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Institute of Jewish Law

Jewish Law Report

Editor: Dr. Chaim Povarsky

May 2002

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Symposium:

A Rabbi's Obligation of Confidentiality vs. the Religious Duty of Disclosure

Vice Dean Eileen Kaufman:

Good Evening. I am Eileen Kaufman, Vice-Dean of the law school, and I am very pleased to welcome you to tonight's program. Dean Glickstein is out of the country, and he asked me to convey his very sincere regrets for not being able to be here tonight.

As always the Institute of Jewish Law has chosen a topic that is both timely and important. I think we all remember the front-page story that created such a stir regarding the case of two rabbis who allegedly divulged confidential information that affected a couple's divorce proceedings. Drawing on the issues implicated by that case, tonight's program is entitled "A Rabbi's Obligation of Confidentiality vs. the Religious Duty of Disclosure."

This topic raises a host of issues, central to both students and practitioners of law, issues involving professional responsibility, as well as the law of evidence and of course constitutional law. Tonight we will hear how some of these issues are analyzed from the Jewish legal perspective as well as from a secular perspective.

I particularly want to thank Dr. Chaim Povarsky, the director of Touro's Institute of Jewish Law, for his effort in planning this event. Dr. Povarsky is a distinguished scholar who served on the law faculty of Tel Aviv University before joining Touro's Faculty of Law. In addition, he is the former director of the world-wide Jewish Law Association and is internationally recognized for his expertise in Jewish Law.

Dr. Povarsky has convened a most impressive panel for us tonight. Rabbi Stanley Boylan, Dean of Touro College, Rabbi Jonathan Reiss of the Beth Din of America, and our very own Professor Bruce Morton, lawyer, teacher and philosopher. I will save the details of introduction for Professor Tom Schweitzer who will be serving as program moderator. At this point it is my great pleasure to present Dr. Povarsky.

Professor Chaim Povarsky:

I am delighted to welcome you to tonight's symposium titled, "A Rabbi's Obligation of Confidentiality vs. the Religious Duty of Disclosure." The symposium is sponsored by the Institute of Jewish Law and supported by the Lillie Goldstein Charitable Trust.

As Dean Kaufman indicated, this symposium was prompted by a recent New York Civil Court case, which discussed a rabbi's obligation of confidentiality and the consequences of breach of that obligation. The panelists will discuss this case at length; I would just like to raise some questions and make some general observations.

The case deals with an action for damages brought by a woman against two rabbis for an alleged breach of confidentiality. The woman, who was a member of a Jewish orthodox community, had some marital problems, and sought counsel on separate occasions from two rabbis of the community. During the counseling she described to the rabbis her marital problems and her social relationship with another man.

Later the woman brought a divorce action against her husband together with a motion for custody of her children. In connection with the custody proceedings the two rabbis submitted to the court affirmations in which they divulged the information they received from the woman. The rabbis believed that because of the woman's behavior she was unfit for

custody of her children under Jewish law, and, therefore, they supported the husband's claim for custody.

The woman was outraged at the rabbis' disclosure of the information and filed a lawsuit against them, claiming damages for breach of confidentiality. The rabbis argued that under Jewish law they were obligated to divulge the information. The court dismissed their arguments, stating that the rabbis violated their obligation of confidentiality. The rabbis appealed, and the appeal will be heard soon (*see* "Editor's Note" at the end of the symposium, page 35).

The case and the court's decision received a lot of publicity in the media and agitated the Jewish community. Especially, it stunned many orthodox rabbis, who were caught in a conflict between American secular law and what they believed to be a principle of Jewish law.

In its decision against the rabbis the court stated that Jewish law did not obligate the rabbis to divulge the information. However, some distinguished authorities, other than the two defendants, disagreed with the court, and argued that the rabbis acted precisely according to Jewish law.

One of the questions that arise is whether the court was justified in discussing Jewish law and deciding what is the Jewish legal position on this issue. When I read that case, it reminded me of the Supreme Court in Israel, a secular court, which has been steadily getting more and more involved in religious matters, rendering decisions on Jewish legal and religious issues. One of the most recent cases the Israeli Supreme Court was involved in focused on conversion to Judaism. The Israeli Supreme Court believes that it has the authority to decide Jewish legal and religious issues. I wondered whether the New York court adopted this approach.

A number of other questions arise: First, what indeed is the Jewish legal perspective on the obligations of confidentiality and what are its limits? Second, were the rabbis in this case justified in divulging the information? And third, given that the plaintiff was a member of the Jewish orthodox community, does it not create a presumption that she agreed that the rabbis should handle the case according to Jewish law as interpreted by them?

Under American law, the question arises as to whether a breach of confidentiality gives rise to an action for damages. This is the first time that a court has decided that the confider is entitled to damages for breach of confidentiality, and, as I mentioned, the case has been appealed, so that we have not yet heard the final word on this issue.

I am not going to discuss extensively the principle of confidentiality; the panelists will do that. I would just like to open the symposium by making

two general observations. We are dealing here with the question of how to evaluate two conflicting duties; how much weight to attribute to each one of them. One of the difficult functions of the legislature and the court is to choose between conflicting values. This dilemma was demonstrated in many cases, such as the case of abortion, where the court had to choose between the fetus' right to life and the mother's right of privacy; the case of euthanasia, where a choice must be made between the principle of preservation of life and the need to eliminate a patient's suffering and preserve his dignity; and cases of capital punishment, where the legislature had to determine whether the protection of the society justifies taking the perpetrator's life.

In the case of confidentiality the conflict is between the interest of the confider that requires that the information remain confidential and the obligation of the confidant to divulge the information in certain circumstances. The question is what is the extent of the obligation of confidentiality. It is commonly agreed that when the divulging of the confidential information is required to save a life or avoid a gross harm to a third party, the confidant may divulge the information.

But would disclosure of the information also be justified where the information is required to save someone a monetary loss by giving testimony in court? In such cases, there may be a disparity between the secular law and Jewish law. The secular law prefers the confider's right of confidentiality, while Jewish law would allow the disclosure of the information.

The difference between the secular and Jewish law is not only about the extent of the obligation of confidentiality, but also about the essence of this principle. Under American and other modern systems of law, confidentiality is basically a right of the confider. The confider is entitled to the right that his confidences not be revealed, and the confidant is obligated to respect the confider's rights and not divulge the information.

Under Jewish law, the focus is not on the right of the confider, but rather on the moral and religious obligation of the confidant. The Torah is concerned with the moral standard of the confidant rather than the right of the confider. Generally, Jewish law is a duty-oriented system, with the focus on duties rather than rights, as opposed to modern secular legal systems, which are rights-oriented.

Thus, under Jewish law the choice is not between the confider's right of confidentiality and the confidant's duty of disclosure, but rather between the confidant's obligation of confidentiality and his religious duty of disclosure. The question under Jewish law is, which of the conflicting confidant's duties has priority – the obligation to conceal or the obligation to

reveal the information. The way the question is presented – right vs. duty or duty vs. duty - may have a crucial effect on the solution of the problem.

These were some preliminary thoughts. We will certainly hear much more from our distinguished speakers. It is now my pleasure to hand over the podium to my colleague, Professor Thomas Schweitzer, who will introduce the speakers and moderate the symposium.

Professor Schweitzer is a member of the faculty and teaches property law, education law, civil procedure, first amendment and law and religion.

Professor Thomas Schweitzer:

Thank you, Dr. Povarsky. The first speaker is Rabbi Stanley Boylan, who is going to speak on the Jewish legal perspective on this case. Rabbi Boylan is the Dean of Faculties and the Executive Dean of Touro College, and until quite recently he was a professor of mathematics and chairman of the Mathematics Department. He has a bachelor's degree in Mathematics from Yeshiva University, a Ph. D. in Mathematics from New York University, and a rabbinical ordination from Yeshiva University.

He has a long list of scholarly publications both in the field of math and Judaica, so I will not go into details. Rabbi Boylan has been a teacher at Touro since 1976, and an administrator for a number of years. His awards and honors include an Honorary Woodrow Wilson Scholar, a National Science Foundation Fellow and a Sloan Foundation Fellow.

Rabbi Dr. Stanley Boylan:

Good evening; it is a great pleasure to be at the law school. I have prepared both a handout and some slides, which I will use during my presentation. The evening's topic, "Rabbinic Confidentiality versus The Religious Duty of Disclosure," presupposes that there is such a duty as rabbinic confidentiality. The reality is, if we approach it from the perspective of Jewish law, that there is a universal obligation of confidentiality rather than a strictly professional code of confidentiality, and I will try to explain that in a moment.

Western legal systems recognize specific codes of professional confidentiality, such as in the area of medicine and law. A variety of professions also have privilege in the sense that discussions are considered privileged, and are, therefore, exempt from testimony and perhaps have other special rules of confidentiality. Jewish law bases itself on what might be called a universal rather than professional law of confidentiality, in the sense that confidential information is not to be repeated irrespective of how one came across it.

The strictness of confidentiality is more dependent on the impact of the release of the confidential material rather than the profession of the person who receives or discloses it. I will focus, however, on special obligations of the rabbinate and the obligation of confidentiality versus privileged testimony. Judaism takes a different view concerning privileged testimony; in general, one might say that there is, in a true sense, very little privileged testimony in Judaism.

The case we are discussing this evening, *Lightman vs. Flaum et al* (687 N.Y.S.2d 562), has engendered a great deal of discussion in the Jewish community. I would refer all interested to a recent survey article by Rabbi J. David Bleich concerning Rabbinic Confidentiality.¹ Rabbi Bleich states simply that Judaism does not recognize a particular fiduciary obligation of confidentiality in association with any professional relationship. Jewish Law has universally applicable laws governing confidentiality, but does not generally have a doctrine of professional confidentiality even with regard to medicine, which the Torah recognizes as a profession in a number of other ways.

Judaism rather has a broader, more comprehensive doctrine of confidentiality, which encompasses anyone who is made privy to confidential material, and is not given specific permission to discuss the matter openly. Discussion of confidential matters, particularly when they have a negative impact on another party, is included in the biblical injunction of *lo telech rochil be'amecho*, or “Thou shalt not be a tale-bearer among thy people” (Leviticus 19:16).

Judaism considers the laws governing *loshon hara* (i.e., evil speech and tale-bearing) to be among the most serious of sins because of the terrible impact such speech may have in dividing families, communities and the people of Israel as a whole. Maimonides comments that although tale-bearing and evil speech are not themselves directly punishable by the court, they can ultimately lead to the shedding of blood.² When Joseph brought his father, the Patriarch Jacob, an evil report concerning his brothers, he set the stage for the eventual descent of the Tribes of Israel into Egypt. The Talmud reports that the destruction of the Second Temple was caused by negative information given over to the Romans because of a personal quarrel.³

This abhorrence of evil speech is reflected in the daily prayers which three times a day include, “My Lord, refrain my lips from speaking evil,”⁴

¹ Bleich, J. David, *Survey of Recent Halakhic Periodical Literature – Rabbinic Confidentiality*, TRADITION, 33:3 (1999), pp. 54-87.

² Maimonides, *Mishneh Torah, Hilkhhot De'ot*, 7: 1.

³ See B. Talmud, Gittin 56a.

⁴ See the conclusion of the *Amidah* service.

and asks that “To the slanderers, let there be no hope, and may all wickedness perish in an instant.”⁵ Having lived surrounded by and oppressed by enemies, the need for maintaining communal confidentiality is recognized by Judaism as a very matter of survival. The prohibition of tale bearing and divulging secret information, even if true, is universally applicable.

The basis of the laws of confidentiality can be found in the Torah (Pentateuch) in Leviticus, in the biblical text (slide). The biblical text here is derived from Leviticus (19:16-19), and the passage we are looking at is a very basic passage in Judaism. Actually, the passage, beginning *b'tzedek tishpot amisecho*, or “In righteousness thou shall judge thy neighbor,” and ending *v'ohavto l'reacha komocho*, or “Thou shalt love thy neighbor as thyself,” are basic moral underpinnings of the Mosaic code.

Among the passages immediately before the injunction against tale-bearing are a number of familiar verses: “I am the L-rd, thy G-d; Ye shall not steal; neither shall ye deal falsely nor lie one to another; Thou shalt not curse the deaf, nor put a stumbling block before the blind, but thou shalt fear thy G-d; Thou shalt not go up and down as a tale-bearer among thy people; neither shalt thou stand idly by the blood of thy neighbor.”

The injunction against tale bearing or gossip is coupled with the second half of the verse, “Thou shall not stand idly by the blood of thy neighbor.” The coupling of these two imperatives in one sentence is viewed by the Rabbis as providing some indication of the moral equivalence of the two injunctions. We can all understand the very seriousness of the demand that one does not stand idly by, when one sees one's neighbor dying or in great peril. That demand seems to hint at the seriousness with which the first part of that sentence is taken, *lo talech rochil*, or “Do not go as a tale-bearer.” Actually Maimonides interprets that passage in exactly that way, in the sense that *loshon hara* or “evil speech or slander” can in instances be akin to murder.

These laws are taken extremely seriously, and are considered by Maimonides as equivalent to the three cardinal sins of Judaism, which are idolatry, homicide and adultery.⁶ Maimonides stresses that even though it is not easily punishable (and gossip is not easily punishable under any legal system), it is, nevertheless, a moral failing that can lead to death and destruction.

⁵ *Id.*

⁶ Maimonides, *supra* note 2, at, 7:3.

There is unanimity among rabbinic commentators and codifiers that to release negative confidential information concerning an individual is included within the biblical injunction against tale-bearing. But not only negative confidential information is not to be divulged; rather, divulging any confidential information is prohibited. In the instance that confidential information is shared with a second individual, the Talmud rules that it must not be divulged without the express permission of the original party.

It is interesting to note that this principle of confidentiality is also implied in Scripture discussing the communication between Moses and the Almighty. In many of the communications between G-d and Moses, the Torah adds the specific designation *lemor*, or “to say;” that is, G-d’s words were meant to be delivered by Moses to the Jewish people, implying that without specific permission, G-d’s word would be considered confidential and therefore, not to be divulged.⁷

The principle of confidentiality has been extended to include information shared in the context of a judicial process (Mishnah, Sanhedrin 3:7). The ruling of a court may often be on the basis of a majority of judges. The specific opinion of individual judges is considered confidential and not to be revealed to third parties. The Mishnah ruled that judges, who subsequently share with the parties their individual opinions presented in a judicial process, are considered “Tale-bearers who are revealers of secrets” (Proverbs 11:13).

In codifying this law, Maimonides⁸ cites a case from the Talmud (Sanhedrin 31a) of a participant in a confidential matter in the *Beis Medrash* (Study Hall) of Rabbi Ami, who revealed details of a case, twenty-two years after it had been completed. The student was expelled from the *Beis Medrash* for his act and he was declared to be a betrayer of confidences. By discussing private matters even after twenty-two years, he had disqualified himself as a future participant, and earned public censure.

A specific problem concerning this particular breach of confidentiality is that a *Beis Medrash* (Study Hall) is not generally considered private. This suggests a view espoused by some recent commentators⁹ that information shared by an inner circle, although not considered confidential within that circle, may still be considered confidential with regard to the general population.

⁷ *Yoma* 4b. For further discussion, see Bleich, *supra* note 1 at 58-59.

⁸ Maimonides, *Mishneh Torah, Hilkhos Sanhedrin*, 22:7.

⁹ See commentary by R. Samson Raphael Hirsch on Leviticus 19:16; see also *Hagahos Maimoniot, Hilkhos De’ot* 7:7.

This very strong prohibition against discussing private matters made it unnecessary to provide a special doctrine of professional confidentiality. The Talmud (Yoma 4b) asserts that any communication is to be assumed to be private and confidential, unless explicit permission is granted.

Now, having agreed with Rabbi Bleich that Judaism espouses universal confidentiality rather than a specific confidentiality related to a profession, I would like to disagree in a sense with Rabbi Bleich. There are indeed special Rabbinic confidentiality issues in the very fact that the rabbi is a spiritual leader. As a spiritual leader, he exemplifies the best in the Jewish tradition and in order to function properly, he must be a man of faith. To be a man of faith, he has to keep faith with those who speak to him. There are many confidential situations that a rabbi faces on a regular basis, which are not faced by others. Here are a number of special confidential situations a rabbi may face: (1) charity disbursements; (2) converts and penitents; (3) community controversies/conflict resolution; (4) Halachic consultations; (5) marital and family issues; and (6) personal references.

The list is certainly not exhaustive, but it becomes obvious that a rabbi has to be sensitive to confidentiality issues and perhaps more sensitive than most. Issue number one is charity disbursements. There is a great tradition of anonymous giving and the receipt of funds in an anonymous fashion. The New York Times¹⁰ recently had a quotation from Maimonides¹¹ concerning the praiseworthiness of anonymous giving. It is very clear that confidentiality is involved in the disbursement of charity and that has been a tradition in the Jewish community.

There is a second group of issues concerning converts or penitents. There is a longstanding tradition in Judaism, that if someone has a background that is less than desirable, but has actually changed his lifestyle, or has become Jewish, that his background may not be used or mentioned against him. The rabbi, who very often is privy to the religious background of many congregants, must keep this strictly confidential. There is no way that can ever be mentioned in any context whatsoever.

In addition, there are community controversies and conflict resolutions in which the rabbi has a major role in resolving conflicts, in trying to settle controversies, and in some way containing the controversies. As a go-between, the rabbi has to talk to all sides to understand what is involved, and often he will be exposed to various material, opinions, and what otherwise might be called gossip. Obviously,

¹⁰ David Cay Johnston, *They Gave Millions (Mum's the Word)*, New York Times, Late Edition, January, 26, 1997, Sec. 4, p.4.

¹¹ Maimonides, *Mishneh Torah, Hilkhoh Matnot Aniyim* 10:8

this itself creates a certain moral temptation, but it also is a special problem with which the rabbi must deal.

With regard to marital and family issues, I think all of us are aware from the present case that the rabbi must deal with matters, which generally would never be discussed. Personal references, the final item on my list, are an issue that confronts the rabbi very often. A party from out of town, who wishes to know about an individual or a family, will call on the local rabbi. The rabbi must know what he can say and what he cannot say. So, there are a variety of specifically rabbinic confidentiality issues.

Let me say, that it is my impression that rabbis throughout the millennia have maintained the faith, so to speak, indeed keeping private matters strictly confidential. So, I think that it is possible to read a news story and derive the wrong impression. Rabbis by their very nature have to be extremely discreet and indeed, except in special circumstances, live up to these rules. Indeed, we have seen before that a Rabbinic jurist who is not discreet, might well be expelled from the academy.

Having said all of that, Judaism does recognize that there are some conditions requiring disclosure. Although there is a presumption of confidentiality, under certain conditions confidentiality may be waived or compromised. I will mention four different types of conditions requiring disclosure.

A basic question with regard to confidentiality arises in the instance that an individual is called upon to testify. Because the Torah's view is so all-encompassing in terms of confidentiality, to consider confidential material as privileged would be tantamount to eliminating all testimony. With the possible exception of the situation where there is an oath of confidentiality, there is simply no such thing in Judaism as privileged testimony.

Testimony is only one instance in which the halacha would allow the disclosure of confidential information. Three other examples that we will discuss shortly involve disclosure of the material to prevent harm to a second party, to prevent a major transgression of Jewish law, or to alert a potential business or marital partner of potential problems.

Let us recall that disclosing confidential information comes under a general prohibition against *rechilus*, gossip or idle talk. Testimony in Jewish law is not considered as idle talk and indeed testimony is considered mandatory,¹² in that a rabbinic court can order it. There is a

¹² See Maimonides, Mishneh Torah, *Hilkhot Edut*, 1:1; *Shulchan Aruch*, *Choshen Mishpat* 28:1.

conflict between the requirement of confidentiality and the requirement of testimony. As for a person who testifies in a Beth Din (Rabbinical Tribunal), his testimony may be required. However, there are conditions that would have to be met in order for the testimony to be required by the court. At times, for example, Jewish law requires two witnesses and does not consider an uncorroborated witness as effective.

There is a very famous case, which is quoted in the Talmud in two places,¹³ where an uncorroborated witness testified that somebody violated the law (the specific violation is not mentioned and is not important), and the court punished the witness rather than the party who was presumably guilty. Whether the party, who was the subject of the testimony, was indeed guilty was irrelevant. Because the testimony was uncorroborated, it had no validity in court, and therefore, was considered defamation of character.

If a person is merely testifying to ruin somebody's character, any violation of confidentiality would be punishable by law. However, when the law itself requires witnesses, then the court can indeed demand that a person testify and would not recognize any privilege with regard to confidential material. Since violation of confidentiality is prohibited under the laws of gossip and we do not consider testimony to be gossip or idle chatter, a witness may be compelled to testify under Jewish Law, when necessary for the pursuit of justice.

Even if a party undertakes an oath not to testify in a certain case, such an oath might well be considered invalid.¹⁴ A person cannot in general take an oath to violate Jewish law. Therefore, if Jewish law would demand that testimony be given, an oath to violate Jewish law and remain silent would not be considered binding. However, a general oath of confidentiality, such as the Hippocratic oath, may be binding; but again, a rabbinic court may release the witness from this oath. A rabbinic court can demand the testimony because the pursuit of justice itself is also something that is given great significance.

In these situations, the halacha dictates that one should seek to obtain a release from confidentiality from the parties involved before the testimony is heard. In general, that is the way that halachic jurisprudence works; first, try to get the release, and if not successful, then decide whether to end the confidentiality and to demand the testimony. There are cases, modern cases,¹⁵ in which rabbinic courts have done exactly that.

¹³B.T. Pesachim 113b; Makkot 11a.

¹⁴See *Rama, Yoreh De'ah*, 228:33; *Turei Zahav, Yoreh De'ah* 228: 42; *Pitchei Teshuva, Choshen Mishpat* 28:1.

¹⁵For an extensive discussion of these issues, see Rabbi Shiloh Raphael, *Medical Confidentiality—Halachic Aspects*, ASIA 12-15 (Av 5738); Baruch Rakover, *Is a Doctor*

They have demanded the testimony of the witnesses, even though confidentiality was promised, or expected, because it was necessary to violate this particular confidentiality for the greater good.

The following are guidelines governing the disclosure of confidential information: (1) Clear and persuasive evidence of danger to another's well being; (2) purpose of release not motivated by personal animus, but to prevent harm; (3) alternatives, such as the release of information by the relevant parties themselves, are not possible; (4) only necessary and relevant matters, which are based on first-hand knowledge, may be disclosed; (5) damage to the first party due to the release of information must not be excessive relative to the potential benefit of the disclosure; (6) confidentiality must be preserved to the extent possible during the disclosure itself; and (7) the disclosure must be credible and effective in preventing the potential harm.

These guidelines above were developed by Rabbi Israel Mayer Kagan, a great Jewish thinker, who wrote a very persuasive book titled, *Chofetz Chaim*, "The Lover of Life."¹⁶ It appears that Rabbi Kagan knew of a case where a particular rabbi in a community was besieged by people who accused his children of not being religious and of being unworthy, and it seems that this was an untrue statement. However, the rabbi died from shame from the controversy.¹⁷ Rabbi Kagan was very taken by this particular case and he felt that he had to write a definitive work which would try to explain when confidential materials can be released, when one is allowed to speak and when one cannot speak.

Generally, the entire work is dedicated to the principle of confidentiality, refraining from speaking about other people, trying to keep within bounds of what we call *loshon hora*, or gossip. In order to define the halacha, however, he had to provide conditions under which material can be released. The above guidelines are taken from his work.

What kind of conditions would allow one to disclose confidential information? First, clear and persuasive evidence of danger to another's well being. I think that Dr. Povarsky indicated earlier that that would, of course, be the law in United States as well. Clear and persuasive evidence

Allowed to Testify about his Patient in the Absence of the Latter's Consent? II NOAM 188-191 (1958/59). See also J. David Bleich, II CONTEMPORARY HALAKHIC PROBLEMS (*Professional Secrecy*) 74-80 (1983).

¹⁶ For a biography of the *Chofetz Chaim* see Eckman, Lester, REVERED BY ALL: LIFE AND WORKS OF THE *CHOFETZ CHAIM*, (Shengold Publishers, New York), 1974.

¹⁷ For the full story, see *MICHTAVEI CHOFETZ CHAIM*, (Saphrograph Co., New York), 1953, pp. 13-15.

of danger to another's well being, however, may be defined in different ways and Jewish law might define this differently than western law.

Guideline number two, that the purpose of release not be motivated by personal animus or self-aggrandizement, is actually a moral principle. In Judaism, the release of information - when it is considered gossip and forbidden, and when it is considered purposeful and permitted - has to be viewed also in terms of the intent of the parties involved, not only in terms of what is achieved. Basically, these guidelines were to discourage individuals from talking evil about others. If a rabbi would have to testify or would have to speak in a less than confidential manner, he would have to make sure his own objectivity was maintained.

Guideline number three requires that alternatives, such as the release of information by the relevant parties themselves, are not possible. There are many cases in which the real object of the halacha, or Jewish law, would be that the parties involved should share the information and the information should not come from the rabbi. The guidelines also insist that damage to the first party due to the release of information must not be excessive relative to potential benefit, that confidentiality be preserved to the extent possible during the disclosure itself, and that the disclosures must be credible and effective in preventing the potential harm. According to Rabbi Kagan, these conditions are generally not realized in practical situations.

Nevertheless, these are the conditions that are necessary in order for confidentiality to be broken. A bit earlier, I alluded to the issues of confidentiality when there is a potential compromise of Jewish law. In Jewish law, for instance, if a rabbi was told confidentially, that this food being served tonight was not kosher, then the rabbi would not be bound by confidentiality. It would be his obligation to share that information. Information about anything illegal would have to be shared to prevent a transgression of the law.

In Jewish law, this principle has very wide application. If a rabbi learns that there are matters between husband and wife which would render the marriage as null and void or inoperative, the rabbi would be obligated to share that with parties concerned, just as a rabbi would share the information about the *kashrut*. Actually, the case that we are discussing is not about kosher food, but about marital relationships. The obligation of confidentiality, I heard somebody say, is hierarchic; that is to say that it is important, but it is not preeminent in Judaism, because there are even higher values. Thus, a person cannot take upon himself to swear to be confidential in a matter when Jewish law would require that person to disclose the information.

The questions of relationships between men and women and between potential partners, wherein rabbis are used as references, are all problematic areas. The fact is that the calling of the rabbi is not an easy one and rabbis have to balance many kinds of pressures. They have to be able to discuss certain matters that they have learned in confidentiality in order to preserve other values, which are important to Judaism. So while confidentiality is important, it is not paramount. I have no doubt that the rabbis in the case we are discussing were well aware of the guidelines I outlined above and believed they had no choice but to share the information given to them with appropriate parties.

I would like to end as a rabbi with something that comes from the weekly reading from the Prophets, in which Malachi describes the ideal spiritual leader, saying, “The lips of the priest will keep watch over knowledge, and the Torah learning shall ye seek to from his mouth, because he is the Angel of G-d.”¹⁸ And I quote this as relevant to the rabbinate whose role is to preserve the Torah. I think I outlined some of the areas in which confidentiality is absolutely important, in which the lips of the rabbi must keep watch over the knowledge given to him. And then, and only then, can learning be sought from their mouths, because they are then like angels. Let us say that rabbis are not angels, but certainly we know they are on the side of the angels.

Professor Thomas Schweitzer:

Thank you, Rabbi Boylan, for that very informative presentation. Our second speaker is Professor Bruce Morton of the Law Center faculty. Professor Morton is an accomplished pianist and received a bachelor’s degree in piano from Juilliard, a Ph.D. in philosophy from the University of Rochester and a J.D. from the University of Michigan Law School. He has been an administrator of our summer program in Moscow. He teaches, among other courses, evidence, civil procedure, jurisprudence, professional responsibility and comparative law and has a long list of publications. Professor Morton will give an American law perspective on these issues.

Professor Bruce Morton:

Good evening. I am delighted to be here. When Dr. Povarsky invited me to participate on this panel, I was both pleased and flattered and also somewhat baffled. So I set about trying to figure out what my purpose would be here. I take it that what I am here to do is to try to discuss some purely secular issues, at least, to the extent that purely secular issues can

¹⁸ *Malachi 2:7.*

be disentangled logically from issues of Jewish law.

Then I began asking myself, to what extent is that even possible, and the answer that I came up with is not to a very great extent at all. For the most part, the purely secular issues, it seems to me, are logically bound up with issues of interpretation of Jewish law, upon which I feel no authority to speak. Having said that and having apologized a bit for it, I will go ahead and deliver some thoughts and speculations.

One of the secular issues involved is the concept of a privilege. There exists in most jurisdictions, including the State of New York, what is usually described as a clergyman/penitent or priest/penitent privilege. This terminology exists more comfortably in a Christian religious tradition than it does in a Jewish religious tradition; it is language, which is not entirely adaptable to Judaism, but I will continue to use this language because it is the language of the civil law.

But, as Rabbi Boylan pointed out, or implied, the language that one uses is important, and to a certain extent, the language of priest/penitent or clergyman/penitent works well based upon certain assumptions that are made by the secular and predominantly Christian community, but the language does not work so well when applied to the Jewish tradition. That is one of the problems in trying to discuss this issue from a purely secular perspective. By using the language given by the secular law, I may already be begging some questions that are basic to the way Judaism regards some of these issues.

What is the clergyman/penitent privilege? There must be a confidential communication made to a clergyman, priest or rabbi, when the approach to the clergyman is made in a clergyman's capacity as a spiritual advisor. In other words, this is not simply a personal conversation; it is not seeking advice as a friend or even seeking advice as a secular therapist; it must be for the purpose of seeking religious counsel, solace or ministrations. That is language taken from some of the cases. And, of course, the privilege must not have been waived by the penitent. Notice by the way that privileges are possessed by one or the other of the parties; they do not just exist floating in the air. The privilege is the penitent's privilege; in the case of attorney client privilege, it is the client's privilege, and so forth.

So, on TV shows (and I love to collect legal howlers and bloopers from TV shows) you may see a physician or a psychotherapist on the stand saying, "normally this would be covered by a physician/patient privilege, but because of the importance of this matter I am going to waive the privilege." That is a blooper because the privilege belongs not to the psychotherapist to waive, but to the patient to waive.

I said that many secular issues are inextricably bound up with issues of Jewish law, and we have already encountered one such instance. The statement of the privilege requires a confidential communication. To put it slightly differently, the penitent must have a reasonable expectation of confidentiality. I think that it depends upon an interpretation of Jewish law, which I have no authority to give, to decide the question of whether a person in Mrs. Lightman's position had a reasonable expectation of confidentiality. In other words, whether this was a confidential communication at all, as the secular law defines and understands that concept, requires an interpretation of Jewish law.

Mrs. Lightman approached and spoke to the rabbis in the context of her own cultural and religious tradition. In the secular law, the question of whether Mrs. Lightman had a reasonable expectation of confidentiality is based on an objective standard. In other words, she must have more than a subjective expectation of confidentiality; that expectation must be reasonable. It is hard for me to know what her state of mind was when she approached the rabbis with her disclosure about her marital life, and it is even harder for me to be sure what her reasonable expectations and anticipations were.

But it seems to me that since she did approach the rabbis, she must have subjectively expected that the matters she disclosed to the rabbis would be kept confidential, or at least that the rabbis would not disclose them in the manner and in the context in which they did. These were obviously highly personal and embarrassing matters. One assumes that she would not have disclosed them absent at least the subjective expectation of confidentiality.

So, I am uncertain as to Mrs. Lightman's state of mind, but I keep wishing that I could find more evidence of compassion and sympathy for her from the rabbis, since she was obviously in a very intense and difficult personal emotional situation. Mrs. Lightman was, apparently, deeply committed to her Orthodox Jewish religion and cultural and legal traditions. On the other hand, she was unhappy in her marriage, and, apparently, she was engaging in improper activities, including evidently sexual relationships with at least one other man, about which she felt extremely guilty and conflicted.

So, I doubt that she was consciously focused on what her reasonable expectations should be, given the cultural context in which she lived. She was crying out for help and assistance, and she was going to the most natural place where she knew how to find it, and that was from the rabbis who had been father figures, spiritual advisors, people worthy of deference and respect. It was the natural and automatic thing for her to do.

It is interesting to note that with respect to the exceptions as to various privileges, that is, the circumstances under which disclosure could be made, the secular law and Jewish law are quite consistent with each other. For example, with respect to many privileges in American law, disclosure is permissible if some form of harm might be caused by failure to disclose. Thus, in the context of attorney/client relationship, if a client discloses to his or her attorney, in confidence, an intention to commit a crime or fraud, the attorney in most jurisdictions has an obligation to disclose that communication. In some jurisdictions it is only permissive; the attorney may reveal it. So, the concept of harm is relevant to disclosure in the attorney/client privilege context.

The concept of harm also is relevant to the psychotherapist/patient privilege. New York courts held that in a child custody case, where the best interests of the child are at issue, the psychotherapist has the obligation to disclose a confidential communication if that communication goes to the fitness of one of the parents or potential custodians of the children on the basis of the best interests of the child. This is an interesting analogy to the Lightman case, where one justification the defendant rabbis claimed for their disclosures was their concern for the interests of Mrs. Lightman's children.

In the case of the social worker/client privilege, also recognized by a New York State statute, there is a much more general statement that the social worker may make disclosure in order to prevent or avoid a harmful act. This general formulation is closely in line with some of the formulations in Jewish law that Rabbi Boylan was discussing.

It is often said that Jewish law focuses on duties and obligations rather than on rights, but in secular law as well, there is often the issue of the conflict between competing duties. That certainly is the case in the attorney/client situation in where there is the duty of confidentiality and the duty to disclose and avoid future harm, if that harm involves crime, fraud or tort.

I have identified a few situations, with respect to other privileges, where disclosure could be made to avoid harm. What about the clergyman/penitent privilege? What are the circumstances in secular New York law under which the clergyman may disclose? It is interesting that of all the privileges recognized by New York law, the clergyman/penitent privilege is the one which is expressed in the most categorical, absolute terms. There are virtually no circumstances under which disclosure could be made. So, the secular law inclines in the direction of nondisclosure.

On the other hand, there are also profound competing considerations in the secular law. However, when constitutional considerations compete with a statutory privilege, they necessarily carry great weight. I am referring here to first amendment, especially free exercise considerations, in as much as the rabbis defended their disclosures on the grounds that it was a religious requirement, and that for the secular court to penalize the disclosure, or even to allow a right of action, would be inconsistent with the free exercise clause of the first amendment of the United States Constitution.

So, we are being pulled in opposite directions. The apparently absolute nature of the privilege militates against disclosure, and the free exercise argument on behalf of the rabbis militates in favor of allowing disclosure. One thing this case is about is the extent to which a secular court should consider religious arguments, especially when the religion offers a competing legal and moral system. In a case such as this, by what standards or criteria should a secular court measure the harm suffered by plaintiffs? Does the court measure harm by purely secular criteria or, in a case such as this one, should the secular court measure harm by religious criteria?

Let me try to illustrate by an example used by Rabbi Bleich in his article. He considered a case in which an orthodox Jewish butcher comes to the rabbi and says, "Rabbi, I want to seek spiritual counsel from you," and it is evident from the context that the butcher is speaking with the expectation of confidentiality. The butcher says you know "I have been selling meat that is not kosher and passing it off as kosher. I am not ready to do anything about it, but I just feel the need to get it off my chest and sometimes confession is good for the soul, so I am telling you about it, but I am going to keep right on selling it and I don't want you to reveal it."

Now, let's change the scenario a bit. Suppose that the butcher says, "Rabbi, a large shipment of ground beef that I got last week is thoroughly tainted with E. Coli bacteria, but I made a terrific sale to a restaurant chain and I am going to go ahead and sell it to them. This is confidential, and I don't want you to disclose it." I take it that this latter case is an illustration of a situation in which secular harm predominates. I assume it is also religious harm. Under Jewish tradition or otherwise, it is a sin for this butcher to be selling meat which he knows will probably harm and possibly kill people.

When I say that this is one end of the spectrum where secular harm predominates, I mean that a secular court would not have to make any reference whatsoever to the Jewish or religious principles involved, to say that what the butcher is doing is legally and morally wrong. That is clearly a situation in which secular harm predominates.

Now, let us take the first situation from Rabbi Bleich's article in which the butcher says, "I am selling meat which is not kosher." There is no suggestion that anything is wrong in a secular sense with the meat. It is not going to cause illness, and in a secular sense it is perfectly consumable good meat. But even in this case, I think that there is an element of what I am calling secular harm, because it seems to me that the Orthodox Jewish butcher who sells meat that is not kosher has committed a fraudulent misrepresentation to his customers, and this constitutes secular harm.

Now, it happens that most of the customers to whom the butcher sells are members of his own community and he is also committing the religious harm of foisting off non-kosher food on them, which, for purely religious reasons, he ought not to be doing. But this is a hybrid case, in which both religious and secular harm are involved, and it seems that this is the most usual case.

Do the distinctions among religious harm, secular harm, and harm which is a hybrid of the two help answer the question of how a secular court should resolve the issue of confidentiality? It seems to me that they do. Another relevant factor here, which I am sure the rabbis agree with, is that Mrs. Lightman, by bringing an action in secular court rather than before a religious court or Beis Din, betrays the fact that she no longer is operating within the context of her own religious community. She has chosen to seek redress for what she perceives as a grievance in the secular legal system rather than the religious system. From a secular point of view that is something she has the right to like any other member of the civil society to which she belongs. She may seek justice, redress and relief on the basis of whatever principles a secular court applies in deciding issues properly before it.

In general, ignoring a few exotic abstention doctrines, or the like, a secular court has the obligation to decide all cases over which it has jurisdiction. Professor Povarksy posed the question at the outset of whether secular courts have the right at all to consider questions of Jewish law. And the answer has to be "yes"; if the resolution of a case properly before a secular court necessarily implicates questions of Jewish law, then the secular court has not merely the duty, but the obligation to consider such questions. Of course, the secular court may decide to defer to religious principles, and furthermore there is some extent to which the secular court must do so given first amendment considerations.

There is a general principle that secular courts may not make decisions that impinge upon the free exercise of religion. But in confronting this crucial issue, the court is not very helpful. It says, for example, that "the imposition of liability in tort or otherwise, for conduct or activities of a religious society or its members, in furtherance of religious beliefs, is barred where the imposition of liability would result in

the abridgement of the free exercise of religion in violation of the first amendment.” If it violates the first amendment, of course, the court is barred; this does not tell us anything.

A little bit later, in that same paragraph the court says, “The same holds true where the court would be required to become excessively entangled with religious doctrine and its standards.” Of course, the question is what kind of entanglement is excessive and on the basis of what principles do we decide when entanglement is excessive? In typical fashion, when a court is discussing constitutional questions the court says, “there is a balancing test.” The secular court must balance the societal interest involved in upholding the privilege and allowing a right of action against the defendants, against the harm that would result from disclosure. Unfortunately, the court makes little headway when it comes to actually applying this balancing test to the facts of this case.

There are two distinguishable questions, from my perspective as an evidence teacher. First, there is the question of whether the court correctly interpreted Jewish law when it concluded, “The defendants had shown no religious basis whatsoever for the disclosure of this information.” This is the first issue: Was there a religious justification for the disclosure by the rabbis?

The second issue is, did the defendants in this case make an adequate evidentiary showing, based upon testimony or affidavits by expert witnesses or otherwise, which would enable the secular court to reach the result which the defendants wanted it to reach, that is that the disclosure was justified in terms of Jewish law? Even if the court concluded incorrectly as a matter of Jewish law that there was no adequate basis for disclosure, I think the answer to the second question is a resounding “no.” The defendants did not make an adequate evidentiary showing.

That, of course, is separable and distinguishable from the question of whether an adequate evidentiary showing about the content of Jewish law could have been made. We will never know whether Judge Goldstein might have reached a different result, notwithstanding his apparent hostility to the defendants, if the defendants had made a more adequate evidentiary showing of the content of Jewish law.

I suspect that if the defense had made a more adequate evidentiary showing it would have been a much tougher case for Judge Goldstein. My students have heard me ask the question, “is this a lawyer screwed up case?” I do not know the details of the evidence presented by the defense, so I will not presume to answer that question categorically. But it appears that the lawyers presented conclusory statements from the defendants

themselves, but they presented no affidavits from independent expert witnesses who would testify as to the content of Jewish law.

It appears that the way the lawyers presented the case on their summary judgment motion made it very easy for Judge Goldstein to deny the defendants' motions for summary judgment, and decide in favor of the plaintiffs in most respects.

Rabbi Jonathan Reiss, Esq.:

I was informed that my role tonight was to follow Rabbi Boylan and Professor Morton. First, I want to commend both speakers, Rabbi Boylan for an excellent presentation of the Jewish law and Professor Morton for an extremely thorough presentation of the secular law on the subject.

I understand that the way it was supposed to work is that Rabbi Boylan presents the Jewish law and Professor Morton presents the secular law, and then I am here to compare the two. I do not know why you need me here tonight, because you have heard Rabbi Boylan and you have heard Professor Morton, and then you can review your notes and compare the Jewish law with the secular law on the subject, and basically we are done. Nevertheless, I can try to offer additional insights that might enhance the discussion we are having here tonight.

It is very interesting that so much controversy has emerged from the case that we have been discussing of the two rabbis in Far Rockaway who allegedly divulged to a court certain information that was given to them in confidence. The sad part of the case is that one gets the impression that you cannot trust rabbis. In truth, Jewish law forbids saying anything derogatory about anybody and forbids divulging confidential information even if it is not derogatory.

Thus, Jewish law is much stricter than the secular law when it comes to the subject. It is almost an absolute prohibition according to Jewish law to say anything derogatory about anybody, except under very limited circumstances, and the issue in this case was that, according to the judgment of the rabbis, this case fell within those very limited circumstances.

In secular law there is a general presumption that you have a right to free speech, that you have the right to say anything about anybody. You certainly have the right to speak derogatorily about people if what you are saying is true. That usually is an absolute defense. You can say anything you want to anybody when you are dealing with a public official, according to the case of *New York Times v. Sullivan* (378 U.S. 254), even if what you said is not true, even if it is false, as long as it is done without

actual malice. In order to promote the public discourse, people have the right to say even mistaken things every now and then about public figures and public matters.

Jewish law does not have this notion at all. Not only can you not say false things when it comes to public figures but you cannot say even truthful things that are derogatory about anybody. Professor Povarsky spoke about the contrast between rights and duties in Judaism. Judaism, maintains Robert Cover, focuses on duties while secular society focuses on rights. I think that is very true, and this principle provides a helpful conceptual model for our problem.

There are sometimes conflicting duties in Jewish law. There is one principle that you cannot speak disparagingly of anybody, and a second principle that if somebody tells you something, you are not allowed to tell it to anybody; and then in addition to these legal principles, there is a separate duty in the Torah, *Lo ta'amod al dam reacha* (Leviticus 19:16) *i.e.*, if somebody is going to be hurt, you have to protect him from harm. There is a discussion in Jewish law concerning how far that rule extends. The literary meaning of that commandment is that you cannot stand idly by your neighbor's blood, so it sounds as if you only have to protect your neighbor from physical harm.

However, Rabbi Israel Meir Kagan (known as *Chafetz Chaim*), discusses (in his famous work *Shmiras Halashon, Rekhilut* 9:1) the laws of what you can and cannot say, and quotes various sources, such as Maimonides (*Sefer Hamitzvot, Lo Ta'aseh* 297), in support of the proposition that the duty of *lo ta'amod al dam reacha* applies not only to physical harm but to monetary harm as well. If you know that somebody is going to be defrauded of some money then you have an obligation in Jewish law to prevent this harm from occurring.

Not only does the Jewish law obligation to rescue from harm apply to physical harm and monetary harm but it applies to spiritual harm as well. Rabbi Yoseph Bavad, (author of *Minchat Chinuch*) shows that whenever you have an obligation in Jewish law to rebuke somebody (if somebody is about to sin, one is supposed to find ways to prevent this, including reprimanding the would-be offender) there is also a corresponding duty of not standing idly by your neighbor's "spiritual" blood. You have to prevent his soul from bleeding through the commission of a transgression (*see Minchat Chinuch, Mitzvah* 239).

Clearly, that is the dilemma in the case of the rabbis. On the one hand, you have the duty of the Jewish law not to reveal confidences and on the other hand the duty to prevent what the rabbis perceived to be spiritual harm to the man (I am not talking about whether the rabbis were right or wrong because every rabbi obviously uses his own judgment in

such matters, but rather am focusing on the fact that the rabbis perceived that there was going to be spiritual harm to the children if they did not reveal things that they knew about the plaintiff).

This tension of different duties runs counter to the tension in secular law, and this is why I think there is a bit of a different result. The tension in secular law is between conflicting rights as opposed to duties: the right to speech, the right to be able to say anything that you want, and the right to confidentiality. Secular law says you ordinarily can say anything that you want and it does not matter. You can sit down to dinner and gossip about the whole world and you have not done anything wrong.

According to Jewish law it is considered as if you have spilled blood, committed murder; it is a terrible thing. Under secular law you are having dinner conversation with your spouse, it's not a big deal. However, due to the fact that we want to encourage free and open discourse in the context of certain types of relationships, there is a special confidentiality privilege under secular law for communications within the framework of those relationships, including the clergy/penitent relationship. The penitent is given a "right" not to have his confidences revealed.

Thus, while Jewish law focuses on the fact that you may have a duty that overrides your other duties, secular law focuses on the fact that we care about the right that this penitent has; it does not matter what he said. As Professor Morton pointed out, if you look at the case law in New York, you could very feasibly conclude that if a person comes to a minister and says that he is about to kill somebody, the minister does not have to reveal that information.

Indeed, does he not have to reveal that information, but he may even be in violation of statutory law if he would reveal that information; it may even be that from the statutory perspective it is better for somebody to be killed. (In this regard the clergy/penitent privilege may be more extreme than other professional privileges, such as the lawyer/client privilege or the doctor/patient privilege).

The Model Code and Modern Rules (see rule 1.6(b)(1)) dealing with professional ethics for lawyers at least permit, although they do not obligate, a lawyer to divulge confidences in order to prevent bodily harm. In the context of medical professionals, the *Tarasoff* case (17 Cal.3d 425) went so far as to hold that a psychotherapist had a duty to disclose a confidence in order to warn against a possible murder. However, in the case involving the two rabbis in Far Rockaway, the rabbis clearly felt that they were obligated under Jewish Law to divulge the information.

Nonetheless, the court was prepared to punish the rabbis despite their attempt to adhere to Jewish law principles.

How should the secular law respond to the fact that Jewish law has a different view? On the flip side, to what extent should the secular law affect the Jewish law on the subject? Do we say that once the local legislature promulgates a rule, then Jewish law must adapt to that rule? Does Jewish law require rabbis to commit an act of civil disobedience in protest against a law inconsistent with their religious duties? It is a very awkward situation.

First, I will discuss the reaction that I think is appropriate from the secular law perspective. I don't know that it will be identical to everything Professor Morton said, but I'll just go through a quick constitutional analysis. The first concern from a constitutional perspective is that, if we take away the ability of people to practice their religious law, we have to be worried about the free exercise clause of the Constitution.

The free exercise clause says that no law shall be enacted that will inhibit the free exercise of religion. However, here you have a law that says that a clergyman is never allowed to divulge confidences even when his religion says he has to do it in order to prevent harm. This would seem to be a violation of free exercise. The normal test for a law that seems to violate free exercise used to be that the state had to show a compelling state interest.

Many states still have that standard on the books in their state constitutions, but the United States Supreme Court case of *Employment Division v. Smith* (494 U.S. 872) decided that states are not obligated to adhere to that standard. Rather, it is sufficient that you have a "religion neutral" law, that is a law that is not specifically targeted at religious practice but has the incidental effect of burdening religion. If you have a law like that, even though the religion happens to be burdened, the law is constitutional, according to this decision.

The *Smith* case dealt with an Indian tribe that smoked peyote as part of their ritual. Members of the tribe claiming a violation of free exercise challenged a law, which prohibited people from smoking peyote. They said, "We want to be able to smoke peyote to observe our religious rites." But the Supreme Court said that this law is not targeted at the tribe, but at everybody. Because nobody is allowed to smoke peyote, the law does not have anything to do with religious services. That the law happens incidentally to affect religious observances does not render it unconstitutional, because the law is not targeted at hindering free exercise.

What about a law that is like this one, a clergy-penitent privilege law, a law that says that specifically in the context of religious counseling a religious counselor is going to be stymied from being able to exercise his religious duties as he sees fit. This sounds like a law that relates specifically to religious practice insofar as it infringes upon the religious interactions of rabbis with their congregants. The law inhibits the rabbis from being able to exercise their religious duties in the way that they understand that they must. That is why they went into the rabbinate. They did not become lawyers or doctors or other professionals; they became rabbis, specifically for the purpose that they would be able to exercise their religious obligations for the benefit of their community.

So, it seems as if this law has a very serious free exercise problem to the extent that it does not permit the rabbis to act in accordance with their religious consciences. There is a recent article in *DePaul Law Review* (Moskowitz and Debouer, “*Clergy and the Requirement to Report Elder Abuse*,” Fall 1999) that analyzes to what extent different religions require or allow information to be divulged in order to prevent harm.

In the context of their discussion, the authors make a very salient observation with respect to Jewish law. They note that when a person comes to a rabbi for counseling, which is what the rabbi is doing, the person expects that the rabbi would treat any information presented by the person in accordance with Jewish law. Thus, the lawyers make a strong argument in favor of allowing each religion to operate within its own parameters when it comes to clergy/penitent confessions based on the assumption that people do not have an expectation for greater confidentiality than that which is mandated by the clergyman’s religion.

There is also a possible Establishment Clause problem with clergy/penitent confidentiality statutes. Under the Establishment Clause you cannot enact a law for the purpose of specifically furthering the practice of religion or a particular religious belief. The notion that when a person goes to a priest or goes to a religious counselor, everything has to be treated on the level of absolute confidentiality, which is greater than what a person expects from normal everyday discourse, is not really a Jewish concept, as we have shown.

In Jewish sources, there is no special privilege that resides with a rabbi/congregant conversation that is greater than the “privilege” that resides with any other people who talk in the street. Regardless of the parties to a conversation, there is always the same obligation not to reveal information unless there is a very clear positive purpose to prevent harm. By enacting a law that says that there is something very special from the perspective of confidentiality in the context of a priest or a rabbi/penitent communication, the state is perhaps imposing upon Judaism and imposing

upon rabbinic clergy the perspective of the nature of the clergy/penitent relationship adopted by the Catholic religion.

The sacrament of penance and confessional dialogue in which sins are confessed to a minister is a notion that was introduced in the Catholic religion in the Fifth Century by Pope Leo. This was never part of the rites of Judaism. According to Judaism, a Jew who wants to confess goes to G-d and confesses to G-d. If you go to a rabbi and talk to him, you are doing so for some other reason; you may want to discuss something, or obtain guidance, but it has nothing to do with this notion of confession. However, the statute seems to be based on preserving the sanctity of the sacred nature of confession. The law may very well endorse notions of clergy/penitent communications held by a particular religious group.

In these last few comments I have addressed the constitutionality of clergy/penitent statutes. What about the perspective of Jewish law? How does Jewish law respond to the fact that the law is on the books? What about the *dina d'malkhuta dina* principle (see Talmud Bava Kamma 113a), that is the Jewish law principle that the law of the land must be followed? Jews are supposed to be obedient to the laws of the land in which they live.

Here, it is important to distinguish between laws governing interpersonal dealings of a non-ritual monetary nature and laws which entail a ritual obligation. The principle that the law of the land must be followed applies in the realm in which the framers of the constitution intended it to apply, meaning outside of ritual obligations. If you have a tenant in your building and there are rent control laws telling you how much you can raise the rent, then you have to abide by those laws. But a law that says you cannot keep the Sabbath, or that you cannot do circumcision, or a law that says that you are not allowed to exercise your religious duty of preventing others from suffering harm, whether it be physical, financial or spiritual in nature, does not come within the rubric of *dina d'malkhuta dina*.

So, what is going to happen if somebody comes to a rabbi and says that he is going to physically assault his next-door neighbor? The rabbi, following the dictates of his religious conscience, goes to the neighbor and says, "I'm just worried that so and so may want to beat you up, so be cautious." Then the rabbi is taken to court, is sued for two million dollars and has to pay the two million dollars. Perhaps there would be an exception in the case of physical abuse, but I am not so sure. Given that the principle of *dina d'malkhuta dina* does not apply, does the Rabbi have to put himself in that predicament under Jewish law?

There are some views in Jewish law, according to which the amount that you have to exert yourself in order to fulfill a religious precept

depends upon whether you are asked to actively violate a commandment or whether you just end up passively violating a commandment. In this case, if the rabbi does nothing and thereby observes his secular law obligation, he is only passively violating a Jewish law precept. Instead of warning the person, what Jewish law requires doing, the rabbi is not doing anything.

Many authorities opine that, in such a situation, a person does not have to give up everything he possesses in order to fulfill his obligation. How much does one have to give up? Let's say the rabbi is worth one hundred thousand dollars and he would end up losing twenty thousand dollars as a result of his fulfilling his religious obligation, thus forfeiting 20% of his net worth. Many scholars based on Talmudic sources draw the line at the 20% point; he has to be prepared to forfeit 20% of his net worth but no more (*see, e.g., Pitchei Teshuvah, Yoreh Deah 157:4*). However, it seems unfair to force rabbis into this predicament.

A possible solution would be to determine a way the rabbis can follow the law without having to violate the Jewish law. Consider the decision of Judge Goldstein in the case of the two rabbis. According to Judge Goldstein, the rabbis could have figured out a way to communicate the necessary information without violating the statute. Part of what the Rabbis did was to go to the husband and say, "Listen, we know your wife is no longer keeping the laws of ritual purity and therefore under Orthodox Jewish law you are not allowed to be with her anymore." Perhaps they could have said instead, "So are you and your wife getting along? Are you still having marital relations?" Then, if they determined that the spouses were still together they could have gone further and said, "Hmm, you know, maybe you should check and make sure that she is still going to the ritual baths." This is a suggestion the court makes.

However, what about a situation where there is absolutely no way in the world for the rabbis to communicate their concerns without divulging the source of their concerns? According to the court decision, the rabbis acted wrongly in not determining an alternative way to address the religious issues. But the truth is that under Jewish law they were obligated in any event to look for alternative means to communicate the information.

Under Jewish law, you are only supposed to divulge a confidence, or to divulge derogatory information if there is absolutely no other way for you to get the message across. If there is another way to get the message across, the rabbis are supposed to get the message across that way. Thus, you can assume that the rabbis came to the conclusion that the way they communicated the information was the only way that the message could get across.

Also, Judge Goldstein criticized the rabbis for filing affidavits with the court describing their religious opinion as to the mother's conduct for purposes of assisting the court in its custody determination. Such affidavits, in order to be reliable, had to describe the source of the rabbis' information. Accordingly, the court's solution is somewhat narrow-sighted.

There are some statutes, as Professor Morton pointed out, that do give a little bit more leeway and make it easier for the rabbis to comply with the statutes and not violate Jewish law. The New Jersey statute, for example, says that a rabbi is permitted to breach the clergy/penitent confidence in the event that the rabbi needs to do so to prevent a future criminal act. Presumably, beating up somebody is a criminal act; and even stealing money is a criminal act, so that would cover all cases where financial or physical harm needed to be avoided. But it would not cover cases in which spiritual harm needed to be averted, unless you interpret the statute to include even a criminal act under the religion of the rabbi, which would be a strained interpretation.

What ends up happening is that rabbis have to make their own judgment concerning the Jewish law obligations, and how to reconcile those obligations with the secular law statute. The rabbis in this particular case came to the conclusion that Jewish law required them to divulge the confidences and the court became enmeshed in the exercise of figuring out whether the rabbis were justified in their interpretation of Jewish law. This enmeshment was clearly inappropriate from a constitutional perspective. The *Lemon* test (for violation of the Establishment Clause, *see* 403 U.S. 602) states that a law is unconstitutional if it leads to excessive entanglement with religion. To have a judge sit down and make an interpretation of Jewish law really seems to be excessive entanglement.

There are court precedents, cases where there are disputes in ecclesiastical matters about how a church's rituals are supposed to be practiced. A court typically says that it cannot pass judgment, as these are ecclesiastical questions that have to be handled by the ecclesiastical courts.

What about cases in which courts have considered Jewish law? I think that in most cases of this sort that have been upheld, the courts have not interpreted Jewish law, but rather they have made a determination of whether a person was truly acting in accordance with his or her religious conscience. In other words, the court determines the general sentiment of people who practice the Jewish religion, with a view that you have to be sensitive towards these sentiments. I will give you an example.

There was a case of a woman who got stuck with her date on a ski lift (*Friedman v. State of New York*, 282 N.Y.S.2d 858). The ski facility didn't realize that these people were up there, so they closed up and left for the night. The girl was a religious Jewish girl and the boy was a religious boy, and the girl panicked because under Jewish law you are not supposed to be alone with a male who is not your husband or a close relative. She thought that Jewish law required her to jump. So, she jumped and fell 20 feet into the bushes, suffering facial lacerations and other injuries. Then she sued the ski lift company for the injuries that she suffered. The court asked whether it was reasonable for her to have acted in that way under her religion, given that they closed up the ski lift.

The ruling was that she was entitled to damages because it was reasonable for her to think that she had a religious obligation to jump, not because Jewish law required it of her. It is a very interesting question and many Jewish law authorities would say that she did not have to risk her life. But the point of the analysis was not to determine whether she was right or wrong under Jewish law, but whether she had a legitimate basis for her religious convictions.

Similarly, to the extent that the courts get involved in this sort of judgment in the context of whether or not a rabbi has a duty to divulge certain information, the question should be whether the rabbis reasonably thought they were acting under Jewish law rather than whether the judge, after his examination of Jewish law, determines whether their Jewish law conclusion was correct. From the perspective of Jewish law you can have very interesting discussions, but I do not think that the place for that is in a court.

There is a whole discussion in halakhic literature about the issues that confronted the rabbis in the Far Rockaway case. One of the questions is whether you have to tell a husband that his wife is seeing other men. There are very interesting responsa going in different directions about whether a rabbi is obligated to tell, whether the woman is obligated to tell, or whether the adulterer is obligated to tell the husband. If secular courts engaged in that sort of analysis, our law books would look very different. Many of the pages would be in Hebrew, and there would be lots and lots of source material from ancient Jewish and Talmudic sources, such as *Rashi*, *Tosafot*, *Noda Beyehuda*, *Divrei Chaim*, *Chelkat Yoav*, etc.. It would be very interesting; I personally would love reading it. But I think you would agree that this is not the province of the court.

What then is the best answer to these problems? What should rabbis do? One possibility for rabbis is to just follow the secular law and to refrain from what they believe to be their religious obligation entirely. We

have shown that while this would be perfectly fine from a secular perspective, it creates Jewish law problems.

There is one Jewish law opinion that seems to indicate, not in a rabbinic counseling context but in the context of doctors or psychologists, that perhaps the public's need for people to feel comfortable, going to doctors or psychologists and telling them things without worrying about their being revealed, outweighs the general prohibition against "standing idly by your neighbor's blood," even if the rabbi would find out that somebody might be harmed. I bring this position just to be thorough. It is a minority view because it is not really so buttressed in the sources, but maybe a rabbi will follow this view. There is an article by Rabbi Alfred Cohen in the first issue of the "Journal of Contemporary Halakha and Society," which makes such an argument, but it is not mainstream.

Thus, most rabbis would still be left with situations in which the secular law would come into tension with the religious law. One way to deal with the statute, we suggested, is to figure out creative ways to avoid the application of the statute. You could, as the court suggests, have a third party present so that the confidentiality rule would not apply. But that could be a detriment for the people who come in to see the rabbi. They do not necessarily want to speak to the rabbi and the rabbi's wife, or the rabbi and another third party when they talk to the rabbi. Another possibility is for a rabbi to deal with the statutes in accordance with principles of Jewish law, and just figure out in every case whether his adherence to his Jewish law obligation to rescue somebody from harm will cause him to lose 20% of his income.

Another possible approach (this is something I will throw out, which may require further legal analysis) is to have open disclosure by the rabbi of the requirements under Jewish law. Now, according to the authors of the DePaul Law Review article there is automatically open disclosure because people know when they go to a rabbi that the rabbi is going to act according to the Jewish law (whatever that may be). But maybe the rabbi can post a big sign saying: when you come to me understand that there are certain limitations on my ability to be confidential and if I find out that somebody is really going to be harmed, I may have to divulge that information. Such a policy may have certain chilling effects, but maybe that is not such a terrible idea.

In a famous case called *People v. Dreilich* (123 A.D.2d 441), a man told a rabbi that he had murdered his wife, and the rabbi reported the man to the criminal authorities. The man was convicted and then tried to overturn his conviction based on the argument that the rabbi had violated the clergy/penitent confidentiality privilege. The man lost the case in part because the rabbi made it very clear to him from the outset that he was

functioning as an advisor and not as a rabbi. Certainly, in a case where a rabbi thinks there is a possibility that he may need to utilize information that will be told to him, it might be prudent for the rabbi to make such a disclaimer, or to issue such a caveat, at the beginning of the conversation.

The best solution, in my opinion, from the perspective of the secular law to avoid entanglement in these matters by the courts (and judges having to learn in yeshiva for 10 years), is to provide an exception to the statute that allows rabbis to act in accordance with the dictates of their conscience. Perhaps the statute in its current form accurately reflects the religious views of Roman Catholic priests, but provisions can be added to allow clergy of other religious denominations to be released from the statute to the extent that it is not consistent with particular religious beliefs.

There are in fact a number of states that give rabbis the ability to waive the clergy/penitent privilege. The rabbi holds the privilege, and the rabbi can waive the privilege. Maybe that is a good idea. But these are all suggestions, and I am just trying to provide a survey of some of the problems. Obviously, it is a complex issue. There are many issues to consider both from the secular law perspective and from the Jewish law perspective and I just hope that this discussion was somewhat enlightening.

Professor Thomas Schweitzer:

Thank you, Rabbi Jonathan Reiss, for a very learned commentary and discussion of some very complicated and detailed issues, including First Amendment Law. I just wanted to drop a footnote; I think it is obviously clear that the Christian or Catholic approach to the priest/penitent privilege, which is the origin of the common law privilege, is quite different from the Jewish one.

Under Catholic law there is the, so-called, seal of the confessional, where it is a most heinous offense for a priest to divulge what he was told in the confessional. In an early 1800's case, a man admitted committing a murder and the priest was called as a witness and refused to testify. The New York court upheld his right not to testify. Certainly, it is an establishment clause problem in which a rabbi has that kind of approach imposed on him when it is at variance with Jewish law.

I would like to exercise the moderator's privilege by asking a question of either of the rabbis present. It struck me that Justice Goldstein dealt with Jewish law rather summarily and blithely, not mentioning any Jewish law sources. It seems to me that it is questionable as to whether he adequately summarized it. Obviously, as Rabbi Jonathan Reiss pointed out, there is a big problem when secular judges (civil judges) attempt to

opine without becoming expert on Jewish law. Do you want to comment on that?

Rabbi Dr. Stanley Boylan:

Certainly, the rabbis are greater experts on Jewish law than the judges. The defendants are actually quite distinguished rabbis. I know of no rabbi who thinks that a judge should tell these rabbis what is Jewish law. Rabbis rarely have discretion in some of these cases. They clearly had to testify for the benefit of children in that case, and it falls within the kinds of guidelines that we talked about.

When you try to preserve other people's values, and we are talking about spiritual values as well as life values, there is no question in Jewish law that preserving religious values is equal in some cases to preserving one's life. So, the rabbis were certainly well within the bounds of Jewish law in testifying in that case, and I think it is a miscarriage of justice for a judge to try to construe what Jewish law would say.

Rabbi Jonathan Reiss:

The most disturbing quote from Judge Goldstein's decision was when he was making reference to the disclosure of the fact that the woman was no longer going to the *mikveh* (the ritual bath) that would allow her to have conjugal relationship with her husband. The judge said that since the rabbi had been told by the husband that there was no sexual relationship, there was no need for disclosure, especially under the pretext of preventing any violation of religious doctrine, unless this was to serve some other "male, Orthodox, but equally irrelevant role."

Question:

To what extent does the present court decision mean that rabbis would have to behave differently from this point on to satisfy American law? I am sure many of us are trying to consider how we act from this point on.

Professor Thomas Schweitzer:

Let me just observe, of course, that this is a supreme court decision, and despite the name it is a trial court in New York, not even the appellate division, let alone the court of appeals, our highest court. It is a precedent, but it would not even be binding in other courts of the State. They can quote it, but another Supreme Court justice, say in Buffalo, could disagree with this; the precedent does not bind him. But, I am curious whether anyone knows about the process of appealing the decision.

Rabbi Dr. Stanley Boylan:

I have a copy of the appeal with me, which has been filed by Smithtown on behalf of the two rabbis. If anyone wants to see it, I can share it with him.

Professor Thomas Schweitzer:

The hour is late, but we have time for maybe one or two questions. The gentleman in the back, please.

Question:

I wonder whether a rabbi's duty of confidentiality, according to the court's decision, would also apply where the person who consults with the rabbi is not a member of the rabbi's congregation, would the rabbi still not be allowed to divulge the information? And what should a rabbi do to satisfy both the secular and the religious law?

Rabbi Jonathan Reiss:

It is important to emphasize, first of all, that the way the law is drafted it does not apply only to the congregants, the people that are members of that rabbi's particular synagogue. It can apply to somebody else from another synagogue, or to somebody else who walks off the street as well, unless the rabbi makes it very clear, as in the Dreilich case, that he is not meeting with the person in the context of his rabbinical role.

I think that probably the best thing for a rabbi to do in situations like that is to make it very clear from the outset. Because, I agree that there are certain circumstances where the expectations of the parties might be different based on where they are coming from, and it is important that when there is a suspicion that a rabbi might use the information in the future, then it probably does behoove him to figure out a way to structure the conversation in such a way that he is not going to be impeded afterwards.

It is not an easy situation at all. I personally think that it is a very tortured situation, even taking the secular law out of the picture. A rabbi, to whom a person came and poured his heart out, knows certain things he would not have known otherwise. Then the rabbi is faced with that knowledge. Leaving aside the secular law, it is a very tortured situation for the rabbi to be in. You have to figure out ahead of time what is the situation that you want to put yourself into. Sometimes you don't really have much of a choice. It is very difficult.

Rabbi Dr. Stanley Boylan:

I want, first of all, to make it clear, and I think I spelled it out a bit, that even under those conditions, when rabbis have to give information, they have to be very discreet and careful, and not give more information than is necessary to accomplish the ends involved. There are certainly constraints even in the context of Jewish law. There are constraints, about what a rabbi can say.

I will tell a short story. There was a certain rabbi of a Beth Din (rabbinical court) in Tel Aviv who arranged a Get, a Jewish divorce. Later, a party of rank approached this rabbi and said, “You were part of that Beth Din, and I would like to know whether there is any reason I should not marry the woman who was divorced.” This circumstance was a bit complicated by the fact that the people had been married for ten years, and there were no children, which is a cause for divorce under certain circumstances. The rabbi involved in this case did not know what he should do. So, he approached the world famous authority, Rabbi A.Y. Karelitz, known as Chazon Ish, and asked him what he should say, because he did not want to divulge information more than was necessary. Chazon Ish told him that all he could say in that case is that “if I were you, I would not marry her;” he could not give more details than that; he is not allowed to tell the whole truth.

The end of this story was, that the party who approached the rabbi met him several months later, and the rabbi asked, “Well, what finally happened?” The man replied, “Well, I must say I didn’t listen to you, and I did marry her, and thank God, she’s expecting a baby.” That is the story, and it shows that one does not always know the right thing to do in life. Jewish law does not absolutely give us the license to say everything that we want to say. And, actually, part of those guidelines that I put out is that you say as little as possible to accomplish what you want, that is to caution the person who needs to be cautioned.

Very often what rabbis will do is to say, “Well, why don’t you look into this problem, I do not really know about it, but I think you should investigate it.” I have done that in cases, and that is the way we do not breach the duty of confidentiality, but at the same time we, in some way, perform our rabbinical duties.

Professor Bruce Morton:

I can give a very direct, literal response to the gentleman’s question. I have a rather clear recollection that there are New York cases, although I don’t have them in front of me, which say quite specifically and directly,

that if a person approaches a clergyman as a penitent, seeking religious or spiritual counseling, and the statutory elements of the privilege are met, then indeed the privilege cannot be waived, even if the penitent is in a completely different religion from the clergyman.

Question:

Given the problems a rabbinical tribunal would face in dealing with cases like the one we discussed, could a rabbinical tribunal simply refer the parties to a secular court?

Rabbi Jonathan Reiss:

Well, let's take this case for example. If this case had been brought to the Jewish courts, the Jewish courts would have taken it. Speaking for my Beth Din, we would have taken the case. But if a case is incapable of being handled by a Jewish court, for whatever reason, then there could be grounds, under Jewish Law, to permit the case to be handled in the secular court under exceptional circumstances.

For example, suppose one sues the other in a Beth Din for a breach of contract, and the defendant does not want to come to the Beth Din. A rabbinical court in this country cannot force a party to appear before it. In such a situation, the rabbinical court might refer the plaintiff to a secular court.

Professor Thomas Schweitzer:

Thank you, speakers, for excellent presentations, and I thank the audience for your attentive interest.



Editor's Note

It is noteworthy that the decision of the New York Supreme Court in the case of *Lightman v. Flaum, et al* (687 N.Y.S.2d 562), which was the focus of the symposium, was reversed by the Appellate Division, and the reversal was upheld by the Court of Appeals, though for different considerations.

The Appellate Division (717 N.2d 617) adopted in principle the position of the Supreme Court that the duty of confidentiality extends to the cleric-congregant relationship, giving the congregant a right to sue the cleric for breach of confidentiality. In this case, however, the Appellate Division found that the plaintiff waived her right of confidentiality due to the presence of third parties during her meetings with each of the defendants.

On the other hand, the Court of Appeals (736 N.Y.S.2d 300) rejected the idea that a congregant may sue a cleric for breach of confidentiality. The court said: “We find a distinction between confidential information under the rules and regulations that govern secular professionals and information cloaked by an evidentiary privilege under the CPLR.” Statutory privileges, the court held, do not create fiduciary duties, but only proscribe the introduction of evidence of certain confidential information. The CPLR 4505, concluded the court, was intended by the legislature as a rule of evidence and not as a basis of a private cause of action.



Participating at a symposium at Touro Law School titled, "The Status of Jerusalem: A Jewish Legal, International and Political Perspective," from right: Mr. Tal Becker, Esq., Israel Office of Academic Affairs in the U.S.A., Consulate General of Israel in New York; Professor Chaim Povarsky, Director of the Institute of Jewish Law, Touro Law Center; Professor Harry Reicher, University of Pennsylvania Law School, and Observer on behalf of Agudath Israel at the United Nations; and Professor Ilene Barshay, Touro Law Center (see p. 42).

A "Thank You" reception for Touro Law School's major donors took place recently at "The Point," the home of F. John Handler ('96). A panoramic view of the Long Island Sound provided a picture perfect background for this gathering.

Dean Howard A. Glickstein (center) with Touro benefactor Shirley Fuchsberg (left), and long time Touro supporter, alumnus Barry Fine '90.

*Dean Glickstein (right) with Professor Lawrence Newman of Columbia University.
Professor Newman is a member of the Law Center's Board of Visitors.*

*Richard Eisenberg, Esq. (seated) with Professor Chaim Povarsky, Director of the Jewish
Law Institute. Mr. Eisenberg is a Trustee of the CAMBR Foundation,
whose gift supports the work of the Institute.*



CURRENT EVENTS IN ACADEMIA

1. The Harvard Law School Conference on Equity in Jewish Law

A conference on Equity in Jewish Law, sponsored by the Israel B. Greene and Sara Mann Greene Fund for Equity Studies, was held at the Harvard Law School on May 19 through May 21, 2002. The conference discussed a variety of equity-related issues such as, "Equity in the Western Tradition," "Equity in Roman Law," "Equity in the Jewish Legal Tradition," "Equity Applied: Identifying Talmudic Cases," "Equity in the Talmud: Compromise," and others.

Speakers at the conference were: Professor Charles Donahue from Harvard Law School; Professor Shmuel Shilo from the Hebrew University of Jerusalem; Professor Hanina Ben Menachem from Harvard Law School; Professor Berachyahu Lifschutz from the Hebrew University of Jerusalem; Professor Steven Friedell from Rutgers University Faculty of Law; Professor Timothy Lytton from Union College Faculty of Law; Professor Suzanne Last Stone from Benjamin N. Cardozo Law School; Dr. Arye Edrei from Tel Aviv University Faculty of Law; and Professor Zev Harvey from the Hebrew University of Jerusalem.

2. Jewish Law Heritage's Seminars in Israel

(1) On March 21-23, 2002, The Jewish Legal Heritage, headed by Professor Nahum Rakover, sponsored a seminar on Captive Ransoming, Terror and Extortion, at the Carlton Hotel, Nahariya, Israel. The speakers were: Tel Aviv District Court Judge Oded Modrick, former Chief Rabbi of the Israeli Army Mordechai Piron, Dr. Yaakov Weinrot, Esq., and Mr. Uri Slonim, Esq.; The Mayor of Nahariya, the Honorable Jackie Sabag, greeted the audience. The seminar was chaired by Professor Rakover.

During the seminar the audience gathered in workshops in which different aspects of the topic were discussed. The workshops were guided by Judge Neil Hendel and Yaakov Shapiro, Esq.

(2) On September 12-14, 2002, The Jewish Legal Heritage will sponsor a seminar on "Solomon's Trial," in which the admissibility of circumstantial evidence in a court of law, under Jewish law, will be discussed. Among other issues of circumstantial evidence, the seminar will discuss the admissibility as evidence of polygraph tests, DNA and blood tests, as well as drawing conclusions from a defendant's behavior in determining facts and intent.

The seminar will be held at the Eden Inn Hotel in Zichron Yaakov, Israel. The speakers at the seminar will include, the recently appointed Chief Rabbi of Tel Aviv Shlomo Amar, Professor Uriel Simon from Bar Ilan University, and Professor Nahum Rakover. The workshops will be guided by Rabbi Yehoshua Ben Meir, Esq.; Professor Dov Frimer, and Yaakov Shapira, Esq.

3. The 2002 Annual Meeting of the AALS Jewish Law Section

The Jewish Law Section of the American Association of Law Schools met on January 3, 2002 at the Annual Meeting of the AALS in New Orleans. The program was titled, "Stem Cell Research and Jewish Law: The Definition of the Beginning of Life." The speaker was Professor J. David Bleich from Benjamin N. Cardozo School of Law. The session was moderated by Professor Michael Broyde from Emory Law School.

4. The 12th Biennial Conference of the Jewish Law Association

In accordance with its by-laws regarding the rotation of its biennial conferences between Israel and the Diaspora, the 12th Biennial Conference of the Jewish Law Association will take this year, August 12-15, 2002, in the Kibutz Ramat Rachel at the outskirts of Jerusalem, Israel.

The conference will seek to demonstrate the relevance of Jewish law to general legal thinking and to the enhancement of the society. Among the topics that will be discussed are: A Constitution and Human Rights; Environmental Law; The Human Genome; Frozen Embryos; Sale of Organs; The Duty to Rescue; Extradition of Criminals; Tort and Insurance Law; Law and Reality; Jurisprudence; and Comparative Law.

Over hundred members, most of them from Israel, have registered for the conference. Among the distinguished guests participating at the conference are: Chief Rabbi of Israel Eliyahu Bakshi-Doron, Minister of Justice Meir Shitrit, and Chairman of the Kneset's Law and Constitution Committee and Kneset member Michael Eitan.

5. A Conference of Religiously Affiliated Law Schools

On February 22-23, 2002, the Religiously-Affiliated Law Schools sponsored a conference titled, "Viewing Law through the Eyes of Faith," held at Pepperdine University School of Law, Malibu, CA. Among other topics, the conference discussed the Secularization of the American Legal Academy; Programs Reflecting Law Schools' Religious Character; The

Outrageous Idea of Religious Legal Scholarship; and Religious Traditions' Potential Contribution to Scholarship.

Over a hundred professors from all over the country participated at the conference. Touro Law School was represented by Dean Howard A. Glickstein and Professor Chaim Povarsky. Professor Povarsky's presentation appears in this issue of the Jewish Law Report (see page 45 below).

Professor Chaim Povarsky speaking at the symposium titled, "The Status of Jerusalem: A Jewish Legal, International and Political Perspective" (see p. 42).

Professor Harry Reicher speaking at the symposium titled, "The Status of Jerusalem: A Jewish Legal, International and Political Perspective" (see p. 42).



ACTIVITIES OF THE INSTITUTE

1. Symposia

(1) In November 2001, the Institute sponsored a symposium titled, "The Status of Jerusalem: A Jewish Legal, International and Political Perspective." The panelists were: Professor Chaim Povarsky, Director of the Institute of Jewish Law, Touro Law Center; Professor Harry Reicher, Professor of Law, University of Pennsylvania Law School, and Observer on Behalf of Agudath Israel at the United Nations; and Tal Becker, Esq., Israeli Office of Academic Affairs in the U.S.A., Consulate General of Israel in New York. The moderator was Professor Ilene Barshay, Touro Law Center.

(2) On October 3, 2002 the institute will sponsor at the Law Center a symposium titled, "Human Rights: A Jewish, Israeli, American and International Perspective." The speakers are: Professor Asher Maoz from Tel Aviv university Faculty of Law; Professor Chaim Povarsky from Touro Law School; and Professor Richard Klein from Touro Law School. Dean Howard Glickstein will greet the audience, and Professor Neil Afran from Touro Law School will moderate the symposium. A reception will follow.

The ongoing symposia of the Jewish Law Institute are supported by The Abraham and Lillie Goldstein Charitable Trust.

2. The Lillie Goldstein Mobile Judaica Collection

The Lillie Goldstein Mobile Judaica Collection at Touro Law Center was established four years ago for the purpose of making Jewish law sources available to other law schools that wish to offer courses in Jewish law. The Judaica collection has been given as a loan free of charge (except for shipment expenses) to a number of law schools across the country, such as Chicago Kent College of Law, Illinois Institute of Technology, and the University of Utah School of Law.

The next borrower, for fall 2002 and spring 2003, will be Boston College Law School. During fall 2004-spring 2005, the Judaica collection will go to the University of Colorado Law School.

Law schools that wish to take advantage of this opportunity and offer a Jewish law course are advised to write to Mrs. Carol Shapiro-Joseph, Head of Technical Services, The Law Library, Touro College, Jacob D. Fuchsberg Law Center, 300 Nassau Road, Huntington, New York 11743, Tel. (631) 421-2244, ext. 360, Fax: (631) 421-2675.

3. Courses in Jewish Law at the Law Center

The Institute offers a variety of courses in Jewish law: a main course entitled, "Jewish Law," which consists of two parts, an introduction to Jewish law and Jewish domestic relations law; "Jewish Legal History;" "Jewish Legal Philosophy;" and "Selected Topics in Jewish Law." The courses are offered every second, third or fourth semester.

The course "Introduction to Jewish Law" discusses the following issues: the Basic Components of Jewish law; the legislative, judicial and administrative powers in the Jewish legal system; the rules governing the legislative power of the sages; the king's prerogatives; customs and usage as binding sources of law; judicial precedents; the basic sources of Jewish law; exegetical rules; the application of the law of the state in rabbinical tribunals (the principle of *dina d'malchuta dina*); and the seven Noahide laws.

The Jewish Legal History course includes: the revelation at Sinai; the different periods in Jewish legal history; the major events that marked the transition from one period to another; the written and oral law; the rabbinical law; The outstanding authorities in each of the periods; the decline of the power of the authorities; and the impact of political and social events in Jewish history on the development of Jewish law.

The course "Jewish Legal Philosophy" discusses the philosophical and theological foundation of the law; the belief in one G-d; G-d's plan in

creating the universe and the role of man in the creation; the role of the Torah in the creation of the universe; the Revelation at Sinai; G-d's kingdom; the significance of law in establishing G-d's kingdom; man's physical and spiritual components; the human soul; the special and eternal relationship between G-d and man; Divine Providence; man's free choice; the need for man's free choice for establishing the relationship with G-d; the principle of free choice vs. the principle of cause and effect; the principle of free choice vs. the principle of Divine knowledge of the future; the animal soul.

The course on Jewish Domestic Relations Law includes the following issues: the status of the woman in the family relationship; the nature of the marital relationship; marriage and divorce procedures; the role of the spouses, rabbis and court in marriage and divorce procedures; three stages in establishing a marital relationship and their legal consequences; conditional marriage and divorce; invalid marriages; marriage by proxy; rights and duties of the spouses; the effect of civil marriage under Jewish law; modes of dissolution of marriage and their legal consequences; recognition of Jewish divorce by American courts under conflict of law theories; the "Aguna" problem; the effect of civil divorce on Jewish married couples; the involvement of American courts in Jewish divorce; the New York "Get" Statutes (N.Y. Dom. Rel. Law § 253, 236(5)(h), 236(6)(d)); and their limits and constitutionality problems.

The Course "Selected Topics in Jewish Law" includes: abortion in Jewish and American law; legal issues arising from new reproductive technology; and the law of the pursuer.



Mr. Tal Becker, Esq., speaking at the symposium titled, “The Status of Jerusalem: A Jewish Legal, International and Political Perspective” (see p. 42).

Professor Ilene Barshay moderating the symposium, “The Status of Jerusalem: A Jewish Legal, International and Political Perspective” (see p. 42).



Religion and Law at Law Schools

By Dr. Chaim Povarsky

(Based upon a presentation at a conference at Pepperdine Law School, sponsored by the Religiously Affiliated Law Schools. See p. 40).

Introduction

My presentation is supposed to focus on the activities of the Jewish Law Institute at Touro Law School, which is under my directorship. Before I do that I would like to make some general observations about the introduction of religion at law schools, whether it should be introduced and to what extent.

Later I will discuss the special character of Jewish law, the teaching of Jewish law at law schools, as well as the activities of the Jewish Law Institute.

Introducing Religious Perspectives at Law Schools

I believe that except for a number of cases which I will discuss later, religion per se should not be discussed extensively in class – and I stress “in class” - at law schools, just as politics should not be discussed extensively in class at law schools. Those are very controversial issues, not closely related to law and may distract students from their legal studies.

On the other hand, teachers and students should be encouraged to express their general religious perspectives and attitudes on legal issues. I will refer to the general religious perspective and attitude as “religious consciousness” or “religious conscience.”

A religious conscience and a secular conscience have much in common. Both are based on beliefs, education and culture. Beliefs, education and culture of a religious person may be different from those of a secular person, just as they may be different from one secular person to another, and as a result, also the sensitivities of their conscience may be different. However, expression of any feelings of conscience in the study of the law, whether secular or religious, is perfectly legitimate.

One may raise the question as to whether one’s conscience is relevant at all to the study of the law. It may be argued that legal study is actually a study of a profession intended to provide the students with certain information and develop in them certain skills, and there is no room for conscience sensitivities in the study of law. I would disagree. The expression of one’s conscience in the study of the law is no less

significant than the expression of one's mind. One cannot ignore one's conscience just as one cannot ignore one's mind.

Perhaps it was common to ignore one's conscience in the 19th and the beginning of the 20th centuries, when the positivistic theory of law dominated the legal arena, and when law was regarded as a pure science, separate from morality and conscience. In those days, law was regarded as physics and mathematics, in which, obviously, morality and conscience do not play any role.

Today, however, we have moved beyond those ideas, especially after World War II, when the world saw with dismay the kind of atrocities a so-called civilized nation could commit, whose laws were totally detached from morality and human conscience. Unlike physics and mathematics, which deal with plain facts and natural phenomena, law deals with human relationships, and one cannot discuss those relationships while ignoring one's conscience.

The question arises, what is particular about a religious conscience and in what sense is it different from a secular conscience? A religious conscience is the product of a religion. A religion not only requires its followers to believe in certain things and behave in certain ways; a religion dominates the believer's world, strengthens moral convictions, and shapes one's perception of life, human relationships and human happiness. A religion elevates the believer's conscience and gives it extra strength and sensitivity.

Take for example the controversial issue of abortion. Based upon a woman's right of privacy, the Supreme Court legalized abortion. Many religious figures were opposed to this legalization. Were they opposed because of any religious commandment? Not necessarily. The debate over abortion may be based on the differences in sensitivities of religious and secular consciences.

The secular conscience may be sensitive to a woman's right over her body, while the religious conscience may be more sensitive to the preservation of human life and to acts of cruelty involved in an abortion. Such differences of sensitivities that distinguish a religious and a secular conscience do not make one conscience more legitimate than the other.

I mentioned that a religious conscience is the product of a religion. But not only is the existence of a conscience the product of a religion; one of the primary goals of a religion is to sharpen the sensitivities of one's conscience. There is an interesting story in the Talmud about Rabbi Judah the Prince, who was one of the greatest Jewish authorities and the author of the Mishnah. A calf was about to be slaughtered, when it escaped from

the slaughterhouse, ran over to Rabbi Judah the Prince, hid among the folds of his garment, and started crying.

Rabbi Judah turned to the calf and said: “Go, go, you were created for that purpose,” that is, to be slaughtered. The Talmud relates that at that moment it was decided in heaven that Rabbi Judah should be punished for his behavior. And, indeed, Rabbi Judah contracted a disease from which he suffered greatly for a long time. In committing the calf to slaughter, Rabbi Judah did not violate any explicit religious commandment; he only showed a lack of sensitivity and compassion to the calf’s suffering, for which he was punished severely (*Bava Metzia* 85a).

This story, as well as many others, demonstrates that the Jewish religion requires a high degree of sensitivity of one’s conscience, and I believe the same is true with other religions.

I mentioned earlier that religion per se should not be discussed extensively in class at law schools. This may be generally true; however, there are some exceptions. It may be appropriate to discuss religion in a course on legal philosophy, where a religion is part of the philosophy of the law, as in the case of Jewish law, or in a course on a foreign legal system, which is based on religion. Examples of the latter category would be laws of some Islamic countries, whose laws are based on the Koran, which is the Islamic gospel, or Jewish law, which is based on the Torah.

With respect to other legal systems that are not based on religion, a believer may raise issues of religious conscience in the study of the law without referring to specific religious traditions and practices.

Although the majority of modern society may not be engaged in religious activities, and may not take part in religious services and ceremonies, many people still believe in the existence of a Supreme Being who has certain expectations of human beings. Those beliefs may develop a religious conscience, which may be relevant to the study of the law, and needs to be freely expressed, also at law schools.

I might add, that religious authorities are occasionally invited to appear before congressional committees to present their perspectives on legal issues. There is no reason why those same religious perspectives should not be discussed at law schools.

The Special Character of Jewish Law and its Teaching at Law Schools

Allow me to say a few words about the special character of Jewish law and its teaching at law schools. Jewish law is considered a religious law because it is based on the Jewish Bible, and it seeks to accomplish religious goals, primarily, the belief in G-d, His power and providence.

However, Jewish law is also a legal system just like any other legal system; it includes the law of contract, torts, property, criminal law, family law, labor law, evidence, procedure, etc.

Courses in Jewish law are offered in about 30 law schools in the United States, most of which are not religiously affiliated. Jewish law is offered at those schools primarily because it is an ancient legal system, and not because of its religious character.

Incidentally, American courts sometimes cite Jewish law. For instance, in the landmark case of *Miranda v. Arizona*, the Supreme Court cited Jewish law in support of its view that self-incrimination should be restricted. The court said (n27):

[A] thirteenth century commentator found an analogue to the privilege grounded in the Bible. 'To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.' Maimonides, *Mishneh Torah* (Code of Jewish Law), Book of Judges, Laws of Sanhedrin, c. 18, para. 6. III Yale Judaica 52-53. See also Lamm, *The Fifth Amendment and its Equivalent in the Halakha*, 5 JUDAISM 53 (Winter 1956).

What is the goal of the Jewish Law Institute at Touro Law School in teaching Jewish law? Touro College, the law school's parent institution, was founded under Jewish auspices. One of the primary goals of the college and the law school is to teach the relevance of Jewish culture and tradition to American society. Because Jewish law is one of the major components of Jewish culture and tradition, it is quite appropriate for Touro Law School to introduce Jewish law to its students and to the American legal community at large.

However, Jewish law is also a legal system, and the primary goal of the Jewish Law Institute at Touro is to introduce Jewish law as a legal system, rather than as an expression of the Jewish religion or culture. As I mentioned earlier, I believe that religion per se should not be taught at law schools. Several years ago, some students submitted papers for my Jewish law course that focused on pure religious issues. I did not accept the papers. I said to the students that I teach law, not religion.

Jewish culture and tradition are introduced at Touro Law School not as a course, but rather in programs, which are not part of the academic curriculum. The programs are sponsored primarily by the Jewish Programs Committee, which is a faculty committee, and the Jewish Law Students Association, which is a student organization.

The Activities of the Jewish Law Institute

What are the activities of the Jewish Law Institute at Touro Law School? First, the Institute offers a variety of courses, all of which are related to the Jewish legal system, such as: “Jewish Law,” including an Introduction to Jewish Law and Jewish Domestic Relations Law; “Jewish Legal Philosophy;” “Jewish Legal History;” and “Selected Topics in Jewish Law,” including topics such as abortion and advanced reproductive technology.

Second, the Institute publishes the Jewish Law Report, a periodical that contains articles and programs of symposia on Jewish law as well as information on current events in the world of Jewish law.

Third, the Institute sponsors symposia and conferences on Jewish law, and invites legal scholars from around the world to discuss Jewish legal issues.

Fourth, the Institute assists other law schools in establishing Jewish law courses, by providing them with information and syllabi on a variety of Jewish legal topics.

Fifth, over the past several years the Institute has been cooperating with Touro’s law library in offering other law schools a mobile Jewish legal collection, free of charge (except for shipping expenditures), for one or two semesters. This is a very significant initiative, as many law schools might be interested in offering a Jewish law course, but cannot do so because of lack of a basic Jewish law collection.

Touro Law School found a solution to this problem by establishing a mobile Judaica collection. A number of law schools have already taken advantage of this opportunity, such as Chicago Kent College of Law, and the University of Utah. The next borrower of the Judaica Collection for the fall 2002 and spring 2003 will be Boston College Law School, and in fall 2004 and spring 2005, the collection will go to the University of Colorado Law School.

Religious and Moral Principles in the Jewish Legal System

I mentioned that Jewish law is offered at Touro not because of its religious character, but rather for its legal significance. However, since Jewish law is based on religious traditions and moral principles, it is virtually impossible to teach Jewish law without discussing those traditions and principles. Here are some examples.

(1) One of the most significant events in the history of Jewish law is the Revelation at Sinai and the giving of the Torah and the law to the

Jewish people. In a course on Jewish law, one cannot avoid discussing the Revelation at Sinai. The divine source is one of the basic features of Jewish law and cannot be ignored.

(2) According to the Bible, G-d owns all souls. The prophet Ezekiel quotes G-d, saying, "Behold, all souls are mine" (Ezekiel 18:4). Controversial legal issues such as abortion and euthanasia are determined, under Jewish law, based upon that religious principle according to which G-d owns all souls, and therefore an individual has no right to terminate his or her own life or, according to some authorities, the life of a fetus.

Jewish law does not recognize a living will, in which people give directions prohibiting the use of extraordinary measures to prolong their lives, because, under Jewish law, one does not have the right to terminate one's life, or direct others to do that.

Also, self-incrimination under Jewish law is totally inadmissible in criminal proceedings, even with "Miranda warnings," because, according to one interpretation, one does not own one's body and soul and, therefore, cannot cause them harm by making a confession.

(3) Many cases were determined in Jewish law based on the moral obligation not to act in the manner of Sodom (*kofin auto al midat Sodom*). The term "Sodom" in this context does not refer to sexual perversions, but rather to wicked behavior. The people of Sodom were very wicked and it is prohibited to act in their manner. Jewish law adopted and enforces this moral principle. Here are some examples.

In one case, partners who owned a piece of land wished to terminate the partnership and divide the land among the partners. Ordinarily, they would divide the land into equal portions and allocate the portions to the partners by drawing lots.

In this case, one of the partners owned another parcel of land adjacent to the land owned by the partners, and wanted his portion of the partners' land be next to his other land. He asked to be given the portion that was adjacent to his land, without drawing lots.

It made no difference whatsoever for the other partners which portion they would receive, but they nevertheless refused to allow the one partner to receive his share without drawing lots. Ordinarily, they had the right to deny the partner's request. However, under Jewish law, based upon the above religious and moral principle, they could be compelled to give the partner his share next to his private land without drawing lots, because otherwise they would be acting "in the manner of Sodom" (B.

Talmud, Bava Bathra 12b; Maimonides, *Mishneh Torah*, The Book of Acquisition, The Laws of Neighbors 12:1).

In another case, a mill owner rented out his mill, and the parties agreed that instead of paying the rent in cash, the lessee would grind a certain amount of wheat for the mill owner every month. Later, the mill owner became rich and no longer needed his wheat to be ground, and asked the lessee to pay the rent in cash. The lessee refused to do so.

Under the law of contract, the lessee is entirely within his rights in refusing to pay the rent in cash. However, if the lessee will always find customers for grinding their wheat, even if he operates the mill at full capacity, he may be compelled, under Jewish law, to pay the rent in cash. Because it does not make any difference to the lessee whether he grinds the wheat of the mill owner or of other people, refusing to accommodate the mill owner in this case is like acting in the manner of Sodom, which cannot be allowed (B. Talmud, Ketuboth 103a; Maimonides, *Mishneh Torah*, the Book of Civil Law, The Law of Hiring 7:8).

(4) Jewish law requires not only that people not be wicked, but also that they should be good and righteous; that is, not merely to be neutral and indifferent, but rather to do what is right and good. This obligation is based on the biblical commandment, "And thou shalt do that which is right and good" (Deuteronomy 6:18).

Two cases were decided based on this moral principle (B. Talmud, Bava Mezia 108a, 35a). The first case involved a neighbor's right of preemption. Based upon the duty to do what is right and good, it was decided that a landowner who wishes to sell his land must offer it first to an adjoining neighbor. Only if the neighbor is not interested in the land, may the landowner then sell it to others.

If the landowner sold the land to another without first offering it to his neighbor, the latter may repay the purchaser and evict him from the land (*See* Maimonides, *Mishneh Torah*, the Books of Acquisition, The Laws of Neighbors 12:2).

The second case involves a debtor who could not pay off his debt. The creditor collected the debtor's land as payment for the debt. Later on, the debtor obtained cash, and wished to pay the creditor and recover his property. Ordinarily, the debtor should not be entitled to recover the property, which already belongs to the creditor. However, based on the biblical duty to do what is right and good, the creditor must accept the money and return the land to the debtor (*See* Maimonides, *Mishneh Torah*, The Book of Civil Law, the Laws of Creditor and Debtor 22:16).

The above cases illustrate the religious basis of many Jewish legal principles. One who teaches those legal principles in a Jewish law course must also discuss those religious principles, not for the purpose of teaching religion, but rather for a better understanding of the legal principles.

Jewish Legal Philosophy

As I mentioned earlier, the Jewish Law Institute at Touro also offers a course in Jewish legal philosophy. A course in Jewish legal philosophy must discuss Jewish theology extensively, because the Jewish religion is the major part of the philosophy of Jewish law. Again, the purpose of those discussions is not to present the Jewish religion to the students, but rather to show the philosophical basis of Jewish law.

The course discusses, among others, the following issues: The existence of G-d, and G-d's Providence; the revelation at Sinai; creation vs. evolution; the purpose of the creation of the universe; the purpose of human life; the cosmo-theological order of the universe; the role of the law in the cosmo-theological order; the effect of theology on the law; the interrelation between law, religion and ethics, and the obligation to imitate Divine attributes, such as, loving kindness, compassion, holiness and humility.

Conclusion

In conclusion, I would like to point out that the introduction of religious perspectives and general religious values in the study of the law may benefit the students in many ways, including in their legal careers.

The legal profession does not have the reputation of a profession of a high ethical standard. Lawyers are frequently engaged in disputes and clashes among parties, involving intrigue, trickery and deception.

Human nature, in itself, and even a good education, may not be sufficient to prevent a lawyer from getting involved in those unethical deeds. Religious values may provide law students with a new perspective and an additional tool in dealing with those difficult situations.



Mr. Abraham D. Foxman, National Director of the Anti-Defamation League, receiving an award from Touro Law School, flanked by Dr. Bernard Lander, President of Touro College (left) and Dean Howard Glickstein.

ADL National Director Abraham D. Foxman, speaking at Touro Law Center.

ADL National Director Abraham D. Foxman and Professor Chaim Povarsky engaged in a conversation during a reception in honor of Mr. Foxman.

The Honorable Richard J. Goldstone, Justice of the Constitutional Court of South Africa, speaking at Touro Law Center in April 2002. Justice Goldstone was invited to the law school as Distinguished Jurist in Residence, and among other programs, he attended and addressed the Jewish law class.

**THE LILLIE GOLDSTEIN MOBILE
JUDAICA COLLECTION**

Touro Law Center's Lillie Goldstein Mobile Judaica Collection
is available as a loan to law schools for
fall 2003 and spring 2004

Law Schools in the United States that wish to borrow the
collection are advised to contact Touro Law Center

For more information and for a subscription to the Mobile
Judaica Collection, see page 42.

*The Honorable Richard J. Goldstone, Justice of the Constitutional Court of South Africa,
accepting an award from Dean Howard Glickstein (see p. 55).*



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