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NOTES

Enforceability of Religious Law in Secular Courts— It's Kosher, But Is It Constitutional?

In several different contexts—for example, in enforcing contracts that refer to religious law or in enforcing secular laws that use religious terminology—secular courts may be called upon to apply and even to interpret laws established by religious bodies. The limitations imposed by the first amendment on the courts in these areas will be discussed here in the specific context of Judaism. It is the thesis of this Note that the courts may not be as constrained in enforcing laws of religious bodies and in resolving disputes about those laws as would appear at first glance.

In *Wener v. Wener*,¹ a New York court faced this problem in deciding whether to award child support payments in a divorce proceeding between a husband and wife who had been married in an Orthodox Jewish ceremony. In accordance with Jewish tradition, at the time of the marriage the couple had signed an agreement called a ketuba, which provided, among other things, that they were “betrothed according to the Laws of Moses and Israel” and that the husband assumed all obligations “as are prescribed by our religious statutes.”² The ketuba, which was also signed by the officiating rabbi and two other witnesses, was written in Hebrew, Aramaic, and English.³

When Mr. and Mrs. Wener later decided to adopt a child, Mrs. Wener went to Florida and returned with a female infant, who was

1. 59 Misc. 2d 957, 301 N.Y.S.2d 237 (Sup. Ct. 1969), *aff'd.*, 35 App. Div. 2d 50, 312 N.Y.S.2d 815 (1970).

2. 59 Misc. 2d at 959, 301 N.Y.S.2d at 240. The phrase “the Laws of Moses and Israel” refers to the laws of the Jewish people (not to the modern state of Israel). As the ketuba itself does not list the specific obligations of a husband to his wife, the extent of the husband's obligations can only be determined by reference to that law. There is no single codification of Jewish law. The *Shulhan Arukh* (completed by Joseph Caro in 1542) is the most authoritative code of Jewish law, *see* 14 *ENCYCLOPEDIA JUDAICA* 1475 (1971), but it is not the last word. Moses Isserles added several notes recording his differences with Caro's work. *See* 5 *id.* at 650-51. The other major compilation is the code of Maimonides (compiled 1180), which differs in many conclusions of law from the *Shulhan Arukh*. *See* 5 *id.* at 638-42. Each of these works relies heavily on the Babylonian and Palestinian Talmuds, *see* 5 *id.* at 755, which may have to be consulted for a fuller understanding of the codified law. Further, all of the above works are heavily annotated with commentaries and, in several cases, commentaries on the commentaries. In addition, there exists an extensive Responsa literature—responses by rabbis to particular legal questions—that goes back to Talmudic times. *See* 5 *id.* at 633. In back of all this stand the Five Books of Moses, which are said to contain 613 commandments. *See* 5 *id.* at 760.

3. 59 Misc. 2d at 959, 301 N.Y.S.2d at 240. Traditionally the ketuba is signed just before the Jewish wedding service. However, Reform Jews generally omit the ketuba. Finkelstein, *The Jewish Religion: Its Beliefs and Practices*, in 2 *THE JEWS: THEIR HISTORY, CULTURE, AND RELIGION* 1739, 1789-90 (3d ed. L. Finkelstein 1960).

never adopted⁴ but lived with the couple for thirteen months, until the husband and wife separated. It was this child for whom the wife requested child support.

The court granted her request on two alternative grounds. First, it found an agreement to adopt, which created an obligation of the husband to support the child.⁵ This finding was based on, among other things, the husband's cooperation in making arrangements for his wife's trip, his supplying the child with the necessities of life after the wife's return, his naming the baby girl after his grandmother in a ceremony in a synagogue, and his reference to the child as his "darling daughter."⁶

Second, the trial court found that, even absent an agreement to adopt, the marriage contract bound the husband to support the child because the Jewish law to which it referred requires that a head of a household who takes in a child provide for its support.⁷ In arriving at this conclusion, the court referred extensively to Jewish legal sources.⁸

The appellate division affirmed only on the first ground, holding that the husband's support obligation rested upon an implied contract and equitable estoppel.⁹ However, it disapproved of the lower tribunal's reliance, in its alternative holding, on Jewish law:

New York cannot apply one law to its Jewish residents and another law to all others. If our law does not require a husband to support a child whom he has never agreed to adopt, the court cannot refuse to apply such law because the tenets of the parties' religion dictate otherwise. Application of religious law would raise grave constitutional problems of equal protection and separation of church and state.¹⁰

4. 59 Misc. 2d at 959, 301 N.Y.S.2d at 239-40.

5. 59 Misc. 2d at 959, 301 N.Y.S.2d at 239.

6. 59 Misc. 2d at 959, 961, 301 N.Y.S.2d at 239, 241. He also claimed the child as a dependent on his federal income tax return under the category "children" and sent the child a card signed "Love, Dad." 35 App. Div. 2d at 52, 312 N.Y.S.2d at 817.

7. 59 Misc. 2d at 959-60, 301 N.Y.S.2d at 240.

8. 59 Misc. 2d at 960-61, 301 N.Y.S.2d at 240-42.

9. 35 App. Div. 2d at 53, 312 N.Y.S.2d at 818.

10. 35 App. Div. 2d at 54, 312 N.Y.S.2d at 819. The appellate court relied on two law review notes. 35 App. Div. 2d at 54, 312 N.Y.S.2d at 819. One of these commentators said: "The court's reliance on the fact that the parties involved were of a particular faith and entitled to special treatment and the application of law particular to only people of that faith, appears to be a violation of the equal protection clause of the United States Constitution." Note, *Domestic Relations—Child Support—Ketuba as Grounds for Child Support Claim Notwithstanding Lack of Formal Adoption Proceeding*, 15 N.Y. L. FORUM 973, 978 (1969). The other stated: "The problem arises from the fact that if the parties were not Jewish, Jewish law would not apply. . . . The result is that New York would be applying one law to Jews and another to all other New York citizens. . . . The New York legislature could not require only Jews to support minor children brought into their homes; and the courts may not accomplish this same result." Note, *Jewish Law: A Misapplication in New York*, 4 ISRAEL L. REV. 578, 580 (1969).

The appellate division's concern for equal protection would be warranted if one law were applied to Jews solely because they are Jews and another to Gentiles solely because they are not Jews. Such a distinction bears no rational relationship to a legitimate state purpose and would violate the fourteenth amendment.¹¹ However, the application of Jewish law by the trial court in *Wener* was predicated not upon the parties' religion or race, but upon the marriage contract that the parties had voluntarily signed. The court was merely enforcing the contract. There was no indication that a Jew would be required to enter into such a contract by New York law; nor did the trial court rule that a non-Jew who entered into a similar contract would not be bound by the substantive provisions referring to Jewish law.

Wener also raises a second, and more complex, issue—whether the first amendment prohibits a secular court from enforcing religious law. The relevant portion of the first amendment provides that “[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹² The first amendment has been applied, through the fourteenth amendment, to the states and thus to the actions of state civil courts.¹³ It could be argued that enforcing Jewish law through the enforcement of the ketuba, as the trial court in *Wener* would have done, violates the constitutional prohibition against state “establishment of religion.”

The Supreme Court has defined “establishment,” as used in the first clause of the first amendment, as “sponsorship, financial support, and active involvement of the sovereign in religious activity.”¹⁴ Thus, it would clearly be improper for the government to create a church.¹⁵ However, the scope of the prohibition found in the establishment clause encompasses more than such clear and direct involvement; it also forbids action that is merely a “step” in the direction of establishment of religion.¹⁶ In determining what action falls into that category, the Supreme Court has interpreted the establishment clause to prohibit state action that (1) lacks a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) entangles the government “excessively” with religion.¹⁷

The trial court in *Wener*, it should be repeated, merely intended to effectuate the parties' contractual promises. Thus, its purpose was

11. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

12. U.S. CONST. amend. I.

13. See, e.g., *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

14. *Walz v. Tax Commn.*, 397 U.S. 664, 668 (1970).

15. *Walz v. Tax Commn.*, 397 U.S. 664, 668 (1970).

16. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

17. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

secular. It did not require that Jewish law apply to all Jews, which would have had the primary effect of advancing a certain religion, but rather enforced the ketuba as a contract. Had Mr. and Mrs. Wener, in their marriage contract, made no general reference to Jewish law, but instead specifically listed the obligations that they intended to assume, including the obligation of the husband to provide child support during and after the marriage, the appellate court would have enforced the specified contractual obligations. It should have reached the same result even though the marriage contract used a shorthand reference to such obligations "as are prescribed by our religious statutes." In using Jewish legal sources to determine what those obligations are, the trial court was merely discerning the intent of the parties as a question of fact.

In *Hurwitz v. Hurwitz*,¹⁸ the court acknowledged the contractual nature of the ketuba. The plaintiffs sued to eject their stepmother from the house in which she was living. As a defense, the stepmother pleaded her rights under a ketuba¹⁹ that she had made with the plaintiffs' father, alleging that it served as an antenuptial property settlement. The appellate division affirmed the trial court's denial of the plaintiff's motion for judgment on the pleadings, ruling that the trial court should be given an opportunity to investigate the circumstances surrounding the making of the ketuba.²⁰ While the court recognized that it may not enforce religious law per se, it ruled that a ketuba could be enforced as a contract²¹ in so far as it is not contrary to state law.²²

If the *Hurwitz* decision were followed in *Wener*, the ketuba would be enforced so long as there was an intent to make a contract. The fact that it was signed as part of the marriage ritual might indicate that the parties merely intended to perform a ceremonial act and

18. 216 App. Div. 362, 215 N.Y.S. 184 (1926).

19. The agreement was referred to in *Hurwitz* as a "koshuba," which is a misspelling of "kesubah," a dialectical variant of "ketuba."

20. 216 App. Div. at 365, 215 N.Y.S. at 187. The ketuba in *Hurwitz* was written entirely in Hebrew, creating sufficient ambiguity to necessitate a trial to consider the circumstances at the time of execution.

21. 216 App. Div. at 365, 215 N.Y.S. at 187. Compare this distinction between enforcing a contract in which the parties agree to be bound by Jewish law and enforcing the Jewish law per se with Professor Paulsen's analysis of adoption statutes that contain a "religious matching" provision. According to Paulsen, "these laws are constitutional . . . because their purpose is to determine religious training with reference to a private rather than a governmental preference," thus avoiding the state action necessary to constitute an unconstitutional establishment of religion. Paulsen, *Constitutional Problems of Utilizing a Religious Factor in Adoptions and Placements of Children*, in *THE WALL BETWEEN CHURCH AND STATE* 117, 141 (D. Oaks ed. 1963). However, if a violation of constitutional rights is found, court enforcement of the contract may satisfy the state action requirement. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

22. 216 App. Div. at 365, 215 N.Y.S. at 187.

not to form a contract.²³ However, this is a factual issue that goes to the existence of a contract rather than to the problem of separation of church and state. Although, as noted by the appellate court in *Wener*,²⁴ New York statutes and case law do not require a man to support a child not his own issue that he has not agreed to adopt, neither do they prohibit the assumption of that obligation by contract. Such a contract benefits the child and should not be unenforceable as against public policy.

If there had been a dispute within Judaism over the extent of the obligations imposed by Jewish law as they were referred to by the *Wener* ketuba, more complicated first amendment problems would have arisen, for the court may have been called upon to decide which of two or more interpretations to follow. This would certainly involve some entanglement in religious affairs and may have the unconstitutional effect of favoring one branch of the religion over another.²⁵

No such problem would arise where the matter has been previously ruled upon by a proper church tribunal, for secular courts must regard the decisions of a religious court on the correct meaning of a disputed religious doctrine as conclusive.²⁶

However, if the parties expect a secular court to resolve the dispute, a serious constitutional problem does arise. In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,²⁷ the Supreme Court ruled that the first amendment prohibits civil courts from resolving "controversies over religious doctrine and practice" even when a resolution is relevant to a suit, such as a property dispute, that is properly before the court.²⁸ In *Presbyterian Church*, two local churches and the general Presbyterian church, from which they had withdrawn in a dispute over doctrine, contested the ownership of property occupied by the local churches. Instead of utilizing internal church tribunals, the local churches sought to enjoin the general church from trespassing on the disputed

23. See G. HOROWITZ, *THE SPIRIT OF JEWISH LAW* 315-16 (1953). In some cases the ketuba may be written only in Aramaic. If neither party understood that language, it could be contended that the parties were unaware that they were signing a contract.

24. 35 App. Div. 2d at 54, 312 N.Y.S.2d at 819.

25. See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952).

26. *Gonzalez v. Archbishop*, 280 U.S. 1 (1929) (decision by the Archbishop of Manila that canon law prohibits petitioner from being appointed as chaplain must be accepted as conclusive by the secular court in the absence of fraud, collusion, or arbitrariness). The *Gonzalez* result was approved in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952), and *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 447 (1969). See also *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722-35 (1872).

27. 393 U.S. 440 (1969) (Brennan, J.).

28. 393 U.S. at 440. See also *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 243 (1963) (Brennan, J., concurring).

property. They argued that the property was theirs under Georgia common law, which implied "a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches."²⁹ The plaintiffs alleged that the condition had failed. The Georgia supreme court affirmed a decision in favor of the local churches by a trial court that had allowed a jury to determine "whether the actions of the general church 'amount to fundamental or substantial abandonment of the original tenets and doctrines of the [general church].'"³⁰ The Supreme Court reversed on first amendment grounds.³¹ It felt that allowing secular courts to determine a matter "at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion"³²—might "[inhibit] the free development of religious doctrine and [implicate] secular interests in matters of purely ecclesiastical concern."³³ The Court remanded, insisting that "the departure-from-doctrine element of Georgia's implied trust theory can play *no* role in any future judicial proceedings."³⁴

Although it was not expressly enunciated by the Supreme Court until a year after *Presbyterian Church*,³⁵ the entanglement doctrine requires the same result. In *Lemon v. Kurtzman*³⁶ the Court held that governmental aid to parochial schools in the form of teachers' salaries was impermissible because it required continuing state surveillance and control over religious institutions.³⁷ The Court in *Presbyterian Church* seemed similarly concerned with the excessive state involvement that may arise in the course of interpreting church doctrines and assessing their relative significance.³⁸

However, the first amendment need not bar court enforcement of the Wener ketuba, even where there is some dispute over the Jewish law in question, for it is not clear that the Jewish law regarding child support is "religion" within the meaning of the first amendment.³⁹

29. 393 U.S. at 442-43.

30. 393 U.S. at 443-44.

31. The Court's opinion never makes clear whether the impermissibility is based upon the establishment or the free exercise clause of the first amendment. See Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347, 374-76.

32. 393 U.S. at 450.

33. 393 U.S. at 449.

34. 393 U.S. at 450 (emphasis original).

35. See *Walz v. Tax Commn.*, 397 U.S. 664, 674 (1970).

36. 403 U.S. 602 (1971).

37. 403 U.S. at 619-20.

38. 393 U.S. at 450.

39. United States Supreme Court interpretations of the scope of "religion" in the context of the first amendment are ambiguous. The early view was that religion was primarily concerned with the relationship between man and God and the obliga-

The term "Judaism" encompasses not only a "religion," but also a culture and a way of life that goes beyond primarily religious matters.⁴⁰ Jewish law, consequently, is not composed solely of "religious law," but is essentially "racial, tribal, or national," as a New York court pointed out in *S.S. & B. Live Poultry Corp. v. Kashruth Association*.⁴¹ That court recognized that, although the entire system of Jewish law might be popularly termed "religious," it is more properly "divisible into two parts, one . . . strictly religious, because concerned with the relations between man and God, the other essentially . . . secular, as controlling the relations between man and man."⁴² The first of these two divisions, which deals with such things as worship practices and dietary obligations, will here be called "theohuman"; the second, which includes, for example, marriage and kinship obligations, will be called "interpersonal."

The Jewish law of child support, and other Jewish interpersonal laws, may be termed "religious" only in the sense that traditional belief holds that God gave the entire law to Moses at Mount Sinai.⁴³ Thus, fulfillment of an interpersonal law would incidentally serve a religious end, in that it is believed to be in general accordance with God's will.⁴⁴ This should not be sufficient to classify interpersonal

tions owed by man to God. *See, e.g., Davis v. Beason*, 133 U.S. 333, 342 (1890) (Field, J.). *Cf. United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting). Recent decisions have hinted at a broader interpretation. In *United States v. Seeger*, 380 U.S. 163 (1965), the Court interpreted the Selective Service Act's requirement that one claiming conscientious objector status be opposed to all wars because of "religious training or belief." The Court concluded that to meet the Act's definition of religious belief—"an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or merely a personal moral code"—the objector must have a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God" in the lives of persons clearly within the exemption. 380 U.S. at 176. Expressions by persons claiming conscientious objector status of, for example, a belief in "some power manifest in nature . . . the supreme expression' that helps man in ordering his life" were found to meet the statutory definition. 380 U.S. at 188. *Wisconsin v. Yoder*, 406 U.S. 206 (1972), may have restricted the *Seeger* definition. In its general discussion of religion (the particular sect in question—the Amish—met any conceivable definition) the Court excluded beliefs that are "philosophical and personal." 406 U.S. at 216. Justice Douglas, in dissent, views this as a retreat from the *Seeger* definition. 406 U.S. at 247-48. It is submitted that acceptance for first amendment purposes of any such broad definition as that in *Seeger* would lead to absurd results. The Court in *Seeger* notes that to some, religion is found in "a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace." 380 U.S. at 174. Acceptance of this belief as religion could lead to a finding that the entire system of American law is a nontheistic religion, for the preamble to the Constitution states the purpose of that document in similar terms: "In Order to form a more perfect Union, establish Justice, insure domestic Tranquility . . ."

40. *See generally* M. KAPLAN, *JUDAISM AS A CIVILIZATION* (1934).

41. 158 Misc. 358, 360, 285 N.Y.S. 879, 883 (Sup. Ct. 1936).

42. 158 Misc. at 360, 285 N.Y.S. at 884.

43. *See* Epstein, *Introduction to Seder Nezikin*, in *BABYLONIAN TALMUD*, pt. 4, v. 1, at xxxii (I. Epstein ed. 1935); S. BELKIN, *IN HIS IMAGE* 15-19 (1960).

44. *See* Chavel, *Foreword to MAIMONIDES, THE COMMANDMENTS* vii (C. Chavel ed. 1967).

laws as "religious" within the meaning of the first amendment, for Jewish interpersonal law is in this respect strikingly similar to Anglo-American law, much of which also is religious in origin and may incidentally serve religious goals.⁴⁵ For example, in *Dominus Rex v. Tayler*,⁴⁶ Lord Hale expressed the view that "Christianity is part of the law itself" and a court may seek to redress injuries to God just as it may punish those who injure man. In the nineteenth century, several American courts echoed Hale's view in cases concerning such matters as Sunday closing laws,⁴⁷ the validity of charities,⁴⁸ and domestic relations.⁴⁹

Today, American courts would almost certainly reject Lord Hale's extreme view as violating the establishment clause.⁵⁰ Mary-

45. Secular prohibitions against murder and theft, for instance, may satisfy the requirements and purposes of the ten commandments and yet not violate the establishment clause. *McGowan v. Maryland*, 366 U.S. 420, 462 (1961) (separate opinion of Frankfurter, J.).

46. 84 Eng. Rep. 906 (K.B. 1675).

47. *Shover v. State*, 10 Ark. 259 (1849).

48. *Vidal v. Girard's Exrs.*, 43 U.S. (2 How.) 126, 198-201 (1844); *Field v. Drew Theological Seminary*, 41 F. 371, 374 (C.C.D. Del. 1890).

49. *Goodrich v. Goodrich*, 44 Ala. 670, 673-75 (1870).

The widespread influence of religious doctrine on law is seen in the application of the common law definition of burglary. In general, burglary is confined to "the breaking and entering, in the nighttime, of the dwelling or mansion house of another, with intent to commit a felony therein." 13 AM. JUR. 2d, *Burglary* § 1 (1964). However, the dwelling house requirement did not apply to the burglary of churches. See 3 E. COKE, INSTITUTES *64; *McGraw v. State*, 234 Md. 273, 199 A.2d 229 (1964), *cert. denied*, 379 U.S. 862 (1964); *Trevino v. State*, 158 Tex. Crim. 255, 254 S.W.2d 786 (1953). Lord Coke explained this curious exception by resorting to the religious belief that a church is the "dwelling house of God." E. COKE, *supra*. For a modern court to predicate its conclusion of law on the religious belief that God dwells in a church would certainly violate the constitutional principle that the law may not "support any religious tenets." *Davis v. Beason*, 133 U.S. 333, 342 (1890). Also it would contravene Justice Miller's exhortation that "the law . . . is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872). In the words of the *Hurwitz* case, it would be enforcing religious dogma per se. 216 App. Div. at 365, 215 N.Y.S. at 187. For a time, however, it seemed that Maryland, whose burglary statute, MD. ANN. CODE art. 27, § 29 (1971), permits prosecution for common law burglary, actually accepted Lord Coke's rationale. Thus, a trial judge's charge to the jury that mentioned Lord Coke's reason was held not to violate the Constitution. *McGraw v. State*, 234 Md. 273, 277-78, 199 A.2d 229, 231-32, *cert. denied*, 379 U.S. 862 (1964). Further, an indictment that charged the defendants with attempting to burglarize "the dwelling house of God" was held to be sufficient, "though not in commendable form." *Dortch v. State*, 1 Md. App. 173, 175, 229 A.2d 148, 150 (Ct. Spec. App. 1967). Finally the Maryland courts rejected Lord Coke's rationale and simply concluded that churches are an exception to the dwelling house requirement. See *Sizemore v. State*, 10 Md. App. 682, 688, 272 A.2d 824, 827 (Ct. Spec. App. 1971).

50. Thomas Jefferson was of the opinion that Hale's remark was erroneous. He traced Hale's view to earlier writers that, he felt, erroneously equated the use of the law of ecclesiastical courts with the use of the Bible itself. Jefferson, *Whether Christianity Is a Part of the Common Law*, Appendix to VIRGINIA REPORTS 137-42 (Jefferson 1829). But see *State v. Chandler*, 2 Harr. 555 (Del. 1837).

Some nineteenth century American judges also criticized the view that Christianity is part of the common law. *E.g.*, *Bloom v. Richards*, 2 Ohio 387, 391 (1853). In an

land, for example, has declared its blasphemy law unconstitutional on this basis.⁵¹ Nevertheless, the courts still recognize that religious beliefs are at the foundation of American society. Thus, Justice Douglas wrote, "[w]e are a religious people whose institutions presuppose a Supreme Being,"⁵² and Judge Cardozo maintained that "public policy" is formed in part from society's religious values.⁵³ Moreover, as Justice Frankfurter pointed out in his separate opinion in *McGowan v. Maryland*: "State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay."⁵⁴ It would be erroneous, however, to characterize Anglo-American laws as "religious."⁵⁵ Even when dealing with laws that originally arose in a religious context—such as those against polygamy⁵⁶ and Sunday labor⁵⁷—the Supreme Court has recognized that the legislation primarily serves a secular purpose and is thus not subject to the first amendment's prohibitions.

By analogy, those laws of Judaism, and possibly other religions, that deal with interpersonal relations have secular purposes and need not automatically be included in the first amendment category of "religion." When they are properly before the court—as when they are referred to in a contract, a trust, or an otherwise constitutional legislative enactment—the court should interpret them as part of its fact-finding process, even where there is some dispute as to their meaning.⁵⁸ Although observance of the Jewish laws regarding, for

interesting note in *Swann v. Swann*, 21 F. 299 (C.C.E.D. Ark. 1884), the court criticized *Hill v. Wicker*, 41 Ga. 449 (1871), which had based the restriction on Sunday labor upon the ten commandments. Contending that the Sabbath in the Bible refers to Saturday, not Sunday, the court remarked that the assumption to the contrary "illustrates the danger of a civil court, which deals only with the temporal affairs of men, predicating a judgment on its interpretation of the Bible commands relating to spiritual affairs." 21 F. at 308.

51. *State v. West*, 9 Md. App. 270, 263 A.2d 602 (Ct. Spec. App. 1970).

52. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

53. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 72 (1921).

54. 366 U.S. 420, 461-62 (1961).

55. See *Commonwealth ex rel. Brown v. Rundell*, 424 Pa. 505, 227 A.2d 895, cert. denied, 387 U.S. 937 (1967).

56. See *Davis v. Beason*, 133 U.S. 333 (1890).

57. See *McGowan v. Maryland*, 366 U.S. 420 (1961).

58. For example, the courts have granted Jewish cantors a tax exemption for parsonage allowances, deciding that they meet the statutory requirement of being "minister[s] of the gospel." *Salkov v. Commissioner*, 46 T.C. 190 (1966); *Silverman v. Commissioner*, 57 T.C. 727 (1972), *affd.*, — F.2d — (8th Cir. 1973). In each case the court made its determination of the cantor's status in part on the basis of Jewish customary law. In *Salkov* the court noted that, while the rabbi alone can decide matters of Jewish law, the cantor's function is to be a "sheliach tzibbur" and "emissary of the congregation before the Almighty in prayer" and listed some of the cantor's sacerdotal functions at the Sabbath and at festivals. 46 T.C. at 196, 198.

instance, child support, bailments,⁵⁹ debt,⁶⁰ landlord-tenant relations,⁶¹ real property,⁶² labor relations,⁶³ maritime cargo and charter agreements,⁶⁴ and torts⁶⁵ may, in a general sense, serve a religious purpose in that one following the law lives in accord with the will of God, the immediate effect and purpose of these laws is secular.⁶⁶ Thus, in *Wener* the first amendment need not have deterred the court from applying the Jewish law of child support if it was found to be required under a valid contract, even if there had been a dispute as to its meaning.

A secular court's resolution of a dispute over a Jewish interpersonal law may inhibit Jewish courts from resolving the matter differently in a subsequent case. However, if a dispute over an interpersonal law is not a "religious" matter within the meaning of the first amendment, such a result would not be unconstitutional.

Also, the secular resolution of a dispute over the meaning of an interpersonal law may have an indirect impact on the development of theohuman law, for in a complex body of laws a decision affecting one part may indirectly affect the others.⁶⁷ Although a direct impact on theohuman law would violate *Presbyterian Church*, a possible in-

Furthermore, in distinguishing a cantor from a Baptist minister of education, the tax court in *Silverman* indicated that the court was required to consider the "mores and customs" of each religion. 57 T.C. at 731.

Similarly, a federal court has indicated that a cantor is entitled to an exemption from selective service as a clergyman. Application of Kanas, 385 F.2d 506, 509 (2d Cir. 1967).

Judicial notice of religious beliefs is not uncommon. For example, reconciliation agreements between husband and wife, enforceable in court, frequently incorporate commonly held religious beliefs. One standard agreement takes notice that most people believe that a child is the "handiwork of God," not merely the parents' product, that God entrusts the parents with the child, and that the parents are God's agents in raising the child. Burke, *Conciliation—A New Approach to the Divorce Problem*, 30 CAL. ST. B.J. 199, 211-12 (1955). See also *State v. Olson*, 287 Minn. 300, 178 N.W.2d 230 (1970) (judicial notice of the solemnity of the Catholic mass); *In re Estate of May*, 305 N.Y. 486, 114 N.E.2d 486 (1953) (finding that Jewish law permits marriage between an uncle and a niece).

59. E.g., BABYLONIAN TALMUD, pt. 4, v. 2, *Baba Mezia* 93a-93b, at 537-40 (I. Epstein ed. 1935) [hereinafter BABYLONIAN TALMUD].

60. See 2 CODE OF MAIMONIDES, *Creditor and Debtor* 77-187 (J. Oberman, L. Ginsberg & H. Wolfson ed. 1949) [hereinafter CODE OF MAIMONIDES].

61. See, e.g., THE MISHNAH, *Baba Metzia* 8.6, at 361-62 (H. Danby ed. 1933).

62. BABYLONIAN TALMUD, *supra* note 59, pt. 4, v. 3, *Baba Bathra* 28a, at 138.

63. BABYLONIAN TALMUD, *supra* note 59, pt. 4, v. 2, *Baba Mezia* 83a, at 476.

64. CODE OF MAIMONIDES, *supra* note 60, *Hiring* ch. 5, §§ 3-4, at 19-20.

65. See, e.g., BABYLONIAN TALMUD, *supra* note 59, pt. 4, v. 1, *Baba Kamma* 9a, at 36.

66. See Epstein, *supra* note 43, at xxxiii. For example, the law of landlord-tenant relations deals with such secular matters as the notice required for the termination of leases (twelve months for commercial leases, one month for most residential leases of unspecified terms). See THE MISHNAH, *Baba Metzia* 8.6, at 361-62 (H. Danby ed. 1933). See also L. FINKELSTEIN, THE PHARISEES (3d ed. 1962) (analysis of the social and economic role of the Jewish law in the early Talmudic period).

67. See M. KADUSHIN, RABBINIC MIND 15 (1952).

direct future effect on a Jewish court's resolution of a theohuman matter seems remote and attenuated. Furthermore, any such effect would be neutralized by the Jewish court's awareness that its decisions with respect to theohuman law will be conclusive in subsequent litigation before a secular court.⁶⁸

Presbyterian Church, however, clearly forbids secular courts from resolving theohuman disputes directly. A civil court might be called upon to do this in, for example, a case involving the enforcement of a criminal statute relating to kosher foods.⁶⁹ Several states have such statutes, which provide for criminal penalties if a seller falsely represents food to be "kosher"⁷⁰ or "prepared in accordance with Orthodox Hebrew religious requirements."⁷¹

Even if there is no dispute over the meaning of the term "kosher" or the content of "Orthodox Hebrew religious requirements," the statutes themselves may be attacked as violating the first amendment on the grounds that their primary purpose and effect is to aid Jews in the observance of their religious rites.⁷² Although not establishing religion, enforcement of the statutes could be regarded as a forbidden step in that direction.⁷³ However, these statutory provisions are more appropriately seen as merely enacted to enforce the general state policy against mislabeling and fraudulent misrepresentation in sales.⁷⁴ They do not single out adherents of the Jewish religion for special protection.⁷⁵

68. See text accompanying note 26 *supra*.

69. Jewish kosher regulations are not merely a special way of preparing food. They relate primarily to a relationship between man and God, as do all ritual obligations. In contrast, court enforcement of a ketuba requires a husband to honor an interpersonal commitment.

70. *E.g.*, D.C. CODE §§ 22-3404 to -3406 (1967). *Cf.* 21 C.F.R. § 3.202 (1973).

71. N.Y. AGRIC. & MKTS. LAW §§ 201(a)-(d) (McKinney 1972). See also CAL. PENAL CODE § 383(b) (West 1970); MD. ANN. CODE art. 27, §§ 196-97 (1971); MASS. ANN. LAWS §§ 94:156-57 (1967); MICH. COMP. LAWS ANN. § 750.297(e) (1968); MINN. STAT. ANN. § 31:651 (1968).

72. *But see* *People v. Goldberger*, 163 N.Y.S. 663, 666 (N.Y. City Ct. Spec. Sess. 1916). See also *Sossin Sys., Inc. v. City of Miami Beach*, 262 S.2d 28, 30 (Fla. Dist. Ct. App. 1972), in which the court upheld a kosher food ordinance against a first amendment challenge. The court said that the ordinance was designed to safeguard the free exercise of Jews in the practice of their religion.

73. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

74. *E.g.*, N.Y. AGRIC. & MKTS. LAW § 201 (McKinney 1972). The specific secular reasons for enacting kosher food laws include the protection of buyers who expect a higher standard of cleanliness in kosher food, *People v. Atlas*, 183 App. Div. 595, 596, 170 N.Y.S. 834, 836 (1918), and the prevention of the fraudulent sale of less expensive nonkosher food at higher kosher prices. *People v. Gordon*, 172 Misc. 543, 545, 14 N.Y.S.2d 333, 335 (N.Y. City Ct. Spec. Sess. 1939), *revd. on other grounds*, 258 App. Div. 421, 16 N.Y.S.2d 833, *affd. mem.*, 283 N.Y. 707, 28 N.E.2d 717 (1940).

75. In New York, for example, the general mislabeling statute provides a more severe penalty than does the specific kosher labeling law. Compare N.Y. AGRIC. & MKTS. LAW § 201 (McKinney 1972); N.Y. PENAL LAW §§ 55.10, 70.15, 80.05 (McKinney 1972); N.Y. GEN. BUS. LAW § 392(b) (McKinney 1972) (misbranding generally—one year or

Generally, the interpretation of the terms "kosher" or "Orthodox Hebrew religious requirements" will pose no problem. For example, in a 1925 suit challenging these terms as too indefinite to provide the seller with adequate notice of what is allowed and what is prohibited, the Supreme Court pointed out that the term "kosher" is generally understood and that any possible uncertainty is not unlike similar difficulties encountered in other criminal statutes.⁷⁶

However, if a dispute did arise concerning the meaning of these terms, an attempted judicial resolution of the controversy may be prohibited by *Presbyterian Church* because of the theohuman nature of the dispute.⁷⁷

It could be argued that such a judicial determination is, like providing police and fire protection to synagogues, necessary to safeguard the Jews' free exercise of religion.⁷⁸ This consideration did not deter the Court in *Presbyterian Church*, where one effect of the Georgia court's decision, reversed by the Supreme Court, was to protect the local church in the observance of its religious beliefs and practices. However, since there was a dispute between two segments of the church, the over-all effect of protecting the local churches in this way was to inhibit the general church in the free development of its religious doctrine. Similarly, a resolution of a theohuman dispute by a secular court should not be permitted.

The inability of secular courts to resolve controversies over Jewish theohuman law should not render the kosher statutes unconstitutional. As pointed out above,⁷⁹ it is unlikely that the general requirements of the Jewish dietary laws will be disputed. Also, if a showing of specific intent to defraud is required,⁸⁰ a bona fide belief that the food is kosher will excuse the seller and render a judicial determination of the meaning of the term unnecessary.

1000 dollars) with N.Y. AGRIC. & MKTS. LAW § 201(d) (McKinney 1972) (kosher labeling—one year or 500 dollars). See also *People v. Atlas*, 183 App. Div. 595, 170 N.Y.S. 834 (1918).

76. *Hygrade Provisions Co. v. Sherman*, 266 U.S. 497 (1925). See also *People v. Atlas*, 183 App. Div. 595, 170 N.Y.S. 834 (1918); *Ehrlich v. Municipal Ct.*, 55 Cal. 2d 552, 360 P.2d 334, 11 Cal. Rptr. 758 (1961).

77. The diverse sources of Jewish law make such disputes with respect to specific applications of the dietary laws possible. See note 2 *supra*. Cf. *Tamarkin v. Children of Israel, Inc.*, 2 Ohio App. 60, 206 N.E.2d 412 (1965), *appeal dismissed*, 384 U.S. 157 (1966) (disagreement over Jewish law regarding disinterment of bodies).

78. See *People v. Goldberger*, 163 N.Y.S. 663, 665 (N.Y. City Ct. Spec. Sess. 1916); *Sossin Sys., Inc., v. City of Miami Beach*, 262 S.2d 28, 30 (Fla. Dist. Ct. App. 1972). A similar rationale has been used to uphold statutes prohibiting the disruption of religious services. *Ford v. State*, 210 Tenn. 105, 110, 355 S.W.2d 102, 103-04, *rehearing denied*, 210 Tenn. 105, 356 S.W.2d 726 (1962), *cert. denied*, 377 U.S. 994 (1964).

79. See text accompanying note 76 *supra*.

80. See *Hygrade Provisions Co. v. Sherman*, 266 U.S. 497, 502-03 (1925), construing New York statutes, chs. 580-81 [1922] N.Y. Laws 1314, substantially like the present New York law, N.Y. AGRIC. & MKTS. LAW § 201(a) (McKinney 1972).

An accused seller may attempt to halt the prosecution by raising a frivolous claim that the product he is selling is kosher. For example, the seller of a "kosher cheeseburger" might claim that it meets the Jewish dietary requirements. A court might think itself bound by *Presbyterian Church* to dismiss the charge, for the court must make at least a cursory investigation of Jewish law to determine that mixtures of meat and dairy products are unkosher. However, since in such a case there is no real dispute between different segments of the religion, a court would not be promoting one branch and inhibiting another. Moreover, no "excessive" entanglement of church and state need be involved, for a superficial reading of the Jewish law would be sufficient to dispose of the claim.

It should be noted that determining whether or not a given matter is theohuman or interpersonal might itself involve the court in some entanglement in religious matters. Certain laws clearly fall into one category or the other,⁸¹ but the classification of others may require closer analysis of their history and purpose. However, this analysis is thrust upon the courts by the first amendment itself. As Chief Justice Burger has said: "No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement."⁸²

81. See note 66 *supra*; text accompanying notes 56-66 *supra*.

82. *Walz v. Tax Commn.*, 387 U.S. 664, 670 (1970).