

A JEWISH CONSTITUTION

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My views for a Jewish constitution are based on the principles of Jewish law, and it would be helpful to first dispel some common misconceptions about that subject. Many have the mistaken notion that Jewish law is primarily about ritual practices, that these rituals are those described in the Hebrew bible, or that the Hebrew bible provides a complete description of Judaism.¹ Indeed, Jewish law has much to say about ritual practices, some of the rituals are described in the Bible, and the Bible is an important Jewish source. However, Jewish law has many sources, including the Talmud, several codes, commentaries, and a vast response literature. These sources pertain to every aspect of life and encompass all “secular” subjects as well, from admiralty, adverse possession, and arbitration, to tax and torts.

One feature that sets Jewish law apart is the religious obligation to study Jewish law on a daily basis, including those parts of the law that are no longer of practical importance. A Jew’s study of Jewish law is a religious act, preceded by a blessing,² and is intended to bring that person closer to God and to greater observance of God’s will.³

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¹ For a discussion of this problem see ELLIOT N. DORFF & ARTHUR ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* 13–14 (1988).

² SHULHAN ARUKH, *Orach Chayim* 47:1. Prayer and study are the two parts of a conversation with God. The Talmud recounts that Rabbi Chiyya bar Ami said that after the destruction of the Temple, God’s place in the world is restricted to the four cubits of Jewish law, and that when Abaye heard this he resolved to pray only where he studied. BABYLONIAN TALMUD, *Berachoth* 8a. Revelation is an ongoing process. The Talmud says when a man teaches his son Torah he is deemed to have received it at Mount Sinai. BABYLONIAN TALMUD, *Berachoth* 21b; see also MAX KADUSHIN, *WORSHIP AND ETHICS: A STUDY IN RABBINIC JUDAISM* 86 (2001) (“the proper study of Torah is a mystical experience, an experience wherein there is felt to be a manifestation of God in some manner.”).

³ THE TALMUD OF THE LAND OF ISRAEL, *Yerushalmi Hagigah* 1:7 (Jacob Neuser ed., 1986); see also ECCLESIASTES RABBAH 2. This thought is beautifully captured by Rashi in his commentary on the first Psalm. Where the Psalm says, “But his delight is in the teaching (in Hebrew, the Torah) of the Lord, and in his teaching he studies day and night.” Rashi observes that at first the Torah is referred to as belonging to the Lord, but once a person studies it, it is called his own. See *Psalms* 1:2 (Rashi’s Commentary).

Judaism teaches that God used the Torah as a blueprint for creation.⁴ Moreover, the rabbis taught that the world's continued existence depends on the covenant between God and the Jewish people requiring the latter to accept the Torah and live in accordance with its teachings.⁵ Consequently the Torah—meaning all of Jewish learning—is the essential constitution. A person seeking to live in harmony with God and nature must therefore conform to these teachings. Judaism recognizes two sets of obligations—one for non-Jews and one for Jews. Non-Jews are obligated to observe seven commandments, known as the Noachide laws—those applicable to Noah's descendants—consisting of six negative prohibitions and one positive commandment. According to Maimonides the six prohibitions are idolatry, blasphemy, murder, sexual violations, robbery, and eating the limb of a live animal. The positive commandment is to establish a legal system to enforce the above prohibitions.⁶ These commandments are general in character, establish a baseline for civilized society, and leave much room for definition, interpretation, and application. For example, the various theft offenses and harms to property are included under the heading of robbery;⁷ murder would presumably encompass other forms of homicide and personal injury. One would suppose that establishment of a legal system even entails a method of taxation to support a government capable of securing order. The details, however important, are left to each society to work out.

Jews are subject to a larger set of laws. These include a set of 613 commandments found in the Five Books of Moses. These consist of 365 prohibitions and 248 positive obligations to the extent applicable to one's circumstance.⁸ No one person is subject to all 613, as some laws apply only to the land of Israel, and some apply only to Priests (those descended from Aaron) or Levites, farmers or homeowners, men or women. In addition, Jews are subject to various rabbinic enactments, communal laws and

⁴ GENESIS RABBAH 1:1.

⁵ BABYLONIAN TALMUD, *Pesachim* 68b (Rabbi Eliezer said, "But for the Torah, heaven and earth would not endure, for it is said, 'If not for my covenant [that is expected to be studied] by day and night, I had not appointed the ordinances of heaven and earth.'").

⁶ MAIMONIDES, MISHNEH TORAH, *Melachim uMilchamot* 9:14. Nahmanides, Rabbi Moses ben Nahman (1194–1270), views the seventh Noachide commandment as requiring a set of laws to supplement the six negative commandments. NAHMANIDES, COMMENTARY ON GENESIS 34:13.

⁷ MAIMONIDES, MISHNEH TORAH, *Melachim uMilchamot* 9:9.

⁸ BABYLONIAN TALMUD, *Makkoth* 23b.

customs. This set of laws has not been static. For nearly two thousand years Jewish communities throughout their dispersion were engaged in various measure to a degree of self-government. As a result, Jewish law became a dynamic, complex legal system.⁹

There is therefore precedent for a Jewish constitution in the conventions and customs of Jewish self-government. What are some of the features of these legal structures that might be incorporated in a Jewish constitution?

Jewish law recognizes that some laws pertain to the relationship between humans and God (“theohuman laws”) while other laws pertain to the relationships between people (“interpersonal laws”).¹⁰ Laws governing Sabbath observance, prayer, and dietary restrictions fall within the theohuman category; laws concerning torts, contract disputes, and arbitration agreements are examples of laws interpersonal in nature. On the surface these categories roughly correspond to the distinction in American society between religious and secular. However, Judaism teaches that God is not only the source of all of the Torah’s law, but that he is also wronged when a person is wronged.¹¹ Therefore all Jewish law is religious from the Jewish point of view, even if that is not the case from an American court’s point of view.¹²

One implication of the Jewish view is the practical one that before one can seek God’s forgiveness for harms done to another person, one must make a sincere and sustained effort to obtain that person’s forgiveness. Compensation for harm done does not

⁹ See generally MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 46–61 (1994).

¹⁰ See Note, *Enforceability of Religious Law in Secular Courts—It’s Kosher, But Is It Constitutional?*, 71 MICH. L. REV. 1641, 1647 (1973).

¹¹ See MAIMONIDES, MISHNEH TORAH, *Hilchot Chovel uMazzik* 5:1 (it is a religious violation to strike a person). This view can be traced to *Genesis* 9:6 (Whoever sheds the blood of man, by man shall his blood be shed, for in the image of God made He man.). See GENESIS RABBAH 34:14 (it is as if murder reduces the divine image).

¹² Enforcement of state laws that prohibit mislabeling non-kosher food as kosher serve a sufficient secular purpose of preventing fraud even though they aid Jews in observing their religion. Note, *supra* note 10, at 1651. Similarly, enforcement of an agreement to arbitrate a commercial dispute in front of a rabbinic court poses no First Amendment problem even though Jewish law regards compliance with the agreement as a religious obligation. *E.g.*, *Meisels v. Uhr*, 593 N.E.2d 1359, 1365 (N.Y. 1992); *cf.* *Avitzur v. Avitzur*, 446 N.E.2d 136, 136 (N.Y.), *cert. denied*, 464 U.S. 817 (1983) (compelling arbitration of marital dispute before rabbinic tribunal as parties’ agreement compelled defendant to perform a secular obligation).

suffice. The rabbis understood the phrase “eye for an eye”¹³ not as requiring retaliation but as requiring more than compensation.¹⁴ The phrase is meant to instill a sense of the gravity of the situation as if the offender deserves to suffer retaliation and that the compensation is a substitute for it—but not a perfect substitute. The offender needs to atone for his wrong, so that beyond compensation the offender must seek the victim’s forgiveness, confess his error to God, express regret and pledge not to repeat the wrongful conduct.¹⁵

Because Judaism views interpersonal laws as having a religious dimension, the study and practice of these laws is also a religious act. The Talmud presents three ways of becoming pious: by fulfilling the principles of the Ethics of the Fathers, by fulfilling the requirements of prayer, and by fulfilling tort law.¹⁶ Avoiding harm to others is a form of religious observance.

In a world where everyone was pious there would be few if any disputes. People would treat each other with loving-kindness and would exercise the utmost care not to injure one another. In a perfect world there would be little if any need for a secular legal system. However, in such a world Jewish law would not cease to exist but would actually take on a more central role. People would have additional time and energy to study Jewish law, using it as a means of furthering their knowledge of God’s will, thus drawing closer to God. As the prophet Isaiah said, “[a]ll your children shall be taught of the Lord, and great shall be the peace of your children.”¹⁷ A virtuous circle would be created. As people became more aware of God’s presence in the world they would be even more careful to be good to one another. Again as Isaiah said, “[t]hey shall not hurt nor destroy in all my holy mountain: for the earth shall be full of the knowledge of the Lord, as the waters cover the sea.”¹⁸

Can such a time really exist? In the rabbinic imagination such was nearly the case in the reign of King Hezekiah in the

¹³ *Exodus* 21:24.

¹⁴ MAIMONIDES, MISHNEH TORAH, *Hilchot Chovel uMazzik* 1:3. Cf. MOSES MAIMONIDES, GUIDE FOR THE PERPLEXED 344–47 (M. Friedländer, trans., E.P. Dutton & Co., 2d ed. 1910) (distinguishing between biblical principle and rabbinic interpretation).

¹⁵ See MAIMONIDES, MISHNEH TORAH, *Hilchot Teshuva* 1:1; see also MAIMONIDES, MISHNEH TORAH, *Hilchot Chovel uMazzik* 5:9. BABYLONIAN TALMUD, *Yoma* 85b.

¹⁶ BABYLONIAN TALMUD, *Baba Kama* 30a.

¹⁷ *Isaiah* 54:13.

¹⁸ *Isaiah* 11:9.

seventh and eighth centuries before the common era, a time when Isaiah prophesied. The rabbis said that under Hezekiah's leadership, every man, woman, and child living in Israel knew even the details of the laws of ritual purity, some of the most technical and difficult portions of Jewish law.¹⁹ The rabbis said that God wanted to make Hezekiah the Messiah, that he was the one referred to in Isaiah's famous words, "[u]nto us a child is born, a son is given."²⁰ Unfortunately, Hezekiah was passed over because he never uttered a song of praise to God.²¹

Judaism recognizes that people are imperfect, that disputes will occur and will need resolution, and that people will need direction to lead them to a more perfect world. The rabbis said, "the Torah was not given to ministering angels."²²

Governing structures have changed throughout Jewish history. The Book of Exodus describes Moses establishing a set of courts to assist him, with Moses having jurisdiction over important matters, some of which Moses took to God for resolution.²³ In later biblical accounts various rulers, some called "judges," and others who were kings, decided disputes.²⁴ In Babylonia Jews were governed by two sets of internal Jewish courts—those established and run by the rabbis²⁵ and those administered by the Exilarch,²⁶ the Jewish leader of the Jews in exile.

A passage in a treatise of the Mishnah known in Hebrew as *Pirkei Avot*, and in English as the *Ethics of the Fathers*, states, "Rabbi Simeon said, there are three crowns, the crown of Torah, the crown of priesthood and the crown of royalty; but the crown of a good name excels them all."²⁷ Beginning with medieval times some rabbis used the concept of the three crowns to describe the allocation of authority in the Jewish community.²⁸ According to

¹⁹ BABYLONIAN TALMUD, *Sanhedrin* 94b.

²⁰ *Isaiah* 9:6. Hezekiah is said to have eight other names: Wonderful, Counselor, Mighty, Ruler, Father, Everlasting, Prince, and Peace. BABYLONIAN TALMUD, *Sanhedrin* 94a (based on the verse in Isaiah).

²¹ BABYLONIAN TALMUD, *Sanhedrin* 94a.

²² BABYLONIAN TALMUD, *Berakhot* 25b.

²³ The Talmud rejected the validity of continuing revelation. See BABYLONIAN TALMUD, *Bava Metzia* 59a–b.

²⁴ *E.g.*, *Judges* 4:6; II *Samuel* 19:30; II *Kings* 8:6.

²⁵ *See e.g.*, BABYLONIAN TALMUD, *Bava Kamma* 27b.

²⁶ *See e.g.*, BABYLONIAN TALMUD, *Bava Kamma* 58b.

²⁷ PIRKEI AVOT 4:13, in BABYLONIAN TALMUD: SEDER NEZIKIN, *Aboth* 51 (I. Epstein trans., Socino Press 1935).

²⁸ *See ELON, supra* note 9, at 55–57; DANIEL J. ELAZAR & STUART A. COHEN, *THE JEWISH POLITY* (1985); Steven F. Friedell, *Jewish Tort Law Remedies Not*

this view, the rabbinic courts wore the Torah crown, but the crown of royalty was worn not only by the anointed kings but also by those who exercised civil authority, be it the Exilarch²⁹ or the local communal governing councils. These councils not only legislated but appointed commissioners and judges to enforce the law. In some communities rabbis oversaw communal legislation.³⁰ In other communities rabbis played only an advisory role.³¹

Rabbis have long recognized that the Torah's laws as developed and interpreted in Talmudic and post-Talmudic times were often impractical and needed to be supplemented or supplanted by other legal norms. The Talmud recognized that courts and communities needed to define their own norms and procedures to ensure survival, provided only that these rules be adopted "for the sake of Heaven."³² Later rabbis came to see that society was not sustainable if courts were required to rigorously apply certain rules such as the two-witness rule, the prohibition of accepting confessions in criminal cases, or the extreme limitations on tort liabilities.³³

Although both rabbinic authority and secular government can establish and enforce rules of conduct, the crown of Torah's primary function is a religious one: to bring the Jewish people closer to God. Rabbis understood that secular governments, both

Based on Torah Law—An Approach based on the Ran and the Rivash, 10 JEWISH POL. STUD. REV. 47, 49–51 (1998). Cf. BABYLONIAN TALMUD, *Sanhedrin* 52b (the community leaders' power is derived from the king's power). According to one of the leading rabbis of the 13th century, the Jewish community's power to depart from Torah law is based in part on King David's execution of the Amalekite based solely on the Amalekite's account that he had killed King Saul, as recounted in II *Samuel* 1. By contrast, the Torah law precludes self-incrimination. RABBI SOLOMON BEN ABRAHAM ADRET, RESPONSA RASHBA 4:311. Other authorities derive the community's power to depart from the law by analogy to the power of a rabbinic court. E.g., SHULCHAN ARUKH, *Choshen Mishpat* 2:1.

²⁹ MAIMONIDES, MISHNEH TORAH, *Sanhedrin* 4:13.

³⁰ This was the dominant view and is based on the Talmud. See BABYLONIAN TALMUD, *Baba Batra* 8b.

³¹ See RABBI ISAAC BEN SHESHET PERFET, RESPONSA RIVASH 399. See generally Friedell, *supra* note 28, at 51–54.

³² E.g., BABYLONIAN TALMUD, *Yebamoth* 90b.

³³ See e.g., MAIMONIDES, MISHNEH TORAH, *Melachim uMilchamot* 3:10; RABBI ASHER BEN YECHIEL, RESPONSA 101:1 (a court can impose fines when necessary and can depart from law if there is custom to do so); *Id.*, 107:6 (a judge may decide based on intuition as to the truth even in absence of formal proof); RABBI SOLOMON BEN ABRAHAM ADRET, RESPONSA RASHBA 3:393; RABBI ISRAEL ISSERLEIN, RESPONSA TERUMAT HADESHEN 307 (court can depart from rule of no liability for indirect damage caused by slander and impose fine if deemed necessary to prevent future incidents).

Jewish and non-Jewish, are better able to establish rules deemed necessary for social order. Jewish law expresses this view in a number of ways. It requires rabbinic courts to give effect to certain laws of a non-Jewish state through the maxim, “[t]he law of the kingdom is the law.”³⁴ It allows secular Jewish authorities to legislate and regulate affairs,³⁵ it gives legal effect to certain customary practices,³⁶ even if they are based on non-Jewish law,³⁷ and it borrows non-Jewish legal concepts that were unknown to earlier Jewish authorities, such as corporate law³⁸ and copyright.³⁹ The notion that God requires and authorizes all nations to develop laws for preserving social order, combined with the recognition that Jewish law can be modified by custom, allows Jewish law to grow by incorporating new ideas into Jewish law. Moses accepted the wise counsel of his Midianite father-in-law regarding the best means of administering justice for the Israelites. The Talmud records how rabbis were willing to engage in learned discussions with non-Jewish thinkers and rulers—be it discussions of science or discussions about the soul—and they integrated some of these foreign ideas into their understanding of Judaism.⁴⁰

Even when departing from the Torah law, rabbis sought to ground their decisions in some general principle.⁴¹ A cornerstone of Jewish jurisprudence was found in the verse from Proverbs, “[h]er ways are ways of pleasantness, and all her paths are peace.”⁴² From this the rabbis derived two sets of principles: when faced with a choice of two alternatives, courts prefer the more pleasant

³⁴ See 6 ENCYCLOPAEDIA JUDAICA, *Halakhah: Structure of Halakhah* 3747 (2d ed. 2007).

³⁵ ELON, *supra* note 9, at 678ff.

³⁶ ELON, *supra* note 9, at 880ff.

³⁷ Ron S. Kleinman, *Civil Law as Custom: Jewish Law and Secular Law—Do They Diverge or Converge?*, 14 REV. RABBINIC JUDAISM 11 (2011).

³⁸ See 12 ENCYCLOPAEDIA JUDAICA, *Legal Person* 604 (2d ed. 2007).

³⁹ See Miriam B. Altman, *IP Rights Outside of Secular Law: Copyright in Judaism and Islam*, 43 MD. B.J. 52 (June 2010); 8 ENCYCLOPAEDIA JUDAICA, *Hassagat Gevul* 448 (2d ed. 2007).

⁴⁰ E.g., BABYLONIAN TALMUD, *Pesachim* 94b (path of the sun); BABYLONIAN TALMUD, *Sanhedrin* 91b (when does a soul enter the body and when does a person develop an evil impulse); see also MAIMONIDES, *MISHNEH TORAH Kiddush HaChodesh* 17:24 (we rely on non-Jewish books on astronomy). See generally RABBI BARUCH EPSTEIN, *BARUCH SHE’AMAR, TEFILOT HASHANA* 5–8 (1969) (collecting examples of Jewish customs and rules that derive from non-Israelite and non-Jewish practices including many derived from the non-Israelite prophet Balaam who had sought to curse the Israelites).

⁴¹ E.g., RABBI NISSIM BEN REUVEN GERONDI, *RESPONSA* 30 (using metaphor from Nehemiah 3:35).

⁴² *Proverbs* 3:17.

one;⁴³ and people should act in such a way as to promote peace with others.⁴⁴

A Jewish constitution could take a variety of forms consistent with the principles of Jewish law and the history of limited Jewish self-government. The idea of three crowns suggests that while a theocracy is possible—a Sanhedrin that exercises all legislative and judicial functions, wearing both the Torah and the royalty crowns—it is also possible to separate the two, giving some or even almost all governing authority to non-rabbinic bodies while giving a rabbinic council some power, and perhaps only an advisory role.

The drafters of a Jewish constitution should be guided by the principle of Jewish law that rabbinic legislation must not impose a burden on people that will be too difficult for them to live by.⁴⁵ Accordingly, when most or a sizable minority of the community are non-religious and opposed to rabbinic authority, the rabbinic role under a Jewish constitution must be no more than advisory. If the community became more religiously observant and more accepting of a direct rabbinic role, it would be appropriate for the rabbis to take on a greater role, perhaps having the power to delay legislation or send it back for reconsideration, but not the power to prevent legislation from being adopted. If the community became more solidly observant, a greater role for the rabbinic authorities can be imagined, either having the power to block legislation or even having the sole power to legislate. In the meantime the rabbinate would have much work to do to bring the world closer to God through education.

Even with a limited role for rabbinic authorities, non-rabbinic courts and legislators can choose to be guided by general principles of Jewish law. In modern Israel this has sometimes been the case. The Israeli courts have often cited Jewish law as dicta in support of a decision.⁴⁶ In one instance, Israel's Supreme Court used Jewish law even more directly to hold that a man does not

⁴³ *E.g.*, RABBI DAVID BEN SOLOMON IBN ZIMRA, RESPONSA RADBAZ 1052 (Jewish law does not require a person to have a limb amputated in order to save another's life). *See generally* AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW: BEYOND EQUITY: HALAKHIC, ASPIRATIONISM IN JEWISH CIVIL LAW 181 (1991).

⁴⁴ *E.g.*, MAIMONIDES, MISHNEH TORAH *Melachim uMilchamot* 10:12 (general principle governing relationship of Jewish government to non-Jewish inhabitants). *See generally*, ELON, *supra* note 9, at 1892 n.255.

⁴⁵ *E.g.*, BABYLONIAN TALMUD *Baba Kamma* 79b; MAIMONIDES, MISHNEH TORAH *Hilchot Mamrim* 2:5.

⁴⁶ *See generally* YUVAL SINAI, APPLICATION OF JEWISH LAW IN SECULAR COURTS (2009) (in Hebrew).

have right to rape his wife.⁴⁷ At the time of the decision, the law in England and in most of the United States was the opposite.⁴⁸

If judges and legislators wanted to be inspired by the teachings of Jewish law, the legal system would look vastly different than what we are used to.⁴⁹ Jewish law emphasizes compromise as a means of promoting peace in the community. Although the search for truth and peace can be complimentary goals, they can also conflict, and when they do, peace is more important.⁵⁰ Jewish law empowers judges to impose compromise if necessary and to depart from the formal rules of law and procedure when the judge deems it necessary to do so, provided only that the judge acts “for the sake of Heaven.”⁵¹ They may instruct a person to act beyond what the formal law requires, with various degrees of sanction.⁵² Lawyers play a small role in this process.⁵³ Ideally, the parties appear before a rabbinical court without legal representation and without professional advice.

Unless the rabbis see a need for an extra-legal sanction, Jewish tort law imposes less liability than does American law. The Talmud and the later codes recognize no concept of *respondeat superior* or other forms of vicarious liability, and liability is not usually imposed when harm is indirect.⁵⁴ However, as we have seen, when a person is liable for injuring another, the injurer must not only compensate the victim but must make sincere efforts to obtain the victim’s forgiveness, and the victim must also act responsibly.⁵⁵

A comparison of American and Jewish tort law reveals something about their cultural values. In America, a tortfeasor’s only obligation for the most part is to pay damages, something often handled by insurers and their lawyers. In a few cases a tortfeasor may face the prospect of an injunction or a criminal penalty. However, the tortfeasor has no reason to speak to the

⁴⁷ CA 91/80 Cohen v. State of Israel 35(3) PD 281 [1981] (Isr.).

⁴⁸ See Rene I. Augustine, *Marriage: The Safe Haven for Rapists*, 29 J. FAM. L. 559 (1990-91).

⁴⁹ For an elaboration of some of ideas expressed here, see Steven F. Friedell, *The “Different Voice” in Jewish Law: Some Parallels to a Feminist Jurisprudence*, 67 IND. L.J. 915 (1992).

⁵⁰ See BABYLONIAN TALMUD, *Sanhedrin* 6b, MAIMONIDES, MISHNEH TORAH *Sanhedrin veba’ Onashin haMesurin* Iahem 22:4.

⁵¹ See *supra* text accompanying notes 32 & 33.

⁵² See generally Shmuel Shilo, *On One Aspect of Law and Morals in Jewish Law: Lifnim Mishurat Hadin*, 13 ISR. L. REV. 359 (1978).

⁵³ 2 ENCYCLOPAEDIA JUDAICA, *Attorney* 648 (2d ed. 2007).

⁵⁴ See Friedell. *supra* note 28, at 48.

⁵⁵ See *supra* text accompanying note 15.

victim or to show concern for the victim's welfare. The process alienates both victim and injurer. By contrast, Jewish law sees a web of intricate relationships that tie a community together. The injury and the resulting dispute have damaged that web, and the parties are obligated to try to rebuild it.

Although imposing less tort liability, Jewish law requires everyone in society to contribute "tzedakah" (charity) for the benefit of others. In medieval Jewish society, medical care was provided by town physicians employed by the Jewish community. These physicians were not allowed to charge the poor or even to accept payment from them. They could charge the wealthy and might accept payment from those in the middle class.⁵⁶

A central teaching of Jewish law is that all people are created in the image of God.⁵⁷ To love one's fellow through action is a way of showing love of God. A fundamental concept in Judaism is that all people are subject to certain commandments—*mitzvot*, the plural of *mitzvah*. It is often said that Jewish law emphasizes the primacy of duties, rather than rights.⁵⁸ But the word "duties" does not capture the flavor of *mitzvot*. A duty suggests a constraint or a burden. Judaism focuses not on the burden but on the opportunity to bind with the community and with God. A person is privileged to be able to perform a *mitzvah*, often the occasion for reciting a blessing. If two people perform similar acts but only one of them is obligated to do so, one might think that the volunteer's merit is greater.⁵⁹ Jewish law sees the matter differently. The one performing a *mitzvah* has the greater merit.⁶⁰ Indeed, depriving another the opportunity to perform a *mitzvah* is a tort.⁶¹

⁵⁶ See generally Joshua Leibowitz, *Town Physicians in Jewish Social History*, in INTERNATIONAL SYMPOSIUM ON SOCIETY, MEDICINE AND LAW 117, 121–22 (H. Karplus, ed., 1973).

⁵⁷ *Genesis* 1:27.

⁵⁸ E.g., Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 312–13 (Amihud I. Ben Porath, trans., 1961); see also Sheldon Nahmod, *The Duty to Rescue and the Exodus Meta-Narrative of Jewish Law*, 16 ARIZ. J. INT'L & COMP. L. 751 (1999); Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987).

⁵⁹ The law of salvage, for example, offers a reward to the volunteer, but one who saves property under a duty to do so receives no reward. See *Markakis v. S/S Volendam*, 486 F. Supp. 1103 (S.D.N.Y. 1980).

⁶⁰ See BABYLONIAN TALMUD, *Baba Kama* 38a.

⁶¹ MAIMONIDES, MISHNEH TORAH *Hilchot Chovel uMazzik* 7:13. The amount of damage is left to the discretion of the court. In the State of Israel breach of a patient's autonomy is a tort even if the patient would have chosen the same course of treatment had the doctor given the patient the opportunity to make it. CA 2781/93 Daaka v. Carmel Hosp. 53(4) PD 526 [1999] (Isr.). Justice Hendel

In our discussions of religious liberty we ought to focus on the purposes that religion can serve, particularly on the ways in which a religious outlook can inspire people to help others. I hope this look at the values implicit in Jewish law has shown that a religious orientation can do this. It can encourage more cooperation and less competition, and where disputes arise, more compromise and less contention, greater attention to the particulars of a case and the needs of the people involved and less focus on rules of general application. Although the pursuit of truth is of value, the pursuit of peace is more precious.

Would one have to be Jewish to adopt this orientation? Would one even have to believe in God to do so? In a daring passage in the Jerusalem Talmud, Rabbi Hiyya bar Ba said that God would prefer that the people would desert God if they would only keep his Torah.⁶² One can understand this in two ways. An explanation given in the Jerusalem Talmud is that if people were to observe the Torah, they would eventually be lead back to God.⁶³ One can also accept the statement at face value. Too often we have seen people of all faiths claim rights for themselves in the name of God or religion that seriously hurt others. One would rather a world where people lived a moral life, a life of loving-kindness for others, without a professed belief in God.

A constitution based on Jewish values would encourage loving-kindness, which Judaism considers one of the pillars on which the world rests.⁶⁴ It is what makes life worthwhile. It is relatively easy to write a constitution. The hard part is translating the constitution's ideals into practice through statutes and regulations, and above all, by instilling it in the hearts and minds of the people. Since people have different ideas of what loving-kindness might require—take, for example, the difficult issues surrounding the beginning and ending of life—we may only be able to agree on a process for making these kinds of decisions. One principle ought to be that people not impose their idea of what is good on others. Loving-kindness requires listening and careful dialogue.

Although the views presented here are not highly systematic, a few principles ought to be clear. The ultimate goal of

drew a connection to the rule of Jewish law. CA 9936/07 Ben David v. Antebi 2011(1) PD 2443 [2011] (Isr.).

⁶² THE TALMUD OF THE LAND OF ISRAEL, *Yerushalmi Hagigah* 1:7 (Jacob Neuser ed., 1986).

⁶³ *Id.*

⁶⁴ See PIRKEI AVOT 1:2.

the Torah is for people to know God as much as humanly possible, to live in harmony with God's will, and to love God by demonstrating loving-kindness to all others. The study of Torah is essential to achieving these goals. Jews and non-Jews have different sources for their responsibilities, but in terms of preserving social order in an imperfect world these are essentially the same. Although Jewish law places few obstacles in the particular choices to be made in preserving social order, Jewish law provides some principles that may lead to a more peaceful world.