

# Religion and the Discourse of Human Rights

Editors:

Hanoch Dagan | Shahr Lifshitz | Yedidia Z. Stern



THE ISRAEL  
DEMOCRACY  
INSTITUTE

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# Introduction

Hanoch Dagan, Yedidia Z. Stern,  
and Shahar Lifshitz

The role of religion in the human rights discourse is elusive. On the one hand, historically, the human rights discourse developed in many instances on a religious platform while using decidedly religious rhetoric and arguments. As a result, religious values, such as the creation of humans in the image of God, play—to this day—an important role in secular liberal thinking and in the human rights discourse, while different facets of human rights are encompassed in the contents of various religions. On the other hand, in many countries around the world, religion, both in terms of its content (that is, its distinct value and normative choices) and in terms of its methods of organization (namely religious, social, and political institutions that promote the religious message and practice), is perceived as one of the most significant threats to the liberal identity of countries and individuals. Beyond the negative sentiment and the pragmatic threat that liberals at times experience toward different religions, parts of the liberal intellectual tradition and human rights discourse on topics of freedom of religion, freedom from religion, and the injunction of non-establishment seems to consider religion as a threat to the liberal world and its dedication to human rights.

Yet, even if in many contexts religion and liberalism, or more specifically, religion and human rights, are perceived in public and intellectual discourse as foes, one must bear in mind that the identity of many people in our world is composed simultaneously of their religious or traditionalist identity as well as from their liberal identity and their dedication to human rights. The State of Israel may serve as an example of this. Israel has a dual identity: it is a member of the family of democratic nations, whose culture is Western and liberal, while it is also a unique country, the nation state of the Jewish people. The influence of both aspects—the universal and the particular—is highly noticeable on the various levels of the Israeli public space: social, educational, cultural, political, legal, and media areas. Elliptical existence, in the shadow of the two foci, is characterized by a climate of cultural dichotomy, which is a basic trait of the national life for many Jews in our generation. The dichotomy between Western culture and traditional

Jewish culture is expressed, for example, in the definition of the State of Israel, in the Basic Laws passed in 1992, as “Jewish and democratic.” The broad acceptance of this definition in both the legal and the general Israeli discourse manifests its correspondence with the way the vast majority of Israel’s Jewish citizens identify themselves: they consider Israeli sovereignty as concomitantly encompassing a dual obligation to both facets of identity—the liberal-democratic on the one side, and the national-cultural on the other. Yet, although studies demonstrate that most of the Jews in Israel are interested in a dual democratic-Jewish identity, the practical meaning of this issue remains unsolved. As a result, at times Israeli Jews are forced to choose between the two focal points in their personality instead of allowing the two of them to enrich and produce a fuller personal and social identity.

This book grapples with these universal challenges while using (in some of its chapters) the Israeli example as a particularly interesting test case. The book offers a comprehensive and pluralist perspective on the complex interactions between human rights and Judaism (and religion more generally), and offers a platform for a dynamic dialogue between the two discourses. As part of the static discussion, the various issues concerning human rights doctrine and the corresponding Jewish discourse are explored through case studies that compare and contrast cases in which there is a conceptual and practical affinity between the two discourses to cases in which there is a clear divergence. Alongside the static method, other chapters in the book engage a more dynamic methodology as well. Authors of these chapters explore questions regarding the patterns of activity, development, and interpretation that religion and the liberal world can employ in order to incorporate one another substantially. A substantial dialogue, or a valuable encounter, has the potential to influence both of its participants. Therefore, this book demonstrates the potential of the liberal principles expressed in the human rights doctrine to influence religious thought. Conversely, it exposes potential religious influence on liberal thought.

\* \* \*

With these aims in mind *Religion and Human Rights Discourse* is divided into four parts. The first part, *Freedom of Religion and Freedom from Religion*, addresses some foundational questions regarding religion as the beneficiary of the human rights discourse and as a potential justification for limiting human rights. The focal questions raised in this context are: (a) Does religion deserve a distinct, heightened protection as compared to freedom of conscience?; (b) What “price” must religion pay in order for freedom of religion to be invoked as a human right?; (c) When, if at all, is it legitimate for the state to incorporate into its laws religious practices (in matters such as marriage and divorce)?; and (d) What should the

proper attitude of a liberal state be toward religious communities that violate the human rights of its members?

Part One begins with Christopher Eisgruber and Lawrence Sager’s “Equal Membership, Religious Freedom, and the Idea of a Homeland.” Many conceptions of religious freedom (including these authors’ previous work) incorporate principles requiring that states provide equal rights and status to people of different faiths and ethnicities. Such conceptions appear inconsistent with the practice of any state that privileges a specific relationship to religion—such as, for example, Israel’s commitment to being a Jewish state or France’s commitment to a secular national identity. In this article, Eisgruber and Sager examine whether the idea of a homeland provides a way to reconcile a limited set of ethnic or cultural preferences with the demands of a robust equality principle. They elaborate on the idea of a homeland as promising not only a secure refuge but also a cultural community. They also suggest how equality principles generate limitations on what a homeland may offer its people and obligations that a homeland must honor with regard to its minority residents. They use this account of equality and the idea of a homeland to analyze human rights controversies in Israel. More broadly, Eisgruber and Sager develop a preliminary taxonomy of equality-respecting regimes—using as examples idealized forms of America’s liberal pluralism, Israel’s Jewish state, and France’s robust commitment to secularity—with the hope of explaining why general principles of religious freedom may apply differently to different polities.

In his “Religion in Politics: Rawls and Habermas on Deliberation and Justification,” Menachem Mautner explores two distinct concepts that are relevant to our understanding of political “deliberation” and “justification.” Mautner argues that John Rawls’s discussion of “public reason” in *Political Liberalism* fails to adequately distinguish between the two concepts. Following that failure, a series of writers have understood Rawls to mean that his concept of public reason amounts to the exclusion of religious discourse from political deliberation. Mautner claims that Rawls’s concept of public reason has to do with justification, rather than with deliberation, and in any event, drawing on Habermas, Waldron, and other writers, he concludes that religious discourse *should* play an important role in political deliberation.

Kenneth Marcus’s “Three Conceptions of Religious Freedom” examines the similarities, differences, and substantive ramifications among individualist, institutional, and ethno-religious approaches to religious freedom in American legal and political thought. In the American constitutional discourse, two conflicting ideas of religious freedom have enjoyed prominence since the colonial era. The first, the dominant Protestant-inspired notion, defends the right of individual conscience against governmental infringement. By contrast, a second conception, more closely associated with Catholic interests and ideology, has

supported the prerogatives of religious institutions as against either individuals or the state. There is, however, a third approach, equally important to American law although more closely associated with Equal Protection jurisprudence, which concerns the protections that members of ethno-religious groups require from discrimination or animus based on such group membership. The need for this approach arises from the existence of non-Christian groups, such as Jews and Sikhs, who face forms of religious discrimination that are different in character from those that primarily concern Protestants and Catholics. This chapter argues that a complete account of religious freedom must fully address individual, institutional, and ethno-religious rights. It further claims that standards for assessing religious interests must be formulated in a way that respects the fundamentally different conceptions that faith traditions have of the concept of freedom.

In “Political Liberalism, Religious Liberty, and Religious Establishment” Richard Arneson asks whether a just state should have a religious establishment. In such a regime, either some state policies are justifiable, if at all, only by appeal to religious doctrines, or the state promotes some religious doctrines, or their adherents, over others (or both). A religious establishment might be nonsectarian, promoting bland doctrines or favoring the religious over the nonreligious. Religious establishment is a common practice in modern democracies. According to some political theorists, the just state must be neutral with respect to all controversial ways of life and conceptions of the good including religious lifestyles and notions. The neutral state adopts only policies that none can reasonably reject and refrains from promoting some controversial ways of life and conceptions of the good over others. This chapter argues against the comprehensive state neutrality doctrine and also against the idea that religious establishment might be just.

The last article in Part One, Avihay Dorfman’s “Freedom from Religion,” discusses the theoretical and doctrinal questions pertaining to the possible unity of the Free Exercise and the Establishment Clauses—and freedom *of* religion and freedom *from* religion, more generally—in the light of the republican ideal of political legitimation. Dorfman takes particular issue with a familiar argument according to which freedom-of-religion and freedom-from-religion are conceptually and normatively distinct. He seeks to refute this argument, showing that these two forms of freedom are, in fact, surface manifestations of a similar political ideal of democratic self-governance; the Free Exercise clause protects freedom of religion, whereas the Establishment clause protects freedom from religion. Dorfman further demonstrates the doctrinal implications of the argument to the contemporary freedom from religion jurisprudence of the U.S. Supreme Court, seeking to offer a unified theory of the two clauses that could underwrite sectarian toleration among free and equal citizens of a democratic order.

\* \* \*

The current human rights tradition is (at least according to the conventional wisdom) a product of the Enlightenment. And yet, many religious tenets cohere with important human rights prescriptions; religion arguably served throughout history as a significant source of human rights (or natural rights, as they were called). The second part of the book, *Religion as a Source of Human Rights*, addresses this aspect of the relationship of religion and human rights. And here too, religion's role is beset with difficulties, notably: (a) How transferable are religious prescriptions to a humanistic discourse?; and (b) What "price" must the human rights discourse pay to recruit religion to its cause?

We begin Part Two with Christopher McCrudden's "Reva Siegel and the Role of Religion in Constructing the Meaning of 'Human Dignity,'" which indeed addresses the well-recognized role that organized religions have played in the post-World War II development of international human rights protections. One of the problematic aspects of this protection is the extent to which there appears to be disagreement over the basic question of the underpinning of these human rights. Increasingly, "human dignity" has been drawn on to fulfill this role. But "human dignity" is a concept with strong resonances in political, philosophical, legal, and theological understandings of human rights. McCrudden's chapter explores the religious understanding of "human dignity" and the role, if any, it plays in the development of legal interpretation of human rights.

In "The Glory of God and Human Dignity: Between Dialogue and Dialectics" Itzhak Brand explores the ambiguity of the religious stance on the human right to dignity. On the one hand, theology reinforces this right by codifying it as a halakhic principle. On the other hand, religious law is not prepared to grant humanity the upper hand as a rival to God, as it were. The talmudic attempt to characterize the halakhic status, as well as the definitions of "human dignity" and "respect for God," lead Brand to two main conclusions: first, "human dignity" and "respect for God" are two contrasting values that are in dynamic competition. Second, there is an attempt to diffuse the tension and show how the two values complement each other. Thus he concludes that the relationship between these values is one of simultaneous harmony and friction: harmony, because the ultimate source of human dignity is God's glory; friction, because human dignity seeks to take precedence over His glory. Religion serves a dual and dialectical role vis-à-vis the right to respect: it buttresses and strengthens this right on the one hand, yet weakens and curbs it on the other hand.

Izhak Englard's "Law and Morality in the Jewish Tradition" is divided in two major parts: The first part is of a methodological nature. It defines the notions of "law" and "morality," establishes their distinctive features, and clarifies their



mutual relationship and interaction. At the basis of the approach to law and morality lies the positivist-normative theory of Hans Kelsen, which in the author's view is the most successful endeavor to establish objective distinctive criteria for these two normative orders. The second part is dedicated to the problem of the clash between law and morality in the Jewish tradition. This part describes the fact that inside the religious order one finds "legal" norms—enforced by physical force—and mere "moral" norms subjected to other social or transcendent sanctions; it also mentions the sources that deal with a clash in the believer's conscience between a divine order and his or her personal morality. Englard further deals with the relationship between law and equity, the influence of a halakhic authority's subjective ethical notions on his halakhic ruling, and the requirement of a heteronomous motivation in the fulfillment of a religious precept. Finally, this chapter analyzes the reaction of Judaism to the challenge of universal ethical values and to Kant's concept of (ethical) religion.

Haim Shapira's article, "The Right to Political Participation in Jewish Tradition: Contribution and Challenges," explores the development of the principle of majority rule in the Jewish tradition. Originating in the Talmudic period, this principle was fully developed by the high Middle Ages; since then it has become a cornerstone of the Jewish political theory and practice. Shapira argues that this status may explain the acceptance of democratic principles among Jews in modern times and especially in the State of Israel. The social and political conditions of Israel in its early years could not ensure the creation and maintenance of a stable democracy. The fact that democratic principles are rooted deeply in the Jewish tradition, Shapira argues, has made and continues to make an important contribution to the development of Israel's democracy. But as Shapira further demonstrates, the right for political participation in its Jewish rendition is not fully compatible with its form in democratic countries. The main deficiency is the lack of consistent commitment to the principle of equality for all members of the community or for all citizens of the state. The main reason for this deficiency is hidden in the transition from community to a state, which was not fully acknowledged by halakhic authorities. This challenge is not insurmountable, however: some halakhic authorities overcame it, proving the feasibility and viability of employing creative interpretations of the ancient tradition.

The last chapter of Part Two is Gili Zivan's "Have you murdered and also taken possession?" (I Kings 21:19) On the Gains and Losses of Basing Human Rights Discourse on the Bible." Zivan explores three approaches to understanding the relationship between human rights discourse and the Bible. The first approach completely separates the Bible's religious contents from the ethical and humanistic contents of human rights discourse, and is unwilling to ground one in the other. The second approach reduces the Bible to its humanistic values alone, thus neutralizing its religious and theological foundation. These two approaches fail to adequately

take into account the Bible's complex nature and the important educational and social challenge that underlies the attempt to ground modern secular positions in religious values. In the light of these criticisms, the third approach suggests grounding human rights discourse in the Bible out of both educational and interpretive motives. This approach does not ignore the difficulties that arise from such a comprehensive attempt; rather, it suggests ways of grappling with the verses that may seem to contradict the principles of the human rights discourse based on both the Jewish interpretive tradition throughout its generations and on modern hermeneutics.

\* \* \*

After laying these theoretical foundations, we turn, in Part Three, to address *Religion and Human Rights on the Ground*. This part enriches the analysis with some robust contextual data and intriguing case studies that may serve both as a reality-check and as fertile ground for examining some of the more abstract theses offered in this book.

Jonathan Fox and Yasemin Akbaba's chapter, "Religious Discrimination in the European Union and Western Democracies, 1990–2008," explores the variation in the treatment of religious minorities in the West using a special version of the Religion and State—Minorities round 2 (RAS2-M) dataset. The extent and causes of religious discrimination against 113 religious minorities in 36 democracies in the European Union (EU) and the West from 1990 to 2008 are analyzed in three stages. This chapter examines the mean levels of religious discrimination on a yearly basis. It further inspects the extent of each of the 29 specific categories of religious discrimination. Finally, the authors look at the causes of religious discrimination, using OLS multiple regressions for 1990, 1996, 2002, and 2008 in order to assess whether the relationships found in the bivariate analysis are present and consistent over time. The analysis compares theories related to the securitization of Islam in the West and the defense of culture argument. Fox and Akbaba conclude that Muslim and Christian minorities suffer from the highest levels of discrimination in the EU and in Western democracies. Not surprisingly, states with high levels of religious legislation—indicating that they strongly support religion—are also associated with high levels of religious discrimination. The findings demonstrate that both theories explain aspects of the changes over time in religious discrimination in the EU and in Western Democracies.

The next chapter is Micha'el Tanchum's case study, "On the Legal and Constitutional Establishment of Islamist Extremism in Indonesia: Implications for Human Rights and Civil Society in Emerging Muslim Democracies." Tanchum studies the ongoing legal and constitutional developments in Indonesia from 2002 to 2011, particularly the democratic government's responses to Sunni sectarian

challenges by Islamist extremists who attempt to constrain the definition of Islam, undermine the discourse on human rights, and deny Muslims the freedom to practice Islam according to their own beliefs. Through its analysis of how Sunni Islamist extremism has been able to create structures of political opportunity to constrain an individual's right to practice Islam, the chapter highlights the central importance of a national discourse of intra-religious accommodation to establish a foundation for the development of religious liberty and civil society in newly democratizing Muslim societies.

In another case study, "The Tension between Religious Freedom and Noise Law: The Call to Prayer in a Multicultural Society," Alison Dundes Renteln analyzes the difficulties members of religious minorities experience when public policies appear to prohibit their religious practices. This chapter takes stock of the main arguments for and against making exceptions for religious minorities from such general policies as part of a theory of maximum cultural accommodation. It then focuses on controversies in which advocates request exemptions from environmental laws, analyzing in particular the extent to which religious merits exemptions from noise ordinances. While regulating excessive levels of noise is ostensibly a legitimate governmental objective, environmental policies may be enforced in ways that constitute a substantial interference with religious life. This analysis of the interrelationship of environmental law and religious freedom has implications for the resolution of disputes in countries such as Switzerland and the United States where Jewish and Muslim communities have encountered hostility to their efforts to worship in accordance with their religious laws. Ultimately, Renteln asks whether compromises can be found that guarantee the right to religious freedom without undermining nuisance laws.

Ronit Irshai's "Judaism, Gender, and Human Rights: The Case of Orthodox Feminism" explores whether religious perceptions can serve as a source for human rights or as a source to deny them. Using the case study of women's rights in Judaism, Irshai claims that a religion operating under the presumption that people must sacrifice their moral intuitions in order to be considered servants of God, together with a strong essentialist ideology, can result in the violation of human rights. She demonstrates that both essentialism and the prevailing "sacrificial imperative" in contemporary Judaism can circumvent the Aristotelian definition of equality, resulting in the violation of women's rights. Since, according to the Aristotelian principle, equal treatment means "different treatment for the different," this obscures how this kind of religious ideology indeed discriminates against women.

In our last case study, "Religious Exceptionalism and Human Rights," Laura Underkuffler challenges the notion that religion and human rights are complimentary ideas, because human rights include all of those human capacities and freedoms that are essential to human existence—including freedom of religion. Freedom of religion, asserted as a human right by one person, might involve—as

its consequence or even its object—the denial of others’ human rights. When this occurs, the simple identity of religion and human rights breaks down, and the two are, instead, severe antagonists. This chapter explores the issues involved in religion/human rights antagonism in the context of a particularly heated current controversy: the claim that freedom of religion entitles an individual or group to discriminate against gay, lesbian, or transgender individuals on religious grounds. Where protection for gay, lesbian, and transgender individuals is an accepted societal norm, this claim is essentially a claim for religious exemption from certain civil rights laws. Underkuffler argues that whatever the merits of the general idea of exemption for religious exercise might be, it cannot extend to protections afforded by civil rights laws.

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Finally, the last part of the book focuses *On the Possibility of a Dialogue*. This part explores the interrelationships between the diverse roles of religion in the human rights discourse and the potential effects of their interaction. This theme opens up an even broader question, namely: What is the appropriate discursive framework for a dialogue between a religious tradition and the human rights tradition.

We begin with Avinoam Rosenak, Alick Isaacs, and Sharon Leshem-Zinger’s article “From Duties to Rights.” This chapter addresses itself to the common ground of this book and to its political and cultural assumptions, and sets forth an innovative alternative. Our book assumes that there is a power struggle between “the State” and “religion” as a political institution. In this view we are grappling between two political systems, each of which acknowledges the other’s valid existence only under strict conditions, which reflect their mutual suspicion. This chapter points to the violent dimension underlying this perspective. Though it may be possible to justify the necessity of the political framework, with all its failings and violent inclinations, the chapter presents a competing framework. This framework arises from a mode of discussion based on Jewish texts, which points to various sources that have serious reservations about the use of violence in the name of religion. This chapter refers to sources from the Bible, Talmud, Kabbalah, and philosophy. It points to the religious and theological problem with the political dimension and then indicates that an alternative can be found in Judaism, which is here described as an open political structure. In this context we can rethink the basis of human rights in new cultural contexts. These reflections are part of the “Talking Peace” project, which seeks to sketch Jewish political theory, which can be different from commonly accepted political discourse that seems to have many obvious advantages but exacts a high price.

Next comes Shai Lavi’s “Human Rights and Secularism: Arendt, Asad, and Milbank as Critics of the Secular Foundations of Human Rights.” Lavi begins

with the observation that human rights terminology has gained, in recent years, surprising popularity outside the liberal West and has become synonymous with justice in the international political arena. The growing universality of the human rights discourse may be read as a clear sign of its success, but may equally suggest that the concept has been watered down and that its unique historic origins and philosophical commitments have been forgotten. The growing prevalence of human rights discourse among mainstream religious leaders as well as so-called fundamentalists may be taken as further evidence of this development. This chapter lays out the secularist presuppositions of human rights. Secularism is here understood less as a matter of belief (or its absence), and more as a set of practices; less as concerning the divine and supernatural (or its absence), and more as an attunement toward the natural world. Specifically, following Hannah Arendt, Talal Asad, and Luc Boltansky, Lavi's interest lies in the emergence of empathy with distant suffering as constituting the secularist origins of human rights. Once the secularist foundations of human rights are excavated, the final aim of this chapter is to think critically of these foundations, and ask what, if anything, can be learned once we take into account their historical and philosophical particularity, rather than their universality.

Along the lines of these two chapters, Suzanne Last Stone discusses in "Religion and Human Rights: Babel or Translation, Conflict or Convergence?" the challenge of squaring a global rights-based civilizational discourse with the local cultural reasoning of religion in general and Judaism in particular. Several of the discursive challenges are obvious: How does one bridge between a discourse of duties and one of rights? How does one bridge between a discourse dependent on viewing the individual as autonomous rather than heteronomous? Other discursive challenges have been less commented upon. The following two are treated in this chapter: First, the incontrovertible or absolute nature of human rights blurs the division between secular morality based on unaided reason and the realm of the sacrosanct, inviolable, or sacred occupied by religion. Does this create a basis for a common language of sanctity or does this lead, instead, to even more divisiveness, as adherents of religion perceive human rights discourse as imputing sanctity where it does not belong? Second, the discourse of human rights, with its close connection to the Kantian notion that we should treat others always as "ends," detaches human rights from the concept of just deserts. The human being possesses rights by virtue of being human alone. Stone argues that those thinkers within the halakhic tradition who have most advanced a discourse of human rights, such as Halevy, draw on a distinct tradition within Jewish legal thought that conceives of duties owed to others as conditioned on reciprocity. Finally, the chapter discusses whether religious and specifically Jewish religious discourse also can make a distinct contribution of its own to the discourse of human rights—at the level of discourse. We are caught within a paradox when

we argue for the universality of human rights as we do so necessarily from within the particularity of a specific language, culture, and ethical idiom. Does Judaism provide a resource for dealing with this paradox, given its complex discourse of universalism and particularism?

Part Four and the book as a whole concludes with Leora Batnitzky's "From Collectivity to Individuality: The Shared Trajectories of Modern Concepts of 'Religion' and 'Human Rights.'" This chapter argues that the question of the role of religion in the human rights discourse often reifies the categories of "religion" and "human rights" because the question itself does not adequately account for the fact that both categories are particularly modern inventions. These categories share a conceptual and historical trajectory that moves from a focus on the collective to the individual. While this analysis has important theoretical implications for how we might understand the modern categories of "religion" and "human rights," it also has implications for appreciating some of the practical tensions that play out in some contemporary legal systems, especially those that seem to accommodate a kind of legal pluralism. To explore some of these tensions, the chapter turns to a comparative analysis of the status of personal laws in Israel and India, as they do and do not cohere with contemporaneous notions of religion and human rights.

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The papers in this volume are the products of the inaugural international conference of the project "Human Rights and Judaism," conducted by the Israel Democracy Institute in Jerusalem. The project studied various aspects of the relationships between religious, national, social, and cultural particularistic traditions, on the one hand, and universal liberal thought, on the other. In addition to the project's general aspect, of which this book is one manifestation, its main goal is to consider the parameters of the encounter between Jewish tradition and the doctrine of human rights.

The project assesses what Judaism, in its broadest sense, has to say about fundamental liberal rights such as liberty, dignity, welfare, equality, and freedom of expression. At the same time, it examines the unique set of rights and obligations offered by the Jewish worldview, and explores their relevance to sovereign life in the Jewish nation-state. This two-way approach exposes areas of overlap and consensus among important parts of the liberal and Jewish lexicons, and highlights areas of divergence between the two traditions in a way that enables each to be informed and enriched by the other. This issue is critical for the State of Israel, which exists in a constant state of tension between its universal character, as a "democratic state," and its particular character, as a "Jewish state."

Many critics see an irresolvable contradiction between Israel's twin identities, and increasingly call for the adoption of one definition or the other. These critics

believe that Israel must either abandon its pretense of democracy and erect an authoritarian state of the Jews, or abolish the Jewish character of the state and reinvent itself as a multi-ethnic, supra-national democracy—a post-modern “state of its citizens.” Either alternative would carry serious consequences for the future of Israel and of the Jewish people. IDI’s Human Rights and Judaism Project is designed to produce the normative grounding that will enable the intellectual leadership of this generation to foster a strong sense of solidarity with Israel as both a vibrant democracy and as the national homeland of the Jewish people.

## Part One

# Freedom of Religion and Freedom from Religion





# Equal Membership, Religious Freedom, and the Idea of a Homeland

Christopher L. Eisgruber  
and Lawrence G. Sager

## 1. Introduction

Religion figures in human rights discourse in two seemingly contradictory ways. On the one hand, religion is the locus of passionate human concerns and commitments that differ among groups and individuals, and that, historically, have been the object of indifference or even hostility across the lines of difference. The resulting injustices of religious persecution or discrimination call for remedy, ultimately in the name of equality; and those calls are staples of modern human rights. On the other hand, religion is sometimes invoked in an effort to justify actions that seem inconsistent with human rights, especially rights based on norms of equality. The favored treatment of men over women; of heterosexuals over homosexuals; or of majority religionists over minority religionists or secularly-oriented members of the relevant community are familiar examples of *prima facie* injustices that the advocates of some religions claim are consistent with—and indeed, demanded by—justice in the name of making space for the needs of religion. In this essay we examine an issue at the intersection, or possibly the site of collision, of these two opposing threads of modern human rights analysis: How, if at all, can a polity respect the demands of equality and also maintain a distinctive commitment to the needs of a people defined partly by race, ethnicity, culture, or religion?

The question is both difficult and important. Most conceptions of religious freedom incorporate principles requiring that states provide equal rights and status to people of different faiths and ethnicities. In our own work, centered on religious

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freedom in the United States' constitutional experience, equality has been the dominating theme; we have been critical of views that call for the privileging or the disabling of groups or enterprises on the grounds that they are or are not religious. To that end, we have argued that elements of our constitutional tradition that may appear to embrace the privileging or disabling of religion should be understood or reshaped as elements of an equality-based jurisprudence of religious liberty. The apparent tension between equality and the preferred or dispreferred treatment of religion in the United States dissolves, we argue, if the enduring elements of American constitutional practice are appropriately understood.<sup>1</sup>

In this essay, we expand our gaze to embrace the circumstances, experience, and commitments of other nations. And in this essay, we take up national practices that seem harder to square with the demands of equality. In particular, we consider Israel's foundational commitment to be a Jewish state and France's efforts to maintain a secular public culture, as prominent instances of states that appear to favor some communities over others, communities that seem defined at least in part by their relationship to religion.

Our goal is to offer a sympathetic understanding of such national practices; an understanding, that is, which reconciles at least the essence of these practices with the demands of equality. Equality, after all, is central to human rights analysis, and sits at the heart of most accounts of justice. Equality is also foundational to both Israel's and France's announced self-understandings. That fact helps to connect our analysis to the internal constitutional debates within those polities—but, in our view, the equality principles that we discuss in this paper are requirements of justice and are binding upon all governments, whether they have endorsed them or not.

Key to our thoughts is the idea of a *homeland* as a means of reconciling a limited set of ethnic or cultural preferences with the demands of a robust equality principle. A homeland, on our account, is a space where a people can enjoy both secure refuge and cultural community. So understood, the maintenance of a homeland is a laudable national objective that can permit a people to flourish; under at least some circumstances, it actually promotes equality. But the project of maintaining a homeland does not excuse a polity from the obligations of inclusion and fair treatment of all those within its borders and purview. To the contrary, the goal of a homeland is dangerously conducive to patent injustice, and requires a homeland-centered state to be especially vigilant, to bend over backwards to assure inclusion and fair treatment.

1 Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007).

Once we have this account of the fraught relationship between equality and homeland in hand, we will undertake in turn to analyze human rights controversies in both Israel and France.

## 2. Homeland and Equal Membership

Israel raises in acute form the questions that concern us in this paper. The Israeli declaration of statehood both announces that Israel will be a “Jewish state” and promises that the new polity “will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race, or sex; it will guarantee freedom of religion, conscience, language, education, and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.”<sup>2</sup> Israel’s commitment to “complete equality of social and political rights” is, as a purely textual matter, an unusually strong statement of equality principles. It is more affirmative and unambiguous, for example, than the American Constitution’s equal protection clause.

Israel’s politics and history underscore the difficulty of maintaining the twin commitments to create a Jewish state and to uphold equality. Israel’s treatment of non-Jews provokes intense concern from the human rights community (inside Israel as well as outside of it), and Israel’s Orthodox Jewish minority enjoys legal authority and privileges that seem—to many Jewish Israelis as well as to most outsiders—arbitrary and inconsistent with basic norms of equality and religious freedom.

The human rights questions confronting Israel are specific manifestations or symptoms of a more general problem intrinsic to any notion of a homeland. The idea that a polity is a homeland for one particular people seems on its face to imply that other people do not belong there, or at least do not belong in the same way or to the same degree as do those who claim it as their homeland. Throughout history, notions of “homeland” or, more broadly, of ethnic priority have licensed all sorts of mischief and injustice, ranging from official indifference and petty insults to persistent discrimination to horrific episodes of ethnic cleansing.

Yet, if Israel’s current predicament manifests the tension between equality and the idea of a Jewish state, the circumstances of Israel’s founding suggest why the creation of an ethno-religious homeland might be not only consistent with but conducive to respect for equality. In the twentieth century and for centuries preceding it, Jewish minorities were cruelly oppressed and sometimes massacred. Unlike some other minorities, they had no homeland that would accept them as

2 The Declaration of the Establishment of the State of Israel (1948), official translation available at [http://www.knesset.gov.il/docs/eng/megilat\\_eng.htm](http://www.knesset.gov.il/docs/eng/megilat_eng.htm). (accessed April 17, 2013).

refugees. During the Holocaust, the United States and other nations refused to provide asylum for Europe's Jews and thereby allowed the murder of many who would otherwise have survived. Zionists sought to redress these injustices. They invoked equality principles to justify their quest: other people have homelands, so the Jewish people deserved one, too.

The Zionists hoped that Israel would provide refuge from persecution. Jews would no longer be forced to live as outsiders in someone else's country, and Jewish minorities around the world would have a place to go when the surrounding society turned hostile. The Zionist project, though, aimed at much more than mere refuge, and as we use the concept of homeland here, it goes beyond refuge and hence beyond immigration policy. A homeland offers people what we might call "the comforts of recognition"—a place where their values, commitments, and traditions are familiar and shared by many.<sup>3</sup> Chaim Gans, whose elegant and compelling book also invokes the concept of a homeland to analyze the moral foundations of the Israeli national project, says that a homeland "requires the existence of a . . . community in numbers that would enable the members of that community to live most aspects of their lives, including their economic and political lives, within the framework of that culture."<sup>4</sup> In our view, a homeland provides, in a word, a secure *home* for a people.<sup>5</sup>

- 3 Several political theorists have used the concept of "recognition" to discuss cultural rights. For example, Alan Patten uses "recognition" to describe accommodations that meet two conditions: the accommodation must be customized or tailored to fit a certain conception of the good (or certain cultural practices), and the conception of the good (or cultural practices) must be identity-related. Alan Patten, "Equal Recognition: The Moral Foundations of Minority Cultural Rights" (typescript, 2012), 280–281; see also Patten, "Equality of Recognition and the Liberal Theory of Citizenship," in *The Demands of Citizenship*, ed. Catriona McKinnon and Iain Hampshire-Monk (London: Continuum, 2001), 193, 197. Patten's definition is one among many conceptions of "recognition" that are consistent with the broad version of the concept that we invoke: we mean by it to allude generally to a political environment that provides a supportive foundation for a set of cultural practices.
- 4 Chaim Gans, *A Just Zionism: On the Morality of the Jewish State* (New York: Oxford University Press, 2008), 115.
- 5 Like us, Gans argues both that homeland states may be legitimate and that they must respect demanding equality norms. We admire his book and have learned a great deal from it. There are many parallels between his approach and ours, and we note some of these similarities in the pages that follow. There are also differences. For example, Gans links individual well-being more strongly to cultural identification and membership than we are inclined to do (see, for instance, Gans, *A Just Zionism* [above n. 5], 18); he therefore argues for a *right* of homeland peoples to self-determination at either a state or sub-state level (*ibid.*, 60–63, 123), whereas we defend the *moral permissibility* of certain kinds of homeland states.

The preferential characteristics of the Jewish homeland (or any other ethnicity's homeland) might thus be equality-promoting when evaluated as one component of a complex, differentiated system or collection of homelands and pluralist democracies, but threatening to equality principles when evaluated from the standpoint of domestic political justice. The latter set of problems can be severe. Attaching legal status to group affiliation, through the concept of a homeland or otherwise, poses serious risks. Perhaps urgent necessity will sometimes justify political actors in taking or condoning such risks, as we believe it did at the moment of Israel's founding. But why not insist that any such state aspire eventually to become not an ethnically specific homeland but a pluralist constitutional democracy? Why accept the risk of violent conflict—and the near-certainty of discrimination—entailed by constituting a state with a specific ethnic identity?

One line of response to these questions is pragmatic and concedes that an ethnically defined homeland is at best a defensible compromise. On this account a pluralist constitutional democracy simply is not possible in Israel now, given the facts of the Israeli-Palestinian conflict, and the radiant consequences of that conflict in the Middle East more generally. The fundamentals of the Israeli state, and in particular its self-proclaimed identity as a Jewish state are artifacts, in effect, of a hard-won state of transitional justice. Perhaps—but if that is all that can be said in Israel's defense, it is a way of saying that we should hope that the Jewish state eventually gives way to a pluralist and fully multi-national successor (and, if so, Israeli statesmen and constitutionalists should have this goal in mind when they make fundamental decisions about the polity's future).<sup>6</sup>

Our project in this essay is to offer a deeper, more durable means of bringing the idea of a homeland—in this instance, a Jewish homeland—into repose with a commitment to what we have elsewhere called “equal membership.” Equal membership requires that a state accord equal status to all persons within its jurisdiction without regard to their race, ethnicity, religion, or other fundamental aspects of their identities. In the sensitive and vulnerable context of religion, equal membership insists that *no members of a political community ought to be devalued on account of the spiritual foundations of their important*

6 It is possible that specific aspects of present-day Israel might be justifiable on the basis of (and only on the basis of) transient, pragmatic considerations, even if there is a principled justification for a Jewish state. Gans, for example, makes that argument with regard to hegemonic Jewish control of the Israeli military: he maintains that the history of the Israeli-Palestinian conflict justifies such control for the time being, but that Israel has an urgent moral obligation to pursue circumstances in which that hegemony would no longer be defensible. See Gans, *A Just Zionism* (above n. 4), 79–80, 146–47.

*commitments and projects.*<sup>7</sup> In application to a pluralist democracy like the United States, equal membership ruthlessly disqualifies partiality toward and among religious commitments and practices, on the ground that such partiality can only be explained as the valuing of some members of the pluralist community over others, precisely on the basis of their spiritual commitments. Prominent examples of religiously partial state behavior barred by equal membership are: (1) The granting of exceptions from laws of more or less general application to accommodate important secular interests and/or mainstream religious interests, which are not made available to minority religious interests; (2) Government sponsorship of rituals, expressions, monuments, and other symbolic behaviors that have a social meaning denigrative of members of the community who hold particular religious views (or views about religion); and (3) Public programs that unfairly distribute benefits directly or indirectly through the delegation of public functions to religious entities. In each of these contexts the state is treating the important concerns and commitments of some of its members as more important than those of other members, and the secular or specific religious impetus of these diverse concerns and commitments is the gravamen of the state's partiality. In a pluralist democracy the only explanation for this favoring of some concerns and commitments is the differential value placed on them by the state, and by implication, placed on those who hold such concerns and commitments.

In prior work discussing principles of religious liberty in the United States, we collected these observations under the rubric of *equal regard*, which we described as the requirement that a state “attend to the deep minority religious commitments of its citizens with the same regard that it brings to bear on other, more mainstream concerns.”<sup>8</sup> We believe that the requirement of equal regard applies not only to religion but also to other deep cultural commitments,<sup>9</sup> and we believe that it is not special to the American constitutional system but applies with comparable force in other pluralist constitutional democracies.

But here, we consider the possibility that under appropriate circumstances, homeland states may be able to extend a limited form of partiality to the homeland segment of their population without violating the basal principle of equal membership. If this possibility exists, it is because homeland states, unlike plural democracies, may have reasons for such partiality that (1) are themselves

7 Eisgruber and Sager, *Religious Freedom* (above n. 1), 52.

8 *Ibid.*, 101–102.

9 Lawrence G. Sager, “The Free Exercise of Culture: Some Doubts and Distinctions,” in *Engaging Cultural Differences: the Multicultural Challenge in Liberal Democracies*, ed. Richard Shweder, Martha Minow, and Hazel Rose Markus (New York: Russell Sage Foundation, 2002), 165–176.

justice-regarding, possibly even equality-enhancing, and (2) do *not* depend upon or reflect any devaluation of the status of minority members of their political community. The argument that this may be so will occupy the lion's share of our analysis here.

In pursuing this argument on behalf of homeland states, it is useful at the outset to consider just what sort of judgment one is making when assessing whether the demands of equal membership are satisfied. Equal membership, along with human rights and social and political rights more broadly, have in common a somewhat paradoxical focus. They are a bit like the scientific study of “chaos,” which turns out to be the search for and discovery of order; or the similar, reciprocally inverted study of symmetry, which ferrets out asymmetries in our apparently symmetrical world. Inquiries into, and claims that emanate from, the domain of political justice generally are claims about the avoidance of acute injustices, not descriptions of what a perfect world would be like.<sup>10</sup> As such, they take many features of the world in which we actually live as obdurate givens. This does not make them limp or meaningless: indeed, few if any polities in the world fully satisfy the demands of equal membership. Acute injustice is all too present, unfortunately. But focusing on the imperative to avoid acute injustice does mean that the requirements of political justice—equal membership included—are likely to embrace a diversity of political arrangements. This characteristic of political justice is a virtue, as it generates feasible claims for real world predicaments.

In an ideal world, every state might commit itself to respect the dignity and the rights of all persons and minorities living within it. If ever any polity breached that promise, every other state might offer hospitable refuge to the victims of persecution and discrimination. Or, for that matter, the boundaries among states might disappear, and a beneficent worldwide democracy of all peoples might govern with scrupulous regard for the rights of all individuals and groups. We obviously do not live in that idealized world. States exist, they sometimes discriminate, and they often close their borders to asylum-seekers.

In the world that we inhabit, preferential institutions and practices may be crucial elements for the achievement of equality and justice. Racially or ethnically defined affinity groups, for example, may be indispensable advocates for racial or ethnic equality.<sup>11</sup> Likewise, ethnically specific national projects may, at least potentially, contribute to a world order that is more just—and more respectful

10 See Lawrence G. Sager, *Justice in Plainclothes* (New Haven: Yale University Press, 2004), 138–139 (“In general, justice is concerned most clearly and centrally with avoiding various nasty states of affairs—prominent failures to treat individuals and groups fairly”).

11 An argument of this kind is made in Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2004).



of equality—than it would otherwise be. And homelands may offer the ultimate assurance of safe refuge to peoples who have reason to be otherwise unsure that such refuge will be available in precisely those times when it is needed.

Nor is it clear that the world would in fact be a better place without national borders and national identities. The case for national homelands is not confined to claims that are at bottom defensive or reparative. There are affirmative values to be invoked, values that lie in the broad domain associated with the ideas of culture and community. Nearly all views of human flourishing recognize the benefits that may flow from membership in close (and to some degree, necessarily, closed) communities such as friendships, families and kinship networks, churches, identity groups, and political and civic associations. That is true, for example, of our own view about religious freedom: although we emphasize the government’s duty to accord equal status to all persons without regard to the spiritual (or non-spiritual) foundations of their deepest commitments, we also insist on the importance of robust associational freedoms not limited to religion. These associational freedoms allow for the formation of ethical sub-communities (both religious and non-religious) some of which may operate in ways deeply inconsistent with the principle of equal membership that we regard as fundamental to constitutional democracies.<sup>12</sup> Other political theories, of course, make much more ambitious and far-reaching claims on behalf of the importance of cultural and group membership.<sup>13</sup>

Liberal theories of associational or group rights typically focus on the rights and powers of groups within states. The concept of a homeland requires us to consider whether similar (or related) arguments might apply at the level of the state itself. Of course, states are very different from private associations. Politics exercise much more comprehensive forms of power than do associations. Moreover, while it is often easy for people to leave or join private associations, it is usually costly for them to relocate from one country to another. We should therefore anticipate only limited success when we try to generalize arguments about associational rights to illuminate the role and nature of national communities.

Indeed, limited success is, in an important sense, our goal. Speaking metaphorically, one might say that in order to make the idea of a homeland even plausibly attractive from the standpoint of political justice, we must show how it is possible to open the door to the possibility of an ethnically defined state without throwing the door wide open. Put less metaphorically but still abstractly,

12 Eisgruber and Sager, *Religious Freedom* (above n. 1), 63–66.

13 See, for instance, Charles Taylor, “The Politics of Recognition,” in *Multiculturalism: Examining the Politics of Recognition*, ed. A. Gutmann (Princeton: Princeton University Press, 1994), 25; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995).

the challenge is to explain how one might realize the benefits of a certain kind of ethnic community while remaining faithful to the principle of equal membership—that is, the principle that a state must accord equal status to all persons within its jurisdiction without regard to their race, ethnicity, religion, or other fundamental aspects of their identities. Put concretely with regard to the Israeli example, the question is whether and how the two equality-promoting aspects of the Israeli constitutional project—the creation of a secure homeland for a historically oppressed people and the announcement of a foundational commitment to a broad equality principle—can be reconciled with the facially inegalitarian character of the aspiration to be a Jewish state.

To make progress, we need to refine our observation about the link between group affiliation and human flourishing in at least two fundamental ways. The first involves looking more closely at the picture of global diversity to which we have already alluded. The second involves close assessment of the deep limitations on what a homeland can offer its beneficiaries, and the closely related, affirmative obligations of a homeland to those groups and individuals who are not the beneficiaries of homeland priority.

We begin with diversity and with the observation that we can regard the division of the globe into multiple national communities as itself a way of accommodating certain kinds of group-based interests: membership in a particular polity may be one distinctive and important way of participating in the benefits of group affiliation, and different polities may be associated with different groups (in the sense of nations or peoples). There are deep and wide cultures that come to shape life in a nation state. We can think about the multiplicity of national cultures as creating the conditions for diverse homelands.

The diversity takes place on a different level as well. Nation states, by virtue of positive constitutional law and/or entrenched tradition, may occupy diverse positions on the spectrum of reasonable—more definitively, of *just*—arrangements concerning the interplay of group identity, religious freedom, and equality. Provisionally, and merely for the purpose of illustration, we might order this spectrum on the basis of the extent to which states make it part of their project to afford a secure home for a particular culture or people. We are inclined to put Israel with its foundational commitment to be a Jewish state at one end of that spectrum, and the United States, with its constitutionally secured commitment to equality and insistence that group affiliation be a matter of private choice at the other. We mean to be very careful at this point. We are not claiming that Israel as it sits is just. Our point is instead that if Israel could be changed to the point where it were just—where it met its commitment to equality as well as its commitment to being a Jewish state—it would be at the far end of the spectrum we are conjuring. Nor, obviously, are we suggesting that the United States is in full compliance with the demands of justice. Here again the point is that its fundamental institutional

arrangements, which are at their core anti-homeland, place it on the other end of that spectrum. We do mean to claim that there exists such a spectrum of diverse, just arrangements. Our claim in this respect invokes our earlier observation that the objects of political justice we now more familiarly know as human rights are concerned not with claims about the ideal state of affairs, but with the avoidance of certain marked, as it were, morally *fatal*, deviations from any plausible view of the ideal.

The positions of nations along this spectrum may reflect differing interpretations of and judgments about the meaning and relative importance of equality, community, and other values. That said, we should resist the temptation to make simple equations between positions on the spectrum and particular constitutional values. For example, it would be a mistake twice over to observe that homelands aim at a certain kind of ethnic community and conclude that they have therefore chosen to emphasize group identity rather than equality, whereas pluralist democracies have done the reverse. Although nations may at times—at their founding and at other constitutional moments—choose how they arrange themselves in these respects, these choices are seldom if ever abstract or fully self-conscious. They will almost invariably be heavily driven by history and circumstance, and in this sense, decidedly path-dependent. Israel’s founding, in the crucible of the Holocaust and against the background of what must have seemed an eternity of Jewish status as persecuted outsiders, is of course a particularly vivid and extreme example. Perhaps more importantly, locations on the spectrum that we have described do not correspond to invariable, linear, trade-offs between group affiliation and equality. We have already observed how the existence of national homelands may, from a global perspective, significantly enhance equality. Conversely, a proponent of pluralist constitutionalism might well think that a good strategy for promoting cultural affiliation and its attendant virtues (especially but not uniquely in a large, diverse nation of immigrants) is to protect associational freedom for all groups and to keep government out of religion and cultural affairs.

This analysis suggests that there are at least two ways in which an international system of states, composed of both homelands and pluralist regimes, may support the benefits of group affiliation better than could any single polity.<sup>14</sup> First, each homeland will constitute a distinctive national-level community, which will be more attractive to some people but unattractive (or less attractive) to others. Second, the various polities will have significantly different arrangements,

14 Gans makes a more aggressive version of this argument, contending that “the ideal of cultural equality may be one to be aimed at on the global level rather than on the state level” (Gans, *A Just Zionism* [above n. 4], 124).

constituting themselves, broadly speaking, as homeland or pluralist states, and offering significantly divergent versions of each. These arrangements may also be more or less stable or secure, depending on the depth and durability of the polities' traditions and institutional structures that offer a warrant for continuity, like constitutions and robust constitutional enforcement. Different states' choices among legislative and constitutional options will be hospitable to different individuals and groups.

But to take advantage of these differences among states, people have to be either lucky enough to grow up in the right place (to grow up French in France, for example) or else willing and able to bear the costs of international migration. The burdens of migration are sometimes severe, but that does not mean that they are intolerable. On the contrary, history is filled with examples of people—including the pilgrims who settled in America and the Zionists who went to Israel—willing to undertake perilous projects in the hope of establishing a community more congenial to their ways of life. Yet, while the difficulties of international migration do not negate the associational value of homelands, they underscore the plight of minorities trapped within an unfriendly homeland. Requiring those minorities to accept second-class status is unfair; giving them the alternative of leaving is equally unfair and may be entirely unrealistic (they may have nowhere to go).

One upshot of all this is that homeland states depend on historical, global, geographic, and cultural facts for their justification. Israel is once again a prominent case in point. The history of the Jewish people over time and the plight of central European Jews before and during what became the Holocaust—coupled with a period of strategic indifference on the part of countries like the United States—and the absence of any other homeland or secure refuge, made the claims for a Jewish homeland compelling. Long-standing homelands, like France and Italy, may have justifications born of the great weight of history and the lightly-worn but remarkably pervasive cultural webs that have grown up over their centuries of national development. Indigenous groups with rich associational bonds threatened with cultural extinction may present similar claims for homeland status. The point to remember is that there must be a substantial, justice-serving reason for the limited preferential license of a homeland state. Absent such a justification there remains only the naked preference for some citizens over others—the very antithesis of equal membership.

We can illustrate the point by imagining that a renegade Congress undertook to create a Protestant—or perhaps in a more ecumenical spirit, a Christian—homeland in the United States. Steps taken by this imaginary Congress might include the mere announcement of homeland status; the provision of extremely generous and specific immigration policies for Protestants or Christians as a whole; and the subsidization of Protestant or Christian educational enterprises and cultural activities. The most important observation to make about this somewhat

dystopian fantasy is that the invocation of the idea of a homeland, as we advance it here, does nothing to slow the irresistible judgment that this whole project and its various parts are flagrant violations of the principle of equal membership. This is so because nothing about the circumstances of Protestants or Christians within the United States or abroad supports the conclusion that creating a homeland in the United States is in anyway justice-serving, much less equality-enhancing. To the contrary, from end-to-end, this dubious venture is redolent with a single purpose and consequence, namely, the valorization of a particular religious group within the broader American political community.

We could simply stop at this conclusion and move on, but there are two features of this example that merit comment in passing. The first is that, as improbable as the entire fantasy is, it is especially improbable that political support could under any circumstances be mustered for welcoming all Protestants or all Christians into the United States. A true homeland will almost certainly involve sacrifices driven by the logic of making a home for a people. Valorization, on the other hand, is cheap. Second, while we describe this fantasy as “somewhat dystopian,” and are unequivocally prepared to brand it as unjust (and without question, in violation of the Constitution of the United States), it is not the stuff of which nightmares are made. On the contrary, it is strikingly tame by the standards of world news on most nights. This would be especially true if the hypothetical homeland were in full compliance with the restrictions on homelands we are about to set out. For example, those restrictions would require that state sponsored religious education for Protestants be accompanied by comparable support of the educational programs of other religions, as well as by attractive secular educational opportunities. This last observation is important: in the discussion of homelands that follows, equal membership is very demanding, and a well-formed homeland should embrace rather than affront egalitarian sensibilities. The creation of a homeland, in other words, is not a license for government-sponsored crèche displays or other casual privileging of particular cultural identities; it is instead an exacting commitment to a specific kind of justice-regarding, egalitarian project.

Even in those cases where the benefits of community and global diversity give us grounds from the vantage of justice to accept ethnically defined homelands (rather than concluding that all regimes ought to aspire to become pluralist democracies), there are crucially important limits on the permissible scope of homeland accommodations of the home culture, and there are equally important obligations of a homeland to the many citizens whose national, ethnic, or religious background, or whose beliefs or commitments make the direct benefits of the homeland unavailable or unattractive to them. The underlying point is this: the value of cultural community and the virtues of global diversity neither nullify nor override the demands of equal membership. On the contrary, the value of equal membership, which insists upon the equal dignity of each human being—that

no members of [a] political community ought to be devalued on account of the spiritual foundations of their important commitments and projects—constrains the kinds of homelands that we may recognize as legitimate. Homelands have outsiders in their midst, and equal membership makes weighty demands on behalf of those outsiders.

These obligations include, as we have already observed in passing, at least two elements: (1) limitations on what concerns of the homeland’s beneficiaries can be met on the preferential basis the homeland claims for its beneficiaries; and (2) affirmative obligations of the homeland toward its minority members, obligations which we collect below under the rubric of “solicitous inclusion.”

We begin with the essential limitations on the preferential reach of a homeland. To be a homeland, a nation state must offer its beneficiaries a space where they can enjoy both secure refuge and what we have called the comforts of recognition. A homeland state can prefer its beneficiaries to the extent, *but only to the extent*, that the preference in question is narrowly-tailored to the conferral of these benefits. This is far from a self-executing moral yardstick, and the devil will surely be in the details, as we will discover when we look with some care at the real-world homelands of Israel and France. But examples of where this analysis is likely to lead may be helpful at this point.

Something like Israel’s right of return (which, roughly speaking, grants genealogically defined members of the Jewish people and converts to the Jewish religion an assured right to immigrate to Israel) satisfies the test of being necessary to provide refuge to the Jewish people. On this account, of course, what makes Israel’s strong immigration preference appropriate is not a claim about the Jewish people’s historical heritage in Palestine, but rather a judgment about the legitimate scope of homeland preference. The immigration policy described as the “right to return” is an appropriate policy not just for Israel but for homeland states more generally.

More difficult questions arise with regard to the license of a homeland to provide the conditions that permit a cultural community to be at home. To some extent, the comforts of recognition may flow from the sheer size and concentration of the favored ethnic or cultural group. When a group constitutes a majority, or even a significant plurality, within a state’s population, it will have a robust political voice—its members will have electoral clout and hold many political offices. Its native tongue will be an official language, its history will be recorded in museums and memorialized in the names of streets and buildings, its artistic interests will enjoy the patronage of private individuals and government agencies, and its affairs and concerns will be addressed in the most prominent news media. These benefits, which result from a combination of market forces and the democratic aggregation of preferences, are not by themselves problematic, though the government will have an obligation to ensure that minorities and minority interests are respected

(not only in political institutions but also, for example, in street names and in public subsidies for the arts) by the homeland majority. We will consider this obligation—the obligation of “solicitous inclusion”—in greater detail below.

Where, however, the culture of the target population of a homeland community is to a significant degree wrapped up with religious beliefs and practices, providing the comforts of recognition may require acknowledgement of, and conferral of benefits on, religious tradition and authority in ways that would sit uncomfortably in a pluralist democracy like the United States. Some of these preferential elements of a religiously-connected homeland may be wholly expressive, registering in the domain of what we have elsewhere referred to as “social meaning.”<sup>15</sup> Israel’s founding declaration that it will be a “Jewish State” is a particularly explicit and forceful instance of such expressive conduct (and one that we will revisit and worry about below), but there are others as well: the design of national symbols, the conferral of official status on holidays, and so on.

Other preferential elements in a religiously-connected homeland will have more concrete entailments. Such a homeland might choose to have a uniform day of rest, and in turn, select a particular day of the week for that purpose, precisely because of religious dictates prevalent among the culture for which it has set out to provide a home (of course, this situation is hardly unique to homelands: the selection of Sunday as a day of rest in the United States, for example, clearly reflects the predominance of the Christian faith, even though the United States is not a Christian homeland). If the prevalent religion has demanding ceremonial and substantive requirements for marriage, divorce, and other familial relationships, the homeland state might choose to create structures that authorize religious authorities to exercise shared or exclusive authority over these matters with regard to consenting members of the religion.

It is just at this point, however, that the limits of a homeland state’s preferential license assert themselves. A homeland state can, in the ways that we have described, seek to nurture a protected culture with embedded religious commitments, but that project is different and considerably more limited in scope than would be an effort to shape the laws and traditions of the nation to meet every theological stipulation of the embedded religion. Where, for example, the prevalent religion of a homeland’s culture insists that its beliefs and commitments can be honored only if all persons in the nation are subject to its religious laws concerning marriage, divorce, and inheritance, this asks for far too much. The comforts of recognition stop short—far, far short—of theocratic rule. Once the members of the home culture (and its embedded religion, where such exists), have been afforded a secure place where

15 Eisgruber and Sager, *Religious Freedom* (above n. 1), 127.

their values, commitments and traditions are familiar and shared by many, the preferential license of the homeland state has reached its limit.

To some degree, the scope and nature of the preferential license of a homeland state will turn on whether laws and institutions devised to assure the comforts of recognition for one culture can be shared with others, or, to the same end, offset by other laws and institutions that serve minority cultures well. Some things cannot be shared or offset. Israel's declaration that it is a Jewish state cannot be shared without losing its force as an announcement that Israel has set out to be a secure home for the Jewish people (it can, in a certain sense be *inflected* in service of equal membership, a possibility that we will discuss below). It is altogether possible that a wide-open immigration policy like the right of return cannot, for a variety of practical reasons, be extended to any group other than the community to which the homeland is devoted. The idea is not that such benefits are literally non-divisible, but rather that their division or extension would significantly impair their capacity to provide the comforts of recognition to the home culture.

But other efforts to provide the comforts of recognition surely can, in this sense, be shared or offset. For example, we earlier suggested that if a homeland's culture includes an embedded religion, the homeland might endow the religion's clerics with authority to regulate marriage for consenting members of the homeland's people. That delegation of authority is permissible so long as it does not impair the opportunity of everyone else in the homeland state to be married under the rubric of their own faith or ethnic tradition, or, if they so desire, to be married under the secular umbrella of the state itself. The exact entailments of such a situation are complex, and the details matter. By delegating state authority to a clerical body, the state seeks to recognize the preferences of the members of the preferred homeland community. That benefit is a legitimate form of preference, but it triggers an obligation on the part of the state to share the benefit more broadly. Having opted for a particularized marriage regime, the homeland state is obliged to make the benefits of that regime available on equal terms. It can easily do so by making clerical authority over marriage available to all faiths on a non-preferential basis and by offering a viable and attractive secular option as well. The importance of a secular option is two-fold: many individuals or groups might want such an opportunity directly, and others might choose it as the least offensive or burdensome available option.

A requirement of egalitarian pluralism thus follows closely on the heels of a preferential homeland arrangement. The requirement is, in effect, the equal membership cost of the preferential arrangement or homeland commitment. This structure is worth tarrying over, as it is likely to occur with some frequency in homeland states. Roughly the same scenario, for example, could be played out in the context of education, where religiously oriented charter schools, vouchers, specialized religious schools, or religious education or teachers in the public



schools might be attractive choices for a homeland states in the name of assuring the comforts of recognition to a culturally-embedded religion. In each case, the benefits of such arrangements or offsetting arrangements can be widely shared. In each such case, equal membership will insist that they be shared, and in each case the normative formula will be the same: The religion-specific opportunity must be made available to all on a non-preferential basis; and in each case there must be a viable and attractive secular option.<sup>16</sup>

When we turn from the distribution of concrete benefits to the symbolic distribution of approbation, matters become more complex. As a practical matter, symbolic public displays—embracing history, respecting a tradition, or announcing projects to which a national community is committed—can always be shared by broadening their content to include other histories, other traditions, or other projects. But broadening the content will often significantly weaken or change the meaning of such public displays. This means that the question of whether such displays must be shared will depend on what sorts of public messages are appropriate. More exactly, for our purposes, the question becomes what public messages are consistent with equal membership in a homeland state. For Israel to put the Star of David on its flag, for example, is much like the verbal announcement that Israel is a Jewish state—and thus, on our reading of that idea, much like an announcement that Israel has made itself a homeland for the Jewish people. Arguably, to insist that Israel forbear from such a display, or share it by including an array of cultural and/or religious symbols, would be at odds with our conclusion that Israel’s commitment to be such a homeland is consistent with equal membership. But as we will be at pains to emphasize, below, there is a critical distinction between Israel’s undertaking to be a homeland for the Jewish people, and Israel’s valorizing the Jewish faith or the Jewish people at the expense of the minority members of Israeli society.

Israel, or any government that displays the religious symbols of a homeland population, can and should also display the religious symbols of minority groups. Some people might regard this kind of even-handedness as inconsistent with the very idea of a homeland: how, for example, could a Jewish state possibly sponsor Christian or Islamic religious displays while remaining a Jewish state? The answer is that the “comforts of recognition” imply neither valorization nor exclusivity. They entail only, as we said at the outset of our argument, that a people will have “a place where their values, commitments, and traditions are familiar and shared by many,” not a place where those values, commitments and traditions

16 We have argued that exactly these requirements apply when determining whether school tuition voucher programs are constitutional in the United States. See Eisgruber and Sager, *Religious Freedom* (above n. 1), 207.

are enforced by the government or where alternative values, commitments, and traditions are denigrated, disadvantaged, or suppressed. If it seems peculiar that a homeland would sponsor the displays of multiple religions, it bears remembering that there is no reason that a government need sponsor any such displays—and, indeed, it is unclear why government sponsorship would be necessary with regard to traditions that are already familiar and shared by many. Thus, while the Star of David on Israel’s flag may, in context, be appropriate as an announcement of the nation’s homeland commitment,<sup>17</sup> the unbalanced proliferation of Jewish religious symbols would quickly cross the line into favoritism at stark odds with equal membership.

There is no simple or mechanical rule to lay down here. The social meaning of symbolic public acts is highly contextual, with history and the global environment joining contemporary circumstance to inflect community understanding. And only a thin line separates the legitimate embrace of homeland status from the unjust exercise of favoritism. But the line is crucial, and equal membership demands that a homeland state bend its efforts to observe it.

We turn now from the limits on the kinds of preferences that a homeland state may provide to the affirmative undertakings that equal membership requires of such a state. Metaphorically speaking, we might say that a state that undertakes to be the homeland to a particular culture must “bend over backwards” to affirm the full membership of its citizens who are outsiders to that culture. Less metaphorically, we submit that, as applied to culturally or ethnically preferential homelands, equal membership requires that a polity practice an attitude of *solicitous inclusion* toward its minority populations.

Solicitous inclusion comprises two separate but mutually reinforcing conditions, one material and the other largely symbolic. The material element of solicitous inclusion concerns the obligation that a homeland state has to take those steps necessary to avoid or remediate the deep injustice of entrenched subordination of a group of its citizens. The great risk, of course, is the subordination of some or all of those citizens who are not members of the cultural group privileged by homeland status. The entrenched subordination of a group of citizens is, of course, starkly at odds with a commitment to equal membership.

Subordination of the minority groups in a homeland state can assume a number of forms, forms unhappily recognizable to students of the blemished history of race in the United States. These include, in no particular order and without the

17 Gans, who pursues a similar line of argument, takes a ruthless view about what must be shared, maintaining that even flags and national anthems ought to respect all of the groups that legitimately regard a polity as their homeland—meaning, in Israel, Arabs no less than Jews. See Gans, *A Just Zionism* (above n. 4), 138–41.

pretense of being inclusive: legal disabilities with regard, for example, to voting, higher education, or public office; discrimination, including segregation, in public or private schools, including unequal public financing of schools, to the detriment of cultural/religious minorities; public and private discrimination in employment; and broad, chronic, entrenched, and structural disparities in economic well-being. Where religion is selectively embedded in the homeland culture, there is an added risk of subordination, namely, the existence of patterns of public denigration, including active thwarting and/or marked indifference to the spiritual well-being of minority faiths.

A homeland state is at great risk of harboring and supporting—indeed of inducing—these injustices. In turn, a homeland state committed to equality is obliged to actively prevent or retroactively remediate these injustices. That obligation is the material dimension of solicitous inclusion; and without vigorous efforts in this direction, equal membership in a cultural homeland state is impossible.

There are many possible ways in which a homeland state can confront the risks of subordination. Prominent among these are vigorously enforced anti-discrimination laws that address, *inter alia*, the private employment and housing sectors; programs aimed at creating educational and economic opportunities for underprivileged segments or areas of the homeland; ruthless insistence on the fair distribution of government services; and judicially enforced constitutional requirements of equal treatment. There is nothing easy about the public enterprise of combating subordination.

The symbolic aspect of solicitous inclusion concerns the non-tangible effort a homeland state must make in order to make its citizens—members of the home culture and cultural minorities alike—feel that cultural minorities are welcome and valued as members of the community, even if it is not the homeland for their people. Equal membership requires that minorities are able not only to flourish within a homeland community but able as well to identify with it as their home. This concern is both subtle and difficult to satisfy. On the one hand, it is not at all clear how a non-Jewish Israeli can identify wholeheartedly with membership in an avowedly Jewish state. On the other hand, it is hard to see just how a homeland state that has otherwise complied with the demands of equal membership—one that has narrowly tailored its efforts to provide the home culture with refuge and the comforts of recognition, and has strived to meet the affirmative requirements of solicitous inclusion—could possibly do more to promote an inclusive understanding of minority status.

There is, however, an exquisitely symbolic aspect to the mission of a cultural homeland, and that aspect carries with it special hazards for equal membership. At stake is the thin but meaningful line between an announcement by a nation state that it is committed at its core to providing refuge and the comforts of recognition

to a particular cultural group and the announcement that it is committed, at least tacitly, to the view that groups and individuals who are not members of the homeland group are less worthy, less valuable, less than full members of the political community. This line is particularly fine and yet particularly important when there are religious beliefs and traditions embedded in the home culture. To be outside many religions is to have failed to have acknowledged the one true god, to have denied that god the tribute to which he or she is entitled, to have committed a blasphemy, and possibly to have threatened the salvation of the entire community. The denigrative implications of a homeland's embrace of religion are quite close to the surface.

To be sure, the actions of homeland states may speak more loudly than words, but homeland states have the capacity to shape explicit messages about their commitments. They can do so in their constitutions, in their judicial opinions, in the preambles to their legislation, in the remarks of their leaders, in the content of their public celebrations and rituals, and so on. The symbolic aspect of solicitous inclusion demands that homeland states strain to communicate their self-understanding as states committed to equal membership.

In the two sections that follow, we apply our analysis in greater detail to Israel and then to France. These examples will make clear, among other things, just how demanding the requirements of equal membership are—indeed, we expect that its requirements will strike some people as unrealistically stringent. We have two preliminary observations about that concern. The first is that the requirements of equal membership are and should be demanding with regard to any polity, including not only homelands but pluralist liberal democracies. We believe that the United States, for example, has never satisfied fully the requirements of equal membership (unlike in the past, it now does rather well on matters of religious freedom; its worst failings come at the intersection of racial and economic justice). The second observation is that we ought to expect homelands to have some trouble complying with the demands of equal membership. Homelands are founded upon a self-evident departure from equality (namely, the open embrace of a particular culture or ethnicity); our argument is sympathetic to such an embrace as potentially consistent with equality principles, but there is no way to make this reconciliation easy, either in theory or in implementation.

### 3. The Jewish State

Israel tests the limits of the possibility that a state can at once be a homeland to a culturally defined people and treat all of the members of its political community as equals. As a Jewish state, Israel's partiality runs deep. Because "Jewish" is a racial and religious category, becoming fully affiliated with the Jewish people

and so with the homeland will be difficult or even impossible (depending upon the rules for conversion) for non-Jews. The religious dimension adds a special element of true belief to the national; the Jewish people may or may not have been chosen by God, but they have surely been chosen by Israel. And “Jewish” is a privileged subset even of “Israeli.” Not all Israeli citizens are Jewish, so if Israel is the homeland only of the Jewish people, then it is not the homeland of the Israeli people (or, alternatively, not all Israeli citizens are part of the Israeli people). While the French government wants all its citizens to become culturally French, the Israeli government harbors no such aspiration for non-Jewish citizens of Israel,<sup>18</sup> and realistically, offers them little or no possibility of becoming Jewish.

Israel’s special regard for the Jewish people is justifiable only if it meets three conditions. First, the special treatment or status accorded to Jewish persons, authorities, and traditions must be limited—carefully tailored—to the enterprise of providing secure refuge and the comforts of recognition to those who qualify as Jewish. Second, the Israeli government will have to energetically set itself against the discrimination and entrenched political, social, and economic disadvantages that are likely to be the lot of Israel’s non-Jewish population. And third, Israel will have to genuinely adopt and communicate a stance toward its status as a Jewish state that is wrapped in the view that all people are entitled to live in polities where they are safe and respected, not in a special prerogative of the Jewish people. All three of these conditions are called for by equal membership; the second and third compose the affirmative governmental posture that we have named solicitous inclusion. Together, these requirements are very demanding, to be sure. They are likely to strike many as hopelessly idealistic or inviting of hypocrisy. But unless they are satisfied, preferential overreaching on behalf of Israel’s Jewish population and subordination of Israel’s non-Jewish population will make a mockery of Israel’s purported commitment to “complete social and political equality” . . . to what we have called equal membership.

One obvious response to this picture is to conclude that there is no feasible way to reconcile equality with a commitment to be a Jewish state. Israel’s most severe critics charge that Israel cannot respect basic human rights and remain a

18 Ruth Gavison, who offers a more sweeping defense of the Jewish state than we are willing to accept, agrees on this point: “When Israel is described as the nation-state of Jews, the implications to the status of its Arab citizens is very different from the issues raised for a Moslem French citizen. For one thing, the Moslem can be described as partaking in Frenchness by being a citizen. The Israeli Arab does not partake in the Jewishness of the state by virtue of his being an Israeli citizen.” See Ruth E. Gavison, “Can Israel be Both Jewish and Democratic?” *Social Science Research Network*, January 1, 2011, 122, <http://ssrn.com/abstract=1862904>.

Jewish state.<sup>19</sup> Some more sympathetic commentators take the view that Israel can be defended only by compromising both of the foundational norms articulated by its declaration of statehood: Israel is a Jewish state only to some extent, and the promise of “complete equality” means something less than full equality. On this view, the task of Israeli statesmen is to balance equality principles and the demands of Jewish identity on the basis of vaguely defined and highly situational pragmatic considerations.<sup>20</sup>

Israel’s liberal constitutionalists, including some of its most prominent Supreme Court justices, have taken a different and more challenging tack. They have sought to interpret Israel’s status as a Jewish state in ways that are consistent with the full respect for social and political equality so clearly articulated at the nation’s founding. Their project is consistent with the line of reasoning we pursue in this paper, and the arguments in the remainder of this section explore in more detail whether and how Israel can be the homeland for one portion of its people and yet respect the equal membership of all of them. The first sub-section asks how well Israel achieves the goals of a homeland, and the next three sub-sections examine whether it lives up to the demands of equal membership.

19 See, for instance, the controversial article by Tony Judt, “Israel: ‘The Alternative,’” *New York Review of Books*, October 23, 2003, 60. An example of the response that Judt provoked is Leon Wieseltier, “What is Not to be Done: Israel, Palestine, and the Return of the Bi-national Fantasy,” *The New Republic*, October 27, 2003, 20.

20 Ruth Gavison aims at a more principled middle ground. She defends Israel as Jewish and *democratic* without requiring a full commitment to the equality of its Arab citizens. Her argument turns on two propositions. The first is a definition of democracy that is procedural and does not incorporate a demanding principle of equal membership. Gavison, *Can Israel* (above n. 19), 125–33. The second is the view that if Israel is in this way democratic, it can be understood as just, notwithstanding its lapse from equality. We interpret the meaning of democracy differently from Gavison, but, for purposes of this argument, we can be agnostic about that point. The critical question is not whether the principle of equal membership is a part of democracy, but whether it applies to Israel and other homelands. Gavison’s argument on this point appears to depend on a kind of balancing: the historical case for a Jewish nation state outweighs the harms to the Arab citizens who live within it (*ibid.*, 145–148). This balancing approach may be enough to justify a pragmatic, transient compromise: as, in other words, an argument that, despite real faults, a Jewish state is preferable to any currently achievable alternative. But at the level of principle, it falls short, both in terms of the aspirations articulated in the Israeli declaration of statehood—which commits Israel not just to democracy but also to demanding standards of equality—and in terms of political justice. Perhaps Gavison agrees: she observes at one point that “a bi-national state on the area from the sea to the river is also an option. *On paper, it even seems the more attractive one*” (*ibid.*, 146 [emphasis added]).

### 3.1. Homeland and Cultural Diversity

We noted earlier that the idea of homeland comprehends at least two elements: refuge from persecution and the comforts of recognition. Israel's Law of Return, which offers citizenship to Jews and their descendants, implements the first of these goals. We will have more to say below about how to evaluate this preferential immigration policy against the requirements of equality, but, from the perspective of homeland and especially the goal of providing refuge, we think that it succeeds. It is broad enough and clear enough to make Israel a haven for Jews facing persecution elsewhere.

With regard to the comforts of recognition, however, the case is surprisingly mixed. On the positive side of the ledger, Israel has created a polity where Jewish culture flourishes and where the Jewish people, who for millennia existed throughout the world only as a persecuted and vulnerable minority within other states, enjoy the benefits of majority status. Few Jewish visitors to Israel return to their own countries without remarking upon the joy and sense of belonging they felt upon being enveloped by their own culture. This sort of experience testifies powerfully to Israel's ability to provide the comforts of recognition.

On the negative side of the ledger, Israel sometimes creates surprising barriers to activities, practices, or rituals that American Jews take for granted. Most of the problems arise because Israel does not merely accommodate Jewish religious and cultural practices but cedes legal authority over questions of personal status to religious authorities (the fact that the religious authorities represent a minority position within Israel's Jewish community makes the issue more glaring, but making religious authorities the final arbiters of personal status would create a problem even if the authorities were mainstream). Israeli marriage laws provide an especially compelling but not unique example. Israel delegates to religious officials the authority to approve marriages and divorces. The problem with this delegation is not principally that it favors Jews over non-Jews: Israel endows Muslim and Christian religious officials (among others) with authority comparable to what it gives to Jewish ones. The problem instead is that Israeli law neither provides for secular alternatives to religious marriage nor recognizes the diversity of opinion and practice within religious and cultural communities. Israel thereby allows religious officials to exercise legal power over some people—Jews and non-Jews alike—who neither respect their authority nor wish to abide by their rules.<sup>21</sup> Legal authority over Jewish marriages rests with Orthodox rabbis who enforce a set of restrictions rejected by most Israeli Jews, who are predominantly secular. Reform

21 Natan Lerner, "Religious Liberty in the State of Israel," *Emory International Law Review* 21 (2007): 239, 254.

and Conservative rabbis lack the authority to prescribe alternative marriage rules. Members of Israel's secular Jewish majority therefore routinely leave the country to marry; Cyprus is the typical destination. In Cyprus (where Israeli marriage is a major business), Israelis can avoid the rabbinate's restrictions, and, when they return to Israel, the state will recognize their foreign marriage as legally valid.<sup>22</sup> The problem is especially poignant for individuals who identify themselves as Jewish but whose Jewishness is denied by Orthodox authorities. These individuals have no legal capacity to marry anyone in Israel. Some estimates suggest that waves of immigration over the last twenty years increased the number of Israeli citizens in this category to more than one hundred thousand.<sup>23</sup>

It may be that to the founders of the Israeli state it was particularly important to provide the comforts of recognition to Orthodox Jews, whose firmly established and distinct traditions, beliefs, and practices in matters ranging from dress, to ceremony, to marriage and the family, had made them conspicuous outsiders the world over. And, in any event, the politics of unifying support among Jews for the creation of a Jewish state may have required special accommodation of Orthodox Jewish leaders. At a time when securing unified Jewish support for the new Israeli state was critically important, and when the numbers and influence of Israel's Orthodox minority were waning, it may have seemed both appropriate and benign to continue delegating marriage authority to the Orthodox Jewish rabbinate.<sup>24</sup> But this has created an entrenched theocratic monopoly, with patently unjust consequences.

In our analysis above, we insisted that when benefits initially prompted by concerns for the comforts of recognition of the homeland community could be shared, equal membership requires that they be shared. Thinking about the specific case of religious authority over marriage (and the somewhat analogous case of education), we concluded that the conferral of such authority was consonant with the requirements of equal membership only if such authority were available to other groups on a non-preferential basis, and if an attractive secular option were made readily available by the state as well.

22 Ibid., 253.

23 Asher Cohen and Bernard Susser, *Israel and the Politics of Jewish Identity: The Secular-Religious Impasse* (Baltimore: Johns Hopkins University Press, 2000), 116–18.

24 See, for instance, Alan Dowty, *The Jewish State: A Century Later* (Berkeley: University of California Press, 1998), 179. The delegation of marriage authority to the rabbinate originated with the Turkish *millet* system and was sustained first by the terms of the British Mandate in Palestine and then by David Ben-Gurion's commitments to Orthodox religious leaders (ibid., 166); Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (New York: Cambridge University Press, 2011), 72–73.



Israel may lack the political will to put this right by making religious authority over marriage available to qualifying groups (such as Conservative or Reform Jewish authorities) on a non-preferential basis and by making an attractive secular marriage option readily available. Efforts to move in the direction of such a policy have been defeated by Israel's Orthodox minority.<sup>25</sup> But two things are true: equal membership requires reform of this sort; and, nothing about Israel's commitment to being a Jewish state—to being a homeland for the Jewish people—stands in the way of this reform. On the contrary, the present arrangement has the perverse consequence of rendering the majority of Israeli Jews less able to marry in their homeland than they would be in a pluralist constitutional democracy such as the United States. The idea that Reform Jews in Israel must fly to Cyprus or New York to get married by a Reform rabbi is antithetical to the ideal of recognition: their faith tradition, and their sense of what it is to be Jewish, is disparaged rather than recognized. Both equal membership and ideal of a Jewish homeland are undermined as a result.

### 3.2. Refuge and Immigration Policy

We have thus far focused on whether and to what extent Israel's policies deliver the recognition promised by a homeland to its people. We now turn to a more commonly asked question about Israel: namely, whether it can be both a homeland to the Jewish people and a place where equal membership is enjoyed by non-Jews in general and by Arabs in particular. In this section, we take up the question of refuge for the Jewish people and Israel's preferential immigration policy. In the next, we address questions concerning the comfort of recognition and the demands of solicitous inclusion.

Because the principle of equal membership governs a state's treatment of its domestic population—that is, its members—rather than its attitude toward the world at large, we think that Israel's preferential immigration policies are defensible from the standpoint of equality (or, at any rate, they are as defensible as are the immigration policies of other countries). Indeed, if homelands were distinguishable from other polities only by their immigration policies, then they would present few, if any, special difficulties from the standpoint of equal membership. That is not because homelands have egalitarian immigration policies—they do not—but

25 Lerner, "Religious Liberty" (above n. 21), 253–254; Lerner, *Making Constitutions* (above n. 25), 212–219. In November 2010, the Knesset passed a "Partnership Covenant Law" that allowed "religionless" Israelis to enter into civil unions (but not marriages) with one another (Israel makes no provision for interfaith marriage). The law was widely and harshly criticized as an unsatisfactory response. See Irit Rosenblum, "What they didn't tell you about the 'Partnership Covenant for the Religionless,'" *Jerusalem Post*, November 23, 2010, 16.

because few if any other polities do either. Political borders generate arbitrary distinctions of birth and parentage: if you are born on one side of a line, or to certain parents, your rights of citizenship are very different than if you were born on the other side of the line or to different parents. These arbitrary differences of geography and lineage can have momentous consequences for a child's life prospects. If one admits the validity of borders at all, it becomes impossible to apply equality principles to immigration policies in the same way that one would do with regard to wholly domestic policies. States will and do create immigration preferences based on parentage, place of origin, economic prospects, and many other factors. As Chaim Gans points out, this sort of "everybody does it" argument is by itself question-begging: absent some account of the justice-regarding purposes served by the division of the world into states (including homeland states), it might be that "everybody does it" and everybody ought to stop.<sup>26</sup> That said, the reasons (whatever they are and however imperfect they may be) that justify the existence of arbitrary political borders in the first place are almost certainly potent enough to give states relatively broad discretion to determine who may cross them.

Broad discretion is not the same as limitless discretion, of course. States act unjustly, for example, when they exclude individuals on the basis of racial and religious prejudice. So, for example, Israel would behave unjustly if it declared itself to be the homeland for all Jews except Jews of African descent, or if it allowed for the immigration of any relative of an Israeli citizen unless that citizen (or his relative) were Muslim, or if it more directly erected barriers to the immigration of Muslims more generally while allowing Christians, Sikhs, and others to immigrate freely. These hypothetical rules incorporate prejudices against Africans and Muslims, respectively. There is an obvious sense of injustice that asserts itself even in a global domain characterized by arbitrary and frequently pernicious selectivity. Less obviously, perhaps, but more on point for our purposes, were Israel to adopt exclusionary rules like these, those rules would undermine equal membership *within* Israel. Israelis of African descent or Israelis who were Muslims would be denigrated by virtue of the selective exclusion of their counterparts.

Israel's Law of Return (which allows any Jew to enter Israel and become a citizen), by contrast, does not share this vice.<sup>27</sup> It is partial, in the sense that it

26 Gans, *A Just Zionism* (above n. 4), 70–73. Gans later supplies his own justice-regarding case for allowing Israel to maintain an appropriately tailored but racially preferential immigration policy; his argument relies, as does ours, on the legitimacy of recognition and refuge as objectives for a homeland state (*ibid.*, 121–122, 129).

27 Speaking about immigration of Ethiopian Jews to Israel, human rights activist Natan Sharansky "said with pride, 'Black, white—there is no difference in the ingathering of exiles.'" See Isabel Kershner, "Second-Generation Ethiopians in Israel March Toward Dream of Acceptance," *New York Times*, June 10, 2012. As Kershner's article makes clear,

prefers Jews to other people, but its partiality is rooted in a historically justified effort to provide refuge for the targets of prejudice, not in animus against another group.

In order to claim the benefit of this line of reasoning, an ethnically defined homeland has an obligation to shape its preferential immigration policy in a way that is reasonably consistent with its justice-seeking aims (rather than, for example, on the basis of prejudice or arbitrary favoritism). In our view, Israel has done so.<sup>28</sup> The Law of Return as currently construed recognizes as Jews those who have been converted to Judaism or who were born of a Jewish mother and are not members of another religion. Conversions by any branch of Judaism—not just those by Orthodox rabbis—are accepted (if the conversions take place outside of Israel, where the Orthodox enjoy an unfair monopoly). Importantly, the Law of Return also extends immigration rights to the children and grandchildren of Jews, the spouse of a Jew, and the spouse of a child or grandchild of a Jew.<sup>29</sup> Israel’s law is thus reasonably calculated to protect most persons who might be persecuted as Jews (whether or not Israeli law or Orthodox authorities would consider them Jews with regard to marriage and other questions of personal status). In this respect, Israel’s immigration law is arguably more justice-regarding than most immigration policies, which are usually designed almost entirely to protect or enhance the economic position of the indigenous population.

There is of course a different and very urgent question about immigration policy at the heart of the Israeli-Palestinian conflict. That question pertains to whether Israel must allow Palestinian refugees to return to Israel and obtain citizenship. Israel refuses to do so for various reasons, but the most fundamental is that if it admitted the refugees it would cease to be a Jewish state. Given the

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however, race discrimination within Israel remains a problem, as it is in the United States and many other countries.

28 Though Gans also defends the legitimacy of preferential immigration policies for homeland states in general and Israel in particular, he is more critical than are we with respect to the details of Israeli policy. He regards it as wrongfully over-inclusive with regard to the rights of Jewish immigrants and under-inclusive with regard to non-Jews. See Gans, *A Just Zionism* (above n. 4), 125–129. Because our argument emphasizes “refuge” more than does Gans’s argument (which focuses mostly on “recognition,” at least in current circumstances), we are more comfortable than is he with the breadth (with regard to Jews) of the Law of Return. On the other hand, his examples of unjust exclusivity include some that are compelling, such as Israel’s refusal to grant citizenship to native-born children of immigrant laborers and to non-Israeli Arab spouses and children of Arab-Israeli citizens (*ibid.*, 128, 134–135).

29 Lerner, “Religious Liberty” (above n. 21), 248. Jews who have voluntarily practiced a religion other than Judaism are thereby rendered ineligible for the rights conferred by the Law of Return.

bitter conflict between Israel and the Palestinians, some people will regard Israel's policy as driven by animus—in other words, they will suppose that Israel excludes the refugees because of a hatred (or at least a mistrust) that is specific to the Palestinian people. We understand why some people might take that view, but that is not what Israel says about its position. Israel rejects the refugees' claim to return because it cannot be the homeland for the Jewish people if it is also the homeland for the Palestinian people *or any other people*.

The claims of the Palestinian people are relevant in another way, however. They illustrate a general principle of reciprocity that is implicit in the idea of a homeland: a state that proclaims itself a homeland for a particular people must respect similarly justified claims made by other peoples, including, potentially, minority groups within its own borders.<sup>30</sup> When multiple peoples claim the same or overlapping territories as their homelands, this reciprocity principle may generate powerful claims for partition, federalism, autonomous enclaves, or other forms of accommodation. No modern state illustrates the need for and implications of this reciprocity principle so poignantly as does Israel. Israel came into being partly because of the need to provide refuge for a persecuted minority with no country to call its own. It now refuses entry to Palestinians who in the past lived on the same land and want to call it home again. The logic of Israel's own founding entails that this exclusion is just only if the Palestinians have a homeland of their own: in other words, some version of the "two-state solution" to the Palestinian conflict is a necessary part of any sound case in favor of a Jewish state.<sup>31</sup>

### 3.3. The Comforts of Recognition and Solicitous Inclusion

Notwithstanding the overreaching authority of the Orthodox rabbinate, Israel has been wildly successful in fashioning itself a Jewish State, and providing not just refuge but a cornucopia of comforts of recognition for Jews who choose to make Israel their home. From the outset, Israel's success at creating a homeland for the Jewish people has put the mostly Arab, non-Jewish population at great risk of being locked into the status of second-class citizens. Consider the bare bones of the situation: Israel has proclaimed itself a Jewish state, yet about twenty percent of the Israeli population is Arab. The Arabs of Israel are separated from Jewish

30 Gans contends that minority homeland groups are entitled to their own set of homeland privileges—so that, in particular, the Arab-Israeli Palestinian population is entitled to be treated as a homeland group within Israel, and this entitlement would persist even after the creation of a Palestinian state. See Gans, *A Just Zionism* (above n. 4), 107–09.

31 On this point, both Gans and Gavison agree, and each makes the point with considerable force. See Gans, *A Just Zionism* (above n. 4), 19, 58–59, 137; Gavison, *Can Israel* (above n. 18), 147–148.

Israelis by history, by religion, by cultural tradition, by wealth, and by physical location—the Arabs to an overwhelming extent live in their own communities. The significance of this division might, at least in principle, be mitigated to some extent by the great national diversity of Israeli Jews; in the right circumstances, the Arab minority could consider itself one group among many. For the moment, though, this possibility seems more imaginary than real, and the situation is surely seriously aggravated by the bellicose enmity that exists between Israel and its Arab neighbors. Israel is thus a riveting example of the challenges to equality faced by a cultural homeland.

In some respects, of course, minorities will be at a disadvantage even in states that do not constitute themselves as culturally or ethnically preferential homelands. Democratic majorities will inevitably make laws that advance their interests rather than those of minorities. A society in which a majority prefers shopping malls to parks will build more malls than parks (much to the disappointment of the minority). A society with a large Christian majority will close its schools on December 25<sup>th</sup> but not on Yom Kippur or Eid al-Fitr. The mere fact that a polity adopts rules more favorable to one group than to another is not sufficient to produce a problem from the standpoint of equal membership. But the idea of a homeland seems to suggest something more, and more problematic: namely, that the polity cares especially about the interests of some people (those for whom it is a homeland) and less about the interests of others.

In our analysis above, we concluded that a homeland nevertheless may be able to satisfy the requirements of equal membership, but only if it (1) to the greatest extent possible shares the institutional benefits it confers on the homeland population with the minority populations within its borders; (2) affirmatively undertakes to prevent and/or remedy the political, social, and economic subordination of homeland minorities; and (3) firmly adopts and effectively communicates a view of its homeland commitments that underscores the deep egalitarian values that underlie those commitments and the connection between those values and community-wide equal membership. The second and third of these requirements we have summarized as the public stance of solicitous inclusion. The point of all this is blunt: A homeland state must seek to ensure that its minorities share fully in the economic, social, and political benefits of the state.

In some respects, Israel does that. For example, it supports Christian and Islamic schools as well as Jewish ones—although, in practice, the Muslim schools have less autonomy and less support than the Jewish ones.<sup>32</sup> Muslims

32 See generally Majid Al-Haj, *Education, Empowerment, and Control: The Case of the Arabs in Israel* (Albany: State University of New York Press, 1995).

and Christians have full voting rights. As Israel points out frequently (perhaps too frequently, given the inequalities within its borders), Arab Israelis have done better economically than Arab populations in other Middle Eastern states. A bevy of Israeli laws prohibit discrimination. But, Israel has failed to affirmatively address the opportunities of its Arab population. To the contrary, Arab individuals, neighborhoods, and communities receive fewer resources with which to exercise their authority than do their Jewish counterparts.<sup>33</sup> This discriminatory policy reflects a combination of animus and systematic neglect. For example, Alan Dowty observed in 1998 that: “Reportedly the Israeli cabinet has never held a comprehensive discussion or review of policy toward the Arab sector; specific Israeli Arab issues have been discussed in regular policy sessions on perhaps a dozen occasions, but no overall decisions or guidelines have ever been adopted by the government as a whole.”<sup>34</sup>

Dowty puts this problem at the core of the challenges facing the Jewish state: he contends that “Jewish-Arab relations within Israel are the acid test of Israeli democracy” (Dowty is referring to relations within Israel’s pre-1967 boundaries, where Arabs are full Israeli citizens, rather than to the status of the West Bank and Gaza).<sup>35</sup> The conflict between secular and religious Jews also presents Israeli democracy with profound challenges, but from the standpoint of the idea of a homeland and the issues taken up in this paper, Dowty is clearly correct. As we have noted, most estimates put Israeli’s Arab citizenry at around 20% of the population (about 1.5 times the percentage representation of African-Americans in the United States). Providing this substantial group, one that has many reasons for alienation from the Zionist project, with full and equal membership in a Jewish state is a demanding undertaking indeed. Equal membership means, for example, that Israel’s Arab citizens ought to have opportunities equal to those of their Jewish peers with regard to healthcare, education, and economic well being, and that the Israeli state should care just as deeply about their barriers to opportunity as it would about similar problems faced by Jewish citizens. That is far from true today: Israeli Arabs suffer from discrimination rather than benefiting from solicitous inclusion.

33 A case study, focused on Jerusalem, is Amir S. Cheshin, Bill Hutman, and Avi Melamed, *Separate and Unequal: The Inside Story of Israeli Rule in East Jerusalem* (Cambridge, MA: Harvard University Press, 1999). See also, for example, Gershon Gorenberg, “Israel’s Other Occupation,” *New York Times*, November 27, 2011.

34 Dowty, *The Jewish State* (above n. 24), 189. At the end of the same paragraph, Dowty notes that David Ben-Gurion “did not visit any Israeli Arab community until eleven years after the establishment of the state.”

35 *Ibid.*, 208.

Equal membership and the more specific requirement of solicitous inclusion demand that such inequalities be redressed. Homelands may have a tendency to neglect or discriminate actively against minorities, but that vice is neither unique to them (one need only think of historical attitudes in the United States toward, for example, African-Americans and Native Americans) nor inevitable in them. As Dowty points out, “Nothing in the ‘Jewish’ nature of the state inherently compels discrimination in government budgets, health and welfare services, education, economic opportunities, or treatment in the courts.”<sup>36</sup>

### 3.4. Equal Membership and Social Meaning

In order for minorities to claim equal membership in a homeland, they must not only be able to flourish materially within it but also be able to identify with it. They ought to be able to feel that it is truly their home, and that they are fully members of its community, even if it is not the homeland for their people. This concern about identification is less tangible and more symbolic than the others that we have discussed, and it is also the most conceptually difficult of them: it is not at all clear, for example, how a non-Jewish Israeli can identify wholeheartedly as a member of the Jewish state.

This problem of identification intersects with the problems of endorsement and social meaning that we have analyzed elsewhere. The United States Supreme Court has held that the government ought to refrain from sponsoring religious symbols because by doing so it endorses or affiliates within one group in the society at the expense of others.<sup>37</sup> The government thereby elevates one group’s status over another and fails to honor the ideal of equal membership. In our work on religious freedom and the United States Constitution, we have defended this doctrine (and extended it) by reference to the social meaning of religious symbols.<sup>38</sup> We have argued, in particular, that given the meaning of (for example) a Latin cross within American culture, the government endorses Christianity by sponsoring its display even if the government denies that it has any specific intention to honor Christianity or to disparage other faiths.

Some people, of course, deny that harms of this kind are meaningful or important. There are constitutional theorists in the United States—such as Justice Antonin Scalia and Professor Noah Feldman—who suggest that minorities ought to thicken their skins.<sup>39</sup> They have a right to be protected from discrimination and

36 Ibid., 214.

37 *County of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989).

38 Eisgruber and Sager, *Religious Freedom* (above n. 1), 122–28.

39 *Lee v. Weisman*, 505 U.S. 577, 640–42 (Scalia, J., dissenting); Noah Feldman, *Divided By God: America’s Church-State Problem—And What We Should Do About It* (New York: Farrar, Straus and Giroux, 2005), 237–243.

material harms but not from a symbolic sense of disparagement. People who take this tolerant attitude toward government-sponsored crèche displays in the United States can extend it to Israel and other culturally preferential homelands: on such a view, if the demands of equality are otherwise satisfied, then the fact that Israel declares itself a Jewish state presents no independent problem.

For those who take the problem of symbolic harms seriously in the United States, however, the problem is greatly magnified in the case of a homeland state like Israel. Equal membership in Israel requires that both the Jews and the Arabs of Israel come to accept the proposition that the Arabs are full members of the Jewish state. The Arabs must see themselves as valued members of the Israeli community and the Jews must see the Arabs in that same light. The social meaning of the actions and commitments of a state like Israel will influence the capacity of its citizens to see themselves and each other in this beneficial light.

Consider three different understandings of Israel's self-proclaimed status as a Jewish state:

- The Jewish people have been chosen by God and are treasured by him. To provide this homeland for the Jewish people is to fulfill God's will and to actualize his love.
- The Jewish people have endured centuries of being persecuted outsiders, culminating in the unthinkable events of the Holocaust. Providing secure refuge and recognition of their legitimate place in the world is to confer on the Jewish people what many other peoples have taken for granted, and to which all are entitled.
- The history, beliefs, and traditions of the Jewish people fill them with empathy and concern for outsiders everywhere. Hence the *twinned* commitments in the founding documents of Israel, to make of Israel both a Jewish state, and a state in which all citizens enjoy equal social and equal political rights.

The point, of course, is that the second and third of these social meanings are affirming of equal membership, while the first is deeply at odds with that dimension of justice. It behooves the State of Israel and every homeland state to see equality as, paradoxically, lying at the heart of its partiality.

One way to think about all this is as the objective of creating a shared, possibly secondary, pan-Israeli identity that might be embraced by the state's non-Jewish citizens (even if this goal is fully realized, non-Jewish Israelis will sometimes feel like outsiders in the Jewish homeland—but, then again, so too will Jewish and Muslim Americans sometimes feel like outsiders in the United States or other predominantly Christian countries, even if there were never crèches in the town square or Christian prayers in the local schools).



The need for an identity of this kind has sometimes been asserted within Israel. For example, the Israeli-Arab novelist Anton Shammas has called for “a new definition of the word ‘Israeli,’ . . . so that it will include me as well.”<sup>40</sup> Various proposals have been made about how to make progress toward this end—for example, by the creation of some non-Jewish and inclusive Israeli national holidays (the contemporary, secular version of American Thanksgiving would be an example).<sup>41</sup>

One could also shape a shared identity by associating Israel and Israeli identity with a set of principles drawn from the Jewish tradition but capable of having universal appeal. The former President of the Israeli Supreme Court, Aharon Barak, has advocated such an approach, arguing that interpreters should regard “the phrase ‘Jewish State’” as having “meaning on a high level of abstraction, which will unite all members of society and find the common ground among them.”<sup>42</sup> Barak’s argument is extremely controversial.<sup>43</sup> For our purposes, it is important because it represents one way—though by no means the only way—in which Israel might generate an inclusive version of national identity. It, or some other version of a pan-Israeli identity, must eventually prevail if Israel is to vindicate both its commitment to be a Jewish state and its commitment to equality. More generally, any homeland must forge an analogous synthesis—it must create a national identity in which ethnic minorities can share fully—in order to satisfy the demands of equal membership.

Some people—including both critics and defenders of Israel—will undoubtedly regard this aspiration as so far removed from present reality as to be preposterous. They might be tempted to confront us with what they consider a *reductio ad absurdum* of our position: “If Arabs must be equal members of the Jewish state, then it follows that an Arab-Israeli might someday be prime minister of the Jewish state. That is clearly absurd, so you must be wrong.”

We reject the conclusion, but we think that the premise of this argument is sound: the ideal of equal membership implies not only that Arab Israelis should be formally eligible for all public offices, including that of Israeli Prime Minister,

40 Quoted in Dowty, *The Jewish State* (above n. 24), 213.

41 Ibid., 214.

42 Aharon Barak, *The Constitutional Revolution: Protected Human Rights, Mishpat Umimshal [Law and Government in Israel]*1 (1992): 9, 30 [Hebrew] (as translated into English in Gary Jacobsohn, “The Permeability of Constitutional Borders,” *Texas Law Review* 82 [2004]: 1763, 1775).

43 Ran Hirschl, *Constitutional Theocracy* (Cambridge, MA: Harvard University Press, 2010), 70–72; Cohen and Susser, *Israel and the Politics* (above n. 23), 83–95; Lerner, *Making Constitutions* (above n. 25), 75–86; Jacobsohn, “The Permeability” (above n. 43), 1780–1787.

but that it would be desirable if at some point in the future the Jewish state had a non-Jewish leader. We are also keenly aware of how fanciful this suggestion appears. We are arguing, however, not about what is achievable tomorrow or even in the next half-century, but about the ultimate goals and defining principles of homelands in general and Israel in particular. A due respect for justice and human rights requires, among other things, that political regimes dedicate themselves to aspirations that will take a very long time to achieve. America's founders, for example, declared independence by announcing that "all men are created equal," but neither they nor their successor Abraham Lincoln believed that white and black Americans could live together as equals (Lincoln's preferred solution was to repatriate American blacks to Liberia). The idea that a black man (or a Native American) might one day become president of the United States would no doubt have seemed to them preposterous and risible. Indeed, until the very eve of Barack Obama's election, many well-meaning Americans continued to believe that they would never see an African-American president in their lifetimes.

Israel is now less than seventy years old. During that time it has confronted grim alternatives and its choices (like those of any other country we can think of, including our own) have sometimes been unjust. But Israel has also accomplished extraordinary things, building a modern democratic state rapidly in harsh conditions. Our argument in this paper joins forces with those inside and outside Israel who believe that to navigate the difficult challenges ahead, Israel must have a clear conception of its ultimate constitutional goals, even if those goals are unreachable for the present and for generations to come. If our analysis of the concepts of homeland and equal membership is valid, it supports the conclusion that Israel can reaffirm its commitment to equal membership without abandoning its foundational commitment to be a Jewish state.

### 3.5. Counterpoint: The Concept of a *Modus Vivendi*

A central concern of this essay has been the question of whether Israel's self-identification as a Jewish state can be reconciled with the demands of justice, and, more particularly, with the principle of equal membership. It is a concern shared by many leading Israeli constitutional thinkers, including the former President of the Supreme Court, Aharon Barak, and his successor Dorit Beinisch, and in less formal terms, by many Israeli leaders and citizens. For us, this inquiry is the occasion to broaden our understanding of religious liberty to include circumstances far removed from those in the United States. For concerned Israelis, the question carries a more practical and more urgent charge. Israel formally is committed to equality and human dignity, and no one who takes those values to heart can fail to ask whether they are within or without the nation's reach.

But not everyone who observes and worries about the Israeli state is inclined to take these fundamental principles of justice into account. Prevalent in Israeli debates is an approach that sets aside questions of justice or fairness and appeals in their stead to the purported stipulations of a settled constitutional compromise that fixes the terms of a *modus vivendi* for the divided Israeli Jewish community. The thinking behind this common invocation of a *modus vivendi* seems to weave together a Burkean impulse to stay with what works, pessimism about the possibility of bridging the deep divisions in the Jewish community with anything more than a stalemate that offers something to each side, and a vague sense that the terms of this compromise have been settled in some way that grants them authority. It bears emphasis that the deepest divisions in Israeli society—between Arabs and Jews—are left out of this *modus vivendi*, which is often described simply as the terms of accommodation between secular and religious Jews.<sup>44</sup>

This settled compromise, which attempts to preserve the balance between secular and religious Jewish interests exactly as it existed at the inception of the state in 1948, governs a range of topics from the mundane (bus schedules) to the lofty (the distribution of political offices). Ironically, this commitment to the status quo means that Israel, which lacks a formal written constitution, sometimes honors ad hoc historical practices to a degree that might embarrass even an American originalist like Clarence Thomas. So, for example, buses run on the Jewish Sabbath in Haifa and Eilat but nowhere else in Israel because that's the way things were when Israel was founded.<sup>45</sup>

We have three things to say about this idea of a *modus vivendi*. The first is blunt and obvious: The *modus vivendi* cannot be defended from the standpoint of equal membership, justice more broadly conceived, or the Israeli Declaration of the Establishment of the State's commitment to equality. This bleak assessment holds even with regard to arrangements that affect only the purported parties to the settlement. And once the interests and concerns of Israel's Arab population are taken into account, it becomes perfectly clear that notions of equity, fairness, or justice are simply not any part of the *modus vivendi* picture.

This is unlikely to disturb those who are drawn to the idea of a "status quo" settlement as the governing premise of important Israeli policy choices. For them, the point of the *modus vivendi* is to set aside justice and equality in the hopes of achieving a workable peace in the face of very fundamental conflicts and

44 A good, sympathetic and thorough treatment of the *modus vivendi* argument is Cohen and Susser, *Israel and the Politics* (above n. 24). Hanna Lerner's analysis is simultaneously sensitive to the goals of the *modus vivendi* but critical of its exclusion of Arab-Israelis. See Lerner, *Making Constitutions* (above n. 25), 96–108.

45 Cohen and Susser, *Israel and the Politics* (above n. 24), 27–29.

disagreements; and for them, Israel's existential necessity trumps any competing concerns.

But even on its own terms, the idea of finding a workable peace by insisting on the maintenance of the status quo is dubious in the extreme. The Israeli *modus vivendi* suffers from a basic flaw, common to many pragmatist strategies and solutions: namely, despite its pragmatic dress, it has not worked and, indeed, cannot possibly work. The idea of "preserving the status quo" strikes us as a particularly ill-starred attempt at establishing a stable compromise. Lots of things change, and when they do, the idea of "preserving the status quo" becomes incoherent. Technology changes (television becomes common, for example, and the internet follows later), work habits and the economy change, and life styles and mores change. More fundamentally, changes in demographics and international borders render old arrangements unacceptable. For example, Israel has experienced an influx of Jewish immigrants whose children Orthodox authorities deem to be *psulei hittun*—people ineligible for marriage. The clear injustice of this situation has led even some commentators sympathetic to the status quo solution to observe that "[t]he Orthodox monopoly in marriage and divorc[e]—perhaps the single most significant element in the consociational edifice of the past—appears to be doomed."<sup>46</sup> An even more profound transformation in the status quo came about because of Israel's 1967 conquest of the West Bank, viewed as holy land by most religious Jews and as a strategic asset or a bargaining chip by their secular counterparts. The occupation of the new territory radically altered the significance of religion and religious parties in Israeli politics.

The breakdown of Israel's *modus vivendi* as a result of the polity's expansion bears more than a passing resemblance to the unraveling of America's starkly unprincipled agreement to maintain the geographic status quo with regard to slavery. That agreement unraveled as America expanded westward and new states joined the Union. Did honoring the constitutional compromise mean freezing the number of slave states or preserving the balance between slave states and free states? The Constitution supplied no clear answer to that question, and Lincoln declared that a more principled solution would eventually have to be found: "'A house divided against itself cannot stand.' . . . It will become *all* one thing or *all* the other."<sup>47</sup> We do not mean, of course, to suggest that Israeli concessions to religious authority—which are at the heart of *modus vivendi* claims—are as unjust and odious as America's history of slavery. But we think that, in the end, Israel

46 Ibid., 118.

47 Abraham Lincoln, "A House Divided: Speech delivered at Springfield, Illinois, at the close of the Republican State Convention," June 16, 1858, repr. in *Abraham Lincoln: His Speeches and Writings*, ed. Roy P. Basler (Cambridge, MA: Da Capo Press, 2001), 420.

will be unable to duck critical questions of principle just as the United States was unable to duck the questions of principle that lay at the heart of national divisions over slavery.

When a *modus vivendi* breaks down, it offers no resources for its own repair. There is, to be more specific, no way to apply or extend the *modus vivendi* to govern unanticipated circumstances—and most of Israel’s circumstances today, both domestic and international, were unanticipated in 1948. One cannot turn for guidance to the principles that animated the original agreement because it is not principled—that is, indeed, precisely the sense in which it purports to be “pragmatic.” It is thus no surprise that Israel’s *modus vivendi* bid for peace without principle has led not to peace among Israel’s various Jewish sub-communities but to escalating conflict, in which Jewish settlers attack Israeli military installations and in which the haredim allege that Israel’s government is anti-Semitic.<sup>48</sup>

A *modus vivendi* built around the idea of “preserving the status quo” is self-evidently prone to unraveling, but we believe that vulnerability is intrinsic to any unprincipled settlement of a deeply contested moral issue. A *modus vivendi* has a chance of succeeding if it becomes genuinely a way of life—that is, if people take it for granted and conform their conduct to it without thinking about it. If, however, the issue at its core is a life-or-death question that continues to agitate people—slavery, the relationship between state and religion, or the fate of land that some regard as sacred—then people will chafe against the *modus vivendi*’s departure from the principles they favor. As circumstances change, they will see opportunities to seize the moment and reconfigure the terms of the settlement—and when such moments occur, the settlement will by its nature offer no principles capable of guiding the altered debate to a tranquil conclusion.

Our third observation is that a *modus vivendi* may nevertheless be an appropriate and, indeed, necessary response to a narrow range of problems for which principled solutions are impossible not simply as a practical matter but conceptually. We think that the city of Jerusalem, which is holy ground for multiple religions, presents a problem of that kind. There is no way to find a principled resolution to a problem in which multiple sects and faiths claim the same rock or building as sacred for utterly incompatible reasons and purposes. There may be no ultimate disposition of issues about Jerusalem, only a shifting set of pragmatic

48 Isabel Kershner, “Israeli Protest’s Invocation of Holocaust is Condemned,” *New York Times*, January 2, 2012; Noah J. Efron, *Real Jews: Secular vs. Ultra-Orthodox and the Struggle for Jewish Identity in Israel* (New York: Basic Books, 2003). Disputes between secular and ultra-religious portions of Israel’s Jewish community erupt regularly around the role of women. Ethan Bronner and Isabel Kershner, “Israeli Women Core of Debate on Orthodoxy,” *New York Times*, January 15, 2012.

deals among contending groups, backed up by some combination of international arbiters and military force (with all the instability and risk that entails).

## 4. The French Republic

France presents a second model of a cultural homeland, one with a distinct strategy for addressing the demands of equal membership and a distinct set of problems and challenges to accompany it. Like Israel and unlike the United States, France conceives itself as the home of a particular ethnic group or people—the French—and endeavors to preserve and sustain a specifically French public culture. Like Israel, France has maintained immigration laws that incorporate preferences for French people living outside of France, including, in particular, denizens of Algeria and other French colonies. Like Israel, France’s foundational principles include not only a commitment to the maintenance of a French identity but also an emphatic endorsement of equality. Unlike Israel, however, France conceives of its national identity as inclusive of all minorities; this makes it, in principle at least, a powerful mechanism for implementing the ideal of equal membership rather than a barrier to it. Whereas “Jewish” is an exclusive category and carries the equality-threatening charges of both race and religion, everyone in France can, in theory, become French. Indeed, the French desire that everyone do so. France thereby exemplifies a particular kind of solution to the inequalities entailed by a preferential commitment to a particular ethnic culture: such a commitment is arguably consistent with equal membership if the national culture is everyone’s culture.

To ensure full and equal membership of each French citizen in the French national community, France aggressively seeks to limit the public significance of intermediate ethnic and cultural groups. France is skeptical of the hyphenated identities (African-American, Irish-American, or Jewish-American) that the United States takes for granted: every citizen should count equally as French, rather than partially as African-French or Jewish-French. This posture affects how France treats racial and ethnic identities. For example, France forbids not only affirmative action policies but also the collection of any demographic data about race. In this regard, French constitutional law demands a kind of “color-blindness” that goes significantly beyond any widely held position in American law (many Americans have constitutional objections to affirmative action policies, but relatively few express concerns about the collection of demographic data).

The French commitment to an unmediated national community has important implications for religious freedom. Indeed, France’s concern about mediating groups derives directly from opposition to the power once exercised by the Catholic Church in France, and it gives rise to the French conception of secularism known as *laïcité*. *Laïcité* comprehends two elements. One aspect is a notion of church-state

separation that is, in some ways, stricter than its American counterpart but in other respects more flexible (for example, the French government sponsors churches and national religious councils in ways that would be unthinkable in the United States).<sup>49</sup> The second aspect is an affirmative commitment to a robustly secular public space, defined by the “civil, civic, and political values that come from the Declaration of the Rights of Man of 1789, the preamble to the Constitution of 1946, and the fundamental principles recognized by the laws of the Republic.”<sup>50</sup> This commitment to a secular public culture undergirds what Cécile Laborde calls a “*doctrine of conscience*, which prescribes norms of conduct both for religious organizations and for individual citizens.”<sup>51</sup> As Elisabeth Zoller notes, it is the second aspect of *laïcité* that most sharply distinguishes it from American-style secularism: instead of celebrating a religious pluralism in which individuals freely choose among and express allegiance to a variety of competing theologies and churches, French *laïcité* cultivates a public sphere in which manifestations of religion, and hence, of religious difference, are suppressed.<sup>52</sup>

French nationalism thus both promotes a particular culture and simultaneously incorporates a robust commitment to equal membership that aims to overcome the preferentialism otherwise associated with a cultural homeland: everyone is invited and expected to become French. French nationalism promises to preserve the freedom and equality of all French citizens, including the freedom of all citizens to worship as they choose. France does not have a theology, or, for that matter, an anti-theology. No one is required to renounce his or her spiritual beliefs, or to affirm an alien set of beliefs. No one is punished or persecuted for worshipping the god of his or her choice, in the manner of his or her choice, providing that this all goes on indoors rather than in the public square.

That of course is the rub: a French citizen can commit to any religion, any set of cultural values, *in private*. But if his or her deep commitments demand a public showing of religiosity or a public manifestation of cultural ritual, they may clash with the doctrine of conscience that aims to keep the public sphere ruthlessly secular. It is this aspect of *laïcité* that puts French nationalism, despite its vigorously egalitarian foundations, at potential odds with the principle of equal membership. Becoming French is easier and less theologically demanding than

49 “Understood as the principle of the separation of church and state, *laïcité* operates in the United States in an infinitely harder and more rigid manner than in France” (Elisabeth Zoller, “*Laïcité* in the United States or the Separation of Church and State in a Pluralist Society,” *Indiana Journal of Global Legal Studies* 13 [2006]: 561, 592).

50 *Ibid.*, 592.

51 Cecile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (New York: Oxford University Press, 2008), 33.

52 Zoller, “*Laïcité*” (above n. 49), 592, 594.

converting to Judaism, but it is not clear that France can meet the demands of equal membership by asking everyone to become French any more than Israel could do so by asking everyone to become Jewish. In particular, if a minority within France has cultural commitments inconsistent with the public culture, it may have to suppress public expression of those commitments in order to become fully part of the French people and the French republic.

For example, agents of the French government are held to a “*devoir de réserve*” (obligation of restraint): they must not display any sign of religious allegiance, so as to show equal respect to all users of public services.<sup>53</sup> This requirement applies not only to politicians (who are expected to avoid the kind of religious rhetoric common in American politics) but also to run-of-the-mill civil servants, including tax inspectors, postal clerks, and bus drivers. The strictures of the *devoir de réserve* will obviously affect secular or Catholic French citizens differently from, say, Sikhs, who may not be able simultaneously to accept public employment and adhere to their religion.

Given the egalitarian ambitions of French secular culture, some people might be tempted to view this problem in terms of liberty rather than equality: persons in France must surrender some freedom or suppress some of their individuality so that everyone can have (or at least appear to have) equal status in the public sphere. These impositions on liberty, however, occur according to a pattern that has clear implications for equality. Not surprisingly, France’s secular public space is largely inoffensive to the majority or dominant group in France. Those who must make the greatest sacrifices of liberty are likely to be members of minority groups. This pattern is no accident. Group-based identities are among the targets of *laïcité* and French nationalism more generally: “To become a citizen, a report in 1993 stated, meant enjoying full freedom of private communal association and explicitly rejecting ‘the logic of there being distinct ethnic or cultural minorities, and instead looking for a logic based on the equality of individual persons.’”<sup>54</sup>

The most notorious instance of this problem is the long-running controversy over the wearing of the *hajib* or headscarf by Muslim schoolgirls.<sup>55</sup> The controversy exposes clearly how *laïcité*, despite its vigorously egalitarian pedigree, can be in tension with equality. In 2004, on the recommendation of a commission

53 Laborde, *Critical Republicanism* (above n. 51), 48.

54 Joan Wallach Scott, *The Politics of the Veil* (Princeton: Princeton University Press, 2007), 76, quoting Adrian Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain* (New York: Palgrave Macmillan, 2001), 70.

55 The summary that follows draws heavily upon Laborde, *Critical Republicanism* (above n. 51); Scott, *The Politics* (above n. 54); and Ahmet T. Kuru, *Secularism and State Policies Toward Religion: The United States, France, and Turkey* (New York: Cambridge University Press, 2009).



chaired by Bernard Stasi, France enacted legislation prohibiting the wearing of *hajib*, or headscarves, in the public schools. The legislation also applied to any other “ostentatious” religious symbols—such as yarmulkes, large crosses, and turbans—but headscarves were the sole provocation and clear target for the law. The Commission and the French government defended the law as necessary to implement *laïcité*. In their view, the headscarves were objectionable on two grounds: they announced a sub-national identity that compromised the schools’ ability to inculcate the values of a unified French Republic, and they marked the young women who wore them as having a status subordinate to men. According to proponents of the law, the headscarf ban promoted rather than compromised equality: it made Islamic young women full members of the French republic and protected them from sexist religious practices. In 2010, the French Parliament went considerably further, banning the wearing of *niqab*, or facial veils, *anywhere in public*. This second ban did not affect other religious symbols, but it did apply to other facial coverings—such as masks and balaclavas. As with the law that preceded it, everyone understood that the clear target of the law was Islamic dress.

French proponents of the *hajib* and *niqab* bans vigorously defend them in the name of equal membership. They claim that both garments mark women as neither fully equal nor fully French, and that they accordingly impede women from achieving the full measure of French citizenship. For example, Fadela Amara, an Islamic feminist and the former French Secretary of State for Urban Policies, criticized the *hajib* on the ground that “the veil is the visible symbol of the subjugation of women.”<sup>56</sup> French Prime Minister Francois Fillon justified the prohibition of the *niqab* on the ground that those who cover their faces in public put themselves “in a situation of exclusion and inferiority incompatible with the principles of liberty, equality, and human dignity affirmed by the French republic.”<sup>57</sup>

Our framework requires that we ask two questions about these claims. The first is whether the French conception of equal membership, considered on its own terms, justifies the prohibitions on headscarves and veils. The second is how that conception fares when tested against the standards of solicitous inclusion that, we have argued, France or any other homeland might strive to honor in order to avoid the unjust preferences that otherwise invariably accompanies the commitment to a specific national culture.

With regard to the first question, many Islamic women in France and elsewhere insist that they wear headscarves or veils voluntarily, and that they gain protection from harassment and enjoy the gratifications of manifest devotion and Islamic

56 Rose George, “Ghetto Warrior,” *The Guardian*, July 17, 2006.

57 Angelique Chrisafis, “France Spells Out Niqab Ban,” *The Guardian*, March 4, 2011.

cultural identity. To our knowledge, there is little if any empirical data available to justify the government's decision to override this judgment by some Islamic women about their own best interests. Perhaps more tellingly, the French *Conseil d'Etat* reached the same conclusion in 1989, when it first confronted questions about headscarves and citizenship: it held that principles of *laïcité* did not justify banning the *hajib* from the schools.<sup>58</sup> Moreover, the newly exquisite sensitivity to headscarves and religious dress comes during a period when French schools have otherwise become increasingly accommodating of idiosyncratic dress. France did away with school uniforms in the 1970s.<sup>59</sup> The 2004 statute banning headscarves thus created a singular exception to an otherwise permissive set of practices. Indeed, Cécile Laborde notes that the 2004 law was in one significant respect a novel extension of previous understandings of *laïcité*: it marked the first time “that the principle of the neutrality of public service [was] explicitly understood to entail obligations for [the] users” of such a service (namely, students) rather than only for the state agents (teachers) who provided it.<sup>60</sup>

In light of all these facts, the prohibitions on headscarves appear to have more to do with prejudice and ideological dogmatism than with the conditions necessary for the fulfillment of French citizenship. The extension of the headscarf ban to yarmulkes and turbans only makes the matter worse. These items of religious apparel seem never before to have been considered inconsistent with the development of French citizenship, and their prohibition deepens our doubts about the need for the ban and the motives behind it.

Nor, turning to the second of the two questions that we identified, does the rigorous imposition of a French public identity seem well calculated to achieve the goal of solicitous inclusion. The Muslims of France are ghettoized and are the victims of intolerably high unemployment. Studies suggest that there is rampant discrimination against them in the job market. According to Joan Scott “[North African] immigrants, who make up about 8 percent of the [French] population, account for about a third of all unemployed. They are last hired and first fired; that rates of unemployment of fifteen-to- twenty-four-year-olds of Algerian origin . . . are more than double those of ‘native’ French with the same credentials.”<sup>61</sup> North Africans live in “separate enclaves on the edges of cities, at once invisible and visibly distinct from residents of city centers.”<sup>62</sup> Scott argues that racial and religious hostility provided the primary impetus for the headscarf ban.

58 Kuru, *Secularism and State Policies* (above n. 55), 103.

59 Scott, *The Politics* (above n. 54), 98.

60 Laborde, *Critical Republicanism* (above n. 51), 53.

61 Scott, *The Politics* (above n. 54), 75.

62 *Ibid.*, 76.

In all, France's Islamic population might with some justification feel more like a tolerated source of labor than welcome citizens of a lofty French culture. Missing, and demanded by solicitous inclusion, are well-enforced anti-discrimination laws, and vigorous programs aimed at making it possible for Muslims to flourish, to enjoy economic, social, and political equality. In France, of course, such policies could not be group-conscious—they would have to be implemented, in other words, without collecting demographic data about racial or religious minorities—but that is no barrier to meeting the demands of solicitous inclusion: the relevant welfare policies could be framed in terms of assisting disadvantaged persons or neighborhoods rather than racially or religiously defined groups. Fadela Amara, the French politician whom we quoted earlier, would presumably agree: she is a vigorous critic not only of headscarves but of the French treatment of the Arab minority to which she belongs.

For Amara and other defenders of the laws banning headscarves and veils, those prohibitions are necessary first steps toward ending the inequalities that plague French society. Yet, given those inequalities, the prohibitions function instead as unnecessary insults added to injuries that are already substantial. Like many other commentators, we regard the bans as unjust affronts to equality. That is transparently so in light of the inequality that prevails in France today, but we find it hard to imagine any circumstances in which the sweeping prohibitions on the *hajib* and *naqib* would be defensible from the standpoint of equal membership. Yet, even so, the idea of a homeland might help to explain and justify other differences between *laïcité* and American principles of religious freedom, such as with regard to questions about religious expression by government officials or about when state schools must accommodate religious clubs or organizations on school premises.<sup>63</sup>

## 5. Conclusion

We have tried in this paper to broaden the set of conceptual and evaluative tools available for the analysis of political regimes committed to religious freedom. Our framework permits the identification of at least three kinds of regime. In American-style liberal pluralism, the political regime creates the national people:

63 The United States Supreme Court has held that school officials must permit religious groups the same access to school facilities that they allow to other, non-religious groups. See *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). Such a doctrine might be appropriate to the United States but not to France.

the American people are a collection of overlapping groups united by their commitment to a shared political system. In French-style republican nationalism, the political regime serves a national political community and expresses an historical political culture that aspires to embrace all citizens: France is the homeland of the French people. In Israeli-style ethnic nationalism, the polity serves as the cultural homeland for some but not all citizens: Israel is the homeland of the Jewish people but not of all Israelis.

The principle of equal membership applies to all three regime-types, but its entailments differ. In the case of liberal pluralism, equal membership demands that the state treat all persons with equal regard. In the case of culturally preferential homelands, which have justice-regarding reasons to adopt policies inconsistent with equal regard, equal membership remains achievable if the state adopts a posture of solicitous inclusion. Embracing solicitous inclusion is especially difficult in ethnic nationalism, which begins by preferring one group to other portions of the citizenry—but we have argued that it is not an impossible goal, so long as the homeland's cultural identity can be construed to include, as one of its own defining principles, a commitment to the equality of minority groups.

We realize that our argument turns on some delicate distinctions, especially insofar as it attempts to show that a state can simultaneously dedicate itself to prefer one culture over others and to uphold the equal membership of persons from all cultures. We believe that we have found a path through the difficulties. For those who disagree, however, we hope that our analysis remains relevant in another way. We noted earlier in this paper a second justification for Israel and other ethnic homelands. That justification was pragmatic and based in claims about transitional justice. It maintained that, even if some more egalitarian, pluralist government is ultimately desirable, an ethnic homeland might be the best possible approach to justice in the radically imperfect circumstances in the present world. For those who prefer (or are at least willing to consider) such an account of Israel, we hope that our argument might illuminate what is at stake: the benefits that an ethnic homeland might secure as well as the kinds of equality that it can and cannot be asked to provide to the minorities who live within it.

# Religion in Politics

## Rawls and Habermas on Deliberation and Justification

Menachem Mautner

In this article I argue that John Rawls's concept of public reason—clearly one of the central concepts of his political liberalism—lumps together a selection of political activities (voting, deliberation, decision making) and a set of political institutions (legislatures, courts), without sufficiently distinguishing between them or identifying the distinct normative considerations that are relevant to each. Moreover, Rawls's concept of public reason is very ambiguous. This over-inclusiveness and ambiguity of the concept has spilled over to much of the lively discussion of Rawls's political liberalism.

I shall try to elucidate Rawls's concept of public reason by recasting it in terms of two major concepts that are relevant to our understanding of the political: deliberation and justification. I argue that Rawls's public reason should be read as having to do with justification rather than deliberation, and that Jürgen Habermas's position on public reason is superior to that of Rawls inasmuch as it is premised on a clear distinction between deliberation and justification. However, some of Habermas's critiques of Rawls are unjustified, and there is a contradiction in Habermas's position.

I also argue that Habermas's and Rawls's positions epitomize “the anthropologization of politics” that follows from the substitution of the nation-state paradigm with the multicultural paradigm of the state. The rise of the multicultural paradigm also occasions “the anthropologization of courts”: I argue that liberal courts intervening in the cultural practices of non-liberal groups need

\* The Danielle Rubinstein Chair on Comparative Civil Law and Jurisprudence, Faculty of Law, Tel Aviv University. For their helpful comments I wish to thank Yitzhak Benbaji, Avihay Dorfman, Amnon Knol, and Tami Meisels. I also wish to thank the participants of the International Conference on the Role of Religion in Human Rights Discourse, held at the Israel Democracy Institute in May 2012, and the participants of the Faculty Seminar of the Department of Philosophy, Bilkent University, Ankara, for their comments.

to support their rulings with justifications internal to those groups, including justifications borrowed from the human rights doctrine.

## 1. Deliberation and Justification

### 1.1. Deliberation

Political theory of the last decades of the twentieth century has taken “a strong deliberative turn.”<sup>1</sup> Several justifications have been offered in support of a deliberative view of democracy.

One justification focuses on *legitimacy*: for decisions undertaken by a democratic political system to be legitimate, they need to be the outcome of deliberation among the citizens who would be made subject to those decisions.<sup>2</sup>

A second justification of the deliberative view of democracy focuses on the notion of *respect*: if human beings are viewed as being capable of forming and acting on intelligent conceptions of how their lives should be lived,<sup>3</sup> then respect for citizens in a democracy requires that they have the opportunity to deliberate over the desirability and content of political decisions that may affect them.<sup>4</sup>

- 1 John S. Dryzek, *Deliberative Democracy and Beyond* (Oxford: Oxford University Press, 2000), 1. See also Richard H. Pildes, “Competitive, Deliberative, and Rights-Oriented Democracy,” *Election Law Journal* 3 (2004): 685. It is often argued that deliberative democratic theory developed as a reaction against aggregative accounts of democratic politics, also known as interest groups liberalism, which view politics as functioning according to the logic of the market. See Clarissa Rile Hayward, “What Can Political Freedom Mean in a Multicultural Democracy? On Deliberation, Difference, and Democratic Governance,” *Political Theory* 39/4 (2011): 468, 471. See also Jane Mansbridge, “Self-Interest in Political Life,” *Political Theory* 18 (1990): 132.
- 2 Seyla Benhabib, “Toward a Deliberative Model of Democratic Legitimacy,” in *Democracy and Difference*, ed. Seyla Benhabib (Princeton, NJ: Princeton University Press, 1996), 67, 68; James Bohman, “Survey Article: The Coming of Age of Deliberative Democracy,” *Journal of Political Philosophy* 6 (1998): 400, 401–402; Jack Knight and James Johnson, “Aggregation and Deliberation: On the Possibility of Democratic Legitimacy,” *Political Theory* 22 (1994): 277, 283; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996), 41; Dryzek, *Deliberative Democracy* (above n. 1), 1; Pildes, *Competitive* (above n. 1), 695.
- 3 Ronald Dworkin, “What Rights Do We Have?” in *Taking Rights Seriously* (London: Duckworth, 1978), 266, 272; William Galston, “Defending Liberalism,” *American Political Science Review* 76 (1982): 621, 625.
- 4 Charles Larmore, “The Moral Basis of Political Liberalism,” *Journal of Philosophy* 12 (1999): 599, 623; Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton, NJ: Princeton University Press, 2004), 4, 7, 11, 21–22; Dryzek, *Deliberative Democracy* (above n. 1), 17; Bohman, *Survey* (above n. 2), 408–409; Gutmann and Thompson, *Democracy and Disagreement* (above n. 2), 12, 14, 18.

A third justification claims that deliberation among citizens enriches and improves the quality of decisions undertaken by a democratic political system. It is on this justification that I wish to focus.

The claim that deliberation improves the quality of political decisions may be traced back to its roots in Aristotle, who phrased “the doctrine of the collective wisdom of the multitude”:<sup>5</sup> “There is this to be said for the Many. Each of them by himself may not be of a good quality; but when they all come together it is possible that they may surpass—collectively and as a body, although not individually—the ability of the few best.”<sup>6</sup> Aristotle takes his analogy from the feast: “Feasts to which many contribute may excel those provided at one man’s expense. In the same way, when there are many (who contribute to the process of deliberation), each can bring his share of goodness and moral prudence; and when all meet together the people may thus become something in the nature of a single person who—as he has many feet, many hands, and many senses—may also have many of the qualities of character and intelligence.”<sup>7</sup>

According to Thucydides, Pericles had the same insight: “instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all.”<sup>8</sup>

In *On Liberty*, J. S. Mill sees deliberation as a dialectical process that leads to “new synthetic truth.” For Mill, opposites complement each other with the elements of truth contained in them, and thus “as agents rebut opposing views and defend their own against critics, a dialectical process emerges that, by convincing people of their limited views and pointing out the value of alternative positions, discovers new, positive positions.”<sup>9</sup>

Mill’s insight is shared by John Rawls. Behind “the veil of ignorance” legislators are already impartial, writes Rawls. So what would deliberation add to their decision-making process? The answer lies in the fact that “discussion among many persons is more likely to arrive at the correct conclusion . . . than the deliberations of any one of them by himself”:

5 Jeremy Waldron, “Minority Cultures and the Cosmopolitan Alternative,” *University of Michigan Journal of Law Reform* 25 (1992): 751, 772.

6 Aristotle, *Politics* 1281b, *The Nicomachean Ethics*, trans. J.A.K. Thompson, (London: Penguin Books, 1953, 1987). See also Jeremy Waldron, “Religious Contributions in Public Deliberation,” *San Diego Law Review* 30 (1993): 817, 836, 841, 842; Waldron, “Minority Cultures and the Cosmopolitan Alternative,” *University of Michigan Journal of Law Reform* 25 (1992): 751, 772.

7 Aristotle, *Politics* 1281b (above n. 6).

8 Jon Elster, “Introduction,” in *Deliberative Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 1998), 1.

9 Robert Devigne, *Reforming Liberalism* (New Haven: Yale University Press, 2006), 87. See also Waldron, “Religious Contributions” (above n. 6), 817, 836–837.

The exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from their standpoint and the limits of our vision are brought home to us. . . . Even representative legislators are limited in knowledge and the ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments. At least in the course of time, the effects of common deliberation seem bound to improve matters.<sup>10</sup>

In the same vein, in *Political Liberalism* Rawls writes that “Citizens learn and profit from conflict and argument, and when their arguments follow public reason, they instruct and deepen society’s public culture.”<sup>11</sup>

Likewise, Amy Gutmann and Dennis Thompson write that “Through the give-and-take of arguments, participants can learn from each other, come to recognize their individual and collective misapprehensions, and develop new views and policies that can more successfully withstand critical scrutiny. When citizens bargain and negotiate, they may learn how better to get what they want. But when they deliberate, they can expand their knowledge, including both their self-understanding and their collective understanding of what will best serve their fellow citizens.”<sup>12</sup>

James Bohman claims that the enrichment rationale is “the best defense of public deliberation”: “When deliberation is carried out in an open public forum, the *quality* of the reasons is likely to improve. In such a forum, public opinion is more likely to be formed on the basis of all relevant perspectives, interests, and information and less likely to exclude legitimate interests, relevant knowledge, or appropriate dissenting opinions. Improving the quality of the reasons employed in political justification will ultimately affect the quality of the outcomes that they produce.”<sup>13</sup>

10 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 358–359.

11 Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), lvii. See also Francis Bacon, “Of Friendship,” in *The Essays*, ed. John Pitcher (New York: Penguin Books, 1985), 138, 142.

12 Gutmann and Thompson, *Why Deliberative Democracy?* (above n. 4), 12. See also Gutmann and Thompson, *Democracy and Disagreement* (above n. 2), 44; Amy Gutmann, “Rawls on the Relationship between Liberalism and Democracy,” in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), 168, 202–204.

13 James Bohman, *Public Deliberation* (Cambridge, MA: MIT, 1996), 26. Emphasis in original text. See also on 25, 68, 72.



Jeremy Waldron writes that deliberation enables citizens and decision makers to be exposed to “perspectives and experiences with which they are initially unfamiliar”;<sup>14</sup> “to open [their] mind to other perspectives, hear what others are saying, remind them of things they may have overlooked, exchange experiences, proverbs, images, and insights;”<sup>15</sup> and thus to come up with decisions that are superior to those that could have been made on the basis of the “prejudices with which the people went into the forum.”<sup>16</sup>

Seyla Benhabib claims that as “no single individual can anticipate and foresee all the variety of perspectives through which matters of ethics and politics would be perceived by different individuals,” and as “no single individual can possess all the information deemed relevant to a certain decision affecting all,” deliberative processes are “essential to the rationality of collective decision making processes.”<sup>17</sup> Even more significant, according to Benhabib, is the fact that “the very procedure of articulating a view in public imposes a certain reflexivity on individual preferences and opinions. When presenting their point of view and position to others, individuals must support them by articulating good reasons in a public context to their co-deliberators. This process of *articulating good reasons in public* forces the individual to think of what would count as a good reason for all others involved.”<sup>18</sup>

Jorge M. Valadez, too, sees the main contribution of deliberation in a democracy as being the enrichment of the discourse that leads to political decisions: deliberation increases citizens’ understanding of policy options; it deepens their understanding of the collective good; it examines and critiques even “the most fundamental and cherished values and beliefs”; and it is the force of the better argument that becomes “the primary legitimizing factor of social policies.”<sup>19</sup>

Some writers go even further, claiming that the more culturally diverse a country is the more enriching its processes of political deliberation are likely to be. Thus, James Bohman writes that “in the case of cultural pluralism . . . diversity can even improve the public use of reason and make democratic life more vibrant.”<sup>20</sup> And Amy Gutmann writes: “Multiculturalism . . . can aid adequate deliberation. Our moral understanding of many sided issues . . . is furthered by discussions with

14 Waldron, “Religious Contributions” (above n. 6), 841.

15 Ibid., 834.

16 Ibid., 841.

17 Benhabib, “Toward a Deliberative Model” (above n. 2), 69, 71–72.

18 Ibid. Emphasis in original text.

19 Jorge M. Valadez, *Deliberative Democracy, Political Legitimacy, and Self-Determination in Multicultural Societies* (Boulder, CO: Westview Press, 2001), 5.

20 James Bohman, *Public Deliberation* (above n. 13), 72.

people with whom we respectfully disagree especially when these people have plural identities different from our own.”<sup>21</sup>

And finally, reflecting on Kant, Onora O’Neill writes that thinking and the communication of thoughts are inseparable: we cannot reason or even think correctly “unless we think in common with others.”<sup>22</sup> Reason, for Kant, develops and emerges through uninhibited debate in which it withstands criticism and challenge, and therefore the communication of thoughts cannot be made subject to any external authority; the only authority to which reason may be made subject is that of reason itself. Likewise, any limitation on our freedom to communicate our thoughts amounts to a limitation of our freedom of thought.<sup>23</sup>

## 1.2. Justification

“‘Public justification’ is the most important idea in contemporary liberal-democratic political theory.”<sup>24</sup> But there are at least three contexts in which the notion of justification is used in political theory.<sup>25</sup>

One is the justification of the liberal-democratic regime to the citizens living under it.<sup>26</sup> Prime contemporary examples of that are Rawls’s *A Theory of Justice* and his *Political Liberalism*.<sup>27</sup> Together with Rawls, “many philosophers now

21 Amy Gutmann, “Rawls” (above n. 12), 203–204.

22 Onora O’Neill, “The Public Use of Reason,” *Political Theory* 14 (1986): 523, 546.

23 Ibid.

24 Fred D’Agostino, “Value Pluralism, Public Justification, and Post-Modernism: The Conventional Status of Political Critique,” *Journal of Value Inquiry* 29 (1995): 351.

25 See Robert Audi, *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000), 65; David Estlund, “Book Review,” *Philosophy & Phenomenological Research* 59 (1999): 821, 823; J. Roland Pennock, “Justification in Politics,” in *Nomos*, ed. J. Roland Pennock and John W. Chapman, vol. 28 (New York: New York University Press, 1986), 291.

26 Charles Larmore, “Pluralism and Reasonable Disagreement,” *Social Philosophy & Policy* 11 (1994): 61; Charles Larmore, “Political Liberalism,” *Political Theory* 18 (1990): 339; Larmore, “The Moral Basis” (above n. 4); Thomas Nagel, “Moral Conflict and Political Legitimacy,” *Philosophy and Public Affairs* 16 (1987): 215, 218; Steven Wall, “Is Public Justification Self-Defeating?” *American Philosophical Quarterly* 39 (2002): 385; Stephen Macedo, “Politics of Justification,” *Political Theory* 18 (1990): 280.

27 Charles Larmore, “Public Reason,” in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), 368, 374; Michel Seymour, review of *John Rawls* by Catherine Audard, *Ethics* 118 (2008): 327, 330–332; Samuel Freeman, *Justice and the Social Contract—Essays on Rawlsian Political Philosophy* (Oxford: Oxford University Press, 2007), 217, 250. For another example see Gerald F. Gaus, *Value and Justification* (Cambridge: Cambridge University Press, 1990); Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (New York: Oxford University Press, 1996).

argue that grounding political principles in public justifications is a fundamental feature of liberalism.”<sup>28</sup>

A second context has to do with the requirement of justifying to the citizens of a state a particular decision made by a leader or state institution, a coercive action by a leader or state institution, or a proposal made by a citizen that may end up coercing other citizens or that may adversely affect other citizens.<sup>29</sup>

The third context in which justification is used in political theory concerns the requirement of citizens to provide justifications for the arguments made by them in the course of political discussions. As Christopher J. Eberle writes: “A citizen’s obligation to provide public justification governs not just political decision making but also political advocacy: it governs the reasons a citizen may employ to convince her compatriots that they ought to support her favored coercive laws. When a citizen seeks to convince them, she ought to articulate a public justification for that policy; and if she cannot do so, then she ought to refrain from advocating that law.”<sup>30</sup>

Obviously, the dividing line between deliberation and justification is fuzziest in this last context, and clearest in the second. While deliberation deals with a process meant to culminate in a decision, justification of a coercive decision assumes that a decision-making process has already taken place (not necessarily with the participation of the person to whom the decision is about to be applied) and been completed.

28 Bruce W. Brower, “The Limits of Public Reason,” *Journal of Philosophy* 91 (1994): 5. See also Colin Bird, “Mutual Respect and Neutral Justification,” *Ethics* 107 (1996): 62.

29 Jeremy Waldron, “Disagreement about Justice,” in *The Philosophy of Rawls*, ed. Henry S. Richardson and Paul J. Weithman (New York: Garland, 1999), 78, 107, 116; Gutmann and Thompson, *Democracy and Disagreement* (above n. 2), 13; Gutmann and Thompson, *Why Deliberative Democracy?* (above n. 4), 3; Gutmann, “Rawls” (above n. 12), 201; Macedo, “Politics” (above n. 26), 280; Frank I. Michelman, “Justification (and Justifiability) of Law in a Contradictory World,” in *Nomos* (above n. 25), 71; Jeremy Waldron, “‘Public Reason and Justification’ in the Courtroom,” *Journal of Law, Philosophy & Culture* 1 (2007): 107, 116, 123; Paul J. Weithman, *Religion and the Obligations of Citizenship* (Cambridge: Cambridge University Press, 2002), 121, 124; Cristina Lafont, “Religion in the Public Sphere: Remarks on Habermas’s Conception of Public Deliberation in Postsecular Societies,” *Constellations* 14 (2007): 239, 250.

30 Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), 57. See also Thomas A. Spragens, Jr., “Justification, Practical Reason, and Political Theory,” in *Nomos* (above n. 25), 336, 338 (“Political justification is the reflective side of *phronesis*, of practical reason”); Don Herzog, *Without Foundations* (Ithaca: Cornell University Press, 1985), 18; Gaus, *Value and Justification* (above n. 27), 321, 322, 325–328; Virginia Held, “Justification: Legal and Political,” *Ethics* 86 (1975): 1, 9, 10; Audi, *Religious Commitment* (above n. 25), 89, 90; Waldron, “Disagreement about Justice” (above n. 29), 78, 116.

The main underlying rationale of the justification requirement, in all three contexts, is the need for state leaders, state institutions, and citizens to treat citizens with respect. As Charles Larmore explains with reference to the justification of coercion, “The use or threat of force cannot be deemed wrong in itself, for then political association would be impossible. What we must regard as improper is rather to seek compliance by force alone . . . Persons are beings capable of thinking and acting on the basis of reasons. If we try to bring about conformity to a rule of conduct solely by the threat of force, we shall be treating persons merely as means, as objects of coercion, and not also as ends, engaging directly their distinctive capacity as persons.”<sup>31</sup>

## 2. Rawls’s Failure to Distinguish between Deliberation and Justification

Several authors have criticized the ambiguity in Rawls’s discussion of public reason. Paul J. Weithman writes that much of Rawls’s exposition of the concept “is extremely puzzling.”<sup>32</sup> Samuel Freeman writes that “the idea of public reason takes on increasing complexity each time Rawls discusses it.”<sup>33</sup> Colin Farrelly writes that even after Rawls’s latest exposition of the concept (in “The Idea of Public Reason Revisited”), the question regarding the role of public reason in normal politics “is still left unresolved.”<sup>34</sup>

One of the problems with Rawls’s discussion of public reason is that it fails to make the distinction between deliberation and justification. Charles Larmore comes somewhat close to this claim when he writes that “neither in *Political Liberalism* nor in ‘The Idea of Public Reason Revisited’ does he [Rawls] note the difference between two forms of public debate—*open discussion*, where people argue with one another in the light of the whole truth as they see it, and *decision making*, where they deliberate as participants in some organ of government about which option should be made legally binding.” Rawls “fails to discriminate between the two. Yet the distinction is plain and important,” writes Larmore.<sup>35</sup>

31 Larmore, “The Moral Basis” (above n. 4), 607. See also Eberle, *Religious Conviction* (above n. 30), 11, 68, 84; Macedo, “Politics” (above n. 26), 293; Gutmann, “Rawls” (above n. 12), 185.

32 Weithman, *Religion* (above n. 29), 181. Weithman also writes that “A full Rawlsian theory of public reason that elaborated its strictures and laid down moral requirements for their observance would be enormously complicated. It would require sensitivity to a large number of important distinctions.” Paul J. Weithman, “Rawlsian Liberalism and the Privatization of Religion,” *Journal of Religious Ethics* 22 (1994): 3, 21.

33 Freeman, *Justice* (above n. 27), 224.

34 Colin Farrelly, “Book Review,” *Mind* 109/4 (2000): 598, 600.

35 Larmore, “Public Reason” (above n. 27).

## 2.1. Public Reason as Deliberation

There are many instances in which Rawls refers to public reason as delineating the limits of political deliberation. Thus, he writes that the idea of public reason applies to “the debates of political parties and those seeking public office when discussing constitutional essentials and matters of basic justice.” Rawls states that public reason is the ideal that refers to the way “citizens are to conduct their public political discussions of constitutional essentials and matters of basic justice.”<sup>36</sup> He asserts that the idea of public reason refers to “the structure and content of society’s fundamental bases for political deliberations.”<sup>37</sup> He further mentions that “citizens learn and profit from conflict and argument, and when their arguments follow public reason, they instruct and deepen society’s public culture.”<sup>38</sup> He adds that “the ideal of public reason contains a form of public political deliberation.”<sup>39</sup> He maintains that public reason is made up of “citizens’ reasoning in the public forum about constitutional essentials and basic questions of justice.”<sup>40</sup> In addition, he writes that that public reason applies to “public discussion”<sup>41</sup> and to “debates” concerning “constitutional essentials and matters of basic justice.”<sup>42</sup> The ideal of public reason, in Rawls’s opinion, “hold[s] for citizens when they engage in political advocacy in the public forum, and thus for members of political parties and for candidates in their campaigns.”<sup>43</sup> He writes that public reason applies “to legislators when they speak on the floor of parliament”<sup>44</sup> and that the ideal of public reason applies to the way “citizens are to conduct their fundamental discussions.”<sup>45</sup> He states that the ideal of public reason “expresses a willingness to listen to what others have to say and being ready to accept reasonable accommodations or alterations in one’s own view.”<sup>46</sup> Rawls also believes that public reason applies to “the discourse of candidates for public office and their campaign managers, especially in their public oratory, party platforms, and political statements.”<sup>47</sup>

36 Rawls, *Political Liberalism* (above n. 11), 1.

37 *Ibid.*, lx.

38 *Ibid.*, lvii.

39 *Ibid.*, lix.

40 *Ibid.*, 10.

41 *Ibid.*, 44.

42 *Ibid.*, 48.

43 *Ibid.*, 216.

44 *Ibid.*

45 *Ibid.*, 226.

46 *Ibid.*, 253.

47 John Rawls, “The Idea of Public Reason Revisited,” in *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 131, 132–133.

He draws a distinction between the “public political culture” and the “background culture,” implying that both serve as contexts for deliberation.<sup>48</sup>

Rawls’s understanding of public reason as having to do with deliberation also emerges from his discussion of the abolitionists of the nineteenth century and the Civil Rights Movement, neither of whom were part of the state machinery.<sup>49</sup>

A series of writers have read Rawls as using the concept of public reason to mean the body of political doctrine to be used by the citizens of a liberal democracy in their political deliberation.<sup>50</sup>

48 Ibid., 152.

49 Rawls, *Political Liberalism* (above n. 11), 249–252.

50 Charles Larmore writes that “Rawls’s recent writings on public reason outline a complex model of deliberative democracy.” Larmore, “Public Reason” (above n. 27), 368. Samuel Freeman writes that “public reason is the mode of discourse in deliberative democracy and one of its most essential features. Moreover, deliberative democracy is the primary forum within which public reasoning takes place [according to Rawls].” Freeman, *Justice* (above n. 27), 226. See also on 253, 254. Anthony Simon Laden writes that “the central idea and high point” of Rawls’s achievement in *Political Liberalism* is “the idea of public reason and its accompanying picture of political deliberation.” Anthony Simon Laden, “The House That Jack Built: Thirty Years of Reading Rawls,” *Ethics* 113 (2003): 367, 379. Laden adds that “if the centerpiece of Rawls’s work is a model of political deliberation in a pluralist democracy, then we need to think of him as not primarily a liberal or an egalitarian but, first and foremost, a democrat” (ibid., 389). Samuel Scheffler writes that Rawls’s public reason is “the modes of reasoning that may be used and the types of considerations that may be appealed to in discussing and resolving political questions in a society regulated by the principles of justice. They impose constraints on acceptable forms of political argument.” Samuel Scheffler, “The Appeal of Political Liberalism,” in *The Philosophy of Rawls*, ed. Henry S. Richardson and Paul J. Weithman (New York: Garland, 1999), 94, 104–105. Michael W. McConnell writes that “Rawls has been among a chorus of voices—perhaps the director of the choir—that has propagated the idea that democratic deliberation must be confined to secular arguments and justifications.” McConnell, “Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation,” *Journal of Law, Philosophy & Culture* 1 (2007): 159. See also James Bohman, “Public Reason and Cultural Pluralism: Political Liberalism and the Problem of Moral Conflict,” *Political Theory* 23 (1995): 253, 260, 262, 264; Bohman, *Public Deliberation* (above n. 13); Larmore, “Public Reason” (above n. 27), 382; Waldron, “Disagreement” (above n. 29), 112; Estlund, “Book Review” (above n. 25), 823, 825; Weithman, “Rawlsian Liberalism” (above n. 32), 14, 20; Philip L. Quinn, “Political Liberalisms and Their Exclusions of the Religious,” in *Religion and Contemporary Liberalism*, ed. Paul J. Weithman (Notre Dame, IN: University of Notre Dame Press, 1997), 139, 139–140; Veit Bader, “Religious Pluralism,” *Political Theory* 27/5 (1999): 597; Miguel Vatter, “The Idea of Public Reason and the Reason of State,” *Political Theory* 36/2 (2008): 239.

## 2.2. Public Reason as Justification

Even though there is much evidence in Rawls's writings to support the view that public reason for him is a concept that determines the content and boundaries of political deliberation, there is just as much evidence to support the view that when Rawls talks about public reason he means to suggest the terms in which the decisions undertaken by the institutions of a liberal state need to be justified.

Thus, in several instances in his discussion of public reason, Rawls explicitly associates the concept with *decision-making processes*. He writes that public reason applies "to public and government officers in official forums, in their . . . votes on the floor of the legislature."<sup>51</sup> He writes that public reason "applies in official forums . . . and to the executive in its public acts and pronouncements."<sup>52</sup> He writes that public reason specifies the public reasons in terms of which "questions of law or policy . . . are to be politically decided."<sup>53</sup> He associates public reason with "cases in which some political decision must be made, as with legislators enacting laws and judges deciding cases";<sup>54</sup> with "the judiciary in its decisions";<sup>55</sup> and with voting.<sup>56</sup> He writes that public reason applies to the judiciary, and above all to the Supreme Court of a constitutional democracy, "because the justices have to explain and justify their decisions."<sup>57</sup>

In other places, Rawls associates the concept of public reason with the exercise of power, arguing that the exercise of state power requires justification, and this justification needs to be phrased not in terms of any "comprehensive view," but rather by drawing on the shared and widely accepted public reason.<sup>58</sup> He writes that "in a democratic society public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution."<sup>59</sup> He maintains that "our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse."<sup>60</sup> According to Rawls, "The ideal of citizenship imposes a . . . duty . . . to be able to explain to one another . . . how the principles and policies they advocate and vote for can be supported by the

51 Rawls, *Political Liberalism* (above n. 11), 252.

52 *Ibid.*, 216.

53 *Ibid.*, liii.

54 *Ibid.*, liv–lv.

55 *Ibid.*, 253.

56 *Ibid.*, 219, 252.

57 *Ibid.*, 216. See also Rawls, "The Idea" (above n. 47), 131, 133.

58 Rawls, *Political Liberalism* (above n. 11), xlvi, 37.

59 *Ibid.*, xlvi, 214.

60 *Ibid.*, xlvi.

political values of public reason.”<sup>61</sup> He adds that “our exercise of political power is proper only when . . . the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.”<sup>62</sup>

A series of writers have interpreted Rawls’s concept of public reason to imply the doctrine that may be used for justifying the exercise of coercive state power on citizens.<sup>63</sup>

### 2.3. The Correct Interpretation of Rawls

I have argued that there is an ambiguity in the way Rawls talks about his concept of public reason. At some points in his theorizing, public reason is the body of doctrine to be used in political deliberation. At others, it is the body of doctrine to be used for justifying the exercise of political coercion. In spite of this ambiguity in Rawls,<sup>64</sup> I think that his concept of public reason has to be associated with justification rather than deliberation.

61 Ibid., 217.

62 John Rawls, “The Idea” (above n. 47), 131, 137. See also Rawls, *Political Liberalism* (above n. 11), lv.

63 Jeremy Waldron writes that “public reason for Rawls, is reason oriented to the justification of political decisions. A decision is political when it concerns the ‘exercise of political power.’” Waldron, “Disagreement about Justice” (above n. 29), 108. Waldron also writes that “Rawls writes as if each comment that is made in public debate is nothing more than a proposal to use public power to forcibly impose something on everyone else so that what we have to evaluate, in each case, is an immediate coercive proposal.” Waldron, “Religious Contributions” (above n. 6), 841. Charles Larmore writes that Rawls’s concept of public reason is concerned with “the very basis of our collectively binding decisions.” Larmore, “Public Reason” (above n. 27), 368. Paul J. Weithman asserts that “Rawls’s central idea is that we can isolate properties reasons must have if they are to be capable of justifying (or making good) the public advocacy and legal imposition of certain political outcomes.” Public reason is therefore the reasons provided “to justify their public advocacy of and their votes for outcomes on certain political questions,” as well as the “reasons governments must offer citizens to justify laws and policies that bear on those questions.” Paul J. Weithman, “John Rawls’s Idea of Public Reason: Two Questions,” *Journal of Law Philosophy & Culture* 1 (2007): 47, 49. See also Jeremy Waldron, ““Public Reason”” (above n. 29), 107, 109–110; Weithman, *Religion* (above n. 29), 190; Jürgen Habermas, “Religion in the Public Sphere,” *European Journal of Philosophy* 14 (2006): 1; Stephen Macedo, “Why Public Reason?” (unpublished paper); Vatter, “The Idea” (above n. 50); Weithman, “Rawlsian Liberalism” (above n. 32), 19–21; Freeman, *Justice* (above n. 27), 221; Evan Charney, “Political Liberalism, Deliberative Democracy, and the Public Sphere,” *American Political Science Review* 92 (1988): 97, 99; Wall, “Is Public Justification” (above n. 26).

64 Some writers follow this ambiguity. Wolterstorff ties together “political debate” with “political decisions” and “discussions” with “decisions,” without ever making a distinction



However, when Rawls uses the concept of public reason as a repertoire of contents for providing justification, he has in mind two distinct contexts in which justification need be provided. In the first context, public reason serves as a repertoire of contents for the justification of the exercise of state and political power. As Charles Larmore writes:

The ideal of public reason . . . ought to be understood as governing only the reasoning by which citizens—as voters, legislators, officials, or judges—take part in political decisions . . . having the force of law. Rightly perceived, it does not thwart the uninhibited political discussions which are the mark of vigorous democracy. We can argue with one another about political issues in the name of our different visions of the human good while also recognizing that, when the moment comes for a legally binding decision, we must take our bearings from a common point of view.

Rawls never puts thing in this way, and so one cannot be sure that he would agree. But it is what the logic of his position entails.<sup>65</sup>

In the same vein, Seyla Benhabib discusses the ways “the Rawlsian model diverges from the deliberative model.” One aspect of this divergence is that “while the Rawlsian model focuses upon ‘final and coercive political power,’ the deliberative model focuses upon noncoercive and nonfinal processes of opinion formation in an unrestricted public sphere.”<sup>66</sup>

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between debates and discussions, on the one hand, and decisions on the other. Nicholas Wolterstorff, “The Role of Religion in Decision and Discussion of Political Issues,” in *Religion in the Public Square: The Place of Religious Convictions in Political Debate*, ed. Robert Audi and Nicholas Wolterstorff (Lanham, MD: Rowman & Littlefield Publishers, 1997), 73; Wolterstorff, “Why We Should Reject What Liberalism Tells Us about Speaking and Acting in Public for Religious Reasons,” in *Religion and Contemporary Liberalism*, ed. Paul J. Weithman (Notre Dame, IN: University of Notre Dame Press, 1997), 162.

65 Larmore, “Public Reason” (above n. 27), 383.

66 Benhabib, “Toward a Deliberative Model” (above n. 2), 75–76. For a similar distinction see Eberle, *Religious Conviction* (above n. 30), 58:

“There’s an important distinction between advancing some argument *for purposes of critical discussion* and advancing some argument *for purposes of convincing others to support some law*. . . . A citizen who articulates a religious argument for purposes of critical discussion without attempting to convince others that they ought to support some coercive law solely on the basis of that argument isn’t implicated in the sort of coercion that justificatory liberals regard as requiring public justification. Although there is no doubt some slippage between critical discussion and advocacy, I won’t impute to the justificatory liberal the view that a citizen may articulate in ‘public’ arenas only those arguments she takes to constitute a public justification for a given coercive law.”

In discussing Mill's writings on freedom of speech, Peter Berkowitz clearly alludes to Rawls when he juxtaposes Mill with "the spirit of much contemporary liberalism—which seeks to articulate principles whose purpose is to circumscribe public debate, and whose effect in practice is to stigmatize as unreasonable, and ostracize from public life, a range of fundamental opinions held by law-abiding citizens."<sup>67</sup> This juxtaposition, which paints Rawls's liberalism in highly unattractive colors, is valid only if we read Rawls's concept of public reason as referring to deliberation rather than justification. To preserve Rawls's liberal integrity, we have to read his discussion of public reason as referring to justification, not deliberation.

The second context in which Rawls uses public reason as a repertoire for justification is in the justification by citizens of their arguments in the course of their deliberations over issues of constitutional essentials and matters of basic justice. As T. M. Scanlon writes: "The idea of public reason is . . . a norm of political justification: a specification of the kind of justification that citizens must be able to offer in political discussion when constitutional essentials and questions of basic justice are at issue."<sup>68</sup>

It is because justification is part of political deliberation in this second context that some readers of Rawls interpret his concept of public reason as having to do with deliberation rather than the justification of decisions and the exercise of coercion.<sup>69</sup>

### 3. Rawls and Habermas on Religion in Politics

#### 3.1. Rawls's Two Phases

Rawls's position on the role of religion in politics had two phases. In *Political Liberalism* he distinguished between the "exclusive" and the "inclusive" view of public reason. According to the *exclusive* view, "reasons given explicitly in terms of comprehensive doctrines are never to be introduced into public reason."<sup>70</sup> According to the *inclusive* view, citizens are entitled "to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided they do this in ways that strengthen the ideal of public reason itself,"<sup>71</sup> that is,

67 Peter Berkowitz, *Virtue and the Making of Modern Liberalism* (Princeton, NJ: Princeton University Press, 1999), 152.

68 T. M. Scanlon, "Rawls on Justification," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman, (Cambridge: Cambridge University Press, 2003), 139, 160.

69 See note 50 above.

70 Rawls, *Political Liberalism* (above n. 11), 247.

71 *Ibid.*

ways meant to promote “the constitutional values of a liberal regime” and that “would help to make society more just.”<sup>72</sup> Rawls adopted the *inclusive* view as the correct understanding of the meaning of his concept of public reason.<sup>73</sup>

Later on, however, Rawls further revised and expanded the scope of public reason. Introducing the “proviso” and referring to this new formulation as “the wide view of public reason,” he dropped his previous inclusive view of public reason and argued that comprehensive doctrines may be introduced into public reason at any time, “provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support.”<sup>74</sup> This, according to Rawls, would have the advantage of showing to other citizens the roots in their comprehensive doctrines of their allegiance to the public reason.<sup>75</sup>

In spite of this wide leeway for religious discourse in politics,<sup>76</sup> a series of writers have understood Rawls to mean that his concept of public reason amounts to the exclusion of religious contents from political deliberation. As Habermas put it, “Rawls’s concept of public reason has met with resolute critics. The objections were leveled . . . against an overly narrow, supposedly secularist definition of the political role of religion in the liberal frame.”<sup>77</sup>

### 3.2. Habermas’s Distinction between Deliberation and Justification

Jürgen Habermas<sup>78</sup> joins those who interpret Rawls’s concept of public reason as dealing with deliberation and as restricting the role of religion in political discourse.

72 Ibid., li.

73 Ibid., 248.

74 Ibid., li–lii. See also Rawls, “The Idea” (above n. 47), 131, 152, 155. “Rawls is insisting more and more that nonliberal but reasonable doctrines be expressible in public reason—subject always to the proviso—because of his recognition that as we come to the end of the twentieth century many liberal citizens hold nonliberal comprehensive doctrines.” Burton Dreben, “On Rawls and Political Liberalism,” in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), 316, 345. For criticism of Rawls’s proviso, see Larmore, “Public Reason” (above n. 27), 385, 387; Macedo, “Why Public Reason?” (above n. 63).

75 Rawls, *Political Liberalism* (above n. 11), li.

76 Larmore, “Public Reason” (above n. 27), 386 (“Rawls now believes that citizens may call upon their full convictions at any time. The sole qualification is what he terms ‘the proviso.’”)

77 Habermas, “Religion” (above n. 63), 6.

78 Habermas, *ibid.*; Jürgen Habermas and Joseph Ratzinger, *The Dialectics of Secularization—on Reason and Religion* (San Francisco: Ignatius Press, 2006); Jürgen Habermas, “Faith

On the basis of this interpretation, Habermas criticizes Rawls on two counts. As I shall show in the following discussion, Habermas's position is superior to Rawls's in that it is premised on a clear distinction between deliberation and justification: deliberation may take place in varied political arenas and may unrestrictedly include religious contents; justification is to be part of decision-making processes (first and foremost legislation) and should support decisions of state institutions that have coercive power. However, I shall argue that some of Habermas's critique of Rawls is unjustified. Also, Habermas's position is incoherent.

### 3.2.1. Habermas on the Contribution of Religion to Political Deliberation

In his first critique of Rawls, Habermas forcefully claims that the exclusion of religion from politics entails an ideational and normative loss, as well as impoverishment of political discourse. He writes as follows:

The liberal state has an interest in unleashing religious voices in the political public sphere, and in the political participation of religious organizations as well. It must not discourage religious persons and communities from also expressing themselves politically *as such*, for it cannot know whether secular society would not otherwise cut itself off from key resources for the creation of meaning and identity. Secular citizens or those of other religious persuasions can under certain circumstances learn something from religious contributions.

. . . Religious traditions have a special power to articulate moral intuitions, especially with regard to vulnerable forms of communal life. In the event of the corresponding political debates, this potential makes religious speech a serious candidate to transporting possible truth contents, which can then be translated from the vocabulary of a particular religious community into a generally accessible language.<sup>79</sup>

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and Knowledge," in *The Future of Human Nature* (Cambridge: Polity, 2003); Habermas, "A Conversation about God and the World," in *Religion and Rationality—Essays on Reason, God, and Modernity*, ed. Eduardo Mendieta (Cambridge, MA: MIT Press, 2002), 147. On Habermas's positions on the role of religion in politics, see Hugh Baxter, *Habermas—the Discourse Theory of Law and Democracy* (Stanford, CA: Stanford Law Books, 2011), ch. 5; Lafont, "Religion" (above n. 29); Simone Chambers, "How Religion Speaks to the Agnostic: Habermas on the Persistent Value of Religion," *Constellations* 14 (2007): 210.

79 Habermas, "Religion" (above n. 63), 10. See also, Cornel West, "Prophetic Religion and

This position of Habermas is part of his broader view as to the important role religious contents deserve to have in modernity: “It would not be reasonable to reject out of hand the idea that the world religions . . . assert a place for themselves in the differentiated architecture of Modernity because their cognitive substance has not yet waned. We cannot at any rate exclude the thought that they still bear a semantic potential that unleashes an inspiring energy for *all of* society as soon as they release their profane truth content.”<sup>80</sup>

Habermas acknowledges the contribution of religious contents not only to democratic political deliberation and to the culture of modernity, but also to Western philosophy: as the thinking of such varied thinkers as Kant, Hegel, and Kierkegaard attests, he writes, philosophy may gain “innovative stimulation” from its encounter with religious traditions.<sup>81</sup>

### 3.2.2. Justification: Habermas’s Institutional Translation Proviso

In his second critique of Rawls, Habermas adopts Wolterstorff’s<sup>82</sup> and Weithman’s<sup>83</sup> argument that Rawls’s approach imposes an undue cognitive burden on religious citizens. It is not only the case that because of the totalizing trait of religious belief, Rawls’s approach demands of them something they cannot do, namely conduct their political activities not according to their religious convictions but according to public reason; when religious people are demanded to phrase their positions in secular terms, they face a burden from which their secular fellow citizens are exempt. Thus, Rawls’s approach, claims Habermas, results in different citizens facing asymmetrical burdens once they enter the political sphere.

However, Habermas does accept Rawls’s position that decisions adopted by the institutions of the liberal state may not be justified by religious arguments. Rather, such decisions need to be backed up by the shared secular public reason of the state. Habermas therefore offers a division between political deliberation,

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the Future of Capitalist Civilization,” in *The Power of Religion in the Public Space*, ed. Eduardo Mendeta and Jonathan Van Antwerpen (New York: Columbia University Press, 2011), 92.

80 Ibid., 17 (emphasis in the original text).

81 Ibid.. The contribution of religious contents to philosophy, particularly to liberal political theory, as well as to politics, is also acknowledged by Waldron, “Religious Contributions” (above n. 6), 835, 846–847; Waldron, “Secularism and the Limits of Community” (unpublished paper, December 2010); Audi, *Religious Commitment* (above n. 25), 77; Lucas Swaine, *The Liberal Conscience* (New York: Columbia University Press, 2006), 150; Michael J. Perry, “Further Thoughts—and Second Thoughts—on Love and Power,” *San Diego Law Review* 30 (1993): 703, 705.

82 Wolterstorff, “The Role of Religion” (above n. 64).

83 Weithman, *Religion* (above n. 29).

on the one hand, and political decision-making, on the other. In the context of political deliberation, religious arguments may be freely and uninhibitedly put forward. However, because of the coercive aspects of political decisions, they may not be justified by particularistic convictions, but only by the generally accepted contents of public reason. Habermas thus puts forward a position that is very much like Rawls's, at least according to the way Larmore reads Rawls, namely that "we can argue with one another about political issues in the name of our different visions of the human good while also recognizing that, when the moment comes for a legally binding decision, we must take our bearings from a common point of view."<sup>84</sup>

This means, however, that religious citizens who may freely express their political positions in religious terms would still have to bear the onus of translating their arguments into secular terms once decisions are about to become binding (the paradigmatic case is that of enacted laws). Habermas expresses this transition from deliberation to decision by putting forward the concept of "the institutional translation proviso": "Every citizen must know and accept that only secular reasons count beyond the institutional threshold that divides the informal public sphere from parliaments, courts, ministries, and administrations. . . . The truth content of religious contributions can only enter into the institutionalized practice of deliberation and decision-making if the necessary translation already occurs in the pre-parliamentarian domain, i.e., in the political public sphere itself."<sup>85</sup>

Thus, Habermas "maintains a strong distinction between what may be said in the public sphere and what may stand as a reason for state action."<sup>86</sup> The proviso "does not demand self-restraint from religious citizens or advocate the censorship of religious topics, reasons, and arguments that may be incorporated in the deliberative agenda of the *informal* public sphere."<sup>87</sup> "Translation is a requirement only when reasons become attached to coercive laws."<sup>88</sup>

Habermas realizes that there may be instances in which religious citizens will find it difficult to clothe their religious convictions in secular terms. In cases of this type, religious citizens may be allowed "to express and justify their convictions in a religious language."<sup>89</sup> And in any event they should be able to count on the cooperation of their fellow citizens in accomplishing the required translation:<sup>90</sup> the translation requirement "must be conceived as a cooperative task

84 Larmore, "Public Reason" (above n. 27), 383. See *ibid.*, text at notes 65 to 69.

85 Habermas, "Religion" (above n. 63), 9–10.

86 Chambers, "How Religion Speaks" (above n. 78), 213.

87 Lafont, "Religion" (above n. 29), 244. Emphasis in the original text.

88 Chambers, "How Religion Speaks" (above n. 78), 213.

89 Habermas, "Religion" (above n. 63), 10.

90 *Ibid.*

in which the non-religious citizens must likewise participate, if their religious fellow citizens are not to be encumbered with an asymmetrical burden.”<sup>91</sup> The participation of religious citizens in the translation task should be facilitated by the secular citizens “open[ing] their minds to the possible truth content” of what is presented by their religious fellow citizens and by entering into dialogue with them, “from which religious reasons then might well emerge in the transformed guise of generally accessible arguments.”<sup>92</sup>

### 3.2.3. Religious Fundamentalists and Non-Fundamentalists

The question that needs to be addressed is what kind of religious believers Habermas has in mind when he talks about the asymmetrical burden imposed on religious citizens. The answer is that Habermas’s concern is relevant only to religious fundamentalists, but not to non-fundamentalist religious believers.

We may distinguish between fundamentalism as an ideology and fundamentalism as personality traits.

One of the tenets of religious fundamentalism as an ideology is that nothing should be left “outside the boundaries of religion,” “nothing remains religiously neutral.”<sup>93</sup> For fundamentalists, religion is “the exclusive source of authority and guidance in the entire realms of the life of the individual and society.”<sup>94</sup> “No one can serve two masters; for a slave will either hate the one and love the other, or be devoted to the one and despise the other.”<sup>95</sup>

Habermas’s second critique of Rawls assumes religious citizens who accede to a fundamentalist ideology. But do they fully succumb to it? This brings us to the second question, namely whether there can be such a thing as a fundamentalist

91 Ibid.

92 Ibid.; see also Habermas, “A Conversation about God” (above n. 78), 150: “Each religious faith must build a relationship with competing messages of other religions, just as much as with the claims of science and a secularized, halfway scientific common sense.”

93 Gideon Aran, “Jewish Zionist Fundamentalism: The Bloc of the Faithful in Israel (Gush Emunim),” in *Fundamentalism Observed*, ed. Martin E. Marty and R. Scott Appleby, vol. 5 (Chicago: University Of Chicago Press, 1991), 265, 296.

94 Eliezer Don Yehiya, “The Book and the Sword: Nationalist ‘Yeshivas’ and Political Radicalism in Israel,” in *A Hundred Years of Religious Zionism*, ed. Avi Sagi and Dov Schwartz, vol. 3 (Ramat Gan: Bar Ilan University, 2003), 187 [Hebrew]. See also Martin E. Marty and R. Scott Appleby, *Conclusion: An Interim Report on a Hypothetical Family in Fundamentalism Observed*, vol. 1 (above n. 93), 814, 824. Habermas himself writes that “we call ‘fundamentalist’ those religious movements which . . . persist in practicing or promoting a return to the exclusivity of premodern religious attitudes.” Habermas, “A Conversation about God” (above n. 78), 151.

95 Matthew 6: 24.

person—a person whose mind categories are composed only of religious contents to the exclusion of all or most secular categories. I would maintain that such human beings are rare, if they exist at all.

For many years anthropologists dealt with the cultures of “whole,” enclosed societies. For this reason, they thought of culture as an entity clearly bounded in terms of its contents and internal processes of development, and as widely shared and even agreed to by members of a society.<sup>96</sup> In recent decades these views of culture have been abandoned and superseded by a new understanding of culture that is, to a great extent, the reverse of the former one: the culture of every society is viewed as highly fragmented, that is, as composed of a large number of subcultures (on the basis of class, locality, age, gender, profession, etc.) whose contents are mastered to varying extent by different members of a society (in addition to one common cultural layer whose contents are widely disseminated by the state’s educational and other institutions and by the media, which make these contents widely shared, though not necessarily accepted,<sup>97</sup> by a large number of the members of a society).<sup>98</sup> Also, under the current view of culture, there is no such a thing as a “pure” culture. Rather, the contents of every culture are both produced internally and borrowed from other cultures through varying means of contact with them.<sup>99</sup> What all of this means is that people internalize cultural

96 Ulf Hannerz, *Cultural Complexity—Studies in the Social Organization of Meaning* (New York: Columbia University Press, 1992), 68, 69; William H. Sewell Jr., *The Concept(s) of Culture*, in *Beyond the Cultural Turn—New Directions in the Study of Society and Culture*, ed. Victoria E. Bonnell and Lynn Hunt (Berkeley: University of California Press, 1999), 35, 39; J. L. Harouel, “Culture, Sociology of,” *International Encyclopedia of the Social & Behavioral Sciences* 5 (2001): 3179; Neil J. Smelser, “Culture: Coherent or Incoherent,” in *Theory of Culture*, ed. Richard Munch and Neil J. Smelser (Berkeley: University of California Press, 1992), 3.

97 Sewell, *The Concept(s)* (above n. 96).

98 The literature on this topic is vast. See, for example, Hannerz, *Cultural Complexity* (above n. 96); Ann Swidler, *Talk of Love—How Culture Matters* (Chicago: University of Chicago Press, 2001), 6, 12–13, 38, 129, 133, 160, 169, 183–184, 186, 189; Swidler, “Culture in Action: Symbols and Strategies,” *American Sociological Review* 51 (1986): 273; Sewell, *Concept(s)* (above n. 96); Sewell, “Historical Events as Transformations of Structures: Inventing Revolution at the Bastille,” *Theory & Society* 25 (1996): 841; Robert Brightman, “Forget Culture: Replacement, Transcendence, Relexification,” *Cultural Anthropology* 10 (1995): 509; Paul DiMaggio, “Culture and Cognition,” *Annual Review of Sociology* 23 (1997): 263; George Steinmetz, “Introduction: Culture and the State,” in *State/Culture—State Formation after the Cultural Turn* (1999), 1; Madhavi Sunder, “Cultural Dissent,” *Stanford Law Review* 54 (2001): 495.

99 On cultural borrowing, see Adam Kuper, *Culture—The Anthropologist’s Account* (Cambridge, MA: Harvard University Press), 13, 63, 67; Sewell, *The Concept(s)* (above n. 96), 54–55; Martinez, “Cultural Contact: Archeological Approaches,” *International*



contents whose origins lie in various cultural systems and give meaning to what transpires in their lives by means of mind categories whose origins lie in various cultural systems. Put differently, most people are multicultural beings.<sup>100</sup> This line of reasoning has several implications, the essence of which is that Rawls's assumptions about religiosity, at least when applied to Western religiosity, are more accurate than those of Habermas.

First, even people who subscribe to fundamentalist ideologies, at least in Western countries, are rarely familiar only with the cultural contents of their religions. It is almost always the case that they are familiar with both the religious culture of their group and the contents of the culture of the surrounding society, including its political culture. Habermas's concept of "translation" is far too strong when applied to the participation of such people in political deliberation. The need for translation arises when a person lacks *any* command of a language. But at least with respect to religious fundamentalists living in Western countries, the assumption that they lack any command of the liberal-democratic political culture and discourse of their countries is overstated.

A good example is Mohamed Morsi, who in June 2012 was elected president of Egypt and in July 2013 was removed by the military. Morsi is a leader of the fundamentalist Muslim Brotherhood movement. However, he received a Bachelor's and Master's Degree in engineering from Cairo University, studied for four years at the University of Southern California in the United States, and then served for another four years as an assistant professor at California State University, Northridge. Two of Morsi's five children were born in California and are US citizens by birth. Indeed, Morsi's public pronouncements attest to his being versed in Western parlance.

I wish to emphasize that my claim is a modest one: I am not contending that religious fundamentalists give weight to Western contents when they think about political issues; obviously they do not. All I am saying is that Western fundamentalists are usually able to phrase their political convictions in terms borrowed from liberal-democratic political culture, albeit not as easily as when they draw on their religious doctrine.

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*Encyclopedia of the Social & Behavioral Sciences* 5 (2001): 3035; Arjun Appadurai, "Global Ethnoscapes—Notes and Queries for a Transnational Anthropology," in *Recapturing Anthropology—Working the Present*, ed. Richard G. Fox (Santa Fe, NM: University of American Research Press, 1991).

100 Stuart Hall, "Introduction: Who Needs 'Identity'?" in *Questions of Cultural Identity*, ed. Stuart Hall and Paul du Gay (London: Sage, 1996), 1; A. Gutmann, "Multiculturalism and Identity Politics: Cultural Concerns," *International Encyclopedia of the Social & Behavioral Sciences* 15 (2001): 10175; Joan Scott, "Multiculturalism and Politics of Identity," in *The Identity Question*, ed. John Rajchman (New York: Routledge, 1995), 3; See also Gutmann, "Rawls" (above n. 12), 183, 184; Waldron, "Minority Cultures" (above n. 5).

Second, the asymmetrical burden of which Habermas writes is exaggerated.<sup>101</sup>

Third, there is a contradiction in Habermas's argument. On the one hand, he assumes that religious citizens are religious fundamentalists. On the other hand, however, he calls on the citizens of a liberal state, both secular and *religious*, to embark on "complementary learning processes" that will acquaint them with and make them appreciate the best of the other group's heritage.<sup>102</sup> But how can religious fundamentalists be expected to go beyond the doctrines of their religion and, moreover, give positive value to what exceeds their own religious heritage?

Fourth, there are many religious people in the world who reject religious fundamentalism and who willingly consume cultural products of both their religion and the culture of the surrounding society.

Fifth, it is clearly the case that Rawls had in mind people of the latter type. Therefore, Rawls's distinction between comprehensive religious doctrines and political doctrine makes a lot of sense for many religious people living in liberal countries.

Sixth, Habermas talks about translation. But religious people of the kind Rawls had in mind, those non-fundamentalist whose lives are governed by a comprehensive religious doctrine and by a liberal political doctrine, go through the process of translation, so to speak, routinely throughout their lives: when they address a normative question they think about it both in terms of the doctrine of their religion and in terms of the political culture of the country in which they live.

The Israeli legal scholar Yedidia Stern refers to this situation using the term "normative duality":

101 To Wolterstorff, on whom Habermas draws, the same critique applies: he writes that the liberal restraint on the use of religious reason in politics "is totally unrealistic as a proposal. Most people who reasoned from their religion in making up their mind on political issues would lack the intellectual imagination required for reasoning to the same position from premises derived from the independent source" (Wolterstorff, *The Role of Religion* [above n. 64], 78). Wolterstorff also writes that Rawls's assumptions about American society are unrealistic: "Large numbers of Americans . . . do not accept the Ideal of liberal democracy . . . Rawls works with an extraordinarily idealized picture of the American political mind" (ibid., 97). For a depiction of American religious believers in fundamentalist terms, see McConnell, "Secular Reason" (above n. 50), 173. See also Margaret Moore, "Political Liberalism and Cultural Diversity," *Canadian Journal of Law & Jurisprudence* 8 (1995): 297. Cf. Audi, *Religious Commitment* (above n. 25), 82: "I shall indeed assume that in the United States, at least, reflective religious people, particularly those in what we might loosely call the Hebraic-Christian tradition, are on the whole committed to preserving not only democratic government but also religious liberty, including the liberty to remain outside any religious tradition."

102 Habermas, "Religion" (above n. 63).

Jewish society in Israel is composed of two civilizations: the western-liberal and the Jewish-traditionalist. . . . The vast majority of the Jews living in Israel draw on the rich contents of both cultures. Only part of the public who experiences cultural duality also feels the burden of normative duality. The latter are simultaneously subject, due to their personal choice, to two legal systems: the law of the state, which is one of the products of the western-liberal culture, and Halakhic law, which is one of the products of the Jewish-traditionalist culture. . . .

My personal existence is one of both cultural duality and normative duality: I am fully and wholeheartedly committed . . . to the rule of law. At the same time I am fully and wholeheartedly committed to Halakhah (as it is interpreted by the religious circles to which I belong). I deem both legal systems as being part of my primary and unmitigated responsibility.<sup>103</sup>

#### 4. Deliberation following the Anthropologization of Politics

Jürgen Habermas talks about “translating” religious contents into shared public reason contents. Even though Rawls does not explicitly use the term, it is clear that his proviso anticipates such translation as well. The fact that both philosophers envision the carrying out of the task of translation is part of a process I would like to call “the anthropologization of politics.” In this part of the article I would like to note two problems, which bear on the conduct of political *deliberation* following the anthropologization of politics in liberal democratic countries.

For some two centuries after the French Revolution the common paradigm of the state was that of a nation state—a state serving as the political framework for a homogenous national group; a state carrying out policies aimed at cultural *homogenization* of the various groups living in its territories, as well as policies for the cultural *assimilation* of immigrants. This paradigm led to the view that it would be only a matter of time until complete cultural uniformity of states’ populations was accomplished.

In recent decades, however, many authors have suggested that this prevalent paradigm of the state is false; after two centuries of homogenization and assimilation, the populations of most states of the world are multicultural: they are composed of more than one national group and/or more than one religious group,

103 Yedidia Z. Stern, *Law, Halakhah and Pluralism: Life in Normative Duality* (Ramat Gan: Bar Ilan University, 2000) [Hebrew].

and of many ethnic groups (tribes, immigrant groups, etc.).<sup>104</sup> As Sylvia Walby wrote in 2003, “Modern societies have often been equated with nation-states . . . . But nation-states are actually very rare. . . . They may be widespread as imagined communities, or as aspirations, but their existence as social and political practice is much over-stated. There are many states, but very few nation-states.”<sup>105</sup>

What this development means is that problems once faced by anthropologists who used to reach out to cultural groups living outside the boundaries of their states are now routinely arising in the context of the *internal* relations between liberal states and non-liberal cultural groups living in their territories, and in the context of the relations of cultural groups inhabiting the same states. I wish to briefly point out two such problems that I deem central.

The first problem is that of *understanding*: the question arises whether people located in one culture are able to correctly understand the true meaning of cultural practices in another culture.

There is a longstanding tradition in Western culture premised on faith in the ability of people living in one culture to grasp the meaning that people of another culture ascribe to their lives.<sup>106</sup> This tradition is epitomized by the academic discipline of anthropology. Anthropologists usually work across cultures. The underlying premise of their discipline is that people located in different cultures can “converse” with each other, “translate” each other’s meanings, and “understand”

104 Walker Connor, “Nation-Building or Nation-Destroying?” *World Politics* 24 (1972): 159; Thomas Hylland Eriksen, “Multiculturalism, Individualism and Human Rights: Romanticism, the Enlightenment and Lessons from Mauritius,” in *Human Rights, Culture and Context*, ed. Richard A. Wilson (London; Chicago: Pluto Press, 1997), 49; Jeff Spinner, *The Boundaries of Citizenship* (Baltimore, MD: John Hopkins University Press, 1994), ch. 7; James Tully, *Strange Multiplicity* (Cambridge: Cambridge University Press, 1995), ch. 1; D. Ivison, “Multiculturalism,” *International Encyclopedia of the Social & Behavioral Sciences* 15 (2001): 10169; Michel Wieviorka, “Is Multiculturalism the Solution?” *Ethnic & Racial Studies* 21 (1998): 881.

105 Sylvia Walby, “The Myth of the Nation-State: Theorizing Society and Politics in a Global Era,” *Sociology* 37 (2003): 529.

106 Vico, for example, in a famous passage, expressed astonishment at the fact that human beings invest so much intellectual energy in the study of nature, to the neglect of the study of human society, including “the world of nations”: “The world of civil society has certainly been made by man . . . . Whoever reflects on this cannot but marvel that the philosophers should have bent all their energies to the study of the world of nature, which, since God made it, He alone knows; and that they should have neglected the study of the world of nations, or civil world, which, since men had made it, he could come to know” (Giambattista Vico, *The New Science of Giambattista Vico*, trans. Thomas Goddard Bergin and Max Harold Fisch [Ithaca: Cornell University Press, 1984], §331).

them.<sup>107</sup> In the same vein, a series of thinkers have applied Hans-Georg Gadamer's dialogical hermeneutics<sup>108</sup> to cross-cultural encounters,<sup>109</sup> emphasizing the change such encounters may effect in the self-understanding of the parties involved in them.<sup>110</sup>

107 For a review and discussion of "the interpretive approach" and "the subjectivist approach" to this issue, see Suzanne R. Kirschner, "'Then What Have I to do with Thee?': On Identity, Fieldwork, and Ethnographic Knowledge," *Cultural Anthropology* 2 (1987): 211. See also Talal Asad, "The Concept of Cultural Translation in British Social Anthropology," in *Writing Culture*, ed. James Clifford and George E. Marcus (Berkeley: University of California Press, 1986), 141; Ladislav Holy, "Introduction: Description, Generalization and Comparison: Two Paradigms," in *Comparative Anthropology*, ed. Ladislav Holy (Oxford: Blackwell, 1987), 1. Gellner points out "the interesting fact" that "no anthropologist . . . has come back from a field trip with the following report: *their* concepts are *so* alien that it is impossible to describe their land tenure, their kinship system, their ritual" (Ernest Gellner, "General Introduction: Relativism and Universals," in *Universals of Human Thought*, ed. B. Lloyd and J. Gay [Cambridge, MA: Cambridge University Press, 1981], 1, 5). Martha Nussbaum writes that "despite the evident differences in the specific cultural shaping of the grounding experiences, we do recognize the experiences of people in other cultures as similar to our own. We do converse with them about matters of deep importance, understand them, allow ourselves to be moved by them" (Nussbaum, "Non-Relative Virtues: An Aristotelian Approach," *Midwest Studies in Philosophy* 13 [1988]: 32, 46).

108 Hans-Georg Gadamer, *Truth and Method*, trans. J. Weinsheimer and D. Marshall, rev. ed. (1960; repr., New York: Continuum, 1993); Hans-Georg Gadamer, *Philosophical Hermeneutics*, trans. David E. Linge (Berkeley: University of California Press, 1976).

109 Jürgen Habermas, "A Review of Gadamer's Truth and Method," in *Understanding and Social Inquiry*, ed. Fred R. Dallmayr and Thomas A. McCarthy (North Dame: University of Notre Dame Press, 1977), 335, 342, 352; Charles Taylor, "Understanding the Other: A Gadamerian View on Conceptual Schemes," in *Gadamer's Century*, ed. Jeff Malpas, Ulrich Arnsward, and Jens Kertscher (Cambridge, MA: MIT Press, 2002), 279–280, 296; Charles Taylor, "Politics of Recognition," in *Multiculturalism and "The Politics of Recognition"*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1992), 25, 67, 70, 73; Richard Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics and Praxis* (Philadelphia: University of Pennsylvania Press, 1983), 36; David Linge, "Editor's Introduction to Philosophical Hermeneutics," in Gadamer, *Philosophical Hermeneutics* (above, n. 108), xi–xii, xxi; For Gadamer, translation, conversation, and understanding are very much the same. See *ibid.*, 383–389. See also Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *The Interpretation of Cultures* (New York: Basic Books, 1973), 3, 30.

110 Linge, "Editor's Introduction" (above n. 109); Bernstein, *Beyond Objectivism* (above n. 109); Roy Wagner, *The Invention of Culture*, rev. ed. (1975; repr., Englewood Cliffs: Prentice-Hall, 1981), 9; Harvey B. Sarles, "Cultural Relativism and Critical Naturalism," in *Cultural Relativism and Philosophy*, ed. Marcelo Dascal (Leiden: E. J. Brill, 1991), 195.

And yet, anthropologists, linguists and cultural researchers are well aware of the difficulties involved in attempts to understand foreign cultures and to “translate” meaning that is prevalent in one culture into the meaning terms extant in another culture without suffering misunderstandings, distortions and losses,<sup>111</sup> as well as the difficulties involved in maintaining intercultural communication.<sup>112</sup> Indeed, there are too many instances in which Western liberals have failed to understand the meaning of cultural practices prevalent in non-liberal groups. It is often the case that liberals attach certain meanings to such practices, while in the groups themselves they bear wholly different meanings.<sup>113</sup>

Thus, when Habermas talks about “the institutional translation proviso” and about translation being “a cooperative task,” he envisions cross-cultural encounters

111 Godfrey Lienhardt, “Modes of Thought,” in *The Institutions of Primitive Society* (Oxford: Blackwell, 1954, 1961), 95; Alasdair MacIntyre, “Relativism, Power, Philosophy,” *Proceedings and Addresses of the American Philosophical Association* (1985): 5, 9–10; *Comparative Anthropology*, ed. Ladislav Holy (Oxford: Blackwell, 1987); *Implicit Understandings*, ed. Stuart B. Schwartz (Cambridge: Cambridge University Press, 1994); Asad, “The Concept” (above n. 107), 141; *Translating Cultures*, eds. Paula G. Rubel and Abraham Rosman (Oxford, UK; New York: Berg, 2003).

112 Michael Clyne, *Inter-Cultural Communication at Work* (Cambridge: Cambridge University Press, 1994).

113 For a discussion, see Menachem Mautner, “A Dialogue between a Liberal and an Ultraorthodox on the Exclusion of Women from Torah Study,” in *Religious Revival in a Post-Multicultural Age*, ed. Rene Provost and Shai Lavi (Oxford: Oxford University Press, 2014); Mautner, “From ‘Honor’ to ‘Dignity’: How Should a Liberal State Treat Non-Liberal Cultural Groups?” *Theoretical Inquiries in Law* 9 (2008): 609, 619–621. See also J. W. Fernandez, “Cultural Relativism, Anthropology of,” in *International Encyclopedia of the Social & Behavioral Sciences* 5 (2001): 3110 (“People are usually aware from their domestic everyday experience of the difference of perspective and the relativity in understanding between men and women, the old and the young, the parent and the child, the slow and the quick.”) For a strong argument that Western activists against female genital mutilation fail to understand the true meaning attached to this practice by the cultural groups that engage in it, see Richard A. Shweder, “‘What About Female Genital Mutilation?’ and Why Understanding Culture Matters in the First Place,” in *Engaging Cultural Differences*, eds. Richard Shweder, Martha Minnow and Hazel Markus (New York: Russell Sage Foundation Press, 2002), 216. Pinhas Shifman provides a list of examples of misunderstandings that arise when religious people invoke religious terms in Israel’s public discourse. For instance, when a mass accident occurs, religious people often claim that it is God’s response to the proliferation of religious sinfulness. Secular people are annoyed by such pronouncements, because they see them as manifestations of a cruel accountancy and flawed causality. But religious people understand such pronouncements very differently, namely as calls for religious soul-searching. See Pinhas Shifman, *One Language, Different Tongues* (Jerusalem: Shalom Hartman Institute, 2012), 30–35 [Hebrew].

and implicitly assumes that the parties involved in such encounters can overcome the problems of misunderstanding that may be part of such encounters. (When Rawls in his proviso assumes that those introducing comprehensive religious contents into political discourse will in due course present public reason to support their positions, he assumes religious persons who are multicultural persons).

The second problem is that of *evaluation*: the question arises whether and how people located in one culture can normatively evaluate practices taking place in another culture.<sup>114</sup>

## 5. Justification following the Anthropologization of the Courts

Rawls presents the Supreme Court as the institution that epitomizes the public reason of a liberal state.<sup>115</sup> (And note that when he does so, it is not clear whether what he has in mind is public reason as a vehicle of deliberation—the constitutional tradition that the Court cultivates in its opinions—or public reason as a means of justification—the constitutional arguments the Court puts forward in support of its operative rulings). Rawls is well aware, however, that though his notion of public reason may neatly apply to “well-ordered societies” (“the ideal case”), it requires some adaptations when applied to societies which fall short of that. Indeed, when Rawls discusses the cases of the Abolitionist and Civil Rights Movements he has in mind societies of the latter type. Rawls, however, discusses the *political* discourse of such societies, not their *legal* discourse—the discourse of courts in their opinions. The question that needs to be addressed is what role public reason should fulfill as a means of *justification* in the opinions of courts in liberal states that fall short of the ideal case, namely liberal states whose political doctrine and culture are contested by significant non-liberal religious groups. Put differently, the question is how liberal courts should justify their coercive decisions bearing on citizens that belong to non-liberal religious groups.

Israel is a case in point. In the *Emanuel* affair,<sup>116</sup> the Supreme Court intervened in the cultural practices of an ultra-Orthodox community, specifically the blatant separation between Ashkenazi and Sephardic children in the community’s school. The community claimed that the separation was grounded in religious motives: since Judaism is a religion of practices, and the religious practices of Sephardic Jews are less strict than those of Ashkenazi Jews, there was an imminent danger

114 For discussion, see Mautner, “A Dialogue” (above n. 113).

115 For Waldron’s criticism of Rawls’s position see Waldron, “Disagreement” (above n. 29).

116 *Noar Ka-Halakhah v. Ministry of Education*, HCJ 1067/08 (Aug. 6, 2009; May 17, 2010; June 15, 2010; June 20, 2010; June 22, 2010; June 27, 2010; Sept. 14, 2010).

that the exposure of Ashkenazi children to the religious practices of Sephardic children would undermine their religious socialization. The Court held that the community's practices amounted to unlawful ethnic discrimination. (It could therefore be argued that the *Emanuel* affair represents the failure of a liberal court to adequately understand the meaning of a non-liberal community's cultural practice.) The confrontation between the Court and the community ended up in the sending of dozens of members of the community (both men and women) to jail for failing to comply with the Court's orders. What kind of *justifications* should we find in the opinions of a liberal Supreme Court (such as Israel's) that, with the aim of uprooting or modifying the cultural practices of non-liberal groups (such as the Israeli ultra-Orthodox), exercises coercive power over members of the group?

Rawls himself, in dealing with the justification of the moral premises of the liberal-democratic regime, acknowledged the problem of cross-cultural justification. "Justification is always addressed to some particular group of persons," he wrote. "What constitutes the most reasonable basis of public justification for one society may not be a basis of justification for another; and the same holds for the same society at different times."<sup>117</sup> Rawls is not alone in that; the problem of cross-cultural justification of a moral-political system has been acknowledged by other writers as well.<sup>118</sup> From a broader perspective, the

117 *Justice as Fairness: A Restatement* (Cambridge, MA: Belknap Press of Harvard University Press, 2011), cited by: Waldron, "Religious Contributions" (above n. 6), 838.

118 Thomas Nagel writes that "The problematic cases are those in which either the impersonal value to which I appeal to justify coercion would not be acknowledged by the one coerced, or else it conflicts with another impersonal value to which he subscribes but which I do not acknowledge, though I would if I were he" (Nagel, "Moral Conflict" [above n. 26], 225). Burton Dreben writes that the basic problem of political philosophy is "how can you justify to someone who does not share your comprehensive moral doctrine ... the action you have taken as a citizen either directly or indirectly through your legislative representatives?" (Dreben, "On Rawls" [above n. 74], 337–338). Lucas Swaine writes that "not all reasons hold equally well for all people." For instance, "theocrats and liberals simply are not similarly situated parties" (Swaine, *The Liberal Conscience* [above n. 81], 19). T. M. Scanlon writes that in conditions of reasonable pluralism, justifications of a conception of justice that depend on a particular comprehensive view "will be ones that some citizens (those who do not share this view) have no reason to accept" (Scanlon, "Rawls" [above n. 68], 161). See also Weithman, *Religion* (above n. 29), 128 ("If someone offers what she should know cannot be good reasons for others, those she addresses may feel insulted, condescended to or patronized"); Weithman, "John Rawls's Idea" (above n. 63), 59 (if the fundamental conditions for the exercise of the moral powers can only be supported by a conception someone rejects, "then her situation can plausibly be described as one of subjection to an alien cause"); Gaus, *Justificatory Liberalism* (above n. 27), 123



problem is part of the accessibility requirement, which has been widely discussed following Rawls's exposition of the notion of public reason.<sup>119</sup>

What is the problem with justifying coercion with a ground borrowed from a normative system not shared by the coerced person? The answer is clearly that such justification amounts to disrespect of the coerced person and thus undermines a central value not only in Rawls's political liberalism, but in contemporary political theory as well.

So how should a liberal court (a court that accepts that it needs to treat the citizens of the state with respect) go about its business when it intervenes in the cultural practices of non-liberal groups? Dicey's view of the rule of law as the equal application of one uniform law to all the population of the state belongs to the era of the nation-state paradigm.<sup>120</sup> As part of the accommodation that courts need to go through in the era of the multicultural paradigm of the state, and as part of the anthropologization ensuing from this new paradigm, a court's opinion in instances of this type should provide three layers of justification.

First is the regular layer of the court's liberal tradition. It is the primary and indispensable mission of courts in liberal countries to preserve and cultivate a normative liberal tradition that guides the conduct of both other state institutions and the citizenry of the state.<sup>121</sup> Courts need not give up this role even when they deal with the affairs of citizens who do not share their liberal convictions.<sup>122</sup>

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(coercive interference with another person must be justifiable to that person in terms that could be persuasive to him or her, given his or her belief system or rational commitments); Audi, *Religious Commitment* (above n. 25), 78 ("when governmental coercion is necessary, it should be justified by considerations of a kind that do not alienate those affected").

119 See, for example, Gutmann and Thompson, *Why Deliberative Democracy?* (above n. 4), 4.

120 Dicey, who was particularly concerned that the powerful not have one law for themselves and another law for ordinary people, argued, among other things, that the rule of law stands for the exclusion of "prerogative" and "equality before the law, or the equal subjection of all classes to the ordinary law of the land." Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1961), 42. According to this ideal, "the law should be the same for everyone: one law for all and no exceptions" (Jeremy Waldron, "One Law for All? The Logic of Cultural Accommodation," *Washington & Lee Law Review* 59 [2002]: 3). See also Kent Greenawalt, "The Rule of Law and the Exemption Strategy," *Cardozo Law Review* 30 (2009): 1513, 1516.

121 Menachem Mautner, "Three Approaches to Law and Culture," *Cornell Law Review* 96 (2011): 839.

122 William A. Galston argues that "we show others respect when we offer them, as explanation, what we take to be our true and best reasons for acting as we do." Galston, *Liberal Purposes: Goods, Virtues and Diversity in the Liberal State* (Cambridge, MA: Cambridge University Press, 1991), 109. For criticism of Galston's argument, see Eberle, *Religious Conviction* (above n. 30), 98–99.

Second is the layer of human rights doctrine. The doctrine can be said to enjoy universality in the sense that its ideals may be found in many cultures around the world, and in the sense that it enjoys widespread acceptance in the world community: many people around the world, living in a variety of societies and cultures, endorse the doctrine and would like its contents to become an important part of the political culture of their country and of their personal lives. “No other ideal seems so clearly accepted as a universal good,” writes Oscar Schachter.<sup>123</sup> The doctrine of human rights is the only source available to us of standards that may be said to transcend any particular culture, for the purpose of evaluating cultural practices. Put differently, the doctrine may be said to enjoy an “overlapping consensus” among world cultures.<sup>124</sup> Therefore, by providing non-liberal citizens with justifications that draw on the human rights doctrine, a court may be said to provide these citizens with justification that may be said to be “indirectly internal” to the normative system to which these citizens adhere.<sup>125</sup>

Third is the layer of “directly internal” justifications, namely justifications explicitly drawing on the normative system that non-liberal citizens live by, and not on the liberal normative tradition of the court. While for Rawls the supreme court is the state institution that epitomizes public reason, in a country that is not well-ordered the court needs to add to its regular public-reason layer of justification an additional layer borrowed from the comprehensive doctrine of non-liberal religious groups in whose internal affairs it coercively intervenes.

Rawls himself was aware of the availability and importance of “directly internal” justifications. He makes a distinction between “two ideas of toleration.”

123 Oscar Schachter, “Human Dignity as a Normative Concept,” *American Journal of International Law* 77 (1983): 848, 849.

124 Mautner, “From ‘Honor’ to ‘Dignity,’” (above n. 113). See also Nagel, “Moral Conflict” (above n. 26), 218: “Defenses of political legitimacy are of two kinds: those which discover a possible *convergence* of rational support for certain institutions from the separate motivational standpoints of distinct individuals; and those which seek a *common standpoint* that everyone can occupy, which guarantees agreement on what is acceptable. There are also political arguments that mix the convergence and common standpoint methods.”

125 See also Claire L’Herreux-Dube, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court,” *Tulsa Law Journal* 34 (1998): 15, 16 (“More and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions, particularly when making decisions on human rights”); Anne-Marie Slaughter, “The Real New World Order,” *Foreign Affairs* 76 (1997): 183 (judges all over the world are increasingly drawing on decisions of foreign courts, particularly in the area of human rights); Ann-Marie Slaughter, “A Typology of Transjudicial Communication,” *University of Richmond Law Review* 29 (1994): 99 (“Courts are talking to one another all over the world,” particularly on matters of human rights).

One is purely political. It is expressed in terms of the doctrine of religious liberty, which is part of the widely shared “political conception of justice.” The other is “expressed from *within* a religious or a nonreligious doctrine.”<sup>126</sup> Rawls calls this last idea of toleration “reasoning from conjecture,” and writes that it is conducted when “we reason from what we believe, or conjecture, may be other people’s basic doctrines, religious or philosophical, and seek to show them that, despite what they might think, they can still endorse a reasonable political conception of justice. We are not ourselves asserting that ground of toleration but offering it as one they could assert consistent with their comprehensive doctrines.”<sup>127</sup> “However, it is important that conjecture be sincere and not manipulative,”<sup>128</sup> he adds. We are back to the Habermasian task of translation, but this time the other way around: the need for a liberal court to translate its doctrine into the terms of religious doctrine.<sup>129</sup>

Israel’s Supreme Court is a case in point. The Court routinely justifies its rulings by drawing on the vast resources comprising its rich liberal tradition. (As a result of the thirty years of British government over Palestine, Israeli law is, to a great extent, Anglo-American liberal law).<sup>130</sup> Some of the Justices of the Court, however, often include in their opinions lengthy discussion of halakhic sources in support of their rulings. That is what an opinion needs to look like when it deals with non-liberal religious groups, e.g., the Ultraorthodox.

However, it could be argued that the respect requirement is not met when a liberal court interprets the contents of a non-liberal cultural group in a way that does not conform to, or even contradicts, the way the spiritual leaders of the group interpret these contents. But interpreting the internal normative contents of a group, even not in conformance to the way the group’s leaders do, seems to be the utmost a state institution may do to meet the respect and justification requirements with regard to non-liberal citizens.

126 Rawls, “The Idea” (above n. 47), 152 [emphasis added].

127 Ibid.

128 Ibid., 156. See also Rawls, *Political Liberalism* (above n. 11), li: “If we argue that the religious liberty of some citizens is to be denied, we must give them reasons they can not only understand . . . but reasons we might reasonably expect that they as free and equal might reasonably also accept.” Swaine, *The Liberal Conscience* (above n. 81), 137: “Liberals should employ reasons that theocrats should accept, instead of *pro tanto* reasons that elide theocrats’ religious convictions or hold only for those affirming secular conceptions of the good.”

129 Cf. Gaus, *Value and Justification* (above n. 27), 321 (justification as part of political deliberation needs to draw on “the other’s perspective”).

130 Menachem Mautner, *Law and the Culture of Israel* (Oxford: Oxford University Press, 2011).

# Three Conceptions of Religious Freedom

Kenneth L. Marcus

Three strands of thought intertwine in the American legal literature of religious freedom. They may be characterized as individualist, institutionalist, and peoplehood. Very roughly, they correspond to the three historically prominent American religious groups, respectively, Protestant, Catholic, and Jewish. During most periods, the individualist conception, drawing on Protestant notions of personal conscience, has been dominant. American constitutional discourse is not unique in this respect, as international human rights law has also been largely anchored in the same Protestant-individualist conception.<sup>1</sup> To this extent, the American experience may be broadly illustrative. In recent years, however, American courts have been more sympathetic to claims that are anchored in the prerogatives of religious institutions, rather than on individual conscience alone. At the same time, courts and commentators have frequently gestured toward an altogether different conception, which is based on the vulnerability of minority religious groups to discriminatory treatment. These three conceptions are often aligned, but they also sometimes clash. The challenge for constitutional jurisprudence is to negotiate an accommodation that respects the equal dignity of widely different conceptions of religious freedom. The three conceptions, taken together, provide a pluralistic approach to religious freedom that is ultimately more compelling than any the three alone could provide.

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1 See Leora Batnitzky, "From Collectivity to Individuality: The Shared Trajectories of Modern Concepts of 'Religion' and 'Human Rights,'" this volume, 547–571.

# 1. Three Conceptions

## 1.1. The Individualist Conception

The first, long-dominant, Protestant-inspired approach defends the right of individual conscience against governmental infringement.<sup>2</sup> Religious freedom is defined in terms of individual scruples because that is how religion itself is understood in this traditional view. For many years, this ideology was so deeply ingrained in American thinking that its biases appear to have been invisible to some of its exponents, although its influence can be seen pervasively. A careful examination will show that this oft-dominant conception is tailored to cover the contours of one religious tradition, namely the Protestant tradition, while it is markedly less suitable for other traditions that have different notions of religion. The discrepancy has been masked by the tendency of minority religious groups to assimilate to the dominant tradition, adapting to the Protestant idea of “religion.”

The phrase “freedom of conscience,” with its emphasis on individual mental states, is not found in the United States Constitution. Indeed, the First Amendment’s Religion Clauses say only that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>3</sup> However, it is now well-known that Protestant notions of freedom of conscience infused these two clauses and their early interpretations.<sup>4</sup> This can be seen in both the more expansive language of some earlier state constitutions and the debate on the Constitution’s Bill of Rights.

Some state charters, beginning with Rhode Island’s Charter of 1663,<sup>5</sup> explicitly equated religious freedom with “liberty of conscience.”<sup>6</sup> Others more fully described this individual basis for religious freedom, such as Virginia’s constitution, which announced that the “religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason

2 On the relationship between Protestantism and the individualist approach, see Martha Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (New York: Basic Books, 2008), 34–58.

3 US Const., First Amendment.

4 See, for example, Michael J. White, “The First Amendment’s Religion Clauses: ‘Freedom of Conscience’ versus Institutional Accommodation,” *San Diego Law Review* 47 (2010): 1075–1076.

5 Rhode Island Charter of 1663, *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, 2nd ed. (Clark, NJ: Lawbook Exchange, 2001), (B. Poore. ed.), 1328, 1338, 1595–1596.

6 Michael W. McConnell, “The Origins and Historical Understanding of the Free Exercise of Religion,” *Harvard Law Review* 103 (1990): 1425.

and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience...”<sup>7</sup> This language rather reflects an individualistic conception of religious freedom, indebted to John Locke and the Protestant tradition, in which each individual must be given the liberty to choose the manner in which he or she follows the demands of individual conscience.<sup>8</sup> Locke’s concern for personal conscience (not always reflected in his writings on religious freedom) was arguably exceeded by evangelical Protestants who drove the development of free exercise ideology in the republic’s early years.<sup>9</sup>

This individualist conception is explicit in Supreme Court decisions interpreting the religion clauses from the mid-twentieth century onwards. For example, it can be seen in decisions providing religious exemptions from mandatory military service for individuals’ “whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”<sup>10</sup> Similarly, the protection (or privilege) of “conscientious scruples” provided the basis for the strict judicial scrutiny that the courts for many years imposed even on generally applicable legal rules which substantially burdened the free exercise of religion.<sup>11</sup> Perhaps most plainly, the Supreme Court has declared that, “The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the . . . inviolable citadel of the *individual heart and mind*. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel[.]”<sup>12</sup>

As this language suggests, the Protestant-individualist understanding of religion was recently so dominant as to appear to have been invisible to its exponents, in much the same way as the whiteness or maleness of rights discourse also posed as neutrality. The problem with this notion of religious freedom is not that it has been applied unevenly to members of different religions but that it is based on a sectarian understanding of what it means to be a “religion.” This is well illustrated in the recent work by Leora Batnitzky, a leading religion scholar whose work is represented in this volume. “Religion,” Batnitzky explains, “is a modern German Protestant category that Judaism does not quite fit into.”<sup>13</sup> Batnitzky demonstrates

7 Virginia Constitution, Article I, §16.

8 White, “The First Amendment’s Religion Clauses” (above n. 5), 1076.

9 McConnell, “The Origins” (above n. 7), 1442–1449.

10 *Welsh v. United States*, 398 U.S. 333, 344 (1970).

11 *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).

12 *Abington School Dist. v. Schempp*, 374 U.S. 203, 226 (1963) (emphasis added).

13 Leora Batnitzky, *How Judaism Became a Religion: An Introduction to Modern Jewish Thought* (Princeton, NJ: Princeton University Press, 2011), 13.

that Judaism traditionally a set of practices to guide a nation—combining politics, culture, and what we now know as “religion”—was only partially reinvented as a “religion” during the modern period. Similar stories could be told of other ethno-religious traditions or peoples.<sup>14</sup> Just as European ethnic groups have assimilated to an Anglo-inspired conception of whiteness, so have Western ethno-religious traditions assimilated to a Protestant conception of religion.<sup>15</sup> In both cases, the motivations have been the same: like whiteness in ethnic relations, “religion” in constitutional discourse has been the gateway to privilege.<sup>16</sup>

The Jewish experience suggests a challenge to the dominance of the individualist conception. The question is whether it is appropriate for a liberal constitution to protect the prerogatives of a “religious” group only to the extent that it assimilates to a model established by another group? To be sure, the individualist conception provides for infinite variations on the theme of personal conscience, but these variations obtain within a limited range. One plausible response is that the sanctity or vulnerability of individual conscience both justifies and requires peculiar solicitousness regardless of its origins within a particular tradition. This response may be convincing as far as it goes, but the deeper question is whether rival conceptions must be accommodated to an equal extent. To the extent that the traditional individualist conception of religious freedom is understood as basically sectarian, it becomes necessary to examine and evaluate the other ways in which this freedom might be construed.

At the same time, it should be acknowledged that in recent years the individualist conception has been in decline. This can be seen most clearly in the much criticized case of *Employment Div., Dept. of Human Resources of Oregon v. Smith*.<sup>17</sup> In that

14 Indeed, Batnitzky has already undertaken this task—at least to some degree. See Batnitzky, “From Collectivity” (above n. 2), applying the same reasoning to Islam and other religions.

15 The process by which European ethnic groups have negotiated assimilation to the American “whiteness” standard is explored in Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge, MA: Cambridge University Press, 1998). The Jewish experience of this process is explored in Eric L. Goldstein, *The Price of Whiteness: Jews, Race, and American Identity* (Princeton, NJ: Princeton University Press, 2006); Karen Brodtkin, *How Jews Became White Folks and What That Says About Race in America* (Brunswick, NJ: Rutgers University Press, 1998); and *Jewish Locations: Traversing Racialized Landscapes*, eds. Bat-Ami Bar On and Lisa Tessman (Lanham, MD: Rowman & Littlefield, 2001).

16 On the relationship between religion and privilege, see Christopher L. Eisgruber and Lawrence G. Sager, “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,” *University of Chicago Law Review* 61 (1994): 1245, 1282–1284.

17 *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990).

case, the US Supreme Court held that a state could deny unemployment benefits to a Native American who was terminated for violating a state prohibition on the use of peyote during an Indian religious ritual. Since *Smith*, the individualist conception has been an impotent sovereign. It remains the reigning theory of religious freedom, but it no longer enjoys a power commensurate with its prestige. For this additional reason, it is necessary to consider the other conceptions that have undergirded this basic right.

## 1.2. The Institutional Conception

By contrast, a second and older conception, less firmly rooted in American constitutional tradition but arguably ascendant in recent years, is more closely related to Catholic tradition and has supported the prerogatives of religious institutions as against either individuals or the state. The institutionalist approach supports religious freedom, at least to a significant extent, as recognition not of personal spiritual commitments but rather of a proper domain of “church autonomy” protected against the state. Its basic idea is that certain communal institutions hold significant intrinsic social value, or are inextricably connected to both social interaction and individual flourishing, and thus merit protection from governmental encroachment.<sup>18</sup>

This concern for institutional prerogatives has been traced back to Pope Gregory VII’s revocation, at the end of the eleventh century, of the then-longstanding prerogative of temporal rulers to select and supervise bishops within their realms.<sup>19</sup> A century later, the first constraint to which King John agreed in the Magna Carta was “that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.”<sup>20</sup> In accepting the “freedom of elections,” King John acknowledged that this right was “thought to be of the greatest necessity and importance to the English church.”<sup>21</sup> In these early confrontations, the idea of religious freedom originated from a preference for

18 Paul Horwitz, “Churches as First Amendment Institutions: Of Sovereignty and Spheres,” *Harvard Civil Rights-Civil Liberties Law Review* 44 (2009): 79, 111–112.

19 Ira C. Lupu and Robert Tuttle, “The Distinctive Place of Religious Entities in Our Constitutional Order,” *Villanova University Law Review* 7 (2002): 37.

20 J. Holt, *Magna Carta App. IV*, 317, §1 (1965). See, generally, Richard W. Garnett, “Religion and Group Rights: Are Churches Just Like the Boy Scouts?” *St. John’s Journal of Legal Commentary* 22 (2007): 515, 524 (explaining the historical importance of this provision).

21 *Ibid.*



papal primacy over the wide range of church affairs. This idea has less to do with individual conscience than with “church autonomy.”<sup>22</sup>

Institutional religious freedom, or “Church autonomy,” has been described as an “increasingly important site of contestation in the law of the Religion Clauses.”<sup>23</sup> Trumpeting this question of institutional religious freedom as “our day’s most pressing religious freedom challenge,” one prominent commentator insisted that “the church-autonomy question . . . is on the front line” of religious freedom litigation.<sup>24</sup> Another has argued that church autonomy “should be the flagship issue of church and state.”<sup>25</sup> Some such comments may, in their patent and understandable enthusiasm, evince a certain amount of over-statement, but this is immaterial. The critical point is that American courts have shown increasing deference to the prerogatives of religious institutions and that this reflects a conception of religious freedom (and of religion) that is acutely different from the still-dominant, if significantly weakened, individualist conception.

Church autonomy received important recent vindication in the “ministerial exemption” cases, most importantly the 2012 U.S. Supreme Court case of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>26</sup> Under Title VII of the Civil Rights Act of 1964, religious entities are exempted from anti-discrimination lawsuits in cases regarding “the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”<sup>27</sup> This provision does not explicitly exempt churches from challenges involving other protected categories such as race or sex.<sup>28</sup> Nevertheless, the Supreme Court in *Hosanna-Tabor* recognized a judicially developed “ministerial exemption,” which provides that the First Amendment requires a wider immunity than the statute

22 Gerard V. Bradley, “Forum Juridicum: Church Autonomy in the Constitutional Order: The End of Church and State?” *Louisiana Law Review* 49 (1987): 1057, 1061–1062, 1064 (describing the idea of “church autonomy” and contrasting it with the individualist conception of “personal spirituality”).

23 Horwitz, “Churches” (above n. 19), 79, 81.

24 Richard W. Garnett, “Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus,” *Journal of Law & Religion* 22 (2006–2007): 503, 521.

25 Bradley, “Church Autonomy” (above n. 22), 1057, 1061.

26 *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 Sup. Ct. 694 (2012). There is some irony in the fact, observed by Justice Alito, that this term, “minister,” is most frequently associated with Protestant clergy. *Ibid.*, 669 (Alito, concurring).

27 42 U.S.C. §2000e-1(a) (2000).

28 See, for example, *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985).

indicates. *Hosanna-Tabor* shows that the institutionalist approach to religious freedom is gaining ground at a time when the individualist conception is ailing.

### 1.3. The Peoplehood Conception

The third conception, equally important to American law, if less fully articulated in the constitutional literature, concerns the protections that members of ethno-religious populations (or peoples) require against discrimination or animus based on group membership. This approach is particularly important for these groups, such as Jews, Sikhs, Native Americans, and (some argue) Muslims, which are culturally framed in terms that combine religious belief with ethnic or ancestral characteristics. This peoplehood approach is broadly distinguished by a focus on three distinct but interrelated qualities: (1) equality or nondiscrimination (rather than liberty *per se*), (2) individual rights anchored in group membership (rather than on individual dignity or institutional autonomy), and (3) aspects of religion that overlap with race (rather than faith or institutional practice alone). The peoplehood conception is as deeply woven throughout American law as are its individualist and institutionalist analogs, but it has rarely been recognized as such, resulting in sporadic and unpredictable application.

#### 1.3.1. Equality or Nondiscrimination

The idea of formal equality, as well as its philosophical antecedents, has always been pervasive to Religion Clause jurisprudence<sup>29</sup> as the idea of freedom underlies the Equal Protection Clause. John Locke stated the matter plainly: “The sum of all we drive at is, that every man enjoy the same rights that are granted to others.”<sup>30</sup> Interestingly, the language of equal protection was first articulated in the provisions of early colonial state constitutions addressing religious freedom.<sup>31</sup> This concern for equality can be seen throughout the history of Religion Clause jurisprudence, reflected, for example, in Justice John Harlan’s explicit 1970 observation that Establishment Clause “Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”<sup>32</sup> In

29 Robin Charlow, “The Elusive Meaning of Religious Equality,” *Washington University Law Quarterly* 83 (2005): 1529–1530.

30 John Locke, “A Letter Concerning Toleration” (1689; rpr., Amherst, NY: Prometheus Books, 1990), 69.

31 Bernadette Meyler, “The Equal Protection of Free Exercise: Two Approaches and Their History,” *Boston College Law Review* 47 (2006): 275, 293.

32 *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, concurring).

recent years, the egalitarian principle has been increasingly ascendant, to the point that it can be said that religious freedoms have “changed from a substantive liberty, triggered by a burden on religious practice, to a form of nondiscrimination right, triggered by a burden that is not neutral or not generally applicable.”<sup>33</sup>

This egalitarian concern is most readily grasped where majorities attempt to impose their religion upon minority groups. After all, the Supreme Court has announced that “the clearest command of the Establishment Clause” is the rule that one religion cannot be preferred over another.<sup>34</sup> In some Establishment Clause cases the Supreme Court has recognized that, in the words of former Justice Sandra Day O’Connor, “endorsement sends a message to nonadherents that they are outsiders.”<sup>35</sup> In one older case, *McCullum v. Bd. of Education*,<sup>36</sup> Justice Felix Frankfurter observed that (constitutionally impermissible) weekly religious training at public school “sharpens the consciousness of religious differences at least among some of the children committed to its care.”<sup>37</sup> The equality principle is equally important, however, where minority groups are precluded from exercising their religions.

It is important to recognize that egalitarian concerns can have either thin or thick formulations. In *Smith*’s thin anti-discrimination formulation, for example, the Court reduced Free Exercise to the rule that state actors may not discriminate among or against religions but that they are not barred from taking actions that have the effect of eradicating religious practices. This anti-discriminatory model is far less protective of individual religious freedom than other approaches have been. On the other hand, thicker formulations of equality can be found in certain federal civil rights laws that may require accommodations and prohibit disparate impacts. As the ideological core of religious freedom law has shifted from liberty to equality, its protectiveness has, in some respects, diminished, but its impact may run in the opposite direction if thicker conceptions are embraced.

### 1.3.2. Group Membership

Although religious freedom is generally framed as an individual right, some commentators have observed that it is necessary to protect group members from

33 Douglas Laycock, “Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty,” *Harvard Law Review* 118 (2004): 155–156.

34 *Larson v. Valente*, 456 U.S. 228, 244 (1982).

35 *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, concurring).

36 *McCullum v. Bd. of Education*, 333 U.S. 203, 227–28 (1948) (Frankfurter, plurality).

37 See Susan Gellman and Susan Looper-Friedman, “Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause),” *University of Pennsylvania Journal of Constitutional Law* 10 (2008): 665–667, n. 6.

discriminatory treatment.<sup>38</sup> In other words, this individual right may have a source in the individual's relationship to a particular collectivity. This position is supported by three arguments. First, in any factionalized setting, weaker groups are vulnerable to oppression by stronger groups (the "Madisonian argument"). Second, when it comes to religion, it is especially necessary to provide particular protections for weaker religious groups in light of the peculiar history of religious minorities (the "Religious Persecution argument"). Third, group membership provides certain socially valuable benefits, especially in the case of religious or ethno-religious groups, including the sustenance of religious faith, practice, and collective action (the "Group Benefits" argument). These three arguments have provided a basis for securing the freedom of religious freedom of individuals to participate as active members in religious groups.

From the beginning, constitutional structures were designed with the intent of protecting minority groups from dominance by the majority. During the congressional debates over the Bill of Rights, James Madison explained that his constitutional proposal was intended to reduce the likelihood not only that a single group "might obtain pre-eminence," but also that "two [might] combine together, and establish a religion to which they would compel others," presumably thereby the minority, "to conform."<sup>39</sup> This Madisonian Argument provides a powerful basis for the separation of Church and State and for the federalist structures that support it.

The Religious Persecution Argument has given greater strength to the religion clauses. According to this argument, the historical mistreatment of certain religious minorities, such as Jews and Catholics, provides a compelling justification for the protection which the Religion Clauses afford.<sup>40</sup> Generally speaking, the egalitarian justifications for religious freedom are mostly characterized in terms of group

38 Cf. Thomas C. Berg, "Minority Religions and the Religion Clauses," *Washington University Law Quarterly* 82 (2004): 919 (arguing that that the Court's main goal in Religion Clause cases should be to protect minority religions). Similar arguments may be found, for example, in Stephen M. Feldman, *Please Don't Wish Me A Merry Christmas: A Critical History of Separation of Church and State* (New York: New York University Press, 1997); Suzanna Sherry, "Religion and the Public Square: Making Democracy Safe for Religious Minorities," *DePaul Law Review* 47 (1998): 499; David E. Steinberg, "Religious Exemptions as Affirmative Action," *Emory Law Journal* 40 (1991): 77. In contrast, see Patrick M. Garry, "The Democratic Aspect of the Establishment Clause: A Refutation of the Argument that the Clause Serves to Protect Religious or Nonreligious Minorities," *Mercer Law Review* 59 (2008): 595–626 (arguing that the Establishment Clause does not protect minority rights).

39 Quoted in Berg, "Minority Religions" (above n. 39), 933–934.

40 Eisgruber and Sager, "The Vulnerability of Conscience" (above n. 17).

rights or interests, despite the traditional emphasis of American constitutional law on the rights of individuals.

Finally, the Group Benefits Argument provides that religious groups merit protection not only for their vulnerability but also for the social benefits that they provide. For example, it has been argued that the “solidarity and insularity of group membership and belief sustain the insistence of many religions on one right God and one right way to homage and salvation--upon one right and insular epistemology. It is the group identity of the faithful that mobilizes pity, distrust, or even hatred for those who are not believers.”<sup>41</sup>

#### 1.4. Ethno-Religious Populations

The peoplehood approach is further predicated upon the existence of non-Christian groups, such as Jews and Sikhs, who face religious violations that are different in character from those which primarily concern Protestants and Catholics, since their cultural identities are not based exclusively on their religious beliefs and practices.<sup>42</sup> Although the United States courts have generally treated religion and race according to very different doctrinal principles, governmental treatment of racial, religious, and ethno-religious population groups implicate similar concerns.<sup>43</sup> Moreover, certain peoples are vulnerable to forms of mistreatment which are difficult to classify as merely religious or ethnic. This can be seen, for example, when governmental practices prevent group members from observing certain holidays or donning particular forms of ethno-religious attire.

The Supreme Court has occasionally acknowledged the parallels between race and religion over the years, as in *Board of Education of Kiryas Joel Village School District v. Grumet*, where the Court observed that “government may not segregate people on account of their race . . . [as] it may not segregate on the basis of religion.”<sup>44</sup> Some prominent commentators, such as Jesse Choper, have also acknowledged the parallels between race and religion, such as the fact that both “have been the object of public (and private) stereotyping, stigma, subordination, and persecution in strikingly similar ways.”<sup>45</sup>

41 Ibid., 1249.

42 See, generally, Kenneth L. Marcus, *Jewish Identity and Civil Rights in America* (New York: Cambridge University Press, 2010).

43 Tseming Yang, “Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion,” *Indiana Law Journal* 73 (1997): 119–120.

44 *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, concurring).

45 Jesse Choper, “Religion and Race under the Constitution: Similarities and Differences,” *Cornell Law Review* 79 (1994): 491–492.

The peoplehood conception has not previously been identified as such and may resonate more with some readers than others. Some may wonder whether the peoplehood conception, with its emphasis on collectivities, is fully distinguishable from the institutional approach. In fact, there is a world of difference between a conception based on the needs of a group or people and one based on the institutions that people develop. It is the difference between Christians and the Christian Church—a difference which is, unfortunately, elided in those analyses that speak only of “collectivities,” without distinguishing between institutions and groups. Other readers may wonder whether the peoplehood conception is even a conception of religious freedom at all. Intuitively, it seems to be a very different kind of animal than the other two. There is a kernel of truth to this intuition: the three conceptions are, in actuality, not different ideas about how freedom can be achieved for a fixed and stable entity, “religion.” Rather, these different freedom conceptions are based on entirely different meanings of religion. In this respect, the peoplehood conception is not anomalous, since it is true of all three strands.

## 1.5. Ramifications

The peoplehood approach challenges jurists to frame certain disputes in terms of ethno-religious group equity. Some disputes take on a different light when courts and agencies recognize that religious freedom sometimes arises from the egalitarian, group-based rights of ethno-religious populations. This can be seen in two kinds of cases: racial claims that appear at first blush to be based on religious difference, and religious claims that appear to be based on ethnic, racial, or cultural commitments. For an example of the former, consider the successful race discrimination claims have been brought by practitioners of Orthodox Judaism,<sup>46</sup> including a Hispanic convert.<sup>47</sup> For an example of the latter, consider the prison grooming cases that have been brought by ethno-religious groups like Rastafarians. The peoplehood approach to religious freedom provides that the liberty interests of ethno-religious groups should be protected from discrimination to the extent that individual conscience and church autonomy claims are recognized.

If religious group-based rights cases should ascend further, their genesis may one day be found in one of the more puzzling cases in American constitutional literature. In *Wisconsin v. Yoder*,<sup>48</sup> the Court held that Wisconsin’s compulsory school attendance law violated the Free Exercise Clause of the First Amendment by forcing Amish parents to enroll their children to public school after the eighth grade, despite Amish religious convictions requiring them to remain “aloof from

46 *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2nd Cir. 1995).

47 *Singer v. Denver School District No. 1*, 959 F. Supp. 1325 (D. Colo. 1997).

48 *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

the world.”<sup>49</sup> This sweeping exemption to a generally applicable state statute, which was not enacted to burden the Amish religion, strikes some as an anomaly in American law. The case has been read not only as an application of Free Exercise but also as a parental liberty case. For this reason, Justice Antonin Scalia held *Yoder* out as a “hybrid rights” case, explaining on behalf of the *Smith* Court that the Amish parents’ claims were stronger than the usual religious claimants because they were based on more than one constitutional provision.<sup>50</sup> What is most striking about *Yoder*; however, is the Court’s preoccupation with the unique cultural qualities of the Amish people and the extent to which their requested exemption emerges from the distinctive ethno-religious characteristics of this people. In this way, *Yoder* involved hybrid rights in the additional and perhaps more compelling sense that the state was abrogating not only the individual rights of religious parents but also the ability of a discrete and insular people to transmit its values and preserve its culture. Properly understood, *Yoder* is the paradigmatic peoplehood case.

A broadly similar approach can be seen in the response of the U.S. Department of Education’s Office for Civil Rights (OCR) to claims that Sikh and Jewish students have faced discrimination in federally funded educational programs and activities.<sup>51</sup> Such discrimination is typically unlawful when based on a student’s race, color, or national origin, under Title VI of the Civil Rights Act of 1964,<sup>52</sup> a statute that does not, however, prohibit religious discrimination.<sup>53</sup> When a Sikh father sought OCR’s protection, shortly after September 11, 2001, for a son who had been beaten on school grounds on account of his “faith” and called, “Osama,” OCR had to reconsider its long-held position that ethno-religious groups (such as Sikhs and Jews) lack Title VI protection.<sup>54</sup> After much ambivalence and equivocation,<sup>55</sup> OCR has interpreted<sup>56</sup> that provision to encompass ethnic and

49 Ibid., 210.

50 *Smith*, 494 U.S. (above n. 18), 881.

51 See, generally, Marcus, *Jewish Identity* (above n. 43).

52 42 U.S.C. §2000(d) (2000).

53 Kenneth L. Marcus, “The Most Important Right We Think We Have But Don’t: Freedom from Religious Discrimination in Education,” *Nevada Law Journal* 7 (2006): 171.

54 Marcus, *Jewish Identity* (above n. 43), 26–36. For other examples of post-9/11 discrimination against Sikhs in various contexts, see Dawinder S. Sidhu and Neha Singh Gohil, *Civil Rights in Wartime: The Post-9/11 Sikh Experience* (Burlington, VT: Ashgate, 2009).

55 Kenneth Lasson, “In an Academic Voice: Antisemitism and Academy Bias,” *Journal for the Study of Antisemitism* 3 (2011): 2501, 2553–2254; Kenneth L. Marcus, “Jurisprudence of the New Antisemitism,” *Wake Forest University Law Review* 44 (2009): 371, 389–90.

56 Russlynn Ali, Assistant U.S. Secretary of Education for Civil Rights, “Dear Colleague

ancestral discrimination against such groups, but not discrimination based narrowly on a student's religious belief.<sup>57</sup>

It would be tempting, but not fully accurate, to assume that OCR's determination reflects not a third conception of religious freedom but only an interpretation of an entirely different concept, namely ethnic, racial or national origin discrimination. Like the courts and other administrative agencies, OCR carefully parses the protected categories within its jurisdiction, determining whether each individual complaint falls within its jurisdiction relating to, such as race, color, national origin, or, when applicable, religion. The artificial construct "race" overlaps so substantially with the equally shifty notion of "national origin" that the two terms now apply, at least since *Sha'are Tefilah v. Cobb*,<sup>58</sup> to largely the same set of attributes.<sup>59</sup> The permeability of the bounds between religion and these other concepts can be seen, for example, in racial discrimination cases in which the plaintiff's ancestors do not share the racial characteristics on which the plaintiff's case is predicated, such as racial discrimination cases successfully brought by Orthodox Jewish converts to Judaism. The "religion," "race," and "national origin" protected in these cases are not completely separate; rather, they are aspects of a broader group membership or peoplehood.

Nevertheless, the courts have not consistently appreciated the extent to which the anti-discrimination rights of persecuted populations deserve special protection under those clauses.<sup>60</sup> Challenges to religious discrimination are seldom brought under the Equal Protection Clause, even though that clause may be more effective for addressing unequal treatment.<sup>61</sup> The drawback is that equal protection jurisprudence has not always been as robustly interpreted as some advocates and scholars would prefer.<sup>62</sup> It has not been especially productive, for example, in addressing unintentional or systemic discrimination, disparate impacts or failure to accommodate.

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Letter: Harassment and Bullying," October 26, 2010, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (accessed March 21, 2013). See also Kenneth L. Marcus, "Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964," *William & Mary Bill of Rights Law Journal* 15 (2007): 837.

57 Kenneth L. Marcus, "The New OCR Antisemitism Policy," *Journal for the Study of Antisemitism* 2 (2011): 479.

58 *Sha'are Tefilah v. Cobb*, 481 U.S. 615 (1987).

59 Marcus, *Jewish Identity* (above n. 43), 191–198.

60 Meyler, "The Equal Protection" (above n. 32).

61 Gellman and Looper-Friedman, "Thou Shalt Use" (above n. 33), 666 (addressing government religious expression cases).

62 Meyler, "The Equal Protection" (above n. 32), 279–280.



## 2. Alignment and Conflict Among the Three Conceptions

### 2.1. Alignment

Claims to religious freedom are on strongest grounds where the three conceptions are aligned and most uncertain where they conflict. Perfect alignment is achieved when a distinct ethno-religious population group is persecuted or burdened by governmental actions that both encroach on institutional prerogatives and restrict individual conscience. This may be seen, for example, in the otherwise surprising result that the Court reached nineteen years ago in *The Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>63</sup> There the city of Hialeah, Florida, adopted ordinances regulating animal slaughter. The ordinances, if valid and enforceable, would have effectively banned the religion of Santeria, which maintains ritual animal sacrifice as a central element of worship. To the surprise of many court watchers, who had expected that Hialeah would prevail under *Employment Division v. Smith*, the Court struck the ordinances on the ground that they impermissibly targeted a particular religion for disfavored treatment. Drawing on cases decided under both the Religion Clauses and the Equal Protection Clause, Justice Anthony Kennedy explained for a unanimous Court that is unconstitutional “to infringe upon or restrict practices because of their religious motivation.”<sup>64</sup> The Equal Protection analogy is especially appropriate here, because Hialeah encroached upon central cultural practices of a discrete and insular ethno-religious people.

The same may of course be said of the facts in *Smith*. Justice Scalia argued that *Smith* did “not present such a hybrid situation” because its free exercise claim was “unconnected with any communicative activity or parental right.”<sup>65</sup> However, the *Smith* case *did* present a hybrid situation in the broader sense that members of the Native American Church, who considered peyote ingestion central to their community, faced violations of individual conscience, institutional practice, and ethno-religious cultural identity. Unfortunately for the Indian plaintiffs in *Smith*, the cultural practices of the Native American Church may have appeared less noble than those of the Quaker plaintiffs in *Yoder*. This was not unpredictable to court-watchers in light of the fact that the Native American Church appeared before the Court primarily as a group interested in the ingestion of unlawful drugs.

63 *The Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

64 *Ibid.*, 2227.

65 *Smith*, 494 U.S. (above n. 18), 882.

## 2.2. Conflict

The three conceptions clash on certain issues, such as the question as to whether governmentally funded universities are permitted or required to bar student religious organizations from discriminating against potential members or officers who do not share the organizations' religious precepts. Under an institutionalist approach, the university must respect a religious student organization's prerogative to select its own members and officers. Under some individualist approaches, however, this may contradict the individual student's freedom of conscience. Even more saliently, under a group-based conception the university must shield ethno-religious groups from discrimination by student organizations.

The Supreme Court partially addressed this issue two years ago in *Christian Legal Society v. Martinez*.<sup>66</sup> In *Martinez*, the Supreme Court considered whether a public law school may condition its official recognition of a religious student organization (with consequences for the availability of facilities and funds) on the group's willingness to extend eligibility for membership and office-holding to all students. Justice Ruth Bader Ginsburg wrote for a divided Court that this requirement, imposed at Hastings College of Law, was a "reasonable, viewpoint-neutral condition on access to the student-organization forum" which therefore did not violate Hastings' Christian Legal Society's rights to free speech, expressive association, and free exercise of religion.<sup>67</sup> Justice Ginsburg emphasized her view that CLS seeks "preferential exemption from Hastings' policy" rather than parity with other groups.<sup>68</sup>

By assuming, for purposes of its decision, that CLS had an "all-comers" policy, rather than an anti-discrimination policy, the Court dodged the harder question as to whether "proscribing discrimination on the basis of religion itself discriminate[s] against religion."<sup>69</sup> Justice Alito, writing for the four dissenting Justices, argued that Hastings' nondiscrimination policy violated the First Amendment because it permitted some ideological groups to discriminate against those who do not share their views, but barred religious groups from doing so.<sup>70</sup>

When the evil day comes when the Court must confront the issue that it dodged in *Martinez*, it will decide between institutionalism on the one hand and,

66 *Christian Legal Society Chapter of the Univ. of Cal. v. Martinez*, 130 Supreme Ct. 2971 (2010).

67 *Ibid.*, 2978.

68 *Ibid.*

69 William P. Marshall, "Smith, Christian Legal Society, and Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability," *Cardozo Law Review* 32 (2011): 1937.

70 See *Martinez*, 130 Supr. Ct., (above n. 67), 3003–04, 3010–11 (Alito, dissenting).

on the other, individualism and peoplehood. The presence of two rationales on the latter side might appear to tip the scale in their favor, except that the former side may carry with it the weight of both Catholic sympathy and some forms of conservative opinion, both of which now command a majority on the present Court. From a pluralist perspective, the *Martinez* question is whether the conflict between anti-discrimination law and free exercise can be resolved in a way that equally respects individual, institutional, and group rights.

### 2.3. A Pluralist Reconciliation: Bringing Three Conceptions to Dialogue

The differences in these three conceptions parallel differences among the American religious groups to which they have primarily been applied, respectively Protestants, Catholics, and Jews. More broadly, they also reflect the differing conceptions of religion that emerge from each tradition. That is to say, religious disagreements among Protestants, Catholics, and Jews reflect not only different approaches to the same phenomenon, “religion,” but rather different conceptions of what “religion” is, with correspondingly different approaches the phenomenon so described. In other words, they do not merely supply different answers to the same question; rather, they supply different questions as well as different answers. This has always been a challenge for inter-religious dialogue. It is no less a challenge for legal discourse concerning the freedom of “religion.” The three conceptions described here are not three approaches to a fixed concept, “religion,” but rather three approaches based on three different but overlapping concepts.

When these three approaches are delineated in this way, the most salient ramification is that equivalent regard must, as a matter of equal protection, be given to each of these three conceptions. Even the thinnest egalitarian principles might disapprove a court which, for example, gives greater latitude to Protestant-based concerns rooted in individual conscience than to Catholic-based concerns for “church autonomy,” or vice versa, or that fails to attend equally to individual and group-based concerns. This observation may place new light on judicial decisions which, for example, burden minority religions by deferring to military uniform rules<sup>71</sup> or prison grooming regulations.<sup>72</sup>

71 *Goldman v. Weinberger*, 106 Supr. Ct. 1310 (1986).

72 See, for example, *Booth v. Maryland*, 207 F. Supp. 2d 394 (D. Md. 2002) (rejecting discrimination claim by Rastafarian prison guard punished for wearing modified dreadlocks).

The answer, of course, is not to extend a different conception of religious freedom to each group, with Protestants permitted freedom of conscience, Catholics provided institutional freedom, and so on. As *Martinez* demonstrates, Protestant groups are sometimes denied institutional prerogatives, and it would be inequitable to extend those prerogatives only to members of certain religions. Nor could one sensibly require groups to choose between institutional prerogatives and individual conscience. Once a right is recognized for one group, it must be recognized for all. This can only be accomplished by permitting all persons with the freedom of individual conscience, institutional autonomy, and group protection.

Some may object that the three conceptions may not be equally compelling and that reason dictates that each be advanced according to its own merits rather than in tandem. This argument presents a problem of perspective. It is assuredly true that few individuals will find all three conceptions to be equally compelling, but people will undoubtedly differ on the weight to be given to each conception. These differences will vary in part with the religious and philosophical outlook that each person brings to the table. It is also true that few individuals will find all religious doctrines or religious practices to be equally compelling. The heart of religious freedom is to provide equal freedom to all religious doctrines regardless of the resonance they have with either popular or informed opinion. The same must be said of religious conceptions. Equal freedom must be extended along each of the three conceptions, regardless of the resonance each of them has with popular or informed opinion, because the alternative is to provide materially unequal treatment.

This pluralist conception—which aims to accommodate all three approaches—need not amount to mere leveling. Little is gained, for example, by a jurisprudential tendency that suppresses the aspirations of personal conscience, *à la Smith*, while nodding to the claims of church autonomy, as in *Martinez*—in the expectation that this will bring the historical pendulum back to the center. If the exercise of both individual and institutional prerogatives is not sufficiently robust, then we cannot conclude that equal religious *freedom*, rather than equal religious *regulation*, has been achieved.

Those who defend a bias in favor of one or the other of these conceptions may respond that equal regard for the three conceptions is unnecessary, because the relationship between each approach and its corresponding religious tradition is quite loose. Martha Nussbaum, for example, has conceded that basing religious freedom on the claims of individual conscience is tantamount to basing it on a peculiarly Protestant set of ideas. She nevertheless argues that this bias is acceptable, because this individualism can also be squared with a host of other traditions, from Greek and Roman Stoicism to certain strands within contemporary

Catholicism.<sup>73</sup> This argument is unsatisfactory, however, because it proves too much. A dominant religion, such as American Protestantism, will inevitably have both historical antecedents and inter-religious influence. Nussbaum's argument would effectively permit establishment of any Protestant dogma that can claim both. The principle of neutrality cannot admit an exception for sectarian dogmas or practices that are embraced by multiple sects—or the exception will swallow the rule. Few encroachments on the Establishment Clause cannot be defended on this logic.

### 3. Conclusion

The persistence of three distinct, overlapping, but sometimes divergent conceptions of religious freedom should not be surprising in a nation that has been home to three very different primary religious traditions. The tendency of most jurists has been to argue for one or another of these conceptions, or perhaps for some hybrid of two of them, in various formulations of differing robustness. Of the three conceptions, the individualist approach has been so dominant, at least during some periods, that some jurists have assumed it to be the sole form that religious freedom might take. In recent years, the venerable institutional approach has made steady headway; its proponents, however, have not necessarily acknowledged that there might be other approaches that could stand together with these two, Christian-inspired conceptions. The peoplehood approach should be recognized as a third, equally compelling conception, with similarly deep roots in American constitutional culture, even if it has not been as clearly identified as the other two. To understand these three conceptions—and the distinct but powerful moral demands that each provides—is to acknowledge that a robust, equitable approach to religious freedom must respond to all of their demands. This implies a pluralist religious freedom, which is equally responsive to the demands of individual conscience, institutional autonomy, and the equality of all peoples.

73 Nussbaum, *Liberty of Conscience* (above n. 3), 58.

# Political Liberalism, Religious Liberty, and Religious Establishment

Richard Arneson

Religion is a trap and a snare for states in the modern world. People fervently believe in religious doctrines, which they take to be central for the guidance of their own lives and pivotal for determining morally appropriate and just laws and public policies. The religious beliefs of members of modern societies tend to be wildly diverse. They conflict with each other in ways that resist sensible compromise. Jesus is either the Son of God, the Savior whose teachings will lead us to eternal salvation, or he is not.

What stance toward religion does a just state maintain? This essay outlines and defends an answer to this question that is associated with the slogan calling for the separation of church and state. The defense consists of knocking down bad defenses and merely gesturing toward a better one. But even if this hint of a defense can be successfully developed, it will only go so far. Toward the end of the essay, an objection is raised that is not susceptible to decisive refutation and that can be properly engaged only by case by case adjudication seeking best policies for current actual circumstances. The issue in play here arises from the consideration that, despite the fact that it would be morally desirable to achieve a certain goal, it does not follow that any attempted movement toward achieving that goal would be morally desirable in any and all circumstances.

## 1. Separation of Church and State

The thought that there should be a wall separating church and state is a slogan that expresses a metaphor, and not one that is self-interpreting. The rough idea is that a wall protects what lies on one of its sides from interference from the other side. The protection looks to be symmetrical; each side is protected from the other. In my view, the important constraint is that the state is obligated to refrain from providing special privileges, power, or subsidies to any church or sect. Were the state to do so, this would be to breach the wall by interfering wrongfully in the religious sphere. To favor one sect is to disfavor others. The separation ideal also prohibits sects and churches from attempting to seek political power for the

purpose of gaining from the state any special privileges, powers, or subsidies. We should construe the idea of gaining privileges as including putting the force of state law behind sectarian doctrines. If the Roman Catholic Church prohibits use of contraceptive devices on religious grounds—for church officials, church members, or others acting on their behalf to seek to put state power behind this prohibition would violate the separation ideal. So would seeking to pressure people toward conforming to religious doctrine by noncoercive means—such as providing tax reductions for those who refrain from contraception. Of course, some religious norms might be thought to be dual in nature, having normative force for us both in virtue of their status as having been commanded by God and also in virtue of their inherent reasonableness. If we set aside claims of divine command and still find that there are compelling independent reasons supporting the claim that contraception is immoral, pointing out these independent compelling reasons in the public square as grounds for legislation against contraception is not any sort of breach in the wall of separation between church and state.<sup>1</sup>

Some sort of generalization of the ideas just stated has to be part of the separation doctrine. Suppose the state enacts laws and policies that promote the recitation and internal endorsement of nondenominational prayers, so anodyne in content that no sect or church will count them as reflections of its doctrines. The prayers are not recognizably Christian or Jewish or Islamic or Buddhist; nor do they match any other particular religious doctrines at all closely. The prayers might simply summon the spiritual forces of good in the universe to give us supernatural aid in our spiritual endeavors. Putting the weight of state power behind such vague prayers should count as a violation of the separation doctrine. Writing to defend the separation of church and state, Robert Audi includes within it what he calls a “neutrality principle” and states in these words: “The state should give no preference to religion (or the religious) *as such*, that is, to institutions or persons simply because they are religious.”<sup>2</sup> I endorse the idea Audi affirms, though the label “neutrality principle” is perhaps misleading. The state is under no obligation to be neutral between religion and science or between religion and core values essential to a flourishing just society. The obligation is one-sided—to refrain from favoring the religious as such over the nonreligious, not to refrain from favoring either the

1 I use the phrase “religion in the public square,” but it can be misleading. Advocates of religious doctrines are at liberty to proselytize for their ideas in the public square. Exercising free speech rights in this way does not run counter to separation of church and state. Advocacy for public policy proposals on religious grounds does run counter to separation as formulated in this essay. Legal rights of freedom of speech protect such advocacy, but the ideal of separation condemns it, and in this limited sense, separation bars religion from the public square.

2 Robert Audi, “The Separation of Church and State and the Obligations of Citizenship,” *Philosophy and Public Affairs* 18 (1989): 259–296.

religious or the nonreligious. This nonneutrality is a core feature of the separation of church and state doctrine and part of the reason it is perennially contentious.<sup>3</sup> Religious advocates who regard the separation doctrine standardly conceived as tending toward state establishment of some vague doctrine antithetical to religion along the lines of secular humanism or modern godlessness have a point. Why we should nonetheless accept a full-blooded separation doctrine despite its failure to be evenhandedly neutral in disputes between religious and other values is a question this essay will eventually address.

The doctrine of the separation of church and state is an ideal of political morality consisting of three claims: (1) The state should not favor (or give any preference to) any church or sect or to any church or sect doctrine; (2) The state should not favor (or give any preference to) religion as such or the religious over nonreligion or the nonreligious; and (3) neither public officials nor ordinary citizens should seek to bring it about that claim 1 or claim 2 is violated. The favoring of religious doctrine that separation rules out is favoring of religious doctrine as such: If a church excoriates racism and celebrates baseball and there are good and sufficient nonreligious reasons to excoriate racism and celebrate baseball, then state policies that entrench nonracism and baseball do not run counter to the separation doctrine and church advocacy of nonracism and baseball is also perfectly consistent with separation (at least if the church advocates recognize that these practices have adequate self-standing support of secular reasons).

## 2. Against the Free Exercise Clause

The separation doctrine I want to defend is a claim of political morality, not one of constitutional interpretation. Indeed many estimable constitutions known to us may run afoul of this claim of political morality.<sup>4</sup> Simply for illustrative

3 But see the final two paragraphs of section eight of this essay. Separation of church and state does not imply support for persecution of religion.

4 Article 18 of the International Covenant on Civil and Political Rights, adopted by the United Nations in 1966, and signed by 166 countries as of 2010, reads in part:

1. Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others, and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.



purposes, and not because this particular constitution has special transcendent merit, I single out the U.S. Constitution.<sup>5</sup> The First Amendment to this Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” There are two requirements here, one relating to establishment and one to free exercise. There should be no quarrel with the first. It says that the state ought not to give a privileged place in society to any church or sect by special subsidy of its practices, endorsement of its doctrines, or incorporation of its rituals or practices in official state functions. Nor should the state make any particular church or sect an agency of the state. Nor should the state by its laws and public policies favor one church or sect over others. Nor should the state favor religion as such or religious people as such over nonreligion and the nonreligious. These claims constitute the core of what I am calling “separation of church and state.”

The Free Exercise clause, in contrast, is problematic and on one natural interpretation objectionable. I take it that the idea of refraining from prohibiting the free exercise of religion goes beyond protecting citizens in their rights of freedom of speech and assembly. These rights give strong legal protection to religious believers, as well as others, to freedom to speak when they are addressing a (willing, uncoerced) broad audience on some matter of public affairs, broadly construed to include any issue that concerns how we should live.<sup>6</sup> This also includes rights to assemble with like minded others for the purpose of refining one’s beliefs, reinforcing them by ceremony and ritual, organizing to proselytize others, and advancing one’s beliefs by public action, and so on. They protect the rights of the religiously inclined to speak, assemble, organize, and engage in ceremony and ritual just as they protect the similar rights of the nonreligious.<sup>7</sup> So the free exercise of religion is evidently intended to go beyond these other basic freedoms. The idea is roughly that one is free to exercise one’s religion when the following is true: one has the opportunity to live according to the dictates of one’s

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Cited from Michael J. Perry, “From Religious Freedom to Moral Freedom,” *San Diego Law Review* 47 (2010): 993.

- 5 For a vigorous defense of the religion clauses of the U.S. Constitution and “America’s tradition of religious equality,” see Martha C. Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (New York: Basic Books, 2008).
- 6 The formulation in the text is not fully apt. Freedom of speech includes the right (for example) to pass out leaflets that one knows no one will take and read. The right does not include an entitlement to force speech on unwilling listeners, but nor is it conditional on having a willing audience. Nor need one be intending to communicate ideas that add to public debate; one might simply intend to bear witness, as when many speakers parade before a microphone and say “I agree” at a protest rally.
- 7 So the freedom to worship should count as an aspect of freedom of speech and assembly.

chosen religion without interference of government or law up to some point.<sup>8</sup> What point? Views differ. Most would probably say that a law wrongfully burdens the free exercise of one's religion if the law either fails to serve a legitimate state purpose or does serve such a purpose but in a way that poses an excessive cost on the religiously burdened—a cost that is disproportionate to the gains the law, as framed, provides in the terms of this legitimate purpose. Details aside, the idea is that there is a special presumption of unconstitutionality that attaches to a law that limits people's liberty or imposes burdens on people when it impinges on people's religious concerns as compared to other sorts of concerns they might have. This tilting in favor of religion is wrong and amounts to a type of wrongful discrimination.<sup>9</sup>

To see the problem, consider a law that forbids ingesting peyote or similar psychedelic drugs.<sup>10</sup> Now imagine three different groups of persons who find their significant projects hindered by this law. One group consists of adherents of a religious group whose traditional sacred rituals give an important place to the ingestion of peyote or some other psychedelic. Another group consists of persons who feel themselves bound in conscience to carry out work to save the environment from human degradation. Their practice, central to their organizing momentum, is to gather weekly and ingest peyote and contemplate the Earth's precarious richness and gird themselves for the fight to save the environment. A third group of people surfs in the ocean for fun and pleasure. They gather together to surf, and engage in a pre-surf ritual involving ingestion of peyote, which turns what would have been a joyous activity into a sublime experience of unsurpassed excellence and merit. All three groups could alter their practices to bring them into conformity with legal requirements, but at some considerable cost. My complaint is that, on its face, the Free Exercise clause of the First Amendment tilts in favor of the first group. If we follow some legal theorists and Supreme Court decisions and stretch the constitutional protection of the free exercise of religion so that it protects a broader category of individual action, motivated and compelled by conscientious moral belief, then the discrepancy in legal treatment that the Free Exercise clause mandates is between groups one and two on the one side and

8 This is a rough characterization. You do not enjoy freedom to exercise your religion if the state scrupulously leaves you alone but fails to protect you when mobs ransack and burn your synagogue, mosque, or church or harass you while you are carrying out religious rituals or other functions.

9 See Richard Arneson, "Against Freedom of Conscience," *San Diego Law Review* 47 (2010): 1015–1040.

10 The example in the text differs from, but is inspired by, the facts of *Employment Division v. Smith*, 494 U.S. 872 (1990).

group three on the other. Whether one interprets the free exercise ideal narrowly or broadly, either way it mandates wrongful discrimination.

### 3. Accommodation

Rejecting the claim that there is a special moral mandate to accommodate religious practice does not gainsay the value of seeking to accommodate those individuals who would be specially burdened by requiring them to conform to otherwise acceptable state law. Law is a blunt instrument of social control. Laws should be formulated in terms that are simple and easy to administer. A good law does not try to register in its formulation all of the subtle niceties and complexities that might arise in its application in varying circumstances. Hence a law can bear down very heavily on some individuals to little or no purpose. The law demands that they bear sacrifices that are disproportionate to any gains their compliance might bring about for other citizens. In some situations there is no sensible way to alleviate their burden, but in other cases, there is. A law can be rewritten to restrict its scope, or an informal practice may exempt some from strict conformity, or various levels of discretion in the enforcement of law may be deployed to good purpose.

A law might mandate that all individuals residing in a territory shall be vaccinated to reduce the incidence of some dread disease. The risk of harm from vaccination is small and the expected gains for the public are great. Nonetheless there may be a subgroup of the population that bears far greater than average risk of adverse medical consequences from being vaccinated. Since the public health gains from vaccination diminish hardly at all if a group as small as this subgroup does not participate in the program, and given that being vaccinated imposes a special burden of risk on members of the subgroup and not others, any reasonable and morally sensitive cost and benefit calculation yields the judgment that the members of the subgroup should not be legally required to obtain this vaccination. In these circumstances the state should accommodate the members of the subgroup by exempting them from the general legal requirement to submit to this vaccination treatment.

Accommodation can occur in many ways by adjustment of any of several elements of the enforcement mechanism. There might be a good case for incorporating some form of accommodation provision in a constitution that sets judicially enforced limits to what legislatures and government officials may permissibly do. I take no stand on this issue.

The standard that determines whether an individual claim for an accommodation should be granted involves balancing the extent to which the person (along with others for whose sake that person wishes to act) would be made worse off if he or she is required to conform to the requirements of some law that

applies to him or her, versus how badly off others would be made if that person were not required to conform. Exactly what the standard should be is beyond the purview of this essay. For our purposes it is necessary only to note that the coin of the realm here is well-being or welfare gains and losses.<sup>11</sup> The notion of welfare in play here can be variously construed; but the sheer fact that my conscience tells me not to do X does not mean that I suffer any sort of burden if the law imposes penalties on me for not doing X. What holds of conscientious judgment in general, a fortiori holds for religiously based conscientious judgment. The sheer fact that God tells me not to do X does not establish any sort of prima facie case that I should be excused from the legal burden of a statutory requirement that requires me to do X.

Far from there being a general moral presumption in favor of bending the laws as far as is possible to encourage each person to live according to her conscientious beliefs about what is good and right without suffering legal punishment as a consequence, there is, in fact, a general moral presumption against such generalized accommodation of conscientious belief. In modern societies there is wide and deep pluralism of belief: citizens disagree about what we owe one another and about what constitutes a worthwhile human life. We are all made better off, up to a point, by our own individual lights if a set of rules is adopted and, coercively enforced, elicits general voluntary acceptance—even though many of the rules taken one by one are obnoxious to many citizens. In these circumstances, there is room for a cooperative practice whereby I obey rules that offend my conscience in some domain, while others obey rules that offend their individual consciences in other domains. The overall result may be that the situation of general rule-following is superior from each of our conscientious standpoints than the situation that would result if none of us deferred to others' opposed conscientious judgments. When such a cooperative practice is in effect, others are disposed, up to some threshold point, to obey laws even though they are obnoxious to their conscience. When this is the case, there is then a general fair play obligation that falls on me to reciprocate and dispose myself to follow laws that offend my conscience, up to a point, and to act on this disposition.

Another constraint on measuring the special burdens that obedience to laws imposes on particular groups is that the gains and losses that are advanced as constituting a burden must be measurable and checkable by generally acceptable procedures. The magnitude of a claimed burden cannot rely on supernatural claims, as when I might claim that the gods will be angry and rain ruin on my clan if the mountain sacred to members of my faith is disturbed. Government

11 Well-being can accrue to an individual from an action that is not narrowly self-interested, such as an act aimed at benefiting close family members or an act that furthers altruistic endeavors that have become one's important life projects.

agencies and officials ought not to be in the business of verifying such claims; accepting them at face value for the purpose of determining someone's burden status is unthinkable. This is an aspect of the norm of the separation of church and state. Here and elsewhere state agents ought not to be called on to interpret and substantiate particular theological claims in order to determine what their legal duties are and how they ought to proceed in order to fulfill their assigned roles.

The reasonable position here is not that a government should never be required to modify its legal policies, or suspend their enforcement, in order to accommodate religious believers who are specially burdened by the requirement of conformity to the law in question. The claim, rather, is that the accommodation norm should not be formulated so that it protects religious practices or practices similar to religion as such. The burdens that merit accommodation are costs to people's well-being that compliance with the law would impose on them, and that are disproportionate to the advantage to society that the imposition of the law achieves. That compliance with law—which would prevent people from complying with their religious convictions or conscientious judgment about what they ought to do—is not necessarily a disadvantage at all, and certainly not a disadvantage of a type that trumps all others.

A final note: whether a particular accommodation of some class of persons is fair should be assessed not by peering at the particular law in question, but by looking at the entire set of laws and accommodations in force. An accommodation that, in isolation, looks like an unwarranted privilege for one group might seem fair when seen against the wider background of accommodations provided to other groups in other contexts.

## 4. Eisgruber and Sager on Accommodation and Equal Liberty

The separation doctrine described here may be compared to the views on accommodation of religion developed by Christopher L. Eisgruber and Lawrence G. Sager.<sup>12</sup> They find the separation of church and state metaphor unhelpful, but their reasons do not conflict with anything I would want to claim. They frame their position as an interpretation of the Establishment and Free Exercise clauses,

12 Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007). They are offering an interpretation of the U.S. Constitution, not defending claims of political morality. For criticism of Eisgruber and Sager from the standpoint that this Constitution does treat religion as unique and special—and reasonably so—disfavoring it in some ways and favoring it in others, see Kent Greenawalt, *Establishment and Fairness*, vol. 2, *Religion and the Constitution* (Princeton and Oxford: Princeton University Press, 2008), ch. 21.

but they aim to construe the Free Exercise doctrine so it does not require, and in fact disallows, special legal privilege for religion. Take zoning law restrictions in their bearing on church endeavors as a canonical example of their view. If a zoning law forbids certain activities and uses of property in a neighborhood, a claim that one ought legally to be exempt from the requirement to conform to the zoning ordinance should not acquire greater moral weight or gain support from the Free Exercise clause of the Constitution just because the claimant is a church or a set of religious believers engaged in religious activity. So they say, and this essay's separation doctrine agrees.

Eisgruber and Sager hold that the core of constitutionally protected religious liberty is a nondiscrimination norm. This is one part of a three-part norm that they call "Equal Liberty." They write that "it insists in the name of equality that no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects."<sup>13</sup> The other two elements in Equal Liberty are the denial that the Constitution mandates special favoring of religion or religious claims and the broad affirmation of general constitutional guarantees of "free speech, personal autonomy, associative freedom, and private property."<sup>14</sup>

I agree that, for example, a law that prohibits animal sacrifice in a gerrymandered way—where it is clearly aimed not at fostering animal welfare but specifically at banning the rituals of the Santeria religion—wrongfully discriminates against persons on the basis of their religious commitments. But I suspect a norm against any devaluing of persons on account of the spiritual foundations of their important commitments is overly protective. The state ought to refrain from acts that insult any persons. Each person has a dignity that commands respect. This applies to racists, to convicted serial murderers, and to everyone else. In pursuing legitimate secular objectives, however, a state may legitimately do what has the effect of—at least implicitly—leveling harsh criticism against the defective spiritual foundations of people's important commitments. Consider the teaching of evolution in school biology classes. Eisgruber and Sager agree that evolution should be taught, and that laws that impede its teaching, or muddy the water by requiring the teaching of religion-based alternatives to scientific ideas—such as creation science and intelligent design—would be wrongful establishment of religion. The schools should help students learn science as we best currently understand it. So far so good. But Eisgruber and Sager suppose that it would be consistent with their Equal Liberty construal of the religion clauses of the Constitution if the law were to require that

13 Eisgruber and Sager, *Religious Freedom* (above n. 12), 52.

14 *Ibid.*, 53.

high school biology teachers issue a disclaimer along these lines to their students: “Science is science and religious faith is religious faith. Nothing we are going to say about the scientific evidence and theory should be taken to be a commentary on the value or validity of anyone’s religious commitments.”<sup>15</sup>

I do not dispute that Eisgruber and Sager might be right in their interpretation of what the U.S. Constitution permits. But the law they envisage violates the separation of church and state, as construed in this essay, and illustrates why “no devaluing” is overly protective. Religious doctrines make empirical claims, and claims about proper methods for discovering empirical truth, that are straightforwardly in conflict with scientific understanding. Religious doctrines also make claims about what is morally right, and claims about proper methods for discovering moral truths (such as, look in the sacred book), that are straightforwardly in conflict with secular moral understanding. (I don’t claim our moral understanding is very developed; “moral science” is in a primitive stage. But the point just made still holds.<sup>16</sup>) So a legal requirement that teachers say “that science is science and religion is religion and the one is not in conflict with the other” is requiring teachers to announce a false, vague religious ideology. In fact, a well taught high school biology class should provide competent students whose parents espouse fundamentalist Christian doctrine and a literal belief in Genesis with all the premises they need to draw the conclusion that their parents’ religious beliefs about biology are hokum. It would be wrongfully insulting for the biology teacher to call attention in class to this conclusion he has enabled his student to draw; that would be gratuitously insulting. But the good biology teacher devalues some individuals on account of the spiritual foundations of their important commitments and projects. Although this further claim would be more controversial, I would say much the same if the state sought to teach ethical and moral reasoning in schools. How should we go about reasoning about what is right and good, what is worthy of pursuit and what we owe to one another? This is a good topic for school. Sensible answers to it conflict with many people’s sincere and deep religious convictions, according to which the answers are to be found in the revelations of a sacred book. There is genuine conflict between ethics and religion just as there is genuine conflict between science and religion.

15 Ibid., 195.

16 For a sophisticated discussion of the fundamentals of ethics from a theistic standpoint, see Robert Adams, *Finite and Infinite Goods* (New York and Oxford: Oxford University Press, 1999). Adams sees religious truths as the uniquely rational basis for reasonable ethical norms and imperatives.

## 5. Separation and Rawlsian Political Liberalism

The claims made so far in this essay amount to no more than an interpretation of the ideal of separation of church and state. In advancing this interpretation I make no claim to originality; the idea is a familiar one. The question naturally arises: why should anyone accept this doctrine so interpreted? One might appeal to an underlying ideal of a democratic society governed by laws enacted by majority rule processes, in which all citizens have equal voting power, and against a background of broad freedom of speech on public affairs. However, one can picture a fully and continuously democratic society that steadily violates the separation of church and state ideal by procedurally proper democratic vote.

A very tempting answer appeals to the doctrine of political liberalism, as articulated in the later philosophical writings of John Rawls, and to associated ideals of state neutrality. Consider Rawls' liberal principle of legitimacy: "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason." Rawls adds: "all questions arising in the legislature that concern or border on constitutional essentials, or basic questions of justice, should also be settled, so far as is possible, by principles and ideals that can be similarly endorsed."<sup>17</sup> This seems to leave it open that public policies and laws not involving basic questions of justice might be legitimate—even if not justifiable according to principles acceptable to all—provided the procedures by which the laws and policies are established accord with a constitution acceptable to all. From a certain angle, the restriction looks odd. Matters of nonbasic justice are still matters of justice. Even if a policy is enacted via a fair procedure, this fact always seems to leave open the question whether the substance of the policy is fair.

If we extend the liberal legitimacy norm so that it applies to all laws and public policies, and not only to the presumably more restricted domain of basic justice and constitutional essentials, we have the basis for a strong separation of church and state doctrine in the form of a requirement of public reason: legislators should only support proposed laws that are fully justified by appeal to reasons we can share, reasons whose reason-giving force is independent of any controversial conceptions of the good or of what we owe to one another. Public officials should establish only policies that are likewise justifiable in this neutral way. Religious

17 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 137. See also John Rawls, "The Idea of Public Reason Revisited," repr. in Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).



views are always controversial conceptions, so the laws and public policies will be fully justifiable independently of any religious doctrines. Moreover, the water flows back: citizens in their role as voters casting ballots that play a role in determining the content of laws and public policies should vote only in ways that are fully justifiable in terms of reasons we can share, reasons of right and good that none can reasonably reject.

This looks to be separation of church and state with a vengeance. In present public culture there is no norm against voting on the basis of one's conscientious convictions—no matter what their source. Religious convictions are thought to be a perfectly respectable, and, indeed, an especially admirable basis for voting one way rather than another. Nevertheless, the public reason requirement rules out as illegitimate voting on the basis of religious beliefs. Any such belief would be sectarian if proposed as the shared justification for public policies. The reasons we can share thus immediately shrink to secular reasons, and, indeed, only to a small subset of these: the secular reasons that are sufficiently uncontroversial that no one, whatever his comprehensive beliefs, could reasonably reject.

Rawls associates the liberal legitimacy norm with a neutrality ideal: state laws and policies should be justifiable without appeal to controversial ethical doctrines, and state laws and policies should not aim to promote some controversial ethical conceptions or their adherents over other conceptions or their adherents. Rawls states this last idea, which he calls “neutrality of aim,” as follows: “that the state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it.”<sup>18</sup>

Political liberalism is a response to the problem of how there could be shared agreement on principles that regulate the conduct of public affairs in a diverse society in which there is stable disagreement on the nature of the good life (that is to say, what goals are worthy of pursuit) and on the nature of the right (what we owe to one another). If we disagree on fundamentals, it might seem as though there could be, at most, strategic alignment for mutual advantage. The idea of political liberalism is that there might be logical space for principled agreement despite ultimate disagreements. The principles that are to regulate common affairs might be the object of consensus from opposed standpoints. Atheists might reason from “There is no God” to the conclusion that there is no point to persecution, so toleration is acceptable; while if theists start with “There is a God” and add that

18 Rawls, *Political Liberalism* (above n. 17), 193. In Rawls's terminology, a “comprehensive doctrine” is one that aims to provide an encompassing world view that tells us how to live, what we owe others, what aims are valuable and worthy of pursuit, and what is the place of individuals in the cosmos. He opines that each distinct religion or sect typically espouses a particular comprehensive doctrine in this sense.

God seeks willing assent, not coerced assent, they conclude that persecution is wrong and toleration is acceptable.

There is no guarantee that a substantial doctrine suitable for the regulation of society can be the object of this sort of overlapping consensus; but there is no guarantee that the project must fail. If it succeeds we have established the possibility of reasonable people disagreeing down to the roots in their worldviews and ideologies, yet agreeing on the basic terms of their cooperation and resolving to impose on each other only on terms none can reasonably reject from their own standpoint. Each agrees, on principle, not to force his worldview on the others without relinquishing his firm adherence and commitment to his particular view, the one that he believes to be true. (Won't some reasonable standpoints judge that ensuring that their particular view prevails, if that can be arranged, is better from their standpoint than agreeing to renounce forced imposition on those who conscientiously disagree? In this project we stipulate that one who is willing to impose his views coercively on those who reasonably reject them is being unreasonable, and we seek a consensus among the reasonable.)

## 6. Political Liberalism Does Not Support Separation of Church and State

Nothing said so far indicates exactly how and why the political liberalism doctrine supports separation of church and state as formulated in this essay. At most, the relationship between the doctrines appears to be one of vague affinity. Can more be said?

Rawls associates his proposed liberal legitimacy norm with closely related ideals of neutrality of aim and neutrality of justification. Here is a statement of the two ideas:

- (1) Neutrality of aim requires that no action or policy pursued by the state should aim to promote some controversial ways of life or conceptions of the good over others.
- (2) Neutrality of justification requires that any policies pursued by the state should be justified independently of any appeal to the supposed superiority of some ways of life or conceptions of the good over others.

If we add the premise that state action that favors one church or sect over others, or favors the religious as such, always aims to promote one controversial way of life or conception of the good over another, then we can conclude that neutrality of aim would be violated by any state action that violates the separation doctrine. Political liberalism requires that citizens refrain from seeking to use state power in ways that would violate neutrality, so political liberalism would then require that citizens refrain from seeking to bring about state action that would violate

(principles 1 and 2 of) the separation doctrine. Moreover, any state action that is justifiable, if at all, only by appeal to some controversial religious claim will violate the neutrality of justification, inasmuch as such state actions and striving by citizens to bring about such state actions will straightforwardly violate the separation doctrine as well.

If the seemingly divisive and controversial separation doctrine can be brought under the rubric of political liberalism in this way, then a path opens up whereby one can picture religious and nonreligious citizens coexisting in genuine harmony. From the standpoint of all reasonable significant convictions about how to live, including religious convictions, the exclusion of religion from the public square appears sensible and right. Separation, in this perspective, need not be a sectarian doctrine imposed on an array of religious adherents.

Trouble awaits. The problem is that neutrality of aim is not actually an entailment of the political liberalism doctrine. Hence, one can consistently affirm political liberalism and deny neutrality of aim and then further deny the separation doctrine.

A stylized example can serve to illustrate the problem. Suppose that social science research shows that churchgoing and religious sect affiliation reduce the incidence of criminal conduct. The state responds by enacting laws that promote churchgoing and religious sect affiliation in order to reduce crime. Suppose that these laws significantly reduce crime and no alternative laws would do better to reduce crime. So it might be the case that there is a cogent, compelling neutral justification for the laws, even though they involve the state in promoting some controversial ways of life or conception of the good over others—religious lifestyles are being promoted over nonreligious lifestyles. One might imagine a further case, in which social science shows that not just any sect affiliation is equally beneficial in promoting abstinence from crime. Buddhism and fundamentalist Christianity, it turns out, score high in producing law abiding citizens; other religions and sects score lower. On this basis the state promotes not only churchgoing over non-churchgoing ways of life, but, more specifically, some sect affiliations over others. I assume that if the crime problem is severe and otherwise intractable, a wide array of sensible moral arguments will converge in justifying the promotion of some controversial ways of life and conceptions of how to live (namely, religious ones), over others. But in this imagined scenario, political liberalism, identified here with the liberal legitimacy norm, can be satisfied even though neutrality of aim is not. The state that promotes sect adherence to bring about a tolerable level of safety and public order is promoting some controversial ways of life over others (and so violating neutrality of aim); but nothing rules out the possibility that this violation of neutrality of aim is justifiable by appeal to principles that should attract the allegiance of all reasonable points of view in a diverse society. Violation of neutrality of aim can

be justifiable in the terms of principles that none can reasonably reject. (Although there is clearly a tradeoff of values here, and different and sensible views, which qualify as reasonable according to the political liberalism standard, will assign greater or lesser weight to public safety as against other values with which it might conflict, I suppose that there is a level of public safety and an amount of gain in public safety that can be achieved by promoting religion, a level and amount at which the promotion of state actions will be acceptable under the liberal legitimacy norm.)

## 7. Rawlsian Political Liberalism is Unacceptable

In the previous section I have denied that one who accepts political liberalism as formulated here is necessarily committed to accepting separation of church and state. Maybe this result is not so damaging. Perhaps, contingent truths that hold pervasively in the modern world rule out the scenarios in which one can consistently follow political liberalism but violate separation. Maybe so, maybe not. However, there is worse to come.

Despite its elegance and appealing simplicity, the political liberalism doctrine and the norm of neutrality of justification that is allied with it are vulnerable to simple objections that are hard to overcome. So whatever support these doctrines might give to the doctrine of separation of church and state is weightless, because the doctrines themselves do not withstand critical scrutiny.

To see the problem, consider the simple formulation that government actions and policies are morally illegitimate unless they are justifiable by appeal to principles that none could reasonably reject. What would render one's justification of a proposed principle *beyond reasonable rejection*? A reasonable person, let us vaguely stipulate, is one who is responsive to reasons, able to discern reasons, and assess their strength. Reasonableness evidently admits of degrees. But there is immediately a dilemma for the political liberalism doctrine: if one stipulates that a reasonable person is one who is fully responsive to reasons, always discerns the reasons there are, assesses them correctly, and makes no cognitive or other errors in his practical reasoning, then liberal legitimacy ceases to be an independent requirement. The norm just says that state actions and policies are morally legitimate just in case they are best supported by the reasons there are. If, on the other hand, one relaxes the requirements of reasonableness, so one can count as a reasonable person even if one's beliefs and judgments are mistaken and rest on cognitive errors in one's attempts to discern and assess the reasons—then it is no longer plausible to maintain that it is wrong for the state to impose policies on individuals that those individuals could (in the relaxed sense) reasonably reject. Why would it be wrong or morally illegitimate for the state to impose policies on me just in virtue of the fact that I object to them on moral grounds, if the basis of

my rejection is some cognitive error—such as adding up two and two and getting five as the answer?

A version of the same problem afflicts the idea of “controversial” conception of good in the liberal neutrality doctrines. It will not do to say that a doctrine is controversial just in case someone actually controverts it and finds it objectionable. The ideas that friendship is a great good in human life, and that forming and sustaining friendship are worthwhile endeavors, are not rendered controversial just by virtue of the fact that some eccentric thinks friendship is worthless. On the other side, even if all members of society are deluded into uncritical acceptance of some oddball cult belief, the sheer fact that no one objects to it does not render the cult belief uncontroversial in the relevant sense. The issue is normative not descriptive. A doctrine of how to live and what goals in life are worth seeking is controversial if there is good reason to object to it (whether or not anyone actually objects). But then a question arises regarding how to understand neutrality of justification.

Consider the idea that nonheterosexual sex, sexual activity between individuals of the same sex, can be good and worthwhile, on a par with heterosexual sex. This is a controversial notion in that there are some points that can be raised against it. Some versions of natural law doctrine, such as those promulgated by John Finnis and Germain Grisez, raise points against same-sex sex that have some merit.<sup>19</sup> Nonetheless, I would hold that, all things considered, the idea that same-sex is valuable and on par with heterosexual sex is normatively uncontroversial—after careful scrutiny, no fully rational and reasonable person unencumbered by sheer prejudice or religious dogma would reject it. In other words, neutrality of justification either becomes trivial or unreasonable. It becomes trivial if it incorporates a maximally strong normative notion of uncontroversiality, in which case neutrality only requires that state policies should be justifiable, supported by best reasons (so far as these can be discerned from our present-day epistemic perspective). It becomes unreasonable if it incorporates some weaker notion of uncontroversiality, in which case neutrality of justification rules out establishing and maintaining state policies that are, according to our best lights, correct, best supported by the reasons there are, just because some people do or might object to the policies on somewhat reasonable but not, all things considered, reasonable grounds.

Another way to see that the political liberalism ideal is defective is to note that the ideal it upholds—of fully rational and reasonable people disagreeing on morals and ethics while agreeing on a common conception of justice to regulate

19 John Finnis, “Marriage as a Basic and Exigent Good,” *The Monist* 91 (2008): 396–414; also Finnis, *Natural Law and Natural Rights* (New York and Oxford: Oxford University Press, 1980); Germain Grisez and Russell Shaw, *Beyond the New Morality: The Responsibilities of Freedom*, rev. ed. (Notre Dame: Notre Dame University Press, 1980).

their affairs—is incoherent. Consider the simplest example: a two-person society in which one member bears allegiance to Roman Catholicism and another to Lutheran Protestantism. The political liberalism ideal envisages each affirming the rationality and reasonableness of the other, each affirming a comprehensive ethical view that is contrary to the view of the others, and both affirming from opposed perspectives common principles of justice. The unstable position here is that I (suppose I am the Roman Catholic) am supposed to believe that there are private reasons that suffice to single out Catholicism as the uniquely rational doctrine I should follow; yet, since I recognize that you (the Protestant) rationally disagree, I recognize, and you recognize as well, that the public reasons we share exclude the genuine private reasons each of us separately affirms. This idea of a private reason, however, makes no sense. What is sauce for the goose is sauce for the gander; a reason for me is a reason for you if you and I are in relevantly similar circumstances. Since we share a common public culture with freedom of inquiry, we share the same epistemic vantage point. The reasons I have for believing Catholicism are available to you and your reasons for affirming Lutheranism are available to me. But if my reasons outweigh yours, they do so for you as well; and if your reasons outweigh mine, they do so for me as well. There is no stable epistemic common ground, standing on which we rationally agree to disagree. If the reasons I can advance in favor of Catholic doctrine are counterbalanced by reasons you can offer, there is an epistemic stalemate; that too should be a conclusion we both share if we are both fully reasonable and rational. If you weight some reasons more highly than I do, and there is no decisive reason in favor of your weighting of reasons rather than mine, again the stable position we should reach is not your believing Lutheranism and my believing Catholicism, but both of us believing that there is no decisive reason to affirm either doctrine and, so far as we know, either doctrine could be true, or perhaps some third alternative not yet explored.

Of course, in the world as we know it, people do stably affirm contrary doctrines; this, however, simply reflects the fact that we have limited cognitive powers and are only imperfectly rational. This means that in the actual world, state policies might impose on me against my considered conscientious beliefs, yet the state policy might be correct, best supported by reasons, and my opposed position might simply be wrong (the opposite can occur as well, state policies are often horribly wrong-headed). This means that the liberal legitimacy norm should be rejected, if it is formulated with a relaxed notion of reasonableness, so that people can be reasonable even though making mistakes and affirming, even consistently over time, beliefs unsupported by available evidence.

It is not wrongfully disrespectful or morally illegitimate, *per se*, to impose state policy on me—even a coercive state policy, for that matter—when the policy is justified and my opposition is unjustified. As a partly rational agent, I have a

nonrevocable commitment to following reasons and being ruled by reasons; so when other people or the state coerce me to follow the path of reason, when, left free, I would wander onto another path, the coercion is in accord with my deeper rational will.<sup>20</sup> Example: Suppose I am a conscientious racist. It is not merely the case that a racist ideology strikes me as correct, it is also true that I have conscientiously thought hard and long and tried as best I can to discover what is practically reasonable in this domain. I just get it wrong. The state law that requires me to refrain from wrongful racial discrimination can be a morally acceptable law; a substantive political liberalism doctrine that leaves room for its being morally illegitimate to put state power behind principles that some citizens “reasonably” reject should itself be rejected. The same goes for any other conscientious belief I hold that falls short of what accords with political morality (as best we can discern it from the present day epistemic perspective).

## 8. Toward an Alternative Argument Supporting Separation of Church and State

By now, the separation doctrine appears to be thoroughly undermined, lacking in support. The argument to this point has challenged the idea that one can rule out as inappropriate or illegitimate a proposed justification for state action on

20 There are different types of cases in which the will imputed to me might be different from what is, in the ordinary sense, my actual will. In one case, I want to act on the best reasons that apply and try to identify them. If I misidentify the best reasons, my real will, in a sense, is to act on what really are the relevant reasons—not what I am taking to be that. In another type of case, I might make no effort to identify the best reasons that are relevant to my choice of action and might even make efforts to avoid recognizing them (perhaps I have an inchoate suspicion that the reasons would point me toward an action I would dislike doing). Here I might entirely lack any motivation to seek to identify the course of action that reasons support and do that. Nonetheless, possessing rational agency capacity, I have some ability to recognize reasons; and reasons are only considerations that fix what ought to be done. Insofar as I am rational, I must will to believe what is true and act in accordance with the reasons there are. Since my actual empirical motivations might entirely repudiate this latent rational will, it might seem implausible to impute such a will to me at all. But if I am repudiating rule by reasons, if my will is, at the bottom line, to live according to what I now subjectively take to be right—whether or not there is any backing for my current subjective feeling—it does not seem a wrongful violation of my autonomy to issue coercive threats to seek to induce me to conform my conduct to the requirements of just law. The same goes if my repudiation of rule by reasons is only partial; my rejection of the principles that justify the law that is being imposed on me has some rational backing, and would not be affirmed by me if this were not true. I am indifferent to the further career of reasons and reasoning beyond this threshold level of reasonableness.

the mere ground that it is controversial. What is controversial might nonetheless be objectively correct. More to the point, a controversial proposal, subject to plausible objections and replies, might still at the end of the day—all things considered from the standpoint of the practical reasons available to us—be the proposal that is most likely to be true, singled out as best by the reasons we have. Basing state actions on moral principles that are best, in this sense, coupled with our best understanding of what are the relevant empirical facts—the relevant facts being those singled out as relevant by the best principles—does not involve any wrongful imposition on dissenters, even conscientious dissenters.

But nothing in any of this rules out the possibility that religious claims and doctrines might figure in the best available reasons. The sheer fact that the doctrines of the religious sect I embrace are rejected by rival sects and by most members of the society I inhabit does not rule out the possibility that sound ethical imperatives are constituted by divine commands and that these divine commands are uniquely captured in the doctrines of my sect. So, nothing rules out appealing to religious claims as a basis for state policy.

Any such claim is subject to public appraisal and assessment. The question becomes whether one's claims, be they religious, secular, or something else altogether, are defensible in the forum of practical reason and stand out from the pack of competing claims as better backed by reasons.

Here the case for secular establishment begins. In this essay I cannot touch on this case or even begin a light sketch of arguments that need to be made in convincing detail. I simply want to indicate the character of the argument that needs to be made in order to sustain a claim that the basic political and social arrangements of one's society are tolerably just. For example, suppose the laws permit a pregnant woman to secure an abortion. This abortion regime is just if, and only if, the claim that a pregnant woman has a moral right to secure an abortion is really correct; and the regime is morally legitimate if, and only if, so far as we can tell from the best epistemic position we can reach, the claim that a pregnant woman has the moral right to secure an abortion is correct (just ignore the further complication, irrelevant here, that there is some gap between what is morally the case and what bits of morality should be enforced by law).

The next step is simply to observe that the building blocks for good arguments concerning what is morally right and just are of two sorts: (1) evaluative and specifically moral claims and (2) empirical claims about what are the facts about the natural universe and about what causes what in the natural universe. Religious doctrines affirming supernatural claims as a basis for how we should live are irrelevant and unhelpful in discovering sensible claims of types one and two.

This is not a matter of conceptual or logical necessity. In principle, for example, the existence of an all-powerful God who rules the universe with infinite kindness might affect what we ought to believe about what the world is like and



how we should comport ourselves within it. But the arguments for the existence of such a God, or for any religious claim that would have comparable significance, are spectacularly weak and unequivocally merit rejection.

(To avoid misunderstanding, I should emphasize that for purposes of this essay this claim is simply an assumption, and one for which I provide no shred of argument. The relevant arguments are complicated, and well beyond the scope of this essay.<sup>21</sup> Someone who disagrees and thinks there is good evidence for religious claims is welcome to take my argument as an argument against separation of church and state.)

The only plausible basis for empirical claims is the evidence of observation, as refined in common-sense theories of evidence and justification and as further refined in the complex and ongoing development of scientific methodology. The only plausible evidence for ethical claims is intuitive judgment made in a cool hour and adjusted and corrected by the demand that one's judgments, overall, should form a consistent and coherent set. Particular judgments—such as that Sally ought to get the prize on offer here and now—are made true by being derivable from true general claims, along with premises asserting the relevant empirical facts and general claims are rendered plausible and shown likely to be true by their power to explain and justify the particular judgments that remain intuitively plausible after extended critical reflection. At any given time, one's set of ethical beliefs may be vitiated by inconsistency or by their being formed by processes involving cognitive error. Ethical truth is what would be affirmed in a “reflective equilibrium” between particular and general beliefs emerging from ideally extended ideal critical scrutiny.<sup>22</sup> Premises appealing to God's wishes, God's will, God's commands, and the like do not figure in the bases for either rational empirical or rational ethical beliefs. Making progress toward ideal reflective equilibrium in ethics is likely a collective project of humanity extending through history.

The above is a mouthful, but even swallowing and accepting all of it would not yet suffice to justify the doctrine of separation of church and state. The points just made concern the epistemic defects in religious doctrines, regarded as paths to the empirical and ethical truths needed to guide our lives and regulate state policies. However, there are grounds for favoring religion and the religious as

21 The relevant arguments are in philosophy of religion. For an accessible introduction written from an atheistic standpoint, see J. L. Mackie, *The Miracle of Theism: Arguments For and Against the Existence of God* (Oxford: Oxford University Press, 1982).

22 The “reflective equilibrium” idea is from John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 40–46. See also Norman Daniels, “Wide Reflective Equilibrium and Moral Theory,” repr. in Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice* (Cambridge: Cambridge University Press, 1996); also T. M. Scanlon, “Rawls on Justification,” in *A Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003).

such, and perhaps grounds for favoring some churches and sects over others, that are unaffected by these epistemic defects—on the assumption that they are genuine defects as here postulated. Consider the plausible claim that religions and churches by and large tend to channel their followers toward adherence to decent values including honesty, prudence, social solidarity, nonmalfeasance, trustworthiness, and broadly extended charity. Consider also the plausible claim that affiliation to churches tends to be an important source of uncontroversial goods in life for many people. From religious involvement people gain community, regular friendly social contact, friendship, and much else. To the extent that careful investigation clarifies and supports these claims, they generate arguments for favoring religion and churches in violation of separation of church and state.

The argument would not be that in pursuing legitimate secular objectives the state might permissibly act in ways that, as a side effect, generate advantages for religion and churches, as when providing school tuition vouchers to parents (in response to the duty of the public to ensure adequate education for all children and the right of parents to raise their children as they see fit within appropriate limits) predictably ends up benefiting religious schools and the churches that operate them. The argument would be that the state permissibly acts with the aim of promoting religion and some churches because doing so is a means to advancing some legitimate secular goal. The latter violates separation even if the former does not.

Again, I shall simply point to the kind of argument that would have to be developed in order to defend the separation doctrine against the attack just adumbrated. Here is a crude comparable case: suppose social science research of the future determined that belief in Santa Claus oddly has unexpected beneficial consequences. Believers tend to be more socially trusting and thereby come to be more reliable participants in cooperative enterprises and more valuable members of society. There are cults that promote belief in Santa Claus for adults as well as children, so the possibility arises of doing good by promoting Santa Claus cults. I suppose a just state should balk at this suggestion. The state ought not to be party to promoting false beliefs and superstitions among its members even if good comes of it. Instead, resolute efforts should be made to find other ways to secure the goods without promoting false belief and superstition.<sup>23</sup>

23 And if these resolute efforts fail? Suppose we cannot establish and sustain a world order that does not condemn a large percentage of its inhabitants to grim and miserable lives without extensive establishment of religion? In that possible world (which, so far as I can see, not the actual world) sound ethical principles would imply that liberalism should be abandoned. Liberal political norms are a matter of lore (what will bring about morally good outcomes in our world) as well as principle (what count as morally good outcomes).

The state ought to be fostering the autonomy and cognitive maturity and epistemic skills of its citizens, on the ground that these virtues and skills will be generally conducive to individuals coming to form increasingly sophisticated, nuanced, and epistemically warranted beliefs. The liberal hope is that, in the long run, a fair distribution of greater good to more people will be achieved by fostering people's rationality than by accepting their now limited rationality and manipulating it in the service of good.<sup>24</sup> If belief in Santa Claus cults is entrenched in society and the belief system has become central to many people's sense of the values they most cherish, the state should not engage in direct propaganda against the cults, which would be insulting to citizens and likely counterproductive. However, the state should not engage in promoting the cults and should seek indirect ways of dampening their attraction and their influence.

The argument for separation of church and state suggested here might seem to offer no principled barrier to outright persecution of religious faith. Grant that there should be freedom of speech and expression and other basic civil liberties. Within these constraints, why should the state not seek to dissuade people from religious belief and practice, say by proselytizing against religion or by offering tax incentives favoring the nonreligious?

To address this question, one would need to characterize the morally proper goals that a just state pursues. This task is beyond the scope of this essay. In rough terms, if policies that advance a fair distribution of human well-being have the effect of discouraging religious adherence, that is no objection to them.<sup>25</sup> But actions that intend the dampening of religious adherence either as a goal or as a means to some goal tend to do harm, not good, as the history of progress toward liberal toleration attests, so we should abjure such policies. There is also a live-and-let-live element in any viable liberal political morality; secularist attempts to disfavor the religious breed attempts to disfavor the secular. These considerations are matters of lore; not fundamental principle, but liberal toleration itself is a doctrine derived jointly from stable empirical facts about the natural and social world and moral principles, rather than being derivable from the latter alone.

24 The locus classicus of this liberal argument is in J. S. Mill, *On Liberty*, ed. Elizabeth Rapaport, (Indianapolis: Hackett Publishing Company, 1978). This text is available at <http://www.utilitarianism.com/jsmill.htm> (originally published in 1859).

25 Here I gesture vaguely toward the welfarist and consequentialist morality that I deem most defensible. I rely on the broad idea that the ultimate concern dictated by morality is the advance of the welfare of humans (and other animals) along with its fair distribution in part three of this essay. It should be emphasized that the separation of church and state doctrine affirmed here is defensible from a range of plausible moral theories including right-based, not welfare-based, doctrines. Separation of church and state is an object consensus of overlapping plausible moral views. On welfarism, see Richard Arneson, "Welfare Should Be the Currency of Justice," *Canadian Journal of Philosophy* 30 (2000): 497–524.

## 9. Revisiting Political Liberalism and Rejecting It

David Estlund defends the idea that the state coerces those within its jurisdiction with legitimate authority when it acts on the basis of policies that are justified from every qualified point of view. A point of view need not be constituted by truths to be qualified; it suffices that the beliefs that shape the point of view satisfy a threshold standard of reasonableness or be reasonable enough. Some truths, then, could not form a basis for state action that would have legitimate authority, because any justification of this basis for state action would be rejected from some qualified point of view. As Estlund puts it, “even if the pope has a pipeline to God’s will, it does not follow that atheists may permissibly be coerced on the basis of justifications drawn from Catholic doctrine. Some non-Catholic views should count as qualified for this purpose even if they are mistaken.”<sup>26</sup> This is a deft statement of the political liberalism norm.

The claim that the pope has a pipeline to God’s will is ambiguous. It might mean that the pope has a wild hunch or a private revelation (which might be just a vivid dream) that happens to be true without being, in any sense, epistemically warranted. If this is true, then the pope’s say-so is not a legitimate basis for state policy. But another possible meaning of having a pipeline is that the pope has discovered a reliable method for discerning truth in religious matters, and hence has shareable reasons that are better than the competing reasons that atheists and agnostics and apostates and such can muster. The political liberalism idea slurs over this distinction, or, perhaps it would be fairer to say, makes nothing of it. This is the distinction between being in possession of the truth, perhaps by sheer coincidence, without compelling warrant, and being in possession of claims to truth (which might or might not be ultimately correct) that are more strongly backed by available reasons than any competing claims to truth. The available reasons are the reasons identifiable by the best methods of the day. The theorist who denies the political liberalism doctrine as elaborated by Estlund would hold that there might be candidate state policies that are backed by compelling justification and that ought to be implemented even though they are subject to rejection from some qualified viewpoint. This is so because a viewpoint might be qualified because it passes a threshold of reasonableness even though it is not as reasonable as other competing viewpoints; this is so especially if it is inferior to the viewpoint that is most reasonable on balance, so far as we can discern with the best cognitive resources presently available.

26 David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008).

Now back to the pope's claimed pipeline to truth. I agree with Estlund to this extent: it is unlikely that there are good grounds for putting state power behind Catholic doctrine and suppressing atheists and heretics. The basis for this hunch is simple: Catholic doctrine backed by the best arguments that can be mustered in its defense is not superior to some rival religious doctrines, to some alternative metaphysically extravagant quasi-religious doctrines, or to some metaphysically non-extravagant versions of atheism and agnosticism. In contrast, metaphysically non-extravagant versions of atheism and agnosticism will turn out to be better supported by arguments than rivals. Hence, in effect, rejecting political liberalism, we would end up, it is plausible to suppose, endorsing a secular religious establishment. You might ask, what is a "secular religious establishment"? A state with an established church subsidizes the church's activities, proclaims official state endorsement of its doctrines, favors the established church over other churches and over nonreligious organizations and movements that are rivals to it, and so on. A state with a secular establishment subsidizes sensible nonreligious organizations in preference to religious organizations (for example, Oxfam gets tax benefits unavailable to any church organization), lends official state support to uncontroversial scientific claims and to the scientific method for establishing empirical facts, lends official state support to the best nonreligious, this-worldly values, especially uncontroversial ones, has procedures in place that aim to keep sectarian religious doctrines from shaping the content of state laws and public policies, and so on. Secular establishment so understood is fully compatible with robust protection of people's freedom to worship and follow their religious faith, freedom to proselytize on behalf of religious doctrines, freedom to assemble and organize for religious purposes, legal (though not moral) freedom to seek to influence the choice of laws and public policies so that they conform to favored religious doctrines, and so on. In the same way, the state's maintaining an established church is compatible with the state's protection of religious liberty.

Estlund raises the same issue in a slightly different context. He considers a hypothetical case for state-enforced mandatory Bible study:

1. Christianity is a truth of the utmost importance.
2. Truths of the utmost importance ought to be taught in public school, a policy backed up with state force.
3. Therefore, Christianity ought to be taught in public schools, a policy backed up with state force.<sup>27</sup>

27 Ibid., 50.

Estlund notes that the political liberalism doctrine he embraces allows one to reject the third statement, which looks to be objectionably sectarian and a wrongful denial of religious liberty, without making the controversial claim that the first is false. Instead, the third does not follow from the first because the second is false. There are truths of the utmost importance that should not be taught in public schools on a mandatory basis for all. Some truths are controversial, and unsuited to be rammed down the throats of those who have reasonable grounds for rejecting them as a basis for state policy, regardless of where ultimate truth lies.

Rejecting political liberalism, I claim we should respond to the proposed argument in a somewhat similar way. The secular establishment doctrine does not deny that the first statement may be true. It might, for all we know. However, we have no good grounds for believing it. Hence it is epistemically unsuitable as a basis for state policy. In contrast, there are claims about human well-being and human equality and individual moral rights that are controversial, but still stand out from the pack of candidate justifications for state policy as better supported by reasons. Claims of this sort may not coalesce into a unique set but rather form groups of alternative coherent doctrines, none of which is decisively defeated by any rivals. So, some set in this epistemically privileged group can legitimately be enforced by state power on the ground that no decisively superior basis for state policy can be identified. Since there may be truths of the utmost importance to which we have, at present, no epistemic access, the sheer fact that it is possible that claim X is true is not an adequate basis for legitimate state policy. Truths of the utmost importance to which we have at present no epistemic access are not a morally appropriate basis for state policy. It follows that the second and third statements are false.<sup>28</sup> The correct response is that, so far as we can tell, Christianity is not true, and, a fortiori, not a truth of the utmost importance. If the pope really did have a pipeline to God, this would be a proper basis for religious establishment; in fact, our common negative assessment of the Spanish Inquisition would then require radical revision.

## 10. Conclusion: A Retreat

The argument in this essay has an abstract and almost otherworldly character. Even if my claims are accepted, pressing practical issues remain entirely open. The question addressed in this essay might be put in these words: if you were an agent

28 We ignore the problem, here irrelevant, that some truths (for example, quantum field theory) might be too complex to be usefully taught in school.

with the power to create a political system according to your preferences, and you wanted above all to create a just political order, what would be the relation between church and state in the system you would build? An alternative formulation would be that this essay provides a cogent response for use by a majority of secular voters in a tolerably just social democracy that enforces separation of church and state, if they were challenged by a disgruntled coalition of voters committed to religious creeds who claim that the current regime discriminates against religion and wrongfully blocks religion from the public square. For many who are uneasy about the relationship between church and state, the questions that are troubling them are not ones this essay addresses.

For all that has been said in this essay, it might be the case that in a society torn by religious strife, the attempt to establish and maintain separation of church and state would exacerbate strife and bring it about that, for the foreseeable future, basic human rights for all members of society would be less fulfilled than they would be if a mild religious establishment were put in place that settled the question of which religion is to be dominant, and encouraged most people to turn their energies away from religious quarrels.

For all that has been said in this essay, it might be the case that in a society in which most people's decent sociable dispositions are tied to their religious convictions, any successful attempt to convince them that religious convictions are not proper grounds for advocating public policies in a diverse society would dampen their willingness to support decent and humane social policies. The predictable result of attempts to inhibit people from undertaking religious-political campaigns for social causes would be that the laws and public policies of the society come to be increasingly mean-spirited, inegalitarian, and unjust.

In the two imaginary cases just sketched, pressing for separation of church and state, would likely be morally wrong. At least, none of the abstract arguments canvassed in this essay rules out this possibility. There are many similar scenarios that elicit the same judgment. Consider a political community that encompasses people of widely divergent religious worldviews. There is stable deep disagreement in people's fundamental beliefs. This may be the actual situation of any modern society that we can envisage that does not wrongly persecute and expel adherents of minority doctrines. In these circumstances, establishing and maintaining a state policy that is scrupulously neutral between different doctrines and between people of opposed convictions is not automatically the uniquely just response to pluralism of belief. In some circumstances, a more sane response is to divide the political community into politically autonomous territorial units, each political unit according special privileges to the religion that has the allegiance of the bulk of the inhabitants of that territory. This approach might be carried out via a federalist strategy, the separate units being

autonomous federal regions united in one political state. The approach might also be carried out via a secession or dismemberment strategy—the original political community disappearing and being replaced by two or more separate states, with each one featuring a different established religion in alignment with the convictions of the bulk of the citizens.

It is not a decisive objection to the religion-establishment-for-social-justice proposals just mentioned that they would perpetrate some form of injustice simply in virtue of failure to conform to separation of church and state. In the circumstances under review, which might correspond to actual circumstances in some or all current societies, the principles of justice will be incompletely fulfilled no matter what feasible policy option we pursue. The question we then face is, roughly: What is the best place we can get to from where we now are. (This is only “roughly” the right question to pose because, as stated, it ignores the interaction between the values of the outcomes a policy choice might reach and the probabilities that this or that outcome will obtain given that choice.) Confining attention to the justice of church-state relations, we should acknowledge that insistence on upholding the most just form of this relationship might be counterproductive in its own terms and lead to more unjust church-state relations than what might, instead, have been obtained by a less insistent stance. Broadening the focus so that the justice of church-state relations is seen as only one component of an encompassing ideal of social justice, we should acknowledge the immediate possibility of tradeoffs in justice values. In the unfortunate conditions of this-worldly existence, acceptance of less than the best obtainable state of affairs as assessed by one justice value might be warranted by the fact that this compromise in this domain of justice enables greater fulfillment of other components and more justice overall, all things considered.

These quick and dirty reflections on justice for here and now do not constitute backtracking on my part from any of the abstract claims urged in this essay. In order to make sensible judgments of policy choice among feasible alternatives with different social justice outcomes, none ideal, one needs a standard of social justice to be able to rank policy and strategy choices by their social justice desirability. Separation of church and state is one element (derivative, not fundamental) in the standard of social justice.

Nor should we leap to the conclusion that the norm of separation of church and state belongs to a misty ideal that has no relevance to the selection of the best moral policies in a variety of real-world circumstances. On the contrary: In confronting various policy choices at lower levels of abstraction for various pervasive modern conditions, I would tend to argue that more separation of church and state is better than less of it, and that, by and large, we should press for this secularist policy precisely in order to make whatever small steps



toward justice we can make in the world as we see it. In other words, I would press for separation of church and state, so to speak, in pragmatic practice as well as in ideal practical theory.<sup>29</sup> My point here is simply that these would be completely different arguments from the ones considered in this essay. To argue for this or that policy in actual given circumstances (including the facts about the distribution of people's beliefs), one would need to attend to matters of history and culture and, more generally, to the messy and unruly jumble of factors that will determine the likely consequences of policy choice in the real world. This essay does none of this.

Finally, although this essay sometimes adopts the strident tone of the militant secularist, this tone is powerless to overcome a truism: our ability to determine the likely consequences of various policy choices even in the short term is not that great, and for many choices we face, the even more uncertain long-run consequences we are even less able to discern are the more important ones. In this situation the policy choices the liberal recommends reflect a somewhat optimistic assessment of the capacities of human beings for enlightenment, reasoned reflection, and allegiance in conduct to whatever conclusions are best supported by the reasons there are. These issues are ultimately empirical but, in practice, somewhat intractable. That is to say that the liberal social justice project, in which separation of church and state is a familiar traditional element, rests not just on reason and evidence, but on secular faith.

29 In their contribution to this volume, "Equal Membership, Religious Freedom, and the Idea of a Homeland," Christopher L. Eisgruber and Lawrence G. Sager explore the proposal that religious establishment is consistent with a liberal political morality of equality and liberty. The idea is roughly that in a world like ours in which Jews and other religious adherents are, in some places, persecuted for their religious beliefs, the existence of some political societies that provide the special protection of religious establishment for one of these otherwise persecuted groups can increase the cause of liberty and equality overall. (A similar point might hold for ethnicity and other cultural markers.) We should oppose this suggestion. Religious establishment, even prettified with liberal trimmings, must be unfair to members of society who hold other views, including the children of adherents of the favored creed, who might come to dissent from it. On a global scale, adherents of liberty and equality are more likely to advance the cause by creating pockets of justice where they can rather than by offsetting "bad favoritism" elsewhere by reverse (moderate) "bad favoritism" in their sphere of influence. These scrappy remarks, however, are promissory notes toward new arguments that need to be made in response to proposals of this ilk. My essay does not try to develop such arguments, but it does seek to distinguish "secular establishment" from genuine religious establishment and to indicate that arguments against genuine religious establishment do not tell against its secular counterpart.

# Freedom from Religion

Avihay Dorfman

State imposition of religious orthodoxy is widely held to constitute an illegitimate exercise of political authority. According to the conventional view, free and equal persons enjoy not only *freedom of religion*, which is the liberty associated with the active pursuit of religious heterodoxy; they are also entitled to *freedom from religion*, which is the negative liberty associated with the absence of state-imposed religious orthodoxy.<sup>1</sup> Thus, it is not uncommon to find courts, scholars, politicians, and laypeople expressing the thought that freedom of and freedom from religion are deeply connected principles—that whatever it is that gives rise to freedom of religion seems also to underwrite the principle of freedom from religion.

In spite of its conventional appeal, however, the thought that the two freedoms can hang together in a coherent way has so far remained puzzling in theory. Thus, there exists a gulf between the moral and legal lived experience of these freedoms and the theory that explains this experience. There are, in fact, three separate concerns regarding the possible unity in question: The first two are that the principles of freedom of religion and freedom from religion are, separately, incoherent or, at best, redundant. The third is that even given that each of these freedoms is a freestanding principle of political morality, they resist theoretical

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1 The principle of ‘freedom from religion’ is presented in a number of different ways (as is the case of freedom of religion). For instance, some arguments related to freedom of religion involve claims against government imposition of religious orthodoxy; likewise, some arguments from liberty of conscience are, in essence, an appeal to freedom from religion; and yet other arguments cast in terms of Establishment Clause violation invoke the principle of properly conceived freedom from religion. As shall become clear in due course, it is conceptually and normatively plausible—indeed, it is important—to see these arguments in the light of the principle of freedom from religion.

unity, in which case achieving reconciliation is contingent upon purely pragmatic considerations that, typically, take the form of ad hoc balancing (and, to this extent, render reconciliation unstable in principle).

I devote these pages to the concern relating to freedom from religion. My argument develops two main claims. Negatively, I seek to repudiate the core of the case against the redundancy of a principle of freedom from religion. The centerpiece of my argument at this stage is that the two prevailing theories of freedom from religion fail to take seriously the political circumstances—viz., democratic politics—under which claims for freedom from religion arise. Affirmatively, I shall seek to develop an account of freedom from religion; I do this by elaborating on the democratic conception of freedom from religion. On the proposed account, freedom from religion is a freestanding moral principle, by which I mean a principle that secures political freedom from infringements that are distinctively associated with religion. The point of freedom from religion, I shall argue, is the protection of citizens from being (illegitimately) governed by public laws that are grounded in religious reasons. Its basic point is to sustain political solidarity among citizens, who stand in the relation of co-rulers to one another, rather than among mere subjects—who share the status of being ruled together by another.

## 1. Freedom from Religion: Two Theories, One Neglect

### 1.1. Setting the Stage: The Theoretical Challenge

I shall seek to show that contemporary invocations of the principle of freedom from religion purport to generate moral and legal rights (against state imposition of religious orthodoxy) far exceed what the prevailing theoretical accounts of this principle could possibly underwrite. This mismatch between theory and practice, moreover, is merely a surface symptom of a deeper deficiency that these approaches hold in common—that they purport to develop accounts of freedom from religion that can be appreciated by resort to abstract liberal ideals that remain fundamentally pre-democratic.

To set the scene, consider the two generic cases against which claims for state violation of freedom from religion often arise: First, laws that render prohibited an otherwise permissible activity on account of its inconsistency with the dictates of religion, such as Sunday closing laws insofar as they deem illegal commercial activities on Sundays;<sup>2</sup> and second, laws that express government's favoritism

2 See, e.g., *R. v. Big M Drug Mart* [1985] 1 SCR 295.

of a particular religious belief or of religious faith in general. Examples include fixing a crucifix to the walls of public school classrooms as well as many other cases involving the “endorsement” of religion by government fiat.<sup>3</sup>

Both cases are of a piece insofar as they feature legal norms that draft persons into the service of sustaining the conformity of the public sphere with the dictates of religion (orthodox or otherwise). They differ in that the former does the drafting directly, that is, requiring persons to act in conformity, though not necessarily in compliance, with religious directives.<sup>4</sup> The latter, by contrast, does the drafting indirectly, which is to say persons are forced to support—either through tithing or simply by not interfering with—the government’s effort to display religious favoritism. But other than that, the two generic cases feature a similar moral and legal complaint—that the state confronts the non-religious people in a way that is disrespectful of their rights not to be subjected to public laws that are grounded in religious convictions.

Now, the main theoretical challenge that these two types of cases raise is as follows: Public laws seeking conformity with religious dictates need not amount to coercing anyone to practice the particular (or any) religion whose dictates underlie the relevant legal norm. Likewise, these laws do not compel the affirmation of a religious conviction. Thus, in the former case, both employers and employees are not coerced to observe (or affirm) the Lord’s Day. Nor are they forced to abstain from a self-imposed (religious or non-religious) duty to work on Sundays.<sup>5</sup> Instead, Sunday closing laws merely restrict their economic freedom.<sup>6</sup> The same is true in the latter case, for a state’s favoritism of religion does not convert taxpayers into religious devotees. Nor does it compel students attending public schools decorated with crucifixes to engage in religious practice of whatever sort.

3 The endorsement test was first introduced by Justice O’Connor, as a clarification of the *Lemon* test, in her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687–688 (1984) and implemented by a majority of the Supreme Court reviewing the constitutionality of displaying religious symbols in government buildings in *County of Allegheny v. ACLU*, 492 U.S. 573, 592–593 (1989).

4 As I shall explain in the main text below, the difference between an obligation to act in conformity, rather than in compliance, with religious beliefs has important implications for freedom from religion.

5 The claims typically raised in petitions against Sunday closing laws are not cast in terms of state interference with an ethical or religious duty to work on Sunday.

6 This is not to say that economic freedom is not important or even that it is less important than freedom from religion. Rather, the point of my argument is that an infringement of the former freedom should not be confused with infringement of the latter freedom.

Against this backdrop, the theoretical challenge is that of explaining how it is that both cases are, nonetheless, a form of illegitimate coercion by virtue of subjecting the non-religious to legal norms grounded in religious reasons. Thus, the case for (or against) freedom from religion depends on showing that grounding public law in religious reasons in particular renders these laws fundamentally private ones, in which case the enforcement of these “laws” amounts to nothing more than engaging citizens in the mode of brute and, indeed, arbitrary imposition. As I shall seek to argue, the two leading theories of freedom from religion cannot make good on this showing.

## 1.2. Freedom from Religion as Freedom of Religion

On this account, freedom of religion includes not only the liberty to engage in religious practices, but also the liberty to disengage oneself from these practices, either partially or entirely. This expansive reading of freedom of religion begins with the proposition that no genuine freedom to exercise religion can be had without holding the right to choose what religion to exercise in the first place. And holding this right, the argument goes, means that persons, religious and otherwise, must be at liberty, at any given moment, to decide whether or not to adopt a religious course of action. For this reason, coercing a non-religious person to comply with a religious practice (say, to attend church on Sunday) violates this person’s freedom from religion precisely because it denies her freedom of religion, which is to say the right to choose for herself whether this practice is worth her allegiance.<sup>7</sup>

To be sure, this way of grounding freedom from religion in the principle of freedom of religion does not rest on the dubious assumption that non-religious persons engage in an ongoing deliberation about whether or not to join a religious sect (and, by implication, about whether or not to attend church on Sunday or go to work instead). Rather, it assumes, with John Locke, that sincere faith is constitutive of the very possibility of any act to count as an exercise of religion. Accordingly, coercion in the form of compelled submission to religious command

7 My reconstruction of the account of freedom from religion in terms of freedom of religion shows that the critique leveled by Sapir and Statman against this account is misplaced. According to Sapir and Statman, freedom of religion does not include freedom from religion insofar as the latter purports to protect the interest of the non-religious in autonomy (or even negative liberty). See Gidon Sapir and Daniel Statman, “Why Freedom of Religion Does Not Include Freedom from Religion,” *Law & Philosophy* 24 (2005): 467, 489–494. Contrary to Sapir and Statman, I show in the main text that the reconstructed account does not appeal to negative liberty *simpliciter*, but rather to the distinctive freedom associated with the exercise of religion by providing an expansive interpretation of the content of freedom in connection with the exercise of religion.

is inimical to freedom from religion because it thereby deprives individuals of the freedom essential to practicing religious belief, which is the freedom of religion.

I shall set aside the merits of this account of freedom from religion. In particular, I shall not discuss the question of whether the value of sincere belief warrants a sufficiently broad prohibition against all forms of state imposition of religious orthodoxy, whether in the form of straightforward oppression, or in the milder form of providing persons with incentives to adopt a religious way of life. Instead, I shall only focus on the gulf between this theory and the contemporary practice of the principle of freedom from religion.

Certainly, the theory in question fails entirely to account for the two generic cases mentioned above as exemplified by a certain version of Sunday closing laws and by some instances of public display of religious symbols. Again, the argument for the violation of freedom from religion that these cases often raise does not turn on any accusation that the state persecute, coerce, or even merely encourage persons to comply with the dictates of religion in some or all aspects of their practical affairs.<sup>8</sup> And although in some of these cases the state does encroach on their freedom (say, of contract or of occupation), none implicate the state in the business of directly or indirectly requiring persons to practice religion, in part or in its entirety.

### 1.3. Freedom from Religion as Liberty of Conscience

This account partially replicates the previous account's attempt to explain away the principle of freedom from religion, since it, too, reduces the principle under consideration to another principle, that is, freedom of conscience. Thus, a claim for the violation of freedom from religion is, in essence, an assertion of a right to enjoy one's liberty of conscience. And, our lived experience to the contrary notwithstanding, this is just another way to concede that there exists no such freestanding principle of freedom from religion.

However, the liberty of conscience account may also depart substantially from its predecessor.<sup>9</sup> More specifically, whereas the account that grounds freedom

8 Of course, I do not deny that some government programs (such as public displays of religious symbols) may carry positive effects for some, and perhaps even that this is their purpose, that is, to produce state-based religious propaganda. That said, the case for the violation of freedom from religion does not rest on the occurrence of these effects, which depends, to an important extent, on a causal or psychological argument.

9 It may depart, but it needn't be so if freedom of religion is itself fully reducible to liberty of conscience. As I argue elsewhere, an adequate account of freedom of religion cannot allow for this reductive approach; a better approach would be to defend the morality of this freedom without resorting to considerations relating to liberty of conscience. See Avihay Dorfman, "Freedom of Religion," *Can. J. L. & Juris.* 21 (2008): 279, 282–285.

from religion in freedom of religion purports to defend the former by reference to religion in particular, the argument from conscience grounds freedom from religion in general moral terms that are not necessarily, and even not directly, distinctive of religious belief (or disbelief). Indeed, disobeying a state imposition of religious orthodoxy is simply one case among many of adhering to one's own set of deep beliefs and commitments, religious or otherwise.

Normally, proponents of the move from freedom from religion to liberty of conscience are forced to grapple with an embarrassingly immense gap. Rather than being swallowed by the right of conscience, the principle of freedom from religion (and, likewise, freedom of religion) figures prominently in legal practice and in the lived experience of the modern state, more broadly.<sup>10</sup> Attempting to address this challenge—viz., that the argument from conscience explains away what it is intended to explain, namely freedom from religion—proponents of liberty of conscience offer two contrasting responses: First, some proceed by telling a causal story, the point of which is to introduce new and contingent reasons that could justify special protection of liberty of conscience in matters of religious belief and disbelief, as opposed to all other matters.<sup>11</sup> For instance, the story could emphasize that religious oppression has, on balance, far more adverse consequences than all other cases involving coercing a person to act against the directives of her conscience.<sup>12</sup> Second, a diametrically opposite response is to follow the argument from conscience to its logical conclusion—that is, to articulate a revisionist account of freedom from religion (and freedom of religion as well). On this account, liberty of conscience's historical cradle, the principles of freedom of/from religion, is just that: an historical contingency. To overcome this contingency, we are told that it must be the case that all moral and legal claims for the violation of liberty of conscience ought to be treated alike.<sup>13</sup>

10 See Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103 (1990): 1409, 1491 n. 420; Dorfman, "Freedom of Religion" (above n. 9), 282–289; Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* (Princeton: Princeton University Press, 2008), §21.

11 One exception to singling out religion for purposes of protecting freedom of conscience is that of pacifism. See *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). It is telling, in my view, that the court addresses this type of case by recasting conscientious objection to army service in the somewhat superficial terms of religious faith.

12 Noah Feldman, "The Intellectual Origins of the Establishment Clause," *N.Y.U. Law Review* 77 (2002): 346, 424–426.

13 See, e.g., Christopher L. Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007), 52; Ronald Dworkin, *Is Democracy Possible Here?* (Princeton: Princeton University Press, 2006), 61; Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013), 7.

Although these two contrasting responses to the gap between the argument from conscience and the principle of freedom from religion are helpful as far as they go, they do not go far enough. In particular, none of them can make sense of the two generic cases mentioned above—that is, they run afoul of settling a reflective equilibrium between the theory and the lived experience of freedom from religion. This is so for two main reasons. To begin with, as mentioned above, the morality of liberty of conscience is over-inclusive in the sense that it cannot account for the distinctive place of religious belief (or disbelief) in cases in which the state purports to adjust the public sphere in the light of the dictates of religion. In principle, there should not be a difference between a state program motivated by religious persuasion and one which expresses commitment to extra-religious belief systems. To the extent that they authorize the use of coercion in furtherance of their respective goals, both programs may give rise to claims of equal moral weight for the violation of liberty of conscience. The argument of conscience, therefore, renders an independent principle of freedom from religion redundant.

Moreover, and more dramatically, liberty of conscience is also under-inclusive in a way that brings me back to the centerpiece of my argument at this stage, which is the theoretical challenge of casting contemporary invocations of the principle of freedom from religion into sharp relief. Indeed, the two generic cases in question involve public laws that track the dictates of religion but that do not coerce an affirmation of, let alone a participation in, a religious practice. Thus, even if liberty of conscience could adequately justify the need for a special protection of religious conscience, the contemporary resort to the principle of freedom from religion would still remain alarmingly mysterious.<sup>14</sup> As already explained, the lack of compelled affirmation of or participation in religious practices deprives of the argument from conscience its natural appeal.

Finally, it turns out that neither freedom of religion nor liberty of conscience can make good on the theoretical challenge of explaining what it is about the principle of freedom from religion that warrants a freestanding place in the constitutional architecture of the modern state.<sup>15</sup>

14 There is another reason (which is only indirectly related to my argument) for thinking that liberty of conscience is inadequately narrow—some claims for the violation of freedom of religion cannot be explained by reference to the right of any particular individual. They sometime invoke the right of a religious group as opposed to, and even against, the religious conscious of their members, taken severally. See, most recently, *Hosanaa-Tabor Evangelical Lutheran Church and School v. EEOL*, 134 S.Ct. 694 (2012).

15 The modern state may surely mean different things in different contexts. I use the adjective modern to emphasis a political community that adheres to some version of state/church separation. On this view, the version of state/church separation adopted by the First Amendment of the U.S. Constitution is not the only one currently invoked by



## 2. Identifying the Source of the Problem: The Democratic Neglect

In this stage of the argument, I shall seek to explain why the two leading theories discussed a moment ago fail to account for the lived experience of freedom from religion. In particular, I shall argue that both proceed on the false assumption that the main (or even only) reason for concern about illegitimate imposition of religious orthodoxy by the state is that of violating fundamental—viz. pre-political—human rights, especially the rights to liberty of religion or conscience. This assumption is false insofar as it completely neglects the possibility that illegitimate state imposition of religious orthodoxy can also have a political source—that religious imposition of religious orthodoxy may be democratically illegitimate. The gulf between the lived experience of freedom from religion and the failed theories of this freedom reflects the distance between two notions of legitimate authority: The democratic and the liberal ones, respectively.

To see precisely what keeps the theory and the practice of freedom from religion apart, and to take one step forward toward a successful integration, it will prove helpful to begin with the distinction between the concept of freedom from religion and its various conceptions.<sup>16</sup> The concept of freedom from religion addresses the problem of explaining the legitimacy of state-imposition of religious orthodoxy. It emphasizes that the core problem that needs to be addressed by this concept is that of political legitimation—how political authority in matters of religious concern is possible. The various conceptions of freedom from religion provide different theories of the concept—that is, each conception consists of a set of principles that purports to resolve the problem picked out by the concept. As I shall now seek to show, the two accounts of freedom from religion discussed above ignore the concerns of political legitimation that are distinctively associated with democratic rule, properly conceived.<sup>17</sup>

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modern states. For an intriguing account of some of the familiar versions, see James Q. Whitman, “Separating Church and State: The Atlantic Divide,” in *Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman*, ed. Robert W. Gordon and Morton J. Horwitz (Cambridge and New York: Cambridge University Press, 2011), 233.

16 A conception, in Rawlsian terminology, is a theory of the concept. See John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971), 5–6.

17 Before getting on to these two accounts, it is apt to mention that a cluster of conceptions of freedom from religion can also be characterized by their sectarian origins. For them, the legitimacy of state imposition of religious orthodoxy depends on divine authority. The question of whether or not to impose religious orthodoxy must be resolved by reference to the best (or true) interpretation of what state allegiance to God requires. Here there can

Both of these accounts are best understood as expressing a classical liberal ideal of political legitimation. On this view, the baseline against which the liberal conception of freedom from religion determines the terms of the legitimate exercise of political authority is that of fundamental human rights. In the case at hand, two such rights suggest themselves: freedom of religion and liberty of conscience. The state enjoys the legitimate power to enact public laws concerning religion only insofar as the laws fully respect these two rights.

To be sure, it might turn out that these laws feature an illegitimate exercise of political authority after all, but this will be so only if other rights, but not those of religion or of conscience, are being transgressed. For instance, Sunday closing laws might not pass the liberal bar of political legitimacy on account of their encroachment on economic freedoms (such as freedom of contract or of occupation). But, once again, these laws—or all other laws falling within the two generic cases, more generally—do not raise the specter of illegitimate religious coercion insofar as the question of legitimation is determined by reference to the liberal conception of freedom from religion.

Of course, state commitment to protecting fundamental rights is no doubt crucial for establishing its legitimate authority, including in the context of state/church relations. However, this alone could not possibly provide a satisfactory account of the problem of political legitimation as we know it, which is that democracy, characterized as a political practice of collective self-rule, generates an independent source of legitimate authority.<sup>18</sup>

Determining what counts as illegitimate (religious) coercion by reference to fundamental rights leaves unaddressed the existence of democratic political authority and hence overlooks the threat of illegitimate coercion that can distinctively arise

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be—as history actually shows—different answers. These answers span the full range from the unrelenting power of religious persecution (as in the Inquisition of the Middle Ages) to Post-Reformation's commitment to an increasingly broader conception of toleration (mainly among Protestant sects at first, followed by a gradual extension of toleration toward Jews and Catholics, among others). For the former, see David Nirenberg, *Communities of Violence* (Princeton: Princeton University Press, 1996). For the latter, see John M. Barry, *Roger Williams and the Creation of the American Soul* (London: Viking, 2012); see also Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008). The two accounts of freedom from religion discussed above—the freedom of religion and the liberty of conscience accounts—may be grounded in some of these sectarian conceptions of freedom from religion (such as those originating from the theologies of Luther and Calvin and culminating in the sectarian theory of liberty of conscience advanced by Roger Williams).

18 This abstract characterization of democracy requires further elaboration which I intend to outline in section 3 below.

from democratic politics, badly done (as will be explained below). Indeed, the liberal conception of freedom from religion is so far removed from the democratic structure of the modern state that its normative materials fit perfectly with an explanation of the proper bounds of political authority in the matter of religion in the early modern, pre-democratic state. It is not surprising, therefore, that this conception reached its intellectual maturity, as it were, in a pre-democratic age, roughly speaking, almost one century before the great revival of republicanism.<sup>19</sup>

At any rate, whatever its peculiar history is, the liberal conception conceives of citizens as mere subjects, who are entitled to equal protection of fundamental rights against their ruler, possibly a minority class (or even an individual), in power. I do not argue that this must be so or that the liberal conception is inconsistent with the democratic idea of citizenship (on which more below). Rather, the point is that the liberal conception does not require a democratic rule and hence does not bring the major place that citizenship occupies in a democracy to bear on the question of legitimate political authority in the context of religious matters.<sup>20</sup> This is just another way to say that, on the liberal conception in question, illegitimate religious coercion can be determined solely by reference to rights possessed by the ruled against the ruler.

The democratic neglect, so to speak, intrudes into the liberal conception of freedom from religion precisely at this point, however: Democracy turns the distinction between the ruled and the ruler on its head. The freestanding authority of democracy arises from the thought that the ruled are, in fact, self-ruled not

19 For historical analyses of the transition from pre- to democratic rule, see, e.g., R. P. Palmer, *The Age of the Democratic Revolution*, vol. 1 (Princeton: Princeton University Press, 1959); Gordon Woods, *The Idea of America: Reflections on the Birth of the United States* (New York: Penguin Press, 2011), 57–60. Although he was not the first, John Locke (1632–1704) is probably the most important thinker to contribute to the early modern development of the liberal conception of freedom from religion. According to Locke, “the Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others.” John Locke, *Two Treatises of Government*, ed. Peter Laslett, 2nd ed. (Cambridge: Cambridge University Press, 1967), part II, §§135, 376. Even those who give a rather generous—and, for that reason, a somewhat anachronistic—reconstruction of Locke’s constitutional theory, admit that the role of the legislature is to “pin down more precisely the rules and distributions that already exist in rough and ready form in the law and in the state of nature.” Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), 67. See also n. 20 below.

20 It is not surprising, therefore, that Locke discusses the limits of legislative authority in connection with this matter: “Legislative, whether placed in one or more, whether it be always in being, or only by intervals . . .” Locke, *Two Treatises of Government* (above n. 19), 375.

merely by happenstance but rather as a matter of principle. Accordingly, the political authority that democracy generates in its own right, and that the liberal conception overlooks, may suggest that the problem of illegitimate coercion that the concept of freedom from religion addresses cannot possibly be adequately resolved by resort to the liberal conception alone. It further suggests that the gulf between the theory and the practice of freedom from religion that I observed above may in the end be real. More importantly, the preceding analysis also implies that the theory—the liberal conception of freedom from religion—is the main suspect to blame for the gulf. In other words, this gulf reflects the basic shortcoming in the liberal conception of freedom from religion, which is its inability to account for democratic political authority and, by implication, for religious coercion that is the distinctive (negative) upshot of democratic rule.

### 3. Freedom from Religion: A Republican Theory

The republican conception of freedom from religion that I shall seek to outline in this section identifies an intimate connection between democratic politics and religious coercion. The centerpiece of the foregoing argument is that public laws whose grounds are fundamentally religious represent a form of illegitimate political power even when these laws do not violate basic liberties (including liberty of conscience). The reason is that by invoking these grounds, one shuns one's compatriots, and thus undermines the possibility that the democratic system of collective self-rule could deliver legitimate political power. On the proposed account, certain forms of religious grounds might render the democratic process neither collective—because invoking these grounds amounts to turning one's back on others—nor an example of self-rule—because these others cannot see themselves as co-authors of the laws in question. The right to freedom from religion, on the proposed account, is the right to be free from being subjected to laws grounded in religious belief.

I shall begin with a brief discussion of the freestanding political authority of democracy. I shall then elaborate on the legitimation difficulty that arises in connection with the use of certain forms of religious reason associated with the democratic process of decision making. I also emphasize that the difficulty in question is distinctively about some religious reasons. Finally, I take up the practical implications of the republican conception of freedom from religion; in particular, I discuss the possibility and limits of enforcing a legal right of freedom from religion.

### 3.1 The Authority of Democracy

A democratic process of decision making purports to garner legitimation even when the decisions it yields cannot be justified by reference to the demands of reason (whatever they are). This is true not only in trivial matters but also in a wide variety of issues including even disagreements about justice and the general good.<sup>21</sup>

The ground of democracy's independent authority lies in the special link that democratic politics seeks to establish between each participant, the community of participants as a whole, and the outcome of the participation; this bond is most pointedly referred to as co-authorship.<sup>22</sup> In particular, those subject to political authority have a reason to understand themselves, by virtue of their participation, to be the co-generators of this authority. For this reason, the official pronouncements of this authority—laws giving rise to new policies, rights, and obligations—are at bottom self-given.<sup>23</sup> They reflect a shared responsibility for settling together the terms of our political life. This is especially important in the case of out-voted participants who are, nonetheless, required to display allegiance to these new rights and obligations and thus to recognize the collective will as authoritative over their own personal (and out-voted) wills.<sup>24</sup> The force of the democratic process, in other words, permits the dissenting citizen to fully respect the legitimacy of the solution produced by this process, to regard it as the solution that we, rather than they, reached. To this extent, democratic politics may present the best interpretation of the Rousseau's otherwise fanciful characterization of legitimate political authority in terms of a political process by which each participant "uniting with all, nevertheless obey only himself and remain as free as before."<sup>25</sup>

None of this could be true were the democratic process of will- and opinion-formation entirely reducible to the aggregation of sheer preferences, that is, preferences formed prior to and independently of any political engagement.<sup>26</sup>

21 Of course, there may be limits to the free-standing authority of democracy (such as in the case of the tyranny of the majority). It is a separate question, however, as to what grounds these limits—either liberal or republican conceptions of legitimate authority.

22 Robert Post, "Democracy and Equality," *Law, Culture & the Humanities* 1 (2005): 142, 145; Jürgen Habermas, "Religion in the Public Sphere," *European Journal of Philosophy* 14 (2006): 1, 5.

23 For more, see Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, MA: Harvard University Press, 1945), 285.

24 See Waldron, *The Dignity of Legislation* (above n. 19), 156, referring to the complicated, democratic procedures of the legislation process as "the grounds of [the statute's] authority."

25 Jean-Jacques Rousseau, *Of the Social Contract*, ed. and trans. Victor Gourevitch (Cambridge and New York: Cambridge University Press, 1997), 49–50.

26 Engagement in politics is not limited to voting (in the elections or in parliament). It extends to participating in the public discourse, political parties, houses of representatives, and a variety of many other fora for political deliberation and debate.

To be sure, I do not argue that preferences are irrelevant or unimportant for democratic politics. Nor do I embrace the opposite extreme, namely, that democratic politics consists in pure, moral reasons. Rather, the republican theory of freedom from religion that I prefer emphasizes that democratic politics properly conceived turns on the exchange of reasons—not necessarily pure reasons—which is generated by the preparedness of participants to justify their preferences and judgments to their fellow citizens.<sup>27</sup>

To illustrate this, consider a hypothetical world in which politics is replaced by sophisticated software that collects preferences for and against potential policies. No freedom of speech, free press, public deliberations, political parties, debates on the parliament's floor, and so on. A policy can be adopted (or rejected) depending on preference counting—with a preference for majority rule, pure and simple.<sup>28</sup>

Those whose preferences are on the losing side do not have a reason to conceive of themselves as authors of the collectively preferred law. In particular, there is nothing in a pure process of preferences aggregation that could tie the out-voted to the outcome in the way that the ordinary democratic process could do. Certainly, the fact that my preference loses and a majority of others' happens to win can hardly turn the preferred policy into a decision that I can view as mine, too. The idea of settling together the terms of our existence becomes unintelligible in the absence of political engagement among citizens, and indirectly among their representatives. Coercing me to act according to the dictates of the majority's aggregated preferences raises the specter of illegitimate power, since a preference—or a group of preferences—cannot serve as its own justification.

But even given that no functioning mechanism of collective decision-making can do away with politics (however defined), the freestanding authority of democracy cannot be recovered simply by returning to public forums of political engagements insofar as the manner in which these engagements proceed is limited to making public each one's private preferences for or against a certain policy. It is hard—implausible, really—to view an interaction in which participants

27 As I mention below, the exchange of reasons typically includes prudential, strategic, and other forms of instrumental reasons. I make this clarification to avoid misunderstanding concerning the republican foundations of my account of freedom from religion. In particular, nothing I argue in these pages turn on a naïve view of the quality of deliberation and participation in democratic politics. The legitimate authority of democracy, on my account, depends on the possibility of engagement between citizens qua citizens, rather than qua philosophers, qua publicly-spirited attorneys, or even qua publicus-like citizens whose lives are fully dedicated to public debate.

28 The hypothetical in the main text borrows from Robert Post, "Equality and Autonomy in First Amendment Jurisprudence," *Michigan Law Review* 95 (1997): 1517, 1523–1525.

disclose their respective preferences as anywhere close to a discussion, debate, or deliberation. Here, too, there is nothing in their so-called engagement that could transform, with Rousseau, the “sum of [their] particular wills,” taken severally, into a genuinely public law expressing “the general will” of all participants, the out-voted included.<sup>29</sup>

Thus, for a process of collective decision-making to establish collective self-rule, political engagement must move beyond the aggregation of sheer preferences in order to underwrite a political community in which members stand to one another as co-authors of the norms by which they live. The missing element is, roughly speaking, the reason-giving character of political debate and discussion. It is only when reason is invoked that one’s brute preference becomes a political argument, properly so called.

Indeed, political engagement in all its forms and forums may succeed in tying the participants to one another and, by implication, to the outcome of their joint enterprise because the use of reason—and the disagreement that (typically) follows—can transcend the brute imposition of preferences. It does so not because reason—and rationality, more broadly—gets society closer to achieving desirable goals by public law-making, such as doing justice or promoting well-being (although it surely may do that as well).<sup>30</sup> Rather, reason-giving is crucial to collective self-rule because it enables participants to engage one another in ways that can establish a community of co-authors of the laws under which they live as free and equal persons. Justifying one’s preferences opens one up to the critical judgment of others and, thus, invites them to share in (or repudiate) one’s point of view about the matter at stake. At the wholesale level of democratic politics, the decision reached by participants committed to this notion of mutual justification is such that each participant, simply by virtue of participating in this process, can assume responsibility for it.

That said, a democratic practice informed by reason-giving cannot accommodate just about any kind of reason. Once again, the point of reason-giving in this context is not merely (and, perhaps, not necessarily) to increase the rationality of democratic decision making, but rather to establish a process

29 Rousseau, *Of the Social Contract* (above n. 25), 60.

30 While I do not deny that political engagements committed to the use of reason may increase the chances of getting close to the truth (as epistemic democrats believe), I insist that there is no relationship of entailment between a democratic process of decision-making and right reason. Within limits, a decision produced through the democratic process (when properly constructed and executed) may garner political legitimation even when it falls short of the demands of right reason. Indeed, this possibility expresses, in a nutshell, the basic intuition behind the notion that democracy can give rise to a freestanding source of political legitimation.

of collective undertaking. Accordingly, some reasons might not be apt to sustain the requisite process as they isolate, rather than unite, the reason-giver from her fellow citizens. As I shall now seek to explain, certain forms of religious-based reasons do just that. And as I shall further argue, these forms of reason are characteristically religious ones, since they express a commitment to engage the divine, rather than people.

### 3.2. Freedom from Religion

On the republican conception of freedom from religion, citizens should not be required to concede authority to legal norms grounded in religious belief because these grounds cannot possibly sustain the political engagement of will- and opinion-formation that underwrites collective self-rule.

To investigate the nature of the tension between certain forms of religious grounds and the freestanding authority of democracy, consider the recent political quarrel over public transportation in Tel Aviv on the Sabbath. The city's mayor, responding to the demands of secular social movements, called for the introduction of a public bus service on the Sabbath. For this to happen, the Tel Aviv municipality would need to receive the permission of the Israeli government and, in particular, the Minister of Transportation. Unsurprisingly, the result has been a debate in which both citizens and representatives have taken part.

Some opponents articulate their arguments by reference to secular values such as protecting the environment or the bus drivers and their families.<sup>31</sup> The other class of opposition is cast in terms of religious reasons. There may be different variations, but they are all on the same theme; in particular, the non-secular argument against public transportation on the Sabbath invokes the ultimate reason, which is to say the religious sanctity of this day. Proponents, by contrast, provide a variety of reasons unrelated to church/state relations (such as, most obviously, equal freedom of movement). They argue that the absence of buses on Saturday denies them reasonable access to wherever they wish to go.

There is an importantly different line of argument in support of the mayor's initiative, however—one that responds directly to the use of the ultimate religious reason mentioned above: that the legal ban on public transportation on the Sabbath, because it is grounded in the sanctity of this day, amounts to a religious coercion in violation of freedom from religion. And this violation, the argument

31 It is an open question, however, whether these reasons can explain why Saturday of all days. There may be a pragmatic, non-religious justification for singling out Saturday (this could include a path-dependence argument to the extent that our market and political institutions are pre-configured in a way that makes Saturday the preferred resting day for most people, religious or otherwise).



goes, does not turn on further encroachments on other fundamental rights—it might be the case that the ban does not, after all, deny reasonable access or that people can easily do without buses on Saturdays. Rather, the violation is in the very idea of being dependent on, and thus liable to, the power of the Minister of Transportation to fix their normative situation based on a purely religious belief in the sanctity of the Sabbath.<sup>32</sup> In other words, the difficulty lies in the fact that the minister (or, for that matter, any other state official) proceeds as though it is morally permissible to put citizens under a legal duty, namely, to obey the law on public transportation on the Sabbath, on the basis of a religious belief. But it is not permissible to do so because it undermines collective self-rule and hence renders the minister's exertion of political power illegitimate.

To begin with, a formal political authority, such as the one vested in the Minister of Transportation to allow or prohibit public transportation, is never a reason for itself. The democratic legitimacy of this authority depends, instead, on the political process that generates a co-authored outcome (whatever it is). In particular, it depends on a set of practices and institutions through which participants could publicly deliberate on the matter at stake by engaging one another with reasons they can come to share or reject.<sup>33</sup>

By invoking an ultimate religious reason in its support, though, political power fails to garner democratic legitimacy; this reason replaces a concern for addressing other citizens (or persons, more generally) with a concern for addressing the divine. Indeed, participants who ground political power in an ultimate religious reason forswear political engagement that is necessary for a legal authorization of power to be considered co-authored (in the appropriate sense). Simply saying that a public bus service on the Sabbath is prohibited because of the sanctity of this day is tantamount to turning one's back on one's fellow citizens. More specifically, the retreat from political engagement, that is, the retreat from opening oneself up to the critical judgment of deliberating others, manifests itself in two ways: concerning the accessibility of a religious reason and concerning the attitude presupposed in invoking this reason. I take each in turn.<sup>34</sup> (Note that I shall not take up the question of whether these two concerns appear outside the purview of religious-based reasons until Part 4.1 below.)

32 By normative situation I mean the rights and duties held by those who are liable to the minister's authority; by being liable to the minister's authority I draw on Hohfeld's famous taxonomy of rights. See Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1913): 16.

33 To be sure, the reasons in question need not be philosophical or otherwise sophisticated justifications of political power only. Democratic politics are famously open to pragmatic and, indeed, political reasons (including in the pejorative sense of the word "political").

34 The following discussion draws on Dorfman, "Freedom of Religion" (above n. 9), 307–318.

First, the merits of the ultimate religious reason are not susceptible to critical assessment in the sense that the force of this reason need not turn on whether it can withstand normative or empirical inquiries by others (the non-religious included). An appeal to the sanctity of the Sabbath just is an appeal to that which obtains regardless of what human inquiry could reveal by resort to practical or theoretical reasoning.<sup>35</sup> In other words, the success and failure conditions of an ultimate religious reason, such as the argument of the sanctity of the Sabbath, do not leave sufficient space for positive and normative considerations by (non-religious) others.<sup>36</sup>

Second and relatedly, the act of giving reasons in support of arguments (political or otherwise) presupposes a commitment on the part of reason givers to recognize the conditions of their own failure.<sup>37</sup> In particular, reason givers, by virtue of using reason, commit themselves to adopt a reflective attitude of the sort Thomas Nagel calls “preparedness,” which is the willingness to open themselves up to the critical judgments of others.<sup>38</sup> Of course, I do not claim that participants in political debates are self-consciously aware of the reflective attitude that, on my account, is presupposed by being engaged in the practice of reason giving. Rather, my argument is that anyone who gives reasons in support of an argument must accept as valid any criticism which shows that these reasons are unsupported, unconvincing, or simply false.<sup>39</sup>

35 As Max Weber, following Saint Augustine, has observed, “*credo non quod, sed quia absurdum est.*” Max Weber, “Science as a Vocation,” in *From Max Weber: Essays in Sociology*, trans. and ed. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 129, 154.

36 There may remain some space for interpretive considerations. Thus, the argument based on the sanctity of the Sabbath, one could argue, does not provide the best interpretation of the scriptures or it fails to take into account the changing conditions that underlie the original obligation to desist from everyday affairs. That said, to the extent that the argument of the sanctity of the Sabbath is not entirely false (so that it could be supported, say, by the plain language of Exodus 31:13–17), it is not clear what sort of counter-argument could be made in criticizing the person who (sincerely) believes that that argument reflects God’s will.

37 For instance, those who argue against public transportation on the Sabbath on the basis of environmental considerations must assume that all the (factual and moral) premises in the argument stand; otherwise, they must reject it.

38 Thomas Nagel, “Moral Conflict and Political Legitimacy,” *Philosophy & Public Affairs* 16 (1987): 215, 232.

39 Moreover, I do not deny that religious people do not acquire some reflective attitude toward their beliefs. But to the extent that they do, it seems that this attitude is different from the one mentioned in the main text above in at least two ways: concerning its scope and character. As scope is concerned, a reflective disposition on the part of a religious adherent in matters of religious conviction is typically directed toward the grand question

Each of these two features, because it undermines the possibility of critical reflection through public deliberation, severs the connection between the democratic process and collective self-rule. It prevents the ultimate religious reason from sustaining a political process the outcome of which citizens can respect even as they remain unpersuaded by it. Accordingly, participants in a democratic process cannot understand themselves, and at the very least have no reason to understand themselves, as authors of a law grounded in an ultimate religious reason. Their democratic citizenship is being reduced to the status subjects who are being ruled by another and therefore in violation of their political freedom. The principle of freedom from religion is just the institutional expression of the need to insure against this violation.

Against this backdrop, the republican conception of freedom from religion gives rise to a principle against the imposition of religiously-grounded political power. On this conception, the Minister of Transportation violates citizens' freedom from religion when he decides, on the basis of the sanctity of this day, to outlaw public transportation on the Sabbath.<sup>40</sup> In this way, now returning to the apparent gap between the practice and the theory of freedom from religion, the lived experience of claims for the violation of freedom from religion can finally be cast into sharp, theoretical relief—these claims are properly generated out of concerns for political legitimation that are distinctively associated with democratic rule.<sup>41</sup>

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of whether or not to remain faithful to his or her religion at all. It is not directed at any particular religious-based reason that is given during participation in public debates (say, the religious argument against public transportation on the Sabbath). This is true even when skepticism at the wholesale level—viz., of one's own religion—can be causally traced back to the retail level—viz., to one's rejection of a particular religious-based reason (say, that the sanctity of the Sabbath justifies the denial of public transportation on that day). Concerning character, the reflective attitude characteristic of the religious adherent is typically self-directed; generally speaking, one's faith is not the business of other citizens. Whereas, the attitude of preparedness on the part of reason-giving citizens is, first and foremost, other-directed in the sense that it implicitly or explicitly asserts the validity of the reasons they given and, hence, invites the critical judgments of others.

40 It remains to explain what the implications of the republican conception of freedom from religion to the participating citizens are (on which more below).

41 It is important to note, in case it is not apparent by now, that my argument does not target religious reasons, *tout court*. Rather, it focuses on religious reasons that are grounded in the divine—in God's commands directly or indirectly through its earthly agents. The argument based on the sanctity of the Sabbath is a case in point—as well as some of the arguments that are being made in contemporary public debates about family values (especially in connection with same-sex marriage), abortion, immigration policy, settlements in the Occupied Territories and so on. However, there exist other instances in which advancing

### 3.3. Freedom from Religion: Practical Implications

The republican conception of freedom from religion purports to guide the conduct of state officials and citizens with respect to the appropriate ways of deliberating and participating in the democratic process.<sup>42</sup> On this conception, state officials vested with the powers of making and executing laws are required, negatively, to abstain from acting on the ultimate religious reason and, affirmatively, to justify their powers through reasons that are susceptible to common reflection and criticism.<sup>43</sup> It is less clear, however, whether the same conclusion holds with respect to deliberating citizens. As I shall seek to argue, it is one thing to say that an obligation against invoking religious reasons in public deliberation arises from the ethics of citizenship; quite another to make this obligation a legally enforceable one.<sup>44</sup>

To begin with, participating citizens invoke reason in order to justify and criticize a certain course of action. State officials, by contrast, are required to justify not merely a certain course of action, but rather the course adopted (or that is about to be adopted) by the state. As a result, the use of the ultimate religious reason at the antecedent stage of deliberation merely undermines the idea of political

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religious-based reasons in public debate may not pose the threat of illegitimacy discussed above. This is so whenever these reasons do not depend on the divine in ways that violate the freedom from religion of other citizens. For instance, some such reasons have their historical roots in religion. Others are equally founded on non-religious moral outlooks. Others yet may have their intellectual roots in religion (on which see Jeremy Waldron, “Religious Contributions in Public Deliberation,” *San Diego Law Review* 30 [1993]: 817). None of these are at odds with the republican theory of freedom from religion insofar as they do not turn for their existence and potency on the divine.

- 42 The proposed conception cannot, of course, produce the needed motivation for acting in a certain way; instead, it purports to give people reasons for being motivated to act as participants in democratic politics ought to do. In other words, the conception in question seeks to provide motivational guidance in (very roughly speaking) the sense reminiscent of Scott Shapiro’s distinction between motivational and epistemic guidance. See Scott J. Shapiro, “On Hart’s Way Out,” *Legal Theory* 4 (1998): 469, 490.
- 43 Metaphorically speaking, the principle of freedom from religion insists that state officials must face their constituents rather than turn their backs on them.
- 44 In his recent writings on the subject, Jürgen Habermas draws a different conclusion with respect to the ethical obligations of citizens in connection with the use of public reason. According to Habermas, the non-religious citizens are required to bear the burden of translating political arguments grounded in religious reasons into non-religious ones. See Jürgen Habermas, “Religion” (above n. 22). It seems to me, however, that there must be limits to the possibility of thus translating. For this reason, Habermas’s conclusion cannot overcome the concerns identified in the main text above—invoking the ultimate religious reason during public deliberations might offend the freedom from religion of others.

engagement that underlies the democratic authority of the engagement's outcome. That said, employing such a reason need not render the outcome democratically illegitimate, especially when the supporting arguments behind the outcome are not grounded in, and may even stand in opposition to, the ultimate religious reason.

More importantly, there are reasons to believe that the obligations associated with the ethics of citizenship should not be automatically assimilated in political morality. For instance, casting a vote in an arbitrary manner (say, voting for whomever wears brown shoes on Election Day) is flatly inconsistent with the demands of the ethics of citizenship. In spite of this, no reasonable state would subject its voters to legal sanction for arbitrary voting. More generally, no reasonable state would interfere with citizens' privacy and liberty by enacting the ethics of citizenship into the law.<sup>45</sup>

To this extent, the legal enforcement of the ethical requirement to open oneself up to the critical judgment of others, which is partly the requirement to respect the freedom from religion of others, is an instance of this more general difficulty of coercing ethical behavior through law. Furthermore, the requirement in question may raise an additional difficulty. Indeed, a duty against invoking the ultimate religious reason amounts to a restriction on freedom of political speech, and a content-based at that. It, therefore, exerts pressure toward conflict with one of republicanism's most important values.

Against this backdrop, it is not clear (to say the least) whether the republican conception of freedom from religion can give rise to legal obligations that capture political engagements among private citizens, rather than public officials exercising their legal powers.<sup>46</sup> To be sure, the argument is not that freedom from religion must never be legally enforced against private citizens, but rather that the republican conception of this freedom does not entail this conclusion and that additional reasons are needed to render legal enforcement of this matter plausible.

45 To this extent, legal enforcement of the ethics of citizenship raises similar concerns as does the legal enforcement of the ethics of trust or of apology. Note that I do not argue that legal enforcement of some duties that form part of the ethics of citizenship (or trust or apology) is necessarily wrong. I insist, however, that these duties can be properly enforced in law only because, and only insofar as, there are additional reasons (i.e., not reducible to the ethics of citizenship) for deploying the law.

46 To be sure, even the legal enforcement of freedom from religion in the case of public officials can give rise to skepticism about the desirability of thus enforcing. The worry pertains to the potential creation of incentives toward insincerity and bad-faith on the part of officials. While I do not deny this possibility, I do reject skepticism about the ability of the public as well as the courts to identify instances of insincerity. However, it is beyond the scope of this paper to discuss the legal doctrines that specifically address the problem of administrative and legislative insincerity.

## 4. Freedom from Religion and the Argument of Public Reason

Certainly, the argument I have developed so far draws on the idea of public reason, namely, the thought that the exercise of legitimate political power depends on the existence of justifications that reasonable persons could share. Although it is most famously associated these days with the work of John Rawls, it is important to recall that the idea of public reason is not peculiar to Rawls or even, more broadly, to modern Kantianism.<sup>47</sup> Rather, some version of this idea is shared, and must be shared, by anyone who takes democratic politics to be more than a practice of aggregating personal preferences.<sup>48</sup> It would therefore be apt to identify, but not pursue, the particular version of public reason onto which the republican conception of freedom from religion maps. I shall do that by emphasizing two aspects where my account diverges from certain familiar accounts of public reason, especially the one developed by Rawls: First, the place of comprehensive doctrines in determining what counts as a nonpublic reason; second, the value of public reason.<sup>49</sup>

### 4.1. Nonpublic Reasons: The Distinctiveness of the Ultimate Religious Reason

Any theory of public reason must provide a baseline against which to assess whether or not a particular reason is ‘public.’ Some modern advocates of public

47 See, especially, Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1823), ch. II, §§ XII, XIV, XIV n.9.

48 More generally, some version of the idea of public reason must be acknowledged by anyone who takes seriously the distinction between an argument and a sentiment (or opinion). On the crucial role of expert knowledge for deliberative democracy, see Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven: Yale University Press, 2012).

49 Since the purpose of the discussion that follows does not defend Rawls’s or a Rawlsian conception of public reason, I shall not seek to address the numerous books and articles criticizing virtually every aspect of Rawls’s conception of public reason. For leading critical works on Rawls’s public reason, see, e.g., Michael Perry, *Religion in Politics* (Oxford and New York: Oxford University Press, 1997); Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002); John Finnis, *Collected Essays: Religion & Public Reasons*, vol. 5 (Oxford and New York: Oxford University Press, 2011), 16–126. Note, however, that often participants in the debate concerning the moral permissibility of invoking religious reasons in democratic politics tend to blur the critical distinction that I have made, namely, between religious reasons and what I call ultimate religious reasons. This shortcoming is unfortunate since it obscures our understanding of the principle of freedom from religion (and, plausibly, freedom of religion as well).

reason articulate this baseline by reference to the normative source of the reason in question. They ask whether this reason arises from, or turns on, what Rawls calls a comprehensive doctrine.<sup>50</sup> A comprehensive doctrine reflects an organized set of “views of the world and of our life with one another, severally or collectively, as a whole.”<sup>51</sup> Since a comprehensive doctrine appeals to “the whole truth”<sup>52</sup> or to “the constitution of the whole of beings,”<sup>53</sup> reasons derived from such a doctrine present the paradigmatic case of nonpublic reasons. The appeal to the whole true, the argument goes, renders the doctrine unable to address those who do not share its claim for the truth. On the Rawlsian approach to the idea of public reason, ultimate religious reasons are paradigmatically nonpublic reasons but so are reasons that stem from non-religious comprehensive doctrines—such as philosophical doctrines (e.g., deontological and utilitarian moralities).

On the republican conception of freedom from religion, by contrast, the major place of the concept of comprehensive doctrine in the notion of public reason loses momentum. Appealing to the whole truth or to ideas stemming from a comprehensive doctrine need not render a particular reason nonpublic. Rather, the reason that should count as ‘nonpublic’ is the ultimate religious reason (or any other reason that takes this form, on which more below). In particular, reasons are ‘nonpublic’ only because, and only insofar as, those who give them can defend their validity—not by addressing the points of view of other citizens, but rather by appealing to convictions that transcend the critical judgment of the latter. This is just another way to say that an ultimate religious reason is nonpublic in the sense that it cannot sustain political engagement due to the two distinctive features identified above: that the merits of an argument grounded in the ultimate religious reason are inaccessible to critical inquiry and that making such an argument forces one to beat a retreat from a reflective attitude of being willing to submit one’s own argument to the critical judgments of others.

To clarify the republican conception’s view of public reason, consider the case of non-religious reasons, including, in particular, those arising from

50 Since the publication of *Political Liberalism* in 1993 (below n. 51), Rawls has revised the theory of public reason twice: the first revision is presented in the introduction to the paperback edition (John Rawls, *Political Liberalism* [New York: Columbia University Press, 1996], 1–lvii). A much more dramatic revision of this theory is found in Rawls, “The Idea of Public Reason Revisited,” in *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 131–180. It now seems that Rawls allows far more space for reasons that are shaped by comprehensive doctrines. It is not clear, however, whether this latest account of public reason abandons the concept of comprehensive doctrine for the purpose of determining what makes a given reason a nonpublic one.

51 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 58.

52 *Ibid.*, 218, 243.

53 Habermas, “Religion” (above n. 22), 16.

comprehensive doctrines. Many among those who oppose excluding religious reasons from political deliberation on public-reason grounds claim that non-religious reasons are no less inaccessible. These opponents' stock example is that of political arguments grounded in concern for animal rights. Suppose that one of the arguments against public buses on the Sabbath has to do with the harm inflicted by these buses upon pets. More concretely, the argument is that anecdotal and impressionistic observations by pet owners suggest that noisy buses significantly increase the stress level on the part of these animals. Opponents of public reason point to reasons of this sort to show that the distinction between religious and non-religious reasons cannot be cast in terms of the distinction between non-public and public reasons. I suspect that this is so because people often perceive the arguments made by animal rights advocates as ones which are either irrational—pure and simple—or reminiscent of religious arguments.

In response, I shall argue that the distinction between religious and non-religious reasons need not cut across the distinction between public and nonpublic reasons—that arguments from animal rights can be qualitatively different from the ultimate religious reason and that the difference in question tracks the two features that, on my account, renders religious reasons in particular nonpublic.<sup>54</sup> Indeed, the person who makes the argument that noisy buses are harmful to pets presupposes the *prima facie* validity of certain empirical and moral propositions, namely, the fact and the normativity of harm in connection with pets, respectively. And, unlike the ultimate religious reason discussed above, these presuppositions force any one in that person's shoes to open oneself up to the critical inquiry of one's fellow citizens. To this extent, they force one to accept a certain way of being with others in this world—that which involves engaging others in the mode of justification that addresses these others as co-rulers.

What if support for the argument from animal rights persists even when its underlying presuppositions turn out to be either empirically or morally false? This would mean that support of this argument rests solely on an article of faith asserted in complete disregard of practical or theoretical forms of reasoning available to human inquiry. But must this case challenge my argument that non-public reasons are characteristically political arguments grounded in an ultimate religious reason? I think not. The animal rights argument under discussion may not emanate from an established religion but it, nonetheless, takes the form of an appeal to the ultimate religious reason. In other words, those who advance this argument are not officially affiliated with a religious creed in the colloquial sense of this term, but their invocation of reasons that self-consciously give up

54 The two features, to repeat, are the reason's inaccessibility to common human judgment and the want of reflective attitude on the part of the reason giver.



the possibility of critical human inquiry render them no less religious in the appropriate—viz., Weberian—sense.<sup>55</sup>

## 4.2. What is the Point of Public Reason: Forging Agreement versus Forging Community

The preceding discussion shows that, unlike the Rawlsian account of public reason, the republican conception of freedom from religion is far less troubled by the inclusion of reasons that appeal to “the whole truth.”<sup>56</sup> The source of this difference is the respective role designated to the public use of reason in the democratic process. On the Rawlsian account, the constraints imposed on the content of justifications of political power by the idea of public reason are meant to ensure that political life will be guided by reasons that “all might reasonably be expected to endorse.”<sup>57</sup> These reasons are articulated against the backdrop of a political conception of justice around which reasonable citizens who hold incompatible comprehensive doctrines can nonetheless form an overlapping consensus.<sup>58</sup> Public reason, one might conclude, supports the attempt of Rawls’s political theory to justify a principled agreement on substantive questions of justice between reasonable persons by bracketing off potential sources of conflict (including, in particular, disagreements arising from the existence of incompatible belief systems or comprehensive doctrines).<sup>59</sup>

55 See n. 35 above.

56 Moreover, the republican conception of freedom from religion is far more generous with respect to the inclusion of expert knowledge (in matters of both practical and theoretical reason) that far exceed the actual knowledge and sophistication of many private citizens. For this reason, it views civil society and other formally private institutions as fully operating within the public sphere.

57 Rawls, *Public Reason Revisited* (above n. 50), 243.

58 While Rawls does not claim truth for his political conception of justice, he does argue that it is the “most reasonable [conception] for us”; that is, a conception that “we regard—here and now—as fair and supported by the best reasons.” Rawls, *Political Liberalism* (above n. 51), 28, 26, respectively.

59 Richard Arneson confines the Rawlsian notion of public reason to “secular reasons that are sufficiently uncontroversial that no one, whatever his comprehensive beliefs, could reasonably reject.” Richard Arneson, “Political Liberalism, Religious Liberty, and Religious Establishment” (this volume), 117-144. I do not believe, however, that this is correct—neither as a reconstruction of Rawls’s notion of public reason nor as a successful competitor to my preferred notion (on which more below). The reason is that Arneson’s definition of public reason seems to obscure the important difference between political and moral debate by reducing the former into the latter.

The idea of public reason underlying the republican conception of freedom from religion, by contrast, has far less ambitious aspirations. It has, in fact, an altogether different point. It does not purport to resolve substantive disagreements by way of offering a political conception of justice around which reasonable citizens may unite. Nor does it seek to create a political space of reasons, as it were, within which a reasonable society could come to a principled agreement on basic questions of justice and legitimation.<sup>60</sup> Rather, the point of excluding nonpublic reasons from the democratic process is to sustain a political community in which members stand in the relation of co-rulers to one another. On the proposed account, using ‘public’ reasons is necessary to facilitate political engagements that not only go beyond preference aggregation of isolated individuals, but also form the basis against which citizens can hold themselves answerable to their compatriots and, to this extent, respect the latter as full members in the ruling class. Thus, although participation in a practice of giving public reasons need not—and indeed, will likely not—solve substantive disagreements, it can nonetheless help to sustain the legitimacy of political power in spite of such (persisting) disagreements.<sup>61</sup>

60 The metaphor of the “space of reasons” is elaborated in Joshua Cohen, “Establishment, Exclusion, and Democracy’s Public Reason,” in *Reasons and Recognition: Essays in the Philosophy of T. M. Scanlon*, ed. R. Jay Wallace, Rahul Kumar, and Samuel Freeman (Oxford and New York: Oxford University Press, 2011), 256.

61 The value of sustaining a democratic political community that underwrites the republican conception of freedom from religion might be challenged for exerting pressure toward exclusion and segregation. The suspicion is that it might influence the religiously-motivated citizen to opt out of democratic politics whenever her best (or sole) argument is grounded in the ultimate religious reason. Addressing this challenge carefully is beyond the scope of the present argument. Instead, I shall seek to sketch an outline of my response, which comes in three different counts. First, the argument of segregation is speculative, since it draws on a causal claim that the devotee in question will prefer to opt out of politics, as opposed to reconstruct her argument in ways that can engage her fellow citizens (rather than merely the divine) and thus so pass the bar of freedom from religion. For more on the “empirical questions” that surround the debate over the desirability of public reason, see Eduardo M. Peñalver, “Is Public Reason Counterproductive?,” *West Virginia Law Review* 110 (2007): 515, 532. Second, the proposed account of freedom from religion is not at all hostile to integration and toleration. To the contrary, it seeks to establish the basic threshold below which integration becomes superficial. On my account, an ideal of creating integration through political participation requires that participants could engage one another by exchanging reasons, and thus opening themselves up to each other’s point of view. This is precisely the point of the principle of freedom from religion developed in these pages. Third, a more comprehensive assessment of the integrationist/segregationist consequences of freedom from religion must take into consideration the offsetting effects of freedom from religion’s non-identical twin, namely, the principle of freedom of religion. I expound a bit more on the latter principle in the conclusion.

## 5. Conclusion

The argument developed in these pages emphasizes that the principle of freedom from religion protects citizens from being governed by public laws that are grounded in purely religious beliefs. In a previous article I have argued that freedom of religion is best explained by reference to a republican ideal of political legitimation.<sup>62</sup> In the present paper, I have sought to show that freedom from religion, too, reflects concerns for upholding the same ideal in the face of the familiar practice of grounding political arguments in ultimate religious reasons.

It makes sense, therefore, to take a brief look at the manner in which the two freedoms (of and from religion) may hang together under the unifying theme of political legitimation. Begin with freedom from religion. In my account, this freedom excludes arguments grounded in an ultimate religious reason. It seeks to curb political initiatives to compel conformity to, though not necessarily compliance with, religious dictates (such as the one underlying certain Sunday closing laws). In other words, freedom from religion insures against the illegitimate practice of state imposition of religious orthodoxy within the public sphere. Freedom of religion, on the other hand, seeks to compensate for the exclusionary effects brought about by the principle of freedom from religion. It grants religious adherents, and religious adherents only, exemptions from otherwise acceptable laws of general application that are, nonetheless, particularly burdensome for these adherents.<sup>63</sup> Indeed, to the extent that they are restricted by the principle of freedom from religion from advancing their religious beliefs through the democratic process, these adherents are entitled, on account of the principle of freedom of religion, to some measure of exemption from the adverse implications of this process's outcome on their exercise of religion.

This way of linking freedom from and of religion has the important advantage of accounting for what may seem to be the greatest challenge of explaining the otherwise mysterious treatment of religion by many democratic states. Religion is usually singled out for two opposing effects. The principle of freedom of religion does the singling out by providing religious adherents with an especially favorable treatment; whereas, freedom from religion singles out religion in ways

62 Dorfman, "Freedom of Religion" (above n. 9).

63 This account of freedom of religion addresses the skepticism voiced by lawyers and philosophers concerning the moral permissibility of singling out religion for the purpose of protecting the free exercise of this form of belief, as opposed to all other such forms, especially the non-religion ones. See, e.g., the skepticism raised in Arneson, "Political Liberalism" (above n. 59), 113–140.

that especially burden the religious adherents.<sup>64</sup> As I have sought to show in these pages, the key to explaining this seemingly schizophrenic approach to religion is the connection between certain religious reasons and the ideal of democratic legitimation.

64 These opposing tendencies are most famously exemplified by the (religious-favoring) Free Exercise Clause and the (religious-disfavoring) Establishment Clause of the U.S. Constitution's First Amendment.



Part Two

# Religion as a Source of Human Rights



# Reva Siegel and the Role of Religion in Constructing the Meaning of “Human Dignity”

Christopher McCrudden

## 1. Introduction

There is a well-recognized role that organized religions played in the post-Second World War development of international and transnational human rights protections. One of the problematic aspects of this protection is the extent to which there appears to be a disagreement over the basic question of what underpins these human rights. Increasingly, “human dignity” has been drawn on to fulfill this role. “Human dignity” is a concept with strong resonances in political, philosophical, legal, and theological understandings of human rights.<sup>1</sup> But what, if any, is the religious understanding of “human dignity” and what role, if any, does it play in the development of legal interpretation of human rights? As importantly, what role should it play?

The “religious understanding” of dignity is, of course, a topic of considerable complexity and is the subject of extensive scholarship.<sup>2</sup> In this paper, I consider only understandings of dignity that are currently under discussion in Roman Catholic (hereafter “Catholic”) circles, not least because Catholic discussions of dignity are often seen as influential in public policy and legal interpretation, directly and indirectly. Even after having narrowed the scope of my project in that way, the topic is still beyond the scope of a single (relatively short) paper. I shall focus, therefore, on one relatively neglected issue in legal scholarship: how scholars go about the task of identifying what a particular religion’s understanding of human dignity involves.

To illustrate the methodological problems that such an enterprise raises, I shall take one attempt by a scholar writing in the field of secular legal scholarship to describe Catholic understandings of dignity in the context of abortion and same-sex marriage. The discussion is that of Reva Siegel, an academic lawyer at Yale

1 I have attempted to sketch the variety of interpretations of the concept in Christopher McCrudden, “Human Dignity and Judicial Interpretations of Human Rights,” *European Journal of International Law* 19/4 (2008): 655.

2 As a starting point, see the various chapters in David Kretzmer and Eckart Klein, eds., *The Concept of Dignity in Human Rights Discourse* (New York: Kluwer Law International, 2002), 55–111 on different religious understandings of dignity.



University; her recent analysis of differing understandings of dignity illustrates some of the issues that arise when the secular scholarly community addresses religious understandings of dignity.

## 2. Context

This example of secular scholarship needs to be set in context. Siegel's work shares with other recent histories of human rights in general, and of particular human rights, an understanding that social movements should be recognized as major actors in this history, rather than mere bit players. Her legal work can be seen as part of this recent rethinking of human rights history. Like Samuel Moyn and other recent historians of human rights,<sup>3</sup> Siegel's work examines the role of social movements in the development of human rights thinking. In contrast to other historians, though, Siegel documents the development of a particular human right, the right to equality—particularly in the United States—rather than the development of human rights collectively.

The second academic development that frames this scholarship is comparative politics and comparative law. In the article that I focus on in this paper, an article in the *International Journal of Constitutional Law*,<sup>4</sup> Siegel joins a growing body of human rights scholars who take a comparative approach in examining the development of specific human rights or of human rights in general. Indeed, the journal in which her article appears is one of the more prominent examples of where such literature is published. This literature examines the development of human rights comparatively and transnationally, emphasizing the flow of ideas across borders, and considers how this flow has contributed to the evolution of human rights legal doctrine and to the activities of political movements that address human rights.

## 3. Internal and External Approaches to the Study of Religion

Although I shall be critical of aspects of Siegel's discussion, I emphasize that I am sympathetic to several elements of her enterprise. First, she is undoubtedly correct in identifying the concept of "dignity" as central to Catholic social thought. It

3 See Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2011).

4 Reva B. Siegel, "Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage," *International Journal of Constitutional Law* 10/2 (2012): 355–379.

is noteworthy that the *magisterium* of the Catholic Church adopted “human dignity” as the rallying cry for the social teaching it developed at the end of the nineteenth century. The threat that it viewed socialism to pose, particularly with the development of Communism by Marx, and the fear of radical redistribution, class war, and totalitarianism, contributed to the adoption of dignity as central to an all-encompassing Catholic social doctrine. This began with the Pope Leo XIII’s encyclical *Rerum Novarum* at the end of the nineteenth century, and developed further in 1931 by Pius XI, and John XXIII in the nineteen-sixties. In all these cases, however, the other enemy was seen as radical individualism, in particular an individualism that was seen as supporting unbridled capitalism. Since then, “dignity” has become central to Catholic social and moral teaching and Catholic moral teaching more broadly and plays a central role in the *magisterium* in areas as diverse as abortion, marriage, socio-economic rights, gender equality, and torture. In this use of dignity terminology, Catholic teaching shares a rhetorical space with human rights discourse, which also uses the concept of dignity as an important underpinning to its articulation of why human rights are important. In Catholic social teaching, it would seem there is an emphasis on the continuity of dignity as providing a bridge between different generations as they struggle to articulate a basis for human rights.

I also agree with the view that identifying the role of the Catholic Church in the history of human rights is an appropriate and important academic enterprise. I also concur with her implicit assumption that views the Church as an influential and controversial international and transnational social movement. The role of the Church in the development of human rights has too often been either ignored, or viewed too uncritically in the past. I do not, therefore, share the opposing view, often implied rather than articulated that only members of the Catholic Church—that is, those that believe in its teachings—are in a position to engage in a scholarly examination of the Church’s role. The problems with “church history,” written from the perspective of the believer, have been frequently identified and need not be repeated here, and accounts from outside the Church are an important antidote. In particular, these perspectives rightly emphasize that the evolution and presentation of religious discourse about human rights shares many of the same characteristics that we identify secular human rights discourse as possessing. In both, the discourse emerges from power struggles; there is bargaining; there is internal opposition; and the discourse may change over time. We should not, in other words, regard religious discourses of human rights as immune from the negotiation that secular discourse involves.

The methodological difficulties for secular scholars in engaging in a serious study of the Church’s role are not trivial, however. Recent historiographical debates, for example, have considered how best historians can analyze forms of religion to which the historians themselves do not personally subscribe. One

approach is to regard these religions simply from an external viewpoint, as the outward manifestations of forces of which the believers themselves may not even have been aware. So, for example, the approach that Keith Thomas famously adopted in his analysis of religion in sixteenth-century England, drawing from African cultural anthropology, considered religious practices from the point of view of an external observer.<sup>5</sup>

Such external, or detached, views may often be appropriate. We might want to look at the external behavior of those who are religious without necessarily taking their understanding of what they are doing into account, just as some socio-legal or law-and-economics scholarship considers the behavior of some legal actors from a similarly external viewpoint. Observing the regularity of behavior of a group of actors may be useful without looking at what is going on the minds of those so acting.

It would be a mistake, however, to consider that such an external perspective is the only way to study religious contributions to human rights discourse. More recently, there has been a turn to consider the belief systems of religious believers, and their significance, from their own (internal) perspective. This involves an attempt to understand rather than simply to observe.<sup>6</sup> This internal perspective is also the approach lawyers expect those writing about law to take about some legal phenomena. Famously, H. L. A. Hart distinguished between external and internal points of view.<sup>7</sup> A sophisticated approach to the study of legal doctrine requires the scholar not just to adopt an external perspective, observing the law as a cultural phenomenon involving certain practices, but also as a normative system that requires understanding from an internal perspective. This is not to say that an external perspective should be ignored when considering religious doctrine. One should include the internal point of view, but one should not be stuck to it to the exclusion of all else. In particular, to capture the internal understanding of the normative system does not require acceptance of these internal beliefs.

The reason for this is because there are two types of internal perspective available. Neil MacCormick has distinguished between two components of the internal point of view: “There is [the] ‘cognitively internal’ point of view, from which conduct is appreciated and understood in terms of the standards which are being used by the agent as guiding standards: that is sufficient for an understanding

5 Keith Thomas, *Religion and the Decline of Magic* (London: Weidenfeld and Nicholson, 1971).

6 Carlo Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller*, trans. John Tedeschi and Anne C. Tedeschi (Baltimore: Johns Hopkins University Press, 1992).

7 H. L. A. Hart, *Concept of Law* (Oxford: Oxford University Press, 1961).

of norms and the normative.” This should be contrasted with what MacCormick terms “the ‘volitionally internal’ point of view: the point of view of an agent, who in some degree and for reasons which seem good to him has a volitional commitment to observance of a given pattern of conduct as a standard for himself or for other people or for both: his attitude includes, but is not included by, the ‘cognitively internal’ attitude.”<sup>8</sup>

Scholars writing about normative systems that make up particular religions are faced with choices, therefore, about which is the appropriate methodology to adopt in presenting religious systems. These choices mirror similar decisions facing scholars writing about law. While solely external perspectives are sometimes justified, when writing about legal doctrine, legal rules, and legal principles, we generally expect scholars to adopt a cognitively internal viewpoint. We should, I suggest, expect those studying particular religions to adopt a ‘cognitively internal’ point of view when considering religious doctrines, rules, and principles.

## 4. Siegel’s Argument in Brief

With these thoughts in mind, we can turn to consider Siegel’s argument. She considers the current use of dignity terminology by the Catholic Church in such areas of doctrine as abortion and same-sex marriage. Siegel distinguishes between three conceptions of dignity: “dignity as autonomy,” “dignity as equality,” and “dignity as life.” She views these different conceptions of dignity as playing an important role in debates about the proper role of the state and law in regulating abortion and same-sex marriage. She regards the Catholic position as encapsulating the conception of “dignity as life” in contrast with the use of dignity by “human rights organizations”<sup>9</sup> that draws on conceptions of “dignity as autonomy” and “dignity as equality.” “Human rights organizations, on the one hand, and the Catholic Church . . . , on the other,” she writes, “act from conflicting pictures of human flourishing.”<sup>10</sup> As these and the later quotations indicate, Siegel is not simply identifying what Catholic authorities in, e.g., the United States, say about these issues, but what “Catholic doctrine”<sup>11</sup> as such requires.

Siegel’s discussion is part of her wider interest in examining the use of the discourse of dignity in the transnational context in these areas. The Catholic Church’s use of dignity in these contexts is intended by Siegel, I understand, not

8 Neil MacCormack, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 292.

9 Siegel, “Dignity and Sexuality” (above n. 4), 378.

10 *Ibid.*, 379.

11 *Ibid.*, 371, 375.

only to provide an example of how religious organizations use dignity language to argue for restrictions on abortion and against same-sex civil marriage, and what the connection is between the use of dignity in these contexts, but also to provide an example of how “religious organizations . . . deploy dignity in regular and intelligible ways.”<sup>12</sup> This, in part, is intended to qualify an earlier article of mine that examined the use of dignity in judicial interpretation.<sup>13</sup> That paper emphasized the radically diverse and relatively unpredictable ways in which dignity was used in that context.

There are two other points that Siegel makes in the course of her rich and interesting article that are of particular interest for the purposes of this paper. First, she argues that it is important to distinguish “certain religious claims about dignity [by which I understand Siegel to include the ‘Catholic’ understanding of dignity]” from “secular claims about dignity.”<sup>14</sup> Second, she argues that “the Catholic”<sup>15</sup> approach to same-sex marriage and abortion derives from premises regarding “women’s roles” and “sexual expression,” both of which she describes as “conservative” and “illiberal.”<sup>16</sup> In “the Catholic Church’s”<sup>17</sup> view of dignity as life, “women have a special gender-differentiated role in the family, with implications for the Catholic understanding of dignity as autonomy and dignity as equality.”<sup>18</sup> Men and women are seen as formally equal but different, complementing each other in their differences. This gender “complementarity”<sup>19</sup> affects not only the role of women, but also the Church’s approach to same-sex marriage, which it is opposed to because true “marriage” depends on this “complementarity.”

## 5. Problems in Siegel’s Account

This brief account of Siegel’s article cannot do justice to the many dimensions of her argument and readers are recommended to read the original. In this essay, I want to use Siegel’s essay as a jumping-off point for a discussion about how to talk and write about religious institutions’ and religious persons’ engagement in politics, but I shall focus only on her approach to Catholic institutions’ and individuals’ use of dignity. Siegel does not claim, by the way, that all Catholics hold these views, or that all Catholics are conservative. She emphasizes that

12 Ibid., 356.

13 See above, n. 1.

14 Ibid., 371.

15 Ibid., 372.

16 Ibid., 371.

17 Ibid.

18 Ibid., 372.

19 Ibid., 376.

advocates of other religious organizations also hold these views. Indeed, Siegel's primary concern, I understand, is to show how a coalition of those speaking from a religious perspective (particularly in the United States) have come together to espouse a "conservative" and "illiberal" social agenda through the use of "dignity" language. That said, there are various aspects of her analysis of the Catholic dimension of this coalition that seem to me to be problematic.

First, what exactly does Siegel mean by "Catholic"? As we have seen, Siegel uses several different terms in the course of her article: she refers at various points to "the Catholic Church," "Catholic doctrine," and the "Catholic understanding of dignity." She also uses the term "Catholic spokesperson."<sup>20</sup> In some places, Siegel means simply that the person quoted is someone who is in communion with the Catholic Church, as a practicing member of that Church. In the contexts in which she quotes Robert George, for example, to whom I return subsequently, it is in his role as an academic or public intellectual. He has, so far as I am aware, no official role in the Church beyond being a well-known American Catholic who seeks to promote his moral and ethical views in the public domain, and who occasionally advises members of the Catholic hierarchy.<sup>21</sup> Sometimes, George claims to promote specifically Catholic viewpoints; more often he seeks to articulate what he would claim to be "natural law," to which I also return subsequently. But in what sense is he a "Catholic spokesperson," as Siegel claims him to be?

Second, Siegel demonstrates a critical misunderstanding in her discussion of how "Catholic doctrine" is to be identified. I assume that by "Catholic doctrine" she means to refer to what is called the *magisterium* of the Church—that is, the exercise by the Catholic hierarchy, particularly the Pope, of a formal teaching role. In supporting various propositions about what "Catholic doctrine" requires, apparently in this sense, she cites to a variety of different sources, including the *Catechism of the Catholic Church*, several Papal encyclicals by Pope Paul VI and Pope John Paul II, several papal homilies and addresses, a statement from the Congregation for the Doctrine of the Faith, a pastoral letter from an American Bishop, and an online blog by an individual Catholic. Citing all these sources together to demonstrate "Catholic doctrine" risks underestimating the hierarchical nature of Church authority, and the way in which the *magisterium* (the teaching authority of the Church) is manifested.<sup>22</sup> More importantly, it does not identify

20 Ibid., 376.

21 In the interests of transparency, I should add that I too have informally advised members of the Catholic hierarchy, that I too have no official position or role, and that nothing written here should in any way be thought to reflect the views of any other Catholic.

22 This is not a criticism, merely an indication of a difficulty. The *magisterium* of the Church is a controversial and complex concept; see John Boyle, *Church Teaching Authority: Historical and Theological Studies* (Notre Dame, IN: University of Notre Dame Press,

that the gold standard of the Catholic *magisterium* is the teaching of the popes and bishops when they are speaking infallibly, and Siegel makes no mention of which if any of these pronouncements are intended to be infallible, an issue of considerable complexity. Perhaps most importantly, the *magisterium* should be understood as a whole; Siegel identifies only some aspects of the relevant teaching.

This is particularly apparent when she refers to the papal encyclical of Pope Paul VI, *Humanae Vitae*, which sets out (infallible according to some, non-infallible according to others)<sup>23</sup> papal teaching prohibiting the use of contraception in marriage. This encyclical is part of the *magisterium*, but it is by no means the only part. In particular, to ignore *Gaudium et Spes*, which is the Pastoral Constitution on the Church in the Modern World, and one of the four Apostolic Constitutions of the Church arising from the Second Vatican Council, is potentially misleading. This is because some Catholic theologians have relied on *Gaudium et Spes* as the basis for what Siegel would regard as a less conservative approach to marriage, women, and homosexuality.<sup>24</sup> In short, Siegel's cherry-picking of which parts of the *magisterium* to quote gives a false picture of doctrinal certainty that consistently privileges the more "conservative" (her term) aspects of that teaching, and thus fails to recognize the full extent of doctrinal debate within the Church.

Nor, when the Catholic doctrinal position is being identified is it appropriate to focus only on the *magisterium*. There are, to put it in more traditionally legal terms, three sources of Catholic doctrine in addition to the *magisterium*. These include revelation, natural law, and human experience. This multiplicity of sources means that, taken together, they can be interpreted in a variety of ways that tell different stories about what that religion requires; this has important implications for the type of analysis that Siegel undertakes. Perhaps of particular significance, it means that these sources require sophisticated interpretation, and an important source of such interpretation is the works of current theologians.

1995). The brief discussion in this paragraph is intended merely to indicate some of the difficulties to a primarily non-Catholic audience.

23 For a selection of the extensive literature, see Ermenegildo Lio, O.F.M., *Humanae Vitae e Infallibilità: il Concilio, Paolo VI e Giovanni Paolo II* (Vatican City: Libreria Editrice Vaticana, 1986); John Ford and Germain Grisez, "Contraception and the Infallibility of the Ordinary Magisterium," *Theological Studies* 39/2 (1978): 258–312; Francis Sullivan, S.J., *Magisterium: Teaching Authority in the Catholic Church* (Dublin: Gill & Macmillan, 1983).

24 See, for example, the controversial discussion by Todd A. Salzman and Michael G. Lawler, *The Sexual Person: Towards a Renewed Catholic Anthropology* (Washington, DC: Georgetown University Press, 2008).

In deciding what the “Catholic understanding” of dignity consists of, Siegel appears to ignore (at least as far as her citations reveal her thinking) the writings of Catholic theologians on these matters. Here again, Catholic understandings of the role of women and homosexuality, as reflected in the writing of Catholic theologians, reflect a considerably greater plurality of viewpoints than she appears to recognize; in particular, there are different understandings of the meaning and implications of dignity. To imply otherwise is to impoverish a vibrant, and (most importantly) an *ongoing* discussion within the Church.

Third, there is an added complexity in considering “the Catholic Church’s” position on these issues. “The Church” is both a religious organization and a secular organization recognized in international law in the form of the Holy See. The Holy See acts very much like any other state, in so far as it concludes bilateral agreements with other states (“concordats”), participates in international organizations, and ratifies (some, though relatively few) international human rights conventions.<sup>25</sup> A full examination of “the Church’s” position on abortion and same sex marriage would involve considering the approach the Holy See has taken in these contexts, and not confine attention to the *magisterium*, however important that is in the context of the Church’s position *qua* religious organization.

Fourth, Siegel seems to have a particular, but unarticulated, view of what constitutes a “religious” argument. Her discussion of the Congregation of the Faith’s *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons* illustrates this. This, she says, “confirms that marriage between persons of the same sex can never fulfill the procreative, society-building ends of heterosexual marriage.”<sup>26</sup> She then quotes the document itself: “Homosexual unions are totally lacking in the biological and anthropological elements of marriage and family which would be the basis, on the level of reason, for granting them legal recognition. Such unions are not able to contribute in a proper way to the procreation and survival of the human race. The possibility of using recently discovered methods of artificial reproduction, beyond involving a grave lack of respect for human dignity, does nothing to alter this inadequacy.”<sup>27</sup> Then comes the critical statement that contains the difficulty: “Although arguing from religion,” Siegel writes, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* “was not only addressed to

25 See further Christopher McCrudden, “Catholicism, Human Rights and the Public Sphere,” *International Journal of Public Theology* 5 (2011): 331–351.

26 Siegel, “Dignity and Sexuality” (above n. 4), 376.

27 Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (2003), §§3, 7, quoted in Siegel, “Dignity and Sexuality” (above n. 4), 376.



Catholics, other Christians or even just people of faith, it was addressed to all people.”<sup>28</sup>

The key words are “although arguing *from religion*.” In her article, Siegel nowhere identifies what defines an argument as “religious.” In the context in which she uses the term, it does not appear to be the case that she means simply to include any argument espoused by a person who is a member of a particular religion, a definition that would plainly be overbroad. What she appears to mean by a religious argument is one whose premises can be accepted only by a believer in a particular religious creed. The problem is that the Congregation, in the passage quoted above, goes out of its way to argue that it is neither on the basis of the *magisterium* of the Church (that is, on the basis of Church authority), nor on the basis of scriptural exegesis (that is, on the basis of revelation) that it reaches its conclusions, but on the basis of what it takes to be practical reasoning that can and should appeal to those who do not recognize the Church’s teaching authority, or the role of revelation. It is hard to read the quoted passage as doing anything else, with the key terms being: “biological and anthropological,” “on the level of reason,” and “procreation and survival of the human race.” That is to say, the document relies on a particular *anthropological* understanding of the person to ground its understanding of what human dignity requires. To put it another way, it relies on a particular understanding of what is “natural”; it relies, in other words, on “natural law.”

There is a large and complex literature on the meaning and implications of “natural law.”<sup>29</sup> For generations of law students, particularly in the Anglo-American tradition, “natural law” evoked debates largely about the relationship between law and morality, in particular the question of whether a law that contravened morality was nevertheless still good law. The issues raised by natural law are, however, much more complex and multi-faceted than that suggests. I do not want to enter into a general discussion about the relationship between “natural law” and “positive law” (although that issue is raised by the Congregation’s statement, quoted by Siegel). What I want to emphasize at this point is only that although “natural law” is one of the sources of the Catholic *magisterium*, that does not make “natural law” “religious,” which is to confuse the idea of “natural law” with the other beliefs of (some of) its adherents. In soccer parlance, she is “playing the man,” rather than “playing the ball.” The criticism has been made, understandably in some cases, that those espousing “natural law” may interpret it

28 Siegel, “Dignity and Sexuality” (above n. 4), 376.

29 See, for example, the chapters by John Finnis, “Natural Law: the Classical Tradition,” and Brian Bix, “Natural Law: the Modern Tradition,” both in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott J. Shapiro (Oxford: Oxford University Press, 2002), on 1 and 61, respectively.

in such a way as simply to justify the then existing *magisterium*, rather than using natural law as an independent basis for assessing and contributing to the evolution of the *magisterium*; however, this is a misuse of “natural law.” Those who purport to interpret “natural law” do so, they say consistently, on the basis of practical reason, and those interpreting it and the conclusions they reach are therefore open to being criticized on the basis of practical reason.

Siegel makes the point that the arguments are “religious” as if that is enough in itself to justify bracketing them apart from other arguments of practical reason; as such, she fails to engage with the merits of the conclusions drawn. Had she dug deeper, she would have discovered that there is a heated debate occurring at this time among Catholic scholars and intellectuals which has resulted in different strands of “natural law” thinking emerging on the issues she considers, only one of which is of the “conservative” brand that she identifies as characteristic of “Catholic thought.” This makes the picture of what constitutes “Catholic thought” much more complicated than she appears to realize.

## 6. Explaining the Gap between Catholic and Secular Human Rights

The role of Pope John XXIII is critical in bridging between human rights discourse and the *magisterium*, culminating in *Pacem in Terris*, the papal encyclical that did more than any other single document to signal a rapprochement between Catholic teaching and human rights developments at that time, subsequently confirmed in *Gaudium et Spes*. Given this apparent rapprochement, what needs to be explained is why there is such a widely shared view inside and outside the Church that significant gaps have now opened up between the Catholic *magisterium* and aspects of human rights thinking, in particular in those areas which Siegel is anxious to explore: gender and sexual orientation.

It will be useful to start with a general proposition that is now so well accepted as to be almost trite: stable democratic states that participate in the drafting of human rights documents do so primarily *pour encourager les autres*, that is, they expect that these norms will affect the behavior of *others* rather than themselves. Another way of putting the same point is that human rights are often initially seen in foreign offices and state departments as primarily for export, because most stable democratic states consider their own internal human rights positions to be relatively satisfactory; in need of tweaking, perhaps, but fundamentally in compliance with human rights obligations. It is often only much later that these states discover that human rights have a tendency to morph in such a way that leaves such states exposed to criticism of their own compliance.

We can see much the same development occurring as regards the Catholic Church. During the 1960s, there was a significant opening up to human rights

thinking; however, I believe it would be fair to say that this was seen at the time as primarily for export only. It would be fascinating to trawl the Vatican archives to test this intuition, but I would guess that no systematic assessment was carried out for the implications of the turn to human rights that Pope John XXIII initiated, and that the Second Vatican Council adopted so wholeheartedly. Why the Catholic Church was willing to adopt human rights thinking is still the subject of considerable historical investigation and interest, but in part it is likely that the human rights agenda at the time was seen as having sufficient overlap with Church positions on issues of justice, welfare, and the common good to be worthy of support; that the Church's decline as a secular power resulted in greater self-awareness of the Church's moral voice in the world, a voice that could be articulated in the language of human rights; and that the development of Catholic understandings of freedom of religion and conscience was partly articulated in human rights terms. It is also probable that the influential involvement of Catholics in the drafting of the Universal Declaration of Human Rights and the European Convention on Human Rights in the late 1940s was seen as giving a seal of approval to the process. This served to further underpin the presumption that human rights would have little effect within the Church itself, not least because of the apparently strong protection for religious freedom within these human rights documents.

This support for human rights soon came to be seen as an example of the difficulty the Church faced in reacting to aspects of modernity. Bernard Lonergan's 1967 essay is a useful starting point.<sup>30</sup> In it, he contrasts two modes of thinking about meaning, those characteristic of "classical" and "modern" culture, with the former being ahistorical and essentialist, secure in having clear and accepted meaning, while the latter is more historical and inductive. Catholic moral theology, born in the former is now confronted with the latter world of meaning. Lonergan anticipates a split in Catholic theology in which "a scattered left" develops "captivated by now this, now that new development, exploring now this and now that new possibility" in contrast with "a solid right that is determined to live in a world that no longer exists."<sup>31</sup>

John Langan, S.J., although using the terms "revisionist" and "anti-revisionist" has suggested a similar intuition.<sup>32</sup> The main factors making for revisionism are: the importance of historical conscientiousness; the general theological awareness of the development of doctrine; a desire for a more culturally and psychologically

30 Bernard Lonergan, "Dimensions of Meaning," in *Collection: Papers by Bernard Lonergan*, S.J., ed. Frederick E. Crowe (New York: Herder and Herder, 1967), 252. I am grateful to James Hanvey, S.J., for drawing this to my attention.

31 *Ibid.*, 245.

32 Personal communication on file with the author.

sensitive pastoral practice; and the social distance between ecclesial authority and the profession of theology. The main factors making for anti-revisionism are: an essentialist, legalistic, and biologicistic conception of natural law as developed in neo-scholasticism, with a strong emphasis on its immutability and universality; the assertion of papal authority in moral matters since the mid eighteenth century (in the First Vatican Council), with a preoccupation on infallibility and the irreversibility of Church teaching.

This discussion is relevant for the issues that Siegel discusses, as they put into perspective two intellectual developments that took root in the late 1960s that contributed to opening up the perceived gap between the human rights movement and the Catholic Church in the areas that Siegel considers. We can begin with developments within secular human rights and human dignity discourse itself, particular within what Siegel describes as “dignity as equality.” With the increasing emphasis on racial and gender equality from the 1960s onwards, morphing into a more general concern to enable an individual’s identities to be valued and protected, equality discourse took on a strongly individualistic, autonomy-based, anti-essentialist, and constructivist quality.

There are, of course, several different meanings that may be intended by the use of the term “essentialist.” I use it here to refer to the idea that “definitions are descriptions of the essential properties of things, and that one can evaluate attempts at definitions in terms of the falsity or truth of the descriptions given by them.”<sup>33</sup> “Essentialism” is now most used in the social sciences as a description of a position that is regarded as out-dated, a term of criticism rather than approbation. As Simon Blackburn explains, “Essentialism is used in feminist writing of the view that females (or males) have an essential nature (e.g. nurturing and caring versus being aggressive and selfish), as opposed to differing by a variety of accidental or contingent features brought about by social forces.”<sup>34</sup> Often such “essentialism” is seen as based on biological determinism. It is this understanding that anti-essentialism seeks to challenge, preferring to view institutions and roles as socially constructed and provisional. In particular, social identities are seen as socially constructed and changeable. Human rights discourse, and to a significant extent human rights law, has significantly (but by no means uniformly) adopted an anti-essentialist understanding of “dignity as equality.”<sup>35</sup>

33 S.v. “Essentialism,” in John Scott and Gordon Marshall, *A Dictionary of Sociology* (Oxford: Oxford University Press, 2009); online at [www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t88.e745](http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t88.e745) (accessed April 10, 2012).

34 S.v. “Essentialism,” in Simon Blackburn, *The Oxford Dictionary of Philosophy* (Oxford University Press, 2008); online at [www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t98.e1139](http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t98.e1139) (accessed April 10, 2012).

35 Tariq Modood, “Anti-Essentialism, Multiculturalism and the ‘Recognition’ of Religious Groups,” *The Journal of Political Philosophy* 6 (1998): 378.

A second major intellectual development took place in discussions of “natural law.” From the early 1960s, there was a sustained attempt to rethink and reformulate the foundations of “natural law” in a way that grew from and was consistent with Thomist approaches. One of the most influential of these attempts was what came to be called “new natural law” by its proponents and opponents. “New natural law,” as articulated by a group around Germain Grisez, and including John Finnis and Robert George, became in practice a controversial<sup>36</sup> alternative to aspects of revisionist approaches within the Church. “New natural law” was seen by some elements of the Church hierarchy, particularly in the United States, as supportive of the traditional elements of some of the existing *magisterium* and in turn to be supported and encouraged, particularly after the bitter controversy that arose within the Church on the publication of *Humanae Vitae*. Even this short introduction to “new natural law” is, however, overly simplistic as it is a complex phenomenon and not one that can be easily pigeon-holed.

There are important differences between these revisionist and anti-revisionist approaches, which will be considered in a moment; however, at least in one respect they do not differ. Both are based on interpretations of “natural law”; and those who adopt these approaches do not consider that either is narrowly “religious,” as both appeal to reason and the natural order. The major difference, for the purposes of this discussion, is in their anthropological understanding. One key issue, as Siegel rightly identifies, is the issue of sexual “complementarity.” What she misses, though, is the debate within the Church as to the appropriate understanding of this “complementarity,” and the extent to which dignity language is used on both sides of the internal debate. The result is a sharp dispute, *within* the Church, over what is required to ensure human flourishing.

Both approaches appeal to human dignity,<sup>37</sup> but there is sharp disagreement as to what human dignity requires. Sometimes, a revisionist understanding of dignity is evident, particularly in the social teaching of the *magisterium*; sometimes an anti-revisionist approach to dignity, more compatible with new natural law, is evident, particularly in some of the teaching of the *magisterium* in areas touching on gender and sexual orientation. The narrative of dignity in Catholic thought, for

36 See, e.g., Nicholas C. Bamforth and David A. J. Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (Cambridge: Cambridge University Press, 2008).

37 Different authors within “new natural law” place somewhat different emphases on the importance and centrality of “dignity” to their enterprise. John Finnis, for example, treats it very briefly, for example in *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), 176–180, whereas Patrick Lee and Robert George has given the concept much more extensive treatment and importance, see, for example, “The Nature and Basis of Human Dignity,” *Ratio Juris* 21 (2008): 173.

this reason, is not consistent with Siegel’s thesis that the Catholic Church’s use of dignity provides an example of how “religious organizations . . . deploy dignity in regular and intelligible ways,” contrary to the argument in my earlier work. My understanding of the use of dignity within Catholic discourse (understood broadly) is consistent with my earlier assessment—that the use of human dignity is confused, uncertain, and evolving, rather than Siegel’s revisionist assessment that its use by “the Church” is regular and intelligible. Only by substantially ignoring the debate within the Church could Siegel’s assessment be seen as credible.

## 7. Conclusion: Why Does It Matter?

Why should any secular scholar be concerned about these apparently internal debates within Catholic circles? Is there any reason why we should be concerned that the “cognitively internal” viewpoint is so absent from Siegel’s argument? One response is simply at the level of scholarship: correctly identifying what constitutes the “Catholic conception” of human dignity helps present accurately the past intellectual history of human rights. But there is more at stake, however important that may be. The importance of the issue has much more to do with the present and future legitimacy of Catholic contributions to public debate, and the place of Catholics in the human rights movement.

Nigel Biggar has captured the point in his general discussion on the place of religious voices in public discourse. For Biggar, there is a “very deeply rooted” view that “religious discourse [in the public sphere] is uniquely menacing because it is uniquely characterized by dogmatic certainty and authoritarian appeal, and is therefore ‘unreasonable’ in the sense of being incapable of the discursive give-and-take requisite to secular peace.”<sup>38</sup> My fear is that, whether intentionally or not, Siegel’s argument is likely to encourage such thinking. I have suggested that whatever may be said about other religions, the current Catholic understandings of human dignity are not characterized by “dogmatic certainty” and that any “authoritarian appeal” that aspects of the *magisterium* may hold is itself an issue that currently occupies much time within internal Catholic debates. In these discussions, experience is brought to bear, the multiplicity of sources is seen to require rational negotiation, and the rules of logic and evidence are authoritative. “The fact that religious arguments are informed by certain authorities does not mean,” as Biggar puts it, “that these proponents are incapable of deliberating,

38 Nigel Biggar, “Conclusion,” in *Religious Voices in Public Places*, ed. Nigel Biggar and Linda Hogan (Oxford: Oxford University Press, 2009), 319–320.

reasonably and critically, with those who differ from them.”<sup>39</sup> Something similar, of course, occurs in legal argumentation.

Overestimating the internal coherence and stability of a religious (in this case, Catholic) conception of dignity may have another purpose: it creates a wedge between the “religious” and the “human rights” perspectives, driving them apart. If the “conservative and illiberal” are seen, as I believe Siegel presents them, as the more authentic expression of Catholic doctrinal orthodoxy, the easier it is to present other Catholic voices (such as those within human rights communities) as, in some sense, dissident or inauthentic. The “true” religious voice is thus increasingly seen as outside, and apart from, the human rights movement.

This is not just quibbling. There is an intense discussion currently occurring within the community of Catholic theologians and within communities of Catholics more generally about human rights, the role of women, and gay rights, with a wide variety of different viewpoints being expressed and debated. That is unsurprising and, as we have seen, Siegel acknowledges that associations of Catholics have identified on both sides of the same-sex marriage debate. Whomever secular public intellectuals identify as “Catholic spokespersons,” for example, is likely to privilege one side of that (unresolved) internal debate. It is rather like an anthropologist examining a particular culture and singling out one group of the participants in that culture as “the” representative of that culture. We would not regard that as good anthropology when done among Amazonian tribes; why is it any more acceptable when writing about American Catholics? The effect is also to delegitimize the human rights movement in the eyes of those with a religious viewpoint, strengthening the idea that they have to choose between two sets of beliefs that are essentially incompatible.

This sharpening of the battle lines between “religious” and “human rights” perspectives has another effect: not only does it overly simplify the “religious” perspectives, it also falsely implies the coherence of the human rights movement itself.<sup>40</sup> It is simply unconvincing to argue that non-religiously grounded human rights discourse, in particular the discourse of equality and autonomy, is as coherent or univocal as Siegel appears to suggest. Whether intentionally or not, the overly monolithic characterization of the Catholic position has the effect of obscuring the pluralistic and essentially contested nature of human rights discourse itself. Elements of what Siegel characterizes as specifically “religious,” such as the idea of the “complementarity” of men and women, has strong echoes in parts of secular “difference feminism,” and in equality-based politics such as the French *parité* movement, regarded by some as a paradigm example of progressive thought.

39 Ibid., 321.

40 I am grateful to Paolo Carozza for this point.

The purpose in pointing to these problems is not to poke holes in the work of a prominent and respected scholar simply for the sake of it, but to use this as the opportunity to reflect more broadly on the difficulty that future scholars face when they write about the role of the Catholic Church in human rights debates, particularly in the use of dignity discourse. Whether one supports that role or one profoundly disagrees with it, human rights scholarship needs to address its role in ways that accurately capture its complexity and uncertainty. I have argued that the discussion of “Catholic” understandings of dignity illustrates the need for considerably enhanced inter-disciplinary work between theology, law and history, one which incorporates a cognitively internal point of view, if a productive understanding and critique of the role of Catholic thinking on dignity in human rights discourse is to be integrated into these disciplines.



# The Glory of God and Human Dignity Between Dialogue and Dialectics

Itzhak Brand

## 1. Introduction

The encounter between religion and human rights is heavily charged and replete with contradictions. On the one hand, religion affords major support for human rights. What is more, religious literature exalts human beings' right to dignity and freedom. In fact, the various charters of human rights are based on religious texts and terminology.<sup>1</sup> On the other hand, religion is one of the most conspicuous barriers to human rights. Clerics are frequently the leading opponents of various measures that would establish or expand constitutional rights.<sup>2</sup>

The relations of dialogue and dialectic between religion and human rights find strong expression in the right to respect or dignity. The Jewish religion institutes and exalts human beings' right to dignity. The various categories of religious literature, from the Bible through the later rabbinic writings, pay tribute to human dignity. Even the secular discourse about the human right to dignity frequently refers to man as created in the image of God.<sup>3</sup> On the other hand, halakha places

\* The Hebrew word *kavod* has a very broad semantic field that includes "honor," "respect," "majesty," "dignity," and "glory." Here the term has been rendered into the English word that best reflects the context in which it is used. This article was translated by Lenn Schramm and Shoshan Levy.

1 See, for example, Robert J. Nelson, "Human Rights in Creation and Redemption: A Protestant View," in *Human Rights in Religious Traditions*, ed. A. Swidler (New York: Pilgrim Press, 1982), 2, 10. On Islam, see Abdullah al-Ahsan, "Law, Religion and Human Dignity in the Muslim World Today: An Examination of OIC's Cairo Declaration of Human Rights," *Journal of Law and Religion* 24 (2008–2009): 569.

2 J. Waardenburg, "Human Rights, Human Dignity and Islam," *Temenos* 27 (1991): 151–182. For the Christian world, see *ibid.*, text at nn. 10–12 and notes. With regard to the Muslim world, see *ibid.*, text at n. 36 and the note itself.

3 See below, n. 6.

limits on human dignity and frequently assigns precedence to respect for God and His precepts when they come into conflict with human dignity.

In the present article, we will attempt to sketch a legal and halakhic picture of the balance of forces between human dignity and religion. We will begin by describing the source of the theological and halakhic power of human dignity: the conception of human beings as made in the image of God (*imago Dei*). Next we will consider the theological and halakhic antipode, which gives precedence to respect for God over human dignity. After that we will provide examples of the tension between the two poles by studying a passage from the Babylonian Talmud that expounds the halakhic principle, “Great is human dignity, in that it overrides a negative precept in the Torah.” Finally, we will propose a thematic analysis of the polarity. This analysis may clarify the nature of the possible systems of relations between religion and human dignity in general and human rights in particular.

## 2. Human Dignity and the Image of God

The right to dignity is one of the most prominent of human rights. Some have seen it as the cornerstone of every human right (in law),<sup>4</sup> or, alternatively, of all the precepts that govern relations among human beings (in halakha).<sup>5</sup> A human being’s right to respect is supported by various rationales and diverse values;<sup>6</sup> one of the most prevalent is that man is created in the image of God. It is true that this argument is widespread in the secular discourse about human rights; it is also obvious that, in such a discourse, the right to human dignity is not associated with any religious obligation to show respect for God.<sup>7</sup> Nevertheless, all allow

4 Alan Gewirth, “Human Dignity as the Basis of Rights,” in *The Constitution on Rights*, ed. Michael Meyer (Ithaca: Cornell University Press, 1992), 10–28; *Human Rights and Civil Liberties in Israel*, eds. Ruth Gavison and Hagai Shenedor (Tel Aviv: The Association for Civil Rights in Israel, 1992), [Hebrew]: “The principle of human dignity is effectively the basis for every humanistic tradition or any belief in human rights. . . . The idea in this entire tradition is that human beings as individuals possess dignity . . . and this is the fundamental source for every theory of human rights.”

5 See Rabbi Josef B. Soloveitchik, *Memorial Days* (Jerusalem: Eliner’s Library, 1989), 9 [Hebrew]: “The principle of human dignity is the ideal axis of many halakhot. . . . It is even possible that all of the precepts between man and his fellow are based on the principle of human dignity.”

6 Yehoshua Arieli, “On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights,” in *The Concept of Human Dignity in Human Rights Discourse*, ed. David Kretzmer and Eckart Klein (London and New York: Martinus Nijhoff Publishers, 2002), 1–17.

7 See Yaakov [Gerald] Blidstein, “*Kevod ha-beriyot* and Human Dignity” in *Questioning Dignity, On Human Dignity as a Supreme Moral Value in Modern Society*, ed. Yossi David

that this assertion is essentially of religious origin. Human beings' right to dignity stems from the fact that they have been created in the image and likeness of God; consequently the fundamental religious obligation to respect God is transferred to human beings who bear His likeness.<sup>8</sup> This idea is alluded to in the Bible and stated explicitly in the talmudic literature.

## 2.1. Biblical References

Although this concept is not mentioned explicitly in the Bible, two biblical passages allude to it:

- A. Psalm 8 praises human beings as the quintessence of creation. In light of their virtues, human beings merit attention by God and have dominion over all other creatures: "What is man that Thou art mindful of him, and the son of man that Thou dost care for him? Yet Thou hast made him little less than God, and dost crown him with glory and honor. Thou hast given him dominion over the works of Thy hands; Thou hast put all things under his feet" (Ps. 8:5–7 [4–6]).<sup>9</sup>

Man's lofty status as the ruler of all creatures is also found in the account of Creation:

Then God said, "Let us make man in our image, after our likeness; and let them have dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the earth, and over every creeping thing that creeps upon the earth." So God created man in His own image, in the image of God He created him; male and

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(Jerusalem: The Israel Democracy Institute and Magnes, 2006), 99, 127 n. 1 [Hebrew]; Justice Mishael Cheshin, Civil Judgments 7325/95, *Yedioth Ahronoth v. N. Krauss*, P.D. 52(3), 2, p. 75: "The observant and believers are required to derive human dignity from the dignity of God; in this way they exalt human dignity to the utmost. And what can be said by those who are not observant and do not believe? They will say, why should we have to depend on God to recognize human dignity as a supreme value? Is not the value of human beings, qua human beings, sufficient to require us to defend their honor? For that is his dignity and man's dignity is his humanness" [Hebrew]; Arieli, "On the Necessary and Sufficient Condition" (above n. 6), 10–12.

8 See Yair Lorberbaum, "Blood and the Image of God: On the Sanctity of Life in Biblical and Early Rabbinic Law, Myth, and Ritual," in Kretzmer and Klein, *The Concept* (above n. 6), 56.

9 According to the interpretation proposed here, following the plain meaning, the subject of the Psalm is "man" and "the son of man," referring to all human beings in general. See Abraham Ibn Ezra's commentary ad loc. The talmudic sages demurred at this interpretation and attributed the high praise to the elite of the human species, with Moses at their head. See *Avot de-rabbi Nathan*, Recension A, ch. 2; *Tanhuma* on Leviticus (ed. Buber), 3–4.

female He created them. And God blessed them, and God said to them, “Be fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth.” (Gen. 1:26–28)

It is the creation of humans in God’s image and likeness that makes it possible for them to rule over all the animals. The “image of God” found in the account of Creation is thus parallel to “Thou . . . dost crown him with glory and honor” in the Psalm. The glorification of human dignity is thus bound up with man’s creation in the image of God.<sup>10</sup>

- B. The corpse of a criminal who was hanged for his misdeeds must not be left overnight on the gallows: “And if a man has committed a crime punishable by death and he is put to death, and you hang him on a tree, his body shall not remain all night upon the tree, but you shall bury him the same day, for a hanged man is accursed by God [*or*: is a Divine curse; *or*: is an affront to God,]; you shall not defile your land which the Lord your God gives you for an inheritance” (Deut. 21:22–23).

There are several ways to explain the ban on leaving a corpse hanging overnight:<sup>11</sup> one is that God has cursed the hanged man.<sup>12</sup> Some propose that the Divine

10 Nahmanides on Genesis 1:26: “The meaning of *tzelem* is as the word *to’ar* (appearance), . . . that is, the appearance of their countenance. . . . Thus man is similar both to the lower and higher beings in appearance and honor, as it is written, *And thou has crowned him with glory and honor* (trans. Chavel, 53); Abravanel on Gen. 1:14: “Loftiness and honor as well as lowliness and degradation relate to the soul. And because man was created in the image of God and in His likeness, and his soul is of a spiritual nature, man is not truly low or contemptible, inasmuch as he has a precious heavenly soul.”

Another expression of the link between man’s creation in the image of God and his glory is found in *Deut. Rabbah* 11:3 (ed. Vilna): “Adam said to Moses: ‘I am greater than you because I was created in the image of God.’ Whence this? As it is said, ‘And God created man in His own image’ (Gen. 1:27). Moses replied to him: ‘I am far superior to you, for the honor which was given to you has been taken away from you, as it is said, ‘But man [Hebrew *Adam*] does not abide in his honor’ (Ps. 49:13); but as for me, the radiant countenance which God gave me still remains with me.’ Whence? As it is said, ‘His eyes were not dim, nor his vigor abated’ (Deut. 34:7).” See also *Zohar* Num. 159:1: “In this [world] there is separation; this [third] world is the abode of the celestial angels, whereas the Holy One, blessed be He, is both there and not there. . . . And is not seen, so that all ask, ‘Where is the place of His glory?’ He is not always found in this world. The same is true of [man, as it is said,] ‘For God made man in His own image.’ (Gen. 9:6).”

11 See Yair Lorberbaum, *Image of God* (Tel Aviv: Schocken 2004), 252 and n. 326 [Hebrew].

12 *Ibid.*, near nn. 327–328.

curse rests on the hanged man because of his deeds and the condition of his corpse;<sup>13</sup> others hold that death by hanging is more accursed and degrading than other forms of capital punishment.<sup>14</sup> Another reading is that the hanged man, or those who come after him, curse God. Some say that the criminal was condemned to death for having cursed God.<sup>15</sup> Still others assert that passersby who encounter the corpse of the hanged man protest his execution and curse the judges (or God) who condemned him to death.<sup>16</sup> In the tannaitic literature we find another explanation: God is cursed, as it were, by the fact that the hanged man bears His likeness: “Rabbi Meir used to say: “What are we to learn from ‘a hanged man is an affront to God?’ It is akin to two identical twins, one who reigned over the entire world and the other who became a brigand. Eventually the one who became a brigand was captured and crucified, and all passersby said, ‘It seems as if the king has been crucified.’ That is why it is written, ‘for a hanged man is an affront to God.’”<sup>17</sup>

According to Rabbi Meir, the human likeness is the likeness of God, as if man and God were twins. Consequently, the man’s disgrace is God’s disgrace; and when a human being is cursed, God is cursed along with him.<sup>18</sup> From this disgrace one can infer its contrary—respect: respect for human beings is respect for God, because He made man in His image.

## 2.2. The Talmudic Literature

As noted, the link between human dignity and the image of God is not stated explicitly in the Bible, but the tanna’im find it implied there. Whereas the previous projection is anchored in the text (an affront to God) and explains it, the next projection appears as an external conclusion derived from the biblical text.

The Bible bans climbing up to the altar on steps: “You shall not go up by steps to my altar, that your nakedness be not exposed on it (*‘alav*<sup>19</sup>)” (Ex. 20:23 [26]).

13 Abraham Ibn Ezra on Deut. 21:22: “And the plain meaning is that God is the subject and that the curse of the hanged man will rest every place nearby.”

14 Nahmanides ad loc.; Lorberbaum, *Image of God* (above n. 11), 251, nn. 324 and 331.

15 See the references in Lorberbaum, *ibid.*, 257–258; on suiting the punishment to the crime (measure for measure) see *ibid.*, 260–269.

16 Rashbam ad loc. and on Exod. 22:27.

17 T *Sanhedrin* 9:7 (ed. Zuckerman, 429), MS Vienna.

18 Lorberbaum, *Image of God* (above n. 11), 286–292; *ibid.*, 274 near nn. 412–414 (relating to the Mishnah “and the Name of Heaven will be profaned”); *ibid.*, 275–285; *ibid.*, 285, nn. 32–34 (the consistency of R. Meir’s approach).

19 Alternative rendering (on which the Mekhilta’s homily is based): “to him,” that is, one’s fellow man rather than the altar.

The school of Rabbi Ishmael interpreted this prohibition as a mandate to show respect to the altar: “And it follows a fortiori: if in the case of stones that have no knowledge, neither of evil nor of good, the Holy One blessed be He said not to treat them disgracefully; for your fellow, who is in the likeness of the One Who spoke and the world came into being, it follows logically that you must not treat him disgracefully—that you shall not expose your nakedness to him.”<sup>20</sup>

The homilist takes it for granted that climbing steps is apt to expose the private parts of the person climbing them and that nudity is an affront to the dignity of his surroundings, even if they are only stones. A person who climbs up to the altar is enjoined to show respect for the stones; a fortiori is he required to show respect for his fellow men who bear the likeness of the Creator. Thus human dignity is anchored in the concept of the Divine image.

The association of human dignity with the notion of man as the Divine image also appears later, in the words of R. Tanhuma, an amora from Eretz Israel, inspired by the school of Rabbi Akiva: “Ben Azzai said: ‘This is the book of the descendants of Adam’ (Gen. 5:1)—is a great principle of the Torah. R. Akiva said: ‘Thou shall love thy neighbor as thyself’ (Lev. 19:18) is an even greater principle. Hence you must not say, ‘Since I have been put to shame, let my neighbor be put to shame.’ R. Tanhuma said: If you do so, know whom you are putting to shame, [for] ‘In the image of God He created him.’”<sup>21</sup>

The obligation to show respect for one’s fellow and the prohibition to disgrace him have their roots in the idea that he is created in the image and likeness of God. Someone who disgraces his fellow is, as it were, disgracing God, because “in the image of God He created him.”

As we have seen so far, allusions in the Bible and explicit statements in the talmudic literature define respect for human beings as a fundamental religious duty. Human beings’ obligation to show respect for their fellows derives from man’s respect for his creator. The idea of the Divine image at the very least likens the created being to its creator; it may even conceive of the human image as bearing the attributes of God or as an extension or presentification of God.<sup>22</sup> The linkage between human dignity, on the one hand, and the concept of the image and likeness of God, on the other, allows religion to provide strong support to the human right to dignity.

20 *Mekhilta de-R. Ishmael* 11 (ed. Horowitz-Rabin, 245). See Lorberbaum, *Image of God* (above n. 11), 443–445.

21 *Gen. Rabbah* 24 (ed. Theodor-Albeck, 236–237). For a discussion, see Lorberbaum, *Image of God* (above n. 11), 397–402; Nahum Rakover, *Human Dignity in Jewish Law* (Jerusalem: The Library of Jewish Law 1998), 22–24 [Hebrew].

22 Lorberbaum, *Image of God* (above n. 11), 90–91, 99–100.

### 3. “No wisdom . . . can prevail against the Lord.”

The concept of the image and likeness of God enhances human beings and increases their dignity vis-à-vis other human beings or themselves.<sup>23</sup> God and His dignity are embodied in this image; consequently human beings who stand face to face with the image of another person are in practice standing before God. The hierarchy and relations of respect are clear in vertical situations, when one man stands before the image of God. Nevertheless, there may also be horizontal confrontations in which the copy confronts the original. This is the case when human dignity comes into conflict with respect for God. On the surface, preference must then be accorded to the original—that is, God—over the copy, the image of God that is man.<sup>24</sup>

The Babylonian Talmud discusses such clashes in a passage that deals with the well known halakhic principle: “Great is human dignity, in that it overrides a negative precept in the Torah.” At first glance, this principle gives human dignity primacy over a Divine injunction. Because the Talmud finds it difficult to accept this conclusion, it puts the principle to the test. In the course of the discussion that follows, various situations of a confrontation between human dignity and biblical prohibitions are raised. The passage begins with an ancient amoraic halakha (enunciated by the first or second generation of the Babylonian amora'im): A person who is standing in the public street and discovers that he is wearing a garment containing both wool and linen (the forbidden mixture known as *sha'atnez*) is commanded to remove it then and there. Although nudity in public is a harsh affront to his dignity, respect for Heaven takes precedence. As the Talmud puts it there: “Wherever profanation of the Divine name is involved, no respect is paid to a sage [or to one's teacher].”

This formulation is the axis on which the entire passage turns. As we shall see below, the Talmud quotes tannaitic sources that give precedence to human dignity in such situations of confrontation; that is, which hold that a person should violate Torah prohibitions in order to avoid humiliation. The Talmud rejects the ruling by the tanna'im and challenges them: “Why should it? Let us apply the rule, ‘No wisdom, nor understanding, nor counsel can prevail against the Lord.’” What is the essence of this challenge?

23 Human dignity includes self-respect. Hillel the Elder defined personal hygiene as a religious precept, because the human body is the image of God and respect for the body is respect for God. See *Avot de-rabbi Nathan*, Recension B, ch. 30, p. 66; Lorberbaum, *Image of God* (above n. 11), 306–311.

24 Similarly, see B *Sanhedrin* 85a: “Respect for Heaven takes precedence [over respect for one's father]”; B *Qiddushin* 33ab: “So that respect for [one's teacher's] does not exceed respect for Heaven.”

Its source can be traced to two verses in Proverbs: “No wisdom, nor understanding, nor counsel can prevail against the Lord. The horse is readied for the day of battle, but the victory belongs to the Lord” (Prov. 21:30–31). Here we have a theological principle that demarcates the borders of human autonomy and power as opposed to God’s sovereignty. Human beings may aspire with all their might to achieve their goals and may employ all their skills to do so; in the end, however, the results are not determined by their abilities, but by Heaven. Similarly, although the warrior trains intensively for war, salvation comes from the Lord.<sup>25</sup> The Babylonian Talmud paraphrases the theological principle and derives a halakhic rule from it, one that sets limits to the sages’ status and honor. The Talmud juxtaposes the verse “No wisdom . . . can prevail against the Lord” with the injunction, “Wherever a profanation of God’s name is involved no respect is paid to a sage [*or*: to one’s teacher].” This teaching interprets the verse as follows: in situations of confrontation between the dignity of the sages and the dignity of Heaven, the dignity of Heaven is to be preferred. The broad theological principle that relates to every human being is projected by the halakhic rule onto a limited group of human beings—the sages. The power and dignity of the sages, too, inasmuch as they are human beings, is limited in comparison to the sovereignty and dignity of God.<sup>26</sup> The Babylonian Talmud employs this principle in several contexts.<sup>27</sup> Here we will look at two of them:

- 25 Rashi on 1 Chron. 10:3; Malbim on Proverbs ad loc: “Although human beings have a choice, and in personal matters human beings may succeed through their preparation and diligence, nevertheless, in matters that are decreed by the Lord and determined by Providence, such as collective affairs that relate to an entire nation and state, then even though human beings must do their part and make the natural preparations, just as, in the case of warfare, which is a collective matter, they must prepare their weapons and horse and chariot; nevertheless it is God’s counsel that will prevail and human efforts are of no avail.”
- 26 This is how various commentators interpreted Proverbs 21:30. See Rashi and R. Elijah the Gaon of Vilna. Saadia Gaon proposed something similar (comm. on Proverbs ad loc., ed. Qafah [Jerusalem: The Committee of Publishing Sa’adia Writings, 1976]): “We are not entitled to provide the sages with special rights except when they obey the Lord.” So too, Judah Halevi in the *Kuzari* (3:23): “The calculation of proportions that give the human form belongs exclusively to the Creator. In the same manner, the determination of the living people worthy to form the seat of the Divine Influence is God’s alone. This calculating and weighing must be learnt from Him, but we should not reason about His word, as it is written: ‘No wisdom nor understanding nor counsel can prevail against the Lord’ (Prov. 21:30).” (English: *The Kuzari: An Argument for the Faith of Israel*, trans. Hartwig Hirschfeld [New York: Schocken, 1964], 163–164 [modified]).
- 27 The source of the rule seems to be a homily by the amora Samuel (B *Sanhedrin* 82a): “And it is also written, ‘And Phineas, the son of Eliezer, the son of Aaron the priest, saw it.’ Now, what did he see? . . . Samuel said: ‘He saw that “No wisdom, nor understanding nor counsel



### 3.1. A protest against a transgressor even though it shows a lack of respect for a sage:

Ravina once sat in the presence of R. Ashi when he observed that a certain person was tying his ass to a palm tree on the Sabbath.<sup>28</sup> He called out to him but the other took no notice. He [Ravina] called out, “Let this man be placed under the ban.” “Does such an act as mine,” he then asked [R. Ashi], “appear to be impertinence?”—He [Rav Ashi] replied, “‘No wisdom nor understanding nor counsel can prevail against the Lord’; wherever a profanation of God’s name is involved, no respect is paid to one’s teacher.”<sup>29</sup>

This man’s desecration of the Sabbath and disregard of the sage’s censure triggered an immediate protest by Ravina. Although it would have been appropriate for him to allow his teacher Rav Ashi, out of respect for his status, to protest first or pronounce the excommunication, the honor of Heaven overrode Rav Ashi’s honor.

### 3.2. Testimony by a scholar before an inferior court:

And Rabbah son of R. Huna said, “If a rabbinical scholar has some evidence to give but it would be undignified for him to go to the judge, who is inferior to him, to testify before him, he need not go. . . . However, this applies only to monetary matters; but in the case of a prohibition [he must give evidence, for it is written]: ‘No wisdom nor understanding nor counsel can prevail against the Lord.’ Thus, wherever profanation of God’s name is concerned, no respect is paid to a sage.”<sup>30</sup>

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can prevail against the Lord”; wherever a profanation of the Divine name is involved no respect is paid to a sage [*or*; one’s teacher].’ Phineas assaulted the transgressors at Baal Pe’or (Num. 25:1–9) without asking for permission from Moses, in order to prevent the profanation of the Lord as result of mass idolatry. Even though this was an assault on Moses’ honor, his honor and greater wisdom must be set aside out of respect for the Lord.

28 A rabbinic injunction prohibits this action on the Sabbath, so that people will not come to break twigs from the tree. See Maimonides, *Mishneh Torah, Laws of the Sabbath* 21:6.

29 B *Eruvin* 63a.

30 B *Shevu’ot* 30b.

Because scholars have a right to their dignity, they are entitled not to testify before a rabbinic court if its judges are of lesser stature than they are. However, if this testimony relates to the ritually permitted or forbidden, compliance with halakha (regarding both compliance with the duty to give evidence and the use that will be made of the testimony) outweighs the scholar's dignity. In these circumstances, scholars must testify, even before lesser judges.

In these two examples, the broad theological principle that “no wisdom can prevail against the Lord” takes the form of a concrete halakhic rule: just as the sovereignty of each human being is subordinate to that of God, so too a scholar's dignity and status are inferior to the glory of Heaven. Wherever profanation of God's name is concerned, no respect is paid to a sage.

As mentioned previously, the discussion in the Babylonian Talmud concerning human dignity applies the rule that “no wisdom can prevail against the Lord” to reduce the importance of human dignity. The Talmud criticizes several tannaitic precepts that prefer human dignity to compliance with biblical precepts. Although the halakhic rule in the examples cited above relates to the dignity of sages, in the passage dealing with human dignity the rule is broader and relates to all human beings. Man's power is limited and contingent on the God's will. Hence a human being's entitlement to dignity must give way before his obligation to observe the precepts of the Torah.

It is for this reason that the verse, “No wisdom can prevail against the Lord” assumes various forms: in its original biblical context it is a theological principle that states man's imperfection vis-à-vis God. As a halakhic rule, it appears in two forms. The first states the sages' subordination to halakha and to the dignity of Heaven; the second is closer to the theological principle and refers to all human beings. Every person is obligated to observe halakha, and this duty outweighs his right to dignity.<sup>31</sup>

31 The religious axiom is that honor is hierarchical. There is a “pecking order” of those who merit respect—with God at the top: “All of you are obligated to honor Me.” The obligation to observe halakha is the ultimate display of respect for God and thus takes precedence over respect for human beings. For example, individuals are commanded to honor their fathers; but the fathers, too, are bound to respect God. For this reason, if a father tells his son to commit a prohibited act, the son must not obey, because “[both] you and your father are obligated to honor Me” (Rashi on Lev. 19:3; Tosefot on B *Yevamot* 5b, incipit *kulkhem*). A similar reasoning is offered with regard to showing respect to the Temple. It is forbidden to desecrate the Sabbath in order to glorify the Temple, because “[both] you and the Temple are obligated to honor Me” (Rashi, B *Shevu'ot* 15b, incipit *ein binyan beit ha-miqdash*). With regard to respect for a monarch, too, if a king commands a subject to commit a transgression, he is not heeded, because “[both] you and the king are obligated to honor Me” (R. Elhanan Wasserman, *Kovetz He'arot*, 17a).

## 4. The Talmudic Discussion: Structure and Sequence

As we have seen, the Talmudic discussion about human dignity involves two contradictory principles. One of them supports human dignity: “Great is human dignity, in that it overrides a negative precept in the Torah.” But the other principle, “No wisdom can prevail against the Lord,” contradicts the first. The presence of God enhances His glory and diminishes man. One might say that the relationship between religion and human dignity is ambivalent: although religion exalts human dignity, it is also a factor that undermines and suppresses this dignity.

In the passage from the Babylonian Talmud on which we are focusing, the charged encounter between human dignity and the glory of God enters the halakhic arena. The ambivalent relationship between human dignity and the glory of God is manifested in this discussion, both in its structure and in the substance of the halakha.

### 4.1. The Passage

1. R. Judah said in the name of Rav: If one finds mixed kinds [wool and linen] in his garment, he takes it off even in the street.
2. What is the reason? [It says]: “No wisdom nor understanding nor counsel can prevail against the Lord.” Wherever a profanation of the Divine name is involved, no respect is paid to a sage.
3. An objection was raised [from a *baraita*]: If they have buried the body and are returning, and there are two paths available to them, one ritually pure and the other impure—
4. if [the mourner] goes by the pure one they go with him by the pure one, and if he goes by the impure one they go with him by the impure one, out of respect for him.
5. But why is this so? Let us apply the rule, “No wisdom nor understanding prevails against the Lord.”
6. R. Abba explained the statement as referring to a *beit peras* [a field in which the presence of a corpse or human bones is only suspected], which is declared impure only by the Sages; for R. Judah said in the name of Samuel: “A man may blow in front of him in a *beit peras* and walk through it.”
7. And R. Judah b. Ashi said in the name of Rav: A *beit peras* that has been well trodden is ritually pure.
8. Come and hear; for R. Eleazar b. Zadok said: “We used to leap over coffins containing bodies to greet Israelite kings.”
9. Nor did they mean this to apply only to Israelite kings, but also to heathen kings,

10. so that if one should be privileged [to live to the time of the Messiah], he should be able to distinguish between Israelite kings and heathen kings.
11. But why is this so? Let us apply the rule, “No wisdom, nor understanding, nor counsel can prevail against the Lord.”
12. It is in accord with the dictum of Rava; for Rava said: “It is a principle of the Torah that a ‘tent’ that has a hollow space of a handbreadth forms a partition against impurity, but if it does not have a hollow space of a handbreadth
13. it does not form a partition against impurity.” Now most coffins have a space of a handbreadth,
14. but [the Sages] decreed that those with such a space [do not form a partition] lest they be confused with those that have no space; but where respect for kings was involved they did not enforce the decree.
15. Come and hear. “Great is human dignity, in that it overrides a negative precept in the Torah.”
16. But why is this so? Let us apply the rule, “No wisdom, nor understanding, nor counsel can prevail against the Lord.”
17. Rav b. Shava, in the presence of R. Kahana, explained the dictum as referring to the negative precept of “Thou shall not turn aside [from the decision rendered by judges/sages (Deut. 17:11)].” They laughed at him. The negative precept of “Thou shall not turn aside” is also a biblical precept.
18. R. Kahana said: “If a great man makes a statement, you should not laugh at him. The rabbis based all of their ordinances on the prohibition of ‘Thou shall not turn aside’;
19. but where the question of [human] dignity is concerned the Rabbis permitted the act.”
20. Come and hear: “And you ignore them [lost objects or another person’s fallen animal]” (Deut. 22:1, 4). There are times when you may ignore them and times when you may not ignore them. How so?
21. If the man [who sees the animal] is a priest and it [the animal] is in a graveyard, or if he is an elder and it is not in accordance with his dignity [to raise it], or if his own work exceeded that of his fellow [he need not take action].
22. Therefore it states, “And you ignore them.”
23. But why is this so? Let us apply the rule, “No wisdom, nor understanding, nor counsel can prevail against the Lord.”

24. The case is different there, because it says expressly, “And you ignore them.” Let us then derive from this [the rule for mixed kinds]? — We do not derive a ruling about the ritually prohibited from a ruling in civil law.
25. Come and hear: “Or for his sister” (Lev. 21:3). What does this teach us? Suppose he was going to slaughter his paschal lamb or to circumcise his son, and he heard that a near relative of his had died.
26. Am I to say that he should go back and defile himself? You say “he should not defile himself” (ibid.). Shall I say that just as he does not defile himself for them, so he should not defile himself for a *met mitzvah* [a corpse that has no one else to bury it]?
27. It specifically states, “And for his sister”: for his sister he does not defile himself, but he does defile himself for a *met mitzvah*.
28. But why is this so? Let us apply the rule, “No wisdom nor understanding nor counsel can prevail against the Lord.”
29. The case is different there, because it is written, “And for his sister.” Let us then derive a ruling from this [for mixed kinds]. Where it is a case of “sit still and do nothing,” it is different.<sup>32</sup>

## 4.2. Structure and Sequence

As noted previously, the discussion opens with an ancient amoraic halakha: “If one finds mixed kinds in his garment, he takes it off even in the street” (line 1). Whoever wears a garment composed of “mixed kinds,” meaning one that contains both wool and linen (also known as *sha’atnez*), transgresses a biblical prohibition. Consequently he is required to take off his garment at once, even in public, despite the shame this will cause him. The rationale behind this halakha is the principle “No wisdom . . . can prevail against the Lord” (line 2).

The main body of the talmudic discussion follows in the form of a series of juxtapositions of the introductory halakha and five tannaitic dicta.<sup>33</sup> According to

32 B *Berakhot* 19b–20a.

33 The text quoted in the third case (“Great is human dignity”) also seems to be tannaitic. It is introduced by the formula *ta shema* (“come and hear”) and *amar mar* (“the master said”—B *Menachot* 37b), which are the characteristic incipits for tannaitic dicta. See I. Brand, “Great is the Honor Due to Others,” *Sidra* 21 (2005/6), n. 57 [Hebrew]. It may be the Babylonian Talmud’s version of a tannaitic halakhic midrash. See *Mekhilta de-R. Ishmael* (ed. Horowitz-Rabin), *Neziqin* 12 (Jerusalem, 1969/70), 291–292: “Rabbi Johanan b. Zakai says, ‘God is concerned with human dignity. [If a thief stole] an ox, which walks on its own legs, [the thief] pays fivefold; [if he stole a sheep, though,] which he has to carry on

these rulings, when human dignity comes into conflict with biblical prohibitions, human dignity has the upper hand. This decision contradicts, *prima facie*, the principle that “No wisdom can prevail against the Lord.” For each of the five cases, the Talmud points out this contradiction, employing the same formula each time: “But why is this so? Let us apply the rule, ‘No wisdom . . . can prevail against the Lord.’”<sup>34</sup> Then the contradiction is resolved by applying the same principle: Human dignity overrules relatively “minor” prohibitions. For such prohibitions, the tannaitic halakha applies, according to the rule: “Great is human dignity, in that it overrides a negative precept in the Torah.” But in situations of conflict between human dignity and “major” prohibitions, the amoraic halakha applies, following the principle that “No wisdom can prevail against the Lord.” The sequence of the discussion follows a recurrent three-beat rhythm: the tannaitic source (which emphasizes human dignity), the conflict (between the tannaitic source and the amoraic source, which adheres to the principle that “No wisdom can prevail against the Lord”); and a resolution of the conflict.

Let us move from the general to the particular and begin with the first case in the series of conflicting principles (lines 3–7 above). After a burial ceremony, the mourners and those accompanying them, including priests, start making their way home from the cemetery. There are two alternate paths out of the cemetery: one is shorter and ritually impure, while the other is longer but ritually pure. The tannaitic halakha permits priests to accompany the mourner along the shorter path and become ritually defiled by contact with the dead, out of respect for the mourner (lines 3–4). That is, the mourner’s dignity overrules the ban on priests’ allowing themselves to be defiled. This halakha contradicts the opening halakha. The Talmud notes the contradiction with the fixed formula (line 5) and resolves it by softening the conflict between human dignity and the glory of Heaven. There is indeed no leniency that permits priests who accompanying the mourner to transgress the severe biblical prohibition against their becoming ritually impure out of respect for the mourner. The tannaitic halakha referred to a less severe form

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his back, he pays fourfold.” In the version found in the Babylonian Talmud (*Bava Kama* 79b), there is a subtle change in the text: “R. Johanan b. Zakkai said: ‘Come and see how *great is human dignity*; [if a thief stole] an ox, which walked on its own legs, [the thief pays] fivefold; [if he stole] a sheep, which he carried on his back, [he pays] fourfold.’” The expression “great is human dignity” appears here in the same form as the talmudic principle and with the same meaning: a biblical rule (fivefold repayment for theft) is suspended on account of human dignity.

34 See above, lines 5, 6, 11, 23, 28. This text is found in most manuscripts (Munich 95, Florence II-I-7, Paris 671). In MS Oxford 23, however, the phrase appears only in the introductory halakha.

of priestly defilement (one of rabbinic origin only), namely the ritual impurity of a *beit peras* (lines 6–7).<sup>35</sup>

The second case (lines 8–14) is the testimony of R. Eleazar b. Zadok, who was a *kohen*.<sup>36</sup> According to his account, he and his fellow *kohanim* walked close to coffins in order to greet kings who came to visit their city (lines 8–10). This halakha, too, ranks human honor (here, respect for a king) above the priestly prohibition against contracting ritual impurity, thereby overruling the principle, “No wisdom can prevail against the Lord” (line 11). Once again, the Talmud chooses to resolve the conflict by defining the halakha in question as referring to a “minor” prohibition. Most coffins do not transmit ritual impurity, which is blocked by the airspace inside them. Nevertheless, because of the minority of “impure” coffins, the Sages enacted that even the majority of “pure” coffins transmit impurity. This rabbinic decree is not absolute and can be disregarded when a king’s honor is concerned (lines 12–14). This is why the principle “No wisdom can prevail against the Lord” does not apply here.

The third case (lines 15–19) is the center of gravity of the passage.<sup>37</sup> It differs from the other cases in that it does not cite a particular incident or situation, but

35 A *beit peras* is a field about where is a suspicion, but no certainty, that it contains human remains. See M *Ohalot* 17:1; T *Ohalot* 17:1–2 (ed. Zuckerman, 615); B *Mo’ed Qatan* 5b (“there are three [types] of *beit peras*”); Maimonides, *Mishneh Torah, Laws of the Impurity of the Dead* 10:1: “What is a *beit peras*? It is a place where a grave has been plowed up, and the bones were crushed with the dust and spread all over the field.”

The Talmud cites two halakhot to show that this prohibition is of lesser severity. One may check whether a field contains human bones either by taking a representative sample of the dirt and blowing through it into one’s hand (“a man may blow”), or by repeatedly walking back and forth through the field (“that has been well trodden”). See Maimonides, *Commentary on the Mishnah, Tohorot* (ed. Qafih, 511): Were we dealing with a regular prohibition and standard ritual impurity, there would be no way to permit the priests to walk on such a path, in accordance with the general rule: “[In the case of] a ‘father of ritual impurity,’ even one ordained by the Sages, when there is a doubt one is stringent” (M *Tohorot* 4:11). The validity of these two tests indicates the less severe nature of the prohibition.

36 For the identity of R. Eleazar b. R. Zadok the priest, see Aaron Hyman, *Toledot tanna'im ve-amora'im* (Annals of the tanna'im and the amora'im) (London: The Express Press, 1909/10), 201, 203.

37 The third case stands at the center, in two senses: (1) In terms of length, it is intermediate between the first two and the last two cases, which are of similar length. (2) Structurally: A close look at the several forms of respect under discussion reveals a chiasmic structure. There is a crosslink between the first and last cases: respect for a mourner and respect for the dead (respect for the situation of death). There is also a crosslink between the second and fourth cases: respect for kings and respect for sages (respect for eminent persons). Human dignity occupies the center of the chiasmus. See Noam Samet, “Human Dignity: A Multidisciplinary Study of a Talmudic Passage,” (M.A. thesis, Ben-Gurion University of the Negev, 2000), 73–80 [Hebrew].

only an abstract halakhic principle: “Great is human dignity, in that it overrides a negative precept in the Torah” (line 15). This rule collides head-on with the principle that “No wisdom can prevail against the Lord” (line 16). The Talmud suggests a way to reconcile the rules: When biblical prohibitions are concerned, “No wisdom can prevail against the Lord” and the prohibition overrules human dignity. Rabbinic prohibitions, though, can be shunted aside in favor of human dignity. It is only on this front, and exclusively within its parameters, that the principle “Great is human dignity, in that it overrides a negative precept in the Torah” applies (line 17). The nature of the conflict shapes the outcome; because the clash is between principles, the result is a fundamental division of the domains in which the two principles apply.

The next two cases are halakhic midrashim from which it is inferred that human dignity takes precedence over biblical prohibitions. The first (lines 20–24) rules that a sage (“an elder”) is exempt from returning a lost object if it were beneath his dignity to do so. Here the sage’s dignity overrules the biblical prohibition of “You shall not ignore [lost objects]” (line 21). The Talmud clarifies that this does not contradict “No wisdom can prevail over the Lord” (line 23), inasmuch as the latter is limited to matters of ritual prohibition and permission. But where property and monetary laws are concerned, the palm goes to “Great is human dignity, in that it overrides a negative precept in the Torah” (line 24).<sup>38</sup> The pattern of the discussion of this case parallels that in the earlier ones. Here, too, a formula that strikes a balance and reconciles the two conflicting principles is suggested. According to this formula, human dignity is set aside in cases of “severe” prohibitions (“ritual prohibitions”) but takes precedence over “minor” prohibitions (“matters of civil law”).

The fifth and final case (lines 25–29) is a halakhic midrash that permits a high priest or a nazirite to defile himself by tending to a *met mitzvah* [a corpse lying unattended with nobody to arrange for its burial; the duty of burying it devolves on whoever discovers it], out of respect for the dead. This special license is granted to individuals who, in normal circumstances, are not allowed to contract ritual impurity, not even to mourn their close relatives (lines 25–27). In order to

38 This distinction between ritual prohibitions (*issura*) and civil matters related to monetary dealings and property (*mamona*) can be interpreted in two ways:

- (1) The conflict between the two rules is not resolved, leaving us in a doubtful situation. In instances of doubt, the guiding principle is that one must be stringent in ritual matters (the prohibition overrules human dignity); in civil affairs, however, it is proper to be lenient (and human dignity prevails).
- (2) Ritual matters fall into the category of man’s relationship with God, so respect for God is paramount in this domain. But with regard to civil matters, which involve the relations among human beings, it makes sense that human dignity be given greater weight.



reconcile this halakha with the principle that “No wisdom can prevail against the Lord” (line 28), the Talmud suggests a mitigation of the prohibition of ritual impurity for a high priest or nazirite. According to our text of the Talmud (line 29, “Where it is a case of ‘sit still and do nothing,’ it is different”), the act of defilement is passive; alternatively, here the prohibition against ritual impurity has actually been set aside,<sup>39</sup> so there is no longer a clash with “No wisdom prevails against the Lord.” The Geonim had a different text: “The case is different for a priest, because it is a prohibition that does not apply equally to all [Jews]; and the case is different for a nazirite, because it is possible to ask [a sage to release him from his vow].”<sup>40</sup> In this version, the prohibition against priests and nazirites defiling themselves is a relatively “minor” one, either because it applies only to priests or because the nazirite’s vow can be annulled. In other words, a “minor” prohibition may be disregarded in favor of human dignity, but “No wisdom can prevail against the Lord” when severe prohibitions are concerned.

## 5. The Talmudic Discussion: From Structure to Meaning

### 5.1. The Structure: Main Elements

An overview of the structure and sequence of the Talmudic discussion produces some salient findings:

- (a) The main axis of the discussion: The central thread of the entire passage is the tension between the amoraic halakha with which it begins and the five tannaitic halakhot that are then juxtaposed to it. In practice, this is a conflict between the values these rulings represent. The introductory halakha is based explicitly on the principle that “No wisdom can prevail against the Lord.” By contrast, the tannaitic halakhot rest implicitly on the tenet “Great is human dignity, in that it overrides a negative precept in the Torah.” The

39 See Brand, “Great is the Honor” (above, n. 33).

40 See *She’iltot, Vayehi* 36, ed. S. Mirsky (Jerusalem: Surra, 1960/1), 237, where this is implied: “We do not learn it from impurity, because it is both a biblical prohibition and positive commandment that is not equal for all [Jews]. . .”; Nahmanides, *Torat ha-adam, Sha’ar ha-kohanim*,” in *Kitvei ha-Ramban*, vol. 2 (Jerusalem: Mossad Harav Kook, 1964), 137 (*naschei atiqei*; with reference to the commentary of Hai Gaon); *Hama’or on Berakhot* 11b of the *Rif* (the text of the Ge’onim; versions from Spain). See also Rashba, *Novellae, Berakhot* 20a (*ve-yesh nusha’ot*); Menahem Hameiri, *Beit ha-behirah* ad loc. (*she-yesh gorsin ken be-hedyā*). It is possible that Maimonides, too, worked from a different text of the Talmud. See Saul Lieberman, *Hilkhot ha-yerushalmi le-ha-rambam zal* (New York: Jewish Theological Seminary of America, 1947/8), 28–29, §6.

clash between these values is present in every stage of the discussion, in the form of the recurring question, “But why is this so? Let us apply the rule, ‘No wisdom nor understanding prevails against the Lord.’” The opposition becomes more acute in the third case—the center of gravity of the entire passage. Here the two principles come into frontal collision (lines 15–16): “Come and hear: ‘Great is human dignity, in that it overrides a negative precept in the Torah.’ But why is this so? Let us apply the rule, ‘No wisdom, nor understanding, nor counsel can prevail against the Lord.’”

- (b) The constant and the variable: Another structural feature of the passage is its use of constant and variable elements. Throughout the discussion, the assumption is that no distinction is to be made among the several types of honor or respect: the respect shown to the mourner is equated with the honor accorded to kings and sages, and these are all on a par with respect for the dead.<sup>41</sup> “Human dignity” is the constant element here. But each stage of the discussion distinguishes multiple levels of prohibitions, ranging from “minor” rabbinical prohibitions (the first case) to regular rabbinical prohibitions (the third case), through biblical prohibitions—first, those concerning civil matters (the fourth case), and then those concerning ritual matters (the fifth case). The “negative precept in the Torah” is the variable element in the discussion.
- (c) Halakhic contradictions: The ban on priests’ defiling themselves is juxtaposed to human dignity, both at the start of the passage (the first and second cases)

41 The structure of the passage might be thought to convey precisely the opposite message: it proceeds from the dignity of a transgressor (who is wearing “mixed kinds”) to the dignity of a mourner and of a king, and then to that of a sage, priest, and nazirite. This ascending scale of religious status, rising from the sinner at the bottom to the priest and nazirite at the summit, might be taken to imply that a person’s religious status directly influences his entitlement to respect (I would like to thank the editors for this point).

There are two problems with this idea. First, the last section of the passage relates to respect for the dead. It is not the priest and nazirite who are entitled to respect, but the “transgressors” who must show respect for the dead. Second, and more importantly, the idea that would be conveyed by the proposed reading is veiled and in code. The overt and direct message is the recurring halakhic assertion that it is the severity of the prohibition that influences the level of respect to be shown. The relationship between the concealed message (as proposed by the editors) and the overt message (presented here) is particularly prominent in the last two sections of the passage: if a person’s religious status is a significant factor in determining how much respect he is due, the passages should have said that a priest and nazirite may defile themselves for a corpse because of their religious status. Instead, the passage deliberately opts for a different explanation: those mentioned are allowed to render themselves impure not because of their status but because of the minor status of the prohibitions involved.

and at its end (the fifth case). However, not only are the halakhic conclusions that emerge from these conflicts not identical; they overtly contradict one another. The conclusion of the first case implies that the prohibition against priestly defilement takes precedence over human dignity only in the case of a “minor” rabbinic prohibition (the impurity decreed for a *beit peras*) or, alternatively, in the case of a rabbinic enactment that has been annulled. By contrast, the end of the passage implies that the prohibition against priestly defilement is itself a “minor” prohibition. According to the geonic version of the text, it is less severe because it applies to priests alone. The bottom line here is that, as a matter of principle, human dignity overrides the prohibition against priestly defilement.<sup>42</sup>

These three points are intertwined and embody both the explicit and implicit messages of the discussion. The primary and explicit message is the existence of tension between the fundamental values and halakhic principles that constitute the foundation of the edifice of human dignity. On the one hand, “Great is human dignity, in that it overrides a negative precept in the Torah”; on the other hand, “No wisdom can prevail against the Lord.” This tension has dual roots. In the theological domain, it stems from the clash between two religious phenomena that are embodiments of God: man, who bears His image and likeness) the justification for showing respect to human beings), versus halakha (observance of which shows respect for God). The other source of tension is in the halakhic arena: the tannaitic ruling seems to accord precedence to human dignity, whereas the dictum stated by R. Judah in the name of Rav, with which the passages begins, rests on the basis that “No wisdom can prevail against the Lord.”

The redactor of the passage expresses its inherent tension through both its structure and its sequence. The discussion begins with a first-generation amoraic halakha, expounded by the school of Rav. It opts for strict compliance with halakha, because “No wisdom can prevail against the Lord.” The tannaitic halakhot cited afterwards favor human dignity: “Great is human dignity in that it overrides a negative precept in the Torah.”

42 See Nahmanides, *Torat ha-adam, Sha'ar ha-kohanim*, 137: “The sense, according to these versions, is that all prohibitions of impurity are suspended on account of human dignity, inasmuch as they are all prohibitions that are not equally applicable to all; and the entire previous discussion [i.e., the first and second cases] is refuted”; Zevi Hirsch Chajes, *Novellae, Megillah* 3b; Rashi, incipit *et lo ta'aseh*: “And it seems in truth that the Talmud’s concludes . . . that [the case of] a priest is different as it [relates to] a prohibition that is not equally applicable to all; thus these *baraitot* raise no difficulty in any case . . .”; R. Baruch Te'omim Frankel, *Barukh ta'am* (Krakow: Fischer Press, 1894/5), 39d (incipit *ve-nir'eh*).

The redactor did not try to cut this Gordian knot. He presents the issue in a format that leads students to internalize the ambivalence and dialectic between the values and principles at stake, which underlie the contradictions between the beginning and the end of the passage. The start of the discussion, under the influence of the introductory halakha, emphasizes the principle that “No wisdom can prevail against the Lord.” In the first two cases, the principle of observing halakha and honoring Heaven are reinforced, while the value of human dignity is diluted. Human dignity can overrule the prohibition against priestly defilement only when the latter is relatively insignificant (the rabbinically ordained impurity of a *beit peras* or the enactment concerning coffins, whose application is contingent). In the latter part of the discussion, the direction changes: after the presentation, in the middle case, of the principle “Great is human dignity,” the subsequent cases bolster human dignity so that it can override even biblical prohibitions. At this stage, human dignity cancels out the prohibition against priestly defilement, even when that is of biblical origin.

## 5.2. The Structure: Constant and Variable

### 5.2.1. Respect as the Constant

Even though the redactor does not take a uniform and obvious stand on the relationship between the two principles, we can discern his position from the covert messages the passage conveys. As mentioned, the format of the passage makes human dignity a constant. Nowhere in the course of the discussion is there any attempt to differentiate among the several forms of respect.<sup>43</sup> We might have expected to be offered here the classic distinction between respect for people of high status (“honor”) and respect for human beings as such (“dignity”).<sup>44</sup> That we

43 Although the Talmud does not make this distinction, the Tosafists (*Bava Metzi'a* 30b, incipit *ella le-zaqen*) did make it. They maintain that respect for a corpse or the dignity of the body (i.e., clothing) rank above the respect due a sage (the first two prevent “disgrace and great shame”). See also R. Isaac b. Sheshet, *Responsa*, 226: “We should not compare between human dignity of different circumstance.” Several later decisors follow the Tosafists’ lead. See, for instance, *Responsa Havvot Yair*, §115; *Peri megadim*, O.H., *Eshel Avraham*, §311(3); *Arukh ha-shulhan*, O.H. 13:7.

44 This is the standard distinction made in the literature on human dignity. See Pierre Bourdieu, “The Sentiment of Honor in Kabyle Society,” in *Honor and Shame: The Values of Mediterranean Society*, ed. J. G. Peristiany (Chicago: The University of Chicago Press, 1966), 228–229; Peter Berger, “On the Obsolescence of the Concept of Honor,” in *Revisions: Changing Perspectives in Moral Philosophy*, eds. S. Hauerwas and A. MacIntyre (Notre Dame: University of Notre Dame Press, 1983), 177; Orit Kamir, *Israeli Honor and Dignity: Social Norms, Gender Politics, and the Law* (Jerusalem: Carmel, 2004), 19–23, 27–34 [Hebrew].

are not may convey a message about the essence of respect. Respect for human beings because of their humanness and respect for eminent persons are one and the same thing. It may well be that this identity is based on the religious notion that respect is never an inherent human right. Respect pertains only to God and is bestowed on whomever God shares His glory with.<sup>45</sup> Eminent and high-ranking individuals (such as scholars and kings) are entitled to honor and respect because of the idea that they reflect God by virtue of their position and status.<sup>46</sup> Similarly, all human beings are entitled to dignity because they bear the image of God.<sup>47</sup>

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R. Naftali Amsterdam (1832–1916), one of the leaders of the Mussar movement in Lithuania, proposed incorporating this distinction into halakha as well. See *Responsa Peri Yizhaq*, vol. 1 (Vilna: n.p., 1881), §53, 92c: “[The principle of] *kevod ha-beriyot* applies only to those things that are shameful to the entire human race, whatever the individual’s status . . . [i.e., a matter of *human dignity*]; but in a case where only a specific person would be shamed, as a function of his character [i.e., a matter of *personal honor*], in this instance it is not at all appropriate to make an exemption on account of *kevod ha-beriyot*.”

- 45 Another approach views the honor accorded to people of high rank as a secular entitlement; nonetheless, the king’s honor and human dignity may be identical. Highly placed or eminent persons may expect to be honored precisely because of their status. When denied this treatment, they are apt to feel insulted and humiliated just as ordinary persons do when their basic human dignity is not respected. The laws of charity include a similar halakha. See *Midrash Tanna’im*, Deut. 15:8: “[One must provide the pauper with] ‘All he is lacking’—everything according to his honor, even a horse to ride on and a slave to run before him.”
- 46 This attitude with regard to sages is common in the talmudic literature. The obligation to treat them with respect and awe is equated with the obligation to revere and respect God. See *M Avot* 4:12: “And the awe of your teacher should be as the awe of Heaven”; *Avot de-R. Nathan*, Recension A, 27: “That the honor of his teacher should be as dear to him as the honor of Heaven, . . . because his voice represents the Divine Presence”; B *Pesahim* 22b: “‘You shall fear the Lord your God’ [Deut. 6:13]—this includes scholars”; B *Sanhedrin* 110a: “He who quarrels with his teacher is as if he were quarreling with the Divine Presence”; *J Eruvin* 5:1 (22b): “Greeting one’s teacher is tantamount to greeting the Divine Presence.” On this notion as it relates to kings, see Yair Lorberbaum, *Disempowered King: Monarchy in Classical Jewish Literature*, (Ramat Gan: Bar-Ilan, 1998), 7–26 (the Bible) and 163–168 (the rabbinic literature).
- 47 As Samuel Loewenstamm has shown, in Mesopotamia only the king was viewed as imaging the deity. See Loewenstamm, “Beloved is Man as he was Created in the Divine Image,” *Tarbiz* 17 (1957/8): 1 [Hebrew]. The Bible extended the notion of the Divine image to apply to all human beings, democratizing an idea that had previously been attached to the king alone. See Moshe Weinfeld, “The Creator God in Genesis 1 and in the Prophecy of Deutero-Isaiah,” *Tarbiz* 37 (1967/8): 114 [Hebrew]. For more details, see Lorberbaum, *Disempowered King* (above n. 46), 144–148.

### 5.2.2. Halakha as the Variable

Against the backdrop of the redactor's designation of dignity as the constant element in the discussion, his parallel designation of the prohibition as a variable stands out. At each stage of the discussion, the redactor modifies the category or degree of the prohibition that human dignity may override. The introductory halakha implies that human dignity never takes precedence over a prohibition, even a minor rabbinic one.<sup>48</sup> The first test case shows that human dignity overrides minor rabbinic prohibitions. From the second case it follows that human dignity may render a rabbinic ordinance contingent and leave it ineffective, but does not override every prohibition.<sup>49</sup> From the third case on, human dignity becomes increasingly powerful: in the third, it suspends regular rabbinic prohibitions; in the fourth, it suspends biblical prohibitions related to civil matters; by the fifth, human dignity can suspend even a negative precept of the Torah, including biblical prohibitions that relate to ritual matters.

### 5.3. The Difference between the Constant and the Variable

When the Talmud sets one factor constant and makes another extremely labile, we can infer how it relates to both of them. Here, the constant value that one should strive to realize, to the greatest extent possible, is human dignity. halakha is the flexible and impermanent factor. In some cases halakha makes a slight gesture to human dignity; in others, it draws back considerably. The redactor intentionally refrains from proposing a final ruling about the issue.<sup>50</sup>

Nevertheless, the redactor indirectly reveals his ethical preference by means of the direction in which he steers the discussion. As we saw above, in the last three cases, the power of human dignity is steadily enhanced until it can hold the field against biblical prohibitions, even if in a qualified and restricted manner.

## 6. The Post-Talmudic Decisors

One of the things we have observed here is the alteration in the status of human dignity from the tannaitic ruling to the final talmudic halakha. The tanna'im

48 This was the opinion of several Rishonim. See Brand, "Great is the Honor" (above, n. 33), n. 43 (R. Judah b. Benjamin Anau and R. Aaron Halevy).

49 See Rakover, *Human Dignity* (above n. 21), 81 and n. 260.

50 This refusal to take a final stand in the discussion analyzed here is conspicuous against the backdrop of other talmudic passages that deal with human dignity. All of those lead to a clear-cut ruling that human dignity suspend only regular rabbinic prohibitions. See Brand, "Great is the Honor" (above n. 33), text at nn. 59–61 and n. 59.

accorded human dignity constitutional status; consequently, they ruled that human dignity overrides even biblical prohibitions. The amora'im rejected this possibility and deferred to the principle that "No wisdom can prevail against the Lord." The final talmudic ruling reduces the weight of human dignity and allows it to override only secondary legislation enacted by human beings (rabbinic prohibitions). But when it comes into conflict with primary legislation (biblical prohibitions), human dignity collides head-on with a Divine injunction, "No wisdom can prevail against the Lord."<sup>51</sup>

The decisors accepted the prevailing talmudic halakha and went even further down the amoraic path. They advocated meticulous observance of halakha, with no exceptions, and confined human dignity to a nearly invisible corner. This situation has been described unflinchingly by a leading contemporary halakhist, Rabbi Aharon Lichtenstein: "The [decisors] recoil [from employing the concept of human dignity], to such an extent that in the contemporary responsa literature it is nearly impossible to find an instance in which a prohibition—even a rabbinic one—is suspended on account of human dignity."<sup>52</sup>

Diverse factors produced this halakhic result. One major factor is the positivism evinced by many decisors. This attitude augments the tendency to preserve the halakhic status quo and minimizes the weight of principles in the process of formulating new rulings.<sup>53</sup> Nor can one ignore the theological factor: specifically, the prevalent view among decisors that halakha is divinely ordained. Hence it is obvious to them that when human rights and halakha come into conflict, the former must give way to the latter.

51 See the remarks by Justice Haim Cohn, *Katalan et al. v. Prison Service et al.*, H.C.J. 355/79, PD 34(3), p. 294 [Hebrew]; Rakover, *Human Dignity* (above n. 21), 161 and n. 524.

52 Rabbi Aharon Lichtenstein, "Human Dignity," *Mahanayim* 5 (1992/3): 14 [Hebrew]. See also *Responsa Havvot Yair* 95: "And I feel extremely uneasy, even concerning rabbinic precepts, about saying that they could be suspended due to human dignity for matters not mentioned in the Talmud." This is not the place for a lengthy consideration of the decisor literature. The reference to decisors here is intended merely to support the argument that the trend to devalue human dignity, which began in the Babylonian Talmud, has continued down to the present. For an extensive treatment of the matter, see Gerald Blidstein, "On Human Dignity in Rabbinic Law," *Jewish Law Annual* 9–10 (1982/83): 128–129, 178–181 [Hebrew].

53 For a description of halakhic positivism, see Rabbi Joseph Dov Soloveitchik, "Ma dodech mi-dod," in *Sod ha-yahid ve-ha-yahad* (Jerusalem: Orot, 1975/6), 222–225; Soloveitchik, *Halakhic Man*, trans. Lawrence Kaplan (Philadelphia: Jewish Publication Society, 1983), 17–19; Dov Schwartz, *The Thought and Philosophy of Rabbi Soloveitchik* (Alon Shvut: Tevunot, 2003/4), 391–394 [Hebrew].

## 7. Religion and Human Dignity: Dialogue and Dialectic

The discourse on man's entitlement to dignity in general, and this passage of the Babylonian Talmud in particular, offer us a glimpse of the crossroads where religion meets human rights. As we saw, this is an ambivalent junction: on the one hand, religion views the right to respect as an interlocutor that itself warrants respect. The notion that man is created in God's image serves as a supporting factor and a positive vector for human dignity. On the other hand, religion views man's right to dignity as a rival that must be weakened and restricted. When halakha and human dignity collide, the Talmud tends to prefer halakha and to make human dignity back down.

What is the meaning of these antithetical relations between religion and human dignity? We can describe them in two ways:

- (1) The first way is in theological terms: Human dignity and compliance with halakha are two sides of the same coin. Or, to put it another way, they are two different consequences of man's resemblance to or imitation of God (*Imitatio Dei*).<sup>54</sup> One aspect of this resemblance is inherent in the creation of man. Human dignity stems from the notion that man is created in the Divine Image (*Imago Dei*). This concept implies the presence of God in man, by virtue of their resemblance.<sup>55</sup> Another way in which man imitates God is through religious acts. By observing the precepts and complying with halakha, human beings become holy; and this holiness makes them resemble God.<sup>56</sup> These two types of imitation may fuse, but they may also clash. Their conflict is difficult to resolve precisely because both values derive from the same source.
- (2) If the first explanation sees both values as rooted in a common theological notion (*Imitatio Dei*), in the second explanation they represent discrete religious systems. The concept of *Imago Dei*, that man is created in the image of God, is an expression of mythic theology. It elevates man to a God-like status, and it is by virtue of that status that man is worthy of honor: "Yet thou hast made him little less than God, and dost crown him with glory and honor" (Ps. 8:6). Observance of halakha reflects religious ritual and practice. These

54 Lorberbaum, *Image of God* (above n. 11), 463–464, n. 77.

55 Yair Lorberbaum highlights the general religious phenomenon of the transfer of holiness from places and objects to man. This notion is especially salient in the talmudic literature after the destruction of the Second Temple, when God transfers His presence from the Temple to human beings. The notion of the image of God as His presentification reflects this religious phenomenon. See *ibid.*, 436–468.

56 *Ibid.*, 468 n. 87 and 474–475.



are meant to provide the myth with substance in a human and earthly setting and to create a relationship of devotion and subservience between human beings and God. The dynamic of opposition<sup>57</sup> between the myth and the ritual feeds the tension between religion and human rights.

## 8. Epilogue

Although the encounter between religion and human dignity is a particular case, it permits a broader look at the encounter between religion and human rights in general.

Religious thought may support human rights. The idea of the Divine Image or the notion of God's immanent presence exalts human beings and, consequently, enlarges their rights. On the other hand, as it was formalized, halakha increasingly qualified and restricted human rights. Although the older (tannaitic) halakha linked the notion of the Divine Image to halakhic norms, the tanna'im incorporated theological (and sometimes mythic) aspects into their legal discourse. But the halakhic literature, from the Babylonian Talmud to the present day, inclines toward a "pure" halakhic discourse that evolves from within itself by means of fixed methodological paradigms and stringent halakhic rules. This discourse focuses on preserving the halakha and recoils from the influence of extra-halakhic elements on it, including theological and mythical thought.

This being the case, it is possible that attempts to enlist religion in order to promote human dignity should focus exclusively on the theological aspect and avoid excavating the sanctuary of halakha. An attempt to influence the halakhic discourse from within, by reviving the ancient halakha, is impracticable. Halakhists will categorically reject any such attempt en masse. A much more realistic possibility for influencing the halakhic discourse would be an intensively philosophical and theological debate conducted alongside the halakhic discourse. Some halakhists are willing to listen to such discussions, and their exposure to it might increase their awareness of and engagement with matters of human rights.

57 For a general discussion of the tension between mythic theology and religious practice, see Gershom Scholem, *On the Kabbalah and Its Symbolism*, trans. Ralph Manheim (New York: Schocken, 1965), 98, 119–121, 133; Moshe Idel, *Kabbalah: New Perspectives* (New Haven: Yale University Press, 1988), 170–171.

On the tension between theology and law in the specific context of human dignity, see Dietrich Ritschel, "Can Ethical Maxims Be Derived from Theological Concepts of Human Dignity?" in *The Concept*, (above n. 6), 88–91. On the parallel tension in Islam, see M. Siddiqui, "Between God's Mercy and God's Law: Human Dignity in Islam," in *The God of Love and Human Dignity: Essays in Honour of George M. Newlands*, ed. Paul Middleton (London: T and T Clark, 2007), 51–64.

This proposal thus faces a major hurdle, given that the discourse about human rights takes place mainly in the legal arena and is conducted by jurists. Their natural inclination is to engage the religious counterpart, halakha. As stated above, however, it is possible that law's natural partner is actually theology, and that God will help discover man, even without a corresponding commitment by man to discover God.

# Law and Morality in the Jewish Tradition

Izhak Englard

## 1. Introduction

Common to law, morality, and Judaism is that their exact meaning is most controversial, and the question of their mutual relationships has been discussed for generations by the greatest minds. The diverse conceptions of these notions are intimately linked to fundamental philosophical and ideological assumptions. For this reason, for any meaningful exchange of ideas to take place, it is vital to clarify from the outset one's own methodological point of departure. In the present context, this means first and foremost to define clearly the concepts used in the discussion. This is the only way that a fruitless debate about words can be prevented, a so-called logomachy, which impedes mutual understanding and constitutes a serious obstacle to reaching the substance of an issue.<sup>1</sup> True, method and personal mentality may ultimately be connected, but the subjective dimension of the discourse does not detract from the possibility of a fruitful communication.

\* Bora Laskin Professor of Law (Emeritus), Hebrew University Jerusalem; Justice (ret.) Supreme Court of Israel; Member of the Israel Academy of Sciences and Humanities.

1 For an example of the quandary caused by the lack of exactly defined concepts, see Menachem Kellner, "Reflections on the Impossibility of Jewish Ethics," *Bar Ilan* 22–23 (1987): 45–52; see Kellner, "Well, Can There Be Jewish Ethics or Not?" *The Journal of Jewish Thought & Philosophy* 5 (1996): 237–241. Kellner makes a worthy effort to distinguish between the different questions. However, in my view, he does not clearly differentiate between values, ideology, and morality, and does not deal with the problem of the absolute or relative nature of values. Moreover, he does not clearly define legal positivism, which, as is well known, has a variety of meanings. In his discussion of formalism in the judicial process, no sufficient attention is paid to the distinction between rhetoric and substance. Not only are legal concepts—which are at the basis of the so-called formalistic reasoning—often the expression of most fundamental substantive values, but what may be conceived to constitute judicial activism of a revolutionary nature, can actually be achieved by means of a very formalistic, "lean" judicial rhetoric.

My basic approach to law and morality is not original; it relies heavily upon Hans Kelsen's positivist normative theory, which I consider to be the most successful endeavor to establish objective distinctive criteria for two normative orders. I readily avow my admiration for the great legal philosopher, though I am only too conscious of the fact that Kelsen's unique form of legal positivism has provoked fierce criticism from various quarters.<sup>2</sup> Even so, it is my personal conviction that the essential elements of his theory have withstood the manifold attacks and therefore remain valid. I have no intention to assume the presumptuous task of defending Kelsen's theory. Those who cannot be convinced by Kelsen's own specific counter-arguments—and in the present context, many important comments on his modern opponents can be found in the posthumously published *General Theory of Norms*<sup>3</sup>—will certainly not be impressed by whatever the present author would be able to add to the argument. In the first section, the notions of law and morality are treated summarily, as well as their relationship and interaction. The second section treats the issue as it manifests in the Jewish legal tradition.

## 2. The General Relationship between Law and Morality

### 2.1. Formal Aspects

Both law and morality, in the broad sense, are normative orders—sets of rules of human behavior. They determine that a person *ought* to behave in a certain manner. Hence, the law in the legal sense and the moral rule—unlike the laws of nature—do not describe a reality, a matter of fact, but something that ought to be, something that should be manifested by an act or an omission. As a result, law and morality render possible the evaluation of an actual human behavior: the latter can be legal or moral, if it corresponds to the relevant norm—to the relevant rule of behavior; on the other hand, when the concrete behavior contradicts the norm, it will be illegal or immoral according to the respective applicable norm.

2 For a more recent critical survey on Kelsen, see *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, eds. Stanley Paulsen and Bonnie Litschewski Paulson (Oxford: Clarendon Press, 1998).

3 Hans Kelsen, *General Theory of Norms*, trans. Michael Hartney (Oxford: Clarendon Press, 1991), *passim*. It should be noted, however, that Kelsen changed some of his original views in this field. Cf. *ibid.*, 394, n. 154.

According to Kelsen, the difference between law and morality lies exclusively in the nature of the respective sanction to be imposed for norm-violating behavior. In his words:

A difference between law and morals cannot be found in *what* the two social orders command or prohibit, but only in *how* they command or prohibit a certain behavior. The fundamental difference between law and morals is: law is a coercive order, that is, a normative order that attempts to bring about a certain behavior by attaching to the opposite behavior a socially organized coercive act; whereas morals is a social order without that sanction. The sanctions of the moral order are merely the approval of the norm-conforming and the disapproval of the norm-opposing behavior, and no coercive acts are prescribed as sanctions.<sup>4</sup>

Kelsen adds that the sanctions of morality do not constitute an integral element of the moral norm contrary to the legal sanctions that make part of the legal norm.<sup>5</sup>

In the following discussion I will adhere to the Kelsenian distinction between law and morality: it relates exclusively to the nature of the sanction and is not based upon any a-priori criterion linked to the content of the norm. Hence, any rule of conduct, not backed by a threat of socially organized physical coercion, is by necessity a moral norm.

This formal sanction-oriented test of law and morality, which is completely divorced from any specific content of the norm, creates a rather crude dichotomy in relation to norms. One has to admit that it does not contribute much to the clarification of the problem of interaction between the two normative orders which necessarily relates to substantive aspects, presupposing possible conflicts between the contents of the respective norms. There must therefore exist additional features suitable to each of the two respective sets of norms which, even if not of an absolute nature, are common enough so as to constitute general characteristics that may be taken into consideration.

The normative notion of morality comprises three fundamentally different meanings which will be described in short:

1. *Positive Morality*: This denotes the existing social order composed of norms that are not enforced by socially organized physical sanctions. It is constituted

4 Kelsen, *The Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1970), 62.

5 See Kelsen, *General Theory of Norms* (above n. 3), 22–23, 97–98, and especially his distinction between primary and secondary norm in relation to law and morality on 142–143.

by the rules of conduct required generally by society, including etiquette, manners, sexual behavior, and other kinds of behavior that are considered to be socially required. Conduct that violates these norms is sanctioned by social reactions ranging from derision to ostracism. Behavior that is in conformity with social norms may be rewarded by “positive sanctions” such as praise, social honors and prizes.

2. *Personal Morality*: This includes the rules of conduct that are laid down by an individual person for his or her own behavior according to their own subjective value system. These norms are sanctioned by internal feelings of remorse or gratification. Kelsen describes this process of self-legislation as an individual’s split of consciousness into two entities: the *ego* that wants that the *alter ego* ought to act in a certain way. It resembles the act of self-observation.<sup>6</sup>
3. *Ethics and Justice*: The notion of morality has an additional, fundamentally different meaning. It denotes the philosophical inquiry into the absolute good. It constitutes the *critical* or *ideal morality*. It assumes the task to answer the question about the correct content of the rules of conduct. In relation to the positive or personal morality, one speaks of *ethics*; ethics establishes the criteria for a normative evaluation of the social or personal morality. The ideal rules for the evaluation of the law fall under the notion of *justice*. Seen from the standpoint of the substance of the rules of conduct, there is no *a priori* difference between ethics and justice. This means that, in principle, every ideal rule of morality could be cast into a legal norm. However, empirically seen, one can discern a difference between ethics and justice. Law, as a coercive order of interpersonal relations, contents itself in practice mostly with less stringent rules than those required by morality that aims at the perfection of the individual. In other words, a *just* legal solution may be considered ethically insufficient for the personal conduct. The reason for this difference resides in the fact that law does not strive—unlike morality—to achieve the individual’s personal perfection, but is mainly concerned with the peaceful coexistence of the various members of society. As a result, modern law imposes coercive sanctions only upon acts that are socially damaging; it does not induce the individual to be a person of perfect virtues. This is the ideology of the modern liberal state that contents itself in creating and preserving the external conditions that enable the individual to live up to his or her own ethical principles. As we shall see later, this ideology may clash with the religious outlook.

6 Ibid., 29–30.

Another fundamental difference between ethics and justice is based on Kant's specific moral theory, which places a main emphasis on the motivation of the acting person. Accordingly, for an act to have moral value—to be morally good—it must be motivated by an autonomous sentiment of duty. Hence, if a person acts out of fear of a threatened sanction, the act is devoid of any moral value. Moreover, if a person acts out of a purely internal inclination—such as giving charity to the poor out of a sense of compassion—this deed, too, does not possess moral value, since it lacks the required sentiment of moral duty. This rigorous Kantian *Gesinnungsethik*<sup>7</sup> was derided by Friedrich Schiller in an epigram:<sup>8</sup>

Scruples of Conscience

I like to serve my friends, but unfortunately I do it by inclination.

And so often I am bothered by the thought that I am not virtuous.

Decision

There is no other way but this! You must seek to despise them

And do with repugnance what duty bids you.<sup>9</sup>

Contrary to ethics, which is unconditionally linked to the motivation of the acting person, justice can, in Kant's understanding, content itself with the person's

7 This notion has been translated into English by a variety of terms, among them: ethics of conviction, ethics of intention, ethics of motivation, ethics of mental disposition, ethics of principle, ethics of ultimate ends.

8 Friedrich Schiller, *Sämtliche Werke*, vol. 3: *Gedichte, Klassische Lyrik/Xenien, Gewissenskrupel-Entscheidung* (Munich: Winkler, 1990), 256:

Gewissenskrupel

Gerne dien ich den Freunden,

doch tu ich es leider mit Neigung,

Und so wurmt es mir oft,

dass ich nicht tugendhaft bin.

Entscheidung

Da ist kein anderer Rat,

du musst suchen, sie zu verachten,

Und mit Abscheu alsdann tun,

wie die Pflicht dir gebeut.

The English translation in the text is taken from Allen Wood, *Kant's Ethical Thought* (Cambridge and New York: Cambridge University Press, 1999), 344.

9 Cf. A. Ehrenfeld, *Der Pflichtbegriff in der Ethik des Judentums* (Bratislava: Rosenbaum, 1933), 121; the author thinks that Schiller wronged Kant by this epigram. For an extensive discussion on the relationship between Schiller and Kant in respect to ethics, see Frederick Beiser, *Schiller as Philosopher: A Re-Examination* (Oxford: Clarendon Press, 2005), 169–190.

external behavior. However, Kant's philosophy did not remain undisputed; one could certainly maintain that even acting "out of a sentiment of pure duty" may cause an inner feeling of pleasure. Hence, duty and inclination may harmoniously coincide.<sup>10</sup>

Kant's moral philosophy exercised—as will be shown subsequently<sup>11</sup>—a considerable influence upon modern Jewish thinkers. From a purely normative-formal point of view, no interaction is possible between law and morality. Every normative system must be unitary and exclusive by its inner logic, since the validity, that is, the specific existence, of each individual norm can only be tested by a unique and uniform criterion.<sup>12</sup> The statement that a norm is at the same time valid and not valid constitutes a logical contradiction. Hence, the validity of a given legal system is not only completely independent of the norms of another legal system, but also from morality in all its different senses, and naturally also vice versa. In other words: a law can be legally binding, though it may contradict social morality, personal morality, or the principles of ethics; and a moral principle can be valid, though it contradicts a specific law.

The statement that a certain law is immoral constitutes a subjective value judgment.<sup>13</sup> Kelsen insists that the object of a moral or legal value judgment can never be a norm—which itself constitutes such a value judgment—but only a fact.<sup>14</sup> Such a fact can be a legislative or judicial act that forms the basis of a norm or of the concrete behavior of a person. The only possible objective value judgment that has as its object a norm relates to the latter's validity, whose exclusive point of reference, that is, the grounds of its validity, is constituted by the normative system's so-called basic norm.

It is possible, however, to create a formal, normative relationship by a unilateral incorporation. The legislator has the possibility to refer explicitly to moral rules and standards for the solution of a certain dispute. This, in fact, occurs in many legal systems, such as in relation to legal transactions which are declared to be legally void when being contrary to positive morality.<sup>15</sup> In not a few cases

10 In this sense, see Friedrich Schiller, "Anmut und Würde," in *Schillers Werke*, ed. Gerhard Stenzel, vol. 1 (Salzburg: Das Bergland-Buch, 1950), 391, 413–418.

11 Below, p. 249, 250, 253–254, 257–263.

12 On this problem in general, see Izhak Englard, *Religious Law in the Israel Legal System* (Jerusalem: Hebrew University, Faculty of Law, Harry Sacher Institute for Legislative Research and Comparative Law, 1975), *passim*.

13 Hans Kelsen, *What is Justice? Justice, Law, and Politics in the Mirror of Science, Collected Essays* (Berkeley and Los Angeles: University of California Press, 1957), 227–230.

14 On the relationship between value and reality, see Kelsen, *General Theory of Norms* (above n. 3), 60–62, on that between truth and validity, 175–186.

15 Cf. the Israel Law of Contracts (General Part), 1973, §30; German BGB, §138; Swiss OR, Art. 20.



a legal provision may refer also to justice, or to its related notion of equity.<sup>16</sup> The significance of such a procedure is the transformation of these moral rules and standards into positive legal norms.

Conversely, positive morality and personal ethics may stipulate obedience to law, not necessarily because of its specific content, but because of its being enacted by representative central organs of society. The famous exchange in the *Crito* between Socrates—who had been unjustly condemned to death—and his disciples touches upon this very topic.<sup>17</sup> However, in this case too, law becomes incorporated into morality.

In all these situations the “foreign norm” derives its validity from the normative order on the receiving end. It is not valid by virtue of its own normative force, but only on the basis of its explicit recognition by the other system. From the perspective of each individual normative system, the norms of another system are not taken into consideration.<sup>18</sup>

## 2.2. The Moral Decision

The foregoing analysis dealt mainly with the formal aspects of the notions of morality, ethics, and law. However, the central problem of normative ethics is, no doubt, how to determine the contents of justice and of personal morality. How should one behave? What is morally good? In relation to law, the question of its ethical evaluation is encapsulated, as mentioned, by the notion of justice. What is just? As a matter of fact, since the beginning of mankind no uniform answer has been given to this most fundamental question of ethics and justice.

It may appear tragic, but this age-old philosophical problem has produced a multitude of contrasting criteria: today the struggle is mainly between the Kantian

16 Cf., e.g., the Israel Law of Contracts (Remedies for Breach of Contract), 1970, §3(4); German BGB, §315; Swiss ZGB, Art. 4, Abs. 3.

17 Opinions differ about Plato’s real view on the matter. Some scholars consider the statements of Socrates in the dialogue as being purely ironical; see Anthony D’Amato, “Obligation to Obey the Law: A Study of the Death of Socrates,” *Southern California Law Review* 49 (1976): 1079; Ernest Weinrib, “Obedience to the Law in Plato’s *Crito*,” *American Journal of Jurisprudence* 27 (1982): 85–108. For the more traditional understanding, see Hans Kelsen, *Die Illusion der Gerechtigkeit—Eine kritische Untersuchung der Sozialphilosophie Platons* (Vienna: Manz, 1985): 386–388.

18 Kelsen originally maintained that from the viewpoint of a given normative order, the norms of another system are devoid of validity, and, therefore, do not exist. The latter can be conceived only as facts and not as an objective obligation. Kelsen changed his view in this respect in his later work, *General Theory of Norms* (above n. 3), 211–212. On the relationship between law and morality in Kelsen’s theory, see Ryuichi Nagao, “Kelsen on Law and Morals: A Critical Analysis,” *Nihon University Comp. L.* 16 (1999): 35.

moral philosophy of personal autonomy and utilitarianism with all its various forms and shades. To state the alternative in very simple terms: good and just is what furthers the personal freedom or what procures the individual or the society the greatest benefit.

I will not attempt here to give a response to that ethical question. However, it is important to recognize that the essential problem of justice and morality consists of the need to decide between conflicting values. Each value in itself is considered to be legitimate, but their clash in a given situation requires a decision of priority that will have the effect of sacrificing one value for the sake of the other. The ethical question consists now in deciding which value will have to be sacrificed. The tragic aspect of the situation lies in the fact that (unfortunately) it is impossible to preserve contemporaneously both values in their integrity. Now, the higher the respective values are held, the more difficult the decision becomes. One of the great antinomies resides in the tension between individual and collective welfare. Yet, also the choice between individual persons may sometimes require a “tragic” choice, such as the implantation of human organs in the common case of their scarcity: who, among the urgently waiting needy persons, shall be selected as the benefactor?<sup>19</sup> As a matter of fact, in view of the manifold ethical theories, any concrete decision will be considered to constitute a subjective value judgment.<sup>20</sup> This decision between conflicting values, constituting a value judgment, I will call henceforth a “moral decision,” whatever its content may be.<sup>21</sup> In other words, this “moral” decision may still be evaluated as being unjust or unethical.

I start from the premise that, in practice, there are no absolute values which would always, in every situation, displace all other values. Even human life, the highest individual value, does not always take priority; in all societies it has admittedly to yield to collective survival, for example, in a defense war. In reality, human lives are sacrificed—consciously or unconsciously—for the sake of much lower economic values (take, for example, traffic victims, whose life could theoretically be saved, but at very high costs). In this context one can mention

19 Cf. Guido Calabresi and Philip Bobbit, *Tragic Choices* (New York: Norton, 1978).

20 In Kelsen's view, there are no objectively valid absolute values; all values are relative; therefore, value judgments are always subjective: Kelsen, *Essays in Legal and Moral Philosophy*, ed. Ota Weinberger, trans. Peter Heath (Dordrecht and Boston: Reidel, 1973), xxv, 7, 277; Kelsen, *What is Justice?* (above n. 13), 140–141.

21 See the important series of articles by Eliezer Goldman, “Religion, Morality, and Halakha,” *De'ot* 20 (1962): 47–61; 21 (1962): 59–72; 22 (1963): 65–76 [Hebrew]; repr. in Goldman, *Expositions and Inquiries—Jewish Thought in Past and Present*, ed. Avi Sagi and Daniel Statman (Jerusalem: Magnes Press, Hebrew University of Jerusalem, 1996), 265–305 [Hebrew].

the famous dilemma of applying torture on a person in the case of a “ticking time bomb,” in order to save the lives of innocents. In Germany this issue of the so-called *Rettungsfolter* (“salvation torture”) caused a sharp public controversy in the Daschner case,<sup>22</sup> against the background of Article 1 of the German Constitution, which provides that “Human dignity shall be inviolable.”<sup>23</sup> The fundamental question is whether human dignity is such an absolute value that the lives of other people may be sacrificed in order to preserve its integrity.<sup>24</sup> The ensuing value judgment constitutes a moral decision which, in the eyes of the decider, appears to be the just or moral solution in the given difficult situation. The decision may leave us a feeling of tragicalness that renders us unsatisfied or even unhappy. But subjectively, no other acceptable choice appeared to exist.

By introducing the notion of “moral decision,” the relationship between law, morality, and justice receives a further dimension that goes beyond the formal-normative one. Every norm-creative act, be it in relation to a general or an individual norm, is preceded by a moral decision. Let us take first any specific law enacted by the legislative body. The content of the legal norm is based upon a moral decision, since the ordering of a certain behavior always implies a value judgment. In many instances, history and background of the legislative act clearly reveal the collective body’s specific choice between conflicting values. The enacted law is the expression of the authority’s idea about what justice requires in the envisaged situation. At the most general level, the legal ordering of a certain behavior signifies the preference of a collective aim over personal autonomy. The imposition of a certain conduct necessarily constitutes a restriction of an individual’s freedom of action. Hence, every rule of conduct is the result of a value judgment, and according to our definition, a moral decision.

22 Rolf Herzberg, “Folter und Menschenwürde,” *JZ* 60 (2005): 321–328; Florian Jessberger, “Bad Torture—Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany,” *Journal of International Criminal Justice* 3 (2005): 1059, 1061–1062.

23 Federal Republic of Germany, Constitution, Art. 1: “Die Würde des Menschen ist unantastbar.”

24 In this context, see also the decision of the German Federal Constitutional Court in relation to the constitutionality of §14(3) of the *Luftsicherheitsgesetz* (Air Security Law), *BverfG*, 1BvR 357/05 of Feb. 15, 2006, §§118–124, 130–132, 135. See Tatjana Hörnle, “Shooting Down a Hijacked Plane—The German Discussion and Beyond,” *Criminal Law and Philosophy* 3 (2009): 111–131. Cf. the decision of the Israel Supreme Court in *Public Committee Against Torture in Israel*, H CJ 5100/94, P.D. 53(4) 817; cf. Kai Ambos, “May a State Torture Suspects to Save the Lives of Innocents?” *Journal of International Criminal Justice* 6 (2008): 261; Alon Harel and Assaf Sharon, “Can We Ever Justify or Excuse Torture?” *ibid.*, 241.

The same is true for legal norms created on a lower, more concrete level, such as judicial decisions. True, the judge is subject to the basic norm of the legal system in whose framework he functions, and which orders him to abide by the law. The legislator expects the judge to *apply* the enacted law. The idea of application means that the judge is generally required to implement the prior moral decision made by the legislative authority. By asking for general abidance, the law constitutes an institutionalized normative context (value) with a highly standardized solution of a moral problem.<sup>25</sup> The individuals subject to the law, be it private or official persons, are required to forgo a renewed and independent weighing of the relevant values involved in the situation. They are asked to accept the law's pre-established solution of the moral problem, to submit to the authoritative value judgment.

Two factors, however, are mainly responsible for the reality of additional value judgments during judicial decision-making. First, legal norms cannot usually provide clear-cut solutions; they require judicial interpretation. There are several reasons for the uncertainty created by legal provisions, such as the inevitable shortcomings of human language, the deficiency of human foresight, the vagueness of legal concepts, and the designed reliance upon judicial discretion. All these and some other reasons prevent the application of norms from being a merely logical process. Syllogistic reasoning will be functional only after all the premises have been established by the judge. Judicial value judgments are, therefore, inevitable. This signifies that the judge is forced to make new moral decisions. The component of value judgments in the judicial process forms the essence of the well-known phenomenon of judicial creativity, where the personality of the judge plays an important role. In comparison with the functions of the legislative body, the judicial leeway is evidently much more restricted. The framework of the enacted law constitutes a natural limitation on judicial autonomy.

The second factor necessitating a personal moral decision on the part of the judge touches upon an even more fundamental aspect. It concerns the judge's very inner willingness to apply the law in the sense of the legislator. At first glance, this may be surprising. But where the judge constitutes the final instance of a case, his or her loyalty toward the law is of greatest importance. From a normative point of view, the final decision of a court is binding—that is, legally valid—whatever its content may be. The finality of a judicial instance's decision (generally of a supreme court) is an aspect of the “dynamic” nature of positive law.<sup>26</sup> A judge's resolution to be loyal to the law, therefore, is again a moral decision.

25 Goldman, *Expositions and Inquiries* (above n. 21), 275, 290–291, uses the term of “closed moral context.”

26 Kelsen, *The Pure Theory of Law* (above n. 3), 195–201, 236–245, 353–355.

### 2.3. Autonomy and Heteronomy

In the context of law and morality, I would like to make several additional comments on the notions of autonomy and heteronomy. Many writers oppose the heteronomous character of law to the autonomous one of morality. From the perspective of individuals subject to law, the legal norms are, indeed, imposed upon them from the outside. Their validity is independent of their personal recognition or acceptance.

In order to be moral, human behavior must originate in a person's autonomous will, and be based upon nothing else than the duty derived from reason. In Kant's terminology, the moral law must determine the will directly; one must act out of duty and not out of self-interest. In the words of a Jewish author dealing with the notion of duty in Jewish ethics:<sup>27</sup>

The categorical character of the imperative, its peculiarity that its law does not depend upon an extraneous purpose, but is an end in itself and, therefore, obliges categorically—this quality assumes necessarily “a property of the will by which it gives itself laws.”<sup>28</sup> Kant calls this quality of the will: “autonomy” or self-legislation of the will. This capacity of the will constitutes the “supreme principle of morality,”<sup>29</sup> since without it a categorical imperative could not be possible; because if the law came from an object extraneous to the will, it would be valid only hypothetically, and would be, according to its origin, heteronomous.

All other moral systems, except the categorical imperative, are heteronomous in the Kantian sense, since the necessity of acting arises out of an interest and not from pure duty. The heteronomy of the will is the origin of all spurious principles of morality: “I ought to do something because I will something else”<sup>30</sup>—such as happiness or a benefit.

It seems, therefore, that Kant's idea of autonomy comprises two dimensions: first, the moral acting out of duty, that is, the basis of the cognition of what is unconditionally valid, without any extraneous interest in the success of the act; second, the autonomous cognition of the content of the moral law on the basis of the own personal, human reason. Hence, abiding by a law out of fear of the

27 Ehrenfeld, *Der Pflichtbegriff* (above n. 9), 35–36.

28 Cf. Immanuel Kant, *Groundwork of the Metaphysics of Morals*, ed. and trans. Mary Gregor and Christine Korsgaard (Cambridge: Cambridge University Press, 1998), 46.

29 Ibid.

30 Ibid., 47.

sanction, or in the hope for a reward, is heteronomous in the first sense. The fulfillment of a law, such as state law, because it is a law, that is, out of a pure sense of duty, is autonomous in the first sense, but heteronomous in the second sense, since the content of the law has not been established autonomously by the abiding individual; it originates from the legislature. The same is true for positive morality: the content of this social order is established from the outside; the individual submits himself or herself because of desiring the positive social sanction (approval, praise), or because of seeking to avoid the negative one (disapproval, censure, etc.). The only autonomous order in the second sense is the personal morality that has been established independently by the individual.

However, these Kantian premises require a certain qualification. The assumption of a complete individual autonomy in relation to personal morality is hardly realistic. An individual's personal morality is subject to the influence of a number of powerful external factors such as education and social environment. On the other hand, a person's concrete behavior is, in the end, always based upon a certain moral decision. Whatever may be the motive for a decision, the choice between alternatives constitutes an autonomous "moral decision."

Quite frequently individuals may decide to submit themselves to another moral or religious authority. In this case, their personal autonomy exhausts itself in the basic decision to accept as binding the heteronomous set of rules, and in the ultimate decision, to behave in conformity with them in concrete circumstances. As mentioned, the law, as such, can be incorporated into the personal morality. Seen from this perspective, the notions of autonomy and heteronomy are of a rather relative significance.<sup>31</sup>

A final observation on the possible conflict between law and morality: Since every normative order is unitary and exclusive, norms of different systems cannot clash in a formal normative sense. Their conflict takes place in the mind of the individuals who find themselves addressed by two independent sets of norms. The resolution of this conflict requires an individual moral decision, which involves preferring one norm over the other and enduring the rejected norm's sanction. Thus, in case of a conflict between personal morality and state law, the individual's choice is between abiding by the state law and suffering the pangs of conscience, and acting according to one's ethics and accepting the state's sanctions.

31 In this sense, cf. Moritz Steckelmacher, *Das Princip der Ethik vom philosophischen und jüdisch-theologischen Standpunkte aus betrachtet* (Mainz: J. Wirth, 1904), 64: "When I accept by my own will the divinely transmitted law, as being conformed to my innermost duty, transforming it to my own, assimilating it to my inner self—then I am really *autonomous*, as far as I can become it as a human being." [Author's translation, I.E.]

### 3. Law and Morality in Judaism

#### 3.1. Legal and Moral Sanctions

The conceptual tools elaborated in the preceding section will now serve us in the analysis of the relationship between law, justice, and morality in the Jewish tradition. However, the religious character of all its norms adds a most significant dimension to the relationship between law and morality. Divinity, conceived as the ultimate source of normative validity, is, by definition, of absolute nature. For the believer it constitutes, therefore, the supreme value, in face of which every conflicting human interest must, in principle, give way. The basic norm: “You ought to abide by the commands of Divinity” is of absolute and unconditional validity, if the existence of Divinity is taken seriously. The authority of the supra-human entity is absolute.

In this context, I would like to touch briefly upon the opinion of a scholar who claims that the Kelsenian principle of the unity and exclusiveness of every normative system is inapplicable to Jewish law.<sup>32</sup> The latter, the halakha, is, in his view, of a pluralistic nature. The author adduces as proof of his thesis the halakhic principle that recognizes the normative force of state law. According to Jewish commentators, this principle is based upon the fact that the law of the state has been accepted by the whole population.<sup>33</sup> In the author’s view, this is an example of the pluralistic foundation of Jewish law. From a normative point of view, this argument is unfounded. The actual motive for state law’s reception into Jewish law does not detract from the necessity of its formal incorporation into the receiving system. The validity of state law inside Jewish law is necessarily founded upon the basic norm of Jewish law.<sup>34</sup> This can be seen from the very formulation of the said principle *dina de-malkhuta dina*, “the law of the state is the law,” or, in other words, the law of the state becomes a Jewish religious law.<sup>35</sup>

Kelsen’s normative monism constitutes an epistemological principle and, as such, must be valid for all systems. Should it appear to be invalid for Jewish

32 Avi Sagi, *Judaism: Between Religion and Morality* (Tel Aviv: Hakibbutz Hameuchad, 1998), 116–120 [Hebrew].

33 B *Bava Batra* 54b; R. Samuel b. Meir (Rashbam) (ca. 1080–1160), ad loc.. On this principle in general, see Menachem Elon, *Jewish Law—History, Sources, Principles*, vol. 1 (Philadelphia: Jewish Publication Society, 1994), 64–74; Shmuel Shilo, *The Law of the State is Law* (Jerusalem: Jerusalem Academic Press, 1974) [Hebrew].

34 As a matter of fact, Jewish law determines the exact scope of the principle. State law is given validity only very partially and under very specific conditions.

35 This means, among other things, that the violation of state law constitutes an offence under Jewish law.

law, then it would be scientifically untenable. In my view, however, the principle remains generally valid. The fact that in the Jewish tradition, like elsewhere, one can find partisans of a dualism of natural law and positive law does not constitute a proof against the validity of Kelsen's theory.<sup>36</sup>

I have defined the distinction between law and morality—following Kelsen's approach—on the basis of the difference in the kind of sanction. Whereas this criterion establishes a clear distinction in relation to human law, it loses much of its importance and acuity in the realm of the Jewish religious normative order. The reason for it lies in the assumption that behind all the religious norms—be they legal or moral—stands one and the same (divine) authority. This observation needs further elaboration. In rabbinic Judaism law, the halakha, occupies a central position. Religious norms, which in Judaism tend to regulate all human activities, call for organized societal sanctions, backed with a threat of physical coercion. Traditional Judaism never subscribed to the notion—adopted by Moses Mendelssohn<sup>37</sup> and a number of Protestant theologians<sup>38</sup>—that there exists an irreconcilable conflict between law, as a coercive order, and religion as based upon acts of faith. In Judaism, the physical enforcement of religious norms—which, certainly, is not the ideal situation—is nevertheless society's ultimate collective duty.<sup>39</sup> Obviously, physical coercion in the non-interpersonal sphere is mainly aimed at the prevention of religiously prohibited acts, but one finds some talmudic sayings which would seem to equally admit it for the enforcement of purely ceremonial acts.<sup>40</sup> In any case, a system of law, in the strict sense of social coercive order, forms an integral part of Judaism. On the specific problems, that is, to what extent it still functions as such a legal system in the contemporary world, we shall make some short comments later on.

36 Sagi, *Judaism* (above n. 32), attempts to differentiate between a descriptive analysis and a normative judgment. In my view, this attempt is highly problematic methodologically.

37 Moses Mendelssohn, "Jerusalem oder über religiöse Macht und Judentum (Berlin 1783)," *Gesammelte Schriften*, vol. 3 (Berlin: Akademie Verlag, 1929–1938) 255–362; Mendelssohn, *Jerusalem and Other Jewish Writings*, trans. and ed. Alfred Jospe (New York: Schocken, 1969). For a detailed analysis of this work, see Alexander Altmann, *Moses Mendelssohn—A Biographical Study* (Philadelphia: The Jewish Publication Society of America, 1973), 514–552.

38 Englard, *Religious Law* (above n. 12), 21–22.

39 On Mendelssohn's attempt to reconcile his view with the Jewish tradition, see Altmann, *Moses Mendelssohn* (above n. 37), 547–549; Julius Guttmann, "Mendelssohn's Jerusalem und Spinoza's 'Theologisch-Politischer Traktat,'" *Bericht der Hochschule für die Wissenschaft des Judentums* 48 (1931): 31–67.

40 B *Ketubbot* 86a; B *Hullin* 132b. On the problem in general, see Michael Nehorai, "Can a Religious Act Be Performed through Compulsion?" *Da'at* 14 (1985): 21–34 [Hebrew]; Avi Sagi, *Jewish Religion after Theology* (Boston: Academic Studies Press, 2009), 17–26.



Judaism does not rely exclusively upon organized societal sanctions: as typical in respect of many other religions, it knows a whole ambit of other sanctions, ranging from expressions of approbation and censure to promises of supra-human reward and punishment. In many instances positive worldly sanctions are combined with promises or threats of additional transcendent retributions. In terms of effectiveness, transcendent sanctions are often at least as efficient as threats of physical coercion, if not more so. The matter depends upon the individual's state of belief. For a genuinely religious person, the difference in nature between a societal and a transcendent sanction is of no decisive importance. Moreover, since all the different sanctions are established by the same authority, and are often conceived as being cumulative, the distinction between religious legal and moral norms becomes rather artificial. Finally, the borderline between physical and non-physical societal sanctions is not always as clear as the dichotomy would suggest. Let us take for example the sanction of excommunication entailing the denial of certain religious privileges. The implementation of that sanction does not require the cooperation of the person subjected to it, and, therefore, there seems to be no need for organized societal coercion.

More important, are, however, those quite numerous halakhic rules of conduct, which explicitly renounce judicial enforcement by limiting themselves to general expressions of censure or by relying exclusively upon divine sanctions. The gradual transition from legal to moral norms is further attested to by the phenomenon of different levels of behavior, varying according to the state of the individual's perfection. Thus, the requirements of a person who has reached the status of *hasid* (pious) are more stringent than that of the ordinary person.<sup>41</sup> In this context mention should be made of talmudic notions linked to equity and supererogation, such as “the characteristic of Sodom (*middat sedom*),”<sup>42</sup> “beyond the letter of the law” (*li-fnim me-shurat ha-din*);<sup>43</sup> “standard of saintliness” (*middat ha-hasidut*);<sup>44</sup> “Do what is right and good in the sight of the Lord” (Deut. 6:18).<sup>45</sup> In several

41 Cf. Isadore Twersky, *Introduction to the Code of Maimonides* (New Haven and London: Yale University Press, 1980), 134–135.

42 *Ethics of the Fathers*, 5:10; B *Bava Batra* 12b; *Shulhan Arukh*, H.M. 174:1.

43 B *Bava Mezia* 24b, 30b; B *Bava Kama* 99b..

44 B *Bava Mezia* 51b–52b; B *Shabbat* 120a; B *Hullin* 130b.

45 NJPS trans. On the topic in general, see Isaac Herzog, *The Main Institutions of Jewish Law*, 2nd ed., vol. 1 (London: Soncino Press, 1965), 381–386; Moshe Silberg, *Talmudic Law and Modern State*, trans. Ben Zion Boxer (New York: Burning Bush Press, 1973), 93–130; Shalom Albeck, “Law and Morality in Jewish Tradition,” *State Audit—Developments in Public Accountability*, ed. Benjamin Geist (London: Macmillan Press, 1981), 365–385; Shmuel Shilo, “On One Aspect of Law and Morals in Jewish Law: Lifnim mi-shurat ha-

cases there are controversies among the rabbis about the judicial enforceability of these rules of behavior. If they are to be physically enforced, then the moral norms are transformed into legal ones.

The close proximity between moral and legal norms in the religious system is the outcome of one of the central aims of religion: the perfection of the individual.<sup>46</sup> Perfection, in the religious sense, relates to the individual's position vis-à-vis Divinity, the Creator.<sup>47</sup> The integration of human perfection—be it intellectual contemplation or behavioral achievements—into the notion of the service of God creates a unitary framework for the religious norms. Hence, there are no *a priori* ideological-political premises limiting the function and ambit of law to the coordination of inter-human activities in society. Coercive measures are legitimate beyond the interest of social coexistence, as long as they can achieve their objectives of individual perfection.

A telling example of a legal rule which gives preference to the moral aim of personal perfection over other interests is the following case: “If one encounters two animals, one crouching under its burden and the other unburdened because the owner cannot find anyone to help him load, he is obligated to unload the first to relieve the animal's suffering, and then to load the other. This rule applies only if the owners of the animals are both friends and both enemies (of the person who

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din,” *Israel Law Review* 13 (1978): 359; Twersky, *Introduction* (above n. 41), 427–429, 510–513. See also Shubert Spero, *Morality, Halakha, and the Jewish Tradition* (New York: Ktav, 1983), 166–200; H.J. Laks, “Three Proposals Regarding the Relationship of Law and Morality in the Halakha,” *Jewish Law Annual* 8 (1989): 53; cf. Moshe Drori, *The Concept of Abuse of Rights in Jewish Law—Kofin 'al Middat Sedom*, ed. Yaron Unger (Ofra: Makhon Mishpete Erez, 2010) [Hebrew].

46 Cf. Twersky, *Introduction* (above n. 41), 134–135, 427–429; see also Rabbi Shneur Zalman Pines, *The Ethics of the Bible and the Talmud*, 2nd ed. (Jerusalem: privately printed, 1977), 35–38 [Hebrew]; Boaz Cohen, “Law and Ethics in Light of Jewish Tradition,” *Jewish and Roman Law—A Comparative Study*, vol. 1 (New York: Jewish Theological Seminary of America, 1966), 65, 68, 76, et passim.

47 In this context, mention has to be made of the fact that as a consequence of Jewish law's emphasis on the position of human beings before Divinity, the halakhic discourse focuses on human duties and not so much on human rights. Cf. Abraham Weingort, “Ethique et droit dans la tradition du judaïsme,” *Revue Historique de Droit Français et Étranger* 68 (1990): 463. See especially Kelsen, *Pure Theory of Law* (above n. 4), 125–140. According to Kelsen, from the point of view of the pure theory of law, the stress should be placed on the duty of a person and not on the right of another. However, one could still argue that, from an analytical point of view, a right usually corresponds to the duty and its enforcement. This right exists in favor of the person who has the power to initiate proceedings in order to enforce the duty.

comes upon them). But if one is an enemy and the other a friend, he is obligated to load for the enemy first, in order to subdue his evil impulse.”<sup>48</sup>

As a result, the religious-legal endeavor to achieve individual perfection is more important than the immediate relief of an animal’s pain, the prevention of it is, according to important rabbinical authorities, a commandment of biblical standing.<sup>49</sup> Obviously, where perfection signifies *voluntary* submission to divine commands, coercion loses its justification in view of religion’s contrasting objective. The rabbis have been very much aware of the dialectical tension between law and faith, between coercion and free choice. Not surprisingly, they rate serving God out of pure love higher than doing so out of fear.<sup>50</sup>

In conclusion, the distinction between legal and moral norms in the Jewish tradition is of much less importance, in the light of the identical norm-giver.<sup>51</sup> In view of the religious ideology of service of God and collective responsibility, the sphere of legal norms is considerably more extensive than generally accepted in Western democracies that have adopted a liberal-utilitarian philosophy. As mentioned before, the modern liberal state limits itself to the creation and preservation of the external conditions enabling the individual to live up to his or her own ethical principles without, evidently, causing damage to others. However, in the contemporary world, where the mostly secular states maintain a monopoly on force, religious systems operate only as positive moral orders, since their organs lack the possibility of autonomous physical enforcement. In some states, among them Israel, certain religious norms are legally enforceable through their reception by, and transformation into, state law.

### 3.2. The Substantive Conflict between Religion and Morality

The formal, sanction-oriented distinction between law and morality by no means exhausts the problem of their relationship in the Jewish religious tradition. A much deeper problem exists on the substantive level, where a conflict is experienced between specific religious norms and norms of positive morality or personal

48 Maimonides, *Book of Torts, Murder and Preservation of Life*, 13:13, trans. Isaac Klein (New Haven: Yale University Press, 1954), 235–236. The rule is based upon B *Bava Mezia* 32b.

49 Cf. *Shulhan Arukh*, H.M. 272:9 and Rema ad loc.

50 On fear of Heaven, reverence, and love in relation to human conduct, see, in general, Efraim Urbach, *The Sages: Their Concepts and Beliefs*, trans. Israel Abrahams, 2nd ed. (Jerusalem: Magnes Press, 1979), 400–419.

51 Albeck, *Law and Morality* (above n. 45), 369; Cf. Kelsen’s remarks on legislative provisions lacking sanctions, *The Pure Theory of Law* (above n. 4), 54.

ethics. Moreover, the problem has been conceived as raising fundamental theological and philosophical issues: What is the relationship between revealed divine commands and absolute ethical values? Are ethical values determinable by intellect and reason, and to what extent are they subject to divine revelation? These questions have engaged the minds of philosophers and theologians since antiquity.<sup>52</sup> The opinions on these issues are divided in Islam, as well as in Judaism and Christianity. The medieval controversy between rationalists and voluntarists reflects the deeply felt theological problem. The objections of Maimonides (1138–1204) to Saadia Gaon's (882–942) rational conception of moral virtues are representative, in the Jewish philosophical tradition, of the cognitive issue.<sup>53</sup> No doubt, all of these fundamental questions relating to the relationship between religion and ethics are of greatest importance in philosophy and theology. They concern the nature of Divinity; among these issues there is the most complex problem of divine governance, the so-called theodicy. It is no wonder that an enormous extent of literature has dealt with these problems and continues to deal with them. However, the contemporaneous, Orthodox rabbinic Judaism is not inclined—apart from very few exceptions—to deal systematically with theological-philosophical questions in general, and with the abovementioned ones in particular.<sup>54</sup> We will limit ourselves to an enquiry into the way the rabbinical

52 See the *Euthyphro* on the question of piety; cf. Mark McPherran, "Socratic Piety in the *Euthyphro*," *Journal of the History of Philosophy* 23 (1985): 283–310; Richard Sharvy, "Euthyphro 9b–11b: Analysis and Definition in Plato and Others," *Noûs* 6 (1972): 119–137; John Hall, "Plato: *Euthyphro* 10a1–11a10," *The Philosophical Quarterly* 18 (1968): 1–11; Peter Geach, "Plato's *Euthyphro*—An Analysis and Commentary," *The Monist* 50 (1966): 369–382.

53 Eliezer Goldman, "The Ethical Philosophy of R. Saadia Gaon," in *Expositions and Inquiries* (above n. 21), 23–44; Goldman, "The Complexity of Ethical Philosophies—R. Saadia Gaon and Maimonides," *ibid.*, 45–59 [Hebrew]; Nahum Arieli, "Morality in Saadia's and Maimonides' Teachings," *Da'at* 15 (1985): 37–66 [Hebrew]; Twersky, *Introduction* (above n. 41), 456–459; David Rau, "Die Ethik R. Saadyas," *Monatsschrift für Geschichte und Wissenschaft des Judentums* 55 (1911): 385–399, 513–530, 713–738; 56 (1912): 65–79, 181–198.

54 Two Israeli professors of philosophy have undertaken the task of a comprehensive analysis of the relationship between religion and morality in traditional Judaism: Prof. Avi Sagi of Bar-Ilan University and Prof. Daniel Statman of the University of Haifa. First, they analyzed the general fundamental question of the relationship between religion and morality: Daniel Statman and Avi Sagi, *Religion and Morality* (Amsterdam: Rodopi, 1995). Then—based on their general insights—they inquired into the said relationship in Judaism: Statman and Sagi, "Divine Command Morality and Jewish Tradition," *The Journal of Religious Ethics* 23 (1995): 49–68; for an expanded version of this article in bookform: Sagi, *Judaism* (above n. 32). Ehrenfeld, *Der Pflichtbegriff* (above n. 9) arrived at similar conclusions on the basis of Jewish sources. This author thinks that the ethics of

tradition copes with a situation of a conscious, concrete conflict between a divine commandment and the personal morality of a believer. These conflicts take place—subjectively seen—in the conscience of the believer, who will have to decide which of the two conflicting normative orders he will now follow. It puts the believer before the grave dilemma of a conflict of duties, since she considers, in principle, both orders as binding for her.

In the Bible we find a series of situations that appear to us as a contradiction between a divine commandment and ethical principles. A famous case of such a situation is the divine order to Abraham to sacrifice his son Isaac. There exist many attempts—in the Jewish rabbinic tradition included—to resolve this contradiction.<sup>55</sup> However, our interest here lies exclusively in the conflict situation as such, and not in interpretations that attempt to ultimately avoid the contradiction. In the case of Abraham, the Bible itself does not explicitly mention such a conflict, since he apparently obeys the divine order without hesitation. One finds an allusion to such a conflict in the biblical story of the expulsion of Hagar and her son Ishmael.<sup>56</sup> The Bible recounts that it was very grievous in the eyes of Abraham, but God told him to hearken unto the voice of his wife, which is what he then did.<sup>57</sup> Indeed, the religious answer seems to be unequivocal: God’s command constitutes an absolute value, in face of which any contrary, merely human, value-system must give way. An outstanding example of such a clear-cut theocentric solution to the dilemma is found in the talmudic account of the Biblical story about King Saul’s tragic failure in dealing with the vanquished Amalekites:<sup>58</sup> “When the Holy One, blessed be He, said to Saul: ‘Now go, attack Amalek,’<sup>59</sup> he said: ‘If on account of one person the Torah said: Perform the ceremony of the heifer whose neck is to be broken,<sup>60</sup>

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Judaism teach the autonomy of morality, recognize human reason as a source for morality, and subject Divinity Itself to the moral order; *ibid.*, 123–125. For a critique of Prof. Sagi’s method in relation to some of the sources, see Yoav Altman, “Between Torah Ethics and ‘Academic’ Ethics,” *HaMa’ayan* 46/1 (2005): 67–72 [Hebrew].

55 Cf. Sagi, *Judaism* (above n. 32), 257–267; cf. also the manifold explanations of other ethically problematic stories in the Bible, *ibid.*, 182–229. See also in connection with the sacrifice of Isaac, J.G. Gellman, “A Hasidic Interpretation of the Binding of Isaac: Rabbi Leiner of Izbica,” in *Between Religion and Ethics*, ed. Avi Sagi and Daniel Statman (Ramat Gan: Bar-Ilan University Press, 1993), xxiii–xxxix; Isaac Kalimi, “‘Go, I Beg You, Take Your Beloved Son and Slay Him!’: The Binding of Isaac in Rabbinic Literature and Thought,” *Review of Rabbinic Judaism—Ancient, Medieval and Modern* 13 (2010): 1–29.

56 Gen. 21: 9–15.

57 It is possible that Abraham was convinced by the divine promise, *ibid.* 21: 13: “And also the son of the bondwoman will I make a nation, because he is thy seed” (NJPS trans.).

58 B *Yoma* 22b.

59 1 Samuel 15:3 (NJPS trans.).

60 Cf. Deut. 21.

how much more ought consideration to be given to all these persons. And if human beings sinned, what has the cattle committed; and if the adults have sinned, what have the little ones done?’ A divine voice came forth and said: ‘Be not righteous overmuch.’”<sup>61</sup>

A further interesting example of barely veiled and poignant moral criticism of a religious legal rule one finds in a Midrashic comment on the unfortunate position of *mamzerim*, the offspring of an incestuous or adulterous relationship.

. . . It bears on what is written in Scripture: “But I returned and considered all the oppressions” (Eccl. 4:1). Daniel the Tailor interpreted the verses as applying to bastards. “And behold the tears of such as were oppressed” (ibid.). If the parents of these bastards committed transgression, what concern is it of these poor sufferers? So also if this man’s father cohabited with a forbidden woman, what sin has he himself committed and what concern is it of his? “And they had no comforter” (ibid.), but: “On the side of their oppressors there was power” (ibid.). This means, on the side of Israel’s Great Sanhedrin which comes to them with the power derived from the Torah and removes them from the fold, in virtue of the commandment: “A bastard shall not enter into the assembly of the Lord” (Deut. 23:3). “But they had no comforter.” Says the Holy One, blessed be He: ‘It shall be My task to comfort them.’ For in this world there is dross in them, but in the World to Come, says Zechariah, I have seen them all gold, all of them pure gold: hence it is written: ‘I have seen, and behold a candlestick all of gold, with a *golah* [bowl] upon the top of it—*roshah*” (Zech. 4:2).<sup>62</sup>

61 Eccles. 7:16. The parallel version of this story in *Kohelet Rabba* (7:33) has: “Do not be more just than your Creator.” In his comments on Rabbi Jakob Emden’s commentary on *Ethics of the Fathers*, Rabbi Zevi Hirsch Levin (Hirschel Löbel, 1721–1800), onetime chief rabbi of Berlin, refers to the Biblical commandment to annihilate Amalek. He states that the foundation of all ethics lies for the Jewish person in the divine law as revealed by Moses and that no other morality exists. “Therefore, the Torah commands sometimes acts that should not be executed according to human nature and reason. Thus, it ordered to annihilate Amalek, human beings and animals. . . . Whatever is written explicitly in the Torah cannot be changed, though it may appear to be against the morality of reason; do not oppose you to it” (in *Ethics of the Fathers with Four Commentaries* [Jerusalem: Sefarim Torani’im, 1986], 1a–b [Hebrew]). The attempt by Sagi and Statman, “Divine Command Morality” (above n. 54), 47–48, to attenuate this opinion of Rabbi Levin is, in my view, ideologically inspired.

62 *Leviticus Rabba* 32:8 (Soncino trans.). The Midrash mentions that the words of the prophet Zachariah, וגלה על ראשה, were interpreted differently by two of the sages: One reads *golah*

By identifying the “oppressors” with the Great Sanhedrin, the legitimate authority responsible for the implementation of religious law, the commentator suggests a very daring implication. The final reliance upon God’s consolation, though betraying resignation to the inevitability of the law’s actual harsh results, creates a peculiar tension between God and His laws.<sup>63</sup>

Another allusion to an external moral criticism of a religious law is made in relation to the halakhic rule which discriminates between Jews and Gentiles in respect of the liability for goring oxen. The Talmud recounts that two commissioners sent by the Roman government, after having thoroughly studied Jewish law, remarked:<sup>64</sup> “We have minutely examined all your law and it is correct, except what you say that if an ox of an Israelite gores an ox of a Canaanite there is no liability, [whereas if an ox] of an Canaanite gores the ox of an Israelite . . . there is liability to pay full compensation . . . We will not tell this matter to the government.”

The two commissioners thus mercifully promised that they would not divulge this legal state of affairs to the Roman government.<sup>65</sup> The Jewish sources provide different reasons for the legal discrimination between Jews and Gentiles, but the feeling of an ethical problem remains.<sup>66</sup>

The truth is, however, that until modern times the problem of a conflict between Jewish law and a different moral system did not seriously engage Jewish religious thought. The theocentric outlook, combined with a strong sense of submission to legitimate religious authority, provided the necessary answers to possible critical moral objections of individuals.

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“exile,” meaning that the Shekhina (Divine Presence) will accompany the people into the exile; the other reads *go’alah*, “her redeemer,” meaning that God, the Redeemer, will lead them out of the exile.

63 See Sagi, *Judaism* (above n. 32), 242, and see the various legal attempts to solve the actual concrete problems of the *mamzerim*, *ibid.*, 242–256.

64 B *Bava Kama* 38a.

65 In the parallel story in the Jerusalem Talmud, *Bava Kama* 4,3, a number of additional discriminations between Jews and Gentiles are mentioned. The Talmud recounts there that the Roman commissioners forgot all they had learned when leaving Palestine.

66 See the rationale given by the Babylonian Talmud, *Bava Kama*, 38a (Divine punishment for the fact that the Gentiles do not observe the seven Noahide laws imposed upon them). Cf. especially the ethical-philosophical justification by Maimonides in his commentary on the Mishnah, *Bava Kama*, 4:3; contrast his utilitarian argument in *Mishne Torah, The Book of Torts, Damage by Chattels* 8:5, trans. Isaac Klein (New Haven: Yale University Press, 1954), 29. In the opinion of R. Menahem Hameiri (1249–1316), the discriminatory provisions concern exclusively people practicing idolatry, but not the civilized nations of the Christian and Muslim faiths. See Hameiri, *Beit ha-behira, Bava Kama* (Jerusalem: K. Schlesinger, 1963) 37b, 122.

An interesting and influential attempt to provide a theological foundation to the precedence of divine law over human reason was undertaken by the Great Rabbi Loew of Prague (Maharal) (ca. 1525–1609), who, at the eve of modern times, came in contact with the humanistic thoughts of the Renaissance at the court of Emperor Rudolf II. In his view, the divine law of the Torah is the expression of the absolute intellect, which is far superior to human reason; hence, the possible divergences between human law (דת נימוסית) and Jewish religious law. The former is based upon commonsense reasoning (סברה) and human reflection (מחשבה) aimed at the perfection of worldly affairs (תיקון העולם). The Torah, on the other hand, “is pure intellect and does not heed to human common sense.”<sup>67</sup> He stipulates as guiding principle: “Whenever you find a thing which is remote from human reason, the cause is that [the sages’] opinion is based upon divine reason which is superior to human reason.”<sup>68</sup>

Maharal’s writing exercised a great influence upon important trends in Hasidism. As a matter of fact, the notion that divine reason, upon which the Jewish law is based, is far superior to human reason has a special place in Hasidism.<sup>69</sup>

### 3.3. The Tension between Law and Equity

A different reaction occurred in the Jewish tradition in relation to the inevitable tension between what has been called the letter and spirit of law. The talmudic sages were well aware of the fact that formal adherence to the law, and the individual insistence upon one’s strict rights, may fall short both of substantive justice in the social context and in that of personal perfection. Hence the famous saying of Rabbi Yohanan, quoted in the Talmud, that the insistence upon one’s strict rights was the main reason for the destruction of the Second Temple.<sup>70</sup>

67 Maharal, *Be’er ha-golah, Be’er sheni* (Jerusalem: n.p., 1971), 31–32: והתורה שכלית לגמרי ואין התורה פונה אל הסברא [author’s translation, I.E.].

68 *Ibid.*, 37: “על פי דרכי התורה שהוא השכל האלוקי אשר הוא למעלה משכל אנושי זה תדע, בכל מקום שתמצא דבר כזה שהוא רחוק משכל אנושי, אין זה רק בשביל שדבריהם היו” [author’s translation, I.E.]. The author justifies himself for revealing such things. He claims to have done it for the honor of the Torah and God may forgive him; it was a reaction to writings that protested against the fact that religious precepts go against human reason. See also Rivka Schatz-Uffenheimer, “The Maharal’s Conception of Law—Antithesis to Natural Law Theory,” *The Jewish Law Annual* 6 (1987): 78–93.

69 The idea is prominent in the literature of Habad. Cf. below, p. 255, on the generally skeptical approach to human reason by Hasidism.

70 B *Bava Mezia* 30b. Cf. generally Boaz Cohen, “Letter and Spirit in Jewish and Roman Law,” *Jewish and Roman Law*, vol. 1 (New York: Jewish Theological Seminary of America, 1966), 31–64, esp. 50–57.



Throughout the generations, rabbinical authorities have attempted to overcome these inherent shortcomings of legal rules by requiring from the individual higher standards of behavior.<sup>71</sup> This reliance on moral norms—in the sense of legally unenforceable conduct—does not constitute a problem of a clash between two value systems. The individual is not put before a problem of conscience, because he is allowed, and even required, to act with moderation by forgoing the full extent of his legal rights.<sup>72</sup> As mentioned above,<sup>73</sup> the ideas of supererogation and equity do not stand in opposition to religious law, but supplement it in the framework of the comprehensive religious normative system.<sup>74</sup>

### 3.4. Judicial Process and Moral Decision

The rabbis were fully conscious of the decisive human dimension in the application of religious law and the dominant place of the individual scholar's personal outlook in reaching legal conclusions. They were aware of the fact that the legal method of conceptual reasoning could not provide an exclusively formal-logical, deductive way to reach the solution of a legal problem. Indeed, the talmudic sages insisted that a precondition of the nomination of a judge was his ability to declare a reptile to be a pure animal on the basis of Biblical law.<sup>75</sup> However, a reptile is the symbol of impurity and described as such explicitly in the Bible.<sup>76</sup> This demonstrates that the Rabbis were convinced that a judge could reach, by means of purely juridical concepts, any legal result, even one that seen from a religious point of view would be considered a complete absurdity.<sup>77</sup> What hinders, therefore, the judge from reaching such a conclusion? It is his faith, his religious outlook, his personal commitment, and loyalty toward the religious law; it is what in the Jewish context is called fear of Heaven (יראת שמים)—hence, the indispensable requirement that the judge must be a believer and God-fearing.<sup>78</sup>

71 Cf. Aaron Lichtenstein, “Does Jewish Tradition Recognize an Ethic Independent of Halakha?” in *Modern Jewish Ethics*, ed. Marvin Fox (Columbus, OH: Ohio State University Press, 1975), 62–88.

72 Izhak Englard, “The Problem of Equity in Maimonides,” *Israel Law Review* 21 (1986): 296, 331–332.

73 Above, p. 232–233.

74 Cf. Lichtenstein, “Does Jewish Tradition” (above n. 71), 67, 70–73, 83.

75 B *Sanhedrin* 17a.

76 Lev. 11:29–30, 43–44.

77 The Talmud (B *Eruvin* 13b) recounts that a learned disciple in Yavneh had found 150 reasons to declare a reptile to be pure.

78 In this sense: Psalms 111:10: “The beginning of wisdom is the fear of the LORD” (NJPS trans.); Proverbs 9:10; *Ethics of the Fathers* 3:9, 17. See Izhak Englard, “The Problem of Jewish Law in a Jewish State,” *Israel Law Review* 3 (1968): 254, 270. Cf. in this context

In the absence of this precondition, neither the judge nor his judgment will be considered legitimate from a religious standpoint. Jewish sources know a special term for apparently well-reasoned, but intrinsically wrong, legal conclusions: “To reveal a face in the law,” (לגלות פנים בתורה) which means to approach the law brazen-facedly.<sup>79</sup>

However, it remains a fact that also the God-fearing judge and decider, who subject themselves unreservedly to the yoke of the law, can—and generally do—introduce into their decision elements of their specific personal religious ideology. In other words, the personal ethical ideas and values of the decider—evidently in the legitimate framework of the Jewish Orthodox religion—penetrate during the judicial process into the decision. Two factors contribute their part to this phenomenon: the omnipresence of dissent in the *halakha*<sup>80</sup> that enables the decider to make a choice, and the manifold general legal standards, whose concretization leaves place for ethical considerations.

The creative function of the “halakhic man” was emphasized by Rabbi Joseph B. Soloveitchik (1903–1993):

Since the halakhic gesture is not to be abstracted from the person engaged in it, I cannot see how it is possible to divorce halakhic cognition from axiological premises or from an ethical motif. If halakhic research were limited to its interpretive phase—deciphering some obscure texts—such a discrepancy between the logical and the

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the statement by Rabbi Joseph Carlebach (1883–1942), chief rabbi of Hamburg, *Das gesetzestreue Judentum* (Berlin: Schocken Verlag, 1936), 10–11, where he emphasizes the dialectics between constraint and freedom in the moral decision of a Jew: “So ist die Entscheidung des ethischen Konflikts Gebundenheit und Freiheit in einem . . . Auf dem Grund des Gesetzes kann und soll die Individualität, die Freiheit des einzelnen, erwachsen; das Gesetz nur kann uns Freiheit geben. . . . Diese Freiheit in der Gebundenheit . . . ist das Geheimnis unserer persönlichen und geistigen Freiheit und das Wesen jüdischer Individualität.” “Thus the decision of the ethical conflict is at once constraint and freedom. . . . On the basis of the law, the individuality and the freedom of the individual can and should accrue; only the law can give us freedom. . . . This freedom under constraint . . . is the secret of our personal and spiritual freedom and the essence of Jewish individuality.”

Rabbi Carlebach, an outstanding personality and prominent scientist, was killed by the Nazis near Riga.

79 *Ethics of the Fathers* 3:15; the standard printed text adds שלא כהלכה (“not according to the halakha”). It seems that these two words were added to the original text later on; see Urbach, *The Sages* (above n. 50), 263.

80 On the problem of dissent in the halakha, see Avi Sagi, “Halakhic Praxis and the Word of God: A Study of Two Models,” *The Journal of Jewish Thought and Philosophy* 1 (1992): 305–329.

axiological judgments would be warranted. Since, however, halakhic thought is creative, original, flowing from the inner recesses and mysterious spring-wells of the personality where logical-cognitive and ethico-axiological motives are interwoven, any attempt at separation would result in crippling human creativity.<sup>81</sup>

The author adds:

From my own experience I know that in any halakhic investigation I have always been guided by a dim intuitive feeling which pointed out to me the true path, and this intuition has never been stripped of an ethical intention. Of course, in speaking of an ethical moment implied in halakhic thinking, I am referring to the unique halakhic ethos which is another facet of the halakhic logos. I do not, however, intend to say that the current ethical standards are the determination. Far from it, at times the halakhic ethos runs contrary to popular ethical notions. Hence, one must exercise great caution in isolating the ethical moment of halakhic cognition.<sup>82</sup>

The influence of personal (moral) ideologies upon religious decisions is today well-known, and I myself dealt with it in the context of the actual problem of giving up, under Jewish law, territories of Eretz Israel to Arab rule.<sup>83</sup> I attempted to show that the fundamental differences of opinion between two Orthodox rabbis were grounded in contradicting personal and political ideologies.<sup>84</sup> Another prominent

81 Rabbi Joseph B. Soloveitchik, *Community, Covenant, and Commitment—Selected Letters and Communications*, ed. Netanel Helfgot (Jersey City, NJ: Ktav Publishing House, 2005), 276. The text is from a letter written by Rabbi Soloveitchik in 1952 to Rabbi Menahem E. Rackman as a reaction to the latter's draft of an article.

82 Ibid.

83 Izhak Englard, "The Problem under Jewish Law of Relinquishing Parts of the Holy Land to Arab Rule: Law and Ideology," *Hapraklit* 41 (1993):13–34 [Hebrew]. Cf. in this context Chaim Burganski, "Rabbi Yisraeli's Halakhic View on the Surrender of the Territories," *Diné Israel—Studies in Halakha and Jewish Law* 22 (2003): 241–267 [Hebrew]. The author analyzes R. Yisraeli's change in attitude on the issue. Another central issue was the observance of the sabbatical year prohibitions (*shemita*), which engendered a sharp controversy on the backdrop of conflicting ideologies. See A. Edrei, "From Orthodox to Religious Zionism: Rabbi Kook and the Sabbatical Year Polemic," *Diné Israel—Studies in Halakha and Jewish Law* 26–27 (2009–2010): 45.

84 For a similar conclusion in relation to the issue of autopsy, cf. Jehiel Jacob Weinberg (1885–1966), "Autopsies in the State of Israel," *Techumin* 12 (1991): 382–388 [Hebrew].

modern example—illustrating the influence of personal views—constitutes the fierce controversy about artificial insemination between Rabbi Feinstein on the one side, and the Rabbis Breisch and Teitelbaum on the other one.<sup>85</sup> Indeed, according to the remark of the late Chief Rabbi of England, Rabbi Jakobovitz, in the background of these differences of opinions between the famous halakhic authorities stand different ethical conceptions.<sup>86</sup>

Although the ultimate and overriding aim of religion transcends the individual and the collective, their welfare constitutes still an important—albeit mediate—goal of religious law. Hence, no wonder that the halakha is replete with worldly utilitarian considerations. Moreover, in many cases existing rules have been qualified or modified in order to achieve socially important interests, among them of purely economic nature.<sup>87</sup> However, welfare is not conceived as an end in itself, but as a necessary condition for the achievement of the ultimate calling. The following talmudic story—notwithstanding its sophistic turn—is a most telling testimony of the Jewish consciousness about the relative value of human social interests:<sup>88</sup>

85 Moshe Feinstein, *Iggerot Moshe, E.H.* (New York and Bene Beraq: privately published, 1961), vol. 1, §71; vol. 2, §§11, 42; vol. 4, §32; Mordechai Yaakov Breisch, *Helqat Ya'akov, E.H.* (Tel Aviv: privately published, 1992), §§ 12–21; Yoel Teitelbaum, *Divrei Yoel*, vol. 2, *E.H.* (New York: n.p., 1982), §§ 107–110. The controversy was in relation to artificial insemination, in general, and with the semen of a gentile in particular.

86 Immanuel Jakobovits, *Jewish Medical Ethics* (New York: Bloch Publishing Co., 1975), 248–249. On the problem of artificial insemination under Jewish law and on the controversies among rabbinic authorities, see Daniel Sinclair, *Jewish Biomedical Law: Legal and Extra-Legal Dimensions* (Oxford: Oxford University Press, 2003), 68–120; Sinclair, “Assisted Reproduction in Jewish Law,” *Fordham Urban Law Journal* 30 (2002): 71–106, on 106; Alfred Cohen, “Artificial Insemination,” *Journal of Halacha and Contemporary Society* 13 (1987): 43–59; cf. David Ellenson, “Artificial Fertilization and Procreative Autonomy: Two Contemporary Responsa,” in Ellenson, *After Emancipation: Jewish Religious Responses to Modernity* (Cincinnati: Hebrew Union College Press, 2004), 452–470; Alfredo Mordechai Rabello, “La procreazione assistita alla luce del diritto ebraico,” in *Laicità e diritto*, ed. Stefano Canestrari (Bologna: Bononia University Press, 2007), 363–388.

87 Cf. Marvin Fox, “The Mishnah as a Source for Jewish Ethics,” in *Studies in Halakha and Jewish Thought—Presented to Rabbi Menachem Emanuel Rackman on His 80th Birthday*, ed. Moshe Beer (Ramat Gan: Bar-Ilan University Press, 1994), 33\*–48\*; Daniel Sperber, *Ways of Pesiqa—Methods and Approaches for Proper Halakhic Decision Making* (Jerusalem: Reuven Mass Publishing, 2008), 141–163 [Hebrew]; Sperber, *The Path of Halakha—Women Reading the Torah: A Case of Pesiqa Policy* (Jerusalem: Reuven Mass Publishing, 2007), 93–99 [Hebrew].

88 B *Me'ila* 17a (Soncino trans.).

For the [Roman] Government had once issued a decree that [Jews] might not keep the Sabbath, circumcise their children, and that they should have intercourse with menstruant women. Thereupon R. Reuben son of Istroboli cut his hair in the Roman fashion, and went and sat among them. He said to them: “If a man has an enemy, what does he wish him, to be poor or rich?” They said: “That he be poor.” He said to them: “If so, let them do no work on the Sabbath so that they grow poor.” They said: “He speaketh rightly, let this decree be annulled.” It was indeed annulled. Then he continued: “If one has an enemy, what does he wish him, to be weak or healthy?” They answered: “Weak.” He said to them: “Then let their children be circumcised at the age of eight days and they will be weak.” They said: “He speaketh rightly,” and it was annulled. Finally he said to them: “If one has an enemy, what does he wish him, to multiply or decrease?” They said to him: “That he decreases.” “If so, let them have no intercourse with menstruant women.” They said: “He speaketh rightly” and it was annulled. Later they came to know that he was a Jew, and [the decrees] were reinstated.

### 3.5. The Motivational Aspect

Another relevant aspect of the theocentric orientation of Jewish religious ideology relates to the required motivation on the part of the individual abiding by the religious rule of behavior. Every person should act under the conscious acceptance of the binding nature of the precept *qua* religious command. A few talmudic and rabbinical sources will illustrate this central point. First, the fundamental principle mentioned in the name of R. Hanina: “He who is commanded and does fulfill the law stands higher than he who is not commanded and fulfills it?”<sup>89</sup>

The required motivation is, therefore, not one of personal, autonomous conviction, but the conscious acceptance of the external character of God’s command. The same idea is articulated in the Midrash in relation to the prohibition of pork: “Do not say: ‘I have no desire for it’; but ‘I want it, but what can I do, My Father in Heaven has ordered it to be prohibited.’”<sup>90</sup>

We encounter this idea throughout rabbinical literature. A prominent example relates to the fulfillment of the seven Noahide commandments which—according to the Orthodox understanding—have been imposed upon

89 B *Avoda Zara* 3a; *Bava Kama* 38a, 87a; *Qiddushin* 31a.

90 *Sifra, Qedoshim* 11:22, in the name of R. Eleazar b. Azaria.

the Gentiles by God through the Torah.<sup>91</sup> In this context, Maimonides establishes the following rule:<sup>92</sup>

A heathen who accepts the seven commandments and observes them scrupulously is a “righteous heathen” (חסיד אומות העולם), and will have a portion in the world to come, provided that he accepts them and performs them because the Holy One, blessed be He, commanded them in the law and made known through Moses our teacher that the observance thereof had been enjoined upon the descendants of Noah even before the law was given. But if his observance thereof is based upon a reasoned conclusion, he is not deemed a resident alien (גר תושב),<sup>93</sup> or one of the pious of the Gentiles, but<sup>94</sup> one of their wise men.<sup>95</sup>

91 B *Sanhedrin* 56a on the difference with the Jews, who are subject to 613 commandments.

92 Maimonides, *The Book of Judges, Kings, and Wars*, 8:11, trans. Abraham Hershman (New Haven: Yale University Press, 1949), 230. See Twersky, *Introduction* (above n. 41), 455 and n. 239.

93 A gentile resident of Eretz Israel who observes the seven Noahide laws properly and therefore has certain privileges according to Jewish law.

94 In the standard editions it says here: “and neither” (ולא); but according to another version, considered to be the better one, it is as quoted in the text: “but” (אלא). Spinoza in his polemics against Judaism quoted (in Latin) the standard printed version “and neither” (*Tractatus Theologico-Politicus*, ch. 5, ed. Gebhardt 3:79–80).

95 It is no wonder that this passage of Maimonides, known as a rationalist, more than displeased Moses Mendelssohn, a partisan of the enlightenment. He addressed himself in 1773 to Rabbi Jacob Emden in Hamburg and requested an explanation. See the correspondence in Hebrew: Moses Mendelssohn, *Gesammelte Schriften Jubiläumsausgabe*, vol. 19 (Stuttgart/Bad Cannstatt: F. Frommann, G. Holzboog, 1974), 178–183 (letters 154, 155). Cf. Altmann, *Moses Mendelssohn* (above n. 37), 294–295; on Maimonides’ talmudic sources, see *ibid.*, 806 n. 40. Cf. also the neo-Kantian Hermann Cohen, *Religion of Reason: Out of the Sources of Judaism*, trans. Simon Kaplan (New York: F. Ungar Publishing Co., 1972), 331–332. This author was equally troubled by Maimonides’ insistence upon the religious motivation in relation to the just conduct of Gentiles. In this context, he mentions the commentary of R. Joseph Caro (1488–1575) on Maimonides’ Mishne Torah, *Kesef mishne*, ad loc. Caro states that Maimonides’ motivational condition was “his own opinion.” Cohen omits to note, though, that Caro immediately adds: “and [his view] is correct.” This omission has been noted by Leo Strauss, *Spinoza’s Critique of Religion*, trans. Elsa Sinclair (New York: Schocken Books, 1965), 23, in his preface to the English translation. On the whole argument, see Steven Schwarzchild, “Do Noahides Have to Believe in Revelation (A Passage in Dispute between Maimonides, Spinoza, Mendelssohn, and H. Cohen)?” *Jewish Quarterly Review* 52 (1962): 295–308; 53 (1962): 30–65. See especially the comprehensive and fascinating article by Eugene Korn, “Gentiles, the World to Come, and Judaism: The Odyssey of a Rabbinic Text,”

Many rabbinical sources emphasize the requirement that rules of conduct that are generally considered to be based upon human reason should be complied with as divine commandments. The acting person should bestow upon his deed a religious dimension by seeing the (exclusive) motive for his conduct in the divine order. A typical example for this approach, among numerous others, one finds in the Bible commentary of one of the leading nineteenth-century rabbinical authorities, Rabbi Moshe Sofer (Schreiber, 1762–1839) of Pressburg, named after his major work *Hatam sofer*:

The Decalogue contains some precepts concerning relationships between man and Divinity, and six of them between man and his neighbor. Indeed, those commandments which concern the relationships between men are precepts which reason itself imposes; even in the absence of God's command reason would oblige to fulfill them, especially for the purpose of social welfare. Obviously, men are more careful in observing precepts of this kind, but it is difficult to direct one's intention at fulfilling them exclusively for Heaven's sake, *qua* commands. Precepts between man and Divinity, however, which are not grounded upon reason, can be performed with no other motive than for Heaven's sake, but men are not as careful and eager and willing to do them, as those between men. In truth, the commandments concerning relationships between men have to be performed exclusively for Heaven's sake, like those between man and Divinity.<sup>96</sup>

The same idea was expressed in an even more radical form in Hasidism. Thus, for example, Rabbi Yehuda Arye Leib Alter (1847–1905)—named after his major work *Sefas Emes*—the head of the influential movement of Gur Hasidism,<sup>97</sup> remarked, in the context of the rational foundation of the commandments, that the

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*Modern Judaism* 14 (1994): 265–287. The author describes the contrasting interpretations of Maimonides' text by Orthodox rabbis, among them Chief Rabbi Abraham Isaac Kook (1865–1935) and R. Isaac Ze'ev (Velvel) Soloveitchik (1886–1959). On R. Kook's interpretation, see Yehuda Shaviv, "Divine Torah Confronting Human Morality: A Study of Rabbi Kook's Philosophy," in *Derekh Eretz, Religion and State*, ed. Amichai Berholz (Jerusalem: Ministry of Education, 2001), 215–231 [Hebrew]. Cf. also Zvi Kaplan, "Mendelssohn's Religious Perspective of Jews," *Journal of Ecumenical Studies* 41 (2004): 355–366. On the whole issue, see also Twersky, *Introduction* (above n. 41), 455, n. 239.

96 R. Moshe Sofer, *Torat moshe*, 4th ed. (Budapest: A. Czobel, 1928), 113 [author's translation, I.E].

97 "Gur" or "Ger" is the Yiddish name for the Polish city of Góra Kalwaria.

will of Divinity precedes reason, and that in the fulfillment of the commandments, reason has to be suspended in the face of God's will.<sup>98</sup> The idea of heteronomy is equally present in the thought of Habad-Lubavitch Hasidism.<sup>99</sup>

An interesting exception to the pronounced heteronomous outlook in Jewish Orthodoxy, one encounters in the influential religious philosophy of Rabbi Abraham Isaac Kook (1865–1935), the first Ashkenazi Chief Rabbi during the British Mandate in Palestine. Rabbi Kook, a mystic of original ideas, considered the natural sentiments of human beings and their reason to be God-given, upon which the divine commandments of the Torah have to be added. The fulfillment of the commandments is, therefore, a harmonious combination of both elements.<sup>100</sup> He says:

Piety (fear of Heaven) should not push aside man's natural sense of morality, for it would then no longer remain pure piety. The criterion of pure piety is that the natural morality, which is implanted in man's straight nature, steadily moves up by means of that piety to a degree higher than that where it would remain without piety. However, if piety would be of a property that without its influence on life,

98 Yehuda Arye Leib Alter, *Sefat emet 'al ha-tora*, vol. 2, *Mishpatim* (Jerusalem: Mir, 1997), 108–110 [Hebrew]. In the same sense, see the hasidic Rabbi Kalonymus Kalman Halevy Epstein (ca. 1751–1823), in his famous commentary on the Pentateuch, *Sefer ma'or va-shemesh*, vol. 1, *Mishpatim* (Brooklyn: Imre Shefer, 2008), 354–355; *Vayakhel* (2008), 413 [Hebrew]: “There are some offences which also in the eyes of the person appear to be detestable, but it should not appear in the eyes of the person that he abstains from doing it because it is detestable; he must break his nature and see that he abstains from doing it only because it is a prohibition of the King toward His servants. Equally, there are some commandments that reason obligates to execute. They should not be fulfilled because reason obligates it, but all out of obedience toward the Creator, blessed be He, who so imposed it as Master upon servants” [author's translation, I.E.].

99 Jacob Gottlieb, *Rationalism in Hasidic Attire: Habad Harmonistic Approach to Maimonides* (Ramat Gan: Bar-Ilan University Press, 2009), 153–159 [Hebrew].

100 See Shaviv, “Divine Torah” (above n. 95), 215–231. In a rather bold way, Rabbi Kook interprets Maimonides' view on the fulfillment of the Noahide precepts in the *Law of Kings* (above n. 92). Rabbi Kook suggests that being a “wise man” is a higher degree than having “a portion in the world to come,” since the former is equally entitled to that portion (Shaviv, “Divine Torah,” 216–217, quoting from Rabbi Kook's letter to his disciple R. Moshe Seidel in 1904 [*Iggerot ha-ra'yah*, vol. 1, 100]). On the whole issue of autonomy and heteronomy in halakhic Judaism, see Rabbi Yaakov Ariel, “The Relationship between Ethics and Law in the Halakha and in Hasidism,” *Peri etz ha-gan* 2 (2000): 221–234 [Hebrew]. The author suggests a dialectical harmony between heteronomy and autonomy in Hasidism: “Only the person, whose ethics becomes law, can transform the law into ethics” (*ibid.*, 234).



life would be more disposed to work the good and to realize what is useful to the individual and the collectivity, but that under the influence of piety these acting forces would be weakened—such a piety is an improper piety.<sup>101</sup>

The idea of heteronomy is further developed in the classic problem: who is greater, the man who, in order to behave well, has to overcome his evil inclinations, or the one who by nature is good? It is of no surprise that, in principle, the former is considered greater in Judaism.<sup>102</sup>

A partly corresponding idea can be found in Kant's above-mentioned concept of moral duty. In Kant's view, a man acting "good" out of natural inclination does not perform a "moral act." However, between the Jewish-Orthodox outlook and Kant's moral philosophy exists an irreconcilable difference: Judaism, starting from a theocentric premise, considers the basis of the religious duty to lie in a heteronomous commandment; Kant, on the other hand, demands a fully autonomous duty of the agent based upon anthropocentric premises.<sup>103</sup>

101 R. Kook, *Lights of Holiness*, vol. 3 (Jerusalem: Mossad Harav Kook, 1964), 27 [Hebrew; author's translation, I.E.]; Shaviv, "Divine Torah" (above n. 95), 220–221; Sagi, *Judaism* (above n. 32), 155, 266. On Rabbi Kook's general conception of morality, see Abraham Isaac Kook, *The Lights of Penitence, the Moral Principles, Lights of Holiness, Essays, Letters, and Poems*, trans. and intro. by Ben Zion Bokser (New York: Paulist Press, 1978), 131: "Morality for Rabbi Kook is not an autonomous order of values, but is integrally related to the larger world of religion. While the roots of morality are to be found in human nature itself, its fullest unfolding is dependent on the influences of the teachings and disciplines of religion and on the refining service of reason."

102 Cf. Maimonides, *Shemonah peraqim*, 6 in *A Maimonides Reader*, ed. Isadore Twersky (New York: Behrman House, 1972), 366. However, Maimonides makes a distinction between the inclination to commit common crimes, such as bloodshed, theft, robbery, and fraud, and the inclination to violate purely ceremonial laws, such as dietary laws. Only the overcoming of the latter inclination renders the person a greater one, since the inclination to criminal acts is a sign of an inherent, fundamentally corrupt character. Cf. Twersky, *Introduction* (above n. 41), 453–454. Rabbi Jacob Emden (1697–1776) rejects this distinction made by Maimonides in his commentary on the Eight Chapters, ad loc.

103 Immanuel Kant, *Critique of Pure Reason*, trans. and ed. Paul Guyer and Allen Wood (Cambridge: Cambridge University Press, 1998), 684: "So far as practical reason has the right to lead us, we will not hold actions to be obligatory because they are God's commands, but will rather regard them as divine commands because we are internally obligated to them. We will study freedom under the purposive unity in accordance with principles of reason, and will believe ourselves to be in conformity with the divine will only insofar as we hold as holy the moral law that reason teaches us from the nature of the actions themselves, believing ourselves to serve this divine will only through furthering

No wonder, therefore, that Kant adopted a most negative view in relation to Judaism.<sup>104</sup>

### 3.6. Religious Responses to the Challenge of Modernity: Autonomy and Universal Values

The sporadic theoretical and abstract scholarly speculations in Judaism about the relationship between law and morality proved insufficient, the moment the issue turned into a real spiritual crisis. The Enlightenment, accompanied with the desire for emancipation, confronted the Jewish tradition with a scale of values conceived to be based on reason and to possess universal validity. The clash between the systems had far-reaching effects on the Jewish people, and the issue of Jewish ethics continues to be of great actuality.<sup>105</sup>

In the early nineteenth century, Judaism divided into different religious movements, each adopting its own views about divine revelation and the religious legal tradition:

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what is best for the world in ourselves and others.” On Kant’s moral philosophy from a Jewish perspective, cf. Emil Fackenheim, “Abram and the Kantians: Moral Duties and Divine Commandments,” *Encounters Between Judaism and Modern Philosophy* (New York: Basic Books, 1973), 31–77. Kant’s general attitude toward the religious experience has been criticized by many; cf. Pepita Haezrahi, *The Price of Morality* (London: Allen & Unwin, 1961), 236–239.

104 Kant’s negative attitude to Judaism is well known. In his work *Religion within the Boundaries of Mere Reason*, trans. and ed. Allen Wood and George Di Giovanni (Cambridge: Cambridge University Press, 1998), 130, Kant describes the Jewish religion as a collection of merely statutory laws. Accordingly, in his opinion, “Judaism is not a religion at all but simply the union of a number of individuals who, since they belonged to a particular stock, established themselves into a community under purely political laws, hence not into a church; Judaism was rather *meant* to be a purely secular state, so that, were it to be dismembered through adverse accidents, it would still be left with the political faith (that pertains to its essence) that this state would be restored to it (with the advent of the Messiah)” (ibid.). On Kant’s views in relation to Judaism, see Julius Guttmann, “Kant und das Judentum,” *Schriften herausgegeben von der Gesellschaft zur Förderung der Wissenschaft des Judentums* (Leipzig: Fock, 1908), 41–61; Jacob Katz, *From Prejudice to Destruction: Anti-Semitism 1700–1933* (Cambridge, MA: Harvard University Press, 1980), 65–68; Nathan Rotenstreich, *The Recurring Pattern: Studies in Anti-Judaism in Modern Thought* (London: Weidenfeld and Nicolson, 1963), 23–47; Rotenstreich, *Jews and German Philosophy: The Polemics of Emancipation* (New York: Schocken Books, 1984), 3–6. Cf. the heavy disappointment by Ehrenfeld, *Der Pflichtbegriff* (above n. 9), 125–131, about Kant’s negative judgment of Judaism.

105 Cf. Zev Levi, “Is There a Jewish Ethics, and What is its Essence,” in *La storia della filosofia ebraica*, ed. Irene Kajon (Padua: CEDAM, 1993), 421–445. The author’s approach is basically liberal and his notion of ethics is universalistic.

## A. Reform Judaism

Thus, influenced by Kant's moral philosophy and his notion of religion, the movement of liberal and progressive Reform Judaism subjected the whole legal tradition to moral criticism.<sup>106</sup> The traditional doctrine of a unique and binding revelation of divine law was rejected. As a result, the heteronomous foundation of the traditional rabbinic halakha was abandoned, and the autonomous, moral understanding of the individual believer received absolute priority. By assuming the comprehensive moral-rational nature of the Jewish religion, Reform Judaism excluded *a priori* the possibility of any conflict between religion and morality.<sup>107</sup>

## B. The "Positive-Historical" (Conservative) Judaism

In the middle of the nineteenth century, the so-called "positive-historical" Judaism separated itself, under the spiritual leadership of Rabbi Zacharias Frankel (1801–1875), from the Reform movement.<sup>108</sup> Frankel's ideas exercised

106 On the history of the Reform movement, see Michael Meyer, *Response to Modernity: A History of the Reform Movement in Judaism* (New York: Oxford University Press, 1988). On Kant's influence on the Reform movement, cf. *ibid.*, 64–66. See also Caesar Seligmann, *Geschichte der jüdischen Reformbewegung von Mendelssohn bis zur Gegenwart* (Frankfurt a.M.: J. Kauffmann, 1922); on Kant's influence, cf. also Rotenstreich, *The Recurring Pattern* (above n. 104), 41–42.

107 See the important, posthumously published philosophical work of liberal Judaism by Hermann Cohen, *Religion of Reason* (above n. 95); see Julius Guttmann, *Philosophies of Judaism—The History of Jewish Philosophy from Biblical Times to Franz Rosenzweig*, trans. David Silverman (New York: Jewish Publication Society of America, 1964), 352–367; Nathan Rotenstreich, *Jewish Philosophy in Modern Times: from Mendelssohn to Rosenzweig* (New York: Holt, Rinehart and Winston, 1968), 52–105; cf. Eliezer Schweid, "The Philosophical Prophecy of Hermann Cohen," *Prophets for Their People and Humanity—Prophecy and Prophets in 20th Century Jewish Thought* (Jerusalem: Magnes Press, 1999), 21–43 [Hebrew]; Michael Zank, "The Ethics in Hermann Cohen's Philosophical System," *The Journal of Jewish Thought & Philosophy* 13 (2004): 1–15; cf. the other papers in that issue dedicated to Hermann Cohen's Ethics. For a critical analysis of Hermann Cohen's view on Judaism, cf. Eliezer Berkovits, *Major Themes in Modern Philosophies of Judaism* (New York: Ktav, 1974), 1–36.

108 On the ideological reasons for the separation that occurred at the Rabbinical Conference in Frankfurt a.M. in 1845, see Eliezer Schweid, *A History of Modern Jewish Philosophy*, vol. 2 (Tel Aviv: Am Oved, 2002): 144–156 [Hebrew]. On Frankel's conception of religion, see Isaac Heinemann, *The Reasons for the Commandments in Jewish Literature*, 2nd ed. (Jerusalem: Horev, 1993), 162–182 [Hebrew]. Cf. David Ellenson, *Wissenschaft des Judentums, Historical Consciousness, and Jewish Faith: The Diverse Paths of Frankel, Auerbach, and Halevy*, The Leo Baeck Memorial Lecture 48 (New York and Berlin: Leo Baeck Institute, 2004).

a decisive influence in the United States, where the movement is today known and active under the name of “Conservative Judaism.” This trend inside religious Judaism accepts, in principle, the binding character of the traditional halakha. However—influenced by Savigny’s German Historical School—it attempted to differentiate, inside religious law, between essential, fundamental elements and those that are merely historically contingent.<sup>109</sup> The Conservative movement relies upon the assumption that a scientific-historical analysis of the incontestable changes in Jewish law throughout the ages would be able to reveal the reality of purely historically conditioned value judgments. These value judgments were based upon opinions, beliefs, and circumstances that were current at that time, and, therefore, could not claim to be of lasting validity. In view of the profound social changes in modern society, a revision of the traditional laws imposed itself. Conservative Judaism tries, therefore, to solve the conflicts experienced between Jewish traditional law and current moral conceptions by means of legal interpretation that is based upon a preceding historical-scientific analysis of the existing halakha.<sup>110</sup>

A few comments on this approach: The relationship between legal and historical research is a most complex and delicate one and raises difficult problems of methodology.<sup>111</sup> However, in my view, the endeavor to deduce normative conclusions from historical analysis transcends the scientific method. Neither the knowledge of the historic reality of legal changes, nor the understanding of the reasons of these changes can impose, by themselves, any normative conclusions. It is only the critic’s personal ideology that is able to provide him the basis for alternative rules of conduct.<sup>112</sup>

109 See Izhak Englard, “Research in Jewish Law—Its Nature and Function,” *Modern Research in Jewish Law, The Jewish Law Annual*, sup. 1, ed. S. Jackson (Leiden: E.J. Brill, 1980), 52–53, n. 121; cf. Andreas Brämer, “‘Wissenschaft des Judentums’ und ‘Historische Rechtsschule’—Zwei Briefe Zacharias Frankels an Carl Josef Anton Mittermaier,” *Aschkenas: Zeitschrift für Geschichte und Kultur der Juden* 7/1 (1997): 173–179.

110 On the place of historical science in the movement’s ideology, see Marshall Sklare, *Conservative Judaism: An American Religious Movement* (New York: Schocken Books, 1972), 170–174, 229–232; Solomon Schechter (1847–1915), “Historical Judaism,” in *Tradition and Change: The Development of Conservative Judaism*, ed. Mordecai Waxman (New York: Burning Bush Press, 1958), 89–97; for a practical example concerning Sabbath observance, see Robert Gordis, “Tradition and Change,” *ibid.*, 375–391, esp. 383; Gordis, “A Dynamic Halakha: Principles and Procedures of Jewish Law,” *Judaism* 28 (1979): 263–282, esp. 264, 270; and see the ensuing symposium in *Judaism* 29 (1980): 5–109.

111 See Englard, “Research” (above n. 109), 27–37.

112 *Ibid.*, 53, n. 123. These remarks should be understood as a critique of the general tendency of Elliot Dorff, “The Interaction of Jewish with Morality,” *Judaism* 26 (1977): 455–466.

I do not, of course, deny the legitimacy of a value-approach to history and religion. I merely object to the implicit claim of a scientific basis to such normative conclusions. A similar criticism has been articulated by a contemporary scholar at the occasion of a controversy, inside the Conservative movement, concerning the retention of the traditional halakhic matrilineal principle as the exclusive criterion of appertaining to the Jewish people by birth.<sup>113</sup> The author, Shaye Cohen, after a historical discussion of the topic remarks:<sup>114</sup>

Does my analysis have Halakhic implications? The answer is no. Jewish Law like other legal systems is based on precedent, and what the historian can contribute to Halakha is the collection of precedents and the analysis of legal history. But history and Halakha are *autonomous* disciplines, each with its own methods, assumptions and goals, and which decision to adopt. The modern jurist will, of course, consider the data provided by the historian, the sociologist, the economist, the politician, etc., but it is the jurist who makes the decision, and he makes this decision in accordance with his own legal philosophy. In its interpretation of the Constitution the Supreme Court considers, but is not bound by, the original meaning of the document in its eighteenth century context, the jurist seeks to determine the law, the historian seeks to determine truth. The two need not coincide.<sup>115</sup>

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The paper undoubtedly has its merits by offering a number of interesting insights into the problem and by referring to important talmudic and rabbinic sources. However, its major shortcoming consists, in our view, in the mingling of law, history, and ideology. Thus I doubt the correctness of the author's conclusion that "sometimes the rabbis deliberately misinterpreted a Biblical verse which they found morally objectionable" (*ibid.*, 461). The attribution to the rabbis of such a state of mind, which comes close to a cynical and disloyal manipulation of texts, betrays a too simplistic view of a most complex phenomenon. See in this context David Weiss-Halivni, "Can a Religious Law Be Immoral?" in *Perspectives on Jews and Judaism: Essays in Honor of Wolfe Kelman*, ed. Arthur Chiel (New York: Rabbinical Assembly, 1980), 165.

113 The renewed discussion came in the wake of a resolution voted by the (Reform) Central Conference of American Rabbis on March 15, 1983, to put patrilineal descent on a par with matrilineal descent. The Conservative movement decided in 1986 to maintain the halakhic matrilineal criterion.

114 Shaye Cohen, "The Matrilineal Principle in Historical Perspective," *Judaism* 34 (1985): 5–13, on 13.

115 In the same spirit, see Joel Roth, "An Halakhic Perspective on an Historical Foundation," *ibid.*, 62–67. Not surprisingly, Cohen's approach provoked critical reactions from different

### C. Moritz Lazarus

In this context, a major effort to bring traditional Jewish ethics in line with (Kantian) ethics must be mentioned. As a matter of fact, a rabbinical conference held at Koblenz, Germany, in 1883, decided to have such a work prepared in view of the various (anti-Semitic) attacks against Judaism.<sup>116</sup> The task was entrusted to Prof. Moritz Lazarus (1824–1903), philosopher and psychologist, a prominent and active member in the Jewish community life of Prussia and Germany. The author undertook this work, and a first volume of his monumental *Ethics of Judaism* was published in 1898.<sup>117</sup> The second volume appeared posthumously in 1911.<sup>118</sup> The author's basic method is in the spirit of the Historical School. He was a partisan of the idea that every nation had a specific psychology, and that the national spirit, the *Volksgeist*, evolves organically. Lazarus was convinced that he could gauge from the biblical and talmudic sources what he considered being the true specific ethics of Judaism, which was basically in accord with the Kantian premises of autonomy and universality.<sup>119</sup> He stated:

Not by divine command does the moral become law, but because its content is moral, and it would necessarily, even without an ordinance, become law, therefore it is enjoined by God.<sup>120</sup>

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quarters; see Robert Goldenberg, "Halakha and History," *ibid.*, 24–27; Herman Schaalman, "History and Halakha are Related and Inseparable," *ibid.*, 74–77. In my opinion, though, these defenses of the task of history in the legal process completely miss the methodological argument. Cf. in addition the remarks of Louis Jacobs, *ibid.*, 58–59; Jacob Staub, *ibid.*, 99, 106. On Shaye Cohen's general approach, see the pertinent critical comments of Alan Yuter, "Can History Teach Halakha?" *ibid.*, 122–128.

116 Moritz Lazarus, *Einiges aus den Motiven, welche in der Coblenzer Conferenz vom 11. und 12. August 1883 zu dem Beschluss geführt haben, ein grundlegendes Werk über jüdische Ethik ins Leben zu rufen* (Berlin: J.S. Preuss, 1887).

117 Lazarus, *The Ethics of Judaism*, trans. Henrietta Szold (Philadelphia: Jewish Publication Society of America, 1900).

118 Lazarus, *Die Ethik des Judentums*, vol. 2, ed. Jacob Winter and August Wünsche (Frankfurt a.M.: Kauffmann, 1911). This second volume has not been translated into English.

119 See the critical analysis of Lazarus' approach in Rotenstreich, *Jewish Philosophy* (above n. 107), 43–51. Cf. Guttman, *Philosophies of Judaism* (above n. 107), 350–352; Meyer, *Response to Modernity* (above n. 106), 204–205. See below, n. 126.

120 Lazarus, *The Ethics of Judaism* (above n. 117), §79, 112.

He added:

In a word, the fundamental doctrine of Judaism reads: Because the moral is divine, therefore, you shall be moral, and because the divine is moral, you shall become like unto God.<sup>121</sup>

His progressive view of Judaism he expressed in the following words:

Reform—a new conception—often furnishes the real justification for a law which, in its earlier shape, has diminished in value, has become irrelevant and inexpedient. Reform, therefore, is pre-eminently conservative.<sup>122</sup>

And, finally, he affirmed:

Of still greater importance is the thought . . . recurring again and again in Talmudic literature, that every age is justified in disregarding, more, is in duty bound to disregard, the written law whenever reason and conviction demand its nullification.<sup>123</sup>

Hence, in his view, there was no inherent contradiction between Judaism and modern ethical understanding. He claimed that the ceremonial precepts had a symbolic significance, and in most cases they were symbols of ethical ideas.<sup>124</sup>

Notwithstanding Lazarus' contrary claim, his work, written in a popular style, was quite apologetic, selective in the use of the sources, and subjective in their interpretation.<sup>125</sup> No wonder that his method, pretending to be objective, was severely criticized by the liberal neo-Kantian philosopher Hermann Cohen.<sup>126</sup>

121 Ibid., §81, on 113–114. See also *ibid.*, §§83–85, on 115–119.

122 Ibid., §52, on 71.

123 Ibid., §87, on 120–121. The author relies for this rather extreme statement on *M Rosh Hashanah* 2:9, which is a quite doubtful source for such a view. See also Lazarus, *Die Ethik des Judentums* (above n. 118), §400 on 193–194; §410 on 202. Cf. Uriel Tal, *Christians and Jews in Germany: Religion, Politics, and Ideology in the Second Reich, 1870–1914*, trans. Noah Jacobs (London: Cornell University Press, 1975), 181–182.

124 Lazarus, *The Ethics of Judaism* (above n. 117), §25, on 26–27.

125 See, for instance, Lazarus' suggestion that the talmudic passages treating (derogatorily) the *am ha-arets* (literally: “people of the land,” meaning “boor”) “cannot be considered as anything but jests, as student jokes. Only a soul hounded by persecution could harbor the narrow pedantry that invests them with serious meaning or halakhic significance” (*ibid.*, §48a, on 63–64, and especially *ibid.*, appendix 9, on 256–261).

126 Hermann Cohen, “Das Problem der jüdischen Sittenlehre: Eine Kritik von Lazarus' Ethik des Judentums,” *Monatsschrift für Geschichte und Wissenschaft des Judentums*

## D. Jewish Orthodoxy

The hard core of Jewish Orthodoxy never experienced any real moral dilemma in connection with modernity. Religious society lived its spiritual life in virtual seclusion, completely ignoring the challenges of other value systems. In such a closed environment, the traditional theocentric answers were more than satisfactory. The self-imposed cultural isolation was no doubt reinforced by the threatening appearance of dissident religious movements and by the increasing number of freethinkers.<sup>127</sup> However, it is likely that the rapid expansion of Hasidism, a popular movement with strong mystical foundations, constituted an indirect response to the challenges of critical rationality. One finds, indeed, in some Hasidic trends a pronounced tendency against reliance upon human reason. Rationality is considered to be a disturbing factor in the human endeavor to reach a state of genuine and complete faith.<sup>128</sup> We have here a renewed manifestation of an old idea, known in Christianity as *sancta simplicitas*.<sup>129</sup>

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43 (1899): 385–400, 433–449. Cohen’s critique is quite devastating. He refutes Lazarus’ notion of ethical autonomy, and his conception on the relationship between the ethical human being and God. At the end of the paper, Cohen castigates Lazarus for belittling the value of Maimonides’ work. Lazarus, for his part, did not deign to respond to that criticism. In the preface to the second volume, after mentioning the positive reactions to his first volume, he caustically observed: “Nur zwei Ausnahmen, eine christliche und eine jüdische sind mir bekannt; beide von Grund und von Haus meine Gegner: Oberlehrer Bonhomer (Thorn) im Antisemitischen Jahrbuch für 1900 und Professor Hermann Cohen (Marburg) in der Grätz-Brannschen Monatsschrift 1899. Die beiden Herren mögen sehr verschieden voneinander sein, meinem Werke gegenüber sind sie durchaus par nobile fratrum,” Lazarus, *Ethik des Judentums* (above n. 118), xxxix. “I know of only two exceptions, one Christian and one Jewish; both are fundamentally and from the very beginning my opponents: Senior Teacher Bonhomer (Thorn) in the *Antisemitisches Jahrbuch* of 1900 and Professor Hermann Cohen (Marburg) in the *Monatsschrift* of 1899, edited by Grätz and Brann. The two gentlemen may be very different from each other, but in relation to my works they are quite a well-matched pair” [author’s translation, I.E.].

127 The opposition against the Reform movement influenced the halakhic decisions of Orthodox rabbis; see Moshe Samet, “The Beginnings of Orthodoxy,” *Modern Judaism* 8 (1988): 249–269, 255–258.

128 Cf., for example, the interpretation of Genesis 28:11, by R. Nathan Sternhartz of Nemirov (1780–1844)—the chief disciple and scribe of Nahman of Bratslav (1771–1810)—in *Likute halakhot ‘al shulhan arukh, H.M.*, vol. 2 (Jerusalem: Agudat Meshekh Hanahal, 1999), *Hilkhot piqqadon* 3:14, on 123–124. Jacob’s sleep at the setting of the sun signified the closure of reason, which was vital for complete faith in God and for understanding His mystery. See Arthur Green, *Tormented Master: The Life of Rabbi Nahman of Bratslav* (Tuscaloosa, AB: University of Alabama Press, 1979), 297–300, 306–309.

129 The idea of “holy simplicity” made up part of Francis of Assisi’s theology: “The pure holy simplicity disrupts all wisdom of this world and the wisdom of the body.” See *Die Opuscola S. Francisci Assiensis*, ed. Kajetan Esser (Rome: Ed. Collegii S. Bonaventurae ad Claras



## E. Neo-Orthodoxy

The task of coping with the problem of a binding religious legal tradition and contrasting moral values fell upon those relatively restricted circles of Orthodoxy who made openings toward modernity, by studying science and humanities.<sup>130</sup> As a matter of fact, it is very difficult to trace the exact border between some neo-Orthodox scholars and moderate Progressive (Conservative) ones, who basically accept the binding character of the halakha. Both may consider it open to changes, but they may differ on the extent and the mode of these changes. For our purpose it is important to note that one finds in these circles a number of scholars who did not see any fundamental contradiction between modern ethics and the halakha.

In this sense, Rabbi Moses Löb Bloch (1815–1909), the rector of the Budapest Rabbinical Seminar,<sup>131</sup> declared in his work on ethics and halakha:

The *Halakha* is intimately linked to ethics and is also externally related to it. Both, ethics and *Halakha*, are rooted in God, both have their origin in God. The ultimate end of both is God, both are divine commandments. The ethical insight confers the *Halakha* the support which in moments, where the sensual desires rush against the human will, equip it with the necessary moral force and provide it with the required protection. Moreover, the *Halakha* without morality were a debasement of the divine inside the human being; in the combination of both we may consider the essence of Judaism.<sup>132</sup>

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Aquas, 1976), Pars 1:14: “Salutatio Virtutum”: “Pura sancta simplicitas confundit omnem sapientiam huius mundi et sapientiam corporis.”

130 Cf. Eliezer Goldman, “Responses to Modernity in Orthodox Jewish Thought,” *Studies in Contemporary Jewry* 2 (1986): 52–73; in relation to some historical aspects, Carlebach, *Das gesetzestreue* (above n. 78). See, though, the sharp opposition to any apologetic defense of Judaism: Rabbi Jehiel Jacob Weinberg (1885–1966), “May You Keep Silent: The Apologetic Literature of the Advocates of Judaism,” *Lifraqim*, vol. 1, 6th ed. (Jerusalem: Havaad Lehozaat Kitve HaGaon HaRav Jehiel Jacob Weinberg, 2010), 265–271 [Hebrew].

131 The Budapest Rabbinical Seminary, founded in 1877, encountered the opposition of the Hungarian Orthodoxy, and was established on the basis of a decree by Emperor Franz Josef. It was connected to the Rabbinical Seminary of Breslau, which was close to the Conservative movement. The Budapest Rabbinical Seminary tended toward the same religious orientation, called in Hungary “Neologist.” However, as mentioned in the text, the borders between neo-Orthodoxy and Conservative Judaism are fluid and far from being sharply defined.

132 Moses Bloch, *Die Ethik in der Halacha* (Budapest: Athenaeum, 1886) [author’s translation, I.E.]. Similarly, see also Siegfried Adelman, *Erklärungen dunkler und schwieriger Stellen im Talmud und Midrasch auf dem Gebiete der Ethik nach philosophischer Auffassung*,

More conscious of the problematic relationship between the Jewish tradition and modern ethics were the members of an important center of neo-Orthodoxy that was created in the Jewish community of Frankfurt under the guidance of Rabbi Samson Raphael Hirsch (1808–1888). Rabbi Hirsch considered the heteronomous character of the commandments to be a foundation of the Jewish religion, in contrast to Kant's conception of religion.<sup>133</sup> Isaac Breuer (1883–1946)—a

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2nd ed. (Frankfurt a.M.: M. Slobotzki, 1905), 29–30: “Daraus geht hervor, dass die Ethik der Thora keiner Veränderung unterworfen sein kann. Vielmehr hat diese Ethik auch beim grössten Fortschritte der Menschen und bei aller Gesittung der Welt, sowohl vom Standpunkte der Thora als von dem der Vernunft, ihre volle Bedeutung und Gültigkeit. Denn die Lehren derselben sind, wie gesagt, in der Natur unserer Seelenkräfte begründet und der Wirkung derselben angemessen” (ibid., 30). “Hence it follows that the ethics of the Torah cannot be subject to any change. On the contrary, this ethics retains—from the standpoint of the Torah as well from that of reason—its full significance and validity even in relation to the greatest progress of mankind and in relation to the highest possible morality of the world. For the instructions of the Torah are, as mentioned, founded on the nature of our spiritual forces and adapted to their action” [author’s translation, I.E.].

In this sense, too, the late chief rabbi of Geneva, Alexandre Safran (1910–2006), *Éthique juive et modernité* (Paris: A. Michel, 1998), 25: “Il n’existe pas de bonheur humain en tant que tel; il n’y a de bonheur humain que conforme à la conception du Créateur. Il n’existe pas de droiture humaine en tant que telle, la droiture humaine est ce qui est ‘droit aux yeux de Dieu.’ La morale et la société n’existent pas par elles-mêmes: seule la Tora divine leur donne le droit d’exister. Heureux celui qui lui est fidèle. C’est elle qui soutient et dirige les pas de l’homme sur sa route. Heureux l’homme qui avance sur cette route, il connaîtra le bonheur ici-bas.” “There exists no human happiness as such; there is only human happiness according to the conception of the Creator. There exists no human uprightness as such, human uprightness is what is ‘right in the eyes of God.’ Morality and society do not exist on their own: only the divine Torah grants them the right to exist. Happy who is faithful to the Torah. It is the Torah that supports and directs the steps of man on his way. Happy the man who advances on this way, he shall know happiness here below” [author’s translation, I.E.].

The ideas of this author are influenced by Kabbalah and Hasidism. Cf. also Louis Jacobs (1920–2006), “The Relationship between Religion and Ethics in Jewish Thought,” in *Contemporary Jewish Ethics*, ed. Menachem Kellner (New York: Sanhedrin Press, 1978), 41–57.

133 See Isaak Heinemann, *The Reasons for the Commandments in Jewish Literature* (above n. 108), 95–96 [Hebrew]: “Kant’s conception of religion is completely autonomous, that of Hirsch, to the contrary, theonomic.” It is noteworthy that Rabbi Hirsch was also in this respect influenced by his famous teacher “Hakham” Isaak Bernays (1792–1849), the rabbi of Hamburg. Rabbi Bernays himself, who had studied at the University of Würzburg, as well as at the talmudic academy there with Rabbi Abraham Bing, did not leave any written works. On Rabbi Hirsch in general, see Heinemann, *ibid.*, 91–161.

grandchild of Rabbi Hirsch, and son of Rabbi Salomon Breuer,<sup>134</sup> the son-in-law and successor of Rabbi Hirsch—dealt with this topic in an article published in 1911.<sup>135</sup> The author starts from the premise that provisions of the Jewish law run diametrically counter the “good morals” (*gute Sitten*) of modern law, as, for instance, in relation to women’s rights, and to the laws of slaves and of foreigners. The author attempts to explain and justify these differences between the modern conception of law and that of Judaism by means of the historical method. A short summary of Breuer’s arguments:

The ultimate purpose of modern law lies in the ethics. The law aspires to be “right.” In such a manner the foundation of ethics has become the foundation of law. The foundation of ethics is the idea of the human being as such, as a reasonable being. This discovery is the great deed of the Kantian theory, of the categorical imperative. In front of the moral idea of the equality between human beings, the differences between man and woman vanish, and slavery cannot persist. The social autonomy of the members of the nation joins the ethical autonomy. The idea of humanity constitutes the formal principle of the law as well as of the ethics. The idea of the unity of mankind is an original Jewish idea. But it is not the only idea of Judaism. It constitutes in Judaism the premise for the service of Divinity. In modern ethics the idea of humanity serves as a means for the derivation of mutual rights; in Judaism it serves as a means for the derivation of duties toward Divinity. For the autonomous ethics, the idea of humanity constitutes the ultimate, most fundamental and absolute idea. The human being is the highest, absolute purpose. For Judaism, humanity is not the ultimate, not the absolute idea. It is a premise, a pre-condition to the pre-eminent idea of the service of Divinity. For Judaism, man is not the ultimate purpose, and his dignity does not consist in being the ultimate purpose. The dignity of humanity consists in Judaism in the task—imposed upon it by being created in the image of God—to be the responsible agent for the divine objectives on earth.<sup>136</sup>

134 Salomon Breuer (1850–1926) came from Hungary. He turned against the Reform movement and Zionism. However, he did not occupy himself directly with the problem of the relationship between traditional law and universal ethics. Cf. the posthumously published writings, Salomon Breuer, *Belehrung und Mahnung: Aus Nachgelassenen Schriften* (Basel: Verlag Morascha, 1993).

135 Isaac Breuer, “Die rechtsphilosophischen Grundlagen des jüdischen und modernen Rechts,” *Jahrbuch der Jüdisch-Literarischen Gesellschaft* 8 (1910–1911): 35–64; the article was published again, with minor changes in Breuer, *Wegzeichen* (Frankfurt a. M.: J. Kauffmann, 1923), 61–101, under the title “Frauenrecht, Sklavenrecht und Fremdenrecht.” The article has been published in English: Isaac Breuer, “The Philosophical Foundations of Jewish and Modern Law,” in *Concepts of Judaism*, ed. Jacob Levinger (Jerusalem: Israel Universities Press, 1974), 53–81.

136 On the relationship between Breuer’s conception and Kant’s philosophy, see Walter Wurzbarger, “Breuer and Kant,” *Tradition: A Journal of Orthodox Thought* 26/2 (1992):

In the modern era, ethics necessarily separated itself from law, since the autonomous morality is the science of acting, whereas the law is the science of the act. This separation has been desecrated by the law that has become essentially a balance of interests. Ethics can only fulfill a role of delimiting borders.

In Judaism the law remained in intimate contact with ethics. There is no autonomous ethics. It teaches the divine filiation of mankind and establishes its bondage toward God. Jewish law deduces from that bondage the different circles of duties. The foundation of Mosaic Law is the service of God. The disparity in the distribution of duties is the dominant principle that has been established by the Creator. Jewish law can be understood and evaluated only as a divine law. Law and morality require here the same thing: obedience. The idea of humanity—called in Jewish law brotherhood (אהוהוה)—is not a constitutive principle, but a regulative, moral principle that should prevent the abuse of power. The divine legislator expects this from the free moral decision of the member of the legal community without legal coercion. Because of the fact that in the modernity the autonomous ethics withdraw to the individual, law must seek to suppress with coercion the abuses of the struggle of interests in social life. Thus, an oppressive heteronomy of law corresponds to the autonomy of ethics. Thus, the “good morals” become protected with coercion, and as a result they are deprived of their ethical value. It is different in Judaism. The heteronomy of Jewish ethics corresponds to the autonomy of the Jewish law. The disparity in the distribution of duties is handed over to legal coercion; the preservation of the idea of humanity is entrusted to the freedom of the members of the legal community. In the modern law, the idea of humanity must scantily be protected against violation by means of coercion, since in place of the assumption of duties before Divinity, law has at its disposition only the formal principle of autonomous ethics, and in place of brotherhood (humanity) only the balance of interests and the distribution of power.

The author recognizes, therefore, the importance in modernity of the autonomous, anthropocentric ethics, but he considers it as insufficient and inferior to the Jewish religious legal tradition. The divine origin of Jewish law—with its central ideas of distribution of duties and brotherhood—explain and justify the Jewish legal provisions that do not accord with modern ethics.<sup>137</sup> The idea of the

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71–76: “Whereas Kant’s attempt to secure human freedom by placing man under the rule of the moral law had been wrecked on the shoals of pure formalism, obedience to the Divine Law, so Breuer maintains, enables man to relate to the domain of the noumenal, which is not subject to the determinism governing the experience of the phenomenal world” (ibid., 73).

137 On Breuer’s conception of law, see the critical analysis of Alan Mittleman, *Between Kant and Kabbalah: An Introduction to Isaac Breuer’s Philosophy of Judaism* (Albany: State University of New York Press, 1990), 124–149; see also especially Charles Friedmann,

heteronomous foundation of the ethical duties in Judaism has been emphasized even more explicitly by Joseph Wohlgemuth (1867–1942), lecturer at the Orthodox Hildesheimer Rabbinical Seminary in Berlin.<sup>138</sup> The author declares:

As man is created in the image of God, so it is his mission to become more and more similar to Divinity, and the means to it is the obedience toward God. According to the genuinely Jewish conception, it is completely wrong to describe the duties toward the neighbor as primary, and the duties toward God as secondary, and then strenuously attempt to bridge between them in order to demonstrate how the former are a means to prepare the ethics and to bring it to a higher perfection. To the contrary! The ethical duties too are duties toward God, and they are binding only insofar as they stem from God. Only because God has commanded it, love of the human mankind is a duty, and only insofar its implementation originates in the obedience toward God, it signifies a good deed.<sup>139</sup>

The author then adds:

But the foundation, the ultimate principle, the center of our philosophy of life, remains the obedience toward God. It constitutes the only secure foundation. Because any other has until now failed. All other principles have proven to be deficient; they have tarnished the purity of ethics and have pulled down its content into the quarrel of ideas. Only what is executed out of obedience to God remains completely untouched by any ulterior motives, by any selfish interests, by any eudemonistic and utilitarian objectives. Only what

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“La loi dans la pensée d’Isaac Breuer (1883–1946),” *Revue des études juives* 131(1972): 127–159. On Breuer’s conception of history cf. David Myers, *Resisting History—Historicism and its Discontents in German-Jewish Thought* (Princeton, NJ: Princeton University Press, 2003): 130–156. For some critical remarks on Breuer’s religious and political ideology see Zvi Kurzweil, *The Modern Impulse of Traditional Judaism* (Hoboken, NJ: Ktav, 1985): 31–47; see also Mittleman, *Between Kant and Kabbalah*, 183–184.

138 Joseph Wohlgemuth, *Gesetzestreu und liberales Judentum: Eine Entgegnung* (Frankfurt a.M.: J. Kauffmann, 1913). Wohlgemuth reacted with this booklet to a most polemic pamphlet of the liberal Rabbi E. Seligmann, *Eine Abrechnung mit Herrn Dr. Wohlgemuth und mit den “Erklärungen” gegen die Richtlinien zu einem Programm für das liberale Judentum* (Frankfurt a.M.: J. Kauffmann, 1913). Another reply to the pamphlet of Rabbi Seligmann was published by Joseph Carlebach, *Liberales Judentum und jüdische Tradition* (Frankfurt a.M.: Verlag des “Israelit,” 1913).

139 *Ibid.*, 44 [author’s translation, I.E.].

God commanded is permanently and steadfastly binding, is above the vicissitudes of times, and above all changes of the dominant ideas. Indeed, our ethics is heteronomous. It is a pathetic spectacle how all our modern people wish to save—for the sake of Kant and his categorical imperative—the autonomy also for the Jewish ethics. Our ethics is heteronomous, but the Other is God and His word is the moral law.<sup>140</sup>

Rabbi Joseph B. Soloveitchik (1903–1993), too, had reservations about the Kantian idea of autonomy. Referring to the freedom of the halakhic man he stated:<sup>141</sup>

140 Ibid., 45. Rabbi Eliezer Berkovits (1908–1992) argued in a very similar vein. Born in Transylvania, the author studied at the Orthodox Seminary in Berlin and received a doctoral degree from the University of Berlin in 1933. He reached the United States after a stay in England and Australia, and moved to Israel in 1975. Cf. Eliezer Berkovits, *God, Man and History—A Jewish Interpretation*, 2nd ed. (New York: J. David, 1965), 85–130. The author considers reason—contrary to Kant—as an insufficient means for the moral act: “In truth, however, reason as such may neither command nor has it the power to induce action. Reason is the faculty of understanding, of recognition and interpretation, of analysis or synthesis. Reason may tell the difference between right and wrong; perhaps even the difference between good and evil. It cannot, however, provide the obligation for doing good and eschewing evil. The source of all obligation is a will, and the motivation of a will is a desire. Reason knows no desire, though man may desire to be reasonable” (ibid., 100). Concerning the relationship between human and divine morality, the author emphasized the absolute character of the divine commandment:

The binding force of a code instituted by society or the state is relative; the force of the one willed by God is absolute. . . . But a law instituted by a will of relative authority admits of compromise for the sake of expediency; the law of absolute authority will not be overruled by such considerations. All secular ethics lack the quality of absolute obligation. They are as changeable as the desires and the wills that institute them; the law of God alone is as eternal as His will. Secular ethics, derived as it must be from a relative will, is subjective; God alone is the source of objectivity for all value and all law. Relativistic ethics, serving the goal of subjective desire, is essentially utilitarian; the desire of God alone makes the object of the desire an end in itself (ibid., 102–103).

However, in his writings the author dealt with the actual tension between the biblical-divine ethics and the positive rabbinical law; see for that issue, David Hazony, “Eliezer Berkovits and the Revival of Jewish Moral Thought,” *Azure* 11 (2001): 23–65.

141 Rabbi Joseph Soloveitchik, *Halakhic Man*, trans. Lawrence Kaplan (Philadelphia: Jewish Publication Society of America, 1983), 66, n. 80 on 153. See also ibid., 137, n. 147 on 163–164. See also his critical comments on liberalism, Soloveitchik, *The Halakhic Mind: An Essay on Jewish Tradition and Modern Thought* (New York: Seth Press, 1986), 88–91; the author remarks that explaining a religious norm by an ethical precept would make religion “the handmaid of ethics” (93).

This concept of freedom should not be confused with the principle of ethical autonomy propounded by Kant and his followers. The freedom of the pure will in Kant's teaching refers essentially to the creation of the ethical norm. The freedom of halakhic man refers not to the creation of the law itself, for it was given to him by the Almighty, but to the realization of the norm in the concrete world. The freedom which is rooted in the creation of the norm has brought chaos and disorder to the world. The freedom of realizing the norm brings holiness to the world. See Hermann Cohen, "Das Problem der jüdischen Sittenlehre—Eine Kritik von Lazarus' Ethik des Judentums."<sup>142</sup>

The idea of the heteronomous character of the Jewish religious law has been stated in an even more extreme form by Yeshayahu Leibowitz (1903–1994), a provocative Orthodox scientist and thinker:<sup>143</sup>

Ethics as a value by itself is a downright atheistic category. Only one who considers man to be the ultimate end and the supreme value—that means one who puts man in the place of God—can be a moral person. One who conceives man as a creature that is not God, but merely an image of God—one who has a religious approach—cannot accept ethics as a standard and criterion. Ethics has only one of two meanings: (1) Ethics is the direction of man's volition according to his perception of the truth of reality—this is the ethics of Socrates, Plato, and Aristotle, of the Epicureans and Stoics, especially of the latter, and in modern philosophy—of Spinoza. (2) Ethics is the direction of man's volition according to his perception of duty—this is the ethics of Kant and the German Idealism. But in the *Shema* prayer it reads (Num. 16, 39): ". . . and that ye seek not after your own heart"—this is the rejection of Kant; "seek not

142 The reference is to Cohen's critique of Lazarus, *Ethik des Judentums* (above n. 118). See in this context Rabbi Soloveitchik's comment in *Halakhic Man* (above n. 141), 46, n. 51 (on 150): "The distinction that Lazarus introduced between ethical holiness and ritual holiness, a distinction which was accepted as self-evident by the school of German-Jewish philosophers (including Hermann Cohen), is a fragment of Lazarus's imagination that fits in with the world view of liberal religious Judaism, which based Judaism upon ethics."

143 Yeshayahu Leibowitz, born in Riga, studied in Berlin and Basel. He taught biochemistry, neurophysiology, and the history of science at the Hebrew University of Jerusalem. He was an influential personality in Israel. His sayings and views relating to Judaism and politics were controversial and produced an extensive literature.

after your eyes”—this is the rejection of Socrates. Hence, there are no moral precepts based on perception of reality or perception of duty: there are only the commandments of the Creator. Of all forty-eight prophets and seven prophetesses who were active in Israel, none ever addressed him—or herself to the human conscience, the latter being very suspect to be an expression of idolatry. It is no accident that the term “conscience” is not found in the Bible and had to be invented in the later Hebrew. The “direction by conscience” is a pronounced atheistic concept. The *Halakha*, as a religious institution, does not tolerate the category of ethics—and there is no need to state that it does not tolerate the utilitarian foundation, neither from the standpoint of individual welfare nor from that of the nation or society or the like.<sup>144</sup>

Leibowitz leads the theocentric foundation of Judaism to its extreme consequence: between religion and human morality there is an irreconcilable contradiction. In the spirit of Leibowitz, one could say that the greater the sacrifice of human (moral) values, the greater is the religious significance of the obedience toward the Divine law. As I have shown elsewhere, Leibowitz himself did not remain consistent in his own positivistic religious outlook, especially when voicing political views, or suggesting changes in the halakha, such as his argument for the equality of women.<sup>145</sup>

Nevertheless, Leibowitz’s fundamental thesis that Judaism, by necessity, is an “amoral” normative system is of great theoretical and practical interest. This extreme, and to the ears of many, offensive and shocking formulation of the amorality of Judaism, has obviously to be understood on the background of the opposition between the divine and the human, and not between the evil and the good. “Amoral” does not mean “immoral,” but “beyond morality,” that is, being neither “moral” nor “immoral.” Theocentricity, as such, does not signify

144 Yeshayahu Leibowitz, “The Meaning of the Halakha,” *De’ot* 9 (1959): 15–22, on 20. This is my translation from the original Hebrew version of this paper. A somewhat extended version has been published in the English translation: Yeshayahu Leibowitz, “Religious Praxis: The Meaning of Halakha,” in Leibowitz, *Judaism, Human Values and the Jewish State*, ed. and trans. Eliezer Goldman et al. (Cambridge, MA: Harvard University Press, 1992), 3–29, on 18–19.

145 Izhak England, “Isaiah Leibowitz at Eighty,” *Jerusalem Quarterly* 29 (1983): 112–126. See also Daniel Statman, “The Ethical Theory of Leibowitz,” in *Yeshayahu Leibowitz: His World and Philosophy*, ed. Avi Sagi (Jerusalem: Keter, 1995), 326–341 [Hebrew]; on the status of women, cf. Tamar Ross, “The Status of the Woman in Judaism: Some Objections to the Conception of Leibowitz in Relation to the Adaptation-Mechanisms between Halakha and Reality,” *ibid.*, 148–161 [Hebrew].



immorality. The inherent problem lies, therefore, not so much in the content of the norms, but in the ideological and motivational dimension of human decision-making. The basic issue resides in the tension between the religious notion of justice and ethics as service of God on the one hand, and their notion as service of mankind on the other hand.<sup>146</sup>

However, modernity has without doubt intensified the problem, since a considerable number of actual halakhic rules are considered by many to constitute a violation of universal values, especially in relation to the status of women, Gentiles, and non-believers. Other important fields, where difficult new problems arose, are those of bioethics and medical ethics.<sup>147</sup>

This problem confronts the modern Jewish State—in view of its legislative and political autonomy—with grave, concrete decisions. On the background of the traditional Orthodox theocentric vision—that shifts the point of gravity from human rights to human duties, from the pursuit of human happiness to man's position before his Creator—the Jewish State must find the right path to maintain its democratic and liberal character.

## 4. Conclusion

The fundamental issue in modern Judaism is normative: *Should* current moral considerations affect the shaping of Jewish Law? *Should* Jewish law respond in an affirmative sense to new moral attitudes and values? Any attempt to answer

146 See the critical remarks on the weaknesses and deficiencies of Leibowitz's notion of ethics in Statman, "The Ethical Theory" (above n. 145); on a general philosophical critique of Leibowitz's approach, see Avi Sagi, *Jewish Religion after Theology*, (above n. 40), passim. Leibowitz's view on the place of ethics in Judaism was also criticized by Rabbi David Hartman, *A Living Covenant: The Innovative Spirit in Traditional Judaism* (New York: Free Press, 1985), 109–130. Hartman affirms that "the surrender of human rationality and the sacrifice of one's human ethical sense are not required by Judaic faith" (89–90). He adds:

The crucial issue between Leibowitz and myself is whether the worship of God and human self-realization are mutually exclusive. Leibowitz's theocentric Aqeda model of worship drives a wedge between consciousness of God and consciousness of self. There is no place for a covenantal religious consciousness in his system. The *mitzvot* are completely one-directional, representing solely the will of the individual to worship. It is because the covenant is abandoned in Leibowitz's perception of Judaism that he can force one to chose between humankind and God, between the ethical and the *mitzvot*. But when, as in my view, the *mitzvot* are seen as embodying the full covenantal interaction of human beings with God, then our humanity remains an essential component of our relationship with God (110).

147 Levi, "Is There a Jewish Ethics?" (above n. 105), 437–445.

these crucial questions puts believing Jews to the ultimate test. It requires of them to determine their position before the Creator in the light of a binding tradition. They will have to ask themselves if their striving for the adaptation of religious law to their personal convictions and feelings of morality is not an act of human conceit and insubordination, manifesting oblivion of their real position before God. There cannot be an objective criterion for the correct answer, since it requires a value judgment. But, by the honest admission of the existence of such a grave dilemma, the way is open for a radical reevaluation of current moral trends. Doubtless, the theocentric approach in its extreme form contains danger of religious fanaticism and of fundamentalism leading to a complete rejection of modernity. Such tendencies can be discerned also in some circles of contemporary Jewish Orthodoxy.

Theocentricity in itself has no attraction, nor even relevancy, to a non-believer. Nevertheless, by its appeal to traditional values, its claim to universality and its inherent skepticism of current claims of rationality, it is able to fulfill a vital critical mission in modern culture. Moreover, a deeper knowledge and understanding of this approach is a prerequisite for a fruitful communication between secular and religious cultures. Such an exchange of ideas is vital, both for the peaceful coexistence in a multicultural society, as well as for the relations between states.

# The Right to Political Participation in Jewish Tradition Contribution and Challenges

Haim Shapira

## Introduction

The present article investigates the question of whether Jewish tradition recognizes the right to political participation, and, if it does, to what extent. To this end, it reviews and analyzes Jewish legal sources from the Talmudic period to modern times and explores the way in which Jewish tradition addressed the new challenges that it faced. Then, it evaluates the contribution of Jewish tradition to the acceptance of the right to political participation among the Jewish people, especially in Israel.

The right to political participation is the right of individuals to participate in the political process and to influence the political authority. In modern countries the right to political participation consists primarily of the right to vote and run for office, along with other rights such as the right of assembly, the freedom of speech, and the freedom of demonstration—all of which enable further participation and influence beyond the regular elections.<sup>1</sup> The present article focuses on the core of this right, namely the right to vote and to be elected. In the context of small communities, characteristic of Jewish political existence for generations, the right to vote was not always a right to elect representatives for office but often to vote directly on public matters. In some cases, however, it refers to elections.

The article discusses Jewish tradition as articulated in Jewish law or halakha. The main obstacle in dealing with rights in Jewish law is that the halakha normally

1 On the right of political participation as a human right see Henry J. Steiner, “Political Participation as a Human Right” in *Harvard Human Rights Y.B.* (Cambridge, MA: Harvard University Press, 1988), 77; Gregory H. Fox and Brad R. Roth, *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), ch. 2.

speaks about duties rather than rights. Thus, to talk about rights, one must translate duties into rights. If we assume that most duties imply parallel rights, such a translation should not prove impossible.<sup>2</sup> In our case, the premise that it is the duty of a community to reach decisions by majority consent, if it exists, takes for granted the right of individuals to express an opinion that counts toward that majority. Nevertheless, this type of conclusion requires cautious examination. As we shall see, the supposition that decisions should be made by the “public” or even by a “public majority” is not always consistent with the acknowledgment of the individual’s right to public participation. The problem arises when the term “public” refers to a collective rather than to the individual members who form the community. Furthermore, “majority” may denote a group within the community that represents the “public” rather than the majority of all its members. Focusing on the right of the individual to political participation thus raises the question of whether the majority truly rules, and, if so, whether this indicates that every member of the community can exercise the right to express an opinion.

The article introduces the claim that Jewish law has gradually recognized the right to political participation. The discussion explores the path of development followed by the recognition of this right, which was not always linear; it also examines the extent of the right, as well as the ways in which halakhic authorities dealt with new challenges. Recognition of this right by halakhic authorities occurred in the context of the environments within which the Jewish communities existed. A dialogue, explicit or implicit, was effectively established between the Jewish tradition and the outside world; another aspect of the discussion, therefore, is to explore this dialogue. Finally, the article assesses the contribution of Jewish tradition to the acceptance of democratic principle especially in Israel. Contrary to a common view that there is a contradiction between Jewish tradition and democratic culture, the article suggests that Jewish tradition created a wide basis for the acceptance of democratic principles. At the same time, it points out the limits of the traditional recognition of political participation, and consequently the need for a continuous dialogue between the Jewish and democratic cultures.

The context in which Jewish law recognized political rights is that of the local community. The foundations of the organized community were laid in the early talmudic period, and the complete structure was built in the Middle Ages. Thus, the article takes the reader on a legal-historical journey from the talmudic period through the Middle Ages to the twentieth century. The first two sections are devoted to the process that led to the recognition of the right to political

2 On the relationship between rights and duties see W. N. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919); Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988), 170–172.

participation; the first section treats talmudic sources, the second medieval ones.<sup>3</sup> Section three discusses the right to political participation as formulated in the modern period by rabbinic authorities in the twentieth century. Sections four and five deal with new challenges faced by halakhic authorities; section four deals with women's right to political participation; section five addresses equal rights of non-Jews. The summary in section six assesses the effect of Jewish tradition on the acceptance of democratic principles within the Jewish state and elsewhere.

## 1. Talmudic Sources

In the time of the Mishnah and the Talmud, the community was organized within the framework of the city. The “city” was a well-organized small town or a large village that had such communal institutions as a synagogue, school, court of law, welfare system, and some others.<sup>4</sup> In tannaitic sources there is a collection of laws that may be called “the laws of the people of the city.”<sup>5</sup> These laws specify the authorities of a Jewish city and the rights and duties of its inhabitants. The constitutional framework they reflect suggests a democratically structured community in the classical sense of the term.<sup>6</sup> The “people of the city” form

- 3 Note that all translations are my own, unless otherwise stated. For more information about the material covered in these two sections, see Haim Shapira, “Democratic Principles in the Halakha and the Jewish Political Tradition: the Community Reign and Majority Rule,” in *The Democratic Way: On the Historical Sources of the Israeli Democracy*, ed. Alon Gal et al. (Beersheva: Ben-Gurion University of the Negev Press, 2012), 15–53 [Hebrew]; Shapira, “Majority Rule in the Jewish Legal Tradition,” *Hebrew Union College Annual* 82 (forthcoming 2013).
- 4 See B *Sanhedrin* 17b, which counts ten institutions. On the character of cities in the talmudic era, see Ze’ev Safrai, *The Jewish Community in Palestine in the Days of the Mishnah and Talmud* (Jerusalem: The Zalman Shazar Center for Jewish History, 1995), 29–49 [Hebrew].
- 5 In the Mishnah, civic ordinances are scattered in various places, mainly in *Bava Batra* 1:5, *Megillah* 3:1, *Sheqalim* 2:1. The Tosefta has a compilation of civic ordinances in *Bava Metzia* 11, particularly from ordinance 23 onward. For an analysis of the chapter in Tosefta, see Noam Zohar, *On the Secret of the Creation of Talmudic Literature* (Jerusalem: Magnes Press, 2008), 33–65 [Hebrew].
- 6 For a review and analysis of the structure of the Jewish city in that period, see: Martin Goodman, *State and Society in Roman Galilee* (Totowa, NJ: Rowman and Allanheld, 1983), 119–134; Shmuel Safrai, “The Jewish City in Palestine in the Days of the Talmud and Mishnah,” in *Holy War and Martyrology in Jewish History and World History: The City and the Community, A Collection of Lectures* (Jerusalem: The Israel Historical Society, 1968), 227–236 [Hebrew]; Safrai, *The Jewish Community* (above n. 4); Safrai, “The Jewish Community in the Talmudic Period,” in *Kahal Yisrael: Jewish Self-Rule*

an assembly called “the ranks of the people of the city,”<sup>7</sup> which constitutes the supreme civic body of the town. Alongside the assembly operated the governing body of the town, which consisted of the “seven good people of the city.”<sup>8</sup> The “people of the city” hold authority in various spheres, including significant areas of legislation. The tannaitic halakha includes several of these. The most cited source is: “The people of the city are authorized to set prices for goods, measurements, and workers’ wages. And they are authorized to enforce these.”<sup>9</sup>

Specification of these areas is intended to define the domain in which the people of the city hold authority. It is clear that the people of the city do not hold legislative authority in purely religious matters that are part of halakha. According to this tannaitic law, they have legislative authority in matters of trade. Other adjunct laws (in the Tosefta) contain additional examples relating to city life, such as imposing limits on pasture or imposing a ban on relations between individuals and the foreign (Roman) authorities. Yet, the borderlines between halakha and civil law are not fully drawn. Jewish law contains also monetary laws (*mamona*) that are distinct from religious matters (*issura*). Could the people of the city use their legislative power to interfere in monetary laws? Talmudic law does not provide a direct answer to this question. Only in the Middle Ages did halakhic authorities answer this question (affirmatively).<sup>10</sup>

Who are the “people of the city” who have this right and what are the terms of citizenship? The Mishnah in tractate Bava Batra states: “How long shall he reside in the city to be considered a citizen? Twelve months. Having purchased a house there to dwell in he becomes as the people of the city.”<sup>11</sup> According to this definition, every permanent resident of the city becomes a citizen with respect to

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*over the Generations*, vol. 1, *The Ancient World*, ed. Y. Gafni (Jerusalem: Zalman Shazar Center, 2001), 150–151 [Hebrew].

- 7 (מעמד אנשי העיר). All translations or phrases or quotes from the Hebrew that appear in this article are my own, unless noted otherwise.
- 8 (שבעה טובי העיר). There is a reference to the rank of the people of the city in B *Bava Metzia* 78b and 106b. The rank of the people of the city and the seven notables are also mentioned in the B *Megillah* 26a, J *Megillah* 3:2 (74a). An early mention of the seven notables is even found in Josephus’s *Antiquities of the Jews*, 4, 8, 14.
- 9 See T *Bava Metzia* 11:23 (ed. Lieberman, 125) and B *Bava Batra* 8b. For further examples of legislation, see the Tosefta.
- 10 Menachem Elon, *Principles of Jewish Law, History, Sources, Principles* (Jerusalem: Magnes Press, 1988), 558–578 [Hebrew].
- 11 *Bava Batra* 1:5. A variant of this uniform definition is found in the Tosefta: “If he has resided there for thirty days then he becomes as the people of the city with respect to alms, and six months for raiment, for the poor of the city [in another version: “for city rails”], after twelve months. T *Pe’ah* 4:9 (ed. Lieberman, 57); Cf. J *Pe’ah* 8:7 (21a); B *Bava Batra* 8a.

rights and duties. He need not be a member of a particular class, or enjoy high standing or great wealth. If he purchases a home or lives in it for twelve months, he is regarded a taxable citizen with a right to the services provided by the city. He is also entitled to join the “rank of the people of the city,” that is, the general assembly, and to voice an opinion on city rulings.

In Palestine during the Mishnaic and Talmudic eras, mixed Jewish and non-Jewish populations lived side by side in the cities. What status did the non-Jewish citizens hold according to halakha? The Mishnah says nothing specific in this regard. One could argue that because the Mishnah is addressed to Jews, the halakha refers exclusively to the Jewish community. Hence, it stands to reason that in settlements of mixed populations, ethnic groups would organize into separate polities. Indeed, we know that during Roman times many cities had ethnic populations organized as discrete communal-political sectors.<sup>12</sup> However, a tannaitic source that appears in the Tosefta and in both Talmuds relates explicitly to mixed communities of Jews and non-Jews, and states: “In a city where Jews and gentiles live together a treasurer is appointed from among the gentiles and one from among the Jews and they collect from the Jews and the gentiles and support the gentile poor and the Jewish poor, and visit the gentile sick and the Jewish sick, and bury the gentile dead and the Jewish dead, and comfort gentile and Jewish mourners, and cleanse the vessels of the gentiles and those of the Jews because of ways of peace.”<sup>13</sup> This tradition appears to call for equality in the treatment of all people of the city, Jewish and non-Jewish. At first glance it seems that what is being addressed here is righteousness and deeds of loving kindness, that is, voluntary precepts dealing with interpersonal relations. However, at least some of these precepts involve both the municipal tax system and the services it provided. For this reason, it would be correct to say that this halakha deals with the social rights of the people of the city and the equal status of Jews and non-Jews. Moreover, it calls for the appointment of Israelite and gentile treasurers, indicating that even the appointment of city officials requires equality between Jews and non-Jews.<sup>14</sup> It does not specify, however, the general political status of

12 See Arieh Kasher, “The Jewish Politeuma in Alexandria: A Model of Community Organization in the Roman-Hellenistic Diaspora,” in *Center and Periphery, Palestine and the Diaspora in the Second Commonwealth Period, the Mishnah and the Talmud*, ed. Y. Gafni (Jerusalem: The Zalman Shazar Center for Jewish History, 2004), 57–91 [Hebrew]; and the literature referred to in note 1.

13 T *Gittin* 3: 13–14 (ed. Lieberman, 259); J *Gittin* 5:8 (47c); B *Gittin* 61a. The above citation is from the Jerusalem Talmud.

14 Note that this matter appears in a *baraita* in the Jerusalem Talmud, although not in the version of the Tosefta, where the term *parnasin*, administrators, is used, indicative of Jews.

gentiles—for example, their right to participate in the ranks of the people of the city and their eligibility to hold public positions.

The democratic structure of the talmudic city echoes the Greco-Roman polis, and the Hellenistic influence on the constitution of the Jewish town is quite apparent. At the same time, the unique character of the Jewish city is also manifest. At this point, the polis had long since ceased to be democratic and served as a vehicle of rule by the elite.<sup>15</sup> The Jewish city, in contrast, offered a more popular framework most clearly seen in its welfare and educational systems the likes of which were unknown in Roman cities of the time.<sup>16</sup> This was also reflected in the political framework of the city. As we have noted, all city residents were considered citizens and counted as “people of the city.”

At the same time, however, we have no details beyond the basic constitutional structure of the city. What authority did the general assembly have, and what decisions did it make? How were powers divided between the assembly and the city leaders? Were the leaders elected by the assembly? There are no clear answers to these questions in tannaitic sources, nor much information in either Talmud.<sup>17</sup> A dictum found in the Babylonian Talmud states: “One does not set up officials over the public except by taking counsel with the public.”<sup>18</sup> This dictum indicates that the public must take part in the election of administrators or public leaders, but also that officials were not elected directly by the public but by some other agency that is not mentioned. The agency was supposed to consult with the public about the appointment, although it is not clear in what way and who represented the public in this consultation. Talmudic sources designate only the general framework. They recognize that political authority lies in the hands of the people of the city and view all permanent residents as citizens with equal rights and duties, but offer no details about how decisions were reached in the city or how officials were appointed. These questions are answered in greater detail in medieval halakhic literature.

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See also *Sifrei Deut.* 157 (ed. Finkelstein, 208–209), and the discussion further in this article, section 5.

15 Arnold H. M. Jones, *The Greek City from Alexander to Justinian* (Oxford: Clarendon Press, 1940), 157–219.

16 Z. Safrai, *The Jewish Community* (above n. 4), 50–76, 347–352.

17 See *ibid.*, 262–267.

18 B *Berakhot* 55a, in the name of R. Yizhak, a third-century Palestinian sage. On the term *parnas*, see Steven Fraade, “Local Jewish Leadership in Roman Palestine: The Case of *Parnas*,” in *Halakha in Light of Epigraphy*, ed. A. Baumgarten et al. (Göttingen: Vandenhoeck & Ruprecht, 2011), 155–173.



## 2. The Middle Ages

In the early Middle Ages, the majority of Jewish communities existed within a Muslim cultural environment. Their structure was traditional and patriarchal. Halakhic sources during the Gaonic era recognize the political authority of the traditional leadership of the elders, but they contain no reference to the power of the public or to the principle of majority rule. This attitude is apparent in a responsum by R. Hanania Gaon (tenth century), who cites and interprets the talmudic law regarding the power of the people of the city as follows: “And our Rabbis said: ‘the people of the city are authorized to set prices for goods, measurements, and workers’ wages. And they are authorized to enforce these’— and all of this in accordance with the decision of the elders.”<sup>19</sup> This interpretative note of R. Hanania reflects his notion that the authority of the people of the city is granted to the elders. Thus, we may conclude that in early Middle Ages there is a regression in the democratic character of the Jewish community.

The first mention of the principle of majority rule appears to be in a responsum of R. Isaac al-Fasi (Rif) about the manner of enacting ordinances in the community: “The principal manner in which this is usually done is that the majority of the congregation consults the elders of the congregation and they enact the ordinance accordingly and implement it, as is the custom.”<sup>20</sup> R. Isaac al-Fasi mentions two bodies, the “majority of the congregation” and the “elders of the congregation.” The term “elders of the congregation” refers to the leadership of the community, whereas the “majority of the congregation” refers to a larger circle of community members, presumably the majority of the community. But given the brevity of the responsum, it is difficult to know whether this majority is counted from the entire community or only from a certain group within it.<sup>21</sup> As noted earlier, the phrase “majority of the congregation” was often used rhetorically to mean that the support of the majority was required, not that all members of the community actively participated in the decision-making process.

19 *Sha'arei Tzedek*, 4, 4, 16 (*Otzar Hageonim*, Ketubot, Teshuvot, §162: 52). See Aharon Nachlon, *The Kahal and its Enactments in the Geonic Period* (Jerusalem: The Institute for Research in Hebrew Law, 2001), 59–65. A perusal of Nachlon’s book, an anthology of all the Geonic material on community regulations, reveals that the principle of majority rule is not mentioned even once.

20 R. Isaac Alfasi, *Responsa Rif*, §13.

21 Elon, *Principles of Jewish Law* (above n. 10), 580, assumes simply that this refers to majority opinion. But Yehiel Kaplan argues that in view of the Geonic tradition, which did not recognize the majority, one should not interpret this too simply. He believes that also in Rif’s understanding it was the elders who endorsed the ordinances. See Yehiel Kaplan, “Majority and Minority in the Medieval Jewish Community,” *Shenaton ha-mishpat ha-ivri* 20 (1995–1997): 213–280 [Hebrew].

A salient example of the gap between the principle of majority rule and the right of every member of the community to participate in decision making can be found in an eleventh-century halakhic responsum. In the wake of a dispute in the French community of Troyes, the people of the city dispatched a series of questions to the sages of the German city of Mainz (*Magenza*), R. Yehudah b. R. Meir ha-Kohen and R. Elazar b. R. Itzhak. Among others, the following two questions were asked: (a) “Are the people of the city permitted to impose their will on the minority of their congregation and enact ordinances for them?” and (b) “Should we ask each and every member whether he is in agreement with our thoughts and intentions?”<sup>22</sup> The first question is one of principle: Do the majority of the people of the city have the authority to enact ordinances that are binding also for the minority that opposes them? The second question has to do with procedure and whether it is necessary to ask the opinion of each member of the community. The inquirers explained that under normal circumstances the majority of the community accepted the decisions of the leadership. The question was, therefore, whether the city leadership should rely on the support of the silent majority or whether it must obtain the explicit agreement of all the people in the city. Rabbis Yehudah and Elazar answered the first question in the affirmative. The people of the city have the right to enact ordinances that are approved by the majority and to impose them on the minority who are not in favor of them. Concerning the second question about how to count the majority, the responders ruled that it was unnecessary to ask the opinion of every individual. The community leadership can take for granted that simple folk usually acquiesce to the opinion of the important members of the community. Counting on the support of the silent majority is based not only on the fact that this is how the community normally behaves but also on the merits of the matter, or in the language of the responders: “The general rule is that the small [should] obey the great in whatever they put into effect.”

This responsum expresses the democratic principle that majority consent is the basis for the legitimacy of community decisions, but in the same breath it accepts the aristocratic notion that “the small should obey the great.” The discrepancy between reliance on the majority and recognition of the right of every individual to express an opinion is evident.

22 *Sefer Kolbo* 142. This question is discussed at length in Irving A. Agus, “Democracy in the Communities of the Early Middle Ages,” *Jewish Quarterly Review* 43 (1952): 163–165; Avraham Grossman, “The Attitudes of the Early Sages of Ashkenaz to Authority and Community,” *Shenaton ha-mishpat ha-ivri* 2 (1975): 175–199 [Hebrew]. For a detailed discussion of the different versions of the responsum, see Haim Soloveitchik, *The Use of Responsa as a Historical Source* (Jerusalem: The Hebrew University, 1991), 87–106.

In the twelfth century, there was a lively debate between halakhic authorities on the principle of majority rule. This elicited sharp dissent from Rabbenu Yaacov Tam, the greatest French sage in his day, who held the view that the public may not impose a ruling on protesting individuals whose rights it may infringe. In Rabbenu Tam's view, any ruling that may infringe upon individual rights, particularly property rights, must be accepted by those whose rights are liable to be threatened. Therefore, all community decisions must be unanimously approved.<sup>23</sup> According to this approach, the opinion of every member of the community must be heard, and every individual has the power to oppose a ruling that threatens his rights. It should be stressed that it is property rights that concerned R. Tam here, not the right to political participation, but the implication relates to political participation as well.

As other scholars have explained previously, it seems that R. Tam's attitude is based on a view of the community as a partnership of individuals. Partners are judged according to the principles of private law, and decisions that threaten the rights of any of the partners require unanimous consent.<sup>24</sup> From a practical point of view, this system clearly raises difficulties by granting every member of the community the right to veto majority decisions. Indeed, notwithstanding R. Tam's high standing and influence, there is no indication that the communities followed his approach. A few of his students continued to adhere to the theory, but apparently no communities applied it in practice.

Most of the halakhic authorities disagreed with R. Tam and were unequivocally in favor of majority rule. R. Eliezer b. Yoel Halevi of Bonne (Rabiya), who was

23 R. Tam interpreted the Talmudic halakha that authorizes the people of the city to implement their decisions as pertaining to the situation in which the decisions were initially accepted unanimously: "What we have said [in the Talmud]: 'the people of the city have authority to enforce their decision'—this means that they have authority to punish monetarily one who violates a decision that they took unanimously, to which he agreed when they enacted it, but now he violates it" (Mordekhai b. Hillel, *Bava Kama* 179 and *Bava Batra* 480). For a review and discussion of all sources on the opinions of R. Tam, see Yehiel Kaplan, "Decision Making in the Jewish Community According to Rabbenu Tam," *Zion* 60 (1995): 277–299. For additional aspects, see Ephraim Kanarfogel, "Unanimity, Majority, and Communal Government in Ashkenaz during the High Middle Ages: A Reassessment," *American Academy of Jewish Research* 38 (1992): 79–105; Avraham Reiner, "Rabbinical Courts in France in the Twelfth Century: Centralization and Dispersion," *Journal of Jewish Studies* 55/2 (2009): 298–318.

24 Shalom Albeck, "The Relationship of R. Tam to the Problems of His Day," *Zion* 19 (1954): 27. Yitzhak Baer maintains that R. Tam's approach corresponds to the German law that prevailed throughout Europe in the early Middle Ages. See Yitzhak Baer, "The Foundations and Decisions of Jewish Communal Organizations in the Middle Ages," *Zion* 15 (1950): 1–41, particularly from p. 38 onward.

active in Germany at the end of the second half of the twelfth century, expressed this position as follows:

And should any among the people of the city protest against the intentions of the heads of the community or against a ban [*herem*],<sup>25</sup> if the majority of the community consents, the ban shall be instituted, as I shall clarify. And should the majority not consent and express an objection, even the heads of the community may not protest . . . but if the majority approves and the minority objects then the ban shall be instituted on them against their will, as we read in the second chapter of tractate *Avodah Zarah*: “One shall not enact a decree on the community unless the majority of its members are able to bear it, as is said: ‘You are cursed with a curse, for you are robbing me, the whole nation’ (Malachi 3: 9). If it is the whole nation, it is valid, and if not, not.”<sup>26</sup>

According to Rabiya, the community is an independent entity, a corporation, not a mere aggregate of individuals. The majority in the community represents the community as a whole and acts on its behalf. Rabiya finds this principle in the Talmud, which identifies public majority with the nation as a whole. It follows that the authority of community decisions is based on majority rule. If the public majority consents to it, a decree is carried out even against the will of those who oppose it; if the majority does not agree to it, however, the decree lacks authority. Rabiya emphasized that even the heads of the community are bound by majority opinion and have no authority to oppose it. This explicitly contradicts the statements of R. Yehudah ha-Kohen and R. Eliezer b. Yitzhak in the responsum discussed above. Rabiya does not accept the principle that “the small must obey the great,” and instead refers to the duty of the heads of the community to concede to majority opinion. It is clear that Rabiya is not imagining an oligarchy using status and high birth to force its will on the community, but rather a leadership that enjoys the trust of the community, which is why he is cited as one who supports a leadership elected by the entire community.<sup>27</sup>

25 A ban (*herem*) was normally attached to every enactment and was intended to support an ordinance and serve as a sanction against transgressors.

26 R. Haim b. Isaac, *Responsa 'Or zarua (abridged)*, (Lipsia: 1860), §222 and parallel in Mordechai, *Bava Batra*, 282. At the end of this section Rabiya explains: “And I extended my commentary seeing that among my fellow rabbis some would say that this means etc.” (ibid.) The rabbi he refers to is R. Eliezer of Metz, who was a disciple of R. Tam.

27 “Our ancestors would choose officials to lead their communities and govern them. And because they were elected, nothing whatsoever could be added to or subtracted from their acts. So wrote R. Avi ha-Ezri” (*Responsa of R. Haim Or Zarua*, 65).

These statements reflect a fundamental change that occurred by that time in the structure of general community leadership and in the halakha. The traditional oligarchy gave way to an elected leadership, and decisions within the community were reached by majority rule. The change finds expression in the halakha as well. The halakhic authorities began to relate to the principle of the majority in a serious and practical way. They determined that it is necessary to consult the majority, and that majority rule holds sway even over the heads and officials of the community,<sup>28</sup> as clearly evident in the words of R. Meir b. Baruch (Maharam), who was active in Germany during the second half of the thirteenth century:

As to your question, if there is a dispute in your community and you are unable to reach an agreement . . . it seems to me that you should get the taxpaying householders together and they will express an opinion under oath for the sake of Heaven and the rectification of the city, and they will follow the majority whether in their choice (election?) of leaders or other officials (*chazanim*), or in the matter of repairing the pouch for donations (*kis tzedaka*), or in appointing officials for the synagogue (*gabbayim*), or in building or tearing down synagogues, adding or subtracting, and buying a wedding chamber, a chamber for craftsmen, and establishing or abolishing all the needs of the community.<sup>29</sup>

Maharam maintained that all community decisions, including the choice (election) of officials, should be determined by majority rule. He explained that at the beginning of a meeting the congregants would avow that the opinions they express are “for the sake of Heaven and the rectification of the city” and not for the sake of any private interest. Subsequently they would discuss matters and reach decisions based on majority opinion. Maharam specified that the assembly should be composed of “taxpaying householders.” If in past generations the majority was counted among the relatively narrow ranks of the “great” or “meritorious” or “important” citizens, the Maharam determined that anyone who paid taxes is entitled to participate in the decision-making process.

R. Asher b. Yehiel (Rosh), student of Maharam of Rothenburg, also adopted the principle of majority rule and explained it as follows: “Know that concerning any public matter the Torah says ‘follow the majority,’ and therefore any matter

28 This opinion was first presented by Rabiya, R. Eliezer b. Yoel Halevi of Bonne (*Responsa of R. Haim Or Zarua*, 65, Mordekhai b. Hillel on *Bava Batra* 282).

29 *Responsa Maharam* (Berlin, 1891), 885; *Hagahot maimoniot*, Tefilah 11:2. The responsum is included also in R. Judah b. R. Eliezer ha-Levy of Mintz, *Responsa Mahari mintz*, §7.

the community agrees upon follows the majority, and the minority must then abide by what the majority agrees upon.”<sup>30</sup> The principle of “follow the majority” was applied in the Talmud only to the rabbinical court (*beit din*) and not to public issues. Rosh was the first sage who applied it explicitly to public issues based on halakhic rulings that have continued to evolve since the twelfth century.

The principle of majority rule was also accepted by the sages of Spain, as expressed by R. Shlomo b. Adret (Rashba), who was active in Barcelona in the thirteenth century:

The strict law regarding city decisions [is that] so long as the majority agrees and enacts and accepts as law, individual opinion is overlooked, because the majority in every individual city acts as the great court for all of Israel. And if they decree a ruling it will stand and the transgressor will be punished, as is written, “in cursing you are accursed etc.” That is to say, the majority may issue a ban even against one’s will, as is written: “in cursing you are accursed and me you have robbed the whole nation,” if it is “the whole nation” it is valid. That means the individuals are subject to a curse if the majority supports it.<sup>31</sup>

Rashba drew a striking comparison between the power of the majority vis-à-vis individuals and the power of the great rabbinical court vis-à-vis the Jewish people. Just as the court is an authorized body with enforceable power over the Jewish people as a whole, so too, the public majority is authorized to enforce its rulings on the community in general. Rashba’s ruling comprises two elements: the power of the public and the support it must receive from the majority.

In summary, according to the prevailing opinion among the halakhic authorities of the thirteenth century, community decisions, including the appointment of community officials, must be arrived at by majority. Consequently, every member of the community, or at least every taxpayer in the community, has the right to participate in the decision-making process and to elect officials.

What about the right to be elected to hold a position of leadership? Is this an equal right or are there preferred ranks for holding office? Maimonides, who was asked about the nature of the city leadership, defined it as follows: “And the seven good people of the city are the learned sages, men of Torah learning and of virtuous deeds.”<sup>32</sup> According to this definition, the authority of the city

30 R. Asher b. Yehiel, *Responsa Rosh*, Principle 6, §5.

31 R. Shlomo b. Adret, *Responsa Rashba*, 5:126.

32 Maimonides, *Responsa*, ed. J. Blau (Jerusalem: *Makitzei Nirdamim*, 1960), §271.

leaders is based on their personal merits, on being men of Torah learning and of virtuous deeds, so that the leadership should be chosen from the community's religious elite. Thus, anyone who cannot claim to have such status cannot nominate himself for the position. Rashba, however, defined community leaders in an entirely different manner: "The seven good people of the city mentioned everywhere are not seven people selected for their wisdom or wealth or honor, but seven people nominated by the community to stand as officials."<sup>33</sup> According to Rashba, the city leaders' authority does not stem from their personal status (their wisdom, wealth, or honor) but from being elected by the public. This definition allows any decent person (transgressors were disqualified) to be nominated for a leadership post, and allows the community to choose whomever it wills. The dispute between Maimonides and Rashba reflects not only the different approaches toward the leadership of the community but also the development that took place in Jewish communities over the hundred years that separate the two sages. Maimonides's position is consistent with the elitist approach that characterizes Jewish communities up to the twelfth century, where the authority of the leadership was based on the personal status of community members. By contrast, Rashba's position is consistent with the new reality and approach, whereby the authority of the leadership is based on public consensus.

Scholars pointed to the parallel phenomenon taking place in European society and law. In the thirteenth century, European cities and certain other organizations began making decisions based on the majority principle. This was a result of the influence of Roman law, which recognized this principle, in contrast to the local German law that did not recognize it and required unanimous agreement. Historians are divided on the question whether this affected Jewish communal life and law. Yitzhak Baer maintained that halakhic authorities learned all their legal principles from Christian jurists: "The principle of majority rule in all public matters was accepted in the cities of Europe only during the thirteenth century, first in southern Europe that was more open to the influence of Roman law, then in northern countries that accepted it later. . . . Mainly, the Jewish scholars learned their laws from their Christian colleagues, the jurists and Canonists, and

33 R. Shlomo b. Adret, *Responsa Rashba*, 1: 617. On the parallelism between "city leaders" in the Jewish communities and the officials of gentile cities, see Arieh Grabois, "The Leadership of Officials (*parnasim*) in the Communities of Northern France in the Eleventh and Twelfth Centuries: The 'Community Leaders' and the 'City Elders,'" in *Culture and Society in Medieval Jewish History: Festschrift in Memory of Haim Hillel Ben-Sasson*, ed. Reuben Bonfil, Menachem Ben-Sasson, and Joseph Hacker (Jerusalem: Zalman Shazar Center, 1989), 303–314; Yitzhak Baer, *The History of the Jews in Christian Spain* (Philadelphia: The Jewish Publication society, 1992), 186 ff.

not from the Talmudic tradition.”<sup>34</sup> Opposing him are other historians, including Haim Soloveitchik and Avraham Grossman, maintaining that this was internal halakhic development that has nothing to do with external influence.<sup>35</sup> The main evidence for the latter position is the fact that decisions by majority were common already in the eleventh century, and even if the majority was not counted based on community members, it is still clear that there was no need for unanimous agreement.

The question of the equal right of all, rich and poor, wise and ignorant, continued to trouble halakhic scholars. After the expulsion from Spain, there was a sharp disagreement between two scholars in the Ottoman Empire regarding the question whether the principle of majority rule refers to a quantitative majority (*rov minyan*) or a qualitative one (*rov binyan*). R. Shmuel di Modina, one of the great scholars of Salonika in the sixteenth century, was asked: “Our rabbi, teach us as one audience, including the rich, the middle class, and the poor, some knowledgeable in the Torah and important, what is the law, how the public should behave with respect to the public’s needs.” He replied as follows:

Apparently the Torah simply said to follow the majority to the point where it appears that there is no division between rich and poor and all are counted equally, and the minority is ignored relative to the majority. And this is how it appears at face value in the answer of Rosh, who wrote: “And in all matters about which the public agrees we follow the majority, and individuals must observe everything that the majority agrees about, etc. Therefore the Torah said in all public agreements: ‘follow the majority.’” This is what everyone thinks, but I see that the meaning of what the Torah said about “following the majority” is not what appears to people . . . Because the Torah did not say “follow the majority” but (only) when those who are in disagreement are equal, then majority inclination is decisive. But when there is a difference between two factions, is it possible that one man counts for more than 1,000? Where is it written in the Torah? But we must say that when the Torah said “follow the majority” it may be a qualitative majority (*rov binyan*)

34 Yitzhak Baer, “The Foundations and the Beginnings of the Jewish Community in Middle Ages,” *Zion* 15 (1950): 38 (Hebrew).

35 Soloveitchik, *The Use of Responsa* (above n. 22), 102–105; Grossman, “The Attitude of Ashkenazic Sages” (above n. 22), 175–199. See Kaplan, “Majority and Minority” (above n. 21), following Baer but in a milder version.



or a quantitative one (*rov minyan*). When they are equal it is *rov minyan*. When they are not equal it is *rov binyan*.<sup>36</sup>

R. Shmuel di Modina admits that the simple meaning of the principle, “follow the majority” indicates a simple numeric majority, without “dividing between rich and poor,” and this is what everyone believes. But in his opinion, the principle of majority decision should be accepted only when the parties to the disagreement are equal. When one party exceeds the other in wisdom or wealth, there is no reason to mechanically follow the majority. For this reason, Di Modina decrees that the deciding majority is a qualitative one (*rov binyan*); only where there is no clear qualitative majority should the quantitative a majority (*rov minyan*) be followed.

Opposing him was R. Eliyahu Mizrahi, one of the great scholars of Turkey in the sixteenth century:

The entire public is referred to as a court in these matters, similarly to rabbinical judges who convene in a rabbinical court, who are not allowed to break until they reach a decision as a result of any disagreement that occurred between them . . . they are merely counted and follow the majority, in accordance with the decree of our holy Torah, “follow the majority.” And he who deviates from the many is called a sinner. And no distinction is made if that majority consisted of rich or poor, learned or laymen, because the entire public is referred to as a court for interpersonal matters.<sup>37</sup>

R. Eliyahu Mizrahi based the authority of the community on the concept of rabbinical courts, and argued that “*the entire public* is referred to as a court for interpersonal matters.” In other words, as far as public affairs are concerned, the entire community must be regarded as a rabbinical court. By virtue of this analogy, rulings in the community should follow the method of ruling in court, that is, by majority opinion. Similarly to rabbinical courts, also in the community everyone must be counted, and therefore it makes no difference whether the majority consists of the rich or the poor, of the wise or the laity. The conclusion that arises from the argument of R. Eliyahu Mizrahi is that everyone in the community is granted an equal right to express his opinion about the selection of officials and other community decisions.

36 R. Shmuel di Modina, *Responsa Maharashdam*, O.H. 37.

37 R. Eliyahu Mizrahi, *Responsa*, 50, p. 145. These two answers were cited in Menachem Elon’s article “Democracy, Basic Rights, and Good Governance in the Jurisprudence of Oriental Sages,” *Shenaton ha-mishpat ha-ivri* 18–19 (1992–1994): 9–63 [Hebrew].

These opinions guided future generations of halakhic authorities as well as community practices. Historians believe that the principle of majority rule has been accepted from the thirteenth century onward and that community decisions were usually made in this way.<sup>38</sup> These principles were applied in the responsa of decisors in subsequent generations until the twentieth century, showing that there was recognition of the equal right of all community members (at least of taxpayers) to be partners in the political process.

### 3. From the Principle of Majority to Individual Right

Although the right to political participation was recognized at the practical level, at the level of halakhic discourse no such right was formulated. A formulation of the right to political participation (as a right) appears for the first time at the beginning of the twentieth century. The recognition of this right serves as a standard for determining the pattern of community elections. The issue was brought up in halakhic responsa of three prominent authorities to a problem that plagued the Jewish community in Czechoslovakia.<sup>39</sup> After World War I, the government of Czechoslovakia established a proportional electoral system in the country. According to this method, various groups could be elected to municipal councils and to the legislature according to their proportion within the population. Subsequently, members of the Jewish community of Munkacs asked the authorities to implement a proportional electoral system in their community as well. The Munkacs Rebbe, Haim Eliezer Shapira, objected because the Munkacs Hasidim, whom he represented, were in the majority, and following the majoritarian approach which was in effect until then, they held all the powers. For this reason, those who did not belong to this hasidic group demanded to change the system and to obtain representation. The local government did not want to decide on the matter and brought the question before the central government in Prague. The Interior Minister summoned the Chief Rabbi of Czechoslovakia, Rabbi Dr. Haim Brody, and asked him what the electoral system according to halakha should be. Rabbi Brody answered that the proportional method is the most appropriate. The

38 H. H. Ben-Sasson, *Studies in Medieval Jewish History* (Tel Aviv: Am Oved, 1977), 116–124 [Hebrew]; Simcha Goldin, *Uniqueness and Togetherness* (Tel Aviv: Hakibbutz Hameuchad, 1997), 145–156 [Hebrew]; Kenneth Stow, *Alienated Minority* (Cambridge, MA: Harvard University Press, 1997), ch. 8.

39 The case, its background, and the three responsa are described in Shlomo Shragai, “The Law of Election,” *Sinai* 14 (1945): 100–114, repr. in *Thoughts about Jewish Democracy*, ed. Benny Porat (Jerusalem: The Israel Democracy Institute, 2010), 273–291 [Hebrew].

Minister of the Interior, who received a different opinion from other rabbis, asked him whether there may be differences of opinion in the halakha, and what was to be done in such cases. R. Brody replied that this is possible, and that in these cases the leading scholars of the generation must be consulted. In the case at hand, he suggested referring the question to the chief rabbis in Mandatory Palestine, Rabbi Abraham Isaac Kook and Rabbi Yaakov Meir. When formulating the question, Rabbi Brody presented his position in the case as well, and thus there are three references to the question.

Rabbi Shapira's claim was that the binding halakhic principle is "follow the majority," meaning that the majority should decide in all matters, and that granting participatory rights in community groups to the minority contradicts this halakhic principle. The three rabbis rejected this claim. Rabbi Chaim Brody claimed that the majority had the right to decide but that it had no obligation to do so. The majority may waive its right and hand over the power to a minority or to a group of individuals. For considerations of fairness and honesty the majority should take into account the minority and allow it to be represented, as evidenced by the proportional electoral method.

Rabbi Kook ruled in a similar vein: "And there is no doubt that all social matters involve concession and yielding, whether for individuals or the public, and therefore it is the consensus and custom of the public that elections be conducted according to the principle of proportionality in order to avoid controversy, which is a genuine Torah law." Rabbi Kook found precedents for his ruling in the methods of appointment of biblical judges. He claimed that the way of the Torah is to ensure that the process whereby judges and public representatives are elected reflects the voices of all sectors of society. A decision by the majority that suppresses entirely the minority opinion is in complete contradiction with the way of the Torah. In principle, argued Rabbi Kook, the fundamental rule of public enterprise is partnership. Therefore, it is necessary to ensure that each partner has an equal right to share in the political process.

The clearest formulation of the personal right to political partnership appears in the answer of Rabbi Yaakov Meir, the first Sephardic Chief Rabbi of Mandatory Palestine. Rabbi Meir determined that not only is it proper to grant this right based on considerations of integrity, but that it is required by Torah law. He presented two reasons for his ruling: a rational reason ("the rational law") and halakhic reason ("the legal law"):

To add a personal touch, I say that true judgment is based on reason as well as law. Reason: when it comes to every honest person, his reason requires him to accord to each person his rights as a human being, and the franchise is granted to every individual, with no distinction between rich and poor, to vote and to be elected. If so, I

wonder how the majority has the power to deprive the minority, and even an individual, of his human rights? . . . [The basis in] law is that our holy Torah states that we should follow the majority only for laws that apply to everyone equally. Then they follow the majority. But in regard to one sect against the other sects, then the judges are no longer considered judges but rather are considered litigants . . . And this distinction is made explicitly from the great sage, Rabbi Joseph of Trani: “They taught to follow the majority only in a matter where all are equal—then one should follow the majority opinion. But if all agree to deprive one of his rights, they all should be considered interested parties [and are therefore disqualified from sitting in judgment].”<sup>40</sup> All the more so, in a case in which several parties come to deprive one party of its power and its right to contest the election. Thus, we must judge correctly that they are not impartial and therefore [in this case we] should not follow the majority.

The two grounds cited by R. Meir are instructive. The first, the rational one, expresses a clear concept of human rights. All people have personal rights by virtue of their status as a person. These rights are not related to their social status, to whether they are rich or poor, or to any other of their characteristics. Among these rights is the right to vote and to be elected, a right that cannot be denied by the majority. The second reason, the halakhic one, is similar to the first. The authority of the majority, recognized by the halakha, applies to public matters in which all are considered equal. But the power of the majority does not apply to infringe on the rights of the minority or of the individual. This distinction contains a clear definition of the balance between the powers of the majority and the rights of the individual.

Rabbi Ben-Zion Meir Hai Uziel, the Sephardic Chief Rabbi of Mandatory Palestine, Rabbi Yaakov Meir’s successor, also spoke about the right of the individual to political participation. In 1935, Rabbi Uziel was asked by the Mizrahi and Hapoel Hamizrahi Union who was eligible to vote. He replied as follows:

Everyone in town is a partner in the regulation of their common needs in town, and therefore all adults who pay the taxes imposed on them have equal rights with all the residents to express an opinion in matters of community and municipal leadership, that is, to vote and to be elected to the managing bodies . . . And it seems that the notion of “taxes” includes all joint payments in which the

40 R. Yosef Trani, *Responsa Maharit* 1:95 (born in Safed, 1568, died in Istanbul, 1639).

individual participates in his estimation. This includes payments for water and sanitation services and the like. And all these services are paid from the public treasury and conducted by an elected public administration. Thus, the law provides that all those who participate in the payment of what was imposed upon them, whether a great deal or a little, also have the right to participate in electing the municipal public leadership with full and equal rights.<sup>41</sup>

Rabbi Uziel formulates a personal right to vote and to be elected that is granted equally to all. He softens the traditional halakhic requirement whereby the right is vested only in the taxpayers in the community, possibly limiting the right to the wealthy who have a tax liabilities, whereas the poor, who can not pay taxes, would not be entitled to vote or to be elected. In his interpretation, he says that the idea of “taxes” does not reflect a certain income bracket but any payment for services that can attest to the fact that the person is a member or resident of the community.

It is reasonable to assume that the formulation used by twentieth century sages in explicitly recognizing the right of the individual to vote and to be elected was affected by the recognition in society at large of the right to individual choice. At the same time, though, this conclusion follows from halakhic tradition itself. The decisors do not articulate their opinions as an innovation or a new interpretation of the sources. They regard their opinions as proper interpretations of the halakhic tradition. The indirect dialogue between halakha and external reality brought the halakhic authorities to explicate what is already implied in halakhic sources.

## 4. New Challenges: Women’s Suffrage

The new reality has posed new challenges before halakhic authorities. One important challenge in this area was the right of women to political participation. Until the twentieth century, Jewish tradition did not recognize the right of women to be partners in the political process. In this respect, Jewish tradition was no different than what was customary in surrounding societies and countries. The changes that took place in this regard since the beginning of the twentieth century raised the issue among halakhic decisors as well. Here the matter was not just an explication; it was about innovation. The issue first arose in Jewish communities of the Diaspora, from where it reached Mandatory Palestine. There, the issue arose in 1918 following the decision of the second constitutive assembly of the Yishuv to grant women the right to vote. The controversy became the main political and religious issue from 1918 to 1926. As it is beyond the scope of this article to

41 Rabbi Ben-Zion Meir Hai Uziel, *Responsa Mishpetei Uziel*, vol. 4, H.M. 3.

review all the opinions on this issue, I will describe the controversy in broad strokes and focus on two main opinions.<sup>42</sup>

Halakhic decisors distinguished between active suffrage, namely the right to vote, and passive suffrage, that is, the right to be elected. Most (Orthodox) rabbis objected to granting women both active and passive suffrage.<sup>43</sup> According to another group of halakhic authorities, women should be granted the right to vote but not to be elected.<sup>44</sup> Yet another group of halakhic decisors stated that women should be granted both active and passive suffrage.<sup>45</sup> The distinction between active and passive suffrage is based on the fact that in halakhic sources there is no explicit prohibition against active voting by women but there is such a ban on their holding public positions. The main source that is cited in this context is Maimonides in *Laws of Kings*: “One should not endow a woman with royal sovereignty . . . and to all positions in Jewish communities, one must appoint only men.”<sup>46</sup>

Rabbi Avraham Yitzhak ha-Kohen Kook, the Chief Rabbi of the Mandatory Palestine, expressed his unambiguous opinion against granting suffrage to women.<sup>47</sup> He discussed the issue from a broad perspective, examining three aspects of the question: (a) from the legal point of view, whether it is allowed or prohibited; (b) from the point of view of the common good, whether the Jews will benefit from allowing or prohibiting it; and (c) from the point of view of ideals,

42 About the history and politics of this controversy, see Menachem Friedman, *Society and Religion: The Non-Zionist Orthodoxy in Eretz Israel* (Jerusalem, 1978), 146–184 [Hebrew]; reference to halakhic materials on p. 146, n. 1. A great deal of halakhic information is found in Justice Menachem Elon’s ruling in the Leah Shakdiel case, *Leah Shakdiel v. The Minister of Religious Affairs* HTC 153/87, and others, Rulings 42(2) 221, and in his book, *The Status of Women: Law and Judgment, Tradition and Transition, the Values of a Jewish and Democratic State* (Tel Aviv, 2005), 51–101.

43 Among them were Rabbi Israel Meir ha-Kohen of Radin, author of *Hafetz hayyim* and *Mishnah berurah*, and Rabbi Haim Ozer Grodzinski of Vilna, one of the great decisors of the first half of the twentieth century, and most of the famous rabbis in Palestine.

44 Among these was Rabbi David Zvi Hoffman, head of the Rabbinical Seminary in Berlin. See his article in *Jeschurun* 6 (1919): 262–267 [German]. It was translated into Hebrew in *The Kibbutz in the Halakha: Collection of Articles* (Sha’alim: n.p., 1984), 286–290. His words are cited by Justice Elon in the Shakdiel case.

45 Among them were rabbis who belonged to the Mizrahi religious Zionist movement. See Friedman, *Society and Religion* (above n. 42).

46 Maimonides, *Laws of Kings* 1:5.

47 *Ma’amarei ha-R’ayah, a Collection of Articles by Rabbi Kook* (Jerusalem, n.p., 1984), 189–194. There are three different responsa by him regarding this matter. For analysis of R. Kook Halakhic approach in this issue see also: Avinoam Rosenak, *The Prophetic Halakha* (Jerusalem: Magnes Press, 2007), 246–253 [Hebrew].

whether our moral consciousness rejects the matter or demands it. Regarding the law, Rabbi Kook appealed to general principles and policy considerations (as there is no direct rule relating to the issue). He believed that women's suffrage contradicts the principle that only men have public obligations, that "it is the way of men to conquer, it is not the way of women to conquer" (Yevamot 65b). Moreover, it can result in the mixing of the genders, which is liable to conflict with the principles of modesty espoused by the halakha. Regarding the common good, Rabbi Kook believed that the Jewish people will greatly benefit from continuing to rely on their sources and thereby retain their uniqueness. He believed that preserving the special character of the people also reinforces the recognition of their rights to Eretz Israel. Regarding the ideal, Rabbi Kook believed that the Jewish perception of the women's ideal place is completely different from that of European nations. Keeping the women's place outside the bustle of public life is necessary to protect their position, delicacy, and modesty. In his opinion, this attests to greater respect for women. He particularly emphasized the protection of the integrity of the family and believed that granting women the right to vote could bring political controversy into the home, which would present a risk to family harmony.<sup>48</sup>

An entirely different position was expressed by Rabbi Ben-Zion Meir Hai Uziel. At the time of the debate, Rabbi Uziel was Chief Rabbi of Tel Aviv, and subsequently Chief Sephardic Rabbi of Israel. R. Uziel did not express this position during the debate itself.<sup>49</sup> In hindsight, he wrote:

This question became a point of contention in Israel and threw the entire Eretz Israel into upheaval. And day after day, leaflets and

48 Note that his son, R. Zvi Yehuda Kook, indicated that although his father opposed the matter, he did not use the term "prohibited." In his opinion, the matter lacked merit but it was not halakhically prohibited. Shlomo ha-Kohen Aviner, ed., *Conversations of Rabbi Zvi Yehuda* (Jerusalem: Yeshivat Ateret Kohanim, n.d.) [Hebrew].

49 Uziel, *Mishpetei Uziel* 4, H.M. 5. The response was reprinted in Uziel, *Piskey uziel be-sheilot ha-zeman* (Jerusalem: Mossad Ha-Rav Kook, 1976), §44. This is what he wrote: "I wrote this answer at the time in order to clarify the halakha for myself, and I did not want to publish it and issue a practical ruling on the matter, but now, after this question was resolved on its own, I found it appropriate to publish it for the glory of the Torah." The answer was published only in 1939, after the issue had been decided, and after the death of R. Kook. It is possible that R. Uziel refrained from publishing the answer as long as R. Kook was alive. For analysis of the dispute between R. Kook and R. Uziel see Y. Cohen, "The Controversy between Rabbi Kook and Rabbi Uziel on Granting Women the Franchise," *Hapenina—Memorial Book for Penina Rafel* (Jerusalem: Bene Hemed publishers, 1989), 51–62 [Hebrew].

warnings, pamphlets and articles appeared in newspapers, frequently published in order to prohibit women's participation in elections altogether. Some relied on Torah law, others on maintaining the boundaries of morality and modesty, and others yet on protecting the peace in the family home. And everyone's opinion was based on the same phrase: "novelty is forbidden by the Torah."

This is his opinion regarding the right of women to vote:

We found no clear basis to prohibit the first one (active suffrage), and it is inconceivable to deprive women of this basic personal right. For in these elections we appoint leaders for ourselves and give power of attorney to our elected representatives to speak on our behalf, to arrange the affairs of our settlement, and to levy taxes on our property. And women, directly or indirectly, accept the authority of these representatives and observe their public and national laws. And how can you hold both ends of the stick: to impose upon them the disciplinary obligation of the representatives of the nation and to deny them the right to vote?

Regarding the right of women to be elected he said:

The second question is that of the representatives—whether a woman can be elected. And in this we apparently found an explicit prohibition (*Sifrei* on Deut. 29:16): "'You may indeed set [a king]'— [if he] dies, you should appoint another one in his stead, a 'king' and not a queen." And from this Maimonides learned: "One should not endow a woman with royal sovereignty, for it is said: '[set a] king over you' and not a queen. And to all positions in Jewish communities one must appoint only men" (*Laws of Kings* 1: 5). . . . But I am doubtful whether this rule is based on the principle that a woman is disqualified from serving as a judge or on the principle of the "dignity of the public." The difference is in a case in which she is not appointed by the court but chosen by a portion of the community as their representative and agent . . . According to the first explanation, it would not be effective, just as an individual is not allowed to accept a woman's testimony in matters of divorce, marriage, and the like because the Torah disqualified her. But according to the second explanation, their choice should be effective . . . And from what is written in the *Tosafot* that Dvora was a judge



because they accepted her authority over themselves, it proves that their acceptance is effective . . . Accordingly, it is clear that what is written in *Sifrei* is to be interpreted in this way that we do not appoint a queen over the public by an appointment of the court because of the dignity of the public. Therefore the individual or individuals are entitled to elect her, and by the right of the electors she joins the group of the elected.

Rabbi Uziel concluded his answer as follows:

(a) The woman has a perfect right in elections in order that she may partake in the meaningful duty to the representatives who will head the people. (b) The woman can also be elected with the consent and enactment of the public.

Note that despite the opposition of the decisors, over time the community, including the ultra-Orthodox community, accepted women's suffrage. Already before the establishment of the State of Israel and certainly ever since, there has been no rabbinic authority calling for women to avoid voting. Naturally, there is a political interest here as well. If the ultra-Orthodox community had prevented women from voting, it would have undermined the community's representation in the institutions of the Yishuv and subsequently, of the state. Nevertheless, the fact that the decisors did not oppose the right to vote indicates that, in any case, they found no prohibition against women voting. This is not the situation, though, with regard to women's right to run for office. Here there is still objection among ultra-Orthodox authorities. Indeed, one cannot find a single woman among Ultraorthodox Knesset members or in other public positions.

In sum, halakhic authorities had to face the challenge of women's suffrage. The demand for equal right to vote ran against the custom, and the demand for equal right to run for office was against an explicit prohibition. The rabbis were divided in their response to this challenge. Some of them opposed women's suffrage altogether, others accepted active suffrage and opposed passive suffrage, and others yet accepted women's equal right to vote and run for office. Eventually, the controversy was decided by social reality. In halakhic terms, one may call it the custom: "This is the norm and no one contests it. Come and see how people behave."<sup>50</sup>

50 Justice Elon in the Shakdiel case (above n. 42), §36.

## 5. From Community to a State: Non-Jews' Right to Political Participation

The new reality raised another challenge for halakhic authorities regarding the equal right of non-Jews to political participation. As we have seen, in the halakhic tradition the right to political participation developed within the boundaries of the Jewish community. Halakha did not deny the right of non-Jews to political participation, but because it referred to the Jewish community, in practice it granted this right to Jews only. The new reality, however, required halakhic authorities to address a situation in which all citizens of the country have equal rights. From the outset, Zionist leaders proclaimed that the future state would be democratic and grant equal rights to all its citizens. Consequently, in Israel's Declaration of Independence, the state committed itself to "ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race, or gender." What is the position of the halakha on this matter? Does it recognize the expansion of the right to political participation and grant it equally to all, Jews and non-Jews alike?

It seems that the first one to address this question was Rabbi Isaac Herzog (1888–1959), who was chief rabbi of Mandatory Palestine, and later Chief Rabbi of the State of Israel at its inception. In his work, *Law for Israel According to Torah*, Rabbi Herzog extensively discussed the issue of "minority rights" and that of "public appointments of non-Jews today."<sup>51</sup> In his discussion, Rabbi Herzog addressed both halakhic and realpolitik considerations. First, he mentioned the demand of the international community, included in the UN Resolution of November 29, 1947, to grant equal rights to all residents. This requirement was a condition for recognition of the State of Israel by the international community; as so, it had a decisive halakhic weight. In his opinion, even if the halakha had ruled that equal rights should not be granted to everyone, the UN demand ought to have been accepted because it was in the national interest. The requirement to grant equal rights to all is even stronger, inasmuch as the halakha does not object to it in any way. Rabbi Herzog explained that halakhic laws limiting the status of non-Jews did not apply to the current reality and therefore are not valid today. It follows that on the one hand there is no halakhic restriction against granting equal rights to non-Jews, and on the other, this was required by political and national considerations.

51 R. Y. H. Herzog, *Constitution and Law in a Jewish State According to the Halacha*, ed. Itamar Warhaftig (Jerusalem: Mossad HaRav Kook, 1989). The topics in brackets cited above in the text are the titles of the second and third parts of the book.

Rabbi Herzog raised another argument that was based on a model of partnership that, in his opinion, describes the establishment of the State of Israel in the best way:

The basis of the state itself is a kind of partnership. It is, so to speak, through the mediation the nations, say even idolaters, who agreed to give us a shared government in a way that would grant us a clear superiority, and the state would be named after ourselves. Does the law of the Jewish Kingdom (*malkhut yisra'el*) apply to this state to the same degree to which it applied in the days of David and Solomon? . . . This is another matter. Indeed, this is a partnership between the Jewish people and a gentile people under conditions that ensure a certain measure of superiority for the first partner. The question is, therefore, only whether we are allowed to form such a partnership.<sup>52</sup>

At the root of R. Herzog's approach is the distinction between the ideal model of the "Jewish Kingdom" that fits the Kingdom of David and Solomon, and the real model of partnership that fits the State of Israel. R. Herzog admits that halakhic rulings regarding the State of Israel need not be made with reference to the ideal model of the Kingdom of Israel, but in light of current reality, which must be grasped more modestly as a partnership between citizens, Jews and non-Jews alike. This partnership is offered to the Jews as a deal, the terms of which are defined in advance. On one hand, it grants a certain priority to the Jewish people, and on the other, it requires a division of political power and the granting of equal rights to all citizens. The question, therefore, is not about the content of the arrangement, but only whether it is permissible and appropriate to accept it. R. Herzog raises several doubts, but in the end his answer is clear: it is worthwhile, and therefore permissible and proper. This model summarizes and reflects his position on this issue. The halakhic justification for granting equal rights to non-Jews is based primarily on pragmatic considerations of political expediency. The halakha contains no prohibition that would prevent accepting this principle, but neither is there an obligation to accept it in the absence of pragmatic considerations.

R. Herzog devoted a special discussion to the right to be elected and to fill public positions. Although the justification he presented so far also applies to this issue, he chose to devote a special halakhic discussion to it. Unlike the right to vote, which the halakha does not limit explicitly, the right to fill public offices is restricted. Talmudic law requires that only Jews be appointed to public or

52 Ibid., 20.

government positions. “One from among your brethren you shall set as king over you, you may not set a foreigner over you, who is not your brother’ (Deut. 17:15): all appointments which you make must be only from among of your brothers.”<sup>53</sup> Maimonides also ruled in this spirit.<sup>54</sup> In this matter, then, the halakha presents a more difficult challenge. R. Herzog addressed this limitation by using the distinction already raised by decisors in the past, between *appointment* by virtue of law and *acceptance* by the public.<sup>55</sup> According to this distinction, the restriction on appointing a non-Jew to public office applies only to the appointment by virtue of law, but the public is entitled to accept voluntarily even those whom the halakha disqualifies by virtue of law. Because in a democracy the public voluntarily accepts these public appointments, they are also deemed acceptable according to the halakha. Therefore, there is no halakhic prohibition regarding the right to be elected and to discharge public functions, and thus it all comes back to the main political consideration of granting equal rights to all.<sup>56</sup>

In sum, R. Herzog’s opinion is that all citizens of the state should be granted full equal rights, regardless of their religion and nationality, including the right to vote, to be elected, and to discharge all public functions. However, as noted above, his main reason for granting equal rights is based on pragmatic and political considerations rather than on a moral acceptance in principle of the equality of non-Jews. R. Herzog found halakhic “permission” to grant equal rights, but did not provide a justification for doing so in the first place.

By contrast, Rabbi Shaul Israeli (1909–1995), one of the most prominent authorities on issues of state and halakha, presented a different approach. R. Israeli’s discussion focuses on the gentiles’ right to be appointed to public office, which is the more problematic side of this issue from the halakhic point of view. R. Israeli did not recognize the distinction between “appointment” and “acceptance” with regard to the manner in which the appointment is made. Instead, he offered another distinction concerning the nature of authority. The halakhic prohibition against appointing a non-Jew to public office has to do, in the words of Maimonides, with “power” (*serara*). Thus, R. Israeli distinguished

53 B *Qiddushin* 76b, cf. *Sifrei* Deut. 157 (ed. Finkelstein, 208).

54 Maimonides, *Laws of Kings* 1:4.

55 Herzog, *Constitution and Law* (above n. 51), 22–24. As the source of this distinction R. Herzog mentions R. Hayyim Benbenisti, *Knesset ha-gedola*, H.M., §7.

56 Furthermore, R. Herzog discussed the problem of appointing judges who are not Jewish. This is a more serious matter, because apart from the prohibition against granting authority to non-Jews, there is a special prohibition against turning to the “courts of the gentiles.” After he analyzed the reasons for the prohibition, showing that they do not apply in the context of Israel, he reached the conclusion that non-Jews can be appointed to the position of judge. Herzog, *Constitution and Law* (above n. 51), 24–25.

between “power” and elected officials. Power is investing an individual with personal authority. Personal authority is manifest in the fact that it is not limited in time, and the person invested with it may even bequeath it to his sons. By contrast, an elected official does not act by virtue of personal authority but by virtue of being a trustee and a representative of the public. This is reflected inasmuch as his position is assigned to him for a limited time, and he cannot bequeath it to his sons. “For today the meaning of being a representative is not that they are vested with personal power over the public; they are merely agents and representatives of the public.”<sup>57</sup> Consequently, R. Israeli claimed that the prohibition against granting authority to a non-Jew is limited to “power” only, the reason being that gentiles may become cruel toward those who are not from among their people.<sup>58</sup> This point does not apply when the persons are not vested with personal authority but act as representatives of the public, because the public limits their power both in the duration of time and in the scope of their authority. R. Israeli also used a partnership model to explain the matter:

And now it seems clear that, just as in the case of a business partnership between Jews and gentiles, it is possible to arrange a division of labor between them in such a way that the gentile takes care of managing the business and, as such, gives orders and assigns activities for everyone, etc., and it is not be perceived as a matter of power, because this is just by virtue of partnership and he gives orders in the name of all partners. Similarly, in the larger partnership of managing a city or a state, the fundamental content of the right of elected representatives does not change, and they do not acquire power, and are merely representatives of the public commanded to act for its benefit, and as such they are granted special rights.<sup>59</sup>

A political organization, whether a city or a state, is a form of partnership. Just as Jews and gentiles are allowed to form business partnerships and divide positions and areas of responsibility between themselves, they are also entitled to do so in politics. The agreement of the partners to divide the political power and equal rights between themselves is binding. Elected officials are the trustees and representatives of the public, and therefore there is no reason not to appoint non-Jews to such a position.

57 R. Shaul Israeli, *Amud ha-yemini*, §12 (Jerusalem: n.p., 1966), 143.

58 He cites *Sefer ha-hinnukh*, Neg. Precept 498, which explains in this manner the prohibition against appointing a king “who is not among your brothers.”

59 Israeli, *Amud ha-yemini* (above n. 57), 144.

Unlike R. Herzog, R. Israeli did not base his argument on pragmatic considerations but on the principles of political organization. R. Israeli had no difficulty with a political partnership based on equality. He saw no need to justify the partnership by the fact that Jews were granted precedence or by the fact that the state was to be Jewish. The shared desire of the parties justifies the partnership without a need for further validation. Thus, the equal rights of the gentiles are based on the consent of the public, which includes both Jews and non-Jews, to establish the country in this manner.<sup>60</sup>

Following the same line of thought, other decisors based the equal right of non-Jews to vote and to be elected on the commitment made in the Declaration of Independence. According to this approach, the consent of the public at the time of establishment of the state also forms the basis of the halakhic obligation to grant equal rights to all. This is what R. Haim David Halevy, who was Chief Sephardic Rabbi of Tel Aviv, wrote: “In the reality of our life in the State of Israel . . . when the Declaration of Independence explicitly states that Israel ‘will ensure complete equality of social and political rights to all its citizens irrespective of religion, race, and gender,’ Israeli society must grant all its citizens, including gentiles, all the full rights granted by law to Jews.”<sup>61</sup> Those who hold this view recognize that the halakha provides no explicit source or precedent for granting the right to political participation to non-Jews. But this deficit can be remedied by the halakhic principle that recognizes the power of community to determine for itself the proper modes of functioning and to assume various commitments toward its members. The state’s commitment expressed in the Declaration of Independence, and later in legislation, to grant equal rights to all, Jews and non-Jews alike, has therefore full halakhic validity.<sup>62</sup>

60 For a comparison of R. Israeli’s and R. Herzog’s attitudes towards the State of Israel, see Chaim Burgansky, “Community and Kingdom: Halakhic approaches of R. Y. H. Herzog and R. Shaul Israeli to the State of Israel,” in *Religion and State in Jewish Thought in the Twentieth Century*, ed. Aviezer Ravitzky (Jerusalem: The Israel Democracy Institute, 2005), 267–294.

61 R. Haim David ha-Levy, *Ase lekha rav*, vol. 9, (Tel Aviv: ha-Va’adah le-hotsaat kitve ha-g. R. H. D. Halevi, n.d.), 61, 283. A similar approach was adopted by R. Yehuda Amital, “The Treatment of Minorities According to the Torah in the State of Israel,” *Daf Qesher Yeshivat Har-Etzion* 200 (Tishrei 1990).

62 Concerning the general treatment of minorities, see Eliezer Haddad, *The Status of Minorities in the Jewish State: Halakhic Aspects* (Jerusalem: The Israel Democracy Institute, 2010) [Hebrew]. On the right to be elected, see *ibid.*, ch. 2.

## 6. Conclusion: the Role of the Jewish Tradition in Israel's Democracy

Does Jewish tradition in any way influence the fact that Jews tend to hold a positive attitude toward democratic rule? This question is especially interesting in the context of the State of Israel. From its inception, the Zionist movement adopted democratic principles, and Israel has maintained a stable democratic regime for over sixty-five years. These facts are not self-evident. Many Zionist activists and immigrants to Israel came from countries that do not have a democratic tradition. The pioneering groups of the first immigration waves came from Eastern Europe and exhibited definite socialist leanings. The ideological environment in Eastern Europe produced authoritarian communist regimes. Subsequent waves of immigration to Israel came only partly from countries with democratic traditions. After the establishment of Israel, many immigrants came from Middle Eastern countries that were not democratic either. Furthermore, one must also take into consideration the difficult political and security conditions that existed at the time of Israel's establishment and its struggles in the early years. Such a combination of conditions does not usually encourage the development of democratic and liberal regimes. Nevertheless, despite the above circumstances, a stable democracy emerged in Israel. Jews living in Israel, whatever their origin, embrace the principles of democracy and take an active part in it. Despite the many controversies and divisions among the citizens of Israel, the question of the democratic regime remains outside the controversy. Even the most traditional communities, which opposed modernity and Zionism, did not voice explicit opposition to the democratic regime. Many members of these communities proclaim the superiority of a halakhic state, but in practice do not refrain from participating in elections and accepting the democratic rules. The development of a democratic regime in Israel and the wide support it enjoys therefore require an explanation. On what social and historical foundations is it based?<sup>63</sup>

It is reasonable to assume that the explanation of this phenomenon includes several factors, which I consider without attempting to exhaust the topic. First is the Zionist movement's Central European and liberal background. Herzl, the founder of the Zionist movement, was influenced by the liberal European atmosphere, which, in turn, determined the basic democratic structure of the Zionist movement

63 See the collection of articles in Gal et al., *On a Democratic Path* (above n. 3); see also Yonatan Shapira, "The Historical Sources of Israeli Democracy: The Labor (*Mapai*) as a Dominant Party," *Israeli Society: Critical Aspects* (Tel Aviv: Breirot, 1994), 40–53 [Hebrew]. Shapira focused on the nature of Israeli democracy—procedural versus liberal—as a result of the political system and of the parties.

and of its institutions.<sup>64</sup> Second, Israel was established after World War II and the Holocaust, which had moral and political implications. The moral lesson shared by many societies was to favor democracy and human rights. Politically, if Israel wanted to gain the sympathy of the West, it had to adopt a democratic regime. Third, the formal demand of the United Nations Resolution of November 29, 1947 from the two future states, the Jewish and the Arab, to adopt democratic regimes.<sup>65</sup> But these factors do not seem to provide a full explanation. The Zionist movement's Central-European background was certainly an important factor; how, though, was this fact alone able to influence a national movement nourished by many diverse communities that, as noted, did not come primarily from countries with democratic traditions? The fact that Israel came into being after World War II and that there was an international demand for the establishment of democracy does not provide a full explanation either. Many countries that were established in the post-colonial era failed, despite the hopes placed in them and despite the demands made of them to adopt stable democratic regimes.

At this point one must consider the possible role of Jewish tradition. As is well known, the interrelations between the Zionist movement and the Jewish tradition are complicated. On the one hand, the Zionist movement rebelled against tradition, especially against the Diaspora way of life. On the other hand, though, the Zionist movement built on tradition. The very idea of a national renaissance is based on reviving old concepts and values such as those of the Jewish people, Eretz Israel, and the Hebrew language.<sup>66</sup> What was the role of tradition with respect to political philosophy and political arrangements? Some old political concepts were important to Israel's founding fathers. For example, the concept of the "Kingdom of Israel" played an important role in Zionist political rhetoric, although in this context "kingdom" (*malkhut* or *mamlakha*) did not mean monarchy but sovereignty.<sup>67</sup> The Kingdom of Israel might therefore be manifested

64 See Amos Elon, *Herzl* (Tel Aviv: Am Oved, 1976), 247–293 [Hebrew]. Since the First Zionist Congress (1897) the movement operated in a democratic manner. Shlomo Avineri mentioned the fact that the Second Zionist Congress (1898) granted women the right to vote and to be elected before any other European parliament did so. S. Avineri, *Herzl* (Jerusalem: The Zalman Shazar Center for Jewish History, 2007), 139 [Hebrew].

65 Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/88/IMG/NR003888.pdf>.

66 The literature about this topic is immense. See for example Yosef Salmon, "Religion and Nationalism in the Zionist movement," in *Jewish Nationalism and Politics—New Perspectives*, ed. Jehuda Reinharz et al. (Jerusalem: The Zalman Shazar Center for Jewish History, 1996), 115–140 (and the literature mentioned there).

67 A use of this term was made by many writers, politicians, and ideologists (including rabbis). A special use was made by David Ben-Gurion, which Nir Kedar interprets as



in democracy. But what are the sources of this democracy? How did it capture the people's hearts and how was it maintained for so many years?

It is possible to confront this challenge by suggesting that tradition played a constructive role here. It seems that historians tend to overlook the effect of Jewish tradition in shaping the political life on the renewed Jewish community in Mandatory Palestine and later on in the State of Israel. However, it is difficult to assume that Jewish tradition had no influence on the masses, both individuals and communities that joined the Zionist movement or immigrated to Israel. It most certainly influenced the more traditional segments of the movement and of the immigrants, and it unquestionably had an effect on the rabbis and leaders of these communities. How would these people view democracy in light of Jewish tradition? As shown in the present article, the approach of Jewish tradition can uphold democratic principles, and make it possible to consolidate a broad support for democratic rule in Israel. The fact that Jewish tradition, on its own, developed a quasi-democratic legacy created a traditional infrastructure based on which it was possible to mold Israel's democratic structure. Subsequently, the democratic logic was accepted and a dialog was established between Jewish tradition and the democratic culture. It must be said that Jewish tradition by itself could not generate a liberal democracy. The Jewish political tradition was not liberal. It certainly needed the contribution of the liberal democracy tradition. A liberal democracy on its own, though, would not have been accepted so broadly. Only the combination of these two traditions could facilitate the creation and acceptance of democracy in Israel. Obviously, there is a tension between these two traditions and sometimes it erupts. Nevertheless, it should be recognized that Jewish tradition served alongside the liberal-democratic tradition as the historical source of Israel's democracy.

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Republicanism. See Nir Kedar, *Mamlakhtiyut: David Ben-Gurion's Civic Thought* (Jerusalem: Yad Ben-Zvi, 2009).

# “Have you murdered and also taken possession?!” (1 Kings 21:19)

## The Gains and Losses of Basing Human Rights Discourse on the Bible

Gili Zivan

This essay explores the following question: Is it worthwhile (and possible) to ground the discourse of human rights in biblical concepts and the Jewish exegetical tradition?<sup>1</sup> At first glance, it seems that the secular liberal discourse of rights could have no better foundation than ancient statements that possess religious authority: Look, even God is concerned with the rights and dignity of the weak! People of faith would certainly be happy to base the modern discussion of rights on binding religious tradition; even nonbelievers may want to grant wider validity to the claims they advance in the humanistic discourse of rights and demonstrate that these have an ancient basis in traditional biblical concepts. However, a second look at the issue raises difficult questions, both for those who defend human rights and for those who believe in the Bible as the word of God.

To begin with, I will try to demonstrate the attraction of the attempt to ground the discourse of rights in the Bible by looking at the story of Naboth’s Vineyard in 1 Kings 21. Then I will broach the difficult questions raised by the naïve use of

1 This essay is dedicated to the blessed memory of my teacher and friend, Yoske Achituv, a courageous thinker and fighter for the rights of the disadvantaged, who made a special effort to read my essay only weeks before he passed away and found time to give me important suggestions and to share with me some of his vast knowledge and understanding. May his humane and loving spirit give us the strength to struggle on behalf of those whose voices are not heard in Israeli society. This article was translated from the Hebrew by Moshe Gresser, and I am very grateful for this efforts.

This issue is part of a broader question of whether it is worthwhile to ground modern ethics on religion. I will focus here on the Bible, because (as I will show below) both the advantages and problems are intensified for someone who wants to find a biblical underpinning for human rights discourse, as compared with later canonical texts.

this and similar episodes. Even though this literary analysis may distract us from the main discussion about the relationship between religious discourse and human rights discourse, I believe that it has great importance, because it exemplifies the power of the biblical text and its influence on readers, even in our times.

In the second part of the essay, I will propose three possible approaches to the question of the relationship between the discourse of human rights and the biblical text. I will reject the first two, which separate the two modes of discourse, and argue for the usefulness of the third approach, as I understand it, for the present context. This effort will take into account both the religious perspective and the ethical perspective, while being grounded in the ancient and modern traditions of interpretation.

## 1. "Have you murdered and also taken possession?" (1 Kings 21:19) versus "And [Elijah] slew them there" (1 Kings 18:40)

### 1.1. Naboth's Vineyard (1 Kings 21) as a Basis for a Dialogue on Human Rights

The well-known story of Naboth's vineyard illustrates the use that can be made of a story with a clear religious message. The monotheistic God created all human beings, and as His creatures they are subject to God's law. No created being stands above God's word. For this reason even a powerful king cannot violate divine law. When he does so, the prophet, acting in the name of the God of justice, fearlessly comes and denounces him.<sup>2</sup> This story seems to be a short step away from the discussion of liberal human rights.

According to this story, the king's power is limited and he is subject to criticism. God Himself defends the individual citizen whose rights have been trampled. Modern democratic ideas, too, such as the separation of powers and criticism of the government find profound expression in this story. The issue of the translation from religious language to the secular language of the human rights discourse is, of course, also present in biblical injunctions to protect the widow, orphan, and sojourner, and in the words of the prophets who cry out against social injustice and the exploitation of the weak. During the protests held in Israel in the summer of 2011, there was wide use of the biblical prophets' statements to defend the concepts of social justice and responsiveness to the suffering that afflicts many

2 As the prophet Nathan does regarding David (2 Sam. 12).

sectors of Israeli society.<sup>3</sup> Thus, the choice of the story of Naboth's vineyard in 1 Kings<sup>4</sup> is merely an instructive illustration of a more general principle.<sup>5</sup>

The story in 1 Kings 21 reads as follows:<sup>6</sup>

And it came to pass after these things, that Naboth the Jezreelite had a vineyard, which was in Jezreel, near the palace of Ahab king of Samaria. And Ahab spoke to Naboth, saying, "Give me your vineyard, that I may have it for a vegetable garden, because it is near to my house: and I will give you for it a better vineyard than it; or, if it seem good to you, I will give you the worth of it in money." And Naboth said to Ahab, "The Lord forbid it me, that I should give you the inheritance of my fathers." And Ahab came into his house sullen and displeased because of the word which Naboth the Jezreelite had spoken to him: for he had said, "I will not give you the inheritance of my fathers." And he laid him down upon his bed, and turned away his face, and would eat no bread. But Jezebel his wife came to him, and said to him, "Why is your spirit so sad, that you eat no bread?" And he said to her, "Because I spoke to Naboth the Jezreelite, and said to him, 'Give me your vineyard for money; or else, if it please you, I will give you another vineyard for it'; and he answered, 'I will not give you my vineyard.'" And Jezebel his wife said to him, "Do you now show yourself king over Israel!<sup>7</sup> Arise, and eat bread, and let your heart be merry: I will give you the vineyard of Naboth the Jezreelite." So she wrote letters in Ahab's name, and sealed them with his seal, and sent the letters to the elders and to the nobles that

3 See Yuval Cherlow, "The Use of the Prophets as Shaping the Attitude toward Social Uprisings: Manipulation or Genuine Torah? *De'ot* 53 (October 2011): 10–12 (Hebrew). See also below, at the conclusion of this essay.

4 See also 2 Kings 8, where our story is cited as an explanation for the destruction of the House of Omri.

5 I have chosen a literary genre intentionally, because the power of "a good story" is stronger than any abstract formulation of the forbidden and permitted. God's words to Ahab (through Elijah), "Have you murdered and also taken possession?!" still echo in the statements of judges, educators, and leaders down to our very own times (see below, n. 37).

6 All translations of the bible are taken from the Koren translation (Jerusalem, 1980), which seemed to me to reflect the Hebrew text more closely. However, I have retained the standard transliteration of the Hebrew names. I have also taken the liberty of modernizing the usage, replacing "thou," "thy," "hast," etc., with "you," "your," "have," etc., respectively. Any further changes made to bring the translation into closer alignment with the original Hebrew are noted in the footnotes.

7 Read as a command, instead of a question, diverging from the Koren translation.

were in his city, who dwelt with Naboth. And she wrote in the letters, saying, “Proclaim a fast, and set Naboth at the head of the people: And set two base fellows before him, to bear witness against him, saying, ‘You did curse God and the king.’ And then carry him out, and stone him, that he may die.” And the men of his city, the elders and the nobles who were the inhabitants in his city, did as Jezebel had sent to them, and as it was written in the letters which she had sent to them. They proclaimed a fast, and set Naboth at the head of the people. And there came in two base fellows, and sat before him: and the base men witnessed against him, against Naboth, in the presence of the people, saying “Naboth did curse God and the king.” Then they carried him outside of the city, and stoned him with stones, that he died. Then they sent to Jezebel, saying, “Naboth is stoned, and is dead.” And it came to pass, when Jezebel heard that Naboth was stoned, and was dead, that Jezebel said to Ahab, “Arise, take possession of the vineyard of Naboth the Jezreelite, which he refused to give you for money. For Naboth is not alive, but dead.” And it came to pass, when Ahab heard that Naboth was dead, that Ahab rose up to go down to the vineyard of Naboth the Jezreelite, to take possession of it. And the word of the Lord came to Elijah the Tishbite, saying, “Arise, go down to meet Ahab king of Israel, who is in Samaria. Behold, he is in the vineyard of Naboth, where he is gone down to possess it. And you shall speak to him, saying, ‘Thus says the Lord, Have you murdered,<sup>8</sup> and also taken possession? And you shall speak to him, saying, Thus says the Lord, In the place where the dogs licked the blood of Naboth shall the dogs lick your blood, even yours.’” And Ahab said to Elijah, “Have you found me, O my enemy?” And he answered, “I have found you: because you have given yourself over to work evil in the eyes of the Lord. Behold I will bring evil upon you . . . .”

Down through the centuries, a great deal has been written about this story in its historical, literary, theological, and ethical contexts.<sup>9</sup> In this essay, I intend to

8 Instead of “killed” in the Koren translation.

9 See, for example, Alexander Rofé, “The Source of the Story and Its Agenda,” *Beit miqra* 4 (1988): 432–446 (Hebrew), which includes a broad survey of the literature on the topic; Itzhak Englard, “The Story of Naboth the Jezreelite,” *Mishpatim* 14 (1985): 521–526 (Hebrew). See also the lecture by Prof. Uriel Simon, which compares David’s sin with Ahab’s and points out the destructive power of tyrannical rule: <http://mikravideo.cet.ac.il/movieDetails.aspx?nItemID=154&nSection=2> (Hebrew).

show only how it is possible to ground the discussion of human rights on this foundational story, which deals with the violation of the rights of the individual by a rapacious ruler and the price that the ruler pays in consequence. With this in mind, we should pay close attention to several interesting exchanges in the chapter.

The first interchange takes place between Ahab and Naboth (21:2–3). The Bible begins by presenting the context of Ahab’s greed (v. 1). It seems that the king’s subject, Naboth, owned a vineyard adjacent to Ahab’s palace in Jezreel (his winter residence, apparently); the king wanted to acquire the plot and turn it into a vegetable garden that would provide him with fresh produce every day. The beginning of the story already surprises us, given what we know about neighboring kingdoms in those times.<sup>10</sup> A king of the ninth century BCE is *asking* a subject to sell him his vineyard. This opening dialogue serves as an example of the subject’s protected rights (the right of inheritance—“the inheritance of my fathers”—and the right to observe religious precepts—“The Lord forbid it me”) and of the restraints on the king’s power:

And Ahab spoke to Naboth, saying, Give me your vineyard, that I may have it for a vegetable garden, because it is near to my house: and I will give you for it a better vineyard than it; or, if it seem good to you, I will give you the worth of it in money. And Naboth said to Ahab, The Lord forbid it me, that I should give you the inheritance of my fathers.

Scripture emphasizes that this is a request and not a command—“Give me” rather than the imperative, “Give!” What is more, the king even justifies his request, “that I may have it for a vegetable garden, because it is near to my house,” an element that is quite unnecessary in a world where the king is a mighty ruler who does not have to justify taking whatever he desires. In addition, Ahab, who according to the prevailing custom of monarchies of that era could have seized Naboth’s vineyard peremptorily, with no explanation or justification, actually offers to pay for the property, in money or in kind: “And I will give you for it a better vineyard than it; or, if it seem good to you, I will give you the worth of it in money.” Here Ahab is displaying exceptional consideration for the needs of his subject in a world where subjects had no rights vis-à-vis the king.

Naboth’s answer is also surprising. He says, “No” to the king who is standing before him and “Yes” to the King of Kings, God, who commands him to safeguard

10 See Francis I. Andersen, “The Socio-Juridical Background of the Naboth Incident,” *JBL* 85 (1966): 46–57, which compares the law as portrayed in the story of Naboth’s vineyard with Ugaritic and Mesopotamian law.

his inheritance and forbids him to alienate it,<sup>11</sup> as a sign of the covenant that God made with His people when they entered the land. However, the biggest surprise comes at the end of this passage. When he hears Naboth's refusal, Ahab does not order his soldiers to arrest him, kill him, or to take the field from him by force. Instead, he accepts his subject's answer and goes home with nothing.

This is followed by the second dialogue, between Jezebel and Ahab, in vv. 5–7:

But Jezebel his wife came to him, and said to him, “Why is your spirit so sad, that you eat no bread?” And he said to her, “Because I spoke to Naboth the Jezreelite, and said to him, ‘Give me your vineyard for money; or else, if it please you, I will give you another vineyard for it’: and he answered, ‘I will not give you my vineyard.’” And Jezebel his wife said to him, “Do you now show yourself king over Israel! Arise, and eat bread, and let your heart be merry: I will give you the vineyard of Naboth the Jezreelite.”

Jezebel does not understand her husband's resignation in the face of Naboth's refusal. (Indeed, Ahab [v. 6] does not tell her Naboth's full response and, significantly, omits Naboth's explanation. This may reflect the cultural distance between Jezebel and Ahab.) She sees the king's acquiescence to his subject as a weakness that endangers the Israelite kingdom, which is not headed by a decisive and absolute ruler. She urges Ahab to exercise his royal prerogative: “Do you now show yourself king over Israel!” Jezebel's conception of monarchy is very different from Ahab's. As Adin Steinsalz says,

Jezebel does not act for herself. She is the daughter of the king of Sidon, but she does not act for the benefit of Sidon. She does what she does in accordance with what she sees as the good of the kingdom of Israel. She tries to strengthen the king's status . . . and at no point is she able to understand the particularity of the matter, the combination, the status so special and strange to those times, of a kind of “constitutional king”—a king limited by constitution and law, by the formal frameworks of the legal branch of the government itself, and not less than this, a king who is limited by a certain moral perspective. Jezebel expresses a foreign worldview of a king who is

11 As explained in Num. 36:7: “So the inheritance of the children of Israel shall not remove from tribe to tribe: for every one of the children of Israel shall cleave to the inheritance of the tribe of his fathers.”

more than an absolute ruler, a worldview in which the king is also (a half, a third, or a quarter) a god. A king whose will is not just the law, but is itself also morality.<sup>12</sup>

Jezebel tells Ahab to get out of bed and eat because she wanted to help him feel better, but perhaps also because eating is a component of rule, and perhaps even an expression of the notion that the ruler consumes his subjects.<sup>13</sup> Ahab's weakness and his willful disregard of what Jezebel is about to do, when she announces that "I will give you the vineyard of Naboth the Jezreelite," encourage her to stage the show-trial that leads to Naboth's execution under the cover of law. Jezebel understands that in the strange kingdom in which she is now living, there have to be adequate grounds for executing a subject, in full conformity to legal niceties. She proclaims a public fast, both because she wants to accelerate the trial and to emphasize the severity of Naboth's sin,<sup>14</sup> whereby he "cursed"<sup>15</sup> God and the king. (How ironic that Naboth, who cried, "The Lord forbid it me, that I should give the inheritance of my fathers to you," is found guilty of blasphemy.) Thus Jezebel prepares the ground for Naboth's conviction by the municipal court, which hears the testimony of the two witnesses.<sup>16</sup> The proceedings are completely lawful.

12 Adin Steinsalz, *Women in the Bible* (Tel Aviv: MOD, 1983), 73 (Hebrew). On the differences in conceptions and the argument among scholars on this point, see Andersen, "The Socio-Juridical Background" (above, n. 10).

13 See Yakov Shabtai's play *Eating*, written in 1977, which deals with governmental corruption in both the biblical and contemporary periods. The drama is set in Ahab's palace during a royal banquet; throughout the action, the actors on stage are eating. In this way, the playwright touches profoundly on the element of eating in the biblical story, while bestowing on eating a symbolic meaning of a government that consumes its citizens and its own laws and brings destruction on itself as well. See Yakov Shabtai, "Eating," in *A Crown on the Head and Others* (Tel Aviv: HaKibbutz HaMeuchad, 1995), 78–104 [Hebrew].

14 Cf. Rofé, "The Source of the Story" (above, n. 9), 447: Why does Jezebel command that a fast be proclaimed in the city of Naboth? An answer to this question may be found, in my opinion, in the queen's needs. She requires a special and accelerated procedure, one which will not give Naboth an opportunity to organize his defense. A fast, which has been proclaimed as a result of a national crisis, is the occasion in which the nation searches out the sins that have caused the trouble. Similar cases are the incident of Achan (Joshua 7), and the judgment of the people of Mitzpah by Samuel (1 Sam. 7:6) ... Therefore, when Jezebel orders a fast to be proclaimed in the name of the king, and seats Naboth at the head of the assembly, and afterwards accuse him of cursing God and the king, it is clear that she has arranged a special procedure that facilitates a speedy conviction and immediate execution.

15 The Hebrew text uses the euphemism, "bless," meaning, "curse."

16 Note too the characterization of Jezebel as someone who knows and follows the biblical



Jezebel informs Ahab that all he has to do now is go to Naboth's vineyard and take possession of it. The property of Naboth, as a traitor who cursed the king, reverts to the king.<sup>17</sup>

The third exchange of note is that between the prophet Elijah and Ahab:

And the word of the Lord came to Elijah the Tishbite, saying, "Arise, go down to meet Ahab king of Israel, who is in Samaria. Behold, he is in the vineyard of Naboth, where he is gone down to possess it. And you shall speak to him, saying, 'Thus says the Lord, Have you murdered, and also taken possession?' And you shall speak to him, saying, 'Thus says the Lord, In the place where the dogs licked the blood of Naboth shall the dogs lick your blood, even yours.'" And Ahab said to Elijah, "Have you found me, O my enemy?" And he answered, "I have found you: because you have given yourself over to work evil in the eyes of the Lord. Behold I will bring evil upon you . . ."

We should take note of the harsh words of reproach addressed to Ahab, the first part of which are spoken by God and the second part presented as Elijah's words to Ahab. The narrator wishes to emphasize that the ethical message expressed in the rhetorical question—"Have you murdered and also taken possession?"—is being delivered by God Himself. This is not a matter of political enemies settling scores with one another, nor is it a personal dispute, as Ahab tries to describe it: "Have you found me, O my enemy?" Ahab seeks to minimize the message and turn it into an annoying argument between human rivals. However, the Bible emphasizes that Elijah is not the speaker here, but God.

God is not willing to accept the cruel deed carried out by Jezebel, who "hushed it up." Ahab knows Jezebel's methods and her worldview. Thus, when he accepted her promise, "I will give you the vineyard of Naboth the Jezreelite," he in effect became responsible for her deed. Indeed, the chapter concludes with Ahab's repentance and submission to the Lord's verdict and acceptance of the punishment, which will be deferred until the days of his son, Yoram. But the

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law that requires two witnesses: "according to two witnesses, or according to three witnesses shall the matter be confirmed" (Deut. 19:15).

17 See the commentary ad loc. by Rabbi David Kimhi (Radak): "One who curses God and [the] king is liable for death, and whoever becomes liable for execution by the kingdom, his property belongs to the king." R. Shlomo Yitzhaki (Rashi) notes that "some of our sages say that the property of those executed by the kingdom belongs to the king, and there are those who say that [Naboth] was the king's brother's son, and that [Ahab] killed him and his sons, making himself the heir."

indictment, “Have you murdered, and also taken possession?!” resounds over the centuries as an example of a corrupt government that cruelly exploits its power and murders an innocent man without pangs of conscience, merely for a plot of land.

Indeed, this story and that of Nathan’s rebuke of David for his sin with Bathsheba and murder of her husband Uriah (2 Samuel 11–12) are unparalleled as pillars of the democratic position that emphasizes the limits of government and insists on the right to express unfettered criticism of the government. Nothing surpasses this and similar stories as an expression of sensitivity to and concern for the rights of the ordinary citizen who is enslaved, exploited, and oppressed, and sometimes even murdered. The commentators who hold that the prophets of Israel, from the first to the last, fought for the rights of the weak and oppressed and did not see the Israelite religion as expressed exclusively in religious ritual, but also as an ethical doctrine, are correct.<sup>18</sup>

Nevertheless, if we would assert a biblical basis for the human rights discussion, we must admit that there are also verses that militate in precisely the opposite direction.

## 1.2. Is It indeed the Case that Every Biblical Verse Fits with Our Conception of Human Rights?

Three chapters before the story of Naboth’s vineyard we find the story of Elijah at Mt. Carmel (1 Kings 18). There, after the failure by the prophets of Baal and Elijah’s impressive miracle, he is not satisfied with the people’s cry of allegiance, “The Lord, He is the God; the Lord, He is the God.” Instead, he calls on them to seize the prophets of Baal and kill them with a cruelty that even the biblical narrator finds hard to digest, using the verb “slaughter,”<sup>19</sup> usually reserved for animals, to describe the mass killing:

And it came to pass at the time of the offering of the evening sacrifice, that Elijah the prophet came near, and said, “Lord God of Abraham, Isaac, and of Israel, let it be known this day that you are God in Israel, and that I am your servant, and that I have done all these things at your word. Hear me, O Lord, hear me, that this people may know that you are the Lord God, and that you have turned their heart back again.” Then the fire of the Lord fell, and

18 There is not enough space here to refer to all the verses in which the prophets of Israel cry out against moral injustice, so I will cite only a few representative examples: Amos 2:6; Micah 3:1–2; Isa. 1:7, 58:7; Jer. 7:3–15.

19 The Koren translation has “and [he] slew them” – 1 – וַיִּשְׁחָטוּ Kings 18:40.

consumed the burnt sacrifice, and the wood pile, and the stones, and the dust, and licked up the water that was in the trench. And when all the people saw it, they fell on their faces: and they said, “The Lord, He is the God; the Lord, He is the God.” And Elijah said to them, “Take the prophets of the Ba’al; let not one of them escape.” And they took them: and Elijah brought them down to the wadi Kishon, and slew them there. (1 Kings 18:36–40)

And, a few verses later: “And Ahab told Jezebel all that Elijah had done, and how he had killed all the prophets with the sword” (19:1).

What happened to the human rights of the 450 prophets of Baal? Does their support for idolatry justify killing them? It is reasonable to assume that they were brought up in this faith, which was the accepted culture of their environment. And even if we assume that they knowingly chose to abandon the God of Israel and worship Baal, ought we to kill our ideological opponents? This question is relevant not only to this episode; it is a much broader question of principle. As is well known, there are biblical injunctions that are not compatible with the recognition of “the Other” and respect for humans’ basic rights (such as the right to life and free speech), to say nothing of the preservation of their dignity.

One of the main difficulties of basing the human rights discourse on scriptural verses alone is that many biblical precepts fail to support human rights and do precisely the opposite, such as the injunctions to annihilate idol worshippers, eradicate Amalek, and wipe out the seven Canaanite nations; the Bible’s attitude toward homosexuals; and the prevalence of capital punishment in the Bible.

Uriel Simon opens his essay, “Does Tolerance Have Roots in the Bible?” with the following words: “The appropriate name for this essay is really ‘Tolerance has (almost) no roots in the Bible.’ But since I recoil from declaring this harsh truth in the title, I have chosen the format of a question.”<sup>20</sup> Simon goes on to list four characteristics of biblical faith “that essentially contradict the value of tolerance” and may even be opposed to the principle of human rights.

The first characteristic is *absolutism*: Divine revelation does not allow room for positions that are understood as deviations from its values, whence comes the Bible’s absolute negation of idolatry. The second characteristic is *isolation* from all the other cultures of the region. The third is *uniformity*—the pursuit of maximum homogeneity and the exclusion of exceptions. The fourth trait is *exclusivity*, meaning the Israelites excel in their wisdom and culture and have

20 Uriel Simon, *Seek Peace and Pursue It: Contemporary Questions in the Light of the Bible, the Bible in the Light of Contemporary Questions* (Tel Aviv: Yedioth Ahronoth and Sifrei Hemed, 2002), 249 [Hebrew].

nothing to learn from the neighboring peoples.<sup>21</sup> These characteristics of biblical faith strongly challenge the notion that the Bible as a whole can be included in the modern conceptual discourse of human rights.

As Simon rightly indicates, the Talmud softens the harsh stance of absolutism and isolationism. The precept to exterminate the nations of Canaan, “You shall save alive nothing that breathes” (Deut. 20:16),<sup>22</sup> underwent a dramatic change in the rabbinic period, when it was restricted to those who practice idolatry intentionally. Similarly, the demand for collective punishment undergoes a “softening with far-reaching consequences” as interpreted by the Sages “both in theory and in practice.”<sup>23</sup> Uniformity, too, is replaced by positions that may be termed “pluralistic.” The idea of homogeneity undergoes a revolutionary transformation in the thought of the Sages, who praise debate and see it as a value.<sup>24</sup>

But a close examination of the biblical text uncovers many positions that are unequivocal in their negation of “the nations” and rejection of “the Other” on their own terms. If we study the Bible without preconceptions, we find it hard to find any defense of the rights of the Canaanite slave, of women, of sinners or idolaters, and so on.

Even in the Talmud, in spite of the greater leniency, there are still halakhic concepts that contradict the most basic intuitions of human rights discourse, such as the attitude toward women, minors, the deaf, and those with mental disabilities. There is no need to expand on this matter here.

How, then, is it possible to deal with precepts such as those mentioned above, which are incompatible with the human rights discourse we wish to support? Do we have to ignore the many biblical foundations of an ethos that would legitimize the discourse of liberal human rights? On the other hand, is the price to be paid for giving up the biblical stratum of the underpinnings of that discourse too high?

Below I will outline three fundamental approaches to these questions. As mentioned, I will reject the first two approaches in favor of the third option,

21 See Avraham Melamed, *Myth of the Jewish Origins of Science and Philosophy* (Jerusalem: Magnes Press, 2010) [Hebrew], for a discussion of the myth that the Torah is the source of all wisdom and that the other nations learned wisdom from the people of Israel. (I would like to thank the late Yoske Achituv for drawing this book to my attention.)

22 See the example cited by Simon (*Seek Peace* [above n. 20], 258): “As [the Amora] Samuel said, Joshua sent three letters to the [inhabitants of the] Land of Israel before the Israelites entered the land: Anyone who wants to emigrate, let him so do; any who wishes to surrender, let him do so; any who wishes to wage war, let him wage war” (J *Shevi’it* 6:1).

23 Simon, *Seek Peace* (above n. 20), 259.

24 See Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse*, trans. Batya Stein (London and New York: Continuum, 2007), which deals with the centrality of the phenomenon of rabbinic debate and its significance for talmudic and post-talmudic discourse (especially chapter 4).

which I see as the only way to include the biblical layer without paying an excessive price, both from a religious perspective and from an ethical perspective. Furthermore, I will try to show that this third option is not only worthy from an ethical perspective, but that it also provides a reasonable grounding from a biblical perspective, and, in addition, is supported by both ancient and modern exegetical traditions.

## 2. Three Different Approaches to the Relationship between the Bible (and Religion in General) and Human Rights Discourse

### 2.1. Complete Separation between the Biblical Discourse (Religious by Definition) and the Human Rights Discourse

This approach solves the problem that we raised by totally severing the two languages—the religious and the social-ethical—from each other. It understands the biblical text in terms of its theological meaning only and is not willing to see it as a basis for secular ethical claims for the rights of the individual or the community. This approach rules out any attempt to ground the human rights discourse on biblical/religious foundations. It holds that there is no way to translate one “language game” (in Wittgenstein’s sense<sup>25</sup>) into another. This compartmentalization means that the domains do not overlap. With such a conceptual dichotomy, of course, one cannot ground the ethical discourse on the biblical discourse or criticize the religious discourse for its social and ethical insensitivity. The separation is absolute.

This absolute separation touches upon the question of the *source* of obligation to ethical norms: are they based on an imperative enunciated by human conscience or on obedience to the word of God? For example, a person who accepts the prohibition, “Do not steal,” does so not out of recognition of the other person’s right to his or her own property, but rather because of the knowledge that this is God’s command. Here we have a religious requirement that is also an ethical mandate, but the believer’s motivation to comply with it has a religious rather than ethical basis. In this conception, God’s demands can in principle deviate from ethical norms, as for example, in the Binding of Isaac where God tells Abraham to sacrifice his son.

This ideological purity has a clear advantage: it protects both the biblical-religious discourse and the ethical-secular discourse against superficiality and

25 For clarification of the concept and its use here see Gili Zivan, *Religion Without Illusions* (Jerusalem: Shalom Hartman Institute; Tel Aviv: HaKibbutz HaMeuchad, 2005), 39–40 [Hebrew].

keeps either from being assigned greater importance. The human rights discourse is built on secular and liberal foundations, whereas the religious discourse is focused entirely on the question of human worth in the eyes of God.

However, this separation also comes at a high cost:

1. Detaching the biblical text from the secular and civil experience of life makes it irrelevant to it.
2. Grounding the human rights discourse on liberal thought alone makes it shallower and prevents it from basing its arguments on the ancient ethical tradition.
3. And, chiefly, such an approach misrepresents the text itself. An approach that does not recognize the ethical underpinnings of the Bible distorts its very character. Placing the Bible on religious foundations alone, it ignores the many verses that mandate concern for the weak, the biblical stories like the one we began with, and the prophets' protest against religion that is composed of ritual alone. And, of course, it totally disregards the ethical injunctions. What place does it allow, for example, for Genesis chapter 18, in which Abraham demands that God look again and reconsider whether He has made a mistake in deciding to destroy Sodom. How can we understand Abraham's appeal on behalf of the people of Sodom—"Far be it from you to do after this manner, to slay the righteous with the wicked: and that the righteous should be as the wicked, far be it from you—Shall not the Judge of all the earth do right?" (Gen. 18:25)—on the basis of a conception that completely dissociates God's word and ethics? How can we understand the demand, reiterated throughout the Bible, "You shall not pervert the judgment of the stranger, or of the fatherless; nor take a widow's garment as a pledge" (Deut. 24:17)? How can we understand Jeremiah's cry: "Will you steal, murder, and commit adultery, and swear falsely . . . and come and stand before me in this house, which is called by my name, and say, 'We are delivered'; that you may do all these abominations? Is this house, which is called by my name, become a den of robbers in your eyes?" (Jer. 7:9–11)? Anyone who tries to depict the Bible without its ethical and social foundations distorts it.
4. In addition, in the talmudic and post-talmudic tradition, the Sages gave a central place to the ethical dimension of the biblical laws and adopted an exegetical method to negate the unethical interpretation of a verse and establish it on ethical foundations.<sup>26</sup> As Yeshayahu Leibowitz argued,<sup>27</sup> the notion of religious commands as divorced from any ethical

26 See the broad discussion of this tendency in Moshe Halbertal, *Interpretative Revolutions in the Making* (Jerusalem: Magnes Press, 1997), esp. 63–64, 185–186, 190–193 [Hebrew].

27 See, for example, Yeshayahu Leibowitz, *Judaism, the Jewish People and the State of Israel*

consideration is foreign to the entire Jewish interpretive tradition. This is a reading that distorts the biblical, talmudic, and halakhic tradition, which recognized and recognizes ethical values as valid considerations in halakhic discourse.<sup>28</sup>

In many of his writings, Yeshayahu Leibowitz came out against basing ethical discourse on the Bible and on religion in general; for him, it was the Binding of Isaac that was the paradigm of religious existence.<sup>29</sup> He saw the penetration of religious discourse by ethical considerations as a manifestation of human beings worshiping themselves, rather than worshiping God:

In this kind of religiosity [which introduces ethical considerations into religion – G.Z], the status of human beings in God’s presence (“You have separated human beings from the start and taught them to stand before you” [from the Ne’ilah service on Yom Kippur]”) is pushed aside before the status of human beings in their own world. In reality, one who holds this conception does not mean to worship God, but rather the worship of God is a means to fulfill the needs of the self (as an individual or as part of the collective); this conception also serves the self in that it absolves the person from having to think about taking a position regarding problems that derive from merely human values and not from the worship of God. This is the secularization of religion, turning it into an ethical method for perfecting human beings and human society. It views religion as a

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(Jerusalem: Schocken Publishers, 1975), 311–314 [Hebrew]. (Selections from this book were translated into English and published by Harvard in 1992: Cf. Yeshayahu Leibowitz, *Judaism, Human Values, and the Jewish State*, ed. Eliezer Goldman, trans. Eliezer Goldman, Yoram Navon, Zvi Jacobson, Gershon Levi, and Raphael Levy [Cambridge, MA: Harvard University Press, 1992], 17–18. However, the essay quoted here was not included in the English version, and so I have translated from the Hebrew edition.). For criticism of the divorce between ethics and religion in the thought of Leibowitz and his basing of Jewish law on the worship of God alone, see Eliezer Goldman, *Expositions and Inquiries: Jewish Thought in the Past and the Present*, ed. Dani Statman and Avi Sagi (Jerusalem: Magnes Press, 1997), 294–305 [Hebrew].

28 On the place of ethical and social considerations in the rendering of halakhic decisions, see for example, Menachem Elon, “Ethical Principles as Halakhic Norm,” *De’ot* 20 (1962): 62–67 [Hebrew], in which he shows how the principle, “its [the Torah’s] ways are ways of pleasantness,” becomes a decisive factor in halakhic discussions.

29 Yeshayahu Leibowitz, *Faith, History and Values* (Jerusalem: Akademon, 1982), 31–33, 57–60 [Hebrew].

way to realize human values, to which the atheist with a soul and a conscience also aspires. It turns religion into humanism.<sup>30</sup>

Later in the same essay, Leibowitz expresses himself more sharply and argues:

Perhaps ethics and religion are nothing but contradictions: ethics is an expression of seeing humanity as a value, and for that reason, it sees the stance regarding the human individual or regarding human society as the central problem of man. By contrast, religion is an expression of seeing humanity as “vanity” on his own terms and as having no greater value than the animals, and it sees value not in humanity itself, but rather in human standing in the presence of God.<sup>31</sup>

Although Leibowitz’s approach, which would isolate and purify the religious act from all foreign considerations, including ethical ones, is seductive in its resoluteness and clarity, it is incompatible with both traditional Jewish interpretations and the Bible itself. In the words of Eliezer Goldman:

It would be a mistake to conclude that this context [of serving the Creator] is the only relevant one for understanding or implementing a halakhic norm. There are norms and even whole branches of Jewish law that belong to other contexts as well. . . . If the Sages made a ruling because of “the repair of the world” [*Tikkun olam*] or “the decree of the Levites” or “the customer’s loss,” it means that the halakha belongs to different contexts that it wishes to correct. . . . If “the Torah had pity on the Jews’ money,” it means that a consideration belonging to an economic context has influenced the decision in the laws of grain offerings, the shofar, etc., and in the special way of dealing with cases of great loss, even in decisions related to matters of forbidden and permitted acts.<sup>32</sup>

This is not the place to broaden the discussion of the issue of religion and ethics, which has been dealt with by so many before me.<sup>33</sup> Still, to claim that there can be

30 See Leibowitz, *Judaism* (above n. 27), 312.

31 *Ibid.*, 313.

32 Goldman, *Expositions and Inquiries* (above n. 27), 305.

33 See Avi Sagi, *Judaism between Religion and Morality* (Tel Aviv: HaKibbutz HaMeuchad, 1998) (Hebrew). After a thorough study of the status of ethics in the Jewish tradition, Sagi concludes that in the Jewish tradition, from the Bible onwards, “God is not an arbitrary



no basis whatsoever in grounding human rights discourse in the Bible and to insist instead on defining the Bible only in a religious context is to distort the spirit of the Bible, of religion, and of Jewish law throughout its history. It also has severe and painful consequences for the character of the Jewish religion, on which I will expand in my conclusion.

## 2.2. Inclusion—Complete Identification of Religious/Biblical Language and Human Rights Discourse

This approach stands in total contrast to the dichotomous approach, in that it reduces the values of monotheism to those of human rights. I believe that this approach too, suffers from a number of severe liabilities.

First, it deprives religion of its independence and turns it into a human ethical teaching in which there is no place for the Divine command. The Bible is only the superfluous shell of a vanished world that formerly gave expression to ethical ideas, such as human rights, by means of religious language and divine precepts. Today however, we can dispense with such language and establish ethical discourse on purely humanistic foundations. In this approach, religion completely loses its autonomy as a perspective reflecting a relationship with an absolute, transcendent God, who does not depend on ethical rationality.

Second, not only does it leave no place for the notion of a God who requires certain behaviors, this reduction to secular ethics contradicts the plain meaning of the text and the entire history of biblical interpretation. Biblical commentators have always understood the Bible as the word of God and His prophets; when, not infrequently, they are confronted by a command that escapes human ethical rationality, they acknowledge the situation. This orientation can be found, for example, in a midrash on the precept of the Red Heifer. Commenting on the verse, “This is an ordinance of the Torah” (Num. 19:2), Rashi draws on the midrash:<sup>34</sup> “Because Satan and the nations of the world taunt Israel, saying, ‘What is this command and what reason is there for it?’ [Scripture] uses the term *huqqat* for it, implying that it is My decree and you have no right to criticize it.” So too with regard to the precepts of *kil’ayim* [mixed kinds] and forbidden foods, Rashi writes:

Rabbi Eleazar ben Azariah says, “Whence do we know that one should not say, ‘My soul loathes pork’ or ‘I have no desire to wear

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legislator, an all-powerful sovereign who compels his subjects in obedience for its own sake ... God and human beings are partners in an ethical community, both subject to morality in equal measure” (14).

34 See *Tanhuma*, *Huqqat* 6; B *Yoma* 67b.

clothes that combine wool and linen,’ but one should say, ‘I do want these things, but what can I do? My Father in Heaven has decreed that I not partake of them’; as Scripture says, ‘And I have separated you from the nations to belong to Me,’ meaning that your separations from them should be for my sake, so that one should refrain from transgression and accept upon oneself the yoke of the kingdom of Heaven.”<sup>35</sup>

There is no doubt that, alongside the demands that rest on an ethical basis, there is another clear orientation in Jewish tradition, from the Bible to our own day, that sees the fulfillment of religious precepts as a sign of the believer’s obedience and acceptance of “the yoke of the commandments.” Furthermore, many commandments do not belong to the category of ethics, from putting on phylacteries to reciting the *Shema*, and thus are not subject to ethical rationality. This means that grounding the Bible solely on an ethical-social foundation distorts the spirit of the Bible itself.<sup>36</sup>

Finally, we must add the educational and political consideration. This reductionist position ultimately destroys religious language entirely and wrecks the crucial balance between the two languages, the ethical and the religious. Furthermore, it also sacrifices the depth and force that the biblical-religious language can add to the modern human rights discourse. At the beginning of this essay, I mentioned the benefits (for both secular and religious people) of using the Bible as the basis for a secular human rights discourse. But if we adopt an approach that removes the religious dimension from the biblical text—in other words, secularize the Bible—not only do we misrepresent the biblical text’s complex character, but we also alienate the large community of believers (religious and traditional) who are not interested in such a strict dichotomy between their religious life and their civil-social life and who would be happy to strengthen modern democratic values and the secular discourse of human rights with elements of their religious tradition.

To sum up, placing religious discourse on ethical foundations alone distorts the Bible and its character. If the first approach undermines the ethical foundations of the Bible, the second approach tries to uproot religious precepts that are not

35 Rashi on Lev. 20:26: “And you shall be holy unto me, for I the Lord am holy and I shall separate you from the nations to belong to me.”

36 It may be more accurate to say that this is a characteristic of all religions, for example as presented by Rudolf Otto, *The Idea of the Holy*, trans. John W. Harvey (London and New York: Oxford University Press, 1923). On the Bible, see there, “The Numinous in the Old Testament,” 72–81.

compatible with the discourse of human rights. As such, it distorts the character of the Bible, which is not only the embodiment of humanistic imperatives, but also includes divine demands that are not always given to ethical rationalization. Not only are these dichotomous positions (everything is religion or everything is ethics) out of tune with the character of Scripture; they are also at variance with the natural tendency of most human beings to achieve a maximum integration between the different worlds of discourse and value systems in their lives—in our case, between the worlds of religious and secular-civic life. I will expand on this point in the conclusion of my essay.

### 2.3. Grounding Human Rights Discourse in the Bible, with an Awareness of the Selection of Texts and their Interpretation

This approach—which I will recommend—makes use of the important contribution that biblical foundations can make to the human rights discourse, but at the same time does not ignore the difficulties inherent in adopting biblical theological discourse as a basis for a secular discourse about human rights.

This conception recognizes the religious foundation of the biblical text, but makes a conscious decision to transfer it (in part) to the domain of human rights discourse, fully aware of the costs of the move and acknowledging its incompleteness and, at times, even inconsistency. Such a conception recognizes the fact that human beings build their world of values from multiple fields of discourse, and that setting the religious discourse on a single foundation fits neither the Bible nor the religious experience of the majority of believers.

Furthermore, taking the text on its own terms certainly highlights the predominance of the human demand for ethics. Alongside the relatively few precepts that we have trouble “digesting” because of our ethical conceptions, there are hundreds of verses that commend social justice, demand that we be diligent in protecting the rights of our fellow human beings, and require believers to be concerned about the weak and the persecuted before they come to worship God. There are so many of these that I cannot list them, but anyone who looks honestly at the Bible must recognize the moral ethos found throughout. These biblical demands, like prophets’ protests on behalf of the outcasts of society, have inspired many of the humanistic demands in the modern human rights discourse.<sup>37</sup>

37 Here I will mention only one of the many in rulings by Israeli courts that quote: “Have you murdered and also taken possession?!” The appellant sought to adopt his baby daughter into his childless family, taking her away from the biological mother, whom he had deceived into having relations with him. Justice Cheshin rejected the appeal and based his decision on this dictum (Supreme Court of Israel, Civil Appeal 3798/94, *Anonymous Male v. Anonymous Female*, October 3, 1996). These are his words:

If we look at the biblical corpus as a whole, verses that do not harmonize with our ethical conceptions are relatively few in number. However, we must not ignore them if we wish to use the Bible as the basis for modern discourse of human rights.

In light of all this, I would argue that only a self-conscious interpretation that acknowledges the partial and complex transfer of contents from religious discourse to secular human rights discourse, and vice-versa, can cope with the difficulties raised by the second approach but also benefit from the mutual enrichment of the religious and secular language games, which the first approach loses.

How, then, is it possible to base human rights discourse on the foundations of the Bible (and of religion in general), without ignoring those biblical commands and stories that are incompatible with our ethical concepts?

I wish to suggest an answer to this question with reference to two scholars: one of Bible and the other of Talmud, who see themselves as equally committed to the discourse of human rights and the ancient sources.

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The sense of the moral injustice that would be done to the young mother, to her family, to the society we live in, and to ourselves, were the petitioner to be given custody of his child, is strong. What is more, were he awarded of his child—despite the young mother’s despairing cries—injustice would benefit from its own evil, to our shame and to the shame of the society we live in. “Have you murdered and also taken possession ?!”—thus did God instruct Elijah the Tishbite to cry out against Ahab in his presence, regarding the killing of Naboth the Jezreelite. Indeed Elijah did cry out, and so too was the punishment of Ahab and his wife Jezebel apportioned. Here Justice Cheshin quotes the biblical story at length and concludes that the case of Naboth has become the basis of morality and justice:

A man must never murder and also take legal possession of his victim’s property. *And this ethical directive has long been accepted as an integral part of the legal corpus.* And things were so already in the times of Adam and Eve. *Cain murdered Abel. However, even when he was left alone by himself, Cain did not receive the blessing that God gave to Abel. So too in the story of David and Bathsheba and Uriah the Hittite . . .* Just as the King of Israel did not acquire his child, so too must this petitioner not take possession of his child. “Have you murdered and also taken possession?!” This is not done in our region, that a man murders and then inherits from his victim, and we will not accept—as a matter of principle—that a man commits an injustice and profits from his evil. (Emphasis added)

At the end of his opinion, Justice Cheshin again refers to the biblical basis of his decision: “Our ancestors told us these ancient stories in our childhood, and in time we read them in our book, the Bible. We have grounded ourselves on them. They are our heritage. Their morality is our morality, and they are a pillar of fire and a pillar of cloud that show us the way forward.” (I would like to thank Dr. Haim Shapira for calling this ruling to my attention.)

Uriel Simon is a Bible scholar who openly acknowledges the bias of his approach in the foreword to his book, *Seek Peace and Pursue It*: “The first purpose of this book is to challenge the strong grip of militant religiosity on the public mind by posing an alternative conception, simultaneously authentic and persuasive, of the values of the faith of Israel as they arise from the Bible.”<sup>38</sup>

What does he do when he encounters verses that do not coincide with his religious and ethical ideas? Simon suggests an approach that is both historical and evolving:

To the best of my understanding and knowledge, we have no choice but to adopt a historical and evolutionary approach. Only such an approach has the power to rescue us from the problem created by the fact that the values of the Bible in this area on the one hand are hallowed for us, but on the other hand, are not suited to our religious consciousness. What was necessary and justified in the initial era of the establishment of monotheism in a blatantly polytheistic world, what was necessary and justified in the era of Israel’s youth, when the Torah was still not firmly established in its midst and the nation had not yet overcome the impulse towards idolatry (something that was achieved only after the return from Babylonian exile), is not required and is not justified in a world that is essentially monotheistic-agnostic, at the end of the blood-soaked twentieth century, in a period in which intolerance is identified with evil Fascist and Communist regimes. Moreover, today pluralism is almost a stable psychological and sociological fact. The same is true regarding individualism (which in any event, did not exist in the biblical period) and the openness to the wisdom of the nations. These qualities are, practically speaking, an existential necessity for the State of Israel and an intellectual necessity for most of its citizens (as in the times of Maimonides and those who have continued his approach).<sup>39</sup>

As for whether such a position is legitimate from a religious perspective, Simon responds as follows:

However, is there religious legitimacy to a historical-evolutionary conception such as this? As is well known, most religious Jews,

38 Simon, *Seek Peace* (above n. 20), 15.

39 Ibid., 259–260.

and even more so the ultra-Orthodox, are very afraid of the concept of “development,” which seems to undermine the absolute nature of the divine truth and its eternal nature. But the eternal nature of the word of God can be understood in two different ways: as static eternity, which never changes (and this is the typical hallmark of the fundamentalist conception), or as dynamic eternity, which means that God’s word retains its absolute kernel while adapting itself to the changing needs of every generation (such as the way that the enactment of the *prozbul* made it possible to suspend the obligation to cancel debts in the sabbatical year in order to fulfill the essence of the law—giving loans to the poor).<sup>40</sup>

As mentioned, Simon does not write only as a biblical scholar, but also as someone who observes the commandments and wishes to see in the Bible, which he considers to be holy, a source of inspiration for his ethical humanistic worldview. He is not prepared to give up on the biblical foundation, but admits that parts of it “are not suited to our [modern] religious consciousness.” Simon chooses to follow the path that the Sages of the Mishnah and the Talmud walked before him and endeavors to explain the “unethical” commandments against the background of the formative period of monotheism; but now that “the impulse for idolatry has ceased” (BT *Yoma* 69b), it is possible to modify the literal interpretation of the precept and fulfill only its essential kernel.

The Talmud scholar Daniel Boyarin carries out a similar move in relation to talmudic texts.<sup>41</sup> He sees parts of the Talmud as a source of inspiration for social justice, in particular when it comes to providing equal opportunities for women, but is not prepared to “sanctify” every word of the Talmud about women. Those dicta that he cannot fit to his worldview he tries to understand against the historical background. Like Simon, Boyarin feels bound by his ethical principles, which have been influenced by modern and post-modern cultural developments; but neither is he willing to give up on the ancient Jewish texts as a basis for his

40 Ibid., 260.

41 See Daniel Boyarin, “Husbands, Wives, and Sexual Discourse: The Talmud Reads Foucault,” *Theory and Criticism* 4 (1993): 161–178 [Hebrew]. In this essay, which was published only in Hebrew, Boyarin analyzes his hermeneutic conception briefly and clearly and therefore I have preferred to quote from it and not from the book, *Carnal Israel: Reading Sex in Talmudic Culture* (Berkeley: University of California Press, 1993), which was published in English just after the essay appeared in Hebrew. This book includes a chapter entitled, “Husbands, Wives and Sexual Discourse” (ch. 4), which discusses the same talmudic passages that the Hebrew essay does, but without the summarization of the author’s hermeneutic conception, which is important to our discussion here.

ethical position. He formulates this dialectical position clearly: “What benefit can come to a troubled world from the study of ancient texts? I am interested in the ethical responsibility we have towards the dead, towards those who have created the texts and who shaped us for good and for ill, as we understand this today, and also in our ethical responsibility towards the living, today and in the future, that is, the responsibility to use the text to lead human beings to richer and freer lives.”<sup>42</sup>

If so, Boyarin asks, how is it possible to grasp the rope from both ends? And he answers: “To my mind, the question that stands before us is as follows: How is it possible to criticize a past culture, and especially that culture that I identify with? In other words, how can I defend my own culture without sinning against ‘the historical truth,’ on the one hand, and against my ethical responsibility to change the forms of relationship between the sexes in this culture?”<sup>43</sup>

To this question Boyarin responds frankly in a sharp and clear formulation that may serve as a basis for everyone who wants to fulfill a responsibility to both worlds—the traditional and the contemporary. Because of its importance, I quote the passage at length:

I assume that we do not have the ability to change the past as it actually existed. But changes in the way we understand the past are likely to change the present and the future. Someone who does not experience the past as something uncomfortable that is worth being rid of (as many indeed do experience it), will view the developmental position as an exclusively negative conception of the past and will feel resentment towards it as a useless position that weakens the power to change. For example, someone who finds in the past only the hatred of women; reproduces hatred of women; someone who finds only the absence of feminine power, autonomy, and creativity empowers the passivity of woman and her position as victim. By contrast, the attempt to rescue from the past those voices that were opposed to the dominant androcentrism is likely to help to lift us onto a path of empowerment in anticipation of a change, and together with this to anchor this path in the rich ground of that very past. . . . Therefore, cultural criticism involves, in my opinion, the ability to understand on the basis of the context and historical point of view the conventions of “the other” from the past—who is really us—in a manner in which the culture being studied can serve us well in our coming to understand the conventions of our own society:

42 Ibid., 161.

43 Ibid.

such study will provide the richness that derives from belonging to the past, without limiting us in our attempts to shape conventions that are freer and more equal in the present.<sup>44</sup>

For this complex move of dual responsibility to the past and to the present, to the dead and to the living, Boyarin enlists the insight that post-modernism has given us when we come to speak about “the Other.” He is careful of arrogance toward “the Others,” who live in other times and cultures than his own, and tries to listen to their voice with empathy and understanding and an awareness of the changes that have taken place in human ideas since the time when those others spoke.

I wish to term this kind of cultural criticism “generous criticism.” Criticism such as this tries to discern the patterns of behavior of the other from the point of view of the accepted conventions of the time and place and their needs, without fixing the other as an object and without condescending towards him or her in order to judge him/her in his/her time and place . . . I intend a kind of analysis that is not apologetic and yet at the same time improves our understanding of the needs and motivations that impel a certain group of human beings to make the cultural decisions that they do. This contextual research is capable of allowing us at one and the same time to connect ourselves to the past without being bound to it or trapped by it.<sup>45</sup>

In traditional language, this kind of historical reading appropriate to the “accepted conventions of the time and place” is expressed as “the Torah spoke in the language of human beings.” That is, the precept needs to be adapted to people who live in the specific time and place and we should decipher it in the context of their cultural world. Boyarin is careful to avoid both arrogance toward the past and apologetics<sup>46</sup> about ancient and hallowed texts. Not only that, but he sets us a new challenge: the challenge to search for and find marginal voices in Jewish tradition (biblical or post-biblical) that are suited to our ethical understanding and to turn these peripheral voices into central voices: “The interpretation that research like this proposes is historicizing genealogy that seeks to discover *other voices in the*

44 Ibid., 162–161.

45 Ibid., 162.

46 As Boyarin puts it, “Three things turn criticism into apology: a positivist approach, a tendency to preach, and an attempt to create a sense of victory of one culture over another culture” (ibid., 163).



*lap of the past*, dissenting and critical strengths that were a part of the discussion and the [canonical] texts. This genealogy is likely to provide a powerful channel to identify with our ancestors and yet preserve the ability to disagree about that part of their behavioral world that we must reject in order ‘to further our common project’—a partnership, that is how I wish to understand this, a project common to us and to them.”<sup>47</sup>

Let us return to our issue and ask if it is possible to base human rights discourse on the Bible, which includes verses that are at odds with our notions of human rights.

If we adopt the approach of Simon and Boyarin, we can respond to this question in the affirmative: for someone who identifies with the ancient culture and sees the Bible as an object for identification and belonging and perhaps even a holy text, the need to find an echo of our modern and liberal conceptions in it is legitimate and crucial. We should emphasize the sources that support the modern ethical discourse of human rights, illuminate and use them as we did at the start of this essay, in connection with the story of Naboth’s vineyard. On the other hand, we should explain the texts that contradict our ethical values against the background of “the accepted conventions of the time and place and their needs,” as Boyarin put it. We should not cover up these writings and we should not force them into the ethical conceptions of modern readers. We should acknowledge that in our culture, too, there are ideas like these and that our role is to explain them in their context and not to see them as voices that bind us or constrain our work for social justice and human rights. Furthermore, we should also bring voices that were marginal in their time to the center of our own discussion, if they have the ability to strengthen our efforts on behalf of a better world.

We also must be aware that sometimes we are using biblical verses that were written from a monotheistic theological perspective and are knowingly using them to strengthen a liberal secular perspective. Examples are equality before the law and the separation of powers, which in the Bible derive from a clearly theological conception, from the word of God who is the sole sovereign, whereas in modern democracy the principles are founded on humanistic rather than theological values.

The conscious self-criticism of the modern interpreter does not allow room for the illusion that our voice is the authentic voice of the text. However, it allows us to continue in the path of the homilists, to search among the treasures of the past, which is precious (or if you prefer, holy) to us and to choose (consciously!) those voices found in the Bible that coincide with our ethical, social, and religious values.

In this case, we remain faithful to the spirit of the Bible. As I have already indicated, anyone with a strong education in biblical literature must acknowledge

47 Ibid. (emphasis added).

the centrality of the ethical commandments and the important place that the Bible gives to the struggle for justice—for example, Abraham (Gen. 18:20–33) and Moses (Exod. 32:7–14), who argue with God about Divine decisions that seem unethical or unjust in their eyes—and to the concern for the weak in society (that is, in the Pentateuch, in the books of Samuel and Kings, in the prophecies of Isaiah, Micah, Amos, Jeremiah, and others). The nature of the Bible and of its rabbinic interpretations throughout the generations obligates us to protest against precepts that are not ethical, following the lead of the Babylonian Talmud (*Yoma* 69b): “Since they knew that the Holy One blessed be He is true, therefore they would not ascribe false things to him.”

That is, the biblical tradition, and in particular its talmudic interpretation, encourages us to criticize commands we see as immoral and to explain them in a way that brings them into line with our ethical sensibilities. This reading of our sources is not new, as I have noted. Much has been written about the Sages’ creative methods of interpretation.

We learn from the Sages to supply questions that have not been asked, to criticize divine commands, and not to keep silent when we identify injustice in Holy Samuel conveyed to Saul, “Now go and smite Amalek, and utterly destroy all that they have, and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass” (1 Sam.15:3), they place an ethical question in Saul’s mouth:

“And he strove in the valley” (v. 5). R. Mani said: “Because of what happens ‘in the valley’: When the Holy One, blessed be He, said to Saul: ‘Now go and smite Amalek,’ he said: ‘If on account of one person the Torah said: “Perform the ceremony of the heifer whose neck is to be broken” [Deut. 21:1–9], how much more [ought consideration to be given] to all these persons! And if human beings sinned, what has the cattle committed? And if the adults have sinned, what have the children done?’” (BT *Yoma* 22b).

The question, of course, is what are the limits of interpretation? Should we allow the claim of the theoreticians of deconstructionist hermeneutics that no text obligates us and all is interpretation? Although this is not the place to discuss this issue,<sup>48</sup> I cannot ignore it completely, so I will indicate briefly the theoretical framework that suits the interpretation of the talmudic sages and those who continued their method, which I commend to our contemporaries as well.

48 See Zivan, *Religion without Illusions* (above n. 25), 238–257, which discusses this issue at length.

It seems to me that traditional exegesis, including the examples we have been dealing with, more than being close to the approach of radical deconstructionism, reflect a hermeneutic consciousness that is close to the theories of the kind that Gadamer proposes.<sup>49</sup> Gadamer dismisses the two opposing claims of extremist hermeneutics: (1) the claim that the role of the reader is to discover the author's intention (Schleiermacher);<sup>50</sup> and (2) the radical idea that sees the reader as the exclusive creator of the text (Derrida). Gadamer argues that readers understand the text on the basis of their own concepts, but that the text is not erased completely. This position does not ignore the place of the text and the interpretive traditions that accompany it, just as it does not ignore the role of the interpreter, who also stands within a specific exegetical tradition through which he reads the text. The meaning of a text is therefore created from "the merging of horizons," those of the world of the text and the world of the tradition and culture that the text represents.

I wish to identify with a number of researchers, such as Halbertal,<sup>51</sup> Sagi,<sup>52</sup> and Jaffee,<sup>53</sup> who have understood the usefulness of Gadamer's hermeneutics for understanding the relationship between the tradition and its interpretation. Since it is not possible to encompass the full complexity of Gadamer's hermeneutics in a few sentences, I would like to indicate just a few principles drawn from his teaching, which, it seems to me, can enlighten and clarify the interpretive process I am proposing.

Gadamer defines the act of interpretation as a creative act that derives from "the merging of the horizons" of the author and the reader. That is, our understanding of the text is never a return to the author's original intention. "Understanding"—Gadamer claims—"is always interpretation."<sup>54</sup> In order to understand the meaning of the text, we must interpret it, translate it into our language. Understanding always begins with a previous understanding, which is itself a product of the particular tradition in which the interpreter lives and which shapes his prejudices.

49 Hans-Georg Gadamer, *Truth and Method*, ed., trans. Joel Weinsheimer and Donald G. Marshall, 2nd rev. (New York: Crossroad, 1989).

50 Zeev Levi, *Hermeneutica* (Tel Aviv: Sifriat HaPoalim and HaKibbutz HaMeuchad, 1986), 87–88 [Hebrew].

51 Halbertal, *Interpretative Revolutions* (above n. 26), 40, 193–203.

52 Avi Sagi, *Challenge: Returning to Tradition* (Tel Aviv: HaKibbutz HaMeuchad, 2003), ch. 1, esp. 18–19 [Hebrew].

53 Martin S. Jaffee, "Halakhah as Primordial Tradition: A Gadamerian Dialogue with Early Rabbinic Memory and Jurisprudence," in *Interpreting Judaism in a Postmodern Age*, ed. Steven Kepnes (New York: New York University Press, 1996), 85–94.

54 Gadamer, *Truth and Method* (above n. 49), 269–274.

Precisely on this point, Gadamer opposed the Enlightenment, which sought to free human beings from the chains of tradition and prejudice.<sup>55</sup> That is, Gadamer would say, not only is it impossible to free oneself from the tradition and from the prejudices that it dictates, but without the literary, religious, historical, legal, scientific, and other traditions it would not be possible to begin to understand a text in any of these fields. Not only is there no need—and it is impossible in any event—to be freed from a tradition’s prejudices, as they thought in the period of the Enlightenment; if the reader has no prejudices (in the sense of preconceptions) in relation to the text, it is meaningless for him. The text is supposed to touch upon questions that are relevant to the reader. “Understanding begins . . . when something addresses us”—says Gadamer—“this is the hermeneutic precondition.”<sup>56</sup> We cannot read the text in an “objective” way, one that is “pure,” from within the conceptual world of the writer. The interpreter always comes to the text laden with a specific cultural cargo of values and knowledge, a content that is shaped by traditional and cultural horizons. In our case, we approach the text with an ethical sensitivity that the Jewish tradition has formed in us, together with the secular humanistic tradition.

Yet acknowledgement of the reader’s horizons does not mean the absolute cancellation of the text being read, as deconstructionists believe. Interpreters cannot impose their world on the text without being self-critical, since they act within a traditional interpretive framework that determines criteria for the acceptance or rejection of interpretations. Indeed, every interpretation of a traditional text creates something new, an insight that results from the encounter between the reader and the text. However, this interpretation, too, is influenced by the tradition that has shaped our antecedent understandings. This is the “hermeneutic circle,” according to Gadamer. The new interpretation, which expresses the “merging of horizons” of the interpreter and the text, incorporates the chain of traditional interpretations that shaped the interpreter’s horizons: “We always stand within a tradition.”<sup>57</sup> In other words, according to Gadamer, the interpretive move from the present to the past is woven into the founding move from the past to the present, because the interpreter’s present (from which he observes the past) is also shaped by the past.

If we now return to examine the traditional ethical interpretation, as maintained by Boyarin and Simon, of biblical injunctions that do not fit our ethical conceptions, we can say that we do indeed read the traditional texts with the eyes of contemporary interpreters, holding modern and post-modern conceptions, on the basis of a sensitivity to the liberal human rights discourse, but do so within

55 Ibid.

56 Ibid., 266.

57 Ibid., 250.

a world of tradition that itself establishes new readings of canonical texts. This interpretation, even in its most radical form, does not deviate from the dialogue that founded the tradition: the unending dialogue between the horizons of the interpreter in the present and the horizons of the traditional text.

To summarize: This approach, which harmonizes the classical methods of homiletic interpretation in the Jewish tradition, conceives of the Torah text as an open, dynamic, and self-regenerating text. The sacred text is understood to carry within itself multiple interpretive possibilities whose emergence depends upon the dynamic meeting between the interpreter and the text. As Hartman puts it: “Religious language is dependent upon context . . . You can continue the religious language only if you give it content that reflects your world . . . content that is born out of the reality within which [the interpreter] lives.”<sup>58</sup>

### 3. Personal Reflections in Place of a Conclusion

Why, then, do I believe it necessary to adopt the third approach, complex and dialectic, which would ground human rights discourse in the Bible and post-biblical Jewish sources as well?

I have hinted above that not only do the dichotomous approaches distort the Jewish tradition down through the generations, they also have two troubling socio-political weaknesses.

The first weakness is that it forces believers to live in self-contradiction. They live in a perpetual disconnection of their different identities. Their religiosity does not touch their lives as active citizens who are concerned with the trampling of human rights in their surroundings; their ethical sensitivity is not connected to the many scriptural verses and Jewish laws that speak about preserving the rights of the weaker elements of society. They live with an almost impossible internal rift—impossible because, as noted, human beings do not live with personalities split between their religious, professional, and ethical worlds. Goldman expresses this well when he argues against Leibowitz’s attempt at compartmentalization.<sup>59</sup> Goldman holds that it is impossible to understand Leibowitz’s religious conception without an awareness of his scientific world and that the forms of thought and values in one area influence his positions in another area: “Cultures are not hermetically closed systems. One culture is fertilized by another . . . Only the relative openness of this culture towards another, an

58 David Hartman, “The God of the Congregation of Israel,” in *Questions about God: Dialogues*, ed. Yizhar Has and Eleazar Strum (Ohr-Yehuda: Sifriat Shorashim and Hed Artzi, 1998), 17–18 [Hebrew].

59 Eliezer Goldman, quoted in Zivan, *Religion Without Illusions* (above n. 25), 299–301.

openness to the inner nuances of each one of them, makes possible a coherent multicultural personality.”<sup>60</sup>

The second weakness, more severe and more troubling, is the severing of religious discourse from ethical discourse. Such a separation between ethical and religious discourse is liable to have cruel results, because the critical ethical faculty that has preserved Judaism for thousands of years from simplistic and extremist fundamentalism (as in the classic example of “an eye for an eye”) disappears in that case (the first approach). In other words: religion that functions in a changing reality, without a self-critical ethical faculty, is liable to destroy itself (and, as noted, to distort its own tradition). On the other hand, ethical teachings that are not rooted in the culture in which they operate are liable to be barren and to lack the energy to realize themselves.

Pinchas Schiffman complains about the danger of the positions presented by the first and second approaches in his penetrating criticism of the dichotomous discourse (religion/ethics) in Israeli society. In particular, he directs his criticisms against the move that Leibowitz makes to establish a sharp separation between religion and ethics, in which he unwittingly acts against his own ethical doctrine.<sup>61</sup> I cannot review all of Schiffman’s important arguments here. But his frank concern about turning the Jewish religion into an amoral language, on the one hand, and his fear of the irrelevance of Jewish religion for ethical discourse, on the other, are very important to this essay and to my criticism expressed of the first approach, which would totally dis sever the ethical and the religious languages:

Although Leibowitz himself uses ethical considerations when dealing with halakhic questions, . . . the simplistic and decisive conclusion continues to appear as a result of his writings: since ethics is an atheistic category, a religious person cannot take into consideration ethical ideas that are liable to undermine the commitment to the meticulous observance of Torah and commandments. In my view, Leibowitz has thus contributed his modest part to an extremely negative educational and spiritual phenomenon, namely, *the evasion by religious consciousness, in the eyes of the public and of young people, of ethical considerations, and the weakening of moral inhibitions in actions that are accepted as religious obligations.*

60 Ibid., 299.

61 See Pinchas Schiffman, *One Language and Common Words* (Jerusalem: Keter, 2012), 37–65.

The fortified wall that Leibowitz has erected between religion and ethics is intended of course to achieve the opposite—it seeks to strengthen religious and ethical consciousness . . . [but] the attempt to remove “ethics” from Judaism is liable to undermine both ethics—by denying its universal character—and Judaism—by denying its religious meaning.”<sup>62</sup>

The Kantian ethical conception adopted by Leibowitz—that is, “the ethical quality of a deed is determined by the intention of the actor: if it is for the sake of human beings, it is ethical, and if it is for the sake of Heaven, it is religious”<sup>63</sup>—and Leibowitz’s particular conception of religion, which emphasizes only the service of God “for its own sake” (in contrast to the tradition of the Sages, which also recognizes the religious value of commandments that are performed “not for their own sake”)—bring Leibowitz “to elevate the artificial barrier that he has erected between religion and ethics and to remove ethical considerations from religious consciousness. Religion and ethics are made foreign to one another.”<sup>64</sup>

There is no better time than the present to warn of the dangers inherent in detaching religion from ethics. Israeli society is exposed to ever-stronger unethical voices in the religious sectors of society (such as the “price tag,” the book *The Law of the King*, the refusal to rent apartments to Arabs in Safed, the exclusion of women, rabbinic support for President Katsav, etc.). This should be enough to warn us of the danger that lies in detaching the discussion of human rights from the Bible, the Talmud, and the rest of the spiritual treasures of the classical Jewish library.

One piece of good news comes from the restoration of prophetic discourse to those struggling for social justice, as was evident in the summer of 2011. This restoration brought “the return of the echoes of prophetic content within the religious world,” says Rabbi Yuval Cherlow. This is good news because prophecy does not defer to anyone. It demands justice and ethics also from the great and powerful in Israel, and it severely criticizes them when they do not walk in its path; it grants special status to matters between a man and his fellow, and these are not conceived of as a flight from the service of God, rather they are the essence of the service of God; it elevates the voices of those silenced on the margins of the society, and does not let society ignore them; . . . it does not permit behavior that contradicts ethics and justice.<sup>65</sup>

62 Ibid., 47–48 (emphasis added).

63 Ibid., 48.

64 Ibid., 49.

65 Cherlow, “The Use of the Prophets” (above n. 3), 11–12.

For me, as a religiously observant Israeli Jewish woman, basing the discourse of rights and social justice on the foundations of Jewish culture forms a deep bond to the different cultural systems to which I feel committed and by which I shape my life. Disconnection from either is liable to be destructive to both.

If I began my essay by asking whether it is worthwhile to base the secular discourse of human rights on the Bible (or to be more precise, also on the Bible), I conclude it with a vehement exclamation point: Yes, it is appropriate and essential to do so!





## Part Three

# Religion and Human Rights on the Ground



# Religious Discrimination in the European Union and Western Democracies, 1990–2008

Jonathan Fox and Yasemin Akbaba

## Abstract

This study focuses on exploring the variation in the treatment of religious minorities in the West using a special version of the Religion and State Minorities round 2 (RAS2-M) dataset. The extent and causes of religious discrimination against 113 religious minorities in 36 democracies in the European Union (EU) and the West from 1990 to 2008 are analyzed in three stages. First, we examine the mean levels of religious discrimination on a yearly basis. Second, we inspect the extent of each of the 29 specific categories of religious discrimination. Finally, we look at the causes of religious discrimination, using OLS (ordinary least squares) multiple regressions for 1990, 1996, 2002, and 2008 in order to assess whether the relationships found in the bivariate analysis are present and consistent over time. The analysis compares theories related to the securitization of Islam in the West and the defense of culture argument. We find that Muslim and Christian minorities suffer from the highest levels of discrimination in the EU and Western democracies. Not surprisingly, states with high levels of religious legislation—indicating that they strongly support religion—are also associated with high levels of religious discrimination. The findings demonstrate that both theories explain aspects of the changes over time in religious discrimination in the EU and Western Democracies.

## 1. Introduction

Minority groups targeted for discrimination are of “greatest concern in international politics.”<sup>1</sup> A state that discriminates against minorities creates a biased and

1 Ted R. Gurr and Barbara Harff, *Ethnic Conflict in World Politics* (Boulder: Westview Press, 1994), 5.

unfair environment for groups. In 1990, around 80% of the politicized ethnic groups suffered from either contemporary or historical economic and/or political discrimination.<sup>2</sup> Anecdotal evidence<sup>3</sup> and the studies based on the Minorities at Risk dataset<sup>4</sup> show that states engage in different levels of discrimination against different minorities.

Previous cross-national studies compare how individual minorities are treated—as opposed to studies that have a single “discrimination,” “freedom,” “human rights” score for each state<sup>5</sup>—or focus mostly on ethnic conflict.<sup>6</sup> This study examines the status of religious minorities in Western democracies, asking whether some minorities are treated differently from others, and, if so, what factors influence this differential treatment. We find that differential treatment does exist and assess the roles of the securitization and defense of culture arguments on religious discrimination against religious minorities in 36 democracies in the European Union (EU) and the West from 1990 to 2008.

Much of the existing literature on the topic focuses on Islam, and our findings confirm that Muslims suffer from disproportional levels of religious discrimination in Western democracies. Islam is the fastest-growing religion in Europe.<sup>7</sup> More than 21 million Muslims live in the EU, (approximately 4.5 million in France, three million in Germany, 1.6 million in the United Kingdom and more than half a million each in the Netherlands and Italy).<sup>8</sup> Immigration from the Arab world,

2 Ibid..

3 Jonathan Fox, *A World Survey of Religion and the State* (New York: Cambridge University Press, 2008), 105–312.

4 Ted R. Gurr, *Minorities at Risk* (Washington D.C.: United States Institute of Peace, 1993); Gurr, *Peoples Versus States: Minorities at Risk in the New Century* (Washington D.C.: United States Institute of Peace Press, 2000).

5 Fox, *A World Survey* (above n. 3); Brian J. Grim and Roger Finke, “Religious Persecution on Cross-National Context: Clashing Civilizations or Regulating Religious Economies,” *American Sociological Review* 72 (2007): 633–658; Brian J. Grim and Richard Wike, “Cross-Validating Measures of Global Religious Intolerance: Comparing Coded State Department Reports with Survey Data and Expert opinion,” *Politics and Religion* 3/1 (2011): 102–129; M. Rodwan Abouharb and David L. Cingranelli, “The Human Rights Effect of World Bank Structural Adjustment, 1980–2001,” *International Studies Quarterly* 50/2 (2006): 233–262.

6 Gurr, *Minorities at Risk* (above n. 4); Gurr, *Peoples Versus States* (above n. 4); Gurr and Harff, *Ethnic Conflict* (above n. 1).

7 Sam Cherribi, “Politicians’ Perceptions of the ‘Muslim Problem’: The Dutch Example in European Context,” in *Democracy and the New Religious Pluralism*, ed. Thomas Banchoff (New York: Oxford University Press, 2007).

8 Jocelyne Cesari, “The Securitization of Islam in Europe,” *Center for European Policy*, Brussels, Research Paper No. 15, 2009.

Turkey, and South Asia in the twentieth century increased Muslims' visibility in Western Europe.<sup>9</sup> The number of Muslims is estimated to be 2.5 million in United States.<sup>10</sup> With increasing visibility, Muslim rights in the West have become an important topic of debate.<sup>11</sup>

The securitization of Islam argument suggests that the 9/11 attacks made Islamic extremism a key security issue for the West and religious discrimination against Muslims is a result of the securitization process. The defense of culture argument proposes discrimination against Muslims to be the manifestation of a desire to protect national culture and identity linked to religion—Christianity in particular. The defense of culture argument is not incompatible with the securitization argument. To the contrary, it is possible that cultural challenges can facilitate the securitization process. It is also possible for both processes to be occurring simultaneously. For this reason, we do not suggest that both processes are mutually exclusive, but intend to analyze variation in the treatment of religious minorities in the West with the guidance of two theoretical frameworks.

The remainder of this study is organized as follows: We begin with an examination of the securitization of Islam and the defense of culture arguments. The research design section presents the data and operationalization of the variables. In the following section we report our findings. The final section presents our conclusions.

9 For a more thorough discussion of the history of Muslims in Europe see Jorgen S. Nielsen, *Towards a European Islam* (New York: Palgrave Macmillan, 1999).

10 Pew Forum on Religion and Public Life, *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population, October 2009*, <http://pewforum.org/newassets/images/reports/Muslimpopulation/Muslimpopulation.pdf> (accessed June 14, 2010).

11 Paul M. Sniderman and Louk Hagendoorn, *When Ways of Life Collide* (Princeton and Oxford: Princeton University Press, 2007); Bhikhu Parekh, "Europe, Liberalism, and the 'Muslim Question,'" in *Multiculturalism, Muslims, and Citizenship: A European Approach*, ed. Tariq Modood, Anna Triandafyllidou, and Ricard Zapata-Barrero (London and New York: Routledge, 2006); Hassan Boussetta and Dirk Jacobs, "Multiculturalism, Citizenship, and Islam in Problematic Encounters in Belgium," in *Multiculturalism, Muslims and Citizenship*; Aristide R. Zolberg and Long LittWoon, "Why Islam is Like Spanish: Cultural Incorporation in Europe and the United States," *Politics and Society* 27/1 (1999): 5–38; Tore Bjorgo, "Xenophobic Violence and Ethnic Conflict at the Local Level," in *Challenging Immigration and Ethnic Relations Politics: Comparative European Perspectives*, ed. Ruud Koopmans and Paul Statham (Oxford: Oxford University Press, 2000).

## 2. Securitization of Islam and Religious Discrimination

The issue of how to accommodate and integrate Muslim minorities has been debated for decades in the West. The 9/11 attacks and subsequent terrorist incidents have made this debate even more controversial and divisive. Western democracies with a substantial population of Muslim immigrants must grapple with the question of how to respond to the challenging post-9/11 context without damaging the functioning of democracy and multiculturalism. The securitization of Islam has made this task even harder for policy makers. This section explains the concept of securitization and illustrates how the securitization approach applies to the specific context of the treatment of Muslims in the West following 9/11.

Securitization theory is known to be one of the most prominent components of the Copenhagen school of international relations theory.<sup>12</sup> According to this theoretical framework, any topic can be potentially transformed through speech acts. As Bryan Mabee points out, securitization theory considers “the identification of security threats as an inter-subjective process, highlighting the influence of ideational factors on policy making.”<sup>13</sup> Specifically, by citing the

12 For more on Securitization theory, see Ole Wæver, Berry Buzan, and M. Kelstrup, *Identity, Migration and the New Security Agenda in Europe* (London: Pinter, 1993); Ole Wæver, “Securitization and Desecuritization,” in *On Security*, ed. Ronnie Lipschutz (New York: Columbia University Press, 1995); Berry Buzan, Ole Wæver, and Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder/London: Lynne Rienner, 1998); Carsten Bagge Lausten, and Ole Wæver, “In Defense of Religion: Sacred Referent Objects for Securitization,” in *Religion in International Relations: The Return from Exile*, ed. Fabio Petito and Pavlos Hatzopoulos (New York: Palgrave Macmillan, 2003); Michael C. Williams, “Securitization and the Liberalism of Fear,” *Security Dialogue* 42/4–5 (2011): 453–463. For an overview of the debates on securitization theory, see *ibid.*; Ulrik Pram Gad and Karen Lund Petersen, “Concepts of Politics in Securitization Studies,” *Security Dialogue* 42/4–5 (2011): 315–328; Jeff Huysmans, “What’s in an Act? On Security Speech Acts and Little Security Nothings,” *Security Dialogue* 42/4–5 (2011): 371–383; Ole Wæver, “Politics, Security, Theory,” *Security Dialogue* 42/4–5 (2011): 465–480; Lene Hansen, “The Politics of Securitization and the Muhammad Cartoon Crisis: A Post-structuralist Perspective,” *Security Dialogue* 42/4–5 (2011): 357–369. For a discussion on how to improve securitization theory, see Thierry Balzacq, “The Three Faces of Securitization: Political Agency, Audience, and Context,” *European Journal of International Relations* 11/2 (2005): 171–201; and Paul Roe, “Actor, Audience(s) and Emergency Measures: Securitization and the UK’s Decision to Invade Iraq,” *Security Dialogue* 39/6 (2008): 615–635.

13 Bryan Mabee, “Re-imagining the Borders of US Security after 9/11: Securitization, Risk, and the Creation of the Department of Homeland Security,” *Globalizations* 4/3 (2007): 388.

word “security” a state representative can “securitize” an issue.<sup>14</sup> The level of perceived threat attributed to a securitized issue lifts it above ordinary politics and requires extraordinary strategies to eliminate the threat.<sup>15</sup> This process allows the declaration of an issue or population as a significant security threat to justify actions outside the normal boundaries of political practice.<sup>16</sup> Since securitized issues entail urgent and extraordinary responses, once an issue is securitized, a government might justify the use of exceptional means or special powers. Initially securitization theorists focused on extraordinary measures such as surveillance, police activity, and tight government controls. More recently the theory has expanded the range of these extraordinary actions to encompass restrictions on cultural and religious rights.

Significant and tragic events can potentially provoke a securitization process.<sup>17</sup> The 9/11 attacks were a huge shock to the West and, as posited by securitization theorists, helped catalyze a securitization process which made Islamic extremism a key security issue.<sup>18</sup> The literature suggests that 9/11 has had a dramatic impact on Muslims living in Western democracies.<sup>19</sup> After 9/11, there was a hardening of national discourses on both sides of the Atlantic. As securitization theory predicts, this perceived extraordinary threat legitimized policy responses beyond what would normally be acceptable in Western democracies. The repressive nature of state responses, based on more control and scrutiny of Muslims, had consequences for the religious freedom of Muslim groups. The securitization of Islam in the West created a political environment where issues related to Muslim minorities went beyond the realm of immigration and integration, as they had already been

14 Wæver, “Securitization and Desecuritization” (above n. 12).

15 Lausten and Wæver, “In Defense of Religion” (above n. 12).

16 Buzan, et. al., *Security: A New Framework* (above n. 12).

17 Mabee, “Re-imagining the Borders” (above n. 13).

18 Kanishka Jayasuriya, “September 11, Security, and the New Post-liberal Politics of Fear,” in *Critical Views of September 11: Analysis from Around the World*, ed. Eric Hershberg and Kevin W. Moore (New York: The New Press, 2002).

19 Ayhan Kaya, “Individualization and Institutionalization of Islam in Europe in the Age of Securitization,” *Insight Turkey* 12/1 (2010): 47–63; Erik Bleich, “Muslims and the State in the Post-9/11 West: Introduction,” *Journal of Ethnic and Migration Studies* 35/3 (2009): 353–360; Ihsan Bagby, “The American Mosque in Transition: Assimilation, Acculturation, and Isolation,” *Journal of Ethnic and Migration Studies* 35/3 (2009): 473–490; Shamit Sagar, “Boomerangs and Slingshots: Radical Islamism and Counter-Terrorism Strategy,” *Journal of Ethnic and Migration Studies* 35/3 (2009): 381–402; Jytte Klausen, “British Counter-Terrorism After 7/7: Adapting Community Policing to the Fight Against Domestic Terrorism,” *Journal of Ethnic and Migration Studies* 35/3 (2009): 403–420; and Frank Buijs, “Muslims in the Netherlands: Social and Political Developments after 9/11,” *Journal of Ethnic and Migration Studies* 35/3 (2009): 421–438.



before 9/11, and became a security issue that involved new surveillance devices and control policies. This securitization process justified and even necessitated a different way of dealing with Muslims, compared to other minorities.

The USA Patriot Act and the establishment of the Department of Homeland Security (DHS) were intended to enhance security in the post-9/11 United States. President George W. Bush argued that the new security threats and risk environment required new responsibilities to defend the United States: “We’re fighting a new kind of war against determined enemies. We will fulfill that duty. With the Homeland Security Act, we’re doing everything we can to protect America. We’re showing the resolve of this great nation to defend our freedom, our security and our way of life.”<sup>20</sup>

The perception of threat changed in the EU as well. For instance, the linkage of asylum and immigration-related issues to terrorism and security-related threats became common after 9/11. Jocelyne Cesari writes: “European nations face a paradox: Although they seek to facilitate the socioeconomic integration of Muslims, anti-terrorism and security concerns fuel a desire to compromise liberties and restrict Islam from the public space.”<sup>21</sup> New policies and institutions were created to respond to changing definitions of security; 9/11 also “escalated the securitization of asylum and immigration in the EU.”<sup>22</sup>

In this securitized environment many Muslims were arrested, deported,<sup>23</sup> and experienced racial profiling.<sup>24</sup> Many European countries used existing laws or passed new ones to facilitate the deportation of radical imams. France expelled more than 25 imams from 2001 to 2004, and in 2005 proposed laws that would ease the deportation process.<sup>25</sup> In 2004, Spain proposed government monitoring of religious sermons. In 2004, Denmark restricted foreign religious workers’

20 Remarks by the President Bush at the signing of H.R. 5005, the Homeland Security Act of 2002, <http://georgewbushwhitehouse.archives.gov/news/releases/2002/11/20021125-6.html> (accessed June 10, 2010).

21 Cesari, “Securitization of Islam” (above n. 8), 2.

22 Dace Schlenz, “Did 9/11 Matter? Securitization of Asylum and Immigration in the European Union in the Period from 1992 to 2008,” *Refugee Studies Centre*, Oxford University, Working Paper Series 56, 2010, 31.

23 “US Threatens Mass Expulsions,” *BBC News*, June 10 2003 <http://news.bbc.co.uk/2/hi/americas/2974882.stm>; “Immigrants Rush to Meet US Deadline,” *BBC News*, January 10, 2003, <http://news.bbc.co.uk/2/hi/americas/2644951.stm>; “France Expels Islamist Militant,” *BBC News*, August 26, 2005, <http://news.bbc.co.uk/2/hi/europe/4189756.stm> (all accessed June 10, 2010)

24 Michael Davis, “The Flames of New York,” *New Left Review* 12 (2nd ser.) (2001): 34–50.

25 “France to Expel Radical Imams,” *BBC News*, July 15, 2005, <http://news.bbc.co.uk/2/hi/4688111.stm> (accessed June 11, 2010).

visas to those associated with recognized denominations, limited the number of visas per denomination, and set a policy that visas would not be issued if there is “reason to believe the foreigner will be a threat to public safety, security, public order, health, decency, or other people’s rights and duties,” alluding to imams who preach ideas contrary to Danish cultural norms.<sup>26</sup> In addition to imams, mosques became a security concern as well. In 2009, Switzerland voters, in a referendum, banned the building of minarets.<sup>27</sup> The Swiss ban inspired extreme rightist parties—such as the Danish People’s Party, Vlaams Belang in Belgium, the Italian Northern League, and the Dutch Party for Freedom—to pursue similar policies.<sup>28</sup> One province in Austria passed a law in February 2009 requiring mosques to be compatible with the overall look of a town.<sup>29</sup> Similar restrictions are discussed further in the analysis below.

Moreover, the quantity of asylum and immigration-related legislation and surveillance mechanisms to prevent illegal immigration increased significantly.<sup>30</sup> Cesari documents that some of the new immigration proposals targeted socially conservative Muslims. For example, the new citizenship tests in Baden-Württemberg (Germany) included “questions concerning the willingness of parents to allow children to participate in swimming lessons.”<sup>31</sup> Also, border controls against illegal immigration were tightened due to security concerns.<sup>32</sup>

Another issue has been policies limiting the right of Muslim women to wear their traditional head coverings. Restrictions on head coverings, in some European nations, were about taking a stand against Islam. In Germany, many teachers in public schools were dismissed due to laws enacted by several states that ban the

26 U.S. Department of State, “International Religious Freedom Report,” 2003, 2004, 2005, 2006, 2007, 2008, <http://www.state.gov/g/drl/irf/rpt/>; Anthony Browne, “Denmark to Curb Muslim Preachers,” *The Times* (London), February 19, 2004; “Islam in Denmark,” *Wikipedia*, [http://en.wikipedia.org/wiki/Islam\\_in\\_Denmark](http://en.wikipedia.org/wiki/Islam_in_Denmark).

27 “Swiss Voters Back Ban on Minarets,” *BBC News*, November 29, 2009, <http://news.bbc.co.uk/2/hi/europe/8385069.stm> (accessed June 11, 2010).

28 Judith Southerland “The Minaret Vote, Europe’s Call to Show Bias” *Human Rights Watch*, December 2, 2009, <http://www.hrw.org/en/news/2009/12/02/minaret-vote-europes-call-show-bias> (accessed June 14, 2010).

29 Jeffrey Stinson “Mosques Increasingly Not Welcome in Europe,” *USA Today*, July 17, 2008, [http://usatoday30.usatoday.com/news/religion/2008-07-16-mosques\\_N.htm](http://usatoday30.usatoday.com/news/religion/2008-07-16-mosques_N.htm) (accessed June 14, 2010).

30 Schlentz, “Did 9/11 Matter?” (above n. 22).

31 Cesari, “Securitization of Islam” (above n. 8), 3.

32 E. Brouwer, “Immigration, Asylum and Terrorism: A Changing Dynamic, Legal and Practical Developments in the EU Response to the Terrorist Attacks of 11.09,” *European Journal of Migration and Law* 4 (2003): 399–424.

wearing of head coverings by teachers in public schools.<sup>33</sup> Restrictions on head coverings are discussed further in the analysis sections of this study.

Political leaders and parties contributed to the securitization of Islam as well. Cesari highlights the electoral success of extreme right wing parties, despite their anti-Muslim discourse.<sup>34</sup> Jean-Marie Le Pen, the leader of France's National Front, who advocates "zero immigration" and associates Islam with terrorism, placed second in France's 2002 election.<sup>35</sup> Reflecting the general trend across Europe, the Danish People's Party, known for its anti-Muslim rhetoric and support of tough asylum policies, entered parliament as the third largest party in November 2001 taking 12% of the vote.<sup>36</sup> In the Netherlands, Pim Fortuyn's List continued its harsh measures against non-assimilating immigrants following the assassination of its former leader, Pim Fortuyn; it came second in the general elections on May 15, 2002.<sup>37</sup> Similarly, in Italy, the Northern League takes advantage of Islamophobia for political gain.<sup>38</sup> In general, poor treatment of Muslims in the West is blatantly manifested in various examples of policies in fields of immigration, religious rights, and security.<sup>39</sup>

### 3. Protecting Western and European Culture

An alternative explanation for the discrimination against Muslims in the West is that this discrimination is not about securitization; rather, it stems from a desire to protect national culture and identity that is linked to religion, specifically Christianity. Religion is generally accepted as a significant source of identity,<sup>40</sup>

33 U.S. Department of State, "Germany Country Report on Human Rights Practices, 2005," [www.state.gov/g/drl/rls/hrrpt/2005/61650.htm](http://www.state.gov/g/drl/rls/hrrpt/2005/61650.htm) (accessed January 9, 2012).

34 Cesari, "Securitization of Islam" (above n. 8), 3.

35 "Marine Le Pen in Bid to head France's National Front," *BBC News*, April 13, 2010, <http://news.bbc.co.uk/2/hi/europe/8617647.stm>; "Profile: Jeane-Marie Le Pen" *BBC News*, April 25, 2007, <http://news.bbc.co.uk/2/hi/europe/3658399.stm> (both accessed June 11, 2010). See also Cesari, "Securitization of Islam," (above n. 8).

36 "Denmark's Immigration Issue," *BBC News*, February 19, 2005, <http://news.bbc.co.uk/2/hi/4276963.stm> (accessed January 7, 2013).

37 Cesari, "The Securitization of Islam" (above n. 8).

38 "Islam in Italy" *EuropIslam.Info*, <http://www.euro-islam.info/country-profiles/italy/> (accessed on January 10, 2012).

39 For a detailed examination of policies undertaken in fields of immigration, security, and religion, as well as influence of these policies on Muslim minorities in Europe, see the report "Muslims In Western Europe After 9/11: Why the term Islamophobia is more a predicament than an explanation" <http://www.libertysecurity.org/article1167.html> (accessed on November 20, 2013).

40 Glynis Breakwell, *Coping with Threatened Identities*, (London: Methuen, 1986); David Little, "Belief, Ethnicity and Nationalism," *Nationalism and Ethnic Politics* 1/3 (1995): 284–301.

especially due to its ability to provide a social, geographical, cosmological, temporal, and metaphysical “sense of locatedness.”<sup>41</sup> Religious traditions and institutions resist change—thereby bringing stability, predictability, and continuity to both individuals and groups.<sup>42</sup> Religious identity is also strengthened by its ability to convey a picture of security—of a “home” safe from intruders<sup>43</sup>—and its ability to provide answers to threats to established orders.<sup>44</sup> Religious identification is also perceived to be a decisive factor in distinguishing political attitudes, especially because it is a relatively stable attribute, contrary to the transitional nature of attitudes toward many political issues.<sup>45</sup>

Despite contrary assumptions,<sup>46</sup> survey research shows that religion remains important in the West. A large proportion of Westerners, including those in supposedly-secular Europe—is religious and considers religion important.<sup>47</sup> Many argue that in the West, Christian heritage remains important politically and linked to nationalism and political identity.<sup>48</sup> Katzenstein and Byrnes argue that

41 Jeffrey Seul, “‘Ours is the Way of God’: Religion, Identity, and Intergroup Conflict,” *Journal of Peace Research* 36/5 (1999): 558.

42 Ibid.; Mark Juergensmeyer, *The New Cold War? Religious Nationalism Confronts the Secular State* (Berkeley and Los Angeles: University of California Press, 1993).

43 Catarina Kinvall, “Globalization and Religious Nationalism: Self, Identity, and the Search for Ontological Security,” *Political Psychology* 25 (2004): 741–767.

44 Taufik Abdullah, “Identity Maintenance and Identity Crisis in Minangkabau,” in *Identity and Religion: International Cross Country Approaches*, ed. Hans Mol (Beverly Hills, CA: Sage, 1978), 151–167.

45 Bernadette C. Hayes, “The Impact of Religious Identification on Political Attitudes: An International Comparison,” *Sociology of Religion* 56/2 (1995): 177–194.

46 See, for example, Steve Bruce, “Secularization and Politics,” in *Routledge Handbook of Religion and Politics*, ed. Jeffrey Haynes (New York: Routledge, 2009), 145–158.

47 Pablo Branas-Garza and Angel Solano, “Religious Favoritism in Europe: A Political Competition Model,” *Rationality and Society* 22/3 (2010): 333–352; and Pippa Norris and Ronald Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (New York: Cambridge University Press, 2004).

48 Grace Davie, “Is Europe an Exceptional Case,” *The Hedgehog Review* 8 (2006): 23–34; Claes H. De Vreese, Hajo G. Boomgaarden, Michael Minkenberg, and Rens Vliegthart, “Introduction: Religion and the European Union,” *West European Politics* 32/6 (2009): 1182–1189; Zsolt Enyadi, “Emerging Issues in the Study of Church-State Relations,” *West European Politics* 26/1 (2003): 218–232; Michael Minkenberg, “Democracy and Religion: Theoretical and Empirical Observations on the Relationship between Christianity, Islam, and Democracy,” *Journal of Ethnic and Migration Studies* 33/6 (2007): 900; Minkenberg, “Religion and Euroscepticism: Cleavages, Religious Parties, and Churches in EU Member States,” *West European Politics* 32/6 (2009): 1190–1211; Anthony D. Smith, “Ethnic Election and National Destiny: Some Religious Origins of Nationalist Ideals,” *Nations and Nationalism* 5/3 (1999): 331–355; idem, “The Sacred Dimension of Nationalism,”

this is particularly true of the new members of the European Union.<sup>49</sup> Kunovich demonstrates that in Europe, Christians are more likely to consider religion an important component of national identity—and that the larger the religious minority population in a state, the more salient the country’s Christian identity becomes.<sup>50</sup> This is particularly true of countries with large Muslim minorities.

This Western support for religion translates into policy. Most Western states do not have a separation of religion and state. This is because a clear majority of Western and European democracies support a single religion more than others, or support a small number of religions more than others. When these states support one religion more than others, it is almost always the case that they support those religions with a long historical presence in the state, integrating them into the state’s culture.<sup>51</sup>

Many link this preference for dominant religions to other aspects of politics and democracy in the West. For example, in a study of Greece, Karyotis and Patrikios argue that “in cultural contexts where religion holds a prominent place in the public sphere, the influence of religious elites on public attitudes may even outweigh that of political elites.”<sup>52</sup> The prominence of Christianity also becomes apparent in the failed attempt to draft a European constitution, when many pushed for a reference to God in the constitution.<sup>53</sup> Daniel Philpott argues that there is a link between Christianity and the emergence of democracy.<sup>54</sup> Others argue more generally that a shared culture is a necessary prerequisite for a successful democracy.<sup>55</sup>

That dominant cultures take steps to protect themselves is also well established in the wider political science literature. This trend is especially present in the ethnic conflict literature, which posits that cultural differences between majority and minority groups can result in ethnic conflict, including discrimination

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*Millennium* 29/3 (2000): 791–814; and Malina Voicu, “Effect of Nationalism on Religiosity in 30 European Countries,” *European Sociological Review* (2011): DOI:10.1093.

49 Peter J. Katzenstein, and Timothy A. Byrnes, “Transnational Religion in and Expanding Europe,” *Perspectives on Politics* 4/4 (2006): 679–694.

50 Robert M. Kunovich, “An Exploration of the Salience of Christianity for National Identity in Europe,” *Sociological Perspectives* 49/4 (2006): 435–460.

51 Fox, *A World Survey* (above n. 3).

52 Georgios Karyotis and Stratos Patrikios, “Religion, Securitization, and anti-Immigration Attitudes: The Case of Greece,” *Journal of Peace Research* 47/1 (2010): 43–57.

53 Thomas Diez and Mariano Barbato, “Christianity, Christendom, Europe: On the Role of Religion in European Integration,” *Azure* 23/1 (2008): 25–35; and Philip Schlesinger and Francois Foret, “Political Roof and Sacred Canopy? Religion and the EU Constitution,” *European Journal of Social Theory* 9/1 (2006): 59–81.

54 Daniel Philpott, “Christianity and Democracy: The Catholic Wave,” *Journal of Democracy* 15/3 (2004): 32–46.

55 Arash Abizadeh, “Does Liberal Democracy Presuppose a Cultural Nation? Four Arguments,” *American Political Science Review* 96/3 (2002): 495–509.

against minorities.<sup>56</sup> While most of this literature does not focus on religion, the general category of culture explicitly includes religion. Moreover, several studies specifically link religious factors to discrimination against ethnic minorities.<sup>57</sup> Samuel Huntington's Clash of Civilizations theory also posits that, within states, the presence of religious minorities leads to conflict.<sup>58</sup>

This assumption is also specifically linked to Western democratic culture. Huntington singles out tensions between Western states and Islam, including Muslim minorities within the West. The literature on consociationalism, and the writings of Arend Lijphart in particular (whose work focuses mainly on Europe), argues that liberal democracy is not possible in heterogeneous societies without complex power-sharing arrangements.<sup>59</sup> John Madeley argues that Europeans are "particularly sensitive to the multicultural challenges posed by recent increases in immigration and the emergence of more or less exotic new religious movements and cults."<sup>60</sup>

## 4. Research Design

This study employs RAS2-M, a special version of RAS2 dataset, to examine the extent and causes of religious discrimination against 113 religious minorities in 36 democracies in the EU and the West from 1990 to 2008. These include all of the current members of the EU, all other countries in Western Europe, the United States, Canada, Australia, and New Zealand. The study also includes all of the religious minorities in these countries that meet a minimum threshold of 0.25% of a country's population, or a minimum of at least 500,000 members (in countries with populations of 200 million or more). As this study focuses on Islam, the problem set also includes cases where Muslim minorities did not meet this threshold.

56 Gurr, *Minorities at Risk* (above n. 4); Gurr, *Peoples Versus States* (above n. 4); and Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985).

57 Jonathan Fox, *Religion, Civilization, and Civil War: 1945 through the New Millennium* (Lanham, MD: Lexington Books, 2004); and Jonathan Fox and Shmuel Sandler, "Regime Types and Discrimination against Ethno-Religious Minorities: A Cross-Sectional Analysis of the Autocracy-Democracy Continuum," *Political Studies* 51/3 (2003): 469–489.

58 Samuel P. Huntington, "The Clash of Civilizations?" *Foreign Affairs* 72/3 (1993): 22–49; Huntington, *The Clash of Civilizations and the Remaking of the World Order* (New York: Simon and Schuster, 1996).

59 Arend Lijphart, "The Power Sharing Approach," in *Conflict and Peacemaking in Multiethnic Societies*, ed. Joseph V. Montville (Lexington: Lexington Books, 1990), 491–509; Arend Lijphart, *Democracy in Plural Societies* (New Haven: Yale University Press, 1997).

60 John T.S. Madeley, "A Framework for the Comparative Analysis of Church-State Relations in Europe," *West European Politics* 26/1 (2003): 39.

The operational definition for religious discrimination is effectively that of the RAS2-M dataset: restrictions placed on the religious institutions or practices of minority religions *that are not also placed on the majority religion*. The dataset includes 29 specific kinds of religious discrimination. Each of these types of discrimination is coded on a scale from zero to two. This definition singles out types of discrimination that are not placed on all religions and, rather, focuses only on ways in which minorities are singled out for restrictions; in other words, we focus on differential treatment. Restrictions placed on all religions reflect a general bias against religion in society. Differential treatment arguably reflects a bias not against religion in general, but a bias against or hostility toward specific religious minorities. This bias and hostility is what RAS-M is intended to measure. This fits well with the propositions of securitization theory, which predicts that securitized minorities will, in fact, be singled out. It is also consistent with the defense of culture argument, which also posits that certain minorities will be singled out.

The 29 measures (available in Tables 1a and 1b) are added to form a global measure, which runs from 0 to 58.<sup>61</sup> These codings differ from previous measures of religious discrimination in two respects: first, the 29 items included in the study constitute more types of specific religious discrimination than any previous study.<sup>62</sup> Second, most other data collections that measure discrimination either include only a global score for an entire country<sup>63</sup> or include only some minorities.<sup>64</sup> Thus, the RAS2-M dataset is the only one that can compare multiple types of discrimination against specific minorities while including all relevant minorities.

RAS2-M is part of the Religion and State project that collects a wide variety of variables on state religion policy. The project's coding procedures are based on reports written by research assistants on each country included in the problem set. These reports are the basis for coding the data. These reports use multiple sources

61 For a full discussion of a non-weighted versus a weighted composite variable using the RAS dataset, see Jonathan Fox, "Building Composite Measures of Religion and State," *Interdisciplinary Journal of Research on Religion* 7/8 (2011): 1–39. This analysis demonstrates that composite variables weighted by expert opinion and factor analysis are statistically near-identical to non-weighted variables. For a similar analysis of the previous version of the RAS-M dataset, see Yasemin Akbaba and Jonathan Fox, "The Religion and State Minorities Dataset," *Journal of Peace Research* 48/6 (2011): 807–816.

62 The previous version of the RAS-M dataset included 24 types of discrimination for 1990 to 2002. Most other codings of religious discrimination include significantly less items.

63 Abouharb and Cingranelli, "The Human Rights" (above n. 5); Grim and Finke "Religious Persecution" (above n. 5); Grim and Finke, *The Price of Freedom Denied* (New York: Cambridge University Press, 2011); Grim and Wike "Cross-Validation Measures" (above n. 5), and Emilie M. Hafner-Burton, "Right or Robust? The Sensitive Nature of Repression to Globalization," *Journal of Peace Research* 42/6 (2005): 679–698.

64 Fox, *Religion, Civilization* (above n. 57).

and include general sources—such as the US State Department International Religious Freedom reports, reports by numerous human rights organizations, *The World Christian Encyclopedia*,<sup>65</sup> country-specific academic sources, and print media articles from the Lexis-Nexis database.<sup>66</sup>

While space limitations do not allow a full description of the dataset, some relevant aspects require discussion. First, RAS2-M focuses on official government structure, policies, institutions, practices, and laws rather than on civil society or religiosity. This means that the data include only actions taken by governments or their representatives, not actions taken by other groups and individuals within society. Second, the variables are coded at the national level. They do not include actions taken by regional or local governments, unless a significant plurality of these governments engages in a codable behavior. Third, they reflect either laws on the books or consistent government policy.<sup>67</sup>

The analysis proceeds in three stages. First, we examine the mean levels of religious discrimination on a yearly basis against the following categories of minorities: Christians, Muslims, Hindus, Buddhists, Jews and other groups. While the RAS2-M has more detailed codings on the religious identity of minorities, these are the most specific categories available for which there are sufficient numbers of minorities for statistical analysis. A country may have more than one Christian minority. In France, for example, Orthodox Christians and Protestants were coded separately.<sup>68</sup>

Second, we examine the extent of each of the 29 specific categories of religious discrimination, controlling for the same religious minorities categories as above. These tests look at points in time: 1990 (or the earliest year available for a country) and 2008—the first and last years that are available in the RAS2-M dataset—in order to measure change over time.

Finally, we examine the causes of religious discrimination using OLS multiple regressions for 1990, 1996, 2002, and 2008 in order to assess whether the relationships found in the bivariate analysis are present and consistent over

65 D. B. Barret, G. T. Kurian, and T. M. Johnson, *World Christian Encyclopedia*, 2nd ed. (Oxford: Oxford University Press, 2001).

66 For a more detailed description of the RAS2-M dataset, including reliability tests, see Akbaba and Fox, “The Religion” (above n. 61). For a more detailed discussion of RAS project coding procedures, including a full listing of sources used to code the data, see Fox, *A World Survey* (above n. 3); Fox, “Building Composite Measures” (above n. 61).

67 Fox, *A World Survey* (above n. 3); Fox, “Building Composite Measures” (above n. 61).

68 In general, the most specific religious categories available were used as long as each one met the population cutoff. In cases where individual Christian minorities did not meet the population cutoff or more specific information was not available, all Christians who are not members of the majority denomination or a coded minority denomination were coded as an “other Christians” category.



time. We control for the following factors identified by previous studies of the RAS dataset<sup>69</sup> to be important causes of religious discrimination:

*Religious identity*: We control for whether the majority religion is Catholic or Orthodox Christian. We also control for whether the minority is Christian or Muslim.

*Religious diversity* is based on Herfindahl methodology, which measures the probability that two random individuals belong to the same religion. As this methodology measures religious homogeneity, this study used the formula of one minus the Herfindahl score for a country.<sup>70</sup>

*Economic development* is measured by log-per-capita GDP. This variable is taken from the UN Statistics Division website.<sup>71</sup>

*Regime durability* is taken from the Polity Project. It measures how many years a regime has persisted without a change in the Polity measure, which assesses the extent to which a government is autocratic or democratic.<sup>72</sup> The Polity measure itself is not used in this study because the countries in this study are all democracies and there is very little variation in this variable.

*Years EU Member* measures how many years the country has been a member of the EU at the time point being tested. Countries that are not members are coded as zero. This measures the influence of the EU's human rights regime on these countries.

The *log-of-population* variable controls for population size. This variable is from the World Bank.

*Religious legislation* is taken from the general RAS dataset and it measures the presence of 51 types of religious legislation in each country. This variable is intended to control for governments that support the majority religion through legislation.<sup>73</sup> As this variable is strongly correlated both theoretically and statistically with the dependent variable (a correlation of 0.516, significance <.001) we examine all models twice, once including this variable and once excluding it.

69 Fox, *A World Survey* (above n. 3).

70 This variable is taken from Rachel M. McCleary and Robert J. Barro, "Religion and International Economy in an International Panel," *Journal for the Scientific Study of Religion* 45/3 (2006a): 149–175, and McCleary and Barro, "Religion and Economy," *Journal of Economic Perspectives* 20/3 (2006): 49–72.

71 United Nations Statistical Division, <http://unstats.un.org/unsd/default.htm>.

72 Keith Jagers and Ted R. Gurr, "Tracking Democracy's Third Wave with the Polity III Data," *Journal of Peace Research* 32/4 (1995): 469–482.

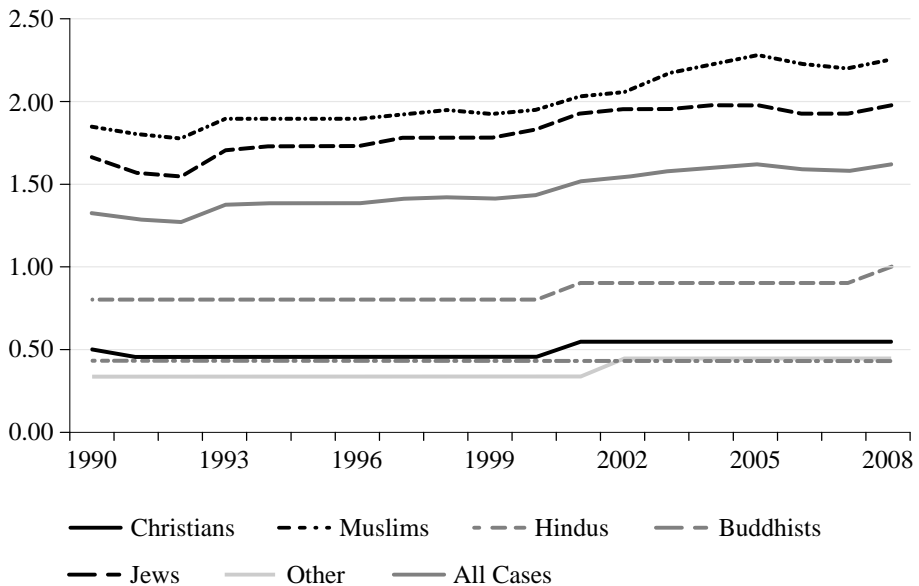
73 For a detailed listing of the 51 types of religious legislation included in this variable, see the RAS website at <http://www.religionandstate.org>.

Correlations between the independent variables are all below 0.7, with the highest being 0.565. Accordingly, multicollinearity is not an issue.

## 5. Data Analysis

Figure 1 presents the patterns of religious discrimination between 1990 and 2008. It demonstrates three important trends. First, religious discrimination: while not particularly high, it was clearly present. Second, there was a clear rise between 1990 and 2008 in level of religious discrimination. Between 1990 and 2008, the average level of discrimination increased by 21.8%. This rise became statistically significant in 2001.<sup>74</sup> Religious discrimination also increased for each of the specific types of religious minorities analyzed here except Hindus, but was only statistically significant for Christians and Muslims.<sup>75</sup> Another indication of this increase in discrimination is that in 1990 (or the earliest year available), 14 countries engaged in no discrimination against the coded minorities. By 2008, this was no longer true of Austria, Belgium, and the United Kingdom.

Figure 1: Mean Levels of Religious Discrimination: 1990–2008



74 The statistical significance was at the <.01 level in 2001, 2002, 2006, and 2007 and at the <.001 level in 2003, 2004, 2005, and 2008.

75 For Christians, the rise was statistically significant at the <.05 level in 2008 only. For Muslims the rise was statistically significant at the <.05 level in 2003, 2004, 2005, 2006, and 2008.

This rise occurred consistently over time, and it began before and continued after the 9/11 events. This is consistent with the defense of culture thesis; it is not inconsistent with the securitization argument, but it indicates that the securitization of Islam predates 9/11.

Third, there is a clear difference between the treatment of the various religious minorities. Muslims consistently are the targets of the highest mean levels of discrimination, followed closely by Christian minorities. Recall that these minorities are Christians who belong to denominations different from that of the majority. Buddhists experience significantly lower levels of discrimination, but more than Hindus, Jews, and other types of minorities—all of which suffer approximately the same levels of discrimination. That Muslims experience the highest levels of discrimination is consistent with the securitization thesis. However, this does not explain the presence of rising discrimination against other minorities, particularly Christian minorities. These findings are more consistent with the defense of culture argument.

The analysis of specific types of discrimination, presented in Tables 1a and 1b, demonstrates that the trends found in figure 1 are robust. Twenty of the 29 types of discrimination measured by the RAS-M dataset are present against at least some minorities in Western and European Union democracies. Of these, 12 have increased between 1990 and 2008 and only one—restrictions on the access of clergy to places like hospitals and the military—have decreased. Few of these types of discrimination are present vis-à-vis a large proportion of minorities; however, the overall presence of some form of discrimination is ubiquitous.

Table 1a: Specific Types of Religious Discrimination: 1990, 2001, and 2008

	Christians		Muslims		Hindus		Buddhists	
	1990	2008	1990	2008	1990	2008	1990	2008
Public observance: religious services/festivals/holidays/Sabbath	2.5%	2.5%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Building, leasing, repairing and/or maintaining places of worship	20.0%	20.0%	30.6%	36.1%	0.0%	0.0%	0.0%	0.0%
Access to existing places of worship	2.5%	5.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Formal religious organizations	7.5%	12.5%	5.6%	8.3%	0.0%	0.0%	0.0%	10.0%
Running religious schools/religious education	2.5%	7.5%	2.8%	5.6%	0.0%	0.0%	0.0%	10.0%
Making/obtaining materials necessary for rel. rites/customs/ceremonies.	0.0%	0.0%	0.0%	2.8%	0.0%	0.0%	0.0%	0.0%
Mandatory education in the majority religion	5.0%	5.0%	5.6%	5.6%	0.0%	0.0%	10.0%	10.0%
Arrest, continued detention, or severe official harassment	0.0%	2.5%	0.0%	11.1%	0.0%	0.0%	0.0%	0.0%
Surveillance of minority religions	2.5%	5.0%	5.6%	8.3%	0.0%	0.0%	0.0%	0.0%
Writing/publishing/disseminating religious publications	0.0%	2.5%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Religious laws on personal status, (marriage, divorce, burial)	7.5%	10.0%	11.1%	13.9%	14.3%	14.3%	10.0%	10.0%
Wearing of religious symbols or clothing	0.0%	0.0%	5.6%	13.9%	0.0%	0.0%	0.0%	0.0%
Ordination/access to clergy	0.0%	0.0%	0.0%	2.8%	0.0%	0.0%	0.0%	0.0%
Non-violent attempts to convert members of minority religions	2.5%	2.5%	2.8%	2.8%	0.0%	0.0%	0.0%	0.0%
Proselytizing by permanent residents of state to members of majority religion	5.0%	5.0%	2.8%	2.8%	0.0%	0.0%	0.0%	0.0%
Minority religion must register to be legal or to receive special tax status	42.5%	42.5%	36.1%	36.1%	14.3%	14.3%	30.0%	30.0%
Restricted access of minority clergy to hospitals/jails/military bases	20.0%	17.5%	22.2%	19.4%	0.0%	0.0%	0.0%	0.0%
Declaration of some minority religions as dangerous/extremist sects	5.0%	10.0%	2.8%	2.8%	0.0%	0.0%	0.0%	0.0%
Anti-religious propaganda in government publications	2.5%	2.5%	2.8%	2.8%	0.0%	0.0%	0.0%	0.0%
Other types of restrictions.	0.0%	0.0%	8.3%	8.3%	0.0%	0.0%	0.0%	0.0%
% of minorities with at least one restriction	50.0%	57.5%	53.6%	61.1%	14.3%	14.3%	30.0%	40.0%
Number of minorities	40		36		7		10	

\* The following types of religious discrimination were not present in any Western democracy against the listed minorities between 1990 and 2008 and are, accordingly, not included in the table: Private observance of religious services/festivals/holidays/Sabbath; import of religious publications; access to religious publications for personal use; forced observance of religious laws of another group; conversion to minority religions; forced renunciation of faith by recent converts to minority religions; forced conversions of people who were never members of majority religion; proselytizing by permanent residents of state to members of min. rel.; custody of children granted to members of majority rel. on a religious basis.

\*\* As each type of discrimination is coded between 0 and 2, countries can change policies without a change in the number of countries that have such a policy

Table 1b: Specific Types of Religious Discrimination, 1990, 2001, and 2008

	Jews		Other Minorities		All Minorities	
	1990	2008	1990	2008	1990	2008
Public observance: religious services/festivals/holidays/Sabbath	0.0%	0.0%	0.0%	0.0%	0.9%	0.9%
Building, leasing, repairing and/or maintaining places of worship	0.0%	0.0%	0.0%	0.0%	16.8%	18.6%
Access to existing places of worship	0.0%	0.0%	0.0%	0.0%	0.9%	1.8%
Formal religious organizations	0.0%	9.1%	0.0%	0.0%	4.4%	8.8%
Running religious schools/religious education.	0.0%	0.0%	0.0%	0.0%	1.8%	5.3%
Make/obtain materials necessary for religious rites/customs/ceremonies.	9.1%	9.1%	0.0%	0.0%	0.9%	1.8%
Mandatory education in the majority religion	0.0%	0.0%	0.0%	0.0%	4.4%	4.4%
Arrest, continued detention, or severe official harassment	0.0%	0.0%	0.0%	0.0%	0.9%	4.4%
Surveillance of minority religions	0.0%	0.0%	0.0%	11.1%	2.7%	5.3%
Write/publish/disseminate religious publications	0.0%	0.0%	0.0%	0.0%	0.0%	0.9%
Religious laws on personal status, (marriage, divorce, burial)	9.1%	9.1%	0.0%	0.0%	8.8%	10.6%
Wearing of religious symbols or clothing	0.0%	0.0%	0.0%	0.0%	1.2%	4.4%
Ordination/access to clergy	0.0%	0.0%	0.0%	0.0%	0.0%	0.9%
Attempts to convert minority religion members which fall short of force	0.0%	0.0%	0.0%	0.0%	1.8%	1.8%
Proselytizing by permanent residents of state to members of majority religion	0.0%	0.0%	0.0%	0.0%	2.7%	2.7%
Minority religion must to register to be legal or receive special tax status	9.1%	9.1%	22.2%	22.2%	32.7%	32.7%
Restricted access of minority clergy to hospitals/jails/military bases	0.0%	0.0%	0.0%	0.0%	14.2%	12.4%
Declaration of some minority religions dangerous/extremist sects	0.0%	0.0%	0.0%	0.0%	2.7%	4.4%
Anti-religious propaganda in government publications.	0.0%	0.0%	0.0%	0.0%	1.8%	1.8%
Other types of restrictions	0.0%	0.0%	0.0%	0.0%	2.7%	2.7%
% of minorities with at least one restrictions	9.1%	18.2%	22.2%	33.3%	41.6%	48.7%
Number of minorities	11		9		113	

We discuss here six of the more common types of religious discrimination. Restrictions on constructing, maintaining, and repairing places of worship are a common and increasing form of religious discrimination. This type of discrimination is found exclusively against Muslim and Christian minorities and is increasing against Muslims. In 1990 (or the earliest year available), eight Christian and 11 Muslim minorities experienced this type of discrimination. By 2008 an additional two Muslim minorities experienced this type of discrimination. In Switzerland, this has taken the form of banning the building of mosques with minarets by local governments. Between 2005 and 2008 several laws to ban minarets were proposed in Swiss cantons (regional governments), but all were defeated. In practice, however, these governments used zoning laws and denied building permits to prevent the building of mosques with minarets. Finally, a 2009 national referendum, which is binding under Swiss law, banned the construction of mosques with minarets in Switzerland.<sup>76</sup>

This national-level ban is unusual, as nearly all bans on the erection of places of worship in the countries included in this study are enacted by local governments. They follow the pattern found in pre-2009 Switzerland, where local governments simply deny building permits.

In 1990 (or the earliest year available) only five minorities experienced restrictions on their formal religious organizations. By 2008, this figured increased to ten minorities. Slovakia, for example, has very strict registration laws. A 1991 law requires a petition by 20,000 citizens in order for a religion to be formally registered; non-registered religions are banned from engaging in basic religious activities such as building places of worship and conducting services. A 2007 amendment to this law makes this requirement stricter: religious organizations must now prove that they have 20,000 members who are citizens or permanent residents; they must submit an “honest declaration” attesting to their membership and knowledge of the religion’s articles of faith and basic tenets. As a result, the freedoms of many small religions in the Slovak Republic are limited. The RAS2-M dataset codes this to be the case for several Muslim and Christian minorities.<sup>77</sup>

76 Elaine Engeler, “Swiss Nationalists Force Referendum on Minaret Ban,” *Human Rights Without Frontiers*, July 8, 2008, <http://www.hrwf.net>; “Switzerland: Europe’s Heart of Darkness?” *The Independent*, September 7, 2007; U.S. Department of State, “International Religious Freedom Report,” 2008 (above n. 26); David Lev, “Swiss Debate Grows Over Mosque Minaret Ban,” *Israel National News*, September 13, 2009, [www.israelnationalnews.com/News/News.aspx/133400](http://www.israelnationalnews.com/News/News.aspx/133400); Stephen Brown, “Religious Leaders Oppose Swiss Ban on Mosque Minarets,” *USA Today*, Religious News Service, September 9, 2009, [http://usatoday30.usatoday.com/news/religion/2009-09-09-minarets-muslim-switzerland\\_N.htm](http://usatoday30.usatoday.com/news/religion/2009-09-09-minarets-muslim-switzerland_N.htm). (accessed January 7, 2013)

77 Martin Docjar, “The Religious Freedom and Legal Status of Churches, Religious Organizations, and New Religious Movements in the Slovak Republic,” *Brigham Young*

In 1990 (or the earliest year available), no religious minorities included in this study were singled out for arrest, detention, or harassment. Around 1997 Bulgaria began harassing small “unrecognized” Protestant denominations. Between 2002 and 2005, Bulgaria, France, Germany, and Italy all began low-level harassment of Muslims. In Bulgaria this is primarily against “fundamentalist” Muslims as opposed to the “mainstream” Muslims, who are recognized and supported by the government.<sup>78</sup> Beginning in 2005, Italy began occasionally deporting imams accused of hate crimes.<sup>79</sup> As part of their campaign against terror, German authorities occasionally raid mosques and Islamic institutions in a manner many consider excessive. The earliest reports we found of these raids were in 2005.<sup>80</sup> After 2001, France began engaging in multiple forms of harassment: this included placing mosques under surveillance and targeting Arab-looking individuals for random and aggressive police checks.<sup>81</sup> Muslim institutions, such as mosques and *halal* butcher shops, have been increasingly subject to “random” inspections by tax investigators.<sup>82</sup> In addition, between 2001 and 2006, approximately 70 “Islamic fundamentalists”—including 15 imams—were deported from the country.<sup>83</sup>

In 1990 (or the earliest year available), 10 minorities were subject to restrictions on their ability to observe religious dictates regarding personal status. By 2011, this figure increased to 12. These limitations are usually minor; in Sweden, for example, the Church of Sweden controls all cemeteries and burials—even those of members of other religions.<sup>84</sup> Romania’s Orthodox

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*University Law Review* 2 (2001): 429–437; Act No. 308/1991, Freedom of Religious Belief and on the Status of Churches and Religious Societies, <http://www.religlaw.com/document.php?DocumentID=868>; U.S. Department of State, “International Religious Freedom Report,” 2008 (above n. 76).

78 “Police Call for Investigation of Islamic Sect,” *Bulgarian News Network*, August 8, 2003; “Bulgaria Security Agency Busts Mayor, Teacher over Radical Islamism,” *Sofia News Agency*, March 16, 2009.

79 “Terrorismo La Moschea Di Torino,” *La Stampa*, January 10, 2008; U.S. Department of State, “International Religious Freedom Report,” 2006, 2007, 2008 (above n. 26).

80 *Ibid.*.

81 *Ibid.*; Steven Erlanger, “Burqa Furor Scrambles French Politics,” *The New York Times*, August 31, 2009; “Freedom in the World Reports, 2008,” *Freedom House*, <http://www.freedomhouse.com>.

82 Erlanger, “Burqa Furor” (above n. 81).

83 U.S. Department of State, “International Religious Freedom Report,” 2004, 2005, 2006, 2007, 2008,” (above n. 26).

84 R. Reid, “Church of Sweden is Thriving on Its Own,” *The Washington Post*, December 29, 2000.

Church similarly controls many cemeteries and has refused burial to members of other Christian denominations.<sup>85</sup> In Greece the restrictions are more extensive: the fact that there are no civil burials in Greece raises problems for members of non-recognized minority religions.<sup>86</sup> For example, Buddhists burial ceremonies include cremation—which was illegal until 2006; even after it became legal, there were insufficient cremation facilities in Greece.<sup>87</sup> Moreover, to engage in official religious rites—including weddings or burials—Muslims in Athens must either travel to Thrace or leave the country; otherwise these rites are not recognized by the government.<sup>88</sup>

In 1990 (or the earliest year available), two countries banned Muslim women from wearing their traditional headscarves in public; by 2008, another three countries did so as well. Most of these restrictions are enacted by local, rather than national, governments and apply in schools and to public employees. For example, in 2003 Germany's Federal Constitutional Court acknowledged that states could ban headscarves.<sup>89</sup> Approximately one year later, the German state Baden-Wuerttemberg prohibited teachers from wearing Islamic headscarves.<sup>90</sup> By the end of 2008 at least eight of Germany's states had enacted such a ban.<sup>91</sup> Local governments in Belgium, too, have also restricted the wearing of the *hijab* by public employees and in schools.<sup>92</sup> Several of Switzerland's cantons have likewise forbidden head coverings in schools.<sup>93</sup> In Latvia there is a legal provision that forbids the wearing of a head covering in passport photos.<sup>94</sup>

85 U.S. Department of State, "International Religious Freedom Report," 2001, 2002 (above n. 26).

86 Helena Smith, "Greek Church Stirs Holy War Over ID Cards," *The Observer*, May 28, 2000.

87 U.S. Department of State, "International Religious Freedom Report," 2003, 2004" (above n. 26); "New Greek Law Permits Cremation," *The New York Times*, March 2, 2006.

88 U.S. Department of State, "International Religious Freedom Report," 2003, 2004, 2005, 2006, 2007, 2008, 2009 (above n. 26); Anthee Carassava, "The Faith that Has No Place," *Time Magazine*, April 23, 2006.

89 Cesari, "The Securitization of Islam," (above n. 8).

90 "German State Backs Headscarf Ban" *BBC News*, April 1 2004, <http://news.bbc.co.uk/2/hi/europe/3591043.stm> (accessed June 9, 2010).

91 "State and Church in Germany," *European Studies on Religion and State Interaction*, January 2008, [www.euresisnet.eu/Pages/ReligionAndState/GERMANY.aspx](http://www.euresisnet.eu/Pages/ReligionAndState/GERMANY.aspx); "Germany: Hijab Ban Discriminatory" *Human Rights Watch*, February 26, 2009, [www.hrw.org/news/2009/02/26/germany-headscarf-bans-violate-rights](http://www.hrw.org/news/2009/02/26/germany-headscarf-bans-violate-rights) (accessed January 7, 2013); "German Court Upholds Headscarf Ban," *Worldwide Religious News*, December 10, 2007, [wwwrn.org/articles/27139/?&place=germany&section=church-state](http://wwwrn.org/articles/27139/?&place=germany&section=church-state) (accessed January 7, 2013).

92 Boussett and Jacobs, "Multiculturalism, Citizenship, and Islam" (above n. 11).

93 U.S. Department of State, "International Religious Freedom Report," 2003, 2004, 2005, 2006, 2007, 2008 (above n. 26).

94 U.S. Department of State, "International Religious Freedom Report," 2008 (above n. 26).



The most common type of discrimination is a requirement that minority religions register in order to receive recognition as a religion or special tax status. To be coded, this type of registration must be different from the process for registering a non-religious non-profit organization and be required only of minority religions. This mode of discrimination is present against 37 minorities included in this study. In most cases, this is an artifact of laws that recognize certain religions but require all other religions to register. Generally, failure to register does not significantly limit religious freedom; non-registered religions, though, may have no means to own property, gain tax-exempt status, or open bank accounts. Most religious organizations that seek to register are able to do so and most exceptions are small religions that the governments consider cults, such as the Scientologists, and do not meet the population threshold for this study. This becomes a serious issue only in cases where registration is denied *and* where the denial of registration results in limitations on religious freedom. Only in Bulgaria are both of these the case which, as is discussed above, has several significant implications for religious freedom.

Table 2 presents the results of multivariate tests of the RAS-M data. The results confirm the findings that Muslim and Christian minorities suffer from the highest levels of discrimination in the EU and in Western democracies. Not surprisingly, states with high levels of religious legislation—indicating that they strongly support religion—are also associated with high levels of religious discrimination.

Table 2: Regressions

	1990		1996		2002		2008	
	Beta	sig	Beta	sig	Beta	sig	Beta	sig
Majority Catholic	-.326	.008	-.291	.020	-.253	.043	-.246	.067
Majority Orthodox	.500	.000	.397	.000	.371	.001	.354	.002
Minority Christian	.130	.174	.188	.067	.181	.077	.205	.055
Minority Muslim	.187	.043	.222	.025	.210	.033	.251	.015
Religious Diversity	-.377	.002	-.178	.138	-.207	.083	-.155	.200
Log per-capita-GDP	.196	.130	.031	.845	-.137	.392	-.009	.953
Regime Durability	-.022	.870	-.077	.643	.032	.850	-.015	.926
Years EU Member	.042	.683	.038	.735	.121	.289	.096	.431
Log Population	.197	.054	.086	.389	.090	.368	.093	.408
Df	102		112		112		112	
Adjusted r-squared	.422		.311		.317		.252	
	1990		1996		2002		2008	
	Beta	sig	Beta	sig	Beta	sig	Beta	sig
Majority Catholic	-.067	.601	.014	.910	.032	.793	.055	.686
Majority Orthodox	.555	.000	.493	.000	.489	.000	.420	.000
Minority Christian	.103	.241	.142	.120	.127	.164	.149	.125
Minority Muslim	.168	.050	.201	.022	.186	.034	.234	.013
Religious Diversity	-.217	.063	.050	.658	.024	.837	.024	.834
Religious Legislation	.348	.000	.441	.000	.438	.000	.435	.000
Log per-capita-GDP	.212	.076	.136	.333	.074	.625	.102	.449
Regime Durability	.048	.700	-.026	.862	.005	.974	.086	.569
Years EU Member	-.027	.782	-.068	.507	-.033	.754	-.006	.958
Log Population	.202	.032	.077	.383	.095	.285	.057	.573
Df	102		112		112		112	
Adjusted r-squared	.509		.457		.458		.385	

## 6. Conclusions

Overall, the empirical portion of this study reveals two interesting findings. First, religious discrimination in Western democracies and the EU has increased over time. This phenomenon has been consistent over time and applies to most minorities. It is also robust, inasmuch as it involves changes in a large number of states as well as many different types of discrimination; it is not driven by only a few states, nor does it involve changes in merely a few types of policy.

Second, different religious minorities suffer from differing patterns of discrimination. Muslims suffer from the highest levels of discrimination, followed by Christian minorities (those of Christian denominations other than the majority denomination in a state), and then Buddhists. Other minorities, including Jews and Hindus, experience the lowest levels of discrimination.

Neither the securitization of Islam argument nor the defense of culture argument can by themselves account for all of these findings; taken together, though, they can explain much of what is occurring. The first important distinction is that the only religious minority in the West that is said to be securitized is Islam. Thus, securitization theory cannot explain the existence or the rise in discrimination against non-Muslim religious minorities.

The defense of culture, on the other hand, can explain these results. On average, the largest minorities in these countries are Christian minorities. The average Christian minority included in the RAS2-M dataset comprises 4.21% of a country's population as opposed to 2.14% for the next largest minority, Muslims. While many of these Christian minorities are sufficiently indigenous that they would be unlikely to evoke attempts to protect a country's culture, this is not true of all of them. In particular, US-based protestant denominations have been making efforts to gain converts in Europe. These groups tend to attract more governmental attention. Both France and Belgium have some of these denominations on their official lists of potentially dangerous sects. A 1996 French parliamentary commission identified 173 groups as "cults," including US-based denominations such as Mormons, Seventh Day Adventists, and Pentecostals.<sup>95</sup> Groups on this list have been targeted for surveillance and discrimination. In 1999, Belgium created the "Belgian Sect Observatory," which maintains a list of more than 600 sects and cults and has been accused of targeting some of these minorities for slander and discrimination. It also includes some US-based denominations, such as Seventh-Day Adventists and Mormons.<sup>96</sup>

The other minorities are much smaller, each significantly less than 1% of a country's population overall; accordingly, they pose less of a threat to Christian culture. The Jewish minorities have a long history in these countries and are usually considered part of the indigenous culture.

Islam is a more problematic proposition to explain within the defense of culture argument. On the one hand, Islam is likely the most visible minority in the West and is a growing minority. On the other hand, many of the Muslim minorities in Western and EU countries have a long history in those countries. Thus, while

95 "Cults in France," a report delivered to the French national Assembly on December 20, 1995. An English translation of this report is available at [http://www.cftf.com/french/Les\\_Sectes\\_en\\_France/cults.html](http://www.cftf.com/french/Les_Sectes_en_France/cults.html).

96 "International Coalition for Religious Freedom," *World Reports Online*, <http://www.religiousfreedom.com/>; "The Institute on Religion and Public Policy Denounces Defamation of Religion in Belgium at the UN," *Human Rights Without Frontiers*, <http://www.hrwf.net/>; "Institute Report to UN Details Systematic Religious Discrimination in Belgium," *International Christian Concern*, <http://www.persecution.org>.

the levels of discrimination against Muslims can be explained by the defense of culture argument, it is likely better explained by the securitization argument.

In light of the significant insights produced by the literature on treatment of Muslims in Western democracies after 9/11, it is surprising that few scholars have explored trends of religious discrimination over an extensive time frame. It is also surprising that few have done so in a comparative context, comparing both across states and across different minorities. In an attempt to contribute to the discussion of securitization and defense of culture theoretical frameworks, this study examined religious discrimination against Muslims before and after 9/11. Results show that Muslim and Christian minorities suffer from the highest levels of discrimination in the EU and in Western democracies. Not surprisingly, states with high levels of religious legislation—indicating that they strongly support religion—are also associated with high levels of religious discrimination. Overall, a combination of both theories best explains these result.

# On the Legal and Constitutional Establishment of Islamist Extremism in Indonesia

## Implications for Human Rights and Civil Society in Emerging Muslim Democracies

Micha'el M. Tanchum

After the collapse of the thirty-one year “New Order” dictatorship of President Suharto in 1999, Indonesia embarked on a five-year process of democratic transition. The process began with legislative elections in 1999, and culminated in 2004 with legislative elections without any reserved seats for the Indonesian military and Indonesia’s first direct elections for the office of president. Although a strong Islamist current seeking the Islamist reconstruction of Indonesia as a socio-political order administered according to *shari’ah* has been present since the 1950s, Indonesia’s successful transition to democracy was aided by a robust liberal Islamic public discourse committed to democracy and civil society.

A key element in Indonesia’s liberal Islamic discourse has been its commitment to the normative diversity within Indonesian Islam through its support of intra-religious accommodation. In the historical pattern of democratic development since the English Treaty Settlement of 1689 between Anglicans and Protestant nonconformists, intra-religious accommodation has played a pivotal role in the securing of individual rights, the advancement of religious liberty, and the development of civil society.<sup>1</sup> This study examines how the failure to

1 This article was written with the support of a fellowship from the Department of Middle East and Islamic Studies at the Shalem Center, Jerusalem. The author wishes to express his thanks to Shalem College and to Avishai Don, Noga Gluscksam, and Meir Dardashti for their assistance.

Initiating the development of the Lockean, self-limiting state—a polity wherein the state does not establish a religion and nor does religion establish the state, the process of intra-religious accommodation was subsequently expanded through legal and constitutional

defend intra-religious accommodation against sectarian challenges in the public sphere in Indonesia has created political opportunity structures for shari'ah-state Islamists both to erode an important pillar of Indonesian democracy by utilizing legal mechanisms of the state and to obviate the influence of Indonesia's liberal Islamic discourse.

A new phase of Indonesian politics began in 2005 when Islamists began to challenge the continuation of Indonesia's norms of democracy and civil society through local campaigns of Sunni sectarian agitation against the heterodox Islamic sect known as the Ahmadiyah. Ultimately, the Islamists would succeed in their call for the national government to legally prohibit the Ahmadiyah from practicing their faith in Indonesia. In 2010, Indonesia's Constitutional Court upheld the national government's prohibition.<sup>2</sup> Through an examination of the Indonesian governmental response to Sunni sectarian agitation, the study will show how the failure of the government of President Susilo Bambang Yudhoyono to uphold intra-religious accommodation has proven to be an important turning point in the course of Indonesia's democratic development.

The analysis will explore the impact of the government-sponsored *Majelis 'Ulama Indonesia* (The Council of Indonesian Clerics), or MUI, in legally constraining the definition of Islam.<sup>3</sup> In 2005, the MUI issued a ruling that declared interpretations of Islam that employ concepts of liberalism, pluralism, or secularism to be non-Islamic beliefs. Similarly, the MUI also declared the heterodox Islam practiced by the Ahmadiyah to be a non-Islamic religion. While the MUI's fatwa against Indonesia's liberal Islamic discourse proved tremendously unpopular, anti-Ahmadi agitation inspired by the MUI fatwa has succeeded, in part, politically and legally, to constrain the parameters of Islamic interpretation, to undermine the discourse of human rights, and to deny Muslims the freedom to practice Islam according to their own beliefs.

Through its analysis of how Sunni Islamist extremism has been able to create structures of political opportunity to constrain an individual's right to practice Islam, the paper will suggest the central importance of a national discourse of intra-religious accommodation to establish a foundation for the development of religious liberty and civil society in newly democratizing Muslim societies.

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reforms in the United Kingdom and the American Colonies (later the First Amendment of the U.S. Constitution). Such constitutional advancements crucially depended on the public religious discourse in defense of intra-religious accommodation by political figures ranging from Roger Williams and John Locke to Patrick Henry and James Madison.

- 2 On the functioning of Indonesia's Constitutional Court in matters of religion and state, see Simon Butt, "Islam, the States and the Constitutional Court in Indonesia," *Pacific Rim Law & Policy Journal* 19/2 (2010): 279–301.
- 3 *'Ulamā* are Islamic legal scholars or jurisconsults. The singular form is *'ālim*.

## Indonesia's Liberal Islamic Discourse and Its Opponents during the Transition to Democracy

Indonesia's transition to democracy, which began in 1999, culminated with the inauguration of the country's first directly elected president in late October 2004. Throughout the period of transition, the Muslim advocates of a liberal Islamic discourse in support of civil society and democracy increasingly gained political ascendancy. Indonesia's largest Islamic organization, the Nahdlatul 'Ulama (NU), under the leadership of Abdurrahman Wahid (1940–2009), adopted a liberal political agenda of Islamic modernization rooted in the defense of traditional Indonesian Islam.<sup>4</sup> After Indonesia's first parliamentary elections in June 1999, in the wake of the collapse of the Suharto dictatorship, the NU's leader Abdurrahman Wahid was elected by the parliament in October 1999 to be Indonesia's president. Although a respected *'ālim* of considerable standing, Islamist-oriented *'ulamā* nevertheless bitterly opposed Wahid, condemning him as a “secularist” for his advocacy of *ijithād*, which combined a traditional Indonesian understanding of Islam with liberal principles relating to individual choice in religion.<sup>5</sup> Wahid also stood as a potent symbol for the normative diversity within Indonesian Islam and intra-religious accommodation. Moreover, he was a strong advocate for respecting citizenship rights and the national participation of Indonesia's non-Muslim minorities.

The pioneering founder of Indonesia's liberal Islamic discourse, who posited important ideational foundations for the development of civil society in Indonesia, was Dr. Nurcholish Madjid (1939–2005).<sup>6</sup> Madjid belonged to a prominent, traditionalist Muslim family in East Java with strong roots in the Nahdlatul 'Ulama movement.<sup>7</sup> On January 3, 1970, Nurcholish Madjid created an earthquake in

4 Nahdlatul 'Ulama means the “Awakening of the Religious Clerics.” On Abdurrahman Wahid, see Greg Barton, “Indonesia's Nurcholish Madjid and Abdurrahman Wahid as intellectual 'Ulama: The Meeting of Islamic Traditionalism and Modernism in Neomodernist Thought,” *Islam and Christian-Muslim Relations* 8/3 (1997): 323–350.

5 *Ijithād* is the act of using independent reason to determine solutions to questions posed by new situations. On the politics of *Ijithād* among Indonesia's *'ulamā*, see Nadirsyah Hosen, “Fatwa and Politics in Indonesia,” in *Shari'a and Politics in Modern Indonesia*, ed. Arskal Salim and Azyumardi Azra (Singapore: Institute of Southeast Asian Studies, 2003), 168–180.

6 Nurcholsih Madjid was popularly known in Indonesia by his nickname Cak Nur and often is referred to as Nurcholish. Following the Western journalistic convention, the article will refer to him as Madjid. The same convention is followed with other Indonesian personal names.

7 Madjid's father had been a leading activist in the Islamist political party Masyumi, which was banned by Sukarno in 1960. Madjid began his career as a student activist in Islamist

Indonesia's religious and political landscape when he famously declared "Islam Yes, Islamic Party No!" In a series of powerful public presentations during 1970 and 1971, Madjid put forth the claim that Islamist activists had distorted Islam through their focus on Islamic parties and the achievement of an Islamic state.<sup>8</sup> Accusing them of "sacralizing" the profane, Madjid claimed that Islamist politicians had made a fetish out of an Islamic state to the detriment of Islam, replacing Divine imperatives with humanly-devised objectives. He grounded his argument in the central Islamic principal of *tawhīd* or Divine unity. Claiming that *tawhīd* demanded a continuous process of distinguishing the Divine from the merely human, Madjid writes: "Islam itself, if examined truthfully, was begun with a process of secularization. Indeed the principle of Tauhid represents the starting point for a much larger secularization."<sup>9</sup>

Madjid would regret using the word "secularization" because his distinction between secularization and secularism (understood as the absence of religion in society) was blurred by his detractors and his opponents. However, Madjid's line of thinking was in general conformity with the mainstream of Islamic reformist thought since the latter half of the nineteenth century.<sup>10</sup> Emphasizing rationalism,

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politics and continued to work with the Masyumi leadership even after the party had been banned. With the advent of Suharto's New Order regime, Madjid sought to revive an Islamist political party but was eventually blocked by the government. For a succinct intellectual and political biography of Madjid, see Barton, "Indonesia's Nurcholish Madjid" (above n. 4), 323–350.

- 8 Nurcholish Madjid's major essays appear in Madjid, *Islam, Modernity, and "Indonesianness"* (Bandung: Mizan, 1987) (Indonesian). For an overview of Madjid's formative intellectual contribution, see Muhammad Kamal Hassan, *Muslim Intellectual Responses to New Order Modernization in Indonesia* (Kuala Lumpur: Percetakan Dewan Bahas dan Pustaka, 1980), 89–116.
- 9 Nurcholish Madjid, "More on Secularization" in *Islam* (above n. 8), 249–266. The translated excerpt is from Robert W. Hefner, *Civil Islam—Muslims and Democratization in Indonesia* (Princeton, NJ: Princeton University Press, 2000), 117, quoting from the 1984 edition of Madjid's book, 222. All translations that appear in the main text are that of the author, except where otherwise indicated.
- 10 An original and sensitive thinker on the topic of Islam and civil society, Madjid situated himself in a longstanding reformist tradition that originated with the great Egyptian reformer Muhammad Abduh, who similarly regarded the Islamic concept of *tawhīd* as demanding a commitment to reason, science, and human progress. In the essay, "Modernization is Rationalization not Westernization," Madjid follows a line of thinking similar to Abduh and asserts "Modernity resides in a process, a process of discovery which truths are relative, leading to the discovery of that Truth which is absolute, that is Allah." The translated excerpt here is from Hefner, *Civil Islam* (above n. 9), 117, quoting from the 1984 edition of Madjid's book, 174.



Madjid articulated an Indonesian school of Islamic thought, intellectually cosmopolitan and pragmatic, which embraced pluralism and democracy as consonant with Indonesia's Islamic heritage.<sup>11</sup> Working from this ideational foundation, Madjid and likeminded Muslim intellectuals worked unceasingly to develop this liberal Islamic sensibility among the growing new generation of urban Muslims in Indonesia.<sup>12</sup>

Among Madjid's contemporaries was Dawam Rahardjo, who had spent most of his career as a prominent figure within the Muhammadiyah movement. Indonesia's second largest Islamic organization and a rival to the NU, the Muhammadiyah movement was founded in 1912 as an Islamic reform movement opposed to the Sufi-mediated form of traditional Indonesian Islam. The Muhammadiyah regarded the incorporation of pre-Islamic Indonesian folk rituals and customs in traditional Indonesian Islam as an impediment to Indonesia's ability to modernize and oppose colonialism. Dawam Rahardjo's family had been longstanding members of the Muhammadiyah. Building upon Nurcholish Madjid's work, Rahardjo became one of the leading voices in the development of a Muslim discourse of democracy and pluralism in Indonesia. As such, Rahardjo emerged as one of the chief advocates within the Muhammadiyah of an Islamic liberal discourse. Rahardjo and likeminded figures were opposed by the theocratic-oriented segments of the Muhammadiyah who sought an Islamist reconstruction of Indonesian society. The competition between these two orientations within the Muhammadiyah intensified in the latter years of the

11 Madjid and the subsequent advocates of Indonesia's liberal Islamic discourse embraced Indonesia's five founding national principles, or Pancasila, as a means to understand the appropriate application of Islam to Indonesian society. The Pancasila are: (1) Belief in the one and only God (*Ketuhanan Yang Maha Esa*); (2) Just and civilized humanity (*Kemanusiaan Yang Adil dan Beradab*); (3) The unity of Indonesia (*Persatuan Indonesia*); (4) Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives (*Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan dan Perwakilan*); (5) Social Justice for all of the people of Indonesia (*Keadilan Sosial bagi seluruh Rakyat Indonesia*). At Indonesia's founding, a seven-word amendment was proposed to placate Islamist objections to Pancasila. Known as the Jakarta Charter, the amendment read: "Belief in Almighty God with the obligation for its Muslim adherents to carry out the Islamic law/Syari'ah [i.e., shari'ah]" (*Ketuhanan dengan kewajiban menjalankan syariah Islam bagi pemeluk-pemeluknya*). The amendment was not adopted upon Indonesia's independence. Islamists reject Pancasila and the legitimacy of the Indonesian state upon which it is based.

12 See the discussion in Bahtiar Effendy, "Emergence of the New Islamic Intellectualism," in *Islam and the State in Indonesia* (Singapore: Institute of Southeast Asian Studies, 2003), 65–101.

New Order regime as the Suharto dictatorship began to use Islam to preserve its power and formed alliances with anti-democratic Islamist forces within the Muhammadiyah. One of the leading figures of the theocratic Islamist faction within the Muhammadiyah is Muhammad Sirajuddin Syamsuddin, commonly known in Indonesia as Din Syamsuddin. Seeing no utility in democratic reform, Syamsuddin sought to achieve the realization of an Islamist agenda through the Islamization of the institutions of the New Order dictatorship.

One of the main arenas of the competition between Muslim civil society advocates and sharī'ah-state Islamists during the latter part of the New Order regime was the Association of Indonesian Muslim Intellectuals (Ikatan Cendekiawan Muslim Indonesia).<sup>13</sup> Known more commonly by its Indonesian initials, ICMI, the association was inaugurated by Suharto in December 1990 with the intention of coopting Indonesia's burgeoning educated Muslim elite to support the regime. By 1994, ICMI had grown to approximately 20,000 members, primarily Muslim professionals, scientists, academics, and religious scholars. Although wary of the regime's motives, civil society-oriented Islamic reformers, such as Dawam Rahardjo, saw the ICMI as an opportunity to create a forum which would give voice to a Muslim public discourse on democracy. Islamist theocrats such as Din Syamsuddin, along with their allies in the regime, regarded the ICMI as a vehicle by which to control and dominate Muslim political discourse, shaping it toward their Islamist agenda. As such, they also regarded it as an instrument for the Islamization of the ruling GOLKAR party, the bureaucracy, and eventually the military.

Sympathetic members of the military and Suharto's children, who were concerned to preserve their own position after their father's eventual death, created a think tank for Syamsuddin innocuously named the Center for Policy and Development Studies. Syamsuddin used the think tank to take effective control of the ICMI. In 1994, Syamsuddin was appointed the director of the Research and Development Bureau of GOLKAR, a post from which he sought to advance his Islamization agenda. Working to counter those who advocated a Muslim discourse of democracy and civil society, Syamsuddin even attempted, albeit unsuccessfully, to have Abdurrahman Wahid removed from the NU leadership.<sup>14</sup> However, Syamsuddin was successful in preventing Dawam Rahardjo from securing the position of General Secretary of the ICMI. Moreover, the ICMI ended

13 For a historical treatment of the founding of the ICMI, see Robert W. Hefner, "Islamization and Democratization in Indonesia," in *Islam in the Era of Nation-States: Politics and Religious Renewal in Muslim Southeast Asia*, ed. Robert W. Hefner and Patricia Horavitch (Honolulu: University of Hawaii Press, 1997), 75–127.

14 Hefner, *Civil Islam* (above n. 9), 173.

its funding for Rahardjo's journal, *Ulumul Qur'an*, one of the most important Islamic intellectual outlets for pluralism, democracy, and civil society.<sup>15</sup>

With the fall of the Suharto regime, Din Syamsuddin and his Islamist allies found themselves in a significantly weaker position. Under these new circumstances, Syamsuddin focused on neutralizing the advocates of liberal Islam within the Muhammadiyah itself.<sup>16</sup> In 2005, Syamsuddin succeeded to the chairmanship of the organization. As the leading intellectual force within the Muhammadiyah for a Muslim discourse of pluralism and democracy, Dawam Rahardjo posed one of the most immediate obstacles to Din Syamsuddin's agenda. More broadly, Syamsuddin sought to change the course of Indonesian society through bolstering the position of Islamist-oriented *'ulamā* within the MUI. Syamsuddin, who had assumed the position of secretary-general of the MUI in 2000, worked to transform the MUI into an instrument for the gradual Islamist reconstruction of Indonesia.

The MUI was created in 1975 during the New Order regime of Indonesian dictator President Suharto. Although financed by the Indonesian government, the MUI was ostensibly an independent, non-governmental body charged with the task of being a liaison between the government and the Indonesia's Sunni population, as well as a channel of communication between the government and the country's *'ulamā*. Representatives of virtually every Sunni orientation are members of the MUI. Indonesia's small Shia and Ahmadiyah communities, who combined comprise approximately one percent of Indonesia's Muslim population, have no representation in the MUI. As a result of the MUI being tantamount to a national deliberative body for Sunni Islam, the issuance of fatwas was regarded as a collective process that involved dialog among the different streams of Indonesia's Islamic clerical community.<sup>17</sup> In the beginning of the post-Suharto era transition to democracy, the MUI suffered from the stigma of having been associated with the old regime while it struggled to assert its voice in shaping the future role of Islam in Indonesian society. Conservative and Islamist elements within the MUI sought to dominate the organization, to use the MUI's central position to define an Islamist vision of Indonesia society, and to pressure the government toward implementing this vision.

15 Ibid., 155.

16 On the battle between the two religio-ideological factions within the Muhammadiyah, see Dawam Rahardjo's interview in the Indonesian magazine *Tempo*. Rahardjo, "I was disappointed in religion," *Tempo* 49/34 (January 30–February 5, 2006), posted on the *Bacaan Islam Bermutu* Blog, <http://bacaanislambermutu.blogspot.co.il/2006/03/m-dawam-rahardjo-saya-pernah-kecewa.html> (Indonesian).

17 Hosen, "Fatwa and Politics" (above n. 5), 168–180.

In 2001, the Indonesian parliament replaced President Abdurrahman Wahid with Vice President Megawati Sukarnoputri, whose Indonesian Democratic Party-Struggle (Partai Demokrasi Indonesia-Perjuangan), or PDI-P, commanded the largest number of seats in the parliament. Under Megawati and the center-left, secular nationalist PDI-P, the advocates of intra-religious accommodation and liberal Islamic discourse continued to enjoy prominence in the Indonesian public sphere. This was particularly true after the popular public backlash against, and the subsequent governmental crackdown on, all Indonesian militant organizations in the wake of the October 2002 Bali bombings committed by the al-Qaeda affiliated Jihadist organization *Jemaah Islamiyah*.

The militant organization *Laskar Jihad*, which had been waging violent jihad against the indigenous Christian and Animist populations in the Maluku Islands, was formally disbanded. The organization's militants, primarily from Java, Sumatra, and South Sulawesi, were forced to abandon active combat.<sup>18</sup> Indonesia's third major militant organization, *Front Pembela Islam* (The Islam Defenders Front) or FPI, which had engaged in a sustained Jihadist campaign of low-intensity urban violence for the establishment of an Islamic state, was similarly forced underground.

In 2004, Indonesia held its first direct elections for the office of president. Retired general Susilo Bambang Yudhoyono defeated incumbent Megawati Sukarnoputri in a September 2004 run-off election after receiving a plurality of the votes in Indonesia's first round of presidential elections in July 2004. Yudhoyono had served in Megawati's government as her Coordinating Minister for Political and Security Affairs, and cemented his reputation for being against Islamic militancy with his vigorous prosecution of the *Jemaah Islamiyah* after the Bali bombings. In the presidential election campaign, Yudhoyono had selected the popular, liberal politician Jusuf Kalla as his running-mate. A native of South Sulawesi, Kalla had been instrumental in negotiating the accord that ended the Muslim-Christian conflict in the neighboring Maluku islands, thereby creating the foundation for the disbandment of *Laskar Jihad*. Although Yudhoyono received

18 The conflict, which began as a local matter in 1999, quickly transformed into a Jihadist campaign with intervention of the Islamist militant organization *Laskar Jihad* against the indigenous Christian and animist populations in Maluku. *Laskar Jihad* was responsible for killing thousands and causing the displacement of tens of thousands. Through negotiations facilitated by Jusuf Kalla, a peace accord between the Christian and Muslim populations of Maluku was signed in February 2002, initiating the process of ending the conflict. The accords called for the disbanding of *Laskar Jihad*. The popular backlash against the October 2002 Bali bombings provided the national government with sufficient popular backing to move against *Laskar Jihad*. See a discussion of Kalla further on in the main text.

a strong popular mandate, his Democratic Party placed fifth in Indonesia's parliamentary elections held on April 2004. GOLKAR, the party of the former New Order regime now led by Jusuf Kalla, received the highest vote total, followed by Megawati's PDI-P. In the 550 member legislature, GOLKAR received 128 seats and the PDI-P received 109 seats. With Yudhoyono's Democratic Party garnering only 55 seats, his coalition in parliament did not command a majority. Although Yudhoyono's selection of Kalla as vice-president contributed to Yudhoyono's electoral victory, Kalla—as leader of the largest party in Indonesia's parliament and a staunch pluralist with multi-ethnic appeal—posed a threat to Yudhoyono's reelection aspirations, thus providing Yudhoyono with an additional political incentive to cooperate with the Islamist parties and organizations.

A major component of Yudhoyono's coalition was the Islamist-oriented Prosperous Justice Party (*Partai Keadilan Sejahtera*), which had received almost the same number of seats as the Yudhoyono's Democratic Party. The Prosperous Justice Party emerged from an Islamist movement whose leaders had ideological and personal links with the Muslim Brotherhood.<sup>19</sup> Running on an anti-corruption platform and stressing the need to eliminate public vice, the Prosperous Justice Party has continued to build a mass base and extend its geographic reach. The party's stance against public vice echoed the rhetoric of the FPI Islamist militants. Since the post-Bali bombing governmental crackdown, the FPI adopted a strategy of working in coalition with Islamist political organizations. An FPI-led coalition would spearhead the campaign of anti-Ahmadi agitation and mob violence to challenge the Yudhoyono government to defend intra-religious accommodation.

## The Yudhoyono Presidency and the Failure to Uphold Intra-Religious Accommodation

During the onset of Yudhoyono's government, Islamists within the MUI perceived an opportunity to advance their agenda nationally and to undermine the position of the advocates of a liberal Islamic discourse. The social and political importance of the MUI was highlighted by the fact that President Yudhoyono decided that it was politically prudent to personally open the MUI's seventh national congress, which convened at the end of July 2005. However, MUI chairman Sahal Mahfudz made the MUI's agenda clear in his opening address: "Although the MUI tries to position itself in the middle of all Muslim groups in Indonesia, the council

19 For an overview of the formation of the Prosperous Justice Party, see Amad-Norma Permata, "Ideology, Institutions, Political Actions: Prosperous Justice Party (PKS) in Indonesia," *Asien* 109 (2008): 24–28.

is also required to take a firm stance in dealing with religious deviation. We are determined to win the war of ideas against liberal Islam.”<sup>20</sup>

To achieve this end, the MUI congress went on to issue a number of fatwas, the most notorious of which was its Fatwa No. 7 that declared interpretations of Islam that employ concepts of liberalism, pluralism, or secularism to be non-Islamic beliefs. The fatwa sparked a firestorm of negative responses from the NU,<sup>21</sup> sections of the Muhammadiyah, and, more generally, from Indonesian society as a whole.<sup>22</sup> Nurcholish Madjid, who had received a liver transplant, was incapacitated and would succumb to his ailments on August 29, 2005, one month after the MUI issued its fatwas. Madjid’s passing left Dawam Rahardjo as the leading senior intellectual to oppose the MUI fatwas. Both in print and in broadcast media, Rahardjo systematically dissected the MUI’s definitions of liberalism, pluralism, and secularism demonstrating how the flawed premises in the MUI’s fatwa were designed to legitimize MUI’s efforts to ban “freedom of thought, opinion, and belief, which are part of human rights.”<sup>23</sup>

In consonance with the fatwa against liberalism, pluralism, and secularism, the MUI congress also issued a fatwa calling for a complete ban of the Ahmadiyah. Because of the mystical claims of its founder Mirza Ghulam Ahmad in relation to being the Mahdi, many Sunni Muslims considered the Ahmadiyah to have contravened the tenet of *khātim an-nabiyīn* (“seal of the prophets”), Muhammad’s status as the final prophet, and are therefore non-Muslims.<sup>24</sup> During the New

20 Rendy Witular, “MUI to Formulate Edicts Against Liberal Thoughts,” *Jakarta Post*, July 27, 2005.

21 Although MUI chairman Sahal Mahfudz and Ma’ruf Amin, one of the authors of the fatwa, were members of the NU; the NU as an organization unequivocally opposed the fatwa. See “NU Response to the MUI 2005 Fatwa,” August 25, 2005, republished in the Tausyiah 275 Blog, <http://tausyiah275.wordpress.com/2005/08/25/tanggapan-pbnu-atas-fatwa-mui/> (Indonesian), addressing the collection of MUI’s 2005 fatwas in a single document the NU disputes the MUI’s definitions of liberalism, pluralism, and secularism. Furthermore, the response denounces violent attacks against the Ahmadiyah as well as state coercion to compel the Ahmadiyah to alter their beliefs.

22 Zuhairi Misrawi, “Humanist Fatwa or Violent Fatwa?” *Liberal Islam Network*, August 8, 2005, <http://islamlib.com/en/article/humanist-fatwa-or-violent-fatwa>.

23 Dawam Rahardjo, “When the MUI Bans Pluralism,” *Tempo Interactive*, August 1, 2005, [www.tempo.co/read/news/2005/08/01/05564630/kala-mui-mengharamkan-pluralisme](http://www.tempo.co/read/news/2005/08/01/05564630/kala-mui-mengharamkan-pluralisme) (Indonesian). See the transcript of Dawam Rahardjo’s contribution to the radio discussion, “After the MUI Fatwa—Dealing With the Differences,” Radio Berita 89.2 FM, Radio 68H News, August 4, 2005, posted on the Huma di belantara maya blog, <http://jejaklangkah.multiply.com/journal/item/11/Menyikapi-Perbedaan-Pasca-Fatwa-MUI-Transkrip-Diskusi-Radio-68H> (Indonesian).

24 While Shia consider the twelfth Imam to be the Mahdi, many orientations within Sunni

Order regime, the MUI had issued a fatwa in 1980 prohibiting the dissemination of Ahmadi doctrines. The Jemaat Ahmadiyah Indonesia (Community of Ahmadiyah [in] Indonesia) claims to maintain 542 facilities across Indonesia, including 289 mosques and 110 preaching centers, which service approximately 200,000 adherents.<sup>25</sup> While unable to make significant headway directly through the issuance of the fatwa against liberalism, pluralism, and secularism, Islamist activists used Sunni sectarian agitation against the Ahmadiyah to contest democratic, civil society as well as the liberal Islamic discourse, which been predominant since Indonesia's democratic transition.

A new phase of Indonesian politics began when Islamists challenged the Yudhoyono government through anti-Ahmadi agitation in July 2005. Three weeks before the opening of the MUI's congress, the Jemaat Ahmadiyah's 46th annual meeting was scheduled to be held from July 8 through July 10, 2005. Held at the movement's headquarters in Bogor, West Java, the meeting was attended by approximately 10,000 Ahmadiyah from Indonesia and Southeast Asia. On July 9, 2010, hundreds of anti-Ahmadi demonstrators were mobilized by a front headed by the militant organization FPI and the Islamist think tank Lembaga Penelitian dan Pengkajian Islam (Institute for the Research and Evaluation of Islam), or LPPI. A Saudi-funded institute, the LPPI is dedicated to eliminating the normative diversity in Indonesian Islam.<sup>26</sup> The FPI-LPPI led mob, under the banner of

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Islam also hold a belief in a Mahdi, or guided one, who will return in the end of days. Some believe in a series of periodic Mahdis until the arrival of the last Mahdi. The relationship between the Mahdi and the returned Jesus varies among these Muslims. Mirza Ghulam Ahmad claimed to be both the Mahdi and the returned Jesus, therefore giving rise to the accusation that he claimed the status of being a prophet. See Yohanan Friedman's study on the Ahmadiyah, Friedman, *Prophecy Continuous: Aspects of Ahmadi Religious Thought and its Medieval Background* (Berkeley: University of California Press, 1989).

- 25 UNHCR Refugee Review Tribunal (UNHCR-RRT), *Australia RRT Research Response*, IDN30493—Indonesia, September 6, 2006, §2, [www.unhcr.org/refworld/pdfid/4b6fe1e82.pdf](http://www.unhcr.org/refworld/pdfid/4b6fe1e82.pdf); citing Roy Tupai, "The Right to Faith No More," *Paras Indonesia*, August 2, 2005, [www.parasindonesia.com/read.php?gid=53](http://www.parasindonesia.com/read.php?gid=53) (Indonesian).
- 26 The Jakarta-based LPPI is directed by MUI member Amin Djamaluddin. Highly active in seeking an Islamist reconstruction of the Indonesian state, Djamaluddin is also a member of Persatuan Islam ("Islamic Association" or Persis) and the notoriously anti-Ahmadi organization Dewan Dakwah Islamiyah Indonesia ("Indonesian Islamic Propagation Council" or DDII). Djamaluddin and his LPPI initiated the campaign against the Ahmadiyah prior to 2005, but faced opposition from the Indonesian national government then led by President Megawati Sukarnoputri. For an overview of Djamaluddin and the LPPI related to the issuance of the MUI 2005 fatwa, the post-fatwa, and anti-Ahmadi activism through Spring 2008, see "Indonesia: Implications of the Ahmadiyah Decree," *Update Briefing*, Asia Briefing No. 78, July 2, 2008, [www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/b78\\_indonesia\\_\\_implications\\_of\\_the\\_ahmadiyah\\_decree.pdf](http://www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/b78_indonesia__implications_of_the_ahmadiyah_decree.pdf).

“Indonesian Muslim Solidarity,” gathered outside the Ahmadi headquarters and demanded that the meeting be ended because the Ahmadiyah are apostates and therefore “disturb Muslims.”<sup>27</sup> When the Ahmadi leaders refused, the demonstrators began throwing stones, bricks, and other dangerous projectiles at the building. Ahmadiyah members then clashed with the demonstrators to defend their building, prompting the arrival of heavy police detachments to quell the violence. No arrests of FPI or LPPI members were made.

On July 15, 2005, two weeks before the MUI congress, the FPI-LPPI front mobilized a larger force to attack the Ahmadiyah complex. The militants claimed they were acting in accordance with the 1980 fatwa of the MUI and faced no interference from the several hundred-strong police presence at the scene. The militants damaged several buildings; when they succeeded in setting fire to the women’s dormitory in the boarding school inside the complex, the police forcibly evacuated the remaining Ahmadiyah “for the sake of their own safety.” No arrests were made on the pretext that so many people participated in the attack that no specific individual could be identified.<sup>28</sup> The attack on the Ahmadiyah complex in Bogor was condemned by Jusuf Kalla, Indonesia’s vice-president and GOLKAR party chairman.<sup>29</sup> However, President Yudhoyono himself issued no strong condemnation. Tacitly accepting the erosion of intra-religious accommodation, the Yudhoyono government made no attempt to intervene at the local level. Five days later, on July 20, 2012, the Bogor Regency administration officially closed down the Ahmadiyah complex and ordered the cessation of all activities by the Ahmadiyah movement within its jurisdiction, claiming that the teachings of the Ahmadiyah were against the tenets of Islam and therefore could incite public disorder.<sup>30</sup> This action was followed by the Kuningan Regency administration officially closing down an Ahmadiyah complex within its regional jurisdiction on July 29, 2012. Occurring as the MUI congress was in session, the Kuningan Regency officials also claimed to be acting on the MUI’s 1980 fatwa. The head of the Kuningan Religious Affairs Office, Djainal Arifin, said the administration saw the moment as an opportune time to close the complex with little local opposition.<sup>31</sup> In his statement to the press,

27 UNHCR-RRT, *Australia* (above n. 25), §13.

28 *Ibid.*

29 Muningsari Sri Saraswati, “Gov’t Condemns Group’s Attack on Ahmadiyah,” *The Jakarta Post*, July 18, 2005, [www.thejakartapost.com/detailheadlines.asp?fileid=20050721.A04&irec=3](http://www.thejakartapost.com/detailheadlines.asp?fileid=20050721.A04&irec=3).

30 Theresia Sufa and Wahyoe Boediwardhana, “Scholars Urge MUI to Lift Ahmadiyah Ban,” *The Jakarta Post*, July 22, 2005, [www.thejakartapost.com/news/2005/07/22/scholars-urge-mui-lift-ahmadiyah-ban.html](http://www.thejakartapost.com/news/2005/07/22/scholars-urge-mui-lift-ahmadiyah-ban.html).

31 Nana Rukmana, “Ahmadiyah Congregation Complex in Kuningan Closed by Authorities,” *The Jakarta Post*, July 30, 2005, [www.thejakartapost.com/news/2005/07/30/ahmadiyah-congregation-complex-kuningan-closed-authorities.html](http://www.thejakartapost.com/news/2005/07/30/ahmadiyah-congregation-complex-kuningan-closed-authorities.html).



Djainal added that his office had made preparations to work with the Ahmadiyah in the region to convince them to return to “true Islamic teachings.”

The local bans strengthened the MUI's position, and upon the issuance of the MUI's 2005 fatwa against the Ahmadiyah, Islamist theocrats pressed for a national ban on the Ahmadiyah. Indonesia's national government gave less than a fully robust defense of intra-religious accommodation when it rejected calls to ban the Ahmadiyah based on the MUI's 2005 fatwa. The government argued that the MUI's original 1980 ban only prohibited Ahmadiyah from disseminating their ideas, but not from practicing them.<sup>32</sup> The position of the Yudhoyono government represented a partial capitulation and an abandonment of intra-religious accommodation, implicitly accepting the MUI's 1980 fatwa as the basis of national policy on the issue. Through the combination of anti-Ahmadi sectarian violence and the legal banning of the Ahmadiyah by local governments in response to that violence, Islamists were succeeding in their agenda to constrain individual rights and undermine the advancement of civil society in Indonesia. Without an unequivocal public defense of intra-religious accommodation by the national government, the pattern of local bans against the Ahmadiyah in the wake of targeted sectarian violence continued. In response to attacks on Ahmadi mosques in the West Javan city of Cianjur, the Cianjur Regency administration responded by officially banning the Ahmadiyah from its district.<sup>33</sup> While human rights activists decried the bans on the Ahmadiyah as a violation of the Indonesian constitution's right to freedom of religion, more attacks on the Ahmadiyah were conducted on the islands of Java and Lombok during late 2005 and early 2006.<sup>34</sup>

On February 6, 2006, in honor of the Chinese New year, President Yudhoyono addressed a gathering of ethnic Chinese Confucians and affirmed that Indonesia's government is constitutionally bound to protect freedom of religion.<sup>35</sup> In his

32 Muningar Sri Saraswati, “Government Rejects MUI's Demand to Ban Ahmadiyah,” *The Jakarta Post*, August 11, 2005, [www.thejakartapost.com/news/2005/08/11/government-rejects-mui039s-demand-ban-ahmadiyah.html](http://www.thejakartapost.com/news/2005/08/11/government-rejects-mui039s-demand-ban-ahmadiyah.html).

33 “Cianjur ‘Bans’ Ahmadiyah,” *The Jakarta Post*, September 29, 2005, [www.thejakartapost.com/news/2005/09/29/cianjur-039bans039-ahmadiyah.html](http://www.thejakartapost.com/news/2005/09/29/cianjur-039bans039-ahmadiyah.html). This occurred despite the fact that authorities had arrested twelve individuals for their part in the attacks, “Indonesia Arrests 12 for Attack on Muslim Sect,” *Reuters*, September 21, 2005, [www.thepersecution.org/world/indonesia/05/09/rue21.html](http://www.thepersecution.org/world/indonesia/05/09/rue21.html).

34 Yuli Tri Suwarni, “Court Rejects Ahmadiyah Suit,” *The Jakarta Post*, December 30, 2005, [www.thejakartapost.com/news/2005/12/30/court-rejects-ahmadiyah-suit.html](http://www.thejakartapost.com/news/2005/12/30/court-rejects-ahmadiyah-suit.html); Theresia Sufa, “JAI Sues Bogor Administration,” *The Jakarta Post*, October 21, 2005, [www.thejakartapost.com/news/2005/10/21/jai-sues-bogor-administration.html](http://www.thejakartapost.com/news/2005/10/21/jai-sues-bogor-administration.html).

35 Yudhoyono's statement contradicts Indonesian law, which officially recognizes only six religions—Islam, Catholicism, Protestantism, Hinduism, Buddhism, and Confucianism.

speech, Indonesia's president declared: "The Constitution guarantees the freedom of every citizen to have a religion and to practice their faith. *The state shall never interfere in any religious teachings.*<sup>36</sup> The duty of the state is to protect, serve and facilitate the building and maintenance of places of worship and to encourage citizens to become good followers of their religions."<sup>37</sup>

On the same day, an organized two thousand-person mob burned the houses of 31 Ahmadi families in Lombok. With the complicity of the local administration, 58 Ahmadi families were driven out of their native villages and have since remained refugees in a transmigration center in West Nusa Tenggara.<sup>38</sup> One month after President Yudhoyono declared that "[t]he state shall never interfere in any religious teachings," the Indonesian government made a clear statement when its Minister of Religious Affairs, Maftuh Basyuni, ordered the Ahmadi community in Indonesia to either declare themselves to be non-Muslims or "return to Islam" by renouncing their beliefs.<sup>39</sup> Following Basyuni's statement, two more organized attacks on the Ahmadiyah ensued.<sup>40</sup>

In contrast to President Yudhoyono, Dawam Rahardjo articulated a principled defense of the rights of the Ahmadiyah and intra-religious accommodation. In an interview in Indonesia's *Tempo* magazine, Rahardjo defined religion as "the faith held by individuals" and framed his staunch defense of the Ahmadiyah as a defense of individual freedom. "I adhere to the principle of liberalism, namely freedom of thought, religion, and the use of reason and knowledge," Rahardjo stated in the interview. He then went on to declare, "Religion should not be carried out through [the use of] force. Religious beliefs cannot be imposed. If religion coerces the application of *shari'ah*, then it is contrary to democracy and human rights."<sup>41</sup> Rahardjo's stance brought him into conflict with Din Syamsuddin, who

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Each Indonesian is required to hold an identity card that designates which of these six religions he or she belongs to. Under the anti-China policy of the Suharto regime, Confucianism had ceased to be recognized as a religion. This ban on Confucianism was lifted during the presidency of Aburrahman Wahid.

36 Emphasis added.

37 "Religious Persecution," *The Jakarta Post*, February 07, 2006, [www.thejakartapost.com/news/2006/02/07/religious-persecution.html](http://www.thejakartapost.com/news/2006/02/07/religious-persecution.html).

38 Panca Nugraha, "'Forgotten' Ahmadiyah Followers Resign Themselves to Their Fate," *The Jakarta Post*, September 29, 2007, [www.thejakartapost.com/news/2007/09/29/039-forgotten039-ahmadiyah-followers-resign-themselves-their-fate.html](http://www.thejakartapost.com/news/2007/09/29/039-forgotten039-ahmadiyah-followers-resign-themselves-their-fate.html).

39 Salim Osman, "Islamic Sect Told to Declare Itself Non-Muslim," *The Straits Times*, March 11, 2006, <http://www.rn.org/articles/20799/?&place=indonesia-brunei&section=ahmadiya>.

40 Panca Nugraha, "Ahmadiyah Gets Fresh Attack, House Razed in Lombok," *The Jakarta Post*, March 20, 2006, [www.thejakartapost.com/news/2006/03/20/ahmadiyah-gets-fresh-attack-house-razed-lombok.html](http://www.thejakartapost.com/news/2006/03/20/ahmadiyah-gets-fresh-attack-house-razed-lombok.html).

41 Rahardjo, "I was disappointed" (above n. 16). See related statements by Rahardjo in "Kala MUI bans Pluralism" (above n. 23) and "After the MUI Fatwa" (above n. 23).

was in the process of assuming the leadership of the Muhammadiyah from his position as vice chairman of Muhammadiyah in 2005. As Secretary-General of the MUI, Syamsuddin had been one of the key figures behind the MUI congress and became one of the principle defenders of the MUI's fatwas. Capitalizing on the political momentum from the series of local government bans on the Ahmadiyah, and the lack of a robust defense of intra-religious accommodation from the national government, Syamsuddin expelled Rahardjo for his defense of the Ahmadiyah.<sup>42</sup>

The Yudhoyono government officially began to abandon intra-religious accommodation when it legally formalized the restrictions against the Ahmadiyah with Ministerial Decree No.1/2006, issued jointly by Religious Affairs Minister Basyuni and Home Affairs Minister Muhammad Maruf. The ordinance declared that a house of worship can be permitted only if it is sanctioned by at least 90 worshippers and 60 people from other faiths residing near its vicinity. The MUI supported the government decree, stating in a press interview that "if we don't limit the places of worship, they will be abundant. There would be competition from different religions or sects, and it would create public disorder." The decree was vocally criticized by Indonesia's Ahmadi and Christian communities, as the latter were already facing obstacles in establishing new churches. In seeking to place international pressure on the Indonesian government, 187 Indonesian Ahmadiyah from Lombok attempted to seek asylum in Australia.<sup>43</sup> In August, Indonesia's own National Commission on Human Rights appealed to the government to guarantee the security of the Ahmadiyah, in accordance with Indonesia's 2005 parliamentary ratification of the International Convention on Civilian and Political Rights.<sup>44</sup>

Despite the effort of human rights and civil society activists in Indonesia, the Yudhoyono government continued to abandon intra-religious accommodation while attacks against the Ahmadiyah continued throughout 2007.<sup>45</sup> The ongoing campaign of sectarian violence continued to challenge the national government. On December 18, 2007, a large crowd attacked an Ahmadiyah complex in Kuningan Regency of West Java and damaged dozens of houses owned by members of the local Ahmadiyah community. Local authorities closed the complex.<sup>46</sup> Although Indonesia's Religious Affairs Minister Basyuni denounced the attack, labeling

42 Rahardjo, "I was disappointed" (above n. 16).

43 "Islamic Sect may Seek Asylum in Australia," *Reuters*, July 24, 2006, [www.thepersecution.org/world/indonesia/06/07/reute24.html](http://www.thepersecution.org/world/indonesia/06/07/reute24.html).

44 Panca Nugraha, "Human Rights Commission Wants Ahmadiyah Protected," *The Jakarta Post*, August 12, 2006, [www.thepersecution.org/world/indonesia/06/08/jp12.html](http://www.thepersecution.org/world/indonesia/06/08/jp12.html).

45 UNHCR-RRT, *Australia* (above n. 25), February 5, 2007.

46 Nana Rukmana, "Group Attacks Ahmadiyah Complex in Kuningan," *The Jakarta Post*, December 19, 2007, [www.thepersecution.org/world/indonesia/07/12/jp19.html](http://www.thepersecution.org/world/indonesia/07/12/jp19.html).

it as “criminal,” he announced that it was the responsibility of the Religious Affairs Ministry alone to make the Ahmadiyah “aware of their wrong beliefs or practices.”<sup>47</sup> In the beginning of 2008, the national government’s Coordinating Board for Monitoring Mystical Beliefs in Society (Badan Koordinasi Pengawas Aliran Kepercayaan Masyarakat), known by its Indonesia acronym Bakor Pakem, issued a three-month deadline to the Ahmadiyah to confirm their adherence to a document of twelve tenets that affirm mainstream Islamic beliefs and disavow “deviant” beliefs ascribed to Ahmadiyah. A legacy of Suharto’s New Order regime, Bakor Pakem is composed of officials from the Religious Affairs Ministry, the Attorney General’s Office, the Home Ministry, and the National Police. The decision outraged Islamists within Indonesia and the MUI reiterated its objective of a total ban on the Ahmadiyah.<sup>48</sup> Human rights groups applauded the government’s refusal to immediately ban the Ahmadiyah but criticized its use of Bakor Pakem as a “clear intervention of the state into the freedom of religion” in Indonesia.<sup>49</sup> At the end of its three-month ultimatum, Bakor Pakem recommended that the government outlaw the Ahmadiyah entirely for failing to commit to the document of twelve tenets. The Muhammadiyah, under Din Syamsuddin, supported the government policy. In addition to the Muhammadiyah, the NU affirmed the government’s right to ban the Ahmadiyah for the sake of national stability.<sup>50</sup> Indonesia’s Attorney General quickly complied with the recommendations, and banned the Ahmadiyah from practicing their religion in Indonesia, declaring that “all Ahmadiyah followers must cease their religious activities immediately.”

The Ahmadiyah leadership vowed to fight the decree in court; the matter soon reached President Yudhoyono himself, as the Indonesian President is the official ultimately authorized to ban any organization.<sup>51</sup> The Islamist militants from the

47 “Religious Affairs Minister Denounces Violence Against Deviant Sects,” *Antara News*, January 3, 2008, [www.thepersecution.org/world/indonesia/08/01/an03.html](http://www.thepersecution.org/world/indonesia/08/01/an03.html).

48 “Ulema Cannot Dictate Religious Policy: Official,” *The Jakarta Post*, January 22, 2008, [www.thepersecution.org/world/indonesia/08/01/jp22.html](http://www.thepersecution.org/world/indonesia/08/01/jp22.html).

49 “Sect Monitoring Board ‘Must Be Disbanded,’” *The Jakarta Post*, January 18, 2008, <http://www.rn.org/articles/27507/?&place=malaysia&section=church-state>.

50 Desy Nurhayati, “Gov’t Drafts Joint Decree to Outlaw Ahmadiyah,” *The Jakarta Post*, April 18, 2008, [www.thejakartapost.com/news/2008/04/18/govt-drafts-joint-decree-outlaw-ahmadiyah.html](http://www.thejakartapost.com/news/2008/04/18/govt-drafts-joint-decree-outlaw-ahmadiyah.html). With a concern for the religious practices of many of its members, the NU pronouncement reiterated its preference for dialog and guidance rather than government coercion.

51 “Indonesia: Jakarta Cracks Down On ‘Deviant’ Islamic Sect,” *The Philippine Inquirer Mysinthew News*, April 17, 2008, [www.mysinthew.com/node/10050](http://www.mysinthew.com/node/10050); “Editorial: Religious Persecution,” *The Jakarta Post*, April 18, 2008, [www.thejakartapost.com/news/2008/04/18/editorial-religious-persecution.html](http://www.thejakartapost.com/news/2008/04/18/editorial-religious-persecution.html); See note 35 on Suharto’s ban on Confucianism.

FPI and other organizations mobilized thousands of demonstrators demanding of President Yudhoyono to completely disband the Ahmadiyah.<sup>52</sup> Anti-Ahmadi militants torched an Ahmadi mosque in the West Javan city of Sukabumi, 80 kilometers south of Indonesia's national capital.<sup>53</sup> A multi-religious coalition of civil society organizations and human rights groups appealed to Yudhoyono not to ban the Ahmadiyah and staged a protest march of several hundred demonstrators in Jakarta.<sup>54</sup> Local bans continued as the mayor of the city of Cimahi in the greater Bandung metropolitan area of West Java banned the Ahmadiyah, cordoning off six of their mosques and removing the signs from the buildings.<sup>55</sup> On June 1, 2008, members of the National Alliance for the Freedom of Faith and Religion held a rally in support of the Ahmadiyah on the sixty-third anniversary of the adoption of Pancasila, the five national principles which serve as the pluralist foundation of the Indonesian state.<sup>56</sup> The rally was violently disrupted by members of the FPI.<sup>57</sup> A day later, the leader of the FPI urged his followers to "prepare for war" against the Ahmadiyah.<sup>58</sup>

The national government's response was to capitulate to the Islamists and to completely abandon intra-religious accommodation for the Ahmadiyah. On June 9, 2008, President Yudhoyono, along with his Minister of Religious Affairs, Attorney General, and Minister of the Interior, signed an official decree ordering the Ahmadiyah to stop practicing their form of Islam or face arrest. The decree invoked Indonesia's controversial 1965 Blasphemy Law, which prohibits "practicing an interpretation of a religion that deviates from the core of that

52 "Islamic Sect Draws Protest in Indonesia," *Associated Press*, April 20, 2008, [www.msnbc.msn.com/id/24226101/ns/world\\_news-south\\_and\\_central\\_asia/](http://www.msnbc.msn.com/id/24226101/ns/world_news-south_and_central_asia/). See also "Indonesia: Scrap Proposed Religion Ban," *Human Rights Watch*, April 24, 2008, [www.hrw.org/en/news/2008/04/22/indonesia-scrap-proposed-religion-ban](http://www.hrw.org/en/news/2008/04/22/indonesia-scrap-proposed-religion-ban).

53 "Protesters Burn Indonesian Mosque," *BBC News*, April 28, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7370650.stm>.

54 Abdul Khalik, "Sect Ban Will 'Escalate Violence,'" *The Jakarta Post*, April 30, 2008, [www.thejakartapost.com/news/2008/04/29/sect-ban-will-'escalate-violence'.html](http://www.thejakartapost.com/news/2008/04/29/sect-ban-will-'escalate-violence'.html); "Supporters of Sect March in Jakarta," *Gulf Times*, May 7, 2008, [www.gulf-times.com/site/topics/article.asp?cu\\_no=2&item\\_no=216952&version=1&template\\_id=45&parent\\_id=25](http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=216952&version=1&template_id=45&parent_id=25).

55 Yuli Tri Suwarni, "Mayor Uses Security as Excuse to Ban Ahmadiyah," *The Jakarta Post*, May 16, 2008, [www.thejakartapost.com/news/2008/05/16/mayor-uses-security-excuse-ban-ahmadiyah.html](http://www.thejakartapost.com/news/2008/05/16/mayor-uses-security-excuse-ban-ahmadiyah.html)

56 On Pancasila and its significance, see note 11.

57 Nathan Franklin, "Ahmadiyah Dispute Intensifies," *Inside Indonesia*, March 4, 2009, [www.insideindonesia.org/edition-95/ahmadiyah-dispute-intensifies](http://www.insideindonesia.org/edition-95/ahmadiyah-dispute-intensifies).

58 "Indonesian Islamic Militants Prepare for War against Islamic Sect," *Voice of America*, June 2, 2008, [www.voanews.com/english/news/a-13-2008-06-02-voa14.html](http://www.voanews.com/english/news/a-13-2008-06-02-voa14.html).

religion's teachings."<sup>59</sup> The wording of the decree does not explicitly ban the group, but rather warns the Ahmadiyah that they are no longer free to practice their religion and strongly encourages them to "return to mainstream Islam."<sup>60</sup> Three years after the MUI's 2005 fatwa, the Indonesian government had, in effect, declared the Ahmadiyah to be non-Muslims by presidential decree and outlawed the practice of their faith. Through the use of sectarian agitation and violence against the Ahmadiyah, Islamists had succeeded in diminishing Indonesia's civil society. Approximately one year later, President Yudhoyono won his reelection bid with 61% of the vote, handily defeating Megawati Sukarnoputri and Jusuf Kalla in a three-way race.<sup>61</sup>

Yudhoyono's decree was challenged in Indonesia's Constitutional Court in early 2010. Indonesian Human Rights groups and Civil Society advocates vocally supported the law's repeal, but Indonesia's Religion Minister defended it, arguing that removing the law would lead to "a harmony breakdown."<sup>62</sup> In April 2010, Indonesia's Constitutional Court, by a vote of eight to one, upheld the Blasphemy Law and thus the anti-Ahmadi decree.<sup>63</sup>

During the first half of Indonesia's first decade of democracy, the Indonesian government defeated Jihadist violence and promoted civil society. These efforts were aided by Indonesia's liberal Islamic discourse of human rights and pluralism, the advocates of which enjoyed a central position in Indonesia's public sphere. Since the election and re-election of President Susilo Bambang Yudhoyono, Indonesia has witnessed an Islamist resurgence that has succeeded in marginalizing liberal voices within important sectors of Indonesia's Muslim

59 Arghea Desafti Hapsari, "Blasphemy Law Does Not Violate Religious Freedom: Hasyim," *The Jakarta Post*, February 10, 2010, [www.thejakartapost.com/news/2010/02/10/blasphemy-law-does-not-violate-religious-freedom-hasyim.html](http://www.thejakartapost.com/news/2010/02/10/blasphemy-law-does-not-violate-religious-freedom-hasyim.html). For an in-depth analysis of the 1965 Indonesian Blasphemy Law and the challenge to it in Indonesia's Constitutional Court stemming from the Anti-Ahmadi decree, see Melissa A. Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law* 7/1 (2012): 1–46.

60 Peter Gelling, "President of Indonesia Restricts Muslim Sect," *The New York Times*, June 10, 2008, [www.nytimes.com/2008/06/10/world/asia/10indo.html?\\_r=0](http://www.nytimes.com/2008/06/10/world/asia/10indo.html?_r=0) (accessed May 13, 2013).

61 Megawati Sukarnoputri and Jusuf Kalla received 27% and 12% of the vote respectively.

62 Anita Rachman and Ulma Haryanto, "Religion Minister Defends Indonesia's Blasphemy Law," *The Jakarta Globe*, March 25, 2010, [www.thejakartaglobe.com/home/religion-minister-defends-indonesias-blasphemy-law/365540](http://www.thejakartaglobe.com/home/religion-minister-defends-indonesias-blasphemy-law/365540).

63 "Religious Freedom Groups Slam Indonesia's Blasphemy Law," *USA Today*, April 20, 2010, [www.usatoday.com/news/religion/2010-04-20-blasphemy-indonesia\\_N.htm](http://www.usatoday.com/news/religion/2010-04-20-blasphemy-indonesia_N.htm); On the Constitutional Court's reasoning behind their decisions, see the analysis in Crouch, "Law and Religion" (above n. 59), 39–44.

religious establishment, particularly the semi-governmental *Majelis 'Ulama Indonesia*. Through their incremental approach for the Islamist reconstruction of Indonesia as a state administered according to *sharī'ah*, the Islamists have succeeded in using a campaign of Sunni sectarian agitation and violence to create the political opportunity to eliminate the human rights of the Ahmadiyah through legal and constitutional mechanisms of the state. Although upholding the constitutionality of the Blasphemy Law in its April 2010 decision, Indonesia's Constitutional Court warned of the need to clarify and reform this law, a task which the court assigned to the national legislature. A recent campaign of Sunni sectarian agitation against Indonesia's Shi'i population is producing a similar pattern of violence, anti-Shi'i fatwas, governmental bans, and judicial confirmations of the bans on the basis of blasphemy. In December 2011, the boarding school of Shi'i cleric Tajul Muluk in East Java was burnt down by thousands of demonstrators mobilized by Sunni Islamists. Days after the fire, the local branch of the MUI issued a fatwa against Muluk claiming that he "tarnished Islam."<sup>64</sup> In January 2012, Bakor Pakem called on Indonesia's Attorney General to ban the teachings of Tajul Muluk and blasphemy charges were filed against the Shi'i cleric. At the time of this writing, Tajul Muluk has begun to serve a two-year prison term for his conviction on charges of violating the Blasphemy Law.<sup>65</sup>

The second half of Indonesia's first decade of democracy suggests that the long-term viability of Indonesian democracy and civil society depends on the national government's committed support for a public discourse of intra-religious accommodation. Such accommodation is essential because it precludes Islamist extremists from accruing a privileged status to define the parameters of normative religious practice. In so doing, a government-supported discourse of intra-religious accommodation provides incentives to Muslims from across Indonesia's socio-cultural landscape to view themselves as common stakeholders in the maintenance of democratic rights and the development of civil society. The recent history of Indonesia further suggests that the process of democratization and civil society development in other Muslim countries, which are now emerging from decades of dictatorship, similarly requires a robust public discourse of intra-religious accommodation.

64 Sara Schonhardt, "Officials Turn Blind Eye as Religious Tensions Rise in Indonesia," *The New York Times*, July 18, 2012, [www.nytimes.com/2012/07/19/world/asia/indonesia-turns-blind-eye-as-religious-tensions-rise.html](http://www.nytimes.com/2012/07/19/world/asia/indonesia-turns-blind-eye-as-religious-tensions-rise.html).

65 Human Rights Watch, "Indonesia: Shia Cleric Convicted of Blasphemy," July 12, 2012, [www.unhcr.org/refworld/docid/4ffff48c2.html](http://www.unhcr.org/refworld/docid/4ffff48c2.html).

# The Tension between Religious Freedom and Noise Law

## The Call to Prayer in a Multicultural Society

Alison Dundes Renteln

### Introduction

In pluralistic societies clashes often occur over various types of sound. This is a particularly sensitive topic if the sounds happen to be associated with religious practices. When objections are raised to sounds that are integral to the faiths of religious minorities, there is a legitimate concern about whether the anti-noise law is a subterfuge for discrimination. As a consequence, the government may be compelled to intervene to strike the proper balance between noise and silence. This essay considers disputes about religious sounds that have been interpreted as noise, focusing largely on the Islamic call to prayer, and asks what types of government regulation are permissible in democratic political systems. Analyzing the disputes requires paying close attention to differing conceptions of the ideal soundscape,<sup>1</sup> the culturally constructed realm within which sounds occur. This study is intended to provide a small contribution to the relatively new field of acoustic jurisprudence.<sup>2</sup>

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1 The term “soundscape” was coined by R. Murray Schafer, *The Soundscape: Our Sonic Environment and the Tuning of the World* (Rochester, VT: Destiny Books, 1976).

2 For a proponent of this field, see James Parker, “The Soundscape of Justice,” *Griffith Law Review* 20 (2011): 962–993.



I begin with the importance of sound for society, including a consideration of sounds regarded as problematic. I then discuss the interpretation of objectionable sounds or “noise” in the context of legal doctrine, such as “nuisance,” and of environmental regulations. In these contexts it is conceivable that notions of excessive sound are both culturally constructed as well as subject to objective measures of demonstrable harms; I explore both of these possibilities. If religious sounds ostensibly constitute a nuisance or noise pollution, then the next question often is whether they should be banned or accommodated with a religious exemption. I consider the motivations behind a strategy of limiting religious sounds to see if it masks insidious discrimination: a desire to deter members of religious minorities from migrating to and residing in urban spaces.<sup>3</sup>

I analyze how these conflicts play out by turning to disputes in which governments have sought to prevent religious sounds as well as to policies that have banned the construction of buildings or structures from which the sounds are projected. In actual disputes related to religion and noise one can observe whether political systems have seen fit to make a specific exception either on an occasional basis or to grant a general religious exemption from noise laws, as they balance the protection of religious freedom and the state interest in noise abatement.

This discussion is followed by a consideration of international and domestic legal approaches to this question. I call attention to the lack of adequate government justifications for the limitation on loud religious sounds. The presumption that restrictions are valid has allowed theorists and policymakers to avoid justifying anti-noise laws. Yet, if the right to religious freedom is a fundamental right, then one must ask why anti-noise policies should be administered in communities in such a way as to infringe upon this right. Indeed, religious sounds deserve at least comparable protection to ordinary sounds, and should warrant even greater protection in the absence of a sufficiently compelling state interest. Yet, such an interest may exist if there is a human right to quiet. Thus, to justify the limitation of religious sounds, I will suggest that these anti-noise laws reflect an implicit customary right to quiet.<sup>4</sup> The challenge ultimately will be to weigh these competing rights appropriately so as to justify lowering the volume of loud religious sounds.

In the penultimate section, I propose compromise policies that would permit the call to prayer via new forms of social media. I argue that governments should

3 In some places one may also inquire as to the motivations of minorities seeking to make loud religious sounds. Some may wonder whether their motivation reflects primarily religious concerns or serves to promote a political cause, or both. When conflicts arise in pluralistic societies, there is bound to be suspicion about motivations on both sides.

4 The right may be formulated as a right to quiet enjoyment or to peace and tranquility. There are analogues to the right to quiet.

support a policy of maximum accommodation, which here may be achieved by means of new technologies, as long as the relevant religious minority communities consider them acceptable. At the end, I contend that the entire issue may eventually require a reconceptualization of the main question. International law may need to recognize a new human right to quiet to justify existing anti-noise laws.

## Noise as a Social Problem

Noise is defined as unwanted sound, which begs the question of what constitutes unwelcome sound. When sound is referred to as noise, this usually has negative connotations.<sup>5</sup> As one scholar put it, “Noise is often a term of abuse, especially applied to music one does not like.”<sup>6</sup> Or, as another explains: “If we define *sound* as anything we can hear, then noise is the kind of sound that is disorderly.”<sup>7</sup> The challenge, then, is to determine when noise is the proper designation for the phenomenon; there are likely to be differing views when it comes to religious sounds. In general, sounds that are familiar tend not to attract attention whereas sounds that are unusual do.<sup>8</sup> Once people become accustomed to new sounds, they sometimes fade into the background and people cease to be aware of them. When this occurs in multicultural societies, it forces us to confront the culturally constructed nature of the soundscape. Yet, even if some initially strange sounds, after becoming familiar, are no longer irksome, this does not preclude the possibility of cross-cultural agreement that some loud sounds are excessive and harmful.

- 5 This was not always the case: Americans, until the mid-twentieth century, associated urban noise with progress. Isaac Weiner, *Religion Out Loud: Religious Sound, Public Space and American Pluralism* (New York: New York University Press, 2014), 91.
- 6 Stuart Sim, *Manifesto for Silence: Confronting the Politics and Culture of Noise* (Edinburgh: Edinburgh University Press, 2007), 15. Sim prefers the terms “noise” and “silence” to “sound” and “quiet” because of their general usage and the emotional connotations they evoke. He points out, interestingly, that “noise” is derived from the Latin term “nausea,” or sea sickness, *ibid.*, 16.
- 7 He goes on to suggest that “All sound is either the one or the other or a mixture of the two.” Siegmund Levarie, “Noise,” *Critical Inquiry* 4 (1977): 21–31. Although noise is commonly understood to be loud, noise is not necessarily loud, *ibid.*, 21.
- 8 George A. Spater, “Noise and the Law,” *Michigan Law Review* 63 (1965): 1373–1410. He explains that individuals tolerate noise that is familiar; thus, city dwellers may find that barnyard noises awakened them, while those from rural areas may find it difficult to sleep in the city (*ibid.*, 1375.).

Although not consciously acknowledged, the modern condition involves considerable noise of all sorts, what some have called the “new noisiness.”<sup>9</sup> In large cities, individuals are often bombarded with all different types of loud sounds: sirens of fire engines and ambulances, car alarms and the honking of horns, and police helicopters. Furthermore, when inside buildings such as airports, doctors’ offices, elevators, hotels, and restaurants, one cannot escape “muzak.” The new levels and types of noise raise genuine concern about their impact on individuals and the quality of social life in general. Because of possible threats to public health and to individuals’ wellbeing, commentators emphasize the importance of protecting society from noise. The magnitude of the problem has increased to such an extent that some worry that “. . . silence is a threatened phenomenon.”<sup>10</sup> The trend toward more and more noise associated with a “24-hour society” seems virtually inevitable, partly because it reflects pressures exerted by market forces. Criticisms such as these are often based on a tacit assumption that a culture of serenity is superior to one of cacophony.

The quest for a proper balance between noise and silence requires considering the scope of the social problem as well as the value some cultures place on silence. For instance, George Prochnik, in his provocative book, *In Pursuit of Silence: Listening for Meaning in a World of Noise*, argues convincingly that we should recognize the importance of silence partly because it is vital for deliberative democracy. Other scholars suggest that the shift to the consideration of the auditory experience is critical for understanding the role of “the self” in modernity; they contend that this depends upon the emergence of new acoustic technologies.<sup>11</sup>

The threat to the “culture of silence,” in the sense of freedom from excessive noise, has been exacerbated by the technological innovation of amplification.

9 George Prochnik, *In Pursuit of Silence: Listening for Meaning in a World of Noise* (New York: Doubleday, 2010), 18.

10 Sim, *Manifesto for Silence* (above n. 6), 1. For more on the social significance of noise in the United States, see Hillel Schwartz, “On Noise,” in *Hearing History*, ed. Mark M. Smith (Athens: University of Georgia Press, 2004), 51–53. See also Schwartz’s impressive treatise, *Making Noise: From Babel to the Big Bang & Beyond* (Brooklyn: Zone Books, 2011).

11 See, e.g., Steven Connor, “The Modern Auditory I,” in *Re-writing the Self: Histories from the Renaissance to the Present*, ed. Roy Porter (London: Routledge, 1997), 203–223. For a popular overview of noise and quiet with a noise time line in world history, see Garret Keizer, *The Unwanted Sound of Everything We Want: A Book about Noise* (New York: Public Affairs, 2010). See also Emily Thompson, *The Soundscape of Modernity: Architectural Acoustics and the Culture of Listening in America, 1900–1933* (Cambridge, MA: MIT Press, 2002), especially chapter 3.

With the advent of this technology, the volume of sound from some sources has increased dramatically. The intensification of sound has had serious repercussions. For some, loudness has sinister connotations and is associated with evil. Prochnik, for example, argues that Hitler's rise to power was accomplished partly by means of microphones.<sup>12</sup> It is also well known that US military personnel used loud music as part of the "enhanced interrogation" or torture of enemy combatants who were detained on the military base in Guantanamo Bay, Cuba.<sup>13</sup>

The use of amplification in music emerged in jazz in the 1940s, but it was not until it was deployed in rock music that it led to much social consternation. Widespread use of microphones at large-scale concerts and festivals gave cause for concern.<sup>14</sup> In some parts of the world loud music is perceived as aggressive, and this is exacerbated by the use of microphones.

## Government Interests in Regulation

The most common rationale for regulation is that noise pollution is associated with adverse health consequences. Much of the literature concerned with "community noise" focuses on sounds related to transportation, often emanating from aircraft and highways.<sup>15</sup> In 1999 the World Health Organization (WHO) issued a report, *Guidelines for Community Noise*, that compiled data showing the extraordinary threat noise poses to public health and provided a general overview of noise-

12 "Hitler himself once remarked that without the loudspeaker he could not have conquered Germany, and his loud voice was a treasured property of the rising Nazi Party." Prochnik compares Hitler's loudness to other political leaders at the same time and notes that no one was as loud as he. Prochnik, *In Pursuit of Silence* (above n. 9), 69–70.

13 "Deafening music was played on the loudspeakers directly into their ears and they were told to dance around the room," in Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review of Books, 2004), 15. For a trenchant critique, see Suzanne C. Cusick and Branden W. Joseph, "Across an Invisible Line: Music and Torture," *Grey Room* 24 (2011): 6–21. They mention that the Society for Ethnomusicology and the American Musicology Society adopted resolutions condemning "no touch" torture interrogation that involves music. Sim believes that sound can constitute torture: "Unsought noise is mental torture," *Manifesto for Silence* (above n. 6), 5.

14 *Ibid.*, 116. When the US soldiers tried to induce Manuel Noriega to leave the Vatican embassy, Nunciatura, they blared loud rock music as part of their effort to dislodge him. Ronald H. Cole, *Operation Justice Cause Panama*, (Washington, DC: Joint History Office, Office of the Chairman of the Joint Chiefs of Staff, 1995 ). Acoustic weapons were used in the war in Fallujah, Iraq, Keizer, *Unwanted Sound* (above n. 11), 269.

15 Sanford Fidell, "Community Response to Noise," in *Noise and Society*, ed. Dylan M. Jones and Antony J. Chapman (Chichester: John Wiley & Sons, 1984), 247–277.

related phenomena. A search of the medical literature in the US National Library of Medicine database identified several thousand sources about the detrimental health effects of excess noise.<sup>16</sup>

One of the serious consequences of noise is the loss of hearing.<sup>17</sup> As this is the most common harm, estimates of those afflicted with noise-induced deafness are substantial. Hearing loss is frequently caused by industrial work and excessively loud music.<sup>18</sup> Those who work in factories are known to experience both constant psychic fatigue and hearing impairment as they age.<sup>19</sup> Because of difficulties in measuring the relationship between noise and auditory loss, it is not possible to quantify this accurately.<sup>20</sup>

Some studies claim to have shown a correlation between loud noise and low birth weight. This was evidently the case for babies whose mothers lived near airports in Osaka, Japan, and Los Angeles International airport.<sup>21</sup> While some researchers attribute this to the stress the mothers had experienced, others question the relationship between noise stress and birth weight. Studies that attempt to prove a correlation between aircraft noise and mortality rates have not been entirely conclusive either.

Besides physical consequences, researchers have documented psychological and emotional effects of excessive noise. Their results reveal that exposure to loud noise over time is associated with annoyance, stress, and other emotional disorders. Some medical research suggests long-term exposure to loud noises may cause

16 See Lisa Goines and Louis Hagler, "Noise: A Modern Plague," *Southern Medical Journal* 100 (2007): 287–294.

17 Already in 1998, approximately 15% of American teenagers had permanent hearing damage. A. S. Niskar et al., "Prevalence of Hearing Loss Among Children 6 to 19 Years of Age," *Journal of the American Medical Association* 278 (1998): 1071–1075. The acronym for noise-induced hearing loss is NIHL.

18 Rock music is considered responsible for causing significant hearing loss. See Lucy Kavaler, *Noise: The New Menace* (New York: John Day Co., 1975), 50.

19 Levarie, "Noise" (above n. 7), 24.

20 W. Dixon Ward, "Noise-induced Hearing Loss," in *Noise and Society*, ed. Dylan M. Jones and Antony J. Chapman (Chichester: John Wiley & Sons, 1984), 77. Kary Kryter, *The Handbook of Hearing and Effects of Noise* (New York: Academic Press, 1994). For a more technical discussion of the challenges associated with measurement, see Michael Rettinger, *Handbook of Architectural Acoustics and Noise Control: A Manual for Architects and Engineers* (Blue Ridge Summit, PA: TAB Professional and Reference Books, 1988). See the treatment of community noise and the relationship between annoyance and noise (*ibid.*, 43–53).

21 Charles R. Clark. "The Effects of Noise on Health," in *Noise and Society* (above n. 20), 119–120.

heart disease, hypertension, and ulcers.<sup>22</sup> In extreme cases, loud noise may even function as a provocation, leading those exposed to it to commit acts of violence.<sup>23</sup>

When noise occurs during the night, affecting sleep, that is ordinarily considered a serious health problem. Insofar as unwanted sound disturbs usual sleep patterns, it contributes to chronic insomnia and other problems associated with it. As one study notes: “Long-term psychosocial effects have been related to nocturnal noise.”<sup>24</sup> Indeed, the analysis of nuisance and noise policies invariably mentions the extent to which the sound interferes with sleep patterns.

The most obvious objection to loud noise is that it is distracting. Individuals find that it interferes with their ability to concentrate and be productive. If religious sounds, in and of themselves, do not cause the above health problems and the primary objection is irritation, then one must ask whether an annoyance objection is sufficient to justify the limitation of sounds considered significant for a religious community. Moreover, the question of whether the intensity of noise exceeds standards acceptable to a community is complicated in pluralistic societies comprised of diverse ethnic and religious groups. That is, the response to sound is quite clearly a reflection of culturally variable standards.<sup>25</sup> One must ascertain whether legislating morality with regard to sound can be justified in a democratic polity when there are differing conceptions of the soundscape.

Insofar as culturally different sounds may eventually become familiar and cease to be distracting, the justification for limiting those sounds would appear to be much weaker. When religious sound exceeds established decibel levels of what is deemed safe, regulation is easier to justify. When the loud sounds are beneath levels that cause serious health hazards and are only irksome, the question of whether regulation can be justified is more difficult.

## Acoustic Jurisprudence

Symbols are powerful representations of group identities; as such, they often elicit strong societal responses. Whether the symbol is a building, a linguistic system, or a particular sound, it accentuates a difference. When the majority considers

22 Brent Baughman, “Noise Pollution Hard on Heart as Well as Ears,” *National Public Radio* (May 14, 2011), on the World Health Organization (WHO) report; Jenny Selander et al., “Long Term Exposure to Road Traffic Noise and Myocardial Infarction,” *Epidemiology* 20/2 (2009): 272–279; Frank P. Grad, *Treatise on Environmental Law* (Newark: Matthew Bender, 2011), §5.01.

23 Kavalier, *Noise: The New Menace* (above n. 18), 10.

24 Goines and Hagles, “Noise: A Modern Plague” (above n. 16).

25 W.I. Acton, R.P. Grime, and K. Ratcliffe, “Legal Aspects of Noise,” in *Noise and Society* (above n. 20), 279–302, specifically on 279.

the minority a threat, it often attempts to regulate symbols as part of an effort to undermine the power of the group. Ironically, by clamping down on a community, the government inadvertently causes members of the minority group to rally around the symbol representing it.<sup>26</sup> Historically, majorities have regulated sounds associated with a minority as part of their policies of oppression.<sup>27</sup>

A fascinating field of legal theory is concerned with how the senses influence our understandings of juridical matters.<sup>28</sup> Much of the scholarship emphasizes the importance of visual evidence in courts in comparison to other means by which information can be introduced.<sup>29</sup> In the common law the prohibition against hearsay reflects a presumption about the unreliability of auditory forms.<sup>30</sup> This approach in sensational jurisprudence likewise highlights a distrust of sound (even though we call legal processes “hearings”).

There may be reasons for this. Sometimes, one cannot ascertain the actual meaning of the utterances or sound. Also, people may lie while giving testimony, and recordings may be altered. A special complication may arise when the testimony is given in a language other than that used in court. Interpreters may not provide accurate translations, and there is fear that the court may miss something. Where the meaning of sounds is not apparent, there tends to be excessive fear that the messages may be missed or misconstrued.

## Legal Approaches

The law permits the regulation of sounds if they are disruptive. For quite some time, jurists have acknowledged the social significance of silence and the threat posed by noise.<sup>31</sup> Because individuals are uncomfortable when they hear particular

26 This idea is similar to Johan Galtung’s concept of “rally ’round the flag.”

27 See, e.g., Ruth HaCohen, *The Music Libel Against the Jews* (New Haven: Yale University Press, 2011).

28 See *Law and the Senses: Sensational Jurisprudence*, ed. Lionel Bently and Leo Flynn (London: Pluto Press, 1996).

29 In the brilliant scholarship of Bernard Hibbits, he highlights the prominence of “aurality” in performance cultures in contrast to the Anglo American jurisprudence which privilege visual sense. He also discusses the law of sound as it relates to both speech and music. See also Hibbits, “‘Coming to Our Senses’: Communication and Legal Expression in Performance Cultures,” *Emory Law Journal* 41 (1992): 874–960; and Hibbits, “Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse,” *Cardozo Law Review* 16 (1994): 326–328. His analysis reveals a shift toward more reliance on aural metaphors and highlights analogies between law and music.

30 For discussion of common law preference for eye-witness testimony over hearsay, see Piyel Haldar, “Acoustic Justice,” in *Law and the Senses* (above n. 28), 123–136.

31 For example, Judge Oliver Wendell Holmes wrote a poem “The Music Grinders” on his objections to the noise made by street musicians: *The Complete Poetical Works of Oliver*

sounds,<sup>32</sup> and because the volume of noise has become greater, this has motivated public officials to adopt more anti-noise laws: “The overpowering attack by noise on a defenseless population has evoked an increasing number of protective anti-noise laws in various cities, states, and countries.”<sup>33</sup>

Litigation regarding loud sounds has been addressed via doctrines in the common law such as nuisance (private and public), negligence, and occasionally trespass and strict liability.<sup>34</sup> One commentator notes that dealing with noise is more complicated than other types of nuisance because evaluating it can be highly subjective.<sup>35</sup> In determining what constitutes a nuisance, courts focus on the specific context in which it occurs: whether it is in a residential or industrial area.<sup>36</sup> Primary considerations are whether the sound would bother a “reasonable person” (as opposed to a nervous, hypersensitive one), whether the activity causing the sound has “social value,” and whether the cost of noise abatement would be prohibitive. The dominant view seems to be that loud noise during the night is *prima facie* unreasonable. Also, when factories blew whistles early in the morning, courts generally treated this as a nuisance.<sup>37</sup>

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Wendell Holmes (London: George C. Harrap, 1895). Sim refers to this poem in *Manifesto for Silence* (above n. 6), 3, n. 3; 172–173.

- 32 They can range from grunting in a gym to the noise of aircraft overheard on the Sabbath. Legal systems proscribe verbal utterances such as profanity, ethnic slurs, and insults. Words deemed to be sufficiently offensive both in substance or in the manner uttered, as with “fighting words,” may be subject to regulation. Repugnant utterances are usually analyzed in the framework of freedom of expression. When dealing with sound *per se*, time, place, and manner restrictions of free speech jurisprudence may be applicable.
- 33 Levarie, “Noise” (above n. 7), 29. He discusses the “ascendancy of noise” in society and considers how it entered contemporary music. For a thoughtful treatment of the rise of the anti-street musician movement, see John Picker, “The Soundproof Study: Victorian Professionals, Work Space, and Urban Noise,” *Victorian Studies* 42 (1999): 427–453.
- 34 For a discussion of noise as nuisance, see Bart Kosko, *Noise* (New York: Viking, 2006), §§2, 3. For a superb comparative analysis of noise in the context of nuisance law in South Africa and Scotland, see Hanri Mostert, “Nuisance,” *Bringing Rights Home in Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa*, ed. Elspeth Reid and Daniel Visser (Edinburgh: Edinburgh University Press, 2013), 256–293.
- 35 Spater, “Noise and the Law” (above n. 8), 1373–1410.
- 36 According to Lloyd, the early cases in the United States often involved the metals industries. Hospitals had to be built in such a way as to avoid bothering neighbors with the “groans and moans of the operating room.” William H. Lloyd, “Noise as Nuisance,” *University of Pennsylvania Law Review* 82 (1934): 567–582, especially on 573. He mentions litigation involving the barking of dogs, often deemed a nuisance.
- 37 *Ibid.*, 572; Grad, *Treatise on Environmental Law* (above n. 22), §5.02.



For the most part, what is “reasonable” depends on one’s group membership.<sup>38</sup> Courts also take into account “variables such as the locality of the origin of the noise, the degree of intensity and disagreeableness of the sounds, their times and frequency, and their effect on people of normal sensibilities.”<sup>39</sup> With respect to the issue of “social value” or “social utility of the activity,” there may be a class bias, for instance, in the assessment of what types of music should be construed as an “annoyance.”<sup>40</sup> A leading article on this subject asserts that the noise associated with what is deemed a virtuous cause is unlikely to be treated as a nuisance whereas the noise emanating from race tracks and some types of entertainment lacking social value were more likely to be considered nuisances.<sup>41</sup>

There is a question about how to interpret music with respect to what counts as a nuisance. Although historically it was not obvious that bells should be interpreted as musical instruments, an early case involved the question of whether church bells constituted a nuisance. They had been placed in the roof of a house and were rung five times daily and more often on Sunday. In an old case *Soltau v. DeHeld* (1851), the court issued an injunction barring individuals from ringing them, apparently following precedents on chimes and church bells.<sup>42</sup>

To prevail in a noise action, the plaintiff must prove causation and that the noise was unreasonable. Evidently, the former has not been difficult when the source of noise is clear—as is the case with barking dogs, amusement parks, airplanes, and amplification.<sup>43</sup> However, historically demonstrating that the noise was “unreasonable” sometimes proved to be challenging.

When the government itself is responsible for the noise, lawsuits may be barred because of the principle of sovereign immunity, unless that is waived. When the government builds a system of transportation or some other major construction project, questions may arise as to whether the noise interferes with a property owner’s right to enjoy the peaceful use of his property and whether it results in a devaluation of the property. Even if it does, in the United States, if the development

38 Lloyd begins his essay with the formulation as put forward by a student: “The test then is whether this conduct interferes with ordinary comfort, not according to some fanciful standard but according to the plain and sober manners of an English gentleman.” Lloyd, “Noise as Nuisance” (above n. 36), 567.

39 Grad, *Treatise on Environmental Law* (above n. 22), §5.02.

40 Lloyd refers to a case in which the judge asked: “Whether classical music was more distracting than works of a lower class, he could not say,” “Noise as Nuisance” (above n. 36), 578. The mere fact that he posed this query reflects a bias.

41 Although bowling alleys were once regarded as socially unacceptable, the attitude toward them changed over time. In the United States, complaints were often related to barking dogs and rollercoasters.

42 *Soltau v. DeHeld*, 2 Sim. (N.S.) 133 (1851).

43 Grad, *Treatise on Environmental Law* (above n. 22), §5.02.

project is necessary for government functions (constitutes a public purpose), this will not be treated as a “taking” under the Fifth Amendment of the Constitution. The government generally has immunity from lawsuits alleging a nuisance, so long as the noise-creating project is necessary to fulfill its responsibilities.<sup>44</sup>

## Noise Pollution: Codes and Cases

Noise pollution affects millions of people across the globe, and has raised awareness of the value that relative quiet holds for everyone. Throughout the world unwanted sound has been regulated by statutes in various areas of law including public health, occupational safety, and environment. Aircraft in particular have been the target of much of the anti-noise legislation.<sup>45</sup> The WHO has issued community noise guidelines, which established limits on the volume of sound.<sup>46</sup> Noise pollution is a worldwide problem that is receiving increasing attention, sometimes through special events like Ghana’s International Noise Awareness Day in 2006.<sup>47</sup>

Jurisprudence related to noise pollution has begun to develop in this area. In *Hatton and Others v. United Kingdom*, the plaintiffs alleged that night flights at Heathrow Airport constituted “noise disturbance” that exceeded the WHO guidelines and violated their rights guaranteed in the European Convention of Human Rights including Article 8: the right to respect for privacy, family life,

44 For a review of cases discussing the question of whether noise causes damage and whether this constituted a “taking,” see Spater, “Noise and the Law” (above n. 8). In rare cases, plaintiffs allege that the noise constitutes a trespass. This type of suit seldom prevails. “There is no right of recovery for noise from public improvements, whether operated by the government or those acting under government authority,” *ibid.*, 1401. See also commentary on whether the Religious Land Use and Institutionalized Persons Act (RLUIPA) applies to cases involving the power of eminent domain.

45 Grad, *Treatise on Environmental Law* (above n. 22), §5.01.

46 *Guidelines for Community Noise*, eds. Birgitta Berglund, Thomas Lindvall, and Dietrich H. Schwela (Geneva: World Health Organization, 1999). See also Alexander Gillespie, “The No Longer Silent Problem: Confronting Noise Pollution in the 21st Century,” *Villanova Environmental Law Journal* 20/2 (2009): 181–216.

47 See, e.g., Farhad Dabiri, Parvin Nasiri, and Nooshin Ahanrobay, “A Comparative Analysis of the Legal Status of Noise Pollution in Iran and the World,” *International Conference on Environmental Engineering and Applications* (Singapore: ICEEA, 2010), 188–190. Seyed Hamad Mirhossaini et al., “Environmental Noise Pollution in the City of Khoramabad, Iran,” *Journal of Environmental Science and Technology* 1/4 (2008): 164–168; Sanjay Marale et al., “Comparative Analysis of Noise Pollution in Pilgrimage Places from Maharashtra, India,” *Enrich Environment* 4/2 (2011): 3–12. On Ghana, see Keizer, *Unwanted Sound* (above n. 11), 269.

and home.<sup>48</sup> Although the Court initially ruled in their favor, the Grand Chamber disagreed, concluding that the margin of appreciation doctrine required deferring to the UK government's assessment of the threat posed by the night flights.<sup>49</sup> The dissenting opinion highlighted the importance of "environmental human rights." It suggested that the protection of a right against excessive noise was the proper jurisprudential conclusion. Some commentators felt that the reasoning gave too much weight to economic development over environmental human rights.<sup>50</sup>

The European Court of Human Rights subsequently found that excessive sound did violate human rights guaranteed in the European Convention of Human Rights.<sup>51</sup> In *Moreno Gomez v. Spain* (2005), the Court held that the failure of local officials to limit noise emitted by bars, restaurants, and discotheques to legal limits in an "acoustically saturated zone" violated a woman's right to Article 8, the right to respect for private and family life.<sup>52</sup> The Court was influenced by the fact that, for years, the government had been aware that violations of anti-noise policies had disturbed her at night and shirked its responsibility to address the problem.<sup>53</sup>

In the United States where noise is considered a serious public health problem that adversely affects quality of life, numerous statutes that cover noise have been

48 Application no. 36022/97, Oct. 2, 2001, referred to the Grand Chamber Aug. 7, 2003; Grand Chamber judgment, July 8, 2003. 2003–VIII Eur. Ct. Hum. Rts. 189 (July 8). In another case, *Ashworth and Others v. U.K.*, involving a claim of noise pollution related to low-flying aircraft, the Court ruled that the application was inadmissible. 2004–X Eur. Ct. H.R. 327 (2005).

49 The Grand Chamber was persuaded that the UK had mitigated the impact of the flights and had weighed the economic interests against the rights of the individuals who lived near the airport carefully enough. Although the Court found no violation of Article 8, it did find a violation of Article 13, the right to a remedy, due to the inadequate judicial review of the environmental assessment process. It agreed that the plaintiffs should receive attorneys' fees and compensation for other expenses associated with the litigation.

50 See, e.g., Alan Boyle, "Environment and Human Rights," *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2012), §24; Boyle, "Human Rights or Environmental Rights: A Reassessment," *Fordham International Law Review* 18 (2007): 147–511.

51 Telmo Esteban Fernandez, "Environmental Cases in the ECHR: A Focus in [sic] Noise Pollution," *Yearbook on Humanitarian Action and Human Rights* (2009): 133–146.

52 Case of *Moreno Gomez v. Spain*, European Court of Human Rights, (2005), Application no. 4143/02. (2005) 41 E.H.R.R. 40 (ECHR, 11/16/2004). The Court reversed the burden of proof, noting that the sound level readings, taken by environmental inspectors outside her house, showing noise exceeded legal limits were sufficient; it was unnecessary to assess the decibel level inside her home.

53 Francis McManus, "Noise Pollution and Human Rights," *European Human Rights Law Review* (2005): 575–587.

enacted by various federal agencies including the Federal Aviation Authority, Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Secretary of Transportation, the Secretary of the Interior (for National Parks), the Department of Housing and Urban Development. In 1974, the EPA issued the first major report on noise, which called attention to portable air compressors and medium and heavy-duty trucks; it took only a few years to establish standards governing them, though.<sup>54</sup> Among the most important laws are the Federal Noise Control Act of 1972 and the Quiet Communities Act of 1978 to fund and facilitate the development of state local noise abatement programs. The Noise Control Act has been criticized for focusing primarily on the manufacture of products that create noise and for delegating too much regulatory control to state and local authorities. In addition, although the EPA could help with the guidelines concerning noise regulatory standards, the FAA retained considerable control and had the final say. The absence of a specialized agency to handle noise may be part of the problem with inadequate enforcement.

Despite the existence of much legislation on noise, there has been disagreement regarding the maximum decibel levels that the law should allow. In the United States, for example, the OSHA standard was ninety decibels over an eight-hour day, and the EPA has argued that this was not stringent enough.<sup>55</sup> The noise control laws are also subject to the criticism that they have not established objective or quantitative standards. Furthermore, the sanctions are minimal penalties and appear to be an inadequate deterrent. A major treatise concludes that “most anti-noise laws have therefore been almost entirely ineffective.”<sup>56</sup> Noise pollution standards are inconsistent: they vary in the magnitude of the noise permitted and contain differing definitions. They also differ with regard to the places regulated, the times they prohibit loud noise, and other issues.

Cities have taken varying approaches. Chicago adopted the first major city ordinance in the United States in 1971. Interestingly, the city had an imaginative enforcement plan. They would send out teams with portable sound meters to listen for violations. In 1972, New York City adopted a noise control code that relied on setting specific decibel limits for various machinery. The New York policy allowed for exemptions for specific activities. The law allowed individuals to apply for permits to engage in noisy activities.

54 Grad, *Treatise on Environmental Law* (above n. 22), §5.03[1d].

55 Grad, *Treatise on Environmental Law* (above n. 22) §§5, 5.03[1b]. For an overview of noise policies in the United States with an emphasis on Florida, see Paula P. Bentley, “A Line in the Sand: Florida Municipalities Struggle to Determine the Line Between Valid Noise Ordinances and Unconstitutional Restrictions,” *Stetson Law Review* 35 (2006): 461–508.

56 Grad, “Noise,” in *Treatise on Environmental Law* (above n. 55), §5.

Another approach has been to focus on insulating structures to withstand noise, rather than concentrating on the source of the noise.<sup>57</sup> Baltimore adopted a policy that regulated the use of amplification by stores. It stipulated that merchants could not make loud noises before 8 am in the morning, though they may at other times. Street vendors were also prohibited from crying out after 10 pm. Local ordinances on noise pollution that prohibit “unreasonable, raucous, or unnecessary noise” have been challenged on the due process ground that they are overly vague, but in the United States the laws have mostly been upheld.

Having considered some of the existing and emerging policies regarding unwanted sound, I turn now to the matter of loud religious sounds. In what follows I ask how to interpret the call to prayer in established frameworks. Even if the majority thinks religious sound is “noise,” it is not obvious that it should be subject to the policies. The question is simply whether or not officials should grant exceptions because of the motivation for making the sound.

## The Call to Prayer

The question of whether the Islamic call to prayer, or *adhan* (*azan*), deserves a religious exemption from existing noise laws has been fraught with controversy. What has made this especially controversial is the fact that traditionally the *adhan* takes place five times a day every day, from very early in the morning until the late evening.<sup>58</sup> Although some scholars deny that the Quran requires praying five times a day, the Muslim worldview seems to regard this as obligatory for adults.<sup>59</sup> Although one should not assume that all schools of Islamic jurisprudence approach prayer (*salat*) the same way, they do seem to share the view that praying five times a day is obligatory: “The five times of prayer (*miqat*) are defined as

57 Interestingly, insulation is said to be ill-advised for sacred buildings because “excessive use of sound insulation causes sacred spaces to lose one of their most essential qualities: the sense of otherworldliness, the atmosphere that creates conditions for transcendent experience.” Rudolf Stegers, *Sacred Buildings: A Design Manual* (Basel: Birkhauser, 2008), 97.

58 For a discussion of surahs in the Quran explaining the injunction for five prayers, see Kenneth Cragg, *The Call of the Minaret* (New York: Oxford University Press, 1964), 106–110. See also Imam Feisal Abdul Rauf, *What’s Right with Islam: A New Vision for Muslims and the West* (New York: Harper San Francisco, 2004), 50. Some scholars maintain that in earlier times, Muslims were required to pray only twice a day, morning and afternoon. See, e.g., Uri Rubin, “Morning and Evening Prayers in Early Islam,” in *The Development of Islamic Ritual*, ed. Gerald Hawting, vol. 27 (Aldershot: Ashgate/Variorum, 2006), 105–129. For the evolution in meaning of *adhan*, see C.H. Becker, “On the History of Muslim Worship,” in *Development of Islamic Ritual*, ed. Gerald R. Hawting, vol. 26 (Burlington, VT: Ashgate Publishing, 2006), 47–94.

59 Cafer S. Yaran, *Understanding Islam* (Edinburgh: Dunedin Academic Press, 2007), 39.

daybreak (*salat al-subh* or *fajr*), noon (*salat al-zurh*), mid-afternoon (*salat al-asr*), sunset (*salat al-maghrib*), and evening (*salat al-siha* or *atmama*), but the precise way in which these times are determined varies.<sup>60</sup> According to most treatises, despite the frequency of the call, it is not necessary to go to the mosque to pray except for on Friday.

The *adhan* is the call outside the mosque, and it is associated with the *iqama*, the beginning of the prayer inside the mosque. The *adhan* is considered a demarcation between the sacred and the profane, and it serves to unify the community.<sup>61</sup> Its importance is suggested by a Muslim custom associated with the birth of a child: “When a child is born in a Muslim family, after the midwife has completed her task, the *adhan*, or Call to Prayer, is pronounced in the child’s right ear and the *iqama*, or the establishment of prayer, in the left one, so that the first thing the child hears is the attestation of faith and the call to worship its creator.”<sup>62</sup>

Although this may not have always been the case, the tradition has evolved so that a Muslim man, the *muezzin*, calls from a tower of the mosque known as a minaret.<sup>63</sup> Historians contend that the *adhan* was inspired by other religious traditions: “The *adhan* itself was copied from the Christians and the Jews. Ibn Hisham tells us that when the first Moslems came to Medinah, they prayed without any preliminary *adhan*. But the Moslems heard the Jews use a horn, and the Christians the Nakus or clapper and they wanted something similar for their own use.”<sup>64</sup>

While in the past the *adhan* was accomplished by the human voice alone, in the mid-twentieth century amplification was used, most likely so as to reach a wider range of followers.<sup>65</sup> After loudspeakers began to be employed in the early 1950s,

60 Andrew Rippin, *Muslims: Their Religious Beliefs and Practices*, 4th ed. (London: Routledge, Taylor & Francis, 2012), 107. Rippin says that it is not clear why there are five times for prayer every day, but posits that it may be associated with the number’s ritual significance in the Muslim culture (e.g., the five pillars of Islam).

61 Muneer Goolam Fareed, “Adhan,” in *Encyclopedia of Islam and the Muslim World*, ed. Richard C. Martain (New York: Macmillan Reference USA, 2004), 13. See also Tong Soon Lee, “Technology and the Production of Islamic Space: The Call to Prayer in Singapore,” *Ethnomusicology* 43/1 (1999): 86–100, especially 86. As-Sayyid Sadiq, *Supererogatory Prayer*, trans. Muhammad Sa-eed Dabas and Jamal al-Din M. Zarabozo (Indianapolis: American Trust Publications, 1989).

62 Yaran, *Understanding Islam* (above n. 59), 46.

63 J. H. Richard and G. Gottheil explain that early on mosques did not have minarets and there was “no mention of a special place for the Muezzin,” “The Origin and History of the Minaret,” *Journal of the Oriental Society* 30 (1910): 132–154.

64 *Ibid.*, 133–134.

65 Mark Sedgwick, *Islam and Muslims: A Guide to Diverse Experience in a Modern World* (Boston: Intercultural Press, 2006), 73; Umar F. Abd-Allah, “Living Islam with Purpose,” *UCLA Journal of Islamic and Near Eastern Law* 7 (2008): 17.

the debate over this custom became even more heated. When individuals lived in residential communities mainly with those belonging to their own faith, this was less likely to be a problem. As people migrated to live in pluralistic societies, the sound of the adhan has sometimes been startling to others. Because of its frequency and volume, there has been, in some quarters, little tolerance for it.

The call to prayer is an enigma to Westerners. First, in trying to classify the sound, some might mistakenly treat it as music. This would be incorrect, however, as Muslims do not regard the recitation of Quran as music; branding it as such, in their eyes, would be sacrilegious.<sup>66</sup> Furthermore, even when Westerners misinterpret the call to prayer as music (often comparing it to the peals of church bells),<sup>67</sup> they tend to treat it as “noise” anyway. They consider it “unwanted” noise; to Muslims, though, adhan is sound and certainly not noise.<sup>68</sup>

## Contemporary Debates

In the twenty-first century, public officials in pluralistic societies have been confronted with new cultural groups seeking to follow religious traditions. In some of most prominent disputes, muezzin simply wished to call members of the community to prayer from a special building. The reaction by the majority to what they regarded as the “acoustic occupation of space” shows that the call to prayer clearly touched a nerve; because the majority has sometimes reacted with overt hostility, these debates deserve careful scrutiny. Since the adoption of the loudspeaker, which considerably increased the adhan’s volume, there have been numerous direct and indirect attempts to regulate the call to prayer. When this happens, some Muslims argue that sanctions infringe upon their right to religious freedom.

Many controversies in the West have revolved around questions such as whether mosques could be built in cities, or whether minarets, the tower on the

66 “The cultural logic here is that labeling the Qur’anic recitation ‘music’ would impugn the Qur’an’s claim of uniqueness. If the Qur’an is truly inimitable, totally unique, and of divine origin, it simply cannot be treated or viewed as comparable to any other object, certainly not a human object. To call its recitation ‘music’ would therefore demean it by classifying it as belonging to a whole range of purely ordinary mundane creations.” Alan Dundes, *Fables of the Ancients? Folklore in the Qur’an* (Lanham: Rowman & Littlefield, 2003), 21.

67 Thus, although the selective enforcement argument that pervades the discussion of sound regulations often compares the peals of church bells to the call to prayer, some Muslims might strongly object to this comparison.

68 Naveeda Khan, “The Acoustics of Muslim Striving: Loudspeaker Use in Ritual Practice in Pakistan,” *Comparative Studies in Society and History* 53/3 (2011): 586.

mosque, could be erected on top of them.<sup>69</sup> Architectural matters have generated remarkable conflict, largely for the symbolic reason that: “[t]he mosque is an interface between the urban environment, Muslim citizens, and religious pluralism.”<sup>70</sup> In Italy, Germany, the United Kingdom, and the United States highly publicized mosque controversies have attracted widespread public attention.<sup>71</sup> In some cases, outright bans were enacted. The explicit justifications for bans varied somewhat, but included objections that the design would be incompatible with other buildings in the surrounding area and that the mosques would cause traffic congestion in particular areas;<sup>72</sup> in other cases, there were more specific objections to the minarets.

Although American and European cities have other tall structures such as church towers and steeples, those are generally viewed as “secular.”<sup>73</sup> By contrast, Islamic structures are often viewed as highly visible religious symbols in public spaces. In an era characterized by “Islamophobia,” minarets are sometimes perceived as threatening.<sup>74</sup> Occasionally opponents admit that they simply do not

69 See, e.g., Special Issue, “Mosque Conflicts in Europe,” *Journal of Ethnic and Migration Studies* 31/6 (2005). See also Katherine Pratt Ewing, “Legislating Religious Freedom: Muslim Challenges to the Relationship Between Church and State in Germany and France,” in *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies*, ed. Richard A. Shweder, Martha Minow, and Hazel Rose Markus (New York: Russell Sage Foundation, 2000), 66.

70 Nilufer Gole, “The Public Visibility of Islam and European Politics of Resentment: The Minarets-Mosques Debate,” *Philosophy and Social Criticism* 37 (2011): 383–392, specifically on 386.

71 The most famous controversy surrounded the Cordoba House, a mosque to be built a few blocks from Ground Zero. Other mosque disputes that attracted media coverage include one in Temecula, California. Phil Willon, “Planned Temecula Mosque Draws Critics,” *Los Angeles Times*, July 18, 2010, A33, A38. Opponents of the erection of an Islamic Center in Tennessee actually denied that Islam was a valid religion. The Obama Administration twice censured the local officials saying that failure to authorize the mosque would violate the civil rights of its members. Thomas Perez, Assistant Attorney General for Civil Rights, noting that mosques had to be treated the same as synagogues, commented: “This is not only common sense. It is required by federal law.” See Richard Serrano, “Justice Department Back Building of Tennessee Mosque,” *Los Angeles Times*, October 19, 2010, A8. On Germany, see Mark Landler, “Germans Split Over a Mosque and the Role of Islam,” *New York Times*, July 5, 2007, A3.

72 See, e.g., Phil Willon, “Mosque OKd Over Protests,” *Los Angeles Times*, January 27, 2010.

73 Todd Green, “The Resistance to Minarets in Europe,” *Journal of Church and States* 52/4 (2010): 619–643. He notes: “few buildings in Europe generate the kind of protest and conflict that mosques do.”

74 Wilfried van Winden, the architect for a mosque in Rotterdam, rejects the idea Muslims should have to hide their identity from the host country. He views “minaret phobia” as



want to attract Muslims to their neighborhoods. These individuals feel that banning the mosques will deter members of religious minorities from moving to their communities. Some publicly admit that they associate the erection of mosques with terrorism.<sup>75</sup> In some instances the explicit concerns involved “noise.” At least one commentator has suggested that the visual presence of minarets accompanied by the acoustic presence of the *adhan* reinforces fears of a Muslim takeover and of the imposition of their value-system.<sup>76</sup> Thus, even disputes ostensibly about other matters may be partly motivated by concerns about loud religious sounds.

One of the cases involving one of the more explicit expressions of hostility occurred in Birmingham, England. Although the city council considered the design consistent with aesthetic standards and gave its official approval, it was subject to the restriction that “no sound reproduction or amplification equipment shall be installed or used on any part of the said minaret at any time.”<sup>77</sup> The Muslim community asked that the restriction be removed, giving two reasons: first, because churches could ring their bells any day of the week, the mosque committee’s request to install amplification “was not unreasonable,”<sup>78</sup> and second,

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a way for the dominant culture to oppress minority cultures in order preserve national identity. Wilfried van Winden, “Freedom Equals Happiness: A Plea for Pluralism in an Open Society,” in *The Mosque*, ed. Ergün Erkoçu and Cihan Buğdaci (Rotterdam: NAI Publishers, 2009), 80–87.

- 75 When a pastor of a Baptist Church was asked why he objected to the construction of a mosque in Temecula, he responded, “The Islamic foothold is not strong here, and we really don’t want to see it spread. There is a concern with all the rumors you hear about sleeper cells and all that. Are we supposed to be complacent just because these people say it’s a religion of peace? Many others have said the same thing.” Phil Willon, “Temecula Mosque” (above n. 71), A33, A38.
- 76 Green contends that the resistance to minarets is related to the *adhan* but says that this is driven more by “what might be on the horizon rather than by current practice,” “Resistance to Minarets” (above n. 73), 632.
- 77 Richard Gale provides an excellent account of this dispute. Gale, “Planning Law and Mosque Development: The Politics of Religion and Residence in Birmingham,” in *Law and Ethnic Plurality: Socio-Legal Perspectives*, ed. Prakash Shah (Leiden: Martinus Nijhoff, 2007), 127–144. For a consideration of a South African case in which the Muslim community unsuccessfully challenged the validity of a contract clause prohibiting the use of amplification, see *Garden Cities Incorporated Association Not for Gain v. Northpine Islamic Society*, 1999 2 SA 268 [C].
- 78 An important shift in argumentation was the willingness of the planning authority to address the comparison between the call to prayer and church bells, acknowledge that both led to complaints, and distinguish them on the basis of the frequency of the call to prayer, which would likely constitute a nuisance. See Gale, “Planning Law” (above n. 77), 134–137.

because another planning authority had allowed the adhan, thereby setting a national precedent.<sup>79</sup>

During the process of public comment, the city council received numerous letters expressing concerns: “that Muslims don’t live in the area; that to approve the call to prayer would be taking ‘race relations’ too far; that England is still a Christian country, whilst Islam is a ‘false’ religion; that the call would devalue properties and contribute to the degeneration of the area; that the sound of the call is unpleasant and ‘alien’ to English heritage; that this application is the ‘thin end of the wedge’ and will lead to other similar applications elsewhere; and that the sound of the call will be a distraction to motorists, leading to road accidents.”<sup>80</sup>

The strength of the opposition supported the council’s decision not to approve the sound equipment, and so under community pressure, the mosque committee withdrew the application for a sound permit to broadcast the call to prayer. After the passage of several years, and more consultation, the application to broadcast the adhan was approved, after an initial trial period. The community calmed down, and the call to prayer was allowed without further ado.

In some countries the proposal for a ban on the call to prayer via loudspeakers comes from the government itself. In Israel, for instance, a member of Knesset introduced a bill proposing an amendment to the nuisance law in December 2011, which, if enacted, would ban the amplified call to prayer throughout the entire country.<sup>81</sup> The “Muezzin Law” was apparently inspired by concerns over noise pollution, the volume of the speakers used in *adhan*, and originated from: “a world view whereby freedom of religion should not be a factor in undermining quality of life.”<sup>82</sup> As Israel was not reacting to a request from a new religious minority or a new method of handling the call to prayer, it is unclear what motivated the proposal at that particular moment.<sup>83</sup> Reactions to the proposal to bar the use of the public announcement system as part of the call to prayer were strongly negative;

79 Ibid., 132.

80 Gale provides empirical data showing the intensity of public opposition. Some of the points made are disturbing. For example, some held the view that allowing the *adhan* would make the Muslims too prominent in the community, putting them at risk for hate crimes. Refusing to allow the call to prayer thus was said to be in their best interest.

81 Donald Macintyre, “Netanyahu Backs Law to Ban Loudspeakers at Mosques Across Israel,” *The Independent*, December 13, 2011, 30.

82 Ibid.

83 According to one account, the “Muezzin” law was part of “a recent wave of legislation proposed by the Knesset targeting Arabs and leftists groups.” Some Arab religious authorities noted that they had been practicing this tradition for fifteen centuries in Jerusalem. Ibid., “Netanyahu” (above n. 81).

the sponsor of the bill even received death threats.<sup>84</sup> Thousands of Israeli Arabs took to the streets to protest publicly against the bill.<sup>85</sup>

Even if the government does grant a request to allow amplification of calls to prayer, members of the community may object to the accommodation. In Hamtrack, Michigan, after the city council approved the request to broadcast the call to prayer, effectively granting a religious exemption, some citizens objected to this. To minimize conflict, the mosque leadership decided not to broadcast before 6 am or after 10 pm. Because the scheduled times of prayer were available on websites, this ostensibly obviated the need to rely on a broadcast call to prayer. Despite the conciliatory attitude of religious elites at the mosque, some residents were not appeased.<sup>86</sup> The Muslims sponsored an initiative, so members of the community could vote on whether or not to retain the religious exemption from noise ordinances. Although there was some confusion about what they were voting for, the measure was approved, and there has been no further controversy.<sup>87</sup> Whereas this was a religious exemption for Muslims in a city in the United States, it is also conceivable to have an exemption policy at the national level.<sup>88</sup>

The Netherlands is one of the only countries that has authorized the call to prayer, subject to stringent regulations. The adhan can only be sounded on Fridays and cannot exceed the decibel levels of noise laws in effect.<sup>89</sup>

In some countries there is a concerted effort to frame the issue as political rather than religious. Some have asked whether the adhan is actually required by Islam. The logic is that if the call to prayer is not part of the prayer itself, then it must not be religiously required. In some debates there is a tendency to deny that the adhan, minaret, and mosque are religious symbols. If that is the case, then religious freedom would not afford them any protection from laws prohibiting them.

84 Lahav Harkov, "MK Michaeli Faces Death Threats after 'Muezzin Bill,'" *The Jerusalem Post*, April 26, 2012.

85 Arie O'Sullivan, "Silencing the Muezzin," *The Jerusalem Post*, January 1, 2012, 10.

86 Stephanie Simon, "Muslim Call to Prayer Stirs a Midwest Town," *Los Angeles Times* May 6, 2004, A17. One woman said she would move if she could hear the call to prayer in her home.

87 Weiner, *Religion Out Loud* (above n. 5). Chapter 6, 158-194 provides a detailed account of the dispute about the call to prayer and ultimate victory for the religious minority. In a comparative analysis of the legal disputes over religious sound, Weiner shows that Muslims were the only group to win an exemption for religious sound (for the call to prayer) in this town in Michigan.

88 New York City also adopted a religious exemption from its noise code, which generated controversy.

89 Todd Green, "Resistance to Minarets" (above n. 73), 94.

In Switzerland, where the most notorious debate involving Muslim worship took place, the adhan was never allowed because of strict noise laws, and a total ban on the construction of minarets was proposed. Proponents of the ban on minarets insisted that the dispute was not about religion. Describing the structures as political rather than religious, they avoided comparisons to church steeples. They also sought to link the anti-minaret campaign to women's rights issues such as religious garb, forced marriage, and female genital cutting. Hence the campaign emphasized that the minaret represented political Islam and that rejecting this symbol would be to reject the "Islamicization" of Switzerland.<sup>90</sup>

Because the towers had not been used for the call to prayer, the minaret appeared not to serve any religious function.<sup>91</sup> Thus, the refusal to allow their construction did not constitute a violation of religious freedom. While this makes a certain amount of sense, this reasoning is absurd because to Muslims the minarets are still regarded as the site for the projection of religious sounds—even if the dominant culture refuses to allow this to transpire.

Opponents of the ban based their argument on religious liberty, saying it violated the following: the Federal Constitution; the European Convention on Human Rights, principally Article 9—the right to religious freedom; the International Covenant on Civil and Political Rights, specifically Article 18—the right to freedom of thought, conscience, and religion; Article 27—the minority rights provision; and Articles 2, 3, and 26—the right to non-discrimination. Yet the ban prevailed. Proponents said their support of the ban "was an effort to prevent the spread of Islam and the socio-political model it represented."<sup>92</sup> They also rejected the proposition that the minarets were important to religious practice.

The international community was aghast at the ban. The United Nations Human Rights Council adopted a resolution condemning the defamation of religion (without specifically mentioning Switzerland, though).<sup>93</sup> The ban was

90 Jean-Francois Mayer, "A Country Without Minarets: Analysis of the Background and Meaning of the Swiss Vote of November 29, 2009," *Religion* 41/1 (2011): 11–28, especially on 18.

91 *Ibid.*, 14. Mayer notes that as of 2011 there were only four minarets in Switzerland and none had ever been used for the call to prayer.

92 Todd Green "The Resistance to Minarets in Europe," *Journal of Church and State* 52/4 (2011): 640, doi:10.1093/jcs/csq110 (accessed January 5, 2011). For a balanced consideration of whether the minaret ban violates international human rights law, see Marcel Stussi, "Banning of Minarets: Addressing the Validity of a Controversial Swiss Popular Initiative," *Religion and Human Rights* 3 (2008): 135–153. Stussi notes that Switzerland entered a reservation to Article 26, but it may be invalid as inconsistent with the object and purpose of the treaty, *ibid.*, 145–146.

93 Mayer, "Country Without Minarets" (above n. 90), 25. Prior to the vote, the Human

widely criticized as an affront to religious liberty,<sup>94</sup> despite the fact that the issue was, admittedly, complicated, due to the characterization of the minarets as lacking an obvious religious function. Indeed, the minarets had not and could not be used for the adhan because of Switzerland's strict noise pollution laws.

One of the most serious concerns here was the ability of the majority to vote to rescind basic rights through mechanisms of direct democracy. Some commentators recognized that this type of voting on the protection of fundamental rights could undermine the legitimacy of a democratic political order.<sup>95</sup> Because this was the underlying problem in this election, the campaign made every effort to avoid characterizing the minarets as religious symbols, so as to deny that an important human right was at stake. In short, the dominant view in the vast literature on the Swiss minarets was that the ban was motivated by religious discrimination.

## Comparative Jurisprudence

In the legal disputes about "noise," some ask whether Muslims have been singled out and punished for their religious sounds as compared to other groups. The call to prayer is often compared to the ringing of church bells,<sup>96</sup> and much of the commentary highlights the role of church bells in medieval times. In England, cases in the nineteenth century addressed the question of whether bell ringing constituted a private nuisance.<sup>97</sup> Evidently, churches in France sometimes competed

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Rights Committee expressed concern that its adoption would "bring Switzerland into noncompliance with its obligations under Articles 2, 18, and 20 of the ICCPR." Lorenz Weiner, "Panacea or Pathetic Fallacy? The Swiss Ban on Minarets," *Vanderbilt Journal of Transnational Law* 43 (2010): 900.

94 Deborah Ball and Nicholas Birch, "Swiss Ban Minarets in Controversial Vote," *Wall Street Journal*, November 30, 2009, A8. Even before the vote took place, there was widespread condemnation. See Simon Bradley, "Anti-minaret Vote Alarms UN Rights Experts," *Swiss News, World wide*, October 13, 2009, [www.swissinfo.ch/eng/politics/internal\\_affairs/Anti-minaret\\_vote\\_alarms\\_UN\\_rights\\_experts.html?cid=9772](http://www.swissinfo.ch/eng/politics/internal_affairs/Anti-minaret_vote_alarms_UN_rights_experts.html?cid=9772). Switzerland was also attacked for pervasive racism by the European Commission against Racism and Intolerance, the UN Committee on the Elimination of Racial Discrimination, and the UN Human Rights Council.

95 Langer, "Panacea or Pathetic Fallacy" (above n. 94), 907.

96 See, e.g., John Eade, "Nationalism, Community, and the Islamicization of Space in London," in *Making Muslim Space in North America and Europe*, ed. Barbara Daly Metcalf (Berkeley: University of California, 1996), 255. See also the special issue "Limitations on Religious Freedom," *Emory International Law Review* 19 (2005).

97 *Soltau v. De Held* (1851) (NS) 133. For commentary on the status of bells, see Thomas Watkin, "A Happy Noise to Hear? Church Bells and the Law of Nuisance," *Ecclesiastical*

to have the loudest chimes in order to convey the importance of their parishes.<sup>98</sup> Even in the twenty-first century, church bells can be fairly loud and may ring every fifteen minutes in some countries, like Switzerland,<sup>99</sup> historically, they chimed as early as 5 am.<sup>100</sup> However, it is also true that when there have been complaints about their peals, courts have on occasion prohibited the ringing of the church bells.<sup>101</sup>

In a nineteenth-century case in the United States, St. Mark's Church argued that the church bells were based on a thousand years of tradition, and as sacred noise were not subject to government regulation. Moreover, the community tolerated industrial noise, which was at least equally as loud. However, the neighbors who objected to the bells argued that the bells posed a threat to public health, and submitted to the court affidavits of over twenty doctors that attested to the serious adverse health effects of the bells. The judge considered whether the bells caused a cognizable injury and whether the court could regulate the church. Ultimately the judge issued an injunction barring the defendants from ringing the bells. Although the Supreme Court of Pennsylvania upheld the injunction, it gave the church the right to ring the bells on Sunday for very brief periods but not for early morning services.<sup>102</sup> As time went on, the Court granted more and more accommodations, so that the prohibition was transformed to an assessment as to the legitimate time the church could ring the bells. The culmination of the lawsuit was a compromise that allowed for bell-ringing within certain limits defined by the Court.

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*Law Journal* 4 (1996): 545–555; Sara Thomas and Thomas Glyn Watkin, “Oh Noisy Bells, Be Dumb: Church Bells, Statutory Nuisance and Ecclesiastical Duties,” *Journal of Planning and Environmental Law* (1995): 1097–1105.

98 Alain Corbin, *Village Bells: Sound and Meaning in the Nineteenth-Century French Countryside* (New York: Columbia University Press, 1998), 211.

99 Joanna Pfaff-Czarnecka, “Accommodating Religious Diversity in Switzerland,” in *International Migration and the Governance of Religious Diversity*, ed. Paul Bramadat and Matthias Koenig (Montreal: McGill-Queen's University Press, 2007), 225–257.

100 See H. B. Walters, *Church Bells* (London: A. R. Mowbray & Co., 1908). Walters discusses how bells were used in medieval times to tell time, even before clocks were invented. For the early bell at 5 AM, see p. 100.

101 An example of litigation over church bells involved St. Mark's Church in Philadelphia. See chapter 2, pp. 40–76 of Weiner, *Religion Out Loud* (above n. 5), who gives a detailed account of this interdenominational conflict among Protestants. See also A. Thomas Miller, “Bells on Trial, Bells Restored: The Story of the Bells of Saint Mark's Church Philadelphia,” (unpublished paper, 2000).

102 *Harrison v. St. Mark's* 34 Leg. Int. 222 (Pa. 1877). See also Weiner, *Religion Out Loud* (above n. 5), 50–71.

Occasionally in the Jewish community there have been requests for exemptions from noise laws.<sup>103</sup> For example, in *R. v. Rottenberg*, a rabbi was prosecuted on several counts of noise nuisance.<sup>104</sup> Although he initially received a two-year conditional discharge and was ordered to pay the costs of the litigation, upon appeal the Crown court found that the noise did not constitute a nuisance under the Environmental Protection of 1990 and thereby avoided addressing the question of whether the prosecution violated his right to religious freedom under Article 9 of the European Convention of Human Rights.<sup>105</sup>

The question of whether legal systems should grant exemptions to religious and cultural communities has also come up in other countries such as India.<sup>106</sup> In some appellate decisions, the Indian Supreme Court grappled with whether there could be amplified sound in religious buildings. When presented with the argument that enforcing a noise law violated religious freedom, the Court held that the right was not absolute and could not be exercised in such a way as to disturb the peace of others.<sup>107</sup> Moreover, the fact that other communities failed to enforce noise laws was not a reason to dispense with it in this community. The Court considered whether religious festivals such as Diwali deserve exemptions from noise laws. In considering the specific types of noise involved and whether it was necessary for the performance of the tradition, the Court reasoned that it was a celebration involving lights and did not require the use of noisemakers such as firecrackers.

Deciding whether to authorize an exemption for a holiday that occurs once a year is quite different than deciding on religious exemptions from noise laws for customs that occur multiple times every single day. If the religious event is only once a year, then perhaps the government should grant a permit. The problem, however, is when the sound is frequent, intense, and during nocturnal hours. It remains to be seen whether existing international law and constitutional rights support granting them in either circumstance.

103 There was a controversy in Brooklyn, New York. Jesse Serwer, "Sabbath Sirens: Madness in Midwood," *Brooklyn Skyline*, March 8, 2004.

104 *R. v. Rottenberg*, [2007], EWHC (Admin) 166 [3], [9].

105 For a detailed account of the case and its significance, see Samantha Knight, "Sacred Space and the City: Religious Buildings and Noise Pollution," *Harvard International Law Journal* 49 (2008): 50–55.

106 Other countries have adopted noise laws that were applied to religious congregations, e.g., "Ghana: Churches Comply with Ban on Noise Making," *Ghana News Agency (GNA)*, May 13, 2007, [www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=123973](http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=123973). The US Department of State Religious Freedom Report, available at <http://www.state.gov/j/drl/rls/irf>, makes reference to similar limitations in Costa Rica, Cuba, Nicaragua, and Uganda. I thank Jonathan Fox for bringing these examples to my attention.

107 *In Re: Noise Pollution Restricting Use of Loudspeakers v. India* (2005) 5 SCC 733.

## Religious Freedom

The right to religious freedom is generally understood to allow individuals the right to hold particular beliefs and to act on them unless this interferes with compelling or significant government interests. In the International Covenant on Civil and Political Rights, the right to religious freedom is guaranteed in Article 18. The right encompasses both beliefs and their manifestations and appears broad in scope. However, Article 18 (3) contains a restrictions clause permitting limitations on the grounds of public health, safety, order, and morals. These exceptions could effectively narrow the scope of what would otherwise seem to be an expansive liberty. To provide direction, the Human Rights Committee issued General Comment 22 giving an interpretation of Article 18. It interprets practice as covering a “broad range of acts”; in its list of acts it explicitly mentions “the right to build places of worship.” Furthermore, General Comment 22 stipulates that the restrictions may not be applied in a discriminatory manner. Although there is no reference to religious sounds *per se*, it does explicitly recognize exemptions from military service. This suggests that jurists embraced policies that recognize the importance of religious motivations.

With regard to the call to prayer, regulation may be justifiable if it is deemed incompatible with public morals or public health. Some might argue that the frequency of the calls deserves consideration. Because the call is traditionally five times a day, every day, this arguably constitutes an intrusion in the way of life of those who do not subscribe to this religion. The non-Muslims are effectively a captive audience and cannot easily shield their ears. For those who prefer tranquility, the call to prayer, when amplified on a daily basis, interferes with their way of life. In those countries in which the dominant culture decides on what constitutes “public morals,” there may be a basis for at least restricting the manner in which the calls are conveyed. For those who favor a culture of silence, there may be reason not to allow the call to prayer, at least in its amplified form.

While there is overwhelming evidence of the deleterious health effects of noise pollution in general, evidence regarding the health effects of the call to prayer is non-existent or inconclusive; it is hard to separate the noise levels it produces from general measures of community noise. Yet there are, most assuredly, adverse physical and psychological consequences for those who find the sounds objectionable. Should there be a determination that the decibel level regularly exceeds internationally agreed-upon standards, as appears to have been the case in Pakistan, then that might provide a basis for limiting the call to prayer.

Article 9 of the European Convention of Human Rights and Fundamental Freedoms contains a strong provision that protects acts that are “motivated and influenced by a religion or belief.” This might afford protection to the call



to prayer.<sup>108</sup> In *Mannoussakis v. Greece*, the European Court of Human Rights rendered a decision that might apply to the call to prayer. It held that denying a permit to erect a place of worship constituted a violation of the “right to worship and observance.”<sup>109</sup> Another argument is that the treatment of Muslims seeking to build mosques differs from that of other religious communities. That might constitute a violation of the prohibition of discrimination in Article 14. The European Court has also held that the right to religious freedom includes the right to proselytize.<sup>110</sup> If it encompasses a right to persuade others to join a faith, presumably it would also protect the right to call members of one’s own faith to prayer.

Analyzing this question in the framework of international law and European law, it appears that there is no basis for banning the call to prayer entirely. There may, however, be some basis for lowering the volume. In international law, the limitations clause might provide a rationale for a limitation on sound level. In European law the margin of appreciation of doctrine could also be applied to support policies stipulating that groups lower the volume of their projected religious sounds.

There is some basis for religious exemptions in the international jurisprudence. Whether states would make exception in the case of nuisance or noise pollution for the loud sounds of religious minorities remains to be determined.

In American constitutional law, the case law regarding the First Amendment can provide guidance on this issue; decisions on the grounds of both free exercise and free speech show American approaches to this issue. To see the extent to which existing doctrines offer protection to those wishing to engage in the adhan, one begins with the belief-action distinction associated with late nineteenth-century decisions about polygamy. Insofar as religious conduct violates criminal law, the US Supreme Court held that it may be proscribed. Religiously motivated actions are, for the most part, not protected when they conflict with a neutral law of general application. In *Smith v. Oregon*, the US Supreme Court presented its “hybrid” analysis to justify lowering the standard of review. Setting aside the compelling state interest, it noted that religious freedom had previously been afforded the highest degree of protection because since cases in which it was invoked also involved other constitutional rights.

After *Smith*, a coalition of liberal and conservative forces lobbied Congress to pass the Religious Freedom Restoration Act (RFRA), which the Supreme Court

108 Some scholars contend that Article 9 would likely protect the call to prayer, church bells, and religious architectural features like minarets and steeples. See, e.g., Langer, “Panacea or Pathetic Fallacy?” (above n. 93), 887.

109 *Manoussakis v. Greece*, 1996–IV Eur. Ct. H.R. 1346 §36.

110 *Kokinnakis v. Greece*. 17 EHRR 397, 1994 Application no. 14307/88.

subsequently struck down in *Boerne v. Flores*, insofar as it applied to the states. Despite evolving jurisprudence in the United States,<sup>111</sup> most states still require a compelling state interest to justify policies that impinge upon religious freedom, sometimes on the basis of states' Religious Freedom Restoration Act (RFRA) laws. The question, then, is whether the call to prayer in the various states might receive constitutional protection under this higher standard of review.

At the federal level, some degree of protection might be afforded by the Religious Land Use and Institutionalized Person Act of 2000 (RLUIPA). Adopted by Congress in the midst of the turmoil over legal protection for religious freedom, the law was enacted to protect religious minorities from discrimination in zoning and landmark policies. It protects the groups from governmental policies that burden groups in their use of land for religious purposes by mandating use of the compelling-state-interest test. RLUIPA applies to mosque disputes insofar as municipalities might attempt to prevent the construction of the buildings.<sup>112</sup> It is less clear, however, whether it would vindicate the rights of those who wish to continue with the call to prayer.

To my knowledge, there has not been any appellate decision on the call to prayer that invokes the free exercise of religion clause. The decisions that provide more relevant analysis for the treatment of the call to prayer involve freedom of speech instead. Insofar as this case law affords insight into a constitutional approach, it deserves consideration. It may seem intuitively appealing to approach the issue in this fashion. As discussed earlier, laws that ban the adhan outright would be overt religious discrimination. But if the issue is the volume of the sound, it makes a certain amount of sense to analyze the issue within the free speech framework, at least in the context of US constitutional law.

One might consider the possibility that the adhan is a question of religious speech. If laws regulate it on the basis of its content, this would clearly constitute an impingement on freedom of speech. However, mandating a lower decibel limit might well be acceptable under time, place, and manner restrictions. In the case of *Saia v. New York*, the issue was whether a Jehovah's Witness could preach in a park where people were having picnics.<sup>113</sup> The loudspeakers employed by

111 In *Smith v. Oregon*, the US Supreme Court presented its "hybrid" analysis to justify lowering the standard of review. Setting aside the compelling state interest, it noted that religious freedom had previously been afforded the highest degree of protection, but the case in which it was implicated also involved other constitutional rights.

112 For a thoughtful overview see Daniel N. Lerman, "Taking the Temple: Eminent Domain and the Limits of RLUIPA," *Georgetown Law Journal* 96 (2008): 2057–2101.

113 *Saia v. New York*. 334 U.S. 558 (1948). For a detailed account of the case, see Weiner, *Religion Out Loud* (above n. 5), ch. 4.

Mr. Saia to deliver his sermons bothered others in the park. Initially, the lower court considered his sermons to be a nuisance; on appeal, though, the US Supreme Court held that barring him from preaching violated freedom of speech. Empowering law enforcement to prevent individuals from speaking in public places with amplification risked censorship. Consequently, this was deemed to be prior restraint and hence illegitimate. The Court anticipated the widespread use of technology to facilitate political activity.<sup>114</sup>

In subsequent cases the US Supreme has allowed for the regulation of amplification. In *Kovacs v. Cooper* (1949), the Supreme Court upheld against a vagueness challenge a local ordinance banning “loud and raucous” sound amplification.<sup>115</sup> In *Ward v. Rock Against Racism* (1989), the Court held that requiring musical groups to use a city’s sound technician and sound system did not violate their right to freedom of speech.<sup>116</sup> As long as the rules are applied fairly to all groups irrespective of the content of their speech, limits on the decibel level have been held constitutional. This suggests that a challenge to the application of sound limit policies to the adhan would be unlikely to succeed.

## Status of the Call to Prayer in Islamic Law

Scholarship on the Muslim prayer rituals focuses specifically on the verbal formulas they contain and the reason behind their being held five times a day at specific times. There is little explanation for the call to prayer itself. Just because it has not been codified, though, does not mean it is not considered important or required. It may be a form of religious customary law. However, even if the call to prayer is regarded as an indispensable part of a religious tradition, it is unlikely that the use of loudspeakers, invented in the mid-twentieth century, is. Yet, in some places, it may have come to be viewed as essential—even if there is no recorded historical justification for amplification.

Furthermore, selective enforcement of noise ordinances against Muslim calls to prayer—while ignoring Christian church bell ringing—would be illegitimate and constitute religious discrimination. The reason why church bell ringing is not curbed is that communities generally do not mind the peals of the bells. While in past centuries public officials also attempted to limit this type of religious sound, it became a more familiar part of the soundscape. As the bells faded into the background, objections to them diminished as did litigation challenging them.

114 Indeed, the Occupy Wall Street movement encountered resistance to its use of microphones. This led to the much publicized “human microphone.”

115 *Kovacs v. Cooper*, 336 U.S. 77 (1949).

116 *Ward v. Rock Against Racism*, U.S. 781 (1989). See also *Daley v. Sarasota (City)*, 752 So. 2d 124 (Fla. App. 2 Dist. 2000).

Some municipal ordinances in the United States even include exemptions for church bells.

This might suggest that Muslims will have to go through a similar process of socializing the majority to accept their sounds, so that pluralistic societies will no longer be affected by it. Ultimately, this sort of speculation may be wishful thinking. Because of the frequency, intensity, and timing (early morning) of church bells and the adhan, some neighbors will claim to be adversely affected.

With respect to the call to prayer, it is the use of loudspeakers that sparked the most intense conflict. Yet, it is not obvious that use of this technology is necessary for the religious practice.<sup>117</sup> There is no indication in the Quran that the call to prayer requires amplification, so the belief that it is required may be based on customary law. Because it is not based on written authority, it may be easier to propose a modification in the sound level.

As the use of loudspeakers seems almost guaranteed to generate conflict, it might be in the best interest of communities to reconsider the use of amplification. If they should choose to turn down the volume voluntarily, that would reduce tensions in many sectors. It is always preferable for the community to decide on its own to bring about change from within than to have it imposed by external forces. The issue may boil down to the question of what level of religious sound is considered truly necessary.

## Toward a Compromise through Technology

Insofar as individuals have a right to a call to prayer, governments should try to follow a principle of maximum accommodation. In this context, though if the loudspeaker is not critical for the purpose of notifying members of the group of the time of prayer, other modes of communication might serve as well. The use of new forms of technology offers a possible means by which to notify followers effectively without disturbing nonmembers of the religious group. This could be

117 Naveeda Khan observes that the introduction of the loudspeaker in Postcolonial Pakistan was met with ambivalence. See Naveeda Khan, "Acoustics" (above n. 68), 571–594. Some leaders were opposed to its use. In South Africa, the Court enforced the contract clause prohibiting amplification of the call to prayer, because the judge was unconvinced that amplification was essential (it was only permissible). In short, while the agreement did represent a limitation of the right of religious freedom, it was not unreasonable, "because the religious practice was not forbidden but merely a particular form of its expression. The amplification of the call to prayer had thus not been an essential element of Islam." Gerhard van der Schyff, "Limitation and Waiver of the Right to Freedom of Religion: *Garden Cities Incorporated Association Not For Gain v. Northpine Islamic Society*," 1999-2 SA 268 [C], *Journal of South African Law* (2002): 376, 379–380; Lee, "Technology" (above n. 61).

achieved through messages sent on radio broadcast, text messages on cell phones, or those sent via new forms of social media such as Twitter or Facebook.

In a brilliant analysis of the use of media technology in Singapore to serve the interests of a religious community, Tong Soon Lee shows how such a compromise might work with radio broadcast.<sup>118</sup> He demonstrates how leaders in the Muslim community supported alternative means of calling their members to prayer after there were objections to the use of loudspeakers.<sup>119</sup> After a series of consultations with the government about its noise abatement campaign,<sup>120</sup> Islamic organizations agreed to three changes: “(1) Reduce the amplitude of loudspeakers in existing mosques, where they remain facing outside. (2) Re-direct loudspeakers toward the interior of new mosques to be built in the future, and (3) Broadcast the call to prayer five times a day over the radio.”<sup>121</sup>

The new mode of carrying out the call to prayer via radio was liberating because Muslims could choose whether to participate in an “imagined Islamic community.”<sup>122</sup> It also benefited women, who usually did not attend prayers in the mosque, by affording them equal access to the religious experience.<sup>123</sup>

Perhaps most importantly, the new method served as a means of maintaining community identity: “In Singapore the use of the radio broadcast in the call to prayer demonstrates how a community actively employs media technology to maintain collectivity in a pluralistic society; media technology here affirms

118 Lee, “Technology” (above n. 61).

119 Evidently loudspeakers were used starting in the early 1950s. See *ibid.*, 97, n. 7. Although at first the public thought the government was banning loudspeakers in mosques entirely as part of a noise abatement campaign, in fact, the government and Islamic organizations had actually decided to redirect them inward. The government program was also misunderstood as being directed solely at Muslims, when it was applied to other cultural practices and institutions. “Chinese opera, funeral processions, church bells, Chinese and Indian temples, music during weddings, record shops, places of entertainment . . . the recitation of pledges in schools and school sports.” *Berita Harian*, June 14, 1974, quoted in Lee, “Technology” (above n. 61), 90.

120 In Singapore the government imposed a limit of 65 decibels on calls to prayer transmitted via loudspeakers but allowed radio dissemination as a compromise. Thio Li-ann, “Pragmatism and Realism Do Not Mean Abdication: A Critical and Empirical Inquiry into Singapore’s Engagement with International Human Rights Law,” *Singapore Year Book of International Law* 41 (2004): 41–91.

121 Lee, “Technology” (above n. 61), 91.

122 Kong praises Lee for showing that “sacred space can become defined by the aural rather than the visual alone.” Her study investigates the implications of religious uses of technology for a new politics of space. Lily Kong, “Religion and Technology: Refiguring Place, Space, Identity and Community,” *Area* 33/4 (2001): 404–413.

123 Lee, “Technology” (above n. 61).

religious and cultural identity and is absolutely important in the world of Islamic culture production. We might say that Muslims are ‘traditionalizing’ media technology, and they are defining its social significance.”<sup>124</sup> While the incisive analysis of the situation in Singapore suggests that Islamic leaders may be open to alternatives such as radio broadcast, it does not consider the effects of amplification.

By contrast, Naveeda Khan’s careful study of the call to prayer in Pakistan focuses on the role of loudspeakers. In this nuanced analysis, she demonstrates the ambivalence with which they were initially viewed. It was thought undesirable for a machine to replace a human being, and considered possible that their usage might undermine the sense of humility required for prayer. This rich historical treatment identifies a concern among religious leaders that relying on loudspeakers might have the unfortunate result that the adhan would be interpreted as noise, which is precisely what happened.

Colonial authorities did wield power to regulate noise, and this was used to suppress political expression. While early on the adhan was not treated as noise subject to regulation, later with the adoption of the 1965 Loudspeaker Ordinance, exemptions for sounds explicitly associated with ritual practices like the call to prayer, prayer instructions, and *khutba* (sermons) were included.<sup>125</sup> In the late 1990s there continued to be a concern that the adhan might be interpreted as noise. Khan tells of a doctor employed by the Pakistani Environmental Protection agency who turned off her noise meters during those periods when mosques broadcast the call to prayer. The doctor explained: “this was because it was inappropriate for a Muslim to consider the azan [adhan] noise. She added that if the meters were left on, their readings would be off the charts. The volume at which the azan was called would exceed the scientific standards for safe sound levels set by the World Health Organization.”<sup>126</sup>

In Oxford when the controversy erupted, the Imam offered to compromise: he would broadcast the call to prayer once a week, on Fridays. The rationale was not only an attempt to compromise but also a recognition that the times of prayer were usually posted on websites.

Other technological innovations have been proposed. For example, cell phones might serve to notify Muslims.<sup>127</sup> There is the Ikkone i800 cellular phone produced

124 Ibid.

125 Khan, “Acoustics” (above n. 68), 582.

126 Ibid., 571–597, 586.

127 Heba El-Sayed, Anita Greenhill, and Chris Westrup, “On the Emergence of Techno-Religious Spaces: Implications for Design and End Users,” in *Reframing Humans in Information Systems Development*, ed. H. Isomaki and S. Pekkola (London: Springer-Verlag, 2011), 17–29.

by a Dubai start-up Samcom with adhan alarm options, which was initially on sale for a discounted price of 292 dollars.<sup>128</sup> Another invention was the LG F7100, a cell phone with a prayer time alarm capability that plays the beginning part of adhan.<sup>129</sup> There is also a special text messaging system publicized in Qatar.<sup>130</sup> Sun Dial, a unique mobile phone-based application to notify Muslims about the time of prayers, is under development (with some glitches in the system to date).<sup>131</sup> While there are attempts to make the devices commercially available, it remains to be seen how widely accepted they will be.<sup>132</sup>

The use of alternative technologies would require that state and private enterprises construct the means by which to convey these messages. When there have been efforts to establish new forms of telecommunications, they have encountered some initial obstacles. For example, in England, when a church was converted to a mosque, there was resistance to the installation of a telephone pole.<sup>133</sup>

In regions where individuals cannot afford to own cell phones or there is insufficient infrastructure to disseminate messages in a reliable manner, governments or international organizations will have to provide the phones and subsidize the construction of towers. This cost may not be insignificant.

In some countries there have been efforts to orchestrate a single call to prayer largely in order to minimize the sound level. In Egypt, the Minister of Religious Endowments explained the rationale for centralizing the adhan: “We have lost the spirituality of the *Adhan*. These days, muezzins are competing on microphone to

128 “High-Tech Call to Prayer,” *Statesman* (Calcutta, India), September 24, 2005, <http://directory.westlaw.com/>; Sarmad Ali, “New Cellphone Services Put God on the Line,” *Wall Street Journal*, March 27, 2006.

129 “Handy Phone for Muslim Travelers,” *New Straits Times*, April 7, 2005.

130 “Qtel’s Prayer Timing Alert Service Available for Ramadan,” *Al Bawaba News*, September 3, 2008, <http://directory.westlaw.com/>.

131 Susan Wyche, Kelly E. Caine, Benjamin K. Davison, Michael Arteaga, Rebecca E. Grinter, “Sun Dial: Exploring a Techno-Spiritual Design through a Mobile Islamic Call to Prayer Application,” *CHI Proceedings*, April 5–10, 2008, Florence, Italy, 3411–3416. The website explains: CHI (ACM Conference on Human Factors in Computing Systems) is the premier international conference for the field of human-computer interaction. Olivia Rondonuwu, “Indonesia’s Prayer Phone: Special Cellphone Helps Busy Muslims Struggling to Balance Work and the Demands of the Holy Month of Ramadan,” *The Globe and Mail*, September 11, 2008, A2.

132 Susan Wyche, et al., “Sacred Imagery in Techno-spiritual Design” *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems*, Boston, April 4–9, 2009, 55–58.

133 “Mosque Radio Mast Overcomes Enforcement,” *Planning*, March 3, 2006, 19.

see who can sing it loudest.”<sup>134</sup> In Bahrain, the Supreme Council of Islamic Affairs announced it would do this to “avoid disturbing chaotic cacophony” and “eliminate discrepancies.” The plan was to consult both Sunni and Shiite authorities to agree upon a time and convey the call to prayer three times a day over a special radio channel.<sup>135</sup> This plan led to fears among muezzins that they might lose their jobs because fewer would be needed to make calls over loudspeakers. There was also a worry about the ramifications of a state monopoly.

The Muslim Council of Britain noted that many Muslims have chosen to receive the call to prayer by radio or via text message on mobile phones.<sup>136</sup> In the United States and in Europe there have been numerous instances of compromise on the part of Muslims:

For their part, Muslims have adopted an accommodating attitude in the overwhelming majority of conflicts concerning mosques and minarets. They have agreed to relocate proposed mosques to less central (and less visible) locations. They have modified architectural designs so that mosques look, well, less-mosque like. They have kept minarets relatively short so as not to rival church towers and steeples, or they have simply not erected minarets. They have developed creative ways to issue the call to prayer, such as short-wave transmitters and text messaging, to ease concerns from non-Muslims overhearing the call from loudspeakers. In the Marseille mosque under construction, a flashing light will be used to issue the call to prayer.<sup>137</sup>

This type of sincere effort to compromise seems not to receive much public attention.

134 Christian Fraser, “One Voice for Cairo’s Call to Prayer,” *BBC News*, May 11, 2009. See also Neil MacFarquhar, “God Has 4,000 Loudspeakers; the State Holds Its Ears,” *New York Times*, October 12, 2004.

135 “Common Call to Prayer Plan for Sunnis and Shiites,” *Gulf News*, January 31, 2008.

136 Georgina Cooper “Oxford Debates Muslim Call to Prayer,” *Edmonton Journal* (Canada), February 16, 2008.

137 Todd Green, “Anti-Mosque Sentiment in America: Lessons from Europe?” *Huffington Post*, July 31, 2010, [www.huffingtonpost.com/todd-green-phd/anti-mosque-sentiment-in\\_b\\_659617.html](http://www.huffingtonpost.com/todd-green-phd/anti-mosque-sentiment-in_b_659617.html).



## Objections

While technological innovations are appealing, they are not a panacea. Some may object to having the government pay for members of minority religious groups to practice their own religions. Moreover, if the real concern regarding the adhan is the presence of the minority group, then the technological solution will not appeal to its opponents in any case, since it enables Muslims to migrate to other countries and continue to follow their religious traditions.

The most serious problem with this technological proposal is that some schools of Islamic jurisprudence may reject the use of technology as a substitute. It is not clear to what extent any of the new inventions will be well received in Muslim communities. Yet Lee documents the fact that leaders of Islamic organizations in Singapore proposed this strategy.<sup>138</sup> This gives us some hope that this approach of finding alternative ways to achieve the call to prayer could eventually gain widespread support. Moreover, some Islamic countries have enacted laws to limit the decibel level of the adhan.<sup>139</sup>

Using technological innovations would facilitate the Islamic ritual that is central to the religious group, without offending the sensibilities of the majority. Important for the acceptance of this proposal will certainly be the willingness of the group to adopt the technology. Ultimately, governmental support for the means by which the call to prayer will be conveyed will also be crucial.

The issue of the call to prayer may represent a false conflict inasmuch as technological solutions exist. However, it remains to be seen whether religious communities will embrace these alternative methods of facilitating calls to prayer.

138 Lee, "Technology" (above n. 61).

139 According to news reports, Saudi Arabia adopted policies that required lowering the volume of mosque loudspeakers and banned the use of external loudspeakers; some advocated following this example. See "Worth Emulating," *Jordan Times* [World News Connection], September 1, 2010. There has also been criticism of the call to prayer with amplification in Egypt as an "assault on the ears" and type of noise pollution. See Charles Hirschkind, *The Ethical Soundscape: Cassette Sermons and Islamic Counterpublics* (New York: Columbia University Press, 2006), 125. In Indonesia, home to the largest Muslim population in the world and to 800,000 mosques, the head of the Ulema Council expressed concern over complaints about a "loudspeaker war." "Mosques' Loudspeaker Wars Jangle Many Nerves," *Scotsman*, July 25, 2012; Olivia Rondonuwu, "Indonesia's Mosques Seek Sound Quality," *Telegraph-Journal*, Religion, August 4, 2012, G6. There was a movement to ban the use of loudspeakers in part of Malaysia as well, see Salim Osman, "Speaking Up on Loud Calls to Prayer," *Straits Times*, July 25, 2012.

## Religious Exemptions from Noise Laws

The controversies over the call to prayer and the erection of mosques may give the misimpression that the issue is primarily one of discrimination against Muslims or Islamophobia. There have, indeed, been many disputes over noise in various countries that involve religious and cultural sounds.<sup>140</sup> It may be worth considering the implications of this analysis of the adhan for a general approach to the question of whether there should be religious exemptions from noise laws.

When the sound is in the middle of the night or at other times when most citizens of a country sleep (such as countries with an afternoon siesta), the government has a significant reason to avoid or to minimize religious-based noise. There is no question that loud noise is irritating, but it is not obvious whether it reaches the level of justifying the infringement of religious liberty. The challenge is that the state interest in limiting religious practices must meet the highest standards, and it is debatable whether limiting loud sounds can be justified based on rationales such as public morals or public health. Governments often try to justify anti-noise noise regulations based on physical or psychological health; at times it may be possible to defend some policies on this ground.

Another justification for limiting religious sounds might be some version of a public order argument. In Europe, urban security policies have been formulated as part of a general concern to maintain public security and order. Although it is within the realm of possibility that religious sounds of sufficient duration and intensity could jeopardize public order, this would likely be the case in rare circumstances only.

The scholarship on noise pollution also includes a liberty interest. The jurisprudence in the European human rights systems invokes the right to privacy and family life as the primary reason for upholding anti-noise policies. Yet, the right against noise is not accurately characterized as a liberty interest. Ironically, it is the noise-maker who would be more likely to invoke a liberty argument as a basis for challenging laws proscribing loud sounds.

Public morality represents a possible rationale for limiting any minority social practice. Use of this concept invites discrimination against extraordinary groups. It seems dangerous to use this type of argument in the context of the loud religious sounds because the dominant religion may insist that the sounds associated with a minority religion violate “public morals.”

Ultimately then, it is difficult to justify anti-noise laws that are administered in such a way as to infringe upon a fundamental human right. If there is a basis

140 The 2005 decision by the Indian Supreme Court provides a survey of various noise-related litigation.

for doing so, it should be to protect another important human right. With regard to anti-noise policies, one might argue that environmental human rights support the enforcement of these laws. This, however, requires a specific interpretation of the environment, as it presupposes that the absence or limitation of loud sounds is necessary for guaranteeing environmental rights. The risk here is that there may be culturally varying notions as to what constitute ideal soundscapes. All societies may not share the same vision of a utopian existence.

Although the analysis of time, place, and manner restrictions usually applies to freedom of speech, this type of framework may also make sense for religious sound as well. The government should not prevent religious sounds altogether, as this would clearly be an overreaction. However, controlling the time at which sound is conveyed and the volume of the sound may well be reasonable restrictions. Even if one concludes that the government can justifiably impose time, place, and manner restrictions, the government should articulate a compelling state interest for regulating loud religious sounds.

## Toward a Harmonious Soundscape

To justify lowering the volume, there must be an explicit normative basis for this, and that is largely absent in the discussion. It is striking that in the vast literature on noise policies, there is a presumption that the state should be able to regulate loud sounds, which leaves government officials open to attack. Instead of assuming the validity of anti-noise policies, I propose the development of a human right to quiet, which would complement and expand existing rights, and which would directly address the issues raised in this work. This is not a right to complete silence, which implies the total absence of noise, but rather a right to limited noise.<sup>141</sup> This right to quiet as a central concept is inspired by laws designed to protect quiet zones or residential communities.

One way of demonstrating the existence of an emerging norm is by taking a comparative approach, similar to *ius gentium*. In this context, the existence of innumerable noise codes across the globe provides a way to identify a cross-cultural universal—that is, an international standard that would permit states, non-state actors, and individuals to ensure the guarantee of a human right to quiet.<sup>142</sup> The human right to quiet would then justify a threshold by means of

141 While I realize that some dictionaries treat silence and quiet as synonyms, quiet appears etymologically to allow for some sound.

142 For an overview of worldwide noise abatement policies, see, e.g., J. Luis Benton Coelho, “Community Noise Ordinances,” in *Handbook of Noise and Vibration Control*, ed. Malcolm J. Crocker (New York: John Wiley & Sons, Inc., 2007), 1525–1532.

which one could condemn loud sounds that exceed that level. This right deserves support from scholars in acoustic jurisprudence and policymakers concerned with soundscapes. It is my hope that the development of the human right to quiet in future works may help resolve some of the ongoing conflicts addressed here.

## Conclusion

In this essay I have considered policies seeking to limit loud religious sounds. Regulating these sounds merely because they are unfamiliar constitutes a form of discrimination. The phenomenon of outlawing minority sounds sometimes reflects culturally varying notions of the soundscape. Because communities may come to grips with their prejudicial attitudes toward new sounds and no longer find them bothersome, some limitations may turn out to be unjustifiable.

Yet, although many controversies surrounding mosques, minarets, and the call to prayer demonstrate continuing intolerance in multicultural societies, sometimes the call to prayer via amplification may indeed be properly construed as both a nuisance and noise pollution. In those circumstances, established jurisprudence authorizing time, place, and manner restrictions could legitimize requests that the call to prayer be conducted either without amplification or via new forms of technology.

The tension between religious sounds and noise laws appears to be a false conflict. If there is a genuine desire on the part of the majority to reconsider their preconceived notions about the call to prayer, and on the part of the religious minority to try other means of conveying their religious messages, compromises can be found that would allow them to establish a harmonious soundscape.

# Judaism, Gender, and Human Rights

## The Case of Orthodox Feminism

Ronit Irshai

### 1. Introduction

Despite the fact that Orthodox feminism belongs, conceptually at least, to the realm of liberal discourse that is identified with human rights, in practice it refrains from couching its main arguments in those terms.<sup>1</sup> Although, on the surface, many of its demands—such as the struggle on behalf of *agunot* and women whose husbands refuse to grant them a *get*, the (today almost self-evident) demand that women be allowed to study Torah, or the incipient discourse on women’s fertility rights—appear to focus on the realm of human rights, it is difficult to find a systematic, Orthodox-feminist philosophical treatment of these issues in these terms. This seems surprising because as a movement directed toward achieving equal rights, we would expect the human rights discourse to dominate Orthodox feminism. The fact that this is not the case is, in my opinion, not accidental.

\* I want to thank Dena Ordan, who translated this article from Hebrew. Her skills made this a better article.

1 I refer here to human rights in terms of bodily integrity, education, life, ownership, and the like. Although this argument is too overarching, I am convinced that it is fundamentally correct. Note Blu Greenberg’s comments in this context: “Oftentimes, a new title or a new context compels one to look at one’s own work in an altogether new and different light. I must admit that until the invitation was extended to me to discuss my work on feminism and Jewish orthodoxy in the framework of this seminar series. . . . I simply never thought of it as a human rights issue” (“Feminism, Jewish Orthodoxy and Human Rights: Strange Bedfellows?” in *Religion and Human Rights: Competing Claims*, ed. Carrie Gustafson and Peter H. Juviler [Armonk, NY: Sharpe, 1999], 145–173). See also Michael S. Berger and Deborah E. Lipstadt, “Women in Judaism from the Perspective of Human Rights,” in *Human Rights in Judaism: Cultural, Religious and Political Perspectives*, ed. Michael J. Broyde and John Witte (Northvale, NJ: Aronson, 1998), 77–111.

One of the principal, and perhaps most effective, strategies employed against Orthodox feminism by the various shades of the religious establishment revolves about this point. Its basic critique argues that there is an inherent contradiction between the human rights discourse on which feminism rests and Judaism: Judaism is presented as a discourse of obligations and demands of the believer; feminism is grasped, in principle, as a movement for equal rights. For the critics of feminism, this dichotomic portrayal serves two main goals, of which the first is to cast the demands of Orthodox feminism as grounded in a shaky theological infrastructure. The discrepancy between these two world-views is so great, it is claimed, that it touches on the most significant elements of what defines a religious person: someone who obeys obligations or someone who demands rights. If the clash between feminism and Judaism is so fundamental, then the feminist critique of religion loses its place on the religious agenda even before it can state its claims. Second, and perhaps more important, this critique goes even further. By framing feminist claims in a cynical, populist light as egotistical—whether this concerns the demand to be awarded equal merit for observing the precepts, or the demand for the status, prestige, and honor that ensue from observance of the precepts—it holds them up to ridicule.<sup>2</sup> In other words, the demand for equal religious rights receives a generally negative presentation—as an attempt to “be like the men,” or as the ostensible pursuit of rights in the sense of merits or benefits. This argument will be further developed below.

As I see it, this critique does not fall on deaf ears. It provides a partial explanation, at least, for why the religious feminist struggle is not conceptualized using human rights terminology.<sup>3</sup> If the very concept of “rights” is used as a weapon by the opposition to deter the initiation of discussion, feminism must employ other strategies. But this is not simply a question of mere strategy, but something more essential. Significantly, Orthodox feminism views itself as an integral part of Jewish religious discourse, with its deep-seated prevalence of the language of duties. Because Orthodox feminists see themselves as part and parcel of this tradition, it is almost at odds with their goals for them to speak in a different language, especially since they are obligated to use accepted halakhic tools to effect change.<sup>4</sup> Moreover, Orthodox feminists are not interested in casting

2 This is the clear impression garnered from Rabbi Ari Shvat’s article, “Orthodox Feminism=Religious Egoism,” *Tsohar* 13 (2003): 153–162 [Hebrew].

3 It is interesting to note that even the religious homo-lesbian discourse is not conceptualized in terms of rights, but mainly speaks in terms of recognition and inclusion. See, for instance, Rebecca Alpert, *Like Bread on the Seder Plate: Jewish Lesbians and the Transformation of Tradition* (New York: Columbia University Press, 1997); Chaim Rapoport, *Judaism and Homosexuality: An Authentic Orthodox View* (London: Vallentine Mitchell, 2004).

4 See Tamar Ross, “Can the Call for Change in the Status of Women be Halakhically

off the yoke of religious obligations; indeed, they wish to take upon themselves additional obligations: namely, these women stress duties above rights.

The present article is an attempt to examine the roots of the argument that the discourse of religious obligations ostensibly neutralizes the possibility of engaging in the human rights discourse. I argue that the claim that the duties discourse of Judaism contradicts rights discourse is superficial, misleading, and has a clear agenda: to block the advancement of egalitarian views and more respectful attitudes toward women. To my mind, duties discourse provides strong protection for rights; thus, even if Orthodox feminism does not use the wording of rights, the duties that it demands of the religious community, including from women themselves, in the final analysis protect the basic values that comprise the conditions for rights. Thus, the very use of the language of rights does not have to be seen as inherently contradictory to the religious insight that sets the category of duties as one of its main values. Moreover, I contend that in Judaism, a human rights discourse can take place only in the context of a religious paradigm that rejects the notion that human morality is subject to an arbitrarily determined divine morality. In other words, Orthodox feminism can only thrive in an environment that rejects the sacrificial imperative (*aqedah*), which equates the sacrifice of ethical insights on the altar of halakha with a greater degree of religiosity. At the same time, given the fact that the sacrificial imperative currently prevails in Jewish religious consciousness,<sup>5</sup> discussion of human rights may remain orphaned.

It is certainly possible to argue that religion can serve as a source of violation of human rights, particularly in the context of the *aqedah* paradigm. But, I also contend that there are significant barriers to women's rights even in the context of a paradigm that does not divorce religion and morality. In the latter case, the primary mechanism employed is the essentialist ideology. I do not claim that every essentialist ideology subverts the foundations of equality, but rather intend

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Legitimated?" *Judaism* (American Jewish Congress) 42/4 (1993): 478–492; Ross, "Modern Orthodoxy and the Challenge of Feminism," *Studies in Contemporary Jewry* 16 (2000): 3–38. See also my remarks elsewhere: "Audre Lorde wrote that 'the master's tools will never dismantle the master's house,' but Orthodox feminists believe just the opposite; to paraphrase Lorde, they maintain that 'it is precisely the master's tools that can dismantle the master's house,'" Ronit Irshai, "Toward a Gender-Critical Approach to the Philosophy of Jewish Law [Halakha]," *Journal of Feminist Studies in Religion* 26 (2010): 60.

5 For an analysis of the sacrificial imperative in current religious discourse, see Ronit Irshai and Tanya Tsiyon Waldoks, "Israeli Modern-Orthodox Feminism—Between Nomos and Narrative," *Mishpat Umimshal* (forthcoming; Hebrew). For a similar analysis of the rift between religion and morality, see Pinhas Shifman, *One Language, Different Tongues: Studies in Law, Judaism, and Society* (Jerusalem: Hartman Institute, 2012) [Hebrew]. He attributes the rift mainly to Yeshayahu Leibowitz's thought.

to demonstrate how this ideology's perception, as consistent with Aristotelian principle of equality, effectively blocks women's rights. In essence, my core claim is that the demand of Orthodox feminism is more basic than one for human rights: it demands recognition of the personhood of women, which is the basis for the granting of rights, even if this recognition imposes new religious obligations and limits. However, the content of this "personhood" stands in sharp contradiction to the essentialist ideology within contemporary halakhic thinking. Thus, the clash (or the gap) between the human rights discourse and halakha is deeper than it seems at first glance.

## 2. Religion and the Human Rights Discourse

From a theoretical-analytical perspective, a contradiction between religious doctrine and the human rights discourse is not inevitable. Indeed, it is more likely that religious notions, such as the creation of humans in the divine image, will defend humans; after all, this notion makes injuring a person comparable to injuring God.<sup>6</sup> Religious doctrines should then be the strongest backers of human rights;<sup>7</sup> it was indeed the case that the early human rights discourse relied mainly

6 Yair Lorberbaum (*Image of God: Halakha and Aggadah* [Jerusalem: Schocken, 2004] [Hebrew]) proposes an even sharper statement in his reconstruction of the rabbinic interpretation of the concept of *imago dei*. He identified an anthropomorphic approach and an iconic conception of the notion of *tselem*, according to which God is present in humans who are made in his image. This conceptual structure served the tannaim as a tool for shaping various bodies of halakha, including the four types of capital punishment, death sentences, flogging (*dine nefashot*), fertility, the wedding benedictions, and laws of marriage and divorce, among others. Many of these laws are grounded in the ontological-realistic notion that "whoever sheds blood" or "prevents reproduction" defaces God's likeness because man was created in the divine image. This type of argument can buttress the notion that the human rights discourse in Judaism is deeply anchored in its conceptual-theological structure.

7 The dominant approach in considerations of Judaism and human rights claims that, because religions supply a scale of values and sources according to which many conduct their lives, religion must therefore be an ally of the modern struggle for human rights. This argument is usually developed as follows: first of all, all laws—including those linked to human rights—have a religious source and dimension. Second, modern human rights movements have bankrupted themselves by reducing the value of religion. They claim that religious conceptions should be part of the rule of law, democracy, and human rights. Writings in this vein usually seek to underscore the huge contribution of Judaism to theory, law, and human rights activism. See, for example, Elizabeth M. Bucar and Barbra Barnett, "Introduction: The 'Why' of Human Rights," in *Does Human Rights Need God?* (Cambridge: Eerdmans, 2005), 1–21; John Witte, Jr., "Introduction," in *Human Rights in*



on religious grounds. One central approach to the relationship between human rights in general, and Judaism in particular, anchors the human rights discourse in religion and views it as the primary source for these rights.<sup>8</sup> Although a historical analysis of its development can serve as grounds for the argument regarding the profound affinity between the human rights discourse and religious thought,<sup>9</sup> I note two challenges to this assumed affinity.

First of all, on the analytical level, it is possible to argue that the protective aspects of the doctrine of *imago dei* can only be anchored in a religious notion that relies on the thesis that “Good is Good and therefore God chose it.”<sup>10</sup> A religious approach that sees morality as subservient to, and arbitrarily set by, God overturns the argument that because humans are created in the divine image this protects them from the infringement of their rights. After all, according to this notion, it is possible that *imago dei* does not apply equally to all humans.<sup>11</sup> More importantly, humans are supposed to submit their moral sensibilities to divine will: even if the divine command requires infringing the rights of another person—this is not to be questioned. Moreover, submission to divine will, even if it does not concord with human morality, becomes the yardstick for measuring human religiosity.<sup>12</sup>

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*Judaism: Cultural, Religious and Political Perspectives*, ed. Michael J. Broyde and John Witte (Northvale, NJ: Aronson, 1998), ix–xxii.

8 See Bucar and Barnett, “Introduction” (above n. 7), 4–6.

9 Griffin sketches the development of the concept of “natural rights” starting with Aquinas, through the Enlightenment, and to the present. See James Griffin, *On Human Rights* (New York: Oxford University Press, 2008), 9–14, 30–32.

10 See Daniel Statman and Abraham Sagi, *Religion and Morality* (Jerusalem: Bialik Institute, 1993) [Hebrew].

11 See Abravanel’s commentary on Gen. 1:27: “in the image of God He created him.” According to Abravanel, woman was not created equally in God’s image; her main function is one of fertility. See also R. Simeon ben Yohai’s statement regarding idolaters: “You are called men [*adam*] but the idolaters are not called men” (B *Yevamot* 61a).

12 I think that Maimonides already noted this basic intuition, according to which the more arbitrary, absurd, and irrational a commandment is, the more it will be considered the divine word. The typical rationale for this train of thought is that humans can rationalize their actions and act rationally, but God, who is omniscient over humans, does not need to justify his actions logically and they cannot be measured according to human criteria. See Maimonides, *Guide of the Perplexed* 3:31. A significant example of this religious intuition, which is indicative of its currency in present-day religious discourse, especially in contexts lying between religion and morality, is the citation by Rabbi Shagar in his *Broken Vessels* in which he relates the moral agony of one of the yeshivah students who was tortured by what he saw as religious weakness because his moral stance required that he rescue a wounded non-Jew on the Sabbath. See Shimon Gershon Rosenberg (Shagar), *Broken Vessels: Torah and Religious Zionism in Postmodern Surroundings* (Efrat: Yeshivat Siah Yitshak, 2004), 85 [Hebrew]. See also Irshai and Waldoks, “Modern-Orthodox Feminism” (above n. 5).

Second, on the empirical level, it is possible to demonstrate that in all religions—Judaism included (at least in its Orthodox version as practiced in the state of Israel)—human rights are undermined. Indeed, examination of recent history conveys the impression that religious doctrines bear significant responsibility for racism, exclusion of women, and a profound failure to accept the Other.<sup>13</sup>

### 3. The *Aqedah* Paradigm

I have treated the *aqedah* paradigm at length elsewhere,<sup>14</sup> and therefore restrict the present discussion to the points relevant to rights discourse. Grounding the *aqedah* paradigm is the assumption that when taking on religious obligations, humans must bend their will, insights, desires, and aspirations to the superior divine will and, moreover, that the acceptance of this yoke defines them as religious persons. At the same time, this notion does not necessarily require that the believing person sacrifice his moral insights, since this depends on a more fundamental question: the relationship between morality and religion.<sup>15</sup> However, the notion that a religious person is required to bend his will to the yoke of halakha, even if this is not in harmony with his moral sensibilities, has gained favor among the Modern Orthodox sector under the decisive influence of the writings of Rabbi Soloveitchik.<sup>16</sup> An example of the *aqedah* awareness, as this comes to the fore in

13 The oft-cited paradigmatic example is the status of women in the rabbinical courts, and of *agunot* and women whose husbands refuse to grant them a *get*. It is worth noting in this context, however, the letter by rabbis regarding the rental of apartments to Arabs in the Galilee; the letter in support of President Katsav after his conviction for rape; violence toward women over the issue of sitting in the back of public buses in Haredi neighborhoods; and discrimination against female pupils from oriental backgrounds or against Ethiopian Israelis in religious schools.

14 See Irshai and Waldoks, “Orthodox Feminism” (above n. 5).

15 This question has been treated systematically by Daniel Statman and Avi Sagi. Their thesis is that morality is neither dependent on, nor opposed to, religion and that the main stream of Jewish exegesis (and of Christian exegesis as well) exerted hermeneutical efforts to overcome what is viewed as the contradiction between religion and morality. In principle, Statman and Sagi argue that Jewish tradition opposed a strong link between morality and religion and cite many examples in defense of this thesis. See Statman and Sagi, *Religion and Morality* (above n. 10). See also Avi Sagi and Daniel Statman, eds., *Between Religion and Ethics* (Ramat Gan: Bar-Ilan University Press, 1993).

16 For an extensive analysis, see Irshai and Waldoks, “Modern-Orthodox Feminism” (above n. 5) and Shifman, *One Language* (above n. 5). That is how I understand the objections raised by Rabbi Moshe Meiselman (Rabbi Soloveitchik’s nephew) to women’s prayer groups. He argues that these groups signify a pagan ritual as compared to halakhic rituals

a conflict with human morality, is illustrated by the following remarks by Rabbi Ronski (former chief rabbi of the Israel Defense Forces): “Aren’t we obligated to halakha even when some Torah verdicts seem immoral in human eyes? . . . I am guided by the truth of Torah wherever I go and not by human opinions, even when they are clothed in the garb of modern morality.”<sup>17</sup>

This spiritual awareness, which is supposed to direct the lifestyle of the believer in all spheres of life, has its strongest impact in the context of actual moral dilemmas in which there is an ostensible gap between what this community’s language-game terms “divine morality” (represented by halakha) and “human morality.”<sup>18</sup> At the same time, it appears that the *aqedah* conception serves as an especially effective tool for goading religious feminism, which is characterized as a superficial religiosity that is not prepared to make the necessary sacrifices required of the believer. As represented by proponents of the *aqedah* conception, religious feminism is not characterized by gestures of submission, self-effacement, and sacrifice, but rather by demands for spiritual experience instead of halakhic minutiae, for fulfillment of human needs instead of submission to divine will.<sup>19</sup> We can then perhaps understand

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that begin with a divine commandment and whose sole thrust is *accepting the yoke of heaven*. A woman, who for “political” reasons does not pray in a *minyan*, a quorum (since women’s prayer groups do not fit the halakhic definition of *minyan*), not only engages in a meaningless act but one that smacks of idolatry, because she seeks *herself and her spiritual experiences* and not God. This is at the heart of the *aqedah* argument and naturally recalls Leibowitz.

- 17 Avi Ronski and Yoska Achituv, “Desecration of the Sabbath, Desecration of Hashem,” *Meimad* 16 (1999), 16 [Hebrew].
- 18 See Shlomo Aviner, *A Nation like a Lion*, vol. 2 (Jerusalem: privately printed, 1983) [Hebrew].
- 19 See Haim Navon’s review of Tamar Ross’ book, *Nequdah* 304 (2007): 59–61. I am convinced that the Orthodox feminist stance that rejects the sacrificial imperative and the dissociation of religion and morality is no less authentic than the current hegemonic religious stances. Indeed, to my understanding, the feminist stance is in greater harmony with central conceptions in Jewish tradition. One aim of religious-feminist discourse is to show that the prevailing halakhic and theological trends are not inevitable; also that their hegemony is not free of exercise of power, by virtue of the rabbinic control and ostensible ownership of the religious corpus as a whole. The steps taken by halakhic decisors and spiritual leaders demonstrate this power in two respects: by choosing exegetical possibilities that are not inevitable and making them hegemonic, and by presenting other options as inauthentic. In my book, *Fertility and Jewish Law: Feminist Perspectives on Orthodox Responsa Literature*, trans. Joel Linsider (Waltham, MA: Brandeis University Press, 2012), I demonstrate how the current hegemonic discourse on abortion and family planning deviates from central halakhic approaches over the generations. For an analysis of the philosophical-halakhic meaning of the feminist process, its undermining of the power structure that presents itself as inevitable even though it is contingent, see my article, “Toward a Gender-Critical Approach” (above n. 4).

why the halakhic notion that one cannot treat an injured non-Jew on Shabbat has (usually) been rejected on the basis of such religious principles and values as *darkhe shalom* (“ways of peace”). But we have yet to hear rabbis rejecting the reduction of female humanity in the name of religious principles and values such as *kevod ha-beriyot* (human dignity) or plain justice.<sup>20</sup>

## 4. The Duties Discourse versus the Human Rights Discourse

Treatments of the encounter between the liberal human rights discourse and Judaism repeatedly underscore the conceptual gap between the two as a fundamental gap between rights versus duties. As a duties-grounded system, Judaism is portrayed as diametrically opposed to liberal philosophy, at times characterized as “obsessive” regarding rights.<sup>21</sup> I propose that two basic approaches can be identified among the range of varied opinions regarding the relationship between the two discourses.<sup>22</sup>

- 20 With the exception of Daniel Sperber, who suggests overriding the halakhic principle of *kevod ha-tsibbur* (congregational dignity) in whose name women are not allowed the obligation/privilege of reading Torah on Shabbat by employing the principle of *kevod ha-beriyot* (human dignity). See Daniel Sperber, *The Path of Halakha: Women Reading the Torah: A Case of Pesiqa Policy* (Jerusalem: Reuven Mass, 2007) [Hebrew]. Here it is pertinent to note that given the *aqedah* paradigm, there is also regression in the attitude toward non-Jews and, accordingly, to the possibility of treating an injured non-Jew on the Sabbath in the name of the principle *mipne darkhe shalom*. See, for instance, Rabbi Ovadia Yosef’s recent statement, as published in the Israeli media, that a Jewish physician should not care for a non-Jewish patient on the Sabbath and that this should therefore be done in pairs, since that is less problematic halakhically. Or, the stand taken by the newspaper *Ma’ayne ha-yeshu’a*, in “People of Faith have been Lost,” December 24, 2012, on the weekly Torah portion, *Shemot*, <http://www.myim.co.il/modules/alonim/pdf/117.pdf> regarding the “sensitive” souls who would refuse to build concentration camps for Amalekites (and note that this is not an extreme publication) and the more extreme case of the book *Torat ha-melekh* by Rabbis Ytzhak Shapira and Yosef Elitzur.
- 21 As Daniel Statman noted in his presentation to the Israel Democracy Institute (November 17, 2010). Suzanne Last Stone even claims that the sacralization of human rights is detrimental to this modern project and that, from a religious point of view, imputing sacredness to the wrong place carries connotations of idolatry. See her article in this volume.
- 22 On the relationship between the liberal human rights discourse and the Jewish duties discourse, see Haim H. Cohen, *Human Rights in the Bible and Talmud*, trans. Shmuel Himelstein (Tel Aviv: MOD Books, 1989); Michael J. Brody, “Human Rights and Human Duties in Jewish Tradition,” in *Human Rights in Judaism* (above n. 1), 273–281; Robert M. Cover, “Obligation: A Jewish Jurisprudence of the Social Order,” *Journal of Law and Religion* 5/1 (1987): 65–74; Moshe Silberg, *Principia Talmudica* (Jerusalem: Academon, 1984), 66–75 [Hebrew].

The first sees this dichotomy as fundamental, namely, as an argument against the human rights discourse in general. It neither denies any interest by Judaism in human rights, nor does it claim that Judaism protects or breaches human rights, but rather that this is not the focus of the discussion. By placing the emphasis on duties, religious discourse seeks to suggest a principled alternative that is mainly concerned with moving the focus from the individual to the community, but not on protecting the interests of its believers.<sup>23</sup> This argument is also voiced by “communitarian” philosophers, and by critics of modern culture, such as MacIntyre and Taylor, who censure the reliance of the modern human rights discourse on extreme individualism. Their opinions are echoed in the approach that links this critique to religious attitudes and which proposes to supply a real alternative to the spiritual attenuation that characterizes modern liberalism.<sup>24</sup>

In any event, I think that, in the intrareligious context, this approach, more than opposing human rights per se, rejects the sketching of a picture of humans and their relationship to God in terms of rights discourse. In that sense, this religious philosophy seeks to transfer the focus of the discourse from humans—their demands, desires, and needs—to God. The human role is to serve God and not the opposite. This naturally brings to mind Yeshayahu Leibowitz’s stance. In his view, every religious gesture that places humans at the center is no less than a form of idolatry. Theoretically, I think that this approach is directly linked to the *aqedah* paradigm. The main gesture required of the religious person is one of sacrifice, whereas human rights discourse places humans in the position of those who claim what they deserve by right and not by benevolence: as those who demand and not of whom demands are made, as those who stipulate and not as those who obey.

The second approach, however, does not grasp the dichotomy as quite so fundamental. According to this approach, it is still possible to argue that Judaism is a legal system based on obligations but also to recognize, at the same time, that obligations and rights are largely correlative concepts: obligations can be

23 See, for instance, the incisive critique by Jonathan Neumann of the new book, *Religion and Human Rights—an Introduction*, ed. John Witte Jr. and M. Christian Green (New York: Oxford University Press, 2012) that supports the affinity between the liberal human rights discourse and the religious rights discourse. See “Human Rights and Religious Wrongs” (January 13, 2012), [www.jewishideasdaily.com/1046/features/human-rights-and-religious-wrongs/](http://www.jewishideasdaily.com/1046/features/human-rights-and-religious-wrongs/) (accessed Jan 20, 2013). In this regard, see Jora Hamerman’s comment on January 17, 2012, which asks why there is a need to claim that “championing individual rights means putting individuals before community?”

24 Charles Taylor, *The Malaise of Modernity* (Concord, ON: Anansi, 1991); Alasdair C. MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (Notre Dame, IN: University of Notre Dame Press, 2007).

converted into rights and vice versa. Accordingly, the fact that Judaism has chosen to speak in terms of obligations does not represent a principled rejection of rights discourse. Indeed, because of the emphasis placed on obligations, rights are ostensibly stronger and more protected than in liberal discourse.<sup>25</sup> It seems to me that Novak incisively sums up the tension between these two approaches: “The challenge for a presentation of religious human rights in the world today is to avoid the emptiness of individualistic rights talk without falling into the trap of the excesses of collectivism.”<sup>26</sup>

The argument that Judaism’s discourse is one of obligations, voiced mainly by proponents of the first approach outlined above, is, at present, primarily directed against Orthodox feminism. This is exemplified by Aryeh Frimer’s extensive critique of Tamar Ross’s book on Judaism and feminism:

With all her scholarly analysis, I believe the author has obfuscated the focal point of the discussion between feminism and halakha. Broadly speaking, feminism is a doctrine about **rights** (*zekhuyot*), advocating equality of opportunity for both genders in all spheres of life, be they social, economic, political or spiritual. It is involved with advancing women’s viewpoint and concerns. Above all, it is deeply preoccupied with personal autonomy and fulfillment, the freedom of the individual to determine the directions s/he will take and the path that makes her/him happiest.

The focus of halakhic Judaism, on the other hand, is *mitzvot* and **obligations** (*hovot*), which, by definition, seriously limit one’s personal autonomy and one’s options for personal fulfillment. This theme of obligation was impressed upon the Children of Israel while they were still under Egyptian servitude. The cry for liberation was “*shalah et ami ve-ya’avduni*—Let my people go **to serve me.**” From its very inception, Judaism has spoken of freedom—not as an end—but as a means to serve God. Religious meaningfulness for a Jew stems from an individual’s response to the Creator’s call to duty.<sup>27</sup> [Emphases in the original]

25 See David Novak, *Covenantal Rights: A Study in Jewish Political Theory* (Princeton: Princeton University Press, 2000), 3–12.

26 Novak, “Religious Human Rights in Judaic Texts,” in *Human Rights in Judaism* (above n.1), 8.

27 Aryeh A. Frimer, Review of Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism*, *BDD* 18 (2007): 70. For Tamar’s Ross’s response, where she seeks to dissolve the dichotomy between rights and duties and argues for mutual dependence between the concepts, see her “Guarding the Treasure and Guarding the Tongue (*Shemirat Halashon*),”

Ostensibly, what we have here is a definitively religious argument against the liberal, secular human rights discourse, grounded in the ultimate religious demand to worship God, which does not regard the religious system as one that aims to fulfill human needs.

The first point that must be addressed is the dichotomic portrayal of religious obligations versus the liberal human rights discourse. I find this argument nothing more than empty rhetoric because, as noted, rights and obligations are largely correlative concepts.<sup>28</sup> Despite the restrictions proposed by Griffin regarding the concept of human rights and his critique of the human rights discourse as having exceeded all bounds, the correlation between obligations and rights remains largely self-evident: “The content of a human right is also the content of the corresponding duty.”<sup>29</sup> In that sense, when Judaism stresses the prohibition against murder it stresses the right to life; when it says not to steal it stresses the right of ownership, and so on. Moreover, logically, any argument regarding rights must address the question of upon whom the obligation to realize this right devolves, as Harel demonstrates. He charts the typical formation of arguments regarding rights: A has a right to Y as opposed to B. B is typically the person who

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*BDD* 19 (2008): 96–99. Frimer is not the only one who takes this stance. See, for instance, Shvat, “Orthodox Feminism” (above n. 2). His main critique of Orthodox feminists is that they ostensibly seek to assume religious obligations, but that this is, in actuality, a guise for seeking certain advantages: they are interested in their “reward in the World to Come,” whereas their true religious function lies in their *obligation* to raise children and to foster family life.

28 For a comprehensive discussion, see Novak, “Religious Human Rights” (above n. 26), 1–33; Novak, *Covenantal Rights* (above n. 25); Griffin, *On Human Rights* (above n. 9), 96–110. Griffin treats three types of obligations in line with Kantian theory: universal obligations (that apply to all and toward all); absolute obligations (the persons obligated and the addressees of the obligation are identified and individual); and non-absolute obligations (which have no specific addressee. The person who is obligated can exercise judgment as to whom he wishes to fulfill his duty, as in giving charity, for example). Different combinations of these categories are possible, but for our purposes what is important is that non-absolute obligations have no correlative rights. The commandment of charity could therefore be grasped as an obligation that does not grant to the indigent person the right to demand charity. For a critique of the Kantian theory, see Griffin, *On Human Rights* (above n. 9), 96.

29 *Ibid.*, 97. In this context, note Dworkin’s stance, who thinks that even when we cannot speak of correlative rights and duties, they still derive from each other. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 168–177; Alon Harel, “Theories of Rights,” in *Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William A. Edmundson (Malden, MA: Blackwell, 2005), 191–206.

holds the obligation, Y indicates the contents of the right, namely, what B must do or refrain from doing (a positive or negative right that is created in harmony with a positive or negative obligation) in order to fulfill his obligation toward A, or what A is permitted to do.<sup>30</sup> There are profound disagreements between philosophers, moralists, and theoreticians of the law regarding which interests or matters are protected by rights; none, however, rejects the basic link between rights and obligations. Moreover, in the context of the theory that sees rights as protecting interests, Raz goes so far as to claim that a right exists only if someone is obligated to realize it; namely, from an analytical viewpoint, obligations precede rights. Put more precisely, rights serve as the basis for imposing obligations, although the correlation between them is more complex. As Raz puts it: “Rights ground duties. To say this is not to endorse the thesis that all duties derive from rights or that morality is right-based. It merely highlights the precedence of rights over some duties and the dynamic aspect of rights—their capacity to generate new duties with changing circumstances.”<sup>31</sup>

According to Raz then, the correct definition of rights would read as follows: “‘X has a right’ if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his or her interest) is a sufficient reason for holding some other person(s) to be under duty.”<sup>32</sup> If we accept Raz’s argument, then there is some basis for the claim that Judaism can be characterized analytically as a religion of rights (at least regarding the realm of interpersonal duties).

Second, Frimer portrays the obligations or mitzvot placed on humans in the religious system as imposing significant restrictions on human autonomy, freedom, and personal fulfillment, whereas they form the foundation of liberal thought. It appears to me, however, that this argument must also be rejected. Whereas it is true that autonomy, freedom, and personal fulfillment are the foundation of the liberal human rights discourse, to my understanding no one argues that they are absolute or unlimited.<sup>33</sup> After all, every normative moral system places limits on human autonomy and freedom. I am of the opinion that inherent in Frimer’s argument is a deeper, somewhat hidden statement, according to which the liberal human rights discourse, with its watered-down obligations and limits, actually reflects a deep moral deterioration and, in that case, how can we, as religious individuals, accept it?<sup>34</sup>

30 Harel, “Theories of Rights” (above n. 29), 192.

31 Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 186.

32 Ibid., 166.

33 Indeed, see Griffin’s efforts (*On Human Rights* [above n. 9]) throughout his book to limit the term “human rights.”

34 Statman has already noted that the religious argument can be understood as not claiming that liberal ethics *necessitates* such moral decline; after all, many liberals devote their



Nonetheless, it remains to inquire why the summary rejection of Orthodox feminism has assumed the rhetorical form of the incongruence between the liberal human rights discourse and the religious-duties discourse. After all, Orthodox feminists do not seek rights in the liberal sense of the word. They do not even word their demands in terms of rights. Furthermore, if there are religious women who oppose feminism, this is also because they are cognizant of the fact that in some senses religious feminism imposes on them a new, not previously existing, burden. Even if we follow Frimer's doctrine, which characterizes Judaism as a religion of obligations, Orthodox feminists seek more obligations and not greater rights. If so, what is the meaning of his argument? These women seek to take on the obligation to pray, to study Torah, to fulfill more commandments than what the religious system demands in the first place. In short, they seek to cancel, not to increase, exemptions. How, then, are their demands of the religious system to be understood in the context of the human rights discourse and why do they arouse such antagonism?

## 5. Orthodox Feminism and the Human Rights Discourse

The Human Rights discourse distinguishes between two main approaches to the question of what rights defend. The first approach, choice theory, treats rights as defending the human ability to choose. As such, it also explains why rights are so fundamental to personhood: after all, the ability to choose assumes individual autonomy, the ability to achieve self-realization, and agency. However, this conception of rights is sometimes seen as too narrow, as not supplying sufficient protection, and as not assigning rights to entities that are not agents. The second approach, interest theory, is broader. With regard to rights its focus is on protecting and promoting the interests of rights holders.<sup>35</sup>

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lives to moral goals, such as defending the rights of others, or the environment, and so on. The thesis is that, in practice, moral discourse in the liberal world is impoverished, rights-focused discourse as opposed to the richer discourse of those subject to halakha, which speaks more of responsibility and obligations (Statman, presentation [above n. 21]).

35 For an analysis of the two theories, see Harel, "Theories of Rights" (above n. 29), 193–197. Here I note that, philosophically, the concept of "free choice" is problematic and is criticized by radical feminist theories based on the claim that in patriarchal societies women do not truly have free choice and are constrained by gender-constructed boundaries. It is in this spirit in which I later criticize the religious-essentialist viewpoint regarding women. On feminist critiques of "free choice" in fertility-related topics, see my book, *Fertility and Jewish Law* (above n. 19), 210–212.

Despite the difference between these two approaches, I do not see them as contradictory with respect to one essential point, namely, that rights protect personhood. Even if Raz (whose definition of rights was cited above) understands the application of the protection extended by rights more broadly, his definition still encompasses the protection of personhood: “An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an ‘artificial person’ (e.g. a corporation).”<sup>36</sup> “Well-being” is certainly an aspect of “personhood” in its broad sense.

For the sake of my argument here, the narrow definition of human rights suffices. Thus, in what follows I elaborate on choice theory and some of its major components. I then use it as an essential point in my critique of religious attitudes toward women.

According to choice theory, because rights bestow exceptionally strong protection, what they protect must be of especial worth, and that is “personhood.” Personhood is best understood as the grasp humans have of themselves, their past, and future. Humans reflect and evaluate, are capable of creating, and of attempting to realize, their picture of the good life, and this is the intent of the saying which distinguishes human from other types of existence. Personhood means that we are agents who initiate, evaluate, choose, and act in accord with our individual vision of the good life. Human rights can therefore be grasped as defending our human status or our personhood. Agency means that individuals must choose their path in life, namely, autonomy: they must not be controlled by someone or something else, and secondly, each person’s choice must be real, based on at least minimal education and knowledge. Having chosen, each person must be able to act, having at his or her disposal the minimal means and the freedom to do so.<sup>37</sup>

In other words, I think that we can simply conclude that if rights mean basic protection of our personhood as humans, then the correlative obligations serve an implemental role. Thus, if a particular society does not define an obligation that promises a person’s right to education, for example, we would conclude that this society and its legal system injure what distinguishes humans from all other creatures, namely, their personhood.

In light of the above discussion I now wish to reconsider the question of rights and obligations in the context of the arguments of Orthodox feminism. As noted, Orthodox feminism does not use the language of rights. This may be because it sees itself as an integral part of the religious system that uses the language of obligations, or because some Orthodox feminists share the critique of the liberal human rights discourse as focusing on individuals, their needs and aspirations,

36 Raz, *The Morality of Freedom* (above n. 31), 166.

37 Griffin, *On Human Rights* (above n. 9), 33–37.

at the expense of larger communal values.<sup>38</sup> To my mind, Orthodox feminism also does not use the language of rights because it makes a more basic demand: *it demands recognition of the personhood of women, which is the basis for the granting of rights, even if this recognition imposes new religious obligations and limits.* How, then, does demanding obligations serve as a basis for recognition of personhood? Two examples illustrate this point.

## 5.1. The Obligation to Study Torah

The precept to engage in Torah study is one of the most important commandments imposed on Jewish men and is the preeminent religious priority (alongside, and perhaps, “in competition” with the commandment of fertility). How is this obligation worded?

*Sifre Deuteronomy* unequivocally places the obligation of Torah study on the shoulders of the father toward his son:

*And ye shall teach them your children (bēnekem) (11:19).* Your sons, not your daughters, so taught R. Jose ben ‘Akiva. Hence the Sages have said: Once an infant begins to talk, his father should converse with him in the holy tongue and should teach him Torah, for if he fails to do so it is the same as if he had buried him (alive), as it is said, *And ye shall teach them your children, talking of them (11:19).* If you teach them to your children, *Your days may be multiplied, and the days of your children (11:21);* if not, your days may be shortened. For thus are the words of Torah to be expounded: the positive implies the negative, and the negative implies the positive. (Hammer, *Sifre on Deuteronomy*, 98)

The Babylonian Talmud expands and analyzes the implication of this section from *Sifre*:

‘To teach him Torah.’ How do we know it? Because it is written, *And ye shall teach your sons [Deut.11:19].* And if his father did not teach him, he must teach himself, for it is written, *and ye shall study [Deut. 5:1].* How do we know that she [the mother] has no

38 That is how I understand Tova Hartman’s argument that there is an inherent, profound difference between Modern Orthodox and feminist discourse. She views feminist philosophy (mainly in Gilligan’s version) as rejecting the liberal individualistic model of autonomy that Modern Orthodoxy has, in her opinion, adopted. See Tova Hartman, *Feminism Encounters Traditional Judaism: Resistance and Accommodation* (Waltham, MA: Brandeis University Press, 2007), 1–19.

duty [to teach her children]?—Because it is written, *we-limaddetem* [and ye shall teach], [which also reads] *u-lemadetem* [and ye shall learn]: [hence] whoever is commanded to study, is commanded to teach; the one whom others are commanded to teach is commanded to teach oneself; and the one whom others are not commanded to teach is not commanded to teach oneself. And how do we know that she is not bound to teach herself?—Because it is written, *we-limaddetem* [and ye shall teach]—*u-lemadetem* [and ye shall learn]: the one whom others are commanded to teach is commanded to teach oneself; and the one whom others are not commanded to teach, is not commanded to teach oneself. How then do we know that others are not commanded to teach her?— Because it is written, ‘*And ye shall teach them your sons*’—but not your daughters. (B *Qiddushin* 29b; Soncino trans.)

Wording the Babylonian Talmud in terms of obligations and rights elicits the following picture: a father has a duty to teach his son and the son’s duty is to teach himself. Although expounded from different verses, the talmudic discussion links these obligations: if others have the obligation to teach a particular person, it then follows that he must teach himself and therefore also teach his sons. The circle is hermetically sealed: both pupil and teacher are required to study and to teach. Women, on the other hand, remain outside the circle; no one is required to teach them and they are therefore not obligated to study, with the result that women are not required to teach others. In other words, the circularity of the starting point lies in the absence of a specific obligation that devolves on her father or some other agency to teach a woman Torah. In the absence of this obligation, there is no one to defend her right to study Torah, which is to my understanding a fundamental one: the right to education, to share in tradition and religious culture and their shaping. Note, however, that nowhere is it stated that a woman cannot study if she so wishes; but because no person or social institution is obligated to teach her, her right to do so has, with rare exceptions, remained unprotected and orphaned throughout the generations. It is therefore important to examine the accepted religious rhetoric, its claim that it is not *forbidden* for women to study Torah; that women have “only” received an exemption from this obligation because of other religious duties that have been imposed on them. In no way is this to be seen as “demeaning,” or “exclusionary,” or as reflecting women’s lesser value in general.<sup>39</sup> Further consideration in the framework of duties and rights

39 Rabbi Saul Berman is convinced, for example, that Judaism does not define an “appropriate” or “necessary” role for women and that the exemptions from various commandments

grants the ostensibly gender-neutral “exemption” an entirely different meaning. Moreover, even the religious discourse that permits women to study Torah (in its broadest spectrum) does not word it in a priori terms (*lekhathila*). This is a sort of second-level study, a barrier to the evil intent or the deleterious influence of external knowledge and modernity. Nowhere is it grasped as a fundamental right of women as subjects and as Jews who seek to take an equal role in the spiritual creativity of their people and culture.<sup>40</sup> But, as noted above, I see the absence of an obligation to study Torah as injurious to women’s personhood. How is this reflected in everyday life?

We can, of course, consider the obligation to study Torah as a formal one that lacks significant moral aspects; furthermore, we can also assume that these values play no part in the exemption from its study. In the case of Torah study, however, I find this exceedingly difficult. Throughout the Talmud, we find the sages voicing their intense longing for Torah study, which diverges from the descriptions of the performance of the other commandments.<sup>41</sup> There is no doubt that the rabbis

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are to be understood as having encouraged the roles of women as wives, mothers, and homemakers because that ensured the continued existence of the Jewish people. If a woman wishes to choose these aims, then no religious obligation will stand in her way. Nonetheless, even though Berman backed the initial steps of religious feminism in the 1970s, he does not understand the exemption from Torah study in the terms that I have proposed, as undermining fundamental rights. See Saul Berman, “The Status of Women in Halakhic Judaism,” *Tradition* 14/2 (1973): 5–28. See R. Abraham Isaac HaKohen Kook, *Iggerot Hara’aya*, vol. 2 (Jerusalem: Mossad Harav Kook, 1985), 102 “The prohibition against Torah study for women is only to teach her, but if she learns on her own by listening, we find no reason to prohibit this.” Rabbi Waldenberg, however, well understands that if no one is obligated to teach her, it is likely that she will not be able to study on her own, “for women only know how to study what they have been taught in the first place and acquire the means to study” (*Responsa Tzitz eliezer*, vol. 9:3 (Jerusalem: n.p., 1945–1998).

40 The initial rationales certainly adopted this exegetical stance. See Israel Meir HaKohen of Radin (*Hafetz Hayyim*), *Likute halakhot*, vol. 2 (Jerusalem: n.p., 1971), 21–22: “But now, due to our iniquities, that ancestral tradition has greatly weakened . . . and in particular women who are used to studying the writings and languages of the nations, it is a big mitzvah to teach them Torah, Prophets, and the Writings and the lessons of the rabbis . . . so that our holy faith will be verified for them, lest they abandon the divine path altogether.” Contemporary halakhic decisions utilize a similar rhetoric. See the responsum by Rabbi Moshe Malka: “If I knew that, by forbidding women to study or to be taught Torah, they would remain at home and busy themselves with household tasks I would agree, but I do not agree that they should be granted the possibility not to study and thereby occupy themselves with worthless things, heaven forbid,” *Responsa Miqveh ha-mayim*, vol. 3, Y.D. (Jerusalem: 1968–1976), 21.

41 See Daniel Boyarin’s analysis of Torah study: Boyarin, *Carnal Israel: Reading Sex in Talmudic Culture* (Berkeley: University of California Press, 1993).

understood the study of Torah as a privilege, at the very least, in the sense of merit. I argue that it is not unfounded to assume that they grasped Torah study as a privilege in its basic sense as a right, as embodying their participation in the shaping of the Jewish people's spiritual culture. Returning to the present, even Yeshayahu Leibowitz, whose formalistic conception of the precepts requires no further analysis in this context, treats the precept to study Torah as an exception. If, according to Leibowitz, the meaning of each commandment is distilled in the simple disciplinary fact that it was commanded by God and this is the sole rationale for its observance, it is unclear why he expended such great efforts to include women in Torah study in this generation. How does it differ in content from any other precept? Nonetheless, Leibowitz does see it as different. Given the importance of this point, I cite Leibowitz at some length:

Many people, religious women among them, perceive the problem in terms of the existence of a set of prescriptions which apply to men only. The most popular examples are Tsitsith [fringes] and phylacteries, or the Mitzvah [precept] of *Sukkah*. They regard the exemption of women from these prescriptions as a humiliation or deprivation; at the least, as downgrading the status of women within the religious context, distancing them, as it were, from the worship of God. This is a totally erroneous view. These Mitzvoth do not prescribe certain acts because they are of intrinsic importance. Their entire significance derives solely from the fact that the Torah prescribed them. Were it not for this, they would be meaningless. If a person who is not obliged to do so perform them of his own accord, he is not thereby worshiping God but engaging in something like a sport or hobby. If Tsitsith, phylacteries, and *Sukkah* were valuable in themselves, then deterring women from observing them would be discriminatory. Conversely, women's performance of these acts of their own accord—even if their sincere intention is to do so for the sake of God, and even if this is accepted throughout the entire religious community—would be religiously pointless, and would achieve nothing by way of bringing women closer to the life of Torah.

The issue of *Talmud Torah*, the study of Torah in its most inclusive sense, is an entirely different matter . . . For besides its significance as the performance of a Mitzvah, Talmud Torah enables the Jewish person to share the Jewish cultural heritage and its spiritual content. One might almost say that it makes the student party to the presence of the Shekhinah [the divine presence] in Israel. Keeping women away from Talmud Torah is not to exempt them from a duty (as is

the case with some other Mitzvoth) but is rather to deprive them of a basic Jewish right.

This deprivation renders their “Jewishness” inferior to that of men . . . Even the accepted halakha, which assigns women a very high status . . . does not grant women equal partnership in sustaining spiritual life . . . Therefore, barring women today from Talmud Torah segregates Judaism from the spiritual reality shared by Jews of both sexes . . . The perpetuation of this attitude within Judaism and the Jewish religion is intolerable in the Jewish world of today.<sup>42</sup>

Leibowitz is well-aware that the obligation to study Torah has intrinsic value and that exemption from it damages the personhood of those exempted, because to be a person in the meaning of an agent means to be able to choose, initiate, evaluate, and act on behalf of what we perceive as “good.” On the assumption that education and learning and socialization into the “bookshelf” of each culture constitute basic tools for building its specific “good,” the personhood of those barred from access to them is greatly denied.

Taking Leibowitz’s logic one step further we can then extend his argument to the rest of the precepts.<sup>43</sup> For if we abandon formalism and take another look at the rationales for excluding women from the public sphere and religious ritual, we discover that most of the rationales barring their participation reduce women’s human value. The demand to take part in religious rituals—Torah reading, prayer, among other rituals (even supposedly minor ones like reciting the blessing over the hallot or joining a *zimmun* [a quorum of three for Grace after Meals])—can now be placed in a different perspective. This is not just some “petty” demand for formal equality with men. Rather, it is grounded in the recognition that—because it heightens the gendered dichotomy between “form” and “matter,” between “sexuality” and “sanctity,” among others, especially where the argument of modesty is involved—the exclusion of women from the public-religious sphere

42 Yeshayahu Leibowitz, “The Status of Women: Halakha and Meta-Halakha,” in *Judaism, Human Values, and the Jewish State*, ed. and trans. Eliezer Goldman et al. (Cambridge, MA: Harvard University Press, 1995), 128–129, <http://tpeople.co.il/leibowitz/leibarticles.asp?id=86> (accessed May 1, 2012).

43 Tamar Ross suggests that Leibowitz’s distinction between *ex ante* commandments, which are not affected or changed by circumstances (Torah study is such a commandment, but it differs nevertheless), and *ex post* commandments that emerge from the spirit of the time and change naturally without the need for a halakhic rationale, is problematic. See Tamar Ross, “Women’s Role in Judaism: Several Critiques on Leibowitz’s Stance on the Mechanism of Adapting Halakha to Reality,” in *Yeshayahu Leibowitz: His World and Philosophy*, ed. Avraham Sagi (Jerusalem: Keter, 1995), 148–161 [Hebrew].

undermines their personhood. Clearly, the reduction of women to their sexual “attributes” and to a constant inherent obstacle to men does not allow them to be seen as human subjects capable of achieving spiritual self-realization. In other words, if Leibowitz was prepared to abandon the formalism that characterizes his religious philosophy and to open the rationales for Torah study to discussion, this can and should be implemented for the remaining precepts. This is precisely what Orthodox feminism attempts to do, and there it discovers that the personhood of women, which is the basis for extending privileges—framed as duties—has been undermined.

The formalistic reduction by present-day halakhists, their attempt to argue that releasing women from obligation does not inhere in some moral rationale, not only fails to resolve, but rather exacerbates the problem. For if we continue to ask why women are not obligated, we discover the roots of this phenomenon: whoever carries greater obligations is holier;<sup>44</sup> whoever is more obligated, their personhood is enhanced and therefore more protected.

## 5.2. Fertility

Let us consider another example. Discourse on the female body and its construction in contemporary halakhic conceptions is in its infancy,<sup>45</sup> and this is not the place for a comprehensive discussion of this issue. At the same time, I make the following comments.

First of all, when religious feminists seek to reopen the discussion of childbirth, family planning, abortion, artificial insemination, and the like this is not because they deny the religious obligation to be fruitful and multiply (even if, formally, this obligation applies only to men). This differs from liberal, feminist discourse that recognizes the undoubted right of individuals, of women especially, not to bear children. What, then, underlies this request by religious feminists? I believe that they are motivated by a desire for the recognition of their personhood and as subjects who possess agency. What they seek is recognition of their worth not just, or mainly as, a function of motherhood or their ability to give birth. This demand does not undermine the religious obligation to form a family and have children,

44 See Maimonides, *Commentary on the Mishnah: Horayot*, 3:7: “You are already aware that all the commandments are obligatory for men, and some for women, as I explained in *Qiddushin*, and he is therefore holier than she, and should be resuscitated first.”

45 This has many manifestations in popular culture. See, for instance, *Shira* and *Haredot*—films that criticize the religious discourse that disproportionately enhances the commandment of fertility; the Kolech website that responds to questions on these matters, [http://www.kolech.com/ask\\_all.asp?org=28](http://www.kolech.com/ask_all.asp?org=28); and Irshai, *Fertility and Jewish Law* (above n. 19).



but it does criticize, at times scathingly, the inability of present-day halakhists to see women as subjects and to realize that women seek personal growth above and beyond their childbearing function. This, of course, has ramifications for family size, the options for family planning, and even for abortion in some instances.<sup>46</sup> Yet none of these oppose ancient halakhic discourse. Indeed, feminist efforts are directed toward identifying existing alternatives within halakhic discourse itself and the legitimate halakhic mechanisms that fuel them. As noted, in this case as well the issue is not posed using the language of rights, and certainly not the language of “rights to bodily integrity,” whose existence in the halakhic framework is doubtful, but as the need to defend female personhood which is no longer understood as entirely overlapping with motherhood or the functions of female fertility.

Therefore, it is not rights that Orthodox feminism seeks. In actuality, it demands the precondition for rights: the recognition of women’s personhood. Only such recognition can foster the need to defend this personhood and it can, of course, impose more religious duties on them.

But what is female “personhood”? Is it the result of each and every woman’s choice, or is it a natural given? Can a woman be an agent as defined by Griffin, or perhaps essentialist conceptions perceive her personhood differently, deriving different means of protection? In other words, if we accept the notion that female personhood is different from what we understand as “personhood,” and that is possible that the religious system of obligations and rights in its present configuration therefore actually protects, rather than harms, women’s personhood, this is perhaps grounds for rejecting everything I have argued above. I address this contention in the following section.

### 5.3. Essentialism

As I noted in the opening, I believe that human rights discourse can thrive only in the context of a religious paradigm that rejects the rift between religion and morality, or put otherwise, that rejects the notion that there are different levels to the creation of humans in *imago dei*. Do essentialist approaches necessarily undermine this assumption?

What do I mean by “essentialism? I do not argue for extreme postmodern attitudes according to which things have no essence at all. It is obvious that not everything can be everything. The problem with essentialist approaches lies in their claim regarding reality, their assumption of the existence of an actual ontological

46 See Ronit Irshai, “Gender Considerations in Halakhic Decisions: Abortion as a Test Case,” in *New Streams in Philosophy of Halakha*, ed. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes, 2008), 417–451 [Hebrew].

“entity.” If this ontological “entity” was created by nature and a person has no control over its content, and if this entity is very “thick,” this in turn negates the human ability to choose. Thus, the problem with essentialist approaches is their content, namely, the features or character they refer to this ontological entity, their “thickness,” and the link between them and the law.

Within Jewish law, essentialist approaches can be illustrated, for example, by the statement: “If any man teaches his daughter Law it is as though he taught her lewdness” for “a woman prefers one *kab* with lewdness to nine *kab* with chastity” (M *Sotah* 3:4, Blackman trans.). Namely, the nature of *x* leads to the derivation of halakha *y*. However, this mode of wording is not necessarily grounded in an essentialist approach (in the sense that this is their absolute nature). It is possible to argue that the women on whose observation Rabbi Joshua based his comment in M *Sotah* acted in this fashion. But it does not necessarily follow that this is part of their unchangeable nature. It can also be the result of social convention, education, or perhaps that was the behavior of women in Rabbi Joshua’s cultural environment. On the other hand, from Meiri’s comments on this passage we can understand it as more directly reflecting an ontological perspective, as seen from the rationale he suggests for Rabbi Eliezer’s statement forbidding the instruction of women in Torah: “because her understanding goes *beyond her limits* she acquires some deviousness and her intelligence is not sufficient for the proper understanding, and she thinks that she has achieved it and chatters like a bell to show her wisdom to all ...” (Meiri, *Bet ha-behirah: Sotah*, 46; emphasis mine—R.I.). According to these remarks there are certain “limits” to a woman’s understanding; namely, this belongs to her given nature and reflects ontological reality. Moving on to Maimonides, we find that the vague wording of the Mishnah also leaves room for a nonessentialist interpretation: “A woman who studies Torah will be recompensed” (Maimonides, *Code: Book of Knowledge*, 15:13; Hyamson trans.)—namely, she can study. There is nothing in her nature or intellectual abilities that prevents her from studying, but in practice, “the majority have not a mind adequate to its study . . .” and this is the basis for the halakha forbidding instruction of women. It is therefore a reasonable assumption that, in a different setting, in which women show an interest in study, it would be permitted to teach them because nothing in their native intellectual abilities negates this. Nevertheless, even if R. Joshua or Maimonides did not regard women as intellectually inferior by nature, still, referring a “thick” and demeaning content to women’s essence is problematic and practically denies them the freedom to take part in their culture.

This is not the place for a comprehensive discussion of essentialist notions regarding women in rabbinic literature.<sup>47</sup> At most I can state that essentialist-

47 For an initial discussion of this issue, see Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* (Hanover, NH: Brandeis University Press, 2004), 34–45.

ontological and nonessentialist approaches are admixed within this literature. Indeed, my interest lies in essentialist notions regarding women in current religious-Orthodox thought: in backing the claim that these notions are not only axiomatic and almost unchallenged but also form the axis of the halakhic discussion, that the essentialist philosophy serves as the primary rationale for the claim that halakha does not undermine women and their rights because this essentialism reflects the proper, natural world order and accordingly divine will. In addition, I claim that the elusiveness of the essentialist argument lies in the fact that it, almost unwittingly, serves the Aristotelian principle of equality.

A multitude of examples presenting women in an essentialist light can be found in current religious discourse.<sup>48</sup> But, one significant difference between current essentialist approaches and that of the ancient rabbis lies in where the emphasis is placed. If in rabbinic times we can say that there were no obstacles to presenting women as intellectually inferior, this is not the case for contemporary essentialist claims because of the intemperate gap between religious statement and social reality. To what, then, does this contemporary discourse direct its attention? What attribute is singled out as specific to women? What is their true unchanging and unchangeable nature? At present, the emphasis has been diverted to the essence of woman as mother, namely, to her inherent attributes and abilities in the realm of rearing and educating children. This perception exalts her lofty qualities: mercy, refinement, patience, and attentiveness. Accordingly, any attempt on her part at partial realization of motherhood<sup>49</sup> (whether by delaying childbirth or having fewer children, or by choosing to have a larger family but a career too), is perceived as betrayal of her natural, original mission and, naturally, as injurious to her children.<sup>50</sup> Feminist writings disclose this approach's inherent underlying oppression, its lack of freedom, and the inability of women to free themselves from the overarching identification of femininity and fertility, as well

48 See, for example, Menachem Brayer, "The Halakhic Status of Woman," in *The Jewish Woman in Rabbinic Literature*, vol. 2: *A Psychohistorical Perspective* (Hoboken, NJ: Ktav, 1986), 147–153; Aaron Soloveitchik, "The Torah's View of the Role of the Woman," in *Logic of the Heart, Logic of the Mind: Wisdom and Reflections on Topics of Our Times* (Jerusalem: Genesis, Jerusalem Press, 1991), 92–97; Rabbi Abraham Isaac HaKohen Kook, *'Olat re'aya*, vol. 1 (Jerusalem: Mossad Harav Kook, 1985), 71–72.

49 I do not mention lack of realization of motherhood at all (by choice) because Orthodox feminist discourse, unlike general feminist discourse, does not touch on it.

50 This is what Dr. Chana Katan wrote regarding a woman married for four years and still childless by choice: "She represents the hedonistic, selfish, spoiled lifestyle that is spreading in the Modern Orthodox camp in many spheres." See Chana Katan, "Non-family Planning" *Nequdah* 264 (Tammuz): 26–28 [Hebrew]; Yishai Kramer, "Longing for a Woman," in *Olam Katan* 327 (6 Kislev 5772 [Dec. 2, 2011]), 3.

as the fact that it serves patriarchal needs and prevents women from achieving self-realization.<sup>51</sup>

For the sake of the discussion I will touch on a number of illustrative examples, some from popular religious, and others from more official halakhic, writing. Rabbi Aviner is one of the main figures who adopts and reiterates this approach. Thus, in his memorial to Rebbetzin Tau, he wrote: “Yes, I will be a female professor . . . a female professor of education, a professor of education for my children, with many degrees: a degree in femininity, in marriage, in motherhood . . . motherhood is a professorship and sanctified job. It is an immense task . . . and my kingdom is my home. I will be a professor of my home. . . .”<sup>52</sup>

In a recent article titled “Longing for a Woman,”<sup>53</sup> Rabbi Yishai Kramer develops the idea that women possess a divine maternal sense, calling on them to “return home”: not to embark on careers, but to devote themselves unstintingly to their children.

But this approach is not just common in popular religious writing. See the following passage by Rabbi Ahron Soloveitchik: “God the Creator formed man and woman with different constitutions, not only biologically and physically, but especially psychologically, emotionally and spiritually. . . . A woman’s personality was molded by the Creator in such a way that she is naturally endowed or disposed toward compassion and consideration. The very word equivalent in the Hebrew language to compassion is *rachmanus*, from *rechem*, meaning a woman’s womb.”<sup>54</sup>

Why does this emphasis on the feminine essence not counter the principle of equality, in its Aristotelian version at least? This is because equality is interpreted as proportionate equality: “Likes should be treated alike and the different differently.” In other words, humiliating discrimination that does not counter the Aristotelian principle of equality is possible because if a woman, or a non-Jew, or an oriental Jew, or a black is perceived as possessing natural attributes different from those of the “typical” man, this constitutes a relevant

51 The feminist critique has treated this topic intensively from the 1970s. See Shulamit Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: Morrow, 1970); Rebecca M. Polatnick, “Why Men Don’t Rear Children: A Power Analysis,” in *Mothering: Essays in Feminist Theory*, ed. J. Trebilcot (Totowa, NJ: Rowman and Allenheld, 1983), 20–40. See also Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (New York: Norton, 1976); Ann Oakley, *Woman’s Work: The Housewife, Past and Present* (New York: Pantheon, 1974).

52 Shlomo Aviner, “I Will Produce Children,” <http://www.nrg.co.il/online/1/ART1/439/143.html> (accessed May 8, 2012) [Hebrew].

53 Kramer, “Longing” (above n. 50).

54 Soloveitchik, “Torah’s View” (above n. 48), 96.

difference that requires different treatment, just as we cannot argue that the principle of equality should treat a physically or mentally deficient person the same as someone able to walk on two legs or with full mental capacities. In other words, by attributing the differences between men and women to ostensibly “natural features,” essentialist or stereotypical thinking can justify wrongs against both women and men seen as differing from the norm. In the name of “female nature,” women were prevented from receiving licenses to practice law by the US Supreme Court,<sup>55</sup> and from voting and being elected. To return to the Israeli context, the opposition of the Israeli army to Alice Miller’s demand to be allowed to participate in a pilot’s training course relied on nothing less than the Aristotelian principle of equality.<sup>56</sup>

Although religious notions do not word their objections to granting greater equality to women in the religious sphere in terms of the equality principle, this point is nevertheless reflected in almost every argument. Namely, the emphasis is directed to the fact that halakhic distinctions do not discriminate against women and that they have unquestioned equality before God. This argument must be understood as follows: first of all, the differences between men and women justify practical distinctions, such as the exemption of women from some of the precepts. Accordingly, if it exists, a sense of humiliation is irrelevant and unjustified (that is, it has no rational basis in halakhic logic). Second, there is no harm to equality: a woman’s religious status is in no way inferior to that of a man. The difference between them, which relies on relevant rationales, does not undermine equality. I argue that we can question this contention on both the normative and descriptive planes. That is, does this distorted image of the world—which suspiciously conforms to patriarchal interests—not lie in essentialist insights? And on the factual level: is it indeed the case that women are perceived as having equal status in the religious world?<sup>57</sup>

55 See *Bradwell v. Illinois*, 83 U.S [16 Wall] 130, 141 (1872) and the discussion in Noya Rimalt, *Legal Feminism from Theory to Practice: The Struggle for Gender Equality in Israel and the United States* (Haifa: Haifa University Press, 2010) [Hebrew].

56 For a treatment of this High Court of Justice case and its implications for the principle of equality, see Yitzhak Benbaji, “Justice Dorner on Equality and Respect,” *Bar-Ilan Law Studies* 22/2 (2006): 445–461 [Hebrew]; Dalia Dorner, “Between Equality and Human Dignity,” in *Sefer Shamgar: Articles*, vol. 1 (Tel Aviv: Israel Bar Association, 2003), 9–23 [Hebrew]; Orit Kamir, *Israel’s Dignity-based Feminism in Law and Society* (Jerusalem: Carmel, 2007), 25–63 [Hebrew].

57 For an analysis of these arguments on the normative-factual plane, see my forthcoming article, “Between Equality and Dignity: On the Tendency to Oppose Women’s Torah Reading.”

## 6. Conclusion

It is now time to attempt to link the rejection of Orthodox feminism on the grounds that it profoundly opposes the religious discourse of obligation to the essentialist world view that serves precisely the same aim. In effect, the two were already linked by Rabbi Ari Shvat in his article, “Orthodox Feminism=Religious Egoism.”<sup>58</sup> Shvat understands the demands of Orthodox feminism as “egoism” because he, like Frimer, views Orthodox feminism as a human rights discourse. In his view, what Orthodox feminists seek is religious rights, but in the sense of religious status, privilege, and formal equality. In other words, if men can lead the prayers, they, too, want to lead the prayers, because being a precentor (*sheliah tsibbur*) or observing additional mitzvot means “looking after our private World to Come” and receiving a reward or some other benefit. Indeed, if men “have no choice” but to continue their battle for honor and ego because of their coarse nature, women have an alternative, it, too, grounded in their essential nature. Because they are refined and sensitive they do not understand that they do not require the male ego trip in order to achieve their World to Come. Their nature prescribes a different role for them: buttressing the Jewish home and raising children. The essentialist world-view here does not skip over men either and is, in that sense, “egalitarian,” but its innate damage is obvious. Not only are women’s demands understood and even constructed as a type of egoism—as a lack of desire for sacrifice on behalf of higher national-religious goals (“altruism” in Shvat’s terms), and as I argued above, as a brand of moral weakness that seeks rights instead of performing duties—the characterization of rights is reduced to something unworthy, to nothing more than an ego trip or a “search for honor.” It is the essentialist ideology that facilitates this diversion or construction of religious feminist demands. Only a woman who denies her true nature, her internal essence and selfhood, can be an Orthodox feminist.

To my mind, more than it undermines the dignity of women specifically, the essentialist reduction totally misunderstands the religious demands of Orthodox feminists. Instead of an “egotistical contest” regarding fulfillment of mitzvot, it is possible to offer an alternative, opposite world view: because it facilitates definition of the female subject under mainly material categories, the exclusion of women from all sanctified spheres genuinely damages their personhood. According to Shvat’s picture, the “elevated” female essence “attracted” the exemptions for women from observing various mitzvot. A more reasonable viewpoint, in my opinion, is that their exemption from various mitzvot (first and foremost, Torah study) actually served a contrary world-view according to which women were

58 See above, n.2.

less intellectual, and more materialistic, sexual, and bestial; therefore they posed incessant danger to the sanctity being created in the religious precincts.

Overall, because it negates the basic human freedom to shape personality and life plans in line with human choices, I think that the essentialist doctrine is harmful to the human rights discourse in general. But, in terms of religious duties discourse, it is a true distortion, not just because it humiliates and excludes women, but also because it does not respect men as well. Does the description of “exalted” women and “ego-chasing” men respect their personhood, for whose protection at least some religious duties have been imposed?

The picture that emerges, then, is one of a head-on collision between Orthodox feminism’s demand for recognition of women’s personhood as the basis for granting rights or imposing duties, and the essentialist viewpoint. This is not because essentialism rules out recognition of personhood, according to its own claims at least, but because the debate revolves about the meaning of “personhood.” If in the liberal human rights discourse “personhood” means the freedom to choose and to function in the world as independent subjects possessing autonomy and agency and to forward the good in which we believe as freely as possible, the essentialist discourse subordinates our choices and ability to function in the world to divinely created human nature. I imagine that liberals would view this as a strong injury to freedom, whereas religious authorities would see it as a form of authenticity, an act in harmony with humanity’s true nature. If that is the case, even if we assume that the discourse between human rights and Judaism takes place under the paradigm that negates the sacrifice of morality on the altar of religion, I find that in many respects it remains a one-sided conversation.

# Religious Exceptionalism and Human Rights

Laura S. Underkuffler

## 1. Introduction

When we think of human rights and religion, we generally think of complimentary—or even subsumed—ideas. Human rights include all of those human capacities and freedoms that are essential to human existence. This includes freedom of religion. And although there are disputes in the twenty-first century world legal order about some human rights claims, freedom of religion is not one of them. It is universally recognized, at least as an abstract idea, as a fundamental human right.

However, this happy identity of religion and human rights is a superficial one. This is because freedom of religion, asserted as a human right by one person, might involve—as its consequence or even its object—the denial of the human rights of others. When this occurs, the simple identity of religion and human rights breaks down; instead the two become severe antagonists.

In this essay, I will explore the issues involved in the antagonism between religion and human rights. In particular, I will examine these issues in the context of a current and heated controversy: whether freedom of religion, as a human right, entitles an individual or group to discriminate against gay, lesbian, or transgender individuals or couples for religious reasons. For example, a municipal clerk might refuse to issue a same-sex marriage license or to register a same-sex civil partnership;<sup>1</sup> an employee of a government contractor (hired to provide counseling services to government employees) might refuse to provide same-sex relationship counseling;<sup>2</sup> or a physician might refuse to provide infertility treatment to a lesbian woman, all on asserted religious grounds.<sup>3</sup>

1 See, e.g., *In the Matter of Marriage Commissioners Appointed Under the Marriage Act, 1995*, 2011 SKCA 3 (Canada).

2 See, e.g., *Walden v. Centers for Disease Control and Prevention*, No. 1:08-cv-02278-JEC (N.D. Ga. 2010).

3 See, e.g., *North Coast Women's Care Medical Group v. Benitez*, 189 P.3d 959 (Cal. 2008).



The case for religious exceptionalism in such settings was recently articulated by litigants in a prominent Canadian case. At issue, opponents declared, was whether courts could “force [Christian] marriage commissioners [to] perform gay ‘marriages.’”<sup>4</sup> Legal counsel for the Evangelical Fellowship of Canada, which prosecuted the case, observed that “[o]ur high court has consistently noted that the right to freedom of religion is broad and [that] it includes the right to belief and the right to act on those beliefs. . . . It is the role of governments in Canada to ensure [that] all enjoy these cherished freedoms.”<sup>5</sup> Their religious beliefs, opponents argued, were integral parts of their lives, and must be accommodated by the government. Any attempt by the government to force marriage commissioners to violate their personal religious beliefs and “privatize” their religious faith must be opposed.<sup>6</sup>

The clash between the religious rights of some and the civil rights of others is a complex and deep matter. In this essay, I cannot hope to address all aspects of this issue. However, I will attempt to establish that such cases are not ones of simple religious accommodation, as religious advocates argue. Furthermore, I will argue that whatever the merits of the general idea of religious exceptionalism, it cannot prevail in conflicts with identity-based human rights.

## 2. Religious Freedom, Religious Exceptionalism: Some Foundational Issues

Because of its long history of asserted protection for both religious rights and other human rights, the jurisprudence of the United States is a rich trove when it comes to issues of religious/human rights conflicts.

Human rights—or “civil rights,” as legally protected human rights in American jurisprudence are called—are a subset of the broader category of established secular norms and secular law. As a general proposition, the approach of American courts and legislatures toward religion/state relations has been one of presumed acceptance of religious exceptionalism in cases of conflict with secular law. It is a legal truism that religious belief cannot be controlled by the state, and is afforded absolute protection by law.<sup>7</sup> In addition, the idea that religious

4 See Rebecca Millette, “Sask. Premier Defends Decision to Force Marriage Commissioners [to] Perform Gay ‘Marriages,’” *LifeSiteNews.com*, January 24, 2011, [www.lifesitenews.com/news/sask-premier-defends-decision-to-force-marriage-commissioners-perform-gay/](http://www.lifesitenews.com/news/sask-premier-defends-decision-to-force-marriage-commissioners-perform-gay/) (accessed July 18, 2012).

5 Ibid.

6 Ibid.

7 See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 603–605 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 304–305 (1940).

freedom involves religious practice, and thus—in the case of conflict—requires the compromise of secular norms, is a familiar one in American jurisprudence. Whether imposed by statutory language or court decision, the idea that freedom of religion requires “special” or “exceptional” treatment to ensure its protection is taken for granted in large swaths of American law. For many years, the United States Supreme Court required special, exceptional protection for religious practice when it conflicted with secular law.<sup>8</sup> Today, religious exceptionalism as a presumptive value continues to exist in federal, state, and local laws.<sup>9</sup>

Religious exceptionalism, as an idea, is simple; its implementation, however, is not. Even where it an accepted principle, serious issues lurk just below the surface. These include the definition of “religion”; the meaning of “exercise”; and the limits of their protection.

## 2.1. What is “Religion”?

One of the most difficult issues in a regime of religious exceptionalism is deciding what “religion” is for this purpose. In a society in which asserted religious identities are limited in kind and relatively noncontroversial, the formulation of an understanding of “religion” might not generate much controversy. However, in a nation of celebrated religious pluralism, such as the United States, deciding what beliefs are religious (and thus afforded exceptional treatment) can be a difficult, foundational conundrum.

In its constitutional jurisprudence, the United States Supreme Court has long contended with this issue. In early opinions, the Court defined religion in traditional, theistic terms. For instance, the essence of religion was stated to be “a belief in a relation to God involving duties superior to those arising from any

8 See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Thomas v. Review Board*, 450 U.S. 707, 717–719 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 220–221 (1972). In 1990, the Court attempted to eliminate the idea that religious believers are presumptively exempt, as a federal constitutional matter, from otherwise neutral and generally applicable secular laws. See *Employment Division v. Smith*, 494 U.S. 872, 878 (1990). This led to a struggle with Congress and the subsequent enactment of two federal laws that attempted to reassert religious exceptionalism. See Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb et. seq.; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc et. seq.. The Supreme Court struck down the first, as applied to the states, as beyond Congressional power. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). The second has so far survived. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

9 See, e.g., 42 U.S.C. §2000e et seq. (employment discrimination); 42 U.S.C. §2000 cc et. seq. (institutionalized persons and land use); 50 U.S.C. App. §451 et. seq. (compulsory military service).

human relation,”<sup>10</sup> or “one’s views of his relations to his Creator, and . . . the obligations they impose.”<sup>11</sup>

The presence of well-known but non-theistic religions presented a persistent challenge to theistic understandings. In 1961, the Court succumbed to this reality and adopted a broader approach. In a now-famous footnote, the Court included non-theistic religions such as Buddhism, Taoism, Ethical Culture, and Secular Humanism within its “religious” definition.<sup>12</sup> The Court subsequently clarified that non-theistic beliefs that meet the “test of religion” are those that are “sincere and meaningful” and occupy a place in the life of those who hold it parallel to that filled by the orthodox belief in God.<sup>13</sup> In an attempt to further limit religious claims, the Court has consistently insisted that religious belief is more than philosophic conviction.<sup>14</sup> However, it has not, to date, explained just how religious beliefs differ from philosophical ones. Scholarly attempts to fill this void include suggestions that religion should be understood as an individual’s “ultimate concern,”<sup>15</sup> or that it is “the affirmation of some truth, reality, or value” that addresses fundamental issues of human existence.<sup>16</sup> However, why philosophical convictions do not also meet these criteria remains unexplained.

One might argue that defining religion is a more theoretical than practical problem, since we generally know what religion is. For instance, it is universally acknowledged in liberal democratic countries that the so-called “Abrahamic faiths” of Christianity, Islam, and Judaism are religions, and their prevalence means that the vast majority of religious disputes involve these beliefs. Indeed, a justice of the United States Supreme Court recently argued that the popular acceptance of particular faiths can in practice be dispositive of their recognition by government. The establishment of monotheism by government is permissible, he wrote, because monotheism—as exhibited by Christianity, Judaism, and Islam—accounts for 97.7% of all religious believers in the United States.<sup>17</sup> Thus, for practical reasons if for no other, the Establishment Clause of the Constitution, in his view, “permits . . . disregard of polytheists and believers

10 *United States v. Macintosh*, 283 U.S. 605, 633–634 (1931) (Hughes, C.J., dissenting).

11 *Davis v. Beason*, 133 U.S. 333, 342 (1890).

12 See *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11 (1961).

13 *United States v. Seeger*, 380 U.S. 163, 176 (1965).

14 See *Yoder*, 406 U.S. (above n. 8), 215–216.

15 See “Toward a Constitutional Definition of Religion,” *Harvard Law Review* 91 (1978): 1056, 1071.

16 John H. Mansfield, “Conscientious Objection—1964 Term,” in *Religion and the Public Order*, ed. David A. Gianella (Chicago: University of Chicago Press, 1966), 3, 10.

17 *McCreary County v. ACLU*, 125 S.Ct. 2722, 2753 (2005) (Scalia, J., dissenting).

in unconcerned deities” by government in its acknowledgment of religion in American life.<sup>18</sup>

Although a rough-cut approach such as this might (arguably) be sufficient in some contexts, it cannot suffice when the question is claimed religious exceptionalism from secular norms. When religious exceptionalism is asserted, the issue at hand is the protection of the claimant’s religious (human) rights. The most powerful reason for recognizing human rights claims in law is to protect them from denial by the majority. When that issue is raised, there must be a more principled reason for granting or denying an asserted faith excepted status than that it does, or does not, enjoy majoritarian support.

Problems involved in determining religious legitimacy are compounded when it is remembered that the question involves not only the recognition of a “religious” group, but also the recognition of particular beliefs of individuals within that group. The inherently subjective nature of religion has led American courts to refuse to examine the existence, legitimacy, or sincerity of declared religious belief. Famously, the United States Supreme Court pronounced in *United States v. Ballard*<sup>19</sup> that “[m]en may believe what they cannot prove. . . . Religious expressions which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.”<sup>20</sup>

Occasionally, courts have articulated outer boundaries to this tolerance, although these boundaries appear to be little more than the exercise of subjective judgment. For instance, a lower federal court opined that constitutional protection does not extend to “so-called religions that tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity.”<sup>21</sup> However, how one separates those that are “obviously shams and absurdities” from those that are not remains unexplained. In a very recent case, *Pleasant Grove City, Utah v. Summum*,<sup>22</sup> the Supreme Court was presented with professed followers of the religion of Summum, which was stated to have been founded in 1975 and presently headquartered in Salt Lake City, Utah. Summum is said to involve belief in the “Seven Aphorisms,” which are similar in some ways to the Ten Commandments of Judaism and Christianity. It is also claimed to be inspired by a visit of other-worldly beings, and to involve—

18 See *ibid.* For a critique of this argument, see Laura S. Underkuffler, “Through a Glass Darkly: *Van Orden, McCreary*, and the Dangers of Transparency in Establishment Clause Jurisprudence,” *First Amendment Law Review* 5 (2006): 59.

19 *United States v. Ballard*, 322 U.S. 78 (1944).

20 *Ibid.*, 86–87 (citations omitted).

21 *Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir.), cert. denied, 419 U.S. 1003 (1974).

22 *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).

as core practices—the fermentation of a sacramental nectar, the mummification of remains, and the preparation of a sexual ointment called Mehr.<sup>23</sup> Owing undoubtedly to the inherent difficulty in evaluating such religious claims, the United States Supreme Court assumed (without discussion) that this was a religious organization and that the beliefs asserted by its followers were bona fide.<sup>24</sup> Another recent case, *Cutter v. Wilkinson*,<sup>25</sup> involved assertions of religious exceptionalism by state prisoners who claimed to be believers in the Church of Jesus Christ Christian, a white supremacist organization; followers of Asatru, a polytheistic religion with claimed Northern European origins; a Satanist; and a witch.<sup>26</sup> To avoid the religious-assessment problem, the state defendants stipulated that the prisoners were members of bona fide religions and that they were sincere in their beliefs—conclusions that the Supreme Court simply adopted without comment.<sup>27</sup>

The refusal of courts to examine the legitimacy or sincerity of professed religious beliefs, of course, creates problems of its own. When the question is the granting of religious exceptionalist claims, the problems involved in leaving the existence, definition, and sincerity of religious beliefs to the individual adherent are obvious. As the United States Supreme Court has observed, government cannot afford to create a situation in which “each conscience is a law unto itself.”<sup>28</sup> Yet, to attempt to foreclose claims as a definitional matter runs afoul of prohibitions against state-imposed orthodoxy<sup>29</sup> and would involve the courts in the difficult and unseemly task of external validation. As a result, courts remain in a precarious position, committed (in principle) to honor all religious claims, while wary (in practice) of what this might mean.

## 2.2. What is Protected “Exercise”?

Assuming that cognizable “religious” status is established, a regime of religious exceptionalism requires a final, important step. Even if the religious nature of the

23 See [www.summum.us/about/welcome.shtml](http://www.summum.us/about/welcome.shtml) (accessed July 18, 2012).

24 See *Summum*, 555 U.S. (above n. 22), 460.

25 *Cutter v. Wilkinson*, 544 U.S. (above n. 8), 709.

26 *Ibid.*, 712.

27 *Ibid.*, 713.

28 *Smith*, 494 U.S. (above n. 8), 890.

29 At a minimum, the enforcement of government decrees regarding these questions risks “establishing a notion respecting religion” in violation of the American Constitution’s Establishment Clause. See, e.g., *School District of Abington v. Schempp*, 374 U.S. 203, 215 (1963) (the United States Constitution requires “absolute equality before the law, of all religious opinions and sects”) (internal quotation marks omitted).

belief is established, one must determine whether the particular “exercise” of that belief is one that can be protected by law.

When it comes to legal protection for religious claims, the separate categories of religious belief, identity, and action must be remembered. If the case simply involves religious belief, or the assertion of religious identity (without more), it is a relatively easy one. Because contemporary liberal democracies rarely attempt to determine the beliefs in citizens’ minds, or criminalize identity alone, cases involving religious beliefs or the assertion of religious identity will rarely present conflicts with secular law. One can imagine unusual cases, such as where religious identity or belief is intertwined with what the state believes to be a prohibited terrorist affiliation or organization. However, cases in which simple religious identity or belief *qua* belief conflicts with state criminal or civil law will be rare. Almost always, it will be *action*—such as advocacy, or more—that will trigger the religious/secular conflict.

It is, thus, in the realm of religiously based action that most difficulties emerge. A regime of religious exceptionalism must have some way to distinguish protected religious claims to act from those who are not protected, lest religious actors become anarchic powers beyond the reach of the law. Whatever the precise formulation, the goals of this winnowing process are generally these: to identify religious beliefs that are important; that are seriously impaired by secular law; and that will not be too damaging to secular interests, should the claim to religious privilege be granted.

American law is rife with tests of this sort. Reflecting a typical approach, American constitutional law long held that religiously based action is protected if it is required by a central religious belief; is substantially burdened by government action; and is not outweighed by any compelling government interest.<sup>30</sup>

Implementing these tests has been fraught with practical difficulties, some integrally related to the problems previously discussed. For example, the requirement that the religious action involve a “central” religious belief, and that the belief be “burdened” by government, yields little substance in practice. Since

30 See *Hernandez*, 490 U.S. (above n. 8), 699; *Thomas*, 450 U.S. (above n. 8), 717–719; *Yoder*, 406 U.S. (above n. 8), 220–221. This approach was abandoned by the United States Supreme Court—as a doctrinal matter—in 1990. See *Smith*, 494 U.S. (above n. 8), 878–890. In *Smith*, a religious drug use case, the Court held that if prohibiting or burdening the exercise of religion is not the object of the law, and merely “the incidental effect of a generally applicable . . . provision,” the First Amendment is not offended. See *ibid.*, 878. This change had the effect—in form, at least—of abolishing religious exceptionalism in federal constitutional cases. It did not mean, of course, that federal statutes, state constitutions, and state statutes could not continue to use this approach, as indeed they have.

(again) the nature and requirements of religious belief must be left to the declarant, there are few claims (if any) that can be eliminated by these tests. As a result, the “centrality” and “burden” tests have been little discussed by American courts, and only rarely have they played any role in the court’s disposition of the claim.<sup>31</sup>

With the “centrality” and “burden” tests relatively meaningless, it is the final, “compelling interest” test that limits religious exceptionalism in American courts. This test represents, of course, the crux of the matter. Religious claims, however important to the adherent and however impaired by government action, must yield—at some point—to secular state concerns. Religious exceptionalism, however much we might value it in principle, cannot be interpreted to allow religious adherents to engage in rape, pillage, mayhem, and murder. Under *any* interpretation, religious exceptionalism must yield—at some point—to the essential values protected by government.

The question is what that point is. In American law, divining any overarching principles from judicial decisions in this area is difficult. For instance, past Supreme Court decisions have held particular government interests to be compelling, or not, with little in the way of articulated reasons. Compelling state interests were found in the forced participation of citizens in the social security system, in compulsory military service, and in the prohibition of polygamy.<sup>32</sup> Less-than-compelling government interests were found in universal childhood education, work requirements for participation in state unemployment compensation plans, and licensing and taxing systems that govern in-person solicitation activities.<sup>33</sup>

31 Such rare cases include *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 304–305 (1985) (denying constitutional free-exercise claim on the ground that the government action did not actually burden the claimant’s religious beliefs); *Hernandez*, 490 U.S. (above n.8), 699 (although “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretation of those creeds, . . . [w]e do, however, have doubts [as to] whether the alleged burden [in this case] . . . is a substantial one”).

32 See *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting Native Americans’ claims for exception from assignment of Social Security numbers); *United States v. Lee*, 455 U.S. 252 (1982) (rejecting Amish claim for exemption from participation in the Social Security system); *Gillette v. United States*, 401 U.S. 437 (1971) (rejecting claim for exemption by a selective (compulsory military) service inductee who opposed war on religious grounds); *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (denying Mormons’ asserted right to practice polygamy); *Reynolds v. United States*, 98 U.S. 145 (1878) (same).

33 See *Yoder*, 406 U.S. (above n. 8), 205 (accepting claim of religious adherent to exemption from compulsory education of children after the eighth grade); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) (invalidating state unemployment rules that conditioned the availability of benefits upon an applicant’s willingness to work under

Although one can imagine reasons that support each of these determinations, there are also good reasons that do not. For instance, the state would seem to suffer relatively little harm if it allowed religious groups to provide their own old-age assistance to their members,<sup>34</sup> whereas the state's interest in childhood education would seem to be profound.<sup>35</sup>

The problem in the articulation of standards is that the government interests that oppose religious claims are as diverse as the reasons for the existence of government itself. At one extreme are interests that are fundamental to an organized society—interests which, if abandoned, would endanger the state's existence. At the other extreme are interests that promote general social (but ultimately nonessential) “well being,”<sup>36</sup> such as those that are involved in the positive but non-essential running of the modern bureaucratic state. In a regime of religious exceptionalism, claimed religious privilege must certainly yield to the former, while it would almost as certainly—if it has any meaning—trump the latter. The problem is where, along this spectrum, particular religious claims lie.

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To summarize the situation thus far, it is clear that there are difficult issues that are an inherent part of the implementation of any regime of religious exceptionalism through law. When the question is the conferral of extra-legal privilege, establishing the boundaries of that privilege is critical. Yet, the inherently subjective nature of religious identity, religious sincerity, and required religious exercise seem antithetical—by their very nature—to state definition and control. Beyond that issue, there is the difficult task of weighing religious claims against competing state interests.

One could respond to these difficulties by concluding that regimes of religious exceptionalism are inherently unworkable and should, therefore, be abandoned by post-modern legislatures and courts.<sup>37</sup> The fact remains, however, that protection

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conditions forbidden by his or her religion); *Thomas*, 450 U.S. (above n. 8), 707 (same); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking down licensing and taxing systems that restricted religious speech and solicitations); *Cantwell*, 310 U.S. (above n. 7), 296 (same).

34 See *Lee*, 455 U.S. (above n. 32), 252.

35 See *Yoder*, 406 U.S. (above n. 8), 205.

36 See Laura Underkuffler-Freund, “The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory,” *William and Mary Law Review* 38 (1995): 837, 924.

37 For classic statements of this view in the American constitutional context, see Christopher L. Eisgruber and Lawrence G. Sager, “The Vulnerability of Conscience: The Constitutional



of religious belief and practice from secular governments continues to occupy a special place in most liberal democratic thought.<sup>38</sup> If the idea of religious exceptionalism in law is to exist, under some circumstances, what should those circumstances be?

Against the background previously discussed, and for the remainder of this essay, I will consider this question in a specific context: the clash between religious exceptionalism and gay, lesbian, and transgender individuals' civil rights.

### 3. The Clash with Civil Rights

The protection of human rights, as legal "civil rights," is a ubiquitous feature of liberal democratic constitutional government. In the United States, general prohibitions against discrimination on the basis of race, color, gender, religion, and national origin have been entrenched for decades in national and state laws. Although still a patchwork affair, discrimination on the basis of sexual orientation has been increasingly added to the prohibited list in various states. As of this writing, almost half of the states and the District of Columbia have laws prohibiting sexual-orientation discrimination in public and private-sector employment.<sup>39</sup> Statutes and ordinances also prohibit sexual-orientation discrimination in public accommodations, housing, and credit.<sup>40</sup> Perhaps most dramatically, fifteen states and the District of Columbia currently authorize same-sex marriage as a legal right.<sup>41</sup>

Recognition of guarantees of civil rights and the principle of religious exceptionalism by the same legal order creates an inherently volatile mix. It is

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Basis for Protecting Religious Conduct," *University of Chicago Law Review* 61 (1994): 1245; and William P. Marshall, "In Defense of *Smith* and Free Exercise Revisionism," *University of Chicago Law Review* 58 (1991): 308.

38 Elsewhere I have argued that under American law, the protection of religious conscience has—and should have—real meaning, and that this includes some protection from the mandate of secular law. See, e.g., Laura S. Underkuffler, "Public Funding for Religious Schools: Difficulties and Dangers in a Pluralistic Society," *Oxford Review of Education* 27 (2001): 577, 584–588; Underkuffler, "Yoder and the Question of Equality," *Capital University Law Review* 25 (1996): 789; Underkuffler, "Individual Conscience and the Law," *DePaul Law Review* 42 (1992): 93.

39 See "Sexual Orientation Discrimination: Your Rights," [www.nolo.com/legal-encyclopedia/sexual-orientation-discrimination-rights-29541.html](http://www.nolo.com/legal-encyclopedia/sexual-orientation-discrimination-rights-29541.html) (accessed July 18, 2012).

40 "Sexual Discrimination and Orientation," *US Legal Law Digest*, <http://lawdigest.uslegal.com/civil-rights/sexual-discrimination-and-orientation/7177> (accessed July 18, 2012).

41 Those states are California, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Washington.

virtually inevitable that the religious beliefs and practices of some will conflict with the civil rights of others at a certain point, and that religious adherents will claim exemption from those civil-rights guarantees. Although not the typical religious-exemption case, there have been many American cases in past decades that have pitted religious exceptionalism claims against state efforts to enforce civil rights. For instance, claims to a right to engage in race, gender, and religious discrimination on religious grounds have been asserted repeatedly in American courts.<sup>42</sup>

With the advent of legal recognition of civil rights for gay, lesbian, and transgender individuals, claims of religious exceptionalism have intensified. The popular press is rife with accounts of religious individuals or organizations that vow to hold fast to their beliefs and deny services, products, or membership to gay, lesbian, or transgender individuals on religious grounds. Religious objections have been emphasized by opponents in the rhetorical war over proposed same-sex marriage legitimization.

In an attempt to defuse the issue, proponents of same-sex marriage have often employed conciliatory language, making clear that (under existing and proposed law) religious institutions and religious clergy would be exempt from performing same-sex marriages.<sup>43</sup> However, the exemption of clergy and religious institutions has not silenced critics. Religious freedom, they claim, extends not only to religious institutions and their clergy, but also to religious individuals. In one of the most strident statements, a Baptist minister recently editorialized that: “. . . the legalization of same-sex ‘marriage’ really is a threat to religious freedom. While ministers may not be required to perform such pseudo-weddings, there is no protection for religious individuals who prefer not to be party to such

42 See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Bob Jones University v. United States*, 461 U.S. 574 (1983) (race); *Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985), reversed on other grounds, 477 U.S. 619 (1986) (gender); *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980) (gender); *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), dismissed for lack of jurisdiction, 478 U.S. 1015 (1986) (religion). See generally, Laura S. Underkuffler, “‘Discrimination’ on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment,” *William and Mary Law Review* 30 (1989): 581, 589–599 (discussing the issue, cases, statutory claims, and defenses).

43 For example, a bitter dispute in Maine involved whether the Secretary of State—a same-sex marriage opponent—had to include mention of a religious exemption for clergy in the submission of the question of same-sex marriage to a popular vote. See Susan M. Cover, “Public Has Its Say on Wording of Same-Sex Marriage Referendum,” *Portland Press Herald*, July 18, 2012, A1. It is a well-settled American legal principle that religious groups and institutions, as well as their clergy, are exempt from anti-discrimination laws when engaged in private religious practice. See Laura S. Underkuffler, “Odious Discrimination and the Religious Exemption Question,” *Cardozo Law Review* 32 (2011): 2069, 2071–2072.

an absurdity. Photographers, caterers, DJs, hotels, limousine drivers, teachers, and others will be subject to loss of employment or legal prosecution for any conscientious dissent or refusal to participate.”<sup>44</sup>

The response of scholars, to date, has been cautious. Even those who are generally supportive of equal rights generally view the appropriate legal response in this context to be one of presumptive religious accommodation.<sup>45</sup>

How should we analyze these cases? To begin with, the foundational question—as noted above—is not new. Claims for religious exemption from conflicting civil-rights laws have been asserted as long as both have existed. How has this clash been resolved in other contexts?

In the United States, litigation for years, and at all levels, has established that race discrimination will not be tolerated by courts, whatever its purported justification. In *Loving v. Virginia*, the most famous case of this kind, the United States Supreme Court struck down a state anti-miscegenation statute that prohibited a “white” person from marrying any person other than another “white” person.<sup>46</sup> In the process, the Court stated that “this Court has consistently repudiated ‘[d]istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people.’”<sup>47</sup> The statute’s religious roots had been cited by the trial court in its sustaining of the statute.<sup>48</sup> These were ignored by the Supreme Court as apparently irrelevant.<sup>49</sup> In *Bob Jones University v. United States*,<sup>50</sup> decided sixteen years later, the Court explicitly addressed a religious claim and held that it could

44 Sandy Williams, “Civil Marriage and Religious Marriage Are One and the Same,” *Portland Press Herald*, June 22, 2012, A8.

45 See, e.g., Thomas C. Berg, “What Same-Sex Marriage and Religious-Liberty Claims Have in Common,” *Northwestern Journal of Law and Social Policy* 5 (2010): 206, 207–208; Douglas W. Kmiec, “Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion,” in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, ed. Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson (Lanham, Maryland: Rowman & Littlefield Publishing Company, Inc., 2008), 103, 109; Colleen Theresa Rutledge, “Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash Between Gay Rights and Religious Freedom,” *Duke Journal of Gender, Law and Policy* 15 (2008): 297, 297–300, 305–309; Robin Fretwell Wilson, “Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws,” *Northwestern Journal of Law and Policy* 5 (2010): 318.

46 See *Loving*, 388 U.S. (above n. 42), 5 n. 4.

47 *Ibid.*, 11 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 [1943]).

48 In the trial court’s words, “Almighty God created the races white, black, yellow, malay, and red, and He placed them on separate continents. And but for the interference with His arrangement there would be no cause for such marriages.” *Ibid.* 3 (internal quotation marks omitted).

49 See *ibid.*; Underkuffler, “Odious Discrimination” (above n. 43), 2073.

50 *Bob Jones*, 461 U.S. (above n. 42), 574.

not justify a private institution's policy of racial discrimination.<sup>51</sup> After *Bob Jones*, no claim of religious exceptionalism from racial-equality laws has been seriously entertained by any American court.

The same judicial intolerance has characterized cases dealing with discrimination on the basis of color or national origin. Discrimination on the basis of either has been declared by the Supreme Court to be "unfair, unjust, and inconsistent with the public policy of the United States."<sup>52</sup> As a result, any claim to engage in such discrimination has been highly suspect. Today, there is no contemporary statutory or judicial authority for the idea that a claimed religious imperative can be used to justify discrimination of this sort.

Discrimination on the basis of gender or sex, although only more recently actionable, is also prohibited widely by American civil-rights laws today. The eradication of gender or sex discrimination in employment, housing, educational opportunity, and other settings has been described by the Supreme Court as a national priority of the highest order.<sup>53</sup> Any claim of a right to treat men and women differently is subject to rigorous scrutiny, and must be proven to be required by a particular employment, educational, or other setting.<sup>54</sup> The same refusal to "except" religious claims in the racial context is also true here.<sup>55</sup>

The last, ubiquitous civil-rights provision prohibits discrimination on the basis of religion. As a superficial matter, religious discrimination is placed into the same legal basket as is race, color, national origin, and gender discrimination. As stated in the *Bob Jones* case, discrimination on the basis "of . . . race, color, *creed*, or national origin" has long been condemned in American law.<sup>56</sup>

There is, however, a potential difference in the protection (for example) of one's "race" and the protection of one's "religion." Race (like gender, color, and national origin) is simply a statement of one's *status* or *identity*: an individual *is* Asian, or black, or white. It is simply a statement of a particular personal characteristic. Religious discrimination, in the field of civil rights, might be similar. For instance, an individual might be the subject of discrimination *because* she was a Catholic, Muslim, Jew, or Jain.

51 See *ibid.*, 604. See also Underkuffler, "Odious Discrimination" (above n. 43), 2074.

52 *Bob Jones*, 461 U.S. (above n. 42), 594–595 (quoting Executive Order Number 11,063, 3 C.F.R. 652 [1959–1963]) (internal quotation marks omitted).

53 See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

54 See, e.g., Civil Rights Act of 1964, tit. VII, §703(e)(1), 42 U.S.C. §2000e-2(e)(1) (setting forth the requirements for a gender-based bona fide occupational qualification).

55 See Underkuffler, "Odious Discrimination" (above n. 43), 2079.

56 *Bob Jones*, 461 U.S. (above n. 42), 594–595.

One would expect discrimination of this type to be on a par with discrimination on the basis of race, color, gender, and national origin, and in American law, it is.<sup>57</sup> Also, as is true of the other categories, a religious basis for the discriminatory actor's conduct does not change this result. Under civil-rights laws and their judicial interpretations, an individual's religious beliefs (alone) cannot justify her refusal to employ a Muslim, serve a Jain, or to rent to a Jew.

Religion can, however, be more than status or identity. It can also involve *conduct*, or its expression in the world. For instance, there might be a refusal to hire someone, or to rent to someone, who manifests particular attitudes or actions that are the product of his religious (protected) beliefs. These "religious conduct" cases are more complex. Because of the unlimited possibilities—described above—for religious conduct claims,<sup>58</sup> and their completely unpredictable consequences for others, the legal status of these claims under civil-rights guarantees is far more ambiguous. Although rooted in identity, religious conduct that would otherwise be objectionable or actionable is not necessarily protected by civil-rights laws.<sup>59</sup>

Distinguishing religious "identity" cases from religious "conduct" cases might seem difficult at times. This is because "the kind of discrimination represented by the first type ('identity discrimination') is often bound up with certain stereotypical or assumed claims about the beliefs and conduct in which particular religious groups engage and, thus, is 'conduct-based' to that extent."<sup>60</sup> The core distinction, however, is clear. In discrimination of the first kind, an individual is the subject of discrimination *solely because* of his religious affiliation or religious identity; there is nothing objectionable about his conduct, of itself, if done by someone else. In the cases of the second kind, the situation is different. It is the conduct itself that is objectionable; and it would be objectionable no matter what the identity of the person who engages in it.<sup>61</sup>

It is the religious-identity case, then, that is the classic civil-rights case. In such cases, does it matter if the discriminatory actor is, himself, motivated by religious conviction? Does it matter if an employer refuses to hire a Muslim because the employer is a Christian, or a landlord refuses to rent to a Jain because the landlord is a Jew?

Contrary to the narrative often told in elementary school textbooks, the United States had a long colonial history of religious-identity discrimination and persecution. Religious oppression and persecution was a virulent reality in

57 See Underkuffler, "Discrimination' on the Basis of Religion" (above n. 42), *passim*.

58 See text notes 10–36 above.

59 See Underkuffler, "Odious Discrimination" (above n. 43), 2077; Underkuffler, "Discrimination'" (above n. 42), *passim*.

60 Underkuffler, "Odious Discrimination" (above n. 43), 2077.

61 See *ibid*.

virtually all of the American colonies, and persisted in many newly formed states until the nineteenth century.<sup>62</sup> It was this historical experience that impelled the eventual adoption of religious equality provisions in the national constitution, state constitutions, and other laws. This early history, and the existence of continuing discriminatory practices against some religious groups, have made the eradication of religious discrimination in civic participation, housing, employment, and other aspects of public and private life a bedrock principle in the United States. Because of the importance of this principle, and the ease with which it could be undermined by religious claims, there is no support today for the claim that religion-identity discrimination is legally sanctioned if claimed to be “compelled” or required by the discriminatory actor’s religious beliefs.

There is, thus, a fixed consensus in the United States—and, I would posit, in other liberal democratic countries—that identity discrimination by the government, as determined by race, color, national origin, gender, or religion, is inconsistent with fundamental liberal-democratic principles. The same is true of discrimination by private individuals, when they are actors in the public sphere. And this conviction does not change because the discriminatory conduct is claimed, by the discriminatory actor, to be compelled by his religious beliefs.

The prevalence of these principles raises an important question. Why is this so? Why is it so clear to liberal democratic societies that discrimination on the basis of race, color, national origin, gender, and religion is odious to the liberal democratic order? And, furthermore, that the religious beliefs of discriminatory actors do not impact this principle?

The theoretical underpinnings for these principles are rarely articulated by legislatures or courts; they are assumed to be self-evident to the liberal-democratic reader. It is assumed by the institutions of government that a liberal-democratic order must grant citizenship, political power, and civic participation in all of its forms to all of its members on an equal basis. Subsequent conduct may, of course, disqualify individuals from these rights; for instance, conviction of a crime may mean forfeiture of freedom, or the right to vote. However, simple *identity* cannot be the basis for the denial of these rights. An individual member of the polity cannot be denied equal civic rights and civic participation because of her immutable, biological characteristics. She cannot be denied participatory rights because of the color of her skin, or the identity of her parents, or the sexual anatomy that she has (or does not have). Nor can a member of the polity be denied those participatory rights because of the preference—including the religious preference—of another polity member. Religion, as discussed above, is an inherently subjective set of convictions determined by individual actors. Citizens’ convictions—no matter

62 See Underkuffler, “The Separation of the Religious and the Secular” (above n. 36), 874–960.

how much we might ordinarily strive to honor them—cannot be honored if their purpose or effect is to deny the basic political and civic participatory rights of others. To honor such requests would be to contradict the most fundamental principle of civic engagement and the governmental compact.

Given this consensus that rejects identity discrimination on the basis of race, color, religion, gender, and national origin, we reach the final question: What about discrimination on the basis of gay, lesbian, or transgender characteristics? Is this a case, like the others, of prohibited identity discrimination?

For many years in the United States, homosexual or transgender identity was viewed as something that was “voluntary” or “chosen” by the individual. In the past twenty years, there has been a massive shift in medical and public opinion on this issue. Today, the broader medical community has abandoned the position that sexual orientation is a choice, mutable at will,<sup>63</sup> as have some of the most prominent spokespersons for that view.<sup>64</sup> Changes in public opinion have mirrored these developments. In the 1980s, American public opinion stood overwhelmingly for the proposition that being gay or lesbian was a voluntary choice; by 2009, only 36% of respondents to a public poll believed that to be true.<sup>65</sup> Understandings of transgender status or identity has undergone a similar evolution. The American Psychiatric Association now recognizes the deep roots and immutability of transgender status,<sup>66</sup> as have other medical professionals.

63 See, e.g., Gregory M. Herek et. al., “Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample,” *Sexuality Research and Social Policy* 7 (2010): 7, 176–200; *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 966 (N.D. Cal. 2010), affirmed 671 F.3d 1052 (9th Cir. 2012) (“No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.”).

64 See, e.g., Benedict Carey, “Psychiatry Giant Sorry for Backing Gay ‘Cure,’” *The New York Times*, May 18, 2012, A1 (discussing Dr. Robert L. Spitzer). On May 17, 2012, the Pan American Health Organization issued a statement which concluded that treatments that purport to “cure” people with non-heterosexual sexual orientation “lack medical justification and represent a serious threat to the health and well-being of affected people.” “[T]here is a professional consensus that homosexuality is a natural variation of human sexuality and cannot be regarded as a pathological condition.” Pan American Health Organization/ World Health Organization, “*Therapies to Change Sexual Orientation Lack Medical Justification and Threaten Health*,” [http://new.paho.org/hq/index.php?option=com\\_content&task=view&id=6803&Itemid=1926](http://new.paho.org/hq/index.php?option=com_content&task=view&id=6803&Itemid=1926) (accessed July 18, 2012).

65 Quinnipiac University Poll (Apr. 21–27, 2009), [www.pollingreport.com/civil.htm](http://www.pollingreport.com/civil.htm) (accessed July 18, 2012). For a general description of changing attitudes in the United States, see Underkuffler, “Odious Discrimination” (above n. 43), 2079–2082.

66 See American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* (4th ed. 2000), 576–582 (transgender status describes a disjunction between an individual’s sexual anatomy and sexual identity).

Changes in public attitudes regarding transgender status is reflected in a recent survey of 636 major U.S. companies. Nearly one-third were found to now cover the cost of gender-reassignment surgery under their employee benefit plans.<sup>67</sup>

With these shifts in attitudes have come shifts in legal understandings. In 1996, the United States Supreme Court described homosexual status as a biological “trait.”<sup>68</sup> In a series of decisions, state supreme courts and lower federal courts have described sexual orientation as an “integral . . . aspect of one’s identity,”<sup>69</sup> “a fundamental aspect of . . . human identity,”<sup>70</sup> and as something that “may be altered [if at all] only at the expense of significant damage to the individual’s sense of self.”<sup>71</sup> As noted above, protections against sexual-orientation discrimination are now prevalent in federal, state, and local laws.<sup>72</sup> Regarding transgender status, early court decisions refused to extend civil-rights protections to transgendered persons, apparently due to the belief that transgendered status was a voluntary choice.<sup>73</sup> More recent court decisions have interpreted traditional civil-rights protections to include transgendered persons,<sup>74</sup> and the Equal Employment Opportunity Commission—the federal agency charged with enforcing federal laws against workplace discrimination—has ruled that discrimination against a transgender employee on the basis of the employee’s gender identity is sex discrimination prohibited by federal law.<sup>75</sup> Thirteen states, the District of Columbia, and many local governments explicitly include gender identity as a protected characteristic in civil-rights and hate-crimes legislation.<sup>76</sup>

New public understandings of sexual orientation and transgender status have left little life in old arguments that these identities are not immutable, personal characteristics in the way that race, color, parentage, and gender are. The argument

67 See <http://ideas.time.com/2011/12/12/transgender-the-next-frontier-in-human-rights> (accessed July 18, 2012).

68 See *Romer v. Evans*, 517 U.S. 620, 633 (1996).

69 *In Re Marriage Cases*, 183 P.3d 385, 442 (Cal. 2008).

70 *Karouni v. Gonzalez*, 399 F.3d 1163, 1173 (9th Cir. 2005).

71 *Varnum v. Brien*, 763 N.W. 2d 862, 893 (Iowa 2009).

72 See text at notes 39–41 above.

73 See Sunish Gulati, “The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence,” *New York University Law Review* 78 (2003): 2177, 2187.

74 See, e.g., *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 720 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). For an extended discussion of recent cases see *Glenn*, 633 F.3d at 1318 n. 5.

75 See *Macy v. Holder*, EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (April 20, 2012).

76 See Underkuffler, “Odious Discrimination” (above n. 43), 2089–2090.



that attractions to persons of the same sex, or repudiation of the biological gender with which one has been identified, are simply “choices” or “actions” within the control of the individual is no longer made by responsible members of the medical profession or by sophisticated legal commentators.<sup>77</sup> Furthermore, because sexual orientation and transgender status *are* immutable personal characteristics—like race, color, parentage, and gender—there is no apparent basis for a difference in their legal treatment. Gay, lesbian, and transgender individuals with these characteristics should be presumptively entitled (like other protected groups) to citizenship, political power, and civic participation in all of its forms, on an equal basis with others.

What remains, of course, is the religious-exceptionalism question. Perhaps sexual orientation and transgender status are protected, “identity” characteristics of individuals; however, that fact alone does not answer the next question: Should religious individuals be required—by law—to serve, hire, house, or otherwise publically engage with them on an equal basis, when the religions of those individuals dictate otherwise?

As discussed above, religious exceptionalism claimed by individuals to justify discrimination on the basis of race, color, national origin, gender, and religious identity in public transactions and civic affairs is a discredited notion, and presumptively invalid under American law. For religious exceptionalism to survive in the sexual-orientation/transgender context, human rights claims on those grounds would have to be distinguished from those made on the other grounds.

The usual argument for religious exceptionalism in this context is made along the following lines: There is generally no argument that gay, lesbian, and transgender status is itself different from the racial, parentage, religious, or gender-related status that forms the basis for other, ubiquitously prohibited forms of identity discrimination. Most advocates of religious exceptionalism wholeheartedly agree that gay, lesbian, and transgender individuals may exist, unmolested and presumptively equal to other citizens. That, they argue, is not when religious exceptionalism is required or justified. Rather, it is required and justified when the issue is *conduct* by those individuals—and religious individuals are required, by civil-rights laws, to participate in or ratify that conduct.

This argument is vividly illustrated by the same-sex marriage issue. In the view of the Baptist pastor quoted above, it is not the simple status of gay or lesbian

<sup>77</sup> See, e.g., *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012) (discussing courts’ rejection of “the mistaken assumption that sexual orientation is merely ‘behavioral,’ rather than the sort of deeply rooted, immutable characteristic that warrants heightened protection from discrimination”).

individuals that is at issue; it is the conduct of those individuals. It is when gay and lesbian individuals engage in “pseudo-marriages” that the religious exemption question arises, and when religious individuals should not be forced to deal with them.<sup>78</sup> The portrayal of the situation is one of *action*. There must be “protection for religious individuals who prefer *not to be a party* to . . . [the] absurdity” of gay marriage. Photographers, caterers, hotel owners, teachers, and others should not “be subject to loss of employment or legal prosecution for any . . . *refusal to participate*.”<sup>79</sup>

This argument is an interesting sleight of hand. Describing the action required of religious objectors subliminally suggests that gay or lesbian civil-rights claimants are engaging (fundamentally) in action as well. Does the fact that the gay, lesbian, or transgender individual engages in action when renting an apartment, seeking employment, getting married, hiring a caterer, and renting a hotel room destroy this transaction as a (protected) identity claim?

This argument echoes, faintly, the identity/action distinction in religious civil-rights claims discussed above.<sup>80</sup> As the reader will recall, claimed discrimination on the basis of religion can be of two kinds: discrimination on the basis of identity—that is, an individual is not hired or afforded an apartment because she is a Christian; and discrimination on the basis of conduct—an example being that an individual desires to engage in otherwise objectionable conduct, such as absence from work, for religious reasons but is denied the opportunity to do so. As pointed out above, American law is extraordinarily protective of the claimant in the first case, but less so in the second. Is this same template—protection for identity, but not for conduct—applicable to the same-sex marriage case?

In fact, the conduct that is involved in these two contexts is of entirely different kinds. The conduct in the religious discrimination “conduct” case is objectionable, independent of the identity of the actor; the actor wishes to do something that work rules, conventions, or laws otherwise forbid. The conduct in the same-sex marriage case, on the other hand, is not objectionable in itself—or objectionable at all. It is a permitted—indeed, in the United States, a constitutionally protected—right, for others. It is only because of the *identity* of the gay or lesbian actor that the objection arises. It is, thus, not a “conduct” case at all, but one of “identity” alone.

Indeed, upon further reflection, the religious objector’s “conduct” argument must completely, and necessarily, collapse. All identity claims must involve conduct or action by the civil-rights claimant if they are to be legally cognizable. If an individual simply *exists* as black, Asian, Jewish, female, or gay, there is no

78 Williams, “Civil Marriage” (above n. 44).

79 Ibid. (emphasis added).

80 See text at notes 57–61 above.

discriminatory action and no legal case. It is when that individual attempts *to act*, and is denied, services or goods in the world—renting an apartment, buying a house, obtaining a job, procuring a marriage license, hiring a caterer, and the myriad of other activities that are a part of civic life—that there is any ground for legal complaint or action. There is, therefore, no doubt that same-sex marriage cases, and other gay, lesbian, and transgender cases, involve identity claims. There is no reason to subordinate them to the claims of religious objectors on this basis. Is there any other?

There is a remaining objection that is often advanced. This objection accepts the fact that gay, lesbian, and transgender status involves identity, and that identity claims involve the equal right of individuals to act (in ways acted by others) in the world. Rather, the objection is this. Although the identity claim is real, and substantial, the burden on the religious objector—when required to honor that claim—is also real and substantial. In a shootout between these claims, on their theoretical merits, the religious claim might lose, as it concededly does when it opposes civil-rights claims on the basis of race, color, national origin, religion, and gender. However, the religious objector does not demand the ability to engage in discrimination in its harshest forms; he demands only situational accommodation. If the religious objector’s needs can be met without much harm to the gay, lesbian, or transgender individual—indeed perhaps, in some cases, without the discriminatee’s knowledge—then that accommodation should be made. For instance, the religious objection should be honored if the gay, lesbian, or transgender individual can obtain similar commercial services, accommodations, advantages, facilities, goods, or privileges elsewhere.<sup>81</sup> Thus a city clerk should be able to silently step aside, when asked to issue a same-sex marriage license, if she knows that her colleague is available to perform the municipal function.<sup>82</sup>

The idea that religious accommodations could be made so that both sides win is a very attractive suggestion. Religious freedom is highly valued in American life, and no one wants to force a sincere religious adherent to do unnecessary things that are abhorrent to her conscience. If accommodation can be made with little practical inconvenience to (or even awareness of) the gay, lesbian, or transgender person, what is the harm in it?

The harm that accommodationists consider to be at issue, and to be minimal, is “material” or “transactional” harm: harm to an individual because he or she cannot get served, rent the apartment, obtain the marriage license, and so on. If

81 See Marc D. Stern, “Liberty v. Equality: Equality v. Liberty,” *Northwestern Journal of Law and Social Policy* 5 (2010): 307.

82 See, e.g., Berg, “Same-Sex Marriage” (above n. 45), 228–232; Wilson, “Insubstantial Burdens” (above n. 45), 323–326.

an alternative exists, such harms are (arguably) avoided, or of minimal effect (although having to drive down the road to another hotel after a tiring day's journey is not a *de minimus* annoyance). Focus on such harms, however, misses the point. We do not ban discrimination on the basis of race, national origin, religion, gender, and other grounds because, if we did not, the victim would have no housing to buy or restaurant to patronize; we ban it because *the denial* of public goods, facilities, services, and accommodations *is itself* the evil to be addressed. There is more than the conveyance of a private "message of disapproval"<sup>83</sup> that the victim should ignore; it is—if tolerated by the greater polity—a statement that the victim has no valid claim to the equal treatment that the law otherwise demands. In cases involving race, color, national origin, religion, and gender, the polity has decreed that identity discrimination is not trivial, and that the interest in its eradication is not something whose victims are expected to ignore, or whose sting can be alleviated by accommodations by others. We would never expect a mixed-race couple to graciously tolerate a discriminatory town clerk, or a Catholic to graciously tolerate a discriminatory landlord, or a woman to graciously tolerate a discriminatory employer, because available alternatives exist. The issue is not only individual transactional difficulties, but societal condemnation. If sexual orientation and transgender status are identity-based claims of a similar nature, there is no reason to believe that unequal treatment—including religiously motivated unequal treatment—is any less violative of the social compact.

## 4. Conclusion

The liberal-democratic governmental compact assures that citizenship, political power, and civic participation in all of its forms will be afforded to all citizens on an equal basis. In particular, simple identity—as a presumptive matter—cannot be the basis for the denial of human rights. It is on this simple yet elegant principle that all civil-rights laws are founded.

Freedom of religion presents a particularly complex problem in this context. On the one hand, it is—itself—a universally recognized member of the human rights family, and is protected under civil-rights laws. On the other hand, it is—because of its possible invocation by any person, its self-definition by adherents, and its unreviewability by courts—a potentially anarchic and undermining force of all laws, including those that protect the civil (human) rights of others.

When the claimed religious freedom of one citizen conflicts with the claimed civil rights of other citizens, a choice by the polity must be made. It is not a question of "painless" accommodation, or the existence of alternatives for the

83 See Berg, "Same-Sex Marriage" (above n. 45), 229.

civil-rights claimant; it is a question of whether the polity, as a whole, will vindicate the principle of identity equality. We have already recognized and enforced the principle that all citizens are entitled to political power and civic participation on an equal basis without regard to their racial, religious, parentage, or gender identities. It is time to include sexual orientation and transgender status as well.

## Part Four

# On the Possibility of a Dialogue



# Human Rights

## On the Political, the Dynamic, and the Doctrine of Unity of Opposites

Avinoam Rosenak, Alick Isaacs, and  
Sharon Leshem-Zinger

### Introduction

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

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

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



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

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

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

## Two Models

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

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

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

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

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

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

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

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

2 For analysis of the arrangements reached between religion and state in Israel and in Europe, including the distinctiveness of the situation in Israel and the tensions associated with its profoundly adversary quality, see Benjamin Neuberger, “Arrangements between Religion and State in Europe,” in *The Conflict between Religion and State in Israel*, ed. Noam Langerthal and Shuki Friedman (Tel Aviv: Miscal, 2002), 336–356 [Hebrew]. For a wealth of historical examples of liberal discourse making statements against the growth of religious tendencies within the State of Israel, see Menachem Mautner, *Law and Culture in Israel at the Start of the Twenty-First Century* (Tel Aviv: Am Oved, 2008) [Hebrew]. They include Doron Rosenblum’s “A Trembling Voice,” warning of “the beginning of the end of the State of Israel” (ibid., 198); Dan Miron’s statement that Jerusalem may be the place from which “a civil war is likely to erupt” (ibid., 193); Amos Kenan and his book, *The Way to Ein Harod* (ibid., 200); and Benjamin Tammuz in his *Jeremiah’s Inn* (ibid., 194).

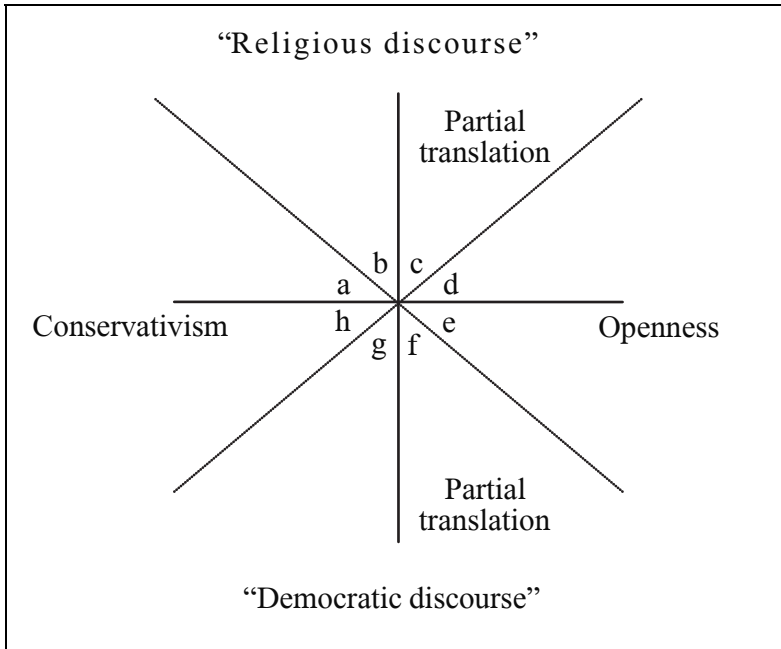
foci of institutional power engaged in political and legal competition<sup>3</sup>—rather, it also attempts to negotiate the broader cultural clash between “Judaism” and “democracy.”<sup>4</sup> When a clash of values is described using this model, each side is understood as working toward delineating the boundaries of their interaction. The appearance of negotiations is, in fact, a battle for (metaphorical as well as physical) territory, since each side tests its strength and sets up lines of defense. Behind these barricades, each can enjoy exclusive control of a particular area of public life without intervention by the other. For example, in Israeli law, the religious monopoly on marriage and divorce is an area where religious society has conquered territory and built barricades, which it now seeks to defend against invasion from the outside. Conversely, the state monopolizes taxation and public funds and combats religious demands that the allocation of these resources serve the interests of religious-interest groups. As each side plays in the other’s arena, they rank and evaluate the issues at hand, and thus determine whether they will decide to concede, or press onward toward a specific goal.

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

- 3 On the three monotheistic faiths as political religions whose clash with the secular establishment can be expected, see Roger Trigg, *Rationality and Religion: Does Faith Need Reason* (Oxford: Blackwell, 1998), 8. For more on this, see Vered Sakal, “Religion and Liberalism: The Challenge of Neutrality and John Locke’s Concept of Religion as a Possible Solution” (Ph.D. diss., Hebrew University of Jerusalem, 2011), 6–7 [Hebrew].
- 4 For historical and philosophical context, see Menachem Lorberbaum, *Politics and the Limits of Halakhah* (Jerusalem: Shalom Hartman Institute, 2006), [Hebrew]; Yitzchak Englander, “Relationships between State and Religion in Israel: Theoretical Historical Background,” in *A Jewish and Democratic State*, ed. Dafna Bark-Erez (Tel Aviv: Ramot, 1996), 291–308 [Hebrew]; *The Jewish Political Tradition through the Ages: Memorial Volume for Daniel Elazar*, ed. Moshe Hillenger (Ramat Gan: Bar-Ilan University, 2010) [Hebrew]; *The Jewish Political Tradition*, eds. Michael Walzer et al. (New Haven: Yale University Press, 2003); Yedidia Stern, *What’s Jewish in Israeli Law?* (Jerusalem: Israel Democracy Institute, 2006) [Hebrew]; Yedidia Stern, *Facing Painful Choices: Law and Halakhah in Israeli Society* (Jerusalem: Israel Democracy Institute, 2003). For an analysis of the tension, the oppositional attitude and the points of friction between the Jewish religion and the State, see Stern, “Religion and State under Siege,” available at <http://www.toravoda.org.il/he/node/1798> [Hebrew].
- 5 Avinoam Rosenak, “A Renewed Look at the Tension between Judaism and the Democratic State,” in *Religion and State in Twentieth-Century Jewish Thought*, ed. Aviezer Ravitzky (Jerusalem: Israel Democracy Institute, 2005), 566–586 [Hebrew]. The model draws on the discussion by Mary Douglas, *Natural Symbols—Exploration in Cosmology* (New York: Pantheon Books, 1982). For a similar treatment, see Avi Sagi, “Judaism and Democracy—Truly in Conflict?” in *Democratic Culture*, vol. 2 (Ramat Gan: Bar-Ilan Faculty of Law, 1999), 169–187 [Hebrew]; Sagi, “Religion and State: A Critical Study of the Meanings

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

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



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

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

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

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

6 Tolerance but not necessarily pluralism; see Avi Sagi, “The Jewish Religion: Tolerance and the Possibility of Pluralism,” *Iyyun* 44 (1995): 175–200 [Hebrew].

7 Asa Kasher, “A Jewish and Democratic State: A Philosophical Sketch,” *Iyyunei Mishpat* 19/3 (1995): 730 [Hebrew].

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

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

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

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

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

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

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

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

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

11 See Adel Manna et al., "Panel Discussion," Van Leer Jerusalem Institute, published in *Ravgevani* 2 (1998): 49–53, 56–59; Gershon Weiler, *Jewish Theocracy* (Tel Aviv: Am Oved, 1976) [Hebrew]; Avigdor Levontin, "'Jewish and Democratic'—Personal Musings," *Iyyunei Mishpat* 19 (1995): 521–546 [Hebrew].

12 According to Prof. Avigdor Levontin, "It is difficult to envision a society or a state simultaneously subject to both of them" (Levontin, "Jewish and Democratic," *Iyyunei Mishpat* 19 [1995]: 522).



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Discourse, Conversation, and Power

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

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

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

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

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

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

## Tracing the Power in Politics

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

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

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

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



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

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

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

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

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

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

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

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

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

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

the sovereign on high—like the supernatural “miracles” once performed by the divine.<sup>32</sup>

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

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

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

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

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

35 See Karl Löwith, “Heidegger’s Existentialism: Political Implications,” <http://www.lacan.com/symptom/?p=55>

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

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

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

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

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

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

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

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

## The Dynamic

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

51 Zinger, “Open a Gate” (above n. 40).

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

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

## Unity of Opposites and *Halakha*

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

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

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

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

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

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

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

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

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

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

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

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

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

57 Ibid.

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

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

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

61 *Tiqunei zohar* §56, 122b.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



## On the Open Personality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

71 *Num. Rabbah* 14:4.

72 *Ibid.*

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

# Human Rights and Secularism

## Arendt, Asad, and Milbank as Critics of the Secular Foundations of Human Rights

Shai Lavi

### Introduction

The contributions to this volume discuss the relationship between religion and human rights. Before we plunge into the matter, we may wish to reconsider the question and its premises more carefully. There are, essentially, two different ways to broach the issue. The first takes human rights as its starting point and poses questions to religion. Can religion be reconciled with human rights? Is religion inherently antagonistic to human rights, or quite to the contrary, could it be redeemed as the origins of human rights? Can religious wars and religious intolerance be moderated and contained through human rights? In posing these questions, human rights and—somewhat more implicitly—secularism, are taken for granted as fundamental characteristics of the modern age, and religion is interrogated, favorably or unfavorably, as the “odd man out.”

In this essay, I wish to approach the question from a different angle. Rather than interrogating religion about its relationship to human rights, I propose we focus our attention on the secular and its relationship with human rights. Recent scholarship in the social sciences has drawn attention to a prevalent bias within the field, which has turned religion into its subject matter, while taking for granted the secular.<sup>1</sup> While sociology of religion and anthropology of religion have

1 See, for example, John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Oxford: Blackwell, 1993); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003); For a less critical account of secularism, see Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007).

established themselves as respectable sub-disciplines, and while the problematic issue of state and religion has played a central role in political science and law, little has been written before the 1990s about the sociology and anthropology of the secular, nor about the role of secularism in law and politics, other than in the negative sense as freedom from religion. To the extent that “the secular” has been thematized it has been understood on its own terms—as a process of growing rationality, disenchantment, and the disintegration of the life world into separate spheres of autonomous rationality (economy, politics, law, morality, science etc.).<sup>2</sup>

More recently, with the growing presence of religion in the public sphere and the emerging understanding that, far from declining, religion is in fact fortifying its place within the modern world, scholars have begun turning their attention to the secular, no longer taking for granted its place within modernity.<sup>3</sup> By the same token that a scholarly account of religion should not accept uncritically religion’s self-understanding, so too the new scholarly accounts of secularism do not accept the secularist understanding of the modern age (but nor do they revert to a religious perspective). Rather, they reject any attempt to understand the secular as the universal opposite of religious particularism, and wish to study secularism for its highly particular set of dispositions, practices, beliefs, and arrays of knowledge and experience.

Human rights as a deeply secular set of ideations, practices, and sensibilities is a good candidate for such an inquiry. To be sure, viewing human rights as a secular ethics is by no means uncontroversial. Current scholarship on the relationship between human rights and religion has pointed out, quite the contrary, the religious origins of human rights.<sup>4</sup> Setting aside the complex relationship between religion and human rights, this essay takes as its point of departure a different set of concerns. It asks: what can we learn about human rights by exploring its relationship with secularism, and what can we learn about the secular age by highlighting the particular characteristics of human rights as a dominant ethics?

2 See, for example, Max Weber, “Religious Rejections of the World and their Directions,” in *From Max Weber: Essays in Sociology*, ed. Bryan S. Turner (London: Routledge, 1991), 323–359.

3 See José Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994). See also note 1 above.

4 *Christianity and Human Rights: An Introduction*, eds. John Witte, Jr. and Frank S. Alexander (New York: Cambridge University Press, 2010); John Witte, *The Reformation of Human Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2008).

There is a further, less critical, but equally pressing reason to consider the secular dimension of human rights. In recent years, the language of human rights has gained surprising popularity outside the secular-liberal West and has become, in the international political arena, synonymous with justice. The growing universality of human rights discourse may be read as a clear sign of its success, but may equally suggest that the concept has been watered down and that its unique historic origins and philosophical commitments have been forgotten. The growing prevalence of human rights discourse among mainstream religious leaders as well as so-called “fundamentalists” may be taken as further evidence of this development. If “human” in human rights stands for an all-encompassing humanity, and “rights” stands for an all-encompassing sense of justice, who—but for the most parochial—would object to it? But then, what can be gained from such abstract and undisputable truisms? What is required is a critical analysis of the specific sense in which both “human” and “rights” are employed in this combination. Critique here is first and foremost an attempt to understand the phenomenon in its distinctness, and only secondarily to single out its promises as well as its shortcomings.

There are two aspects of the following critique of human rights that distinguish it from more familiar ones. First, the critique focuses on the secular nature of human rights and brings to the study of human rights insights from the critique of secularism. Striving to understand human rights, the paper turns to religious traditions as a counterpoint reference. Second, the critique here does not follow the trodden path of condemning human rights for its focus on the atomistic individual and its commitment to negative rights. Quite to the contrary, I wish to focus on the ways in which human rights are commonly grounded in a sense of empathy, which give rise to duties that reach beyond the limits of negative rights. Consequently, I will focus on the line of critique of human rights that takes seriously its commitment to duties of care and gives heed to empathy as the ground for human rights.

Human rights is a very broad and opened-ended concept that has multiple definitions. Broadly defined, human rights include all forms of liberal rights—civil, political, social, and cultural.<sup>5</sup> Broadly understood, human rights becomes synonymous with the notion of rights per se. There is, however, another more restricted sense of human rights, which will be the main focus of the following discussion. In its restricted sense, human rights is a specific notion of rights that is distinguishable from other notions of rights—such as civil and political rights. Whereas social, civil, and political rights are the rights of humans as citizens,

5 Thomas H. Marshall, *Citizenship Social Class and other Essays* (Cambridge: Cambridge University Press, 1950).

human rights are the rights of humans as such, whether or not they are citizens of any given state. This explains the centrality of the category of human rights in international law, and specifically in international humanitarian law. These commitments extend to human beings as such, even if they are citizens of an enemy country or lack citizenship altogether. In what follows and up to a point, I will maintain the distinction between the two, and use the term “human rights” to discuss the more limited terrain of legal protection. Nevertheless, it would be a mistake to overlook the close connection between human rights and rights in general, and I will return to examine this affinity below.

Human rights *sensu stricto* has a distinct claim to universality. Its premise is not simply that all human beings have rights (Christian morality would be equally universal in this sense), but more forcefully that the only reason why humans deserve such rights is their being human (rather than, for example, because they were created by God). Human rights’ universalism is also manifest in its rapid spread across the globe. If there is today a *lingua franca* of morality, human rights is no doubt its most common idiom.

To be sure, civil rights, too, claims to be universal, and is often designated as “natural law.” But ultimately the validity of civil rights is bound to the state and depends on the preexistence of a civil and political order. Not so with human rights, in the strict sense, which aims to guarantee fundamental rights beyond the limitations of civil and political society. This distinction is often blurred when the two are discussed in one breath, as with the French Declaration of the Rights of Man and Citizen.

Human rights’ claim to universality should not, however, blur its particularism. If human rights is not to become an empty signifier, the idea needs to be clarified and its roots laid bare. A good way to clarify the concept and its uses is to turn to history, and specifically to the rise of human rights along with a secularist ethics. To be sure, historicizing human rights does not undermine human rights’ claim to moral validity. As a matter of principle, no claim to a rationally grounded morality can be undermined simply by pointing to historical origins. Rather, the turn to history aims to draw attention to some of the underlying presuppositions of human rights not merely as an abstract system of thought, but as a practical ethics—grounded in sentiment as much as in reason. The question, therefore, is not whether human rights is universally binding, but rather what universality means in this context, and what were the conditions of possibility that have allowed human rights to emerge as universally binding.

It is in this vein that the paper will discuss the critique of human rights offered by three scholars: Hannah Arendt, the German-Jewish political theorist, who offers a careful study of the inherent contradictions of human rights in her *Origins of Totalitarianism*; Talal Asad, who has launched a powerful critique



of secularism and the human rights discourse taking his cue from the Western confrontation with Islam; and finally, John Milbank, a Christian theologian, who turns to medieval writings to think through modern legal concepts. Though coming from different intellectual traditions and scholarly disciplines—political theory, theology, and anthropology—the three seek to understand and consequently criticize human rights as a secular project, and turn to history in order to shed light on its significance in contemporary law and politics. All three reject the simplistic understanding of human rights as grounded in the alienated and atomistic individual and take seriously the role of empathy as its foundation; yet, each arrives at a different understanding of the phenomenon—its promises and shortcomings.

With the help of Arendt, Asad, and Milbank, the paper seeks to lay out the secularist presuppositions of human rights. One may raise the objection that, in contrast to religion, “secularism” is not a valid analytic category, because there is very little if anything that links together different “secularist” positions other than the negative and trivial fact that they are not religious. To this challenge two responses are in place. First, to the extent that it makes sense to speak of “religion and human rights,” as the title of this collected volume suggests, there is *a fortiori* reason to speak of secularism and human rights. After all, secularism is a relatively new phenomenon, and compared to the great variety of religions and religious history, secularism has a much shorter and distinctly modern career. Second, as we shall see, secularism is here understood less as matter of belief (or its absence), and more as a set of practices, less as concerning the divine and supernatural (or its absence), and more as a social and political attunement.

## Human Rights’ Critique: Beyond Negative Rights and the Atomistic Individual

The most common critique of human rights—posed both by right-leaning communitarians and left-leaning Marxists, feminists, and other critics—focuses on the negative freedom of human rights and its inherent individualism.<sup>6</sup> Rights within a liberal paradigm, so goes the critique, guarantee freedom only in the

6 On the left, the classic text is, no doubt, Karl Marx, *On the Jewish Question* (Cincinnati: Hebrew Union College, 1958). On the right, one may think of Edmund Burke, *Reflections on the Revolution in France* (Stanford, CA: Stanford University Press, 2001). The argument was picked up by writers on both sides in the 1990s and continues to shape the contemporary discussion. See, for example, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1993/1991); Mark Tushnet, “The Critique of Rights,” *SMU Law Review* 47/1 (1993): 32.

negative sense, namely, freedom from state coercion. The atomistic individual is both the theoretical and methodological premise of liberal theory and liberal rights, and its ultimate telos. If, nevertheless, individuals have obligations toward fellow individuals, as both classic and modern theories of the social contract claim, this is only because and only to the extent to which such duties can be justified from the point of view of the isolated individual. Liberals, to be sure, do not assume that individuals are self-centered, greedy, or egotistic, only that they have a right to be so. This is the basis of the liberal rights discourse, and the target of most critical accounts of the classic liberal notion of rights. Critics claim that individuals are always part of larger communities, and that duties, responsibilities, and solidarity lie at the foundations of any just polity and legal system.

There is, no doubt, some truth to this line of critique, especially when directed against classic theories of rights from Locke to Kant. In recent years, however, rights discourse has evolved dramatically, so much so, that older critiques seem to have lost much of their original bite. With the growing concern with social rights, and the rise of humanitarian protections especially in the international sphere, these critics seem to be directed against a human rights scarecrow.

Furthermore, and more tellingly, the image of the detached individual misses the mark even when we confine ourselves to classic strands of human rights theory. This becomes evident if, rather than focusing on Locke and Kant, we turn to Scottish Enlightenment; alternatively, this also becomes clear if we examine more closely the underlying ethos of the French Revolution. As we shall see, one of the characteristics of these alternative strands of human rights theory and history was a notion of empathy that linked individuals together through an acute awareness and compassion for suffering. There is little coincidence that this commitment was formulated most clearly and unabashedly by the most avid advocate of liberal rights and political economy, Adam Smith. It may be worthwhile quoting at some length a paragraph from “The Theory of Moral Sentiment”:

How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortunes of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it. Of this kind is pity or compassion, the emotion we feel for the misery of others, when we either see it, or are made to conceive it in a very lively manner. That we often derive sorrow from the sorrows of others, is a matter of fact too obvious to require any instances to prove it; for this sentiment, like all the other original passions of human nature, is by no means confined to the virtuous or the humane, though they

perhaps may feel it with the most exquisite sensibility. The greatest ruffian, the most hardened violator of the laws of society, is not altogether without it.<sup>7</sup>

The following inquiry and critique takes as its point of departure precisely this notion of sympathy (or what we call, today, empathy) as essential to any attempt to understand the contemporary challenge of human rights. Liberal thought from Adam Smith, through the French Revolution to the UN Declaration of Human Rights, and to the most recent humanitarian delegations to catastrophe zones are grounded in a sense of empathy and in a commitment to the anguish and suffering of others. It is not about compassion beyond rights, but rather about compassion as the basis of rights. This notion of empathy is especially prevalent in the more restricted sense of human rights, discussed above, namely, as the rights that are owed to all human being as such, regardless of their membership in a particular political community. Some straightforward examples include fundamental humanitarian rights such as the right of every human being to food, shelter, safety, and security.<sup>8</sup>

Whereas Adam Smith and thinkers who followed his legacy have characterized empathy as a universal, innate character of human beings, I will follow the lead of Arendt, Asad, and Milbank, and suggest that the modern notion of empathy and its role in contemporary law and politics is far less obvious and much more contested than defenders of human rights often presuppose. Though my focus will be on the critique of human rights *sensu stricto*, I will nevertheless argue that, for all three thinkers, the critique has bearing on the more inclusive conception of rights in the liberal tradition.

To briefly recap, the following critique of human rights thus differs from some of the more familiar critiques in three ways. It does not accuse human rights for its individualism, but rather questions the specific way in which community is imagined; it does not blame human rights for its detachment, but rather for the specific ways in which it engages; and it does not attempt to rid legal discourse from metaphysics, as many secularist critics have done, but rather seeks to unveil the metaphysical assumptions that underlie the secularist understanding of humanity inscribed in the history of human rights.

7 Adam Smith, *The Theory of Moral Sentiment*, 2nd ed. (London: A. Millar, 1761), 1–2.

8 See, more generally, *Basic Documents on Human Rights*, eds. Ian Brownlie and Guy S. Goodwin-Gill, 5th ed. (Oxford: Oxford University Press, 2006).

## Human Rights and Empathy: Past and Present

Lynn Hunt's recent *Inventing Human Rights: A History* offers an insightful introduction to the history of human rights. Hunt's history, to be sure, does not search for the first appearance of the term "human rights." Throughout the eighteenth century the more common expression was, in fact, "natural rights." Jefferson, for example, began using the term "rights of man" only after 1789 and "human rights," which was invented by the French in the 1760s (*droits de l'homme*), only became popular thanks to Rousseau's *Social Contract* of 1762.<sup>9</sup> Hunt's book focuses on eighteenth-century France and America and serves, in what follows, as a helpful starting point for excavating not so much the history of the concept, but more importantly its conceptual underpinnings.

The book's main argument is that "imagined empathy" served as the basis of human rights. Imagination does not mean fabrication, but rather the ability to place oneself in the shoes of the other and identify with her suffering. Hunt explains, "As eighteenth-century people pushed for the expansion of self-determination, they ran up against a dilemma: what would provide the source of community in this new order that highlighted the rights of the individual? It was one thing to explain how morality could be derived from human reason rather than Divine Scripture or how autonomy should be preferred to blind obedience. But it was quite another to reconcile this self-directed individual with the greater good . . . The philosophers, like eighteenth-century people more generally called their answer 'sympathy.'"<sup>10</sup>

What eighteenth-century writers called sympathy (literally, "suffering with"), and what we are accustomed to call empathy,<sup>11</sup> played an important role in the creation of equality. While the notion that all human beings were equal had ancient roots, the development of human rights depended on creating a new basis of equality. Indeed, it was one thing to believe in equality in the Kingdom of Heaven, it was quite another to view all persons in the mundane reality as equal. Empathy allowed one to enter into the body of the other and suffer with her.

Empathy, which had a place of honor in the republic of arts and letters and in the development of the new genre of the novel, played an equally important role in the day-to-day practice of the new notions of human rights. One of the paradigm

9 Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton, 2007), 122.

10 *Ibid.*, 64.

11 The word "empathy" (*Einfühlung*) was coined in the second half of the nineteenth century by the German philosopher Rudolf Lotze to convey the idea that appreciation of art depends on the viewer's ability to project his personality onto the viewed object. The word "sympathy" has older origins and signified an emotional affinity between things, or a community of feeling. In what follows, I will use the term empathy.

cases was the prohibition on torture and cruel punishment. In France, punishment was harsh up to the end of the nineteenth century. Capital offenses were highly popular and increased in number; executions were often accompanied by public torture to increase deterrence.<sup>12</sup> Criticism of torture and cruel punishment began two decades before the revolution and was associated with Voltaire and other writers of the Enlightenment. It was, however, only six weeks after passing the Declaration of the Rights of Man and Citizens that the French deputies abolished all uses of judicial torture as part of a reform of criminal procedure.<sup>13</sup>

On the other side of the Channel, Blackstone, too, believed that criminal law should always be “conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind.”<sup>14</sup> Compassion and empathy toward the inflicted body in pain, rather than any calculus of utility, seem to have been the main motivation underlying the attack on corporeal punishment. More precisely, empathy toward pain was a necessary condition for developing a universal calculus of pain. “We should not forget that even criminals possess souls and bodies composed of the same materials as those of our friends and relations,” exclaimed Benjamin Rush, “they are ‘bone of their bone.’”<sup>15</sup> A similar position was voiced, most famously, by Cesare Beccaria in his proposal to reform punishment.

This seemingly “natural” and “reasonable” approach was, however, not self-evident. Not even for Voltaire, who originally decried torture and the death penalty not because of their cruelty, but because they were inflicted on the innocent. A more vocal adherent of the traditionalist approach was Pierre-Francois Myuart, who offered a point-by-point refutation of Beccaria. “I pride myself on having as much sensibility as anyone else, but no doubt I do not have an organization of fibers [nerve endings] as loose as that of our modern criminalists, for I did not feel that gentle shuddering of which they speak.”<sup>16</sup>

Empathy may well be a universal trait, but its emergence as a political drive was strikingly new. Hunt explains, “Under the traditional understanding, the pains of the body did not belong entirely to the individual condemned person. Those pains had the higher religious and political purposes of redemption and reparation of the community. Bodies could be mutilated in the interest of inscribing authority, and broken or burned in the interest of restoring the moral, political, and religious order.”<sup>17</sup>

12 Hunt, *Inventing Human Rights* (above n. 7), 77.

13 *Ibid.*, 135–136.

14 *Ibid.*, 81.

15 Rush, quoted in *ibid.*, 76.

16 Myuart quoted in *ibid.*, 93.

17 Hunt, *ibid.* (above n. 7), 94.

Under Christendom the suffering body could have any number of meanings from punishment to penitence and redemption. Not so in the emerging secular view, in which pain belonged solely to the here and now. “Where pain had served as the symbol of reparation under the old regime, now pain seemed an obstacle to any meaningful quittance.”<sup>18</sup>

Torture and punishment are merely one example, albeit one that continued to play a central role in twentieth century international human law, such as in Article V of the Universal Declaration of Human Rights (1948), stating that “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” But there are many other instances. At their center lies the protection of the human body stripped from any social, political, and historical context.<sup>19</sup>

Sympathy and empathy continue to accompany human rights discourse both in practice and in theory. A recent book by Martha Nussbaum is especially worth mentioning in this context, because it brings us closer to the question of religion, secularism, and human rights. In her new book, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age*,<sup>20</sup> Nussbaum discusses the emerging fear in the United States and Europe of Islam and of other minorities including blacks and gays. The immediate context for her contemplations is the French prohibition of the *burqa* in public schools, but her argument is broader. Much of the discrimination against minorities, Nussbaum argues, is grounded in deep anxieties from the stranger and foreigner. To overcome the politics of anxieties and to secure a political notion of equality, we must turn to empathy. For Nussbaum, as Hunt has already pointed out, an abstract belief in human rights will not do. What is required is empathy with human experiences that are very different from our own. It is only on the basis of such empathy that true acceptance may emerge.

Nussbaum calls this ability “participatory imagination” or simply “empathy,” and explains:

18 Ibid., 97.

19 Consider the following international law documents: *Standard Minimum Rules for the Treatment of Prisoners*, adopted Aug. 30, 1955 by the First United Nations Congress on Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I; *Declaration on Social Progress and Development* G.A. res. 2542 (XXIV), 24 U.N. GAOR Supp. (No. 30) at 49, U.N. Doc. A/7630 (1969); *Universal Declaration on the Eradication of Hunger and Malnutrition* Adopted on 16 November 1974 by the World Food Conference convened under General Assembly resolution 3180 (XXVIII) of 17 December 1973; and, most recently, *Universal Declaration on Bioethics and Human Rights* adopted “by acclamation” at the UNESCO General Conference on October 19, 2005.

20 Martha C. Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (Cambridge, MA: Harvard University Press, 2012).

More generally, what the imagination does is to make others real for us. A common human failing is to see the whole world from the point of view of one's own goals, and to see the conduct of others as all about oneself. Thus: "those veiled women are aggressively defying Frenchness." . . . By imagining other people's way of life, we don't necessarily learn to agree with their goals, but we do see the reality of these goals for them. We learn that other worlds of thought and feeling exist.<sup>21</sup>

For Nussbaum, empathy may help us overcome our fears. It is crucial for seeing how people, who seem very different than us, are in fact not all that different. "In empathy the mind moves outward, occupying many different positions outside the self."<sup>22</sup> The way to occupy these different positions is by imagining ourselves in the place of others. The most immediate way of doing so is through empathy. Specifically, empathy is a condition for religious tolerance and allows us to view otherwise alien traditions and practices as similar to our own. Empathy—putting oneself in the place of another—is a fundamental human capacity, like imagination itself. It has a universalizing effect to the extent that it allows us to bridge the gaps that divide people and see commonality where previously only difference could be seen.

What Nussbaum and other defenders of empathy-based human rights fail to see is that a critique of current political prejudices cannot take for granted empathy as a means for promoting religious tolerance, without questioning the way in which empathy itself is a secularist sentiment. A critique of the secular character of empathy suggests that the failure of human rights is not under-inclusiveness, but rather the way in which it includes. Consequently, the political challenge we face is not how to overcome religious intolerance through a turn to empathy, but rather to acknowledge the secular intolerance that is intimately tied to the practices of empathy and is embedded in human rights. This is precisely the task which Arendt, Asad, and Milbank have taken upon themselves.

## Hannah Arendt and the Politics of Pity

Arendt was one of the first political thinkers to draw critical attention to the interrelationship of human rights, the politics of empathy, and secularism. The problem that Arendt poses in her historically grounded book, *The Origins of Totalitarianism*, is how to explain the fact that precisely in the age of human rights

21 Ibid., 39.

22 Ibid., 39–40.

and in the wake of international law, Europe faced the most atrocious violations of human rights. For the German-Jewish political thinker, the answer does not lie in the evil intentions underlying the crimes—those are often present but can hardly give rise to the systematic violations of rights. Rather, she asks how such crimes became possible, and why nothing, or very little, stood in the way of their execution. The ground for these unprecedented atrocities, Arendt claims, lies in the emergence of a new political formation, the totalitarian regime.

One important element in the rise of the totalitarian regime was the failure of the modern liberal nation state to protect human rights. This observation may sound, at first, as a logical truism. For Arendt, however, the failure of human rights to protect “the rights of man” was not accidental, and though not inevitable, had its seeds planted early on with the rise of the modern nation state and the promise of human rights. Human rights failed to protect the rights of humans due to an inherent shortcoming of the ideal of human rights present from its early inception.

In the chapter “The Decline of the Nation-State and the End of the Rights of Man,”<sup>23</sup> Arendt traces the internal paradox of human rights back to the bedrock of modern politics, to the French Revolution. The Declaration of the Rights of Man and of the Citizen gave birth to a new legal and political order, which aspired to protect all citizens regardless of their religious affiliation or social status. But the modern notion of rights, Arendt argues, hid a fundamental paradox. The grounding of rights on the foundations of the abstract concept of “humanity,” stripped human beings from anything that identified them, historically, culturally, or religiously and left them entirely dependent on the political protection of the modern nation state. Arendt refers in this context to Edmund Burke, who was famously aware of this danger, when he contrasted the traditional “rights of the English man” with the emerging ideal of universal rights. Burke found the protection of the former much more reliable—because they were grounded in history, tradition, and institutions—than the latter, which relied only on the good will of the revolutionaries and denied human beings their particular history and tradition.

Arendt adds the important insight that the new legal protection of human rights had, in fact, an institutional grounding. Its new basis was the modern nation state, which emerged alongside the rise of human rights. Put simply, the famous declarations of the rights of man *and* citizen ultimately protected only the rights of man *as* citizen. Humans had their rights guaranteed only if and as long

23 Hannah Arendt, “The Decline of the Nation-State and the End of the Rights of Man,” in *The Origins of Totalitarianism*, 3rd ed. (London: George Allen & Unwin, 1966), 267–302.



as they were citizens. Stateless people (including citizens of very weak states or citizens whose citizenship was lost or revoked) depended on the good will of the “hosting” state.

Though the status of stateless people was not a real question in the nineteenth century, this vulnerability was inscribed into the French idea of human rights.

The problem materialized in the aftermath of the First World War with the growing number of stateless people who roamed the lands of Europe, Russians, Germans, Slovaks, Croats, and, by no means an exception, the Jews. “Once they had left their homeland they remained homeless, once they had left their state they became stateless; and once they had been deprived of their human rights they were rightless, the scum of the earth.”<sup>24</sup> Indeed, once one became stateless, there was little protection that “human rights” could offer. The Declaration of the Rights of Man turned out to be a promissory note that had no cover. In her words, “The conception of human rights based upon the assumed existence of a human being as such broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human.”<sup>25</sup>

Arendt’s critical take on human rights is not limited to her novel account of totalitarian regimes. The latter express in the most extreme way a danger that threatens ordinary liberal politics. To think of human beings only through their humanity has led to what Arendt describes in other parts of her work as the “politics of pity,” turning the suffering of human beings into the primary motivation of politics. The problem is not sensitivity to suffering as such, but rather the turning of this sensitivity into the basic motivation and criterion for political action and intervention. Arendt believes that thinking of human beings first and foremost through their capacity to suffer is, in the final analysis, the animalization of humanity. This problem is dominant in certain strands of liberal politics and, as scholars following Arendt have argued, becomes most apparent in the politics of (main stream) humanitarian aid.<sup>26</sup>

Arendt does not condemn the liberal tradition as a whole, but rather distinguishes between two strands of the liberal-democratic tradition—the American and the French. The Europeans, she claims, have suffered from this malaise more than the Americans. Arendt distinguishes, in this context, between compassion and pity on the one hand, and solidarity, on the other. Whereas the

24 Ibid., 267.

25 Ibid., 300.

26 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, 1998).

former is based on need, the latter is based on political action—which is grounded in freedom rather than need. Solidarity, she writes, “though it may be aroused by suffering, is not guided by it, and it comprehends the strong and the rich no less than the weak and the poor; compared with the sentiment of pity, it may appear cold and abstract, for it remains committed to ‘ideas’—to greatness, or honour, or dignity, rather than to any ‘love’ of men.”<sup>27</sup> Arendt further distinguishes between pity and compassion. Whereas compassion is a pre-political sentiment, which has its place in the intimate sphere of private relationships, pity is the translation of that sentiment into politics. “Pity, because it is not stricken in the flesh and keeps its sentimental distance, can succeed where compassion always will fail; it can reach out the multitude and therefore, like solidarity, enter the market-place.”<sup>28</sup> “But pity,” continues Arendt, “in contrast to solidarity, does not look upon both fortune and misfortune, the strong and the weak, with an equal eye; without the presence of misfortune, pity could not exist, and it therefore has just as much vested interest in the existence of the unhappy as thirst for power has a vested interest in the existence of the weak.”<sup>29</sup>

Arendt claims that pity was at the heart of the French revolutionaries, who were concerned primarily with the needs of the lower classes and emerged out of compassion to these needs—first and foremost to hunger. In contraposition, “The passion of compassion was singularly absent from the minds of the American revolutionists.”<sup>30</sup> Unlike the French Revolution the American Revolution did not take its cue from the suffering of the masses, but rather from the will to secure the freedom of the financially secured—and thus did not emerge out of necessity and pity, but rather out of freedom and solidarity. Thus, Arendt does not simply criticize the concept of human rights, but rather shows its multiple forms, preferring one legacy over the other.

Arendt’s critique of human rights and critique of empathy go along with her deep understanding and critique of the secular age. The Declaration of Human Rights was a turning point in history, because it meant nothing more nor less than “that from then on Man and not God’s command or the customs of history, should be the source of Law.” Under the new order, fundamental rights, such as the right to life and property, which until then had been outside the political order and had been guaranteed “by social, spiritual, and religious forces,” became dependent upon government and constitution.<sup>31</sup> Arendt concludes,

27 Hannah Arendt, *On Revolution* (New York: Viking Press, 1965), 84.

28 *Ibid.*, 84.

29 *Ibid.*

30 *Ibid.*, 79.

31 Arendt, “The Decline” (above n. 23), 290–291.

Since the Rights of Man were proclaimed to be ‘inalienable,’ irreducible to and uneducable from other rights or laws, no authority was invoked for their establishment; Man himself was their source as well as their ultimate goal. No special law, moreover, was deemed necessary to protect them because all laws were supposed to rest upon them. Man appeared as the only sovereign in matters of law as the people was proclaimed the only sovereign in matters of government. The people’s sovereignty (different from that of the prince) was not proclaimed by the grace of God but in the name of Man, so that it seemed only natural that the ‘inalienable’ rights of man would find their guarantee and become an inalienable part of the right of the people to sovereign self-government.<sup>32</sup>

For Arendt, secularism, like democracy, is simultaneously a promise and a danger. Stripping humanity of the authority of tradition, it leaves a political vacuum that cannot be easily filled. During the French Revolution, “Nature” emerges as a promising candidate, but Arendt points out the unintended consequences of this choice. The grounding of politics in abstract universal reason goes hand in hand with the reduction of humanity to its natural existence and political justice to pity. In contrast, Arendt claims that only the grounding of politics in concrete institutions and in the artificial (rather than natural) notion of equality can properly protect human freedom. This is what the French Revolutionaries failed to see, and what the Founders of American Federacy were all too aware of.

One may question whether Arendt’s contraposition of America and Europe, and specifically her attempt to link the European tradition of the nation state to the rise and fall of human rights and to the emergence of totalitarian regimes, does justice to the historical records. One may further question whether the twentieth century development of humanitarian law indeed has its roots in the French Revolution, or whether—as some recent scholarship suggests<sup>33</sup>—post-World War II discourse on human rights has a different genealogy and perhaps much more recent origins. For current purposes, the details of the historical account are less important than her claim that underlying the modern and secular notion of human rights lies a politics of empathy and pity.

This latter claim, too, may be challenged—does not the very notion of rights demand equal treatment and respect regardless of any feelings, including empathy? Do human rights—as a demand for dignity and justice—not stand in

32 Ibid., 291.

33 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge; MA: Harvard University Press, 2012).

stark opposition to the politics of pity? Or simply put, do not the rational and universal aspirations of human rights contradict any attempt to reduce humanity to its animal nature?

Here I do not wish to defend Arendt's position, but only to clarify it. Arendt refuses to take the liberal tradition on face values, and refuses to treat the above questions as rhetorical. Her main insight is that any attempt to base modern politics on rational secular abstractions of the individual is bound to fail, but not because it ignores the concrete needs of individuals (as leftist critics of liberalism have often suggested), but quite to the contrary—because it is bound to think of individuals only through their most abstract common denominator, that is, their natural needs. Contrary to common (secularist) wisdom, rational abstraction does not free us from nature, but rather binds us to it.

## Talal Asad and the Critique of the Secular

In a series of articles and public lectures, the renowned anthropologist, Talal Asad, offers a different set of reflections on the question of human rights and empathy. Asad is well aware of Arendt's critique of human rights and follows certain of her moves, but the general tenor of his critique is quite different.

Asad's primary concern is to expose the very specific, and by no means universal, sense in which the "human rights" idiom is formulated and practiced. Though less historically grounded than Arendt, Asad derives his basic insights from the history of European colonialism and post-colonialism. His observations, however, are not limited to this context, and pertain to more general patterns emerging within the West, including to the relationship between the secular state and its religious minorities. If, for Arendt, the big historical paradox lay in the emergence of totalitarian regimes in the age of human rights, the big puzzle for Asad is the tension between the missionary enterprise of Western countries to spread humanism, human rights, and democracy to non-Western countries, which is accompanied by the infliction of great devastation and suffering on colonized and occupied populations.

Non-Christian traditions have been especially vulnerable to these dialectics. Specifically, Asad is concerned with the common association of Islam (or fundamental Islam) with cruelty and barbarism. He does not wish to defend such practices, but merely to ask, why only specific kinds of suffering, which take on a particular form of cruelty, are protected by human rights. Certain forms of cruelty are denounced by the West, whereas others are tolerated or even promulgated. Humanitarian concerns are much less rational and consistent than they claim to be, but nor are they entirely arbitrary. In fact, the infliction of suffering has been institutionalized in certain settings such as warfare, sports, scientific

experimentation and the death penalty, so “inflicting physical suffering is actively practiced and also legally condoned.”<sup>34</sup>

While this may sound like a simple accusation of hypocrisy and duplicity, Asad shies away from such conclusions and rejects the simple, albeit common, explanation of discrimination against “the other.” Rather, he seeks the underlying logic of the articulation of suffering in the West, which has its own logic and its own language. “What is interesting,” he writes, “is not merely that some forms of suffering were to be taken more seriously than others, but that ‘inhuman’ suffering as opposed to ‘necessary’ or ‘inevitable’ suffering was regarded as being essentially *gratuitous*, and therefore legally punishable.”<sup>35</sup>

One of the many examples Asad uses to demonstrate the liberal calculus of pain is the military practice of strategic bombing. Strategic bombing takes the lives of innocent bystanders and inflicts mass destruction, but is viewed as legal and moral, as long as the collateral damages are not intended and as long as they are outweighed by the pursuit of legitimate ends. Thus, in a polarizing example, Asad compares the denouncement of torture by UN soldiers from Belgium and Canada in Somalia with the destruction of entire city blocks and the killing of a considerable number of civilians by the US military, and concludes that while torture was condemned as a human rights violation per se, the death of civilians through aerial bombardment was regarded not “a matter of human rights abuse but of *collateral damage*.”<sup>36</sup>

One may easily counter that torture is deliberate and thus cruel, whereas strategic bombing is a tragic choice of the lesser evil.<sup>37</sup> But this is precisely Asad’s point. Once one takes a critical distance from the moralizing language of the West, in which human rights prefigures dominantly, and observes both practices and justifications anthropologically, one cannot but be struck by the highly particularistic set of presuppositions and customs that characterize secular ethics, and by the heightened attention they give to specific forms of suffering while underplaying others.

Asad discusses, further, more mundane examples of this logic of the “lesser evil.” Flogging, for example, is seen as an inhumane and cruel punishment, as imprisonment becomes a model of modern secular justice. This distinction cannot be taken for granted. The very possibility of comparing different kinds of pain as a justificatory argument is central to the secular ethics of the modern state. One form of suffering is used as a measuring rod to justify another.

34 Asad, *Formations* (above n. 3), 113.

35 Ibid.

36 Ibid., 128.

37 Compare Eyal Weizman, *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza* (London: Verso, 2012).

For Asad, this specific concern with cruelty is characteristic of Western societies as secular societies. “A major motive of secularism has clearly been the desire to end cruelties—the deliberate infliction *in this world* of pain to the living body of others, and the causing of distress to their minds that religion has so often initiated and justified.”<sup>38</sup> But ultimately, the desire to eliminate pain, a regulatory ideal of secular ethics, can never be attained, and is thus replaced by a proxy—the rational calculus of pain and cruelty. Under this secular ethics, the affliction of pain is no longer justified in the name of a higher and absolute good, but rather in comparison to other forms of cruelty, which are deemed irrational and barbaric.

Unlike Arendt, Asad does not identify empathy with “suffering” in general, but rather with a certain calculus of suffering, which is characteristic of the language and practice of human rights. Cruelty is marked by the excess of pain and its irrationality. As long as pain can be justified and has its place within the chambers of reason, it is not understood as cruel. The ability to undertake such a calculus, and to place a specific form of suffering within a comparative framework, is a mark of rational, secular ethics.

Asad takes a further step and seeks to place in context the very desire of secular ethics and human rights to eradicate suffering as part of progressive politics. Asad’s critique is by no means a defense of cruelty, but offers an anthropological account of the very categories that are used to identify cruelty and lump together very different practices: “There is a secular viewpoint held by many (including anthropologists) that would have one accept that in the final analysis there are only two mutually exclusive options available: either an agent (representing and asserting himself or herself) or a victim (the passive object of chance or cruelty).”<sup>39</sup>

When we say that someone is suffering, we usually do not think of him or her as an agent. In contrast, Asad points to non-secular traditions, which think of pain not merely as a passive experience. The experience of childbirth would be an interesting case to begin challenging the secularist conceptualization of pain, and opens a whole series of cases from the suffering of the criminal under corporeal punishment to the most recent debates on child circumcision. In this sense, too, Asad’s critique differs from Arendt’s. Whereas her account of human rights and empathy depends on a clear distinction between active doing and passive suffering, Asad suggests that the distinction itself is deeply secular.

38 Asad, *Formations* (above n. 3), 100.

39 *Ibid.*, 79.

## John Milbank and the Critique of the Possessive Individual

In a recent article “Against Human Rights: Liberty in the Western Tradition,” John Milbank, a leading critical theorist, approaches the question of human rights from yet another perspective. His work, here and elsewhere, assumes that much of the modern approach to politics, law, and society stems from secularist presuppositions that should be critically examined, and ultimately overcome. He turns to medieval Christian theology in search of an Archimedean vantage point from which he critically observes and seeks to overturn these presuppositions. Milbank, however, does not simply contrast the secular present with a medieval past. He claims, rather, that the secularist positions themselves often have their roots in medieval theology, albeit in a distortion of a more genuine Christian approach. Milbank’s position can be compared and contrasted with the more familiar formulation of political theology by Carl Schmitt.<sup>40</sup> If, for the latter, all significant concepts of the modern theory of the state are a secularization of theological concepts,<sup>41</sup> then, for the former, they are a secularization of *contorted* theological concepts.

Milbank takes on the liberal conception of human rights for its inherent failure to protect human dignity. He criticizes the liberal assumption that “the notion of human rights is the high mead, the finest distillation of the western tradition—the very point where it fulfills itself by denying its specificity and opening up to the universal.”<sup>42</sup> The root of his critique is the subjective ground of human rights. Milbank juxtaposes this modern subjective notion with its medieval counterpart of an objective *jus*, which can be found in the writings of the Fathers of the Church. The battle lines Milbank draws set apart the modern secular notion of individualism, which he deems as “possessive individualism,” from the objective medieval concept of a “right order.” Whereas the former is based on human will, the latter is grounded in divine order.

The modern view of human rights is most clearly present in Hobbes, but is echoed in Locke and later theorists of the social contract. At its heart is the double notion of sovereignty—both of the individual sovereign and of the state as sovereign. The inalienable and hence absolute rights of the individual are mirrored in the absolute and hence inalienable rights of the sovereign state.

40 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, ed. George Schwab (Chicago: University of Chicago Press, 2006).

41 *Ibid.*, 36–52.

42 John Milbank, “Against Human Rights: Liberty in the Western Tradition,” *Oxford Journal of Law and Religion* 1/1 (2012): 7.

Whereas liberal thinkers view the inalienable rights of the individual as a limitation on the absolute power of the state, Milbank sees the very notion of inalienability, common to both, as the root of the problem of human rights and the liberal state. The danger in absolutism is the lack of any external limitation on its power. It is only from within the logic of sovereignty that boundaries are drawn, but any such attempt at self-restriction that is grounded in notions of self-ownership is bound to give way under pressure, “For if it is only ‘self-ownership’ that is absolutely inalienable (or ownership of the will itself by itself, as Rousseau and Kant later saw, in an Ockhamist lineage) then this is compatible with more or less any actual bondage—provided there is consent, which may well be taken to be tacit, since this is assumed to be sufficient by all known polities (to some degree absolutely, and in certain circumstances contingently).”<sup>43</sup>

Milbank contrasts the absolutism and subjective notion of the modern sovereign (both state and individual) with the medieval notion of personhood and dominion, which are mediated and relative. The political structure of the Middle Ages was highly de-centralized and, perhaps more importantly, had intermediary institutions that mediated between the individual and the ruler and thus allowed for more individual freedom. No worldly power had absolute authority, and all political authorities were limited by an objective order external to them.

Milbank reverses the common opposition between religion and the secular by identifying the former, rather than the latter, with absolute power. His position may be criticized for ignoring the stark differences between modern absolutism and modern democracies. The latter, unlike the former, are ruled by law not by the absolute power of man. Though Milbank does not directly address this problem, he seems to suggest that the rule of law itself has an absolutist character. While for liberals, the rule of law sets apart democracy from absolutist regimes, for Milbank the two share a great deal in common—where one form of absolutism is simply replaced by another. The affinity between seemingly different secular political formations—sovereignty and liberal democracy—becomes clear once the two are compared to medieval political institutions.

Milbank’s critique of secular politics as absolutist seems to contrast not only with liberal positions but also with Asad’s, who criticized human rights precisely for its balancing and relativizing approach to the calculus of pain. There is no reason to assume that the critics of secularism are reconcilable. And yet, it may be helpful to point out that Asad’s main concern is with the content of the norms, whereas Milbank seems to be concerned with their authority, regardless of their specific content.



To emphasize the absolutist nature of modern politics, Milbank turns to an analysis of the modern notion of property rights, which is central both in the liberal and the neo-liberal traditions. “Absolute inalienability and alienability belong together,” he argues. “The tyranny of the individual to alienate his property is mirrored in the right of the state to do the same. There is no external order that bounds either the state or the individual.”<sup>44</sup> In contrast to the liberal concept of property, for Aquinas *jus* was objective, but not in the modern sense of objectivity as a thing that could only be shared in terms of a literal partition. “Aquinas did not think of the right to buy, sell and manage as material, ‘thingy’ processes, which the law later legitimizes (after the dualistic, biopolitical manner of modern liberalism), but rather saw these rights (outside any such dualism of nature and culture) as incorporeal relations in which we stand to things which are instrumentally subordinate to a more general and guiding incorporeal relationship of humanity as a whole to corporeal things as a whole.”<sup>45</sup> The modern notion, quite to the contrary, places an “excessive stress upon the isolated individual.”<sup>46</sup>

The last quote from Milbank notwithstanding, it is important to distinguish his critique of rights from the more familiar communitarian and Marxist critiques. For Milbank the heart of the problem is not the liberal emphasis on the isolated individual, detached from a broader social and political context. Though problematic, it is not the ground of the problem, but a mere symptom. The real problem lies in the subjective nature of liberal theory and politics.

It is in this context, that we can now turn to Milbank’s more specific discussion and critique of empathy as an important supplement to the liberal notion of human rights. Like Arendt and Asad, albeit on his own terms, Milbank addresses sympathy as an important ingredient in the liberal world view. Milbank readily admits that, in comparison to the liberal image of the possessive individual, the turn to compassion and empathy can and should be viewed as a potentially redeeming aspect of liberalism. Still, he seeks to distinguish between the modern sense of sympathy (or empathy) and the Christian notion of *agape*, which is significantly different.

Adam Smith and other thinkers of the Scottish Enlightenment relegated sympathy to the sphere of “civil society” that lies outside the economic order: “For Hume as for Adam Smith, however, our sympathy for the distressed is a weaker emotion than our sympathy for those unjustly treated; our sympathetic fear confronted by those punished by the law; and our sym-pathetic admiration for the lives of the wealthy. Hence society is built mainly upon justice and accumulation—

44 Ibid.

45 Ibid., 12.

46 Ibid., 5.

not upon benevolence. This is confined to the margins. Benevolence—as marginal, as unilateral, or as non-festive—is a fake substitute for charity. This is why I argue that the space of charity was abolished.”<sup>47</sup>

For Milbank, benevolence cannot find its ground in the human on its own, and empathy based on this kind of evolution is bound to fail just as human rights is to fail:

Sympathetic charity cannot resolve the aporia of sympathy and imagination. If there is only my-self and the other, and no God, then sympathetic imagination reduces either to animal instinct that regards purely the other, or else to a rationally reflexive projection of my own self-interest. Imagination can only be a discerning recognition of the other for his own sake, and for the sake of his entire set of sensible and intellectual relations, including his relation to myself, if it is an active anticipation (to use a favorite Cambridge Platonic word) of the divine telos for humanity and the cosmos.<sup>48</sup>

This final passage highlights some commonalities between Milbank’s critique of human and both Arendt’s and Asad’s critiques. Milbank, like Arendt, sees the danger that the politics of sympathy (or empathy) will reduce human beings to their animal instinct and, once again like Arendt, points to the close connection between the reduction to animal nature and rational reflection. In tune with Asad’s critique of the secular opposition between active doing and passive suffering, Milbank proposes the religious attunement of “active anticipation” as an alternative ground for the political ethics of solidarity.

## Conclusion

Each of the three thinkers discussed in the paper offers a different understanding both of human rights and of secularism, and thus constructs differently the relationship between the two. More specifically, they each offer different answers to the following set of questions: What are the inherent limitations of human rights? How do these limitations become clear once human rights is understood as a secularist project? What is the role of empathy in comprehending and consequently in criticizing human rights? Finally, each develops a different relationship to the secular and its place vis-à-vis religion. While it is striking to find three so very

47 John Milbank, “The Invocation of Clio: A Response,” *Journal of Religious Ethics* 3/1 (2005): 35.

48 Ibid.

different thinkers asking the same set of questions, the differences between their answers is probably as glaring as their affinities.

By way of conclusion, I wish to emphasize the difference between the three thinkers and focus on the way each of them conceptualizes the relationship of secularism and history as part of a critique of human rights. Central to Arendt's position is her radical commitment to secular modernity. With all her critique of human rights as a secular politics, Arendt is well aware of the fact that there is no going back. Religion, tradition, and authority—the Roman trinity of the Ancient world, which survived the Middle Ages, has come to a dramatic end with the rise of the modern age. But to give up on religion, tradition, and authority is not to give up on belief, history, and politics.<sup>49</sup> The question for Arendt is whether and how the latter will take new form in the modern age. Human rights has not been able to meet this challenge, but this is only a reason to strive forward, while constantly reinterpreting the past. Since the future of human rights, as much as its past, is closely tied to the history of the nation state, it may well be that with the current challenges facing the nation state, new political forms will emerge that will be more congenial to the legal protection of humans, not in the abstract, but rather as members of new political formations.

Milbank's position on the relationship between secularism and history is radically different. For him, past traditions cannot be left behind, and the secular age cannot free itself from theological thinking. The very attempt to escape theology will not lead to a break with tradition, but only to its distortion. While Milbank is far from being naive and surely does not think that one can simply step back into the Middle Ages, he does believe that the only way to overcome the present limitations of liberal thought is by returning to forgotten possibilities that can be found in ancient institutions and in the writings of classic Christian theology.

Asad's position is perhaps more complex. Like Arendt, he too acknowledges that the secular age is our reality, and cannot be replaced by religion. Yet he calls for a much greater modesty in the secular claim to universality. Secularism is as much a tribal tradition with its specific beliefs, practices, and sentiments as any other tradition. Though secular practices cannot be criticized for their unavoidable partiality, "we seculars" would probably do better if we faced and embraced this partiality, rather than glorify human rights as an epitome of progress and perfected reason.

Each of the three thinkers approaches the problem of human rights from a different conception of history and the relationship between secularism and

49 Hannah Arendt, "What is Authority?" *Between Past and Future* (New York: Penguin Classics, 2006), 91.

modernity. It would make no sense to try and synthesize their positions into one coherent argument. Such an attempt would necessarily require removing the critiques from their concrete historical and theoretical context, and would lead precisely to the kind of abstraction that all three thinkers oppose in their writings. What we are left with is, therefore, not an answer to the question of the relationship of human rights and religion, but rather, and at best, a new way of formulating the question, taking as our point of departure neither human rights nor religion, but rather the question concerning the nature of secularism and its place within modernity.

# Religion and Human Rights Babel or Translation, Conflict or Convergence?

Suzanne Last Stone

Nearly two decades ago I was invited to contribute to a collection of essays, much like this one, convened to explore the possibility of “articulating a position of human rights on assumptions of humankind and of the cosmos other than those of Western liberal civilization.”<sup>1</sup> The aim was to break decisively with the conventional essays by representatives of the world’s religions, each one claiming that its tradition had anticipated, if not actually given birth to, contemporary understandings of human rights. Instead, we were charged with marshaling the resources of our respective traditions to defend political and social liberties without necessarily invoking the language of rights; or the political and philosophic assumptions of secular, liberal modernity, such as the view of society as a collection of discrete, autonomous, rights-bearing individuals and the view of the individual as a self-regulating moral agent. The project was self-consciously constructive: to creatively mine potentialities within a given religious tradition that could support certain desirable insights of modernity—chief among them, tolerance and pluralism—while maintaining a commitment to tradition and religious identity. In the specific case of Judaism, this translation project took on added dimension in light of the internal translation process called for by the changed setting of Judaism from exclusively diasporic conditions to include majority rule within a modern state.

1 Adam B. Seligman, “Introduction,” in *Religion and Human Rights: Conflict or Convergence*, ed. Adam Seligman (Hollis, NH: Hollis Publishing Company, 2005), 11. The conference also generated *Modest Claims: Dialogues on Toleration and Tradition*, ed. Adam Seligman (Notre Dame: University of Notre Dame Press, 2004); Suzanne Last Stone, “Tolerance versus Pluralism in Judaism,” *Journal of Human Rights* 2/1 (2003): 105–117.

At nearly the same time, I participated in a series of academic conferences on the topic of universal human rights and cultural pluralism.<sup>2</sup> The focus of these gatherings, in the heyday of multiculturalism, was the question how to reconcile universal human rights with the diverse practices of actual human communities and their distinctive cultural (including collective religious) identities. Such questions as how universal norms could be transplanted and particularized to meet local conditions and histories and whether so-called group rights could co-exist with individual rights, were all debated within the confines of liberal thought.

Together, these two projects held out a vision of convergence between religion and human rights in which each tradition of discourse would continue to speak its own language. The peculiarly modern and Western language of human rights is just that: modern and Western. Talk of rights can be linked historically to the decline of the feudal order, the emergence of national states and market economies, and to the invention of the autonomous individual in the European imagination at the origins of modernity. From political rights of peoples and minority groups, political, civil, and social rights became extended to individuals as citizens in the state and eventually conceived as held by humans as such, inviolate and inalienable.<sup>3</sup> The discourse of human rights drew on diverse philosophic antecedents—from Locke and conscience to Kant and dignity, and the reading of the self as a self-regulating agent. The common thread, however, was that identifying and securing human rights was a key political project of secular modernity and, as such, to be validated through public reason accessible to all. Rights might be trumps but cultural and religious particularity could be managed, so went the optimistic story at the time, and within liberal premises.

For their part, with sufficient effort and creativity, religions, no matter how diverse, would discover that human rights were, in some fashion, always already there. After all, religions were each, in different ways, concerned with human worth and flourishing even if they did not ascribe to the politics or philosophical anthropology of Western modernity. And religions—Judaism is a prime example—had a long experience with the coexistence of universalism and particularism. In the case of Protestant Christianity and reformed religions, the leap clearly would

2 See Suzanne Last Stone, “Cultural Pluralism, Nationalism, and Universal Rights,” *Cardozo Law Review* 21 (2000): 1211; and Stone, “The Intervention of American Law in Jewish Divorce: A Pluralist Analysis,” *Israel Law Review* 34 (2000): 170.

3 I rely here primarily on John Clayton, “Human Rights and Religious Values,” in *Religion and Human Rights* (above n. 1). Other stories of origin have been told, some of which are discussed in the body of the paper. See Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton: Princeton University Press, 2008); Max Stackhouse, “Why Human Rights Need God: A Christian Perspective,” in *Does Human Rights Need God?* ed. Barbara Barnett and Elizabeth M. Bucar (Grand Rapids, MI: Eerdmans, 2005).

be short, for certain basic assumptions about religion as primarily concerned with belief rather than law or public practice; as a private matter of conscience in which voluntarism, rather than group cohesion or institutional authority, was highly valued, were most congenial to the worldview that gave rise to Western rights discourse in the first place. With respect to non-Western or non-reformed religions, especially competing law-based religions, the hermeneutic project would be vastly more complex. Indeed, translation and re-interpretation are all the more difficult in a self-conscious age already suspicious of liberal or reformed religion. So other denominations and religions would simply have to work harder to remain reasonably faithful to their traditional texts, traditions, and internal viewpoints.

Nearly two decades later, these projects seem almost utopian. That is not to say that the discourses of religion and human rights have failed to converge. On the contrary, they may be converging only too well.

In this essay, I will briefly survey what has happened in the discourse of human rights in the intervening two decades, focusing on developments that, in my view, elide the difference between human rights as a modern secular political project (that is, to extrapolate the concrete rights of citizens onto the international arena) and human rights as increasingly a quasi-religious, even Christian, project. My argument is that the sacralization of human rights is detrimental to the modern political project and to a possible convergence between the human rights tradition and many non-Christian, non-reformed religions. The incontrovertible or absolute character of human rights blurs the division between secular morality based on unaided reason and the realm of the sacrosanct, inviolable, or the sacred occupied by religion. While the intention may have been for the creation of a common language of sanctity it has led instead to ever more divisiveness, as adherents of religions perceive human rights discourse as imputing sacredness where it does not belong.

I then offer a concrete example of the challenge of eliciting from Jewish sources, including from its most promising image—the creation of humans in the divine image—a common language of sanctity or a conception of rights equally held by all humans as such. That humans possess rights by virtue of being human detaches rights from the idea of “just deserts.” This does not mean that Judaism lacks a means of organizing life together with others, including on commonly recognized ethical notions, such as reciprocity. Reciprocity and exchange provide a crucial link to “just deserts.” Indeed, those thinkers within the halakhic tradition who have most advanced a discourse of human rights, such as Rabbi Hayyim David HaLevi, draw on a distinct tradition within Jewish legal thought that formulates duties owed to others around the idea of reciprocity.

I will then draw on Jewish sources to explore a different strategy of convergence between religion and human rights that emphasizes human rights

as a purely political project revolving around consensus and convention, aiming for positivity. Indeed, there are an increasing number of voices within the human rights tradition calling for a ratcheting down of the language of sacredness, of ethical universalism, and of moral or ontological arguments, and a re-focusing on human rights as a more limited international political project: a legal regime. Human rights, after all, as Adam Seligman writes, are a theory: “Though often treated as sacrosanct, they are but means to a further end . . . They are one way to live together based on some commonly acceptable notions of fairness and justice.”<sup>4</sup> I will conclude with some broader questions about the costs of legal convergence from both the perspective of ethics and of Jewish identity.

## Human Rights as a Secular Political Project?

What precisely has changed in the intervening two decades? In order to make sense of the contemporary scene, it is useful to first distinguish between three expansive, modern visions of human rights that roughly correspond to three succeeding stages:<sup>5</sup> the first is human rights as a legal regime consisting of hard law such as binding conventions and bills of rights. The second is human rights as a set of universal moral standards that apply to all people in all places, irrespective of their beliefs. In this view, rights are rooted in fundamental values shared by all human beings by virtue of their being human. While it is common to suppose that the idea of human rights as moral rights has driven human rights law, the relationship is primarily the reverse. The intense preoccupation with substantive moral theories today generally grew out of what William Twining calls the misguided view that human rights is a legal regime that “can and should be founded on a coherent philosophy or ideology”—on the straightforward embodiment of moral universalism. However, the fact of a diversity of beliefs on the ground led to the third vision: discourse ethics, which seeks to shift the conversation to ‘rights talk’ as a form of discourse in public reasoned discussions that provides a framework for argument across societies.<sup>6</sup>

In all of these versions, however, the discourse is almost always centered on rights and the individual human being is viewed as the basic legal subject and unit of morality. This language of human rights has become the dominant mode of public moral discourse, replacing such discourses as distributive justice, the common good, and solidarity. Indeed, it has become something of a faith of its

4 Seligman, “Introduction” (above n. 1), 12.

5 See William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009).

6 *Ibid.*, 180.



own. And in the course of constituting itself as a quasi-faith, certain intellectual trends within the discourse of human rights have become clearer or, at least, far more prominent. The most pertinent for my purposes is an increased blurring of the line between religion and the secular and, in its wake, an increased confusion with respect to the question whether human rights is still a modern secular project or something else altogether.

Habermas's "post-secular" turn is one step toward this blurring of boundaries.<sup>7</sup> In his 1981 *Theory of Communicative Action*, Habermas presented the modern disenchantment and disempowerment of the domain of the sacred as an unequivocal gain for humanity. Now, however, Habermas has called, among other things, for secularly minded citizens to engage critically, along with their religious compatriots, with the cognitive contents of religion.<sup>8</sup> More to the point, he calls on philosophy to open itself to—and utilize for its own projects—the power of religious imagery and narrative. Among Habermas's cited reasons for doing so are the developments in biotechnology, which threaten an instrumentalization of human nature that fundamentally endangers our understanding of ourselves as members of the human species. Resurgent religion and the events of the September 11 terror attacks also prompt the question of whether modernization can be rescued by purely secular means. Critical engagement with religious content to produce images, intuitions, and insights are, of course, intended to enrich secular projects—not validate religious truth claims, or lead to greater convergence between religious traditions and modern projects. On this Habermas is clear. The salvaging of religious images, narrative, and moral intuitions occurs in the public sphere—the sphere of public opinion in the weak sense—and not in the strong arena of democratic politics.<sup>9</sup>

Yet, putting aside the questions whether the instrumental turn toward religion is good for religion<sup>10</sup> or coherent when shorn from any connection with metaphysical assumptions or beliefs,<sup>11</sup> in the context of human rights discourse,

7 This turn is analyzed in Maeve Cooke, "Salvaging and Secularizing the Semantic Contents of Religion: The Limitations of Habermas's Post-Metaphysical Proposal," *International Journal for Philosophy of Religion* 60 (2006): 187–207.

8 See, generally Jürgen Habermas, *Between Naturalism and Religion: Philosophical Essays* (Cambridge: Polity, 2008); and Habermas, "'The Political': The Rational Meaning of a Questionable Inheritance of Political Theology," in *The Power of Religion in the Public Sphere*, eds. Eduardo Mendieta and Jonathan Vanantwerpen (New York: Columbia University Press, 2011).

9 Cooke, "Salvaging and Secularizing" (above n. 7), 187–207.

10 Charles Taylor, "Why We Need a Radical Redefinition of Secularism," in *The Power of Religion* (above n. 8).

11 Cooke, "Salvaging and Secularizing" (above n. 7), 187–207.

one could argue that there is already a deep—perhaps too deep—convergence between the modern secular project of universal human rights and religious images via Christianity. The recent revival of Paul as a political figure in European intellectual discourse in the wake of post-secular philosophy is telling. Consider Alain Badiou<sup>12</sup> and Slavoj Žižek’s calls to the political left to discover the radical universalism of Paul<sup>13</sup> and Giorgio Agamben’s project to restore Paul’s letters to “the status of the fundamental messianic text for the Western tradition.”<sup>14</sup> As Jose Mendonca writes, the reclamation of Paul is clearly caught up in “the current need to respond to the crisis of multiculturalism and the universal.”<sup>15</sup> That crisis, at least in Europe, has taken the form of the demise of the multiculturalist paradigm in favor of a Christian, majority culture<sup>16</sup> and the post-political search for ever-increasing universal norms. In short, the specter of a new Christianized form of politics haunts the human rights movement.

How indebted the human rights tradition is to Christianity has become a much-debated issue. In the West, the discourse of rights played out, of course, in a Christian context. It is not surprising that its suppositions would be congenial with Christianity. The claim increasingly is made, however, that it was impossible to think it without Christianity, whether due to the “hidden God of Locke,” to the natural rights tradition developed by canon lawyers and theologians in the Middle Ages and inherited by the philosophers of the Enlightenment, or in the traditions of sectarian Protestantism (a very particular Christian tradition defined by beliefs in the inner light and the privatization of grace). It is interesting how a religious tradition has globalized itself in more or less secular form. On the standard account, the human rights tradition borrowed from religion and then superseded it. From a system of politico-legal norms, it became the shared moral vocabulary of our time. Upendra Baxi puts it succinctly when she writes:

12 Alain Badiou, *Saint Paul: The Foundation of Universalism*, trans. Ray Brassier (Stanford, CA: Stanford University Press, 2003).

13 Slavoj Žižek, *The Fragile Absolute: Or, Why Is the Christian Legacy Worth Fighting For?* (London: Verso, 2000).

14 Jose Mendonca, “The Reactivation of Paul: A Critical Dialogue on Giorgio Agamben,” *Didaskalia* 41/2 (2011): 53–63.

15 Ibid.

16 On the demise of the multiculturalist paradigm, see Susanna Mancini, “To Be Or Not To Be Jewish: The UK Supreme Court Answers the Question,” *European Constitutional Law Review* 6 (2010): 481–502. For an analogous argument, see Christopher McCrudden, “Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered,” *International Journal of Constitutional Law (I-CON)* 9/1 1 (2011): 200–229.

Much of the twentieth century of the Christian Era (CE), especially its latter half, stands justly hailed as the Age of Human Rights. No preceding century in human history witnessed such a profusion of human rights enunciations on a global scale. Never before have the languages of human rights sought to supplant all other ethical languages. No previous century has witnessed the proliferation of human rights standards as a core aspect of intergovernmental desire . . . constitut[ing] “a common language of humanity.” Indeed, in some ways, human rights sociolect emerges, in this era of the end of ideology, as the only universal ideology in the making, enabling both the legitimation of power and praxes of emancipatory politics.<sup>17</sup>

At the heart of the discursive tradition of human rights is the growing contention that its moral logic, and universalism, is ultimately conceptually incoherent apart from the religious presuppositions. Thus, Michael Perry,<sup>18</sup> Max Stackhouse,<sup>19</sup> and Nicholas Wolterstorff<sup>20</sup>—drawing on diverse Christian themes and history in varying ways—all assert that the foundation of human rights is essentially theological. Certainly, the language of sacredness permeates the discourse; indeed, bare statements are common about the inviolate nature of humans and their sacredness, decoupled from secular justifications for treating humans as sacred (that is, of ultimate value). Thus, the discourse has shifted from a Western political conception that flourished in a Christian setting; to a secular political and then moral tradition that claimed to have been made possible only by Christianity; and now to a discursive tradition whose key insights are validated by Christianity and by moral intuitions preserved primarily in Christianized readings of the Bible and other religious traditions and narratives.

The Christian reclamation of the human rights tradition has not gone unnoticed. The presumption is quickly vanishing that human rights are in some strong sense neutral, while competing religious claims are local and confined to the communities of interest embracing them.<sup>21</sup> But this leveling is only increasing the tension between religion and human rights. Within theory, this leveling and competition is addressed through the debate about public reasons. On the ground, however, it is often seen as a clash between religions.

17 Upendra Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2006), 1–2.

18 Michael Perry, *Toward a Theory of Human Rights* (Cambridge: Cambridge University Press, 2007).

19 Stackhouse, “Why Human Rights” (above n. 3).

20 Wolterstorff, *Justice: Rights and Wrongs* (above n. 3).

21 Clayton, “Human Rights” (above n. 3).

In one sense, as Shmuel Trigano writes,<sup>22</sup> the modern political always relied on a certain “immanent transcendence,” as much as it may have also disavowed it. Both Spinoza and Rousseau recognized the need for religion—or religion under the guidance of the state—to bolster democracy.<sup>23</sup> In modern politics, nationalism, civic religion, and totalitarian political ideologies all took the structure of religion and contributed to a kind of re-enchantment. Today it is the modern project of human rights that seeks, in Habermas’s words, to salvage religion for modernity’s purposes. Whether this process is unconscious or a logical necessity, it is persistent and recurrent—and human rights discourse has followed this pattern.

In my view, the extreme tension today between resurgent religion and the liberal order seems less over secularism per se, but, rather, over this re-enchantment of the secular state. Whereas before, under thinner conceptions of liberalism, political and public space were secular in the strict sense—profane, or not holy—and holiness resided in the private sphere; increasingly, universal human rights, for better or worse, presents itself—and is certainly perceived—as a competing transnational, universal, sacred, and transcendent realm. Within the religious worldview, however, imputing sacredness to the wrong place is the equivalent of idolatry.

## The Human as Sacred: The Creation of Humans in the Image of God

One can hardly imagine a more powerful religious image for philosophy to “salvage” from religion for its own political projects than the creation of humans in the image of God. Contemporary thinkers about human rights such as Michael Perry, Robert Dahl, Jeremy Waldron, and Max Stackhouse have all invoked the sacredness of humans, in different ways, to support human rights. In Stackhouse’s succinct phrasing, human beings possess “a divinely endowed core that is the ultimate basis for the right to have rights.”<sup>24</sup> The intuition that at the base of modern concepts of human equality and human rights is the sense of human sacredness is reflected in the invocation of creation in the image in the American Declaration of Independence and Lincoln’s Gettysburg Address, of course, but even a self-conscious theorist such as Ronald Dworkin invokes this language—human life

22 Shmuel Trigano, “The Rediscovery of Biblical Politics,” *Hebraic Political Studies* 4/3 (2009): 204–318.

23 Ibid, 306–307.

24 Max Stackhouse, “The Sources of Human Rights: A Christian Perspective,” in *Religion and Human Rights* (above n. 3).

is sacred—without providing formal justification.<sup>25</sup> As George Fletcher argued, a coherent formal philosophical justification for equality has proved quite elusive while holistic arguments (for him, Kant coupled with the Hebrew Bible) are far more successful.<sup>26</sup>

The translation of biblical themes through Christianity into political thought is a process that bypasses the rabbinic tradition in Judaism, however. And, within the rabbinic legal tradition, by contrast, creation in the image of God occupies a relatively negligible role. It is worth first understanding why this is so before taking up the question whether, freed from the diasporic setting of much of the rabbinic tradition, the principle could be more dynamically elaborated to meet present intuitions and the contemporary needs of a Jewish state.

Certainly, from the perspective of the rabbinic tradition, the creation of humans in God's image implies that humanity has special worth that distinguishes humanity from other creatures. Creation in God's image may even embody an ethical ideal of social harmony between the diverse members of humankind—one that the prophets envision as the goal of the end of days. But, even in the biblical portrayal, humanity is not intended to be a universal human order, "one fellowship and societie," as Locke wrote.<sup>27</sup> The Tower of Babel, after all, is the closest analogue to a biblical image of world government. In his biblical commentary, Rabbi Naftali Zvi Yehuda Berlin (the Netziv) portrays it as the watchtower. The biblical remedy is the division of humanity into collectivities, each with their distinct language and identity.

Creation in the image of God is rather the beginning of the unfolding in biblical and especially rabbinic thought of a drama of hierarchy, distinction, and difference that moves from humanity to Noahide (that is, civilized) society; to the political community of resident strangers and Jews; to the congregation of Israel charged with becoming "a holy nation of priests"; and then to the community of fellows, which, at least in theory, excludes rebellious Jewish sinners.<sup>28</sup>

25 Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993).

26 George P. Fletcher, "In God's Image: The Religious Imperative of Equality under Law," *Columbia Law Review* 99 (1999): 1608. Fletcher argues that the principle of equality is best grounded in a holistic view of human dignity, and he draws on the biblical ideal of creation in God's image as well as on Kant.

27 John Locke, "The Second Treatise of Civil Government," in *Locke's Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1967), 401.

28 I address the rabbinic "ethical vision of social life" and its contemporary challenges at greater length in Suzanne Last Stone, "The Jewish Tradition and Civil Society," in *Alternative Conceptions of Civil Society*, ed. Will Kymlicka and Simone Chambers (Princeton: Princeton University Press, 2000), 208.

The rabbinic tradition reveals two opposing tendencies: one emphasizing the particular dimension of Judaism, and the other, the universal. The first tendency countenances discrimination against others by reserving thick obligations of social solidarity for fellow Jews. Confining obligations of social solidarity and even equal juridical rights to Jews can be understood from several perspectives. First, Jewish tradition draws a sharp line between monotheists and non-Jewish idolaters. Jews are forbidden to associate with or extend civil rights to those who practice idolatry, which symbolizes in the Bible moral corruption. Second, from a communitarian standpoint, confining positive obligations of social solidarity and fellowship to Jews creates a strong sense of community and Jewish peoplehood. The more universal strain within rabbinic thought attempts to expand the circle of solidarity by imposing duties of fellowship based on factors other than Jewish membership, such as sharing political space or moral values.<sup>29</sup> The talmudic rabbis mediated between these two poles essentially by upholding rules banning fellowship with idolaters while also articulating certain principles, chief among them *darkhei shalom*, “pursuing paths of peace,” which obligated Jews to extend social solidarity to idolatrous neighbors with whom they shared political space. It remained unclear, however, whether “pursuing paths of peace,” was an ethical principle grounded in notions of equal human dignity or a pragmatic policy aimed at appeasing hostile neighbors, given the precarious situation of Jews as a minority within a larger pagan space. The protracted period of isolation, persecution, and disenfranchisement of Jews hardly created a context in which to develop the universalist strains within the tradition and even so potentially powerful a concept as creation in God’s image received scant attention.

As a halakhic category, man’s creation in the divine image is invoked to justify the intrinsic equal value of human life,<sup>30</sup> the duty to procreate,<sup>31</sup> and the respect owed to the human body—even to the corpse of a murderer. All these invocations are limited to physical matters, raising the question of how the rabbis understood the similitude between man and God. Concentrating on the tannaitic layer, Yair Lorberbaum has argued that a school of early rabbis understood the notion as expressing an iconic relationship between man and God.<sup>32</sup> In some sense, according to this school, man is an ontological extension of God—a view consonant with philosophical and ethical notions of the time. The consequences of this viewpoint, he argues, were played out primarily in the domain of criminal or judicial taking of life.

29 Ibid.

30 Genesis 9:6.

31 T *Yevamot* 8:6.

32 Yair Lorberbaum, *Image of God* (Tel Aviv and Jerusalem: Schocken, 2004)[Hebrew].

Ontological conceptions of creation in the divine image are hard to enlist in the service of ethical or moral theories about human rights; indeed, they can lead in quite the opposite direction, as evidenced by the persistent strain of rabbinic thought that often seeks to restrict the ambit of creation in the divine image to Jews.<sup>33</sup> This problem resurfaces in the contemporary application of creation in the divine image as a halakhic category in connection with the question whether autopsies done for the advancement of medicine are permissible. In contrast to Rabbi Uziel, who equates all humans in the matter of respect for the dead,<sup>34</sup> Rabbi Kook rules that such autopsies may be conducted only on non-Jews. He comments: “The prohibition of desecrating a corpse is derived from the divine image in man, which is unique to Israel in its greater strictness as a result of the sanctity demanded by the Torah.”<sup>35</sup> Rabbi Kook’s romantic and idealistic tendency, and the role played in his rulings of the concept of the special sanctity of the Jewish people, is well known.<sup>36</sup> In this ruling, Rabbi Kook notes the unique sanctity of the body of Jews who are charged with ritual commandments such as kashrut that fashion the body’s sanctity.

It is an interesting question whether beneath the “conceptual and metaphysical garb” an “existential truth” regarding humans as sacred can still be rescued that is both consistent with the general rabbinic schema and does work in a larger secular context.<sup>37</sup> As Shlomo Fischer points out, an ontological conception also emphasizes “the external source of the sacred value of human beings. The concern is for a God who is ‘present’ in the human being, a Being who is totally outside the immanent human world.” Even translated into the language of ethics, the perspective is distinctly heteronomous. “The value of humans lies in their subjection to commandments; it cannot anchor absolute human value in the immanent human being or in some human characteristic such as autonomy or the

33 There is the view of R. Simeon b. Yohai, which gave rise to the Tosafists’ question: “Are the gentiles called man (*adam*)?” (Tosefot on *Bava Kamma* 38a, s.v. *ela*). The Tosafists seem to reject R. Simeon’s opinion, and Rabbeinu Tam suggests that Scripture uses the term *adam* in different ways, some of which do include gentiles. But the Zohar and kabbalistic literature (although not halakhic sources) take up R. Simeon’s view to pursue an ontological division between non-Jews and Jews.

34 *Piskei Uziel*, O.H. (Jerusalem, n.p., 1976/7), no. 32, 178–179.

35 R. Abraham Isaac Ha-Kohen Kook, *Da’at Kohen*, §§199, 383 (Jerusalem: n.p., 1993).

36 Michael Z. Nehorai, “Halakha, Metahalakha, and the Redemption of Israel: Reflections on the Rabbinic Rulings of Rav Kook,” in *Rabbi Abraham Isaac Kook and Jewish Spirituality*, ed. David Shatz and Lawrence J. Kaplan (New York: New York University Press, 1995), 120, 144–147.

37 Shlomo Fischer, “Kevod Ha’adam, Tzelem Elohim, and Kevod Habriot,” in *Religion and Human Rights*, ed. Adam Seligman (Hollis, NH: Hollis Publishing Company, 2005), 11, 20.

ability to self-legislate.”<sup>38</sup> In short, the concept challenges, as much as it affirms, received notions of human rights.

Of course, the remarkable under-elaboration of this concept in halakhic thought also has much to do with lack of historical need or opportunity. The dynamic elaboration of principles such as creation in the image or the dignity principle, *kevod haberiyyot*, or pursuing paths of peace, *darkhei shalom*, and even the possibility of generating new norms from them, is precisely what this collection of essays is in part designed to explore.<sup>39</sup> And it should be noted that Rabbi Kook does not, strictly speaking, limit the concept of creation in the image to Jews. Instead, he writes that Jews are, as it were, “more fully in the image” than non-Jews as a result of the sanctity bestowed by the Torah’s ritual commandments. Although hardly promising at first blush, it is interesting that R. Kook treats creation in the divine image more as a comparative concept, a matter of degree. Jews are more fully in the image than non-Jews because they perform more commandments. In this view, the concept of creation in the image is a statement about the potential of humans to perfect themselves through observance of the law. It is a theory about human potentiality to become full moral and legal subjects through their actions.

The conceptual link between human creation in the divine image and human equality seems as follows: all humans are born equal in their capacity to become full moral and legal subjects and perfect themselves. When humans sufficiently realize their potential, they become rights holders under Jewish law. But when has this potential been sufficiently realized? Rabbi Kook, in emphasizing the ontological aspects of the ritual commandments, implies that only full observance of Torah suffices. But other stopping points short of conversion might be posited. R. Menahem Meiri (Provence, 1249–1316; henceforth, “the Me’iri”) ruled for example, that juridical equality is owed to the non-Jews of his time, because they are members of nations under the rule of their religious law. According to the Me’iri, societies bound by religious law occupy an intermediate category between

38 Ibid, 21–22.

39 Gerald Blidstein, “Halakha and Democracy,” *Tradition* 32/1 (1997): 29. Blidstein argues that norms such as *darkhei shalom*, *kiddush Hashem*, and *hillul Hashem*, which I term principles, have a dynamic quality, expanding and contracting “according to social realities and expectations.” They “seem to respond to, and assimilate, the expectations and standards of their surroundings when these cohere with basic Jewish ethics” (ibid., 29).

In his study of the principle *kevod haberiyyot* (respect for human dignity), Blidstein suggests that, in the medieval period, this principle served to generate several new norms (See Gerald J. Blidstein, “*K’vod Habriyyot*: Studies in the Development of Halakha,” *Shenaton ha-Mishpat ha-Ivri* 9–10 [1982–1983]: 127–186). This argument is not free from difficulty, however. Blidstein’s own study of *kevod haberiyyot* reveals that the range of halakhic application of this principle was severely circumscribed because of the principle’s subjective, “aggadic” (narrative) character and its radical potential to supplant other halakhic norms.



idolaters of old and Jews. Such societies have critically progressed toward perfection.<sup>40</sup> Their final perfection, he writes, is conversion. Yet, those within the intermediate category are entitled to juridical equality. The critical question, then, is what makes a person or a society ethical or just so as to merit juridical equality under Jewish law: observance of the entirety of Torah, observance of Noahide commandments, or the empirically observed creation of a just and decent society committed to the rule of law?

Thus, some concept of “just deserts,” and not the possession of rights by virtue of being a human as such, seems implicit in the Jewish conception of the idea of creation in the divine image. In one of the more creative contemporary rabbinic attempts to grapple with human rights, this comes to the fore. The problem that Rabbi Hayyim David HaLevi addresses—the rights of non-Jews in the Jewish State to enjoy equal citizenship rights and social solidarity within Israeli society—is all too topical. The issue is not Israeli law; rather, he is addressing whether obligations of social solidarity extend to all citizens within the state, pursuant to Jewish religious norms. HaLevi argues that the right of self-determination granted to Jews by the international community not only creates moral constraints on the exercise of Jewish majority rule; it triggers a new moral obligation of human solidarity only hinted at before in Jewish teachings. Jewish sovereignty creates the condition for Rabbi HaLevi to develop this ethical universal strain. The question could have been framed within older talmudic paradigms addressing obligations of social solidarity in a mixed society—“pursuing paths of peace” could serve as a ready answer, for example. HaLevi refuses to follow this easy route. *Darkhei shalom*, he insists, is a diasporic concept; it is only suitable to Jewish life as a minority population. Its logic is rooted in survival, not moral principle: And while Maimonides had theorized that appeasement of idolaters would no longer be allowed once Jews are in power and relieved of fear, HaLevi declares: “In the Western democratic world, to which we belong, society is founded upon equal rights for every person; there is no place in a democratic state for religious discrimination. Even were we a superpower, we could not practice such [discrimination].”<sup>41</sup>

HaLevi is claiming that Western democratic values bind the Jewish state, according to Jewish religious law. Israel “belongs” to the Western world because it was brought into being by the United Nations no less than by Jewish efforts. Admission of the State of Israel into the world community of nations and the granting to Jews of full political rights triggers a duty, in turn, to extend not only equal citizenship rights but actual and meaningful social solidarity to all fellow citizens in the State.

40 R. Menahem Me’iri on *Sanhedrin* 59a.

41 R. Hayyim David HaLevi, “Ways of Peace in the Relations between Jews and Non-Jews,” *Tehumin* 9 (1988): 71–78 [Hebrew].

HaLevi insists that the source of this obligation is not contractual or conventional; it is a moral obligation rooted in the concept of a shared humanity. At the same time, HaLevi implies, one could not truly speak of a shared humanity before, given centuries of persecution and Jewish disenfranchisement. Now, with the recognition of Jewish sovereignty, HaLevi suggests, the immense distinction between Jew and non-Jew finally has been lessened. Consequently, Jews have a human moral duty to recognize the full humanity of others. HaLevi is also arguing for a radical change in the mindset of Jews toward the world and that awareness of the new reality penetrate the normative sphere. The exilic mindset requires alteration so that “we visit the gentile sick, bury their dead, and comfort their mourners out of a moral, human duty, not merely because of the ‘ways of peace.’”

It is important to note the halakhic significance HaLevi assigns to the world’s recognition of the political rights of Jews. It is equally important to note that this is the arena of reciprocity and exchange, not of transcendence, the moral absolute, or the sacred. The moral obligation Jews owe to the other—and to one another—is based on ethical reciprocity, norms of mutuality, moral symmetry, and gratitude. In retrospect, it is the principle of reciprocity that may also underlay prior rulings extending solidarity beyond Jewish borders. HaMeiri, whom HaLevi cites, reinterpreted talmudic rules permitting discrimination as confined to idolaters who are not “restricted by the ways of religion.” The nations who are under the sway of religion, Me’iri implies, adhere to basic norms of morality that governs their behavior toward those with whom they share political space. Jews have a moral duty, in turn, to reciprocate.

The universal ideal of human solidarity that HaLevi draws out of Jewish teaching thus differs in an important respect from the core notion of Western human rights discourse: rights are not absolute or inherent; they are not inviolable and they do not inhere in the human as such. Nor is HaLevi invoking sympathy or love for the other, irrespective of their actions or capacities for doing evil. A more fruitful comparison is to the political conceptions of rights and evocation of reciprocity made by John Rawls in his *Theory of Justice*. There, Rawls draws on principles of moral psychology, following Piaget, to argue that the sense of justice grows out of prior stages: first the morality of authority based on reciprocal love between parent and child and then the morality of association based on friendship.<sup>42</sup> “Because we recognize that they wish us well, we care for their well-being in return . . . The basic idea is one of reciprocity, a tendency to answer

42 While Rawls seemed to deny that the original position “explicitly” presupposed a principle of equal respect, Dworkin has claimed that this is the “deep theory” behind the original position. “This right, he says, is ‘owed to human beings as moral persons,’ and follows from the moral personality that distinguishes humans from animals” (Ronald Dworkin, *Taking Rights Seriously* [Cambridge, MA: Harvard University Press, 1978], 181).

in kind.”<sup>43</sup> Genuine other-regard depends on receiving benefits, inaugurating the play of gratitude and indebtedness. Rawls extends this to those who have only the potential to reciprocate; but there is a close connection between Rawls’ invocation of a well-ordered society and the reasonableness of expecting benefits and therefore extending respect to those who only have the potential to reciprocate. HaLevi combines these notions: a well-ordered society is presupposed. “These are not the idolaters of ancient times.” Given tangible evidence of an ordered society—“they have wished us well”—a moral duty of equal concern and respect is created.

The line of thought HaLevi develops is a disavowal of any shared vision of the human as such as sacred but it captures the more modest notion of a regime of rights based on the play of recognition and exchange. As Adam Seligman writes: “The world of the sacred and of religious authority is, by definition, a world marked off from the play of negotiation and exchange within which social order is defined. The sacred is that which is ineluctably Other, that which cannot be grasped, bartered, or exchanged. Its dictates impose obligations that are simply of a different order of experience, that involve totally different domain assumptions than those encompassed by the play of reciprocity and autonomy on which a regime of rights is based.”<sup>44</sup>

## From the Absolute Universal to International Convention

Since Kant, we tend to reflexively endow the universal realm with transcendent status and grant priority to the universal over the particular. But the universal was once conceived as a common or shared realm, expressing a kind of consensus gentium. Recently, Jack Donnelly, among others, has urged a return to this more modest conception of human rights.<sup>45</sup>

If we were to approach human rights in this way, the question becomes whether Judaism gives weight, as a matter of the religion’s internal viewpoint, to world

43 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 433. By invoking Rawls here, I aim to elucidate my point in terms of modern political philosophy. I do not mean to suggest that HaLevi preempted Rawls’ theory of justice, or that Rawls drew upon rabbinic literature. It would be a distraction to further discuss Rawls’ relationship to Jewish thought in this essay. For an elaboration of Rawls and reciprocity, see Thom Brooks, “Reciprocity as Mutual Recognition,” *The Good Society* 21/1 (2012): 21–35.

44 Seligman, “Introduction” (above n. 1), 8.

45 Jack Donnelly, “The Relative Universality of Human Rights,” *Human Rights Quarterly* 29/2 (2007): 281.

consensus. In other words, would the Jewish tradition defer to the international legal regime of human rights only in virtue of consensus?

This strategy of convergence between religion and human rights depends on retrieving the idea of human rights as a purely political discourse and emphasizing its legal forms by which immunities and liberties are inscribed as rights (that is, the international legal regime of human rights) without recourse to the philosophy of the person and society with which it has been entangled.<sup>46</sup> There need be no agreement between Judaism and human rights discourse on the content of the core principals of human rights—even a fine one. Deference, rather, would be based on second order reasons, such as tacit or hypothetical consent and possibly a certain moral claim that consensus in itself makes on us.<sup>47</sup>

These notions, indeed, are quite deeply embedded in the Jewish tradition and find expression in a variety of halakhic doctrines, such as *dina de-malkhuta dina* (“The law of the kingdom is the law” and *minhag yisra’el din hu* (“the custom of Israel is the law”). Through these doctrines, the people’s contemporary practices were incorporated into the halakhic system and translated into norms. These practices usually pertained to private law or fiscal matters, and parties are permitted to vary Jewish private law by contract, in any event. With the rise of the State of Israel, Jewish contemporary practice includes matters of public law, such as practices of war, statecraft, and the shaping of civil society. These practices pertaining to public law are absorbed from the larger environment: that is, the “family of nations.” Recall HaLevi’s statement: “In the Western democratic world, to which we (that is, Jews in the State of Israel) belong, society is founded upon equal rights for every person.” In other words, the environment of the State of Israel is the Western democratic world and its norms.

Still, incorporating norms generated from outside the halakhic world into the halakhic system raises a number of deep and complex issues, chief among them the question of limits. Contemporary responsa even in the area of private law well illustrate the dilemma. Thus, some rabbinic decisors have held that contemporary practices such as gender equality in splitting marital assets, meet the technical requirements of incorporation doctrines such as *dina de-malkhuta dina* and

46 Charles Taylor urges the disentanglement of the human rights discourse as a set of legal forms by which immunities and liberties are inscribed as rights from human rights as a philosophy of the person and society. Either the form or the philosophy could then be adopted alone without the other. See Charles Taylor, “Conditions of an Unforced Consensus on Human Rights,” in *The Politics of Human Rights* (New York: Verso Publishing, 2002), 101.

47 See Clayton, “Human Rights” (above n. 3), as to how this differs from Rawlsian overlapping consensus. Per Rawls, we would agree on the norms, while disagreeing on why they were the right norms.

“customs of the people”;<sup>48</sup> while others contend that laws stemming from a “worldview” or a “religious or social ideology” cannot be incorporated because the “religious and social worldview of the Jewish people derives exclusively from the Torah.”<sup>49</sup> To put it starkly, if the Declaration of Human Rights is absorbed into the halakhic system as the norm of the family of nations to which the State of Israel belongs, the halakhic tradition would no longer serve as a resource for contributing to a critique of contemporary politics, including human rights discourse itself. Instead, the halakha would be confined primarily to the ethico-spiritual realm; its political dimension would simply parallel that of the law of nations. What, then, is the role of the Jewish religion and the halakha in shaping a specifically Jewish politics as an expression of Jewish religious ideals and identity?

I have dealt with these questions at length elsewhere and will only summarize here one fascinating line of thought supporting halakhic incorporation of the international legal regime of human rights in virtue of world consensus. Whether such deference to the international regime of human rights is halakhically permissible or even obligatory touches on a large and, at times, highly technical debate within Judaism concerning the status and contours of its doctrine of universal law, the Noahide Code. Put highly schematically, the claim is that international law and consensus are binding on Jews through the complex interaction of Noahide law with the talmudic principle, “the law of the kingdom is the law.” While Noahide law is ordinarily thought of as the universal moral law that God gave to humanity—superseded at Sinai for Jews—in fact, the relationship of Noahide law with Jewish obligations is far more complex. Noahide law can be seen, or so I have argued at length elsewhere, as an alternative source of norms even in a purely internal Jewish context, a form of fall-back or residual law, which can be invoked when the particular law requires supplementation or functional adjustment.<sup>50</sup> Paradoxically, although Noahide law is presented as a universal

48 See Rabbi Shlomo Dichovsky, “The Shared Assets Rule—Is it *Dina De-Malkhuta*?” *Tehumin* 18 (1997): 18 [Hebrew].

49 See Rabbi Avraham Sherman, “The ‘Shared Assets’ Rules in Light of the Laws of the Torah,” *Tehumin* 18 (1997): 32 [Hebrew].

50 Suzanne Last Stone, “Sinaitic and Noahide Law: Legal Pluralism in Jewish Law,” *Cardozo Law Review* 12/3–4 (1991): 1157; Stone, “Religion and the State: Models of Separation from Within Jewish Law,” *International Journal of Constitutional Law* 6/3–4 (2008): 631–661; Stone, “Law without Nation? The Ongoing Jewish Discussion,” in *Law Without Nations*, ed. Austin Sarat, Lawrence Douglas, and Martha Umphrey (Stanford, CA: Stanford Law Books, 2010), 101–137. Also see the Great Rabbinical Court (Rabbis Dikhovsky, Sherman, Ben Shimon) case no. 4276/03, November 11, 2003, <http://www.rbc.gov.il/judgements/docs/12.doc>, for the proposition that Jews were given additional obligations at Sinai, including marriage and divorce laws, but were not relieved of their

moral code given by God, the content of which is discerned and elaborated by Jewish tradition, it is sometimes the case that the content of Noahide law is essentially determined by the convention of the nations.

An analogous claim was, indeed, made by Rabbi Shaul Yisraeli, in a different—and highly politically charged—context when he ruled that the Jewish state was obligated by—and only by—international standards of war.<sup>51</sup> Rabbi Yisraeli based his view that the rules of war are those agreed to by the global community of nations on two legs.<sup>52</sup> The first is that war is a part of statecraft—an activity committed to the Jewish king and its successor institutions such as the modern Jewish state. He cites Deuteronomy 17:14, in which the people ask for a king “like all the nations.” And he couples this with the view, most clearly articulated by the Netziv in the nineteenth century, that war is a universal activity permitted to all societies and therefore should be waged by universal rules.

Deuteronomy 17:14 is ordinarily not viewed as a legal source. Rabbi Yisraeli, it seems, is compressing a long tradition of legal and political discourse about Jewish kingship. To grasp both the inner logic at work here and the ethical and identity dilemmas they raise requires a bit of a detour through halakhic discourse about the status and validity of conventional government. I have dealt with this issue at length elsewhere and will only summarize the contours of the argument here.<sup>53</sup>

Within Judaism, there are a variety of doctrines that roughly correspond to a division between religious and political spheres. Several were developed in tandem with Islam and Christianity in the twelfth and thirteenth centuries along with the emergence of criminal law as public rather than religious law. Biblical evidentiary restrictions on conviction were jettisoned by all three religions, and various justifications emerged for the assignment of certain extra-legal powers to political authorities who were not restrained by religious law. Far from positing a

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obligations imposed by Hebrew Law on Noahides, which function as fallback law when the former are not applicable.

51 See Rabbi Shaul Yisraeli, *Amud ha-yemini* 15:165–205 (Jerusalem: n.p. 1991). The ruling was a retrospective justification of the Kibiye massacre; however, as Gerald Blidstein commented, his innovative legal thinking would have traction, nonetheless (Gerald Blidstein, “The Treatment of Hostile Civilian Populations: The Contemporary Halakhic Discussion in Israel,” *Israel Studies* 1/2 [1996]).

52 *Just Wars, Holy Wars, and Jihads: Christian, Jewish, and Muslim Encounters and Exchanges*, ed. Sohail H. Hashmi (New York: Oxford University Press, 2012), 351.

53 For further analysis, see Suzanne Last Stone, “The Jewish Law of War: The Turn to International Law and Ethics,” in Hashmi, *Just Wars* (above n. 52), 351; see also Arye Edrei, “Law, Interpretation, and Ideology: The Renewal of the Jewish Laws of War in the State of Israel,” *Cardozo Law Review* 28/1 (2006): 187–228.

total society, unified under one sacral law, several medieval Jewish legal thinkers imagined the halakha as composed of different jurisdictions generating law in accordance with different principles. The political realm emerges in these writings as a space with its own distinct logic and laws.

The medieval Jewish discussion centers on the rights of monarchs, including the prerogatives of the “Jewish king,” and is revived in modern halakhic discussions of the legitimacy of the law of the state, including a Jewish state. The Hebrew Bible sets up a tension between a model of kingship that is particular and culturally specific and one that is universal. That tension is fully exploited in the medieval discussion. Whether kingship is a realm of politics, discretion, and wisdom, or a realm of distinctive law, is a large and lingering question. Maimonides’ codification of the laws of Jewish kings seems to transfer over to the Jewish king a separate body of talmudic law about the universal ‘Noahide’ laws that bind non-Jewish societies, from the Jewish perspective.<sup>54</sup> In addition to six substantive commands—exemplifying a civilized political community, such as prohibitions on murder, theft, and the like—Noahide law includes a seventh command of justice, *dinin*. For Maimonides, *dinin* is nothing but the requirement to establish governmental structures capable of preserving order by punishing violations of the other Noahide laws. As Gerald Blidstien noted, “Maimonides’ entire edifice of monarchic powers identified Jewish and gentile governance as a single structure possessing similar goals and utilizing similar instruments.”<sup>55</sup>

The most far-reaching articulation of Jewish kingship as social order is that of Rabbi Nissim Gerondi (Spain, 1310–1375?) who posits a central gap in the halakha: the lack of conventional modes of governance able to preserve social order. Yet, the Torah itself provides the means for correcting this deficiency: monarchical powers. The monarch is merely the site of social order historically chosen by the people who may consent to another institutional form if they so desire. Although Gerondi is largely silent on whether this is a space of discretion or law and whether there are any inherent limits, I believe we can read him against the background of his predecessors and contemporaries as at the least implicitly incorporating the conventional rules of non-Jewish societies, insofar as they relate to matters of enforcing social order.

This underlying concept—that government, the task of which is the preservation of social order, is a universal Noahide norm incumbent on all societies, Jewish

54 Gerald J. Blidstein, “‘Ideal’ and ‘Real’ in Classical Jewish Political Theory,” *Jewish Political Studies Review* 2/1–2 (1990): 58–60. Traditional jurists commenting on Maimonides note this connection. See Rabbi Meir Simhah ha-Kohen of Dvinsk, *Ohr Sameah, Laws of Kings* (n.p., 1922), 3:1.

55 Blidstein, “‘Ideal’ and ‘Real’” (above n. 54), 58.

and non-Jewish alike and in more or less the same way—also underlies Rabbi Yisraeli’s approach to war. Thus, Rabbi Yisraeli relies on prior precedent holding that war is not only permitted to non-Jewish societies but that it is a logical outgrowth of the Noahide command of *dinin*, because war in present times is a means to reduce social conflict and therefore to preserve social order. And the War Convention sets the limits of what is permissible. Thus, the link between Noahide law as a universal body of norms that was Jewishly discerned and elaborated and accordingly subject to internal standards of some sort—Judaism’s contribution to discourse about human rights as a moral theory—becomes reversed. Now at least this one Noahide law is imagined as the tacitly agreed upon practices of conventional societies in pursuit of good governance.

The second leg of Rabbi Yisraeli’s opinion relies on a more familiar halakhic principle: *dina de-malkhuta dina* (the “law of the kingdom is the law”; henceforth DDM), but he gave it a radically innovative meaning. Where formerly the dictum governed the obligations and privileges of individual Jews relative to their host states, in the elaboration by Yisraeli, it now governs the obligations and privileges of the Jewish nation acting in the international context. And where formerly, the dictum extended only to the laws of a sovereign ruler, such as king or state, here it extends to international law on the theory that the non-Jewish kingdom could be defined in global terms, as long as the collective will of the world’s citizens ratified the global kingdom’s law. (The perspective is quite similar to that of current United States Supreme Court jurisprudence holding that the convention and customs of the nations is incorporated into federal law.)

DDM is first articulated in the context of the power of foreign rulers to tax and expropriate land and eventually became a cornerstone for the successful integration of the formerly legally autonomous Jewish communities into the legal systems of the nation state. Paradoxically, the principle originally served to make the halakha fully functional in exile but then the postulate took on a life of its own as the jurists begin to theorize in the Middle Ages about its conceptual basis. The most prevalent conceptual base is one or another version of consent theory. Rashi, interestingly, connects the principle to Noahide law. He explains the talmudic permission to Jewish litigants in an intra-Jewish dispute to take advantage of non-Jewish methods of validating deeds as resting on the notion that non-Jews are commanded to “institute justice”—citing the Noahide norm of *dinim* (instituting justice through establishing courts and/or laws). Accordingly, they can be effective agents for all matters subsumed under that command. Recall that, from the internal perspective of rabbinic Judaism, this command obligates humanity to preserve social order by enacting systems of law. Accordingly, non-Jewish legal activity can serve here as an alternative norm even for Jews and even when it is at variance with Jewish law. The implication of Rashi’s rationale is that large portions of the halakha are in



fact replaceable by foreign law, thus shrinking the scope of halakha to matters of ritual and religious prohibition (including marriage and divorce).<sup>56</sup>

Yisraeli's opinion about the binding nature of international law seems to blend the underlying rationales of the consent school and of Rashi's turn to Noahide *dinim*. Jews can consent to be governed by international norms, just as they can consent to be governed by the civil laws of host states. Consent to laws pertaining to war is legitimate even though war involves the religious prohibition of bloodshed. War, however, is a chosen means to settle disputes in contemporary life and, as such, fulfills the goal of civilizing the world and securing social order, even if such wars are not undertaken for the sake of enforcing Noahide norms.

The laws of the Jewish king, DDM, and the Noahide command of justice thus become all facets of a single concept. Still, the very existence of a 'universal' code within a particular legal system has opened a deep fissure in Jewish thought. If Noahide law is God-sanctioned, what precisely is the point of the particular laws given later at Sinai? The various eighteenth and nineteenth century debates within Judaism about the modern state, from that of the Reformers to Mendelssohn, are in part attempts to answer that question.

Gerondi, too, anticipates this issue. For, in the course of outlining the Jewish king's powers, he addresses the purpose of the halakha's highly non-conventional system of order, as reflected in its criminal procedures. Certain biblical laws, such as judging in accordance with two witnesses, he argues, were never intended as a practical means to govern society. Rather, they are intended to bring on the divine effluence and to judge individuals in a manner exquisitely attuned to the rights of individual defendants without regard to social need. Gerondi is working off earlier rabbinic sources as well as extending the doctrine of Noahide law to one logical conclusion. He is following, as Blidstein pointed out, Yehuda Halevi, who wrote about "the social—ethical law given to humanity (that is, Noahide law) to which the spiritual-ceremonial law is added at Sinai," and decisively splitting the two into the realm of the sacred and particular, where true justice is possible, as opposed to the realm of the profane and universal, where the needs of society are irreconcilable with the rights of individuals.

As we know from modern Jewish history, the coexistence of universal and particular elements in one tradition led to an internal splitting of the tradition along

56 Jewish law maintains that with respect to financial matters, as opposed to religious matters, it is possible for parties to contract out of the law in any event, despite the fact that these norms originate in divine law. But the rationale that links the validity of Gentile law to the Noahide command of *dinim* would suggest that it could extend to all laws subsumed under the Noahide command, including criminal law and punishment, traditionally categorized as "religious." Rashi's theory has very few internal limits, except that subjects unique to Jewish law cannot be displaced.

lines generally analogous to the modern differentiation of political and religious realms. Increasingly, the particular laws given exclusively for Jews at Sinai becomes seen as religion or ethics, even from an internal standpoint—and not only from the standpoint of the host nation states in which Judaism later was set.

Modern separation or differentiation of realms not only allows different realms of human experience to proceed in accordance with different conceptual logics; it also provides a means for one realm or activity to critique the other. This is the most powerful claim of modern positivism's separation thesis: by differentiating between law and morality, strong moral critique of modern law is made possible. One of the more interesting questions for those observing the Jewish tradition today revolves around this issue of critique. What resources should or could the tradition use to critique the organization of the contemporary political sphere, including the discourse of human rights? Keen observers of the tradition will note that, outside the State of Israel (which presents a unique set of problems), the standards used to judge the political sphere are not, by and large, the particular religious or ethical aspirational norms of the Jewish tradition but, rather, they draw on the large body of Jewish sources which develop the universal Noahide Code. That body of law is, in itself, an ongoing project that develops in tandem with developments in the larger political sphere. For example, while the original markers of good government in the service of religion from the talmudic period through the medieval period cite the Noahide ban on idolatry and blasphemy, over time, these criteria are re-interpreted to fit a secular age. Thus, the ban on idolatry is in the process of reinterpretation in terms of commitment to the rule of law. In short, the tradition continues to provide a standpoint from which to judge the very space it authorizes. In doing so, we can catch a glimpse of what—in the eyes of Judaism—is a well-ordered political space and what is, instead, seen as inimical to the common project of government.

It is here that Yisraeli's turn to the international legal regime is most vulnerable, for it entails abandonment of any standpoint from which criticism is possible. International codes of war, treaties, and so on, govern the state of Israel—from the halakhic perspective—and not indigenous, national-collective norms or particular, aspirational norms developed to govern relations of members within a covenantal community. In his analysis, Yisraeli makes clear that halakhic norms pertaining to use of force developed within the context of individual self-defense could not countenance the manner of conducting warfare acceptable within the international community. But rather than view halakha as a ground for ethical critique, he sees halakha as allowing the incorporation of looser standards of behavior when the nation acts beyond its borders. Should international society adopt more stringent norms than halakha, these too would be binding on the nation acting in the international arena. The Jewish nation state is no longer modeled

on a concept of exceptionalism; instead, it is merely a member of international society whose norms should converge.

Rabbi Yisraeli's position was re-examined recently in two American symposia on the topic of Jewish law and war. The responses it invoked are telling. Even those thinkers who are sympathetic to the idea that the laws of the Jewish king and Noahide law bear a "family resemblance" were deeply troubled both by the complete "surrender to comparative law" and by "the suspension of the normative ethics of Jewish law." The gist of both objections is that in turning to international law, Yisraeli left no standard for ethical critique or reason to contribute a distinctively Jewish ethical voice to society at large. What is at stake is both the role of the halakha as a resource for ethical thought as well as the role of traditional Jewish sources, developed from within, in shaping a particular Jewish character and sensibility and providing an aspirational set of norms or set of supererogatories. In short, what is at stake is not only the status of halakha as an ethics but also identity and exceptionalism, of carving out rules—even in heart of the political realm such as warfare—that reflect particularist ideals even if not adhered to by the rest of the world.

These internal debates about politics as a shared, universal realm of experience, about the Jewish tradition as a resource for ethical critique, and about Jewish identity also shed light on the role of human rights discourse in contemporary Jewish Orthodox society. I do not need to belabor certain trends in the discourse of traditional Judaism, especially in Israel: increased ethnocentrism and the rise of romantic, utopian strains of religion emphasizing authenticity. Not that long ago, it was common to debate how coterminous halakha was with ethics and whether there was an equally obligatory ethic independent of halakha—and these debates were not confined to rarified academic or intellectual circles. Pursuant to that conception, human rights as an ethical theory need not always be elaborated from within; it could be obligatory independent of halakha. Now there is an increasing tendency to view halakha as comprehensive and all-encompassing, in which all rights and obligations, including political ones, must be generated exclusively from within a single sacral framework that emphasizes only one pole of biblical and rabbinic thought: the particular. At its most extreme, the sacred is perceived as the holy, in the face of which the norms of general society are irrelevant. The subject of religion and human rights is an occasion not only to resuscitate the question of the independence of Jewish ethics, but also to reflect on the reservoir of Jewish sources that speak to the other pole of biblical and rabbinic thought: the universal.

# From Collectivity to Individuality

## The Shared Trajectories of Modern Concepts of “Religion” and “Human Rights”

Leora F. Batnitzky

Conversations about the role of religion in human rights generally revolve around the question of whether religion is or is not good for human rights. “Human rights,” the thinking goes, represent humanity’s greatest moral, political, and legal ideals and aspirations, which have evolved organically over time and were codified in the UN’s Universal Declaration of Human Rights of 1948. “Religion,” in this scheme of things, is much older than modern articulations of “human rights.” The questions to be answered, then, are whether there are resources in “religion” to support “human rights,” whether “religion” has historically contributed to or hindered the development of modern notions of “human rights,” and whether “religion” today helps or impedes the rightful realization of “human rights.”

Some, if not many, argue that a turn toward human rights requires precisely a turn away from religion. Anat Biletzki states this position concisely when she writes that

it [human rights] is a turn to the human, and a (perhaps axiomatic, perhaps even dogmatic) posit of human dignity, that turns the engine of human rights, leaving us open to discussion, disagreement, and questioning without ever deserting that first posit. The parallel turn to God puts our actions under his command; if he commands a violation of human rights, then so be it. There is no meaning to human *rights* under divine commandment. A deep acceptance of divine authority—and that is what true religion demands—entails

\* I am grateful to the conference organizers and participants for their generous comments and criticism. I would especially like to thank Suzanne Stone and Shira Billet for their comments on earlier drafts of this paper.

a renunciation of human rights if God so wills. Had God's angel failed to call out—"Abraham! Abraham!"—Abraham would have slain Isaac.<sup>1</sup>

In contrast, some contemporary religious leaders and scholars of religion come to the opposite conclusion, that it is not religion that ought to learn from human rights but human rights discourse that ought to learn from religion—for the very sake of human rights. For instance, note the Archbishop of Canterbury, Rowan Williams's recent statement on "Human Rights and Religious Faith." Human rights language, Williams avers,

takes for granted that there are some things that remain true about the nature or character of human beings whatever particular circumstances prevail and whatever any specific political settlement may claim. While this is not—as a matter of fact—a set of convictions held uniquely by religious people, religious people will argue that they alone have a secure "doctrinal" basis for believing it, because they hold that every human subject is related to God independently of their relation to other subjects or to earthly political and social systems. ... take away this moral underpinning, and language about human rights can become either a purely aspirational matter or something that is simply prescribed by authority. If it is the former, it is hard to see why legal systems should be expected to enshrine such recognitions. If it is the latter, its force depends on the will of some actual legal authority to enforce it; the legitimacy of such an authority would have to be established; and there would be no inbuilt guarantee that the unconditionality of the rights in question would always be honoured.<sup>2</sup>

In North America, the Calvinist philosopher of religion Nicholas Wolterstorff similarly contends not only that there is no tension between human rights discourse and religion but also that the former requires the latter for its own internal coherence. In making this claim, Wolterstorff follows the Jewish philosopher and theologian

1 Anat Biletzki, "The Sacred and the Humane," *New York Times*, July 17, 2011, <http://opinionator.blogs.nytimes.com/2011/07/17/the-sacred-and-the-humane/> (accessed April 10, 2012).

2 Rowan Williams, lecture on Human Rights and Religious Faith at the World Council of Churches Ecumenical Centre in Geneva, February 28, 2012, <http://www.archbishop-ofcanterbury.org/articles.php/2370/human-rights-and-religious-faith> (accessed April 10, 2012).

David Novak who argues that religious citizens, far from requiring secularist notions of human rights to help them navigate the ever more complex national and international moral landscapes of modernity, offer secularists their own best bet for creating and maintaining just national and international political orders.<sup>3</sup>

Disagreements about the role of religion in human rights discourse can be productive. At best, these conversations help us to think more carefully about the philosophical basis for claims about human rights, different conceptions of universalism and particularism, as well as the complex relation between rights and duties. Ironically, however, these conversations are often least helpful in allowing us to consider more critically what we mean by both “religion” and “human rights.” This is because much of the discourse on religion and human rights is dominated by a modern Christian, and especially Protestant, assumption that religion concerns primarily individual faith and conscience. This assumption often goes unspoken not only in post-Christian, or secular, contexts but also in non-Christian ones in surprising ways. Human rights have also come to be defined in terms of individual freedom and conscience. While there is no shortage of practical problems to be worked out from these respective conceptions of religion and human rights, conceptually they are one and the same: both are premised on and affirm the freedom of the individual as the most fundamental right and definition of the human being. As I will argue in this paper, if religion is implicitly defined as freedom of conscience, then the question of the role of religion in human rights is not really a question, because according to these definitions religion and human rights are in many ways redundant.

In claiming that these notions of human rights and religion are redundant, I do not mean to minimize the very real and essential labor of working out the manifold practical dimensions of their relation, such as conflicts between religious conscience and the duties of citizenship. However, not acknowledging the redundancy of these two concepts in contemporary discussion of the role of religion in human rights discourse is problematic because it obscures the ways in which this modern notion of religion and contemporary conceptions of human rights are *both* modern inventions. Whatever the moral and political merits of conceptions of religion and human rights rooted in the sacrosanct conscience of the individual may or may not be, most of the world has not historically and does not now view religion primarily in terms of religious conscience. So too, until

3 Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton: Princeton University Press, 2007). Wolterstorff specifically mentions David Novak’s *Natural Law in Judaism* (Cambridge and New York: Cambridge University Press, 1998). Novak’s more recent work may be even more relevant. See especially Novak, *Covenantal Rights* (Princeton: Princeton University Press, 2000); and Novak, *The Jewish Social Contract* (Princeton: Princeton University Press, 2005).

fairly recently, the individual detached from any collective was not the main focus of human rights discourse.

This paper argues that there are three significant convergences between contemporary concepts of human rights and religion. First, the complex relationship between religion and the modern nation state produced a notion of religion that shifted from an emphasis on the collective to an emphasis on the individual. Contemporary views of human rights also developed in tandem with the modern state and similarly moved from a focus on the collective to a focus on the individual. Second, in both cases the conceptual movement from the collective to the individual was accompanied by a shift away from politics. As such, religion and human rights both came to be understood in fundamentally apolitical terms. Third, and perhaps most importantly, neither the concept of religion as individual and apolitical nor the concept of human rights as individual and apolitical has proven, and, I shall argue, can prove, stable.

To make these arguments, the paper is divided into six parts. Part one briefly considers prevailing notions of religion in human rights discourse. Part two describes how modern conceptions of religion shifted from what had been an emphasis on collective activity to a view of religion as rooted in individual conscience. Part three explores a similar conceptual shift in the much briefer modern history of human rights. Part four turns to some practical difficulties of maintaining conceptions of religion and human rights as primarily individualistic and apolitical. Part five looks briefly and comparatively to Israel and India as case studies of collectivist conceptions of religion and human rights. Part six cautions against a simplistic division between individualist and collectivist conceptions of religion and human rights by looking at the ways in which individualist assumptions play significant roles in Israeli and Indian political life, despite national and religious ethea that would suggest otherwise. Finally, the conclusion of the paper considers the implications of these arguments for contemporary discussions of the role of religion in human rights discourse.

## 1. Religion in Human Rights Discourse

In order to appreciate the often-repetitious nature of contemporary concepts of “religion” and “human rights,” it is helpful to begin with the two parts of Article 9 of the European Convention on Human Rights:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.<sup>4</sup>

The practical implications of the relationship between the two parts of the article are, no doubt, enormously complex. Conceptually, however, the article is quite straightforward, even if it is at the same time vague: every individual is free to think or believe as they choose so long as this freedom does not interfere with the rights and freedoms of others. Religion is implicitly defined in terms of individual conviction and religion would seem to be a type of conviction, along with “thought” and “conscience.” Presumably, these types of conviction may or may not overlap.

The UN debate surrounding the drafting of this article, as well as debates in subsequent years focusing on problems of religious discrimination, confirms that “religion” came to be defined primarily in terms of individual conviction. For instance, much of the debate centered on whether atheists ought to be given the same rights and protection as religious believers. Perhaps most tellingly, when expanding on Article 9, the European Commission and Court of Human Rights explicitly defined it as the right to private thought: “Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e., the area which is sometimes called the forum *internum*.”<sup>5</sup> Article 9 does allow for collective forms of religious practice; yet it is important to recognize that the justification for any collective religious activity, such as worship, teaching, practice, and observance, is grounded in the individual's right to his individual conviction: “While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of one's religion or belief may take—namely worship, teaching, practice, and observance.”<sup>6</sup>

This is not to suggest, however, that the definition of religion in terms of individual conviction was and is not problematic. In particular, the second sentence of the first part of the article—“this right includes freedom to change his

4 [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-C9014916D7A/0/CONVENTION\\_ENG\\_WEB.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-C9014916D7A/0/CONVENTION_ENG_WEB.pdf) (accessed April 10, 2012).

5 As quoted in Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge and New York: Cambridge University Press, 1997), 294.

6 *Hasan and Chaush v. Bulgaria*, 34 European Human Rights Report 35 §62 (2000). See also Mark W. Janis, Richard S. Kay, and Anthony W. Bradley, *European Human Rights Law: Text and Materials* (New York: Oxford University Press, 2008), 365.



religion or belief”—continues to prove especially sticky. Note, for instance, the Sudanese rejection of this provision:

Islam is regarded by Muslims not as a mere religion but as a complete system of life. Its rules are prescribed not only to govern the individual's conduct but also to shape the basic laws and public order of the Muslim State. Accordingly, apostasy from Islam is classified as a crime for which ta'zir punishment may be applied (ta'zir is a disciplinary, reformative and deterrent punishment).

. . . The punishment is inflicted in cases in which the apostasy is a cause of harm to the society, while in those cases in which an individual simply changes his religion the punishment is not to be applied. But it must be remembered that unthreatening apostasy is an exceptional case . . . Assuredly, the protection of society is the underlying principle in the punishment for apostasy in the legal system of Islam.<sup>7</sup>

While the tension between Islam and a modern concept of religion defined in terms of individual conviction increasingly receives attention in today's world, it is important to recognize that this issue is not unique to Islam or to a Muslim State. India and Nepal, countries with majority Hindu populations, also resist, albeit in different ways, freedom of conversion. Judaism is also a religious tradition that does not fit this model of religion as rooted in individual religious conviction. In parts five and six of this paper, I consider some contemporary tensions in India and Israel revolving around the conflict between historical understandings of Judaism and Hinduism and their present day relations to a Jewish or Hindu nation state.

Before doing so, however, it is important to note that Article 9 of the European Convention on Human Rights (ECHR) anticipated a larger trend in human rights discourse: a focus on the rights of the individual in isolation from the collective. Once again, Article 9 asserts that an individual, as such, has the right to religious freedom, and not that religious collectives as such have the right to religious freedom. Here the ECHR follows the framework set in motion by the Universal Declaration of Human Rights (UDHR), which led by Eleanor Roosevelt's efforts, deliberately detached the right to religious freedom from the rights of minorities. Article 18 of the UDHR thus reads: "Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief,

7 As quoted in Evans, *Religious Liberty* (above n. 5), 256.

and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.” Article 18 of the UDHR, along with Article 9 of the ECHR, defines religion in fully volitional terms. Both articles would seem to suggest that religious freedom is a human right because the choice to live by one’s personal convictions, so long as this freedom does not conflict with the freedom of others, is a fundamental right belonging to all human beings. Religion by definition would seem to be bound up with the right to individual freedom, more broadly understood. Once again, it is important to note that collective religious activity is protected only because it protects the individual’s freedom of religion, and not the collective religious body as such:

This emphasis on the collective dimension derived from democracy means that, for the ECHR, it carries considerable weight: Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organization of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organizational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.<sup>8</sup>

## 2. Modern Concepts of Religion: From the Collectivity to Individuality

For many people today, and Americans especially, a point to which I will return below, the definition of religion as bound to individual freedom seems completely obvious.<sup>9</sup> But viewed diachronically and synchronically, that is, historically as well as in terms of the ways in which much of the world looks at religion still today, this volitional definition of religion is anything but obvious. Rather than an expression of unbounded individual choice (as the emphasis on changing religion or belief would seem to suggest), “religion,” as the term has historically been understood, and religions, as they have historically been practiced, convey a sense of the individual’s boundedness. The etymology of the term “religion”

8 *Hasan and Chaush*, 34 European Human Rights Report (above n. 6).

9 On this issue, see Kenneth L. Marcus, “Three Conceptions of Religious Freedom,” this volume, 99–116.

remains disputed, though a leading candidate remains the Latin verb “leig,” to bind. Whatever the term’s historical origin, we do know that the word “religion” was used in its Roman and early Christian settings as a noun (*religio*), an adjective (*religiosus*), and also an adverb (*religiose*), and all of these uses were related not primarily to individual belief but to the performance of ritual practices. In the sixteenth century, colonialists began to use the term specifically with reference to non-Christian ritual practices. Yet by the eighteenth century, religion did not refer mainly to ritual practice or performance but instead to personal belief or faith. As Jonathan Z. Smith notes, Samuel Johnson, in his 1755 *Dictionary of the English Language*, “defines ‘religion’ as ‘virtue, as founded upon reverence of God, and expectations of future rewards and punishments.’” So too, belief became the prime definition of religion, as evidenced by the increased use of the German term *Glaube* and the English term “faith.”<sup>10</sup>

The Hebrew term *dat* also only came to mean “religion” or “faith” in the early modern period. The term is biblical and appears in the Book of Esther (3:8). There it means law, both the Jewish people’s and the king’s: “And Haman said unto king Ahasuerus: ‘here is a certain people scattered abroad and dispersed among the peoples in all the provinces of thy kingdom; and their laws [*dateihem*] are different from those of every people; they neither keep the king’s laws [*datei ha-melekh*]; therefore it does not profit the king to suffer them.’”<sup>11</sup> As Avraham Melamed has shown, up until the early modern period, Jewish thinkers such as Saadia Gaon, Moses Maimonides, Joseph Albo, Judah Messer Leon, and Nissim of Marseilles used the term *dat* in a variety of ways, but all of these usages referred to law, whether human or divine, and not to particular beliefs or faithfulness, Jewish or otherwise.<sup>12</sup> Simone Luzzatto’s 1638 *Discorso circa il stato degl’ hebrei et in particolar dimoranti nell’inclita città di Venetia* marked a change in the meaning of *dat*. Luzzatto described Judaism as a religious faith like Christianity by translating *dat* as “religio” and “religione.” Spinoza would follow Luzzatto in distinguishing between law (*lex*) and religion in his 1670 *Theologico-Political Treatise*. The term *dati*, which in modern Hebrew refers to a religious person, is a distinctly modern coinage and begins to appear with regularity in Hebrew sources

10 Jonathan Z. Smith, *Relating Religion: Essays in the Study of Religion* (Chicago: University of Chicago Press, 2004), 179–196.

11 Translation from *The Hebrew Bible in English* (Philadelphia: Jewish Publication Society, 1917).

12 Avraham Melamed, “De la loi à la religion: métamorphoses du concept de *dath* dans la tradition politique juive” in *Entre ciel et terre, le judaïsme*, ed. Shmuel Trigano (Paris: In Press, 2009), 61–76.

only in the eighteenth century.<sup>13</sup> It is worth noting that Eliezer Ben Yehuda's modern Hebrew dictionary captured the changing meaning of *dat* and thereby included in its definition of the term "decrees and ordinances of the kingdom," "laws and customs that were fixed in accordance with God's commandments," and "faith and knowledge of God." Strikingly, as Melamed has remarked, today both the *Even Shoshan* Hebrew Dictionary and the Hebrew version of Wikipedia define *dat* in terms of faithfulness (*emunah*).<sup>14</sup>

Why did the meanings of religion and *dat* change? Of course, there are many answers to this question. One basic answer surely has to do with internal Christian self-understanding and especially the ascension of Protestantism on the world stage. So too, as mentioned above, Christian encounters with non-Christians also certainly had a role to play in this change. But perhaps the most fundamental reason for this change from viewing religion as collective activity (in the form of ritual or law) to, as the ECHR would call it, viewing religion as a "forum *internum*" would be the rise and subsequent development of the modern nation state in which the political community constituted by the state became, at least in theory if not always in practice, the primary locus of collective identity. It is worth recalling that the very idea of state sovereignty is a modern one, coined by the French philosopher Jean Bodin, who imagined an independent and supreme political authority that could end sectarian strife by centralizing political power.<sup>15</sup> While modern political theorists would continue to debate the nature of state sovereignty, most modern European political thinkers conceived of sovereignty as the centralization of political power and authority and defined the modern nation state in terms of such sovereignty.

The European Jewish response to the creation of sovereign European states is instructive. Prior to becoming individual citizens of modern nation states, individual Jews were members of local Jewish communities. While a particular Jewish community's existence depended on the whim of others (usually the nobility or royalty), pre-modern Jewish communities were unique in that they had a tremendous amount of political autonomy. Each community had its own set of

13 With very few exceptions, prior to this, *dati* did not stand alone and was used only as the construct *datei*, meaning laws of, as in the quotation from Esther above, the king's laws [*datei ha-melekh*].

14 Avraham Melamed, "Shifting Understandings of the Term 'Dat' in Medieval Jewish Political Philosophy," lecture presented at Princeton University, February 8, 2011, sponsored by the Tikvah Project on Jewish Thought at Princeton University.

15 Jean Bodin, *On Sovereignty*, ed. Julian Frankels (New York and Cambridge: Cambridge University Press, 1992). Johannes Althusius would provide an alternative view for the most part not picked up by history; see *Politica Methodice Digesta of Johannes Althusius* (New York: Arno Press, 1979).

bylaws administered by laypersons. Rabbis, in turn, had jurisdiction over ritual law and also gave credence to the laws of the community as a whole. Each community had its own courts, as well as its own educational, health, economic, and social services systems. Outside rulers gave the Jewish community responsibility to maintain law and order, and the right to punish its members in a variety of ways, including exacting fines, imprisonment, and corporal punishment.<sup>16</sup> For all of these reasons, it does not make sense to describe Judaism in a pre-modern context by way of a modern concept of religion defined in terms of individual belief. Prior to the acquisition of the rights of citizenship, a Jew's religious life was defined by, though not limited to, Jewish law, which was simultaneously religious, political, and cultural in nature.

The idea that Judaism is a religion alone was invented by the German Jewish philosopher Moses Mendelssohn in anticipation of a Prussian state that would dissolve the corporate power of local Jewish communities. Known as the "German Socrates," Mendelssohn thrived in both Jewish and German Enlightenment circles. Yet despite his fame, Mendelssohn, like all other Jews at the time, had no civil rights. When he was publicly challenged to explain why he shouldn't convert to Christianity, he argued that Judaism was wholly compatible with German Enlightenment values. But he stressed Judaism's religious components over its corporate structure, thus giving birth to the idea that Judaism was a religion alone.<sup>17</sup> He vehemently opposed the idea that the Jewish community should retain its autonomy in matters of civil law, stressing that Jews should receive civil rights as individuals and not as a corporate entity. And he especially rejected the Jewish community's claim, still maintained in his day, to the right to excommunicate. Mendelssohn moved Judaism into the modern world by contending that politically, but not theologically, the individual Jew was separate from the Jewish community. Mendelssohn defined the very category of Jewish religion by separating Judaism from the politics of the state. In this way, the idea of Jewish religion was born together with the modern *Rechtsstaat*.

Much more could be said about how modern Jewish thinkers negotiated the difficulties of defining Judaism as a modern religion, as well as modern conceptions

16 For a concise summary of the break with the Jewish past that emancipation brought, see Salo Baron's classic essay, "Ghetto and Emancipation," *The Menorah Journal* 14 (1928): 515–526.

17 Mendelssohn claimed that Judaism was a religion alone on the basis of an argument about Jewish praxis. For a discussion of the ways in which this claim was fraught with conceptual tension that in many ways defined and continues to define modern Jewish thought, see Leora Batnitzky, *How Judaism Became a Religion: An Introduction to Modern Jewish Thought* (Princeton: Princeton University Press, 2011).

of state sovereignty. For the purposes of this paper, however, the point I would like to make is basic but is nevertheless often overlooked. The modern Jewish attempt to mold Judaism into a modern religion defined as something different in kind from the modern state represents something fundamental to political modernity more generally; namely, that the very idea and existence of the modern *Rechtsstaat* requires that religion, in theory if not always in local realities, be defined in distinction to the authority of the state, understood as the guarantor of individual and collective freedom. This is the case even in states that protect the autonomy of religious institutions since this institutional independence depends upon the permission of the state. This movement from collectivity to individuality in the modern concept of religion reflects the transfer of the locus of collectivity away from historical religions to the state. As Talal Asad has remarked, “the suggestion that religion has a universal function is one indication of how marginal religion has become in modern industrial society as a site for producing disciplined knowledge and personal discipline.”<sup>18</sup> In other words, the very idea that there is something universal called “religion” points not to the power of religion in the modern world but to its historical weakening in the service of the modern state. Or, as Leo Strauss succinctly put it, “Liberalism stands or falls by the distinction between state and society, or by the recognition of the private sphere protected by the law but impervious to the law, with the understanding that, above all, religion as particular religion belongs to the private sphere.”<sup>19</sup>

My point here is not to weigh in on whether or not this marginalization of religion in the modern world (in the name of capital “R” religion) is a good thing or not. Rather, my suggestion is that if we want to think seriously about the role of religion in human rights we need to think critically, and therefore historically, about each term of the equation. Just as we have considered the historical evolution of modern notions of religion, we must consider the historical evolution of modern concepts of human rights. Before doing so, however, let me be clear that my argument about the parallel trajectories of modern conception of religion and human rights does not suggest or imply a historical overlap or causal connection between these notions, except insofar as they are both outgrowths of the history of the modern nation state. As we will see, appreciating the parallel conceptual trajectories between modern concepts of religion and human rights allows us to recognize that, despite common contemporary views to the contrary, it is doubtful whether the concept of human rights ever was or ever can be fully understood in purely individualist, apolitical terms.

18 Talal Asad, *Genealogies of Religion* (Baltimore: Johns Hopkins University Press, 1993), 46.

19 Leo Strauss, *Spinoza's Critique of Religion* (Chicago: University of Chicago Press, 1965), 3.

### 3. Modern Concepts of Human Rights: From the Collective to the Individual

Amnesty International defines human rights as “basic rights and freedoms that all people are entitled to regardless of nationality, sex, national, or ethnic origin, race, religion, language, or other status.”<sup>20</sup> But as Samuel Moyn reminds us in his important work, *The Last Utopia: Human Rights in History*, while many histories of human rights look to the French and American revolutions as the origins of contemporary claims for human rights, “The ‘rights of man’ were about a whole people incorporating itself in a state . . . they were about the meaning of citizenship. This profound relationship between the announcement of rights and the fast-moving ‘contagion of sovereignty’ of the century that followed cannot be left out of the history of rights.”<sup>21</sup> If the nineteenth century marked the beginnings of human rights talk, those rights were a justification for the modern nation state, and not a claim for the individual’s rights against the state, as many believe today. The Universal Declaration of Human Rights also did not advance trans-political individual rights but rather sub-national citizenship. In the words of the Declaration, human rights are “a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.” As we saw above, the Declaration did understand religion in particularly individualistic terms. Yet religious freedom for the individual was, like other human rights, predicated on citizenship within particular nation states and the sovereignty of such states.

The primacy of the sovereign nation state for both national and international law stood in tension with what increasingly became a commitment to the self-determination of peoples in the wake of decolonization.<sup>22</sup> Strikingly, the Declaration deliberately did not include the right of all peoples to self-determination, despite the fact that the Atlantic Charter of 1941 included this right. But decolonization and anti-colonialism ultimately changed the terms of the discussion at the UN. According to Moyn, anti-colonialism was not a human

20 <http://www.amnestyusa.org/research/human-rights-basics> (accessed April 10, 2012).

21 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010), 26.

22 It is in the context of this argument that Moyn rejects the popular notion that the Holocaust contributed directly to human rights talk (see especially 82–83 and 219–220).

rights movement, as we understand human rights today. Rather than advocating individual rights and international law, anti-colonialism was “the agent of the greatest dissemination of sovereignty in world history.”<sup>23</sup> New states born of decolonization joined the UN and focused its attention on collective liberation from imperialism. In this context, human rights were equated with the self-determination of all peoples, culminating in the 1961 declaration that “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.”<sup>24</sup> The anti-colonialist equation of human rights with the self-determination of peoples rejected the imperialist equation of human rights with the rights of membership, but the two had something significant in common: in both cases, human rights were associated with collective entities and with sovereign states, and not with individuals and an international order apart from these states. Nowadays, however, human rights are understood as the rights of the individual against the collective, and especially against the sovereign state.

How, then, in recent decades did human rights move from the province of collectives to that of individuals? Why did collective liberation (either in the form of the modern nation state with its rights of citizenship or in the form of the self-determination of peoples) turn into individual liberation? According to Moyn, human rights turned away from collective to individual rights because of deep disillusionment with what had been utopian hopes of self-determination. Just as anti-colonialists formed their conception of the self-determination of peoples out of their disillusionment with colonial powers, so too, contemporary notions of human rights—as rooted in the trans-national and trans-political individual—grew from disillusionment with the promises of self-determination. In short, post-colonial powers proved as brutal as their colonialist predecessors. Referring to Arthur Schlesinger Jr.’s statement that “states may meet all the criteria of national self-determination and still be blots on the planet. Human rights is the way of reaching the deeper principle, which is individual self-determination,” Moyn marks 1977 as “the breakthrough year of human rights.”<sup>25</sup>

23 Moyn, *The Last Utopia* (above n. 21), 86.

24 Atlantic Charter (1941), UN Resolution 545 VI (1952), and UN Resolution 1514 (1961), [http://en.wikisource.org/wiki/United\\_Nations\\_General\\_Assembly\\_Resolution\\_1514](http://en.wikisource.org/wiki/United_Nations_General_Assembly_Resolution_1514) (accessed April 10, 2012).

25 As quoted by Moyn, *The Last Utopia* (above n. 21), 118.



The shift in human rights discourse from collective liberation to individual liberation was also a shift from politics to morality. Andrei Sakharov concisely articulated this movement from politics to morality and from the collective to the individual in his 1975 Nobel Peace Prize lecture when he wrote, “What we need is the systematic defense of human rights and ideals and not a political struggle, which would inevitably incite people to violence, sectarianism, and frenzy. I am convinced that only in this way, provided there is the broadest possible public disclosure, will the West be able to recognize the nature of our society; and that then this struggle will become part of a world-wide movement for the salvation of all mankind. This constitutes a partial answer to the question of why I have (naturally) turned from world-wide problems to the defense of individual people.”<sup>26</sup> Similarly, the move from the collective to the individual in the modern notion of religion explored above was also an attempt to move away from politics. The logic of Article 9 of the ECHR protecting the “forum *internum*” of religion conforms to the logic of Mendelssohn’s division between the theological and political dimensions of Judaism as it had been historically practiced as well as to Asad’s comment, quoted above that, “the suggestion that religion has a universal function is one indication of how marginal religion has become in modern industrial society as a site for producing disciplined knowledge and personal discipline.” Just as human rights moved from its historical association with the modern nation state to a trans-political notion of global morality, so too religion moved from what had been its historically political function to its modern private, that is, internal function.

So far we have explored the first two significant convergences between contemporary conceptions of human rights and religion. First, as we have seen, contemporary notions of religion and human rights each emerged from their complex historical relationships to the emergence of the modern nation state. In each case, this relationship produced a concept that moved from a focus on the collective to a focus on the individual. Second, the shift from the collective to the individual in contemporary conceptions of religion and human rights was accompanied by a shift away from politics. As such, religion and human rights both came to be understood in fundamentally apolitical terms. Let us turn now to the third, and perhaps most important, convergence between contemporary conceptions of religion and human rights, which is that neither the concept of religion as individual and apolitical nor the concept of human rights as individual and apolitical has proven or can prove to be stable.

26 Andrei Sakharov, “How I Came to Dissent,” trans. Guy Daniels, *New York Review of Books*, March 21, 1974, quoted in Moyn, *The Last Utopia* (above n. 21), 139.

## 4. The Instability of Modern Concepts of Religion and Human Rights

The tension between contemporary notions of religion and human rights and contemporary political realities is in many ways obvious. As Moyn notes, an apolitical conception of human rights could hold only for the briefest of historical moments. By the mid-nineteen nineties genocide prevention became one of the chief aims of the international human rights movement; attention to social and economic rights, women's rights, and global poverty only plunged human rights activists deeper into political waters. On Moyn's reading, the future of the international human rights movement will be defined by whether and how human rights activists can reconcile a moral apolitical vision of human rights with the necessity of political action: "the program for human rights faces a fateful choice: whether to expand its horizons so as to take on the burden of politics more honestly, or to give way to new and other political visions that have yet to be fully outlined."<sup>27</sup> Similarly, a modern apolitical notion of religion as rooted in individual conviction and conscience also has not proven stable. Even if we confine our analysis to modern western democracies, the limitations of this modern view of religion are clear. As anyone who reads the newspaper surely recognizes, the idea that every individual is free to believe and practice his religion so long as this freedom does not interfere with the rights and freedoms of others is by definition fraught with ambiguity.

For two interrelated reasons endemic to its founding, the United States represents perhaps the most successful example of defining religion in terms of individual belief: a Protestant heritage coupled with the disestablishment of religion. Yet as Winnifred Fallers Sullivan has argued, these two characteristics lead to a somewhat paradoxical situation: courts must define religion in order to protect it but they must do so in a political and legal context that does not and cannot recognize any legally established orthodoxy. This means, according to Sullivan, that religious freedom is actually impossible.<sup>28</sup> Whether one agrees with it or not, Sullivan's conclusion is instructive because it points to the redundancy of this modern idea of religious freedom on its own terms. If religion comes down to individual conscience, and if individual conscience is a, if not the, prime value of a legal and political system, then the question to ask is not how to reconcile religion with democratic freedom but rather how to reconcile various democratic freedoms with one another.<sup>29</sup>

27 Ibid., 225–226.

28 Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005).

29 On this issue, see Christopher Eisgruber's and Lawrence Sager's enormously helpful *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007).

The view of freedom presupposed by freedom of religion in the United States might be helpfully labeled “volitionalist” because it takes human will as the defining feature of religion.<sup>30</sup> Volitionalism goes hand in hand with the notion that religion is a matter of voluntary association. If the United States succeeds in protecting religious liberty it is because volitionalism and voluntary association are at the heart of American culture. As Tocqueville famously put it in *Democracy in America*:

Religion [in America] is a distinct sphere, in which the priest is sovereign, but out of which he takes care never to go. Within its limits he is master of the mind; beyond them he leaves men to themselves and surrenders them to the independence and instability that belong to their nature and their age. I have seen no country in which Christianity is clothed with fewer forms, figures, and observances than in the United States, or where it presents more distinct, simple, and general notions to the mind. Although the Christians of America are divided into a multitude of sects, they all look upon their religion in the same light. This applies to Roman Catholicism as well as to the other forms of belief.<sup>31</sup>

If Tocqueville offers a concise description of the preeminent American view of religion, David C. Williams and Susan H. Williams helpfully sum up the American legal perspective on religion: “the [American] Constitution . . . protects individual rights, including the rights of religious practice, precisely and only because it incorporates a volitionalist frame of reference. Individuals should have a sphere of autonomy in certain areas because their most fundamental moral, religious, or political action is making up their own free and self-determining minds. In short, the enshrinement of religious liberty is nothing more than a recognition of the importance of volitionalist activity.”<sup>32</sup>

There are many Americans, of course, who do not believe that the United States succeeds, as it ought to, in protecting religious liberty. Those unhappiest with America’s protection of freedom of religion often have non-volitionalist and non-voluntarist assumptions about religion, meaning that they do not understand religion primarily in terms of the free choice of individuals. From this perspective, the courts do not adequately recognize religious liberty. Witness for example the

30 David C. Williams and Susan H. Williams, “Volitionalism and Religious Liberty,” *Cornell Law Review* 76 (1990–1991): 770–932.

31 Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve, vol. 2, unabrdgd. (London: Longman, Green Longman and Roberts, 1862), 14.

32 Williams and Williams, “Volitionalism” (above n. 30), 771.

2012 outcry from some Catholic groups in the United States over mandatory health insurance coverage for contraception, in which this mandate was described as a “war on religion.” I do not aim here to make an argument about, or even offer a view of, the proper interpretations of the free exercise and establishment clauses of the American Constitution. Rather I wish merely to make the rather obvious point that volitionalist assumptions about religion remain open to question, even in the United States.

When we look around the world, defining religion as well as human rights as individualist and volitionalist is even more problematic. I am not making a normative claim but rather an analytic one. As I have argued throughout this paper, those who are committed to current understandings of religion and human rights as grounded in the individual’s freedom of choice ought to recognize that these views of religion and human rights have particular histories shaped by the legacy of Protestantism and the rise of the modern nation state. Once this is acknowledged there seem to be one of two options: either openly advocate that the rest of the world adopt these views of religion and human rights or think carefully about missed opportunities in the particular histories of these ideas for considering alternatives. The problem with choosing the former is not just that it is a repetition of some of the worst parts of the legacy of imperialism and colonialism (though this is a big problem). The problem is also that talking about religion and human rights only in these terms simply doesn’t work because it doesn’t speak to the realities lived by most people in the world.

## 5. Israel and India as Case Studies

The cases of Israel and India are instructive for appreciating the complexity of applying volitionalist and individualist conceptions of religion and human rights in non-Christian (or non-post-Christian) contexts. As a number of scholars have noted, Israel and India share some important similarities, despite their many differences. Both are multiethnic states created by partition in the wake of decolonization and their majority cultures share important features stemming from their perhaps surprisingly similar histories. In Marc Galanter and Jayanth Krishnan’s words, “Each of these cultures underwent a prolonged colonial experience in which its traditions were disrupted and subordinated to a hegemonic European Christian culture; each had an earlier experience with victorious, expansive Islam; each has reached an uneasy but flourishing accommodation with the secular, scientific modernity of the West.”<sup>33</sup> When it comes to religion, the legal systems of both countries are based upon British common law and each has a system of personal

33 Marc Galanter and Jayanth Krishnan, “Personal Status Law and Human Rights in India and Israel,” *Israel Law Review* 34 (2000): 101.

status law (India's personal status law is based on British common law while Israel retains parts of the Millet system of the Ottoman Empire). Personal status law in both states exists in tension with other political and legal commitments. In India, provisions for personal status law in the Constitution sit uneasily with its goal of a uniform civil code. In Israel, personal status law, especially for the majority Jewish population, often exists in tension with the state's commitment to the freedom of the individual. When it comes to human rights, both Israel and India, in their respective foundations, embrace the collectivist right to the self-determination of peoples as a, if not the, fundamental human right.

When it comes to both religion and human rights together, the hotly contested issues of proselytizing and conversion in Israel and India are especially telling. Israel's Declaration of Independence guarantees "complete equality of social and political right to all its inhabitants irrespective of religion, race or sex, and guaranteed freedom of religion, conscience, language, education, and culture," while article 25 of the Indian Constitution pledges that "all persons are equally entitled to freedom of conscience and the right freely to profess, practice, and propagate religion." Nevertheless, proselytizing and conversion are sources of profound ambivalence in both Israel and India, though, as will be discussed in the next section of this paper, anxieties about conversion run in opposite directions. In Israel, the majority religion worries about who is converting in while in India the majority religion worries about who is converting out. Important as this difference is, taken together Israeli and Indian anxieties about proselytizing and conversion point to what is perhaps better described as the parochial rather than universal nature of western and specifically Protestant focus on freedom of conscience as a defining component of the human right of religious freedom.

Neither Judaism nor Hinduism is a religion in the Protestant sense described in the first part of this paper. As discussed, prior to the modern period, Judaism was not just a religion but also a culture and nationality. It was only when Jews became citizens of modern nation states that they would argue that Judaism was a religion like Christianity. The historical origins of Zionism can be understood in large part as a rejection of the claim that Judaism is a religion. Political, cultural, and ultimately religious Zionists all decried the split demanded by the modern European nation states between Judaism's religious and national elements. Hinduism also only became a religion in the modern period. The Sanskrit word "Sindu" refers to the River Indus and its geographical region. Muslims called the people living in that area Hindus, which also came to connote non-Muslims.<sup>34</sup> (Similarly, the term "Iodaisos" originally meant "Judean" and referred to the inhabitants of the geographic region associated with the biblical tribe of Judah.

34 Romila Thapar, *Interpreting Early India* (Delhi: Oxford University Press, 1993), 79.

Only later the term came to be translated as “Jew.”<sup>35</sup>) When, in the nineteenth century, the British census called for locals to declare their religion, the term Hindu took on a distinctly religious meaning. The idea that Hinduism was a homogeneous tradition displaced what had been a far more variegated reality of multiple, overlapping communities defined by location, language, caste, occupation, and sect.<sup>36</sup> As is the case with Jewish nationalism, the historical origins of Hindu nationalism can be found in the rejection of the colonialist baggage that came with the claim that Hinduism is a religion. Coined by Vinayak Damodar Savarkar, the father of Hindu nationalism, the term *Hindutva* (“Hindu-ness”) opposes the colonialist construct of Hinduism as a religion in order to promote a broader view of Hindu culture, nationality, and civilization.<sup>37</sup>

The unease over proselytizing in both Israel and India derives largely from residual resentment over forced conversions of Jews and Hindus to Christianity. Proselytizing is legal in Israel, though there is a popular impression that it is not. Still, there are obstacles to proselytizing, including the illegality of offering material benefit for conversion and a prohibition on converting anyone younger than eighteen. Missionaries have been denied entry into the country. Visas and permanent status petitions have also been denied on account of purported missionary activity.<sup>38</sup> While proselytizing is legal in India, a number of states have passed anti-conversion laws that make it difficult for people to convert. When lower caste Hindus who receive Christian aid convert to Christianity, Christians are often charged with forced conversion and at times arrested.<sup>39</sup>

Christian groups have often claimed that they are at the very least victims of discrimination, if not persecution, in Israel and India. Are they? Are proselytizing and conversion human rights or are they more productively understood as issues of social and communal identity? These questions are difficult to answer. Different

35 On this topic, see Shaye J. D. Cohen, *The Beginnings of Jewishness: Boundaries, Varieties, Uncertainties* (Berkeley: University of California Press, 1999).

36 Thapar, *Interpreting Early India* (above n. 34), 77.

37 Vinayak Damodar Savarkar concisely summarizes this perspective: “Hindus are bound together not only by the tie of the love they bear to a common fatherland and by the common blood that courses through their veins and keeps our hearts throbbing and our affection warm but also by the tie of the common homage we pay to our great civilisation, our Hindu culture,” *Hindutva: Who is a Hindu?* 2nd ed. (Bombay: Veer Savarkar Prakashan, 1969), 91.

38 U.S. Department of State, Bureau of Democracy, Human Rights, and Labor – Israel and the Occupied Territories – “July-December, 2010 International Religious Freedom Report,” [http://www.state.gov/j/drl/rls/irf/2010\\_5/168266.htm](http://www.state.gov/j/drl/rls/irf/2010_5/168266.htm), accessed on April 10, 2012.

39 U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, “India – International Religious Freedom Report 2010,” <http://www.state.gov/j/drl/rls/irf/2010/148792.htm> (accessed April 10, 2012).

assumptions about the relations between religion and nationality, the individual and collective, and heredity and identity lead to different answers. From a Jewish point of view, Jewish identity is comprehensive. For this reason, religious conversion seems a thin way to define identity, religious or otherwise. From a halakhic perspective, Jews simply cannot convert out of Judaism, even if they try to do so. The impossibility of converting out of Judaism, again from a Jewish point of view, is tied to a Jewish ambivalence about conversion into Judaism, a subject to which I will soon return. If religious conversion seems too narrow a way to encompass identity from a Jewish perspective, religious conversion is far too comprehensive a way to encompass identity for Hindus. As one scholar has put it, “The problem from the Hindu point of view is that conversion to an Abrahamic or Western religion involves a double conversion: a conversion not just to that religion but to its view of what a religion is—that religious adherence is exclusive in nature and you cannot be a member of two religions simultaneously.”<sup>40</sup> Jewish and Hindu anxieties about proselytizing and conversion cut across ideological lines within Jewish and Hindu communities. Just as many nationalist, religious, and secularist Jews worry about proselytizing and conversion, so do nationalist, religious, and secularist Hindus. In this context it should not be surprising that Gandhi himself opposed conversion, calling it “an error, which is perhaps the greatest impediment to the world’s progress towards peace.”<sup>41</sup>

We see then that the unease over proselytizing in both Israel and India derives not only from residual resentment over forced conversions of Jews and Hindus to Christianity but also from the Christian remaking of Judaism and Hinduism in its own image. In this way, anxiety about proselytizing and conversion in Israel and India is tied to the shared impetus for the establishments of the modern states of Israel and India, which is the right to the self-determination of all peoples. To be sure, many people who are committed to views of religion and human rights grounded in the autonomous individual (in Israel, India, and around the world) consider Jewish nationalism and Indian nationalism anathema to human rights. Yet criticism of Jewish and Indian nationalism on the basis of the assumed primacy of the autonomous individual only confirms the impulse that has and continues to fuel the counterclaims it rejects. To be clear, my purpose is not to criticize, defend, or conflate Jewish nationalism and Indian nationalism. Nor do I purport to offer anything but the most cursory account of each. Instead, I would like merely to suggest that unacknowledged volitionalist premises behind

40 Arvind Sharma, *Hinduism and Human Rights: A Conceptual Approach* (Delhi: Oxford University Press, 2003), 118.

41 M. K. Gandhi, *Hindu Dharma*, ed. Bharatan Kumarappa (Ahmedabad: Navajivan Publishing House, 1950), 232.

contemporary notions of religion and human rights muddy our ability to think critically about the role of religion in human rights for these unexamined premises do not allow us to recognize the histories that gave rise to contemporary ideas as well as reactions to them.

## 6. Against a Simple Divide between Individualist and Collectivist Conceptions of Religion and Human Rights

It would be a mistake, however, to leave things at this, as if there were a simple divide between those who understand religion and human rights in individualistic terms and those who understand them in collectivist terms. Just as it is clear that even in the United States it is increasingly difficult to view religion only through the lens of private conviction, so too it is not possible to understand religion in Israel and India without recognizing the role that volitionalist views of religion play in their respective legal systems—despite the fact that the Israeli and Indian national thea purport to oppose exactly this. While many in Israel and India have pointed to the endurance of personal status law as a potential source of human rights violations, it is possible to argue that, at least in some cases, it is through an endorsement of a volitionalist view of religion that the majority religions in Israel and India may be said to violate a human right to religious freedom. Once again, the problem of conversion allows us to appreciate this odd tension.

As is well known, the questions of who is a Jew and who decides are at the core of tensions between not just religious and secular Jews in Israel (as well as between different kinds of religious Jews in Israel) but also between Israelis and Jews living in the Diaspora. Because of the Law of Return, these questions are as political as they are theological. These questions most recently came to a head over what to do about some 150,000 Russian Jewish immigrants who were of questionable Jewish descent. In 2009, MK David Rotem introduced a bill to convert these Russian Jewish immigrants. In order to pass the bill, the foreign minister at the time, Avigdor Lieberman joined forces with Eli Yishai of the Shas Party. The compromise that resulted meant that the ultra-Orthodox Shas party would support civil marriage while the secularist Yisrael Beytenu party would cede control over religious conversions to the Orthodox rabbinic establishment. In short, the legitimacy of non-Orthodox and even some modern Orthodox conversions would be deemed invalid, meaning that those who converted under the auspices of such authorities would not be allowed to marry as Jews in Israel, a ruling that would have many practical consequences not just for the partners in marriage but also for their potential offspring.



From an external perspective, the source of this problem can certainly be traced to personal status law in Israel, which grants to the Orthodox establishment control over conversion for the purposes of marriage and divorce. Yet, from an internal Jewish perspective, it is also arguable that the source of the problem comes from the Orthodox establishment's narrow criteria for conversion to Judaism. The sticking point for the Orthodox establishment in Israel is the potential convert's complete commitment to an observant Jewish life, as defined by the Orthodox establishment. This commitment amounts to a belief in the authority of the Orthodox establishment as the final arbiters of not only Jewish law, but of God's will as defined by that law. However, Zvi Zohar (an authority on Jewish law, an Orthodox Jew, and a professor at Bar Ilan University) has argued that this position is of relatively recent vintage. According to Zohar, it was only in the late nineteenth century that a pledge "to observe the totality of the law at the moment of conversion" became the criterion for conversion. Prior to the late nineteenth century, conversion to Judaism meant that the convert bound his fate to the people of Israel, as Ruth, a convert from whom Jewish tradition believes the messiah will descend, did with Naomi when she proclaimed, "Your people are my people." As Zohar puts it:

[These rabbis of the late nineteenth century] could not deny these [secular] people, who to their minds had betrayed authentic Judaism, the title "Jew," since even traditional Judaism insisted that 'a Jew who sins is still considered a Jew.' But there was, still, one human group [that] those who held this worldview could seek to force to live in accordance with their Orthodox perspective—the group of Gentiles who were seeking to convert. Thus, a view from which those born Jewish were de facto exempt, was brought to bear with excess rigidity on those who sought to become Jews by volition.<sup>42</sup>

This last sentence is particularly important for appreciating how a volitional view of religion allows the Orthodox establishment in Israel to potentially discriminate against other Jews. Those born Jewish do not need to commit to following the law as understood by the Orthodox establishment in Israel in order to be Jewish. This is simply definitional of what it means to be a Jew, which, as we have seen throughout this paper, is not defined merely or even primarily by personal conviction and belief, but rather by membership. Yet it is precisely the requirement of personal conviction and commitment that the Orthodox establishment in Israel demands of a convert.<sup>43</sup>

42 Zvi Zohar, quoted in David Ellenson and Daniel Gordis, *Jewish Pledges of Allegiance* (Palo Alto: Stanford University Press, 2012), 153.

43 Zohar's point is made differently by Gary Jeffrey Jacobson when he writes: "the pursuit of religious national aspirations . . . can, as many Orthodox Jews in Israel have, to their

A different though formally similar irony may be found in India. Many in India and elsewhere argue that Indian personal status law is a potential source of human rights violation. Criticism comes from multiple sources: the tension between personal status law and the elusive goal of a uniform civil code as played out, for instance, in divorce law as well as the purported benefits or negative consequences for minority religions vis-à-vis the majority religion. But it is also arguable that a view of religion as volitionalist can operate in India as a source of discrimination. As J. Duncan M. Derrett remarks, “In an India which is ruled by a Hindu majority the Hindu concept of religion as a social identification is accepted virtually by all.”<sup>44</sup> Yet in a series of cases that go to the heart of definitions of religion and national identity, the court has mainly defined religion in terms of individual conviction, and not social identification.

As is well known, the Indian Constitution codifies a system of reservations, which is basically a system of affirmative action meant to address the profound historical discrimination of people of lower castes. As part of a quota system, members of lower or backward castes (people who were once called “Untouchables” but are now usually referred to as “Dalits”) may receive allotted educational, occupational, and governmental spots. A presidential order of 1950, and specifically paragraph 3 of this order, limited these reservations to Hindus: “notwithstanding anything contained in para. 2, no person who professes a religion different from Hinduism shall be deemed a member of the Scheduled Castes.” Amendments in 1956 and 1990 allowed for the inclusion of Sikhs and Buddhists. Muslim and Christian groups claim discrimination because they are not included in this reservation system.<sup>45</sup>

Islam and Christianity in India have historically, though unofficially, maintained a caste system. Many converts to Islam and Christianity over the centuries came from lower caste backgrounds. Indeed, conversion was often a means to rid converts of the caste system. Nevertheless, caste often remained operative within these communities. For instance, within Christian communities in India today it is not uncommon to find the descendents of former lower caste

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dismay, come to realize, weaken and dilute the theological or spiritual content of religious devotion providing as an incidental if not unimportant political benefit, a more hospitable environment for exercising religious tolerance towards minorities” (Gary Jeffrey Jacobson, *The Wheel of Law* [Princeton: Princeton University Press, 2003], 79).

44 J. Duncan M. Derrett, *Religion, Law, and the State in India* (New York: Free Press, 1968), 558.

45 For what remains the best and most comprehensive overview of the legal and religious issues related to these cases, see Marc Galanter, “The Religious Aspects of Caste: A Legal View,” in *South Asian Religion and Politics*, ed. D. E. Smith (Princeton: Princeton University Press, 1966), 277–310.

members sitting separately from others. Marriage rarely takes place between Christians of different caste origins.<sup>46</sup> Outside of these communities, Dalit Muslims, and Christians face social disability. Some have offered data suggesting that compared to other Dalits, Dalit Muslims and Christians fare significantly worse educationally and economically.<sup>47</sup>

One might argue, as many do, that the problem stems from personal status law and the reservation system. If people were treated as individuals, and not part of groups, a more democratic and just society would emerge. There is some truth to this argument, yet it also ignores the deep roots of caste discrimination in India that are still present today as well as the pervasive cultural conception of religion as social identification, for better or for worse. What interests me in the context of this paper, however, is the way in which Hindus, and especially Hindu nationalists, have defined religion in terms of individual conviction in order to exclude Muslims and Christians from reservations.<sup>48</sup> One would think that on the basis of claims about Hindu culture, again the foundation of Hindu nationalism—in distinction to Hindu religion—that it would be obvious to all that conversion is not comprehensive and does not erase other identities. At the same time, it is particularly ironic that Christians in India should be defining themselves in ways contrary to their own theological commitments. Some Indian Christians oppose the quest for inclusion in the reservation system for this very reason.<sup>49</sup>

Much more could be said about the vexed issue of conversion in Israel and India. But for our purposes, the point I would like to make is rather straightforward but also essential. As we have seen, despite the rejection of the colonialist baggage of Christian hegemony of their intellectual founding fathers, the nation states of Israel and India have internalized aspects of the system that they sought to overturn. Jewish and Indian nationalisms are as much a product of what they reject as they are their own unique creations. But this is true of any identity—individual, national, religious or otherwise.

46 Author's interview with Bishop Dr. B. S. Dvamani, March 12, 2012.

47 Satish Deshpande, *Dalits in the Muslim and Christian Communities: A Status Report on Current Social Scientific Knowledge* (New Delhi: CBCI Commission for SC/ST/BC, New Delhi Commission for Dalits, NCCI, Nagpur, and Centre for Dalit/Sabaltern Studies, 2010).

48 The Bharatiya Janata Party (BJP) has opposed reservations for Christians and Muslims for this reason; however, this may be changing now as the party strives to present a more inclusive face. Author's interview with Chandan Mitra, March 16, 2012.

49 Author's interview with RL Francis and Ram Bharati of the Poor Christian Liberation Movement, March 15, 2012.

## 7. Conclusion: Implications for the Role of Religion in Contemporary Human Rights Discourse

I have argued in this paper that views of religion and human rights, as rooted in the sacrosanct autonomy of the individual, are not universal and have particular histories that gave rise to their contemporary meanings as well as to critical responses to them. Acknowledging the shared historical and conceptual trajectories of “religion” and “human rights” ought not, in my view, lead to a rejection of these ideals or to a wholesale embrace of them. Instead, the messiness of their histories as well as the instability of their meanings and uses in today’s world ought to lead us to reconsider ways in which collectives and individuals are always implicated with one another, just as politics and our non-political aspirations are.

At the same time, the difficulty, if not impossibility, of constructing pure national, religious, cultural, or other identities tells us something important about questions regarding the role of religion in human rights discourse. “Religion” and “human rights” can and ought to converse with one another. But this happens best when we stop thinking of each as a self-contained, monolithic whole. Like all living traditions, religious traditions endure because they have critically appropriated ideas and values from encounters with other traditions and new realities and continue to do so.<sup>50</sup> Much the same can be said about human rights talk. Instead of inquiring about the role of “religion” in “human rights,” we would do better thinking of religion and human rights discourse as one large conversation among multiple voices both within and beyond particular traditions.

50 In my view, John Milbank epitomizes the error of uncritically positing a so-called religious versus a secular view of the modern world. As I have argued elsewhere, Milbank, despite his protestations to the contrary, is a profoundly modern thinker whose construction of Christianity has more in common with Kant than with Augustine. See Leora Batnitzky, “Love and Law: John Milbank and Hermann Cohen on the Ethical Possibilities of Secular Society,” in *Secular Theology*, ed. Clayton Crockett (New York: Routledge Press 2001), 73–91. For an alternative view of Milbank, see Shai Lavi’s article in this volume (Shai Lavi, “Human Rights and Secularism: Arendt, Asad, and Milbank as Critics of the Secular Foundations of Human Rights,” 500–523). In my view, Talal Asad and Hannah Arendt, the other two thinkers considered by Lavi, have far more to offer in conversations about the role of religion in human rights discourse. This may well be because they are both self-consciously sensitive to the historicity of human ideas and existence. I would also argue that the best path for integrating Orthodox Judaism and human rights discourse begins with recognition of the ways in which Judaism and Jewish thinkers have always critically appropriated ideas from other traditions. This is not a modern phenomenon. One need not look any further than Maimonides’ *Guide of the Perplexed* for both an example and a theological justification of this process. For a different view of the possibilities for integrating Orthodox Judaism and human rights discourse, see Ronit Irshai’s article in this volume.



# Authors

Prof. Yasemin Akbaba	Political Science Department, Gettysburg College
Dr. Richard Arneson	Department of Philosophy, University of California, San Diego
Prof. Leora F. Batnitzky	Ronald O. Perelman Professor of Jewish Studies and Professor and Chair of Religion, Princeton University
Dr. Itzhak Brand	Faculty of Law, Bar-Ilan University
Prof. Hanoch Dagan	Stewart and Judy Colton Professor of Legal Theory and Innovation, Faculty of Law, Tel Aviv University; Senior Fellow, The Israel Democracy Institute
Dr. Avihay Dorfman	Faculty of Law, Tel Aviv University
Prof. Christopher L. Eisgruber	President, Princeton University
Prof. Izhak England	Bora Laskin Professor Emeritus of Law, The Hebrew University of Jerusalem
Prof. Jonathan Fox	Department of Political Studies, Bar-Ilan University
Dr. Ronit Irshai	Gender Studies Program, Bar-Ilan University and Shalom Hartman Institute, Jerusalem
Dr. Alick Isaacs	Ruthberg International School, Hebrew University of Jerusalem; Co-Director Talking Peace
Prof. Suzanne Last Stone	Professor of Law, Cardozo Law School and University Professor, Yeshiva University
Prof. Shai Lavi	Faculty of Law, Tel Aviv University
Ms. Sharon Leshem-Zinger	Program for Conflicts Management and Resolution Ben-Gurion University; Collot Ba'negev, Sapir College; Co-Director Talking Peace

Prof. Shahar Lifshitz	Dean, Faculty of Law, Bar-Illan University; Senior Fellow, The Israel Democracy Institute
Hon. Kenneth L. Marcus	President of the Louis D. Brandeis Center for Human Rights Under Law, Washington DC
Prof. Menachem Mautner	Danielle Rubinstein Professor of Comparative Civil Law and Jurisprudence, Faculty of Law, Tel Aviv University
Prof. Christopher McCrudden	Professor of Human Rights and Equality Law, School of Law, Queen's University Belfast; William W. Cook Global Professor of Law, University of Michigan Law School
Prof. Alison Dundes Renteln	Professor of Political Science, Anthropology, Law, and Public Policy, University of Southern California
Dr. Avinoam Rosenak	Jewish Thought Department, Hebrew University of Jerusalem and Van Leer Institute in Jerusalem; Co-Director Talking Peace
Prof. Lawrence G. Sager	Alice Jane Drysdale Sheffield Regents Chair in Law, University of Texas at Austin
Dr. Haim Shapira	Faculty of Law, Bar-Ilan University
Prof. Yedidia Z. Stern	Faculty of law, Bar-Ilan University; Vice-President of Research, The Israel Democracy Institute
Micha'el M. Tanchum	Department of Middle Eastern and Islamic Studies, Shalem College
Prof. Laura S. Underkuffler	Associate Dean for Academic Affairs and J. DuPratt White Professor of Law, Cornell University Law School
Dr. Gili Zivan	The Yaacov Herzog Center for Jewish Studies

Religion plays an elusive role in the human rights discourse. Historically, that discourse often employed distinctively religious rhetoric and arguments. On the other hand, religious practices are frequently perceived as a threat to a country's liberal identity and to individuals' human rights. *Religion and the Discourse of Human Rights* grapples with some of the universal challenges that emerge from this complex relationship, with the Israeli example offered as an interesting test case.

After delving into some of the classic questions of freedom of religion and freedom from religion, the book investigates the possibility of using religion as a source of human rights and presents case studies of the interaction between religion and human rights. It concludes with analyses of the appropriate discursive framework for a dialogue between a religious tradition and the human rights tradition.

*Religion and the Discourse of Human Rights* is the product of the first international conference of the Israel Democracy Institute's Human Rights and Judaism project. The project studies the relations among particularistic traditions (religious, national, social, and cultural) and universal liberal thought, both in general and in the context of the specific encounter between the Jewish tradition and human rights doctrine.



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