

## ***THE WAY OF TORAH***

Nahum Eliezer Rabinovitch

**Biography:** Rav Nahum L. Rabinovitch is *Rosh Yeshivah* of Yeshivat Birkat Moshe in Ma'ale Adumim. He is author of *Yad Peshutah*, a critical edition of Maimonides' *Mishneh Torah* with comprehensive commentary. Thirteen volumes have appeared to date.

**Abstract:** This essay argues that the unique characteristic of each person, his *Tselem Elohim*, is identified with his power of free choice and only when a human being chooses the good because it is good is Torah's highest value realized. It demonstrates that the Torah's method is to be a catalyst for the evolution of moral values in history, i.e. from polygyny to monogamy, from slavery to freedom, from war to peace, and from coercion to liberty. Some Torah laws are given in accordance with minimal standards, some for study alone, and some for realization of moral and spiritual ideals. Punishments and the system of legal coercion function heuristically to fashion social improvement without having any practical application today. If there is a need to implement punishment and coercion, Torah grants authority only *ad hoc*, when there is demonstrable communal benefit, and when there is consent of the entire community. Lastly, it argues that legitimate governmental authority is based on consent of the community, and has no jurisdiction over religious matters. It is therefore barred by *halakhah* from legislating and coercing religious standards.



# THE WAY OF TORAH\*

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"Lord, You are my God, I will exalt You and praise Your Name, For You have done wondrous things; counsels of old, in faithfulness and truth." (*Isa.* 25:1)

The Sages taught:<sup>1</sup>

Accordingly, the Holy One blessed be He said to Moses, "and they will take for you pure olive oil"<sup>2</sup> – not that I need them to do so, but that you shall illuminate for me as I have illuminated for you....It may be compared to a blind and a sighted person walking together. The sighted person said, "Come; I will guide you," and the blind person walked along with him. When they entered a house, the sighted person said to the blind one, "Go and light the lamp to illuminate for me; I ask you to do that so you will not feel obligated to me for having guided you." The sighted person represents the Holy One, blessed be He, as Scripture says, "His eyes range over the entire world,"<sup>3</sup> and the blind person represents Israel, as Scripture says, "We grope for the wall like the blind; like those without eyes we grope;

we stumble at noon as at night."<sup>4</sup> ...Israel said, "For You light my lamp,"<sup>5</sup> yet You say that we should illuminate before You? God replied, "In order to elevate you, so that you illuminate Me, just as I have illuminated you."...The Holy One Blessed be He said, "Let My lamp be in your hand and your lamp in Mine." And what is the lamp of The Holy One Blessed be He? It is Torah, as Scripture says, "For the commandment is a lamp and Torah is light."<sup>6</sup> And what is the lamp of the commandment? Everyone who performs a commandment is as if he lights a lamp before The Holy One Blessed be He.... "And you shall command"<sup>7</sup> – that refers to what is written, "You would call and I would answer You; you would desire Your handiwork."<sup>8</sup> ...God desired His handiwork...He illuminates the world, as Scripture says, "The earth shone with His glory."<sup>9</sup> He said to Israel, "They will take for you pure olive oil!" – i.e., "You would desire Your handiwork."

### I. Free Will – The Glory of Man

The Image of God (*Tselem Elokim*) is man's unique qual-

\*Translation by Joel Linsider. The original Hebrew essay appeared in *Me'aliyot*, the publication of *Yeshivat Birkat Moshe Ma'ale Adumim* in 1988. An expanded version of this essay can be found in the full volume, "*Darkhah Shel Torah*," by the same author, (*Me'aliyot* Jerusalem, 1999).

<sup>1</sup>Exod. Rabbah, Parashat Ve-Attah Tetsaveh, sec. 36.

<sup>2</sup>Exod. 27:20.

<sup>3</sup>2 Chron. 16:9.

<sup>4</sup>Isa. 59:10.

<sup>5</sup>Ps. 18:29.

<sup>6</sup>Prov. 6:23.

<sup>7</sup>Ex. 27:20. (The words form the beginning of the directive to Moses to instruct the Israelites regarding the lamps. – *trans*)

<sup>8</sup>Job 14:15.

<sup>9</sup>Ezek. 43:2.

ity that elevates him above all other creatures. It is the capacity of free choice.<sup>10</sup> The Creator acts with total freedom; nothing stands in His way; nothing forces or pressures Him to do anything. God decided to create a being in the lower realms in whom He would implant an aspect of higher existence: the power to choose. At the same time, like other creatures in the lower realms, man is limited because he is made of flesh and blood. Absolute freedom and choice are inconceivable without infinite power, and man lacks infinite power! But the Creator nevertheless allowed man a space in which he could operate in accord with his free will. To that end, He endowed him with vast powers of wisdom and understanding so he could exercise dominion over this world. In some areas, that dominion is almost complete; in others, it is less so.

All in all, however, man's potential capacity is vast, clearing a wide expanse in which his free will can be exercised. And only in the exercise of that free will does man actualize his essence. A person who fails to attain that level – who cannot exercise free choice, whether because of external factors that confine him or because of stunted development of his physical and spiritual powers – is one whose soul is dimmed and in whom the image of God does not appear. Conversely, the more a person finds opportunities to choose and relies on his free choice, the more he resembles the supernal model on the basis of which he was created. *Tselem Elokim* is garbed in him, and he attains the degree of perfection contemplated for him from the start. All creation delights in him and sings his praise: "You made him little less than God, and crowned him with glory and splendor."<sup>11</sup>

But is the exercise of choice all that is needed? Is it con-

ceivable that the goal is choice *per se*, with no account given to what is chosen? Free choice allows one to choose darkness as well as light. One possessing choice can prefer wickedness to righteousness – but would that be his glory? On the contrary; the great value of choice resides only in its ability to be used to choose the good and despise the evil.

The glory of man lies in his capacity to illuminate the entire world. "Every man is given authority: If he wants to direct himself to the good and be righteous, he has the power to do so. But if he wants to direct himself to the bad and be wicked, he has the power to do so."<sup>12</sup> And since he is given that power, "You have granted him dominion over Your creatures; everything is under his rule."<sup>13</sup> All creatures require man's illumination; indeed, even God Himself desires, as it were, man's illumination.

*Only if he chooses the good because it is good, and not because of any constraints or pressure, does his choice express his true essence.*

Endowed with choice, man is the foremost of all God's creatures, yet he has the capacity to return the entire world to chaos. Creating man will have been worthwhile only if he chooses the good. But even that is not enough. If one does good, but does not do so entirely of his own free will, then his actions do not partake of the image of God that is within him. Only if he chooses the good because it is good, and not because of any constraints or pressure, does his choice express his true essence. Only then does he justify the creation and continued existence of the human species. That is why the ministering angels argued that man should not be created,<sup>14</sup> for doing so

<sup>10</sup>Cf. Maimonides, *Mishneh Torah, Hilkhos Teshuvah* 5:1 – "As it is written in the Torah, 'And so, man has become as one of us, knowing good and evil' (Gen. 3:22); that is, this human species has become singular in the world, and no other species resembles it with respect to this matter: that he, of himself, in his wisdom and understanding knows the good and the evil and does what he wills, and there is none to restrain his hand from doing the good or the evil." See also my explanation in *Yad Peshutah* ad loc. and the parallels there cited, as well as *Guide of the Perplexed* 3:8.

<sup>11</sup>Ps. 8:6.

<sup>12</sup>Maimonides, *Mishneh Torah, Hilkhos Teshuvah* 5:1.

<sup>13</sup>Ps. 8:7.

<sup>14</sup>*Sanhedrin* 38b.

involves a great gamble. One must endow him with choice from the outset, but who can guarantee that he will choose the good? Yet were he denied the ability to choose evil, his creation would have been in vain.

From a purely logical point of view, the ministering angels' argument was sound. But since they themselves lack free choice, all they have is critical intellect. The intellect distinguishes positive from negative, existence from non-existence – but nothing more. Free choice blurs those distinctions, for it encompasses two seemingly contradictory aspects: it entails the ability to choose the good, but also the opposite. That concept is reflected in the Sages' interpretation of the verse "The Rock whose work is perfect... The God of faith": "The Rock' [*ha-tsur*] – the artist [*tsayyar*] who shaped [*tsar*] the world from the beginning and formed [*vayyitsar*] man in it... 'God of faith' – Who had faith in His world and created it."<sup>15</sup> The Holy One blessed be He is the great One of faith, for only with the power of faith was it possible to create the world. Only the Master of choice could have faith in man, who also is endowed with choice. God desired his handiwork because He had faith in him and therefore created him; and for that reason as well he gave us the Torah and its commandments. Had he so wished, He could have instilled in our souls obedience to His commandments. Just as He instilled in all animals, man included, instincts that determine particular behaviors, He could have fashioned an animal that distances itself from sin and performs the commandments. But "if it were His will to change the nature of every man to that which He, may He be exalted, seeks from the individual, the mission of all the prophets and all that is commanded would be useless."<sup>16</sup> Obedience to the commandments has value only if it flows from man's free will. Otherwise, it is nothing more than a purely mechanical act.

Of course an infant is not born with the capacity to exer-

cise choice. To establish a domain in which he can act, a human requires growth, education, and maturation over a long period. Even an individual lifetime is insufficient. Human heredity operates not only in the biological sphere but also in the cultural. Each generation acquires knowledge and power from the efforts of its ancestors, and, like a dwarf perched on the shoulders of a giant, its vision can penetrate a bit farther into the distance. Sometimes, a generation will advance beyond its predecessors and thereby become equipped to teach its descendants to advance even further. The history of each nation, like that of humanity as a whole, comprises a process of development whose goal is to raise the splendid human being for whose sake the world was created and an entire society that gives rise to such human beings. This process is not consistent; it encompasses advances and retreats. Some generations would have been better off had they not been created, and some individuals are the select few by whose merit the entire world exists.

The nation of Israel, which has already succeeded in producing such choice individuals, serves as a vehicle for this process, whose goal is to establish a society in which the kingdom of heaven will be realized on earth. "Mankind is beloved, for it was created in the Image of God... Israel is beloved, for it was given the instrument through which the world was created."<sup>17</sup> This Torah that was given to them guides and molds Israel's image and makes Israel fit to attain the desired goal – making use of *Tselem Elokim* in order to resemble Him in all His ways.

Just as an individual's training proceeds step by step until he attains his full spiritual stature, the history of Israel as a whole comprises periods that correspond to the various stages of human maturation. In each of them, the Torah serves as guide and regulator, for the Torah was given not to one generation alone but to all generations. The Torah thus encompasses guidance for each stage of develop-

<sup>15</sup>*Sifri* on Deut. 32:4.

<sup>16</sup>Maimonides, *Guide of the Perplexed* 3:32.

<sup>17</sup>*Avot* 3:17.

ment along the way as well as instruction on how God is to be served by the perfected man and the generation that has attained full wisdom.

Maimonides, the "guide" for all generations, has expressed the idea as a parable: "When one teaches the young, one teaches them to serve [God] through fear, so as to receive a reward."<sup>18</sup> "A young lad who comes to a teacher to be taught Torah...should be told, 'Learn, and I will give you nuts and figs.' He will then study and strive not for the learning itself, for he does not know its worth, but in order to receive the treats...But when he matures and his mind becomes stronger, and what he valued earlier becomes trivial in his eyes and he turns to appreciate other things, he should be motivated with whatever is most important in his eyes."<sup>19</sup> In this way, he is drawn along until he reaches the heights of wisdom and his mind is perfected, at which point he will understand that "the purpose of truth is to recognize the truth and the commandments are truth, and therefore their purpose is their performance."<sup>20</sup>

And so it is in the life of nations. The Rabbis saw the first step as one involving fear: "They stood at the base of the mountain [Sinai]<sup>21</sup> – R. Avdimi b. Hama b. Hasa said, This teaches that [God] held the mountain over them as a dome and said to them, 'If Israel accepts the Torah, well and good; but if not, this will be your burial place.'"<sup>22</sup> This threat was no exaggeration or hyperbole; for, as the text goes on to explain, "The Holy One blessed be He imposed a condition on the things He created, saying to them, 'If Israel accepts the Torah, you will endure; if not, I will make you revert to chaos.'" That result is axiomatic; for man was created with choice only for the purpose of accepting the Torah, and if no one could be found

willing to do so, creation would not have been worthwhile and the world would deserve to revert to chaos. But that fact can be frightening and threatening; and one who hears it will be likely to overcome his will as a result of dread and fear, rather than choosing the good and the true because of its inherent virtue.

Accordingly, the *gemara* continues, "R. Aha b. Jacob said, From this there is a great objection to the [binding authority of the] Torah." Although they said, "We will do and we will listen,"<sup>23</sup> this may not have been an exercise of free choice. An expression of will under duress is of no value, and the obligation assumed thereby is not binding, for there is an objection that negates the acceptance *ab initio*. But "Rava said,<sup>24</sup> Nevertheless, the generation of the time of King Ahasuerus accepted it, as is written, 'The Jews maintained and accepted it'<sup>25</sup> – they maintained what they had previously accepted."

*The first stage continued for about one thousand years. Even when observance of the Torah was prevalent in Israel, that entire period was the epoch of fear.*

Rashi, of blessed memory, interpreted this as having been "for love of the miracle that had been done for them." Rava agrees that the acceptance of the Torah at Sinai had not been a total, binding acceptance, but only the first step in the nation's training for divine service. At that early stage, the absence of total willingness is not a flaw, for one is taught at the outset only to serve out of fear. That first stage continued, according to Rava, for about one thousand years – through the time of the judges and the kings, the first Temple, the Babylonian exile, and the return to Zion, all the way to the miracle of Purim. That

<sup>18</sup>Maimonides, *Mishneh Torah, Hilkhoh Teshuvah* 10:5.

<sup>19</sup>Maimonides, Commentary on the Mishnah, *Sanhedrin*, Introduction to *Heleq*.

<sup>20</sup>Id.

<sup>21</sup>Exod. 19:17.

<sup>22</sup>*Shabbat* 88a.

<sup>23</sup>Exod. 24:7.

<sup>24</sup>*Shabbat* 88a.

<sup>25</sup>Esth. 9:27.

entire period, even at times when observance of the Torah was prevalent in Israel, was the epoch of fear. On occasion, the nation's consciousness was penetrated by the idea that their very existence depended on the Torah and that if they denied it, "this will be their burial place." At those times they returned to the Torah and its commandments. But even then, their acceptance was not seen as genuine acceptance, for they were acting only out of fear.

The second stage began in the days of Ahasuerus. Like the youngster who studies Torah to be rewarded with sweets and treats, the Jews accepted the Torah because of their appreciation of the miracle. They were pleased that "All the princes of the provinces...regarded the Jews highly."<sup>26</sup> That form of acceptance, to be sure, is not considered for legal purposes to have been compelled, and it is regarded as unqualified, for "one compelled by his own will is different [from one externally compelled]"<sup>27</sup> – he assumes the obligation because he desires the reward and makes that decision willingly. But while the obligation entered into is binding, the exercise of genuine free will is still absent. Even one "compelled by his own will" remains compelled, and his action does not express the splendor of man as the Image of God.

After the passage of another several hundred years, Antigonus of Sokho was perfect in piety and he attained truth and thought the time had come to declare the end of the second phase of the nation's training.<sup>28</sup> "He would say, 'Be not as servants who serve the master in order to receive a reward; rather, be as servants who serve the master not to receive a reward.'<sup>29</sup> They understood him to mean thereby belief in the truth for its own sake, which they referred to as service on account of love."<sup>30</sup> But the generation was not yet ready for that, and two students distorted the words of their master and set out in hereti-

cal directions: "They arose and distanced themselves from the Torah, and two dissident groups emerged from them – the Saducees and the Boethians."<sup>31</sup>

*The Torah places before us lofty goals that challenge and motivate the generations. At the same time it establishes criteria for conduct that, as a practical matter, people can accept.*

Still, those epochs saw progress. The nation's elite rose to the highest levels, and even the simple folk registered the influence of generations of training in Torah. False ideas that had once been commonplace withered away. Throughout the First Temple period, the belief in idolatry remained a force to be reckoned with, notwithstanding the revelation of God's presence that pervaded the Temple. Even when believers in God predominated, belief in idolatry did not disappear totally; it continued to lurk underground, ready to burst forth at any opportunity. By the time of the Second Temple, that was no longer the case. The Men of the Great Assembly annulled the impulse to idolatry<sup>32</sup>; a thousand years of Torah had left its mark on the people of Israel as a whole.

The belief in idolatry became a thing of the past, removed from the hearts of all Israel, even the least of them. Even Zadok and Boethius could not displace the Torah from its central place in the nation's consciousness. The Torah became the mark of Israel's identity, and monotheism became the characteristic that distinguished it from other nations.

## **II. The Real and the Ideal**

The system of Torah and commandments is two-fold. On the one hand, it conveys concepts, instills eternal val-

<sup>26</sup>Esth. 9:3

<sup>27</sup>Bava Batra 47b.

<sup>28</sup>Maimonides, Commentary on the Mishnah, *Sanhedrin*, Introduction to *Heleq*.

<sup>29</sup>Avot 1:3.

<sup>30</sup>Maimonides, Commentary on the Mishnah, *Sanhedrin*, Introduction to *Heleq*.

<sup>31</sup>Avot de-Rabbi Natan 5:2.

<sup>32</sup>Yoma 69b.

ues, and directs people to the service of God at the highest levels and to the formation of a society worthy to be the bearer of God's presence. On the other hand, it encompasses legislation and commands to combat the forces of evil and destruction that erupt within the individual's soul and the nation's spirit and to ensure that the necessary conditions for spiritual development are satisfied to the greatest possible extent, given each generation's situation and the social, economic, and cultural circumstances prevalent at any given time and place. For the first objective, the Torah places before us lofty goals that challenge and motivate the generations, for even the noblest of people cannot attain them in full. At the same time it establishes, for the second objective, criteria for conduct that people can, as a practical matter, accept—minimum standards that must be met to avoid endangering the survival of the individual and the society in which he is placed and giving up all hope of spiritual uplift. We can illustrate the principle with three examples from the life of the individual, the society, and the nation. The illustrations are simple but typical, and they provide a basis for considering other matters as well.

The beginning is instructive: "Male and female He created them"<sup>33</sup> – one male and one female. "Therefore a man shall leave his father and his mother and cleave to his wife and they will become as one flesh"<sup>34</sup> – man and wife, an eternal construct. The King of the universe so determined it, making it part of nature. In contrast to certain animal species, humans are born half of them male and half female,<sup>35</sup> making it clear that the desirable state is the permanent pairing of one man with one woman and that

such pairing is divinely intended – "the woman you have placed with me!"<sup>36</sup>

This idea is stated in the Torah and reiterated in both the Prophets and the Holy Writings: "A covering of tears for the altar of God, crying and moaning, for [God] no longer turns to the sacrifice, is no longer pleased to accept from you. And you will say, 'Wherefore?' – Because the Lord has given testimony as to you and the wife of your youth, whom you have betrayed, though she is your companion and the woman of your covenant."<sup>37</sup> "Your companion" is one – "One is my dove, my delight"<sup>38</sup> – and "your covenant" that you entered into with her is eternal: "I am my beloved's and my beloved is mine."<sup>39</sup> God entered into a similar covenant with the community of Israel – "I betroth you to me forever"<sup>40</sup> – and He will never exchange her for another nation<sup>41</sup> nor will he send her away or leave her to her own devices: "Where is your mother's bill of divorce, by which I have sent her away?"<sup>42</sup> And Scripture speaks clearly: "For he despises sending away"<sup>43</sup> – "R. Yohanan said,<sup>44</sup> One who sends away is despised, as R. Elazar said, If one divorces his first wife, even the altar sheds tears for him."

*Prima fascia*, one may ask why, if one who divorces his wife is despised, the Torah not only permitted divorce but enacted various positive and negative commandments related to it to be implemented in different situations for different couples. And if each man's mate is unique, why did the Torah permit polygyny? Only the High Priest was restricted to a single wife, as we have learned: "'He shall atone for himself and his household'<sup>45</sup> – but not for two

<sup>33</sup>Gen. 1:27.

<sup>34</sup>Gen. 2:24.

<sup>35</sup>See *Yevamot* 119a.

<sup>36</sup>Gen. 3:12.

<sup>37</sup>Mal. 2:13-14.

<sup>38</sup>Song of Sol. 6:9.

<sup>39</sup>Song of Sol. 6:2.

<sup>40</sup>Hosea 2:21.

<sup>41</sup>*Pesahim* 87a.

<sup>42</sup>Isa. 50:1.

<sup>43</sup>Mal. 2:16.

<sup>44</sup>*Gittin* 90b.

households."<sup>46</sup>

*If one who divorces his wife is despised, why did the Torah permit divorce? And if each man's mate is unique, why did the Torah permit polygyny?*

Without doubt, a permanent covenant is the *desideratum*, and it is that to which a man should aspire. But reality does not always correspond to our highest aspirations. Not every person succeeds in finding a suitable partner, and one cannot dwell together with a serpent. Moreover, though God nicely created equal numbers of males and females, the world was accursed because of man's sin, and wars produce numerous widows weeping for their husbands who have died in battle. Other factors as well led the divine wisdom to permit polygyny and divorce – but not without steps to ensure that necessary values will be preserved. We therefore were given commandments regarding betrothal, marriage, and mutual obligations between husband and wife, all in order to fashion personal life in a manner that fosters the sanctity of the family in Israel.<sup>47</sup> These commandments introduce spiritual content into the concept of marriage and create more appropriate family relationships, thereby directing the ensuing generations toward the intended goal.

Indeed, emotions were refined over the course of generations; the sense of sanctity became widespread, and Jewish marriage became a model for the nations. As the values toward which the Torah instructs us became more firmly rooted, it became possible as well to enact additional legislation to raise the lowest threshold to a higher plane. For example, the Sages of the Talmud enacted remedial legislation that limited the opportunity for

divorce – "so sending her out would not be taken lightly by him."<sup>48</sup> And in the time of the *rishonim* (rabbinic authorities of the mid-eleventh through mid-fifteenth centuries), R. Gershom, Beacon of the Diaspora, saw that his generation was ready for a ban on divorce without the wife's consent<sup>49</sup> and for eliminating polygyny, at least within the communities of Western Europe.<sup>50</sup> By now, his enactments have spread through all Israel. Certainly the Sages instituted such enactments – yet they did not draw them out of thin air, but advanced the values already determined by Scripture. In the biblical era, however, the time was not yet ripe, and people were not yet ready, for the full realization of that vision. Only over time, as a result of training in the life of Torah, were people's hearts made ready and did it become possible to draw closer to the goal established by the Torah.

A second example: "The original man was created a single individual in order to promote peace among the creatures, so no man could say to his fellow, 'my progenitor is greater than your progenitor'... [and] to declare the greatness of the King of kings, the Holy One blessed be He, for a man mints one hundred coins on a single mold and they all are identical to one another, but the King of kings, the Holy One blessed be He, mints every human being in the mold of primeval Adam, yet none is identical to his fellow. Accordingly, each can say, 'For my sake the world was created!'"<sup>51</sup> Thus, from Creation itself the Torah teaches us that all men are truly equal. Maimonides read it as follows: "'The mold of primeval Adam' – the form of the human species, within which lies man's humanity and in which all human beings share."<sup>52</sup>

However, humanity went astray. Men subjugated one another and distinguished between slaves and masters.

<sup>45</sup>Lev. 17:11. ("Bayit," here translated "household," is routinely understood by the rabbis to connote "wife." – *trans.*)

<sup>46</sup>*Yoma* 13a.

<sup>47</sup>See Maimonides, *Mishneh Torah, Hilkhos Ishut* 12:1-3; *Guide of the Perplexed* 3:49.

<sup>48</sup>*Ketubbot* 11a.

<sup>49</sup>*Shulhan Arukh, Even ha-Ezer* 119:6, comment of R. Moses Isserles.

<sup>50</sup>*Shulhan Arukh, Even ha-Ezer* 1:10.

<sup>51</sup>*Sanhedrin* 4:5.

<sup>52</sup>Maimonides, *Commentary on the Mishnah*, ad loc.

These distinctions of status lack substance and are not grounded in reality, for the Creator regards them all as equal. Only one whose imagination is depraved will disregard the fact that all mankind share in Adam's mold; and only the wicked will rule that the status of a slave is sub-human. "If I despise the cause of my servant or of my maid-servant when they contend with me, what shall I do when God rises up? When He remembers, what shall I answer Him? Did not He that made me in the womb make him? Did not the One fashion both of us in the womb?"<sup>53</sup>

Yet the Torah recognizes the institution of slavery! On the one hand, there is no clearer declaration than the creation of but one man, whose mold is on the servant just as on his master; on the maid as on her mistress. On the other hand, Scripture states, "from them you shall purchase slave and maidservant...and they shall be your possession!"<sup>54</sup> But it is an instance of the principle that Maimonides explained:<sup>55</sup> "Out of concern over what the soul by its nature could not accept...God diverted them from the straight path that was the primary goal." Given the dictates of circumstance, the Torah did not require that the principle be applied in full from the outset. Rather, it taught society to advance step by step, until the goal could be fully achieved. The point is clearly made in *Sifra*:<sup>56</sup> "Lest you say..., 'what shall we employ?' Scripture states, 'slaves and maidservants that may be yours from among the nations.'" In the ancient world, it was almost impossible to sustain a proper economy without vast amounts of human labor, and that human labor was usually recruited for the most part from slaves. The leading thinkers among the nations could not conceive of a successful society without abundant bonded servants; as a matter of economics, it was simply impossible. "What shall we employ?" was a serious question that could not

be avoided.

The Torah revolutionized the institution of slavery. Some fundamental principles could not be violated, and they set a floor that prevented descent to the vile conduct of the nations. So, for example, in contrast to the laws of other nations, the slave's soul did not become the master's property but remained that of the Master of all: "If a man strike his slave or his maidservant with a rod, causing death, the death shall be avenged."<sup>57</sup> The slave may be given over to labor for the master, but the Torah remains concerned about the slave's soul as well. The Sabbath is sacred not only for the master but also for the slave. "On the seventh day you shall rest" – referring to the master; but also "so that your ox and ass may rest and the child of your maidservant and the stranger may be refreshed."<sup>58</sup> You are obligated to provide rest even for the animals that work for you, but the Sabbath affords the slave more than rest and respite from enslavement; in his case, Scripture says "be refreshed," and you are obligated to allow him to cease working.

Despite these limitations, the institution of slavery remained, for the prevailing conditions precluded its abolition. But raising the status of the slave, subjecting him to commandments, and bringing him to a certain degree under God's wings gave rise to a particularly difficult problem, for once a slave had tasted of God's commandments, it would be unreasonable for him to return to idolatry. And so it was forbidden for his master to sell him to a gentile<sup>59</sup> and even more so to restore him to full gentile status. At the same time, it would be inconceivable to allow him to fully enter the covenant of Israel, as a free man and righteous convert; for if the master were to free the slave against the latter's will, there would certainly be no willing acceptance of the commandments. The slave

<sup>53</sup>Job 31:13-15.

<sup>54</sup>Lev. 25:44-45.

<sup>55</sup>*Guide of the Perplexed* 3:32.

<sup>56</sup>*Sifra* on Lev. 25:44.

<sup>57</sup>Exod. 21:20.

<sup>58</sup>Exod. 23:12. See *Guide of the Perplexed* 1:67, where Maimonides explains that "'be refreshed' [*ve-yinafesh*]" is a passive verb constructed from 'soul' [*nefesh*]; it refers to satisfying his needs and carrying out his will."

<sup>59</sup>Maimonides, *Mishneh Torah, Hilkhos Avadim* 8:1.

would be likely to return quickly to his old ways, and even if he were to proclaim morning and evening his desire to be a righteous convert, it would more likely be his wish to be free of his master that was speaking, rather than his submission to service of God. A legal option to free large numbers of slaves and make them Jews would expose Jewish society to the danger of being overwhelmed and loosed from its moorings.

The halakhic acceptance of the institution of slavery was paradoxical, for despite the principled opposition to slavery, it was impossible legally to free a slave, for every act of emancipation entailed a degree of compulsion, and how could one become a Jew through compulsion? How could converts be accepted if they were not shown to have the proper intention? Maimonides treated the matter in *Sefer ha-Mitsvot*:<sup>60</sup>

Commandment 235 is the one we were commanded with respect to the law affecting a Canaanite slave, i.e., that he is to be enslaved forever and not to be emancipated except as a consequence of [a blow that knocks out] a tooth or an eye, and the same rule applies to the loss of other major limbs that cannot be restored, as we know from the traditional interpretation [of Scripture]. And that is as He, may He be exalted, said, "You shall work them forever,"<sup>61</sup> and he said, "If a man strike [his slave's eye...],"<sup>62</sup> and the *gemara* in *Gittin*<sup>63</sup> states that one who frees his slave violates a positive commandment, for Scripture says, "You shall work them forever," and the Torah says he shall be freed [only through loss of] tooth or eye.

All the laws with respect to a Canaanite slave thus rely on a single positive commandment, which is the essence of

"the law of a Canaanite slave." There is no commandment to acquire a Canaanite slave, and one who has a Canaanite slave does not thereby fulfill any divine command. In stating "You shall work them forever," Scripture does not issue a commandment requiring a person to act; it simply states that the law recognizes the possibility of emancipation only as a consequence of losing a tooth, an eye, or some other major limb.<sup>64</sup>

In summarizing the positive commandments at the end of his presentation, Maimonides again emphasized the distinction between regulations and obligations:

Some of the commandments are legislative provisions, as we have explained, such as the rule of the Hebrew slave or maidservant, the rule of the Canaanite slave, the rule of the gratuitous bailee or the borrower, and others like them, mentioned above. And it is possible that a person will live his entire life without encountering these rules and will not be subject to these commandments.

But does it not follow that even if a legal mechanism to emancipate a slave were found, it would be regarded as a circumvention of the law and forbidden in any event *qua seyag* (lit., "a fence"; a prohibition imposed to distance people from the risk of a more serious violation)? That is indeed the case; the law is decided as follows:

A woman may purchase maidservants but may not purchase slaves because of suspicion [of improper conduct], but if she purchases them, she gains ownership as does a man....Likewise, it is forbidden for a man to emancipate his slave, and anyone who does so infringes a positive commandment, as Scripture says, "You shall work them forever." But if

<sup>60</sup>Positive Commandment 235. The words "not to be emancipated" appear in the translation of Ibn Iyyub in the edition of R. H. Heller of blessed memory. That translation appears to be to be more accurate than that of R. Y. Kapah, may he be granted good and long life, even though I generally quote from the latter's translation.

<sup>61</sup>Lev. 25:46.

<sup>62</sup>Exod. 21:26.

<sup>63</sup>*Gittin* 38a.

<sup>64</sup>But see the comments of Nahmanides, who disputes Maimonides on the point and identifies two positive commandments with respect to Canaanite slaves. For the definition of a commandment that is a rule, see positive commandment 95.

he does emancipate him, [the slave] is emancipated, as we have explained. And it is permitted to emancipate a slave for the sake of performing a commandment, even a rabbinic [as distinct from biblical] commandment. For example, if a quorum of ten were not present in the synagogue, one may free his slave and thereby complete the quorum; and so in other similar situations. Likewise a maidservant with whom people act promiscuously, such that she is a snare for sinners: we compel her master to free her so that she will marry, thereby eliminating the snare; and so other similar situations.<sup>65</sup>

What significant principles are taught here! First, just as the prohibition on a woman purchasing slaves is only rabbinic – because of suspicion – so, too the prohibition on freeing one's slave also is only rabbinic, for to do so would circumvent the law derived from the verse "you shall work them forever," which does not make it possible to grant freedom. That is why he used the word "likewise," to teach us that point<sup>66</sup> and thereby to explain his ensuing statement that one who emancipates his slave "infringes." Were he speaking of a full-fledged positive commandment, he would not simply have replicated the *gemara's* wording without explanation but would have said "he violated a positive commandment," as he does in other instances.<sup>67</sup> And since it is not a biblical commandment to keep them enslaved but only an inferred regulation, the regulation yields in the face of any matter related to a commandment, even a rabbinic one.

Once again we see that even though the Torah identifies no possibility of emancipation, the possibility was in fact implicit within the law, and the sages of blessed memory

succeeded in revealing it. And just as a bill of emancipation is effective when the slave has suffered the loss of a principal limb,<sup>68</sup> so is it effective in and of itself. Accordingly, the rabbis decreed that if a person utters emancipatory wording to his slave, "we require the master to write for him a bill of emancipation." Taking account of the reason why the Torah made no provision for emancipation, the rabbis recognized that if the community were to be harmed by that omission, the master would be compelled to free the slave or maidservant.

The Sages directed so much attention to remedial legislation related to slaves, and the doctrine of equality so penetrated the national consciousness, that these attitudes eventually became characteristic of Judaism and oppressive regimes attempted to uproot them. A *baraita* tells<sup>69</sup> that in a time of oppression, the authorities arrested R. Elazar b. Parta and accused him of five "offenses." One of the charges was "Why did you emancipate your slave?" Rashi comments, "[the regime] had forbidden [emancipating slaves] because the practice was a Jewish religious precept."

*The abolition of slavery is simply a partial realization of the exalted ideal taught by the Torah.*

Was this "Jewish religious precept" an innovation? Of course it was; but it was born of and nourished by the Torah, and its origins are rooted in Scripture, though the world at the time of the Bible was not yet fit for it. Over the course of time, knowledge increased throughout the world, new scientific and technological discoveries produced sources of energy far mightier than human labor,

<sup>65</sup>Maimonides, *Mishneh Torah, Hilkhhot Avadim* 9:6.

<sup>66</sup>See *Kesef Mishneh* ad loc., who considers the significance of the wording "likewise."

The source of the rule is in *Berakhot* 47b, printed editions of which include the objection that freeing a slave for the sake of performing a commandment results in "a commandment performed by means of a sin." The response is that "a commandment affecting the public is different." That suggests that a slave may be emancipated only to facilitate performance of a rabbinic commandment that affects the public but not otherwise. But see *Diqduqei Sofrim*, which notes the existence of manuscripts that omit both the objection and the response, and it is clear that Maimonides was reading from such a manuscript.

<sup>67</sup>See, for example, *Mishneh Torah, Hilkhhot Tsitsit* 3:11 and *Yad Peshutah* ad loc.

<sup>68</sup>See Maimonides, *Mishneh Torah, Hilkhhot Avadim* 5:4.

<sup>69</sup>*Avodah Zarah* 17b.

and opportunities for leisure grew. Divine providence then led to the abolition of slavery nearly everywhere. Blessed be God, who spread the light of His Torah, giving those who had strayed the intelligence to recognize the divine greatness imprinted on every human being! The abolition of slavery is simply a partial realization of the exalted ideal taught by the Torah; and the history of the West makes it clear beyond all doubt that one of the decisive factors in that process was the widespread knowledge of the Torah. This came about "to improve the world as a whole so it would serve God together, as Scripture says, 'For I will then turn the nations to clear speech, so they may call upon God's name and serve Him in unison.'"<sup>70</sup>

The final example bears on international relations. "R. Joshua said:<sup>71</sup> Great is peace, for the name of the Holy One blessed be He is called peace, as Scripture says, 'And he called it "the Lord is peace.'"<sup>72</sup> "R. Simeon b. Halafta said:<sup>73</sup> There is no vessel that holds blessing as does peace, as Scripture says, 'The Lord will grant strength to His people; the Lord will bless His people with peace.'"<sup>74</sup> Our obligation is to "seek peace and pursue it."<sup>75</sup> Accordingly, the prophets longed for the awaited day: "It shall come to pass in the future that the mountain of the Lord's house will be established at the head of the mountains... and nations will stream toward it... and they will beat their swords into plowshares and their spears into pruning hooks. Nation will not lift up sword against nation nor will they practice war any longer. A man will sit under his vine and under his fig tree with none to frighten him."<sup>76</sup>

But the Torah did not totally forbid war; indeed, it commanded certain obligatory wars and recognized certain permissible ones.<sup>77</sup> How can we resolve the contradiction between establishing peace as one of the highest values, identified with the name of the Creator of the universe, and issuing explicit commandments related to war?

*How can we resolve the contradiction between establishing peace as one of the highest values and issuing explicit commandments related to war?*

And so the Sages declared:<sup>78</sup> "'Her ways are ways of pleasantness and all her paths are peace'<sup>79</sup> – everything written in the Torah was written for the sake of peace. And even though wars are written in the Torah – they, too, for the sake of peace were written." In a cruel world where kingdoms strive against one another and man consumes his fellow alive, the law must necessarily provide that "If one comes to kill you, arise and kill him first."<sup>80</sup> A nation not prepared to defend itself and its land will be unable to maintain itself and will quickly pass from the world. A readiness for war is a necessary condition for the building of a society, for the fulfillment of Torah, and for the realization of a vision.

God imposes on his children no demands that are beyond their ability to carry out. At the same time, the Torah is not satisfied with the world as it finds it. In every area, "there is a stratagem God advised us to use in attaining His primary goal."<sup>81</sup> Everything written in the Torah is there to lead us to the recognition that peace is at the pinnacle of a society's values. All the commandments are

<sup>70</sup>Maimonides, *Mishneh Torah, Hilkhhot Melakhim* 11:4, citing Zeph. 3:9.

<sup>71</sup>*Derekh Erets Zuta, Pereq ha-Shalom.*

<sup>72</sup>Judg. 6:24.

<sup>73</sup>End of Mishnah `Uqtsin.

<sup>74</sup>Ps. 29:11.

<sup>75</sup>Ps. 34:15.

<sup>76</sup>Micah 4:1-4.

<sup>77</sup>Maimonides, *Mishneh Torah, Hilkhhot Melakhim* 5:1.

<sup>78</sup>*Midrash Tanhuma* (ed. Buber) 96:5.

<sup>79</sup>Prov. 3:17.

<sup>80</sup>*Sanhedrin* 72a.

<sup>81</sup>Maimonides, *Guide of the Perplexed* 3:32.

designed to nurture in us the feeling that warfare is a terrible illness, even though it can serve a necessary purpose when there is no alternative.

And so, even when the Torah tells of war, it does so for the sake of peace:<sup>82</sup>

One finds that the Holy One blessed be He revoked a decree for the sake of peace. How so? When the Holy One blessed be He said to Moses, "When you besiege a city for many days...",<sup>83</sup> He said as well that Moses should utterly destroy [the cities of the Canaanite nations]... But Moses did not do so, saying, instead, "I now go to attack, but I do not know who has sinned and who has not sinned. Rather, I will approach them in peace," as Scripture says, "I sent messengers from the wilderness of Qedemot... with words of peace."<sup>84</sup> When [King Sihon] did not respond in peace, [Moses] attacked him.... God said to [Moses], "I said 'utterly destroy them,'<sup>85</sup> and you approached them in peace? By your life, as you have said, so will I do," as Scripture says: "When you approach a city to make war on it, you shall [first] call out to it in peace."<sup>86</sup>

*All the commandments related to war were given in order to restrict the scope of warfare and to replace an attitude that glorifies war and its heroes with one that longs for peace.*

And the *halakhah* was decided accordingly: "War is not to be waged against any person in the world without first calling out to him in peace."<sup>87</sup> All the commandments related to war were given in order to restrict the scope of warfare and to replace an attitude that glorifies war and its heroes with one that longs for peace. As long as danger-

ous enemies confront us, we need to arm ourselves with the most up-to-date and effective weaponry. But we must not forget for a moment that all such apparatus "are nothing but demeaning, as Scripture says, 'They shall beat their swords into plowshares and their spears into pruning hooks.'"<sup>88</sup>

Of course, realization of the Torah's peaceful tendencies does not depend on us alone. As long as there is continued plotting by "the wicked of the nations, compared to wolves and leopards, as Scripture says, 'a wolf of the desert plunders them; a leopard lies in wait at their cities,'"<sup>89</sup> as long as hatred of an eternal nation endures, we are powerless to establish peace among the nations. The goal for now remains beyond us, but the day will surely come, "for the mouth of the Lord of Hosts has spoken."<sup>90</sup>

### III. Study Is Its Own Reward

The Torah's 613 commandments fall into two categories. Some commandments are destined to endure, in their present forms, at the end of days; and as a person rises higher in character and intellect, he becomes aware of broader opportunities for fulfilling those commandments and understanding their meanings. But there are other commandments that are primarily a mechanism for bettering society and moving it toward the formation of circumstances that permit carrying out the purposes for which man was created – the Kingdom of Heaven on earth. These commandments apply only in certain situations, and our aim is to move beyond them, to a state in which we will no longer be bound to fulfill them – just as it is the practice, after the *halitsah* ritual, for "the judges [to] say, 'May it be [God's] will that the daughters of Israel

<sup>82</sup>Midrash Tanhuma (ed. Buber) 96:5.

<sup>83</sup>Deut. 20:19. (The passage goes on to forbid the cutting down of fruit trees in connection with the siege. – *trans.*)

<sup>84</sup>Deut. 2:26.

<sup>85</sup>Deut. 20:17.

<sup>86</sup>Deut. 20:10.

<sup>87</sup>Maimonides, *Mishneh Torah, Hilkhoh Melakhim* 6:1.

<sup>88</sup>*Shabbat* 6:4, citing Isa. 2:4.

<sup>89</sup>Maimonides, *Mishneh Torah, Hilkhoh Melakhim* 12:1, citing Jer. 5:6.

<sup>90</sup>Micah 4:4.

not come to need *halitsah* or *yibbum*."<sup>91</sup>

We are not speaking here of commandments that from the outset were intended only for a particular time or place, such as the directives given to the Israelites in the wilderness with respect to their travels and their manna and water. Maimonides enumerated them and found that "more than three hundred commandments were given to Moses for that time only and not for all generations."<sup>92</sup> But when the judges pray that women will not come to need *halitsah*, they are referring to a commandment that binds all generations. And when we thank God for having rid the world of slavery, we firmly hope that the earlier situation will not recur and that the commandments regarding slavery will never again be of practical effect—even though they, too, were commandments not given for a limited time only.

That, in turn, raises two fundamental questions. One relates to the definition of "for all generations" in the context of the ninth of the thirteen principles of faith enumerated by Maimonides in his commentary on the Mishnah.<sup>93</sup> The eternal nature of the Torah necessarily implies "that nothing will be added to it and nothing taken away, not in writing and not through explanation."<sup>94</sup> None of the commandments will ever be annulled, "and one who says that the Creator exchanged one commandment for another or annulled this teaching...denies the Torah."<sup>95</sup> If a commandment ceases to be practicable because times have changed, as have the circumstances on which it depends, can that commandment be said, God forbid, to have been annulled?

In enumerating the commandment to make war against the seven Canaanite nations and to destroy them, Maimonides deals with this issue:<sup>96</sup>

Might a person think, because the seven nations have already disappeared, that this commandment is not one for all generations? That would be the view only of one who fails to understand the meaning of "applicable for all generations." A commandment is not considered to be removed from that category if it has come to an end because it has achieved its purpose, for it is not dependent on a particular time, and it applies in any generation where there exists the possibility of carrying it out... The killing and destruction of the seven [Canaanite] nations is something we were commanded to do. It is an obligatory war, and we are bound to uproot them and search them out in every generation, to the last person; as we did until their destruction was completed by David and their remnant was dispersed and assimilated among the nations, to the point of being unrecognizable. But the fact that they have already been eliminated does not make the commandment to kill them any less applicable to all generations. Similarly, we do not say that the war against Amaleq does not apply to all generations, even after their destruction and elimination, for that commandment is not dependant on a particular time and place, as are the commandments unique to the wilderness or Egypt. Rather, it depends on the presence of its objects – whenever they may be found, the directive is to be carried out. To state the matter generally, one must understand and consider the distinction between the commandment and its object, for there may be situations in which [the commandment] applies to all generations but its object has disappeared at a particular time, but the absence of the object does not mean that the commandment is not applicable to all generations.

<sup>91</sup>*Shulhan Arukh, Even ha-Ezer* 169:56. (*Yibbum* is the act of levirate marriage, which requires the brother of a married man who dies childless to wed the widow and bear children with her. *Halitsah* is the ritual by which the widow is released to marry another in the event the surviving brother is unwilling to fulfill his *yibbum* obligation – *trans.*)

<sup>92</sup>*Sefer ha-Mitsvot*, Introduction, third principle.

<sup>93</sup>Maimonides, Commentary on the Mishnah, *Sanhedrin*, Introduction to *Heleq*.

<sup>94</sup>Id.

<sup>95</sup>Maimonides, *Mishneh Torah, Hilkhoh Teshuvah* 3:8.

<sup>96</sup>Maimonides, *Sefer ha-Mitsvot*, positive commandment 187.

The second question is also one of principle, already considered in *baraitot* in the *Tosefta* that are cited in the Talmud. If a commandment lacks practical application, what is its use and why was it given? The *baraita* sharpens the question by suggesting that there are some commandments that have never been fulfilled and that, *ab initio*, were never intended to be carried out in practice.

There are three commandments whose detailed descriptions in the Torah can shock and strike terror in the listener.

(1) "If a man should have a stubborn and rebellious son...his father and mother shall take hold of him...and they shall say to the elders of his city 'this son of ours is stubborn and rebellious, he does not heed our voice, he is a glutton and a drunkard.' And all the people of his city shall stone him to death, and you shall remove the evil from among you, and all Israel will pay heed and will fear."<sup>97</sup> The Oral Torah<sup>98</sup> explains that the passage is speaking of a young lad who has just attained the age at which he becomes subject to the commandments (i.e., thirteen years and one day) and that there is only a three-month interval during which he can be adjudged a stubborn and rebellious son. The horrific stringency of the punishment seems, on its face, wholly disproportionate to his offense. "R. Jose the Galilean says:<sup>99</sup> Should he be taken to court to be stoned because he ate a *tarteimar* of meat and drank a half *log* of Italian wine? No; the Torah foresaw what would ultimately become of the stubborn and rebellious son – he would consume his father's resources, and, wishing to continue living as he had become accustomed to, he would become a highway robber. The Torah therefore said, let him die innocent rather than guilty, for the death of the wicked is a benefit to them and a benefit to the world." But even after this

explanation, the passage is extremely harsh, and the law of the stubborn and rebellious son brings the attribute of stern justice to bear in a profoundly terrifying way.

(2) Yet there is an even more frightening and unsettling passage, that of the wayward city.<sup>100</sup> "If you should hear that in one of your cities...some wicked men have gone out and led the inhabitants of their city to stray, saying 'Let us go and worship other gods' which you have not known...And if it is true and certain that such an abomination has taken place in your midst, you shall strike the inhabitants of that city by the sword, destroying it and all that is within it, including its cattle, by the sword...And you shall completely burn the city and all its spoil...and it shall be a ruin forever."

(3) And sometimes the quality of stern justice affects even wood and stone. "How has the land sinned, that it is smitten?"<sup>101</sup> But the land is smitten on account of human sins, as Scripture says, 'A fertile land is turned into a salt waste for the wickedness of those who inhabit it.'<sup>102</sup> ...And why are wood and stones and walls smitten? So their owners will see and repent... Accordingly, the Holy One blessed be He warns them and smites their homes so they will repent, as Scripture says, 'I shall inflict a plague of *tsara`at* on a house in the land you possess.'<sup>103</sup>

These commandments are presented in detail in the written Torah, and the oral Torah supplements them with a multitude of additional rules and laws. Nevertheless, we have learned three surprising *baraitot*:<sup>104</sup> "The stubborn and rebellious son never existed and never will exist"; "The wayward city never existed and never will exist"; and "The afflicted house never existed and never will exist." The *gemara* explains that the authors of those statements believe there to be no chance at all of ever satisfying the

<sup>97</sup>Deut. 21:18-21.

<sup>98</sup>*Sanhedrin* 69a.

<sup>99</sup>*Sanhedrin* 72a.

<sup>100</sup>Deut. 13:13-18.

<sup>101</sup>*Tanhuma Yashan, Parashat Metsora`.*

<sup>102</sup>Ps. 107:34.

<sup>103</sup>Lev. 14:34. (*Tsara`at*, often but imprecisely rendered "leprosy," is an impurity-causing affliction that can affect human beings and buildings – *trans*.)

detailed preconditions to putting these commandments into practice. But if that is so, why were they given to us? "Why was it written? Expound and receive reward!"<sup>105</sup>

The fact that these rules appear in the Torah constitutes an important educational measure. "Expound and receive reward" – one who studies these laws cannot fail to be seized by fear and trembling and will almost certainly be so deeply influenced that some of the perversity in his heart will be cured. Indeed, the very act of engaging with these laws may have the capacity to open blind eyes and deaf ears, so that "all Israel will listen and be afraid."<sup>106</sup> There is no need whatsoever for such nightmarish punishments to be carried out in the real world. The reward for studying them is their remaining forever theoretical and abstract. Schoolchildren who are aware of the laws of the stubborn and rebellious son will never become one. A community whose adults study the laws of the wayward city can be assured that it will never give rise to the "root bearing gall and wormwood" of idolatry. And one who has learned to recognize the hand of God in natural phenomena and natural disasters will no longer need afflicted buildings to inspire in him thoughts of repentance. Similarly for all the commandments whose object has already been achieved in the betterment of life in practice; they retain their heuristic force. Even if humanity has progressed and risen above the minimal level that certain commandments were given to ensure, continued study of the laws associated with those commandments can refresh the intellect and direct it to even higher levels, while preserving its existing accomplishments. The idolatrous impulse has departed the world, but study of the laws related to its prohibition can arouse in us a recognition of genuine spirituality. The more impressed we are by the stringencies imposed in prohibiting idolatry, the more intense our sense of holiness becomes.

<sup>104</sup>*Sanhedrin* 71a.

<sup>105</sup>*Id.*

<sup>106</sup>Deut. 21:21.

<sup>107</sup>*Qiddushin* 30b.

<sup>108</sup>Jer. 23:29.

<sup>109</sup>Isa. 55:1.

<sup>110</sup>Job 14:19.

<sup>111</sup>Gen. 32:28.

*There are three commandments whose detailed descriptions in the Torah can shock and strike terror in the listener.*

How powerful is Torah study? "It was taught in R. Ishmael's academy:<sup>107</sup> My son, if a vile temptation befalls you, bring it to the study house. If it is as stone, it will be crushed; if it is as iron, it will be shattered, as Scripture says, 'Is not my word like fire, says the Lord, like a hammer that shatters the rock?'<sup>108</sup> If he is stone he will be obliterated, as Scripture says, 'O, all who are thirsty, come for water'<sup>109</sup> and 'the water wears away the stones.'<sup>110</sup>

A nation that internalizes the Torah's ideas and values slowly builds up immunity against shameful seductions. Over the course of generations, students of Torah develop modes of critical thinking that can slice through issues, distinguishing illusion from reality, imaginings from truth, vain puffery from glorious responses to God's voice. Believers in the Torah build up a stockpile of spiritual strength that enables them to overcome the waves of evil that pound the world and its many internal and external pitfalls. They merit the sobriquet of the nation's father: "Israel – for you have striven with God and with men and have prevailed."<sup>111</sup> And that is what the sages meant when they said, "Expound it and be rewarded."

Its cultural legacy transmits from generation to generation a set of qualities that characterize this nation. This is not the place to dwell at length on Israel's national character, but there is without doubt a common denominator expressing the traits recognizable in our nation. Traces of those qualities linger even within those who have broken away from the Torah's framework; for at least several gen-

erations their hearts remain bound, even in alien environments, to their Jewish sources.

#### IV. Coercion and Punishment: Means or Ends?

On the one hand, "Justice, justice you shall pursue"<sup>112</sup>; on the other, "You shall remove the evil from among you"<sup>113</sup> – these are two sides of the same coin. "It is a positive commandment of the Torah to appoint magistrates and marshals in each and every province... Magistrates are the judges who constitute the court; litigants come before them. Marshals are armed with rod and strap and stand before the judges to correct weights and measures and strike those who transgress, but all their actions are to be at the direction of the judges. And anyone who is observed to have transgressed is brought before the court, where he is adjudged in accordance with his degree of guilt."<sup>114</sup>

Maimonides began *Sefer Shofetim* (the volume of *Mishneh Torah* that considers, among other things, civil governance), with the laws of the judiciary, which he called "*Hilkhot Sanhedrin ve-ha-Onshin ha-Mesurin Lahem*" ("Laws Related to the Sanhedrin and the Punishments It May Impose"). He there enumerated at least thirty commandments, apart from the other commandments considered elsewhere in *Sefer Shofetim*, and the subject of enforcing justice is a central and weighty one. Nevertheless, the sages of the *mishnah* disagreed<sup>115</sup> over whether it was preferable for judges to rigorously decide the disputes that come before them or to pursue compromise and settlement. "R. Eliezer the son of R. Jose the Galilean says: It is forbidden to split [the difference], and one who does is considered a sinner and one who praises one who does

is considered a reviler, and of this it is said, 'One who praises an acquisitive man reviles the Lord.'<sup>116</sup> Rather, render a rigorous judgment even if it pierces a mountain, as Scripture says, 'For judgment is God's.'<sup>117</sup> In contrast, "R. Joshua b. Qorhah says: It is a commandment to split, as Scripture says, 'Truth, judgment, and peace shall you adjudicate at your gates.'<sup>118</sup> But where there is judgment there is no peace and where there is peace there is no judgment! No; what is the judgment that incorporates peace? It must be mediation for compromise! And so of David it is said, 'David executed justice and righteousness for all his people.'<sup>119</sup> But where there is judgment there is no righteousness and where there is righteousness there is no judgment! No; what is the judgment that incorporates righteousness? It must be mediation."

*In the clash between two exalted values – truth and justice on the one hand; peace and righteousness on the other – which is to be preferred?*

The *halakhah* was decided in accordance with R. Joshua b. Qorhah's view. "What is the judgment that incorporates righteousness? It must be mediation and it must be compromise. But when is that the case? Before judgment is rendered, even if the judge has heard both sides and knows in which direction he is tending, it is a commandment to split. But once he renders judgment and says, 'X, you are free of liability' and 'Y, you are liable,' he is no longer permitted to reach a compromise between them, but let justice pierce the mountain."<sup>120</sup> In the clash between two exalted values-truth and justice on the one hand; peace and righteousness on the other – which is to be preferred? R. Eliezer saw the directive to judge as

<sup>112</sup>Deut. 16:20.

<sup>113</sup>Deut. 21:21.

<sup>114</sup>Maimonides, *Mishneh Torah, Hilkhot Sanhedrin* 1:1.

<sup>115</sup>*Sanhedrin* 6:2.

<sup>116</sup>Ps. 10:3. (R. Eliezer's statement plays on two different verbs with the root *b-ts-*. In the verse from Psalms, the verb is related to the noun meaning ill-gotten gain and signifies grasping. The homonym used by R. Eliezer means to "split [the difference]" or "impose a settlement" and is derived from the core meaning "to break" or "to cut off," as a piece of bread; by extension, it means to resolve a case by giving each side something . – *trans*.)

<sup>117</sup>Deut. 1:17.

<sup>118</sup>Zech. 8:16.

<sup>119</sup>2 Sam. 8:15.

absolute; accordingly, he would allow the judgment to pierce the mountain. But in R. Joshua's view, the commandment that the judges adjudicate between their brethren is not an end in itself but a means to attain the more exalted goal of bringing peace to the antagonists. Does compromise circumvent the entire array of laws pointing toward a given determination? It certainly does; but all the ways of the Torah are peace. Arranging for compromise and settlement between litigants is not enumerated among the Torah's 613 commandments, yet doing so rises above and beyond the commandments and laws that suggest a decision one way or the other. Accordingly, if a judge perceives the possibility of reaching a compromise, he must do so even at the last minute, thereby leaving both litigants pleased and avoiding the need to compel them to accept the ruling. Even though the court has authority to compel, it is preferable for it not to use that power.

The punishments that may be imposed by a court are many and varied. The Torah subjects various offenders to fines and corporal punishment and even specifies capital punishment for a substantial number of offenses. Each of the four types of capital punishment entails a positive commandment<sup>121</sup> – "the command we were given to kill those who transgress certain commandments...." But we learn as well<sup>122</sup> that "a Sanhedrin that executes one in seven years is called draconic. R. Elazar b. Azariah says, one in seventy years. R. Tarfon and R. Akiva say, Were we in the Sanhedrin, no one would ever have been executed. R. Simeon b. Gamaliel says, They would have increased the number of shedders of blood in Israel."

The *gemara*<sup>123</sup> expresses wonderment that R. Tarfon and R. Akiva sought to preclude imposition of capital punishment in any circumstances. To be sure, numerous conditions must be met before the accused can be sentenced to death; for example, there must be two qualified wit-

nesses who testify that they admonished the accused and that he, with clear mind, acknowledged the admonition, yielded himself to capital punishment, and committed the murder in full view of the witnesses. Preconditions such as these certainly mean that few will be sentenced to death, and it is understandable how capital punishment would become a very rare phenomenon-occurring only once in seven or once in seventy years.

But how can there be a pledge that no one would ever be executed by the Sanhedrin? R. Yohanan and R. Elazar explained what R. Tarfon and R. Akiva meant. The Torah requires that the witnesses be thoroughly cross-examined. Some questions must be asked, but others, though they need not be asked, will still disqualify the testimony if, once asked, they cannot be answered. For example, "Did you see if the victim was already mortally wounded? Or was the victim unhurt [before being attacked by the accused]? R. Ashi said: If he is able to say that the victim had been unhurt, perhaps the victim had [nevertheless previously] been wounded at the site where the [accused's] sword [pierced him]." The murderer is not subject to capital punishment if he killed a person likely to die imminently because of a preexisting wound or illness, but the presumption is that the victim had been healthy and unhurt. Accordingly, the witnesses are to be asked how they know the victim was healthy and unhurt, given that he might previously have been wounded at the very point on his body pierced by the assailant's sword. They will be unable to answer, for it is inconceivable that they would have examined the victim previously at precisely the point pierced by the sword. And because they have no answer, their testimony is voided and the murderer will not be executed.

It thus appears that beyond all the detailed laws governing the operation of the court, and beyond the commandments that obligate the judges in their deliberations,

<sup>120</sup>Maimonides, *Mishneh Torah, Hilkhoh Sanhedrin 22:4*.

<sup>121</sup>Maimonides, *Sefer ha-Mitsvot*, positive commandments 226-229.

<sup>122</sup>*Makkot 1:11*.

<sup>123</sup>*Makkot 7a*.

there remains room for "penal policymaking," on which R. Simeon b. Gamaliel disagreed with R. Tarfon and R. Akiva. They believed it preferable to avoid capital punishment totally, while he was concerned that without the deterrent effect of capital punishment – even if very rarely imposed – shedders of blood would abound in Israel. Accordingly, capital punishment should not be ruled out totally, and its deterrent effect must be taken into account, even though extensive deliberation must be had before imposing a capital sentence and great care must be taken to avoid acting hastily.

The view of R. Tarfon and R. Akiva can be understood in two ways. They may have believed that humanity had already improved to the point of no longer needing a deterrent and that the incident in question was exceptional, unlikely to recur. Alternatively, they may have been persuaded that capital punishment no longer served as an effective deterrent, in which case there would be no point to the judicial shedding of blood. Indeed, it might have the opposite of its intended effect: if people came to see the harsh punishments as exemplifying the acts of a wicked government, they might be impelled by them not to improve themselves but only to scorn, God forbid, the Torah and those who act in its name. Since, as a matter of law, imposition of the death sentence can always be circumvented, it may be preferable to avoid it entirely.

Rabbeinu Hananel echoed the second interpretation in another context.<sup>124</sup> "It was taught: Forty years after the destruction of the Temple, the Sanhedrin went into exile and convened in the marketplace...so they could not impose capital punishment. What was their reason? When they saw that people were committing murder and could not be disciplined, they said, 'It is better that we wander from place to place and not impose the death penalty...since it is precluded by our meeting place.'" Rabbeinu Hananel commented on this: "For when they saw that bloodshed had become cheap and people were

committing murder, they said, 'Let us rise up and exile ourselves from this place.'" The Sanhedrin could impose capital punishment only as long as it met in the Chamber of Hewn Stone in the Temple. Once it became clear that their judgments could not deter murderers, they removed themselves from the Chamber of Hewn Stone, thereby annulling their authority to impose capital punishment.

*What we have is not annulment of the commandments related to judges, but elevation of the judicial process to a higher level.*

But this should not be seen as an act of despair. The *Talmud Yerushalmi*<sup>125</sup> recounts: "It was taught: Forty years before the destruction of the Temple capital jurisdiction was taken away, and in the days of Simeon b. Shetah [some texts: Simeon b. Yohai], monetary jurisdiction was taken away. R. Simeon b. Yohai said, Blessed is God, that I know not how to judge!" Why would R. Simeon b. Yohai utter praise and thanksgiving over the revocation of authority to adjudicate in accordance with the Torah? And even if the view of R. Tarfon and R. Akiva accounts for his comment with respect to capital cases, why would he include monetary cases as well? The *rishonim*<sup>126</sup> interpreted the statement on the premise that it referred to preference for compromise over judgment, and that R. Simeon b. Yohai was offering praise over the termination of authority to adjudicate and to compel the litigants to submit to the court's judgments. As a result, they had to pursue compromises that would be acceptable to both sides, and the judges were saved from the risk of sinning by failing to muster the understanding to resolve the case properly, in accordance with the law of the Torah. And even though the judgment legislated by the Torah was not thereby carried out, as a practical matter the Torah's higher goal – a judgment of peace – was achieved. What we have here, then, is not annulment of the commandments related to judges, but elevation of the judicial process to a higher level.

<sup>124</sup> *Avodah Zarah* 8:2.

<sup>125</sup> *Yerushalmi Sanhedrin* 1:1. Cf. id. 7:2, with slightly different wording. See also *Perishah* on *Tur*, *Hoshen Mishpat* 12:6.

<sup>126</sup> *Sefer Mitsvot Gadol*, Positive Commandments, sec. 107, and see the commentary of R. Stein ad loc. The comments of *Sefer Mitsvot Gadol* are cited in *Tur*, *Hoshen Mishpat* sec. 12, and see *Bah* ad loc., n. 6.

A great Torah authority of the preceding generation<sup>127</sup> nicely treated these matters in his observations on the rabbinic comment that divided world history into three epochs—the era of chaos, the era of Torah, and the days of the Messiah.<sup>128</sup> The rabbis added that the Messiah was born on the day the Temple was destroyed,<sup>129</sup> implying that the days of the Messiah had begun then. But how could that be? R. Henkin answered, "It is the Messiah's task to instill a spirit of understanding and fear of God and to discipline verbally, without a need for corporal punishment (see Isaiah 11). That the days of the Messiah began at the destruction of the Temple...means that Israel began to accept the governance of the Torah without bow or sword. The annulment of capital jurisdiction that resulted from the Sanhedrin's exile to the market place, and the annulment of monetary jurisdiction that resulted from the abolition of rabbinic ordination (in the talmudic sense), may have been brought about by God, may He be blessed, as preparation for the days of the Messiah, so that people would annul their impulse to spill blood, just as the impulse to idolatry had already been extirpated from their hearts."

This notion is consistent as well with Rabbeinu Hananel's above interpretation, in which many has come to regard bloodshed lightly and were undeterred by the prospect of punishment. The cancellation of capital punishment itself diminishes the degree of violence within society and has a kind of educational value that can influence wide segments of the community. In a sense, the abolition of capital trials constituted an open declaration of the seriousness of shedding blood – even that of a murderous offender. Over the long run, raising the nation's overall moral level can reduce depraved conduct even on society's fringes.

Still, the tendency to avoid enforcing judgments, for all its benefits, is fraught with risk. Especially in the realm of

dealings among people, weak responses by judges and governing authorities can bring about disaster. The fundamental obligation of those responsible for justice is to rescue the poor from their powerful oppressors, and how can that be done with no force whatsoever? Indeed, the prophet keens but also admonishes us: "How the faithful city has become a harlot; she that was filled with justice, righteousness lodged in her, but now murderers. Your silver has become dross, your wine cut with water; your princes are rebellious and companions of thieves, all of them loving bribes and pursuing rewards. They judge not the orphan nor allow the cause of the widow to come before them. Therefore, says the Lord...O, I will be relieved of my adversaries and avenged of my enemies."<sup>130</sup>

This problem, of course, exists even when the court possesses and exercises its plenary authority. The Torah severely limits the imposition of punishment, subjecting it to all manner of preconditions that constrain the judges. A court cannot impose a punishment without witnesses and without the accused having been admonished. Even in monetary cases, witnesses and cross-examination are needed as a matter of principle. The laws of evidence are extensive and complex. As a practical matter, a process that comports fully with the law in all its details has only a slim chance of resulting in the accused being convicted. There is considerable tension between, on the one hand, the halakhah's demand that we fulfill the requirement of "the community shall rescue"<sup>131</sup> the accused and, on the other, the drive "to break the hand of wickedness"<sup>132</sup>; and it is the latter interest that appears to lose out. In one of his responsa,<sup>133</sup> R. Solomon b. Adret (Rashba) depicted the situation in all its intensity:

For if you allow all to depend on the laws specified in the Torah, doing nothing but what the Torah provides with respect to the infliction of injuries

<sup>127</sup>R. Joseph Elijah Henkin, of blessed memory, in *Ha-Darom* 10 (5719):6.

<sup>128</sup>*Avodah Zarah* 9a.

<sup>129</sup>*Yerushalmi Berakhot* 2:4.

<sup>130</sup>Isa. 1:21-24.

<sup>131</sup>Num. 35:25.

and so forth—the world would be destroyed, for everything would require witnesses and admonition. As the sages of blessed memory said, Jerusalem was destroyed only because they based all their judgments solely on the specifications of Torah law.<sup>134</sup> And how much more is that the case outside of the Land of Israel, where our courts do not impose fines either, and irresponsible people burst all bounds of conduct and the world could be made desolate... Still, in each and every place courts do sometimes render judgments so as to restrain the contemporary populace... and the Sages said the reason is to prevent violations of the Torah by erecting a fence around the Torah.<sup>135</sup> ... And so they do in every generation and every place when they find that circumstances so demand, to discipline fools and immature people who act perversely.

We have here a type of vicious circle, and we again arrive at a paradox. How does the judges' authority to restrict conduct to meet the needs of the moment exceed the authority given them by the Torah to adjudicate in accordance with its written commandments and rules? And what good is it to cancel the obligation to adjudicate and punish in accordance with the laws of the Torah if it is replaced with the enforcement of rulings made "to restrain the contemporary populace"?

*All concur that the community's representatives and judges enjoy authority and power only if the community has empowered them.*

Three distinctions, all based on a single principle, can be drawn between laws of the Torah and laws instituted to restrain conduct. The latter differ from the former in that (1) they are temporary; (2) their purpose is evident to all; and (3) they are premised on the community's acceptance:

(1) "When the court sees that the populace has strayed in a particular manner, they should institute restraints and reinforce proper conduct, as they see fit – a step taken in view of the exigencies of the situation, and not intended to establish permanent law."<sup>136</sup>

(2) "Not to violate the Torah but to erect a fence around the Torah." If it is evident to all<sup>137</sup> that the court's action establishes justice and curbs wickedness, it creates an effective fence around the Torah. But if the broad community forms the impression that the court acted with unjustified or arbitrary violence, the court will not have established a fence around the Torah; instead, it will have promoted disdain for the entire system of justice and will have encouraged others to violate the Torah's laws. Temporary changes can be understood as a proper reaction to circumstances, but permanent exceptions to the laws of the Torah would certainly be a transgression.

(3) "Specifically the great authority of the age... or the selectmen of the town whom the masses have recognized as authoritative, but not just any judge."<sup>138</sup> In a gloss on the *Shulhan Arukh*,<sup>139</sup> R. Moses Isserles notes that some dissenting opinions limit the authority of the selectmen of

<sup>132</sup>Cf. Ps. 10:15.

<sup>133</sup>Cited in *Bet Yosef, Hoshen Mishpat* sec. 2.

<sup>134</sup>*Bava Metsi`a* 30b.

<sup>135</sup>*Yevamot* 90b: "R. Elazar b. Jacob said: I heard that a court imposes lashes and other penalties not specified in the Torah, and they do so not to violate the Torah but to erect a fence around the Torah."

<sup>136</sup>Maimonides, *Mishneh Torah, Hilkhot Sanhedrin* 24:4.

<sup>137</sup>See R. Zevi Hirsch Chayes of blessed memory, *Torat ha-Nevi'im*, chap. 5 ("Hara'at Sha'ah"), where he writes: "And I have seen the comment of *Tosafot* (on *Yevamot* 90b)... and the thrust of their response is that when the general improvement that will result from the uprooting [of a law] is evident to all, in that situation, a sage may annul... for the severe punishment that will be inflicted on evildoers will lead other people to take notice, fear, and obey, so that they will cease taking prohibitions lightly. But if the great benefit is not evident to all, then even if the sage concludes in his mind that the uprooting is essential, as long as we do not see the benefit clearly, a commandment of the Torah may not be uprooted."

the town even though they were chosen by the populace as their representatives, "and they are not permitted to change anything that benefits one at the expense of the other or to confiscate funds *without unanimous consent*. In any event, we follow the local custom, particularly *if the community accepted the leadership's authority on all matters*." All concur, then, that the community's representatives and judges enjoy authority and power only if the community has empowered them; and one view holds that, even then, the judges may not depart from customary and accepted practice even for the pressing needs of the moment. New remedial legislation can be enacted, and new liabilities and levies imposed, only by unanimous consent. A mere majority will not suffice, though an explicit decision by the community from the outset to grant broader authority to its representatives would be effective.

At first blush, this is startling. On the one hand, the authority to restrain conduct is derived from the Torah, which grants that right "to the court at each place and time to impose corporal punishment...."<sup>140</sup> On the other hand, their power is effective only when "the masses have recognized them as authoritative." If the Torah is the source of the authority, why must the community recognize them? The Torah commanded the court to enforce its judgments and gave it the authority to do so! And if they do not derive that authority from the Torah, what good is communal acceptance? The members of the community, to be sure, can grant the judges power over their possessions, for each can renounce ownership and allow the court to dispose of them. But they cannot grant such authority over their persons, authorizing the court to impose lashes or imprisonment. A person's body is not his to renounce, and one may not wound oneself,<sup>141</sup> much less permit others to do so!

*If the Torah is the source of the authority, why must the community recognize them?*

In fact, the source is the Torah; without the authority that flows from it, the court would be powerless to act. That was true even when courts comprised rabbis who had been ordained in the talmudic sense; it is even more so today, with that chain of ordination long since broken. But we are considering cases in which the benefit and protective effect of the ruling must be clear to all. If a judge, in exercising his Torah-based authority, were to impose punishments and issue rulings on the basis of novel, unusual criteria foreign to the Torah, his actions would be regarded by the community as violent and tyrannical – even if his intentions were for the sake of Heaven, and even if he sincerely meant only to repair breaches that he perceived. In such a case the decision, rather than firmly reestablishing the rule of justice, would merely provoke the populace into asking "Who appointed you a judge over us to strike with the fist of wickedness?" But if the community has chosen its appointees, recognized them as authoritative, and even specified precisely the authority granted to them, it will treat them with proper respect and understand that they are acting for the common good and meeting the needs of the time. In that way, the breaches will be repaired and the benefit will be apparent to all. In those circumstances – and in those circumstances only – did the Torah grant the authority at issue.

It thus turns out that the source of the leadership's authority lies in both the Torah and the community. The consent of the community must be expressly granted to specific individuals recognized as authoritative. It is clear that if the community votes unanimously, or even by majority, to confirm specific procedures through which compulsory measures may be adopted, the usefulness of

<sup>138</sup>*Tur Hoshen Mishpat* sec. 2, citing R. Isaac Alfasi of blessed memory.

<sup>139</sup>*Shulhan Arukh, Hoshen Mishpat* 2:1, gloss of R. Moses Isserles. See also *Sefer Mei'rat Einaim* 13.

<sup>140</sup>Maimonides, *Mishneh Torah, Hilkhoh Sanhedrin* 24:5. Cf. the Rashba's responsum cited in n. 133. I treated this matter at length in my book *Hadar Itamar*, pp. 171-173.

<sup>141</sup>Maimonides, *Mishneh Torah, Hilkhoh Hovel u-Maziq* 5:1.

those measures will be apparent to all. And in that case, the Torah as well will confirm them.

There is an ongoing tension between aspiring to the Torah's social ideal of undisturbed peace and recognizing reality, with its very real need to do battle against the dangerous manifestations of a few undisciplined evildoers. Even if the majority of a nation is suffused with a love of truth and peace, it cannot give up the power to block criminal tendencies at its margins. That is even more the case when the Torah is not sovereign for the majority of the nation. The key to resolving this tension is to make the will of the people an anchor of the government's authority to compel. Those whom "the masses *have recognized* as authoritative" enjoy authority, and that authority does not detract from the principles to which we aspire.

I have already noted that this problem existed even when the Temple stood, the Sanhedrin met in the Chamber of Hewn Stone, and talmudically ordained courts were convened in every district and town. It was, moreover, the primary reason why the sages favored compromise over strict adjudication, as explained. But Scripture and the Talmud suggest that in the time of the kings, there was an additional mechanism for securing justice.

"A king is appointed in the first instance only to do justice and make war, as Scripture says, 'And our king will judge us and will go before us and fight our wars.'<sup>142</sup> Doing justice is thus the first obligation of the king, and the people therefore requested that one be appointed and even undertook the onerous obligations to the king spelled out in the Torah's consideration of the monarchy. But the forms of adjudication before the king-or before the judges appointed by him – are completely different from those followed before the Sanhedrin. "One who commits murder without any direct eyewitness or with-

out having been admonished, even if there is but a single witness, or one who accidentally kills his enemy – the king has the authority to put such a person to death, thereby repairing the world in accordance with the exigencies of the time...in order to intimidate and weaken the wicked of the world."<sup>143</sup>

As I will explain below, God willing, the king's juridical authority is confined to interpersonal (i.e., non-ritual) matters, where he can act to remedy society through righteousness and judgment. But this authority is rooted as much in the consent of the nation as in the king having been chosen by God's prophet. Scripture spells this out:<sup>144</sup> "All the elders of Israel gathered around". "R. Eliezer said:<sup>145</sup> The elders of the generation made a proper request, as Scripture says, 'Give us a king to judge us.'" And after the prophet Samuel read them the passage regarding kingship and attempted to forewarn them of the monarchy's onerous burden, "the nation declined to heed Samuel and said, 'No, but a king shall be over us...and our king shall judge us.'<sup>146</sup> And after the king was selected in the presence of the entire nation, "the entire nation shouted and said, 'Long live the king!'"<sup>147</sup> Samuel again lectured them on the consequences of appointing a king: "Samuel addressed the nation on the rules of the monarchy, and he wrote them in a scroll and placed it before the Lord."<sup>148</sup>

So, too, is it described with respect to David: "All the tribes of Israel came to David at Hebron...and David made a covenant with them at Hebron before the Lord, and they anointed David king over Israel."<sup>149</sup> The covenant included the rules governing the monarchy, and the community even made demands and set conditions, as set forth in connection with King Rehoboam: "All Israel came to make him king...And they spoke to Rehoboam, saying...if you now ease the harsh service

<sup>142</sup>Maimonides, *Mishneh Torah, Hilkhos Melakhim* 4:10, citing 1 Sam. 8:20.

<sup>143</sup>Id. 3:10.

<sup>144</sup>1 Sam. 8:4-5.

<sup>145</sup>*Sanhedrin* 20b.

<sup>146</sup>1 Sam. 8:19-20.

<sup>147</sup>1 Sam. 10:24.

<sup>148</sup>1 Sam. 10:25.

imposed by your father and the heavy yoke he placed on us, we will serve you."<sup>150</sup> And when he declined to heed them, "All Israel saw that the king had not heeded them, and they answered him, saying, 'We have no portion in David, nor any share in Jesse's son; to your tents O Israel.'"<sup>151</sup> One of the *rishonim* summed it up nicely:<sup>152</sup> "Whatever honor the masses are willing to give him, that is the sovereignty he will have, to the point that if they wish to take away all honor from him, all sovereignty will be taken away from him."

Other verses may be cited to show that the authority of the king of Israel is based both on the commands of the Torah and the prophets and on the acquiescence of the nation; and the principle that compromise takes precedence over rigorous judgment has been inferred from David – "David did justice and righteousness for all his nation."

That said, the king selected by the nation, given its confidence, and placed on the throne of justice must act in a manner that makes his justice apparent to all and must not discriminate, in any of his decrees, between high and low. Otherwise, his rulings will lack all force. "The general rule is that laws of general applicability enacted by the king do not constitute robbery on his part. But anything the king takes from one individual alone, not in accord

with a rule known to all but only to oppress that individual – that is robbery."<sup>153</sup> Along these lines, Scripture praises King Solomon: "All Israel heard the judgment that the king had rendered and they feared the king, for they saw God's wisdom within him to do justice."<sup>154</sup> Inasmuch as they all recognized his wisdom in being able to identify the villain in a mystery, his judgment served to deter evil-doers from carrying out their plans, for they feared the king.

Nevertheless, the sages stressed the special status of a king's rulings as merely temporary measures that do not establish permanent *halakhah*.<sup>155</sup> "How do I interpret 'Qohelet sought to find out things of delight'?"<sup>156</sup> Qohelet sought to render judgments on hidden matters, without witnesses and without admonition. A heavenly voice went forth and said to him, 'but it is written "uprightly, words of truth"<sup>157</sup> – "by two witnesses shall a matter be established..."'<sup>158</sup>

And so, all three characteristics of a judicial decision to restrain conduct so as to establish a fence around the Torah appear as well in the laws of the monarchy and the judicial system based on the king's power and authority.

## V. The Domains of Torah and Governmental Authority

<sup>149</sup>2 Sam. 5:1-3.

<sup>150</sup>1 Kings 12:1-4.

<sup>151</sup>1 Kings 12:16. See also R. Zevi Hirsch Chayes, *Torat ha-Nevi'im*, chap. 7 ("Din Melekh Yisrael"): "For all the rules of the monarchy are simply a matter of the relationship between the king and the nation, and these arrangements were satisfactory to both sides, the people having been willing to give up their riches and property for the common good, etc. But it was not only their riches and property that they were willing to abandon for the glory of the king and the benefits that would result from his governance. They undertook as well to grant the king permission to kill any man who defied his word, and the entire nation agreed to this when they established the monarchy, etc". See his lengthy treatment of that connection, where he cites proof from *Yerushalmi Sanhedrin* the end of the chapter *Kohen Gadol*: "'You shall place over you a king' – Scripture says not 'I shall place' but 'you shall place'; it is your act. See also below, n. 182, where I cite Maimonides wording in *Mishneh Torah, Hilkhhot Gezeilah va-Aveidah* c. 5, where the matter is explicitly clarified.

<sup>152</sup>Rabbeinu Nissim (Ran) in his discourses, in the name of Rabbeinu Jonah of blessed memory in *Megillat Setarim (Derishot ha-Ran*, Feldman edition, Discourse 11, p. 202.)

<sup>153</sup>Maimonides, *Mishneh Torah, Hilkhhot Gezeilah va-Aveidah* 5:14. Previously, at 5:11, it is explained that this rule applies to both gentile kings and kings of Israel. See below, n. 182, where I cite Maimonides' statement there.

<sup>154</sup>1 Kings 3:28.

<sup>155</sup>*Rosh ha-Shanah* 21b.

<sup>156</sup>Eccl. 12:10.

<sup>157</sup>Id.

<sup>158</sup>Deut. 19:15.

We have seen that there existed in Israel two parallel sources of authority for legislation and adjudication. One was the Sanhedrin and the courts subject to it; the other was the King and his appointees. "A king – over whom no man in Israel has authority and above whom in his dominion is only the Lord his God."<sup>159</sup> The king represents the nation as a whole and its independence; "his heart is the heart of the entire congregation of Israel."<sup>160</sup> His virtue is the "virtue of dominion,"<sup>161</sup> in contrast to the Sanhedrin, whose virtue is the "virtue of Torah scholarship, that is, the academy."<sup>162</sup> "The wisest of all of them is appointed their head and he is the leader of the academy, and he is referred to by the sages everywhere as the *nasi*, and he stands in the place of Moses our teacher."<sup>163</sup>

Some of the *rishonim*<sup>164</sup> considered the question of how these two sources of power differ. What jurisdictions are dealt with primarily by the king and what by the Sanhedrin? As explained above, there is a degree of overlap between the two authorities, at least with respect to constraining conduct to establish a fence around the Torah. It is clear that over the years, circumstances wrought changes in how the two authorities operated. Some believe that when the monarchy was abolished, its power was transferred to the Sanhedrin.<sup>165</sup> On the other hand, both attributes – dominion and Torah scholarship – were initially combined in Moses our teacher.<sup>166</sup> In the future, the King Messiah (may he come speedily) will like-

wise combine both qualities within him.<sup>167</sup> But even after the loss of its independence, Israel retained a residue of sovereignty, and Maimonides explains the exilarch's status in those terms:<sup>168</sup> "The dominion of the exilarch over all Israel is like the dominion of the king who rules by his might, and God therefore refers to him as a 'rod,' as the Sages said,<sup>169</sup> "'The rod shall not depart from Judah'"<sup>170</sup> – these are the exilarchs in Babylonia who rule Israel with a rod, that is, willy-nilly and by compulsion.' And you see that we have regard not for his learning but only for his ancestry and for his having been appointed with the consent of the people in his locale."

This is not the place to clarify the scope of the two authorities and draw the lines that separate them, but we will attempt to establish the boundaries of the monarchy's judicial power. It is clear that one aspect of the king's role is expressed by Nahmanides as "administering and improving society in the provinces."<sup>171</sup> And Rabbeinu Nissim in his discourses<sup>172</sup> wrote that:

"The human species requires a judge to adjudicate among its members, without which a man would consume his fellow alive and all would be destroyed. And every nation requires this sort of governmental resolution of disputes...and Israel needs it like the other nations...If transgressors are not punished...social order will be totally lost, for spillers of

<sup>159</sup>Maimonides, *Mishneh Torah, Hilkhoh Shegagot* 15:6.

<sup>160</sup>Id., *Hilkhoh Melakhim* 3:8.

<sup>161</sup>Maimonides, *Sefer ha-Mitsvot*, negative commandment 316.

<sup>162</sup>Id.

<sup>163</sup>Maimonides, *Mishneh Torah, Hilkhoh Sanhedrin* 1:3.

<sup>164</sup>Discourses of Rabbeinu Nissim (Ran), of blessed memory, Discourse 11. See also R. Isaac Abarbanel's commentary on the Torah, *Parashat Mishpatim*.

<sup>165</sup>Rabbeinu Nissim, Discourse 11 (ed. Feldman, p. 192): "When there is no king in Israel, the judge encompasses both powers – the power of the judge and the power of the king."

<sup>166</sup>*Midrash Tanhuma* (ed. Buber), *Parashat Qorah* sec. 6 – "Moses was king and Aaron his brother High Priest," etc. See also id., sec. 3 – "And Moses...to sovereignty." See Ibn Ezra on Deut. 33:5, "And there was a king in Yeshurun" – That refers to Moses, from whose mouth the leaders of the nation heard the Torah interpreted." To similar effect is the commentary of R. Sa'adiah Gaon on the Torah (ed. R. Y. Qapah), and it is implied as well by Maimonides' wording in *Mishneh Torah, Hilkhoh Melakhim* 2:6.

<sup>167</sup>Maimonides, *Mishneh Torah, Hilkhoh Teshuvah* 9:2 and *Yad Peshutah* ad loc.

<sup>168</sup>Maimonides, Commentary on the Mishnah, *Bekhorot* 4:4.

<sup>169</sup>*Sanhedrin* 5a.

<sup>170</sup>Gen. 49:10.

<sup>171</sup>Nahmanides, Commentary on the Torah, Exod. 15:25.

blood will become numerous and will not fear punishment. God, may He be blessed, therefore commanded the appointment of a sovereign to improve society... And the king may adjudicate without [prior] admonition, in accordance with what he sees to be needed for the political unit. And thus the appointment of a king is the same in Israel and other nations, in that it is necessary for the political order.

Ibn Ezra's observation in his commentary on the Torah is of interest here: "From the beginning of 'These are the civil statutes (*mishpatim*)' to 'Six years,' the Torah sets forth civil statutes, and the high priest and the judge are required to study and know them."<sup>173</sup> In his view, it appears, the high priest also is involved in the governmental system,<sup>174</sup> but it is clear that he regarded the focus of the king's judicial activities to be civil statutes, that is, laws between man and his fellows – in other words, "improving society."

Similarly, R. Abraham, the son of Maimonides,<sup>175</sup> defines "affairs of the kingdom" on the basis of Ps. 101:5. "'One who slanders his fellow in secret I will destroy...'" – this describes [King David's] course when he returns from seclusion to deal with matter of state.... His involvement is in accordance with the will of God, may He be exalted.... He will punish the wicked who do evil and those who sow strife." The psalm in its entirety speaks of interpersonal transgressions and can be seen as expounding its opening verse, "Of mercy and justice I sing" – "of the mercy and justice that I do for Israel...., as Scripture says, 'and David did justice and righteousness for all his people.'"<sup>176</sup> Ibn Ezra refers specifically to the king's unique

authority to wipe out evil doers: "'Him I will destroy' – in accordance with the laws of the monarchy."<sup>177</sup>

The *rishonim* likewise interpreted Psalm 72, David's prayer for his son Solomon, as describing the activities of the king. There, too, the detailed description is limited to inter-personal matters, on which depend the improvement of government and the stability of society: "O God, give your judgments to the king and your righteousness to the king's son. Let him judge your people with righteousness and your poor with justice. Let the mountains bear peace to the people and the hills, justice. Let him judge the poor of the nation, redeem the needy, and crush the oppressor.... He will deliver the needy who cry out, the poor who have no helper. He will have pity on the poor and the needy, and the souls of the needy he will save. From oppression and violence he will save their soul, and precious will their blood be in his sight."

In a *midrash*,<sup>178</sup> the Sages already noted that this psalm speaks of the king's unique authority to adjudicate and punish in a manner differing from the law of the Torah:

David said, "Master of the universe, give Your judgments to the king's son – just as you adjudicate without witnesses and without admonition, so shall Solomon adjudicate without witnesses and without admonition." The Holy One blessed be He replied to him, "So he shall do"... And that was the case of the two harlots, as is said, "Then came two harlots.... She is his mother."<sup>179</sup> When they saw that it was so, they said, "Happy are you, O land, whose king is a free man."<sup>180</sup>

<sup>172</sup>Rabbeinu Nissim, Discourse 11, pp. 189-190.

<sup>173</sup>Ibn Ezra, Commentary on the Torah, Exod. 34:26. His point is that from the beginning of *Parashat Mishpatim* (Exod. 21:1) to "Six years you shall sow your land" (Exod. 23:10), the Torah sets out all the laws classified as civil statutes. Thereafter, the Torah speaks of the sabbatical year, the Sabbath, and the festivals, matters that do not pertain specifically to the king.

<sup>174</sup>Cf. *Tosafot*, *Yoma* 12b, s.v. *Kohen*, stating the appointment and removal of the high priest "depend on the king and his fellow priests."

<sup>175</sup>Rabbeinu Abraham son of Maimonides, *Sefer ha-Maspiq le-'Ovedei ha-Shem* (tr. R. Y. b. Sallah Dori), Jerusalem 1973, p. 181.

<sup>176</sup>Commentary of R. David Qimhi on Ps. 101:1. In citing 2 Sam. 8:15, he is referring to the *gemara's* statement in *Sanhedrin* 6b referred to above, n. 115. See also the commentary of R. Menahem Me'iri on Psalms.

<sup>177</sup>Commentary of Ibn Ezra *ad loc*

I previously cited Maimonides' ruling that "One who commits murder without any direct eyewitness or without having been admonished, even if there is but a single witness...the king has the authority to put such a person to death, thereby repairing the world in accordance with the exigencies of the time...."<sup>181</sup> But it remains necessary to consider the limits of the king's judicial authority. Even though he has the right to punish people who demean him, "he may not appropriate property, and if he does appropriate it, it is robbery."<sup>182</sup> The king's decree binds his nation, but "one who disregards the king's decree because he is engaged in carrying out commandments (*mitsvot*), even a minor commandment, is not liable-[for if there is a conflict between] the words of the master and the words of the servant, the words of the master take precedence. And it goes without saying that if the king decreed that a commandment be disregarded, he is not to be heeded."<sup>183</sup>

Since the king's role in legislation and adjudication is intended to repair the world, there is no part for him to play in all those areas of the Torah that involve relations between man and God. The Sanhedrin is granted authority to adjudicate and instruct with respect to the entire Torah, and they even have the power to suspend part of the Torah when times and circumstances so require.<sup>184</sup> Just as they built fences around some commandments, so did they set some of their requirements in the place of a commandment.<sup>185</sup> Not so the king. He lacks authority to annul even a minor commandment, even by refraining from performing an obligation. His authority is confined

to the improvement of governance.

Still, we find in the Talmud<sup>186</sup> an account of King David giving instructions in other areas of law:

Thus said David before the Holy One blessed be He: "Master of the universe, am I not behaving piously, for all the kings of east and west sit enwrapped in their glory, but my hands are sullied with blood and chorion and placenta so as to rule a woman pure and available to her husband? And not only that, but on anything I do I consult with Mefiboshet my teacher, saying to him, 'Mefiboshet my teacher, did I adjudicate properly? Did I find liability properly? Did I exonerate properly? Did I properly declare something pure? Did I properly declare something impure?' And I was not ashamed." R. Joshua b. R. Idi said, "What is the textual basis? – I will speak of Your decrees before kings, and will not be ashamed."<sup>187</sup>

The distinction between David and other kings stands out here. Because he is wise and a servant of God, he involves himself in matters unrelated to the tactics of kings; like any Torah scholar he adjudicates and teaches regarding all manner of halakhic issues. He engages in this activity not qua king but because of his piety. The piety and modesty of King David and his descendants caused them to be counted among the sages of the Torah, in contrast to the other kings of Israel. "The kings of the house of David, though not seated in the

<sup>178</sup> *Midrash Tehillim* (ed. Buber), Psalm 72, sec. 2.

<sup>179</sup> 1 Kings 3:16.

<sup>180</sup> Eccl. 10:17.

<sup>181</sup> Maimonides, *Mishneh Torah, Hilkhot Melakhim* 3:10.

<sup>182</sup> Id. 3:8. And cf. *Hilkhot Gezeilah va-Aveidah* 5:11 – "A tax imposed by the king, taking one-third or one-fourth or some fixed amount...one who evades such a tax transgresses, for he is misappropriating the king's portion, regardless of whether it is a gentile king or a king of Israel." But he later adds (5:18): "When does that apply? Where the king's coin is accepted, for the people of that land accepted him and agreed that he would be their lord and they his servants. But where the king's coin is not accepted, then he is like a powerful robber or a band of armed bandits – their law is no law, and so, too, such a king and his servants are robbers in all respects."

<sup>183</sup> Maimonides, *Mishneh Torah, Hilkhot Melakhim* 3:9. See also *Sefer ha-Mitsvot*, positive commandment 173.

<sup>184</sup> *Yevamot* 89b-90a.

<sup>185</sup> *Pesahim* 92a.

<sup>186</sup> *Berakhot* 4a.

Sanhedrin, nonetheless sit and judge the people, and they are judged if there is a case against them. But the kings of [the northern kingdom of] Israel do not judge and are not judged, for they do not submit to the words of the Torah, and damage may result from them."<sup>188</sup> Maimonides explained more extensively in *Hilkhot Mekakhim*: "Because their hearts are insensitive and damage and loss could be caused to the law."<sup>189</sup>

*Since the king's role in legislation and adjudication is intended to repair the world, there is no part for him to play in all those areas of the Torah that involve relations between man and God.*

But how can they say, "the kings of [the northern kingdom of] Israel do not judge"? Adjudication to improve the realm is one of the king's principal roles! What they mean, however, is that they do not judge in the same manner as the other sages of Israel, adjudicating in the regular manner prescribed by the Torah, and they do not rule with respect to all aspects of the Torah, declaring things forbidden or permitted, pure or impure, and so forth. Instead, they are limited, and judges appointed on their behalf adjudicate only in those areas for which the government is responsible, that is, improvement of the state. And it appears that when a king was appointed, the scope of his authority was defined, and those limitations were the subject of the covenant executed with the king, as recounted in Scripture.<sup>190</sup> That was the practice in later

times as well and even with respect to the kings of the northern kingdom, though in their case, the applicability of the rules of the state and the needs of the time was restricted to the greatest extent possible.

Still, even they were authorized to kill "murderers and the like."<sup>191</sup> Maimonides so informs us through his wonderfully precise wording: "If a *king of Israel* wished to kill them under the laws of the monarchy for the repairing of the world" – a *king of Israel*, not limited to a king of the House of David. And the need to ensure improvement of the world did not lapse when the monarchy was abolished or even when talmudic ordination and the Sanhedrin were abolished. I have already cited the *Shulhan Arukh's* ruling that even contemporary courts adjudicate and punish in accordance with the needs of the day, though such steps may be taken only by "the selectmen of the town whom the court have accepted over it."<sup>192</sup> R. Yehoshua Falk explains:<sup>193</sup> "whom the community has accepted as a court over it." The term "selectmen of the town" means that they are in charge of communal needs and not necessarily judges who are authoritative in adjudication and instruction. Use of the term indicates that the halakhic decisors saw them as carrying on the role of the monarchy, not that of the Sanhedrin. Just as the ex-larch in Babylonia possessed some residue of the king's authority, so in every town and province the selectmen of the town carried out the king's role in improving governance to the extent they were able.

<sup>187</sup>Ps. 119:46.

<sup>188</sup>Maimonides, *Mishneh Torah, Hilkhot Sanhedrin* 2:5.

See *Shabbat* 14b – "When Solomon instituted *erubin* (legal mechanisms permitting carrying objects on the Sabbath in certain circumstances or walking further than would otherwise be permissible – *trans.*)..." But Maimonides, in citing that text in *Hilkhot Eruvin* 1:2, used the following precise wording: "And this matter was instituted by Solomon and his court." See also *Avodah Zarah* 36b – "David's court decreed," cited by Maimonides in *Hilkhot Issurei Bi'ah* 22:3 as "David and his court decreed." Maimonides' wording conveys the thought that David and Solomon did not issue these decrees as kings, for in these matters, the king qua king has no authority. Rather, given that the courts issued the decree, and David and Solomon were sages seated with the court, the decrees were issued in their names. Accordingly, even though the *gemara* mentioned only Solomon, Maimonides added "his court," since it would otherwise make no sense. As for David, the *gemara* mentioned only the court, but since it is explicitly stated in *Avot* 4:4 that David was "the head of the seventy elders," we see that he, too, was among them.

<sup>189</sup>Maimonides, *Mishneh Torah, Hilkhot Melakhim* 3:7.

<sup>190</sup>See above n. 149.

<sup>191</sup>Maimonides, *Mishneh Torah, Hilkhot Rotseiah u-Shemirat Nefesh* 2:4.

<sup>192</sup>*Shulhan Arukh, Hoshen Mishpat* 2:1.

<sup>193</sup>*Sefer Mei'rat Einaim*, 9.

With respect to extraordinary powers, contemporary judges should not be seen simply as heirs to the Sanhedrin's authority, for talmudic ordination was abolished and at most "we do their bidding" That is, we act on behalf of the ancient courts as if we were performing their bidding. Thus the scope of jurisdiction is limited to the kinds of cases that arise frequently and are necessary for the conduct of ordinary affairs.<sup>194</sup> But the selectmen of the town stand in the shoes of the king, and to the extent the public has accepted them as authoritative, they have the power to do whatever times require. And see further the *Bet Yosef*, who cites the following, attributing it to Nahmanides' responsa:<sup>195</sup> "But if one transgresses against the remedial measures of the government, it is necessary to do what the times require, for if you did not say that, they would not be permitted to impose fines or act in matters that are not usual, where we do not do their bidding, such as robbery and battery, and he would need an admonition, but they said we impose stripes and other punishments not to transgress the words of the Torah but to create a fence around them."

Because this position relates to the government's remedial measures, it suggests that contemporary community officials stand in the place of both Sanhedrin and monarchy. In particularly serious matters, such as capital cases, "they should be admonished to act only with the approbation of the elders of the city, so they will act in cases of great need and with deliberation."<sup>196</sup> In consultation with the other elders of the city and its leaders, they enjoy wide support. Accordingly, it is desirable that the institution termed "selectmen of the town" should be as broad as possible, since it stands in the shoes of the monarch and not in those of a court with a fixed number of members.

As a practical matter, most large communities through most of history have had two types of leadership. The community appointed a rabbi and judges who were greatly learned in Torah, excelling in "the quality of Torah scholarship" to the extent now possible. In addition, they appointed a community leader and council – the selectmen of the town – to manage the various matters that required attention. Even the appointment of the rabbi and other religious functionaries was up to them, subject to the approval of the community. Occasionally, the two forms of leadership were combined, but more often they were kept separate, just as the Sanhedrin and monarchy had been. "The selectmen of the town" generally dealt with governmental remedial measures, within the limits imposed in the Diaspora, thereby continuing, on a small scale, the role of the king.

The *gemara* states that communal governance was assigned to "the seven leaders of the town,"<sup>197</sup> and Maimonides was asked if the number should necessarily be seven. He responded<sup>198</sup> that the number was not prescribed and that seven had been used as an example; "it merely represents a large number...and the selectmen of the town. They ought to be scholars, men of Torah, men of good deeds, to teach us that it is fitting that guidance issue from those who act upon it themselves." These comments show the desirability of appointing a broadly representative leadership and council, but it is permissible as well to designate a single leader; as long as the community accepts his authority, he must be heeded.<sup>199</sup> And it certainly is proper and desirable that the leaders be "scholars, men of Torah, men of good deeds," though even with respect to descendants of King David, Maimonides wrote that "we consider not his wisdom but only his lineage and whether his appointment was with

<sup>194</sup>*Bava Qamma* 84b.

<sup>195</sup>*Tur, Hoshen Mishpat* sec. 2. The responsum is actually by R. Solomon b. Adret, of blessed memory, but the printers erroneously attributed a volume of his *responsa* to Nahmanides. R. Joseph Karo himself noted that in his introduction to *Bet Yosef*, but nevertheless quoted those responsa in Nahmanides' name in order to show where to locate them.

<sup>196</sup>*Bet Yosef*, id., citing R. Solomon b. Adret's responsum.

<sup>197</sup>*Megillah* 27a.

<sup>198</sup>Responsa of Maimonides (ed. Blau) sec. 271.

the approval of the local citizenry."<sup>199</sup> The criterion for choosing a king or the selectmen of the town is set in light of the administrative tasks they need to perform, whether internal or international. If one who has the needed skills also has other desirable qualities, so much the better – and that is how it should be.

*The Sanhedrin and Torah sages strove to avoid compulsion and punishments in their judgments. For the sake of sound governance, a system was activated that drew its authority from communal consent.*

We have already seen that the Sanhedrin and Torah sages strove mightily to avoid compulsion and punishments in their judgments. But for the sake of sound governance, an adjudicatory system was activated, when needed, that drew its authority from communal consent as well, and it could be used to repair breaches and advance the common good. That system was identified more with the law of the monarchy and government than with the Sanhedrin and its application of the Torah; still, it could not be activated without communal acceptance of and consent to all adjudicatory and legislative activities. But there remains a difference in principle between a court that imposes corporal and other punishment other than in accordance with Torah law and a monarchy that does so, even though both are acting to constrain activity to create a fence around the Torah and both require communal consent. In contrast to the monarchy's jurisdiction, that of the court extends to all aspects of the Torah.

Even communal consent will not grant the king jurisdiction over commandments between man and God. If the king is wise and pious, as was our lord King David, he, like other Torah sages, will have jurisdiction even over matters of purity and impurity. Otherwise, he will deal only with sound governance and that should suffice for him; for his jurisdiction qua king extends only that far. And even within that confined area, he should avoid compulsion to the extent possible: " Truth, judgment, and peace shall you adjudicate at your gates"<sup>201</sup> – judgment that encompasses peace.

## VI. Governmental Rule and Halakhah

Maimonides saw a possibility that Jewish independence might be restored even before the appearance of the Messiah, by establishing a government along the lines of that in Second Temple times. In such circumstances, he believed, the people, if they wished, could appoint a non-Davidic king, who accordingly could not be a possible Messiah. That this was his opinion is clearly implied by his references, in ruling on the king's status, to sources related to the northern kingdom of Israel, the Hasmonean kings, and the Herodian dynasty.<sup>202</sup> The rules applicable to those kings differ in fundamental ways from those applicable to Davidic kings and to the awaited King Messiah. Were the circumstances of the northern kingdom of Israel considered transitory, never to recur, there would be no reason to codify rulings regarding them. Inasmuch as Maimonides did so, ruling on the status of the kings of Israel and their differences from kings of the

<sup>199</sup>Id. sec. 270.

<sup>200</sup>Maimonides, Commentary on the Mishneh, *Bekhorot* 4:4.

The distinction between the administrative function and that of teaching and issuing halakhic rulings means that some individuals will be fit for only one or the other, though both are called "judges." That point was emphasized by Rabbeinu Abraham, son of Maimonides in his commentary on the Torah (Exod. 18:22).

It may be noted that the editor of that commentary rendered the Arabic *al-si'asah* as "*memshalah*" (government) and therefore perceived a conflict with Maimonides' statement in *Mishneh Torah, Hilkhot Melakhim* 1:5 (see n. 57). But my friend R. Isaac Shilat referred me to his edition of "Maimonides' Epistle to R. Samuel ibn Tibbon Regarding the Translation of the *Guide*" (in vol. 1 of the R. Isaac Nissim Memorial Publication, Jerusalem 1985), where Maimonides writes that "*si'asah* should be rendered as '*nehilah be-rahamim*' (administration with mercy). This parallels the concept of "*al-tadbir = hanhalah* (administration)" that Rabbeinu Abraham refers to together with *al-si'asah*, and it is clear that the son's words reflect his father's scheme. [This refers to the question discussed by Rabbeinu Abraham as to eligibility of women to serve in governmental positions. Some people ascribe to Maimonides the view that this is completely prohibited, but it clear from Rabbeinu Abraham's discussion that this is not so.]

<sup>201</sup>Zech. 5:16, as explained above, n. 118.

House of David, he must have believed that those laws might at some time again be needed. Just as he ruled on matters related to the King Messiah (may he come speedily), which will certainly be of practical import, so, too, did he rule on these matters, which may be of practical import.

To be sure, a king – even one of the northern kingdom of Israel – should not in principle be appointed except by direction of a prophet and a court of seventy-one members.<sup>203</sup> But that does not mean that restoration of prophecy is a precondition to appointment of a king. There were no prophets in the time of the Hamoneans, which demonstrates that, after the fact, a king appointed solely by the court, or arising on his own with the consent of the court and the people, is in fact considered a king and has all the authority of a king of the northern kingdom of Israel, including the power to kill murderers and sentence rebels to death. But the approval of the Sanhedrin is required; without it, he lacks the full authority of a king and is to be regarded only as a *nasi* or similar leader, without the right to kill.<sup>204</sup> Maimonides' position here reflects his general view that it is possible even now to renew talmudic ordination and convene a Sanhedrin.<sup>205</sup> "It seems reasonable to me that if all the sages in the Land of Israel agree to appoint judges and ordain them, they will be considered ordained, with the authority to impose monetary penalties and to ordain others." Since a court of seventy-one can be convened, it would also be possible to designate a king if foreign domination were removed. Accordingly, Maimonides detailed the laws applicable to such a king.

But even in the absence of a Sanhedrin, it remains desirable to appoint a leadership to tend to matters of governance, though that leadership would have somewhat limited jurisdiction.

*The Knesset should deal solely with matters related to the improvement of society, the arrangement of relationships among citizens, matters of security and foreign affairs.*

It has already been explained that a leader or *nasi* may be appointed, and all who have accepted his authority will be required to obey him. It is preferable, however, to establish a leadership council comprising several representatives, as Maimonides learned from the reference by the Sages of blessed memory to the "seven selectmen of the town" on which he briefly commented.<sup>206</sup> R. Isaac Abarbanel explained the matter at greater length,<sup>207</sup> and it is worthwhile to cite a summary of his remarks in praise of a council chosen for a fixed term:

Reason suggests that the view of the majority should be followed against that of an individual, and that it is more likely that an individual person will sin...than that many will sin when they come together as a group. For if one strays from the path, the others will correct him. And if their leadership is only temporary and they are destined to yield it after a set time, the fear of man will be upon them.

Several practical conclusions flow from the foregoing consideration, and they may be summarized as follows:.

(1) The founding of the State of Israel and the establishment of an independent nation of Israel on its land, even before the future complete redemption, are events anticipated by *halakhah*. The restoration of our sovereignty imposed on us the halakhic obligation to set up governmental institutions for the improvement of governance and the advancement of Torah. The Torah leadership is selected from those who excel in learning and other qualities related to Torah. The political leader-

<sup>202</sup>See, for example, Maimonides, *Mishneh Torah, Hilkhot Sanhedrin* 2:4-5; *Hilkhot Melakhim* 1:4; id. 1:8-10; id. 3:7; and elsewhere.

<sup>203</sup>*Hilkhot Melakhim* 1:3.

<sup>204</sup>*Hilkhot Sanhedrin* 5:1.

<sup>205</sup>Id. 4:11.

<sup>206</sup>See above, n. 198.

<sup>207</sup>In his commentary on the Torah, *Parashat Shofetim* (Deut. 17:14).

ship, analogous to the monarchy in ancient times and the selectmen of the town in later periods, is also chosen by the people, who grant it defined authority. This leadership must represent all classes of society, so its membership should be numerous enough to express the varied political views within the community. It is clear that the Knesset and the government embody the governing authority, but to fulfill the requirement that the people "recognize them as authoritative," the elections should be personal, that is, the residents of each district should directly choose their representatives for limited terms, and those representatives should be responsible to their constituents.

(2) There must be a separation between the political authority – the Knesset and government – and the Torah authority. Not separation of church and state in the American sense, but separation between the jurisdictions exercised by the two authorities.

(3) The Knesset should deal solely with matters related to the improvement of society, the arrangement of relationships among citizens, and matters of security and foreign affairs. It has broad powers to adjudicate and legislate, though they are defined by the general consensus of the public. The power to compel by force is essential to the existence of a sound social order, but that power is given to the government only in accordance with the will of the people, and it should be used as little as possible. If there is a need for far-reaching changes in the tax laws, in the military draft, or in other matters involving compulsion, the desirability of submitting the matter to referendum should be weighed, and the principle of majority rule is widely recognized.

(4) All questions of Torah and procedures for deciding on matters between man and God are within the sole province of the Torah authorities. In particular, the Knesset has no authority to legislate with respect to such matters.

(5) The Torah authority should never use compulsion, except with the consent of the community that accepted it as authoritative and granted it that power. Even then, compulsion should be used only in instances where harm may be inflicted on others, such as in family law matters related to divorce, support, and the like. It is desirable that the Torah authority never employ force.

*The Torah authority should never use compulsion, except with the consent of the community that accepted it as authoritative and granted it that power.*

## **VII. The Value of Liberty**

Our age is characterized by the widespread view that individual liberty is a value greater than any other human need. There is much that is good about that phenomenon, for only one who values free choice can come to recognize how that choice should be used to advance lofty spiritual goals. And even though our generation compares poorly to its predecessors with respect to faith and religious observance, its deepening sense of individual liberty represents definite progress over past achievements. Until modern times, there prevailed an authoritarian worldview, which regarded discipline as the highest value. Today, liberty enjoys the highest priority. Only a person conscious of his power to choose can act entirely out of free will.

The thirteen principles of faith are preceded by the premise of choice: "a great principle, a pillar of the Torah and of the commandments."<sup>208</sup> The Torah's conception of the world is built on the other elements as well, but the principle of choice is the pillar that supports the entire magnificent structure of Torah and commandment. The more profound and vital the experience of choice, the more complete the *Tselem Elokim* that resides in man. Today, there are many who are motivated more by liberty than by any prospect of reward or punishment. They are

prepared to sacrifice much and suffer much for the sake of individual freedom. And that is a precondition to making humanity receptive to the destiny for which it was created.

In educating a child, one proceeds gradually, from fear of punishment to appreciation of reward and beyond, step by step. The parent's efforts are accompanied by a firm belief that at the conclusion of the long process, when the child attains the age of maturity at which his or her free will can be effectuated, he or she will choose the good and the true for its inherent value and not merely because of external considerations. That belief reflects the faith of the Holy One Blessed be He, "Who believed in His world and created it,"<sup>208</sup> and that faith is the fulcrum for all of history. It appears that our generation is nearing the state of national maturity, the age at which the human soul recoils from anything imposed on it against its will, and there is no better guarantee that humanity is on the threshold of the great era in which the Image of God within it will appear in all its glory. Their powerful hope that the entire nation was progressing toward these heights led our Sages of blessed memory to regard each restriction on the power to compel as a step toward preparing the world to accept the kingdom of heaven. Accordingly, they consciously renounced the authority to enforce the rules and commandments of the Torah. Today, proponents of the Torah and teachers of the nation face a two-fold challenge. On the one hand, they must recognize the great value of a generation impelled by a longing for liberty; on the other hand, they must sense the power of the brilliant light concealed within the Torah, which could penetrate every dark corner and awaken every heart to truth, if only allowed to

burst forth into the world. One who is unsettled by this two-fold challenge, one who is frightened by the way of the faithful God, one who fears that the pillar of Torah and commandment has been shaken and who lacks confidence in his own free choice – such a person will long for the days when the people were willing to subject themselves to judges who would base religion on compulsion.

*The human soul recoils from anything imposed on it against its will. There is no better guarantee that humanity is on the threshold of the great era in which the Image of God within it will appear in all its glory.*

But one who is familiar with the present generation's struggles and who has experienced with them the discovery affecting the deepest recesses of the soul – the discovery that individual freedom is the factor without which there is no sense to life – such a person will see that the task is to distill the wine of Torah, as R. Levi b. Gershon (Gersonides) wrote:<sup>210</sup>

Our Torah is unique among nations' teachings and laws, for our Torah contains nothing not decreed by righteousness and understanding, and for that reason, this divine ordinance attracts people on their own to act in accordance with it. But the laws of other nations are not so, for they are not organized in accord with righteousness and understanding, and they are manners alien to human nature. People adhere to them by reason of necessity, for they are fearful of the sovereign and fearful of the infliction of punishment, but not on their own.

<sup>208</sup>Maimonides, *Mishneh Torah, Hilkhoh Teshuvah* 5:3.

<sup>209</sup>As explained above, n. 15.

<sup>210</sup>Gersonides, Commentary on the Torah, *Parashat Va'ethanan*, To'ellet 14.

Cf. Maimonides' illuminating comments in *Guide* 3:11:

All these great evils are done among men...because of an absence of wisdom. Just as a blind person because of the absence of vision will constantly stumble and be injured and injure others, since he has nothing to guide him along the way, so, too, groups of people, each in accord with the extent of his foolishness, inflict great evils on themselves and others...But if there were present with them wisdom that could bear the same relation to humankind as the power of vision bears to the eye, all those harms to themselves and others would be avoided. And [the prophet] already promised as much, saying that "the wolf shall dwell with the lamb and the leopard lie down with the kid...and the cow and the bear shall graze...and an infant shall play..." (Isa. 11:6-8).

God's kindnesses overpower us. We now can illuminate Him as He illuminated us. The nation returning to its land has the capacity to renew the eternal covenant through its own free will, and now only the personal example of faithful adherents of the Torah can exert influence and cause the Torah to be spread throughout all segments of the nation. The prophet long ago described the nature of such people:

Behold My servant, whom I sustain, My chosen

one, in whom my soul is delighted. I have put My spirit upon him....He shall not cry out or shout aloud, making his voice heard in the street. He shall not break even a weak reed or extinguish a dimly burning wick. He shall judge in accord with truth. He shall not fail nor be crushed until he establishes justice in the world, and the isles will await his teaching.<sup>211</sup>

And he goes on to give the reason for it, saying that the cause for the removal of the hatreds and conflicts and domination is that humanity will come to know the truth of God, and he said, "They will do no evil and wreak no destruction throughout my holy mountain, for the world will be filled with knowledge of God, as waters cover the sea." Know this.

See also *Mishneh Torah, Hilkhos Melakhim* 11:4. And he had previously explained this in *Hilkhos Teshuvah* 9:2: "The king that arises from the descendants of David will be wiser than Solomon, and he will be a great prophet nearer than Moses our teacher, and he therefore will teach the entire nation and instruct them in the ways of God."

<sup>211</sup>Isa. 42:1-4.