Two Horwitzian Journeys

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FESTSCHRIFTS PROVIDE AN OPPORTUNITY TO ACKNOWLEDGE INTELLECTUAL debts, and my debt to Morty has been huge. Much of my academic career has been influenced by the Horwitzian depiction of antebellum American legal doctrines in *Transformation I*. The Horwitzian interest in judge-made law and the arguments made in that book about the ways in which common-law rules favored the powerful in society have been a source of inspiration for me ever since I first read his work as a law student in Israel in the early 1990s.

In this article, I would like to describe in some detail one of my first projects as a legal historian, written in the middle of the 1990s, as well as to briefly discuss one of my latest projects, which I have been working on in the last couple of years but have not yet completed. Both projects were inspired in some ways by *Transformation I*. Both are also about the transformation of *Transformation I*, as it migrated to non-American legal contexts and as its historiographical questions and interpretations were transformed as a result of their encounter with the specific legal texts and historical contexts that I was interested in.

Both of the projects that will be discussed in this article attempt to answer the question “What factors influence judicial decisions?” Both seek to show that class and economic interests, at least in some contexts, are not the major factors

that shape case law. This article is thus an opportunity for me to look back on
more than a decade of work and reflect on how my work has been, to a large
extent, an attempt to revisit the “Horwitz thesis” outlined in Transformation I,
taking some explicit and implicit questions that Horwitz posed in that book, shift-
ing their focus from legal doctrines and their economic effects to judicial minds
and their relationship to culture and public opinion, and examining them in a
number of non-American contexts. The ultimate lesson of this experience, I will
conclude, is that the Horwitzian journey, a journey that seeks to study the links
between politics and judge-made doctrines, is at once an inconclusive yet also a
rewarding pursuit.¹

AN ARAB, A JEW, AND A LITTLE ENGLISH GIRL

It was not easy being a student in Israeli law schools in the late 1980s and
early 1990s. Back then there were very few Israeli scholars interested in legal
history, and most of the courses offered by the Tel Aviv University Law School,
where I was a student, were dry, black-letter, formalist courses. There were few
exceptions to the generally stifling atmosphere that I encountered at the law
school. One exception was a course on “legal systems”—a combination of com-
parative law, legal history, and sociology of law taught by Pnina Lahav and the late
Leon Sheleff. Another exception was a course on American legal history taught by
a visiting professor, Eben Moglen of Columbia Law School. Eben was the person
who introduced me to Horwitz’s work. At that time, I was studying for a joint
history-law degree (a rare phenomenon in those days), and Eben’s course con-
vinced me that law was not as dry as I thought it was and that I could combine
my interest in history and law and become a legal historian.

After graduating from the Tel Aviv University Law School, I went to Harvard
in the fall of 1994. At first I thought that I would continue the work I had done
as a history student in Israel. As a graduate student in the history department of
Tel Aviv University, I wrote an MA thesis on Protestantism and radical reform of
English law in the seventeenth century.² I was interested in examining the affinit-
ies between radical religious and legal thought, but I ultimately decided to aban-
don this topic and focus on colonial legal history instead. The decision to forsake
law and religion and move to the study of law and colonialism was the result of
my encounter with two books, one very famous and the other quite obscure.

When I came to Harvard, one of the first books I bought in one of the Harvard
Square bookstores was Edward Said’s Orientalism. I had been aware of the book
for a long time, but in Israel I never read it. While Said’s brand of cultural history
is clearly flawed and problematic (as dozens of works have shown since Oriental-
ism was first published thirty years ago), the book is also extremely interesting
and challenging. The second book, the one that sealed my decision to focus on
the legal history of colonialism rather than on law and religion, provided the perfect example of the power as well as the problems of the Saidian thesis. I still remember the day that I first encountered it in the library. It was autumn. The weather, which was fine when I arrived in Cambridge in the summer, had turned bitterly cold. Snow was falling, and I was sitting in the Widener library, searching the catalog for books on the subject “Palestine—Law.” One of the entries that came up read *Palestine Parodies.* The catalog said that the book was “printed for private circulation” in British-ruled Palestine in 1938. Its authors were identified as “Mustard and Cress.” Who the hell were Mustard and Cress, and why was such a book cataloged under “law”?  

When I found the book amid the dusty stacks, I discovered that it was written by a British judge in Palestine of the 1930s, and that the reason it was cataloged under “Palestine—Law” was that it was written in that particular English genre—the legal parody—well known from books like *Forensic Fables.* The book contained numerous parodies of famous literary works transported to Palestine. For example, the first chapter of the book was entitled “Alice in Blunderland.” It was modeled after Lewis Carroll’s *Alice’s Adventures in Wonderland.* One of the sections, called “Down the Souk,” described Alice’s visit to the Old City of Jerusalem, where she met with a group of scheming Arab politicians bent on establishing “the A.S.S.” (Arab Supreme State). Another section of this chapter, called “The Pool of Tears,” was about lazy British government officials frightened by the discovery of a lost government file. A third section, “The Municipal Tea Party,” told the story of Alice’s visit to the council room of the Jewish municipality of Tel Aviv, where the Mayor, the Engineer, and the Town Clerk (modeled after Lewis Carroll’s Dormouse, Mad Hatter, and March Hare) conducted a demented council meeting. In one of the sections, entitled “A Visit to the Courts,” Alice was taken to a government court in Tel Aviv, whose sleepy denizens acted as strangely as those who populated the court of the King and Queen of Hearts. This was exactly the kind of material I was looking for: a text that would allow me to gain access to the mentality of the British colonial rulers and would enliven the dry cases that later came to serve as the main sources of my history of law and colonialism in British-ruled Palestine.  

Inspired by *Orientalism* and *Palestine Parodies,* Edward Said as well as Mustard and Cress, I embarked on a Horwitzian journey through the decisions of the Supreme Court of Mandatory Palestine, reading the reports of the court cover to cover, seeking to find in the hundreds of cases that were entombed in the dusty and crumbling pages of the law reports clues to the questions that intrigued me: Who were the strange and unfamiliar people who determined the fates of Arabs and Jews in Palestine in the early twentieth century? Was the colonial setting in which they functioned relevant to the legal doctrines they produced? Were the British judges animated by an Orientalist mentality of the type that Said was describing in his book? What other factors influenced the shape of judge-made
doctrines in Palestine? Were their decisions connected to economic or political interests, or were they manifestations of cultural biases? And was it possible to write a history of judge-made law that ignored the personal and social background of specific judges and focused merely on the doctrines they produced?

Approaching the cases with these questions in mind, I soon discovered that among the hordes of cases of now long-forgotten litigants, one could indeed find real gems that were equal in many senses to the stories told in *Palestine Parodies*. Such gems were especially evident in tort cases that dealt with the application of Article XLVI of the Palestine Order in Council, 1922, which was the foundational constitutional document of British rule in Palestine. Three specific cases, one dealing with an Arab, another with a Jew, and a third with a little English girl, came to serve as the starting point of my story. This story would trace the transformation of a private law doctrine, but it would do so focusing on non-economic, cultural, and personal factors.

**The Cases**

In 1930, an Arab resident of Haifa, Dr. Caesar Khoury, fell into a hole dug by the municipality and fractured his shoulder blade. Would Dr. Khoury be compensated? The law of torts of Palestine was found in the Ottoman civil code, the *Mejelle*, which the British retained when they conquered the country at the end of the First World War. Did the *Mejelle* provide a remedy for cases of personal injury? No, said Judge Francis Baker, who wrote the opinion of the Supreme Court of Palestine. The *Mejelle* dealt with liability for damages caused by animals to property, but it was “silent” with regard to injuries caused to persons. Therefore, Dr. Khoury could not be compensated.5

In 1939, a Jewish resident of Tel Aviv, Feivel Danovitz, was run down by a truck. He sued the driver and the owner of the truck. The lower courts of Tel Aviv decided that because the *Mejelle* did not deal with liability for personal injury, there was a lacuna in the tort law of Palestine that could be filled by recourse to English common law in accordance with the provisions of Article XLVI of the Palestine Order in Council, 1922. According to Article XLVI, in the absence of Ottoman laws or local Palestinian legislation, the civil courts of Palestine were to exercise their jurisdiction “in conformity with . . . the substance of the common law, and the doctrines of equity in force in England . . . provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants . . . permit and subject to such qualifications as local circumstances render necessary.” Because English common law recognized liability for personal injury, Danovitz could be compensated.

On appeal, however, the Supreme Court of Palestine rejected this argument. Judge Randolph Copland, who wrote the majority opinion, acknowledged that
there was indeed a gap in the tort law of Palestine. But, said Copland, the proviso of Article XLVI prevented the importation of the English law of torts. The proviso stated that English law could be used by the courts only so far as “the circumstances of Palestine and its inhabitants . . . permit.” The common law, said Copland, is a law based on the customs and habits of the English people, and “the customs and habits, mode of life, mode of thought and character of the English people are very different from those of the inhabitants of Palestine. . . . It would be a grave injustice to force on another country a customary law which is founded on the totally different customs and habits of a totally different race.”

Dissatisfaction with the Sherman decision led to the promulgation of the Civil Wrongs Ordinance of 1944. The ordinance, however, came into effect only in July 1947. By then, the Supreme Court of Palestine had reversed the Sherman decision and declared that English tort law was indeed applicable to Palestine. This reversal was caused by a little English girl.

Stephanie Constance Orr, the daughter of the chief registrar of the Supreme Court of Palestine, was born in 1943 in a Jerusalem hospital belonging to the London Society for Promoting Christianity among the Jews. While she was still in the hospital, a hot water bottle was placed in Stephanie’s cot. The bottle had a hole. It leaked and Stephanie Orr was permanently crippled. Her parents sued the London Society. At first glance, it appeared that in view of the Sherman decision, the Orrs were bound to lose. The Supreme Court, however, decided otherwise. In May 1947, exactly a year before the end of British rule in Palestine, Sherman was overruled. In his decision, Chief Justice William FitzGerald explained that Sherman was no longer applicable. If in 1940 there were circumstances that prevented the application of the English law of torts, said FitzGerald, they did not exist anymore. “There is now in Palestine,” he said “a population of 600,000 Jews with western ideas of culture and western ideas of commerce. There is a progressive Arab population of one and a half million, also with strong cultural and commercial ties with Europe.” The circumstances of Palestine and its inhabitants did not bar the importation of the English law of torts.

Law and Identity

How can the positions of different British judges on the applicability of English law to Palestine be explained? Would a Horwitzian instrumental explanation assist us? Obviously, it would be difficult to rely on a direct analogy to the American cases. British judges had little incentive to reshape the law of Palestine in order to promote economic growth or in order to serve the interests of local capitalists, be they Jewish or Arab. The economic and social setting of Palestine in the early twentieth century was simply not equivalent to that of the United States in the early nineteenth century. But what about the personal interests of judges? One possible way to explain the transformation of the law of torts of
Palestine between *Sherman* and *Orr* would be to view the decision in *Orr* as an example of the important role of empathy in judicial decisions. Judge Orr was the registrar of the Supreme Court, and British judges were obviously more inclined to rule in favor of the young daughter of a close British colleague than to assist an unfamiliar Arab or a Jew. There were also practical considerations that might have led to the different decisions in *Sherman* and *Orr*: the desire to let the public insure itself before imposing tort liability, or the fear of overloading the courts with tort claims.\(^\text{10}\)

However, an explanation based simply on the role of judicial empathy is not sufficient. As I immersed myself in the cases and in the biographical and historical context of the decisions of the Supreme Court of Palestine, I came to realize that one could also read them as expressions of conflicting cultural images of British rulers and Jewish and Arab subjects. *Sherman* and *Orr* could not be read simply as manifestations of the direct interests of the judges who decided them. Instead, they reflected two conflicting notions about identity within the British judiciary in Palestine. After all, before looking for hidden motives, one needs to consider the explicit justifications used by the judges, and the contradictory justifications used in *Sherman* and *Orr* in order to reject and then to justify the importation of English tort doctrines into the law of Palestine manifested conflicting notions of identity based on different answers to the question whether “the character of the English people” was or was not “very different from [that] of the inhabitants of Palestine.”

Notions of “Englishness,” as well as notions of Arab and Jewish identity, I discovered, often influenced decisions concerning the importation of English law into Palestine. Because Article XLVI required the courts to determine whether the specific circumstances of Palestine and its inhabitants allowed the importation of specific English norms, it forced the judges of Palestine to reveal their opinions about the country and its inhabitants, to compare the English to Arabs and Jews, and to discuss similarities and differences between them. The cases that interpreted Article XLVI were, therefore, an important locus where law and identity interacted in the decisions of the courts of Palestine. One could thus trace a slow and gradual evolution in the willingness to import English law, a development that paralleled changes in the composition of the British judiciary in Palestine and in British notions of the identity of self and other. In this respect, a comparison between the Supreme Court of Palestine of the 1920s and early 1930s and the Supreme Court of the 1940s would be instructive.

During the 1920s and early 1930s, the Supreme Court of Palestine was usually quick to state that differences between the law of Palestine and the law of England prevented the application of English norms, and quantitatively, there was little importation of English law. Why did the Supreme Court of Palestine ignore Article XLVI during the first fifteen years of the mandate? There were some objective barriers to the introduction of English law. English legal literature was not
readily available in Palestine at the time. Many local lawyers, as well as some British judges, were unfamiliar with English law. Perhaps there was also less pressure to import English norms because the massive development of the economy occurred mainly in the 1930s (due to the influx of German Jewish immigrants and capital) and the 1940s (when Palestine became a major supply center of the British army in the Middle East). Finally, the reason may rest on the style of the early decisions of the courts of Palestine, which, in the 1920s, tended to be very brief. It is therefore often difficult to discern the specific reasons that led the judges to decide a case one way or the other. However, it is also possible to attribute the reluctance to use English law to British notions of self and other.

One can imagine a spectrum of British attitudes on the appropriate balance between local and English law in the colonies. On one end of this spectrum was a “traditional” approach that viewed English law as superior and local law as inferior. According to this approach, English law could not be introduced into the colonies because the natives were inferior and therefore had to be governed by their own local laws, which were appropriate to their level of civilization. A middle position on this spectrum would be that English law was superior to local law and therefore could be introduced into the legal system as part of the “civilizing mission” of the British. Finally, at the opposite end of the spectrum, one would find a position according to which the natives and the English were equal and English law and local law were comparable. Therefore, those parts of English law that were better than the comparable parts of local law should be introduced, and those parts that were inferior should not.

Many of the judges of the Supreme Court of Palestine in the 1920s and early 1930s came from a cultural and professional background that would have made them more amenable to the “traditional” approach. The first chief justice, Sir Thomas Haycraft, was a barrister and a veteran of the colonial service. Before coming to Palestine, Haycraft served as a judge in Cyprus, Gibraltar, Mauritius, and Grenada. He was considered a conservative judge. Age may have played an important role in his conservatism. Palestine was the last station in Haycraft’s long colonial career. He came to Palestine in 1921, at the age of sixty-two.

Another Supreme Court judge in the 1920s was Owen Corrie. Corrie was described by Judge Gad Frumkin, the only Jewish Supreme Court judge, as “a graduate of Eton and Cambridge and a member of the English bar” who “saw himself as superior to his British colleagues . . . and it goes without saying that he snubbed his non-British ones, and attempted to erect a barrier between himself and them.” In 1936, Corrie became the chief justice of the Fiji Islands. “He liked ceremonies,” said Frumkin, “and when he was transferred to Fiji as chief justice, he enjoyed the rites which accompany such an office in a far-away colony. He told his friends about the number of boats and servants he had and sent them a photo of himself in his official dress with a black boy holding the fringes of his gown.”

Similar comments were made about Michael McDonnell, the second chief
justice. McDonnell was Irish. He was educated in a public school—St. Paul—and then at the University of Cambridge. In 1909, when McDonnell was only twenty-seven years old, he wrote the official history of St. Paul. The 500-page book was based on meticulous historical research, but in essence, it is merely a list of the achievements of St. Paul’s graduates throughout the ages: the academic and athletic prizes they won, the books they wrote, the various positions they held in the British government. It is the work of a conservative young man convinced of the superiority of his education and the tradition he represents. It is no wonder that some contemporaries described him as a “hard-bound, die-hard conservative . . . full of tradition and precedents.”

McDonnell’s conservatism may have been augmented by a dislike for the “cosmopolitan” and “proletarian” Jews of Palestine and by a general pro-Arab inclination, which eventually led to his forced resignation during the Arab rebellion of 1936.

Randolph Copland, who wrote the Sherman decision in 1940, was made in the same mold. Copland was a graduate of the University of Cambridge who had served for a long time as a judge in the district courts of Palestine, finally being appointed to the Supreme Court of Palestine in 1936. Frumkin described him as “cynical” and mainly interested in deciding cases in the fastest possible way (his nickname was “the Broom”).

Haycraft, Corrie, McDonnell, and Copland were all reluctant to use English law. They seem to have viewed Article XLVI as giving the judges discretion to turn to English law if they thought it appropriate. They rejected the idea that in certain cases the locals could claim English rights or remedies by virtue of the article. Their attitude, it seems, stemmed in part from their notions of identity, from a strong self-other view of the population of Palestine that prevented them from thinking that English law was applicable to the local population.

The Supreme Court of the late 1940s and especially its chief justice, William FitzGerald, were very different. FitzGerald was the former attorney general of Palestine. He was portrayed by contemporary observers as “a warm hearted eloquent Irishman,” less committed to the preservation of British imperial traditions than the earlier generation of judges (his relatives were involved in the struggle for Irish home rule). Unlike the first generation of British judges, who tended to erect formal barriers between themselves and the local litigants and judges, FitzGerald viewed local judges as his equals and strove to abolish discrimination between native and British judges. FitzGerald’s decision in Orr, as well as many other decisions of his, reflected this background.

One can see the link between identity and attitudes toward the importation of English law even more clearly when one contrasts the Orr decision with its immediate predecessor, the Sherman decision of 1940. Judge Copland, who wrote the decision in Sherman, viewed Palestinian and English societies as static. He was unwilling to recognize changes in the composition of society, and he emphasized the more stable aspects of life (“customs and habits, mode of life, mode of
FitzGerald’s decision in *Orr* described Palestinian society as dynamic, both in recognizing changes in it and in focusing on those aspects of personality that could be changed easily, such as “ideas of culture and commerce” or “cultural and commercial ties.”

Copland based his decision on the traditional colonial dichotomy. His world was divided into two entities, each with its own distinct identity—the English on one hand, and the people of Palestine on the other. In his world, the barrier between colonial ruler and local subjects was impassable, because the subjects were required to change the most immutable aspects of their identity, their “race” or “character.” FitzGerald lived in a different world. The English now belonged to a broader category—the West (or Europe). The inhabitants of Palestine were no longer an undifferentiated mass. Instead, they were divided into two categories—Jews and Arabs. The barriers between categories were not rigid. What was required of the Jews and Arabs now was not the impossible feat of changing their “character” or “race.” All they had to do was adopt Western ways of commerce and culture. *Sherman* and *Orr* thus represented two different conceptions of Palestinian and English identity, both of which had supporters among the British judiciary in Palestine.

The decisions of the Supreme Court of Palestine on Article XLVI were thus not a product of rational doctrinal evolution, nor were they simply a reflection of nonlegal economic or political interests of the sort that Horwitz discussed in his description of antebellum American law. Instead, they were determined by the identities of various British judges, and their views of the local “others.” The more conservative judges—those who refused to import English law and at the same time saw English law as superior to local law—were those judges who viewed the locals, both Arabs and Jews, in the familiar Orientalist fashion as different (and inferior). The less conservative judges, those who were both more willing to use English law and willing to recognize its defects, were those judges whose notion of identity was less rigid. Judicial interpretations of Article XLVI were thus mirrors of identity, in the sense that they reflected the self-definitions of British judges in Palestine, as well as their understandings of the identity of their others—the Jews and Arabs.

Colonial identities were obviously merely one factor among many. Institutional considerations (different perceptions of the role of judges and legislature or different perceptions of the independence of the law of Palestine), differences in knowledge of local law, and the narrow self-interests of judges (preventing as much litigation as possible or the desire to assist the daughter of a close colleague) all played a part in determining the specific path that the judicial interpretations of Article XLVI took. Ultimately, I came to realize, it would be impossible to estimate the specific weight of each factor, including identity, in influencing judicial outcomes.
A DUKE, A LADY, AND A SOFA

My early Horwitzian journey into the case law of Palestine provided me with an example of the difficulty of translating the class-based instrumental argument used in Transformation I to non-American settings, in which national identities rather than class may have played a major role in shaping the case law. But in some sense, the story I told was merely a variation of the Horwitzian thesis, since in the British Empire, race (or ethnic origin) replaced class as the major category used to create social hierarchy.24

However, whether it was race that played a major role in shaping the decisions or whether it was class, one thing that bothered me was the fact that I could not determine the relative weight of these and other factors in shaping the case law. Perhaps, I reasoned, the problem was found in my historiographical brush. A macro-history, albeit that of a single court (the Supreme Court of Palestine) during a relatively brief period of time (thirty years), is simply not accurate enough. It assumes a coherence in a set of decisions by a single court, or even a single judge, which simply cannot exist, given the fact that institutions and even personal views are dynamic rather than static.

My next Horwitzian journey would therefore focus on a small set of specific landmark cases, trying to provide as thick a description as possible of these cases, replacing historiographical breadth with depth. Such a description would, of course, be sensitive to the doctrinal context in which the cases were decided, but it would be more focused on the multiple layers of nonlegal contexts that influenced the judicial outcome. I would seek to uncover the economic, political, social, cultural, and institutional background of the cases, creating (so I believed at the time) a more precise description of judicial motivations. The project would also be comparative, enabling me to look at the way the same legal question was dealt with by different courts in different countries. What legal doctrines would I use?

When I came back to Israel, I began teaching comparative law and legal history, but I also had to teach a “real” legal subject. My dean at the time said that I could choose one of three subjects: civil procedure, conflict of laws, or taxation. Civil procedure and conflict of laws are taught in Israel in the fourth and final year of law school, when most law students have already long lost their interest in law. I was therefore not very happy with the first two choices. Fortunately, there was a third choice: I could teach taxation. This choice seemed to me more appealing. Taxation was a third- rather than a fourth-year course, and it seemed more interdisciplinary than the procedural courses. I therefore gladly embraced the offer to become a tax professor. Most of my colleagues, when they heard this, thought that I was either very brave or very foolish. At first I too was a bit apprehensive, but soon I discovered that unlike other areas of law, the legal history of taxation is an almost totally unexplored field, and I knew that I made the right choice.
One of my first projects as a tax historian was to reconstruct the history of tax avoidance doctrines in the Anglo-American world. Avoidance—the reduction of one’s taxes through the abuse of gaps or loopholes in the law—is always a hot topic for tax scholars, but the history of the creation and transformation of judicial anti-avoidance doctrines, in the United States and elsewhere, has received very little attention.

One rare exception is a study of the judicial decisions of the House of Lords in the twentieth century. This study was written in 1978 by legal historian Robert B. Stevens. Since a large portion of the cases heard by the House of Lords have been tax cases, Stevens had to pay close attention to the development of tax doctrines. Like Horwitz in *Transformation I*, Stevens’s interpretation of the cases was a class-based one showing how judicial doctrines were tilted in favor of the wealthy. According to Stevens, the decisions of the House of Lords on tax avoidance could be read as a reflection of the political ideology of the law lords. In the late nineteenth century, Stevens argued, the courts did not treat tax statutes differently from other statutes, and their overall approach did not seem to favor the taxpayers. But then matters changed in the early twentieth century. With the introduction of a progressive income tax in Britain in 1909, a formalist, pro-taxpayer stance on tax interpretation and tax avoidance came to dominate the decisions of the House of Lords. This stance, which enabled the wealthy to avoid taxation, can be partly attributed to the fact that many of the law lords sought to serve the interests and protect the wealth of “the established sections of society.”

One of the major examples used by Stevens to illustrate this argument was the infamous *Duke of Westminster* case, decided by the House of Lords in 1935. In this case, the law lords used a formalist approach to avoidance in order to allow the wealthiest man in Britain to artificially reduce his tax burden. *Duke of Westminster*, argued Stevens, was the logical outcome of a long line of cases in which the law lords sought to prevent the use of taxation for the redistribution of wealth in Britain.

After reading Stevens’s book, I thought that it would be interesting to examine whether his argument was also relevant to the Israeli and American contexts. Ultimately, I also decided to revisit the English case and describe in more detail the legal and nonlegal contexts in which it was decided. My project thus became a comparative micro-history of landmark tax avoidance cases in three jurisdictions: the United Kingdom, the United States, and Israel. What I discovered was that while class interests certainly played a role in the outcome of these and many other tax avoidance cases, other factors, most notably the dynamics of public opinion at the time that a particular tax avoidance case was decided, as well as non-political tax administration concerns, were as important as politics and class in determining the shape of judicial anti-avoidance doctrines.
The Cases

Hugh Richard Arthur, the second Duke of Westminster, was a spoiled playboy and a Nazi sympathizer to boot. He was also the wealthiest man in Britain in the 1930s, and naturally, his legal advisers invested a great deal of effort in devising ways to protect his wealth from taxation. One of the schemes he used was paying his servants deductible annuities instead of non-deductable salaries. This scheme became the subject of *IRC v. Duke of Westminster*, decided by the House of Lords in May 1935. The duke won. “Every man,” said Lord Tomlin, “is entitled if he can, to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.”

At the very time at which the House of Lords was deciding the *Duke of Westminster* case, a similar tax avoidance case, that of a Brooklyn woman, was moving through the American legal system, with very different results. This was the case of Evelyn Gregory, the widow of the private secretary of the multimillionaire banker and philanthropist V. Everit Macy. *Gregory* involved a spinoff transaction pursued by Gregory merely to reduce her tax burden. However, in the American case, the judges decided in favor of the state rather than the taxpayer. In *Gregory v. Helvering*, decided by Judge Learned Hand of the Second Circuit in March 1934 and affirmed by the U.S. Supreme Court in January 1935, the court ruled that while the spinoff transaction in question was literally covered by the words of the Revenue Act of 1928, which exempted “corporate reorganizations” from taxation, it was not, in substance, one of the transactions that the Revenue Act intended to exempt.

Just “as a melody is more than the notes,” said Judge Hand in his decision, so the “meaning of a sentence may be more than that of the separate words.” The purpose of the section exempting reorganizations from taxation “is plain enough; men engaged in enterprises . . . might wish to consolidate, or divide, to add to, or subtract from, their holdings. Such transactions were not to be considered as ‘realizing’ any profit, because the collective interests still remained in solution. But the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand, not as an ephemeral incident, egregious to its prosecution. To dodge the shareholders’ taxes is not one of the transactions contemplated as corporate reorganizations.” *Gregory* was thus the exact opposite of the *Duke of Westminster* case. While the *Duke of Westminster* enshrined a formalist approach to tax avoidance in England and Commonwealth countries for most of the twentieth century, Learned Hand’s substantive approach to avoidance came to dominate American cases ever since the 1930s.
The third and last case whose history I chose to examine was a case of *Mefi Ltd. v. Assessing Officer*, decided by Israel’s Supreme Court in 1967. This case marked the transition of Israeli tax avoidance doctrines from the formalist, pro-taxpayer, English-inspired *Duke of Westminster* approach to a more substantive, anti-taxpayer *Gregory*-like approach.

*Mefi* was a case involving the purchase of a loss-making corporation that manufactured furniture in order to offset its losses against income made by the purchasers. Israel has a legislative general anti-avoidance provision that allows the Revenue to disregard “artificial transactions.” The main question before the Israeli Supreme Court was, therefore, whether the transaction was indeed “artificial.” Before the decision in *Mefi*, the term “artificial” was interpreted by the courts as referring to any transaction that was “uncommon.” Such an approach, which examined the form of the transaction rather than the motivation of taxpayers, tended to favor taxpayers.

Justice Moshe Silberg, who wrote the leading opinion in *Mefi*, rejected this interpretation of the term “artificiality.” Silberg noted that such an interpretation would protect tax avoidance transactions because once a transaction reduces one’s taxes, it would become common. Silberg therefore suggested a new, substantive, purpose-oriented notion of artificiality. The question that should be asked, he said, was whether the transaction in question had any substance apart from its tax consequences.

**Public Opinion and Tax Administration**

How can one explain the decisions in the three cases? Robert Stevens read the English cases (and would probably read the American and Israeli ones) as reflecting the political ideology of the judges. While I did find a few indications that political ideology and class interests influenced the attitude of some English, American, and Israeli judges toward tax avoidance, I believe that the political ideologies of the judges were not the major explanatory factor. Instead, judicial responses to short-term fluctuations in public opinion in the English and American cases, and judicial concerns with the efficiency of the tax administration machinery in the Israeli case, played an important role in shaping the outcomes of the specific cases I studied.

Tax avoidance decisions are influenced by the complex pull of various factors. Avoidance undermines trust in government. However, a substantive interventionist approach to avoidance by the courts blurs the boundary between the legislature and the other branches of government and undermines the notion of the rule of law. The courts are thus constantly pulled in two opposite directions: on one hand, the desire to intervene in tax avoidance cases in order to contribute their share to the battle against tax avoidance and, on the other, a desire to preserve the notion of the rule of law by leaving this task to the legislature. These
opposing forces mean that the specific result in tax avoidance cases is never prede-
termined but is instead the outcome of particular conditions existing at the time
of the decision: when economic conditions worsen, tax avoidance often becomes
a source of public concern and even public scandal. The courts are then forced
to treat avoidance harshly. Conversely, when economic conditions improve, tax
avoidance is no longer viewed as a matter of general public concern. Public opin-
ion is not enraged by the use of tax avoidance schemes to undermine the fairness
of the tax system. In such circumstances, courts tend to adopt a more formalist,
pro-taxpayer, and passive attitude to avoidance, leaving the matter to the legisla-
ture.

This model of judicial behavior in tax avoidance cases is the one that I think
can best explain the outcome of such cases as Duke of Westminster. In order to
explain the decision, one has to trace the ebb and flow of public concern with tax
avoidance and its companion phenomenon, tax evasion (that is, the reduction
of the tax burden by criminal means) in Britain in the early twentieth century. Such
a history of public opinion and tax avoidance, based on both quantitative and
qualitative methods, reveals that British public opinion was not concerned with
tax avoidance and evasion in the period leading up to the decision in Duke of
Westminster in May 1935. While tax avoidance increasingly captured the attention
of accountants and lawyers in the early 1930s, it was not until 1936 that the issue
came to the attention of the general public. As long as there was no public pres-
sure to deal effectively with avoidance, the law lords did not feel compelled to
intervene.

In addition to the lack of pressure from public opinion, judicial passivity in
the Duke of Westminster case was also the result of the specific institutional
culture of English courts. In England, courts were not viewed as the proper insti-
tution to deal with the problem of avoidance. Instead, as some of the judges who
decided such cases expressly said, the problem was seen as one that should be
resolved by the executive and legislative branches of government. This was not
merely a rhetorical ploy to justify judicial passivity. Revenue and treasury officials
too did not consider the judiciary an appropriate forum for tackling tax avoidance.
Indeed, following the rise to power of Nazism in 1933, judicial intervention be-
came even more problematic, because at least some observers came to identify a
substantive approach by the courts to tax avoidance with the legal practices of
Nazi courts, especially after a German Supreme Fiscal Court case in 1935 declared
that all tax laws should be interpreted according to the National Socialist weltan-
schaung and that tax avoidance was an offence against “the loyalty the citizens
owe to one another and to the country.”

The same impact of short-term changes in public opinion can be seen in
Gregory, the American case. Gregory’s substantive anti-taxpayer approach was the
result of the immediate political context in which the case was decided, rather
than any long-term ideological convictions of the judges in that case. Specifically,
the decision was mainly the result of the influence of tax avoidance and tax evasion scandals that captured newspaper headlines in the United States in the period immediately preceding the decision, especially the attempt by the FDR administration to indict Andrew Mellon, the former secretary of the treasury, for tax evasion. Thus, in the months and weeks before Judge Hand decided *Gregory*, leading American newspapers such as the *New York Times* contained many reports accusing the former secretary of treasury of tax evasion and tax avoidance. It seems therefore reasonable to speculate that these reports had some influence on Judge Hand’s decision in *Gregory*.

The argument that there is indeed a direct link between short-term concerns of public opinion with avoidance and a substantive approach is enhanced by the fact that Learned Hand had no clear and consistent view on these matters. Thus, soon after *Gregory* was decided, Hand reverted to a more conservative approach to tax avoidance in *Chisholm v. Commissioner*, decided in July 1935, six months after the Supreme Court’s decision in *Gregory*. *Chisholm*’s facts—appreciated shares were sold indirectly through a partnership in order to minimize the taxes—were quite similar to the facts in *Gregory*. The Board of Tax Appeals found for the commissioner, based on the argument that the transaction was not “bona fide.” This decision, however, was reversed by Judge Hand. Hand distinguished this case from *Gregory* by noting that the partnership in this case had continued existence, unlike the transitory nature of the spinoff corporation discussed in *Gregory*. But the real reason that Hand distinguished *Chisholm* from *Gregory* may be found in the internal memos of the three judges who decided the case. These memos reveal that the judges apparently felt that they had released the substantive genie from its bottle and that they regretted having done so.

Finally, in the Israeli study, which examined the transition from a formalist to a substantive approach to tax avoidance in Israel of the 1950s and 1960s, I show that while a liberal ideology and pro-taxpayer sentiments may have played a certain role in the propagation of a formalist approach to tax avoidance, the main cause of judicial formalism was administrative inefficiency—the inability of the Israeli Revenue to deal effectively with tax evasion, let alone tax avoidance.

The social history of tax compliance in Israel in the first decade after Israeli independence in 1948 is one of widespread evasion and a massive breakdown in tax compliance. During the last decade of the British Mandate in Palestine, the Jews established a large-scale voluntary tax system that financed illegal Jewish immigration and an autonomous Jewish military apparatus. However, after independence, levels of compliance dropped dramatically. This drop can be attributed to the heavy burden of taxation, to economic hardship, and to the fact that the relative cohesiveness of pre-independence Israeli society disappeared as post-1948 Israel absorbed huge waves of non-ideological Jewish refugees fleeing post-Holocaust Europe and the Middle East.

When the government cannot collect taxes, judges are also reluctant to col-
lect them or they view certain forms of noncompliance, such as tax avoidance (which seemingly is based on obedience to the law), as more benign. The inefficiency of the tax collection machinery and the fact that many Israelis were simply evading their taxes contributed to the adoption of a passive, formalist, pro-taxpayer approach to tax avoidance. Judges were not willing to aggressively intervene in tax avoidance transactions as long as the state was unable to crack down on the cruder, more deplorable, and far more widespread phenomenon of tax evasion. Once the Israeli tax collection machinery became more efficient in the early 1960s and tax compliance rose, judges renounced their previous formalist and passive approach to avoidance and adopted a substantive approach in cases such as Mefi.

CONCLUSION

Morty was one of my intellectual fathers. Like many sons, I tried to rebel, but as a historian I know that you cannot really escape your past. My research agenda was, and still is, influenced in various ways by his work. Many of my research projects are based on questions that I first asked myself while reading Transformations I as a young law student in Israel of the early 1990s. These projects seek to understand judge-made law, its sources, and its impact and aim to show that at least in some (American and non-American) contexts, the political and redistributive functions of law are not the only or indeed the major ways to explain the development of judicial doctrines.

Looking back on more than a decade spent in Horwitzian journeys, I now understand that the journeys were more important than the destination. Having read countless decisions of courts around the globe, I realize that my research projects have, in certain ways, been misconceived. The attempt to uncover judicial motivations, which has been the major goal of my research in both of the projects described in this article, is futile.

There is no way to discover why judges decide the way they do. Autonomous legal considerations; policy preferences; political ideology; jurisprudential notions; institutional constraints; strategic behavior; cultural biases; the influence of public opinion; the personality of judges, litigants, and lawyers; and countless other factors are all involved. Sorting them out and determining which of these factors influenced a specific decision or indeed a series of decisions is often an impossible task. Whether we use the broad-brush Horwitzian approach to the history of judicial doctrines, such as the one applied in Transformation I; the more nuanced, complex, thicker, and culturally sensitive methodology used by Horwitz in his later work; a biographical approach focusing on specific judges rather than on the development of specific doctrines; a micro-history of specific landmark cases; or even the “hard” quantitative methodology so favored by political scientists engaged in the study of judicial behavior, we will never really solve
the mystery and reach the promised land of certain answers to what is, ultimately, a literary, interpretative pursuit. But as one of Morty's favorite lawyers, Oliver Wendell Holmes, said long ago in another context, "certainty generally is illusion, and repose is not the destiny of man." I, at least, am certain that I will keep following the road that Morty first inspired me to explore.

NOTES

1. The Horwitzian project, of course, has itself changed in the three decades since Transformation I was published in 1977. Some of my other projects, such as my attempt to argue in favor of a comparative transnational history of modern legal thought, have also been written against the backdrop of Horwitz's work, especially the type of American-centered intellectual history of legal thought that characterizes Transformation II. See Assaf Likhovski, "Czernowitz, Lincoln and Jerusalem and the Comparative History of American Legal Thought," Theoretical Inquiries in Law 4 (2003): 621.


8. The defendants moved to dismiss the case on the grounds that no cause of action had been shown. Judge Curry of the District Court of Jerusalem rejected their motion but nevertheless said that "it appears to me at present that the respondent [Orr] is unlikely to succeed." Motion 6/46 Rendle v. Orr, 1946 S.C.D.C. 94, 95 (1946) (Jerusalem District Court).


24. For a different argument, one that suggests that class was as important as race in the British Empire, see David Canadine, *Ornamentalism: How the British Saw Their Empire* (London: Allen Lane, 2001).
27. Ibid., 206–8. Stevens also mentions other factors that influenced judicial opinion such as the rise of a formalist, “scientific,” “professional” approach to judicial lawmaking (183–84, 191–97).
The development of the British tax system and especially the need of politicians to shape the tax system in ways that fostered the people’s trust in the state and in fellow taxpayers, see Martin Daunton, Just Taxes (Cambridge: Cambridge University Press, 2002), xiii–xiv.


38. Chisholm, 79 F.2d at 15.


