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# *The Jewish Political Tradition*

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entire controversy comes about because of the overall lowliness, for purity has not been fully completed in the basic character of the nation as regards the exterior of its soul, and it is being progressively purified.

Both these parties are on the level of the two harlots who came to Solomon. The fiat, "Bring a sword" (1 Kings 3:24), is a probing on the part of the divine wisdom of the Israelite kingdom: the one who is to be spurned is the one who says, "Cut!" (3:26). In her murmuring she pronounces the real gripe in her heart. Her only interest is, "It shall be neither to me nor you. Cut!" (3:26). And the merciful mother, the real mother, says: "Give her the living child, only do not slay it!" (3:26). And the divine spirit screams: "Give her the living child, she is the mother!" (3:27) There is no end to the physical and spiritual evils of dividing the nation into sectors, even though total separation as imagined by those who cruelly operate is impossible and will never be. . . .

The foundation of the righteousness of the just [*tzaddikim*] in every generation is supported by the wicked as well, who, with all their wickedness, as long as they cling with their heart's desire to the collectivity of the nation, are referred to [by the verse], "Your people are all righteous" (Isa. 60:21). Their outer wickedness serves to anneal the strength of the righteous, as dregs to wine. The imagined division undermines the foundation of all holiness, as the deed of Amalek, who attacked the stragglers disgorged by the Cloud [of Glory].<sup>58</sup> "He stretched his hand against his peace, he profaned his covenant" (Ps. 55:21).

### *The Boundaries of the Nation-State*

#### *Who Is a Jew?*

##### **40. Israel Supreme Court: *Oswald Rufeisen v. The Minister of the Interior***

*Selected Judgments of the Supreme Court of Israel*, edited by Asher Felix Landau (Jerusalem: Ministry of Justice, 1971), pp. 2-33.

*Israel's Law of Return* states that "Every Jew has the right to come to" Israel (§14, §24). *Oswald Rufeisen*, also known as *Brother Daniel*, a Jew who had converted to

<sup>58</sup> See *Midrash Tanhuma* (Deut. 25:18).

*Catholicism and became a member of the Carmelite order, wished to immigrate to Israel as a Jew under the Law of Return and was refused entry by the Ministry of the Interior because of his conversion. His petition to the Supreme Court served as the first important test case of the relation between Judaism as a national identity and Judaism as a religious commitment in Israeli self-understanding. Born in Poland before the Holocaust, Rufeisen was educated in an orthodox Jewish environment. During the war, he was deeply involved in resistance activities, saving many fellow Jews from danger; it was during the war that he converted. Rufeisen always insisted that although he had embraced the Catholic faith, he belonged to the Jewish people as, indeed, his entire life story attested.*

#### *Silberg J.*

[I.] From the outset of this most unusual case, I have been faced with a great psychological difficulty. Paradoxically enough, this is due to the deep sympathy and great sense of obligation which we as Jews feel for the petitioner, Oswald Rufeisen, known since his conversion as *Brother Daniel*. The petitioner is a man who during the dark years of the holocaust in Europe risked his life times without number in rescuing his brother Jews by daring feats of courage. . . . Can he be denied the burning desire of his life to be completely identified with the people he loves and to become a citizen of the land of his dreams, not as a stranger coming from without but as a Jew returning home?

But this sense of profound sympathy and obligation must not be permitted to mislead us and to justify our profaning the concept of "Jew" both in name and in meaning.

I have pondered deeply upon this question and have considered it in all its aspects. I have reached the conclusion that what *Brother Daniel* is asking us to do is to erase the historical and sanctified significance of the term "Jew" and to deny all the spiritual values for which our people gave their lives in different periods of our long dispersion. . . . Our history would lose its unbroken continuity and our people begin numbering its days from the emancipation which followed the French Revolution. A sacrifice such as

this no one is entitled to ask of us, even one so meritorious as the petitioner before this court.

2. The question of law before us is very simply the meaning of the expression "Jew" as used in the Law of Return, 1950. Does it also include a Jew who has changed his religion and been baptized as a Christian but who still feels and regards himself as a Jew in spite of his conversion?

According to the prevailing opinion in Jewish law, so it seems to me, a Jew who is converted or becomes an apostate continues to be treated as a Jew for all purposes save, perhaps, certain "marginal" laws which have no real importance with regard to the central problem. I shall not rely here on the well-known dictum that "A Jew, even if he has sinned, remains a Jew" (BT Sanhedrin 44a [§10]), since, as some writers have already pointed out, it may well be that this dictum is more in the nature of a homily (*aggadah*) than a rule of law (*halakhah*). Be that as it may, it has, however, served throughout the ages as a cornerstone for judicial decision and has ministered as authority, binding or persuasive, in nearly all cases decided in favor of converts being considered Jews (or, in traditional language, members of the people of Israel). . . . If the principle is, as will be seen in due course, that [Jewish] law is binding on the convert [out], then he too is of the people of Israel, i.e. a Jew. . . .

Were I of the opinion that the term "Jew" in the Law of Return is identical in meaning with the same term in the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, that is to say, a Jew *according to the rules of Jewish law*, I would grant the application of the petitioner and make the order *nisi* absolute. The difficulty is, however, that the term "Jew" is not employed in the same sense in both these Laws. It bears a religious connotation . . . in Jewish law, whereas in the Law of Return the term has a secular meaning, as it is usually understood in common parlance—and this I emphasize—by the ordinary simple Jew.

The reason for this is so clear that it need hardly be mentioned. The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law was enacted for the purpose of extending rabbinical jurisdiction. It is an open secret that the extension of this jurisdiction was sought and granted in order to broaden the application of Jewish religious law to Jews. Hence the further question, Who is a Jew for the purposes of this Law? must be answered according to Jewish law. . . .

It is otherwise with the Law of Return. For all its immense historical importance, this . . . is a secular Law, and in the absence of definition either in the statute itself or in the decided cases, we must interpret its terms according to their ordinary meaning, taking into consideration, when departing from the ordinary sense, the legislative purpose behind its provisions. And because the Law of Return is an Israeli statute, originally enacted in Hebrew . . . the term "Jew" must be interpreted in the sense that it is understood by Jews, for they are nearest to the subject matter of the Law, and who better than they know the essential content of the term "Jew"?

Once more the question must be asked, what is the ordinary Jewish meaning of the term "Jew," and does it include a Jew who has become a Christian?

5. The answer to this question is, in my opinion, sharp and clear—a Jew who has become a Christian is not deemed a "Jew."

It is not my purpose to preach religion, nor to present any particular point of view as to the most desirable course for the future development of the Jewish people. I know full well that opinion in Israel as to what is and what should be is divided into all the various shades of the spiritual rainbow—from the extreme orthodox to the total agnostic. But there is one thing that is shared by *all* Jews who live in Israel (save a mere handful) and that is that we do not cut ourselves off from our historic past nor deny our ancestral heritage. We continue to drink from the original fountains. The shape has changed, the channels have been altered, but we have not sealed the wells, for without them we would be but "as the poor that are cast out." Only the simple believe or think that we are creating here a *new* culture; for this it is much too late. A people which is almost as old as the human race cannot start *ab ovo* and our new culture in this land—at the highest—is merely a *new version* of the culture of the past.

Whether . . . religious, non-religious, or anti-religious, the Jew living in Israel is bound, willingly or unwillingly, by an umbilical cord to his torical Judaism, from which he draws his language and its idiom, whose festivals are his own to celebrate, and whose great thinkers and spiritual heroes—not the least of whom are the martyrs of [the crusaders of] 1096 and those who perished at the stake in Spain—nourish his national pride. Would a Jew who has become a Christian find his place in all this? What can all this na-

tional sentiment mean to him? Would he not see in a different light and appraise by other standards our draining to the dregs the bitter cup from which we drank so deeply in those dark Middle Ages? Certainly, Brother Daniel will love Israel. This he has proved beyond all doubt. But such love will be from without—the love of a distant brother. He will not be a true inherent part of this Jewish world. His settling in Israel in the midst of the Jewish community and his sincere affection for it cannot take the place of absolute inner identification which is absent.

The healthy instinct of the Jewish people and its urge for survival are also responsible for this general axiomatic belief; experience has taught us that converts [out of Judaism] eventually become wholly deracinated simply because their children intermarry with other peoples. This too is the answer that was given to counsel during the hearing when he complained bitterly of unjust discrimination against converts [out of Judaism] as compared with atheists. Counsel's frivolous remark that there is no danger of the children of the petitioner being lost to the Jewish people through intermarriage because he is a Catholic priest sworn to celibacy is, at its best, in the worst of taste. The grant of Jewish nationality is not a reward or a punishment, reserved only for those who are childless.

At the conclusion of the final submissions of the State Attorney, the question was suddenly raised as to what nation does the petitioner then belong. Neither to the Jewish nation, nor to the Polish, for he renounced Polish nationality before leaving Poland. If so, to which nation is he to be registered as belonging on his identity card?

The answer is to neither the one nor the other. Brother Daniel is a man without nationality, and that part of the identity card which is reserved for the answer to the question headed "nation," in accordance with sec. 4(f) of the Registration of Inhabitants Ordinance, 1949, will have to be left blank. . . . There is no anomaly in this, for not *every* applicant for an identity card can give answers to *all* the questions therein, as, for example, one who has no religion.

I am of the opinion, therefore, that the order  *nisi* must be discharged.

Cohn J.

I agree with my learned colleague, Silberg J., on three of his conclusions, but on one I cannot agree.

I agree that according to Jewish religious law (*din torah*) a converted Jew remains a "Jew" irrespective of the fact that he is not eligible to form part of a *minyan* or that a rabbinical court may penalize him by disinheriting him (*Shulhan Arukh*, HM 283:2).

I also agree that the Law of Return (as also the Registration of Inhabitants Ordinance) should not be construed according to Jewish religious law but that these statutes, and the various expressions found therein, should be interpreted in accordance with the rules of interpretation usually applied by the courts of Israel to legislation of the Knesset. I would go even further and say that the traditional religious tests—both positive and negative—for determining who is a Jew are irrelevant in construing the Law of Return. Religious law does not apply in Israel save in matters of marriage and divorce, and the boundaries and frontiers which divide the law that is binding on everyone from religion, which is not, are the boundaries and frontiers upon which the rule of law in the State and the basic rights of its citizens depend.

But I cannot agree that in giving such an interpretation to the Law of Return, it is imperative or permissible to deprive the petitioner of his rights as a Jew. . . .

If I have correctly understood my learned colleague, Silberg J., he is of the opinion that the historic continuity of the Jewish people from those terrible times till the present day can never permit us to regard anyone as a Jew who has entered into the covenant of the Catholic Church and joined one of its orders. Although the Church has both in theory and in practice ceased to be our mortal enemy, it can no more deny its past than we can deny ours, and a Jewish Catholic will forever remain a contradiction in terms.

I myself do not postulate an "historical continuity" such as this. If history is continuous and uninterrupted from the start, this does not mean that it does not change, progress, and evolve. On the contrary, changes of times and ideas, evolution of concepts and cultural values, and continuous

improvement of ways of life and of law—all these are in the very nature of the process of history. To me, historical continuity means continuing to build on the foundations of the past, adding brick to brick, renewing and developing—and not remaining stagnant.

Never has there been such a revolutionary event in the history of the Jewish people, scattered and dispersed amongst the nations, as the establishment of the State of Israel. In the Diaspora we were a minority, tolerated or persecuted, but in our own State we are an independent nation like all other nations. In place of our former status as a minority, whether religious, ethnic, national, or radical, we have created for ourselves in our own State "the status of a fully-privileged member of the comity of nations" (as it is expressed in the Declaration of the Establishment of the State of Israel). This revolution is not merely of a political character; it renders imperative a revision of the values which we have imbibed in our long exile. All this is commonplace and self-evident and what I am saying is nothing new.

At the gates of the homeland, which (according to the said Declaration) "the State will open wide to every Jew," the petitioner now knocks and declares: "I am a Jew, let me in," and the Minister of the Interior, who is charged with implementing the Law of Return, refuses to listen because of the gown that the petitioner wears as a Catholic priest, the cross that hangs from his neck, and his self-declaration that his creed is that of the Gentiles. Had he folded his gown, hidden his cross, and concealed his creed, the gates would have been opened wide without protest. But he chose to come as he is, openly and without guile, and he finds the gates locked.

It is difficult not to recall those Jews who, loyal to their ancestral faith, donned the outward garb of the Christian religion so that they might continue to dwell in the lands beloved to them and harvest the fruit of their toils. How loudly they cried: "We are Christians, open the gates." But had they revealed their true selves, their devotion to the religion of Israel, all gates would have been closed before them.

Times have changed and the wheel has turned full circle. There comes now to the State of Israel a man who regards Israel as his motherland and craves to find fulfilment within its borders, but his religion is Christian. Shall we therefore close the gates? Does the turning wheel of history indeed demand that we deal out measure for measure? Should the State of

Israel, "based on freedom, justice, and peace as envisaged by the prophets of Israel," act towards its inhabitants and those who return as did the evil rulers of some Catholic kingdoms in the past?

This was the vision of the prophets of Israel: "Open ye the gates that the righteous gentile [*goy tzaddik*] which keepeth the truth may enter in" (Isa. 26:2). Isaiah speaks of the righteous gentile, and not of priests, levites, or the people of Israel. Almighty God does not disqualify anyone; all are acceptable to Him; the gates are always open and whoever wishes may enter (*Sifra, Ahare Mot; Exodus Rabbah*, chap. 17).

From the notice sent to the petitioner by the District Office of Immigration and Registration in Haifa on August 12, 1959, . . . it would seem that the Minister of the Interior refused the petitioner's request to be considered a Jew under the Law of Return because of the Government's decision of July 20, 1958, that "Anyone declaring in good faith that he is a Jew, and who does not profess any other religion, shall be registered as a Jew."

Because the petitioner is a Christian, he is not to be registered as "a member of the Jewish people" and is consequently not "included in the Law of Return." In other words, but for his Christian religion no one would dispute the fact that he is a Jew, and only because he professes another faith has the Government decreed that he is not a Jew. It may also be gathered from the notice sent to the petitioner that no one questions his good faith when he declares that he is a Jew. The only obstacle in his path is his profession of another religion.

I accept that part of the decision of the Government that anyone declaring in good faith that he is a Jew is to be regarded as a Jew for the purposes of the Law of Return, but I cannot accept the proviso thereto which restricts its effectiveness to those cases where the declarant has no other religion. I have already pointed out that the tests provided by religious law cannot apply to the Law of Return and it is unnecessary to add that the tests employed by the English courts in determining who is a Jew, cited to us by the State Attorney, cannot apply either. In the absence of an objective test provided by the Law itself, there is no alternative, in my opinion, but to assume that the Legislature intended to content itself with the subjective test, that is to say, that the right to return to Israel belongs to any person who declares that he is a Jew returning to his homeland and wishes to settle there. . . .

Landau J.

[Landau expresses his disagreement with Cohn's "single test" and endorses Silberg's position.]

I have one further comment. Zionism has always put the emphasis upon the national aspect of Judaism, in contrast to its antagonists who regard Judaism merely as a religious creed. Nonetheless, it is a fact that also today religious identification, be it by the flimsiest observance of religious ceremonies, continues to serve as the principal force that links together the Jews of the Diaspora. For these Jews conversion is the first step towards complete assimilation, and it is for this reason that they undergo conversion. The Law of Return was enacted for the benefit of Jews who immigrate to Israel from the Diaspora, and this fact demonstrates all the more sharply the basic weakness of the interpretation suggested by the petitioner of the term "Jew" in that Law.

I concur that the order nisi should be discharged.

Berinson J.

Counsel for both parties were agreed that the Law of Return is a national Law enacted to enable the State of Israel to fulfil its central mission, the ingathering of its scattered sons, and that the term "Jew" used therein must be given a secular-national and not a religious connotation. Counsel differed, however, as to the nature of that connotation. Counsel for the petitioner contended that since the Law has not defined a Jew as one whose religion is Jewish, it follows that in this context faith and religion are irrelevant and the petitioner must therefore be considered a Jew because of his Jewish descent and his Jewish national consciousness. The State Attorney, on the other hand, submits that when a Jew changes his religion, he excludes himself from the Jewish people in the secular and generally accepted sense, and in this sense, as distinguished from the religious approach, he is no longer to be regarded as a Jew. Counsel for both parties have each found support for their views in the opinions and utterances of national and spiritual leaders, historians, and scholars of repute.

Speaking for myself, I do not think that these authorities can be of

much assistance. Every opinion and utterance may be valid and pertinent in its own period and place, but as times and circumstances change, notions and ideas change as well. And vast changes have taken place in the life of the Jewish people. It has been overwhelmed by the holocaust of the Nazis, who set out to kill, exterminate, and obliterate the whole of the Jewish people without distinction between believers and agnostics, orthodox and heretics. The State of Israel was established, and we became a sovereign nation in our own land, enjoying an international status like other nations. Had the petitioner fallen into the hands of the Nazis after embracing Christianity, his religion would not have saved him from their murderous claws and he would have fallen victim to them as a Jew. Now that the State of Israel has been created and the petitioner comes knocking at its gates, will it refuse to recognize him as a Jew? . . .

Were I at liberty to decide this question according to my own convictions, I would not have the slightest hesitation in regarding this particular petitioner as a member of the Jewish people. Ben Yehuda in his dictionary defines a "nation" as a group of people who have the same origin, who speak the same language, who share a common history, and who live for the most part in the same country. There is no mention of religion as a distinguishing feature common to all members of a nation, and we must not assume that the author overlooked the Jewish nation in this definition.

From his own point of view, the petitioner's claim to belong to the Jewish nation is sincere and genuine. He is Jewish in origin, was educated as a Jew, and, as a Zionist, has labored and suffered as a Jew, and even when he embraced Christianity, he did not sever his family ties nor seek to leave the Jewish fold. This is no pretence by the petitioner, no caprice or passing fancy. Throughout the twenty years since his conversion to Christianity, he has been consistent in his Jewish outlook and consciousness and proud of belonging to the Jewish people, and he has with sincerity and Jewish dignity proclaimed this fact whenever possible. He is not of the type mentioned by the State Attorney, who regard their being Jewish as membership of a social club which one may join one day and leave the next. His membership of the Jewish people has been forged by suffering and courage such as cannot easily be matched in our generation, that has seen so much suffering and courage. His claim is genuine in conviction and sentiment, in word and in deed, and

finally in his having immigrated to the State of Israel and his desire to live there and work on its behalf.

To the best of my understanding all this should have been sufficient to open the gates of this country to the petitioner as an immigrant and for his registration in the Register of Inhabitants as a Jew by nationality. . . .

Even Ahad Ha'am, the father of modern spiritual Zionism, who traced his Zionist convictions to Jewish spiritual nationalism and considered the Jewish religion an inseparable part of our national past, did not believe that a Jew would have to be excluded from the Jewish fold because of his refusal to accept the spiritual values of the nation and because "of the truly great chasm which lies between such a man and the others, be they religious or otherwise." In one of his articles (see *Kol Kitve Ahad Ha'am* [Tel Aviv: Dvir; Jerusalem: Jewish Publishing House, 1956], p. 291), Ahad Ha'am recalls the question put to him very frankly by some Jew who asked: "What would you call a Jew who is devoted to his people, its literature and all its spiritual treasures; who longs for its renaissance in the ancestral home and yearns for its liberty, but who at the same time is a free thinker in the widest and most general meaning of the word; who sees beauty and order in nature everywhere and at all times but refuses recognition to Him who is the author and regulator of it all and certainly to Him who gave the Law unto His people with all the consequences thereof—is such a man one of us or not? Can we exclude such a man from the generality of the Jewish people and say to him, 'Leave our camp?'"

To this Ahad Ha'am answers: "From all the particulars given by the questioner, this Jew is 'one of us,' that is to say, a loyal son of his people and of its spiritual heritage, not only like the multitude who have faith, but in some sense more than they."

The people themselves, however, because of a well-developed sense of self-preservation, have decided otherwise, have behaved differently throughout the centuries. For them a Jew who has embraced another religion has withdrawn himself not only from the Jewish faith but also from the Jewish nation and has no place in the Jewish community. Not for nothing is a Jew who has changed his religion called in Hebrew a *meshumad* (meaning "destroyed"), because from the national point of view he is regarded as having destroyed himself and become lost to the nation, both he and his de-

scendants after him. His family mourn for him, rending their clothes, as they would for someone who had really died. All ties with him are broken as if he were indeed dead. In the contemplation of the Jewish people, a Jew and a Christian cannot reside in one person, and certainly not a Jew who is a Catholic priest—to them that would be a contradiction in terms.

I believe that the Law of Return was enacted wholly in this spirit, and in using the word "Jew" therein the Knesset intended it to be understood in its popular meaning as explained above. . . . When Mr. Sharett (then Mr. Shertok) appeared before the United Nations Special Committee for Palestine on behalf of the Jewish Agency and was asked by one of the members, whom did the Jewish Agency consider to be a Jew, Mr. Sharett's reply was as follows: "Speaking in a technical sense and as the terms are used in Palestine legislation, I should say that the Jewish religion is essential. What is essential is that the person should not have gone over to another religion. He need not be a practicing orthodox Jew, observant of its precepts. He is still considered a Jew. But should he join the brotherhood of another faith, he can no longer claim to be recognized as a Jew. The religious test is decisive."

These words, uttered before a committee of the nations of the world by the official representative of the Jewish people certainly reflected the view then current among the people, and there is nothing to show that any change has occurred on the question in Jewish public opinion since they were said some mere fifteen years ago. . . .

My final conclusion, therefore, is that a Jew who has changed his religion cannot be considered a Jew in the sense intended by the Knesset in the Law of Return and as this word is used in common parlance today.

#### Commentary. The Brother and the Other

The halakhic definition of a Jew looks circular. One is a Jew if one's mother is a Jew. But what sort of definition is it if the term "Jew" is used to define "Jew"? Well, from a logical point of view it is a kosher definition, used extensively in mathematics and called recursive. The necessary Jewish mother is in turn a Jew if her mother was a Jew, and so we move backwards in history until we come to the first woman who was a Jew, by fiat. Who

is this Ur-mother of all the Jews? One obvious answer is Sarah, the wife of the founder of the faith—"Sarah our mother," as she is popularly called. But this is not obvious from the halakhic point of view. Indeed, Sarah is considered by halakhists such as Rashi to belong to the descendants of Noah (*bene Noah*)—which means that she was not a Jew.

The first postulated Jewish mothers are those who stood at Sinai and accepted the Torah. This means that the halakhic notion of the Ur-Jew depends on a combination of blood relations and "ideology" (acceptance of the Torah). The combination manifests itself in the full-fledged definition of a Jew—namely, anyone born to a Jewish mother or converted properly to Judaism, where "properly" means according to *halakhah*. Each of these conditions, birth or conversion, is a sufficient condition for being a Jew. But the full-fledged definition does not guarantee that each individual Jew is Jewish by virtue of both birth and ideology. On the contrary, a Jew by birth is a Jew no matter what his or her ideology, as expressed by Rashi's famous dictum, "Even though he has sinned, he is [still] Israel" (§10).

By this definition, the grandson of Nikita Khrushchev is a Jew, and the grandson of David Ben-Gurion a non-Jew, as Jacob Talmon pointed out with dismay. It is a definition by which Oswald Rufcisen, better known in Israel as Brother Daniel, a Jew who became a Carmelite monk, should have been declared a Jew—had the Israel Supreme Court followed the *halakhah*. Both Judges Silberg and Cohn agreed that had the court adopted the halakhic definition, Brother Daniel would have been considered a Jew. Paradoxically, the court tried to narrow the rabbinic definition of a Jew. The court, one may say, tried to be "more Catholic than the pope."

I do not believe that a rabbinic court would have ordered Brother Daniel registered as a Jew just because he was born to a Jewish mother and thus fulfilled the halakhic requirement. We need to distinguish between a Jew *simpliciter*—one whose Jewishness involves birth or conversion—and a Jew relative to a specific purpose: a Jew, for example, with respect to the necessary quorum for praying (*minyan*), or with respect to burial, or to inheritance, or to interest-free loans. The far more useful definition is the one that tells us who is a Jew with respect to such and such a purpose. There is no contradiction in saying that an apostate is a Jew for this purpose but a non-Jew for another purpose.

On this view, Jewishness is a cluster of entitlements and duties. Saying that someone is not a Jew for such and such a purpose means that that person is excluded from a certain entitlement that other Jews possess. Yet the person may possess different entitlements. So I see no problem in a rabbinic decision that an apostate is not a Jew for the sake of the Law of Return. I raise this issue of the relativity of "Jew" not to speculate about what a rabbinic court would have done had Rufcisen appealed to such a court. My aim is to make the point that the Supreme Court should have used the halakhic methodology in this matter, even if as a secular court it had to shy away from any of the substantive claims of *halakhah*. It should have posed the question in its relative form, Who is a Jew for the sake of the Law of Return? rather than asking, Who is a Jew without qualification? In a way, this move is already recognized in Israeli law, where being a Jew for the sake of citizenship does not mean being a Jew for the sake of marriage. The rabbinate can deny the second status (marriage) without thereby denying the first (citizenship).

So the question to address is not Who is a Jew? but Who is a Jew for the sake of the Law of Return? Let me first offer my answer to this vexed question and only then address the tantalizing story of Brother Daniel.

My outrageous answer is that any person who would be regarded as a Jew according to the Nuremberg laws of 1935 should be regarded as a Jew for the sake of the Law of Return. Israel's Law of Return was aptly evaluated by Ben-Gurion as its most important law. The law says that any Jew can immigrate to Israel at any time and be admitted unconditionally as a citizen of the state. This is indeed an unusual law, though not unique. Germany had such a law until its unification in 1989, and Taiwan, I believe, still has such a law.

The rationale for the Israeli law is the idea that the long history of Jewish persecution, with no sure refuge available anywhere on earth—and especially this history as it was manifest in the wretched years before and during World War II—morally requires Israel to offer Jews everywhere an unconditional asylum. The Law of Return is an expression of this commitment.

The idea of a national asylum was, I believe, the basic idea of the Zionist movement when it was founded; in any case, it was the basic idea of Herzl's Zionism. Moreover, I believe that this was a noble idea. But noblesse

oblige. The obligation should be to accept anyone who was persecuted as a Jew or who might have been persecuted as a Jew. And this obligation was clearly defined in our generation by what the Nazis did and to whom they did it.

The idea of Israel as an asylum should have been interpreted in such a way that no person could be turned down by the state of Israel who would have been persecuted by the Nazis had he or she lived then and there. The Nazis cast their murderous net wide; they did not wait for the rabbinate to tell them who was a Jew. "Who is a Jew I decide," said, famously, Karl Lueger, the charismatic and anti-Semitic mayor of Vienna. Jews do not decide who is a Jew for the sake of persecution.

The idea of Israel as an asylum, which is the only defensible rationale for the Law of Return, means that the definition of a Jew should be "negative"—determined by the persecutors of the Jews. I do not, however, adopt Jean-Paul Sartre's idea that the only content of the idea of a Jew is given by the "others." I believe that the Jews, just like the French, are capable of giving positive content to their idea of themselves, and if there is a sense in which they are incapable of doing that, the French are incapable too.

It is of course quite painful to admit to the Israeli law books something as repugnant as an article taken from the Nuremberg Laws. But I maintain that this is no different from wearing the yellow star in a ceremony as an act of identification with the victims. The meaning of doing such a thing is the opposite of what the Nazis meant to do in the Nuremberg Laws. There the purpose was exclusion (the ultimate exclusion); here the purpose is inclusion in the state of the Jews. So on my account of who is a Jew for the sake of the Law of Return, Oswald Rufeisen should be regarded as a Jew.

Nechama Tec, in her book *In the Lion's Den* (New York: Oxford University Press, 1990), tells the amazing story of Oswald Rufeisen's heroism in saving the lives of his fellow Jews. While serving as a secretary and interpreter in a police station in the Belorussian town of Mir (better known to us for its famous yeshivah), he passed the test of loyalty to his people in a way very few did. Again and again he risked his life to rescue Jews. The judges of the Supreme Court knew all about this and were impressed: "The petitioner is a man who during the dark years of the holocaust . . . risked his life times without number in rescuing his brother Jews by daring feats of

courage," writes Judge Silberg. He then asks: Can such a man be denied his "burning desire" to become a citizen, not as a stranger, but as a Jew "returning home." Four out of five judges answered yes to this question and denied Brother Daniel the status of a Jew according to the Law of Return.

Since the Law of Return is a secular law, the term "Jew," writes Judge Silberg, should be interpreted according to "common parlance," that is, according to the understanding of an "ordinary simple Jew." So the criterion for who is a Jew is the common use of the term "Jew" among common people. I take it that all this applies to the Hebrew term *yehudi* as it is understood among Hebrew-speaking people in Israel. Judge Silberg, a sentimental non-simple Jew, is not in the best position to judge the ordinary use of the term *yehudi* among secular Israeli Jews. They, for example, have no problem in applying this term to successful apostates—for example, Karl Marx and Gustav Mahler and many other baptized Jews. Ordinary apostates may have a more difficult time with ordinary Hebrew speakers.

All that is probably irrelevant to Judge Silberg. He is not really interested in the common use of "Jew" but in the mysterious knowledge that he imputes to these speakers, namely, knowledge of the "essential content" of the term. And this knowledge has somehow to do with a recognition shared, he believes, by all Jews that they drink from the same "original fountain"—and a commitment similarly shared to keep drinking from the same fountain.

I don't want to poison Silberg's well. But I suspect that the issue at hand is not the essential content of the term "Jew" (which has, as we have seen, a relative content) but the issue of disturbing images. The image of a Carmelite monk in his uniform of white mantle over brown habit asking to be admitted as a Jew is, indeed, hard for simple and not so simple Jews to stomach. This image evokes dark and sinister memories among Jews. Brother Daniel was quite aware of this, but he came to court dressed in his habit because he was afraid of being accused of hiding his identity as a monk.

Pinchas Rosen, the virtuous minister of justice, told Rufeisen before the trial, "You will not succeed, even though all the rational factors are on your side. The emotional elements will be against you, and you will fail." Rosen knew what he was talking about.

My sense of Brother Daniel is of someone who tried to revive the

idea of the Nazarene Jews. The members of that ancient Palestinian sect, according to Jerome, considered themselves Jews who also accepted the messianic and perhaps the divine nature of Jesus. Brother Daniel upheld a form of eccentric religiosity. He made it clear to the Church that he was a Christian Jew—and in a much stronger sense than that used by Cardinal Lustiger in Paris. Lustiger, despite his exotic origin, is a conventional Catholic, not banal but conventional. This was not the case with Brother Daniel.

It is not even true to say that Brother Daniel was a Carmelite monk. He refused to accept the Carmelite monastic rules in order to be free to pursue his particular brand of religiosity. He never got a penny from the Church. If Jesus came back to life, he would recognize in Brother Daniel a kindred soul and a true brother. Brother Daniel was truly confusing because he was a genuine Jew and a true Christian.

But this should not confuse us in Israel. For the sake of the Law of Return, he should have been considered a Jew. Had the Nazis gotten hold of him, it would not have helped him to plead that he was a Christian Jew (as he presented himself to the partisans in the forest). The Nazis undoubtedly would have executed him immediately as a Jew and only as a Jew. That should have been a good enough reason for Israel to admit him as a Jew.

*Avishai Margalit*

## SIXTEEN Gentiles

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2. Genesis 9:1–17

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3. Book of Jubilees 7:20–21, 26–39

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4. BT Sanhedrin 56a–59a

##### *The Role of the Noahide Commandments*

5. Maimonides, MT Laws of Kings 9:1, 14

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6. Nahmanides, *Commentary on the Torah*, Genesis 34:13

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7. Moses Isserles (Rema), *Responsa* 10

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8. Meir Simhah Cohen, *Or Same'ah*, Laws of Kings 3:10

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10. Mishnah Avodah Zarah 1:1–2, 7–9; 2:1–2