Human Rights: On the Political, the Dynamic, and the Doctrine of Unity of Opposites

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Introduction

Three significant questions arise when we consider the compatibility of religion and human rights. Each of these questions is at the heart of the encounter between religion and the State. More specifically, in the context of this discussion, the question of human rights is tested against the two poles of Judaism and of Israel's secular democracy.

The first question is to what extent religion (or religious practice) is entitled to protection as a matter of human rights? Conversely, what price can religious practice be expected to pay (in terms of sacrificing its norms) in order to earn that protection? Furthermore, what potential threat to human rights does the Jewish religion pose? Can a Jewish state contain that threat, and under what conditions? Finally, to what extent is it reasonable to view religion as a full-fledged foundation for human rights? In other words, can religious norms be fully compatible with the value systems that control humanistic discourse? If, from the point of view of religion, they indeed are, what limitation will this impose on the values and concerns of human rights?

These questions are all expressions of a "clash of cultures," made especially acute by the effort to build a humanist democratic state on Jewish traditional foundations. In what follows, we will take a bird's-eye view of these problems in the hope of singling out what strikes us as the core of the tension between the politics of Judaism and the politics of human rights. We wish to make it clear, however, that this tension does not arise simply from specific issues or cases. Neither is it the product of the great confrontation between "religion" and "state" or between "Judaism" and "democracy." Rather, in more preliminary terms, this

is a conflict between opposing forces. Our interest is in how clashes between opposing forces are *constructed* and how these conflicts are to be dealt with. The different ways in which opposites come into being and relate to each other say something very deep about the nature of dialogues, the problems of the "political," and, finally, the concept of "truth," which does not seem to accept the coexistence of stark contradictions. By showing the interconnection between these concerns we hope to offer a new Jewish perspective on the specific clash or opposition between religion and human rights.

Religion and human rights may perhaps be seen to advance opposing concerns. If we go beyond the specifics of this clash, however, religion and human rights seem to propose two very different kinds of discourse, each of which treats the conflict or opposition between them very differently. Being aware of the differences in the discourses is a necessary prerequisite for trying to overcome them. However, this is not easily accomplished. Consider the setting in which this paper is being given. We are at a conference, in a room where scholars have come together to share and debate their ideas. Presumably, this gathering would appear to present an optimal or neutral context for free investigation, deliberation, and clarification of ideas. However, it is clear that this setting is itself constructed according to a particular world view. It adheres to the conventions that are typical to the settings best suited to the discussion of human rights (conventional perhaps to those engaged in clarifying the legal boundaries of human rights). It is precisely those conventions that we mean to call into question. All of us sitting around the table are intellectuals committed to "democratic discourse." The invitation to participate in this discussion in the particular way it is being conducted can be seen as a statement that seeks to bolster democratic discourse—or at least ensure its survival—in the face of an ostensible religious opposition to it. The nature of the discussion is reflected in the phrasing of its questions, which clearly single out religion as an adversary, either to be tolerated or not. The opposition created between religion and democratic discourse does not view religion as a partner capable of shaping a discourse of its own in which its capacity to tolerate the discourse of democratic rights is also being evaluated.

In what follows, we will attempt to confront the questions this situation raises, on two levels. First, we will describe in detail how opposition and adversity are dealt with in conventional diplomatic, political, or academic discourse; then we will attempt to set out the foundations of our proposed alternative to it.

Two Models

The discourse of human rights belongs to a wider structure in which the clashes between value-systems are clarified and worked out. Broadly speaking, there are two models that dominate the conventional thinking about this clash. The first

focuses on the priority given to democratic discourse and questions its capacity to tolerate deviant voices that assault it from without. The second seeks to negotiate a balance. As we shall show, both of these approaches, despite the apparent differences between them, operate on the same key assumptions. Let us begin with the more one-sided model.

The legal model is rooted in liberal humanist philosophy and has both practical and ideological elements.[1] This model is one-sided, in that it allocates priority to the liberal, legal system of democratic discourse. This is a system of discourse that is grounded in the principles, values, policies, and laws of a secular, liberal, and democratic state. The value-system that this model draws upon to confront adversity is the basis for a practical model of society based on public institutions (legislatures, courts) that express those values. By way of example, the questions we raised about the accommodation of religious concerns in the human-rights discourse clearly express the value-system and logic of the humanist legal discourse: Is religion in fact worthy of protection? Can that protection draw on the principle of freedom of conscience? Analysis of these questions makes it plain that the entity affording protection is the state, and the entity being evaluated is religion. Religion here is seen as a generator of friction which rubs against the prioritized value-system of the law from within society.

In this context, the legal discourse raises questions about the concessions religion must be called upon to make for the common good. The system maintains itself and its general hold over religion by giving "reasonable" religious people the benefits of "religious freedom" in exchange for the concessions they make. By offering this freedom of religious practice (along with all the other practices legitimized by the state), the liberal-democratic state establishes its status as defender of the greater and common good, marginalizing the broader agendas of religion and absorbing religion's practitioners on condition that they are loyal citizens. But here we must ask, what are the limits of the state's ability to incorporate the religious "other"? What should be the attitude of democratic discourse towards violations of human rights in the name of religion? And to what

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1 For examples of this discourse, see *Free Judaism: A Journal of Secular Humanistic Judaism*, http://www.free-judaism.org/76682/Products [Hebrew]; *Defense of Free Expression in a Democratic Regime*, ed. Mordechai Kremnitzer (Jerusalem: Israel Democracy Institute, 2002) [Hebrew]; Dafna Barak-Erez, Doron Navot, and Mordecai Kremnitzer, *Contradictions in the Public Sphere: Law, Culture, Morality, and Politics* (Jerusalem: Israel Democracy Institute, 2009), [Hebrew]; Alexander Jacobson and Amnon Rubinstein, *Israel and the Family of Nations: the Jewish Nation- State and Human Rights* (Jerusalem: Schocken, 2003) [Hebrew]; Avigdor Feldman, "The Democratic State *vis à vis* the Jewish State: Space without Place, Time without Continuity," *Iyyunei Mishpat* 19 (1995), 717–727 [Hebrew].

extent can the democratic system draw upon principles, practices, and values that originated in religion?

These questions create dichotomies between liberal societies and the values of the religious ones which they came to replace. Liberal societies tend to deal with these dichotomies dialectically. A process of negotiation tends to ensue, in which reasonable balances and compromises are sought.[2] But this process moves forward under the auspices of democratic institutions, which "rightfully" hold legal power, and is subject to their logic alone. This logic, though well-meaning, cannot avoid seeing religion as problematic from the outset. Given its genuine commitment to the wellbeing and prosperity of all its citizens, the state encounters the religious worldview defensively. The state must consider the wisdom of confronting a threat from a religious source head on, by unleashing an attack, by setting principle against principle, might against might. Such may be the case, for example, when religious ceremonial involves a human-rights violation. Alternatively, it might be better to enlist religious discourse in a joint effort designed to identify generic values and concerns that religious and democratic systems may share. In this way, democracy would prudently take religion into account by partially acknowledging the theological or historical values that secular-democratic human-rights discourse inherited from Scripture or some other canonic religious text. This acknowledgment absorbs religious concerns by partially (or conditionally) validating them, thereby making religion a fitting or worthy partner, which, thus transformed, could now bolster the democratic discourse rather than pose a threat to it.

In the second model, the cultural logic behind each of the contending positions is examined. This model seems at first glance to level the field on which religion and human rights can interact. However, upon closer examination we will see that this is not exactly the case. In the Israeli context, this model is used not only to negotiate the tension between "religion" and "state"—a tension between two

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2   For analysis of the arrangements reached between religion and state in Israel and in Europe, including the distinctiveness of the situation in Israel and the tensions associated with its profoundly adversary quality, see Benjamin Neuberger, "Arrangements between Religion and State in Europe," in *The Conflict between Religion and State in Israel*, ed. Noam Langerthal and Shuki Friedman (Tel Aviv: Miscal, 2002), 336–356 [Hebrew]. For a wealth of historical examples of liberal discourse making statements against the growth of religious tendencies within the State of Israel, see Menachem Mautner, *Law and Culture in Israel at the Start of the Twenty-First Century* (Tel Aviv: Am Oved, 2008) [Hebrew]. They include Doron Rosenblum's "A Trembling Voice," warning of "the beginning of the end of the State of Israel" (ibid., 198); Dan Miron's statement that Jerusalem may be the place from which "a civil war is likely to erupt" (ibid., 193); Amos Kenan and his book, *The Way to Ein Harod* (ibid., 200); and Benjamin Tammuz in his *Jeremiah's Inn* (ibid., 194).
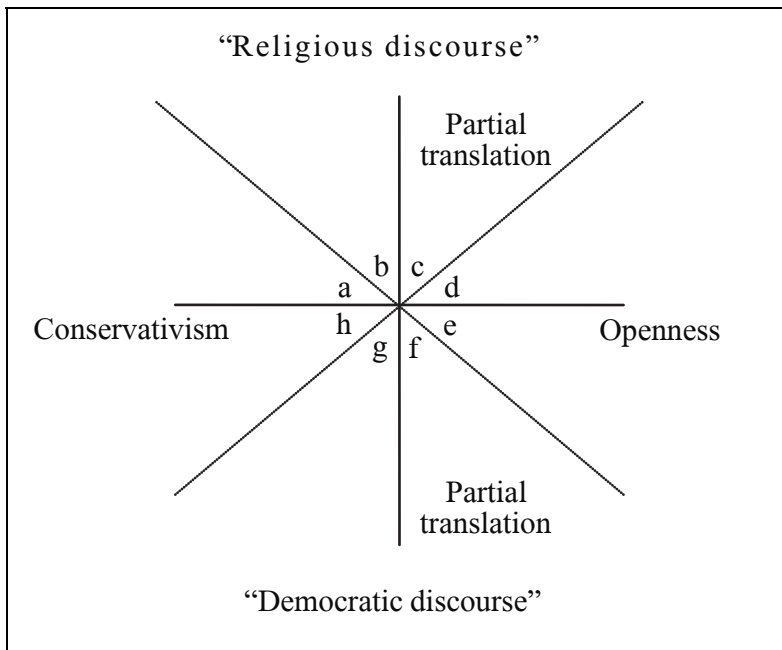
foci of institutional power engaged in political and legal competition[3]—rather, it also attempts to negotiate the broader cultural clash between "Judaism" and "democracy."[4] When a clash of values is described using this model, each side is understood as working toward delineating the boundaries of their interaction. The appearance of negotiations is, in fact, a battle for (metaphorical as well as physical) territory, since each side tests its strength and sets up lines of defense. Behind these barricades, each can enjoy exclusive control of a particular area of public life without intervention by the other. For example, in Israeli law, the religious monopoly on marriage and divorce is an area where religious society has conquered territory and built barricades, which it now seeks to defend against invasion from the outside. Conversely, the state monopolizes taxation and public funds and combats religious demands that the allocation of these resources serve the interests of religious-interest groups. As each side plays in the other's arena, they rank and evaluate the issues at hand, and thus determine whether they will decide to concede, or press onward toward a specific goal.

A model that seeks to analyze the clash of religion and state in Israel, in which the cultural logic of each side is taken into consideration, already exists.[5] If the

3   On the three monotheistic faiths as political religions whose clash with the secular establishment can be expected, see Roger Trigg, *Rationality and Religion: Does Faith Need Reason* (Oxford: Blackwell, 1998), 8. For more on this, see Vered Sakal, "Religion and Liberalism: The Challenge of Neutrality and John Locke's Concept of Religion as a Possible Solution" (Ph.D. diss., Hebrew University of Jerusalem, 2011), 6–7 [Hebrew].

4   For historical and philosophical context, see Menachem Lorberbaum, *Politics and the Limits of Halakhah* (Jerusalem: Shalom Hartman Institute, 2006), [Hebrew]; Yitzchak Englander, "Relationships between State and Religion in Israel: Theoretical Historical Background," in *A Jewish and Democratic State*, ed. Dafna Bark-Erez (Tel Aviv: Ramot, 1996), 291–308 [Hebrew]; *The Jewish Political Tradition through the Ages: Memorial Volume for Daniel Elazar*, ed. Moshe Hillenger (Ramat Gan: Bar-Ilan University, 2010) [Hebrew]; *The Jewish Political Tradition*, eds. Michael Walzer et al. (New Haven: Yale University Press, 2003); Yedidia Stern, *What's Jewish in Israeli Law?* (Jerusalem: Israel Democracy Institute, 2006) [Hebrew]; Yedidia Stern, *Facing Painful Choices: Law and Halakhah in Israeli Society* (Jerusalem: Israel Democracy Institute, 2003). For an analysis of the tension, the oppositional attitude and the points of friction between the Jewish religion and the State, see Stern, "Religion and State under Siege," available at http://www.toravoda.org.il/he/node/1798 [Hebrew].

5   Avinoam Rosenak, "A Renewed Look at the Tension between Judaism and the Democratic State," in *Religion and State in Twentieth-Century Jewish Thought*, ed. Aviezer Ravitzky (Jerusalem: Israel Democracy Institute, 2005), 566–586 [Hebrew]. The model draws on the discussion by Mary Douglas, *Natural Symbols—Exploration in Cosmology* (New York: Pantheon Books, 1982). For a similar treatment, see Avi Sagi, "Judaism and Democracy— Truly in Conflict?" in *Democratic Culture*, vol. 2 (Ramat Gan: Bar-Ilan Faculty of Law, 1999), 169–187 [Hebrew]; Sagi, "Religion and State: A Critical Study of the Meanings

concept of human rights is placed at the forefront of our inquiry, this model can be analyzed as follows:

We start with the working assumption that we are dealing with two arenas of discourse, neither of which is entirely alien to human-rights issues. Each has four elements—two of which tend toward isolation from the other, and two of which tend toward varying degrees of openness and collaboration. Visually, the two arenas can be mapped as follows:

Within religious discourse, groups *a* and *b* tend toward isolation, while groups *c* and *d* tend toward openness; they are situated along the axis running from conservatism to openness.

In this model, each side's reaction to any clash of interests is conditioned by its understanding of the Other and by its assessment of how flexible it can afford to be. If the Other is understood as a "thin" system, by which we mean one that it makes only minimal cultural demands, the capacity for compromise will increase. On the other hand, a "thick" set of varied and comprehensive cultural demands is likely to elicit stronger reactions that call for accepting the demands

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of Public Discourse," in *Religion and State in Twentieth Century Jewish Thought*, 43–75 [Hebrew].

or rejecting them altogether. For example, we can think of "democratic discourse" as a thin system that handles the technicalities of elections and the administration of government. A "thin" perception of democracy will narrow its values-based interests to the management of government. Its interest is then to ensure the kind of tolerance[6] that allows competing points of view to interact on the level playing field that democracy provides. It is here that the value-based tensions of members of society can then be resolved.[7] This "thin" notion of democracy might also be seen to protect the basic rights of citizens to be heard, so that society can genuinely know and reflect the will of the majority. Democracy of this sort has no interest in the hearts and minds of citizens and would not interfere with private matters like their religious and moral education.[8]

6   Tolerance but not necessarily pluralism; see Avi Sagi, "The Jewish Religion: Tolerance and the Possibility of Pluralism," *Iyyun* 44 (1995): 175–200 [Hebrew].
7   Asa Kasher, "A Jewish and Democratic State: A Philosophical Sketch," *Iyyunei Mishpat* 19/3 (1995): 730 [Hebrew].
8   Kasher also mentions the practical needs that obligate the state to allow for the realization of the citizens' rights. See ibid., 731–732. On that minimal basis, one can understand the beginnings of modern philosophical studies of these issues in, for example, Locke's "Letter Concerning Toleration." See also Aviezer Ravitzky, "Jewish Values and Democracy in Historical Memory," in *Judaism and Democracy: Conflict and Unity—Annual Conference of the Center for the Study of Educational Thought in Jewish Philosophy* (Jerusalem: The Center for Jewish Educational Thought, Lifshitz College, 1996), 13 [Hebrew]. As Locke puts it, "the whole jurisdiction of the magistrate reaches only to these civil concernments, and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls" (John Locke, "A Letter Concerning Toleration," in *Classics of Moral and Political Theory*, ed. Michael L. Morgan, 5th ed. (Indianapolis: Hackett, 2011), 779, available at http://socserv.socsci.mcmaster.ca/econ/ugcm/3ll3/locke/ toleration.pdf. See Ruth Kleinberger, *Chapters in the History of Political Theory* (Tel Aviv: Daggan, n.d.), 132–200 [Hebrew]. See also Montesquieu, *The Spirit of the Laws*, ed. Anne Coheler, Basia Miller, Harold Stone (Cambridge: Cambridge University Press, 1989). So too John Stuart Mill, in *On Liberty*: "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant," Mill, *On Liberty and Other Writings*, ed. Stefan Collini (Cambridge: Cambridge University Press, 1989), 13. In Kasher's words: "It follows that, when all is said and done, a democratic state is neither secular nor religious, neither left nor right. The government, at base, can be right or left; centralized, or religious, or otherwise. But the state, which is meant to reflect a fair resolution to these conflicts, cannot be any of these. It is meant to be neutral" (Kasher, "A Jewish and Democratic State" [above n. 7], 730).

However, from the point of view of the "religious discourse," the democratic Other might also be seen in much "thicker" terms. Here democracy would be seen to encompass a rich and multi-faceted moral system, to be an overall view of the world that extends beyond the modes and methods of election and representative government. A "thick" notion of democracy has its own vision for the education of citizens. It cultivates a commitment to its key values of liberty, equality, autonomy, liberalism, criticism, and rationality. These values permeate the educational system and the structures of both professional and social life, which seek to reward adherents and marginalize deviants.[9]

What is the nature of this seemingly collaborative kind of cultural confrontation? What is at stake in the effort to bring two contradictory worldviews together under the canopy of a single overarching political culture? What are the mechanisms that allow flexibility in the dealings between the two sides and what are the conditions in which they find themselves in conflict?

Lets us return to our diagram and consider each of the four positions on each side. Group *a* represents a posture of *absolute withdrawal*. It signifies what we identify as a conservative and isolationist religious stance that rejects all contact with the democratic discourse in both its forms (thin and thick). Religion is seen in "thick" terms and, as such, should permeate all aspects of public life, leaving no space for the democratic discourse.[10] It aims to move the world along a clear trajectory from what is understood as an imperfect reality toward the fulfillment of a religiously sanctioned social and political ideal. From this point of departure, the role of the democratic discourse, even as a technical or neutral facilitator of interaction between competing points of view, is in fundamental opposition to religious interests. Within the context of this religious approach, there are no values of human rights that are not derived from the religious canon, which—as has so often been noted—speaks not of rights but of obligations.

From the perspective of the democratic human-rights discourse, this religious world-view is not a partner for negotiations. The two camps have no choice but

9   See David Hade, "Two Concepts of Liberalism," in *Individual and Society in a Democratic Government*, ed. Yuval Luria and Haim Mintz (Beersheva: Ben-Gurion University Press, 1991), 169–185 [Hebrew]; Kasher, "A Jewish and Democratic State" (above n. 7), 729–739.

10   This is what Akiva Ernst Simon termed the "Catholic approach." Simon's account relies on that of the modern cultural historian Johan Huizinga (1872–1945); see the latter's *The Waning of the Middle Ages: A Study of the Forms of Life, Thought, and Art in France and the Netherlands in the XIVth and XVth Centuries*, trans. F. Hopman (Garden City, NY: Doubleday Anchor Books, 1956). Religion in that sense applies, in Simon's words, to "eating, drinking, dress, work, rest, society, and state, love and war" (Akibah Ernst Simon, "Are We Still Jews?" in *Are We Still Jews?: Essays* [Tel Aviv: Poalim Publication House, 1982], 9 [Hebrew]), as reflected in the maxim "know Him in all your ways."

to struggle against each other. However, this is a struggle that is won not only by defeating the Other but also by smothering it with tolerance. This second and more subtle strategy is the one that stirs up the questions we encountered in the legal model: To what extent is religion entitled to the protection of human rights? What must it concede in order not to forfeit its right to that protection? What are the threats posed by religion to our broader commitment to the human rights of society? Can the state assimilate these threats and under what conditions? If not, what mechanisms can the state use to nullify the problematic Other? Here, for example, we might recall the case of Rabbi Meir Kahane, whose religiously driven political ideology clashed with the state's human-rights agenda. The result was that his political party was outlawed and barred from competing in the open field for electoral support. This is an example of what happens when Group *a* attempts to press its position to the limit. The value system of the democratic discourse, based on human rights, is challenged so fundamentally that there is no choice but to declare an all-out war. The State uses its power to outlaw the deviant, while the deviant draws its legitimacy from sources outside the State's discourse. In this sense, Kahane was understood as having launched a systematic attack on the democracy of the state.

While the Kahane case points to one side of this equation, it should be clear that his position is mirrored by Group *h*, which we refer to as disengaged democracy. Like Group *a*, this position, too, is absolutist. The difference is that on this side of the fence it is the Jewish element of the state's identity that is seen as contradicting the fundamental integrity of Israel's democracy.[11] Adherents of this point of view see democracy in "thick" terms and as such are unable to allow the public interference of any other value system in political life. As such, the Jewish element of Israeli public and political culture cannot be integrated into the democratic system in any fashion, without coming at the expense of democracy's fundamental values and commitments. This democratic rights discourse is absolutely opposed to the theory and practice of religious discourse and cannot recognize it or engage with it when it promotes the human-rights agenda. This approach, like that of Group *a*, sees the contradiction between religion and human rights as total and non-negotiable.[12] It would find no place in the present volume.

11 See Adel Manna et al., "Panel Discussion," Van Leer Jerusalem Institute, published in *Ravgevani* 2 (1998): 49–53, 56–59; Gershon Weiler, *Jewish Theocracy* (Tel Aviv: Am Oved, 1976) [Hebrew]; Avigdor Levontin, "'Jewish and Democratic'—Personal Musings," *Iyyunei Mishpat* 19 (1995): 521–546 [Hebrew].
12 According to Prof. Avigdor Levontin, "It is difficult to envision a society or a state simultaneously subject to both of them" (Levontin, "Jewish and Democratic," *Iyyunei Mishpat* 19 [1995]: 522).

Group *b* falls under the rubric of "religious discourse," but is willing to consider ceding "territory" to the democratic discourse on strategic grounds. We will refer to it as the group of *ideological abstention*. Its proponents have no interest in deep cultural engagement or interaction with the democratic discourse and in this sense are close to Group *a*.[13] However, they do evince a kind of religious pragmatism, of the sort often found, for example, in halakhic reasoning, which incorporates a degree of flexibility in its dealings with the outside world. This flexibility can participate in the democratic system when the latter is seen to advance only its "thin" concerns, that is, those that make it possible for government to function.[14]

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13   Rabbi Eliezer Shach, a leading rabbinic dignitary in the Haredi world and a key figure in in Haredi politics in Israel, put it this way:

> We must be devoted to the Holy One blessed be He with all our souls, and must not disparage, Heaven forbid, anything in the Torah. We must not think that the system called "democracy" is a positive thing. For what is democracy? Freedom, liberty, a total lack of restraint. In truth, only the Torah affords humanity genuine freedom, for a person must have laws that limit him. Without that guidance, he may destroy the world . . . And that instruction can come only from the Holy One blessed be He, Who knows the strengths of mankind well, what a person can bear and what is beyond his strength. But can mere mortals define their own strengths and make laws for men like themselves? Consider, for example, Russia, which over the course of eighty years developed a doctrine under which no one was to own private property, arguing that there was no reason for the rich to possess property and the poor to lack it. And so they declared all to be equal, and created a constitution under which there was to be nothing private. What came of that? You know well that millions of people were killed in the name of this doctrine—no less. And so, too, with democracy. When one wants to go against the Torah and tries to imitate it by constructing a new regime that will bring "bliss" to the world, the truth is that the result will be a tragedy. It will provide an imaginary feeling of "freedom" when, in truth, there will only be license, nothing more. Consider, for example, the matter of elections, which seems at first to be something positive. Yet, how much falsehood and deviousness pervade the conduction of the process. People do not vote on the basis of careful judgment but on the basis of trivial considerations . . . . True elections are only those that are in accord with the Torah, and it is only the Torah that provides man happiness." (Rabbi Eliezer Shach, *Letters and Articles* (Bene Beraq: Students of Rabbi Shach), 124, letter 523 [Hebrew].)

14   Rabbi Samuel Jacobowitz, *The Haredi Stance* (2001) (photo-offset), 3. Elsewhere he expands on the idea: "A world of faith, of fear of Heaven, of 'acceptance of the yoke of Heaven' that strives for infinite expanses of knowledge of God [is] a world that differs in all respects from a world of 'liberty, equality, and fraternity,' a world in which 'every man did as he pleased' [cf. Jud. 17:6] . . . for us, this difference entails a comprehensive difference in the essence of our identity and destiny as Jews. When all is said and done, 'liberalism' uproots everything that believing and faithful Jews regard as the primary purpose of their lives, for which 'we have suffered martyrdom daily,' quite literally, for thousands of years" (Jacobowitz, "Two Ideologies—But Still One Nation," *Ravgevani* 2 [1998]: 36–37 [Hebrew]).

This position, too, poses a challenge to democratic discourse, for its proponents are willing to make only minor concessions in exchange for the rights they seek. These might include compliance with the "thin" demands of democratic society, but only to the extent that these may be exploited to advance the group's interests. For example, the Ultraorthodox groups in Israel, who participate in elections, rally support for their interests alone and use the power that the democratic system affords primarily to attain their own ends. Though the clash between this position and democratic values is less acute in theory, it also generates heightened public concern about the potential threat to human rights from within. After members of Group *b* join the government, they are criticized by those groups closer to democratic discourse for not endowing their communities with a "thicker" appreciation of democratic principles. Conversely, they are criticized by the religious world for the concessions they are perceived as having made.

Group *g* is the democratic-discourse counterpart to Group *b;* we refer to it as the model of *uncompromising democracy*. It is prepared to engage in limited cooperation with religion, within the democratic framework, but only if the cooperation is understood in purely technical or "thin" terms. This approach accepts the fact that Israel has religious citizens whose concerns are legitimate in the democratic process. However, it finds it inconceivable that Jewish-religious values can play a definitive role in the formulation of the democratic discourse itself. For example, Israel can be regarded as a Jewish and democratic state— as Aharon Barak maintains—because it grants the rabbinic courts the right and authority to adjudicate matrimonial matters—but this must be defined as a legal allowance granted by the state and accepted only because it somehow serves the greater interest of democracy.[15] Any approach that does not accept democracy as the absolute and exclusive framework for the society is seen as subversive and threatening.[16] From that perspective, the human-rights discourse is the product of Israel's democratic culture only, and there is no prospect that it can be enhanced by interaction with religion. Because religion's commitment to democracy is limited, its potential to affect the country's stance on human rights issues (for example, through the rulings of the rabbinic courts) must be kept to a minimum.

15 Aharon Barak, "Panel Discussion," in *The State of Israel as a Jewish and Democratic State*, ed. Ron Margolin (Jerusalem: The World Union of Jewish Studies, 1999), 11–12 [Hebrew].

16 See the analysis by Eliezer Schweid, "Israel as a Jewish-Democratic State: Historical and Conceptual Aspects," in Zionism in a Post-Modernistic Era (Jerusalem: WZO, 1996), 136 [Hebrew]. See also the treatment of the issue by Zvi Bruner and Yoav Peled, "On Autonomy, Ability and Democracy: A Critique of Liberal Multiculturalism," in *Multiculturalism in a Democratic and Jewish State— Memorial Volume for Ariel Rosen-Zvi*, ed. Menachem Mautner et al. (Tel Aviv: Ramot, 1998), 107–131[Hebrew]; Meir Shamgar, "On Liberal Democracy," *Iyyunei Mishpat* 22 (1999): 557–561 [Hebrew].

Group *c*, on the religious side, can be said to take a position of "*post factum openness*" to the democratic discourse. This approach sees Judaism as an all-embracing system (as do groups *a* and *b*), but also recognizes democracy in "thick" terms. However, rather than balking at the clash between these two systems, post factum openness imagines the ways religion and democracy can work together. It recognizes the need for cooperation and recognizes the validity of the ethical demands that democratic concepts and values make of religion. These demands must be met through an act of "translation," which, though necessarily limited and conditional, tries to articulate the values of human rights discourse in language that makes intuitive sense to religious ears. Translation serves a deeper agenda of cultural integration, which makes it possible for both the religious and democratic forms of discourse to be less dogmatic. Cultural contact between a committed Jew and the secular political environment is therefore both possible and desirable. In fact, it is crucial to creating an integrated Jewish democracy in which—through cautious and careful deliberation—a peaceful symbiosis can be established. It should be clear, though, that from this perspective democracy is still seen as an Other whose legitimacy is contingent upon the successful translation of its values into terms that can ultimately be recognized by the religious mind. From the perspective of democracy, this position is understood as one in which religion has taken positive and meaningful steps in the right direction, in exchange for protection under the heading of human rights.

Opposing the skepticism of Group *c*'s religious position is Group *f*. Though the relationship between these two positions is value-based, it does nothing to lessen the wider threats they pose to each other. Ultimately, Group *c*'s religious position continues to leave ultimate authority in the hands of the religious leadership rather than the democratic leadership.[17] Group *f* maintains a primary and underlying loyalty to democratic discourse, but recognizes the importance of building bridges to the Jewish discourse that, in the broad sense, commands the loyalties of significant sectors of society. Again, Group *f,* like its religious counterpart, imposes limitations. While it is proper to build bridges between the diverse elements of Israel's Jewish society, these bridges can serve their purpose only under the canopy of an Israeli democracy whose parameters are universal

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17 Prominent in this context is the statement by Julie Tamir that "in my view, only liberal democracy has any value" (interview in *Panim* 2 [May 1997], 94). See also Tamir, "Two Concepts of Multiculturalism" in *Multiculturalism* (above n. 16), 79–92 [Hebrew]. She asserts that "if divine law or the law of the tribe takes precedence over any other law, the conflict between the two can never be resolved" (ibid., 86). On the preconditions to be demanded of halakhists as they enter the political-democratic sphere, see Yedidia Stern, *Halakhic Rulings on Political Questions* (Jerusalem: Israel Democracy Institute, 1999).

and built exclusively on secular democratic values.[18] Given this precondition, it becomes clear that the integration of religious values by the state into democratic society reflects a deeper ambition to subsume them and even to bring religious people to understand and articulate them in the light of a more universal human-rights discourse. The aspirations of Group *f* are therefore directed towards strengthening the human rights discourse through the recruitment of religious partners. The limitations of this approach become apparent when the possibility that the partnership may slip beyond the bounds of democratic control begins to generate a threat.

Group *d* in the religious discourse is "*openness ab initio*." This group engages with democracy as a "thick" system of discourse, but regards the translation of religious values into terms that are compatible with the democratic system as something positive in principle.[19] It identifies the foundations of democracy

18 Aharon Barak, "The Constitutional Revolution: Defending Basic Rights," *Mishpat u-Memshal* 1 (1992): 30–31 [Hebrew]; Barak, *Interpretation in Law*, vol. 3 (Jerusalem: Nevo, 1994), 344–347, 428–429 [Hebrew]. In this context, one can understand as well Barak's comments regarding the authority of the "enlightened public" in *Wechselbaum v. Minister of Defense et al.*, HCJ 5688/92, 47 (2) P. D. 812 at 827; see also Barak, *Interpretation in Law*, 229–241. Barak asserts that in the event of conflict between the values of a Jewish state and of a democratic one, the decision between them should be in accord with the perspective of the "enlightened public" in Israel (ibid., 346–347). See also the analysis by Asher Maoz, "The Values of a Jewish and Democratic State," *Iyyunei Mishpat* 19 (1995): 622–625 and the critique by Ronen Shamir of democratic fundamentalism: "Society, Judaism, and Democratic Fundamentalism: On the Cultural Sources of Legal Interpretation," *Iyyunei Mishpat* 19 (1995): 702, 713–716 [Hebrew]. On the increased strength of liberalism in Israel during recent decades, see Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel Aviv: Ma'agele Da'at, 1993) [Hebrew]; Mautner, *Law and Culture* (above n. 2). Mautner notes how the judicial branch increased its authority at the expense of the legislative (the latter having been taken over by the Right) by such means as expanding justiciability; introducing concepts of "reasonableness" (ibid., 314, 516) and proportionality (ibid., 135–136); invalidating laws enacted by the Knesset (ibid., 205 et seq.); employing concepts of "rights" (ibid., 109, 215); and creating new norms ex nihilo (ibid., 160). Mautner sharply criticizes these developments, noting the affinity between judicial decision making to mass communications and the Left's conversion of its defeat in the Knesset to a victory in the courts.

19 See Rabbi Sol Roth, *Halakha and Politics: The Jewish Idea of a State* (New York: Ktav and Yeshiva University Press, 1988); Yedidia Stern, *On the Role of Jewish Law in Matters of Religion and State,* Position Paper 48 (Jerusalem: Israel Democracy Institute, 2004) [Hebrew]. On the public and political elements implicit in classical halakhic thought, see Stern, *State, Law, and Halakhah: Public Leadership as Halakhic Authority*, Position Paper 22 (Jerusalem: Israel Democracy Institute, 2000) [Hebrew]. For a position that contrasts with the narrow perception of Judaism and that sees it as drawing on a variety

in Jewish values and allows the democratic discourse to issue correctives via the reinterpretation of the classical Jewish canon.[20] Since these correctives are considered to be authentic within the Jewish discourse, they are believed also to be implicit in traditional Judaism. For this reason, there is no reason for there to be any value-based clashes between the two systems.[21] At the same time, Judaism should not be absorbed into its democratic progeny; nor should it lose its distinctiveness to it. The historical depths of the Jewish canon allow it to function as a complementary value system, able to reinforce democracy and human rights by providing them with perspective, as it were, from within the tradition. Thus the reinterpretation of Jewish texts is a fruitful source of fresh insights that replenish the discourse of human rights when it faces new targets and dilemmas. The price paid for this is minimal, since, if there is any conflict at all, it is compensated for by the dividends that this strategy ultimately yields.

Group *e*, the counterpart in the democratic discourse, is by necessity closely aligned with Group *d*. They pose no threat to each other and agree on all basic matters of principle. Group *d* affirms the translation process between the two systems of its own volition and actively seeks the reflection of its own concerns in traditional Jewish sources. It sees itself as part of Judaism and thus thinks of Jewish values as inseparable from the democratic system. Unlike Group *e*, its point of entry into this process does not originate in religious convictions but in the legislator's determination that the State of Israel is both "Jewish and democratic."[22] From that moment on, the texts of Jewish civil law become part of the democratic canon and, as Menahem Elon put it, "the term 'Jewish' expresses the essence of the State."[23] It follows that human rights both empower and need

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of sources, see Aviezer Ravitzky, "The Jewish People and the 'Clash of Civilizations'" in *The Jewishness of Israel*, eds. Aviezer Ravitzky and Yedidia Stern (Jerusalem: Israel Democracy Institute, 2007), 723–738 [Hebrew].

20 See Joseph Achituv, "Conditions Internalizing Democratic Values in Halakhic Rulers from the Religious Zionism," in *Judaism: a Dialogue Between Cultures*, eds. Avi Sagi, Dudi Schwartz, and Yedidia Stern (Jerusalem: Magnes Press, 1999), 101–102 [Hebrew]. It should be noted that not every effort at reconstruction grows out of Group *d*; some efforts, limited to methodology, appear in Group *c*. See Asher Cohen, *The Tallit and the Flag* (Jerusalem: Yad Yitzhak Ben-Zvi, 1998), 34–35 [Hebrew].

21 That spirit can be seen in the writings of figures such as Dov Rappel, Simon Federbush, and Rabbi Yoel Bin-Nun. See, e.g., Yoel Bin-Nun, "Torah, Zionism, Democracy" *Ha-zofeh* 1 (1995): 3 [Hebrew]; Eliezer Berkovits, "*Halakhah* in a Democratic Society," *Petahim* 37 (1976): 27–31 [Hebrew]; Berkovits, "Religious Authority in a Democratic Society–How?" *Sinai* 99 (1986): 86–92 [Hebrew].

22 See Ruth Gavison, "Thoughts on the Meaning and Implications of Judaism in the Term 'a Jewish and Democratic State,'" in *Words* (above n. 19), 107–178.

23 Menahem Elon, "The Basic Laws: Their Enactment and Interpretation—Whence and Whither?" *Mehqarei Mishpat* 12 (1996), 258 [Hebrew]; Elon, "The Way of Law and

the Hebrew-religious outlook,[24] and there should be no concern about the hidden costs of cooperation. There is no gap, from the legislator's perspective, between Jewish and democratic sources, and should one open up, the halakhic logic can be trusted as in any procedure of democratic deliberation.[25]

So far we have presented a detailed analysis of two basic models that we believe conform to the conventional understanding of the conflict of democracy and religion as binary opposites. Within this structure, we have looked at the different strategies that each side uses to deal with the other. The legal model operates exclusively on democratic-liberal assumptions. It is evaluative and not deliberative. The conceptual model is more dialogical. It allows us to break down the conditions of compromise into distinctive categories according to the degree to which Judaism and democracy consider the other worthy of attention.

If our analysis is complete, we believe it covers the range of options available for conceptualizing—in the context of academic discourse—the clash between Judaism and human rights in the State of Israel. Despite the many differences among the options suggested by these models, our main point is that they both conform to the same "academic" structure of analysis. Ultimately, it is this structure that we believe misses the deeper potential for alleviating the tension between religion and human rights. Since the academic discourse is itself part of the democratic discourse, it offers a reflection of religion (and even protects its interests) on purely democratic terms that are neither authentic to religion nor sufficiently helpful to resolve the tension in question. What we mean by this emerges into view when we take note of the binary oppositional thinking on which both of these models are based. Both construct and perpetuate a deeper sense of conflict between moderates (Groups *d* and *e*) and extremists (Groups *a* and *h*), which is often even more acute than the original struggle between religion and democracy.

Jurisprudence" in *Judicial Activism*, ed. Ariel Porat (Tel Aviv: Ramot, 1993), 194 [Hebrew]; Elon, "Panel Discussion," (above, n. 15), 17. This position does not contemplate a "halakhic state" or the exercise by Jewish law of plenary control over the State. See also Aharon Barak, "Jewish Law and the Law of the State," *Mayim Mi-dalyo* 133, (1998), 134 [Hebrew].

24 Elon, "Panel Discussion" (above n. 23), 17–18. As he put it elsewhere: "To employ the values of the State of Israel as a Jewish state, it is not necessary to open the floodgates . . . by command of the legislator, the legal introduction to the basic rights . . . we are bound and commanded to make use of analysis and consideration of the sources from which one can infer the values of a Jewish and democratic state" (Elon, *The Way of Law* [above n. 23], 202, 207).

25 Elon, "The Basic Laws" (above n. 23), 261–281.

Discourse, Conversation, and Power

Both the legal and conceptual forms of discourse that we have been describing are tied to or restrained by the same set of political convictions. Both inquiries—the legal and the conceptual—assume a dichotomy that is defined by the distribution of power between religious and secular forms of discourse. Indeed, the role of power seems to dominate the clash between the sides in ways that run far deeper than the value systems of either. Power underlies the values debate, which serves, primarily, as the locus in which entitlement to power is determined. The questions under consideration are really opportunities for evaluating and attempting to regulate the distribution of political power.

Until now, we have used the term "discourse" to denote the positions on both sides of this struggle. We chose it because, as Judah Liebes taught, the term underscores the problematic nature of the model described thus far, which this paper seeks to replace. "Discourse" (*siah* in Hebrew) tends to be marked by an absence of two-way communication. "Conversation" (sihah) is more open. The term "discourse" describes a one-dimensional doctrine that builds a complete paradigm for understanding the world. It can combine various voices and contain multiple elements; but when it encounters a binary Other it is incapable of dialogue. So it seems to make perfect sense that, in our analysis, religious discourse has been pitted against its opposite—democratic discourse—but no true dialogue has emerged between them. Their encounter is always adversarial; each side plays its defined role and protects its own territory. Each one stands on the ramparts that suppress internal cultural flexibility and silences voices that might make a dynamic of exchange possible. Where there is a point of tangency, the moderate positions form an alliance in a joint struggle for power against the more radical ones.

In a political encounter, there always lurks an element of threat and forceful sanctions that each side may bring to bear on the other. The dominant culture (the democratic-liberal one represented by the secular state) is the first to deploy sovereign-governmental power, setting bounds for religion within the state and determining the nature of religion's in secular culture. Aggressive regulation is an inseparable part of government. It is an inherent part of enforcement, whether it is applied to the more obviously forceful acts of government, such as declarations of war or the apprehension of criminals, or to the "gentler" process of formulating the principles of a national curriculum. Religion, for its part, returns fire using the means available to it as a minority voice. But, one way or the other, discourse involves power and is inherently aggressive and confrontational.

The problem of power in politics, of course, applies equally to governments founded on religious principles. Historically, religion has usually had the upper hand and has wielded the power of government in oppressive ways. The trauma

of the Jewish historical experience under Christian and Muslim rule plays a clear role in the Jewish commitment to secular democracy and the privatization of religion that the latter enforces.[26] Indeed, the fact that the Enlightenment led to the secular abuse of state power, which is now sometimes directed against religion, is rather ironic. And yet—for the liberal-minded—the notion that secular government is the lesser of two evils makes it especially hard to imagine an enhanced role for religion in government. In this sense, one might conjecture that the struggle between liberal democracy and religion in Israel is, at least in part, a vicarious struggle between modern Jews and their traumatic historical memory of Christian and Muslim religious oppression. But it does not recognize the unique potential that Judaism has when given a place in the public sphere. It fails to distinguish among the religions and to consider the possibility that, when faced with democracy, Judaism might do better than the others.

In the remainder of this paper we shall try to outline what we see as a Jewish alternative to the struggle for power between religion and liberalism. We believe that this alternative can allow for a new image of the interaction between the human-rights discourse and the religious discourse when the religion in question is Judaism. We will not deal with the subject of human rights itself or with specific conflicts between religion and state or between Judaism and democracy. Rather, we will try to uncover the nature of the political struggle for power that emerged from theology and found its way into European secularism. We will trace the dynamics of the political interaction that power-politics engenders and sketch an alternative to it, based on two elements: group dynamics and Jewish thought.

Tracing the Power in Politics

Modern democracy is more than a form a government. Ultimately, it is better understood as a "thick" system with its own values and cultural perspectives. It is built on the intellectual legacy of Locke[27] and Montesquieu[28] and ensures the rights of human beings and citizens. These rights include freedom of expression, freedom of association, freedom of movement, freedom of religion, and freedom

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26 On the states' decisive role in the privatization of religion, see, for example, William Cavanaugh, "A Fire Strong Enough to Consume the House: the Wars of Religion and the Rise of the Nation State" in *The Radical Orthodoxy Reader*, eds. John Milbank and Simon Oliver (New York: Routledge, 2009) 314–337.

27 John Locke, *Two Treatises of Government*, ed. Peter Laslet (Cambridge: Cambridge University Press, 1988). It is important to emphasize the profoundly religious-Christian dimension of Locke's writings and to take it into account in understanding his liberal doctrines.

28 Montesquieu, *The Spirit of the Laws* (1748).

from religion.[29] This system is founded on an educational doctrine that is imbued with a sense of trust in human beings, their rationality, and their goodness.[30] It is this basic trust in the good of humanity that, according to liberals, underwrites the concept of humanism on which both representative democracy and human rights are built.

Various assaults on and critiques of this liberal approach have been mounted by thinkers who question liberalism's capacity to tame state power. Do the mechanisms of representative government, the judiciary, and the press as watchdog really diffuse the damaging potential of state power in ways that cannot exist in religious and despotic regimes? There is no doubt that they do. Politics has come a long way since the birth of democracy and we would not blight its reputation. Our question is more open-ended. Has politics come far enough? Does the clash with religion (or indeed the possibility that democratic elections may be won by non-democratic candidates) reveal the "underbelly" of democratic abuses of power, which need to be exposed and diffused?

The critique of liberal democracy that exposes this problem most clearly may be that propounded by Carl Schmitt (1888–1985). His perspective is troubling because it originates from a far corner and from a warped perspective that sees democracy as guilty of despotism. Schmitt was a Nazi who regretted the liberal government's dismantling of the sovereign's absolute authority. He argued that democracy's so-called distribution of power between the sovereign government and the electorate was little more than a cover-up for an inescapable truth. That truth is that sovereignty is and will always be an absolute force. Schmitt famously extends this from the absolutist regimes of the past to the most liberal and secular forms of government that we know today. Secularism, for Schmitt, is the

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29 On the wide chasm between the religious and secular worlds regarding space and time, see Charles Taylor, *Modern Social Imaginaries* (London: Duke University Press, 2004), 83–99. For a useful study on the revolutionary impact of liberalism on religion, see: Michael Walzer, "Liberalism and the Art of Separation," in *Thinking Politically—Essays in Political Theory*, ed. David Miller (New Haven and London: Yale University Press, 2007), 53; Walzer, *On Toleration* (New Haven: Yale University Press, 1997); Roger Trigg, *Rationality and Religion: Does Faith Need Reason?* (Oxford: Blackwell, 1998), 3–5; Paul Morris, "Judaism and Pluralism: The Price of Religious Freedom," in *Religious Pluralism and Unbelief: Studies Critical and Comparative*, ed. Ian Hammett (London and New York: Routledge, 1990), 179–201, esp. 182–188.

30 On the democratic tradition's educational doctrine, see John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: Macmillan, 1929). John Locke's doctrines encompassed conflicting accounts of human nature. See Sakal, *Religion and Liberalism* (above n. 4), 46–48, 55–57, 63–64; Locke, *Two Treatises of Government*, (above n. 27); Walter Spellman, *John Locke, and the Problem of Depravity* (Oxford: Clarendon Press, 1988), 46–47.

secularization of theology and, as such, inherits theology's absolute power. His primary claim is that the mechanisms of liberal government obscures and hinders the most crucial function of government, which he identified as decision-making. Schmitt believed that liberalism, by weighing down the decision-making process, undermined the very essence of sovereignty without offering any alternative to it. Even after long deliberation, the power to decide remains in the hands of the sovereign, whose subjects are not part of the process at the critical moment. As such, liberalism did nothing to dilute the force of government and only weakened the capacity of those in power to use it.

An inseparable part of sovereignty is a dualistic approach to decision-making, one that identifies and distinguishes friend and foe, good and bad, the axis of evil and the allies of good governance. In Schmitt's view, liberalism errs by entertaining the illusion that sovereignty can be grounded on universal, egalitarian, eternal— and good—laws. This unrealistic image may last for a while, but it will always collapse when faced with a crisis that requires decisive leadership. (This was the case in the United States, for example, after 9/11. The decisive use of state power soon led to a blurring of the boundaries between friend and foe, which led to dramatic errors in evaluating the intelligence about WMDs.) Such crises, in fact, require the declaration of a state of emergency; the state's ability to declare and act on them, in Schmitt's eyes, represents the essence of authentic sovereignty.

Schmitt begins his well-known essay "Political Theology" (1922) with the observation that the sovereign is the one who makes decisions in a state of emergency. The state of emergency reveals the sovereign's power to deal with the extraordinary when the extraordinary has become the norm. "A decision regarding the extraordinary," Schmitt claims, "is a higher decision. A general norm, as expressed by the usual legal determination in force."[31] Sovereignty rests on decision-making and the power of decision-making lies in its arbitrariness. Sovereignty is not subordinate to a higher rationality or value-system. It makes decisions exclusively by virtue of its authority.

A decision inevitably has its victims. Victimization is therefore an inseparable part of the political. The political, as Schmitt sees it, is not the normal but the extraordinary; what defines sovereignty is not the law, but the setting aside of the law in the face of an emergency. In other words, sovereignty is most clearly expressed not when it keeps the peace, but by its ability to go beyond the law in a time of crisis to combat the extraordinary and the violent. Violence is met with violence, institutionalized in the form of detention camps, military operations, imprisonment, extraterritorial districts, and emergency decrees that descend from

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31   Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005).

the sovereign on high—like the supernatural "miracles" once performed by the divine.[32]

So construed, the political becomes a secular theology, a substitute for God. Sovereignty replaces the divine, and its power is transposed into political power. Politics, in the words of Shahar Galili, is a "theological machine," in which the political paradigm of the state of emergency allows for the forms of arbitrary rule and divine violence which are powerful enough to face a crisis to set aside the law.[33] In light of these principles, Schmitt legitimized the Nazi regime (and other totalitarian regimes) because he viewed it as an honest expression of the state power that liberal democracy only barely manages to conceal. He invoked this argument to provide political justification for the political purges that ensure the sovereignty of the state in times of crisis, such as the Night of the Long Knives.[34] But it also challenges even the most routine acts of government and implicates them in the state's capacity for tyranny.

Schmitt's political philosophy shares many of its most basic assumptions with the ontological analysis that his contemporary, the Nazi philosopher Martin Heidegger (1889–1976), offers in *Being and Time*. The associations between the two men were noted by Heidegger's student Karl Löwith (1897–1973).[35] According to Löwith, there is a link between the notion of "authenticity" expressed in Heidegger's "resoluteness" and Schmitt's concept of "decisiveness." The sovereign must be one who knows how to decide. According to Heidegger, the sovereign's firm decision is not the product of rational deliberation; rather, it grows out of the unique moment, the here and now. That idea, Löwith says, is the basis for understanding what takes place when a judge issues a ruling. Judicial decisions are arbitrary; passing judgment is a constant function of human life; hence human life is arbitrary. The sovereign is called upon to exercise firm and arbitrary power. Indeed, anything less (even in liberal societies) is considered a shirking of the responsibility to govern. The true political hero is the one who realizes Heidegger's notion of authentic *Dasein* and Schmitt's "political."

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32 As Karl Löwith clarified, what matters is that when all is said and done, there is no high court of appeal that may review the political decision of the sovereign.

33 Shahar Galili, "The Theological Machine" *Zemanim* 103 (2008): 74 [Hebrew].

34 This refers to the events of June 30, 1934, when the Gestapo, on Hitler's orders, liquidated Ernst Röhm (head of the S.A. "Storm Troopers") and the entire officer corps under him in order to strengthen Hitler's rule and eliminate any rivals. See Ian Kershaw, *Hitler: 1880–1936 Hubris* (New York: W. Norton and Co., 1999), 519, Carl Schmitt, "The Führer Upholds the Law."

35 See Karl Löwith, "Heidegger's Existentialism: Political Implications," http://www.lacan.com/symptom/?p=55

Shocking as this may be, the core of Schmitt's theory of the political is not resolved by the monitoring mechanisms of liberal regimes. Power is distributed more uniformly among their citizens than it is in a totalitarian regime. However, the source of that power, its very nature, is of the same order. One can trace the same forms of arbitrariness and victimization in the decisions made by even the most liberal states, which inevitably wield powers that entitle them to use violence. This can be manifested in two ways.[36] The first has been formulated by Nitzan Leibowitz, who explains how any theological-political regime "infiltrates the most intimate reaches of a man's life, telling him how to parent his children, how to make love, how to fight, and, ultimately, how to die."[37]

On the second plane, there is the obligation of every polity—including a liberal regime—to make decisions. Decisions are made at every step, as new questions and concerns appear on the daily agenda. As we now know from the extensive psychological literature on decision-making, these decisions are not necessarily as rational as liberalism's self-image would have it.[38] Every polity is therefore implicated in the arbitrary use of power, to some degree or other. Open and liberal societies exist only because of those who use the power entrusted to them (arbitrarily or not) to maintain security from without and order and discipline from within. Disturbing as this is, our contention here applies to the most routine acts of government as well as to those extreme emergencies when critical decisions are made in an instant. In normal political life, the arbitrary use of power by the sovereign is an implicit fixed element.

It is easy to identify the violence in dictatorships. Those regimes always take pains to define a "them" that must be eradicated; citizens become faceless members of a conscripted collective whose task is to eradicate the "other" that threatens "our" existence. But a parallel, albeit not congruent, structure can be found in a democratic state—and, again, not only in times of outright emergency.

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36 An intuitive echo of this affinity can be heard in Avinoam Rosenak, "Is Jewish Law an Educational Ideology? A Critical Discussion," in *Halakhic Ruling: Ideologies and World Views in the Halakhic Discourse*, ed. Avinoam Rosenak (Jerusalem: Magnes Press, 2012), [Hebrew]. Mautner, too, notes the link between liberalism in the State of Israel and Heidegger; he cites the terror that seized the leftist hegemony when it lost its standing and confronted a Judaism increasing in strength—a terror having no concrete source but that could not dissipate (Mautner, *Law and Culture* [above n. 2], 191).

37 Nitzan Leibowitz, "Introduction: Between Religion and Politics," *Zemanim* 103 (2008): 40 [Hebrew].

38 On the complexity of the judgments that are made at moments of decision and the changing, unforeseeable factors that are involved, see Daniel Kahneman and Amos Tversky, "Choice, Values, and Representations," in *Rationality, Fairness, Happiness: Selected Writings*, ed. Maya Bar-Hillel (Jerusalem: Keter, 2005), 64–81 [Hebrew].

Democracy requires political direction. It certainly does not attempt to destroy everyone it does not approve of, but it does create forms of exclusion that set restrictions on those it regards as "problematic." In the context of democratic discourse, the outlawed are often excluded when they are held accountable for the exclusion of others. So democracy excludes the non-democratic just as advanced societies exclude primitives and chauvinistic discourse excludes women, gays, and lesbians.

Isaac Binyamini has noted that this is a cycle that cannot be broken.[39] Those who try to resist the oppression of the powerful have no option but to seize power for themselves. As a result, someone else is repressed, generating a cycle of violence that, in its gentler forms, is the heart and soul of politics. The Earth turns a few times and, before we know it, we are condemning the oppressed of yesteryear for today's acts of oppression. A move away from this vicious cycle must in some way go beyond the structures of political thought. The dynamic interactions engendered by liberal institutions of government reflect the power that liberalism has seized more than the values that it seeks to institutionalize. The problem is therefore inherent to the political itself. Is there a solution?

The Dynamic

The difficulties faced by public demonstrations against oppression—all oppression, but especially the genteel and well-mannered sort—arise from what we shall refer to as "automatic" dynamics of power-laden political discourse. By automatic discourse we mean the interpersonal reactions and interactions that are conditioned by the ongoing power struggle that people within a state are all engaged in when they encounter others.[40] Automatic discourse is designed to gain power. It therefore silences threatening voices (in all sorts of aggressive, passive-aggressive, and smothering ways) and constructs lines of defense. This is an inevitable part of any kind of binary opposition, and political discourse cannot avoid it. It is most visible perhaps in the corridors of power (that is, in government) but— like state power itself—permeates all aspects of social existence.

It therefore follows that even the human-rights discourse within the liberal state is implicated in this power struggle. Every system that produces unspoken decisions generates the automatic reactions to others that block communication

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39   Isaac Binyamini, "In preparation for critical theology of modern politics," *Eretz Ha'emori,* at http://haemori.wordpress.com/2011/09/19/theology/ [Hebrew].

40   Sharon Leshem Zinger, "Open a Gate for Us: On the Significance of Roles in Group Dynamic Situations" (forthcoming).

and, in some way or other, victimize (by silencing, censuring, or smothering) the Other.

The problem is not one of a specific "them" (as seen by one faction or another) who hold the reins of government; the problem is in the use of political power, which, one way or another, is always geared towards discriminatory decision-making. We see this in all spheres of government, whether the issue is military, economic, or political. In the sovereign decision-making dynamic, every choice is made at the expense of someone whose voice is not fully heard. The state, every state, is a body that, though it protects the human diversity of its citizens, has no meaning unless it can act. And its action always entails crushing and concealing the claims of arbitrary victims. Thus government always generates opposition and this opposition is always expressed through the dynamic of automatic struggle. We see this all the time, whether the issue at hand is gay rights, the distribution of national resources for home construction or healthcare, transport, peace agreements, the removal of settlements, and immigration law.

Ironic and confusing as this may sound, the most effective form of silencing the Other is the public discourse itself. In the struggle for the proverbial microphone, the one thing that cannot emerge is an opportunity for "conversation" (*sihah*). We see this all the time on television or in the print media, in the Knesset and in the courts. Even at academic conferences, the power struggles for a foothold in the matrix of knowledge make it impossible for genuine conversation to take place. The absence of conversation from political discourse is not an accident. It is the product of a crucial silencing apparatus that politics requires in order for government to work. Those who are invited to participate in deliberations on social or cultural conflicts (the present one is no exception) typically are experts who have accumulated power in their fields and then critique one another while an audience decides whether it is time to strike up an alliance or unleash an attack. We are all familiar with panels whose invited participants have defined cultural roles— "type X defender of democracy" and "type Y defender of democracy," along with "a Haredi," "a modern-Orthodox," "a secularist," "a Zionist," "a post-Zionist," "an anarchist," "a woman," "a representative of the Establishment," "a gay," "a straight," "a company yes-person," "an Ashkenazi," and "a Sephardi"—all of whom more or less successfully play their designated roles. But their monologues, even if they develop into a sort of dialogue, create an automatic-adversarial discourse. The old joke has it that "a dialogue is a monologue between two people." It is easy enough to identify the failings of the group dynamic that characterizes these discussions and the role-playing games engaged in by the representatives of the various positions. These panels are structured in an adversarial manner, as "reaction" against "reaction," and invites automatic responses. The program can be used to label one position as politically inferior to another. With only a fleeting glance at the list of speakers on a panel, an expert will be able to tell how

the dialogue will be steered to the benefit of the "correct" positions and how the influence of the "erroneous" positions is pre-programmed to fade.

These dialogues manifest a culture of inattentiveness that is endemic to politics. But this inattentiveness has cultural consequences that will ultimately be felt in other contexts, to the disadvantage even of those who hold power. Even if this kind of dialogue offers glimpses of the hidden worlds that it seeks to bring into play, it can never create in-depth discussion that generates truly unexpected results. That outcome is precluded by two familiar and interrelated strategies: either the encounter between the disputants will be conducted in a way that deliberately avoids getting to the heart of the controversy and focuses instead on matters at the margins; or the discussion will deal with what is putatively at the heart of the dispute but avoids touching on its personal and emotional aspects. The discussion will be intellectual and may include probing arguments; but it will nevertheless remain automatic.[41] The participants will play their circumscribed roles, without any flexibility vis-à-vis themselves or the other participants.[42]

If we return now to the question at hand, our criticism is not of the values being discussed but of the politicization that precludes any real interaction. While there have been some efforts in the past to resolve the clash between religion and state and between Judaism and democracy that have pointed critically at the deterioration of moral-cultural conversation into legal-political discourse, they have aimed at best to tone down the conflict by creating closed environments in which the effects of power can be neutralized. Aviezer Ravitzky has been a particularly eloquent advocate for constructing extra-political or extra-legal settings in which ideas can be explored.[43] However, in order for this to happen the legal field must remain "thin" and allow the broader discussion to take place elsewhere.[44] The result of this effort is unsatisfactory and frustrating, inasmuch

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41 "A person's unconscious aspect is his automatic behavior … It is a directed unconscious, part of the warp and woof of the mind itself, from which the tapestry of the mind is built. The social penetrates his mind" (P. Delal, "A Tale of Two Sub-Consciousnesses—the Journey from the Freudian Unconscious to the Fuchsian Social Unconscious," *Mikbatz* 8/1 (2003): 70 [Hebrew].

42 Zinger, "Open a Gate" (above n. 40).

43 Aviezer Ravitzky, "Panel Discussion" in *The State of Israel as a Jewish and Democratic State —Panel Discussion and Accompanying Sources*, ed. Ron Margolin (Jerusalem: World Congress of Jewish Studies and Avichai-Israel, 1999), 56–66 [Hebrew]. On the contrary tendency now seen in the High Court, see Ruth Gavison, *The Constitutional Revolution—Depiction of Reality or Self-Fulfilling Prophecy?* (Jerusalem: World Congress of Jewish Studies and Avichai-Israel, 1998), 17.

44 On the reverse process in that direction in the State of Israel, see Mautner, *The Decline of Formalism* (above n. 18) and Mautner, *Law and Culture* (above n. 2). He describes

as it insists that the only places in which decision-making can be meaningful are by definition the settings in which conversation is superficial. Conversely, meaningful discussions can ensue only where they have no impact.

This is why we wish to take a different view. We do not believe it possible to separate the spheres;[45] on the contrary, all of society is interconnected. The question is: how can a different dynamic come into play in non-automatic political discourse? We can begin to see this dynamic and the need for it by recognizing that the automatic political discourse conceals information that, in a healthier dynamic situation, would be allowed to emerge into public view. When they are unable to emerge in this way, suppressed concerns, feelings and convictions continue to lobby the psyche of the political players from the outside. So we need to ask: what are the effects of knowledge or information in the context of legal and political discourse that the power-laden setting cannot and will not acknowledge? How can it be brought to the fore? The legislator and the judge have backgrounds that are not only cultural and intellectual but also personal and emotional. Unless the latter are given a place, the suppression of emotional content knowledge will always be the name of the game. To enter fully into a genuine and open discussion of the tension between religion and human rights , one must go beyond the clash between religious and democratic forms of discourse and enter into the heart of the feelings, convictions, and personal experiences of the people involved. This is what is required in order to move past "automatic" discourse. A changed dynamic can change the character of the existing conversation by creating situations in which dialogue (in part intimate dialogue) makes space for confronting the issues in connection with the personal experiences of the subjects.[46]

"the rise of a sweeping activism" in the High Court (ibid., 13, 166) and the abandonment of formalistic decision-making and the court's role as "a professional institution, whose principal role is to decide disputes" in favor of "a concept under which it is a political institution, that is, an institution that takes part, along with the Knesset, in the processes through which the State's values are set and its material resources allocated" (ibid., 14).

45 Hence the problematic nature of Sagi's comment (summarizing Eliezer Goldman's observations) that "The State of Israel . . . is the state of its citizens and all its citizens. That determination is anchored in the character of the modern state, and not in theological or philosophical considerations" (Sagi, "Religion and State" [above n. 5], 46–47).

46 In this context, it is worth noting Avi Sagi's extensive writings on the essentiality of the identity discourse that is likely to replace political discourse and the automatic, monologic discourse that allow the adversaries to avoid any effort to establish a complex, shared culture. But the political discourse Sagi alludes to is political discourse in the immediate sense of the word, that is, discourse held captive by politicians. We use the term "political" in a broader sense; it also applies to discourse involving people and institutions in additional contexts, such as higher education and communications. The identity discourse suggested here also requires a dynamism that is not to be found today in academic discourse and it

Dramatic changes in the attitudes of political opponents to each other's point of view can take place only if it is possible to develop meaningful relationships between people in situations of conflict without making any effort to change anybody's mind.[47] This cannot take place without the existence of a secure and attentive space.[48] That secure space is essential because what is at stake is much more than political, legal, and cultural power. We are dealing with the very foundations of the speakers' identity discourse—something, as noted, that has hitherto been silenced. But without the invocation of that identity discourse, politics is left to resolve its problems exclusively by decision and force. This is the case even when the concept used to silence and conceal the perspectives of others is as genteel as ideas that demand "compromise" in the discourse of identity, which renders compromise coercive.[49] It has victims in the same way as any other form of decision-making does. These decisions create ideological, adversary, and power-based roles that are locked and set in stone and they sacrifice the inner flexibility that marks the person whose identity is woven out of numerous, complex, and often contradictory threads. A person's release from a locked role, if effected in a secure place, will not undermine or weaken his or her identity with the cultural community of origin. On the contrary, it is likely to strengthen it in unforeseen ways.[50] By generating unexpected affinities and insights on the part of those who participate in a dynamic colloquy, conversation that is attentive, yet not judgmental, strengthens the fabric of identity while making interaction between

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provides added impetus to Sagi's call to end the monologues. See Sagi, "Society and Law in Israel: Between Rights discourse identity Discourse," *Mehqarei Mishpat* 16 (2000): 37–54 [Hebrew]. In this context, favorable mention should be made of Mautner's *Law and Culture* (above n. 2), which places the divisions within Israel society in perspective and notes Israel's transformation into a multi-cultural society. Mautner clarifies the ways in which multicultural and pluralistic discourse operates in non-relativistic contexts and sets out practical solutions with respect to Israeli society. For a sharp critique of Mautner's solutions, see the review of his book by Evelyn Gordon, "Liberalism's Endgame: Law and Culture in Israel at the Threshold of the Twenty First Century," *The Jewish Political Chronicle* 14 (Fall 2009): 36–40.

47 Zinger, "Open a Gate" (above n. 40).

48 On creating a safe group space, see, e.g., Ronald Applebaum, *The Process of Group Communication:* (Chicago: Science Research Associates, 1974); Dov Darom, *A Climate for Growth* (Tel Aviv: Poalim, 1989) [Hebrew].

49 On the problem of compromise, see Avinoam Rosenak and Alick Isaacs, "Peace Secularism and Religion," in *War and Peace in Jewish Tradition*, ed. Yigal Levin and Amnon Shapira (New York: Routledge, 2012).

50 On the importance of examining roles in a group, see, e.g., Yaron Ziv and Yael Baharav, *A Group Journey* (Tel Aviv: Gal, 2001) [Hebrew]; Wilfred Bion, *Experiences in Groups, Human Relations* (1948), vols. I–IV, 1948–1951, repr. in *Experiences in Groups* (London: Tavistock, 1961).

conflicting identities more flexible. In addition to unlocking a fixed situation, this dynamic process provides knowledge—previously suppressed by the mechanisms of adversary and defensive discourse—that is necessary for the conversation.[51]

The discussions that are familiar to us go forward, for the most part, without any attention to the emotional-existential plane, and any acquaintance with the other's emotions or irrational associations is brokered by the mass media, which deal in narrow and stereotypical depictions. Shifting the discussion to an emotional and personal plane is considered illegitimate, contrary to sound procedure and good taste. The fundamental cultural premises of these discussions are expressed through politics. That is the way in which power-based systems—government, the academy, organizations, and social movements—are organized. The consequences of that structure bear on every step of the way, shaping the tapestry of life and guiding us even in our most intimate encounters.

The dynamic circle is linked to the political circle.[52] The fear of co-opting and gaining in-depth knowledge of the Other emerges when we discover that we are involved in a political game that requires firmness and "resolute" decision-making à la Heidegger. If we make it possible for the other to be heard in a way that diverges from the conventional pattern, one involving intimate recognition likely to generate empathy, he or she will be seen as a threat. An event involving in-depth familiarity with the other is construed as an event calling for change on the part of the listener. Discussions of the conventional sort are not meant to bring about true change but are conducted for their own sake. Accordingly, these discussions are not intended to provide a probing emotional and existential inquiry, so the dynamic is entirely one of automatic role-playing.

Discussions that deal with opposition and support for "excluding women from the public sphere," "conscripting yeshiva students," "running public transportation on the Sabbath," and similar issues are not expected to have any effect on the participants, whose positions are well known and whose shocking statements can be anticipated. The hope is to produce a decision when echoes of the debate reach the ears of policymakers, who are invested with power and authority. There is no interest in gaining a deeper understanding of a speaker's inner world. A conversation about the existential contexts and surprising nuances within the other's personal experience of his or her point view is likely to expose the more fundamental concerns that constitute the infrastructure on which the burning political issues being debated are only incidental. This sort of complex understanding has the ability (indeed is likely) to alter the shape of the conflict.

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51   Zinger, "Open a Gate" (above n. 40).
52   See, e.g., Daniel de Malakh and Ariella Be'eri–Ben-Yishai, "The Group Is Political: Integrating the Study of Group Processes with the Study of Society in the Spirit of Critical Pedagogy," *Mikbatz* 14/1(2009): 49–66 [Hebrew].

Engaging with it requires forces that the speakers fear they or their colleagues will be unable to muster. It is easier to resort to automatic modes of interaction that suppress more fundamental concerns while intensifying the existing points of conflict. The result is a paradoxical situation in which the goal is either to maintain the conflict in its present form or to make it disappear through an imposed decision. But since its disappearance is highly improbable, its intensification will channel social power towards confining the other within prescribed limits. Examination of his/her rights and the conditions for allowing exercise of those rights will go forward only as long as those involved have enough power to dictate the terms on which their point of view is heard. But to be honest, the discussion of these terms touches only the surface of the conflict. To make real progress the conversation must run deeper so that those involved can move beyond the power-politics in which the players are still concerned about losing control over the dynamic and surrendering the political structures that sustain society as we know it. If these structures can be seen as part of the problem because they are ill-suited to change, are they consistent with the idea of allowing Jewish thought a place in the politics of the state of Israel? Does the clash between religion and human rights require a political dynamic for its resolution? Or are there possibilities within the Jewish tradition that support the dynamic reframing we are suggesting?

Unity of Opposites and *Halakha*

In our view, a philosophical and political embodiment of these dynamic ideas can be found within Jewish thought.

In the theoretical context, we are referring to the concept of the Unity of Opposites, found in the writings of Rabbi Kook.[53] Preliminary strata of this idea can be seen in the teachings of Maharal;[54] its roots go back to the kabbalistic literature and the concept of the "infinite" (*ein sof*) or the *sefirah* of the Crown (*keter*).[55] Earlier still, it can be identified in the Talmud and perhaps even in the

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53 Avinoam Rosenak, *Prophetic Halakhah: Rabbi A. I. H. Kook's Philosophy of Halakhah* (Jerusalem: Magnes Press, 2008) [Hebrew]; Rosenak, *Rabbi A. I. Kook* (Jerusalem: Shazar Center, 2007) [Hebrew].

54 André Neher, *Le puits de l'exil: tradition et modernité: la pensée du Maharal de Prague (1512–1609)* (Paris: Le Cerf, 1991); Avinoam Rosenak, "Modernity and Religion: New Explorations in Light of Unity of Opposites," in *Rabbinic Theology and Jewish: Intellectual History –The Great Rabbi Loew of Prague*, ed. Meir Sleider (New York: Routledge Jewish Studies Series, 2013).

55 Isaiah Tishby, *The Wisdom of the Zohar* (Jerusalem: Bialik Institute, 1957), 98–101. Kabbalistic doctrine speaks of ten *sefirot*, divine emanations that represent various aspects of God.

biblical narrative. In our view, this key concept yields productive results when applied to the cultivation of a new kind of political thinking. In this model, conflict can be dealt with in new ways that allow the concept of human rights to meet religion on a different footing.

The idea of the Unity of Contradictions or Unity of Opposites displaces the dichotomous oppositional thinking described above. The Unity of Opposites maintains that the contradictions found within one's experience—divided as it is between right and left, good and bad, justice and injustice, higher and lower, negative and positive, etc.—share a common root in the One. As a result, our understanding of polar dichotomies must change and their adversary posture towards each other must be tempered—though it will not disappear entirely. The understanding that opposites exist and that these entail dualistic, dichotomous, and even adversary structures, is well suited to the structure of the world we know. In this world, as we have seen, theology functions as a power structure that operates inside politics. In the account of theology supplied by the unity of opposites, conflict and mutual exclusion do not reflect the unified picture of the world that is associated with theology. This is an insight that should affect the way we conduct ourselves when we face adversity inside the political world. According to this approach, the divisions and dichotomies are external expressions of a greater paradoxical unity. That unity is not harmonious, and some aspects of it might be described as dialectical. It is analogous to twilight—a mysterious oneness that hovers between day and night. But conflicts do exist within it. They continue to exist as part of the internal structure of the greater unity.

It is hard to assimilate this idea with respect to the "revealed" world as we know it, but it is fundamental to the "concealed world." The unity alludes to a different perspective on reality, which is rooted in the monotheistic concept of unity. This concept of the unity of creation points to an unfathomable source and a utopian goal that encompasses opposites while the clash between those same opposites—paradoxically enough—expresses the harmony of the source and of the goal.

Elements of this paradox can be found in Heraclitus, who spoke in praise of contradictions whose source is in the unity of the logos.[56] One can see the links between this theory and the philosophy of Nicholas of Cusa (1401–1464)—who

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56 "The way up and the way down is one and the same" (Heraclitus, Fragment 60); "God is day and night, winter and summer, war and peace, surfeit and hunger; but he takes various shapes, just as fire, when it is mingled with spices, is named according to the savor of each" (Heraclitus, fragment 67), (available at http://www.heraclitusfragments.com/files/e. html). See Samuel Shkolnikov, *History of Greek Philosophy: The Pre-Socratics* (Tel Aviv: Yahdav, 1981) [Hebrew].

propounded the theory of "coincidence of opposites" (*coincidentia oppositorum*) and the idea that "in the absolute, the rule of contradiction is cancelled)"[57]—and of the Italian humanist Pico della Mirandola (1463–1494),[58] who maintained that "truth incorporates a large number of true claims, and every system or school therefore expresses a different specific aspect of that same universal truth."[59]

Here we will not trace the distinctions between the Jewish-kabbalistic doctrine of Unity of Opposites and its parallels[60]—but we must not lose sight of their profound interconnections. That said, these perspectives have been supplanted by the "principle of contradiction" of Aristotelian logic, which dominates cultural and political discourse. In this sense, the idea that the unity of opposites can provide a platform for political discourse remains unique.

The Unity of Opposites argues that multifacetedness is essential and remains committed to uncovering the plurality of the truth in every situation; however, it is not to be mistaken for the liberal doctrine of pluralism. While pluralism seeks to multiply legitimate points of view, the Unity of Opposites sees the world in its inherent variety as a One that no individual or group can evaluate. It is therefore resistant to the legal or political decision that forces each side of a conflict to single out the Other. That resistance flows from the religious-kabbalistic premise that "no place is void of Him";[61] nothing lacks a divine presence, and the divine will is embodied in everything. This approach calls into question the legal absolutes about good and evil and allows everything that exists to play a role in the self-redemptive machinery of history. At the same time, its recognition of contradictions means there is a need to maintain the various structures that distinguish between opposites and to forge a legal hierarchy that rejects the bad and affirms the good. The system is therefore paradoxically open-minded to an extent that defies the defining and narrowing mechanisms of logical thought. All the same—and this is crucial—when one considers the complexity of human character and of social groups, the paradox of the Unity of Opposites is familiar. It resonates with our experience of ourselves and with our emotions, which are repressed by automatic interactions created by conventional political structures in which these have no place.

57   Ibid.

58   Ben Zion Bokser, *From the World of the Cabbalah* (New York: Philosophical Library, 1954), 81–83, 199.

59   Tamar Ross, "Miracle as another Dimension in the Thought of Maharal," *Daat* 17 (1986): 95, n. 77.

60   See Avinoam Rosenak, "Modernity and Religion: New Studies through the Light of the Unity of Opposites," in *Rabbinic Theology and Jewish: Intellectual History—The Great Rabbi Loew of Prague*, ed. Meir Sleider (New York: Routledge), 145–146.

61   *Tiqqunei zohar* §56, 122b.

A particularistic cultural community that is sensitive to the Unity of Opposites is called upon to live a dual life on two parallel planes. On the one hand, it maintains its faith in the superiority of good over evil, as implied by its teachings and cultural identity and by the understanding of reality that these generate. On that plane, there is not the slightest affinity with relativism. But in the same breath, and not merely as a matter of show, it will honor other cultural systems that it regards as erroneous and flawed but whose very being expresses the divine will and whose continued existence is essential to the maintenance of an overall balance that no person controls.[62] The existence of other cultural systems is necessary for God's perfect manifestation in the world. Again, a paradox: the recognition that there are other doctrines and perceptions that contradict one's worldview does nothing to undermine the particularistic truth that one affirms, because the struggle for that truth is understood as maintaining a balance rather than destroying it. It is this capacity to see the inherent value of illegitimate points of view that distinguishes the Unity of Opposites from even the most radical forms of pluralism.

The political expression of this paradoxical system, it seems to us, can be found in halakha—perhaps a surprising observation, given halakha's image as an invariant normative system. But the paradox we have outlined stands at the very foundation of halakhic terminology, both in its encompassing of contradictions as a theoretical matter and in its polyphonic forms of practical implementation.

A mishnah that reports the dispute between the schools of Hillel and of Shammai is the *locus classicus* of this paradox. It states: "For three years, the school of Shammai and the school of Hillel disagreed. These said the halakha accords with our opinion, and these said the halakha accords with our opinion. A [divine] voice called out and declared: these and those [that is, both] are the words of the living God, but the halakha accords with the opinion of the school of Hillel" (B *Eruvin* 13b).

A halakhic decision is reached, but the divine voice affords legitimacy to both contradictory sides. Again, we are not reading this text as pluralistic. The conflicting points of view are not both true. In their combined paradoxical unity, they assume theological meaning as the words of the living God. The Maharal

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62 This mental state differs from a pluralism that maintains equanimity in the face of diverse truths because one has lost the ability to make truth claims. See Roger Trigg, *Religion in Public Life: Must Faith be Privatized?* (Oxford: Oxford University Press, 2007), 1. On the difference between the latter stance and the Jewish view, see Edward Halper, "Judaism and the Liberal State," in *On Liberty: Jewish Philosophical Perspective*, ed. Daniel H. Frank (Richmond, Surrey: Curzon, 1999), 63–81; John Hick, "Religious Pluralism and Salvation," in *The Philosophical Challenge of Religious Diversity*, ed. Kevin Meeker and Philip Quinn (New York: Oxford University Press, 2000), 54–66. See also Sakal, *Religion and Liberalism*, 17–18 (above n. 3).

deals extensively with this theoretical paradox in halakha in his remarks on the links between halakha and aggadah.[63] In the halakhic context, he explains:

> There is no reason to wonder how it is possible for both contradictory sides of the argument to be sustained, for that poses no difficulty. Even if the dispute were to be resolved in the sense that people considered the various opinions and decided the halakha in accord with one of them, which would in no way mean that the other position would not endure; for God, blessed be He, did not put an end to the dispute. For the explanation of "it will not endure" [the fate of a dispute that is not for the sake of Heaven, in contrast to a dispute that is for the sake of Heaven, which will be sustained] is that it will not be sustained by God, blessed be He. *And regarding the dispute between the school of Shammai and the school of Hillel, even though the [heavenly] voice declared the halakha to be decided in accord with the School of Hillel, it was not because dispute is disapproved that the voice put an end to it. [On the contrary,] this dispute is deeply appreciated, [and the voice issued its ruling] only to teach that halakha, for they wanted to know what the halakha was; but the voice also said "these and those are the words of the living God,"* and was happy to leave the dispute unresolved.[64]

A decision, then, is a low-level political necessity. It is made, but it does not discard the opposing view. On the contrary, contradictions must survive the decision so that both options can continue to reflect a system in which expressing through law the words of the living God is an operative value. Even the view that is rejected (as a matter of practice) incorporates the word of God;[65] in some circumstances it

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63   Maharal, *Be'er ha-golah* (London: L. Honig and Sons, 1955-1964), vol. 6, 135; Avinoam Rosenak, "Unity of Opposites in the Teachings of Maharal—A Study of His Writings and Their Impact on Jewish Thought," in *Maharal Anthology*, ed. Elchanan Reiner (Jerusalem: Shazar Center, forthcoming) [Hebrew].

64   Maharal, *Derekh hayyim* (Bene Beraq: Yahadut, 1980), ch. 5, 157–158, (emphasis added). In the first volume of *Be'er ha-golah*, Maharal offers a different interpretation, explaining that the dispute between the school of Hillel and the school of Shammai was unique, in that it truly lacked resolution and neither position was found superior to the other. What he says there is not at odds with our position here, however, for even where a disagreement is resolved on the grounds that one position has more truth than the other, this does not undermine the importance of the truth in the rejected position. See Maharal, *Be'er ha-golah*, vol. 1, 20, s.v. *u-li-fe`amim ha-behinot shavim le-gamrei*."

65   "Even though with respect to *halakha*—the manner in which a man should act—they are opposites, and both cannot be practiced, still both [views] and the reasons for them are

may do so even more than the view that prevailed. In the Maharal's theory, these rabbinic opinions belong to unique system of debate that—without celebrating the resolution of difference—is capable of comprehending the Unity of Opposites.[66]

In this approach, human rights are grounded in the essential need for the other's position to exist. That requirement is rooted in metaphysics or faith and does not contradict the need for concrete political deliberations to produce a decision. But the decision, in contrast to its image in the political sphere, is merely a practical need—a need that is not repugnant, inasmuch as it is required by the realities of life, but that, nevertheless, is reductionist and misses what is really important. Decision-making and arbitrariness are not ideals; they are, respectively, necessary and tragic moments—polar opposites that must listen to each other. The same system that requires making a decision also requires the continued resonance of the rejected point of view. The justice it embodies must continue to be made visible. Halakhah, both from the ideal perspective of "these and those are the words of the living God" and from the perspective of the canonic halakhic corpus, based on the Mishnah and Talmud, strives to create a tapestry of connected and conflicting points of view that makes it possible to perpetuate contradictions even after necessary choices are made.

We believe that this understanding allows us to portray halakha as a political system that can accomplish the practical outcomes of decision-making but embeds them in an entirely different dynamic of discourse, in which the power applied is not that of the ego, but of the system that contains all opposites. This power is the theological heart of halakha. This system creates a politics in which polyphony is not only built in to genre of writing that dominates the classical Jewish canon of legal texts, but is also part of the way in which the system operates. Even a halakhic decision is not unambiguous, given the multiple halakhic voices and communities whose leaders have the authority to define the halakha and pass it on to their faithful followers who look to them for guidance. Halakhic polyphony supports the coexistence of contradictory decisions within a political structure. Applying this structure to the running of a modern state is difficult, but the challenge is worth accepting.

from God, Blessed be He, Who encompasses all the opposites. And if he learned both opinions, he has learned the Torah, for both are from the mouth of God, may He be blessed, both the opinion that invalidates and the one that validates, and when we rule halakhically, it is merely practical halakha, teaching how a person should act" (Maharal, *Derekh ha-hayyim* [above n. 64], ch. 5, 259).

66 *Be'er ha-golah*, vol. 1, 20; vol. 4, 56; *Tif'eret yisra'el*, ch. 11, 40; G*evurot ha-shem*, ch. 67, 309–313; *Gur aryeh al vayiqra*, 8:28, 55.

On the Open Personality

The feasibility of encompassing contradictions and maintaining dialogue is based on the structure of an open personality. To explain this, we will use William James's terminology.[67]

James differentiates between people with a "tough-minded" personality and people with a "tender-minded" or open personality. The former see the world as a wicked, cruel place, not conducive to trust. They are usually suspicious and shy away from connecting to others; they see loving relationships as unnecessary and inherently risky.

People with an open personality, in contrast, learn to be trusting and to see the world as welcoming, understandable, reasonable, and friendly. They turn to others with good will and love. Though they may be naïve, they are unlikely to be so, for when they shape their open personalities they must recognize that the world is a difficult place, that trust is not always warranted, and that there is a risk of illusions being burst.

The construction of a halakhic politics of the Unity of Opposites, which would allow a different understanding of human rights and the resolution of clashes and confrontations between conflicting groups, requires more than a redefinition of the political and an understanding of the limitations of the structure that Schmitt and Heidegger described and of the harm it has caused. It entails also— and perhaps mainly—a softening of the political persona that current political modes of discourse tend to harden. This softening allows for levels of cynicism to drop and for the degrees of sincerity to rise. This is an educational project of supreme importance that, in its traditional sense, was accomplished through training in the intellectual agility of Torah study. However it is accomplished, the presence of a softer persona in the political process and the construction of a setting that rewards and acknowledges the skills of empathy and compassion are essential to the facilitation of an alternative experience of how adversity may be dealt with in the public sphere. With these preconditions in place, it becomes possible to conceive of a reality in which political concerns are worked out in a profound interpersonal dialogue that allows "open space" for the participants to listen to one another in a manner that is neither automatic nor confrontational. The firmness of identity that comes from self-attentive listening (listening to the other while paying attention to my own automatic reactions as I do) dissipates the threat posed by the other and opens the door to empathy with those with

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67 William James, *Pragmatism and the Meaning of Truth* (Cambridge, MA: Harvard University Press, 1909; repr. 1975), 12–15.

whom one differs. This makes no demand on my point of view, which need not be compromised in any way. Nor must the setting in which this takes place be thought of in neutral terms. On the contrary, it is the absolute oneness posited by the Unity of Opposites that is, ultimately, being maintained, not by agreement but by attention and interaction. The oneness is achieved by speaking to those who are open to listening and listening to those who are open to speaking. This is a genuine encounter in which the power struggle of political advantage is cast aside and the constraints on discourse that this struggle enforces are jettisoned. This does not mean that all participants in the dialogue must be of similar temperaments. For one thing, it is certain that not every person who lacks an open personality falls into the trap of automatic discourse. But the dialogic project has, needs, and requires certain skills that, as it proceeds, must be cultivated, learned, and refined. The project is not only political, moral, and dynamic; it is educational as well.

It now becomes clear why the Talmud rules for the school of Hillel. Their virtue is not simply their implicit willingness to accept the polyphony of the rabbinic discourse. Neither need we assume that their point of view was somehow more correct. Their advantage was their enthusiasm for the theological horizon that a dynamic of empathetic interaction brings into view:

Inasmuch as "these and those are the words of the living God," why did the school of Hillel merit having the halakha determined in accordance with their view? Because they were cordial and humble and taught the school of Shammai's words along with their own. They even placed the school of Shammai's words before their own, as we have learned [M *Sukkah* 2:7]: If one had his head and most of his body within the sukkah but his table within the house, the school of Shammai say his act is invalid [that is, rule that he does not fulfill the obligation to eat in the sukkah] and the School of Hillel say it is valid. The school of Hillel said to the school of Shammai: "Was there not an incident in which the elders of the school of Shammai and the elders of the school of Hillel went to visit Rabbi Yohanan b. ha-Horanit and found him sitting with his head and most of his body within the sukkah and his table within his house?" The school of Shammai said to them: "Can we adduce a proof from that? In fact they said to him, 'if that was your practice, you have never in your life fulfilled the precept of the sukkah!'" This teaches you that one who humbles himself is elevated by the Holy One blessed be He, and one who elevates himself is humbled by the Holy One blessed be He. If one seeks out greatness, greatness flees from him; and if one flees from greatness, it seeks him out. If one strives frantically to achieve success by some particular time, the time evades him; but if one does not strive frantically, he is ultimately successful (B *Eruvin* 13b).

It was the open personality of Hillel and the school of Hillel that give them their advantage here,[68] whereas the intransigence of the school of Shammai made them less worthy—notwithstanding what may have been their greater halakhic acuity (B *Eruvin* 14a).[69]

We cannot know what the social and cultural landscape will look like in the future if these ideas are expanded and given a place in the political arena. But we believe that the questions considered here with respect to such matters as "religion's right to be protected," "the price it should pay for that protection," or "the threat that may be posed by religion" would become less acute. A political structure that calls to mind an open study hall more than a legislative chamber would make it easier to demonstrate how faith facilitates profound insights regarding the rights of different communities. It would create a larger public space in which diverse voices can be heard.[70] That study hall is one in which one can find "scholars seated in groups and engaging in Torah. These declare something impure and those declare it pure; these forbid something and those permit it; these invalidate and those validate."[71] But the heart of this perspective amounts to a political project that seeks to maintain diversity of all kinds so that it can be heard and so that the multiplicity of humanity, which includes the struggles for dominance between groups, can become known. In the words of the Midrash:

If a person should say, "given that these declare something impure and those declare it pure, these forbid and those permit, these invalidate and those validate, how can I continue to learn Torah?" The response is that they were all given by a single shepherd. One God gave them, and one agent stated them in His name, may He be blessed. As it is written (Ex. 20:1), "God spoke all these words"—so, too, should you make your ear receptive and acquire a listening heart, so you may hear the words of those who declare impure and those who declare pure, those who forbid and those who permit, those who invalidate and those who validate.[72]

The key aspects of our analysis—the critique of political philosophy and the association of dialogic-dynamics with the unity of opposites—are all interconnected. In our view, we cannot realize our (the political-halakhic)

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68   See B *Shabbat* 31a; see also B *Gittin* 56a on the humility of R. Zekhariah b. Avkolos.

69   And see Maharal's explanation for the acceptance of the school of Hillel's opinion over that of the school of Shammai. Maharal, *Be'er ha-golah*, vol. 5, ch. 1, s.v. *u-ke-khol ha-devarim ha-eileh ameru hazal*.

70   For an effort to examine this complexity with legal tools, see Ariel Rosen-Zvi, "'A Jewish and Democratic State': Spiritual Paternalism, Alienation, and Symbiosis—Can the Circle be Squared?" *Iyyunei Mishpat* 19 (1995), 498–499 [Hebrew]. Rosen-Zvi attempts to avoid the need to make a decision even when a legal decision is required.

71   *Num. Rabbah* 14:4.

72   Ibid.

conclusion and understand how human rights function without taking account of the insights found in the first two sections (the philosophical-political and the dynamic). This project perhaps embodies Zionism's classical aspirations: the reconstruction of Jewish politics as the legal and political ethos of the newborn Jewish state.