

Jewish Ideas Weekly

www.jewishideasdaily.com

August 3-10, 2012

FRIDAY, AUGUST 3

Is Romantic Love a Jewish Value?

By Ben Greenfield

Today is the happiest day in the Hebrew calendar. According to the Mishnah, Tu b'Av (the 15th of the month of Av) was a joyous occasion on which the unmarried women of ancient Jerusalem would dance in the vineyards, hoping to find a match. In modern Israel, Tu b'Av has been revived as a holiday of romantic love, the *sabras'* Valentine's Day. But is it "Jewish" to celebrate romantic love? It is one thing to encourage singles to marry, but quite another to endorse the kind of rapturous lust that saturates Western culture. And yet, there is no better record of vivid—*torrid*, even—romance than the Bible's Song of Songs:

Oh, let him kiss me with the kisses of his mouth, for your love is better than wine . . . You have ravished my heart, my sister, my bride! You have ravished my heart with but one of your eyes, with but one bead from your necklace! . . . I am my beloved's, and my beloved is mine.

But it is this very passion that the rabbis seem to erase from the work. Across the Talmud and Midrash, they read the Song of Songs' amorous verses as an allegory—a figurative representation of God's relationship to Israel. Breasts are not breasts, but synagogues; velvet lips are pious deeds; and restless, love-sick nights are the fate of an exiled people. In other words, a sexual saga is but the vehicle for the expression of God's love for His people.

By the 19th century, a symbolic reading, and an attendant denigration of romantic love, had gained widespread acceptance. This was so much the case that a Baghdadi rabbi, Yosef Hayim ben Eliyahu, rebuked a schoolteacher for tasking his pupils with copying the Song of Songs into Arabic, for fear the children would think the text was "erotic verse, God forbid."

God forbid indeed—today's ArtScroll editors have gone one step further, denying that



a literal interpretation of the "love story" is even a possibility: "The literal meaning of the words is so far from their meaning that it is false." In their mind, allegory *rescues* the tale from potentially profane misunderstandings: The Bible would never stoop so low as to endorse romance.

On the surface, an allegorical reading of the Song of Songs appears to neutralize its erotic content, bringing it into line with the rest of the canon and confirming an anti-romantic bias. But as the scholar Jon D. Levenson points out, an allegory points in two directions. By infusing a romantic relationship with aspects of the divine, the rabbis corre-

spondingly infuse the divine with aspects of a romantic relationship: the passion in the Song of Songs may be spiritualized, but the passion between God and Israel is *eroticized*.

This potentially surprising notion of Godly romance in fact permeates the works of Jeremiah, Ezekiel, Isaiah, and Hosea. Throughout these later prophetic books, God is depicted as a devoted husband to His bride Israel. Though the entire world may call Israel filthy and despised, God sees her beauty, wrapping her in His cloak and bejeweling her with rings and bracelets. When Israel betrays Him, using His cloak and jewels in pursuit of different lovers, God is heartbroken, yet cannot restrain His love: "The wife of one's youth—can she ever be spurned?" One day, He imagines, Israel "will call me *Ishi*, my Man, and no longer *Ba'ali*, my Master . . . I will betroth you unto Me forever . . . and you shall know the Lord." As many readers will intuit, this "knowledge" is not merely—or not at all—cognitive.

And this allegory is not merely a rhetorical device or literary flourish. For the rabbis, like the prophets, it is the very substance of the Jewish story.

Rabbinic glosses of the Song of Songs treat the romantic allegory with utmost seriousness. The rabbis pine to know which day in Jewish history was akin to lying in the arms of one's beloved; which part of our Exile can only be understood as a cold and lonely bedroom; in which exact quality lays our irresistible attractiveness to God. It is through the lens of the romantic that the rabbis finally make sense of the God-Israel relationship—and across an eternity of wilderness the Jewish people carried these love poems, knowing their Beloved was singing them too.

Get the latest from Jewish Ideas Daily in your inbox every morning.

Sign up at www.jewishideasdaily.com



I. B. Singer's Last Laugh

By David G. Roskies

Like millions of his fellow immigrants to America, Isaac Bashevis Singer (1902-1991) started over. In the beginning, he was a deadly serious Polish-Yiddish writer with world-literary ambitions. By the end, he was known to some as a world-literary figure indeed—but to many others as a species of American-Jewish comedian. He played the latter part to perfection. Here, for instance, is an excerpt from his acceptance speech upon receiving the 1970 National Book Award for his children's book, *A Day of Pleasure: Stories of a Boy Growing Up in Warsaw* (Farrar, Straus and Giroux):

Why I Write for Children

There are five hundred reasons why I began to write for children, but to save time I will mention only ten of them.

Number 1. Children read books, not reviews. They don't give a hoot about the critics.

Number 2. Children don't read to find their identity.

Number 3. They don't read to free themselves of guilt, to quench their thirst for rebellion, or to get rid of alienation.

Number 9. When a book is boring, they yawn openly, without any shame or fear of authority.

Number 10. They don't expect their beloved writer to redeem humanity. Young as they are, they know that is not in his power. Only the adults have such childish illusions.

By 1970, this sort of thing—mockery disguised as foolishness—had become Singer's calling card. I am but a lowly storyteller (he was saying), who now prefers to write for children because children, unlike grown-ups, are devoid of pretense, sophistication, guile, existential angst, and, worst of all, false hopes for the betterment of humanity. In the name of these naïve readers, Singer accepted the National Book Award not for any of his major works like *The Slave*, *The Magician of Lublin*, or *In My Father's Court*, or for any his volumes of short stories, but for a modest volume written expressly for youngsters. Passed over as a writer of serious fiction, at least temporarily—by 1978, the omission

would be rectified by the Nobel Prize for Literature—he assumed the role of a comic, cushioning his barbs with disarming levity in heavily accented English.

How Singer became a comic writer and a deliberately comic figure is a story in three phases. Each is well-documented, but lost along the way is Singer's relation to Yiddish literature and to that literature's career in America. Only as an American-Yiddish writer could he have had the last laugh—as indeed he did.

By the time Singer arrived in New York harbor in 1935, the "Persona" school of American Yiddish poetry had entered its second phase. These "youngsters," as they were called, had shaken free of their collective Jewish identity during the peak of the



Eastern European mass immigration (1905-1910). Against the anonymous backdrop of New York City, they were bent on achieving individuation, refracting their varied lives into a rich gallery of assumed personae: Mani Leyb as poet-cobbler, Zishe Landau as dandy, H. Leivick as martyr, Celia Dropkin as circus lady, Moyshe-Leyb Halpern as rascal.

Theirs was a radically new aesthetics. Blocking out the cries of the traffic and the competing claims of the street, they were the first Yiddish poets anywhere to focus on their inner state of being, on the search for a reinvented self. Some adopted an extravagant poetic mask. Zishe Landau's persona—a Europeanized dandy living a life of sensual self-indulgence was a persona designed to celebrate the "it-ness" of the everyday; Mani-Leyb's persona—a devoted craftsman, marked by a streak of asceticism—evoked a more purified state of being.

Nothing quite like this was happening in Poland, let alone in the Soviet Union. There were, however, a number of quick-change artists there. One was Yitzhak Manger, a se-

rious poet who, changing his name to "Itzik" when he arrived in Warsaw from Romania in 1928, transformed himself into the last of the Yiddish folk troubadours. Another was the young Singer, who, adopting the name "Bashevis" (after his mother Bathsheba) in order to avoid being confused with his older brother, the novelist I. J. Singer, became, along with Manger, the youngest writer admitted into the newly-founded Yiddish PEN Club. But it was impossible to earn a living from highbrow fiction and literary translation, and so Bashevis did what others did: anonymously, he published *shund*, or pulp fiction, in the popular press, occasionally also signing his name to humorous sketches.

In Poland, Bashevis was a jack-of-all-literary-trades. In America the thirty-three-year-old immigrant split himself into three separate identities: Isaac Bashevis the highbrow writer, Isaac Warshavski a middlebrow writer, and D. Segal, a tabloid journalist. "Bashevis" was the name he used not only for his novels and short stories but also for a series of Yiddish manifestos: "Problems of Yiddish Prose in America" (March-April 1943), "Concerning Yiddish Prose in Poland" (August 1943), and the recently discovered "Realism as a Method and World-view" (February 1944). "Warshavski" was the name he used for his literary criticism, and for works of fiction that he considered borderline: *In My Father's Court*, called "a literary experiment," and all the stories for children, including *A Day of Pleasure*. "D. Segal" was a well-kept secret—for good reason. These were articles cribbed mostly from the *Daily News* and rewritten in the colloquial "Potato Yiddish" of the daily *Forverts*. It was the New World equivalent of *shund*.

Pen names, even three of them together, do not a persona make. With the help of Warshavski and Segal, Bashevis could protect the realm of his serious, his "real," writing. Only after living in America for a full quarter-century, sometime around 1960, did the need for maintaining such a protective wall become moot—perhaps because, thanks to translation and growing fame, his American publishers and readers were eager to consume anything that carried the I. B. Singer imprimatur. Bashevis, Warshavski, and Segal having become irrelevant, Singer proceeded to invent a persona, an authorial double.

In 1960, with "Alone," set in Miami Beach, "Bashevis" began to publish Yiddish stories narrated in the first person by someone with a biography very similar to that of I. B.

Singer. A perennial bachelor very successful with the ladies, this alter ego appears in melodramatic plots that combine fantasy with hilarity. In “Alone,” the hero gets his signals crossed by otherworldly forces and ends up with a hunchbacked Cuban for a lover. In “Brother Beetle,” he finds himself naked and shivering on the roof of his lover’s apartment building. Eventually, this fictional persona would assume the stable identity of Aaron Greidinger, the narrator-protagonist of such middlebrow novels as *Shosha* and *Scum* and of fantastical tales like “The Cafeteria.” If Zishe Landau’s dandy conjured up prosaic reality, and Mani Leyb’s cobbler-poet a realm of higher beauty, Bashevis’s exhibitionist was a comic grotesque. When he grew weary of clowning, Bashevis-Warshavski wrote stories for children.

Having abandoned one set of identities, Yiddish-American writers gained another of their own invention. But more difficult than finding a surrogate identity was finding a surrogate language. As early as 1935, when Singer arrived, Yiddish itself, in his judgment, had become an obsolescent tongue, spoken by an ever-dwindling and ever-aging segment of American Jewry. Moreover, the Yiddish still being spoken was a creole, he maintained, unfit for serious consumption: a language so impoverished that its Hebraic component—that which made Yiddish the language of Yiddishkayt—and its Slavic component—that which gave it its regional, provincial flavor—had all but vanished in a Germanized and Anglicized mishmash. In “Problems of Yiddish Prose in America,” a sobering analysis published in *Svive*, a little magazine founded by the poet Kadia Molodowski in 1943, Singer proclaimed his belief that Yiddish no longer had a vital role to play in the life of American Jewry.

But then, in the next two issues of *Svive*, at the height of the Holocaust, Bashevis un-

veiled a new species of comic writing the likes of which Yiddish literature had never seen: early installments in a projected series of stories that he called *Dos gedenkbukh fun yeytser-hore*, “The Devil’s Diary.” The series, which would eventually include such brilliant tales as “The Unseen,” “Zeidlus the Pope,” and “The Destruction of Kreshev,” was written in a satiric, super-idiomatic style steeped in Jewish learning. But the voice was the voice of the Devil, master ventriloquist and seducer. No form of Jewish consciousness, male or female, sophisticated or simple-minded, was foreign to this character, and no one had the slightest hope of escaping his net. Bashevis’s ambitious (but unrealized) plan was to fashion not a Yiddish *Comédie humaine* à la Balzac, and certainly not a Yiddish *Divina Commedia* à la Dante, but a true *Comédie diabolique*.

Singer was by no means a lone figure on the stage of genius during the terrible years of 1943-1945—years four, five, and six of the war. In particular, Yiddish was also being rediscovered as a superidiomatic folk vernacular by his most formidable rival: the poet, critic, and novelist Jacob Glatstein. As Bashevis was parading the Devil’s repertoire of Yiddish styles, Glatstein reimaged himself as the great Rabbi Nahman of Bratslav (1772-1810). In the dramatic monologue *The Bratslaver to his Scribe*, Reb Nahman, weary of intellectual endeavor, sets out with his companion Reb Nosn in search of simplicity, direct experience, and melody. Having found a perfect counterpart in the weighty and witty voice of an early Hasidic master and Yiddish storyteller, Glatstein would return to his Bratslaver persona over the course of the next twenty years.

The Devil’s Diary, too, was written as a kind of monologue. Thanks to the labors of the late scholar Khone Shmeruk, we now know that between 1945, the year he published the

original Yiddish version of his masterpiece story “Gimpel the Fool,” and 1975, Bashevis perfected the lost art of the Yiddish monologue as spoken by men and women, Hasidim and thieves, animals and demons. Not all the monologues were comic and none of the monologists was as polyphonic a speaker as Gimpel. But each monologue was a command performance. And by the later decades there was a new audience—one that no longer spoke or even understood Yiddish, but loved nothing better than a Yiddish-inflected performance in translation. *Everything* Yiddish sounded wickedly funny when featured in *Playboy*, or even in *Partisan Review*, where Saul Bellow’s translation of “Gimpel” had appeared in 1953.

The last stage was the easiest: to cover his tracks, to run circles around his interviewers, to play the ingénue and make it seem as if little Isaac Singer of Krochmalna Street in Warsaw was born to be a simple storyteller and gossip-monger. That, after all, is what such born-again storytellers as Sholem Aleichem and Itzik Manger had done before him. And how much easier it was for I. B. Singer to pull it off. By the time he commanded center stage, few even knew to look for hidden tracks or were aware of the other costumes hidden in the closet.

Finally, I. B. Singer commanded the stage because in America there was room for only one Yiddish comedian at a time. Glatstein could never play the role even if he had wanted to, for the simple reason that he spoke an unaccented American English and was a bona-fide New York Jew. All other contenders made a graceful exit to the grave: Mani Leyb, Zishe Landau, H. Leivick, Celia Dropkin, Moyshe-Leyb Halpern, Aaron Glantz-Leyeles, Aaron Zeitlin, Kadia Molodowski—the lot.

Above all, though, I. B. Singer had the last laugh because he alone knew how to keep his audience laughing.

TUESDAY, AUGUST 7

The Postmodern Golem

By Alex Joffe

Elizabeth Baer’s *The Golem Redux* (Wayne State University Press) promises to take us “from Prague to post-Holocaust fiction,” with an emphasis on American Jewish expression. To Baer, the recent spate of golem literature, going beyond novels to comic books, artwork, even *The X-Files*, is an “in-

tentional tribute to Jewish imagination as well as to the crucial importance of such imagination in the post-Holocaust period.” She deems this “intertextual,” the way that Jewish culture expresses itself by reimagining earlier texts. Put another way: Every generation creates the golem it needs.

The golem itself is the ultimate example of “intertextuality.” God took inert matter to create man and, as Baer ably recounts, beginning with brief talmudic and kabbalistic musings, Jewish thinkers have speculated on

how man could imitate God and create artificial life. Since the 16th century, the literary expression of this desire has seen man create life in his own image, with golems made to be servants or protectors. The most famous literary golem, “Joseph,” was, according to legend, created by the Maharal, the 16th-century Rabbi Judah Loew in Prague to protect the community from the depredations of the Emperor Rudolph II. Fashioned from earth, the golem was activated by rituals and the word “*emet*,” truth, and deactivated

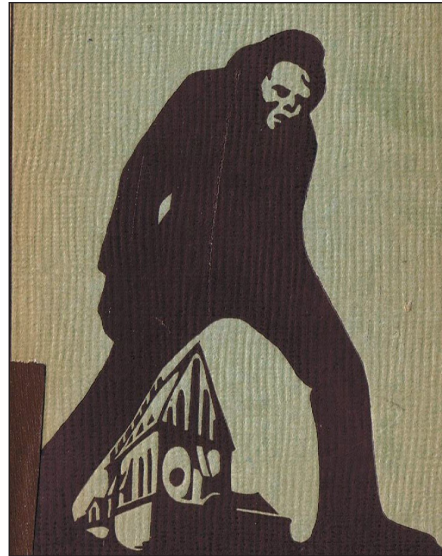
by removal of one letter, leaving the word “met,” or death.

But, as Baer shows, each literary iteration of the golem added contemporary elements and concerns, such as protection from late-19th-century blood libels. She is less understanding of early 20th-century appropriations by non-Jews, most notably Paul Wegener’s 1920 film *Der Golem*. In Wegener’s interpretation of the story, Loew’s creature saves the life of the Holy Roman Emperor and thereby wins the Jews of Prague his favor. But the golem, now under demonic control, subsequently runs amok—only to be vanquished by a small blonde girl. Wegener’s golem is not only the test bed for ideas about life, consciousness, and the soul, but also the mirror of both Jewish concerns and anti-Semitic fantasies.

Baer’s main focus is on post-Holocaust golems. Following Theodor Adorno, she asks how golems should be written after Auschwitz and whether the Shoah forms a bridge or a chasm for the imagination of artificial life. Modern golems span from Isaac Bashevis Singer’s and Elie Wiesel’s traditional retellings, to the increasingly fantastic renderings of Francis Sherwood (*The Book of Splendor*), Michael Chabon (*The Adventures of Kavalier and Klay*), Thane Rosenbaum (*The Golems of Gotham*), and Cynthia Ozick (*The Puttermessa Papers*)—not to mention the ultimate film golem, James Cameron’s *Terminator*. These are American golems, imbued with greater will, communication skills, and independence than their

European prototypes. They protect and defend their makers and inevitably, their strengths and weaknesses amplify by reflection those of their creators.

But even in a European context, the



golem has long been an intertextual and crossover artist: witness Mary Shelley’s 1818 novel *Frankenstein; Or, The Modern Prometheus*. The traditional Jewish golem combined the fantasy of a magical protector with musings on the unintended consequences of usurping the divine, as much a spiritual violation as a practical mistake. Shelley’s novel was a horror story of science without limits and the aesthetic revulsion of the creator and the created. This fear, of being

consumed by our creation, is why the golem resonates beyond Jewish myth, today more than ever.

Much as Loew was at ease with his creation at first, we have been lulled by the dull automata that surround and serve us, airbags, heart monitors, cell phones and countless others that bring comfort and security. But cute robotic vacuum cleaners have morphed into an array of battlefield robots that observe, disarm bombs, and even carry supplies on four legs. Drones kill miscreants in faraway lands, and are on the verge of doing so autonomously. Soon Hell-fire missiles will no longer be fired at jihadis in Yemen by an overworked airman in Nevada. The drone itself will answer the questions, who are they, are they a threat, should they die. As one government study put it, “Lethal autonomy is inevitable.” (In one early telling, Loew’s soulless golem became enraged when Loew failed to deactivate it for the Sabbath.)

The lesson of the golem, especially the American variety, is that what military robotics scientists call “artificial conscience” is hard to install after the fact, especially after the supreme act of hubris that brought the creature into existence in the first place. Unlike Loew, we have no way to erase a letter and consign our creature to oblivion. In 1965, Gershom Scholem named the Weizmann Institute’s first computer “Golem No. 1.” His sardonic plea to the golem and its creator, “develop peacefully and don’t destroy the world,” must also be ours.

WEDNESDAY, AUGUST 8

Inventing Pluralist America

By Kevin Zdiara

With the United States of 2012 more culturally diverse than ever, it is tempting to think that the country’s social pluralism was foreordained. After all, aren’t we a nation of immigrants?

In fact, however, a tolerant pluralism was not the only possibility for America. It emerged as the dominant view of how our society should be organized only after a bitter debate that began with the wave of Eastern European immigration at the end of the 19th century and finally dissipated only in the crucible of World War II. One

of the chief theorists of American pluralism—indeed, the man who coined the term “cultural pluralism”—was a German-born American Jew named Horace Meyer Kallen. This coming Saturday will mark the 130th anniversary of his birth. It is a date worth celebrating.

About a century ago, Kallen was at the height of his fame. He had just edited the last book by his late teacher, the Harvard philosopher William James; he was about to publish an extraordinary comparative study of James and the French philosopher Henri Bergson; and he was at the center of a heated debate about America’s future.

The wave of immigration from Eastern and Central Europe at the beginning of the 20th century was being met by aggressive anti-immigrant sentiment from the

WASP elite. Theodore Roosevelt, for one, inveighed against “hyphenated Americans.” Others were less subtle. Sociologist Edward A. Ross warned in his 1914 book, *The Old World in the New*, that “the blood now injected into the veins of our people is ‘sub-common.’”

Kallen, who had emigrated with his family from Germany at the age of four, felt that those sentiments betrayed the ideals of the United States and needed to be refuted. He was an advocate of James’s philosophical pluralism and undertook to apply this concept to social, political, and religious problems.

In his famous essay, “Democracy vs. the Melting-Pot,” Kallen argued that the United States was a commonwealth based on an idea, not on blood or territory. The idea was that people are different, and that this differ-

ence was good; the equality postulated in the Declaration of Independence didn't mean sameness but equal rights for individuals fundamentally different from each other.

Kallen's pluralism, therefore, was descriptive as well as prescriptive. His starting point was the idea that each individual had a unique perspective on the world, which was influenced by one's geographical situation and cultural, religious, and political environment. The individual could then contribute this perspective to a more comprehensive understanding of the world. Although for Kallen there was no preferred point of view as such, he did recognize the importance of providing a common ground from which the differences could grow and flourish. That common ground was democracy, which protected the individual's "right to be different," as Kallen would come to call it in the 1930s, and enabled a pluralist society.

Relatedly, Kallen was cognizant of the dangers posed to pluralism by totalitarianism and intolerance. Following his travels through Fascist Italy and Soviet Russia at the end of the 1920s, he became a vocal critic of totalitarianism, long before other progressives and liberals did so. The same was true for religions: Though Kallen acknowledged their importance for shaping identities, he was appalled by their history of coercion and violence, and especially opposed those which were obstructing scientific development or which acted intolerantly toward other religious groups.

Kallen's hostility toward religious groups also applied to his own. He exchanged harsh words with Reform Rabbis Samuel Schulman and Abba Hillel Silver for their exclusively religious definition of Judaism; he was equally critical of some Orthodox Jews for their religious intolerance; and he was no less outspoken against zealous anti-Zionists from all Jewish camps.

His hostility toward some Jews should

not, however, be confused with contempt for Judaism, which remained dear to him. Indeed, his experiences as a Jew were likely the inspiration for his cultural philosophy. During his time as an undergraduate at Harvard, his exposure to anti-Jewish resentment brought the realization that, despite his efforts, he would never be accepted as a WASP. Consequently, he chose affirmation of his Jewish heritage instead. Kallen, together with Henry Hurwitz and other Jewish students, started the Harvard Menorah Society in 1906, and promoted a comprehensive concept of Jewish culture which they called "Hebraism." They were ardent Zionists all, and in the 1910s Kallen played a critical role in converting Louis D. Brandeis into a Zionist.

But Kallen's concern for Judaism went beyond interest. It was a search for his own difference, for the "timbre" he could contribute to the "orchestration of mankind," as he later repeatedly called it. Although his lifelong engagement with Judaism is only partly known today, it was, to his contemporaries, one of Kallen's defining characteristics. His friend, Milton R. Konvitz, noted of Kallen in 1953 that

Jewishness defines his very essence. Jewishness defines his very humanity. His Jewishness is all-comprehensive, all-pervasive; it penetrates into his every act, it bites its way into his every feeling; he sees as a Jew, he hears as a Jew, he feels and thinks as a Jew, he thinks and writes and teaches as a Jew.



Horace Kallen (R) with Mordecai Kaplan, 1962. (Photograph courtesy of the Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio.)

Kallen's experiences as a Jew shaped his understanding of and contributions to Judaism; thus Judaism was for him like the United States, a commonwealth of different perspectives. Jews grow up under a variety of circumstances, hence each Jew brings a unique perspective, and all these differences are the condition for the growth of Judaism.

Difference was, then, crucial for Judaism, as Kallen understood it, hence his concern over the suppression of diversity, particularly after World War II. In 1959, he participated in a YIVO conference in which he laid out two possibilities for the future of American Jewry:

The first, he warned, was "an inter-organizational war with one another, each group denying to the others the designation 'Jew' or 'Judaist,' each fighting to shut and cut off whatever is different"; the second, to "labor to orchestrate [Jews'] differences, and re-enforce one another by uniting in the common struggle to live on, and grow." Clearly, Kallen preferred the latter.

Today it seems as if Kallen's ideas about difference were visionary, and that that

vision has now been realized. But pluralism, Kallen insisted, could never be final, for it was in fact a perpetual process to deliver ever more freedom to the individual.

Until his death in 1974, his friends requested he write an autobiography. He refused—insisting that it was only his ideas that mattered. This humble, Jewish-American intellectual was right: Kallen the man is almost forgotten, but cultural pluralism lives on.

— The Editors

THURSDAY, AUGUST 9

What are Israel's Rights in Judea and Samaria? Two Views

Israel's presence in the territories seized in the Six-Day War of 1967—a presence now signaled mainly by Jewish settlement activity especially in Judea and Samaria—has been for

decades the object of intense opposition by the "international community." Indeed, most governments, including that of the United States, regard those settlements as illegal under international law.

Now an official Israeli commission, headed by former Supreme Court Justice Edmond Levy, has concluded that, to the contrary, the settlements are lawful and "Israelis have the legal right to settle in Judea and Samaria." The commission's 90-page report—so far,

only portions of the Hebrew original have been translated—was published last month to a storm of criticism in Israel and abroad.

With the aim of clarifying the issues involved, we present here two differing views of the Levy report, the reasoning of its authors, and the implications of its conclusions for Israel's legal, political, and diplomatic position.

The Levy Report: A Note of Caution

By JHH Weiler and Yaffa Zilbershats

A 90-page report by a commission appointed by the government of Israel to look into the international legal status of Judea and Samaria has provoked a media brouhaha in Israel and beyond. To understand why, it helps to know that in reaching its conclusions, the commission, headed by Justice Edmond Levy, draws on legal arguments that are themselves the objects of controversy.

For the most part, those arguments were developed in the period following the Six-Day War of 1967 in which Israel, defending itself against concerted Arab aggression, seized Jordanian, Syrian, and Egyptian territories. The arguments are associated principally with the names of such distinguished American authorities as Eugene Rostow, Julius Stone, Arthur Goldberg (then the American ambassador to the United Nations), Judge Stephen Schwebel of the International Court of Justice (also known as the World Court), and, most notably among Israeli scholars and diplomats, our esteemed friend Yehuda Blum.

But the case advanced by these figures was hardly accepted universally at the time—in Israel itself, it was subjected to strong criticism by, among others, Yoram Dinstein of Tel Aviv University—and it has been rendered increasingly irrelevant by later developments.

Most states, including Israel, accept Resolution 242 of the United Nations Security Council, adopted in the aftermath of the Six-Day War, as the political and legal “cornerstone” of efforts to resolve the conflict. The resolution balances Israel’s right “to live in peace within secure and recognized boundaries free from threats or acts of force”—a statement that opens the prospect of security-driven border adjustments in the context of any eventual peace treaty—with (a) “the inadmissibility of the acquisition of territory by war” and (b) the principle of “[w]ithdrawal of Israeli armed forces from territories occupied in the recent conflict.”

The hard-won wording of the last of these principles, especially the carefully phrased

formula “from territories” rather than “from the territories” or “from *all the territories*,” was intended by 242’s drafters to safeguard the possibility that, in Ambassador Goldberg’s words, “territorial adjustments to be made by the parties in their peace settlements could encompass less than a complete withdrawal of Israeli forces.” In the intervening years, however, some have construed this formula as indicating an Israeli right either to hold on indefinitely to the bulk of the conquered territories or to act as sovereign in them, or both.

The late Dean Nathan Feinberg of the Hebrew University law school characterized that view as being “without a firm legal foundation . . . unconvincing, not helpful to peace, and one that does not add honor to Israel.” A similar judgment might be entered on the conclusions of the Levy report.

Today, most international lawyers, whether friendly or hostile to Israel, are agreed that although Israel legitimately seized the conquered territories in a war of self-defense, and that therefore its occupation of those territories was not illegal, Israel’s status, pending an agreed-upon peace agreement with the Palestinians, remains that of a “belligerent occupier.” This is also the position of the World Court and of practically all governments, friend or foe. Israeli governments of both the Left and the Right have proceeded under this assumption, and the Supreme Court of Israel has operated under the same premise. A statement in a 2004 case is typical: “The point of departures of all parties—and this is our point of departure as well—is that Israel is holding the territories under [the law of] belligerent occupation.” Likewise, a broad legal consensus, accepted by Israel, recognizes the Palestinians as a people with an attendant right to self-determination within the territories.

The status of “belligerent occupier” bestows neither sovereignty over the territories nor permanent title to them, but instead grants certain rights and imposes certain duties. According to the prevailing view, most Israeli settlements, for example, are unlaw-

ful under the law of belligerent occupation. The Supreme Court of Israel has stated that since the occupation of the territories is temporary, the future of the settlements will be decided in international agreements to which Israel will be a signatory.

All this militates against the relevant conclusions of the Levy report—specifically, its position that Israel is *not* an occupying power under the law of belligerent occupation, and that Israelis have a legal right to settle in the West Bank. Indeed, if the legal

approach of the Levy report were to be adopted, it could ultimately lead to making the territories part of Israel proper. This in turn would issue in two equally unpalatable choices: either Israel would grant citizenship to the Arabs living in the territories, with demographic consequences that would compromise and potentially undermine the Zionist ideal of Israel as the state of the Jewish people, or

Israel would adopt a governing structure for the territories amounting to a form of apartheid, thereby compromising and undermining the state’s democratic character—another core aspect of the same Zionist ideal.

The logic of the arguments developed in the Levy report thus opens a juridical Pandora’s box. In recent times, Israel’s very legitimacy has come under increasing international attack, reminiscent in its intensity of the precarious early years of the state. One front in that campaign is the relentless and increasingly sophisticated use of international law to wage “lawfare” against Israel, its leaders, and its soldiers. In these circumstances, to destabilize the internationally accepted status of the territories risks creating a perverse legal boomerang, further destabilizing the status of Israel itself within its present, internationally recognized boundaries.

So far, the government of Israel has neither endorsed nor adopted the conclusions of the Levy report. Instead, the report is “being studied.” In our view, this is a wise and a good thing.



The Levy Report: A Welcome Advance

By Avi Bell

In mid-July, Prime Minister Benjamin Netanyahu was presented with the report of the Commission to Examine the Status of Building in Judea and Samaria, headed by former Supreme Court Justice Edmond Levy. The report has drawn a flurry of overwrought criticism due to its inclusion of a section concerning the lawfulness of Israeli settlement activity.

In contrast with the misinformed and sometimes outright disingenuous criticism, the report's discussion of the lawfulness of settlements is surprisingly modest in substance. The report does little more than endorse the traditional official Israeli position that the Fourth Geneva Convention does not apply *de jure* to the West Bank, and in any event does not bar Israeli settlements. While the report's analysis is far from comprehensive, it is more detailed and more persuasive than that usually offered by anti-settlement activists.

The Levy report adduces one of two fairly compelling reasons for concluding that the laws of belligerent occupation do not apply *de jure* to Israel's presence in the West Bank. One of the *sine quibus non* of belligerent occupation, as reaffirmed recently in an expert conference organized by the International Committee of the Red Cross, is that the occupation take place on *foreign territory*. While recent years have seen some debate on the meaning of foreign territory, considerable state practice supports the traditional view that captured territory is "foreign" only when another state has sovereignty. The Levy commission is on solid ground in observing that neither Jordan nor any other foreign state had territorial sovereignty over the West Bank in 1967 and that the territory cannot therefore be "foreign" for purposes of the law of belligerent occupation. Indeed, had the Levy commission chosen to so argue, it could have argued cogently that Israel itself was already the lawful sovereign over the West Bank in 1967.

Unmentioned by the report, Israel's peace agreement with Jordan constitutes a second reason for questioning the *de jure* application of the laws of belligerent occupation to the West Bank. As Yoram Dinstein wrote some time ago, the rules of belligerent occupation cannot be applied to Israel's presence in the West Bank "in light of the combined

effect of . . . the Jordanian-Israeli Treaty of Peace of 1994 and the series of agreements with the Palestinians. There is simply no room for belligerent occupation in the absence of belligerence, namely, war." While Dinstein qualified his observation by holding several idiosyncratic views regarding the definition of occupation and the status of the Palestinians, as well as by joining a small group of legal scholars who believe in a "post-belligerent occupation" that shares many of the rules of belligerent occupation, the majority position is still clearly that the rules of belligerent occupation do not apply to an agreed-upon peacetime presence.

On settlements, the Levy report likewise adduces several strong arguments to the effect that even if the laws of belligerent occupation applied to Israel's presence in the West Bank, the Fourth Geneva Convention poses no bar to the kinds of actions that are subsumed under the term "settlement activities."

The Fourth Geneva Convention forbids "transfers" and "deportations" by the occupying state of parts of its population into occupied territory, but not "settlements." Officials of the state of Israel have provided services to settlers and sometimes encouraged them, but the state of Israel has not transferred any Israeli to the West Bank against his or her will. In fact, as even anti-settlement activists like Talia Sasson acknowledge, "there was never a considered, ordered decision by the state of Israel, by any Israeli government" on settlements. While some governments of Israel have favored the physical expansion of settlements or the increase of their population, settlement growth has been driven by the preferences of private citizens not by official Israeli population transfers. There is no precedent for any other state being adjudged to have violated the Fourth Geneva Convention simply on the basis of permitting or facilitating private preferences in the way Israel has done. Indeed, this is the reason that the Arab states sought to redefine the bar on "transfers" in international law by including a crime of "indirect" transfers in the Rome Statute creating the International Criminal Court. However, Israel is not a party to the Rome Statute and it is therefore not bound by the alternative, more restrictive standard.

The Levy commission notes that even if facilitating private Jewish residential preferences in the West Bank were otherwise suspect "transfers," *sui generis* rules apply to the area. Article 6 of the Mandate of Palestine

demands "encourage[ment], in cooperation with the Jewish Agency . . . [of] close settlement by Jews on the land, including State lands . . ." As the late Eugene Rostow, one-time dean of Yale Law School, noted, this command is preserved by article 80 of the UN Charter, and, if the West Bank is under belligerent occupation, by article 43 of the Hague Regulations. Additionally, if, as Israel's critics contend, the International Covenant on Civil and Political Rights applies to Israeli actions in the West Bank, articles 3, 12, and 26 of the Covenant lend urgency to Israeli efforts to protect Jewish housing rights in the West Bank in light of the Palestinian Authority death penalty for land sales to Jews coupled with senior Palestinian officials' open call for a Jew-free state of Palestine.

Talia Sasson, author of her own controversial 2005 report on outposts, has criticized the commission on the grounds that its conclusions are contradicted by Israeli Supreme Court rulings. But contrary to Sasson's assertions, while the Supreme Court has adjudicated cases on the basis of Israel's voluntary assumption of selected duties of a belligerent occupant, the Court has never ruled that the Fourth Geneva Convention applies *de jure* to the West Bank.

In opposing the Levy report, Aeyal Gross and David Kretzmer have claimed that if the laws of belligerent occupation do not apply *de jure* to the West Bank, Israel lacked the authority to empower a military commander to undertake actions such as seizing property in the territory. However, Gross and Kretzmer err. Israel's administrative law determines the powers given to an Israeli military commander, not international law, and there is nothing to prevent Israel granting various powers to its commander in the West Bank, in the absence of a *de jure* belligerent occupation. History supplies more extreme examples: the United States applied full military regimes to defeated Confederate states after the civil war, and to Puerto Rico following a peace treaty with Spain, even though the states were American territory and there was clearly no *de jure* belligerent occupation.

Some have argued that the Levy report is foolish politically, arguing that by asserting its legal rights, Israel will signal that it is unwilling to entertain "land for peace" compromises. This seems a doubtful thesis. Israel has asserted its legal rights to Jerusalem for decades, but yet repeatedly offered compromises on its rights in the city.

Others have objected that the Levy report's conclusions can be disputed by international jurists, including by a controversial and non-binding advisory opinion of the International Court of Justice. It is true that like many legal controversies, the questions addressed by the Levy commission are capable of being analyzed in a number

of ways. The Levy commission's conclusions are logical applications of reasonable understandings of the rules in an area where no authoritative resolution of the dispute has yet been rendered.

The Levy report has reinvigorated the discussion of the legitimacy of Israel's position under international law after many years in

which Israel has been silent about its legal rights. That is a welcome development.

This essay was originally published on July 31 by the Begin-Sadat Center for Strategic Studies as a BESA Center Perspectives Paper (No. 176), and is republished with permission.

Upcoming Features on *Jewish Ideas Daily*. Iran's Jews, wrongful reparations, Israel's military elite, Charles Murray's America, and much more! All on www.jewishideasdaily.com.