Islamic Society," *International Journal of Middle Eastern Studies* 6 (1975), pp. 363-385, esp. pp. 382-385. See, as well, the materials cited in notes 3, 27, 33. Kerr has suggested that since it is a religious system, Islam remains vague and non-specific on basic constitutional issues; it would be interesting to pursue this question in the Jewish context as well.
3. See D. Pipes, *In the Path of God: Islam and Political Power* (Basic Books, 1983), pp. 29-63, and bibliographic references. Pipes relates to the Jewish problematic on pp. 41-42. This problem has been touched upon recently, as well, by J. Katz in M. Bar-Asher, ed., *Mehkarim BeYahadut* (Jerusalem, 1986), p. 217.
4. The rabbis will even claim that some provisions of biblical law depart from the ideal and are concessions to human weakness: see b. *Kiddushin* 21a (the captive woman) and b. *Sanhedrin* 20b (the monarchy).
5. *Tosefta Sanhedrin* 4:2 (ed. Zuckerman, p. 420).
6. M. *Sanhedrin* 2:2 and b. *Sanhedrin* 19a-b; the different construction found in the Palestinian Talmud *ad. loc.* is not our concern here. For a "constitutional" understanding of this Mishnaic provision, see P. Dickstein, "Mishpat uMedina BeYisrael," *HaTekufah* 28 (1936), pp. 363-374.
7. See, e.g., M. *Sotah* 9:9 and b. *Avodah Zarah* 8b: "When murderers became many the rite of breaking the heifer's neck ceased...when adulterers became many the rite of the bitter waters ceased"; "said R. Nahman b. Isaac...when the Sanhedrin saw that murderers were so prevalent that they could not be properly dealt with judicially, they said: 'Rather let us be exiled from place to place...'"
8. For a brief summary of *Mishpat HaMelekh* (=the king's law), see M. Elon, ed., *Principles of Jewish Law* (Jerusalem, 1975), col. 30-31; but note the reliance on medieval sources. For broader discussion and bibliography, see Y. Blidstein, *Ekronot Mediniyyim BeMishnat haRambam* (Ramat Gan, 1983), pp. 123-131, 161-167; see, as well, my paper (Hebrew) on Rashi's treatment of these materials in *Eshel Beer-*

*Sheva* III (1986), 137ff. It may well be the case, indeed, that this intrinsic limitation of "the king's law" to matters of state lies at the root of the view that *dina demalkhuta dina* ("the law of the king is law") may be applied only to matters of state and not to civil law.

9. B. *Sanhedrin* 46a; p. *Hagigah* 2:2 (78a); and see n. 29. We are interested, of course, in the Talmud perception and understanding of these events; the question of whether the "extraordinary" penalties imposed were in fact normative in earlier historical periods is not our concern. For textual comparison of the Babylonian and Palestinian versions, see M. Elon, *Hamishpat Halvri*, II (Jerusalem, 1973), p. 422, n. 94. For a general discussion of the overall issue, see H. Ben-Menachem, "Setiyyat HaShofet Min Hadin," *Shenaton Hamishpat Halvri* 9 (1981), pp. 113-134.
10. P. *Hagigah*, *op. cit.*, where the discussion is *amoraic*. See Ben-Menachem, *op. cit.*, pp. 126-127.
11. See b. *Ketubot* 27b and Rashi; b. *Baba Kamma* 96b and Rif; b. *Sanhedrin* 27a-b and Rashi (here an *amora* is acting in the service [?] of the *Resh Galuta*); b. *Baba Kamma* 116b-117a and Rashi.
12. It ought to be noted that the examples provided by the *baraita* all concern religious law or morals, and not civil or criminal law. This was pointed out by R. Ephraim, a twelfth-century student of R. Alfasi, in apparent objection to his master's extended use of the doctrine (*Temim De'im* 68; to Rif at B.K. 96b); it is also at the heart of Ran's comment, cited in n. 57 *supra*, whose context is a discussion of the *Sanhedrin* 46a passage. See also n. 17.
13. Further discretionary powers are given in b. *Mo'ed Katan* 16a. "...we may quarrel (with the offender), curse him, smite him, pluck his hair out, bind him, imprison him..."; these are derived from *Nehemiah* 13:25 and *Ezra* 7:26. I consider these powers discretionary because the Talmud does not specify in which circumstances they are to be used (see n. 27), nor is it clear that the list is exhaustive. It is noteworthy (a) that the Talmud does not relate to the power to execute, listed in *Ezra* 7; (b) that these powers are derived from an edict of a gentile king, Artaxerxes; and (c) that the Palestinian Talmud does not, apparently, know of these powers. Another similar pattern describes the penalties imposed on informers and the like: *Tosefta Baba Mezi'ah* 2:33 (ed. Zukermantel, p. 375).
14. See I. Herzog, *The Main Institutions of Jewish Law* (London, 1936), I, pp. 55-56. Naturally, so broad a generalization requires refinement and qualification, but that task would take us far afield.
15. This is stressed in certain medieval collections (see n. 39, *infra*) on the basis of Talmudic materials, both Babylonian and Palestinian (see b. *Ketubot* 85b and p. *Baba Kamma* 10:1).
16. B. *Sanhedrin* 32a-b; p. *Sanhedrin* 4:1 (22a).
17. B. *Sanhedrin* 2b-3a. Some of these problems were often solved in more artificial but less disruptive ways; see b. *Gittin* 88b, b. *Baba Kamma* 84a-b, etc. Yet despite all this activity, further legal measures had to

- be devised in the *geonic* period to allow collection of fines and other payments that were constitutionally inactionable outside the Land of Israel; the materials are collected in A. Aptowitz, *Mekharim* (Jerusalem, 1941), pp. 97-122.
18. I do not intend to suggest that Maimonides as the first to read, say, the *baraita* b. *Sanhedrin* 46a expansively. This tendency is already found in R. Alfasi and his student R. Joseph ibn Megas (*Responsa* 161), and it is reflected in the commentary of Rashi (n. 11). The *baraita* also forms part of the preamble of the text of local enactments as recorded by R. Judah al-Barceloni, *Sefer HaShetarot* (Berlin, 1898), p. 134. I do not recall seeing *geonic* exploitation of this *baraita*. See, in general, S. Albeck, "Yesodot Mishtar HaKehillot," *Zion* 25 (1960), pp. 106-114. This Maimonidean tendency has been noted by H. Cohen, "Maimonides' Theory of Codification," *JLA* I (1978), p. 34; and see now D. Biale, *Power and Powerlessness in Jewish History* (Schocken, 1986), pp. 51-53.
  19. *H. Rozeah* 2:1-5; *H. Melakhim* 3:10.
  20. See the incident involving the Exilarch (*Resh Galuta*), whom Maimonides assimilates to a monarchic figure (*H. Sanhedrin* 4:13). See also b. *Sanhedrin* 5a and parallels. The Talmud is also wary of monarchic desires to disregard the norms of legal procedure: see b. *Rosh HaShannah* 21b.
  21. *H. Sanhedrin* 4:13-14 (the expansion of b. *Sanhedrin* 5a to imply the authority to appoint judges as well as the right to free them from payment of damages is explicit in *geonic* literature and reflects historical reality); *ibid.* 3:8.
  22. Compare *H. Melakhim* 3:10 and 4:10.
  23. *H. Yesodai HaTorah* 9:3-5; *H. Mamrim* 2:4. In recapitulating our *baraita*, *H. Sanhedrin* 24:4, Maimonides also adds the cautionary phrase, *hora'at sha'ah* which is doubtless an expanded echo of the Talmudic *ha-sha'ah zerikhah* (see at n. 9).
  24. *H. Rozeah* 4:9. I have used with slight adaptation the translation of H. Klein, *The Code of Maimonides: The Book of Torts* (New Haven, 1954), p. 207.
  25. *H. Melakhim* 3:10, and see n. 10. It is, of course, suggestive to speculate as to whether the institution of *hatra'ah* had reached full development before the Jewish judiciary stopped functioning normally, that is, during the Second Temple period, or whether it is in large part the product of legal theorists: see Z. Falk, *Introduction to Jewish Law of the Second Commonwealth*, I (Leiden, 1972), pp. 119-121. That the Pharisees were loath to impose severe penalties is well known, as are the rabbinic tendencies to minimize use of the death penalty.
  26. *H. Rozeah* 2:4-5. Another instance where Maimonides distinguishes between the steps to be taken in cases where an individual is harmed and those appropriate to a broad social threat concerns recourse to gentile authority: "...if one oppresses the community...it is

- permissible to hand him over to the gentile authorities to be beaten, imprisoned, and fined. But if one merely distresses an individual, he must not be handed over" (*H. Hovel uMazik* 8:11).
27. See Tynan, *op. cit.*, pp. 236, 263-269; N. Coulson, *A History of Islamic Law* (Edinburgh, 1964), pp. 132-144. See also S. Baron, *SRHJ*, V (Philadelphia, 1957), p. 20, on the parallelism of the prerogative of the judge in Jewish law, and the Islamic institution of *ta azir*.
  28. See R. de Vaux, *Ancient Israel*, I (New York, 1951), pp. 150-154; Z. Frankel, *Der gerichliche Beweise* (Berlin, 1846), pp. 40ff. For a fuller discussion, see Y. Blidstein, *Ekronot*, pp. 92-93, 119-147.
  29. In this, of course, he picks up the Talmudic cautionary note (see at n. 9). But he also expands: The Talmud does not limit *Ezra* 7:26 (see n. 13) to extraordinary situations, but that is how Maimonides incorporates it in his Code (*H. Sanhedrin* 24:8-10).
  30. J. Dunn, *The Political Thought of John Locke* (Cambridge University Press, 1969), pp. 148-156. (My thanks to my colleague, Dr. Haim Marantz, who pointed me in the direction of Dunn). Locke had allowed the sovereign prerogative power, which is "the people's permitting the rulers to do...things...sometimes against the direct letter of the law for the public good" (*Two Treatises of Civil Government*, sec. 164). This doctrine was rejected both in England and the United States; see E. Fraenkel, *The Dual State* (Oxford University Press, 1941), pp. 66-69. The modern bureaucratic state, it has been pointed out, is rife with prerogative.
  31. *H. Sanhedrin* 24:10-25:2.
  32. See S. Cohen, "The Concept of the Three Ketarim: Its Place in Jewish Political Thought," *AJS Review* IX, 1 (Spring, 1984), pp. 27-54.
  33. "Islamic political theory is not based upon the principle of the separation of powers. Supreme executive and judicial power is vested in the sovereign, and by the process of delegation each and every official of the State becomes his representative. Judicial competence results only from appointment by the ruler; the jurists admit the right of the ruler to restrict the competence of the *qadi* by forbidding him to hear certain cases or types of cases; and further they recognize that in the majority of instances the *qadi* is entirely dependent upon the political authority for the execution of his judgments....Since...it was perfectly legitimate for the ruler to delegate full or limited judicial competence to officials of the State other than the *qadi*, the jurists were forced to recognize the so-called extra-Shari'ah tribunals....For in the event the powers and functions of the executive authorities will depend upon the discretion of the ruler"; N. Coulson, "The State and the Individual in Islamic Law," *International and Comparative Law Quarterly*, 6 (1957). See also n. 27.
  34. Structurally, this is the judicial parallel to the rabbinic power of *takkanah* vis-a-vis the law itself; *takkanah*, too, is considered part and parcel of the Oral Law in the broad sense of the term. Such internalization may prevent the demoralization of which researchers of

Islam speak (see at n. 3), though I am not fully convinced by their description in any case.

35. See at n. 21.
36. See *H. Genevah* 8:20; *H. Sanhedrin* 1:2; *Sefer HaMitzvot*, Aseh 176. The presence of *muhtasib* in the Maimonidean *shoter* was first noted by S. Baron, "Economic Views of Maimonides," in S. Baron, ed. *Essays on Maimonides* (New York, 1941), p. 173, n. 93. My discussion of the authority of the *shoter* will appear in the Proceedings of the First International Conference on Maimonides, held at Barcelona, 1985. For a general treatment, see my *Ekronot, op. cit.*, pp. 105-106.
37. See *H. Melakhim* 3:10, and, in general, *Ekronot*, pp. 123-126. But see *Guide* 3:40, according to which the monarch may punish "on presumption," although a single — if unfit — witness is mentioned.
38. *Perush HaMishnah, Sanhedrin* 9:5.
39. *H. Sanhedrin* 24:1-3. This is an excellent instance of Maimonides' shaping a Talmudic source (b. *Ketubot* 85b) and enlarging upon it in terms of a broader position; compare the treatment of R. Alfasi *ad loc!* Note paragraph 3, where Maimonides points out that even in present times, a judge is not to accept testimony which runs counter to his intuitions, as probative. For the general Talmudic basis of these Maimonidean positions, see H. Hefez, "Dinei Umdenah," *Dinei Yisra'el* 8 (1977), pp. 45-64; *idem.*, "Mekomah Shel Edut," *Dinei Yisra'el* 9 (1978-1980), pp. 51-84. Other instances of Maimonidean insistence that the court use its good judgment are *H. Malveh VeLoveh* 2:4 (and note the proviso as to the court's motivation), and 23:2. See also *H. She'elah U-Pikadon* 6:4.
40. *H. Edut* 12:1.
41. *H. Rozeah* 6:5, and note the stricture of *Ra'abad ad loc!* Maimonides is consistent here with *Guide* 3:40. See also *Ekronot*, pp. 123, 132, n. 46.
42. *H. Rozeah* 4:8-9, and n. 38. See also *H. Yesodei HaTorah* 8:2 (which, incidentally, is also a topos in Islamic legal theory).
43. See *Ekronot*, pp. 123-137.
44. *H. Rozeah* 2:2; here Maimonides sets the terminological code which is used in the following chapters of *H. Rozeah*.
45. *Ekronot*, pp. 75-90.
46. A.L. Feldman, ed., *Derashot HaRan* (Jerusalem, 1977), pp. 189-190.
47. R. Nissim of Gerona was a leading Talmudist in Barcelona, a judge and a recognized authority in Jewish law who penned thousands of responsa (only some 70 are extant). A doctor, R. Nissim was familiar with the intellectual currents of his day.
48. R. Nissim was rapped on the knuckles for this entire exercise by Abrabanel to Deuteronomy 17; Abrabanel, a vigorous anti-monarchist, had his own reasons for being sensitive to this expansion of monarchic power.
49. This idea goes back, ultimately, to Plato, *Republic* 1: 351c; R. Nissim

attributes it here to "the sage." See R.A. Markus, *Saeculum: History and Society in the Theology of St. Augustine* (Cambridge, 1970), pp. 22-153.

50. *Op. cit.*, p. 190.
51. *Op. cit.*, p. 191.
52. In general, "R. Nissim's sermons are of a decidedly anti-philosophical character"; L. Feldman, "Nissim of Gerona," *EJ* 12:1186.
53. *Kuzari* 2:27; see G. Blidstein, "On Political Structures," *Jewish Journal of Sociology* 22, 1 (June, 1980), pp. 54-55.
54. *Op. cit.*, pp. 192-193.
55. *Op. cit.*, p. 194. For the history of this reading of Deuteronomy 17, see *Ekronot*, pp. 168-177.
56. *Op. cit.*, p. 202.
57. In addition to the model presented in the text and discussed above, R. Nissim also presents the following secondary model: "It may also be said that any matter related to the [religious] commands of the Torah, whether it is to be decided according to true justice or not, is within the jurisdiction of the court; and that in what concerns men alone — true justice alone is within the authority of the court...but what goes beyond that is given to the king to achieve." This, of course, reflects a reading of the traditional Jewish concepts *bein adam lehavero* and *bein adam lamakom* in political terms derived from the Christian *regnum* and *sanctum*. For other instances of this phenomenon, see G. Blidstein, "On Political Structures — Four Medieval Comments," *Jewish Journal of Sociology* 15, 1 (June, 1980), pp. 47-59. See also notes 58-59.
58. For the fourteenth century Civilians, see R.W. and A.J. Carlyle, *A History of Medieval Political Theory in the West*, VI (repr. Edinburgh, 1962), pp. 76-82, and cf. V, p. 99. For Philip the Fair and Boniface, see B. Tierney, *The Crisis of the Church and State* (New Jersey, 1964), pp. 172-179; see, in general, B. Tierney, "The Prince is Not Bound by the Law — Accursius and the Origins of the Modern State," *Comparative Studies in Society and History*, V (1963), pp. 378-400. My thanks are due to my colleague, Professor Elana Luria, who directed me to the discussions of Tierney.
59. In the "Privileges of the Union" (1287), Alfonso III granted wide governmental privileges including, eventually, the right of deposition to the nobles of Aragon who had formed a union in defense of their rights already during the reign of his father, Pedro III. See R.B. Merriman, *The Rise of the Spanish Empire*, I (New York, 1918), pp. 438-446, 459-466, 472-473; for the right of deposition, see p. 439. For a succinct discussion of the constitutional issues, see A. Mackay, *Spain in the Middle Ages* (New York, 1977), pp. 104-106. See also M.L. Madden, *Political Theory and Law in Medieval Spain* (New York, 1930), pp. 101-123, 164-167. Ran's dates are given by Feldman as c.1290-c.1380.

60. D. Gutenmacher, *Political Obligation in the Thirteenth-Century Hispano-Jewish Community* (dissertation, New York University, 1986), pp. 187-188.
61. G. Blidstein, "Individual and Community in the Middle Ages: *Halakhic* Theory," in Daniel J. Elazar, ed., *Kinship and Consent* (Ramat Gan, 1981), pp. 224-225.
62. M. Elon, *op. cit.*, I, pp. 42-45. In a sense, Elon is in search of a *halakhic* model which would legitimate state sovereignty, a difficult task in a theocentric system; see F. Hinsley, *Sovereignty*, 2nd ed. (Cambridge University Press, 1986).
63. A. Ravitzki, "On Kings and Laws in Medieval Jewish Thought," R. Bonfil, *et al.*, ed., *Tarbut Vehevrah BeToledot Yisrael Biyme'i HaBenayyim* (Jerusalem, 1989) (Hebrew) appeared after completion of this essay. Ravitzki's essay focuses on Abrabanel, but he has interesting points to make about R. Nissim as well.