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Profit, Progress and Moral Imperatives

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BOOK REVIEW

PROFIT, PROGRESS AND MORAL IMPERATIVES

IN THE MARKETPLACE: JEWISH BUSINESS ETHICS. By Meir Tamari.* Southfield, Michigan, Targum Press, Inc. 1991. Pp. 154. $13.95.

Reviewed by Deborah Waire Post**

INTRODUCTION

This is a very small book which should have a much larger audience than it probably will enjoy. I offer that opinion as one who might not have read it if I had not been asked to review it for the Touro Law Review. I was asked, I assume, because I teach Business Organizations. Apparently, the law review editors thought this meant I was qualified to speak on the issue of business ethics. They certainly had no reason to believe that I had any knowledge of Jewish Law.[1] Although I teach at a Jewish law

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1. I am not Jewish. My father's church, which considered the Jewish traditions important to the Christian faith, was located in a distant city, so my mother took charge of our regular religious training. Because my mother was eclectic in her religious preferences, my sisters and I were raised for the most part as what I call "generic" Christians. We did not pay much attention to denominations and attended Episcopalian, Baptist, Methodist, Lutheran, and Presbyterian churches at one time or another. Like many of my age, I chose to attend religious instruction in junior high school. For the Catholic students who were preparing for their Confirmation, this was a serious undertaking. For those of us who were "generic" Christians, it meant early dismissal on Monday afternoons.

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school,[2] there are others here far more qualified than I to critique a work on Jewish law.[3] Having duly noted the limitations under which I labor, I offer my opinion of *In the Marketplace: Jewish Business Ethics*.

I. SCHOLARSHIP CULTURALLY DEFINED

The book is written in a style which I assume is part of the tradition of Jewish law. The author provides a textual analysis of the words of the Torah[4] citing to the Talmud[5] and the work of post Talmudic rabbinical scholars. The author uses examples, hypotheticals or parables, anecdotes, and stories to illustrate the purpose for and the application of the principles of Jewish law.[6]

This was not my first introduction to Jewish law, but it was my first attempt to place this style of scholarship within a framework so that I could understand it and explain it. This is, after all, a book by a public official who invokes a particular scholarly tra-

2. *See* Howard Glickstein, *The Jewish Tradition*, 22 VAL. U. L. REV. 675 (1988) (discussing principles and mission of Touro College Jacob D. Fuchsberg Law Center).

3. Dr. Chaim Povarsky is the Director of the Institute of Jewish Law at Touro College Jacob D. Fuchsberg Law Center and Professor Jeffrey Roth is also a scholar in the field of Jewish law. *See, e.g.*, Chaim Povarsky, *Jewish Law v. The Law of the State: Theories of Accommodation*, 12 CARDOZO L. REV. 941 (1991); Jeffrey I. Roth, *Crossing the Bridge to Secular Law: Three Models of Incorporation*, 12 CARDOZO L. REV. 753 (1991); Jeffrey I. Roth, *The Justification for Controversy Under Jewish Law*, 76 CAL. L. REV. 337 (1988) [hereinafter Roth, *Justification*]. Dr. Chaim Povarsky has written a small essay on business ethics for lawyers, *Business Ethics and the Law*, THE RESTATEMENT, Feb. 1989, at 4.

4. The Torah as it is used by Meir Tamari refers to a detailed legal code, the Pentateuch, the first five books of what Christians would call the Old Testament. Irving Breitowitz, *The Plight of the* Agunah*: A Study in* Halacha, *Contract and the First Amendment*, 51 MD. L. REV. 312, 314 n.4 (1992).

5. The work known as the Talmud is actually comprised of the Mishnah, a compendium of oral law or the oral tradition which existed for centuries and the Gemara, the commentary on the Mishnah. For a more complete discussion of the sources of Jewish law see Roth, *Justification*, *supra* note 3, at 340 n.9, 341 n.12; Breitowitz, *supra* note 4, at 314 n.4.

6. MEIR TAMARI, IN THE MARKETPLACE: JEWISH BUSINESS ETHICS (1991).

dition, a tradition which exists in a culture different from that which defines the enterprise for a majority of the legal scholars in the United States.[7]

The issue addressed is important, the approach is thoughtful and the author's discussion of Jewish law is easy to follow and very informative. The format of the book might make those who prefer the literary style of the traditional law review uncomfortable. If this were not a book which announces its outsider status quite clearly and emphatically, it might be subjected to the kind of criticism which other outsider scholarship receives in the academy.[8] Perhaps the argument would be made that it is not scholarship since it lacks the ponderous footnotes which make our work look so substantial.

The current controversy over legal scholarship is not unique but reflects the intellectual climate of our time, a concern with the "classic norms" which seem to have a "monopoly on objectivity" and agitation for the use of "a wider range of rhetorical forms in social description."[9] As legal scholars, we have witnessed enthusiasm for new styles of discourse and attacks on them as well.[10]

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7. Jewish law can be treated as a field of comparative law. It has received greater attention in the past few years in part because of the activities of organizations like the Jewish Law Institute at Touro. The philanthropy of the Gruss Family's Fund for Jewish Education established a Professorship in Talmudic Civil Law, and Talmudic Civil Law Library at New York University School of Law, as well as professorships at Harvard and the University of Pennsylvania. The American Association of Law Schools approved a Section on Jewish Law in May of 1991. The Jewish Law Institute on was instrumental in initiating the request for the Jewish Law section. *The Late Word*, JEWISH L. REP. (Institute of Jewish Law, Touro College Jacob D. Fuchsberg Law Center), June 1991, at 17. Periodically the Institute publishes a list of the courses on Jewish law offered at law schools in the United States. *See id.* at 15-16.

8. *See infra* notes 9-16 and accompanying text (discussing reaction to "outsider" or oppositional scholarship). *See also* ROBERT BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988) (discussing outsider status of Supreme Court Justices Brandeis and Frankfurter). The book itself was criticized as an "extended parable." G. Edward White, *The Parable As Legal Scholarship*, 87 MICH. L. REV. 1508 (1989).

9. RENATO ROSALDO, CULTURE AND TRUTH, THE REMAKING OF SOCIAL ANALYSIS 52-54 (1989). Rosaldo has identified two separate but related

While there is nothing new about such debates — they are, in fact, a venerable tradition in the academy — the current debate is also more dangerous than its historical antecedents.[11] It is dan-

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problems. He acknowledges the legitimacy of technical, distancing, normalizing language when he admits that it can provide analytical insight. *Id.* at 54. But he also recognizes a danger in the form and the process, something he refers to as a "validity" crisis. *Id.* at 49. A crisis exists with respect to the validity of ethnographic description because ethnographys are now contested by those who have been described and condemned by them as parodic. An ethnography which employs "the classic norms of ethnographic composition" is potentially misleading. *Id.* at 42. It is a half truth, a view of a multi-faceted experience from only one perspective. Rosaldo concludes that "no mode of composition is a neutral medium, and none should be granted exclusive rights to scientifically legitimate social description." *Id.* at 49.

10. The growing number of law journals devoted to women's issues or feminist jurisprudence, the number of new interdisciplinary journals, and the space within traditional journals allocated to "essays" rather than "articles" (a system of classification which defies comprehension and which presents problems for those whose work partakes of both genres) provide a forum for non-traditional, alternative, or oppositional scholarship. Until recently, much of the debate about law, diversity, and scholarship occurred in these journals. The demand for these journals demonstrates the interest, at least among students, in interdisciplinary work and oppositional scholarship.

Still, the work has not been received with great enthusiasm by tenured faculty members. Mark Tushnet presented the concerns of the typical tenure committee at the meeting of the Minority Law Teachers Section of the AALS. Mark Tushnet, Address at AALS, Workshop for Minority Law Teachers (Oct. 9-10, 1992). According to Professor Tushnet, there are problems with the believability of the stories, the significance empirically of a particular experience, the lack of critical evaluations which stem from the power of the narrative, and the tendency to classify this work as art rather than serious scholarship. *See also* Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 260-71 (1992) (elaborating on the "methodological" weaknesses of the personal narrative); Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992) (responding to Tushnet's arguments).

11. *See, e.g.*, ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 3-30 (1938) (discussing the debate over rationalism and "destructive realism," analytical and philosophical jurisprudence, proponents of new and old natural law, and positivists). There is also the memorable debate between H.L.A. Hart and Lon L. Fuller. *See* LON L. FULLER, THE MORALITY OF LAW 187-242 (rev. ed. 1969) (summarizing the debate and listing significant articles which contain the gist of that debate).

gerous because the proponents of these alternative forms of social description are members of groups who have been unwelcome in academia in the recent past.[12] The fact that their critics are

12. *See* Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988) (law schools must recruit, hire, and tenure minorities more aggressively); Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989) (racial equality in legal teaching field has not been achieved). Both the ABA and the AALS have committees which address the issue of recruitment and retention of women and minorities. *See, e.g.*, *Report of the Special Committee on Recruitment and Retention of Minority Law Teachers*, published in 1991 Proceedings of Annual Meeting of the Association of American Law Schools; the ABA 1992/93 Directory lists 12 committees within each of 12 sections concerned with the status of minorities in the profession.

Anti-semitism had an impact on the entry of Jews into law firms and law school teaching. This is a subject which has not received much attention recently and certainly deserves more attention than it receives. *But see* ALAN DERSHOWITZ, CHUTZPAH (1991) [hereinafter CHUTZPAH] (recounting the experience of anti-semitism at Harvard University). Many people believe that the presence of Jews in large numbers in the academy or the legal profession eliminates their status as outsiders. I do not share that view.

I was present at a revival of the alumnae association of Harvard Law School on Long Island last year when Alan Dershowitz referred to the historical practice at Harvard Law School of limiting the number of Jews hired as faculty members. As if to prove his point, one of the individuals who declined to attend this event, presumably a Harvard Law School graduate, sent back a response produced by the organizers of the event. On the top of the invitation this person had written "too many Jews."

Unfortunately, the relationship between Jews and other outsiders may have been damaged by the different ways in which we have experienced prejudice and discrimination. Jews are afraid of quotas, afraid that Jews will be fired or not hired because they are "over-represented" in certain professions. This is the proposition set forth by Dershowitz in CHUTZPAH, *supra* and by the Honorable Richard A. Posner. *See* Richard A. Posner, Comment, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1158 (1990). For some Jews, the experience (or the memory) of oppression makes them assume diversity politics and affirmative action will hurt them; that in a manner of speaking, those with power, white males, will trade Jews for blacks. *Id.* at 1158.

This was the fear I heard in the voice of my classmates at Harvard at the time of the *Bakke* decision. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). It is the fear I read, although I did not recognize it at the time, in the

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unwilling to acknowledge the relevance of aesthetics and cultural preferences in the definition of scholarship puts these new scholars at risk and threatens the gains which have been made in eliminating the social inequalities that exist in our society.[13]

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rhetoric of Judge Posner's warning that affirmative action will result in the failure of black students for whom their white classmates feel "contempt." Posner, *supra*. For a much lengthier development of the relationship between affirmative action and the disadvantagement of Jews see CHUTZPAH, *supra*. I think I hear something similar in the anger of Mark Tushnet's response to Gary Peller's suggestion that Tushnet's status as a Jew might have something to do with his reaction to critical race theory and "culturally" based oppositional scholarship. Mark Tushnet, *Reply,* 81 GEO. L.J. 343 (1992); *see* Peller, *supra* note 10, at 314. The idea that there must be some sort of offset, one less Jew for every woman or person of color on a faculty is absurd. It is equally absurd and ultimately more dangerous if the alliance among outsiders is successfully attacked by those who would like to see us at each other's throats.

13. The relationship between culture and the definition of scholarship and knowledge is recognized by outsiders and those who propose to wage a cultural war to save the canon and the soul of America. The most recent manifestation of this war, the index of leading cultural indicators, was proposed by William Bennett as a goal of a new organization called Empower America. Judy Mann, *Republican Regrets, Regrouping,* WASH. POST, Jan. 22, 1993, Metro, at E3; Ralph Z. Hallow, *4 GOP Governors Join Empower America,* WASH. TIMES, Jan. 13, 1993, at A4. *See also* HENRY LOUIS GATES, JR., LOOSE CANONS: NOTES ON THE CULTURE WARS, (1992); BELL HOOKS, YEARNING: RACE, GENDER, AND CULTURAL POLITICS (1990); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing An Authentic Intellectual Life in a Multicultural World,* 65 S. CAL. L. REV. 2129 (1992) (discussing critical race theory as "oppositional cultural practice" with respect to legal scholarship).

The fight to preserve traditional American values is sometimes characterized as a battle for the "soul" of the United States, although the battle that is envisioned by Jeane Kirkpatrick and William Bennett might not be the same as that envisioned by Jack Kemp. Mr. Kemp has used the same phrase to refer to the struggle to raise consciousness and provoke action to deal with the desperate condition of the poor in the United States.

> Just as a person who gains the world might lose his soul, certainly a country has a collective soul. The soul of America is in what we do on a bipartisan basis about poverty. The soul of America is in what we do about our inner cities. The soul of America is at stake in what we do about race relations and empowering the poor . . . .

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There is no doubt that the attempt to define scholarship will be complicated by our acknowledgment of cultural differences; by the suggestion that there may be multiple forms of intelligence and multiple ways of acquiring and transmitting knowledge, ways of knowing that may be specific to the particular task or to a particular culture.[14] For instance, there are some who insist that there must be a difference in the way we "know" or understand natural phenomena and the way we "know" our social world, the "messy domain of human interaction."[15] Stories — narratives, parables, allegories — are some of the ways we construct our social reality.[16]

While most people associate the current controversy over scholarship with the emergence of critical race theory,[17] the adherence to currently prevailing "objective" standards of scholarship makes the scholarship of other disciplines and other cultures

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Hearing on the Confirmation of Henry G. Cisneros as Secretary of Housing and Urban Development Before the Senate Committee on Banking, Housing, and Urban Affairs, 103rd. Cong., 1st Sess. (1993) (statement of Jack Kemp, outgoing Secretary, HUD).

14. Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQ. 1, 2-3 (1991).

15. *Id.* at 4.

16. Literary scholars have written of the relationship between narrative, story telling, and the way in which we live our lives and the fact that until recently, "women lived by a script they did not write . . . ." *See* CAROLYN G. HEILBRUN, HAMLET'S MOTHER, AND OTHER WOMEN 103 (1990) (chapter entitled *What Was Penolope Unweaving?* contains discussion of the way in which women are making new "fictions" out of old tales). *See also* Caroline G. Heilbrun and Judith Resnick, *Convergences: Law, Literature and Feminism*, 1990 YALE L.J. 1913 (1990). Many of these tales have been written from the perspective of those who create and control the dominant culture, but there continue to be stories which provide a counterpoint. *See, e.g.*, KATIE G. CANNON, BLACK WOMANIST ETHICS (1988) (discussion of the work of black women writers, particularly Zora Neal Hurston, and the morality of the black community, an ideal which amounts to "virtuous living in situations of oppression").

17. *See generally* Calmore, *supra* note 13, at 2160-68. Critical Race Theory is a form of scholarship that challenges white authority and judgment as the standard that sets culturally acceptable behavior. It challenges "the dominant discourse on race and racism as they relate to the law." *Id.* at 2160-61.

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equally suspect. These standards could make it difficult for evaluators to acknowledge the importance or significance of the work of Jewish law scholars. It remains to be seen if faculties will treat Jewish law as scholarship. The treatment accorded these scholars may depend on their ability to place their work in traditional law reviews.[18]

The fact that this scholarly tradition predates by hundreds of years the existence of most law schools would seem to make any discussion of the "legitimacy" of this style of scholarship ludicrous. Any concession to the idea that there is an alternative mode of scholarship which has value as an intellectual enterprise, however, affirms the relationship between culture and scholarship and undermines the argument that there is a single "objective" standard for judging the quality of scholarship. If scholarship is defined culturally by the form which was used, Jewish scholars have selected a form which combines textual analysis, narrative,

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18. Over the years, the single issue which seems to have received the most attention in law review literature is the problem of divorce under Jewish law. *See, e.g.*, J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201 (1984); Breitowitz, *supra* note 4; Dr. Chaim Povarsky, *Is There a Remedy for the Modern Agunah*, JEWISH L. REP. (Institute of Jewish Law, Touro College Jacob D. Fuchsberg Law Center), July 1992, at 16; Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From* Avitzur *to the* Get *Statute*, 50 BROOK. L. REV. 229-53 (1984).

Recently, *halakha* has been used as an analytic tool in the discussion of constitutional law. *See, e.g.*, Irene Rosenberg & Yale Rosenberg, *In The Beginning: The Talmudic Rule Against Self Incrimination*, 63 N.Y.U. L. REV. 955, 964-65, 1027 (1988); Irene Rosenberg & Yale Rosenberg, *Miranda, Minnick and the Morality of Confessions*, 19 AM. J. CRIM. L. 1, 29-30 (1991) [hereinafter Rosenberg & Rosenberg, *Morality of Confessions*] (criticizing the "moral" argument by Justice Scalia in *Minnick* that confession is a "good act" by using the tradition in Jewish law, with its strong moral base, which would have prevented the use of the confession). The Professors Rosenberg are tenured professors who have written extensively in the area of criminal and constitutional law. Their more recent work is critical and comparative, exploring the reasoning in Supreme Court decisions and the approach taken in Jewish law. *See* Irene M. Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the Maharal of Prauge*, 90 MICH. L. REV. 604 (1992) [hereinafter Rosenberg & Rosenberg, *Guilt*] (discussing similarities and differences between Jewish law and American law).

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parables, problem solving, and extreme deference to prior authorities. While other outsider scholarship might not seem to have the same lengthy tradition, it does have many attributes which are similar to those of Jewish law, in particular the use of stories and narratives.[19]

I am interested in narrative and I have used it myself on occasion.[20] I have always struggled with the problem of integrating the narrative parts of a piece with the descriptive and analytical parts. I was surprised by the lack of self-consciousness in the way Mr. Tamari combines a variety of forms of presentation. The introductory section of the book sets out certain basic beliefs and principles. A close textual reading and interpretation, a discussion of the significance of specific words, is often followed in the book by a story which is used to illustrate a point.[21]

I was intrigued by the discussion of the basic needs of human kind equating the need for sex, food, and the accumulation of wealth.[22] Each of these is a basic human drive, necessary to our survival. Each also has the potential to cause harm to us and to

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19. The Jewish community has its own narrative, its own stories, some of which have been told by the literary giants of the Jewish community in Hebrew, Yiddish, Ladino, and the languages of the many other countries of the Diaspora. The Jewish tradition embodies the idea of living our lives through texts, and the principal text is the Torah. *See generally* TAMARI, *supra* note 6. *See also* Richard Delgado, *Storytelling for Oppositionists and Others, A Plea for Narrative,* 87 MICH. L. REV. 2411 (1989) [hereinafter Delgado, *Narrative*] (discussing narrative as an attribute of the scholarship of "people of color"); Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?,* 76 VA. L. REV. 95 (1990) (discussing debate about "voice" in legal scholarship). *See also* White, *supra* note 8, at 1524-26, and Tushnet, *supra* note 10 at 346-47 (criticism of parables).

20. *See, e.g.*, Deborah Waire Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN'S L.J. 136 (1991) (using personal narrative to discuss gender, race and the influence of both on teaching and scholarship); Deborah Waire Post, *Race, Riots and the Rule of Law*, 70 DEN. U. L. REV. (forthcoming 1993) [hereinafter Post, *Riots*].

21. TAMARI, *supra* note 6, at 21, 24.

22. *Id.* at 11. A similar concern led to rules that restricted consumption in a Catholic society. *See, e.g.*, Diane Owen Hughes, *Sumptuary Law and Social Relations in Renaissance Italy, in* DISPUTES AND SETTLEMENTS: LAW AND HUMAN RELATIONS IN THE WEST (John Bossy ed., 1983).

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those around us.[23] So, the author tells us, these basic needs are constrained by rules, by mitzvot.[24]

The author uses a story in the Introduction to explain why there is a need for rules to govern economic relationships.[25] The recent spate of convictions for economic crimes by very wealthy individuals is offered to support the author's statements that human beings are passionate about money and that our appetite for wealth is insatiable,[26] but these statements are also followed by a story which convinces the reader in a very different way. The author relates a story about a rich man who collapsed on Yom Kippur and who claimed that he was dying.[27]

> Once a wealthy man collapsed on Yom Kippur and needed to be fed. The rabbi of the shul gave instructions that he should be given to drink, measure by measure, as halakha rules. This did not suffice. The man went on crying, "I'm dying, feed me. If you do not do so I will die. Brothers have mercy!"

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23. TAMARI, *supra* note 6, at 11-12.

24. *Id.* at 11.

25. *See id.* at 13.

26. In addition to the securities industry, the source of the author's examples, Michael Milken and Ivan Boesky, we have seen criminal behavior by corporate officers in the defense industry. *See, e.g.*, John M. Broder, *Two at Teledyne Convicted in Pentagon Case*, L.A. TIMES, Apr. 14, 1989, at 1 (conspiracy to pay off Navy department purchasing official); *Ex Chairman of Grumman Pleads Guilty in Fraud Case*, N.Y. TIMES, Nov. 19, 1992, at D5; Robert E. Kessler, *Ex Grumman Chief Admits Fraud Related to Payments*, NEWSDAY, Nov. 18, 1992, at 3; *Litton Offials Indicted in Defense Probe*, WASH. TIMES, Mar. 20, 1991, at A2; *Loral Official Pleads Guilty*, DEFENSE NEWS, Sept. 28, 1992, at 2. Similar behavior is found in the highly regulated food and drug industry see Pete Bowles, *Guilty at Third Attempt*, NEWSDAY, Nov. 14, 1989, at 41 (Beech-Nut Corp. president convicted for selling sugar water as apple juice); Gregg Krupa, *Beech-Nut President Cops Plea Before Third Trial*, MANHATTAN LAW., Nov. 21-27, 1989, at 7; Michael Unger, *Fugitive in Generic Drug Probe; Company's Ex-President Missing After Getting Two Years in FDA Probe*, NEWSDAY, Nov. 6, 1990, at 29 (illegal payoffs to regulators by president of generic drug company located on Long Island). And who could forget the consummate con artist and influence peddler at the heart of the savings and loan scandal, Charles Keating, Jr., Elka Worner, *Keating Sentenced to 10 Years in S & L Fraud*, UPI, Apr. 10, 1992.

27. TAMARI, *supra* note 6, at 13.

> The congregants turned to the *Derech Chaim,* the *Admor* of Zans, and asked what should be done. The *Admor* approached the dying man and whispered in his ears, "I will give you permission to eat a full meal on Yom Kippur and so save yourself, but you will have to donate five hundred rubles to the charity funds."
>
> Suddenly the man's color returned, he stood up, brushed off his clothes, and said, "You know, Rebbe, I am feeling much better now."[28]

Jewish law is replete with stories. Some of the stories are funny. Human frailty or imperfection, like the weakness of the rich man in the preceding story, is often comic and laughable. Some of the stories are sad. We witness the connection between our own imperfection and human tragedy. Some stories describe heroes, virtuous rabbis who demonstrate through their actions the way to live a life which goes beyond mere obedience to the letter of the law. Whether they are selling donkeys or buying land, they are exemplars of the righteous person, the ones who embrace not only the letter of the law, but its very spirit.[29] Whether they are told in the third person as parables or anecdotes or written as a personal narrative, stories make a connection on a different level, a connection based on a sense of our own humanity. The truth in a story derives from our understanding of ourselves and other human beings.[30]

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28. *Id.*

29. *See id.*

30. *See* Bruner, *supra* note 14, at 10-11 (discussing the characteristics of narrative). For a discussion of the value of narrative, see generally Symposium, *Story Telling,* 87 MICH. L. REV. 2073 (1987); *see also* Carrie Menkel-Meadow, *The Power of Narrative in Empathic Learning: Post Modernism and the Stories of Law,* 2 U.C.L.A. WOMEN'S L.J. 287 (1992); Thomas W. Laqueur, *Bodies, Details, and the Humanitarian Narrative, in* THE NEW CULTURAL HISTORY (Lynn Hunt ed., 1989) (discussion of the "humanitarian narrative," a style of fiction that flourished in the 19th century in the United States and Great Britain). The hallmark of this literature was its ability to "connect the actions of its readers with the suffering of its subjects." *Id.* at 177. *But see* White, *supra* note 8, at 1525 (lack of evidence makes interpretation a parable with "scholarly pretense"); Tushnet, *supra* note 10, at

The argument might be raised that narrative, stories, and parables have always been used by religious leaders. Of course, the relationship between religion and law is explicit in Judaism, while the relationship in American law is problematic. The task of a religious leader is different from that of one who is engaged in a secular enterprise, a critical inquiry which is constrained by norms of objectivity and neutrality.[31] Religion is a matter of

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345-46 (criticizing narrative). I am not sure whether Professor Tushnet is surprised and alarmed by the power of the form, concerned with the potential abuse of the form (which he discusses in terms of the Hill-Thomas Hearing) or afraid of the effect of competition among competing forms of scholarship (particularly when he has mastered a form which currently has "monopoly" power). *See* Rosaldo, *supra* note 9. It seems to me, that while the first two reasons are a legitimate cause for concern, the last might provoke attacks which are ill-considered and regrettable. Attack on the form in the last case would be an attack on the author as well; an attempt to make the form illegitimate in order to discredit the author.

I do not mean to accuse Professor Tushnet of impure motives. I only mean to point out the reaction which unconventionality elicits in us all. Blurred genres are disturbing. *See generally* CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 20-35 (1983) (discussion of blurred genres). Legal scholars who use literary style in a discipline that has pretensions as a science are feared because they inhabit the "edges of social boundaries." They act in ways which are inconsistent with "custom or convention." They cannot be located in "cultural space." Louise Harmon, *Fragments on The Deathwatch*, 77 MINN. L. REV. 132 (1992) (discussion of theories of Victor Turner and Arnold Van Gennep).

31. There has been so much discussion and criticism of the ideals of neutrality and objectivity in both critical legal studies and critical race theory that it would be impossible to include them all in one footnote. For examples of scholarship which touch on the topic of the relationship between law and morality, *compare* Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REVIEW 263 (1989) (advocates the use in the law of criteria found in the scientific method) with Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1351 (1991) (neutrality as political ideal which prevents liberals from using the state to promote values liberals share, moral ideals, or as the author describes it "conceptions of the good life" which are present in liberalism). I find myself among those Mr. Gardbaum lists as critics of liberalism since I believe the state should take a much more active role in promoting equality, even at the expense of individual freedom. *See id.* at 1352.

faith, not empirically verifiable fact. It is not open to question. The role of legal scholars and the nature of the juristic enterprise are singularly different in this one respect. Nothing is a matter of faith, everything is open to question.[32]

The opposition created by this dichotomy is a false one, however. Roscoe Pound, in a discussion of natural law (which he renamed philosophical jurisprudence), described the legal enterprise as one which seeks "to yield a reasoned canon of values and a technique of applying it."[33] The difference between law and religion is the source of the moral imperative. Jewish law is grounded in the belief in an omniscient being who has given his chosen people laws which they must obey.[34] Those of us who have been trained in the legal tradition in the United States recognize that our tradition is rooted in the Enlightenment, in a faith in reason and a common belief that logic leads inexorably to truth.[35] The task of the theologian and law

32. The Professors Rosenbergs refer to the "long and objectively verifiable historical tradition" of normative Jewish law and the "rational explanations" offered by post-Talmudic scholars as reasons for respecting (and perhaps incorporating) a doctrine that is acknowledged to be a matter of divine decree. Rosenberg & Rosenberg, *Morality of Confessions*, *supra* note 18, at 30. The boundary between law and religion may seem less substantial if we consider the ideas which lawyers accept as a matter of "faith." *See, e.g.*, POUND, *supra* note 11, at 15 (discussing our faith in reason).

33. POUND, *supra* note 11, at 29.

34. TAMARI, *supra* note 6, at 12-13.

35. Pound said that "Morals were set free from authority [and] . . . Jurisprudence was divorced from theology . . . . Yet men felt the need of an unchallengeable starting point as much as ever. They believed they found it in reason. Reason demonstrated and expressed in natural law replaced authority." POUND, *supra* note 11, at 15.

Natural law is an anathema for many today, more than 50 years after Pound wrote this book, for some of the same reasons discussed by Pound in his chapter on natural law. See, for example, the concern expressed in the confirmation hearings over the use of natural law theory by Clarence Thomas. *Senate Judiciary Committee Focuses on Natural Law in Third Day of Thomas Confirmation Hearings*, U.S.L.W., Sept. 12, 1991 (describing the questioning and Clarence Thomas' attempt to minimize the impact of prior statements on natural law). But our belief in reason is as unshakable as ever. Reason is the way we connect our belief system with our knowledge of the real world — the bridge between faith and knowledge. The association we make between reason

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professor, persuading others that there is a "right" and a "wrong" way to behave, whether as lay persons or lawyers, judges or legislators, is not as dissimilar as one might think.[36]

II. THE RELATIONSHIP BETWEEN LAW, RELIGION, AND MORALITY

Jewish Business Ethics is a book about business. It is about a particular part of our social lives — the part where relationships are created by the act of exchange or cooperation in an economic

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and justice is evident in the violent reaction which occurs when our faith is betrayed. *See, e.g.*, Post, *Riots*, *supra* note 20. *See also* Bruce Morton, *John Locke, Robert Bork, Natural Rights and the Interpretation of the Constitution*, 22 SETON HALL L. REV. 709 (1992) (discussion of natural law and the political ideology of Thomas Jefferson, philosophy of John Locke, and jurisprudence of Robert Bork); Bruce Morton and Chaim Povarsky, *Law and Morality in Jewish and American Legal Systems*, INST. OF JEWISH L. NEWSL. (Institute of Jewish Law, Touro College Jacob D. Fuchsberg Law Center), Dec. 1990, at 1.

36. *See* Rosenberg & Rosenberg, *Guilt*, *supra* note 18, at 614-24. One author has noted the increase in interest in the nature of law, including the comparative study of Jewish Law. John F. Wilson, *Religion, Political Culture and the Law*, 41 DEPAUL L. REV. 821 (1992). The new scholarship is an inquiry into law as a "cultural activity" and the "self conscious appropriation from fields like moral philosophy." *Id.* at 822. Mr. Wilson argues that while law has become "ubiquitous" in our lives, religion has taken on "private" qualities because that is one of the consequences of cultural pluralism. *Id.* at 822-23. In addition, the "successive disruptions" our society has experienced and the "enlargement and complexification" of our national society have made the law an "idiom" for what we expect of one another. *Id.* at 822. In this way, the law, more than religion, has become the "authority" to "ground the order of the common life." *Id.* at 823.

For me, this is not a cause for alarm, but it is a reason for considering, quite self-consciously, the moral content of our laws and the way in which we determine what is moral. *See infra* notes 157-64 and accompanying text (discussion of ethical relativism). For the reaction which I think is more typical and fairly representative of the fear most liberals have of political power, see Kim Lane Scheppele, *The High Cost of Virtue: A Reply to Linda Hirshman*, 15 LAW & SOC. INQ. 575 (1990). The author rejects Judge Posner's utilitarian approach to the law on moral grounds, but recoils from the idea of judicially imposed "standards of decency" because of the possible use of coercion to produce an "intolerable unitary set of beliefs." *Id.* at 576.

venture; the part of our lives where relationships exist because each of us, in the satisfaction of her economic needs, co-exists with others who are also involved in economic ventures. This is a book about the way we view those relationships. It is a book about the standards of behavior that govern those who have reciprocal economic relationships and those who are members of the community in which these economic activities take place. It is a book about the needs and reasons for limiting the ability of individuals to conduct their economic affairs free of restraint or coercion.

Meir Tamari is talking about religion and the constraints which arise from Jewish law. I am concerned with the moral and ethical content of American business law. The discussion of business ethics and the relationship between law and morality occurs in a variety of contexts in American law. The struggle to define the meaning of good faith in contract law is one example of the interplay between law and morality;[37] the debate on corporate social responsibility is another.[38]

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37. Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 829-30 (1982). However, the recognition that the breach of a duty of good faith was a tort rather than simply a matter of contract, moving it into the area of public law (communal, involuntary, and moral) and out of private law (consensual, voluntary, and amoral), has been controversial. *See, e.g.*, Oki Am., Inc. v. Microtech Int'l, Inc., 872 F.2d 312 (9th Cir. 1989) (discussing tort of breach of duty of good faith). Judge Alex Kozinski characterizes modern tort theory as "Cloud Cuckooland" and analogized what some might say is dishonest behavior of a company — refusing to acknowledge the existence of a contract as distinguished from the expression of an intention to breach that contract — to "maliciously refusing to return phone calls or adopting a condescending tone in interoffice memos . . . ." *Id.* at 314 (Kozinski, J., concurring). Judge Kozinski argued that the intrusion of courts into business relationships "trivializes" the law. *Id.* at 314-15 (Kozinzki, J., concurring). Some might argue that his overstatement and hyperbole do more damage to his argument than any rejoinder that could be offered by those who feel that the law should recognize and enforce an obligation of good faith. *But see* David A. Golden, Comment, *Humor, the Law and Judge Kozinski's Greatest Hits*, 1992 B.Y.U. L. REV. 507 (1992) (defense of Judge Kozinski's "humor").

38. The best collection of essays on the social responsibility of corporations I have found is CORPORATE GOVERNANCE AND DIRECTORS'

I have noted that the author, Meir Tamari, proceeds from the assumption that he is discussing a moral imperative, one which is the expression of Divine Will.[39] The community, he states, is a prime mover in creating a moral environment.[40] I think of this as holiness on a "meta" level, as compared to the saintliness to which individuals aspire. If you are not religious, you might be

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LIABILITIES: LEGAL, ECONOMIC AND SOCIOLOGICAL ANALYSES ON CORPORATE SOCIAL RESPONSIBILITY (Klaus J. Hopt & Gunther Teubner eds., 1985) (essays which trace historical development of the debate in the United States, explain various theories which have been advanced by proponents and opponents of the idea, and provide a cross cultural comparison by examining European responses to the same issues). *See also* CORPORATE SOCIAL RESPONSIBILITY: CONTEMPORARY VIEWPOINTS (Suzanne Rabitaille Onitveros ed., 1986) (annotations of articles) [hereinafter CONTEMPORARY VIEWPOINTS]; CORRIGIBLE CORPORATIONS AND UNRULY LAW (Brent Fisse & Peter A. French eds., 1985) [hereinafter CORRIGIBLE CORPORATIONS]; WARREN J. SAMUELS & ARTHUR S. MILLER, CORPORATIONS AND SOCIETY POWER AND RESPONSIBILITY (1987).

39. In creating that environment, the community is guided by the law. Interestingly enough, the author also discusses the "natural morality which all men share" a form of human wisdom to which the Torah adds a divine dimension. TAMARI, *supra* note 6, at 94. The idea that the community may be responsible for creating a moral environment is not entirely foreign to American law. While the Jewish community is bound by its legal code to behave ethically, our legal systems sometimes looks to the community to determine what is ethical. *See, e.g.*, Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988) (discussing interpretation of obligation of good faith); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (duty of good faith and fair dealing refers to "community standards of decency, fairness, and reasonableness"). This would suggest that courts can either engage in an empirical process to determine what the community does (the actual practices) or what the community thinks should be done in a particular set of circumstances (the ideal), or the court can define "reasonableness" for itself, drawing on that "natural morality" to which Mr. Tamari refers. In the first two instances, the source of moral authority is external to the law, in the last the law becomes one of the sources of moral authority. *See also* David Charney, *Hypothetical Bargains: The Normative Structure of Contract Interpretation Law*, 89 MICH. L. REV. 1815 (1991) (discussion of libertarian and communitarian argument in the "hypothetical bargain" paradigm and the use of idealizing or non-idealizing interpretive strategies).

40. TAMARI, *supra* note 6, at 15.

tempted to put the book down at this point. Obviously, you conclude, the author had a different audience in mind, and that audience does not include those who object to the very idea of obedience to Divine Will.

You might want to reconsider. After all, we live in a time when American tradition and American culture — a kind of jurisprudential nationalism — have become a refuge for courts bemused by a confusing array of competing theoretical approaches and political ideologies. More than once religion, the Judeo-Christian tradition as it is often described, has been used to explain why we have certain rights or why a particular result is consistent with our conception of justice.[41] Unfortunately, those

41. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 196 (1986); Miranda v. Arizona, 384 U.S. 436, 458 n.27 (1966); *but cf.* Kentucky v. Wasson, 842 S.W.2d 487, 492-93 (Ky. 1992) (finding protection of privacy interest in Kentucky State Constitution). *See also* L. Benjamin Young, Jr., *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581 (1992) (discussion of "history and tradition" methodology of Justice Scalia).

Courts and the general public tend to see the relationship between law, sex, and morality. Decisions about a state's right to regulate birth control, abortion, or obscenity, for example, may discuss the relationship between law and morality, while courts do not feel it necessary to explain the relationship between due process and morality. Abortion has become a moral crusade, pitting those whose symbol is the human fetus, the participants in Operation Rescue, who would protect "children" from harm, against those who carry the symbol of the bent coat hanger, those who would protect women from harm. Obscenity is, for some people, a moral issue. *See, e.g.*, A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney Gen. of Mass., 383 U.S. 413, 427-28 (1965) (Douglas, J., concurring) (Justice Douglas described the deluge of mail he received every time the court had an obscenity case before it as identical "postal cards urging me to protect the community . . . . The inference is irresistible that they were all copied from a school or church blackboard . . . ."). Activists like Catherine McKinnon and Andrea Dworkin, Richard Delgado, Charles Lawrence, and Mari Matsuda among others, have changed the terms of the discussion in the First Amendment area by focusing on issues of political morality, the relationship between the politics of subordination and the physical and emotional harm experienced by victims of pornography and hate speech. *See* CATHERINE MACKINNON, FEMINISM UNMODIFIED (1987); Richard Delgado, *Words That Wound*, 17 HARV. C.R.-C.L. L. REV. 133 (1992); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE

L.J. 431 (1990); Mari J. Matsuda, *Legal Storytelling, Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1987).

The relationship between the state and religion is at the heart of the debate over the use of prayer at graduations, sports events, and legislative sessions. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983) (upheld constitutionality of prayer by chaplain hired by Nebraska legislature); Lee v. Weisman, 112 S. Ct. 2649 (1992) (invocation at public school graduation held unconstitutional). Justice Scalia's dissent, joined by Chief Justice Rehnquist, and Justices White and Thomas, invoked tradition and history, the will of the majority in a community, their desire to invoke the blessings of God "as a people[,]" and assumed that everyone present either believed in one God or was a "non-believer[.]" *Id.* at 2685-86 (Scalia, J., dissenting). *See generally* Thomas A. Schweitzer, Lee v. Weisman: *Whither the Establishment Clause and the* Lemon v. Kurtzman *Three-Prong Test?*, 9 TOURO L. REV. 401 (1993). *See also* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) (allowing school to enforce preference of majority of students over objection of their peers because such action does not psychologically coerce religious conformance). An economic approach has not been offered to solve the Free Exercise and Establishment Clause issues raised with respect to school prayer or public displays of menorahs or crèches. *But see* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. OF CHI. L. REV. 1 (1989) (advocating economic definition of neutrality in case involving religion clauses).

Few, if any, commercial cases involve strong statements about the religious implications of various rules of law. With certain notable exceptions, the fiduciary ethic, the unconscionability doctrine, good faith, and the continuing debate over corporate responsibility referred to earlier, a public/private distinction has prevailed and courts have taken the position that commercial law is not concerned with the moral strictures.

Most non-legal literature exploring the relationship between religion and business has focused on the antagonisms that arise from social activism by religious groups. *See generally* CONTEMPORARY VIEWPOINTS, *supra* 38 (The articles annotated contemporary viewpoint discussing the social activism of groups like the National Council of Churches or the Ecumenical Interfaith Center on Corporate Responsibility on issues like Apartheid or the marketing of products in less developed countries. This activism provoked much discussion of the proper relationship between the religious institutions and economic institutions. In the most extreme cases, these religious institutions were sometimes criticized for their anti-corporate sentiment or "Marxist" leanings.); *see also* Herman Nickel, *The Corporation Haters*, FORTUNE, June 16, 1980, at 126 (accusations that church ideology was hostile to business and pressure tactics of churches were coercive); J. Philip Wogaman, *The Ethical Premise for Social Activism*, BUS. & SOC'Y REV., Summer 1985, at 30-36.

who invoke tradition often approach it as though it were that famous talisman,[42] some historical relic preserved in amber. It is a

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But see Robert Sirico, *God and Mammon*, WALL ST. J., Dec. 3, 1992, at A11 (reviewing RICHARD JOHN NAUHAUS, DOING WELL AND DOING GOOD: THE CHALLENGE TO THE CHRISTIAN CAPITALIST (1992)) (book review discussing recent papal encyclical which was construed by author as a retreat from "socialist" aspects of Catholicism). There is the rare law review article, generally in the area of legal history, that discusses the relationship between contract law and particular religious traditions. *See, e.g.*, Harold J. Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 J.L. & RELIGION 103 (1986); Andrew W. McThenia, Jr., *Religion, Story and the Law of Contracts: Reply to Professor Berman*, 4 J.L. & RELIGION 125 (1986).

42. A talisman is an object which has some power, magical or otherwise, which produces good fortune or wards off evil. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1203 (9th ed. 1991). The Supreme Court is quite fond of this word. A search for the term talisman or one of its variations produced 135 instances where the word appeared in a Supreme Court decision. It has been used as a noun: California v. Hodari D., 111 S. Ct. 1547, 1556 (1991) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)) ("'search' and 'seizure' are not talismans"); Butterworth v. Smith, 494 U.S. 624, 630 (1990) (quoting United States v. Dionisio, 410 U.S. 1, 11 (1973) ("[W]e have recognized that the invocation of grand jury interest is not 'some talisman that dissolves all constitutional protections.'")); St. Louis v. Praprontnik, 485 U.S. 112, 139 n.3 (1988) (Stevens, J., dissenting) (existence of municipal policy in § 1983 suit is transformed by majority opinion from "touchstone to talisman"); Colorado v. Bertine, 479 U.S. 367, 387 (1987) (words become talismans to ward off the Fourth Amendment). In some opinions this noun begins to sound more like a crystal ball or magic mirror. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 715 (1987) ("We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable.").

With increasing frequency the noun has been used in its adjectival form or even an adverbial form to mean magical, like words recited in ritual incantations which have a magical effect. *See, e.g.*, American Nat'l Red Cross v. S.G. and A.E., 112 S. Ct. 2465, 2479 (1992) (Scalia, J., dissenting) (arguing that there is no "talismanic significance" to the mention of federal courts in charter of organization); Sochor v. Florida, 112 S. Ct. 2114, 2125 (1992) (Rehnquist, C.J., dissenting) (arguing that result will be remedied by lower court if it uses a "talismanic phrase 'harmless error'"); Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 758 (1992) ("language . . . not intended to take on talismanic quality"); Washington v. Harper, 494 U.S. 210, 245 n.11 (1989) (treatment is not "talismanically in a patient's best interest"); R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 155 (1986) ("talismanic 'in transit' status") (quoting Xerox Corp. v. Harris County, 459

vision drawn from memory, a synchronic approach which denies the reality and the vitality of the tradition to which it refers.

If there is one thing this book does, it is to serve notice that the "Judeo" part of the Judeo-Christian tradition is thriving. The author, Meir Tamari, has been a government official and he is currently the director of Jerusalem's Institute for Ethics in Economics. In this book, he attempts to show the relevance of halakha, Jewish law, to contemporary business situations.[43] Principles which appear in texts written by men who lived under vastly different circumstances, under conditions and in situations which are very different to those that exist today, can be interpreted and applied to contemporary moral dilemmas. In his attempt to provide material which will be a "source for serious discussion and study,"[44] Tamari has succeeded in proving that tradition is not static. Tradition is a thing in motion, moving through the present to become part of our past.

I am inclined to agree with the author that despite the changes in economies and technologies that have occurred in the several generations that separate the Mishnah, Talmud, and the other halakhic authorities he cites, human nature has not changed and the basic issues remain very much the same.[45] Economic need is a strong drive in human kind and the tendency to excess in this area has not gone unnoticed even by those of us who are not well versed in the relationship between a particular *yetzer,* need or drive, and the *mitzvot*, the rules that operate as a restraint on that drive.[46]

If the reader can put aside prejudices, suspend disbelief or cynicism or the temptation to dispute the fundamental theological premise, there is much to be learned here. Jewish law assumes the existence of a community of people who are bound together

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U.S. 145, 157 (1982) (Powell, J., dissenting)); New York Times v. Sullivan, 376 U.S. 254, 269 (1964) (talismanic immunity). I guess you could say that "tradition" and "culture" are used talismanically to justify results in Supreme Court decisions.

43. TAMARI, *supra* note 6, at 12.

44. *Id.* at 9.

45. *Id.* at 12.

46. *Id.* at 12-16.

by their religious beliefs.[47] The book is illuminating as an example of the way a people can, as a community, assign individual and collective responsibility for human behavior in the economic sphere.

The idea of community is not one which is limited to people of the same faith or people of the same ethnicity or even, ultimately, to people of the same nationality. In contemporary society we define our communities without regard to geographic boundaries (something which Jews and Blacks learned during their respective diasporas). In the absence of geographic proximity or kinship ties, some deference must be paid to the norms which foster connections, which sustain our sense of community. Jewish law provides a model that can be adapted to the needs of our global economy and our international society.

This book is a welcome addition to a growing body of literature on business ethics and the social responsibility of corporations.[48] After all, the phrase makers, the men and women who mark the passage of time by creating labels which reduce the epochs of our lives to their essence, have labeled the decade of the Eighties as the decade of greed.[49] The label is also a judgment, a moral critique.[50] If we tried, as lawyers and as legal scholars, to describe

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47. *Id.* at 12-13.

48. *See supra* note 38; *see also* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990).

49. Otto Friedrich, *Freed From Greed*, TIME, Jan. 1, 1990, at 76-77.

50. DANTE ALIGHIERI, THE DIVINE COMEDY: THE INFERNO (Musa Mork trans., 1984). In Dante's Inferno, those who are guilty of what we call greed today were punished for their avarice. "Now may you see the fleeting vanity of the goods of Fortune for which men tear down all that they are, to build a mockery." Canto VII. Greed is associated with the excess and overindulgence which fascinates and repels us. Millions of people tune into Robin Leach and Lifestyles of the Rich and Famous, they visit museums which were once the residences of robber barons and their profligate offspring, like the Vanderbilt Museum or the Hearst Castle, where they are both thrilled and shocked by the opulence they see. Excessive self-indulgence can provoke righteous indignation in Americans and make those who are so fascinating unappealing and unsympathetic. Those who have come to understand the fickle nature of public adoration include such contemporary hero-villains as Michael Milken, Donald Trump and Leona Hemsley. The extent to which we accepted the excesses of the recent past, even rationalized them, may now be a source of

the law of the Eighties, it could be described as the decade in which law and morality parted company.[51] It might be more accurate still to describe it as the decade in which certain values traditionally associated with the ideology of a free market system and capitalism reemerged and assumed dominance in politics and legal theory.[52] It was a time when theoretically, at least, we seemed to move from a concern with reciprocal obligation and mutual responsibility to autonomy, self reliance, and loyalty.[53]

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embarrassment for many of us, including many members of the judiciary. *See, e.g.*, Andrew G.T. Moore, *The 1980s — Did We Save the Stockholders While the Corporation Burned?*, 70 WASH. U. L.Q. 277 (1992).

The moral proscription of greed or avarice may look inward in the belief that this sort of self indulgence is bad for one's soul or it can focus outward on the effect such behavior has on others. *See, e.g.*, ORSON SCOTT CARD, 1 THE MEMORY OF EARTH: HOMECOMING 175 (1992) (The "memory" of the earth is described as "[a] family sitting at a huge table, covered in food, eating ravenously, then leaning over and vomiting on ragged beggars that clung hopelessly to the legs of their chairs . . . . Surely no one ever would be so morally bankrupt as to eat more than he needed, while others were dying of hunger before their [sic] eyes!"). A work of fantasy might seem irrelevant to a discussion of contemporary business ethics, but consider the current controversy over executive salaries. There is no doubt that some of the indignation of some of the critics of executive compensation is prompted by the belief that executives have been greedy and such greed seems especially wrong when it occurs while others are suffering. *See, e.g.*, Geoffrey Colvin, *How To Pay the CEO Right*, FORTUNE, Apr. 6, 1992, at 60.

51. The discussion of the separation of law and morality as a jurisprudential issue has a longer history. *See, e.g*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (explaining what the utilitarians and positivists like Bentham and Austin did and did not mean by separation of law and morality); POUND, *supra* note 11, at 16; *see also* FULLER, *supra* note 11, at 187 (clarifying the author's definition of the relation between law and morality).

52. *See generally infra* notes 57-61 and accompanying text (the discussion of the law and economics movement). As one critic noted, "[i]n philosophical terms, [law and economics] is a discredited form of analytical positivism and a throwback to the legal formalism and conceptionalism of the nineteenth century seeking to impose hidden and *a priori* set of theological postulates on reality." John J. Flynn, *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept, in* SAMUELS & MILLER, *supra* note 38, at 135.

53. *See* Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise,* 92 COLUM. L. REV. 2215 (1992) (comparing two

Somewhere along the way, between the development of a market economy, the transformation of society by the Industrial Revolution, and most recently, the displacement which has occurred as we enter what some call the Information Age,[54] the acquisition of wealth became a moral imperative.

I remember being surprised, when I was in practice, by a young associate, a fundamentalist Christian, who volunteered his opinion on my prospects for success in the firm. With the best of intentions, my colleague advised me that I was not "sufficiently motivated by greed." It sounded like some sort of personal failing, some moral delict on my part. Avarice had ceased to be one of the seven capital sins and instead had become a virtue.

In academia, I heard echoes of this sentiment in the work of the proponents of law and economics.[55] Significant legal debates were phrased in terms of wealth maximization and efficiency.[56] Legal scholars seemed less concerned with issues of harm or fault; with principles of justice and equity; with the idea of duty

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approaches to corporate law found in FRANK H. EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) and ROBERT N. BELLAH ET AL., THE GOOD SOCIETY (1991)).

54. In the Information Age in American society, information or knowledge replaces matter and energy as the primary resource as our society moves from an industrial economy to one which is post-industrial or an "information economy." Rashi Glazer, *Marketing in an Information-Intensive Environment: Strategic Implications of Knowledge as an Asset*, J. OF MARKETING, Oct. 1991, at 1 (citing DERRICK BELL, THE COMING OF THE POST INDUSTRIAL SOCIETY (1973)).

55. Virtually every contracts or corporation textbook includes material discussing the economic analysis of legal rules. In addition, a number of texts which focus on the theory and its application in various contexts have appeared. For some of us it all began with Judge Posner, *see* RICHARD POSNER ECONOMIC ANALYSIS OF THE LAW (3d ed. 1986), and David Barnes and Lynn Stout, *see* DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW (1992) and DAVID W. BARNES & LYNN A. STOUT, ECONOMICS, THE ECONOMICS OF CONTRACT LAW (1992) [Hereinafter BARNES & STOUT, CONTRACT].

56. One of the most recent examples is the debate over the contractarian theory of corporate law. *See generally* Thomas Lee Hazen, *The Corporate Persona, Contract (and Market) Failure, and Moral Values*, 69 N.C. L. Rev. 273 (1991); Johnson, *supra* note 53.

or responsibility based on privilege, the idea of noblesse oblige, than they were with protecting property, privilege, and power. The scholarly journals were saturated with articles about the ways in which the legal system did or could maximize wealth, produce efficiency, and pareto superior exchange.[57] With their argument for the modification of existing legal doctrine and their interpretation of statutes, they sought to transform the world into their economic model: an ideal world where wealth is maximized, moving from a less valued use to a more valued use; where all human beings are motivated by economic considerations and the market is propelled by the collective force of separate, rational, economic choices.[58]

Law and economics has transformed our understanding of the role of the law and of lawmakers. It is a legal theory which has many of the attributes of a religious movement including the fer-

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57. *See* Hazen, *supra* note 56, at 275-78 nn.11-26 (summarizing the use of economic theory in recent legal scholarship); Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1403-12 nn.86-145 (1992) (describing the literature and arguments found in economic analysis of limited liability companies).

58. I do not mean to discount the work of the many who have used the language of law and economics to explain or justify results which might have been explained in moral terms in the past. Nor am I critical of those like Guido Calabresi whose work on risk allocation and the law reveals much about the inequalities that exist in our society while discussing in a meaningful way values which are not quantifiable. *See, e.g.*, GUIDO CALABRESI, IDEAS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985); ROBERT C. CLARK, CORPORATE LAW (1986) (norms governing behavior of others and need for trust as efficient); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) (presents arguments to justify parentalism in contract law). Although I have reason to quarrel with some of the rhetoric and decisions of Dean Robert C. Clark, I admire his hornbook on corporate law because it speaks in terms of the norms that govern the behavior of shareholders and managers.

More recent scholarship attacks some of the assumptions contained in law and economics. *See, e.g.*, Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 3 n.4 (1992) (citing articles discussing altruism and positive interdependence). Mr. McAdams employs a number of social sciences in an examination of the negative interdependence which makes the individualistic assumptions of neo-classical economic theory inappropriate. *Id.*

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vor of its adherents and the convictions of its converts in their unabashed attempts to spread the good word.[59] The analogy should end there, for the movement, while it is driven by ideals which have tremendous social, political and some would say, moral implications, has made the claim that economic analysis is "neutral," devoid of moral content.[60]

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59. According to two economists, Ronald Coase, Judge Posner, and Guido Calabresi are a triumvirate whose work began the law and economics movement. *See* Werner Z. Harsh & Evan Osborne, *Law and Economics Valuable But Controversial*, 17 LAW & SOC. INQ. 521 (1992). Another principal advocate for the law and economics approach has to be Henry Manne, currently the Dean of George Mason Law School. His Law and Economics Center has been in existence for 18 years, and during that time approximately 500 law professors and 400 federal judges have participated in two week institutes on law and economics. Program for Summer Curriculum. *Twenty-Fourth Economics Institute and Basic and Advanced Courses on Quantitative Methods*, Dartmouth College, Hanover, N.H., at 3 (conducted by George Mason Univ., Law and Economics Center) (on file with author).

I am not the first to see the resemblance to religious fervor. *See, e.g.*, Johnson *supra* note 53, at 2217 n.13 (quoting ALAN WOLFE, WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION 36 (1989)) ("'Chicago school economists have become missionaries. They have an idea about how the world works. This idea seems to apply in some areas of life. It therefore follows, they believe, that it ought to apply in all.'"). The law school which is most closely associated with the law and economics movement is the University of Chicago and, in fact, the reference to Chicago has become a way of identifying the brand of economics used by a particular scholar.

60. Law and economics makes much of the fact that it does not judge the content of people's choices. The outrage many feel when issues of morality are dealt with in this neutral way is epitomized by a tongue in cheek article by Sidney DeLong, *A Modern Proposal*, 42 J. LEGAL ED. 127 (1992). The author compares Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (on infertility and private adoption) with Jonathan Swift, *A Modest Proposal for Preventing the Children of Ireland From Being A Burden to Their Parents or Country* (1729), *reprinted in* 5 ENGLISH MASTERPIECES: THE AUGUSTANS 82 (Maynard Mack ed., 1950).

Law and Economics is "neutral" then in the sense that the emphasis on individual choice treats human values as "tradable commodities." P. John Kozyris, *In the Cauldron of Jurisprudence: The View From Within the Stew*, 41 J. LEGAL ED. 421, 436 (1991). But law and economics is not valueless. In fact, certain values are embedded. It is a theory which supports the "institutions of private property and a free exchange economy." *Id.* It proceeds

While almost every textbook in contracts and corporations now includes materials which describe law and economics theory and its application in particular cases, few of them disclose the value choices that are implicit in the method.[61] As a consequence, we now have a generation of law school graduates who have been instructed in the law and economics approach to legal analysis, many of whom have been indoctrinated in this new morality; a morality which focuses exclusively on progress, efficiency, and profits.

The neutrality of economic principles appears consistent with a secular approach to law, the disavowal of natural law principles and the creation of a legal system capable of mediating between and among people who may be profoundly religious or profoundly irreligious.[62] In contrast to the treatment of economic

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on the assumption that "economic pluralism undergirds political democracy and sustains personal autonomy and human rights." *Id.*

61. See Gary Lawson, *Efficiency and Individualism*, 42 DUKE L. REV. 53, 53-54 nn.2-8 (1992) (discussin pervasiveness of law and economics in legal scholarship and in the curriculum at law schools). For an example of the way in which law and economics might be presented in a textbook which is not organized around or infused with law and economic theory see ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED PARTNERSHIPS 558-72 (4th ed. 1990). Professor Hamilton includes a number of selections from longer articles in a chapter about the social responsibility of corporations. *Id.* Unfortunately, the students must derive their understanding of the position of those who advocate moral reform from the characterizations provided by the critics of this position. *See* excerpt from Richard A. Rodewald, *The Corporate Social Responsibility Debate: Unanswered Questions About the Consequences of Moral Reform*, 25 AM. BUS. L.J. 443 (1987) (discussing theories advanced in CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975), and Christopher D. Stone, *Corporate Regulation: The Place of Social Responsibility, in* CORRIGIBLE CORPORATIONS, *supra* note 38, at 30).

62. I am not a student of comparative religion, but I imagine there might be a problem with reliance on the non-sectarian label to immunize ceremonial prayers from attack on Constitutional grounds. The idea that certain prayers are non-sectarian may work when we are concerned about preferring Christians to Jews or one denomination of Christianity over another. I am not certain that it works if certain Eastern religions, for instance, have some other convention for the expression of faith, a convention which might not involve the same conception of "prayer." *See, e.g.*, Linda Saslow, *School Accepts Moslem and*

exchange, the courts have acknowledged and affirmed the influence of religion and concepts of morality on laws with respect to human sexuality. In *Bowers v. Hardwick*,[63] the Supreme Court explicitly adopted an approach to human rights, and human dignity and personal privacy which located and limited fundamental liberties to those which had a "'history and tradition'" of this nation,[64] while Chief Justice Burger's concurring opinion found support for sodomy laws in "Judeo-Christian moral and ethical standards."[65]

Jewish Business Ethics would be an eye opener for those who have compartmentalized religion and relegated it to the sphere of personal and social relationships. I would put it on the required reading list of those who believe that the Judeo-Christian tradition provides the moral and ethical foundation for American law. They might be surprised to find just what that tradition is.

Buddhist Holidays, N.Y. TIMES, Oct. 4, 1992, at 6 (discussing change in school holidays because of increase in number of Moslem and Buddhist students in New York). The article lists the following religions recognized by one Long Island school district: Buddhist, Bahai, Christian, Hindu, Islamic, Jewish, Jain, Mormon, Eastern Orthodox, Protestant, Catholic, Sikh, Shinto, and Theravada Buddhist. *Id.* The increase in the numbers of Pakistanis and Koreans, to cite only two examples of the changing demographics in the United States, should change the discussion of religion by the federal courts. I assume that even Justice Scalia might have to acknowledge the inappropriateness of labeling a prayer "non-sectarian," assuming that all religions share a belief in a single supreme being or that everyone else is a "non-believer" only mildly inconvenienced by sitting through such a prayer. *See generally* Schweitzer, *supra* note 41.

Pound offers an historical explanation for natural law theory: it was a reaction by the Greek city states to pluralism. The cynicism which followed the discovery of competing systems was followed by an attempt to identify "universal" rules for human behavior analogous to the rules which were thought to govern the natural world. POUND, *supra* note 11, at 14. There is comfort in the idea that we are not the first nation to deal with issues of diversity or pluralism; that the cynicism about values which we have witnessed is a normal reaction to the knowledge of diversity as is the search for universality.

63. 478 U.S. 186 (1986).

64. *Id.* at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., concurring)).

65. *Id.* at 196 (Burger, C.J., concurring).

This book suggests that the efforts to understand the relationship between law and morality have been misdirected. The tendency on the part of our judiciary to invoke tradition and culture in their approach to moral issues involving human sexuality stands in marked contrast to the "neutrality" of the law with respect to economic exchange. Perhaps Justice White and the other Justices who remain on the Supreme Court, such as Chief Justice Rehnquist and Justice O'Connor, should read Meir Tamari's book. They might find the discussion of the fall of S'dom instructive.[66] It is a biblical event that is used to illustrate the extent to which the "unraveling of the entire social fabric" begins with economic sin.[67] In the case of S'dom, it was the "collective refusal to utilize wealth to alleviate suffering" which doomed the inhabitants of that city.[68]

The right to engage in particular sexual practices might not be part of the official "history or tradition" of this society. In fact, we might concede the opposite is true, intolerance of people who have a different sexual orientation is probably deeply rooted in our history. The fact that morality has been used as a justification for discrimination on the basis of sexual orientation does not make all morality or all moral considerations dangerous. Damage has been done in our society, people have been injured by those who are ferocious in their righteousness. Although we might long for some respite from political storms in an oasis of neutrality and detachment, the oasis is an mirage.[69]

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66. *See* TAMARI, *supra* note 6, at 24-26. S'dom is the infamous Sodom of Sodom and Gomorrah. *Genesis* XVIII-XIX.

67. TAMARI, *supra* note 6, at 14.

68. *Id.* at 25.

69. *See* Allen Ides, Bowers v. Hardwick: *The Enigmatic Fifth Vote and the Reasonableness of Moral Certitude*, 49 WASH. & LEE L. REV. 93 (1992) (discussion of relationship between morality, political power, and reasonableness).

III. HARM, FAULT, OR DUTY: A CROSS-CULTURAL COMPARISON OF BUSINESS ETHICS.

This book is about business, but it is also about different kinds of morality: a negative and a positive morality; a morality which is both individual and communal. Jewish law seems to have escaped the dichotomies which characterize our legal system. The ideas which we think of as oppositional are treated as complimentary.

From the perspective of Jewish law, the negative morality is one which imposes an obligation to refrain from harming others;[70] the positive morality is the affirmative duty to share what one has with those who are less fortunate.[71] The idea of complimentary versions of the same concept, a negative and a positive version, a kind of yin and yang, is not new.[72] It is a theme repeated not only in the law but, as *Jewish Business Ethics* suggests, in our economic institutions, capitalism, and a market economy.[73]

The first chapter in this book, "Mine and Yours," begins with the idea of morality as a limitation on our freedom, a limitation which is grounded in the idea that we should not harm one

70. TAMARI, *supra* note 6, at 17-37.

71. *Id.*

72. There are many articles discussing the positive and negative forms of liberty. *See, e.g.,* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 96 (1992) (American constitutional law "knows only 'negative' and not 'positive' liberties"); Thomas Morawetz, *Persons Without History: Liberal Theory and Human Experience*, 66 B.U. L. REV. 1013 (1986); Peter Westen, *"Freedom" and "Coercion" — Virtue Words and Vice Words*, 1985 DUKE L.J. 541 (1985); *see also* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW (1988) (discussions of negativism and positivism); *but see* Gerald G. MacCallum, Jr., *Negative and Positive Freedom*, *in* THE BOBBS MERRILL REPORT SERIES IN PHILOSOPHY (1967) (discussion of freedom as a "triadic relation").

73. *See generally* TAMARI, *supra* note 6, at 92-103.

another.[74] As the author continues his explanation of the complex relationship between principles of private ownership and free will, values affirmed by the Jewish faith, it becomes clear that Jewish law goes beyond the negative and imposes an affirmative obligation on the individual and the community.[75] According to Jewish law, we are all individually and collectively accountable for the well being of others as well as ourselves.[76] In a way that is difficult to explain. The existence of individual prescriptive norms is justified by this idea of collective responsibility.

In his discussion of the relationship between property, private enterprise, and morality, the author offers a story which appears in the Medrash.[77] The story recounts the attempt by a Jewish community to explain its system of ethics to an outsider, Alexander the Great. Of course, they told him a story. They told him of a property dispute between two men.[78] In this dispute, the buyer of a piece of land and the seller of that land were arguing over who owned a treasure which was found after the sale. According to the story, the seller claimed the treasure belonged to the buyer because he sold the field and everything in it. The buyer claimed the treasure belonged to the seller because he only bought a field. The judge solved the dispute by decreeing that the son of the buyer should marry the daughter of the seller and the treasure would be used as a dowry.[79]

The tale of the dispute provoked a response from Alexander the Great which was similar to the discussion that might ensue in a contemporary contracts class.[80] He explained that in the Greek or Macedonian community, both buyer and seller would claim the treasure. What I found most interesting in this story within a

74. *Id.* at 17-23.

75. *Id.* at 21-33.

76. *Id.* at 28-31.

77. *Id.* at 32-33.

78. *Id.*

79. *Id.* at 33.

80. Actually, a problem entitled "The Treasure in the Dunghill: A Rabbinical Account" citing to 1 Midrash Rabbah, ch. XXXIII appears in EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW (4th ed., 1991).

story was the reaction of the Jewish community to Alexander's description of Greek justice. The people reacted with shock when they heard that the Greeks had never experienced divine retribution for such behavior, that "the grass continued to grow and the rain to fall." It was not the greedy buyer or seller whom they thought should be punished but the entire society for creating an environment where greed and dissension flourished.[81]

The parable offers an interesting counterpoint to American law. It involves a contract and property, two areas of law in our society which are infused with libertarian ideology. Anyone teaching contracts in the United States is accustomed to the rhetoric of cases admitting the inadequacy of the law or the unwillingness of the law to sanction all moral delicts. These cases consign the plaintiff to the internal forum, the *forum conscientiae*, the conscience or ethics of the defendant.[82] These stand in marked contrast to other cases which refer to the principles of natural law which inform judicial decisions.[83]

The principles of natural law often turn out to be moral precepts against unjust enrichment,[84] an expression perhaps of either

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81. TAMARI, *supra* note 6, at 33.

82. In MURPHY & SPEIDEL, *supra* note 80, at 21-25, 30-32, 36-40, three striking examples of this kind of rhetoric are found in the introductory chapter providing an overview of contract law: Mills v. Wyman, 20 Mass. (3 Pick.) 207, 210 (1825) (holding that a moral obligation is not enforceable but is a matter for the "tribunal of conscience"); Spooner v. Reserve Life Ins. Co., 287 P.2d 735, 738 (Wash. 1955) (plaintiffs were relying on "corporate conscience" rather than written contract); Ozier v. Haines, 103 N.E.2d 485, 487 (Ill. 1952) ("moral wrong" of defendant who refused to perform an oral agreement did not justify use of promissory estoppel when statute of frauds had not been satisfied).

83. In describing the principle which invokes the doctrine of quasi-contract, one court referred to the obligation imposed by the court as arising "from the law of natural immutable justice and equity." Baily v. West, 249 A.2d 414, 417 (R.I. 1969) (quoting 12 AM. JUR., *Contracts*, § 6 (1938) (discussion of quasi-contract)).

84. Liberty interests are constrained by the idea of justice which rests on twin concerns in public law of fault and harm. The idea of unjust enrichment is one which crosses many of the boundary lines in American law, through contract and tort, and the law governing fiduciaries (which is itself an amalgam of contract and tort). GEORGE E. PALMER, 1 LAW OF RESTITUTION, § 1.1

the Protestant ethic or the Anglo-American concern with the protection of property interests. More recently, it has been used in connection with reliance theory and the concern with the harm caused by a promise when responsibility for that harm fairly can be assigned to the promisor because the harm was reasonably foreseeable.[85]

Although the phrase "morals of the marketplace" has been used to symbolize the absence of altruism and an expectation that individuals will act in their own self interest,[86] it has never been synonymous with immoral behavior. Contract law is not neutral or non-judgmental. It employs concepts of harm and fault. Harm and fault are the magnetic poles of the American moral compass. When the evolution of contract law or the law governing exchange relationships is described by some scholars, they note the move from a morality and an ethos which exalted individualism and self reliance to one which is collectivistic, concerned with social complexity, interdependence, and ethical notions of social

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(1978). The principle of unjust enrichment is expressed in the law of restitution. *See generally* RESTATEMENT OF RESTITUTION (1988); PALMER, *supra*, at § 1.1. In contract law, unjust enrichment may support a promise without consideration, *id.* at § 6, and restitutionary recovery is allowed in circumstances when there has been breach of the contract or the contract is void or avoidable. *Id.;* RESTATEMENT (SECOND) OF CONTRACTS §§ 370-77 (1981) (restitution). Fault here amounts to the receipt of a windfall; getting something for nothing.

85. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979) (promissory estoppel).

86. I would venture that almost every graduate from law school in recent memory has had occasion to read the words of Judge Cardozo who described the fiduciary duty of partners or joint ventures as something "stricter than the morals of the marketplace." Meinhard v. Salmon, 249 N.Y. 458, 463, 164 N.E. 545, 546 (1928). *See, e.g.*, Randy E. Barnett, *Some Problems with Contracts as Promise*, 77 CORNELL L. REV. 1022, 1023 (1992) (describing himself as one who ascribes to a "classical liberal conception of justice"). Mr. Barnett objects to the "tortification" of contract law, that is the movement from a private law to public law regime, because it violates the ideal of assent, itself an expression of commitment to individual autonomy and liberty. *Id.* at 1025-26.

duty.[87] If this were true, I could say that American law has embraced an ideal found in Jewish law, the ideal of community which creates social duties.

I think this conclusion might be premature, ours is not a morality which imposes an affirmative obligation to help one another. Nor is it a morality which holds us all accountable for the wrongdoing of particular individuals. The difference between Jewish law and business law in the United States is the individualization of morality.

We are still uncomfortable with the idea of communal responsibility for the moral climate in our society. The debate over affirmative action, for instance, is fueled by a rejection of the idea of collective guilt as much as it is by a commitment to the idea of a meritocracy.[88] While there is a real commitment in some quarters of our society to solving the problem of homelessness and hunger, very few people would accept the idea that they were personally responsible for the problem or personally obligated to do something about it.[89] In fact, as the problem grows and be-

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87. Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and the Evolution of Contract Law*, 18 AM. BUS. L.J. 139 (1980).

88. *See, e.g.*, Jude P. Dougherty, *Collective Guilt*, 35 AM. J. JURIS. 1 (1990) (discussion of extent to which modern corporations are "victims" of "new modes of thought" which are not "dispassionate" in a "professional way" but evidence "moralism of the left" in dispensing with need to show intent or even knowledge of harm being done, which author thinks reflects a creeping of notion of collective guilt into legal theory).

89. Phil Collins, the song writer, describes our reaction to homelessness pretty accurately in his image of a man who is asked "Sir can you help me? It's cold and I've nowhere to sleep."

> He walks on, doesn't look back,
> he pretends he can't hear her
> starts to whistle as he crosses the street
> seems embarrassed to be there.

PHIL COLLINS, *Another Day in Paradise, on* . . . BUT SERIOUSLY (Atlantic Recording Corp. 1989). Who among us has not done the same?

See the discussion of homelessness in Normal Siegel, *Homelessness: Its Origins, Civil Liberties Problems and Possible Solutions*, 36 VILL. L. REV. 1063 (1991), and more generally, the relationship to legal theory and the

comes more and more visible, the blame and the fault is laid on the heads of the homeless themselves. The danger that they present offers a justification for mass removal.

This book made me wonder what our society would look like if we truly believed in the Judeo-Christian tradition; if somehow the mitzvot concerning assistance to others[90] could be codified. If, in Jewish law, landowners are required to leave a portion of their fields unharvested to provide for the poor and the stranger,[91] there must be some twentieth century equivalent for those of us who are the owners of property and wealth in our society. This mitzvah is not a mere exhortation to do good and be generous or charitable; it is not the biblical equivalent of the volunteerism promoted by the Reagan/Bush administration. It is not a matter of education, for education "may simply create good but unfulfilled intentions."[92]

It is the existence of this duty which legitimizes and justifies a system of taxation. It is a duty cognizable at law, removing the duty to care for the poor and the weak and the inefficient from the arena of the "individual conscience" and making morality a matter of public law.[93] Most Americans chafe at the idea of prescriptive morality, and the political and legal expression of that morality in a system of taxation or social welfare supported with public funds.

Jewish Business Ethics also describes an ethical system which is familiar to many of us because we do accept the idea of proscriptive morality. We find both harm and fault in situations which involve predation, the exploitation of human weakness to obtain

treatment of the underclass in Richard Delgado, *Pep Talks for the Poor: A Reply and Remonstrance on the Evils of Scapegoating*, 71 B.U. L. REV. 525 (1991).

90. *See* TAMARI, *supra* note 6, at 21-22.

91. *Id.* at 31.

92. *Id.* at 22.

93. See the discussion of the different kinds of "advantage-taking," some of which are acceptable and some which are not in Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) (discussion of ideals of autonomy, liberty, and equality contained in a libertarian approach to contract law).

more than what could have been gotten fairly.[94] The objection to behavior which is oppressive is grounded in our aversion of deceit, unearned wealth, and to the ideal of equality, not material but dignitary.

The chapter entitled "Just Prices and Just Profits"[95] is a perfect companion piece to any discussion of the unconscionability doctrine. The chapter contains familiar concepts, including a story which illustrates the meaning of a phrase like "the absence of meaningful choice"[96] or a discussion of the need to protect the party who is "weaker, ignorant of his rights, disadvantaged or misled."[97] While there is heavy emphasis on the relationship between the control of information and the possibility of exploitation, there is also some recognition of structural inequality.[98]

Even in this area of congruence between Jewish law and American Law, there are differences. Jewish law and American law have different conceptions of fault. Jewish law does not seem preoccupied with fault on the part of the person who shows poor judgment or who does not exercise care in entering into a contract.[99] In contrast, in the United States, fault may sometimes

94. The antecedents for contract doctrines of adequacy of consideration and unconscionability have been traced back to "Christian just price theorists of the Middle Ages" and Aristotle. There was no mention of Jewish law. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 283-84 (1986). Mr. Barnett would have profited from exposure to Jewish law in formulating his discussion of the historical antecedents of contemporary notions of unconscionability and adequacy of consideration. I refer him to Chapter 5 of this book entitled "Just Price and Just Profits." TAMARI, *supra* note 6, at 78-91.

95. TAMARI, *supra* note 6, at 78.

96. The example given is about one whose life was at risk and who agreed to pay an excessive price for transportation to a safe place. *Id.* at 82.

97. *Id.*

98. *Id.* at 85.

99. Although some forms of oppression are eliminated when ignorance is cured by the disclosure of information, there is no suggestion that the burden of ascertaining the relevant information lies with the person who did not possess the information. Nor does knowledge and assent to overcharging automatically eliminate oppression. *Id.* at 82. Oppression can be found in the circumstances of the transaction or the position of the two parties. In one example the price charged was so excessive, it was viewed as oppressive. *Id.* at

work against a weaker party because the value placed on self-reliance is expressed as a legal duty to be vigilant and to read and understand contractual terms.[100] Many of the students I teach believe the failure to protect oneself is the greater evil, more culpable than the use of superior bargaining power to extract favorable terms.[101]

What distinguishes Jewish law and legal doctrines like unconscionability from the economic model offered by some scholars is opposing views of humankind. The former acknowledges imperfection and compensates for our weaknesses while holding out an ideal of human behavior. The latter is a theory built on a faulty premise, the existence of an ideal, the rational person. There is also an opposition with respect to the proper response by the community, or by the state acting for the community, or by a judge acting for the state.

The fact is that if the law does not have a moral or ethical component, it is difficult to justify the interference of a court in the voluntary relationships between individuals. Jewish law is less worried about issues of legitimacy: issues of arbitrariness on the part of judges, the possibility of oppression by a political agency which is not bound by the constraints of our elected representatives. A couple of years ago the Director of the Jewish Law Institute at Touro Law Center made a presentation to the faculty in which he discussed the *get*, the Jewish method of obtaining a divorce. Divorce is a contractual matter, but it is exclusively within the power of a husband to give or withhold the *get*. The possibility for oppression is self-evident.[102]

82-83. According to Tamari, when society abandons concern for the "unfortunate, the inefficient or the stupid," it is a selfish society and it is doomed. *Id.* at 25.

100. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981) (risk of mistake is borne by contracting party as to presently existing circumstances when he treats his limited knowledge as sufficient unless otherwise provided for by contract between parties, or a court allocates risk to other party as reasonable under the circumstances).

101. *But cf.* TAMARI, *supra* note 6, at 42 (discussing fault on the part of market participant who is injured by insider trading activities).

102. *See supra* notes 4, 18 and accompanying text (describing the plight of the *agunah*, the wife whose husband refuses to give her a divorce).

When I was told that a man had been jailed in Israel because he refused to give his wife a *get*,[103] I was floored. I did not understand how imprisonment could be used to coerce someone to give a *get* if the *get* was a matter of contract, an area of voluntary action. The answer was simply that one who refuses to give a *get* when he has a duty to do so is not expressing his "true" will. His true will would be obedience to the law. When a man is forced by the court to comply with the law and give a *get*, the law assumes that this is his true intention. What he thought was his was his intent was really an evil "inclination."[104]

Jewish Business Ethics describes a legal system where a contract is the central organizing principle; where "[c]ontracts, verbal or written, understood or implied, imposed by law or by local custom, are considered almost sacrosanct."[105] And yet, in more than one instance, a contract will not be enforced when its enforcement would violate a moral or ethical restriction on the behavior of one of the contracting parties. Of course, imprisonment is not a sanction cognizable in our system of private law.[106]

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103. Hugh Orgel, *80 Year Old Jailed 30 Years For Refusing His Wife A Get*, JEWISH PRESS, Feb. 19-25, 1993, at 1 (old man jailed because Israel "follows religious law in matters of marriage and divorce").

104. Breitowiz, *supra* note 4, at 332 n.79.

105. TAMARI, *supra* note 6, at 83.

106. Imprisonment is not a sanction cognizable in our system, with one important exception, the non-payment of child support. *See, e.g.*, Frank J. Murray, *Bush Targets Deadbeat Dads and Moms*, WASH. TIMES, Oct. 1, 1992, at A4 (discussion of "deadbeat Dads"). President Bush proposed six month jail sentences for first offenders and two years for repeat offenders. *Id.* Congress already passed a bill which criminalized the failure to pay child support. Child Support Recovery Act, Pub. L. No. 102-521, 106 Stat. 3403 (codified at 18 U.S.C. 228 (1992)). This statute only applies to intra-state proceedings. Courts can achieve the same result through the use of contempt citations. I have no doubt that the actions of a court, even without the authorization of a statute which criminalizes such behavior, would be viewed as justified because support of minor children is a moral obligation in our society. Ridgway v. Baker, 720 F.2d 1409 (5th Cir. 1983) (indigent father imprisoned for contempt had right to counsel particularly since his confinement could have been indefinite).

The rationale offered by Jewish law for the coercion sounded familiar. It reminded me of the trouble students have with *Jacobs & Young v. Kent.*[107] Judge Cardozo's opinion inflames many students who react to it, as did the dissent, as a violation of the liberty interests of the owner who contracted for the installation of Reading Pipe.[108] One line in Judge Cardozo's opinion has always fascinated me. He referred to the immaterial breach, "[t]he margin of departure within the normal range of expectation," and then continued:

> From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and the probable.[109]

The discussion of Jewish law helped me understand what Judge Cardozo meant in that passage.[110] Unlike Judge Cardozo, my

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107. 230 N.Y. 239, 129 N.E. 889 (1921).

108. *Id.* at 247, 129 N.E. at 892.

109. *Id.* at 242, 129 N.E.2d at 891.

110. I have always used biographical information on Justice Cardozo in my classes, including the fact that Justice Cardozo was a Sephardic Jew because I thought it was significant although I did not know how. *But see* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990). Judge Posner objects to the application of the term "saint" to Justice Cardozo. "The people who call Cardozo a saint know little about saints and have succumbed to the American habit of sanctifying law." *Id.* at 8. He states that Justice Cardozo "appears to have had no religious convictions," *id.* at 7, 8, although he also notes that Justice Cardozo's writings display "a strong streak of moralism." *Id.* at 5. I do not know whether Justice Cardozo went to Hebrew school or had a bar mitzvah, but I assume he did. I do not know whether he went to synagogue only on Yom Kippur, or not at all. I do not know whether he read Maimonides, but I assume he did for he has been described as a "bookish" man. *Id.* at 6.

Justice Cardozo's use of reasonableness might be drawn from Aristotle or St. Thomas Acquinas. Because he was Jewish, I prefer to believe that Justice Cardozo's concern with justice and oppression, and his use of the idea of "presumed intention" are derived from Maimonides. Judge Posner says that it was Justice Cardozo's civility, his courteousness as a colleague which made him like a saint. *Id.* at 7-9. I wonder if Judge Posner has read the famous story

students have difficulty accepting a rule of law which admits human imperfection or which restricts intention to that which is either reasonable or probable. Reasonableness is a synonym for the collective interest. Liberty, not morality, is the touchstone of American ideology.

Perhaps that is the reason why law and economics is so attractive to the first year law student. Economic analysis ignores the "messy part of human interaction"[111] and creates relationships which are mental constructs, relationships which exist only in men's minds. It is theory which purports to be neutral, but it also validates assumptions about human behavior which justify the enforcement of unreasonable provisions or unreasonable behavior. If people who contract are assumed to be rational, there is no need to monitor the fairness of terms or the reasonableness of behavior. In contrast to Jewish law, law and economics theory would have American law adopt legal rules which promote detachment rather than affiliation; rules which subordinate communal interest in ethical behavior to the liberty interests of the individual.[112]

In the United States, contract theory has become an instrument for the limitation of duties which have a moral or ethical component. While economic theory can be used to justify government intrusion in contractual relationships, as in the use of "gap fillers" in modern commercial law, the intervention by the state has been justified by arguments which claim that such "off the

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of Hillel who was challenged by a non-Jew to teach him the whole Torah while he stood on one foot. Hillel said to him, "What is hateful to you, do not to your neighbour: that is the whole Torah, while the rest is the commentary thereof; go and learn it." *Babylonian Talmud, Shabbath at* 31d. Perhaps Justice Cardozo was a saint because he was a man who lived his life according to the law as Hillel taught it.

111. *See* Bruner, *supra* note 14, at 2-3.

112. *See The Responsive Communitarian Platform: Rights and Responsibilities*, 2 RESPONSIVE COMMUNITY 4 (1991) (discussion of Communitarian "platform" that responsive community rights are responsibilities). *See also* Fred Strasser, *Searching for the Middle Ground*, NAT'L L.J., Feb. 3, 1992, at 1.

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rack" terms increase efficiency or reduce transaction costs.[113] "Classical" law and economics theory does not contain a moral or ethical component. In its aspiration to neutrality and objectivity[114] it is decidedly amoral,[115] yet the terms which are supplied by one statute, at least, the Uniform Commercial Code, are measured against a benchmark associated with moral and ethical standards, a standard of reasonableness.[116]

Law and Economics competes for adherents with legal realism, consent theory, critical theory, tort theory, and relational theory.[117] In marked contrast to these other approaches which seek

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113. *See* David Charner, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991).

114. Because economics is concerned with efficiency rather than fairness, it appears to be neutral and unbiased. The use of formulas, like the Pareto system, purports to be neutral and non-judgmental about the initial allocation of goods. *See generally* BARNES & STOUT, *supra* note 55.

115. *See, e.g.*, DEL. CODE ANN. GEN. CORP. LAW § 102(b)(7) (1991); N.Y. BUS. CORP. LAW § 402 (b) (McKinney 1993). For criticism of the use of "contract" principles to justify director's exculpation statutes, see generally Lucian Arye Bebchuck, *The Debate On Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1985); John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay On The Judicial Role*, 89 COLUM. L. REV. 1618 (1989). Just to show how far a bad idea can go on its own momentum, partnership law has recently been infected by the contractarian theory. *See generally* REVISED UNIF. PARTNERSHIP ACT (1992) (drafted, approved, and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws). Prior to the current revision, the fiduciary duty of partners could not be modified *in advance* by the partners.

116. *See* UCC § 2-204 (stating that a contract can exist despite missing terms if there is a "reasonably certain basis for giving an appropriate remedy"); UCC § 2-309 (providing for delivery within a "reasonable" time); § 2-305 (supplying price term, a "reasonable price at the time of delivery"). Elsewhere I have argued that "[r]easonableness is an idea that is at the heart of our legal system. It is central to our belief in the morality of the law itself." *Riots*, *supra* note 20. *See also supra* notes 33-38 and accompanying text (discussion of the relationship between the ethical and the moral); *supra* note 110 (discussion of relationship between intent, reasonableness, and morality in discussion of Justice Cardozo and Maimondies).

117. There is a lovely piece in my contracts book, adapted from an article by Professor Lewis Kornhauser, Lewis A. Kornhauser, *The Resurrection of Contract*, 82 COLUM. L. REV. 184 (1982) (reviewing CHARLES FRIED,

to affirm the reasonable expectation of the parties or to recognize and enforce the claims which grow out of voluntary relationships, law and economics is a conscious attempt to avoid revealing moral and ethical choices. What is distressing for some of us is the extent to which the sanctity of contract and the liberty interests have been manipulated to further an ideology of progress — *laissez-faire* economics coupled with a belief that the creation of wealth is a moral imperative.[118] This theory fashions legal rules which are not reasonable but "efficient;" the terms supplied are those of the "value maximizer" rather than the terms of the reasonable person. Law and economics, whatever its form, does not ask whether or not such a contract, if it did exist, would be moral or ethical; it does not ask whether such an agreement should be enforceable at all.[119]

Jewish Business Ethics provides an alternative to a model of oppositional morality — conceptions of fairness and justice on one hand and progress and efficiency on the other. Jewish law balances the interests in progress and economic activity with the need to promote the welfare of a community.[120] The author's discussion of environmental issues is illustrative. One has only to

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CONTRACT AS PROMISE (1981), and IAN R. MACNEIL, THE NEW SOCIAL CONTRACT (1980)) that organizes contract theory chronologically and categorically. The contemporary scene is described as "Stage Three: Post-Realist Angst and the Competing Theories of Contract," MURPHY & SPEIDEL, *supra* note 80, at 90-95.

118. In the words of one writer, the law and economics school, particularly those of the "Chicago" school, "seem compulsively committed to preserving the prerogatives of majorities and the vulnerability of at-will employees and close corporation minorities as essential to the maintenance and enhancement of the productivity of business enterprises." John A.C. Hetherington, *Bargaining for Fiduciary Duties: Preserving the Vulnerability of the Disadvantaged?*, 70 WASH. UNIV. L.Q. 341, 351 (1992).

119. *See, e.g.*, Jason Scott Johnson, *Opting in and Opting Out: Bargaining for Fiduciary Duties in Cooperative Ventures*, 70 WASH. UNIV. L.Q. 291 (1992) (author attempts to provide alternative theory to answer the more "typical" assumption in law and economics that fiduciary obligations are "inefficient").

120. TAMARI, *supra* note 6, at 128-46.

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compare the halakhic approach to one scholar in the field of corporate law who employs economic theory.[121]

One of the principal proponents of law and economics in the corporate area is Daniel Fischel. In an article which appeared ten years ago, Fischel talked about ethics and economic theory in a way which made my head spin. He argued that while a firm which pollutes a stream imposes a cost on the users of the stream, if the firm were to use more expensive methods which kept the stream clean, the users of the stream would be imposing a cost on the firm's investors, employees, and consumers.[122] Because each case would involve costs which were greater than the benefits to the one who imposed the costs, the author concludes that "neither polluting nor failing to pollute is *a priori* the 'ethically' or 'morally' correct course of action."[123]

What Fischel overlooks is the inequality in his moral equation. The harm to a corporation, a diminution in profits, or even an economic loss, is given the same weight as harm to human beings, diminution in life expectancy, in the quality of health, in the genetic make up of human beings, in the ability we have to procreate.[124]

The political reality we face today is one where the environmental movement has become the villain. The protectors of wildlife, air, and water have been identified as the "radicals" who pose the greatest threat to capitalism today.[125] Anti-envi-

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121. *See generally* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982).

122. *Id.* at 1270.

123. *Id.*

124. *Id.* at 1269-70

125. In a recent issue, the editors of Forbes summarized their opposition to environmentalists;

> No one—least of all Forbes—questions the necessity of protecting our natural environment against the ravages of industrialization. But we have frequently quarreled with the more extreme fringes of the environmentalism movement, the neo-Malthusians who want to end economic growth and the green socialists who want to use the environment to expand government control over our lives . . . .

James W. Michaels, *A Prisoner of Politics*, FORBES, July 6, 1992, at 10 (editorial). The conflict over the preservation of endangered species has

ronmentalists have begun a moral crusade of their own and the moral imperative that moves them is economic growth and the profit motive. Removing morality as an issue is one way of neutralizing the power of the environmental movement and the persuasiveness of the arguments in favor of greater government regulation of industry. Fortunately for most of us, common sense and human decency have prevailed over the sophistry of economic arguments.

Pollution is not a matter of corporate governance unless it is a law that must be obeyed, and, in the regulatory scheme Fischel proposes, the legislature's charge is to resolve the problem by considering the "result that will duplicate what the parties would have bargained for had they been able to do so at no cost."[126] Hypothetical contracts ungrounded in any ethical considerations should not be a safe harbor for those who behave in a way which is immoral or unethical. The law does not allow us to contract away certain rights.

Jewish law does not allow a person to contract away the right to be free from the dangers posed by pollution.[127] Halakha is a moral and ethical system. American law, according to Fishel, need not be. I am left with the feeling that Fischel has been disingenuous here; that in fact, he is moved by a different moral vision — a vision of human progress propelled by human creativity and a desire for profit.

In Jewish law there seems to be less confusion about the relationship between human need and ethical and moral imperatives. The moral basis for the regulation of pollution is found in

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convinced some members of labor and the working class that environmentalists are members of the elite. *See* Ted Gup, *Owl v. Man: In the Northwest's Battle Over Logging Jobs Are At Stake, But So Are Irreplaceable Ancient Forests*, TIME, June 25, 1990, at 56; *see also* Ruth Marcus, *Endangered Species Act Must Change, Bush Says; People and Jobs Deserve Protection Too*," WASH. POST, Sept. 15, 1992, at A8 (attempt to capitalize on this issue in the Presidential campaign).

126. Fischel, *supra* note 121, at 1270 (citing R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19-28 (1960)). This kind of thinking is not far from the regulatory scheme proposed by President Bush which would have allowed companies to buy and sell the right to pollute.

127. TAMARI, *supra* note 6, at 136.

biblical admonitions with which many of us are familiar. "Thou shalt love thy neighbor as thyself" and "Thou shalt not stand upon thy brother's blood."[128] There is no option to pollute and then pay damages. As the author notes, "payment of damages is not a moral act, it simply restores that which we have destroyed."[129]

IV. ETHICS AND ABSTRACTIONS: CORPORATE MORALITY AND THE LOYALTY ETHIC

If there is one criticism that may be leveled at the author of this book, it is the failure to explain the application of law to the corporate entity. There is some explanation of the rules against oppression and the imposition of fiduciary obligations on shareholders in closely held corporations.[130] There is even a discussion of the moral assumptions which support rules against insider trading.[131] However, there is no explanation of how Jewish law treats actions taken in a representative capacity.

The idea that a corporation is dangerous because it has no soul is one which has lost its power in American law. Yet the fear and resentment of corporations is with us still. In my Business Organizations class we discuss some of the obvious reasons for this fear, reasons which were expressed in a decision by Justice Brandeis in *Louis K. Liggett Co. v. Lee*[132] at the time of the Great Depression. The fears were not irrational or unfounded for "the evils attendant upon the free and unrestricted use of the corporate

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128. *Id.* at 139.

129. *Id.* Economic theory has influenced practice in the field of environmental law. Scholars discuss efficiency, transaction costs and value maximization; the regulators experiment with emissions trading policies. *See generally* Brennen Van Dyke, *Emissions Trading to Reduce Acid Deposition*, 100 YALE L.J. 2707 (1990).

130. *See* TAMARI, *supra* note 6, at 30, 86; *see also supra* notes 95-98 and accompanying text.

131. *See* TAMARI, *supra* note 6, at 42, 86 (discussing dishonesty as a function of the possession of information which others cannot or do not know).

132. 288 U.S. 517, 541 (1933) (Brandeis, J., dissenting).

mechanism" are still with us today.[133] We still suffer from the "insidious menace" associated with the aggregation of capital, the danger that presents to democratic institutions,[134] the harmful effect of the impersonal and anonymous nature of corporate management and its relationship to employees,[135] the foreclosure of opportunities attendant upon the creation of monopoly power.[136]

The author adheres to the view that the separation of ownership and control have caused a moral crisis in the corporate setting.[137] What he does not explain, and perhaps he thought this would be self-evident to his readers, is that as far a Jewish law is concerned, there is no such thing as a corporation. Ethical questions must be resolved by examining what it is the halakha requires of human beings. There are only two choices in the area of corporate law: either the shareholders are responsible for the conduct of the business of the corporation, or the directors and managers are. While that might seem to make matters easier, it does not. The problem of the "unnatural" person, the corporate entity, is no easier to solve in Jewish law than it is in our secular corporate law.[138]

I would not disagree with the author's basic premise that ownership includes both privileges and responsibilities. While it is clear that the shareholder is the owner and owners normally are

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133. *Id.* at 548 (Brandeis, J., dissenting).

134. *Id.* at 549 (Brandeis, J., dissenting). The idea that the principles of representative government are subverted by those who have or control money and resources as a populist sentiment found a receptive audience in the American electorate in 1992. *See, e.g., Transcript of Clinton's Address to a Joint Session of Congress*, N.Y. TIMES, Feb. 18, 1993, at A20-L (discussion of campaign finance reform and lobby reform in President Clinton's address to joint session of Congress); *see also* Flynn, *supra* note 52, at 131-33 (discussing granting of contractual rights to corporate person and extent to which that limits "the power of the individual to enlist the aid of the government against the activity of the corporate collective").

135. *Liggett*, 288 U.S. at 549 (Brandies, J., dissenting).

136. *Id.* (Brandies, J., dissenting).

137. TAMARI, *supra* note 6, at 27.

138. For a discussion of the various theories of the corporation which have found expression in the American legal tradition and the conceptual problems created by each, see David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990).

responsible for the way in which or wealth is used,[139] there is far too little discussion. The fact that in most public corporations, the traditional concept of ownership does not apply. In truth, the privileges of ownership, the wealth and the power associated with ownership, belong to the corporate managers.[140] There is too little discussion by the author of the ethical considerations that must govern the conduct of the officer or manager of the business other than the obvious prohibitions on robbery or the need for disclosure of conflicts of interest.[141]

As we have of conceived the role of corporate managers, it is far too easy for them to disclaim responsibility for the decisions they make. Their personal morality, they might argue, is irrele-

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139. In "Mine and Yours," the author compares the deleterious effect of the elimination of a concept of private property in several settings: European communist economies, the Israeli Kibbutz, and the modern corporation. TAMARI, *supra* note 6, at 26-27. These three institutions all have one thing in common, the transfer of moral responsibility. He notes the separation of identity between the shareholders and the corporation and suggests that the result is the "feeling" on the part of shareholders that "they have no role in supervising the illegal or immoral acts of directors." *Id.* at 27. Since responsibility for managing most corporations resides with corporate officers rather than directors, some corporate misconduct occurs without the active participation of directors, making it even more difficult for the shareholders to control such behavior.

I would agree with the author that the separation of ownership and control has eliminated the connection between the ownership of property and the responsibility for preventing it from damaging others. This separation has obfuscated the ethical duties of managers who feel constrained in their decision making by a loyalty ethic which requires more than the preservation of property, but the creation of profits. *See infra* notes 150-154 and accompanying text (discussing loyalty ethic).

140. *See* Rodewald, *supra* note 61, at 443, 462. In discussing whether the agent of society theory will work, Rodewald, a critic of the idea of the socially responsible corporation, described the value system of the normal manager in the following way: Managers are "more likely . . . to be committed to a capitalist competition that has satisfied many of their important wants, and which provides the source of their motivation and standards of achievement and self-worth, and ultimately, their economic, social and political power and prerogatives." *Id.* at 462.

141. *See* TAMARI, *supra* note 6, at 26-27.

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vant.[142] They are bound morally and legally to advance the interests of the shareholders, but the personal morality of shareholders is also irrelevant.[143]

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142. *See* Martin Benjamin & Daniel A. Bornstein, *Moral and Criminal Responsibility and Corporate Persons, in* SAMUELS & MILLER *supra* note 38, at 277. (argument that corporate managers must act impersonally in implementing organizational goals (profit only) and responsibilities are determined by role); Michael Distelhorst, *Living in the Faith of Our Special Myths*, 19 CAP. U. L. REV. 1135 (1990) (discussing proposal by Professor Nancy Moore for a "radical reformulation of professionalism" which would include elimination of "role differentiated ethics"). As the author puts it so eloquently, "In refusing to experience the tension between the ethics of our role and our personal ethics, we risk losing touch with some of who we are . . . ." *Id.* at 1337. I might add that awareness of this "tension" might lead us to question the professional "ethics" we have embraced.

143. I have always been fascinated by the footnotes in State *ex rel.* Pillsbury v. Honeywell, Inc., 191 N.W.2d 406 (Minn. 1971), where the court tried to answer the question — who controls the political and social philosophy of a corporation? The court concluded that this was not a shareholder's concern at least not a shareholder who was thought to have no real "investment motivation" and whose opinion differed from that of the "company in which he becomes a shareholder." *Id.* at 411-12. On the other hand, the court also referred to the language in the opinion in Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated,* 404 U.S. 403 (1972) (another case which involved an attempt to stop production of weapons used in Vietnam), criticizing the argument by the management of Dow Chemical Company that they could run the company according to their "personal, political and moral prejudices." *Pillsbury*, 191 N.W.2d at 412 n.7 (citing *Medical Comm. for Human Rights*, 432 F.2d at 681).

Over the years there has been a remarkable change in the perception of the appropriateness of such activism by owners. Owners which have some sort of public trust (pension funds for state or municipal employees) and religious institutions have utilized federal regulation 17 CFR § 240.14(a)(8), designed to promote shareholder democracy to good advantage. The Securities and Exchange Commission, or at least the staff of the agency, has taken the position that shareholders may submit proposals with respect to policy matters (but not ordinary business matters) for a shareholders' vote. The most recent amendments to the proxy rules make it even easier for shareholders to communicate with one another. Regulation of Communications Among Security holders, Exchange Act Release No. 30,849, Fed. Sec. L. Rep. (CCH) ¶ 85,002 (June 24, 1992).

Because corporate management has been forced to listen to shareholders, we have seen systematic and continuous efforts by some institutional shareholders

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Putting aside for a moment the debate over the desirability or the feasibility of transferring power and control from the managers to shareholders, I tried to approach this problem from the perspective of a student of halakha. How could it be argued that

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and social activists to promote reform and to force these corporations to act morally and ethically. The regulations include categories which allow the management to exclude matters which are immaterial from a financial standpoint, 17 CFR § 240.14a-8 (c)(5), or which touch on ordinary business matters, 17 CFR § 240.14a-8 (c)(7). SEC Action Letters reflect certain value judgments on the part of the staff. Sometimes they are sympathetic to the cause, at other times they are not. Shareholder proposals have been used effectively to promote reform in the area of employment discrimination *see, e.g.*, 1991 SEC No-Action. LEXIS 143 (General Electric shareholder proposal, sponsored by General Board of Pension of the United Methodist Church, for report on affirmative action programs could not be excluded because it was a matter of social policy not just a matter of conduct of ordinary business operations under 17 CFR § 14a-8(c)(7)); but this position was reversed by the SEC Commission in Capital Cities/ABC on April 4, 1991. Capital Cities/ABC, Inc., SEC No-Action Letter, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,690, at 78,116 (Apr. 4, 1991). *See also* Cracker Barrell Old Country Store, Inc., (Oct. 13, 1992), 1992 SEC No-Action LEXIS 984, (corporation could exclude shareholder proposal of New York City Employees' Retirement System asking for policy of nondiscrimination with regard to sexual orientation). The retreat on certain issues might reflect the realization that once a matter has been classified as a social issue, the staff has no ability to monitor the "righteousness" of the shareholder proposal.

A recent anthropological study of institutional investors confirms the suspicion that fiduciary responsibilities of fund managers (as codified in ERISA) may deter any social consciousness or any tendency to consider ethical issues. *See* John M. Conley & William M. O'Barr, *The Culture of Capital: An Anthropological Investigation of Institutional Investment*, 70 N.C. L. REV. 823 (1992). In this case study of several investment funds, there was a marked difference between public and private pension funds. A difference was noted in the activism of pension funds with respect to corporate governance, gaining positions on the board which would give institutional investors a voice in the decisions made by management. *Id.* at 842-44. However, both private and public pension funds "reacted with hostility" to the idea of social investing, divestiture, and proxy initiatives on the environment or South Africa. *Id.* at 844. Public funds were willing to consider investments which were political, providing indirect economic benefit in the form of jobs or a healthier economy for their beneficiaries provided there was a "decent return" on the investment. *Id.* at 838.

the managers must obey the law in managing the corporate enterprises? I considered the discussion in the book of *lifnei iver*, the stricture against placing a stumbling block in the path of the blind.[144] The principle applies to transactions with Gentiles which, while technically legal, might result in violations of the Torah.[145] The halakha operates on the assumption that Gentiles may be "blind" to the spiritual consequences of particular actions.[146] Perhaps that is sufficient to cover the situation of corporation which cannot "see" the immorality of certain behavior.[147]

Ultimately I was forced to conclude that this will not work because the halakha does not "know," that is, it doesn't recognize the existence of a corporation. If a corporation does not exist, it cannot be blind.

Managers can be said to be guilty of *lifnei iver* because the owners, those who are ultimately responsible for the way in which their property is used, are "spiritually blind," unaware in most instances of the operating decisions made by management. For this analysis to work, we must assume that shareholders, if properly informed, not only would choose to do the "right" thing, but that they would have the power to make management do what they wish.[148]

This use of *lifnei iver* has a certain appeal, but ultimately it is unsatisfactory. It seems artificial and false because it is supported by assumptions which we know are untrue, assumptions which ignore the economic and social reality of the modern corporate

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144. TAMARI, *supra* note 6, at 92-102.

145. *Id.* at 94-97.

146. *Id.* at 93.

147. I say this though I know it is a conclusion with which others have disagreed in the past. See, for example, the tongue in cheek comments of an early practitioner:

> These public-spirited associations, though often alleged to be *soulless*, have proved themselves *not* to be altogether *sightless*, for they have readily seen and promptly taken advantage of every opportunity which a combination of capital, skill, and industry has afforded, to strengthen their doubtful possessions.

REUBEN A. REESE, ULTRA VIRES 25 (1981).

148. *But see supra* note 137 (discussion of the author's acknowledgment of the structural problem, the separation of ownership and control).

enterprise. Shareholders' rights organizations may take heart from the unequivocal halakhic endorsement of the rights and privileges of ownership, but I think it unlikely that these advocates would embrace the corollary principle, shareholder responsibility, quite as enthusiastically. Shareholder activists may object to the transfer of power to management, but it is this transfer which justifies the whole notion of limited liability. It is this transfer of control which makes it necessary for us to hold management, not shareholders, liable for corporate wrongdoing.

Perhaps the *lifnei iver*, the stumbling block in the path of the blind, that confronts us in corporate law is the corporate culture we have created. We transferred control and responsibility to managers of corporations and then we exempted them from the normal moral precepts which govern our individual behavior. Managers engage in questionable behavior, violating the law and their personal morality because they are convinced that it is their duty to do so. Unethical and immoral behavior is presented as honorable behavior.

In the end, we are collectively responsible as a society which has created a culture and institutions that "encourage[] . . . acts forbidden by the Torah."[149] Our blindness to the ethical or moral implications of many corporate decisions has its source once again in the profit motive, but this time the profit motive masquerades as a fiduciary obligation.

This status ethic is the most clearly defined moral and ethical obligation in American law.[150] It is often described as a duty of

149. TAMARI, *supra* note 6, at 99.

150. For a discussion of the ethics of corporate managers see generally NORMAN BOWIE, BUSINESS ETHICS (1982) (discussing role of morality in corporate management); Benjamin & Bornstein, *supra* note 142; Rodewald, *supra* note 61. With respect to the duty of a lawyer see generally Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367 (1992). A very interesting discussion on loyalty from the perspective of moral philosophy is contained in this article on the ethical obligations of lawyers. The author compares the approach to loyalty taken by utilitarians who "view loyalty as generating false moral arguments" because, the morality of loyalty depends on the consequences of the social action involved. *Id.* at 371. The author provides a theory for resolving the apparent conflict between the duty of loyalty and the duty lawyers owe to the community. *Id.* at 404-27. He begins with a

perfect loyalty.[151] Self dealing, appropriation of property, including business opportunities are forbidden by this ethic.[152] Until recently, the fiduciary obligation in the corporate setting meant opportunities to make or maximize profits for shareholders took priority over any obligation owed to the consumers, to employees or to society at large.[153] Most socially responsible acts of

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discussion of the object of loyalty — ideals or people. "Human beings are subject to human frailties, including errors of judgment and egocentrism. Uncompromising loyalty is difficult to defend in the face of such frailties." *Id.* at 372. The fidelity to the ideal of absolute loyalty on the part of the lawyer has defeated claims by lawyers who were whistle-blowers. *See, e.g.*, Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991) (corporate counsel who reported sale of "adulterated" kidney dialysis machines to FDA could not bring an action for retaliatory discharge).

The most troubling aspect of the loyalty ethic is the damage that is done to other ideals, particularly the need and desire for honesty. Lying has become endemic in politics, undermining our sense of well being as a polity. While hypocrisy is tolerable, lying usually is not. See one author's reaction to the dishonesty of a former President. Weston Kasova, *George, Why Can't You Be True?*, UTNE READER at 69 (Nov./Dec. 1992), *reprinted with permission from* WASH. CITY PAPER (Aug. 16, 1991).

151. Meinhard v. Salmon, 249 N.Y. 458, 463-64, 164 N.E. 545, 546 (1928) ("the duty of the finest loyalty . . . [n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior").

152. *But see* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATION (ALI 1992) (proposed final draft). The proposed final draft changed the terminology, and imposed an obligation of fair dealing rather than loyalty. The change, adopted for purposes of "clarity," describes the duties which apply when officers and directors have a "pecuniary interest' in a matter, including transactions which traditionally have been referred to as self-dealing, *id.* at § 5.02, and usurpation of a corporate opportunity. *Id.* at § 5.05.

153. *See* Dodge v. Ford, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."); *but see* Jeffrey N. Gordon, *Corporations, Markets and Courts*, 91 COLUM. L. REV. 1931 (1991) (discussing changes that have been wrought by recent legislation and court decisions in Delaware regarding duty owed to shareholders). The ability of the court to consider interests other than the maximization of the welfare of the shareholders was debated in a symposium issue on corporate constituency statutes. *See* Marleen A. O'Connor, *Corporate Malaise - Stakeholder Statutes: Cause or Cure?*, 21 STETSON L. REV. 3 (1991) (discussing corporate altruism and the idea of directors as agents of society). The most prolific writer and advocate for this position seems to be Christopher

corporations have had to be justified in terms of the long-term positive effect on profits.[154]

In my Business Organizations class, I now use a role playing exercise that I borrowed from a friend who teaches a course in organizational behavior to undergraduate students. When law students assume the position of major shareholders and corporate executives on a Board of Directors of this mythical pharmaceutical company, they have to decide whether to

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Stone. *See* CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATIONS (1976); Christopher Stone, *Corporate Regulation: The Place of Social Responsibility, in* CORRIGIBLE CORPORATIONS, *supra* note 38, at 30.

An attempt to balance the concern between shareholder profits and ethical issues is reflected in the section entitled "The Objective and Conduct of the Corporation." PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 152, at § 2.01. The new section indicates that the corporation should conduct business to enhance "corporate profit and shareholder gain" but "[e]ven if corporate profit and shareholder gain are not thereby enhanced, the corporation . . . [m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business[.]" *Id.* Making a profit is a duty. The corporation "should" do it. However, acting ethically and responsibly is not a duty, although it is permitted.

154. An interesting discussion of legal history and the evolution of corporate law with respect to social responsibility in the context of the doctrine of ultra vires is contained in A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 583-84 (N.J. 1953) (philanthropic donations "sustained within the common law doctrine upon liberal findings that the donations tended to promote the corporate objectives"). The ultra vires doctrine was an attempt to control the power of the corporation.

> This unbridled pruriency for illegitimate commercial procreation, stimulated by successful efforts in the aggregation of wealth and power at the expense of the public wealth, has led corporations to overstep the boundaries designated in their charters within which they are to confine their acts and undertakings and to enter upon the private preserves reserved for individual industry.

REESE, *supra* note 147, at 25-26. While the idea that charitable contributions would violate the duty to shareholders reflects the continuing struggle between shareholders and managers over the property rights — the rights of an owner to dispose of his property, to chose which cause is worthy, and to benefit from the act of philanthropy. Ultimately, it is the managers, not the shareholders who make the decisions and who gain power from these contributions.

withdraw a dangerous drug from the market.[155] They know this is not just some make believe exercise which has no relevance to real life. The first time I used this problem, we had just learned about the dangers associated with the use of silicon implants.[156] Yet in almost every case the students felt compelled to minimize the "harm" to the company and its shareholders. In most cases, their solution was to continue to market the dangerous drug in third world nations.

The reasoning process employed by the students was intriguing. Most of them justified their actions by noting that the Food and Drug Administration (FDA) had not yet acted to remove the drug from the market and that even if it had, the FDA only had jurisdiction over the market in the United States. There was no connection made between the action by the government agency and any moral or ethical concern which might apply to all human beings without regard to national boundaries or national identity. Even if they did have some reservations about the propriety of such action, they felt compelled to do something to prevent the loss by the company of several million dollars. This is, as I have mentioned earlier, an example of profit making as moral

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155. ROY J. LEWICKI, ET. AL, EXPERIENCES IN MANAGEMENT AND ORGANIZATIONAL BEHAVIOR (1988). My students are assigned the Vanatin case involving a drug "considered by experts to be injurious to the health of consumers—even to the point of causing death." *Id.* at 175.

156. Malcolm Gladwell, *FDA Set to Begin Hearings on Silicone Breast Implants*, WASH. POST, Feb. 17, 1992, at A1. The FDA ordered a moratorium on the production of implants on January 6, 1992, and in March, Dow Corning announced that it would not re-enter the market. At Dow Corning, one of the principal manufacturers of Silicone implants, employees altered the data with respect to the production of some of the devices. *Silicon Gel Implant Records Altered*, L.A. TIMES, Nov. 3, 1992, at 4. Employees also disregarded the "cautionary memorandum" written in 1976 from the scientist in charge of the implant's development. *A Full Report on Implants*, S.F. CHRON., Jan. 25, 1992, at A16 (editorial). Questions were raised about the safety of silicone as early as 1973, and in 1976, Congress authorized the FDA to regulate medical devices like the implants, but manufacturers and plastic surgeons objected. Boyce Rensberger, *Top Scientist for Implant Firm Covered Up Findings on Silicone*, HOUS. CHRON., Jan. 18, 1992, at A9. In 1978, the Commissioner of the FDA overruled staff recommendations that the implants be subjected to rigorous testing standards. *Id.*

imperative, an imperative which can neutralize concern for the health and welfare of others; a morality which can remove the moral and ethical restraints which forbid the intentional infliction of harm on other human beings.

CONCLUSION

In recent years, there has been an increase in the concern with issues of moral philosophy by business people and lawyers. In some ways, the questions which are being asked are meta-ethical.[157] We are concerned with the source of our ethical rules as much as we are concerned with the normative ethics, the language and the practices which we use to define right and wrong.

Much blame has been placed on the idea of relativism, the anthropological theory which became ethical relativism, a conundrum for moral philosophers and political theorists.[158] In a manner of speaking, the idea of relativism and the fact of pluralism have so unsettled us as a society that we feel disconnected from one another. In fact, some have suggested that we are doomed unless we abandon multi-culturalism or modify it to eliminate what they feel is a tendency toward cultural entropy.[159]

Uncertainty provokes in some a need for the security of the familiar and so we find a tremendous nostalgia for the past, for traditions which define who we are and what we are all about.[160]

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157. *See generally* JAMES S. FISHKIN, BEYOND SUBJECTIVE MORALITY: ETHICAL REASONING AND POLITICAL PHILOSOPHY 8-9 (1984) (discussing meta-ethics as a branch of moral philosophy).

158. *See* ELVIN HATCH, CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY 8 (1983) ("ethical relativism is generally conceived as standing at the opposite pole from absolutism, which is the position that there is a set of moral principles that are universally valid as standards of judgment").

159. ARTHUR M. SCHLESINGER, THE DISUNITING OF AMERICA, REFLECTIONS ON A MULTICULTURAL SOCIETY 17-18 (1992). According to Mr. Schlesinger, "[t]he ethnic upsurge . . . began as a gesture of protest against the Anglocentric culture. It became a cult, and today it threatens to become a counter-revolution against the original theory of America as 'one people,' a common culture, a single nation." *Id.* at 43.

160. I think it is fair to say that there is no dispute about the existence of shared values or ideals, or even a common belief that those ideas should be

Others cling to deontological ethics, to role morality and the loyalty ethic,[161] or to political or economic ideals.[162]

Given the appeal of the rules of Jewish law presented in this book, I can see why one might be tempted to find a solution to the problem of ethical relativism in an appeal to tradition and culture.[163] As attractive as that might seem as an approach, it is both dangerous and inconsistent with the ideological commitment to diversity and pluralism within this society. While some politicians wish to reaffirm our Judeo-Christian tradition, others would just as soon describe the United States as a Christian nation.[164]

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preserved. We disagree about what it is that we should preserve. Some think that we must preserve the prerogatives and the social structure that existed at the time of the Constitution; others think it important to examine the ideas and the philosophy of the founding fathers. For a critique of originalist theory see generally Morton, *supra* note 35.

For example, if our founding fathers were committed to the ideal of religious freedom, the Free Exercise Clause might mean that it is important not to have any form of "official" prayer; if, however, we look at the idea and the fact that the founding fathers were mostly Christian, you could argue that we are a "Christian" nation. *See* John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 28-29 (1992); Lee v. Weisman 112 S. Ct 2649, 2685-86 (1992) (Scalia, J., dissenting), discussed *supra* note 41. I could speculate that the more literal reading of tradition is one which assuages fear in a country which is confronted with so much uncertainty (a psychosocial analysis), or that it is a struggle to preserve power (a political analysis), but this does not answer the question of why one approach is better than another. The answer has to be one which is grounded in faith, a moral and ethical idea of law and society, or it can be grounded in something called pragmatism. *See, e.g.*, Richard A. Posner, *Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433 (1992) (discussing theories of constitutional interpretation).

161. *See generally* BOWIE, *supra* note 150.

162. *See* SCHLESINGER, *supra* note 159, at 136 (discussing the American Creed); POUND, *supra* note 11, at 15-16, 28-29 (discussing natural law as a political ideal).

163. *See supra* note 41 (discussion of the use of "history and tradition" in Constitutional law).

164. *See* Ann Devroy & John E. Yang, *Bond Admonishes Fordice on Remarks*, WASH. POST, Nov. 20, 1992, at A36; Thomas B. Edsall, *GOP Unity Session Ends in Discord; Mississippi Gov. Fordice Insists the U.S. 'Is a Christian Nation,'* WASH. POST, Nov. 18, 1992, at A1. *See supra* note 41 (discussion of the separation between church and state, the Establishment

If Jewish law seems an appropriate template for our own legal system, it is because of the bridge the talmudic scholars built between faith and human experience. It is a bridge between emotion and intellect which partakes of both realms, satisfying the intellect with the logic of its arguments and the emotions with the power of its stories. This book on Jewish law is important not because it provides a blueprint for the legal system that we should adopt in the United States, but because it contains an idea which might work in a community which is multi-cultural and where the unifying principle must be humanistic.

The work of moral philosophers who grapple with the problem of subjectivism and relativism leads to a similar conclusion. A legal system must have an ethical foundation. It is that ethical foundation that creates ties of solidarity; that produces a sense of community and ultimately a sense of shared culture. The founding fathers embraced an ideal of natural law in which they articulated the general principle that everyone is entitled to "life, liberty and the pursuit of happiness."[165] More recently, an anthropologist argued that normative ethics should be dictated by humaneness, by the idea that people should be treated well, and with sufficient attention to the "wants, needs, interests and happiness" of a people.[166]

It seems to me that the halakha does this. We all need a legal system which provides us with assurances that we will be treated fairly and honestly, without any sophistic resort to abstractions which absolve individuals of responsibility to their fellow human beings; that will eliminate our need to be on guard at all times,

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Clause and the variety of debates over school prayer, invocations and the reference to God); President George Bush, Remarks at the National Affairs Briefing in Dallas, Texas (Aug. 22, 1992), *reprinted in* 28 Weekly Compilation of Presidential Documents 1483, 1486 (1992) (speech by President George Bush that accused Democrats of having a platform which did not contain the three letter word "G-d.").

165. THE DECLARATION OF INDEPENDENCE para 1 (U.S. 1776). *See also* Stevens, *supra* note 160 (discussing relationship between the idea of equality contained in the Declaration of Independence and the idea of liberty contained in the Bill of Rights) .

166. Hatch, *supra* note 158, at 135.

suspicious of the motive or intent of strangers with whom we have dealings; confident that our health and safety is protected by a shared understanding that it cannot be sacrificed in the name of progress, and assured that our physical and material needs can be met without an unnecessary loss of dignity or self respect.

The moral content of a standard of reasonableness derives from the ethical sensibilities of the interpretive community. Jewish law assumes the existence of an interpretive community and the meaning of reasonableness is rooted in the history and the life experiences of that group. In a multi-cultural society, our community continues to expand and to become more inclusive. We must be sure that there are no "outsiders" in the interpretive community which is engaged in the task of defining what is reasonable.

I write this review as a member of an outsider group, as one who has benefited from the idea of cultural relativism, intellectually, emotionally, and personally. I live in concentric communities, inhabiting more than one culture simultaneously. I know that the principle of cultural relativism forces a concession, an agreement that our common culture is not one which should adopt the moral prescriptions of a particular religion. I also know that nothing prevents us from learning from or considering the relevance of other moral or ethical systems in constructing our own. And we will need stories if we are to interpret in any meaningful way the standard of reasonableness we set for ourselves.

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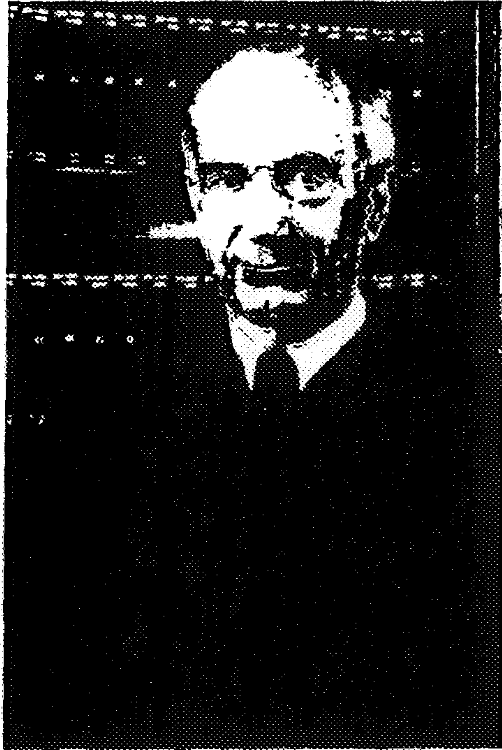

Judge Hancock will be retiring from the New York Court of Appeals in December, 1993. This issue is dedicated to his long service in the courts of New York, and most notably, his distinguished career on the New York Court of Appeals from 1986-1993. His tireless devotion to the law and his commitment to the fundamental tenets of fairness and justice have greatly benefited the citizens of the State of New York.