

# Towards a Jewish Theology of Democratic Citizenship

**W**e are, as Jews, called toward exemplary liberal-democratic citizenship wherever and insofar we are blessed with the opportunity to do so. That is, to the extent that we engage in political activity in places like the United States or Israel, we are as Jews called not only to do so in pursuit of just outcomes, but to do so in such a way as to strengthen the interpersonal bonds which make effective liberal-democratic governance—governance by and for the people—possible. What this requires is the manifest, willing acceptance of some measure of cost, risk, or sacrifice with respect to our own parochial Jewish interests for the sake of the common democratic good. It requires hearing and honoring those voices we are inclined to ignore, renouncing strategic manipulation in favor of honest, good-faith dialogue, and proactively cultivating a culture in which such dialogue is possible, even when doing so makes us less likely to obtain everything we want. We strengthen the bonds of democratic community by exhibiting our depth of commitment to it, and we exhibit our depth of commitment through the medium of enacted vulnerability.

By way of introduction, I want to address a pair of hesitations. The first involves a relative of a problem made famous by Bernard Williams. While it is surely possible to offer strong moral justifications for a husband's choosing to rescue his wife rather than a stranger from drowning, for the husband to engage in such reasoning, Williams says, is to engage in "one thought too many" (just imagine what his wife would think while he was busy deliberating). Similarly, it seems to me that the responsibilities I aim to put forward are and ought to be fundamentally a matter of basic *menshlichkeit*, and so I worry that an effort to offer arguments for them may actually subvert their standing, evincing doubt and inviting contestation where there should be only conviction and consensus. Efforts to marshal Jewish texts in support of these ideas, moreover, especially where requiring elaborate analysis, may seem to engender the Talmudic rejoinder "*lama li kra—sevara hi*" ("For what do I need a scriptural verse—it is simple logic!"). It is one thing to express matters of basic decency with reference to traditional proverbs and the like, but it is another

to offer 12,000 words of Talmudic argumentation in support of what is or should be obvious.

The reality is, however, that these responsibilities are in fact contested by many thoughtful and conscientious people. It is entirely common to think that politics is never anything but war by other means, and so it is at best foolish to leave any leverage on the table; the only question is how much we can get, and how to go about getting it. Jews, after millennia of political precariousness and reliance for their very survival on currying favor with the authorities of the day, are perhaps particularly conditioned to think in this transactionalist way. Many, moreover, argue that in a democracy the best way to ensure the ideal outcome for all parties is precisely for each party to fight their hardest and then let the chips fall where they may. Finally and most importantly, the work of democracy is both highly strenuous and often unclear in its demands. Even those of us, therefore, who are the most committed to this work in principle will often stumble and fall short, and so will reasonably look for both encouragement and guidance. This is less like the snap, yes-or-no decision to rescue one's drowning spouse than the long-term, open-ended project of a marriage through the course of life; it is a mistake to think such a project does not call for attention and reflective investment. And once the need for this investment is recognized, it is a given that those of us who aspire to have Torah on our lips day and night will make Torah learning a central, if not exclusive, engine of this work.

This leads to a corollary, if contrasting hesitation: that what I am really doing is putting forward contemporary Western morality with argumentation from halakhic sources as post-hoc window dressing. What I will say first is that if the question is whether the arguments I offer are sound, then the question should be decided by the arguments' merits—their alleged motivation notwithstanding, they are either sound or not. I do not pretend, however, that my arguments are beyond rebuttal by a committed skeptic, and I do confess the improbability of my having come to them without having been born in the time and place I was born. My holding these views is in fact an artifact of my swallowing certain strands of contemporary morality.

But this is no objection in itself. As Jews we must take responsibility for discerning our moral obligations as such.<sup>1</sup> Thus, what matters is not how I came to believe the moral propositions in question, but whether or not those propositions are true. That is itself all the more reason to be

1 This point is made forcefully by R. Avraham Grodzinski (1884–1944) in his “*Torat ha-Sekhel ha-Enoshi*” in *Torat Avraham* (Jerusalem, 1963). He argues that ignorance with respect to rational-moral law is in fact more severe a matter than ignorance with respect to statutory halakha (see *ibid.*, section 4).

critical with regard to the prevailing cultural morality—we are responsible for getting it right. We can take such care in no small part by forming our moral viewpoints in and through our study of Torah. My aim in this article, then, is not to show that the Torah's views match those of contemporary liberal-democratic morality. Rather, it is to show that important tenets of contemporary liberal-democratic morality are true, and that we can arrive at this understanding in no small part through our study of Torah.

A few final qualifications as to scope. My focus here is not on the well-trodden, vital questions of the legitimacy of democratic governance in a Jewish state or the ideal relation between specific halakhic norms and the particulars of public policy.<sup>2</sup> Even if the ideal form of Jewish government turns out to be absolutist rule by a divinely-designated monarch, for instance, those of us living in democracies would still need to discern our moral responsibilities in our democratic context. Likewise, I am not concerned in this article with the full suite of responsibilities we bear as Jews in a democratic society.<sup>3</sup> It is my view, for instance, that we are responsible for working toward the redress of any and all injustices in such societies, but that is not my topic here. My focus, rather, is specifically on our responsibilities toward the project of democratic community.

In section I, I examine the laws governing mandatory contributions toward vital public-infrastructure projects, offering an interpretation of these laws in “contractualist” terms. As a matter of interpersonal respect, I argue, every citizen of a polity is obligated to contribute toward any project that no one can reasonably reject. In section II, I develop this halakhic-contractualist model further with respect to public projects and proposals subject to reasonable disagreement. I dilate on Maharam of Rothenberg's prescription for democratic deliberation predicated on an oath to “speak for the sake of heaven and the betterment of the city,” and spell out the implications of this prescription for contemporary democratic deliberation. In section III, I suggest that “the sheer value of heeding each other” (*Bava Batra* 106b) grounds our duty to heed the results of democratic deliberation. I show this to involve the fair and mutual coordination of risks and benefits in cooperative enterprise. Section IV extends this argument through an analysis of the laws governing *asmakhta* (contracts predicated on uncertain eventualities),

2 For helpful discussions including extensive references to primary sources, see Gerald J. Blidstein, “Halakhah and Democracy,” *TRADITION* 32:1 (1997), 6–39; Aviezer Ravitzky, “Is a Halakhic State Possible? The Paradox of Jewish Theocracy,” *Israel Affairs* 11:1 (2005), 137–164.

3 See the essays collected in *Tikkun Olam: Social Responsibility in Jewish Law and Thought*, eds. David Shatz, Chaim I. Waxman, Nathan J. Diament (Jason Aaronson, 1997).

suggesting that democratic deliberation will be binding only where each party to the deliberation is equally well-positioned to secure their interests, and only where the true probability of success in securing their interests is transparent to each party. I briefly consider the implications of these constraints for contemporary American democracy. In section V, I argue that the same principles are the basis for the concept of *dina de-malkhuta dina* (“the law of the kingdom is law”). Laws are valid only if their imposition cannot be reasonably rejected by any citizen subject to them. It follows that in a democratic context, we have a responsibility to ensure that laws are determined exclusively through democratic deliberation constrained by the principles described above. In the conclusion, I reflect briefly on the implications of all of this for our responsibilities, as Jews, in the course of our political engagement.

The bottom line: Halakha regards the work of politics as fundamentally about realizing relations of respect and accountability between all affected persons. We accomplish this by demanding that our representatives take care to work exclusively “for the sake of heaven and the betterment of the city,” and we make that demand by living this political ideal ourselves.

## I. Introducing Halakhic Contractualism

There are, according to accepted halakha, certain public resources so vital to the common good that no citizen potentially benefiting from those resources can refuse contribution toward their procurement. Rather, as the Tosefta puts it, citizens can “compel one another” (*Bava Metzia* 11:12) to contribute. Specific examples include social-welfare funds (see *Shulhan Arukh, Yoreh De’ah* 248:1), city walls and gates for security (see *Shulhan Arukh, Hoshen Mishpat* 163:1), a communal synagogue (*ibid.*), and Torah and other scriptural scrolls as requisite for public liturgical use (*ibid.*), but as Rema stresses, this is true for “all needs of the city” (*ibid.*). This principle applies not only in the context of a city but also in the smaller context of a co-owned courtyard—again, no individual party can refuse contribution toward any “great need” on the part of the courtyard collective (*Shulhan Arukh, Hoshen Mishpat* 161:1). Where there is a community of persons on a scale larger than that of a city, the principle presumably applies on that scale as well. Citizens of Minneapolis could not refuse contribution to either Minnesota or United States infrastructure projects of potential benefit to them. And insofar as political relations obtain between individuals across the globe, whether through international bodies or other channels, the principle should require universal contribution toward addressing all needs of the world.

Importantly, the principle applies even where most of the citizenry objects to the infrastructure project in question: “Even a minority can force the hand of a majority,” Rema clarifies (*Shulhan Arukh, Hoshen Mishpat* 163:1). This appears anomalous, as even an authoritative rabbinic body cannot impose an edict which is unacceptable to a majority of the population (*Bava Batra* 60b). The citizenry, as a collective, holds a right of refusal against rabbinic edicts, and majority support is adequate to exercise this right. Why, then, can a minority impose its will on the majority with respect to vital infrastructure projects? One possibility is that contribution toward these projects is simply mandatory upon all citizens regardless of anyone’s preferences, such that it is not the minority, but the law itself, which overrules the majority. But while certain of these projects may be mandatory in this sense—the building of a synagogue is one example—there is no record in rabbinic law of a preference-independent obligation to construct a wall around a courtyard, for instance, and yet the construction of a synagogue and a courtyard wall are presented as equivalent in this regard. It also does not appear to be the case that projects of this type are mandatory where no one demands them. If no one wants a wall—perhaps no one judges the project worth the expense—no one is obligated to build a wall. Finally, the formulation of the principle as “The citizens can compel one another” to support these projects, as opposed to, for instance, “One is obligated to support these projects,” suggests the ground of the resulting obligation is a function of the citizens’ respective wills rather than the law as such. I am obligated to contribute because you, my fellow citizen, want me to.

I suggest that the work *Hazal* are doing here is best understood in terms of the “contractualist” framework developed by thinkers like T.M. Scanlon and John Rawls. While a full presentation of this school would be prohibitively burdensome, I can offer a brief, stylized account. Contractualists start with the basic idea that persons are morally privileged entities; in Rawls’ formulation, persons are, unlike mere things, “self-originating sources of valid claims.”<sup>4</sup> Suppose I awake in a clearing and see, among other things, both a rock and you, a person. Knowing nothing else about your identity and our relative social standing, I know that whereas I may kick the rock for the fun of it, I may not kick you for the fun of it. You have a valid claim against me to not be kicked, and if I do kick you, you have a valid claim for some or other form of restitution. Because

4 See John Rawls, “Kantian Constructivism in Moral Theory,” *The Journal of Philosophy* 77:9 (September 1980), 515–572. As he spells out the concept, to say that persons are self-originating sources of valid claims is to say that “their claims carry weight on their own without being derived from prior duties or obligations owed to society or to other persons, or, finally, as derived from, or assigned to, their particular social roles” (543).

you are a person, and not a rock, I owe it to you to honor these claims as valid. I am in this sense *accountable* to you—you can rightly hold me to account when I wrong you, and I am generally responsible for treating you only in ways for which I could offer an adequate account justifying my treatment of you. Where my account is inadequate, I have failed to respect you as a person.

But of course not all claims you might make are valid. If you demand that I refrain from breathing because the sound of it annoys you, I need not honor that demand, for it is plainly not valid. What distinguishes valid from invalid claims you might make upon me? The contractualist thought is that this determination is a function of a kind of hypothetical, idealized negotiation. To know what I do and don't owe you, I ask what rules of action both of us would agree to. Any rule which either of us could reasonably reject must be rejected. If I abide by the resulting rules, I will treat you only in ways which you would, insofar as you are being reasonable, agree are fair. In constraining my behavior toward you in this way, I show my commitment to honoring your standing as a person—an entity to whom I am accountable for my behavior. If, by contrast, I act in accordance with rules which you reasonably reject, I fail to respect you as a person, for I fail to justify my behavior to *you*.

John Rawls applies this idea in the political realm where the question is far more complex: Here we need to know not only how we all ought to treat each other one on one, but how we ought to shape our institutions and distribute our goods such that we are all honored as persons. In his landmark *A Theory of Justice*, Rawls famously introduces the idea of the “veil of ignorance.” To know what a just social arrangement would look like under a given set of conditions, I ask what arrangement a group of rational bargainers would agree to if none of them knew anything about their ultimate place in the arrangement. That is, if they were ignorant of their own particular identities, gender, race, support networks, or even their talents. Since each bargainer knows that he or she might end up on the bottom of the social order, each person will be motivated to ensure that the arrangement is maximally favorable to the least advantaged. The result, according to Rawls, would be an arrangement on which the only inequalities allowed would be those of benefit to the least advantaged by circumstance.

Every aspect of this account is widely and vigorously disputed, but for our purposes it is not the details but the underlying ideas that matter. What I owe to my fellow citizens is to support a social arrangement that is fair to all affected. Just as I should not do anything to you for which I cannot offer you an adequate justification, I should not support any public policy affecting you for which I cannot offer you an adequate

justification. I will be able to offer you a justification for a given policy only where it is one you cannot reasonably reject. Whether or not the particular procedure put forward in *A Theory of Justice* is the right one, then, I will need some kind of procedure for asking whether any given policy is fair to *everyone* involved, particularly those on whom the policy will impose the greatest burden. The resulting policy will be fair when it is judged that no one could reasonably reject it. That is not to say that the policy need be what everyone most wants—given the plurality of interests and perspectives in any society, the need for compromise and sacrifice is inevitable. The question is whether the imposition of a given sacrifice is reasonable, either because the sacrifice promises countervailing goods in this case for everyone involved, or because this party's sacrifice now will be requited by another party's sacrifice in another case, and the aggregate results over time will be to the benefit of all involved. A policy meeting these conditions will be *legitimate*—no one can reasonably regard its imposition as tyranny—and someone supporting it will appropriately honor the personhood of all involved. Governments ordered toward meeting these conditions for its policies, including policies regarding the apportionment of public offices, will generally qualify as liberal democracies.

Return now to our public infrastructure projects. With regard to a city wall (in the Talmud's historical context), for instance, the contractualist interpretation of the law would be that, while many citizens may not want a wall, the need met by a wall is so pressing and universal that no one could reasonably regard the demand for one as unreasonable. Those desiring a wall can thus demand that those opposed make the sacrifice of contributing toward a project from which they will benefit as well. It is, however, reasonable to demand that the amount a given citizen is required to pay be proportional to the degree of benefit received—why should I, who benefits less, have to contribute the same amount as someone who benefits more? And so, indeed, the Talmud discusses the right criteria for assessing the relative benefit of an individual city-dweller from a wall (*Bava Batra* 7b). Importantly, Rabbenu Tam (see *Tosafot ad loc.*, s.v. *le-fi kiruv*) adds the further principle that those with greater capacity to pay should be expected to pay more than those with less, even where those with less are (as one would expect in an economically stratified city) closer to the edge of the city and so in greater need of protection from the wall. Even where they have less need for the project, the wealthy cannot reasonably refuse to pay their fair share, and their fair share is larger than that of the poor.

It is important, however, that where an individual or class of citizens do not benefit from the project *at all*, they can indeed reasonably refuse

to contribute. In this instance, while the matter appears to have been contested by both political and rabbinic authorities, the consensus view of the Talmud is that rabbinic scholars “do not require protection” and so cannot be rightly expected to contribute toward the construction of a wall (*Bava Batra* 7b). Where I am confident that I have no need for the resource in question, it is, all things being equal, reasonable for me to reject the demand that I contribute toward its procurement. Even where I do indeed benefit from the resource, moreover, I may reasonably object if I can offer reasons why the project would represent countervailing disvalue for me. In the context of an alleyway, any resident can object not only to their contributing to the construction of doors at the alleyway entrance but to the construction of the doors per se, as they can say “I want to enter with my bundle all the way to my own door” (*Shulhan Arukh, Hoshen Mishpat* 162:1). Despite the value in terms of security all presumably agree would be added by the doors, any individual resident can object to the project on the grounds that it would rob them of the convenience of unimpeded passage. The other neighbors may argue that this concern is unreasonable in face of their common security needs, but in this case the halakha determines that the resident can indeed reasonably reject the proposal since it is bad on the whole *for him*.

The fact that a cost is involved to the individual resident cannot be the only factor, however, as in all cases where contributions are required for a project, the benefit of the project will arguably be outweighed by the subjective disvalue of the imposed cost. It may be that in the case of the alleyway the security needs are relatively low, since the individual courtyards nestled within the alleyway can have their own security structures protecting the households within, and with regard to the courtyard security-structures there is no record of an analogous rule justifying quashing the project at the demand of a solitary resident. It also may be that doors at an alleyway entrance are not a standard feature, and so a resident has a particularly reasonable expectation of conveniently doorless alleyway entry. In any case it is clear that in justifying a policy it is not enough to consider who benefits, and it is not enough to consider the magnitude of the benefit overall. We must also consider whether, on account of the costs to specific individuals, those individuals can reasonably reject the policy, even as a matter of subjective preference. Where they can, and where in fact they do object, imposing the policy upon them constitutes an illicit violation of their standing as persons.

To summarize: the right of some citizens to compel all others to contribute toward certain public-infrastructure projects but not others is explained on contractualist grounds. I may compel my fellow citizens to contribute toward all and only those projects which they cannot

reasonably reject. The proportioning of mandatory contributions to projected benefits, as well as the exemption of those not benefiting at all, are likewise explained in these terms. We turn now to the question of how we might reasonably reach pragmatic consensus on public-policy proposals subject to reasonable disagreement.

## II. Democratic Deliberation as a Solution for Reasonable Disagreement

The Talmud records that “The citizens of a city may regulate with regards to weights and measures, commodity prices, and wages, and may impose penalties regarding their determinations” (*Bava Batra* 8b). The citizenry holds broad license to regulate market activities and to punish deviance from its regulations even where, as Rashi notes, their determinations differ from, or are simply unsupported by, standard Torah law (s.v. *le-hasia al kitzatam*). The question that emerges is what constitutes the citizenry in this context. According to Rabbenu Tam, wherever a regulation involves potential “loss to one and profit for the other,” we require full unanimity of the citizenry in order to authorize the regulation (as quoted in Mordekhai to *Bava Batra* 481). The power, put forward in the passage above, to impose penalties obtains only with respect to violations of regulations previously agreed to by unanimous consent, including, of course, the consent of the party to be penalized. The legitimacy of the penalty requires that “all agreed together, him among them, and then he violated the regulation” (idem, 482). On Rabbenu Tam’s view, every individual citizen has the right to refuse subjection to any public policy imposing a cost upon them. Phrased from the other perspective, we as citizens may not support any policy which imposes a cost upon any individual citizen unless that citizen consents. In contractualist language, legitimate government must honor the standing of every individual citizen as a self-originating source of valid claims.

The pragmatic problem with this view is obvious: public policy decisions need to be made, and unanimity on political matters is hard to come by. There is often simply no way to avoid imposing any cost on any citizen, and as Hatam Sofer puts it, “If we wait until everyone agrees, no issue will ever be resolved, and the result will be the destruction of the public” (Responso *Hatam Sofer, Hoshen Mishpat* 116). And so indeed we find Ra’avya insisting, against the view of Rabbenu Tam, that majority rule is sufficient to authorize regulations (see Mordekhai, *Bava Batra* 481). Ra’avya maintains that we are to be prepared, as a matter of public exigency, to compromise our commitment to liberal-democratic legitimacy in imposing a policy which some number of citizens can reasonably reject. Perhaps, though, the question is how we go about reaching the

majoritarian conclusion. Maharam addresses a case of “discord” where the community requesting his counsel “could not reach unanimity . . . this one says this and that one says that, and on account of their divided heart ‘the daily offering is nullified,’ justice is blighted, and there is neither truth nor peace in the city or in the entire kingdom following its lead.” He answers as follows:

It seems to me that there is cause to assemble all the tax-paying citizens, and for them to accept upon themselves a “blessing,” that each of them will express their opinion for the sake of heaven and the betterment of the city. And they should follow the majority, whether with regard to choosing leaders, appointing cantors, or establishing the public welfare fund . . . every public-policy matter should be executed on their authority as expressed. And if a minority dissents and refuses to comply with what is said, then either the majority or they whom the majority appoints in its stead have the authority to force and coerce them [the minority], whether through Jewish or gentile law, until they say “We desire [to comply]” (*Hagahot Maimoniyot, Sefer Kinyan, 27*).

Maharam is indeed emphatic that coercion of the minority by the majority can be justified, but that this justification is not automatic in any given case. What is required is not only a democratic process open to all taxpaying citizens, but a particular form of democratic deliberation involving two critical components. One is that every individual party to the deliberation “express their opinion for the sake of heaven and the betterment of the city.” The second is that every individual party to the deliberation publicly accept upon him or herself a “blessing” (a rabbinic euphemism for an oath backed by threat of a curse upon violation) *affirmatively committing* them to speaking only for the sake of heaven and the betterment of the city. I will consider each component in turn.

### **A: Speaking for the Sake of Heaven and the Betterment of the City**

What does it mean, in the context of a public policy debate, to express one’s views for the sake of heaven and for the betterment of the city? On any given issue, I may regard a certain outcome as in my best interest. The first step toward expressing my view for the sake of heaven, I suggest, is to consider—most prominently by way of listening—whether or not what is in my best interest is also in the best interest of my fellow citizens. Where I discern that my interests are indeed in conflict with others’, nothing here requires that I suppress my own interest entirely. Satisfying every citizen’s interest is the purpose of the exercise, and so, as a citizen myself,

my interests count as well. What I must do, however, is consider whether a given proposal is *fair* to all parties involved. That is, I must seek a resolution which, because each party's interests are duly considered and honored as best as possible under the circumstances, no party can reasonably reject. If I have discerned such a resolution, speaking for the sake of heaven and the betterment of the city will involve simply putting forward that resolution and recommending it on those grounds. If I have yet to discern such a resolution, then I ought to inquire as to the precise interests of my fellow citizens, encourage exploration of avenues toward compromise, and so on. I may, in addition, simply put forward my own interests and preferred resolution—these are, after all, legitimate and important data points for all to consider. Each of these interventions would plausibly qualify as speaking for the sake of heaven and the betterment of the city.

Here I must be wary of temptation, for there is more than one way to speak. Philosopher Jürgen Habermas distinguishes between what he calls “strategic” and “communicative” action.<sup>5</sup> When I speak to you strategically, I aim through my speech to secure a certain state of your mind—your agreement with my view on an issue, for instance—independently of or in active contravention of your autonomous rational faculties. A paradigm case is lying. If, wishing for you to believe that I am the sovereign prince of Nigeria, though I am not, I send you an e-mail stating that I am the sovereign prince of Nigeria (and won't you please wire me some money), I am in so doing undermining your rational pursuit of truth. Another important example in this context is demagoguery. I may, in seeking to persuade you to purchase the worthless product I'm hawking, speak such as to elicit your fears, inflame your passions, evoke nostalgic feelings, and so on toward the end of your buying my product, precisely without adequately critical, rational deliberation. In so doing I am treating you as a craftsman treats their materials—as an object to be manipulated for my ends—rather than as a person, as a means rather than an end.

When I speak communicatively, by contrast, I aim to secure your assent to a proposition through the exercise of your own rational faculties. I speak such as to empower you to see for yourself the truth I see already. I will thus speak only the truth, all things being equal, and will convey my thoughts such that the force of my words is nothing but the “unforced force of the better argument,”<sup>6</sup> rather than, for instance, the force of irrational fear. In restricting my speech to you in this way, I honor your standing as a person, rather than a thing.

5 See Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, trans. Thomas McCarthy (Beacon Press, 1981), esp. 273–337.

6 Habermas, *The Inclusion of the Other* (MIT Press, 1998), 37.

Habermas' view is often criticized on the grounds that the kinds of speech it allows are overly restrictive. Because humans are not robots, it follows that effective politics, even politics wholly in pursuit of justice, will require various forms of rhetoric and emotional appeal. Even without resolving this and related questions, however, the basic Habermasian distinction remains fruitful for our purposes. There are border cases, but we all know the difference between someone trying in good faith to generate mutual understanding and someone trying to take advantage of their audience. What I want to suggest is that the commitment to "express one's opinion for the sake of heaven and the betterment of the city" is well articulated in terms of the Habermasian commitment to communicative rather than strategic speech. Where my preferred resolution is not the ideal solution from the perspective of fairness, I will be tempted to speak *as if* my preferred resolution were the ideal for the community overall, offering superficially plausible but ultimately specious arguments, and perhaps also tying acceptance or rejection of these arguments with logically unrelated issues I know to be emotionally charged. Alternatively, I may simply attack my opponents as untrustworthy, disreputable, or otherwise noxious, not the kind of people whose side you'd want to be on, all the while hiding my own vested interests in my preferred outcome. Another approach would be to bypass the council deliberations through backroom coalition dealings, offering enough of my fellow citizens enough incentives to assemble a majority effectively negating the minority's interests. Where the groundwork has been laid and expectations successfully dimmed, I may not even need to do this in the backroom.

All these are familiar, even dominant, modes of politics in contemporary democratic contexts, and all these, I am arguing, are illicit under the commitment to speak one's opinion for the sake of heaven and the betterment of the city. I must, rather, speak plainly and transparently as to my own interests, and I must actively seek to balance my interests with those of my fellow citizens. Where they face difficulty in expressing their interests, I ought to come to their aid. When I offer arguments, I must believe in the validity of those arguments, and I must express them clearly and forthrightly such that they will convince only insofar as they are themselves convincing. This need not mean that I must renounce all rhetorical and emotional appeal, but these devices must be carefully tailored and moderated such as to sustain rather than subvert level-headed deliberation. I must not engage in *ad hominem* attacks or methods of "scoring points," and I must not subvert the deliberative process through coalition building, in backrooms or otherwise, at the expense of minority interests. Precisely that—what is ultimately just majoritarian domination—is central to the problem Maharam's deliberative prescription is meant to solve.

**B: The Oath**

The second component of Maharam's prescription is that the parties must not only conduct their deliberations in the manner specified, but must explicitly, publicly commit to doing so on solemn oath and under penalty of a curse. This is vital, because even if I am disposed to conduct myself in good faith, I may worry that my opponents will not. I may worry, that is, that I will be taken advantage of, and so I may feel compelled to defend my interests through the methods proscribed above. Given that all parties to the deliberation are themselves self-interested—and once again, there is nothing at all wrong with them each looking out for their own interests—for the deliberation to proceed for the sake of heaven and the betterment of the city it will be necessary to generate *trust*. I must know that if I speak plainly and transparently, and if I eschew manipulative means of persuasion, that you will do the same and vice versa.

It is hard to say to what extent Maharam's suggestion would have been effective in the time and culture to which it was addressed, and indeed it is hard to say what procedures are likely to be effective in any context. Genuinely cooperative commitment among humans is always a fragile proposition at best. Comprehensive cynicism is not warranted on this score, however. We know that trust is possible because we know that we resent its violation, and it makes no sense to blame anyone for doing something we have no expectation anyone would do otherwise. And the fact of the matter is that even in a context like that of the contemporary United States, genuine cooperation between opposing parties occurs on a substantial, even if steadily diminishing, basis. The point is that the available funds of trust on a given issue are a function of the parties' conduct, which is to say that there are ways in which the parties can conduct themselves such as to increase rather than diminish trust. The very fact that this trust has been diminished over time entails, at least in principle, that it can be increased as well. Anytime that I have an interest in a particular deliberative outcome and also manifestly have available to me means of securing that outcome other than good-faith deliberation, if I choose the path of good-faith deliberation I will fulfill my commitment to deliberation for the sake of heaven. In so doing, I give my fellow citizens rational grounds for granting me trust.

It is not enough to say that I am so committed—that is precisely what those least committed will say. What I must do, rather, is manifestly accept some sacrifice, or at least risk of sacrifice, to my own interests in pursuit of the public good. In any context in which I might have chosen strategically superior means but instead proceeded with good-faith deliberation, that is what I will have done, and so I will have contributed to the available

funds of trust, making it more possible for other parties to feel secure in reciprocating. This is true in the vaunted halls of Parliament, Congress, or the council at the city gates, and, in the context of representative democracies, it is true for ordinary citizens in the streets, around the water cooler, and online. Where I have the opportunity to score points, stoke and indulge indignation, or drown the dialogue in a stream of the latest talking points, and I instead engage in passionate but controlled conversation aimed at shared understanding, where I genuinely listen to and respond to the other side, retract or revise my points in light of my opponents' objections, and work to tailor my words such as to be hearable by the actual persons I aim to persuade rather than dunking on them to win social capital among those who share my views, I make clear that my aim is to cultivate a community of deliberation in pursuit of the public good. In so doing I contribute to the fund of public trust, making the dream of liberal-democratic community just a bit more real.

Rema, importantly, gives genuine deference to Rabbenu Tam's view that the public cannot impose policies rejected by any burdened parties, but ultimately seems to endorse any employment of public power enjoying longstanding precedent (*Hoshen Mishpat* 2:1). Politics need to get things done, and they always have. Rema does not quite resolve this tension, but what he does do in navigating it is to put forward Maharam's democratic prescription for "any community that cannot reach unanimity on account of differing opinions" (*Hoshen Mishpat* 163:1).

To summarize: where there is reasonable disagreement as to public policy, Maharam prescribes that disagreements be resolved through democratic deliberation in which each party is oath-bound to speak only for the sake of heaven and the betterment of the city. This entails, I argue, a commitment to communicative rather than strategic speech, and a second-order commitment to make that choice publicly manifest in one's political conduct. Where these conditions are adequately met by an adequate proportion of the citizenry, resolutions reached through deliberation will be reasonable to, and so legitimate for, all citizens. We turn now to the question of precisely why, that being so, such resolutions should be binding.

### III. The Ground of Democratic Obligation

It is important that the imperatives discussed in the previous section serve not only as binding within the halakhic system of government but also as its basis. Why, after all, should a citizen be bound by the determinations of a representative body? Why indeed should they be bound by a decision to which they were directly party, given the absence of a proper *kinyan* (formal mechanism of property or rights transfer) and the

well-known difficulties with effecting *kinyanim* with regard to uncertain (*asmakhta*) and not-yet-real (*davar she-lo ba le-olam*) eventualities? And why, in the end, should a dissenting citizen be bound by the decision of the majority? *Arukh ha-Shulhan* notes the problem inherent in holding citizens to merely verbal agreements, and offers the deflationary response that “All public matters are decided with words alone, as it is impossible for an entire community to make *kinyanim*” (*Hoshen Mishpat* 2:3). That is fair enough in identifying the need, but the question remains how and why that need can indeed be met by “words alone.”

There is an intriguing Talmudic model for this, however, noted as such already in the *Mordekhai* (*Bava Batra* 481). Here is the relevant passage in the Talmud:

It is taught in a *baraita* that Rabbi Yose says: When brothers divide, once the lot for one of them is drawn, they all acquire. What is the reason for this? Rabbi Elazar said: This is similar to the inauguration of *Eretz Yisrael*. Just as the inauguration was by lots, so too here, it is by drawing lots. If so, just as there, it was through a receptacle [in which the lots were placed] and the *Urim ve-Tumim*, so too here, through a receptacle and the *Urim ve-Tumim*. Rav Ashi said: Through the sheer value of their heeding each other they fully transfer ownership to each other (*Bava Batra* 106b).

The case is one of siblings dividing their collectively-owned estate. Suppose there are four brothers. The land is divided into four plots of equivalent value. It may be, however, that multiple brothers would prefer one or more plots in particular (perhaps there is a lakefront in play), such that they cannot reach unanimity as to who should receive which plot. The solution is to draw lots, with each brother blindly selecting the plot that will go to him. Now, according to R. Yose’s teaching, once the first brother—let us call him Reuven—draws the first lot, the acquisition is effected with respect to all of the brothers. On Rashbam’s interpretation what this means is that each brother is bound to respect Reuven’s acquisition of his plot (ad loc., s.v. *kanu kulam*). Even if, that is, either Reuven or the other brothers want to renege on the arrangement—perhaps one of them is disappointed at losing out on the lakefront plot—any of the parties can insist that the drawing be respected. (Obviously, the arrangement can be nullified if they all agree to do so.) Ra’avad, however, argues that the more compelling reading is that “they all acquire” means that the apportionment-by-lot-drawing arrangement is now binding on all parties, even with respect to the remaining land (see *Shita Mekubetzet*, ad loc.). That is, once Reuven has drawn his lot, none of the remaining brothers may refuse to apportion the remaining plots by way of lots. Once the

first has bound himself to the first results of the lot-drawing process, they are all bound by the subsequent results of the lot-drawing process.

The question is why they should be so bound, given that drawing lots is not a standard form of *kinyan*. The question is especially pressing on Ra'avad's interpretation, as the remaining brothers have done nothing to bind themselves to the arrangement with respect to the remaining plots at all. Even if Reuven is entitled to the plot he drew, why can't any of the others back out of the arrangement going forward? Here R. Elazar offers the suggestion that the binding authority of lot-drawing in the context of estate division is derived from the use of this procedure for the initial distribution of estates when the Land of Israel was first settled (see Numbers 26:55). R. Elazar's theory is that the distribution of land via lots enjoys a kind of supra-rational, divinely-grounded authority flowing from sacred history. Rav Ashi objects on the grounds that if this mechanism is to function without rational basis and simply as representing sacral precedent, it stands to reason that it should have to match that precedent exactly, including the presence of the high-priest's breastplate (the oracular *Urim ve-Tumim*). Rav Ashi's point is that we can access the power inherent in sacred historical events only if we can perfectly replicate them, but this is generally not possible, and so we cannot access their power. There is no going back to the founding.

Having rebutted R. Elazar's approach, Rav Ashi's suggestion is that the first brother's lot drawing is binding on all of the brothers "through the sheer value of their heeding each other." The brothers each face a problem: each wishes to own an independent plot, but they cannot agree on who should get which, and so none of them can get what they want. Insofar as they persist in pursuing their own interests independently, they will be left at a stalemate and all be left with nothing. To avoid this result, they agree on an arrangement for mutually coordinating their individual risks and rewards to the benefit of all. Out of self-interest, therefore, each brother commits to the risk of losing his desired plot for the sake of gaining the opportunity to obtain that same plot, and for the sake of gaining any individual plot at all. Since no brother will agree to this compact if risks are skewed against him, the risk-benefit ratios must be equivalent across all parties, which can be achieved through the mechanism of a lottery. Each brother agrees to accept the risk of loss, therefore, because each other brother accepts the same risk. They each commit to the collective arrangement, that is, because the arrangement is to each individual party's benefit overall, and the arrangement is fair. And the arrangement is fair because each brother is willing to accept the risk of loss for the sake of the collective benefit. Each party's knowledge of the other party's willingness to do this represents what Rav Ashi calls "the

sheer value of heeding one another.” Reuven’s drawing the first lot first represents possible sacrifice on the part of each of the brothers, and so their allowing it to go forward for the sake of their collective benefit effects a binding contract of each to all—they have each given each other something of value in exchange for the desired commodity.

This is precisely the dynamic underlying democratic policy deliberations. Each party, for the sake of its own interests overall, commits to some measure of risk to those interests for the sake of opportunities to be secured only through collective cooperation. Your exposing yourself to risk is what enables my opportunity for gain, and vice versa, and so we each offer the other something of value in exchange for the commodity we desire, with the result of a binding contract between us. The ground of political obligation is mutually coordinated consent to the fair distribution of risks and rewards. It is clear, then, that for the obligation to honor the results of the political process to hold, the distribution of risks and rewards must in fact be fair. If the distribution is to be determined by communal deliberation, therefore, it follows that the communal deliberation must itself be conducted fairly, and conducted in such a way that the result is indeed a function of each party heeding the other. This reinforces the conclusion that employing strategic rather than communicative means to influence political outcomes is illicit. If we win benefits from others through political manipulation or any means other than rational persuasion in pursuit of fairness, we will be guilty of theft, for the other party will not have willingly consented to, and so will not be bound by, the political outcome.

To summarize: the reason that political resolution reached through reasonable deliberation is binding, I suggest, is that each party to such deliberations receives the value of participation in fair deliberation toward mutual benefit—“the sheer value of heeding each other.” This entails that political resolutions are binding only where they in fact reflect fair deliberation toward mutual benefit. The next section expands on this claim and its implications through an analysis of halakhic reasoning regarding contracts predicated on uncertain future events (*asmakhta*).

#### **IV. *Asmakhta* as a Model for Democratic Legitimacy**

The dynamic involved in democratic deliberations is, as noted in the *Mordekhai* (*Bava Batra* 481), comparable to that of an *asmakhta*, where one party promises to provide a given benefit pending on a given eventuality. If I, a sharecropper, commit to paying you a thousand *zuz*—a massive sum—in the eventuality I do not work your land, I am not, upon failing to work your land, bound to pay you the thousand *zuz*. Such a commitment, on the prevailing view (see *Shulhan Arukh, Hoshen Mishpat* 207), is non-binding, since

at the time of the commitment I do not genuinely believe that I will in the end have to pay you and so do not really mean to commit. There are, however, other, superficially similar cases where my commitment is accepted as binding. If, for instance, I promise that if I fail to work your land I will pay you, not a thousand zuz, but the full value of your lost revenue, I must make good on the payment if I fail to work your land. Another example is where we each place bets on a dice game—if I win, I am obligated to pay you your winnings, and vice versa. What distinguishes the cases where my commitment is binding from the cases where it is not?

This is a complex topic that I cannot treat in full, but two proposals in particular are worth our attention in this context. According to Rashi, the cases where a commitment pending an uncertain eventuality is not binding are cases where the party making the commitment is liable to believe that it is within its power to avoid the eventuality, when in fact it may not be (Rashi to *Sanhedrin* 24b, s.v. *kol ki hai*). If I commit to doubling my outstanding debt to you if I don't pay my original debt on time (see *Bava Batra* 168a), for instance, I have no real intention of ever giving you the extra funds, since I believe I will indeed pay you on time. Even if, therefore, I in fact am unable to come up with the funds, my commitment is not binding, since it was premised on an error. In the case of a bet on dice rolling, by contrast, I have no expectation whatsoever that I can control the outcome, and so if I commit to paying upon a certain outcome, it is clear that I am committing to this despite, and not because of, my lack of knowledge and control. For Rashi, the validity of these contracts breaks down where there is a mismatch between perceived and actual capacity to affect a desired outcome.

In the political context, what this will rule out are political maneuvers and deals that take place outside the realm of public deliberation. If you enter into deliberation with the hope of achieving a desired outcome, it is one thing if you do not achieve it because my argument did not carry the day. That is part of the risk upon which your commitment to abide by the result is premised, as it is because of everyone taking this risk that any or all of us can benefit. If, however, I have in some way pre-determined the results such that no matter what you say, no matter how persuasive your arguments are, your view cannot prevail, then it will be the case that you have made your commitment on a mistaken premise, and the results will not be binding upon you. If I proceed to benefit from the result at your expense, I will be guilty of theft. This is particularly important with respect to historically marginalized or otherwise disadvantaged communities, whose participation in democratic life is often won in part through the promise of material improvement toward justice. Where the powers that be are not in fact prepared to allow for such change, the result is that

these communities are committed to the democratic project on false pretenses, and so it cannot rightly be expected of them to bear its burdens. It then becomes obligatory upon all citizens to reform the prevailing structures of power.

According to Rabbenu Tam (Tosafot to *Sanhedrin* 24b, s.v. *kol ki hai gavna*), the fundamental distinction is between cases where the risks and benefits involved in the arrangement are one-sided and cases where they are evenly balanced. If I commit to doubling my outstanding debt to you if I do not pay on time, only I can lose and only you can gain from this commitment. Based on our prior analysis, we can see that the problem with this is that, since I receive nothing from you, there is no ground for ratifying my commitment. In an arrangement like the dice game, by contrast, our respective chances of loss and gain are equivalent and mutually intertwined—it is because you might lose that I might win, and because I might lose that you might win. Here we have the requisite ground for a binding commitment—coordinated expenditures or risk-taking for the sake of potential benefit to both parties. And here the moral in our context is that the potentials for risk and benefit must in fact be distributed equally among the various parties; the cards cannot be stacked in anyone's favor.

If I, a wealthy and well-positioned operative, use my money and connections to win support for my proposal and against yours, the contest between us will not be a balanced one, as, regardless of who has the better argument, I am far less likely to lose and you are far less likely to win. Since your consent to the deliberative body's authority cannot be regarded as binding in that case, if I do in fact win, and I profit at your expense, I will be engaged in the type of theft outlined above. More fundamentally, insofar as I force you to live under a regime to which you have not granted valid consent, I will be in violation of my responsibilities to you as a person. This is, again, a particular problem with regard to historically marginalized communities, which are likely to command far less political influence than others. And inequalities can persist even where these communities are arguably treated lawfully in the present. It remains the case, to take one aspect of one example, that in America the median black family holds one-eighth the wealth of the median white family.<sup>7</sup> Such inequalities are plausibly both an indicator and a ground of democratic deficiency, in that the cards have been stacked against one group, and will continue to be stacked unless remedial measures are taken. The ongoing

7 Neil Bhutta, Andrew C. Chang, Lisa J. Dettling, and Joanne W. Hsu with assistance from Julia Hewitt, "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances," *FEDS Notes* (September 28, 2020): [www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm](http://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm).

legitimacy of the system will thus be a function of the extent to which such remedies are indeed achievable.

To summarize: the obligation conferred through participation in democratic deliberation to heed its results is comparable to the obligation conferred by parties via an *asmakhta* contract to heed its terms, and I suggest that the parameters of the former should mirror those of the latter. According to Rashi, an *asmakhta* is valid only if the true probabilities of benefit from the transaction are transparent to the parties. So too, I suggest, the true probabilities for success in democratic deliberation must be made transparent to all parties involved. According to Rabbenu Tam, an *asmakhta* is valid only if the potentials for benefits and costs are evenly distributed between the parties. So too, I suggest, the potentials for success and failure in securing interests through democratic deliberation must be evenly distributed across all parties. Where the cards are stacked against one or more parties, they must be unstacked.

## V. The Legitimacy of Law

On the theory I have put forward here, halakhic thinking regards the legitimacy of governmental authority as predicated on the obligation born by every individual person to treat every other individual person with the respect owed to them as a person. Government is thus authoritative only if it is generated through forms of cooperation between citizens which flow from, and in no way violate, the commitment to interpersonal respect. Given that the reactive agents in play here are human universals rather than anything particular to rabbinic halakha, we should expect to find that the halakha applies the same thinking with respect to non-Jewish law. And indeed it does.

The Talmud in several places invokes the dictum of Shmuel that “The law of the kingdom is law (*dina de-malkhuta dina*)” (see, e.g., *Nedarim* 28a). The primary noted import of the principle is the legitimacy of taxation, rendering the paying of taxes obligatory and making it such that funds collected as taxes are not classified as stolen (see *Bava Kamma* 113a), as well as the binding authority of government regulation with respect to commercial transactions (*Bava Batra* 54b). The principle is nowhere disputed and is regularly cited in a manner indicating its authoritative status. Importantly, with one prominent exception (*Beit Shmuel*, *Even ha-Ezer* 28:3), the consensus view is that the principle has the status of a biblical law. As Hatam Sofer puts it (with regard to laws governing commercial transactions), “It is established for us that the [principle that the] law of the kingdom is law is from the Torah *without a doubt*” (*Hatam Sofer*, *Yoreh De’ah* 314). This is remarkable, as nowhere in the Talmud is there any evidence of curiosity as to the source of this principle. While not so utterly obvious

as to render Shmuel's articulation superfluous, the principle's standing as binding, *de-oraita* law is apparently understood as self-evident once made known.<sup>8</sup>

The *Rishonim* do evince curiosity in this regard, however—the legitimacy of governmental norms is sufficiently problematic to them as to call for justification. Various theories are offered. Of particular interest in our context is that of Rashbam: “All taxes, levies, and practices of the laws of the kingdom with which they are accustomed to governing their kingdom are valid law, for the reason that all of the kingdom's citizens willingly accept upon themselves the laws and ordinances of the king. Therefore, it is completely valid law” (Rashbam to *Bava Batra* 54b, s.v. *ve-ha-amar Shmuel*). This formulation is cited and endorsed by *Or Zaru'a* (Responsa 745) and *Terumat ha-Deshen* (341). Rambam offers a similar formulation, limiting legitimacy to laws passed by *recognized* sovereigns—those whose “coin circulates throughout those lands.” Only the laws of such a sovereign are valid, he says, as “The citizens of that land consented to him and are resolved to recognize him as sovereign, such that he is their master and they are his subjects.” A ruler not enjoying such recognition is no more than “a strongman robber” or “armed criminal cartel” whose “laws are not [valid] laws” (*Gezeila ve-Aveida* 6:18). Rambam's formulation is reproduced verbatim in the *Shulhan Arukh* (*Hoshen Mishpat* 369:2). There is rule grounded in consent, and there is rule grounded in sheer force. Only the former is legitimate.

According to these authorities, arguably representing the prevailing position of the halakhic tradition, consent of the populace to a given sovereign is both a necessary and sufficient condition for the legitimacy of that sovereign's taxation and regulatory ordinances. The halakha recognizes the obligation to heed the directives of a legitimate government, and a government's legitimacy is a function of its enjoying the people's will. It follows that the halakha recognizes, on a biblical level, the obligation to heed the directives of the people's will. What is the ground of this obligation? Or, as Rabbi Asher Weiss puts the question, “Of what import is it that the people offer a generalized consent to the government—is there a *kinyan* involved in this consent? How is that an individual is bound by his fellow's or his own consent to obey the law of the government, and why can he not retract his consent at any point?”<sup>9</sup>

R. Weiss's approach to this question is to argue that the Torah recognizes the general legitimacy of monarchy and the validity of its laws,

8 Compare to an arithmetical calculation. Prior to performing the calculation, one may not know the result, but once the calculation is performed, the result is self-evidently valid.

9 *Parashat Hukkat: Dina de-Malkhuta Dina* (5782), 5: [https://m.torahbase.org/pdf/Chukas\\_he\\_81.pdf](https://m.torahbase.org/pdf/Chukas_he_81.pdf).

but with the proviso that it sustain its own popular support. Consent is a prerequisite, but not the ground, of legitimacy. This is a problematic reading of Rashbam, however, as were his view to be that governments are inherently legitimate, there would be no reason, without the impetus of some special problem, to appeal to popular consent in explaining that legitimacy as such. And yet Rashbam does so appeal. Based on what we have seen, then, what we might argue in response to R. Weiss' question is that consent is in fact precisely the ground of legitimacy, and the reason that it is binding is again due to the "sheer value of heeding one another." Each citizen, in entering into an arrangement of mutually coordinated vulnerability for the benefit of each and all, binds himself to that arrangement henceforth. It is true for the citizens of the local town council, and it is true for the citizens of a nation. Governmental authority is legitimate only if, and because, it enjoys popular consent.

The corollary of this is that the halakha recognizes the illegitimacy, and so the impermissibility, of exercising political power without enjoying the people's consent to that power. Importantly, Rashbam's formulation is that *all* of the government's citizens offer their consent, which could be taken to imply either that individuals have the right to dissent, or perhaps even that governments are legitimate only when enjoying *universal* consent. These possibilities are not raised in the text, and indeed an individual right to dissent would clearly undermine the determination of the law as binding, as there is no need to bind those who agree. Perhaps the mere fact of living in the land and benefiting in various ways from the government makes it such that one *de facto* consents to the government's legitimacy in general, even if they would prefer in a given case not to. Something like this form of tacit consent is expressed in the *Terumat ha-Deshen's* formulation: "It is on this basis that we make our residence under them," he writes (341). Even so, the principle of the matter remains that a government is legitimate only insofar as it earns the overall, bottom-line consent of each of its citizens. If and insofar as an individual citizen can reasonably dissent, therefore, it will be the case that the government is not authoritative for that citizen. To support such a government will, where expropriation of a citizen's property is involved, amount to theft, and in any case will be, as a moral and therefore halakhic matter, wrong.

The question of legitimacy applies not only to the government as a whole but to individual policies. Laws targeted at individual citizens are illegitimate (see *Shulhan Arukh, Hoshen Mishpat* 369:8). Further, Rema cites the view of Maharik that laws discriminating against a particular profession are illegitimate, since such laws are "not legislated for all" (see Rema *ibid.*). As Ri Migash put the idea in one of its earliest formulations, "Because

it [a given tax] is imposed upon the entirety of the citizenry, it is the law of the government” (Ri Migash to *Bava Batra* 54b). The idea seems to be that discriminatory or otherwise arbitrarily imposed law lacks the form of law, and it is only law, not the arbitrary exercise of power, to which the population grants assent.

On a somewhat more substantive rather than formal level, some *Rishonim* argue that a king may only impose laws grounded in the established laws of the state. As Rashba emphatically puts it, “So have all the authors and commentators agreed, that they only said ‘the law of the kingdom is law’ with regard to that which belongs to the laws of kings, but that which the king takes by force is not [valid] law, as the laws of kings are known and agreed upon” (Rashba to *Bava Batra* 55a). Ramban writes similarly that laws “which the king imposes for a time or a new law meant to penalize the people in a manner not practiced by his fathers” are not valid (Ramban to *Bava Batra* 55a). Now, Beit Yosef cites this view of Ramban and writes that “such is not the opinion of our sages” and that indeed “a king can make a new law” (Beit Yosef, *Hoshen Mishpat* 369:13). It may be, however, that what Rashba and Ramban intend is not that kings may not innovate new law at all, but that any laws they innovate must fit with the established set of constitutional constraints. The idea is not that there is one constitution governing all states, but that every state, because it is a state for its people, will have some or other set of established norms defining the powers and prerogatives of the ruler. And since accountability to the people is the ground of the ruler’s legitimacy, laws issued by the ruler are valid only where they fall within the given constitutional bounds.

Rashba concludes his comments here with the observation that “This is why they said ‘the law of the *kingdom* is law,’ rather than ‘the law of the king is law’” (Rashba to *Bava Batra* 55a), and the line is quoted without attribution by the Vilna Gaon in justifying the invalidity of arbitrary property seizures (*Bi’ur ha-Gra* to *Hoshen Mishpat* 369:31). Whether the specific deficiency with the law in question is that it is discriminatory or that it runs afoul of established legal tradition, the underlying point is that governmental law is valid if and only if it honors the accountability of the ruler to the ruled. It is important here that, even those authorities who offer justifications for the *dina de-malkhuta* principle other than that of Rashbam, and so who, one could argue, may not share the view that popular consent is sufficient to establish the validity of law, certainly share the view that consent is in some substantial degree *necessary*. Even if, as per the view Ran famously attributes to the *ba’alei Tosafot*, the law of the ruler is valid because the ruler owns the land upon which the ruled reside (see Ran to *Nedarim* 28a), it is still the case that a ruler may not impose arbitrary or otherwise unjustified law.

R. Eliezer Melamad writes in this context that “common-fare corruption and discrimination, which is present in virtually every government, do not nullify the rule that ‘the law of the kingdom is law,’” as if it did, no law would be regarded as valid (*Peninei Halakha, Ha-Am ve-ha-Aretz* 6:2). This is plausible in its primary meaning that actual laws in reasonably but imperfectly just states ought to be obeyed. But the matter is different from the perspective not of obeying but of imposing the laws. Here it is clear that, at the very least, those enacting laws must do so in such a way as to honor the accountability of the state to all of its citizens. On the interpretation I have offered, this requires that no law be imposed to which any individual citizen could reasonably object. Since, in a democratic context, we are all empowered to shape public policy, we are all obligated to do so, whether it be through voting or influencing public opinion on Facebook, only in such a way as to honor our accountability to every other citizen.

To summarize: according to Rashbam and others, the validity of law in general is grounded in popular consent, and there is a general consensus that accountability to the populace on the part of the sovereign is at least a necessary condition of law’s validity. This both confirms and extends my suggestion that the mechanism of obligation inherent in democratic deliberation is nothing other than the sheer value of each party to the deliberation heeding each other party. Even where, as in a monarchy, the mode of public-policy formation is not democratic deliberation, democratic accountability remains the ground of the resulting policy’s legitimacy. Wherever and insofar as we do have agency in the formation of public policy, therefore, we must take care to ensure that democratic accountability is realized.

## Conclusion

The idea that government ought to be accountable to the people is, as we have seen, not new to modernity. What is arguably new, and still developing, is a recognition as to the open-ended possibilities as to the form of effective government. We have learned, for instance, that even large, heterogeneously-populated states can be ruled by electoral democracies rather than more or less constrained monarchs. The precise formula for doing this best has arguably yet to be conclusively demonstrated, but the debates on this score underline the more basic recognition that the form of our government is subject to the people’s discretion. Whereas in the past the people could not so much as choose which king to be ruled by, now we can choose whether to have a monarchy at all, and if not, what to try in its place. If we have chosen an electoral democracy, we may then choose how

that democracy will conduct its business. And if indeed it is our prerogative to choose, then it is our responsibility to choose fairly, justly, and wisely.

It is common, however, to think that, especially in the context of contemporary democracy, individual citizens possess no agency, and so no responsibility, with regard to their form of government. There is too much money and power concentrated in too few hands, and any attempts at genuine political discourse are promptly drowned in algorithmically-generated outrage for profit. The very fact that we resent these challenges and their perpetrators, however, and the very fact that we hold each other and ourselves accountable for our political behaviors, betrays our conviction that these are all products of accountable choices, choices that could be made differently and would matter if they were. And the fact is that as powerful as market forces are, market forces respond to demand. If enough people demand better politics and better political discourse, the market will provide better politicians and better, healthier platforms for civic engagement. It is true that no one can effect these changes on their own, but that is precisely why it is vital that we each seek to make a difference *politically*. That is, insofar as we engage in political activity, as so many of us do, we must do so in such a way as to model and invite others into the work of speaking for the sake of heaven and the betterment of the city. There will always be efforts to manipulate the electorate. We can and should make such manipulation harder.

Contemporary political and media operatives have extraordinarily precise data on the individual citizen's hopes and fears, what they love and what they hate, and have extraordinarily sophisticated means of manipulation, whether through advertising or finely crafted stump speeches. They can bring us to blinding outrage, stir up enmity, pull at our deepest hopes, all toward no goal other than the continuation of the profitable status quo at the people's expense. No one is immune. But we can all do better. We can seek out and create opportunities for patient, thoughtful, forceful-but-respectful dialogue with those we disagree with, asking genuine questions, offering replies that are genuinely responsive to what our interlocutor has said, and acknowledging our errors and blind-spots even when doing so risks sacrificing the high ground in combat. We can refuse consumption of media sources designed to stir enmity and replace critical thinking with pre-packaged talking points. We can take care to discern and stick to reliable sources of information, as only with a shared truth can we hope for a shared life rather than a fight to the death. We can, in putting forward our own interests, consider the interests of our fellow citizens as well, and ensure that we put forward our interests in a way we can reasonably expect all of our fellow citizens to accept. We have every right to press our own interests, but we have a responsibility

to do so in a way which supports, rather than subverts, our ability to talk to and make fair policy along with our fellow citizens.

The responsibilities I have put forward here, while grounded in halakhic thinking, are human universals, and the halakha, as I have read it, regards them as such. But that does not mean that in the political sphere we are as Jews meant to be like all the other nations. On the contrary, most people fail to live up to these ideals most of the time. We, covenanted with God and committed to fulfilling His Torah and *mitzvot*, are called to make the radical religious sacrifice of taking our political responsibilities seriously. In so doing, we will invite our fellow citizens to join us in the sacred work of democratic community.

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