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THE VARIETIES OF RELIGIOUS AUTONOMY

PERRY DANE

The organizers of this Conference have asked me to write a short paper about religious autonomy in the United States, with special reference to the Jewish case.

“Religious autonomy” is a potentially expansive phrase. I want to define it narrowly, though, as one subset of the larger domain of concerns in the encounter of religion and state.

Roughly speaking, I understand the legal problem of religious autonomy to refer to the effort by secular law to make sense of religious self-governance, particularly institutional or communal self-governance. In the United States, contexts in which religious autonomy is at issue include classic disputes over church property and personnel, in which secular courts have to gauge their deference to organs of governance within the religious community.¹ They also include more recently developing questions over the extent to which regulatory regimes such as labor law,² civil rights law,³ and even

¹ See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 718 (1976) (forbidding “detailed review” of internal church decision to remove a bishop); *Kreshik v. Saint Nicholas Cathedral of The Russian Orthodox Church of North America*, 344 U.S. 94 (1952) (striking down state’s effort to override hierarchal church’s ecclesiastical determination of rights to church property).

² The leading case, though technically decided on statutory rather than constitutional

malpractice⁴ and defamation⁵ and contract⁶ law, can intervene in the internal relations of religious institutions and communities. Countries such as Israel⁷ and India also explicitly extend a high degree of formalized religious autonomy in matters of “personal law” such as marriage or divorce. This is not true in the same way in the United States, but – for reasons that will become apparent – I will still have something to say about these subjects.

This paper is not a comprehensive discussion of religious autonomy in general or even Jewish religious autonomy in the United States. Rather, I want to discuss a particular set of complications inherent in the notion. My argument is that the idea of “religious autonomy”, even as narrowly defined,

grounds, was *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding that NLRB did not have jurisdiction over union organizing effort by parochial school teachers). But cf., e.g., *Catholic High School Ass’n of Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161 (2d Cir. 1985) (upholding constitutionality of applying state labor law regime to religious school).

³ See, e.g., *Equal Employment Opportunity Commission and Elizabeth McDonough v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) (enforcing “ministerial exception” to employment discrimination law); *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994) (same).

⁴ See, e.g., *Nally v. Grace Community Church*, 47 Cal. 3d 278, 253 Cal. Rptr. 97, 763 P.2d 948, (1988) (rejecting malpractice claim based on suicide allegedly arising out of religious counseling); *Cherepski v. Walker*, 323 Ark. 43, 913 S.W.2d 761 (1996) (rejecting cause of action for clergy malpractice); *Schieffer v. Catholic Archdiocese*, 244 Neb. 715, 508 N.W.2d 907 (1993) (same); but cf., e.g., *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994) (allowing professional negligence claim by parishioner against pastor, but only for “secular” aspects of psychological counseling); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996) (allowing church to be sued for negligent hiring and supervising of minister accused of abusing counselees).

⁵ See, e.g., *Marks v. Estate of Kenneth Hartgerink*, 528 N.W.2d 539 (Iowa 1995) (recognizing qualified privilege against defamation claim for communications made in context of church disciplinary proceeding); *Goodman v. Temple Shir-Ami, Inc.*, 712 So. 2d 775 (Fla. App. 1998).

⁶ Compare, e.g., *Jewish Center of Sussex County v. Whale*, 165 N.J. Super. 84, 397 A.2d 712 (Sup. Ct. Chancery Div., Morris Cty. 1978) (adjudicating merits of suit for rescission of contract between congregation and rabbi, holding that “arrangements between a pastor and his congregation are matters of contract subject to enforcement in the civil court”) with *Goodman v. Temple Shir-Ami, Inc.*, 712 So. 2d 775 (Fla. App. 1998) (dismissing terminated rabbi’s claim for breach of contract, holding that inquiring “into the adequacy of the religious reasoning behind the dismissal of a spiritual leader is not a proper task for a civil court”, though allowing separate claim for payment on past executed contract.)

⁷ See generally *Izhak Englard*, *Religious law in the Israel Legal System* (1975).

contains within it an array of different and even competing principles and possibilities. Supporters of religious liberty and autonomy are often tempted just to advocate more rather than less of it. But what is at stake is not merely the amount of autonomy but how various expressions of autonomy are configured and balanced against each other. I will – particularly in the latter part of the paper – illustrate my argument with examples from the Jewish context, not because it raises unique questions, but because it is a particularly revealing setting in which to show the bite of the difficulties that the paper seeks to identify.

Even within its limited scope, this paper is only a prolegomena. It dissects various aspects of autonomy, but does little – beyond the sketchiest of speculations in the conclusion – to try to adjudicate among them. More important, the paper, after some introductory remarks, maintains a determined focus on the problem of autonomy, in itself. For its own limited, heuristic purposes, the paper treats religious autonomy – however variously understood – as unambiguously necessary and desirable. It makes no sustained effort to ask whether autonomy promotes or retards other values in the jurisprudence of religion and law, or to weigh autonomy against those other values.⁸

I. PRELIMINARIES

Let me begin with a few framing observations. First, I will briefly situate the problem of religious autonomy in the larger topic of religion and the law. Second, I will explain what I find particularly interesting about religious autonomy, and how I want to approach the topic. Third, I want to introduce the special characteristics of the Jewish example.

1. MAPPING THE BOUNDARIES OF RELIGION AND THE STATE

The encounter of religion and the state gives rise, as any thoughtful observer knows, to a series of overlapping but distinct theoretical and practical issues. Some of these are just instances or cognates of more general issues of civil

⁸ Thus, for example, the paper does not try, on the whole, to speak to the usual concern in American Establishment Clause discourse that the state neither “advance” nor “inhibit” religion.

liberties and human rights.⁹ Other questions arise out of the efforts of various fields of secular law – contract, tort, property, taxation, and the like – to fit religious phenomena into otherwise conventional legal categories.¹⁰ I will have more to say about that challenge below. The most pregnant and emblematic problems in the encounter of religion and the state, however, are, it seems to me, essentially jurisdictional. They are about the nature of the boundaries between the realms of religion and secular law and government, and the nature and degree of deference that each should expect of the other.

I have in earlier work¹¹ suggested that, in the American context, many controversies arising under our “Establishment Clause” – such as cases about state sponsorship of religious practices and state financial support of

⁹ Thus, for example, the idea that the state should not discriminate against disfavored religions is in many respects tied to a larger principle of equality that spans a wide range of contexts. Similarly, some aspects of religious liberty are intimately tied to notions of freedom of belief, expression, and association, that apply in a variety of non-religious settings as well. For reasons that I have discussed in more detail elsewhere, however, I strongly disagree with the view that the problems of religion and law just reduce to one or more of these more conventional categories of constitutional talk. See *Perry Dane*, Constitutional Law and Religion, in *A Companion to the Philosophy of Law and Legal Theory* 113, in: *Dennis Patterson* (ed.), 1996; *Perry Dane*, Note, Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities, 90 *Yale L.J.* 350 (1980).

For an especially clear and powerful effort to reduce all questions regarding law and religion to applications of the equality principle, see *Philip Kurland*, *Religion and the Law of Church and State and the Supreme Court* (1962). For important more recent efforts to see religious liberty through the lens of “neutrality”, while still recognizing its special dimensions, see *Douglas Laycock*, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 *DePaul L. Rev.* 993 (1990) and *Michael McConnell/Richard Posner*, An Economic Approach to Issues of Religious Freedom, 56 *U. Chi. L. Rev.* 1 (1989). For an notable effort to reduce most religious liberty questions to problems in freedom of expression, see *William P. Marshall*, Solving the Free Exercise Dilemma: Free Exercise as Expression, 67 *Minn. L. Rev.* 545 (1983).

¹⁰ For discussions of such efforts, and their special character, see *Perry Dane*, The Corporation Sole and the Encounter of Law and Church, in: *Nicholas Jay Demerath III/ Peter Dobkin Hall/ Terry Schmitt/ Rhys H. Williams* (eds.), *Sacred Companies: Organizational Aspects of Religion and Religious Aspects of Organizations* 50, 1998 (hereinafter *Corporation Sole*); *Perry Dane*, The Public, the Private, and The Sacred: Variations on a Theme of Nomos and Narrative, 8 *Cardozo Studies in Law & Literature* 15 (1996) [hereinafter *Public, Private, and Sacred*].

¹¹ See *Dane*, supra note 9, at 120-21.

religious institutions – can be understood as efforts to work out principles of separation and deference at a general or “wholesale” level, while many issues arising under our “Free Exercise Clause” can be understood as arising out of the need to adjust those principles at the “retail” level to particular religions and religious individuals. The most crucial of these “retail” questions, whose solution remains bitterly contested, is the problem of religion-based exemptions: whether religious believers should ever be exempted from “neutral” and generally applicable laws – such as education requirements¹² or tax laws¹³ or zoning laws¹⁴ or military draft laws¹⁵ or drug laws¹⁶ – that happen to collide directly with the specific demands of their religious tradition.¹⁷

¹² See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish from part of State compulsory education law requiring them to send their children to school beyond the eighth grade).

¹³ See, e.g., *United States v. Lee*, 455 U.S. 252 (1982) (upholding duty of Old Order Amish employers to pay social security taxes, despite their religiously-grounded objections).

¹⁴ See, e.g., *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538 (D. D.C. 1994).

¹⁵ See, e.g., *Gillette v. United States*, 401 U.S. 437 (1971).

¹⁶ See, e.g., *Employment Division v. Smith*, 494 U.S. 872, 878-79 (1990).

¹⁷ Various state and federal statutes have long provided for limited religion-based exemptions to specific secular norms. Among some of the more interesting examples are Ill. Stat. § 7-609 (exempting, under certain conditions, members of religious organizations that “hold a bona fide conviction that acquisition of insurance is contrary to their religious beliefs” from statutory requirement that motor vehicles be covered by liability insurance policy); N.J.S. § 26:6A-1 & -5 (adopting neurological definition of death, but providing that, as to persons for whom this definition would violate their religious beliefs, death would be declared solely on traditional cardio-respiratory criteria); Fla. Stat. F.S.A. § 232.032(3)(a) (exempting children from compulsory immunization if a parent objects that “the administration of immunizing agents conflicts with his or her religious tenets or practices”).

The more difficult question, however, has been whether the Free Exercise Clause of the First Amendment to the United States Constitution mandates such exemptions. In *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v Yoder*, 406 U.S. 205 (1972), and a series of other cases, the United States Supreme Court held that the Free Exercise Clause generally requires such exemptions absent a “compelling” government interest. In 1990, however, the Court severely limited those precedents, and held that religious persons did not ordinarily even have a prima facie claim to be exempt from valid, “neutral” and “generally applicable”, laws that conflicted with the demands of their faith. *Employment Division v. Smith*, 494 U.S. 872, 878-79 (1990).

The problem of “religious autonomy” straddles the Establishment and Free Exercise Clauses, and therefore straddles the efforts at drawing “wholesale” and “retail” boundaries between religion and the state. As it sits on the “free exercise” side of the straddle, religious autonomy is a species of religious liberty. But it is a species with its own attributes. For one thing, it generally involves a well-defined institutional or communal interest, and not merely an individual one. Moreover, at least the paradigmatic claims to religious autonomy do not depend for their force on the specific norms of a particular religious community. Rather, they invoke limitations on government intrusion in *any* religious community. For example, the argument that secular anti-discrimination laws should not apply to the hiring of clergy is not limited to religions whose norms require them to discriminate; it applies to all religions, and rests on the general idea that the state should not interfere in any ecclesiastical appointments.¹⁸ In this sense, religious autonomy claims differ radically from the more purely “retail” claims to religious exemptions.¹⁹

In 1993, Congress passed, and the President signed, the Religious Freedom Restoration Act (RFRA). Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. 2000bb -1 to -4 (1994)). The language of RFRA explicitly criticized *Smith*, and it reinstated, as a matter of statutory right against both the federal and state governments, a compelling interest requirement modeled on that articulated in *Sherbert* and its progeny. But the Supreme Court struck down RFRA, at least to the extent that it tried to create rights against state laws. *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). The Court held that Congress was impermissibly trying to bypass *Smith*, and that RFRA was not a valid exercise of Congress’s power under section five of the Fourteenth Amendment to “enforce” the Amendment “by appropriate legislation”.

¹⁸ See, e.g., *Combs v. Central Annual Conference of the United Methodist Church*, 183 F.3d 343 (5th Cir. 1999).

¹⁹ See *supra* note 17. This difference between claims to religious autonomy and claims to religion-based exemptions has important doctrinal significance in the current legal climate in the United States. The Supreme Court in *Smith* rejected a general constitutional claim to religion-based exemptions because it held that to excuse a believer from a “a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)”, 494 U.S., at 878, would “court[] anarchy”, *id.*, at 888, and would produce, not a “constitutional norm”, but a “constitutional anomaly”, *id.*, at 886, that would, “in effect . . . permit every citizen to become a law unto himself”. *Id.*, at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879) (internal quotation marks omitted)). These objections do not apply to claims of religious autonomy, however, because those claims, while they might invoke rights that are special to religion as a category, do not depend on the

2. SOVEREIGNTY-TALK AND THE COMPLICATIONS OF AUTONOMY

I have suggested that the leading issues in the encounter of religion and the state are “essentially jurisdictional”. My approach to that encounter is therefore legal pluralist, insisting on the distinctive juridical dignity of the religious *nomos*.²⁰ Claims to religious liberty implicate not only the libertarian language of “rights-talk”, but the existential language of “sovereignty-talk”.²¹

From the perspective of legal pluralism, the problem of “religious autonomy” is particularly interesting, because it is this context that the language of sovereignty and jurisdiction tends to be most self-evidently applied, even by courts not otherwise inclined to embrace “sovereignty-talk”.²² There are several reasons for this. For one thing, because autonomy cases usually deal with institutions, their facts make it easier to discern at least the formal characteristics of authority and juridical integrity. Moreover, because these cases focus less acutely than exemption cases on particular religious beliefs, they are less adaptable to a simple “rights-talk” rhetoric of liberty of conscience. Finally, these cases often raise what conflict of laws²³ scholars call “false conflicts”²⁴ in which the dispute, at least arguably, is

specific religious norms of a particular religion. For a more extended discussion of this point, see “Province and Duty, and the Rule of Law”, a longer manuscript now in progress, from which I have also drawn several short passages in the present paper.

²⁰ For my own take on legal pluralism, and citations to some of the classic sources, see *Perry Dane*, *Maps of Sovereignty: A Meditation*, 12 *Cardozo L. Rev.* 959 (1991).

²¹ See *id.*

²² See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 363 U.S. 190 (1960); *Watson v. Jones*, 80 U.S. 679 (1871); *Hutchison v. East Ohio Conference of The United Methodist Church*, 789 F.2d 392 (6th Cir 1986); *North Dakota v. Burckhard*, 1999 N.D. 64. For a compelling historical account, see *Bernard Roberts* (Trujillo), Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 *Yale L.J.* 211 (1991).

²³ I.e., private international law.

²⁴ See generally *Brainerd Currie*, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 *Duke L J* 171, reprinted in *Brainerd Currie*, *Selected Essays on the Conflict of Laws* 177 (1963); *Larry Kramer*, *Rethinking Choice of Law*, 90 *Colum. L. Rev.* 277 (1990).

internal to the religious normative community, and the state, as often as not, has little independent substantive interest of its own.

The ease with which a discussion of religious autonomy invites the methods of legal pluralism and the metaphor of conflict of laws is deceptive, however. For this setting also reveals that, for all the power and importance of that method and metaphor, neither the method nor the metaphor is straightforward.

Indeed, consider briefly the three standard divisions of conflict of laws: choice of law, recognition of judgments and personal jurisdiction: Choice of law in its standard, state-based, form, assumes that the courts of one sovereign can, even if with difficulty, interpret the law of another sovereign, for the sake of applying it, and that such interpretive acts are often necessary to the machinery of justice. In the religious context, however, secular courts – at least American secular courts – see their *refusal* to interpret religious law as vital to maintaining the autonomy of ecclesiastical polities. Recognition of judgments, in its standard form, assumes that foreign sovereigns can, unless inter-jurisdictional complications arise, enforce their own judgments, and that those judgments rest on transparent lines of authority. But in the religious context, enforcement by the religious community of its own judgments is difficult, inter-jurisdictional complications are pervasive, and making sense of the lines of authority is often problematic. Personal jurisdiction, in its standard form, assumes that judicial authority need not rest on express consent to be legitimate. But in the religious context, the individual's right to opt out is often a highly cherished value that can stand against the imperatives of communal authority. The upshot, as I have already suggested, and as I will try to show in more detail, is that juridical autonomy in the religious context works itself out in a swarm of distinct and often competing ideas.

3. THE JEWISH NOMOS

The Jewish case poses particular challenges to any account of religious autonomy. To begin with, Judaism has traditionally embodied – as central to its religious essence – a complex and comprehensive body of law,²⁵ whose

²⁵ For introductions, some in the legal literature, see, e.g., *Ephraim Urbach, The Halakhah: Its Sources and Development* (Raphael Posner, trans. 1986); *Elliot Dorff/Arthur Rossett, A Living Tree: The Roots and Growth of Jewish Law* (1988); *David Hartman, A Living Covenant: The Innovative Spirit in Traditional Judaism*

subjects range from ritual and spiritual practice to tort and contract. Moreover, observant Jews look to rabbinic authorities as legal decisionmakers and to Jewish tribunals (including courts known as batei din) as adjudicators. Thus, “autonomy” is a particularly salient category in Jewish religious life. On the other hand, Jewish communities and institutions, particularly in the United States, are largely non-hierarchical in their polity, and thus often lack the obvious and essentially uncontested²⁶ locus of authority of such institutions as the Roman Catholic Church. Moreover, Jewish communities, even when they exercised significant power within host states in Europe and elsewhere, historically relied on parallel and interacting systems of rabbinic and lay authority.²⁷ Finally, Jewish law has traditionally – though with exceptions – discouraged resort to secular courts to resolve intra-communal disputes,²⁸ thus adding another layer of complication to the interaction of the two legal systems.

II. AN ANATOMY OF AUTONOMY

1. THE STANDARD ACCOUNT

The rest of this paper elaborates the observations I have made so far. An obvious place to begin is with the classic problem of internal disputes over the control or policy of a congregation or other religious body. One account of American law on that subject – an account of the sort I have given myself²⁹ – might go something like this:

(1985); *Suzanne Last Stone*, In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory, 106 Harv. L. Rev. 813 (1993); *Perry Dane*, The Yoke of Heaven, The Question of Sinai, and the Life of Law, 44 U. Toronto L.J. 353 (1994).

²⁶ But cf. *Dane*, Corporation Sole, supra note 10 (discussing possibility of emergent “democratic” impulse in Roman Catholic tradition.).

²⁷ See generally *Louis Finkelstein*, Jewish Self-Government in the Middle Ages (1964); Jacob Katz, Tradition and Crisis (1961); *H. H. Ben-Sasson*, The Middle Ages, in: A History of the Jewish People 385, 421-438, 490-516, 593-611, 659-690 (1976).

²⁸ See generally *Michael J. Broyde*, The Pursuit of Justice and Jewish Law: Halakhic Perspectives on the Legal Profession (1996); *Dan Bressler*, Arbitration and the Courts in Jewish Law, 9 J. Halacha & Contemp. Soc’y 105, 112 (1985).

²⁹ Much of this sub-Part is drawn from *Dane*, Corporation Sole, supra note 10.

If two factions of a congregation, or a denomination, vie for control, how should the civil courts respond? One possibility, in principle, is for the court to do nothing – simply to allow the dispute to be resolved within the religious community and through its own methods of enforcement or coercion, whatever they are. In certain contexts, this might be a live option. But in the typical church property dispute, it seems not to be. So what should the secular court do? The prevailing answer in American law, as most famously crystalized in the *Watson v. Jones*, a United States Supreme Court case decided in 1871,³⁰ began with a negative injunction: Whatever else you do, do not try to decide matters of religious faith. A civil court may not look to the religious issue that divides two church factions and hold that one side or the other is, by that church’s creed, right. The Supreme Court thus rejected, at least in that case, the “departure from doctrine” approach traditionally used by British and some American courts to resolve some intra-church disputes, at least when the use of church property was restricted by the terms of a trust or other instrument. In *Watson*’s celebrated words, “The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect”.³¹

This negative injunction, however, is only half the story. It charts the path to avoid, but not the one to take. *Watson*’s method, which the Supreme Court seemed to rely on for many years, deferred to the church’s own system of governance. This affirmative injunction – known as the “polity approach” – looked to religious doctrine only to figure out what that system of governance was – in particular, whether it was hierarchal or congregational. Then it accepted the church’s own judgment as binding.

Watson rested on common law rather than constitutional grounds.³² Indeed, the Supreme Court did not explicitly ground what I have called its “negative injunction” in the Constitution until 1969.³³ In the intervening years, some state courts continued to try to make sense of substantive religious questions for themselves in resolving church property disputes.

³⁰ 80 U.S. 679 (1871). *Watson* involved a dispute within a Presbyterian congregation.

³¹ 80 U.S., at 728.

³² To emphasize this is not to devalue the case. As I argue in *Dane*, Public, Private, and Sacred, supra note 10, much of the most revealing and important legal doctrine in the encounter of religion and the state gets played out in non-constitutional or sub-constitutional contexts, and it is only a form of analytic distraction that I call “constitutional glare” that makes us think otherwise.

³³ See *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

Meanwhile, in 1979, the Supreme Court held that the “affirmative” side of *Watson* – its embrace of the “polity” approach to resolving intra-church conflicts – was *not* constitutionally mandated, and that state courts were equally free to employ an alternative methodology called the “neutral principles of law” approach.³⁴ The crux of the “neutral principles of law” approach is to decide intra-church disputes by reference to documents – deeds, trusts, by-laws, contracts, wills, and so on – that establish property rights and other entitlements cognizable in secular law. Only when those secular documents contain references to religious doctrine or questions must the courts look – as in the polity approach – to the appropriate religious authority. The neutral principles of law approach has been criticized for affording religious communities less genuine autonomy than the polity approach.³⁵ In any event, its rhetoric does not as clearly recognize the independent juridical and normative dignity of religious institutions.

2. UNPACKING THE VARIABLES

The story I have just told is not wrong. But it is too simple. For one thing, my account of the *Watson* decision’s “negative injunction” treats it – as I think most American observers instinctively do – as an unproblematic, if minimum, prerequisite to religious autonomy. But, as the Canadian scholar Denise G. Réaume has pointed out,³⁶ there is at least an argument that the older “departure from doctrine” approach sometimes better enforces a religious community’s own constitutive will. Moreover, the *Watson* decision’s refusal to examine questions of religious doctrine went only to *substantive* doctrine. The Court’s own “polity” approach required it to interpret for itself where – as a matter of religious doctrine – the locus of authoritative decision in the Church resided. Indeed, one defense of the “neutral principles of law” approach is that it manages to avoid that interpretive task as well, though at some cost.

This last point suggests that the debate between the “polity” and “neutral principles” approaches is also more complicated than it seems. Whether the polity approach can genuinely succeed in respecting religious autonomy might partially depend on the character of the religious polity and its

³⁴ *Jones v. Wolf*, 443 U.S. 595 (1979).

³⁵ See, e.g., *Ira C. Lupu*, Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination, 67 B.U.L. REV. 391, 408 (1987).

³⁶ Denise G. Réaume, Common Law Constructions of Group Autonomy: A Case Study, 39 *Nomos* 257 (1997).

amenability to being “read” by a secular court. And whether the neutral principles of approach really overrides religious autonomy might depend in part on whether the state’s secular legal categories have put the religious community in a straitjacket, or have, to the contrary, given it the means by which to successfully express its own constitutive norms.³⁷

I do not want to suggest that effectuating, religious autonomy is a necessarily intractable or indeterminate problem. There *are* easy cases. Nevertheless, as I have intimated, it might also be wise to try to unpack the debate over which set of doctrines affords a religious community more autonomy, and look to the various aspects of autonomy and their interaction. To that end, consider the following typology of the various meanings of autonomy suggested by *Watson* and its progeny:³⁸

To begin with, a secular state might just choose not to hear certain intra-religious disputes *at all*. Let me call this Adjudicative Abstention.

One might argue, of course, that there is really no such thing as Adjudicative Abstention – that any decision not to intervene on behalf of a given plaintiff necessarily implies the state’s support for the defendant. To believe in the “essentially jurisdictional” character of autonomy arguments, however, is also to accept the more general jurisdictional instinct in our legal culture that when a court finds a matter or an issue outside its competence, it can do so without bearing the onus of a particular substantive result.³⁹

There is, however, a more subtle complication in the notion of Adjudicative Abstention. Assume that a secular court declines to get involved in the initial substance of an intra-religious controversy. It might still face the dilemma of whether to intervene if one party to the controversy engages in some form of intra-communal remedy or self-help. If the self-help takes the form of, say, excommunication or condemnation, the same reasons that prompted the secular court to abstain in the first place might lead it to continue to stay out of the controversy. But if the self-help consists of, for example, physical violence, the state’s attitude might change. Thus, if we were being truly

³⁷ As I point out in *Dane, Corporation Sole*, supra note 10, this can sometimes be accomplished through “secular” legal categories that are tailored to the theological demands of specific religious communities.

³⁸ In defining each of these forms of autonomy, I have in mind the aspiration of the secular court, not whether it gets the answer “right”.

³⁹ For a more general discussion, outside the religious context, of what I have called the Idea of Jurisdiction, see *Perry Dane, Jurisdictionality, Time, and the Legal Imagination*, 23 Hofstra L. Rev. 1 (1994).

precise, Adjudicative Abstention could really be further classified as either “primary” abstention or several varieties of “secondary” abstention.

In any event, while American courts have adopted an attitude of genuine Adjudicative Abstention in certain contexts, including some cited earlier in this paper,⁴⁰ that has not been their general approach to disputes over the ownership or control of church property. Whether because “property” seems a legitimate topic for secular concern, or whether because “primary” abstention would only postpone the problem as one or the other side to the dispute tried to establish “facts on the ground”, secular courts have consistently agreed to render judgment.

Nevertheless, even if a court does not abstain from hearing a case altogether, it can still abstain from certain specific acts. The negative imperative of *Watson*

– that the “law knows no heresy” – is a form of *interpretive* abstention. I want to refer to it as Substantive Interpretive Abstention. There are, however, at least two other forms of interpretive abstention. One is Jurisdictional Interpretive Abstention, in which a civil court would decline to try to identify the locus of religious authority within a religious community. The *Watson* court necessarily rejected this form of abstention. Another form is Procedural Interpretive Abstention, in which a civil court declines to look into whether a religious community’s own procedural forms have been complied with. There is some overlap between Jurisdictional and Procedural Interpretive Abstention, as there is between jurisdictional and procedural doctrines themselves. But to the extent that procedural and jurisdictional questions can be separated, it now seems clear, despite earlier notions that a court might ask whether an ecclesiastical decision was “arbitrary”, that the First Amendment, while it does not require Jurisdictional Interpretive Abstention, does, in principle, require Procedural (in addition to Substantive) Interpretive Abstention.⁴¹

Abstention is a refusal to get involved in a particular enterprise. Now consider several forms of more “affirmative” deference to a religious community. The most basic, though least dispositive, form of deference might just be called Recognition – the willingness of the secular legal system at least to cognize one or another relevant religious norm.

To cognize a norm, however, is not necessarily to yield to it. That requires more consequential forms of deference. In that respect, I want to define

⁴⁰ See *supra* notes 4-6.

⁴¹ See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

Substantive Deference as the effort by a secular court to be guided by a religious community’s own first-order norms in deciding a question affecting the internal life of that community. Decisional Deference is the effort to be guided by the judgment of some designated decisionmaking organ within the religious community.

Finally, I want to consider – not instead of, but orthogonal to, other forms of deference – what I will call Constitutive Deference and Dynamic Deference. Many normative communities consider themselves bound over the long term to a set of principles or procedures that are immune at least to some extent from the vagaries of momentary sentiments. When secular states feel so bound, we call it constitutionalism, and emphasize its importance. Constitutive Deference simply recognizes the same power in religious communities.

At the same time, many normative communities, or at least forces within those communities, feel the imperative to undergo change – even fundamental change. And the ability to actualize fundamental changes marks an important difference between genuine sovereign dignity and a mere regime of rights.⁴² Dynamic Deference recognizes this element of autonomy.

Constitutive Deference and Dynamic Deference are by definition in profound, though not necessarily absolute, tension with each other. Each also overlaps, but is not identical, with both Substantive and Decisional Deference.

With these categories in mind, we can now chart the three judicial methodologies I’ve mentioned in this discussion – the “departure from doctrine” approach rejected by American courts, and the “polity” and “neutral principles of law” approaches, both of which are permissible under current constitutional doctrine:

		Departure from doctrine	Polity	Neutral Principles of Law
	Adjudicative Abstention	N	N	N

⁴² I emphasize this point in *Dane*, supra note 20.

Forms of abstention	Substantive Interpretive Abstention	N	Y	Y
	Jurisdictional Interpretive Abstention		N	
	Procedural Interpretive Abstention		Y	
Recognition		Y	Y	?
Forms of deference	Substantive Deference	Y	Y	?
	Decisional Deference	N	Y	N
Subjects of deference	Constitutive Deference	Y	?	?
	Dynamic Deference	N	?	?

This table is obviously only schematic. It does not, for example, try to account for the fact that both the “departure from doctrine” and “neutral principles of law” approaches revert to the “polity” approach under certain circumstances. Some boxes remain blank, because they seem not germane to a particular method, at least in its purest form. And some boxes have question marks, because the answer is ambiguous or variable. As I have already suggested, for example, while the “neutral principles of law” approach seems in formal terms to reject not only Substantive Deference but

even simple Recognition, it might actually be able to achieve both, at least indirectly, to the extent that religious communities can give a secular, “neutral”, legal expression to their religious norms. The larger point, however, is that no method of resolving intra-church disputes affords complete “autonomy” to a religious community, because autonomy is not one idea, but several.

3. THE MIXED SEATING CONUNDRUM

To see these general principles at work in the Jewish context, consider four cases, spanning almost forty years, that arose out of similar facts: Judaism, although not divided into denominations in the Christian sense, nevertheless has various streams or branches that disagree on fundamental questions. Although strictly “Orthodox” Judaism has in recent years witnessed remarkable growth and resurgence, a common occurrence in earlier years of the century was for nominally Orthodox synagogues to institute practices such as the mixed seating of men and women, which was traditionally forbidden, or to switch their identity entirely to either Conservative or Reform practice. When these transformations took place, dissident factions sometimes invoked the aid of the civil courts to try to undo the decision.

In *Davis v. Scher*,⁴³ a 1959 Michigan decision by the Supreme Court of Michigan, the court sided with the minority faction. While, at first glance, the decision looks like an exercise in the “departure from doctrine” method rejected by *Watson*, and more recently declared beyond the constitutional pale, it is actually more subtle. The court did not actually decide religious doctrine for itself, for it relied on undisputed “expert” testimony about the requirements of Orthodox practice. The defendants in the case, representing the synagogue’s majority, took the “calculated risk” of not disputing that testimony, and relied instead on their absolute right to control the synagogue’s affairs. The court, however, conceived of the religious polity differently. While *Watson* distinguished sharply between hierarchal churches, which were not expected to be democratic, and congregational churches, which were, the Michigan court adopted a more abstract account of the relevant unit of religious community, holding that

the majority faction of a local congregation or society, being one part of a large church unit, . . . may not, as against a faithful minority, divert the property of the society to another denomination or to the support of doctrines fundamentally

⁴³ 356 Mich. 291, 97 N.W.2d 137 (1959).

opposed to the characteristic doctrines of the society, although the property is subject to no expressed trust.⁴⁴

This court, while purporting not to compromise Interpretive Abstention, or even Decisional Deference, understood broadly, still clearly put its greatest emphasis on Constitutive Deference.

The question for us is whether, in the process, it paid too little attention to the imperative of Dynamic Deference, and whether, for that matter, it ignored the fact that Jewish constitutionalism does value the very process of majority decisionmaking that the court so easily overrode.

Another pattern appears in *Katz v. Singerman*,⁴⁵ a 1961 Louisiana case in which the court sided with the majority faction that voted to adopt mixed seating despite an original trust dedicating the synagogue to the “orthodox Polish Jewish Ritual”. In *Katz*, both sides put on expert witnesses, and the court concluded that it had no basis on which to decide whether or not the synagogue was still “orthodox”. “If there is one impression which is certain to be had from the evidence, it is that there is severe dispute among Orthodox Jews on the question of family or mixed seating.”⁴⁶

The *Katz* court stuck to the principle of Interpretive Abstention, at least in the presence of any prima facie dispute about the meaning of religious law. And it consciously sought a balance between Constitutive Deference and Dynamic Deference, recognizing that the legality of the congregation’s decisions could not be measured by the static benchmark of past practice, but also suggesting that at least a nominal loyalty to the synagogue’s original identity remained important: “If the Board of Directors sought to divert the property of the Congregation to the use of a religious body entirely foreign to Orthodox Judaism, a different situation would be presented.”⁴⁷

One concurring judge in *Katz* believed that the whole dispute related “solely to religious rights” and was outside the cognizance of secular courts.⁴⁸ This view comes closest to the polity approach. It also foreshadows the 1962 judgment of the Massachusetts Supreme Judicial Court in the third case in my list, *Solomon v. Congregation Tiffereth Israel of Revere*,⁴⁹ in which the

⁴⁴ *Id.*, at 298.

⁴⁵ 241 La. 103, 127 So. 2d 515 (1961).

⁴⁶ *Id.*, at 151. The court specifically distinguished *Davis*, in which all the expert testimony was on one side. *Id.*

⁴⁷ *Id.*, at 153.

⁴⁸ *Id.*, at 155 (Hamiter, J., concurring).

⁴⁹ 344 Mass. 755; 183 N.E.2d 492 (1962).

court simply dismissed a challenge to a congregation's adoption of mixed seating, holding in an emphatically short opinion that it "is not the province of civil courts to enter the domain of religious denominations for the purpose of deciding controversies touching matters exclusively ecclesiastical".⁵⁰

There is real appeal to an opinion like *Solomon*. It certainly seems the most "modern" and constitutionally aware of the cases I have discussed so far. It sharply upholds Interpretive Abstention and Decisional and Dynamic Deference, and for that matter comes very close to real Adjudicative Abstention. Yet it bears emphasis that there has also been some loss. Constitutive Deference, even of a mild sort, has disappeared. The ability of the religious nomos to impose enforceable substantive standards on itself – an ability that in the secular context we value deeply – has dissolved away in the court's refusal to take jurisdiction.

Finally, consider a much more recent case arising in Brooklyn, New York.⁵¹ The Park Slope Jewish Center was the product of the merger of three synagogues. After a dispute about the mixed seating and the role of women, the disputing parties entered into a stipulation in 1983 allowing the Orthodox faction to hold their own services in the building as long as they remained members of the synagogue. Subsequently, however, the synagogue voted to amend its bylaws to require members to commit themselves to the equality of women in religious services, thus effectively trying to oust the remaining Orthodox members.

The trial court purported to apply the "neutral principles of law" approach approved by the United States Supreme Court. It held that, without delving into matters of religious doctrine, it could conclude, on the basis of the earlier secular stipulation, that the synagogue majority's adoption of mixed seating was legal, but that its effort to require members to commit themselves to women's religious equality *illegally* deprived the Orthodox faction of its rights.

The problem with this opinion is that it does not achieve the goal of either Dynamic Deference or Constitutive Deference; it allows the congregation to change a little, but not to entrench that change in its basic instruments. Nor does the opinion really serve either Substantive Deference or Decisional Deference; it does not purport to ground itself in any religious norm, but it

⁵⁰ *Id.*, at 756 (quoting *Moustakis v. Hellenic Orthodox Society*, 261 Mass. 462, 466, 159 N.E. 453 (1927)).

⁵¹ *Park Slope Jewish Center v. Stern*, 128 Misc. 2d 909; 491 N.Y.S.2d 958 (Sup. Ct. Kings Cty. 1985).

also rejects the authoritative pronouncement of the synagogue's own juridical authority. Put another way, by relying on a regime of contract, the court advanced neither religious integrity or religious self-governance.

The trial court's decision was reversed on appeal, with the intermediate appellate court holding that the "neutral principles" approach was simply inapplicable to a congregations's ecclesiastical decisions about membership criteria.⁵² About twelve years after that, after the dispute had gone through several more bouts and the Orthodox faction had constituted itself as a separate congregation claiming the right to essentially rent-free space in the Conservative synagogue, the highest court in New York – unfortunately – issued an opinion that harkened back, in some though not the worst, respects, to the original trial court opinion.⁵³

As I emphasized above, I do not want to suggest here that something like the neutral principles approach is always an unsatisfactory response to intra-congregational disputes. But for the approach to have any hope of advancing religious autonomy, in any of its multiple meanings, the formal instruments on which the approach depends must be understood, not as simple secular documents, but as imperfect and provisional efforts to facilitate and organize the encounter between the religious nomos and the secular state, which is to say as at least indirect stabs at Recognition and some form of Deference.

III. AN INQUIRY INTO INTEGRATION

The religious autonomy problem is not limited to dealing with congregational conflicts, of course. I noted at the start of this paper a panoply of issues concerning whether various regulatory regimes should intervene in the workings of religious institutions. To the extent, though, that in some of these contexts, less state intrusion just means more religious autonomy, and vice versa, they are not interesting for my present purposes. Instead, I want to devote the last third of this paper to a distinct and more complex set of questions that arise when the secular state encounters, not only religious behavior, but the internal theological and legal categories of religious communities. The cases I will consider here focus less on secular

⁵² See *Park Slope Jewish Ctr. v. Stern*, 128 A.D.2d 847, 513 N.Y.S.2d 767 (2d Dep't 1987).

⁵³ *Park Slope Jewish Center v. Congregation B'nai Jacob*, 90 N.Y.2d 517, 686 N.E.2d 1330 (1997). The saga continued with a new, apparently unpublished, trial court opinion the next year.

involvement in the internal disputes of religious communities, and more on how secular and religious norms themselves interact and interpenetrate. I will therefore find it useful to reshuffle and reorient the seven-pronged typology of autonomy I employed in Part II, and shift to a different – though consistent – analytic model.⁵⁴

Consider that a secular legal regime has to make two different decisions about the religious norms that come within its gaze. One decision is whether to use the coercive power of the state to overrule the religious *nomos*. Thus, for example, when the law declines to apply civil rights legislation to ecclesiastical appointments, that is a decision *not* to overrule.

Another, more subtle, decision that a secular legal regime has to make, however, is whether to take religious categories “seriously” by integrating them into its own legal understanding, or to treat them “unseriously” by denying them affirmative juridical meaning. For example, bankruptcy law in the United States has had to consider whether religious “tithing” is a genuine obligation of a sort commensurate with other financial obligations – as religious believers themselves might treat it – or is an essentially optional act of beneficence.⁵⁵ “Integration”, as I am describing it here, is related to what I earlier referred to as “Recognition”, except that it goes one step further, not merely cognizing religious normative categories, but at some level at least, accepting their legal analytic consequences.

As seen through the lens of legal pluralism, taking religious categories seriously is, at least in formal terms, an act of respect, akin to recognizing a foreign-created legal status in conventional choice of law. But such integration of religious and secular categories can be as easily a ground for religious oppression as for religious freedom. Thus, for example, when nineteenth-century Mormons in the United States entered into “plural” marriages in religious ceremonies, the United States prosecuted them for bigamy, treating their religious rites as sufficiently real, in secular terms, to constitute a crime.⁵⁶ That is to say, the Mormons were not prosecuted for engaging in a purely “religious” rite – a prosecution that would violate the

⁵⁴ For yet another effort at cataloging various forms of interaction between the secular and religious normative orders, see *Carol Weisbrod*, *Family, Church and State: An Essay On Constitutionalism and Religious Authority*, 26 *J. Fam. L.* 741 (1987-88).

⁵⁵ See, e.g., *Religious Liberty & Charitable Donations Act of 1998*, Pub. L. No. 105-183, 112 Stat. 517; *In re Young*, 89 F.3d 494 (8th Cir. 1996); *In re Hodge*, 220 B.R. 386 (D. Idaho 1998); *In re McDonald*, 1999 Bankr. LEXIS 404 (Bankr. S. D. Fla. 1999); *In re Saunders*, 215 B.R. 800 (Bankr. D. Mass. 1997).

⁵⁶ The leading case was *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879).

Free Exercise Clause of the First Amendment even by nineteenth-century standards – but for engaging in a rite to which the government accorded genuine, *if negative*, secular significance.

Taking both these dimensions into account suggests a two-by-two grid that would look something like this:

	Non-Integration	Integration
Rejection	<i>I.</i> Non-Integrative Rejection	<i>II.</i> Integrative Rejection
Acceptance	<i>III.</i> Non-Integrative Acceptance	<i>IV.</i> Integrative Acceptance

Block ***I*** in this grid, Non-Integrative Rejection, includes the most patent cases of religious oppression. Block ***II***, Integrative Rejection, includes such ironic examples as the prosecution of Mormon polygamy. Block ***III***, Non-Integrative Acceptance, represents the height of separation between church and state, in which secular law neither interferes with, nor makes any effort to give secular significance to, the internal affairs of a religious community. Block ***IV***, Integrative Acceptance, is in some ways the most interesting, in which the state tries to further religious autonomy by translating religious categories into affirmative, and affirming, secular terms. But this type of interaction between religious and secular norms is also treacherous, because purely benign translations of religious doctrine tend to be more elusive than they at first appear.

Let me now try to illustrate these general observations by discussing three sets of distinctively Jewish examples.

1. FOOD, FAITH, AND FRAUD

Observant Jews adhere to a rigorous set of restrictions, known as the laws of kashrut, on what they are permitted to eat. These restrictions do not only forbid certain types of food, such as pork or shellfish. They also forbid certain foods that are not prepared in a religiously required fashion. Thus,

for example, beef and chicken are only kosher if the animals have been slaughtered according to certain precise rules.

One legal problem that these rules of kashrut raise for the secular state is a fairly conventional question of religious liberty: should kosher slaughter be allowed, even if it deviates from the norms that the state ordinarily imposes on the slaughtering process? Though this question has been debated in several countries, the generally uncontroversial answer in the United States has been to treat Jewish ritual slaughter as one of the means, alternative to more conventional procedures, to satisfy the legal norm that slaughter must be “humane”.⁵⁷

I want to focus briefly on another question, however: One of the challenges facing a religious Jew in the observance of kashrut is knowing whether particular products are really kosher. Jews look to religious authorities to certify the kashrut of much of the food they buy. But modern Judaism, as I have emphasized, is not a hierarchal faith, and a multitude of certifying agencies exist, whose trustworthiness is sometimes debatable. Moreover, there are, within the general sphere of the rules of kashrut, many good faith disagreements about the acceptability of particular foods or procedures. Finally, individual producers or sellers, with or without certification, can claim that their products are kosher, and those claims – whether made in good or bad faith – might or might not satisfy the religious standards of individual observant Jews.

In the light of these predicaments, the first question that the secular state must ask itself is whether to interfere in the Jewish community’s internal efforts at policing standards of kashrut through self-help. Disputes about

⁵⁷ See 7 U.S.C. § 1902:

No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane:

(a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

(b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.

kashrut, after all, are arguably not only religious questions, but also have serious commercial and financial repercussions. Nevertheless, the general attitude of American courts has been that, when kashrut certifying agencies or rabbinic authorities withhold or withdraw their approval of particular products or providers, and even strenuously publicize those decisions, sometimes causing serious financial harm, civil courts will not entertain suits for defamation, restraint of trade, conspiracy, or the like, to second-guess those decisions.⁵⁸ In these contexts, kashrut has been treated as a purely ecclesiastical issue. Only occasionally, when the good faith of certifying agencies was genuinely at issue, have some courts interfered,⁵⁹ and those cases – which tend to be older – seem dubious under current constitutional doctrine.

Judicial non-interference of the sort just described represents what I have called Non-Integrative Acceptance. In an increasingly splintered Jewish community, however, institutional self-help to enforce standards of kashrut, particularly against unscrupulous merchants and producers, is arguably insufficient. Indeed, several States in the United States have tried to include concern for the interests of kosher-keeping Jews into their secular schemes of consumer protection. This has meant enacting secular legal prohibitions on fraudulent or deceptive claims of Kashrut,⁶⁰ and even setting up bureaucracies, often staffed by rabbis, to police those norms.⁶¹

The conceptual challenge of these sort of kashrut statutes is the notion that the state can adequately translate a religious legal category into secular terms. That is to say, the statutes treat “kosher” as a product label, akin to “no-fat” or “organic” or the like. In practice, enforcement officials have realized that the translation must be imprecise; they have, with few exceptions, not intervened when a genuine difference of opinion existed as to whether a product was kosher, or when different segments of the Jewish community applied different standards on a question. In a sense, then, the

⁵⁸ See, e.g., *United Kosher Butchers Association v. Associated Synagogues of Greater Boston, Inc.*, 349 Mass. 595, 211 N.E.2d 332 (1965); *Korn v. Rabbinical Council of California*, 148 Cal. App. 3d 491; 195 Cal. Rptr. 910 (2d App. Dist., Div. 1, 1983); *S. S. & B. Live Poultry Association v. The Kashrut Association of Greater New York, Inc.*, 158 Misc. 358, 285 N.Y.S. 879 (Spec. Term, N.Y. Cty. 1936).

⁵⁹ See, e.g., *Cabinet v. Shapiro*, 17 N.J. Super. 540, 86 A.2d 314 (1952).

⁶⁰ See, e.g., N.Y. C.L.S. Agr. & M §§ 201-a to 201-j.

⁶¹ See, e.g., N.Y. C.L.S. Agr. & M § 16. See generally *Kent Greenawalt, Religious Law And Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. Cal. L. Rev. 781 (1998).

secular term “kosher” acts as a proxy, not so much for the religious term “kosher”, in its intricacy, as for a homogenized, secularly cognizable, idea of good faith.

On the surface, the sort of Integrative Acceptance embodied in the kashrut enforcement statutes I’ve just described might seem in tension with the Non-Integrative Acceptance of the secular court’s refusal to define the term “kosher” when a merchant claims that rabbinic authorities have unfairly labeled his products not kosher. The conflict dissolves, however, if we appreciate that the goal, in both instances, is to accommodate the spiritual demands of observant Jews in an age in which the internal coercive resources of that nomos have been seriously diluted.

Nevertheless, for the state to take on itself the enforcement of a religious claim, even in the guise of protecting consumers against obvious fraud, has seemed to some to run too much against the grain of the American tradition of separation. Thus, in recent important cases, courts have struck down kashrut enforcement statutes, holding that they not only enmesh the state too deeply into religious questions, but also engage in impermissible “denominational preferences”.⁶²

For my present purposes, I do not want to debate whether these cases were correctly decided. Two points are worth noting, however. First, one’s view of whether classic kashrut enforcement statutes promote religious autonomy – and whether their voiding compromises that autonomy – depends in part on how one balances two aspects of autonomy: the separation of the religious from the secular, and the affirming recognition of the religious by the secular. Second, it might be possible to reconcile these impulses. At least one State, faced with the judicial rejection of its kashrut statute, replaced it with a new model of regulation. Rather than try to translate the religious concept of kashrut into secular terms, the new statute only mandates disclosure, requiring kosher establishments, for example, to post notices detailing their standards of kashrut and the identity of the agency that certifies their kashrut.⁶³ This solution, does not only ease the encounter between religious norms and secular adjudication; it also comports with an increasing trend in modern regulatory theory to encourage norms, such as disclosure, that seek only to “perfect” free markets rather than more

⁶² See, e.g., *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir. 1995) (striking down Baltimore municipal ordinance); *Ran-Dav’s County Kosher, Inc., v. New Jersey*, 129 N.J. 141, 608 A.2d 1353 (1992), cert. denied, 113 S.Ct. 1366 (1993) (striking down New Jersey statute).

⁶³ See New Jersey Kosher Food Consumer Protection Act, N.J. Stat. §§ 56:8-61 to -66.

intrusive substantive norms that try to control the market.⁶⁴ Thus, secular insights into the dynamics of regulation can help ease the trade-off between the affirming and separatist goals of religious autonomy.

2. MARRIAGE AND TRANSLATION

The cross-cutting dichotomies of Integration/Non-Integration and Acceptance/Rejection are also apparent in the last set of problems I want to discuss briefly here: marriage and divorce.

Marriage is a historically complex institution, which has played a role in both “secular” and “religious” life from well before the two were thought of as divisible in the modern sense. Today, secular attitudes to the religious dimension of marriage run a wide range. At one extreme are countries such as Israel where, as noted, jurisdiction over marriage and divorce is in large part handed over to state-supported religious tribunals. At the other extreme are countries like France, Belgium, and Mexico, in which religious marriage is tolerated, but has no civil effect, and couples must appear before state functionaries to be considered married in the eyes of secular law.

The United States stands between these poles.⁶⁵ On the one hand, its own substantive law concerns itself deeply, in secular terms, with marriage and its consequences. On the other hand, the law officially recognizes the religious aspects of marriage. Thus, for example, in every State, clergy – as well as secular officials such as judges and mayors – are authorized to perform marriages in the name of the state. It is possible, to be sure, to read this authority as a mere delegation of secular authority, grounded in sentiment and convenience, but having no deeper meaning. But it is not quite that simple. For example, while state law typically requires prescribes certain types of formalities before religious ceremonies will be recognized as having civil effect, many States explicitly accommodate those faiths, such as

⁶⁴ See generally *Robert D. Cooter/Edward L. Rubin*, Orders and Incentives as Regulatory Methods: The Expedited Funds Availability Act of 1987, 35 U.C.L.A. L. Rev. 1115 (1988); *William C. Whitford*, The Functions of Disclosure Regulation in Consumer Transactions, 1973 Wis. L. Rev. 400.

⁶⁵ For a discussion of the interpenetration of civil and religious authority in the definition and regulation of marriage, see *Weisbrod*, supra note 54. My own more extended discussion of the matter will appear in *Perry Dane*, The Intersecting Worlds of Religious and Secular Marriage, in *Law and Religion: Current Legal Issues*, Vol. 3 (Oxford University Press) (forthcoming).

the Society of Friends (Quakers), Mennonites, Baha'i, and to some extent Jews, whose religious practices don't always fit the standard model.⁶⁶

Particularly intriguing is that at least one State supplements these essentially procedural accommodations with a remarkable substantive bow to a particular religion's law of marriage: According to a very old Rhode Island law, the general statutory prohibitions on certain types of unions between close family members

shall not extend to, or in any way affect, any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion.⁶⁷

The practical effect of this provision is limited – the only marriage that civil law generally treats as incestuous but which Jewish law does not is that between an uncle and a niece. But the symbolic import of this provision is profound. Moreover, the statute has had some interesting ripples. In a 1953 case called *In re May's Estate*,⁶⁸ the highest court in the State of New York upheld (in the context of a will dispute) the validity of a marriage celebrated in Rhode Island between an uncle and his half-niece who were domiciled in New York, refusing to treat the marriage as prohibited by either New York public policy or “natural law”. The court concluded that the marriage

solemnized, as it was, in accord with the ritual of the Jewish faith in a State whose legislative body has declared such a marriage to be ‘good and valid in law’, was not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law.⁶⁹

Almost twenty years later, the same court, in a purely domestic case, faced another uncle and his half-niece who had gotten married in a Jewish ceremony.⁷⁰ The court held that the marriage itself was incestuous and void under New York law. But, relying in part on *May's Estate*, it also held that the couple's antenuptial agreement – which would generally be held unenforceable in the absence of a valid marriage – remained binding.

⁶⁶ See, e.g., Ala. Code § 30-1-7(c); Ark. Stat. Ann. § 9-11-213(b); Fla. Stat. @ 741.07(2); Maine Rev. Stat. § 658; Mich. Stat. Ann. § 25.13; Minn. Stat. § 517.18; Nev. Rev. Stat. § 122.150; N.H. Rev. Stat. § 457:37; N.Y. C.L.S. Dom. Rel. § 12; N.C. Gen. Stat. § 51-1; 43 Okl. St. § 7(D); R.I. Gen. Laws § 15-3-6; Tenn. Code Ann. § 36-3-301(b).

⁶⁷ R.I. Gen. Laws § 15-1-4.

⁶⁸ 305 N.Y. 486, 114 N.E.2d 4 (1953).

⁶⁹ *Id.*

⁷⁰ *In re Simms*, 26 N.Y.2d 163, 257 N.E.2d 627 (1970).

As noted earlier, however, in the case of Mormon polygamists, for secular law to take religious marriage “seriously” can be a double-edged sword. Consider the following modern variation, as applied to a pair of Jews: Robin Shaha was offered employment as an attorney in the office of the Attorney-General of the State of Georgia. After Shaha “married” her lesbian partner in a (Reconstructionist) Jewish ceremony, the Attorney-General revoked her offer of employment. She sued – claiming violation of her constitutional rights – and, in an opinion issued only three years ago, the United States Court of Appeals for the Eleventh Circuit held against her.⁷¹ The case is complicated, in part because it arose in an employment context. But I want to focus on one question: the status of Shaha’s Jewish lesbian marriage.

The Attorney-General argued that he revoked Shaha’s offer of employment because to take her on would conflict with the office’s opposition to same-sex marriage and its enforcement of the State’s sodomy statutes. Shaha claimed, and a dissenting judge forcefully argued, that her wedding ceremony was a purely religious act, and that Shaha never held herself out to be married in a civil sense and even disavowed any secular legal rights as a result of her marriage.⁷² Therefore, the Attorney-General was simply penalizing her for participating in a religious ritual, and thus acted illegally.

The majority, however, read the situation differently. Though Shaha’s religious marriage was not recognized as such by civil law, it was enough of a marriage in civil and public contemplation that it justified the Attorney-General’s concern.

As a statement about personal liberties, this opinion is clearly a blow to Shaha and others in her position. One must also wonder, however, about the implications of the dissent’s position. Does it really serve religious autonomy, and the normative dignity of religious communities, to treat a religious account of as fundamental an issue as marriage as mere ritual, incommensurate with, and incapable of being cognized by, the norms of the secular state? Again, it seems to me that the answer is difficult and unclear. At the very least, the choice between Integrative Rejection and Non-Integrative Acceptance is, at least in this context, an unhappy one all around.

⁷¹ Shaha v. Bowers, 114 F.3d 1097 (11th Cir. 1997), cert. denied, 118 S.Ct. 693 (1998).

⁷² *Id.* (Godbold, J., dissenting).

3. DIVORCE AND COORDINATION

I will end by turning to a problem closely related to marriage, to wit, divorce. The interaction between Jewish and secular divorce has been the subject of much attention in recent years. I do not want to add to that volume of commentary, but a few observations seem in order.

Jewish law, as interpreted by Orthodox and Conservative Jews, does not recognize the efficacy of civil divorce. To be truly divorced in the eyes of Jewish law requires a Jewish divorce. Jewish divorce, though supervised by a rabbinic court, is not a judicial act, but rather occurs when the husband delivers a bill of divorcement, called a “get”, to his wife, in person or through an agent. In principle, both the husband’s delivery and the wife’s acceptance must ordinarily be consensual.

Without a “get”, an observant Jew, and in particular, an observant Jewish woman, cannot remarry in the eyes of Jewish law. In traditional self-governing Jewish communities, and to some extent in Israel today, religious courts faced with dead marriages could use various means, including even physical restraint, to coerce the parties to divorce. In modern secular societies, those modes of enforcement are no longer available. Moreover, to the extent that secular law can provide many of the practical advantages that come with dissolution of a marriage, the temptation to refuse to grant or receive a “get” out of spite, or to use the threat of such refusal to obtain concessions in the division of property or the custody of children, is great. The result is that many Jews, particularly women, who have been civilly divorced stand incapable of entering into a new marriage, and are thus chained to a bond that ended long ago.⁷³

Many solutions to this dilemma have been attempted, both within and outside the Jewish *nomos* itself. Various forms of prenuptial agreements have been proposed or executed to mitigate the problem. In addition, some authorities and streams of Judaism have resorted to rabbinical nullification of marriages. Both these solutions, however, have been controversial, and have won only limited recognition among observant Jews.

In several secular jurisdictions around the world, the legislature has concluded that it is in its interest to make sure that the institution of civil divorce not be a nugatory act, and in particular that it not disadvantage one of the parties through its inadvertent interaction with religious norms. The

⁷³ See generally *Irving Breitowitz*, *Between Civil and Religious Law: The Plight of the Agunah in Modern Society* 15 (1993).

most important consequence in New York State was the passage of a statute that, though it does not refer to Jewish divorce in so many words, has been informally dubbed the “get law”. As relevant here, the core of the statute is a requirement that any party seeking an annulment or divorce must file, as a prerequisite to obtaining a final judgment, a sworn statement that

to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant’s remarriage following the annulment or divorce.⁷⁴

The phrase “barriers to the defendant’s remarriage” is in turn defined to include

any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party’s commission or withholding of any voluntary act.⁷⁵

A more recent companion statute, passed in 1992, allows judges, in dividing marital property, to “consider the effect of a barrier to remarriage” as that term is defined in the earlier statute.⁷⁶ The practical point of this provision is to recognize that the withholding of a “get” can be an economic lever, and to reduce the effect of that lever by allowing the judge to give a counterbalancing award to the disadvantaged party.⁷⁷

These statutes are profound examples of Integrative Acceptance – the effort by the secular state to strengthen religious autonomy and the self-actualizing capacities of religious communities by finding appropriate secular translations for religious norms. But they also emphasize yet again, the difficulties – even if inevitable difficulties – of such translation.

Both the original “get” statute and the 1992 provision have a potential pitfall in common: it turns out that, under some interpretations of Jewish law, a “get” procured through the coercion of such secular statutes is, in Jewish legal contemplation, involuntary and therefore invalid.⁷⁸ Whether or not

⁷⁴ NY CLS Dom Rel § 253(3).

⁷⁵ NY CLS Dom Rel § 253(6).

⁷⁶ NY CLS Dom Rel § 236(B)(5)(h).

⁷⁷ The 1992 statute was inspired in part by the decision in *Schwartz v. Schwartz*, 153 Misc.2d 789, 583 N.Y.S.2d 716 (Sup. Ct., Kings Cty. 1992).

⁷⁸ For some relevant sources, see *Susan Metzger Weiss*, Sign at Your Own Risk: the “RCA” Prenuptial May Prejudice the Fairness of Your Future Divorce Settlement, 6 *Cardozo Women’s L.J.* 49, 102 n.40 (1999).

these interpretations are compelling, or prevail in the community at large, they at least put “gittin” so obtained under a cloud. Thus, a statutory scheme meant to facilitate the workings of the religious nomos can potentially blunder its way into throwing that nomos into disarray.

The more obvious problem lies with the 1992 provision alone. The original get statute arguably furthers the understandable secular interest in insuring that a party who *initiates* a secular divorce proceeding not leave the other party stranded in an undissolved religious marriage. But the 1992 provision applies to *both* the plaintiff and the defendant in a civil divorce. The provision assumes that entitlement to a get has economic value, which can be taken into account in dividing marital property. Thus, for example, if one party to divorce proceeding could extract \$ 50,000 from the other in return for a “get”, a court might give the spouse who is the potential victim of such extortion an additional \$ 50,000 to compensate for that undelivered “get”. The problem, however, is in the assumption that either party to a civil divorce, even the party who initiated the civil divorce, is automatically entitled to obtain a religious divorce, and that, whenever a civil divorce is in the works, refusal to grant a “get” is, in effect, the withholding of a secularly compensable entitlement. But this might or might not be true as a matter of religious law or practice. And the 1992 statute ends up, not so much integrating religious norms into secular law as trying to conscript religious law to the service of secular norms. None of this is to suggest that any effort at integration is doomed. But it must be undertaken with the greatest of care, and sensitivity, and a large measure of humility.

II. CONCLUSION

I emphasized early in this paper that my goal here has been limited. I have tried to dissect the notion of religious autonomy, but not to put all the pieces together again. Nevertheless, some degree of normativity has inevitably crept into the discussion.

A crucial question for the supporter of religious autonomy, in the light of this discussion, is how to choose among the various forms that autonomy might take. Whatever the answer, it will be complex, and deeply contextual. Sometimes, one or another form of autonomy will seem less genuinely at stake than another. If, for example, a question of religious doctrine is singularly uncontroversial, then the secular state’s commitment not to interpret such questions – a commitment I have called Substantive Interpretive Abstention – might not really serve the larger cause of

autonomy at all.⁷⁹ In that happy instance, the challenge to secular law, which it might be unable to discharge, is to be nimble enough to recognize and take advantage of the opportunity. When the forms of autonomy are in more genuinely pressing tension with each other, one strategy might be to look to the religious nomos itself to choose among them. Whether this strategy can provide real insight, or simply lead to an infinite regress of meta-conflicts among forms of meta-autonomy will, again, depend deeply on context.

At some point, the friend of autonomy might need to admit that other values should come into play, especially when different forms of autonomy are in conflict. When that happens, however, it is helpful to be explicit about it. For example, if American constitutional law takes Substantive Interpretive Abstention as a near-absolute, it needs to be understood that this is not only out of a commitment to religious autonomy – particularly when such abstention rules out effectuating competing forms of autonomy – but more particularly reflects other, undoubtedly important, values in the American principle of nonestablishment. Similarly, when faced with the sad and ironic choice I described in the *Shaha* case between what I have called Integrative Rejection and Non-Integrative Acceptance, a civil libertarian might choose the lesser evil of Non-Integrative Acceptance, but he should do so fully aware that the value driving that decision has more to do with individual freedom than with the integrity and autonomy of a religious community.⁸⁰

When all other strategies fail, or even before, the friend of religious autonomy might think it necessary to grasp the matter more firmly and try to decide, as a matter of general – if contextually sensitive – principle, which aspects of autonomy are more important than others, and why. But that task, as I emphasized at the outset, is truly beyond the scope of this paper.

* * *

My point in trying to unpack the notion of religious autonomy – even to the point of self-consciously obnoxious terminological overkill – has not been to deconstruct autonomy by exposing its fractures, or even to diminish its importance. To the contrary, it seems to me that religious autonomy as part of a discourse of legal pluralism is a necessarily complicated and contested idea, much like other great values such as democracy or freedom. If

⁷⁹ Cf. *Samuel J. Levine*, Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief, 25 *Fordham Urb. L.J.* 85 (1997).

⁸⁰ To be sure, opting for the third option of what I have called Integrative Acceptance would maximally satisfy both religious autonomy and individual freedom, but the political or legal situation, as in the *Shaha* case itself, might not make life that easy.

anything, it is necessarily more complicated. “Autonomy” is only the label we attach to one side of a necessarily two-sided encounter between normative worlds. The complications of autonomy are therefore the product of the confusion and contestedness inherent in the self-understanding of each side to the encounter, multiplied by the haze of misperception and misunderstanding that separates them. But the existential demands of the encounter, not to mention good faith and human decency, require that each side forge ahead nevertheless.