

CIVIL LIBERTIES AND THE “IMAGINATIVE SUSTENANCE” OF JEWISH CULTURE

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Irving Howe observed: “The imaginative sustenance that Yiddish culture and the immigrant experience could give to American Jewish writers rarely depended on their awareness or acknowledgement of its presence. Often it took the form of hidden links of attitude and value.”¹ In this essay, I will focus on three of those “links of attitude and value,” and how they have shaped my approach to my religion and to my work as a constitutional lawyer and scholar. First is the value of dispute and dialectic as a bedrock principle in both the religious and legal realms. Second is an entrenched skepticism about power and a heightened awareness of power imbalances. Third is a respect for settled ritual and process, and how it comes into tension with the substantive goal of justice.

However, before considering these linkages, a few words about what I am not arguing here. Our charge was to think about how our religious background influenced our attitudes toward constitutional law. I doubt the question is premised on the possibility of drawing simple cause and effect linkages between religious upbringing and constitutional interpretation. Certainly no such clear, linear linkages can be drawn in my case. This is partly because of the porous boundaries between my religious and cultural upbringing in New York City. But such linkages between background and meaning are also elusive because of the very nature of religious and constitutional interpretation, as I understand it.

The first question I struggle with is: how does a New Yorker—or at least a certain kind of New Yorker from a certain era—trace anything back to the influence of Judaism? Until I moved to Chicago as an adult, I did not understand what a luxury it was to be a Jew in New York, where one could simply imbibe certain attitudes and values and speech patterns and share jokes without having to make the choice to go out and learn Jewish culture. Or as my rabbi put it, only partially in jest: growing up in New York is like living the Torah. It is as if growing up in that

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¹ IRVING HOWE, *WORLD OF OUR FATHERS: THE JOURNEY OF THE EAST EUROPEAN JEWS TO AMERICA AND THE LIFE THEY FOUND AND MADE* 597 (1976).

city, one can act like the simple son (who is not motivated to learn about his faith) and reap all the benefits of the son who has applied himself and learned. More accurately, as I discovered years later, I was a maven of cultural Jewishness; but I was woefully ignorant about too much of my religion—so much so, that I made the decision to study to become a bat mitzvah at the age of fifty. I make this observation about growing up in New York to illustrate the challenge of answering a question that seeks out cause and effect between one’s religious identity and one’s adult belief system. By the time I learned the formal tenets of Judaism, my attitudes toward the law and constitutional interpretation were pretty well formed. Consequently, there is no evidence in my life of that kind of chronological cause and effect between formal belief systems.

So rather than a neat correlation between background and belief, I posit something far messier, in which it is hard to isolate the religious values from the secular and cultural values in my Jewish home and almost entirely Jewish neighborhood in Queens. And the cause and effect linkage is just as malleable on the effect end of the equation. One of the problems with tying religious belief to legal attitudes is that in Judaism, so much is commentary. This opens it up to all sorts of cherry picking. I have sometimes expressed impatience with what might be called the “family parsha”² approach to bible study. In that approach, there is an attempt to find a politically correct message in every biblical reading, and to transform or paper over the parts of the Bible that offend modern sensibilities. Yes, I can make a good argument that the Torah should be interpreted as anti-death penalty, especially in light of current knowledge and conditions, as I did when I gave my own *davar torah*. But of course the counterargument is also quite supportable. The parallel to the perils of constitutional interpretation is obvious. There is danger in interpreting the Constitution as a kind of Rorschach test. There is also danger in the “family parsha” syndrome in which all the objectionable parts of the document are ignored or transformed, or at least assumed to be perfectible. I am reminded of the classic Onion article entitled: “Area Man Passionate Defender Of What He Imagines Constitution To Be.”³

² See, e.g., SHALOM HAMMER, *THE FAMILY PARSHA BOOK* (2006),

³ *Area Man Passionate Defender Of What He Imagines Constitution To Be*. THE ONION (Nov. 14, 2009), <http://www.theonion.com/articles/area-man-passionate-defender-of-what-he-imagines-c,2849>.

In short, I do not take my topic to be a demand for demonstrable cause and effect. It is an invitation to contemplate, rather than oversimplify. As it happens, the Onion article captures a central question for this discussion: what do I imagine the Constitution to be, and why do I imagine it to be that way? In other words, what historical, cultural and in particular religious influences shape my imagination? But on a deeper level, there is another question: how many imaginative interpretations can these documents, the Bible and the U.S. Constitution, accommodate? And this question leads to many other questions, and finally, to my central thesis: that questioning and disputation are the core Jewish values that inform my constitutional approach.

Although I cannot say with confidence what other religions believe, it does strike me that the Jewish emphasis on study and dialectic is one of its defining characteristics. In myriad ways, Judaism elevates the moral inquiry over the moral precept. If Rabbi Hillel is to be believed, there is only one fixed moral precept and the rest is commentary, and our affirmative duty is to go and study. Moral value is attached to study itself, and to the evaluation and debate that grow from study. The teachings we are meant to live by come down to us as stories, or standards, that are open to interpretation, rather than as fixed precepts. The act of learning is the act of articulating and evaluating competing arguments.

Leon Wieseltier describes a tradition of argumentativeness that has “its most sophisticated and most robust home . . . in Judaism, from its beginnings in ancient rabbinical literature all the way to the present day In the Jewish tradition, disagreement is not only real, it is also ideal—at least in the unredeemed world, which is the only world we know.”⁴ One need not be an observant Jew steeped in Torah study to be raised in this argumentative tradition. It is the tradition of the dinner table. One need only be able to articulate and defend one’s argument and refute all the others. And in my house, like so many others in my neighborhood, one first needed to be able to get a word in edgewise.⁵

⁴ Leon Wieseltier, *The Argumentative Jew*, JEWISH REVIEW OF BOOKS (2015), <http://jewishreviewofbooks.com/articles/1491/the-argumentative-jew/>.

⁵ For example, in Deborah Tannen’s doctoral thesis, she recorded a Berkeley Thanksgiving with guests from various places. She found that everyone but the New Yorkers had a hard time getting a word in edgewise. Deborah Tannen, *New York Jewish Conversational Style*, 30 INT’L J. SOC. LANGUAGE 133 (1981), available at <http://faculty.georgetown.edu/tannend/NY%20conversational>

Argument and disputation are important values for several reasons. They offer a superior form of knowledge to memorizing precepts or unquestioningly adopting consensus beliefs. Argument offers all the advantages of the common law method over the continental method of developing a supposedly comprehensive system of rigid rules. Whether a moral norm applies under a particular set of circumstances, or in light of changing circumstances, can always be argued and revisited. Indeed, Weiseltier's words make the connection to law clear: "Minority opinions are not obsolete opinions: They are preserved alongside majority opinions because their reasoning may one day be useful again."⁶

More important, argument demands articulation and justification. It demands an articulation of the underlying principle and a debate over its reach and justification. In this regard, Judaism is a faith that does not often demand leaps of faith and blind obedience. Rather, it demands a good argument, based on text and commentary; one that is well supported and well presented. And moreover, it demands reasoning and justification from rabbis and wise men along with everyone else. Conversely, it is not only rabbis and wise men who are entitled or expected to interpret and argue. The debate takes place here on Earth; not through divine revelation. This point can be framed in yet another light. If there is no God's eye view of truth; if truth arises from reasoned debate, it follows that a range of viewpoints must be tolerated and even respected. Those who claim to possess the universal perspective, or the only true perspective, are at odds with the core value of Judaism. This core value is the respect for a multiplicity of viewpoints, so long as they can be discussed and defended. This is the value that enables a pluralistic society.

This discussion of argument brings me back to Howe's observation about hidden links of attitude and value. The values of debate and dialectic, as I have described them, are all readily applicable in an entirely secular context. They can be transmitted and deeply held without reference to religion. In fact, the bedrock belief in debate and interpretive leeway is arguably in significant tension with the idea of faith, if faith includes taking certain verities as sacred and insulated from debate.

If one accepts these values of inquiry and debate as primary, they would seem to apply to all governing texts, both

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⁶ Wieseltier, *supra* note 4.

secular and religious. Judaism finds inherent value in testing the boundaries of principle through argument about interpretation. If one is raised in a culture deeply permeated by belief in the value of the argument itself, and in a culture that mistrusts the notion of rigid precepts that come from on high and that are insulated from scrutiny, it is entirely predictable that one would approach constitutional interpretation in a similar way. This value does not depend on the nature of the text, which helps explain how Jewish values can be transmitted so thoroughly without reference to the formal tenets of Judaism. But it also raises the question of what makes these values non-secular or spiritual.

I gave little thought to these issues until much later in life, when I recognized that there was a non-cognitive dimension to belief. Judaism as I experienced it was very much about the value of process and debate. And the particular subset of Judaism I inhabited was one that teetered between Reform Judaism and doing nothing at all. So it seemed to me that Reform Judaism itself, and the decision whether to participate in Reform Judaism in addition, added up to a continual debate about the importance of ritual and belief—a debate which ritual for its own sake rarely won. When I finally became a bat mitzvah many years later, I began to appreciate the power of ritual, or what it is that makes Judaism not just a system of beliefs but a religion.

These musings have led me to reflect on why it is that so much of my teaching and scholarship have been focused on procedural areas. Although I was a lawyer at the American Civil Liberties Union before joining academia, I never taught substantive constitutional law. I opted to teach federal courts. Although I was a lawyer for the State Appellate Defender before that, I never taught substantive criminal law. I opted to teach criminal procedure. I teach in fields that examine the tensions between fair process and just outcome. These are also fields that examine the extent to which process values (such as notice, predictability, uniformity and finality) can be evaluated without reference to the underlying substantive principles they are meant to facilitate.⁷

One strand of this approach, evident in Judaism, is that justice does not exist in the abstract. Rather, justice is directly dependent on the quality of the evidence presented and the procedures used to present it.

⁷ See generally Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990).

One tenet of Jewish ethics is that a verdict is only as legitimate as the procedures used. The procedures of the Sanhedrin, the ancient Jewish High Courts, contain some famous and remarkably psychologically astute examples of the veneration of procedure. One example is the practice of appointing different judges from case to case to investigate evidence pointing to guilt and innocence, which was meant to ensure that judges developed no vested interest in acquittal or conviction. Another example of the importance placed on procedure was the counterintuitive provision that a unanimous vote to convict in a capital case is reason *not* to execute—because it implies that the judges reached accord too easily, without thoroughly seeking exonerating evidence.

These procedures reflect a deep understanding of the value of debate and dialectic. They also anticipate, by a couple of thousand years, contemporary understandings about the importance of creating fact-finding institutions that promote adversarial presentation of evidence, incorporate a naysaying function, and discourage tunnel vision.⁸

How these precepts inform my fields of law is complicated. It is crucial that Judaism, even of the most observant sort, venerates procedure but never at the expense of substance. It is not all about the means to the exclusion of the ends, but rather insists that both ends and means must be just. In Judaism, ethics can override settled rules and practices—as with certain exceptions to keeping the Sabbath when safety or compassion demands a variance from settled commands.

Procedure is a necessary but never a sufficient argument. Decisions of this nature require one to keep the ultimate ends of justice and its underlying principles in sight. I would like to think that a case like *Coleman v. Thompson*,⁹ in which the Supreme Court upheld the death sentence of a man whose lawyer missed a deadline by one day, would not be venerated as a case about federalism, as Justice O'Connor claimed,¹⁰ but rather condemned as a case in which justice loses out to a reliance on procedure and rules. I have recently been studying the jurisprudence of Judge Jack Weinstein,¹¹ and one of his guiding principles—one that he

⁸ See Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L. J. 475 (2006).

⁹ *Coleman v. Thompson*, 501 U.S. 722 (1991).

¹⁰ *Id.* at 726.

¹¹ Susan Bandes, *Empathy and Article III: Judge Weinstein, Cases, and Controversies*, 64 DEPAUL L. REV. (forthcoming 2015).

has specifically connected to his Jewish values—is that the command to do justice is an affirmative command.¹² That is, standing by and watching injustice without intervening makes one culpable. Jeffrey Morris, in his book on Judge Weinstein, wrote about a telling counter-example to *Coleman v. Thompson*. In this case, a social security claimant failed to file a timely notice of appeal. However, instead of dismissing the case, Judge Weinstein went out and found the claimant, and helped him file his appeal.¹³

This is a small, individualized story, but the larger principles that underlie it are important. These principles are the affirmative command to do justice, but also the concern about the effects of unequal power and unequal access. The reality and impact of unequal access to power are among the most basic, visceral influences on the immigrant Jewish experience. These influences provide a prime example of a hidden link of value or attitude that was transmitted to my generation in countless ways. This link was transmitted in many forms, including suspicion and fear, self-protection, and loyalty toward and reliance on community.

Returning to my earlier discussion of the importance of argument, unequal power led to a hyper-awareness of perspective. Furthermore, this hyper-awareness of perspective led to a distrust and skepticism toward those who claimed a universal perspective. It also led to a clear-eyed view of the rituals and pretensions of power. As Irving Howe points out, this is the underlying genius of the Marx Brothers movies, in which the elaborate structure of power is disassembled and treated with total disrespect.¹⁴

The awareness of power imbalances underlies the importance of fair process. At the same time, it provides an important counterweight to the reliance on process. For example, in my criminal procedure scholarship, I have been very wary of a reliance on substance that would threaten the integrity of process. Specifically, I have been wary of the innocence movement, to the extent it suggests that one can know in advance of process who is innocent, and therefore accord special protections to that group—and conversely lesser protections to those we think in advance might be guilty. Ex ante rules that apply to the innocent as well as the guilty are essential to criminal procedure—both as a

¹² See *United States v. C.R.*, 972 F. Supp. 2d 457 (E.D.N.Y. 2013).

¹³ JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN 113 (2011).

¹⁴ HOWE, *supra* note 1, at 567.

theoretical matter and as a means of ensuring continued support for restrictions on governmental power.

At the same time, I have strongly critiqued habeas rules that consider a claim of innocence virtually irrelevant to a claim for habeas corpus relief, unless it happens to be accompanied by a procedural violation. As Justice Blackmun explained, “the execution of a person who can show that he is innocent comes perilously close to simple murder.”¹⁵ Procedures metastasize and stray far from their original principles unless they are prodded and reexamined.

The discussion of habeas leads to another of my fields of study: federal courts. The danger of federal courts doctrine lies in its ability to justify substantive injustices by advancing what appear to be overarching ethically neutral values. Here, the precepts of Jewish law are again instructive. When gatekeeping principles are arcane to the masses and accessible only to a select guild, they cannot be debated and subjected to the sort of scrutiny justice demands. The problem is not only that the principles are arcane; it is also that gatekeeping principles such as standing doctrine are not applied with consistency and predictability. At their best, these principles preserve important values like the separation of powers and federalism. At their worst, they embody the most objectionable of Alexander Bickel’s passive virtues¹⁶—specifically the use of obfuscation in order to maintain the Court’s power. The challenge is to avoid the trap of entrenching unequal power and the trap of allocating power in a way that is not transparent and subject to debate.

One way to avoid this trap is through a deeply pragmatic jurisprudential strain exemplified by Judge Brandeis,¹⁷ Judge Posner¹⁸ and Judge Weinstein, to name a few. Rather than rest on the assurance of overarching principles, this strain is focused on how the doctrines are working in practice. It asks: how are principles like federalism and separation of powers working with the current Congress and the current Executive, rather than in relation to some abstract notion of what the political branches

¹⁵ *Herrera v. Collins*, 506 U.S. 390, 446 (1993). See also Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501 (1996).

¹⁶ Alexander Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

¹⁷ See generally EDWARD PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* (2000); Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829 (2001).

¹⁸ RICHARD A. POSNER, *OVERCOMING LAW* 74 (1995).

should be doing? This strain is exemplified by a refusal to hide behind the formal descriptions of the duties of the courts and the political branches while avoiding the question of whether these duties are actually being carried out. Judge Weinstein in the Agent Orange cases, among others, acknowledged that ideally Congress would undertake the sort of mass tort resolution he took on, but recognized that Congress was doing no such thing.¹⁹ At that point, as he saw it, the federal courts have an obligation to help those the political branches will not help. The courts have an affirmative duty to do justice. This strain of jurisprudence is similarly characterized by its acknowledgement that interpretation requires choice, and with choice comes responsibility. This strain—an interesting mix of pragmatism and idealism—illustrates the interplay of ritual and substantive justice. Traditions and rituals deserve supremacy only to the extent they promote our deeply considered values; our publicly debated values.

¹⁹ David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2087 (1997).