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Property Ownership: Right or Duty?

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PROPER(TY) THOUGHTS

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In 2003, with ten other adult men, I became a b'nai mitzvah, a son of the commandments, at the age of 60 at Adas Israel in Washington, DC, where we lived until 2008. Both during and since that day, I have been trying to figure out the deeper meanings of the bar mitzvah ritual I undertook as an elder. If I had trouble with that you can imagine how hard it must be for a thirteen year old with a crackling voice and raging hormones. I began to discover part of the answer in 2011.

During a Saturday morning Shabbat service at B'nai Jeshurun, the synagogue my wife and I then attended in New York City, we were stunned when Rabbi Rolando Matalon began talking about and reading from an essay written by a law professor. We knew the place was unusually open to interesting ideas, but law review stuff? That is not typically on a synagogue's menu. It turned out that Rabbi Matalon had selected an essay by perhaps the only legal scholar whose work slid easily into the Jewish gestalt.

Robert Cover was born the same year as me—1943. He died suddenly of a heart attack in 1986 just before his 43rd birthday. The event stunned not just Yale Law School where he became a full professor at the age of 29, but the entire legal academy and much of the legal world. So many people knew about Cover's breathtaking teaching, insightful writing, and deep commitment to the civil rights and the anti-apartheid movements, as well as his personal dedication to improving the lives of the least well off. He lived his intellectual commitments to the fullest in ways few of us will ever match. He talked the talk and walked the walk. After his death, his colleague Steven Wizner elegantly and simply said of Cover: "Bob Cover lived in this world, even as he dreamed of better worlds. He fought for social justice. He practiced loving kindness. He was a teacher and friend to all of us."^[1]

The Cover essay Rabbi Matalon used turned out to be a brief piece I had not previously read. Entitled *Obligation: A Jewish Jurisprudence of the Social Order*.^[2] It was about a topic close to Cover's heart—the ways in which cultural narratives and normative legal systems influence each other, though not necessarily harmoniously. Explored at much greater length in a famous article called *Nomos and Narrative* published in Harvard Law Review in 1983,^[3] Cover took the position that the contours of national cultures, their various constituencies and their normative universes, whether for good or ill, were supported, confined, and given meaning by myths and narratives widely accepted in the relevant communities. It's this idea—the relationships between national legal institutions and cultural narratives—that I would like to explore here to see if the myths and narratives of Jewish property law have something to tell us about modern legal analysis in western societies.

Let's start with a brief excerpt from the Cover essay that helped me understand more about the significance of a bar mitzvah.

The basic word of Judaism is obligation or mitzvah. It * * * is intrinsically bound up in a myth—the myth of Sinai. Just as the myth of social contract [governing much of American legal life] is essentially a myth of autonomy, so the myth of Sinai is essentially a myth of heteronomy. Sinai is a collective—indeed, a corporate—experience. The experience at Sinai is not chosen. The event gives forth the words which are commandments.

* * * *

Indeed to be one who acts out of obligation is the closest thing there is to a Jewish definition of completion as a person within the community. A child does not become emancipated for “free” when he or she reaches maturity. Nor does she/he become *sui juris*. No, the child becomes bar or bat mitzvah, literally one who is of the obligations. * * * [T]he logic of Jewish law is such that once the obligation is understood as falling upon * * * [any person], then there is no question of “right” of participation. Indeed, the public role is a responsibility.[4]

The consequences, therefore, of becoming a person of obligation and responsibility are quite distinct from those attached to becoming an adult citizen capable of claiming and holding rights in property. Choosing to join the Jewish community, which is what every bar or bat mitzvah does, carries with it obligations to both the community and the world at large. It embodies a form of “freedom” encompassing both responsibilities and the understanding that others have responsibilities toward you. It is an environment that not only encourages understanding of the meaning of obligation by relentless study of Torah but also allows for community supported risk taking—a rarely discussed form of freedom—in ways not automatically encompassed in a world of free-wheeling autonomy and rights. Learning is not just for its own sake or for us as individuals, but also for the benefit of the community. Obligations that seem obscure, old-fashioned and even silly to some become deeply important. Keeping kosher, for example, not only makes people thoughtful and thankful about everything they eat. More importantly, it is an obligation insuring that everyone we know—Jewish and non-Jewish alike, can eat in our house without any concern. It helps mark our membership in and responsibility to a community.

There are many examples of this in ancient Jewish property law. Farmers are not asked to be generous as a matter of personal choice. Rather they are obligated to leave the corners of their fields unharvested for the benefit of the poor. Strangers must be taken into our homes, especially for Passover seders, not just out of personal generosity, but as a reminder that we were once slaves—strangers in a strange land—prior to Sinai. But perhaps the most interesting is the “shmitah”—the sabbatical year. The word “shmitah” literally means “release.” The sense here is that land is released from its standard forms of production and debtors are released from their duty to pay their creditors.

The idea surfaces in three somewhat different ways in the Torah—the first five books of the Old Testament. Exodus (Sh’mot or “*names*” in Hebrew) 23:10-11 reads:

Six years you shall sow your land and gather in its yield; but in the seventh you shall let it rest and lie fallow. Let the needy among your people eat of it, and what they leave let the wild beasts eat. You shall do the same with your vineyards and your olive groves.

Leviticus (Vayikra or the Lord “*called*” in Hebrew) 25:3-6 says:

When you enter the land that I assign to you, the land shall observe a Sabbath of the Lord. Six years you may sow your field and six years you may prune your vineyard and gather in the yield. But in the seventh year the land shall have a Sabbath of complete rest, a Sabbath of the

Lord: you shall not sow your field or prune your vineyard. You shall not reap the aftergrowth of your harvest or gather the grapes of your untrimmed vines; it shall be a year of complete rest for the land. But you may eat whatever the land during its Sabbath will produce.

And finally Deuteronomy (Devarim or “words” in Hebrew) 15:1-2 provides:

Every seventh year you shall practice remission of debts. This shall be the nature of the remission: every creditor shall remit the due that he claims from his fellow; he shall not dun his fellow or kinsman, for the remission proclaimed is of the Lord.

These verses project a set of intriguing ideas about land and money. First, the earth needs rejuvenation just as we do. Declining to undertake work or other standard activities on Shabbat is by far the most important observance for a Jew. But these Biblical lines suggest that Shabbat is not only a ritual for the Jewish community. It is extended beyond the community to the entire earth. There is, therefore, a fascinating spiritual linkage between us, the property we use, and the world in which we live. Second, the “shmitah” of the land is for the poor. You may eat what the land produces on its own, but you must also let the poor enter on the land and do the same thing. Again, it is a community obligation.

Echoes of both ideas are in another famous Biblical story about the land and its food. Shortly after the Israelites left Egypt they complained bitterly about life in the desert and the dearth of food. God delivered manna to them with several restrictions. First, they would have to go out and gather it each morning. Food was not going to arrive without labor. Second, they could take only what they needed. If they took more it would rot before it was consumed. All members of the community were treated the same. And third, there would be two helpings of manna on Friday so they wouldn’t have to gather food on Shabbat. Here, as with “shmitah,” the bounty of the earth was to be shared by the entire community, the earth, and even God. Even the Divine, the food provider in the myth, needed a period of calm, reflection and rest every week.

Third, in the “shmitah” passages the sabbatical year is “for the Lord.” Now for someone like me who does not think of the world as governed by a *deus ex machina* divinity pulling puppet strings, this strikes a particularly interesting chord. Its meaning for me is not that we are obligated to let the land rest only for its benefit, but also for ours. The responsibility to fulfill mitzvot or commandments certainly is not for the benefit of any concept of God or force of nature that I or you may have. To begin prayers with the phrase “Blessed are you our Lord our God” as virtually all Jewish blessings do is on its surface nonsensical. If a God-notion is powerful and apart from us it does not need our beneficence. How can our acts bless or benefit whatever God or spiritual image you may have? Only by thinking of us as partners with the world, as part of whatever spirituality resides in it, can sense be made of blessing a spirit or nature, or making the sabbatical year “of the Lord.” We are not autonomous people but in and of a world dependent on our actions for its well-being. An obligation to repair the world—Tikun Olam in Hebrew—is the consequence for Jews.

Finally, “shmitah” applies not only to land but to debts—a bankruptcy rule if you will. Why? It’s not really for the benefit of the debtor. Why should a debtor’s “right” to release be any more important than a creditor’s “right” to receive payment for an obligation? The answer, at least in Jewish law, must be because leavening wealth differences benefits the community. To forgive a debt becomes a mitzvah, if you will, benefitting the community as a whole, not the debtor.

This all sounds quite utopian, right? Certainly in part. The practical difficulties of following such rules led rabbis over the years to create exceptions, rules and limits in ways that only Talmudic scholars may ever fully understand. But there are aspects of such a thought modality about obligations and communities rather than rights and autonomy that operate not only in Jewish real property law but in our property law—real, personal and intellectual—as well. Trust law embodies such ideas—

imposing on fiduciary actors, sometimes against their will, obligations to protect others. Concurrent owners have fiduciary obligations to each other. They are, if you will, a small community with mutual obligations and duties imposed by law. Adverse possession law, by allowing long-standing land use practices to continue, gives priority to extant community habits over old personal claims of right. This is especially visible in cases validating public rights to beach access in a number of coastal states. Nuisance law, by giving priority to uses favored by the community, is in many ways the antithesis of an autonomy-fulfilling doctrine. Despite the claim of many economists that nuisance law embodies the ultimate in allocation of rights, it actually should be thought of as a system to distribute duties. In copyright law, transfers of copyright interests may be terminated thirty-five years later, much like forgiving a debt. And, of course, we do have a bankruptcy system. What would happen if we began to think of the world of property as presumptively about obligations to the world rather than about personal rights? How would things then look? And is such a world attainable?

Our property system with all the claims of right inherent in its structure is not preordained. It is a cultural phenomenon, as Cover would say, shaped by national narratives, stories, myths, ideals and goals. Constraints on property ownership and use are routinely described by many, if not most, of us as exceptions to general principles of autonomy and rights. We have all absorbed that message, making the intellectual lives of spiritually invested people like me a constant struggle to recognize the ways my own autonomy as a rights claimant should be limited by the needs of the larger communities in which I live, pray, and work.

That is especially critical to think about—especially at a time like the present—when various cultural mythologies about American property law come to loggerheads. How can a society survive if no one wants to sacrifice in any way for the enhancement of a larger community? Are there other narratives that may be told—other stories buried in our culture that might lead to different sorts of property regimes?

Some of the thoughts in this blog were first delivered on November 3, 2011 when I was the Gifford Distinguished Lecturer in Real Property at the University of Hawaii William S. Richardson School of Law in Honolulu.

[1]. Steven Wizner, *Tributes to Robert Cover*, 96 Yale L.J. 1699, 1711 (1987).

[2]. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. of L. & Rel. 65 (1987). This original version has been republished in other volumes, including Michael Walzer (ed.), *Law, Politics, & Morality in Judaism* (2006).

[3]. Robert M. Cover, *The Supreme Court, 1982 Term – Foreward: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983).

[4]. Walzer, *supra* note 2, at 5.