On Liberty--and Halakha

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> The Blessed One, Holy Be He, held a mountain over their heads, and said, “If you accept Torah, it is well. If not, this shall be your burial ground. R. Aba B. Jacob observed, “This constitutes a protest against the Torah.” Said Raba, “They accepted (Torah) in the days of Ahaseurus.” (BT, *Shabbat* 88a)

I

I speak as a religious Jew, bound to the Torah, Jewish tradition, and the people of Israel, who takes the value of personal liberty as a given. There lies the challenge.

Is there a one among us today who, after thriving in the freedom of democratic society, does not deeply value the right to choose and express personal beliefs, to choose a lifestyle, politics, or place of residence? Now we are all committed "libertarians"—political conservatives as well as liberals. All of us accept the fundamental principle of liberty, differing only over the extent to which it should be applied.

Liberty represents the political dimension of the larger concept of autonomy. In a strict philosophic sense, autonomy means that people are capable of determining their actions based upon principles they give themselves. Since the influence of Kant, however, that metaphysical capability has

been understood as a moral imperative: To act autonomously is the highest responsibility that we have as moral agents. In short, acting from our own principles gives our behavior moral character.[1]

In a more popular sense, autonomy means the necessity of choosing for ourselves, of rejecting decisions imposed on us by external authority. Autonomy and choice are the hallmarks of modern experience, for what was once a person's fixed destiny has become largely a matter of choice in modernity. That is, the process of modernization entails a transformation from fate to personal decision.[2] All modern thinkers who defend traditional religion struggle to find a legitimate place for individual freedom and autonomy within their systems. Thus spokespeople for the Modern Orthodox theology[3] consider choice to be an inescapable datum of our experience. For them it has *a priori* justification and its value is not subject to acceptance or rejection by the halakha.

Yet the commitment to autonomy when expressed as political liberty is at *prima facie* odds with Judaism's central categories of divine authority and commitment to mitzvoth. Simply put, God has commanded and we Jews must obey. The Torah is an obligation-based system, rather than a rights-based political culture. Further still, since Sinai "the Torah no longer resides in heaven." Classical Judaism invested human institutions (e.g., *bet din*, rabbinic authorities, *Sanhedrin*) and techniques (e.g., *herem, pisqei din,* sanctions and fines) with the authority to coerce Jews to obey and to punish them for disobedience. If these instruments are viewed as implementations of God's will as realized in the halakha, wherein lies the basis for individual political freedom? Is there room for liberty in a religious Jewish polity?

If the authentic implementation of halakha ultimately denies the legitimacy of political freedom, no amount of dialectical analysis will make Orthodoxy compatible with Western political thought. On an existential level, no amount of economic affluence or participation in the mainstream of modern society will allow a halakhic Jew to feel at ease. Modern Orthodox Jews will be condemned to lead a fractured life, torn between a principled religious commitment to obey political expressions of Torah authority and a deeply rooted freedom-consciousness.

This conflict is being played out regularly in Israel, where the use of political authority to enforce religious law is a real option. Modern religious Israelis and their political parties repeatedly agonize over how much they will support religious legislation that imposes Orthodox standards upon the Israeli populace. Such legislation would deny the rights of individuals to violate the Sabbath in public, to express themselves freely, and to be guaranteed full equality under the law. In the actual confrontation between human rights and coercive religious legislation, where can the Modern Orthodox Jew stand?[4]

The problem is much deeper than the psychological discomfort of some religious Jews. It casts ominous clouds over the religious and political future of all *Kelal Yisrael.* Barring a messianic intervention changing the socio-political conditions of Jews today, it is certain that any philosophy or political arrangement that denies individual freedom will be rejected by the overwhelming majority of the Jewish people. In other words, any conception of halakha that fails to make room for liberty means that *Am Yisrael* will never be able to return to Jewish tradition and a belief in the authority of its Torah. In Israel such a conception means that religious Israelis have no halakhic option other than pursuing a politic that limits fundamental civil liberties through religious legislation. Thus Israel's political arena will be the scene of an unending *kulturkampf,* with religious Jews battling against the free democratic structure of the State.

II

If we are to understand the halakhic attitude to political freedom we must first clarify the general concept of liberty. In his celebrated essay,[5] Isaiah Berlin explicates two different notions of political liberty appearing in Western thought. The first, negative liberty, stresses the right of a person to act without interference from others. It is personal independence, the right to act however one likes in certain areas of his life. Deliberate interference by others within these areas constitutes a lack of political freedom, implying oppression and coercion. To quote John Stuart Mill, "The only freedom which deserves the name is that of pursuing our own good in our own way."[6]

English political philosophers (Hobbes, Mill, Locke) all agreed on this concept of freedom, even though they disagreed over the extent to which a state should protect these rights. They knew that unlimited political freedom produces social chaos, a primitive "state of nature" that destroys justice, security, and even freedom itself. Yet all these thinkers agreed that there is a certain domain of action that ought to be impervious to both legal and social control. The values that we cherish so dearly such as freedom of religion, of speech, the rights to property, privacy, and political expression, all emerged from this British school of thought to become the bedrock of American society and the foundation of Western democracies.

Moreover, the passionate defense of liberty always runs along the same lines. Without liberty humans cannot develop their natural faculties. People's religious, intellectual, and moral character are all frustrated when they are overly constrained by others. Indeed, once people surrender totally to an outside authority, they are so degraded that they lose their essence, their "personhood," becoming more akin to members of the animal world. Thus the lack of freedom is not only oppressive, it is humanly self-defeating. These philosophers debate what constitutes the human essence that pervasive authority destroys and what is a person's minimum requirement of liberty, but all agree that freedom from absolute political authority and external interference is a fundamental value. The freedom to decide one's own actions is as necessary to a person's health and creativity as the air one breathes. Coercing adult humans for the sake of their own religious, rational, or moral interests is never justified.

The second concept of freedom, "positive liberty," is not a "freedom from" outside authority but a "freedom to" be and do. It is the freedom to be one's own master, to act from reasons that are one's own, rather than from external causes. In a word, it is the impulse to be a rational, morally responsible subject, not merely an object.[7] Each person, of course, is a complex personality with multiple dimensions often in conflict. Some philosophers saw the true challenge of life to be the realization of one's ideal or "higher" self, and the liberation from one's lower nature. The higher self is usually identified with some form of reason or rational will,[8] while the interfering or baser human dimensions are identified with humanity's irrational impulses, their uncontrolled desires, or their undisciplined character. A person swept along by every gust of desire is no better than a brutish animal. It is the disciplined person, acting out of rationally accepted principles, who realizes one's humanity, one's true self to the fullest. Freedom is thus a function of *what* one chooses and believes, not *how* one's action is determined.

Superficially, negative and positive liberty seem to be two sides of the same coin: They appear to express the same concept with a mere change in qualitative mode. How different is acting without interference from others (negative liberty) from acting out of one's true being (positive liberty)?

"Enormous" is the simple answer. In fact, as Berlin notes, Western thinkers developed the two concepts in divergent and ultimately antithetical directions. The British empirical philosophers seized negative liberty and developed it as actual behavior within a field without obstacles, while the political rationalists (Plato, Rousseau, Kant, Hegel) focused on positive liberty expressed more as a metaphysical notion of self-mastery. The latter were more concerned with freedom from spiritual slavery than with breaking the bonds of pervasive political authority. More important than freeing oneself from others was the task of being free from oneself.

It is here that positive liberty can conflict with the concept of negative liberty. According to the doctrine of positive liberty, realizing your empirical will or your actual preferences does not make you free. Freedom evolves, rather, from some idealized metaphysical will of what you *would* choose or how you *would* act if you were fully realized, perfectly rational or in accord with a particular philosophy's supreme human attribute (e.g., obedience, productivity, social conscience). This leads to the paradox of one person forcing another to be free[9]: For if I am (or think I am) more rational than you, in the name of positive liberty I can force you against your expressed will to act on my perceived rational choice. It is not my power to force you that astonishes here; it is my moral justification for coercing you. Indeed it is not coercion at all, but mere assistance in your own self-realization. According to positive liberty, my control "extends" your moral choice and freedom.

There is no need to explain here how pernicious the political application of such a conception can be. It is the basis for an Orwellian Newspeak universe, where the worst forms of repression and totalitarianism are justified in the name of freedom. Enough manipulation of the definition of humanity's essence can transform freedom into whatever the manipulator wishes to do to you. Even well-meaning paternalism ultimately produces a coercive and repressive political structure.[10] In the end, it is no accident that in Plato's ideal republic an entire class of people was required to act as police officers, forcing the philosopher-king's choices upon the irrational majority. This is what led Kant to declare that, "paternalism is the worst form of despotism imaginable."

III

With which concept of liberty is traditional Jewish thought most at home? Certainly the positive, metaphysical concept of freedom with its notion of an individual conquering oneself, resonates throughout rabbinic literature. The dual notions of the good and evil impulses, *yetser ha-tov* and *yetser ha-ra,* in perpetual conflict provide the Jewish philosophical background for this conception. Who is the truly strong and autonomous person? One who conquers one's own passions.[11] Who is really free? One who sheds the bonds of nature and impulse, losing oneself in the rational pursuit of Torah.[12]

Maimonides formulates the most conspicuous point of departure within halakhic literature for analyzing the concept of positive liberty. After asserting that a *get* is defective when it is obtained through coercive means by a heathen court, but valid if the coercion is at the order of a *bet din,* Rambam explains the apparent inconsistency:

> And why is this *get* not null and void seeing that it is the product of duress, whether exerted by the heathens or by the Israelites? Because duress applies only to him who is compelled and pressed to do something that the Torah does not obligate him to do, for example, one who is lashed until he consents to sell something or give it away as a gift. On the other hand, he whose evil inclination induces him to violate a commandment or commit a transgression, and who is lashed until he does what he is obligated to do, or refrains from what he is forbidden to do, cannot be regarded as a victim of duress; rather he has brought duress upon himself by submitting to his evil intention. Therefore this man who refuses to divorce his wife, inasmuch as he desires to be of the Israelites, he wills to

> abide by all the commandments and to keep away from transgressions—it is only his evil inclination that has overwhelmed him. Once he is lashed until his inclination is weakened and he says, "I consent," it is the same as if he had given the *get* voluntarily.[13]

This passage contains ambiguities that are mirrored by textual variations. One interpretation supported by the above version implies that Rambam is making one unified argument that articulates the Jewish concept of positive liberty with all its classical elements: A Jew has an essence, or "higher will" (to obey mitzvoth), as well as a lower alien dimension (evil inclination) that impels him to transgress mitzvoth. When the evil inclination "overwhelms" his true self, the court may administer corporal punishment or other sanctions until the husband relents. The issuance of the *get* is valid because the husband gives it voluntarily, as a result of his ideal metaphysical will, even though he appears to be coerced and his consent is extracted under duress. The halakha of *get*, it appears, is oblivious to the Jew's empirical will and actual preferences; it concerns itself only with a predetermined metaphysical will as defined by halakhic obligation. Evidently the Jewish people's original collective acceptance of Torah obligations while standing at Sinai millennia ago eclipses all subsequent individual volition to obey or disobey. Hence the action of the court is "therapeutic," not punitive or coercive. The court is merely administering a kind of benevolent, albeit painful treatment to assist the husband in discovering his true self.

Note that Rambam's formulation is not restricted to the limited case of divorce. He is positing a general principle of ideal will: Individual Jews are necessarily guided by an objective will to be Jewish. This, by definition, entails the voluntary acceptance of the Torah as a normative system as well as the desire to abide by each particular commandment.

Once this view is accepted, there is little room for the right of Jews to act without interference from Torah authority and its human agencies (i.e., negative liberty). Rabbinic authorities and courts or state institutions acting as agents of rabbinic authority will always be justified in ignoring the actual wishes of Jews and employing coercive measures to induce halakhic obedience. In principle, the freedoms of speech, travel, assembly, privacy, and political expression all collapse under the weight of halakhic directives. In other words, if we postulate that every Jew today has accepted the Torah at Sinai and stands obligated to obey its halakhic canons, it seems that the concept of negative liberty has no place in an authentic halakhic political theory. Accordingly, individual Jews would have no inalienable right to basic political freedoms in a Torah society.

Should it be otherwise? If Plato, Rousseau, Hegel, and Marx all were willing to sacrifice liberty to promote the highest values of their systems, should the halakha be any less committed to establishing its ideals and enforcing obedience to mitzvoth? For the traditional Jew, *a fortiori* the rule of Torah should supersede all other values. Perhaps political freedom, tolerance, and individual rights are amongst those respectable Western values that are simply a product of non-belief and a lack of religious commitment. Negative liberty may be a *desideratum* only for a community that lacks substantive value commitments or for individuals mired in theological apathy. In a word, negative liberty may actually be "the freedom of indifference."

An interesting problem arises from this reading of Rambam. May rabbinic courts coerce one who has converted out of Judaism? In the eyes of the halakha, the convert is a sinning Jew and is still obligated by mitzvoth, i.e., his ideal will still wishes to follow the halakha, even though his empirical will indicates he does not "desire to be of the Israelites, to abide by all the commandments and keep away from transgression." If we are concerned with his metaphysical will only, it follows that the court may indeed "coerce" the issuance of the *get.* Yet to totally ignore the fact that the convert has opted out of Judaism flies in the face of the real situation with which the halakha is dealing. Indeed, according to

one opinion such a person cannot be legally lashed. His source?—the very same law of Rambam with a slight textual variation:

> But we have found in the Maharit Zahalon who has questioned this (and maintains) that we do not coerce a convert to divorce even though he is one about whom the law rules (for other reasons) that he is to be coerced, and he bases his opinion on that which Maimonides has written: "And why is this *get* not null and void seeing that it is given under duress? Therefore this man who refuses to divorce his wife, in as much as he desires to be of the Israelites and he desires to abide by all the commandments, and to keep away from transgression, it is only his inclination that has overwhelmed him. Once he is lashed until his inclination is weakened and he says, "I consent," it is the same as if he has given the *get* voluntarily." According to this a convert who has transgressed every commandment indifferently and angers his Creator through serious transgression (and is coerced), is thereby consenting under duress; he is just like someone forced to give a present. And even after he is lashed and has divorced, his soul will not rest and he will be full of anger toward those who brought him to do this. Even though he performed a mitzvah, the soul of every evildoer is evil, "For the wicked boasts of his heart's desire." And so, he is completely forced to do this; therefore, how do we coerce even if the law decreed that for other reasons he should be coerced to divorce?[14]

The text before the *Or Sameah* and the Maharit Zahalon contains the additional conjunction, *and*: 'I. . . inasmuch as he desires to be of the Israelites *and* he desires *("ve-rotseh hu")* to abide by all the commandments. . . ." This implies that Rambam is concerned not exclusively with an ideal will, but also with a Jew's actual will to obey mitzvoth and the evidence for realistically presuming that empirical desire. Under this interpretation, Rambam is making two connected arguments. First he asserts the principle of the ideal will: A Jew acts in accordance with his will when he does mitzvoth. But how does the Rambam know this? Evidently it flows not from the immutable historical event at Sinai, but from a second, more empirical assumption: Each Jew actually "wants to be of the Israelites." This consent to communal membership provides the warrant for claiming that the Jew really desires to abide by all the commandments, a desire deeper than any temporary inclination to disobey. Thus the application of lashes is justified only because by opting for membership in *Kelal Yisrael,* the individual has told the Jewish community that he really wants to fulfill mitzvoth.

This thesis also need not be restricted to the sole instance of *get.* It establishes the general principle of empirical will: One's actual consent, or presumption of consent, to obey mitzvoth is necessary to justify coercive legal action. Thus the Maharit maintains that in the case of the convert, who demonstrates that he does not want to be a member of the Jewish people, the presumption that he wants to do mitzvoth dissolves and with it disappears any rationale for coercion. Although disagreeing with the Maharit in the case of the convert, the *Or Sameah* also requires some realistic warrant for the assumption that a Jew actually wants to obey mitzvoth, maintaining that when we know in advance that lashing or other sanctions will not induce some actual expression of acceptance of mitzvoth, coercion has no halakhic justification whatsoever.[15]

Of course both interpretations support "coercion"—but for very different reasons. In the first reading, only the ideal will is relevant. That objective will always express preference to be a part of the Jewish people and this membership connotes acceptance of Torah obligations. Here the very concept of Jewish identity means being a party to the covenantal agreement at Sinai; therefore wanting "to be of the Israelites" conceptually entails acceptance of mitzvoth. An "unobligated Jew" is a

contradiction, as misconceived as a “married bachelor”—and as difficult to find.

According to the Maharit’s reading of Rambam, the will to be Jewish is contingent, yet it serves as a sufficient basis for presuming that a Jew has an empirical desire to obey mitzvoth. The Maharit could assert this because throughout our history Jewish self-perception had always testified to that linkage. Before the Enlightenment, there was a broad general consensus among Jews that obligation to Torah law constituted their identity. All medieval Jews saw themselves as commanded people, even if they failed to be systematically observant. Only through conversion could they escape the “yoke of the commandments.” The case of the convert is illuminating precisely because it was the rare exception to the cultural norm. It shows how far a Jew had to travel to shed the identity of “commandedness.”

In our post-Emancipation Jewish communities of Israel and the Diaspora, however, what was unthinkable for Maimonides and unknown for the Maharit—the unobligated Jew—has become the sociological norm. In the words of one Orthodox rabbinic authority, “in our day the observant are called separatists and it is the sinners who go the way of the land.”[16] Regrettably, contemporary Jewry has no consensus regarding what it means to be a Jew and a lack of observance pervades Jewish life. Now there are wholly secular, nationalistic, and ethnic formulations of Jewish identity for which acceptance of the Torah and traditional mitzvoth are largely irrelevant. These formulations may be heretical and even conducive to long-term assimilation, yet we cannot deny that today most Jews define their own Jewish identity independent of theological belief and halakhic commitment. These Jews do not seek assimilation. On the contrary, they often exhibit unflagging dedication to the Jewish people at great personal sacrifice. As Rav Abraham Isaac HaKohen Kook observed of the nonobservant majority of the Jews of his day, “they go astray, nevertheless many of them are loyal to their nation and are proud to be called Jews, even though they know not why. . . .”[17] They “wish to be of the Israelites,” but do not wish to be obligated by the commandments—at least not the mitzvoth as defined by Orthodox tradition.

This radical shift in Jewish self-perception has posed a challenge for all post-Enlightenment Orthodox leaders and *posekim.* Unwilling to dismiss it as a mere chimera or product of heresy, several prominent religious authorities have given halakhic status to the fact that modern Jews act and think of themselves in non-traditional categories. This consideration has been materially relevant to reformulating the answers to a variety of halakhic questions regarding punishment for Sabbath desecration, eligibility for a *minyan,* conversion to Judaism, and contemporary definition of an apostate, to name but a few. Consider the opinion of R. Jacob Ettlinger in 1874, regarding heretics and Sabbath violators:

> But I do not know how to consider Jewish sinners in our time, unless to apply to them the rule of “one who says it is permitted,” which means that they are only close to being sinners. For because of our sins the sore has spread greatly, to such an extent that for most of them the desecration of the Sabbath has become a permissible act. There are those among them who offer Sabbath prayers and sanctify the day and then violate the Sabbath. [18]

Or the position of Rabbi David Zvi Hoffmann at the turn of the twentieth century:

> In our time one is not called a public desecrator of the Sabbath, because most people are such. Were the majority of Israel innocent, and a few audaciously violated the law, they would thereby deny the Torah, boldly commit an abomination, and separate themselves from Israel as a whole. But since most Jews have breached the fence, their failing turns to their advantage. The individual thinks that it is not such a major offense, and one need not commit it only in private.[19]

Even Rabbi Moshe Feinstein, one of the most fervent Orthodox leaders in rejecting any non-Orthodox ideology or institution, acknowledged that a mere general intention to join the non-observant Jewish community without any commitment to Sabbath observance was no necessary impediment to valid Orthodox conversion with its attendant Jewish identity.[20]

Most important is the position taken by the *Hazon Ish*,[21] one of the great fathers of twentieth-century ultra-Orthodoxy. Noting the pervasive lack of faith in modern times, he formulates a new halakhic approach to Jews who are non-observant in fact and in principle:

> It seems to me that the law of throwing (the heretic) into a pit (to be left to die) applies only to those periods when the Blessed Lord's Providence is apparent, such as when miracles took place, or the Heavenly Voice functioned, or the righteous men of the generation lived under a generalized Divine Guidance visible to all. At such times, those who commit heresy are acting with deliberate perversity, allowing their evil impulse to lead them into passion and lawlessness. It was at periods such as these that the destruction of the wicked was a salutary measure to save humanity, for all know that were the generation to be led astray, world catastrophes, such as plagues, wars, and famines would result. But when Divine Providence is concealed, when the masses have lost their faith, throwing (heretics) into a pit is no longer an act against lawlessness. On the contrary, it is an act which would simply widen the breach; for they would consider it an act of moral corruption and violence, God forbid. And since our entire purpose is to remedy the situation, the law does not apply to a period when no remedy would result. Rather, we must bring them back through the bonds of love and enlighten them to the best of our abilities."[22]

Not only does the law mandating killing the heretic not apply today, but even the commandment to admonish lapsed Jews cannot be implemented since today we do not know how to reproach effectively. In fact, because we cannot offer effective reproach, the entire halakhic category of the heretic becomes inoperative.[23] Both the *Hazon Ish* and Rav Kook consider nonobservant Jews today to be pawns of the intellectual forces of the day:

> Yes, my dear friend, I understand well the sadness of your heart. But if you should concur with the majority of scholars that it is seemly at this time to utterly reject those children who have swerved from the parts of Torah and faith because of the tumultuous current of the age, I must explicitly and emphatically declare that this is not the method that God desires. Just as the (Ba 'ale) Tosafot in Tractate *Sanhedrin* (26b) maintain that it is logical not to invalidate one suspected of sexual immorality from giving testimony because it is considered an ones—since his instincts overwhelmed him—and the (Ba'ale] Tosafot in

> Tractate *Gittin* (41b) maintain that since a maidservant enticed him to immorality he is considered as having acted against his will, in a similar fashion (is to be judged) the "evil maidservant" of the current age…who entices many of our youngsters with all of her wiles to commit adultery with her. They act completely against their will and far be it from us to judge a transgression which one is forced to commit (ones) in the same manner as we judge a premeditated, willful transgression.[24]

The *Hazon Ish* and Rav Kook struggled painfully with the obvious fact that most of *Kelal Yisrael* of their day lacked a principled commitment to Torah and mitzvoth. Rather than reject the nonobservant by invoking biblical and talmudic categories mandating reproach, *herem,* or corporal punishment, they believed that changed sociological and intellectual conditions demanded a new understanding of halakhic categories and a pragmatic course of action.

But what of the classic approach of coercion? It appears that when these modern rabbinic authorities are understood in conjunction with each other, the halakhic imperative to coerce the sinner also disappears. The Maharit establishes the principle of empirical will: Coercion is justified only when we can reasonably assume the Jew accepts the obligation of mitzvoth. But the *Hazon Ish* and Rav Kook now assert that the Torah considers contemporary nonobservant Jews, being "coerced" by modern culture, to be in a category of individuals who lack this sense of obligation. For technical reasons they escape the reproach and punishment accorded to heretics as they have not willfully rejected the halakha. Yet as coerced parties they do not willfully express, nor can we presume that they would express, any acceptance of mitzvoth. In the absence of such acceptance, coercion provides no halakhic solution.[25]

IV

If the previous analysis is correct, we see that there are two models within halakha for dealing with Jews who consistently violate Jewish law, even those whose lifestyle bespeaks a lack of commitment to mitzvoth. Biblical and talmudic literature often emphasize correction through coercion, since prior assent to the halakha is assumed. Late Rabbinic literature delineates the halakhic option of a non-coercive approach, applicable prior to assent, which focuses on education and moral suasion and tolerates behavior that conflicts with the halakha. Once the legitimacy of both approaches is established, a question facing halakhically committed Jews is one of *techne,* of means: Which approach will be the most effective instrument for bringing Jews today to a greater appreciation of Torah and mitzvoth? In the words of the *Hazon Ish,* which halakhic policy is likely to "remedy the situation," and which will "widen the breach?"

On the pragmatic level, experience indicates that the non-coercive approach yields the best religious results. No one familiar with contemporary Israeli society can deny that coercive religious legislation—even the specter of such legislation—has caused deep alienation from and disrespect for Torah and its political spokesmen. Non-religious Jews in Israel harbor a well-founded suspicion that the *dati* community seeks no limitation on its political power, and that the objective of its politics is to manipulate the non-religious for its own ideological benefit, never treating them with the respect due all human beings. It is ironic that at a time in Israeli society when fewer and fewer citizens hold philosophies that in principle reject the theological and ethical ideas of Torah, nearly all non-*dati* persons evidence a palpable disgust for the coercive policies of religious political leaders. Quite

simply, Israelis are more anti-clerical than anti-religious. This is doubly tragic, for with the withering of socialist-Zionist ideology many Israelis yearn for a value structure that Torah has to offer. Yet they find *dat* repugnant because the image of religious leadership is one whose face sneers at non-religious Jews and whose hands clutch at the throats of their civil liberties. In the prophetic words of the *Hazon Ish,* the policy of pushing restrictive religious legislation is viewed as an "act of moral corruption and violence."[26]

Nevertheless, Judaism values action—the doing of mitzvoth—not only attitude and relationship. If there are Jews who cannot do mitzvoth out of conviction and love of God, is not their obedience caused by threat of legal punishment preferable to their free disobedience? Indeed, the Rabbis claim repeatedly that "a man should always immerse himself in Torah and commandments even if his motive is impure; for from acting from impure motive, he will come to act with pure motive." If this dictum is a principle of empirical prediction rather than dogmatic axiom, Israeli experience contradicts it, for it has produced the opposite results. Coercive legislation has induced only animosity and the denigration of Torah, not a voluntary attraction to mitzvoth. Even on a strictly behavioral level, the coercive policy has failed. All the restrictive Sabbath legislation has not made even one Israeli a Sabbath observer according to halakhic standards—one might just be someone who does not ride buses on Friday evening, someone who watches home videos instead of frequenting the theater.[27]

Examining each talmudic context of this dictum, in truth we see that it is intended as prudent advice for an individual to continue to voluntarily participate in mitzvoth, even when he lacks immediate religious motivation. There is no hint whatsoever in the sources of any outside authority that would constrict personal freedom or choice.[28] This is not surprising as the halakha usually adopts prudent and reasonable means to realize its end values. If the Torah's goals are idealistic, its methods to achieve them are pragmatic. To quote Rav Kook, "Know that good sense is a fundamental value in our law. We are therefore obligated always to achieve the central purpose of good sense."[29]

Hazal were keen students of human behavior. They knew that a person can, by the power of his own will, condition himself to experience new-found love, joy, and religious meaning in any halakhically required act even when he is in the throes of spiritual malaise. Hazal had the "good sense" to know, however, that when any person or authority imposes laws on another, denying one free choice in the name of a doctrine to which one does not subscribe, no constructive religious motivation or character would result. Understood as council to continue voluntary assumption of mitzvoth however lacking in *kavanna,"mitokh shelo lishma, ba lishma"* modern Israeli experience does not falsify the rabbinic claim. It points, rather, to the lack of wisdom of authoritarian religious politics.

V

Clearly, classical Judaism posits a metaphysical and moral ideal of human experience. It maintains that a human realizes its highest being when relating to the Divine Will and obeying God's commandments. Philosophically, the Torah is committed to this conception of positive, substantive liberty. Yet in practice, the option exists to pursue a policy of tolerance: one that poses no coercive interference to Jews following their own will, so long as that individual liberty does not diminish the rights and religious opportunity of others. In other words, it is a policy that allows for political freedom and fundamental human rights. Paradoxically, this policy also holds the most hope of encouraging positive religious attitudes, given the historical and intellectual conditions of *Am Yisrael* today.

Adopting such a “libertarian” policy that allows for freedom and individual difference does not imply axiological agnosticism or lack of commitment to the ideal of obligatory mitzvoth for the Jewish people. Nor does it lessen the religious obligation for all Jews to be responsible for one another, including the promotion of halakhic observance. The policy shifts the thrust of religious politics from an authoritarian approach to one stressing education, tolerance, and identification with the whole of the Jewish people. The political approach utilizing coercive law has the illusory quality of a “quick-fix.” Yet in purely practical terms, attempting to deny a Jew the liberty to violate religious law is not an option in the Diaspora and does not work in Israel, as we have seen. The quick-fix is a fantasy, nurtured by a longing to retreat to the ghetto of the past that is much too narrow to house the majority of the Jewish people today. As fantasy, it is a flight from any serious religious responsibility toward *Kelal Yisrael.*

Religious Jews should be resolute in their conviction that halakhic behavior is the ideal for every Jew. When one confuses legal tolerance with pluralistic value equivalence one departs from both the halakha and religious Jewish thought. Because of this belief in the validity of mitzvoth, religious Jews both in the Diaspora and in Israel have a responsibility to be uncompromisingly active in promoting religious and educational opportunities where every Jew can study, assess, and personally decide on their acceptance of Torah. This educational approach implies a difficult and long-term program of “openness” by the religious community toward all Jews rather than a posture of social isolation. It means developing honest relationships with non-religious Jews, sharing experiences where we all treat each other with full dignity and where we can nurture voluntary religious growth. It also requires utilizing personal, institutional, and even state resources toward these ends.[30]

Without a serious commitment to a program of religious opportunity and Jewish education, any society of Jews where civil liberties and human rights are legally guaranteed can easily yield a “freedom of indifference” and evolve into a society where pockets of religious commitment are lost in the dominant cultural quest for *hedone.* The resulting culture glorifying youth, sex, and wealth is far from anyone’s ideal vision of the Jewish people. It strikes fear in the hearts of all past and present Jewish thinkers—be they religious, secular Zionist, or merely cultural. In addition to threatening authentic Jewish moral and religious standards, elevating these hedonistic values to ideals would spell the end to all Jewish culture as a distinctive and enduring phenomenon.

VI

The pragmatic argument for adopting a policy of political freedom in a Jewish society is compelling. Its attractiveness for halakhic Jews lies in its ability to synthesize Judaism’s conception of religious action as the ideal of human experience (positive liberty) with a commitment to tolerance, autonomy, and human dignity (negative liberty).

The previous argument that makes room for liberty—and its concomitant of tolerance—is casuistic, the classic method of argumentation of law in general and halakha in specific. How effective this argument can be in securing a permanent acceptance of personal liberty within Jewish law remains to be seen. By definition, casuistic arguments apply to specific cases and are embedded in particular empirical assumptions. Hence their conclusions are contingent and inevitably limited in scope. On this basis liberty seems to be an unstable value not only within the Western political tradition,[31] but also in halakha. Liberty within the halakhic system is further imperiled because the argument depends on the lamentable historical conditions, i.e., the absence of national consensus, agnosticism, and

widespread rejection of mitzvoth and Torah. Thus the casuistic argument helps us only "to muddle through," in Professor Stone's phrase. Liberty flows from religious failure, rather than from a spiritual or political ideal. In short, "because of our sins" we are allowed to be free.

Whether or not the casuistic argument can serve as a secure foundation for liberty in Jewish society, we cannot deny that it is spiritually unsatisfying and philosophically inadequate. Liberty should be an inspiring value that emerges from principle, not a concession to circumstance. Is there a principle within Judaism that can illuminate political freedom as such a value? The concept of *Tzelem Elohim* has been explored as the foundation for the ethics of human respect and dignity elsewhere,[32] but within this concept also are fertile seeds for a conceptual breakthrough that transforms freedom into a principled ideal within Jewish thought and law. R. Meir Simcha HaCohen identified *Tzelem Elohim* with human freedom.[33] This does not go far enough, for we have seen that Jewish sources and Enlightenment rationalists and romantics alike understand freedom as positive liberty that can easily lead to totalitarian politics. Further development is required for the concept of *Tzelem Elohim* to lay the foundations of negative liberty.

Human beings created *beTzelem Elohim* are the crowning glory of God's creation. A contemporary rabbinic thinker has observed that *Tzelem Elohim* has two constituent components.[34] First, human beings are differentiated from beasts because God gave them the unique metaphysical gift of free choice. Second, God's ideal for creation is for each person to employ this gift by freely choosing the good. Both are necessary and neither is sufficient for the divine plan to be complete. Unbounded free will can opt for evil and return creation to darkness and chaos (*tohu ve-vohu*). Involuntary human behavior undermines God's plan for the universe by transforming human action into determined behavior akin to that of lower animal species. In a word, absence of freedom robs a person of his unique humanity. Therefore, preserving individual freedom (i.e., negative liberty) and promoting choice for the good (positive liberty) are both requisites for realizing *Tzelem Elohim*.

As Isaiah Berlin never tired of telling us, freedom and order must exist in tension with each other. Neither condition can be realized absolutely; only in the messianic era will both values concurrently blossom into full expression. In our unredeemed world, therefore, we need to adopt a dialectical political policy. On religious grounds this policy should seek to maximize *Tzelem Elohim* by restricting individual liberty only when allowing individual choice would undermine the liberty, dignity, and equality of another. The rationale for limiting liberty is neither spiritual rectitude nor religious ideal, but functional and social. In principle, restricting personal freedom and coercing behavior for any ideological or halakhic end robs such behavior of its unique spiritual character, and as such it is devoid of religious value.

Mishna *Sanhedrin* 4:5 instructs us that human diversity testifies to the greatness of God: "The supreme King of kings, the Holy One, Blessed be He, stamped all people with the seal of Adam the first, and not one of them is similar to another." As the Mishna indicates, from *Tzelem Elohim* flows the uniqueness of each human person. Difference in human opinion[35] and behavior should therefore be celebrated as religious values. Though the Mishna is old, the recognition of diversity—and the tolerance required for it to flourish—is a modern religious insight. Previously, religious cultures prized uniformity, but the bold claim of the Mishna is that the empirical pluralism of modernity is a religious value that reflects God's glory, not religious failure. The right and freedom to be different illuminate God's infinitude and each person's sacred uniqueness. Hence, to flatten out differences by coercing toward uniformity is a spiritual sin and tantamount to rebelling against God's plan for creation.

It is precisely here that Judaism must differ from other philosophies espousing objective values and substantive positive liberty. For Plato, philosophical truth and the rational ordering of society were ends in themselves. For Marx, productive labor represented the highest human value. Because of their absolute commitments to these values, any means to optimize them were justified. In the political systems of these thinkers individual human beings were regarded as mere instruments toward realizing

these goals. Indeed, it is hard to find even a hint of considerations of individuality in these philosophies. Ultimately, a person's real hopes, desires, choices, and values—one's empirical will—were robbed of any worth and one's identity was reduced to a perishable part of a well-running rational organization. Accorded no intrinsic value of "personhood" or "humanness," the individual was crushed under the weight of a rational totalitarian politic.

Because Judaism posits that every person is created in the image of God, it insists on the unique spiritual integrity of each human being and can never lose sight of a person's immeasurable value. Judaism's ideals are intrinsically spiritual: the love of God and humanity's honest testimony to God's Presence. The goals of Torah, therefore, cannot be merely external behavior in conformity with religious law. Halakha and mitzvoth are only means—perhaps indispensable means—of a system designed to realize these goals for every Jew.

Here the contradictory nature of the coercive approach is apparent. Today, when no prior voluntary assent to Torah and mitzvoth exists, imposing halakhic standards entails forcing a person against one's will. In as much as free will is necessary for one's religious and spiritual development, "imposing" the love of God on a person in contemporary circumstances is a sterile, self-contradictory policy. On a collective level also, *Am Yisrael* is charged with being a "holy people," whose behavior and values testify to God's sovereignty. But if religious observance is merely a result of political decision, human legislation, and police enforcement, our observance testifies only to the fear of governmental punishment, and speaks nothing of divine acknowledgement. Such observance corrupts the halakhic meaning of *edut.* In classic rabbinic parlance, it is *edut sheker*—false testimony.

The above is fundamental to those who understand the Torah's concept of humanity created in the image of God as ensuring the dignity and worth of every individual. The divine character of every human being demands that each person be considered an end-in-oneself. One may never be used merely as a means within some larger system, and must never be dominated completely by any form of coercive political or legal authority.

God created neither robots nor slaves to acknowledge God. God acted out of *hessed*, endowing each person with free will, reason, and a spiritual character. At Sinai God offered the Torah to the Jewish people, and they voluntarily accepted with complete understanding and freedom.[36] The proper religious approach for Jews today is one that fulfills the commandment of *imitatio dei*,[37] emulating that divine standard: one that preserves the dignity and liberty of each person, touching one's spiritual character while simultaneously bringing one to Sinai in order to freely accept the Torah.

It is true that the conceptualization of *Tzelem Elohim* that celebrates freedom, tolerance, and human diversity as religious ideals constitutes a break with the past. Previously, attempts to pressure toward both religious observance and communal uniformity were normative values in Jewish life. Yet, this conceptual change need not be viewed negatively. The evolution of authentic moral ideals can be understood as part of God's plan for Jewish history and the flowering of ultimate Torah values.[38] We have gone as a people from sacrifices to prayer, from polygamy to monogamy, and from monarchy to democracy as part of the positive evolution of Jewish values. Unlike the Western philosophic proponents of positive liberty who moved from freedom to coercion in their political vision, the dynamic of Jewish thought must move from coercion to freedom. The talmudic ideal dramatized in *Shabbat* 88a points to a necessary logical relation, and resolves the freedom/ obligation paradox that has long bedeviled political thinkers: The validity of legal obligation grows out of voluntary acceptance, not the reverse. Only with prior free acceptance of Torah do mitzvoth and the system of halakhic responsibility make moral sense.

As the talmudic passage indicates, movement from an authority-based understanding of observance to the voluntary acceptance of mitzvoth is also an evolution toward the Jewish people's fuller acceptance of Torah and effective testimony to God. Out of the power of *Tzelem Elohim* a new

world awaits us—one with broad horizons and exciting challenges that nurture hope for a future heading closer to our messianic dream. It is a society where the Jewish people express the image of God fully, bear witness to the gift of freedom and acknowledge Torah out of the noblest human spirit reflecting God.

Of course there is no absolute certainty that Jews, both in Israel and the Diaspora, will emerge from a politically free society to voluntarily return to religious values. This lack of *a priori* certainty is the price we pay for treating each other as dignified human beings, as moral creatures who quest after spiritual achievement. Yet religious Jews have good reason to believe that modern Jews will ultimately resist the allure of radical secularism. Just as in biblical times when Jews voluntarily accepted God's Torah, the Jewish people today can choose similarly when it is brought to Sinai with love and understanding. The Torah promises this, for God offers each new generation of the Jewish people the opportunity to renew the covenant: "Neither with you only do I make this covenant and this oath; but with him that stands here with us this day before the Lord our God, and also with him that is not here this day."[39]

Religious Jews today believe in the God of Israel and the truth of God's Torah. Are we to believe any less in the eternal spiritual capacity of *Am Yisrael* to accept, with integrity freedom and conviction, partnership with the Divine?

Notes

[1] For an Orthodox treatment of mitzvoth sympathetic to the principle of moral autonomy, see Walter Wurzburger, "Covenantal Imperatives," *Samuel K. Mirsky Memorial Volume* (New York. 1970). For an analysis of how liberal Judaism confronts the primacy of Kantian autonomy, see Emil Fackenheim, "Revealed Morality of Judaism and Modem Thought," *Rediscovermg Judaism* (Chicago, 1965).

[2] Peter Berger, *The Heretical Imperative* (Garden City, 1979) Chapter 1. As Berger points out, mode rn man's situation of having to choose the essential characteristics of his life is a mixed blessing. It can bring with it a host of cognitive maladies, chief amongst them being alienation. For good or for bad, the lack of axiomatic belief and the demand for personal choice is the very situation in which modern man finds himself. Rene Descartes is considered to be the first modern philosopher. His thought is distinct from his predecessors because he did not take as a given any religious tradition or substantive worldview. Standing alone with only the awareness of his own consciousness, he recreated God, material objects and the universe *ex nihilo* from a voluntary cognitive act. Nearly all modern philosophy has assumed this solitary, individualistic starting point.

[3] David Singer offers the thesis that the writings of David Hartman, Irving Greenberg and Michael Wyschograd constitute a "new Orthodox theology." *Modern Judaism* (February, 1989), pp. 35–53.

[4] A prime example of this conflict was seen in November 1989, when Israel's religious parties steadfastly resisted the passage of a Knesset bill entitled. "Basic Law: Human Rights." Orthodox politicians opposed the bill since its provision for freedom of religion guaranteed Israelis the right not to practice Sabbath observance in public and to choose heterodox interpretations of Judaism. The long-

standing Orthodox opposition to a constitution for the State of Israel is grounded in the same type of thinking. An interesting question is whether the opposition to such legislation is based primarily on the desire to preserve familiar social patterns, on political opportunism, or on impartial inquiry into the halakha.

[5] "Two Concepts of Liberty" in *Four Essays on Liberty* (New York, 1969) pp. 118–172.

[6] *On Liberty* (New York, 1956), Introduction p. 16.

[7] Berlin, p. 131.

[8] Marxist political theory also belongs to this school. The Marxist conception of man entailed the externalization of the rational will in the form of labor. That is, it is a pragmatic will manifested as efficient production.

[9] J. J. Rousseau, *Social Contract* Book I, Chapter 7 See also J. L. Talmon, *Origins of Totalitarian Democracy* (London, 1952).

[10] Berlin, pp. 131–134. See also the same author's, *Freedom and Its Betrayal: Six Enemies of Human Liberty* (Princeton, 2002), where Berlin demonstrates how great positive libertarians (e.g., Rousseau, Hegel, Fichte) concluded with totalitarian coercive political structures. Twentieth-century totalitarian systems—both Communism and Nazism have roots in this doctrine. Even though they were mortal military foes, the Marxist doctrine of "Work Makes (Man) Free," hung over the entrance to Auschwitz. Both political systems proceeded to deny the intrinsic value of the individual, ultimately slaughtering him in the name of a substantive political ideal.

[11] *Avot* 4:1.

[12] *Avot* 6:2.

[13] *Mishneh Torah***,** Laws of Divorce 2:20 (Version found in Yemenite and Sephardic manuscripts).

[14] Ohr Sameah, (R. Meir Simcha HaCohen, 1843–1926), Commentary on *Mishneh Torah***,** Laws of Divorce 2:20. Both Ohr Sameah and Maharit, although they quote Rambam differently, appear to have the texts consistent with the version found in Ashkenazic manuscripts.

[15] *Ibid.*, and Laws of Rebels 4:3. Ironically, today's widespread problem of the *agunah*, when a recalcitrant husband refuses to issue a *get* (bill of divorcement), is a clear case where coercive and punitive legislation needs to be vigorously enacted. The justification for such legal intrusion, however, lies in eliminating the victimization of the "chained" wife and protecting her right to lead a productive life, not in preventing the husband from violating mitzvoth. The distinction between victimless and victimizing sins and the principle of forceful intervention only in the latter category is rooted firmly in halakha. See Mishna *Sanhedrin* 8:7 and the ensuing talmudic discussion 73a–74a. This discussion, as well as the majority of rabbinic commentary on this text, make clear that the primary halakhic

consideration for intervention is the protection of the potential victim, rather than the severity of the transgression or the maintenance of the spiritual state of the transgressor. Moreover, the text indicates that prudential limits to intervening in instances of sinful behavior, i.e., 'coercion' of proper religious behavior, apply to both negative and positive mitzvoth.

[16] R. David Zvi Hoffman (1843–1921) *Melamed LeHo'il I.* no. 29.

[17] Collected Letters, no. 332.

[18] *She'elot uTeshuvot Binyan Zion haHadashot, no. 23.*

[19] *Melamed Leho'il I,* no. 29.

[20] *Iggerot Moshe, Yoreh De'ah,* no. 160 (1950).

[21] R. Abraham Isaiah Karelitz (1878–1953).

[22] Commentary on *Yoreh De'ah,* 13:16.

[23] See *Arakhin* 16b and *Hazon Ish* commentary on *Mishneh Torah,* Laws of Moral Dispositions 6:3. Also Norman Lamm, "Loving and Hating Jews as Halakhic Categories," *Tradition* 24:2 (Winter 1989) and Samuel Morell, "The Halakhic Status of Non-Halakhic Jews," *Judaism* 18:4 (Fall 1969).

[24] Rav Kook, *Iggerot haRe'iya,* Volume I, no. 138.

[25] It may be argued that the Maharit's principle of empirical will is not general, prohibiting coercion in the instance of *ger* where the volition of the husband is crucial, but not in other cases of transgression. This is a doubtful claim, as he never explicitly limits his thesis to this one case. Nevertheless, even if we accept this restrictive reading of the Maharit, when utilizing the *Hazon Ish's* standard of applying the halakha to "remedy the situation," coercive measures still lack justification. Section IV attempts to demonstrate this claim.

[26] In America also, Orthodox leaders have come to learn the consequences of trying to impose halakhic standards through power politics and legislative fiat. The recent "Who is a Jew" controversy was precipitated when a few American religious leaders attempted to exploit the Knesset as an instrument for rejecting non-Orthodox conversions. As such legislation would have had negligible demographic consequences in Israel itself (approximately five Jews with questionable conversions apply for Israeli citizenship per year), some have speculated that the true objective of the political campaign to change the Law of Return was to invalidate heterodox Jewish movements in the eyes of American Jews. Understanding the implications of this legislative move, non-Orthodox Jews united in firm opposition to *"giyur ke-halakha"* legislation and the coercive tactics adopted. The resolution, its defeat, and its painful aftermath was a spiritual disaster for halakha, Orthodoxy, and *Am Yisrael.* In attempting to discredit the Conservative and Reform Movements, the campaign succeeded only in casting aspersions on Orthodoxy's values, seriously calling into question its commitment to *Kelal*

Yisrael as an entire people, rather than a narrow sect. Moreover, whatever incentive Reform and Conservative Jewry may have had for cooperating with Orthodoxy and reconsidering valid halakhic standards for their conversions has now been eliminated by the resultant profound distrust of Orthodox motives and tactics.

[27] Even if religious legislation were to somehow be miraculously effective and succeed in preventing Israelis from violating the halakha, their observance would have dubious religious value. Given the present hostility to religious legislation, it is safe to assume that Israelis would intend not to fulfill any mitzvah via action demanded by such legislation. In a situation where the intent is not to fulfill religious obligations, Meiri maintains "there is no doubt that one does not fulfill (the mitzvah), for no person can fulfill his obligations through coerced action." Bet *ha-Behira, Pesahim* 114b. Even when we do not assume negative intent, if the sins of someone who disobeys halakha under "cultural duress" are mitigated, then the converse is also true. Obedience stemming from external coercion (political or otherwise) lacks authentic religious meaning. Norman Lamm alludes to this ("Loving and Hating Jews as Halakhic Categories," footnote 21): "…there is no spiritual merit in faith and obedience in the presence of revelation or, derivatively, in circumstances when the Zeitgeist moves an individual to belief and observance. In both cases the environment exercises a form of duress on the individual. The maximum opportunity for freedom of choice, and therefore credit or blame, occurs when circumstances are neutral and equidistant from both extremes.

[28] The context of Rav's dictum in *Pesahim* 50b is a discussion of the merit of refraining from work after *minhah* on the eve of Shabbat or Yom Tov. This custom was followed in only some communities. The Talmud states that heaven will bless those who refrain from work out of concern for the approaching holy day and will bestow a lower blessing even on those who do not work for lesser motives. The fact that this is a custom and not enforceable law, that there is no mention of punishment and only heavenly reward, indicates that the claim is prudential moral advice to individuals. *Sanhedrin* 105b refers to heavenly reward for Balak's voluntary sacrifice. However flawed Balak's motives, God saw fit to bless him by making the virtuous Ruth his descendant. *Horayot* 19b also relates this dictum to heavenly reward, comparing Tamar's illicit relations with Judah and Balak's sacrifice. Because of Tamar's pure motives, she was blessed to have David among her descendants. Again the reference is to divine blessing, not to human enforcement. *Arakhin* 16b avers that even false modesty is better that no modesty at all. Here the dictum refers to the desirability of personality traits, not action which is legislatable or enforceable. *Sotah* 22b discusses the negative personality traits of some Pharisees and false motives for doing mitzvoth. Fear of heavenly punishment and love of divine reward is this context of Rav's statement. It is also instructive that Rambam codifies this dictum in the Laws of Torah Study (3:5) and in the Laws of Repentance (10:5)—two spheres of religious observance that are more personal than public and for which a voluntary attitude is critical to their performance.

[29] Collected Letters, no. 20.

[30] Nothing proposed here requires the total separation of synagogue and state, creating a "naked public square." In Israel, allocating state funds for voluntary religious experiences and education should be strongly backed by religious Jews. Nor does it exclude the establishment of public religious standards in a community or institution when those standards are voluntarily accepted by its residents or members.

[31] See Bernard Williams, "Toleration: An Impossible Virtue" in *Toleration: An Elusive Virtue*, ed. by David Heyd (Princeton: Princeton University Press).

[32] See this author's "*Tzelem Elokim k'Gesher Beib ha-Echad L'Acher*" in *Ha-Acher*, edited by Haim Deutsch and Menachem Ben Sasson (*Yediot Aharonot*: Israel 2001).

[33] *Meshekh Hokhmah*, Gen. 1:27.

[34] *Darkha Shel Torah*, N. Rabinovitch in *Ma'alei Asor* (Ma'ale Adumim, 1988).

[35] Rambam defines *Tzelem Elohim* as intellect, i.e. conceptual capacity. *Moreh Nevukhim* 1:1–2 and *Mishneh Torah, Hilkhot Yesodei ha-Torah* 4:8. If human thought can reflect divine truth, it follows logically that suppressing dissent diminishes the potential presence of God in the world and the possibilities for hearing His voice. Because Rambam assumed that theological and metaphysical claims were demonstrably true, he did not follow this logic. In our post-Kantian modernity, it would seem that this conclusion is a necessary corollary of the premise of *Tzelem Elohim* as human intellect and judgment.

[36] See Rav J. B. Soloveitchik. "Lonely Man of Faith," *Tradition* 7:2 (Summer 1965) p. 29: "The very validity of the covenant at Sinai rests upon the halakhic principle of free negotiation between Moses and the Jewish people to submit to the Divine Will." (note no. 2) As the Rav explains, the midrashic statement found in *Shabbat* 88a and quoted by Rashi on Exodus 19:17 ("He held the mountain over their heads.") fails to have any literal application to the initial acceptance of mitzvoth or halakhic-juridic import. Indeed the presupposition of the talmudic discussion is that were the acceptance of Torah to have been coerced, its obligatory nature would be invalid. The voluntary nature of the Sinaitic covenant is also a major motif in the Rav's essay, *"Kol Dodi Dofek,"* where it is termed *"Berit Yi'ud"* and contrasted with the involuntary covenant of fate, *"Berit Goral"* imposed upon the Jews during the exodus from Egypt.

[37] Deuteronomy 26:17. See also *Sotah* 14a and Maimonides, *Mishneh Torah*, Laws of Moral Dispositions 1:5–6.

[38] Rabinovitch *op. cit*.

[39] Deuteronomy 29:13. The biblical and talmudic (*Shevuot* 29a) models of the Jewish people obligating themselves to Torah via an oath also presuppose voluntary consent, since a coerced oath has no halakhic or juridic value. Moreover, the halakha allows me to obligate myself through the medium of an oath, but I cannot impose obligations upon others—either contemporaries or descendants—through that medium. Thus it remains unclear how the voluntary actions of our biblical forefathers can generate a binding covenant upon Jews today. This implies that the fundamental acceptance of Torah obligations must be voluntarily renewed by each generation. As Rav Soloveitchik notes, only after such acceptance is freely expressed are coercive measures toward implementation halakhically justified.