

# **IN PRAISE OF A LEGAL POLYMATH A SPECIAL ISSUE DEDICATED TO THE MEMORY OF HAROLD J. BERMAN (1918-2007): TRIBUTES: THE HIDDEN INFLUENCE OF JEWISH LAW ON THE COMMON LAW: ONE LOST EXAMPLE**

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## **Text**

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[\*1403]

### Introduction

Arguably, one of the most famous observations that the late Professor Harold Berman made was about the influence of Jewish law on the common law tradition. Twenty-five years ago, he wrote:

While a direct influence of Jewish law on Western law cannot be identified, Jewish thought did contribute to the general intellectual climate of the times. This came about in two ways. First, there was the influence of Jewish thought directly - in particular, the allegorical tradition of reasoning present in the Midrash ... .

The second form of influence was more subtle. As Christian scholars sought contacts with Jewish intellectuals in order to clarify their understanding of the Old Testament, they found that the Jews frequently had translated words and phrases differently and had interpreted passages in a wholly different way. This forced the Christians to reexamine their sources and their arguments, and often to devise new explanations to counter Jewish knowledge and criticism...

Nevertheless, neither Jewish thought nor Jewish law seems to have had any substantial influence on the legal systems of the West, at least so far as the surviving literature shows. <sup>1</sup>

Professor Berman is undoubtedly correct that the surviving literature shows little such influence of Jewish jurisprudence. Over the course of numerous conversations I had with Professor Berman at Emory, we discussed another possibility, namely that the Jewish tradition indeed had a distinct influence on the common law; however, due to the general lack of enthusiasm for the Jewish legal tradition throughout the medieval Christian world, even when [\*1404] Jewish sources were consulted, they were not cited. I wish to show what I think is one such example - the enigmatic origins of the common law rule that the holder of lost property might be a bailee for hire and not a gratuitous bailee.

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<sup>1</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 588 (1983).

### The Holder of Lost Property as a Bailee

One who picks up a lost object prior to abandonment does not take complete title to the object according to both Jewish and common law.<sup>2</sup> Rather, a bailment is created as the finder is entrusted to hold the property for its true owner. But what type of bailment is created, and with what level of liability? In general, Jewish law recognizes essentially three categories of bailment, each with varying degrees of responsibility: (1) the gratuitous bailee, who is liable only for outright negligence; (2) the bailee for hire, who is also liable for theft or loss; and (3) The borrower, who is virtually an insurer, and liable for almost all mishaps which may befall the article.<sup>3</sup>

Similarly, although the common law tradition has a number of terms to describe various scenarios in which one is entrusted with the property of another, it essentially recognizes three categories of bailments (excluding exceptional obligations created by law): (1) gratuitous bailments for the bailor's sole benefit (e.g., the unpaid watchman); (2) gratuitous bailments for the bailee's sole benefit (e.g., the borrower); and (3) bailments for mutual benefit (including the watchman for hire and the renter).<sup>4</sup> The rights and responsibilities of the bailee in each of these categories - including liability for the object in question - though different from Jewish law, likewise vary by classification. Clearly in the case of holding on to lost property, the bailment is not to the sole benefit of the finder. But what of the remaining two categories - is the bailment created a very limited bailment, like a gratuitous bailee, or is it the more rigorous bailment for hire?

### The Jewish Law

The Talmud cites two opinions concerning the category of bailment created when one finds lost property and holds it for its true owner. The Talmud [**\*1405**] states: "A bailee of lost property: Rabbah ruled that he is a gratuitous bailee; Rabbi Joseph maintained that he was a bailee-for-hire."<sup>5</sup> It is unclear which of these two opinions Jewish law accepts as normative. Many early authorities, including Maimonides and Joseph Karo, author of the Shulhan Arukh, rule in accordance with the opinion of Rabbi Joseph and therefore hold the finder responsible not only for negligence but also theft or loss not attributable to negligence.<sup>6</sup> Many other authorities, including Rabbi Moses Isserles, accept the opinion of Rabbah and rule that the finder only has the status of a gratuitous bailee and is liable only for his negligence.<sup>7</sup> This dispute remains unresolved in Jewish law.<sup>8</sup>

At this point we should note that while nearly all of these works of Jewish law were generally unavailable to those who did not read Hebrew in pre-modern times, Maimonides' Mishneh Torah had been translated into Latin.<sup>9</sup> And

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<sup>2</sup> See Michael J. Broyde & Michael Hecht, The Return of Lost Property According to Jewish & Common Law: A Comparison, 12 J.L. & Religion 225, 239-41 (1995-96).

<sup>3</sup> Bava Mezia 93a; Moses Maimonides, Mishneh Torah, Hiring [of Workers], 1:1-2.

<sup>4</sup> 19 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 53:3 (4th ed. 2001).

<sup>5</sup> Bava Mezia 29a; cf. Bava Kama 56b.

<sup>6</sup> Moses Maimonides, Mishneh Torah, Theft and Abandonment 13:10; Joseph Karo, Shulhan Arukh, Hoshen Mishpat 267:16.

<sup>7</sup> Shulhan Arukh, Hoshen Mishpat 267:16.

<sup>8</sup> Both Joshua Falk-Cohen (Sema) and Shabtai ben Meir HaCohen (Shakh) label this dispute as a case of legal doubt.

<sup>9</sup> See Gorge K. Hasselhoff, Maimonides in the Latin Middle Ages: An Introductory Survey, 9 Jewish Stud. Q. 1 (2002).

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Maimonides unequivocally rules that the holder of lost property is a bailee-for-hire. Admittedly, the opinion classifying the finder as a bailee-for-hire requires explanation. Why should a person who is involuntarily returning lost property assume the status of a paid bailee? The Talmudic Rabbi Joseph<sup>10</sup> renders his opinion based on an overtly religious doctrine that, while one is engaged in the actual performance of a legally compulsory religious duty, one is excused from other legal obligations, including financial obligations. Thus, Rabbi Joseph recounts that if perchance while the bailee was attending to the lost article for the owner's benefit<sup>11</sup> - a legally compulsory duty - a poor man came for a charitable donation, one would be excused from giving him charity, and such charity is otherwise mandatory.<sup>12</sup>

**[\*1406]** The bailee's involvement in attending to a lost object exempts him from attending to the poor man (which would otherwise be obligatory), thereby allowing the returner of lost property to derive a clear financial benefit from his action; such a benefit qualifies as a payment. This financial benefit, according to Rabbi Joseph, is itself sufficient to classify the finder of lost property as a bailee-for-hire, since he can derive financial benefit from his bailment.<sup>13</sup> This outcome is unlikely, however, and that is why some authorities accept the opinion of Rabbah and rule that, since the financial gain is sufficiently remote, a finder should better be classified as a gratuitous bailee. As a matter of Jewish law, with its almost unique mixture of law and religion, this dispute makes sense. But it does not easily map onto native common law principles.

#### The Common Law Tradition

This exact dispute as to the status of the finder of lost property occurs in the common law. As one legal encyclopedia states:

The finder of lost property who takes possession of it assumes the duties of a bailee without compensation, although there is also authority that the finder is a bailee for hire.<sup>14</sup>

However, in common law the prevailing view is that the finder is a gratuitous bailee, with only a minority of authorities accepting the bailee for hire rule.<sup>15</sup> But this dispute makes no sense in the common law. Unlike Jewish

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<sup>10</sup> Bava Kama 56b.

<sup>11</sup> Obviously the mere fact that the object is in the finder's possession does not constitute involvement in a mitzvah (esek be-mitzvah). The bailee must actually be involved in preserving the object. See Tosafot, Bava Kama 56b, s.v. behahi hana'ah.

<sup>12</sup> Providing charity for a person's daily food needs is mandatory in Jewish law. See Shulhan Arukh, Yoreh Deah 250:1. It is worth noting that the Talmud, Bava Kama 56b, seems to offer an alternative rationale for Rabbi Joseph, namely that the finder is considered a bailee for hire because Divine Law imposes against one's will the obligation to pick up lost objects. In this explication of Rabbi Joseph's view, one's religious obligation to pick up lost items generates responsibilities to the found object above and beyond the care due to all property one does not own (i.e., merely to avoid negligence, the same duty incumbent upon a gratuitous bailee, who fundamentally is not a bailee at all as everyone is required to exercise this minimum level of care for others' property). Rabbah would disagree with this as well, viewing the property in the finder's possession as no different from an object left on anyone's property by a stranger (heftsekha bimekomi), due no (extraordinary) care other than the avoidance of negligence.

<sup>13</sup> This distant definition of benefit is not foreign to American law. Frequently, the law defines even a very tangential theoretical benefit as sufficient to be classified as a benefit as a matter of law. See, e.g., [Donovan v. Bierwirth, 680 F.2d 263 \(2d Cir. 1982\)](#) (holding that, for the purposes ERISA law, a benefit encompasses even situations where there is no apparent real financial benefit).

<sup>14</sup> 36A C.J.S. Finding Lost Goods § 8 & nn.13-15 (2008) (emphasis added, footnotes omitted).

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law, which mandates that one pick of a lost object when one sees it, and unlike Jewish law which mandates the giving of charity in certain situations, the common law has no basis for explaining why one might consider the person who picks up a lost object to be a bailee for hire. Indeed, when one looks in the classical works of the historic common law, one sees that the commentators on the common law [\*1407] were equally befuddled by this mystery. <sup>16</sup> Why should the common law ever burden the voluntary holder of lost property with the status of a bailee for hire? There is no good answer to this question.

All things considered, I think that the answer is the influence of Maimonides on the common law. The great early writers of the common law had Maimonides' code of Jewish law in front of them in Latin translation, and Maimonides clearly rules that the finder of lost property is a bailee for hire. Since Maimonides provides no reasoning for the black-letter law in his code, there was nothing to indicate to the great codifiers of the common law that this was one of the instances where the commercial law in the Jewish tradition was influenced by its religious values, and Maimonides' rule was incorporated into the common law as one possibility. Of course, as was the style of the day, Maimonides was not cited - but yet, it is quite reasonable to suppose that an otherwise absolutely inexplicable enigma in the common law could well be explained by reference to the medieval Jewish law treatise readily available to the codifiers of the common law, such as the eminent legal scholar and jurist John Selden, who others have noted sometimes made even direct use of Jewish law and whose scholarship was replete with influences of Jewish law. <sup>17</sup>

## Conclusion

Lacking skills as a legal historian - yet another skill Professor Berman seemed to have acquired with ease - I am not sufficiently well-trained to prove that the common law was, in fact, influenced by Jewish law in its analysis of this area, rather than merely evolving in the same way as a matter of unexplainable coincidence. However, the common law rule that the finder assumes the duties of a bailee for hire seems impossible to explain within the common law tradition. <sup>18</sup> It would not come as a surprise to me if this were but [\*1408] one of many examples of a hidden Jewish law influence on the common law, nor would this be the first time such an influence has been shown. <sup>19</sup>

<sup>15</sup> See, e.g., Ray Andrews Brown & Walter R. Raushenbush, *The Law of Personal Property* § 3.5 (3d ed. 1975); 36A C.J.S. *Finding Lost Goods* § 8 (2008).

<sup>16</sup> See R.H. Helmholz, *Equitable Division and the Law of Finders*, [52 Fordham L. Rev. 313 \(1983\)](#); Comment, *Lost, Mislaid, and Abandoned Property*, 8 *Fordham L. Rev.* 222 (1939).

<sup>17</sup> See Isaac Herzog, *John Selden and Jewish Law*, 13 *J. Comp. Legis. & Int'l L.* 236, 236-45 (1931). Herzog went on to become the first Chief Rabbi of Israel.

<sup>18</sup> In Michael Broyde & Michael Hecht, *The Return of Lost Property According to Jewish & Common Law: A Comparison*, 12 *J. L. & Religion* 225, 244 (1996), I speculated that the answer to this question is different. I wrote,

On the other hand, there is a reasonable chance that the finder will derive a monetary benefit from his actions, since if the true owner does not come forward, the finder stands to gain use of the property rent free. Thus one could classify him as a bailee for hire, since he is seeking to rescue the property with the hope of using it.

Id. This may well be a fine explanation for Jewish law, but at its core the common law cannot recognize this answer as correct since such a taking is illicit as a matter of common law. Professor Berman noted to me many years ago that I must have been confusing Jewish law and common law when I wrote this sentence, and he was correct.

<sup>19</sup> See Judith A. Shapiro, Note, *The Shetar's Effect on English Law - A Law of the Jews Becomes the Law of the Land*, [71 Geo. L.J. 1179 \(1983\)](#); Isaac Braz, *The Privilege Against Self-Incrimination in Anglo-American Law: The Influence of Jewish Law*, in *Jewish Law and Current Legal Problems* 161-68 (Nahum Rakover ed., 1984); Jacob J. Rabinowitz, *The Influence of Jewish Law on the Development of the Common Law*, in 1 *The Jews: Their History, Culture, and Religion* 497 (Louis Finkelstein ed., 1st ed. 1949).

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Indeed, Professor Berman's wisdom can be seen even in his careful choice of words to describe the known influence of Jewish law on the common law. When he states "neither Jewish thought nor Jewish law seems to have had any substantial influence on the legal systems of the West, at least so far as the surviving literature shows," it might well turn out that this final clause marks his profound contribution to this field of inquiry, inspiring scholarship to present a more complete understanding of the impact of Jewish law on the common law tradition.

Such is the mark of a true scholar.

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