

"COERCION AND CONSENT"

Insights from the Halakhah on some Issues in the Patty Hearst Trial

The Patty Hearst case is one of the most piquant in recent memory. This is so for a number of reasons: first, it is a sign of the turbulence of our times, with its radical groups, spin-offs of the Counter Culture, and such exotic phenomena as the Symbionese Liberation Army. Second, it reveals the personal tragedy of a prominent American family which heretofore reported the news, and now is making the news. Third, it raises profound legal issues relative to a complex human situation that is riddled with ambivalencies and ambiguities. My interest is only in the third element. I am not concerned with the personalities or political aspects or even with the truth or falsity of the case.

I am discussing this topic for two reasons. First, as an exercise in *Talmud Torah*, which is my excuse for presenting a *sheur* instead of a sermon. The second is a practical reason. The problem of what is popularly called "brainwashing," and other forms of persuasion, have become prominent since the Korean War. With improvements in technology, we are developing ever more sophisticated techniques. This becomes more and more ominous as we inch towards the dread year of 1984, about which George Orwell wrote so chillingly.

Since I am not interested in the particular details or even facts of the trial, but rather in general principles, I shall be using Patty Hearst as a mere name, without any reference to the real person or the real trial. I wish to make a brief attempt to locate some Jewish sources for dealing with the most significant of the issues raised in the trial. To this end, we shall turn to the Bible and the Halakhah, or Talmudic Law, for illumination.

First, permit me to formulate the circumstances and the questions. Granted that Patty Hearst was kidnapped and exposed to coercive persuasion, can she be faulted for acts she committed later, such as bank robbery, which she probably would not have done before being kidnapped, which she now repudiates, but which, at the time she was doing it, she maintained was being done voluntarily? Of course, it is this last point on which everything else turns. However, we shall accept, for the time being, that the act was declared by herself as voluntary, and later we shall consider some variation of the argument.

First, let us turn to a well-known biblical incident which is similar although not identical. Pharaoh, the Emperor of Egypt, persecuted the Children of Israel, and was severely punished for it. Yet, at almost every stage in the protracted negotiations between Pharaoh and Moses, we read such expressions in the Torah as *כִּי אָנִי הִכְבַּדְתִּי* ("And He hardened the heart of Pharaoh") and *לִבִּי פָרְעֹה* ("For I have hardened his heart"). All the commentators raise what is a very serious question: Does this not deny the principle of free will which is at the basis of the Whole Torah, and the principle of *teshuvah* (repentance)? Why then, was Pharaoh punished?

Many answers are offered. The most compelling of all is probably that of Maimonides (*Hil. Teshuvah* 6:1-3) who replies that the initial act of Pharaoh was a free one. His decision to enslave the Children of Israel and make their lot unbearable was taken without any coercion. Once he chose the path of evil freely, the rest of the chain of events was inevitable. Certain sins are so severe, so repulsive, that the punishment for them is the closing off of the possibility of repentance. Hence, the final punishment of Pharaoh was for the first, wrong, free choice that he made.

But whatever the answer, this much is clear: that we consider the first act of a chain of deeds. In this case, that of Pharaoh, the first act was a free one; thereafter, the Lord "hardened his heart" -- which is another way of saying that God brainwashed Pharaoh -- but nevertheless Pharaoh is guilty, because of the first free act.

Obviously, if the situation was different, and if the initial act too was coerced, then the "brainwashed" acts committed later cannot be considered criminal nor can the perpetrator be held culpable. Both the question and the answer presuppose that if the initial decision of Pharaoh had been under duress, we could not, in all justice, find him guilty.

The conclusion obviously exonerates a defendant who was kidnapped and brainwashed. The "hardening of her heart" robbed her of genuine consent, and we must consider her later acts as coerced, and since the initial act was under duress she must be held not guilty.

However, it is difficult to form a firm opinion from the biblical incident alone. Let us therefore turn to the Halakhah, where the problem is discussed under the rubric of אונס (oness), which means coercion or duress. The word also means rape. It is a fundamental principle of Jewish Law that a coerced act has no standing, either as a good act or an evil act. We learn this from the biblical law of וּלְנַעֲרָה לֹא תַעֲשֶׂה דָבָר, "And to the maiden shall you do nothing," which means that a betrothed maiden who was ravished is held innocent as long as she protested the attack.

Of special relevance to our case is the problem discussed in the Talmud, *Ketubot* 51b. In order to understand this passage let us bear in mind that according to Jewish Law a married woman who committed adultery is guilty of a capital offense, as is the adulterer. This punishment is administered if adequate warning was given to her, and if there is a Sanhedrin. Where capital punishment cannot be effected, she is forbidden to live any longer with her husband.

Now, אביוה דשמואל, the father of Samuel, states the following law: אשת ישראל שנאנסה אסורה לבעלה -- a Jewish wife who was sexually attacked is forbidden to live with her husband. Unless we have proof that she protested the act from the beginning to the end, we suspect that תחילתה באונס וסופה ברצון, that whereas the act was begun under duress, in the end she may have cooperated with the attacker out of her own free will, and therefore she is in the category of an adulteress, and thus forbidden to live with her husband.

However, this is only one opinion. A contrary view is held by Rava. Thus we read:

ופלגא דרבא, דאמר רבא כל שתחילתה באונס וסופה ברצון, אפילו היא אומרת הניחו לו, שאלמלא הוא נזקק לה היא שוכרתו, מותרת, מאי טעמא, יצר אלבשה.

This is disputed by Rava, for Rava said that wherever the beginning was under duress and the end was with her consent, then even if she says, "leave him be, for even if he did not want me I would hire him for such purpose," she is permitted to live with her husband. What is the reason? Because he clothed her with passion.

What the Talmud means is that as long as the initial act was committed under duress, we consider the later consent of the woman as not genuine, and effectively as a case of coercion. The reason for this is that her erotic instincts were

aroused, so that the consent she gave at the end of the act was spurious, not genuinely of her free will, even though she declared herself acting voluntarily.

Maimonides (*Hil. Sanhedrin* 20:3), together with the other decisors of Jewish Law, declared that the Halakhah holds with Rava and against the father of Samuel. Hence, the authoritative opinion of the Halakhah is that תחילתה באונס וסופה ברצון, where the act began with coercion and ended with consent, the entire act is treated as coercive, and the perpetrator is held not guilty.

(On the decision of Maimonides in favor of Rava, the author of *Kesef Mishnah* asks, How can passion be used as an excuse? Can we not by the same reason excuse every sinner because such a person acted on the impulse of passion? His answer is, that the element of "passion" cannot itself be sufficient to exonerate the defendant. Rather, the main element under consideration is that the act began under duress, and only now was there consent because of passion. The main brunt of the defendant's exoneration is because of the entire process issued from the initial act of coercion.)

It would, then, clearly seem that a kidnapped person who later acts out of apparent consent is nonetheless held innocent of the crime. As in the talmudic case of תחילתה באונס וסופה ברצון, here too she was "enclotted with passion," her feelings and emotions were manipulated by her captors. There should be no substantive difference between the sexual יצר or passion, and political passions (especially in an age of fashionable radicalism).

However, the matter does not end there. On the same page of the Talmud, a little later on, the following passage appears, and it bears a remarkable resemblance to our case:

א"ר יהודה, הני נשי דגנבו לגבו, שרין לגבר"הו. אמרי ליה רבנן לר"י, והא קא ממטיאין להו נהמא? - מחמת יראה. והא קא משלחן להו גירי? - מחמת יראה. ודא', שבקינהו ואזלו מנפש"הו, אסירן.

R. Judah said: Women who were kidnapped are permitted to their husbands. (Presumably, they were outraged, yet we assume that this was under duress and therefore they are permitted to resume relations with their husbands when they are rescued.) Said the Rabbis to R. Judah, "But do they not help serve bread?" (In other words, we notice that women who are held captives by such gangs of thieves, normally are pressed into domestic service, indicating that they accept their roles. R. Judah answered that the only reason they do so is) "because of fear." (The Rabbis asked again), "But do they not hand them the arrows?" (In other words, we often notice that women in this position help the kidnapers during military attacks against them. To this R. Judah again responded) "this too is because of fear." However, certainly, if the kidnapers let them go, and they returned to the kidnapers of their own free will, they are later forbidden to resume relations with their husbands.

This passage of the Talmud clearly states that if there is a possibility of escape, and the possibility was not taken, then this demonstrates that the captives have now decided to stay on with the captors of their own free will, and are therefore guilty of adultery and hence may not live with their husbands ever again.

(The dictum of R. Judah represents a third opinion, and it is difficult to tell whether or not he agrees with Rava on the basic question of תחילתה באונס וסופה ברצון. It is fairly self-evident that he does not accept the view of

the father of Samuel. However, if he agrees with Rava, why did he answer to the Rabbis that the captives provided food or ammunition "out of fear" when he could just as easily have responded, "out of passion," i.e., as a result of the infatuation which began as coercion? Either R. Judah disagrees with Rava on this point, or else Rava is non-committal -- the excuse of "passion" may not cover an extended period of time -- and R. Judah implicitly rejects the passion argument under such circumstances in favor of the assumption that coercion was caused by fear.)

This would indicate, in our present case, that if the defendant in the trial had the possibility of escape, and she did not avail herself of it, that she is guilty of cooperating with the criminals in the bank robbery.

However, there are two ways of responding to this argument. First, the difference between the captives handing weapons to the kidnappers, and being released entirely and returning of their own free will, is not quite that clear. On the question and answer concerning the handing of the arrows, to which R. Judah answered that they did so out of fear, one of the commentators (שיטה מקובצת) asks the following question: can we not argue that if the women refused to assist, then the thieves might have been defeated and thus the women would be rescued; hence, the fact that they cooperated in the defense of the gang is a sign of their consent to remain with the captors? Should this not lead us to conclude that they are guilty? The same authority answers that this is not so, because the women are afraid that if they do not cooperate in fighting, their captors may win anyway, and then will kill them for disloyalty to them. Hence, it is still considered a case of fear and coercion.

Hence, there is a vague middle-ground between both cases, one in which "released by the captors" remains undefined, and we must determine this relative term based on the conditions and the risks that are taken. The argument by Patty Hearst that she did not attempt to escape because of her fear that the kidnappers will later take revenge upon and kill her, has to be given some credence according to this authority.

Second, my grandfather, R. Yehoshua Baumol, of blessed memory, in his *Emek Halakhah* (II, No. 19, p. 249), suggests a distinction that is most relevant here. We must recall that the talmudic passage under consideration speaks only of the problem of אסורה לבטלה, whether she is permitted to her husband, and not the question of ח"ב בת מיתה, whether she is liable to capital punishment. Whereas if completely innocent she is both free of punishment and may live with her husband, there are times when the two consequences diverge. Thus there is the opinion of one great authority (R. Isaac Colon), quoted in the *Shulhan Arukh*, that if a minor wife committed adultery, we must under Jewish Law refrain from punishing her. Because she is a minor, she is presumed not to know the law, and one cannot be punished if he was not warned of the offense and indicated in advance full knowledge and consent to the nefarious act. However, we still maintain that she is forbidden to her husband, because one does not need to be warned, and it is not necessary to have a legal education, in order to understand quite naturally that adultery is an offense against the marital bond. That is why she is forbidden to her husband even though she is not to be punished by the courts. She may not be morally innocent, but she is not criminally guilty. (My grandfather makes the distinction between the woman in question being forbidden to her husband and her liability to punishment, with regard to the reverse case, i.e., one who began the act with consent and in the end was coerced. My uncle, Rabbi Joseph M. Baumol, in his commentary on that responsum, brings proof to my grandfather's distinction from both Maimonides and Meiri.)

(The validity of this distinction is reinforced by the specific mode of

codification by Maimonides. The law of Rava is codified by him in *two* places -- in *Hil. Sanhedrin* 20:7, and in *Hil. Ishut* 24:19. The law of R. Judah is mentioned only in *Hil. Ishut* 24:20. I suggest that the basic law of Rava is understood by Maimonides as applying equally to the criminal nature of the sexual act and its disruptive effect on the marital relationship. With regard to both, Rava holds the woman guiltless. Hence, Maimonides codified the law both in *Sanhedrin*, where he discusses the question of courts and punishment; and in *Ishut*, where his concern with permission for the husband and wife to resume normal relations. The law of R. Judah is recorded only in *Ishut* because it is irrelevant to court-ordained and administered punishment, and affects only the domestic questions. The captive woman who did not come home when released by her kidnappers has rejected her marital fidelity by not escaping, even if there was some lurking fear of revenge, as if the captors were testing her, and even if she would later claim a residual passion or infatuation. But with regard to punishment as a criminal, these elements are sufficient to defend her against a clear finding of guilt.)

Hence, in our case of women who might have escaped but did not, we may find different levels of coercion and consent. It is quite possible that R. Judah will hold that they are forbidden to their husbands, and yet maintain that a court cannot find them guilty of a criminal act. The argument is a cogent one.

(An additional problem arises in the attempt to exonerate Patty Hearst on the basis of "the beginning was coercion and the end was consent." That is, that in the controversy between the father of Samuel and Rava, both discussed the case of one single act of transgression, which was begun under duress and ended in consent -- not a series of such acts. It might seem that the entire controversy, including Rava's lenient opinion, refers to a single act which he therefore categorizes as coerced, but that a series of acts must be treated differently, i.e., each act in and of itself. However, this is contradicted by the case quoted later by R. Judah who clearly speaks of a long captivity by women who were kidnapped. It is obvious from that passage that we are speaking of a number of acts and not a single one.)

From all that I have said, the weight of the Halakhah would seem to be on the side of a victim of brainwashing who committed a crime out of apparent free will. Of course, I must repeat that I am not speaking about a specific trial except in the way I have structured the facts. Whereas the father of Samuel would argue for guilt in such a case, Rava -- whose opinion is accepted as Halakhah -- would exonerate the defendant.

(However, one must be careful not to overstate this argument. Thus, it may be objected that the halakhic principle of coercion which ends in consent, as we have applied it, might be used as a blanket exculpation of Germans and other Nazis during World War II. After all, their political "passion" was aroused and this would then be a source of excuse for their heinous activities.

However, this argument is false on two grounds. First, for the great majority of Germans, this is not a case of *תחילתה באונס*, of having begun the act of political degeneration under duress. They embraced the malevolence of Nazism of their own free will, and even if they later went along with it out of a mass hysteria -- the political equivalent of aroused erotic passions -- they must be held accountable for the entire process because of their initial free acceptance of it. The parallelism between the applied concept of coercion and the biblical paradigm, must be exact. Just as in the biblical case, the fact of coercion must be established by vigorous protest -- *וַלְעָגָהּ וְאֵין בְּיוֹשֵׁי*, "And she cried out and there was none to help her" -- so in the case of political responsibility, we must have unassailable proof that the person or persons involved unequivocally protested the doctrine and practice of Nazism. Otherwise, they must be regarded as having accepted this criminal philosophy out of free

will, whether passively or actively.

Secondly, the concept of coercion as an excuse is not absolute. It does not, for instance, cover the case where one was coerced into killing a third party. Murder, along with idolatry and unchastity, cannot actively be undertaken under the excuse of coercion. Hence, Nazis cannot argue their innocence on the grounds that they were coerced to kill Jews and others.)

What we have attempted to do is to show how the most significant human problems, no matter how new they may appear, are in some way or other anticipated by and treated in the holy Torah, especially the Halakhah.

וְבִינְתַנְּם לְעֵינֵי הַגּוֹיִם, "For it is your wisdom and your understanding in the eyes of the nations." And if it is so in the eyes of the nations, then certainly the Torah is the source of our pride, our wisdom and our understanding, in our own eyes.