Introduction

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The role of religion in the human-rights discourse is elusive. On the one hand, historically, the human-rights discourse developed in many instances on a religious platform while using decidedly religious rhetoric and arguments. As a result, religious values, such as the creation of humans in the image of God, play—to this day—an important role in secular liberal thinking and in the human-rights discourse, while different facets of human rights are encompassed in the contents of various religions. On the other hand, in many countries around the world, religion, both in terms of its content (that is, its distinct value and normative choices) and in terms of its methods of organization (namely religious, social, and political institutions that promote the religious message and practice), is perceived as one of the most significant threats to the liberal identity of countries and individuals. Beyond the negative sentiment and the pragmatic threat that liberals at times experience toward different religions, parts of the liberal intellectual tradition and human rights discourse on topics of freedom of religion, freedom from religion, and the injunction of non-establishment seem to consider religion as a threat to the liberal world and its dedication to human rights.

Yet, even if in many contexts religion and liberalism, or more specifically, religion and human rights, are perceived in public and intellectual discourse as foes, one must bear in mind that the identity of many people in our world is composed simultaneously of their religious or traditionalist identity as well as from their liberal identity and their dedication to human rights. The State of Israel may serve as an example of this. Israel has a dual identity: it is a member of the family of democratic nations, whose culture is Western and liberal, while it is also a unique country, the nation state of the Jewish people. The influence of both aspects—the universal and the particular—is highly noticeable on the various levels of the Israeli public space: social, educational, cultural, political, legal, and media areas. Elliptical existence, in the shadow of the two foci, is characterized by a climate of cultural dichotomy, which is a basic trait of the national life for many Jews in our generation. The dichotomy between Western culture and traditional Jewish culture is expressed, for example, in the definition of the State of Israel, in

the Basic Laws passed in 1992, as "Jewish and democratic." The broad acceptance of this definition in both the legal and the general Israeli discourse manifests its correspondence with the way the vast majority of Israel's Jewish citizens identify themselves: they consider Israeli sovereignty as concomitantly encompassing a dual obligation to both facets of identity—the liberal-democratic on the one side, and the national-cultural on the other. Yet, although studies demonstrate that most of the Jews in Israel are interested in a dual democratic-Jewish identity, the practical meaning of this issue remains unsolved. As a result, at times Israeli Jews are forced to choose between the two focal points in their personality instead of allowing the two of them to enrich and produce a fuller personal and social identity.

This book grapples with these universal challenges while using (in some of its chapters) the Israeli example as a particularly interesting test case. The book offers a comprehensive and pluralist perspective on the complex interactions between human rights and Judaism (and religion more generally), and offers a platform for a dynamic dialogue between the two discourses. As part of the static discussion, the various issues concerning human rights doctrine and the corresponding Jewish discourse are explored through case studies that compare and contrast cases in which there is a conceptual and practical affinity between the two discourses to cases in which there is a clear divergence. Alongside the static method, other chapters in the book engage a more dynamic methodology as well. Authors of these chapters explore questions regarding the patterns of activity, development, and interpretation that religion and the liberal world can employ in order to incorporate one another substantially. A substantial dialogue, or a valuable encounter, has the potential to influence both of its participants. Therefore, this book demonstrates the potential of the liberal principles expressed in the human rights doctrine to influence religious thought. Conversely, it exposes potential religious influence on liberal thought.

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With these aims in mind *The Role of Religion in Human Rights Discourse* is divided into four parts. The first part, *Freedom of Religion and Freedom from Religion*, addresses some foundational questions regarding religion as the beneficiary of the human-rights discourse and as a potential justification for limiting human rights. The focal questions raised in this context are: (a) Does religion deserve a distinct, heightened protection as compared to freedom of conscience?; (b) What "price" must religion pay in order for freedom of religion to be invoked as a human right?; (c) When, if at all, is it legitimate for the state to incorporate into its laws religious practices (in matters such as marriage and divorce)?; and (d) What should the proper attitude of a liberal state be toward religious communities that violate the human rights of its members?

Part One begins with Christopher Eisgruber and Lawrence Sager's "Equal Membership, Religious Freedom, and the Idea of a Homeland." Many conceptions of religious freedom (including these authors' previous work) incorporate principles requiring that states provide equal rights and status to people of different faiths and ethnicities. Such conceptions appear inconsistent with the practice of any state that privileges a specific relationship to religion—such as, for example, Israel's commitment to being a Jewish state or France's commitment to a secular national identity. In this chapter, Eisgruber and Sager examine whether the idea of a homeland provides a way to reconcile a limited set of ethnic or cultural preferences with the demands of a robust equality principle. They elaborate on the idea of a homeland as promising not only a secure refuge but also a cultural community. They also suggest how equality principles generate limitations on what a homeland may offer its people and obligations that a homeland must honor with regard to its minority residents. We use this account of equality and the idea of a homeland to analyze human-rights controversies in Israel. More broadly, Eisgruber and Sager develop a preliminary taxonomy of equality-respecting regimes—using as examples idealized forms of America's liberal pluralism, Israel's Jewish state, and France's robust commitment to secularity—with the hope of explaining why general principles of religious freedom may apply differently to different polities.

In his "Religion in Politics: Rawls on Deliberation and Justification," Menachem Mautner explores two distinct concepts that are relevant to our understanding of political "deliberation" and "justification." Mautner argues that John Rawls's discussion of "public reason" in *Political Liberalism* fails to adequately distinguish between the two concepts. Following that failure, a series of writers have understood Rawls to mean that his concept of public reason amounts to the exclusion of religious discourse from political deliberation. Mautner claims that Rawls's concept of public reason has to do with justification, rather than with deliberation, and in any event, drawing on Habermas, Waldron, and other writers, he concludes that religious discourse *should* play an important role in political deliberation.

Kenneth Marcus's "Three Conceptions of Religious Freedom" examines the similarities, differences, and substantive ramifications among individualist, institutional, and ethno-religious approaches to religious freedom in American legal and political thought. In the American constitutional discourse, two conflicting ideas of religious freedom have enjoyed prominence since the colonial era. The first, the dominant Protestant-inspired notion, defends the right of individual conscience against governmental infringement. By contrast, a second conception, more closely associated with Catholic interests and ideology, has supported the prerogatives of religious institutions as against either individuals or the state. There is, however, a third approach, equally important to American law although

more closely associated with Equal Protection jurisprudence, which concerns the protections that members of ethno-religious groups require from discrimination or animus based on such group membership. The need for this approach arises from the existence of non-Christian groups, such as Jews and Sikhs, who face forms of religious discrimination that are different in character from those that primarily concern Protestants and Catholics. This chapter argues that a complete account of religious freedom must fully address individual, institutional, and ethno-religious rights. It further claims that standards for assessing religious interests must be formulated in a way that respects the fundamentally different conceptions that faith traditions have of the concept of freedom.

In "Political Liberalism, Religious Liberty, and Religious Establishment" Richard Arneson asks whether a just state should have a religious establishment. In such a regime, either some state policies are justifiable, if at all, only by appeal to religious doctrines, or the state promotes some religious doctrines, or their adherents, over others (or both). A religious establishment might be nonsectarian, promoting bland doctrines or favoring the religious over the nonreligious. Religious establishment is a common practice in modern democracies. According to some political theorists, the just state must be neutral with respect to all controversial ways of life and conceptions of the good including religious lifestyles and notions. The neutral state adopts only policies that none can reasonably reject and refrains from promoting some controversial ways of life and conceptions of the good over others. This chapter argues against the comprehensive state neutrality doctrine and also against the idea that religious establishment might be just.

The last chapter of Part One, Avihay Dorfman's "Freedom from Religion," discusses the theoretical and doctrinal questions pertaining to the possible unity of the Free Exercise and the Establishment Clauses—and freedom *of* religion and freedom *from* religion, more generally—in the light of the republican ideal of political legitimation. Dorfman takes particular issue with a familiar argument according to which freedom-of-religion and freedom-from-religion are conceptually and normatively distinct. He seeks to refute this argument, showing that these two forms of freedom are, in fact, surface manifestations of a similar political ideal of democratic self-governance; the Free Exercise clause protects freedom of religion, whereas the Establishment clause protects freedom from religion. Dorfman further demonstrates the doctrinal implications of the argument to the contemporary freedom from religion jurisprudence of the U.S. Supreme Court, seeking to offer a unified theory of the two clauses that could underwrite sectarian toleration among free and equal citizens of a democratic order.

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The current human rights tradition is (at least according to the conventional wisdom) a product of the Enlightenment. And yet, many religious tenets cohere with important human-rights prescriptions; religion arguably served throughout history as a significant source of human rights (or natural rights, as they were called). The second part of the book, *Religion as a Source of Human Rights*, addresses this aspect of the relationship of religion and human rights. And here too, religion's role is beset with difficulties, notably: (a) How transferable are religious prescriptions to a humanistic discourse?; and (b) What "price" must the human-rights discourse pay to recruit religion to its cause?

We begin Part Two with Christopher McCrudden's "Reva Seigel and the Role of Religion in Constructing the Meaning of 'Human Dignity'," which indeed addresses the well-recognized role that organized religions have played in the post-World War II development of international human-rights protections. One of the problematic aspects of this protection is the extent to which there appears to be disagreement over the basic question of the underpinning of these human rights. Increasingly, "human dignity" has been drawn on to fulfill this role. But "human dignity" is a concept with strong resonances in political, philosophical, legal, and theological understandings of human rights. McCrudden's chapter explores the religious understanding of "human dignity" and the role, if any, it plays in the development of legal interpretation of human rights.

In "The Glory of God and Human Dignity: Between Dialogue and Dialectics" Itzhak Brand explores the ambiguity of the religious stance on the human right to dignity. On the one hand, theology reinforces this right by codifying it as a halakhic principle. On the other hand, religious law is not prepared to grant humanity the upper hand as a rival to God, as it were. The talmudic attempt to characterize the halakhic status, as well as the definitions of "human dignity" and "respect for God" leads Brand to two main conclusions: first, "human dignity" and "respect for God" are two contrasting values that are in dynamic competition. Second, there is an attempt to diffuse the tension and show how the two values complement each other. Thus he concludes that the relationship between these values is one of simultaneous harmony and friction: harmony, because the ultimate source of human dignity is God's glory; friction, because human dignity seeks to take precedence over His glory. Religion serves a dual and dialectical role vis-à-vis the right to respect: it buttresses and strengthens this right on the one hand, yet weakens and curbs it on the other hand.

Izhak Englard's "Law and Morality in the Jewish Tradition" is divided in two major parts: The first part is of a methodological nature. It defines the notions of "law" and "morality," establishes their distinctive features, and clarifies their mutual relationship and interaction. At the basis of the approach to law and morality lies the positivist-normative theory of Hans Kelsen, which in the author's view is

the most successful endeavor to establish objective distinctive criteria for these two normative orders. The second part is dedicated to the problem of the clash between law and morality in the Jewish tradition. This part describes the fact that inside the religious order one finds "legal" norms—enforced by physical force—and mere "moral" norms subjected to other social or transcendent sanctions; it also mentions the sources that deal with a clash in the believer's conscience between a divine order and his or her personal morality. Englard further deals with the relationship between law and equity, the influence of a decisor's subjective ethical notions on his halakhic ruling, and the requirement of a heteronomous motivation in the fulfillment of a religious precept. Finally, this chapter analyzes the reaction of Judaism to the challenge of universal ethical values and to Kant's concept of (ethical) religion. Judaism split into different religious movements: Orthodox, Reform, and Conservative.

Haim Shapira's chapter, "The Right to Political Participation in Jewish Tradition: Contribution and Challenges," explores the development of the principle of majority rule in the Jewish tradition. Originating in the Talmudic period, this principle was fully developed by the high Middle Ages; since then it has become a cornerstone of the Jewish political theory and practice. Shapira argues that this status may explain the acceptance of democratic principles among Jews in modern times and especially in the State of Israel. The social and political conditions of Israel in its early years could not ensure the creation and maintenance of a stable democracy. The fact that democratic principles are rooted deeply in the Jewish tradition, Shapira argues, has made and continues to make an important contribution to the development of Israel's democracy. But as Shapira further demonstrates, the right for political participation in its Jewish rendition is not fully compatible with its form in democratic countries. The main deficiency is the lack of consistent commitment to the principle of equality for all members of the community or for all citizens of the state. The main reason for this deficiency is hidden in the transition from community to a state, which was not fully acknowledged by halakhic authorities. This challenge is not insurmountable, however: some halakhic authorities overcame it, proving the feasibility and viability of employing creative interpretations of the ancient tradition.

The last chapter of Part Two is Gili Zivan's "'Have you murdered and also taken possession?' (I Kings 21:19) On the Gains and Losses of Basing Human Rights Discourse on the Bible." Zivan explores three approaches to understanding the relationship between human rights discourse and the Bible. The first approach completely separates the Bible's religious contents from the ethical and humanistic contents of human-rights discourse, and is unwilling to ground one in the other. The second approach reduces the Bible to its humanistic values alone, thus neutralizing its religious and theological foundation. These two approaches fail to adequately take into account the Bible's complex nature

and the important educational and social challenge that underlies the attempt to ground modern secular positions in religious values. In the light of these criticisms, the third approach suggests grounding human rights discourse in the Bible out of both educational and interpretive motives. This approach does not ignore the difficulties that arise from such a comprehensive attempt; rather, it suggests ways of grappling with the verses that contradict the principles of the human-rights discourse based on both the Jewish interpretive tradition throughout its generations and on modern hermeneutics.

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After laying these theoretical foundations, we turn, in Part Three, to address *Religion and Human Rights on the Ground*. This part enriches the analysis with some robust contextual data and intriguing case studies that may serve both as a reality-check and as fertile ground for examining some of the more abstract theses offered in this book.

Jonathan Fox and Yasemin Akbaba's chapter, "Religious Discrimination in the European Union and Western Democracies, 1990 to 2008," explores the variation in the treatment of religious minorities in the West using a special version of the Religion and State—Minorities round 2 (RAS2-M) dataset. The extent and causes of religious discrimination against 113 religious minorities in 36 democracies in the European Union (EU) and the West from 1990 to 2008 are analyzed in three stages. This chapter examines the mean levels of religious discrimination on a yearly basis. It further inspects the extent of each of the 29 specific categories of religious discrimination. Finally, the authors look at the causes of religious discrimination, using OLS multiple regressions for 1990, 1996, 2002, and 2008 in order to assess whether the relationships found in the bivariate analysis are present and consistent over time. The analysis compares theories related to the securitization of Islam in the West and the defense of culture argument. Fox and Akbaba conclude that Muslim and Christian minorities suffer from the highest levels of discrimination in the EU and in Western democracies. Not surprisingly, states with high levels of religious legislation—indicating that they strongly support religion—are also associated with high levels of religious discrimination. The findings demonstrate that both theories explain aspects of the changes over time in religious discrimination in the EU and in Western Democracies.

The next chapter is Micha'el Tanchum's case study, exploring "On the Legal and Constitutional Establishment of Islamist Extremism in Indonesia: Implications for Human Rights and Civil Society in Emerging Muslim Democracies." Tanchum studies the ongoing legal and constitutional developments in Indonesia from 2002 to 2011, particularly the democratic government's responses to Sunni sectarian challenges by Islamist extremists who attempt to constrain the definition of Islam,

undermine the discourse on human rights, and deny Muslims the freedom to practice Islam according to their own beliefs. Through its analysis of how Sunni Islamist extremism has been able to create structures of political opportunity to constrain an individual's right to practice Islam, the chapter highlights the central importance of a national discourse of intra-religious accommodation to establish a foundation for the development of religious liberty and civil society in newly democratizing Muslim societies.

In another case study, "The Tension between Religious Freedom and Noise Law: The Call to Prayer in a Multicultural Society," Alison Dundes Renteln analyzes the difficulties members of religious minorities experience when public policies appear to prohibit their religious practices. This chapter takes stock of the main arguments for and against making exceptions for religious minorities from such general policies as part of a theory of maximum cultural accommodation. It then focuses on controversies in which advocates request exemptions from environmental laws, analyzing in particular the extent to which religious merits exemptions from noise ordinances. While regulating excessive levels of noise is ostensibly a legitimate governmental objective, environmental policies may be enforced in ways that constitute a substantial interference with religious life. This analysis of the interrelationship of environmental law and religious freedom has implications for the resolution of disputes in countries such as Switzerland and the United States where Jewish and Muslim communities have encountered hostility to their efforts to worship in accordance with their religious laws. Ultimately, Renteln asks whether compromises can be found that guarantee the right to religious freedom without undermining nuisance laws.

Ronit Irshai's "Judaism, Gender, and Human Rights" explores whether religious perceptions can serve as a source for human rights or as a source to deny them. Using the case study of women's rights in Judaism, Irshai claims that a religion operating under the presumption that people must sacrifice their moral intuitions in order to be considered servants of God, together with a strong essentialist ideology, can result in the violation of human rights. She demonstrates that both essentialism and the prevailing "sacrificial imperative" in contemporary Judaism can circumvent the Aristotelian definition of equality, resulting in the violation of women's rights. Since, according to the Aristotelian principle, equal treatment means "different treatment for the different," this obscures how this kind of religious ideology indeed discriminates against women.

In our last case study, "Religious Exceptionalism and Human Rights"—Laura Underkuffler challenges the notion that religion and human rights are complimentary ideas, because human rights include all of those human capacities and freedoms that are essential to human existence—including freedom of religion. Freedom of religion, asserted as a human right by one person, might involve—as its consequence or even its object—the denial of others' human rights. When this

occurs, the simple identity of religion and human rights breaks down, and the two are, instead, severe antagonists. This chapter explores the issues involved in religion/human rights antagonism in the context of a particularly heated current controversy: the claim that freedom of religion entitles an individual or group to discriminate against gay, lesbian, or transgender individuals on religious grounds. Where protection for gay, lesbian, and transgender individuals is an accepted societal norm, this claim is essentially a claim for religious exemption from certain civil rights laws. Underkuffler argues that whatever the merits of the general idea of exemption for religious exercise might be, it cannot extend to protections afforded by civil rights laws.

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Finally, the last part of the book focuses *On the Possibility of a Dialogue*. This part explores the interrelationships between the diverse roles of religion in the human rights discourse and the potential effects of their interaction. This theme opens up an even broader question, namely: What is the appropriate discursive framework for a dialogue between a religious tradition and the human-rights tradition.

We begin with Avinoam Rosenak, Alick Isaacs, and Sharon Leshem-Zinger's chapter "From Duties to Rights." This chapter addresses itself to the common ground of this book and to its political and cultural assumptions, and sets forth an innovative alternative. Our book assumes that there is a power struggle between "the State" and "religion" as a political institution. In this view we are grappling between two political systems, each of which acknowledges the other's valid existence only under strict conditions, which reflect their mutual suspicion. This chapter points to the violent dimension underlying this perspective. Though it may be possible to justify the necessity of the political framework, with all its failings and violent inclinations, the chapter presents a competing framework. This framework arises from a mode of discussion based on Jewish texts, which points to various sources that have serious reservations about the use of violence in the name of religion. This chapter refers to sources from the Bible, Talmud, Kabbalah, and philosophy. It points to the religious and theological problem with the political dimension and then indicates that an alternative can be found in Judaism, which is here described as an open political structure. In this context we can rethink the basis of human rights in new cultural contexts. These reflections are part of the "Talking Peace" project, which seeks to sketch Jewish political theory, which can be different from commonly accepted political discourse that seems to have many obvious advantages but exacts a high price.

Next comes Shai Lavi's "Human Rights and Secularism: Arendt, Asad, and Milbank as Critics of the Secular Foundations of Human Rights." Lavi begins with the observation that human-rights terminology has gained, in recent years,

surprising popularity outside the liberal West and has become synonymous with justice in the international political arena. The growing universality of the human-rights discourse may be read as a clear sign of its success, but may equally suggest that the concept has been watered down and that its unique historic origins and philosophical commitments have been forgotten. The growing prevalence of human rights discourse among mainstream religious leaders as well as so-called fundamentalists may be taken as further evidence of this development. This chapter lays out the secularist presuppositions of human rights. Secularism is here understood less as a matter of belief (or its absence), and more as a set of practices; less as concerning the divine and supernatural (or its absence), and more as an attunement toward the natural world. Specifically, following Hannah Arendt, Talal Asad, and Luc Boltansky, Lavi's interest lies in the emergence of empathy with distant suffering as constituting the secularist origins of human rights. Once the secularist foundations of human rights are excavated, the final aim of this chapter is to think critically of these foundations, and ask what, if anything, can be learned once we take into account their historical and philosophical particularity, rather than their universality.

Along the lines of these two chapters, Suzanne Last Stone discusses in "Religion and Human Rights: Babel or Translation, Conflict or Convergence?" the challenge of squaring a global rights-based civilizational discourse with the local cultural reasoning of religion in general and Judaism in particular. Several of the discursive challenges are obvious: How does one bridge between a discourse of duties and one of rights? How does one bridge between a discourse dependent on viewing the individual as autonomous rather than heteronomous? Other discursive challenges have been less commented upon. The following two are treated in this chapter: First, the incontrovertible or absolute nature of human rights blurs the division between secular morality based on unaided reason and the realm of the sacrosanct, inviolable, or sacred occupied by religion. Does this create a basis for a common language of sanctity or does this lead, instead, to even more divisiveness, as adherents of religion perceive human-rights discourse as imputing sanctity where it does not belong? Second, the discourse of human rights, with its close connection to the Kantian notion that we should treat others always as "ends," detaches human rights from the concept of just deserts. The human being possesses rights by virtue of being human alone. Stone argues that those thinkers within the halakhic tradition who have most advanced a discourse of human rights, such as Halevy, draw on a distinct tradition within Jewish legal thought that conceives of duties owed to others as conditioned on reciprocity. Finally, the chapter discusses whether religious and specifically Jewish religious discourse also can make a distinct contribution of its own to the discourse of human rights—at the level of discourse. We are caught within a paradox when we argue for the universality of human rights as we do so necessarily from within

the particularity of a specific language, culture, and ethical idiom. Does Judaism provide a resource for dealing with this paradox, given its complex discourse of universalism and particularism?

Part Four and the book as a whole concludes with Leora Batnitzky's "From Collectivity to Individuality: The Shared Trajectories of Modern Concepts of 'Religion' and 'Human Rights.'" This chapter argues that the question of the role of religion in the human-rights discourse often reifies the categories of "religion" and "human rights" because the question itself does not adequately account for the fact that both categories are particularly modern inventions. These categories share a conceptual and historical trajectory that moves from a focus on the collective to the individual. While this analysis has important theoretical implications for how we might understand the modern categories of "religion" and "human rights," it also has implications for appreciating some of the practical tensions that play out in some contemporary legal systems, especially those that seem to accommodate a kind of legal pluralism. To explore some of these tensions, the chapter turns to a comparative analysis of the status of personal laws in Israel and India, as they do and do not cohere with contemporaneous notions of religion and human rights.

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The papers in this volume are the products of the international conference that was part of the project "Human Rights and Judaism," conducted by the Israel Democracy Institute of Jerusalem. The project studied various aspects of the relationships between religious, national, social, and cultural particularistic traditions, on the one hand, and universal liberal thought, on the other. In addition to the project's general aspect, of which this book is one manifestation, its main goal is to consider the parameters of the encounter between Jewish tradition and the doctrine of human rights.

The project assesses what Judaism, in its broadest sense, has to say about fundamental liberal rights such as liberty, dignity, welfare, equality, and freedom of expression. At the same time, it examines the unique set of rights and obligations offered by the Jewish worldview, and explores their relevance to sovereign life in the Jewish nation-state. This two-way approach exposes areas of overlap and consensus among important parts of the liberal and Jewish lexicons, and highlights areas of divergence between the two traditions in a way that enables each to be informed and enriched by the other. This issue is critical for the State of Israel, which exists in a constant state of tension between its universal character, as a "democratic state," and its particular character, as a "Jewish state."

Many critics see an irresolvable contradiction between Israel's twin identities, and increasingly call for the adoption of one definition or the other. These critics believe that Israel must either abandon its pretense of democracy and erect an

authoritarian state of the Jews, or abolish the Jewish character of the state and reinvent itself as a multi-ethnic, supra-national democracy—a post-modern "state of its citizens." Either alternative would carry serious consequences for the future of Israel and of the Jewish people. IDI's Human Rights and Judaism Project is designed to produce the normative grounding that will enable the intellectual leadership of this generation to foster a strong sense of solidarity with Israel as both a vibrant democracy and as the national homeland of the Jewish people.