

MARC GALANTER

A DISSENT ON BROTHER DANIEL

IN DECEMBER, 1962, the Supreme Court of Israel rejected the claim of Brother Daniel, a Polish Jew who had become a Carmelite monk, that he was entitled to be admitted to Israel under the Law of Return. The decision of the Court—together with Brother Daniel's paradoxical identification of himself as a Jew—has brought into sharp focus certain questions of Jewish identity that continue to be vexing both in Israel and throughout the Diaspora.

Brother Daniel, born Oswald Rufeisen, is the son of Polish-Jewish parents. As a boy, he belonged to the Zionist youth movement. After finishing secondary school in 1939, he spent two years on a *hachsharah* training farm preparing for emigration to Palestine. During the Nazi occupation of Poland, he became a hero of the Jewish resistance movement and, in the words of the Court, "rescued hundreds of his fellow Jews from the Gestapo in legendary feats of daring." In 1942, while hiding from the Nazis in a convent, he converted to Roman Catholicism, though continuing to maintain his connections with his family and the Jewish community, and to regard himself as a Jew whose mission was to save other

Jews. At the end of the war he joined the Carmelite order in the hope of being transferred from Poland to a Carmelite monastery in Palestine. He received his hoped-for assignment to Israel in 1958, and presented himself to the Polish authorities as a Jew seeking to emigrate to his homeland. Having relinquished his Polish nationality, he was then given the ordinary "Jewish" travel document for emigration to Israel.

Arriving in Israel in 1958, Brother Daniel applied for an identity card in compliance with the Registration of Inhabitants Ordinance of 1949, which requires that every resident of Israel have an identity card with appropriate entries indicating among other things his nationality, religion, and ethnic group. In his application, Brother Daniel listed his religion as Roman Catholic and his ethnic group as Jewish.

At the same time he also applied for an immigration certificate under the 1950 Law of Return, which provides that "every Jew who has expressed his desire to settle in Israel" shall be entitled to do so. The only exceptions are those applicants deemed by the Minister of the Interior to be "engaged in an activity directed against the Jewish people"; to be "likely to endanger the public health or the security of the state"; or to be persons "with a criminal past, likely to endanger public welfare."

The Minister of the Interior requested an opinion from the government on

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Brother Daniel's application, whereupon the government issued a directive stating that a person having another religion could not be registered as a Jew. Brother Daniel then brought suit against the Minister, asking for an order to compel him to grant the certificate and to issue the identity card. By a four to one majority, the Supreme Court, sitting as court of first instance, denied the order on the ground that the word "Jew" in the Law of Return did not include an apostate.* It further held that Brother Daniel was not entitled to an identity card listing "Jewish" as his "ethnic group."

THE COURT WAS careful to indicate that it was not addressing itself to the meaning of the term "Jew" in every possible context or for every conceivable purpose. Its concern was limited to interpreting a specific law and applying it to a specific situation; in other words, simply to deciding whether or not Brother Daniel came within the meaning of the term "Jew" as it appears (undefined) in the Law of Return.

Brother Daniel urged that, notwithstanding his conversion, he was still a Jew according to Jewish religious law. While expressing displeasure—and even revulsion—at his reliance upon the law of the religion he had abandoned, the majority conceded that he did remain a Jew in this sense. However, the Justices unanimously rejected the relevance of re-

* The opinion of the Court was delivered by Justice Silberg. Justices Landau and Berinson, concurring, appended their own views in separate opinions. The fourth member of the majority, Justice Many, merely noted his agreement with the Silberg and Landau opinions. Justice Cohn wrote a dissenting opinion. In the following discussion references to the views of "the Court" should be understood as referring either to a consensus among all the opinions or else to views expressed in the Silberg opinion and uncontradicted in the other opinions. References to the views of the "majority" should be understood as referring to a consensus among the three majority opinions or else to views expressed in the Silberg opinion which are not contradicted in either of the concurring opinions.

ligious law in considering the question before them. The term "Jew" in the Law of Return, declared Justice Silberg, "does not refer to the 'Jew' of Jewish religious law, but to the 'Jew' of secular law." Religious law, far from being accepted as binding on the Court, was disregarded even as a source of guidance. In effect, the Court was acknowledging that the religious law supplies only one among several definitions of the term "Jew," and one without any special pre-eminence in this matter.

Where, then, can the prescriptive meaning of "Jew" be found? The majority judges agreed that popular usage offers the proper guide. Justice Silberg spoke of "the normal meaning of the word as used by Jews"; Justice Landau, of the "instinct of the overwhelming majority of Jews today" (as well as of the "philosophy of the founders of Zionism"); Justice Berinson, of "the common meaning of the word" and of "the popular understanding." To invoke the authority of popular usage and common understanding, however, was to assume that the Knesset had intended some single "objective" test of Jewishness. But Justice Cohn, dissenting, urged that the Knesset had left the term undefined precisely so that it would be able to accommodate a variety of subjective meanings.

Once it is supposed that a single "common" meaning exists and can be found, the question arises as to which Jews are to be consulted for their usage and understanding. Israelis? If so, only Jewish Israelis, or, since this is a secular law, all Israelis? The Diaspora as well? Contemporary Jews or those throughout history? The majority seems to have had in mind mainly present-day Israelis; but then one might wonder whether the "everyday" definitions of "Jew" in Israel are sufficiently differentiated to incorporate the many meanings attached to the term in the Diaspora—for it is to Diaspora Jews that the Law of Return applies. Furthermore, even within Israel to-

day, the word "Jew" is used in a variety of ways. Which ordinary usage is the relevant one?

All the Justices acknowledged that Brother Daniel was a Jew according to religious law. Justice Landau conceded that he was still a Jew "in the racial sense." Justice Berinson stated that he remained a Jew ethnically and nationally "according to my own personal sentiments." Justice Cohn regarded him as a Jew because Brother Daniel so regarded himself.

It goes without saying that these overlapping and conflicting notions of Jewish identity are not confined to the Israel Supreme Court; and there is undoubtedly also a similar variety of views both in Israel and the Diaspora as to which notion is most relevant. However, even assuming that a court were able to determine the most commonly acceptable idea of what a Jew is, there would still be great difficulty in transposing such popular usage from everyday contexts to the technical and complex demands of a case as intricate and unusual as Brother Daniel's. Indeed, reliance on usage, if taken seriously, would involve a relinquishment of the judicial responsibility to clarify and enlighten current public sentiment rather than merely to reflect it. The question before the Court, after all, was not what current usage is (i.e., has been) in other contexts, but what it is (i.e., ought to be) in this technical one. Yet, bound by a self-imposed commitment to the common understanding, the Court felt unable to move beyond it. As Justice Berinson said: "I do not think that we judges are entitled to be the first to step out and determine today something which it seems to us is bound to come in the course of time. Law follows life and not life the law."

As its working definition of Jewishness, then—whose derivation was never finally made clear—the Court put forward the idea of identification with the Jewish people and their heritage. All the judges agreed that this tie of identification—of

voluntary connectedness with the Jewish past and future—is decisive. All of them rejected blood or descent as the test. Nor, in their view, does this connectedness require adherence to the tenets of Judaism. All agreed that a person might be religious, irreligious, or even actively anti-religious and still be a Jew. It was only beyond this point that the real differences among the members of the Court appeared.

THE MAJORITY CLEARLY find apostasy to be incompatible with the requisite identification. In fact, the lowest common denominator of Jewish understanding of the matter is seen to lie in "the fundamental conception that Jew and Christian are a contradiction in terms." The majority offers two arguments in support of this assertion: first, that the apostate is incapable of fully identifying himself with the Jewish past and destiny; and second, that apostasy leads to intermarriage and eventually to complete assimilation.

The most important of these two arguments is the first. In the words of Justice Silberg:

Brother Daniel will be a lover of Israel; he has already proved that and I have no doubt of it. But he does so from the outside. He has no part in, and will have no true feeling for, the world of Judaism. His undoubted love for, and even full association with the Jewish society in Israel are no substitute for the absent subjective self-identification.

By conversion, says Justice Landau, "an apostate cuts himself off from his national past," "no longer shares a common fate with the Jewish people," and "erects a barrier against any future identification with the Jewish people. . . ."

There is certainly sufficient evidence for saying in a general way that converts from Judaism usually abandon their connections with the Jewish people and heritage. But Brother Daniel presents the case—perhaps an almost unique one—of a man who not only converted but became a monk, and who nevertheless not only retained his identification with Jews

and the Jewish fate, but demonstrated the power of that identification by a consistent and heroic course of action. And, indeed, Justice Silberg acknowledges Brother Daniel's strong personal attachment—to say the least—when he mentions “his life's desire . . . to become completely merged with the people he loves. . . .” Similarly, Justice Berinson observes that in the twenty years since his conversion, Brother Daniel “has been consistent in his attitude and in his Jewish consciousness . . . proud of his association, openly proclaiming it at every opportunity. . . . His association with the Jewish people, tempered by suffering and courage rarely encountered even in this generation so sorely tried in suffering and courage . . . is based on consciousness and on faith accompanied by public utterances and deeds, of which the latest is his immigration . . . [to] Israel and his desire to live in it and work for it.”

IN APPLYING THE test of Jewish identification and relating it to conversion, the Court had two courses open to it. One was to establish, *as a rule of law*, that being a convert automatically precludes the requisite identification, which would make the particular evidence in Brother Daniel's case irrelevant. The second was for the Court to say that, given the general validity of its view of conversion, any conversion initially raises the *presumption* that Jewish identification is lacking, thus placing upon the convert the burden of proving through the introduction of relevant evidence that he has maintained the necessary ties of connectedness. The majority took the former course, thus in effect avoiding the question of Brother Daniel's Jewish identification. But in making it a rule of law that *no* convert is capable of a Jewish identification, the Court went beyond the necessities of settling the case before it. If, instead, it had treated its generalization about converts as raising a factual presumption, the court could have avoided confirming the

legal adage, “hard cases make bad law.”

On the other hand, the Court might have accepted Brother Daniel's estimate of his Jewish identity expressed in the declaration accompanying his request for an *oleh's* visa. This “subjective test”—urged by Justice Cohn but rejected by the majority—would have allowed the Court to dispense both with generalizations about converts and with evidence about the Jewish identification of Brother Daniel in particular. If the “subjective test” is objectionable because it reduces the complexities of personal identity to a matter of the individual's volition at a given time, it still avoids the more dubious procedure of applying an objective test as subtle as that propounded by the majority—a test, moreover, that requires the State to discern and evaluate personal qualities by administrative and judicial procedures ill-suited to the task. The subjective test recommends itself, then, not as the most adequate measure of Jewish identity, but at least as one that avoids the necessity for state inquiries into the imponderables of personal identity.

But what of the Court's other line of argument: that apostasy leads to intermarriage and ultimately—since the children of apostates marry members of other faiths—to “complete assimilation”? On close inspection, this assertion turns out to be neither so relevant nor so convincing as it may at first appear—and not only in the case of a monk. For given the fact that certain kinds of assimilation are acceptable to the Court—the exchange of religious commitment for secular humanism or nationalism, for example, troubles the judges not at all—the argument from assimilation becomes in part merely a restatement of the question. Moreover, to say that apostasy *leads to* complete assimilation implies that some attenuated form of identification may persist after conversion. In view of the Court's avowed concern for Jewish survival, it might have been expected, in interpreting the Law of Return, to be guided by policies for

promoting such survival. Would not the cause of Jewish survival be better served by an interpretation that would encourage converts to express and expand their remaining ties to Jews, than by one taking their conversion as involving a complete foreclosure? And again, if the purposes of the Law include providing refuge and asylum to the persecuted, the term "Jew" might well be thought to embrace Brother Daniel and all those who were subject—or who subjected themselves—to persecution on the ground of their Jewishness.

In addition to all this, the Court's reasoning raises another problem. If conversion is evidence of lack of identification because it leads to assimilation, what then of the less dramatic but perhaps equally potent encouragements to assimilation provided by non-converts? Would the Court be willing to test the Jewishness of the anti-Semitic Jew or the ideologically assimilationist Jew by the degree to which they obstruct and discourage the Jewish identification of their children (or others)? This implicit notion of measuring Jewish identity by effect on other Jews also runs into a textual difficulty that deserves notice. The Law of Return makes provision for the exclusion of those Jews "engaged in an activity directed against the Jewish people. . . ." Presumably systematic anti-Jewish activity would show a lack of voluntary attachment and would also have a deleterious effect on other Jews. Yet it is clear that a person involved in such activity would be included in the term "Jew" as it is used in the Law. A non-convert engaged in systematic anti-Jewish activities remains a Jew; a convert, however well-disposed toward Jews, and whatever contribution he may make to Jewish life, does not.

THOUGH THE Court emphatically declined to set up a positive religious test and emphatically rejected even a modicum of adherence to Judaism as a requirement of Jewishness, its test of identification in the end amounts to a religious disquali-

fication. The nature of the disqualification is explicitly revealed in the treatment of the question of the identity card. The Court holds that, as a member of a non-Jewish religion, Brother Daniel cannot identify himself as a member of the Jewish ethnic group—in spite of the fact that the Registration Ordinance distinguishes between religion and ethnic identification.

To whom, one wonders, does this disqualification apply? Does it derive from the historic hostility to Jews of the church involved, from the formal abjuration of Judaism by the convert, from doctrinal or practical incompatibility with Judaism, or from some combination of these? Justice Landau placed particular weight on the extreme form of Brother Daniel's conversion and on the necessary fealty to his order which prevents him from sharing a common fate with Jews. However, the majority's reasoning appears to apply with equal force to any Roman Catholic and probably to any Christian. Would the disqualification also extend to Quakers? To Unitarians? To non-Christian Unitarians? Presumably it would extend to Islam—and to any other faith that shares with Judaism and Christianity a jealous regard for the exclusive allegiance of its members. Islam, like Christianity, has been doctrinally hostile to Jews, if notably more tolerant in practice. It is unclear what would happen to the Jew who embraced a religion like Buddhism or Hinduism, which has no historic antipathy to Jews or Judaism, which does not require the renunciation of previous religious commitments, and which does not require a formal act of conversion. Justice Berinson suggests that if Brother Daniel "announced that he believed in the teachings of the Buddha, teachings which do not require a change of religion, he would apparently be recognized as a Jew." The other majority judges, who stress the historic antipathy of the Roman Catholic Church to Jews, might possibly reach the same conclusion.

But the majority's religious disqualifi-

cation is not derived solely from empirical generalizations about converts. Ultimately it rests on the theory that Jewishness and Christianity are incompatible. And this theory—strongly felt by the majority and rejected by Justice Cohn—rests in turn upon a certain conception of the nature of historical continuity and a view of the nature of personal identity. When the Court says we cannot sever ourselves from our heritage, the heritage it is referring to is a selective and, inevitably, distorted product of the judges' own notions of the character of Jewish existence. According to these notions, secularism and irreligion do not violate historical continuity, but a failure to hold oneself entirely apart from Christianity does. To permit a Christian to be a Jew would, says the majority:

... expunge the historic . . . meaning of the word "Jew" . . . renounce all those spiritual values for which we have been martyred throughout the different periods of our long exile up to this day. The glorious memory of our martyrs of the Middle Ages will fade away to nothing, and our history will lose its continuity and begin its annals only with the emancipation which followed the French Revolution.

This peculiar selectivity about the past is disconcerting. For one thing, it tends to visualize all of Jewish history in relation to Christianity. The repeated references to the historical antagonism of Christianity toward Judaism suggest that an intransigent response to this antagonism is an essential—perhaps *the* essential—component of Jewishness. Secondly, there is a type of masochistic bias here which tends to define the past exclusively in terms of suffering, persecution, and martyrdom. The love of learning, the thirst for justice, the attachment to reason and law—all of these are passed by without mention. The emphasis on suffering—especially at the hands of the Roman Catholic Church—works a kind of estoppel against the convert's claim. By conversion he has joined the other side. However well-disposed, he has identified

himself retrospectively with inquisitors and oppressors and disqualified himself from the brotherhood of Jewish suffering. In the majority view, then, the primary thing that one must do to remain a Jew is to resist resolutely the blandishments of Christianity; the mission of all Jews is to bear witness, if not to the validity of Judaism, then at least to the injustices of Christianity.

THUS OUR connection with our heritage demands that we resist Christian pretensions in even the benign and dedicated person of Brother Daniel. Continuity must be guided along the lines laid out by "history":

Only a simpleton believes or thinks that we are creating a *new* culture here. It is too late for that! . . . Our new culture in Israel will, even in the most extreme case, be no more than a new edition of the culture of our past.

In contrast, Justice Cohn views the establishment of the State of Israel as a decisive historic break that enables us to re-evaluate our experience and to recognize change. The Jews themselves have "become a nation like all other nations. . . . This revolutionary event demands a change in values and in attitude, a revision of our *galut* thinking." The Church itself is "no longer, either in theory or practice, an enemy of the Jewish people."

To the majority, history has already been witness to all the valid categories of personal identity and affiliation; and it is these categories which must guide our notion of continuity. For Justice Cohn, on the other hand, there may be new possibilities of identity and of human connection. In shaping the future we may invoke, not only the categories established in the past, but our own experiences and aspirations. Indeed, "the imperative of historical continuity is to *build* on foundations laid in the past, to add stone on stone, to innovate and to progress, not to stagnate."

But the majority's assumption of the fundamental incompatibility of Christian

belief and Jewishness follows from something more than its subservience to selected aspects of the past; it also comes from the desire to establish and certify some objective boundaries to the concept of Jewishness. Justice Cohn, by contrast, is willing to accept that Jewishness is open to the wide variety of interpretations offered by particular Jews.

In trying to answer the questions about personal identity raised by these differences, it is probably best to begin by recognizing that no single criterion exists that works to separate Jews from non-Jews; "the Jews" are an entity comprising a number of overlapping groups. First, there are those who adhere to Judaism, or the Jewish religion, in its several forms (Orthodox, Conservative, Reform, "Ethiopian Jews," Karaites, etc.). Second, there are those who may be called "ethnic Jews"—members of communities recognized to be Jewish, such as the "Yiddish" communities of Eastern Europe, the Sephardic communities of the Mediterranean, the B'nai Israel of India. All these communities have contained members who adhere to one or another of the forms of Judaism, as well as members who were either indifferent to Judaism or actively secularist. If, then, ethnic ties have often coincided with religious ones, they have also served as the primary or even exclusive basis of Jewish identification—as they certainly did, for instance, for large numbers of East European Jews. Finally, there are the Israelis, as well as Zionists outside Israel, whose identification with the Jewish people is primarily political.

How could any single standard—religious, ethnic, or political—encompass everyone who belongs to these overlapping but distinct groups? A religious standard would exclude a significant portion of the American and Israeli Jewish communities. An ethnic standard would inevitably be defeated by the diversity of cultures within the Jewish fold. And as for the national standard—commitment to membership in the Jewish nation—it is

rejected not only by many adherents of Judaism (e.g., the American Council for Judaism, the Neturei Karta) but even by many ethnic Jews.

IF THERE is no single set of contemporary beliefs, customs, or allegiances which unifies all these groups, neither is there any ancient or intimate historical connection between them. The only thing they have in common is some historical connection to Judaism and its practitioners—whether as fellow believers, cultural forebears, or fellow citizens. In this limited sense Judaism provides the central core of Jewish identity—not because it prescribes the boundaries of Jewishness in the present, but because it serves as a kind of historical linchpin transecting the different Jewish groups at their point of overlap.

A Jew, then, is a person who has some connection with a history that presents the problems of cosmic design and human destiny in terms of the God of Jewish tradition. According to the Court, he may either affirm this design and destiny and be a religious Jew, or he may reject it and be a secular Jew. Suppose, however, that he not only rejects Judaism but accepts the answers formulated in another religious tradition? Here, the majority would draw the line. Typically, those who have for various reasons embraced other religions have forsaken—or worse—their affiliations with Jews. But there are individuals who defy this pattern, and there are some religious traditions which bear no historic antagonism, in doctrine or in practice, to Jews. Such marginal cases, then, present us with a choice: to cultivate a toleration for the farthest and most precarious reaches of Jewish identity or to attempt to circumscribe and regularize it.

This choice comes to the Court as involving the relative weight to be given to individual volition on the one hand and to group acceptance and consensus on the other. Even if one rejects Justice Cohn's total reliance on the individual's own voli-

tion, it is not necessary to accept the majority's assertion that the criteria of Jewishness need be acceptable to all Jews. Would not acceptability to some Jews suffice? The emphasis on a common denominator is disquieting, for no common denominator could include everything that may be thought of as distinctively and valuably Jewish.

BOTH RELIGIOUS Jews and Zionists acknowledge that there are in fact other kinds of Jews, but they tend to see them as a transient phenomenon—a mere penumbra around the true center of Jewishness (be that Judaism or Israel) destined either to be re-absorbed or lost through assimilation. They seek to end this cultural dispersion by an ingathering of all Jews within the spiritual homeland of Judaism or the national home of Israel. But if the diffuse and plural—polycentric is perhaps the better word—character of Jewishness is viewed not as a problem to be overcome, but as a resource to be cultivated, “Jewish survival” becomes a matter not of bringing everyone together into a single category, but of accepting many styles of being a Jew (including some which are not yet articulated) and of encouraging mutual toleration, respect, and support among all the different kinds of Jews.

It should be clear that this polycentric view does not imply an endorsement of “assimilation.” On the contrary, it assumes that a man must have the moral and intellectual courage to be his own kind of minority: ultimately he must choose not only to be a Jew but also what

it should mean to be a Jew, acting on his own definition of his experience rather than allowing himself to be herded along—or to be excluded—by those who speak in the name of their own exclusive patent on Jewish survival. One must always remember that what is distinctive in the Jewishness one seeks to preserve is no homogeneous blend of characteristics, but a varied, uneven, and sometimes conflicting and uneasy combination of elements. The reasons that impel us to resist the pressure to blend indistinguishably with the outer world should also impel us to resist those pressures which would smooth over and abolish all internal differences.

We must recognize the permanence—insofar as anything is permanent—of our spiritual dispersion; there is not likely to be any final ingathering in this world. Religious beliefs and practices, ethnic traits and national loyalties, may rise or fall in favor and fortune. The fate of Jewishness does not lie exclusively with any one of them. The Jews have developed an identity much richer than a religion, a nation, or a culture—a kind of brotherhood through history that crosses unprecedented barriers. Jewish history, by its rich and complex patterns of religious, cultural, and national experience, has made of Jewishness a thing *sui generis*. No one Jew or group of Jews is able to partake of all of it. The complexities of this heritage should not be reduced to the more manageable and presentable dimensions of nationality or religion, but should be kept open to the complexities of our changing experience—including the enrichments offered by such Jews as Brother Daniel.