

**Jewish Law and American Public Policy:  
A Principled Jewish Law View &  
Some Practical Jewish Observations**

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**Mea Culpa**

*I am not a political scientist, and I am not active in American political life, such that my observations about what is good or bad for Jews in America are worthy of publication or even discussion. In the synagogue which I worship, we have a rule that the Rabbi is not allowed to speak about naked political matters from the pulpit, even Israeli matters, and that has struck most of the congregants, and the rabbi himself, as a wise idea, since these are exceedingly divisive matters whose truth is hard to prove, other than with hindsight -- and then it is too late!*

*Having said all of this, the reader might ask why I was asked to present a paper on law and public policy -- and why I agreed to do so!*

*The answer is that this paper is primarily focused on what Jewish law requires of Jews in matters of public policy. This is a matter that my scholarly skill can address. At the end of the paper, I cannot help but do that which I know I lack the credentials to undertake: I apply the principles that I develop to the public*

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arena, as I perceive it. That final step is the one most vulnerable to criticism and for that, I apologize.

## Introduction

### Monotheism and Fundamentals of Jewish Law

Jewish law presupposes that there is just one God, and that such a Deity is the sole God in the heavens and the earth, unmatched and omniscient. Jewish Law expects that all people -- Jews and Gentiles -- will accept this one God as THE GOD and worship God appropriately, Jews according to Jewish law, and everyone else according to Noahide law. (Noahide law is that area of Jewish law that discusses what Jewish law thinks gentiles should be doing, and is, in the eyes of Jewish law as binding as Jewish law itself).<sup>1</sup> To the extent that one can speak about a single Jewish contribution to religious civilization, it is this exact notion of

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<sup>1</sup> The universalistic law code governing those who are not Jewish (called the Noahide code) requires the observance of many commandments that are basic to the moral existence of people. The talmud (Sanhedrin 56a) recounts seven categories of prohibition: idol worship, taking God's name in vain, murder, prohibited sexual activity, theft, eating flesh from a living animal, and the obligation to have a justice system or enforce laws. These seven commandments are generalities which contain within them many specifications -- thus, for example, the single categorical prohibition of sexual impropriety includes both adultery and the various forms of incest. As has been noted elsewhere, these Noahide laws appear to encompass nearly 60 of the 613 biblical commandments traditionally enumerated as incumbent on Jews from the bible itself, which is nearly one-fourth of those biblical commandments generally applicable in post-temple times; See Aaron Lichtenstein, The Seven Laws of Noah (New York, 1986) at 90-91. The majority of the commandments found in Jewish law that are unrelated to ritual activity are also found in the Noahide code. The Noahide code was intended to be a practical legal code, and form a system that satisfied the social, legal and religious needs of peoples outside the framework of Judaism. **For more on this, see my** "Jewish Law and the Obligation to Enforce Secular Law," in *The Orthodox Forum Proceedings VI: Jewish Responsibilities to Society*, (D. Shatz & C. Waxman eds.) 103-143 (1997) and "Proselytizing and Jewish Law," in John Witte, Jr. and Richard C. Martin, eds., *Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism* 45-60 (Maryknoll, NY, 1999).

monotheism; this single value permeates every single facet of rabbinic thought. Inversely, Judaism's profound distaste for polytheism or paganism, either by Jews or gentiles, is profound and pervasive.

A word on paganism -- a distasteful word to the modern American mind -- is needed. Jewish law is rigorously monotheistic and has a considerable amount of religious contempt for faiths that deny the unity of God. These faiths are referred to in this article as pagan or polytheistic.<sup>2</sup> Conversely, the Jewish tradition has a great deal of respect for the inherent validity of monotheistic faiths other than Judaism. The Jewish tradition does **not** maintain that all must acknowledge the "Jewish" God; rather, it recognizes that monotheism need not be accompanied by recognition of the special role of the Jewish people.<sup>3</sup> Maimonides opening formulation of the Jewish view of messianic times is revealing. He writes:

One should not think that in messianic times that the normal practices of the world will change or that the laws of nature will change. Rather the world will be, as it always is. The words of the prophet Isaiah "and the wolf will dwell with the lamb, and the leopard shall lie down with the goat" are metaphors meaning that the Jews will live peaceful among the gentile nations of the world.<sup>4</sup>

Even in messianic times, the Jewish tradition avers that there

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<sup>2</sup> It is a complex matter of comparative theology to examine particular faiths and see where they fit. However, there is no doubt in this author's mind that many new age religions are polytheistic.

<sup>3</sup> See generally, Maimonides, Law of Kings, Chapters 9 and 10. For a thorough discussion of these issues, see David Novak, *The Image of the Non-Jew in Judaism* (New York, 1983).

<sup>4</sup> Maimonides, Laws of Kings 12:1.

will and should be Gentiles -- people who are not members of the Jewish faith. *The existence of those who are not Jewish is part of the Jewish ideal, which requires that all worship the single God, although not exclusively through the Jewish prism of worship.* The Talmud insists that in messianic times conversion into Judaism will not be allowed; Jews and Gentiles will peacefully co-exist.<sup>5</sup> Jewish law is not the ideal legal code for all -- only for Jews. For example, consider the remarks of Rabbi Judah Loewe of Prague concerning the Jewish law prohibition of cross-breeding in animals. He states:

There are those who are aghast of the interbreeding of two species. Certainly, this is contrary to Jewish law which God gave the Jews, which prohibits inter-species mixing. Nonetheless, Adam (the First Person) did this. Indeed, the world was created with many species that are prohibited to be eaten. Inter-species breeding was not prohibited because of prohibited sexuality or immorality ... Rather it is because Jews should not combine the various species together, as this is the way of Jewish law. As we already noted, the ways of the Jewish law, and the [proper] ways of the world are distinct .... Even those forms of creativity which Jewish law prohibits for Jews, is not definitionally bad. Some are simply prohibited to Jews.<sup>6</sup>

What flows most clearly from this is that there is nothing intrinsically wrong with cross breeding, even if it violates Jewish law; indeed, Rabbi Loewe nearly states that such conduct by Gentiles is good. Jewish law is not a general ethical category governing the conduct of all, but its scope and application is limited to Jews, not merely jurisdictionally, but even

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<sup>5</sup> Yevamot 24b.

<sup>6</sup> Judah Loewe of Prague (*Maharal Me-Prague*), BER HAGOLAH at pages 38-39 (Jerusalem 5731).

theologically.

### **Jewish Law and Paganism**

An interesting trend can be found in modern American culture; once freedom of religion was genuinely granted to all Americans (about 50 years ago),<sup>7</sup> pagan and polytheistic religions began to multiply -- they asked to be a part of the public religious dialogue in American culture. It is almost as if the talmudic observation that the hunger for paganism was dead<sup>8</sup> had been proven wrong in America. No less a public religious figure than Rev. Patrick Robertson, founder of the Christian Coalition, recently decried this phenomena, and has even indicated that he will oppose faith-based government funding unless something can be done to eliminate the 'deviant' religions from the right to receive government funding. Robertson states:

Our laws do not let government engage in content discrimination of speech. The same government grants given to Catholics, Protestants and Jews must also be given to the Hare Krishnas, the Church of Scientology or Sun Myung Moon's Unification Church -- no matter that some may use brainwashing techniques or that the founder of one claims to be the messiah and another that he was Buddha reincarnated. Under the proposed faith-based initiative, all must receive taxpayer funds if they provide "effective" service to the poor. In my mind,

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<sup>7</sup> Such that people could choose their mode of worship unafraid of consequences. To explain why this happened in America when it did is beyond the scope of this work. Profound freedom of religion -- by which I mean a person suffers no legal or economic consequences of his religious beliefs or conduct -- did not really exist until after World War II. For more on this, see John Witte, Jr. "Religion and the American Constitutional Experiment: Essential Rights and Liberties" pages 117-149 (Westview, 2000).

<sup>8</sup> **Sanhedren** 63a-b.

this creates an intolerable situation.<sup>9</sup>

Although Rev. Robertson does not explicitly tell us why this is 'an intolerable situation,' what he undoubtedly means is that any religion whose founder claims to be the messiah or Buddha reincarnated, ought not be allowed to be part of any government program. It is better to have no government programs than to have program that support any and all religions. These religions, Robertson feels, ought to be not supported.

This paper will address whether the across the board support for all religions -- including pagan faiths -- creates an intolerable political situation for Jews who adhere to Jewish law. How should we respond to attempts to deny pagans the right to worship freely? This article will explore how Jewish law and Orthodox Jewish society should respond to requests for religious freedom by members of secular society to the secular government, when we know that many will use their newly minted Freedom of Religion to engage in pagan rituals and practices that are categorically and absolutely forbidden to all (Jew or Gentile) according to Jewish law. It will then address a related question: What should Jewish public policy be when addressing matters that violate Jewish law or that encourage the violation of Jewish or Noahide law?

Consider for example, a stark case of conflicting values. In 1989, the city of Hialeah, Florida passed an ordinance that suppresses the right to a group of pagans to engage in their animal sacrifice, a rite which is central to their religious belief and ritual conduct. The members of the suppressed religious faith sued, alleging a violation of their First Amendment right to freedom of religion. This case is more complex as a matter of American law than it might appear, as the Supreme

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<sup>9</sup> Pat Robertson, "Bush Faith-based Plan Requires an Overhaul" USA TODAY March 5, 2001 Page 15a.

Court had recently ruled *in Employment Division v. Smith*<sup>10</sup> that neutral governmental rules can be applied against religious activity -- thus, for example, a law that prohibits medically unnecessary surgical procedures for children could ban ritual circumcision.<sup>11</sup> Should a Jewish institute for public affairs support Hialeah's law because it does, in fact, suppress paganism (as Jewish law wants) or should it support the right of the pagans to worship freely, as freedom of worship is a valuable principle that we ought to defend even if the people who are now using this principle conduct their lives in violation of Jewish law (Noahide law) principles, since they are pagan polytheists worshipping many gods?

The theme of this article is that these decisions are in the eyes of Jewish law, broadly speaking, political decisions, and not strictly a Jewish law one. They are not governed by a tight calculus of always requiring that one seek from the secular government a policy that maximizes observance either of Jewish law or of Noahide law. If one can persuasively argue this approach with regard to paganism, then I believe that this argument extends *mutatis mutandis*, to every other violation of the Jewish law, each of which is less serious than the utter rejection of monotheism.

#### Jewish Law is not Internally Religiously Pluralistic

Before one proceeds to analyze an exact response to polytheism in Jewish law, one must realize that the unvarnished Jewish law

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<sup>10</sup> 494 U.S. 872 (1990).

<sup>11</sup> For exactly such an article, see Ross Povenmire, "Do Parents have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from their Infant Children?: The Practice of Circumcision in the United States" 7 *Am. U.J. Gender Soc. Pol'y & L.* 87 (1999). See also 139 *Cong. Rec.* H2356, H2363 (daily ed. May 11, 1993) (Rep.Maloney) ("The Jewish practices of kosher slaughter and circumcision, for example, might be threatened [by *Smith*]").

(stripped of any nuances and complexities) is neither very pluralistic in its core values nor deeply tolerant of rooted and structured dissent from principles of Jewish law. The simple quotation from Maimonides, directly lays out the pristine Jewish law as he understood it. Maimonides states:

Heretics and apostates, those who worship idols yet are Jewish, or they sin in other ways to flaunt their sinfulness, even eating not kosher or wearing mixed wool and linen garments, are heretics. Heretics -- which are those who deny torah and prophecy among the Jews -- it is a good deed (*mitzvah*) to kill them. If one can kill them in public, with a sword, do that; otherwise, interact with them in stealth, until you can kill them. For example, if one sees one of them fall into a pit, and the ladder is in the pit, quickly grab the ladder from the pit and tell them 'I am running to take my child down from the roof and then I will return it' [and then do not return it] or other such actions.<sup>12</sup>

One can find many medieval Jewish law commentators who argue with the details of this exposition of the Jewish law. One can note

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<sup>12</sup> Maimonides, Laws of Murder, 4:10. This is not the place to address in detail the exact view of Maimonides, which also might prohibit direct murder. The first word of this section is, in the uncensored text of Maimonides, the Hebrew word *min*, which could be translated as "troublemakers" and thus this provision of Jewish law could be understood as limited to pagan troublemakers and not merely all pagans. With this tool, one can resolve the apparent tension between this section of Maimonides' code and his categorical statement in Laws of Murder 1:11 prohibiting all extra-judicial punishment, except in the case of a pursuer. (This case, which permits extra-judicial killing, is thus limited to cases of people who are both sinful pagans and troublemakers. Mere sinful troublemakers are covered by the rules found in 1:11, and may not be killed. However, Maimonides in Laws of Murder 4:11 is quite clear that "Gentiles with whom we have no dispute and Jewish thieves one does not cause their death, but it is prohibited to rescue them if they are dying, such as when one sees such a person drowning in the sea one may not rescue him as it states "do not stand by while your neighbor's blood is shed" and this is not your neighbor.



that most medieval commentators prohibit actually killing even an intentional first-generation heretic. However, merely permitting indirect murder or even merely noting that one should not save such people from death and we wish they were dead,<sup>13</sup> is illustrative of the fact that there is very little substantive textual sources in Jewish law for the 'live and let live' classical religious pluralism adopted by American law.<sup>14</sup>

One is hard pressed to find -- internal to Jewish law -- much that is positive to be said about the values of letting people worship whichever gods they see fit. The structured response of one group of commentators is that such people ought to be killed in public as a display of what happens to those who rebel, and a 'more liberal' view is that we should merely arrange for the indirect death of these people, without actually killing them! Yet a "more liberal" view posits that one should merely not save such people and let them die. None are very 'pluralistic' in their orientation. Jewish law has the same theoretical view towards gentiles and central violations of Noahide law; violations are punished, by execution and sometimes by other means, and systemic rebellion is punished by death.<sup>15</sup>

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<sup>13</sup> This is the view of the Rosh as cited in the Kesef Mishnah on Rotzeach 4:10. See also Tur, CM 222.

<sup>14</sup> Even the Rambam's formulation for wayward children (*tinokot shenishbu*) is not exculpatory in the classical sense of the word, as it is the possibility of repentance and change, combined with the status of these individuals as *annussim* that generates the leniencies. The conduct of these individuals is still 'off the charts'.

<sup>15</sup> For excellent works surveying issues concerning Noahide law generally, see R. J. David Bleich, "Mishpat Mavet be-Dinei Benei No'ah," Sefer ha-Yovel Li-Khavod Morenu ha-Gaon Rav Yoseph Dov Soloveitchik, eds. S. Yisraeli, N. Lamm, and Y. Rafael, Vol. 1 (Jerusalem, 1984), 193-208; *idem.* "Hasgarat Poshe'a Yehudi she-barah le-Erez Yisrael," Or ha-Mizrah 35 (5747):247-69; Nahum Rakover, "Jewish Law and the Noahide Obligation to Preserve Social Order," Cardozo Law Review 12 (1991):1073-1136; *idem.*, "Hamishpat

Thus, those who seek to advocate tolerance and pluralism as a political agenda by the Jewish community will not find it in the classical rabbinic sources themselves when they deal with flagrant and open sinners. Where then does this approach come from? The answer, I suspect, is in the logic of practical calculus captured well by the rabbinic phrase '*yatza secharo behefsado*<sup>16</sup>' -- the gain accrued through any given action can sometimes be lost through the price paid. Whenever the Jewish community sets out to advance a political or religious agenda, it should not only look at the gain from advance, but also the losses it must sustain to accomplish this advance, and whether -- no matter how hard it tries -- it will lose anyway, and thus ought not even try.

Elsewhere I have developed a model for reciprocal economic rights according to Jewish law, which is a more principled exposition of this notion. That article posits that:

in the area of financial rights, duties and obligations, Jewish law frequently excluded Gentiles from the full benefits of Jewish law because Jewish law did not consider them to be bound by the obligations of Jewish law. Thus, for example, Jewish law did not compel the return of the lost property of a Gentile, since he was

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ke-Erekh Universali: Dinim Bi-Bnei No'ah" 15-57 (Jerusalem, 5748); "Ben No'ah," Enzyklopedyah Talmudit, 3:348-62; Aaron Lichtenstein, The Seven Laws of Noah (New York, 1986). While undoubtedly the view of the Menachem ben Meir Ha-Meiri needs to be quantified, one is hard-pressed to accept that Meiri extends his view even to those who unquestionably violate central provisions of Noahide law. Rather, he is adopting a view of idol worship that excludes most Christians from that status. For more on this, see J. David Bleich, "Divine Unity in Maimonides, the Tosafists and Meiri" in Neoplatonism and Jewish Thought, Lenn E. Goodmann, ed. (1992) pp.237-254.

<sup>16</sup> Avot 5:11-12.

not legally obligated to return lost property belonging to others. Exclusion was based on a failure of reciprocity -- the privileges of Jewish law were given only to those who were fully obligated in and thus accepting of Jewish law, in this case, the laws of lost property.

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Thus, one can now fully comprehend the importance of personal status and reciprocity plays in the law of lost property. The unmodified talmudic rule for property of a person who does not consider himself bound by Jewish law is that one is under no obligation to return the lost property of such a person, since that person -- honest as he might be -- does not consider himself reciprocally legally obligated to return such property. Jewish law ruled that one may -- but need not -- return his property, just as he may -- but need not -- return your property. On the other hand, in the case of a person who considers himself bound by Jewish law to return lost property, one is obligated to return the property of such a person precisely because the person feels legally obligated to do the same. Indeed, the same rule is true for the lost property of a person who is legally bound according to secular law to return lost property to others. Jewish law would require that his property be returned, as he would do the same to a Jew.<sup>17</sup>

In this approach, Jewish law codified reciprocity as the manner of measuring the gain and loss. Indeed, a case can be made that this type of balancing is substantively principled in that it extends

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<sup>17</sup> See "The Gentile and Returning Lost Property According to Jewish Law: A Theory of Reciprocity" *Jewish Law Annual* XIII 31-45 (2000).

Jewish law rights to people who grant Jews secular rights. However, it is clear that this calculus is not grounded in a moral theory of political rights such as Dworkin or Rawls would consider consistent with liberal conceptions of political justice. A case could be made that the principles demonstrated in that article can form a basis for political pluralism in the Jewish tradition grounded in more than mere politics of survival.

If the proper Jewish response to a request for civil rights for pagan rites is to engage in a political calculus of reciprocity -- rather than to automatically support restrictions that diminish paganism -- the same political calculus is needed for every component of basic morality. The decision by the Jewish community to support the expansion or contraction of civil or political rights in secular law is not a Jewish law discussion and it never has been. Why this is so is explained in the next section.

#### **There is No Obligation to Prevent Secular Society from Sinning**

In an earlier article of mine, presented at an earlier Orthodox Forum of Yeshiva University, entitled "Jewish Law and the Obligation to Enforce Secular Law,<sup>18</sup>" I there reviewed the relevant technical Jewish law and conclude that **classical Jewish law does not compel a Jew to persuade or entice a people generally to observe the law** and that Jewish law sees no technical obligation in most situations -- even as it is morally laudatory -- to insure that Noahides obey their laws.

Why is there no obligation to monitor secular law and values to insure that they are consistent with Jewish law? The answer (as explained in the above quoted article) is that most decisors of Jewish law rule that -- other than in situations where one is the

<sup>18</sup> *The Orthodox Forum Proceedings VI: Jewish Responsibilities to Society*, (D. Shatz & C. Waxman eds.) 103-143 (1997).

"but for" causation of a person sinning -- Jews are not responsible, in a formal, technical, Jewish law sense, for the content of secular law or for its enforcement. (This is even more so true for the general tone of secular society.)

Even though there is no technical Jewish obligation to inform uninterested gentiles of the Noahide law, and no obligation upon Jews to enforce Noahide law, there are no less than five reasons why the Jewish community might, nonetheless, choose to participate in the articulation of values and law in Gentile community. They are:

A. *Heightened Ethical Duties to All People Created in God's Image*

Jewish law recognizes that it is morally laudatory to inspire people to observe Noahide law. Ethics of the Fathers (Perkai Avot) states:

[Rabbi Akiva] used to say, Humanity is precious since people were created in God's image.<sup>19</sup>

and Rabbi Lipman Heller comments:

Rabbi Akiva is speaking about the value of all people...He wished to benefit all people including Noahides...Rabbi Akiva seeks to elevate all inhabitants of the world...<sup>20</sup>

and Rabbi Judah the Pious observes:

When one sees a Noahide sinning, if one can correct him, one should, since God sent Jonah to Ninveh to return them to his path.<sup>21</sup> "

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<sup>19</sup> Ethics of the Fathers, 3:14.

<sup>20</sup> Tosafot Yom Tov on id.

<sup>21</sup> Sefer HaChasidim '1124.

Thus, there are many theological reasons why it might be good to teach Noahide laws generally, and indeed, a claim can be made that Jewish law obligates a truthful response to an honest query from a person concerning his obligation under the Noahide code.<sup>22</sup>

*B. Corruption in Society Affects Us All*

Jews are part of the general society, and what ails a general society will come to ail Jews also. Rabbi Moses Schick states:

[I]t appears that any situation that involves judging violators, even if they are Noahides, is a Jewish person's concern, for others will learn from any wrong done in public and will follow suit and, in the least, the sight of evil is harmful to the soul. Thus, it is our concern. In any case, it is inconceivable that any person living among the residents of a given city be beyond the jurisdiction of the [Jewish] court.<sup>23</sup>

Rabbi J. David Bleich puts it a little differently. He states:

Despite the absence of a specific *obligation* to influence non-Jews to abide by the provisions of the Noahide Code, the attempt to do so is entirely legitimate. Apart from our universal concern, fear lest "the world become corrupt," as Maimonides puts it, it is

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<sup>22</sup> Support for this proposition can be found in Seforno, commenting on Exodus 19:6 which clearly indicates that Jews must answer such questions from Noahides. See generally comments of Maimonides, Maseh Karbanot 19:16 and Meiri 59a.

<sup>23</sup>Maharam Shick OC 144. An example of this can also be found in the letter of Moshe Feinstein sent to the New York State governor favoring the implementation of the death penalty for certain crimes; Igrot Moshe, CM 2:68.

also very much a matter of Jewish concern and self-interest. Disintegration of the moral fabric of society affects everyone. Particularly in our age we cannot insulate ourselves against the pervasive cultural forces which mold human conduct. Jews have every interest in promoting a positive moral climate.<sup>24</sup>

Corruption of values affects all, and one needs to work to insure values in society -- our society in which we fully participate.

#### C. *Desecration of God's name*

By standing by silently when others sin, Jews sometimes appear to be supporting or condoning violations, which are a desecration of God's name. It is possible that there could be situations where public institutional silence by Jewish groups as to the propriety of a particular activity by Government or other groups, particularly when other religious groups are protesting this activity as immoral, could lead to desecrations of God's name and thus a wrong. On the other hand, the more clearly known it is that governmental policy is non-religious in nature and that Jewish law imposes no obligation on Jews to protest, the less serious an issue this becomes.<sup>25</sup>

#### D. *Fixing the World: Tikun Olam*

The mandate of *tikun olam*, a Jewish obligation to make the world a better place, might provide some direction.<sup>26</sup> Volume VII of the

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<sup>24</sup>Rabbi J. David Bleich, *Contemporary Halakhic Problems* ("Teaching Torah to Non-Jews") 2:339.

<sup>25</sup>See Rabbi Yehuda Gershuni, *Kol Tzofech* (unnumbered pages in the back of the book, seven pages after numbering ends) (2nd ed. 5740) where he discusses the possibility of selective teaching of the Noahide laws.

<sup>26</sup>See generally See R. Nissim, *Derashot haRan*, Number Eleven,

Orthodox Forum series was directed towards this principle, and the many different essays shed some light on this concept.<sup>27</sup> However, fixing the world has never been treated as a mandatory Jewish law principle in the same way as any general *religious obligation*, or even as a rabbinic obligation. One can choose, in particular circumstances, not to fix the world now if the consequences of fixing are deleterious to ones long term interest.

*E. Being a Light onto the Nations: Ohr Lagoyim*

There is the philosophical mandate to be a "light onto the nations of the world." As noted by medieval scholar Rabbi David Kimchi commenting on the words "light onto the nations" (Isaiah 42:6) "because of the influence of the Jews, the Gentiles will observe the seven commandments and follow the right path." While an elaboration on this concept is beyond the scope of this paper, and deserving one of its own, a brief review of the use of the term "light onto the nations" indicates that it is normally used to mean that the Jews should behave in an exemplary manner such that Gentiles will wish to imitate Jews, and not as a mandate to proselytize observance of Noahide law.<sup>28</sup>

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(which uses the term *tikun siddur hamedini* to refer to Noahide activity.) For a brief discussion of this issue, see Suzanne Last Stone, "Sinaitic and Noahide Law: Legal Pluralism in Jewish Law", *Cardozo L.R.* 12:1157 (1990). On the use of *tikun olam*, it is also important to examine the way that term is used by Maimonides, in Malachim 11:4 in the uncensored versions of his text (for example, see *Rambam Le'am*). This issue is quite crucial, as Maimonides image of *tikun olam* seems to be directed at the reason for religions other than Judaism; see also Responsa Kol Mevasser 1:47 and Hechail Yitzchak OC 38.

<sup>27</sup>*The Orthodox Forum Proceedings VI: Jewish Responsibilities to Society*, (D. Shatz & C. Waxman eds.).

<sup>28</sup> This is exemplified by the use of the phrase in Issiah 60:3; for examples of that in rabbinic literature, see Bava Batra 75a; Midrash Rabbah Esther 7:11; Midrash Berashit 59:7 and Midrash Tehilim (Bubar) 36:6. For a sample of its use in the responsa



## Summation

There are a wealth of rabbinic sources that encourage one to be an active participant in the secular society which one resides in. However, this participation was never deemed, neither formally nor informally, to be a *mitzvah* and was never formulated as any sort of a Jewish religious imperative.

### *Concerns in the Opposite Direction*

The absence of a general obligation upon Jews to increase observance of the Noahide code by Gentiles, or to rebuke Gentiles when they violate Noahide law, or to separate Gentiles from sin, allows for a balancing of Jewish interests to occur; Jews need not participate in general society to the detriment of the Jewish community or individual Jews. This is even true given the presence of such concepts as the prohibition of generating hatred through rebuke,<sup>29</sup> which certainly allow one to be silent in the

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literature, see Tzitz Eliezer 10:1(74); Yavetz 1:168 and particularly Chatam Sofer 6:84; see also Responsa of Rosh 4:40 which is also cited in Tur OC 59. None of these authorities use the citation in a legal context to direct Jewish participation in Gentile activities -- all of the citations are homolitical (Maharit EH 2:18 does appear to use it in a legal context concerning an inter-Jewish dispute; however upon further examination one sees that not to be so). This concept plays yet a more prominent note in cabalistic literature; see Sefer Rasesai Layla, '57 s.v.

*techlat* and *vezehu*. For a defense of this beacon-like (*i.e.*, Jews behave properly and this illuminates the world) understanding of the verse as the proper understanding of the literal meaning of the bible itself, see Harry Orlinsky, "A Light onto the Nations: A Problem in Biblical Theology" in Neuman & Zeitlin, *The Seventy-Fifth Anniversary Volume of the Jewish Quarterly Review* (1967) pages 409-428. For an indication as to why Radak might use both the phrase "observe the seven commandments" and the phrase "follow the right path," see Igrot Moshe YD 2:130 who indicates that the two are separate concepts.

<sup>29</sup>*Eva* in Hebrew.

face of sin by both Jews and gentiles. So too, the lack of obligation to rebuke an intentional sinner<sup>30</sup> diminishes the obligation mandating conduct to castigate sinners and remove sin. Even more so, the license to facilitate sin when the sin will happen no matter what a Jew does (and the sinner is a knowing and willing participant in a deliberate violation of Jewish or Noahide law) even further reduces the force of the obligation.<sup>31</sup>

**In sum, Jewish law does not mandate that Jews need to craft a policy towards secular law that always penalizes a violation of either Noahide or Jewish Law.** Jewish history supports this understanding of obligation. One sees very little overt response -- in the sense of active involvement -- by the Jewish law community to the conduct of the gentile community.

Of course, it would be ideal if we could always adopt a policy that increases fidelity to Noahide law by Gentiles, Jewish law to Jews and was also consistent with the Constitution of the United States. Sadly, we cannot -- because these values are frequently mutually exclusive. Frequently, we are called upon to make hard choices about which values we want to put on the public agenda before other values. The possibility that there might be circumstances where the unfettered teaching of the Noahide code in the United States (where distinctions based on religious affiliation, content, or practice cannot be governmentally defended) could be deleterious to the observance of Jewish law by

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<sup>30</sup>R. Shabtai Meir HaCohen (*Shakh*), *Yoreh Deah* 151:6 and R. Ezekiel Landau, *Dagul me-Revavah*, commenting on *Yoreh Deah* 151.

<sup>31</sup>Thus, a Jew may sell items whose purpose is sinful when others are selling these items also. See my *The Pursuit of Justice: A Jewish Perspective on Practicing Law* (Yeshiva University Press, 1996) where this issue is repeatedly addressed and "Enabling a Jew to Sin: The Parameters", *J. Halacha & Contemporary Society* 19:5-36 (1990).

Jews is not to be dismissed.<sup>32</sup> The possibility that a clearly Jewish attempt to seek enforcement of Noahide laws could result in vast antagonism and backlash toward Jews and Judaism from those groups whose conduct is categorically prohibited by Noahide law cannot be ignored. The consequences of endorsing and supporting a governmental policy that denies civil rights and encourages economic discrimination, against people who engage in pagan conduct which violates Noahide law, but which harms no one other than other willing participants, might be very drastic and deleterious to the Jewish community, which has benefitted mightily from ironclad rules against religious discrimination, both on a private and a public level.

This view of the mandates of Jewish law is supported by the Orthodox Jewish response to the *Church of the Lukumi Babalu Aye*,<sup>33</sup> (discussed as a hypothetical on page 6) dealing with pagan animal sacrifice. This case, in fact, was litigated, and many different Orthodox Jewish organizations briefed in the Supreme Court in support of pagans' right to worship.<sup>34</sup> Not a single Orthodox group briefed in favor of the City of Hialeah and the suppression of paganism. Why?

Certainly not because the conduct this matter is permitted by Jewish law or Noahide law. One can claim that the conduct of this group is a central breach of everything the Jewish tradition stands for -- monotheism. Nevertheless, the institutional advocacy groups within the Orthodox community realize that freedom to worship ought to be protected as a matter of secular law, even when the way worship occurs is a fundamental violation of our most

<sup>32</sup>For example, the promulgation of an abortion law in the United States consistent only with the Noahide code would cause situations to arise where halacha's mandates could not be fulfilled.

<sup>33</sup>Supra text accompanying notes **Error! Bookmark not defined.**,

<sup>34</sup>*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* 580 U.S 520 (1993)

basic Jewish rules and values. Were pagans to spread their religious values, one could readily see an anthropological change in how religion would be viewed, just as Judaism was viewed dramatically differently two thousand years ago when surrounded by polytheistic pagans. Yet, the Orthodox Jewish community and its various institutions have all been diligent in supporting freedom of worship for all, because, in the totality of the picture, it is of benefit to Orthodox Judaism.<sup>35</sup>

Thus, the central question is simple to state when it comes to matters of civil rights: what policy will leave the Jewish community better off? Indeed, this is part of a very complicated general question about whether the Orthodox community ought to seek the expansion of civil rights generally and political pluralism specifically, so as to protect the economic and political interest of the Jewish community.

(My own view of what is needed is stated in the next section, but

<sup>35</sup> See amicus curiae brief of COLPA in Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, United States Supreme Court (No. 91-948) (which states in note 1 that both the Orthodox Union and the Rabbinical Council agree with the legal position taken in this brief). No Orthodox Jewish organization filed an amicus brief against the Church.

Let me give another example. Recently there has been a great deal of discussion about government funding of religious schools, a concept that certainly is within the pale of both legal and social policy in the United States -- However, such funding, were it to occur, would undoubtedly have to be blind to the substantive religious values these schools articulate. While a goodly number of the Jewish schools will remain (one hopes) true to authentic Jewish values, we can readily predict that many will advance visions of Judaism with which we do not agree. Among the parochial schools for Gentiles, one hopes that most will be Godly. Some of these schools will be centrally anti-semitic even as they are Godly; others will, undoubtedly support and foster pagan worship -- and some of these pagans will be sympathetic to Jewish causes and others will not. But yet, the Orthodox Jewish community and its various institutes have all been diligent in supporting school vouchers, because, in the totality of the picture, it is of benefit to Judaism.

the answer I provide is centrally unimportant to this methodological discussion, because the details of my calculus may be wrong -- I, of course, think not. However, precisely because there is no exact Jewish law mandate compelling one to support increased observance of Noahide law as a Jewish law obligation, one must weigh a political calculus of what to do.)

Legislative goals which do not necessarily seek to enforce Jewish law can be well supported from the positions taken by decisors of Jewish law on political questions. For example, in 1977 Rabbi Moses Feinstein -- the dean of the Orthodox Rabbinate in America -- was asked what statutory changes Orthodoxy should seek from the New York State government on the issue of time of death. He replied that Orthodoxy should seek a legislative mandate that allows each person (or family) to determine the time of death in accordance with their own religious or personal beliefs. He did not suggest that the proper governmental policy to seek is that New York state should be urged to adopt Jewish law in this area. The public policy advocated by Rabbi Feinstein in the context of time of death -- one of Orthodoxy seeking to allow Jews to follow Jewish tradition, without forcing our standards on non-believers -- was the preferred one. This was so notwithstanding the certainty that some people, given this new freedom, will adopt a standard for time of death which violates Jewish law by withdrawing care before a time permitted by Jewish law and thus committing murder -- the only violation on par with polytheism. Rabbi Feinstein did not feel compelled to seek the enforcement of Jewish law by the secular state.<sup>36</sup> As Rabbi Chaim David Zweibel of Agudath Israel of America puts it:

The principle of religious accommodation is one that has stood the American Orthodox Jewish community in good stead in a wide variety of secular legal contexts . . .

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<sup>36</sup>See Letter of Rabbi Feinstein dated 8 Shevat 5737 provided to this author by Chaim Dovid Zweibel of Agudath Israel.

For what is really at issue here is . . . whether it is in the interest of the Torah observant community to combat secular laws that preclude individuals from following the guidance of their individual [Jewish law] decisors.<sup>37</sup>

Indeed, in the famous amicus brief filed by Agudath Israel of America in *Webster v. Reproductive Health Serv.*, 429 U.S. 490 (1989), Agudath Israel of America argued that secular abortion law ought never be allowed to become law if such a law preclude individuals from following the guidance of their individual religious leaders and have an abortion when mandated (as Jewish law sometimes does) by their own religious beliefs. This, one assumes, includes pagan religious leaders as well, and would include abortions that are murder in the eyes of Jewish law.

**The portion of the paper that I feel fully comfortable with is now over, and is worthy of summary. Jewish law imposes no religious obligation upon its adherents to seek to impose Jewish law as a personal religious value on individual members of society who do not wish to accept it. Thus, Jews who function according to Jewish law are not obligated to adopt political strategies that maximize adherence to Jewish or Noahide law by others, and may instead adopt alternative strategies with alternative goals.**

#### **Practical Applications**

This section, written in a smaller font, is also written with a more tentative voice. See the mea culpa introduction.

What is the political calculus that one must weigh? What policy is in the long term best interest of the Jewish community. To me, the answer is increasing religious, social and cultural freedom, even if it leads to violations of Jewish

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<sup>37</sup>See Rabbi Chaim Dovid Zweibel, Determining The Time of Death: Legal Considerations, *Journal of Halacha and Contemporary Society*, 17:49 (1989).

or Noahide law. Freedom is a better alternative for a Jewish society than one which suppresses people, as eventually we will be suppressed in such a society. Returning to our opening question in Reverend Robertson's mind -- that it is better to fund no faith than to fund ones whose founder thinks he to be the messiah -- why should a religious faith that denies that the messiah has yet to come (Judaism) be treated any better, as a matter of principle, than one that thinks its founder is the messiah?

Thus, the decision by Jewish organizations to support, oppose, or remain neutral in a dispute where certain people desire to expand their civil rights or general legal rights is not determined solely by whether the group under discussion is one generally in compliance with Jewish law or morality or even whether this particular claim is grounded in Jewish law or ethics. It is in the best interests of Judaism to support the continued granting of basic civil rights to all, *while making clear our moral opposition to the underlying conduct of those who exercise their freedom in violation of basic ethical norms of Judaism.* We are providing no moral legitimization for an activity if we seek to prohibit firing a person from his or her job because of it, and we make no claim of general ethical application when we seek to legalize or even protect sinful conduct from suppression by the secular law.<sup>38</sup>

My political thesis can be summarized as follows: *Religious Judaism is providing no moral legitimization to an underlying activity when it seeks to prohibit firing a person from his job, or eviction from his house, because of that (unethical) activity.* This ought to be the basic rule of civil rights. Like free speech, where we all understand that supporting the right of another to speak is not the same as agreeing with what the person says, supporting civil rights for people is not synonymous with morally approving of their actions. Thus, Religious Judaism should support the right of all individuals to be free from harassment and discrimination in their jobs and homes and to insure everyone's physical safety.

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<sup>38</sup>However, I recognize that my answer to this question is based on my read of American political history and a prediction of the future as I see it -- and I could be wrong in either or both of these determinations. One makes the best political judgment that one can. That is all that is expected of us.

Judaism should seek to prevent or prohibit people from being fired from their jobs or evicted from their homes for reasons unrelated to their suitability for the job or as a tenant.<sup>39</sup> Certainly, traditional Judaism should oppose, for example, a law that seeks to give homosexuals a *preferred place* in the legal or social spectrum. Thus, school curricula that teach the moral equivalency of homosexuality, governmental attempts to redefine marriage to include homosexual relations and governmental attempts to prohibit religious organizations from declining to hire overt homosexuals should be opposed.<sup>40</sup> However, merely because we favor the decriminalization of what we religious insist is odious conduct and the granting of civil rights for those who engage in such conduct does not mean that, in the name of religious freedom we need to support the placement of such conduct in a privileged position within society.<sup>41</sup> Indeed, it is a nearly risk-free<sup>42</sup> fulfillment of the Jewish people's mandate to be a moral "light onto the nations of the world" and demonstrate our moral and religious disagreement with such conduct.<sup>43</sup>

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<sup>39</sup>New York State has precisely such a law. The "legal activities law" essentially prevents a person from discriminating against employees or job applicants based on their participation in legally permissible activities unrelated to employment outside of times and places of employment; see *New York Law Journal* "Employment Law Update" September 3, 1992.

<sup>40</sup>There historically have been statutory exemptions for religious organizations from anti-discrimination laws.

<sup>41</sup>Thus, while homosexual activity should be legal, and economic discrimination against homosexuals should be prohibited, homosexual marriages should not be allowed. Not all conduct which is legally permissible is morally commendable or encouraged by government.

<sup>42</sup>Thus, even in situations where the realpolitik factors indicate that advocacy of civil rights is in error (such as in a highly politicized environment where no matter which position one favors, there are significant consequences) institutional silence would be the preferred policy as it minimizes the fallout resulting from actively supporting the denial of rights. policy.

<sup>43</sup>Now comes the difficulty: Do we, as Religious Jews, seek to grant equal civil rights to all or should we join hands with those groups that seek to deny political rights to those engaging in a consensual, but immoral, activity. It requires nearly an act of prophesy to determine which position is in our best long term interest. Frankly, this writer is inclined to answer that we should err on the side of more political freedom, rather than less. The fact is that many of the non-Jewish groups that seek to curtail the political rights of those who



We must realize that the political freedoms granted to minority religious communities through laws which prohibit religious, racial, and sexual discrimination in commerce are quite vital to the economic survival of Judaism in America. These laws are not guaranteed by the Constitution, and are subject to simple repeal by Congress and the dictates of the majority. They have been passed through the support of a broad consensus of minority religious and political

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deviate from the "Judeo-Christian" ethic, have historically been the profound enemy of the Jewish community.

Thus we are confronted by a set of difficult choices:

- 1] We can politically join with those who practice immoral acts to protect our own political future; or
- 2] We can associate with those who have oppressed (and murdered) us in the past, (and who we fear will oppress us in the future) to make illegal an activity that we agree is immoral; or
- 3] We can decline to publicly involve ourselves in this dispute and adopt an institutional policy of silence while not actively opposing civil rights to all.

I would suggest that, as a matter of political expedience and survival, that the best path for Religious Jews is to *generally favor (and certainly not oppose) granting civil rights and political freedom to all*, including those whose activity we find religiously repugnant, providing that the prohibited activity is one that is consensual and harms no one other than its voluntary participants; *hand in hand with that, we should seek to prohibit commercial discrimination against people based on factors unrelated to the commercial activity, such as religious affiliation, national origin, marital status, race or sexual orientation*. This position is based not on the assertion that all such conduct or statuses are acceptable to Jewish law and tradition (they aren't); but on the assertion borne out by history that many of those that seek to curtail activity based on a "religious" sense of ethics quite plausibly will seek, when they are in control, to advance the cause of "Christian ethics" in a way that will be incompatible with the continued successful existence of Judaism in the United States. If we do not seek to protect the civil and political rights of those with whom we theologically disagree, we may find these groups will not seek to assist us when our rights are settled. At the very least, Jewish public policy should not publicly and institutionally oppose granting civil and political rights to all. The exact details of this approach are left to be spelled out later and it certainly does have some limitations. It is clear to this author that Jewish public policy need not favor the legalization of prostitution and pornography in the name of (religious) freedom; as a general matter, activity entered into purely for financial gain creates a different set of issues unrelated to this one. So too

organizations. Should each of these groups conclude that they no longer support civil rights for the other groups due to philosophical or theological opposition to the underlying conduct, *all* of the groups risk losing the protection granted by law. In such a climate, one could easily imagine feminist groups supporting laws which discriminate against Judaism based on their understanding of our ritual practices.

There are those who will reply by asserting that I am understating the countervailing factor: the cultural influence secular society has on religious Judaism. The advocacy of governmental non-intervention in "private" matters will, these people claim, lead to a society so morally and socially disfavored by classical Judaism that our political freedoms will be of no value in such a society as we will not be able to function.

That is a danger; however, it seems to this writer that historical precedent runs counter to the belief that such a danger is the most serious. While one can cite numerous examples of Jewish societies within the last thousand years that have been destroyed by cultural and religious intolerance (the Crusades, the expulsion from Spain, the many pogroms, the Holocaust), one is hard-pressed to cite a Jewish culture destroyed by pluralism. Indeed, the Golden Age of Jewish life in Spain six hundred years ago and the incredible religious accomplishments of the Jews of Babylonia more than thirteen hundred years ago can be attributed to the religious freedom found in that time?and each magnificent era ended as religious freedom was abolished in the area. In fact, the political, economic and cultural resurgence of Religious Judaism in America since the 1960's can be directly attributed to precisely the pluralism in American society. The ability to work as a white-collar professional while keeping kosher, taking off for the Jewish holidays, and even wearing a *yarmulke* at work, is a result of tolerance by the secular society

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this approach should not be understood as preventing systemic governmental (financial) assistance to **all** religions in some of their charitable or educational acts. For example, governmentally sponsored tuition tax credits or payment vouchers to parochial day school?a governmental policy that would vastly increase Jewish education and thus continuity?is certainly proper under this rationale (and should be supported by all those concerned with the future of the Jewish community).

for cultural deviance. While Judaism does face certain challenges in a morally pluralistic society, these are challenges that we can (and will) overcome through heightened observance and additional outreach to the unaffiliated. Governmental persecution, massive societal anti-semitism or significant commercial discrimination against Jews are obstacles that pose much greater danger and are frequently beyond our ability to overcome.<sup>44</sup>

The tenuous basis of our religious freedoms is continuously demonstrated. In 1990 the United States Supreme Court, in *Employment Division v. Smith*<sup>45</sup> ruled that when a State passes a criminal law, it need not exempt from prosecution people who violate the law even if they harm no one and are motivated by a sincere religious belief. It was only through the efforts of a multi-denominational ecumenical coalition of very diverse religious groups that the detestable result the Supreme Court sought to make the law of the land was avoided through congressional legislation -- *The Religious Freedom Restoration Act of 1993*, which was struck down as unconstitutional by the Supreme Court as it applies to the States in *Boerne v. Flores*.<sup>46</sup> The right to the free exercise of religion remains unclear in America, as legislation of general application (such as legislation that surgery may only be done by a licensed physician in authorized hospital) can still be applied to destroy religious duties (such as the obligation to circumcise ones child) -- and the right to free exercise of our Jewish faith is a right worth protecting.

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<sup>44</sup>For example, in response to a number of European countries banning *shechita* (kosher slaughter) in the early part of this century, Judaism sought and Congress passed a law which states "No method of ... slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane: .. or (b) by slaughtering in accordance with the ritual requirements of the Jewish faith"; See 7 U.S.C. '1902. If we adopt the principle of refusing to support legislation that explicitly violates any provision of Jewish law, can we really expect others to support our legislative needs that violate their ethical norms?

<sup>45</sup>494 U.S. 872 (1990).

<sup>46</sup>RFRA is found at 42 U.S.C. '200bb-1, and it was struck down in *Boerne v. Flores*, 117 S.Ct. 2157 (1997).

## **Conclusion**

This paper seeks to establish that no technical Jewish law obligation is present mandating that Jews seek to enforce Noahide law, and that even in cases where central values directly related to our Creator's revelation to us are at stake, we need advance an agenda focusing on what will be in the long term best interest of the Jewish people. Jews need to look both ways before crossing the street, lest the society that we form to suppress 'deviation' suppress us also.