Dear Readers,

Thank you in advance for reading this. It is very much a (first) draft. The paper is part of a larger book project tentatively titled “What is Religious Freedom? The Case of Conversion in Israel and India.” The broad argument of the book is that it is not possible to divorce notions of religious freedom (and conversion as the epitome of this notion) from the realities, structures, and ideologies of particular sovereign nation states. While conversion controversies in Israel and India, as well as in the histories of Jewish and Indian nationalisms, may represent extreme cases of the difficulty of separating arguments about religious freedom from arguments about sovereign, national identity, the book contends that these more blatant cases can help us to observe some of the ways in which American and European conceptions of religious freedom are also bound to debates about national identity. The first part of the book is devoted to the Israel-India/Indian-Jewish nationalist comparison. The second part looks at how some of the issues encountered in the first part play out in the US and Europe. This paper is part of the second part of the book.

I very much look forward to our conversion. Thank you in advance for your thoughts, criticisms, and suggestions.

Leora
The Return of the Corporation:
Recent Israeli Conversion Cases and American Debates about Religious Freedom

Leora Batnitzky
Princeton University

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In July 2019, the Jerusalem Post reported that “In 2014, just nine inmates in Scotland’s penitentiaries were registered as Jewish. But… In 2017, inspectors from the Scottish Prison Service (SPS) called for an “urgent investigation” after almost £1 million was spent serving specially prepared kosher meals to more than 100 prisoners.” What accounted for this more than 400% increase in the Jewish population in Scotland’s jails and subsequent requests for kosher meals? You might assume that the answer contains a salacious story about the conviction of a large number of religiously observant Jewish criminals in Scotland. But this is not the case. Instead, at least according to the Post, the increase can be attributed to the influence of popular culture and specifically the third season of Netflix’s Orange is the New Black in which one of the characters, known as “black Cindy,” imprisoned in the fictional Litchfield penitentiary converts to Judaism in order to receive kosher meals, which, apparently are better than regular prison food. As reported by the Jerusalem Post, “the following year after season three of the series, in which Cindy converts to get better dinners and ends up embracing her newfound faith, that number [of Jewish prisoners in Scotland’s jails] shot up. …To limit the spread of the kosher noshing behind bars, the SPS made the process of applying for kosher diets on religious grounds more stringent, and have since seen a drop in numbers.”

For many of the Jerusalem Post’s readers, this story was likely amusing. Indeed, the report refers to an advertising campaign for Levy’s “real Jewish rye” bread that ran from 1961-1970s: “You don’t have to be Jewish to love Levy’s.” Over many years, these ads featured, among others, photos of a young African American boy, an alter boy, a Native American man, an Asian American man and a Catholic woman smiling while eating Levy’s rye bread. In the Jerusalem Post’s words: “You don’t have to be Jewish to love Levy’s, but you do have to be Jewish to get eats these days in the Scottish prison system.”

As the Jerusalem Post and the Scotland’s Prison Service both imply, the issue at stake in both real life and on television is food and only food. But without denying the genuine significance of food, both for being in prison and for being Jewish, I want to suggest that Cindy’s conversion in season three’s Orange is the New Black, provides us an important jumping off point for recognizing some of the connections between recent Israeli conversion cases and debates about religious freedom in the United States. The story about increased requests for kosher food in Scotland’s prisons both presumes and implies that “strictly religious grounds” represent a realm that can be distinctively separated from “non-religious grounds.” Again, in the Post’s words, “To limit the spread of the kosher noshing behind bars, the SPS made the process of applying for kosher diets on religious grounds more stringent, and have since seen a drop in numbers.” But what are “religious,” as opposed to “non-religious” grounds? And who has the authority to decide the answer to this question?

Leaving Scotland aside, let’s turn back to the United States to try to answer this question. In Cindy’s case, it is a prison rabbi who has the right to decide whether Cindy can qualify as Jewish. In an episode entitled “Where my Dreidel at,” Cindy initially joins many prisoners in trying to convince the rabbi that she is in fact Jewish and thereby deserving of kosher meals in
prison. After Cindy describes herself by way of thinly veiled reference to the movies Annie Hall and Yentel, the rabbi tells her that she has confused “cultural Judaism with committed Jewish belief.” In subsequent episodes, Cindy then takes it upon herself to find a Jewish prisoner who can teach her about Judaism. She finds two. After studying with them, she arranges to meet the rabbi again with her two Jewish friends, telling the rabbi that with him as the third she now has a beit din.

On the face of it, the rabbi accepts Cindy’s request to convert because of her religious sincerity. In contrast to her prior requests, and the requests of other inmates, Cindy has successfully expressed her genuine religious commitment. This religious commitment is not politically or instrumentally motivated. For this reason, Cindy is entitled to kosher food. The legal and intellectual conceit here is that by defining Cindy’s desire to convert as strictly religious, Cindy can receive a state, and thereby a political, advantage. In other words, it is only because Cindy’s religious identity can be described in wholly non-political terms that she qualifies for what is in effect a political benefit—kosher food in federal prison.

Many proponents of religious freedom in the US would likely contest my claim that this is a political benefit. After all, the usual story goes, the whole point of religious freedom is that it is not political but religious. As long as the conversion is a sincere, strictly religious one, and not one that is politically or otherwise motivated, any benefits that follow are not in fact benefits but rather rights. This is of course a standard American story about religious freedom: that it is a right to individual conviction (and in the case of conversion to change one’s conviction) wholly separate from the politics of the modern nation state.

On this conception of religious freedom, the Israeli state’s entanglement with conversion to Judaism cannot but seem to be the polar opposite of religious freedom. After all, the fact that
conversion to Judaism is tied directly to state benefits, including first and foremost citizenship, seems to suggest that, if anything, Israel can only serve as a counterexample to American free exercise and disestablishment. We could extend this contrast to American and Israeli Jewish identity as well. As Cindy’s example shows, in the United States the state protects the right of any individual to choose to be Jewish. Conversion to Judaism is simply the individual’s freely chosen religious choice, so long as that person is sincere. In contrast, in Israel the state actually prevents many individuals from converting to Judaism. In Israel, it is not the individual who chooses (or is free) to convert. Rather, the state decides who can and can’t be a Jew.

It is undeniable that there is significant truth to the stark contrast I have just laid out. But it is the task of this paper to show that this stark contrast is not the whole story and that those interested in religious freedom, whether in Israel, the United States or around the world, might benefit from a comparison between recent conversion cases in Israel and debates about religious freedom in the United States. As I will argue below, there is more of American style religious freedom than meets the eye in recent Israeli conversion cases as well as more religious establishment than meets the eye in recent debates about religious freedom the United States. More specifically, what recent Israeli conversion cases and recent debates about religious freedom in the United States share is the emergence of the corporate religious body as both the product and competitor of the nation state. To makes this argument, the paper has three parts. In part one I briefly consider current American debates about corporations and contracts as they may relate to pre-modern Jewish history and the development of Israel’s state Rabbinate. Part two turns to recent conversion cases in Israel in which we arguably see the reemergence of the pre-modern Jewish corporation, the kehillah. Part three focuses on the intimate interconnections between the history of disestablishment of religion and the subsequent establishment of religious
corporations in the US for thinking about the scope of religious freedom in the US. Finally, the conclusion suggests that the comparison between recent Israeli conversion cases and recent US religious freedom cases allows us to appreciate that religious freedom is not a free-standing concept or right but always involves a relationship to politics, collectives, and the state.

**Part One: The Eclipse of the Corporation**

In an article on corporate finance and legal economics in the United States, the legal scholar Margaret M. Blair urges “scholars…[to] keep the corporate persona function in mind in evaluating corporate personhood theories, and return to a theory that sees corporations as more than a bundle of contracts.”2 While contemporary debates about personhood status for corporations may appear recent, Blair reminds us that historically the corporation has played a long role in American history and an even longer role in pre-modern history more generally:

Centuries ago, courts recognized that an institution like a church or university could hold property, sue and be sued, and enter into contracts in its own name, apart from any of the individuals who were members or affiliated with the institution, provided that the institution had a charter from the King or Parliament, or possibly the Pope….Organizations that had these features were called ‘corporations,’ from the Latin word corpus, meaning body, because the law recognized that the group of people who formed the corporation could act as one body or one legal person.3

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2 Margaret M. Blair, “Corporate Personhood and the Corporate Persona,” *University of Illinois Law Review* 3 (2013): 785-820, citation at 785
3 Ibid., 788-789
American legal scholars have debated the nature of corporate personhood since the 19th century and by the end of that century there was general consensus that the corporation was a “real entity,” meaning that it was more than the sum of the individuals and contracts that bound the corporation together.

According to Blair, it was only in the 1980s that there was a shift in legal thinking about corporations:

Once the real entity theory was widely accepted, and large corporations had been legitimized in the law, it seemed that there was no further need to debate the question of their nature. This remained true until the 1980s, when legal scholars began turning to economic arguments to provide new interpretations and understandings of legal questions. In so doing, they took up the argument that corporations were nothing more than contractual devices to allow a group of people to work together in a common enterprise. Under the new contractual theory, corporations were said to be mere “nexuses” of contracts. This position was adopted in the late twentieth century by scholars of law and economics because, among other things, it justified the use of a simple model of corporations as bundles of assets owned by shareholders, in which directors and managers were “agents” of shareholders.  

For Blair, this shift is a mistake for it fails to take account one of the central features of corporate personhood: continuity in contracts and property ownership, asset partitioning, and self-governance by boards—which make a corporation much more than an aggregate of its shareholders. In her words:

4 Ibid, 808
While the role of shareholders in corporations is not trivial—without financial capital, few business enterprises could get out of the starting block—it is the efforts and vision of the entrepreneurs, managers, and key employees, as well as business practices that cultivate innovation and collaboration in teams, that create corporations whose value greatly exceeds the value of the financial capital that has been put in them.\(^5\)

In part three of this paper, I will consider the connection between the eclipse of the corporation in US legal thinking and contemporary debates about religious freedom. In the remainder of this section, I turn to the ways in which Blair’s comments regarding the corporation bear upon the Israeli Rabbinate’s relation to conversion to Judaism.

In making her arguments, Blair’s concern is with the “rights, protections, remedies, and responsibilities [of] corporations” and “the effectiveness of corporations as business organizations.” But while very far from her purposes, Blair makes a number of statements that sum up what are arguably the defining characteristics of medieval and early modern Jewish history. For instance, she writes:

another important purpose of the corporate form was self-governance, among a group of people. Charters granted to municipalities in the Middle Ages, for example, explicitly provided for self-governance. For the purposes of their external relations, the incorporated group was able to act as a single individual in buying, selling, or holding property or entering into contracts. Within the group, they had to work out their own rules of governance and resolve their own disputes.\(^6\)

\(^5\) Ibid, 814
\(^6\) Ibid, 790
As is well-known to students of Jewish history, the corporate status of the pre-modern Jewish community was its decisive feature. And the dissolution of the corporate Jewish community is arguably the crucial characteristic of modern Jewish history and the basis of debates about modern Jewish identity.  

A brief look at the decline of the corporate Jewish community and the rise of the modern nation state shows some striking conceptual parallels to Blair’s discussion of the much shorter history of corporate America. Jewish emancipation (in theory if not always in practice) granted Jewish admission into the social contract of the modern nation state but it also came at the cost of the benefits of corporate life that Blair mentions—shared property, asset partitioning and self-governance—and more. As early as 1928, Salo Baron provided an important counter-narrative to a wholly triumphalist conception of the political rights and freedoms gained by Jewish emancipation in distinction to the political paucity of the pre-modern corporate community. In Baron’s words:

> Complex, isolated, in a sense of foreign, it [the Jewish community] was left more severely alone by the State than most other corporations. Thus the Jewish community of pre-Revolutionary days had more competence over its members than the modern Federal, State, and Municipal governments combined. Education, administration of justice between Jew and Jew, taxation for communal and State purposes, health, markets, public order, were all within the jurisdiction of the community-corporation…. Statute was reinforced by religious, supernatural sanctions as well as by coercive public opinions within the group. For example, a Jew put in *Cherem* by a Jewish courts was practically a lost man,

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and the Cherem was a fairly common means of imposing the will of the community on the individual. All this self-governing apparatus disappeared, of course, when the Revolution brought ‘equal rights’ to European Jewry.\footnote{Salo Baron, “Ghetto and Emancipation,” \textit{The Menorah Journal} 14 (1928): 519.}

Put into the admittedly narrower terms of Blair’s discussion of the history of corporations in the US, we might say that a contractual conception (and reality) of Jewish political life came to replace a corporate conception (and reality) of Jewish communal life. As Baron points out, the political functions of the pre-modern Jewish community, which included the administration of justice between Jew and Jew and the enforcement of sanctions on its members, were the province of Jewish law and were often practically executed by and always theoretically justified by rabbinic authorities. In both eastern and western Europe, the eventual (if not entirely successful) acquisition of individual rights for Jews ultimately brought about an end to corporate Jewish life. Whereas the pre-modern Jewish corporate body was more than the sum of its individual members, modern Jewish political life is no more than the sum of its members.

The contractual character of collective Jewish life is as pronounced in Israel as it is in the US, albeit in a different way. Pre-modern Jewish corporations were multiple and diverse; indeed, the dispersion of communities and their placement in widely divergent contexts characterizes Jewish diasporic existence. Zionism, in its varied forms, imagined an ingathering of the exiles into one, singular Jewish community. This is not to deny that most forms of Zionism either affirmed or at least tolerated internal Jewish diversity. But in political terms, the return to Jewish sovereignty meant that the state would, as modern, sovereign states do, enforce one uniform and centralized system of law for each of its individual citizens. To state the
obvious, just as is the case with any modern nation state committed to the rule of law, a social contract, and not a corporate structure, undergirds the Israeli state.\(^9\)

One might immediately object to this characterization by pointing out that even if the Israeli state is better understood under a (social) contractual model rather than a corporate one, Israeli’s personal law system, which leaves matters of personal status, including marriage, divorce, and burial, to religious bodies, remains, for better or for worse, within a corporate model. But within the broader context of Jewish history, this objection does not hold because the establishment of the state of Israel brought an end to corporate Jewish life, not just in terms of the emergence of its secular legal system but also in terms of the state sponsored system of personal law. Historically, Jewish law was highly local and variable. Different communities often had different laws and customs. Gone from both the legal systems of the state of Israel and its state backed Rabbinate is what had been a pre-modern history of legal pluralism. Historically, legal pluralism had defined not just a particular Jewish corporation’s external relations, that is, the relationship to a non-Jewish legal system, but also the internal Jewish relationship between different Jewish corporations.

As Alexander Kaye has so brilliantly shown, the religious Zionists who would come to lead the Israeli Rabbinate internalized the preference for legal centrism that was adopted by the

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\(^9\) The social contractual view is reflected in Israel’s Declaration of Independence “The state of Israel will promote the development of the country for the benefit of all its inhabitants; will be based on precepts of liberty, justice and peace taught by the Hebrew prophets; will uphold the full social and political equality of all its citizens without distinction of race, creed or sex; will guarantee full freedom of conscience, worship, education and culture...” (https://www.knesset.gov.il/docs/eng/megilat_eng.htm). The enormous subjects of the relationship of the recent Nation State Law to the Declaration as well as the much broader questions of unequal treatment of Jews within Israel and of non-Jewish citizens of Israel are beyond the scope of this paper. My claim is not that the reality of the state reflects a social contractual model but rather that the social contract is broadly speaking the conceptual model for the state, as the social contract model is for other nation states that define themselves in terms of the rule of law. For a very helpful recent treatment of Israel’s history of uneven application of rights of minorities, see David Sorkin *Jewish Emancipation Across Five Centuries* (Princeton: Princeton University Press, 2019).
state of Israel (and most other modern nation states). In the decades leading up to the establishment of the state of Israel, many religious Zionists were advocates of legal pluralism. As is well-known, post-biblical, pre-modern Jewish political thought recognized two kinds of law: rabbinic law and “the law of the king” (din ha-malkhut). From this perspective, various religious Zionists argued, the centralized, secular law of the state of Israel would be analogous to the king’s law. In many ways, legal pluralism would have seemed the obvious route to go from a traditionalist perspective. Yet, as Kaye argues, Rabbi Isaac Herzog, the first Ashkenazic chief rabbi of the state of Israel, played a crucial role in shifting the legal philosophy of religious Zionism away from legal pluralism and toward legal centrism. Before coming to Palestine, Herzog, who was born and raised in England, had been the chief rabbi of Ireland where he published on legal and political matters of Jewish and general import. His views on the sovereignty of Jewish law owed as much to European debates about legal positivism as to Jewish sources. Herzog, in fact, rejected legal pluralism on the basis of an analogy between Jewish law and English law. As he put it: “it is inconceivable that the laws of the Torah should allow for two parallel authorities – like the courts of law and the courts of equity, the latter stemming from the authority of royal law, that operated in the past in England.” As Kaye shows, before the state was established, Herzog advocated for a clause in the constitution guaranteeing that all the laws of the state would be based on the Torah. No such clause emerged, and neither did a

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11 For a discussion of the relation between these two types of law see Menachem Lorberbaum, Politics and the Limits of Law: Secularizing the Political in Medieval Jewish Thought (Palo Alto, CA.: Stanford University Press, 2001).
12 Kaye, The Invention of Jewish Theocracy, chapter 2.
constitution. Although given jurisdiction only over personal law, religious Zionists continued to centralize their authority by standardizing rabbinic courts and procedures.

In the early years of the state, matters of personal status with regard to conversion were not a high priority and were dealt with locally, as they had been in mandate Palestine. In 1956-1957, however, controversy erupted because approximately 10% percentage of immigrants to Israel from Poland and Russia were deemed not Jewish by birth. Mafdal, the religious nationalist party, insisted that these non-Jews by birth had to have a religious conversion if they were to be registered as Jews. But Ben-Gurion’s government maintained that Jewish status was a matter of self-identification. If someone came to the state of Israel and wanted to be registered as a Jew, that person should be registered as a Jew. As will be discussed briefly in the next section, two controversial and famous Israeli Supreme Court cases shifted what had been the default self-identification option for both purposes of registration and conversion. This also ultimately led to the centralization of the process of conversion under the state sponsored Israeli Rabbinate. Rabbi Sholom Goren had at one time been an advocate of legal pluralism. But when he became Chief Ashkenazic Rabbi of Israel in 1972, after having headed the Rabbinate for the IDF from 1948-1968, he established what remain today’s centralized special training institutes and courts for conversion. The recent Israeli conversion cases to which we now turn must be understood within the context of this historically unprecedented Israeli centralized legal system for conversion.

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15 In an especially insightful article, Michal Kravel-Tovi convincingly argues that in response to the infusion of immigrants from the former Soviet Union, “the State of Israel has endorsed a pro-conversion policy aimed specifically at this population of new citizen” and that “the Foucauldian concept of biopolitics” can “explain the state conversion endeavor.” By this Kravel-Tovi means that the state of Israel uses “conversion as a field of policy through which the nation-state attempts to control the size and composition of its population.” Michal Kravel-Tovi, “‘National mission’: Biopolitics, non-Jewish immigration and Jewish conversion policy in contemporary Israel,” Ethnic and Racial Studies 35:4: 737–756, citation at 738. See also Michal Kravel-Tovi’s excellent study, When the State Winks: The Performance of Jewish Conversion in Israel (New York: Columbia University Press, 2017).
Part Two: The Return of the Corporation: Recent Israeli Conversion Cases

By now, Israel’s supreme court has considered the relationship between conversion to Judaism and Israel’s Law of Return for close to 70 years. Most famously, in the 1962 case Rufeisen v. Minister of the Interior, otherwise known as the brother Daniel case, the court ruled that Oswald Rufeisen, having converted to Catholicism, though still identifying as a Jew, did not qualify for immigration under the Law of Return. The 1950 Law of Return stated that “Every Jew has the right to come to this country as an oleh” but did not define who counted as a Jew. Partially in response to the Rufeisen ruling, the Law of Return was amended in 1970 to include a definition of who counted as a Jews: “anyone born of a Jewish mother or who has become converted to Judaism and who is not a member of another religion.” As many have noted, the revised (and current) Law of return has only further complicated the question of who counts as a Jew. This is because the law does not define what it means to have become converted. At least for the legislature, this ambiguity was purposeful. As Y.S. Shapira, the Minister of Justice who offered draft amendments to the Law of Return to the Knesset, stressed “There are many Jewish communities…. We say therefore that an individual who comes with a conversion certificate of any Jewish community, provided that his is not a member of another religion, will be accepted as a Jew.”

Not surprisingly, since the 1970s revision, the Israeli Rabbinate, along with other interested parties, has insisted that a convert to Judaism for the purposes of the Law of Return must adhere to the its standards of conversion. The court has repeatedly stated that it is ultimately up to the legislature, i.e. the Knesset, to define what “has become converted” means.

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18 Knesset Proceedings, vol. 56, at 781
The history of the government’s attempts and failures at reaching a consensus on this issue suggests that resolution remains unlikely for the foreseeable future. In the meantime, from its own point of view, the court has consistently tried to outline a fairly minimalist position in its decisions about conversion and the Law of Return by limiting itself to rulings regarding immigration and registration in Israel’s population registry. In a 1995 case, Pessaro v. Minister of the Interior, the court ruled that the Israeli Rabbinate’s jurisdiction over conversions to Judaism “applies only to subjects that are within the jurisdictions of the religious courts.” As such, the court has continually affirmed the authority of the Israeli Rabbinate to determine matters of personal status, while nevertheless insisting that the relation of conversion to the Law of Return is a matter for the court to decide until a political solution presents itself.

One practical result of this division of labor is that a person who converts to Judaism and gains citizenship in Israel under the Law of Return may or may not be considered Jewish by the Israeli Rabbinate. If the Rabbinate finds a proselyte’s conversion invalid according to its criteria, the proselyte still remains a full Jewish citizen of the state. However, unless he or she converts (again) according to the Rabbinate’s criteria, he or she would not be allowed to marry another Jew in Israel or, in the case of a woman, have her future children counted as Jewish by the Rabbinate.

This is the general backdrop for the cases that I turn to in this section. In Rodriguez-Tushbeim v. Minister of the Interior from 2005 and Rogachova v. Ministry of the Interior from 2016, the court further considered the scope of the Israeli Rabbinate’s authority over conversions for the purposes of the Law of Return. Whereas previous cases focused on the rabbinate’s

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19 HCJ 1031/93 Pessaro (Goldstein) v. Minister of the Interior [1995] 49 (4) 661
20 These cases have been made available to the English speaking public by Cardozo’s Israel Supreme Court Project (https://versa.cardozo.yu.edu/opinions)/
authority over conversions of immigrants *coming from outside* of Israel, these two cases considered the Rabbinate’s authority over conversions of people who already resided in or had once resided in Israel. In both cases, the Ministry of Interior rejected the applications of such proselytes for citizenship under the law return. The Ministry of the Interior allowed that conversions that take place outside of Israel may be adequate for the purposes of the Law of Return, but maintained that once a candidate for conversion resides, or has resided, in Israel, only conversions that take place under the auspices of the state conversion system are valid. In both cases, the courted has rejected the state’s reasoning.

These cases, and especially *Rogachova*, may well turn out to have serious implications most obviously for debates about who is a Jew in Israel as well as the Law of Return. Neither of these important topics, however, are not the main concern of this paper. Instead, our focus is on the ways in which these cases have brought back the pre-modern Jewish corporation into Israeli political and legal life. As we will see, the return of the pre-modern Jewish corporation is both a challenge to and a product of the Israeli state.

Let me begin with the basic facts and rulings of *Rodriguez-Tushbeim v. Minister of the Interior* from 2005 and *Rogachova v. Ministry of the Interior* from 2016. In *Rodriguez-Tushbeim*, the petitioners were non-Jewish individuals who lawfully came to Israel where they each resided for a period of time. Each of the petitioners engaged in Jewish learning while in Israel but they each left Israel and underwent conversions abroad within either Reform or Conservative frameworks. Having converted to Judaism in the diaspora, they applied to the Ministry of the Interior to be recognized as Jews under the Law of Return. In an earlier iteration of the case (*Naamat v. Minister of the Interior*), the Ministry of the Interior rejected the
petitioners’ applications since the petitioners had previously resided in Israel. Arguing that there is only one Jewish community in Israel, supervised by the Chief Rabbinate, the Ministry of the Interior maintained that a conversion under any other auspice was invalid. In *Rodriguez-Tushbeim*, the Ministry of the Interior revised its argument. Whereas previously it rejected the petitioners’ conversions on the basis of an argument about the Jewish community they wished to join, now the Ministry of the Interior rejected the petitioners’ conversions because the petitioners had not become a part of the Jewish community under whose auspices they had converted. The court rejected both of these arguments, claiming, in both cases, that according to the Law of Return, there is no requirement that converts join the particular communities under whose sponsorship they convert but only that a convert join a Jewish community. As then President A. Barak put it:

> Whereas we accept the fundamental approach of the state that conversion should be performed within the framework of a recognized Jewish community by the religious organs of the community that are authorized for this purpose, the conclusion that the state derives from this approach—recognizing only a conversion of an individual who wishes to join the community and become integrated in it—is totally unacceptable…. Why is it insufficient for an individual who underwent a conversion process to wish to join another recognized Jewish community that is outside Israel and from there to immigrate to Israel? And why should a conversion that was made in a recognized Jewish community not be recognized if the convert wishes to join the Jewish people who live in Israel? Moreover, why should recognition be denied to someone who already lives

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21 HCJ 5070/95 *Naamat v. Minister of the Interior* [2002] IsrSC 56(2) 49(4) 661
lawfully in Israel and whose sole desire is to ensure recognition of the fact that he has joined the Jewish people living in the land of Israel?\textsuperscript{22}

The court’s decision in \textit{Rogachova v. Ministry of the Interior} from 2016 is argued along the same lines as \textit{Rodriguez-Tushbeim}. The specifics of the case, however, are far more significant for the future of conversion debates in Israel. Whereas \textit{Rodriguez-Tushbeim} was about the validity of conversions that took place outside of the state of Israel while the proselyte was living in or had lived in Israel, \textit{Rogachova v. Ministry of the Interior} considers conversions that took place in Israel under the auspices of Haredi (ultra-orthodox) courts. President Naor sums up the court’s reasoning as follows: “The question of the Law of Return to converts who were living in Israel prior to their conversion has already been addressed in \textit{Rodriguez-Tushbeim v. Minister of the Interior}. The fundamental decision in that case still holds: the Law of Return applies to a person who came to Israel, and converted while living lawfully in Israel. There is no justification for departing from that rule.”\textsuperscript{23}

This ruling is genuinely remarkable, for it seems to dislodge what has been until now the Chief Rabbinate’s monopoly over conversions in Israel. The court explicitly states that when it comes to the Law of Return the state does not have a monopoly over conversion: “Recognition of conversion for the purposes of the Law of Return is a primary arrangement. It reflects the general policy of the State of Israel on an issue that lies at the heart of the justification for the existence of the State, and touches upon fundamental questions that go to the very root of Israeli society…. For these reasons, I [President Naor] do not think that the residual power of the


\textsuperscript{23} HCJ 7625/06 \textit{Rogachova v. Ministry of the Interior} [2016] IsrSC at https://versa.cardozo.yu.edu/opinions/rogachova-v-ministry-interior
government enables it to determine that only conversion in the framework of the state conversion system is conversion under the Law of Return.”

As should be clear from the first part of this paper, the court’s position reflects a position more consistent with Jewish history than with what is the historical anomaly of legal centralization under the Israeli Rabbinate. Two points are especially relevant. First, the court continually maintains that there is not one Jewish community but many Jewish communities. Referring to Naamat v. Minister of the Interior, President Naor affirms then President Barak’s contention that “the conception of the Jews as a single religious community reflects a ‘Mandatory-colonialist approach’. ” Second, the court nevertheless affirms the authority of the Israeli Rabbinate, despite its rejection of its particular authority when it comes to conversions and the Law of Return. The court’s insistence on multiple, legitimate Jewish communities does not undermine the Rabbinate’s authority, though it does deny the Rabbinate sole authority. For Naor, the Israeli Rabbinate represents one of many recognized communities. Here we need to emphasize “many” as well as “recognized.” There may be a plurality of Jewish communities, the court suggests, but these communities must be recognized ones: “From the purpose of the Law – as well as its language, as explained above – it emerges that the term ‘has become converted’ in the Law of Return embodies an objective criterion of public recognition of the process of conversion. What is that criterion? The criterion that I propose to my colleagues is the very same criterion that this Court adopted in relation to recognizing a conversion that was conducted abroad – the criterion of the recognized Jewish community.”

24 Ibid., at 39.
26 Rogachova v. Ministry of the Interior, at 34.
Yet while consistent with pre-modern Jewish history, we should not read Rogachova as a return to pre-modern Jewish history. At least in so far as the court understands it, this decision is not just consistent with but necessitated by the basic tenets of statist Zionism. Recognition of multiple corporate Jewish communities is not a return to diasporic Judaism either in intention or in effect. This is borne out to the extent that this ruling is consistent with the history of the court’s early decisions about which government authority has the right to determine a person’s Jewish status. And of course the state’s recognition of multiple communities is restricted to questions of personal status. The state still reserves the right to its own determination when it comes to the law of return.

At the same time, although it allows for the reemergence of the kehillah, the court continually affirms the authority of the Israeli rabbinic not just in statist terms but in terms that are immediately recognizable to the modern discourse of religious freedom. In President Naor’s words, “it appears indisputable that the state has the right to prevent abuse of conversion and not

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27 Above I mentioned the Brother Daniel case as one impetus for changing the Law of Return. Another was the well-known Shalit case of 1970 (HCJ 58/68 Shalit v. Minister of the Interior [1970] IsrSC 23(2) 477). For our purposes, it is not necessary to get into the details of that case except to note a similar line of reasoning expressed by Justice Kister: “As emerges from the definition itself of the Jewish nation, the term ‘Jew’ is according to modern notions both a national and a religious concept, the two being indivisible. Belonging to the Jewish people cannot be separated from belonging to the Jewish religion. Affiliation to the people is affected by conversion. I am not concerned here with the detailed laws of conversion but with what is expected of a person who desires to join the Jewish people as an inseparable part thereof…. it will be better not to search after the definitions but to quote from the book of Ruth… Ruth’s desire sprang from the depths of her soul: ‘Whither thou goest, I will go; and where thou lodgest, I will lodge; they people shall be my people and thy God my God. Where thou diest, will I die and there I will be buried...’” (115-116). Here Kister echoes Ben Gurion’s early dismissal of conversion rituals by way of reference to Ruth: “We have one more well-known instance of this in the Bible: Bo’az and Ruth... It doesn’t say she [Ruth] immersed herself in a ritual bath,” as quoted in Netanel Fisher, “A Jewish State? Controversial Conversions and the Dispute Over Israel’s Jewish Character” Contemporary Jewry 3:33 (2013), 217-240, at 225. President Naor in Rogachova expresses a similar view when he writes: “The concept of conversion therein does not refer exclusively to the private, religious act. The intention is not to a person’s personal recognition, which is a matter between himself and his God. Conversion in the context of the Law of Return is a public-civic act: by virtue thereof, a person becomes affiliated to the Jewish people, and by virtue thereof he acquires the right of Return and the right to citizenship. From this it transpires that a certain degree of oversight of the recognition of conversion is required (see: Pessaro v. Minister of the Interior [2], at p. 687; Naamat v. Minister of the Interior [3], at p. 753; Makrina v. Minister of the Interior [4], at p. 746.” Justice Hendel qualifies Naor’s claim in Rogachova at 108.
to grant rights by virtue of Return to a person whose conversion is not sincere.”

In Rogachova, the issue of “sincerity” is referred to thirteen times. In a 2014 case, the Supreme Court supported the annulment of a conversion by the Special Conversion Court on the grounds of the convert’s “insincerity,” which it likened to fraud. “Sincerity” is arguably not central to historical Jewish conceptions of conversion. And the annulment of conversion on the basis of insincerity as well as the annulment of conversion more generally is rejected by the Talmud, Maimonides, and Joseph Caro, among other sources. All agree that conversion to Judaism is irreversible. Once someone has converted to Judaism, even if they go back to their old habits and even if their initial motives are proven suspect, the person remains a Jew, albeit a bad one.

In contrast to the relative paucity of concern with “sincerity” in historical Jewish conceptions of conversion, “sincerity” is a core feature of American debates about religious freedom. As we already saw in our brief discussion of Cindy’s conversion in “Orange is the New Black,” and as we will see in the next section, “sincerity” has long been a prerequisite for religious accommodation in US courts. As Laura Dudley Jenkins and others have shown, “sincerity narratives” mark controversies about conversion around the world by indicating whose conversion should count and whose should not. Countries in which conversions are contested

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29 HCJ 5444/13 Yonit Erez v. The Special Conversion Court (December 17, 2014).
30 Shaye Cohen concisely describes the conversion ceremony inscribed in the Babylonian Talmud in the following way: “Conversion’ is understood primarily in terms of enfranchisement. The potential convert is asked: ‘Why have you decided to approach (us) to be converted? Do you not know that Israel at this time is pained, oppressed, harassed and torn, and that afflictions come upon them?’ If the candidate says, ‘I know and am unworthy,’ he is accepted and is given instruction in ‘a few of the light commandments and a few of the severe commandments.’ At the end of the catechism, he is circumcised and becomes ‘like an Israelite in all respects.’…” What is missing…is any association of enfranchisement with a change in belief or a change of spirituality.” The Beginnings of Jewishness: Boundaries, Varieties, Uncertainties (Berkeley: University of California Press, 1999), 237-238. This issue of annulment is obviously a very large topic beyond the scope of this paper. Some helpful material on this includes Menachem Finkelstein Conversion: Halakhah and Practice (Ramat-Gan: Bar-Ilan University Press, 2006) 545–648. Zvi Zohar and Avraham Sagi, Conversion to Judaism and the Meaning of Jewish Identity (Jerusalem: Bialek Institute and Shalom Hartman Institute, 1994). (Hebrew)
31 Yevamot 47b; Mishneh Torah, Hilkhot Issure Biah 13.17; Shulhan Arukh, Yoreh Deah 268:12
according to a sincerity criterion include Egypt, India, and Pakistan.\textsuperscript{32} Even when states ostensibly reject “westernized” and individualized views of religion, the emphasis on sincerity often reflects the influence and internalization of American views of religious freedom as they were adumbrated by Eleanor Roosevelt in the Universal Declaration of Human Rights.\textsuperscript{33} Most broadly, sincerity narratives exhibit an historically Protestant sensibility in which the inner life of the individual considered definitive for defining something as “religious.”

While these are large topics very much beyond the scope of this paper, we see here that the Israeli supreme court’s and the Israeli Rabbinate’s shared emphasis on sincerity and fraud in conversion have more in common with US conceptions of religious freedom than they do with Judaism historically understood. It is in this sense that recent Israeli conversion cases have more of American style religious freedom than meets the eye. We turn now in part three to consider the return not just of the corporation but of the religious corporation in US debates about religious freedom.

**Part Three: The Return of the Corporation: Recent Debates about American Religious Freedom**

Most Americans who read the newspaper are aware that corporate personhood has become a key area of contention in American debates about religious freedom. Most well-known perhaps is the 2014 decision in Burwell v. Hobby Lobby, in which the government sought to compel Hobby Lobby, which describes itself as “the largest privately owned arts-and-


crafts retailer in the world,” to comply with the contraceptive mandate of the Affordable Care Act (ACA). Mardel and Conestoga Wood Specialties joined Hobby Lobby in demanding exemption from the contraceptive mandate, a possibility included in the ACA for “religious employers.” Hobby Lobby’s request for exemption was made with reference to the 1993 Religious Freedom Restoration Act (RFRA) which states that the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” and that the “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance with a compelling government interest and (2) is the least restrictive means of furthering that compelling governmental interest.” The court ruled in favor of Hobby Lobby and the two other plaintiffs by accepting the plaintiff’s twofold argument that (1) Hobby Lobby is a person protected by RFRA and that (2) that submitting to the contraceptive mandate would be a religious burden since the plaintiffs saw this as a “complicity with evil.” The four dissenting opinions rejected both of these arguments. In keeping with our brief discussion of the role of “sincerity” in recent Israeli conversion cases, the Supreme Court stated unequivocally that no one disputed the sincerity of the plaintiffs’ religious beliefs. Nevertheless, Justice Ginsburg ended her dissent by stating that “There is an overriding interest...in keeping the courts ‘out of the business of evaluating the relative merits of differing religious claims’...or the sincerity with which an asserted religious belief is held.”

Much can be said about the question of how courts determine what counts as a religious, as opposed to another kind of, burden as well as the larger related question of what it means for “religion” continues to count as a special category in American law. As Winnifred Fallers

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34 https://www.law.cornell.edu/supremecourt/text/13-354
35 https://www.law.cornell.edu/supremecourt/text/13-354 at 34
Sullivan has argued, there is a certain paradox if not impossibility of religious freedom in the US since “Courts need some way of deciding what counts as religion if they are to enforce these laws.” But how can they do this “without setting up a legal hierarchy of religious orthodoxy? And who is legally and constitutionally qualified to make such judgments?”

Focusing on this aspect of the Hobby Lobby Case, that is, on Hobby Lobby’s claim that it was subject to a specifically religious burden, would be to focus on the free-exercise component of the first amendment. This is an important subject, one which I alluded to in my opening discussion of Cindy’s conversion in “Orange is the New Black.” and a topic to which I’ll return in the conclusion of this paper. Here, however, I would like to focus on the meaning of the court’s acceptance of Hobby Lobby’s position that it, the corporation, is a person protected by RFRA.

The notion that a corporation is a religious person (and therefore deserving of protection under RFRA) may strike us as odd for a number of reasons. In the context of American debates about religious freedom, it might seem especially strange since religious freedom is so often thought of in terms of individuals and not collectives. In fact, many, if not most, Americans would be surprised that a collective body as a body, that is as an entity that is more than the sum of its individual parts, could have religious rights. If religious collectives have rights in American law, the thinking often goes, it is only on the basis of the individuals who, on the basis of individual rights, form an aggregate. But this is not how the court’s majority understood Hobby Lobby. As Sullivan points out in a forthcoming work entitled Church State Corporation:

While Justice Alito in his opinion for the majority in Hobby Lobby pays lip service to the idea that any rights enjoyed by Hobby Lobby are simply traceable to the rights of the owners, in a kind of pass-through contractual theory of the

corporation (one recognizable as the law and economics model mentioned by Blair and Barkan) he also, as we will see, continually recognizes and speaks of the corporate plaintiffs in Hobby Lobby as having personalities and capacities independent to those of their owners. Indeed, notwithstanding Justice Alito’s occasional efforts to describe the views and affects of the corporate plaintiffs as simply a shorthand for those of their owners, there is recurrent slippage between the two locutions in the opinion…. The companies are repeatedly described by Alito and also by the dissenters as “having religious reasons” and as “believing.” We are encouraged to understand these entities as having religious consciences, religious consciences that deserve our respect. The Court is at pains to explain that the corporate form and profit-making objectives do not in any way of themselves formally disqualify the three companies from being persons whose exercise of religion is protected by RFRA.³⁷

If in her 2005 *The Impossibility of Religious Freedom*, Sullivan refigured conceptions of the free exercise of religion, in a number of subsequent publications, including her forthcoming book, she attempts to reshape conversations about religious establishment in the US.³⁸ Sullivan’s work as well as the work of a number of legal historians helps us to appreciate two interrelated aspects of the return of the corporation in contemporary debates about religious freedom in the US: the paradox of disestablishment and the competing sovereignties this paradox helped to create. Let us consider these points in turn.

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In an especially compelling article of 2017, Kellen Funk upends dominant narratives that view American disestablishment as resulting wholly in the privatization of religion by describing what he calls “a paradoxical result” of disestablishment in Antebellum America. Funk argues that in Antebellum America, a commitment to disestablishment led state courts to widen the possibility of incorporation for a much broader array of religious societies. In Funk’s words:

Most American states disestablished their official churches by making corporate charters available to all ‘religious societies,’ an early form of what became known as general incorporation. But the proliferation of church charters posed a dilemma for judges who sought to respect both religious freedom and state sovereignty at the same time. After the Supreme Court reasoned that religious societies were merely distributors of private property and did not exercise governance as rival sovereignties, state courts increasingly protected religious freedom in an unexpected way—not as an individual right asserted against the state, but as a religious society’s institutional right to see its alternative legal order respected in American courts.

As Funk shows with respect to a number of cases spanning the late 18th-early 19th centuries, including the well-known 1816 Dartmouth case in which the New Hampshire legislature unsuccessfully attempted to turn Dartmouth into a public institution, courts came to regard incorporated religious societies in terms of the law of charitable trusts and the intents of their original donors. Increasingly this meant that religious corporations were dealt with by courts much as foreign bodies of law would be dealt. Herein lies the paradox of disestablishment. A

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40 Ibid., 264
commitment to disestablishment pushed states and courts to deny privileged status to different religious societies. But granting equal status to religious corporations also produced what Funk calls “semi-sovereign states” in which “Religious societies not only possessed an alternative legal order, [but] states now allowed religious societies to police themselves.” While Americans are not incorrect to associate the free exercise of religion with the individual, Funk, along with Sarah Barringer Gordon, shows that disestablishment came to define, and indeed to establish, religious freedom as corporate freedom.

While a full, or even adequate, account of the history of corporations in the US is way beyond the scope of this paper (as well as my competence), it is important for our purposes to note that as the rights of the individual gained strength after the Civil War, especially in light of the Fourteenth Amendment, corporate rights did not wane but were only strengthened. As Joshua Barkan has argued:

Taken to its logical extreme, one could imagine the individualization of rights simply eliminating collective institutions. Instead, the application of the Fourteenth Amendment to corporations sought to include within a new liberal order what had been a key, if exceptional, aspect of an older framework of sovereignty that, by the late nineteenth century, was receding. Within this new problematic of liberal government, corporations came to be situated as institutions with a “will” independent from the sovereign power that created corporate personality in the first place.43

41 Ibid., 282.
Barkan’s subject is not religious freedom but his description of corporations as “independent from the sovereign power that created corporate personality in the first place” nicely captures the ways in which the corporate religious body is simultaneously a product and competitor of the modern nation state.

Sullivan offers a succinct conception of what this indicates for understanding religious freedom in the US: “What the US has is disestablishment, not separation. Disestablishment means that church and state are each conceived as governed by the people. It is the people who are sovereign, not the state.” “Government by the people” means that the people are able to create and live by what Sullivan calls “alternate forms of sovereignty.” 44 Referring to the history of church property cases, Sullivan maintains that courts have not historically recognized “group rights as analogues to those of unions and political parties...or to voluntary associations such as the Boy Scouts...but rather...[as] alternative forms of sovereignty.” 45 The implications of the claim that disestablishment ultimately led to a situation in which incorporated churches and religious societies compete for sovereignty with the state is open to debate. Does this mean that in the United States we live in a legally pluralistic society? If this is the case, do we need to recognize that notions of absolute sovereignty may have run their course? 46 Answering these questions in the affirmative is probably premature. As is the case in Israel, it is the American

44 Winnifred Fallers Sullivan, Church State Corporation, forthcoming with University of Chicago press.
45 Ibid.
46 Perry Dane suggests as much: “what is at stake here is not merely a set of legal doctrines or policy prescriptions, but something deeper and more constitutive. The sovereign nation-state...looks out at the world around it and sees other entities that do not easily fit into its own internal sovereign architecture. Some of these are other nation-states. Some might be other types of essentially secular, but non-state, human associations. And others are, or should be, communities—large and small, organized or not, united or splintered—whose normative commitment is to a transcendental sources of meaning and obligation.... sovereign states must step outside a purely internal frame and try to makes sense of the existential Other.” Perry Dane, “Master Metaphors and Double-Coding in the Encounters of Religion and State San Diego Law Review 53, 53-104, at 55-56.
state after all which creates corporations, religious or otherwise. Much as the corporation challenges and even competes with the state it is at the end of the day the product of the state.

Still, understood even within this very brief history of developments in religious freedom and corporate law, we see that the Hobby Lobby case is far less surprising than it may initially have appeared if we only think of religious freedom in the US in terms of the free exercise of the belief of individuals. Just as recent Israeli conversion cases affirm in part what is arguably an Americanized emphasis on sincerely held belief, so too recent US debates about religious freedom exhibit legal recognition of established religious collectives, known in American law as corporations. None of this is to equate Israel and the US. The enormous differences between the two states and their legal systems should go without saying. What I have pointed to is a formal similarity, and not a substantive commonality. We turn now to the conclusion where I try to show why this may be relevant for thinking about religious freedom more generally.

Conclusion:

I’d like to conclude by suggesting that this comparison allows us to appreciate four basic tensions we should be discussing when we talk about religious freedom, in Israel, the US, and elsewhere. Religious freedom is not a free-standing concept or right. Rather, religious freedom is always between—between religion and politics, between the individual and a collective, between the individual and the state, and between religious collectives and the state. This last between—between religious collectives and the state—has been the theme of this paper in which we have explored the emergence of the corporate religious body as both the product and competitor of the nation state in both Israel and the US.
That religious freedom is between religion and politics, between the individual and the collective and between the individual and the state seems obvious in the Israeli case. After all, it is undeniable that conversion to Judaism in Israel is between religion and politics, between the individual and the collective as represented by the Israeli Rabbinate and, given the tie between conversion to Judaism and the Law of Return, between the individual and the state. But our comparison between recent Israeli conversion cases and current debates about religious freedom in the US allows us to see that rather than reflecting the atypical, or exceptional, character of the Israeli state’s Jewish identity (however defined), these same tensions are present in American expressions of religious freedom, albeit in different forms. Let us return to Cindy’s conversion in Orange is the New Black to appreciate these tensions or in betweens. Our discussion of the American intertwining between religion, government, and incorporation allows us to see that Cindy’s conversion involves much more her sincere religious conviction.

As mentioned in the introduction to this paper, on the face of it, the rabbi accepts Cindy’s request to convert because of her religious sincerity. In contrast to her prior requests, and the requests of other inmates, Cindy has successfully expressed her genuine religious commitment. But an awareness of the role of the corporate religious body in the evolution of religious freedom in the US allows us to see that there is much more to Cindy’s story than this. That Cindy’s religious freedom is between religion and politics should be immediately clear from the role of the rabbi in this story. Who is this rabbi and from where does his power to decide who is Jewish derive? In Orange is the New Black, the fictional Litchfield Penitentiary is not only a federal women’s prison but it is also run by a private corporation. The Religious Land Use and Institutionalized Act of 2000 requires federal prisons to serve kosher food to Jewish prisoners who request it. But kosher food is expensive and Management & Correction Corporation (MCC)
is worried about its bottom line. The corporation hires what it calls a “rent a rabbi” who “specializes in corporate inquiry.” Here we see that by not only contracting with private corporations to run its prisons but also by presumably providing federal guidelines for the certification of prison clergy, the federal government allows for the melding of religion and corporation in deciding whether Cindy’s intentions are religiously sincere. In this, Cindy’s religious freedom is surely between religion and politics.

Cindy herself also shows how religious freedom is between the religious and a collective. She greets the rabbi in her second meeting with him by telling him “You are part of my beit din.” The rent a rabbi nevertheless continually focuses on her religious sincerity, asking her “You really want this, sincerely? What is this for you?” Cindy answers him as follows: “Honestly, I think I found my people. I was raised in a church where I was told to believe and pray. And if I was bad I'd go to hell. If I was good I'd go to heaven. If I asked Jesus, he'd forgive me and that was that. And here y'all said ain't no hell, ain't sure about heaven, and if you do something wrong you've got to figure it out yourself. And as far as God is concerned, it's your job to keep asking questions and to keep learning and to keep arguing. It's like a verb. It's like, ... you do God. And that's a lot of work.” As Cindy’s answer suggests, her commitment to God is intimately tied to her joining her people. This of course is a very Jewish view of conversion. But although international law and human rights discourse influenced by a one-sided account of American religious freedom continues to categorize religion, and religious conversion, in terms of the forum internum, religious conversion has historically been as political, or public, as it has been internally spiritual, or private.47 As our discussion of disestablishment and incorporation in

47 Among the many excellent recent scholarly works on conversion as a social and political process see Peter van der Veer, (ed.) Conversion to Modernities: The Globalization of Christianity New York: Routledge, 1996); Gauri Viswanathan, Outside the Fold: Conversion, Modernity, and Belief (Princeton: Princeton University Press), 1998;
American history shows, it is time to abandon what has been an illusion of a private/public dichotomy that supports the idea that religious freedom belongs only to the private individual.

Lastly, Cindy’s exercise of her religious freedom while imprisoned shows clearly how religious freedom is always between the state and the individual. Internal motivations—from psychological, conceptual, political and even theological perspectives—are notoriously difficult to pin down. But even if we accept the notion that one can make a judgment can be made as to what constitutes a “sincerely held belief” it remains the case that an authorized agent of the state determines whether Cindy’s conversion is sincere, just as American courts ultimately decide whether an individual’s conviction counts as religious.

Justice Ginsburg may be right that “There is an overriding interest…in keeping the courts ‘out of the business of evaluating the relative merits of differing religious claims’…or the sincerity with which an asserted religious belief is held.” But the problem is much deeper than this. As our comparison between recent Israeli conversion cases and current about religious freedom has shown, the distinction between religious and non-religious grounds is ultimately untenable. Religion and religious freedom are not free-standing concepts or rights—they are rather always between.

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