

10-1-1984

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Recommended Citation

Saul Touster, *The View from the Hilltop*, 33 Buff. L. Rev. 571 (1984).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol33/iss3/4>

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His opinions are exercises in text-centeredness. As an interpreter of legislation, Justice Halpern seemed to rejoice, as does the Talmudist, in embracing contested language, in relentlessly pursuing its history, in thoroughly examining the relationship of one word to another, in trying to squeeze meaning from context.

And yet there is, as Bloom says, the very serious danger of the disappearance of this quality.²⁶ We have wandered from our Talmudic tradition, first rejecting its religiosity and then, too often, its discipline, its mode of learning, its ethics, and its ability to link law to a larger tradition. Perhaps these lectures, in honor of Philip Halpern, can help, in some small way, to restore and rebuild that tradition, that yearning for text, that joy in scholarship.

The View from the Hilltop

SAUL TOUSTER*

In Judaism, we do not divide the realm of law from that of ethics or faith. Thus, to observe that Justice Philip Halpern's life exemplified the unity of law, ethics, and faith is to note how his roots in Jewish tradition influenced his secular roles as judge and public servant. I met Justice Halpern when I first came to Buffalo in 1955 as a young law professor. Up until then I had known a few scholars, encountered in my brief practice a few judges, and was exposed to a few deans. But I had not met a man who was all of these until I met him, and when it turned out that he was a friend of my father's—they having served together in national Jewish communal work—the values and continuities were compelling.

One of the things I remember most vividly about him was that, analytically sharp and persuasive in argument as he was, his

the defendant's action in causing the plaintiff's son to be circumcised in a manner violating the fundamental tenets of their faith was obviously of a serious character.

Kalina, 18 A.D.2d at 760, 235 N.Y.S.2d at 813-14 (citations omitted).

26. H. BLOOM, *supra* note 16, at 321-29.

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judgments were always distinguished by a keen historical sense. Issues were framed in the perspective of time—and that is, of course, the necessary if not sufficient condition of wisdom. When he was serving as a leading delegate to the State Constitutional Convention in 1938, he was at one point arguing in favor of a provision to restrict the admissibility of illegally obtained evidence. He reminded the Convention of the perils to freedom of a corrupt state—and remember, this was when Hitler was still rampant, Fascism flourished in Italy, and the Moscow trials had been held—and then he called on the delegates, in his words, “to go with me to a hilltop and take a long-range view of this question.” Encouraged by his advice, then, I dare this morning to look, as from a hilltop, at the Jewish contributions to American law.

That view has been a heady one, and what I’ve seen has been, in many ways, surprising and enspiriting. My received ideas have, frankly, been shaken. I, like most of us, have viewed the experience of American Jewry in the New World as that of sojourners, strangers, immigrants. And I have viewed Jewish contributions to American culture, to law in particular, as occasional, belated, peripheral—usually in the form of what outstanding Jews have contributed in lives devoted to public service. From that hilltop, however, I have seen that I was wrong. The Jewish contributions to American law and political culture have not been peripheral, they have been central.²⁷ We have not been sojourners here—unless, of course, we chose to be. We have been here at the founding, both as idea and as people. Let me describe the view from the hilltop.

We begin, of course, with the Puritans, whose faith and vision were immersed and shaped by the Old Testament as much as by the New. They thought of themselves as a people, Israel. They referred to themselves as sojourners, their wanderings as journeys

27. One author recognized Jewish contributions to American secular law, albeit in a much narrower sense:

[m]any modern laws had their genesis in Hebraic law, including our present-day copyright law, which is based on a law evolved by medieval rabbis. The great jurists of the seventeenth century were influenced by biblical and rabbinical writings. In the eighteenth and nineteenth centuries, on the Continent as well as in England, Jewish lawyers, advocates, and barristers played important roles in the development of secular justice.

ST. R. JOHN, *supra* note 6, at 289. Specific instances of Jewish influence on secular law, however, are not the focus of this article.

in the wilderness. Exodus was the text of their lives, and when one reads the memorials of their trials—of the deaths from scurvy as they tossed the oceans packed in their little ships, of the starving time as they clung to their settlement on the barren shore, of the epidemics, and of the loss of faith of many—one recognizes that their identification with the ancient Jews was not merely religious rhetoric. It was a language of faith lived and confirmed by the hard and bitter experience of their venture.

In 1630, John Cotton, one of their most learned and revered ministers, in a sermon of blessing upon a shipload of Puritans leaving England, took as his text the second book of Samuel: "I will appoint a place for my people Israel, and will plant them, that they may dwell in a place of their own, and move no more; neither shall the children of wickedness afflict them any more, as before time."²⁸ It was the characteristic sense of the time. What else could justify what they were about but the founding of a Promised Land, a New Jerusalem in this New England? And when they joined together in their undertaking, what could better represent the bond of their commitment than a covenant, one that reenacted God's covenant with Israel?

We know all this but we tend to look at their Biblical language as only that, as metaphorical figures. Yet it became more than that in the ethos of the new world—in the evolution of an American ideal, in general, and an American idea of law, in particular. For a century before the settlement, there had been, in the realm of law, great agitation for change. As the great currents of the Reformation swept England, the common law came to be looked on as part of a chaotic, corrupt and authoritarian order, the secular side, Caesar's, of what was viewed as the fallen, not-so-universal Roman Church. Mystical, inaccessible, irrational, ministered by a self-seeking clergy of lawyers, the common law was no more the source of true justice to the Puritans than that Roman Church was the route to true salvation. On the continent, too, a comparably disordered legal system led some to move back to the rational order of Roman Law, while in Geneva John Calvin would look to the Old Testament and the Mosaic Law to build God's Kingdom on earth. Again, even here, we see that the Puritans' turn toward the law of Moses was not eccentric but part of a

28. *Samuel* 7:10.

search, a yearning, that was evident in all sectors of enlightened thought: how to bring to communal life a civic order out of the ruins of Medieval Europe. The problem was not an easy one. For the English Puritans, Roman law was not an attractive model. It was viewed as closely related to the Roman Catholic Church and resonant with an imperial autocracy too much like that of the Stuart kings, which they saw as a new oppression. The Canon law, which was still applied in England in many areas of life, and in which many lawyers were trained, was too obviously part of what the Puritans viewed as the "polluted" stream of Romanism to be adopted as a model. And as for Greek sources of law, they were not accessible, they were not part of the cultural inventory. Thus, it is not surprising that when they turned toward some model of law that could bring coherence and rationality, that would not support an authoritarian monarchy, and that would, most importantly, be consistent with their Messianic faith, it was the Old Testament and Jewish law to which they turned.

When John Cotton himself came to Massachusetts Bay he was called on in 1636, as the most revered and Hebraically learned of what was, in effect, their rabbinate, to draft a code, a fundamental law for the new Commonwealth. The code he submitted was called "Moses His Judicials," and was based upon the Pentateuch.²⁹ For five years, the colony conferred and debated over this and over other codes based upon the Pentateuch, until a work entitled "The Body of Liberties" was enacted in 1641.³⁰ It was clear that for the Puritans their community would be governed by Genesis, Exodus, Leviticus, Numbers, and Deuteronomy, rather than the Year Books of the Common Law. The surprising thing was that the inspired authors of this work would adopt the Biblical law without reference to the two thousand years of rabbinic interpretation and adaptation by which the Jews had kept vital their God-given law. Indeed, they seem not even to have been troubled by the idea that something might be lacking. Such an idea would have, no doubt, pushed them to ask themselves, What of the Jews?

29. See B. MEISLIN, *supra* note 6, at 8-10 for a discussion of the influence of Jewish law on Cotton's "Moses His Judicials." Also included are selections from this work which are taken directly from the Pentateuch (Torah).

30. See *id.* (in both "Moses His Judicials" and "The Body of Liberties," the "overriding influence . . . was the conviction of Calvin that the Pentateuch was the true source of law for the regulation of mankind").

A troubling question. The Jews had denied what they believed to be the second covenant by which God had revealed Himself. And so all that had happened to the law of the Pentateuch since the ministry of Jesus was to be read through the New Testament only. You can, no doubt, see how fragile an endeavor it was, this attempt to adopt a Judaic code, in an ahistorical act of faith. The pressures of Christian messianism, Church politics, theocratic impulses, and schism were too powerful for so shallow-rooted a code. And then there were the stronger pressures and more powerful cross-currents from England. The roots of the common law, like the roots of language itself, were too deep. Thus, it is no surprise that within a decade, the Puritans put aside their Mosaic code and returned to the common law.

Was this, then, only an oddity of Puritan history, this turning to "Moses His Judicials?" No. It had lasting effects and marked out in very important ways what would become special and unique in the American idea of law. It would, in some measure, be the source of what would distinguish our legal development from that of England. It was in that sense that I said the Jewish presence was felt at the founding.

During the first years of settlement, there was a sowing of seeds—two, in particular—which, nourished by other sustenance and watered by other currents, have grown full and rich into distinctive American fruit. The first seed was the idea that the social body is created by a covenant which is not merely a social contract but a compact in the service of some high ideal.³¹ Beginning with the Mayflower Compact, and realizing itself most fully in the Constitution, we have always expressed our fundamental law in covenantal terms: the social bond of a people joining together in a high, almost messianic, purpose, whether to build a new Jerusalem or to achieve freedom and justice. This is one of the fruits from the Mosaic seed. And it was the covenantal idea that gave life also to the congregational form—the democratic form—of church governance in early New England. It was through reliance on passages from our Jewish forefathers in Deuteronomy, Exodus, Ecclesiastes, and Jeremiah, that our New England forefathers mandated the free election of magistrates, thus establishing the non-aristocratic (that is, non-inheritable) power of our governors.

31. See *supra* note 15.

The second seed was the American vocation for legislation. Since that first attempt in the Mosaic code we see, threading through the history of American law and distinguishing it, in important ways, from the English, the idea that the good, the true, the righteous, even the beautiful, can be achieved by law, and particularly by statutes and codes. Whatever the ills of the new society, the primary response seems to have been the passage of statutes. It is, perhaps, an amalgam of these two seeds, that of the covenant and of the law as the way to all good things, that accounts for that peculiar American creation: the law as a kind of civil religion, bonding us in our diversity. If so, then its roots can be traced to those Hebraic elements that moved the Puritans.

The Jewish contribution at the founding was the idea of Law as part of the ideal of Faith, refracted in the universal peoplehood of those sharing a covenant under God. That, after all, is what defines the contribution of Judaism to Western Civilization. It is no wonder it should mark, albeit in a special form, the founding of America. But there is another Jewish contribution to the civilization: the prophetic ideal. We might ask, too, whether that ideal has not touched American law in some special way. We would not find the prophetic element in seventeenth-century New England except in its Christian appearances. However, there is, within more modern times, a Judaic contribution to American law which can be heard as bearing the critical, judgmental voice of the prophets who called for social justice.

Looking back to the end of the nineteenth century we observe in the United States a movement of Jews into the mainstream of intellectual and political leadership.³² The process of secularization that was everywhere was touching Jews in special ways. Talented, bright young Jews, American-born and immigrant, those who would have previously pursued the rabbinate were now entering the secular professions: law, medicine, and politics. Louis Brandeis was exemplary of this new generation in law,³³ as was Abraham Flexner³⁴ in medicine. They, and others not so famous, played leading roles in the movements of reform,

32. See A. VORSPAN, *supra* note 6.

33. See *id.* *supra* note 6, at 22.

34. See R. LEURSI, *THE JEWS IN AMERICA: A HISTORY* 334 (1954). For over 30 years, Abraham Flexner was director of laboratories at the Rockefeller Institute for Medical Research. See also A. FLEXNER, *AN AUTOBIOGRAPHY* (1960).

and acted very much as modern prophets in calling up to the self-seekers of the Gilded Age the claims of the old virtues and the bonds of one community. Their sense of calling and how they practiced it seemed to give their professions something of the tonality of rabbinic learning and the sanction of benevolence. Jews, in modern times, are especially sensitive to the dangers of social division, the need for openness in the social fabric, and for generosity in the body politic. And it was just this sensitivity that Justice Brandeis responded to and called on, leading Franklin Roosevelt to refer to him as "our resident Isaiah." Even the titles of Brandeis's works, such as *The Curse of Bigness*, resounded with the prophetic call. And it resounded as well with a faith in democracy at a time when the Brahmin descendants of the Puritans were losing theirs. Brandeis was not alone in this; these qualities touched even Bernard Baruch, a very different kind of man.³⁵ And there were many more in the next generation—Felix Frankfurter,³⁶ Joseph Proskauer,³⁷ Herbert Lehman,³⁸ Benjamin Cardozo,³⁹ and others whose names are less well known—who carried these qualities, this prophetic tonality, in appeals to the social conscience. Some, but by no means all, were only advisors, suited out for the too familiar role of court-Jew. We might recall that in 1933, the first year of the New Deal, there were five Jewish governors in the forty-eight states,⁴⁰ and two of nine justices on the Supreme Court. And in the generation that followed there were even more people of that character, Justice Halpern among them.

With few exceptions in the history of the diaspora, Jews who have risen to positions of power in non-Jewish states have given up—or been forced to give up—their ties to Jewish life and tradi-

35. Bernard Baruch (1870-1965) was an eminent financier who was active in American politics. See M. COIT, *MR. BARUCH* (1957).

36. Felix Frankfurter, in 1934, was the third Jew to be named to the Supreme Court. See H. RIBALOW, *AUTOBIOGRAPHIES OF AMERICAN JEWS* 460 (1973).

37. Joseph M. Proskauer (1877-1971) was a prominent jurist, lawyer, public servant, and leader in Jewish and civic causes. See L. HACKER & M. HIRSCH, *PROSKAUER: HIS LIFE AND TIMES* (1978).

38. Herbert H. Lehman (1878-1963) was a distinguished public servant, serving as governor of New York and U.S. Senator. see HERBERT H. LEHMAN AND HIS ERA (1963).

39. Benjamin Cardozo served on the New York Court of Appeals and in 1932 was appointed to the U.S. Supreme Court. See R. ST. JOHN, *supra* note 6, at 291.

40. The five Jewish governors were Herbert H. Lehman (N.Y.), Julius L. Meier (Or.), Henry Horner (Ill.), Arthur Seligman (N.M.) and David Sholtz (Fla.). R. LEURSI, *supra* note 34, at 330.

tions. This was not the case for these modern American leaders who not only retained their Jewish ties but also became leaders among their Jewish brethren. We can, I think, take this as proof of the democratic ideal they espoused, testimony that there is, indeed, an intimate relation between being a good American and being a loyal Jew.

So we end as we began, looking at Jewish contributions to American law not in particulars but from the hilltop view urged on us by Justice Halpern. We are not sojourners here, at least no more so than are all the peoples in this country, this continent, this planet where life is ever fragile, protected, and renewed by men of vision and faith. If the rule of law is vital today in the United States, it is because that rule has also carried with it a certain vision and faith, from the time of the founding when the Mosaic law and the covenantal idea mysteriously entered the tap roots of our culture through our Puritan forebears.