

## JUDAISM, PLURALISM, AND CONSTITUTIONAL GLARE

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I am deeply committed to Jewish religious observance, the American experiment, and the legal imagination. And I have found over the years that a deep pluralism, taking many forms—legal, religious, and philosophical among them—has become the through-line tying my scholarly projects to each other and to my spiritual life. That pluralism comes with a good deal of tension, irony, and unresolved difficulties, but that, it seems to me, is part of its power and glory, and I would hate to be without it. Pluralism, I should not need to emphasize, is not relativism or skepticism.<sup>1</sup> But it is a recognition (and in some contexts a celebration) of multiplicity, complexity, perspective, humility, and the imperatives of encounter.

What follows is a minor personal and intellectual memoir. It is “about me” in a way that is uncomfortable. But I offer it in the hope that tying together a set of otherwise disparate topics might be of some highlighting commonalities that would otherwise be less apparent.

### I.

I was born in Israel. My mother had originally come from Germany. When she was only about nine or ten years old, not long after Hitler’s rise to power in 1933, her parents had the miraculous prescience to leave everything behind and smuggle themselves and their five daughters across Europe and the Middle East to safety. My father came from the small city of Sighet in Transylvania.<sup>2</sup> He reached Palestine in 1939 as an enthusiastic

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<sup>1</sup> See, e.g., NICHOLAS RESCHER, *PLURALISM: AGAINST THE DEMAND FOR CONSENSUS* (1993).

<sup>2</sup> Transylvania’s political history is complex. It was famously ceded from Hungary to Romania in the Treaty of Trianon after World War I. Hungary administered the region during much of World War II before handing it over to Romania again in 1944. When my father was growing up, he spoke Romanian in the public schools, Hungarian in the streets, and Yiddish at home, and he prayed in Hebrew in the synagogue. The city of Sighet, in Maramures County, was

teenage Zionist pioneer. His parents and siblings and much of his extended family, who remained behind, perished in the Nazi death camps. Sighet was also the home of Elie Wiesel, who survived Auschwitz,<sup>3</sup> and whom my father remembered as a young boy.

My parents, brother, and I left Israel when I was about two and eventually settled in the United States. We were not a religiously observant home, but my father in particular was knowledgeable and respectful of religion. We sporadically attended our local Conservative synagogue in New Jersey, where I celebrated becoming a bar mitzvah.

When I got to Yale College as a freshman, I did not gravitate to Jewish life. I was not hostile, just disengaged. Then at the end of my first semester, one of my roommates invited me to join a large group going Christmas caroling. I did. And it struck me that night that there was something odd about the fact that this was the first vaguely religious thing I had done in college.

Mind you, I did not regret going caroling. I still appreciate religious Christmas music more than so-called secular holiday music.<sup>4</sup> For that matter, I have almost as much Christian music on my iPod as Jewish music, including chant, cantatas, classical works, modern minimalism, Shaker songs, and the great old English and American Protestant church hymns. But as I went caroling, I realized that something was missing. I tell this story partly because it is emblematic of what eventually came to be a more theoretically-articulated emphasis on the possibilities of encounter in our common life.<sup>5</sup>

The next semester, I started going to Friday night services under the bells of Harkness Tower. There, I had the fabulous luck to find Rabbi Arnold Jacob Wolf, the Yale Jewish Chaplain of Chicago fame.<sup>6</sup> Arnie would gather us round after services, pose a

known in Hungarian as Máramarossziget. Its official name now is Sighetu Marmatiei.

<sup>3</sup> See ELIE WIESEL, NIGHT (rev. ed., Marion Wiesel, trans., 2006).

<sup>4</sup> I am similarly one of those Jews who “are more comfortable with explicitly religious Christmas decorations whose beauty [we] can appreciate as outsiders than with the siren-song of Christmas glitz.” Perry Dane, *Christmas*, available at <http://ssrn.com/abstract=947613>.

<sup>5</sup> One reason I resist the occasional liberal insistence that political debate should be grounded in a thin consensus is that I actually think that even radically different comprehensive theories and theologies can find wisdom in each other through the power of dialogical encounter and metaphorical resonance.

<sup>6</sup> For the most complete collection of Arnie’s brilliant and powerful shorter writings, see UNFINISHED RABBI: SELECTED WRITINGS OF ARNOLD JACOB WOLF (Jonathan Wolf ed., 1998).

difficult and piercing question drawn from the weekly parsha (Torah portion), sit back to see us throw ideas around, then wrap things up with his own profound, provocative, synthesis. I was hooked. I went almost every Friday night. I still was not religiously observant. But I was religiously engaged. My undergraduate thesis was an outlandishly ambitious effort to map out the connections between—and tensions among—religion, science, technology, art, and morality.

At Yale Law School, my law journal student note tried to rethink the problem of religion-based exemptions.<sup>7</sup> Claims for religion-based exemptions arise, at least in the paradigmatic case, when a general, non-discriminatory, law happens to forbid a religious believer from doing something that the believer's religion requires or requires the believer to do something that his or her religion forbids. I wrote my Note during the period between *Sherbert v. Verner*<sup>8</sup> and *Employment Division v. Smith*<sup>9</sup> when the Supreme Court recognized at least a *prima facie* right to religion-based exemptions, subject to a compelling interest test. I supported religion-based exemptions, and still do. But I argued that the doctrine as it stood was “ad hoc and conceptually flawed.”<sup>10</sup> It ignored the differences between the right to religion-based exemptions and other constitutional rights<sup>11</sup>—the same sort of differences that would eventually lead the Court in *Smith* to conclude that the idea of “a private right to ignore generally applicable laws” was “a constitutional anomaly.”<sup>12</sup> And the Court's cases failed to “provide a principled answer to objections that religion-based exemptions contradict the rule of law, violate general notions of equal treatment, and violate the establishment clause.”<sup>13</sup>

I argued for a new way of approaching the problem of religion-based exemption, grounded in an analogy between the free exercise problem of exemptions and the doctrine of choice of law:<sup>14</sup>

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<sup>7</sup> Perry Dane, Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980).

<sup>8</sup> 374 U.S. 398 (1963).

<sup>9</sup> 494 U.S. 872 (1990).

<sup>10</sup> Dane, *supra* note 7, at 350.

<sup>11</sup> *Id.*, at 350, 358-59.

<sup>12</sup> *Smith*, 494 U.S. at 886. For a more elaborate argument along these lines, in the wake of *Smith*, see Perry Dane, “*Omalous*” *Autonomy*, 2004 BYU L. REV. 1715.

<sup>13</sup> Dane, *supra* note 7, at 356 (footnotes omitted).

<sup>14</sup> My interest in choice of law was not merely opportunistic. I was and remain interested in the subject in its own right. See, e.g., Perry Dane, *Vested*

just as ordinary choice of law recognizes that some legal disputes are best resolved by reference to the law of a foreign state or nation, religion-based exemptions simply recognize that the obligations of individuals are sometimes best adjudicated by reference to their own religious norms rather than the law of the state.<sup>15</sup> Exemptions, that is to say, should be seen as grounded, not in a rejection of law or legal constraint, but in allegiance to a competing legal system. The challenge is to work out how the religious and secular legal systems could each be sovereign in its own appropriate domain.

My Note built on notions of religion and religious authority that I had picked up in my Jewish life at Yale College and Yale Law School. But I was still not seriously observant, beyond attending those Friday night services. When I moved to Washington for my clerkships, I attended Shabbat and other services at Fabrangen, a Dupont Circle havurah, and deepened my Jewish life, but only so far. I was theoretically engaged with the halakhah—the system of Jewish law central to the traditional pattern of Jewish life and spirituality—but did not live it. About a year after I returned to Yale to teach, however, I finally deepened my religious observance. I am not Orthodox, for various reasons. But I am halakhically committed.

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*Rights, "Vestedness," and Choice of Law*, 96 YALE L. J. 1191 (1987); Perry Dane, *Whereof One Cannot Speak: Legal Diversity and the Limits of a Restatement of Conflict of Laws*, 75 IND. L.J. 511 (2000); Perry Dane, *Conflict of Laws*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 197 (Dennis Patterson ed., 2d ed. 2010). In one more recent piece, I reversed the metaphoric polarity, so to speak, suggesting that ideas about interreligious dialogue can be a model for puzzling through some of the deep dilemmas that challenge thinking about choice of law. See, Perry Dane, *The Natural Law Challenge to Choice of Law*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW 142 (Donald E. Childress, III ed., 2011) [hereinafter Dane, *Natural Law Challenge*].

<sup>15</sup> Dane, *supra* note 7, at 365-69. I did not, but should have and have since often, quoted James Madison's famous formulation, which might or might not have had anything to do with religion-based exemptions as such:

It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe.

James Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 64 (1947).

I do not think there was any one reason for my shift. Part of the story is just a progression of spiritual small steps. Even as an undergraduate, I had in mind Franz Rozenzweig's teleology of the "not yet"<sup>16</sup> and Arnie Wolf's wonderful image of "Judaism Street" embedded with the jewels of the mitzvot, available for us to pick up one at a time when we have the strength.<sup>17</sup> I actually started saying blessings on the food I ate long before I started keeping kosher. Another element was community, as I found friends who were more observant than I.<sup>18</sup>

But a last piece of the puzzle—the part most relevant here—was jurisprudential. If I was to take seriously the juridical dignity of religious normative systems, I had to cash that idea in. Law—once one treats it as legitimately implicated in one's life—is binding. Particular pieces of it might be negotiable. But the system is not voluntary.

That confluence of the intellectual and the personal took on further meaning and depth when I found a friend and inspiration in Robert Cover, who articulated more strongly than I could the profundity of legal pluralism, the notion that the phenomenon of law is not limited to the law of the state and extends as well to other normative communities, not only but maybe most clearly religious normative communities.<sup>19</sup> Frankly, I no longer recall if Bob's ideas about jurisgenesis and paideia helped make halakhic

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<sup>16</sup> See ALAN T. LEVENSON, AN INTRODUCTION TO MODERN JEWISH THINKERS: FROM SPINOZA TO SOLOVEITCHIK 93 (2d ed. 2006); see also Franz Rosenzweig, *The Builders: Concerning the Law*, in ON JEWISH LEARNING 72, 86-87 (N. N. Glazer ed. 1955).

<sup>17</sup> WOLF, *supra* note 6, at vii.

<sup>18</sup> To that extent, my experience is at least mild evidence for Rodney Stark's famous sociological hypothesis that religious faith and practice typically spreads less through intellectual conversion than through the effects of networks of friends and family. RODNEY STARK & ROGER FINKE, ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION 114-38 (2000).

<sup>19</sup> Bob's iconic article on legal pluralism was Robert M. Cover, *The Supreme Court, 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). See Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 CARDOZO STUD. L. & LITERATURE 15 (1996). Other important accounts of legal pluralism include, e.g., PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012); CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37 (2002); John Griffiths, *What Is Legal Pluralism*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); Brian Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. L. & SOC'Y 296 (2000); Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3-28 (Gunther Teubner ed., 1997).

obligation credible, or if my developing religious commitments drew me more strongly to Bob's work. But the two were surely connected. And those sorts of resonances between scholarship and spirituality have continued in the years since, though they are often barely perceptible, usually complex, and sometimes ironic.

The remainder of this short essay will highlight how some of these early ideas about pluralism and commitment have branched and morphed, leading to the separate but connected strands in my scholarship and then doubling back to the Jewish piece of it all.

## II.

I remain convinced, after all these years, that much of the relationship between religion and the state is best expressed, not through rights-talk, which defines the liberties allocated to individuals, but through sovereignty-talk, an encounter between legal orders and normative communities trying to make sense of each other.<sup>20</sup> These encounters are to a large extent existential,<sup>21</sup> not reducible to instrumental calculations.<sup>22</sup> And this process is at least roughly symmetric: Just as the state needs to make sense of

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<sup>20</sup> See, e.g., Perry Dane, *Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959 (1991) [hereinafter Dane, *Maps of Sovereignty*]; Perry Dane, *Constitutional Law and Religion*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 119 (Dennis Patterson ed., 2d ed. 2010).. See also Perry Dane, *Master Metaphors and Double Coding*, 52 SAN DIEGO L. REV. (forthcoming 2015) [hereinafter Dane, *Master Metaphors*].

<sup>21</sup> See, e.g., Perry Dane, *The Intersecting Worlds of Religious and Secular Marriage*, in 4 LAW AND RELIGION: CURRENT LEGAL ISSUES 385, 404 (Richard O'Dair & Andrew Lewis eds., 2001) (“[T]he impulse to appreciating legal pluralism arises, not merely out of theoretical commitments, but out of a process of existential encounter, as each normative system asks itself precisely what is going on outside the reach of its most solipsistic concerns.”); Dane, *supra* note 12, at 1771-72.

<sup>22</sup> “The recognition of another sovereign does not serve a purpose, as such, though purposes can be articulated for it. It is more of an existential encounter, a fact—if a socially constructed fact—of the world.” Dane, *Maps of Sovereignty*, *supra* note 20, at 970. Such an encounter has about it echoes of Martin Buber's I-Thou relationship, MARTIN BUBER, I AND THOU (First Scribner Classics ed., Ronald Gregor Smith trans. 2000). I explore that connection further in Dane, *Master Metaphors*, *supra* note 20. See also Perry Dane, *Martin Buber and the Existential Encounter of State and Religious Authority*, Paper delivered at Dialogue in the 21st Century: A Martin Buber Memorial Conference, sponsored by the Manhattan College Center for Ethics; Holocaust, Genocide and Interfaith Education Center; Office of Mission; Philosophy Department; and Religious Studies Department (April 23, 2015).

religious and other normative communities, those communities need to make sense of the state and articulate its proper domain within their own political theory or theology.

This process of encounter is also difficult and fraught, however. It can involve a profound clash of values and perspectives. More essentially, any normative system is likely to exhibit a measure of solipsism—an unwillingness to recognize the genuine juridical dignity of anything outside its own boundaries. Even mundane, secular, choice of law suffers from a moderate solipsism. Sometimes, the encounter of normative worlds requires a sort of double-coding, a stereoscopically-overlapping simultaneous acceptance and rejection of the possibility of normative worlds beyond one's own. Sovereignty-talk can coexist with rights-talk.<sup>23</sup> Genuine encounter requires its own mode of understanding even as it finds expression in legal doctrine and the work of the legal imagination.<sup>24</sup>

The encounter of normative systems goes beyond the interactions of separate communities. Within the world of any single community, or individual, diverse normative discourses coexist and interact. I have written, for example—inspired by Jeremy Waldron and Brian Tierney—about a view of natural law that treats it, not as a quasi-constitutional set of principles hovering above positive law, ready to lob missiles down on offending enactments, but as sitting alongside positive law, in a contingent, mutually-interstitial, relationship. I pursue this approach in a recent piece on conflict of laws,<sup>25</sup> and more urgently in an article on the same-sex marriage debate,<sup>26</sup> where my argument goes something like this: One might understand the institution of marriage as being, in some natural law sense, paradigmatically heterosexual. But that does not eliminate the possibility of extending that paradigmatically-heterosexual institution to same-sex couples in the name of human dignity and the situational conditions of contemporary society. If I am right, all this has practical implications for how we think of the constitutional arguments now being litigated and the broader implications of same-sex marriage itself.

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<sup>23</sup> See Dane, *Master Metaphors*, *supra* note 20.

<sup>24</sup> See Perry Dane, *Scopes of Religious Exemption: A Normative Map*. Paper Delivered at Bowling Green Workshop in Applied Ethics and Public Policy. Department of Philosophy, Bowling Green State University.

<sup>25</sup> Dane, *Natural Law Challenge*, *supra* note 14.

<sup>26</sup> Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 *BUFF. L. REV.* 291 (2014).

Here as elsewhere, the process of dialogue, recognition, and mutual adjustment is complex, contradictory, and often ironic. Sometimes, the encounter of normative discourses produces simply intractable conflicts. Sometimes there is no principled solution. Sometimes, we just need to make existential choices.

### III.

So far, I have explained how the basic idea of pluralism and encounter implicates the relation of distinct legal systems and discourses to each other. But it might also suggest some claims about the internal dynamic of any given normative system or discourse.

Consider constitutional law. I have argued that the religion clauses embody a commitment to sovereignty-talk. But that commitment requires conceptual resources beyond the usual repertoire of constitutional doctrine. It requires seeing the constitutional treatment of religion as one piece of a larger encounter—also found in more mundane areas of law including tax, tort, and property law—between religion and the secular state.<sup>27</sup> Or, to put it another way, there needs to be a conversation, not only between the state and religious communities, but between the constitution and the rest of the state's own law.

That basic principle, it seems to me, extends well beyond the religion clauses. Our constitutional culture suffers from what I call “constitutional glare.”<sup>28</sup> We treat the Constitution, not only as lexically superior to the rest of law, which it is, but as foundational of our legal values. We also treat it, in a deep sense, as being self-contained. We admit that constitutional provisions were written in a historical moment. But that is where the conversation with the rest of the legal system sometimes ends. I believe that is quite wrong. Constitutional glare both keeps us from appreciating the deep importance of the rest of law and from appreciating what constitutional law itself might be. In fact, I argue in a work in progress that constitutional glare has grievously distorted both the substance and the methodology of constitutional law. I suggest, for example, that the effort to reduce

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<sup>27</sup> See Dane, *supra* note 19.

<sup>28</sup> See, e.g., *id.* at 21; Perry Dane, *The Parsonage Exemption and Constitutional Glare*, CENTER FOR LAW AND RELIGION FORUM (Nov. 7, 2013), <http://clrforum.org/2013/11/27/parsonage-exemption/>.



constitutional interpretation to a search for “original public meaning” is a flawed effort to turn the hard normative and doctrinal work necessary for making sense of the Constitution—within the larger context of our legal tradition—into an essentially empirical search for the fact of the matter. That strikes me as both a mistake and abandonment.

As I think about these issues, I find myself drawn to the halakhic system as a helpful model. Jewish law, though imagining a singular moment of revelation, nevertheless has no “constitution.” Certainly, the Bible or the written Torah is not the Constitution. But even if we consider both the written and oral law, there still is no text about which we can say, “*this* and not anything else is the basic law.”<sup>29</sup> To be sure, the temptation to identify such a text is present. But our tradition resists it mightily.

The relevance to constitutional law is only suggestive. The Constitution does play a distinctive role in the American legal system. But if we could move even a little toward that more textured, open-ended, and discursive vision found in the Halakhah, I think we would come closer to what constitutional law should be.

More broadly, the halakhic example reinforces my conviction that central to law and the work of lawyers in all contexts is a subtle combination of textual exegesis, the construction of powerful mythical historical narratives that articulate and motivate legal values, and the necessary if often imprecise work of old-fashioned casuistry. Law, that is to say, including constitutional law, is at crucial points, a form of artificial reason,<sup>30</sup> an artificial reason that both channels and shapes our fundamental commitments and actually helps make them real.<sup>31</sup> And it is the hard craft of lawyering that makes all that possible.

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<sup>29</sup> The Talmud comes closest to such a basic text. But it is more of an open-ended record of debates and digressions than a constitution. For that matter, some scholars suggest that it only achieved its definitive canonical status centuries after its completion. See, e.g., TALYA FISHMAN, *BECOMING THE PEOPLE OF THE TALMUD: ORAL TORAH AS WRITTEN TRADITION IN MEDIEVAL JEWISH CULTURES* (2011). In any event, the work of practical halakhic decision-making rarely begins with reference to the Talmud itself and sometimes bypasses it altogether.

<sup>30</sup> Cf. Charles Fried, *The Artificial Reason of the Law—Or What Lawyers Know*, 60 TEX. L. REV. 35 (1981).

<sup>31</sup> For more thoughts about the importance of the legal imagination, see, e.g., Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1 (1994); Dane, *Master Metaphors*, *supra* note 20. See generally JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (Abridged Ed., 1985); Erika Rackley, *When*

## IV.

I just suggested how the dynamics of Jewish law can help inform a better account of constitutional law. But some of my other scholarly work has tried to make better sense of the Halakhah itself. That work reflects, if through its own refractions, some of the themes I have discussed so far. But it is also where my pluralistic instincts, in some sense, run deepest. I published two pieces early on, one on the nature of the “Oral Law”<sup>32</sup> and the other on the conditions for halakhic commitment.<sup>33</sup> But the rest of the effort remains in long drafts of chapters of what should one day, “*b’ezrat Hashem*,” be a book. One chapter explores the relationship of Jewish law to morality and the other dissects the sorts of arguments that typically get made about the dynamics of Jewish legal change.

Here’s a piece of the Introduction in its current draft:

The overall thrust of the project is to question the temptation, across the Jewish spectrum from “traditionalist” to “liberal,” to find comfort in one or another foundational claim. Thus, some “traditionalist” Jews moor their faith to belief in a literal, explicit, revelation at Sinai, while some “liberal” Jews base their faith on rejecting belief in a literal, explicit, revelation at Sinai; some Jewish thinkers insist that there is no legitimate moral discourse outside the four corners of Jewish law, while others insist that Jewish law must give way to morality.

I argue that such foundational moves are on the whole unhelpful, or partial, or wrong. They are also deeply ironic. On closer inspection, purported bulwarks against modernity tend to be thoroughly modern in their assumptions and strategies, and purported defenses of modernity come off as stale and tired, or inattentive to the deeper texture of

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*Hercules Met the Happy Prince: Re-Imagining the Judge*, 12 TEX. WESLEYAN L. REV. 213 (2005).

<sup>32</sup> Perry Dane, *The Oral Law and the Jurisprudence of a Textless Text*, S’VARA: A JOURNAL OF PHILOSOPHY, LAW, & JUDAISM Vol. 2, No. 2 (1991) at 11, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1718700](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718700).

<sup>33</sup> Perry Dane, *The Yoke of Heaven, the Question of Sinai, and the Life of Law*, 44 U. TORONTO L. J. 353 (1994).

modernity itself. More important, the Halakhah, reasoning in Halakhah, and reasoning about Halakhah, are all at their best and truest without these crutches. Modernity cannot be avoided. Nor, however, should it be taken as merely given. In its creative encounter with modernity, the Halakhah can bring to bear resources of its own, including great wells of radical possibility. The Halakhah lives in, and with, and through, tension and contradiction. Its greatest potential, as a legal system and as a religious practice, lies in directly confronting—indeed, embracing—uncertainty.

Somehow, I remain convinced that this all goes back to that night I sang Christmas carols with my college friends.

## V.

All this is obviously connected, both personally and intellectually. Our normative worlds – between communities, within communities, and even within single traditions – are plural and complex all the way down. There are no Archimedean points from which to survey it all, but only the possibility of encounter, conducted carefully and in good faith, with the help of imaginative structures such as law and legal doctrine.

I need to end, though, with a touch of melancholy. The sort of pluralism I treasure might be yesterday's news. Religion-based exemptions have been demoted as a constitutional principle<sup>34</sup> and their status is even more generally in flux.<sup>35</sup> Constitutional law and theory have, as suggested above, become more univocal and

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<sup>34</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>35</sup> For a post-mortem of recent events and their implications for the broader mood on the subject of religion-based exemptions, see Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014). On the other hand, consider, the Supreme Court's latest decision under the Religious Land Use and Institutionalized Persons Act, in which it unanimously struck down prison regulations that prevented Muslim inmates from growing even short beards. *Holt v. Hobbs*, 135 S. Ct. 853 (2015). Meanwhile, our courts' Establishment Clause doctrine is also in sad shape, not only as to its results but more important as to its underpinnings and basic aims. But that is a story for another day. See Perry Dane, *Prayer is Serious Business: Reflections on Town of Greece*, 15 RUTGERS J. L. & RELIGION 611 (2014).

brittle. And the Jewish world's responses to modernity seem to have become more polarized and wooden.<sup>36</sup>

But melancholy is not pessimism. Ideas such as pluralism, encounter, and a comfortable uncertainty run against our natural solipsism and the arrogance born of insecurity. But they also have a power and necessity of their own. One day, if “not yet,”<sup>37</sup> that will be clear.

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<sup>36</sup> I hesitate even to mention the gloomy outlook in the Middle East, where the hopes for legal and political understanding that I once expressed, see Perry Dane, *Pluralities of Justice, Modalities of Peace: The Role of Law(s) in a Palestinian-Israeli Accommodation*, 32 CASE W. RES. J. INT'L L. 273 (2000), seem further off than ever.

<sup>37</sup> See, *supra* text accompanying note 16.