

# CONSERVATIVE LEGAL REALISM: NATHAN ISAACS, JEWISH LAW, AND MODERN LEGAL THEORY

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## INTRODUCTION

The Legal Realist Movement was actually two movements—radical legal realism and Conservative Legal Realism (CLR). There were a number of underlying themes of legal realism that are common to both strains. However, the radical legal realism strain has been the more debated aspect of legal realism.<sup>1</sup> This article will analyze the less debated, often neglected strain of CLR. The vehicle for this investigation will be the life and works of Nathan Isaacs (1886-1941). This article will investigate the legitimacy and determinacy of the legal order through the lens of CLR as represented by the work of Nathan Isaacs.

Isaacs was a prolific writer whose works populated legal scholarship from 1914 through the 1930s.<sup>2</sup> His writings, and his deeply contextual worldview, provide numerous

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<sup>1</sup> “‘Legal Realists,’ were a group of elite academics, from Yale, Harvard, and Columbia ... [who] were generally modernist, leftist, reform-oriented.” Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325 (1995) (hereinafter Kamp, *Between-The-Wars*) (describing social influences on the realists). The Legal Realist Movement “grew out of contempt for ... conceptualistic legal theory . . . The realists stressed the uselessness of legal rules and concepts.” LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* 3 (1986).

<sup>2</sup> The authors count 36 law review articles, articles in the Harvard Business Review, numerous books, and dozens of articles in non-law publications and Jewish scholarly journals. Isaacs first academic law article was Nathan Isaacs, *The Merchant and His Law*, 23 J. OF POLITICAL OF ECONOMY 529 (1914). His most famous articles, which will be often cited in this article, include: Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917) (hereinafter Isaacs, *Standardizing Contracts*); Nathan Isaacs, ‘*The Law*’ and the Law of Change (Parts 1 & 2), 65 U. PA. L. REV. 665, 748 (1917) (hereinafter Isaacs, *Law of Change*); Nathan Isaacs, *Fault and Liability: Two Views of Legal Development*, 31 HARV. L. REV. 954 (1918) (hereinafter Isaacs, *Fault and Liability*); Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922) (hereinafter Isaacs, *Law and the Facts*); Nathan Isaacs, *The Limits of Judicial Discretion*, 32 YALE L.J. 339 (1923) (hereinafter Isaacs, *Limits of Judicial Discretion*); Nathan Isaacs, *How Lawyers Think*, 23 COLUM. L. REV. 555 (1923) (hereinafter Isaacs, *How Lawyers Think*); Nathan Isaacs, *Two Views of Commercial Arbitration*, 40 HARV. L. REV. 929 (1927) (hereinafter Isaacs, *Two Views*); Nathan Isaacs, *Trusteeship in Modern Business*, 42 HARV. L. REV. 1048 (1929) (hereinafter Isaacs, *Trusteeship*); *The Securities Act and the Constitution*, 43 YALE L.J. 218 (1933) (hereinafter Isaacs, *Securities Act*).

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insights still important to modern legal theory. Some of his works pre-dated the Legal Realist Movement of the 1930s. Isaacs' early writings provide insights that predated the works of the more famous realists, such as Karl Llewellyn, Jerome Frank, and Herman Oliphant.<sup>3</sup> Despite his scholarship throughout the 1930s, he was not considered as a core member of the Legal Realist Movement.<sup>4</sup> As such, Isaacs can be seen as the forgotten realist. Despite his prolific and broad scholarly production few people, and surprisingly few legal scholars, know much about the man and his place in legal scholarship.<sup>5</sup> This article will explore the importance of Isaacs' works to the conservative strain of legal realism more recently exemplified by law and economics.

In order to fully understand Isaacs work and views of law and legal development,

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<sup>3</sup> It is difficult to determine exactly what the movement stood for, or even those who should be considered Legal Realists. *See generally* N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN 175 (1997) (surveying conflicting definitions of American Legal Realism); Roscoe Pound, *Call for a Realist Jurisprudence*, 44 HARV. L. REV. 7 (1931) (attack on the Realists); Karl Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) (hereinafter Llewellyn, *Some Realism*) (early defense and definition of Legal Realism). *See also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 169 (1992) (hereinafter HORWITZ, TRANSFORMATION); WILLIAM W. FISHER III, MORTON J. HORWITZ, & THOMAS A. REED, AMERICAN LEGAL REALISM xiv (1993). *But see* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 8, 15-21 (1995) (arguing that the term “Legal Realist” should only be applied to a small circle of legal academics lead by Walter Wheeler Cook and Underhill Moore that were dedicated to empirical legal research and to reforming legal education at Columbia, Yale, and Johns Hopkins in the 1920s and 1930s).

<sup>4</sup> Llewellyn did not count Isaacs as a member in the Realist camp in either his published or unpublished accounts. *See* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) (hereinafter Llewellyn, *Realistic Jurisprudence*); Llewellyn, *Some Realism*, *supra* note 3; HULL, POUND AND LLEWELLYN, *supra* note 3, at 343-346; HORWITZ, *supra* note 3, at 183. Karl Llewellyn did cite three of Isaacs' articles in the section entitled “Real Realists” in his famous response to Dean Pound. Llewellyn, *Some Realism*, *supra* note 3, at 1235-6 n.36, 1241-2 n.47, 1246 n.61.

<sup>5</sup> Peter Linzer had this to say: “Of course, people have been asking these [important theoretical] questions forever, and I am certainly not denying Lon Fuller's role, Morris Cohen's role, and somebody who is not as well known as them, *Nathan Isaacs*, in his very important but largely forgotten article, *The Standardizing of Contracts in the Yale Law Journal in 1917*.” Larry Garvin, et al., *Theory and Anti-Theory in the Work of Allan Farnsworth*, 13 TEX. WESLEYAN L. REV. 1, 10-11 (2006) (emphasis added). Professor Horwitz includes Isaacs in his group of great minds of the times: Louis Brandeis, Roscoe Pound, John Dewey, Benjamin Cardozo, Arthur Corbin, Lon Fuller, and Felix Frankfurter. HORWITZ, TRANSFORMATION, *supra* note 3 at 182-84, 314-19.

an analysis of the influence of Jewish law to his personal development as a legal scholar will be examined. Information about Isaacs' personal approach to life and the role of law in it can be drawn from accounts written by family members,<sup>6</sup> valuable but scattered discussions in non-legal books,<sup>7</sup> and in various archival collections.<sup>8</sup>

Isaacs' knowledge of Jewish law and his position in the Harvard Business School influenced his view of legal development. His writings were both historical in their context and practical in their content. Unfortunately, the fact that his work was not theoretical in nature may have lowered scholars' assessments of many of his important

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<sup>6</sup> See Elcanan Isaacs, *Nathan Isaacs*, in MEN OF THE SPIRIT 573, 590 (Leo Jung ed., 1964) (invaluable biography of his older brother Nathan) (hereinafter Elcanan Isaacs, MEN OF SPIRIT); Raphael Isaacs, *Raphael Isaacs*, in AMERICAN SPIRITUAL AUTOBIOGRAPHIES: FIFTEEN SELF-PORTRAITS 83 (Louis Finkelstein ed., 1948) (hereinafter Raphael Isaacs, SELF-PORTRAITS) (a short spiritual autobiography that casts light on Nathan's early home life and religious development; written by Raphael Isaacs, a younger brother of Nathan); NANCY ISAACS KLEIN, *Seventh Son: A Biography of Moses Legis Isaacs*, in HERITAGE OF FAITH: TWO PIONEERS OF JUDAISM IN AMERICA 63 (1987) (hereinafter KLEIN, *Seventh Son*) (a niece of Nathan Isaacs recounts family history in a biography of her father).

<sup>7</sup> See PAUL RITTERBAND & HAROLD S. WECHSLER, JEWISH LEARNING IN AMERICAN UNIVERSITIES: THE FIRST CENTURY 146 (1994) (discussing Isaacs' relationship to Jewish academic scholarship and attitude to Yeshivas and Seminaries); MAX WALLACE, THE AMERICAN AXIS: HENRY FORD, CHARLES LINDBERGH, AND THE RISE OF THE THIRD REICH 131 (2003) (discussing covert reports sent to Isaacs by a fellow former military intelligence agent about the connections between Henry Ford and the Nazis).

<sup>8</sup> See Nathan Isaacs Papers, American Jewish Historical Society (unprocessed), Newton Centre, MA and New York, NY (hereinafter, "NI Papers, AJHS"); Nathan Isaacs Papers, Hebrew College, Newton Centre, MA (unprocessed) (hereinafter NI Papers, HC); Nathan Isaacs Papers, 1915-1941, HBS Archives, Baker Library Historical Collections, Harvard Business School, Soldiers Field, Boston, MA (5 Boxes and 2 Volumes) (hereinafter NI Papers, BLHC, HBS); 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 held at The Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio, (hereinafter "NI Papers, MS 184, AJA, Letters to Nathan Isaacs"); Adolph S. Oko Papers, MS 14, American Jewish Archives, The Jacob Rader Marcus Center of the American Jewish Archives (9 Boxes), Cincinnati, Ohio, (hereinafter "ASO Papers, MS 14, AJA"); The Class Notes of Nathan Isaacs, 1919-1920, Harvard Depository Class Notes Collection, Harvard Law School Library (2 Boxes), Cambridge, MA (hereinafter "NI Class Notes, HLSL"); Nathan Isaacs Papers, 1907-1920, Harvard Depository Modern Manuscript Collection, Harvard Law School Library (1 Box), Cambridge, MA (hereinafter "NI Papers, HLSL").

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insights and their connection to legal theory.<sup>9</sup> Nonetheless, the works of Nathan Isaacs are cited to the present in such diverse areas as administrative, constitutional, contract, trust, and arbitration law. This article investigates his many insights across various areas of law and their significance to modern legal theory. The article concludes that Nathan Isaacs work is best captured by the term CLR.

Isaacs, as a CLR thinker, adopted the legal realists' skepticism about classical legal theory and stressed a functional approach to law dictated by the changing needs of society. However, unlike liberal legal realists who were allied to political progressivism and liberalism, Isaacs relied upon the legal realist toolset to attain conservative political, social, and economic goals. Isaacs' conservatism, which was meditated by his methodological legal realist commitments, took two major forms. First, Isaacs was a traditionally observant Jew. His study of Jewish law had a major influence on his secular legal scholarship, and his secular legal scholarship simultaneously influenced his understanding of Jewish law. Second, Isaacs was committed to a vision of capitalism dominated by the requirements of business. Isaacs remained a leading figure in the Legal Realist effort to adapt the law to the requirements of business while at the same time strongly opposing the New Deal.

Part I provides a brief biographical sketch of Isaacs unique upbringing to better understand his application of the Jewish Legal Tradition to American law. His work reflects the forces that shaped his intellect—Midwestern pragmatism, business acumen, Jewish Orthodoxy, and intellectual curiosity. Part II reviews Isaacs' contributions to numerous areas of law including contract, constitutional, and arbitration, as well as tort and trust law. Part III of the article provides the context for assessing Isaacs works and the notion of CLR. This Part investigates the role of Jewish law in the framing of Isaacs' CLR, the place of CLR in the Legal Realism Movement and modern legal theory, and the

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<sup>9</sup> Isaacs' last research assistant provides an avenue into the power of Isaacs' writings: The "*ostensible* meaning" of Isaacs' writings "always make sense;" but that plain meaning "is often almost contradictory to the ultimate or real meaning." Albert M. Freiberg, *Nathan Isaacs In Cambridge* pg. 6 (NI Papers, AJHS, *supra* note 8, Box 3 (unpublished preface to a planned book

merging of the Jewish legal tradition and legal realism into a unified theory of legal development. Part IV explores the relationship between Isaacs' form of functionalism (realism) with Jewish law and the Legal Realist Movement. It more specifically analyzes his functional approach to the underlying themes of legal realism including, interdisciplinary study of law, Llewellynian thought, and Hohfeldian conceptualism. Part V explores his cycle theory of legal development. Part VI and Part VII examine two important themes in Isaacs' CLR—the unconstitutionality of New Deal legislation and his theory of legal reasoning. Ultimately, Isaacs' theory of functionalism is premised upon two foundational principles: (1) law is a hybrid of status-based and contract-based relationships and (2) the need for a principled-based, rational-realistic approach to legal reasoning.

#### I. SETTING THE CONTEXT: A BRIEF BIOLOGICAL SKETCH

Isaacs was an orthodox observer of Jewish law and a believer in the Jewish faith. An intimate friend judged that his faith was based upon personal conviction, not merely because it was “a creed which he inherited.”<sup>10</sup> However, Isaacs' beliefs were certainly immensely influenced by being the product of a unique Nineteenth century Midwestern family that held fast to Jewish Orthodoxy. The Isaacs family stemmed from the town of

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collection of Isaacs' essays) (emphasis in the original)).

<sup>10</sup> Adolph S. Oko, *Nathan Isaacs*, pg. 1 (February 22, 1942) (ASO Papers, MS 14, AJA, *supra* note 8, Box 9, File 12 (manuscript of memorial address)). Oko (1883-1944) was a prominent librarian and a scholar who was affiliated for many years with the Reform movement's Hebrew Union College in Cincinnati. See BIOGRAPHICAL SKETCH in “An Inventory to the Adolph S. Oko Papers, Manuscript Collection No. 14, 1911-1944,” available at <http://www.americanjewisharchives.org/aja/FindingAids/oko.htm> (last visited 3/27/08). See Letter from Nathan Isaacs to Adolph S. Oko (July 10, 1936) (ASO Papers, MS 14, AJA, Box 8, *supra* note 8, File 3 (acknowledging Oko's great intellectual influence on Isaacs)). Isaacs was committed to a ritually observant lifestyle while Oko identified as a Reform Jew. However, they shared a common commitment to the renewal of Jewish learning and life. See Memorandum from Nathan Isaacs to Chancellor Henry Hurwitz, Subject: Menorah plans (June 24, 1917) (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 2).

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Libawa which was located in the borderland between Lithuania and Germany.<sup>11</sup> Isaacs' paternal grandfather, Schachne Isaacs, was "known as a 'fire-eater,' eternally vigilant in the observance of orthodoxy and against innovation."<sup>12</sup> In 1853 Schachne immigrated to Cincinnati Ohio.<sup>13</sup> Cincinnati was the home of Rabbi Isaac M. Wise, the father of the American Reform movement, which Schachne fervently opposed.<sup>14</sup> When Schachne was presented with Wise's radically reformed prayer book, Schachne publicly burned the prayer book in a stove and excommunicated Wise.<sup>15</sup> Isaacs' maternal grandfather, Aaron Zvi Friedman, immigrated to America in 1848 and became a prominent ritual slaughterer in New York City.<sup>16</sup>

The Isaacs family was highly respected for their accomplishments, character, and loyalty to traditional Judaism. The Isaacs' retention of a punctilious religious observance after three generations in America was particularly remarkable.<sup>17</sup> Nathan's upbringing profoundly influenced his adult spiritual commitment to the faith of his ancestors.<sup>18</sup>

The Isaacs household valued intellectual accomplishments more than material success. Nathan's brother Raphael attested that in their family "scholarship was

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<sup>11</sup> Elcanan Isaacs, *MEN OF SPIRIT*, *supra* note 6, at 575.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> JACOB RADER MARCUS, *UNITED STATES JEWRY 1776-1885*, VOL. III 57-60 (1993).

<sup>15</sup> Elcanan Isaacs, *SELF-PORTRAITS*, *supra* note 6, at 576; I. HAROLD SHARFMAN, *THE FIRST RABBI: ORIGINS OF CONFLICT BETWEEN ORTHODOX AND REFORM: JEWISH POLEMIC WARFARE IN PRE-CIVIL WAR AMERICA A BIOGRAPHICAL HISTORY* 425-426 (1988).

<sup>16</sup> KLEIN, *Seventh Son*, *supra* note 6, at 69. Friedman was greatly respected for his piety and learning, and was "widely known as the 'Ba'al Shem' [Holy Man] of America." Cyrus Adler, *Friedman, Aaron Zvi*, in *JEWISH ENCYCLOPEDIA* (1901-1906), *available at* <http://www.jewishencyclopedia.com/view.jsp?artid=409&letter=F&search=Friedman> (last visited 4/4/08).

<sup>17</sup> "Cincinnati Jewry looked upon the Isaacs as to courageous men standing on a summit unattainable to all others." BORIS D. BOGEN, *BORN A JEW* 73 (1930) (in collaboration with Alfred Segal). Boris D. Bogen (1891-1929), a pioneering Russian born Jewish social worker, became the Superintendent of United Jewish Charities of Cincinnati in 1904. *See* "An Inventory to the Boris D. Bogen Papers," *available at* <http://www.americanjewisharchives.org/aja/FindingAids/Bogen.htm>, (last visited 3/12/08) (Bogen biographical information).

<sup>18</sup> Elcanan Isaacs attributed Nathan Isaacs' loyalty to Judaism in part to a "stimulating early education in Jewish subjects." Elcanan Isaacs, *MEN OF SPIRIT*, *supra* note 6, at 592.

considered the highest aim of a successful life” because proper knowledge of the Torah (the “Law”) required unending study.<sup>19</sup> Their method of worship and appreciation of G-d was through observing a comprehensive religious law that related to most areas of life.<sup>20</sup> The Isaacs’ family did not consider their observance of the Torah’s rules burdensome.

Isaacs grew up in a family that firmly encouraged intellectual and religious growth. At the same time, the Isaacs children felt they had “a considerable amount of freedom in the application of the religious laws to changing conditions.”<sup>21</sup> This attitude set them apart from the other European-trained Orthodox Jews in Cincinnati who had a less flexible view of Jewish law.<sup>22</sup> After being “steeped in the rich tradition of the Jewish heritage” from childhood, Isaacs’ lifelong study of Jewish law reinforced his allegiance to the Jewish religion and believed in its ability to respond to modern times.<sup>23</sup>

Isaacs’ childhood was steeped in ritual observance. As an adult, he sought to discover intellectual justifications for such ritual observance. Influenced by his secular studies,<sup>24</sup> Isaac’s understanding of his religion eventually became significantly different from anything he had been taught as a child.<sup>25</sup> Despite his development of a more

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<sup>19</sup> Raphael Isaacs, SELF-PORTRAITS, *supra* note 6, at 84. Nathan, who was six years older than Raphael, served as Raphael’s teacher. See *id.*, at 86-7.

<sup>20</sup> “There was no punishment or criticism for a violation of religious law,” Raphael recalled, “it just was not the thing to do, so it never occurred to [the children] to violate it.” Raphael Isaacs, SELF-PORTRAITS, *supra* note 6, at 85.

<sup>21</sup> *Id.* at 87.

<sup>22</sup> *Id.*

<sup>23</sup> Elcanan Isaacs, MEN OF SPIRIT, *supra* note 6, at 592.

<sup>24</sup> He received an A.B. degree in 1907, an A.M. degree in 1908, a PhD in economics in 1910 (all from the University of Cincinnati), and a LL.B. law degree in 1910 from the Cincinnati Law School. He later would earn a doctorate from Harvard Law School. Nathan Isaacs, *Barrier Activities and the Courts: A Study in Anti-Competitive Law*, 8 LAW AND CONTEMPORARY PROBLEMS 382, 382 (1940) (biographical information). The biographical information in the following passages, except otherwise noted, are based upon the following sources: Interviews of Paul Wotitzky, son-in-law of Nathan Isaacs, by Samuel Flaks, co-author, in Brookline MA (February 13, 2008 and May 9<sup>th</sup>, 2008) (notes on file with the authors); *Isaacs, Nathan* in 9 ENCYCLOPEDIA JUDAICA 42 (1972); Myles L. Mace, *Nathan Isaacs*, 16 BULL. BUS. HISTORICAL SOC’Y 19 (1942). See also “Isaacs, Nathan, 1886-1941. Papers, 1915-194: A Finding Aid,” (September 2007), Harvard Business School Archives finding aid, Baker Library, *available at* <http://oasis.lib.harvard.edu/oasis/deliver/~bak00049> (last visited 2/28/08).

<sup>25</sup> See *infra* Part III, Subsection C and Part IV, Subsection A (discussing Isaacs’ view of

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pragmatic view of Judaism, he remained religiously observant even after achieving professional success.<sup>26</sup>

Isaacs excelled in his legal studies. His mind has been described as “the ideal scholar’s tool.”<sup>27</sup> Isaacs’ dual law and economics degrees helped him develop an interdisciplinary view of business and law.<sup>28</sup> After a few years of private law practice, Isaacs began his teaching career at Cincinnati Law School.<sup>29</sup> Cincinnati Law School

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Biblical and Jewish law).

<sup>26</sup> See BOGEN, *supra* note 17, at 73 (The disappointed Orthodox parents of straying offspring often pointed to Abraham Isaacs’ sons and said “[t]hey, too are in the university and excel everyone in scholarship and yet they are faithful.”) In keeping with his minimalist Lithuanian–Jewish heritage, Abraham Isaacs detested longwinded performances by Cantors which sacrificed the meaning of the Hebrew words of the prayers in favor of catchy tunes. Accordingly, Abraham Isaacs and his nine sons bucked Cincinnati Orthodox convention by walking out of the synagogue at 11:00 am every Sabbath morning regardless of whether the service was finished). Nathan Isaacs’ siblings all had successful professional careers. KLEIN, *Seventh Son*, *supra* note 6, at 73. Four of the siblings were included in Who’s Who in America. Elcanan Isaacs, MEN OF SPIRIT, *supra* note 6, at 578. Aaron, the oldest son, became a businessman. KLEIN, *Seventh Son*, *supra* note 6, at 73. Isaac also became a businessman. Schachne became army psychologist at Walter Reed Hospital in Washington D.C. Elcanan Isaacs, MEN OF SPIRIT, *supra* note 6 at 577. Raphael Isaacs was a prominent doctor and scientist known especially for his work on blood disorders as Director of the Reese Hospital in Chicago. *Id.* Neshah was an instructor in Political Science at the University of Cincinnati before her marriage. *Id.* Elcanan was a graduate of the University of Cincinnati Law School who also earned a Harvard S.J.D. He worked at the Securities and Exchange Commission. See “Contributors” in MEN OF THE SPIRIT 573, 592, *supra* note 6. Moses Legis was an Assistant Professor at Columbia University, Dean of Yeshiva College, and Professor of Chemistry at Stern College of Yeshiva University. Asher became an economist and professor at the University of Pittsburgh. KLEIN, *Seventh Son*, *supra* note 6, at 74. Judah, the youngest, ran own insurance business in New York City. *Id.*

<sup>27</sup> Freiberg at pg. 4 (NI Papers, AJHS, *supra* note 8, Box 3). See Elcanan Isaacs, MEN OF SPIRIT, *supra* note 6, at 578.

<sup>28</sup> Isaacs was especially close with his economic professor in Cincinnati, Fred C. Hicks, who later became President of the University of Cincinnati. See Letter from Fred C. Hicks to Nathan Isaacs (August 23, 1920) (NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 8). Isaacs’ research for his doctorate in economics was financially supported by the Carnegie Institution. Memorandum from Nathan Isaacs to Henry Hurwitz, Chancellor of the Menorah Society, Subject: Menorah plans (June 24, 1917) (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 2).

<sup>29</sup> The Cincinnati Law School was founded in 1833, and is the fourth oldest law school in the United States. Roscoe L. Barrow, *Historical Note on the University of Cincinnati College of Law (Cincinnati Law School)*, in THE LAW IN SOUTHWESTERN OHIO 289 (Compiled by Frank G. Davis, George P. Stimson ed., 1972). In 1897, it merged with the University of Cincinnati Law

possessed a library that included an extensive collection of legal history materials.<sup>30</sup> It was here that he was first exposed to European legal historians including Frederic William Maitland, Frederick Pollock, and Paul Vinogradoff.<sup>31</sup> He would draw from these legal historians and the historical and critical minded “Science of Judaism” school of thought in developing his theory of legal change.<sup>32</sup> In contrast, he believed that the Jewish Reform movement, as well as commercial law, had become orthodox and doctrinaire.<sup>33</sup>

In 1918, Isaacs moved to Cambridge to begin graduate study at Harvard Law School. His studies were interrupted by U.S. Army intelligence service during World War One, but upon Isaacs’ return to Harvard he both taught and attended classes. His professors included Roscoe Pound, Christopher Beale, and legal historian Eugene Wambaugh. Ironically, Isaacs would develop his realist insights under the tutelage of two

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Department. The first Dean of the merged school was William Howard Taft. Faculty members included Dr. Gustavus H. Wald and J. Doddridge Brannan, both of whom had studied under C.C. Langdell. They would help the school adopt Langdell’s case method approach to law study.

<sup>30</sup> Elcanan Isaacs, *MEN OF SPIRIT*, *supra* note 6, at 579. The work of the great English legal historian, Sir Frederick Pollack, was influential at the school. Dean Wald was the editor of the American edition of Sir Frederick Pollack’s casebook. *See* Letter from Nathan Isaacs to Adolph S. Oko (June 8, 1936) (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 3). When in 1903 the Law School dedicated a new building, Pollock gave the keynote address on the merits of the common law in memory of Wald. Barrow, *supra* note 29, at 295. Isaacs, still a college student, was present at the dedication. Letter from Nathan Isaacs to Adolph S. Oko (June 8, 1936) (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 3). Isaacs considered Pollack a powerful influence on his own legal thinking. Letter from Nathan Isaacs to Adolph S. Oko (July 10, 1936) (ASO Papers, MS 14, AJA, Box 8, *supra* note 8, File 3). Dean Rogers’ address at the building dedication also had an influence on the young Isaacs. Rogers declared that: “The proper laws of a community may exist . . . often in contradiction to those which are declared.” Barrow, *supra* note 29, at 295. In his own career, Isaacs would pursue similar ideas regarding the historical evolution of the law.

<sup>31</sup> *See* Nathan Isaacs, Book Review, 26 *YALE L.J.* 512, 513 (1917) (reviewing RALPH WILLIAM AIGLER, *TITLES TO REAL PROPERTY ACQUIRED ORIGINALLY AND BY TRANSFER INTER VIVOS* (1916) (Isaacs singled out for praise Frederic William Maitland, Frederick Pollock, and Paul Vinogradoff).

<sup>32</sup> *See* Adolph S. Oko and Nathan Isaacs, *Correspondence Between A Jurist and a Bookman*, IV *MENORAH JOURNAL* 73, 73-85 (1918) (calling for the writing of a history of Jewish Law inspired by Maitland and *Wissenschaft des Judenthums*).

<sup>33</sup> “[Q]uestioning [of Reform doctrine] was heresy and heresy-hunting was a great game.” Letter from Nathan Isaacs to Henry Hurwitz (June 3, 1926) (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 2).

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diametrically opposed legal scholars—Christopher Beale and Roscoe Pound.<sup>34</sup> His education at Harvard included classes with both of them. Beale defended the virtues of legal formalism. For him deduction from general principles provided all the right answers to novel cases. The legal order was characterized as thick, gapless, and exceedingly rational. Pound, although part of the “old guard” was considered a proto-Realist. Contrary to the more classical mindset of Samuel Williston and Beale, Pound saw the need for a new jurisprudence to address the indeterminacy of the existing one.

After earning his S.J.D., Isaacs would return a few years later to teach as a lecturer at the Harvard Business School. Isaacs found himself in a delicate and uncertain position. The President of Harvard, Abbott Lawrence Lowell was an anti-Semite who had pushed for a quota system for admissions of Jewish students.<sup>35</sup> Though it was not publicly known, Dean Donham of the Harvard Business School had been a leading advocate of the quota system.<sup>36</sup> Nonetheless, with the support of Dean Pound of the law school and Dean

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<sup>34</sup> See NI Class Notes, HLSL (collection consists of class notes on administrative law, equity, conflict of laws, and Roman law, given by various members of the faculty, including Roscoe Pound, Francis B. Sayre, and Joseph H. Beale).

<sup>35</sup> MORTON & PHYLLIS KELLER, *MAKING HARVARD MODERN: THE RISE OF AMERICA'S UNIVERSITY* (2001). The quota proposition was rejected by a faculty committee which included Isaacs' friend and brilliant historian of Jewish philosophy, Harry Wolfson. RITTERBAND & WECHSLER, *supra* note 7, at 111. The pair became “intimately associated” in their work. Letter from Nathan Isaacs to Judge Julian W. Mack (January 23, 1925) (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 2). However, anti-Jewish quota restrictions were covertly put in place by 1926. RITTERBAND & WECHSLER, *supra* note 7, at 114. KELLER & KELLER, *supra* note 35, at 48

<sup>36</sup> MARCIA GRAHAM SYNNOTT, *THE HALF OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970* 70, 89 (1979). Donham had argued to the Committee on Methods of Sifting Candidates for Admission that there were two different types of Jews. One type of Jew desired “complete assimilation”, while the others desired to retain their separate group identity. Donham asserted that “very serious racial antagonism” would result if too many separatist Jews were admitted into Harvard. “Minutes of the Committee Appointed by the President of the University to Consider and Report to the Governing Boards Principles and Methods for More Effective Sifting of Candidates for Admission to the University, June 1922 through March 1923,” Meeting of June 21, 1922, Harvard University Archives, quoted in SYNNOTT, *supra*, at 86-87. Donham had worked on the subcommittee on Statistics, which developed an intricate method to identify Jews. *Id.*, at 93. Each Harvard student was divided into four categories: “J1”, “J2”, “J3” and Other. The J1 groups were deemed conclusively Jewish. A “preponderance of the evidence” indicated that the J2's were Jews, while J3's were possible Jews. JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT*

Donham, President Lowell, after initially ignoring the request, gave Isaacs a permanent position. It seems that Donham's prejudice did not prevent him from recognizing the worth of Isaacs' scholarship on the intersection of business and law.<sup>37</sup> After only a single year of teaching at Harvard, Isaacs in 1924 became one of the first publicly self-identified Jewish members of the tenured faculty at Harvard University.<sup>38</sup>

## II. ISAACS' CONTRIBUTIONS TO AMERICAN LAW

The works most cited to the present come from Isaac's analysis of numerous areas of law. His 1917 Yale Law journal article *The Standardizing of Contracts*<sup>39</sup> was the first to alert academe to the problem of standard form contracting within the framework of classical contract law and legal formalism. Professor Bates frames this debate and Isaacs

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HARVARD, YALE, AND PRINCETON 96 (2005). A few years later, this system was relied upon in order to covertly exclude Jews. SYNNOTT, *supra* note 36, at 107. Though Wolfson told Isaacs that Donham had been a leader of those supporting the quota on the faculty committee that had considered the question, the grateful Isaacs could "not believe it." Isaacs refused to pay "much attention to the gossip because it fails to correspond in so many particulars with what I find." Donham and his wife had been extremely cordial to Nathan and his wife Ella. Donham's son befriended, Nathan's youngest brother Judah, who was then an undergraduate at Harvard. Isaacs was impressed that "[e]ven the Lowell's have gone out of their way to be friendly." Letter from Nathan Isaacs to Adolph S. Oko (November 14, 1923) (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 2).

<sup>37</sup> Due to his association with Isaacs, Donham eventually arrived at a better understanding of Judaism. At memorial services held for Isaacs at Harvard December 21, 1941, Donham said that he had considered Isaacs to be "[c]learly the most scholarly man among us, unique in his field....All in all, by his life and strict adherence to intellectual, ethical and religious standards, occupied with tolerance for the views of others, he gave those who of us who adhere to other varieties of religious experience, some conception of the strength and majesty of the ancient Hebrew faith." Elcanan Isaacs, *supra* note 6, at 593.

<sup>38</sup> A few other Jews had previously received tenured chairs at Harvard. See SUSANNE KLINGSTEIN, *JEWS IN THE AMERICAN ACADEMY, 1900-1940: THE DYNAMICS OF INTELLECTUAL ASSIMILATION* 10-14 (Leo Wiener was Harvard University's first Jewish tenured professor in 1911, but Wiener was conflicted about his Judaism and identified as a Russian). See also HELEN SHIRLEY THOMAS, *FELIX FRANKFURTER: SCHOLAR ON THE BENCH* 11-12 (Frankfurter was named Byrne Professorship of Administrative law in 1921). Harry Wolfson received a tenured appointment a few years after Isaacs. *But see* Letter from Paul Wotitzky, Nathan Isaacs' son-in-law, to Samuel Flaks, co-author (February 6, 2008) (Ella Davis Isaacs, Nathan Isaacs' widow, told Wotitzky that Nathan Isaacs was the first tenured Jewish Harvard faculty member).

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cautionary role by observing that “[t]he inability of contract law and legal scholars to grasp effectively the phenomenon of standard form contracts has done little to help the consumer, it has certainly made Nathan Isaacs the most remarkable sage of the twentieth century.”<sup>40</sup> Isaacs’ 1927 Harvard Law Review article *Two Views of Commercial Arbitration*<sup>41</sup> provides a framework for arbitration models still debated today. He set forth two models for arbitration. One model cast the arbitrator in the role of judge; the other view’s the arbitrator as agent. Isaacs 1929 Harvard Law Review article, *Trusteeship in Modern Business*,<sup>42</sup> highlighted the flexibility of the trust concept and predicted its expansion into unforeseen areas of the law. The rest of this Part will briefly examine Isaacs contributions to these areas of law and a number of others.

#### A. Law of Contracts

Isaacs developed a cyclical theory of the standardization of contracts. Isaacs took issue with the widely accepted assessment of Nineteenth century scholar Henry Sumner Maine<sup>43</sup> that legal development moves in a linear fashion from status-based to contract-based legal relationships.<sup>44</sup> In *Standardizing Contract*, Isaacs contested Henry Sumner Maine’s claim that civilization inexorably progresses “from status to contract.”<sup>45</sup> Isaacs felt that the social needs of the Twentieth Century required a return to the creation of legal relationships based on status.<sup>46</sup> Isaacs’ analysis lead him to criticize the *Lochner*<sup>47</sup> era

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<sup>39</sup> Isaacs, *Standardizing Contracts*, *supra* note 2.

<sup>40</sup> Larry Bates, *Administrative Regulation of Terms in From Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT’L L. REV. 1, 1 (2002).

<sup>41</sup> See Isaacs, *Two Views*, *supra* note 2.

<sup>42</sup> Isaacs, *Trusteeship*, *supra* note 2.

<sup>43</sup> HENRY SUMNER MAINE, ANCIENT LAW (Beacon Edition 1963) (1861) (MAINE, ANCIENT LAW).

<sup>44</sup> Isaacs, *Law of Change*, *supra* note 2, at 748 (discusses his view of legal change).

<sup>45</sup> MAINE, *supra* note 43, at 126, 128, 168-9; Nathan Isaacs, “Appendix: Technique of Legal Research,” pg 12-13, NI Papers, BL, HCD, HBSA, Arch GA 41, Box 2, File: Unpublished, Alphabetically, n.d. 4/4.

<sup>46</sup> Isaacs, *Standardizing Contracts*, *supra* note 2, at 46-47.

courts' hostility towards minimum wage legislation. Isaacs defended the need for labor legislation as a means of standardizing employment relations to overcome the disparity of power held by most employers.<sup>48</sup>

Professor Weisbrod notes the importance of Isaacs' insight that "one should get away from an idea of legal history progress as movement . . . in one direction or another, and see 'a kind of pendulum movement back and forth between periods of standardization and periods of individualization.'"<sup>49</sup> Isaacs not only places the standardization of contract, and more generally, the unification of contract law, in an historical context, but also challenges the existence of mutual assent in standard form contracting. He also recognized the role of bargaining power in the drafting of contract terms. Isaacs' solution was the incorporation of community or law-determined standard terms.<sup>50</sup>

It was in Isaacs' *The Standardizing of Contracts* article that the term "standard" was first applied to contracts.<sup>51</sup> The inability of contract law to adequately deal with standard form contracts within a unitary view of contracts was aptly noted by Isaacs.<sup>52</sup> The conundrum of standard form contracts as a different category of contracts with the need for

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<sup>47</sup> *Lochner v. New York*, 198 U.S. 45 (1905) (holding that the "right to free contract" was implicit in the due process clause).

<sup>48</sup> Isaacs argued that status-based protections were needed "in order to remove them from the control of the accident of power in individual bargaining." Isaacs, *Standardizing Contracts*, *supra* note 2, at 47.

<sup>49</sup> Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 Utah L. Rev. 777, 788 (hereinafter Weisbrod, *Way We Live*).

<sup>50</sup> This is the system that Germany has taken in the most recent revision of their Commercial Code (BGH). See B. MARKESINIS, H. UNBERATH & A. JOHNSTON, *THE GERMAN LAW OF CONTRACT* (2006) (reviews Germany's 2002 Revised Civil Code).

<sup>51</sup> Professor Snell traces scholarly concern for adhesion contracts to the work of Isaacs: "[Isaacs argued] that contract law should promote 'freedom in the positive sense of presence of opportunity' and that the law should strive toward 'standardizing . . . the relations in which society has an interest, in order to remove them from the control of the accident of power in individual bargaining.'" G. Richard Shell, *Federal versus State Law in the Interpretation of Contracts Containing Arbitration Clauses: Reflections on Mastrobuono*, 65 U. CIN. L. REV. 43, n.109 (1996) (citing *Standardizing Contracts*, *supra* note 2, at 47).

<sup>52</sup> See FISHER, ET AL 77-79 (excerpting *Standardizing Contracts* as an example of a realist analysis that highlighted the conflict between the will theory of contract and early twentieth century legal developments).

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specialized rules remains the center of debate to the present. Isaacs noted that standard form contracting was not purely the exercise of freedom of contract that underpinned the will theory and private autonomy principle of classical contract law. Professor Weisbrod more recently has understood *The Standardizing of Contracts* as revealing the malleability of the consent principle: “All relationships can also be seen through the law of contracts—some more comfortably than others. By bending and twisting the idea of choice, most relationships can be understood as chosen, even if the choice is the refusal of an association.”<sup>53</sup> The “problem” posed by standard form contracting to classical contract theory was the strained application of the consent principle to boilerplate or standard terms.<sup>54</sup>

Classical contract theory were embedded in the two cornerstone documents of Isaacs’ time which were both authored by Samuel Williston—First Restatement of Contracts and the Uniform Sales Act. As to the later, Isaacs stated in a speech that “one drawback to this beautiful scheme, is that the contract made for us by the Sales Act might not under a given set of conditions be the contract that we would have made for ourselves if the various points had been called to our attention.”<sup>55</sup> We see here the notion of what is now called the hypothetical bargain.<sup>56</sup> Under hypothetical bargain theory the implied terms or default rules of contract law are based upon what the parties would have agreed to if operating under full information at the time of formation. This implied hypothetical intent results in efficient implied terms because it mimics what the parties’ intent would have been. An alternative formulation of this approach is Isaacs’ argument that the default rules in the Uniform Sales Act had grown hopelessly divergent to the custom and practices found in the business world. This approach would later be used by Llewellyn in the Code project in

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<sup>53</sup> Weisbrod, *Way We Live Now*, *supra* note 49.

<sup>54</sup> “The contractual view focuses on individual autonomy in a way that denies much reality in the world.” *Id.*

<sup>55</sup> N.I. Papers, Box 2, File: “Speeches, 1924-1941.”

<sup>56</sup> See David Charny, *Hypothetical Bargains The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991) (hypothetical bargain formulation conceals a complex set of issues).

which he used the contextual nature of contracts to infuse the rules with ongoing commercial practice. In this way, the default rules of contract are made to merge with the private parties' hypothetical bargain.

Isaacs was committed to a contextual approach to contract interpretation and in the interpretation-application of contract rules. Under this approach, classical contract theory's major tenets relating to contract interpretation—duty to read, four-corners analysis, and the plain mean rule—would be jettisoned in favor of a more nuanced exploration of contractual context. He argued that “an analysis is necessary in every case that goes far beyond words used into customs, past dealings of the parties, business understandings . . .”<sup>57</sup> The new tenets of contextual interpretation would later be incorporated into the Code. Isaacs observation made clear that the goal of contract rule application was to ascertain the intent of the parties as situated within the business world.

The abstraction of classical contract theory treated standard forms as traditional contracts. This resulted in diminishing the power of the private autonomy principle.<sup>58</sup> The judiciary felt the need to adjust other doctrines of contract law to compensate for injustices caused by this single model approach. The expansion of the doctrine of unconscionability from equitable principle to a law principle is one such adjustment.<sup>59</sup> The development of the implied duty of good faith is another example.<sup>60</sup>

Isaacs advanced the idea that freedom of contract was not by itself a surrogate for personal liberty.<sup>61</sup> Instead, freedom of contract was susceptible to abuse by contracting parties of superior bargaining power. A recent case coding project showed that the lack of

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<sup>57</sup> N.I. Papers, Box 3, File: “Business Law.”

<sup>58</sup> Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'*, 100 COLUM. L. REV. 94, 120 (2000).

<sup>59</sup> See U.C.C. §2-302.

<sup>60</sup> See Symposium: *The Enduring Legacy of Wood v. Lucy, Lady Duff-Gordon*, 28 PACE L. LAW 161 (2008).

<sup>61</sup> Nathan Isaacs' comment that the attack on standard form contracts was premised on the idea that “freedom of contract is not synonymous with liberty” illustrates the departure from the tenet of negative freedom that equated freedom of contract and personal liberty. See Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 90 U. CHI. L. REV. 1513, 1519, n.28 (2003) (quoting Nathan Isaacs, *Standardizing Contracts*, *supra* note 2, at 47).

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“strong” consent weighed heavily on courts application of the doctrine of unconscionability.<sup>62</sup> This finding demonstrates the importance of finding meaningful consent even to a doctrine largely premised upon concerns of substantive fairness.

Isaacs charged that this diminished exercise of private will would and should lead to status-oriented rules for certain categories of contracts. He viewed standard form contracts as a “practical check on the individuality of contracts, if not a theoretical limitation on the freedom of contract.”<sup>63</sup> Contract theory failed to properly readjust by continuing to rationalize the enforcement of such contracts through the rubric of unitary contract principles. Isaacs’ prediction that status would make a major comeback in contract law has strong evidentiary support.<sup>64</sup> It can be seen in the enactment of consumer protection laws, the merchant-consumer distinction in commercial law, and the good faith and implied-in-fact exceptions to the employment-at-will doctrine.

The oscillation between status and contract in Isaacs’ analysis included a normative role for society and law. Given, the need for standardized relations and agreements in a complicated, consumer-oriented marketplace, society through law needed to intervene to protect the weaker party in the standardized relationship. Status-based protections were needed to counterpoise the “accident of power in individual bargaining.”<sup>65</sup> Professor Bridwell notes that *Standardizing Contracts* drew the important “distinction between positive and negative freedom.”<sup>66</sup> The one-sidedness created by the use of superior bargaining power dictated the intervention of the law to reorder relationships initially created by contract in order to protect the weaker party from overreaching.<sup>67</sup> This reordering would transform standard contracts from being solely industry-generated to

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<sup>62</sup> Larry A. DiMatteo & Bruce L. Rich, *A Consent Theory of Unconscionability: An Empirical Analysis of Law in Action*, 33 FLORIDA STATE LAW REVIEW 1067 (2006).

<sup>63</sup> Isaacs, *Standardizing Contracts*, *supra* note 2, at 39.

<sup>64</sup> *Id.* at 40.

<sup>65</sup> Lyman Johnson, Book Review, 92 COLUM. L. REV. 2215, 2239-40 (1992).

<sup>66</sup> Bridwell, *supra* note 61, at 1519, n.30 (citing Isaacs, *Standardizing Contracts*, at 47).

<sup>67</sup> Isaacs gave the example of the insurance contract in which overreaching by the insurance industry lead to government intervention. NATHAN ISAACS, *THE LAW IN BUSINESS PROBLEMS* 217 (The Macmillan Company, rev. ed. 1934). See Carol Weisbrod, *War, Insurance and Some*

quasi-private, quasi-public creations.

Isaacs approach to the enforcement of standard contracts was a mix of contract-based and status-based legal regimes. He explains that in their “origin, these relations are, of course, contractual; in their workings, they recall the regime of status.”<sup>68</sup> This is an example of what the later realists would call the illusion of the public-private distinction and which the CLS Movement would use to support the thesis that the liberal legal order was built upon layers of contradiction.<sup>69</sup> Isaacs uses the public-private distinction to describe the ongoing cyclical evolution of law. He also implies a normative assessment that the blurring or melding of public-private law is a necessary and efficient means of dealing with standard contracts.

Isaacs’ cycle theory can be seen as a linear-cyclical blend. Types of relationships are formed through a purely contract-based legal regime. Overtime, abuses of freedom of contract results in the law converting the relationship to a partially status-based one. Contractual rights and duties are determined by status-based and contract-based principles depending on the particular term or issue. This eventually results in parties contracting away from the status-based relationship and creating new contract-based relationships with new sets of rights and duties. This process continues *ad infinitum* with freedom of contract

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*Problems of Community*, 10 CONN. INS. L.J. 103, 111-13 (2004).

<sup>68</sup> Isaacs, *Standardizing Contracts*, *supra* note 2, at 39. See Professor Kamp’s discussion of this point. Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275, 282 (1998). Isaacs refers to the standardizing of insurance contracts and bills of lading as other examples of the trend from contract-based contracting to a contract-status based contract law. Isaacs, *Standardizing Contracts*, *supra* note 2 at 38-39.

<sup>69</sup> The public-private distinction held that some areas of law were with the private sphere and others within the public. Politically conceived it has been viewed “in terms of the administrative state [with] the ‘public’ realm distinguished by the use of legitimate coercion and the authoritative direction of collective outcomes, as opposed to formally voluntary contract . . . based on market exchange.” Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 36 (Jeff Weintraub & Krishan Kumar 1997). The realist and CLS scholars attacked the distinction as masking the power of the government and courts in shaping private law. See e.g. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1932) legal realist critique of the notion that property law was solely within the private sphere); Duncan Kennedy, *The Stages of the Decline of the Public-Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (CLS critique).

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providing the means for the creation of novel types of relationships and the law infusing them with status-based qualities. Morris Cohen would adopt this insight of the quasi-status, quasi-contract track of legal development in his often cited *The Basis of Contract*.<sup>70</sup>

Isaacs saw the status-based elements of the law as a grassroots creation in which community norms and practices become incorporated into the status-based relationship and subsequently recognized into law. This is the perspective more deeply developed by Llewellyn in his scholarship and work on the Code. The importance of trade usage and business custom in the Code's interpretive methodologies is a testament to this belief that most of commercial law comes from the recognition of real world commercial practice. However, for Isaacs' the quest was not that simple. He believed that any complete theory of legal evolution needed to discover universal principles and allow for those principles to accommodate change.

#### B. Constitutional Law

Isaacs' cycle theory,<sup>71</sup> which largely derived from his study of Jewish law, had a powerful influence on his understanding of American constitutional law. Isaacs sought to develop a theory of jurisprudence that would, by putting the Supreme Court's method of constitutional interpretation in historical context, intellectually undermine the Supreme Court's *Lochner* era doctrine that the Fourteenth Amendment protected substantive economic rights.

Isaacs' criticism of the *Lochner* era Court was grounded in his theory of codification. He believed that the Constitution was, in essence, a "code." Isaacs derided the Court for having turned "to literalism and to fictions."<sup>72</sup> He asserted that "much of the

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<sup>70</sup> Morris R. Cohen, *The Basis of Contract Law*, 46 HARV. L. REV. 553, 558, 560-64 & 587 (1933).

<sup>71</sup> See Samuel Flaks, Note, *Nathan Isaacs's IDEIA: Statutory Evolution and Parental Pro Se Representation of Students with Disabilities*, 46 HARV. J. ON LEGIS. (2008) (forthcoming) (explaining aspects of Isaacs' cycle theory and applying it to a modern statute).

<sup>72</sup> See *id.* (quoting Nathan Isaacs, Unpublished Manuscript, "Cases and Documents illustrative

vaunted Constitutional Law” of the Nineteenth century “was the merest word-study” in which words were stretched. For example, legal fictions were employed to preserve the form of the Electoral College and to create federal jurisdiction over corporations.<sup>73</sup>

In the aftermath of the vast expansion of the federal government’s power during World War One, Isaacs argued that the Supreme Court had stretched the words “interstate commerce” in the Constitution “until they almost burst.”<sup>74</sup> Yet, even legal fictions have their limits, especially because “it is easier to read a current economic concept into the Constitution than to read it out when it ceases to be current.”<sup>75</sup> While acknowledging that the Founding Fathers did not anticipate modern conditions, Isaacs boldly pronounced that “we are entering just now after one hundred and fifty years nearly a second stage of constitutional interpretation in which we are trying to get to the spirit of the thing, rather frankly confessing that the letter is not the whole thing.”<sup>76</sup> Isaacs suggested that an equitable way of studying the Constitution would be to try to understand the thought of the men who wrote it as an aide in discovering general constitutional principles.

Isaacs knew well that “[s]ome of the greatest legal battles of” his day was “being fought over statutory collisions with the principle of freedom of contract.”<sup>77</sup> One of the purposes of Isaacs’ groundbreaking analyses of the history of contracts and torts<sup>78</sup> was to undermine the reactionary *Lochner* era Court’s opposition to interfering with the freedom of contract, or the imposition of strict liability, as unhistorical.<sup>79</sup> For example, Isaacs showed that the Founding Fathers and John Marshals’ understanding of contract law was

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of Anglo-American Legal History, 1917, pg. 4, NI Papers, HLSL, *supra* note 2, Box 1, File 2, Cases & Documents ill. Of A.-A.-Legal History II Writings.

<sup>73</sup> Isaacs, *Securities Act*, *supra* note 2, at 220

<sup>74</sup> Nathan Isaacs, History Lecture, pg. 8 (December 4, 1922) (NI Papers, BLHC, HBS, *supra* note 8, Box 1, File: Legal History Lecture, 27 October 1922.

<sup>75</sup> Isaacs, *Securities Act*, *supra* note 2, at 220.

<sup>76</sup> Nathan Isaacs, History Lecture, pg. 2 (January 8, 1923) (NI Papers, BLHC, HBS, *supra* note 8, Box 1, File: Lecture on Legal History, 8 January 1923.

<sup>77</sup> Isaacs, *Standardizing Contracts*, *supra* note 2, at 38 n.17.

<sup>78</sup> *Infra* nn. 79-83, 96-101 & accompanying text.

<sup>79</sup> FISHER, ET AL at 79.

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very different from that of the *Lochner* Court.<sup>80</sup> In a 1922 lecture on Legal History, Isaacs argued that decisions that had declared the inviolability of freedom of contract were the product of Justices who had been in “the habit of talking about natural rights. Whenever they wanted to prove that a man had a certain right, all they had to do was say it was natural.”<sup>81</sup> In the end, Isaacs’ cycle theory of legal development molded his views on contract and tort law, as well as constitutional law. Isaacs did not think, as the influential Maine had, that civilization inexorably progressed “from status to contract,”<sup>82</sup> as discussed above. Minimum wage legislation, maximum work hour legislation, and collective bargaining of labor contracts were perhaps the most significant examples of retreats from absolute freedom of contract.<sup>83</sup> Isaacs’ views on constitutional law are more complicated than posed here. While he thought that governmental regulation in status-based relationships (employment) was warranted, he was a critic of later New Deal legislation as unconstitutionally anti-business. Part VI will examine Isaacs’ critique of the New Deal.

#### C. Two Views of Arbitration

In response to the passage of the Federal Arbitration Act, Isaacs provided the first full analysis of the status and role of arbitration in society. In his 1927 Harvard Law Review article, *Two Views of Commercial Arbitration*, he sketches two models of arbitration—the arbitrator as judge model and the arbitrator as agent model.<sup>84</sup> Isaacs

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<sup>80</sup> Nathan Isaacs, *John Marshall on Contracts*, 7 VA. L. REV. 413 (1921).

<sup>81</sup> Isaacs mocked Justices who were accustomed to thinking of Adam Smith’s school of economics “as the law of nature.” Nathan Isaacs, “Second Lecture on Legal History,” pg. 3 (Oct. 9, 1922) (NI Papers, BLHC, HBS, *supra* note 8, Box 1, File: “Lecture on legal history, 5 October 1922).

<sup>82</sup> MAINE, *supra* note 43. Maine famously asserted that “we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.” *Id.* at 126, 128, 168-9 (emphasis in original); Nathan Isaacs, “Appendix Technique of Legal Research”, pg 12-13, NI Papers, BL, HCD, HBSA, Arch GA 41, Box 2, File: Unpublished, Alphabetically, n.d. 4/4.

<sup>83</sup> Isaacs, *Standardizing Contracts*, *supra* note 2, at 46-47.

<sup>84</sup> See Isaacs, *Two Views*, *supra* note 2. See Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 OR. L. REV. 1, n. 148

refers to the former model as the “legalistic view” and the later as the “realistic view.”<sup>85</sup> The importance of Isaacs’ analysis and its remaining cogency was recently noted:

Nearly seventy years ago, at the dawn of the modern era of arbitration, *Nathan Isaacs* posed the question, ‘Is arbitration a mode of trial or a substitute for trial of so different a nature as not to be properly included under that term?’ On the one hand, Isaacs explained, arbitration might be viewed as a creature of private contract, with arbitrators as the parties’ agents and instruments of their will. On the other hand, as a system for binding adjudication of disputes by independent decision makers, arbitration invited comparisons to court trials. Isaacs concluded that one’s perspective on many practical and legal questions confronting parties, arbitrators, courts, and legislatures hinges on the ‘more or less subconscious’ categorization of arbitration as an instrumentality of contract or court substitute.<sup>86</sup>

Isaacs feared that adoption of the legalistic view would make arbitration litigation-like. Wesley Sturges wrote to Isaacs in 1930 to voice similar concerns of the role of lawyers in the arbitration process: “I appreciate your prophecy . . . [that if] lawyers take on the management of arbitrations, more and more will the process not be a simple one.”<sup>87</sup> Isaacs feared that the lawyerization of arbitration would remove it as a unique means of dispute resolution and as a result most of its benefits. Isaacs thought the realistic conception of

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(2006).

<sup>85</sup> “The proper role of an arbitrator was transforming in the colonies and it remained unclear in the nineteenth-century. In a Harvard Law Review article, *Nathan Isaacs* contrasted the ‘legalistic view,’ which likens arbitrators to judges, with the ‘realistic view,’ generally adhered to by businesspeople, who see arbitrators as agents of the parties.” Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Anointed Arbitrators on a Tripartite Panel*, 30 *FORDHAM URBAN L.J.* 1815, 1834 (2003), citing Isaacs, *Two Views* at 932.

<sup>86</sup> Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 *NW. U.L. REV.* 1, 5 (1997) (emphasis added) (citing Isaacs, *Two Views*, *supra* note 2, at 929).

<sup>87</sup> Letter from Wesley Sturges to Nathan Isaacs (Nov. 24, 1930) (NI Papers, BLHC, HBS, *supra* note 2, Box 2 File: “Correspondence, Re: Articles and Books, 1930).

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arbitration saw it as “a device for avoiding trials and perhaps as much more of the machinery of ordinary legal procedure as is humanly possible” was prevalent among businesspersons, rather than the legalistic view of arbitration as a substitute for a courts.<sup>88</sup> He argued that parties should opt towards treating the arbitrator as an agent of the parties instead of as a substitute judge.<sup>89</sup> Professor Schmitz notes that Isaacs “emphasized that judicial review of awards would foster legalistic, ‘trial-like’ arbitration complete with formal procedure, records and opinions.”<sup>90</sup> Ultimately, Isaacs’ views on arbitration were an important element of his general project of adapting the law to the needs of business. His argument against a broad right of judicial review of arbitration decisions has largely been accepted.<sup>91</sup>

#### D. Further Contributions

In *Trusteeship in Modern Business*,<sup>92</sup> Isaacs discusses the business trust and noted that “foremost among the advantages of trusteeship over the standardized legal devices is its flexibility. The document creating the trust . . . may determine the types of business, the types of investment, the distinction to be made between corpus and income, and the use of both with the utmost freedom, according to the needs of the case.”<sup>93</sup> Isaacs also observed that “next to contract, the universal tool, and incorporation, the standard instrument of organization, [the trust concept] takes its place wherever the relations to be established are too delicate or too novel for these coarser devices.”<sup>94</sup> As Isaacs predicted, twentieth

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<sup>88</sup> Isaacs, *Two Views*, *supra* note 2, at 937-938.

<sup>89</sup> *Id.* at 940-941.

<sup>90</sup> Amy J. Schmitz, *Ending A Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123 (2002), at n.17 (citing Isaacs, *Two Views*, *supra* note 2, at 934-35. Professor Schmitz acknowledges the prophetic nature of Isaacs commentary: “His concerns remain true today.” *Id.*

<sup>91</sup> In recognition of his scholarship, the American Arbitration Association was invited to become a member of its Board of Directors. Invitation from Lucius Eastman, NI Papers, BL, HCD, HBSA, Arch GA 41, Box 1, File Correspondence; 1915-1940. (2-20-1940).

<sup>92</sup> Isaacs, *Trusteeship*, *supra* note 2.

<sup>93</sup> *Id.* at 1052.

<sup>94</sup> *Id.* at 1060-61.

century saw the expansion of trust and fiduciary duty law.<sup>95</sup>

Isaacs also contested the claim that civilization had progressed from strict liability to a morally-based negligence principle in tort law. The context of Isaacs work in this field, as revealed by his lecture notes, was a wave of state supreme court rulings at the turn of the Twentieth century that had held that workers compensation laws were unconstitutional imposition of liability without proving fault.<sup>96</sup> Isaacs took issue with the fault-based rationale of the negligence standard in tort law. The need for personal culpability was a central construct of classical tort theory.<sup>97</sup> Isaacs, as realist and contextualist, recognized that the rise of industrial society necessitated the recognition of other grounds of liability, such a strict liability. Professor Horwitz has explained that Isaacs' pro-standardization and pro-strict liability stance was unique among contemporary tort scholars, almost all of whom had retreated to a subjectivist position in order to defend the negligence principle.<sup>98</sup> Isaacs concluded from a review of Anglo-American legal history that tort law had alternated between the principles of negligence and strict liability. He argued that the shift to a mass-production economy warranted a return to strict liability.<sup>99</sup> Isaacs saw that this cause of action was needed to police culpable conduct independent of individual culpability.<sup>100</sup> This development came to pass with the

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<sup>95</sup> Tamar Frankel noted that “[t]he twentieth century is witnessing an unprecedented expansion and development of the fiduciary law.” Tamar Frankel, *Fiduciary Law*, 71 CAL L. REV. 795, 796 (1983). See also Jerry W. Markham, *Fiduciary Duties Under the Commodity Exchange Act*, 68 NOTRE DAME L. REV. 199, 216 (1992) (“law of fiduciary duties continues to retain its elasticity”).

<sup>96</sup> Nathan Isaacs, Legal History Lecture, pg. 8 (January 15, 1923) (NI Papers, BL, HCD, HBSA, Arch GA 41, Box 1, File: “Legal History, 1922-1923”).

<sup>97</sup> See Isaacs, *Fault and Liability*, *supra* note 2; *Two Views*, *supra* note 2, at 976.

<sup>98</sup> HORWITZ, TRANSFORMATION, *supra* note 2, at 126 (noting that Isaacs was the first to recognize that “that objectivism had already cleared away the most powerful individualistic objections to strict liability”).

<sup>99</sup> See Isaacs, *Fault and Liability*, *supra* note at 2; Nathan Isaacs, *Quasi-Delict in Anglo-American Law*, 31 YALE L. J. 571 (1922).

<sup>100</sup> Isaacs was not above challenging established authorities on this subject. He argued against Holmes and Wigmore’s claims that historical rules of tort were not grounded on moral principles. “Nathan Isaacs, who in 1918 . . . marshaled in evidence that both Holmes and Wigmore were wrong about historical tort rules of England being devoid of moral sense.” Nelson P. Miller, *An Ancient Law of Care*, 26 WHITTIER L. REV. 3, 4 (2004) (citing Isaacs, *Fault and Liability*, *supra*

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acceptance of strict products liability.

Yet, Isaacs did not suggest that the ultimate criterion for the validity of a law was its usefulness towards implementing changing tastes. He insisted that variation in law was not caused by any inevitable evolution, but by the constant challenge of reconciling changing realities with moral principles. Defending the supposedly amoral doctrine of strict liability, he argued that “a re-defining of external standards is necessary. 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 recognition of a human limitation that law cannot be free.”<sup>101</sup> Isaacs’ aspirations, inspired by the example of Jewish law, reflected the social scientific ambitions of some members of the Legal Realism Movement and the ethical and equitable inspiration of others.

Isaacs wrote a number of articles on the judicial system and lawyering. In one article he questioned the ability of even the most able judges to understand and apply scientific aspects of some cases.<sup>102</sup> In the area of attorney-client relations, Isaacs saw the enactment of the securities laws as fundamentally altering that relationship. The securities laws bifurcated the attorney’s role as one of loyalty to client and at times a conflicting allegiance to the public or its legal system. He argued for the need to restate the attorney’s “answerability to the court and to society.” Isaacs believed that it was imperative to educate clients to the fact that the attorney’s obligations to them were not unlimited.<sup>103</sup>

Isaacs also weighed in on the fact-law distinction. He offered this critical view of the distinction between issues of fact and issues of law.<sup>104</sup> He thought it a false distinction

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note 2, at 963-66.

<sup>101</sup> Isaacs, *Fault and Liability*, *supra* note 2, at 978.

<sup>102</sup> Isaacs, *Law and Facts*, *supra* note 2, at 7.

<sup>103</sup> Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 15-16 (2005) (quoting Nathan Isaacs, *Liability of the Lawyer for Bad Advice*, 24 CAL. L. REV. 39, 47 (1935)). Professor Schwarcz notes that the novelty of this insight was due to the fact that “during the formative years of common law development . . . there was little if any real conflict between an attorney’s responsibility to a client and to the public. Therefore, there was little need to try to define [the attorney’s public trust] responsibility. The need to balance client and public responsibilities became more acute, though, after passage of the federal securities laws.” *Id.*

<sup>104</sup> “The delusive simplicity of the distinction between questions of law and questions of fact

because judges decided what issues were matters of law or fact. Isaacs noted that judges often converted issues of fact to issues of law. In the area of administrative law, Professor Levin acknowledged that the distinction between law and discretion in administrative law is “an updated version of Nathan Isaacs' remark that ‘whether a particular question is to be treated as a question of law or a question of fact is not in itself a question of fact, but a highly artificial question of law.’”<sup>105</sup> Finally, Isaacs saw the need to expand the protections offered by trademark law through functional interpretations of trademark.<sup>106</sup> His functional analysis of the use and need to protect trademarks is still cited today.<sup>107</sup> Space has not permitted an exhaustive review of Isaacs' many contributions to legal scholarship. However, this brief review shows the magnitude of his contributions. The next Part will more fully examine his cycle theory of legal development. It is here where the influence of Jewish law has its clearest connection to his theory of legal development.

### III. CONSERVATIVE LEGAL REALISM AND THE JEWISH LEGAL TRADITION

There are a number of reasons for Isaacs not ascending the ranks of legal realist scholars. First, his insights were not cloaked in theoretical nomenclature.<sup>108</sup> Second, his view of CLR was not as sexy as the more radical insights of Llewellyn<sup>109</sup> and Frank.<sup>110</sup> Theoretical or not, radical or not, his insights into the actual working out of law in a

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has been found a will-of-the-wisp by travelers approaching it from several directions.” Isaacs, *Law and Facts*, *supra* note 2, at 1.

<sup>105</sup> Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 16 (1985), citing Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 11-12 (1922).

<sup>106</sup> Nathan Isaacs, *Traffic in Trade Symbols*, 44 HARV. L. REV. 1210 (1931).

<sup>107</sup> See, e.g., 3 RUDOLF CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES* 17.01-.03 (4th ed. 1981). Callmann cites Nathan Isaacs, *Traffic in Trade-Symbols*, 44 HARV. L. REV. 1210, 1220 in which he describes the functions of origin and guarantee.

<sup>108</sup> Professor Horwitz labeled Isaacs as a “original and penetrating torts-contracts scholar.” HORWITZ, *TRANSFORMATION*, *supra* note 2, at 183.

<sup>109</sup> Llewellyn, *Some Realism*, *supra* note 3.

<sup>110</sup> JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

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cyclical evolutionary path were important contributions to legal realism and modern legal theory. His writings provide insights into the law from both critical and developmental perspectives. Many of the ideas he nurtured are still relevant to modern legal theory, as well as foundational issues in disparate areas of law such as contracts, sales, arbitration, trademark, torts, and trust law. Isaacs' position as a proto-realist illuminates the intellectual offerings of other proto-realist like Pound, Corbin, Hale, and Hohfeld, as well as the realists of the 1930s, including Karl Llewellyn and Morris and Felix Cohen. Third, Isaacs focus on the functionality of law remains an important part of legal scholarship. For example, Hohfeldian jurisprudence details the breaking down of legal concepts from abstract generalizations to concrete, workable duties. This decomposition of legal abstraction is at the heart of Isaacs' analysis.

Duncan Kennedy groups Isaacs with Roscoe Pound and Morris Cohen for using an analytical methodology which seeks to place specific areas or issues of law within the context of underlying interests and principles.<sup>111</sup> In this way, those specific areas of law could be critiqued for congruence with the underlying principles and interests that they supposedly serve. Under this hypothesis a given interest or interests are predominate in a particular area should be used to explain the rules within that area of law. Isaacs believed that these underlying interests varied in a cyclical movement between individualist and relational norms. The normative structure of the law wavered between these normative poles in responding to prevailing social and economic conditions.<sup>112</sup> The rest of this Part will place Isaacs' scholarship within the context of American legal realism, examine the connection between his brand of CLR and modern legal theory, and the relationship between Jewish law and his theory of legal development.

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<sup>111</sup> Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'*, 100 COLUM. L. REV. at 120 (citing Isaacs, *Standardizing Contracts* at 40-41 (1917) (emphasis added)).

<sup>112</sup> *Id.*

## A. American Legal Realism

Legal realism is often associated with two well analyzed insights. First, the radical form of legal realism, more recently associated with Critical Legal Studies (CLS), questions law's ability to provide determinate, unbiased answers to legal disputes. This rule skepticism is the most noted characteristic of the legal realist scholarship of the 1930s.<sup>113</sup> This is the idea that the CLS movement of the 1970s and 1980s further radicalized to question the very legitimacy of the legal order. Critics of the Realists feared the nihilistic and lawless implications of such theorizing, but it is doubtful that many of the Legal Realists actually intended to assault the underlying legitimacy of law.<sup>114</sup> Clearly, as discussed earlier, Isaacs' CLR attempted to merge the indeterminacy of the dynamic nature of law with its disaggregated conceptual core.

The second major insight of the legal realists was the need for an interdisciplinary analysis of law and legal practice. It is this insight that connects legal realism to the modern law and economics movement (LAE). Isaacs' PhD in economics, and immersion into legal history, likely instigated his broad contextual view of law and the importance of an interdisciplinary approach to law study. A comparison of Isaacs' CLR will be more fully explored in Part V.

## B. Conservative Legal Realism and Modern Legal Theory

This CLR strain of legal realism plays a major role in modern legal theory. The

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<sup>113</sup> The legal formalists of the early 1900s believed "that judges decide cases on the basis of distinctively *legal* rules and reasons." It is this type of formalism that the legal realists attacked. Brian Leiter, *American Legal Realism*, in W. Edmundson & M. Golding (eds.), *THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* 50 (2003) (emphasis in the original).

<sup>114</sup> See FISHER, *et al.*, *supra* note 3; WILLIAM TWINNING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809 (not assaulting the underlying legitimacy of law); *But see* KARL LLEWELLYN, *THE BRAMBLE BUSH* (1930); Joseph Hutcheson, *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision*, 14 *CORNELL L. REV.* 274 (1929); FRANK, *supra* note 110 (radical

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connection between legal realism and various schools of legal thought, such as CLS, law and society, and LAE, has been well documented elsewhere.<sup>115</sup> However, the relationship between the work of Isaacs and modern legal thought has not been adequately analyzed. Understanding Isaacs' insights can help us better comprehend the meaning and influence of the Legal Realist Movement and their intellectual descendents.

It is commonly thought that the LAE movements' general alignment with political conservatism<sup>116</sup> lacks precedent from within the original legal realist tradition. It is widely known that one of the forerunners of legal realism, Roscoe Pound, became a conservative,<sup>117</sup> and was criticized by the realists of the 1930s for not going far enough with his realist insights<sup>118</sup> Robert Gordon has suggested that the general affiliation of legal formalism with political conservatism and Legal Realism with political liberalism is "only an accident of our recent history. It is easy to imagine a radical formalism, such as the French Revolution's program to remake society in accordance with abstract legal rights, or a conservative Realism, such as German historicism."<sup>119</sup> Nathan Isaacs embodied a conservative realism unique among the American legal academics of the 1920s and 1930s.

The recognition of a conservative strain of legal realism puts into perspective a long standing dispute over the historic pedigree of legal realism and CLS. This article suggests a resolution of this debate by establishing that there was a CLR strand of realists

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criticisms of the judicial decision making).

<sup>115</sup> See RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 13 (2001). Critical Legal Studies was "in major part a revival of legal realism in an uncompromisingly radical form...The critical scholars claimed that law is nothing but politics...." *Id.* at 3. "[T]he legal realist movement of the 1920s and 1930s advocated not only greater psychological realism (Jerome Frank) and economic realism (Karl Llewellyn, William O. Douglas) about the law but also large scale empirical research as the path of law reform." *Id.*

<sup>116</sup> See e.g., STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

<sup>117</sup> Compare Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911) (part one), 25 HARV. L. REV. 140, 489 (1911-1912) (parts two and three) with Roscoe Pound, *Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931) (attack on the Realists).

<sup>118</sup> See e.g., KERMIT HALL, *ROSCOE POUND & KARL LLEWELLYN* 283 ("the acuity of Pound's intellectual vision faltered").

<sup>119</sup> Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 66 n.18 (1984).

that embraced the moral and political valence of social science and the recognition of the socially contingent nature of law. But, in the end, they believed that the contingent nature of law was limited by moral, political, and cultural values that were essentially conservative. Professor Horwitz rejects the proposition that legal realism rested upon conservative values. He contests the assertion that because legal realism and LAE “both share an instrumentalist and consequentialist approach to law” they are both based upon a conservative ideology.<sup>120</sup> He argues that the social science embraced by the realists was value laden and intertwined with a progressive political valence that is incompatible with LAE’s embrace of a purportedly value free economic social science.<sup>121</sup> The thesis here is that Isaacs’ strain of CLR is more aligned with LAE than the 1930’s brand of legal realism. Horwitz may be right regarding the linkage between radical legal realism, but his argument loses weight when comparing LAE to CLR.

Richard Posner has chastised realism for its liberalism, irresponsibility, and its “naive enthusiasm for government.”<sup>122</sup> However, Posner has acknowledged that he agrees with the realists on “what to do—think things not words, trace the actual consequences of legal doctrines, balance competing policies.”<sup>123</sup> Posner’s more recently espoused theory of

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<sup>120</sup> HORWITZ, TRANSFORMATION, *supra* note 3, 270.

<sup>121</sup> *Id.*

<sup>122</sup> See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006) (arguing for a pragmatic approach to issues of constitutional interpretation in relation to war on terror); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); Richard A. Posner, *Foreword* to MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS XIV (2001); RICHARD A. POSNER, OVERCOMING LAW 393 (1995) (hereinafter POSNER, OVERCOMING LAW) (advocating the “fusion” of liberalism, pragmatism, and economics in law application). See also Elisabeth Krecke, *Economic Analysis and Legal Pragmatism*, 23 INT’L REV. L. & ECON. 421, 427 (2003) (describing Judge Posner’s assertion that an invisible hand “drives the law toward efficiency”); WOUTER DE BEEN, LEGAL REALISM REGAINED: SAVING REALISM FROM CRITICAL ACCLAIM 190 (2008) (observing that Posner has “not been keen to acknowledge the Realists as one of his intellectual forebears.”) Posner’s pragmatism has been described as “an instrumentalist perspective which focuses primarily on the practical consequences of legal rules, rather than on their doctrinal logic and propriety.” *Id.* at 197.

<sup>123</sup> POSNER, OVERCOMING LAW, *supra* note 122, 393. See DE BEEN, *supra* note 122, at 191 (suggesting that Posner could be considered a modern advocate of an “empirical approach inspired by Legal Realism”).

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pragmatism is fully informed with legal realism.<sup>124</sup> Posner echoes the realists' pragmatic commitment to social science when he decries that contemporary law has "too much emphasis on authority, certitude, rhetoric, and tradition, too little on consequences and on social-scientific techniques for measuring consequences."<sup>125</sup> Isaacs' functionalist CLR and Posner's pragmatic LAE both offer a pro-business and conservative social vision of the American legal order.<sup>126</sup>

Like the legal realists, and anticipating Posner, Isaacs rejected the formalist view of law as a science, and instead advocated for an understanding of law as a set of malleable tools that should be used to solve society's problems. Politically, Isaacs was a conservative who believed in free enterprise. He believed that the law should use its tools to assist businesspersons in their pursuit of economic gain. The next section examines the Jewish legal tradition as it relates to Isaacs' unified theory of law.

#### C. Jewish Legal Tradition and Isaacs Unified Theory of Law

There was a complex interaction between Isaacs' understanding of secular and religious law. His writings on Jewish and general legal subjects cannot be understood in isolation. Isaacs' study of Jewish law was influenced by contemporary currents in general legal thought, just as his academic contributions to secular legal thought were influenced by his study of Jewish law. He investigated Jewish law with the same scholarly approach which he used to study other legal systems and his conclusions sometimes radically differed from traditional understandings.<sup>127</sup> Jewish law served as a paradigm for other systems of law in Isaacs' mind; his understanding of Jewish law shaped his work on

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<sup>124</sup> Samuel Flaks, class with Professor Jon Hanson," Harvard (Nov. 2006).

<sup>125</sup> POSNER, *THE PROBLEMS OF JURISPRUDENCE* 465 (1990).

<sup>126</sup> See DE BEEN, *supra* note 122, 200 ("There might be something wrong with Posner's substantive view, but from a Pragmatic perspective there is nothing wrong with his commitment to a vision. It lends coherence and purpose to his Law and Economics approach. There is a *point* to Posner's varied research projects... (emphasis in the original)).

<sup>127</sup> Oko eulogized Isaacs as "no 'fundamentalist,' biblical or rabbinic." Adolph S. Oko, *Nathan Isaacs*, unpublished manuscript of memorial address pg.1 (February 22, 1942) (ASO Papers, MS 14, AJA, *supra* note 8, Box 9, File 12).

American law. He claimed that the Jewish and Anglo-American legal systems shared many essential attributes. It is striking that just as in the realm of commercial law Isaacs advocated for a functional approach while simultaneously insisting upon the integrity of traditional common-law process. As will be discussed below, he stressed in the realm of Jewish law that legal doctrines were mere tools that should be adapted as dictated by the moral goals of the law.<sup>128</sup>

Isaacs' work was heavily influenced by his Jewish faith and knowledge of legal history.<sup>129</sup> His knowledge of Jewish and civil law legal systems enabled him to place Anglo-American law in a broader context. Isaacs' conservatism reflected his lifestyle as an observant Jew, and his defense of both traditional Jewish and Anglo-American legal traditions was based on a unified theory of jurisprudence. Isaacs' theory of jurisprudence was a direct outgrowth of his contribution to the internal debate between Reform and Orthodox Jews over Jewish law. He used insights taken from the historical development of Jewish law to inform his theory of legal development. And at the same time, Isaacs relied upon the legal realist toolset to facilitate business transactions and to defend Judaism.

Jewish law was at the confluence of Isaacs' legal and religious interests. He suggested that Jewish law was the last remaining area for juristic study.<sup>130</sup> Adolph Oko noted that Isaacs was both "fascinated by universal legal ideals" and his belief that Jewish law was a living, growing law.<sup>131</sup> Isaacs did not see the Jewish people or their law as *sui generis*.<sup>132</sup> He recognized that the tension between tradition and innovation in Jewish law

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<sup>128</sup> See Nathan Isaacs, *The Place of Law in Jewish Education*, 6 UNITED SYNAGOGUE RECORDER 2 (March 1926) (advocating the functional approach to teaching Jewish law).

<sup>129</sup> See Weisbrod, *Way We Live*, *supra* note 49, at 786 nn.40-44 (analysis of the general character of Nathan Isaacs' writings and career).

<sup>130</sup> Letter from Isaacs [Jurist] to Oko [the Bookman], pg. 3, X in the series, No Date (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 3).

<sup>131</sup> Adolph S. Oko, "Nathan Isaacs" [Hebrew Teachers College Nathan Isaacs Memorial Service], pg. 1 (February 22, 1942) (ASO Papers, MS 14, AJA, Box 9, *supra* note 8, File 12). See Adolph S. Oko and Nathan Isaacs, *Correspondence Between A Jurist and a Bookman*, IV MENORAH JOURNAL 73, 73-85 (1918) (calling for the writing of a history of Jewish Law).

<sup>132</sup> Nathan Isaacs, *Jewish Law in the Modern World*, 6 THE MENORAH JOURNAL 258, 262

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was a characteristic of all legal systems. He believed that aspects of this tension had been transmitted from Jewish to civil and common law legal systems.<sup>133</sup>

Much of Isaacs' scholarship works to resolve the challenge of recognizing that law adapts to the changing needs of society while continuing to insist that the law was not simply opportunistic. Isaacs' worldview saw law as serving a relatively fixed moral end, even when the law changes to respond to different historical conditions.

Isaacs conceived a theory of legal cycles to support a traditional understanding of Jewish law against the attacks of Reform Judaism, even as he embraced the changing nature of the law. Isaacs asserted that the debate between Orthodox and Reform was "not a question of change versus no change; it is a question of the mode and manner of development."<sup>134</sup> He thought that Jewish law evolved to serve human needs, but also that it contained timeless principles and "practical guidance in the art of right living."<sup>135</sup> Isaacs laid out his unified understanding of Jewish law and secular law in a two part article: *'The Law' and the Law of Change*.<sup>136</sup> In that article, he sketched the cycles in the history of Jewish law and extrapolated them to secular law. Isaacs' cycle theory was an attempt to discover universal principles of law while allowing for constant change in the content of the law. He asserted that those changes are accomplished through a predictable set of means which correlate to the different but recurring stages of how lawyers approach their

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(October, 1920).

<sup>133</sup> See Nathan Isaacs, *The Influence of Judaism on Western Law*, in THE LEGACY OF ISRAEL 377, 402 (Edwyn Robert (Bevan, ed., 1927). Some of his close associates wrote shortly after his death that Isaacs "saw in Jewish sacred law the foundation of his legal studies, since it is there that he found the higher purposes of Jurisprudence contemplated or attained." Resolution adopted by the Board of Trustees of the Associated Jewish Philanthropies at its meeting on March 9, 1942, attached to Letter from Ben. M. Selekman, Executive Director of Associated Jewish Philanthropies, to Ella Isaacs, Nathan Isaacs' widow (April 8, 1942) (NI Papers, AJHS, *supra* note 8, Box 2, Scrapbook).

<sup>134</sup> Nathan Isaacs, *Notes on Fiction, Equity and Legislation in the Development of Jewish Jurisprudence*, 1 JEWISH FORUM 600, 601 (Dec. 1918).

<sup>135</sup> Nathan Isaacs, *The Great Preamble—A Rereading of Genesis*, in THE JEWISH LIBRARY, SECOND SERIES 232 (Leo Jung, ed. 1930).

<sup>136</sup> Isaacs, *Law of Change*, *supra* note 2, at 748.

legal system.<sup>137</sup>

Because of his belief in the dynamic nature of law, Isaacs rejected the “simple account of Revelation” that the entire law (Torah) was given *de novo* by God at Mt. Sinai.<sup>138</sup> Instead, he argued that “the great mystery of ‘revelation’ must be approached as an incident in the life of the law—an incident involving selection, rejection, purification, but not creation.”<sup>139</sup> At the turn of the 20<sup>th</sup> Century, Higher Biblical Criticism rested in part on the presumption that law always evolved in a steady ethical progression which could be discerned by the Prophets from the different codes found in the Bible.<sup>140</sup> Isaacs believed that such a presumption was untenable. He sarcastically noted, in relation to Jewish and English law, that: “if 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 “which a simplistic history of English law could be written that entirely conformed with the original hypothesis.”<sup>141</sup>

At the same time, Isaacs also rejected a fundamentalist understanding of the Bible. Biblical fundamentalists believe that G-d’s intent can be discerned from a literal reading of holy texts. In contrast, non-fundamentalist Catholics, Orthodox Jews and Muslims interpret the Bible through the lenses of tradition, doctrine, and precedent.<sup>142</sup> Isaacs rejected the idea of “Jewish fundamentalism.” Instead, he thought the Pentateuch was primarily a Law Book in which the non-legal parts are auxiliary, and only useful to the

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<sup>137</sup> Nathan Isaacs, *Preface* [of planned book collection of his articles C.E. 1923], Nathan Isaacs Papers, 1915-1941, Baker Library, Historical Collections Department, Harvard Business School Archives, Arch GA 41, Soldiers Field, Boston, MA [hereinafter NI Papers, BL, HCD, HBSA, Arch GA 41], Box 3, File: “Chapters in Books Published ? n.d.”

<sup>138</sup> Isaacs, *supra* note 132, at 262.

<sup>139</sup> Nathan Isaacs, *The Common Law of the Bible*, 7 A.B.A. J. 117, 119.

<sup>140</sup> Nathan Isaacs, Book Review, 45 HARV. L. REV. 949 (1932), *reviewing* J.M. POWIS SMITH, *THE ORIGIN AND HISTORY OF HEBREW LAW* (1931)).

<sup>141</sup> *Id.*, at 951. *See also* Isaacs, *supra* note 139 (claiming that a knowledge of the development of unwritten law takes the sting out of turn of the 20<sup>th</sup> century Higher Biblical Criticism).

<sup>142</sup> ALAN DERSHOWITZ, *RIGHTS FROM WRONGS* 111-112 (2004).

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extent that they helped explain “The Law.”<sup>143</sup> Isaacs conceded that there was indeed a Jewish Orthodoxy that zealously obeyed the smallest commandment of The Law. But he insisted that there was a broader Orthodoxy that incorporated the cyclical and dynamic nature of The Law.

Isaacs’ conservatism and broad view of legal evolution allowed him to reject legal orthodoxy and to search for new principles to anchor ever-evolving law. He blended the negative critique of the legal order associated with the legal realists with a positive theory of legal development. Isaacs’ descriptive view of legal development will be explored in Part IV’s analysis of “cycle theory.” For now, it is enough to note the positive or prescriptive values he offered in his CLR. The lack of a positive plan for legal form is the basis for the claim of nihilism waged against the realists of the 1930s and the CLS Movement.

Isaacs maintained a practical and skeptical stance as to how legal principles should be applied to changing facts and business problems. Often, Isaacs considered radical change in the law as a sign of its continuing vitality, rather than its capriciousness. At the same time, Isaacs work was premised on a faith that it was possible to formulate objective principles in both Jewish and secular law in order to further moral goals. The Legal Realist Movement was a radicalization of the realist insights offered by Roscoe Pound and Nathan Isaacs. In the end, Isaacs’ realist-conservative view allowed him to reject the New Deal political agenda shared by most of the Realists, while never abandoning his legal realist commitments to studying the law in practice and to a pragmatic, non-literalistic jurisprudence. Isaacs’ functional method at the core of his CLR and its relationship to legal realism and Jewish law will be more fully examined in the next Part.

#### IV. ISAACS, THE FUNCTIONAL METHOD, AND JEWISH LAW

This Part will examine the roots of Isaacs’ realist or functional approach to the law.

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<sup>143</sup> Isaacs, *supra* note 135, at 232-233.

Isaacs' functionalism bridged the intellectual divide between the importance of teaching doctrine and critiquing that doctrine; between general principles and transaction-specific rules; and between legal formalism and radical realism.<sup>144</sup> The first section reviews the role of Jewish law in Isaacs functional analysis. He saw in the Jewish *responsa*<sup>145</sup> evidence of the dynamic nature of even supposedly fixed law. He used this knowledge of Jewish law to inform his legal realism and in the framing of his cycle theory of legal development.<sup>146</sup> The first section of this Part will analyze the connection between Isaacs' functionalism and Jewish law. The second section analyzes the application of his insights taken from the study of Jewish law to develop CLR critique of American law. This section will also analyze his promotion of an interdisciplinary approach to law study, the relationship of Isaacs' scholarship to Llewellynian thought, and his critique of Hohfeldian conceptualism.

#### A. Isaacs' Functionalism and Jewish Law

Isaacs' commitment to a functional law was forged in part by his knowledge of Jewish law, which he also believed had and should adapt to new social conditions. Isaacs' cycle theory, which posited that law develops through a recurring cycle from status to contract to status, was largely informed by his analysis of the development of Jewish law. His second major insight regarding Jewish law was that it is dynamic, living law that was responsive to moral and ethical concerns. He applied this living law concept to the evolution of law in general, and more specifically to the American legal system. Isaacs disagreed with the view that Jewish law became rigid and formalistic after Biblical times. One of those who held that view was famed legal sociologist Eugen Ehrlich. Isaacs'

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<sup>144</sup> Felix Cohen provided this description of functionalism: “[F]unctionalism represents an assault upon all dogmas and devices that cannot be translated into terms of actual experience.” F. Cohen, *Transcendental Nonsense*, *supra* note 114, at 822. He also remarked that “if the functionalists are correct, the meaning of a definition is found in its consequences.” *Id.* at 838.

<sup>145</sup> *Responsa* refers to Jewish case law.

<sup>146</sup> See *supra* Part III, C.

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accused him of falling into the trap of believing that current Jewish law had become fixed.<sup>147</sup> He argued that Jewish life was “developing the *Halakah* by applying it.”<sup>148</sup>

Isaacs used a Jewish legal concept, *hazakah*, as an example of the dynamic nature of Jewish law. In the Middle Ages, Jews would not compete with one another for housing rentals. Jewish practice held that it was improper to offer a higher rental amount for a residence occupied by another Jew. There was no explicit rule in the Talmud that dealt with this issue. However, some Rabbis found authority for the practice in the Talmudic principle that: “If a poor man is turning a cake, he who takes it from him is wicked.” Isaacs saw this as an example of Jewish law, acting in the spirit of Pound’s view of law as social engineering, being “put to the test in this as in hundreds of other details in the Middle Ages.”<sup>149</sup> The Talmud was used creatively in practice to deal with novel issues. In this example, Jewish tenants came to respect “each other’s tenant-right, or *hazakah*, so that they could not be made to compete with each other effectively.”<sup>150</sup> The result was an early form of rent-control.

Isaacs’ research on rent-control in Jewish law was cited as precedent for the constitutionality of rent-control laws in the New York Court of Appeals and the U.S. Supreme Court.<sup>151</sup> Both courts upheld the constitutionality of New York’s rent-control

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<sup>147</sup> Isaacs, *Jewish Law in the Modern World*, *supra* note 132, at 263-4.

<sup>148</sup> Letter from Henry Hurwitz to Adolph S. Oko, enclosed copy of Isaacs’ introduction of Louis Ginzburg’s Zunz Lecture in Chicago, pg. 4 (January 12, 1921) (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 2).

<sup>149</sup> *Id.* at 264.

<sup>150</sup> Isaacs, *supra* note 133.

<sup>151</sup> When the constitutionality of the first New York rent control laws were challenged in the New York Court of Appeals and then in the U.S. Supreme Court, Julius Henry Cohen, one of the lawyers defending the legislation for the Joint Legislative Committee on Housing of the New York Legislature, was aided by an article written by Isaacs in the *Menorah Journal*. Isaacs, *supra* note 132. Isaacs also translated an Italian study of the subject for Cohen. Julius Henry Cohen, *Book Review*, 22 *COLUM. L. REV.* 603, 603 n.2. Cohen believed that the rent control law would be upheld if the judges were weaned “away from the prevailing lawyers’ bias against the laws” by bringing the history of Jewish law and Parliamentary laws which regulated rents in Ireland into play. JULIUS HENRY COHEN, *THEY BUILDED BETTER THAN THEY KNEW* 170 (1946). Cohen first relied upon these arguments before the New York Court of Appeals, which held, in an opinion that was joined by then Judge Cardozo, that the rent regulations were constitutional. *See* Edgar A. Levy

statute.

Isaacs' belief in the ability of the common law to adjust itself to meet modern problems was borne out of his study of Jewish case law or *responsa*. He was amazed by adaptive qualities of Jewish law. Isaacs concluded that "without *responsa* no really satisfactory study can be made of the *Halakah* as a living institution."<sup>152</sup> From this conclusion he postulated that an authoritative text would become arcane unless there was a method to adjust it in response to new situations. Even though the issues dealt with in the *responsa* were not generally relevant to the common law, he believed that studying the method of law application represented by the *responsa* system would result in a better understanding of the common law system. From a prescriptive view, he believed that *responsa* study and the legal experience of the Jewish settlement in Palestine could add "a new chapter...to the influence of Judaism on Western Law."<sup>153</sup> The study of Jewish law was important not only for a better historical understanding of legal change, but also in the quest for law reform.

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Leasing Co. Inc. v. Siegal, 230 N.Y. 634 (1921); *affirming* 192 APP. DIV. 482 (1920); 810 West End Avenue v. Stern, 230 N.Y. 652 (1920), *reversing* 194 APP. DIV. 482 (1920). Cohen successfully defended the wisdom of the laws during oral argument before the U.S. Supreme Court in Edgar Levy Leasing Co. v. Segal, 258 U.S. 242 (1922). COHEN, *supra* note 151. These historical precedents, or at least the British ones, were effective. In the companion case to *Siegal*, Justice Holmes stressed in the majority opinion that "[t]he preference given to the tenant in possession...is traditional in English law." *Block v. Hirsh*, 256 U.S. 135, 157. However, it was probably more important for Holmes that the rent law purported to be a temporary emergency measure. *Block.*, 256 U.S. at 158. In contrast, Holmes would shortly thereafter void as a taking the permanent Pennsylvania statute which made it illegal for coal companies to cause the subsidence of public buildings, streets, or any private home. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>152</sup> Letter from Nathan Isaacs to Adolph S. Oko (February 5, 1923) (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 2).

<sup>153</sup> Isaacs, *supra* note 133, at 236. Isaacs' dream is closer to fulfillment today due to the availability of tools such as the computerized Global Jewish Database (The Responsa Project). *See* <http://www.biu.ac.il/JH/Responsa/> (advertisement for the Online Responsa Project, last visited 3/4/08). Isaacs systematically built up an impressive Judaica collection of an estimated 10,000 bound volumes, and 1000 pamphlets. The collection was especially strong in the fields of Jewish thought, bibliography, and law. The library, included many valuable and rare early printed editions of *responsa* and other Jewish works. Adolph S. Oko, *The Nathan Isaacs Jewish Collection* (ASO Papers, MS 14, AJA, *supra* note 8, Box 9, File 12). The Nathan Isaacs library is now owned by

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Isaacs condemned the classification of Jews as “Reform” or “Orthodox” as being deceptive and destructive. As matters stood in 1922, Isaacs argued that “the labels are not only lies; they are an absolute menace” because they imposed ideological classifications which prevented people from thinking for themselves and hampered recognition of the true division between observant and non-observant Jews.<sup>154</sup> Isaacs’ belief in a variant of Modern Orthodox or Conservative Judaism helped him to formulate a universal theory of legal cycles.

Isaacs understood and sympathized with Jewish students attempting to deal with the demands of Jewish law and culture in a secular university setting. He wrote to Menorah Chancellor Henry Hurwitz that:

You know as well as I do what indelible scars the transition [between traditional Jewish scholarship and American academia] has left on many of our contemporaries. They deserve our pity and have it too, in spite of the awful things they perpetuate. I am reminded of the Talmudic story of the Four that entered the Garden [of mystical knowledge]. One died, one lost his mind, one became a heretic and only one entered in peace and departed again in peace. The same general proposition obtains today among bechurim [young yeshiva students] who gain admittance to American graduate schools.<sup>155</sup>

Isaacs, though he had never attended a Yeshiva, may have had himself in mind as someone who had seamlessly merged his secular and Jewish studies. Isaacs thought the transition of traditional Judaism to American life had created schisms in American Judaism. However, he was confident that eventually a moderate approach would arise combining the strengths of Jewish and American traditions.<sup>156</sup>

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The Chaim Berlin Yeshiva in Brooklyn now owns the Nathan Isaacs Library.

<sup>154</sup> Nathan Isaacs, *Jewish Sects and Factions in America*, 5 THE JEWISH FORUM 8, 16 (Jan. 1922).

<sup>155</sup> RITTERBAND & WECHSLER, *supra* note 7, at 147.

<sup>156</sup> Louis Hurwich, *Professor Nathan Isaacs*, THE JEWISH ADVOCATE, Feb. 20, 1942 (NI Papers, AJHS, *supra* note 8, Box 2, Scrapbook (recounting by Acting Dean of Hebrew Teachers College and Superintendent Bureau of Jewish Education of the theme of a series of Hebrew lectures Isaacs had delivered at Boston’s Hebrew Teachers College).

### C. Isaacs' Functionalism and the Legal Realist Movement

Nathan Isaacs' research methodology, probably influenced by his position at Harvard Business School, focused on how law adapted in response to changing social and economic problems. Isaacs helped develop a functional approach to law study.<sup>157</sup> Carol Weisbrod noted that his work centered on a non-formalistic, business-oriented vision of the law.<sup>158</sup> Indeed, the bulk of Isaacs' work applied a distinctly legal realist approach to commercial law. Commercial law, in Isaacs' scholarship, should be organized through the perspective of a businessperson's problem-solving orientation. For Isaacs, the "law is made for such realities as business and not business for the law."<sup>159</sup> This functional or problem-oriented approach was an attempt to discuss legal concepts in their actual business context rather than through the lens of contract doctrine.<sup>160</sup>

Isaacs explained that his approach was a product of "the theories of more recent schools that consider the law as a phenomenon with a social function."<sup>161</sup> Isaacs was referring to Roscoe Pound's sociological school.<sup>162</sup> Isaacs was a student of Dean Pound and studied the works of European forbearers of the sociological school, especially the works of Eugen Ehrlich.<sup>163</sup> Ehrlich's concept of "living law," sometimes characterized as the divergence between book law and the law in practice, influenced Isaacs' thinking on

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<sup>157</sup> Nathan Isaacs, Book Review, U. PA. L. REV. 328, 329 (1926) (reviewing RALPH STANLEY BAUER & ESSEL RAY DILLAVOU, *CASES ON BUSINESS LAW* (1925)).

<sup>158</sup> Weisbrod, *Way We Live*, *supra* note 49, at 786, n.40.

<sup>159</sup> Nathan Isaacs, Book Review, 25 ILL. L. REV. 114, 116 (1930) (reviewing WILLIAM H. SPENCER, *A TEXTBOOK ON LAW AND BUSINESS* (1929)).

<sup>160</sup> John D. Donnell, *Business Law Textbooks: A Retrospective Exploration*, 22 AM. BUS. L.J. 265, 270 (1984) (discussing Isaacs' books).

<sup>161</sup> Nathan Isaacs, *The Teaching of Law in Collegiate Schools of Business*, 28 J. OF POLITICAL ECONOMY 113, 123 (1920).

<sup>162</sup> Isaacs declared that "the leadership of the world in juristic thinking" had passed "pretty clearly" to Pound. Nathan Isaacs, Book Review, 22 MICH. L. REV. 394 (1924) (reviewing ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923)). *See also* Nathan Isaacs, *Business Security and Legal Security*, 37 HARV. L. REV. 201, 213, n. 15 (1923) (hereinafter Isaacs, *Business Security*) (citing Roscoe Pound, *The Law in Books and Law in Action*, 44 AM. L. REV. 12.

<sup>163</sup> Isaacs, *Business Security*, *supra* note 162, at 213 n.15 (citing Eugen Ehrlich, *The Sociology of Law*, 36 HARV. L. REV. 129, 130 (1922) (Nathan Isaacs trans.)).

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law creation and development. In 1924, Isaacs suggested that the entire Harvard Law School faculty participate in a Seminar of Living Law to embody the functionalist method. The idea was inspired by Ehrlich's course of the same title, which had investigated the differences that had developed between European statutory law and the actual legal practices of specific regions.<sup>164</sup>

Another influential scholar in the functional approach was Herman Oliphant of Columbia Law School.<sup>165</sup> The link between Oliphant and Isaacs sheds new light on the origins of the Legal Realist conception of law as a tool to serve business. Isaacs and Oliphant had attended a 1914 conference in which the term "functional approach" was coined.<sup>166</sup> At the conference, Isaacs reviewed the history of the "law merchant" in relation to business law books. In the 1920s, Oliphant would champion the functional approach at Columbia.<sup>167</sup> During that time, Oliphant asked Isaacs to advise on an organized labor case. Isaacs focused his response by noting that the "marked disparity in bargaining power" was the key factor in the labor-management relationship.<sup>168</sup> In this case, employees were

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<sup>164</sup> Isaacs' wrote that though he was personally pursuing this line of research he had no desire "to monopolize the field." Memorandum from Nathan Isaacs to Curriculum Committee of Harvard Law School, pg. 3 (March 25, 1924) (NI Papers, BLHC, HBS, *supra* note 8, Box 1, File: HBS Memorandum related to Law School Conference, 25 March 1924) (following up informal conference with Curriculum Committee of Law School). Unfortunately, the legal formalist Harvard Law faculty apparently rejected the proposal. However, Isaacs was able to institute a joint program between the Harvard Business School and the Yale Law School with similar aims. See *supra* nn.198-191 and accompanying text.

<sup>165</sup> Isaacs, *Business Security*, *supra* note 162, at 213 n.15 (citing Herman Oliphant, *Studies of the Operation of Rules of Law*, 9 AM. BAR. ASS. J. 497).

<sup>166</sup> Isaacs later recalled that at the path-breaking meeting of business law teachers, "some one hit upon the adjective 'functional' to describe a new approach to the law for the business student." Nathan Isaacs, Book Review, 25 ILL. L. REV. at 115. See also Nathan Isaacs, *The Merchant and His Law*, 23 J. OF POLITICAL OF ECONOMY 529, 556 (Oliphant had independently already begun experimenting with the functional method in Chicago).

<sup>167</sup> In 1927, Oliphant asked help from Isaacs involving a lawsuit challenging an employment contracts that forbid employees from joining a union. Oliphant wrote Isaacs "[t]here is something to chuckle over in the origin of the so-called 'functional approach,' isn't there?" The irony being that the functional approach was initially conceived as pro-business, while the lawsuit was decidedly anti-business. Letter from Herman Oliphant to Nathan Isaacs (December 9, 1927) (NI Papers, BLHC, HBS, *supra* note, Box 1, File: Correspondence, 1927).

<sup>168</sup> *Id.*

required to “sign-on-the-dotted-line contract” as a precondition to employment.<sup>169</sup> The functional approach argued, in this instance, for the necessity of collective bargaining agreements in order to equalize the disparity of bargaining power. The idea that power plays a key role not only in private contracting, but also in the choice to regulate or not regulate in the private sphere, would become associated with legal realism.

In 1921, Isaacs co-authored a casebook entitled *The Law in Business Problems*.<sup>170</sup> This was the first casebook to attempt a functional, rather than doctrinal, treatment of commercial law.<sup>171</sup> The casebook asked questions such as “[d]oes the law help or hinder or otherwise affect the process of engaging in business?”<sup>172</sup> The authors juxtaposed topics unrelated doctrinally, but were functionally alternative tools to deal with business problems.<sup>173</sup> Isaacs condemned the typical law school trained student, who “devours the intricate learning of mortgages without once asking the practical questions: What are they used for today, and why, and what are the practical limitations upon their use and how do they compare with alternative devices?”<sup>174</sup> Alfred Bays, author of a popular doctrinal

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<sup>169</sup> *Id.*

<sup>170</sup> LINCOLN FREDERICK SCHAUB & NATHAN ISAACS, *THE LAW IN BUSINESS PROBLEMS: CASES AND OTHER MATERIALS FOR THE STUDY OF THE LEGAL ASPECTS OF BUSINESS* (1921) (hereinafter SCHAUB & ISAACS). The book was widely discussed and often criticized. See Grover C. Grismore, Book Review, 35 HARV. L. REV. 218, 219-220 (1922) (critical review of SCHAUB & ISAACS); Charles A. Huston, Book Review, 22 COLUM. L. REV. 392 (1922) (critical review of SCHAUB & ISAACS); *but see* Book Review, 55 AM. L. REV. 795 (1921) (stressing the originality of the casebook). Isaacs would write an extensively revised second edition in 1934. NATHAN ISAACS, *THE LAW IN BUSINESS PROBLEMS* (1934) (rev. ed.) (hereinafter ISAACS, *LAW IN BUSINESS PROBLEMS*). See also NATHAN ISAACS, *COURSE IN BUSINESS LAW* (1922) (text for Columbia mail course on Business Law).

<sup>171</sup> See Donnell, *supra* note 160, at 271.

<sup>172</sup> SCHAUB & ISAACS, *supra* note 170, at vi.

<sup>173</sup> For example, one of the book’s parts, “The Enforcement of Contracts with Special Reference to the Relation of Debtor and Creditor,” dealt with the doctrinally diverse but practically related topics of guaranty, mortgages, conditional sales, pledges, and negotiable instruments. SCHAUB & ISAACS, *supra* note 170, at vi, 357-525, discussed in Donnell, *supra* note 160, at 271. The book, which at over 800 pages was short compared to its contemporaries, contains less and less editorial comments as it progresses and becomes almost solely a collection of cases by its end. The authors intended that students would become proficient at understanding cases as the school semester progressed. SCHAUB & ISAACS, *supra* note 170, at vi.

<sup>174</sup> Isaacs, Book Review, *supra* note 157, at 329.

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treatise,<sup>175</sup> was especially critical of the book. While Isaacs wanted to discover the law in business practice, Bays insisted that to find the law, one must look at “the decisions and the statutes and nowhere else.”<sup>176</sup>

Karl Llewellyn praised Isaacs book for emphasizing business facts and how law served as a tool for different businesses.<sup>177</sup> Llewellyn declared that Isaacs’ book was “unquestionably the most valuable and suggestive single volume of any of those under discussion [for] the lawyer, law teacher, and to the student of social institutions.”<sup>178</sup> His book had an influence on the legal realist casebooks that would follow.<sup>179</sup> These included Wesley A. Sturges, *Credit Transactions* and Carrol Shanks and William O. Douglas, *Management of Business Units*.<sup>180</sup> The commonality of these functional-realist books was the supplementation of “legal principles with life situations.”<sup>181</sup> However, the radical-conservative realist distinction was already apparent. Grant Gilmore characterized the Sturges book as almost nihilistic.<sup>182</sup> In contrast, Isaacs’ constructive approach prefigured the eventual rationalization and unification of commercial law<sup>183</sup>

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<sup>175</sup> See ALFRED W. BAYS, *BUSINESS LAW: AN ELEMENTARY TREATISE* (1920).

<sup>176</sup> “The Place of Business Law in the Curriculum of the School of Business,” in *The Ronald Forum*, pg. 17, NI Papers, BL, HCD, HBSA, Arch GA 41, Box 4, File: “The Place of Business Law in the Curriculum of the School of Business.” See *id.*, at pg. 20 (The Seventh Annual Meeting of the Association of Collegiate Schools of Business was held at Columbus Ohio May 7-9, 1925).

<sup>177</sup> See Karl N. Llewellyn, Book Review, *The Modern Business Law Book*, 32 *YALE L.J.* 299, 300 (1923) (reviewing SCHAUB & ISAACS, *supra* note 170, and other business law books).

<sup>178</sup> *Id.* at 304.

<sup>179</sup> The 1934 revision of his casebook, ISAACS, *LAW IN BUSINESS PROBLEMS*, *supra* note 170, also made groundbreaking contributions. A contemporary teacher of business law commented that “[o]ne of the most valuable things in the [1934] book is the discussion of the relation of business to government.” E.S. Wolaver, Book Review, 83 *U. PA. L. REV.* 708, 708-9 (1935).

<sup>180</sup> Nathan Isaacs, Book Review, 44 *HARV. L. REV.* 880, 881 (1931) (reviewing WESLEY A. STURGES, *CASES AND MATERIALS ON THE LAW OF CREDIT* (1930)). See WILLIAM O. DOUGLAS & CARROL M. SHANKS, *CASES AND MATERIALS ON THE LAW OF MANAGEMENT OF BUSINESS* (1931).

<sup>181</sup> KALMAN, *supra* note 1, at 80.

<sup>182</sup> He described the book as consisting “principally of the most absurd cases, along with the most idiotic law review comments, which he was able to find.” GRANT GILMORE, *THE AGES OF AMERICAN LAW* 81 (1977).

<sup>183</sup> *Id.* at 83-86 (describing Llewellyn’s role in drafting the U.C.C.). See Nathan Isaacs, *The Economic Advantages and Disadvantages of the Various Methods of Selling Goods on Credit*, 8

## 1. Need for Interdisciplinary Approach

Isaacs aspired to empirically study the “exact extent of the changes in the use of” contracts that could provide “a basis for a study of the reasons for the change, its relation to our economic, political, and social life, for its workings and limitations.”<sup>184</sup> He recognized that such research would be “laborious, almost interminable”, but predicted that it would serve “as a corrective for an unhistorical use of history” by those who thought that “normally each [legal] institution had a single original purpose.”<sup>185</sup> He saw empirical research as a means to uncover the underling matrix of principles that supported specific areas of law, such as contract and tort. This “uncovering” would allow for a better understanding of law and its application to novel situations.

Apparently Isaacs was conflicted over whether his functional approach, which was being strongly advocated for at Columbia Law School,<sup>186</sup> was pedagogically appropriate for law students. Isaacs doubted the wisdom of abandoning the study of doctrine. He argued that “the clustering of law courses around business facts rather than around legal principles tends to result in a hodgepodge of legal points that offers no opportunity for the development of principle.”<sup>187</sup> Moreover, if the functional approach appeared “more up to

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CORNELL L. Q. 199 (1923) (a paper Isaacs previously read at the Round Table on Commercial Law, Association of American Law Schools, Chicago, December, 1922, in which Isaacs called for lawyers as caretakers of business to look beyond the doctrinal forms of security devices to their business function.) *See also* Isaacs, *Business Security*, *supra* note 162, at 209 (contrasting the “gap between the law in the books and the law in action as applied to realizing on securities in business”).

<sup>184</sup> Nathan Isaacs, “Appendix, Technique of Legal Research”, pg 12-13, NI Papers, BL, HCD, HBSA, Arch GA 41, Box 2, File: Unpublished, Alphabetically, n.d. 4/4.

<sup>185</sup> *Id.*, at pg. 15.

<sup>186</sup> WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS 160* (1974). *See* KALMAN, *supra* note 1 (discussing controversy among Columbia Faculty. Legal realist professors at Columbia included Underhill Moore, Hessel Yntema, Karl Llewellyn, Walter Wheeler Cook, Julius Goebel, Thomas Reed Powell and William O. Douglas. Douglas, later a Supreme Court Justice, explained that in “[i]n credit transactions, we wanted to explore all the institutions of credit as well as the commercial code. The same was true of almost every other subject.”).

<sup>187</sup> Nathan Isaacs, Book Review, 44 HARV. L. REV. 880, 881 (1931).

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date it does so at the expense of making it to the same extent ephemeral.”<sup>188</sup> Isaacs did not feel that the functional approach should be the single means of teaching law. This tension between functionality and guiding principle is the underlying theme of CLR. Realism is displayed in the importance of business facts to law application. The conservative element of that realism is his belief in the importance of a body of evolving, but stable principles.

In 1932, Isaacs wrote to William O. Douglas, then a Professor at Yale Law School, suggesting an interchange of students between Harvard Business School and Yale Law School. Eventually, they decided on a joint dual-degree program.<sup>189</sup> This integration was the institutional embodiment of the realists ambition to “cross-fertilize” between academic disciplines.<sup>190</sup> Isaacs CLR approach is further evidenced in a legal seminar course he taught at Yale Law School. He sought to teach his students at Yale “a method of approach to the study of statutory law not normally taught in a law curriculum.” In his introductory class, he traced the “economic repercussions” of the recently passed neutrality law in the event of war breaking out in Europe. Isaacs’ students wrote substantial papers which studied the “business realities of some particular” legal relations during such an extraordinary event.<sup>191</sup>

### 2. Isaacs Relationship with Llewellynian Thought

Isaacs had a complicated relationship with Karl Llewellyn, but it appears that

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<sup>188</sup> Nathan Isaacs, Book Review, 42 HARV. L. REV. 587, 594 (1929), (reviewing E.F. ALBERTSWORTH, *SELECTED CASES AND OTHER AUTHORITIES ON INDUSTRIAL LAW* (1928)).

<sup>189</sup> Letter from William O. Douglas to Nathan Isaacs, (July 20, 1932), in WILLIAM O. DOUGLAS, *THE DOUGLAS LETTERS* 16 (Melvin I. Urofsky ed.1987). This course was a predecessor of the joint MBA-JD program that became popular beginning in the 1970s.

<sup>190</sup> The joint program “testified to the dream realists...had of cross fertilizing disciplines.” KALMAN, *supra* note 1 (discussing the joint program, though Isaacs is not mentioned).

<sup>191</sup> Letter from Nathan Isaacs to John F. Meck, Jr., Yale Law School (October 26, 1938) NI Papers, BLHC, HBS, *supra* note 8, File: Yale Law School joint program, 1938). Isaacs also saw a need for more interdisciplinary work on the interrelationship of business, law and government. He was as a founding faculty member at the Harvard University Graduate School of Public Administration, later to become the Kennedy School of Government. *See* Mace, *supra* note 24.

Isaacs pushed him in the direction of concentrating upon how the needs of business and society shape the law. It is hard to read the works of Llewellyn in the area of adhesion contracts without seeing the influence of Isaacs. Llewellyn was heavily influenced by a Romantic School of German Jurisprudence that emphasized the creative power of the *volk* (people) in commercial law. This predisposed Llewellyn to Isaacs' conception of commercial law as a tool for business. These influences resurfaced in Llewellyn's heavy reliance on the custom of businessmen in writing the Uniform Commercial Code (Code).<sup>192</sup> Isaacs, and Llewellyn, believed that business executives and lawyers should act as caretakers of business and society. Therefore, commercial law should evolve from commercial practice.

When Llewellyn was editor-in-chief of the Yale Law Journal in 1919, he wrote to Isaacs that “[t]here have been few strictly legal articles published in the past few years as interesting and stimulating” as *The Standardizing of Contracts*.<sup>193</sup> The publication place of the article was not a matter of coincidence. Yale Law School Professors Walter Wheeler Cook and Arthur Linton Corbin, both pioneering legal realists, had urged the *Journal* to solicit an article from Isaacs.<sup>194</sup> More than a decade after the publication of Isaacs' *Standardizing Contract* article, Llewellyn began his prolific scholarship critiquing the commercial law. Llewellyn adopted Isaacs' argument that contracts should not be reduced to formalistic doctrinal formula.<sup>195</sup> Llewellyn also agreed with Isaacs' writings regarding

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<sup>192</sup> See James Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L. J. 156 (1987).

<sup>193</sup> Isaacs, *Standardizing Contracts*, *supra* note 2; Karl Nickerson Llewellyn, Editor-in Chief of the Yale Law Journal, to Nathan Isaacs (January 21, 1919) (NI Papers, BLHC, HBS, *supra* note 8, Box 2, “Correspondence regarding articles and books, 1917-1919).

<sup>194</sup> Stephen F. Dunn, Chairman of the Yale Law Journal, to Nathan Isaacs (May 10, 1917) (NI Papers, BLHC, HBS, *supra* note 8, Box 2, File: Correspondence regarding articles and books, 1917-1919).

<sup>195</sup> Karl N. Llewellyn, *The Rule of Law in our Case-Law of Contract*, 47 Yale L. J. 1243, 1262, n.48 (1938). See Edwin M. Borchard, *Introduction to The PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY*, (John H. Wigmore ed.) (1918) xxxv, xxxvi (though Borchard does not cite Isaacs' *Standardizing of Contracts* as the source of the suggestion, he suggests the possibility that “in the field of labor legislation, a reaction against Sir Henry Maine's theory of evolution from status to contract or merely a recognition of the necessity for greater protection of the social

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the need to reform sales law. He was also probably inspired by an extended horse-trader analogy that Isaacs had used in his articles to name his path breaking articles *Across Sales On Horseback*<sup>196</sup> and *First Struggle to Unhorse Sales*.<sup>197</sup> Isaacs had mocked the Sales Act of 1906 for being better suited for the selling of a saddle to a horseman than for Twentieth century business transactions.<sup>198</sup>

It is hard to read the works of Karl Llewellyn in this area without seeing the influence of Isaacs. Despite his borrowings from Isaacs and the closeness of their positions in areas of contracts and sales law, Llewellyn failed to list Isaacs as a member of the realist movement.<sup>199</sup> Nonetheless, the work of Isaacs played an important role in Llewellyn's scholarship. Professor Rakoff noted the connection between Isaacs' scholarship and that of Llewellyn: "From his earliest writings onward, Llewellyn, following the work of *Nathan Isaacs*, stressed the fact that the law itself provided parties with standardized institutions to serve as the background for their own particular arrangements: the sale, the pledge, the mortgage, and so forth."<sup>200</sup> Llewellyn did cite to Isaacs discussion of a balanced standardized contract which he would later attempt to incorporate in the Code:

Isaacs has pointed out that the whole law of partnership or sales is a sort of standardized contract-frame into which the parties' expressed intention is fitted, and out of which their 'contract' as to any unforeseen emergency, is drawn. But this law-made standard differs from the ordinary

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interests of the state" was ongoing).

<sup>196</sup> Karl N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939).

<sup>197</sup> Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939).

<sup>198</sup> See Nathan Isaacs, *The Industrial Purchaser and the Sales Act*, 34 COLUM. 262, 263 (1934); see Weisbrod, *Way We Live Now*, *supra* note 49, at 789 n.64 (citing Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 477 n.43 (1987) (suggesting this possible influence)).

<sup>199</sup> Llewellyn, *A Realistic Jurisprudence*, *supra* note 4; Llewellyn, *Some Realism*, *supra* note 3. Karl Llewellyn did cite three of Isaacs' articles as examples of scholarly efforts that were realist or akin to realist. *Id.* at 1235-6 n.36, 1241-2 n.47, 1246 n.61. Llewellyn also does cite Isaacs' *Standardizing Contracts* article in his sales casebook. KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 51 (1930).

<sup>200</sup> Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1202 (1983).

standardized contract of the present day in having grown up out of the balance of contentions on both sides.<sup>201</sup>

In promoting the need to modernize the law of sales through codification, Isaacs uses the notion of the *delumping* of concepts later mastered by Llewellyn.<sup>202</sup> Isaacs states that “title no longer was a lump-concept and instead [had] become a conglomeration of separate property interests that each demanded individual treatment.”<sup>203</sup> The de-lumping concept was applied by Llewellyn and Isaacs to the area of risk of loss. Here both argued that the old notion that risk of loss passed from the seller to buyer at the time of transfer of title was outdated and needed to be unhinged. Once again, Isaacs can be seen as the predecessor to Llewellyn on the notion of de-lumping.<sup>204</sup>

Llewellyn’s conception of the right kind of rules—the singing rule—can be seen in Isaacs’ notes which predated Llewellyn’s work. Isaacs states that “the reason for a rule will frequently determine the scope of the rule in its actual application in life.”<sup>205</sup> Llewellyn’s innovation was the belief that the patent reason for a rule should be part of the rule itself. For Isaacs, the reason for a rule was an historical inquiry to be undertaken by a

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<sup>201</sup> LLEWELLYN, *supra* note 199 (citing Isaacs, *The Standardizing of Contracts*, *supra* note 2, as discussed in Kamp, *Between-the-Wars*, *supra* note 1, at 325).

<sup>202</sup> In the area of warranty, Llewellyn argued that the “lumping” of title with ownership and risk was necessary for long distance sales. See Karl N. Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699 (1936) and Karl N. Llewellyn, *On Warranty of Quality and Society: II*, 36 COLUM. L. REV. 699 (1936). See also Llewellyn, *Some Realism*, *supra* note 3 (“too much is written about ‘law’ and ‘rules,’ lump-wise”).

<sup>203</sup> Nathan Isaacs, *The Sale in Legal Theory and in Practice*, 26 Va. L. Rev. 651 (1940). See Michael Madison, *The Real Properties of Contract Law*, 82 B.U.L. REV. 405, 472 (2002).

<sup>204</sup> Llewellyn's 1938 article *Through Title* cites with approval Isaacs. See Karl N. Llewellyn, *Through Title to Contract and A Bit Beyond*, 15 N.Y.U.L.Q. REV. 159 (1938). Isaacs also took issue with the *Tarling* rule that held the setting aside of an item for future delivery passed the risk of loss to the buyer. Isaacs added the element previously missing from Llewellyn's campaign, a direct attack on the *Tarling* rule that had long been codified in the Sales Act and was proposed for inclusion in federal law. Robert L. Flores, *Risk of Loss in Sales: A Missing Chapter in the History of the U.C.C.: Through Llewellyn to Williston and A Bit Beyond*, 27 PAC. L.J. 161, 212 (1996). “The rule was ‘thoroughly logical’ within the realm of property theory in which it had been developed, but ‘nonsensical’ as judged by modern business practices, and so did not comport with expectations of the parties.” *Id.* at 212-13 (citing Isaacs, *supra* note 203, at 652).

<sup>205</sup> NI Papers, BL, HCD, HBSA, Arch GA 41, Box 1, File: Legal History, 1922-23.

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judge or lawyer. Llewellyn attempted to uncover the reason for a rule and to externalize it in the writing of the Code. The advantage of externalizing the reason for a rule is that the externalizing allows the rule and its reason to be critically analyzed. The problem with the antiquated rules of the Uniform Sales Act was that they no longer provided guidance in the applying the rules to modern business transactions. The rules had been severed from their underlying reason or purpose. For Isaacs, this opened their interpretation to “false reason” and thus, “false scope.”<sup>206</sup> Llewellyn sought to rectify this shortcoming in the drafting of the Code.

Llewellyn is associated with the notion of transaction-types. That notion had been used by Isaacs, in the mid 1930’s, to critique the *First Restatement of Contracts* as an “idealized composite.”<sup>207</sup> In that critique, he provided a description of the relationship of transaction-types to contract law by asserting that the *Restatement* had failed to grapple with the great deviations from the general contract mold that had grown in construction contracts, real estate contracts, employment contracts, and insurance contracts.<sup>208</sup> As with the singing rule, Isaacs had fully articulated the concept of transaction-types that Llewellyn would later popularize. Llewellyn’s notion of situation-sense<sup>209</sup> is exhibited in Isaacs critique of the *Restatements* as “dangerously forgetful of the peculiarities of specific situations.”<sup>210</sup> Finally, Llewellyn’s reference to old “paper rules”<sup>211</sup> that were devoid of meaning is similar to what Isaacs refers to as “dry rules.”<sup>212</sup> In reality, these concepts were

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<sup>206</sup> *Id.*

<sup>207</sup> Nathan Isaacs, *Some Thoughts Suggested by the Restatements Particularly of Contracts, Agency, and Trusts*, 8 THE AM. L. SCHOOL REV. 424, 425 (1936).

<sup>208</sup> *Id.* at 427.

<sup>209</sup> KARL LLEWELLYN, THE COMMON LAW TRADITION (1960). For an excellent explanation of Llewellynian nomenclature, such as type-facts, transaction-types, and situation sense, see Todd D. Rakoff, *The Implied Terms of Contract: Of ‘Default Rules’ and ‘Situation-Sense,’* in GOOD FAITH AND FAULT IN CONTRACT LAW 191 (Jack Beatson & Daniel Friedmann eds., 1995). See also Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397 (2004) (reviewing tenets of Llewellynian thought).

<sup>210</sup> NI Papers, BL, HCD, HBSA, Arch GA 41, Box 1, File: Lectures, Courses, Notes, Miscellaneous, 1920’s.

<sup>211</sup> Llewellyn, *Some Realism*, *supra* note 3, at 1237.

<sup>212</sup> Isaacs, *supra* note 207, at 428.

not original to either scholar, but Isaacs can be seen as a precursor to Llewellynian thought.

### 3. Questioning Hohfeld's Re-conceptualization of Law

Isaacs' sometimes rough intellectual treatment of Llewellyn's revered mentor at Yale, Wesley Newcomb Hohfeld was a source of friction between the two men.<sup>213</sup> Isaacs initially had praised Hohfeld's work on *Fundamental Legal Conceptions*<sup>214</sup> and discussed his ideas in *The Standardizing of Contracts*.<sup>215</sup> Subsequently, Hohfeld wrote to Isaacs giving his appreciation for the "the fresh thinking that you are contributing to some of the great problems of the law."<sup>216</sup> However, Isaacs and Hohfeld's relationship soon soured. Hohfeld apparently saw no contradiction between the analytical approach that characterized his own work and the Sociological approach of Pound.<sup>217</sup> Isaacs mocked Hohfeld's division of legal scholarship into several different and complimentary fields by pointing out how these diverse methods contradicted each other.<sup>218</sup> In contrast, Isaacs argued that in different periods of the cycle of legal history, different schools of legal

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<sup>213</sup> Llewellyn had this to say in a biographical note: [Hohfeld's Conceptual analysis] "can obviously solve no cases it makes for clarification and cuts very close to the atomic structure of the law on its conceptual side." Karl N. Llewellyn, *Wesley Newcomb Hohfeld*, 7 *ENCYCLOPEDIA SOC. SCI.* 4000, 302 (1932).

<sup>214</sup> Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 *YALE L. J.* (1913).

<sup>215</sup> Isaacs, *Standardizing Contracts*, *supra* note 2, 39 n.19

<sup>216</sup> Letter from Wesley Newcomb Hohfeld, to Nathan Isaacs (November 21, 1917) (NI Papers, BLHC, HBS, *supra* note 2, Box 2, File: Correspondence regarding articles and books, 1917-1919) ("It seems to me we are all under a debt to you for your very acute and penetrating analysis of the legal-historical phenomena which you have handled.").

<sup>217</sup> N.H.H. Hull, *Vital Schools of Jurisprudence: Roscoe Pound, Wesley Newcomb Hohfeld, and the Promotion of an Academic Jurisprudential Agenda, 1910-1919*, 45 *J. LEGAL EDUC.* 235, 279, 273, 269 (1995). See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 *HARV. L. REV.* 591 (1911).

<sup>218</sup> Isaacs compared Hohfeld's desire for the simultaneous teaching of many different approaches to law to a gluttonous character in a joke: "A man in a restaurant once ordered a cherry pie, mince pie, peach pie, and lemon pie. The waiter quietly asked, 'What's the matter with apple pie?'" Nathan Isaacs, *The Schools of Jurisprudence: Their Places in History and their Present Alignments*, 31 *HARV. L. REV.* 373, 374 n.7 (1918).

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interpretation come to the fore.<sup>219</sup> Hohfeld sought to place a wedge between Pound and Isaacs by noting that Isaacs had not included Pound's Sociological Jurisprudence in his list of the "Schools of Jurisprudence."<sup>220</sup> Isaacs came to regret writing the article in which he criticized Hohfeld.<sup>221</sup>

Isaacs also attacked those followers of Hohfeld who believed that his approach was sufficient for all analytical issues of law. Isaacs referred to Hohfeld's 1914 speech to the Association of American Law Schools to demonstrate that Hohfeld himself did not think his analytical system sufficed for all purposes.<sup>222</sup> Isaacs did praise Hohfeld's "meticulous insistence on the careful use of certain words."<sup>223</sup> Isaacs thought Hohfeld's vision was relevant "where he endeavors to see farthest and recognizes in the whole analytical process mere preliminary work that must be followed by a study of the relation of law to life's needs."<sup>224</sup> Some ardent followers of Hohfeld, which may have included figures such as Arthur Corbin<sup>225</sup> and realist Walter Wheeler Cook,<sup>226</sup> considered Isaacs' review of a posthumous collection of Hohfeld's essays to be "unfair."<sup>227</sup> In contrast, Karl Llewellyn, who was well on his way to non-formalist heterodoxy, wrote to Isaacs expressing agreement with the main points of his review. He agreed with Isaacs' proposition that there was a need to study the relationship between law and society's needs and not to

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<sup>219</sup> *Id.* at 375.

<sup>220</sup> Hull, *supra* note 217, at 273 (citing Letter from Hohfeld to Pound (Jan. 21, 1918)).

<sup>221</sup> In 1934, an older Isaacs wrote on his personal copy of *The Schools of Jurisprudence* "Cf. Psalms xxv. 7." Hand written note by Nathan Isaacs (Oct. 1934) (NI Papers, BLHC, HBS, Box 4, File: "The Schools of Jurisprudence," January 1918. The verse reads: "Remember not the sins of my youth, nor my transgressions.")

<sup>222</sup> Nathan Isaacs, Book Review, 36 HARV. L. REV. 1038 (1923) (reviewing WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN LEGAL REASONING AND OTHER LEGAL ESSAYS* (1923)). See Hull, *Vital Schools of Jurisprudence*, *supra* note 217 (making a similar argument).

<sup>223</sup> Isaacs, *supra* note 222, at 1041.

<sup>224</sup> *Id.*, at 1042.

<sup>225</sup> See Arthur Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921).

<sup>226</sup> See Walter Wheeler Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721 (1919) (arguing that Hohfeld's work was a major contribution to analytical jurisprudence).

<sup>227</sup> Letter from Roger S. Justin, Harvard Law Review Book Review Editor, to Nathan Isaacs, (November 14, 1923) (NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 8).

solely focus on refining law's conceptualism.<sup>228</sup>

## VI. ISAACS' OPPOSITION TO THE NEW DEAL

Isaacs became deeply opposed to New Deal legislation which he believed was irrationally anti-business. During this period Isaacs stressed his faith in the existence of objective legal principles and that judges were largely not influenced by economic and social prejudices. This seems to be in conflict with his realist insights. In fact, Isaacs always stressed the importance of general legal principles, and he remained true to his theories of adaptive legal cycles and legal reasoning. However, Isaacs' application of these ideas dramatically shifted from the early 1920's to the 1930's, most likely in response to the national calamities of the times.

### A. The New Deal as Unconstitutional Impediment to Business

In the early 1920s, Isaacs argued that history made greater government regulation of the economy inevitable. For example, Isaacs argued that American constitutional law would have to uphold price fixing legislation in order to adapt to changing social conditions.<sup>229</sup> At the 1921 Annual meeting of the American Political Science Association, Isaacs spoke the application of the Interstate Commerce Clause in relation to government centralization.<sup>230</sup> Isaacs declared that the lines of division between the state and federal governments were "mere chalk"; that state lines ignored the communication revolution which had made a single "business unit of the country."<sup>231</sup> Isaacs justified the expansion

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<sup>228</sup> Letter from Karl Llewellyn, to Nathan Isaacs (September 5, 1923) (NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 8).

<sup>229</sup> Nathan Isaacs, *Revival of the Justum Pretium*, 6 CORNELL L.Q. 381, 400 (1921).

<sup>230</sup> *Annual Meeting*, 16 THE AMERICAN POL. SCI. REV. 111, 111-112 (1922).

<sup>231</sup> Nathan Isaacs, *Federal Control over Industry*, 16 THE AMERICAN POL. SCI. REV. 432, 440 (1922).

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of the federal government's commerce power by drawing an analogy to the extension of the King's power over feudal units in medieval England.<sup>232</sup> He believed, at that time, that the U.S. Constitution would give way to contemporary necessity.

Isaacs advocated the expansion of national power in order to facilitate the growth of business. So far as state power failed "to correspond to actualities," Isaacs insisted "we may depend on the 'law in action' to deviate from the law of the books to meet the practical needs of business..."<sup>233</sup> Such a divergence would render law less facilitative and relevant to business. The New Deal, for Isaacs, delineated the difference between law as facilitative and law as an impediment to business. Isaacs thought most New Deal legislation was irrational and violated legal principles. In Isaacs view, the New Deal of the mid-1930s was class-conscious, pro-labor, and anti-business.<sup>234</sup> He found it to be unfairly anti-business.

This attack on New Deal legislation was founded on three fundamental beliefs. First, that much of it exceeded the constitutional limits of federal government power. Second, the New Dealers ignored the fact that people make decisions often influenced by emotions and irrationality.<sup>235</sup> This is a rudimentary argument that the rational human actor

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<sup>232</sup> *Id.* at 440-443. In making this analogy he states that "as American life became "national, national jurisdiction had to expand to take care of it." *Id.* at 443

<sup>233</sup> *Id.*

<sup>234</sup> See Ruel E. Schiller, *The Era of Deference: Courts, Expertise, And the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 414 n.76 (2007) (citing ARTHUR M. SCHLESINGER, JR. *THE AGE OF ROOSEVELT: THE CRISES OF THE OLD ORDER* (1956); *THE COMING OF THE NEW DEAL* (1958) (hereinafter Schlesinger, *COMING OF THE NEW DEAL*); *THE POLITICS OF UPHEAVAL* (1960) (arguing that there was a pro-large business First New Deal and a more pro-working class Second New Deal). Isaacs was opposed to the both New Deals. He contended that much of the major New Deal legislation, including early National Industrial Recovery and Securities and Exchange Acts, and the later "the one sided" National Labor Relations Act (Wagner Act) reflected to a great degree "the assumption of some New Dealers, that business is intrinsically wicked." Nathan Isaacs, "Business Law In Transition," pg. 4, NI Papers, BL, HCD, HBSA, Arch GA 41, Box 2, File: Unpublished, Alphabetically, n.d, 1/4. See Nathan Isaacs & Carl F. Tausch, *The NIRA in the Book and in Business*, 47 HARV. L. REV. 458, 459 (1934) (mockingly comparing the NIRA's premise that the end of unfair competition to the Biblical prophets assumption of "a supernatural connection between sin and punishment, between repentance and recovery.").

<sup>235</sup> See Nathan Isaacs, *Charges New Deal Loses Sight of Human Nature*, BOSTON TRAVELER, Nov. 14, 1935, (hereinafter Isaacs, *New Deal Loses Sight*) (NI Papers, BLHC, HBS, *supra* note 8,

is a flawed decision-maker. The more recent behavioral law and economics<sup>236</sup> movement reflects this questioning of the rationality assumption of economics. Third, government is “limited in its ability to gather and digest information.”<sup>237</sup> This efficiency argument informs modern law and economics. Governmental regulation is inherently more inefficient than freely made contracts.

Isaacs’ anti-New Deal stance was part of a broader pro-business attack on the Roosevelt administration.<sup>238</sup> Conservatives articulated their opposition to the growing New Deal state by claiming that its policies threatened individual liberty and self-reliance.<sup>239</sup> Isaacs declared that the most important challenge to the New Deal would come from the self-reliant character of human nature.<sup>240</sup> He excoriated the administrators of the National Recovery Act as “petty bullies who shook their fists of worried shopkeepers or innkeepers and threatened them with dire consequences because of anonymous accusations of having violated impossible code provisions.”<sup>241</sup> In 1920, Isaacs had argued for increased Federal power in order to facilitate the growth of a national economy. He then opposed New Deal legislation because it threatening to business. He thought that program was motivated by thoughtless anti-business animus. Earlier he dismissed the importance of Commerce Clause restrictions on federal power, and continued to oppose *Lochner*-era constitutional formalism. By 1934, he advocated

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Box 5, File: Newspaper Clippings, 1924-1941).

<sup>236</sup> See HERBERT A. SIMON, *MODELS OF MAN: SOCIAL AND RATIONAL* (examines the notion of ‘bounded rationality’); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 18 *SCI.* 1124 (1974) (studies the influence of heuristics and biases in the decision-making process); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1997); Cass R. Sunstein *Behavioral Analysis of Law*, 64 *U. CHI. L. REV.* 1175 (1997).

<sup>237</sup> Isaacs, *New Deal Loses Sight*, *supra* note 235.

<sup>238</sup> SCHLESINGER, *COMING OF THE NEW DEAL*, *supra* note 234, at 471. See Nathan Isaacs, “Business Law In Transition,” pg. 4, NI Papers, BL, HCD, HBSA, Arch GA 41, Box 2, File: Unpublished, Alphabetically, n.d, 1/4 (attacking the Wagner Act).

<sup>239</sup> SCHLESINGER, *COMING OF THE NEW DEAL*, *supra* note 234, at 472-473.

<sup>240</sup> Nathan Isaacs, *Government by Bribery*, Address at the Harvard Business School Club of Boston (November 19, 1935) (NI Papers, BLHC, HBS, *supra* note 8, Box 3, File: Speeches, 1935).

<sup>241</sup> Nathan Isaacs, *The NRA Decision*, 13 *HARV. BUS. REV.* 393, 394 (1935) (hereinafter Isaacs, *NRA Decision*).

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constitutional limits on the Federal commerce power.

As noted above, Isaacs' view of the constitution was not value neutral. He was willing to embrace non-New Deal "growth of government control over business."<sup>242</sup> But, this was a limited control that had to support one of two objectives—the promotion of business or societal fairness. Under the fairness rationale, Isaacs was willing to support the constitutionality of *state* labor and social welfare legislation.<sup>243</sup> In the end, his conservative cultural commitment was based on the values of business and "American individualism."<sup>244</sup> This conservatism saw conventional business initiative as the means to bring the Great Depression to an end.

#### B. Constitutional Interpretation: Realist, Strict, and Isaacs' Principled Approach

The constitutional limits to federal power was the main premise for Isaacs opposition to the Federal Securities Act of 1933. He believed that because securities were primarily the products of intrastate commerce they were not subject to federal regulation.<sup>245</sup> Isaacs viewed the debate on the Securities Act within the context of his cyclical theory of legal history. He labeled those that supported the Act as "realist" and those opposed it as "verbalist."<sup>246</sup> The realist-verbalist debate over constitutional interpretation was a battle between the "letter that killeth and the spirit that giveth life."<sup>247</sup> But, Isaacs neither believed in a literal interpretation of the Constitution nor did he believe in the indeterminacy of the

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<sup>242</sup> Nathan Isaacs, *Where Business and Government Meet*, paper read at the Annual Meeting of the Collegiate Teachers of Business Law in Chicago (December 28, 1934) (NI Papers, BLHC, HBS, *supra* note 8, Box 3, File: Speeches, 1935 (discussing of the State as a Business actor and influencer of Business decisions. Isaacs claimed that Government and Business meet in Business Law).

<sup>243</sup> Isaacs, *NRA Decision*, *supra* note 241, at 404.

<sup>244</sup> Nathan Isaacs, Address at Wesleyan University (December 6, 1934) (NI Papers, BLHC, HBS, *supra* note 8, Box 3, File: Speeches, 1934).

<sup>245</sup> Isaacs, *The Securities Act*, *supra* note 2, at 218.

<sup>246</sup> *Id.* at 220.

<sup>247</sup> *Id.*

Constitution as a body of “general and vague. . . terms.”<sup>248</sup> Isaacs accepted the premises of the 1930’s realists’ theory of constitutional interpretation which eschewed a literal interpretation of the text, but believed that an honest application of those principles would render the Securities Act and other New Deal legislation unconstitutional.<sup>249</sup> He observed that the social engineering approach of the realists was a radical form of the dynamic nature of law he had posed. Felix Frankfurter<sup>250</sup> had argued that the Supreme Court should merely ascertain “whether there is a legitimate object to be accomplished by any piece of legislation.”<sup>251</sup> Frankfurter argued that the Securities Act only needed to satisfy this rational basis test. Isaacs argued that rational review was inadequate to protect important constitutional values.<sup>252</sup> In a public lecture, Isaacs argued for a “compromise” that emphasized a spirit of the law approach, but one limited that would not go so far as to emancipate the Constitution from history.

The CLR of Isaacs is vividly displayed by his merging of the realist claim that much of law was out of sync with modern times and his idealistic claim that underlying principles was the proper means to adjustment. He acknowledged that America was enduring a crisis which was “a supreme test of adjustability.”<sup>253</sup> To deal with this situation he wanted to formulate principles based on actual developments in constitutional law. These principles would then be used as the test of constitutionality federal legislation.<sup>254</sup> A

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<sup>248</sup> Isaacs used realist language when he argued that the founding fathers did not intend the Constitution to be interpreted literally and that it was intentionally made to be vague. Nonetheless, he viewed New Deal legislation as an unconstitutional usurpation of state power. *Id.*

<sup>249</sup> *Id.* at 225.

<sup>250</sup> An obituary reported that Isaacs had been “associated” with Frankfurter. *Mourned: Prof Nathan Isaacs*, THE CHICAGO ADVOCATE, January 16, 1942 (NI Papers, AJHS, *supra* note 8, Box # 2, Scrapbook).

<sup>251</sup> Felix Frankfurter, *Hours of Labor and Realism of Constitutional Law*, 29 HARV. L. REV. 353 (1916).

<sup>252</sup> Isaacs, *The Securities Act*, *supra* note 2, at 221. In his view, the Supreme Court “must have the vision to read our fundamental charter progressively, but also the courage to resist panic.” Nathan Isaacs, Cutler Lectures at the University of Rochester, *Recovery Under The Constitution*, pg. 10 (1934) (NI Papers, BLHC, HBS, *supra* note 8, Box 2, File: New Deal-Cutler Lectures, 1934 (Un. Of Rochester)).

<sup>253</sup> *Id.* at pg. 15.

<sup>254</sup> *Id.*, at pg. 11.

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principled approach would allow for flexibility in application, but would prevent the indeterminacy represented by the radical, anti-literal approach. He rejected the radical approach charge that all that is reasonable, desirable, or necessary is constitutional. Isaacs' saw the principled approach as more in line with realist interpretation rather than a strict interpretation (verbalist) which would stretch the meaning of "interstate commerce" to uphold the Act. It was this strain of Isaacs thought that finds kinship with the post-war Legal Process School, which acknowledged that judges make law, but insisted that they were disciplined by impersonal principles.<sup>255</sup>

Although Isaacs believed that the spirit, rather than the letter of the Constitution, should be decisive, the spirit could be used to support different courses of action.<sup>256</sup> When this occurred the interpreter needed to see whether the intended course of action (statute) violated "an essential principle" of the Constitution.<sup>257</sup> Charles Black, decades later, similarly rejected "the purported explication or exegesis" of the constitutional text "as a directive of action."<sup>258</sup> Isaacs argued that an application of constitutional principles in this manner would have resulted in the voiding of the Securities Act. He believed the only legal means that would allow such federal regulation was through a constitutional amendment.<sup>259</sup> A constitutional amendment was the only legitimate means to begin a new cycle of codification.

#### C. Reconciliation

Weisbrod has noted that throughout Isaacs' "work there is a descriptive or analytic rather than prescriptive quality."<sup>260</sup> That descriptive mindset allowed Isaacs to eventually

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<sup>255</sup> KALMAN, *supra* note 1, at 231.

<sup>256</sup> *Id.* at 221.

<sup>257</sup> *Id.*

<sup>258</sup> CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969) (advocating method of constitutional interpretation "from inference and relationships created by the Constitution").

<sup>259</sup> *Id.*

<sup>260</sup> Weisbrod, *supra* note 49, at 786, 786 n.44.

adapt his thought to the legal landscape created by the New Deal.<sup>261</sup> Isaacs remained confident that the Supreme Court would craft decisions striking a balance between the public and private spheres of law. He agreed with the views of the Supreme Court's conservative majority, but he also agreed with the liberal proposition that the Constitution should evolve in order to keep up with the times. By 1937, Isaacs retreated from his alarmist warnings about the New Deal. He was now prepared to admit again, as he did before the New Deal, that judges should not rely solely on one line of legal reasoning to direct them to the correct decision. But, he insisted that it was important to retain the idealism of universal principles, even if they could not truly be formulated. Isaacs argued that even the 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, thereby nodding assent to the principle."<sup>262</sup> Under this view, judicial decision-making and law in action, worked within the shadow of general principles. Isaacs' CLR recognized the folly of deciding real cases through pure deduction from principles. But, he also recognized the use of principles as an end goal of legal evolution. Principles provided a normative end point that the law would strive but never fully reach.

Isaacs was willing to reconcile his own deep-seated commitment to free enterprise to the new spirit of the times. In 1940, he declared that "[w]e no longer believe in self-starting, automatically-controlled competition as nature's sacred device for regulating markets."<sup>263</sup> Isaacs accepted this verdict of history, but remained strong in the belief that many Depression-era laws were anti-competitive in nature.<sup>264</sup>

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<sup>261</sup> In 1937, President Roosevelt introduced his infamous court-packing plan declaring that "[m]eans must be found to adapt our legal forms and our judicial interpretation to the actual present needs of the largest progressive democracy in the modern world." PUBLIC PAPERS OF FDR, V: 639-40. Isaacs noted that Roosevelt's proposal was based on the premise that the courts should respond to political pressure. Nathan Isaacs, *Political, Legal, and Economic Logics-And Logic*, Address at the American Academy of Arts and Sciences, pg. 5 (Jan. 13, 1937) (NI Papers, BLHC, HBS, *supra* note 8, Box 3, File: Speeches, 1937).

<sup>262</sup> *Id.* at pg. 30.

<sup>263</sup> Isaacs, *supra* note 24, at 390.

<sup>264</sup> He remained a staunch opponent of the Robinson-Patman Act, which limited the ability of chain-stores to fix retail prices. See Nathan Isaacs & Edmund P. Learned, *The Robinson-Patman*

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Isaacs never abandoned his conservative, pro-business standpoint. He was willing to compromise his commitment to free enterprise to the need to prepare America for World War II. In a 1940 speech, Isaacs argued that impending war emergencies called for a “partly voluntary, partly compulsory” revision of the business practices of distributors.<sup>265</sup> He admitted to his audience that the weakening of constitutional safeguards in an emergency was dangerous for democracy.<sup>266</sup> Isaacs thought it was necessary to take that risk.<sup>267</sup>

By the end of his life, Isaacs’ was spurred by the threat of Nazism to attempt to reconcile democracy and his commitment to the development of the law by an unelected judiciary. Isaacs contrasted American populism to the absolutism of non-democratic regimes.<sup>268</sup> Isaacs claimed that both legislation, “or custom which ripens into law and is not repealed by legislation” are laws that endure the “test of the people’s will.”<sup>269</sup> Unfortunately, Isaacs did not live long enough to fully reconcile his conception of the historical evolution of the law and democratic principles.

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*Law: Some Assumptions and Expectations*, 15 HARV. BUS. REV 137. Isaacs was on the board of Directors of a chain store, Gimbel Brothers, but his reasoning regarding the Robinson-Patman act is entirely consistent with his broader thinking on similar issues). *See also* Isaacs, *supra* note 24, at 390.

<sup>265</sup> Nathan Isaacs, *War Emergencies and Trade Practices*, Address before Boston Conference on Distribution, pg. 1, Oct. 7, 1940, NI Papers, BL, HCD, HBSA, Arch GA 41, Box 4, File: “War Emergencies and Trade Practices,” Oct. 1940. *See also* Letter from Louis Johnson, Assistant Secretary of War, to Nathan Isaacs (March 2, 1940) (NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 8, (“It is indeed gratifying to note the interest being taken in our national defense problems by such institutions as the one you represent.”); Letter from Louis Johnson, to Nathan Isaacs (April 16, 1940), NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 8, (discussing “the seminar being held at the Littauer Center of Public Administration on the afternoon of Monday, April 22<sup>nd</sup>.”).

<sup>266</sup> Isaacs, *supra* note 265, at pg. 2.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at pg. 2.

<sup>269</sup> *Id.* at pg. 3.

## VII. ISAACS AND LEGAL REASONING

Isaacs was an early contributor to the Legal Realists' attempts to recognize the contingencies and intuitions inherent in legal reasoning. Nonetheless, he sought to justify traditional (deductive) legal reasoning as the pragmatic best way to deal with legal problems, while eschewing any claims to scientific exactness. While cognizant of the contingencies and faults of traditional legal reasoning, Isaacs defended its legitimacy and the “power—quite different form knowledge—which comes from legal training and from contact with legal traditions...which we may call lawyer-like thinking.”<sup>270</sup> Isaacs relied on a similar pragmatism to defend the study of the humanities, social sciences, and especially, Jewish law, which was also the product of a learned legal tradition.<sup>271</sup>

Isaacs' CLR approach provided a moderate alternative to the Realists' more radical criticism of legal reasoning. His version of realism can be described as an “organic theory of rationalism.”<sup>272</sup> This description of CLR is neither a formalistic nor fully realist in approach to legal reasoning: “These new rationalists agreed with Holmes and the realists that the hard cases were not decided by logical deduction from rules and precedents, but maintained that hard cases can be decided by reference to underlying ‘principles’ and ‘equities.’”<sup>273</sup> The CLR ranks along with Isaacs include Justice Cardozo,<sup>274</sup> Dean Pound,

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<sup>270</sup> Nathan Isaacs, *Liability of the Lawyer for Bad Advice*, 39 CAL. L. REV. 39, 43 (1935) (explaining this “practical reason for not assuming that a lawyer warrants his conclusion of law.”).

<sup>271</sup> Letter from Isaacs [Jurist] to Oko [the Bookman], pg. 3, X in the series, No Date (ASO Papers, MS 14, AJA, *supra* note 8, Box 8, File 2).

<sup>272</sup> WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACHS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* xiii (1994).

<sup>273</sup> *Id.*

<sup>274</sup> Isaacs, who was related to Cardozo and developed a friendly relationship with him. Nathan Isaacs' aunt Julia Nathan was married to the brother of Benjamin Cardozo's mother. Interview of Paul Wotitzky, son-in-law of Nathan Isaacs by Samuel Flaks, co-author, in Brookline MA (May 8, 2008). After Cardozo was elevated to Supreme Court, Isaacs visited Washington. Cardozo wrote to Isaacs that he had “yearned to see” him, but “[u]nfortunately the Court sessions and the bar receptions use up all my days. Letter from Benjamin N. Cardozo to Nathan Isaacs (October 16, 1932) (NI Papers, MS 184, AJA, Letters to Nathan Isaacs, *supra* note 8).

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and the later Llewellyn.<sup>275</sup> This version of legal realism recognizes the role of discretion and law creation in judicial reasoning. But, it is a limited discretion and creationism in which underlying principles, sometimes unarticulated, regulate the creative activity.<sup>276</sup>

Isaacs was attracted to an understanding of legal reasoning which rejected the formalistic search for a right legal answer, yet still bestowed legitimacy to traditional lawyerly ways of thinking. Isaacs' familiarity with the evolution of Jewish law likely attracted him to modified natural law and Neo-Kantian philosophy. That philosophy set the goal of legal reasoning as the discovery of objective principles, while allowing those principles to grow and change with new conditions. This goal is similar to that of the Marburg Neo-Kantian School lead by Rudolph Stammler.<sup>277</sup> Stammler believed in "a natural law with a variable content."<sup>278</sup> Isaacs' notes (from Dean Pound's class) reveal that he was attracted to Stammler's search for "general" but still contingent principles, rather than universally true principles.<sup>279</sup> He held to the Kantian objectivity of law, but recognized that the substance of that law can change.<sup>280</sup>

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<sup>275</sup> The "later Llewellyn" refers to the more moderate form of realism that he developed later in his career and cumulating with THE COMMON LAW TRADITION, *supra* note 209.

<sup>276</sup> *Id.* (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11 (1921).

<sup>277</sup> At the turn of the 20th Century, "Neo-Kantianism was the dominant academic philosophy or Schulphilosophie in the German universities." FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY VOL. VII 436 (1963).

The founder of that school was Herman Cohen (1842-1919), who dedicated his later work to Jewish philosophy. HERMANN COHEN, RELIGION OF REASON OUT OF THE SOURCES OF MODERN JUDAISM (1919) (1978 trans.). Modern researchers have relied upon Stammler's "natural law with a changing content" in order to understand Jewish Law. B.S. Jackson, "The concept of religious law in Judaism," *in* Vol. 2 AUFSTIEG UND NIEDERGANG DER ROMISCHEN WELT 33, 37-38 (1979).

<sup>278</sup> *Cf.* CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 248 (1930) (quoting STAMMLER, THEORIE DER RECHTSWISSENSCHAFT 124 (1911); STAMMLER DIE LEHRE VON DEM RICHTIGEN RECHTE 93, 196 (1902-07)).

<sup>279</sup> Miscellaneous Class Notes, no page number (NI Class Notes 1919-1920, HLSSL, *supra* note 8, Box 1, File: Misc. (discussing Stammler's call for "general" rather than "universal" legal principles). *See also* Miscellaneous Class Notes, pg. 273 (NI Class Notes, HLSSL, *supra* note 8, Box 1, File: Misc.) (notes discussing the "Revival of Natural Law in France").

<sup>280</sup> A French school of legal philosophers headed by R. Saleilles and J. Charmont further developed Stammler's theory of law. *See École historique et droit naturel d'après quelques ouvrages récents*, REVUE TRIMESTRIELLE DE DROIT CIVIL (1902); CHARMONT, LA RENAISSANCE

The intellectual debate centered on the universality of natural law principles and the incoherency of legal conceptualism—the application of general principles to rapidly changing content. The philosophical Pragmatist John Dewey, who greatly influenced Isaacs and other realists, asserted that the admission that the content of law changes was “fatal to everything which the doctrine” of natural law was supposed to mean.<sup>281</sup> This coherency argument was the basis of Isaacs attack on the natural law approach of the *Lochner* court. He viewed the Court’s simplistic version of natural law theory as failing to mediate between the conflicting elements of general principles and changing content.<sup>282</sup>

In 1922, Isaacs participated in John Dewey’s course entitled *Some Problems In the Logic and Ethics of Law*.<sup>283</sup> Isaacs drew heavily upon that course, and from courses taught by Roscoe Pound<sup>284</sup> and W.W. Cook, to write an article that outlined many of the jurisprudential points that became key to Legal Realism.<sup>285</sup> Isaacs thought that Dewey’s unique contribution was the insight that for different tasks, there were many different types of logic. Depending on the task at hand one kind of logic may depend heavily on intuition

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DU DROIT NATUREL 167 (1910). “Just law, like the law of nature, is a law or laws with specific legal content which is in accord with the standard. It is then objectively just, but not absolutely just; for the moment the circumstances change, the same legal content will no longer be in accord with the standard and hence will cease to be just.” See HAINES, *supra* note 278, at 252-260 (discussion of the French natural law school) (quoting Isaac Husik, *The Legal Philosophy of Rudolf Stammler*, 24 COLUM. L. REV. 373, 387-388 (1924); Rudolph Stammler, *Fundamental Tendencies In Modern Jurisprudence*, 21 MICH. L. REV. 638 (1923).

<sup>281</sup> John Dewey, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 73, 84 (F.B. Rothman 1987) (1941).

<sup>282</sup> Isaacs took Sir John William Salmond to task in a book review for dismissing the concept of natural law without taking into account “the law-of-nature-with-a-changing-content that the recent French writers have taken from Stammler and developed into a system of their own.” Nathan Isaacs, Book Review, 34 HARV. L. REV. 222, 223 (1920) (review of JOHN WILLIAM SALMOND, JURISPRUDENCE, Sixth Edition (1920)). See also Isaacs, *supra* note 133, at 385.

<sup>283</sup> See generally, John Dewey, *Logical Method and Law*, 10 CORN. L.Q. 17 (1924). See JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW 410 n.101 (1947) (Isaacs’ *How Lawyers Think*, *supra* note 2, is Stone’s third earliest citation of contributions made by Sociological school scholars to the study of reasoning, after Roscoe Pound, *Theory of Judicial Decision*, 36 HARV. L. REV. 641 (1922) and CARDOZO, *supra* note 276).

<sup>284</sup> See Pound, *supra* note 283.

<sup>285</sup> Isaacs, *How Lawyers Think*, *supra* note 2.

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and precedents, while others may require a more mathematical rigor.<sup>286</sup> There was no one ideal form of logic.<sup>287</sup> Isaacs thought that pragmatic reasoning had deep roots in the common law.<sup>288</sup>

In order to better understand and improve the application of principles to novel case situations, Isaacs supported the Legal Realists' proposition that it was not sufficient to study the purported logic of decisions. Empirical social scientific research was necessary to understand context and the true meaning of the law. In an unpublished manuscript, Isaacs claimed that the first step in reforming legal research was "an investigation of the facts of life made by such surveys as are used in the other social sciences."<sup>289</sup> His contextual view of the law, later championed by Llewellyn in the Code, saw the danger that deductive logic could "deliberately obliterate" background facts. The result would allow legal logic, at times, to dismiss important contextual facts as irrelevant.<sup>290</sup>

Isaacs' pragmatic view allowed for a great deal of flexibility in legal reasoning. His pragmatic approach allowed him to criticize those legal formalists who claimed that there was very limited judicial discretion in finding the one right answer to questions of law application.<sup>291</sup> Based on that conclusion, Isaacs was one of the first American scholars to

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<sup>286</sup> Isaacs, *supra* note 261, at pg. 2.

<sup>287</sup> Isaacs observed that Dewey's definition of logic included "any methods actually used to reach conclusions, whether they are careless or extremely careful, whether they involve demonstration or only approximation of the truth sought." Nathan Isaacs, *How Lawyers Think*, *supra* note 2, at 556.

<sup>288</sup> *Id.* at 557. See Isaacs, *supra* note 261, at pg. 2 (citing Prohibitions del Roy (1612) 12 CO. REP. \*63, \*65 (Lord Coke's classical defense of common law reasoning against the learned King James's assertion that he could reason as well as the lawyers and therefore he could decide cases for himself).

<sup>289</sup> "Appendix Technique of Legal Research" n.d. 4/4, pg. 19, NI Papers, BL, HCD, HBSA, Arch GA 41, Box 2, File: "Unpublished, Alphabetically."

<sup>290</sup> *Id.*, at pg. 26. An example of Isaacs' approach is his treatment of Conflict of Laws. Nathan Isaacs, Book Review, 38 HARV. L. REV. 125, 129 (1924) (reviewing ERNEST G. LORENZEN, CASES ON THE CONFLICT OF LAWS, SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS (1924)).

<sup>291</sup> After surveying different eras of legal development, he concluded that when "one considers the vast fluctuations from time to time and from place from place in the extent allowed to judicial discretion, one becomes skeptical, to say the least, as to whether we can ever hope to discover it." Nathan Isaacs, *The Limits of Judicial Discretion*, 32 YALE L.J. 339, 352 (1923). For example,

criticize the generally accepted distinction between questions of law and questions of fact as an artificial concept that disguised judicial discretion.<sup>292</sup> This false distinction was seized upon later by the Critical Legal Studies Movement.

By criticizing the formalistic-no discretion mindset of legal formalism, Isaacs was firmly exhibiting his legal realist views. However, his CLR approach did not see judicial discretion as a negative. He believed in the common law system and its entrusting judges with discretion. This is the reason he was so critical of the New Deal—it preempted judicial discretion in favor of administrative discretion.<sup>293</sup> Isaacs advocated a proactive judicial review of administrative law. This was founded on a belief that courts and not governmental agencies were better equipped to mediate the conflict between existing law and the changing needs of society. This view was based upon the assumption that there was an inherent tension between legal rules and governmental regulation.<sup>294</sup> The concern here was that administrators would be unconstrained by the rule of law.<sup>295</sup> Isaacs' conservatism was on the losing side as “progressives” implemented the New Deal and ushered in the modern administrative state.<sup>296</sup> This distrust of the administrative state can be seen at work in the LAE movement.

Isaacs was also disturbed with the courts increased deference to administrative law

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Isaacs asserts that “during periods of growth by equity, there is a great deal of discretion by judges.” *Id.*, at 345. Roscoe Pound later cited this article to support the proposition that “[t]here are many situations, however, where the course of judicial action is left to be determined wholly by the judge’s individual sense of what is right and just.” ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* (1913), 87, 87 n.62 (2002).

<sup>292</sup> See Isaacs, *Law and Facts*, *supra* note 2.

<sup>293</sup> Letter from Nathan Isaacs to B.M. Siegal (December 6, 1921) (NI Papers, BLHC, HBS, *supra* note 2, File: Correspondence Regarding Articles and Books, 1920-1921).

<sup>294</sup> William E. Forbath, “Politics, State Building, and the Courts, 1870-1920,” *Public Law and Legal Theory Research Paper*, No. 113, Jan. 2007, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=958104#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958104#PaperDownload) at 1141.

<sup>295</sup> *Id.*

<sup>296</sup> See generally, Schiller, *supra* note 234, 402. Forbath, *supra* note 294, at 1141-1142; Nathan Isaacs, Book Review, 30 *YALE L.J.* 776, 778 (1921) (reviewing NAGENDRANTH GHOSE, *COMPARATIVE ADMINISTRATIVE LAW WITH SPECIAL REFERENCE TO THE ORGANIZATION AND LEGAL POSITION OF THE ADMINISTRATIVE AUTHORITIES IN BRITISH INDIA* (1919)) (discussing constantly shifting line between when the courts will interfere with administrators).

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decisions. He felt it was the obligation of courts to review what is now considered to be administrative fact-finding.<sup>297</sup> He asked, rhetorically, whether the country was “experiencing a general reaction against leaving important questions of property to the uncontrolled discretion of non-judicial bodies?”<sup>298</sup> Isaacs view was based on his respect for the judge-made common law and the *responsa* of Jewish law. Like his mentor, Roscoe Pound, Isaacs turned against the political program and the more extreme jurisprudential implications of the Legal Realist Movement. In the end, Isaacs remained true to his idealistic faith in the common law process.

### CONCLUSION

Nathan Isaacs was a conservative legal realist whose insights are recognizable in the contemporary legal academic landscape, but who has been largely neglected in the study of the Legal Realist Movement of 1930s. Isaacs was an influential early Legal Realist and, at the same time, an economic and jurisprudential conservative. His knowledge of legal evolution and Jewish law informed his belief structure. He was an adherent of a Historical School of Jewish Thought that believed in flexible adaptation to new conditions and historical contingencies, while affirming the divine and binding nature of the law.

Isaacs’ broad contextual framework allowed him to play a pioneering role in the development of the social-scientific study of law and the critique of legal formalism that was the basis for the Legal Realist Movement. Simultaneously, Isaacs endeavored to discover universal legal principles through his cyclical theory of legal history. He attempted to resolve the tension inherent in his jurisprudence by recognizing the

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<sup>297</sup> Nathan Isaacs, *Judicial Review of Administrative Findings*, 30 YALE L.J. 781, 790 (1921).

<sup>298</sup> *Id.* at 797. Isaacs supported the Supreme Court’s decision in *A. L. A. Schechter Poultry Corporation* overturning the statute establishing the National Recovery Administration. *A. L. A. Schechter Poultry Corporation v. U.S.* 295 U.S. 495 (1935).

provisional nature of legal, while at the same time endorsing judicial reasoning's key role in the common law system. His conservative brand of legal realism saw the enactment of New Deal legislation as undermining the integrity of the common law system.

The Conservative Legal Realism or realistic natural law theory advanced by Isaacs was a compromise between abstract conceptualism and radical realism. Law in action was somewhere between a body of principles (conceptualism) and the “mass of indefinable discretion” of radical legal realism.<sup>299</sup> Isaacs' contextualist approach to legal reasoning allowed for the certainty of principle and the ability to adjust principles to novel fact patterns.

Isaacs' scholarship stressed the historical contingencies of Anglo-American common law, while retaining a belief in some version of natural law principles. His scholarship assumed that there were natural law-inspired general principles, but the content of that law was constantly changing. Isaacs' conservative realism recognized the dynamic nature of law, but believed in the ability of the common law to provide correct answers to legal questions. Isaacs' insights on the tension between conceptualism and realism—his belief in the efficiency of the common law system, the need for empirical research in order to make it more efficient, and his belief in the inefficiency of government regulation—can be used to better understand the role of conservative legal realism in modern legal theory.

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<sup>299</sup> Nathan Isaacs, Book Review, 41 HARV. L. REV. 108, 111, (1927), *reviewing* HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS (1927).