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EDITORIAL

At the core of the three research articles in this issue, John P. Anderson, Melissa Moschella, and Jonathan Rothchild are exploring the relationship between religion and freedom, each from his or her own fascinating perspective. In this editorial, I share what I sense is the historical Jewish approach to the relationship between religion and political freedom. Judaism is a diaspora religion historically and was—unlike both of its daughter religions, Christianity and Islam—always both a minority religion and never in its own land. This allowed it to develop unique doctrinal tools to flourish in many different societies whose social, religious, or political cultures it might not agree with.

Five doctrines of Jewish law are immediately apparent as relevant to this question of living as a diasporic minority. Furthermore, when examining these doctrines it quickly becomes clear that there is some play in the joints between them, and they do not, even in sum, clearly resolve all possible problems. Indeed, sometimes that play in the joints creates tension. To expound briefly on each of the five:

First is the idea that the "law of the land is the law," a doctrine with ancient and Talmudic roots. This doctrine imposed upon the diaspora Jewish community the duties of being good citizens and generally made participation in the commonweal of society, at least at the level of law obedience, a basic religious value.

Second, the purpose of secular law need not be to create a perfect society in which the "city on the hill" religious ideal is directly manifest in the law. The Jewish tradition assigned to secular law the much more mundane task of keeping the peace. In the words of Ethics of the Fathers 3:2, "Pray for the welfare of the government, for were it not for the fear of it, people would swallow each other alive."[1]

The third idea is one of practical freedom. In 1977, when questions about brain death were being raised and legislation was being proposed to determine legally the moment of death, the great American Jewish law sage Rabbi Moses Feinstein was asked what Jewish law authorities should recommend to New York's legislators. Rabbi Feinstein replied that Jewish law favored a policy of accommodating everyone's faith on this matter: secular law should be encouraged to allow people to function as their religion directs and should not seek the one and full "truth."

The fourth idea is personal responsibility. The Jewish tradition recognizes that, even as others around me are engaging in violations of Jewish law, I need not be responsible for the whole of my society; rather, I am responsible for insuring that my own action and the actions of those under my charge are proper. There are many times when all that can be done will do nothing to prevent a violation of Jewish law from happening, but I can make sure that I do not violate Jewish law.

The final idea is that assisting someone in a violation of my religious law is not the same as violating my religious law. The Jewish tradition is adamant that even though I must not sin, merely assisting another in a violation of Jewish law is not identical to my violating Jewish law. There

1 Ethics of the Fathers (Pirkei Avot) 3:2 (translation by author). For the exact Hebrew, see https://www.sefaria.org/Pirkei_Avot.3.2?lang=bi.

might very well be situations in which the Jewish tradition counsels that a specific course of conduct is a violation of Jewish law, without insisting that no one should assist in any way in the violation. Being a principal is not the same as being an accomplice.

These five principles—whose tensions are clear to anyone who might ponder them—clearly reflect that life as a principled religious person in a secular society that, almost by definition, does not share all one's principles all the time is complex. In response, one could embrace the goal of working to ensure that secular laws and principles are identical with one's own religious law, but the Jewish tradition averred that this goal was often both hard to achieve and ensured a tense relationship with the surrounding society.

The Jewish tradition went in a different direction: it rejected the idea that secular law is always holy, important, and must be zealously protected and morally defended. Instead, the Jewish tradition sought a secular law that protected freedom, maximized opportunity, validated religion generally, and sought to create a pleasant and livable society. Secular law was not the Jewish ideal for law: rather it was a base upon which a Jewish society could build its Jewish ideal. It also was the base upon which those of other faiths—and even those of no faith—could also build their ideal communities.

I would suggest that, while this approach of the Jewish tradition has thrived in America in the last fifty years for many reasons, particularly important is the broad general idea of federated law that is at the heart of law and life in America. Contemporary Western societies are diverse places. Individuals are often bound up in a complex array of cross-cutting authorities and normative allegiances owing to concurrent national, cultural, ethnic, racial, class, gender, and religious identities. Societies can respond to this reality of multilayered diversity in different ways, including through different legal regimes.

Many nations contend, quite sensibly, that it is necessary for every society to have only a single legal order in which all citizens are bound by and all societal relationships are governed by the same set of norms. Law both reflects and actualizes policy, and policy, in turn, represents society's collective vision of the substantive, procedural, and constitutional terms on which public-sphere—and even many private-sphere—relationships should be ordered. Permitting the simultaneous existence of multiple, conflicting legal orders, many of which may be reflective of deeply differing values, undermines society's ability to structure itself in accordance with majoritarian preferences. Permitting discrete groups to opt out of societal laws and policies undermines this sense of collective commitment to make society work.

In truth, as reasonable as this policy sounds, it has the weakest resonance in the United States. There is not now, nor has there ever really been only one law of the land in the United States. That country's basic federalist framework is built on the idea that there is no single "correct" law that should apply to all Americans all the time. Unlike many other nations that have uniform national laws, the United States maintains a much deeper commitment to substantive federalism, in which there are fifty states, each with its own laws, an overlay of federal law, Indian tribal law, and a maddening patchwork of overlapping local codes and regulations at the county, city, and town levels. This diversity provides Americans with myriad opportunities to choose which kinds of legal regimes they will use to order their lives. Americans make such choices of law by deciding what states, cities, or counties to live in; where to organize and register their business entities; where to practice their professions; and where to marry, divorce, and raise their children.

Similar opportunities to choose the legal system by which one will be bound is afforded by American contract law, which affords contracting parties the benefit of choosing the laws that will govern their contractual relationship. Parties can agree to structure their relationship not only under New York or California law, but under Canadian, French, or Chinese law. This strong

trend favoring freedom of contract and contractual autonomy suggests that the United States is very much a choice-of-law country. People and organizations regularly choose which state's laws they wish to order their affairs on given matters. The availability of legal choices of this kind is so ingrained in American civic, commercial, and family life that the forces of law strongly favor the idea that people can and should be able to use contractual mechanisms to select the normative systems that will govern their affairs, regardless of whether the choice is between New York, Delaware, or California law, or if it is between the laws of the state of New York and the norms and values of Judaism, Islam, or Christianity.[2] Instead, the United States' legal system reflects the idea that one should be able to choose which legal regime to use in ordering one's affairs, except in those relatively rare situations in which the kind of very broad national consensus ultimately reflected in overarching constitutional norms preempts and precludes the simultaneous existence of alternative legal regimes, including religious law. Importantly, the ability to choose contractually the laws under which contractual relationships shall be governed is not unique to the United States. It is embraced to a greater or lesser extent by many other common law and civil law jurisdictions as well.[3]

This American approach to legal pluralism does not merely reflect a thin, consent-based theory of legal justice: it remains consistent with thicker liberal conceptions of substantive justice and it is deeply consistent with the Jewish vision of the purpose of secular society and its laws. The ever-shifting balance between the law of the state, the law of the nation, and the law of my faith is the central problem of law and religion in the United States.

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2 See Roger S. Haydock and Jennifer D. Henderson, "Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership," *Pepperdine Dispute Resolution Journal* 2, no. 2 (2002): 141–98.

3 See Friedrich K. Juenger, "Contract Choice of Law in the Americas," *American Journal of Comparative Law* 45, no. 1 (1997): 195–208.