

Coercion or Covenant?

Jonathan L. Richler

THE GIVING OF THE TORAH — *MATAN TORAH* —

was the seminal event in Israel's early history. It was then that Israel cohered as a people and began its march towards nationhood and a shared ethos. Amid lightning, thunder, and trembling, what does the dramatic process by which the Torah came into our hands tell us about the nature of Torah and its implications for our lives as modern Jews?

The way that rabbinic *midrashim* imagine *matan torah* can help us to think through some of these implications. Two contradictory strands appear in the midrash. One strand stresses the coercive nature of Torah. The other underscores its consensual or covenantal nature. Some well-known midrashim illustrate each of these strands. On the coercive side, for example, a famous midrash from the Talmud comments on the ambiguous wording in Exodus 19:17, *And they stood under the mountain*.

אמר רב אבדימי בר חמא בר חסא מלמד שכפה הקב"ה עליהם
את ההר כגיגית ואמר להם אם אתם מקבלים התורה מוטב
ואם לאו שם תהא קבורתכם (בבלי שבת פח.)

Rabbi Avdimi bar Hama bar Hasa said: The verse implies that the Holy One overturned the mountain upon them, like an inverted cask, and said to them: 'If you accept the Torah, it is well: if not, your grave will be right here. (B. SHABBAT 88a)

Although this midrash speaks of an acceptance of the Torah by the people as a matter of choice, it is clear that in reality no such choice occurred since the consequences of non-acceptance were so dire. Israel was made an offer that it could not refuse.

In a similar text in Shabbat 88a, Resh Lakish expounds on the relationship between creation and revelation. In attempting to explain why the Torah uses the definite article *yom ha-shishi* (the sixth day) in describing the sixth day of creation, Resh Lakish links this day with the sixth day of Sivan, the day of the giving of the Torah on the festival of Shavuot.

מלמד שהתנה הקב"ה עם מעשה בראשית ואמר להם אם
 ישראל מקבלים התורה אתם מתקיימין ואם לאו אני מחזיר
 אתכם לתוהו ובוהו

(This) shows that the Holy One stipulated (i.e., made the Torah conditional) with the preceding works of creation, saying to them: If Israel accepts the Torah (on the sixth day of Sivan) you will continue to exist: if not, I will return you to desolation and chaos.

As in the first midrash, Resh Lakish reminds us of the benefits of acceptance of Torah and the disastrous consequences that attend its rejection. The continued existence of the universe is dependent on Israel's acceptance of the Torah. Indeed, the entire purpose of creation is revelation. The Torah provides the framework for global order. In the absence of this framework, chaos will reign supreme.

But there are counter-texts that see the moment of revelation differently. In one of the most famous of them, in *Sifre Devarim*, God offers the Torah to all the other nations of the world, only to have each of them in turn rebuff the offer because of the restrictions contained therein. At that point God offers the Torah to the people of Israel who respond with "*naaseh v'nishma*" — *we will do and we will hearken*. (EXODUS 24:7)

Acceptance of the Torah, according to this midrash, is not a matter of coercion. The covenant between God and the people is consensual. God's revelation is preceded by the prior assent of the people. Jonathan Sacks puts it well in his book, *To Heal a Fractured World*, when he states that the principle of the covenant at Sinai is that "there is no legitimate government without the consent of the governed, even if the governor is creator of heaven and earth."

"The free God desires the free worship of a free people. One difference between the God of the Bible and the gods of myth is that the Creator of all does not seek to impose his authority by force." (p. 154)

The contrast between these two sets of midrashim encapsulates two very different paradigms for the relationship between God and Israel. The mode of revelation — coercion or free acceptance — corresponds to the larger question of how we relate to God and halakhah more broadly.

Modern Jewish thinkers are divided on the question of how much reciprocity exists in the divine-human covenant. As examples, consider two contemporary philosophers, Yeshayahu Leibowitz and David Hartman.

A maverick Israeli thinker, Leibowitz sees total obedience as the crux of our relationship with the divine. He utterly rejects any notion that the Torah has any human purpose. To suggest that the Torah or the mitzvot are about any intellectual, ethical, social, or national needs completely voids the mitzvot of any religious meaning and borders on the idolatrous. The Torah is, pure and simple, about serving God, not about serving human needs. For example, the commandments of Shabbat observance, according to Leibowitz, are intended to submit one seventh of one's life to the rule of a special regimen in the service of God. They have nothing to do with providing human beings with the occasion to rest or with relieving them of the burdens of work.

As Leibowitz memorably notes, “The Secretary-General of the trade union looks after the workers’ need for rest. The divine Presence did not descend on Mount Sinai to fulfill that function.”¹

Philosopher David Hartman takes on this viewpoint in a chapter of his book, *A Living Covenant*. According to Hartman, Leibowitz is wrong because he fails to take account of the reciprocity that exists in the covenant between God and the Jewish people. He characterizes Leibowitz's position as an *Akedah* paradigm in which human beings are submissive in the face of the requirement to serve the Almighty, just as Abraham submitted to God's command to sacrifice his son Isaac. For Hartman, a traditional Jew is not an automaton. Through an elaborate discussion of rabbinic and philosophical texts, Hartman demonstrates how worship of God and human dignity are not mutually exclusive, but rather work in tandem with each other to make God and human beings genuine partners in creation.

Much of the disagreement between Hartman and Leibowitz has to

¹ Yeshayahu Leibowitz, “Commandments” in *Contemporary Jewish Religious Thought*, ed. Arthur A. Cohen and Paul Mendes-Flohr (The Free Press, 1987), p. 71.

do with different conceptions on the nature of law, and the reasons for, and ultimate purpose of, the mitzvot. This debate about the purpose and function of law is not a new one, either for Judaism or for Western culture. For centuries, scholars have wondered about the nature of law and why people observe it. What is the role of coercion and sanction in a legal system?

In modern Western jurisprudential theory, there are two basic conceptions of law, with some shadings in between, corresponding roughly to the two sets of midrashim that we began with. The first of these was advanced by John Austin, a 19th century legal philosopher generally credited with being the founder of legal positivism, which continues to influence legal thinkers and jurists to this day. In his classic work, *The Province of Jurisprudence Determined*, written in 1832, Austin distinguished between “laws properly so called” and “laws not properly so called.” Law, in its true sense, is the command of the sovereign backed up by threats of sanction (jail or fines). A command is distinguished from other expressions of desire by the power and purpose of the enactor to inflict pain if the desire is not followed. In other words, according to Austin, law is precisely about sanction and coercion.

This remained the predominant view in jurisprudential theory until the beginning of the 1960’s when an Oxford legal philosopher, H.L.A. Hart, wrote a highly influential work called *The Concept of Law*. In that book, Hart set out to demolish the Austinian viewpoint.

According to Hart, Austin’s theory is most applicable to criminal law, but is otherwise wholly insufficient as a description of what law is. For example, Austin’s theory of law as the command of the sovereign does not capture the essence of constitutional law — that is, that the sovereign (the President, Congress or Parliament) is itself subject to law and limitations. Nor does it take account of judge-made law or of federalism — that is, that sovereignty is divided between different layers of government. Moreover, many laws are not simply “must do” or “must not do.” Some rules (which Hart called “power-conferring rules”) tell us what we *may* do, not what we *must* do — for example, laws that regulate the formation of contracts and wills. Thus, the Austinian formulation of law as the command of the sovereign is an inadequate description of what law actually is and how it functions.

Hart also took on Austin’s theory of legal sanction. In ordinary English parlance, Hart pointed out, there is a distinction between being “obliged” to do something and having an “obligation” to do it. If a gunman

were to say to you, “your money or your life” — we would say that you are “obliged” to hand over your money, but we wouldn’t say that you have an “obligation” to hand over your money. Hart rejects the Austinian notion of sanction which he says would make law analogous to a gunman backing up his demands with threats of violence. For Hart, law is about obligation and legitimacy, not simply about being obliged to do something under the threat of force or sanction.

How much of the Austin or Hart theories on the concept of secular law are applicable to halakhah as a system of revealed law? My own view is: more than you might think. Like any legal system, halakhah cannot be rid completely of its coercive aspects. Like their counterparts in secular law such as court orders and legislative enactments, Jewish legal mandates — *piskei halakhah*, *chukim u-mishpatim* — are not recommendations, or suggestions, or tips for better living. As citizens of the state, we seem to accept the authority of the law and the restrictions that it places upon us, perhaps grudgingly, because we understand that we stand in a social compact with the state — but also because we are aware that the country’s laws are backed up by instruments of enforcement. So, in the end, the coercive element of the law should not be underestimated.

And with that, we return to the two sets of midrashim that we started with — the one emphasizing the coercive aspect of Torah and the other its covenantal purposes.

There are many reasons why a believing Jew accepts Torah and is prepared to observe its commandments and restrictions. For some, the coercive model of law provides a sufficient motivation for compliance. The awareness of the divine origin of mitzvot, the dread of disobeying God’s will, the fear of consequences (material or spiritual) and community pressure all play into this. I would venture to suggest, however, that most modern Jews do not live by this model and many do not accept its theological assumptions. One reason for this is that the community has lacked the means of enforcing halakhah — a circumstance that arose with the breakdown of the traditional *kehillah* [community] in the 18th century, the process of *haskalah* or emancipation, and its shaping of our identities as modern Jews. But that is only one reason.

As professing Jews, many (perhaps, most) of us accept Torah because we believe on some level in the covenantal relationship between God and the Jewish people, and we conceive of Torah as the primary medium by which the covenantal conversation between God and the Jewish people is transacted.

“Israel, the Torah, and God are one,” notes the Zohar. There are many possible sanctions for the mitzvot, if we understand by “sanctions” reasons to observe the commandments. Rather than viewing sanctions solely as the threat of consequences or punishment, we can understand sanctions in the other sense of the word — allowance, permission, encouragement of a set of behaviors. Linked with the Latin *sanctus*, it makes something sacred. In this light, we may consider actions binding not because there is a sword (or a mountain) hanging over our head, but because we are drawn to that action, we value it, and we commit to it. You might say that as moderns, we approach halakhah more out of love than out of fear. Our understanding of what Torah and mitzvot are all about — what they do to us and for us — can supply the impetus for us to make room for them in our lives.

Whether motivated by a desire to serve God, or as an expression of the covenantal relationship between God and the Jewish people or, as Louis Jacobs has suggested, by a desire to connect to the historical heritage of the Jewish people or by any of a host of other possible motivations — or by a combination of any of these reasons — the mitzvot give meaning to our lives as Jews.

At the end of the day, Torah is not *diktat*. It is not only the command of the sovereign. It is not only law, although it obviously contains many legal elements. The original, literal meaning of Torah is “teaching.” While the Torah surely guides our behavior, it does much more than that. It *educates* us. It *inspires* us. And, one hopes, it also *ennobles* us, as individuals and as members of a community, as Jews and as citizens of the world.



JONATHAN L RICHLER practices Canadian and international tax law in Toronto and teaches a seminar in Jewish Law at Osgoode Hall Law School. This essay is based on a *dvar Torah* given at Congregation Beth Haminyan in Toronto on Shavuot, 2009.