

COPYRIGHT NOTICE:

David Novak: The Jewish Social Contract

is published by Princeton University Press and copyrighted, © 2005, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

Follow links for Class Use and other Permissions. For more information send email to: permissions@pupress.princeton.edu

Chapter One

Formulating the Jewish Social Contract

The Democratic Contract

To argue intelligently for the idea of the Jewish social contract today, one must situate the argument within current discussion of social contract theory in general. One must then take a stand on what an authentic social contract is and how sources for it can be activated from out of the Jewish tradition.

The original justification of a society as an agreement between its equal members has long been known as the idea of the social contract. It is a highly attractive idea as evidenced by the amount of discussion it has evoked for at least the past four hundred years, and especially during the past thirty years or so.¹ Many contemporary political thinkers in democratic societies, who are loyal to their societies in principle, believe that this idea best explains how a democracy—especially *their* democracy—can cogently respect and defend the human rights of each of its citizens. These rights are the claims persons are justified in making *before* these societies can subsequently make their own claims on these persons as citizens. Moreover, even these subsequent claims are all essentially redistributive, that is, they are justified by being given an instrumental status. As such, the claims democratic society makes upon its members, to which they are to dutifully respond, are ultimately for the sake of the respect and defense of the prior human rights of the citizens of that society.² Therefore, posterior social claims cannot contradict or overcome these prior human claims on society without losing their own derivative justification.

¹ The point of departure for all social contract theory today is John Rawls's *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). There (p. 11) Rawls writes: "[W]e are not to think of the original contract as one to enter a particular society or to set up a particular government. Rather, the guiding idea is that principles of justice for the basic structure of society are the object of the original agreement . . . the principles which are to assign basic rights and duties." For Rawls and his followers, then, the social contract *assigns* rights and duties, but it does not *presuppose* that these rights and duties are what the parties to the social contract bring to it themselves. In effect, then, the parties come to the social contract normatively naked. See M. J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), 143–46.

² In liberal social contract societies, there are no original communal rights/claims on the individual members of the society. The society only has what the members give to it originally. Cf. D. Novak, *Covenantal Rights* (Princeton, N.J.: Princeton University Press, 2000), 153–58.

Respect and protection of human rights are considered the hallmark of a modern democracy. Respect and protection of these rights are what differentiates a modern constitutional democracy from democracy per se, for without the recognition of the prior rights of its citizens, a democracy could easily become nothing more than the dictatorship of the majority, whether that dictatorship be more spontaneously exercised by a mob (*demōs*) or more systematically exercised by some authority (*archē*) acting in the name of a mob. Such majority dictatorship is always conducted at the expense of the minorities who have no rights against it, no prior claims to make upon it.³

As the basis of a democracy, a social contract presupposes that its parties come to it with rights that are theirs *already*.⁴ The contract itself is specifically designed to respect, defend, and even enhance these prior rights. Any attempt to rescind these rights puts the society in violation of its founding mandate, even if only a small minority might actually object to such rescission. Conversely, in any secular society not based on the idea of a social contract, even where human rights are acknowledged, these rights are at best conceived to be entitlements *from* the society rather than claims made *to* the society. In such societies, human rights are a matter of social largesse or tolerance rather than the duty of a society to ever respect and defend. This is why in societies that do not recognize anything prior to themselves, whatever human rights they do recognize are only entitlements granted *by* the society at will. As such, these rights can just as easily be rescinded from the citizens as they were granted to them by the society; and that can be done without the society contradicting its founding mandate. This type of a society can just as easily decide that these rights are useless for its projects as it can decide that they are useful, whenever any such perceived need arises. For this reason, it is inadequate to the human need for inalienable rights to argue, as one prominent liberal legal theorist has, that “the assumption of natural rights” is not “a metaphysically ambitious one,” that it is no more than a “hypothesis,” or a

³ Hence the apt insight of Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), 205: “The institution of rights is therefore crucial, because it represents the majority’s promise to the minorities that their dignity and equality will be respected. . . . rights are . . . the one feature that distinguishes law from ordered brutality.”

⁴ Even though he had an aversion to Enlightenment notions of rights, Edmund Burke still understood how basic moral obligations are precontractual. In his *Appeal from the New to the Old Whigs*, ed. J. M. Robson (Indianapolis: Bobbs-Merrill, 1962), he writes (p. 96): “We have obligations to mankind at large which are not in consequence of any special voluntary pact. They arise from the relations of man to man, and the relations of man to God, which relations are not a matter of choice. On the contrary, the force of all the pacts which we enter into with any particular person or number of persons amongst mankind depends upon those prior obligations.”

“programmatically decision.”⁵ It would seem that if human rights in a democracy are to “have teeth,” and not be vague, hypothetical claims made by rootless persons, then a real and sufficient foundation for these rights should be found and explicated. And, this requires substantial historical research and ontological reflection in order to be rationally persuasive.⁶

Because the social contract stems from the rights of persons even prior to their becoming citizens of a democracy, a society based on a social contract can also respect and defend the human rights of all human beings everywhere or anywhere. By virtue of simply being human, those other persons who are not *now* democratic citizens *could* in principle become citizens of this or any democracy *later*. Rights-based democracy, then, affirms an idea of human nature, and it is potentially global therefore. The social contract presupposes that humans are by nature rational beings capable of making contracts and keeping them. That view of human nature has huge political consequences everywhere. The question remaining, nonetheless, is whether we need to see human nature as more than the mere capacity of humans to make and keep contracts between themselves.

This emphasis on human rights is what makes modern constitutional democracy so attractive in theory, especially to Jews, who have greatly benefited from it in practice. Thus very few Jews today would want to live in anything but such a democracy. The other modern political alternatives

⁵ Ronald Dworkin, “The Original Position” in *Reading Rawls*, ed. N. Daniels (Oxford: Blackwell, 1975), 46.

⁶ In his last work, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), Rawls claims to have made a significant departure from *A Theory of Justice*. He no longer requires someone who accepts his “reasonable conception of justice” (*The Law of Peoples*, 79) politically to also accept as its philosophical presupposition liberalism’s “comprehensive doctrine” (*ibid.*), which seems to be liberalism’s basic concept of human nature. As such, a citizen of a democracy who publicly affirms his or her prepolitical commitments need not be ruled out of political discourse by Rawlsian liberals. Nonetheless, Rawls reiterates in the end what he asserted in the beginning (*A Theory of Justice*, 11), viz., that the social contract itself “specify the basic rights . . . of citizens” (*The Law of Peoples*, 180). But how is this subsequent “specification” any different from the “assignation” of rights in *A Theory of Justice*? In both cases, citizens can make no prior rights claims on society. Politically, they are still quite “naked.” It is still as if they came from “nowhere”—culturally speaking (see *A Theory of Justice*, 137). So the “overlapping consensus” of *Political Liberalism* (New York: Columbia University Press, 1993), esp. sec. 3.2, only seem to designate the “values” liberalism is willing to tolerate in what citizens from nonliberal cultures bring to civil society. This tolerance turns out to be only for what has always been consistent with liberalism’s values in the first place. But our current “culture wars” show how little liberalism is willing to tolerate in those coming from preliberal cultures, and how little those coming from these cultures are willing to be tolerated by liberals, even by liberals as generous as John Rawls. See Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995), 163–72.

(namely fascism, communism, and clerical oligarchy) have proven disastrous for any society that has adopted them, and especially disastrous for Jews (and many other minorities), who, unfortunately, have found themselves having to live in such societies. For this reason alone, Jews first need to think out a democratic theory by themselves for themselves, especially a democratic social contract theory, inasmuch as social contract theory seems to be the best explanation of a rights-based democratic order. Only in this way can Jews be participants in a contractually based democratic social order in good faith, and not regard the benefits that have accrued for them from such a social order as some sort of historical accident. But that must first be done in traditional Jewish terms, and only thereafter in terms that could appeal to rational persons who are taken to be actual or potential citizens of a democracy.

The Jewish social contract is the means by which a Jew can actively and honestly—as a Jew—engage the democratic society in which he or she lives. This engagement is what is “Jewish,” not the social contract itself, which operates among Jews and non-Jews and must, therefore, function in neutral secular space. This engagement is not located in a singular event like that of Exodus-Sinai, which for Jews has cosmic significance and is regularly celebrated whenever Jews faithfully practice the commandments of the Torah. Rather, that engagement is an ongoing process of negotiation and renegotiation among human beings coming from different cultural backgrounds. It is not a real covenant, as we shall see in the next chapter. Nevertheless, the social contract is more than the hypothetical construct of some philosophers. It is marked by such real events as voting in an election according to Jewish criteria (which does not necessarily require voting for Jewish candidates), and proposing public policies according to Jewish criteria (which need not always involve issues of special Jewish self-interest).⁷

The two tasks for Jewish political theorists—the theological and the philosophical justification of democracy—are not at odds with each other. In fact, they can be correlated. Accordingly, this book should be taken as an implicit polemic against those who theologially reject democracy due to their view of Judaism. It should also be taken as an implicit polemic against those who philosophically reject Judaism due to their view of democracy. Nevertheless, Judaism and democracy are by no means placed on an equal footing here. Instead, the historical and theological priority of Judaism over democracy, for Jews, shall be affirmed. Then it will be shown how Jews can be parties to a democratic social contract in good

⁷ See D. Novak, “Toward a Jewish Public Philosophy in America,” *Jews and the American Public Square*, eds. A. Mittleman, J. D. Sarna, R. Licht (Lanham, Md.: Rowman and Littlefield, 2002), 331–56.

faith because of their Judaism, not in spite of it. Indeed, this book attempts to show how Jews can cogently formulate an idea of the social contract out of their own traditional sources. Thereafter members of other cultural traditions can appropriate by and for themselves whatever intersections with these representations of Judaism they find at home. This can be done when these representations of Judaism are philosophically attractive and can be argued for in a secular, democratic society.

Unfortunately, though, most modern arguments for democracy have been based on basically secularist, liberal ideologies, whether formulated by Jews or adopted by Jews from non-Jewish thinkers. As such, they have not been formulated with much perspicacity, either theological or philosophical. Theologically, they have not shown how the Jewish tradition can allow Jews to participate in a social contract as Jews. Philosophically, these modern arguments have been dependent on views of human nature that do not give a reason why any rational person should enter into a relationship of trust, like a contract, with any other rational person, even though these arguments have frequently recognized the social benefits of relations of trust among the members of a society.⁸ Nevertheless, secularist admiration for interhuman trust has been more phenomenological than ethical, that is, most secularists only describe *how* trust benefits society rather than *why* anyone ought to trust anyone else or be trusted by anyone else.

In fact, most of these modern secularist arguments for democracy have called for mistrust by their claims, both implicit and explicit, that persons coming from traditional cultures like Judaism need to break faith—that is, mistrust and thus overcome—their cultural origins in order to fully participate in civil society. Accordingly, most of these modern arguments for democracy have been, in fact, recipes for the public disappearance of Judaism and the traditional Jewish community. But without a defense of Judaism's *public* participation in civil society, which is theologically and philosophically cogent, individual Jews do not have enough cultural capital to maintain their Jewish identity even in private. For these privatized Jews, a democratic commitment turns out to be the sale of their very souls as Jews. This is why this book shall argue for a Jewish religious justification of a secular democratic order. It is an argument for a finite *secularity*, but it is against any secularist ideology that claims to be a sufficient foundation of that secularity. Because of this, this book shall not engage in the type of apologetics (with its hidden secularist premises) that looks to a secular democratic order to justify the Judaism lived by Jews who participate in that order.

⁸ See 205–12 below.

This prior affirmation of Judaism does not mean, though, that one should argue that Judaism is the sufficient foundation for a democratic order. That would very much imply that one ought to convert to Judaism for the sake of having the best reason to be a citizen of a democracy. But were that argument to be made, as some Christian social theorists have tried to do for Christianity from time to time, the very secularity of the democratic social order would be threatened and one's theological commitments would become ultimately mundane.⁹ Indeed, when such political theology is applied, the secular social order for which this occurs inevitably takes on messianic pretensions. One should not argue that Judaism (or any religious tradition) is either the one necessary source or the one desired end (*telos*) of democracy. The fact that Judaism can enable Jews to participate in a democratic social order does not necessarily mean that Judaism entails democracy or that democracy should be regarded as the ultimate fulfillment Judaism anticipates. Democracy does not emerge directly from Jewish (or any other) revelation nor does it preview the kingdom of God. So the most this book can do is to attempt to show that Judaism can *authorize* a democratic commitment from faithful Jews *for* Judaism's own sake. Therefore, I shall only argue why Jews *can be* active participants in this social order in good faith, not that Jews *must be* such participants, or that all such participants in this social order *ought to be* Jews at all.

However, a Jew's commitment to Judaism is far more profound than any commitment to democracy can or should be. A Jew's commitment to Judaism must be lived as one elected by God to be part of the Jewish people covenanted with God. That election is either by birth or conversion.¹⁰ One chooses to participate in a democratic social contract; one is chosen to be part of the covenant. One initially affirms the social contract; one only chooses to reconfirm the covenant initiated by God. Hence a Jew needs to live by Judaism, whereas he or she opts for a democratic society. Although one's democratic commitment should be consistent with his or her prior Jewish commitment, it neither can nor should be identical with it. Accordingly, a Jew should evaluate democracy by Jewish criteria rather than evaluate Judaism by democratic criteria. Whereas one can say that democracy is the best political option available to Jews, one must say that Judaism is the only religion Jews can live by with Jewish authenticity.

⁹ For a still powerful critique of that Christian tendency, see Reinhold Niebuhr, *An Interpretation of Christian Ethics* (New York: Harper and Bros., 1935), 103–22.

¹⁰ See B. Yevamot 47a—b; B. Kiddushin 68b re Deut. 7:4.

The Political Value of the Social Contract

What, then, is the current political value of the idea of a social contract for Jews as a people and then as individuals that would inspire Jewish thinkers to search for its positive theological and philosophical justification in the Jewish tradition? It would seem that the value of the idea of a social contract is that it is better able to justify a multicultural society than any other idea of political authority. As we shall see, Judaism can function most successfully in a modern multicultural or pluralistic society. The plurality built into the idea of multiculturalism or pluralism is also built into the idea of the social contract. Furthermore, in the idea of the social contract presented here, in which the parties to the contract retain their original rights, these parties are not required to become *parts* of the whole that the contract itself creates. Instead, the parties are *participants* in a multiplicity they themselves create out of their own prior commitments. These prior social commitments are not overcome or meant to be overcome in the social contract.¹¹ These earlier communal commitments will survive intact as they have survived other types of subsequent social arrangements in which Jews have had to participate in the past. Indeed, this covenant will transcend this world and all its mundane social arrangements.¹²

Persons enter into a social contract not only *because* of their prior commitments, but just as much *for the sake of* them. As I shall argue in this book, if what people bring to the social contract are their prepolitical, cultural rights, which are their rights to be rooted in their original communities, then the social contract can be seen as an ongoing agreement as to what is necessary for different cultures to justly and peacefully transact with one another in common social space. This should by no means require the members of any of these cultures to surrender their communal identity to some sort of “melting pot.” Furthermore, what people obtain in their original communities is not only the way they are to justly interact with their own kind, but also the way they are to justly interact with all

¹¹ Conversely, for the view that all original rights with which one entered the social contract are turned over to the state, see Thomas Hobbes, *Leviathan*, chap. 21, ed. M. Oakshott (New York: Collier Books, 1962), 161; Baruch Spinoza, *Tractatus Theologico-Politicus*, chap. 16, trans. S. Shirley (Leiden: E. J. Brill, 1989), 247; Jean-Jacques Rousseau, *The Social Contract*, 1.6, trans. W. Kendall (Chicago: Henry Regnery, 1954), 19.

¹² The redemption of Israel promised to be God’s “peaceful covenant” (*brit shloimi*) in Isa. 54:10 is interpreted by the fifteenth-century Jewish political theologian R. Isaac Abravanel to be the salvation of the Jews intact, and the whole world along with them, who will then be free from all human rule and subject only to the direct rule of God. See his *Commentary on the Latter Prophets*: Isa. 54:5.

others—including all others in civil society. As we shall see, this interaction with others in a democratic society enables Jews to develop certain more general tendencies in their own tradition. It is where Jews need to constitute the idea of natural law, that is, the idea of a universal law binding on both the Jews and the gentiles.¹³

Because of Jewish interest in a multicultural society, a more communitarian idea of social contract should be more attractive to Jews. Surely, Jews should want civil society to respect Jewish communality and not foster the assimilation of Jews, whether as individuals in the Diaspora or even collectively in the land of Israel, into some amorphous “democratic culture.” Accordingly, I shall argue that civil society ought not and, indeed, cannot construct its own culture.¹⁴ Instead, civil society ought to depend on the plurality of cultures that in truth precede and transcend the construction of civil society through the social contract.

The very creation of a secular realm by humans is the result of an *intercultural* agreement to create a space distinct from the sacred space of any primal community, an invented realm in which many cultures can participate. But even the suggestion that this should lead to the creation of some new secular culture to replace the older cultures of the contracting parties is to be firmly rejected. The very secularity of this *new* space—as distinct from the *older* sacred spaces of traditional cultures like Judaism—requires that it be both participated in and limited by the members of the cultures who need such space for their own communal survival and flourishing. Thus a social contract is both useful and desirable for the members of any historical culture, certainly for Jews. By means of such a social contract, a historical culture can claim from civil society its prior right to continue to function as a primal community for its own members. In return, a historical culture like Judaism allows civil society to claim its loyalty and support in that society’s political, economic, and even its intellectual efforts on behalf of all the citizens of that society. Furthermore, an intercultural social contract makes the political life of civil society far more exalted—even more inspiring—than a social contract fundamentally conceived in terms of economic rights. A society dedicated to the protection and enhancement of its participating cultures surely commands more respect and more devotion than a society merely established to protect and enhance private or corporate property.

¹³ See D. Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998), 1–12.

¹⁴ Cf. Richard Rorty, “Rationality and Cultural Difference,” *Truth and Progress* (Cambridge: Cambridge University Press, 1998), 195–201, for the contrary view.

When, however, a civil society no longer respects that communal priority, it inevitably attempts to replace the sacred realm by becoming a sacred realm itself. That is, such a society attempts to become the moral authority over which there is no greater authority in the lives of its citizens. Thus by becoming “civil religion,” civil society usurps the role of historic faith traditions and becomes what it was never originally intended to be: unlimited authority.¹⁵ But the hallmark of a democratic social order is the continuing limitation of its governing range. Without such limitation, any society tends to expand its government indefinitely. But such limitation cannot come from within; it can only come from what is both outside it and above it.¹⁶ Today that external and transcendent limitation can be found in the freedom of citizens of a democracy to find their primal identity by being and remaining parts of their traditional communities. This is what has come to be known in democracies as “religious liberty.”

Membership in these traditional communities is outside the range of civil society because of their historical precedence, and it is above the range of civil society because of the ontological status the relationship of these communities with God gives them. For Jews, this means that their historical and ontological identity in God’s covenant with the people of Israel is what both limits secularity and entitles its limited range to be beneficial for them. Judaism is both older and deeper than any civil society. Without historical priority, the assertion of ontological priority tends to become hypothetical rather than real, abstract rather than concrete; it becomes formal rather than substantial, tentative rather than permanent. And without ontological priority, the invocation of historical priority can easily be overcome by the present-day secular world; it can become a mere precedent rather than an ever present foundation, a matter of nostalgia rather than an active normative force.¹⁷

¹⁵ The term “civil religion” first appears, as far as I can see, in Rousseau, *The Social Contract*, 4.8, p. 221. The notion that true religion (i.e., inner conviction) is a purely private, individual matter was first enunciated in modernity by Spinoza, who saw public religion (i.e., morals and ritual) as a department of a secular state. See *Tractatus Theologico-Politicus*, 19; *Tractatus Politicus*, 3.10. In this matter as in many others, Spinoza is followed by Hegel. See *Philosophy of Right*, sec. 270, trans. T. M. Knox (Oxford: Clarendon Press, 1952), 165–69. Contemporary secularists, going beyond Rousseau’s, Spinoza’s, and Hegel’s role for civil religion, deny any public role for any religion at all. Instead, they sacralize the state itself in more subtle ways. See Richard John Neuhaus, *The Naked Public Square* (Grand Rapids, Mich.: Eerdmans, 1984), 80–82, 152, for a critique of this type of secularism.

¹⁶ For the idea that all limitation is external, see Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, 5.61. Cf. Immanuel Kant, *Critique of Pure Reason*, B295.

¹⁷ Accordingly, Jewish identity must be more than simple loyalty to one’s Jewish past, as Leo Strauss suggested in his 1962 lecture “Why We Remain Jews” (*Jewish Philosophy and*

A Contract between Minorities

Multiculturalism, in my understanding, assumes that all the bearers of the various cultures participating in the social contract are minorities. Any notion of a majority rule, except for purposes of election to public office, legislation, or judicial decision, requires the type of singular or monoculture that is inimical to the cultural rights of any and all minorities. Surely, multiculturalism is for the sake of minority groups.¹⁸ Only when that logic is carried further does it also function for the sake of the individual person and his or her rights. An individual person is the smallest minority possible, but he or she is not the only minority possible. As such, that individual minority only functions as a rights bearer in cases involving certain political, legal, or economic claims on society. But in cases involving larger social claims, such as religious liberty or domestic sanctity, cultural rights—which are the claims of persons to be able to exercise their cultural identity both in their primal communities and in the secular realm—much more is at issue.¹⁹ And, more often than not, the minorities by themselves and between themselves can come to a common consensus with good reason, and that can be without having to formally designate a majority conclusion. Certainly that is the case with a social contract as distinct from a formal political pact. The social contract is not adjudicated in a court or argued in a legislature, even though its negotiation in the larger civil society often has judicial and legislative effects.

Jews have experienced minority status probably longer than any other people on earth. Indeed, at the very beginnings of their history as a people, Moses tells them, “you are the smallest [*ha-me'at*] of all the peoples” (Deuteronomy 7:7), which turned out to be as much a prediction of their future as it was a description of their original condition. And, several of the later prophets referred to “the remnant” [*she'erit*] of Israel, which was immediately intelligible to the Jews (that is, the “Judeans” of the tribe of Judah), who knew that the majority of the whole people of Israel (the Northern Kingdom, also known as the Lost Ten Tribes) had gone into exile at the hands of the Assyrians in 721 B.C.E., and that it was most unlikely that those lost tribes would ever return.²⁰

the Crisis of Modernity, ed. K. H. Green [Albany: State University of New York Press, 1997], 320–29). Jewish identity, in order to have present validity, must affirm the truth of Judaism and not just what has been true *about* Judaism.

¹⁸ See D. Novak, “The Jewish Ethical Tradition and the Modern University,” *Journal of Education* 180 (1998), 22–38.

¹⁹ See Charles Taylor, *Multiculturalism* (Princeton, N.J.: Princeton University Press, 1994), 61.

²⁰ See e.g., Jer. 42:2; Ezra 9:8.

Most Jews today, even in the Jewish State of Israel, live in multicultural societies where they thrive as minorities. Even religious Jews in the State of Israel are a cultural minority and must, therefore, play by multicultural rules in order to survive in that secular society. The establishment of a specifically religious state in Israel, that is, a state governed by Jewish law, both ritual and civil-criminal, would no doubt require a coup d'état that would very likely destroy the already besieged Jewish state by bringing about a civil war. This would be a far greater threat to the survival of Israel than any of the considerable foreign threats it has successfully resisted to date. For this reason of realpolitik alone, many religious Israelis would rather be a powerful minority (indeed, in Israel today there is no cultural majority in any real sense) in a multicultural society than a hated oligarchy. And even if Israel were to become a monocultural society, and even were that to happen through a peaceful transfer of power to a religious establishment, Israel would become more and more of an outcast in an increasingly multicultural, globalized world. It would not even be a minority society among the multicultural democracies of the world, especially the Western world in which almost all Jews want to be included. If that is true even in the State of Israel, all the more so is it true in the Diaspora.

As we shall see in the course of this book, any contract between persons, be it a private contract between some individual parties or a public contract between all parties to the society and for the sake of the society, any such contract is not the most original or even the most persistent social bond, certainly not for Jews. Truly, without the presupposition of more original social or communal bonds, the idea of the social contract becomes incoherent since there are no real persons to come to it. Only full persons and not abstractions can contract with one another in any substantial way. Persons are social beings by nature, not by mutual agreement.²¹ There cannot be contracting persons, as distinct from hu-

²¹ The term “social beings by nature” is borrowed from Aristotle, but my use of it differs from his, as my idea of human sociality differs from his idea of human sociality, which he uses this term to express. In *Politics*, 1.1/1251b1ff., Aristotle distinguishes truly human *political* nature from the *domestic-communal* nature humans share with other animals who also live in groups (cf. *Nicomachean Ethics*, 1.7/1097b10–15). In the domestic-communal sphere, biological dependence and its inherent inequality characterize the personal relationships conducted there. In the political sphere, however, intelligent freedom and its inherent equality characterize the personal relationships conducted there (*Politics*, 3.6/1279a8ff.; also, *Nicomachean Ethics*, 8.6/1158b1; 9.6/1167a21ff.; 9.9/1171b32ff.). Unlike Plato, who wanted to sunder domesticity from politics altogether (*Republic*, 458Eff.), Aristotle recognized everyone’s need for it, even those engaged in politics (*Politics*, 2.1/1261a5ff.; also, *Nicomachean Ethics*, 8.12/1162a15–20). Nevertheless, the household (*oikos*) and its extension, the village (*komē*, what we would call a “community”) is clearly subordinate to the *polis* (see *Nicomachean Ethics*, 8.9/1159b25ff.). The familial-tribal community cannot

manoid phantoms, who are not *already* socialized. And that socialization takes place in the family as the basic component of a primal community.²² Thus no contract between persons can create a primal community because a primal community, one's original society, hovers *around* persons before there are any real agreements *between* persons within it, much less agreements between persons crossing over original borders and coming together from their different communities into a civil society. However, this precontractual, natural priority does not preclude a subsequent social contract. In fact, it can encourage the formulation of subsequent social contracts, as we shall see. Furthermore, one can derive a very positive evaluation of the democratic social contract from the sources of Judaism and then through reasoning about human sociality per se. And that positive yet critical evaluation can be done with theological and philosophical perspicacity. This requires the presentation of the most cogent justification of the idea of a social contract, one whose very cogency claims neither too much nor too little for it.

Community and Society

The difference between an *original* human association and a *contractual* one is the difference between a *community* and a *society*, something modern social theorists have often discussed. It has been best described when designating an original, organic, human association by the German term *Gemeinschaft*, and a contractual, procedural, human association by the German term *Gesellschaft*.²³ The difference between a society and a community can be most powerfully located in the family's role in a community in contrast to its role in a society.

The fact is that for all of us, our original human association, our primal community, is our family. That is why our greatest childhood fear is or-

make any original claims on the *polis*-society. It would seem Hegel saw the political subordination of the family much the same way as Aristotle did. See *Phenomenology of Spirit*, trans. A. V. Miller (Oxford: Oxford University Press, 1977), 268–73; *Philosophy of Right*, secs. 256 and 261, pp. 154–55, 161–62. Both Aristotle and Hegel underestimate the amount of political justice (including many equal rights) in communal life, and they both overestimate the ability of any secular polity to meet the basic human need for community.

²² Arguments for the moral need to transcend the family have been made most strongly by Lawrence Kohlberg, "The Claim to Moral Adequacy of a Highest Stage of Moral Development," *Journal of Philosophy* 70 (1975), 631–47, and with more hesitation by John Rawls, *A Theory of Justice*, 74, 301, 511. Cf. Michael Walzer, *Spheres of Justice* (Oxford: Blackwell, 1983), 229–32.

²³ This terminological distinction was originally made by the German sociologist Ferdinand Tönnies, *Community and Society*, trans. C. P. Loomis (East Lansing: Michigan State University Press, 1957).

phanhood, and even less radical familial breakup (as in the divorce of one's parents), which usually means the loss of our primal community in its most original manifestation. And this is why a community is looked upon not as a negotiated amalgamation of separate families into some new social entity but, rather, as an *extended* family itself.²⁴ To be sure, as we shall soon see, one can look upon this original condition as something to be developed or overcome. It can be affirmed or denied in a variety of ways. But much social contract theory, whether explicitly or implicitly, has avoided consideration of the family as the most immediate and persistent locus of one's primal community altogether. It assumes that there is nothing that mediates the relation of an individual and civil society. Accordingly, this type of social theory cannot recognize that even those who believe they have overcome their communal origins most often find another community in which to be reborn. Frequently this is done through marriage, remarriage, or religious conversion, which are the most basic ways one can alter one's communal status. Even persons making this momentous existential decision rarely choose to become noncommunal beings in any full sense. Usually, they exchange one primal community for another. This is why it is important for the authorities of the community to impress upon the newcomer the gravity of his or her existential transition, and that it is irrevocable.

Conversely, much social contract theory has looked upon the parties to the social contract as lone individuals who are the bearers of rights. The familial status of these lone individuals is at most a matter of privacy; indeed, for them the right to privacy becomes the greatest of all rights. But, following this logic, "privacy" itself is that which is abstracted (*privatio*) from the public realm (*res publica*); hence public considerations ultimately trump the interests of the family on every front as they easily trump privacy itself. In fact, when the priority of traditional familial existence is denied, some democratic theorists want to redefine the family altogether. Yet this flies in the face of the remarkable consensus among traditional cultures as to what the family is, namely, a procreative, conjugal union of a woman and a man for the sake of bearing and raising the children that union intends to bring into the world and usually does bring into the world. This traditional consensus is no doubt under heavy attack in current democratic discourse.²⁵ The question is whether civil society can radi-

²⁴ Cf. Aristotle, *Politics*, 1.1/1252b15–20, where the village (*komē*) grows up *from* the gradual association among several families (*apoikia*), unlike the *polis* that moves *out of* communal life to become a truly new and perfected (*teleios*) human entity (*ibid.*, 1.1/1252b29–35).

²⁵ See, e.g., Andrew Koppelman, "Sexual and Religious Pluralism" in *Sexual Orientation and Human Rights in American Religious Discourse*, eds. S. M. Olyan and M. C. Nussbaum (New York: Oxford University Press, 1998), 215–33.

cally redefine the family as its own institution when in fact the family is an institution civil society received from—that is, was given by—historical cultures like Judaism. It is not something civil society creates by itself *de novo*, let alone *ex nihilo*. To be sure, there are contractual elements involved in family structure, even in traditional Judaism.²⁶ Nevertheless, to reduce familial existence to a series of contractual agreements is to belittle the richness and depth of familial existence, certainly as it has been lived by Jews traditionally. That is why almost all Jewish cultural claims on civil society inevitably involve family issues in one way or another. For Jews to abandon these claims is theologically unjustifiable, philosophically shallow, and politically self-defeating.

If the family is no more than a unit of a contractual society, then why should it not be looked upon as one more private contract within a larger, public contractual realm? If, however, this notion were made known to most traditional Jews living in democratic societies, for whom their extended families are both their necessary and desirable primal communities, they would find much contemporary social contract theory to be morally repugnant. Very few traditional Jews would really want their children to be, *de facto* if not yet *de jure*, wards of the state, which is *the* institution emerging out of the social contract. Yet that is the most obvious result of looking at the liberty of the family as an entitlement from civil society through the state. As we shall see later in this book, familial liberty, as something prior to the founding of civil (or contractual) society and its expression in the state, is intimately linked to religious liberty. Most traditional Jews regard their familial bonds, like their religious bonds, as having a sanctity beyond the reach of civil society and the state. This includes the recognition that the so-called nuclear family, which is a family adrift in civil society without a communal anchor, is exceptionally vulnerable to disintegration. The high rate of intermarriage and the low birthrate among nontraditional Jews in the Diaspora are clear demonstrations of that vulnerability.

The respect and protection of the sanctity of the traditional family, which its survival in civil society requires, is surely not something anyone could cogently claim for his or her property, whose very value is made by the state in terms of its currency, and which is wholly taxable by the state. That is why any movement for communal rights is quite different from movements for economic rights. The movement for communal rights,

²⁶ Thus the traditional Jewish marriage document (*ketubah*) contains stipulations mandated for and conditions contracted *between* the marrying parties. See, e.g., B. Kiddushin 19b; M. Ketubot 5.1. Nevertheless, the non-negotiable stipulations mandated by Scripture and rabbinic legislation take precedence over any private contract negotiated between the husband and the wife. See M. Ketubot 4.7–11; B. Ketubot 47b re Exod. 21:10.

often seen as cultural conservatism, need not entail a specific stand on economic rights. Contrary to the views of many neoconservatives, cultural conservatism (or traditionalism) does not require one to simultaneously endorse economic conservatism—nor does it preclude it. They are separate issues.

Indeed, most traditional Jews regard their familial bonds as part of their religious bonds without, however, making those familial bonds into a self-sufficient community.²⁷ For Jews, in one way or another, the covenanted Jewish people is made up of “all the families [*mishpehot*] of Israel” (Jeremiah 31:1).²⁸ This is why Jewish devotion to family has become proverbial in the modern world, even though too much nostalgic kitsch (which is an attempt to select from tradition without an affirmation of its founding and coordinating revelation) has made Jewish familial devotion a vulgar, sentimental parody.

As we shall also see, the only cultural minorities who can resist the inner tendency of the secular state to turn all alternative societies into private corporations (the modern German word for “corporation” is *Gesellschaft*) within its own purview are religious minorities. In fact, it is the distinction between culture as religiously founded, as opposed to culture as racially founded, that enables a minority religion-culture to resist the totalizing expansion of civil society by its very participation in that society. Cultures that are racially defined, by contrast, either claim some special privileges within civil society, usually as the result of a claim for compensation for past persecution against their members, or they attempt to totally dominate civil society by absorbing it into themselves. That is inevitably done with the simultaneous exclusion of those whom they perceive to be inferior races. Unlike religious cultures who define themselves by their founding, sustaining, and fulfilling relationship with the universal creator God, racial cultures inevitably define themselves in relation to their persecutors or to their victims.²⁹ Racial identity always in-

²⁷ Thus, e.g., duties to one’s teacher (*rav*) take precedence over duties to one’s father (see M. Baba Metsia 2.11; Maimonides, MT: Talmud Torah, 5.1), since one’s teacher is a leader of a community in which one’s family, led by one’s father, is a part. Nevertheless, one’s teacher should not require one to neglect one’s parents (see B. Kiddushin 31b re R. Assi). Even the community is an extension of one’s family, not a substitute for it. There is also a rabbinic debate as to whether one’s familial obligation to marry or one’s communal obligation to study Torah in a yeshivah takes precedence. See T. Bekhorot 6.10; B. Kiddushin 29b. As for permanent neglect of marriage for the sake of full-time Torah study, note the differing views of Maimonides (MT: Ishut, 15.3) and R. Asher (*Tur*: Even Ha’Ezer, 1) re B. Yevamot 63b concerning Gen. 9:7.

²⁸ See B. Kiddushin 70b.

²⁹ This is the most basic thesis of Jean-Paul Sartre’s 1946 book, *Anti-Semite and Jew*, trans. G. J. Becker (New York: Schocken, 1972), viz., “Thus the authentic Jew . . . thinks of himself as a Jew because the anti-Semite puts him in the situation of a Jew” (150). In other

volves some kind of biological or historical determinism, even fatalism. Also, there is nothing voluntary about it. As such, anyone can convert to Judaism (or to Christianity or to Islam), but no one can convert to a race or adopt a new one.³⁰

I can think of no better expression of the political and cultural inadequacies of both economically based liberal (*and* socialist) ideologies and racist mythologies than this magnificent insight of the French Catholic philosopher, Jacques Maritain.³¹ Writing in 1942, when the racist culture of Nazism could have destroyed the Jewish people and Western, multicultural civilization along with us, Maritain noted:

In the bourgeois individualist type of society there is no . . . form of communion. Each one asks only that the State protect his individual freedom of profit. . . . Nor in the racial type of community . . . Nothing is more dangerous than such a community: deprived of a determining objective, political communion will carry its demands to the infinite, will absorb and regiment people, swallow up in itself the religious energies of the human being. Because it is not defined by a work to be done, it will only be able to define itself by its opposition to other human groups. Therefore, it will have essential need for an *enemy against whom* it will build itself; it is by recognizing and hating its enemies that the political body will find its common consciousness.³²

Even though religiously based cultures (and here I can only speak directly of Judaism, even though there are analogies in other religions to be sure) also have the tendency to either withdraw from or dominate others, unlike racially based cultures they also have within themselves the resources

words, racial definitions of Jews are made by their persecutors, who frequently become their murderers. Jews who are alienated from Jewish tradition accept these self-definitions. Assimilated Jews even accept the pejorative value the anti-Semites build into these racial definitions of Jews and try to escape their Jewish identity. Nationalistic Jews invert this pejorative value, taking what was meant by the anti-Semites to be a badge of shame and turning it into a badge of pride. But neither the assimilationists nor the nationalists know how to access the classical Jewish definition of “Jewishness,” which is the doctrine of God’s election of the Jewish people, collectively and individually. Only this definition enables Jews to transcend dependence on the world’s opinions of them. Only God’s opinion of the Jews should matter to them. This divine judgment is far more generous than any Jewish self-esteem and far more merciful than any Jewish self-hate.

³⁰ For the elimination of racial barriers to full conversion to Judaism, see M. Yadayim 4.4; Maimonides, MT: Isurei Biah, 12.22, 25.

³¹ For Maritain’s great appreciation of Judaism and his concern for the Jewish people as the prime victims of European racism, see his “The Mystery of Israel,” Eng. trans. in J. Evans and L. R. Ward, *The Social and Political Philosophy of Jacques Maritain* (New York: Charles Scribner’s Sons, 1955), 195–216; also, *Jacques Maritain and the Jews*, ed. R. Royal (Notre Dame, Ind.: University of Notre Dame Press, 1994).

³² *The Rights of Man and Natural Law*, trans. D. C. Anson (San Francisco: Ignatius Press, 1986), 122–23.

of critical self-judgment. These resources enable Jews to live in good faith in a multicultural society, where no one culture is civilly privileged over another. That is because Judaism (and, at least, Christianity as well) has an idea of universal human personhood as the “image of God.” Mainstream biblical-rabbinic theology sees the image of God (*tselem elohim*) to encompass all humankind and not to be the exclusive and essential designation of the Jews.³³ All humans are capable of a relationship with the same God we Jews believe ourselves to be serving most fully. The image of God does not designate a substance or attribute conveyed by God to humans. Instead, it is a relational capacity for what pertains *between* God and all humans.³⁴ Thus the image of God is not a peculiarly Jewish domain. Jews can accept the fact that other cultures enable their members to function as the image of God. So, in the end, our human differences with other people about God are often more differences of degree than of kind. Everyone outside of Israel is neither an atheist nor a pagan. Indeed, it is only those religious cultures who claim a totally exclusive relationship with God who tend to become racistlike in their attempts to withdraw from or dominate others even in civil society. Truth be told, Judaism too has such tendencies, but they can be resisted with the full force of much of Jewish revelation and tradition behind such resistance.³⁵

One might very well see the beginnings of the multicultural pluralism required for civil society’s social contract to be located in interreligious respect. And that respect can only be genuine, and not merely a rhetorical instrument, when it is the result of each religious community being able to constitute a universal horizon looking out from its own traditional sources. On that universal horizon Jews can discover, with theological authenticity, other cultures in their own moral integrity, and without Jews presuming to judge the truth or falsity of the singular revelations the members of these other cultures affirm among themselves. But this means Jews can only discover the moral integrity of those other cultures who themselves constitute a similar universal horizon, and for much the same reason Jews do.³⁶ Racially based cultures, conversely, have no such transcendent orientation or universalizing ability and cannot, therefore, demand or extend any such respect from others. For racially constituted cultures, all foreign relations are adversarial, and frequently belligerent as well.

³³ See Novak, *Natural Law in Judaism*, 167–73.

³⁴ The same relationality is denoted by the scriptural term “holy spirit” (*ruah ha-qodesh*), e.g., Ps. 51:13. See Hermann Cohen, *Religion of Reason out of the Sources of Judaism*, trans. S. Kaplan (New York: Frederick Ungar, 1972), 104–105.

³⁵ See Novak, *Jewish Social Ethics*, 187–205.

³⁶ See D. Novak, *Jewish-Christian Dialogue* (New York: Oxford University Press, 1989), 138–42.

Following this ethical analysis of cultures, one can see why cultures based on class or gender have even less of a prior claim on civil society than do racial cultures. Being ideological constructs, they are without either the historical or ontological roots of religious cultures, and they are without even the historical roots of racial cultures. They can only function as special interest groups within civil society. As such, they are most dependent on civil tolerance and most vulnerable to civil intolerance, all according to what is currently perceived to be useful, useless, or troublesome for civil society itself. Tolerance is most definitely a vague entitlement *from* civil society, not a prior rights claim like that of respect for one's communal roots made *on* civil society. The type of cultural agenda determined by class or gender is usually advocated by secularist intellectuals who, despite their lack of historical and ontological roots, nevertheless believe themselves capable of creating a new culture in their own image and likeness. But without any such roots, these new cultures turn out to have little more content than the ephemeral practices of opinion groups or elitist subcultures. It is no surprise, then, why the advocates of these new cultures frequently oppose the public presence and influence of the older cultures, who can present themselves with historical and ontological backing, with impressive logical consistency, and with the capacity for intellectual development that can adequately deal with new historical situations. In relation to these older cultures, it is remarkable how the advocates of the newer "cultures," despite all their talk about "inclusiveness," become intolerant, even bigoted.

When one begins with civil society as the primary locus of human sociality, there is no real place for community. But when one begins with community as the primary locus of human sociality, there is the potential to make a real place for society. When one makes civil society socially foundational, it is then impossible to recognize community as being anything more than a matter of privacy, which itself is a transient entitlement from society. The moral priority of community becomes vigorously denied accordingly. But, of course, no historical community could possibly accept this role for itself in good faith. A historical, religiously constituted community asks for more than tolerance from civil society; it asks for respect of its historical and ontological priority.³⁷ And these communities are able to respect the secondary importance of society, which, indeed, is the way many civil societies have been seen by most of their citizens. This is expressed in the value many citizens of a democracy see in the notion of limited government.

Furthermore, affirming the primacy of civil society inevitably requires the creation of a hypothetical—that is, a fictitious, even mythical—"state

³⁷ See Taylor, *Multiculturalism*, 63–64.

of nature” or “original [individual] position” as its starting point.³⁸ The primacy of community, on the other hand, which does lead to civil society, can be really located in history—especially in Jewish history, as will be shown later in this book. Furthermore, that historical origin cannot be regarded as part of a dead past because it is the point of reference from which Jews anticipate a transcendent future, lying after the end of history, and including the resurrection of the dead.³⁹ Compared to this type of historical and ontological priority, which is very much alive in the traditional Jewish community, modern social contract theory with its hypothetical starting point pales. It lacks any real history and ontology; it has no past to sustain continuing memory and no future to sustain continuing hope. Indeed, this theory seems to be little more than the imaginative, utopian projection of some secularized, liberal intellectuals in the West. This is why it is blind to the true social significance of a historical culture like Judaism.

I contend that civil society as truly *secular* space can only emerge out of intercultural agreement, precisely because cultures have a *religious* need for that space. These communities are rarely if ever politically, economically, or intellectually, self-sufficient. In one way or another, they need to make alliances with others outside their own cultural domain, alliances in which no one party dominates the others, or one in which all the parties merge and create a new identity for themselves. Communities need to engage in foreign relations if they do not want to be vulnerable to political, economic, or intellectual conquest, or to stagnating isolation. All of this, in one way or another, is continually done through negotiation. Negotiation, of course, is the stuff of any contract, including the social contract. But no community should ever be required to negotiate away its communal identity as the price for the admission of its members to the social contract.

Secular space, especially for the Jews, came in the wake of the French Revolution of 1789, which ended the social, cultural, and political isolation of the Jews and our subordination to essentially Christian societies. Jews became individual citizens of societies that were becoming more and more secular, that is, neither Christian nor Jewish. The political identity of such “emancipated” Jews was no longer determined by their membership in the semi-autonomous Jewish communities (*qehillot*), which functioned for the most part as their own civil society.⁴⁰ Nevertheless, despite

³⁸ See Rawls, *A Theory of Justice*, 13–22. Cf. Novak, *Natural Law in Judaism*, 22–23. For some critiques of this overly formal approach, see, e.g., Robert C. Solomon, *A Passion for Justice* (Reading, Mass.: Addison-Wesley, 1990), 56–57; Ron Replogle, *Recovering the Social Contract* (Totowa, N.J.: Rowman and Littlefield, 1989), 67.

³⁹ See B. Sanhedrin 90b re Exod. 6:4.

⁴⁰ See Jacob Katz, *Tradition and Crisis* (New York: Schocken, 1971).

the continuing suspicion of some Jewish traditionalists that Jewish communal integrity requires such a semi-autonomous ghetto polity, this new situation gave a radically improved function to the Jewish social contract with civil society. Whereas in the medieval past the social contract meant Jewish acceptance of a communal life *under* Christian civil authority, in modernity the social contract was now *between* Jews and gentiles in a society where no historical community could claim the civil order to be its own domain. Jews were no longer aliens in someone else's society, no longer foreigners dependent on the largesse of a host society that at best tolerated us, and at worst exploited us, persecuted us, and even killed us. Jews could now engage in communal negotiations on a more level social and political playing field. Unfortunately, though, too many modern Jews became convinced—consciously or unconsciously (largely by anti-Semites)—that they could only enter the social contract as anonymous, deculturated, individuals. As such, they deprived themselves—and frequently their less deculturated brethren as well—of much of their rich culture. They brought a rootless cosmopolitanism to civil society instead of the riches of their ancestral heritage, riches that would have more greatly empowered their status in a civil society, which is made up of other people having similar cultural riches in their background.

However, to be able to make such strong claims on civil society requires the creation of neutral or secular space in order to conduct social negotiations and achieve some positive social benefits. Yet what is lost on most social contract theorists is the fact that political, economic, and intellectual interests are all for the sake of cultural survival and development. Ultimately, any community's will to live depends on the desire of its members to preserve and advance their traditional way of life as a cosmic desideratum. For Jews, this means looking to revelation—Torah—as the foundation for which the created world (including the social world) is the context.⁴¹ From this historical foundation Jews are able to consistently look toward messianic redemption (*ge'ulah*) as the final culmination of their history and that of all others in the world together with them. Here is where history and ontology meet: History is more than a dead past; ontology is not about a timeless, disembodied eternity.

Jews need to believe themselves in the vanguard of those who wait for this end of all history, even though they are not the only ones who wait for this end (*eschaton*).⁴² All political, economic, and intellectual pursuits are for the sake of this end, which must be hoped for, even though its

⁴¹ See B. Pesahim 68b re Jer. 33:25.

⁴² See Franz Rosenzweig, *The Star of Redemption*, trans. W. W. Hallo (New York: Holt, Rinehart, and Winston, 1970), 415–16.

content is beyond all human ken.⁴³ Without this orientation, Jews can only be seen as one more special interest group within the mundane world. Thus participation in a civil society (or a larger civilization of civil societies) is useful for the human flourishing of Jews in Judaism and its traditional community. Moreover, this participation can also be seen as a means to a greater (if not yet final) end. In today's world that participation might well be politically necessary. This, surely, is quite consistent with the limited aims of a democratic society, which ought never regard its programs, no matter how serious, of ultimate importance in the lives of its citizens. This is why Jews (or the members of any other minority culture) should not ask for their rights as a matter of public entitlement but as their just desert. The social contract is a matter of ongoing negotiation and renegotiation: asking for the protection and enhancement of prior *communal rights* and accepting subsequent *social duties* in return. But the social contract loses its limiting power whenever a secular society founded upon it assumes a messianic role for itself in and for the world. This inevitably calls for the elevation of one religion/culture within the social contract to the level of a state religion of one kind or another.

Claims for Cultural Autonomy

The cogency of the claims Jews can make in the ongoing negotiation of their engagement in the social contract are largely determined by the cogency of their commitment to the Jewish tradition. The more cogent that commitment, the more cogent is their claim on secular society for their cultural autonomy. The less cogent that commitment, the less cogent is their cultural claim on that society. Minimally, that claim is to be free *from* social interference in their cultural life. Maximally, it is a claim *for* social recognition, even at times support, of that cultural autonomy because of its positive contribution to the common good of that society as a whole.

The human environment or community in which we live has been determined for us by others, yet it is also something we are free to determine for ourselves. Initially, our worldly locale is determined for us since we could not have chosen our birth or our birthplace for ourselves. Our communal origins, like our biological origins, are there for us without our prior consent. Nevertheless, whenever we do become aware of our freedom to choose among multiple possibilities in the world, we eventually learn that the most important possibility is the option of *whether or not*

⁴³ See Novak, *Jewish-Christian Dialogue*, 155–56.

we want to be situated in our original community at all. It is the momentous discovery that the initial social status given to us as children is not necessarily the only one available to us as adults. At this point, we have two fundamental choices: We can either identify with our community or we can repudiate it. The choice is to be there or not as a free person. And the modern world has made that choice a more real opportunity for more people than was ever the case in the past, primarily because of the real opportunity for geographic dislocation and relocation.⁴⁴

There are three ways one can freely engage one's cultural community, and three ways to freely disengage. We now need to see exactly how one's relation to the Jewish tradition determines the type of cultural claim a Jew can make on a democratic society.

Regarding cultural engagement, the first and most usual positive option is to confirm that one's birth locale or native community is *now* the place where one would have chosen to be born and grow up had the choice been available *back then*. The choice is retroactive. As such, one can regard one's present communal status as too good to be considered a mere accident.⁴⁵ This person sees his or her community as even more desirable than is necessary and thus becomes a willing and active member of this community. Most people make this kind of social confirmation a continual process throughout their active lives. In fact, no community (let alone any society) could survive if the vast number of its members were not able to confirm their continued and continuing existence in the community by living freely and actively in it and for it of their own volition.

For most people, though, this choice is largely implicit; it is a matter of tacit consent to remain in the community where they have always been. This usually means taking their community and its practices for granted: an acceptance of the status quo.⁴⁶ This conformity declares that their community and its practices are essentially good for them. All of this indicates the force of custom (*minhag*), which is the habitual continuity of the cultural life of the community.⁴⁷

⁴⁴ Cf. David Hume, *A Treatise of Human Nature*, 2.3.8, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, 1888), 548.

⁴⁵ Thus one is to thank God early each morning for "not having made me [*she-lo asani*] a gentile" (T. Berakhot 6.18 re Isa. 40:17; also, B. Menahot 43b).

⁴⁶ This is like the assumption in the Talmud (B. Yevamot 87a) that silence (*shetiqab*), i.e., lack of protest, is tantamount to agreement (*hoda'ah*). Also, one need not make an explicit commitment to practice any particular commandment, or even all the commandments, since this commitment has already been made by the Jewish people's oath at Mt. Sinai to keep the commandments. But anyone who wishes to make such a commitment to keep a specific commandment does so as an act of personal volition greater than the simple choice to keep or violate that specific commandment (see B. Nedarim 7b–8a re Ps. 119:106).

⁴⁷ See Y. Pesahim 4.1/30a–b.

But, as regards cultural claims made on civil society, such conformists (and the term is not being used here pejoratively) are rarely if ever capable of making them, or even wanting to make them. It would seem that the ability to make a cogent Jewish claim on external society in the name of the community requires that one be able to articulate *why* one has remained faithful to the tradition. This requires greater knowledge of the tradition and a greater desire to intelligently explicate it and transmit it to other members of the community.

This second option regarding positive cultural engagement can only be taken by those few members of the community who can articulate their commitment in and for the community. Their commitment to the tradition needs to be much more conscious and conscientious than the largely tacit consent most of the other members of the community give to the tradition. As true leaders, they need to develop a vision of how the community is to operate by itself and then how it is to operate in the world. There is little that they can or should simply take for granted.⁴⁸ They should thus agree with Goethe, who said: “What you have inherited from your fathers, acquire it in order to possess it. What one does not make use of is a heavy burden.”⁴⁹

Authentic Jewish leaders, who are knowledgeable and purposeful, are well equipped to cogently make the cultural claims of the community on civil society, to be the spokespersons of the community.⁵⁰ Unfortunately, though, too many traditional Jewish leaders in modern times have lacked the self-confidence to come forth and speak for the community to the outside world and, especially, to civil society. Accordingly, they have been willing to leave the tasks of Jewish diplomacy to Jews far less knowledgeable of and committed to the Jewish tradition. These modern Jewish diplomats have, to be sure, usually been far more sophisticated than traditional Jewish leaders have been. Nevertheless, their lack of authentic cultural engagement with Judaism has prevented them from making authentic Jewish cultural claims on civil society.

The third way a Jew can engage his or her cultural community is by the conversion to Judaism of someone who was previously part of a gentile community. Although Jews have long avoided active proselytism, they have never ceased to accept converts. But if being Jewish is a matter of birth, then how can one who is born a gentile *become* a Jew? The answer worked out in the tradition is that a convert to Judaism (*ger*) is, through

⁴⁸ See, e.g., Y. Baba Batra 8.2/16a re Deut. 33:4 and R. Moses Margolis, *Pnei Mosheh* thereon.

⁴⁹ *Faust*, 682–84 (Hamburg: Wegner Verlag, 1949), 29 (my translation).

⁵⁰ See, e.g., B. Yoma 69a.

the event of conversion, “born again.”⁵¹ As such, even though a person may not be converted to Judaism against his or her will, freedom of choice is a necessary but not sufficient condition of becoming a Jew.⁵² A former gentile becomes a Jew by virtue of a proper Jewish tribunal accepting that person into the people of Israel and conducting the appropriate rites of initiation.⁵³ Nevertheless, the fact that the candidate for conversion was not compelled in any way does not automatically require a Jewish tribunal to accept him or her as a convert.⁵⁴ In other words, the tribunal acts like God, *in loco Dei* as it were, by electing a former group of gentiles to be his people at Mount Sinai.⁵⁵ Just as the people’s free acceptance of election was a necessary condition for the covenant to be humanly effective in the world, so it is with the individual gentile who is converted to Judaism now.⁵⁶ And, just as the people’s free acceptance of election confirmed rather than initiated the covenantal relationship, so it is with the gentile who is converted now. Moreover, just as a native-born Jew who does not exercise his or her Jewish duties forfeits many covenantal privileges, so it is with a convert who, in effect, does not develop the normative status he or she obtained at the event of conversion.⁵⁷ Therefore, aside from a few details involving marital status, a convert is as much a child of Abraham, Isaac, and Jacob, Sarah, Rebekah, Rachel, and Leah, as is a native-born Jew.⁵⁸

In terms of the cultural claims that can be made on civil society, it would seem that a convert to Judaism can make the very same claims a native-born Jew can make. Nevertheless, a convert has one additional cultural claim to make on civil society, namely, the democratic claim to be able to convert to a religion of his or her choice. The fact is that in most premodern societies, dominated as they were by Christianity or Islam, Jews were only a tolerated foreign entity. Often one of the conditions of that civil toleration by gentile authorities was that Jews would not accept converts, let alone actively proselytize gentiles in those host societies, gentiles who were almost always Christians or Muslims. One of the innovations of modern secular democratic society was that a Jew could leave the traditional Jewish community without having to become a Christian or a Muslim as had been the case in the past. Another similar innovation was that Jews could accept converts from anywhere, even though they have been

⁵¹ B. Yevamot 22a and parallels.

⁵² See B. Ketubot 11a.

⁵³ B. Yevamot 47a–b.

⁵⁴ See *ibid.*, 24b.

⁵⁵ B. Keritot 9a.

⁵⁶ See esp. B. Shabbat 88a re Est. 9:27.

⁵⁷ B. Yevamot 47b. See, also, B. Sanhedrin 27a re Exod. 23:1 for the status of a person who willfully and publicly violates commandments, but is still taken to be a Jew.

⁵⁸ Cf. M. Yevamot 6.5 re Lev. 21:7.

reluctant to do so.⁵⁹ Both innovations were the result of the official recognition of religious liberty for the citizens of a democracy. Therefore, a convert to Judaism can make the claim of religious liberty with even greater force than a native-born Jew.⁶⁰ So, converts (and returnees to traditional Judaism) have reminded native-born Jews that Judaism itself cannot be effective when simply taken for granted.⁶¹ And these converts and quasi converts have reminded civil societies that religious liberty entails the right of religious conversion for anyone in those societies.

There are three ways a Jew can disengage from his or her primal Jewish community. Here too there are implications for the type of cultural claims such a disengaged Jew can make on civil society.

The most radical form of disengagement from Judaism is conversion to another religion, what is called apostasy (*shmad*).⁶² And the fact that apostasy very often results from intermarriage indicates how closely familial and religious bonds operate, especially for Jews.⁶³

Most Jewish apostates have coupled their attraction to their new religion and its adherents with an aversion to Judaism and the Jewish people. Since they usually do not want to hear the claims the Jewish people make on them to return to the fold, they can hardly be expected to make Jewish cultural claims in a society where they no longer identify themselves as Jews.⁶⁴ Thus the attitude of most Jews toward apostates has been to pray for their later return, but to recognize that in fact they and their descendants are probably lost forever.⁶⁵ And, furthermore, concerning the apos-

⁵⁹ See *Encyclopedia Judaica*, 13:1187–91.

⁶⁰ This is because a convert to Judaism must explicitly accept the authority of all the commandments of the Torah and Jewish tradition as a prerequisite of his or her conversion. See T. Demai 2.5; B. Bekhorot 30b. For a native-born Jew, however, such acceptance is implicit because of ancestral acceptance of the entire Torah at Mt. Sinai. See, e.g., M. Shevuot 3.6.

⁶¹ See B. Kiddushin 70b and Tos., s.v. “qashim gerim” (the opinion of R. Abraham the Proselyte on 71a). Cf. B. Pesahim 91b and Tos., s.v. “shema.”

⁶² B. Sanhedrin 74a (following Ms. Munich). The Greek term *apostasia* (lit. “standing away”), which is termed “apostasy” in English, denotes the specifically religious abandonment of one’s faith as distinct from merely political rebellion, which was its earlier meaning in pre-Hellenistic Greek texts (see Liddell and Scott, *A Greek-English Lexicon* [Oxford: Clarendon Press, 1925], 218–19). It seems to have been coined by Hellenistic Jewish authors in regard to their contemporaries, whose abandonment of Judaism was more a religious than a political rebellion. See, e.g., Septuagint on Num. 14:9 (for Heb. *marad*, lit. “rebel”; cf. Vulgate thereon: *Nolite rebelles*). Cf. I Macc. 1:10–16. In Christian sources, *apostasia* had much the same meaning as *shmad* had in contemporary Jewish sources. See G.W.H. Lampe, *A Patristic Greek Lexicon* (Oxford: Clarendon Press, 1961), 208.

⁶³ See B. Kiddushin 68b re Deut. 7:3–4 and Tos., s.v. “binkha;” B. Sukkah 56b; Y. Sukkah 5.8/55d.

⁶⁴ For continuing Jewish claims even on apostates, see Novak, *The Election of Israel*, 189–99.

⁶⁵ See B. Yevamot 16b–17a.

tates themselves, there seems to be a feeling among many Jews that the community might actually be better off without such unwilling members at present. Although the community must care *about* apostates in the ultimate sense, it need not care *for* them in the more immediate sense.

The second way Jews can disengage from the traditional Jewish community is through avowed secularism. In the most radical form of secularism, like that of Spinoza, a Jew leaves the traditional Jewish community, indeed the Jewish people totally, without, however, converting to another religion.⁶⁶ In less radical forms of Jewish secularism, a Jew leaves the Jewish tradition but remains part of the Jewish people in some nonreligious, or even antireligious, way. Here we find the assertion that the Jewish people is a nationality or an ethnic group whose identity can remain intact without faith in the God who elects the Jewish people, who reveals the Torah to them, who authorizes their tradition, and who will redeem them in the end. Unlike some the old-time Jewish Marxists, though, who made the Communist Party their primal community and who thus left the Jewish people for all intents and purposes, most contemporary Jewish secularists fall back on a racial definition of the Jewish people and Jewish culture in their desire to remain identifiably Jewish. Since racial definitions of Judaism and the Jewish people have proved so convenient for the ideologies of the worst and most dangerous enemies of the Jewish people, especially in recent times, it is rather shocking that so many Jewish secularists would be so oblivious to the paradox of presenting definitions of Jews and Jewish culture that seem racial, if not actually racist.

Most Jewish secularists today are atheists of one sort or another. But the question is whether atheistic Jewish secularism can be considered Judaism in any way that makes sense either historically or ontologically. For this reason, then, it is easy to see why such avowed secularists cannot make any cultural claims on civil society that are not merely those of a human opinion group employing special pleading. Accordingly, they can only ask for entitlements from civil society, entitlements that civil society can take away *from* them as easily as it can give these entitlements *to* them. Denying historical and ontological priority, secularists must rely on social largesse inasmuch as they have no transcendent point of reference from which to truly demand human *rights* as prior claims. This is as much a problem for Jewish secularists in the State of Israel, who want to define the Jewish people and its culture in modern nationalistic terms, as it is for Jewish secularists in the Diaspora, who want to define the Jewish people in ethnic terms.⁶⁷ These secularist ideologies ignore too much Jewish tradi-

⁶⁶ For the now definitive biography of Spinoza, see S. M. Nadler, *Spinoza* (Cambridge: Cambridge University Press, 1999), esp. 153–54.

⁶⁷ Cf. Martin Buber, *Israel and Palestine*, trans. S. Godman (London: East and West Library, 1952), chap. 1.

tion to maintain any real Jewish continuity. That is why their adherents inevitably turn out to be poor advocates of Jewish cultural claims on civil society or Jewish national claims on the world. Jewish culture (including Jewish nationality and ethnicity) cannot be separated from Jewish religion. Nonreligious Jews who define themselves as “cultural Jews” have as little understanding of culture as they do of religion.⁶⁸ Perceptive Jews and non-Jews usually see that sooner or later.

The third way Jews can disengage from the traditional Jewish community is through what must be called “antinomianism.” The disengagement of antinomians is far less radical than that of apostates, and even less radical than that of avowed secularists. Antinomianism might be defined as self-chosen religious doctrines that are contrary to the dogmas of traditional Judaism. Although traditional Judaism has very few dogmas, at least three can be discerned, especially when seen in the light of their modern denials. One, the Written Torah (minimally the Pentateuch), is the direct revelation of God (*torah min ha-shamayim*), even though there is much that can be said about the human transmission of the revealed text.⁶⁹ Two, the Jewish legal tradition (*halakhah*), often called the Oral Torah, is the normative interpretation, application, and supplement of the precepts of the Written Torah, even though there is much flexibility in that interpretation, application, and supplementation.⁷⁰ Three, the destiny of the Jewish people (and most likely all humankind with them) will not be fulfilled until the final redemption, including the bodily resurrection of the dead by God, even though that can hardly be described by any human mind short of it actually happening.⁷¹

Truth be told, modern liberal Judaisms have, in one way or another, rejected all three of these dogmas.⁷² That is why it is not unjust to term

⁶⁸ See Neuhaus, *The Naked Public Square*, 27, 132; Novak, *Natural Law in Judaism*, 14–15.

⁶⁹ M. Sanhedrin 10.1. For traditionalist flexibility in understanding the human transmission of the Torah text, see David Weiss Halivni, *Revelation Restored* (Boulder, Colo.: Westview Press, 1997); B. Barry Levy, *Fixing God's Torah* (New York: Oxford University Press, 2001).

⁷⁰ B. Berakhot 5a re Exod. 24:12; Maimonides, MT: intro., and Mamrim, 1.1–2. For traditionalist understanding of halakhic flexibility, see Eliezer Berkovits, *Not in Heaven* (New York: KTAV, 1983).

⁷¹ M. Sanhedrin 10.1; B. Berakhot 34b re Isa. 64:3. For the flexibility of Jewish eschatological speculation, see Novak, *The Election of Israel*, 152–62.

⁷² This can be seen by looking at the official Torah translation and commentary published by even the most “conservative” of the nontraditionalist Judaisms, the largely American Conservative Movement: *Etz Hayyim* (New York: The Rabbinical Assembly and the United Synagogue of Conservative Judaism, 2001). Concerning the denial of Mosaic revelation of the Pentateuch, see 1406, 1477; cf. M. A. Meyer, *Response to Modernity: A History of the Reform Movement in Judaism* (New York: Oxford University Press, 1988), 273. Concerning the presumption of a right to change Jewish law at will, which, of course, denies the

them antinomian. Revelation has been denied when it is asserted that the Written Torah is a work *by* human beings, even “inspired” human beings, which means much less theologically than saying that the text of the Torah has been transmitted *through* human beings. The authority of the normative tradition has been denied when changes in the law have been made by fiat rather than by reasoned judicial interpretation and its inevitably conservative restraint. And the transcendent character of the final redemption has been denied when a “Messianic Age” of one sort or another has been proposed, which seems more like an idealistic human projection, a utopia, than an apocalyptic event. Nevertheless, all this is not apostasy inasmuch as these liberal Judaisms have not been presented by their proponents as entrances into the tradition of some other community. (In fact, I think liberal Judaisms have saved many modern Jews, who are not yet ready to fully retrieve the Jewish tradition, from apostasy or total assimilation into the secular world.) This is why those traditionalists who proclaim these liberal Judaisms are “not Judaism” are mistaken. Instead, it would be more accurate (and probably more effective) for Jewish traditionalists to try to persuade the followers of liberal Judaisms that their Judaisms are inadequate in the light of the full Jewish tradition, both in terms of their selective correspondence to the classical sources of Judaism, and in terms of what turns out to be their incoherent alternatives to the tradition. It is a needless insult to compare liberal Jews to apostates, and it is a needless compliment to apostates to see them as no different from liberal Jews.

Despite the fact that religiously liberal Jews do not espouse the atheism that has been espoused by so many secularist Jews, because of their inadequate notions of revelation, tradition, and redemption, the claims they make on civil society for Judaism are rarely any different from those made by secularist or “cultural” Jews. Lacking a truly transcendent source from which to make their religious-cultural claims, they are left with the immanent option of presenting themselves as a merely human opinion group, whose religion is an essentially private matter. In other words, they do not have enough of a consistent connection to the historical Jewish tradition, nor do they have a truly ontological point of reference beyond that

authoritative veto of the law for any innovation, no matter how attractive it might be to Jews in the present, see *Etz Hayyim*, 1478; cf. Meyer, *Response to Modernity*, 324. Concerning the designation of traditional Jewish eschatology as “mythic” rather than intending what is true, see *Etz Hayyim*, 388; cf. Meyer, *Response to Modernity*, 388. Thus one can see that whatever theological differences exist between the various liberal Judaisms today, they are matters of degree not of kind. On most social and political issues that are debated in civil society, they seem to speak in a voice rarely distinguishable from that of secularism per se.

of mere human projection from which to argue a fully Jewish case with conviction, even passion. In terms of political effect, therefore, liberal Jews cannot make claims on civil society that are as powerful or as consistent as the claims made by those traditional Jews who speak with more historical and ontological weight, and who know how to enter civil discourse intact, and also exit it intact.⁷³

⁷³ Cf. T. Hagigah 2.4 and parallels.