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Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity

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COLLOQUIES

IDENTIFYING THE JEWISH LAWYER: REFLECTIONS ON THE CONSTRUCTION OF PROFESSIONAL IDENTITY*

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INTRODUCTION

A. *On the "Professional Project"*

What follows might best be read as an extended meditation on the implications of personal participation in what I call the "professional project." I am interested in precisely what it might mean for one to adopt a "professional" identity as part of one's self-conception. This question should be of general theoretical interest to anyone interested in the phenomenon of professionalism in contemporary life. As Stephen Cohen has noted, "professions are potential communities; and, as such, they might serve as surrogates and replacements" for other kinds of communities.[1] Indeed, "some professions could conceivably rival ethnic and religious communities in many ways."[2]

I will be focusing primarily on the implications that membership in the legal profession has for one's identity as a Jew. Perhaps appro-

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[1] STEVEN M. COHEN, AMERICAN MODERNITY AND JEWISH IDENTITY 84 (1983). Cohen generally argues that a strong Jewish identity has survived the entrance of American Jews into "American modernity." *Id. See also* CALVIN GOLDSCHEIDER, JEWISH CONTINUITY AND CHANGE: EMERGING PATTERNS IN AMERICA (1986). A far more pessimistic assessment can be found in JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION (1990) [hereinafter RABBIS AND LAWYERS]. A superb summary of Auerbach's thesis can be found in Jerold S. Auerbach, *Law and Lawyers, in* JEWISH-AMERICAN HISTORY AND CULTURE: AN ENCYCLOPEDIA 343, 343-47 (Jack Fischel & Sanford Pinsker eds., 1992) [hereinafter *Law and Lawyers*].

[2] COHEN, *supra* note 1, at 84.

priately, this topic bridges my own professional and personal interests (and obsessions). I am myself a lawyer and, more accurately, a legal academic. In these capacities, I have been teaching courses for almost a dozen years on "professional responsibility" and the "legal profession," in which questions of identity are at the forefront of my attention.

Lewis Coser made us aware many years ago of what he called "greedy institutions,"[3] which compete with other institutions and make insistent demands for the attentions and loyalties of their members. Part of this greed, of course, involves an effort to control the very ways that individuals conceptualize and present themselves to others in "everyday life."[4] Today we are reminded at almost every turn of the extent to which our identities are social constructions. Indeed, our psyches can be viewed as arenas of contention among competing institutions for primacy in forming a particular conception of the self. The self, from this perspective, is a "colonized" entity, representing the successful imperialistic conquest by one or another set of institutions over the basically vulnerable psyche.

Consider in this regard a comment by Monroe Freedman, which I highlight in the syllabus of my course on the legal profession. "It may be," says Freedman, "that the wisest course is to make each lawyer's conscience [or the teachings of one's religious tradition] his ultimate guide. It should be recognized, however, that this view is wholly inconsistent with *the notion of professional ethics, which, by definition, supersede personal ethics.*"[5] I think that Freedman captures one important aspect of (a particular version of) the professional project, what I call the "bleaching out"[6] of merely contingent aspects of the self, including the residue of particularistic socialization that we refer to as our "conscience." Contrast this with Thomas Shaffer's definition of religious "faithfulness" as meaning "that a lawyer imagines that she is first of all a believer," linked with a particular "community of the faithful," and is only "then a lawyer."[7] There is, I think, a chasm separating Freedman's and Shaffer's idealized conceptions of the lawyer's identity.

The triumph of what might be termed the standard version of the professional project would, I believe, be the creation, by virtue of pro-

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[3] *See* LEWIS A. COSER, GREEDY INSTITUTIONS: PATTERNS OF UNDIVIDED COMMITMENT (1974).

[4] *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

[5] Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1482 n.26 (1966) (emphasis added).

[6] Perhaps a Derridean would want to talk about the "erasure" of these aspects.

[7] THOMAS L. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES 198 (1991).

fessional education, of almost purely fungible members of the respective professional community. Such apparent aspects of the self as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer.

These are, of course, quite abstract notions, and to flesh them out adequately could well take a book. My goals in this Article are more modest. I want to initiate a discussion about the implications of the professional project by looking specifically at some of the problems that arise in identifying oneself (or in being identified)[8] as a "Jewish lawyer." I have already alluded to my personal interest in this topic.[9] That being said, it should be clear that the questions to be considered below can also arise if one is interested in determining what it might mean to be a "Christian lawyer;"[10] indeed, one might substitute almost any similar adjective before the word "lawyer" and find oneself faced with similar problems of analysis. Still, I am most interested in the difficulties surrounding the notion of the "Jewish lawyer," and it is that topic that will take up the bulk of this Article.

B. *Sandy Koufax as a Jewish Pitcher*

Before turning to "Jewish lawyering," I want to set the stage for my inquiry into the complexities of professional identity by looking at a presumably quite different example of the intersection of religious and professional identity, Sandy Koufax. Many contemporary observers suggest that America's national pastime has become litigation, with lawyers at the center of the process. But there is, of course, another officially labeled national pastime—baseball—and it is with that activity, so important to the myths and symbols of American life and identity, that I wish to begin.

A famous episode in baseball history occurred on Wednesday, October 6, 1965 when the sixty-second World Series opened in Minneapolis, between the Los Angeles Dodgers and the Minnesota Twins. Pitching for the Dodgers that day normally would have been Sandy Koufax, the ace of the pitching staff who, while winning twenty-six games during the regular season, set a major league record for strike-

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[8] For a discussion of the difference it might make whether one looks to self-identification or ascription by others of the attribute of "being Jewish," see *infra* p. 1586.

[9] Indeed, the question of Jewish identity was a distinct subtext of another publication of mine. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 152-54 (1988).

[10] *See, e.g.*, THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981); *see also* Joseph Allegretti, *Christ and the Code: The Dilemma of the Christian Attorney*, 34 CATH. LAW. 131 (1988). One should also be aware of the journal *The Christian Lawyer*, which regularly includes articles such as Joel Nederhood, *Doing Christian Law*, 3 CHRISTIAN LAW. 3 (1971).

outs. But October 6, 1965, was also Yom Kippur. Instead of digging his spikes into the pitching mound, "[t]he superstar of the Los Angeles pitching staff," the New York Times told us, "was in his hotel room in St. Paul observing Yom Kippur, the most solemn occasion of the Jewish year."[11]

This was not completely unprecedented. After Koufax won the decisive seventh game with only three days' rest, a "man in the news" column noted that "Koufax has never pitched on the holiday."[12] Moreover, an earlier "legendary moment" in American sports involved another baseball great, Hank Greenberg, who, after publicly anguishing about playing a key game for the Detroit Tigers on Rosh Hashanah (which he did, hitting two home runs), did not play a game that fell on Yom Kippur.[13] But no other day off could ever match the

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[11] Joseph Durso, *Twins Turn Back Dodgers, 8 to 2, As Series Opens*, N.Y. TIMES (international edition), Oct. 7, 1965, at 1.

[12] *Master of the Mound Sanford Koufax*, N.Y. TIMES, Oct. 15, 1965, at 45. See also SANDY KOUFAX, KOUFAX 258 (1966), where he writes that his refusal to pitch on Yom Kippur

> was played all out of proportion. I had tried to deflect questions about my intentions through the last couple of weeks of the season by saying that I was praying for rain. There was never any decision to make, though, because there was never any possibility that I would pitch.
>
> Yom Kippur is the holiest day of the Jewish religion. The club knows that I don't work that day.

Id.

[13] Hank Greenberg described the episodes in LAWRENCE S. RITTER, THE GLORY OF THEIR TIMES: THE STORY OF THE EARLY DAYS OF BASEBALL TOLD BY THE MEN WHO PLAYED IT 330 (1984). Greenberg recounted the following:

> I realize now, more than I used to, how important a part I played in the lives of a generation of Jewish kids who grew up in the thirties. I never thought about it then. But in recent years, men I meet often tell me how much I meant to them when they were growing up. It's almost the first thing a lot of them say to me . . . .
>
> They all remember that I didn't play on Yom Kippur, the Jewish holiday. They remember it as every year, but in fact the situation arose only once, in 1934. Both Rosh Hashanah and Yom Kippur came in September that year, and since we were in the thick of the pennant race, the first for Detroit in many years, it became a national issue whether or not I should play on those days. The press made a big thing out of it.
>
> The question was put before Detroit's leading rabbi, Rabbi Leo Franklin. He consulted the Talmud, a basic source for Jewish morality, and announced that I could play on Rosh Hashanah, the Jewish New Year, because that was a happy occasion on which Jews used to play ball in the streets long ago. However, I could not play on Yom Kippur, the Day of Atonement, because that day should be spent in prayer.
>
> So I played on Rosh Hashanah and, believe it or not, I hit two home runs . . . .

Id.

Jerold Auerbach wrote of Greenberg's status as "a legendary figure to an entire generation of Jewish youngsters and their parents . . . . The Rosh Hashana episode . . . was periodically recounted, always with pride, as part of family oral tradition." Jerold Auerbach, *How Hank Greenberg Solved Pennant-Holy Day Dilemma*, JEWISH ADVOC., October 19, 1989 (on

impact of the first game of the World Series, especially for members of the Jewish community. Over a quarter century later, Koufax's gesture remains embedded in Jewish memory.[14] I strongly suspect that it provided the basis for many Friday night sermons in Reform temples and Conservative synagogues across the land presenting Koufax as a role model for the young (and perhaps the old as well) for his unwillingness to subordinate entirely his identity as a Jew to the demands placed upon him by his role as a professional baseball player even at such a moment as the World Series.

Sandy Koufax presented himself as a Jewish pitcher (just as the earlier Hank Greenberg had presented himself as a Jewish batter) in at least one important sense; namely, he recognized that an overarching obligation derived from his status as a Jew could, even in circumstances so weighty as the World Series, abrogate his "civilian" identity as a key member of the Los Angeles Dodgers with obligations to his teammates. If the *Times* is to be believed, though Koufax apparently did not attend services on Yom Kippur,[15] he nonetheless attended to his obligation to do no work and, perhaps, to fast and, more importantly, to contemplate the nature of one's life.

There obviously were many Jewish baseball players (as well as participants in other sports) before Koufax. I am sure that I am not the only bar mitzvah boy to receive books on Jewish athletes. I think it is safe to say that the message of all such books was straightforwardly assimilationist.[16] That is, persons named Greenberg, Rosen, Rosenblum, and Luckman could participate as equals on the playing fields or in the boxing rings. To put it mildly, what made them Jews was never discussed at any length. The point was that being Jewish

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file with author). Greenberg is also discussed at length in PETER LEVINE, ELLIS ISLAND TO EBBETS FIELD: SPORT AND THE JEWISH AMERICAN EXPERIENCE 131-43 (1992).

[14] I offer as evidence many conversations during the preparation of this Article, as well as the report by a colleague who taught Harvard undergraduates that his Jewish students, who had, of course, not been alive in 1965, readily "remembered" Koufax's refusal to pitch.

[15] Greenberg, however, "spent the entire day at Detroit's Shaarey Zedek synagogue." LEVINE, *supra* note 13, at 135.

[16] Monroe Price, the former dean of Benjamin N. Cardozo School of Law, offers his own reminiscences of such books in Monroe E. Price, *Text and Intellect*, 33 BUFF. L. REV. 562, 565 (1984). Price writes as follows:

> I recall receiving, when I was young, a book called The Jew in American Sports. [HAROLD U. RIBALOW, THE JEW IN AMERICAN SPORTS (1963).] It was a wonderful book, with pictures of Sandy Koufax and Hank Greenberg, boxers, and baseball players. There were little descriptions of each athlete and the particular positions he played or the fights in which he had engaged. That was enough to be identity building—the notion that Jews could, in fact, be athletes, that they could use that route for advancement or for distinction. There was no suggestion then that their experience as Jews had an impact on their athletic endeavors.

Id. (footnote omitted).

really "didn't matter" in terms of one's ability to participate in key American rituals. "Merit," defined in terms entirely independent of anything having to do with being Jewish, would not be denied.[17] At one level, this is obviously true of Sandy Koufax. Yet his story, at least as I am telling it, is somewhat different. On Yom Kippur, his religion most definitely did matter in a way that went to the very heart of his role as the stalwart of Los Angeles's pitching staff.

It is crucial to recognize the limited nature of Koufax's status as a Jewish pitcher. That identity comes from his refusal to pitch on Yom Kippur. Yet what about those days he did pitch? Could anyone looking at his behavior as a pitcher—the choice of pitches, his particular pitching "style"—argue that this had anything to do with his being Jewish?

One does not want to rule out the category of national or ethnic "styles" of play too quickly. In the recent Olympic Games, we were reminded that there may be distinctive Italian, as opposed to Canadian or even French, styles in skiing and other major Olympic sports, and aficionados of American basketball can often be heard arguing about the effects that racial and ethnic backgrounds have on one's ability to play the game. Indeed, anyone with a sociological temperament will be interested in how the performance of any particular role, whether it be athlete, lawyer, musician, or physicist, might be affected by the social group from which a given person emerges. All of this being readily conceded, I think it is safe to say that many of us are likely to be reminded of the Nazis if anyone defines Einsteinian physics as characteristically "Jewish," and most of us are hardly more inclined to view patterns of athletic activity through a lens that focuses on religious identification.

All we can say with confidence is that Koufax's Jewishness, on occasion, would dictate when he would engage in his role as a professional baseball player, just as a Jewish physicist might not perform experiments on Yom Kippur, but not how that role would be performed. One would not expect an analyst to describe the physicist as performing experiments "like a Jew" or to say that Koufax "pitched like a Jew."

We would expect Koufax's pitching style to be unrelated to his religious background. I suspect that we would also be outraged if

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[17] Reality was obviously more complex. Thus Marty Glickman, selected for the United States 4 x 100 meter relay team in the 1936 Olympics, was, at the last minute dropped from the team (along with another Jew and Jackie Robinson's brother), at the urging of the International Olympic Committee in order not to offend Hitler any more than was necessary. For discussion of this episode, see LEVINE, *supra* note 13, at 216-29. I owe my initial familiarity with the episode to Fred Schauer.

anyone suggested that he did throw, or ought to have thrown, different, presumably "softer," pitches to Jewish batters than those he threw to Christian batters, just as, incidentally, we would be rightly disturbed if any of the increasing number of athletes who openly identify themselves as "born-again Christians"[18] were shown to be more aggressive against Jews than against their religious compatriots. Even if Koufax might have felt a measure of "solidarity" with fellow Jews in general or even with fellow Jewish athletes in particular, it would have been inappropriate for him to have manifested this fellow-feeling on the mound. This was not likely to arise often in Koufax's ordinary working day, for there were exceedingly few Jews in the major leagues during Koufax's career. Yet, if he had faced Joe Ginsberg, a catcher for the Baltimore Orioles, during a World Series, or even during spring training, Koufax presumably would have ignored Ginsberg's status as a co-religionist and done what the "objective situation" demanded. That is, after all, what it means to be a professional, or so it generally would be argued.

With Sandy Koufax's identity as a Jewish pitcher as my background example, I turn now to the subject of lawyers. What does it mean to be a "Jewish lawyer?" Five possible models of the Jewish lawyer are sketched and elaborated upon below.

I. FIVE MODELS OF THE JEWISH LAWYER

A. *An Overview*

The first model is the one we would normally use if asked to give the number of Jewish baseball players. It simply asks how many persons that we identify as Jews also happen to be identifiable as baseball players or, in this instance, lawyers. Secondly, we can ask if these lawyers' legal practices are, in some sense, socially immersed within the Jewish community. (This question would make little sense in regard to baseball players.) Thirdly, we might wonder how many of

[18] For the phenomenon of the contemporary Christian athlete, see, for example, *Prayers and the Pros—An Expanding Link; Evangelism: More and More Athletes are Practicing Something Else These Days—Public Displays of Religious Faith in the Arenas and the Locker Rooms*, L.A. TIMES, Jan. 25, 1992, at F17. This article mentions such groups as Campus Crusade for Christ, Athletes in Action, Young Life, the Baseball Chapel, and Athletes for Christ. It notes that "there is little mainline Protestant or Jewish influence" on contemporary athletes. *Id.* *See also* Randy Rieland & Michael J. Weiss, *God Gibbs and the Redskins*, THE WASHINGTONIAN, Sept. 1992, at 58-61, 140-44 (providing an extended description of the role that evangelical Christianity played within the contemporary Washington Redskins football team led by coach Joe Gibbs); David Briggs, *Muscular Christianity Turns Fields of Dreams Into Evangelism Forums*, L.A. TIMES, July 26, 1992, at C7; George Vecsey, *Baseball: As They Look Past Their Riches, Athletes Are Turning to Religion*, N.Y. TIMES, April 29, 1991, at A1.

these lawyers identify themselves as observant Jews, at least to the extent that they would emulate Koufax by refraining entirely from the practice of law on certain days because of overriding duties derived from the Jewish religious calendar. A fourth model takes a quite different approach, asking if the lawyers in question practice specifically Jewish law within the context of Jewish legal institutions, such as *batei dinim*—Jewish courts. Finally, we might inquire if lawyers who practice within non-Jewish settings nonetheless find that the way they practice—and not simply when they practice—is significantly affected by duties derived from Jewish law. It should be obvious, incidentally, that these models are not exclusive. For example, anyone found in the area circumscribed by model five will also necessarily be present in the area defined by models one and three and, possibly, in models two and four as well.

It is perhaps appropriate here to mention that several readers of earlier drafts of this Article suggested a sixth model, focusing on a commitment to Jewish values in the practice of law. Most often cited as exemplary of such values is the practice of civil rights or other forms of law devoted to the interests of the downtrodden. But it should be clear that such an example, however personally compatible with my own views, is quite tendentious.[19] Are the great majority of Jewish lawyers who do not practice civil rights or similar law devoid of Jewish values? In any event, I am disinclined to offer such a model inasmuch as it requires, for cogency, a delineation of what count as specifically Jewish values. This is a subject that, even if within my competence, would also require a full book to elaborate with sufficient nuance. However, insofar as the principal purpose of this Article is precisely to encourage a conversation about intersections of profes-

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[19] *See, e.g., Law and Lawyers, supra* note 1, at 346. Auerbach writes:

> It has often been claimed that the commitment of Jews to the American rule of law expresses their fidelity to venerable Jewish legal principles (law, covenant, social justice), which are also deeply embedded in American constitutionalism. That theme was first expressed more than a century ago by Oscar Straus (1850-1926), lawyer, businessman, and the first Jew to serve in the Cabinet (during Theodore Roosevelt's administration). Its frequent reiteration still reveals the yearning of American Jews to root their identity in two traditions and to merge them into a unitary Judeo-American legal tradition. But the transfer of Jewish allegiance from the Torah to the Constitution, a characteristic expression of modern Jewish secularism, also constitutes a paradigm of the acculturation process . . . . The erosion of Jewish tradition, not fidelity to its norms, accounts for the fervent Jewish attachment to American law.

Id.

I believe that reality is considerably more complex than is suggested by Auerbach, but he captures very well the ideological underpinnings of any account of the tendencies of Jewish lawyers in America.

sional and religious identity, I welcome any contributions of other writers who would elaborate such a model.

B. *The Models Explicated*

1. *The Jewish Lawyer as an "Intersection of Sets"*

One might be tempted to identify Jewish lawyers, at least as a group, by saying that the set of Jewish lawyers consists, no more and no less, of the intersection of two other sets: Jews and lawyers. At the very least, the first set would include anyone who is the child of a Jewish mother, plus anyone religiously converted according to the traditional understanding of Jewish law (*Halakhah*), guaranteed by the participation of Orthodox rabbis in the conversion procedures. The remaining task, then, would be to count the number of such people who are lawyers. The problem with this procedure is that many persons who consider themselves within the Jewish community, including myself, would object vigorously to the definition of Jewishness given above. This exemplifies what lawyers call "underinclusive" insofar as it refuses to count, for example, children of Jewish fathers (and non-Jewish mothers) raised as Jewish, as well as persons converted in non-Orthodox conversion ceremonies.

There is, of course, nothing innocent about this exclusion. It is part and parcel of an attempt by many Orthodox Jews to deny the legitimacy of both the recent declaration by the Reform movement that patrilineal descent (that is, being born to a Jewish father) is of equal importance to matrilineal descent, and the conversion procedures of the great majority of American Jews who are distinctly non-Orthodox. (Many Conservative Jews also would be unhappy about counting the children of Jewish fathers.) My point for now is certainly not to try to resolve this dispute, which raises extraordinarily important questions as to who, within a community, has jurisdiction over the membership rules of that community.[20] Rather, my point is

[20] No group within Judaism in fact rejects the necessity to make exclusionary judgments in determining who is a Jew. *See, e.g.*, Robin Pogrebin, *A Catskills Resort Fight Over Who's a True Jew*, N.Y. OBSERVER, August 24-31, 1992 (on file with author). This article details a boycott threatened by the Jewish Community Relations Council, an umbrella organization of about sixty Jewish groups, against the Stevensville Country Club, a kosher hotel in the Catskills, if the hotel honored a contract it had entered into with the group Jews for Jesus to host its annual convention. Although the Orthodox Agudath Israel of America had "promptly canceled its planned Thanksgiving banquet at the Stevensville," there is nothing in the article to indicate that only the Orthodox were behind the boycott. According to the prominent sociologist Leonard Fein, who is, I am quite certain, not Orthodox, "For [the Jews for Jesus] to use the word 'Jew' is an exploitative imposition. They're perfectly entitled to whatever theology they develop. [But, t]hey're not entitled to violate copyright, as it were. . . ." In response, Susan Perlman, a member of the group, declared, "There is no pope of Judaism that

simply that even the presumably easiest test—based on nothing more than the intersection of numerical sets—for answering our question does not permit a single answer because there is such a sharp split within the Jewish community (or should it be "communities?") as to who counts as Jewish in the first place.

There could, of course, also be some definitional problems in regard to lawyers. For example, it is not clear whether one must be a member of a bar and actually engaged in the practice of law to be a lawyer. (I am the first, though only rarely the second.) Yet I assume that the answers to these very real questions are unlikely to provoke the level of unhappiness—even hatred—caused by adopting one or another test for determining who is a Jew.

It should be obvious that the "intersection of sets" approach to resolving our question carries with it no implications about the actual intersection of one's Judaism with one's practice of law or, indeed, with any other aspect of one's life. It is at least conceivable that knowing that a lawyer is Jewish would provide no more information about her behavior as a lawyer than knowing that her eyes were hazel. Similarly, knowing that a physicist or a tennis player is counted as a Jew under our basically "externalist" criterion makes it actually unnecessary to ask anyone what being a Jew means to her as an "internal" matter.[21] I suspect that most of us currently find it implausible to believe that being Jewish provides no useful information at all about lawyering,[22] though we might explore why that is the case and then ask if we should applaud or lament the day when Jewishness was no more informative about modes of lawyering than about one's work life as a physicist or athlete.[23]

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decrees who is and who isn't a Jew." A pope there may not be, but that does not entail that there is no need that boundaries must be declared and maintained. From the perspective of Ms. Perlman, one may see little difference between the Orthodox attack on non-Halakhic conversion and the refusal of Reform and Conservative Jews to accept her own "Judaism" that recognizes Jesus as the Messiah. It is all a turf battle over cultural jurisdiction.

21 The ability to identify Jews on the basis of external criteria, the most important of which is the status of the mother, derives from Jewish theology rather than mere sociology. To be a Jew is, in fundamental ways, an ontological status rather than one that is subject to choice. To discover who is a member of a Protestant sect may require finding out the details of one's personal biography, including the experience of God's saving grace. There are no such analogues within mainstream Judaism.

22 Though, as noted immediately below, *see infra* text pp. 1587-88, the information thought to be provided might be laced with touches of anti-Semitism.

23 I have little doubt, for example, that Auerbach poses a thoroughgoing attack on the purported declension from a distinctively Torah-centered Jewish community to one (encouraged by lawyers) centered instead on the secular Constitution, *see* RABBIS AND LAWYERS, *supra* note 1, at *passim*, and would thoroughly lament this development even as Auerbach's analysis would lead him to expect it to occur.

The broad question, then, is what do we think we learn when we see standard demographic measures indicating the numbers (or proportions) of any given groups in regard to any given occupation or institution. Consider, for example, our reactions even now to discovering that the number of Jews (or women, African Americans, or whatever group one wishes) entering any given occupational role or institution is increasing. One might think that one is learning a great deal about, say, the occupational preferences of Jews or of some other group. Or one might argue that the lesson has to do with the decline of prejudice and discrimination as forces that prevent members of given groups from achieving goals suitable to their talents.

One might well view the entry into a profession by a formerly discriminated-against group as a simple triumph of social justice. A group once excluded because of "prejudice" (that is, the false insistence that the group in question differs in important respects from some particular standard of behavior or ability) is now being welcomed as it becomes accepted that these differences either do not exist in any fundamental sense or, at the very least, are irrelevant to the role or institution in question (which may be a way of saying that there are no fundamental differences).

Another approach holds that, in effect, we are learning not only about the occupational preferences of Jews or about the social justice of American institutions, but also about what might be termed the "internal" behavior of the institutions in question. That is, one might indeed acknowledge the presence of genuine differences between the formerly hegemonic groups and the new entrants, and argue that the entrance of the latter group will indeed change the nature of the institutions in question as the new sensibilities, perspectives, or ways of relating to the world are brought to bear. Those who support such changes usually do not deny the presence of fundamental difference; instead, they deny the legitimacy of prior conceptions of the practice in question and argue instead that these conceptions need to be reshaped precisely by infusing what the formerly excluded group can bring to the enterprise. Others, of course, tend to describe any such changes that they see as deviations from the appropriate way of doing things, and they may try to prevent these changes precisely as a way of purportedly preserving standards.[24]

There are, for example, both pro-Semitic and anti-Semitic stories

[24] In one of his works, Auerbach describes the concerted attempt by social elites, citing the importance of maintaining standards, to prevent immigrant Jews from entering the legal profession in the early decades of this century. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 125-27 (1978).

available regarding the meaning for the legal practice of the entry of Jews into the mainstream of the profession. Robert Eli Rosen has noted that Jewish attorneys are sometimes "identified as overly aggressive, hired guns."[25] As he points out, these traits, which once operated to legitimize the exclusion of Jews from elite, ostensibly genteel, sectors of the law, became positive attributes in the aggressive market society of the 1980s,[26] though the revulsion against the excesses of that decade may lead to a more negative evaluation and at least some return to traditional anti-Semitism.[27]

Many of the contemporary debates about "multi-culturalism" and the rationales of affirmative action hiring programs for formerly excluded minorities are importantly affected by the stance one takes on the legitimate presence of significant differences, rather than the unfairness of emphasizing more important commonalities.[28] This is seen most dramatically and acrimoniously within the academy in regard to the importance of self-consciously seeking out "different voices" ostensibly associated with membership in given groups. One sees it as well, however, in the debate about whether Clarence Thomas brings an authentic African American voice to the Supreme Court.

There is, for example, a sharp debate about the importance of the significantly larger number of female lawyers than was the case twenty years ago. In what is admittedly an oversimplification, one can ask if this has brought a distinctive "women's voice" to the law, reshaping the very notion of what it means to practice law.[29] Many women, for example, have argued that traditional notions of professional roles reflect a male way of relating to the world, with an emphasis on emotionally distanced individuals, each seeking maximization of one's entitlements under the impersonal rules of the legal game. Women, however, ostensibly have a far more relational stance to the world, emphasizing the connections that create and

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[25] Robert E. Rosen, Jews and Corporate Legal Practice 13 (Nov. 1991) (prepared for November 1991 conference in Madison, Wisconsin on Jews and the Law) (unpublished manuscript, on file with author).

[26] *Id.* at 14. It should be obvious that no reliable data exist on these behavioral differences in regard to Jewish attorneys and that we are dealing with sheer ethnic stereotypes.

[27] Consider, in this regard, the controversy surrounding JAMES STEWART, DEN OF THIEVES (1991), a book describing Wall Street during the 1980s, which was accused by Alan Dershowitz of anti-Semitism for its focus on the criminal conduct of Jewish financiers such as Ivan Boesky, Dennis Levine, Michael Milken, and others.

[28] This question has been at the core of much of Martha Minow's work. *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

[29] *See, e.g.*, Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

maintain human communities.[30] One might respond, though, that the entrance of women is only a recognition that women indeed can fill traditional legal roles just as well as men, leaving unchanged the basic conception of what it means to be a professional. Imagine, as a thought experiment, how one would justify, to a disgruntled client, the assignment of a female associate to the team of lawyers handling his case. Would one be more likely to describe the associate as, of course, comparable in talent to the male associates ("after all, she graduated magna cum laude from Harvard"), or to say that the team is now stronger precisely because it does include the special perspective that she can bring to the team? The client, of course, might ask similar questions about any particular associate who appears to deviate from a model (or "modal") background, and the reader can ask what would count as appropriate responses (assuming that one should not simply denounce the client as a bigot and resign the representation).

In any event, based upon a definition of Jewish lawyers derived only from the intersection of sets, one would presumably have no trouble counting as a Jewish lawyer a thoroughly secular child of a Jewish mother, who has not formally left the Jewish community through conversion to another religion even as he ate a ham sandwich on Yom Kippur during a recess in the vigorous cross-examination he was conducting. Consider in this regard a recent book by Susanne Klingenstein, *Jews in the American Academy*, which refers to Joel Springarn, described as the first Jew appointed to the Department of Literature at Columbia University (in 1904), as Jewish only by "an accidental detail of his descent."[31] Indeed, Klingenstein tells us that "Jewishness played absolutely no role in Springarn's life."[32] This does not, however, prevent her use of Springarn as part of her examination of the emergence of Jews as faculty members at American universities. The attribute of being Jewish is something we consider as externally attached to Springarn rather than as a self-proclaimed aspect of his own inner identity. Perhaps it is not too harsh to say that we who are Jewish[33] take a certain pride in Springarn, despite his

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30 *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

31 SUSANNE KLINGENSTEIN, JEWS IN THE AMERICAN ACADEMY 1900-1940: THE DYNAMICS OF INTELLECTUAL ASSIMILATION 104 (1991).

32 *Id.*

33 Alternatively, this may apply to only some of us who are Jewish. In correspondence, Jerold Auerbach has asked, "Why should we who are Jewish take pride in a Springarn? I, for one, decline to take any pride in any Jew who takes no pride in being Jewish." Letter from Jerold Auerbach to Sanford Levinson (Sept. 10, 1992) (on file with author). This is a profound question whose resolution lies well beyond the scope of this Article.

taking no particular pride in being one of us, and we resist his attempt to withdraw from us. (This may be a dramatic illustration of the social construction of identity, a conception central to much contemporary thought.) Such "assigned" identity is not at all an unknown phenomenon in the tortured history of individuals and groups in a dynamic society like that of the United States. We probably would have described the great Sandy Koufax as a Jewish pitcher even if he had pitched the first game of the World Series or done nothing else to affirm his identity as a Jew. It almost certainly would have earned him plaudits had he simply supported Israel (whatever precisely that means).

2. *Jewish Lawyering as an Expression of Social and Political Solidarity*

This brings me to my second category of Jewish lawyers—namely, those who feel a high degree of membership in, and presumably a loyalty to, a specifically Jewish community, regardless of whether there is an explicitly religious element to this identification. It should probably be emphasized that this kind of Jewish lawyer might well join with Felix Frankfurter in describing himself "[a]s one who has no ties with any formal religion" insofar as there is no longer any commitment to Jewish beliefs or observance of Jewish rituals.[34] Still, Frankfurter is universally viewed as a "Jewish judge,"[35] as is, most certainly, Louis Brandeis. What counts for much of the Jewish identification of Brandeis and Frankfurter is their strong commitment, at least at certain junctures of their lives, to Zionism as a solidaristic expression of Jewish communal interests.[36] I have commented, in a book review concerning Frankfurter and Brandeis, that for many of us what is most attractive about these men "is precisely that they offer ways of being Jewish without accepting any specifically Jewish theological tenets or observing any *mitzvot*."[37] (A central question of

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[34] LEVINSON, *supra* note 9, at 3. Frankfurter had, however, arranged with Louis Henkin, a former law clerk who is also an observant Jew, to recite the Kaddish, the traditional Jewish prayer for the dead, at his funeral. *See* LIVA BAKER, FELIX FRANKFURTER 332 (1969).

[35] It is worth noting, however, that Frankfurter described himself as "a Harvard Law Professor who happened to be a Jew" rather than a "Jewish professor at the Harvard Law School." *See* RABBIS AND LAWYERS, *supra* note 1, at 155.

[36] In turn, Frankfurter especially has been subjected to withering criticism for his unwillingness to press his close friend President Franklin Roosevelt about the Roosevelt Administration's patently weak policies concerning the Holocaust and refugees from Germany. Thus, Auerbach has written that the notably cosmopolitan Frankfurter "would not utilize his position and contacts, or his irrepressible energy, in the service of Jewish needs during the most desperate years of Jewish history." *Id.* at 163.

[37] Sanford Levinson, *Who is a Jew(ish Justice)?*, 10 CARDOZO L. REV. 2359, 2368 (1989) (book review). It should be clear that this present Article is linked to the concern of that

contemporary Judaism, of course, is whether this offers an authentic way "of being Jewish.") Although the appointment of each was met with a measure of anti-Semitic hostility, no one seriously argued that the danger presented by their ascendancy to the Court would be the smuggling in of Halakhic requirements drawn from Jewish law. (One might contrast this with the fears sometimes expressed that Catholic nominees to the judiciary will interpret the constitutional issues surrounding abortion in light of church teachings condemning the practice.)[38]

At one level, a model-two "Jewish lawyer" might be described by the terminology that we ordinarily use in regard to any ethnic lawyer. This requires, in the words of Professor Alan Mintz, that we "disentangle" "Jewishness as an ethnic experience . . . from Judaism as a structure of texts and ideas."[39] Ethnic lawyers characteristically draw their client base from the ethnic community and may well feel some special duties to defend fellow ethnics or co-religionists (if that is the proper term) from attack from the "outside" community. This is, of course, also seen as defending the "community's" interests as well.

In this latter sense, Alan Dershowitz is certainly a leading contemporary Jewish lawyer, especially in light of his book *Chutzpah*.[40] Dershowitz notes that a colleague describes him as Harvard Law School's first "Jewish Jew," the first member of that faculty to "wear his Jewishness on his sleeve."[41] It seems clear that Dershowitz defines at least aspects of his own personal practice of law as being part of a commitment to serve Jewish communal purposes. I am confident that he would wholly reject a 1944 statement by Lionel Trilling, already famous as the first Jew granted tenure in the Columbia English Department, that "I do not think of myself as a 'Jewish writer.' I do not have it in mind to serve by my writing any Jewish purpose."[42] Still,

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article, as, indeed, it is linked to an examination of the intersections of Catholicism and secular American law. *See* Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990) [hereinafter *The Confrontation*].

38 *See The Confrontation*, *supra* note 37, at 1063-64.

39 Alan Mintz, *Manners, Morals, and the Academy*, NEW REPUBLIC, March 9, 1992, at 41 (reviewing KLINGENSTEIN, *supra* note 31).

40 ALAN M. DERSHOWITZ, CHUTZPAH (1991).

41 *Id.* at 79 (quoting Alan Stone).

42 KLINGENSTEIN, *supra* note 31, at 232 n.11. It might be relevant here to note Hank Greenberg's comment that

> [w]hen I was playing, I used to resent being singled out as a Jewish ballplayer. I wanted to be known as a great ballplayer, period. I'm not sure why or when I changed, because I'm still not a particularly religious person. Lately, though, I find myself wanting to be remembered not only as a great ballplayer, but even more as a great Jewish ballplayer.

RITTER, *supra* note 13, at 330.

whatever form Dershowitz's contemptuous rejection of Trilling's assimilationism might take, a major theme of Dershowitz's book is his movement away from his Orthodox background. His book appears to be written from (and to) the stance of the contemporary secular Jew (who still continues to observe major Jewish holidays such as Passover and Yom Kippur), rather than from a position espousing a strong adherence to a specifically religious conception of Judaism.[43]

The complexities of Jewish identity are nicely captured by Dershowitz's description of his encounter, upon joining the Harvard faculty, with then-Dean Erwin Griswold. This encounter concerned Griswold's assigning Dershowitz to teach a class that met on Saturday. Dershowitz responded that he would not work on Saturday, though, interestingly, the reason for this was not a religious one.[44] Dershowitz, who had been raised as an Orthodox Jew, had personally become nonobservant. His refusal to work on Saturday can thus better be described in terms of ethnic solidarity than religious obligation. It is worth noting that this is no small, or merely symbolic, point. A central social function of a common "day of rest," after all, is precisely to provide the opportunity for friends and family to interact with one another. One does not have to be Christian to appreciate the coordinating function served by making Sunday a common nonworking day; similarly, one does not have to be an Orthodox Jew (though it may help to have Orthodox friends or family) to appreciate a similar coordinating function for Saturday.

In effect, Dershowitz can be interpreted as claiming that forcing him to teach on Saturday would make it harder for him to retain his ties with the Jewish community, whether or not he would ever go to synagogue and pray on Saturday. In addition, Dershowitz's teaching on Saturday would make life more difficult for Jewish students at Harvard who, for whatever reason, might feel qualms about having Saturday classes. Dean Griswold acquiesced, though not without pointing out that he thought it was inequitable to exempt only Dershowitz. Thus, Harvard's traditional custom of Saturday classes was simply abolished the next year, so that the question of Dershowitz's, or any other Jew's, specialness, at least in this regard, would never again have to arise.[45]

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[43] *See, e.g.*, DERSHOWITZ, *supra* note 40, at 11. Dershowitz describes himself as having "chose[n] a more secular road" than that walked by his parents and ancestors. *Id.* "It is," he writes, "partly because I cannot leave my children the Jewish legacy that is to be found in the existing tradition . . . that I wanted to write a book that documents my journey as a Jew." *Id.* at 12.

[44] Interview with Alan M. Dershowitz, in Cambridge, Mass. (Mar. 24, 1992).

[45] DERSHOWITZ, *supra* note 40, at 64.

It may be relevant to point out that the simple step of abolishing classes for all on the Jewish Sabbath has not been extended to holidays such as Yom Kippur or Rosh Hashanah, and, therefore, each year brings forth a continuing drama concerning the assertion (or acknowledgment) of Jewish identity by various faculty members. And, as with the episode of Dershowitz and Saturday teaching, the motivations for canceling classes may have as much to do with acknowledging group solidarity (and making life easier for Jewish students) than with any personal desires to attend religious services.[46]

Group solidarity, of course, can also raise important problems, as suggested earlier by the example of Koufax pitching to Joe Ginsberg.[47] Jews surely would have taken no pride in Koufax had it turned out that he treated Jewish opponents better than non-Jews. Indeed, it is even conceivable that, had Koufax thought of his Jewishness while on the pitcher's mound, he would have felt some need to be especially hard on other Jews precisely to still any such doubts. For this reason, Felix Frankfurter acknowledged that he exacted "higher standards from Jews" than from other Harvard law students.[48] Similarly, it has been suggested that Julius and Ethel Rosenberg were sent to their deaths by a Jewish prosecutor, Irving Saypol, and a Jewish judge, Irving Kaufman, both eager to reassure the surrounding non-Jewish community (and therefore, presumably serve the interests of the great majority of American Jews who were not Communists) that Jewish prosecutors and judges could be trusted to discipline one of their own.[49] In fact, it is precisely this aspect of what might be termed the semiotics of Jewish identity that provides the lie, at least to some extent, to Felix Frankfurter's tortured attempt to integrate his various identities in a 1943 case dealing with forcing Jehovah's Witnesses to salute the flag in school.[50] After beginning his opinion by invoking his own membership in "the most vilified and persecuted minority in history," Frankfurter immediately stated that "as judges we are

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[46] It is, of course, a notorious truth that Christian professors are almost never put in a position of having to decide whether to cancel classes on Christian holidays and, concomitantly, need not wonder what interpretation is placed on their (un)willingness to teach on such occasions. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 51 (1991).

[47] *See supra* p. 1583.

[48] *See* RABBIS AND LAWYERS, *supra* note 1, at 155; DERSHOWITZ, *supra* note 40, at 79 n.*.

[49] *See* United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1952), *reh'g denied*, 344 U.S. 889 (1952); RONALD RADOSH, THE ROSENBERG FILE: A SEARCH FOR THE TRUTH (1983).

[50] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations . . . ."[51]

Can the meaning of "attachment to the Constitution," owed by lawyers as well as judges, ever be completely independent of one's membership in a "vilified and persecuted minority,"[52] whether for good or for bad? Even if Irving Kaufman cannot be reduced to being only a Jewish judge, can his role in the Rosenberg case, which marked him for the rest of his life, possibly be described without recourse to that key adjective?

As it happens, Felix Frankfurter was one of the few members of the Supreme Court who behaved with any real integrity in regard to the Rosenbergs,[53] though it is impossible to say with any confidence what role his Jewishness played in this. Perhaps the central question, though, is less about Frankfurter than about us: Should we hope that his Jewishness played no role at all?

3. *Judaism Enters the Legal Workplace (But Leaves the Internal Norms of Legal Practice Untouched)*

From the high drama of death, we move to the mundane aspects of everyday (or at least every seventh day) behavior, and to the third model of Jewish lawyering. Can we select, from the set of all Jewish lawyers defined merely as the intersection of sets (or even that subset that feels solidarity with the Jewish community), that set that, at least occasionally, will subordinate its identity as "lawyer" to that of "Jew," defined in specifically religious, rather than simply ethnic, terms? It was this characteristic that made Sandy Koufax so special. We know that Koufax, like Greenberg, felt compelled to remain in his room rather than go to the baseball field on that key October afternoon.

We do not find it hard to imagine Jewish lawyers refusing to appear in court or to do any work for a client on Yom Kippur, and, for Orthodox lawyers, to do the same on the Sabbath, however genuinely important it might be to the client that the work be done at that inconvenient time.[54] It would be thought odd, at the very least, to refer

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[51] *Id.* at 647. Avi Soifer has noted, however, that Frankfurter might have manifested his Jewishness by contrasting the term "Gentile" rather than "Christian." To be sure, Jews are not the only group who speak of "gentiles;" Mormons do as well. Still, it is hard to ignore Frankfurter's particular background when reading the word.

[52] *Id.* at 646.

[53] *See* Michael E. Parrish, *Cold War Justice: The Supreme Court and the Rosenbergs*, 82 AM. HIST. REV. 805 (1977).

[54] At a conference on law and religion at the Harvard Law School on April 5, 1992, I

simply to the fact that legal professionals consider loyalty to a client as one of their central professional responsibilities, and that it would therefore ordinarily be a dereliction of their duties to allow mere personal convenience to trump the needs of the client. Many lawyers have canceled long-planned vacations or attendance at their child's school play at the last minute because of the legitimate demands based upon client loyalty. But the key term above was "mere personal convenience," and I presume that few of us would use such words to describe the desire by a lawyer to maintain a specific religious identity (or, of course, to obey what are thought to be divine commandments) by refusing to work on Yom Kippur or on Saturday.[55]

For at least some Jews, the moral of the Koufax story might well not be his unwillingness to pitch on Yom Kippur, but rather his lack of concern about pitching on the Sabbath. It should be obvious that only some Jews will be willing to celebrate Koufax's status as a Jewish pitcher, while others will point to his profanation of other holy days within the Jewish religious calendar.

Koufax did not, of course, wear a yarmulke when pitching—and not, one is confident, simply because wearing a baseball cap would have made it superfluous. Indeed, the issue of dress is of legitimate concern to many Orthodox Jews precisely because of its symbolic status in declaring their identity as Jews in the otherwise secular workplace. Although "[o]ne of the leading rabbis of the last generation ruled that one who works among gentiles and whose living would be materially harmed by wearing a yarmulke may abstain from doing so,"[56] younger Orthodox Jews entering the legal profession are justifi-

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heard Nathan Lewin, surely one of the most distinguished Jewish lawyers in the United States, say that he would rather be held in contempt of court than appear on the Sabbath. What occasioned his comment was the reference by University of Chicago Professor Michael McConnell to a late eighteenth-century Pennsylvania case, Stansbury v. Marks, 2 U.S. (1 Dall.) 213 (1793), which had upheld a subpoena to a Jewish witness to appear in court on a Saturday, then a regular working day for state courts, which were in session from Monday through Saturday (though not, of course, on Sunday).

A study of American yeshiva students noted that relatively few yeshiva alumni "entered medicine or dentistry. Aside from the long training period, the problem of Sabbath observance is probably a major factor." WILLIAM B. HELMREICH, THE WORLD OF THE YESHIVA: AN INTIMATE PORTRAIT OF ORTHODOX JEWRY 273 (1986). More yeshiva alumni, however, enter the legal professions. "Not only does [law] require logical thinking, but the style of debate and the use of specific cases to develop general principles bear a striking resemblance to the manner in which the Talmud is studied and its content." *Id.* at 272. See below, however, for some reservations about the analogy between the talmudist's and the attorney's respective roles.

55 *See, e.g.*, Ron Coleman, *A Lawyer and His Sabbath*, STUDENT LAW., Dec. 1987, at 14, 15-19.

56 *Id.* at 15.

ably reluctant to renounce what they consider to be an important expression of their unfragmented Jewish identity. They point out that, at the very least, a Jew wearing a yarmulke is recognized by almost everyone as a Jew and often treated, both by the surrounding society and by fellow Jews, as significantly differently from Jews without yarmulkes.

Still, whatever the number of days taken off from ordinary secular work, or whatever one's decision about wearing a yarmulke, another question remains which moves us ever closer to the heart of this Article. While one is on the job, does one's identity as a Jew in any significant sense shape one's sense of what it means to practice law?

As already suggested,[57] one way to respond to this question is to ask certain kinds of sociological questions directed at such topics as client base and issue specialization. That is, it would not be at all surprising to discover that Jewish lawyers (defined by the simple intersection of sets approach), before discriminatory barriers to entry into "mainstream" law firms were lowered, would tend to have Jewish clients or be interested in certain areas of litigation of primary interest to that client base. Indeed, it would hardly be surprising if "observant" Jews would be even more likely to have such clients and specialize in such areas than "nonobservant" ones. This is, of course, what one would expect to find in regard to any sample of ethnic lawyers. The central question, though, is whether the way one practices law within the office or courtroom—as distinguished from one's client base or legal specialization—would be significantly (and legitimately) influenced by one's being Jewish.

4. *The Jewish Lawyer as a Practitioner in Jewish Courts*

The fourth model suggested above asks if the lawyer in question practices before specifically Jewish religious courts. Perhaps it would be only a play on words to suggest that the correct way to identify Jewish lawyers is to identify who practices law before a Jewish court (that is, a *beit din*) by presenting materials and arguments drawn specifically from Jewish sources. I have already suggested that I am far more interested in examining those lawyers who are concerned with the law of the United States or the various states of the union and the potential implication of their identification as Jewish lawyers.[58] Still, it is illuminating to take note of one significant aspect of the Jewish tradition related to lawyering; namely, that the role of the lawyer,

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[57] *See supra* p. 1591.

[58] *See supra* p. 1594.

especially defined as a client-oriented advocate, is, to put it mildly, not a featured (or valued) one within the Jewish tradition.

Whatever else may explain the apparent attraction of many American Jews to practicing law, it is unlikely to be the presentation by traditional rabbinic Judaism of adversarial lawyering (as distinguished from wise judging) as a worthy way to live one's life. Observant Jewish youngsters would more likely consider great *dayanim*, or Jewish judges, as their models. Those youngsters also might imagine emulating distinguished rabbinic authors of incisive responsa—learned analyses of questions arising under Jewish law. This might well explain why, as American Jews became more secularized, many descendants of rabbis, such as Felix Frankfurter, seemed naturally drawn to careers in the legal academy or to service on the bench. It does little, however, to explain why they would be attracted by the particular role of the adversarial lawyer, selling his services to whatever client could afford to hire him.[59]

Rabbinic Judaism is centrally organized around *Halakhah*. Many Jews are said, therefore, to have a great desire to become learned about Jewish law. This, however, does not establish the existence of, let alone the importance of, the role of the advocate in Judiasm. The advocate has been recognized (and often condemned) since ancient times as far less interested in serving justice or working towards the establishment of legal truths than in simply constructing arguments to serve the interests of a client. It is this client-centered advocate who comes to mind when one recalls the standard image of the lawyer in American culture, and it is precisely such a lawyer who is criticized, if not indeed condemned, by classical Jewish thought.

Myer Galinski, writing about "the administration of justice in ancient Israel," notes that "[n]o lawyers or advocates were allowed to appear in Court on behalf of clients."[60] Although later years saw the development of "a type of special pleaders, called an *orach din*

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[59] It is worth noting that Frankfurter and even Brandeis, probably the most famous Jewish lawyer in history, rejected this role.

Frankfurter never practiced law in the private marketplace. Brandeis did have an important legal practice in Boston, but he gained fame (and, from some quarters, opprobrium) for emphasizing his role as "attorney for the situation," seeking justice for all parties, rather than serving as the wholly committed advocate for his particular client. It was, for example, this depiction of his role as an attorney that led to at least some of the opposition to Brandeis's appointment to the Supreme Court (though other opposition was surely motivated by anti-Semitism). *See* THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 241-308 (1985) (providing materials on Brandeis's legal career and his conception of legal ethics).

[60] MYER GALINSKI, PURSUE JUSTICE: THE ADMINISTRATION OF JUSTICE IN ANCIENT ISRAEL 190 (1983).

(preparer of the law), who drew up pleadings, etc., indicating to a litigant how to conduct his case,"[61] this practice was frowned upon by the rabbinic sages. Such services were viewed as intended "not primarily to advance Justice, but only to promote his client's cause. The use of such a lawyer would obviously weigh in favor of the rich litigant."[62] Galinski focuses on the lawyer's presumed lack of interest in advancing "justice" rather than his lack of devotion to "truth." These goals are often connected; lawyers often are viewed as committed to neither goal.

Few indices of standard sources on Jewish law refer to "attorneys," "lawyers," or "advocates." Most existing discussions emphasize the lawyer as someone to be feared rather than embraced as a valuable participant within the decision-making system.

From the passage in *Deuteronomy* that "the two parties to the dispute shall appear before the Lord, before the priests or magistrates,"[63] it was inferred that all pleadings and arguments should be made directly by the litigants rather than by proxies such as attorneys.[64] Perhaps even more important than this passage from Torah is one from the *Mishnah Avot*. There we read that "Judah ben Tabbai says, 'Do not play the part of a counselor [in court].' "[65] It is this passage that is most often cited in regard to the suspicion of lawyer-counselors. Maimonides commented on this passage as follows:

> "Counselors" are those who study laws and arguments till they become specialists in their legalities, anticipating questions and answers. Thus they advise their clients, "If the judge says this, then you say that; if your adversary argues this way, then you may answer him in the following manner." It is as if the counselor orchestrates the law and the litigant, and hence he is called *orekh din* [arranger of the law]. It is this which the *Mishnah* forbids, opposing the teaching of arguments or denials which might benefit one litigant. And even if you know that this litigant has been wronged, and that his opponent is lying in order to deprive him of what is rightfully his—nonetheless it is not permissible to teach this litigant any arguments that might acquit or help him at all.[66]

It appears clear that Maimonides viewed the counselor as a legal

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61 *Id.*

62 *Id.*

63 *Deuteronomy* 19:17.

64 *See* Haim H. Cohen, *Attorney, in* THE PRINCIPLES OF JEWISH LAW 574 (Menachem Elon ed., 1975) (providing a collection of articles originally written for the *Encyclopaedia Judaica*).

65 *See* BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIME: SOURCES AND COMMENTARY 95 (1984).

66 *Id.* at 97.

manipulator—an artful "arranger"—concerned less with absolute fidelity to the law than with crafting ostensibly legal arguments that would enable the client to prevail against an adversary. This view of the lawyer seems very similar to that taken by Socrates in the Platonic dialogue *Gorgias*,[67] where the orator-rhetorician is denounced for his willingness to use his arts in the cause of persuasion rather than for pursuit of truth and, ultimately, to revel in making the lesser, or unjust, cause appear the greater, or just.

Whatever their other differences, the great medieval rabbi Nachmanides apparently agreed with Maimonides. Nachmanides is described as "doubting whether a third party" (that is, someone other than direct parties to a lawsuit), would "be beholden to the truth. Na[c]hmanides apparently felt that an outside agent, who might be functioning in an impersonal, somewhat 'professional' capacity, might feel able to take liberties with the truth."[68] Far from the least important word in this sentence, of course, is the word "professional." The author puts what are sometimes called "scare quotation marks" around the word. What is not clear in this context is whether the author is suggesting that taking liberties with the truth calls into account one's professionalism, so that the quotation marks indicate that one is not a "true" professional; perhaps, on the contrary, he is suggesting that one becomes a professional attorney precisely by exhibiting a willingness to take liberties with the truth. If the latter is true, we are thus warned against giving undue respect to professional lawyers, rather than merely being told to be on guard against only those inferior lawyers insufficiently respectful of truth.

In any event, Basil Herring, in his book *Jewish Ethics and Halakhah for Our Time*[69] quotes a seventeenth century rabbi who wrote of those who learned the law only for ulterior motives, "leading to argumentation and strife, deception and the adoption of false argumentation to justify the wicked and defame the righteous."[70] Another rabbi of the same period denounced the practice of Venetian "advocates" where "the greater the lies, the deceptions, and the trickeries, the more the litigants pursue their services with financial reward."[71] Thus, it should cause no surprise to read that within Jewish jurisprudence "the lawyer fills no unique role or function within the framework of the Jewish judicial process."[72] It must be noted that the

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67 *See* PLATO, GORGIAS (Walter Hamilton trans., 1960).

68 HERRING, *supra* note 65, at 109.

69 HERRING, *supra* note 65, at 91.

70 *Id.* at 110-11 (quoting Rabbi Yair Hayyim Bachrach).

71 *Id.* at 111 (quoting Rabbi Hayyim Benveniste).

72 Dov I. Frimer, *The Role of the Lawyer in Jewish Law*, 1 J.L. & REL. 297, 303 (1983).

views of Maimonides and Nachmanides were ultimately rejected, and that, since the Middle Ages, Jewish legal procedure has allowed lawyers to represent clients, especially in commercial litigation where it would often be exceedingly difficult to require someone, particularly a plaintiff, to be personally present in litigation rather than to be represented by a proxy attorney.[73] The Israeli rabbinate in 1960 formally accepted "practices permitting legal counsel to argue on behalf of either litigant, on condition that such counsel be legally or halakhically licensed and competent to appear in court, and furthermore that the litigants themselves be present in court, except under extreme circumstances."[74] Thus, summarizes Dov Frimer, halakhists have come to accept the practice of legal counsel before the court, thus overriding earlier opposition.[75] By incorporating certain safeguards and verbal warnings, they hoped to utilize the offices of the legal profession to further the goal of the attainment of the truth in court.[76]

Still, one should not be under any illusion that the Jewish legal system enthusiastically embraces adversarial, client-oriented lawyering. There is, for example, no notion that "due process" requires participation of a lawyer in the proceedings of a *beit din*.[77] In any event, if we were to restrict our definition of a Jewish lawyer to someone who practices as an advocate for others within the context of Jewish courts, the number would be relatively tiny, in part because of the somewhat tainted legitimacy of the notion of the advocate's role in this context.

5. *Judaism as a Constitutive Aspect of the Practice of Law*

It is time to turn to the fifth and final model which concerns self-consciously observant (and especially Orthodox) Jewish lawyers practicing in a non-Jewish legal setting. These lawyers are the ones most likely to be faced with the dilemma of deciding what it means to live within a "community of the faithful."[78] They might well resonate the following statement issued by the University of Notre Dame Campus Ministry (with the obvious substitution of the word "Jewish" for "Christian"): "The Christian life is a mediated life. That means that

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[73] *See* Aaron Kirschenbaum, *Representation in Litigation in Jewish Law*, *in* 6 DINÉ ISRAEL at xxv-xli (Zeér W. Falk & Aaron Kirschenbaum ed., 1975).

[74] Frimer, *supra* note 72, at 303.

[75] *See* Frimer, *supra* note 72, at 297.

[76] *Id.* at 301-02, 305.

[77] *See id.* at 302-03 (discussing a 1953 decision of the Rabbinical High Court of Israel rejecting the claim that a divorce proceeding before a lower (religious) court had been flawed because the court, for reasons left unexplained, refused to permit the husband representation by counsel).

[78] *See* SHAFFER, *supra* note 7, at 196-217.

persons committed to growing as Christians do not make their decisions in isolation, but in consultation with the sense and insight of those they consider wise in the Christian community."[79]

As suggested earlier,[80] there is a tension between this sense of mediation and an unabashed version of the professional project. A "professional" goes through a social process, including training in law school, medical school, or a military academy, designed, as suggested earlier,[81] in some way to "bleach out" or make otherwise irrelevant what might be seen as central aspects of one's self-identity. I recall one of my teachers at Stanford saying, only half-kiddingly, that the best way to understand a Maoist thought reform camp was to compare it to the first year of law school. There was, first, the systematic denigration of whatever one had done prior to entering law school. Just as Mao held out the promise of becoming the new socialist man or woman, so did law school promise the redemptive possibility of becoming transformed into the lawyer.

I certainly do not think that law is unique in this regard. Successful professional training to become a lawyer, doctor, or a military professional is far more significant in terms of predicting one's subsequent behavior, at least when acting within a professional role, than, for example, the fact that one is of a particular race, gender, ethnicity, or religion.

One might take justified pride, for example, that the President of the United States is sufficiently indifferent towards race that he chose General Colin Powell to serve as Chair of the Joint Chiefs of Staff of the armed services. In turn, one might be bothered, indeed outraged, by the suggestion that his self-conscious identity as an African American contributed to his decisions as a military officer. This would accuse him of acting "unprofessionally." Recall, in this context, our earlier discussion of Sandy Koufax. More seriously (perhaps), there is Lionel Trilling's comment that "I should resent it if a critic of my work were to discover in it faults or virtues which he called Jewish."[82] Trilling presented himself as a trained academic ostensibly attempting to live up to the internal norms of the academy. His Judaism was, at least when he was a professor of English, merely an "external" feature of his biography, or so he proclaimed. Similarly, I would assume that any Jewish-American military professional would be equally resentful

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79 *Id.* at 207.

80 *See supra* p. 1578.

81 *Id.*

82 KLINGENSTEIN, *supra* note 31, at 232 n.11.

if his Jewishness was considered in evaluating his military competence.

But clearly the example of military professionalism raises complications that baseball professionalism does not. Are Israeli generals Jewish in their professionalism? One might answer yes if, for example, Israeli generals (or at least some of them) behave as if under a duty to follow Halakhically derived norms, which restrict their ability to inflict harm on enemies, even when these norms are stricter than the general norms of the Geneva Convention, which limit the conduct of all military professionals of all signatory nations. Less happily, one can imagine a "Jewish general" who felt that the Biblical injunction, supported by some contemporary rabbis, to exterminate all Amelikites, might support behavior clearly contravened by the Geneva Conventions. But does Ariel Sharon's wholly non-Halakhic commitment to the survival of the Israeli Jewish community make his generalship "Jewish" in any significant way?

Let me now return to the only slightly less weighty example of the lawyer, seen by some as rivaling the military professional in his capacity to inflict suffering on the morally innocent. To what extent might a specific identity, such as that of an observant Orthodox Jew, create special problems (or opportunities) for the lawyer committed to professional ideals?

Consider the *Shulḥan Arukh*, a basic compilation of Jewish law written by Rabbi Joseph Caro in the sixteenth century, which states, in no uncertain terms, that

> It is forbidden to go before non-Jewish judges and their courts, even if they apply Jewish law and even if both litigants agree to be judged by them. And one who goes to be judged by them is evil, and is regarded as having reviled, cursed, and committed violence against the Torah of Moses our teacher.[83]

To sue in secular courts, even if the principles of decision are identical to Jewish law, is a sign of disrespect for the existing Jewish court system and serves to bolster the status of the non-Jewish secular court.[84]

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[83] 1 EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 174 (1990). *See also* JOSEPH CARO, SHULḤAN ARUKH, HOSHEN MISHPAT 26(a). To this day "[a] central principle of halacha is that disputes between Jews should be adjudicated in duly-constituted rabbinical courts." Dov Bressler, *Arbitration and the Courts in Jewish Law*, 9 J. HALACHA & CONTEMP. SOC'Y 105, 109 (1985). A similar view, of course, can be found within at least pre-Constantinian Christianity. Thus Paul asks, in 1 *Corinthians* 6:1: "Dare any of you, having a matter against another, go to law before the unjust, and not before the saints?" *Id.* It is for this reason, among others, that some explicitly Christian lawyers actively support mediation and other forms of alternative dispute resolution as alternatives to going before regular courts.

[84] *See* Bressler, *supra* note 83, at 112.

Now it is clear, practically speaking, that many Jews do not follow this Halakhic injunction and are more than willing to sue fellow Jews in secular courts. Under such circumstances, the person sued is permitted to defend himself, and a lawyer, including a Jewish lawyer (however defined), is permitted to represent the defendant. However, some rabbis have ruled that *Halakhah* "prohibit[s] a Jewish lawyer from representing a Jewish plaintiff in a civil suit before a secular court,"[85] at least if the plaintiff has not first attempted to summon the defendant before a rabbinical court. Although the defendant has an obligation to respond, there are, of course, no coercive measures available to the rabbinical court (or plaintiff) should the defendant fail to recognize its jurisdiction (and, therefore, of the specific system of Jewish law). Should the defendant fail to appear, the rabbis can then authorize the plaintiff to file a suit in a secular court, where a defendant has less choice about responding.[86] Under such circumstances, a Halakhically observant lawyer is also permitted to continue representing his client before the secular court.[87]

Let us consider some implications of this lesson. Imagine three nonobservant Jews each thinking of filing a lawsuit against other Jews. All describe their aim as finding "a first-rate lawyer" who will offer highly professional representation. The first potential plaintiff goes to lawyer *A*, about whom we know nothing in particular other than that she is a first-rate professional. *A* asks a series of questions of her client and offers advice about the potential costs and benefits of litigation. The second plaintiff goes to lawyer *B*, who we know is Jewish but nonobservant. *B*'s behavior will, presumably, be fundamentally similar to *A*'s. But now consider our third plaintiff, who happens to go to the office of an observant Jew.

One would doubt that either lawyer *A* or lawyer *B* would have made inquiries about the religious identities of the first two clients. They might well regard such questions (except in very special circumstances) as no more inappropriate than inquiries about a client's sexual preferences. But might the observant Jew not make some effort to find out about the religious identity of the client so that there would be no risk of violating the Halakhic injunction against representing a Jewish plaintiff in a secular court without rabbinic approval?[88] Consider what would happen if the lawyer finds out that the potential

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[85] *Id.*

[86] *See id.* at 109-10, 112.

[87] *See id.* at 109.

[88] This might be the equivalent of asking how food is cooked in a nonkosher restaurant to make sure that one is not inadvertently ordering vegetable soup that is in fact cooked in a chicken stock.

client is indeed Jewish. Rabbi Bressler writes that "it would appear that Jewish lawyers are in strategic positions to promote adherence to *halacha* by informing their Jewish clients of the legal procedures that would accord with religious requirements,"[89] including the duty to summon the potential defendant to a rabbinical court and going to a secular court only if there is no response.[90] It should be clear that we have moved far beyond defining the Jewish lawyer simply by reference to whether he will go to work on a given day. Instead, the very way that a lawyer relates to his clients seems to be affected crucially by the lawyer's self-conception as a Jew. It is central to my inquiry that this is different from the obvious fact that lawyers differ and that the various codes of professional responsibility allow fairly wide discretion to lawyers in how they will relate to their clients. The differences (and questions) are twofold. First, I am curious whether there are systematic differences between Jewish and non-Jewish lawyers. The discovery of such systematic differences, should they exist, raises questions altogether different from those based upon perceptions that differences are randomly based or otherwise unpredictable on the basis of such general attributes as race, gender, ethnicity, or, in this case, religious identification. Second, it may be misleading, at least regarding Jewish law, to view this as a question of the lawyer's discretion. A central question is whether at least some Jewish lawyers will feel themselves, because of their adherence to Jewish law, *legally* obligated to behave in a certain way about which American law is formally indifferent.

The emphasis on legal obligation is crucial. One is often tempted, in teaching courses on professional responsibility, to raise "moral" dilemmas. A teacher will commonly ask students if they would adhere, for example, to laws mandating confidentiality even where the client threatens to do significant harm to someone else. American law, in most jurisdictions, says the secret must be kept. Many students say that their moral convictions would lead them to behave otherwise. Note that what is being countered by "law" is "morals." It is usually suggested, especially within secular universities, that the proper discipline for ascertaining if any such moral demands exist is secular philosophy. Someone seeking ethical guidance is, from this perspective, well-advised to read Kant, Bentham, Rawls, or Luban.[91] Rarely, if ever, does one hear suggestions that privileged

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89 Bressler, *supra* note 83, at 112.

90 *See id.*

91 DAVID LUBAN, LAWYERS AND JUSTICE (1988).

guidance might be found in religious traditions and their notions of ethical duties.

One of the things that makes the problem of the Jewish lawyer interesting to me, though, is that he may feel compelled to act by genuine legal duties, derived from Jewish law rather than philosophic reflection. To be sure, one often will argue that Jewish law and morality coincide. Much traditional Judaism, however, does not make any independent inquiry into the morality of Jewish law (that is, look at the specific body of Jewish law from the perspective of a specific mode of inquiry called ethics). Instead, the law is itself deemed to be constitutive of what is moral. It becomes almost literally incomprehensible to ask whether some feature of Jewish law is moral,[92] even though this question is recognized as eminently sensible regarding any secular system of law.

It should be emphasized that there is not agreement, even among the Orthodox, as to the prohibition discussed above. At least some members of the Orthodox community would place the conduct described—assisting a Jew in bringing an unauthorized lawsuit before a secular court—as an instance of *lifnei iver*, aiding another in the commission of a sin. Although this act is forbidden by religious law, there are a number of conditions that allow exceptions to be made, the most important of which is the likelihood that the potential sinner will in fact be able to gain his object even without the help of the particular abettor.[93] To take the easiest example in this context, if someone is likely to be able to find a lawyer to press a claim anyway, then an Orthodox Jew is not estopped from taking the case even though the litigant is violating Jewish law. Under such circumstances, to abet a sin, so long as one does not actively encourage it, is not prohibited.

Much of the same kind of logic (that is, the strong distinction between the actual sinner or wrongdoer and the lawyer-agent who only offers professional assistance) underlies the standard view within the American legal profession that "[a] lawyer's representation of a

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[92] *See, e.g.*, David Weiss Halivni, *Can a Religious Law Be Immoral?*, *in* PERSPECTIVES ON JEWS AND JUDAISM 167 (Arthur Chiel ed., 1978). The answer, according to Halivni, is no. *See also* Aharon Lichtenstein, *Does Jewish Tradition Recognize an Ethic Independent of Halakha?*, *in* MODERN JEWISH ETHICS 62 (Marvin Fox ed., 1975). One of the obvious differences, between at least some versions of Orthodoxy and most versions of Conservative and Reform Judaism is that the answer, for the latter, is most definitely yes. I should not claim that the answer, even for the Orthodox, is not necessarily no, as I have learned over the last ten years of association with the Shalom Hartman Institute for Jewish Philosophy in Jerusalem. It seems safe, and sad, however, to say that the predominant trend in contemporary Orthodoxy is against engaging in independent analysis of the morality of *Halakhah*.

[93] For a discussion of this exception, see Michael J. Broyde, *On the Practice of Law According to Halacha*, 20 J. HALACHA & CONTEMP. SOC'Y 5, 12 (1990).

client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."[94] This idea is often described (and sometimes condemned) as "the principle of non-accountability," by which the nefarious morality and illegal conduct of the client is not attributed to the lawyer, who is simply defending the client's legal rights within the legal system. Still, just as the American Bar Association code encourages a lawyer to bring moral issues to the client's attention, even if the client has the ultimate choice of what legal options will be pursued, it surely seems Halakhically required to encourage a Jewish client to behave according to Jewish law, even if the lawyer is permitted to accept a negative response and, thereafter, to file suit in a secular court. It still seems to be the case that a Halakhically oriented Jewish lawyer will behave quite differently from one differently oriented.

Consider an example in the area of family offered by Rabbi Michael J. Broyde. He notes, altogether accurately, "that many of the values that are at the core of halacha have been rejected by normative American society,"[95] including by many, and possibly most, non-Orthodox Jews. Nowhere, he argues, is this more evident than in regard to family law. Perhaps the clearest example is the Jewish couple seeking a civil divorce. According to Rabbi Broyde, "it would seem incumbent upon an observant attorney who is aiding a Jewish couple seeking a divorce to advise the couple that they must also seek a divorce which is proper according to halacha,"[96] that is, to obtain a *get*—an official decree authorizing the dissolution of the marriage—from a properly constituted rabbinical court. Interestingly enough, the refusal by the couple to arrange for a *get* does not preclude the lawyer's continued representation of the client, under the principle of *lifnei iver*.

Even more interesting, and for many of us more troublesome, is the example of the mixed-marriage couple seeking a divorce. Such a marriage is, of course, Halakhically prohibited. Thus, says Rabbi Broyde, in regard to intermarried clients, "it is incumbent upon the lawyer either to give no advice as to how to salvage the marriage or to counsel the client not to try to save the marriage."[97] I am assuming, of course, that the behavior would be very different if both parties were Jewish. The lawyer in that instance would at the very least be permitted and, I strongly suspect, encouraged to suggest counseling

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[94] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1991).

[95] Broyde, *supra* note 93, at 32.

[96] *Id.* at 33.

[97] *Id.*

and other techniques designed to save a marriage. Are Orthodox lawyers under a duty to disclose to the potential client that they will structure any advice they may give by the norms of Jewish law or are they permitted to remain silent and to offer "interested" advice in a more "disinterested" posture?

Enforcement of the criminal law presents other problems. One rabbi, for example, writes that Jewish law makes it

> forbidden for [an observant Jewish lawyer] . . . to help the criminal escape the consequences of his act, by relying on some technical legal points or other devices. The lawyer, just as any Jew, is directed by the Torah to "eradicate the evil from our midst[,]" and may not actively assist someone to avoid his punishment.[98]

It is not clear whether this particular rabbi is referring to basic legal guarantees of the United States Constitution as examples of mere "technicalities" or to something else. If the former, and if one takes this seriously, then it would appear that no Orthodox Jew could be a criminal defense lawyer. It would certainly be interesting to find out how many Orthodox lawyers in fact practice in this branch of the law.

It is absolutely essential to note that the examples I have offered—and many other examples that could be offered—deal with what, from the perspective of American law regarding lawyers, is left to the lawyer's own discretion. That is, there is no serious argument that lawyers are legally required to take any given cases. Lawyers would be violating no one's legal rights if they simply refused to take given cases. The question is only whether they, under one of the recognized exceptions to the application of *lifnei iver*, are permitted to exercise a legal privilege, within American law, to take particular cases.

Nothing stated earlier in this Article should suggest that there is anything questionable about being a Halakhically-oriented Jewish lawyer. I suggest only that it might comprise a distinctive way of being a Jewish lawyer that might surprise certain clients or otherwise make it vitally important to ascertain in advance the religious sensibilities of one's lawyer before offering a retainer for representation.

We now come to a very different question, which is whether the relationship between Jewish and American law could be not only one of difference, but also of outright conflict. Could the legal systems make genuinely competing demands upon those subject to their jurisdiction? The earlier examples concerned obligations only from the perspective of one legal system. By definition, there could be no legal

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98 Herschel Schachter, *"Dina De-malchusa Dina": Secular Law as a Religious Obligation*, *in* HALACHA AND CONTEMPORARY SOCIETY 85, 103-04 (Alfred S. Cohen ed., 1983).

conflict. However, one must now broach the possibility of the existence of two legal systems each claiming to be fully legitimate and "sovereign" over the behavior of the lawyer. No problem is more complex, with more perceived dangers within the literature of political theory.

There is, to be sure, the principle within rabbinic Judaism of *dina de-malkhuta dina* ("the law of the land is the law").[99] Although one is tempted to ascribe the principle to sound prudential judgment, it is presented as a distinctly nonprudential norm: The Jew is enjoined, as a general matter, to obey the secular law even if violation would go undiscovered. This, however, does not operate as a complete subordination of the commands of Jewish law to those of the states within which Jews live. It is applied primarily in *dinei mamonot*, those matters dealt with in civil commercial law.[100] It has little application in regard to *issurim*, the regulation of religious and ritual observances.[101] More generally, Aaron Kirschenbaum and John Trafimow note that "some authorities maintain [that *dina de-malkhuta dina*] is relative only to matters of a governmental nature; legal norms, judicial practices, and the ordinary administration of justice are not subsumed under the [principle] . . . . Otherwise, *dina de-malkhuta dina* would spell the demise of Jewish law."[102] Thus the principle is not at all comparable to the principle of American law that the law of the United States is (ultimately) the law of Ohio. That is, in any conflict between Ohio and the United States Constitution, and laws passed by Congress under its constitutional powers, the federal law prevails without exception. However deferential observant Jews might be to the legal demands of the secular state, it should be obvious that they cannot accept the obligatory force of any law that might be valid within the secular state that is contrary to *Halakhah*. Imagine, for example, a state that requires assent to the divinity of Jesus. No Jew could recognize this as binding law.

Fortunately, at least in the United States, we need not concern

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99 *See id.* at 85. The literature on the concept is substantial, especially in Hebrew, a language that I do not read. For an interesting recent discussion, see Aaron Kirschenbaum & John Trafimow, *The Sovereign Power of the State: A Proposed Theory of Accommodation in Jewish Law*, 12 CARDOZO L. REV. 925, 941 (1991); Chaim Povarsky, *Jewish Law v. the Law of the State: Theories of Accommodation*, 12 CARDOZO L. REV. 941 (1991); Malvina Halberstam, *Interest Analysis and* Dina De-Malkhuta Dina, *A Comment on Aaron Kirschenbaum, The Sovereign Power of the State: A Proposed Theory of Accommodation in Jewish Law*, 12 CARDOZO L. REV. 951 (1991). The concept also plays a central role in J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 CARDOZO L. REV. 829 (1991).

100 *See, e.g.*, Kirschenbaum & Trafimow, *supra* note 99, at 936.

101 *See id.*

102 *Id.*

ourselves with such a law. But this does not mean that there are no imaginable true conflicts. As one might expect, the one most likely to arise (or at least the one most often discussed) within the context of the American legal profession concerns the obligation to preserve client confidences. The American Bar Association Model Rules of Professional Conduct require, with only limited exceptions, that a client's secrets be preserved.[103] The principal exception, for our purposes, involves "prevent[ing] the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[104]

What this means, in those states that have adopted the Model Rules, is that a lawyer is prohibited, for example, from disclosing a client's intent to embezzle or commit other economic crimes, regardless of the consequences to the community. Just as important is the prohibition against disclosure of past crimes. Thus, to adopt an example from the most famous (or infamous) example in the literature of the American legal profession, a lawyer who has been told by his client the location of yet undiscovered bodies of the client's murder victims is under a duty not to tell anyone else, including distraught parents who might come to the lawyer asking for any information about whether their children are even alive.

Most defenses of the confidentiality privileges are rooted in the Anglo-American individualist tradition, wherein deep (and, some would say, extreme) respect for individual autonomy is mixed with an almost equally deep mistrust of the power of the community, especially when gathered together in a coercive state. It is within this context, then, that one reads Rabbi Alfred Cohen's comment, in an article on the ethics of maintaining professional confidences, that "in Jewish ethics the welfare of the community takes precedence over the needs of the individual."[105]

What is fascinating is that Rabbi Cohen does not suggest that the *Halakhah* provides any categorical rules for resolving the dilemma facing a professional who desires to disclose the secrets of a client in order to protect important community interests. "It may be," he writes, "that maintaining professional secrecy is so absolutely integral to the proper function of that profession and the profession so essential to the welfare of society that the halacha would decide the practi-

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103 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1991).

104 *Id.*

105 Alfred S. Cohen, *On Maintaining a Professional Confidence*, 7 J. HALACHA & CONTEMP. SOC'Y 84 (1984). *See also* Gordon Tucker, *The Confidentiality Rule: A Philosophical Perspective with Reference to Jewish Law and Ethics*, 13 FORDHAM URB. L.J. 99 (1985).

tioner must maintain his professional secrets."[106] Not surprisingly, though, there is the counter possibility as well: "[T]he halacha may be that it is more important for [the lawyer] to reveal the confidential material, even if it will cause him enormous personal damage."[107]

What should observant Jews do when they feel torn about preserving a confidence that would presumptively be protected under secular law? Clearly, this is not a question which people should decide for themselves, and professional practitioners must consult with a competent Halakhic authority. "There is no way a person can overcome his own subjective motivations in deciding so sensitive and crucial a question. Sometimes the needs of society will be best served by maintaining the standards of a given profession, but sometimes that may not be the case."[108]

What is most important about Rabbi Cohen's argument is its clear rejection of the authority of the secular state to make the final decision about the values involved in a given conflict between preserving the client's secrets and disclosing them in order to protect the community. That is, he raises the possibility that a lawyer would learn from a Halakhic authority that Jewish law, correctly understood, requires, at least in a specific instance, violation of the secular legal duty to maintain a client's confidences. It is at least thinkable that *dina de-malkhuta dina* would not address the situation. Of course the Halakhic command cannot be made truly coercive, but, presumably, a lawyer who cared enough to seek out Halakhic guidance would feel obligated to obey its commands, even at the cost of violating the secular law.

Again I emphasize that, should this situation ever arise, it might well be analyzed as a true conflict of legal obligations, rather than as a more conventional conflict between law and morals. In deciding between rejecting the rabbi's interpretation of *Halakhah*, and fulfilling the demand of the secular law, a lawyer would make a basic decision about which community is most truly constitutive of his identity. This might indicate, at the most fundamental level, what it might mean to be a Jewish lawyer.

One question that would immediately arise, in regard to any Orthodox Jewish lawyers who felt obliged to breach the secular legal duty of confidentiality, is whether they would properly be subject to discipline or liability to the betrayed client. That is, could one plausi-

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106 Cohen, *supra* note 105, at 84.

107 *Id.*

108 *Id.* at 84-85.

bly cite the First Amendment[109] on behalf of a "free exercise" permission to reject the otherwise binding law of the state? The answer is almost certainly negative, especially given the present Supreme Court's hostility to recognizing the exemption of religious minorities from state regulation even in matters that go to the heart of a minority's religious ceremonies.[110]

CONCLUSION

I have attempted in this Article to lay out an analytical grid for use in identifying the Jewish lawyer. I have tried to show that distinctly different answers are produced depending on what model of Jewish identity is used. I most certainly do not want to argue that any one of the models is uniquely "correct." Not only do I have an intellectual predilection against making such arguments, but I would also inevitably be engaged in a kind of self-defense in urging any one argument over any others. For example, inasmuch as I classify my own Jewish identity as strongly secular, rather than religious, I could scarcely adopt either the fourth or fifth models, and I would be personally comfortable only with relatively minimal versions of the second or third.

In any event, I hope that I have shown how the question of the Jewish lawyer is not precisely analogous to questions involving other attributes like gender, race, or ethnicity. Even if one wants to argue that there are distinctive ways of looking at the world associated with these other attributes, no one could plausibly argue that these ways are legally mandated by membership in the group in question. If any identified group of people practice law in a distinctive manner, the explanation would, depending on your theory, lie in genetics, psychoanalytic theory, or sociology. It could not lie in the obligation felt by the group member to be faithful to a particular legal tradition with its own mandates.

My major interest is the question of identity, both in regard to being a professional and to being a Jew. Ludwig Wittgenstein[111] has taught us that "to imagine a language means to imagine a form of life."[112] One important life form that has survived from ancient times is that of religious community; for an increasing number of moderns,

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109 U.S. CONST. amend. I.

110 *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

111 It may be also worth mentioning that one of the implicit messages of RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS (1990), is the extraordinary complexity of ascribing a particular religious identity to Ludwig Wittgenstein, whose Viennese family had in its past been Jewish, but who lays buried in a Catholic cemetery in England.

112 LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 8E (3d ed. 1958).

that has been joined by the particular language-form of life that we call professionalism. Perhaps what is distinctive about our "postmodern" society is our increasing self-consciousness that many of us are in effect multilingual insofar as we try simultaneously to inhabit quite different forms of life. This is, I think, one description of the situation of at least some Jewish lawyers. Therefore, the justification for trying to elucidate some of the tensions is implicit in the very term.