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WHAT SHOULD A "JEWISH" LAW SCHOOL BE?

The establishment and existence of a Jewish state has served as stimulus for renewed attention to the study and application of the halakhah as a source of jurisprudence and law outside the framework of the ritual and religious. Wholly aside from "political" considerations involved, the years since the establishment of the State have witnessed, at least in the academic world, considerable ferment in the study of traditional Jewish law sources through the prism of the needs of modern jurisprudence. The extensive writings of Israel Supreme Court Justice Zilberg, the work and publications of the Institute for Hebrew Law at Hebrew University, and the establishment at Bar-Ilan University of a law school under religious auspices, are all some of the evidence of this attention.

Most recently, a charter was granted in New York State for the establishment of a law school as part of Touro College, and plans are under consideration for the Jewish component to be given to that institution's curriculum. The press has carried a report of a pending application for a similar law school charter on behalf of Yeshiva University.

There are thus evident two simultaneous trends. On the one hand, there is a renewed interest in the fitting of halakhic materials into contemporary jurisprudence and legal molds. On the other hand, there is starting to develop Jewish intellectual and academic involvement in the general field of law and legal study. Both trends are likely to continue — each for different reasons. Jointly, however, they pose the question as to what is or should be a "Jewish law school." It is to that question that some preliminary suggested answers are outlined here.

The Jewish legal tradition may well be the oldest *living* legal tradition in the Western world. Jews without religious orientation or background are usually unaware of the continued development of this tradition beyond the Bible, Mishna and Talmud — right into our own day. Some educational efforts have begun in the State of Israel to make the general Jewish public aware of the continued growth and activity of Jewish law institutions and development throughout the Middle Ages and into modern times. The general view in this country among most Jews, however, would probably be unaware of most of this development beyond the Bible.

As the possessor of such an ancient tradition, Jews — particularly those with an awareness and sensitivity to their tradition— should encourage and foster the intense study of law, not merely as "trade," but as scholarship. While individual Jewish legal scholars have achieved considerable preeminence in their field, there remains a need for institutional expression to this traditional tie with the law and its scholarship.

Moreover, much of the Jewish contribution to the Western civilization of which it partakes has been drawn from legal sources. Thus, a major Jewish contribution to the development of legal method is the device of the legal fiction. On a more sophisticated level, the Jewish concept of legal support for ethical behavior (while "bullied" perhaps by Christian writers and thought) has found its way into our society.

Perhaps it might fairly be said, then, that Jewish contributions to Western civilization were essentially legal in origin and nature. It is the essence of the cultural pluralism ideal that each group continue to nurture its basic or "natural" contribution to the whole. In such a light, a Jewish law school, in the fullest and richest sense, becomes imperative.

There should be at least two aspects to the Jewish character of a Jewish Law School.

In the first place, there should emerge from Jewish sensitivity to the continuum of legal institutions and traditions, an emphasis on historical legal development in many cultures and ages as the variety of civilization's and human responses to societal problems.

America is still basically a common law country. Legal training, therefore, tends to emphasize common law historical traditions, to the almost total exclusion of alternate, or older, legal systems. Few casebooks or materials in required areas of law cite or discuss sources earlier than the common law, or even more recent American decisions. Where study of other legal systems (civil law, Roman law, or canon law) is offered on a required or elective basis, it too frequently degenerates to a rote analysis of foreign named institutions or functions, without sufficient effort to integrate such foreign methods, institutions, or rules into the body of law otherwise presented to the student.

Our common law and American legal institutions are our response to given societal conflicts or problems. It is illusory to consider our responses as the only possible logical or historical alternatives. Stated another way, one might note that the connection between the Talmudic grappling with a dangerous ox to the present-day debate over no-fault auto insurance may be difficult to trace. It is a logical and historical fact nonetheless.

An emphasis on historical prospective as a unique expression of a Jewish attitude to legal scholarship would not in any way distort the teaching of substantive law in an American law school. Rather, such historical prospectives, if properly used, should heighten the understanding of the existing legal framework and sense of rules. Just as the study of a language other than one's mother tongue can make one sensitive to the nuances of expression, the study of historical alternatives to given legal responses to human problems may sharpen the same sensitivity and understanding in a student of the law.

A second unique function of a Jewish law school is one which may be easier to articulate, but far more difficult to implement in a classroom and teaching framework. It relates to the ethical and moral assumptions and goals which are, or should be, implicit in a legal system.

The retired associate justice of the Israel Supreme Court, Moshe Zilberg, has emphasized in his brief but incisive work, *Kach Darko Shel Ha-Talmud* (*This is the Method of the Talmud*), the uniqueness of Jewish jurisprudence in its insistence

on the inter-relationship of legal and equitable considerations. As he points out, in other legal systems, "law" stands as something to which moral, ethical or "equitable" considerations, presumably derived from other sources, are to be attached, imposed or superimposed. A similar analysis with respect to Roman law as well, in the context of a comparison to Jewish jurisprudence, may be found in Dr. Kahana-Kagan's, *Three Great Systems of Jurisprudence*. Students of the history of the common law will know that it is only relatively recently that separate courts of law and equity were abolished and courts of general jurisdiction required to impose both abstract legal principles and equitable or moral considerations.

In the Jewish view, however, there is no such dichotomy. Nor should there be one. Rather, all legal rules and institutions themselves must be ultimately derived from religious, ethical, and moral considerations. As a result, as pointed out by Justice Zilberg, Jewish legal development has more often stressed obligations and responsibility, rather than rights and claims.

It is not intended to suggest, of course, that the development of common law, or the present teaching of law, is without ethical or moral content. Both the state of the law and its pedagogy, continue to retain considerable remnants of this approach in which the practitioner, as the student, must often be asked to divorce— in a schizophrenic manner — what the law declares to be right and what seems to be subjectively correct.

The defensive posture which religious practices, institutions and outlook have adopted over the past century has had its effect in the development of jurisprudence as well. When a specific religious outlook or position is juxtaposed with an existing legal institution, it will be the civil and existing institution which is considered "the norm," and used as the standard for testing of the religious attitude.

A law school with a unique Jewish orientation would seek to redress this balance. It would seek to impose the tests of ethical and religious standards on the legal institutions and principles which have developed in common law countries or in the jurisdictions of the United States. It would not do so defensively, as if to justify or prove the outlook of religious

institutions. Instead, its approach would be to analyze those principles which are the subject matter under the curriculum from the point of view of ethical, moral, or similar considerations and submit *them* to the test, rather than the reverse.

The two suggested approaches may be illustrated by application to the usual substantive cause subjects included in first-year law school.

Constitutional law is frequently considered a uniquely American subject matter for study. Historically, the development of the doctrine of judicial review and conceptually, the insistence on couching political problems within a legal or "constitutional" setting is uniquely American.

This does not mean to say, however, that there are no constitutional questions in other countries. In the sense that constitutional law connotes a basic set of legal doctrines and institutions for a society, no organized government could function without them. In a broader sense, however, the concepts of constitutional law are basic to any civilized and organized government. Removed from a specific historical or documentary framework, constitutional law may be viewed as an understanding of the relationship of the judicial process and judicial institutions to the remaining institutions of government or of the community in general. The American experience has seen judicial institutions assert their superiority over the political decision making process. Such a decision and the manner in which it operates in practice, may well be subject to the test of ethical outlook. Is judicial review an improper substitution of minority or elitist rule for majority or popular rule? Is it an appropriate safeguard for the tradition of historical institutions? Is it an abandonment of government self-determination by the people involved?

The description of the problem presented makes it self-evident that historical sensitivity to alternate means of resolution of society conflicts about basic political decisions would be equally appropriate. Study of alternate approaches to the assumptions of American constitutional law would not be relegated to separate courses on civil law, Roman law, international law, or comparative law. They would be specifically included in the

very presentation of the underlying problems and their resolution.

Thus, whether courts should or should not involve themselves in "political decisions" is a matter for historical sensitivity and study. Again, in such involvement merely a substitution of rule by a minority (the Court) for the majority (the "political" decision)? Is it appropriate to vest some measure of such authority in the hands of those whom the community deems to be bearers of its historical tradition, rather than in the majority of the moment? Jewish historical jurisprudential experience will shed light on consideration of those questions. Thus, in many historical communities, the selection of those considered as the community leaders was in a sense a democratic and participatory process. Having made that selection, however, the community would often then be substantially subject to the strong domination of the rabbinical authorities thus selected. The posture adopted by Rabbinic community leadership in the "golden age" of Spain in that country (see Baer, *History of the Jews in Christian Spain*) may be a case in point. Other communities and other times can furnish alternate illustrations of the tension between the variety of sources of community control — the historically traditionally oriented one, or the popular contemporaneously generated power.

It should also be noted that the posture of a constitutional lawyer can best be understood by one oriented to the historical Jewish jurisprudence posture. In both instances, a given text must be successively interpreted and reapplied, in the light of available traditional understanding, to a continually changing fact presentation. In both cases, the opportunity for amendment of the basic and underlying staute may be non-existent or cumbersome. A comparative understanding of the manner in which a variety of legal traditions, starting with the Jewish tradition, has responses to these needs, will serve to enhance understanding of those doctrines generally termed constitutional law.

Contract law, in its basic formulation, involves the manner in which individuals may together commit themselves to a joint course of action, usually for business purposes. The existing common law doctrines of consideration, capacity to contract,

offer and acceptance, represent that which may almost be said to be conceptually required by the questions presented. As such, a better understanding of them may well be gained by some historical exploration of alternate methods of dealing with these same problems.

More important, however, are those matters generally subsumed under the study of contracts in which inherent ethical considerations are the most important. Justice Zilberg has already noted the ethical component of such matters as illegal contracts, frustration of contracted intent, or the equitable requirements of "clean hands."

Later developments in Jewish law — after the close of the early Talmudic and Gaonic periods — are particularly relevant here. Jewish merchants, traders, and bankers kept themselves subject to Jewish Courts and law during hundreds of years of Jewish leadership in the European mercantile world. Rabinowitz (Louis Rabinowitz, *Jewish Law*) has suggested that the development of certain basic common law institutions was derived from requirements of the Halakhah. A cursory review of Jewish legal responsa sources selected and presented from the vantage point of modern concerns only confirms the continued Jewish legal involvement with underlying contract conceptual problems which are still with us today. An excellent presentation of such materials has been completed by Judge Jacob Bazak, *Jewish Law — Selected Responsa.* Similarly, the articles on Mishpat Ivri, by Prof. Menahem Elon of the Hebrew University's Institute, prepared for the recently published *Encyclopedia Judaica* are equally informative.

Civil procedure, another basic course, is derived in substantial measure from the nature of the adversary system. Such a system, however, is not the only possible method for the conduct of inquiry intended to define the truth. The inquiring magistrate under the French or civil system may be a more direct descendant of the kind of approach used in Talmudic law. In Jewish law, at least, the danger of an over-zealous magistrate — turned — prosecutor is presumably precluded by the absolute rule against the admissability of self-incriminating confessions. The presentation of this kind of historical devel-

opment, in the light of its ethical components, both in the civil and criminal law settings, might substantially expedite a student's interest and understanding of the subject matter.

In other areas of procedure as well, there are implicit but frequently not articulated, ethical norms and historical alternatives. The broad spectrum of rules of evidence, or of privileged and confidential communications, should be treated not merely as arbitrarily adopted rules. They must be understood in the light of their development beyond contemporary law or even the common law and in light of ethical needs:

Does society require absolute confidentiality of communication between attorney and client? If so, should this apply to entities other than individual persons?

Does the nature of the marital relationship necessarily require confidentiality of communication?

When does a society interest in protection of certain of its members, such as minors, override the protection normally afforded to confidential communications, as in a custody squabble?

Such questions illustrate the potential for greater stress in analysis of the ethical component and the historical development of the privileges or rules for better understanding of contemporary jurisprudence.

Tort law is obviously essential to any organized community. In many instances, our knowledge of ancient legal systems is derived substantially from their tort and criminal components. Yet, in the usual presentation of tort law, the wealth of existing materials drawn from relatively recent sources, the broad scope of the subject matter, and the novelty of concepts to the beginning students, combine to make it impossible to venture beyond the relatively recent common law and its American development. Clearly, other emphasis, with a more historically focused presentation, would be an appropriate expression of Jewish sensitivity to the historic development of legal institutions.

Such an approach would also focus the ethical overtones of the rules of relationship expressed through tort law. The extent to which individuals must, or may, be held accountable for forces under their control, whether humans, inanimate objects,

or abstract conditions, is part of the essence of tort law. Whether it is an ox, a child, a wife, a fire, or an automobile, the principle of responsibility must be the same. Concomitantly, the extent to which society must force the sharing of risks by refusing to impose liability in certain areas is also fraught with ethical overtones in each historical period's response to the questions so posed.

Would purely ethical motivations make every automobile owner absolutely liable for any damage caused by such a potentially dangerous instrumentality? Is the absolute liability imposed under Workmen's Compensation statutes, or once imposed for blasting a more "ethical" response than the Talmud's insistence on rebutable presumptions of safety, or than the current concept of "no fault" damage coverage?

The development of a pedagogic approach which would incorporate some sources of Jewish law, may have a salutary effect on the pedagogy of the Jewish law itself as well. This is obviously not the place for an extended discussion of the contemporary pedagogy of Talmud. It must be noted that an emphasis on the historical analysis approach here suggested may serve to remove the teaching of Jewish law sources — at the very least, in the area of tort law — from the "academic" and "detached" position in which they now stand. Certainly in the United States and substantially in Israel, the teaching of *nezikin* or tort law, is approached through the confines of the social setting of the Talmud's day. The student knows of the rules of liability or proximate cause only in the medium of oxen, roosters, fires or slaves. The creation of an academic setting in which the conceptual continuum from *shor muad* to the *Palsgraf* case may be demonstrated would itself set the tone for more original thinking in the area of Talmud pedagogy — particularly for the junior high school and high school in this country. (A more or less fanciful illustration of the possibilities may be found in an early chapter of Kemelman's, *Friday, the Rabbi Slept Late.*)

The current public debate over no-fault automobile insurance and the still largely unresolved areas of nuclear accident liability make it clear that the resolution of basic concepts of

tort law will remain with us for some time. In such study, an awareness of a broader range of historical response and a sensitivity to the underlying ethical considerations may be the best training for a law student today.

Corporate law study at the initial level first involves the basic concept of the corporation as an artificial personality before the law, independent of its promoters in all ways (i.e., limited liability for these promoters). Does such a legal fiction (the corporation is a "person") promote the general ethical goals of a business community or a society?

On more sophisticated levels of study, corporate law touches matters with ethical components even easier to articulate. Thus, contemporary notions of corporate responsibility to the community in general or to potential investors in particular, or of managerial responsibility to the shareholders, are obviously replete with ethical overtones. The standards of fiduciary or quasi-fiduciary responsibility imposed by case law, or SEC rule-making efforts to impose similar restraints administratively are obviously subject to ethical rule scrutiny, or review.

What may be less apparent is the corporate law study to be derived from the historical sensitivity which has been suggested. Yet, the problems of business community organization which are covered in the study of corporate law are not novel to common law countries or development. The laws of partnership, the mechanics for allocation of risk, the unforseen profit or loss, and the relationship of manager to investor may all be said to be traditional problems.

Historical sensitivity, therefore, would point out those underlying currents of social organization which transcend the accounting rules, the case law, or the SEC regulatory scheme.

Criminal law is a subject in which the need and aptness of both the historic jurisprudential and ethical analysis approaches are most obvious.

The structure of a penal system can be undertaken in an almost infinite variety of ways and the history or jurisprudence offers a variety of such responses. Historical illustrations and perspective may be profitably used to study questions such as the purpose of punishment by imprisonment, the relative pri-

ority of values to be emphasized, the protection of human life, the value assigned to property protection and rights, the "victimless crimes," and the role of capital and other punishment, are still the source for much public debate and consideration to this day.

Similarly, ethical considerations are equally obvious in terms of the treatment of the legal rules surrounding the apprehension of the suspects, fair trial, and the punishment of those found guilty.

In passing, it may be noted that within the context of American constitutional law the attitude of Jewish jurisprudence has recently served as a source for some guidance. Under Jewish law, to a substantial extent self-incriminating criminal testimony may not be accepted as probative. (See Kirshenbaum, *Self-Incrimination in Jewish Law.*) The Jewish attitude has been cited in certain Warren Court decisions on the problem of coerced confessions. (See Norman Lamm, *Faith and Doubt,* Ch. X.)

It is frequently unknown or forgotten that Jewish courts held criminal jurisdictional power in varying measure until the French Revolution and the Emancipation. That historical development is certainly a fertile source for efforts to inter-relate the needs of the criminal law in an increasingly urbanized society with ethical concepts having a religious foundation. Similarly, other societies and communities whose criminal laws are still available to us can serve as alternate models or sources of comparison and analysis in the problem areas of the criminal law.

The judicial treatment of confessions is only one such area of concern or interest. Questions of intent, proof of intent, corroboration, tained evidence, or burden of proof, are all matters in which both historical awareness and ethical sensitivity can serve first as means of analysis, and then as teaching guides.

The *law of property* is similarly amenable to both suggested sources for a unique Jewish approach to the understanding of law.

Ethical considerations are almost obvious. Any rule of property or of property owners must be analyzed in the light of property rights permitted to individual owners, as opposed to

the needs of society in general, the specific community, individuals residing in it or merely passing through. These determinations of necessity always involve far-reaching ethical and moral considerations.

An owner's right to establish a glue factory on his land may be restricted. His right to restrict subsequent owners from transferring the property to Negroes or Jews may be restricted. More currently, his right to use the property in a way which may affect ecological balance may be restricted, or the right to divide and develop land may be subject to regulations.

Such questions, perhaps in a less sophisticated or complex presentation, have always been presented to organized society as soon as a nomadic existence was abandoned. Seldom, however, is there in the teaching process adequate recognition of the possibility of alternate responses to such problems derived from historical sources.

Still further, what in the recent past may have been thought as quaint "academic" theory may now require more intensive discussion and exploration in our developing concepts of property rights. Thus, Biblical law insists on the limited inalienability of property; the Jubilee Year effectively limited property transfer to leasehold interests not exceeding 49 years. Before dismissing such a conceptual limit as "obviously inappropriate" for modern day society, one might well consider the thrust of recent developments in the law of real property in central urban areas. The expansion of the use of leasehold as opposed to fee interest, of grants of development rights as opposed to transfer of absolute ownership, or of exploitation of air rights as opposed to transfer of the traditional interests in property, all point in completely new directions. It would be naive to assert that the Bible alone will serve as outline for the next decade's developments in property law. It would be equally naive to refuse to recognize the richness of Jewish historical sources, starting with the Bible and Halakhah, and continuing to other countries and systems of law, as possible guides to appreciation of our needs in the area of property law, rights, and obligations, and some of the responses to those needs.

It is obviously easier to suggest general outlines than to find

the specific means for presentation of detail. The tests for comparative law, or for the various specimens of foreign law most often offered for study, are plentiful. Few, if any, of them, however, seek to make use of the historical sensitivity and awareness which we have suggested as a means for teaching an understanding of the substantive law under study *itself,* rather than some other body of "foreign" law.

To the extent that Jewish law and its historical development and application would be used as a source of the historical approach, the required material in English or Hebrew has only recently begun to be developed. The anthology of responsa literature by Judge Bazak, the indices of responsa literature of the middle ages developed by the Hebrew University Institute for Hebrew Law, or the studies and monographs by Prof. Zeev Falk or Justice Zilberg are only the first steps in the required direction.

Insofar as the ethical analysis approach is concerned, the development of material is also a task to be undertaken. While there is a wealth of material in general literature of jurisprudence as to ethics and ethics of the law, relatively little of it could fairly be said to proceed from any suggested orientation of the testing of legal ethics by historical religious attitudes and regimen, and still less from a specifically Jewish point of view.

This outline of possibilities and the required tasks may be self-defeating, for they may suggest that the result in terms of law school pedagogy itself is not worth the scholarly and intellectual effort required. One would hope, however, that national self-awareness in Israel, the intellectual maturity and self-awareness in America, and the richness of our halakhic tradition in general, would all serve to compel further efforts in bringing together the full panorama of Halakhah and the vibrancy of everyday life.