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# Partnership, Democracy, and Self-Rule in Jewish Law

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# PARTNERSHIP, DEMOCRACY, AND SELF-RULE IN JEWISH LAW

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*Abstract: Liberal political theory has long relied on a metaphor of contract: autonomous adults coming together to agree, by unanimous consent, on the basic structure of a just society. But contract is a strange metaphor with which to explain society. Contract law is based on a morality of strangers acting at arms-length. In contrast, decent societies and the governments they set for themselves must be based on a commitment of mutual responsibility. What makes us fellow citizens—fellows of any variety—is accepting that we are all in this together.*

*Jewish legal and midrashic traditions can be a useful corrective to the atomistic metaphors underlying most liberal political theory. The Jewish tradition has never had the luxury of imagining self-sufficiency, that government itself is the primary source of unjust power, or that individuals could be free in a state of nature. We too can no longer ignore that a solitary human being is a dead human being, that we need government to make spaces in which we can be free from want, resist oppression by non-governmental power, reverse the destruction of the natural commons on which we depend, and engage in the communal activities that make life meaningful.*

*The partnership metaphor, I argue, can make visible the mutual concern and collective effort that must characterize decent and just governments in an age of economic challenges and ecological crises. The goal of liberalism should not be individual self-determination but the freedom to live together in peace, prosperity and justice.*

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## I. THE POVERTY OF CONTRACT

Liberal political theory has long relied on a metaphor of contract: autonomous adults coming together to agree, by unanimous consent, on the basic structure of a just society. The metaphor usefully emphasizes equality and consent as foundational elements of justice, and readily yields theories of limited government. Few self-sufficient adults, after all, would consent to be a mere tool to another's ends or to give another total control over their lives.[1] Similarly, it usefully controverts hierarchical and authoritarian political theories that base legitimacy on power or prerogative. It is hard to start from a premise of equality and end with divine right of kings, right of conquest, nativism, colonial trusteeships or paternal power.[2] In contract theories, the governed, not God or guns, are the source of the right to rule, and the rulers are agents or servants of the people rather than their masters.
Nonetheless, contract is a strange metaphor with which to explain society. Contract law is based on a morality of strangers acting at arms-length, in which it is permissible, even expected, to set your own personal interests above those of your counterparts and to ignore the needs of the community. In contrast, decent societies and the governments they set for themselves must be based on a commitment of mutual responsibility. What makes us fellow citizens—fellows of any variety—is accepting that we are all in this together.

Standard social contract theories tell a story of autonomous adults, free of obligations to each other, joining together to form a government. Regardless of whether the agreement is presented as a mythical past[3] or a thought experiment,[4] the metaphor is meant to represent

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[1] Even Hobbes, among the most authoritarian of the contractarians, points out that no person or state can obtain a right to use physical coercion by consent. THOMAS HOBBES, LEVIATHAN II:28 (1651).

[2] *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT II:6 § 52 (1690).

[3] HOBBES, *supra* note 1; *see also* LOCKE, *supra* note 2, at II:2 § 14, II:5 § 49 ("Thus in the beginning all the World was America . . . ."); JEAN JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN AND BASIS OF INEQUALITY AMONG MEN (1755) ("Let us begin then by laying facts aside, as they do not affect the question.").

[4] JOHN RAWLS, A THEORY OF JUSTICE I:4 (1972) (describing an "original position" as an imaginary fair beginning point for contractual negotiation). *See generally* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) (taking the individualism of the imaginary agreement one step further by describing a series of imaginary conversations between individuals, apparently not requiring even hypothetical agreement among the fictional participants).

an argument that a legitimate government must be one to which such imaginary people could have agreed.[5]

Typically, authors in this tradition are relatively unconcerned with private or non-state power, or even the cooperation necessary for survival. To the extent that they theorize private power, they tend to criticize state protection of aristocracy or slave-holding rather than defending state action to prevent private oppression.[6] Indeed, the post-war revival of contract theory can be understood as a reaction to the statist authoritarianism of the Nazis and Communists, combined with suspicion of the wide-ranging power of expert agencies in the New Deal reformation of American politics, attempts to end the state-sponsored discrimination of Jim Crow, and fear of unchecked militarism at home and abroad.[7]

In the real world, contract law is usually quite inegalitarian and often radically unfair. Standard contract law assumes equal bargaining power—which is to say, it usually places the power of the state behind agreements even in the usual case, where bargaining power is not equal. As a result, ordinarily it enforces even objectively unfair

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[5] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 33-35, 89, 115 (1974) (appearing to add the impossible requirement that the actual government be one to which actual people actually did agree in an existing historical past—or at least one which could result from an imaginary sequence of such agreements); *see also* ROBERT WOLFF, IN DEFENSE OF ANARCHISM 69 (1970) (dispensing with the fiction of actual agreements but similarly arguing that freedom is incompatible with state authority).

[6] *See, e.g.*, LOCKE, *supra* note 2, at II:4 § 22. The U.S. Constitution, in its eighteenth-century form, is typical: while it explicitly bans granting of titles of aristocracy, it is embarrassedly silent about chattel slavery, protecting it structurally without defending it explicitly. In contrast, in the next century, the Constitution of the Confederacy, which generally tracks the U.S. Constitution, explicitly mandates slavery. CONST. OF THE CONFEDERATE STATES art. I, § 9, cl. 4; art IV, § 2, cl. 1; art IV, § 3, cl. 3. Perhaps not solely related to its hostility to industry and taxation for improvements, the Confederate version also omits the "general Welfare" clause from the preamble. Hobbes is the obvious and central exception, justifying his quite illiberal state on the quintessentially liberal ground that it is necessary to limit the exercise of far more dangerous power in civil society—the famous war of all against all. HOBBES, *supra* note 1, at I:8. Even Hobbes, however, does not make ending slavery or even serfdom central to his theory. Similarly, Locke, who had personal experience administering slave-holding colonies, begins his First Treatise by contrasting slavery to freedom, but focuses his Second Treatise on limiting state power rather than potential use of state power to restrain private abuses. *See* JOHN LOCKE, FIRST TREATISE OF GOVERNMENT, I:1 §1 (1690); LOCKE, *supra* note 2, at II:9 §§ 124, 131, II:11 § 135.

[7] *See generally* DAVID CIEPLEY, LIBERALISM IN THE SHADOW OF TOTALITARIANISM (2007) (arguing that contract theory revival was part of a reaction to New Deal confidence in government-led reform).

agreements.[8] But the great and powerful have no reason to make agreements with the small and meek unless the latter agree to forgo most of the benefits of cooperation. A starving man will agree to almost anything if it is the most practical way to get food. More generally, the diminishing marginal utility of money means that an extra dollar is always less valuable for a Walton or Bezos than the rest of us. So, the rich should be able to demand more than their share of the benefits of cooperation through contract, since it is easier to refuse for them than for a start-up or its owner, let alone an ordinary employee dependent on company-based medical insurance.

Contract law thus begins by upwardly redistributing the surplus created by cooperation. It often leads to worse.[9] Once the upper class has accumulated sufficient wealth and associated power, contract or related voluntary agreements can create an accelerating spiral of extraction. Theoretically, free agreement can lead to the imaginary contracts of the Joseph story or one form of medieval absolutism, in which serfs and slaves purportedly agreed to forgo freedom in return for a temporary reprieve from death.[10] But in actual societies, real contract tends to make the poor poorer and the rich richer. Eventually, the wealthy accumulate enough power that the easiest route to greater wealth and power is simply to take it, without even coerced consent. The real-life counterpart to the story of Joseph's administration in Egypt is debt-slavery and sharecropping. Even before extraction reaches this extreme, increasing inequality means that the rich can grow richer as the society grows poorer.[11] It is for this reason that

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[8] *See* Lochner v. New York, 198 U.S. 45, 58-59 (1905) (holding that a maximum-hours law was a violation of a baker's right to contract to endanger his life).

[9] For a discussion of the late nineteenth and early twentieth century critiques of Lochnerian contract law, arguing that endemic unequal bargaining power must be recognized by the legal system, see BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE, ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 47 (1998).

[10] Genesis 41. In the Biblical account, Joseph, acting on behalf of the Pharaoh, sold food to starving farmers in exchange for their money, land, seed corn and, ultimately, freedom. The story, prefiguring the Egyptian enslavement of Joseph's descendants, is best read as a critique of debt slavery and, indeed, the injustice of contract itself. The literary parallel to the enslavement of Joseph's own descendants makes clear both that Joseph is not merely a trickster outsmarting the neighbors and that serfdom cannot be justified by consent.

[11] *See generally* DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL, THE ORIGINS OF POWER, PROSPERITY, AND POVERTY (2012) (arguing that once an elite accumulates enough power, it finds it easier to seize than produce).

many legal systems (including as a prominent early example, Leviticus)[12] provide for debt forgiveness, limits on debt slavery, minimum wages and working conditions and so on—far beyond the anti-fraud or anti-duress provisions that are the most minimal requirements to make a system of contractual agreements work.

Indeed, as we have understood since the Great Depression, in a modern market economy, contract law tends to create economic crises. As the wealthy take more and the rest have less to spend, aggregate demand cannot keep up with production. Producers, finding they have insufficient customers to whom to sell, eventually cut investment and employment—which means that customers (who, in the aggregate, are employees) have even less to spend. The resulting downward spiral of low demand and high unemployment is a classic Keynsian ("demand-shortage") recession.[13] Modern economies need mechanisms to restrain contractual redistribution as a matter of survival, not only justice.

Social contract theorists usually seek to avoid the implications of this tendency of contract to reinforce and expand existing inequalities by assuming a recurring fair starting point. Since the imaginary founders are deemed to be equal in significant ways, the agreements naturally reflect such equality at least in early stages. To be sure, many thinkers follow Hobbes in making heroic efforts to explain and justify radical political inequality as a logical consequence of agreements even between actual equals. Others simply treat the power-concentrating effect of contract as inevitable aspects of freedom.[14] Still, the bite of the theory comes from limits on the agreements that rational

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[12] Leviticus 25, 2-7 (sabbatical year), 8-13 (jubilee year); *cf.* Deuteronomy 15, 12 (sabbatical release); Exodus 21, 2.

[13] *See generally* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936) (pointing out that the limiting factor to modern economic growth is usually demand, not supply).

[14] Locke, for example, begins by asserting basic equality: "every man has a property in his own person . . . . Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property." LOCKE, *supra* note 2, II:5 § 27. As he points out, this logically implies that property is limited only to that which the laborer can "enjoy" without allowing it to spoil or harming others' equal right to appropriate from the common store. *Id.* at §§ 31-33, 45. He attempts to resolve this obvious critique of the inequality of his own time by citing the invention of money "which may be hoarded up without injury to anyone." *Id.* at § 50. Unfortunately, the corruption always associated with great inequality is never "without injury to anyone."

individuals are deemed willing to make. Even Hobbes, for example, denies that equals would be willing to agree to subject their life to arbitrary control,[15] while others make the same argument regarding eternal salvation.

## II. A JEWISH LAW ALTERNATIVE TO SOCIAL CONTRACT THEORY

Jewish law and tradition have often taken a significantly different approach to similar problems of both justifying and limiting governmental authority. What follows is not meant to be, and is not, a balanced exposition of the theory as it might have been understood by those who wrote the texts from which I borrow or who lived in the societies in which they were written. Instead, my goal is to use the Jewish texts to show that our own too familiar metaphors are not inevitable. From the foreign perspective of a different tradition, the invisible may become visible.

The Jewish tradition has never had the luxury of imagining individual self-sufficiency, that the community's own government is the primary source of unjust power, or that individuals could be free in a state of nature. As a matter of religious and ideological self-understanding, a Jew can only be a Jew in a community.[16] As a matter of practical reality, the myth of the self-sufficient pioneer could have little appeal to people always reminded of their mutual dependence and danger from potentially hostile outsiders. Locke justifies property in land

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[15] *See* HOBBES, *supra* note 1. In contrast, Locke reaches the same conclusion by postulating that our lives belong to God so that we cannot agree to give up what is not ours, and, since we cannot agree to give up life, we cannot agree to give up the means of its preservation. LOCKE, *supra* note 2, at II.4. §§ 23-24.

[16] *See, e.g.*, IRVING A. AGUS, RABBI MEIR OF ROTHENBURG: HIS LIFE AND HIS WORKS AS SOURCES FOR THE RELIGIOUS, LEGAL, AND SOCIAL HISTORY OF THE JEWS OF GERMANY IN THE THIRTEENTH CENTURY 59 (2d ed. 1970) (1947) (stating, "In order to live a strictly Jewish life … [a] Jew [in early medieval France or Germany] was in need of a synagogue, a quorum of ten for community prayer, a teacher for his children, a ritual slaughterer, and a ritual bath-house; he needed protection against his Gentile neighbors and a person to represent him before his overlord … A community, therefore, was a cooperative body created for the purpose of providing for the common needs of the individual members and for mutual help."); *see also* Rabbi Meir of Rothenberg (Maharam), Responsum 529 (Agus's numbering), *translated in* AGUS, *supra* note 16, at 487 (a majority vote of taxpayers binds the community with respect to various listed essential communal functions, including purchasing a wedding hall or bakery).

by saying that "in the beginning all the World was America,"[17] meaning that a few individuals were surrounded by vast tracts of fertile and empty land, free to be appropriated by anyone who chose to work it. Such a myth could have no appeal to Jews, who until Emancipation, generally were entirely barred from owning land at all.

### A. Egalitarian Impulses in Origin Myths

Like contractarians, the Jewish tradition begins with a myth of radical equality. According to Genesis, all humans are descended from one Adam (and all again from Noah, and all Jews and Arabs from one father, Abraham). The Talmud explains:

> This is why Adam was created alone in the world: To teach that anyone who destroys a single soul, is treated as if he had destroyed an entire world. To teach that anyone who saves alive a single soul, it is as if he saves an entire world. And because of the peace of Creation, so that no person (*adam*) may say, 'My daddy was greater than yours.'[18]

As the Talmud's explication makes clear, the myth of Adam as our common ancestor fundamentally rejects notions of blue blood, separate creation, autochthonous natives and similar assertions that strangers, immigrants, hoi polloi, or ordinary people are inferior to their rulers by nature or God's plan. No one can claim superiority based on ancestry because we all have the same ancestor.

In contrast, the myth of descent from Abraham lends itself to pure-blood readings. But the Biblical text itself disputes that view, insisting that Jews are descended from immigrants, exiles and slaves in Egypt, and an *asaf-soof*[19] or *erev rav.*[20] It specifies that the national

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[17] LOCKE, *supra* note 3, at II:5 § 49. Locke's claim about "America" is radically incorrect as a matter of history. That is not, however, the point here.

[18] Mishnah, Sanhedrin 4:5 (my translation).

[19] Numbers 11, 4 (meaning "rabble").

[20] Exodus 12, 38 (meaning "mixed multitude"). Rashi explains the term as referring to converts. *See* Rashi on Exodus 12, 38. Shaul Bar contends that the word "erev," mixed, implies that these were mercenaries who intermarried with the Jews. *See* Shaul Bar, *Who Were the "Mixed Multitude"?*, 49 HEBREW STUD. 27, 27 (2008). The simple meaning of the story, however, is to controvert the teaching of the earlier tales of the Patriarchs which sought to define Israel by ancestry and blood lines.

hero, King David, was descended from an immigrant.[21] Even the national-ethnic name Hebrew is not derived from a tribal ancestor (unlike "Israel") or their land (unlike "Jew" or Judean) but from a root that suggests foreignness—the people from "over there" or who "passed over." Perhaps it is also in this spirit that Jews have traditionally insisted that all converts be deemed descendants of Abraham and Sarah regardless of actual bloodline. Similarly, instead of privileging natives or a meritorious aristocracy, the foundational myth of Exodus teaches that those who inherit knowledge of the suffering of slaves and strangers must not oppress the stranger, for "you were strangers yourselves in Egypt."[22] Instead, they must have "one law for citizen and immigrant."[23] The test, it teaches, of a society's justice is how it treats its widows, orphans, poor and oppressed[24] in an early and more

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[21] Moses's Egyptian name (and lack of genealogy) and the story of the conversion of David's ancestor Ruth are similar restatements of *Genesis'* anti-aristocratic principle.

[22] The commandment is repeated over and over. *See, e.g.*, Exodus 22, 21 ("You shall not wrong a stranger (*ger*) or oppress him, for you were strangers in the land of Egypt."); Exodus 23, 9 ("You shall not oppress a stranger, for you know the soul of the stranger (*ger*), for you were strangers in the land of Egypt."); Leviticus 19, 34 ("The stranger who resides with you (*ger toshav*) shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt."); Deuteronomy 10, 19 ("You too must befriend the stranger (*ger*), for you were strangers in the land of Egypt."); Deuteronomy 23, 7 ("You shall not abhor an Egyptian, for you were a stranger (*ger*) in his land."); Deuteronomy 24, 22 ("Always remember that you were a slave in the land of Egypt; therefore do I enjoin you to observe this commandment.").

[23] Exodus 12, 49. Here too, commentators hostile to the teaching reinterpret the text to limit its implications. The "one law" rule applies, they suggest, only to converts, not strangers. *See* Rashi on Exodus 12, 49 (following the earlier MECHILTA). The word translated here as "law" is "*torah*." This poses a problem: the plain meaning of the verse, that the Torah applies to Jews and non-Jews alike, is impossible. The English translators solve the problem by reading *torah* to mean law more generally. Rashi takes the alternative possibility: he reads "*ger*" (stranger) according to its later meaning of "convert," even though this requires finding a sense in which the Israelites were converts in Egypt and abandoning the plain sense of the verse. Rashi's interpretation, though, is then available to those who wish to limit the meaning of the verses cited in *infra* note 24. By emphasizing the egalitarian understanding of these verses, I mean only to point out one strand in a debate, not to deny the existence and frequent victories of the other.

[24] *See, e.g.*, Leviticus 19, 34 & 25, 35; Exodus 22, 21-24; Deuteronomy 24, 17-19; Psalms 82, 3 & 146, 9; Isaiah 58, 6; Ezekiel 16, 49.

egalitarian version of Rawls' difference principle[25] (and a very different justification).

This egalitarian tradition has a counter-tradition, of course, offering different myths or cleverly explicating why the obvious reading does not apply to particular enemies, victims or strangers.[26]

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[25] *See* RAWLS, *supra* note 4. Rawls' difference principle states that inequality can be justified only to the extent that it makes the worst off better off. Rawls assumes that most of the time, there will be a trade-off between equality and affluence and does not explicitly address either Veblen's point that after some relatively low level of material well-being, radical inequality always makes the worst off worse off, and usually makes most of the rest of us worse off as well, or Keynes's analysis of demand-driven economic growth.

[26] The conflict is in the oldest texts and continues to this day. In contrast to the Creation story's emphasis on common descent of all people, the Patriarch cycle emphasizes only the Hebrew's common descent. While the Exodus story emphasizes that the Jews trace their origins to slaves and a mixed multitude—*erev-rav*—Numbers 11, 4 specifically blames the people's wrong-doing on the a*saf-soof*. Later commentators amplified this anti-egalitarian countertradition. Thus, Rashi blames the Golden Calf incident on the *erev-rav*, see Rashi on Exodus 32, 4, while the Zohar identifies them with unassimilable evil. *See* Shaul Magid, *The Politics of (Un) Conversion: The "Mixed Multitude" ("Erev Rav") as Conversos in Rabbi Hayyim Vital's "'Ets Ha-Da'at Tov"*, 95 JEWISH QUARTERLY REV. 625, 636, 644 (2005) (contrasting the Zohar's view that the *erev-rav* is equivalent to Amalek, Zohar 1.25a, with Vital's more sympathetic, but still hierarchical, view a generation later). Similarly, one part of the tradition asserts that no one should ever be punished for sins of their ancestors. *See, e.g.*, Deuteronomy 24, 16. But the text also asserts that God specifically condemned Amalek and all his descendants for all time. One resolution of the contradiction might be to criticize God for hypocrisy or to assert that God and God alone may make exceptions to the general moral rule; Amalek, after all, having been obliterated, can have no descendants. On the other hand, disturbingly frequently commentators have been happy to extend the curse on Amalek to unrelated enemies or objects of their hatred, much as slave-owners reinterpreted the Curse of Ham to turn the teaching of single creation on its head. *See generally* STEPHEN R. HAYNES, NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY (2002) (discussing use of the Biblical story of Noah's curse of Canaan by American defenders of slavery and Jim Crow); DAVID M. WHITFORD, THE CURSE OF HAM IN THE EARLY MODERN ERA: THE BIBLE AND THE JUSTIFICATIONS FOR SLAVERY (2016) (describing interpretive transformation of Curse of Ham in the early modern period by defenders of slavery). Harvard's Professor Agassiz and his followers, unwilling to live with even that tension, simply amended their Biblical text to add a second, inferior creation for those they did not wish to accept as fellows. *See* Louis Agassiz, *The Diversity of Origin of the Human Races*, CHRISTIAN EXAMINER, July 1850, at 3 (contending that the Genesis story describes the origin of only "the white race"); STEPHEN JAY GOULD, THE MISMEASURE OF MAN 39-41, 46 (1981) (describing Agassiz's polygenist and competing "degenerationist" racist views).

Interpretive narrowings of the myth of universal human worth remain too powerful an element in Jewish self-understandings to this day.

### B. States of Nature, Contracts and Alternatives in the Biblical Texts

While the Jewish and contractarian traditions share a myth of fundamental equality, they radically differ in their approach to government and society. In contrast to social contract theory, the Jewish texts have little conception of autonomous adults coming together to form a society, at least after Sinai. To be sure, the patriarch stories mirror, to some extent, the contractarian state of nature: people living outside society with no government other than (sometimes tyrannical) *patres familias*. Still, the patriarchs live enmeshed in more settled societies, never join together to form a new regime, and their wanderings are not presented either as a model of an ideal nor as the menacing threat of civil war.

Perhaps Sinai itself, where the people accept a covenant with God binding them to God's law and government as his people, is closer to the social contract model.[27] Certainly, it served as precedent and inspiration for some of the social contract theorists, not to mention the New England Puritans' practice. Still, the Biblical stories do not present Sinai as a coming together of individuals with no previous bonds.

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[27] For an exposition of the Sinai stories as exemplars and critiques of consent theory, see generally, MICHAEL WALZER, EXODUS AND REVOLUTION (1986). For some commentators, the authority of Sinai is that every Jew, born and unborn, was present and freely consented to accept the Law. In contrast, another strand of Jewish law has applied the doctrine of duress to argue that the Covenant at Sinai could not be binding as a matter of agreement, since those who entered into it were pressured to do so. Sometimes the duress is bolstered by reading the Biblical account literally. In the usual translation, Exodus 19, 17 says that the Israelites gathered at the base of the mountain waiting for the revelation. But R. Avdimi read the word *tahat* literally, to mean that the Israelites were "under" the mountain, which God held over their heads and threatened to drop should they not accept the Covenant, thus showing that consent was coerced and not binding. Babylonian Talmud, Shabbat 88a. "Others invalidate any consent notion by reading 'we will do and hear' to mean that the people agreed before they knew to what they were agreeing, so any agreement was uninformed." *Id.* Still others, in the spirit of a standard medieval account of the rights of conquest, emphasize the notion of "redemption": God, in effect, ransomed the Jews from Egypt, not freeing them but becoming their master, replacing service to Pharaoh with service to God. *See* Isaac Abravanel, *Commentary on the* Pentateuch, Deuteronomy 29, *translated in* 1 THE JEWISH POLITICAL TRADITION 37-40 (Michael Walzer et al. eds., 2000) (hereafter 1 JPT).

Rather than strangers, the covenantors at Sinai are already a people, united by a common history, a common eponymous (if not literal) tribal ancestor and allegiance to a common tribal Deity.

More importantly, even if the Sinai covenant contains the consent notion, many readers of the Biblical story saw the law and Ruler to whom the Jews consent as accepted, not negotiated. On this view, Israel had been redeemed—ransomed or purchased—by its God from its slaveowners,[28] taken as a bride by a heavenly Husband, or acceded to the overwhelming power of the Creator or to the necessity of Torah,[29] at least as much as it has consented to the new arrangement. On the one hand, a covenant implies that the people at Sinai are equal in comparison to His might. On the other, they are also portrayed as helpless, starving in the desert or even trapped under a suspended mountain.[30] As Rav Aha b. Yaakov and Rashi pointed out, these are not the right conditions for a fair bargain between equals.[31]

The first Biblical account of just government, as Josephus famously contended, is not republican or limited at all, but theocracy: rule by God via his appointed prophets and charismatic judges, with assistance from the hereditary priests, who also derive their authority from God's arbitrary choice of their ancestor rather than any human source.[32] In those days, says the author of the book of Judges, each man did what was right in his eyes.[33]

And this, at least to some of the tradition, is praise rather than condemnation. When the people, or some of them, ask for a more conventional government, Samuel calls it rebellion against God.[34] Others, presumably including those who preserved and sanctified Samuel's

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[28] *See, e.g.*, Abravanel, *supra* note 27 (arguing that even if the Sinai generation did agree, they had no right to bind later generations; instead, the Sinai covenant is binding as repayment of a hereditary debt incurred when God, in effect, purchased the Jews out of Egypt).

[29] *See, e.g.*, Judah Loew (Maharal of Prague), Tiferet Israel, Chapter 32, *translated in* 1 JPT, *supra* note 27, at 40-42 (criticizing the consent model because Israel's acceptance of the Torah was an existential necessity).

[30] *See* Babylonian Talmud, Shabbat 88a (reading *tahat ha-har* to mean "under" the mountain).

[31] *See id.*; Babylonian Talmud, Shabbat 88a, *translated in* 1 JPT, *supra* note 27, at 28-29 (Rashi explaining, "if He arraigns them, demanding 'Why have you failed to observe that which you accepted?' they can respond that the acceptance was coerced").

[32] FLAVIUS JOSEPHUS, AGAINST APION II:17.

[33] Judges 21, 25.

[34] 1 Samuel 8, 7.

complaint, must have agreed that kings, government, and their rules were unnecessary in the good old days when people did the right thing; authority, chariots, grand building projects, and foreign entanglements are all signs of decadence and falling away from the ideal. In this mode, some later commentators expanded on Samuel to critique the entire institution of monarchy.[35]

But kings were established, even if the prophets continued to denounce them and the priests remained a countervailing force.[36] By Talmudic times, defenders of the rule of kings—not the Jewish monarchy, which was long gone, but foreign ones—turned Samuel's curse on its head. Rav Yehuda, following Rabbi Yose, read Samuel as, instead, instituting law authorizing, not condemning, these injustices.[37]

In short, the Biblical texts appear to show a three-way struggle. The first side might be seen as tribalists mythologizing an era of nomadic tribes under absolutist rule of patriarchs who claimed authority based on having sired or purchased (as slaves, servants or wives) their subordinates, with the patriarchs coming together only in loose alliances with no fixed rulers. Second, we see theocrats insisting that authority derives from inspiration and communication with God—themselves split into charismatic judges and prophets and more institutionalized priests. In the third position are defenders of the monarchy, basing its claim to authority on the King's descent from David, God's favorite, and Samuel's curse (or grant from God) of arbitrary royal power.[38]

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[35] *See, e.g.*, Isaac Abravanel, *Commentary on the* Pentateuch, Deuteronomy 17:14, *translated in* 1 JPT, *supra* note 27, at 150-54 (arguing that a king is unnecessary and even undesirable, both for Jews and non-Jews). This is, to be sure, a minority view. Just as the people overruled Samuel, most commentators see even Gentile kings as vital for the preservation of the minimum security necessary for life. As Rabbi Hanina puts it in Pirkei Avot, "Pray for the welfare of the [foreign] monarchy [i.e., government]. Were it not for fear of it, men would eat their comrades alive." Mishnah, Avot 3:2.

[36] The rabbis of the Talmud, in contrast, seem to view themselves as largely powerless against a king, perhaps reflecting their efforts to avoid another disaster along the lines of the Great Revolt. *See, e.g.*, Michael Walzer, *Commentary,* Babylonian Talmud, Sanhedrin 19a-b, *in* 1 JPT, *supra* note 27, at 139-41.

[37] Babylonian Talmud, Sanhedrin 20b, *translated in* 1 JPT, *supra* note 27, at 141-42; *cf.* Maimonides, Mishneh Torah, Law of Kings 2:5-6; 3:7-10; 4:1, 10; 5:3, *translated in* 1 JPT, *supra* note 27, at 143-47.

[38] 1 Samuel 8, 10-18 (setting out a litany of terrible actions kings take). While a simple reading of Samuel's speech suggests it is a warning of the downsides of monarchy, many later commentators read it as authorization—kings are permitted to take all these seemingly unjust actions. *See*, e.g., Babylonian Talmud, Sanhedrin 20b,

Biblical texts hint at other forms of rule—the judges whom Moses appoints to help him, the judges who sit in the gates of the cities and who the Levitical law demands adjudicate impartially and without bribes, the mobs or masses that reject Samuel's sons and that support and then reject Saul—but little detail to help us understand their claims to legitimacy or the extent of their authority.

### C. From Biblical Kings to the Needs of the Hour

Post-biblically, after the collapse of the Jewish kingdoms, the law of the king continued to be studied. But as a matter of actual Jewish politics, even if it was ever central to struggles over legitimization and delegitimization of state power, it faded to a background critique. By the time of the Talmud, Jews lived mainly under the Roman and Persian empires. Behind the texts, we can see at least the remnants of a debate against radicals seeking to overthrow Roman rule, however bloodily doomed the effort. But the texts were preserved in their current form largely by the opposing party—advocates of quiescence seeking to salvage survival from defeat.

The dominant strand in the Talmud (and nearly all subsequent Jewish literature) sublimates revolutionary impulses, nationalistic struggles for self-rule, theocratic urges to impose religious law on all, and even yearning for simple justice, into messianic hopes for a forever-receding future. Legitimacy is not its central concern. Instead, the dominant position from the Mishnah on is "the law of the land is the law."[39] Any government is entitled to govern and tax—without regard to whether it claims its authority from God, the people, or merely force of arms, provided it meets the most minimal standards of

*supra* note 37. Others continued Samuel's attack. *See, e.g.*, Abravanel, *supra* note 35.

[39] Babylonian Talmud, Bava Kama, 113a-b.

justice[40] and that it is actually accepted.[41] By focusing on peace rather than sovereignty, conquest, honor or justice, this group sought to end the destructive cycle of rebellion. Instead, as Israelites became Jews, they moved to a different model of communal existence, emphasizing religious and cultural autonomy as a separate people living among the nations.

Even without king, state, army or Temple, the Jews from the Talmudic period, and virtually every other period up to the modern era, remained autonomous and partially self-governing for many purposes.

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[40] *See, e.g.*, Maimonides, Mishneh Torah, Robbery and Lost Property 5:14 ("The principle is as follows: Any law enacted by the king that applies generally and not only to a single individual is not robbery, but whenever he takes discriminatorily from a particular individual and not from everyone, he acts lawlessly against that individual and it is robbery."); Asher ben Yehiel (Rosh), *Commentary on* Babylonian Talmud, Nedarim 28a ("[The rule 'the law of the kingdom is the law' applies] only when taxes are equal on all inhabitants of the country . . ."); 1 JPT, *supra* note 27, at 433 (stating that most writers expected only minimal standards of justice—that tax obligations be explicit, defined and generally applicable so that law can be distinguished from robbery).

[41] Some medieval authorities contended that kings rule with tacit or actual consent of the ruled. *See, e.g.*, Samuel b. Meir (Rashbam), Babylonian Talmud commentary, Bava Batra 54b, *translated in* 1 JPT, *supra* note 27, at 438 ("All taxes, rates, and rules of a kings' law commonly established in their kingdoms are law, for all subjects of a kingdom willingly accept the king's laws and statutes."). This consent might be purely imaginary, based on the medieval conceit that traditional law is consensual (and conversely, that new decrees are not valid). *See, e.g.*, Or Zarua, Responsa 80, 206, *translated in* 1 JPT, *supra* note 27, at 430-40; R. Moses ben Nahman (Nahmanides), *in* Maggid Mishneh, *Commentary on* Maimonides' Mishneh Torah, Laws of Stealing and Losing 5:13 ("If the king comes and promulgates new law, even though he enacted the law to apply to everyone, if it was not among the early laws of the kingdom, then the law is not law."). Others looked for evidence that the king's authority was actually in effect, much as modern international law does. Thus, they required some actual consent for legitimacy, although, of course, nothing like a vote or any form of underlying fair conditions. Thus, for example, Maimonides rules that the government's law is binding if the king's "coins are dispersed (used) throughout the land. The people accepted the sovereignty of the king and the laws of the state and they are the king's subjects. But if the sovereign's coin is not dispersed throughout the land, then he is like a thief . . . and his law is not the law." Maimonides, Mishneh Torah, Laws of Theft and Loss 5:18. Perhaps this ruling is related to Jesus's similar conention. Others posit theories closer to the "mandate from heaven." *See, e.g.*, Anonymous Gaonic Responsum, Responsa Geonica (Assaf) 13, *translated in* 1 JPT, *supra* note 27, at 436-37 ("[J]ust as God established the rule of the kingdoms in His world, He also subjected people's property to the[ir] rule … as written, '[On account of our sins …] they rule over our bodies and our beasts as they please.' (*Nehemiah* 9:37).").

The Talmudic rabbis extensively debate the sources and limits of their own authority, but for current purposes, I am more interested in the rather limited discussions of lay authority and in how those texts were used in later periods.

The texts are open to wide interpretation, and I, at least, lack a clear intellectual history placing them in historical context. Moreover, the partial records we have are nearly all from rabbinic sources and thus part of a long tradition of apologetics which often encouraged writers to present their own opinions as deriving inevitably from older sources. This can make it difficult to see the real extent of dispute and disagreement, especially for non-expert readers (of which I am one). Moreover, rabbis as a group were competitors for authority with the lay leadership, not neutral observers; it can be difficult or impossible to sort polemic from description, or rights and rules that only a rabbi (and not all of those) would accept from widely held moral or political views, and aspirations from realpolitik.

Notwithstanding these caveats, the texts can still be useful as illustrations of how a group of people in radically different circumstances from ours thought about problems that are, to some degree, universal. By examining modes of thought that are quite foreign to standard American law and politics, we may be able to illuminate parts of our own beliefs that would otherwise remain invisible.

From the Talmud forward, the rabbis rejected Biblical law as a model for actual governance. The Massachusetts Puritans enacted various Levitical ordinances into law and at least pretended that they were enforceable by ordinary courts—even rules as obviously unrealistic as Deutoronomy's command to parents to turn over stubborn and rebellious sons to be stoned.[42] In contrast, the rabbinical tradition was clear that real governments cannot operate under the Biblical code.

On the one hand, it was too harsh, at least if read without nuance. An eye for an eye,[43] stoning stubborn teenagers,[44] or drinking the bitter waters as a test for adultery[45] are morally indefensible if taken simplistically. The Talmudic disputants instead took them seriously enough to render them inapplicable in all real-world situations.[46]

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[42] Deuteronomy 21, 18-21.
[43] Exodus 21, 22-25; Leviticus 24, 19-20; Deuteronomy 19, 18-21.
[44] Deuteronomy 21, 18-21.
[45] Numbers 5, 11-31.
[46] Thus, the law of the stubborn and rebellious son, read carefully, applies only to a male child over the age of bar mitzvah (since a younger son cannot be held responsible) but before puberty (because he must be a "son," not a man), must be defiant in

On the other hand, Biblical procedure as understood by the Talmud makes actual convictions impossible (as the Talmud itself recognizes).[47] How often will two qualified witnesses hear an accused defendant state that he knows the law and intends to defy it and then see the crime committed in front of them?[48] Even if such witnesses could be found, a capital trial must be before a court made of qualified and ordained judges sitting in the Chamber of Hewn Stone.[49] But the chain of ordination was irrevocably broken, the Chamber of Hewn Stone destroyed by the Romans, and the qualifications for a judge included several—such as understanding every language without an interpreter—that no human can meet.[50]

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only specified ways and only towards appropriate parents. In short, as the Talmudic discussion concludes, "there never has been and there never will be a stubborn and rebellious son." Babylonian Talmud, Sanhedrin 68b-71a. As usual, there is a dissenting view. *Id*. at 71a (reporting R. Jonathan's statement that he once sat on the grave of a stubborn and rebellious son).

Similar exegesis also rendered the eye for an eye rule metaphoric: the literal text could only apply if the exchange is exact, which, of course, is impossible. Babylonian Talmud, Bava Kamma 84a. Maimonides states that the law is so clear that anyone who suggests that actual eyes should be plucked out deserves the death penalty as a false prophet. Maimonides, *Introduction to the Commentary on the* Mishnah ("since he attributes to God that which He has not commanded"); *see also* Maimonides, Mishneh Torah, Law of Tortfeasors 1:5 ("How do we derive the rule that the phrase 'eye for (*tahat*) an eye' (Exodus 21, 24) dealing with the loss of a limb refers to monetary compensation? It is stated in the same context, 'bruise for (*tahat*) a bruise' (Exodus 21, 25). And it has been explicitly stated, 'when men quarrel and one strikes the other with stone or fist, and he does not die but has to take to his bed . . . he must pay for his idleness and his cure.' (Exodus 21, 18-19). Hence, we derive the term *tahat* (for) as used in connection with injuries to eyes and limbs also connotes compensation.").

The trial by bitter waters required a miracle for a conviction and, in any event, could only be performed at the Temple, but the Mishnah reports it was no longer performed even before the destruction of the Temple. Mishnah, Sotah 9:9.

[47] *See, e.g.*, Mishna, Makkot 1:10; Nissim Girondi (Ran), Derashot 11, *translated in* 1 JPT, *supra* note 27, at 156-61 (describing procedural requirements). For my view of these procedural rules, see Daniel J.H. Greenwood, *Restorative Justice and the Jewish Question,* 2003 UTAH L. REV. 533, text at nn. 20-35 (2003).

[48] Babylonian Talmud, Sanhedrin 37b, 40b.

[49] Deuteronomy 17, 10 (requiring capital court to sit in "the place that Adonai chooses," understood to be Chamber of Hewn Stone at the Temple); Babylonian Talmud, Sanhedrin 52b (holding that executions under Biblical law were impossible after destruction of the Temple).

[50] Babylonian Talmud, Sanhedrin 17a (listing qualifications for sitting on Sanhedrin, including height, wisdom, good looks, age, knowledge of magic so as not to be fooled by magicians, knowledge of seventy languages so that no translator is needed, and

Instead, they determined that necessity was the basis of criminal law authority.[51] The "needs of the hour" could justify virtually any ruler using any available means of coercion, provided the coercion would be effective to reach an appropriate social end—whether social peace or observance of religious ritual—and that the people can stand it.[52]

### D. Deriving Government from Partnership

On the civil side, the early sources already recognize some kinds of public authority. Thus, for example, the Mishnah rules that residents of a courtyard may compel each other to share in common costs; Rabban Shimon b. Gamliel extends the principle to entire towns, allowing the town to compel townspeople—those who lived there for one year or own a residence—to share in building a wall or gate if needed.[53] But the short and cryptic passage does not explain who has the right to decide for the town or courtyard and what degree of compulsion is permitted.

Later, medieval authorities appear to have expanded preexisting partnership law norms in order to conclude that participants in various common enterprises could coerce each other. The Jewish law of partnership itself is not based to any significant degree on Talmudic sources. Maimonides's Mishneh Torah, for example, lays out some basic default rules but repeatedly emphasizes that local custom or specific agreements between the parties ordinarily govern in partnership and municipal law alike.[54] Thus, for example, in a partnership, division of profits ordinarily should be equal (per person) but can also be proportional to investment—the same rule as in the modern Uniform

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ability to prove a *sheretz* (swarming creature) pure based on Torah despite Leviticus 11, 29-39, which states that it is impure); Maimonides, Mishneh Torah, Sanhedrin 2, 1, 3; 2, 6-7 (listing somewhat different set of qualifications, including understanding of major branches of knowledge, not being old or eunuch "because these have cruel streaks," not being childless "so that he may be merciful," humbleness, and enough valor to rescue oppressed from their oppressors).

[51] *See* Greenwood, *supra* note 47, at 548.

[52] Babylonian Talmud, Sanhedrin 46a.

[53] Mishnah, Bava Batra 1:15. Maimonides follows Shimon ben Gamliel. Maimonides, Mishneh Torah, Neighbors 5:1.

[54] *See, e.g.*, Maimonides, Mishneh Torah, Neighbors 2:15, 5:1, 6:13 (emphasizing that local custom controls the applicable rules); Mishneh Torah, Agents and Partners 4:3, 4:4, "6:1": "ruling that a partnership agreement may vary the default rules", 5:1 (local custom governs partnerships unless otherwise agreed).

Partnership Act ("UPA").[55] More reasonably than the UPA, Maimonides holds that a labor-only partner should bear less of any losses than a silent investor.[56] More importantly, that rule as well can be varied by any clear evidence of custom or agreement to the contrary.[57] Partnership, quite unlike the law of the king, comes from the bottom up: the ultimate source of the law is the agreement of the affected parties.

Partnership principles seem to have uncontroversially expanded well beyond businesses that we would recognize as partnerships into general provisions of self-government.[58] Or perhaps the two sets of rules developed separately and in parallel. In any event, the law of neighbors on a courtyard, which appears to be the halachic basis of most communal government law, borrows from partnership and vice versa with similar principles and rulings.[59] Moreover, while the medieval rabbis and code writers base their decisions in Talmudic precedent, they also consistently recognize that the community, not the text, is the source of its law. Thus, in economic and fiscal matters, the rabbis consistently rule that no court may invalidate a community decree.[60] Even Rashi, the greatest rabbi of his time, refused to lift a ban

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[55] Maimonides, Mishneh Torah, Agents and Partners 4:3, 6:1 (setting out default rule of equal division of profit and loss among partners, alternative rule of proportional to investment, and that agreement to the contrary is valid); UNIF. P'SHIP ACT §§ 105(a)-(b) (establishing that the partnership agreement may differ from the default rule), 401(a) (setting equal division of profits as the default rule) (2013).

[56] Maimonides, Mishneh Torah, Agents and Partners 4:3. The UPA's default rule is that losses are divided the same way as profits, without regard to the contributions of the partners. UNIF. P'SHIP ACT § 401(a). Rather unfairly, the UPA completely ignores that those who contributed labor have a different kind and extent of losses than those who contribute money. Similar to Maimonides, the UPA rule permits the parties to agree otherwise. *Id.* at § 105(a)(1)-(2).

[57] *See* Maimonides, Mishneh Torah, Neighbors 2:15, 5:1, 6:13.

[58] AGUS, *supra* note 16, at xix ("communities organized themselves into corporate bodies with coercive powers over their members, … established courts of justice and enforced the rulings"); *id.* at 58, 96-97 (the community asserted itself as the source of authority, not relying on Biblical grants to the House of David or gentile authorities).

[59] For example, neighbors sharing a courtyard or brothers inheriting a divisible property are free to agree to vary the default rules that would usually apply, much as partners are. Maimonides, Mishneh Torah, Neighbors 2:9, 2:11. Similarly, custom controls many details, *id.* at 2:15; 2:18, 5:1, 5:3, 5:4, and when local custom contravenes the rules Maimonides sets out, he generally holds that the custom prevails.

[60] *See, e.g.*, AGUS, *supra* note 16, at 96-97 (stating that rulings to this effect were based on Babylonian Talmud, Bava Batra 8b).

imposed by another town, saying "who am I, that I should assume authority in other localities than my own."[61]

Maimonides, for example, does not explicitly address the authority of the Jewish community to regulate itself in the absence of king, priest, or Sanhedrin. Instead, he addresses the rights of neighbors to coerce one another, treating them as if they were partners in a common enterprise. He is clear that partners can coerce one another, and he applies similar language to neighbors. For example, inhabitants of an alleyway or around a courtyard could regulate land use for the common good by, for example, barring a newcomer (but not a citizen of the town) from opening a competing business,[62] or preventing inhabitants from opening new stores that would increase traffic and impinge on others.[63] Local practice again remains critical: the inhabitants may bar anyone from using a lane or courtyard in a non-customary manner but not in customary ways.[64]

Maimonides does not make a strong distinction between negative and positive liberties. Thus, for example, the inhabitants of a courtyard may negatively bar each other from opening new windows that would reduce privacy already had,[65] or from building walls that would unduly block the light to existing windows,[66] but they may also positively require each other to build walls or barriers to create new privacy in the courtyard or on the roof.[67] Similarly, they may negatively prevent their neighbors from engaging in new noxious or noisome activities,[68] or even increasing traffic,[69] but they also may affirmatively coerce everyone to contribute to common defenses such as building a gate (but not ornaments),[70] or require individuals to repair common spaces,[71] or contribute towards maintaining a spring from which the taxpayer derives water.[72]

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[61] *Id.* at 100.
[62] Maimonides, Mishneh Torah, Neighbors 6:8 (lane), 6:11 (town).
[63] *Id.* at 6:8, 6:11-12.
[64] *Id.* at 5:4.
[65] *Id.* at 5:6-7, 5:10, 7:5.
[66] *Id*. at 7:1, 7:8.
[67] *Id*. at 2:14, 3:6, 7:2.
[68] *Id*. at 5:3 (including raising chickens or erecting a mill, provided they interfered with others and are not customary already), 6:8. Here, Maimonides is following Tosefta, Bava Metzia 11:16-17, *translated in* 1 JPT, *supra* note 27, at 387-89.
[69] *Id*. at 5:8-9.
[70] *Id.* at 5:1-2, 5:12, 5:14.
[71] *Id*. at 3:1.
[72] *Id.* at 3:9.

Most dramatically (from an American law perspective), Maimonides repeats the well-known Talmudic rule that "we coerce people not to act in the manner of Sodom,"[73] to hold that a property owner should be compelled not to take actions that hurt another without benefiting the owner, and sometimes even to take an action that costs the owner nothing but benefits another. The common law holds the most basic right of property to be the right to say no for no reason at all; without it contract-based consent theory would lose all its persuasive power. Maimonides condemns this anti-social principle as sodomy.

Similarly, following the Mishnah and Tosefta, he extends the rights of inhabitants of an alleyway to entire cities, with no discussion of whether a city is different from an alleyway.[74] A city, too, may coerce all its permanent residents (those who pay head tax to the non-Jewish authorities) to contribute towards walls, gates, guards and other security measures but also to build a synagogue, to purchase a Torah scroll, or to build roads or a water system,[75] although scholars are exempt from assessments to pay for security (because they are (supernaturally) protected by their Torah study (!)).[76]

Indeed, a city has a full range of governmental powers, including, as the Talmud stated, to regulate the terms of labor and prices and

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[73] This rule holds that the community should use coercion to prevent people from acting in the manner of Sodom, i.e., harming another with no gain to the actor. The rule appears several times in the Talmud. *See, e.g*., Babylonian Talmud, Bava Batra 59a (holding that a householder may open a window into a courtyard over the objections of neighbors, so long as there is no reduction in privacy); *id*. at 12b (applying principle to divide land when one would benefit with no harm to others). The "in the manner of Sodom" principle refers to the behavior of the people of Sodom, who are said to have delighted in harming others for the sake of the harm itself, with no benefit to themselves. *See* Genesis 18-19 (describing sinfulness of Sodom without specifying the sin); Amos 4, 1-11; Ezekiel 16, 49; Genesis Rabbah 48; Yalkut Shimoni, Genesis 83 (each identifying the sin of Sodom as failure to help the poor and strangers); Babylonian Talmud, Sanhedrin 109a (Sodom treated every stranger to a Procrustean bed). It is related to the discussion of character traits in Mishnah, Avot 5:10 ("There are four-character types: One says: 'mine is mine, and yours is yours': this is an average character; and some say this is the character of Sodom. [Second:] 'mine is yours and yours is mine' – a peasant *(am haaretz*). [Third:] 'mine is yours and yours is yours' – a pious person (*hasid*). [Fourth:] 'mine is mine, and yours is mine' – a wicked person.").

[74] Maimonides, Mishneh Torah, Neighbors 6.

[75] *Id.* at 6:1, 6:3, 6:5, 6:7. These sections of the Mishneh Torah follow Tosefta, Bava Metzia 11:23. *See* 1 JPT, *supra* note 27, at 387-88.

[76] *See* Maimonides, Mishneh Torah, Neighbors 6:6; *see also* AGUS, *supra* note 16, at 112-13 (finding similar rules in responsa generally).

measures in the market.[77] Maimonides, following the older sources, rules that towns may establish zoning; ban nuisances, including smelly professions, to the outskirts of town; limit (but not completely ban) competition from out-of-town merchants; and refuse to admit immigrants who threaten the livelihood of citizens.[78]

As in partnership law, other medieval writers are also clear that the citizen/partners have extraordinary powers of self-government. Thus, Rashi reads the Bava Batra passage to authorize a town to punish transgressors even of communal decrees that go beyond Torah law and a responsum by Gershom Me'or Ha-Golah holds that the community could even overturn Talmudic law.[79] Meir of Rothenburg similarly rules that a community may enforce its allocation of taxes by requiring a householder who makes a separate arrangement with the gentile authorities to share his gain with the town, specifically because all the townsmen are "partners,"[80] and that if an individual shirks his share of taxes, the town authorities customarily hire gentiles to break into his home and seize his possessions.[81]

Curiously, Maimonides does not mention the basic organizational units of pre-Emancipation Jewish life. I am not sure whether this is because he is following earlier sources that do not mention them, because they were not controversial since they were ruled by custom or convenience (rather than halacha), or because they did not yet exist. Thus, in his discussion of neighbors and the town, Maimonides tells us

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[77] Babylonian Talmud, Bava Batra 8b.

[78] Maimonides, Mishneh Torah, Neighbors 10:1-4, 11:1, 11:5 (following the same Tosefta).

[79] Gershom b. Judah Me'or ha-Golah, Responsa of Zarfat and Luthir 97, *translated in* 1 JPT, *supra* note 27, at 391-92. Agus states that this was the general view with respect to matters of taxation. Similarly, the rabbis upheld complete communal autonomy with respect to business regulations that might help some at the expense of others, although some required unanimous agreement to change the rules in these areas. In purely ritual matters, the responsa generally upheld rabbinic interpretations of the Talmud over communal decrees, but the boundary is unclear, and even in core ritual matters, such as the laws of kashrut, communal custom (as opposed to decrees) was almost always upheld over the texts. AGUS, *supra* note 16, at 111, 114, 118-23; R. Meir, Responsa 529-31, *translated in* AGUS, *supra* note 16, at 487-90; Irving A. Agus, *The Rights and Immunities of the Minority*, 45 JEWISH QUARTERLY REV. 120, text at nn. 7-8.

[80] R. Meir, Responsa 549-50, *translated in* AGUS, *supra* note 16, at 500-02. Hebrew is gendered, so "townsmen" could theoretically include women, but much as at common law, in most periods and places, women had few property rights while married, and I know of no indication that they voted in communal elections.

[81] *Id.* at Responsum 561.

nothing about how a synagogue is organized or who (or what) owns its property, elects its leaders, or selects its rabbi. He does not mention the burial society or how the cemetery and ritual bath are to be operated or who sets the curriculum or hires the faculty of elementary and advanced schools.[82] He does not explain who hires the community butcher or baker, nor does he explain what happens if one is not found or who may intervene if the incumbent is incompetent, dishonest, or insufficiently careful of kashrut or sanitation. Presumably a city must provide a soup kitchen or other support for the poor, but Mishneh Torah is silent as to the appropriate level of services as well as the organization, property, and responsibilities of those in charge of it. Nor does he tell us who, if anyone, has the right to sell communal or organizational property if the city, synagogue, school, soup kitchen, or courtyard is unable to pay its bills.

Similar silences resonate loudly. Maimonides asserts the right of neighbors to coerce each other or cities to demand that permanent residents bear the costs of common decisions.[83] But he does not explain how the collective decision is to be made in the first place.[84]

His partnership rules state that by default, profits are to be divided equally per person, but may be varied by agreement, and his examples suggest that they frequently were.[85] Did voting follow the same rule? Do the inhabitants of an alleyway or courtyard or city, or the congregants of a synagogue or volunteers of a burial society vote directly or elect representatives who vote for them, or are the texts assuming some kind of self-appointed aristocracy of blood, wealth, or learning? It is even less clear who was entitled to vote—inhabitants, property-owners, taxpayers? Households (presumably meaning male heads of families) or individuals? Or is voting limited to an oligarchical nobility or elite selected by some other method—birth or

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[82] Maimonides does tell us that the community is entitled to coerce members to pay their share of these expenses—but he is silent as to who makes the decisions and who sets the budget. Most strangely for anyone trained in the liberal tradition, he does not discuss what happens when there is disagreement (as there surely always will be) or the procedures by which the community authorizes the expense or elects its officers.

[83] *See supra* text accompanying notes 59-81.

[84] *See supra* notes 53 & 82; *see also* Jerusalem Talmud, Megillah 74a, *translated in* 1 JPT, *supra* note 27, at 391 (seemingly presuming that town and synagogue matters will be determined by a council of seven and three, respectively, "accepted" by the townspeople). Does the term "accepted" here mean not actively resisted or is it closer to election?

[85] *See, e.g.*, Partners 4:3.

education or wealth or force or charisma? Maimonides is silent. Our other sources suggest wide variance.

One key dispute in the responsa[86] is whether the authority of the town depended on unanimous consent or majority (there is little discussion, however, of who counts as a voting member). Some authorities seem to think that all legitimate power to coerce comes from consent—so each enactment must be by unanimous consent and can only be enforced against those who agreed and later reneged.[87] At least one writer, Maharam (Meir ben Baruch of Rothenberg) seems to assume that while the town council—the Seven Good Men—operates by majority rule on most issues, its members must be elected by unanimous consent (although he, too, does not discuss who qualifies as a voter).[88] In either version, a unanimous consent rule surely guaranteed either no action at all or coercion of dissenters in any but the smallest community.

In contrast, others take a more majoritarian view. Rashba writes, "in each and every public, individuals are considered to be under the rule of the many and must pay heed to them in all their affairs" but then, and seemingly contradictorily, holds that an enactment is binding on future generations as well.[89] Perhaps the thread that holds together the disparate notion of majority rule with decrees binding on those who had no part in enacting them is, again, commercial and partnership law. If a decree is understood in contractual terms, a partnership too would be bound by a contract it entered into even if all the partners changed over. Similarly, an heir takes the deceased's property together with its encumbrances and secured debt.[90]

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[86] Reponsa are written rulings by prominent rabbis to questions forwarded to them by local decisionmakers (both rabbinic and lay), often recorded and circulated in manuscript by the author's students. *See* 1 JPT, *supra* note 27, at xxiv-xxv; AGUS, *supra* note 16, at xv-xxii.

[87] *See* Elijah Mizrahi (Re'em), Responsa 57, *translated in* 1 JPT, *supra* note 27, at 409-14 (stating that Maimonides and Rabbenu Tam interpret Babylonian Talmud, Baba Batra 8b in this way).

[88] Meir b. Baruch of Rothenberg (Maharam), Responsa (Prague) 968, *translated in* 1 JPT, *supra* note 27, at 400-01 ("[T]he seven good men of the town who were initially selected with the unanimous consent of the townspeople to oversee their civil affairs and to impose penalties — they too are authorized to enforce their decree.").

[89] Solomon b. Abraham Adret (Rashba), Responsa 3:393, 3:411, *translated in* 1 JPT, *supra* note 27, at 402-05.

[90] Anti-contractarian explanations of the Covenant at Sinai sometimes use a metaphor of redemption: God purchased the Jews out of slavery, so they became His servants.

Perhaps all these systems could be found in different Jewish communities or communal organizations, with some run by oligarchs or under the close supervision of scholars and others more popular. Perhaps the different rules applied to different types of decisions, with majority rule as the general rule, voting by wealth or unanimity for fiscal matters,[91] and scholarly interpretation definitive for ritual issues. Perhaps some of our texts, which have little description of the institutions or procedures implementing (or not) the stated principles, reflect scholastic imaginings based on older texts rather than actually effective institutions. Still, the responsa regularly seem to view the town as a sort of partnership, governed by the same principles as a synagogue or a business partnership. Thus, for example, an eleventh century Ashkenazi responsa asks whether a majority of the members of the *kahal*[92]—it is unclear whether referring to all the townspeople or just the leadership—can bind a minority and rules that it may, even to the extent of expropriating property.[93] Two centuries later in Toledo, Ramah, in ruling that the community had no power to impose an injury on an individual, calls a synagogue a partnership in which each member has equal rights, the majority rules, and actual decisions are delegated to an unreviewable council of seven representing the entire public.[94] In contrast, Maharam applies partnership principles directly to the town, holding that while the majority may rule, "they are not authorized to institute new [arrangements] without unanimous consent," just as modern partnership law holds that the majority rules on ordinary matters, but unanimous consent is required to change the partnership

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*See, e.g.*, Sifre, Numbers 115, *translated in* 1 JPT, *supra* note 27, at 29-30. This explanation is not available for the civil authorities of the town.

[91] *See, e.g.*, Asher b. Yehiel (Rosh), *Responsa*, *translated in* 3 THE JEWISH POLITICAL TRADITION 400 (Michael Walzer et al. eds., 2018) (hereafter 3 JPT) (holding that on matters of finance "we follow the majority of money").

[92] *Kahal* means "community," specifically an organized community or town government.

[93] Yehuda b. Meir HaKohen and Eli'ezer b. Isaac Hakohen, Kolbo 142, *translated in* 1 JPT, *supra* note 27, at 392-96. The responsum appears, however, to limit the power of the *kahal* (town government) to measures intended to "form a fence around the Torah," suggesting some room for arguing that an unjust decree need not be obeyed. The more authoritarian writers argue instead from Sifre, Deuteronomy 154. *See* Sifre, Deuteronomy 154, *translated in* 1 JPT, *supra* note 27, at 333 ("Even if they tell you that right is left and left right, obey them.").

[94] Meir Halevi Abulafia (Ramah), Responsa 285, *translated* in 1 JPT, *supra* note 27, at 399-400.

agreement.[95] However, Maharam sharply limits the right of the partnership to govern itself, even with unanimous consent, by stating that it may never contravene the will of a great man in the town—to do so would be to act wrongly "as a king."[96]

Similarly, it is clear that losers regularly felt that substantive justice (as they perceived it) ought to override the results of the political process (whatever it was); instead of simply abiding by the majority and waiting for another contest on another day, partisans regularly appealed to the local rabbi and esteemed decisors elsewhere. Typically, all we have today is the rabbinic opinion, rarely with any detail of how the original decision was made or indication of whether the parties abided by the opinion rendered in the responsum itself.

### E. Government by Partnership Principles in the Practice of the Late Medieval *Kahal*

These then are the principles that underpinned the quasi-self-governing *kahal*: a Jewish community in a physical location that took on many of the roles of municipal self-government, especially taxation and economic regulation. Typically, the *kahal* negotiated collectively with the local nobility or other government for collective privileges (including residence rights and the right to work in specified professions) and obligations (especially taxation). It then allocated privileges and obligations among the Jewish population with relatively little internal interference from the outside government. Thus, the local non-Jewish ruler set taxes on the entire Jewish community collectively; it was the *kahal's* obligation to raise the funds from individual inhabitants. Again, we know less about how these decisions were made, to what extent different communities followed a common form, or whether ordinary people accepted such decisions or decisionmakers as

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[95] *Id.* at 401; UNIF. P'SHIP ACT §§ 401(h), (k). Meir of Rothenburg similarly rules that a new *kahal* can only be founded by unanimous consent. Responsum 529, *translated in* AGUS, *supra* note 16, at 487-88. So does Rabbenu Tam, in a different time and place. Jacob b. Meir Tam (Rabbenu Tam), Responsa, *translated in* 3 JPT, *supra* note 91, at 397. For different views, see the responsa regarding a dispute over unifying the separate communities of Patras, *translated in* 3 JPT, *supra* note 91, at 422, 426.

[96] Meir b. Baruch of Rothenberg (Maharam), Responsa (Prague) 968, *translated in* 1 JPT, *supra* note 27, at 401.

legitimate or simply tolerated them as inevitable.[97] Indeed, it is unclear to what extent the communities were in fact autonomous; the responsa condemn the practice of appealing to the local rulers sufficiently often that it must have been a regular practice.[98]

In other ways, actual Jewish practice also provides an even more interesting counterpoint to the eighteenth century social contract theories of limited government that remain so influential. At roughly the same time that the French and American revolutionaries were opposing the pretentions of kings asserting divine rights to rule by setting out a new theory of sovereign peoples led by hired servants, Jews were creating a quasi-autonomous form of government in the Four Lands.[99]

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[97] For general discussions, see, e.g., *Introduction, Communal Government*, *in* 3 JPT, *supra* note 91, at 392-93 (stating that most of the *kahals*, and the federated Council of the Four Lands, were strongly oligarchic and that few records survive of debates or opposition); *see also* AGUS, *supra* note 16, at 56-123 (stating that self-governing *kahals* sought to maintain autonomy from gentile authorities and, especially in economic matters, even rabbinic authorities, finding their sources of authority in consent and prescription rather than grants from higher (or Higher) powers).

[98] Sometimes it is clear that Jews went to the gentile courts. *See, e.g.*, Nathan Hanover, *Abyss of Despair* (1653), *translated in* 3 JPT, *supra* note 91, at 430-31 (stating that in the days of the Council of Four Lands, "never was a dispute among Jews brought before a Gentile judge … and if a Jew took his case before a Gentile court he was punished and chastised severely"); *see also* Maimonides, Mishneh Torah, Sanhedrin 26:7, *translated in* 3 JPT, *supra* note 91, at 589 ("Anyone who goes to heathen judges is a wicked man. But if the heathens are powerful, and his opponent refuses to appear before the Jewish court, the court may give him permission to go to the heathen courts.").

[99] *See*, *e.g.*, Herman Rosenthal & S.M. Dubnow, *Council of Four Lands*, JEWISH ENCYCLOPEDIA (1906), http://www.jewishencyclopedia.com/articles/4705-council-of-four-lands. The Council operated from before 1533 until the Polish Diet abolished it in 1764 shortly before its own end with the 1772 Partition of Poland. Its members consisted of prominent members—rabbis and officials—of the constituent communities, selected by more or less oligarchical methods but, importantly, by Jewish norms with little or no overt interference by the Polish or Imperial authorities (with some notable exceptions in cases of internal disputes). Its activities included managing relations with the Polish authorities and attempting to combat calumnies, allocating taxes charged by the Polish government to smaller units, enforcing governmental edicts (including bars on Jews settling in particular places or pursuing particular professions), censoring Hebrew publications, creating and enforcing sumptuary rules, combatting the Sabbateans and, just before its demise, Hasids, supervising intra-Jewish institutions such as schools (primary and secondary) and courts, and serving as the ultimate court of appeals for disputes between different Jewish communities. The Four Lands were Great Poland (Posen); Lesser Poland (Krakow); Red Russia (Podolia and Galicia-Lemburg/Lviv); and Volhynia

Though I do not pretend to a full understanding of how this self-government worked, and it does not seem to have been fully theorized, it still provides a useful counterpoint.

The Council of the Four Lands system seems to have evolved from older forms of medieval Jewish urban self-government, which, as we have seen, in turn borrowed heavily from partnership concepts, often in explicit opposition to the Biblical or Talmudic notions of rule by king, priests and/or rabbinic courts.[100] In the Polish organized *kahal* of the sixteenth century, between ten to twenty *parnassim* (usually translated 'elders,' although 'functionaries' would be better) were the primary officeholders. They were elected by a limited group of electors who, in turn, were selected by lot. Elsewhere in Ashkenaz, the electors were sometimes hereditary but nearly always a limited group of the wealthier taxpayers. The rabbi was an independent authority, although generally hired and fireable by the *parnassim*.[101]

The authority of the *parnassim* was broad, including legislative, administrative and judicial functions, including regulating economic affairs (and enforcing Polish decrees banning Jews from living in specified areas or practicing specified trades), collecting taxes (both for the royal government, which taxed the Jewish community collectively, and for internal Jewish needs), regulating schools, censoring publishers, attempting to suppress religious dissidents such as the Sabbateans or, at the end of the period, Hasids, adjudicating intra-

(Krementz). Sometimes, it was called the Council of Three Lands (combining the two Polands), or Five Lands (adding Lithuania).

[100] The Talmud recognizes several different legal systems. First, it describes an idealized rule by a clearly mythological Sanhedrin applying Torah law as understood by the rabbis using procedural rules and judicial qualifications that cannot exist in the real world. Second, it contemplates legitimate Jewish kings, descendants of David, acting in contravention of Torah law either for their own purposes, treating Samuel's denunciation of royal rule as, instead, authorization of royal prerogative. Third, it derives authority from the "needs of the hour" and seemingly accepts that rabbis, other Jewish authorities and even foreign governments may, or sometimes must, create law and enforce it with violence to keep the peace, reduce crime, help the economy function or, paradoxically, even enforce halachic requirements by violating Torah law.

[101] 3 S.M. DUBNOW, HISTORY OF THE JEWS IN RUSSIA AND POLAND 103, 105 (I. Friedlaender trans.) (1916), https://www.gutenberg.org/files/47212/47212-h/47212-h.htm. A 1551 charter from the King granted the Jews of Greater Poland the right to elect their own rabbis and judges in religious and civil cases between Jews, and, with the consent of the town *parnassim*, to enforce those decisions by herem or other Jewish law sanctions or to turn offenders over to the King's authorities for execution.

communal civil and religious disputes, and the like.[102] They had extensive enforcement powers, including fines and the *herem*, and could also turn offenders over to the king's authorities for execution.

The Council of the Four Lands was composed of representatives from the various *kahals* in its territory (which varied over time). It assumed all the powers of its constituent *kahals* and more, particularly judicial power over appeals and disputes between different *kahal*s, although its power over local authorities seems to have been mostly hortatory rather than coercive.[103]

The powers of *kahal* and Council alike were always highly contingent—the local nobility and priesthood as well as the king were under few restraints and might increase or decrease the powers of the *parnassim* according to whim or interest.[104] But during long periods, the non-Jewish powers found it convenient to deal with the Jews collectively and so allowed and even protected Jewish autonomy.

Similarly, the *kahal* system does not seem to have been designed with checks and balances or popular responsiveness in mind, and unsurprisingly, there are many accounts of arbitrary action, corruption, or favoritism.[105]

## III. LESSONS FROM THE *KAHAL*: GUARANTORS FOR ONE ANOTHER

What can we learn from this experience and the ideological defense the rabbis offered? To a large extent, the *kahal* and especially the councils were part of a feudal system of corporate estates that is

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[102] *Id.* at 108, https://www.gutenberg.org/files/41547/41547-h/41547-h.htm ("Within the area allotted to it the Kahal collected and turned over to the exchequer the state taxes, arranged the assessment of imposts, both of a general and a special character, took charge of the synagogues, the Talmudic academies, the cemeteries, and other communal institutions. The Kahal executed title-deeds on real estate, regulated the instruction of the young, organized the affairs appertaining to charity and to commerce and handicrafts, and with the help of the *dayyanim* [judges] and the rabbi, settled disputes between the members of the community. As for the rabbi, while exercising unrestricted authority in religious affairs, he was in all else dependent on the Kahal board, which invited him to his post for a definite term.").

[103] Rosenthal & Dubnow, *supra* note 99.

[104] DUBNOW, *supra* note 101, at 191.

[105] For one example, see *id.* at 275 (describing appeal to Polish authorities against the *kahal* of Minsk, claiming embezzlement, arbitrary punishment of critics, and general oppression of the common people).

probably incompatible with a modern state.[106] Similarly, it is clear enough that the limitations on the franchise and the narrow understandings of the public and the public interest are nothing to admire. Perhaps most important, we, as Americans, are overwhelming descendants of and participants in a rebellion against the type of closed society that could use a *herem*—shunning—as effective punishment. For most of us, Jews or not, escape from small town gossip and elite control over private lives (and employer attempts to recreate it at the workplace), whether here or abroad, is a critical part of our political identity. For us, city air makes free in a much broader sense than the medievals understood. But nonetheless, I think that the *kahal* and its defenders can teach us something.

Our knowledge is incomplete and my own far more limited than that, but the texts do make some things clear. One is that these were normal political communities in the usual sense that they were full of conflict and disagreement. Many of the extant documents are records of protest by those who objected to the political results of the day.[107] Sometimes they went to the non-Jewish authorities, or sometimes it was the non-Jewish authorities who determined the winners in the first place.[108] Generally, the sources I'm directly or indirectly familiar with come from those who choose to write to a prominent rabbi, and more precisely, from the response the rabbi gave to their plea and eventually circulated or published, often with just a few salient details of the underlying dispute.

Not infrequently, the responding rabbi felt the need to explain why an unhappy *kahal* member should honor a decision he disagreed with or authorities he thought corrupt or misguided or to condemn a

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[106] *See, e.g.*, Shimon b. Wolf [Wolfowicz], *Dissolution of the Kahal*, *translated in* 3 JPT, *supra* note 91, at 431 (calling for dissolution of the *kahal*, on the ground that it was incompatible with citizenship). The non-Jewish theorists reached the same conclusion earlier. *See infra* note 115.

[107] *See, e.g.*, Ezekiel Landau, Responsa Noda Bihudah I, HM 20 (1761), *translated in* 3 JPT, *supra* note 91, at 420 (discussing wealthy rabbi's objection to town decree); R. Meir, Responsum 529, *supra* note 95 (discussing community that was unable to come to consensus); R. Meir, Responsum 531, *translated in* AGUS, *supra* note 16, at 490 (discussing limits on community's right to coerce dissident minority).

[108] *See, e.g.*, R. Meir, Responsa 549-50, *supra* note 80 (condemning wealthy Jews who arranged individual deals with the local lord and insisting that taxes (and rebates) be communal); Hanover, *supra* note 98, at 431 (stating that in the days of the Council of the Four Lands, "never was a dispute among Jews brought before a Gentile judge" and, contradictorily, that "if a Jew took his case before a Gentile court he was punished and chastised severely.").

party that went outside the community to seek help from the non-Jewish powers. The responses consistently condemned appeal to the gentile authorities even on the occasions when they concluded that it was the least bad option.[109] They invoke the principles of the needs of the hour and that all should pay for what benefits all. But perhaps the principle they rely on above all others is mutual responsibility: "All Israel are guarantors for one another."[110]

All the *kahal* were guarantors for one another in the literal, legal sense of the phrase: Gentile taxes were collective, imposed on the community rather than individuals, so that if one Jew failed to pay, other community members would have to make up the difference. When one merchant or lender's business failed, at least his Gentile creditors expected the entire community to make good his debts. When a Jew was kidnapped or imprisoned for real or fabricated failure to meet contractual obligations or fraud (Jewish sources tend to view kidnapping and gentile imprisonment as not materially different), the community was expected to buy his freedom—first, his own community, but appeals would go out to others as well and apparently get responses. Moreover, the communal institutions were relatively extensive and paid for by internal assessments—even fairly small communities were likely to be supporting a teacher, a rabbi, a burial society if not organized aid for the poor, a yeshiva, or a court. Although the Gentile authorities more often seem to have built and supervised the market or fairgrounds, the Jews would have needed their own separate ovens, mikvehs, and slaughterhouses.

### A. The Importance of Guarantors for One Another

The notion of mutual responsibility is not merely an idiosyncratic artifact of particular Jewish traditions or the feudal practice of treating the Jews as a separate estate with collective, rather than individual, privileges and responsibilities. It is, instead, the fundamental notion behind the French revolution's notion of *fraternité*, the common law of partnership, and some versions of liberal republicanism: we are all in this together. The purpose of the collective institution is to promote the good of each member—in the words of the U.S. Constitution,

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[109] The general rule is set out, e.g, in Maimonides, Mishneh Torah, Sanhedrin 26:7, *translated in* 3 JPT, *supra* note 91, at 389. For examples in the responsa literature, see, e.g., Responsa 549-50, *supra* note 80.

[110] Babylonian Talmud, Shevuot 39a.

"to promote the general Welfare."[111] Conversely, each citizen has an obligation to contribute towards the whole. Tax avoidance does not make one "smart" nor is it the highest form of patriotism, as recent American candidates for the presidency and vice presidency have claimed; it is, instead, deeply anti-social. As the Declaration of Independence ends, to make our common society, "we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."[112]

To be sure, matters always are more complicated. There can be no assurance that taxes always will be used for the common good. The taxes the Jewish communities paid to their feudal lords surely were not. But one assumes that even the taxes the *kahal* collected for internal purposes must often have been siphoned off by the richest or most powerful, or simply to support functionaries providing services that not everyone wanted, in ways that did not meet everyone's needs. Half a century after leaving Europe, my own grandmother was still bitter about the abuses of the Jewish authorities in her shtetl, even if they were dwarfed by the poverty caused in large part by deliberate Tsarist policy. Similarly, European Jewish communities had a long and honorable tradition of draft evasion—the armies were not their armies and the wars were not their wars. Many American Jews can trace their ancestors' decisions to emigrate to avoiding the Tsars' brutal draft, while others just as surely were fleeing the internal oppression of overbearing *kahal* authority, formal and otherwise.

Nonetheless, to start from "each is a guarantor of the other" is quite different from starting with a state of nature or original position made of independent individuals with little need of each other, as in the fantasies of Rousseau, Locke or Nozick, or afraid of being murdered in their sleep, as in Hobbes's darker vision. There, individualism is the natural state; community is an artificial addition. In the Jewish understanding, society and mutual responsibility are the starting point; individual rights are the add on.

The partnership metaphor, unlike social contract theory, does not presume or assume mutual indifference or self-interest. On the contrary, partnership law—in halacha and the common law alike—begins from an assumption of mutual responsibility. Partners are responsible for each other and for the enterprise; in American terms, they are fiduciaries, bound to set aside self-interest to work for the whole. Moreover, each partner is a guarantor of the enterprise's obligations

[111] U.S. CONST. pmbl.
[112] THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

even if those obligations are created by the actions of another; in modern American partnership law, each partner is liable for any unpaid debts of the partnership.[113]

### B. Mutual Responsibility in (Partial) Practice

Theory aside, mutual responsibility was central to Jewish communal autonomy: the local nobility consistently held the entire community responsible for any individual's default, and, in the practice of the Jewish *kahal*, the most visible implementation of mutual responsibility was that the king and nobility taxed the Jews collectively, leaving to the Jewish authorities the duties to allocate tax obligations to individuals and collect from them. This made the *kahal* convenient to the outside authorities and must have been critical to the origins and survival of Jewish self-government. In Poland, the *kahal* and Council system began to collapse once the government (in 1764) decided to tax Jews individually instead of collectively.[114] Elsewhere, civil rights, usually cast in the Napoleonic form of "We must refuse everything to the Jews as a nation and accord everything to Jews as individuals,"[115] had the same effect, even when the second part of the syllogism was ignored.

Internally, the most dramatic aspect of mutual obligation may have been the obligation to redeem captives. When non-Jewish

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[113] UNIF. P'SHIP ACT §§ 306-07. This mutual responsibility was the reason why professionals used to practice in partnership: each partner expressed to clients the partner's confidence in the entire firm by accepting (secondary) personal liability for any firm malfeasance. Today, avoiding such responsibility is precisely the reason that most partnerships have shifted to more irresponsible forms such as the limited liability company.

[114] DUBNOW, *supra* note 101, at 197-98.

[115] Conte de Clermont-Tonnere, *Speech on Religious Minorities and Questionable Professions*, French National Assembly (December 23, 1789), *reprinted in* THE FRENCH REVOLUTION AND HUMAN RIGHTS: A BRIEF DOCUMENTARY HISTORY 86-88 (Lynn Hunt, trans., ed. 1986), https:/revolution.chnm.ord/d/284. Others were more skeptical that such a distinction could be made. *See* Abbé Jean Siffrein Maury, *Speech*, French National Assembly (December 23, 1789), https://revolution.chnm.org/d/285 ("I observe first of all that the word Jew is not the name of a sect, but of a nation that has laws which it has always followed and still wishes to follow. Calling Jews citizens would be like saying that without letters of naturalization and without ceasing to be English and Danish, the English and Danish could become French."). Emancipation, which in many countries followed Napoleon's conquests, generally followed this model, largely abolishing Jewish communal privilege and self-government along with the medieval disabilities.

authorities imprisoned a Jewish member—often for bankruptcy or failure to pay debts—the *kahal* generally viewed itself as collectively obligated to pay his debts and ransom the prisoner. While the older texts and codes setting out this rule speak of "Jews" rather than members of a specific community, it appears that most communities made a sharp distinction between members and non-members and were far less likely to tax themselves to redeem outsiders.

Similarly, the *kahal* routinely regulated economic activity, limiting competition as was common in medieval practice. Again, the ideological defense centers on a partnership metaphor: the citizens of a town, or the occupants of a courtyard or alley, have the power as co-owners to coerce each other to act in the common interest. This could mean barring a noisome or otherwise offensive trade from a location where it might bother others.

The usual non-Jewish practice placed the power to restrict access in specific guilds which (like today's bar associations) licensed newcomers and protected incumbents. Jewish practice, in contrast, placed the right to restrict in the town itself. The town's inhabitants were entitled to bar a newcomer (who was not yet a member of the community) from competing with incumbents but generally could not gang up on an existing member to suppress competition. The latter, unlike the former, requires treating one member as a means to the good of others and is therefore a violation of the mutual responsibility principle. Doctrinally, responsa following this view were likely to state that in matters of economics or finance, the decision rule was unanimity, rather than majority (much as partnership law requires unanimous agreement for changes in the partnership agreement).

Of course, in other contexts, the texts and practice clearly did allow punishing one member for the good of others: it was generally accepted that the *kahal* authorities could legitimately imprison, fine, flog, or ban to enforce its decrees, acting under the authority of the "needs of the hour." Even when those measures were controversial, the critics, so far as I can tell, seem to have complained about particular decisions or the improper motives of the decisionmakers rather than questioning the legitimacy of communal coercion as a principle in matters of religious ritual law or what we would think of as criminal or tort law.[116]

[116] Agus contends that majority rule was never disputed with respect to religious matters, but many scholars and communities expected unanimity on business matters. AGUS, *supra* note 16, at 81.

The law of the town, then, begins with a partnership metaphor: all Jews are guarantors for each other. A default by one is a default by all. The group may defend the interests of the group, but the group's interests include the interests of the entire community (although it is safe to assume that some people's interests carried more weight than others, and it is never obvious to what extent women, children, or the poor—the bulk of the Jewish population—had any voice in determining what those interests might be).

### C. The Illiberality of Partnership

The ultimate punishment in the world of the quasi-autonomous Jewish community typically was the *herem*: exile or shunning. Like the partnership metaphor, the *herem* is a powerful reinforcement of the idea that, quite contrary to the ideological assumptions of the social contract, no one can live alone isolated from the community.

Indeed, one of the key victories of modern liberalism is that, within states, we have freed individuals from the full power of the *herem*, not by the impossible feat of making it possible to live without community but by making it possible to live in many partial communities at once and to leave one community for another. That is why tolerant cities—where there are a variety of communities, at least some of which are open to strangers—are the heartlands of liberalism. That is why equal opportunity, office open to talent, neutral exams, bars on invidious discrimination, fair taxation, and markets defined by equality of dollars (where price and tax rates are the same for aristocrats and commoners, citizens and strangers, those with and without connections) are definitional of modern liberal states. It is why we understand the personal relationships that define feudalism—loyalty to the lord, reciprocated by favor to the underling—to be corruption, why good government seeks to end machine politics, why log-rolling (despite being defensible, useful, and perhaps even essential) is suspect. And perhaps most fundamentally, it is why every liberal state and most illiberal ones recognizes that state-sponsored *herem*—stripping dissidents (or those disfavored for other reasons) of their citizenship or exiling them––is a fundamental violation of human rights.

Medieval *kahals* were anything but democratic, liberal, or egalitarian.[117] Sometimes, to be sure, individual wealthy taxpayers were censured or restrained, and the literature shows extensive efforts to

[117] *See* DUBNOW, *supra* note 101, at 192.

prevent powerful individuals from cutting special deals for themselves at the expense of the community.[118] Nonetheless, decision making power appears to have been largely in the wealthy as a group (the "Good men of the Town"), with some countervailing authority in the hands of rabbinic authorities.[119]

There does not appear to have been a clear decision-making rule at either the community or the Council level. The rabbis preferred consensus, and perhaps consensus at least of the powerful was the only possibility for a community that lacked much control over means of coercion and was always subservient to the non-Jewish authorities, themselves still largely free of restraints of law.[120] It seems clear that immigrants into any community were rarely given a voice, that women were never direct participants in government, and that the poor had little, if any, formal authority.

### D. The Limits to Cohesion and Mutual Responsibility

The *kahal* elected, or at least appointed, its rabbi. That very assertion of authority shows the limits of the cohesiveness and power of the Jewish community. Modern democratic theory takes it as axiomatic that a democracy can only exist if all participants accept that sometimes they will lose and that winners accept that they may not use the powers of incumbency to keep themselves, or their platforms, in power forever (details, of course, to be controversial). In the Jewish communities of central Europe, however, no such consensus existed, or if it did, it broke down with the advent of the Reform.

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[118] *See supra* note 108.

[119] *See* 3 JPT, *supra* note 91, at 390 ("It was most often the oligarchs who ruled."); Asher b. Yehiel (Rosh), Responsa, *translated in* 3 JPT, *supra* note 91, at 399 ("if [a kahal's decree] has to do with financial matters, we follow the majority of money [as in a business partnership]. … It is unreasonable that a majority of persons who contribute a minority of taxes should decree a ban upon the wealthy as they see fit."). However, other responsa clearly contemplate a majority of persons at least for some matters. Elijah Mizrahi (Re'em), Responsa 53, *translated in* 3 JPT, *supra* note 91, at 400-01 ("it makes no difference whether the majority consists of the wealthy, the poor, the scholarly or the untettered, because the entire community is denominated a court in dealing with matters of communal interest.").

[120] *See, e.g.*, Joshua Falk (Sma), Sefer Me'irat Einayim, Shulchan Arukh HM 163:3, *translated in* 3 JPT, *supra* note 91, at 401-02 (contending that rich and poor "are each considered . . . half the *kahal*, [despite unequal numbers] and they must compromise with each other . . . .").

Earlier commentators often emphasized that the most important of all commandments was to not split the community and that the rabbi of any community was its sole and authoritative decisor on halachic issues. But with the organization of the Hamburg Reform Temple in 1818 followed by election of Reform rabbis elsewhere, the losers declined to accept their loss and to continue on to another day. Instead, the Hatam Sofer effectively created Orthodox Judaism as a counterreformation, by declaring that all that is new is forbidden,[121] and then endorsing splitting the community by declaring that intermarriage with Reform Jews should be forbidden.[122] Then, Rabbi Samson Raphael Hirsch took the logical next step: if the anti-Reform party was in the minority, he held, it could and should simply refuse to accept the community decision and, instead, form a new electorate only of the likeminded.[123]

Today, in secular politics, we see a similar view, with a minority party refusing to accept the legitimacy of its opponents. Rather than accepting the possibility of loss, the minority party instead resorts to revived techniques of the old Jim Crow, gerrymandering and vote suppression, to invitations to foreign powers to intervene in domestic politics, court packing, results-driven legal reasoning, fear mongering, and even threats to split the community to preserve its authority.

## IV. THE IMPLICATIONS OF PARTNERSHIP FIDUCIARY OBLIGATIONS V. CONTRACT DISINTERESTEDNESS IN AMERICAN LAW

Let us take the positive aspects of the Jewish law commitment to partnership seriously and, for the moment, ignore the obvious potential for abuse and exploitation and the lack of a clear democratic norm. Mutual responsibility, rather than disinterest, indifference and necessity, stood at the base of the institution. In an America in which the notion of mutual responsibility has been transformed into "tort reform," sell-offs of public lands and resources, freedom to pollute, privatization of armies, prisons, and post-offices, and subsidies for the

[121] Moses Sofer (Hatam Sofer), Responsa Hatam Sofer, Orah Hayyim 1:28, *translated in* 1 JPT, *supra* note 27, at 293-95.
[122] Moses Sofer (Hatam Sofer), Responsum 89, *translated in* 2 THE JEWISH POLITICAL TRADITION 378-79 (Michael Walzer et al. eds., 2003).
[123] Samson Raphael Hirsch, *Open Letter to Rabbi S.B. Bamberger* (1876), *translated in* 1 JPT, *supra* note 27, at 369-73.

wealthiest as the solution to all problems, and where self-proclaimed patriots too often seem to lack any concept of the common good, the partnership metaphor may be a useful reminder of the purposes of government.

In American law, the most famous restatement of the difference between contract and partnership morality is by Justice Cardozo, himself an aristocratic Sephardic Jew, who distinguished between the two moralities in suitably medieval tones behind which one can hear the Jewish law principle that all Jews (and all partners) are guarantors of one another:

> The two [partners] were in it jointly, for better or for worse. . . .
> [Partners] owe to one another . . . the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. . . .
> Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation.[124]

Cardozo is making the critical distinction between contract and partnership morality. The morality of contract (the "workaday world") is a set of limits on exploitation of strangers. One may, and indeed should, look out for oneself (and one's family, friends and tribe) first. "If I am not for myself, who will be?"[125] In contract morality, the world, implicitly, is seen as a competitive game in which winning means that others must lose. To be sure, Adam Smith correctly points out that competition can often be good for all by inspiring people (and

[124] Meinhard v. Salmon, 164 N.E. 545, 546-47 (N.Y. 1928).
[125] Mishnah, Avot 1:14.

companies) to produce more than they would otherwise.[126] As a result, in the modern world, we have more than enough material goods to ensure that everyone is fed, clothed, and housed adequately—even complete with internet connections and smart phones. Indeed, we can even all be honorable, at least in the bourgeois understanding of the term—each of us can act with a "punctilio of an honor the most sensitive."[127] But honor in its aristocratic sense, like power, is inherently competitive.[128] I can be honored or powerful or high status only if you are less so.[129] If everyone wins an award, it is no longer a distinction; if everyone can be clothed well, those seeking status must find something rarer that not everyone can have. There are not enough Rembrandts or highest buildings in lower Manhattan for everyone to have one—and that is why they are valued.

Contract law then assumes a background of a Hobbesian state of nature in which the only rule is every man for himself and the devil take the hindmost. Like Hobbes, it seeks to restrain this carnage with a limited set of moral imperatives: not to change the goal but to place limits on the means. It transforms the war of all against all into a civilized competition governed by the Rules According to Hoyle by excluding the grossest forms of coercion, fraud, and overreaching. Contracts are enforceable even if they disproportionately favor one party over the other[130] but not if they were entered into under the barrel of a gun[131] or by intentional deceit (although puffery is permitted, and the

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[126] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS I:2 (1776) ("It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own self-interest.").

[127] *Meinhard*, 164 N.E. at 464.

[128] *See generally* THORSTEIN VEBLEN, THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS (1899).

[129] This is the basis of Hobbes's war of all against all, powered by people who, in his psychology, pursue "power after power" without end. HOBBES, *supra* note 1.

[130] *See, e.g.*, Gubitz v. Security Mut. Life Ins. Co. of New York, 262 A.D.2d 451, 452 (N.Y. App. Div. 1999) ("[F]inancial pressures, even when coupled with inequality in bargaining position, do not, without more, constitute duress.").

[131] *See, e.g.*, United States v. Twenty Miljam-350 IED Jammers, 669 F.3d 78, 88 (2d Cir. 2011) ("'In general, repudiation of an agreement on the ground that it was procured by duress requires a showing of both [1] a wrongful threat and [2] the effect of precluding the exercise of free will.'"). The rule is quite limited. No court has suggested that an employment contract entered into after a failed strike in a one-employer town is unenforceable, even if, as in Ludlow Colorado, the strike was broken using hired detectives with Gatling guns or the full power of the state. *See generally* THOMAS G. ANDREWS, KILLING FOR COAL: AMERICA'S DEADLIEST LABOR WAR (2008).

line often might be clear only to a lawyer).[132] Similarly, courts refuse to enforce certain contracts which they deem too exploitative or one-sided, even given the general rule permitting self-interested behavior––to enter into slavery, to sell body parts or sex, to work in extraordinarily unsafe conditions or for below minimum wage, for a wage increase when bargaining conditions have changed.[133]

### A. The Limited Liberalism of Contract, or a Deeper Liberalism of Life Together

Taken to the public sphere, the contractual morality is the classical liberal ideal: we are, and remain, strangers, but we use the state and the law to limit our conflicts and competition to ways that are mutually beneficial or at least not mutually destructive. Contractual liberalism does not demand much. We need not remake ourselves into a new kind of person. There is no echo of the self-sacrifice of patriotism or of authoritarian or aristocratic demands for personal loyalty or deference to existing power relationships.

Most important, because the state's goal is simply to maintain the peace, not to create or impose a particular civilization or culture, multiple groups can live in relative peace under it. This kind of liberal state, like the great multinational empires that died in turn of the twentieth century nationalism, can stand above and apart from the most divisive issues of collective life, allowing individuals to join and leave their own groups as they please. The First Amendment's promise that the state will have no religion and allow maximum freedom of conscience, debate, culture, and science is the positive paradigm of the impersonal contractual ideal.

Partnership law, in contrast, is a fiduciary relationship. Not only is each partner a guarantor of all, but each owes "the duty of finest loyalty"[134] to both the other partners and the partnership itself. This is

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[132] For example, it appears to be legal to misnumber the floors of a Manhattan high-rise, marketing a seventy-five-story building as ninety floors high. *See, e.g.*, Ralph Gardner, Jr., *For Tower Residents, a New Math*, N.Y. TIMES (May 8, 2003), https://www.nytimes.com/2003/05/08/garden/for-tower-residents-a-new-math.html; Vivian Yee, Donald Trump's Math Takes His Tower to Greater Heights, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/02/nyregion/donald-trump-tower-heights.html.

[133] *See, e.g.*, Alaska Packers' Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902).

[134] *Meinhard*, 164 N.E. at 546.

a necessarily personal relationship, quite different from the workaday relationships of a market of strangers.

On the one hand, the intimacy makes collective rule dangerous. After all, in a community, and indeed in most business partnerships, the loyalty of partnership is necessarily somewhat fictional. Most of those people are always going to be strangers. To be their guarantors and to be tied to them by bonds of loyalty may be too intimate for many of us.

More importantly, it means that politics matter. If loyalty and mutual guarantees mean that—as in a traditional Jewish community—each of my fellows and the government itself are entitled to criticize and coerce me on matters large and small, not only regarding relations with my fellow citizens but even between me and my God, then those who do not trust their fellow citizens cannot afford to lose.

It is hard to accept majoritarianism under these circumstances. Clearly, majority rule is better than minority rule on any given vote. But how can individuals or groups allow their consciences, or even taste, to be governed by other people, majority or not? If every citizen is a guarantor of their behavior, some will want to choose their fellow citizens quite carefully indeed. Politics is far more obviously consequential when the state demands a finer loyalty and involves itself in more aspects of life.

Moreover, liberalism requires a commitment to living with a diversity of people and acknowledging that we will inevitably disagree on many issues. The thicker commitment of partnership strains this commitment. On losing an important decision, many people will be more inclined to try to change the voting population or end majoritarian rule than to bide their time and wait for the next election.

Worse, on major issues, there is no reason to think that the next election will be different. It is for this reason that the dissenters in premodern *kahals* appeal so assiduously to outside rabbinical support for their position—and why, at the moment when Reform Jews began to win elections, the anti-reform party promptly abandoned the ancient principle of not splitting the community and reformed themselves as separate Orthodox communities alongside the traditional one. Neither solidarity nor majoritarianism was nearly as important in their eyes as the substantive results.

Conventional partnership law recognizes precisely this issue. Under the Uniform Partnership Act, by default, no one can join a

partnership without unanimous consent of the existing partners.[135] While the partners may change this rule, that change requires unanimous consent. Just as important, no one may be required to remain in a partnership after they decide that they do not want to be bound by the majority or guarantors of their fellow partners—and that is an absolute rule, not waivable by any agreement.[136] This extreme voluntarism is reasonable enough for business partnership, especially in a well-developed economy where it is reasonable to assume that most people will have various alternative options should they exit—voluntarily or otherwise—in any given partnership. UPA *herem*, unlike medieval Jewish *herem*, is not a death sentence or even exile from your homeland. Generalized to a state, however, this kind of rule would be disastrous.[137]

## V. MUTUAL OBLIGATION IN A SHRINKING WORLD

Traditionally, liberal theorists and citizens assumed that losing an election usually is not unduly consequential in a thin liberal state. The losers will remain free to dissent in politics, religion, and art. Perhaps they will find that zoning will result in a more or less salubrious neighborhood or that regulators will be more or less assiduous in policing cheaters who seek to impose costs on nonconsenting fellow citizens. The key promise of thin liberalism is that politics does not matter that much. The losers should be willing to wait and try again; there are no Flight 93 elections.[138]

Unfortunately, today the stakes are far higher: with an unstable economy and a world nearing catastrophic ecological disaster, elections matter even in the thinnest of the modern wealthy states.

Can we draw any meaningful lessons from these quite different contexts and systems? Despite the differences, I think the partnership

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[135] UNIF. P'SHIP ACT § 402(b)(3) (amended 2013).
[136] *Id.* § 602(a).
[137] *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1973) (arguing that human rights, absent state rights, are empty so that stateless people had no enforceable rights at all).
[138] Publius Decius Mus, *The Flight 93 Election*, CLAREMONT REV. OF BOOKS (Sept. 5, 2016). Flight 93 refers to the passengers of a hijacked jet who seized and crashed it in a field rather than allow the hijackers to crash it into the Pentagon. Presumably, the author of the article used this analogy to suggest that the 2016 election was so critical that his readers ought to be willing to kill and be killed to prevent the election of Hillary Clinton.

metaphor of the *kahal* can help us in our own, quite different politics, in a number of different ways.

**First,** the partnership metaphor highlights the drive to equality and its opposition, which we see in the ancient Jewish texts, the different systems built on them, and their near collapse in modernity. The drive to equality is fundamental, the most basic aspect of human morality. Even toddlers understand that favoritism is wrong; every political democracy is based on the assumption that the good of the country is the good of its citizens and that each citizen should have a part in its governance: a government of the people, by the people, and for the people. But the equality principle is always opposed by an aristocratic or self-serving claim—those who have more want to keep it and find ways to insist that they have a right to it.

And as the powerful get more powerful, they seize more power for themselves until the system collapses into warlord anarchy or slavery and mass poverty. There is no point in working for the future if the rich can simply take whatever you have before the future ever arrives. In a highly unequal society, violence—warlordism and serfdom—is the only way to get ordinary people to work. In a modern market-based economy, market collapse comes first: if ordinary people cannot earn enough to spend, then the rich have no one to whom to sell, and investors, seeing no customers, have no reason to invest. For a while, some businesses can sell to each other, the wealthy or governments, but in the medium run, without an affluent middle class, market capitalism fails. So, government of the people, by the people, and for the people becomes essential even for the elite. Only by restraining their own greed, by accepting that the point of government is to make all of us better off, by taking seriously the equality norm, can the rich retain their riches.

There is no final resolution, no founding myth or agreed-upon text that can eliminate the need to restrain the power of the powerful. Even in a system founded on collective powerlessness, the relatively powerful take more than their share and find ways to justify their actions. Similarly, even in a system founded on a genuinely sacred text, thought to be authored by God, not merely quasi-divine Founders, texts structure discussion rather than determining results. When powerful parties found the texts incompatible with their goals, they simply ignored them—the long-standing bar on splitting the community fell regularly in conflicts between "native" and "immigrant" factions, or disputes between newly wealthy and hereditary elites. And when the

Reform began to win elections, the Orthodoxy defined itself by radically reversing the traditional law they claimed to uphold, insisting that they had an obligation to split the community to keep from power those they viewed as religious heretics. One need not belabor the analogy. Our own neo-Confederates are too happy to insist that law and order require freeing the powerful from the restraints of law or order, that Free Speech and Equal Protection protect the power of economic incumbents to lobby and to suppress their critics, and that principles of democracy require abetting voter suppression, gerrymandering, and awarding elections to candidates who received fewer votes than their opponents.

**Second**, the metaphor used in the Jewish sources helps us to see the continuing attractiveness of both the thin liberal state and its alternatives. A state dedicated only to keeping the peace and promoting economic well-being, deeming issues of culture outside its purview, has abandoned much of what makes collective life worth living––but it has also made peace far more likely. A richer liberalism, borrowing the sense of a common fate and common goal from partnership metaphors, will also need a richer understanding of what equality and equal concern mean. Today, it is clear that a rich cultural life requires governmental action as much as does the continued existence of car-based suburbs or the viability of cities dependent on mass transit and garbage pickup. The current economic model of the free press has failed, leaving us with little press at all, and is largely controlled by a handful of billionaires pursuing their own, not very publicly oriented, goals. But if First Amendment style abstention is detrimental to the very goal of free speech, we need a more sophisticated understanding of how to actively support a variety of viewpoints when we disagree even on the fundamental point of who is a "real" American.

A partnership demands that each individual see himself and herself as a guarantor of the others—as supporting them, standing behind them when they are in crisis, and sometimes setting aside all thought of self, no matter how difficult the abnegation. But we need a clearer way to determine what the common good is in a society that has no consensus on any critical issue—even whether we should take action to preserve our ecological viability. Partnership demands a form of democratic equality dedicated to protecting the common space in which we live and work (including the institutions that make such work practical), education and health to think and feel and act, and affirmative freedom from want and fear—the bread without which

there can be no Torah. It demands an economy sufficiently egalitarian to assure that no one can buy the loyalty of dependents, that no one can accumulate enough power to externalize their own costs onto the rest of us, and most importantly, that no one be rich or powerful enough to succeed even as the society as a whole fails.

**Third**, the Jewish law sources make more visible the fragility and necessity of common enterprise. The Jewish world split when fundamental disagreements arose on the needs of the hour and the demands of the Court above. American politics today has reverted to a fundamental chasm between those who see the proclaimed equality principles of the Fourteenth Amendment and the Declaration of Independence as definitional of American patriotism and those who, instead, insist that only a particular hierarchy is fundamental, that patriotism is a matter of tribalism rather than justice.

Can a house thus divided against itself stand? For Jews and Americans, alike and differently, this remains a key issue.