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Institute of Jewish Law

Jewish Law Report

Editor: Dr. Chaim Povarsky

April 2000

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The Enforcement of a Jewish Marriage Contract in a Civil Court: Is Jewish Law a Religious Law?

(Symposium held in November 1998 at Touro Law Center)

Vice Dean Eileen Kaufman:

Dean Howard Glickstein asked me to send his regrets for not being here tonight, but also his warm regards to the speakers and to those in attendance. I am delighted to welcome you to this conference entitled, "The Enforcement of a Jewish Marriage Contract in a Civil Court: Is Jewish Law a Religious Law?" This program is particularly topical given the fact that there has been at least one Jewish marriage very much in the news lately.

Many of you may have seen an article that appeared in the New York Law Journal last weekend. The story, picked up by the popular media, involved a woman who is suing two Rabbis who divulged what she claimed was confidential information. The rabbis divulged that information to her husband for use in a pending matrimonial action. Her assertion of the privilege, the privilege between what is typically called penitent and priest, is not particularly noteworthy. However, the fact that

she has sued her rabbis for damages in a civil action is quite newsworthy. Apparently, one of the rabbis is now arguing that he was duty-bound, by precepts of religious law, to divulge the information in order to protect the children of the marriage.

I think that this case raises an interesting question, one that is related to the topic for tonight's conference. That is, how is a civil court to weigh an argument that, theoretically, at least, requires the court to assess whether the disclosure of confidential information is actually compelled by precepts of religious law? So whether or not tonight's panelists will directly address that issue, I am sure that the panel will address similar and interesting issues concerning the ability of the civil courts to resolve issues that revolve around religion.

The conference has been organized by Professor Chaim Povarsky, the Director of our Institute of Jewish Law. In addition to teaching courses on Jewish Law here at the Law Center, Professor Povarsky also does a wonderful job publishing the Jewish Law Report and organizing conferences like the one tonight on a variety of Jewish Law topics. Last year's programs included one on lawyers' ethical dilemmas, another on a judge's perspective on the interaction between Jewish and American Law, and one exploring whether democracy and religion are reconcilable. I am delighted to present Professor Povarsky to you.

Professor Chaim Povarsky:

I am delighted to welcome you to the first Jewish law symposium of the 1998\99 academic year, sponsored by the Jewish Law Institute and supported by the Lillie Goldstein Charitable Trust. The topic of this symposium entitled, "The Enforcement of a Jewish Marriage Contract in a Civil Court: Is Jewish Law a Religious Law?" is very controversial and has been subject to extensive discussion both in civil courts and legal literature.

Although the topic refers to a Jewish marriage contract, the issues, which will be discussed tonight, are not limited to a Jewish marriage contract. They are much broader. They encompass the entire Jewish legal system. Occasionally, civil courts deal with cases involving Jewish legal documents or principles. A Jewish marriage contract, known as the *ketubah*, is one example. Other examples are a Jewish divorce known as the *get*, and a Jewish loan contract known as *heter Iska*, designed to circumvent the Jewish prohibition against collecting and paying interest on loans.

On its face these documents are purely secular. They do not involve any religious elements or ceremonies. However, they are part of Jewish

law and are designed to satisfy Jewish legal requirements. Thus, the question arises as to whether Jewish law is a religious law, and whether every Jewish legal document or principle should be labeled religious just because it is part of Jewish law. In a practical sense, the question is whether a civil court should deal with cases involving such documents. Would the court's involvement constitute a violation of the First Amendment regarding the separation of church and state?

The question of whether Jewish law is a religious law can be discussed from both a Jewish and American legal perspective. They are not necessarily identical. I would like to mention briefly a number of facts and principles that might indicate the Jewish legal perspective on this issue.

It is universally known that Jewish law is a combined system, consisting of law, religion and morality. These three elements are intertwined and interrelated, and form one system, known as *halacha*, which means a way of life. For instance, the Ten Commandments include religious, ethical and legal principles. The prohibition against idolatry is a purely religious principle, the obligation to honor parents is an ethical principle, and the prohibitions against homicide and theft are legal principles.

But not only the Ten Commandments, the entire Torah and Jewish law consist of religious, ethical and legal principles. For instance, paying off a debt under Jewish law is not only a legal obligation, but also a religious duty. The Talmud states, *Priyat ba'al chov mitzva*, meaning that paying off a debt is a religious precept. And the same is true with other legal obligations. There is a religious duty to observe Jewish law, and thus, a violation of any legal obligation also constitutes a violation of a religious duty. One must observe the laws of contracts, torts and property just as one must observe the laws of Sabbath and dietary laws. All these laws are binding because they were given by G-d or enacted by those authorized by Him. This aspect of Jewish legal principles seems to indicate that Jewish law is a religious law.

On the other hand, there are some indications that Jewish law can be separated from the Jewish religion. One indication is the very term Jewish Law, *Mishpat Ivri*. This is a modern term. The traditional term is *Halacha*, which, as mentioned earlier, includes law, religion and morality. The term Jewish law was introduced at the turn of the 20th century by modern Jewish legal scholars, who sought to establish a Jewish secular law equivalent to modern legal systems. They did so by distinguishing between the religious and legal principles, and naming the latter *Mishpat Ivri*. Other Jewish legal scholars, however, believe that this "surgery" is purely cosmetic and does not change the religious nature of Jewish law.

Another indication that Jewish law and Jewish religion may not be identical is the talmudic dictum “*mamona me'issura lo yalfinan*,” which means that one cannot draw an analogy between civil principles and religious prohibitions. For instance, a married woman, who claims that her husband is dead and does not provide any evidence, is believed for the purpose of remarrying, but is not believed for the purpose of collecting money from the estate, which she would be entitled to as a widow. The Talmud explains that these are two different branches, law and religion, or, in the talmudic terminology, *mamona* and *issura*, and no analogy can be drawn between them. This may indicate that Jewish law and religion are separate and not identical.

Another indication of the distinction between Jewish law and religion may be found in the interesting theory, advanced by two prominent Jewish authorities in the beginning of this century, Rabbi Shimon Shkop and Rabbi Elchanan Wasserman. A basic rule, which applies in property disputes, is that in case of doubt regarding property rights, the possessor of the property may keep it. In the absence of evidence to the contrary, the possessor may keep the property, even if the possessor himself is not certain whether the property belongs to him.

On the other hand, in case of a doubt regarding a biblically religious prohibition, one must follow the more stringent option. For example, if a person is not sure whether certain food is kosher, he is not allowed to eat it. Rabbi Shkop raises the following question: Since all civil obligations constitute religious duties, and one who keeps another's property is violating the religious prohibition against theft, then the possessor should not be allowed to keep the property in case the ownership rights were not determined, because the possessor may be violating a religious prohibition against theft.

Based upon this and other questions Rabbi Shkop and Rabbi Wasserman suggested the following theory. In a dispute over property rights under Jewish law the court must first decide these rights based upon pure, legal principle. Only after the legal rights have been determined, then a religious duty comes into play requiring that the property be handed over to its owner. Therefore, in case of an uncertainty, because the possessor may keep the property based upon legal principles, religion does not require that the possessor surrender the property. This analysis indicates that Jewish civil law operates independently of the Jewish religion. Religion merely cements and reinforces the legal obligations.

Whatever the Jewish legal perspective may be regarding the question of whether Jewish law is a religious law, a civil court does not necessarily have to adopt the Jewish legal approach. To resolve the issue of whether a civil court may deal with Jewish legal documents, the following questions

should be addressed. First, is Jewish law a religious law from a Jewish legal perspective? Second, should an American civil court be guided by the Jewish legal approach to this issue? And third, what should be the American legal approach? Tonight's symposium should shed some light on these complex issues.

It is now my pleasure to turn over the podium to my colleague, Professor Daniel Subotnik, who will introduce the speakers and moderate the symposium. Professor Subotnik teaches tax and corporation law, and is actively involved in Jewish programs and the activities of the Jewish Law Institute. Professor Dan Subotnik.

Professor Daniel Subotnik:

Thank you, Chaim. I cannot possibly top that as an introduction. I think what I will do is restrict my efforts to introducing the panelists. First, my colleague, Professor Jeffrey Morris. Professor Morris has been at Touro for eight years. In 1965, he graduated from Columbia Law School, and subsequently, in 1972, he earned a Ph.D. in political science from Columbia. He has had a wide range of experience in the area of history, political science and law, and has taught in a variety of different institutions. Professor Morris has worked with some of the most distinguished people in America. First, and perhaps foremost, his father, Richard Morris, who was an eminent historian. In addition, he worked with Henry Commager, Allan Nevins and a variety of judges at the federal level. He has published extensively. Professor Jeffrey Morris.

Professor Jeffrey Morris:

I appreciate Dan's lovely introduction. It should not conceal the fact that my role here tonight is something like that of the overture in the Metropolitan Opera production of "La Forza del Destino." The way the Met does La Forza is to perform the first act, and then, as a prelude to the second act, the overture is played. It goes by quickly, which allows the action to proceed the way it should have from the beginning.

I have been asked to make a few observations on the perspective from American constitutional law. This subject has been a fascinating one throughout the 200 some-odd years since the ratification of the first amendment. I would begin by reminding everyone that the First Amendment seems to require two ultimately contradictory principles: it forbids the establishment of religion, but it also forbids infringement of the free exercise of religion.

The purpose of the First Amendment was expressed brilliantly by Justice Black in the 1947 Everson decision. There, he wrote of the turmoil, evil strife and persecutions of Europe, generated in large part by established sects determined to maintain their political and religious supremacy. Efforts to enforce loyalty to whatever religious group was on top and in league with the government, and at many times and many places caused men and women, wrote Justice Black, to be fined, jailed, cruelly tortured, and killed. We have been spared much of that in our own country, but trying to make one's way through the First Amendment doctrine is nevertheless like crossing a minefield.

The Establishment Clause means that no state church can be established; that no law can be passed to aid a particular religion or, indeed, aid all religions; that no punishment can be tolerated for one's religious beliefs or for lack of attendance at religious services; that there cannot be taxation to support activities of churches and synagogues. And it means, somewhat further, that the state or the actors in the government may not participate in the affairs of religion, and that has included, for example, a prohibition upon the role of the federal courts, indeed any secular courts, in settling religious intra-church disputes. The state has an obligation to refrain from any act, which might interfere with religious discipline or interfere with a religious tribunal. The courts of the realm are also constitutionally enjoined from entering a dispute with religious implications when the subject has been the object of litigation in ecclesiastical courts.

The federal and the state secular courts are also prohibited from determining whether an alleged religion is really a religion. The state cannot enforce religious law. The state cannot settle religious disputes. And, yet, and this is what makes the First Amendment or studying the First Amendment so fascinating, many accommodations between church and state have been made in this country. Chaplains serve in the Congress, state legislatures, and in the armed forces; the Chanukah menorah may sometimes be placed on municipal property, and so forth. It is clear under prevailing case law that states may foster free exercise of religion even to the point of recognizing exceptions to the law for religious beliefs. For example, it does not violate the Establishment Clause of the Constitution for a court to apply to religious practices some neutral principles of law, so long as the courts are not required to interpret religious doctrines.

The prevailing test under the Establishment Clause (and the one that must clearly be kept in mind in dealing with the intricacies of the subject before us tonight) still seems to be that an action of the government must serve a legitimate secular purpose and not have the primary effect of advancing religion. And that means, I dare say, that a court must not bend

existing secular principles to achieve religiously equitable results. A judge cannot interpret religious law, as that would be entanglement. If a state entangles itself in a religious ceremony or in interpreting religious law, the First Amendment is transgressed. Nevertheless, it has been held that courts may apply neutral principles of law to a dispute affected by religious law. The New York State Court of Appeals has attempted to apply objective and well-established principles of secular law to disputes involving religious documents, permitting judicial involvement to the extent that it can be accomplished in purely secular terms.

In attempting to reconcile the involvement of the secular courts in disputes which primarily involve religion, a court can, following principles of conflict of laws, apply laws associated with religion which characterize whether a problem within its law is a secular problem or a religious problem. That much, I think, the secular court can do. And that means that a secular judge, dealing with a dispute over religious matters, must dance carefully down the sideline, avoiding the main playing field of action. A judge must always remember the very real risk of violating religious freedom by attempting through the secular courts to free somebody from restraints that may be caused by religious activity.

Professor Daniel Subotnik:

Thank you Jeffrey. I would like to introduce next Professor Steven Resnicoff of DePaul College of Law. Professor Resnicoff graduated from Yale law school. He also earned *semicha*, Rabbinical ordination, in 1983 under the direction of Rabbi Moshe Feinstein, in a private ordination. I first met Professor Resnicoff about twelve years ago when he gave a wonderful lecture here. Soon thereafter, he began teaching law at DePaul, where he has been ever since. I am amazed, Steve, at what you have been able to accomplish in your years at DePaul where you teach and write extensively in the areas of Negotiable Instruments and Jewish law. Professor Resnicoff also lectures on Jewish law widely. It is a pleasure to welcome you here today, Steve.

Professor Steven H. Resnicoff:

Thank you very much, Professor Subotnik, for your introduction. It is wonderful to see you again after so many years. Professor Morris's analogy to his being the overture to the second act reminded me of F. Scott Fitzgerald's line, "There are no second acts in American lives." Nevertheless, I am still going to give my presentation.

Dr. Povarsky mentioned that today's topic is much broader than what it seems on its surface. Indeed, he said that it encompasses the entire Jewish legal system, which made me feel all the more unprepared, and I am concerned as to whether in twenty minutes I can do justice to such an expansive field. But, as he spoke, I remembered a recent experience that gave me some consolation. After the grades for my course were announced for this last semester, a student came over to me and said, "Professor, I have wanted to say something to you for the entire semester, but, of course, I had to wait until the grades came out." I said, "Well, what is it?" He replied, "I wanted you to know, Professor, that if my doctor told me that I had only one hour left to live, I would want to spend that hour with you. An hour with you is like an eternity." Consequently, even if twenty minutes are not enough time to do justice to this topic, I am confident that, by the end of my speech, it will seem to have been quite sufficient.

We are talking about "The Enforceability of a Jewish Marriage Contract in an American Court." The topic itself is somewhat ambiguous. What is meant by "a Jewish marriage contract"? Does it refer to a prenuptial agreement that may or may not have been entered into - or does it mean something else, such as the bundle of rights and responsibilities that are associated with entering a Jewish marriage? Similarly, what is meant by "enforceability in American courts"? Does this mean direct enforcement pursuant to the law of contract? Does it mean pursuant to the law of torts, pursuant to a court's inherent power of equity, or does the topic refer to some specific secular statutory scheme, such as exists here in the State of New York?

Before evaluating these specific issues, I would like to commend to you several relatively recent publications that address them creatively and extensively. The first two were produced by Touro faculty members. Dr. Povarsky wrote an excellent piece that appeared in the August 1994 edition of Touro's Jewish Law Report. An article by Touro's Ilene Barshay appeared in the Howard Law Review. Of course, many non-Touro academics have taken up these issues. Kent Greenawalt, a professor at Columbia University College of Law, for instance, just authored an article in the Southern California Law Review, and Prof. Irving Breitowitz, of the University of Maryland School of Law, published a book entitled, "Between Civil and Religious Law: The Plight of the Aguna in American Society." Those of you who are familiar with Jewish legal literature will find this volume rich with references to halachic authorities and responsa.

Irrespective of how the terms of our topic are understood, there are principally two types of problems that arise with respect to the secular enforcement of a Jewish marriage. One type emanates from secular law

and the other from Jewish law. The secular legal problems are constitutional and non-constitutional. The constitutional problems, as Professor Morris identified them, are the free exercise clause and the establishment clause. The issue that Dr. Povarsky has framed, *i.e.*, whether Jewish law is a “religious law,” arises in connection with these constitutional questions.

Dr. Povarsky distinguishes between Jewish laws that primarily regulate interaction between man and G-d from those that principally control interaction between man and man. He contends that the Jewish laws governing the consummation and dissolution of marriages fall into the latter category and, as such, are not “religious” laws but, rather, civil laws.

Interestingly, the perspective of Jewish law is that both of these categories of laws are “religious” in nature and have clear religious consequences. The secular constitutional questions, however, should not depend on how Jewish law perceives its rules but, instead, on how *secular* law regards them. This raises a question as to the criteria secular law should use in characterizing such participation. Should it matter at all that Jewish law considers the giving of a divorce decree to be a religious act - or should secular law apply its own independent, objective criteria?

In a very Jewish way, it seems to be that you have to answer this question with another question. Why does secular law care whether participation in a Jewish divorce is a religious act? It is because of the two constitutional issues - free exercise and establishment of religion. Let's take them up one at a time. First, the free exercise of religion. It is not at all clear that the free exercise clause of the First Amendment prohibits the state from requiring somebody to do an act just because some religion considers the act to be a religious act. What is clear is that the free exercise clause restricts the government's ability to prevent a person from doing something which that person's religion requires or encourages. Similarly, it is clear that the free exercise clause limits government's ability to force someone to do something which that person's religion forbids or discourages.

Thus, government cannot force somebody to assert a position of faith that has been chosen for him. It cannot demand that a person perform a ritual that is perceived as a service to some deity. But there are no cases that state that the free exercise clause forbids the state from requiring a person to perform an act that does not invoke a deity or a creed, that does not involve a form of worship and that is not inconsistent with a person's religious views - whatever those views may be.

Larry Marshall, now a professor at Northwestern University School of Law, published an article in the Northwestern University Law Review in 1985 in which he contends that anything that is only done for religious purposes is a religious act. This contention is certainly questionable. Certain types of laws - such as domestic relations law - that are present in virtually all organized societies, may be regarded by American law as “secular” in nature, irrespective of how the Jewish law system regards these laws. See, e.g., *In re Marriage of Goldman*, 196 Ill.App. 3d 785 (1990).

Marshall also asserts that the free exercise clause forecloses ordering anybody to do anything that is perceived to be “religious,” even if the act does not contravene the person’s religious views. But in support of this bold assertion, he cites only two cases - and neither case proves his point. The first case, *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972), cert. Denied, 409 U.S. 1076 (1972), was a plurality decision of a three-judge panel, with the two-judge plurality agreeing on the result for different reasons. Only one judge, Judge Bazelon, based his ruling on the free exercise clause. Moreover, that case dealt with forcing military cadets to go to church or synagogue services, whichever they chose. Judge Bazelon said that this specific practice, compulsory attendance at religious worship sessions, was what the free exercise clause was specifically designed to eradicate.

I do not believe that mandating involuntary attendance at actual religious services is at all analogous to participation in a Jewish divorce ceremony. Requiring attendance at religious services subjected cadets to peer pressure to be actual participants in the specific forms of religious worship, and forced them to be a captive audience for the patently religious, proselytizing messages delivered from the pulpit. By contract, the Jewish divorce process does not involve the invocation of a creed, does not involve the making of any commitment to the tenets of a faith, and does not require anyone present to utter any theological declaration. Moreover, a husband can even fulfill an “obligation” to participate in a Jewish divorce proceeding simply by authorizing a rabbi to deliver the divorce document on his behalf. The husband need not even be present at the time the document is delivered to his wife. Participation in this process is an act that, although it has religious significance from the perspective of Jewish law, does not compromise anyone’s sense of belief.

The second case Marshall mentions is *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980), in which prisoners in a federal penitentiary objected to the prison’s practice of allowing lay religious volunteers to involuntarily subject them to proselytization. These volunteers would enter the prison and engage in singing, prayers and speeches. The prisoners would say, “We don’t want to hear this. Get them out of here.

Leave us alone.” But the lay volunteers were permitted to continue their activities, and the prisoners had no way out. Consequently, this case is not at all comparable with requiring participation in a Jewish divorce. Indeed, the Eighth Circuit Court of Appeals explicitly stated that the practice of the prison officials in *Cantwell* constituted the forced inculcation of religion. Trying to convince people to change their religious beliefs and behavior is strikingly different from having them authorize an agent to deliver a divorce document. Consequently, neither of Marshall’s cases proves that there is any free exercise problem in having someone participate in a Jewish divorce proceeding, at least if the person has no sincere religiously-based opposition to the act involved.

In her article, Ilene Barshay makes the same assertion as Marshall and mentions one additional case. Frankly, however, my reading of the case suggests that it was irrelevant. The case she cited concerned a court’s refusal to interpret internal church ideology and rules and decide which of competing religious factions has “interpreted” them correctly. The court simply stated that it was for the church - not for the court - to decide what the church’s rules were. Consequently, I do not think that the case had anything to do with any free exercise issues arising out of compelling a particular act.

Interestingly, a number of the law review articles on this topic point out that no one has ever raised a sincere religious objection to participating in the Jewish divorce process. One man said that he had a sincere religious objection, but the court rejected his assertion. The case, *Burns v. Burns*, 223 N.J. Super. 219 (1987) involved an interesting rule of evidence relating to the non-disclosure of certain matters raised in settlement negotiations. Many attorneys believe that it is impermissible to disclose any part of the settlement discussions, but, in fact, the language of the evidence rule is often more limited, forbidding the admission of such evidence only for certain purposes. In the case involving the alleged sincere religious objection to participation in the Jewish divorce proceeding, the husband, during settlement discussions, offered to participate in the proceeding, but only if his wife would invest \$25,000 in a special trust for certain beneficiaries (I’ll let you guess who the beneficiaries were). The judge ruled that the evidence that the husband had made this offer was admissible for the purpose of establishing the insincerity of the husband’s assertion of a religiously based objection to participating in the Jewish divorce process.

In no other reported case does it even seem that a husband has asserted such a sincere religiously based objection. If such an objection were raised, it would have to be evaluated in the following way. Even if specifically enforcing such a contract, in some instances, might conceivably affect one’s free exercise rights, there are still several reasons

to permit this impact. First of all, was such an objection ever waived by the party? Under American law, one may waive certain objections. As a general rule, no one can be forced to make a payment to a church. Nevertheless, assume, for example, that a person who believed in a particular religion entered into an enforceable contract according to which he would pay money to a church of that faith. Later on, before making the payment, he changed his religious convictions and, for religiously based reasons, no longer wants to provide any financial support for the church. Nonetheless, as a matter of American law, he must make the payment, because he contracted to do so. Consequently, by entering a voluntary contract, a person can relinquish his right to raise a free exercise objection to his performance of the contract.

Second, even if a free exercise objection has not been waived, it may be overridden by a compelling state interest. Many state interests may be sufficiently compelling to outweigh an alleged free exercise claim. Of course, a balancing process may yield different results based on the precise interests at stake. Consequently, a court's ruling might depend, for example, on whether the issue is secular enforcement of a prenuptial agreement into which these specific parties voluntarily entered or the enforcement of some involuntarily enacted state statute.

One way to promote secular enforcement of a Jewish marriage contract is by having prospective spouses enter into a written agreement explicitly providing that in the event that either spouse seeks a civil divorce, both spouses will appear before a panel (a religious "court") of three identified Jews and will comply with the panel's orders, if any, to authorize the issuance and delivery of a Jewish divorce decree or to authorize the receipt of a Jewish divorce decree through an agent to be selected by the panel.

Incidentally, it is essential to point out the practical usefulness of the prenuptial agreement depends not only on constitutional law but also on technical aspects of Jewish law and of secular law. A Jewish divorce is only religiously valid if the husband grants it voluntarily. There are numerous, difficult Jewish law questions regarding the circumstances in which the prospect of possible secular sanctions would preclude the requisite volition. In addition, there are serious questions regarding the desirability, from a Jewish law perspective, of enlisting the "assistance" of the secular government regarding certain religious matters. It is possible, for example, for even a well-meaning secular government to create greater Jewish law problems than it solves. These subjects would require an elaborate treatment that is impossible here.

Technical secular contract issues also raise enforceability concerns. As a matter of contract law, in order for a purported agreement to be

enforceable, it must in fact represent a meeting of the minds. For this reason, the prenuptial agreement should be written in the parties' native language and should explicitly recite the parties' intention that it be specifically enforceable in secular court. A number of criteria must be satisfied for a contract to be specifically enforceable. For example, a money judgment must be an inadequate remedy. This is surely true in our context. Perhaps the most problematic issue is the requirement that the contract must prescribe the promised performance with particularity. *See, e.g., In re Marriage of Victor*, 177 Ariz. 231 (Ct.App. 1993). But *see In re Marriage of Goldman*, 196 Ill.App. 3d 785 (1990)(requiring specific performance based on a ketubah). For this reason, it would be best to designate either the persons to compose the religious court or a method for the identification of such persons that cannot be frustrated by either of the parties. In addition, care must be taken to ensure compliance with the special rules that apply, in some states, to prenuptial agreements.

In *Avitzur v. Avitzur*, 58 N.Y.2d 108, *cert. denied*, 464 U.S. 817 (1983), the highest court in the State of New York enforced the type of prenuptial agreement we are discussing, but it did so by the narrowest of margins, by a vote of 4 judges to 3. A more recent New Jersey decision, *Aflalo v. Aflalo*, 295 N.J.Super. 527 (1996), expressed agreement with the 3 dissenters in *Avitzur*. It is my belief, however, that, at least in the vast majority of cases, specific enforcement of such agreements is constitutional. By entering into a prenuptial agreement, the parties may have waived any right to raise a "free exercise" objection. Even absent a waiver, there are some compelling governmental interests that should warrant required compliance with a prenuptial agreement.

First, the government has an interest in preserving a person's fundamental right to contract. The fact that the particular contract concerns matters of religious importance surely should not be a reason to deny enforcement. Indeed, a person's religious interests may often be of paramount importance to him. A governmental refusal to enforce contracts regarding such matters would therefore unfairly deprive religious citizens of a critical right.

Second, the government has an interest in protecting the family dissolution process from extortion, fraud and overreaching that would affect both the financial and non-financial status of a spouse and inflict emotional distress on a spouse and on children. Under Jewish law, even if a husband does grant his wife a religious divorce, he is not guilty of "adultery" if he has an affair with an unmarried woman, and any offspring from this affair are "legitimate." On the other hand, even after obtaining a civil divorce, a woman who has not received a Jewish divorce decree, commits the biblical offense of adultery if she cohabits with another man. Any progeny from the adulterous relationship, the innocent children,

would be *mamzerim* (i.e., “illegitimate”) and would never be able to marry any Jew of legitimate birth. Consequently, without a Jewish divorce decree, this woman is effectively denied the ability to remarry. She, as well as any children in her custody, is denied the emotional and financial benefits that might accrue from her remarriage.

These facts provide the husband with leverage that may frustrate the legitimate interests that secular family dissolution laws intend to accomplish. By enforcing prenuptial agreements, secular courts could reduce or eliminate such undesirable leverage. Third, enforcement of a prenuptial agreement would promote the state’s interest in promoting one’s fundamental right to marry. The right to marry is considered a fundamental human right. As already mentioned, despite a civil divorce, a woman who has not received her Jewish divorce is effectively disabled from marrying.

So there are a variety of governmental interests that may be sufficiently compelling to overcome constitutional objections to enforcement of a Jewish prenuptial agreement. And these interests may be more important, or may be perceived to be more important, given that the adverse consequences of non-enforcement tend to disproportionately disadvantage women.

The second constitutional basis for challenging enforcement of a prenuptial agreement is the establishment clause. It is unclear what test the United States Supreme Court will apply to determine whether specific enforcement of a prenuptial agreement will violate the constitutional provision that proscribes the establishment clause of religion. The “Lemon test,” based on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), provides that, to be constitutional, a statute must: (1) have a secular purpose; (2) have a principal effect that neither advances nor inhibits religion; and (3) does not foster an excessive entanglement with religion.

It may well be that, at this point in time, a majority of the present Supreme Court Justices would adopt even a less demanding standard. See Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices With Religious Significance*, 71 S. Cal. L. Rev. 781 (1998). In any event, the judicial enforcement of a prenuptial agreement would seem to satisfy even the Lemon test. Enforcement of the particular prenuptial provision we have identified does not require a secular court to plumb the depths of Jewish law or to become substantially entangled with Jewish law. Moreover, the three government interests previously identified are secular, and the principal effect of enforcing prenuptial agreements would be to promote those interests, not to advance or inhibit religion.

Professor Daniel Subotnik:

Our last speaker is Judge Martin Ritholtz. This is the first time I've had the pleasure of meeting him. Judge Ritholtz got his Bachelors Degree at Columbia in 1968 and obtained his law degree from the Hebrew University of Jerusalem. To me it is always a staggering notion that somebody can study law in a language that is not his native language. Judge Ritholtz after some years of private practice has been mainly affiliated with the court system in Queens approximately for fifteen years. In January of 1996 he was elevated to Judge of the Civil Court of the city of New York. Please welcome Judge Martin Ritholtz.

Judge Martin E. Ritholtz:

As your third speaker of the evening, I am the one who is scheduled to finish. However, having heard from Professors Morris and Resnicoff as to how the case law on tonight's subject is so confusing, I think I am finished before I start. In effect, both Professors have analyzed the subject from a Constitutional and theoretical perspective, and have proclaimed to the judiciary: "it is all yours to figure out."

Were I to approach tonight's question as a multiple choice, yes or no, is Jewish Law a religious law, my answer would be yes, and then I would sit down. But it is not a multiple-choice question; rather, it is an essay, which challenges me to think like a law student.

If you look at Jewish Law externally, that is if you look at it as a Judge or a secular scholar, then perhaps you would be able to bifurcate Jewish Law into two separate compartments: one governing the relationship between G-d and man, and the other between man and his neighbor, the former being ritual law, and the latter being secular law. However, looking at Jewish Law from an internal perspective, the conclusion may be different. Professor Povarsky mentioned the Ten Commandments, and I am reminded of the commentators who note the juxtaposition of Exodus, Chapter 21, embodying a compendium of civil and tort law, with the previous Chapter 20, featuring the Ten Commandments and the laws of the Sanctuary.

Western man differentiates between Church and State, but the Torah knows no such distinction. To the contrary, all areas of life are intertwined and holiness derives from *halachically* proper business dealings no less than from piety in matters of ritual. The Talmud teaches that one who wishes to be a *chasid*, a devoutly pious person, should be scrupulous in matters of civil and tort law (Bava Kamma 30a). So in Judaism the concept of the "temple" is in the courtroom as well as in the

synagogue. The commentaries note that this is the significance of the juxtaposition of the chapters. That is why to me there is no question that Jewish Law is religious law. But that is my expression of an internal view of Jewish Law.

Let me trace with you through case law how a dichotomization of Jewish Law developed. For an excellent review of the subject, I refer you to a Michigan Law Review, August 1973, article, entitled: *Enforceability of Religious Law in Secular Courts - It's Kosher, But is it Constitutional?* The seminal New York case of *Hurwitz v. Hurwitz*, 216 App. Div. 362 (1926), acknowledged the contractual nature of a Ketubah. In that case, the plaintiffs sued to eject their stepmother from the house in which she was living, and as a defense, the stepmother pleaded her rights under the Ketubah that she made with the plaintiffs' father, alleging that it served as an antenuptial property settlement. The Appellate Division affirmed the trial court's denial of plaintiffs' motion for judgment on the pleadings, ruling that there were triable issues of fact relating to the circumstances surrounding the making of the Ketubah. This was in 1926, and while the Appellate Division recognized that it might not enforce religious law per se, it ruled that a Ketubah could be enforced as a contract in so far as it is not contrary to state law.

Then we have another interesting case called *SS & B Live Poultry Corp. v. the Kashruth Association* (158 Misc. 358, Supreme Court New York County, January 1936), involving the enforcement of kashruth laws, written by Judge McCook. It raised the question of whether a poultry dealer could sue a Kashruth Association comprised of rabbis, by seeking an injunction against the association, which required, *inter alia*, that all ritually slaughtered fowl contain a *plumba* (seal of kashruth). Judge McCook recognized that he had to address issues of Jewish Law and on page 360 wrote the following: "The law of the Jews is essentially racial, tribal, or national. Since the government was a theocracy, from one point of view this whole legal system may be called religious. Speaking more exactly, it is divisible in two parts, one public and strictly religious, because concerning relations between man and G-d, the other essentially private and secular, as controlling the relations between man and man."

According to Judge McCook on page 363, there is "a great and fundamental difference between the trial of a religious question and the litigation of a controversy between man and man." Here we clearly see the beginnings of the secular, external view, distinguishing between the secular Jewish laws, *i.e.*, between man and man, and the religious Jewish laws, *i.e.*, between man and G-d. The Michigan Law Review article concludes that even though Jewish law may be considered a religious law, nevertheless, there are instances where these religious laws might have a

constitutionally valid, secular purpose. In the words of the article at pages 1649-50:

Those laws of Judaism and possibly other religions, that deal with interpersonal relations have secular purposes and need not automatically be included in the first amendment category of 'religion'. When they are properly before the court, as when they are referred to in a contract, a trust, or an otherwise constitutional legislative enactment, the court should interpret them as part of its fact-finding process, even where there is some dispute as to their meaning. Although observance of the Jewish laws regarding, for instance, child support, bailment, debt, landlord-tenant relations, real property, labor relations, maritime cargo and charter agreements, and torts may, in a general sense, serve a religious purpose in that one following the law lives in accord with the will of G-d, the immediate effect and purpose of these laws is secular.... If a dispute over an interpersonal law is not a 'religious matter' within the meaning of the First Amendment, such a result would not be unconstitutional.

This excerpt from Michigan Law Review presents an analysis of tonight's subject in a nutshell. But are we not begging the question of whether Jewish law is a religious law within the meaning of the First Amendment? To attack this question properly, I recommend reading a June 1978 Harvard Law Review article entitled, "Toward a Constitutional Definition of Religion," which relates to your area, Professor Morris. The article mentions three different schools defining the purpose of the religion clauses. Roger Williams viewed separation of church and state as a means of protecting religions from intrusive powers of government. Thomas Jefferson, in contrast, wished to insulate the state from the influence of the churches, and James Madison believed that both religion and government could best achieve their respective purposes if each was free within its proper area from interference by the other.

To fully appreciate the fears of Roger Williams, I refer you to a case I had the privilege of being involved with as a Law Secretary to Justice Martin Rodell in 1981, entitled *Zimbler v. Felber*, 111 Misc. 2d 867, which dealt with a synagogue dispute over the tenure of its Rabbi. At page 872, Justice Rodell decried a previous ruling of another Judge which had relegated the hiring of a Rabbi to the category of the "mundane," to be distinguished from the pastoral relationship of a Baptist congregation which said Judge classified as "an ecclesiastic matter with which the Courts shall not interfere." In the words of Justice Rodell: "It was precisely this kind of substantive 'governmental evaluation' of religious practices, and the entanglement of 'government in difficult classifications of what is or is not religious' which has been categorized by the United

States Supreme Court as ‘excessive government entanglement with religion’ that truly threatens private liberty and public order alike.”

The Harvard Law Review article documents the early U.S. Supreme Court decisional efforts to define “religion.” In 1890, *Davis v. Beason*, 133 U.S. 333, stated that “the term ‘religion’ has reference to one’s views of his relations to his Creator, and the obligations they impose on his reverence for his being and character, and for obedience to his will.” Later in 1931, *United States v. Macintosh*, 283 U.S. 605, Chief Justice Hughes concluded that “the essence of religion is belief in a relation to G-d involving duties superior to those arising from any human relation.” The Harvard article points out that the traditional “theohuman” definition of religion was increasingly challenged in the 1940s. There was a dramatic shift from Davis, which defined religion as a relationship between man and G-d, to a more modern definition of religion, as relating man to the broad universe and to other men (*e.g. United States v. Kauten*, 133 F.2d 703). One senses from this quick overview of the Constitutional definition of religion that, at best, it is ambiguous.

Now that we are hopelessly confused, let me get back to Jewish law and marital contract litigation. In *Koepfel v. Koepfel*, 138 NYS2d 366 (1954), Queens County Supreme Court Justice Hallinan dealt with the enforcement of a prenuptial agreement to “appear before a Rabbi and execute all papers necessary to effectuate a dissolution of their marriage in accordance with the ecclesiastical laws of the faith and church of said parties.” Defendant contended that a decree of specific performance would interfere with his freedom of religion under the Constitution. Justice Hallinan held that:

Complying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence. His appearance before the Rabbinate to answer questions and give evidence needed by them to make a decision is not a profession of faith. Specific performance herein would merely require the defendant to do what he voluntarily agreed to do. *Id.* at 373.

Another noteworthy decision is *Morris v. Morris*, 3 WWR 526, wherein a Canadian Judge Wilson categorized a Ketubah as an ante-nuptial agreement, enforceable in a secular court to institute *get* proceedings before a Beth Din. Although this was reversed (42 DLR3d 550 (1973)), it served as a forerunner of similar decisions enforcing a Ketubah. Another important leading case is *Marguiles v. Marguiles*, 42 AD2d 517, decided by the Appellate Division First Department in 1973. The defendant had voluntarily agreed in an open court stipulation to “appear before a Rabbi to be designated for the purposes of a Jewish

religious divorce.” When the defendant failed to comply with the order of the court to give a *get*, he was found in contempt of court and incarcerated. The Appellate Division imposed a fine, but vacated the incarceration. One can perceive mixed signals from this decision.

In *Rubin v. Rubin* (75 Misc2d 776), also decided in 1973, Judge Stanley Gartenstein held that a provision for the cooperation of a wife in obtaining a *get* is enforceable. At page 782, he declared: “The courts of this state have recognized the validity of an agreement to obtain a *Get*.”

But in 1974, in *Pal v. Pal*, 45 A.D.2d 738, the Appellate Division Second Department dealt with a stipulation incorporated into a divorce decree, providing for submission to a Beth Din for the purposes of a *Get*, and found that the lower court “had no authority to, in effect, convene a Rabbinical tribunal.” Justice Martuscello, in a vigorous dissent, reiterated the notion that this was merely the enforcement of an agreement. In my opinion, the dissent was the precursor to the Court of Appeals decision of *Avitzur v. Avitzur*, which I will discuss later.

The decisional pendulum kept swinging back and forth, and in 1976, Judge Louis Heller held in *Waxstein v. Waxstein*, 90 Misc. 2d 784, that a contractual provision requiring defendant to obtain a *get* is enforceable.

In 1981, the Superior Court of New Jersey in *Minkin v. Minkin* (434 A2d 665), in the opinion written by Judge Minuskin, held that a court might order a husband, without infringing on his constitutional rights, to specifically perform a *get* as part of a *Ketubah*. Rabbi Macy Gordon offered expert testimony, concluding, “that the acquisition of a *get* is not a religious act, but a severance of a contractual relationship between two parties.” *Id.* at 667.

For an overview of the differing opinions regarding the enforceability of an agreement requiring a spouse’s cooperation in obtaining a religious bill of divorce, see 29ALR 4th 746. I further recommend reading an important law review article written by Ira Mark Elman in September 1981 (in the *California Law Review*, vol. 69, p. 1378), entitled: *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*. Elman comments on a landmark decision decided by a 5 to 4 narrow majority in 1979, *Jones v. Wolf*, 443 U.S. 595, which introduced the concept of “neutral principles of law.” The majority defined the “neutral principles of law” approach as the application of objective, well-established principles of secular law to a church dispute, thus permitting judicial involvement to the extent that it can be accomplished in purely secular terms. *Id.* at 603.

The vigorous dissent adhered to “strict deference” principles, which defer religious disputes to hierarchical tribunals. This major dispute regarding judicial involvement in church disputes was carried over to our highest court in New York in *Avitzur v. Avitzur*, 58 NY2d 108, decided in 1983 by a narrow majority of 4 to 3. The parties were married in 1966 in accordance with the Jewish tradition. Prior to the marriage ceremony, they signed a “Ketubah,” in which they both agreed to recognize the “Beth Din,” a rabbinical tribunal, as having authority to counsel the couple in matters concerning their marriage. In 1978, the defendant husband was granted a civil divorce, but the wife could not remarry pursuant to Jewish Law, until she received a *get*, which required the defendant to appear before a Beth Din. The defendant refused to appear, and the plaintiff brought an action seeking an order compelling defendant’s specific performance of the Ketubah’s requirement that he appear before the Beth Din.

Judge Wachtler, who might be dropping in here tonight, wrote the majority opinion. The underlying issue was defined as the enforceability of a Ketubah, which had been entered into as part of the religious ceremony between the parties. Judge Wachtler noted: “We find nothing in law or public policy to prevent judicial recognition and enforcement of the secular terms of such an agreement.” *Id.* at 111. And later he adds: “It should be noted that plaintiff is not attempting to compel defendant to obtain a *get* or to enforce a religious practice arising solely out of principles of religious law. She merely seeks to enforce an agreement made by defendant to appear before and accept the decision of a designated tribunal.” *Id.* at 113.

Applying the “neutral principles law” doctrine of *Jones v. Wolf*, Judge Wachtler stated:

The fact that the agreement was entered into as part of a religious ceremony does not render it unenforceable.... Similarly, that the obligations undertaken by the parties to the Ketubah are grounded in religious belief and practice does not preclude enforcement of its secular terms. Nor does the fact that all of the Ketubah’s provisions may not be judicially recognized prevent the court from enforcing that portion of the agreement by which the parties promised to refer their disputes to a non-judicial forum. The courts may properly enforce so much of this agreement as is not in contravention of law or public policy. *Id.* at 115.

Like *Jones v. Wolf*, *Avitzur v. Avitzur* had a strong dissent. In essence the dissent held that “the interest of the civil authorities of the State of New York in the status of the marriage between these parties was concluded when the final judgment of divorce was entered in 1978.” *Id.* at 121. As we can see from *Jones* and *Avitzur*, there is no real “bright line,”

and the narrow majority highlights the fragile precedential value of these decisions.

Permit me to conclude with my own view. There are those who contend that a *get* proceeding is not a religious act. We mentioned Rabbi Macy Gordon. There is also Rabbi J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 Conn. L. Rev. 201 (1984), who argues that giving a *get* is not at all a religious act since “it is not an act of worship; it does not invoke the deity; it involves neither profession of creed, nor confession of faith.” *Id.* at 202. In the second volume of his book entitled, *Contemporary Halachic Problems*, Chapter IV, *Marriage, Divorce and Personal Status*, Bleich elaborates:

The matrimonial state arises solely from the voluntary actions of the parties, and is not contingent upon either the blessing of an officiating clergyman or the pronouncement of their relationship as that of man and wife by an officer of the state. Divorce, in essence, is the cancellation of the contractual relationship and the obligations, which flow therefrom. Although execution of a bill of divorce must be conducted in the prescribed manner, it too requires neither ecclesiastic sanction nor a decree of the state. In Jewish law the parties themselves terminate the relationship, not the state. *Id.* at 87.

Up until here, Bleich categorizes a *get* in secular contractual terms. But then he adds the following: “This is not to say that marriage entails no more than a covenant between the parties. Marriages are indeed made in heaven. Matrimony is sacred and occasions not merely personal but religious obligations as well.” *Id.* Even for Bleich it is hard to divorce a *Get* from its religious origins.

Rabbi Moshe Meiselman, in his book, “Jewish Women in Jewish Law” (Chapter 16, page 96), writes about the marriage contract. He notes that Halacha recognizes two types of contracts: the *Kinyan Issur*, a contract whose basic purpose is to effect a change in personal or ritual status, and the *Kinyan Mammon*, a contract whose basic purpose is to effect a monetary change. In his words: “Marriage establishes a close, intimate relationship, and is also a contract which results in a change of ritual status: *i.e.* it is a *kinyan issur* and not a *kinyan mammon*. True, many financial consequences and obligations result from the ritual change, but the purpose of the *kinyan* is merely to effect a ritual change.” *Id.* at 96-97.

To my mind, marriage and divorce are, from a Jewish point of view, essentially, religious acts involving a change in ritual status. Like

Roger Williams, I am sensitive to the need of protecting religion from the intrusive powers of government. Therefore, in answer to our query “The Enforcement of a Jewish Marriage Contract in a Civil Court: Is Jewish Law a Religious Law?” - notwithstanding “the neutral principles of law” which have the effect of neutralizing or perhaps even neutering Jewish Law for secular legal purposes - I prefer to avoid any entanglement of government in difficult classifications of what is or is not religious, and would emphatically endorse the concept that Jewish Law is intrinsically a religious law, especially in areas of ritual status. Thank you for your kind attention.

Question:

Rabbi Rackman and Rabbi Morgenstern are trying to address the problem in terms of Jewish law. What do you think about their efforts? And what do you think about the two New York statutes that were adopted to try to redress the problem?

Professor Steven H. Resnicoff:

I do not want to address their efforts other than to say that I fully disagree with them. There are a number of articles written by Jewish law authorities that discuss, in detail, the many problems with the steps taken by Rabbis Rackman and Morgenstern. As to the New York legislation, it is important to note, generally, that there are many Jewish law complications that can arise out of legislative efforts. This is readily understandable, because the legislators lack any serious understanding of Jewish law. Consequently, even if a proposed bill is drafted by Jewish law scholars, totally unforeseen amendments may be added through the political process, amendments that may wreak havoc as a matter of Jewish law.

Virtually all responsible Jewish law decisors agree that the first New York “get” bill works as a matter of Jewish law. That legislation requires a person seeking a civil divorce to do what is necessary to remove any barriers to the remarriage of his or her spouse. Similarly, almost all Jewish law authorities believe that it is permissible under Jewish law for the secular courts to enforce the parties’ agreement to arbitrate before a rabbinical court. I also believe that most secular courts will, in fact, enforce such agreements, at least partially, if they are properly designed and executed. While some courts may not specifically require a party to present himself to arbitration before a rabbinical court, they might nonetheless award contract damages for someone’s failure to comply with a contractual promise to so arbitrate.

The fundamental practical problem from a Jewish law perspective is that world Jewry no longer functions as a united community with clearly identified rabbinical authorities. In more ancient times, international Jewry recognized particular rabbinical leaders whose authority was recognized internationally. Such authorities could legislate practical responses to the phenomenon of inappropriate conduct, because the community would comply. We know today, for example, that it is impermissible for a Jewish man to divorce his wife against her will. This prohibition originated with an enactment promulgated by Rabbenu Gershom in about the year 1050. Yet all of Ashkenazic Jewry abides by this rule that he established.

In today's world, however, the community is heterogeneous and we lack a sufficient consensus as to who are the authentic Torah authorities. We can hope that, as we continue to recuperate from the Holocaust, as the nation continues to heal and find ways of growing closer together, that we may be able to develop greater consensus and discover mechanisms that will enjoy widespread support. But the purported "solutions" of a handful of people who have no international recognition - perhaps not even national recognition - in the face of immense opposition by Jewish law scholars are unacceptable. These "solutions" would only result in a situation in which members of the observant Jewish community would be unwilling to intermarry with each other. This is obviously not a result that would go about solving the problem.

Professor Eileen Kaufman:

If I may follow up on the question, you referred to the New York Get law, but doesn't that law present the same problem that was presented in the creation of the Kiryat Yoel school district, because both are ostensibly neutral on their face, but in both cases it seems to me that they were enacted for a very specific goal that was tied to furthering a particular religious agenda?

Judge Martin Ritholtz:

I just want to satisfy some of my curiosity. I know Judge Wachtler is tired because he had a hard day, but I really want to exercise my prerogative up here to ask him his own impressions.

Judge Sol Wachtler:

I will be very brief. I have a class with an examination now, and not that I don't trust them, but I would like to watch them. I would just like to say quickly, when I was a trial judge, I had a great deal of difficulty with the problem of the agunah and husbands holding out with regard to a Get. It was very, very unfair; it was taking advantage of the woman through the use of the Get. It seemed wrong because they were using the power, which they had by virtue of halacha, to exercise leverage in the civil court, to penalize the woman. None of us can divorce ourselves from our sentiments or feelings. This had nothing to do with the fact that I had dinner last night with Rabbi Rackman, but when the *Avitzur* case came along, and after it was decided, I received a call from David Siegel. He called me up and said that "From halacha, I know nothing, but from separation of powers, this decision gives me trouble." And, of course, this goes into the constitutional issue.

But we had been going through a long series of decisions with respect to arbitration and the fact that when a couple contracts to choose a forum to resolve disputes, that contract should be binding upon them civilly. They cannot escape by virtually saying, like a Jackie Mason routine, "Well, there was a contract, may be there wasn't a contract..." The fact is that it was a contract and it was a contract that can be enforced by the law if there can be a neutral application, which it was in this case. Not that I don't have a lot of respect for the dissenting judges. I think Judge Jones wrote the dissent. He is one of my nearest, dearest friends. But it was an honest disagreement.

The case teetered on one judge; it was that close, and it was a question of capturing that judge's mind and heart, not on religious grounds and not having anything to do with halacha or anything else. But saying, "Look, you are going to have people who are trying to dodge contracts by claiming that it was under the auspices of this or that or the other thing without allowing the court to enforce the terms of the contract that they entered into, and it was to interfere with what the Bais Din was doing." It was to try to bring some symmetry to the law of arbitration, as simple as that. Thank you very much, and I wish I could have been here all evening with you.

Question:

Would you say that the *Avitzur* decision in a way helps to compensate for a gap or lapse in Jewish law with regard to the agunah? Do not *Avitzur* and the "Get Statute," which followed that case, promote that end?

Professor Chaim Povarsky:

I do not think so. I believe actually that the *Avitzur* case and the *Get* Statute came to solve a problem unique to the United States and countries other than Israel. Under Jewish law, the rabbinical court has jurisdiction and can summon the parties to appear before it and issue a divorce decree, which may sometimes be compelled. In fact, this is the situation in Israel, where civil divorce is not recognized and rabbinical courts have jurisdiction in matters of marriage and divorce.

The agunah problem in the United States and other countries arises to a large degree from the fact that rabbinical courts in those countries do not have jurisdiction, and the only recognized divorce is a civil divorce. The *Avitzur* case was trying to resolve the jurisdictional problem by forcing parties to a marriage contract, the ketubah, to appear before a rabbinical court, and the *Get* Statute attempted to alleviate the plight of the agunah by denying the recalcitrant husband a civil divorce.

Question:

I was referring more to what Dean Kaufman brought up and that was that the Get statute was followed by two amendments to the Equitable Distribution Act, which were facially neutral but really applied only to Jewish women, and the Governor's memorandum that says that the purpose of the statute was to alleviate the plight of the agunah. So, I mean, it was "out there" and that's what it was about. In certain ways, I sympathize, but it was for that purpose; it was not a secular purpose. And the other was the unequal bargaining power that the agunah would have later on, that would affect the distribution of the marital assets and the right to maintenance as well. So, I don't know any secular purpose.

Professor Steven H. Resnicoff:

That is what I was trying to address. I think that the plight of the agunah, what the government means by the plight of the agunah, is the extortion, the unfair leverage, and the inability to remarry. Promoting the amelioration of these problems is a secular purpose. It is not promoting Judaism, it is promoting these secular objectives.

We asked whether participation in a Jewish divorce proceeding is a "religious" act. I do not believe that anyone really thinks that a divorce in Jewish law does not have religious ramifications. Yet marriages have religious ramifications, too, and priests and clergymen perform weddings. I think that the point is that from a sociological perspective we can look

objectively at a body of law and can conclude that if a category of law is found in virtually all organized societies, then American law can consider this type of law essentially secular rather than essentially religious in character.

So, all of those Jewish law subjects which are normally dealt with by any secular legal system may be treated as if they were matters of French, German or Italian law and not religious law. Indeed, it may not be inappropriate for secular American law to look at Jewish law as culturally and sociologically Jewish rather than as religiously Jewish. If so, the only relevant question for the American system is “Are we violating someone’s religious freedom by forcing him to do something which is inconsistent with his religion?” As a practical matter, that is not the case in the context of the enforcement of prenuptial agreements. No one has successfully asserted a sincere religious objection to participation in Jewish divorce arbitration. The establishment clause is not offended, because, at the very most, there is only an indirect promotion of religion.

What is directly promoted is the protection of a woman from extortion - from monetary and child custody extortion. So these are not religious protections. Enforcement is not to enable her to observe the Sabbath; it is not to enable her to do other religious things. It is to enable her to bring up a family and to receive her legitimate financial rights.

These are the secular interests, the secular purposes for enforcement - not any goal of promoting Judaism as a religion. Yes, such enforcement helps an agunah and an agunah happens to be a religious woman; otherwise she could remarry without the Jewish divorce. But just because she is a Jewish woman does not mean that helping her is promoting Judaism. In this way, there may be some similarity with the situation of someone who, because of religious reasons, does not want to work on the Sabbath. The government is constitutionally able to require that the Sabbath observer’s rights be accommodated without being found to have promoted Judaism.

As to permissible accommodations, just one more observation. Some commentators assert that there is certainly an area where accommodations are permissible even though not required. Accordingly, although the government does not have to accommodate an agunah’s particular free exercise claim, it may accommodate it without violating the establishment clause prohibition. Some say that such accommodation is especially permissible - and appropriate - where the civil government has itself helped to cause the need for the accommodation. Rabbi J. David Bleich, among others, argues that the government has substantially contributed to the agunah’s problem by making civil divorce possible.

Historically, marriages and divorces were matters for religious authorities. Civil divorce is a relatively recent arrival on the historical scene. Historically, the only way to avoid many of the restrictions that applied to a married man was by granting his wife a religious divorce. By making civil divorces available, the state has enabled a man to avoid civil restrictions while refusing to afford his wife her freedom. Thus, the agunah problem has surely been exacerbated by secular government. Similarly, others contend that secular government has contributed to the agunah problem by depriving religious institutions and authorities of their traditional enforcement powers, and that this, too, strengthens the argument for a constitutionally permissible accommodation.

Judge Martin Ritholtz:

The Get Bill, which I will refer to as Get Bill One, the 253 DRL, enacted in 1983, was universally supported by the Rabbis. No one is coerced. Anyone who wants an uncontested divorce must submit an affidavit that he has removed all barriers to the spouse's remarriage.

The problem is, and you might not know this, that there are two different schools of thought involved in Get Bill Two, enacted in 1992. I used to be active in a group called COLPA (the Commission of Law and Public Affairs), run by Dennis Rapps. This group consisted of volunteer lawyers who recognized the plight of the agunah and came up with the idea of a statute, which might help to alleviate the problem. Certain rabbis reacted to it. They were not negative, but it was still in a state of formulation. Under the Equitable Distribution Act, No. 236B, we have a catch-all factor, "anything else," where we take into account age, etc. So, it seemed to be extremely neutral, when awarding maintenance or equitable distribution, to consider, as an economic factor, whether the woman will be able to remarry, just like we take into consideration, for example, how many years the woman has worked.

The amendment was not meant for extortion, but to allow a judge to take the inability to remarry into consideration. The unfortunate thing is that I have the articles, and Professor Resnicoff is more erudite in that area than I, in which certain of the rabbis have found that this might be a certain form of economic coercion. Rabbi Eliashiv, one of our great rabbis has said: "What have we accomplished with all that has been done?" We try to ameliorate the problem, to make things better for the agunah based on that Get Statute, and then there are certain rabbis that say the Get Statute cannot be relied on. And you don't want to have a situation in which a *get* presents a problem.

Professor Daniel Subotnik

We have come to the end of the formal presentation. We invite everyone to stay for a while for a reception during which you will be able to speak to our panelists. Thank you.



Participating in the symposium entitled, "Standards of Conduct of Public Leaders: A Legal, Ethical and Sociological Perspective," which took place in March 2000 at the Law Center, from left: Quinnipiac University School of Law Dean Neil Cogan, Touro Law Center Professor Beverly McQueary Smith, Touro Law Center Dean Howard Glickstein, Institute of Jewish Law Director Professor Chaim Povarsky, noted sociologist Dr. Marvin Schick, and former Deputy Attorney General of Israel Professor Nahum Rakover (see p. 32).

Dean Howard Glickstein greeting the audience at the symposium entitled, "Standards of Conduct of Public Leaders: A Legal, Ethical and Sociological Perspective." Seated from left: Dean Neil Cogan and Professor Nahum Rakover (See p. 32).

Touro Law Center Professor Beverly McQueary Smith moderating the symposium entitled, "Standards of Conduct of Public Leaders: A Legal, Ethical and Sociological Perspective." Seated from left: Professor Nahum Rakover and Dr. Marvin Schick (see p. 32).

Professor Nahum Rakover addressing the audience at the symposium entitled, “Standards of Conduct of Public Leaders: A Legal, Ethical and Sociological Perspective” (See p. 32).

Dr Marvin Schick (left) and Dean Howard Glickstein at the symposium entitled “Standards of Conduct of Public Leaders: A Legal, Ethical and Sociological Perspective” (See p. 32).

Participating in the symposium entitled, "Testamentary Freedom, The Right to Disinherit Family Members: A Jewish, American, Israeli and Continental Perspective," which took place in January 1999 at the Law Center, are (from left): the Honorable Ben Zion Greenberger of the Jerusalem Family Court, Judah Dick, Esq., a New York attorney, Institute director Professor Chaim Povarsky, Touro Law Center Professor Rena Sepowitz, Touro Law Center Vice Dean Eileen Kaufman, and Touro Law Center Professor Douglas D. Scherer.

At the reception at the symposium "Standards of Conduct of Public Leaders: A Legal, Ethical and Sociological Perspective" are (from left): Professor Nahum Rakover, Professor Chaim Povarsky and Dean Neil Cogan (See p. 32).

ACTIVITIES OF THE INSTITUTE

1. Symposia

(1) In November 1999, the Institute sponsored a symposium at the Law Center entitled, "A Rabbi's Obligation of Confidentiality vs. The Religious Duty of Disclosure." The speakers were: Rabbi Stanley Boylan, Ph.D., Dean of Faculties, Touro College; Rabbi Jonathan Reiss, Esq. Director of the Beth Din of America and Professor Bruce Morton of Touro Law Center.

(2) In March 2000, the Institute sponsored a symposium entitled, "Standards of Conduct of Public Leaders: A Legal, Ethical and Sociological Perspective." The speakers were: professor Nahum Rakover, former Deputy Attorney General of Israel, Dean Neil Cogan of Quinnipiac School of Law, and Sociologist Dr. Marvin Schick, Senior Consultant, Avi Chai Foundation.

2. Jewish Law Courses

(1) In fall 1999 the Institute offered a course on Jewish Legal History, taught by Professor Jeffrey Roth. The course covered the Jewish legal system in antiquity, the mishnaic and talmudic periods, and the Jewish legal system in post-talmudic era and in the modern era. The course also dealt with special topics, such as *Dina de'malchuta dina* and the Seven Noahide laws.

(2) In spring 2000 the Institute offered a course entitled, "Selected Topics in Jewish Law," taught by Professor Chaim Povarsky. The course focused on the law of abortion, the law of the pursuer and new reproductive technologies.

(3) In fall 2000 the Institute will offer a Jewish law course that will be taught by Dean Neil Cogan of Quinnipiac University School of Law, substituting for Professor Chaim Povarsky, who will be on sabbatical leave.

3. Hosting a Meeting of the Long Island and Suffolk Boards of Rabbis

On Tuesday, June 6, 2000 the Institute will host a meeting of the Long Island Board of Rabbis and Suffolk Board of Rabbis at the Law Center. Institute director Professor Chaim Povarsky will speak on "Recent Proposed Solutions for the Agunah Problem."

The presentation will focus on the pre-nuptial agreement proposed by a group of Yeshiva University rabbis; retroactive annulment of

marriages based upon alleged errors, advanced by the Bais Din of Agunot; the way of kiddushin, proposed by Professor Meir S. Feldblum of Bar Ilan University, and the husband's denial of benefits as practiced in Israel.



Vice Dean Eileen Kaufman and Professor Chaim Povarsky discussing one of the issues raised by the symposium entitled, "Testamentary Freedom, The Right to Disinherit Family Members: A Jewish, American, Israeli and Continental Perspective "(see p. 31).

Speaking at the symposium entitled "A Rabbi's Obligation of Confidentiality vs. The Religious Duty of Disclosure," which took place in November 1999 at the Law Center are (from top): Rabbi Stanley Boylan, Ph.D., Dean of Faculties, Touro College; Rabbi Jonathan Reiss, Esq. Director of the Beth Din of America, and Touro Law Center Professor Bruce Morton (See p. 32).

CURRENT EVENTS IN ACADEMIA

1. The Eleventh Biennial Conference of the Jewish Law Association

The Jewish Law Association, which was founded in 1978, sponsors biennial international conferences on Jewish law. Conference locations alternate between Israel and the Diaspora. The Tenth Biennial Conference took place in 1998 in Jerusalem. The Eleventh Biennial Conference will take place in Zutphen, Holland, from July 24 – 27, 2000. At the conference association members will make presentations on a variety of topics, which will be published in the Jewish Law Association Studies.

Current officers of the Association are: Chair, Professor Sherman L. Cohn of Georgetown University; Honorary President, Professor Berachyahu Lifshitz of the Hebrew University of Jerusalem; Secretary for Israel, Professor Nahum Rakover, former Deputy Attorney General of Israel; Secretary for the Diaspora Professor Peter Zaas of the Department of Religious Studies, Siena College; and Chair of the Publication Committee, Professor Steven H. Resnicoff of DePaul University.

Association member, Attorney General of the Court of Appeals in Amsterdam, J. C. Al, is in charge of organizing the Holland conference.

2. Jewish Law Seminars in Israel

The Jewish Heritage in Israel, under the directorship of Professor Nahum Rakover, former Deputy Attorney General of Israel, sponsored a series of seminars on Jewish law in Israel for judges, lawyers and scholars, as follows:

(1) During September 16-18, 1999 a seminar on "Violence Against Women" took place in Zichron Yaakov, Israel. The speakers were: Judge Zvi Tal, former member of the Israeli Supreme Court (speaking on the status of women in a social, economic and cultural dynamic); Professor Emanuel Gross (speaking on the right of reaction of the battered woman); Professor Abraham Grossman (speaking against the non-Jewish concept of "The Woman under her Husband's stick"); and Professor Nahum Rakover (speaking on "Coercion in Conjugal Relations").

(2) During December 9-11, 1999, a seminar on "Publicizing the Name of a Suspect" took place in Maaleh Hachamisha in Israel. The speakers were: Chaim Zadok, former Minister of Justice and current president of the Press Council; Dr, Yaakov Weinrot (speaking on "Limits of the Criminal Law in the Media Era"); Professor Yeshayahu Gafni of the Hebrew University of

Jerusalem; and Professor Nahum Rakover (speaking on "Publicizing the Name of a Suspect and Human Dignity").

(3) During January 27-29, 2000 a seminar on "Ethical Standards for Public Servants" took place in Ramat Rachel, Jerusalem. The speakers were: Judge Yaakov Tirkel, member of the Israeli Supreme Court ("The Duty to be Clean in the Eyes of Both G-d and Israel"); Rabbi Abraham Sherman, Judge of the Supreme Rabbinical Court in Israel ("Removing a Public Servant from Office"); Professor Aviezer Ravitzky of the Hebrew University of Jerusalem ("The Conception of Man in the Teachings of Rabbi Kook"); and Mrs. Ruth Ravitzky ("Women Creating a New Exposition").

(4) During March 2-4, 2000 a seminar on the biblical commandment, "Do Not Stand Aside when Your Neighbor's Life is in Danger," took place in Ariel, Israel. The speakers were: The Honorable Elyakim Rubinstein, Attorney General of Israel; Rabbi Yitzhak Zilberstein of Ramat Elchanan, Bnei Brak; Professor Abraham Shteinberg, Director of the Center for Medical Ethics at the Hebrew University and Hadassah Hospital; Professor Aaron Kirschenbaum of the Inter-Disciplinary Center in Herzlia; Professor Daniel Statman of Bar-Ilan University; Dr. Michael Vigoda of the Ministry of Justice and Professor Nahum Rakover.

(5) During April 13-15, 2000 a seminar on "Patient's Rights" took place in Naharia, Israel. The speakers were: Professor Shimon Gliek, of The Center for Medical Education at Ben-Gurion University; and Rabbi Dr. Mordechai Halperin, Director of the Shlesinger Institute for Medicine and Halacha.

3. The Lillie Goldstein Mobile Judaica Collection

The Lillie Goldstein Mobile Judaica Collection at Touro Law Center was established for the purpose of assisting law schools across the country, which do not have an adequate Judaica collection, to offer courses in Jewish law. The Mobile Judaica collection is offered as a loan, for one or two semesters, free of charge. For more specific details see the December 1998 Jewish Law Report, p. 38.

The first borrower of the collection was Chicago Kent College of Law, Illinois Institute of Technology, which used it for a course in Jewish law taught during the spring 2000 by Professor Sheldon Nahmod. The second borrower of the collection is the University of Utah, which will offer a course in fall 2000, taught by Professor Daniel Greenwood.

Law schools that wish to take advantage of this opportunity and offer courses in Jewish law are advised to write to: Professor Daniel P. Jordan Jr.,

Head Law Librarian, Touro College, Jacob D. Fuchsberg Law Center, 300 Nassau Road, Huntington, New York 11743, Tel. (631) 421-2244, ext. 320

4. A Symposium on the Noahide Law

A symposium entitled, “Application of the Noahide Code to Contemporary Social Problems,” co-sponsored by The Tree of Life Society and the Leonard and Bea Diener Institute of Jewish Law at the Yeshiva University’s Benjamin N. Cardozo School of Law, was held on Wednesday, March 15, 2000 at Cardozo School of Law in New York City. The speakers were: Rabbi Israel Chait, Rosh Yeshiva, Yeshiva Bnei Torah; Rabbi Michael Katz, former advisor to the Noahide Community in Athens, Greece; Dr. Aaron Lichtenstein, City University of New York; Rabbi Yoel Schwartz, Yeshivat Dvar Yerushalayim; Professor Nahum Rakover, former Deputy Attorney General of Israel; and Rabbi J. David Bleich, Cardozo School of Law.

5. Courses in Jewish Law in American Law Schools.

The Institute has recently sent out a questionnaire to all law schools across the country regarding courses in Jewish law that they offered in fall 1999 and spring 2000 or will offer in fall 2000. The following list is based upon information provided by the schools.

<u>Law School</u>	<u>Title of Courses & semesters</u>	<u>Professor(s)</u>
University of California at Davis School of Law	Seminar in Jewish Law (Spring 2000)	Edward H. Rabin
Benjamin N. Cardozo School of Law	Introduction to Jewish Law; Advanced Jewish Law (Fall 1999); Bioethics & Jewish Law; Jewish Law (Spring 2000)	J. David Bleich
The Catholic University of America School of Law	Comparative Social Issues Under Jewish Law (Spring 2001)	Benjamin W. Mintz
Chicago-Kent College of Law	Biblical & Rabbinic Law Seminar (Spring 2000)	Sheldon H. Nahmod
Columbia University School of Law	Seminar in Topics in Jewish Law (Fall 1999) Seminar in Jewish Law: Bio-Medical Ethics (Spring 2000) Seminar in Topic in Jewish Law (Fall 2000)	Saul Berman & George P. Fletcher Saul Berman Saul Berman

Cleveland State University Cleveland-Marshall College of Law	Judaic Law (Spring 2000)	Stephen J. Werber
De Paul University College of Law	Jewish Law (Spring 2000)	Steven H. Resnicoff
Duke University School of Law	Jewish Law (Spring 2001)	Martin P. Golding
Emory University School of Law	Jewish Law (Spring & Fall 2000)	Michael Broyde
Fordham University School of Law	Jewish Law (Fall 1999) Jewish Law (Fall 2000)	Abraham Abramovsky & Morris Bernstein Abraham Abramovsky & Samuel Levine
Georgetown University Law Center	Judaic Sources of American Law (Spring 2000)	Sherman L. Cohn, Barry Freundel & David Saperstein
Harvard Law School	The Legal Thought of Maimonides and its Talmudic Sources (Spring 2000); Seminar on Legal Controversy In Jewish Law (Spring 2000)	Hannina Ben Menachem
University of Houston College of Law	Jewish Law (Spring 2000)	Yale L. Rosenberg
Northwestern University School of Law	Jewish Law (Spring 2000)	Mayer G. Freed
Pepperdine University School of Law	Jewish Law (Fall 2000)	W. Harold Bigham
Saint Louis University School of Law	Jewish Law (Spring 2001)	David A. Rubin
Southwestern University School of Law	Jewish Law (Spring 2000)	Ira Shafiroff
Texas Tech University School of Law	Jewish Law (Fall 1999 & Fall 2000)	Dellas W. Lee
Touro College, Jacob D. Fuchsberg Law Center	Jewish Legal History (Fall 1999) Selected Topics in Jewish Law (Spring 2000) Jewish Law (Fall 2000)	Jeffrey Roth Chaim Povarsky Neil Cogan

University of Utah
College of Law

Comparative Law: Hebrew Law
(Spring 2000); Comparative Law
Seminar (Fall 2000)

Daniel Greenwood

Wayne State
University Law
School

Jewish Law (Fall 2000)

Shlomo Sperka

Yale University Law
School

Environmental Issues in Classical
Jewish Law (Fall 1999)

Michael Whitman



Participating in the symposium entitled, "Standards of Conduct of Public Leaders: A Legal, Ethical and Sociological Perspective," are seated from right: Dean Howard Glickstein, Dean Neil Cogan and Professor Chaim Povarsky (See p. 32).

The Honorable Ben Zion Greenberger of the Jerusalem Family Court speaking at the symposium on "Testamentary Freedom, The Right to Disinherit Family Members: A Jewish, American, Israeli and Continental Perspective" (see p. 31).

Participating in the symposium entitled, "Testamentary Freedom, The Right to Disinherit Family Members: A Jewish, American, Israeli and Continental Perspective," are seated (from right): Vice Dean Eileen Kaufman and Professor Douglas D. Scherer (see p. 31).

Responsa Literature and Commentary

Peeping into a Neighbor's Premises: Visual Trespass under Jewish Law

Dr. Chaim Povarsky

\ Introduction

Visual trespass resulting from peeping into a neighbor's premises is part of a distinct branch of law called *Nizkei Shecheinim*, or Damages by Neighbors, dealing with damages caused to an individual by his neighbor while the latter was using his own property. Although rabbinical rather than biblical law may govern the area of damages by neighbors including visual trespass,¹ the impropriety of visual trespass is alluded to in biblical interpretation. The Bible relates the story of Bil'am the wizard who was hired by Balaq the King of Mo'av to curse the Jewish people. However, instead of cursing, Bil'am praised and blessed them. In one of his praises he proclaimed, "How goodly are your tents O Jacob and your dwelling places O Israel."² The Talmud explains that Bil'am observed (and was inspired by the fact) that the entrances of the tents of the Jewish people did not face one another, and because of this they deserved that G-d's spirit should dwell among them.³

In determining liability in cases involving damages by neighbors, Jewish law takes into account the need of both parties to use their respective properties, and determines in each case which use should be protected. In deciding these cases a court needs to strike a fine balance between the conflicting interests of the parties, considering all their concerns, including possible future damages. Thus, the laws of visual trespass not only require that one does not peep into neighboring premises, but also that one takes

¹ See, e.g., Moshe Mi'Terani, *Kiryat Sefer*, The Laws of Neighbors Ch. 9.

² Numbers 24:5.

³ See B. Talmud, Bava Bathra 60a (discussing the principle, according to which co-owners of a courtyard should not open doors or windows to the courtyard facing the doors and windows of the other partners, and quoting Bil'am's proclamation in support of this principle). According to *Rashbam, ad loci*, the purpose of this principle is to enhance modesty, and Bil'am's praise of the Jewish people was for their sense of modesty. However, according to Rabbenu Gershom, *Nimukei Yosef* and *Meiri, ad loci*, the concern is about visual trespass, and Bil'am's praise of the Jewish people was for their effort to avoid visual trespass. As discussed below, the prohibition on visual trespass may not apply today because houses with windows facing neighbors' courtyards are very common, and people do not care about visual trespass. See *infra* notes 25, 28.

steps to eliminate the likelihood of doing so in the future. This may be true even where currently the visual trespass does not cause any damage, but may cause damage in the future. The following case illustrates this principle.

Rashba's Case

Rabbi Shlomo ben Aderet, a renowned 13th century authority (“*Rashba*”), discussed a case involving Reuvein, the defendant, who was constructing a window on his premises facing the land of Shimon his neighbor, the plaintiff.⁴ The plaintiff objected to the construction of the window. He argued that although currently there were no houses on his land near the defendant's wall and no immediate damage would result from the defendant's visual trespass, he might subsequently suffer damage when he built a house on his premises near the defendant's wall. The question arose as to the plaintiff's right to prevent the construction of the window in order to avoid future damages.

Although *Rashba* thought that it was a difficult question, he decided the case based on his teacher's view, according to which one can object to the constructing of a window to avoid future damage.⁵ It is true that the construction of the window in this case would not cause immediate damage, and if the plaintiff decided later to build a house on his land away from the border as required by law, the defendant would have to block his window to eliminate visual trespass into the plaintiff's house. However, because the plaintiff might still suffer damages during the litigation process, the defendant is not allowed to construct the window even before the plaintiff's house is built.

Rashba points out that the question of whether a neighbor (the defendant) can be restricted in using his property to avoid future damage is subject to debate in the Talmud. According to Rava, whose view is adopted, one could be denied the right to use his property to avoid future damage to a neighbor provided the damage is expected. The damage is expected if it results from the plaintiff's using his property in a manner which is common in the neighborhood. In the case under discussion, because courtyards are commonly used for housing, as stated in the Jerusalem Talmud, the plaintiff was expected to build a house on his premises. Consequently, the defendant is not allowed to construct the window even before the plaintiff's house is built and the damage actually occurs.

⁴ See *Responsa Rashba*, vol. 1, responsum 1144.

⁵ *Rashba* may be referring either to Rabbenu Yonah or *Ramban*. Both were *Rashba's* teachers and both are of the same opinion on this issue. See *Shulchan Aruch, Choshen Mishpat* 154:16.

The defendant in visual trespass cases may not be liable according to Rabbi Yossi, whose view is adopted,⁶ who holds that one may place a hazard on one's property even though it might affect the neighbor's ability to use his property. Rabbi Yossi argues that it is the plaintiff's responsibility to avoid the damage by keeping his property away from the hazard. Likewise, it may be the plaintiff's responsibility to avoid visual trespass. However, there is an exception. When the damage can be attributed to the defendant's act (*girei delei*, literally, "his arrow" or "his shot"), whether directly or indirectly,⁷ even Rabbi Yossi agrees that it is the defendant's obligation to remove the hazard.⁸ Because damage caused by visual trespass flows from the trespasser's act, the latter should be responsible for it.

The question, however, arises as to whether the *girei delei* exception would also apply to future damages. More specifically, would Rabbi Yossi deny one the right to build a window on one's premises to avoid visual trespass of a neighbor's premises in the future? Although the defendant's action would eventually cause the damage, because the damage is not imminent it might not be regarded as deriving from the defendant's act, or *girei delei*.⁹ *Rashba*, however, argues that in a number of cases the Talmud

⁶ See Maimonides, *Mishneh Torah*, The Book of Acquisition, The Laws of Neighbors 19:5-7; *Shulchan Aruch*, *Choshen Mishpat* 155:31-32.

⁷ In cases of indirect damage, or *gerama* in talmudic terminology, there is an intervening factor which is the direct cause of the damage. *Girei dele*, however, may occur even where an intervening factor is involved. The damage is considered *girei delei* because the person's action triggered the damage. An example of such a situation is the ladder case discussed in the Talmud. According to the Mishnah, one is not allowed to place on his land a ladder near a neighbor's dovecote because a marten may jump instantaneously on the ladder, reach the dovecote and snatch a chick. Here the damage is not done directly by the defendant or through his act, nevertheless, because the marten jumped on the ladder as soon as the defendant placed it near the dovecote it is considered *girei delei*, deriving from the defendant's action. See B. Talmud, Bava Bathra 22b. Because of the *gerama* principle the defendant in this case would not have a legal obligation to pay damages, but he would be prohibited from placing the ladder near the neighbor's dovecote under the principles of damages by neighbors. *Id.* See also *infra* note 15 and accompanying text.

⁸ See B. Talmud, Bava Bathra 25b; Maimonides, *ibid.* at 10:5; *Shulchan Aruch*, *ibid.* at 155:31.

⁹ The Talmud seems to imply that Rava's ruling, according to which the placing of a hazard which might cause future damage is prohibited insofar as it pertains to Rabbi Yossi, applies only where the hazard caused some damage immediately. An example would be the Digger case discussed in the Talmud. In this case, the defendant ("the digger") was digging a pit on his premises near the border with his neighbor (the plaintiff), within the prohibited distance, which is three *tefachim* (=12") from the border. See Mishnah, Bava Bathra 2:1. Although

seems to indicate that even according to Rabbi Yossi one may not be allowed to place a hazard on his property that would eventually, but not necessarily immediately, directly cause damage to a neighbor.¹⁰ *Rashba* concludes that the *girei delei* principle also applies to future damages.

It might be argued that the plaintiff's objection to the construction of the window by the defendant, in the absence of immediate damage, is considered an act of *Sedom*, or a wicked behavior, which is prohibited under Jewish law (hereinafter the *Sedom* principle).¹¹ *Rashba* cites Rabbi Zeira in the Talmud,¹² who ruled that one cannot object to the construction of a window in a neighbor's wall facing one's premises, if the window was four *Amot* (eight feet) above the ground, because it would be difficult to peep through the window into someone's premises. According to the Talmud this ruling is based on the principle according to which one should not act in the manner of *Sedom*. Likewise, in the case at hand, because the plaintiff would not suffer immediate damage, objecting to the construction of the window may be regarded as an act of *Sedom*.

the major damage would occur in the future when the plaintiff would dig a pit on his premises, immediately outside the prohibited distance (which is also three *tefachim*), and the water that would accumulate in the defendant's pit would weaken the walls of the plaintiff's pit, the digging causes some damage immediately by loosening the plaintiff's soil. Although the minor damage of loosening the plaintiff's soil does not justify a restriction on the defendant's right to dig pits on his premises, yet because some damage occurs immediately the digging is prohibited to avoid the major damage in the future (hereinafter "the Digger's case"). See B. Talmud, Bava Bathra 17b, and *Tosafot*, Bava Bathra 17a, s.v. *lo yachpor*. Assuming Rava's ruling is limited to cases where the hazard causes some damage immediately, the ruling would not apply to *Rashba's* case. Because in this case there were no houses on the plaintiff's land near the border, construction of the window by the defendant would not cause any damage immediately.

¹⁰ See B. Talmud, Bava Bathra 17b-18b. The Talmud cites many sources, which seem to contradict Rava's view, according to which one is obligated to restrict the use of one's land to avoid future damage to a neighbor. Since the Talmud does not resolve this problem by suggesting that those sources follow Rabbi Yossi's view which holds that the defendant is not responsible unless the damage is imminent (while Rava follows the view of Rabbi Yossi's opponents), this may indicate that even according to Rabbi Yossi the damage does not have to be imminent to hold the defendant responsible for it. For more discussion on this point see *infra* note 37.

¹¹ One is not supposed to act wickedly in the manner of the people of *Sedom*. Although this seems to be an ethical principle, it may have legal consequences. See B. Talmud, Bava Bathra 12b; Maimonides, *supra*, note 6 at 12:1; *Shulchan Aruch*, *supra*, note 6 at 174:1.

¹² See B. Talmud, Bava Bathra 59a.

Rashba, however, dismisses this analogy. In Rabbi Zeira's case, because the window is built high in the wall the plaintiff would suffer no damage at all. It is true that he might have a problem in the future if he decided to build a wall near the defendant's window, thereby obstructing light to the window. The plaintiff would then have to litigate the case in court to establish his right to build the wall. However, the plaintiff would not suffer any visual damage during the litigation, and eventually he would win the case. Therefore, the plaintiff has no valid reason to object to the construction of the window, and his objection would be regarded as acting in the manner of *Sedom*.¹³ In the case at hand, however, if the plaintiff would later build a house facing the defendant's window, the plaintiff would suffer damage as a result of the visual trespass. Although the plaintiff would eventually win the case, he would still suffer damage during the litigation, and, therefore, his objection to the construction of the window is justified.

Rashba argues further that the plaintiff's concerns are also justified in light of the growing debate among Jewish authorities as to whether one may acquire a right to stare into a neighbor's premises based on the neighbor's lack of objection.¹⁴ The court, which would subsequently handle this case, may be of the opinion that one may acquire such a right in the absence of an objection. Thus, if the defendant would install the window he may acquire a right to keep his window there, and, consequently, when the plaintiff later decides to build a house facing that window, he would not be able to avoid the visual trespass. The only way to avoid this result is for plaintiff to openly object to the installation of the window, thereby indicating that he did not waive his right against the visual trespass. However, in this case the plaintiff would be compelled to keep the evidence about his objection for

¹³ The application of the *Sedom* principle in Rabbi Zeira's case raises a problem. Since the plaintiff sustains no damage, he should be legally denied the right to object to the defendant's action, not just ethically. For a discussion of this issue *see infra*, notes 42-44 and accompanying text.

It should be noted that Rabbi Eila'ah disagrees with Rabbi Zeira, holding that the victim in this case can object to the installation of the window. *See* Bava Bathra, *supra* note 7. However, as *Rashba* pointed out, Rabbi Eila'ah agrees that based upon the *Sedom* principle, in the absence of damage one cannot object to the construction of a window. Rabbi Eila'ah, however, holds that because the defendant could climb on a chair and stare through the window into the plaintiff's premises, the plaintiff's objection is justified.

¹⁴ For a discussion of the question as to whether a waiver of one's right to object to visual trespass is irrevocable, *see infra*, notes 59-70 and accompanying text.

later litigation. Because maintaining evidence may be burdensome, the plaintiff's reluctance to do so is justified, and, therefore, his objection to the construction of the window is not regarded as acting in the manner of *Sedom*.

Rashba's analysis raises numerous questions regarding visual trespass, including the extent of this prohibition and the damage caused by visual trespass, and as to whether that damage is considered *girei dele*, and whether the prohibition against visual trespass also applies to future damages, and regarding the application of the *Sedom* principle in cases of visual trespass. These questions as well as other issues regarding visual trespass will be discussed below.

Commentary

1. The Obligation to Avoid Visual Trespass. As noted above, *nizkei shecheinim*, or damages by neighbors, which include visual trespass, is a distinct branch of law. This does not necessarily mean that laws of torts never apply to cases involving damages by neighbors. Torts law may sometimes determine liability for damages caused to a neighbor. Laws of damages by neighbors, however, focus primarily on the obligation to avoid damages rather than to pay for damages. Those laws determine in each case whether it is the defendant's obligation to avoid causing damage to his neighbor, the plaintiff, or it is the plaintiff's responsibility to avoid being damaged by the defendant.

An obligation to avoid doing damage to a neighbor or to anyone else may exist even where the damage would not result in a monetary liability. Because the damage is caused while the defendant uses his land in a normal fashion the plaintiff may not be entitled to a remedy under the law of torts. Likewise, the damage may actually be caused by an intervening factor while the defendant's action only triggered the damage, in which case the latter may not be liable in torts because of the *gerama* principle.¹⁵ Nevertheless, the defendant may be obligated to avoid the damage under the laws of damages by neighbors.

¹⁵ See B. Talmud, Bava Kamma 22b, 60a, stating that in case of a *gerama* one is not liable to pay damages. Early authorities debated the meaning of *gerama*. Most authorities hold that a *gerama* case exists when the defendant's action was not the direct cause of the damage. See, e.g., *Tosafot*, Bava Bathra 22b, s.v. *zos omeret*; Mordechai, Bava Kamma, Ch. 9, par. 119; *Or Zaruah*, Bava Kamma, Ch. 2, Par. 137; *Eitur, Mechila*; *Responsa Rashba*, Vol. 3, Ch. 107; *Rosh*, Bava Kamma, Ch. 9, par. 123. See also *supra* note 7, and *infra* notes 29, 32.

The obligation to avoid damages, as opposed to payment for damages, may sound like an ethical obligation. However, because Jewish law combines laws, ethics and religion into one system of law, avoiding damage to another is also a legal obligation, and may be enforced in a court of law. The source of this obligation is subject to debate. According to one interpretation, the obligation is based on the biblical commandment, "And you shall love your neighbor like yourself."¹⁶ According to another interpretation, the obligation is based on the biblical statement, "Her (the Torah's) ways are ways of pleasantness, and all her paths are peace."¹⁷ Others believe that the obligation is based on rabbinical rather than biblical law.¹⁸ The discussion of visual trespass here focuses on the obligation to avoid the damage rather than payment for it.

(2) *The Damage Caused by Visual Trespass.* Visual trespass may be prohibited for a number of reasons. It has been suggested that peeping into a neighbor's property might relate to an "evil eye," which is believed to be harmful.¹⁹ Visual trespass may also result in gossip, or may embarrass the plaintiff and violate his privacy.²⁰ Visual trespass may also significantly restrict the plaintiff's ability to use his property because of fear that the defendant might be watching him.²¹

The last argument is problematic. As noted previously, the responsibility of the defendant in cases of damages by neighbors depends on the question as to whether it is the plaintiff or the defendant who must restrict the use of his property to avoid the damage. To hold the visual trespasser responsible for the damage one must first determine that the defendant rather than the plaintiff needs to restrict the use of his property to avoid the damage. Thus, holding the defendant responsible because of the plaintiff's right to use his property is like placing the cart before the horses, because it does not explain why the defendant and not the plaintiff has the duty to confine the use of his property.

Apparently, this argument assumes that the plaintiff is entitled to privacy without being interrupted by visual trespass. As opposed to other cases of

¹⁶ Leviticus 19:18.

¹⁷ Proverbs 3:17.

¹⁸ *See supra* note 1 and accompanying text.

¹⁹ *See, e.g., Ramban Bava Bathra 59a.* According to the Jewish tradition, staring at another with jealousy and mean thoughts may cause harm to the other.

²⁰ *Id.*

²¹ *See* Rabbi I.Z. Meltzer, *Even Haezel*, *The Laws of Neighbors* 2:16

damages by neighbors, where the damage is limited in scope and might be avoided by the plaintiff without reducing significantly the use of his property, in the case of visual damage, requiring the plaintiff to avoid the damage would affect significantly the use of his property. Therefore, it is the defendant's obligation to avoid visual trespassing of his neighbor's property.

Visual trespass is different from other kinds of damages in that the defendant is required not only to avoid staring into his neighbor's premises, but also to construct his property in a way that would make it difficult for him to have visual access to the neighbor's premises. For instance, one may be prohibited from installing a window or be required to block his window facing his neighbor's house, or build it four *Amot* (eight feet) higher or lower than the windows of his neighbor's house to reduce the ability of peeping into the neighbor's house. This unusual obligation may indicate, as suggested previously, that the trespasser's liability does not derive from the peeping itself, but rather from the result of it, which is the plaintiff's inability to use his property in privacy. The only way to avoid the damage is to eliminate or reduce the defendant's ability to carry out visual trespassing.²²

Apparently, those authorities who hold that visual trespass is prohibited because it may generate an "evil eye" or gossip, or constitute an intrusion into the defendant's privacy, as discussed previously, believe that because the defendant may peep into the plaintiff's premises unintentionally, it is not enough for the plaintiff to refrain from peeping into the neighbor's premises, but rather must eliminate his ability to do so. It may also be suggested that those authorities agree that the major damage involved in visual trespass is the plaintiff's inability to use his property because of fear of visual trespass. The arguments of an "evil eye," gossip, or an intrusion into the plaintiff's privacy only serve as an explanation of why is it the defendant's responsibility to avoid the damage.

(3) *The Extent of the Prohibition against Visual Trespass.* Peeping into another's premises does not always constitute visual trespass. Obviously, one cannot expect that people who walk in the street would avoid staring into one's house or courtyard. It is the responsibility of the occupier of the premises to protect his privacy against such invasions. Indeed, houses and courtyards are generally protected by walls or fences against visual trespass from the street. However, when the visual trespasser is a neighbor it may be the responsibility of the latter to avoid the damage. Visual trespass can be avoided either by not installing windows facing a neighbor's property, by blocking such windows, or by building a wall

²² *Id.*

between the two adjacent properties. A defendant's promise not to peep into the plaintiff's premises is inadequate²³

The Talmud discusses the extent of the prohibition against visual trespass of a neighbor's property. In principle, there is no question that visual trespass may cause damage and must be avoided. The discussion is about the extent of that prohibition. There is a consensus among the talmudic authorities that a visual trespass which may affect the plaintiff's intimacy or constitute a continuous nuisance is prohibited. For example, because houses are an intimate environment and are constantly in use, one must avoid visual trespass of a neighbor's house under any circumstances (whether the visual trespass is carried out from the trespasser's house or courtyard).²⁴ Likewise, one is obligated to avoid visual trespass of a neighbor's courtyard or roof (built in the old fashion²⁵) where the trespassing is carried out continuously from the trespasser's house.²⁶

Talmudic authorities debated whether this principle also applies to visual trespass of one's courtyard or roof where the trespasser is staring from his courtyard or roof.²⁷ Because people do not constantly use

²³ See, e.g., *Ramban*, *supra* note 19.

²⁴ See B. Talmud, Bava Bathra 2b (stating that visual damage caused by staring into a neighbor's house is different from staring into a neighbor's courtyard).

²⁵ Courtyards and roofs in the talmudic time, as well as through the middle ages, were extensively used by their owners, and apparently fenced. See *Rashi*, Bava Bathra 2a, *s.v. Hashutfin* (noting that all the courtyards discussed in the Talmud were connected to the owners' houses and most of the owners' work was conducted in those courtyards). Apparently, this would not apply to most contemporary courtyards and roofs. See also *infra* note 28 (discussing conventional visual trespass).

²⁶ See, e.g., *Ramban*, Bava Bathra 2b. *Ramban* is referring to the Mishnah, Bava Bathra 59b, ruling that one cannot install a window in his house facing a courtyard owned jointly by him and another person. This ruling has been interpreted as based upon the principle of visual trespass, implying that visual trespass has been universally recognized. However, *Ramban* explains that because the visual trespass in this case is carried out from one's house, and because people use their houses constantly, the trespasser is continually committing visual trespass, in which case all authorities would agree that the visual trespass is prohibited.

²⁷ See Bava Bathra, *supra* note 24. The debate in the Talmud arose in connection with the principle set forth in the Mishnah (Bava Bathra 2a), according to which two co-owners of a courtyard who decided to break the co-ownership and divide the courtyard, must build a wall to separate their shares. Talmudic authorities debated whether the obligation to build the wall is based upon their agreement or upon the prohibition against visual trespassing.

courtyards and roofs, visual trespass of the plaintiff's courtyard or roof from the defendant's courtyard or roof may not cause much damage, and may not be prohibited. Most authorities hold that the prohibition on visual trespass applies to all of these cases.²⁸ In *Rashba's* case, because the visual trespass might affect the defendant's use of his future house, it would be prohibited, according to all authorities (assuming the prohibition also applies to future damage).

(4) Causation and Direct Damages in Cases of Visual Trespass. Cases of damages by neighbors may be divided into two categories, depending upon whether the damage derives from the defendant's act (*girei delei*) or not. The following examples may not involve visual trespass, but illustrates the distinction between *girei delei* and other cases. Damage caused by digging a pit on one's land near a neighbor's wall, thereby shaking and weakening the wall, is clearly attributable to the digger's act and is considered *girei delei*. But if roots from a tree planted on one's land eventually penetrate a neighbor's land, the damage is not attributable to the planter, even though it resulted from his action, and is, therefore, not considered *girei delei*. Tannaitic scholars debated the defendant's liability where the damage is not *girei delei*.²⁹ It has been decided that the defendant is only responsible in cases of *girei delei*.³⁰

This does not mean that one is not responsible for damages under tort law unless the damage is categorized as *girei delei*. Obligations in torts are not limited to *girei delei* cases. However, as discussed previously,

²⁸ See, e.g., Maimonides, *Mishneh Torah*, The Book of Acquisition, the laws of Neighbors 2:14; *Shulchan Aruch*, *Choshen Mishpat* 157:1. According to some authorities, however, the application of this rule is limited. Some confined the principle of visual trespass to courtyards attached to private houses, which are open to the courtyards. Such courtyards may require privacy. If the plaintiff's houses are not open to the courtyard, the principle would not apply. See, e.g., Rabbi Meir Abulafia, *Yad Remah*, commenting on Bava Bathra 7a, par. 68; Rabbi Yom Tov ben Ishbili, *Chidushei Ritva*, commenting on Bava Bathra 7a. Some authorities believe that the principle would not apply if visual trespass is common in the neighborhood and people do not care about it. Others, however, maintain that one is not bound by a custom in this matter, and is entitled to protection against visual trespass even if people in the neighborhood do not care about it. See *Tur*, *Choshen Mishpat* 157 and *Rema*, *Choshen Mishpat* 157:4 (discussing the two conflicting views).

²⁹ See B. Talmud, Bava Bathra 25b. The debate whether responsibility for damages under the laws of damages by neighbors is limited to damage derived from the defendant's action (*girei delei*) is not related to the complex issues of *gerama* (indirect damage). See *supra* note 7.

³⁰ See Bava Bathra, *supra* note 29; Maimonides, *supra* note 6, at 10:5.

in cases of damages by neighbors the question is not only whether one committed a tort. Although the defendant's action may not constitute a tort, he may nevertheless be obligated to avoid the damage.³¹ Conversely, the defendant's action may be considered a tort but may not be liable for it. In cases of damages by neighbors the dispute is actually about the use of their respective properties.³² The primary question in those cases is who must restrict the use of his property to avoid the damage. Therefore, the question of whether the damage could be attributed to the defendant's act (*girei delei*) may be of critical significance in those cases, because it would determine who needs to restrict the use of his property.

As to visual trespass, most authorities believe that it is considered *girei delei* because the damage is attributable to the defendant's act, his staring into his neighbor's premises.³³ This is also Rashba's position in the case under discussion.

(5) Avoiding Future Damage Caused by Visual Trespass. *Rashba* maintains that the plaintiff has a right to object to visual trespass even if

³¹ See *supra* note 7. An example of this principle may be found in the *davsha* case. See B. Talmud, Bava Bathra 22b, ruling that one is not allowed to build a wall near his neighbor's wall, because by doing so the latter would be denied the benefit of having the foundation of his wall reinforced by people walking by his wall. Because walls in ancient times needed constant treading by people to harden the soil and reinforce their foundation, one who has a wall by his neighbor's land where people walk acquires an easement on that land, preventing the neighbor from building at that wall, thereby denying the former the benefit of the treading. See Rabbi Meir Abulafia, *Yad Rema*, Bava Bathra, Ch. 2, § 1, *s.v. lo Yachpor*.

The prohibition on building a wall at a neighbor's wall in this case is certainly not based on the tort law. It is rather the plaintiff's property right, under which the defendant cannot block the way for people to walk by the wall, thereby tighten the soil and support the wall foundations. However, some authorities offered other theories for this principle. For instance, Rabbi Vidal de'Talusha cites anonymous sources stating that the *davsha* principle is limited to land purchased by both parties from the King or Government, which presumably grants the *davsha* right to the wall owner. See *Magid Mishneh*, commenting on Maimonides, *Mishneh Torah*, The Book of Acquisition, The Laws of Neighbors 9:9. Rabbi Y. Karo holds that the *davsha* principle is based on public policy, which is concerned that land in general should be solid and stable. See *Shulchan Aruch*, *Choshen Mishpat* 155:11.

³² For a lengthy discussion on the distinction between torts and damages by neighbors, see *Netivot Hamishpat*, *Choshen Mishpat* 155:18; Rabbi Shimon Shkop, *Chidushei Rabbi Shimon Shkop*, Bava Bathra, Ch. 1 § 3.

³³ See, e.g., *Ramban*, Bava Nathra 18b; *Tur*, *Choshen Mishpat* Ch. 152, citing *Rosh*; *Rie Migash*, Bava Bathra 6b; *Raban*, Bava Bathra 2b.

damage may only occur in the future. Plaintiff could argue that when subsequent damage occurs he would have to litigate the case in court and in the meantime he would suffer damages.³⁴ This rule is consistent with Rava's view that one cannot dig a pit on the border with his neighbor because it might damage the neighbor's pit, even though there are currently no pits on the neighbor's land. Because it is customary to dig pits, the plaintiff is expected to dig a pit, which would be damaged by the defendant's pit, and, therefore, can object to the digging of the pit by the defendant. This principle also applies according to Rabbi Yossi in cases where the damage derives from the defendant's act (*girei dilei*), including visual trespass.³⁵

Rashba's case was discussed by Rabbi Yosef Karo.³⁶ In an unusually lengthy opinion, Rabbi Karo discusses this case, citing different views of early authorities. He points out that *Rashba's* view was also adopted by *Ravad*, *Rivash*, Rabbi Yona and *Ramban* and many others. However, he cites Rabbi Asher ("*Rosh*") who is of the opinion that one cannot deny a neighbor's right to install a window to avoid future damage.³⁷ *Rosh* applies to this case the talmudic principle according to

³⁴ *Responsa Rashba*, *supra*, note 5.

³⁵ Also included in this category are all the cases discussed in the Mishnah, such as the prohibition to place a mill or a stove near a neighbor's land, even though currently there is no wall on the neighbor's property that could be damaged by it.

³⁶ *See Shulchan Aruch, Choshen Mishpat* 154:16.

³⁷ *Rosh's* view seems to contradict Rava's view in the Talmud, which was accepted as final law, according to which one may not place a hazard on his premises even if currently it would cause no damage. *See Bava Bathra* 17b. It is true that Rava discussed the case of the digger, and the Talmud points out that the digger causes the plaintiff immediate damage by loosening the latter's soil, even though there are currently no pits on the plaintiff's premises that could be damaged by the defendant's digging. *Id.* However, as *Rivash* pointed out (see *supra* note 10 and accompanying text), the Talmud challenged Rava's view by quoting many sources which seem to indicate that one is not obligated to remove a hazard to avoid future damages, and in those cases the defendant's action did not yet cause any damage; the damage would occur only in the future. This shows that according to Rava, one is not allowed to place a hazard on his premises to avoid future damage even if currently the defendant's action causes no damage whatsoever. *See Responsa Rivash* 471.

See, however, Tosafot (*Bava Batra* 17b, *s.v. marchikin*), pointing out that in all the cases cited in the Talmud against Rava's view, either the defendant's action caused immediately some damage to the plaintiff's land, or it would have taken a great effort to remove the hazard in the future when damage would occur, and thus the plaintiff may have a legitimate concern that the defendant might not remove the hazard later when damage occurs. Only in such cases one must remove a hazard

which a property owner cannot deny another a benefit from his property if the owner would not suffer any loss as a result of the other's benefit (hereinafter "the benefit-no-loss principle"). In this case, by constructing the window the defendant would enjoy the light coming from the plaintiff's land, and the plaintiff would not suffer any loss as a result of it, therefore, he cannot deny the defendant that benefit.

Rosh is not concerned with the visual trespass the plaintiff might suffer later during litigation when he decides to build a house facing the defendant's window. Apparently, *Rosh* holds that temporary future damage does not justify plaintiff's objection to the construction of the window. As to *Rashba's* argument that allowing the defendant to construct the window would compel the plaintiff to keep the evidence about his objection,³⁸ according to *Rosh* plaintiff would not have to keep the evidence. *Rosh* argues that because plaintiff cannot object to the construction of the window, the lack of objection does not indicate a waiver, and, consequently, plaintiff does not acquire a right to visual trespass based on plaintiff's silence.³⁹

Most authorities agree with *Rashba*, contrary to *Rosh's* view.⁴⁰ However, Rabbi Moshe Isserles (*Rema*) concluded that each community could decide this case based upon its custom and tradition.⁴¹

according to Rava. In the case of the *Rosh*, no damage at all occurs at present and it would not be difficult to block the window later when it would cause damage. Therefore, even according to Rava the defendant may be allowed to build the window as long as it causes no damage. See *Rosh*, Bava Bathra 18a quoting *Tosafot's* interpretation with agreement. See also Rabbi Arie Leib (*Ketzo* *Hachoshen* 154:5) discussing *Rosh's* interpretation of Rava's view.

³⁸ See *supra*, text following note 14 (discussing *Rashba's* view according to which plaintiff's need to keep the evidence justifies his objection to the construction of the window).

³⁹ See, however, *Responsa Rivash* #471, taking issue with *Rosh*, arguing that acquisition of a right to visual trespass is not based on plaintiff's ability to object. The opposite is true, plaintiff's right to object derives from defendant's ability to acquire a right to visual trespass. Furthermore, assuming that plaintiff cannot object to the construction of the window, he may still demonstrate his dissatisfaction by raising objection. Lack of such demonstration may imply a waiver, which would result in the defendant's acquisition of a right to visual trespass. But since the plaintiff cannot be required to continue demonstrating his objection, he is entitled to prevent the construction of the window. *Id.*

⁴⁰ See *Shulchan Aruch, supra*, note 36.

⁴¹ See Rabbi Moshe Isserles (*Rema*), in his glosses on *Shulchan Aruch, Choshen Mishpat* 154:16.

(6) Easements by Law to Prevent Damages by Neighbors. *Rosh's* rationale that because of the benefit-no-loss principle one cannot object to the construction of a window by a neighbor if no damage occurs, is problematic. The benefit-no-loss principle generally applies where one derives a benefit from another's property. Although according to the laws of property or torts one needs to pay for the benefit, nevertheless, because of the benefit-no-loss principle the benefiting party is not obligated to pay. In *Rosh's* case the defendant is building the window on his own land, and is not using his neighbor's land. The only problem is the defendant's visual trespass, which might cause damage to his neighbor, the plaintiff. Since *Rosh* holds that temporary future damage is not considered "a loss" and, therefore, the benefit-no-loss principle would apply, the defendant is not causing any damage to the plaintiff and should be allowed to build the window based upon his property rights. The application of the benefit-no-loss principle in this case does seem superfluous.

A similar question arises with regard to Rav Zeira's ruling in the Talmud, cited by *Rashba*,⁴² in the case involving the installation of a window in one's wall four *Amot* (eight feet) above the ground, facing a neighbor's premises. According to Rav Zeira the neighbor cannot object to the installation of the window because of the *Sedom* principle.⁴³ But since the defendant is using his own land and no damage would occur to the plaintiff (because generally people do not stare through such a high window), he should be allowed to install the window based upon his ownership rights, even without the *Sedom* principle.⁴⁴

⁴² See *supra* note 12 and accompanying text.

⁴³ *Id.*

⁴⁴ See Rabbi Arie Leib HaCohen, *Ketzot HaChoshen* 154:1, raising this question regarding Rav Zeira's ruling. The author suggests that if not for the *Sedom* principle the plaintiff could have objected to the installation of the window to prevent the defendant from using air and light from the plaintiff's premises. This argument is problematic. Air and light keep moving and one does not acquire ownership rights over them (unless perhaps by storing air in a container or closed room). See also *Sefer Meirat Einayim, Choshen Mishpat* 153:32 (suggesting that the air is the property of the window owner, even though it comes from his neighbor's land). A similar objection to Rabbi Arie Leib HaCohen's theory was raised by Rabbi A. Erlanger. See Rabbi Erlanger, *Birchat Avraham*, Bava Bathra 59a.

Rabbi Erlanger offers the following explanation. Because the defendant could climb a chair and stare through the window the plaintiff could object to the installation of the window. However, because visual trespass in this case is rare objecting to the installation of the window would be considered an act of *Sedom*. This explanation is likewise problematic. If the fear that the defendant might climb a chair and stare through the window is real (as indeed Rabbi Eila'ah holds, see *supra* note 13) then the plaintiff should be able to object to the installation of the

The application of the benefit-no-loss principle by Rosh and the *Sedom* principle by Rav Zeira in the above cases may demonstrate an interesting Jewish legal approach in dealing with cases of damages by neighbors. As mentioned previously, damages by neighbors is a distinct branch of law. Laws of property and tort may not apply to cases of damages by neighbors. However, sometimes, one needs to be protected against an action by a neighbor even where the latter did not violate any law of torts or one's property rights. An example of this category is the *davsha* case.⁴⁵ To protect one from damages in those cases, where ordinary laws of property and torts would not provide a remedy, the law may grant the plaintiff an easement in the defendant's property restricting the latter's use of the property.⁴⁶

It would appear that such an easement was also granted to a neighbor in visual trespass cases. The prohibition against visual trespass in itself would not deny the defendant the right to construct a window on his premises, as long as he does not actually stare into his neighbor's premises. However, since the existence of the window and the potential ability to stare through it would severely hamper the neighbor's ability to use his land, the latter was granted by law an easement on the trespasser's land depriving the latter the right to construct the window. Because an easement is a property right the neighbor who owns the easement may deny the owner of the property the right to construct a window on his property facing the neighbor's land even if no real damage is expected.⁴⁷ However, *Rosh* holds that in such a case the benefit-no-loss principle applies, allowing one to derive a benefit from another's property if the latter suffers no real damage. Likewise, Rav Zeira applied the *Sedom*

window (as Rav Eila'ah concluded). Conversely, if that fear is not real the plaintiff should not be able to object even without the *Sedom* principle. A minor damage to the plaintiff which would justify the application of the *Sedom* principle (requiring the plaintiff's consent to the damage), should certainly not affect the defendant's right to use his property based upon his ownership rights.

⁴⁵ See *supra* note 31.

⁴⁶ According to some authorities, such an easement has been granted to the plaintiff in the *davsha* case. See, e.g., *Rie Migash*, Bava Bathra 22b.

⁴⁷ In case the installation of the window would not cause any damage the plaintiff would not be able to invoke his easement preventing the installation of the window. An easement which does not provide any benefit is meaningless and may not be valid. The easement in this case is valid because of the likelihood of damage, which could be prevented by exercising the easement. Although this remote and doubtful damage would not justify the denial of the defendant's right to install the window based upon the laws of torts, it may suffice to deny the defendant's right based upon the plaintiff's easement, unless the benefit-no-loss principle or the *Sedom* principle come into play, as discussed below.

principle in another case where no real damage was anticipated, denying the plaintiff the right to exercise his easement against the defendant.

(7) Waiver of a Right to Object to Visual Trespass. In most cases of damages by neighbors the plaintiff may waive his right to object to his neighbor's damaging actions. As a result of the waiver the defendant would be allowed to use his property without restrictions. Although, generally, under Jewish law a transaction requires a formal act, called *kinyan* (act of acquisition), to be valid, most authorities believe that a waiver does not require a *kinyan*.⁴⁸ A waiver does not necessarily have to be explicit. It may be implied by behavior. The plaintiff's failure to object to defendant's actions may constitute a waiver, whereby the defendant acquires a right to use his property even by causing damage to the plaintiff. Thus, by a failure of a courtyard owner to object to a neighbor's visual trespass, the neighbor may acquire a right to stare into the courtyard.

Early authorities discussed the prerequisites for establishing one's right to use his land and thereby cause damage to a neighbor, based upon the neighbor's failure to object. The Talmud discussed in different contexts a failure of a landowner to object to another's action, which affected his land. For instance, if one uses another's land claiming ownership rights based upon a purchase or a gift, and his only evidence is the owner's failure to object, the user must use the land for three consecutive years to establish his rights (hereinafter *hezkat mekarkein*, meaning the establishment of ownership rights based upon the use of property).⁴⁹ However, it is not clear what conditions are required for establishing other rights in land based upon the owner's failure to object.

⁴⁸ See Maimonides, *Mishneh Torah*, The Book of Acquisition, The Laws of Sale 5:11. One can also abandon his property without any formal act, thereby allowing other people to acquire the property. However, to acquire the abandoned property the others will have to perform a formal act of acquisition. See, e.g., *Shulchan Aruch*, *Choshen Mishpat* 173:1-4. By contrast, in case of damages by neighbors after the plaintiff waived his right the defendant would not have to acquire any right; he would simply be able to use his property without restrictions. Therefore, the defendant may not need a formal act of acquisition. See, however, Rabbi Arie Leib, *infra* note 58, holding that for a waiver to be valid in cases of damages by neighbors the defendant must perform a formal act of acquisition, and suggesting that the defendant may have performed such an act by using the plaintiff's land.

⁴⁹ See, e.g., B. Talmud, *Bava Bathra* 28a; Maimonides, *Mishneh Torah*, The Book of Civil Law, The Laws of Pleadings 11:2, 13:1; *Shulchan Aruch*, *Choshen Mishpat* 140:1-2, 141:1-2.

For instance, the Talmud states that one (hereinafter “the user”) may acquire a right to use another’s land if the owner failed to object to the use of his land (hereinafter *hezkat tashmishin*, meaning the establishment of a right to use another’s property based upon the actual use of the property).⁵⁰ Similarly, the Talmud states that one (hereinafter “the damager”) may acquire a right to use his own land even where it incidentally causes damage to a neighbor, if the latter failed to object, even though ordinarily that action would have been prohibited under the laws of damages by neighbors (hereinafter “consensual damages”).⁵¹ The Talmud, however, does not indicate whether in the cases of *hezkat tashmishin* and “consensual damage,” in order to establish their rights the user and the damager must continue their practice for three consecutive years and claim that they purchased their rights or received them as a gift. This gave rise to extensive debate among later authorities.

Some authorities believe that the requirements for three consecutive years of unchallenged use of the property and a claim of purchase or gift only apply to *hezkat mekarkein*. In the other cases the user and the damager acquire their rights as soon as the owner became aware of the their actions and failed to object.⁵² Other authorities believe that the three-year requirement also applies to the other two cases.⁵³ Still others hold

⁵⁰ See, e.g., B. Talmud, Bava Bathra 57a; Maimonides, *supra* note 49 at 12:14; *Shulchan Aruch*, *supra* note 49 at 140:15.

⁵¹ See, e.g., B. Talmud, Bava Bathra 58b-60a; Maimonides, *supra* note 6 at 8:1-6; *Shulchan Aruch*, *supra* note 49 at 153:2, 4, 6, 10, 13, 16-18.

⁵² See Maimonides, *supra* note 6, at 8:1,11:4; *Rashi*, Bava Bathra 6a, s.v. *uchzak le’urdei*. Referring to cases of *hezkat tashmishin* discussed in the Talmud, *Rashi* (cited by *Tosefet*) explains that in all those cases one need not use the land for three years in order to establish *hezkat tashmishin*. The three-year use is required only where the user claims that he purchased the land. In cases of *hezkat tashmishin*, where the user is only claiming the right to use the land, he may use the land for any period of time, and if the owner does not object as soon as he became aware of it, the user acquires *hezkat tashmishin*. This is so, because presumably nobody allows another to use his land without permission in a manner that indicates an intention to use it permanently. *Id.* See, however, *Rashi*, Bava Bathra 7a, s.v. *bedenafshei*, implying that there is a three-year requirement for acquiring a right of receiving light from a neighbor’s land (see, e.g., *Ketonet Pasim*, Bava Bathra Ch. 1, and *Anshei Shem*, Bava Bathra 5a, discussing this apparent contradiction); Rabbi Meir Abulafia, *Yad Ramah*, Bava Bathra, Ch.3, par. 196; *Shulchan Aruch*, *Choshen Mishpat* 153: 2, 6, 16-17; *Rema*, *Choshen Mishpat* 153:16.

⁵³ See, e.g., *Rashbam*, Bava Bathra 57a, s.v. *Eilu devarim* (discussing a variety of cases involving *hezkat tashmishin*), 59b, s.v. *lech* (discussing visionary

that the three-year requirement applies to *hezkat mekarkein* and *hezkat tashmishin*, but not to consensual damages. In the latter case the damager acquires a right to damage as soon as the victim becomes aware of the damager's action and fails to object,⁵⁴ or as soon as he is able to evaluate the damage and fails to object.⁵⁵

According to this view, a distinction should be drawn between acquiring a right to use another's property and acquiring a right to cause damage. Acquiring a right to use another's property (*hezkat tashmishin*) is similar to acquiring ownership rights (*hezkat mekarkein*); in both cases the user acquires a right in another's property. Therefore, the three-year requirement applies to both. By contrast, in the case of consensual damages the damager does not use the victim's property, but his own. The plaintiff's failure to object does not grant the damager any rights in the plaintiff's property; it only serves as a waiver and removes the restrictions imposed on the damager in using his own land. For establishing a waiver there is no need for three-years of unchallenged activity; a waiver is established as soon as the victim becomes aware of the damage or is able to evaluate the damage and fails to object.⁵⁶

Those who hold that the three-year requirement as well as the need for a claim of sale or gift also apply to the case of consensual damages, apparently hold that, for instance, by allowing one to commit visual trespass the trespasser not only acquires a right to use his own property without restriction, but also acquires a right in the neighbor's property, a right to stare into that property.⁵⁷ According to this interpretation, in both *hezkat tashmishin* and consensual damages, one acquires a right or an easement in another's property. Without such an easement, one would not

trespass); *Tosafot*, Bava Bathra 23a. s.v. *veha*; *Rosh*, Bava Bathra, Ch. 1, par. 14; *Rema*, *Choshen Mishpat* 153:16 (citing both views).

⁵⁴ See, e.g., *Ramban*, Bava Bathra 57a, s.v., *ha*, 59a, s.v. *ha detnan*; *Meirat Einaym (Sema)*, *Choshen Mishpat* 153:32; *Netivot Hamishpat* 153:13.

⁵⁵ See *Ramban*, Bava Bathra 59a; *Shita Mekubetzet*, Bava Bathra 59a, s.v. *shameinan*; Maimonides, *supra* note 6 at 7:6 (“or he knew about the damage and did not object”); *Magid Mishneh*, The Laws of Neighbors 11:4 (citing the *Geonic* scholars).

⁵⁶ See *Ramban*, *Meirat Einaym* and *Netivot hamishpat*, *supra* note 54.

⁵⁷ See *Meirat Einaym*, *supra* note 54. The author cites *Rashbam* who applies the three-year requirement to cases of visual trespass. The author explains that acquiring a right of visual trespass actually means acquiring a right in the other's property (in the author's terminology, “*michshav chisaron karka*”), a right to stare into the other's property and restrict the other's use of his property.

be allowed to continue causing damage to a neighbor based on the latter's waiver. Therefore, the user or damager must continue his practice for three consecutive years and claim that he purchased this right or received it as gift, just as in the case where one claims ownership rights over another's land based upon the latter's failure to object to the use of the land by the claimant.⁵⁸

Although generally in cases of damages by neighbors a waiver by the victim would entitle the neighbor to continue his damaging actions, visual trespass may belong to a special category of damages by neighbors, in which a victim's waiver may be ineffective and revocable. Examples of this category of damages are those caused by heavy smoke and foul odor.⁵⁹ In these cases, a victim who did not object may claim that he thought he would be able to endure the nuisance but cannot.

The Talmud discusses a case involving a co-owner to a courtyard who installs a window in his house facing the courtyard. The other co-owner did not object. Some time later the latter demanded that the window be shut down because of visual trespass. The window owner sought guidance from Halachic authorities. Rabbi Yishmael, the son of Rabbi Yossi, advised him that because of the other's failure to object he acquired a right of visual trespass and may keep his window in place. Rabbi Chiya, however, ordered him to shut down the window.⁶⁰ The law follows Rabbi Chiya's view.

⁵⁸ See, however, Rabbi Arie Leib, *Ketzot Hachoshen* 153:3, offering a different interpretation, according to which the defendant's use of the plaintiff's land is considered an act of acquisition by which he acquires a permanent right to use that land. According to this interpretation there is no need to apply the easement theory to establish a *hezkat tashmishin*.

It should be noted that the easement theory has been applied in the *davsha* case (*see supra* note 45-46 and accompanying text), and it has been suggested by this author that the easement theory may also apply to cases of visual trespass (*see supra* text following note 46). In these cases the plaintiff did not use the defendant's land and could not acquire a right in the defendant's land by an act of acquisition. In the *davsha* case, not the plaintiff but rather other people walked on the defendant's land hardening the plaintiff's soil, and in the case of visual trespass, staring into one's land cannot be considered a formal act of acquisition. Therefore, Rabbi Arie Leib's interpretation would not apply to those cases.

⁵⁹ See B. Talmud, Bava Bathra 23a; Maimonides, *supra* note 6, at 11:4; *Shulcham Aruch, Choshen Mishpat* 155:36, 39.

⁶⁰ See B. Talmud, Bava Bathra 59b.

Early authorities offered different interpretations of Rabbi Chiya's ruling, and arrived at different conclusions. Most authorities believe that according to Rabbi Chiya one can always revoke a waiver of visionary trespass just as one can revoke a waiver of damage deriving from heavy smoke and foul odor.⁶¹ *Ramban* reasons that a waiver is effective only with respect to damage to property, which may result only in a financial loss. However, where the damage is to the person himself, as in the case of heavy smoke, foul odor and visual trespass, the victim can always claim that he though he would be able to endure, but realized that he could not.⁶²

Other authorities believe that Rabbi Chiya ordered the shutting down of the window because he holds that to acquire a right to visionary trespass based upon the plaintiff's failure to object the trespasser must continue his practice for three consecutive years. Because in this case, less than three years had passed since the installation of the window, the trespasser did not acquire a right to trespass.⁶³ Still other authorities hold that so long as the victim did not realize the extent of the damage caused by the visual trespass he may still object to it, but once he became aware of it and failed to object immediately he is regarded as having waived his right to object, and consequently the trespasser may continue the visual trespass.⁶⁴

Later authorities ruled that a waiver of visual trespass is effective, and as soon as the victim became aware of the damage and failed to object, the trespasser obtains a right to do so.⁶⁵ However, some authorities disagreed, as *Rema* pointed out.⁶⁶ In deciding the case at hand *Rashba*

⁶¹ See *Responsa Rashba*, vol 1, responsom 1079 (citing early authorities who debated this issue. According to *Rif* and *Ramban* the visual trespasser does not acquire a right to trespass, but according to Rabbi Yosef Me'gash, known as *Rie Migash*, and *Rabad*, the trespasser does acquire a right). See also *Ramban*, Bava Bathra 59a (citing *Rif's* view with agreement); *Tur*, *Choshen Mishpat* 142 (citing Rabbi Yonah); *Shulchan Aruch*, *Choshen Nishpat* 142:3 (citing anonymous authorities).

⁶² See *Ramban*, commenting on Bava Bathra 59a, *s.v. ha*.

⁶³ See, e.g., *Rashbam*, Bava Bathra 59b, *s.v., lech*; Rabbenu Gershom, Bava Bathra 59b; *Meiri*, *Baith Habechira*, Bava Bathra 59b (citing anonymous commentators).

⁶⁴ See *Magid Mishnah*, The Laws of Neighbors 11:4; *Kesef Mishneh*, The Laws of Neighbors 7:1 (discussing Maimonides' view); *Rie Migash*, Bava Bathra 59b, cited in *Shita Mikubetzet*, *supra*, note 22; *Meiri*, Bava Bathra 59b.

⁶⁵ See *Shulchan Aruch* and *Rema*, *Choshen Mishpat* 154:7.

⁶⁶ *Id.*

referred to this extensive debate.⁶⁷ *Rashba* pointed out that because of this debate the judge who would eventually handle this case might be of the opinion that a waiver is effective in cases of visual trespass, which would force the victim to retain the evidence about his objection to refute a possible claim of waiver by the defendant. *Rashba* concluded that the plaintiff cannot be forced to keep that evidence and, therefore, objecting to the construction of a window by the defendants would not be considered a violation of the *Sedom* principle.⁶⁸

The foregoing discussion focused on a waiver of visual trespass. Would the case may be different if the victim sold the trespasser the right to commit visual trespass? Would the victim be entitled to cancel the sale and object to the trespassing? Rabbenu Tam holds that the victim would be able to object even in case of sale, claiming that it was an erroneous transaction.⁶⁹ Obviously, in this case the victim will have to return the money to the purchaser. Other *Tosafot* scholars, however, disagree, maintaining that when the victim knowingly sells the right to trespass he cannot retract, and forfeits his right to object.⁷⁰

8. Conclusion. The laws of visual trespass demonstrate the Jewish law ability to apply legal and ethical principles as well as extraordinary legal devices to reach a desirable solution. The prohibition against visual trespass is based on ethical considerations, such as “an evil eye” and “gossiping,” and the conflicting rights of the parties may be decided based on ethical principles, such as the “benefit-no-loss principle” or the “*Sedom* principle.” One may be denied the right to object to a neighbor’s construction of a window looking into one’s premises based upon these principles.”

The laws of damages by neighbors, including visual trespass, balance one’s right to use his land and a neighbor’s right not to suffer damage as a result of the former’s action, and sets forth the line which should be drawn between these conflicting rights. The primary issue discussed in *Rashb’s* case is precisely that line which should be drawn between the conflicting rights of neighbors. *Rashba* believes that a neighbor should be protected against visual trespass even against a possible temporary visual trespass in the future. To guarantee that right, a neighbor, the plaintiff, was, apparently, granted an easement in the

⁶⁷ See *supra* text following note 14.

⁶⁸ *Id.*

⁶⁹ See *Tosafot*, Bava Bathra 23a, s.v. *ein hazaka*

⁷⁰ *Id.*

defendant's land. The easement entitles the defendant to object to any construction on his neighbor's land which might result in visionary trespass, even if the damage is remote and slight.

The defendant's rights are protected, *inter alia*, by applying the benefit-no-loss principle or the *Sedom* principle, which prohibit the plaintiff from abusing his rights under the easement. According to *Rashba*, the benefit-no-loss and the *Sedom* principles would not apply where the plaintiff may suffer even from a temporary visual trespass in the future or slight inconvenience. One of the problems that arise in cases of future visual trespass is the right to visual trespass the defendant may acquire if plaintiff does not object immediately to the construction of the window, indicating a waiver of his right to object. Although some authorities hold that in cases of visual trespass such a waiver is revocable, many hold that it is not.

To avoid such a waiver, the victim must object to the construction of the window and retain the evidence about his objection for later presentation in the court. *Rashba* believes that even a slight inconvenience on the part of the victim, such as keeping evidence, would justify his objection and exercise his right under the easement. *Rosh* disagrees, maintaining that plaintiff's objection to the construction of a window by the defendant under these circumstances would be considered an abuse of his rights and in violation of the *Sedom* principle.

Another interesting question, which appears to be one of the issues early authorities disagree upon, is whether lack of objection by plaintiff to defendant's action may constitute a waiver where plaintiff has no right to object. According to *Rivash*, and apparently also *Rashba*, plaintiff should object even if he has no right to object. The objection is required for rebutting a future claim of waiver by defendant. *Rosh*, however, holds that plaintiff does not have to object if he has no right to object, and consequently defendant will not be able to raise a claim of waiver.

C.P.



Barry Scheck (at podium) and Pulitzer Prize winning New York Daily News columnist Jim Dwyer at the April 6, 2000 Bruce K. Gould Award Ceremony, honoring them for the best book of the year on a law related subject, for their "Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted." Seated at right is prominent publisher Bruce Gould, Touro Law class of 1984, the Award benefactor.

Dean Howard Glickstein (left) with New York State Assemblyman John J. Flanagan, Touro Law class of 1990. Mr. Flanagan was the guest speaker at the November 1999 Family Day at the Law Center

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Raising a toast at a reception in honor of the Consul General of Israel, Shmuel Sisso at the Law Center on March 16, 2000, are (from left): Ambassador Sisso, Vice President of Touro College Rabbi Elihu Marcus, Dean Howard Glickstein, Israeli Consul for Academic Affairs Orli Gil, and Professor Chaim Povarsky.



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