

A Response to Lorberbaum and Shapira, 'Maimonides' *Epistle on Martyrdom* in the Light of Legal Philosophy'

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The essay of Drs. Lorberbaum and Shapira that appeared recently in this journal is less a criticism of my essay than a jurisprudential analysis of sorts.¹ Such articles usually do not generate reply. Indeed, when their article first appeared in a Hebrew *Festschrift* a decade ago,² I ignored it, especially as *Festschriften* are sites of dignified interment. The publication of an English version in *Diné Israel*, however, provided a far wider dissemination of their analysis and of what, in my view, was a rather distorted presentation of my article.³ After some thought, I concluded that a short corrective was in order. I will first address the jurisprudential aspects of the article and then briefly comment on two of their criticisms of my essay.

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It is very flattering to have an essay written as an undergraduate analyzed years later and shown to rest on a deep jurisprudential foundation.⁴ I picked up Dr. Lorberbaum's and Dr. Shapira's article with curiosity and anticipation: What could I and David Hartman, I wondered, or, for that matter, Maimonides

- 1 Y. Lorberbaum and H. Shapira, "Maimonides' *Epistle on Martyrdom* in Light of Legal Philosophy," *Diné Israel* 25 (2008): 123-69.
- 2 "The *Iggeret ha-Shemad* of Maimonides: The Controversy between Soloveitchik and Hartman in Light of Legal Philosophy," in *Renewing Jewish Commitment: The Work and Thought of David Hartman*, eds. A Sagi and T. Zohar (Tel Aviv: Ha-Kibbutz Ha-Me'uchad, 2001) 1:345-73 (Hebrew).
- 3 Haym Soloveitchik, "Maimonides' *Iggeret ha-Shemad*: Law or Rhetoric," in *Rabbi Joseph H. Lookstein Memorial Volume*, ed. Leo Landman (New York: Ktav, 1980), 281-320.
- 4 It was part of my BA Honors thesis, on file in Pusey Library, Harvard University.

and his opponent, have to do with Ronald Dworkin and Henry Hart? Could I have actually intuited in my youth the thoughts of either of these famed jurists?

My learned colleagues contend that underlying my position are the jurisprudential assumptions of Hart and underlying Hartman's argument are those of Dworkin. They do this by having me agree with Maimonides' opponent and having Hartman side with Maimonides. (Why they need to identify me with Maimonides' opponent instead of simply addressing the latter's position will become clear later on.) Ignoring for the moment my putative identity with Maimonides' opponent, let me address the position of Hartman/Maimonides – for Hartman does, indeed, identify himself with Maimonides' position in *Iggeret ha-Shemad*.

The analysis of Drs. Lorberbaum and Shapira is based upon a lengthy article that I wrote on *Iggeret ha-Shemad*. However, it appears to me that the entire point of that article has eluded them. This is perhaps my own fault. The essay, "Maimonides' *Iggeret ha-Shemad*: Law and Rhetoric," may be too long and not clearly written. However, I also wrote, in reply to Dr. Hartman's critique, a brief essay of five pages (inclusive of quotations) in which I highlighted the crux of my article and my basic differences with Dr. Hartman. Perhaps it, too, was unclear.

I will open, then, by citing the first paragraph of that short essay in full, allowing the reader to judge for himself:⁵

The crucial issue that lies at the very heart of our disagreement [i.e., Hartman and myself – HS] is: Are there outer limits to an intellectual discipline which cannot be breached and can we lay down ground rules for arguments within a discipline?

(1) Everyone agrees that political theory takes into account the entire wide spectrum of considerations – logical, social, and psychological – that Dr. Hartman dwells upon at length. Its broad playing field allows a wide gamut of intellectual maneuver, and the most contradictory views can be advanced with comparable claims to legitimacy. However, should a political theorist argue: (1) All revolutionaries are mortal (2) Goldberg is mortal (3) Therefore Goldberg is a revolutionary; this contention would not be political theory but rhetoric. The problem is

5 "Criteria for Halakhic Rulings: A Reply to Dr. Hartman," *Jerusalem Studies in Jewish Thought* 3 (1984): 683-84 (Hebrew) (It was prefaced by a two paragraph introduction.).

that Maimonides employs precisely this kind argument (i.e., the fallacy of the undivided middle) in the *Iggeret ha-Shemad*. Without plunging into the thorny problem of the ground rules of halakhah, we can safely state two of them: (1) The argument must abide by the elementary rules of logic (2) A halakhic conclusion cannot contradict an explicit mishnah, when the mishnah has been understood in one and the same fashion by all commentators of the past millennium. Maimonides breached both ground rules in *Iggeret ha-Shemad*.

Having failed to get my point across to my two colleagues with a hypothetical from political theory, perhaps I will be more successful with one from law. Suppose a judge sentenced a man to twenty-five years of imprisonment on the basis of the following argument: (1) All terrorists have two feet (2) This man has two feet (3) Therefore this man is terrorist. This ruling was then upheld by the superior courts. Would Lorberbaum and Shapira see that man as having been convicted by a valid legal system, with which they have only a difference of opinion? Do they think that Dworkin would ponder the jurisprudential foundations of such a system?

Maimonides' statements further contradict an explicit ruling in the Mishnah. Does Dworkin treat a legal system as valid where a local judge in Washington, DC can rule that the president of the United States is elected for a two-year term, for when the Constitution of the United States says "four years" it means "two years"? If the *Iggeret ha-Shemad*, by reason of the aforementioned breaches, is not law but simply rhetoric, what then does Dworkin have to do with it? Jurisprudence does not deal with the unarticulated assumptions of rhetoric, polemic, or the literature of consolation. If one wishes to apply jurisprudential analysis to *Iggeret ha-Shemad*, one must first address the question whether or not the *Iggeret* is a legal work.

The authors announce that they are treating the meta-halakhic aspects of the issue and they will take no stand as to the halakhic correctness of the arguments.⁶ However, halakhic error, indeed, occasional absurdity, is the crux of my argument. I checked Maimonides' arguments against the rulings of the Talmud as understood in his writings, especially those of his earlier years, and found them to be in contradiction to his position in the *Iggeret*. I checked his lines of reasoning by the rules of simple logic and found one of them to be absurd. On the basis of these determinations, I advanced the claim that the

6 P. 134.

Iggeret is a work of polemic and not of law. If I am correct, there is nothing in the *Iggeret* about which to be jurisprudential. The accuracy or error of my halakhic analysis is thus prejudicial, in the classic sense of the word, to any jurisprudential analysis. Yet Drs. Lorberbaum and Shapira fail to address this issue. They simply assume that Maimonides' position in *Iggeret ha-Shemad* is legally valid and proceed to philosophize about it. I do not begrudge them their philosophizing, but they are assuming what needs most to be proven.

Not only is there no substantive engagement, but these two crucial points – the use of an argument entailing the fallacy of the undivided middle and the presence of interpretations of a mishnah that run counter to the very words of the *mishnah* (and naturally counter to every interpretation of the *mishnah* of the past millennium, *including* that of Maimonides) – are never mentioned in my colleagues' presentation of my argument and analysis of its assumptions.

To be sure, Drs. Lorberbaum and Shapira do pen the following footnote:⁷

17. Soloveitchik rejects Maimonides' argument from *Nedarim* 3:4, see *ibid.* [i.e., my article – HS], 299-300.

That is an understatement. In my original article, I said that the argument from *Nedarim* 3:4 made no sense, either logically or hermeneutically. To quote from the pages referred to by my colleagues:

But Maimonides does not rest content with this proof; he seeks to advance another, and with it writes some of the most astounding lines in his entire career.... Maimonides has committed the elementary logical fallacy of the “undistributed middle.”

The error is yet greater. It is universally admitted that the coercion that relieves the individual of legal responsibility for his deeds must be the actual threat of death. Something chosen as an alternative to a lesser threat, such as loss of money, is deemed by all hands as voluntarily performed. However, the *mishnah* deals with a case in which the threat of death is not necessarily present.... It is obvious, then, that the principle at work in the passage cited has absolutely nothing to do with the problem of coercion at all; indeed as Maimonides himself, in his *Perush ha-Mishnayot* and his *Yad ha-Hazakah*, and all his contemporaries, whether of the Franco-German, Provençal, or Moroccan schools,

7 N. 17.

recognized and explicitly stated, the law here embodied is one concerning the effectiveness of mental reservations *vis-à-vis* certain vows.

Since Maimonides the halakhist did not write nonsense, I inferred that he was not arguing halakhically; he was not seeking to make a cogent argument but to dispel a mood of despair and a dangerous loss of hope.

My colleagues' formulation, "Soloveitchik rejects the argument from *Nedarim* 3:4," is not accidental; it reflects the *necessary* assumption of their entire essay. There are no fundamental problems with Maimonides' arguments that preclude the *Iggeret* from being a halakhic work. The proof that Maimonides adduces from *Nedarim* is logically and legally sustainable; it is merely Soloveitchik's personal view that this argument is incorrect.

Such are my reservations about the Hartman/Maimonides/Dworkin thesis. As for the Soloveitchik/Maimonides' opponent/Hart thesis, let us turn to the question raised earlier: Why identify me with the position of Maimonides' opponent? Why not write simply about the jurisprudential underpinnings of Maimonides' disputant? The answer is quite simple. Unless I am identified with his opponent, the crucial correlation of that individual's position with *Ish ha-Halakhah* and my family tradition of talmudic analysis collapses. Maimonides' opponent could scarcely be influenced by a work published in 1944 or by a school of thought that arose in the late nineteenth century. It would also appear somewhat rash to set forth the jurisprudential philosophy of an anonymous, twelfth century figure of whom we have but one holding, and next to nothing of that holding in his own words. Yet, other than identification on my part with *one* supposition underlying my *conjectured reconstruction* of *one* of the numerous accusations that Maimonides was seeking to neutralize (see below), there is not a word of personal identification with the rest of the charges. In my article, I was vindicating neither the opponent's charges of heresy nor his contention that the prohibition of idolatry may be violated without inner belief. I was judging those two central contentions, not by what I thought, but by Maimonides' own statements. The question that I posed was: To what extent are Maimonides' positions in the *Iggeret ha-Shemad* compatible with his other writings, especially his earlier ones? To the extent that they are incompatible (putting aside whether they are logically flawed), the *Iggeret ha-Shemad* is rhetoric. What I thought about these questions was and is irrelevant. For this reason, these views were never expressed in my study.

My silence, however, proved no bar for my colleagues. The problem of the *necessary* identity of my position with that of Maimonides' opponent was handled with ease, as the following examples illustrate.

1. Take the statement of culpability for acts committed under duress that the above-cited footnote 17 was meant to document. This is a crucial holding, for without it, I could scarcely agree with Maimonides' opponent as to the status of the Marranos as apostates, their disqualification as witnesses and, arguably, the worthlessness of their religious performances. Drs. Lorberbaum and Shapira write:⁸

Soloveitchik thinks that the Maimonidean argument as to the sinner's exemption from all punishment in those situations where he ought to have sacrificed his life has no real basis.¹⁷

I ask the reader to turn to the cited pages in my essay, 299-300, where I write the exact opposite:

Maimonides' opponent had advocated the view that the imperative of *Kiddush Ha-Shem* conflicts with and destroys the law of *pikuah nefesh*. Once we enter the awesome domain of martyrdom, the principle of self-preservation is annulled *in toto*, hence all acts that require martyrdom, for any reason, retain their full criminality. Maimonides' erudition disposes of this contention easily. He adduces a passage from the *Sifra* stating that idolatry committed under coercion is non-culpable. As the worship of false gods certainly falls within the realm of martyrdom, it is obvious that regardless of the martyr imperative, the deed is still viewed as involuntary, and for this reason the performer is not held legally responsible.³⁴

And in the footnote (34), I expanded on the matter:

34. There should be no doubt as to the force of Maimonides' argument, which he reproduces in *Yesodei ha-Torah* 5:4. Outside of the isolated remarks of R. Moses ha-Cohen (*Hassagot ha-Ramakh 'al ha-Rambam*, ed. S. Atlas, Jerusalem 1969, *ad loc.*) and the counter-interpretation of the *Sifra* by R. David Bonfid (*Hiddushei ha-Ran 'al Sanhedrin* 61b, *s.v. itmar*), which attracted no followers, Maimonides' views won widespread acceptance. Centuries later, a problem was detected in this proof... But

this in no way affected the acceptance of Maimonides' doctrine of non-culpability in instances of duress.

2. Drs. Lorberbaum and Shapira further write:⁹

Soloveitchik argues that performing a commandment without faith and without inner conviction is lacking in value. Ritual without faith, he states, is like a game and not a religious act.

To this statement they append a footnote:¹⁰

To be precise, Soloveitchik attributes this argument to the sage against whom Maimonides argues; however, from the general tone of his words, it is clear that he himself accepts this argument. See Soloveitchik, "Law and Rhetoric," 294-96.

So far, so good. However, they then proceed to state, and, again, it is an important building block of their argument:¹¹

As mentioned above, Maimonides attributed value to the Marranos' fulfillment of the commandments by drawing a distinction between willful idolatry and compelled idolatry. Soloveitchik argued that this is not a real defense, as the Marranos had failed in their obligation to sanctify God's name and had engaged in idolatry and hence were considered as apostates, such that there was no value to the commandments which they fulfilled. The performance of commandments is of value only if it is accompanied by acknowledgement of the God who gave the commandments and the obligation to obey him. Such recognition is lacking among the Marranos.

Not so. There are two separate issues here: 1) Does religious performance require belief? 2) Were the religious performances of the Marranos performed in a state of disbelief? If the reader will review my remarks at the pages cited by my colleagues (294-96), he will see that while I answered 'yes' to the first question, I said nothing about the second. I do believe that the ritual performance of a genuine atheist is of no religious value; that, however, is not the bone of contention in *Iggeret ha-Shemad*. At bar in that work is: Is there religious value to the performance of *mitsvot* by someone who has been

9 P. 133.

10 N. 16.

11 P. 135.

coerced by the threat of death to assert disbelief, yet still believes with all his heart and soul? Maimonides' opponent believed that it was of no value; not I.

As I said in my opening remarks, I would very much like to have intuited in my youth the jurisprudential assumptions of the famed Henry Hart. I simply don't see how I have.

II

Let us now turn to two criticisms, one factual and one methodological, that my colleagues make of my argument

1. They write:¹²

On this point Soloveitchik seems to contradict himself; he initially argues against Maimonides that the definition of idolatry does not depend upon inner faith, but rather upon the technical nature of the act, so that even one who is forced to do so is considered an idolater; further on, he argues that, in order for commandments to be of any religious value, they must be accompanied by inner conviction. Why does idolatry not require inner conviction, whereas it is a necessary precondition for the value of one's fulfillments of commandments?

I fail to follow the logic of their argument. If I believe that paganism or idolatry is cultic rather than creedal, why must I believe that Judaism, or Christianity for that matter, is the same? I point this out with regret, for my colleagues' line of reasoning would greatly alleviate the current problems of conversion in Israel.

Far more important, I never claimed that idolatry is cultic. I said that Maimonides, in his early years, was of the belief that idolatry is cultic. Previously, Lorberbaum and Shapira identified me with the position of Maimonides' opponent; now, they identify my position with that of Maimonides. The only justification of such an identification would be if what I wrote had little basis in Maimonides' actual writings, but was a clear projection of my view onto that great talmudist. Let us therefore examine the basis of my claim that Maimonides early in his career believed paganism was cultic.

Most of us began studying the Talmud with the second chapter in *Bava Metsi'a, Ellu Metsi'ot*. Very soon we came to the famous controversy of Abaye and Rava of *ye'ush shelo mi-da'at* and were told by our *rebbe* (teacher) –

¹² Pp. 135-36.

often with great fanfare – that this controversy is one of only six places in the entire Talmud where the ruling is according to Abbaye. In all the hundreds and hundreds of other controversies between the two, the ruling is always like Rava. And we all felt privileged to study such a unique controversy. It is no exaggeration to say that every schoolboy knows that “*Abbaye ve-Rava, halakhah ke-Rava.*”

The question whether idolatry is cultic or creedal is, in fact, a controversy between Abbaye and Rava (and not one of the famous six).¹³

It has been taught: If one engages in idolatry through love or fear [of man, but does not actually accept the divinity of the idol], Abbaye said, he is culpable; but Rava said, he is not culpable. Abbaye ruled that he is culpable, since he worshipped it; but Rava said he is not culpable: if he accepted it as a god, he is culpable; but not otherwise.

Maimonides in the early version of the *Perush ha-Mishnayot* ruled like Abbaye!¹⁴ Did I have an alternative to stating that Maimonides initially viewed idolatry as cultic?

2. Drs. Lorberbaum and Shapira further write.¹⁵

The validity of his [i.e., Soloveitchik's] arguments depends upon him succeeding in demonstrating that all (or at least most) of Maimonides' arguments in the *Epistle* [i.e., *Iggeret ha-Shemad*] are flawed, and that these flaws are obvious. Hence, in order to confute Soloveitchik's argument it is sufficient to show that at least part of Maimonides' arguments has a firm basis, and that where he does in fact 'err', his error is a reasonable one.

Three brief points: First, is breaking an elementary rule of logic and then ruling contrary to a *setam mishnah* 'reasonable'? Perhaps that is why Drs. Lorberbaum and Shapira omitted these central points from their summary of my argument. Second, how can one demonstrate that a legal argument has a 'firm basis', or that a legal error is a 'reasonable one', if one avowedly eschews legal argument, as my colleagues do?¹⁶ Third, to show that the *Iggeret ha-Shemad*

13 *B. Sanh.* 61b: איתמר העובד עבודת כוכבים מאהבה ומיראה, אביי אמר חייב, רבא אמר פטור. אביי אמר חייב - רבא אמר פטור. רבא אמר פטור - אביי אמר חייב. רבא אמר חייב - אביי אמר פטור. רבא אמר פטור - אביי אמר חייב. רבא אמר חייב - אביי אמר פטור. רבא אמר פטור - אביי אמר חייב.

14 *Mishnah 'im Perush le-Rabbenu Mosheh b. Maimon, Nezikin*, ed. J. Kafih (Jerusalem: Mosad ha-Rav Kook, 1964) *Sanh.* 7:6, p. 184, n. 3.

15 P. 134.

16 *Ibid.*

was a rhetorical work written to persuade a community on the verge of religious despair that they had not betrayed their God, I need only demonstrate that some arguments of Maimonides are so out of line that one cannot imagine that they were advanced seriously. Maimonides did not pen halakhic absurdities, and if there is absurdity in the *Iggeret ha-Shemad*, that work was not penned as a halakhic defense. Some of Maimonides' arguments are impossible, some problematic, and others (as in the distinction between heresy and idolatry) are possible but unproven. One argument alone is cogent – that of coercion. Why, then, did Maimonides pen all the others? I addressed the nature of the *oeuvre*, not whether or not buried in the plethora of rabbinic citations there is one from the *Sifra* which is deeply relevant.¹⁷

Even the *Sifra* passage, though, is insufficiently developed to afford the Marranos relief. For all that Maimonides' remarkable erudition has proven is that coerced acts are not punishable, not that they are non-tortuous. Punishment is one thing, sin is another, and the sting of the opponent's charges lay as much in the sinfulness of the Marranos' deeds as in their culpability. Indeed, in his *Perush ha-Mishnayot*, Maimonides seems to be of the opinion that religious breaches committed under duress have no need for atonement.¹⁸ This would form the natural complement to the argument from the *Sifra*. However, he does not advance it in his defense of Moroccan Jewry and for an obvious reason. If their conduct until then had not been sinful, why should Jews flee Morocco, as Maimonides insists they must? Maimonides was caught between the Scylla of overwhelming guilt and the Charybdis of guiltless inertia¹⁹ – whence the deeply moving but problematic *Iggeret ha-Shemad*.

17 See my remarks in "Maimonides' *Iggeret ha-Shemad*," 313.

18 *Mishnah 'im Perush le-Rabbenu Mosheh b. Maimon, Mo'ed* (ed. Kafih), *Yoma* 8:6, p. 266. (I say 'seems' because Maimonides uses the term in the Arabic original, '*patur*,' which seems awkward here. '*Patur*' from what? From the context the only thing he could be relieved of is the need for repentance or the need for Yom Kippur and suffering to lessen the sin and death to finally atone for it. All of which would imply that the coerced sinner is in no need of atonement. From the context it is clear that Maimonides is referring only to religious infractions, *bein adam la-makom*, not to breaches in one's duty to one's fellow man, *bein adam la-havero*.)

19 This was pointed out in my essay, pp. 310-11.