

**LAW, RELIGION, AND PLURALISM:
THE THOUGHT AND EXPERIENCES OF NATHAN ISAACS*
(1886-1941)**

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* Nathan Isaacs was a professor of Business Law at Harvard who publicly embraced his Jewish identity at a time when that was rare at American universities. Isaacs's academic work was organically bound to his multi-faceted activities in the American Jewish community. He endorsed a pluralist vision of America in which ethnic groups would retain their cultural identities while contributing to the American mosaic. Isaacs encouraged fuller observance of Jewish law and he also urged that Jewish law should adapt to changes in society. He believed that Zionism presented the opportunity to apply the principles of Jewish law to the industry and commerce of a modern state. Thus, he protested the classical Jewish Reform movement's rejection of the authority of Jewish law and Zionism. Isaacs's unique background and analysis of the history of Jewish law enabled him to craft a theory of legal development that suggested that legal systems advance in a cycle of successive periods of codification, literalistic interpretation, legal fictions, principle based interpretation, followed by legislation and re-codification. Isaacs believed that these modes of legal thinking also affected the substantive evolution of the law. Isaacs cultivated his cycle theory under the influences of Hegel, the Historical School of Jurisprudence, and the reaction against formalism in American law in the early twentieth century. However, he was also a defender of the authority of Jewish law and a possible motivation for his work was a desire to refute the arguments of biblical critics. Isaacs's attempt to forge a synthesis among Jewish law, Anglo-American law and society is a remarkable example of fruitful intellectual cross-fertilization.

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I. INTRODUCTION

Nathan Isaacs (1886-1941) was a pioneering figure in the revolt against formalism in American law.¹ He was also a prominent example of an American legal scholar whose study of Jewish law influenced his perception of American law, and whose conception of secular law shaped his understanding of Jewish law. Isaacs made an enduring contribution to the study of Jewish law by fusing his secular and religious learning to present a principled defense of tradition that allowed for flux as social conditions change. Indeed, he argued that this pattern was not unique to Jewish law.² He asserted that this cyclical pattern in the development of law was “something connected with and growing out of human nature.”³ Isaacs’s theories synthesized many different influences. Near the end of his life, Isaacs concluded that “one of the most important things I have learned, or should have learned in the course of fifty years, is that no two fields are really unrelated.”⁴ Accordingly, Isaacs used a multi-disciplinary approach in his application of secular legal thinking to the field of Jewish law and he advocated for an integrated and persuasive understanding of Jewish law’s path and its future.

Part II of this paper summarizes Isaacs’s background and academic career, in which he balanced his Jewish identity with path-

Special appreciation goes to my wife Lauren Schneider for her thorough review and constant support. Though this paper would have suffered greatly without the assistance of all those mentioned above, the remaining errors in fact, style, and judgment are my responsibility alone. I would like to dedicate this paper to my late grandmother Libby Dershowitz Mandel (1924-2011), who always asked hard questions and did not accept facile answers.

¹ See, e.g., DANIEL GREENE, *THE JEWISH ORIGINS OF CULTURAL PLURALISM: THE MENORAH ASSOCIATION AND AMERICAN DIVERSITY* 211 n.50 (2011); JACOB RADER MARCUS, *IV UNITED STATES JEWRY 1776-1985*, at 112 (1993); Larry A. DiMatteo & Samuel Flaks, *Beyond Rules*, 47 HOUS. L. REV. 297, 307-08, 312 (2010) (discussing Nathan Isaacs and his influential career).

² Nathan Isaacs, “*The Law*” and *the Law of Change* (pts. 1 & 2), 65 U. PA. L. REV. 665, 666, 757 (1917) [hereinafter Isaacs, *Law of Change*]; Nathan Isaacs, *Is Judaism Legalistic?*, 7 THE MENORAH J. 259, 266 (1921) [hereinafter Isaacs, *Is Judaism Legalistic?*], available at <http://books.google.com/books?id=df5WAAAAMAAJ&pg=PA259&dq=Nathan+Isaacs,+7+THE+MENORAH+JOURNAL&hl=en&sa=X&ei=p42DTn9Dsfk0QHk4s3LBw&sqi=2&ved=0CEMQ6AEwAA#v=onepage&q&f=false> (last visited Mar. 9, 2013).

³ Nathan Isaacs, *The Schools of Jurisprudence: Their Places in History and Their Present Alignment*, 31 HARV. L. REV. 373, 396 (1918) [hereinafter Isaacs, *Schools of Jurisprudence*].

⁴ Letter from Nathan Isaacs to Adolph S. Oko (July 10, 1936), Adolph S. Oko Papers, American Jewish Archives, The Jacob Rader Marcus Center of the American Jewish Archives (9 Boxes), Cincinnati, Ohio, MS 14 [hereinafter ASO Papers, MS 14, AJA], Box 8, File 3.

breaking innovations in business law and teaching. Part III summarizes and analyzes Isaacs's conception of legal history in general, and Jewish legal history in particular, as a series of recurring cycles in which the methodological styles of codification, literalistic interpretation, legal fictions, interpretation based on equitable principles, legislation, and codification once again alternate as the dominant modes of legal systems. He believed that Jewish law continued to be a vibrant and living law; he sought to counter the view that Jewish law had become rigid and impractically legalistic. Isaacs accepted that there were rigid periods in Jewish law, but he asserted that those periods were followed by flexible periods of equitable and principled application of the law. Indeed, he thought all legal systems experience cycles in which periods dominated by literalistic interpretations were followed by eras of broadminded development of legal principles. Isaacs believed that these methodological styles also have a direct effect on the development of the substance of the law. Isaacs's intimate knowledge of contemporary jurisprudential trends molded his cycle theory. Part IV suggests that Isaacs's cycle theory was heavily influenced by Hegel's conception of cycles in legal history, the nineteenth century Historical School of Jurisprudence, and the anti-formalist revolt in American business and law schools during the early twentieth century. Part V sets forth Isaacs's description of the cycles in Jewish legal history and discusses possible criticisms and responses to his vision. Among the central challengers to traditional Judaism during Isaacs's lifetime were biblical critics who believed that the laws of the Israelites had progressed from a primitive to a more advanced state over the span of centuries. Isaacs's deep-seated opposition to biblical criticism may have been the intellectual impetus to the development of his cycle theory, which asserted that law adapted to provide the best approximation of justice given the condition of society. Part VI analyzes Isaacs's efforts in support of a counter-reformation of Jewish religious life in the United States. His position can be understood as being both formed by and a reaction to the activities of the Jewish Reform movement in Isaacs's native Cincinnati, Ohio. Part VII presents Isaacs's personal views on the future of Jewish law, Zionism, and the American Jewish community within the context of a culturally pluralistic United States.

By describing Isaacs's contributions to Jewish law and

suggesting his possible intellectual motivations we may come closer to understanding the similar challenges facing students of Jewish law today. Isaacs's contributions to Jewish law were enriched by a synthesis with his secular academic interests. The paper is devoted to exploring Isaacs's individual life and work, and his conception of the history of law. Some of Isaacs's specific arguments would perhaps require some reformulation in light of current knowledge of the history of Jewish law. Regardless, the entire body of his career can be viewed as a case study of the possible fruitful interaction of American and Jewish knowledge, culture, and identity.

II. UNIVERSITY CAREER AND COMMUNAL ACTIVITIES

Nathan Isaacs was a brilliant academic whose career bridged divisions between Jewish communal life and the disciplines of law and business. Isaacs was born on July 10, 1886, in Cincinnati, Ohio.⁵ Isaacs earned his A.B. in 1907, his M.A. in 1908, and his economics Ph.D. in 1910, all from the University of Cincinnati.⁶ He also earned his LL.B. at the Cincinnati Law School in 1910.⁷ Isaacs taught at the University of Cincinnati Law School from 1912 to 1918, and served as Assistant Dean there from 1916 to 1918.⁸

After the United States entered World War I, Isaacs entered United States Army Military Intelligence and earned the rank of captain.⁹ Isaacs fought a partially successful campaign to debunk the

⁵ See, e.g., Elcanan Isaacs, *Nathan Isaacs*, in MEN OF THE SPIRIT 573, 578 (Leo Jung ed., 1964) [hereinafter Elcanan Isaacs, *Nathan Isaacs*]; *Nathan Isaacs*, in 9 ENCYCLOPÆDIA JUDAICA 42 (1996) [hereinafter *Nathan Isaacs*, in 9 ENCYCLOPÆDIA JUDAICA]; *Isaacs*, in 5 THE UNIVERSAL JEWISH ENCYCLOPEDIA 596 (Isaac Landman ed., 1969) (1941) [hereinafter *Isaacs*, in 5 THE UNIVERSAL JEWISH ENCYCLOPEDIA]; Joseph S. Shubow, *Professor Nathan Isaacs, Saint and Scholar—Zeker Tsaddik Lee-Berakah*, THE JEWISH ADVOCATE, Boston MA, Jan. 23, 1942, on file at Nathan Isaacs Papers, American Jewish Historical Society (5 unprocessed Boxes) Boston, MA [hereinafter NI Papers, AJHS], Box 5, Bereavement Scrapbook; Roy Tannenbaum, *Jew and Professor: The Life and Personality of Nathan Isaacs as Reflected in His Papers in the American Jewish Archives* (Mar. 14, 1967) (unpublished paper), NI Papers, AJHS, *supra*, Box 3 (containing biographical information regarding Nathan Isaacs) [hereinafter Tannenbaum, *Jew and Professor*].

⁶ Shubow, *supra* note 5; see Nathan Isaacs, *The Mining Laws of Ohio, Indiana and Illinois* (1910) (unpublished Ph.D. dissertation, University of Cincinnati).

⁷ Shubow, *supra* note 5.

⁸ *Id.*

⁹ See Nathan Isaacs, *The International Jew*, 6 THE MENORAH J. 355, 355-60 (1920) [hereinafter Isaacs, *International Jew*] (discussing Isaacs's experiences during the World

anti-Semitic conspiracy theories that flooded United States Army Military Intelligence during 1918 and 1919 while the post-war peace was being crafted.¹⁰ He helped discredit *Protocols of the Elders of Zion* within Army Military Intelligence; the forgery had been spread by a White Russian agent as a genuine document.¹¹ When Henry Ford began disseminating copies of the *Protocols*, Isaacs's drew upon his inside knowledge to refute the pamphlet as a forgery.¹²

Isaacs served as a Thayer Teaching Fellow at Harvard Law School during the 1919-1920 academic year and received a S.J.D. degree from Harvard Law School in 1920.¹³ He served as a Professor at the Law School of the University of Pittsburgh from 1920 to 1923.¹⁴ Dean Roscoe Pound of the Harvard Law School urged Harvard University President Abbott Lawrence Lowell to appoint Isaacs to a position, but President Lowell, who was perhaps motivated by anti-Semitism, deflected that request.¹⁵ Isaacs continued his close association with Roscoe Pound throughout his career.¹⁶ Subsequently, Harvard Business School Dean W.B. Donham invited Isaacs to lecture on business law at his school, without coordinating with Dean Pound, with whom he was not on good terms.¹⁷ Due to Donham's support, President Lowell consented to offering Isaacs a permanent professorship at Harvard Business School in November of 1923, only a few months after Isaacs commenced his visiting teaching position at Harvard.¹⁸ At approximately the same time Isaacs also received a tenure offer from

War I).

¹⁰ JOSEPH W. BENDERSKY, *THE "JEWISH THREAT:" ANTI-SEMITIC POLITICS OF THE U.S. ARMY* 68 (2000).

¹¹ *Id.*; see Isaacs, *International Jew*, *supra* note 9, at 355-60 (recounting in an indirect manner the wide acceptance of *The Protocols of the Elders of Zion* and the manner in which the authenticity of the document came to be discounted by Army Military Intelligence).

¹² See Isaacs, *International Jew*, *supra* note 9, at 355-60.

¹³ Shubow, *supra* note 5.

¹⁴ *Id.*

¹⁵ Letter from Nathan Isaacs to Adolph S. Oko (Nov. 14, 1923) ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 2 [hereinafter Letter from Isaacs to Oko (Nov. 14, 1923)].

¹⁶ See generally THE NATIONAL LAW LIBRARY: AN ENCYCLOPEDIA OF LAW FOR THE MODERN READER (Roscoe Pound & Nathan Isaacs eds., 1939) (continuing their association, Isaacs and Pound co-edited a book series devoted to explaining legal concepts to the general public).

¹⁷ The following account of Isaacs's relationship with Harvard University is an expansion of a section of an earlier article. See DiMatteo & Flaks, *supra* note 1, at 308-10 (discussing Isaacs's time at Harvard University).

¹⁸ Letter from Nathan Isaacs to Adolph Oko (Nov. 14, 1923), *supra* note 15.

Columbia Business School Dean Roswell C. McCrea, who had been attempting to obtain a position for Isaacs at Columbia for a few years. However, Isaacs chose to accept the offer from Harvard Business School.¹⁹ The Columbia and Harvard offers issued a short time after President Nicholas Murray Butler of Columbia had imposed quotas on admission of Jews,²⁰ which led Isaacs to comment to a friend “[w]hat has come over the anti-Semites?”²¹

In 1924, after only a single year of teaching at Harvard, Isaacs received a tenured appointment at the Harvard University Graduate School of Business Administration as a Professor of Business Law.²² In his teaching and scholarship, Isaacs argued for less emphasis on doctrinal questions and urged that greater attention be placed on the functional use of legal devices by businesses.²³ As the senior teacher of law at the Harvard Business School faculty in the 1920s and 1930s, Isaacs helped develop Harvard Business School’s pioneering case method.²⁴ Isaacs taught there one of the country’s first courses in arbitration law.²⁵ In addition to Isaacs’s responsibilities at Harvard Business School, he was a founding member in 1936 of the faculty of the Graduate School of Public Administration at Harvard University.²⁶ He also lectured at Yale Law School between 1937 and 1939 as part of a short lived joint program between the school and Harvard Business School. The program was a landmark attempt to

¹⁹ *Id.*; Eli Ginzburg, *Jew and Negro: Notes on the Mobility of Two Minority Groups in the United States*, in I SALO WITTMAYER BARON: JUBILEE VOLUME 491 (1974). Isaacs taught business law at summer sessions of Columbia University in 1921, 1922, 1923, 1925, and 1926. *Isaacs*, in 5 THE UNIVERSAL JEWISH ENCYCLOPEDIA, *supra* note 5.

²⁰ KEITH GANDAL, THE GUN AND THE PEN: HEMINGWAY, FITZGERALD, FAULKNER, AND THE FICTION OF MOBILIZATION 126 (2008).

²¹ Letter from Nathan Isaacs to Adolph Oko (Nov. 14, 1923), *supra* note 15.

²² *Wins Professorship for One Year of Lecturing: Collaborated with Prof. Shaw on “Law and Business,”* THE HARV. CRIMSON, Mar. 4, 1924, available at <http://www.thecrimson.com/article/1924/3/4/wins-professorship-for-one-year-of/> (last visited Mar. 9, 2013); Shubow, *supra* note 5.

²³ *See generally* Nathan Isaacs, *The Teaching of Law in Collegiate Schools of Business*, 28 J. OF POL. ECON. 113 (1920); Nathan Isaacs, *The Merchant and His Law*, 23 J. OF POL. ECON. 529 (1915) (discussing the practicality of the law as applied to business).

²⁴ *See* JEFFREY L. CRUIKSHANK, A DELICATE EXPERIMENT: THE HARVARD BUSINESS SCHOOL 1908-1945, at 138 (1987) (referring to Nathan Isaacs’s collaboration with Professor Lincoln Schaub).

²⁵ FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 68 n.3 (1948).

²⁶ Shubow, *supra* note 5.

apply in the classroom the insights of the Legal Realist movement, which was skeptical of formal legal rules and stressed the realities of legal practice and the subconscious element in legal thinking.²⁷ Isaacs's eminence in his field was recognized by his induction as a fellow of the American Academy of Arts and Sciences.²⁸

Isaacs's public embrace of his Jewish identity was rare among contemporary legal and academic eminences.²⁹ A few other Jews had previously received tenured chairs at Harvard before Isaacs, but the central role Judaism played in Isaacs's beliefs seems to have been unique.³⁰ Isaacs's stance was distinctive as compared to his Harvard colleagues of Jewish origin, such as Leo Wiener and Harry Wolfson, who sought to transcend their Jewish identities through the universalistic academic community.³¹ In contrast, Isaacs was strict in his personal observance of Jewish law and urged greater observance of Jewish law within the American Jewish community. Isaacs hosted informal classes on Jewish subjects for Harvard and Radcliffe students on Sabbath afternoons throughout the 1920s and 1930s. Rabbi Joseph S. Shubow,³² later a leading Conservative Rabbi in Boston, recounts how as an undergraduate at Harvard he was a member of a study and prayer group in which Isaacs discussed "Judaism, Jewish law, the Bible, the Talmudic tradition, the Rabbinic spirit, Palestine[,] and Zionism" at Isaacs's house on Saturday afternoons.³³ Even after receiving his tenured appointment, Isaacs remained in a vulnerable position at Harvard due to his prominent activities in the larger Jewish community. President Lowell had made it his practice to question Isaacs when the Jewish press

²⁷ See CRUIKSHANK, *supra* note 24, at 191.

²⁸ Isaacs, in 5 THE UNIVERSAL JEWISH ENCYCLOPEDIA, *supra* note 5.

²⁹ See *id.* (describing, a few years after Isaacs's death, his Jewish activities and his membership in a family noted for its adherence to Jewish Orthodoxy).

³⁰ See JONATHAN COHEN, PHILOSOPHERS AND SCHOLARS: WOLFSON, GUTTMANN AND STRAUSS ON THE HISTORY OF JEWISH PHILOSOPHY 31 (Rachel Yarden trans., 2007); SUSANNE KLINGENSTEIN, JEWS IN THE AMERICAN ACADEMY, 1900–1940: THE DYNAMICS OF INTELLECTUAL ASSIMILATION 8, 10–12 (Syracuse Univ. Press 1998) (1991); HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 12 (1960) (discussing the careers of other influential Jewish scholars at Harvard University).

³¹ EDWARD ALEXANDER, CLASSICAL LIBERALISM & THE JEWISH TRADITION 132 (2003).

³² Shubow, *Joseph Shalom*, in 18 ENCYCLOPÆDIA JUDAICA 528 (Fred Skolnik ed., 2d ed. 2007).

³³ Shubow, *supra* note 5. See also LEWIS H. WEINSTEIN, MASA: ODYSSEY OF AN AMERICAN JEW 63–64 (1989).

criticized Lowell and to consult with him about Harvard's dealings with Jewish organizations.³⁴ Isaacs felt intensely embarrassed when articles discussing Harvard in the Jewish press were inaccurate, or when he felt compelled to disagree with the policies of Jewish organizations.³⁵

Isaacs spent much of his time in the 1930s attempting to aid refugees trying to flee from the Nazis.³⁶ Isaacs wrote to a friend: "I have had a good deal of correspondence and many visits from refugees and, what is more tragic, would-be refugees."³⁷ In 1936, he was a delegate at the World Jewish Congress, which under the direction of the prominent leader of American Jewry Rabbi Stephen S. Wise attempted unsuccessfully to coordinate efforts to oppose the National Socialist government in Germany.³⁸ Isaacs also drew upon his old military intelligence contacts to monitor Henry Ford's pro-Nazi activities in the United States.³⁹ In 1940, Isaacs suffered a heart attack from which he was slow to recover. In the fall of 1941 Isaacs collapsed while building his family's Sukkah, the ritual hut used during the holiday of Sukkot.⁴⁰ He passed away at his home on December 19, 1941.

III. ISAACS'S CYCLE THEORY

A. Isaacs's Intellectual Agenda

It is difficult to ascertain the true import of many of Isaacs's

³⁴ Letter from Nathan Isaacs to Boris Bogen (Dec. 8, 1926), Nathan Isaacs Papers, 1812-1945, MS 184, 2.9 linear ft., 1 reel microfilm, (the microfilm contains "Letters to Professor Isaacs, concerning numerous subjects of interest to him. 1910-1945") (original papers on file with The Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio) [hereinafter NI Papers, MS 184, AJA, Letters to Nathan Isaacs].

³⁵ *Id.*

³⁶ Albert M. Freiberg, Nathan Isaacs in Cambridge 6 (July 15, 1952), in Isaacs Collected Papers Vol. 1, Jewish Subjects (unpublished manuscript) (on file at Nathan Isaacs Papers, Hebrew College, Newton Centre, MA (unprocessed)) [hereinafter NI Papers, HC].

³⁷ Letter from Nathan Isaacs to Adolph Oko (Nov. 2, 1938), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 3.

³⁸ *Nathan Isaacs*, in 9 ENCYCLOPÆDIA JUDAICA, *supra* note 5.

³⁹ MAX WALLACE, THE AMERICAN AXIS: HENRY FORD, CHARLES LINDBERGH, AND THE RISE OF THE THIRD REICH 65 (2003).

⁴⁰ JOSEPH KAMINETSKY, MEMORABLE ENCOUNTERS: A TORAH PIONEER'S GLIMPSES OF GREAT MEN AND YEARS OF CHALLENGE 51 (1995).

writings because he cloaked even his most daring ideas as mere descriptions of facts.⁴¹ Isaacs often seemed determined to conceal from readers the implications of his theories by camouflaging the sometimes esoteric nature of his scholarship.⁴² Albert M. Freiberg, Isaacs's last research assistant, attested that Isaacs in both his writing and in his conversation utilized "successive layers of meaning" in which "[t]he *ostensible* meaning will always make sense" but the professed meaning was "often almost contradictory to the ultimate or real meaning."⁴³

Though the ultimate meanings of Isaacs's writings are often cryptic, this paper is based on the premise that elements of Isaacs's academic and intellectual agenda identify Jewish law as the nexus of Isaacs's legal and religious interests.⁴⁴ His self-image was that of a learned layman whose hobby was collecting and studying Hebrew and rabbinical literature.⁴⁵ Isaacs stated "that Jewish experience under the Law was the greatest field of unsurveyed juristic study left since Maitland made English Legal History his own."⁴⁶ One of Isaacs's great unfulfilled ambitions was to write a history of Jewish law.⁴⁷ Isaacs was fascinated by the idea that Jewish law was an embodiment of the life of the Jewish people.⁴⁸ He did not believe that the principles of the development of Jewish law were fundamentally different from that of the laws of other peoples.⁴⁹ For Isaacs, it was a "fundamental fact that the Jews are a part of the human family and have all the traits of the human family, and that their experiences and reactions are accordingly both natural and

⁴¹ CAROL WEISBROD, *BUTTERFLY, THE BRIDE: ESSAYS ON LAW, NARRATIVE, AND THE FAMILY* 193 n.44 (4th ed. 2002) [hereinafter WEISBROD, *BUTTERFLY, THE BRIDE*] ("Throughout [Isaacs's] work there is a descriptive or analytic rather than prescriptive quality.").

⁴² LEO STRAUSS, *PERSECUTION AND THE ART OF WRITING* 25 (1952).

⁴³ Freiberg, *supra* note 36, at 4.

⁴⁴ See generally DiMatteo & Flaks, *supra* note 1, at 326-29 (discussing the impact Jewish law had on Isaacs).

⁴⁵ Shubow, *supra* note 5.

⁴⁶ Letter from Isaacs [Jurist] to Oko [the Bookman], pg. 3, X in the series (No Date), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 3.

⁴⁷ Adolph S. Oko, "Nathan Isaacs" [Hebrew Teachers College Nathan Isaacs Memorial Service?] 2 (Feb. 22, 1942), ASO Papers, MS 14, AJA, *supra* note 4, Box 9, File 12.

⁴⁸ *Id.* at 1.

⁴⁹ DiMatteo & Flaks, *supra* note 1, at 327-29, 332.

interesting.”⁵⁰ Isaacs’s intellectual ambitions for Jewish law reflect a creative tension between tradition and innovation.

B. The Relationship Between Legal Styles and Substantive Law

Isaacs’s cycle theory, in its most basic form, claims that Jewish law and the laws of other peoples have repeated the following pattern: codification, literalistic interpretation and legal fictions, interpretation based on equity and principles, followed by legislation and codification once again.⁵¹ He suggested that these styles in legal reasoning influenced the development of the substantive law. Isaacs derived his categorizations of the major periods in the development of legal systems from Sir Henry Maine (1822-1888).⁵² Isaacs, inspired by the observation of Maine, recounts:

[T]hat Legal Fictions, Equity, and Legislation follow each other universally in the order named, I was led to the consideration that each of these instrumentalities, by which the law is kept in harmony with society, is connected with a peculiar point of view resulting from the state of the law at a given time.⁵³

Isaacs differed from Maine in believing that the stages were part of a cycle, rather than a ladder of development, that is achieved progressively and without repetition.⁵⁴ Maine had argued that progressive societies shift from status based relationships, such as family or racial status, to relationships based on the free willed

⁵⁰ Nathan Isaacs, *Jewish Law in the Modern World: A Study of Historic Fact and Fiction*, 6 THE MENORAH J. 258, 262 (1920) [hereinafter Isaacs, *Jewish Law in the Modern World*].

⁵¹ See Samuel Flaks, *Nathan Isaacs’s IDEIA: Legal Evolution and Parental Pro Se Representation of Students with Disabilities*, 46 HARV. J. ON LEGIS. 275, 277-80 (2009) (summarizing Isaacs’s cycle theory); Elcanan Isaacs, *Nathan Isaacs*, *supra* note 5, at 585 (“An important contribution to jurisprudence which Professor Isaacs made and for which he has achieved a permanent place among jurists was his discovery that the adjustment of law to society is a continuous process going through certain recurrent phases.”).

⁵² HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* (Sir Frederick Pollock ed., Henry Holt & Co. 1906) (1861).

⁵³ Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 378.

⁵⁴ Isaacs, *Law of Change*, *supra* note 2, at 666.

contracts of individuals.⁵⁵ In contrast, Isaacs suggested that progress from status to contract is a “mark of commentatorial periods rather than a continuous factor in the history of law.”⁵⁶

Some of the terms Isaacs used in his exposition of cycle theory require some further explanation. For Isaacs, literalism is the attempt “to do the most with the words” in a controlling code.⁵⁷ Literalism evolves into legal fictions when “[t]o make the words fit life” the words are “interpreted artificially as meaning something that they obviously did not mean originally.”⁵⁸ In Isaacs’s terminology a commentator or advocate of equity has a

point of view that is concerned with the subject matter rather than the words, with the purposes of law rather than its method, its spirit rather than its letter, its principles rather than its rules. It is an appeal from the text to common sense, from technical rules to fundamental principles.⁵⁹

Isaacs calls periods in which growth in the law issues from the courts ages of equity while ages in which the primary developers of the law are scholars are periods of “commentators, or principle-students.”⁶⁰ He views legislation as the creation of a new law by the declaration of an authority without an express reasoned justification on a specific issue, while codification represents the wholesale replacement of old case law and specific laws with a comprehensive code. Isaacs refers to codification “with especial reference to the fact that in this kind of law obligatory force is independent of general principles.”⁶¹

In “*The Law*” and *the Law of Change*,⁶² Isaacs tried to determine the overarching spirit and tendency of Jewish law rather than attempting to explore specific doctrines of that law. Isaacs

⁵⁵ MAINE, *supra* note 52, at 172-74.

⁵⁶ Isaacs, *Law of Change*, *supra* note 2, at 757 n.61. See Frederick Pollock, *Note*, in MAINE, *supra* note 52, at 185 (describing ongoing conservative reaction against the progress from status to contract).

⁵⁷ Isaacs, *Law of Change*, *supra* note 2, at 667.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 668.

⁶¹ *Id.* at 668-69.

⁶² Isaacs, *Law of Change*, *supra* note 2; Tannenbaum, *Jew and Professor*, *supra* note 5.

observed that Jewish law has gone through several phases of codification, followed by literalistic interpretation, interpretation based on equitable principles, and then phases of arid reasoning and pointless mental gymnastics (*pilpul*). Isaacs extrapolated that the same cycle of phases of legal reasoning recurs in all legal systems, whether secular or religious.⁶³ Isaacs collaborated with Adolph S. Oko (1883-1944), the librarian of the Reform seminary Hebrew Union College, in developing the cycle theory, especially as it pertained to the history of Jewish law.⁶⁴ Isaacs even allowed Oko to present his own conflicting point of view regarding why Sir Henry Maine, who provided much of the material of Isaacs's cycle theory, had not written in depth about Jewish law in a footnote to Isaacs's own work.⁶⁵ Therefore, Oko's introduction to Isaacs's "*The Law*" and *the Law of Change* is probably a very good source for insights into Isaacs's intentions.⁶⁶

Oko summarizes Isaacs's argument as follows:

Law changes as language changes—perhaps *because* language changes. Laws are words; words are laws. In the beginning there were customs, conventions—words. They became laws. We have codification. Codification is law (or language) stereotyped, rigid, fixed, dogmatic—prosaic. The experience reflected in the code is of the past; and life brings new experiences. The words acquire new meanings or shades of meanings in different generations[,] among different individuals of the same generation Glossation inevitably follows. The scribes, the learned, the lawyers, or the judges are to discern their "true" meaning by a logical process of reasoning. Alas! [R]eason soon becomes pseudo-logical syllogism and sinks into mere playing with words—with words or laws dead or dying; with words without

⁶³ See *id.* at 666; see also Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 373-80.

⁶⁴ Isaacs, *Law of Change*, *supra* note 2, at 674-75 n.12 (Isaacs acknowledged his "deep indebtedness [to Oko] for innumerable suggestions").

⁶⁵ *Id.*; Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 377-78.

⁶⁶ See Adolph S. Oko, *Introduction to "The Law" and the Law of Change*, 65 U. PA. L. REV. 659 (1917) [hereinafter Oko, *Law of Change Introduction*] (Isaacs and Oko jointly researched the literature of Jewish law).

content or meaning.⁶⁷

Isaacs noted that while the typical early twentieth century Anglo-American lawyer would think it is quite obvious that words of a code require interpretation, a “true codifier” would refuse to accept that anything should be added or subtracted to the words of the code.⁶⁸ Isaacs cited Deuteronomy’s warning against either adding or subtracting a word from the Torah as typical of the attitude of a true codifier.⁶⁹ The same codifying spirit is expressed today by originalists such as Justice Antonin Scalia, who has declared that constitutional interpretation should be limited to determining “what did the words mean to the people who ratified the Bill of Rights or who ratified the Constitution.”⁷⁰

Isaacs utilized his cycle theory to make groundbreaking contributions to Legal Realism that identified the widespread use of contracts of adhesion⁷¹ and strict tort liability⁷² as pervasive aspects of the new legal order that emerged in the early twentieth century.⁷³ Professor Weisbrod has observed that “[i]n *The Standardizing of Contracts*, Isaacs proposed that ‘status-to-contract’ was about differences in degree rather than kind and that these differences were reflected in cycles of change.”⁷⁴ She notes that Isaacs suggested that “[c]odification . . . was associated with the freezing of patterns and equity with the individualized contract.”⁷⁵ She highlights two aspects of Isaacs’s contributions to contract law:

First, the idea of the law filling in contract terms from a presumed intent based on a standard transaction is very different from law telling people what to do

⁶⁷ *Id.* at 662-63.

⁶⁸ Nathan Isaacs, *The Aftermath of Codification*, 4 AM. L. SCH. REV. 548, 550 (1920).

⁶⁹ *Id.* (citing *Deuteronomy* 4:2).

⁷⁰ *Justice Scalia on the Record*, CBSNEWS (Feb. 11, 2009), <http://www.cbsnews.com/stories/2008/04/24/60minutes/main4040290.shtml> (last visited Mar. 9, 2013).

⁷¹ Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 37-39 (1917) [hereinafter Isaacs, *Standardizing of Contracts*].

⁷² Nathan Isaacs, *Fault and Liability: Two Views of Legal Development*, 31 HARV. L. REV. 954 (1918) [hereinafter Isaacs, *Fault and Liability*].

⁷³ See DiMatteo & Flaks, *supra* note 1, at 312 (describing Isaacs’s insights in contract and tort law).

⁷⁴ WEISBROD, BUTTERFLY, THE BRIDE, *supra* note 41, at 53.

⁷⁵ *Id.* at 54.

based on an imposed norm. Second, in a time of radical social change, the method of silence in which an underlying default contract is assumed by both the parties will often be inadequate.⁷⁶

Isaacs made “the suggestion that the social rule has its ultimate origin in the practice of individuals.”⁷⁷ Professor DiMatteo believes that Isaacs contributed the insight that “legal development can best be understood as a progressive-cyclical continuum.”⁷⁸

Oko viewed Isaacs’s “survey of the whole field in the light of comparative jurisprudence” as “the first in the field.”⁷⁹ Bertram B. Benas in 1914 had anticipated Isaacs to a degree when he observed that two aspects of legal systems stressed by Maine, legal fictions and *responsa*, appeared in Jewish legal history, though Benas did not suggest a recurring cycle of those stages.⁸⁰ Isaacs originated the concept that the stages of law outlined by Maine reoccur in cycles; he insisted that the different stages of development of Jewish law were no different from any other legal system. Isaacs thought his cycle theory did not have a bias in favor of any nation. Oko, who collaborated with Isaacs, emphasized that Isaacs believed that his legal cycles applied to all legal systems and were “not limited to the ‘Aryan race,’ as ethnic prejudice would assert.”⁸¹ Isaacs was critical of the Hegelian error of depicting “a kind of history of civilization in which their own condition is shown as the grand climax towards which the universe has been striving all these years, and in which each nationality is given a little recognition for its own little contribution to the final results.”⁸²

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Larry DiMatteo, *An ‘All of the Above’ Theory of Legal Development* (paper presented at the American Association of Law Schools Section on Jewish Law, Jan. 5, 2012), *abstract available at* http://works.bepress.com/larry_dimatteo/9/ (last visited Mar. 9, 2013).

⁷⁹ Oko, *Law of Change Introduction*, *supra* note 66, at 661.

⁸⁰ *Id.* at 662 n.2; Bertram B. Benas, *The Legal Devices in Jewish Law*, 4 JEWISH REV. 419 (1914), *reprinted in* 11 J. OF COMP. LEGIS. 75 (1929).

⁸¹ Oko, *Law of Change Introduction*, *supra* note 66, at 662.

⁸² Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 404.

IV. THE INFLUENCE OF SECULAR JURISPRUDENCE ON ISAACS'S VISION OF JEWISH LAW

A. Hegel and the Historical School of Jurisprudence

While Isaacs's cycle theory very neatly answered some of his ideological needs as a defender of Judaism, the particular formulation of the theory owes a great debt to the influence of the secular jurisprudence of the nineteenth century and the anti-formalist wave that began to spread among American legal academics in the first decades of the twentieth century.⁸³ It would not be accurate to say that the structure of Jewish legal history was so clear that Isaacs's formulation is an obvious extrapolation from the history of Jewish law. One of the more important sources of inspiration for Isaacs was the Historical School of Jurisprudence, which flourished in the nineteenth century and "sought to locate the sources of law in historical practice and precedent, in the character of the native *Volksgeist* and the language in which it expressed itself."⁸⁴ The distinctive jurisprudence of Historical School scholars distinguishes them from legal historians in general.⁸⁵ The most prominent leaders of the Historical School were Friedrich Karl von Savigny (1779-1861)⁸⁶ in Germany and Sir Henry Sumner Maine and Frederick William Maitland (1850-1906) in England.⁸⁷ Savigny claimed that there is "an organic connection between law and the nature and character of a people" and that "customary law is the truly living law."⁸⁸ Savigny "exercised a profound influence on many of the most creative legal jurists and scholars in England and the United States," including Maine.⁸⁹ Isaacs appreciated the Historical

⁸³ See MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 189 (1992) (describing anti-formalism); DiMatteo & Flaks, *supra* note 1, at 328 (Isaacs's "study of Jewish law was influenced by contemporary currents in general legal thought").

⁸⁴ G. Heiman, *Problems Significance of Hegel's Corporate Doctrine*, in *HEGEL'S POLITICAL PHILOSOPHY: PROBLEMS AND PERSPECTIVES* 113 (Z.A. Pelczynski ed., 1971-1972).

⁸⁵ Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 386.

⁸⁶ Savigny, *Friedrich Karl von*, in 16 *THE NEW ENCYCLOPÆDIA BRITANNICA* 288-89 (15th ed. 1982).

⁸⁷ CARL JOACHIM FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 138-39 (2d ed. Univ. of Chicago Press 1963).

⁸⁸ *Id.* at 139.

⁸⁹ Michael H. Hoeflich, *Savigny and His Anglo-American Disciples*, 37 *AM. J. COMP. L.*

School's "realization of the importance of what we should call today the subconscious processes that contribute to the growth of law, and the consequent relativity of law. There is a revolt from those older schools that postulate a perfect law independent of mankind."⁹⁰ He believed that the main lesson of the Historical School was that "the law is a growth as language is a growth, that its roots are deeply hidden in the past life of a people."⁹¹ Isaacs also praises Savigny for having "saved jurisprudence from the clutches of the so-called Natural Law with its 'infinite arrogance' and its 'shallow philosophy.'"⁹²

Isaacs felt that Hegel's dialectical philosophy of history "exactly suited" the needs of the Historical School of Jurisprudence.⁹³ Isaacs may have chosen not to stress the major differences between the approaches of Hegel and Savigny because his cycle theory of legal history owed great debts to both thinkers.⁹⁴ The Historical School believed that there was change in the law but that change could not be forced by means of codification:

[A]ll law is originally formed in the manner, in which, in ordinary but not quite correct language, customary law is said to have been formed: i.e. that it is first developed by custom and popular faith, next by jurisprudence,—everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver.⁹⁵

Savigny opposed codification in post-Napoleonic Germany because he believed that customary law was linked to the life of the people and that law needed more time to develop before becoming crystallized in a codification.⁹⁶ In contrast, Hegel believed in

17 (1989).

⁹⁰ Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 386.

⁹¹ Nathan Isaacs, *The Jewish Law in the Jewish State*, 1 THE JEWISH F. 29, 29 (1918) [hereinafter Isaacs, *Jewish Law in the Jewish State*].

⁹² Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 386.

⁹³ *Id.*

⁹⁴ See FRIEDRICH, *supra* note 87, at 137 (discussing the distinction between Hegel and Savigny).

⁹⁵ FRIEDRICH KARL VON SAVIGNY, THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 30 (Abraham Hayward trans., Littlewood & Co. 1831) (1814); FRIEDRICH, *supra* note 87, at 139.

⁹⁶ SAVIGNY, *supra* note 95.

codification, legal reform, and cyclical progress in legal history. Hegel responded to Savigny that

[t]he supposition that it is customary law, on the strength of its character as custom, which possesses the privilege of having become part of life is a delusion, since the valid laws of a nation do not cease to be its customs by being written and codified – and besides, it is as a rule precisely those versed in the dearest of topics and the dearest of thoughts who talk nowadays of “life” and of “becoming part of life.”⁹⁷

Hegel emphasized that the nationalism and laws of a people were just the means of the development of the world spirit that would eventually be developed by another people. National spirit for Hegel “was given the function of expressing a universal freedom, a principle designated as the manifestation of the world spirit.”⁹⁸

Isaacs adopted the insights of the Historical School scholars Savigny and Maine inasmuch as he recognized change in the law. He saw law as deeply attached to the fate of peoples; he also drew upon Hegel’s idea of cycles in history.⁹⁹ However, unlike Hegel or Maine, Isaacs did not believe that the historical development of law and society would reach an endpoint.¹⁰⁰ Isaacs was also inspired by Rudolph von Jhering (1818-1892), who believed that Law “was not merely the outcome of unconscious forces, but the result of the efforts of individuals.”¹⁰¹ Isaacs notes that to Jhering:

[T]he process of law-making seemed an increasingly conscious process. That the tide of legislation would ever ebb and the subconscious processes become important again, did not occur to him, any more than it

⁹⁷ GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF RIGHT* § 211, at 70 (T.M. Knox trans., 1987).

⁹⁸ FRIEDRICH, *supra* note 87, at 141.

⁹⁹ See Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 404 n.97.

¹⁰⁰ ALEXANDRE KOJÈVE, *INTRODUCTION TO THE READING OF HEGEL* 159-60 (Allan Bloom ed., James H. Nichols, Jr. trans., 1969) (1980) (discussing Hegel’s vision of the End of History).

¹⁰¹ Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 382; see *THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE* 598 (Clarence Morris ed., 12th prt. 1997); *Jhering, Rudolph von*, in 6 *THE NEW ENCYCLOPÆDIA BRITANNICA* 548 (15th ed. 1982).

does to those in our midst who rejoice that the law is
at last like clay in the potter's hands.¹⁰²

Though Isaacs believed that law should attempt to attain ideal principles of justice, he accepted that such a goal might be unattainable given the human condition.¹⁰³ The laws of a people should be constantly adjusted to better reflect those universal principles, despite changing societal developments. For example, though he thought that as a moral ideal tort liability should only be imposed due to culpable fault, modern industrial conditions had made necessary the imposition of strict liability based on external standards.¹⁰⁴ “If the moral notion that links fault with liability must to some extent be violated, our position must not be interpreted as the abandonment of an ideal; it is but a new recognition of a human limitation from which human law cannot be free.”¹⁰⁵ Isaacs's cyclical theory of legal development posits that law is constantly changing in order to bridge the ideals of justice and the shifting realities of society.

B. Jewish Law as Sociological Jurisprudence

Isaacs's formulation of his cycle theory may not be fully viable today as an explanation of legal change. However, the underlying insight of the theory, that Jewish law is a dynamic, living law that is responsive to moral and ethical concerns, is of enduring value. Isaacs was influenced by Roscoe Pound's *The Scope and Purpose of Sociological Jurisprudence*,¹⁰⁶ which denied that law could be mechanically deduced through pure logic.¹⁰⁷ Isaacs argued

¹⁰² Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 382.

¹⁰³ See Isaacs, *Fault and Liability*, *supra* note 72, at 978 (“[I]n the course of progress we cannot wholly avoid rough classifications of conduct; and the extent to which our law suffers from them shows both upward and downward movements from time to time, being greatest in periods of strict law and least offensive to ethics in periods of Equity.”).

¹⁰⁴ *Id.* (“We are now approaching a point where a re-defining of external standards seems necessary.”).

¹⁰⁵ *Id.*

¹⁰⁶ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 3), 25 HARV. L. REV. 489 (1912); see also Flaks, *supra* note 51, at 278-79 (noting the influence that Roscoe Pound's view on legal fictions had on Isaacs).

¹⁰⁷ See Pound, *supra* note 106, at 490-91 (explaining that social jurisprudence has gone through a number of stages and “did not find itself at once”); see also Flaks, *supra* note 51, at 278-79 (“Judges rely upon legal fictions, which generally consist of farfetched

that Jewish life “was developing the Halakah [Jewish law] by applying it.”¹⁰⁸ Eugen Ehrlich, the prophet of a “Living law” school of legal thinking with which Isaacs generally agreed, had observed that the Jews of Czernowitz, in what is now Ukraine, refused to offer higher rent for an apartment in which another Jew was already residing.¹⁰⁹ Ehrlich correctly noted that this law was not found in the Talmud, and he attributed the non-competitive practice to the Jews’ misunderstanding of their own law.¹¹⁰ Isaacs thought that Ehrlich himself had fallen into the trap of believing that current Jewish law had become fixed.¹¹¹ Isaacs argued that Ehrlich’s interpretation of the non-competitive rental practices was “[a] perfect illustration of [how] the practical application of law to life is misbranded as an academic misconception. Life and growth are mistaken for death and decay.”¹¹² In the Middle Ages Gentile landlords took advantage of crowded conditions in Jewish quarters of towns by raising rents to exorbitant levels.¹¹³ Jewish law, acting in the spirit of Pound’s view of law as “‘social engineering’ was put to the test in this as in hundreds of other details in the Middle Ages,” and developed an early form of urban rent control under the aegis of the ancient concept of *hazakah* (priority due to prior presence).¹¹⁴

Isaacs built a large personal collection of rabbinic *Responsa* (*She’elot u-Teshubot*) with the aim of studying how Halakah had adapted to varying historical situations.¹¹⁵ He had come to the conclusion by 1923 that “without *responsa* no really satisfactory

presumptions, in order to change the law without acknowledging that they are changing the law. . . . Roscoe Pound . . . took a negative view of such fictions.”)

¹⁰⁸ Letter from Nathan Isaacs to Henry Hurwitz (Jan. 10, 1921), enclosed copy of Isaacs’s Introduction of Louis Ginzburg’s Zunz Lecture in Chicago, pg. 4 (Dec. 29, 1920), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 2.

¹⁰⁹ Isaacs, *Jewish Law in the Modern World*, *supra* note 50, at 263.

¹¹⁰ *Id.* at 263-64.

¹¹¹ *Id.*

¹¹² *Id.* at 265.

¹¹³ *Id.* at 264.

¹¹⁴ Isaacs, *Jewish Law in the Modern World*, *supra* note 50, at 264-65; *see also* Nathan Isaacs, *The Influence of Judaism on Western Law: A Gift Inter Vivos*, in *THE LEGACY OF ISRAEL* 377, 403 (Edwyn R. Bevan & Charles Singer eds., 1927) [hereinafter Isaacs, *Influence of Judaism on Western Law*] (“Jewish tenants respected each other’s tenant-right, or *hazakah*, so that they could not be made to compete with each other effectively.”)

¹¹⁵ Elcanan Isaacs, *Isaacs*, in 5 *THE UNIVERSAL JEWISH ENCYCLOPEDIA*, *supra* note 5, at 583.

study can be made of the Halaka as a living institution.”¹¹⁶ Isaacs admitted that in most cases the Talmudists dealt with questions that had little interest to modern lawyers, but he believed that the indexing of the *responsa* and the legal experience in the Jewish settlement in Palestine could add “a new chapter . . . to the influence of Judaism on Western Law.”¹¹⁷ Isaacs systematically built up an impressive Judaica collection of an estimated 10,000 bound volumes, and 1,000 pamphlets.¹¹⁸ The collection was especially strong in the fields of Jewish thought, bibliography, and law.¹¹⁹ For the last fifteen years of his life, up until his final days, he sought to acquire a complete library of the printed *responsa*.¹²⁰ In 1936, Isaacs reported to Oko that “my Halakah collection [is] growing continually.”¹²¹ While book collecting must have been expensive, Isaacs also sought to “make it possible for unfortunate students to carry on” during the Great Depression.¹²² Sadly, Isaacs died with little savings, and in 1946 his widow Ella sold the *responsa* portion of his treasured library for \$25,000 to Rabbi Yitzchok Hutner’s Yeshiva Chaim Berlin in Brooklyn, New York.¹²³ The Professor Nathan Isaacs Memorial Library at Yeshiva Chaim Berlin includes many valuable and rare early printed editions of *responsa* and other Jewish works. Yakar Beigelisen, a bookseller and scholar in Brooklyn, had helped Isaacs build up his collection, and informed Rabbi Hutner that the Isaacs collection was for sale.¹²⁴ Joseph Roszenwieg provided financial support for the purchase.¹²⁵ Yeshiva Chaim Berlin lore relates that

¹¹⁶ Letter from Nathan Isaacs to Adolph S. Oko (Feb. 5, 1923), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 2 (emphasis added).

¹¹⁷ Isaacs, *Influence of Judaism on Western Law*, *supra* note 114, at 405-06.

¹¹⁸ Adolph S. Oko, The Nathan Isaacs Jewish Collection (undated), ASO Papers, MS 14, AJA, *supra* note 4, Box 9, File 12.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Letter from Nathan Isaacs to Adolph S. Oko (Apr. 3, 1936), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 3.

¹²² Letter from Nathan Isaacs to Adolph Oko (Mar. 29, 1934), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 3.

¹²³ Interview with Paul Wotitzky, Son-in-Law of Nathan Isaacs, in Brookline, MA. (Feb. 13, 2008).

¹²⁴ Yonasan David & Bruria David, *Biography of Rabbi Yitzchok Hutner: Biography of Rabbi Yitzchok Hutner*, in SEFER HAZIKARON (BOOK OF REMEMBRANCE) 35-36 (Joseph Buksbaum ed., 1983) [Hebrew]. Professor Samuel J. Levine brought this biography to my attention.

¹²⁵ Interview with Rabbi Aharon Schechter, successor of Rabbi Hutner at Yeshiva Rabbi

Rabbi Hutner could not sleep until the purchase was completed.¹²⁶ Isaacs's collection of rare bibliographic works on Hebrew literature came into the possession of Yeshiva University.¹²⁷

Isaacs identified with attempts to synthesize traditional Talmudic and Western academic scholarship. Isaacs's brother, Elcanan Isaacs, believed that university culture should influence schools of Jewish law.¹²⁸ Nathan Isaacs himself believed that the centerpiece of Jewish education should be the study of Jewish law rather than Hebrew literature or the history and style of the Talmud.¹²⁹ Isaacs believed that Jewish law could gain the loyalty of its students and be taught successfully if instead of parsing Jewish legal texts for doctrinal nuances teachers removed "the illusion that the work of the rabbis was mere hair-splitting with no genuine function in life."¹³⁰

V. CYCLE THEORY AND JEWISH LAW

A. Cycles in Jewish Legal History

1. *The International Standard Bible Encyclopedia and Biblical Criticism*

A complicated and somewhat ambiguous viewpoint on the origins of the Pentateuch was central to the evolution of Isaacs's understanding of Jewish law. Isaacs served as the assistant editor in charge of Hebrew to the *International Standard Bible Encyclopedia*,¹³¹ a work first published in 1915 that became one of the most influential biblical reference works for conservative Christian scholars over the next century.¹³² As explained by a

Chaim Berlin (Dec. 26, 2007).

¹²⁶ *Id.* Yisachar Parnes, a librarian at Chaim Berlin, graciously led me on a guided tour of the library.

¹²⁷ Elcanan Isaacs, *Isaacs*, in 5 THE UNIVERSAL JEWISH ENCYCLOPEDIA, *supra* note 5, at 582-83.

¹²⁸ Letter from Elcanan Isaacs to Adolph Oko (July 29, 1919), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 2.

¹²⁹ Nathan Isaacs, *The Place of Law in Jewish Education*, 6 UNITED SYNAGOGUE RECORDER 2, 3 (1926) [hereinafter Isaacs, *Jewish Education*].

¹³⁰ *Id.*

¹³¹ 5 THE INT'L STANDARD BIBLE ENCYCLOPEDIA 3166 (James Orr ed., 1915).

¹³² WILLIAM J. PETERSEN & RANDY PETERSEN, 100 CHRISTIAN BOOKS THAT CHANGED THE CENTURY 33 (2000).

contemporary reviewer, the impetus for the creation of the *International Standard Bible Encyclopedia* was the need among conservative Christians for a biblical dictionary written with “scholarship and thoroughness, but representing a more conservative attitude toward the attainments already reached by Christian learning, a less eager grasping after the novelties reached out to us by the German lecture rooms, especially those sent abroad in the interest of an anti-supernatural conception of Christianity and the Bible.”¹³³ Superficially, Isaacs’s several entries in the *International Standard Bible Encyclopedia* appear to be short articles on unrelated technical topics. However, when read carefully, Isaacs’s entries in the encyclopedia reveal his early struggles with different questions about the Bible and the development of biblical law. These struggles eventually contributed to the development of his comprehensive cycle theory, a few years later. Isaacs was different from the vast majority of the contributors to the *International Standard Bible Encyclopedia* as he was not Christian. Nonetheless, he shared with them a general skepticism towards “higher” biblical critics who attempted to identify several different sources for the biblical books that tradition ascribed to Moses. Those critics also engaged in a speculative dating of biblical events, which postulated that all of those books were written at much later stages of the history of the Israelites than supposed by traditional views. Many Jewish religious leaders thought that higher biblical criticism denigrated Judaism by denying that the Pentateuch was a single unified text, by viewing much of the ritual and legal portions of the Bible as late post-exilic additions, and by viewing the Prophets merely as a step in an ethical progression that culminated in Christianity.¹³⁴ Higher biblical criticism was heavily influenced by Hegel’s idea that history inevitably evolved in a dialectic fashion to an ultimate final spiritual ideal.¹³⁵ Isaacs thought that the central weakness of the higher critics is that they drew drastic conclusions from mere differences in

¹³³ John Alfred Faulkner, *A New Bible Encyclopedia*, in 21 CHRISTIAN FAITH AND LIFE 135 (1915).

¹³⁴ See A DICTIONARY OF JEWISH-CHRISTIAN RELATIONS 55 (Edward Kessler & Neil Wenborn eds., 2005); JULIUS WELLHAUSEN, PROLEGOMENA TO THE HISTORY OF ANCIENT ISRAEL 2-9 (n.p. J. Sutherland Black & Allan Menzies trans., 1885).

¹³⁵ MARK G. BRETT, BIBLICAL CRITICISM IN CRISIS?: THE IMPACT OF THE CANONICAL APPROACH ON OLD TESTAMENT STUDIES 85-86 (1991).

emphasis between biblical texts, which focused on different aspects of a single subject. He noted that this objection “is not answered by pointing out that the differences of emphasis exist.”¹³⁶ Isaacs’s brother, Elcanan, also thought that biblical critics were motivated by anti-Semitism, and was disappointed that few Jewish scholars were interested in responding to biblical criticism.¹³⁷

Isaacs noted the suggestions by modern scholars of possible corruptions discovered in the biblical text, but he was hesitant to resort to hypothetical reconstructions of the Hebrew Masortite text. For example, he noted that some commentators, on the basis of an old Latin manuscript of the Bible, believed that an expression found in the *Song of Deborah*¹³⁸ was an inadvertent interpolation, but Isaacs believed that the sense of the verse could be determined with “reasonable certainty” without asserting that the biblical text was infirm.¹³⁹ Similarly, he cited traditional rabbinic explanations for contradictions in the biblical text regarding the name of Moses’s father-in-law and noted that “[n]one of these views is free from difficulty, nor is the view of those [contemporary Biblical critics] who would give Jethro as the name in the Elohist (E) and Reuel as that in the Jahwist (Jahwist) and (J-E).”¹⁴⁰

Likewise, Isaacs expressed his skepticism regarding the explanations of biblical critics in his article on the Urim and Thummim, a divine oracle that Jewish tradition associated with the breastplate of the high priest. Disregarding these traditions, biblical critics, beginning with Julius Wellhausen, asserted that the Urim and Thummim were instead a type of sacred dice.¹⁴¹ Josephus identified the Urim and Thummim with the breastplate of the High Priest and

¹³⁶ Nathan Isaacs, *Passover*, in 4 THE INT’L STANDARD BIBLE ENCYCLOPEDIA 2256, 2257 (James Orr ed., 1915) (disagreeing with the critical view of Passover as entirely agricultural in origin, rather than being fundamentally connected to the Exodus from Egypt).

¹³⁷ Letter from Elcanan Isaacs to Adolph Oko (July 29, 1919), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 2.

¹³⁸ *Judges* 5:16.

¹³⁹ Nathan Isaacs, *Searchings*, in 4 THE INT’L STANDARD BIBLE ENCYCLOPEDIA, *supra* note 136, at 2710. See SUSAN NIDITCH, *JUDGES: A COMMENTARY* 77 (2008) (discussing alternative Vulgate and Old Latin texts).

¹⁴⁰ Nathan Isaacs, *Raguel*, in 4 THE INT’L STANDARD BIBLE ENCYCLOPEDIA, *supra* note 136, at 2525.

¹⁴¹ *Urim and Thummim*, in 12 THE JEWISH ENCYCLOPEDIA 384 (1906). See WELLHAUSEN, *supra* note 134, at 394.

claimed that the unnatural lighting of the stones was a form of communication with God.¹⁴² The Talmud suggests that the stones were illuminated in a manner that revealed the divine will, or that the stones protruded or perhaps shifted their position to transmit messages.¹⁴³ Isaacs acknowledged difficulties in some traditional rabbinic interpretations, but wryly commented that the “Talm prescribes rules and suggestions for the consultation of the non-existing Urim and Thummim.”¹⁴⁴ Despite acknowledging the problems with traditional accounts, Isaacs expressed his reluctance to reject folklore’s understanding of the Urim and Thummim because “[i]n the absence of other ancient clues[,] . . . it is not safe to reject even the guesses of the Jews of the second temple in favor of our own.”¹⁴⁵ He strove to craft an explanation of the Urim and Thummim that would conform to traditional explanations but would also be acceptable to those influenced by biblical criticism.¹⁴⁶ Isaacs ventured his own etymological explanation that “Urim means ‘light’ ” and “Thummim” means darkness.¹⁴⁷ He believed that this supposition, “while fitting well with the ancient theories or traditions, would not be excluded by the recent theory of lots of opposite purport.”¹⁴⁸

Isaacs combined his general skepticism towards higher biblical criticism and its speculative dating of biblical events with an acceptance of the impact of psychology and politics in biblical narratives. For example, he suggested that the story of the rape of Dinah, in which Dinah’s brothers pursued a vendetta against Shechem and the inhabitants of his city, had “political elements” which “suggest[ed] a tribal rather than a personal significance for the

¹⁴² FLAVIUS JOSEPHUS, *Antiquities of the Jews*, in 1 THE WORKS OF FLAVIUS JOSEPHUS 194-95 (Baltimore, William Whiston, trans., Armstrong & Berry 1839) (1737).

¹⁴³ 3 THE BABYLONIAN TALMUD: SEDER MO’ED, YOMA 73a-b (I. Epstein ed., Leo Jung trans., 1938).

¹⁴⁴ Isaacs, *Urim and Thummim*, in 5 THE INT’L STANDARD BIBLE ENCYCLOPEDIA, *supra* note 131, at 3040-41 [hereinafter Isaacs, *Urim and Thummim*].

¹⁴⁵ *Id.* at 3041; *see also* Trevor Craigen, *Revelation Through Urim and Thummim* (1978) (unpublished paper), available at http://faculty.gordon.edu/hu/bi/ted_hildebrandt/OTeSources/02-Exodus/Text/Articles/Craigen-Urim.pdf (endorsing Isaacs’s arguments about the Urim and Thummim).

¹⁴⁶ Isaacs, *Urim and Thummim*, *supra* note 144, at 3041.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

narrative.”¹⁴⁹ Isaacs also advanced rationalistic interpretations of the origins of biblical laws. He suggested that the “most obvious” explanation for the kosher law’s requirement that an animal must chew its cud and have cloven hooves to be permitted for consumption was that “ruminating animals and animals without claws were apparently cleaner-feeding animals than the others.”¹⁵⁰ The sanitary explanation of the kosher dietary laws had strong precedent in medieval Jewish thinkers.¹⁵¹

Isaacs was also willing to suggest the heavy influence of non-Jewish ancient culture upon the Jews of biblical times. He argued that such an influence could contribute to an explanation of why Ezekiel presents a version of an ideal temple that differs from the original destroyed temple. Ezekiel envisioned galleries that

seem to have been borrowed from the more elaborate architecture of the countries of the Exile, which must have impressed the Jews of Ezekiel’s time very strongly. The building Ezekiel would place in the outer court [of the temple] with its terraces is a perfect Bab[ylonian] *ziggurat* or stage-tower temple.¹⁵²

It was perhaps natural for Isaacs to suggest that the non-Jewish culture and science would influence even the most sacred aspects of Judaism because scholarship of secular origin had provided a catalyst for his own understanding of the Jewish Bible. Despite Isaacs’s opposition to “the ‘higher critic[s]’ of the Bible,” he obviously studied their works and utilized their insights to identify problematic biblical texts.¹⁵³ One of Isaacs’s close associates recounted that “[a]lthough Nathan Isaacs professed contempt for the ‘higher criticism’ of the Bible, he used this tool of scholarship whenever it was an effective goad.”¹⁵⁴

¹⁴⁹ Nathan Isaacs, *Dinah*, in 2 THE INT’L STANDARD BIBLE ENCYCLOPEDIA 849 (James Orr ed., 1915).

¹⁵⁰ Nathan Isaacs, *Chew, Cud*, in 1 THE INT’L STANDARD BIBLE ENCYCLOPEDIA 605 (James Orr ed., 1915).

¹⁵¹ MOSES MAIMONIDES, THE GUIDE FOR THE PERPLEXED (M. Friedlander trans., 2d ed. 1904), available at <http://www.sacred-texts.com/jud/gfp/index.htm>.

¹⁵² Nathan Isaacs, *Gallery*, in 2 THE INT’L STANDARD BIBLE ENCYCLOPEDIA, *supra* note 149, at 1167.

¹⁵³ Freiberg, *supra* note 36.

¹⁵⁴ *Id.*

2. *Biblical Law*

It appears that Isaacs's efforts to counter the claim of biblical critics that the Bible was not written in the age of Moses was a major stimulus for him to develop the idea that legal systems evolve through a continuous cycle. Isaacs was hesitant to discuss the topic of biblical law both because of its sacred associations and because it was a very controversial field.¹⁵⁵ Nevertheless, Isaacs ventured to survey the subject of biblical law because "the Biblical codes, whenever and by whomever they were reduced to writing, are legal codes, subject in the hands of men to the ordinary vicissitudes of codes."¹⁵⁶ Isaacs viewed the biblical legal code as the codification of a pre-existing common law legal system that had developed over many centuries. He argued that the first cycle of Jewish law culminated in the Pentateuch.¹⁵⁷ Isaacs thought that the five books of the Torah should be understood as a long contract. This contract included an extensive explanatory introduction of facts relevant to the contract, the book of Genesis. Isaacs argued that Genesis amounts to a long "whereas" clause introducing the binding legal material contained in the other books of the Torah and was not intended to be an independent historical account. If the Torah is read as a law book, then many of the questions about the historical accuracy of the Bible are moot. A law book is not intended to provide cosmological or historical information.¹⁵⁸ Isaacs argued that "there is no Jewish fundamentalism. There is, of course, an Orthodoxy, so-called, zealous to obey the smallest commandment of 'The Law' with all its ramifications and refinements. But this Orthodoxy is . . . little concerned over beliefs as to who Melchizedek really was or points in the chronological order of events . . ." ¹⁵⁹

Isaacs's view that there had been a single codification that produced the Pentateuch was significantly different from that of contemporary biblical critics, who thought that the final text of the

¹⁵⁵ Isaacs, *Law of Change*, *supra* note 2, at 674-75.

¹⁵⁶ *Id.* at 675.

¹⁵⁷ See Oko, *Law of Change Introduction*, *supra* note 66, at 661-62 (discussing Isaacs's views on the "stages in Jewish 'Law'").

¹⁵⁸ Nathan Isaacs, *The Great Preamble—A Rereading of Genesis*, in THE JEWISH LIBRARY: SECOND SERIES 229, 232 (Leo Jung ed., 1930).

¹⁵⁹ *Id.* at 232-33.

Pentateuch contained multiple legal codes of different origins.¹⁶⁰ As discussed above, an overriding theme of Isaacs's writings on the Bible was his conviction that the hypotheses of biblical critics deserve strict scrutiny. Nineteenth and early twentieth century biblical criticism rested in part on the presumption that primitive Israelite codifications had been barbaric, while later biblical codes reflected a more advanced ethics.¹⁶¹ Isaacs directly challenged that presumption, arguing that it was untenable.¹⁶² "History is full of instances in which a less advanced civilization copies the laws of a more advanced one."¹⁶³ He added sarcastically:

[I]f we were to go through the whole body of English law and forcibly "date" each paragraph by reference to such a juristic theory, throwing out alleged "later additions" and other intractable matter and liberally amending our texts, we might build up a body of learning on the basis of which a later writer could develop a simple history of English law that would concur exactly with our previous job of dating by internal evidence, and we should end with the same hypothesis of legal history with which we had begun.¹⁶⁴

Isaacs's cycle theory was motivated by the need to provide an explanation as to how a code that was the product of a single time could codify the products of previous periods of legal development. Specifically, he was challenging those higher critics who argued that the sophisticated legal systems embodied in the Pentateuch must have been the product not of the age of Moses, as claimed by the biblical account, but of much later eras. As an alternative explanation of how

¹⁶⁰ Cf. Louis Ginzberg, *Law, Codification of*, in 7 THE JEWISH ENCYCLOPEDIA 635, 635-36 (1904) ("[M]odern Bible criticism, whose results are still open to revision, finds in the Pentateuch at least four different codes, ascribable to different epochs and authors.").

¹⁶¹ DiMatteo & Flaks, *supra* note 1, at 331-32 (citing Nathan Isaacs, Book Review, 45 HARV. L. REV. 949, 950 (1932) [hereinafter Isaacs, Book Review] (reviewing J.M. POWIS SMITH, THE ORIGIN AND HISTORY OF HEBREW LAW (1931))).

¹⁶² Isaacs, Book Review, *supra* note 161, at 950.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 951 (footnote omitted). See also Nathan Isaacs, *Common Law of the Bible*, 7 A.B.A. J. 117 (1921) (claiming that a knowledge of the development of unwritten law takes the sting out of the twentieth century Higher Biblical Criticism).

the Torah could embody so many laws that seem only suited for an advanced culture and economy when it was presumably initially received by an unsophisticated people of recently freed slaves, Isaacs proposed that much of biblical law was a restatement of a pre-biblical common law. He argued that the biblical codes “are incomplete statements of the law of a people, and that they are, like the Constitution of the United States, based on a common law, that they call for interpretation, and that through interpretation they grow.”¹⁶⁵ He and his wife Ella suggested, in an article that they co-authored, that before the promulgation of the Torah marriages between half-siblings had been permitted.¹⁶⁶ Therefore, it was not unusual that the half-siblings Abraham and Sarah married.¹⁶⁷ However, these relationships were subsequently forbidden.¹⁶⁸ Furthermore, the Near-Eastern common law included the right of parents to kill their children, but the Torah changed the law to only grant parents a right to request that the proper authorities execute a rebellious child.¹⁶⁹ Professor DiMatteo points out that much current legal scholarship is based on the presumption that legal change is usually in the direction from primitive to more advanced, while Isaacs’s cycle theory is still valuable because he, with the aid of a larger comparative law perspective encompassing thousands of years and many different nations, detected the often cyclical nature of legal change.¹⁷⁰ There is no inherent relationship between the sophistication of a legal system and its predilection to levels of literalism and codification. It is possible in different eras to achieve equally just results through the judicial exercise of equity or legislative enactments.

Isaacs was not the only Jewish thinker associated with Orthodoxy who adopted the thesis that the Bible drew upon a pre-

¹⁶⁵ Isaacs, *Law of Change*, *supra* note 2, at 675.

¹⁶⁶ Nathan Isaacs & Ella Isaacs, *Relationships, Family*, in 4 THE INT’L STANDARD BIBLE ENCYCLOPEDIA, *supra* note 136, at 2554-55 [hereinafter Isaacs, *Relationships*].

¹⁶⁷ *Genesis* 20:12.

¹⁶⁸ Isaacs, *Relationships*, *supra* note 166, at 2555; 2 *Samuel* 13.

¹⁶⁹ See 2 *Samuel* 13 (explaining the murder of Amnon after it was discovered that he had incestuous relations with his sister); see also Isaacs, *Primogeniture*, in 4 THE INT’L STANDARD BIBLE ENCYCLOPEDIA, *supra* note 136, at 2452 (“The writings of the Hebrews take for granted the recognition of a doctrine of primogeniture from the earliest times.”); Isaacs, *Law of Change*, *supra* note 2, at 675 (the primogeniture rules of Hebrews are not laid down in the Bible but only presumed in a discussion of an exceptional case).

¹⁷⁰ DiMatteo, *supra* note 78.

biblical common law. Orthodox Talmudist Rabbi Menachem Mendel Kasher (1895-1983) argued that the existence of ancient Near-Eastern codes that parallel the law codified in the Torah demonstrated that there were laws like the Torah, which were known in the Near-Eastern world.¹⁷¹ Kasher found support for this position among the statements of Talmudic and medieval authorities that antecedents to the Torah laws were practiced before the revelation at Mount Sinai.¹⁷² Biblical scholar Umberto Cassuto (1883-1951) thought the legal passages in the Bible had to be understood in the context of a Near-Eastern “legal tradition that was unitary in its basic elements and principles.”¹⁷³ Other Anglo-American lawyers who were traditionalist Jews, such as Harold Wiener (1875-1929), and David Werner Amram (1866-1939), had argued well before Isaacs that the written Biblical law presumed an oral common law.¹⁷⁴ While the influence by these authors on Isaacs is not clear, when Isaacs’s cycle theory was first published Amram wrote to the younger man that he found the theory to be illuminating.¹⁷⁵

Albert M. Freiberg, Isaacs’s last research assistant, preserved a remarkable incident which illustrates the extent to which Isaacs’s interests in the Bible and Jewish law influenced his secular academic work even as he reveled in concealing the ultimate meaning of his articles from most of his readers. Freiberg notes that in one of Isaacs’s last articles,¹⁷⁶ Isaacs pointed out that the Uniform Sales Act, which was drafted in 1906, was so out of date that later historians would conclude that the law could not have been written later than 1790.¹⁷⁷ Most readers would conclude that Isaacs was merely advocating for the updating of the sales law. However, Isaacs also

¹⁷¹ MENACHEM MENDEL KASHER, 17 TORAH SHELEMAH 222 (1956).

¹⁷² *Id.* at 224.

¹⁷³ UMBERTO CASSUTO, A COMMENTARY ON THE BOOK OF EXODUS 259-64 (Israel Abrams trans., 1967).

¹⁷⁴ HAROLD M. WIENER, STUDIES IN BIBLICAL LAW 45 (1904); David Werner Amram, *Some Aspects of the Growth of Jewish Law*, 8 GREEN BAG 253, 254 (1896); Louis E. Levinthal, *David Werner Amram*, in BIOGRAPHICAL SKETCHES 375 (1942), available at http://www.ajcarchives.org/AJC_DATA/Files/1941_1942_6_BioSketches.pdf. Daniel Klein brought the parallels between these men and Nathan Isaacs to my attention.

¹⁷⁵ Letter from David Werner Amram to Nathan Isaacs (Dec. 20, 1917), NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 34.

¹⁷⁶ Nathan Isaacs, *The Sale in Legal Theory and in Practice*, 26 VA. L. REV. 651 (1940).

¹⁷⁷ *Id.*

intended to skewer biblical critics who used a similar methodology to suggest dates for biblical passages.¹⁷⁸ He implicitly made the point that the Bible, like the Uniform Sales Act, could be a single document even though separate elements of the law or Bible might be restatements of earlier documents or laws. Freiberg recounts the following:

When I had read the manuscript, I laughed heartily. Mr. Isaacs was hovering, waiting. I said, "Mr. Isaacs, that's a wonderful joke about the "higher critics"; but there aren't a half dozen people that will read the article who will ever get the point."

He looked at me with a seraphic smile and said, "Isn't that wonderful?"¹⁷⁹

In this case, at least, Isaacs delighted in the fact that only a select few could detect that he was simultaneously pursuing his agendas in the controversies surrounding the Bible and the law of sales.

3. *Instrumentalities of Legal Change in Jewish Law*

The concrete examples of the major instrumentalities of legal change in Jewish law provided by Isaacs to illustrate his understanding of glossation, legal fictions, equity, legislation and codification help clarify the exact scope of his cycle theory. Isaacs suggested that "[i]t seems that in every legal system one of the instrumentalities of development predominates over the others, without however excluding any of them."¹⁸⁰ Isaacs denied that the spirit of Jewish law is always glossatorial.¹⁸¹ However, he acknowledged that "[g]lossation seems to have impressed itself on Jewish law so that its typical text-book is a gloss upon a gloss, with marginal glossations."¹⁸²

Isaacs identified the first cycle in the history of Jewish law as culminating in the codification of the first five books of the Bible.

¹⁷⁸ Freiberg, *supra* note 36, at 4.

¹⁷⁹ *Id.*

¹⁸⁰ Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 409.

¹⁸¹ Isaacs, *Law of Change*, *supra* note 2, at 677 n.24.

¹⁸² Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 409-10.

Isaacs viewed the pre-prophetic period of the Bible as a period of literalism and legal fictions in interpretation.¹⁸³ He provided the following illustration of legal literalism in the post-biblical era: Leviticus commands that “[y]ou shall live in booths seven days; all citizens in Israel shall live in booths [Sukkoth].”¹⁸⁴ The biblical text provides no definition of what a Sukkah is. Isaacs suggested that information regarding the nature of the Sukkah must have been contained in the Hebrew common law.¹⁸⁵ The most natural way to discover this information “would be the opinion of persons who have retained the traditions of the language.”¹⁸⁶ The famous judgment of Solomon to split an infant in half as a ruse to discover the true parent of the child was an example of the legal fictions that were prevalent during the post-Mosaic but pre-prophetic period.¹⁸⁷ In contrast, the prophets embodied the approach of equity.¹⁸⁸ Isaacs argued that the exile of Jews after the destruction of the first Temple in Jerusalem required legislation as part of the reconstruction of Jewish life.¹⁸⁹ Thereafter, the individual books that became the Hebrew Bible were canonized, embodying a new codification and the beginning of a new cycle in the history of Jewish law.¹⁹⁰

Isaacs provided some examples of the development of legal fictions in Jewish law during the post-biblical period. The stage was set for the development of another legal fiction by the Bible’s establishment of the rule that every seventh year would be a sabbatical year in which all debts would be forgiven.¹⁹¹ A major social ill during the time of Hillel the Elder (ca. 110 BCE) was the prevalent practice of the wealthy to refrain from granting loans prior to the sabbatical year. Hillel devised a new legal fiction, the *prosbul*, as a way of circumventing the biblical rule canceling loans, whereby creditors make a declaration in court that the sabbatical year will not cancel the loan.¹⁹² Isaacs also viewed the creation of fictitious

¹⁸³ Isaacs, *Law of Change*, *supra* note 2, at 678.

¹⁸⁴ *Leviticus* 23:42.

¹⁸⁵ Isaacs, *Law of Change*, *supra* note 2, at 676.

¹⁸⁶ *Id.* at 677.

¹⁸⁷ *Id.* at 678.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 678-79.

¹⁹⁰ Isaacs, *Law of Change*, *supra* note 2, at 679.

¹⁹¹ *Deuteronomy* 15:1.

¹⁹² TRACTATE SHEVIITH, 1 MISHNAYOTH 284 (Philip Blackman trans., 1964); *Hillel*, in 6

boundaries which enabled activities, such as carrying objects on the Sabbath, which would otherwise have been prohibited, as an instance of legal fictions.¹⁹³ Legal fictions were also utilized to ease the stringencies of the criminal law, for example, when the repetitive language in the verse “[a]t the mouth of two witnesses or at mouth of three witnesses shall a matter be established” was used to derive the rule that if there is any discrepancy between the accounts of the witnesses then no conviction is possible.¹⁹⁴ This cycle of Jewish law culminated in approximately 200 CE with the composition of the Mishna, which collected and codified the oral traditions of Jewish law.¹⁹⁵

The greatest Talmudic sages demonstrated a spirit of equity.¹⁹⁶ Isaacs described the generation of Talmudic sages whose leaders were Abaye (ca. 278–338)¹⁹⁷ and Raba bar Joseph (ca. 280–352),¹⁹⁸ as “a period of growth by analogy, a period of formulation of principles, a period in which not the words of the Mishnah, but only the contents are accredited with legal force—in a word, a period of equity.”¹⁹⁹ Isaacs noted that “[a] cursory examination suggests that the period [of Raba and Abaye] witnesses a progress from status to contract,” which lent support to Isaacs’s theory that the shift from status to contract was the product of commentarial periods in the history of legal systems.²⁰⁰ Isaacs suggests that “sub-classification on the basis of peculiar circumstances and implied conditions may in general be considered the method of the Babylonian schools at the height of their creative work.”²⁰¹ This change in emphasis is reflected in the proliferation in the Talmud of sub-classifications of the types of bailees that more closely mirror individual fault than the categorizations of the Mishna. For example, the Talmud states that the general rule that a bailee who hands over his charge to another bailee is liable for the injuries then suffered by his charge does not

THE JEWISH ENCYCLOPEDIA 397 (1904).

¹⁹³ Isaacs, *Law of Change*, *supra* note 2, at 750.

¹⁹⁴ *Id.* at 751 (quoting *Deuteronomy* 19:15).

¹⁹⁵ *Mishna*, in 8 THE NEW ENCYCLOPÆDIA BRITANNICA 185 (15th ed. 1982).

¹⁹⁶ Isaacs, *Law of Change*, *supra* note 2, at 756.

¹⁹⁷ *Abaye*, in 1 THE JEWISH ENCYCLOPEDIA 27 (1901).

¹⁹⁸ *Raba (B. Joseph B. Hama)*, in 10 THE JEWISH ENCYCLOPEDIA 288 (1905).

¹⁹⁹ Isaacs, *Law of Change*, *supra* note 2, at 756.

²⁰⁰ *Id.* at 757.

²⁰¹ *Id.*

apply to the case in which the original bailee was a shepherd who left an animal in the care of an apprentice shepherd exercising the usual standard of care.²⁰² Another example, which Isaacs does not discuss, can be adduced to support the proposition that some Talmudic sages created new status classifications in order to more closely align liability to fault. Abba Arika (ca. 175–247 CE),²⁰³ who was part of a transition generation between the Sages of the Mishnaic era (the Tannaim), and the Sages of the Talmud (the Amorim), said that “[a] *kab* [a measure of weight] [is a culpable overload] for a porter.”²⁰⁴ This rule amounts to an imposition of strict liability. However, the anonymous narrator of the Talmudic passage objected that “[b]ut if it is too heavy for him, is he not an intelligent being?”²⁰⁵ The objection is apparently premised on the belief that further differentiations of liability are necessary based on the specific facts of a case. Abaye suggests that Abba Arika’s rule only applies when the weight of the load immediately struck down the porter upon taking up a load, which the porter did not initially realize was too great for him.²⁰⁶ Raba further supports the transition from status to contract by suggesting that the generalized weight limit rule can be overridden by contract, if the porter receives extra pay.²⁰⁷

Isaacs cited the following incident as an example of the application of equitable principles during the Talmudic era. The Talmud established the rule that porters are liable when barrels break due to their negligence.²⁰⁸ Some porters negligently broke a barrel of wine owned by Rabbah, son of R. Huna, who then seized the garments of the porters.²⁰⁹ Abba Arika, who was a more senior Rabbi, ordered the return of the garments and that Rabbah pay the porters their wages.²¹⁰ Rabbah asked Abba Arika whether his

²⁰² *Babylonian Talmud: Tractate Baba Kamma*, 56b; see also *Babylonian Talmud: Tractate Baba Mezi’a* 94b.

²⁰³ *Abba Arika (Usually Called Rab)*, in 1 THE JEWISH ENCYCLOPEDIA, *supra* note 197, at 29.

²⁰⁴ *Babylonian Talmud: Tractate Baba Mezi’a* 80b (second alteration in original).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Babylonian Talmud: Tractate Baba Mezi’a* 83a.

²⁰⁹ *Id.*

²¹⁰ *Id.*

decision was in accordance with the law.²¹¹ Abba Arika did not point to any technical point to justify his ruling, but instead relied upon the general ethical principle that one must act in practice more equitably than the strict requirements of the law.²¹² A modern commentator has noted that Abba Arika did not deny the law's requirements had bounds, but only insisted that the law should in practice be applied with compassion.²¹³

Isaacs described the solidification of the text and authority of the Talmud as representative of the next codification stage of Jewish law.²¹⁴ The text of the Talmud, as organized by Rav Ashi (ca. 352-427)²¹⁵ and Ravina was indeed a legal code, even if it was certainly a code written in a discursive style.²¹⁶ Isaacs argued that the functions of the sages known as the Gaonim, who flourished from approximately 600 CE to 1000 CE as heads of the Jewish academies in Babylon,²¹⁷ were to "close" and legislate around the Talmud. The Gaonim also initiated a new cycle of Jewish law.²¹⁸ This medieval cycle of Jewish law could boast of the gloss of Rashi (1040-1105),²¹⁹ which was followed by the commentaries of the French Tosafot²²⁰ and Spanish authorities from the eleventh to the thirteenth centuries. It culminated in the codification of the extant law in the Shulhan Arukh of Joseph Karo (1488-1575).²²¹ Karo's codification was based upon the neutral principle of adopting the majority position of respected medieval authorities, though Karo is not entirely consistent in applying this standard.²²² After Moses Isserles interpolated his own comments reflecting the traditions of Ashkenazi Jews into the

²¹¹ *Id.*

²¹² *Id.* See Isaacs, *Jewish Law in the Jewish State*, *supra* note 91, at 32; Nathan Isaacs, *Notes on Fiction, Equity and Legislation in the Development of Jewish Jurisprudence*, 1 THE JEWISH F. 600, 601 (1918) [hereinafter Isaacs, *Fiction*].

²¹³ ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* 237 (2006).

²¹⁴ Isaacs, *Law of Change*, *supra* note 2, at 758.

²¹⁵ *Ashi*, in 2 THE JEWISH ENCYCLOPEDIA 187 (1902).

²¹⁶ See STEINSALTZ, *supra* note 213, at 83, 212, 284. But see JACOB NEUSNER, HOW ADIN STEINSALTZ MISREPRESENTS THE TALMUD: FOUR FALSE PROPOSITIONS FROM HIS "REFERENCE GUIDE" (1998) (describing logical structure of the Talmud).

²¹⁷ *Gaon (plural, Geonim)*, in 5 THE JEWISH ENCYCLOPEDIA 567 (1906).

²¹⁸ Isaacs, *Law of Change*, *supra* note 2, at 758.

²¹⁹ *Rashi (Solomon Bar Isaac)*, in 10 THE JEWISH ENCYCLOPEDIA, *supra* note 198, at 324.

²²⁰ *Tosafot ("Additions")*, in 12 THE JEWISH ENCYCLOPEDIA, *supra* note 141, at 202.

²²¹ *Caro, Joseph B. Ephraim*, in 3 THE JEWISH ENCYCLOPEDIA 583 (1912).

²²² Isaacs, *Law of Change*, *supra* note 2, at 760.

Shulhan Arukh, attention was once again turned to glossation and to the legal fictions of clever scholars who practiced *pilpul* and invented legal fictions.²²³

Isaacs argued that the literalistic period in Jewish law following the canonization of the Bible, the literalistic period following the broad acceptance of the Gemara, and the period of literalism and legal fictions following the general acceptance of the Shulhan Arukh all produced movements within Judaism, which rejected the Oral Law.²²⁴ There have been two common responses to periods of literalistic interpretation of the law and legal fictions. One, as exemplified by the Sadducees after the canonization of the Bible, was characterized by adoptions of a foreign culture, in that case Hellenism, and a rejection of the oral legal tradition. The other reaction is an antinomian mystical reaction, such as that of the early Christians.²²⁵ Examples of mystical reactions to ages of literalism in Jewish law other than Early Christianity include the Cabbalists of the Middle Ages and Hasidism in the eighteenth and nineteenth centuries.²²⁶ Other than the Sadducees, Isaacs also classifies the Karaite movement popular in medieval Arabic speaking lands and the German-American Reform movement as non-mystical reactions against legal literalism, which rejected the authority of the oral law.²²⁷ The Sadducees, the Karaites, and the German-American Reform movement were all heavily influenced by the prevalent non-Jewish cultures of the times.²²⁸ Isaacs discerned a resemblance between the parables of the Hasidim and the folk-tales and parables found in the New Testament.²²⁹ He noted that the Hasidic movement was “a revolt of the layman against a crystallizing rabbinism, that could cite sections and paragraphs, that put everything in the past and nothing in the present.”²³⁰ Furthermore, the contemporaneous Reform movement in Germany and the Hasidic movement in Russia,

²²³ *Id.* at 760-61.

²²⁴ Isaacs, *Fiction*, *supra* note 212, at 601.

²²⁵ Isaacs, *Law of Change*, *supra* note 2, at 749.

²²⁶ Isaacs, *Fiction*, *supra* note 212, at 602.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Nathan Isaacs, *Old Chasidic Legends*, 12 THE MACCABAEAN 111, 112 (1907) (reviewing Martin Buber, *Die Geschichte des Rabbi Nachman, ihm nacherzaehlt* (1906)) [hereinafter Isaacs, *Old Chasidic Legends*].

²³⁰ *Id.* at 113.

“different as they are in externals, are alike [in] protests against [the] exaltation of the letter.”²³¹ Isaacs claimed that the tradition of Jewish law had been maintained by “the main body of Israel,” the Pharisees and their spiritual descendants the Talmudists and the Orthodox, and had emerged from the periods of literalism through the efforts of counter-reform movements within Judaism.²³² In 1917, Isaacs believed that “the neo-orthodoxy of western Europe and America” was in the midst of aligning its position with equitable principles.²³³

B. Motivations, Criticisms and Possible Reformulations of Cycle Theory

1. Possible Motivations for the Development of Cycle Theory

Isaacs viewed his cycle theory as a viable framework to understand the past of Jewish law; he probably thought it set forth an outline for the desirable future of that law. Isaacs and Oko collaborated in publishing in the *Menorah Journal* selections of their correspondence in which they discussed the future study of Jewish law with the goal of spreading knowledge among American Jewish intellectuals of the accomplishments of the *Wissenschaft des Judenthums* (“Science of Judaism”) School. The Science of Judaism School was developed by Jewish scholars in Germany, who had sought to apply the methods of secular historians to the materials of the Jewish past.²³⁴ Isaacs wrote under the pseudonym of the “Jurist” and Oko wrote as the “Bookman.”²³⁵ Isaacs began the correspondence by asking Oko: “Why [has] the history of Jewish law

²³¹ Isaacs, *Law of Change*, *supra* note 2, at 762.

²³² Isaacs, *Fiction*, *supra* note 212, at 602; *see also* Boaz Cohen, *Letter and Spirit in Jewish and Roman Law*, in *ESSENTIAL PAPERS ON THE TALMUD* 410 (Michael Chernick ed., 1994) (“At a certain stage in the development of law, the inherent antithesis between the letter and the spirit becomes more or less pronounced. Now it was the task of the rabbis to preserve a just balance between letter and spirit.”).

²³³ Isaacs, *Law of Change*, *supra* note 2, at 763.

²³⁴ *See generally* Nathan Isaacs & Adolph S. Oko, *Correspondence Between a Jurist and a Bookman: On the Future of Jewish Learning*, 4 *THE MENORAH J.* 73 (1918) [hereinafter *Correspondence*].

²³⁵ *Id.*; *see* BOAZ COHEN, *I JEWISH AND ROMAN LAW: A COMPARATIVE STUDY* XXV (1966) (attributing the article to Isaacs and Oko).

. . . never been written”²³⁶ He hoped to write a history of law which would both capture the spirit of Jewish law and which would be scholarly and comprehensive.²³⁷ Isaacs’s goal of writing a history of Jewish law was not primarily motivated by the urge to fill a void in scholarship, nor did he believe that the obstacles were primarily technical. Writing in the midst of World War One, Isaacs thought that German scholars, such as the great historian of Rome Theodor Mommsen (1817-1903),²³⁸ and the Roman law historian and jurist Rudolf von Jhering (1818-1892),²³⁹ had concentrated on the Romans because Germany was the spiritual heir to Rome. Isaacs asked, “for the corresponding Jewish work must we look to the Jew? Is he or is he not the spiritual heir of his own ancestors?”²⁴⁰ Isaacs thought that such a project would only be achieved if modern Jews succeeded in becoming the spiritual descendants of the Jews of the past.

Isaacs conceived of his theory of legal cycles as a buttress for the Orthodox understanding of Jewish law against the attacks of Reform Judaism, even as he embraced the concept that law by its nature is adaptive.²⁴¹ Isaacs received criticism from some Orthodox readers for acknowledging the Reform movement’s rejection of the authority of Halakah as a natural element of the development of Jewish law. Rabbi Dr. Adolf Büchler (1867-1939) wrote to Isaacs that “[t]he negative attitude of the 19th century reformers . . . does not seem to fit in with the natural stages of development.”²⁴² Isaacs, prompted by those who questioned his apparent concession to the Reform proposition that Jewish law evolves, asserted that the debate

²³⁶ Isaacs & Oko, *Correspondence*, *supra* note 234, at 73 (internal quotation marks omitted).

²³⁷ *Id.* at 76-77.

²³⁸ *Mommsen, Theodor*, in 6 THE NEW ENCYCLOPEDIA BRITANNICA, *supra* note 101, at 986.

²³⁹ *Jhering, Rudolf von*, in 6 THE NEW ENCYCLOPEDIA BRITANNICA, *supra* note 101, at 557.

²⁴⁰ Isaacs & Oko, *Correspondence*, *supra* note 234, at 77.

²⁴¹ DiMatteo & Flaks, *supra* note 1, at 330.

²⁴² Letter from Rabbi Adolph Buchler to Nathan Isaacs (Oct. 6, 1919) (on file with Nathan Isaacs Papers, 1915-1941, Baker Library Historical Collections, Harvard Business School, Box 5, File: Material removed from Volume 1, 1919-1930, Soldiers Field, Boston, MA (5 Boxes and 2 Volumes) [hereinafter NI Papers, BLHC, HBS]. Rabbi Büchler (1867-1939) was the Principal of the Jew’s College, an English Orthodox seminary. RAPHAEL PATAL, THE JEWS OF HUNGARY: HISTORY, CULTURE, PSYCHOLOGY 400 (1996).

between Orthodox and Reform was “not a question of change vs. no change; it is rather a question of the mode and manner of development. It is really a question of acceptance or rejection of the Oral Torah.”²⁴³

Isaacs also believed that a central merit of his cycle theory was that it defused the Christian criticism of Jewish law as too literalistic.²⁴⁴ For Isaacs, glossation, word study, and strict literalism occurred as stages of a cycle that apply to all legal systems, including that canon law of the Church.²⁴⁵ For example, Isaacs pointed out that the Church had experienced a time of literalism when “the church fathers and the early councils were busy interpreting such matters as . . . the proper date for Easter or day for the Sabbath.”²⁴⁶ Isaacs noted that much of the criticism of Jewish law is based on the fact that many of Judaism’s ancient texts and laws are based on interpretations of the Bible, which appear to be legal fictions rather than sound interpretations of the older texts. He explained that

the ancient lawyer[,] . . . when asked for an authority, did what a modern lawyer frequently has to do when he has no case on all fours with the case at bar: he cited an instance not exactly in point, but one showing a clear tendency in the same general direction. If one of his followers thereafter writes the accepted law in the form of an annotation on the old code, he leaves the impression that the practice is derived solely from the passage cited, a decidedly puzzling impression.²⁴⁷

Cycle theory also presented a possible solution to the puzzling question about the origins of the methodology of post-biblical Jewish law. By the time Isaacs developed his cycle theory scholars had developed various theories as to whether post-biblical Jewish law developed first through the Midrashic or the Mishnaic forms. Both of those forms appear throughout the literature of the rabbinic scholars at the beginning of the Common Era, the Tannaim.²⁴⁸ In the

²⁴³ Isaacs, *Fiction*, *supra* note 212, at 601.

²⁴⁴ *Id.* at 600.

²⁴⁵ Oko, *Law of Change: Introduction*, *supra* note 66, at 663.

²⁴⁶ Isaacs, *Law of Change*, *supra* note 2, at 749 n.36.

²⁴⁷ *Id.* at 677 n.24.

²⁴⁸ Oko, *Law of Change: Introduction*, *supra* note 66, at 663; *see* JACOB Z. LAUTERBACH,

Midrashic form the law is taught as a running commentary on the biblical text. In the Mishnaic form the law “is presented as an independent work . . . without any scriptural proof, and teaching them independently and not connected with the words of the written law.”²⁴⁹ Isaacs adopted the view that the Midrashic method of expounding and interpreting the text of the Bible stems from the pre-tannaitic period and preceded the Mishnaic method.²⁵⁰ This position fits into his general theory that glossation comes first in a legal cycle, and then codification. However, from a broader viewpoint Isaacs neatly rendered the controversy irrelevant by arguing that the stages of legislation, codification, and hermeneutical study of texts do not occur in a single order, but instead in a repeating cycle. Cycle theory would posit that the glossing of the Midrashic style of legal thinking would alternate historically with the legislative Mishnaic style. Professor Weiss-Halivni has gone further by discerning a tendency in the Talmudic literature to shift back and forth between an apodictic Mishna like form and a contrasting form in which laws are presented with their justifications.²⁵¹ There continues to be much scholarly disagreement over the chronological relationship between the Midrashic and Mishnaic forms.²⁵²

Isaacs’s suggestion that the glossation form was abandoned when interpretations of the biblical text became too strained is very much like the thesis presented in 1916 by J.Z. Lauterbach (1873-1942),²⁵³ a professor at Hebrew Union College. He, like Isaacs, lived at that time in Cincinnati. Lauterbach argued that when new methods of scriptural interpretations were introduced to justify traditional practices that had no real connection with scriptures, some scholars accepted the new teachings but were uncomfortable with the methods of deriving them. Therefore, they began teaching them in the form of legislation, independent from scriptural bases.²⁵⁴ Both Isaacs and

MIDRASH AND MISHNAH: A STUDY IN THE EARLY HISTORY OF THE HALAKAH (1916).

²⁴⁹ LAUTERBACH, *supra* note 248, at 2.

²⁵⁰ Isaacs, *Law of Change*, *supra* note 2, at 748-49.

²⁵¹ David Weiss-Halivni, *The Amoraic and Stammaitic Periods*, in *ESSENTIAL PAPERS ON THE TALMUD 127-60* (Michael Chernick ed., 1994).

²⁵² See HOWARD L. APOTHAKE, SIFRA, DIBBURA DESINIA: RHETORICAL FORMULAE, LITERARY STRUCTURES, AND LEGAL TRADITIONS 14-15 (2003) (collecting “chicken and egg” arguments over which came first, the Mishna or the Midrash).

²⁵³ Solomon B. Freehof, *Jacob Z. Lauterbach: An Appreciation*, in *RABBINIC ESSAYS BY JACOB Z. LAUTERBACH* (Lou H. Silberman ed., 1951).

²⁵⁴ LAUTERBACH, *supra* note 248, at 77-78, 82.

Lauterbach relied upon the same proof text that traditions had gained more strength and authority than scriptural proofs by the late Second Temple period. In a story found in the Palestinian Talmud, Hillel was said to have argued a contested question of law based on scriptural proofs all day to no success. However, his decision was accepted when he finally stated he had heard the rule as a teaching from his teachers.²⁵⁵ Isaacs cited the story as evidence that at the time of Hillel there was one school that felt free to apply analytical principles to support innovation, while there was in opposition a conservative school that opposed adopting any Halakah not supported by a traditional teaching.²⁵⁶

Isaacs's description of the codification cycles in Jewish Legal history anticipated Isadore Twersky's independent analyses that appeared fifty years later.²⁵⁷ Twersky thought that any student of Jewish law could not ignore its "see-saw tendency." Jewish law is characterized by attempts to compress by

formal codification [which] alternate with counter-attempts to preserve the fulness and richness of both the method and substance of the [Jewish Law] by engaging in interpretation, analogy, logical inference, and only then formulating the resultant normative conclusion. . . . A code could provide guidance and certitude for a while but not finality.²⁵⁸

However, Isaacs went further than Twersky, who only discussed these cycles in post-Talmudic history.²⁵⁹ Like his contemporary, Chaim Tchernowitz (pseudonym Rav Za'ir; 1871-1949), Isaacs presented a historical account of the history of Jewish law from biblical times to his own times.²⁶⁰ Tchernowitz indicated in a letter to

²⁵⁵ *Id.* at 83.

²⁵⁶ Isaacs, *Law of Change*, *supra* note 2, at 755 n.56.

²⁵⁷ Isadore Twersky, *The Shulhan 'Aruk: Enduring Code of Jewish Law*, 16 JUDAISM 141-58 (1967), reprinted in ISADORE TWERSKY, *STUDIES IN JEWISH LAW AND JEWISH PHILOSOPHY* 130 (1982). Professor Noah Feldman pointed out to me the similarity between the thinking of Isaacs and Twersky on this issue.

²⁵⁸ *Id.* at 138.

²⁵⁹ *Id.*

²⁶⁰ See 1 CHAIM TCHERNOWITZ, *TOLDOT HA-POSKIM* 14-17 (1946) (outlining a periodization of Jewish law very similar to Isaacs's theory); *Tchernowitz, Chaim*, in 15 *ENCYCLOPEDIA JUDAICA* 883, 883-84 (1971).

Isaacs that he believed that he and Isaacs shared a similar ideological position.²⁶¹

2. *Criticisms of the Cycle Theory and Feasible Adaptations of the Theory*

There are a number of serious problems with Isaacs's cycle theory. It has been persuasively argued that when later legal academics turned to the Jewish legal tradition as a model for American law, they implicitly espoused a highly contestable modern interpretation of the structure and meaning of Jewish law.²⁶² It is also doubtful if the inherently religious Jewish law can be an appropriate model for secular, democratic, American Constitutional law.²⁶³ These criticisms, though not necessarily fatal, are also applicable to Isaacs. Furthermore, although Isaacs's cycle theory remains a compelling and thought provoking description and explanation of the development of Jewish law, developments in the study of Halakah over the last ninety years may require adjustment of the theory for it to retain its viability. One objection is that the timeline of Jewish legal thinkers throughout the ages does not fully conform to a rigid cyclical schema. Isaacs's characterizations of Jewish legal thinkers are a bit too broad, as many prominent figures do not fit easily into his *a priori* categorizations. For example, while Isaacs admits that Maimonides sought "principles," he claims that the great philosopher "was not far from the glossator in spirit, nor above the making of fictions."²⁶⁴ In support of this evaluation, Isaacs pointed to the treatment of interest by Maimonides. The Bible prohibits creditors from lending money for interest.²⁶⁵ The Talmud, however, extended the prohibition to arrangements, which did not fall into the technical biblical prohibition.²⁶⁶ For example, agreements in which one partner

²⁶¹ Letter from Chaim Tchernowitz to Nathan Isaacs (June 20, 1940), NI Papers, MS 184, AJA.

²⁶² Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 821 (1993).

²⁶³ *Id.* at 894 ("[I]n the final analysis, Jewish law is not only a legal system; it is the life work of a religious community. The Constitution, on the other hand, is a political document. It may even be a *nomos* But it will not be Torah.").

²⁶⁴ Isaacs, *Law of Change*, *supra* note 2, at 758-59.

²⁶⁵ *Exodus* 22-24; *Leviticus* 25:35-37; *Deuteronomy* 23:20-21.

²⁶⁶ HAIM H. COHN, *Usury*, in THE PRINCIPLES OF JEWISH LAW 502 (Menachem Elon ed.,

agrees to bear any losses while profits are shared equally are prohibited due to the extension of the biblical prohibition on interest.²⁶⁷ Isaacs criticizes Maimonides for extending Talmudic legal fictions to allow transactions which logical consistency would require forbidding, such as a creditor giving a sum to an intermediary to lend to a third party borrower.²⁶⁸ However, Rashi, who Isaacs praises for combining the merits of a glossator and a commentator,²⁶⁹ was reported to have permitted the same legal fiction because the prohibition on lending on interest only applies to the direct action of the principals, and not to the actions of their agents.²⁷⁰ Indeed, the biblical prohibition on interest has little practical significance for contemporary observant Jews due to the adoption of the legal fiction of the *hetter iskah*, by which a loan is formulated as a joint venture between a partner who supplies the money and another partner who has full freedom to use the capital.²⁷¹

Cycle theory can be reformulated as the more modest claim that there are certainly broad eras in the history of Jewish law that are recognized to more often than not follow Isaacs's schema. Perhaps this weak form of cycle theory is what Isaacs originally intended, as he was careful to issue the warning that he was not "arguing for a fatalistic philosophy of history" but that his cycles were "only of thought tendencies."²⁷² Cycle theory can also be tweaked to follow Professor Twersky's suggestion that individual students of Halakah experience, the cycle that Isaacs described as taking place over ages: a need for extensive analysis, research and theorizing, goes hand in hand with a subsequent urge for codification and simplification for a practical guide for life. Such was the experience of Rabbi Yosef Caro, who first wrote a comprehensive work discussing and analyzing the arguments of previous authorities, and then composed a shorter work, the *Shulchan Aruch*, which became a practical guidebook. Such an adaption of Isaacs's cycle theory would make it much less ambitious, but it would remain true to his central argument

2007) [hereinafter Cohn]. See Mishna *Baba Mezia* 5:1; *Babylonian Talmud: Baba Mezia* 61b, 67a.

²⁶⁷ COHN, *supra* note 266, at 502.

²⁶⁸ Maimonides, in XIII MISHNAH TORAH.

²⁶⁹ Isaacs, *Law of Change*, *supra* note 2, at 758.

²⁷⁰ COHN, *supra* note 266, at 504.

²⁷¹ *Id.* at 504-05; *Heimbinder v. Berkovitz*, 670 N.Y.S.2d 301 (N.Y. Sup. Ct. 1998).

²⁷² Isaacs, *Schools of Jurisprudence*, *supra* note 3, at 377.

that such changes of style in legal interpretation and efforts are a product of human nature. Another possibly necessary modification of Isaacs's cycle theory would be greater awareness of the differences of manner and modes of interpretation between different regional divisions and heritages within Judaism. Isaacs acknowledged that much of Jewish law was accretions that reflected the customs of the host societies in which Jews have lived throughout thousands of years.²⁷³ Nonetheless, Isaacs believed that there is "a unifying spirit running through [the experience of Jewish law in the Diaspora] that we may call Jewish."²⁷⁴

Another concern regarding the cycle theory is that it does not accord with the everyday experience of lawyers. If one looks at the composition of the current United States Supreme Court, avowed textualists and partisans of more flexible theories of constitutional law sit together at the same time. It is impossible to say that all of the American judges in a certain historical period share the same judicial philosophy. The same can be said about rabbis and deciders of Jewish law throughout the ages: Rabbis who have been contemporaries have had widely different styles of interpretation at the same time. Such differences in style and modes of decision-making have been apparent, as Isaacs of course knew and noted, since the split between the schools of the broadly more liberal Hillel and the more conservative Shammai around the year 0 CE.²⁷⁵ A variant of this objection was forcefully articulated by Samuel Williston after Isaacs presented an address on the "Aftermath of Codification" at the Convention of the American Bar Association in St. Louis on August 23, 1920.²⁷⁶ Isaacs had argued that the codification of law was having a distinct effect on the thought processes of lawyers by turning their attention to the texts of statutes rather than case law.²⁷⁷ Williston, who had drafted several uniform laws, responded that with careful drafting necessary glossing on a statute could be avoided.²⁷⁸ It seems that Williston did not fully

²⁷³ Isaacs, *Jewish Law in the Jewish State*, *supra* note 91, at 30.

²⁷⁴ *Id.*

²⁷⁵ See Isaacs, *Law of Change*, *supra* note 2, at 752.

²⁷⁶ Isaacs, *The Aftermath of Codification*, *supra* note 68, at 550.

²⁷⁷ *Id.* at 548.

²⁷⁸ HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS 25, 26 (1919) (recording minutes of 1920 meeting).

endorse Isaacs's larger argument that glossation was an inevitable result of codification. Nonetheless, ninety years later, Isaacs's prediction has been largely fulfilled.

Another concern about Isaacs's cycle theory may point the way towards understanding Isaacs's likely evolving evaluation of cycle theory. In 1917 and 1918, Isaacs published articles applying his cycle theory to Jewish law,²⁷⁹ tort law,²⁸⁰ contract law,²⁸¹ and the history of jurisprudence.²⁸² In the early 1920s Isaacs began work on a book on the cycle theory, but he then abandoned the project. However, shortly thereafter, Isaacs apparently stopped attempting to develop his cycle theory. It is perhaps unknowable why Isaacs failed to further refine his cycle theory in the last twenty years of his life. He might have become engrossed in his tasks teaching at Harvard Business School and working on new functional methods of understanding business law. However, a more fundamental possible explanation for Isaacs's failure to continue to develop his cycle theory is that he came to doubt the overly rigid categorizations of legal developments and legal thinkers sometimes found in his articles on cycle theory. Ultimately, for Isaacs cycle theory "when properly understood [was] nothing more nor less than the effect of human nature in its relations to Law."²⁸³ With the burgeoning of the Legal Realist movement during the 1920s, Isaacs emphasized the functionalist insight already present in his early work that law should adapt to the needs of society. He did so with the important caveat that he believed that such change should be in accord with neutral ethical principles. Isaacs thought that "every practical man . . . may find himself something of a Kantian, though he has never studied philosophy. He rationalizes his conduct by stating it in generalized terms"²⁸⁴

²⁷⁹ Isaacs, *Law of Change*, *supra* note 2.

²⁸⁰ Isaacs, *Fault and Liability*, *supra* note 72.

²⁸¹ Isaacs, *Standardizing of Contracts*, *supra* note 71.

²⁸² Isaacs, *Schools of Jurisprudence*, *supra* note 3.

²⁸³ Isaacs, *Fiction*, *supra* note 212, at 600.

²⁸⁴ Nathan Isaacs, *Political, Legal, and Economic Logics—And Logic*, Address at the American Academy of Arts and Sciences 30 (Jan. 13, 1937), NI Papers, BLHC, HBS, Box 3, File: Speeches, 1937.

VI. ISAACS'S POSITION IN AMERICAN JEWISH LIFE**A. American Jewish Denominations**

Isaacs's cycle theory consists of theological claims and arguments that are extremely contested. His cycle theory of Jewish law has an ideological bias in favor of the observance of Halakah. Writing in 1918, Isaacs described Orthodoxy as the carrier of the heritage of Jewish law, and Reform Judaism's refusal to accept the authority of rabbinic legal traditions as an understandable but ultimately sterile reaction to a passing stage of literalism and legal fictions in Jewish law.²⁸⁵ Isaacs felt comfortable presenting his cycle theory and its implicit acceptance of changes in religious laws and practices as a theory loyal to Orthodoxy. Today, the claim that change is incorporated in Halakah is not as widely embraced.

It is difficult and almost surely misleading to attempt to place a Jewish denominational label upon Isaacs. There is a distinct danger of unconsciously misreading Isaacs by imposing our current classifications on his thought. Moreover, Jewish denominations and observances of Jewish law were in flux throughout the first half of the twentieth century. Isaacs himself pointed out that Jewish denominational divisions in America between Orthodoxy and Reform were imported from Europe and did not necessarily cohere with the sociological realities of Jewish life in America.²⁸⁶ Indeed, he was opposed to the entire project of classification among the Jews in America. Isaacs urged that

[i]f instead of classifying ourselves as reform or orthodox, Zionists, non-Zionists or assimilators and demanding that every man be labelled as belonging to one party or another, we recognize the constitutional right to remain a Jew, we will have made one step towards encouraging co-operation in various new undertakings where heretofore co-operation has been barred, while at the same time we shall check the involuntary contribution we otherwise make to causes

²⁸⁵ Isaacs, *Fiction*, *supra* note 212, at 602.

²⁸⁶ Nathan Isaacs, *Jewish Sects and Factions in America*, 5 THE JEWISH F. 8, 9 (1922) [hereinafter Isaacs, *Jewish Sects*].

of which we do not approve.²⁸⁷

Isaacs recognized that the behavior and thought of most Jews could not be neatly divided between the observant and the non-observant or good and bad because “[m]ost of us are probably somewhere in between these extremes.”²⁸⁸

However, for purely heuristic use the following categorizations may be helpful in understanding where Isaacs fit in within the theological spectrum of American Judaism. During the early twentieth century Reform Judaism in America emphasized the ethical principles of Judaism and rejected the binding authority of Jewish law.²⁸⁹ Conservative Judaism viewed Halakah as authoritative, but subject to organic change in response to social developments.²⁹⁰ Such an approach was termed “positive historical” in nineteenth century Germany: historical because it acknowledges historical change in Jewish law, but “positive” in recognizing the unchanging authority of the principles and most of the institutions of Judaism.²⁹¹

For our heuristic purposes, Orthodox Judaism can be divided between Modern Orthodoxy and Ultra-Orthodoxy. In general, Modern Orthodox thinkers support the synthesis of Judaism and secular cultures, and insist that although Jewish law is divine and eternal the application of the law can differ based on diverse societal situations.²⁹² In contrast, Ultra-Orthodoxy insists that any change in Jewish law is not permissible.²⁹³

²⁸⁷ *Id.* at 16.

²⁸⁸ *Id.*

²⁸⁹ *Cf.* SYLVIA BARACK FISHMAN, *JEWISH LIFE AND AMERICAN CULTURE* 12 (1999) [hereinafter FISHMAN, *JEWISH LIFE*] (Reform Judaism in the 1990s looked “to social action and universalist principles of *tikkun olam* (perfecting the world and repairing its ills) as the sustained mission of Jews and Judaism in modern times, utilizing their free choice to select from traditional Jewish rituals only those behaviors they feel may contribute to a meaningful Jewish experience”).

²⁹⁰ *Id.* at 23.

²⁹¹ JAMES G. HELLER, *ISAAC M. WISE: HIS LIFE, WORK, AND THOUGHT* 84 (1965); MICHAEL A. MEYER, *RESPONSE TO MODERNITY: A HISTORY OF THE REFORM MOVEMENT IN JUDAISM* 137 (1995).

²⁹² FISHMAN, *JEWISH LIFE*, *supra* note 289, at 20.

²⁹³ *Id.* at 21.

B. The Influence of the Reform in Cincinnati

Isaacs's view of the conflict between Orthodox and Reform Jewry was influenced by Isaacs's personal experience of living his formative years in Cincinnati, which was the home of both Reform Judaism's seminary, Hebrew Union College, and a significant Orthodox population of Jews from Eastern Europe. Much of Isaacs's attitude towards the Reform movement can be explained by the fact that he lived until he was thirty-two-years-old in a Cincinnati where the Reform movement in its Classical stage was dominant and intolerant of any observance of Jewish law. Yet, traditional Jewish observance remained a relatively recent memory for many Reform Jews and a present day reality of the more recent immigrants from Russia.

Much of the special character of the Cincinnati Jewish community was due to the fact that the pulpit of Rabbi Isaac Mayer Wise (1819-1900), the leading figure in the Jewish Reform Movement in the United States during the nineteenth century, was located in that city.²⁹⁴ Wise had been serving as an Orthodox Rabbi in Bohemia when he attended the Frankfurt-on-the-Maine Rabbinical Conference in 1845, one of a series of rabbinical conferences in the 1840s in which the program of Reform Judaism in Germany was laid out.²⁹⁵ The most important event of this conference was the mid-conference withdrawal of Rabbi Zechariah Frankel, the leader of the positive-historical school, which developed into the Conservative movement. Thereafter, it was clear that even among the ranks of the forces urging the recognition of change in Jewish law there would be divisions between those more loyal to tradition and those who rejected the authority of Jewish law.²⁹⁶ The majority of convening rabbis agreed that the messianic ideas should be reinterpreted to stress Judaism's universalistic aspects and that prayers calling for a return of the Jewish People to Palestine and to the establishment of a Jewish state should be abandoned.²⁹⁷ However, the conference did not abandon all of Judaism's distinctive traditions. For example, the

²⁹⁴ MEYER, *supra* note 291, at 242.

²⁹⁵ HELLER, *supra* note 291, at 83; MEYER, *supra* note 291, at 239.

²⁹⁶ HELLER, *supra* note 291, at 84; MEYER, *supra* note 291, at 136.

²⁹⁷ MEYER, *supra* note 291, at 137.

conference refused a suggestion to abandon circumcision.²⁹⁸ Wise's attendance at the conference had an immense influence upon his views and convictions.²⁹⁹

Wise was known as a moderate reformer:

Judaism, its elevation and preservation, the proper understanding of its precepts, a due appreciation of its benign influence, and the choice of adequate means, to naturalize it on American soil and transmit it to posterity, untarnished and unalloyed—this engages chiefly our attention, and it is this which we wish to impress deeply on the mind of our readers. . . . Reform, thus, is the means, not the end.³⁰⁰

To some extent Wise's moderate attitude towards Jewish traditions was a product of his willingness to temporize and compromise upon ideological positions. Wise and Isaac Leeser, then the leader of Orthodoxy in United States, were the most prominent figures at a rabbinical conference convened in Cleveland, Ohio, in October of 1855. Together they crafted a declaration of faith in which they agreed on the divinity of the Bible and that the Talmud was the authoritative interpretation of the Torah.³⁰¹ Wise could only have agreed to such a formulation with the mental reservation that the Talmud had implicitly changed and adapted many Biblical laws, and that the same Talmudic willingness to amend, change, and adapt Talmudic laws should be applied to contemporary Jewish law.³⁰² Indeed, more radical Reform rabbis were extremely critical of Wise's concessions in the statement. These rabbis, such as David Einhorn, wanted to go much further towards solely emphasizing the universal aspects of Judaism and stressing that Judaism was a religion of ethical monotheism.³⁰³ Ultimately, the platform failed as the irreconcilable differences between the Orthodox and Reform

²⁹⁸ *Id.* at 139.

²⁹⁹ HELLER, *supra* note 291, at 85.

³⁰⁰ *Id.* at 554-55 (alteration in original) (quoting Isaac M. Wise, *Orthodoxy and Reform*, 12 THE AM. ISRAELITE 364 (1866)).

³⁰¹ *Id.* at 290 (alteration in original) (quoting Isaac M. Wise, 1 THE AM. ISRAELITE 299 (1855)).

³⁰² *Id.* at 291.

³⁰³ *Id.* at 294-95.

reemerged.³⁰⁴

In 1873, Wise attempted to unify all the Jewish congregations in America under the auspices of the Union of American Hebrew Congregations, though the Union was only able to become the umbrella organization of Reform congregations.³⁰⁵ In 1875, Hebrew Union College was founded by Wise in Cincinnati.³⁰⁶ Wise created Hebrew Union College with the stated purpose of creating an “orthodox” seminary.³⁰⁷ Wise probably meant to use the term “orthodox” in the sense of right thinking and in accordance with a correct interpretation of Jewish doctrine, which of course he would believe to be his own view. However, it is clear that Wise made a strenuous attempt during the early years of Hebrew Union College to make the seminary palatable to more traditional Jews. He arranged for traditionalistic rabbis such as Sabato Morais of the Mikve Israel congregation in Philadelphia to participate in a yearly public examination of the rabbinical students as a means of gathering their support for the seminary.³⁰⁸

Moreover, many of Wise’s theological beliefs were actually quite in line with the beliefs of traditional Judaism. Though Wise did not think that every narrative in the Bible was literally true, he did believe that there was a divine revelation of the Ten Commandments at Mount Sinai from God through Moses to the Jewish people.³⁰⁹ Wise was a strident opponent of Higher Biblical critics; he declared that “[t]he Torah is genuine, authentic, Mosaic; all theories, hypotheses and allegations to the contrary are flimsy *a priori* speculation, without any documentary basis or justification in fact.”³¹⁰ He, in fact, wrote a tract attacking biblical criticism as being based upon a series of unsupported hypotheses that was used for years as a text at the Hebrew Union College.³¹¹ Until Wise’s death,

³⁰⁴ HELLER, *supra* note 291, at 291-93.

³⁰⁵ Naomi Wiener Cohen, *Reaction of Reform Judaism to Zionism*, 40 PUBLICATIONS OF THE AM. JEWISH HIST. SOC’Y 361 (1951), *reprinted in* 8 AMERICAN JEWISH HISTORY, AMERICAN ZIONISM: MISSION AND POLITICS 29, 51 (Jeffrey S. Gurock ed., 1998) [hereinafter Cohen, *Reaction to Reform Judaism*].

³⁰⁶ *Id.* at 40.

³⁰⁷ HELLER, *supra* note 291, at 442.

³⁰⁸ *Id.* at 439.

³⁰⁹ *Id.* at 521-22.

³¹⁰ *Id.* at 522 (quoting Isaac M. Wise, 36 THE AM. ISRAELITE 4 (1890)).

³¹¹ *Id.* at 524.

Reform rabbis in the Midwest were much more moderate in their reforming program than Reform rabbis who ministered to congregations on the Eastern seaboard.³¹²

Wise's efforts to create a unified rabbinical seminary for American Jewry was disrupted when non-kosher food was served at the banquet at the graduation of the first class of Hebrew Union College in 1883.³¹³ In an article in the aftermath of this incident, Wise stated that the serving of non-kosher food had been accidental and he had not been responsible for catering the meal, but he also downplayed the importance of observing the kosher dietary laws.³¹⁴ Wise's stance angered the more traditionalist rabbis. In 1885, Wise was President of a Conference at Pittsburgh that adopted a platform which entirely rejected the Talmud, any aspirations to a renewed Jewish state, a personal messiah descended from King David, and which was even equivocal regarding the divine inspiration of the Scriptures.³¹⁵ This "Pittsburgh Platform" clearly reflected a triumph of the more radical wing of the Reform movement.³¹⁶ The Pittsburgh Platform became the touchstone of Reform Judaism during its classical stage, which flourished in America from the 1880s until the 1930s. Adherents of classical Reform Judaism argued that Judaism was purely a religion and that the Jews were not a nation or ethnicity.³¹⁷ Classical Reform Judaism's rejection of the messianic belief that a scion of King David would restore a Jewish State in Palestine undercut the traditional root of Zionism among Jews.³¹⁸ In the wake of the Pittsburgh Platform, Sabato Morais and other traditionalists founded the Jewish Theological Seminary in New York in 1886.³¹⁹ In 1903, Kaufman Kohler (1843-1926)³²⁰ ushered in the hegemony of classic Reform doctrine at Hebrew Union College when

³¹² Herbert Parzen, *The Purge of the Dissidents: The Hebrew Union College and Zionism 1903-1907*, in 37 JEWISH SOC. STUD. 291, 291 n.5 (1975).

³¹³ HELLER, *supra* note 291, at 452.

³¹⁴ *Id.*

³¹⁵ *Id.* at 462-65.

³¹⁶ *Id.* at 465.

³¹⁷ JACK ROSS, RABBI OUTCAST: ELMER BERGER AND AMERICAN JEWISH ANTI-ZIONISM 6 (2011).

³¹⁸ *Id.*; Cohen, *Reaction to Reform Judaism*, *supra* note 305, at 51.

³¹⁹ Morais, *Sabato*, in 8 THE JEWISH ENCYCLOPEDIA 679-81 (1905).

³²⁰ Kohler, *Kaufman*, in 6 THE UNIVERSAL JEWISH ENCYCLOPEDIA 428 (Isaac Landman ed., 1948).

he succeeded Isaac Mayer Wise as President of the Seminary.³²¹ Kohler introduced biblical criticism into the curriculum.³²² In 1897, the modern Zionist movement was founded with the first Zionist Congress at Basel.³²³ Kohler, like Isaac Mayer Wise himself, was opposed to Zionism.³²⁴ However, unlike Wise, Kohler refused to countenance the employment of Zionists teaching on the faculty of Hebrew Union College.³²⁵ From 1897 to 1915 the establishment of Reform Judaism conducted an intense anti-Zionist campaign.³²⁶ Faculty members of Hebrew Union College who supported Zionism, such as Max Schloessinger (1877-1944)³²⁷ and Max Leopold Margolis (1886-1932),³²⁸ were dismissed from their positions.³²⁹ Margolis taught Hebrew and Semitic languages at the Hebrew Union College from 1893 until 1898 and then from 1905 to 1907 until he was forced out due to his outspoken advocacy of Zionism.³³⁰ Margolis's theological and political convictions had shifted away from Classical Reform during his second stint of teaching at Hebrew Union College.³³¹ Isaacs must have been able to empathize with the hazards of charting an idiosyncratic approach to Judaism that did not fall neatly into pre-ordained denominational lines. Years after being forced out due to his support of Zionism, Margolis confided to Isaacs that "[i]t was not given to me to pursue an even road; mine was a zigzagging line; and I am paying the penalty in being at the outs with one party [the Reform movement] and an object of suspicion with the other [more traditional Jews]," but Margolis asserted that "I am quite happy that things turned out as they did."³³²

³²¹ Cohen, *Reaction to Reform Judaism*, *supra* note 305, at 40.

³²² ROSS, *supra* note 317, at 27.

³²³ RONALD W. CLARK, *EINSTEIN: THE LIFE AND TIMES* 374-75 (1971).

³²⁴ ROSS, *supra* note 317, at 13.

³²⁵ Cohen, *Reaction to Reform Judaism*, *supra* note 305, at 40 n.38.

³²⁶ Donald Fishman, *Reform Judaism and the Anti-Zionist Persuasive Campaign, 1897-1915*, 46 COMM. Q. 375 (1998).

³²⁷ *Schloessinger, Max*, in 9 THE UNIVERSAL JEWISH ENCYCLOPEDIA 410 (Isaac Landman ed., 1948).

³²⁸ *Margolis, Max Leopold*, in 13 ENCYCLOPÆDIA JUDAICA 529 (Fred Skolnik ed., 2d ed. 2007).

³²⁹ *Id.*; Parzen, *supra* note 312.

³³⁰ Cohen, *Reaction to Reform Judaism*, *supra* note 305, at 41.

³³¹ *Id.* at 46.

³³² Max L. Margolis to Nathan Isaacs (Dec. 17, 1922), NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 34.

In a sense, Isaacs's observance of Jewish law in both the ritual and legal aspects of life was an iconoclastic rebellion against the overriding Reform tenor of his native community, although not of his family, which was staunchly Orthodox.³³³ Nathan Isaacs received his primary Jewish education at home from his Orthodox father, Abraham Isaacs, and from private tutors.³³⁴ Isaacs did not have great respect for the scholarship of Isaac Mayer Wise or his successor, Kaufman Kohler.³³⁵ However, the relatively sympathetic attitude towards Jewish tradition espoused by Wise must have had a significant effect on the entire Jewish community in Cincinnati, and indirectly upon Isaacs. Even after the Reform Rabbinate of Cincinnati adopted an extreme hostility towards Jewish law after Wise's death, memories of Wise's moderate approach must have lingered and could have bolstered Isaacs's own affirmative approach to Jewish law in a hostile environment.

C. Counter-Reformation

While still a young man, Isaacs seems to have sought to influence the future leaders of the Reform movement in a more traditional direction. The Hebrew Union College students received their secular undergraduate education at the University of Cincinnati, where Isaacs was also an undergraduate. In approximately 1906, the year Isaacs was a senior at the University of Cincinnati, he founded a secret fraternity which pledged its members to observe some ritual laws.³³⁶ Max Margolis aided Isaacs in establishing the short-lived secret society. Margolis wrote to Isaacs "[l]et me hope that we shall be able to start our little society, and that much good will eventually come therefrom."³³⁷ The secret society collapsed due to the opposition of the Hebrew Union College students who had not been invited to join the society and the disapproval of the rabbinical

³³³ Elcanan Isaacs, *Isaacs*, in 5 THE UNIVERSAL JEWISH ENCYCLOPEDIA, *supra* note 5, at 573.

³³⁴ *Id.* at 592; Raphael Isaacs, *Raphael Isaacs*, in AMERICAN SPIRITUAL AUTOBIOGRAPHIES: FIFTEEN SELF-PORTRAITS 86 (Louis Finkelstein ed., 1948).

³³⁵ Letter from Isaacs to Oko (Oct. 14, 1926), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 2.

³³⁶ MARCUS, *supra* note 1, at 112-13.

³³⁷ Letter from Max Margolis to Nathan Isaacs (Nov. 5, 1906), NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 34.

school's administration.³³⁸ Isaacs was personally very strict in his observance of Halakah. For example, he would not eat nectarines for fear that the fruit violated the biblical injunction against eating hybrid foods.³³⁹ Later in life, as a Professor at Harvard, he often arbitrated rabbinical disputes on questions of Halakah due to his deep knowledge of the Talmud and Jewish law, and his access to his large personal collection of *responsa*.³⁴⁰

Still, Isaacs was not dogmatic. He acknowledged that the medieval ghetto had unnaturally narrowed and distorted Judaism, and that the Reform Movement was a byproduct of the attending literalistic stage in the cycle of Jewish law.³⁴¹ Isaacs argued that during the course of the nineteenth century both Orthodox and Reform Jews had been attempting to formulate "broad principles" of Jewish law.³⁴² However, he thought that Reform doctrine unnaturally limited Judaism to the synagogue rather than incorporating all aspects of society and the national life of the Jewish people. He objected "to stripping Jewish life of everything distinctive about it, in spite of many well-meant efforts to distinguish between what was worthy of being kept and what was not."³⁴³

Isaacs's commitment to integrating Judaism in all aspects of life led him to be an advocate of Zionism, which he viewed as an opportunity to build a nation that would both provide for the physical security of the Jews and demonstrate the viability of Judaism in modern society. Isaacs believed that both Hasidism and Zionism were demands "for a more intensely Jewish life in the present. . . . Chassidism was a mediaeval cry for more feeling; Zionism is a modern striving for more action."³⁴⁴ While recognizing that Jewish law had gone through stages of excessive literalism, Isaacs believed that the immediate future of Jewish law would concentrate on the formulation of broad principles and their application to modern conditions. Isaacs's belief that Jewish law continued to have vitality

³³⁸ MARCUS, *supra* note 1, at 130.

³³⁹ Freiberg, *supra* note 36, at 5.

³⁴⁰ *Id.*

³⁴¹ Nathan Isaacs, *In the Hope of the New Diaspora*, 5 THE MENORAH J. 185, 186 (1919) [hereinafter Isaacs, *New Diaspora*].

³⁴² Isaacs, *Jewish Law in the Jewish State*, *supra* note 91, at 30.

³⁴³ Isaacs, *New Diaspora*, *supra* note 341, at 186.

³⁴⁴ Isaacs, *Old Chasidic Legends*, *supra* note 229, at 113.

led him to advocate the application of Jewish civil law in the Jewish settlement in Palestine. Isaacs accepted that courts in Mandate Palestine would draw upon the laws of Western countries, but he hoped that they would also heavily draw upon the concepts of Jewish law. He also urged that Jews should observe Jewish ritual law in the United States.³⁴⁵

Furthermore, Isaacs's commitment to a Jewish law that could provide the framework for ordering society led him to emphasize how Jewish law had adapted to new challenges. Jewish law had been utilized as a tool to help the Jewish people survive economic and social changes throughout the centuries.³⁴⁶ Isaacs's version of Zionism, which stressed loyalty to Jewish laws and history, seems to have drawn inspiration from Hegel's argument that

[h]istory is always of great importance for a people; since by means of that it becomes conscious of the path of development taken by its own Spirit, which expresses itself in Laws, Manners, Customs, and Deeds. Laws, comprising morals and judicial institutions, are by nature the permanent element in a people's existence.³⁴⁷

In 1907, Isaacs became a co-editor of *The Maccabean*, a journal associated with the Federation of American Zionists.³⁴⁸ An anonymous editorial comment, which was presumably written by Isaacs, responded to Cincinnati Reform Rabbi Dr. Philip Philipson's criticism that the Zionist movement mistook nationalism as the whole of Judaism.³⁴⁹ The editorial asserted that "Reform Judaism is only one of the phases of Jewish religious belief," and neither Orthodoxy nor Reform could be satisfied with the current status of Jewish life.³⁵⁰ Zionism provided the answer for the material problems facing the Jewish people.³⁵¹ Nathan Isaacs's eulogy of Lewis Naphtali

³⁴⁵ Isaacs, *Jewish Law in the Jewish State*, *supra* note 91, at 32.

³⁴⁶ Isaacs, *Jewish Education*, *supra* note 129, at 3.

³⁴⁷ GEORG W. F. HEGEL, *THE PHILOSOPHY OF HISTORY* 163 (J. Sibree trans., 1991).

³⁴⁸ *Announcement*, 12 *THE MACCABEAN* 74 (1907) [hereinafter *Announcement*].

³⁴⁹ *Id.*; ROSS, *supra* note 317, at 16.

³⁵⁰ *Announcement*, *supra* note 348, at 74.

³⁵¹ *Id.*

Dembitz, an uncle of Louis Brandeis, reveals that Dembitz was an early influence on Isaacs's attitude to Zionism and Jewish law, and Jewish life in America.³⁵² Isaacs praised Dembitz as a "Jew who, while thoroughly absorbing the best that is in American life and contributing something to it, never lost his Jewish patriotism."³⁵³ Isaacs recounted that for Dembitz Judaism was not limited to the Reform movement's cramped vision of Judaism as a theological system but that he instead "declared by his actions that Judaism is all of life, not an insignificant, formal part of it."³⁵⁴ Isaacs announced his conviction that "Dr. Dembitz, the conservative Jew, the Nationalist, the Zionist, was right."³⁵⁵

Rabbi Jacob Rader Marcus, who eventually became a founder of the discipline of American Jewish History and a faculty member at Hebrew Union College, recounted that when Nathan Isaacs taught at the University of Cincinnati from 1912 to 1918, a period in which Marcus was a student at Hebrew Union College,³⁵⁶ Isaacs "set out to bore from within and bring the Reform students at the Hebrew Union College back within the ambit of ritual observance."³⁵⁷ Many Hebrew Union College students of that era were raised in Orthodox homes and may have initially entered the Reform seminary as teenagers without strong ideological convictions about the conflict between Orthodoxy and Reform.³⁵⁸ Marcus was probably one of the young Reform seminarians whom Isaacs sought to encourage more personal observance of Jewish law. Soon Isaacs would assist in a broader effort to rethink Orthodox doctrine to make it more appealing to university educated youth.

In 1916, Bernard Revel, the President of Rabbi Isaac Elchanan Theological Seminary, the institution that would launch Yeshiva College and Yeshiva University, organized a "Society of

³⁵² MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 406 (2009).

³⁵³ *Report of Proceedings of Tenth Convention of the Federation of American Zionists*, 12 THE MACCABAEAN 64, 65 (1907).

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ Lawrence Van Gelder, *Jacob R. Marcus, 99, Professor Who Was Oldest Reform Rabbi*, N.Y. TIMES (Nov. 16, 1995), <http://www.nytimes.com/1995/11/16/us/jacob-r-marcus-99-professor-who-was-oldest-reform-rabbi.html>.

³⁵⁷ MARCUS, *supra* note 1, at 112.

³⁵⁸ ROSS, *supra* note 317, at 26.

Jewish Academicians of America.”³⁵⁹ Isaacs was one of the original members of the Society.³⁶⁰ The stated goals of the Society were “to promote constructive scholarship, to elucidate the truths and principles of Judaism in the light of modern thought, and to apply the methods of modern science toward the solution of ritual problems.”³⁶¹ Adherence to the authority of Halakah was required for membership. Leading lights of Jewish studies in America, such as Louis Ginzberg of the Jewish Theological Seminary, were excluded because Revel apparently did not consider them sufficiently Orthodox.³⁶² The society, whose grandiose name galled many of the professors of Jewish studies in America, included academics who did not specialize in Jewish studies, like Isaacs. The Society was probably an unsuccessful attempt to nurture an Orthodox Jewish intelligentsia.³⁶³ Isaacs delivered lectures at the Society’s first conference in 1917 and at the second annual meeting in 1918.³⁶⁴ Marcus described the Society of Jewish Academicians of America as an attempt “to inaugurate an Orthodox counterreformation based on [a confrontation by Orthodoxy with science and] modernism.”³⁶⁵ Isaacs was not naïve regarding the differences of his ideological position, which embraced change in law and adaption to changing conditions in society, and the beliefs of many adherents of Orthodoxy. Isaacs approvingly wrote in 1917 that “the neo-orthodoxy of western Europe and America” was “occupied with a restatement of its whole position” in which equity would predominate over false dialectics.³⁶⁶ Isaacs must have viewed his universal principle of legal cycles, as reflected in Jewish law, as an important contribution to that restatement. He identified with an effort to

³⁵⁹ IRA ROBINSON, *TRANSLATING A TRADITION: STUDIES IN AMERICAN JEWISH HISTORY* 56 (2008).

³⁶⁰ *First Annual Meeting of the Society of Jewish Academicians of America*, 53 *THE REFORM ADVOC.* 754, 754-55 (1917) [hereinafter *First Annual Meeting*].

³⁶¹ *THE AMERICAN JEWISH YEAR BOOK* 5679, at 311 (Samson D. Oppenheim ed., 1918).

³⁶² ROBINSON, *supra* note 359, at 56-58; JEFFERY S. GUROCK & JACOB J. SCHACTER, *A MODERN HERETIC AND A TRADITIONAL COMMUNITY: MORDECAI M. KAPLAN, ORTHODOXY, AND AMERICAN JUDAISM* 69 (1997).

³⁶³ ROBINSON, *supra* note 359, at 57.

³⁶⁴ *First Annual Meeting*, *supra* note 360, at 754-55; Isaacs, *Fiction*, *supra* note 212, at 600.

³⁶⁵ MARCUS, *supra* note 1, at 188.

³⁶⁶ Isaacs, *Law of Change*, *supra* note 2, at 763; Isaacs, *Is Judaism Legalistic?*, *supra* note 2.

reform Orthodoxy from within.

Isaacs hoped that both young Jewish women and men would become more deeply engaged in Judaism.³⁶⁷ He advocated for the greater engagement of women in the study of Judaism. Isaacs argued that the hesitancy to publically teach Torah to women, which is expressed in the Talmud,³⁶⁸ was derived from the era of Judaism that had produced the New Testament,³⁶⁹ rather than the Old Testament period, as both Moses and Ezra had explicitly included women among the public teaching of the law.³⁷⁰ Isaacs and his wife Ella pointed out that the biblical passages assigning a subordinate role to women should be viewed with the knowledge that a great variety of roles were assumed by women in the Bible dependent on changes in mores and differences in social class.³⁷¹

Isaacs argued in 1922 that the labels of “Reform” and “Orthodox” no longer reflected reality.³⁷² He pointed out that use of the term Orthodoxy in the United States had its roots in the divisions among the German Jewish immigrants of the 1840s and 1870s over whether to reform prayer services in the synagogue.³⁷³ However, as most American Jews of German origin adopted the Reform movement, the term Orthodox came to apply to Russian Jewish immigrants who first arrived in great numbers in the United States during the early 1880s.³⁷⁴ Isaacs observed that “American conditions have developed the anomaly of the ‘orthodox Jew’ who does not observe the Sabbath, follow the dietary laws; or any other of the six hundred and thirteen commandments, at least not scrupulously.”³⁷⁵ Isaacs also believed that the title “Reform” no longer described the American Reform movement because it had become dedicated to preserving the form of worship that was solidified in the Reform

³⁶⁷ Isaacs, *New Diaspora*, *supra* note 341, at 186.

³⁶⁸ *Babylonian Talmud: Berakhot 22a*; *Babylonian Talmud: Kiddushin 30*.

³⁶⁹ See 1 *Corinthians* 14:34-35.

³⁷⁰ Nathan Isaacs, *Study as a Mode of Worship*, in 8 *THE JEWISH F.* 370 (1920), reprinted in *THE JEWISH LIBRARY, FIRST SERIES* 51, 59 (Leo Jung ed., 1928) [hereinafter Isaacs, *Study as a Mode of Worship*] (citing *Deuteronomy* 31:12, & *Nehemiah* 8:2).

³⁷¹ Isaacs, *Relationships*, *supra* note 166, at 2554.

³⁷² Isaacs, *Jewish Sects*, *supra* note 286, at 13.

³⁷³ *Id.* at 10.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 14.

Temples of America in the 1880s and 1890s.³⁷⁶ Isaacs claimed that “[d]escribed not with reference to the remote past, but with reference to what [the Reform movement] is and what it wants, it is actually conservative or even reactionary. Its slogans have been almost completely reversed by the life of those who profess it.”³⁷⁷

However, Isaacs cooperated with Reform and non-traditional Jews in non-denominational educational endeavors throughout his career. Isaacs was very active in Jewish educational projects that spanned denominational lines in Boston. Beginning in 1925, he served as President of the Boston Bureau of Jewish Education until his death. He also served as a founding trustee of the non-denominational Hebrew Teachers College of Boston (now known as Hebrew College), and of the Associated Jewish Philanthropies of Boston.³⁷⁸ At least at one early point in his career Isaacs was even active in educational initiatives sponsored by the Reform movement in Cincinnati. In 1911, Isaacs was the secretary of the Union of American Hebrew Congregations’ Department of Synagogue and School Cincinnati Board at the Reform Rockdale Avenue Temple.³⁷⁹

Though Isaacs had strongly principled views on the desirable future of Jewish life in America, he was committed to the right of free expression of untraditional views. In 1933, Isaacs was selected to be on a multi-denominational board of judges for a literary contest that solicited original works regarding how Judaism should adjust itself to modern life.³⁸⁰ Mordecai Kaplan, the founder of the Reconstructionist movement, submitted a draft of his magnum opus, “Judaism as a Civilization,” in which he argued that the Halakah was no longer binding law, but instead reflected culturally enriching folkways. There was a long delay in bestowing the prize because of the ideological disagreement of some of the judges with Kaplan’s positions. Isaacs himself had serious misgivings about Kaplan’s work but thought the prize should be awarded to him, provided that it be made clear that the board of judges did not endorse Kaplan’s

³⁷⁶ *Id.* at 13.

³⁷⁷ Isaacs, *Jewish Sects*, *supra* note 286, at 13.

³⁷⁸ Shubow, *supra* note 5.

³⁷⁹ *The Cincinnati Local Board of Synagog and School Extension* 42 THE REFORM ADVOC. 697 (1911).

³⁸⁰ MEL SCULT, JUDAISM FACES THE TWENTIETH CENTURY: A BIOGRAPHY OF MORDECAI M. KAPLAN 339-40 (Moses Rischin ed., 1993).

views.³⁸¹ Isaacs's research assistant Albert M. Freiberg notes that each of the three rabbis whom Isaacs most admired in the Boston area ministered to a different Jewish denomination.³⁸²

Isaacs also supported mutual respect, appreciation, and communication between Jewish and Gentile scholars of Hebrew studies. In 1920, Isaacs published an article that argued that in Judaism learning is a form of prayer and meditation and has intense spiritual significance.³⁸³ Indeed, soon another writer claimed that Isaacs's argument had immediately struck him as a familiar truth of Judaism and wrote a similarly themed article.³⁸⁴ Isaacs then wrote to his friend Oko, who was associated with the Reform movement, that he found it amusing that based on his pamphlet the "Orthodox" claimed that they always had the concept that learning is a form of prayer, even though Isaacs himself had derived the idea from a lecture of Harvard Professor George F. Moore, a non-Jew.³⁸⁵ Isaacs also helped Moore publicize his monumental book on Judaism,³⁸⁶ among Jewish audiences.³⁸⁷ Isaacs introduced Professor Moore when the eminent scholar addressed Boston's New Century Club, whose membership consisted of Jewish businessmen and intellectuals.³⁸⁸

The combination of academic and professional success with commitment to Jewish tradition that was accomplished by Nathan

³⁸¹ *Id.* at 342; see MORDECAI M. KAPLAN, JUDAISM AS A CIVILIZATION: TOWARD A RECONSTRUCTION OF AMERICAN-JEWISH LIFE (The Jewish Publ'g Soc'y reprinted 2010).

³⁸² Freiberg, *supra* note 36, at 5.

³⁸³ Isaacs, *Study as a Mode of Worship*, *supra* note 370, at 61. This evaluation was often cited in the succeeding decades as an insightful and pithy summary of the unique status of learning in Jewish tradition. See DAVID L. BENDER, CONSTRUCTING A LIFE PHILOSOPHY: OPPOSING VIEWPOINTS (1985); ROGER EASTMAN, THE WAYS OF RELIGION: AN INTRODUCTION TO THE MAJOR TRADITIONS (1993); LOUIS FINKELSTEIN, JOHN ELIOT ROSS, WILLIAM ADAMS BROWN, THE RELIGIONS OF DEMOCRACY: JUDAISM, CATHOLICISM, AND PROTESTANTISM IN CREED AND LIFE 10 (1949); MORDECAI MENAHEM KAPLAN, THE FUTURE OF THE AMERICAN JEW 554 (1948); LEO WALDER SCHWARZ, SALO WITTMAYER BARON, GREAT AGES AND IDEAS OF THE JEWISH PEOPLE 292 (1956); MARK RAY SCHIMIDT, CONSTRUCTING A LIFE PHILOSOPHY 81 (2002); see also ABRAHAM JOSHUA HESCHEL, THE INSECURITY OF FREEDOM: ESSAYS ON HUMAN EXISTENCE 237 (1972) ("Study is an act that is analogous to worship.").

³⁸⁴ Edwin Collins, *Worship as a Mode of Study*, in THE JEWISH LIBRARY, SECOND SERIES 75 (Leo Jung ed., 1930).

³⁸⁵ Letter from Nathan Isaacs to Adolph Oko (undated circa 1925), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 3; Isaacs, *Study as a Mode of Worship*, *supra* note 370, at 53.

³⁸⁶ GEORGE F. MOORE, JUDAISM IN THE FIRST CENTURIES OF THE CHRISTIAN ERA (1927).

³⁸⁷ Letter from George F. Moore to Nathan Isaacs (Jan. 16, 1922), NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 34.

³⁸⁸ Shubow, *supra* note 5.

Isaacs and his ten siblings was considered by their contemporaries to be a striking proof that Judaism could thrive in the United States.³⁸⁹ Two of the younger siblings, Moses Legis Isaacs (1899-1970) and Raphael Isaacs (1891-1965) took different approaches to the conflict between religion and science. Their methodologies provide interesting contrasts to Nathan Isaacs's application of academic methodology to Jewish studies. Moses Isaacs was a professor of chemistry at Yeshiva College and a member of the original faculty. He served as Dean of the College from 1940 to 1953, and subsequently taught at Yeshiva University's Stern College.³⁹⁰ Raphael Isaacs (1891-1965) was a notable medical researcher who specialized in diseases of the blood at Harvard and the University of Michigan. He later became Director of the Hematology Department of the Michael Reese Hospital in Chicago.³⁹¹ Moses Isaacs believed that science was an inherently uncertain and provisional enterprise, in which current conclusions are always subject to revision based on the results of later experiments.³⁹² Accordingly, he believed that science could not be "an ultimate test of religious beliefs and doctrines, or [the] final arbiter . . . of faith."³⁹³ Moses Isaacs argued that "[t]o use science as a test for religion is very similar to an attempt to measure distance with an ever changing, arbitrary yardstick."³⁹⁴ He seems to have considered religion as having access to truth of a higher stature than that available to science.

Raphael Isaacs, like his brother Moses, thought that scientific conclusions were always subject to revisions, but he also appears to have believed that it was theoretically possible for science and religion to ultimately arrive at the same truth and reality. He wrote that there was "no clash between religion and science."³⁹⁵ In a handwritten note, probably written in the late 1950s or early 1960s,

³⁸⁹ BORIS D. BOGEN, BORN A JEW 73 (1930).

³⁹⁰ 1 THE JEWISH LIBRARY: FAITH 211-12 (Leo Jung ed., 1968); NANCY KLEIN, HERITAGE OF FAITH: TWO PIONEERS OF JUDAISM IN AMERICA 17, 63, 87, 97 (1987).

³⁹¹ MAXWELL M. WINTROBE, HEMATOLOGY, THE BLOSSOMING OF A SCIENCE: A STORY OF INSPIRATION AND EFFORT 221 (1985).

³⁹² Moses Legis Isaacs, *Faith and Science*, in THE JEWISH LIBRARY: SECOND SERIES 44 (Leo Jung ed., 1930).

³⁹³ *Id.* at 47.

³⁹⁴ *Id.*

³⁹⁵ Raphael Isaacs, *Raphael Isaacs*, in AMERICAN SPIRITUAL AUTOBIOGRAPHIES: FIFTEEN SELF PORTRAITS 90 (Louis Finkelstein ed., 1948).

Raphael Isaacs stated:

Science is really a mechanism for learning how things work, which, to us, means trying to find out the laws by which God develops the universe. . . .

Each generation tries to explain this miracle in terms of its current education and line of thought. . . . The older explanations, under the general heading of miracles seem inadequate today. The mechanism of study today is observation and experiment; in the ancient literature it was rationalization (i.e., a system of opinions deduced from reasoning).³⁹⁶

Raphael Isaacs and his son Roger D. Isaacs developed the theory that various physical phenomena described in the Bible could be explained in scientific as opposed to miraculous terms.³⁹⁷ Roger Isaacs has recently and comprehensively elaborated upon this theory.³⁹⁸ Roger Isaacs has summarized his father's viewpoint as being that "there was nothing in observable scientific law to either supplant or contradict God's law."³⁹⁹ It is not clear to what degree Nathan Isaacs himself agreed with these ideas advocated by Raphael Isaacs and Moses Isaacs regarding religion and science. However, the entirety of his work reflects a determination to apply the same methodology appropriate to the study of legal history and business law to the Bible, Jewish history, and Jewish law.

VII. ZIONISM AND CULTURAL PLURALISM

A. Zionism as Judaism in Action

While in Cincinnati, Isaacs was particularly active in Zionist causes. Isaacs supported Rabbi Mayer Berlin's call for the separation

³⁹⁶ Raphael Isaacs, *Untitled Note*, in ROGER D. ISAACS, TALKING WITH GOD: THE RADIOACTIVE ARK OF THE TESTIMONY: COMMUNICATION THROUGH IT PROTECTION FROM IT: AN ETYMOLOGICAL STUDY xxiv (Janice Williams Miller ed., 2010) [hereinafter ISAACS, TALKING WITH GOD].

³⁹⁷ RAPHAEL ISAACS & ROGER D. ISAACS, PUZZLING BIBLICAL LAWS: INTERPRETED IN TERMS OF MODERN PHYSICS 7 (1965).

³⁹⁸ ISAACS, TALKING WITH GOD, *supra* note 396, at xxiv.

³⁹⁹ Roger D. Isaacs, Raphael Isaacs 18 (unpublished undated manuscript on file with Samuel Flaks).

of Mizrahi, the religious Zionist movement in the United States, from the Federation of American Zionists.⁴⁰⁰ However, Isaacs continued to be active in the Federation of American Zionists; he served for a time as a member of the Federation's Executive Committee.⁴⁰¹ Isaacs also served for a time as Chairman of the Religious Zionist Mizrahi movement in the United States.⁴⁰² For Isaacs, Zionism in general was not different in character from the nationalism of middle class citizens of any country.⁴⁰³ However, the Mizrahi Zionist party was particularly attractive to Isaacs because it combined Zionism with an allegiance to Jewish law, and thus aimed to put religion into practice in all aspects of life.⁴⁰⁴ Isaacs believed that Jewish civil law should be transplanted to Mandate Palestine, grow in response to twentieth century commerce, and govern a future independent Jewish state.⁴⁰⁵

Isaacs's struggle to reconcile his Zionist political commitments with the import of the biblical narrative influenced one of his International Standard Bible Encyclopedia entries. Isaacs may have been troubled by the ambiguous message of the book of Jeremiah in which the Judeans' insistence on political independence from the Babylonians led to national disaster.⁴⁰⁶ In his commentary, Isaacs described Zephaniah as "a leader of the 'patriotic' party which opposed Jeremiah."⁴⁰⁷ At the same time, Isaacs took pains to point out that Zephaniah was sent to the prophet Jeremiah "as a messenger of King Zedekiah when Nebuchadnezzar was about to attack the city and at other crises."⁴⁰⁸ Apparently Isaacs was seeking to rehabilitate Zephaniah as a leader who was respected as both the prophet of God and by the nationalistic forces that were fighting

⁴⁰⁰ Hyman B. Ginstein, *Orthodox Judaism and Early Zionism in America*, in *EARLY HISTORY OF ZIONISM IN AMERICA: PROCEEDINGS OF THE AMERICAN JEWISH HISTORICAL SOCIETY* 219, 221 (Isidore S. Meyer ed., Arno Press Inc. 1977) (1958).

⁴⁰¹ Isaacs, *New Diaspora*, *supra* note 341, at 185.

⁴⁰² WALLACE, *supra* note 39, at 131.

⁴⁰³ Isaacs, *Jewish Sects*, *supra* note 286, at 12.

⁴⁰⁴ Shubow, *supra* note 5.

⁴⁰⁵ Isaacs, *Jewish Law in the Jewish State*, *supra* note 91, at 31.

⁴⁰⁶ See *THE OXFORD HISTORY OF THE BIBLICAL WORLD* 262-66 (Michael D. Coogan ed., 2001) (recounting Jeremiah's warnings to the King of Judaea's Court of the dire consequences of a revolt against Babylon).

⁴⁰⁷ Isaacs, *Zephaniah*, in *5 THE INT'L STANDARD BIBLE ENCYCLOPEDIA*, *supra* note 131, at 3144.

⁴⁰⁸ *Id.* (citing *Jeremiah* 21:1 & *Jeremiah* 37:3).

against the foreign domination of the Babylonian Empire. Isaacs noted, in what seems an admiring tone, that Zephaniah “continued to adhere to the policy of resistance against Bab[ylonian] authority [after the conquest of Judea as] indicated by the fact he was among the leaders of Israel taken by Nebuzaradan before the king of Babylon, and killed at Riblah.”⁴⁰⁹ In another entry, Isaacs emphasized the nationalistic import of the biblical narrative by noting that the warrior “judge” Othniel succeeded by defeating a foreign oppressor in both saving the Israelites and “by reviving national sentiment among them.”⁴¹⁰ Isaacs directed the reader’s attention to Josephus’s description of Othniel as a man who “endeavor[ed] boldly to gain [the Israelites] their liberty.”⁴¹¹ The biblical text merely describes Othniel as the first of a series of leaders who saved the Israelites from foreigners, whose rule had been a divine punishment for the Israelites’ idol worship.⁴¹² It appears that Isaacs was attempting to stress the nationalistic elements of the biblical narrative, even when such a reading was not obvious from the text of the Bible.

B. Jews in a Pluralistic America

Nathan Isaacs made his most fruitful contributions to the study of both Jewish and American law from 1915 to 1919, in the midst of World War One and in its immediate aftermath. These were years of intense excitement in the Zionist movement in America. Louis Brandeis led the Zionist Organization of America, a post which he declined to resign upon being appointed to the Supreme Court. In reply to charges of dual loyalty, Brandeis insisted that Zionism would make the Jews of America better Americans.⁴¹³ Isaacs thought that young Jewish men and women “had their emotions so deeply stirred and their eyes so suddenly opened [by the events of World War One, including atrocities against Jewish communities] that they are bound

⁴⁰⁹ *Id.* (citing 2 Kings 25:18 & Jeremiah 52:24).

⁴¹⁰ Nathan Isaacs, *Othniel*, in 4 THE INT’L STANDARD BIBLE ENCYCLOPEDIA, *supra* note 136, at 2204.

⁴¹¹ JOSEPHUS, *supra* note 142, at 289.

⁴¹² *Judges* 3:9.

⁴¹³ FISHMAN, *JEWISH LIFE*, *supra* note 289, at 5 (citing Louis D. Brandeis, *Zionism Is Consistent with American Patriotism* (1915), in THE JEW IN THE MODERN WORLD: A DOCUMENTARY HISTORY 471-72 (Paul Mendes Flohr & Jehuda Reinharz eds., 1995)).

to take their Judaism very seriously.”⁴¹⁴ He commented that “[t]he atrocities inflicted on our people in our own days have been as great as those witnessed by any single generation in the dark history of the Jews—and the immediate outlook is not very bright.”⁴¹⁵ In response to these events American Jews began to embrace a vision of an independent Jewish state in Mandate Palestine.⁴¹⁶

At approximately the same time, Isaacs became an important member of the Menorah Society, which was a non-denominational effort to spur intellectual and creative activity among college educated American Jews. He helped found the Cincinnati Graduate Menorah Society in 1916. In 1917, Isaacs served as Vice President of the Cincinnati Graduate Menorah Society, an association for post-college age Jews who were attracted to the intellectual activities of the Menorah movement. Isaacs addressed the Cincinnati chapter’s January 1917 meeting on the topic of “Jewish Jurisprudence.”⁴¹⁷ In 1919, Isaacs became chairman of the Menorah Educational Conference. In a December 1919 address to the Menorah Educational Conference, Isaacs stated that before the founding of the Menorah societies on college campuses Jewish students had been isolated from local Jewish communities and other Jewish students.⁴¹⁸ Horace Kallen recounts that when he was a student in the first decade of the twentieth century “[t]o be a Jew in certain American institutions of that time was not easy, and most of the young Jews in the colleges of my day were not visible as Jews; they tried to conceal the fact that they were Jews.”⁴¹⁹ According to Isaacs, the Menorah Association had helped foster Jewish unity and interest in Jewish culture.⁴²⁰ He urged that the next step of the Menorah societies should be the fostering of Jewish scholarship in Jewish culture.⁴²¹

Isaacs was a member of a circle of young Jewish intellectuals associated with the Menorah Society that developed a theory of

⁴¹⁴ Isaacs, *New Diaspora*, *supra* note 341, at 185.

⁴¹⁵ *Id.* at 185-86.

⁴¹⁶ UROFSKY, *supra* note 352, at 520.

⁴¹⁷ *The Menorah Graduate Movement*, 3 THE MENORAH ASS’N 111 (1917).

⁴¹⁸ GREENE, *supra* note 1, at 107.

⁴¹⁹ FISHMAN, *JEWISH LIFE*, *supra* note 289, at 5 (quoting Horace M. Kallen, *Champion of Pluralism*, in *DIALOGUES IN JUDAISM: JEWISH DILEMMAS DEFINED, DEBATED, AND EXPLORED* 155 (1991)).

⁴²⁰ GREENE, *supra* note 1, at 107.

⁴²¹ *Id.*

cultural pluralism, which stressed the value of minority cultures within the American mosaic. One scholar has recently observed that the impetus for the cultural pluralist theorists was their need to justify the continuing existence of Jews and Judaism in America and “to make space for a thriving Jewish culture in the United States.”⁴²² In a groundbreaking article, Kallen argued that democracy requires “the right to be different,” including differences between ethnic groups in America.⁴²³ Kallen envisioned an America in which ethnic groups would collaborate to create a “symphony of civilization.”⁴²⁴ Isaacs and Kallen had a personal relationship and they may have influenced each other at a time in which both of them were beginning to articulate the cultural pluralist position. In 1915, Kallen commiserated with Isaacs about the Hebrew Union College’s anti-Zionist position.⁴²⁵ On a more prosaic level, Kallen had reached out to Isaacs to arrange for kosher food for his sister Deborah when she visited Cincinnati in 1917.⁴²⁶

Isaacs’s position regarding Jewish law, which was intertwined with his evaluation of Zionism and the future of American Jews, is significant as an early conceptualization of cultural pluralism. Isaacs believed that Zionism was only one aspect of “the Jewish folk’s renewed interest in life.”⁴²⁷ He explained that in Europe the Nation State was based on ethnicity.⁴²⁸ Indeed, Zionism was an extension of the European Nation State system.⁴²⁹

Isaacs believed that the revitalization of the Jewish people in Palestine would also be reflected in revitalization of Jewish life in the United States.⁴³⁰ He thought multiculturalism could be the framework for Jewish life in the United States. The main difference

⁴²² *Id.* at 2.

⁴²³ Horace M. Kallen, *Democracy Versus the Melting-Pot: A Study of American Nationality*, THE NATION, Feb. 25, 1915, at 190-94, 217-20, available at <http://www.expo98.msu.edu/people/Kallen.htm> (last visited Mar. 9, 2013).

⁴²⁴ *Id.* at 217-20.

⁴²⁵ Letter from Horace Kallen to Nathan Isaacs (Jan. 16, 1915), NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 34.

⁴²⁶ Letter from Horace Kallen to Nathan Isaacs (Mar. 16, 1917), NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 34.

⁴²⁷ Isaacs, *New Diaspora*, *supra* note 341, at 187.

⁴²⁸ *Id.* at 189; see CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE 87 (2002).

⁴²⁹ Isaacs, *New Diaspora*, *supra* note 341, at 190.

⁴³⁰ *Id.* at 188.

between the situation of European and American Jews was that “America’s law is non-tribal; all men are free to form such associations as they wish in their daily affairs as well as in religion.”⁴³¹ Assimilation had been foisted upon the immigrants to America by social and economic factors, but the lack of formal legal constraints imposed on immigrants was of key importance.⁴³² Isaacs thought that America would become a much stronger nation if it fostered the unique contributions of the various immigrant groups, rather than in attempting to melt away all of their distinctive qualities.⁴³³

Isaacs believed that an essential characteristic of the United States was its openness to permitting ethnic groups to continue to practice their traditional customs, and at least in the case of Jews, to adhere to their traditional laws. He went so far as to argue that Jews would be better American citizens if they observed the Sabbath. Rabbi Shubow recounts how on one occasion in the late 1920s Isaacs addressed a Reform congregation and said in plaintive tones that “[y]ou have not yet made peace with the desecration of the Sabbath or the laws of Kashruth.”⁴³⁴ Isaacs argued that observance of the Sabbath would be valuable for both a secular and religious point of view by bestowing upon Jews “a better standard of living, [which would] help to preserve all that is good in Jewish family life, and make happier and more enthusiastic citizens of natives and immigrants.”⁴³⁵ The Jews of America would make an important contribution if they “were able to elucidate to learned America what Jewish life means and what Jewish thought is.”⁴³⁶ Isaacs urged that Jews should share their own traditions so they could share those insights with the broader American culture. His program of renewal of Judaism in America was “not a monopoly of Reform, nor of Orthodoxy, nor of Zionism[,] nor of Assimilation—though it has something of the ideal of each.”⁴³⁷ He predicted that “[s]ome day American civilization will be a wonderful product—but it will not be

⁴³¹ *Id.* at 190.

⁴³² *Id.* at 191.

⁴³³ *Id.* at 192.

⁴³⁴ Shubow, *supra* note 5 (internal quotation marks omitted).

⁴³⁵ Isaacs, *New Diaspora*, *supra* note 341, at 193.

⁴³⁶ *Id.*

⁴³⁷ *Id.* at 195.

a mere sub-variety of English or German or Italian or Jewish civilization, but a new creation in which the elements of all these and more will be blended.”⁴³⁸ Isaacs praised America for inviting “its Jewry to help in the construction of a great Community Center, where common interests and not mere blood ties will bring members of all Families together.”⁴³⁹ Though Isaacs’s interrelated theories regarding Jewish law, Zionism, and the American Jewish community are very much bounded by the era of mass immigration to the United States, his arguments are still thought provoking.

VIII. CONCLUSION

Isaacs was an ardent Zionist and leader in the Jewish community who taught at Harvard at the height of the anti-Semitic quota system, was deeply knowledgeable of Jewish texts and history, and defined his own personal synthesis between his understanding of Jewish law and secular law. There were many people of Jewish origin in the American legal community in the early part of the twentieth century, but proud public self-identification with Judaism was much rarer. Isaacs personally observed Jewish law, but he was also an avid student of the critically minded Science of Judaism School.

In his printed scholarship on Jewish law, Isaacs argued that Halakah has continuously gone through phases of codification, followed by literalistic interpretation, then interpretation based on equitable principles, then phases of arid legal fictions, and then legislation followed by re-codification. Isaacs extrapolated that these cycles occur in all legal systems, secular or religious.⁴⁴⁰ He approached both bodies of law in the same spirit, with a disregard of pre-conceived categories. Isaacs’s intellectual ambitions for Jewish law reflect a creative tension between tradition and innovation. This inspiration went far beyond the influence, which Isaacs discovered between many individual Jewish legal doctrines and institutions on Western Law.⁴⁴¹ Isaacs believed in principled change in law, a

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 194.

⁴⁴⁰ Isaacs, *Law of Change*, *supra* note 2.

⁴⁴¹ See Isaacs, *Jewish Law in the Modern World*, *supra* note 50, at 261; Isaacs, *Influence of Judaism on Western Law*, *supra* note 114, at 402.

quality he valued in both rabbinic and American law. There was also an underlying spiritual motivation to his study of Jewish law, as he believed that the Jewish people's collective devotion to studying the law was an intense form of religious meditation and worship.⁴⁴²

Professor Weisbrod has argued that Isaacs sought to keep his Jewish identity separate from his professional identity as an academic who specialized in business law. While it is true that many of Isaacs's article can be read without discerning his deep commitment to Jewish life, that commitment, and its impact on even some of his most technical work, are apparent upon a systematic reading of his articles in both Jewish publications and in law journals, to say nothing of his very public activities in the Jewish community. In his published articles and in his private conversations, Isaacs often discussed theological and sociological issues, but one of his close associates reports that "concerning *his* religious feelings and convictions he was always silent. Here his feelings were too deep, too personal for conversation."⁴⁴³ Isaacs's reticence on religion apparently derived from the profound nature of his beliefs rather than an attempt to disguise his Judaism.

Isaacs was a deeply private person and probably would have had misgivings about attempts to scour his unpublished manuscripts and correspondence for insights into his role in the story of Jewish law. He wrote, in reference to the Jewish people: "Why must we be written about so much? Is there no such thing as privacy?"⁴⁴⁴ Isaacs even found it difficult to write autobiographically in letters to confidants.⁴⁴⁵ There is a real danger of possibly misinterpreting and misrepresenting Isaacs's thoughts on Judaism and Jewish law because they were the product of an extraordinary man who can no longer explain himself. Nonetheless, the effort to understand his writings, his correspondence, and his organizational activities in the Jewish community is justified by the light it sheds on a unique synthesis between early twentieth century jurisprudence and Jewish law that deserves to be the subject of aspiration.

⁴⁴² Isaacs, *Study as a Mode of Worship*, *supra* note 370, at 61.

⁴⁴³ Freiberg, *supra* note 36, at 6.

⁴⁴⁴ Letter from Nathan Isaacs to Adolph S. Oko (July 15, 1941), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 3.

⁴⁴⁵ Letter from Nathan Isaacs to Adolph S. Oko (Jan. 21, 1937), ASO Papers, MS 14, AJA, *supra* note 4, Box 8, File 3.