



JUDAISM AND THE SOCIAL ORDER

TWO MODELS FOR ACCOMMODATION

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CONTENTS

Introduction	4
David Novak: Contracts, Covenant, and Criteria for Participating in the Social Order	5
Emil Fackenheim: Religious Duty and the Social Order	12
Analysis	15
Conclusion	18
Bibliography	19

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Introduction

In this paper, I analyze the thought of David Novak and Emil Fackenheim on the relationship between Judaism and the social order. This paper will be grounded, primarily, in a theological rather than strictly halachic point of view. Or, to put it in the terms of one of the thinkers I will be treating, the discussion will be in the realm of *haggadah* rather than *Halacha* (Novak 1974, 1–14). Before I begin, I need to raise two points about my methodology. The first relates to the scope of this paper. In the case of both thinkers, the analysis is related to the question of the relationship between Jews and Christians. For Fackenheim, the broader relationship between Jews and Christians is premised on mending (*tikkun*) that is required for both faiths, which is why any exhaustive study of the status of Jews in predominantly Christian societies or organizations in Fackenheim’s thought must take the components of the respective *tikkunim* into consideration. For Novak, on his part, Jewish dialogue with Christians and Judaism’s relation to the state are linked with each other, because the theological basis for dialogue is identical to the halakhic ground that allows Jews to participate in the state. However, the question of how Novak and Fackenheim relate to Christians is one that can only be answered by an analysis of a few decades’ worth of volumes from both thinkers, and it is therefore well beyond the scope of our conference. Thus I avoid this broader discussion in the interest of brevity, first and foremost. Moreover, for Fackenheim, the broader issue cannot be understood without reference to his Hegelian thought, which again is beyond the scope of this study. Instead, I focus on the narrower question of the interaction between Jewish law or values and the social order in modern society.

The other methodological point relates to the Canadian element of the subject of this conference. On the face of it, that component is challenging, the reason being that if we are looking either for religious principles or universal ideas on which Jews or Christians base their decision to engage in promoting social order, there should be no reason why Canada should be different from any other place, or even be mentioned at all. That is truer, I believe, from a halachic or legal perspective, according to which location should be irrelevant, other than serving as a useful example. Further, even if Canada meets specific halachic criteria, how would it differ from any other place that meets those criteria? What makes it unique? What we can suggest is that, although halacha does not change, the circumstances that necessitate a halachic response do. And certainly those that

make halachic decisions are faced with new information, which is sometimes a product of time or the environment, and that data affects their output. This is true philosophically as well, since we cannot see ourselves independently of the changes that occur to us, and as Henri Bergson shows, we literally bring our memory and our past with us to the identity we have today; that is to say, we are constantly in the state of change (Bergson 1911, 178). Thus we could ask about the Canadian experience in the context of which we arrive at the halachic and philosophical positions we explore. With this in mind, I will touch on the Canadian angle, if you will, in the case of both these thinkers, so as to assess whether their respective experiences in Canada or their thoughts about this country interact with, or in any way shape, their view.

David Novak

First, I will provide some background. David Novak was born in 1941. He earned his undergraduate degree from the University of Chicago, where he studied with Leo Strauss. He then earned a masters in Hebrew literature from the Jewish Theological Seminary (JTS), under the tutelage of Abraham Joshua Heschel. Novak was ordained a rabbi, also from JTS, in 1966. While serving as a pulpit rabbi, he earned a PhD from Georgetown University in 1971. His thesis, which, as I argued in my thesis, was indicative of the type of philosophical approach he would later take, was on the negative impact of suicide in the thought of Plato, Aquinas, and Kant. After taking rabbinical positions in a number of cities, including Oklahoma City and Baltimore, Novak became the Edgar M. Bronfman Professor in Modern Jewish Studies at the University of Virginia. In 1997, he became the J. Richard and Dorothy Shiff Chair of Jewish Studies at the University of Toronto, a prestigious position that he still holds (Hughes 2013, 4–5). The relevant material for our purposes comes from his books *The Jewish Social Contract* and *In Defense of Religious Liberty*.

Novak's discussion begins with a crucial distinction between contracts and covenants. Novak's conception of the former includes two components. The first is that both parties are equal; the second is that, even if both parties are still in existence, the agreement itself is subject to termination. Novak's conception of the latter also includes two components: there is an implicit inequality between the parties, and, assuming both parties are in existence, the agreement cannot be nullified. Based on this distinction, Novak writes that any covenant that is made with another entity must build atop of the preexisting covenant with God. One example of this is that of the Jews living in Babylon. The nature of the relationship is not described in detail, but from the fact that Israel is castigated by the prophet Daniel for disloyalty, Novak learns that the Jews had a covenant with the Babylonian monarch (Novak 2005, 92–93).

However, the Jews are only able to live in Babylonia if their covenant with God is not thereby undermined. As Novak puts it, “The Jews could accept political subordination in good faith as long as their religious right to serve God above all others was respected” (Novak 2005, 93). The nature of the relationship with the state changes somewhat, Novak says, and that is reflected in a talmudic teaching about three oaths that Jews took, which Novak understands to be in reference to their Roman oppressors. The first was that they would not “scale the wall,” the second is that they should not rebel against the nations of the world, and the third is that the nations should not subordinate Israel to an unreasonable extent (b. Ketubot 111a). The first two are an indication that the rabbis in the third century subscribe to the belief in an apocalyptic (rather than what Novak calls extensive) messianism, inasmuch as they believe that the redemption is solely in God’s hands. From the fact that the word for covenant does not appear here, Novak shows that this has a contractual nature and is therefore subject to termination. Among the other differences Novak finds between this and earlier arrangements is that there is a sense of reciprocity in this agreement, which is not true of the pact with Babylon, and the third is the emphasis against treason, which in this case would be an alliance with Egypt (Novak 2005, 95–96).

However, it is important to remember here that the three vows only relate to political, rather than religious, subordination, meaning that the relationship was not recognized on a religious, *de jure* basis. But Novak shows that, as the Talmud continues, there is a theological-religious component as well. Novak sees this in the statement that there were three *other* oaths: those were against revealing the date for the end of exile, forcing that end, and divulging a “secret.” The last of these is a reference to the rabbinic practice of adding a month to the lunar calendar. By relinquishing this right, Novak says, the Sanhedrin was acknowledging the “loss of its own public authority in the life of the Jewish people” (Novak 2005, 97). The connection to messianism, however, is also significant, and that is because the fact that God will bring about the redemption rather than human beings is what makes the social contract with non-Jews possible. The reason is that every arrangement would now be temporary; it would change when God redeemed the world. Thus, unlike a covenant that is atemporal, this apocalyptic view makes the arrangement a temporary one. Thus a social contract could be put in place.

We note here that Novak is quite cognizant of the political factors that create the setting for these agreements. Those same factors enable him to make a distinction between Jews living in the first few centuries of the common era under the shadow of their failed rebellion and thus having an uneasy, tenuous relationship with Rome, on the one hand, and Jews living in Babylon, where “the Jews were voluntarily living in another land (even though many of them had originally gone there as captives from Judea), with political power and under a legal system that was consistent and in which there were definite civil rights” (Novak 2005, 105). In other words, the arrangement is informed by the type of relationship Jews have with the state.

Nevertheless, even if Jews accept the political and semi-religious authority of non-Jews, they cannot accept their legitimacy for legal and civil matters. Novak supports this point with a statement by Rabbi Tarfon that removes the Jewish “permission” to go to gentile courts (b. Berahot 61b). The grounds for this ruling are that, since Sinai, the law of God has to come through and be administered by the successors of Moses, namely, the rabbis. There are, however, two exceptions to this statement by Rabbi Tarfon. The first is that, with the exclusion of divorce documents and the manumission of slaves, documents from gentile courts are recognized by Jewish courts. The second is that a Jewish divorce document that is coerced by a gentile court is accepted by the Jewish courts. Novak notes, however, that all of this was in the context of the Roman administration of Palestine. Although preferable to no law at all, this administration was under no “coherent system of law.” This differed from what the Jews experienced under Babylonian rule, where they had “definitive civil rights” that they shared with “other members of the realm” (Novak 2005, 105).

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But in order for Jews to avail themselves of non-Jewish law, they would have to become officials and contribute to the non-Jewish legal system. What that means is that they would need to make their laws consistent with the “fittest [*ke-mettuqanim*] of them,” or consistent with the most rationally evident laws within the non-Jewish system. In contrast to the participation that is occurring in Babylon, Novak mentions two stories in the Talmud where an engagement with the non-Jewish legal system in Palestine, in the form of suggestions made to Roman officials, is criticized. In Babylon, however, we do find examples of sanctioned involvement of the Jews in civil law. Unlike the previous incidents, Novak brings a story that takes place in Babylon where the exilarch, who was appointed by Persian authorities, and who followed Persian law when he administered cases for himself (as per bava Kama 58b), commissions someone to act on behalf of the court. In other words, civil law seems to be perceived independently from religious law, a distinction Novak also sees in the talmudic statement that civil law cannot be inferred from ritual law and vice versa (Novak 2005, 107).

But the important point here is that this form of independence was only possible because of governmental authority. In this context, Novak highlights the most decisive statement on this issue, which is “the law of the kingdom is the law” (*dina de-malkhuta dina*). Formulated by the third-century sage Shmuel, it recognizes the law of the state from the perspective of Jewish law. Novak returns to this idea a little later, but not before he notes another interesting phenomenon. Unlike in Palestine, where the polytheism of non-Jews is taken as being part of their “overall immorality,” in Babylon there was an attempt to explain the polytheism of non-Jews away. In other words, for the rabbis, the practices of non-Jews in Babylonia pointed to a “morally impressive secularity.” For this reason, even though

non-Jews have legal status in Jewish law solely if they keep Noahide law, which includes laws against blasphemy and idolatry, Babylonians are not perceived as violating those laws because of their “overall respect for Jewish religious practice” and because the rabbis did not look into the nature of their host nation’s religious practices. That is to say, whatever the exact practices were, their conduct was deemed sufficient to meet Rabbi Yohanan ben Nappa’s acceptance of them as non-idolaters. Novak juxtaposes this statement with another teaching of R. Yonahan, namely, that the first of the Noahide laws is to set up courts. It is that requirement that is the “foundation of Jewish-gentile relations”; and as such, this foundation is political primarily and theological secondarily (Novak 2005, 111–13).

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Novak then offers a more extensive treatment of Shmuel’s statement. While it is usually translated as “the law of the kingdom is the law,” which is how I just translated it, Novak prefers the translation “the law of the state,” since it should not be limited to monarchies. Indeed, Novak takes the reference to

monarchy to be an expression of what was common in rabbinic times, but “that need not be the only form of polity to which Jews could relate in good faith at some later time” (Novak 2005, 114). By extension, we can easily apply the same reasoning toward various other forms of government or organizations. As Novak fleshes out the specific requirements for recognizing their law, we can then attempt to transfer the same conditions to other entities.

However, in order to apply it at all, it is necessary to gain an understanding of the situation in which Shmuel’s statement is applied. Thus Novak offers insight into those cases. Specifically, they pertain to the ownership of real estate and matters of taxation. As Novak shows from the specific examples, in both these areas, the guiding assumption is that the law that surrounds it is fair and impartial, which is why Jews can recognize and participate in it. Based on this application of Shmuel’s teaching, there can seemingly be only a narrow application of Shmuel’s principle. So how can anyone suggest that there is the potential for a broader impact? Novak answers that question by reference to an explanation the Talmud provides for a Mishnah quoted earlier about the validity of documents made in non-Jewish courts. The reasoning that is given by the Talmud is that the statement relates to “specifically religious matters.” According to Novak, this response is an over-explanation: it suggests that “the gentile courts could be places where Jews can bring their cases for justice.” And the reason that is so is because those courts abide by the Noahide standard of justice. Novak also finds this idea working in a ruling of the thirteenth-century rabbinic sage R. Moshe ben Nahman (Nahmanides). The question relates to the prohibition against taking legal cases to non-Jewish courts instead of Jewish ones. But what about a Jewish court that is frightened by a Jewish criminal and the only recourse that is available for the

litigant is to take the matter to a non-Jewish court? Can one move the case out of Jewish jurisdiction? Here, Nahmanides rules that he or she can do so, because by so doing one is not taking the law into their own hands, but moving it from the “powerless” hands of the Jewish court into the non-Jewish courts (Novak 2005, 119).

Novak then acknowledges that, in applying this principle more broadly, there are two extremes that must be avoided. On the one hand, it cannot be extended to include secularism, since that would be against the “covenantal foundation of Judaism.” It would then undermine the philosophical-theological basis of Shmuel’s principle. On the other hand, we do not want to limit the principle to the degree that it does not enable us to benefit from secularity (Novak 2005, 120). In order to avoid either of these possibilities, it is necessary to grasp the distinction Novak makes between the two terms:

Secularism is defined as the idea that human beings can and should constitute their corporate life only with reference to the capacity for social construction. *Secularity*, though, is simply the realm of interhuman, multicultural interaction that does not look to any unique community with its singular historical revelation and special tradition as the exclusive source of social legitimization. (Novak 2005, 121)

For Novak, the latter term means that communal legitimization comes from the founding revelations of each community. Once those respective communities are accepted, the norms that come out of each tradition need to be negotiated with those of other traditions. This process includes four distinct steps. The first is that those norms are understood as emerging from the tradition itself; presumably Novak means that they must not be accepted as a government-mandated law. The second is that they must be constituted through intercultural dialogue. The third is that “normative overlappings must be discovered”; in this case Novak appears to be echoing John Rawls. Finally, the communities need to show how those norms should have authority in the society in question, by which Novak means that those societies must offer some sort of universal explanation for the norms they propose (Novak 2005, 121–22). Novak concludes the article by emphasizing that “neither the Jews nor the gentiles can be seen to have come to any consensus that this interhuman social construction should be either the beginning or the end of authentic human community” (Novak 2005, 123).

Before wrapping up the section on Novak and discussing Fackenheim’s approach, I want to highlight a point that Novak hints at but does not fully develop until a later text. Specifically, the idea that secularity actually functions better than secularism:

Secularity functions best when the sacred limits the profane and the profane is not reducible to the sacred. Atheists, though, by collapsing the sacred into the profane and thus, inevitably, transferring

the ultimacy of the sacred to the profane, cannot affirm the very difference that a cogent secularity seems to presuppose. (Novak 2005, 122)

What Novak means is that there is nothing that protects the members of a state that is committed to secularism. He develops this idea further in *In Defense of Religious Liberty*, to which I turn now. In that text, Novak argues that the only type of democracy that is sustainable is one that is premised on a belief

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in God. Novak arrives at this idea by laying bare the shortcomings of the Hobbesian perspective, which promotes the notion that the fear arising from the uncertain state of nature, in which there is a war of all against all, compels individuals to enter into a mutual agreement of handing over their natural liberty to a monarch, who vows to protect them (Hobbes 2012, 72–80). The problem with this idea

is that a mortal God seems to replace the immortal God. In what way is an immortal God necessary? Novak explains that humans are subject to change, and death in particular, which is the greatest form of change. Thus, if an agreement is made by reference to human law, there is a limit to the trust that one can have in that arrangement (Novak 2009, 169–75). By contrast, if an agreement is made by reference to law that is not of human making, one has good reason to trust that the other party of that arrangement will remain committed to it (Novak 2009, 174–75). Therefore, without a belief in the divine, there is nothing to guarantee the rights afforded to citizens by the government. By way of empirical proof, Novak adds,

One might say that the reason our polities in Britain, the United States and Canada (and others that have a connection to the biblically and philosophically informed morality epitomized by English Common Law) have not become Hobbesian-type tyrannies is because the majority of the citizens still believe themselves obligated by a prior, divine morality, despite the fact that most of them are unable to argue for it theoretically. (Novak 2009, 181)

The two basic ideas, namely, that the criteria for Jews to be able to participate in the democracy in which they live is the adherence of that society to the Noahide code, and the notion that a belief in God is the only sustainable ground for human rights, follow from one another. The logic behind the succession of ideas is as follows: In determining the factor that allows Jews to participate in society, Novak discovers that for the same reason that secularism is in opposition to the covenantal viewpoint, it is not sustainable. In a word, the fact that secularism has no reference point outside of social construction—and it is for this reason that Judaism, which sees the community as oriented toward God’s will, is opposed to it—is also the reason why nothing underwrites the values of secularism. The transition between the two concepts can also be proved by the basic point that, if the laws are unsustainable without the belief in God, there

would be nothing that allows Jews to be a part of that society, since there is no continued commitment to those ideas. If so, this point is more philosophical than halachic, inasmuch as Novak arrives at a ground of moral behaviour rather than an identifiable, positive expression of it.

It is interesting to note that, in this section, Novak refers to the ideology of the Nazis. According to Novak, the ultimate exemplars of a state that regards itself as “the source of its own order,” and also removes individuals from their natural communities, are Hitler and Stalin. The two figures are being used as examples of when the

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state is not beholden to a law outside of its own making. When we get to the approach of Fackenheim, for whom the Holocaust called “all things” into question (Fackenheim 1982, 9), it will be interesting to learn in what way his view resists—I hesitate to use the words “responds to”—the ideology behind the Holocaust.

In any case, Novak seems to arrive at the notion that it is ultimately the acceptance of the belief in God that determines whether a state is moral; the Noahide laws themselves express this view only indirectly. In a sense, this idea is a reversal from the Babylonian rabbis who disregard the theology of the non-Jews among them in light of the moral impressiveness they witness. What I mean by this statement is that, in contrast to the rabbis of that period, for whom the outward expression of morality is enough to warrant participation on the part of Jews in civil matters, for Novak, the adherence to the moral law itself is insufficient if it is not grounded by a belief in God. In this regard we can also speak of Novak’s perception of Canada as shaping his views, for it follows from his *The Jewish Social Contract* that the “prior, divine morality” of which Canadian citizens are aware is not only the factor that prevents Hobbesian-type tyranny, but also allows Jews to participate in the Canadian civil system.

Along these lines, we can similarly apply the same ideas to Jewish participation in entities that promote social order, provided that those entities meet the same criteria. That is, they do not perceive of everyone’s membership as directed only toward social furtherance but instead see its members as subject to a transcendent orientation. Further, the organization or entity in question would have to be one that lets its members get the legitimacy of their involvement as individuals—or as a community, if that is the case—from their own covenantal tradition. By extension, the norms that govern the organization in question need to come from the various traditions that partake in it, and they must be recognized as such. They also ought to be formulated through discussion with other traditions; common ground needs to be discovered; and they must be supported by universal reasons if they are to be implemented.

Emil Fackenheim

Again, a little bit of background. Born in 1916 in Halle, Germany, Fackenheim attended Halle University, and he also enrolled in the Hochschule für die Wissenschaft des Judentums. Fackenheim was ordained a Reform rabbi in 1938, and shortly thereafter was placed in the Sachsenhausen concentration camp. In 1939, his family escaped and eventually ended up in Canada. Later, he became a rabbi in Hamilton, Ontario, and then a professor at the University of Toronto in 1948, after earning his PhD in Islamic philosophy three years earlier. He remained there until 1984, at which point he moved to Israel. He died in 2003 (Cohn-Sherbok 1997, 36).

The pertinent discussion can be found in Fackenheim's *The Quest for Past and Future* (Fackenheim 1968, 193–94), in a chapter titled “Religious Responsibility for the Moral Order.” And it is based on a lecture Fackenheim gave as part of a conference for Protestant-Catholic-Jewish dialogue, which was held in Washington, DC, on November 20, 1961. In his introduction, he mentions this event and notes the “snares” that he tried to “avoid and expose.” They are, first of all, “the mistaking of the separation of Church and State for a dualism which makes religion otherworldly, and society, either amoral or morally concerned in a way which does not only need religious inspiration but positively rejects it.” Second of all, Fackenheim speaks of the “belief . . . that it is the business of religion to offer moral doctrines which are specific and concrete, and yet timelessly valid.” The third snare is the opposite belief, namely, “precisely because religion cannot offer such doctrines, it must confine itself to innocuous generalities . . . thus leaving the big decisions in the hands of religiously and morally neutral ‘experts’” (Fackenheim 1968, 188). After this introduction, Fackenheim begins by expressing a Jewish “affirmation” that “the God on high loves widows and orphans below; and that He commands men, from on high to do His will in the social order below.” Fackenheim then speaks about what is known outside of Judaism:

Elsewhere too men have had an awareness of the divine, and a sense of responsibility in the social realm. . . . It was the distinctive contribution of the Hebrew prophets to proclaim that the two cannot be rent apart; that men ought to treat each other as created in the image of God, who challenges them to this task. (Fackenheim 1968, 189)

We should note that this responsibility that non-Jews share with Jews is grounded in the image of God. Curiously, however, Fackenheim is not discussing a natural morality, in which everyone has an inclination of the good to which they are directed or the limitations of their freedom. Instead, there is a vague notion of “awareness of the divine,” and it is an early indication that Fackenheim is not a proponent of natural law. Fackenheim then expands on the snares he mentioned earlier. He rejects the view that religion has no role in the social order and dismisses the kind of religion that is unconcerned with it. He notes, however, that this idea does not undermine the separation between

church and state, for there is nothing inherent to that split that suggests that the motivation for the social order cannot be religious. Indeed, Fackenheim warns against keeping the religious and social order completely separate from each other, for “one may question whether secularist morality can, for long, treat men as if created in the image of God, in Whom it does not believe; whether it can forever resist the temptation to reduce man from an end in himself to a mere means” (Fackenheim 1968, 190), obviously echoing Kant’s terminology in making the argument.

For Fackenheim, what makes the relation between religion and the social order complex is nothing less than the chasm between the divine and the human. The complexity can be seen in three ways: Because power is initially immoral, an effort must be made to attain indirect power (through influence); further, it is difficult to know how one would phrase the religious imperative, given the variation in situations. In other words, the wording needs to be complex enough to reject a natural law approach that takes certain laws as true in every circumstance. On the other hand, Fackenheim recognizes the need for specificity, since the “moral” conscience is “manifest” in what it “protests against,” so it cannot either be too vague (Fackenheim 1968, 191–92).

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The solution, according to Fackenheim—and this is a crucial point—is a “believing attitude.” The components of this attitude with respect to the will of God are, first, an emphasis that the will of God must be done in the world, as well as a resistance to the belief that God is unconcerned with the world. Further, the believing attitude means to “face up to the will of God . . . here and now,” meaning that the initiative must be constant; and it presupposes a seriousness, to the extent that if “the Divine image is violated even in a single human being, the kingdom of God on Earth is incomplete.” It also includes remembering that even our best efforts are human and that society and religion are judged by God; and finally, that the fate of the world is in God’s hand (Fackenheim 1968, 193–94).

But how does this solution correspond to the overarching problem and the complexities with which he begins this article? It stands to reason that the stress placed on God’s will in relation to the social order is parallel to the need to see others as ends, and thus prevents thinking of others as means. Thus, remembering that the social order is wanted by God underscores the purpose of addressing human concerns. The last component of a believing attitude seems to be correlated with the issue of power, inasmuch as it is imperative that we understand human limitations. Fackenheim’s discussion of God’s judgement, particularly in his reference to doctrine and belief, seems to preclude faith in universal principles, or natural law, which is problematic for him, as we have seen. By insisting on the seriousness of bringing prophetic religion to bear on the social order, and pointing to its constant

applicability, Fackenheim seems to be addressing the way the moral conscience manifests. That is to say, the concern of those who hold a believing attitude pertains to any specific situation, and at any moment, in which the divine image is threatened; those circumstances are not simply wrong in principle. I add that the way these components correspond to the complexities mentioned earlier is clearly open to interpretation.

Moving on to the role of Canada in this approach, I note that Fackenheim recognizes the changes that his experience in Canada has on his views. He says, for example, that he came from an “inferno of hate,” which created a need for “polemic,” but that he has undergone a change. In other words, his experience in Canada has created an environment where liberalism can be analyzed on the basis of what is *right* about it, and Judaism can face an internal critique (Fackenheim 1968, 7–8). More relevant

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for our purposes is the fact that, in his appendix to his book on the Bible, he acknowledges that his exposure to Christian Germans who want to study the Bible, which to him meant that they accepted responsibility for the past, has also had a bearing on his views (Fackenheim 1990, 103). Thus it is possible that he witnessed Christian “self-exposure” to the horror of the Holocaust, which is

a component of the *tikkun* that he sees as necessary for Christianity (Fackenheim 1982, 292). Ultimately that also forms the broader background for the question Fackenheim treats here, as I mentioned in my introduction.

A little more needs to be said about this, however, before we can study the approach of these two thinkers in relation to each other. Specifically, how does this incorporation of the prophetic ideal relate to Fackenheim’s post-Holocaust theology, which is behind perhaps his most famous contribution to Jewish thought, the 614th commandment, namely, the notion that a commandment comes out of Auschwitz and compels Jews not to let Hitler have a posthumous victory? What, then, is the relationship between this obligation and his perspective on our subject of study? I think the answer can be found in a brief reference about the separation of the social order and religion:

Forms of such divorce have existed in all ages. That they may exist in one and the same person has been terribly illustrated in our own time—by those Germans who thought it possible to be Nazis and Christians at once. (Fackenheim 1968, 189).

With this idea Fackenheim connects the task for Jews with an important section of his book *To Mend the World*. There, Fackenheim writes of three components of *tikkun* that the Jews require after the Holocaust. The first is the recovery of the Jewish tradition; the second is a recovery from the sickness

brought on by the Holocaust; and the third is the acceptance that these two are not complete and filled with risk. I want to focus on the second component of this *tikkun*, by which Fackenheim means a fear of the destructive capability of the Nazis. In light of that point, the fact that the Nazis separated the will of God from the social order is exactly what the Jewish endeavour resists. Fackenheim seems to make the same point with this statement:

After the holocaust, the Jewish people owe the whole world the duty of not encouraging its vices—in the case of the wicked, murderous instincts, in the case of good people, indifference mixed with hypocrisy—by continuing to tolerate powerlessness. (Fackenheim 1982, 304)

While this statement appears in connection with the land of Israel, the words seem to address the sickness from which Jews have to heal; and what Fackenheim does by bringing prophetic religion to bear on the social order is to protect those who are vulnerable to destruction. Thus, if he solves the problem he originally introduces by reconciling the divine will with the complexity of the human world, the *tikkun* of which he speaks elsewhere is the post-Holocaust Jewish task to engage in that reconciliation.

Returning to the components of a believing attitude, we will soon see that it is difficult to apply these principles in a practical way. All we can say from Fackenheim's perspective is that both Jews and Christians are bound by the will of God to promote the social order. However, that will seems to be formulated more as an imperative than as criteria with which to assess governments or organizations. We are, nevertheless, exhorted to hold the view that God wills this, that the terminology of how we express God's will has to be measured, and that we are held responsible for the implementation of God's will in this respect.

Analysis

Before we compare the two views in more detail, I should note that Novak and Fackenheim are responding to different problems. For Fackenheim, the issue is that what is religiously motivated has no bearing on society's acceptance of moral law, a point he makes in another context by reference to Kant (Fackenheim, 1973, 38); for Novak it is the question of how to recognize the state on a halakhic basis. To fill that gap, I will take a page out of the Talmud's many books and imagine what one thinker might respond to the other, based on other statements that each figure has made. For his part, Novak would agree that the Mosaic principles have no bearing on society at large without reference to the wisdom that underpins them, which is why the explanation for the norms has to be universal (Novak 2007, 64), but more specifically that means that there are ideas coming out of a covenanted community that could be used to explain why norms are in place. Fackenheim, on

the other hand, would agree with the notion of rational commandments, but I am not certain that would fulfil the prophetic religion of which he speaks.

Fackenheim, for his part, admits in his *Encounters Between Judaism and Modern Philosophy* that Judaism has no resistance to law followed by reason alone (Fackenheim 1973, 37–38). However, he throws doubt into the equation of the Noahide law and moral law, for those laws would not have been known specifically enough to have been written even by those to whom they had not been explicitly given, which is the talmudic criteria for those laws. That is to say, the specific nature of

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the laws prevents them from having a universal status (Fackenheim 1973, 38). Further, we have seen that he resists a natural law point of view. Finally, even Novak implies that the laws themselves are not sufficient. As I argued in my thesis, not unlike Maimonides, who sees the performance of the Noahide commandments as ideally based on a belief in revelation, Novak sees the norms of natural law that are not grounded in the *imago Dei* as insufficient.

A more fundamental difference between the two thinkers is the realm in which they propose their solution. Fackenheim begins with a philosophical problem and ends up with a halachic premise; Novak begins with a halachic problem and ends up with a philosophical premise. What I mean by that is as follows: As we have seen, Fackenheim looks at the question of the way a divine mandate bears on society from a Jewish philosophical point of view. And for Fackenheim, the only way to bridge the gap between “the religious and the social” is by holding a “believing attitude,” by which he means subscribing to the view that we are bound by God’s will, and constantly so. This can properly be described as an obligation, or as we saw earlier, a duty. For Novak, however, the original question is how one can relate to the state, which is the same as asking what would make it halachically permissible. The fact that Novak supplies us with the history of the halachic view of the participation in the state is proof that he treats the question in this realm. In his later works, however, the key determining factor for what makes a moral government is its belief in a God who underwrites human morality. The reason he gives for this necessity, however, is not halachic. The idea is not derived from Jewish law; it is discovered through philosophical reasoning.

The following critiques of these points of view correspond to where the two thinkers end up. For Novak, the question is how one is supposed to determine which organization is premised on a belief in God. Assuming they do not overtly violate any of the Noahide laws, if it is not mentioned

in their mandate, would one need to ask every member of such an organization or entity what they believe? Further, it is unusual that faith should be the determining factor since there is no parallel in Jewish law where one's finances or well-being is directly dependent on one's expressed beliefs. Are there higher standards for non-Jews? I will also make one point about the distinction Novak makes between secularity and secularism. There appears to be a category that meets neither possibility, namely, a state or entity that on the one hand does not subscribe to the view that humans go about their lives by reference to social construction but on the other hand limits the tradition that human beings use as the organizing principle to one covenantal tradition, meaning, to the exclusion of others. Stated differently, what would Novak say in the case of a Christian country or political organization?

For both thinkers the responsibility toward other human beings stems from their being made in the image of God.

For Fackenheim, the question stems from the fact that he does not offer the specificity that he says is necessary. How does one determine whether he or she could join an organization that promotes social order if none of the issues relating to God's will are addressed directly? For that matter, the believing attitude is not phrased casuistically, in the sense that there are no specific conditions that need to be met before one could determine whether the attitude is in place or if it matches his or her own attitude. Instead, Fackenheim's words are framed as a constant obligation. Thus the components of a believing attitude do not seem to do much for assessing one particular organization over the other. In sum, then, even Fackenheim's halachic language is not specific enough and is therefore difficult to apply. Finally, I also must address the concern that emerges from his "awareness of the divine": We have seen that for both thinkers the responsibility toward other human beings stems from their being made in the image of God. For Novak this was not always the case, inasmuch as in his earlier writings he bases the same obligation on human reason, as I show in my thesis. Nevertheless, he admits to it later on. At the same time, Novak says that arriving at this idea is not learned from reason, for he recognizes that the idea is not widely known; it comes rather via phenomenology, or the experience we have of other human beings as intending something beyond our senses.

Fackenheim, for his part, speaks about an awareness of the divine. But since he rejects natural law, which is premised on the idea that moral law is discoverable by reason, at least in part, it is unclear how one can arrive at the notion that his fellow human being is created in God's image. Particularly if the responsibility of human beings to engage in kindness is grounded by that awareness, in what way does one arrive at it? If it comes through the prophets, one could argue that in this age, many if not most have not heard their words and probably cannot name more than one prophet

anyway. A related question is whether we are obligated to, or are even able to, inform the members of society of the words of the prophets, the way Novak promotes the idea of teaching the Noahide laws in schools. And if Fackenheim does believe that Jews should support such initiatives, which interpretative tradition should be used to understand the words of the prophet, specifically when one encounters apparent disagreements between their messages?

Conclusion

In conclusion, although they address different issues, David Novak and Emil Fackenheim see no conflict in bringing a religious viewpoint to the social sphere. The former offers criteria for it, while the latter gives voice to the responsibility to do so. In this sense, the two approaches complement one another, inasmuch as Fackenheim expresses the obligation for Jews to promote social order while Novak formulates the components that need to be in place for Jews to do so. Ultimately, the approach of both thinkers presupposes a feeling of obligation based on a “prior, divine morality,” to use Novak’s terminology, or “an awareness of the divine,” to use Fackenheim’s. Indeed, without that awareness, the prognosis for society is quite bleak. For Novak, such countries become Hobbesian-type tyrannies; while, for Fackenheim, they are capable of far worse. ^

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