

## THE (POSSIBLE) IMPACT OF JUDAISM AND ISRAEL ON ONE PARTICULAR CAREER AS A LEGAL ACADEMIC

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Individuals are notoriously unreliable when offering causal accounts of their own lives. Who really knows why a “disproportionate” number of Jews are represented in the academy, including the legal academy, let alone why any given Jew (however defined) chose such a career? And even if one can in fact propose plausible accounts as to why intellectually talented Jews might have chosen to pursue careers as physicists, say, does this mean that it would be valuable to discuss the ways that “Jewish physics” differs from “Christian physics”? I suspect that most of us would find such inquiries to be highly dubious, if not, indeed, threatening.

I once wrote a piece on “Jewish lawyers” that began with a discussion of Sandy Koufax, almost undoubtedly the best-known “Jewish pitcher” of all time, not least because he refused to pitch in a World Series game on Yom Kippur. That act certainly justified placing the adjective in front of the noun, but would anyone seriously proclaim that Koufax “pitched like a Jew”? Similarly, one can identify Jewish lawyers in a variety of ways, including the clients they represent and their willingness to appear in court on Yom Kippur. But could one go on to argue, with regards to the seven “Jewish Justices” of the United States Supreme Court, that Brandeis, Cardozo, Frankfurter, Goldberg, Fortas, Ginsburg, Breyer, and Kagan all decided cases or wrote their opinions in an identifiably “Jewish” manner? Or aren’t we more likely to categorizing those decisions and opinions as the work of former academics (with regard to Frankfurter, Ginsburg, Breyer, and Kagan) or, probably even more relevantly, as post-Holmesian legal liberals or political “progressives” (as one could argue is true of the entire sample)?

So I offer no grand proclamations as to how the mere fact that I am Jewish accounts for my particular path as a legal academic. Still, I am more than happy—if only for narcissistic reasons—to offer some aspects of personal autobiography and speculate to the degree of which Judaism, in one dimension or another, is relevant. Begin with the overarching term for these collective essays, “the People of the Book.” There is no doubt that this suggests to most people a very particular book, or possibly books, the most obvious of which is the Torah. Somewhat less

obvious, except to anyone who is familiar with the actual history of Judaism, would be the Talmud. It is possible, though, that some think less of any given book than of the general attribute “bookishness.” However, I am going to assume, that “People of the Book” refers to particular Jewish texts rather than to books in general.

It is highly unlikely that the Torah or Talmud contributed to my own career choices or intellectual development, at least prior to 1983 (more about that shortly), when I had already passed my 40<sup>th</sup> birthday. After all, I was barely familiar with the Torah, and I do not recall ever looking at, let alone discussing, a single page of the Talmud. I did have a Bar Mitzvah in my home town of Hendersonville, North Carolina, but this simply means that I was trained, in once-a-week meetings each Saturday morning, to “read” Hebrew in the specific sense of sounding out, more or less correctly, words written in Hebrew. But I understood almost literally not a single word; I was being taught neither vocabulary nor grammar. My fundamental ignorance of Hebrew, beyond sounding out the letters, continues to this day.

To be sure, my fondest memories of growing up in Hendersonville involve what in retrospective nostalgia seem to have been frequent, but never hostile, arguments about religion with friends of mine who were Southern Baptist, Methodist, Presbyterian, and Roman Catholic. Is it really the case, for example, that a loving God would condemn me to eternal damnation for my obdurate refusal to recognize Jesus Christ as my Lord and Savior? I was, incidentally, familiar with basic Christian theology, at least the part derived from the Bible. This is because when I was, I believe, in the third grade, I had won a Bible certificate from the state of North Carolina for memorizing a sufficient number of Bible verses. To this day, I can reel off John 3:16; at the very least, I cannot claim ignorance of the fact that “eternal life” was guaranteed to “whosoever [and *only* whosoever?] believeth” in “God’s only begotten son.” Similarly, to this day I know the lyrics of most of the traditional Christmas carols because every December all of the elementary school students went over to the First Methodist Church and sang the carols. I did, however, remain silent during all of the passages that included reference to “Christ our Lord” or “Jesus our Savior”; after all, for many, both Jews and non-Jews alike, Judaism is “negatively constituted” as the rejection of Christian messianism far more than it is constituted as a “positive theology” of theological precepts that can be spelled out and learned independently. Still, in my annual

visits to the First Methodist Church to join my classmates in singing Christmas carols, I joined in the lyrics of *Adeste Fideles* or *O Holy Night* that did not require “first order theological proclamations.” Frankly, I do not remember if a Hanukkah song was thrown into the mix as part of 1950s multiculturalism, but, if so, it obviously did not register.

I have little doubt that my arguments during my teenage years, often carried out while playing poker and drinking beer, helped to sharpen my general intellectual instincts. So I can offer a limited sociological account to explain my becoming an academic as a result of my marginal social identity as a Jew raised in a small, highly Christian, North Carolina town. But, save for occasional thoughts that the saturation within the public schools of Christianity was surely unconstitutional, given the separation of church and state (of which I had vaguely heard), it would be implausible to say that Judaism helps to explain in any significant way my interest in academic law. Perhaps it should not go without saying that I graduated from Hendersonville High School in 1958, before the Supreme Court’s “school prayer” decisions.)

It is probably true that I learned in Sunday School, taught by lay members (there were no other kind) of the 30-family synagogue, that “Jewish ethics” meant that one ought to be a decent person and support social justice, but there are obviously many gateways to such lessons. And, of course, this also meant eliding the fact that some of the lessons taught by the Bible, such as the seemingly divine retribution directed at Saul for his failure to annihilate Amalekites, are considerably more complicated than simplifying them solely to the basic injunction “do justice.” This is not to suggest, incidentally, that I was familiar with the story of Saul and the Amalekites—or the continuing injunction to root Amalekites out root and branch wherever found.

I was moderately active in aspects of the Civil Rights and anti-War movements of the 1960s, but it would be a fool’s errand to attempt to ascertain the actual link between my Jewish and political identities. I bought, but did not read, Abraham Joshua Heschel’s *The Prophets*, secure in the knowledge that it was sufficient to proclaim adherence to the “prophetic” tradition that spoke truth to power. But, I could not have offered even the briefest answers to questions about specific prophets, let alone the differences, say, between Jeremiah, Isaiah, and Micah.

Duke University, my alma-mater, as a Methodist school required a year of religion courses, which included one on

Christian theology and the other on comparative religion. I enjoyed both, but neither led to any “close encounter” with Judaism, even if I (more often than not) refrained from attending class on Rosh Hashanah or Yom Kippur, and fasted on the latter. As a matter of fact, I went to Harvard in 1962 with the aim of becoming a “defense intellectual,” having become fascinated by the intellectual challenges of deterrence theory and aware of the fact that relative youngsters (including Jews) could rocket to the top, as it were, of this decidedly developing field. I had written my senior thesis at Duke on deterrence theory and wanted to study with Henry Kissinger, who had recently written his book defending “limited nuclear war.” I signed up for Kissinger’s seminar and quickly realized that he was not a man who had any regard for his students. I had enjoyed studying constitutional law at Duke and “migrated” from Kissinger to Robert McCloskey, a truly wonderful man who enabled me to have the happiest experience of any graduate student I have known from Harvard. My dissertation was on Justices Holmes and Frankfurter; the latter, of course, required some discussion of secular Judaism.

Perhaps it is worth noting that my father died in 1963 and that, in order to say Kaddish, I started taking many meals and attending services at the Harvard Hillel Society, then presided over by the remarkable Ben-Zion Gold. That was an important experience for me because it put me in contact with many brilliant “serious” Jews, and I was cured of the belief that one could not be both religious and a serious intellectual at the same time. But that did not lead to my developing a deeper commitment to Judaism as a religion.

I decided to go to law school in 1970, largely as the result of realizing that Harvard, whatever its great glories were in the 1960s, had not really trained me to be a “modern” political scientist, especially as that was defined at schools like Ohio State, where I received my first appointment. Nor, if truth be known, did I have any great desire to become a more “modern” political scientist. Judith Shklar, one of my mentors, once somewhat caustically referred to my generation of graduate students as people who wanted to teach, but had no real idea of what particular discipline they wanted to master prior to beginning their teaching careers. The number of “free-floating intellectuals” was one of the things that made Harvard so interesting and of indelible importance in my own life, but, as noted, I was scarcely “disciplined” when I received my Ph.D. in 1969.

Fortunately, the Russell Sage Foundation had begun sending recently minted PhDs to law school for “interdisciplinary” training (on the optimistic assumption that those who won the fellowships could be accurately described as deeply rooted in a particular discipline). Given the Foundation’s desire that the recipients of the fellowships would return to their initial homes in social science departments, perhaps they were pleased when I was appointed to the Politics Department at Princeton in 1975. Even if this were true, they were then disappointed when I accepted an appointment to the University of Texas Law School in 1980.

The only chapter of my dissertation actually published—in the *Stanford Law Review* as “The Democratic Faith of Felix Frankfurter”—examined the extent to which Frankfurter treated the United States Constitution as the basis of his “civil religion,” having given up any real commitment to the Judaism of his youth. Indeed, one of my first major articles, published in 1979, was on the broader role played by the Constitution in “American civil religion,” and I developed a rather elaborate analogy between approaches to the Constitution and the divisions in Christianity between Catholics and Protestants. There was no reference at all to Judaism. However, in 1988 when I published a revised version of the analysis of our “civil religion” as part of my book *Constitutional Faith*, it included quite extensive reference to Jewish materials as well as Christian ones.

What accounted for the significant change from the original paper and the inclusion of references to Jewish material? The answer is simple: David Hartman and the Shalom Hartman Institute of Jewish Philosophy in Jerusalem. Thanks to a friend, I was invited to a gathering in the Canadian Laurentians in 1983 where we would spend a week in the intense study of Talmud and Maimonides’ *Guide for the Perplexed*. It was, obviously, unnecessary to be learned in order to be invited, though I am confident that I was easily at the end of the spectrum of the unlearned. I accepted the invitation as much to get away from the August heat of Austin, Texas and to spend time with my friend as out of any affirmative desire to study Talmud or Maimonides. That week changed my intellectual life.

But, crucially, the change did not at all involve my religious beliefs. I was then, and remain now, a “secular Jew,” strongly identifying as “being Jewish,” and adhering to certain practices, out of habit (rather than Halachic obligation), such as not eating pork or shellfish, but otherwise being unable to profess belief in any tenets that are affirmed, in say, the *Yigdal*. I find myself as

reluctant to say the words, in English, of the liturgy on those occasions when I do attend services, as I was to proclaim that “Christ” is “my lord and savior” back in the First Methodist Church. Confessing one’s sins on Yom Kippur is easy; affirming belief in a sovereign God is not. But that does not affect my gratitude to the Hartman Institute for changing the arc of my intellectual life. David Hartman’s genius was his ability to generate the belief that Jewish materials were worth confronting intellectually and taking seriously, regardless of one’s degree of personal religiosity.

So, by 1988, it was clear to me that the structural oppositions I was certainly aware of within Christianity—and reflected in many of the fault lines of American constitutional theory—were easily found in Judaism as well. Indeed, one will also find them in Islam. The real point deals with inevitable tensions generated by ostensibly *text-based* commitments that necessarily take place in an ever-changing world that makes its own demands. Although David Hartman came out of an Orthodox background and was, indeed, a student of Joseph Solovetchik, his later life was spent wrestling with the implications for any plausible notion of Judaism of what he always referred to as the “re-entry into history” symbolized by Zionism and the State of Israel. John Marshall once wrote that any constitution designed to endure must necessarily “adopt to the various crises of human affairs.” How does such adaptation occur, however, and yet maintain fidelity to deeply rooted texts and traditions?

Of course, one crucial reality of Jewish history is that what might be viewed as our own “radical protestants,” the Karaites, were basically successfully negated in a way that the Catholic Church could only fantasize with regard to “their Protestants.” What might have happened had those relentlessly anti-Rabbinic Jews survived in numbers sufficient to maintain a significant opposition to the claims of rabbinic Judaism? Instead, the attack on rabbinic orthodoxy leveled by 19<sup>th</sup> century Reform Judaism is quite different from the textual fundamentalism associated with Karoism.

Still, one might well think that the impact of the Hartman Institute, however important to me personally, and to whatever the degree of its reflection in isolated writings of mine, still has relatively little to do with the main body of my work, despite *Constitutional Faith*. More important, in many ways, have been my repeated encounters with Israel itself. Almost all of them were generated by visiting the country to attend Hartman conferences

over the past thirty years; I also spent a full semester in Israel in 1984, teaching not only at the Hebrew University but also at the Hartman Institute itself—a seminar on the hermeneutics of interpreting the United States Constitution.

However, just as my immersion in traditional Jewish materials did not in any way make me “more Jewish” with regard to any theological affirmations, my repeated visits to Israel also have not influenced me to be more Zionist. If anything, I agree ever more strongly with the thesis expressed in the subtitle of Alan Wolfe’s recent book *At Home in Exile: Why Diaspora Is Good for the Jews*. I have always found mildly offensive the ideology underlying the term “aliyah,” which is part of the Zionist negation of the *galut*. Frankly, Israel has reinforced my long felt discontents about nationalism and even “self-determination,” at least in a world where there are far more nations than there is vacant land in which any given nation could enjoy the kind of autonomy it wishes.

In no way do I oppose Israel’s maintenance as an independent state in what is sometimes, ironically, called “the family of nations.” But this does not entail supporting the extent to which Israel, almost uniquely among the states of “the West,” seems committed to maintaining the ideology of 19<sup>th</sup> century organic nationalism (an ideology, incidentally, that was certainly not “good for the Jews”). This means that I am decidedly unhappy that the United States has seemingly accepted the importance of defining Israel as a “Jewish,” in addition to a “democratic state.” I strongly suspect that Israel will, in fact, be predominantly Jewish, at least under a “two-state” solution, in a similar fashion to the way that the United States, demographically, continues to be “Christian,” with consequences, say, for the public calendar.

But, of course, demographic realities do not necessarily translate into normative ideals. If they did, we would support the National Front in France or be marching with those in Dresden who object to the loss of traditional German identity because of the influx of immigrants (particularly, of course, Muslims). I presume (and hope) that few readers support those groups, that most of us accept one or another version of “multiculturalism” that requires distinguishing sharply between civic republican and nationalist notions of political identity. The United States is not a “nation-state,” which I count as a blessing. I have written some very harsh words about the United States Constitution, but I unequivocally admire its (our) “Preamble” inasmuch as it is relentlessly secular and non-ascriptionist in its reference to “We the People.” I

suppose I could say that this is only a personal preference, and that I should be more than happy to “tolerate” more nationalist states. That, after all, could be said to be implied by “multiculturalism,” which recognizes that different persons and groups will choose to live in significantly different ways. If I support accommodating the Amish within the United States, then why not accommodate a “Jewish” state within the international state system, even if that has significant implications for the degree to which it is also “democratic”? The answer is that Israel’s contemporary insistence on maintaining itself as a distinctly “Jewish state” has a number of unattractive implications, particularly with regard to justice toward those who are not Jewish (but, who certainly are Israeli citizens).

In any event, I think it is accurate to say that to be Jewish in the 21<sup>st</sup> century requires that one be intellectually and emotionally engaged with Israel. If one is a constitutional lawyer, it is likely (and desirable) that one be aware of, and perhaps have strong opinions about, the particular career of former Supreme Court President Aharon Barak, a personal friend whom I strongly admire. Often described as “Israel’s John Marshall,” he generates every conflicting view associated with Marshall himself.

And many of the particular decisions of that Court resonate with issues “at home.” For example, to what degree should “national security” considerations trump all other considerations? Barak wrote an important and eloquent decision on the use of certain methods of interrogation, including torture, by Israeli security services. It is a standing reproof to a considerably more silent, even cowardly, American Supreme Court when presented with similar issues (and opportunities) by the conduct of the Bush Administration in the aftermath of September 11 and the wars in Afghanistan and Iraq. He also wrote an important opinion about the (il)legitimacy of targeted assassinations, another issue that has become an ongoing reality of American military policy vis-à-vis so-called “drone attacks.” But Barak has been off the Court now for almost a full decade, and it is very much worth informing oneself about and then evaluating the backlash against his form of “judicial activism” in the Israel dominated by Benjamin Netanyahu and his allies.

In addition, anyone interested in “constitutional design,” as I increasingly am, can look to Israel as an important counter-example of sound design. Think only of the low threshold historically required for a party to enter the Knesset and thus promote the peculiar and often dysfunctional style of Israeli

politics. Moreover, one can wonder whether the law of return, even if one is more supportive of its continuing necessity in the 21<sup>st</sup> century than I tend to be, is wisely interpreted to make one a “full citizen,” with full voting rights instantly upon arrival. Is it necessarily true, for example, that the majority of emigres from the former Soviet Union have any genuine commitment to liberal democracy or the kind of pluralism necessary for a de facto binational Israel to survive as a country of which we can genuinely be proud?

It should be obvious that even deep emotional “connection” with Israel does not entail support for its particular government, anymore than deep connection with traditional Jewish books like the Talmud requires that one in fact be “religious.” I personally regard as pernicious the consequences for American foreign policy of the roles played by AIPAC and what is accurately described, especially in the age of Sheldon Adelson, as the “Israeli lobby,” though I would also emphasize the even more pernicious impact of “Christian Zionists” who insist on treating Israel as a sacralized “Holy Land” instead of just one more state within a complex international political order in which inevitable compromises have to be made. In any event, these are some of the ways in which I can construct a story that connects my Judaism with at least some of the questions that obsess me as a legal academic.