"Beyond Rules"

Larry A DiMatteo, *University of Florida*
Samuel Flaks
BEYOND RULES

Larry A. DiMatteo* & Samuel Flaks**

Introduction................................................................................................................... 2
I. Setting the Context: A Brief Biographical Sketch.................................................... 7
II. Isaacs’ Contributions to American Law................................................................. 12
   1. Law of Contracts................................................................................................. 13
   2. Tort Law........................................................................................................... 18
   3. Constitutional Law............................................................................................ 19
   4. Two Views of Arbitration.................................................................................. 21
III. Conservative Legal Realism and the Jewish Legal Tradition............................. 22
IV. Isaacs, the Functional Method, and Jewish Law.................................................... 30
   1. Isaacs’ Functionalism and Jewish Law............................................................... 30
   2. Isaacs’ Functionalism and the Legal Realist Movement..................................... 32
   3. Need for Interdisciplinary Approach................................................................. 36
   4. Isaacs Relationship with Llewellynian Thought............................................... 37
   5. Questioning Hohfeld’s Re-conceptualization of Law........................................ 41
V. Isaacs’ Opposition to the New Deal...................................................................... 42
   1. The New Deal as Unconstitutional Impediment to Business............................ 43
   2. Constitutional Interpretation: Realist, Strict, and Isaacs’ Principles............... 45
   3. Reconciliation.................................................................................................... 47
VI. Isaacs and Legal Reasoning.................................................................................. 49
Conclusion .................................................................................................................... 54
INTRODUCTION

Legal realism dominated Twentieth century American legal thought. This article argues that the Legal Realist Movement (LRM), in fact, consisted of two strains of legal thought—radical legal realism and Conservative Legal Realism (CLR). The radical strain has been the more debated and recognized aspect of legal realism.¹ This article will analyze the mostly neglected strain of CLR. Though some scholars have recognized that there were competing radical and non-radical schools of realism,² the political, economic, and religious roots of CLR have not been fully understood. The vehicle for this investigation will be the life and works of Nathan Isaacs.³ Isaacs’ work is best captured by the term

---

¹ 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). See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 170 (1992) (hereinafter HORWITZ, TRANSFORMATION) (arguing that the Realists’ main contribution was a “critique of the claims of orthodox legal reasoning to be able to provide neutral and apolitical answers to legal questions” and that the Realists shared progressive political values); 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) (“‘Legal Realists,’ were a group of elite academics, from Yale, Harvard, and Columbia … [who] were generally modernist, leftist, reform-oriented.”).

² See, e.g., GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END 28-31 (1996) (contrasting “progressive” Realists who relied upon social science to provide the normative content of law and believed that law was more than mere politics with “radical” Realists who were more skeptical about legal reasoning and its purported ability to separate law and politics); Daniel T. Ostas, Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner, 36 AM. BUS. L. J. 193, 201-204 (1998) (adopting Minda’s dichotomy); Gary Peller, The Metaphysics of American Law, 73 CAL. L. REV. 1152, 1220-1226 (1985) (distinguishing between Realists who believed in objective social science and those who did not); 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) (distinguishing between more extreme Realists and Realists who adhered to an “organic theory of rationalism” which acknowledged that that legal reasoning was indeterminate but insisted that legal principles can decide cases).

³ Isaacs was born in 1886 and died in 1941. He earned the following degrees: A.B., 1907, A.M., 1908 (English Literature), Ph.D. (Economics), LL.B., 1910, University of Cincinnati; S.J.D., 1920, Harvard University.
CLR. This article will investigate the legitimacy and determinacy of the legal order through the lens of CLR as represented by Isaacs.

Isaacs and CLR are especially worthy subjects for study given the current economic crisis. It is a crisis, much like the Great Depression, that has spurred many people to question core capitalistic premises, such as the superiority of minimal government regulation of business and the structuring of financial instruments through freedom of contract. Isaacs’ conservative brand of legal realism developed at the time of America’s greatest economic crisis. He represents a strain of conservative thinking that questions the coherence of existing rules, but is faithful to underlying legal principles. Isaacs was critical of the rules of private law that existed at the time and called for a new commercial law. This critique of rules centered on the divergence of formal rules and rules in fact, along with the questioning of the public-private distinction and the fallacy of strict legal formalism. These facets of Isaacs’ thinking support his classification as a legal realist. However, unlike the more famous Legal Realists of the 1930s, he rejected the progressive political agenda of the New Deal. His merger of anti-formalism and an idealism inspired by the Jewish legal tradition allowed him to reject Lochner-era judicial decision-making while attacking the constitutionality of New Deal interventionism. His rule skepticism supported government intervention in the employment realm while his belief in the integrity of the common law system provoked a harsh response to the rise of the administrative state. The thoughts of this non-dogmatic conservative legal thinker and his brand of legal realism are especially relevant now as the current economic crisis possibly prompts a reframing of the legal order.

CLR, although critical of the legal rules of the day, moved beyond the rule skepticism associated with radical legal realism. It asserts that although legal rules provide indeterminate answers in hard cases, principled-guided rules will lead to a correct answer. CLR calls on judges to continuously strive to uncover underlying objective principles and to understand their historical evolution. Isaacs sought to blend an evolving, but cyclical, organic theory of legal development with the pragmatism needed to make rules workable. This embrace of both a critical and positive theory of legal rules, as well as a conservative vision of law, rests on the recognition that there is often a disconnect between formal and operative rules. CLR attempts to manage this divergence using principles and contextual evidence or operative facts to guide legal evolution.

Taught at University of Cincinnati, 1912-1918; Harvard Law School, 1919-1920; University of Pittsburgh Law School, 1920-1923; Columbia Law School, Summer 1922. Professor of Business Law, Harvard Graduate School of Business Administration, 1924-1941; Harvard University Graduate School of Public Administration, 1936-1941. Lecturer, Yale Law School, 1937-1939.
CLR provides an historical middle path between strict legal formalism and radical rule skepticism. Though CLR does not see rules as a product of pure deduction, rule skepticism is not a critical endpoint. Instead, CLR sees it as the beginning of a positive-normative process. Rule indeterminacy can be managed through the historical understanding of the evolved rules. Isaacs’ cycle theory of legal development—the continuous reframing of the legal order around status-based and contract-based relationships—asserts that Jewish, Common, and Civil Law evolved in a similar way. Under cycle theory, the status-based features of private law represent the importance of context to legal development while contract-based principles offer a degree of certainty to that development.

For Isaacs, the reforming of legal rules must be grounded in a historical understanding of legal principles. This grounding allows for a reasoned critique of dynamic rule making and for the diminishment of the contingent nature of law. The contingent nature of law is contained within a framework of moral, political, and cultural values. This framework characterizes CLR as both a critical and positive theory of the legal order. It provides a path beyond a critique of rules, while at the same time advancing a conservative, pro-business political agenda. This fusion of an organic natural law with the inherent indeterminacy of legal conceptualism moves beyond rules to a principle-based contextualism. CLR attempts to continuously refresh legal rules and at the same time provide a prescriptive certainty to legal change based upon historically-enriched principles. This conservative strain of legal realism has been recently exemplified in some ways by the law and economics movement.

The initial parts of this article will set the personal context of Isaacs’ contribution to CLR by providing a brief biographical sketch, and a review of his contributions to American law. A review of Isaacs’ background and contributions to disparate areas of law is needed in order to understand his view of CLR. Isaacs was a prolific writer whose works populated legal scholarship from 1914 through the 1930s.

---

4 The authors count 43 law review articles written by Isaacs, including articles in the Harvard Business Review, numerous books, and dozens of articles in non-law publications, such as the Encyclopedia Britannica (1930), Encyclopedia of the Social Sciences (1931-1935) and Jewish scholarly journals. Following contemporary convention, many of Isaacs’ articles are short. Isaacs first academic law article was Nathan Isaacs, The Merchant and His Law, 23 J. POL. ECON. 529 (1915) (hereinafter “Isaacs, Merchant and His Law”). His most famous articles, which will be often cited in this article, include: 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, The Standardizing of Contracts, 27 YALE L.J. 34 (1917) (hereinafter Isaacs, Standardizing Contracts); 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...
modern legal theory. Isaacs’ early writings provide insights that predated and presaged the works of the more famous Realists, such as Karl Llewellyn, Jerome Frank, and Herman Oliphant. Despite his scholarship throughout the 1930s, he was not considered a core member of the Legal Realist Movement. Moreover, despite his prolific and broad scholarly production, surprisingly few legal scholars know much about the man and his place in legal scholarship. Unfortunately, the fact that his work was not theoretical in nature may have lowered scholars’ assessments of many of his important insights and their connection to legal theory. 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 then shifts to the broader context of the role of the Jewish legal tradition in shaping Isaacs’ critique of American law. Isaacs’s knowledge of the historical development of the common law and of Jewish law provided a unique scholarly vantage point that informed his legal realism. The commonality of Jewish and common-law development is the core theme of his view of American law.


5 Llewellyn did not count Isaacs in the Realist camp in either his published or unpublished list of Realists which he sent Dean Pound, but it will be shown that Llewellyn did indeed consider Isaacs a realist. See infra nn. 212-221 and surrounding text. It is difficult to determine exactly what the realist 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) (hereinafter “HULL, POUND AND LLEWELLYN”); Karl N. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 COLUM. L. REV. 431 (1930); 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 HORWITZ, TRANSFORMATION, supra note 1, at 169 (counting all scholars who attacked aspects of classical legal thought as Realists); WILLIAM W. FISHER III, MORTON J. HORWITZ, & THOMAS A. REED, AMERICAN LEGAL REALISM xiv (1993) (same). 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).

6 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 realist movement. That group includes Louis Brandeis, Roscoe Pound, John Dewey, Benjamin Cardozo, Arthur Corbin, Lon Fuller, and Felix Frankfurter. HORWITZ, TRANSFORMATION, supra note 1 at 182-84, 314-19.
This commonality centered his theoretical insights of legal realism and functionalism, as well as his theories of constitutional interpretation and legal development. His position in the Harvard Business School also influenced his view of legal development. Isaacs’ writings, while conscious of history, were also practical in their content. The framework that allows a conciliation of the many facets of his scholarship is CLR. CLR allows for the wedding of critical legal realism to conservative political theory.

As a CLR thinker, Isaacs 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 mediated 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 knowledge of common and civil law informed his understanding of Jewish law. An analysis of the influence of Jewish law to his personal development as a legal scholar will be examined in order to fully understand Isaacs’ work and views of law and legal development. Information about Isaacs’ personal approach to life and the role of law in it can be drawn from accounts written by family members, valuable but scattered discussions in non-legal books, and in various archival collections.

---


9 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),
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, tort, constitutional, and arbitration law. Part III 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 LRM and modern legal theory, and the merging of the Jewish legal tradition and legal realism into a unified theory of legal development (cycle theory). Part IV explores the relationship between Isaacs’ form of realism with Jewish law and the LRM. 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 and Part VI examine two important themes in Isaacs’ CLR—the unconstitutionality of New Deal legislation and his theory of legal reasoning. Ultimately, Isaacs’ 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 BIOGRAPHICAL 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

---


10 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 9th, 2008) (notes on file with the authors). See also Isaacs, Nathan in 9 ENCYCLOPEDIA JUDAICA 42 (1972); Myles L. Mace, Nathan Isaacs, 16 BULL. BUS. HISTORICAL SOC’Y 19 (1942).
which he inherited.” However, Isaacs’ beliefs were immensely influenced by being the product of a unique Nineteenth century Midwestern family that held fast to Jewish Orthodoxy. Before arriving in America, the Isaacs family lived in the town of Libawa which was located in the borderland between Lithuania and Germany. Isaacs’ paternal grandfather, Schachne Isaacs, was “known as a ‘fire-eater,’ eternally vigilant in the observance of orthodoxy and against innovation.” In 1853 Schachne immigrated to Cincinnati Ohio. Cincinnati was the home of Rabbi Isaac M. Wise, the father of the American Jewish Reform movement, which Schachne fervently opposed. When Schachne was presented with Wise’s radically reformed prayer book, he publicly burned the prayer book in a stove and excommunicated Wise. Isaacs’ maternal grandfather, Aaron Zvi Friedman, immigrated to America in 1848 and became a prominent ritual slaughterer in New York City. Friedman’s daughter Rachel and Schachne Isaacs’s son Abraham married and had eleven children, including Nathan Isaacs.

The Isaacs family was highly respected for their accomplishments, character, and loyalty to traditional Judaism. Their retention of a punctilious religious observance after three generations in

11 Adolph S. Oko, Nathan Isaacs, pg. 1 (February 22, 1942) (ASO Papers, MS 14, AJA, supra note 9, 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 9, 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 9, Box 8, File 2).

12 Elcanan Isaacs, MEN OF SPIRIT, supra note 7, at 575.

13 Id.

14 Id.


17 Klein, Seventh Son, supra note 7, 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).

18 Elcanan Isaacs, supra note 7, at 577-578.

America was particularly remarkable. The Isaacs household valued intellectual accomplishments more than material success. Nathan’s brother Raphael attested that in their family “scholarship was considered the highest aim of a successful life” because proper knowledge of the Torah (the “Law”) required unending study of the comprehensive religious law that related to most areas of life. The Isaacs children did not feel oppressed by the burdens of ritual because they experienced it as a natural fact of life. At the same time, dogma, as opposed to religious law, was rarely discussed in the house. The Isaacs children felt they had “a considerable amount of freedom in the application of the religious laws to changing conditions.” 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 his belief in its ability to respond to modern times. As an adult, he sought to discover intellectual justifications for Jewish ritual observance. Influenced by his secular studies, Isaacs’ understanding of his religion eventually became significantly different from anything he had been taught as a child. Despite his development of a more pragmatic view of Judaism, he remained religiously observant even after achieving professional success.

---

20 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 7, at 592.
21 Raphael Isaacs, SELF-PORTRAITS, supra note 7, at 84. Nathan, who was six years older than Raphael, served as Raphael’s teacher. See id., at 86-7.
22 “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 7, at 85.
23 Id. at 87. The Isaacs clan did not always feel bound by community practices. In keeping with his minimalist Lithuanian–Jewish heritage, Abraham Isaacs detested longwinded performances by Cantors that sacrificed the meaning of the Hebrew words of the prayers in favor of catchy tunes. Accordingly, Abraham 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. KLEIN, Seventh Son, supra note 7, at 73.
24 Elcanan Isaacs, MEN OF SPIRIT, supra note 7, at 592.
25 See infra Part III, Subsection 3 and Part IV, Subsection 1 (discussing Isaacs’ view of Biblical and Jewish law).
26 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.”). Nathan Isaacs’ siblings were remarkably successful. KLEIN, Seventh Son, supra note 7, at 73. Four of the siblings were included in Who’s Who in America and eight were admitted into the Phi Beta Kappa Sociey. Elcanan Isaacs, MEN OF SPIRIT, supra note 7, at 578. Aaron, the oldest son, became a businessman. KLEIN, Seventh Son, supra note 7, 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 7 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. Neshas 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 and taught at American University. See “Contributors” in MEN OF THE SPIRIT 573, 592, supra note 7. Moses Legis was an Assistant Professor at
Isaacs excelled in his studies. His mind has been described as “the ideal scholar’s tool.”

Isaacs’ dual law and economics degrees helped him develop an interdisciplinary view of business and law. After a few years of private law practice, Isaacs began his teaching career at Cincinnati Law School. Cincinnati Law School possessed a library that included an extensive collection of legal history materials. It was here that he was first exposed to European legal historians including Frederic William Maitland, Frederick Pollock, and Paul Vinogradoff. 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. Through this study he concluded that the Jewish Reform movement, as

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 his own insurance business in New York City. Id.

27 Elcanan Isaacs, MEN OF SPIRIT, supra note 7, at 578 (quoting Freiberg, Nathan Isaacs In Cambridge pg. 6 (NI Papers, HC, supra note 9, Box 3)).

28 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, supra note 9, Letters to Nathan Isaacs). 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 9, Box 8, File 2).

29 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 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 Christopher C. Langdell. They would help the school adopt Langdell’s case method approach to law study.

30 Elcanan Isaacs, MEN OF SPIRIT, supra note 7, 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 Pollack’s casebook. See Letter from Nathan Isaacs to Adolph S. Oko (June 8, 1936) (ASO Papers, MS 14, AJA, supra note 9, 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 9, 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 9, File 3). Dean Rogers’ address at the building dedication might also have 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.


32 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).
well as American commercial law, had become overly doctrinaire and insensitive to historical experience.  

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. He took classes taught by Roscoe Pound, Joseph H. Beale, and legal historian Eugene Wambaugh. Isaacs would develop his realist insights under the tutelage of two diametrically opposed legal scholars—Beale and Pound. 

Pound, although part of the “old guard,” is 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 to Harvard 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 in the previous year publicly pushed for a quota system for admissions of Jewish students. It was not known publicly that Dean Donham of the Harvard Business School had been a leading advocate of the quota system. Nonetheless, with the support of Dean Pound of the law school and Dean Donham, President Lowell, after initially ignoring the request, gave Isaacs a permanent position. It seems that Donham’s prejudice did not prevent him 

---

33 “[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 9, Box 8, File 2).  
34 See NI Class Notes, HLSL, supra note 9 (collection consists of class notes on administrative law, equity, conflict of laws, and Roman law, given by various members of the faculty, including Pound, Beale, and Francis B. Sayre).  
35 MORTON & PHYLLIS KELLER, MAKING HARVARD MODERN: THE RISE OF AMERICA’S UNIVERSITY 47-48 (2001). Despite an official rejection of the plan by a faculty committee, anti-Jewish quota restrictions were covertly put in place by 1926. Id. at 48; RITTERBAND & WECHSLER, supra note 8, at 114. The faculty committee that rejected the quota proposition included Isaacs’ friend and brilliant historian of Jewish philosophy, Harry Wolfson. Id., 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 9, Box 8, File 2).  
36 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. SYNNOTT, supra, at 86-87. Donham had worked on the subcommittee on Statistics, which developed an intricate method to identify Jews and which later was used in the covert exclusion of Jews. Id., at 93, 107. 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 HARVARD, YALE, AND PRINCETON 96 (2005).  
37 Though Wolfson told Isaacs that Donham had been a leader of those supporting the quota on the faculty
from recognizing the worth of Isaacs’ scholarship on the intersection of business and law. After only a single year of teaching at Harvard, Isaacs in 1924 became one of the very few publicly self-identified Jewish members of the tenured faculty at Harvard University.

II. ISAACS’ CONTRIBUTIONS TO AMERICAN LAW

The contributions made by Isaacs most cited to the present come from numerous areas of law. His 1917 Yale Law journal article *Standardizing of Contracts* 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’ 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.” Isaacs’ early defense of tort strict liability was rooted in the same contextual viewpoint that spurred his contracts scholarship. His 1927 Harvard Law Review article *Two Views of Commercial Arbitration* provides a framework for arbitration models still debated today. One model cast the arbitrator in the role of judge; the other view’s the arbitrator as agent. The rest of this Part will briefly examine Isaacs’ contributions to these areas of law.

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 9, Box 8, File 2).

38 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 7, at 593.

39 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.


1. Law of Contracts

Isaacs developed a cyclical theory of the standardization of contracts that took issue with the widely accepted assessment of Nineteenth century scholar Henry Sumner Maine\textsuperscript{44} that legal development moves in a linear fashion from status-based to contract-based legal relationships.\textsuperscript{45} Instead, Isaacs argued that over the course of time contract law had repeatedly cycled back and forth between the broader categories of “individualized relations” in which the law places great weight upon the subjective will of the parties to the alternative extreme of “standardized relations” in which the law imposes contracts based upon the status of the parties irrespective of attempts to contract out of that status.\textsuperscript{46} He also believed that the eras of individualized relations were associated with an expansive equitable approach to legal interpretation and that the periods of standardized relations were associated with codification and literalistic judicial interpretation.\textsuperscript{47} Isaacs’ cycle theory was heavily influenced by his study of Jewish law.\textsuperscript{48} He felt that the social needs of the Twentieth Century required a return to the creation of legal relationships based on status.\textsuperscript{49}

Duncan Kennedy groups Isaacs with Roscoe Pound and Morris Cohen for their use of an analytical methodology which seeks to place specific areas or issues of law within the context of underlying interests and principles.\textsuperscript{50} 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 that predominate in a particular area should be used to explain the

\textsuperscript{44} Maine famously asserted that “we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.” HENRY SUMNER MAINE, ANCIENT LAW 126, 128, 168-9 (Beacon Edition 1963) (1861) (emphasis in original).

\textsuperscript{45} Isaacs, Standardizing Contracts, supra note 4, 34-39.

\textsuperscript{46} Id., at 39.

\textsuperscript{47} Isaacs, Law of Change, supra note 4, at 757, n.61 (suggesting that that the progress from status to contract is a “mark of commentatorial periods rather than a continuous factor in the history of law” and noting the growing use in statutes (\textit{circa} 1917) of the phrase ‘any provision in any contract to the contrary notwithstanding’) (dash omitted).


\textsuperscript{49} Isaacs, Standardizing Contracts, supra note 4, at 46-47.

\textsuperscript{50} 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, supra note 4, at 40-41 (emphasis added)).
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.\textsuperscript{51}

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.”\textsuperscript{52} Isaacs not only placed the standardization of contract, and more generally, the unification of contract law, in an historical context, but also challenged 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.\textsuperscript{53}

It was in Isaacs’ Standardizing of Contracts article that the term “standard” was first applied to contracts.\textsuperscript{54} He challenged the inability of contract law to adequately deal with standard form contracts within a unitary view of contracts.\textsuperscript{55} The conundrum of standard form contracts as a different category of contracts with the need for specialized rules remains the center of debate to the present. Isaacs noted that standard form contracting was not a pure exercise of the freedom of contract that underpinned the will theory and private autonomy principle of classical contract law.\textsuperscript{56} The “problem” posed by standard form contracting to classical contract theory was the strained application of the consent principle to

\textsuperscript{51}Id.

\textsuperscript{52}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) (quoting Isaacs, Standardizing Contracts, supra note 4, at 40).

\textsuperscript{53}This is the system that Germany has taken in the most recent revision of their Commercial Code (BGH). See B. MARKESTINIS, H. UNBERATH & A. JOHNSTON, THE GERMAN LAW OF CONTRACT (2006) (reviews Germany’s 2002 Revised Civil Code).

\textsuperscript{54}Professor Snell traces scholarly concern for adhesion contracts to the work of Isaacs: “[I]sacs 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 4, at 47).

\textsuperscript{55}See FISHER, ET AL., supra note 5, at 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).

\textsuperscript{56}Professor Weisbrod more recently argued that Standardizing of Contracts demonstrated 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.” Weisbrod, Way We Live, supra note 52, at 49.
boilerplate or standard terms.\textsuperscript{57}

Classical contract theory was embedded in the two cornerstone documents of Isaacs’ time which were both authored by Samuel Williston—the 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 been made for ourselves if the various points had been called to our attention.”\textsuperscript{58} We see here the notion of what is now called the hypothetical bargain.\textsuperscript{59} 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 produced. 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. Llewellyn would later use this approach to infuse the rules of the Uniform Commercial Code (UCC) with a recognition of the contextual nature of contracts and 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 meaning 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 . . .”\textsuperscript{60} These tenets of contextual interpretation would later be incorporated into the UCC. 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.\textsuperscript{61} 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 law principle is one such

\textsuperscript{57} “The contractual view focuses on individual autonomy in a way that denies much reality in the world.” \textit{Id.}
\textsuperscript{58} NI Papers, BLHC, HBS, \textit{supra} note 9, Box 2, File: “Speeches, 1924-1941.”
\textsuperscript{60} NI Papers, BLHC, HBS, \textit{supra} note 9, Box 3, File: “Business Law,”
\textsuperscript{61} Kennedy, \textit{supra} note 50, at 120.
adjustment. The development of the implied duty of good faith is another example.

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.” After Standardizing of Contracts, contract theory has failed to properly adjust 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 is 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 role of 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. This analysis lead Isaacs to criticize the Lochner era courts’ hostility towards minimum wage legislation. Labor legislation, for him, was a form of standardizing employment relations necessary “to remove [employees] from the control of the accident of power in individual bargaining.” Professor Bridwell notes that Standardizing Contracts drew the important “distinction between positive and negative freedom.” Isaacs advanced the idea that freedom of contract was not by itself a surrogate for personal liberty. Instead, freedom of contract was susceptible

---

62 See UCC §2-302.
64 Isaacs, Standardizing Contracts, supra note 4, at 39.
65 A recent case-coding project showed that the lack of “strong” consent weighed heavily on courts application of the doctrine of unconscionability. This finding demonstrates the importance of finding meaningful consent even to a doctrine largely premised upon concerns of substantive fairness. 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).
66 Id., at 40.
67 Lochner v. New York, 198 U.S. 45 (1905) (holding that the "right to free contract" was implicit in the due process clause).
68 Isaacs, Standardizing Contracts, supra note 4, at 47. See Lyman Johnson, Book Review, 92 COLUM. L. REV. 2215, 2239-40 (1992) (citing Standardizing Contracts and explaining the important role status continues to play in modern law).
70 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 Bridwell, supra note 69, at 1519, n.28 (2003) (quoting Nathan Isaacs, Standardizing Contracts, supra note 4, at 47).
to abuse by contracting parties of superior bargaining power. 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. This reordering would transform standard contracts from being solely industry-generated to 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.” This is an example of what the later Realists would call the illusion of the public-private distinction. The Critical Legal Studies Movement (CLS) would use this argument to support the thesis that the liberal legal order was built upon layers of contradiction. 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. Over time, 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 providing the means for the creation of novel types of relationships and the law

---


73 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).
infusing them with status-based qualities.\textsuperscript{74} 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 UCC. The importance of trade usage and business custom in the UCC’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. The role of general principles in legal evolution will be more fully explored in Part VI’s coverage of legal reasoning.

2. Tort Law

Much as he contested the inexorable march from status to contract, Isaacs also contested the claim that civilization had linearly 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 an unconstitutional imposition of liability without proving fault.\textsuperscript{75} 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.\textsuperscript{76} Isaacs, as realist and observer of social context, recognized that the rise of industrial society necessitated the recognition of other grounds of liability, such as 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.\textsuperscript{77} 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.\textsuperscript{78}

\textsuperscript{74} Morris Cohen would adopt this insight of the quasi-status, quasi-contract track of legal development in his often cited \textit{The Basis of Contract}. Morris R. Cohen, \textit{The Basis of Contract Law}, 46 \textsc{Harv. L. Rev.} 553, 558, 560-64 & 587 (1933).
\textsuperscript{75} Nathan Isaacs, Legal History Lecture, pg. 8 (January 15, 1923) (NI Papers, BLHC, HBS, \textit{supra} note 9, Box 1, File: “Legal History, 1922-1923). 
\textsuperscript{76} See Isaacs, \textit{Fault and Liability, supra} note 4, at 976.
\textsuperscript{77} HORWITZ, \textit{Transformation, supra} note 1, 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”). 
\textsuperscript{78} See Isaacs, \textit{Fault and Liability, supra} note 4; Nathan Isaacs, \textit{Quasi-Delict in Anglo-American Law}, 31 \textsc{Yale L. J.} 571 (1922). \textit{See Edwin M. Borchard, Introduction to The PROGRESS OF CONTINENTAL LAW IN THE
Isaacs saw that strict liability was needed to police culpable conduct independent of individual culpability. This development came to pass with the acceptance of strict products liability.

Isaacs insisted that the variation in law between negligence and strict liability 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.”

3. Constitutional Law

The cycle theory had a powerful influence on Isaacs’ 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 held the Fourteenth Amendment protected substantive economic rights. Isaacs’ criticism of the *Lochner* era Court was grounded in his belief that the Constitution was, in essence, a “code.” He derided the Court for having turned “to literalism and to fictions” in the interpretation of that code and claimed that “much of the vaunted Constitutional Law” of the Nineteenth century “was the merest word-study” in which words were stretched beyond their normal meanings. For example, legal fictions were employed to preserve the Electoral College and to create federal jurisdiction over corporations. In the aftermath of the vast expansion of the federal government’s power during World War I, Isaacs argued that the Supreme Court had stretched the words “interstate
commerce” in the Constitution “until they almost burst.”\textsuperscript{83} Yet, even legal fictions have their limits: “It is easier to read a current economic concept into the Constitution than to read it out when it ceases to be current.”\textsuperscript{84} While acknowledging that the Founders did not anticipate modern conditions, Isaacs boldly pronounced that “we are entering just now after one hundred and fifty years 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.”\textsuperscript{85} 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 understood that the greatest legal battles of his day were “being fought over statutory collisions with the principle of freedom of contract.”\textsuperscript{86} One of the purposes of Isaacs’ groundbreaking analysis of the history of contracts and torts\textsuperscript{87} was to reveal the unhistorical nature of the \textit{Lochner} era Court’s opposition to interfering with the freedom of contract, or in the imposition of strict liability.\textsuperscript{88} Isaacs showed that the Founding Fathers and John Marshals’ understanding of contract law was very different from that of the \textit{Lochner} Court.\textsuperscript{89} 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.”\textsuperscript{90} In the end, Isaacs’ cycle theory of legal development molded his views on contract and tort law, as well as constitutional law. As discussed above, Isaacs did not think, as the influential Maine had, that civilization inexorably progressed “from status to contract.”\textsuperscript{91} Minimum wage legislation, maximum work hour legislation, and collective bargaining of labor contracts were perhaps the most significant examples of retreats from absolute

\textsuperscript{83} Nathan Isaacs, History Lecture, pg. 8 (December 4, 1922) (NI Papers, BLHC, HBS, \textit{supra} note 9, Box 1, File: Legal History Lecture, 27 October 1922).
\textsuperscript{84} Isaacs, \textit{Securities Act, supra} note 4, at 220.
\textsuperscript{85} Nathan Isaacs, History Lecture, pg. 2 (January 8, 1923) (NI Papers, BLHC, HBS, \textit{supra} note 9, Box 1, File: Lecture on Legal History, 8 January 1923).
\textsuperscript{86} Isaacs, \textit{Standardizing Contracts, supra} note 4, at 38 n.17.
\textsuperscript{87} \textit{Infra} nn.101-105 & accompanying text.
\textsuperscript{88} FISHER, ET AL., \textit{supra} note 5, at 79.
\textsuperscript{89} Nathan Isaacs, \textit{John Marshall on Contracts}, 7 V.A. L. REV.413 (1921).
\textsuperscript{90} 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, \textit{supra} note 9, Box 1, File: “Lecture on legal history, 5 October 1922).
\textsuperscript{91} MAINE, \textit{supra} note 44; Nathan Isaacs, “Appendix Technique of Legal Research”, pg 12-13 (NI Papers, BLHC, HBS, \textit{supra} note 9, Box 2, File: Unpublished, Alphabetically, n.d. 4/4) (hereinafter “Isaacs, \textit{Appendix Technique}”).
freedom of contract. While Isaacs thought, in the 1910s and 1920s, that governmental regulation in status-based relationships (employment) was warranted, he was a critic of later New Deal legislation as unconstitutionally anti-business. Part V will examine Isaacs’ critique of the New Deal.

4. Two Views of Arbitration

Perhaps prompted by 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. Isaacs refers to the former model as the “legalistic view” and the later as the “realistic view.” Isaacs feared that adoption of the legalistic view would make arbitration litigation-like and would leave arbitration bereft of most of its benefits as a unique means of dispute resolution. He argued that parties should opt towards treating the arbitrator as an agent of the parties.

---

92 Isaacs, Standardizing Contracts, supra note 4, at 46-47.
93 “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Federal Arbitration Act, 9 U.S.C. § 2 (1925).
96 Isaacs, Two Views, supra note 4, at 937-938. Seventy years later, a scholar would note that:

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.
Thomas J. Stipanowich, Punitive Damages and the Consumerization of Arbitration, 92 NW. U.L. REV. 1, 5
instead of as a substitute judge. Professor Schmitz notes that Isaacs “emphasized that judicial review of awards would foster legalistic, ‘trial-like’ arbitration complete with formal procedure, records and opinions.”

Isaacs’ argument, made only shortly after the passage of the Federal Arbitration Act in 1925, against a broad right of judicial review of arbitration decisions, has largely been accepted.

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 CLR and Isaacs’ cycle theory of legal development, both of which were significantly influenced by Jewish law.

III. CONSERVATIVE LEGAL REALISM AND THE JEWISH LEGAL TRADITION

Isaacs’ insights were not cloaked in theoretical nomenclature and his vein of CLR was not as sexy as the more radical insights of Llewellyn and Frank. Theoretical or not, radical or not, his insights into the actual working out of law in a 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 being foundational in disparate areas of law such as contracts, sales, arbitration, torts, and trust law. Isaacs’ position as a proto-realist informs the intellectual offerings of other proto-Realists like Pound, Corbin, Hale, and Hohfeld, as well as the Realists of the 1930s, including Karl Llewellyn and Morris and Felix Cohen. Isaacs focus on the functionality of law remains an important part of legal

(1997) (emphasis added) (citing Isaacs, Two Views, supra note 4, at 929).

97 Id. at 940-941. 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.” Letter from Wesley Sturges to Nathan Isaacs (Nov. 24, 1930) (NI Papers, BLHC, HBS, supra note 9, Box 2 File: “Correspondence, Re: Articles and Books, 1930).

98 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 4, at 934-35). Professor Schmitz acknowledges the prophetic nature of Isaacs commentary: “His concerns remain true today.” Id.


100 See Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 277 (1995) (holding that the FAA applies to all contracts irrespective of whether the parties contemplated engaging interstate commerce) (1995). In recognition of his scholarship, the American Arbitration Association invited Isaacs to become a member of its Board of Directors. Letter from Lucius Eastman to Nathan Isaacs (Feb. 22, 1940) (NI Papers, BLHC, HBS, supra note 9, Box 1, File Correspondence; 1915-1940).

101 Professor Horwitz labeled Isaacs as an “original and penetrating torts-contracts scholar.” HORWITZ, TRANSFORMATION, supra note 1, at 183.

102 Llewellyn, Some Realism, supra note 5.

103 JEROME FRANK, LAW AND THE MODERN MIND (1930).
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. 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.

1. 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. 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. 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’ Ph.D. in economics, and immersion into legal history provided a

104 But see Robert Gordon, Critical Legal Histories, 36 STAN. L. REV. 57 (1984) (criticizing the idea that law
is functional).
105 Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L. J. 16
(1913) (hereinafter “Hohfeld, Fundamental I”); Hohfeld, Fundamental Legal Conceptions as Applied in Judicial
Reasoning, 26 YALE L. J. 710 (1917) (hereinafter “Hohfeld, Fundamental II”).
106 See Isaacs, Standardizing Contracts, supra note 4, at 39, n.19 (Isaacs “gratefully” adopted Hohfeld’s eight
fundamental legal conceptions). Duncan Kennedy has suggested that the search by Isaacs and like minded figures
for the governing functional interest of a legal relation was “very similar to the principles of classical legal
thought, or similar at least in that the trick is to find a governing interest for a domain and then implement it.”
Kennedy, supra note 50, at 120.
107 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
108 See FISHER, et al., supra note 5; WILLIAM TWINNING, KARL LLEWELLYN AND THE REALIST MOVEMENT
(1935) (attacking formalist legal logic but also calling for the assessment of “conflicting human values”). 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 103 (radical criticisms of the
judicial decision making).
knowledge base for his broad contextual view of law and the importance of an interdisciplinary approach to law study. Isaacs’ CLR will be more fully explored in the next Part.

2. Conservative Legal Realism and Modern Legal Theory

This CLR strain of legal realism plays a major role in modern legal theory. The connection between legal realism and various schools of legal thought, such as CLS, law and society, and LAE, has been well documented elsewhere. 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 LRM and its intellectual descendents.

Professor Horwitz has argued that the LAE movements’ general alignment with political conservatism lacks precedent from within the original legal realist tradition. One of the forerunners of legal realism, Roscoe Pound, became a conservative, and was criticized by the Realists of the 1930s for not going far enough with his realist insights. However, 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.” Isaacs embodied a brand of conservative realism present 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 realism that embraced the moral and political valence of social science and the recognition of the socially contingent nature of law. In the end, CLR

109 See, e.g., 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.

110 See HORWITZ, TRANSFORMATION, supra note 1, at 269-271.


112 See e.g., HALL, POUND & LLEWELLYN, supra note 5, at 283 (“the acuity of Pound’s intellectual vision faltered”).

recognizes the contingent nature of law, but insists that such contingency is limited by moral, political, and cultural values that are 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. Horwitz argues that the social science embraced by the Realists was value laden and intertwined with a progressive political ideology that is incompatible with LAE’s embrace of a purportedly value free economic social science. The thesis here is that Isaacs’ strain of CLR is more aligned with modern LAE than with the generally held view of 1930’s legal realism. Horwitz may be right regarding the linkage between radical legal realism and CLS, but his argument loses weight when comparing CLR to CLS.

Richard Posner has chastised legal realism for its liberalism, irresponsibility, and its “naive enthusiasm for government.” 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.” Posner’s more recently espoused theory of pragmatism is fully informed by legal realism. Posner echoes the Realists’ pragmatic commitment to social science when he decries that contemporary law places “too much emphasis on authority, certitude, rhetoric, and tradition, too little on consequences and on social-scientific techniques for measuring consequences.” Isaacs’ functionalist CLR and Posner’s pragmatic LAE both offer a pro-business and conservative social vision

114 HORWITZ, TRANSFORMATION, supra note 1, 270.
115 Id.
116 This linkage has been recently challenged. WOUTER DE BEEN, LEGAL REALISM REGAINED: SAVING REALISM FROM CRITICAL ACCLAIM (2008).
117 RICHARD A. POSNER, OVERCOMING LAW 393 (1995) (hereinafter “POSNER, OVERCOMING LAW”) (advocating the “fusion” of liberalism, pragmatism, and economics in law application). 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). 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”); DE BEEN, supra note 116, at 190 (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.
118 POSNER, OVERCOMING LAW, supra note 117, at 393. See DE BEEN, supra note 116, at 191 (suggesting that Posner could be considered a modern advocate of an “empirical approach inspired by Legal Realism”).
119 Samuel Flaks, recollection of lecture by Professor Jon Hanson, Harvard (Nov. 2006).
of the American legal order. 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.

3. 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. He investigated Jewish law with the same scholarly approach in which he studied other legal traditions and his conclusions sometimes radically differed from traditional understandings. Simultaneously, Isaacs’ academic contributions to secular legal thought were influenced by his study of Jewish law. Though Isaacs was notably reticent about his innermost convictions, his conservatism reflected his lifestyle and intellectual commitments as an observant Jew.

Jewish law served as a paradigm for other systems of law in Isaacs’ mind. Adolph Oko noted that Isaacs was both “fascinated by universal legal ideals” and his belief that Jewish law was a living, growing law. Isaacs did not see the Jewish people or their law as sui generis. He recognized that

---

121 See DE BEEN, supra note 116, 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)).

122 Isaacs’ friend Oko, himself a political liberal, believed that Isaacs “was no rebel in politics. He was a conservative. Not that he chose to stand in the zone of caution. His temper was not that of a reformer, but he was ready to consider every change upon its merits.” Adolph S. Oko, Nathan Isaacs, pg. 2 (February 22, 1942) (ASO Papers, MS 14, AJA, supra note 9, Box 9, File 12).

123 Oko eulogized Isaacs as “a convinced Jew, and orthodox.” However, Oko quickly added that Isaacs was “no ‘fundamentalist,’ biblical or rabbinic” and that in “Nathan Isaacs intelligence and orthodoxy met in a new embrace.” Adolph S. Oko, Nathan Isaacs, unpublished manuscript of memorial address pg.1 (February 22, 1942) (ASO Papers, MS 14, AJA, supra note 9, Box 9, File 12).

124 One of his assistants recounted that Isaacs “was always happy to discuss problems of religious history, theory and practice; but concerning his religious feelings and convictions he was always silent. Here his feelings were too deep, too personal for conversation.” Albert M. Freiberg, Nathan Isaacs In Cambridge, pg. 9 (NI Papers, HC, supra note 9, Box 3 (emphasis in the original).

125 Adolph S. Oko, “Nathan Isaacs” [Hebrew Teachers College Nathan Isaacs Memorial Service], pg. 1
the tension between tradition and innovation in Jewish Law was a characteristic of all legal systems. He also believed that aspects of this tension had been transmitted from Jewish Law to civil and common-law legal systems. Isaacs laid out his unified understanding of Jewish law and secular law in a two part article: ‘The Law’ and the Law of Change. In that article, he sketches the cycles in the history of Jewish law and extrapolates them to secular law. His knowledge of the Jewish and civil law legal systems enabled him to place Anglo-American law in a broader context. He claimed that the Jewish and Anglo-American legal systems shared many essential attributes. 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 that correlate to the different but recurring stages of how lawyers approach their legal system.

This cycle theory of jurisprudence was a direct outgrowth of the internal debate between Reform and Orthodox Jews over Jewish law. Isaacs conceived his 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 factions was “not a question of change versus no change; it is a question of the mode and manner of development.” He used insights taken from the historical development of Jewish law to inform his theory of legal development and stressed that in the realm of Jewish law legal doctrines were mere tools that should be adapted as dictated by the moral goals of the law. It is striking that just as in the realm of commercial
law, Isaacs advocated for a functional approach in Jewish law while simultaneously insisting upon the integrity of its traditional common law process.

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. His worldview saw law as serving a relatively fixed moral end, even when the law changes to respond to different historical conditions. He thought that Jewish law evolved to serve human needs, but also that it contained timeless principles.\(^\text{133}\) Isaacs was inspired by a Talmudic story about the equitable Rabbi Hillel (c. 110BC-10CE) and his more conservative contemporary Rabbi Shammai.\(^\text{134}\) A gentile offered to convert to Judaism if Shammai would teach him the whole Law (Torah) on one foot. An indignant Shammai chased the scoffer away. When the sarcastic gentile presented the same offer to Hillel, he replied "Do not do unto others what is hateful to you. That is the whole Torah. The rest is the commentary. Go and learn it."\(^\text{135}\)

Because of his belief in the dynamic nature of law, Isaacs rejected the “simple account of Revelation” that the entire Torah was given \textit{de novo} by God at Mt. Sinai.\(^\text{136}\) 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.”\(^\text{137}\) At the turn of the 20\textsuperscript{th} 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.\(^\text{138}\) Isaacs believed that such a presumption was untenable. He asserted that such a juristic theory encourages a revisionist view of history in relation to the interpretation of canonical texts. The framing of legal change though the prism of progressive evolution biases the interpreter toward a revisionist view of history in order to confirm the legal-ethical progression.\(^\text{139}\) At the same time, Isaacs also

---

\(^{133}\) Isaacs’ saw Jewish law as “practical guidance in the art of right living.” Nathan Isaacs, \textit{The Great Preamble—A Rereading of Genesis}, in \textit{THE JEWISH LIBRARY, SECOND SERIES} 232 (Leo Jung, ed. 1930) (hereinafter “Isaacs, \textit{Great Preamble}”).  

\(^{134}\) See Isaacs, \textit{Standardizing Contracts}, \textit{supra} note 4, at 752.  

\(^{135}\) B. Shabbat, 31(a).  

\(^{136}\) Isaacs, \textit{Jewish Law in the Modern World}, \textit{supra} note 126, at 262.  


\(^{139}\) Isaacs 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
rejected a fundamentalist understanding of the Bible. Biblical fundamentalists believe that God’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.\textsuperscript{140} In rejecting “Jewish fundamentalism,” he argued that the Pentateuch was primarily a Law Book in which the non-legal parts are auxiliary.\textsuperscript{141} He insisted that there was a zealously observant Judaism that still embraced the Law’s dynamic nature.

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 more significant divisions between observant and non-observant Jews.\textsuperscript{142} Isaacs’ belief in a variant of Modern Orthodox or Conservative Judaism allowed him to formulate a universal theory of legal cycles and to search for new principles to anchor evolving law.\textsuperscript{143} He blended the negative critique of the legal order associated with the legal Realists with a positive theory of legal development.

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 learning on which a simplistic history of English law could be written that entirely conformed with the original hypothesis.” Id., at 951. See also Isaacs, Common Law of the Bible, supra note 137 (claiming that a knowledge of the development of unwritten law takes the sting out of turn of the 20th century Higher Biblical Criticism).

\textsuperscript{140} ALAN DERSHOWITZ, RIGHTS FROM WRONGS 111-112 (2004).

\textsuperscript{141} Isaacs, Great Preamble, supra note 133, at 232-233.

\textsuperscript{142} Nathan Isaacs, Jewish Sects and Factions in America, 5 THE JEWISH FORUM 8, 16 (Jan. 1922).

\textsuperscript{143} 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.

RITTERBAND & WECHSLER, supra note 8, at 147. 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. Louis Hurwich, Professor Nathan Isaacs, THE JEWISH ADVOCATE, Feb. 20, 1942 (NI Papers, AJHS, supra note 9, Box 2, Scrapbook) (Acting Dean of Hebrew Teachers College and Superintendent Bureau of Jewish Education recounting the theme of a series of Hebrew lectures Isaacs had delivered at Boston’s Hebrew Teachers College).
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 retaining 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. Isaacs relied upon the legal realist toolset to both facilitate business transactions and to defend Judaism.144 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.145 The first section reviews the role of Jewish law in Isaacs’ functional analysis. He saw in the Jewish case law or responsa146 evidence of the dynamic nature of a 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.147 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 a 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.

1. Isaacs’ Functionalism and Jewish Law

Isaacs’ insight that Jewish law was a dynamic, living law that was responsive to moral and ethical concerns forged his commitment to a functional law. He applied this living law concept to the

144 Letter from Isaacs [Jurist] to Oko [the Bookman], pg. 3, X in the series, No Date (ASO Papers, MS 14, AJA, supra note 9, Box 8, File 3).
145 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.” Cohen, supra note 108, at 822. He also remarked that “if the functionalists are correct, the meaning of a definition is found in its consequences.” Id. at 838.
146 Responsa refers to the equivalent of Jewish case law.
147 See supra Part III, subpart 3.
evolution of law in general, and more specifically to the American legal system.\textsuperscript{148} He argued that Jewish life continually developed the \textit{Halakah}\textsuperscript{149} through application to novel situations.\textsuperscript{150} The Talmud was used creatively in practice to deal with novel issues. Isaacs used a Jewish legal concept, \textit{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 in preparation to eating it, he who takes it from him is wicked.\textsuperscript{151} In this example, Jewish tenants came to respect “each other’s tenant-right, or \textit{hazakah}.”\textsuperscript{152} Isaacs saw this as an example of Jewish law acting in the spirit of Pound’s social engineering vision of law.\textsuperscript{153} Isaacs’ research on the practice of \textit{hazakah} was cited in briefs supporting the constitutionality of rent-control laws in the New York Court of Appeals and the U.S. Supreme Court.\textsuperscript{154}

\textsuperscript{148} 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 accused him of falling into the trap of believing that current Jewish law had become fixed. Isaacs, \textit{Jewish Law in the Modern World}, supra note 126, at 263-4.

\textsuperscript{149} \textit{Halakah} is the traditional Hebrew term for Jewish law, literally meaning the “path.”

\textsuperscript{150} 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 9, Box 8, File 2).

\textsuperscript{151} B. Kiddushin 59a; Tur Hoshen Mishpat 237:1; Shulhan Arukh Hoshen Mishpat 237:1.

\textsuperscript{152} \textit{Jewish Law in the Modern World, supra} note 126, at 263-4.

\textsuperscript{153} For Isaacs, “The Law” was “put to the test in this as in hundreds of other details in the Middle Ages.” \textit{Id.}, at 264.

\textsuperscript{154} 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. \textit{Jewish Law in the Modern World, supra} note 126. 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. \textit{See} Edgar A. Levy Leasing Co. Inc. v. Siegal, 230 N.Y. 634 (1921); \textit{affirming} 192 APP. Div. 482 (1920); 810 West End Avenue v. Stern, 230 N.Y. 652 (1920), \textit{reversing} 194 APP. Div. 482 (1920). These historical precedents, or at least the British ones, were effective. 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 154. In the companion case to \textit{Siegal}, Justice Holmes stressed in the majority opinion that “[t]he preference given to the tenant in possession…is traditional in English law.” \textit{Block} v. Hirsh, 256 U.S. 135, 157. However, it was probably was more important for Holmes that the rent law purported to be a temporary emergency measure. \textit{Block,} 256 U.S. at 158. In contrast, Holmes would shortly thereafter void as taking the permanent Pennsylvania statute which made it illegal for coal companies to cause the subsidence of public buildings, streets, or any private home. \textit{See} Pennsylvania Coal
Isaacs’ belief in the ability of the common law to adjust itself to meet modern problems was borne out of his study of Jewish responsa. He saw the adaptive qualities of Jewish law as evidence of the Halakah as a living institution.” 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 both descriptively and prescriptively. 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.

2. Isaacs’ Functionalism and the Legal Realist Movement

Isaacs’ research methodology, influenced by his position at Harvard Business School, focused on how law adapted in response to changing social and economic problems. He helped develop a functional approach to law study. Carol Weisbrod noted that his work centered on a non-formalistic, business-oriented vision of the law. Commercial law, in Isaacs’ scholarship, should be organized through the perspective of a businessperson’s problem-solving orientation. 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.

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.” As a disciple of Dean Pound, he studied Co. v. Mahon, 260 U.S. 393 (1922).

---

155 Letter from Nathan Isaacs to Adolph S. Oko (February 5, 1923) (ASO Papers, MS 14, AJA, supra note 9, Box 8, File 2).
156 Isaacs, Influence of Judaism on Western Law, supra note 127, at 406. 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 9, Box 9, File 12). The bulk of the Nathan Isaacs Library is now in the possession of the Chaim Berlin Yeshiva in Brooklyn, NY.
158 Weisbrod, Way We Live, supra note 52, at 786, n.40.
159 For Isaacs, the “law is made for such realities as business and not business for the law.” Nathan Isaacs, Book Review, 25 ILL. L. REV. 114, 116 (1930) (reviewing WILLIAM H. SPENCER, A TEXTBOOK ON LAW AND BUSINESS (1929) (hereinafter “Isaacs, Reviewing SPENCER”)).
161 Nathan Isaacs, The Teaching of Law in Collegiate Schools of Business, 28 J. POL. OF ECON. 113, 123 (1920). He was referring to Roscoe Pound’s sociological school. Isaacs declared that “the leadership of the
the works Eugen Ehrlich.\textsuperscript{162} Ehrlich’s concept of “living law,” sometimes characterized as the divergence between book law and the law in practice influenced Isaacs’ thinking on law creation and development. In 1924, Isaacs suggested that the Harvard Law School faculty participate in a Seminar of Living Law in order to study this dichotomy and to develop a functionalist method of law study.\textsuperscript{163}

Another influential scholar who helped develop the functional approach was Herman Oliphant of Columbia Law School.\textsuperscript{164} 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 first used.\textsuperscript{165} In 1927, the American Federation of Labor recruited Oliphant to help write a landmark Brandeis brief in opposition to yellow dog contracts that forbid employees from joining a union. The Interborough Rapid Transit Company required employees to sign such a contract as a precondition to employment.\textsuperscript{166} Oliphant solicited Isaacs to provide his expertise in standardized contracts in the drafting of the brief.\textsuperscript{167} In his response, Isaacs noted that the “marked disparity in bargaining power” was the key factor in the labor-management 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 (1910)).

\textsuperscript{162} Isaacs, Business Security, supra note 161, at 213 n.15 (citing Eugen Ehrlich, The Sociology of Law, 36 Harv. L. Rev. 129, 130 (1922) (Nathan Isaacs trans.).

\textsuperscript{163} This 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. 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 9, 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 infra nn. 188-191 and accompanying text.


\textsuperscript{165} 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.” Isaacs, Reviewing Spencer, supra note 159, at 115. See also Isaacs, Merchant and His Law, supra note 4, at 529, 556 (Oliphant had independently already begun experimenting with the functional method in Chicago).

\textsuperscript{166} Interborough Rapid Transit Co. v. Green, 131 Misc. 682, 227 N.Y.S. 258 (1928) (trial court refused to enforce yellow-dog contract).

\textsuperscript{167} 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 9, Box 1, File: Correspondence, 1927).
relationship. The Brandeis brief became a storehouse of information and arguments that were relied upon by the drafters of the Norris-LaGuardia Act. The functional approach argued, in this instance, for the necessity of collective bargaining agreements in order to equalize the disparity of bargaining power. Realism would become associated with the idea that power plays a key role not only in private contracting, but also in the choice to regulate or not regulate the private sphere.

In 1921, Isaacs co-authored a casebook entitled The Law in Business Problems. This was the first casebook to attempt a functional, rather than doctrinal, treatment of commercial law. The casebook asked questions such as “[d]oes the law help or hinder or otherwise affect the process of engaging in business?” It juxtaposed topics unrelated doctrinally, but that were functionally alternative tools to deal with business problems. Isaacs aimed to discover the law in business practice, as well as in the cases and statutes. Karl Llewellyn praised Isaacs’ book for emphasizing business facts and

---

168 Id. [Oliphant], INTERBOROUGH RAPID TRANSIT COMPANY AGAINST WILLIAM GREEN, ET AL., BRIEF FOR DEFENDANTS 314 (1928) (both courts and legislatures had displayed a “well marked recognition of disparity in bargaining power” between employers and employees).


171 See Donnell, supra note 160, at 271.

172 SCHAUB & ISAACS, supra note 170, at vi.

173 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.

174 “The Place of Business Law in the Curriculum of the School of Business,” in The Ronald Forum, pg. 17 (NI Papers, BLHC, HBS, supra note 9, 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).
how law served as a tool for different businesses. Isaacs’ book preceded the realist books and approaches of Wesley A. Sturges, *Credit Transactions* and Carrol Shanks and William O. Douglas, *Management of Business Units*. The commonality of these functional-realist books was the supplementation of “legal principles with life situations.” The radical-conservative realist distinction was already apparent. Grant Gilmore characterized the Sturges book as nihilistic. In contrast, Isaacs’ constructive approach prefigured the eventual rationalization and unification of commercial law. A good example of Isaacs’ pro-business functionalism is his evaluation of the business trust. The common law’s concept of a business trust developed in the Massachusetts courts between 1910 and 1925. In 1929, Isaacs discussed the business trust in *Trusteeship in Modern Business* and noted that “foremost among the advantages of trusteeship over the standardized legal devices is its flexibility” due to its contractual nature. He also observed that unlike contact or corporate law the trust concept is needed in areas where relationships could not be governed solely by the contract construct. As Isaacs predicted, the Twentieth century saw the expansion of trust and fiduciary duty law. The commonality and

---

175 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). 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.” *Id.* at 304. However, Llewellyn thought that the book was ill-suited for the business student. Isaacs sought to change Llewellyn’s opinion, but to no avail. Letter from Karl Llewellyn to Nathan Isaacs (September 5, 1923) (NI Papers, MS 184, AJA, supra note 9, Letters to Nathan Isaacs).


177 KALMAN, supra note 1, at 80.

178 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).

179 *Id.* at 83-86 (describing Llewellyn’s role in drafting the UCC). See Nathan Isaacs, *The Economic Advantages and Disadvantages of the Various Methods of Selling Goods on Credit*, 8 CORNELL L. Q. 199 (1923) (originally a paper Isaacs 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 161, at 209 (contrasting the “gap between the law in the books and the law in action as applied to realizing on securities in business”).


182 *Id.* at 1052.

183 *Id.* at 1060-61.

differences between Isaacs’ CLR and mainstream (radical) realism is discussed in the next three subsections.

3. Need for Interdisciplinary Approach

Isaacs aspired to empirically study the extent of the changes in the use of contracts through time. Such a study would provide a basis for understanding legal change and its relationship to economic, political, and social life. He predicted that such research would serve “as a corrective for an unhistorical use of history” by those who thought that “each [legal] institution had a single original purpose.” He saw empirical research as a means to uncover the underlying 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. At the same time, 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 his CLR was premised on the belief in the importance of a body of evolving, but stable principles. Under CLR, the centrality of doctrine and rules persists, but is integrated into a multi-disciplinary approach which views law as being intertwined with society.

(“law of fiduciary duties continues to retain its elasticity”). Scholars have only recently begun to follow Isaacs’ footsteps by reassessing the pervasive role of the trust organizational form in modern businesses. Robert H. Sitkoff, Trust as Uncorporation: A Research Agenda, 2005 U. ILL. REV. 31, 32 (citing Isaacs, Trusteeship, supra note 4, for the proposition that trusts played an important role in the organization of business in the first part of the twentieth century and the advantage provided by the flexibility of trusts). See John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 YALE L.J. 165 (1997); Steven L. Schwarcz, Commercial Trusts as Business Organizations: Unraveling the Mystery, 58 BUS. LAW. 559, 568-69 (2003).


186 Id., at pg. 15.

187 Apparently Isaacs was conflicted over whether the functional approach, which was being strongly advocated for at Columbia Law School, was pedagogically appropriate for law students, as opposed to business students. Isaacs doubted the wisdom of abandoning the study of doctrine in law-schools. 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.” Nathan Isaacs, Book Review, 44 HARV. L. REV. 880, 881 (1931). Moreover, if the functional approach appeared “more up to date it does so at the expense of making it to the same extent ephemeral.” Nathan Isaacs, Book Review, 42 HARV. L. REV. 587, 594 (1929), (reviewing E.F. ALBERTSWORTH, SELECTED CASES AND OTHER AUTHORITIES ON INDUSTRIAL LAW (1928)). Cf. WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 160 (1974) ((Douglas, who taught at Columbia and then at Yale, 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.”).
Isaacs sought to create an institutional framework for the inter-disciplinary study of business and law. In 1932, he wrote to William O. Douglas, then a Professor at Yale Law School, and suggested an interchange of students between Harvard Business School and Yale Law School. Eventually, they decided on a joint dual-degree program. This attempt to integrate the two schools’ course of study was the institutional embodiment of the realists into the Realists’ ambition to “cross-fertilize” between academic disciplines. The program was cancelled in 1938 due to lack of student interest. Nonetheless, Isaacs was able to demonstrate his CLR approach in a Yale Law School seminar course in which he traced the “economic repercussions” of the Pre-World War II neutrality laws. The course studied the “business realities of particular” legal relations during such an extraordinary event.

4. Isaacs Relationship with Llewellynian Thought

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 reliance on the custom of businesspersons in writing the UCC. Isaacs, and Llewellyn, believed that business executives and lawyers should act as caretakers of business and society, and that commercial law should evolve from commercial practice.

The first evidence of Isaacs’ influence on Llewellyn is when Llewellyn, as editor-in-chief of the Yale Law Journal, wrote to Isaacs that “[t]here have been few strictly legal articles published in the past few years as interesting and stimulating” as Standardizing of Contracts. Professor Rakoff notes 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

---

189 KALMAN, supra note 1, at 136.
190 Id.
191 Letter from Nathan Isaacs to John F. Meck, Jr., Yale Law School (October 26, 1938) (NI Papers, BLHC, HBS, supra note 9, 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 10.
with standardized institutions to serve as the background for their own particular arrangements: the sale, the pledge, the mortgage, and so forth.” Notably, Llewellyn was inspired by Isaacs’ extended horse-trader analogy in his path breaking articles *Across Sales On Horseback* and *First Struggle to Unhorse Sales*. Earlier, 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. Llewellyn in *What Price Contract?*, and Isaacs earlier in *Standardizing Contracts* and *Business and Legal Security,* had analyzed the possible ill effects of law on commerce. Both focused on the antiquated rules relating to title, risk of loss, and warranty law found in the Uniform Sales Act.

In promoting the need to modernize the law of sales though codification, Isaacs used the notion of the *delumping* of concepts later mastered by Llewellyn. 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.” Llewellyn and Isaacs applied the de-lumping concept to the area of risk of loss.

---


199 Isaacs, *Standardizing Contracts*


201 In the area of warranty, Llewellyn argued that the “lumping” of title with ownership and risk was necessary for long distance sales. See Llewellyn, *Warranty of Quality I*, supra note 196 and Karl N. Llewellyn, *On Warranty of Quality and Society: II*, 36 Colum. L. Rev. 699 (1936).

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 disconnected. Once again, Isaacs can be seen as the predecessor to Llewellyn on the notion of de-lumping.203

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.”204 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 judge or lawyer. Llewellyn attempted to externalize those reason in writing the UCC. The advantage of externalizing the reason for a rule is that it 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 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.”205 Llewellyn sought to rectify this shortcoming in the drafting of the UCC.

The Llewellynian notion of transaction-types was previously used by Isaacs to critique the First Restatement of Contracts as an “idealized composite.”206 In that critique, he provided a description of the relationship of transaction-types to contract law. He asserted that the Restatement failed to grapple with the deviations from general contract law to more specific contract types, such as construction, real estate, employment, and insurance contracts.207 Isaacs had fully articulated the concept of transaction-types that Llewellyn would later popularize.208 Llewellyn’s reference to old “paper rules”209 that were

(2002).

203 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, Sale in Legal Theory, supra note 202, at 652).

204 NI Papers, BLHC, HBS, supra note 9, Box 1, File: Legal History, 1922-23.

205 Id.


207 Id. at 427.

208 Llewellyn’s notion of situation-sense is exhibited in Isaacs’ critique of the First Restatement as “dangerously forgetful of the peculiarities of specific situations.” Compare, KARL LLEWELLYN, THE COMMON
devoid of meaning is similar to what Isaacs refers to as “dry rules.”

Despite his many intellectual debts to Isaacs, Llewellyn failed to list him as a member of the realist movement in either his famous 1931 polemic Some Realism or in his expanded unpublished list of Realists. This omission by Llewellyn, the leading realist, could be understood as an implicit exclusion of Isaacs from the movement. Professor Horwitz interprets the omission of Isaacs and others from the list as an indication that Llewellyn did not fully grasp the full extent of the realist movement. Relying upon these omissions, Professor Horwitz casts doubt on the accuracy of Llewellyn’s claim in Some Realism that the movement was politically neutral. That argument supports Professor Horwitz’s larger point that realism was not value neutral and had a leftist political valence. This article argues that there were both radical and conservative Realists, and that Isaacs was a major conservative realist.

Llewellyn probably did not intend to exclude Isaacs’ contribution to the realist movement. His list was framed in the context of Pound’s criticism of the legal Realists. It contained the names of scholars that Llewellyn thought Pound would have to agree were Realists. Llewellyn’s notes show that he considered many more scholars as legal Realists. He constructed his list for the Pound rebuttal with the assistance of legal philosopher Felix Cohen; Cohen added to a list of works that exhibited common jurisprudential ground as Isaacs’ article on legal reasoning. That article, in Cohen’s estimation,

LAW TRADITION (1960). For an excellent explanation of Llewellynian nomenclature, such as type-facts, transaction-types, and situation sense, see also 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); Larry A. DiMatteo, Reason and Context: A Dual Track Theory of Interpretation, 109 Penn St. L. Rev. 397 (2004) (reviewing tenets of Llewellynian thought) and NI Papers, BLHC, HBS, supra note 9, Box 1, File: Lectures, Courses, Notes, Miscellaneous, 1920’s. Isaacs’ critiqued the Restatement as “dangerously forgetful of the peculiarities of specific situations.” Id

Llewellyn, Some Realism, supra note 5, at 1237.

Isaacs, Restatements, supra note 206, at 428.

Llewellyn, Some Realism, supra note 5; Hull, Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927-1931, 1987 WIS. L. REV. 921 (1987); HULL, POUND AND LLEWELLYN, supra note 5, at 343-346; HORWITZ, TRANSFORMATION, supra note 1, at 183 (Llewellyn failed to list “the original and penetrating torts-contracts scholar Nathan Isaacs”).

HORWITZ, TRANSFORMATION, supra note 1, at 183.

Llewellyn, Some Realism, supra note 5, at 1254 (“When the matter of program in the normative aspect is raised, the answer is: there is none.”); HORWITZ, TRANSFORMATION, supra note 1, at 182.

HORWITZ, TRANSFORMATION, supra note 1, at 170.

Llewellyn noted the attention that Isaacs had paid to the lawyer as a business counselor. Llewellyn, Some Realism, supra note 5, at 1246, n.61 (citing Isaacs, The Promoter: A Legislative Problem, 38 HARV. L. REV. 887 (1925) (hereinafter “Isaacs, Promoter”)).

FISHER, ET AL., supra note 5, at 50-51.

Id., at 51; Llewellyn, Some Realism, supra note 5, at 1233-1256.

Cohen’s contributions were separately noted in Llewellyn’s notes. Llewellyn, Some Realism, supra note 5, at 1234, n. 94.
was an enlightened exposition of traditional doctrinal analysis that challenged the mathematically precise process advanced by the legal formalist.\textsuperscript{219} Perhaps, Cohen viewed Isaacs as a less formal legal formalist or a quasi-realist in that he remained faithful to the formalist belief of the central place of legal principles, while being critical of the formalistic application of those principles. In \textit{Some Realism}, Llewellyn praised Isaacs’ “more recent work” as representative of the realist critique of the incongruence between the rules courts applied and the operative facts found in the cases.\textsuperscript{220} Whether or not Llewellyn considered Isaacs a full-fledged member of the LRM, or whether he thought that Isaacs’ conservative realism was of a different kind than mainstream legal realism, it is indisputable that Isaacs’ scholarship was influential in Llewellyn’s construction of the UCC.

5. Questioning Hohfeld’s Re-conceptualization of Law

Another possible, though ultimately unpersuasive, explanation of Llewellyn’s omission of Isaacs from his lists of Realists is the friction resulting from Isaacs’ sometimes rough intellectual treatment of Llewellyn’s revered mentor at Yale, Wesley Newcomb Hohfeld.\textsuperscript{221} Isaacs initially had praised Hohfeld’s work on \textit{Fundamental Legal Conceptions}\textsuperscript{222} and adopted his ideas in \textit{Standardizing of Contracts}.\textsuperscript{223} Subsequently, Hohfeld wrote to Isaacs in appreciation for the “the fresh thinking that you are contributing to some of the great problems of the law.”\textsuperscript{224} However, Isaacs and Hohfeld’s relationship soured. Hohfeld saw no contradiction between the analytical approach that characterized his own work and the Sociological Jurisprudence of Pound.\textsuperscript{225} In one article, Isaacs criticized Hohfeld’s

\textsuperscript{219} Llewellyn, \textit{Some Realism}, supra note 5, at 1236, n. 36 (citing Isaacs, \textit{How Lawyers Think}, supra note 4). See Llewellyn, \textit{Some Realism}, supra note 5, at 1242, n.47 (Cohen called Llewellyn’s attention to Isaacs’s discussion of formal legal devices that were concealing the real business purposes of transactions in Isaacs, \textit{Promoter}, supra note 239 at 890 et seq (1925) and Isaacs, \textit{Business Security}, supra note 174).

\textsuperscript{220} Llewellyn, \textit{Some Realism}, supra note 5, at 1236, n. 36 (citing Isaacs, \textit{Promoter}, supra note 239).

\textsuperscript{221} Llewellyn had this to say in a biographical note: \textquote{[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, \textit{Wesley Newcomb Hohfeld}, 7 \textit{ENCYCLOPEDIA SOC. SCI.} 4000, 302 (1932).

\textsuperscript{222} Hohfeld, \textit{Fundamental I}, supra note 105; Hohfeld, \textit{Fundamental II}, supra note 105.


\textsuperscript{224} Letter from Wesley Newcomb Hohfeld, to Nathan Isaacs (November 21, 1917) (NI Papers, BLHC, HBS, supra note 9, 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.”).

division of legal scholarship into several different yet, complimentary fields by pointing out how these diverse methods contradicted each other.\textsuperscript{226} In contrast, Isaacs argued that in different periods of the cycle of legal history, different schools of legal interpretation come to the fore.\textsuperscript{227} Latter, Isaacs referred to Hohfeld’s speech to the Association of American Law Schools, in which he called for the simultaneous analysis of the different styles of legal study, as evidence that Hohfeld himself did not think his analytical system sufficed for all purposes.\textsuperscript{228} He did praise Hohfeld’s “meticulous insistence on the careful use of certain words.”\textsuperscript{229} He 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.”\textsuperscript{230} Still, ardent followers of Hohfeld\textsuperscript{231} thought Isaacs’ review of a posthumous collection of Hohfeld’s essays to be unfair.\textsuperscript{232} In contrast, 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 solely focus on refining law’s conceptualism.\textsuperscript{233}

V. ISAACS’ OPPOSITION TO THE NEW DEAL


\textsuperscript{226} 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, \textit{The Schools of Jurisprudence: Their Places in History and their Present Alignments}, 31 HARV. L. REV. 373, 374 n.7 (1918).

\textsuperscript{227} \textit{Id.} at 375.


\textsuperscript{229} Isaacs, Reviewing Hohfeld, \textit{supra} note 228, at 1041.

\textsuperscript{230} \textit{Id.}, at 1042.

\textsuperscript{231} Dedicated acolytes on the Yale faculty included Arthur Corbin and the realist Walter Wheeler Cook. \textit{See} Arthur Corbin, \textit{Jural Relations and Their Classification}, 30 YALE L.J. 226 (1921); Walter Wheeler Cook, \textit{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).

\textsuperscript{232} Letter from Roger S. Justin, Harvard Law Review Book Review Editor, to Nathan Isaacs, (November 14, 1923) (NI Papers, MS 184, AJA, \textit{supra} note 9, Letters to Nathan Isaacs) (Justin wrote to Isaacs that he had talked with the Managing Editor of the Yale Law Journal, “who is apparently a more ardent Hohfeldian [than Llewellyn], and he had considered your review more or less of a ‘slam’” (bracketed words inserted)).

\textsuperscript{233} Letter from Karl Llewellyn, to Nathan Isaacs (September 5, 1923) (NI Papers, MS 184, AJA, \textit{supra} note 9, Letters to Nathan Isaacs).
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 judges’ ability to make decisions independent of any economic and social prejudices. This appears 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 and their changing application to business.

1. The New Deal as Unconstitutional Impediment to Business

In 1920, Isaacs had argued for increased federal power in order to facilitate the growth of a national economy. He had then dismissed the importance of the Commerce Clause restrictions on federal power. By 1934, though he continued to oppose *Lochner*-era constitutional formalism, he advocated constitutional limits on the federal commerce power because he concluded that the New Deal program was motivated by thoughtless anti-business animus.

In the early 1920s, Isaacs argued that history made greater government regulation of the economy inevitable. For example, he argued that American constitutional law would have to uphold price fixing legislation in order to adapt to changing social conditions.\(^{234}\) In relation to the Interstate Commerce Clause,\(^{235}\) he 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.”\(^{236}\) Isaacs justified the expansion 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.\(^{237}\) 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 fails “to correspond to actualities,” he insisted “we may depend on the ‘law in action’ to deviate from the law of the books [in order] to meet the practical needs of business.”\(^{238}\) Such a divergence would render law less facilitative and relevant to business.

\(^{234}\) Nathan Isaacs, *Revival of the Justum Pretium*, 6 CORNELL L.Q. 381, 400 (1921).
\(^{235}\) Annual Meeting, 16 AM. POL. SCI. REV. 111, 111-112 (1922).
\(^{237}\) *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.
\(^{238}\) *Id.*
In contrast, the New Deal, for Isaacs, represented law as an impediment to business. He thought most New Deal legislation was irrational and violated fundamental legal principles. In Isaacs view, the New Deal of the mid-1930s was class-conscious, pro-labor, and unfairly anti-business.\textsuperscript{239} This attack on New Deal legislation was founded on three 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.\textsuperscript{240} Third, government is “limited in its ability to gather and digest information.”\textsuperscript{241} Regarding the second belief, Isaacs himself attributed the faults of the market to human nature’s tendency to “stock gambling, booms, and depressions.”\textsuperscript{242} This is a rudimentary argument that the rational human actor is a flawed decision-maker. The more recent behavioral law and economics\textsuperscript{243} movement reflects this questioning of the rationality assumption of economics.

The third belief is the efficiency argument that informs modern law and economics. The primary tenet of this belief is that 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.\textsuperscript{244} Conservatives articulated their opposition to the growing New Deal state by claiming


\textsuperscript{241} \textit{Id.}


\textsuperscript{244} Schlesinger, \textit{Coming of the New Deal}, \textit{supra} note 239, at 471. See Nathan Isaacs, “Business Law In Transition,” pg. 4 (NI Papers, BLHC, HBS, \textit{supra} note 9, Box 2, File: Unpublished, Alphabetically, n.d, 1/4
that its policies threatened individual liberty and self-reliance.\textsuperscript{245} Isaacs declared that the most important challenge to the New Deal would come from the self-reliant character of human nature.\textsuperscript{246} He excoriated the administrators of the National Recovery Act as “petty bullies who shook their fists at worried shopkeepers because of anonymous accusations of having violated impossible code provisions.”\textsuperscript{247} More temperedly, Isaacs called attention to the many obstacles faced by administrators, including constitutional and statutory constraints, political and lobbying pressure, and the practical administrative difficulties of conducting business operations as a government agency.\textsuperscript{248}

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.”\textsuperscript{249} But, this was a limited control that had to support one of two objectives—the promotion of business and societal fairness. Under the fairness rationale, Isaacs was willing to support the constitutionality of \textit{state}, as opposed to federal, labor and social welfare legislation.\textsuperscript{250} In the end, his conservative cultural commitment was based on the values of business and “American individualism.”\textsuperscript{251} This conservatism saw conventional business initiative as the only means to bring the Great Depression to an end.

2. Constitutional Interpretation: Realist, Strict, and Isaacs’ Principles

The main premise for Isaacs’ opposition to the Securities Act of 1933 was the constitutional limits of federal power. He believed that because securities were primarily the products of intrastate commerce they were not subject to federal regulation.\textsuperscript{252} He labeled those that supported the Act as “realist” and those who opposed it as “verbalist.”\textsuperscript{253} The realist-verbalist debate over constitutional

\begin{itemize}
\item \textsuperscript{245} SCHLESINGER, COMING OF THE NEW DEAL, \textit{supra} note 229, at 472-473.
\item \textsuperscript{246} Nathan Isaacs, \textit{Government by Bribery}, Address at the Harvard Business School Club of Boston (November 19, 1935) (NI Papers, BLHC, HBS, \textit{supra} note 9, Box 3, File: Speeches, 1935).
\item \textsuperscript{247} Nathan Isaacs, \textit{The NRA Decision}, 13 HARRV. BUS. REV. 393, 394 (1935) (hereinafter Isaacs, \textit{NRA Decision}).
\item \textsuperscript{248} Isaacs, \textit{NRA Decision, supra} note 247, at 404.
\item \textsuperscript{250} Isaacs, \textit{NRA Decision, supra} note 247, at 404.
\item \textsuperscript{251} Nathan Isaacs, Address at Wesleyan University (December 6, 1934) (NI Papers, BLHC, HBS, \textit{supra} note 9, Box 3, File: Speeches, 1934).
\item \textsuperscript{252} Isaacs, \textit{Securities Act, supra} note 4, at 218.
\item \textsuperscript{253} \textit{Id.}, at 220.
\end{itemize}
interpretation was a battle between the “letter that killeth and the spirit that giveth life.” But, Isaacs neither believed in a literal interpretation of the Constitution nor did he accept the indeterminacy posed by the view that the Constitution was a body of “general and vague terms.” Isaacs embraced 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. The social engineering approach of the Realists reflected a radically dynamic view of the nature of law. Felix Frankfurter had argued that the Supreme Court should merely ascertain “whether there is a legitimate object to be accomplished by any piece of legislation.” Under that view, the Securities Act only needed to satisfy a rational basis test for constitutionality. In contrast, Isaacs argued that rational nexus approach was inadequate to protect important constitutional values. He urged a “compromise” that emphasized a spirit of the law approach, but not one that would 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 were the proper means of adjustment. He acknowledged that America was enduring a crisis which was “a supreme test of adjustability.” To deal with this situation he wanted to formulate principles based on actual developments in constitutional law. These principles would then be used to test the constitutionality of federal legislation. A principled approach would allow for flexibility in application, but would prevent the indeterminacy represented by the radical, anti-literal approach. He rejected the radical realist view that all that is reasonable, desirable, or necessary is constitutional. Isaacs’ saw the principled approach as a more proper form of realist interpretation, rather than a strict interpretation that 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

254 Id.
255 Id.
256 Id., at 225.
257 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 9, Box # 2, Scrapbook).
258 Felix Frankfurter, Hours of Labor and Realism of Constitutional Law, 29 HARV. L. REV. 353 (1916).
259 Isaacs, The Securities Act, supra note 4, 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 9, Box 2, File: New Deal-Cutler Lectures, 1934 (Un. Of Rochester)).
260 Id. at pg. 15.
261 Id., at pg. 11.
make law, but insisted that they were disciplined by impersonal principles.\textsuperscript{262}

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.\textsuperscript{263} When this occurred the interpreter needed to see whether the intended course of action (statute) violated “an essential principle” of the Constitution.\textsuperscript{264} Charles Black, decades later, similarly rejected “the purported explication or exegesis” of the constitutional text “as a directive of action.”\textsuperscript{265} 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.\textsuperscript{266} According to his cycle theory, a constitutional amendment was the only legitimate means to begin a new cycle of codification.

3. Reconciliation

Weisbrod has noted that throughout Isaacs’ “work there is a descriptive or analytic rather than prescriptive quality.”\textsuperscript{267} That descriptive mindset allowed Isaacs to eventually adapt his thought to the legal landscape created by the New Deal.\textsuperscript{268} He 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

\begin{itemize}
\item \textsuperscript{262} KALMAN, supra note 1, at 231.
\item \textsuperscript{263} Id. at 221.
\item \textsuperscript{264} Id.
\item \textsuperscript{265} 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”).
\item \textsuperscript{266} Id.
\item \textsuperscript{267} Weisbrod, supra note 52, at 786, 786 n.44.
\item \textsuperscript{268} 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 (1938). 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 9, Box 3, File: Speeches, 1937) (hereinafter ‘Isaacs, Logics-And Logic’).
\end{itemize}
could not truly be formulated: 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.”269 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 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.”270 He concluded that the control of business is “a social and political matter in which the law can be used and must be used”, but he cautioned that the “law has its limitations.”271 Isaacs adopted Holmes’ view that the law “uses the vocabulary of morals, but its tests are and must be externalized and standardized.”272 Accordingly, he was frustrated by the moralizing tone the regulation of business had taken. He viewed the Robinson-Patman Act of 1935,273 which limited the ability of large retailers and chain-stores to cut retail prices, as anti-competitive.274 Isaacs accepted the pro-regulation verdict of history, but remained strong in the belief that many Depression-era laws were anti-competitive in nature.275

269 Id. at pg. 30.
270 Nathan Isaacs, Barrier Activities and the Courts: A Study in Anti-Competitive Law, 8 LAW & CONTEMPORARY PROB. 382, 390 (1941) (hereinafter “Isaacs, Barrier Activities”).
275 See also Isaacs, Barrier Activities, supra note 270, at 390. He remained a staunch opponent of the Robinson-Patman Act. See Isaacs & Learned, supra note 274; Joel B. Dirlam, Alfred E. Kahn, Price Discrimination in Law and Economics, 11 AM. J. ECON. & SOC. 281, 283 (1952) (citing Isaacs & Learned, supra note 274, for early development of the argument that oligopolies will only be willing to lower prices when they can do so in a discriminatory fashion, and that therefore the banning of vertical price discrimination would defeat the pro-competitive purpose of the law by actually reducing price competition). Isaacs and Learned, without using the terms “horizontal” or “vertical” competition, laid out the distinction which leads contemporary anti-trust law to allow vertical competition: “[T]he important problem is: Who are in competition? Are wholesalers and chain stores in competition? Certainly not directly since the chains do not seek the same customers as the wholesalers, but indirectly the customers of the wholesalers are in competition with the retail units of the chains.”
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. He argued that impending war emergencies called for a “partly voluntary, partly compulsory” revision of the business practices of distributors. He admitted to his audience that the weakening of constitutional safeguards in an emergency was dangerous for democracy, but it was necessary to take that risk. 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. He contrasted American populism to the absolutism of non-democratic regimes. He claimed that both legislation and “custom which ripens into law” were core democratic institutions.

VI. ISAACS AND LEGAL REASONING

Isaacs’ general CLR approach was informed and shaped by his understanding of legal reasoning. Indeed, all of his doctrinal work was shaped by his stance on this issue. He 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. He argued that “power [was] quite different from knowledge which comes from legal training and from contact with legal traditions.” He relied on a similar pragmatism to defend the study of the humanities, social

---


277 Id., at 2.

278 Id. See also Letter from Louis Johnson, Assistant Secretary of War, to Nathan Isaacs (March 2, 1940) (NI Papers, MS 184, AJA, supra note 9, Letters to Nathan Isaacs) (“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, supra note 9, Letters to Nathan Isaacs) (discussing “the seminar being held at the Littauer Center of Public Administration”).

279 Isaacs, War Emergencies, supra note 376, at 2.

280 Id. at 3.

281 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.”).
sciences, and especially, Jewish law, which was also the product of a learned legal tradition. He merged this non-formalist but conservative theory of legal reasoning with a thoughtful and measured conservative political, economic, and religious philosophy.

Isaacs’ CLR approach provided a moderate alternative to the more radical Realists’ criticism of legal reasoning. The conservative version of realist legal reasoning that he adopted has been described as an “organic theory of rationalism.” This description of CLR is neither formalistic nor fully realist in its approach to legal reasoning. An organic theory of rationalism assumes that hard cases cannot be decided by pure deduction, but should be decided by reference to underlying ‘principles’ and ‘equities.’ This version of legal realism, espoused by Dean Pound, Justice Cardozo, Isaacs, and the later Llewellyn, recognizes the role of discretion and law creation in judicial reasoning. But, it is a limited discretion and a creationism in which underlying principles, sometimes unarticulated, regulate the creative activity.

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. His familiarity with the evolution of Jewish law likely attracted him to modified natural law and Neo-Kantian philosophy. These philosophies 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. Stammler believed in “a

282 Letter from Isaacs [Jurist] to Oko [the Bookman], pg. 3, X in the series, No Date (ASO Papers, MS 14, AJA, supra note 9, Box 8, File 2).
283 Eskridge & Frickey, supra note 2, at xiii.
284 Id.
285 BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921)). Isaacs, who was distantly related to Cardozo and developed a friendly relationship with him. Nathan Isaacs’ aunt Julia Nathan was married to the Benjamin Cardozo’s uncle (a brother of Cardozo’s mother). Wotitzky Interviews, supra note 10 (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, supra note 9, Letters to Nathan Isaacs).
286 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 208.
287 Id.
288 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
natural law with a variable content.” Isaacs’ student 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. He held to the Kantian objectivity of law, but recognized that the substance of that law changed over time.

The task for Isaacs was to reconcile the universality of natural law principles and the incoherency of legal conceptualism—the application of general principles to rapidly changing content. The Pragmatic philosophy of John Dewey, who greatly influenced Isaacs and other Realists, believed that the task of reconciliation was impossible because the admission of the changing or dynamic nature of law was “fatal to everything which the doctrine” of natural law was supposed to mean. Indeed, this coherency argument was the basis of Isaacs’ attack on the natural law approach of the Lochner court. However, although Isaacs thought the Court’s version of natural law theory was simplistic, he believed that a successful mediation between the conflicting elements of general principles and changing content was possible. 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 understand Jewish Law. B.S. Jackson, “The concept of religious law in Judaism,” in Vol. 2 AUFTSTIEG UND NIEDERGANG DER ROMISCHEN WELT 33, 37-38 (1979).

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)).

Miscellaneous Class Notes, no page number (NI Class Notes 1919-1920, HLSL, supra note 9, Box 1, File: Misc.) (discussing Stammer’s call for “general” rather than “universal” legal principles). See also Miscellaneous Class Notes, pg. 273 (NI Class Notes, HLSL, supra note 9, Box 1, File: Misc.) (notes discussing the “Revival of Natural Law in France”).

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 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 289, 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).


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, Influence of Judaism on Western Law, supra note 127, at 385.
depend heavily on intuition and precedents, while others may require a more mathematical rigor. Isaacs believed that this type of pragmatic reasoning had deep roots in the common law.

In order to better understand and improve the application of principles to novel cases, 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.”

His contextual view of the law, later championed by Llewellyn in the UCC, 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.

In an analysis of the fact-law distinction, Isaacs offered a critical view of the distinction between issues of fact and issues of law. Isaacs was one of the first American scholars to criticize the generally accepted distinction between questions of law and questions of fact as an artificial concept that disguised judicial discretion. This false distinction was seized upon later by the Critical Legal Studies Movement. 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 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.’

Isaacs’ pragmatic view allowed for a great deal of flexibility in legal reasoning. It also prevented

---

294 Isaacs, Logics-And Logic, supra note 268, at 2.
295 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.” Isaacs, How Lawyers Think, supra note 4, at 556.
296 Id. at 557. See Isaacs, Logics-And Logic, supra note 268, at pg. 2, at pg. 2 (citing Prohibitions del Roy 12 Co. Rep. 63, 65 (1616) (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).
297 Isaacs, Appendix Technique, supra note 91, at 19.
299 “The delusive simplicity of the distinction between questions of law and questions of fact has been found a will-of-the-wisp by travelers approaching it from several directions.” Isaacs, Law and Facts, supra note 4, at 1.
him form falling into the traps which ensnared legal formalists who claimed that there was limited judicial discretion in finding the one right answer to questions of law application.\textsuperscript{301} 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 part of the reason he was so critical of the New Deal in that he saw it as preempting judicial discretion in favor of administrative discretion.\textsuperscript{302} He was disturbed with the courts increased deference to administrative law decisions. He felt it was the obligation of courts to review what is now considered to be administrative fact-finding.\textsuperscript{303} 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.\textsuperscript{304} The concern here was that administrators would be unstrained by the rule of law.\textsuperscript{305} Isaacs’ view was based on his respect for the judge-made common law and the \textit{responsa} of Jewish law. His conservatism was on the losing side as “progressives” implemented the New Deal and ushered in the modern administrative state.\textsuperscript{306} Isaacs’ distrust of the administrative state can be seen at work in LAE. Like his mentor, Roscoe Pound, Isaacs turned against the political program and the more extreme jurisprudential implications of the LRM. In the end, Isaacs

\textsuperscript{301} 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.” Isaacs, \textit{Limits of Judicial Discretion}, \textit{supra} note 4, at 352. For example, Isaacs asserts that “during periods of growth by equity, there is a great deal of discretion by judges.” \textit{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 87, 87 n.62 (2002).

\textsuperscript{302} Nathan Isaacs, \textit{Judicial Review of Administrative Findings}, 30 YALE L. J. 781, 797 (1921) (asking the loaded rhetorical question of “whether the country experiencing a general reaction against leaving important questions of property to the uncontrolled discretion of non-judicial bodies?”) (hereinafter, “Isaacs, \textit{Judicial Review”}); see also Letter from Nathan Isaacs to B.M. Siegal (December 6, 1921) (NI Papers, BLHC, HBS, \textit{supra} note 9, File: Correspondence Regarding Articles and Books, 1920-1921).

\textsuperscript{303} Isaacs, \textit{Judicial Review}, \textit{supra} note 302, at 790.


\textsuperscript{305} \textit{Id.}

\textsuperscript{306} See generally, Schiller, \textit{supra} note 239, at 402. Forbath, \textit{supra} note 304, at 1141-1142; Nathan Isaacs, Book Review, 30 YALE L.J. 776, 778 (1921) (reviewing \textit{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).
remained true to his idealistic faith in the common law process.

CONCLUSION

Nathan Isaacs was an influential early 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 the 1930s. Despite his legal realist approach to law study, Isaacs remained an economic and jurisprudential conservative. This seeming incongruence is reconcilable through his adherence to 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.307

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 cycle theory of legal history. He attempted to resolve the tension inherent in his jurisprudence by recognizing the provisional nature of law, 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.

The Conservative Legal Realism or realistic natural law theory advanced by Isaacs was a blend of insights associated with legal formalism and its antithesis—radical legal realism. In his brand of realism, law in action was somewhere between a body of principles (conceptualism) and the “mass of indefinable discretion” of radical legal realism.308 Isaacs’ contextualist approach to legal reasoning allowed for the certainty of principle and the ability to adjust principles to novel fact patterns. 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 a correct answer to legal questions. Isaacs’ insights on the tension between conceptualism and realism—his belief in the efficiency of the common law

307 Isaacs’ last research assistant provides an avenue into both the studied ambiguity and 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, at 6 (NI Papers, HC, supra note 9, Box 3 (unpublished preface to a planned book collection of Isaacs’ essays) (emphasis in the original)).

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.