

ALAN DERSHOWITZ: THE ADVOCATE AND SCHOLAR AS JEW;
THE JEW AS ADVOCATE AND SCHOLAR

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In Monty Python, there is a segue after one segment, or *shtik*,¹ and before another, and it signifies a change in mood, topic, or attitude. So—“[a]nd now for something completely different”²—Professor Alan M. Dershowitz, his writings, his advocacy, and his Judaism.³

Before World War II and the creation of the State of Israel, there was a common stereotype of the Jew, based in part on Shakespeare’s *Shylock*,⁴ but also on adventure books like *The Adventures of Robin Hood*⁵ and *Ivanhoe*,⁶ and even on well-read classics like Dickens’ *Oliver Twist*.⁷ He (it was seldom if ever a she) was miserly, thin, big and pointy nosed, timid, cowardly, and just plain creepy.⁸ He was almost always portrayed as a criminal who lived on the fringes of society and who fed off the fears and needs of the innocent, especially children.⁹ Sometimes, he was portrayed as

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¹ *Shtik* is from the German “[s]tück [or] ‘piece.’ . . . A studied, contrived, or characteristic piece of ‘business’ . . .” LEO ROSTEN, *THE NEW JOYS OF YIDDISH* 368–69 (Lawrence Bush ed., Crown Publishers 2001) (1968).

² This is a transitional catch phrase used on the British television show, Monty Python’s *Flying Circus*. See 1 GRAHAM CHAPMAN ET AL., *THE COMPLETE MONTY PYTHON’S FLYING CIRCUS: ALL THE WORDS* 17 (Roger Wilmut ed., 1989) (emphasis added).

³ I intentionally use the phrase “Judaism” and not Jewish faith, because Professor Dershowitz makes a point of saying that the tradition, writings, and his Jewish-religious upbringing and background are what has affected his actions and writings. See *infra* notes 19–30 and accompanying text.

⁴ See generally WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* (M. M. Mahood ed., Cambridge Univ. Press 1987) (1600).

⁵ See generally ROGER LANCELYN GREEN, *THE ADVENTURES OF ROBIN HOOD* (1956).

⁶ See generally WALTER SCOTT, *IVANHOE* (Bantam Books 1988) (1819).

⁷ See generally CHARLES DICKENS, *OLIVER TWIST* (Kathleen Tillotson ed., Oxford Univ. Press 1989) (1838).

⁸ See LEONARD DINNERSTEIN, *ANTISEMITISM IN AMERICA* xxvii (1994) (portraying Jews as having “deformed bodies and misshapen character,” and having “a big nose, a bad odor, and a speech impediment”).

⁹ The classic example of this is Fagin, in Dickens’ *Oliver Twist*, both as written and as

the wealthy banker or loan-maker, who stole from the diligent working class and interfered with the undertakings of the new industrial leaders.¹⁰ In the most extreme characterization, the Jew was, of course, the scourge of good Christians, who killed the Savior and still used the blood of Christian children for ritual foods.¹¹

Some of these biased characterizations of the Jew remain, but the modern stereotype is somewhat different. Today, the Jew is portrayed as an assertive, aggressive bully. He (and now she) is smart, and much too powerful.¹² He or she exercises power through money and influence.¹³ And then, of course, there are now two conflicting, and somewhat inconsistent, additional sets of traits.¹⁴ To many, Jews are liberals who think they are somehow better than the rest of us and who control the media, the banks, and even the government.¹⁵ They are classic meddlers, who, through a network of civil liberties, diversity, and other do-good groups, are tearing away at our Christian roots.¹⁶ To others, their support for the State of Israel has led our government from one Middle East crisis to another and has made them allies of the Far Right.¹⁷ Their avarice

portrayed in numerous film and television adaptations. See DICKENS, *supra* note 7, at 50.

¹⁰ See ALAN M. DERSHOWITZ, CHUTZPAH 108 (1991) [hereinafter DERSHOWITZ, CHUTZPAH] (describing perception of Jews both as lazy because they did not work the land or produce wealth and as part of an international conspiracy of wealth and power—"the bearded *shtetl* Jew and the . . . moneyed cosmopolitan Jew").

¹¹ See *id.* at 103.

¹² See ALAN M. DERSHOWITZ, THE VANISHING AMERICAN JEW: IN SEARCH OF JEWISH IDENTITY FOR THE NEXT CENTURY 79 (1997) [hereinafter DERSHOWITZ, VANISHING AMERICAN JEW] ("They are accused of being 'too smart,' 'too well educated,' 'too successful,' 'too devoted to their children.'").

¹³ See DERSHOWITZ, CHUTZPAH, *supra* note 10, at 126 (quoting the President of the Massachusetts Senate at a hearing in 1990 referring to Jews "as 'crafty,' as 'connivers' and 'manipulators'").

¹⁴ Of course, the somewhat conflicting stereotypes of the all-too-powerful and the all-too-powerless Jew is not a recent phenomenon. See DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12, at 97–98.

¹⁵ See DINNERSTEIN, *supra* note 8, at 233 (referring to statements made by the chairman of the Joint Chiefs of Staff, General George S. Brown, in 1974).

¹⁶ This was, and is, especially true in the South, where "northern liberal Jews" were perceived as the defenders of African Americans and challengers to the southern "tradition." This often caused conflicts between local southern Jews and those northern "communists" rebels. See *id.* at 185–86. Of course, this is another example of the concept of *shanda fur de goyim*. See *infra* Part I.

¹⁷ See generally Alan Dershowitz, *Has Carter Crossed the Line?*, JERUSALEM POST, Dec. 21, 2006 [hereinafter Dershowitz, *Crossed the Line*], available at <http://www.jpost.com/servlet/Satellite?cid=1164881943132&pagename=JPost%2FJPArticle%2FShowFull> (criticizing President Carter's late-2006 comments and book, *Palestine: Peace Not Apartheid*); see also *infra* notes 175–99 and accompanying text (discussing the so called "Israel Lobby," which influences, and effectively controls, the United States' government).

has been a major cause of the lack of success of people of color.¹⁸

Okay, what does this have to do with Professor Alan Dershowitz? First, he is a clearly self-identified Jew. Professor Alan Dershowitz was born in Williamsburg, a section of Brooklyn, New York, and spent most of his childhood in Borough Park, Brooklyn.¹⁹ Both sections were considered “Jewish,” and Professor Dershowitz was raised as an observant Orthodox Jew; although, as he describes it, a “modern Orthodox” and not a “frumie” or “ultraorthodox.”²⁰

Over time, he has moved from a religious perspective to an activist Jewish perspective—“from passive observance of ritual to active participation in causes.”²¹ In addition, he acknowledges that his “Jewishness” is the source of his activism, his anger at injustice, his pride in his own and others accomplishments, and his principles.²² It is also the basis of his hate of persecution and support for Zionism.²³ And specifically, the Bible and other religious writings have impacted his teaching and practice.²⁴

Third, he sees as his mission to lecture, cajole, and support other Jews and the American Jewish identity. Professor Dershowitz has taught many Jewish students, served as faculty advisor to Jewish student associations, spoken to numerous Jewish groups, and written books about his Jewish identity.²⁵

Dershowitz not only accepts some aspects of the modern stereotype of the American Jew, he revels in them.²⁶ It is acceptable to be smart, pushy, aggressive, and outspoken.²⁷ “Why

¹⁸ See generally DINNERSTEIN, *supra* note 8, at 210–27 (examining the growth of African-American anti-Semitism in the 1960s).

¹⁹ See DERSHOWITZ, CHUTZPAH, *supra* note 10, at 35.

²⁰ *Id.* at 38.

²¹ *Id.* at 62.

²² See *id.* at 10–12.

²³ See *id.* at 14–15.

²⁴ ALAN M. DERSHOWITZ, THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW 11 (2000) [hereinafter DERSHOWITZ, GENESIS OF JUSTICE].

²⁵ DERSHOWITZ, CHUTZPAH, *supra* note 10, at 10; DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12, at 15.

²⁶ DERSHOWITZ, CHUTZPAH, *supra* note 10, at 19 (“I am a proud and assertive Jew . . .”).

²⁷ See ALAN M. DERSHOWITZ, REVERSAL OF FORTUNE: INSIDE THE VON BÜLOW CASE 52–53 (1986) [hereinafter DERSHOWITZ, REVERSAL OF FORTUNE]. In Dershowitz’s first interview with his future client, Claus von Bülow, von Bülow indicated that his “first” problem with hiring Dershowitz was that “some of [my] acquaintances were upset at the prospect of ‘an aggressive Jew’ taking over the case.” *Id.* at 52. Of course, “I [(von Bülow)] don’t have an ounce of the anti-Semite in me. But some of these other people have never encountered Jews like you, intellectuals, cultured people.” *Id.* One interesting aspect of this story is that Dershowitz’s “aggressiveness” was acceptable because it was “countered” by his intellect and status. The other interesting aspect of this telling is that Dershowitz accepts (and perhaps

are there so many Jewish lawyers? Why not?”²⁸

Jews can be proud of their label as “the Chosen People,” and both supportive of the State of Israel and of civil rights, protect religion in the private sphere and demand the separation of church and state, liberal in politics but still realistic in the implementation of that political agenda.²⁹ American Jews—both leadership and others—must act with the confidence of our political and intellectual power and not act as second-class citizens. They need not be concerned how words and actions might be viewed by others. In other words, do not be afraid of being too visible and a *shanda fur de goyim*.³⁰

Professor Dershowitz has melded his Jewish identity with his academic scholarship and public advocacy. First, he has described in great detail the Jewish stereotype and challenged it—not for its content but for its negativity.³¹ In *Chutzpah*, he defines the Jewish stereotype as “boldness, assertiveness, a willingness to demand what is due, to defy tradition, to challenge authority, to raise eyebrows.”³² He also recognizes that detractors define these sets of characteristics as “unmitigated gall, nerve, uppityness, arrogance, hypocritical demanding.”³³

Second, Dershowitz’s religious heritage has infused his perspective and commentary on a variety of legal topics from criminal justice, to professional responsibility, to constitutional law.³⁴ Because of his Jewish, and particularly religious Jewish, upbringing, he uses biblical and Jewish commentary as “sources of analogy and reference.”³⁵

Third, he has written and spoken about the difference between a faith-based perspective and a faith-biased one. The American tradition is based on many religious traditions and has prided itself on protection of religious, and other, minorities. It has also rejected its control by any religious group, even if it is the dominant

even *kvells*) about his “aggressiveness.” *See id.* at 52–53.

²⁸ ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 323 (2002) [hereinafter *DERSHOWITZ, SHOUTING FIRE*].

²⁹ *See generally* ARNOLD M. EISEN, *THE CHOSEN PEOPLE IN AMERICA: A STUDY IN JEWISH RELIGIOUS IDEOLOGY* (1983) (examining the self-definition of Jews as “Chosen People”).

³⁰ *See infra* Part I.

³¹ *See supra* notes 4–22 and accompanying text.

³² DERSHOWITZ, *CHUTZPAH*, *supra* note 10, at 18.

³³ *Id.*

³⁴ *See discussion infra* notes 66–101 and accompanying text.

³⁵ DERSHOWITZ, *GENESIS OF JUSTICE*, *supra* note 24, at 7.

majority.³⁶

Fourth, he has indicated his unwavering support for the State of Israel (but not all its politics and leaders³⁷) and opposition to those who are not just critical but perhaps have biased and, in some cases, even anti-Semitic attitudes.³⁸ It is in the American, and not just American Jewish, interest that we support and understand the only real democracy in the region.³⁹

And finally, Dershowitz has assumed the role of popular translator. He wants to explain his Jewishness, his religion, and other religions in a manner that, though scholarly, can be understood by a broad audience. He can use his visibility and access to convey his perspectives and concerns.⁴⁰ He believes that from his meetings, from his research, and from the letters he receives—from Jews, non-Jews, and even anti-Semites—that he knows what is “on the minds and in the souls of many Jews, of all ages” and that he has a “unique window into the mind of the anti-Semite.”⁴¹

Professor Dershowitz has his critics—both in the academy and in the quasi-, and not so quasi-, public sphere. But he brings credibility to his arguments because of his legal skills, careful scholarship, articulate expression, and sometimes overwhelming persistency. You may disagree with him, but be prepared to refute his logic, facts, and citations.

I. SHANDA FUR DE GOYIM

At a recent meeting of Jewish public policy mavens,⁴² I asked a

³⁶ As I have noted elsewhere, while explicit discrimination based on religion has become unacceptable, there still is discrimination, but it has to be more subtle. See Martin H. Belsky, *A Practical and Pragmatic Approach to Freedom of Conscience*, 76 U. COLO. L. REV. 1057, 1079 (2005).

³⁷ “I am secure enough about my Jewishness to criticize Israel and Jewish leaders when I think they are wrong. I am also secure enough in my Americanism to criticize American leaders when I think they are wrong on Jewish (and other) matters.” DERSHOWITZ, *CHUTZPAH*, *supra* note 10, at 18.

³⁸ See discussion *infra* notes 122–200 and accompanying text.

³⁹ See ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* 228–29 (2003) [hereinafter DERSHOWITZ, *THE CASE FOR ISRAEL*].

⁴⁰ See ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 27 (2006) [hereinafter DERSHOWITZ, *PREEMPTION*] (indicating that he wished by his book to “stimulate . . . debate” over certain legal topics).

⁴¹ DERSHOWITZ, *VANISHING AMERICAN JEW*, *supra* note 12, at 15–16.

⁴² I serve as Vice President of the national Jewish Council on Public Affairs. For the last two years, I have served as the co-chair of that organization’s annual plenum in Washington, D.C.

substantial number of them what they associated with the name Alan Dershowitz. I expected some reference to the book and movie, *Reversal of Fortune*, or perhaps to his role as part of the defense team for O.J. Simpson, or even to his strong support for the State of Israel or his strong stand on the separation of Church and State. Almost unanimously, however, this group of Jewish leaders cited Dershowitz's "call to action" in his 1991 book *Chutzpah*. Moreover, they indicated that that book gave them, and others like them, the license to speak out as Jews.

Chutzpah opens with this direct challenge: Jews should be more, and not less, assertive.⁴³ Jews too often consider themselves and act "as second-class citizens—as guests in another people's land."⁴⁴ Jews should be proud of their contribution to American success and demand, and get, "first-class" status."⁴⁵ To put it bluntly, Professor Dershowitz commands Jews to "strike from our vocabulary the offensive concept of *shanda fur de goyim*—an embarrassment in front of the gentiles."⁴⁶

I now need to get personal. I was raised an assertive, aggressive, "modern Orthodox Jew" in a very diverse Philadelphia neighborhood. My parents were always worried about appearances, and when a Jewish person got into trouble *they* were ashamed, not just for themselves, but for all Jews. I did not and do not share their concerns. As a result, I have been criticized—and sometimes continue to be criticized—for being "too Jewish," although the polite term is "too ethnic."⁴⁷ In fact, I was once told that I did not get a job

⁴³ See DERSHOWITZ, *CHUTZPAH*, *supra* note 10, at 3.

⁴⁴ *Id.*

⁴⁵ *Id.* at 3–4.

⁴⁶ *Id.* at 7. One of my favorite stories in *Chutzpah* is about the two Russian Jews sent to death by the Czar. Both were offered blindfolds. "The first Jew bravely turned down the blindfold. The [other whined] to the first . . . : 'Please, take the blindfold. Don't make any trouble.'" *Id.* at 9. I ran into a similar situation when I was working (as a law student) in 1966 for the then-Federal Office of Education. I was the head of a team going into various school districts in the South, negotiating with school superintendents and school boards on desegregation plans. Refusal to prepare and get approval for such plans could lead to loss of federal [Title I] education funds. In one district, a School Board Superintendent who was Jewish pulled me over to the side and said he wanted to talk to me "*Lantzman to Lantzman.*" *Lantzman* or *Landsman* is from the German "fellow countryman" or, in this context, fellow Jew. See ROSTEN, *supra* note 1, at 203–04. Didn't I realize how difficult I was making this for him? He was sympathetic, but if he took any real action, he would be bringing attention to himself as a Jew, and now I was bringing attention to his Jewishness by being the leader of the group. Couldn't I allow him to just "*sh'a shtill*" (be quiet or remain undisturbed)? My response was strange to him. As a Jew, I argued, he had a special obligation to help minorities and use the credit and "chits" he had earned over the years to effectuate peaceful change.

⁴⁷ Belsky, *supra* note 36, at 1065.

I wanted because some individuals were concerned about “my high-powered ethnic style.” In Oklahoma, the phrase is “high-powered Northeastern (or New York) type!”

Chutzpah, and Professor Dershowitz’s example in his professional life and in his writings, gave me some *gravitas* to say and do something that I might not have done otherwise.

After mentoring by two Jewish judges while he was their clerk, Dershowitz carried on his sensitivity to Jewishness at Harvard as a professor. At first, he notes, he had some ambivalence about his Jewish identity, but he soon evolved into a Jewish activist and “unofficial advocate for Jewish concerns.”⁴⁸ He believed in diversity, but wanted to make sure that it did not get converted into anti-Jewish quotas.⁴⁹ As will be noted later, he is a strong supporter of the State of Israel, and characterizes much of the criticism of that state as “anti-Zionist” bashing.⁵⁰

He acted proudly as a “Jewish Jew.”⁵¹ He states repeatedly that Jews “should feel proud to vigorously defend Jewish rights.”⁵² He would not be, and asks other Jews not to be “house Jews”—“allow[ing] his Jewish identity to be used to justify actions against . . . Jewish interest[s].”⁵³

Dershowitz notes that Jews should not be defensive about anti-Semitism. Being a “Jew-Jew” should be perfectly acceptable.⁵⁴

The important point is that *Jews* are not to blame for anti-Semitism. Anti-Semitism is the problem of the bigots who feel, express, and practice it. Nothing *we* [the Jews] do can profoundly affect the twisted mind of the anti-Semite. We should never take—or refrain from taking—any action just because of its anticipated impact on anti-Semites.⁵⁵

And, he urges, Jews should not continue to premise their future on the “Tsuris Theory of Jewish Survival,”⁵⁶ or they will be “doomed

⁴⁸ DERSHOWITZ, CHUTZPAH, *supra* note 10, at 79.

⁴⁹ *Id.* at 77–79.

⁵⁰ *Id.* at 81.

⁵¹ *Id.* at 82.

⁵² *Id.* at 83.

⁵³ *Id.* at 88. Professor Dershowitz credits Arthur Goldberg for alerting him to the “house Jew phenomenon.” *Id.*

⁵⁴ Another personal anecdote. When I first came to Tulsa, I was warmly welcomed by the local Jewish community, which is small but mighty. When one of the “great old men” of the community saw that I was not merely Jewish, but an active and involved Jew, he commented that he was pleasantly surprised that TU (the University of Tulsa) would ever hire a “Jew-Jew.”

⁵⁵ DERSHOWITZ, CHUTZPAH, *supra* note 10, at 100.

⁵⁶ See DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12, at 3. “[T]suris”—“Troubles,

to live precariously on a pendulum perennially swinging in a wide arc between the extremes of persecution and assimilation.”⁵⁷ Negative Judaism, he argues, must be replaced by “a more positive and enduring Jewish identification” where we can prove “that Jews do not need enemies to survive.”⁵⁸ There are problems, including declining numbers, but Professor Dershowitz is optimistic. Institutional anti-Semitism is almost a thing of the past in the United States.⁵⁹ “[P]rivate anti-Semitism, although still prevalent, is no longer respectable in most parts of the world”⁶⁰ There still are challenges—Holocaust deniers; anti-Zionists who cross the line to anti-Semitism; religious right militias; some disturbing developments in African-American, anti-Jewish prejudice; and Islamic fundamentalism.⁶¹ And these and other issues require concern and response. But the future success of the American Jew is based on a fair competition in the marketplace of ideas, and not on fear of that competition.⁶² This marketplace includes both religious and secular Judaism that focus on learning and on Jewish values, even if not on rituals.⁶³ In his mind, the future success of the Jewish mind-set will be dependent on people like him (and me)—educators.⁶⁴ The theme will not be “Let my people go,” but “Let my people know.”⁶⁵

II. INFUSING JUDAISM INTO THE LAW

The infusion of Alan Dershowitz’s Judaism into his attitude

woes, worries, suffering.” ROSTEN, *supra* note 1, at 408.

⁵⁷ DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12, at 4.

⁵⁸ *Id.* at 6.

⁵⁹ *See id.* at 82–83.

⁶⁰ *Id.* at 89.

⁶¹ *See generally id.* at 96–142 (discussing anti-Semitism in the twenty-first century).

⁶² *See id.* at 320–22.

⁶³ *See id.* at 323–24.

⁶⁴ *Id.* at 331.

When Judaism was primarily a nation, Jews were led by kings. When Judaism was primarily a religion centered in the Temple, Jews were led by priests. When Diaspora Judaism became embattled by a Christianity determined to convert the Jews, Jews were led by rabbis. When Judaism became more political, Jews were led by political leaders. When Judaism became philanthropic, Jews were led by philanthropic leaders.

Today, a new leadership must be added to this great and diverse pantheon of heroes. We need a leadership of Jewish *educators* who can address the pressing issue of Jewish illiteracy and ignorance. We need teachers who can inspire, without necessarily proselytizing. We need educators who believe in Jewish education for education’s sake—as an end, not only as a means toward returning Jews to God.

Id.

⁶⁵ *Id.* at 332.

towards the law is best illustrated by his description of Chief Judge David Bazelon, for whom he clerked:

“Judge Bazelon rarely went to synagogue, but he was a Jewish judge in every sense. He saw the world through his Jewish background. His humor was frequently in Yiddish. His speeches referred to the rabbinic literature. He described himself as a secular American with a ‘Jewish soul.’”⁶⁶

What did he learn? He absorbed the concept of fairness or *rachmones*—a Hebrew-Yiddish word for “compassion.”⁶⁷

Professor Dershowitz does not hide the fact that his activism is based in part on his Jewish background.⁶⁸ He spent his first decades on “the causes of the downtrodden, the underdog, the unrepresented.”⁶⁹ This extended to civil rights, the anti-war movement, gender and racial equality, opposition to capital punishment, freedom of speech, and freedom of religion.⁷⁰ One basis for this activism and outspokenness comes from the two-part obligation derived from Hillel’s commentary.⁷¹ Hillel said, “If I am not for myself, who will be for me?”⁷² Some of us tend to remember that part of what Hillel said. But you should also remember the second part: “[I]f I am for myself alone, what am I?”⁷³

Early in his book on his representation of Claus von Bülow, in fact in its preface, Professor Dershowitz uses an “old Jewish joke” to indicate that there are, in the law, two sides of the story and that an advocate’s job is to make his or her version the convincing one.⁷⁴

⁶⁶ DERSHOWITZ, CHUTZPAH, *supra* note 10, at 58. This was in sharp contrast to his description of Supreme Court Justice Felix Frankfurter, who had been a Harvard Law Professor. Justice Frankfurter described himself as “a Harvard Law School Professor who happened to be a Jew.” *Id.* at 79 n.*. Worried about the image of the Jew, particularly at Harvard (*shanda fur de goyim*), Frankfurter “boasted that he demanded higher standards” from Jewish students. *Id.*

⁶⁷ ROSTEN, *supra* note 1, at 301.

⁶⁸ When he first started to teach at Harvard Law, he was asked to teach on Saturday. As a then observant Jew, he told the Dean that he couldn’t. Eventually, the Dean indicated that he did not have to teach on Saturday, and, in fact, that no classes would be held then. DERSHOWITZ, CHUTZPAH, *supra* note 10, at 64.

⁶⁹ *Id.* at 86.

⁷⁰ *Id.*

⁷¹ See DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12, at 268–69.

⁷² *Id.* at 268.

⁷³ *Id.* at 268–69.

⁷⁴ DERSHOWITZ, REVERSAL OF FORTUNE, *supra* note 27, at xxv. The story is about a Rabbi listening to a dispute between a husband and a wife. After hearing the wife’s version, he says to the wife, “you are right.” *Id.* After hearing the husband’s version, he says to the husband, “you are right.” *Id.* One of his students complains and says, “Rabbi, they can’t both be right.” *Id.* To which, the Rabbi responds, “My son, you are right.” *Id.* Professor Dershowitz follows this by noting that the student was not right stating, “[B]oth sides of a domestic dispute *can*

More significantly, Professor Dershowitz uses his Jewish training, and his knowledge of Jewish commentary, as a basis to challenge authority. One of my favorite anecdotes from the Talmud is obviously one that Professor Dershowitz admires also. Let me give my version.⁷⁵ Two rabbis are having a debate over the meaning of a certain piece of scripture. The fight goes on and on. Finally, a voice from Heaven—deep and basal—says, I am the Lord and this is what is meant by that language. The rabbis continue to debate. God again intervenes, somewhat more strongly. “This is what I meant!” The rabbis continue to debate. God, seemingly angrier now, says, “This is *halachic*—the authoritative meaning of the law.” Finally, both rabbis look heavenwards and said, “Who asked you!”⁷⁶

Dershowitz interprets this as the rabbis telling God, “[I]t is *our* job, as the rabbis, to bring meaning to the Torah that you gave us. You gave us a document to interpret, *and* a methodology for interpreting it. Now leave us to do our job.’ God agreed, laughing with joy[,] ‘My children have defeated me in argument.’”⁷⁷ Look at the Jewish heritage. We “are [a] quarrelsome people.”⁷⁸ We even fight with God.

Jewish law is based on this premise of debate. The Talmud “is the first preserved record of legal arguments—with dissenting and concurring opinions.”⁷⁹ This is not religious for Professor Alan M. Dershowitz; it is accepting his tradition. He consults Jewish sources because he accepts their wisdom but he is not bound by these sources.

For Dershowitz, “[t]o ignore the wisdom of our sages is both arrogant and ignorant. It would be like deciding a complex constitutional issue without bothering to find out what the framers of our Constitution had in mind.”⁸⁰

Professor Dershowitz’s perspectives on ethics are also colored by his Jewish background, his training, and from his Jewish “chip.” Henry Drinker, a famous Philadelphia lawyer, former chair of the American Bar Association’s Ethics Committee and author of a

be right (and more often wrong) at the same time.” *Id.* at xxv–vi.

⁷⁵ See 1 THE BABYLONIAN TALMUD: SEDER NEZIKIN 349–53 (Isidore Epstein ed. & trans., Soncino Press 1978) (1935).

⁷⁶ For a longer version by Professor Dershowitz, see DERSHOWITZ, CHUTZPAH, *supra* note 10, at 196–97.

⁷⁷ *Id.* at 197.

⁷⁸ DERSHOWITZ, SHOUTING FIRE, *supra* note 28, at 323.

⁷⁹ *Id.*

⁸⁰ *Id.* at 328.

widely respected treatise on ethics, did not hide his biases. Dershowitz notes that Drinker questioned the ethics of “Russian Jew boys who came up out of the gutter [and] were merely following the methods their fathers had been using in selling shoe strings and other merchandise.”⁸¹

Dershowitz challenges this directly. The core Jewish doctrines are ethical, political, and moral principles that shape our American law. Personally, his ethics and moral sense come from a complex series of perspectives, but this certainly includes his Jewish heritage. “Traditional Jewish writings and experiences are a very important source of my morality—perhaps among the most important sources, both consciously and unconsciously.”⁸²

In fact, quoting Hillel again, Dershowitz tells the famous story about Hillel’s response when he was asked to transmit the core of Jewish law (the Torah) in the time Hillel could stand on one foot. Hillel responded, “What is hateful to you, do not do to your neighbor; this is the whole Torah. The rest is commentary”⁸³

The biblical command to “do justice”⁸⁴ established the premise of our legal system—to “compromise with power” to require a sharing based on overt and visible rules.⁸⁵ It is the premise of “fairness, equality, or due process.”⁸⁶ The Jewish Bible, Dershowitz concludes, “is the story of [his] quest for justice.”⁸⁷

In his 2000 book, *The Genesis of Justice*, Professor Dershowitz argues that the Bible “is a law book explicitly rooted in the narrative of experience.”⁸⁸ And, the result is a series of principles focused on justice.⁸⁹

Is not our ethical system, and even justice system, generally supposed to be based on the plea to love goodness, preserve equity, or to delight in kindness?⁹⁰ Is not our adversary system and separation of powers based on “the Jewish tradition of questioning,

⁸¹ DERSHOWITZ, CHUTZPAH, *supra* note 10, at 71 (alteration in original). It is interesting to note that Drinker’s law firm in more recent years has had and still has a number of “Russian Jews,” including a present United States Senator, Arlen Specter.

⁸² *Id.* at 197–98.

⁸³ DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12, at 256.

⁸⁴ *Id.*

⁸⁵ *Id.* at 262.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ DERSHOWITZ, GENESIS OF JUSTICE, *supra* note 24, at 6.

⁸⁹ *Id.*

⁹⁰ *See* DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12, at 256.

doubting, and arguing?”⁹¹ Add to these, the biblical mandate to “repair the world” and we have the core of our modern ethical principles of a “safety net” for our people and environmental protection for our future.⁹²

The American constitutional tradition, Dershowitz argues, is similar to Jewish tradition.⁹³ Our Constitution survives because it “contains no single essence,”⁹⁴ reflects compromises that have to be readjusted over time, but primarily creates a “structure for governance.”⁹⁵ Jewish tradition contains many “Jewish virtues that can be distilled from our long heritage and . . . our vast library. But we should not expect them to point in any one direction or provide us with specific answers to current and future problems,” those protections into law are derived from Jewish principles and commandments.⁹⁶ His claim is broad: “Every ‘ism’—from [c]ommunism to capitalism to feminism to environmentalism to legalism—has sources in Judaism.”⁹⁷

The scope of the infusion of Dershowitz’s Jewish culture into his theory of law is demonstrated in his 2004 book—*Rights from Wrongs: A Secular Theory of the Origins of Rights*.⁹⁸ His thesis is that rights must be derived from the need for those rights and how society has responded to those needs, rather than directly from some divine source.⁹⁹ Yet, to document this thesis, he relies first, generally, on a “great fifteenth-century Jewish commentator.”¹⁰⁰ He then later uses a Jewish anecdote to demonstrate that there can be multiple rights and that they can conflict with one another.¹⁰¹

This pattern is repeated in his other writings—he relies on his knowledge of Jewish theology and culture to make his point. In his attack on the use of excuses to justify improper behavior, he cites Adam blaming Eve and Eve blaming the serpent as the earliest example.¹⁰²

⁹¹ *Id.* at 259.

⁹² *See id.* at 317–18.

⁹³ *Id.* at 260.

⁹⁴ *Id.*

⁹⁵ *Id.* (emphasis omitted).

⁹⁶ *Id.*

⁹⁷ *Id.* at 320. Dershowitz equates living “a Jewish life” with the willingness to learn and hopefully apply “the rich and diverse array of Jewish sources.” *Id.*

⁹⁸ ALAN DERSHOWITZ, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS* (2004) [hereinafter DERSHOWITZ, *RIGHTS FROM WRONGS*].

⁹⁹ *See id.* at 5–9.

¹⁰⁰ *Id.* at 6 (observing that “experience is more forceful than logic”).

¹⁰¹ *Id.* at 99–100.

¹⁰² ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND*

In trying to decide the proper balance for determining whether preemptive action is justifiable, Dershowitz analyzes Abraham's "argu[ment] with God about how many false positives would be acceptable in an effort to punish the sinners of Sodom,"¹⁰³ and cites the Jewish principle of *din rodef* (defense of others), as the framework for considering the issue of anticipatory self-defense.¹⁰⁴

In describing how the United States Supreme Court takes cases, he juxtaposes the practice of the Israeli Supreme Court.¹⁰⁵ In analyzing the criminal justice maxim that "[i]t is better for ten guilty criminals to go free than for . . . one innocent person to be wrongfully convicted," he cites Maimonides and again references Abraham's discussion with God about the destruction of Sodom and Gomorrah.¹⁰⁶ The story of Cain and Abel can be used to criticize the present use of the death penalty.¹⁰⁷ Even a story from the Talmud can be used to talk about judicial review.¹⁰⁸

Alan Dershowitz has visited Israel often. He has great respect for the Israeli system of justice. He often cites the decisions of the Israeli Supreme Court as he makes his arguments, especially as to the balancing of individual rights and government responsibilities in a post-9/11 world.¹⁰⁹

One commentary by Dershowitz about the reaction of Jews to his

EVASIONS OF RESPONSIBILITY 8 (1994). He also cites Cain's defense to killing his brother, Abel, to God and even Moses' defense to slaying an Egyptian as other examples of the "Abuse Excuse." *Id.*

¹⁰³ DERSHOWITZ, PREEMPTION, *supra* note 40, at 20–22.

¹⁰⁴ *Id.* at 24–25. *Din rodef* is the general obligation explained by the twelfth-century Jewish scholar Maimonides, "[w]henever one pursues another to kill him, every Jew is commanded to save the attacked from the attacker, even at the cost of the attacker's life." *Id.*

¹⁰⁵ See ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 15 (2001) [hereinafter DERSHOWITZ, SUPREME INJUSTICE].

Despite the common misperception that every citizen has a right to bring his grievances to our highest court, the reality is that the Supreme Court's jurisdiction . . . is relatively limited. In some countries (Israel is a notable example) anyone has the right to appear before the supreme court on specified days to seek justice. In the United States, the power of the Supreme Court is circumscribed by the U.S. Constitution and federal statutes.

Id. (footnote omitted).

¹⁰⁶ ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 187 (2002) [hereinafter DERSHOWITZ, WHY TERRORISM WORKS].

¹⁰⁷ DERSHOWITZ, SHOUTING FIRE, *supra* note 28, at 277.

¹⁰⁸ See Alan M. Dershowitz, *John Hart Ely: Constitutional Scholar (A Skeptic's Perspective on Original Intent as Reinforced by the Writings of John Hart Ely)*, 40 STAN. L. REV. 360, 363–64 (1988).

¹⁰⁹ See, e.g., Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 283–85, 288–89 (2004).

representation of O.J. Simpson is revealing. He is bothered by the mail, criticizing him for being a “turncoat” in representing the killer of a fellow Jew.¹¹⁰ His response is both legal and personal. As an attorney, his “job is to advocate zealously, within the rules.”¹¹¹ However, he notes that much of his mail focuses on “greed” and this, he indicates, is another example of self-deprecating hatred.¹¹² It furthers the anti-Semitic stereotype “that all Jews care about is money.”¹¹³ Moreover, he is bothered that many of the people who wrote letters and were the readers of his book *Chutzpah*, so missed the book’s message. It was not, as some of his hate mail writers indicate, a “tribal plea” for special “parochial Jewish rights,” but rather for rights for all, the deprivation of which Jews, unfortunately, have had special knowledge and experience.¹¹⁴ He is concerned about the level of Jewish hostility—individual anger at the Simpson verdict could be transformed into Jewish anger at blacks in general.¹¹⁵

III. FAITH-BASED VS. FAITH-BIASED PERSPECTIVES

In *Chutzpah*, Alan Dershowitz describes one of his earliest law school experiences—reading a case about Jehovah’s witnesses’ right to refuse to salute the flag for religious reasons.¹¹⁶ He notes Justice Frankfurter’s dissent, where that Jewish Justice noted: “One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution.”¹¹⁷ He then, parenthetically, notes his concern that Frankfurter was “quite ‘insensible’ to the religious freedoms of the Jehovah’s Witnesses.”¹¹⁸ He would do better!

Dershowitz’s Jewish heritage leads to his concerns about the improper application of faith to public policy. Jews do not do well in a closed, sectarian environment; rather, “Jews tend to thrive in open, pluralistic, moderate, nonnationalistic, secular societies.”¹¹⁹

¹¹⁰ See DERSHOWITZ, SHOUTING FIRE, *supra* note 28, at 335.

¹¹¹ *Id.*

¹¹² *Id.* at 335, 336 (emphasis omitted).

¹¹³ *Id.* at 335.

¹¹⁴ *Id.* at 337.

¹¹⁵ *Id.* at 342–43.

¹¹⁶ DERSHOWITZ, CHUTZPAH, *supra* note 10, at 48.

¹¹⁷ *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting)).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 206.

Consider the conflict between Christians and Jews as to the issue of who is the true God; Jewish rejection of Jesus as the true Messiah means, to Christians, that Jews are not “true believers,”¹²⁰ while Christian acceptance of Jesus, to Jews, means that Christians have accepted a “false Messiah.”¹²¹ This, he urges, is faith bias—by both sides. Why must both have *one* true Messiah, or one God?

The protection of people of differing faiths and perspectives’ rights to think and act is premised on the separation of church and state. This is an important issue for all Americans,¹²² but especially for Jews.¹²³ “[U]nlike every other country to which Jews have emigrated, [America] has no *established* church, no *official* religion. Judaism, therefore, is not merely *tolerated*; it has *equal* status—at least in theory.”¹²⁴ Dershowitz bluntly states that “[t]he separation of church and state in America is the foundation on which the first-class legal status of American Jews rests.”¹²⁵ The issues for him are not just professional, they are personal.¹²⁶ The push for prayer in public schools challenges his “first-class citizens[hip].”¹²⁷

“It is part of a program to get Anne Frank out of the schools, to get creationism into the schools, to get the Bible to become the fundamental vehicle of American literary and political life. . . . It is a screen for the next step of saying religion is to be preferred over nonreligion. And if religion is to be preferred we have to decide which religion. . . .

“We [Jews] will be inevitably thrust into second-class status if we accept the first step of prayer in the school, and the second step the religionization, and the third step the Christianization of America.”¹²⁸

Dershowitz does not buy the argument that Jews don’t need to fear the use of God in public—that we are all part of the same

¹²⁰ *Id.* at 105.

¹²¹ DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12, at 211.

¹²² See DERSHOWITZ, SHOUTING FIRE, *supra* note 28, at 204–20 (discussing historical and personal history pertaining to the wall of separation between church and state, the right to disbelief, and the potential fall of the wall).

¹²³ DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12, at 143 (discussing the Christian Right’s “efforts . . . to lower the wall of separation between church and state, to Christianize America, and, ultimately, to convert the Jews to Christianity”).

¹²⁴ *Id.* at 144.

¹²⁵ DERSHOWITZ, CHUTZPAH, *supra* note 10, at 313.

¹²⁶ His father had been “arrested for keeping [a] small store open on Sunday.” *Id.* at 315.

¹²⁷ *Id.*

¹²⁸ *Id.* at 204 (some alteration in original).

“Judeo-Christian” heritage.¹²⁹ To him, acceptance of the phrase “Judeo-Christian” implies that “Judaism is an incomplete religion and that the Judeo becomes complete only when it merges into the Christian.”¹³⁰ It is an indication of “second-class status.”¹³¹

Calling public attention to “faith-bias” is one of Dershowitz’s missions. When President Bush had the prayer at his first inauguration be given by an evangelical minister, who in turn focused on a singularly Christian message, he called the President on it.¹³² The implication, he noted, building on themes in his book, *Chutzpah*,¹³³ is that “America is a Christian nation, and that non-Christians are welcome into the tent so long as they agree to accept their status as a tolerated minority rather than as fully equal citizens.”¹³⁴

Another part of the mission is to convince Jews to show special concern about the Religious Right, and even the Jewish Right, who are challenging “[t]he separation of church and state,” which again he urges, “in my view, has been the single most important reason for the success of the American Jewish community.”¹³⁵ The members of the Religious Right are probably not anti-Semitic—just pro-Christian—but their concepts “undercut . . . the basic reasons America has been so good for the Jews.”¹³⁶ They seek to be exclusive as to who are “*real* Americans.”¹³⁷ They challenge the progressive, centrist social agenda of most Jews, premised on an open democratic (note the small “d”) debate (not “stealth” politics).¹³⁸ In addition, they want a hierarchy of power with Jews, Muslims, atheists, and even liberal Christians having second-class status.¹³⁹

Recently, Professor Dershowitz directly challenged the faith-biased perspective that there are “God-given rights” that can be

¹²⁹ *Id.* at 318.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Alan M. Dershowitz, *Bush Starts Off by Defying the Constitution*, L.A. TIMES, Jan. 24, 2001, at B9 [hereinafter Dershowitz, *Defying the Constitution*], available at <http://www.positiveatheism.org/writ/dershush.htm>.

¹³³ For a discussion of the central themes of *Chutzpah*, see *supra* notes 43–53 and accompanying text.

¹³⁴ See Dershowitz, *Defying the Constitution*, *supra* note 132, at B9.

¹³⁵ DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12, at 145.

¹³⁶ *Id.* at 149.

¹³⁷ *Id.*

¹³⁸ *Id.* at 152.

¹³⁹ See *id.* at 156.

known and enforced.¹⁴⁰ Anyone who believes that God can give all the answers runs the risk that others [and he quotes here Osama Bin Laden] can make equal claims.¹⁴¹

IV. ISRAEL

Israel, says Dershowitz, is “Jewry’s positive response to centuries of anti-Semitism in general and to Hitler’s attempted genocide.”¹⁴² It is also the answer to the stereotypes of Jews in the pre-Israel world: the lazy, manipulative exploiter, who can not do normal work like farming and other normal occupations.¹⁴³

Professor Dershowitz’s support for the state of Israel is founded on his Zionism, but it is also premised on his belief that anti-Israel, anti-Zionist comments and attitudes are too often really just good old-fashioned anti-Semitism.¹⁴⁴ This is indicated not by criticism of the actions of the government of Israel, which may be appropriate, but by a double standard. “[W]hat is missing is the comparable criticism of equal or greater violations by other countries and other groups.”¹⁴⁵ Jews, because of their civil-libertarian inclinations, are expected to defend their enemies, and no other group is asked to do that!¹⁴⁶

Thus, Dershowitz specifically rejects the criticism that as a civil libertarian and advocate of liberal causes, he is guilty of “inconsistency, hypocrisy, or worse, because of [his] support for Israel.”¹⁴⁷ He will criticize Israel when it is wrong, but that is not the same as “bend[ing] over backward to single out Israel.”¹⁴⁸ To do so is merely another reflection of the mindset *shanda fur de goyim*.¹⁴⁹

Israel as a nation-state has the usual normal attributes—both good and bad—of other nation-states. The only issue is how good and how bad. “[Dershowitz] refuse[s] to use criticism of Israel as a

¹⁴⁰ DERSHOWITZ, RIGHTS FROM WRONGS, *supra* note 98, at 23–24; *see also* DERSHOWITZ, SHOUTING FIRE, *supra* note 28, at 9–10 (discussing the dangers and limitations of advocating an understanding of “divine law,” and warning of its “lethal” ramifications).

¹⁴¹ DERSHOWITZ, RIGHTS FROM WRONGS, *supra* note 98, at 24–25.

¹⁴² DERSHOWITZ, CHUTZPAH, *supra* note 10, at 209.

¹⁴³ *Id.* at 209–10.

¹⁴⁴ *See id.* at 121.

¹⁴⁵ *Id.* at 119.

¹⁴⁶ *Id.* at 120.

¹⁴⁷ *Id.* at 210–11.

¹⁴⁸ *Id.* at 211.

¹⁴⁹ *Id.* at 7.

litmus test of [his] patriotism, [his] commitment to civil liberties, or [his] willingness to melt into the American mainstream.”¹⁵⁰

In newspaper and magazine column after column, and in his many books, Dershowitz uses his advocate’s skill to make “the case for Israel,”¹⁵¹ but also to point out that Israel must be willing to bend and enter into good faith bargaining for peace.¹⁵²

The Jewish nation of Israel stands accused in the dock of international justice. The charges include being a criminal state, the prime violator of human rights, the mirror image of Nazism, and the most intransigent barrier to peace in the Middle East. . . .

The time has come for a proactive defense of Israel to be offered in the court of public opinion.¹⁵³

His analysis is a heavily cited case brief: the accusation, the accusers, the reality, and the proof.¹⁵⁴ He rejects the premise that Zionism is racism.¹⁵⁵ He provides historical and other evidence to refute the contention that the Arab refugee issue is a human rights issue, created by Israel.¹⁵⁶

Israel is not just like the old South Africa.¹⁵⁷ Israel is not just the flip-side of Middle East terrorists.¹⁵⁸ There is just no “moral equivalence between those who *deliberately* target innocent . . . civilians and those [like the Israeli Government] who *inadvertently* kill civilians in the process of trying to prevent further terrorist attacks.”¹⁵⁹

On the other hand, Dershowitz does believe that Israel, as the only real democracy in the region, can be criticized when it

¹⁵⁰ *Id.* at 211.

¹⁵¹ *See, e.g.*, DERSHOWITZ, THE CASE FOR ISRAEL, *supra* note 39, at 12 (arguing that “judged by any rational standard, Israel deserves the support—although certainly not the uncritical support—of all people who value peace, justice, fairness, and self-determination”).

¹⁵² *See* ALAN DERSHOWITZ, THE CASE FOR PEACE: HOW THE ARAB-ISRAELI CONFLICT CAN BE RESOLVED 12 (2005) [hereinafter DERSHOWITZ, THE CASE FOR PEACE].

¹⁵³ DERSHOWITZ, THE CASE FOR ISRAEL, *supra* note 39, at 1.

¹⁵⁴ *See, e.g., id.* at 104–16 (discussing whether “Israel [had] [m]ade [s]erious [e]fforts at [p]eace”).

¹⁵⁵ *See id.* at 154–57; DERSHOWITZ, CHUTZPAH, *supra* note 10, at 213; *see also* DERSHOWITZ, THE CASE FOR ISRAEL, *supra* note 39, at 181–88 (rejecting that Zionism is racism as an indictment against Israel for human rights violations).

¹⁵⁶ DERSHOWITZ, THE CASE FOR ISRAEL, *supra* note 39, at 78–90; DERSHOWITZ, CHUTZPAH, *supra* note 10, at 217.

¹⁵⁷ *See* DERSHOWITZ, THE CASE FOR ISRAEL, *supra* note 39, at 13–14 (rejecting the accusation that “Israel is a colonial, imperialist, settler state”).

¹⁵⁸ *See id.* at 178–79 (rejecting the accusation that “Israel’s policy of aggressive retaliation against terrorism . . . promotes a cycle of violence”).

¹⁵⁹ *Id.* at 189.

overreacts; excessive force, excessive censorship, excessive detention, and the creation of settlements in certain areas are such examples.¹⁶⁰ That criticism, however, has to be put in context and compared with the actions of adjacent Arab states and terrorist organizations.¹⁶¹ Boycotts of Israeli scholars or products, which do not even address human rights violations by others, such as Hamas and Hezbollah, are just “immoral” and “bigoted.”¹⁶²

Dershowitz has an agenda: “[t]wo [s]tates with [s]ecure and [r]ecognized [b]orders”¹⁶³ is “both inevitable and desirable.”¹⁶⁴ There are several options available to accomplish this end, but they do not include “the destruction of Israel and the total elimination of a Jewish state anywhere in the Middle East.”¹⁶⁵

Again, as with other areas, Professor Dershowitz refers to the Jewish stereotypes in order to prove his point: Israel, the Middle East’s only democracy, is “‘the Jew’ among nations.”¹⁶⁶ Intelligence, aggressiveness, tenacity, and independence are “publicly condemned as racist, militant, xenophobic, uncompromising, authoritarian, and stiff-necked.”¹⁶⁷

Dershowitz, as is his style, is blunt! Reasonable opposition to particular government leaders or government policies, and even “support for the legitimate aspirations of the Palestinian people, who have suffered greatly,”¹⁶⁸ have been successfully used to fuel excessive and exaggerated rhetoric.¹⁶⁹ This rhetoric, fed by some lingering anti-Semitism, has led to a dramatic “*gulf* between Israel’s *actual* record . . . and its *perceived* record.”¹⁷⁰

With an advocate’s desire to provide a well-documented refutation of others’ arguments,¹⁷¹ Professor Dershowitz has recently detailed

¹⁶⁰ See DERSHOWITZ, CHUTZPAH, *supra* note 10, at 226, 228, 230, 233.

¹⁶¹ See *id.* at 226, 228, 230.

¹⁶² See DERSHOWITZ, THE CASE FOR ISRAEL, *supra* note 39, at 197–98.

¹⁶³ DERSHOWITZ, THE CASE FOR PEACE, *supra* note 152, at 11.

¹⁶⁴ DERSHOWITZ, THE CASE FOR ISRAEL, *supra* note 39, at 2.

¹⁶⁵ *Id.* at 3.

¹⁶⁶ *Id.* at 222.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 226.

¹⁶⁹ See *id.* at 222.

¹⁷⁰ *Id.*

¹⁷¹ One individual who Professor Dershowitz seems particularly upset with is Noam Chomsky, who he characterizes as an “anti-Zionist zealot,” DERSHOWITZ, CHUTZPAH, *supra* note 10, at 174, and a supporter of the deniers of the Holocaust, *id.*; DERSHOWITZ, THE CASE FOR ISRAEL, *supra* note 39, at 213. Dershowitz’s book, *The Case for Peace*, is subtitled, “How the Arab-Israeli Conflict Can be Resolved.” It is, in part, a response to Chomsky’s book, *No Chance for Peace: Why It Is Impossible to Establish a Palestinian State with Israel and the U.S.* DERSHOWITZ, THE CASE FOR PEACE, *supra* note 152, at 4. Chomsky, and his allies,

the arguments for peace.¹⁷² He describes the various geopolitical barriers to peace and indicates that fair bargaining on major issues can lead to resolution.¹⁷³ There are, of course, “[h]atred [b]arriers to [p]eace” on both sides.¹⁷⁴

The most recent illustrations of Professor Dershowitz’s concern for one-sided, anti-Israel bias are his responses to a Kennedy School Working Paper on the “Israel Lobby,”¹⁷⁵ and to a recent book by former President Jimmy Carter.¹⁷⁶

The *Kennedy Working Paper* argues that a group of American Jews, and others, including fundamentalist Christians, make up an all-powerful “Israel Lobby.”¹⁷⁷ This Lobby has disproportionate power and has forced America to adopt a one-sided and harmful attitude to the activities of nation states in the Middle East.¹⁷⁸ In short, the authors of the *Kennedy Working Paper* argue that this Lobby, dominated by wealthy Jewish philanthropists and political action groups, force, or “blackmail,” America’s political leaders into causing America to fight for what are really only Israeli interests.¹⁷⁹ The *Kennedy Working Paper* also questions the legitimacy of many of Israel’s policies.¹⁸⁰

Dershowitz attacks the Working Paper directly. The arguments in it, he claims, “are contemporary variations on old themes” of anti-Semitism.¹⁸¹ He attacks the research basis, the factual errors, and even the logic.¹⁸² Two things, in particular, really bother him.

Dershowitz argues, besides making personal attacks on Dershowitz himself, *id.* at 180–88, are hindering the efforts of moderates to achieve a two-state solution to peace, *id.* at 167–68.

¹⁷² See, e.g., DERSHOWITZ, *THE CASE FOR PEACE*, *supra* note 152.

¹⁷³ See, e.g., *id.* at 51–57 (discussing a possible compromise with respect to the city of Jerusalem).

¹⁷⁴ *Id.* at 121–22.

¹⁷⁵ John J. Mearsheimer & Stephen M. Walt, *The Israel Lobby and U.S. Foreign Policy* (John F. Kennedy Sch. of Gov. Fac. Res. Working Paper Series, Paper No. RWP06-11, 2006), available at [http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP06-011/\\$File/rwp_06_011_walt.pdf](http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP06-011/$File/rwp_06_011_walt.pdf).

¹⁷⁶ JIMMY CARTER, *PALESTINE: PEACE NOT APARTHEID* (2006). Dershowitz did note the lack of balance in the criticism of Israel’s need to sometimes take anticipatory self-defense actions. See DERSHOWITZ, *PREEMPTION*, *supra* note 40, at 77.

¹⁷⁷ Mearsheimer & Walt, *supra* note 175, at 14, 15.

¹⁷⁸ *Id.* at 14, 16–18.

¹⁷⁹ See *id.* at 14–18; see also Alan Dershowitz, *Debunking the Newest—and Oldest—Jewish Conspiracy: A Reply to the Mearsheimer-Walt “Working Paper”* (2006) [hereinafter Dershowitz, *Debunking*], available at http://www.ksg.harvard.edu/research/working_papers/dershowitzreply.pdf (discussing the same).

¹⁸⁰ Mearsheimer & Walt, *supra* note 175, at 9–14.

¹⁸¹ Dershowitz, *Debunking*, *supra* note 179, at 4–5.

¹⁸² *Id.* at 5–6.

First, as he has stated in earlier writings, is the one-sidedness of the authors—a total lack of balance.¹⁸³ He concedes that criticism of both the State of Israel and the power of lobbies are appropriate, but he argues that the language and misuse of information in this paper must lead to questions of its real motive.¹⁸⁴

Second, Dershowitz argued that by focusing on the “all-powerful Israel lobby,” as compared to those of the Saudis or the Emirates, for example, or the American oil lobby, the authors really are attempting to direct the focus through “thinly veiled charges of Jewish control of American thought.”¹⁸⁵ In Dershowitz’s estimation, this is similar to the “notorious [pre-Israel] . . . *The Protocols of the Elders of Zion*.”¹⁸⁶ The authors do not just target Israeli policies, “[t]hey are very explicitly targeting American *Jews*.”¹⁸⁷ The paper presents a “conspiratorial view of history . . . in which Jews manipulate and control the media and government”¹⁸⁸—in the style of Nazi David Duke.¹⁸⁹ The marketplace of ideas requires an open debate and not a one-sided rehash of “old stereotypes and canards.”¹⁹⁰

Dershowitz has stated his admiration of former President Jimmy Carter and his political support for Carter over the years.¹⁹¹ In his 2005 book, *The Case for Peace: How the Arab-Israeli Conflict Can be Resolved*, Dershowitz approvingly cites Carter’s recognition of efforts made in 2003 by leading Israeli and Palestinian political leaders to make peace—the Informal Geneva Accords.¹⁹² That is why he is so bothered by Carter’s most recent book. As Dershowitz notes, “it troubles me so much that this decent man has written such an indecent book about the Israeli-Palestinian conflict.”¹⁹³ Dershowitz first criticizes the omissions and errors in the book and then, as a good advocate, documents his concerns.¹⁹⁴ He raises

¹⁸³ *Id.* at 7.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 12–13.

¹⁸⁶ *Id.* at 13–14.

¹⁸⁷ *Id.* at 15.

¹⁸⁸ *Id.* at 16.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 42.

¹⁹¹ Alan Dershowitz, Op-Ed., *Jimmy Carter Mideast Book Shows His Anti-Israel Bias*, JEWISH J., Dec. 1, 2006 [hereinafter Dershowitz, *Anti-Israel Bias*], available at <http://www.jewishjournal.com/home/preview.php?id=16892>.

¹⁹² DERSHOWITZ, *THE CASE FOR PEACE*, *supra* note 152, at 59.

¹⁹³ Dershowitz, *Anti-Israel Bias*, *supra* note 191.

¹⁹⁴ See Dershowitz, *Crossed the Line*, *supra* note 17, at 22; see also Dershowitz, *Anti-Israel Bias*, *supra* note 191 (pointing out the same comparison).

concerns about the title of Carter's book, *Palestine: Peace Not Apartheid*, which compares Israel's relationship to the Palestinians to that of white South Africans to blacks.¹⁹⁵

He criticizes the former President for his one-sided portrayal and also raises his concern that the President, like the authors of the *Kennedy Working Paper*, seems to imply that there is an over-powerful "Jewish lobby" that controls the media and academic institutions.¹⁹⁶ He asks Carter to apologize and correct the mistakes in his book.¹⁹⁷

When President Carter was asked to speak at Brandeis, he did respond to Dershowitz and other critics. Carter took their attacks personally and admitted some poor use of language, but otherwise stood by his assertions.¹⁹⁸ However, Carter would not share the podium and debate Professor Dershowitz, who had to wait until after he left to respond.¹⁹⁹ When his turn came, Dershowitz, again, chided the former President on his use of facts and on his one-sided portrayal of the situation.²⁰⁰

What is significant about Professor Dershowitz's responses to the Working Paper, to Carter's book, and to criticisms of Israel and American Jews' support for Israel, is his use of advocacy and scholarship. He could not just let these attacks—one-sided in nature—go unanswered. He hopes, and continues to hope, that others will respond; but, *he had to!*

V. TRANSLATION

Some commentators and academics have criticized Professor Dershowitz as being too "popular." His books are written for legal and non-legal audiences. He gives public commentary in newspapers, on radio, and on television. "My God," one may hear,

¹⁹⁵ See Dershowitz, *Crossed the Line*, *supra* note 17, at 22; see also Dershowitz, *Anti-Israel Bias*, *supra* note 191 (pointing out omissions and errors).

¹⁹⁶ Dershowitz, *Crossed the Line*, *supra* note 17, at 22. Quoting from his book, *The Case for Peace*, Dershowitz notes that there are several criteria for determining whether criticism of Israel crosses the line to anti-Semitism, and speculates that perhaps the former President has crossed that line. *Id.*

¹⁹⁷ Dershowitz, *Anti-Israel Bias*, *supra* note 191.

¹⁹⁸ Pam Belluck, *At Brandeis, Carter Responds to Critics*, N.Y. TIMES, Jan. 24, 2007, at A11, [available at](http://www.nytimes.com/2007/01/24/us/24carter.html?_r=1&n=Top/Reference/Times%20Topic/s/People/B/Belluck,%20Pam&oref=slogin) http://www.nytimes.com/2007/01/24/us/24carter.html?_r=1&n=Top/Reference/Times%20Topic/s/People/B/Belluck,%20Pam&oref=slogin.

¹⁹⁹ *Id.*; see also Larry Cohler-Esses, *Carter Faces, and Disarms, Jewish Crowd*, JEWISH WEEK, Jan. 26, 2007, at 1, [available at](http://www.mafhoum.com/press10/293C34.mht) <http://www.mafhoum.com/press10/293C34.mht>.

²⁰⁰ See Belluck, *supra* note 198, at A11; Cohler-Esses, *supra* note 199, at 1.

“they’ve even made a movie where he is portrayed!”²⁰¹ The assumption behind these comments criticizing Dershowitz’s popularity is, simply, that it is not the true role of the scholar to be “translatable” into popular culture. Obviously, Professor Dershowitz rejects this perspective.

Making issues understandable is not a bad thing. Bringing lay attention to important constitutional, ethical, or criminal justice issues and being able to speak in simple, straightforward, understandable language are not bad things.

As noted earlier, one of Professor Dershowitz’s themes is the need for a more positive self-identification by Jews. Writing a book about this was not enough; he felt it necessary to visit numerous cities and speak to numerous groups.

He is worried about the future of all of our rights, so he writes popular books about that concern.²⁰²

He is worried about the future of American Jewish tradition, so he writes a popular book about it.²⁰³

He is worried about how the American press and the American people are being misled about the Middle East, so he writes books and columns about it.²⁰⁴

He is angry about “How the High Court Hijacked Election 2000,” so he *quickly* writes a book about it.²⁰⁵

He is worried about terrorism, the need to counter it, and the need to balance our fear of it against the protection of individual rights, so he writes *several* books about it.²⁰⁶

One may be sure, that if there is a topic about which Dershowitz has concerns, he will go on television, write a column, and most

²⁰¹ See REVERSAL OF FORTUNE (Sovereign Pictures 1990) (depicting the Claus von Bülow murder trial and starring actor Ron Silver as Professor Dershowitz).

²⁰² See DERSHOWITZ, RIGHTS FROM WRONGS, *supra* note 98 (examining the origins of human rights); DERSHOWITZ, SHOUTING FIRE, *supra* note 28 (investigating the changing nature of civil rights in modern times).

²⁰³ See DERSHOWITZ, VANISHING AMERICAN JEW, *supra* note 12 (exploring the need for contemporary American Jews to retain a Jewish identity).

²⁰⁴ See DERSHOWITZ, THE CASE FOR ISRAEL, *supra* note 39 (probing the veracity numerous criticisms of Israel); DERSHOWITZ, THE CASE FOR PEACE, *supra* note 152 (examining methods for overcoming barriers to peace between Israel and Palestine); Dershowitz, *Anti-Israel Bias*, *supra* note 191 (criticizing errors and omissions in Carter’s book).

²⁰⁵ DERSHOWITZ, SUPREME INJUSTICE, *supra* note 105, at xi. Dershowitz explains that he felt obligated to “try to explain” what happened. *Id.* at 10.

²⁰⁶ See DERSHOWITZ, PREEMPTION, *supra* note 40, at 190–250 (discussing, inter alia, methods used to determine whether preemptive government action is necessary); DERSHOWITZ, SHOUTING FIRE, *supra* note 28 (examining the tension between civil liberties and security); DERSHOWITZ, WHY TERRORISM WORKS, *supra* note 106 (discussing the mechanics of terrorism and possible solutions).

likely write a book about it!²⁰⁷

But there is a more significant aspect of Professor Dershowitz's ability to translate complex topics into more understandable language—he is able to explain both legal and religious topics with the same skill.

For example, how can God exist in a terrible world?! One issue constantly raised by Jewish religious scholars and lay people alike (especially survivors and their offspring) has to do with reconciling the existence of God with the Holocaust.²⁰⁸ Dershowitz also asks why the Holocaust did not lead to a thirst for “revenge.”²⁰⁹ He rejects those biblical readings that seem to indicate some guilt by the victims.²¹⁰ He also acknowledges that the Holocaust can lead to a cynicism about justice.²¹¹ His answer is obvious—activism. Jews have a right to demand special indulgence because of the Holocaust.²¹² Jews have a right to seek and punish Nazi war criminals even sixty years later.²¹³ Jews have a right to holler when others are insensitive to the story of the Shoah.²¹⁴

But Jews also have an obligation to use the experience of the Holocaust as a call to future justice. Racial discrimination is bad. Ethnic purity (whether in Bosnia or Darfur) must not be a basis for any political action, let alone military action. Genocide is genocide.²¹⁵

Professor Dershowitz has also sought to explain the importance of the Bible to a non-technical audience. In *The Genesis of Justice*, he explains why he wrote a book about the Bible.

Unlike others who have written about the Bible, I do not bring to the project a lifetime of biblical study. Instead I bring a lifetime of legal studies and practice coupled with a solid grounding in the Bible. . . .

²⁰⁷ See, e.g., DERSHOWITZ, PREEMPTION, *supra* note 40, at 8–9 (raising concerns that post-9/11 fears can lead Americans to accept the argument for preemptive action to control behavior both by individuals and governments, and addressing the impact of that acceptance on rights and justice).

²⁰⁸ See, e.g., David Patterson, *Some Theological Aspects of Jewish Memory in the Holocaust Memoir*, 548 ANNALS AM. ACAD. POL. & SOC. SCI. 200, 201–04 (1996).

²⁰⁹ DERSHOWITZ, CHUTZPAH, *supra* note 10, at 131.

²¹⁰ *Id.* at 131–32 (quoting the Thirty-Seventh Psalm, “I never saw a righteous person abandoned”).

²¹¹ *Id.* at 134.

²¹² *Id.* at 135.

²¹³ *Id.* at 136–37.

²¹⁴ See *id.* at 139–80 (describing Dershowitz's response to attempts by several people and groups to downplay the significance of the Holocaust to Jews).

²¹⁵ See DERSHOWITZ, RIGHTS FROM WRONGS, *supra* note 98, at 7.

I try to use my legal, political, and personal experiences to raise new questions about ancient sources and to provide new insights into old questions.²¹⁶

What is his goal?—a “popularization one.” He wants “to stimulate discussion among believers, nonbelievers, skeptics, and others” about the impact of the Bible.²¹⁷ Use of religious narrative can explain theories of law. God did not kill Adam and Eve, as promised, after they ate the apple.²¹⁸ He did punish, but even God had to learn about balance and equity, justice and injustice. He never really told Adam why he could not eat the apple. Part of their act was his fault.²¹⁹

The idea that we learn from our actions and our experiences—must temper justice with equity—is also found, Dershowitz explains, in the story of the Flood. God did not destroy the world. He gave it a second chance.²²⁰

Even inexplicable stories, like Abraham’s offered sacrifice of his son to God,²²¹ can be used to explain both religion and the law. Abraham argued for the saving of Sodom and Gomorrah if enough good people could be found, but did not argue for the saving of his son.²²² How do we explain this? We can’t! Right and justice do not always speak with one voice. The two Abrahams are not reconcilable. There may not be any clear answers from faith. Sometimes religion and the law “cr[y] out for explication, for disagreement, for reflection, and for concern.”²²³

“[The Bible] provides no answers, only eternally unanswerable questions, and in that respect it is the perfect tool for teaching the realities, limitations, and imperfections of both divine and human justice.”²²⁴

The stories in the Bible about the accusations against Joseph and his eventual overcoming of hardship²²⁵ illustrate, says Dershowitz, several more themes—how justice can depend on human intervention and even fate, but also how we need protections, like

²¹⁶ DERSHOWITZ, GENESIS OF JUSTICE, *supra* note 24, at 11.

²¹⁷ *Id.*

²¹⁸ *See Genesis* 3:3.

²¹⁹ DERSHOWITZ, GENESIS OF JUSTICE, *supra* note 24, at 40–46.

²²⁰ *Id.* at 65.

²²¹ *Genesis* 22:9–10.

²²² *Id.* 18:23–25.

²²³ DERSHOWITZ, GENESIS OF JUSTICE, *supra* note 24, at 129.

²²⁴ *Id.*

²²⁵ *See Genesis* 39:12–18, 41:37–44.

those against false evidence, and due process-type procedures in addition to substantive rules.²²⁶ “The story of Joseph forms the prelaw predicate for the intricate and innovative system of legal protections found in the later books of the Bible . . . [T]he Joseph story shows us what it was like to live in a world without a legal system”²²⁷

Dershowitz concludes *Genesis of Justice* with an explanation of why Genesis is the beginning of our modern concept of law. Law, especially the common law, is a series of stories that develop rules and “[t]he Bible is the first law book to integrate narrative and law” as compared to cold blank codes.²²⁸ When we finally get to the rules, at the revelation at Sinai,²²⁹ the world is ready to use the narratives to formulate a set of written principles.²³⁰ Each of the principles can be derived from some theme in the previous narratives.²³¹

Again, as can be asked about all aspects of Professor Dershowitz’s scholarship and advocacy, especially as it relates to his religious background, why did Dershowitz write this book?

Because he could. He had built over time recognition in the lay world as a lawyer. He had built over time recognition in the Jewish world as an outspoken advocate. He did this by being visible. He did this by “translating” legal rules and doctrines and now religious stories into more easily understood and digestible tidbits.

Why? Again, because he could and, more importantly, he felt he should.

²²⁶ DERSHOWITZ, *GENESIS OF JUSTICE*, *supra* note 24, at 193–96.

²²⁷ *Id.* at 195.

²²⁸ *See id.* at 219–20.

²²⁹ *Exodus* 20:2–17; *Deuteronomy* 5:6–21.

²³⁰ DERSHOWITZ, *GENESIS OF JUSTICE*, *supra* note 24, at 245–46.

²³¹ *Id.* at 247–58.