Harry S. Truman's Bible and Earl Warren's Talmud: A Forgotten Story in the Encounter between American Law and Jewish Studies

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Introduction[1]

On September 14, 1957, as reported by the *New York Times*, "Former President and Mrs. Harry S. Truman became 'classmates' of Chief Justice Earl Warren" at the Jewish Theological Seminary "for … a special course in Talmudic law."[2] The front page displayed a large photo of the Chief Justice together with the Seminary's Chancellor, Louis Finkelstein, under the headline, "Warren Studies Talmudic Law Here."[3] The following day, Warren, who had been gifted a 30-volume set of the Talmud, declared in a public address, "I will study [this Talmud] with great humility, and I will bear in mind that most

1 I thank Leora Batnitzky, Yonatan Y. Brafman, Sally Freedman, Ari Mermelstein, Jason Schulman, and an anonymous reviewer for helpful comments on this article. Yoni Pomeranz helped deepen my understanding of the significance of the events narrated in this article within American legal theory in 1957–58. I thank Andrew Katz for help locating archival material in the JTS archives. It has been an honor to write this article for a *Festschrift* celebrating Suzanne Last Stone, my first teacher of Anglo-American legal theory and of the encounter between legal theory and Jewish law, and her invaluable contributions to the field.

2 Richard Amper, "Trumans Join Judaic Law Class," *New York Times*, Sep 15, 1957, p. 65. https://timesmachine.nytimes.com/timesmachine/1957/09/15/167836742.html?pageNumber=65 (accessed March 12, 2024).

3 Richard Amper, "Warren Studies Talmudic Law Here," *New York Times*, Sep 14, 1957. Front Page. https://timesmachine.nytimes.com/timesmachine/1957/09/14/issue.html (accessed March 12, 2024).

of the good things that we find in our own law and in our own institutions came from the wisdom of men of other ages."[4]

This series of events was part of a weekend symposium at JTS entitled "Law as a Moral Force," inaugurating the newly established Herbert H. Lehman Institute of Ethics.[5] The symposium was described by the *Times* as a "discussion of Judaic laws, ethics, and morals and their relevance to today's world."[6] Organized to familiarize the Chief Justice with themes and concepts from Jewish law,[7] it featured two keynote addresses by prominent members of the JTS faculty: Saul Lieberman, discussing self-incrimination in Mishnah *Sanhedrin*,[8] and Shalom Spiegel, theorizing about the relationship between law and justice from passages in the biblical book of Amos. Former President Truman was in attendance for Spiegel's talk and described it as "one of the best [lectures] I have ever heard in my life."[9]

This event took place at a pivotal moment in American law. The Warren court's monumental 1954 decision in *Brown v. Board of Education* had become a battleground on the national scene. Warren's weekend at the Seminary began ten days after *Brown*'s ruling against segregated schools was put to the test

4 Richard Amper, "Warren Pleads for Moral Unity," *New York Times*, Sep 16, 1957, p. 22. https://timesmachine.nytimes.com/timesmachine/1957/09/16/84761933.html?pageNumber=22 (accessed March 12, 2024).

5 Lehman was an American Jew who had been a popular governor of New York, an official in several presidential administrations, and a U.S. senator. On his political career, see Duane Tananbaum, *Herbert H. Lehman: A Political Biography* (Albany: SUNY Press, 2016).

6 Amper, "Warren Pleads." See n3.

7 See Amelia R. Fry, interview with Louis Finkelstein, 6 Jun 1977, Bancroft Library, University of California, Berkeley, p. 4.

8 Lieberman's talk, which was never written up or published, is believed to have impacted Warren's thinking in the 1966 decision in *Miranda v. Arizona*, where he cited Maimonides's *Mishneh Torah* and an article by Rabbi Norman Lamm, in n27. See S. J. Levine "Rabbi Lamm, the Fifth Amendment, and Comparative Jewish Law," *Tradition* 53:3 (2021): 153–54n6. See Levine also for cautions about such comparative uses of Jewish Law.

9 Amper, "Trumans Join Judaic Law Class," *New York Times*, Sep 15, 1957, p. 65. See also Truman's letter to Louis Finkelstein, where he writes "I have known that entire passage [from Amos 7] word for word for a long time, and I wish you would tell that able and distinguished rabbi [i.e., Shalom Spiegel] that I have never had a more pleasant experience than listening to his lecture" (Truman to Finkelstein, Sep 17, 1957, Jewish Theological Seminary Archive).

in Little Rock, Arkansas, on Sep 4, 1957. Haunting images from Little Rock displayed in newspapers around the country "fired public opinion in favor of the civil rights struggle."[10] At the same time, within America's most respected legal institutions, the legal soundness of the decision was being questioned, most distressingly for Warren, by Learned Hand, "the nation's most highly regarded judge, renowned as the most articulate advocate of liberty."[11]

The symposium at the Seminary came at a moment when Warren was looking for new sources to justify his understanding of law and new institutional collaborations. These interests converged with an aspiration of the Seminary's leadership for a significant relationship between Jewish law and American law.[12] The desired relationship between Jewish law and American law expressed in the public statements by those involved was not only one of shared values; it had an idealistic and utopian dimension, articulated in the lofty hope that "Talmudic ethics" might serve as a resource for America both in terms of achieving racial equality at home and in terms of world peace globally.

In Warren's address at the Institute, he lamented that "there are still wars and rumors of wars throughout the world.[13] There is as much intolerance, as

10 See Danielle Allen's discussion of the "psychic transformation of the [American] citizenry" caused by the images of the Little Rock Nine, especially the iconic image of Elizabeth Eckford and Hazel Bryan, in *Talking to Strangers: Anxieties of Citizenship Since Brown v. Board of Education* (Chicago: University of Chicago Press, 2004), esp. pp. 3–36 (quotes p. 3).

11 See Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Knopf, 1994), 655. On Feb 4–6, 1958, Hand delivered the Oliver Wendell Holmes Lectures at Harvard Law School, where he would "attack the Warren Court's general jurisprudence" and "even questioned *Brown v. Board of Education*," from a perspective of judicial modesty (see pp. 652ff; quotes p. 655). I thank Yoni Pomeranz for this reference.

12 Finkelstein and Warren had developed a friendship beginning in 1950 (Fry interview with Finkelstein, see n6 above). On January 20, 1957, Finkelstein had given an invocation at the inauguration of President Dwight Eisenhower (citing a rabbi from the Babylonian Talmud). Finkelstein later served in President Kennedy's American delegation to the coronation of Pope Paul VI (1963), an invitation he believed was connected to his relationship with Warren (Fry interview with Finkelstein). (For historical context, the presidential inauguration of Harry S. Truman [Jan 20, 1949] was the first to include an invocation by a rabbi, Rabbi Samuel Thurman of St. Louis, MO).

13 Warren's allusion to Matt 24:6 ("wars and rumors of wars") is noteworthy in a lecture before a Jewish audience praising the utility of the Talmud.

much bigotry, and as much hatred rampant in the world today as when these great scholars were developing and evolving this Talmud." He expressed the need for "being able to speak to one another and understand one another and see if there is not a basic concept of morality and ethics and even religion that is common to us all." He hoped that studying ancient legal and religious traditions – including but not limited to Judaism and the Talmud – might uncover such commonalities that could lead to a shared "moral unity." He articulated a human moral duty to "find some way of living both at home and abroad which will permit people to live in happiness" and expressed the hope that in studying Talmud he might gain "a better concept of justice and righteousness and [thus] be better able to serve the people of our nation."[14]

These largely forgotten events and the publications and further institutional collaborations that emerged from them are part of a significant chapter in the history of American law's encounter with Judaism and Jewish law. They are worthy of recovery in their own right, especially at a historical moment when some are suggesting that the American-Jewish encounter is entering a new phase.[15] For my purposes in this article, however, this history forms the crucial background and context for my primary focus, namely Shalom Spiegel's lecture at the 1957 symposium, "Amos versus Amaziah."

Largely due to Truman's urging,[16] the talk was published the following year as a small pamphlet entitled *Amos versus Amaziah*.[17] On receiving a copy, Truman wrote to Spiegel that he would "cherish, and undoubtedly crib from [it] for many years to come."[18] The publication, which was widely distributed, made it to the desk of President Dwight D. Eisenhower, who found it "extremely interesting."[19] When Eisenhower's personal physician, Major General Howard McCrum Snyder, saw a copy of it on the President's

14 All of the quotations from Warren's address are from the passages cited in Amper, "Warren Pleads," p. 22. See n3 above. The full text of Warren's address is in the JTS Archive.

15 See the piece in the Atlantic by Franklin Foer, "The Golden Age of American Jews Is Ending," *The Atlantic* 333:3 (April 2024), pp. 20–35.

16 See letters from Truman to Spiegel, Sep 23, 1957; Truman to Finkelstein, Sep 17, 1957, Shalom Spiegel Archive, Jewish Theological Seminary.

17 Shalom Spiegel, *Amos versus Amaziah* (New York: Herbert H. Lehman Institute of Ethics, Jewish Theological Seminary, 1958).

18 Truman to Spiegel, Feb 13, 1958, Spiegel Archive.

19 Eisenhower to Eli Ginzburg, Dec 12, 1958 (copy), Spiegel Archive.

desk, he wrote to the Seminary to request three copies.[20] It was also sent to prominent academic colleagues who wrote letters of praise to Spiegel – including Harry Austryn Wolfson, Isadore Twersky, and S. D. Goitein[21] – and was later included in Judah Goldin's *The Jewish Expression*, a popular reader that intended to introduce students and lay audiences to then-contemporary Jewish Studies scholarship.[22]

In this article, I present Spiegel's *Amos versus Amaziah* – understood both in its original context as a lecture at the 1957 symposium and as a published text that made its way into subsequent American legal thought – as an overlooked part of the story of what Suzanne Last Stone has described as the "long and checkered history" of the "encounter between Jewish law and American legal theory."[23]

In Part I, I offer an account and analysis of central themes of *Amos versus Amaziah*. In the lecture, Spiegel describes a Jewish approach to the relationship between law and justice through an analysis of passages from Amos, offering this in 1957 as a legal theory for America and the Warren Court. In Part II, I describe the immediate reception of Spiegel's lecture by its Jewish audience and the prominent American officials in the room. In Part III, I discuss *Amos versus Amaziah* in relation to the work of Robert Cover, who chose a quotation from Spiegel's published lecture as the epigraph to his 1975 work of American legal history, *Justice Accused: Antislavery and the Judicial Process* (1975).[24] I suggest that *Amos versus Amaziah* helps shed light on continuities between Cover's earlier and later work. In Part IV, I turn

20 Snyder to the Jewish Theological Seminary, Dec 12, 1958 (copy), Spiegel Archive.

21 See H.A. Wolfson to Spiegel, Dec 2, 1958; I. Twersky to Spiegel, 4 Tevet 5719 (= Dec 15, 1958); S. D. Goitein to Spiegel, Dec 16, 1958; Spiegel Archive.

22 Goldin, a JTS graduate who became a professor at Yale University in 1958 and later at University of Pennsylvania, made many efforts to translate, popularize, and make available Jewish Studies scholarship to audiences that did not read Hebrew. He was an important and widely-read scholar of rabbinic literature in the 1950s–1980s. A highly devoted disciple of Spiegel, Goldin included three pieces by Spiegel in *The Jewish Expression* (New Haven: Yale University Press, 1976), chapters 3, 8, and 10. On Goldin's relationship to Spiegel, see Judah Goldin, "Of Shalom Spiegel," *Prooftexts* 8 (1988): 173–81.

23 Suzanne Last Stone, "In Pursuit of the Counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," *Harvard Law Review* 106 (1993): 813–94.

24 Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975).

to Suzanne Last Stone's groundbreaking work on Cover's use of Jewish sources and on its place in the history of the encounter between American legal thought and traditional Jewish sources. I suggest that *Amos versus Amaziah* is an overlooked bridge between what Stone calls the "classical era of liberal legal scholarship" that dominated through the 1960s (focused on similarities between Jewish law and American law)[25] and the new post-liberal era, exemplified by Cover's work in the 1980s (where Jewish law served as a utopian counter-text for American law).[26] In the Conclusion, I situate the 1957 symposium at the Seminary within a seismic shift in American legal thought reverberating at that exact moment in history, which may be a crucial context for Warren's interest in Jewish law and Jewish institutions in the 1950s and beyond.

Part I. Shalom Spiegel's *Amos versus Amaziah*

The central text from the book of Amos that Spiegel presented in his 1957 speech was Amos 7:7–15:

> (7) Thus [God] showed me: Behold, the Lord was standing behind a wall built by a plumbline, with a plumbline in His hand. (8) And the Lord said unto me: "Amos, what do you see?" And I said, "A plumbline." Then the Lord said: "Behold, I am setting a plumbline in the midst of my people Israel, and I will never again pass by them. (9) The high places of Isaac shall be desolate, and the sanctuaries of Israel shall be laid waste, and I shall rise against the house of Jeroboam with the sword."
> (10) Then Amaziah, the priest of Bethel, sent to Jeroboam, king of Israel, saying: "Amos has conspired against you in the midst of the house of Israel; the land is not able to bear all of his words. (11) For thus Amos has said: 'Jeroboam shall die by the sword, and Israel must go into exile away from his land.'"
> (12) And Amaziah said to Amos: "O seer, go, flee away to the land of Judah, and eat bread there, and prophesy there; (13) but never again prophesy at Bethel, for it is the king's sanctuary, and it is a temple of the kingdom."

25 See Stone, "In Pursuit," 815nn7–8.

26 Stone, "In Pursuit," 818–20.

> (14) Then Amos answered Amaziah: "I am no prophet, nor a prophet's son; but I am a herdsman, and a dresser of sycamore trees, (15) and the Lord took me from following the flock, and the Lord said to me: 'Go and prophesy to My people Israel'."[27]

Amos, a prophet from Tekoa in the kingdom of Judea, delivered this prophecy of doom for the northern kingdom of Israel, anticipating its demise as a result of its failure to enact justice for the vulnerable. Given the division of Israel at that time into two kingdoms, Amos is rejected as an outsider. He is accused of treason and exiled back to the southern kingdom, Judea. In Amos's response to Amaziah in v. 7, Spiegel sees a fervent declaration by Amos "that he had been summoned by the Lord to prophesy to His people Israel, a people one and indivisible whose union and covenant could not be lawfully dissolved by action of separate tribes or states or even by their secession."[28] With this language, it becomes evident that Spiegel's reading of the book of Amos is intended to resonate in modern America, as the legacy of the Civil War and the struggle for racial equality were playing out at that very moment through the Supreme Court.[29]

Spiegel constructs Amaziah's statements as part of an ancient court case, which he means to recover for a contemporary moment and audience. As he sees it, the original case was Amaziah vs. Amos – Amaziah, representing the prosecution, against Amos, the defendant, who loses and is exiled. However, Spiegel titled his lecture "Amos versus Amaziah" because he was less interested in the original case than in the "appeal" – that is, the subsequent vindication of Amos. He says:

> [T]he banishment of Amos from Bethel proved an act of folly very soon. The prophet was vindicated within his lifetime by his own generation, no one dissenting. The decision of the clergy

27 Spiegel's English translation in *Amos versus Amaziah*, 10.

28 *Amos versus Amaziah*, 11.

29 This intention is made plain elsewhere. Spiegel refers to the passage in Amos 9:7, "Are you not like Ethiopians to me, O Children of Israel? says the Lord" (*Amos versus Amaziah*, 20). He imagines Amos bringing God's message of racial equality to the ancient world (see *Amos versus Amaziah*, 40). Spiegel embeds language from relevant Supreme Court decisions throughout his construction of the trial of Amos, including allusions to the 1919 *Schenk v. United States (Amos versus Amaziah*, 13) and the 1896 *Plessy v. Ferguson*, the precedent overturned in *Brown* (*Amos versus Amaziah*, 20).

> or court at Bethel was repudiated by the people, and one can say in a very real sense that it was *repealed* by the inclusion of the book of Amos in the biblical canon. It is this unanimous verdict of history, not the blunder at Bethel, which we have in mind when speaking of the case of Amos vs. Amaziah. This is the verdict which haunts the memory, and will forever merit the attention of students of religion and students of law.[30]

For Spiegel, the vindication of Amos yields crucial insights about the role of law and the judicial process in producing justice. The implications of this vindication cannot be fully understood, he argues, without first understanding the case against Amos. To that end, he first reconstructs the arguments that might have been put forth by Amaziah and the prosecution. The case against Amos was compelling. Amaziah's court was no Kangaroo Court. Amos's words – for example in Chapter 5:21–25, where he denounced the institution of the temple and the established religious practices, and called instead for justice to "roll down like waters"[31] – could easily be construed as "a disturbance of public peace and interference with the rights of free worship."[32] However, there was an argument to be made that this was dangerous for society's most vulnerable, as national social welfare systems were connected to the temple. Furthermore, Amos's prediction of the kingdom's demise in Chapter 7:9, 11 was a threat to national security. His vision could be seen as a danger to the institutional stability needed for peace and a flourishing civil society that could provide for the welfare of all.[33] Aside from these arguments, which Spiegel presents as coming from Amaziah himself, Spiegel imagines other stakeholders coming to make the case against Amos that ultimately led to the verdict of exile.

30 *Amos versus Amaziah*, 24.

31 Spiegel's English translation: "(21) I hate, I despise your feasts, and I take no delight in your solemn assemblies. (22) Even though you offer me burnt offerings and meal offerings, I will not accept them, nor will I look upon the peace offerings of your fatted beasts. (23) Take away from Me the noise of your songs, and let me not hear the melody of your harps. (24) But let justice roll down like waters, and righteousness as a mighty stream. (25) Did you bring to me sacrifices and offerings the forty years in the wilderness, O house of Israel?" (cited in *Amos versus Amaziah*, 13).

32 *Amos versus Amaziah*, 13.

33 See *Amos versus Amaziah*, 14–17.

Most relevant for the contemporary context of the lecture was the testimony Spiegel imagined in the name of the "Association of the Bar of the City of Bethel."[34] By the prosecution, Amos was presented as a threat to the stability of law because he was so ready to break with tradition and custom and established precedent in the name of justice:

> By easy, hazy appeals to righteousness and the whole cluster of virtues, he would have us disestablish the uncontested basis of the common law, whose working rule must be *stare decisis*…. [W]ithout reverence for legal precedent, the scales of justice cannot be kept even and steady; there would be no stability, no predictability, no certainty in law. The courts would be thrown open to chance and whim and arbitrariness.[35]

This would amount to a reversal of reforms designed to especially protect the weak and vulnerable. This was a genuine concern, and a concern that Spiegel himself shared, although he disagreed with its application in this case, because what troubled him was the way such concerns could be used to undermine justice – even though justice is the very aim of the law. Amos revealed ways in which "justice can be defeated not only by … corruption of judges, but by the intricate craft of the law itself," even when practiced by well-meaning judges.[36]

As Spiegel saw it, the crucial difference between Amos and Amaziah was not whether justice was a central virtue. Spiegel believed that Amaziah and the institutional representatives who joined in making the case against Amos all valued justice: "Therein Amaziah did not differ from Amos." But "to Amaziah, justice was an obligation like other obligations, a commandment among many commandments of the law." For Amos, by contrast, "Justice becomes the categorical imperative, transcending all the other requirements of the law. Other ills of society are remediable, but injustice is a stab at the vital center of the communal whole. It instantaneously stops the heartbeat of the social organism."[37]

The practical implications of this difference in approach to justice were stark, according to Spiegel. When justice is a relative virtue, citizens are aware

34 *Amos versus Amaziah*, 17–19.

35 *Amos versus Amaziah*, 18–19.

36 *Amos versus Amaziah*, 45.

37 *Amos versus Amaziah*, 41.

of the persistent possibility that the state will prioritize other concerns over its commitment to justice, potentially leading to legally justified violations of liberties and basic rights of individual citizens. According to Spiegel, without the reassurance that the state's commitment to justice is absolute rather than relative, citizens of the body politic always live under a cloud of fear about how state power might be exercised against them. Such a fear among the citizenry, according to Spiegel, undermines the foundations of civil society: "The sheer threat and dread of arbitrary force terrorize and brutalize man. They throw him back into the state of nature and its savage standards … [because a]rbitrary force shatters the image of God in man."[38] For Spiegel, any force used by the state in violation of the principles of justice, even on the basis of state law, is tantamount to an "arbitrary" use of power. For Spiegel in 1957, the legal system of Nazi Germany was most likely the exceptional case that proved this rule, a cautionary tale for all subsequent jurisprudence.[39]

For Spiegel's Amos, "Justice is the soil in which all the other virtues can prosper. It is the pre-condition of all social virtue, indeed of all community life. It makes civilized existence … possible… [I]t is the very foundation of society."[40] This is the significance of the image of the plumbline, "a homely lesson any mason could understand and impart: a wall to stand and to endure must be straight and strong, without fault of construction. If it be out of plumb, the taller the wall, the surer its fall. The imagery seems to suggest that what the law of gravitation is to nature, justice is to society."[41] In other words, lack of justice will destroy everything human-made – every social institution, body politic, or legal system. It is therefore folly to prioritize the stability of institutions over the pursuit of justice, because the latter is a necessary precondition of the former.

While Spiegel recognizes that law "is innately conservative" and tied to precedent, he understands Amos to be making the claim that "however

38 *Amos versus Amaziah*, 41.

39 Spiegel was born in Romania in 1899 and educated in Vienna in the interwar period. Although he had emigrated first to Palestine in the 1920s and then to the United States by the 1930s, like all European-born Jews of his era, he had close ties to many victims of the Holocaust, and in the aftermath of the war, he had helped many survivors – academics and otherwise – settle in the United States. The vast majority of the Seminary faculty in those years were European born scholars who were directly impacted in numerous ways by the Holocaust.

40 *Amos versus Amaziah*, 41–42.

41 *Amos versus Amaziah*, 32.

ancient or venerable, however conducive to social cohesion or to public safety, a legal practice must recommend and validate itself by one test and one test only: that it serves the ends of justice."[42]

This yielded a new understanding of the role of legal precedent:

> The value of precedent is that it secures for posterity the gains of history, the fund of legal experience, won by centuries of painful growth and uphill advancement toward civilization. Precedent furnishes a floor beneath which legal practice will not sink, but above which it is free to rise, vouchsafing a minimum of justice and standards of rights achieved by many generations.[43]

In other words, the role of legal precedent was to help cement in place the advancement and development of a legal system over time, an advancement best measured, from Spiegel's perspective, by law's ever-increasing ability to vouchsafe justice for all. What *stare decisis* really means is that achievements in justice ought never be rolled back but can always be improved upon.

For Spiegel, Amos vs. Amaziah was a "landmark in Jewish history," setting the stage and the tone for the "age of classical prophecy"[44] – it was a centerpiece of Jewish scripture, and the lifeblood of Jewish ethics. Amos vs. Amaziah was the repeal of Amaziah vs. Amos – the rejection of the claim that justice could be but one important consideration mitigated by extenuating circumstances and other crucial concerns. He compares the impact of Amos vs. Amaziah on Jewish history to the impact of *Marbury* v. *Madison* – the 1803 decision that established judicial review – on American history and American legal history. "The sheer existence of judicial review, even without its being exercised, shields the Bill of Rights by restraining Congress and State from passing laws restrictive of liberty."[45] *Marbury v. Madison* declared the judiciary "the protector of basic liberties of the people," and with that established "the indivisible oneness of the nation"[46] by subjecting all local law to this fundamental standard of justice. This decision shaped American history in fundamental ways: As a legal principle, judicial review became "the rock upon which the nation was built," and "[a]s an educational and moral

42 *Amos versus Amaziah*, 44.

43 *Amos versus Amaziah*, 47.

44 *Amos versus Amaziah*, 25.

45 *Amos versus Amaziah*, 30.

46 *Amos versus Amaziah*, 29.

force," it "shaped the American mind"[47]; "trust in the law as the mainstay of freedom has become a mark of the national character."[48] In a similar way, Spiegel claimed, Amos vs. Amaziah was "woven into the fiber of Jewish institutions" and "molded the character of the Jewish people."[49]

Spiegel believed that the legacy of Amos vs. Amaziah was incorporated into Jewish law through general principles that govern halakhic decisions and the actions of the halakha-abiding Jew. He provides the following examples (inter alia) of "resonance and résumé of Amos vs. Amaziah" within the rabbinic legal tradition: The talmudic statement that "the commandment of righteousness outweighs all the commandments put together" (b. *Bava Batra* 9a)[50] and Naḥmanides's interpretation of Leviticus 19:2 as a call for general virtue and moral goodness (holiness) on top of strict observance of the commandments, because without this general principle one can easily be a "scoundrel within the letter of the law."[51] On Spiegel's account, "[a]bove all, rabbinic Judaism approved of Amos vs. Amaziah because of its choice of justice as the constitutive element of all law."

Spiegel suggested that Amos's conception of justice was similar to the ancient Greek philosophical position shared by Plato and Aristotle that "righteousness contains the sum of all virtue."[52] But Spiegel argues that there "remains a difference between the philosophical and the biblical approach to justice. It is the difference between concept and commandment."[53] Spiegel thinks that philosophical reflection on justice, insofar as it is limited to the sphere of contemplation, is "a utopia designed for escape from reality."[54] For the Bible, however, reflection on justice "is a line of reasoning, of course, but not devised to halt forever in the zone of pure speculation."[55] Spiegel compares biblical reflection on justice to "the plumbline in the hand of the mason" which "is meant to guide the hand that acts, not only the mind

47 *Amos versus Amaziah*, 30.
48 *Amos versus Amaziah*, 30.
49 *Amos versus Amaziah*, 30–31.
50 *Amos versus Amaziah*, 54.
51 *Amos versus Amaziah*, 55.
52 *Amos versus Amaziah*, 51
53 *Amos versus Amaziah*, 51.
54 *Amos versus Amaziah*, 51.
55 *Amos versus Amaziah*, 51.

that thinks."[56] Justice cannot but be enacted in lived life, because it "is the will of God which must be done, not contemplated."[57] God's will is "[a]n irresistible impulse [that] hurls [the prophet] ever again into attempting the seeming impossible."[58]

As utopian as this vision is, Spiegel sets a limit on the extent of this utopianism through a strong distinction he makes between "justice" and "morality." While he was unequivocal that justice is the foundation and precondition of social life and the criterion of all valid law, he thought that morality can be imposed "improperly" into law. "Law may cease to function from overidealization …, when it is… strained to embrace the entire content of morality."[59] Taking issue with the title of the conference at which he was presenting his analysis, Spiegel stated, "Morals, unlike the law, are unenforceable, which alone would make moral force somewhat of a contradiction in terms. Moral ideals are inherently unrealizable."[60] Moreover, "moral ideas spring from spontaneous intuition" and are thus properly qualified as passions, which are "irrational and subjective," refusing to be debated or qualified based on persuasion. Justice, by contrast, is "impregnated with intellectual discipline." It is "midway between morality and reason, virtue and intelligence, love and logic."[61]

In his discussion of the contrast between morality and justice, Spiegel included the statement that Robert Cover chose eighteen years later as the epigraph for *Justice Accused*: "Justice cools the fierce glow of moral passion by making it pass through reflection."[62] This sentence is followed by Spiegel's observation that the metaphor of "the scales of justice" aptly describes the way in which judicial procedure carefully weighs competing claims as if with a "precision instrument … For justice presupposes conflict and competition of claims. Justice requires earnest and ceaseless study."[63] It is a wisdom and a

56 *Amos versus Amaziah*, 51.
57 *Amos versus Amaziah*, 51.
58 *Amos versus Amaziah*, 52.
59 *Amos versus Amaziah*, 55.
60 *Amos versus Amaziah*, 55.
61 *Amos versus Amaziah*, 56.
62 *Amos versus Amaziah*, 56.
63 *Amos versus Amaziah*, 56.

virtue that "issues forth in action."[64] It is thus important that the ancient legal case that Spiegel celebrated in his lecture is an appeal rather than an original case: The process of hearing the claims, rendering a decision, and then being open to revising it based on new evidence or an even more careful weighing of the claims is central to the ability of the judicial process to enact justice.

Spiegel's final discussion was a reflection on what makes for "sound legal doctrine," which must be fully "grounded in the inner logic of the law" and also fully just. Furthermore, sound legal doctrine "must endeavor to be ever faithful to the twin aims of the law …: security of the nation and unabridged liberties of the individual."[65] It must "sustain and strengthen the confidence of the people in the regenerative faculties of the law and the constitution, and in the interpretive resources of the judges to cope successfully with the shift and flux of an expanding future and to seek stability through progressive adaptation."[66] He concluded with a direct second person address to the Chief Justice, commending Warren's belief that "molders of the law in all nations are the builders of peace on this earth,"[67] which he connected to rabbinic conceptions of jurists and judges.

It is hard to categorize the exact genre of *Amos versus Amaziah*. Spiegel was a scholar of the Bible and its reception in midrash, and of Medieval Hebrew literature more broadly. The lecture is sufficiently grounded in critical biblical interpretation to be cited in scholarship on the book of Amos,[68] but it has the flavor of a "legend of the Bible" (i.e., midrash), a genre Spiegel had vividly described one year earlier, in his 1956 introduction to the abridged version of Louis Ginzberg's *Legends of the Jews*, writing that in "legends of the Bible" the "scholar's wit coaxed and forced from [the Bible's] pages a multitude of tales and a host of fancies unforeseen and unsuspected" in the original context of the Bible.[69] But as an analysis that wove together biblical interpretation and rabbinic sources with American legal thought

64 *Amos versus Amaziah*, 56.

65 *Amos versus Amaziah*, 58.

66 *Amos versus Amaziah*, 58.

67 *Amos versus Amaziah*, 59.

68 See, e.g., Shalom M. Paul, *Amos: A Commentary on the Book of Amos* (Minneapolis: Fortress, 1991), 238n7, and Nili Wazana, "Amos against Amaziah (Amos 7:10-17)," *Vetus Testamentum* 70 (2020): 209–28.

69 Shalom Spiegel, "Introduction," in Louis Ginzberg, *Legends of the Bible* (Philadelphia: Jewish Publication Society, 1956), xi.

and constitutional interpretation, *Amos versus Amaziah* seemed to be doing something different and new. The dearth of precedents for this kind of work is reflected in Spiegel's footnotes, which are largely references either to American legal texts or to Jewish traditional sources, but not to works that bring these together.[70]

II. Reactions to *Amos versus Amaziah*

Spiegel was known among colleagues and students both for his scholarly erudition and for his oratory prowess. It is clear from letters written at the time and from later recollections of his keynote lecture that it was exceptionally powerful. Grace Goldin, married to Spiegel's preeminent student Judah Goldin, described the event in a letter to Spiegel's ailing wife, Röslein, who had been unable to attend: "I felt that four thousand years of Jewish history had *visibly* gone into the making of this man" and that his brilliant lecture had been "the truest kiddush hashem [sanctification of God's name] possible."[71] A student who was there later described Spiegel's talk as "the one moment in my life in which I could hear, in the words of Torah, the voice of God."[72]

Apparently the impact on the public officials in the room was no less great, although for very different reasons. Truman, in particular, was profoundly taken by the talk. He repeated this sentiment in a letter to

70 One exception might be the figure of Edmond Cahn, whom Spiegel cites for his analysis of *Marbury v. Madison* and its impact on American law; see *Amos versus Amaziah*, n8, where Spiegel refers to Cahn's "An American Contribution," the introductory essay to his edited volume, *Supreme Court and Supreme Law* (Bloomington: Indiana University Press, 1954). Cahn, Professor of Law at NYU Law School and prominent legal philosopher, occasionally taught ethics courses at JTS. (See Cahn's *New York Times* obituary, Aug. 10, 1964: https://timesmachine.nytimes.com/timesmachine/1964/08/10/97409315.html?pageNumber=31. Accessed March 12, 2024.) Stone describes Cahn as "unique in his use of Jewish sources to illuminate larger issues in American jurisprudence" in the 1940s and 1950s (Stone, "In Pursuit," 815n8, with references).

71 See Goldin to Spiegel, Sep 14, 1957, Spiegel Archive. For more on Grace Goldin, see Sherwin B. Nuland, "Notes and Events," *Journal of the History of Medicine and Allied Sciences* 51 (1996): 66–67. Finkelstein also described the lecture as a "kiddush hashem" (Finkelstein to Spiegel, Sep 15, 1957, Spiegel Archive).

72 See Jacob Neusner's later recollections of the original event in Andrew Greely and Jacob Neusner, *Common Ground: A Priest and a Rabbi Read Scripture Together* (Canada: McGill-Queen's University Press, 1996), 189ff.

Spiegel a week later, urging Spiegel to write up the talk and to send him a copy, noting, "It was the best [lecture] I have ever heard on the subject of conditions currently affecting the United States."[73] To the Chancellor of the Seminary, he wrote, "I have never had a more pleasant experience than listening to that lecture."[74] Incidentally, Truman noted in both of these letters that he had a special relationship to the particular passage from Amos that Spiegel had analyzed, where God shows Amos a plumbline.[75] It is likely that Spiegel's explicit references to masonry were particularly resonant for Truman, a devotee of Free Masonry, a movement within which the passage in Amos 7:7–8 was canonical.[76] The power of Spiegel's oration, the urgency of current events, Truman's love for this particular passage, and the brilliance of Spiegel's analysis of it – linking it to law and theories of justice – all came together to create this transformative experience for Truman.

Warren, too, "enjoyed [Spiegel's] speech so much."[77] At the end of the symposium, he expressed the hope that he had emerged from his study of ancient Jewish law with "a better concept of justice" with which to "be better able to serve … our nation." Warren may have especially appreciated *Amos versus Amaziah* because it offered an account of the relationship between law and justice that justified the legal approach of the Warren Court at a tense political and intellectual moment for both Warren's approach to law and its

73 Truman to Spiegel, Sep 23, 1957, Spiegel Archive. (The *New York Times* reported a similar comment in the immediate aftermath of the lecture; see n8 above.)

74 Truman to Finkelstein, Sep 17, 1957, Spiegel Archive.

75 "You do not know how very much I enjoyed your lecture on Amos. I know that whole biblical quotation by heart and have used it many a time" (Truman to Spiegel, Sep 23, 1957); "I have known that entire passage word for word for a long time" (Truman to Finkelstein, Sep 17, 1957).

76 The plumbline is one of the central symbols of the Masonic guild, and the passage from Amos was widely cited in the Masonic community. While many prominent American public officials, historically, had ties to Free Masonry (including both Earl Warren, the guest of honor at the event, and Herbert H. Lehman, for whom the new institute was named), Truman was one of the first to be quite public about this affiliation. A "Masonic" biography of Truman, based on documentary evidence, written by a writer internal to the movement and published by the Missouri Lodge of Research, provides a useful window into this facet of Truman's life. See Allen E. Roberts, *Brother Truman: The Masonic Life and Philosophy of Harry S. Truman* (Highland Springs: Anchor Communications, 1985). For a reference to Amos 7:7–8, see p. 42.

77 Warren to Finkelstein, Nov 2, 1958 (copy), Spiegel Archive.

most monumental decision in *Brown v. Board*. Spiegel's discussions of legal precedent (*stare decisis*) and of the relationship between law and morals tapped into heated debates emerging within legal theory at that very moment, in reaction to the Warren Court.[78]

The symposium at JTS reflected a broader desire on the part of the Seminary to bring ethical concepts from Jewish law into American law and life, as well as corresponding partners at the uppermost echelons of American law and politics who were interested partners. A year later, the Lehman Institute would host a follow-up event – a testimonial dinner featuring an address by Senator John F. Kennedy, who had served in the U.S. Senate with Lehman. Kennedy emphasized that "the ethical teachings of the Talmud are as vital… today as they were… 1500 years ago."[79] He used the encounter with Jewish sources to express a utopian vision of equality in America regardless of race or creed. Citing a mishnah, Kennedy stated, "God created one man as the common ancestor of all, 'so that the various families of men should not contend with one another'; – so that no one may rightly say, regarding another's nation or religion or race: 'My ancestors were better than yours.'[80]"

III. *Amos versus Amaziah* and Robert Cover's *Justice Accused*

Nearly two decades later, Robert Cover chose a quotation from Spiegel's lecture, which he encountered as a published text, as the epigraph for *Justice Accused*, his monograph on American legal history that dealt with a central

78 H. L. A. Hart's essay on the separation of law and morality was published the following year. See H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593–629; see also the response in Lon Fuller, "Positivism and the Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 631–72.

79 Remarks of Senator John F. Kennedy at the Testimonial Dinner for Senator Herbert H. Lehman. Jewish Theological Seminary (New York, NY). November 23, 1958. John F. Kennedy Presidential Library and Museum. David F. Powers Personal Papers, Box 31, "Senator Herbert H. Lehman Testimonial Dinner, New York, NY, 23 November 1958." John F. Kennedy Presidential Library. Available online at <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/new-york-ny-senator-lehman-dinner-19581123> (accessed March 12, 2024).

80 M. *Sanhedrin* 4:5.

theme of *Amos versus Amaziah* – namely, the relationship between law and justice and the question of what makes for "sound legal doctrine" when there is a tension between law and morality. Cover opened this work of history with a legal reading of an ancient story, the case of Antigone versus Creon. He also offered a legal reading of a modern story, the case of Billy Budd versus Captain Vere.[81] And he connected these ancient and modern literary legal "cases" to a real struggle within American legal history. Whether Spiegel's literary-legal reading of the ancient "case" of Amos and Amaziah had been instrumental to Cover's own use of such a method at a moment when "law and literature" was but a nascent field, or Cover was indebted to other sources for this style and method, the similarity is noteworthy in the context of the birth of the genre.

At the end of his literary introduction to *Justice Accused*, Cover writes, "The rest of this book is not about literature," but about nineteenth-century judges who were "earnest, well-meaning pillars of legal respectability and of their collaboration in a system of oppression – Negro Slavery."[82] Cover wanted to study and analyze "the dilemma of the anti-slavery judge – the one who would, in some sense, have agreed with [the] characterization of slavery as oppression. It was he who was confronted with [Captain] Vere's dilemma [in *Billy Budd*], the choice between the demands of the role and the voice of conscience."[83] Cover's judges struggled when faced with cases related to the Fugitive Slave Act of 1850. Operating in the North where slavery was illegal, and fully opposed to slavery on moral grounds, when faced with this profound dilemma between positive law and personal morality, they all submitted to the force of the law.

At the end of his introduction, Cover writes:

> Make no mistake. The judges we shall examine really squirmed; were intensely uncomfortable in hanging Billy Budd [i.e., returning fugitive slaves]. But they did the job… We must understand them … if we are to understand the processes of injustice."[84]

81 Cover, *Justice Accused*, 1–7.

82 Cover, *Justice Accused*, 6.

83 Cover, *Justice Accused*, 6.

84 Cover, *Justice Accused*, 7.

This is reminiscent of Spiegel's extensive discussion of the case of Amaziah against Amos, in which he endeavored to understand Amaziah's position. He prefaced that discussion by stating, "[W]e owe [Amos's] opponent, the priest of Bethel, a fair and full opportunity to state his version of the encounter."[85]

As far as I can tell, Cover only cites from *Amos versus Amaziah* in the one prominent location at the front of his 1975 book.[86] But this is sufficient to show that Cover deemed the work to have some significant connection to his work in *Justice Accused.* I have drawn out some parallels between the two works, and I suggest that this connection between Spiegel's *Amos versus Amaziah* – understood both as a published text and reference to an actual historical event – and Robert Cover's early work may help shed light on the history of the encounter between American law and Jewish law at a moment of transition, and also illuminate a connection between Cover's earlier and later work. To draw out these points, I turn to Suzanne Last Stone's groundbreaking study of this encounter and the impact of Cover's work on that encounter.

IV. Stone on Cover, and the Encounter Between Jewish Law and American Law

Stone's "In Pursuit of the Counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," launched her influential career, helping to create a truly interdisciplinary field of study bringing together Anglo-American legal theory and rigorous academic study of Jewish sources, especially rabbinic legal sources. Cover's "Nomos and Narrative" had appeared a decade earlier in the same journal, as the opening essay in *Harvard Law Review*'s issue on the Supreme Court's 1982 term,[87] and spawned what Stone described as a "startling increase of citations to Jewish sources

85 Spiegel, *Amos versus Amaziah*, 12.

86 References to Spiegel's most famous monograph, *The Last Trial: On the Legends and Lore of the Command to Abraham to Offer Isaac as a Sacrifice: The Akeda*, translated from the Hebrew with an introduction by Judah Goldin (New York: Pantheon, 1967), appear in Cover's work in two places, in the context of discussions of martyrdom and self-sacrifice in relation to law: Cover, "Nomos and Narrative," 49n133; and Cover "Violence and the Word," *Yale Law Journal* 95 (1986): 1605n10. It is beyond the scope of this article to offer a deeper account of Cover's relationship to Spiegel's work.

87 Cover, "Nomos and Narrative."

in public American legal discourse."[88] This, along with unique features of Cover's use of Jewish sources within his new constitutional theory,[89] led Stone to narrate the history of American law's encounter with Jewish law. She identified two primary eras: the "classical era of liberal legal scholarship," which primarily encompassed writings from the 1940s through the 1960s,[90] and a new post-liberal era that she identifies and describes in her essay, which is exemplified by Cover's work, the most influential example of a new genre of constitutional interpretation.[91]

In the classical liberal era, the focus of the encounter between Jewish law and American law was primarily on the similarities between these two legal systems, emphasizing that "the twentieth-century ideals of America had been the age-old ideals of the Jews," as part of a broader process of the integration of Jews into American society.[92] In the new post-liberal era, Jewish law was valorized not for its similarities to American values, but as a "counter-text" or "contrast case" to the morass in which American law found itself at the close of the Vietnam War. Jewish law was then shown to offer new methods for a redefinition of America law, such as "narrative jurisprudence, legal pluralism, civic republicanism, natural law" and the pursuit of the "ethical dimensions of legal interpretation."[93]

Spiegel's *Amos versus Amaziah* was produced during that classical liberal era, but as Cover himself seems to have recognized, it was a precursor to the post-liberal era and to Cover's own work. In the speeches by Warren and

88 Stone, "In Pursuit," 816.

89 Referring to "Nomos and Narrative" in the opening sentence of "Counter-text," Stone writes, "It is time to take stock when an article about the postmodern vitality of liberalism proclaims as its 'paradigm' Rabbi Joseph Caro, the sixteenth-century author of one of the most austere codes of Jewish law, the Shulhan 'Arukh, and one of the most fantastic diaries of mystical experience, the Maggid Mesharim" ("In Pursuit," 814).

90 See Stone, "In Pursuit," 815n7 and 815n8.

91 Stone, "In Pursuit," 818–20.

92 Stone's description of this era draws from the work of Jerold S. Auerbach, *Rabbis and Lawyers: The Journey from Torah to Constitution* (Bloomington: Indiana University Press, 1990).

93 "In Pursuit," 820. One of Stone's primary arguments in the essay is that the new literature on Jewish law and American law had been part of a process of a "dual redefinition" in which both systems were being redefined in relation to one another.

JFK at the Herbert H. Lehman Institute at the Seminary, both emphasized a utopian vision for America that they hoped the encounter with Jewish law could help achieve. A closer look at the two decades preceding Cover's work, especially the years immediately following *Brown v. Board of Education* in the latter 1950s, can deepen our understanding of the encounter between American law and Jewish sources and institutions. I suggest that Amos versus Amaziah and the 1957 symposium at the Seminary are crucial but largely forgotten missing parts of this story.

The importance of Stone's contribution, however, lay not as much in her narration of the history of American law's encounter with Jewish sources, as in the scholarly caution she brought to bear on it. Common to both types of relationships Stone described in the classical liberal era and the post-liberal era was the notion that Judaism's role vis-à-vis American law was to provide the model of ideal law. In the first stage, this was accomplished by verifying American law's values and in the second stage Judaism provided a counter-model.[94] Stone pointed out how Jewish law was romanticized in this encounter, and she called for a new version of the encounter in which the legal phenomenon of Jewish law could be studied within "the Jewish legal system's own frame of reference,"[95] i.e., "the religious framework that makes Jewish law possible and renders it intelligible to its practitioner."[96] This call would turn out to be a blueprint for a significant aspect of Stone's subsequent career.[97]

Stone also worried that the turn to Jewish law as an ideal counter-text was problematic for American law. The Jewish law that served as a counter-text

94 I thank Yonatan Y. Brafman for this insight and formulation.

95 "In Pursuit," 822.

96 Stone, "In Pursuit," 821. Stone cites as examples of religious aspects of Jewish law that legal studies had failed to recognize in its new widespread interest in Jewish law the following: "basic religious concepts as the revelatory nature of Jewish law, the religious qualifications of authoritative interpreters of the law, the veneration of early masters of the tradition, imitatio dei, and divine accountability" (821).

97 In her many publications, as well as in her field-building work for decades at the Yeshiva University Center for Jewish Law and Contemporary Civilization at Cardozo Law School, Stone introduced a generation of scholars and students to the tools of American law and legal theory, enabling them to study the phenomenon of Jewish law as both a religious praxis and a legal system, without subordinating Jewish law to the concerns of American law.

for American law in Cover's work, Stone pointed out, was the reflection of creative new interpretations of Jewish law, often severed from its historical and religious contexts. Stone claimed, however, that "the complex relationship between halakhah and its spiritual underpinnings" that was elided in these romanticized appeals to Jewish law was "replicated in Cover's conception of law as the paradoxically interdependent and irreconcilable expression of both utopian ideal and institutional hierarchy."[98] It is in this aspect of Cover's discussion in "Nomos and Narrative" that Stone sees the most accurate depiction in the new literature of historical manifestations of Jewish law and Jewish internal conceptions of Jewish law. Stone locates "a distinctive 'Jewish voice'" in then-contemporary American legal scholarship, specifically in "Cover's conception of law as the product of the tension between utopian ideal and institutional order."[99] As I have shown, this tension was at the centerpiece of Spiegel's *Amos versus Amaziah* as well.

Stone sees this tension between the need for stable institutions and the simultaneous need for disrupting ideals that hold those institutions accountable to ethics and justice as *the* crucial insight Cover brings from the Jewish tradition to American legal theory. Cover's discussion of the dynamic interplay between what he calls "paideic" and "imperial" norms in "Nomos and Narrative" is the most well-known locus of this insight within his scholarship. There, Cover's discussion explicitly draws this insight from Jewish sources. He cites and theorizes commentary on the Mishnah's *Pirkei Avot* ("Ethics of the Fathers") by the sixteenth-century Jewish mystic and codifier of Jewish law Rabbi Joseph Karo,[100] a reference Stone emphasizes, contextualizes, and analyzes.[101]

98 Stone, "In Pursuit," 822.

99 Stone, "In Pursuit," 878ff., esp. 889 and 891.

100 Cover, "Nomos and Narrative," 11–13. Cover cites Karo's analysis of the tension between m. *Avot* 1:2 and 1:18 (two different accounts, several centuries apart, of the "three pillars on which the world stands") in one of his two canonical works of Jewish law, the *Beit Yosef*, a commentary on the *Tur* (at *Ḥoshen Mishpat* I). Cover's discussion of Karo is indebted to the 1962 monograph by R.J. Zwi Werblowky, *Joseph Karo: Lawyer and Mystic* (Oxford: Oxford University Press, 1962).

101 Cover's usage of Karo was striking, and Stone cites it as one of the motivating reasons for writing "In Pursuit" (814). Stone contextualizes and analyzes Cover's interest in and reference to Karo at 878ff., as well as her Conclusion on 893–94. She sees in Cover a deep personal identification with the figure of Karo. For

Stone agrees with Cover that such a counter-text is crucial for any institutional legal order, but she cautions against Jewish law itself serving as that counter-text for American constitutional law. To be effective and valid, she believes, the counter-text must come from within a given tradition. For America, it must come not from Jewish law but from "the subterranean and suppressed traditions, myths, and stories that have shaped and continue to shape *America*."[102] For Stone this was not merely a theoretical concern, but one that likely emerged from firsthand experience while clerking for Judge Minor Wisdom in the Fifth Circuit Court in the 1980s.[103]

Stone makes brief reference to Cover's *Justice Accused* in the penultimate footnote of "In Pursuit." There, she notes that Cover had identified such an American utopian counter-text for American law in the natural law tradition in which the founding values of the United States were deeply entrenched, a tradition that included utopian visions of human equality.[104] This footnote implies a continuity between Cover's interest in "the tension between utopian ideal and institutional order," theorized from 1982 onward in relation to Jewish sources, and his earlier work, in *Justice Accused,* that uncovered and explored a version of this tension within the history American law, without references to Judaism and Jewish law (save the epigraph citing Spiegel's *Amos versus Amaziah*).[105] It is my suggestion that Spiegel's text may be an important bridge between those two works in Cover's oeuvre and those two bodies of sources.

The nineteenth-century judges Cover studied in his work of legal history saw themselves as bound, in their capacity as sworn judges, first and foremost to uphold the positive law (institutional order); but they saw

another discussion of Karo, see Robert M. Cover, "The Folktales of Justice: Tales of Jurisdiction," *Capital University Law Review* 179 (1985): 195–96.

102 Stone, "In Pursuit," 893 (emphasis added).

103 See Jack Bass, *Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit Who Translated the Supreme Court's Brown Decision into a Revolution for Equality* (New York: Simon and Schuster, 1981).

104 See Stone, "In Pursuit," 893n469, where she credits Stephen Wizner with this insight, expressed in personal communication.

105 On connections and tensions between Cover's work before and after "Nomos and Narrative," see Martha Minow, "Introduction: Robert Cover and Law, Judging, and Violence," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1995), 1–11.

themselves as equally subject to natural law (utopian ideal), a higher law that declared all humans to be equal and free, and institutions of slavery null and void. *Justice Accused* predates Cover's overt turn to Jewish law in the 1980s, the phenomenon Stone studies in "In Pursuit."[106] Studying figures such as judges Lemuel Shaw, John McLean, Joseph Story, and Joseph W. Swan in their historical context and in the context of natural law discourse among antebellum American practitioners of law, Cover painted a complex portrait of "the antislavery judge [who] experienced a pervasive, but more or less latent, conflict between two potentially inconsistent prescriptive systems: law and (antislavery) morality."[107]

While Cover says that his initial response to learning about such judges had been to polemicize,[108] he reconstructs, in the book, the legal worldview of these judges in their historical context. This is an attempt to understand, as a historian, how these good men and jurists came to commit injustice. But one can see in this work the budding legal theorist who would write "Nomos and Narrative" a few years later. Reading *Justice Accused* in light of "Nomos and Narrative," one can see how Cover reconstructed the "nomos" of the nineteenth-century judges, in order to understand what counter-texts (in Stone's terminology) were available to them, of which they did not ultimately avail themselves, perhaps because they did not have the right legal theory. In some ways, "Nomos and Narrative" can be viewed as Cover's attempt to articulate a credible legal theory that would have supported and made more viable the road not taken by those nineteenth-century judges. This search for a credible legal theory that leans heavily toward justice is reminiscent of Spiegel's discussion, at the end of *Amos versus Amaziah*, of what constitutes "sound legal doctrine."

106 The one reference to rabbinic literature in *Justice Accused* (see 108 and 287n19) stands in marked contrast with Cover's use of rabbinic sources in his later work. In this reference, Cover notes a similarity between a hypothetical used by a contemporary Anglo-American legal theorist in the context of a discussion of positive law and a similar hypothetical that had been expressed by an ancient rabbinic sage.

107 Cover, *Justice Accused*, 226.

108 Cover, *Justice Accused*, xi. See Robert M. Cover, "Review: Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression by Richard Hildreth," *Columbia Law Review* 68 (1968): 1003–1008. The targets of Cover's 1968 polemic were contemporary judges enforcing Vietnam War era draft laws.

Conclusion

This search for a sound legal doctrine that would justify prioritizing justice above all other legal principles was, in many ways, the holy grail of the Warren Court in the 1950s and 1960s, as well as the holy grail of liberal (and postliberal) legal scholars in the succeeding decades. In a recent work on constitutional interpretation, a preeminent American legal scholar describes the challenges faced by those seeking to find a compelling theory of constitutional interpretation today.[109] In this field of imperfect choices, one principle is clear: Any theory of constitutional interpretation that cannot justify the Warren Court's decision in *Brown v. Board of Education* ought to be rejected, because "we should be reluctant to interpret the Constitution in such a way as to allow our constitutional order to be intolerably unjust."[110] This statement reflects a commitment to the principle of justice as the fundamental principle of law and the challenge of finding a single persuasive theory of law that fully embraces this commitment.[111]

In 1957, when Chief Justice Earl Warren and former President Truman came to encounter Jewish legal texts at JTS, the consensus within the American legal community was quite the opposite. While liberals applauded the decision in *Brown v. Board of Education*, the most prominent legal institutions, such as Harvard Law School, and prominent liberal legal theorists who were committed to justice on principle, did not think there was a legal theory to back up the decision.[112] This vacuum may be a crucial context for Warren's extended collaboration with JTS, a collaboration that began with the 1957 symposium and was cemented in 1961 with the establishment of the Chief Justice Earl C. Warren Chair in Law and Ethics at the Seminary's West Coast campus, University of Judaism, as well as the Earl Warren Institute for Ethics and Human Relations, which operated into the 1980s.

109 Cass R. Sunstein, *How to Interpret the Constitution* (Princeton: Princeton University Press, 2023). I thank Yoni Pomeranz for this reference.

110 Sunstein, *How to Interpret*, 110–11.

111 See Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), 130, for Cover's criticism of *Brown v. Board* on similar lines. I thank Jason Schulman for this reference.

112 Consider, for example, Learned Hand's 1958 Oliver Wendell Holmes Lecture at Harvard University. See Gunther, *Learned Hand*, 654–59.

At an inaugural lecture for this Institute and Chair, Warren spoke to an audience of over 500 community leaders at the Beverly Hilton Hotel. Included in attendance were Jose Ferrer, Groucho Marx, Jack Lemmon, and Frank Sinatra.[113] In his talk, Warren declared, "I am convinced that the greatest hope for the future depends on the development of law and ethics studied and applied together in one framework."[114] It is telling that at that particular historical moment, it was in the context of a Jewish institution that Warren was able to begin to cultivate this vision.

Warren's interest in Jewish law as a model for American law may have emerged in the context of a quest for new institutional alliances that might promote new legal theories in the service of that aim. Spiegel's *Amos versus Amaziah* was the beginning of such an attempt, in the context of a Jewish institution. Cover's "Nomos and Narrative" brought that attempt back into America's prestigious law schools. Since the publication of Stone's 1993 article, times have changed, as have trends in American legal theory, constitutional interpretation, and judicial review. But the story of American law's ongoing relationship to the era of the Warren court, and the story of the encounter between American law and Jewish law, continues to unfold.[115]

113 Earl Warren Institute of Ethics and Human Relations Records, Academic Departments and Schools, American Jewish University Archives (Institutional Records). Box 15, Folder 17. (https://oac.cdlib.org/findaid/ark:/13030/c8dz0bj6/) I thank Annie Mintz for calling my attention to this recording.

114 Audio recording (https://makor.primo.exlibrisgroup.com/discovery/delivery/01JTS_INST:01JTS/1255443070007706 (accessed March 15, 2024).

115 A topic for future study is the use of Jewish legal sources related to abortion in amicus briefs and public conversations surrounding the Supreme Court's recent relitigating of the Burger Court's decision in *Roe v. Wade*, widely understood as an outgrowth of Warren Court jurisprudence, and how that fits into the broader encounter between Jewish law and American law discussed in this article, including Stone's cautions about that encounter.