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➤ EN ROUTE

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Ethics, Drugs, and Rock and Roll: On the Integration of Bioethics into the Entrepreneurial Life

Angela Rossetti

➤ **Angela Rossetti** is Executive Vice President of Cell Machines, a newly formed biotechnology company dedicated to the development of protein therapies for rare disease. Ms. Rossetti was formerly a Vice President at Pfizer Inc., and President of Ogilvy Healthworld. Ms. Rossetti graduated from a joint program of the Albert Einstein College of Medicine and Benjamin N. Cardozo School of Law with an M.S. in Bioethics (MBE) and has an MBA from Columbia University Graduate School of Business. She is also an adjunct assistant professor at New York Medical College and serves on several pharmaceutical company boards.

Starting a new biotechnology business is like performing a high dive: it is exciting, frightening, and an ever forward and compelling movement towards an unknown performance. A good, solid business school education (which I fortunately have) is like the high diving board: it provides a secure and resilient jumping off point, but in and of itself, it is not enough. One *must* execute the dive. To do that, an entrepreneur needs a sense of mission and purpose, experience, the ability to be flexible and quickly change direction if necessary (to rock and roll), and the guiding principles of ethics.

Before I became a biotech entrepreneur, I spent multiple decades in pharmaceutical industry. I first started as a copywriter, and, because medical advances in the late 20th century were novel, I was assigned to write about diseases that had been

previously untreated or ineffectively treated. Physicians and patients needed to hear about new pharmaceuticals, and there were jobs to be had if one could communicate well. Pharmaceutical copywriting gave therapeutic progress a needed voice.

It had become a fact of life in medicine that physicians were becoming just too busy to digest or pontificate over the *Journal of the American Medical Association* or the *New England Journal of Medicine* every week in quest of the newest medicine. So, as technology was moving forward at an ever-increasing rate and managed care was limiting physicians' time, physicians came to rely heavily upon commercial communications and sales representatives to inform them of newly available drugs. Commercial communication of information replaced the old technique of perusing

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the literature and having long conversations with colleagues. In part, the change in post-medical school learning techniques did accelerate improvements in health as doctors learned about and were motivated to prescribe the newest drugs.

This was an efficient process and reflected, for the most part, a noble goal. As science advanced and developed ever better treatments, pharmaceutical companies pivoted, increasing research spending and developing breakthrough drugs. They also developed some “me-too” (slightly different, but largely duplicative therapies); but even these had utility for some patients. One size does not fit all. There was very good *and* ethical work done by the pharmaceutical industry at large and by thousands of the industry’s sincere representatives. Overall, the system worked: physicians learned about and had more effective drugs in their armamentarium, the pharmaceutical industry thrived, and patients benefitted from advancing science coupled with the capitalist predisposition towards profitability.

These changes in physician practices had measurable impacts on public health, too. The large, longitudinal Framingham Heart Study started in 1948 tracked the cardiovascular health of thousands of men, their spouses, and their offspring over seven decades and counting in Framingham

Massachusetts.^{1,2} Longitudinal data poured out of the Framingham study in the 1960s, 1970s and beyond:³ the natural history of congestive heart failure,⁴ epidemiologic features of atrial fibrillation,⁵ the relationship of adiposity to the development of hypertension,⁶ along with hundreds of other conclusions. As the industry raced to develop new cardiovascular drugs to respond to these conclusions, new anti-hypertensives and other varieties of cardiovascular drugs were successfully marketed. These drugs changed cardiovascular mortality in the United States: Deaths from heart disease per 100,000 Americans dropped from 588 in 1950, to 492 in 1970, to 321 in 1990, to 187 in 2014 – a dramatic tumble.⁷ This was largely due to the results of studies like Framingham, the industry’s responsiveness in developing drugs to treat the causes and effects of cardiovascular pathology, and the massive efforts of the pharmaceutical industry to communicate and sell their wares. Everyone won: patients lived longer, doctors had a bigger and better range of therapies to use, drug companies made money along with their advances.

But then came the lawsuits: sales representatives went “off script,” companies pushed drugs “off label” (that is, for medical indications for which the FDA had not approved) and a thousand other things that

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made consumers angry and lawyers' practices boom. The rock and roll days of the industry from the 1970s to 1990s, slowed, and companies had to face the legal music.

By 2009, the pharmaceutical industry had largely reinvented itself. By late 2008, it published a new code of ethics that described ethical interactions with healthcare professionals.⁸ More and more companies offered payment assistance for expensive drugs;⁹ companies were willing (or forced by insurers) to accept payment based on product efficacy;¹⁰ and in general, by 2016 the pharmaceutical industry and its ethics were constantly in the news, serving as the base for political rhetoric, and constantly on the minds of increasingly aging American consumers.

So what is a pharmaceutical or biotech entrepreneur to ethically do in the 21st century? Obviously provide a market disruptive, health outcome-improving drug—and do so quickly, affordably, accessibly and ethically. But none of those things are easy.

Jumping off the diving board into the market first requires discovery and development of a superior product. Then, it demands an unfailing ability to conceptualize the product's position in the pharmaceutical armamentarium, the ability to execute access to patients and payers, to obtain physician approval and prescribing. And, not

unlike the athletes whose sport is the high dive, launching a new biotech drug demands excellent training and continuous preparation for its market entry and subsequent trajectory. The lessons of the 20th century and the industry sideshow of unscrupulous 21st century entrepreneurs have also placed additional demands on today's newly formed biotech or pharmaceutical company: it must be built with a strong underpinning of ethics. If not, the company will crash, money will be wasted, and the public good will suffer.

Alexei Marcoux of Creighton University has studied entrepreneurship and provides some insight into the process. In his view, entrepreneurs undo the existing order in order to achieve a better result. Dr. Marcoux reviews several theories of how this is done:¹¹ Knight who theorizes that entrepreneurs are those who are willing to bear uncertainty; Kirzner who believes that entrepreneurs are those who *perceive* opportunity; Schumpeter who believes that entrepreneurship is an act of creation. Or, to be more precise, entrepreneurship is an act of creative destruction of the status quo.

None of this is for the faint hearted. Think about the parallels in music: Elvis Presley creatively destroyed 1950s pop and the charming “doggies in the window,” but even Elvis needed drugs and carbohydrates to get through it all. The Rolling Stones had their own

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acts of creative destruction—famously witnessed in hotel rooms and on island vacations. Synthesizers did in some instruments, and tapes, CDs and streaming relegated the once-ubiquitous vinyl to vague industrial uses. Creative destruction is first *destructive*, but it is so in the hopes that in the end, creativity triumphs and products and markets get better. For biotech entrepreneurs, the bar is even higher. Products, markets, and longevity or quality of life must get better in order for the entrepreneur to succeed.

But, alas, the dis-equilibrating force of biotech entrepreneurship can be distorted in many unethical ways. Martin Shkreli of Turing certainly attempted disequilibrium for markets, but did not offer up a superior, creative product or bear much personal uncertainty. And though he “perceived opportunity” as Kirzner suggests, it appeared to be only for personal financial gain. Arguably Shkreli has not provided *any* benefit to society (except to become a case study of what NOT to do as a pharmaceutical company CEO) and has not displayed what most individuals would consider to be ethics.¹²

So what about business ethics in the realm of biotech entrepreneurship? Exactly who or what comprises the new corporation and who must be ethical? Who is that entrepreneur standing at

the edge of the diving platform? The CEO? Chief scientist? Commercial officers? Legal counsel? All of them... and then some.

Alexei Marcoux also has some thoughts on the “who” of entrepreneurship. In a seminal paper entitled *Business Ethics*,¹³ Marcoux argues that the ethics of a corporation affect all who work there and all who attempt to move the business forward. Marcoux expands on Solomon’s work that defined the existence of multiple levels of ethics in the corporation (even if it is a small biotech!): micro, macro, and molar. Micro-ethics are the ethics that I, as an individual, bring to my work. This occurs on a daily basis, affects everything I do, and ideally drives me towards ethically mediated success. Macro ethics concerns the institutional or cultural rules of commerce for the entire society. What does society expect of a new company trying to innovate in an old industry....and an industry that is committed to human well being at that? Lastly, molar ethics concern the basic unit of commerce globally: the corporation.

For aspiring biotechnology entrepreneurs who have a potent mix of drive, fear of failure, willingness to do good, and a mission to stay within ethical guidelines to develop their product and move the industry and the public’s health towards a better future, Marcoux’ analysis presents a tall, multi-

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faceted order. In short, ethics on every level of the corporation is essential. This would be difficult enough if science were not moving inexorably forward. Today's great scientific thesis is eclipsed by tomorrow's discovery. A biotech entrepreneur, like every entrepreneur, needs focus, but also needs the flexibility to shift gears as the science advances and to perceive new opportunity. Entering a market with yesterday's technology will not achieve market acceptance or access. In short, being late means you have wasted your time, your money and perhaps years of effort. This pressure cooker might drive many to unethical behavior, if it were not for the lessons and lawsuits of the recent past and the ethical commitment of the entrepreneur.

The progress of the pharmaceutical industry in the 1950s and beyond was a combination of discovery, commerce, and some would argue, a fluorescent mix of ethical and unethical behavior. In the upcoming 2020s, the progress of the biotech industry will have the same mixture, but will also have to take off from a higher ethical platform as a consequence of the errors and ethical failings of the past. This is all possible, but to do so requires consistent ethical attention to intent, purpose, and execution. And as every Olympian diver in training knows, that effort and drive towards excellence is personally rewarding and very meaningful. I am

sure many a biotech entrepreneur, and rock musician would agree.

Notes:

¹ Presented at a Joint Session of the Epidemiology, Health Officers, Medical Care, and Statistics Sections of the American Public Health Association, at the Seventy-eighth Annual Meeting in St. Louis, Mo., November 3, 1950.

And: Thomas R. Dawber, Gilcin F. Meadors, and Felix E. Moore, Jr. *American Journal of Public Health and the Nations Health* 1951 41, 3, 279-286 Read More: <http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.41.3.279> Accessed June 22, 2016

² <https://www.framinghamheartstudy.org/about-fhs/> Accessed June 22, 2016

³ The study continues: since 1948, the study has added the Offspring Cohort in 1971, the Omni Cohort in 1994 a Third Generation Cohort in 2002, a New Offspring Spouse Cohort in 2003, and a Second Generation Omni Cohort in 2003. Each one of these additional Framingham was the fruit of collaboration of the US Public Health Service, the municipality of Framingham, MA and now NHLBI and Boston University.

⁴ McKee, Patrick A., M.D. Castelli, William P., M.D. McNamara, Patricia M. Kannel, William B., M.D., M.P.H.

The Natural History of Congestive Heart Failure: The Framingham Study, *New England Journal of Medicine*,

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December 23, 1971

⁵ Kannel, William B., M.D. Abbott, Robert D., Ph.D.: Epidemiologic Features of Chronic Atrial Fibrillation, *New England Journal of Medicine*: 306:1018 April 29, 1982

⁶ The Relation of Adiposity to Blood Pressure and Development of Hypertension: The Framingham Study
W B. Kannel,, M.D., F.A.C.P.; N Brand M.D.; JJ Skinner JR., M.D.; TR Dawber M.D., F.A.C.P.; and P M. McNamara A.B.

Ann Intern Med. 1967;67(1):48-59.
doi:10.7326/0003-4819-67-1-48

⁷ Health, United States 2015, CDC, Table 22; <http://www.cdc.gov/nchs/data/hsr/hsr15.pdf#listtables> Accessed June 22, 2016

⁸ Code on Interactions with Healthcare Professionals, Pharmaceutical Research

and Manufacturers Association, 2008

⁹ <http://phrma.org/access/ppa>
Accessed June 22, 2016

¹⁰ <http://www.fiercepharma.com/pharma/unitedhealth-uses-newfound-scale-to-negotiate-pay-for-performance-deals> Accessed June 22, 2016

¹¹ <https://www.youtube.com/watch?v=Oqgzjt-0qZY> Accessed June 22, 2016

¹² Lee, B: How did Martin Shkreli Ever Become a Pharmaceutical CEO? *Forbes Magazine*, March 30, 2016 <http://www.forbes.com/sites/brucelee/2016/03/30/how-did-martin-shkreli-ever-become-a-pharmaceutical-ceo/#51c66f38d0a4> Accessed June 22, 2016

¹³ Marcoux, A: *Business Ethics*, Stanford Encyclopedia of Philosophy, Spring 2009

Giving up Private Practice and the Corporatization of Medicine

Gino Bottino

➤ **Gino Bottino** is a Board Member of the Westchester County Medical Society and is currently a delegate to the Medical Society of the State of NY. After being in solo practice for more than 30 years, in 2015 he joined the Hudson Valley Hematology Oncology Group and continues to practice at Northern Westchester Hospital Cancer Center. He has published extensively and continues to do research in his field at Northern Westchester Hospital Cancer Center.

Many of my patients do not understand what is happening in the practice of medicine, and what is happening to all doctors. They come in feeling upset and ask me many questions about what happened to my practice, and they need answers. They are not the only ones, so I decided to write this article.

After 31 years in private practice, I closed my PC medical practice for it to be taken over by a corporation for the cost of one dollar. The first misconception that many that people have is that small practices are lucrative for doctors. In today's world, they are worthless, and are not sold for profit or serve to be a retirement fund. We get absorbed into a large corporation and are given a salary.

When my patients come now to see me, they have to fill out all sorts of corporate forms, which ask a lot of personal financial questions, as well as forms to guaranty payment. They cannot see me until it is done. It is clear to me – and to them – that they are not

my patients anymore; but rather have become the corporation's clients.

In considering selling my practice, the only choices I had were either to retire or to get a job. As I still need to support my children and build a retirement fund, I needed to take a job. I never expected to become rich as a doctor, but I always thought I would make enough money to send my children to school and to retire at a reasonable age. Not only is that not possible for me, but I have not been able to do for my children what my father, who was a doctor, did for me.

In my last year of practice, I made just \$56,000.00, even though I grossed close to 2 million dollars in my practice. This is due to the overhead caused by government and insurance mandates. Also, the requirements to continue in practice, which were continuing to go up, meant that I would to spend another \$40,000.00 to update my systems in the next year. I realized that I could not afford to stay in practice any longer.

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So I have explained to my patients that I had to join a large group in order to continue seeing them.

I am at Northern Westchester Hospital, a not-for-profit institution that has operated in the black for 100 years. But due to the same financial pressures that constrain me; the hospital was sold to the Northwell Group this year. The board of directors felt that the hospital could not survive and thrive on its own.

The difference between a small practice and a large corporation, of course, is that large corporations have many financial privileges that small ones do not. They can use economies of scale to buy all they need at a much reduced cost. But what they really have is political and legal power. They have the power to force insurance companies, and the government, to negotiate reasonable payment. No individual small practice or even a big, but single hospital, can do this anymore! Northwell is now the largest employer in NY state, and one of the largest medical provider companies in the country.

Patients come into me and complain that the large practice corporations limit their time with their doctors. They complain that their doctors are spending a good deal of that limited time on a computer and not with them. I do this to an extent too; because I have to, in order to get paid and keep my job.

Unfortunately, the corporate ethos of money being the bottom line has

changed everything about medicine and the way we practice. Gone is the humanism of one-on-one medicine. Gone is caring about the patient first and the money later. Gone is taking the time to care.

Now the notes on the computers have to justify the payment; not the satisfaction of the person for which I am caring. What my patients do not know is that under the new system of “pay for performance,” if the doctors don’t check off all the right boxes (like did we ask if there are guns in the house), we could be docked 5% of what is owed us from government, for lack of performance!

Doctors have become the hired help (and what they do is more and more controlled by corporate interests).

When my practice was my own, anyone that walked in the door was cared for. Now the staff (of which I am just a part and not the boss), has to check their eligibility before they can see me. My hours used to be open, and any time a patient was ill, they knew they could just walk in. No longer. In the “old days”, I would tell the nurses what to do and they would. We would figure out the money later. Even at the hospital that was the way. Now the staff tells me what I can and cannot do. There are progressive roadblocks for the patients to get access to care.

Doctors have lost autonomy, and patients have less access to care.

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My patients still think I am the boss. It is a rude reality for them when they realize that I am not. They have become more and more mistrustful of the system, all for good reasons. They are no longer what is important, the center of attention; no matter what lip service they hear from those that control us say, they know the truth.

Five and ten years ago I would order the tests and medications that I felt would be best for my patients. Now I look up on a computer screen that has their drug plan loaded in it, to see what I can give them. Now I have to look on “treatment guidelines” for what tests I can even order.

Even then, I will routinely get denied, and have the choice to fight for the patient or not. No one pays us to take the time to fight. It is a well-known fact that with each road block the insurance companies and government put up, fewer and fewer doctors will fight it; and they know it will cost them less. It has always been hard to fight city hall. And then, if I do pick up the phone to get permission (why should I have to get permission to take care of my patient from another large corporation or government office), I end up talking to a low level, unqualified person looking on a computer screen telling me what corporate policy is. To fight further I have to ask to have a qualified doctor call me to discuss my patient’s case. If they do not agree, I have to ask

for an independent review that can take days or weeks to happen. My patients are not stupid. They see what is going on and they hate it. More roadblocks for my patients to get care.

Doctors have lost authority in this system to do what we feel is right for our patients.

Then, if I get to order something what happens? More and more, my patients tell me that what I ordered is not covered (at a level that they can afford). The companies and government cut what seem to be little things that do not matter when reading the contract (or you just get sent a new updated contract); that is, until they do matter. Weekly, patients tell me that after years of blood products being covered by insurance, with changes made by converting to an “improved plan”, that suddenly bills of thousands of dollars start showing up. It took many calls to find out the coverage for blood products had been dropped. And this is with a premium increase too!

Daily patients will come back from the pharmacy and tell me that they cannot afford the medicine I prescribed and ask for a cheaper medicine (even when it is not as effective).

This “cost shifting,” which is so prevalent now by insurance companies, was started by the government. What is happening is that when the government does something to cut its costs because it is running out of

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money; the insurance companies copy it, yet do it to increase profits. And because the government did it first, the government insurance regulators cannot say anything to the insurance companies for doing the same thing! Insurance, more and more, is becoming very limited in what it will do for the average patient in an average year. What is worse is that even with this cost shifting, premiums are skyrocketing. What else are skyrocketing are the salaries of the corporate heads and their buildings.

Doctors are extremely aware and concerned about the ever-increasing cost of medical care, which leads to limited care for our patients.

We doctors tend to blame the lawyers for most of the high cost of medicine, but it is not just them. It has become the whole system in the US that it is clearly broken. On the other hand, the cost of litigation against hospitals and doctors is a major contributor to the ever higher cost of medical care. Doctors have been successful in some states to get tort reform, which has resulted in a significant drop in costs. In NYS, we have the highest insurance costs in the US, and twice the second costliest state, Pennsylvania! We desperately need tort reform; and it should be national reform, not just state by state.

Patients may be aware of the medical liability system adding to the cost of their care, but not nearly to the extent that it

impacts them directly.

Many of my older patients, and a significant amount of younger ones on new “Affordable Care Act” plans, are losing their primary care doctors and have to find new ones. They are bewildered by this. Simply put, these large corporate practices limit Medicare and Medicaid enrolments. Especially on new Medicare and Medicaid plans that lose money. Elderly people get sucked into these plans being told that their medical visits and drugs will be covered. What they don’t see is all the fine print about what is not covered. In my opinion, this is no better than the multiple scams to which the elderly are subjected, in the mail and through the web, to get them to sign up for services that they either do not need or to short change them. This is just more corporate greed at work. And as for government plans allowing you to keep your doctors, what a joke that is! Every week I see a new patient because their doctor no longer takes their insurance; and I lose a patient for the same reason. Is that a system that makes sense?

Doctors are very concerned about the lack of continuance of patient care and the lack of choice.

All of this has a great effect on people’s doctors. We have lost authority and autonomy in our care of patients. We are subject to countless mandated reviews, and intrusions on our practice of medicine. We are forced to spend

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hours documenting on computers to prove our worth and defend our payments. And we are forced to work in a “production mode” instead of a “caring mode.” The cornerstone of a medical practice is the doctor-patient relationship, which is being attacked on every front every day. The practice of medicine is being destroyed. You may say, as government and the insurance industry people do, that all this is to protect patients and to insure quality in the care provided (i.e. cut costs). But the cost of medicine just keeps going through the roof, the number of law suits continues to grow, medical accidents are on the rise, while our patients are more dissatisfied than ever.

The strain on society in general is progressive, and harming everyone. Nothing insurance companies or the

government has done has worked, and none of what they want to accomplish has come to pass; just the opposite in fact. Why? Because they are not the doctors, and they can never fill the role of doctors.

The profession of medicine is being destroyed to increase profit for corporations and limit expenses for government. Not only do doctors lose in this situation, but eventually our patients and society in general will be the big losers.

Instead of controlling doctors and beating us down, they need to work with us to find answers. The only way that will happen is if we as physicians with our patients stand together to make it happen.

Can Rabbinic Jurisprudence Help Elevate American Political and Legal Discourse?

Shlomo C. Pill

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Alexis de Tocqueville famously observed that “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”¹ While de Tocqueville’s observation may have accurately described early 18th century American, today it seems that the opposite is true. Today, there is scarcely any legal question that arises in the United States that is not resolved sooner or later, into a political one. One need look no further than the ongoing political battle over the nomination and confirmation of a new Supreme Court Justice to fill the seat previously held by the late Antonin Scalia. After more than three months since Scalia’s death, the Senate Judiciary Committee has yet to hold any confirmation hearings or even informal meetings with Judge Eric Garland, President Obama’s nominee to the Court. This intransigence has little if anything to do with law, principle, or jurisprudence; it is simply a matter of partisan political disagreement, which

increasingly over the last decade and a half or so has infected American public discourse with a disturbing degree of polarization, delegitimization of the other, and divisiveness.

Perhaps nowhere is this trend more evident – and more troubling – than in the realm of American constitutional jurisprudence. The Constitution is the sacred scripture of America’s civil religion, and understanding what this supreme law is and entails is a central concern of American legal and political life. Constitutional norms and values, however, are rarely self-evident. The Constitution is a brief document, and fails entirely to address many important issues of national concern. When the Constitution does speak, moreover, it often does so in broad generalizations and vague or indeterminate terms. There are also numerous tensions and contradictions between some constitutional provisions, as well as between many of the underlying political, jurisprudential, and moral

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values embodied in the text. For these and other reasons, the meaning and practical import of the Constitution is often unclear; at the very least constitutional governance requires a substantial degree of constitutional interpretation.

It is in the realm of interpretation, however, that Americans' unified commitment to the Constitution begins to break down. Not only do we deeply and passionately disagree with each other about what the Constitution means and requires, but we are also deeply divided about *how* we ought to make such determinations. There are at least three main schools of American constitutional interpretation orthodoxy. The first, which we might broadly designate as "textualism," maintains that the Constitution should be understood in terms of their plain textual meaning because only the enacted text of a law – and its apparent linguistic meaning – has been enacted by the legislating authority. Another interpretive model commonly referred to as "historicism" locates constitutional meaning not in the text itself but in a particular historically-grounded understanding of what the text entails. The third interpretive school, designated here as "pragmatism," holds that the Constitution should be read with an eye towards achieving certain policy objectives, including economic utility, majoritarianism, equality,

distributive justice, and many others.

Importantly, underlying all three of these interpretive theories is a general commitment to constitutional determinism, by which I mean that idea that there are in fact uniquely correct answers to constitutional questions. For the textualist, such answers are functions of the objective meaning of language; historicists locate such truths in the specific intentions or understandings of constitutional drafters or ratifiers; and for pragmatists such right answers are identified with good policy outcomes. On some level, this makes good sense. A belief in constitutional determinism and the commitment to seek out and enforce objective constitutional truths helps limit judicial subjectivism and preserve rule of law. However, it also appears that this determinist interpretive perspective is a contributing factor to the increasingly caustic, partisan, and delegitimizing tone of American legal and political discourse. Determinacy entails the belief that normative questions can be rightly resolved in only one way. Dissenting points of view, then, are not simply misguided or wrong; they amount to deep betrayals of America's constitutional foundations and values.

I would like to suggest the possibility of an alternative frame of reference for American constitutional interpretation, which can be applied to how we think

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about the resolution of normative issues more generally. This approach, which I have developed at greater length elsewhere,² and which I call “autonomous-text constitutionalism,” is grounded in the philosophical hermeneutics of Hans-Georg Gadamer. According to Gadamer, textual interpretation is a process through which meaning is constructed via a dialectical encounter between the interpreter and the text. Every interpreter approaches a text with his or her own set of prior assumptions and biases – what Gadamer calls a “horizon of understanding”³ – which is rooted in that individual’s prior experiences with and understandings of the world. Rather than simply imposing this subjective lens upon the text, however, the good interpreter assimilates his or her impressions of the text into his or her experiential horizon, which in turn influences the way in which the interpreter understands the text going forward.

Thus, for Gadamer, interpretation – the development of textual understanding – is a cyclical dialectic. An interpreter approaches and begins to read and understand a text through the lens of his or her subjective horizon. That initial understanding, however, immediately integrates itself into the interpreter’s experiential lens, and this new, broader horizon in turn continues to color and refine his or

her understanding of the text being considered. As Gadamer puts it, “the anticipated meaning of a whole [text] is understood through the parts, but it is in light of the whole that the parts take on their illuminating function.”⁴

Building on these ideas, we might say that in contrast to the interpretive orthodoxy discussed above, once enacted, a text like the Constitution becomes autonomous. It becomes free from any particular linguistic, historical, or even pragmatic conceptions of what the text means. On the contrary, since this approach would view constitutional interpretation as a dialectical process between each interpreter and the text, the “true” meaning of the Constitution is both an individualistic and evolving concept rather than a fixed object of the interpretive process. This perspective supports a pluralist rather than determinist understanding of the Constitution in which the constitutional text genuinely encompasses multiple meanings. It is the text that is binding, and the text reasonably lends itself to many different understandings depending on the subjective experiential consciousness of the interpreter with which it is merged. Because it is this text – rather than any particular conception of what this text means – that is legally authoritative, the autonomous-text of the Constitution has no fixed meaning.⁵ Nor, therefore, can any interpretive understanding

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of the autonomous constitutional text claim to be *the* right one. Constitutional meaning is thus a constantly changing, continually evolving thing.

Autonomous-text constitutionalism holds the promise of an interpretive approach that breaks away from the partisan and divisive consequences of determinist theories. However, in adopting a Gadamerian interpretive perspective this model also bears the foreboding tidings of constitutional anarchy. If the Constitution really does mean what every honest, integrious interpreter understands it to mean, then constitutional jurisprudence may be far less principled and far more political than we might like to believe. It is difficult to imagine how such an approach could be consistent with a functioning rule of law system.

The Jewish jurisprudential tradition illustrates how autonomous-text constitutionalism might work in practice. Interpretation in Jewish law closely resembles the Gadamerian model, and while it is often messy, it has been used to successfully apply Jewish law across time and space in a pluralistic and flexible way that also preserves the historical continuity of the Jewish legal tradition. Indeed, the Jewish law example suggests that rather than threatening the integrity and effectiveness of the law, interpretive pluralism provides a basis for more broadly sustainable, less divisive

constitutional discourse.

Famously, the Rabbinic tradition includes a strong trend that views the Torah as an autonomous text whose meaning is produced through proper interpretive engagement with the text. The Talmudic rabbis famously maintained that the biblical teaching, “it [the Torah] is not in heaven,” signaled that the meaning and import of the Torah had been given over to human interpreters and could not be controlled by God. Indeed, as is indicated by the famous Talmudic story of the “Oven of Akhnai,” even when the rabbis knew the divine intent with certainty, they ignored what was arguable a more “true” conception of the law in favor of their own more “authoritative” understandings.

Divorced from objective linguistic meanings, authorial intentions, and purely result-oriented applications, the meaning of the foundational texts of the Rabbinic legal tradition is understood as a product of a dialectic interaction between text and interpreter, a process that is unique to each reader each time he or she approaches the text. Importantly, the Rabbinic tradition does not view the autonomy of Torah law from divine intentions as a license for human beings to pragmatically make the texts mean whatever they will. The Talmud teaches that “the Torah is only sustained through those who destroy [lit. “kill”] themselves

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on its account.”⁶ According to some commentators, this means that one can only come to understand the Torah if in the process he “destroys” his subjectivity and allows the Torah to speak to him before he analyzes and interprets it through the lens of his own mind. Like Gadamer’s philosophical hermeneutics, then, Jewish tradition instructs that interpretation is not the imposition of meaning on the text by the interpreter. Instead, the interpreter must leave himself open, indeed must subjugate his own prior notions and preconceptions, to what the Torah itself has to tell him before he can begin to expound and truly understand the text.

Finally, Rabbinic jurisprudence sees the meaning of Jewish legal texts as essentially pluralistic. On this view, the Torah’s text lends itself to many different understandings, and no single interpretation is necessarily superior to any other or can claim a monopoly on textual truth. Jewish scholars have often expressed this idea by intimating that just as every Jewish soul is unique, so too every Jew has a unique “portion” in the Torah.⁷ The autonomous text of the Torah lends itself to many, many different explanations, each unique interpretation corresponding to a unique individual’s understanding of the text. Indeed, it is said that competing understandings of the Torah are “created” by each individual’s unique “soul” – the essence of their character,

intelligence, and way of thinking. Thus, one 18th century rabbi wrote:

The Torah has already been bequeathed to us, and it is in our hands to understand it in accordance with our own mental abilities and disposition . . . Every man understands the meaning of the holy Torah in accordance with his own disposition. If he is disposed towards kindness and charity, then he may find everything to be pure, permissible, and kosher in accordance with his mind’s understanding of the Torah . . . if he is disposed toward severity, the opposite will be true.⁸

Another prominent Talmudist explained that “everyone’s soul was present at Mount Sinai and received the Torah . . . Each perceived the Torah from his own perspective in accordance with his intellectual capacity as well as the unique character of his particular soul.”⁹

Of course, while such normative pluralism may be well and good in theory, legal practice requires settled rules and right and wrong ways of doing things. Indeed, the Talmud itself affirms that in practice only one legal opinion can prevail at any given time among a particular constituency or in a given jurisdiction so that “the Torah does not appear to be two Torahs.” To accomplish such unity of practice, the Torah designates

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particular individuals and institutions as the final arbiters of legal disputes. However, while such authoritative rulings are considered binding, the interpretive understanding they reflect are not conclusive in a metaphysical sense. A court's interpretation of the Torah does not establish what the autonomous text of the Torah actually means; it merely establishes the current standard of practice under the law. Alternative understandings of the Torah, however, are preserved as legitimate interpretations of the law, and may be adopted by other courts with interpretive authority over other jurisdictions or constituencies.

There is an important jurisprudential reason for why in the Jewish tradition the interpretation of the Torah and the development of textual meaning is ultimately left to human readers and not to God. An important aim of Jewish law is to enable its adherents to morally ennoble themselves through their choosing to abide by God's commandments. Morality cannot be legislated, however.¹⁰ If the Torah was a clear and comprehensive code of conduct whose application did not require interpretation, adherence to its dictates would be a purely mechanical performance of no more moral quality than a robot's following its programming. As an autonomous text that invites and demands human interaction, however, the Torah induces

its adherents to become engaged with the tradition. As an autonomous text, then, the Torah invites its adherents to become "partners with God in the work of creation,"¹¹ elevating their law-abiding conduct from slavish conformity to an external standard to a morally ennobling collaborative attempt to live justly and righteously within the bounds set by the Torah-constitution's text.

The experiential model of autonomous-text constitutionalism offer by traditional Rabbinic jurisprudence offers a hopeful account of what constitutional discourse might look like. By positing the possibility and demonstrating the workability of interpretive pluralism, the autonomous-text tradition frees debate over how a constitution should be interpreted from the all-or-nothing of determinist theories. Jewish law's autonomous-text constitutional tradition offers the possibility of an interpretive approach that is descriptively accurate and prescriptively compelling. The key question becomes which one of many interpretively plausible understandings should be adopted by those institutions tasked with mediating these competing interpretive perspectives, not which interpretation or interpretive theory is the *right* one. With the stakes thus significantly lowered, discussions about constitutional meaning might proceed in a more reasonable, less caustic

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manner.

Autonomous-text constitutionalism, to be sure, is not neat; it creates the possibility – the near certainty – of doubt about the meaning of our most highly enshrined norms. But the institutional mediation of competing views of the good inheres in the very fabric of America’s political-legal culture. From the perspective of autonomous-textualism, courts’ mediating among litigants’ competing but legitimate constitutional understandings does not meaningfully differ from legislatures’ choosing among contrasting policy preferences being made by legislatures. In both cases, an accepted institution decides for purposes of present practice which conception of the good will prevail, and in neither instance does the deciding authority claim the ability to infallibly and finally pronounce transcendental political-legal truths.

Autonomous-textualism thus hearkens to the very best of America’s constitutional tradition, a liberal commitment to political – and interpretive – autonomy, a respect for everyone’s ability to develop their own conception of the good life, but also an account of the institutional rule of law.

Notes:

¹ Alexis de Tocqueville, *Democracy in America*, Book I, ch. 16.

² See, Shlomo C. Pill, *Valuing our Discordant Constitutional Discourse:*

Philosophical Hermeneutics, Autonomous Texts, and the Jewish Legal Tradition, 64 *Buffalo Law Review* 349 (2016).

³ Hans-Georg Gadamer, *Truth and Method* 143 (Joel Weinsheimer & Donald G. Marshall, trans., 5th ed. 1986).

⁴ Hans-Georg Gadamer, *The Problem of Historical Consciousness in Interpretive Social Sciences – A Reader* 146 (Paul Rabinow & W. Sullivan, eds., 1979).

⁵ See Dennis J. Goldford, *The American Constitution and the Debate over Originalism* 166 (2005) (“If the real constitutional text is the document itself, then all understandings and interpretations of that text are relevant and none is privileged.”).

⁶ *Babylonian Talmud*, Berakhot 63b.

⁷ See, e.g., Derekh Eiz Haim quoted in 1 Haninah Ben-Menahem, et al, *Dialogue and Controversy in Halakhic Sources* 99-100 (1991).

⁸ R. Levi Yitzchak of Berditchev, *Kedushat Levi*, Lekutum (s.v. Teiku); see also R. Meir b. Ezekiel ibn Gabbai, *Avodat ha-Kodesh* 169-71 (1901).

⁹ R. Solomon Luria, *Yam Shel Shelomo*, Introduction to *Bava Kamma*.

¹⁰ See generally Robert P. George, *The Central Tradition—Its Value and Limits*, in *Virtue Jurisprudence* 43-47 (Colin Farrelly & Lawrence B. Solum, eds., 2008) (arguing that moral goods often cannot be realized through legal

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compulsion, and that to facilitate individual moral integrity the law must sometimes decline to regulate so as to enable individuals to make themselves moral).

¹¹ Babylonian Talmud, Shabbat 10a.

The Jewish Bible's Simultaneous Ethical Concern for Jews and Humanity

Jeremiah Unterman

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This article makes use of arguments that are further developed in the beginning chapters of the author's forthcoming book, Justice for All: How the Jewish Bible Revolutionized Ethics, to be published by the Jewish Publication Society.

In his article, “The Particular Ethics of Judaism” (*En Route*, Jan., 2016, pp. 1-6), Jonathan Neumann has an axe to grind. In order to argue against the modern usage of the term, *tikkun olam*, defined as “social justice,” he creates an artificial split in the Torah (and in later Jewish thought) between emphasizing God as the universal Creator of humanity and as the particular God of the Jewish people – opting for the former to be less significant than the latter. In reality, however, the Bible (and the Talmud) neither knows nor recognizes such division. Throughout the Jewish canon, God's concern is simultaneously perceived as universal and particular, His presence transcendent and personal. Furthermore, He is God of the Jewish people and the rest of humankind (whether they recognize it or not).

A telling example of the false dichotomy between the universal and the particular is God's behavior at

Creation and how it serves as a model (an *imitatio dei*) for commemorating Shabbat as described in the Ten Commandments (Exodus 20:7-10). Neumann contends that Shabbat is for Jews alone (Neumann, p. 3), and yet, the unique Biblical idea that a week should consist of six days of work and one day of rest – unknown in *any other* ancient society (!) – has been accepted in Christianity, Islam, and the vast majority of the world. Indeed, it is difficult to find any government that does not give its citizens even a two-day weekend (even China and North Korea have weekends!). Thus, the extension of the values of the observance of the Jewish Sabbath – the first labor rights law in history – to greater society fulfills God's seminal blessing to Abraham in Genesis 12:3, “and all the families of the earth shall be blessed in you.”

The Sabbath is a prime example of God's purposeful pattern of choice in His desire to establish an ethics-

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driven humanity: First, God starts with one man and one woman (Adam and Eve), but that results in massive violence leading to the Flood (Genesis 6:11-12). Next, God begins again by choosing one *righteous* man (Noah) and his family, but the consequence is the rebellion of humanity at the Tower of Babel (Genesis 11:1-9; see the commentary of Rabbi Samuel ben Meir, 12th cent.). Finally, God, accepting humankind's flawed nature (Gen. 8:21; compare 6:5), begins a third time – and creates a special nation from Abraham's seed, "Abraham shall surely become a great and mighty nation, *and all the nations of the earth shall be blessed in him.* For I have known him, to the end that he may command his children and his household after him, *that they may keep the way of the LORD, to do righteousness and justice;* to the end that the LORD may bring upon Abraham that which He hath spoken of him" (Gen. 18:18-19). Note that God's choice of Abraham will result in benefit to the rest of humankind (see, also, Gen. 22:18; compare Numbers 24:9 and Jeremiah 4:21). That God works on behalf of other nations is also seen in verses such as Amos 9:7, "Are you not to me, O Children of Israel, like the Children of the Ethiopians?" – declares the Lord. 'Did I not bring up Israel from the land of Egypt, and Philistines from Caphtor, and Aram from Kir?'"

Neumann (p. 2) marginalizes the idea

that all humans are created in the image of God (Gen. 1:26-27; 5:1) by stating that, in the continuation of the biblical story and in later Judaism, the emphasis is on the particular – the relationship between God and the Jewish people. However, the human as bearers of the Divine image has significant ethical import vis-à-vis both humankind and the Jew. At the end of the Noah story, Gen. 9:6 declares, "Whoever sheds the blood of a human, by a human shall his blood be shed; for in the image of God, He made the human." This uniqueness of human life gives it a supreme value. In contrast to ancient Near Eastern law where frequently a person may be killed for stealing another's property, in the Torah a human life cannot be equated with any object or any amount of property or money. Human life is invaluable. The extraordinary value of human life results, to be sure, in a paradox. Human life can only be compensated by that which is of equal value – another human life. Yet, that, too, is a form of justice. Ultimately, ancient rabbinic law, bothered by the possibility (however remote) that a person – the image of God – will be executed mistakenly, created legal hurdles that make it almost impossible to enact the death penalty. However, at no point is compensation through property considered as an alternative, for human life has *sacred* value.

Further, at the pivotal moment of the

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Sinai revelation, Israel is told to be “a kingdom of priests” (Exodus 19:6). Israelite priests had two major functions - to be the personal servants of God in the Sanctuary (offering sacrifices, keeping the holy place “clean,” etc.), and to instruct the rest of the people on how to worship God (Lev. 10:11; Deut. 17:8-11, and many other verses). If the entire people are to be priests, then, in that metaphor, who are the rest of the people whom the Israelites are to instruct if not the nations of the world? And what is the best method of instruction if not teaching by example?

Additionally, Neumann strives to make the particularistic case that Lev. 19:18, “You shall love your ‘fellow’ as yourself,” is only speaking of other Jews by citing Rabbi Akiva’s interpretation of the verse. Even if Rabbi Akiva’s understanding is the correct one,² I do not know if Neumann is engaging in “pick and choose Judaism” or is simply plucking out verses to bolster his own view while ignoring those that counteract it. Either way, he does not mention the Tanakh’s treatment of the *ger* – usually translated as “stranger” but refers to the resident alien when mentioned in the Bible.

It would be hard to find a more problematic issue throughout various human cultures than the perception of, and position accorded to, the stranger – the classic outsider. The stranger is the person who doesn’t look like you,

or doesn’t act or dress like you, doesn’t speak like you, doesn’t think or believe like you, doesn’t come from the same society as you, or any combination of the above. Thus, the stranger might be from a different race, religion, nation, ethnicity, sexual preference, or even gender and educational background. In defining the other, a group will determine what it is not.³ The result has often been the sad historical fact that the stranger is viewed negatively – for example as an imagined fearful threat, cast in such a light as a means to exclude or restrict the stranger. This xenophobia has had the ultimate consequence of horrific massacres, such as the genocidal wars against the Jews⁴ and Tutsis, as well as the rampant discrimination in the past century against African-Americans in the United States and blacks in South Africa, and the ongoing abuse of women in most Moslem countries. Unfortunately, the list of horrors engendered by xenophobia is too long to number in its entirety here.

The Torah, by contrast, is revolutionarily opposed to xenophobia. In the very same chapter of Leviticus that states, “You shall love your neighbor as yourself,” verse 34 declares, “the alien [the word *ger*] residing with you shall be to you as a citizen among you, and *you shall love him as yourself, for you were aliens in the land of Egypt.* I am the Lord your God” – a view echoed in

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Deuteronomy 10:18-19, "(God)... *loves the alien to give him food and clothing. You, too, must love the alien for you were aliens in the land of Egypt.*" No other ancient society stated such empathy for aliens in its midst. An enlightening example comes from that supposedly prototype of democracy – Athens. In the 5th-4th centuries BCE, three classes of people lived in Athens: the citizens, the metics (aliens), and the slaves. In order to be a citizen, both parents had to be citizens. Only citizens could own land, so the metics primarily turned to trades and commerce. They were free, either Greek or non-Greek, and dwelled in Athens and Attica at large. Their legal status is known from 4th century BCE texts. Laws concerning the metics included the following:

- upon entering Athens, foreigners had to register by a certain time or they could be sold as slaves;
- metics had to pay a tax upon their persons, or could be sold as slaves;
- metics had to pay for the right to trade in the marketplace, in addition to those taxes which citizens had to pay;
- a metic had to find a patron who could represent him in court, or be sold into slavery;
- metics had no political rights.

In short, the metics were second-class citizens with more than all the responsibilities and none of the privileges of the average citizen.

In stark contrast, an examination of the Torah's numerous ethical laws on behalf of the resident alien (in contrast to the collections of law of the ancient Near East²) reveals that, despite the fact that she or he is *not* a member of the people of Israel, she or he is entitled, by Divine fiat, to all the benefits given the Israelite poor, widow, and orphan. Beyond that, the resident alien is singled out to ensure that no harm befalls him or her – "Do not afflict or oppress the stranger, for you were strangers in the land of Egypt," Exodus 22:20 (compare Deuteronomy 23:8); that she or he receives food and clothing; and that his or her rights of justice are protected – "I charged your judges... judge righteously between any man and his brother (that is, fellow Israelite) or his ("his" indicates responsibility) stranger," Deuteronomy 1:16. Special emphasis is placed on the resident alien's parity with the Israelite in both civil law and negative cultic commandments – "*there shall be one law for you and the stranger*" (or, "... *like the citizen, the stranger*" – Exodus 12:47-48; Leviticus 24:16, 22; Numbers 9:14; 15:15, 29-30, etc., relating to the case or parameters given in context). More than that, the prophets include abuse of the resident alien among those behaviors that will bring about God's destruction of Israelite society (see Jer. 7:6; 22:3; Ezek. 22:7, 9; Zech. 7:10; Mal. 3:5). Unlike Neumann's position,

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the Bible affirms that treatment of these aliens is just as critical as treatment of fellow Jews.

Even more, the motivational content attached to the Torah's laws served to eliminate any shred of xenophobia. That the Torah's teaching concerning the stranger has made an impact upon the modern State of Israel (the first time since the Bar-Kochba revolt that the Jewish people was to have full autonomy in its own country) can be seen in Israel's rescue of the Vietnamese boat-people, as well as the tens of thousands of Moslem Sudanese to whom Israel afforded refuge for years. These actions go far beyond the dictates of democracy that demand, for example, the civil and religious rights accorded to Israel's Arab citizens. Indeed, as one of these Moslem Sudanese refugees put it, "I'd read the Bible and I knew that the Jews were good to strangers. I must go to Israel."⁶

The Torah and the Prophets were very much concerned about the creation of a just society, in which all members, particularly the underprivileged – Jew and non-Jew – were protected and supported by the Torah's laws. Whether or not one wishes to use the terminology of *tikkun olam* or social justice, or something else,⁷ it cannot be denied that the purpose of the ethical *mitzvot* of the Torah and the ethical message of the prophets is to create a unique society in which all members

were obligated to provide for the underprivileged, whoever they may be. As Moses states (in Deuteronomy 4:8), "And what great nation is there, that has statutes and ordinances so righteous as all this Torah, which I set before you this day?" Is not the implication of such a statement that Jewish society should be a model for others? Is that not a universal message based upon the particular?

One final note: most of the pragmatic discussion above focuses on the standing of non-Jews within an autonomous Jewish society. What happens when Jews live in exile within non-Jewish communities? For that situation, the prophet Jeremiah provides a constitution for Jews living in exile, "Thus said the Lord of Hosts, the God of Israel, to the whole community which I exiled from Jerusalem to Babylon... seek the welfare of the city to which I have exiled you and pray to the Lord in its behalf; for in its welfare you shall have welfare" (Jer. 29:4, 7). It is incumbent upon the Jew in exile to work on behalf of the city in which she or he lives. Similarly, the Talmud states a hierarchy of loan-giving (which later law codes will use also as a precedent for giving charity),

Rabbi Yosef taught [on the verse], "If you lend money to My people, to the poor among you, do not act toward them as a creditor; exact no interest from them" (Exod. 22:24),

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in the case of a Jew and a non-Jew, the Jew takes precedence; a poor person and a wealthy person, the poor person takes precedence; the poor of your city and the poor of another city, the poor of your city take precedence” (Bava Metzia 71a).

Note that the above text does not state that one should *not* give to a non-Jew. Therefore, one may safely conclude that “the poor of your city” refers also to the non-Jewish poor. Even in exile, then, Jews have the obligation of supporting poor non-Jews.

Certainly, the Jewish Bible and the Talmud concentrate primarily on the Jewish people. That attention, however, is not due to a superiority of the particular over the universal. It is simply that the vast majority of the Torah and the Talmud does not seek to legislate for non-Jews. In reality, God cares deeply for the rest of humanity, which is why they, too, will partake of redemption, as Isaiah prophesied, “In the days to come... all the nations shall stream to it [the mountain of the Lord’s House]... and say, ‘Come, let us go up to the Mount of the Lord, to the House of the God of Jacob; that He may instruct us in His ways, and that we may walk in His paths’... and they shall beat their swords into plowshares and their spears into pruning hooks. Nation shall not take up sword against nation; they shall never again know war” (Isaiah 2:2-4).

Notes:

¹ Compare the promise that Abraham will be the forefather of a multitude of nations – Gen. 17:4-6. See also vss. 16 and 20 there and 21:18.

² On Neumann’s understanding of the dispute between ben Azzai and Rabbi Akiva, it is not at all clear that the issue is between Jew and non-Jew, not is it clear that Rabbi Akiva wins the argument. See, for example, Rabbi David Horwitz’s comprehensive exposition of that dispute (file:///D:/Users/one/Downloads/Shavuot_To_Go_-_5769_Rabbi_Horwitz.pdf), and the various possibilities brought at http://www.tabick.abel.co.uk/love_of_neighbour.html. See, also, the parallel Tannaitic dispute cited in the introduction to the commentary of HaKotev to Ein Yaakov (<http://hebrewbooks.org/pdfpager.aspx?req=47606&st=&pgnum=10>), summarized in English by Rabbi Jonathan Sacks at <http://www.rabbisacks.org/acharei-mot-5774-sprints-marathons/>.

³ Saul M. Olyan, *Rites and Rank: Hierarchy in Biblical Representations of Cult* (Princeton, NJ: Princeton University Press, 2000), p. 63.

⁴ It seems that antisemitism may be the one undying hatred for, even after the Holocaust, the hatred of the Jews has been transported into Moslem lands and has morphed there (and among other antisemites) into hatred of both the Jews and the State of Israel.

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⁵ The main collections are the Laws of Ur-nammu – 2100 BCE, the Laws of Lipit-Ishtar – 1930 BCE, the Laws of Eshnunna – 1770 BCE, the Laws of Hammurabi – 1750 BCE, the Hittite Laws – 1650-1180 BCE, and the Middle Assyrian Laws – 1075 BCE. These collections derive from four different empires: Sumerian (Ur-Nammu and Lipit-Ishtar), Babylonian (Eshnunna and Hammurabi), Hittite (the Hittite Laws), Assyrian (Middle-Assyrian Laws). The only law in these collections on behalf of the stranger is Eshnunna #41 which states, “if a stranger (perhaps, a resident alien)... wishes to sell his beer, the tapster (the person responsible for trading beer) shall sell the beer for him at the current rate.”

⁶ Quoted in Daniel Gordis, *Saving Israel: How the Jewish People Can Win*

a War That May Never End (Hoboken, NJ: John Wiley & Sons, 2009), p. 113.

⁷ It is necessary to note that social justice in ANE societies was not identified with equality, nor was it identical with the elimination of poverty as such, since it was accepted that large sections of the population would constantly exist at subsistence level. Social justice was perceived rather as protecting the weaker levels of society from being wrongly deprived of their due: the legal, property, and economic rights to which their place within the social hierarchy entitled them. See Raymond Westbrook, “Social Justice in the Ancient Near East,” *Social Justice in the Ancient World*, ed. K. D. Irani and Morris Silver (Westport, CT: Greenwood, 1995), p. 149.

IN DEPTH

In the Interest of Peace: The Promotion of Harmonious Relationships in the Mishnah.

Simcha Fishbane

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This essay will examine the concept *mipnei darkei shalom* found in the Mishnah, which I translate as “in the interest of peace”.¹ Although a literal translation would be “because of the paths of peace,” the term is popularity understood and used as I translate it.

The term *shalom* is most commonly translated as peace, yet this is not the only one way it is used. It is a term often used to greet people and to say good-bye. It also connotes completeness, wholeness, health, welfare, safety, soundness, tranquility, prosperity, perfection, fullness, rest, harmony or congeniality, the absence of agitation or discord. The rabbis also state that an additional name for God is *Shalom*. In the Mishnah, however, *shalom* is used as peace or what can be referred to as a harmonious or congenial relationship.

Mipnei darkhei shalom appears in the Mishnah twelve times in five separate Mishnayot (plural of Mishnah).² As Basser correctly points out, *mipnei darkhei shalom* refers to the necessity

of establishing standards of behavior that will avoid conflict *in potentia*. This rubric offers protocols to avoid undue strife. These protocols override or amend either the intention or the explicit rulings of the Mishnaic rabbis.

The issue to consider is – Does the concept of *mipnei darkhei shalom* amend or enhance an existing law? Also, why, in some cases, is it used to turn something permitted into a prohibition, while in others it overrides a rabbinic prohibition to allow something? I will attempt to answer these questions in my analysis of the cases where *mipnei dakchei shalom* is used.

Case 1. “A priest reads first, and afterward a Levite, and afterward an Israelite, in the interest of peace.” (Tractate M. Gitin 5:8)

This ruling is about the order of who reads from the Sefer Torah. The Mishnah Horayot 3:8, while not specifically referring to the order of who reads from the Sefer Torah,

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presents the established hierarchy:

A priest takes precedence over a Levite, a Levite over an Israelite, an Israelite over a *mamzer*, a *mamzer* over a *Netin*, a *Netin* over a proselyte, a proselyte over a freed slave. Under what circumstances? When all of them are equivalent. But if the *mamzer* was a disciple of a sage and a high priest was an *am haaretz*, the *mamzer* who is a disciple of a sage takes precedence over a high priest who is an *am haaretz*.

This hierarchy of status should also apply to the order for Torah reading, so that the educated rabbi would supersede a priest. In this instance, since it is an issue of honor rather than of religious authority or of financial implications, the rabbis relinquish their place of priority for the sake of harmonious relationships. In the Mishnah's perceived ideal Temple society, where the priest is the religious leader, they would have enjoyed a place of symbolic honor. The rabbis, the inheritors of the priests, relinquish this awarded honor even while they still remained the religious leaders.

Case 2. "They prepare an *erub* in the house where it was first placed, in the interest of peace." (Tractate M. Gitin 5:8)

In order to permit individuals to carry from their houses into a shared courtyard (*hatzer*) and vice-versa on Shabbat, the rabbis created the instrument of an *erub hatzarot*. The

rabbinic process requires that all the neighbors place food items in one of the courtyard houses before Shabbat. The *erub hatzarot* is meant to legally join all these domiciles and the courtyard into a single domain in order for its residents to carry within it.

There are various ways to gather these food items. A person from the courtyard can contribute all of the food, or the various residents can jointly contribute towards the amount of food required to make the *erub hatzarot*. The residents could also donate money to collectively purchase the food.

This case seems to imply that in order to reduce conflict between neighbors, to maintain harmonious relationships, and not to insult the householder, the *erub hatzarot* should remain in the home where it was initially placed. I believe there is an additional consideration implied in this instance, namely the possibility for financial gain on the part of the homeowner where the *erub hatzarot* is assigned. Although the food belongs to everyone in the courtyard, this individual would have the opportunity after Shabbat to acquire it before anyone else can do so. As mentioned above, there is also the possibility to take the money for the food. Although it is no more than a possibility, recognizing this as a consideration of the Mishnah would offer greater clarity in understanding why *mipnei darkhei shalom* is a factor

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in where to place the erub.³

Case 3: “A well nearest to the stream is filled first, in the interest of peace.” (Tractate M. Gitin 5:8)

This Mishnah portrays a scenario where a channel flows from a river alongside a series of fields.⁴ The owners of these fields use the channel’s water to irrigate their fields. To avoid the possibility of the water drying out before the fields are irrigated, the owners dig cisterns at the edge of their fields to collect water from the channel. To avoid conflict between the field owners regarding first rights to the water from the channel, the Mishnah, applying the principle of *mipnei darkei shalom*, decides who has first entitlements to the water. In this case, even though the Mishnah attempts to mitigate conflict, there is no halakhic ruling that the principle of “in the interest of peace” overrides. Rather, it is simply a financial issue where there is a possibility where competing interests may cause conflict or unjust results.

Case 4: “Traps for wild beasts, fowl, and fish are subject to the rules against stealing in the interest of peace.” (Tractate M. Gitin 5:8)

The following three cases (4, 5, and 6) are concerned with the acquisition (*kinyan*) of different objects through different methods. This case deals with acquisition through one’s property or utensils rather than by placing it in one’s hand or by dragging it with one’s hand.⁵

The Mishnah is not explicit in defining the principle of acquiring an object by the use of a utensil that has a receptacle as its base (*beit kibul*), yet it is implicit in Mishnah Gitin 8:1 that writes, “He who threw a writ of divorce to his wife... [If he threw it] into her bosom or into her basket she is divorced.” The basket makes the acquisition since it has a *beit kibul*. In any event, a trap would not be efficacious since it does not have a *beit kibbul*, thus hindering its owner from legally acquiring the catch. The Mishnah, therefore, employs the principle of *mipnei darkei shalom* so as to amend the law of acquisition to allow the owner of the trap to acquire the animal.

Case 5: “Something found by a deaf-mute, an idiot, and a minor is subject to the rule against stealing, in the interest of peace.” (Tractate M. Gitin 5:8)

Although not stated explicitly in the Mishnah, this ruling is based on the principle that these three types of people cannot acquire property because they lack mental capacity. This understanding was common during the Greco-Roman period by both Jews and Gentiles.⁶ The Mishnah amends this presumption and prohibits one from taking an object found by one of these three types of individuals. In this case, it is clear that there is a possibility for monetary gain.

Case 6: “A poor man beating the top of an olive tree. What is under it [the

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tree] is subject to the rabbinic override forbidding others to take what has fallen to the ground, in the interest of peace. Rabbi Yose says, it is stealing beyond any doubt.” (Tractate M. Gitin 5:8)

The Mishnah commentaries explain this scenario as referring to the laws of agricultural gifts awarded to a poor person, i.e. the laws of Gleaning [*leket*], the Forgotten Sheaf [*shikhahah*], and the Corner of the Field [*peah*]. This case is again an issue of acquisition. The poor person shakes the tree but since he does not hold the olives in his hand, he does not acquire them. Therefore, if another poor person would grasp them first, if not for the case *mipnei darkhei shalom*, they would belong to him. The Mishnah thus amends a permitted circumstance and prohibits any other individual from acquiring the produce.

I would like to suggest an additional consideration. The gifts offered to the poor person can be his basic means of sustenance. If guidelines for receiving these assistances are not clear and defined it could lead to brawls and possible damage to property, in our case that of the field’s owner. The need for *mipnei dakhei shalom* would therefore go beyond just a clash between two individuals. It could result in financial loss to the owner of the property. The fear of violence from a poor person is implied in Mishnah Peah 4:4, which reads, “*Peah* they [the poor] do not

reap with sickles, and they do not uproot it with spades, lest they strike one another.” This violent behavioral pattern found in a destitute individual could also lead to the destruction of property.

Case 7: “They do not prevent poor gentiles from collecting produce under the laws of Gleaning [*leket*], the Forgotten Sheaf [*shichikhah*], and the Corner of the Field [*peah*], in the interest of peace.” (M. Gitin 5:8)

Implied in the Mishnah’s statement is that a poor Gentile is forbidden to receive gifts of produce. In general, the Mishnah is not interested in the welfare of the Gentile, but rather in creating an ideal legal system for the rabbinic Jew and the world of Mishnah. The concern here, therefore, is not only the security of the destitute Jew seeking these gifts but is also financial. As shown in the above case the tendency of the poor can be toward violence. If the needy Gentile could not share in these gifts, it could lead to property destruction and thus financial loss both for the poor Jew and the owner of the field. This rule is designed to prevent Gentiles from claiming that Jewish law discriminates between Jew and Gentile to reduce conflict. Ultimately, the Jews gain, as it is in their interests to prevent enmity.

Case 8: “A woman lends a sifter, sieve, hand mill, or oven to her neighbor who is suspected of transgressing the law of the Seventh [Sabbatical] year, but

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she should not winnow or grind wheat with her [in the interest of peace].” (M. Shebiit 5:9; M. Gittin 5:9)

This Mishnah is discussing a case of a woman who is suspected of not observing the laws of the Sabbatical year borrowing from one who does keep them. During the seventh year in the land of Israel, one is prohibited to work the land, nor can one enjoy the produce in any fashion. Our case concerns cooking utensils, which normally would be prohibited to lend, since the receiver, who is suspected of ignoring the laws of the seventh year, might use them with forbidden produce from the Sabbatical year.⁷ The reason for the prohibition is that any utensil employed [during the Sabbatical year] for the purpose of transgression is forbidden to sell or to be lent. It is only permitted if the item can also be used for a permitted activity. The current Mishnah overrides the law, even though the assistance offered to the suspected woman would benefit her financially as she need not purchase new ones or rent these items to use domestically or for her business. In pre-industrial rural societies, women played an important economic role in the world of agriculture. They were core economic partners with men. Scott and Tilly correctly argue that women did work and they were necessary for the survival of the family unit. Their contribution was primarily in the home

but could also include working in the family fields. This was essential for the family unit whose solidarity provides the basic framework for mutual aid, control and socialization.⁸

Moreover, people resided in close proximity to one another, which gives rise to both interdependency as well as friction and conflict. Thus, the rabbis choose to apply the principle of *mipnei darkei shalom* to this case to mitigate these tensions, even though it would override the law that forbids assisting a sinner. The point of *mipnei darkei shalom* here is to avoid conflict caused by the usual strict application of laws, where they might be given the benefit of the doubt.

Case 9: “The wife of a *haber* lends the wife of an am *harets* (who is suspected of not keeping the laws of purity) a sifter and a sieve. She may sift winnow, grind, and sift wheat with her. Nevertheless, once she has poured water into the flour (enabling the dough to contract impurity), she cannot allow further working with her to touch the prepared dough. The rabbis do not allow outright assistance to transgressor in the commission of transgressions. And all these rules they stated only in the “interest of peace.” (M. Gittin 5:9)

Since both Mishnah cases discuss women, the consequences of their society’s structure and assisting a potential sinner, the rabbi has grouped cases 8 and 9 together. Case 9 works on

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the same principle as 8 but is concerned with the violation of the laws of tithes and ritual impurity (*tuma*) rather than habit. The Mishnah identifies two status levels of individuals, the *haber* who is meticulous in the observance of Sabbatical, purity laws, and the *am haartez* (uneducated in Torah and rabbinical law) who is distrusted. There should be limited interaction between these different classes of women (as specified in Mishnah Demai 6:7 and 2:3) since the Mishnah is concerned that the wife of a *haber* would become ritually impure or eat from foods not tithed.

In order to permit realization of Mishnah's view it was necessary to override the law, in the interest of peace, and allow limited assistance from the wife of the *haber* to the wife of the *am haartez* up to the point where the ritual impurity becomes an actual danger and not only a concern. As in 8 there are financial results from the cooperation of both women.

Case 10: "They allow giving (real) assistance to Gentiles in the seventh year but not to Israelites [in the interest of peace]." (M. Shebiit 4:3; M. Gittin 5:10)

In Shebiit 4:3, the opening of the Mishnah reads, "During the Sabbatical year they [Jews] lease from Gentiles fields newly ploughed [during that year for the purpose of cultivating them during the following year,] but

[they do not [lease] from an Israelite [a field which he has plowed during the Sabbatical year, in violation of the law]." Yet this opening is not repeated in the other Mishnaic citation in Gittin. It is clear throughout the entire Mishnah that the focus is upon the Jew and not the Gentile. The Gentile's role is to assist the Jew to better function in his world of Mishnah.

This case implies that even though the land of Israel is holy and should not be worked by either Jew or Gentile on the Sabbatical year one cannot prohibit the Gentile from working the land. Thus, the Jew, if this were the only consideration, should encourage the Gentile not to work the land if not for the principle the rabbis applied of *mipnei darkei shalom*. The Jew, by maintaining a harmonious relationship with the Gentile, will receive, in addition to the security of friendship, financial gain, by having a plowed field in the eighth year that is ready for planting.

Case 11: "And they permit inquiring after their [the Gentile's] welfare, in the interest of peace." (M. Shabiit 4:3; M. Gittin 5:9)

In this Mishnah there is no discussion concerning a prohibition to greet pagan Gentiles even on their festivals, when, elsewhere, the Mishnah prohibits various means of interaction with them during their religious festivals for fear that it would encourage and enhance their practice of idol worship.

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Moreover, the Tosefta in Abodah Zarah 1:2, in discussing pagan festivals reads, “nor should one ask after their welfare...But if one happened to come across him in a routine way, he asks after his welfare with all due respect. They permit inquiring after the welfare of the gentiles on their festivals for the sake of peace.”

I choose to view this Tosefta as a commentary rather than as autonomous. As such, two issues are elucidated: First, the Mishnah is concerned with the different junctures when the pagan holiday was celebrated. When not on these occasions (when it would be prohibited) it was permitted to greet the Gentile in a specific fashion. Second, the Tosefta clarifies, if not for the principle “in the interest of peace” it would be prohibited to ask after the well-being of the Gentile on their holiday. This is demonstrated in the language of Tosefta, identical to that of Mishnah, except that Tosefta adds the words “on their festival.”

The present case is similar to case 7 concerning *Peah*, i.e. it is primarily a security issue, although financial loss is also conceivable. Religious holiday gatherings can be a time of incitement and are often used to excuse violence and destruction of property. The Mishnah is interested in the Jew and his welfare, not the Gentiles. Thus, we need to look at these texts with only the rabbinic Jews’ concerns in mind.

If offering greetings on the pagan festival will offer greater security to the Jewish community, their physical well-being and the protection of their property, one would seek to override the prohibitions.

Case 12: “On the fifteenth of this month (Adar), the money-changers outside of Jerusalem seated themselves at their tables. In the city of Jerusalem, however, they did not do this until the twenty-fifth of the month. As soon as the money-changers seated themselves also in the city, the taking of pledges from the tardy ones commenced. But from whom were pledges taken? From Levites, Israelites, proselytes, and freedmen; but not from women, slaves, and minors. If a father, however, commenced to give a pledge for a minor, he was not allowed to stop. And they do not exact a pledge from priests, for the sake of peace.” (M. Sheqalim 1:4)

Ancient custom understood the verses of Exodus 30:12-16 as a basis for all Israelites during the Temple period to give a tax of a half-shekel annually for community sacrifices. If a person could not pay the tax, the rabbis required the giving of a security pledge for the payment of the half-shekel tax. Priest also were required to contribute and if they they did not they too, strictly speaking, were subject to giving a security pledge. The authorities felt it necessary, as Safrai explains, to

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maintain the internal solidarity of the community by exempting them from giving security although they were expected to pay. Safrai based upon Tosefta Menahot 13:18-19 and Zebahim 11:17 shows that the priests were aggressive when it involved their financial gain.⁹ This behavior would explain why the rabbis of the Mishnah needed to employ the *mipnei darkei shalom* principle, a principle used to avoid bickering and strife, to override the law obligating priests to give security.¹⁰

This ruling differs from the cases that we encountered in Mishnah Gittin, which were all undisputed. In this Mishnah, not all of the rabbis were in agreement as to whether the priests should be exempted from the paying the half shekel. The first opinion in Mishnah 1:4 exempted the priest from paying the half shekel, thus they would also be exempted from giving collateral and the *mipnei darkei shalom* principle would not apply.

It is clear that there is financial gain as well as prestige for the priests to be exempt from this tax security-pledge. I would like to suggest that there is an additional advantage for the rabbis, the inheritors of the priests to include this law. Religious taxes took different forms after the destruction of the Jerusalem temple when the half shekel tax was no longer required. If the priests were exempt from a religious tax, it could

serve as a basis for the rabbis to expect exemptions from the religious taxes of their time.

Summary and concluding remarks:

What can be concluded from the above cases is that the Mishnah is concerned with how civil and religious law, primarily those of financial concerns, flow through different strata of society, beginning with its leadership and concluding with the Gentile outsider. The Mishnah sought social stability and social order. Therefore, to avoid conflict and retain a secure and stable society, the principle of *mipnei darkei shalom* was instituted to amend or override rabbinic stringencies that could endanger this stability. The rabbis chose cases primarily with financial implications. It was in the area of economic relationships, interdependence and cooperation that would most impact the social solidarity of the community. What was required was the moralization of economic relationships.

In order to understand how the above cases play a role in understanding the sociology and culture of the 'ideal world' defined by Mishnah, I turn to the Emile Durkheim's school of social theory. I do not believe that there is one neatly packaged world of the Mishnah, but rather there is what appears as different variables to consider. For example, we find on one hand the Mishnah presents a Temple-based culture and on the

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other hand a 3rd century Palestinian social reality. Many pieces make up the puzzle of the Mishnah. The topic of *mipnei darkei shalom* is only one piece in this puzzle, but it may reflect on the others when all the pieces are examined and placed together.

Durkheim in his work, *The Division of Labor in Society*, presents his theory of society, moral consciousness, social order and stability.¹¹ I do not believe this theory in its entirety can be applied to the unpacking of the world of the Mishnah. However, there are elements in this theory, even though they may be taken out of context, which can be used to understand the Mishnah's topic *mipnei darkei shalom* and therefore one segment of the Mishnah's ideal world.

Positive solidarity in society can be considered an essential role in creating social order, and it is a completely moral phenomenon. To achieve this, a legal system with a complete moral consciousness is necessary. Moral ideals and codes of conduct order the functioning of society and, when it is strong, it unites individuals in their social framework. This could facilitate the basis of authority necessary to retain the social order. The solidarity would result in what Mary Douglas terms strong grid – strong group.¹² A strong legal system in a diverse society as manifested in Mishnah brings people together. Solidarity overcomes the

diversity and strengthens the collective. Furthermore, based upon our examples of *mipnei darkei shalom*, I suggest that if we apply the group-grid cosmology to the ideal world of Mishnah we can find that “there are visible rules about space and times related to social roles. Individuals do not, as such, transact with each other.”¹³ In other words, in this world the individual is not the focus of this cosmology, as the individual's recognition would weaken the culture.

We should also consider that, as in our case of the Mishnah, religion and religious law often initiate moral consciousness. Moral bounds were provided by religion. In a religious social structure, morality is permeated with religiosity. Juridical life protects these moral bounds and is essential for the assurance of social harmony. The rabbi's social order was religious in character and articulates moral behavior. Religion provided all social aspects of their ideal society. The world of the Mishnah had the maximum characteristics for the development of a collective consciousness.¹⁴ Durkheim as the volume, intensity, rigidity and content of the beliefs and values identifies these, which compose the collective consciousness of this religious social order. For Durkheim, the state was a moral agency. The role of this body was to focus the collective representation on moral consciousness. For the Mishnah it was the rabbi's role

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to take the responsibility to implement the moral phenomenon into their ideal world and either develop or retain the stability required for their world and their authority. One tool they used to achieve these goals was the application of the principle *mipnei darkei shalom*.

Notes:

¹ The Mishnah, redacted in the early third century is first to use the term *mipnei darkei shalom*.

² In Tractate M. Shebiit 4:3 once, M. Shebiit 5:9 twice, Tractate M. Gitin 5:8 eight times, M. Gitin 5:9 twice, and in Tractate M. Sheqalim 1:3 once.

³ Maimonides in his Mishnah commentary to our case suggests that it is related to a financial issue.

⁴ The Talmud 60b describes the scenario that the last cistern in the field rather than the first receives the priority with the river's water.

⁵ See Mishnah Kidushin 1:4-5 and Baba Batra 5:7 that discusses *kinyan* by dragging an object.

⁶ See Hezser, Catherine. *Jewish Slavery in Antiquity*. Great Britain: Oxford University Press, 2005. pp. 69-104.

⁷ Although the commentators intensively discuss this Mishnah offering varying interpretations I am looking at the direct implications of the

Mishnah.

⁸ Scott, Joan W., and Louise A. Tilly. "Women's work and the Family in the Nineteenth Century Europe." *Comparative Studies in Society and History* 17, no. 1 (January 1975): 36-64.

⁹ Safrai, Shmuel, Zev Safrai, and Chana Saftai, eds. *Mishnat Eretz Israel with Historical and Sociological commentary [Hebrew]*. Vols. Tractate Shkalim. Jerusalem, Israel: E. M. Liphshitz Publishing House College, 2009.

¹⁰ The Talmud chooses to attribute this action by the rabbis because of the honor the priests deserve, but the Mishnah implies otherwise.

¹¹ Durkheim, Emile. *The Division of Labor in Society*. New York: Free Press, 1997. 1997 pp. 68-148. See also Giddens, Anthony, ed. *Emile Durkheim: Selected Writings*. Cambridge, NY: Cambridge University Press, 1972. Introduction pp. 1-50, chapters 4, 5 and 6 pp. 108-154.

¹² Douglas, Mary. *Cultural Bias*. London: Royal Anthropological Institute of Great Britain and Ireland, 1979.

¹³ *ibid.* p 8.

¹⁴ Giddens 1973 p. 5 for a discussion of each of these characteristics.



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