

In *The Guide for the Perplexed* 3:34, Maimonides prefaces his remarks on the reasons of the Biblical commandments with a fascinating passage. He explains how the commandments are intended to benefit the general collective, but they may indeed harm the individual. He argues that it could not be any other way. A law system that is fitting for every individual at all times is logically impossible, and he maintains that which is impossible is unchanging, and even God himself cannot circumvent this.<sup>1</sup> The other alternative, a law system which is changing and adapting, would be imperfect and indefinite, not fitting for the laws of God.<sup>2</sup>

Many have noted that this echoes a similar passage of Aristotle in *Nicomachean Ethics*, Book 5, chapter 10. Aristotle says that all law is universal, and while it may err in some cases, this is not due to imperfection of the law but the very nature of legislation. It thus seems that the Rambam is adopting this idea. However, this essay will endeavor to show that upon closer examination, several differences emerge between the two opinions, and that indeed the Rambam's idea is actually well sourced in Chazal, albeit coated in far different language.

The most obvious distinction between the two passages is pointed out by Rosenthal in his essay "Al Derekh Harov"<sup>3</sup>. Aristotle maintains in that passage that when a judge sees that the fixed law will cause injustice to a particular individual, he must interpret the spirit of the law to enact a just ruling.<sup>4</sup> Rambam, however, makes no such provision. The immutability of Torah law is a major principle of the Jewish faith,

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<sup>1</sup> See Guide 3:15 where he elaborates this and demonstrates that inability to do the impossible in no way limits God. This is analogous to saying: "God cannot juggle Tuesday". Since the verb and predicate contain no semantic meaning when placed together, such inability is in no way a limit upon God. Similarly, inability to create an unliftable rock or a square circle is semantically meaningless. Further see Guide 3:20 and Hilchot Teshuva 5:5 where he seems to content that God's inscrutable essence allows Him to go beyond what seems to be paradoxical. Also see Guide 2:18 where a similar argument is used to refute Aristotle's Eternal Universe theory.

<sup>2</sup> Rambam makes this point using a physician prescribing medication as an analogy, the same analogy used by the Kuzari to make an opposite point. One must wonder if this is a deliberate polemic.

<sup>3</sup> This is the essay that sparked modern interest in this passage.

<sup>4</sup> Aristotle reflects this idea even more explicitly in his definition of fairness in *Rhetoric* 1:13

and Maimonides does not allow particular circumstances to change the law. Rosenthal cites a responsum<sup>5</sup> where Rambam invokes the principle of the law following the majority as a reason to prohibit listening to music even for those individuals for whom it would be spiritually beneficial.<sup>6</sup>

Rosenberg<sup>7</sup> disagrees with Rosenthal and maintains that Rambam does allow circumstances to change the law. He cites *Yesodei Hatorah* 9:3 where a prophet is allowed to issue a *Horaat Sha'ah* as long as it is not permanent, as well as *Guide* 3:41 where the same power is ascribed to the Sanhedrin. He further cites *Mamrim* 2:4 where Rambam uses the very same physician analogy he used in the guide, but this time in favor of temporary legislation. In *Sanhedrin* 24:1 as well, Rambam allows for a judge to use his discretion and if needed follow his instinct even when lacking direct evidence.<sup>8</sup>

Much scholarly debate has occurred over which approach is correct.<sup>9</sup> However, by looking not at Aristotle but Chazal as a source for the Rambam, this confusion can be simply explained.

When looking for a source for philosophical ideas in Chazal, one must bear in mind that the two disciplines rarely speak in the same terms even when expressing identical concepts. Indeed, many philosophical ideas in the Guide are expressed differently in Mishnah Torah. The two systems consistently used different language, thus any attempt to source a philosophical idea in Chazal must allow for it to be expressed far differently.<sup>10</sup> Accordingly, a good starting place for sources to this idea in Chazal would be looking for how similar ideas are expressed in Mishnah Torah. The Rambam's

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<sup>5</sup> Responsa of the Rambam, Blau edition, siman 224

<sup>6</sup> I believe Guide 3:34 itself can be shown to take this approach when Rambam emphatically writes that any changing law system would be imperfect. While this statement can be interpreted as referring to the law's codification and not interpretation, I think the simplest read is that it refers to both aspects of the law.

<sup>7</sup> In an essay also titled "Al Derekh Harov"

<sup>8</sup> See Bava Metzia 39b and Ketubot 85a.

<sup>9</sup> See "The Way of the Majority": Is the Torah Suited to Everyone?", lecture 25 in a series of lectures on the Guide by Rav Chaim Navon for a summary of various opinions. <https://www.etzion.org.il/en/shiur-25-%E2%80%9Cway-majority%E2%80%9D-torah-suited-everyone>

<sup>10</sup> An excellent example of this is the description of prophecy in the Guide and Mishnah Torah. One speaks of channeling the Active Intellect, the other of communication with Ishim, yet a close look reveals the two to be identical.

understanding of the institution of biblical testimony will prove to give us valuable insight both into how the Rambam sources his ideas as well as what his opinion truly is.

In *Yesodei Hatorah 7:7*, while discussing the trustworthiness of prophets, Rambam maintains that in a scenario where a prophet meets all requisite requirements, it is obligatory to follow his word, for even though he may be lying, “the hidden things remain for the Lord<sup>11</sup>.” He compares this to the requirement to trust witnesses even though they may be lying. In 8:2 he elaborates on this analogy and adds that we trust prophets and witnesses, not because we know them to be true, because indeed they may be lying, but because Moses commanded us in the Torah to trust them.<sup>12</sup>

There is another place as well where Rambam explicitly accounts for the possibility of Torah legislation of testimony being incorrect in some cases, and still requires following the law. The Talmud in Bava Kamma 14b-15a explains a cryptic phrase in the Mishnah as meaning that slaves and gentiles may not testify regarding torts. Since testimony throughout the Torah is restricted to adult male Jews, the need to specify this ruling here is noteworthy<sup>13</sup>. In Peirush Hamishnayot ad. loc., Rambam explains that regarding torts, which normally occur in the field and away from people, in the majority of cases the witnesses will be slaves, children, women, or other invalid witnesses. Thus, one might have supposed that under these extenuating circumstances, such testimony would be valid, and the Mishnah felt a need to refute such an opinion.<sup>14</sup> He further echoes this idea exactly in *Nizkei Mamon 8:13*.

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<sup>11</sup> Deuteronomy 29:28.

<sup>12</sup> This idea is expressed perhaps even more clearly in Epistle to Yemen, where he states: “For we are divinely commanded through Moses to render judgment in a suit at law in accordance with the testimony of two witnesses, the possibility of false swearing notwithstanding.” (Halkin Translation)

<sup>13</sup> See Rosh on this Gemara who provides an alternative explanation.

<sup>14</sup> While at first glance this idea may seem to go against the rule of the majority, it is entirely consistent. Even though the majority of Torts may benefit from allowing invalid witnesses, since this is not the case regarding all other applications of witnesses, the law remains unchanging. Furthermore, Rav Mayer Twersky points out that based on the language in Niskei Mamon 8:13, he seems to specifically discussing cases of an ox damaging an ox or a person damaging a person, which are uncommon cases even within torts. That these cases are uncommon is evidenced in the fact that the Takanah of Shelichusayhu does not apply and the court cannot collect Chatzi Nezek or the Kenas payment of Chovel without Semuchim.

While both these passages take into account that the law may be incorrect in minority cases, the presentation is slightly different from how the rule of the majority is expressed in the guide.

In the Guide, he had acknowledged that law by its nature cannot address all possibilities. The law remains perfect despite its inability to fully realize its goals, because such perfection is impossible by the very nature of law. In other words, the halacha addresses an imperfect world and thus by definition cannot address all eventualities. However, there is another way of phrasing this similar idea, but with very different implications.

Had Mishnah Torah really been trying to say the same idea, it would have said that even when witnesses may be lying, we must follow them because in the majority of cases they will be telling the truth. Not only is this not what he writes, it is exactly what he is trying not to say. The main thrust of the passage is that miracles alone are not sufficient cause to follow a prophet, but rather we require an additional factor, the fact the God tells us to trust them. In a similar vein, the fact that most witnesses are telling the truth is not sufficient to trust a witness, but rather we do so because God said to, even though he may be lying. This distinction, while subtle, is of the utmost importance. Fundamentally, we do not trust a witness on account of presumption of truth, but because the Torah says we must trust a witness.

However, this gives rise to a serious problem. As we know from the Guide, the Rambam is a staunch believer that all commandments are rational in nature. Thus, the fact that God commanded it must be based on the underlying presumption that the majority of witnesses tell the truth. What has been gained by making this distinction?

We run into the same idea, albeit perhaps more explicitly, in the responsa of the Rashba. The Rashba<sup>15</sup> denounces an opinion allowing for testimony of women in case where men are not often present and

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<sup>15</sup> Chelek 2 Siman 182 and Chelek 5 siman 139.

cites the aforementioned Rambam as his source. Yet the Rashba seems to contradict himself elsewhere. He was asked<sup>16</sup> to justify a psak of Rabeinu Yonah<sup>17</sup> where an informant was given over to the government to be killed even though a court of 23 judges had not rendered him guilty. The Rashba says that in all such cases where there is a great need, unlike the formal process of capital punishment, we do not require valid witnesses but merely care about *establishing the truth* (emphasis mine).

This ruling is astounding on two accounts. Most simply, it seems to contradict the previous ruling where he disallowed testimony of women despite there being a practical need. Yet his words themselves are astounding. He implies that in general, witnesses in the Torah are not about establishing the truth! This is the same idea expressed by the Rambam in Mishnah Torah. Witnesses are not about establishing the truth, but are about following Mosaic procedure. Yet it should be obvious that the Torah requirement exists so that the truth can be established! So what can Rashba mean?

This responsum, while puzzling at first, is quite clearly alluding to an idea developed at length by Rav Yosef Dov Soloveitchik in Halachic Man. The halacha addresses not the concrete world but an objective idealized reality<sup>18</sup>. In this idealized reality, two witnesses are always telling the truth. In the real world this is not the case, but the halacha was never about establishing the truth in the real world, but about establishing the truth in an objective idealized Torah reality. However, the Torah recognizes that its idealized law system may not always function as intended, and thus if there is a great societal need, super-judicial<sup>19</sup> measures may be introduced. This idea is clearly sourced in the Mishnah Sanhedrin 9:5,

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<sup>16</sup> As quoted by Beit Yosef Choshen Mishpat siman 388.

<sup>17</sup> A cousin of Rabbeinu Yonah of Geronah with the same name.

<sup>18</sup> As Rav Soloveitchik puts it most eloquently: "*Homo religiosus* is dissatisfied, unhappy with this world. He searches for an existence that is above empirical reality." (pg. 13). Another great quote: "... concrete empirical reality serves only as a springboard from which man may make his plunge into the supernal, and it is the supernal realm alone that serves as the object of the religious individuals deepest longing, the goal of his ultimate quest." (15-16) Yet another: "Halakhic man orients himself to reality through a priori images of the world which he bears in the deep recesses of his personality." (17) To fully flesh out the depth of this idea is impossible in this short essay.

<sup>19</sup> I use the term super-judicial and not extra judicial because will above the system, these laws were also part of the system in some sense.

which the Rambam codifies in *Hilchot Rotzeach* 5:8-9. There, Rambam explains that since murder undermines society in a serious way, unlike other sins, even if a murderer's guilt cannot be established through the regular procedure, the court can kill the guilty party through super-judicial means.

Thus, the Rashba can say that in general biblical testimony is not about establishing the truth, but about an idealized method of establishing the truth, and agree that in general, the biblical law, which addresses an idealized abstract realm, must be followed even if it does not work in the real world. The exception to this rule is when doing so will cause a great harm to society, as he felt it did by the case of the informant (as opposed to testimony of women in general.)<sup>20</sup>

It is obvious that the Rashba's source for his ideas was not Aristotle<sup>21</sup>. He felt, from the aforementioned Mishnah in Sanhedrin as well as numerous other sources, that the Torah addresses an idealized reality<sup>22</sup>. Most interestingly, this emerges as an alternative formulation of the rule of the majority. Rambam in Mishnah Torah seems more consistent with this definition than with that of Aristotle. While the Rambam in Moreh phrased this idea in philosophical terms, in Mishnah Torah he framed it as the Rashba did, and indeed as the idea is found in Chazal. Moreover, now that the source of his idea has been properly presented, the debate between Rosenthal and Rosenberg can be reexamined.

Once we have made the connection, the Rambam himself addresses this question. In *Hilchot Rotzeach* 5:8, he explains why by murder in particular the court is allowed to act without proper testimony, but not so by other Torah laws. He explains that when there is a harm to society, the court must step in and act outside and above biblical law. Implicitly, if the societal need is not that great, the judges must accept the idealized Torah law, even if it may be harmful in some minority of cases. Careful application

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<sup>20</sup> I owe this excellent explanation of these two responsa of the Rashba to my Rebbe Rav Twersky.

<sup>21</sup> Indeed, the Rashba issued a ban on studying philosophy.

<sup>22</sup> Giving an exhaustive list of the many places in Chazal that imply this is beyond the scope of this work. However, to name another relevant example, we have the prohibition of testimony of women, which can be understood not as a commentary on the trustworthiness of women, but as a statement about their idealized role in society. See *Halachic Man* for a greater discussion of where this idea can be found in classic Rabbinic literature.

of this principle should be able to resolve all of the conflicting sources raised by Rosenthal, Rosenberg, and later scholars, itself an indication in the correctness of this approach.