TRADITION MEETS MODERNITY:
ON THE CONFLICT OF HALAKHA
AND POLITICAL LIBERTY

I

Is there one Jew among us today, after thriving in the freedom of
democratic society, who does not deeply value the right to choose and
express his own beliefs, to choose his life-style, his politics, or his place of
residence? Now we are all committed "libertarians"—political conserva-
tives 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 autono-
mously 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 traditional man’s fixed destiny has become a matter of choice for
modern man. That is, the process of modernization entails a transforma-
tion 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 the spokesmen for the
“new Orthodox theology,”³ consider choice to be an inescapable datum
of our experience. For them its justification is an a priori given and 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 mitzvot. Simply put, God has commanded and we
Jews must obey. Our Torah is an obligation-based system, rather than a rights-based political culture. Moreover, since Sinai "the Torah no longer resides in heaven," and classical Judaism invested human institutions and techniques—bet din, herem, rabbinic sanctions—with the authority to coerce Jews to obey and to punish their 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 true Jewish polity?

If an 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 all 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 often denies the right 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?

The problem is much deeper than the mere psychological discomfort of some religious Jews. It casts ominous clouds over the religious and political future of all kelal yisraeL Barring a messianic intervention that would change the socio-political conditions of Jews today, it is certain that any philosophy which denies individual freedom will be rejected by the overwhelming majority of the Jewish people. In other words, a conception of halakha making no room for liberty means that am yisrael will never be able to return to traditional Judaism 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 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 man cannot develop his natural faculties. His religious, intellectual and moral character are all frustrated when he is overly constrained by others. Indeed, once a person surrenders totally to an outside authority, he is so degraded that he loses his essence, his "personhood," becoming more akin to a member 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 man'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 he breathes. Coercing an adult person for the sake of his 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 which 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 his 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 man's irrational impulses, his uncontrolled desires, or
his 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 his humanity, his true self to the fullest. Freedom is thus a function of what one chooses and believes, not how his 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 himself.

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 possibly forcing another to act freely. For if I am (or think I am) more rational than you, I can in the name of positive liberty force you against your expressed will to act on my perceived rational choice. It is not my power to force you which 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 man’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. In the end, it is no accident that in Plato’s ideal republic an entire class of people was required to act as policemen, 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.”
With which concept of liberty is traditional Jewish thought most at home? Certainly the positive, metapsychological concept of freedom with its notion of man conquering himself, 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? He who conquers his passions.11 Who is really free? He who sheds the bonds of nature and impulse, losing himself 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, the 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 which 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 the 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 mitsvot), as well as a lower alien dimension (evil inclination) that impels him to transgress mitsvot. 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 the 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, 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 mitsvot? 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.

An interesting problem arises from this reading of the 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 mitsvot, 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 the 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, inasmuch 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 mitsva, 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': "... inasmuch as he desires to be of the Israelites and he desires (ve-rotseh hu) to abide by all the commandments ..." This implies that the Rambam is concerned not exclusively with an ideal will, but also with a Jew's actual will to obey mitsvot and the evidence for realistically presuming that empirical desire. Under this interpretation the 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 mitsvot. 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 mitsvot.

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 mitsvot 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 mitsvot 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 mitsvot, maintaining that when we know in advance that lashing or other sanctions will not induce some actual expression of acceptance of mitsvot, 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 expresses 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 mitsvot. An “unobligated Jew” is a contradiction, as misconceived as a “married bachelor”—and almost as difficult to find.

According to the Maharit’s reading of the 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 mitsvot. The Maharit could assert this because throughout our history Jewish self-perception had always testified to that linkage. Before the Emancipation, there was a broad general consensus amongst Jews that obligation to Torah law constituted their identity. Every medieval Jew saw himself as a commanded person, even if he failed to be systematically observant. Only through conversion could he 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 his 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.” 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 mitsvot 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 . . .” They “wish to be of the Israelites,” but do not wish to be obligated by the commandments—at least not the mitsvot as defined by Orthodox tradition.

This radical shift in Jewish self-perception has posed a challenge for all post-Emancipation Orthodox leaders and poskim. Unwilling to dismiss it as a mere chimera or product of heresy, even the most right-wing 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 20th century:

In our time one is not called a public desecrator of the Sabbath, because most people are such. If the majority of Israel were 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, but 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 *din* to kill the heretic not apply today, but 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 which 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 mitsvot. 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 mitsvot. 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 anusim they do not willfully express, nor can we presume that they would express, any acceptance of mitsvot. 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 life-style bespeaks a lack of commitment to mitsvot. 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 mitsvot? 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 recent 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 the 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 dati 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.”

Nevertheless, Judaism values action—the doing of mitsvot—not only attitude and relationship. If a Jew cannot do mitsvot out of conviction and love of God, is not his obedience caused by threat of legal punishment preferable to his 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.” When we understand this dictum as a realistic principle of empirical prediction and not as a dogmatic axiom, the 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 mitsvot. 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—he is just someone who does not ride buses on Friday evening, someone who watches home videos instead of frequenting the theater. If we examine each of the talmudic contexts of this dictum, we see that it really is intended as prudent advice for an individual to voluntarily participate in mitsvot, 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. This is not surprising as the halakha invariably selects 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.”

The talmudic Rabbis 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. The Rabbis had the “good sense” to know, however, that when any person or authority imposes laws on another, denying him free choice in the name of a doctrine to which he does not himself subscribe, no constructive religious motivation or character would result. When “mitokh shelo lishma, ba lishma” is understood as a voluntary assumption of mitsvot, however lacking in proper kavanna, the recent Israeli experience does not falsify the Rabbinic claim. It only points to the lack of wisdom of authoritarian religious politics.

V

We have seen that Judaism posits a metaphysical and moral ideal of human experience. Man realizes his highest being when relating to the Divine Will and obeying His commandments. Philosophically, the Torah is clearly committed to this conception of positive, substantive liberty. Yet in practice, the option exists to pursue a policy of tolerance: one that poses no legal 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 and teshuva given the historical and intellectual conditions of am yisrael today.

Moreover, the pursuit of such a “libertarian” policy is halakhically legitimate. Adopting this pragmatic policy in no way implies any kind of axiological agnosticism or lack of commitment to the ideal of obligatory
mitsvot 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. It does, however, shift the thrust of this responsibility from an authoritarian approach to a program stressing education, tolerance, and identification with the whole of the Jewish people. The political approach utilizing the coercive instrument of law has the illusory quality of a “quick-fix.” Yet 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 mere 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 towards kelal yisrael.

Religious Jews must be resolute in their conviction that halakhic behavior is the ideal for every Jew. When one confuses legal tolerance with pluralistic value equivalence he departs from both the halakha and religious Jewish thought. Because of this belief in the validity of mitsvot, religious Jews both in the diaspora and in Israel have a responsibility to be uncompromising—even militant—in promoting religious and educational opportunities where every Jew can study, assess, and personally decide on his 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 treat each other with full dignity and where we can nurture voluntary religious growth. It also requires utilizing personal, institutional, and even state resources towards these ends.

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 would likely come to emulate America: it would 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.

The practical argument for adopting a policy ensuring political freedom in a Jewish society seems compelling and self-sufficient. Yet it must be admitted that its attractiveness for modern 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). 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, therefore, 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—his real will—were robbed of any worth and his 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 his immeasurable value. Judaism's ideals are intrinsically spiritual: the love of God and man's honest testimony to His Presence. The goals of Torah, therefore, cannot be merely external behavior in conformity with religious law. The halakha and mitsvot are only means—perhaps indispensable means—of a system designed to realize these spiritual goals in every Jew.

Here the contradictory nature of the coercive approach is apparent. Today, when no prior voluntary assent to Torah and mitsvot exists, imposing halakhic standards entails forcing a person against his 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 direct 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 man created in the image of God as insuring the dignity and worth of every individual. The divine character of every human being demands that each person be considered an end in himself. He may never be used merely as a means within some larger system, and must never be dominated completely by any form of totalitarian political or legal authority.

God created neither robots nor slaves to acknowledge Him. He acted out of hesed, endowing each person with free will, reason, and a spiritual character. At Sinai He offered the Torah to the Jewish people and they voluntarily accepted with complete understanding and freedom.
proper religious approach for Jews today is one that fulfills the commandment of *imitatio dei*, emulating that divine standard: one that preserves the dignity and liberty of each person, touching his spiritual character while simultaneously bringing him to Sinai so he can freely accept the Torah.

Of course there is no absolute certainty that Jews today, both in Israel and the diaspora, will emerge from a politically free society to voluntarily return to *mitsvot* and religious values. This lack of *a priori* certainty is the price we must 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 Biblical Jews voluntarily accepted God’s Torah, today’s Jews can choose similarly, when they are brought to Sinai with love and understanding. The Torah promises this, for God will offer the covenant to each new generation of the Jewish people for renewal: “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.”

Religious Jews today believe in the God of Israel and the truth of His Torah. Are we to believe any less in the eternal spiritual capacity of *am yisrael* to accept, with full integrity and religious conviction, partnership with the Divine?

NOTES


2. Peter Berger, *The Heretical Imperative* (Garden City, 1979) Chapter 1. As Berger points out, modern 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.


4. A prime example of this conflict was seen in November 1989, when Israel’s religious parties steadfastly resisted the passage of a *Knesser* 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.
8. Marxist political theory also belongs to this school. The Marxist conception of man entailed the
equalitarian 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
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. Or Sameah (R. Meir Simcha HaCohen, 1843–1926), commentary on Mishneh Torah, Laws of
Divorce 2:20. Both the Or Sameah and the Maharit, although they quote the Rambam differently,
appear to have the texts consistent with the version found in Ashkenazi manuscripts.
15. Ibid., and Laws of Rebels 4:3. Ironically, today’s widespread problem of the aguna, when a
recalcitrant husband refuses to issue a get, 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 mitsvot. 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 mitsvot.
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 Mohe, Yoreh De’a, no. 160 (1950).
22. Commentary on Yoreh De’a, 13:16.
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).
25. It may be argued that the Maharit’s principle of empirical will is not general, prohibiting coercion
in the instance of get 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 5 Jews with question-
able 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 Conservative and Reform Judaisms, 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 halaka, 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 mitsvah via action demanded by such legislation. In a situation where the intent is not to fulfill religious obligations, the Meiri maintains that "there is no doubt that one does not fulfill (the mitsvah), for no person can fulfill his obligations through coerced action." Beit haBehira, Tractate 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 Halachic 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 minha 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 prudent 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 amongst her descendants. Again the reference is to divine blessing, not to human enforcement. Arakhin 16b avers that even false modesty is better than no modesty at all. Here the dictum refers to the desirability of personality traits, not action which is legislateable or enforceable. Sota 22b discusses the negative personality traits of some Pharisees and false motives for doing mitsvot. Fear of heavenly punishment and love of divine reward is this context of Rav's statement.

It is also instructive that the 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 which 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 the its residents or members.

31. 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." (footnote 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 mitsvot 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.

32. Deuteronomy 26:17. See also Sota 14a and Maimonides, Laws of Moral Dispositions 1:5–6.

33. 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
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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.