

Guilt By Admiration

Written by Dr. Michael Berenbaum
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Nothing seems to be sticking to Elena Kagan so the opposition is resorting to moves of desperation: “guilt by admiration.”

Since they have so little upon which to attack her, they are challenging two men for whom she has expressed admiration, the late Justice Thurgood Marshall and former Chief Justice of the Israeli Supreme Court Aharon Barak. Most Americans—and especially American Jews who were active during the Civil Rights Era—are quite familiar with the record of Justice Marshall, whose role in American history was established by *Brown versus Board of Education*, the case he successfully argued before the Supreme Court in 1954, which overturned the segregation of American schools, determining that separate but equal was decidedly unequal and unconstitutional. America is a better country because of that decision and one wonders about the wisdom of this line of attack. Before joining the bench, Marshall won 29 of 32 cases he argued before the Supreme Court and was a hero of the Civil Rights Movement. He was the first of his race to serve on the Court and his record there was exemplary. He also worked in common purpose with the Jewish community in the late 1940s-1960s as both the Black and the Jewish community used the Courts and the American legal system to overcome discrimination and legal prejudice.

But what about Barak? The attack against Barak stems from Robert Bork who was denied confirmation as a Justice in 1987 because of his views on privacy. Bork attacked Barak because of his undeniable record as an activist judge. What is left out of the discussion, perhaps unknown to Kagan’s Republican attackers, but which surely should be known to Judge Bork is why no justice of Israel’s Supreme Court can confine himself or herself to merely interpreting the Constitution. The reason is clear.

Israel has no constitution.

The founders of Israel could not agree on a Constitution because they could not delineate the norms of Israel’s justice system. They could not determine how to define a Jewish and democratic state constitutionally. Religious leaders wanted a constitution founded on the halakhah, which had been developed in exile without the reality of sovereignty and had not considered the value of democracy. Secular leaders wanted a democratic state and the difficulties of mediating between the two was too onerous in Israel’s initial years when the burdens of war, the absorption of immigrants, and economics or statehood were the most pressing issues. From time to time there are discussions as to the drafting of a constitution but no genuine progress, Israel has some basic laws and conflicting and oftentimes contradictory

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legal norms.

The Israeli legal system is complex; perplexing and confusing may even be a more accurate description. Some Israeli laws are based on Turkish law; the Ottoman Empire ruled Palestine for centuries. Some are based on English law, a reflection of the Mandate period of English domination and of Israel's admiration for the Anglo-Saxon legal tradition. Some are based on Jewish law, which has a respected but not all dominant place in the Israeli Courts, much to the discomfort of religious Jews.

The Supreme Court cannot play John Robert's self defined but much violated role of umpire calling balls and strikes. It cannot rely on precedents in a relatively young nation. As a matter of principle, it considers international norms, contemporary ethics and the responsibilities of a democratic society for all its citizens, and has defined for itself a central role in handling those aspects of Israeli society that politicians just will not grapple with, much to the relief of those politicians who like to play it safe. It serves to define military ethics and to legally and morally challenge the army; so much so that one can say that the Supreme Court has shaped contemporary Jewish military ethics. It is respected by the Arabs who appeal to it to restrain the overreach of government. Most recently, it reminded the Security Apparatus of the State that when it confiscated land for Route 443, it claimed that it was providing better highways for Arab communities, whom it had more recently been restricting from accessing the very roads that were built of Arab lands to serve the Arab populations. It challenged the separate but equal claims—invoking the American case that Marshall argued before his future colleagues—in which Slonim Hasidism would not allow religious Sephardic girls to study with their daughters, claiming that they were insufficiently religious since they ate kitniot on Pesach – as permitted in Sephardic tradition and davened using Sephardic pronunciation, a decision that aroused the protest of perhaps as many as 100,000 Haredim. The Court has shown courage and wisdom and is the single most respected institution in Israel except by the Haredim, who bowed to its will last week, accepting a compromise in practice that they refused to acknowledge lest they inadvertently recognize the Court's authority.

Barak was a brilliant and creative Chief Justice, worthy of admiration and respect. Judge Bork should know enough not to apply American standards to Israel and he and his Senatorial stooges should be able to do better than to challenge soon to be Justice Kagan with accusations of guilt by admiration. If that is all they have, it is little indeed.