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## **Institute of Jewish Law**

# **Jewish Law Report**

**Editor: Dr. Chaim Povarsky**

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### **The Status of Jerusalem: A Jewish and International Legal and Political Perspective (Symposium)**

#### **Dean Howard Glickstein:**

Good evening everyone. My function here tonight is to welcome you to this program sponsored by our Institute of Jewish Law. I am Howard Glickstein, the Dean of the Law School. I think that if we were to make a list of some of the most significant international issues facing the world today, one of them would be the status of Jerusalem. We have a program tonight that could not be more relevant to some of the critical and important issues facing the world today. And I think we have a uniquely qualified panel to speak to us.

At the outset, I want to thank The Lilly Goldstein Charitable Trust, an organization that has provided funds to our Institute of Jewish Law, to make many of these programs possible, and we appreciate their generosity over the years. Our speakers include Dr. Chaim Povarsky, the director of the Institute of Jewish Law, which is one of the important organizations

within the law school. The Institute sponsors programs such as this one, and a publication, the Jewish Law Report, which comes out periodically, and, through the efforts of Dr. Povarsky, has encouraged the teaching of Jewish law in law schools throughout the country by providing materials to interested teachers. Indeed, the teaching of Jewish law has skyrocketed in American law schools since Dr. Povarsky's arrival at Touro.

We are very appreciative that Mr. Tal Becker, the legal advisor to the Israeli mission to the United Nations, has come. We appreciate his taking time out from his busy schedule to speak at this symposium. We are also delighted to have Professor Harry Reicher, who teaches at the University of Pennsylvania. My nephew who graduated from the University of Pennsylvania Law School had Professor Reicher for a course on the Holocaust and the Law. He thought it was one of the best courses he took in law school.

I would like to introduce our moderator for the evening, Professor Ilene Barshay, who has been at the law school for about ten years. She is the Chair of our Jewish Programs Committee, and one of our very effective and beloved teachers.

**Professor Ilene Barshay:**

Thank you, Dean Glickstein. My job this evening is to make the introductions and to moderate. But before I do that I would just like to share some thoughts about Jewish law. Since Professor Chaim Povarsky asked me several weeks ago if I would participate in this symposium, I have been thinking about the topic and would like to share some observations that will help to place our speakers' presentations into perspective.

Three of the world's major religions were born in Jerusalem, became associated with Jerusalem or were drawn to Jerusalem, one way or another. King David built the first Jewish kingdom in Jerusalem. According to the Christian faith, Jesus spent the final hours of his life there. And according to Islam, Mohammed dreamt that he ascended from Jerusalem to the heavens. Thus, it seems as if these three major faiths have a stake in the future of the holy city.

The Talmud says that the creation of the world began in Jerusalem, and that when we see Jerusalem for the first time we should tear our clothes out of mourning, and then when we see the ruins of the Temple we should tear them again. According to Kabala (Jewish mysticism), when G-d will return to Jerusalem the entire world will regain its stability. Today, Jerusalem is a bustling international city made up of a variety of

people. There are Jews of a hundred and four different backgrounds. There are Christians of forty different denominations and there are Arabs and there are Kurds. It has universities, concert halls, shopping malls, parks, tree-lined streets and religious sites. Actually, its population is six hundred thirty-three thousand people, and two-thirds of that population are Jewish.

When interviewing different people with different perspectives in Jerusalem, Zubin Mehta, who is the music director and conductor for life of the Israel Philharmonic Orchestra, has been quoted as saying that Jerusalem is going through one of its most difficult periods, almost as difficult as the Crusades. Jerusalem today is almost in a state of war. Different people that live there are not mixing, not rubbing shoulders on the street as they did for many years, but he believes these troubles are temporary.

Rabbi Adin Steinzaltz, a scholar with whom most of you are familiar, writes that from Jacob's dream through the present, Jerusalem has always represented heaven and earth. This is a place where the sublime is in constant contact with the mundane, and we know that as well. Teddy Kollek who served as Mayor of Jerusalem for twenty-eight years simply says that peace will come to Jerusalem for sure in five or six generations. And Elie Wiesel says that Jerusalem is the place that pulls Jews together, the true city of eternal longing and promise.

However, it is well established that since Jerusalem is a holy place for Muslims as well as for Jews it would be a betrayal for some of the Islamic faith to accept Israel's sovereignty over the holy city. On the other hand, Shaykh Professor Abdul Hadi Palazzi, Secretary General of the Italian Muslim Association, writes that the idea of Islam as a factor that prevents Arabs from recognizing any sovereign right of Israel over Jerusalem is quite recent, and can by no means be found in Islamic classical sources.

The Koran and the Torah indicate quite clearly that the links between Jews and the land of Israel do not depend on any kind of colonization or invasion, but directly on the will of the Almighty. Actually, the Koran openly refers to the reinstatement of the children of Israel in the land before the last judgment, and, thereafter, the children of Israel "shall dwell securely in the promised land." So, there are mixed messages here.

For many of us who are Jewish and many of us who are not Jewish, Jerusalem in one way or another has played a part in our lives. The story of Hanukah, the story of the Macabees, takes place in the holy city of Jerusalem. Breaking a glass at a wedding ceremony expresses the

pain of a broken people who do not have Jerusalem. Each year on Tisah be'Ov (the ninth day of the Jewish month of Ov) we mourn the destruction of Jerusalem, and at Passover we end our traditional Seder with the prayer to celebrate next year in Jerusalem. I am sure that this evening we are going to learn a great deal about how all of these thoughts fit in with the status of Jerusalem.

Our first speaker will be our own Professor Chaim Povarsky, who is the director of the Jewish Law Institute. Professor Povarsky has his law degree from Hebrew University, an LL.M with highest honors from Tel Aviv University and a JSD doctorate from Tel Aviv University as well. He is an ordained rabbi who has won many awards, including the fellowship granted by the Memorial Foundation for Jewish Culture, and the Silberg prize granted by the Israeli Supreme Court. He currently teaches Jurisprudence, Jewish Law and Jewish Legal Philosophy here at Touro. He has also served as the chairman of the executive committee of the worldwide Jewish Law Association.

Dr. Povarsky is the author of many articles, some of them related to Israel and the land of Israel, such as "The Land for Peace Treaty Between Israel and the Palestinians," "The Law of the Pursuer and the Assassination of Prime Minister Rabin," and "The Roots of Jewish Exile from Egypt and Edom." He has also published many notes and articles in the Jewish Law Report, the publication of the Institute of Jewish Law. It is indeed my privilege to introduce Professor Povarsky.

### **Professor Chaim Povarsky:**

Thank you, Ilene. Good evening. It is my pleasure to open the discussion on the status of Jerusalem. My presentation will focus on the old city of Jerusalem, which is a subject of dispute between Israel and the Palestinians. I will not discuss the relatively new city of Jerusalem, known as West Jerusalem, which is predominantly Jewish and has always been under Israeli control. I will refer to the old city of Jerusalem as "the old city," or "the city," or simply Jerusalem.

The question as to the status of Jerusalem has been on the agenda of the international community for many decades. However, since 1992, when the Oslo agreement between Israel and the Palestinians was signed, it became a hot political issue and one of the major obstacles to the peace process between Israel and the Palestinians. It is not just a territorial issue, but it is much more complicated. Each party claims Jerusalem to be its capital, or its future capital. And what complicates the issue even more is that it is not just a political issue, it is a highly emotional and sensitive issue involving national aspirations, deep religious sentiments and long

historical ties. The claims of both parties to sovereignty over Jerusalem are based, to a great extent, on the history of the city. Therefore, I believe, it would be appropriate to outline briefly the history of Jerusalem and draw certain conclusions from it.

Three thousand years ago, King David conquered the city and turned it into the eternal capital of Israel. Not only David made it the capital of Israel, but also G-d Himself chose Jerusalem as the capital of Israel. When G-d informed King Solomon that he was going to rip apart his kingdom and give part of it to someone else, He promised him that one part (Judah), including Jerusalem, would remain in the hands of his son. G-d said to him, “Nevertheless, I will not rip away all the kingdom, but will give one tribe to your son, for David my servant’s sake, and for the sake of *Jerusalem which I have chosen*” (I Kings 11:13) (emphasis added). It appears that G-d chose Jerusalem as His city and as the capital of David’s kingdom and dynasty.

Jerusalem served as the capital of Israel for more than eleven hundred years until the second century C.E. Although during that period, Jerusalem and the entire country were sometimes subject to foreign regimes, such as the Babylonians, the Persians, the Greeks and the Romans, it remained the capital of Israel.

In the second century, Jerusalem was destroyed by the Romans in reaction to the failed, so called, “Bar Kochva Uprising” (named after Bar Kochva, the leader of the rebels). The Romans built a new wall around Jerusalem and changed its name to Alia-Capitalonia. The Jewish people were not allowed to live in the city. Also, in an effort to destroy the identity of the Jewish state, the Romans changed its name from Israel to Palestine. However, the Jewish people continued to call their capital “Jerusalem,” and their land - “The Land of Israel,” for all generations to come. I will refer to Palestine as the Land of Israel.

It is interesting to note that the Land of Israel flourished and prospered only when the Jewish people inhabited it; when they were expelled from the land it became desolate and turned into a wilderness. Even when others tried to settle and cultivate the land it remained infertile and unproductive, filled with swamps and insects carrying malaria and other contagious diseases. According to the Bible and early authorities, this remarkable phenomenon was part of G-d’s plan to keep other nations away from the land.

When G-d warned the Jewish people about the dire consequences of disobeying His commandments, G-d added: “I will make the land desolate, and your foes that dwell upon it will be desolate.” Sifra (a third century commentary on the Torah) explains, “This is a positive measure;

so the Jewish people will not say, 'since we were exiled from our land, now the enemies would come and benefit from it,' therefore it is said, 'and your foes who dwell upon it will be desolate,' that is the enemies who will come [to the land] would not find satisfaction in the land." (Sifra, Leviticus 26:38.)

The prohibition imposed by the Romans on the residence of Jewish people in Jerusalem was in effect for over two hundred years until the fourth century, when Julian the Apostate allowed the Jews to resettle in Jerusalem. In the beginning of the seventh century, Jerusalem was conquered by the Persians who expelled the Jews from the city. It should be noted that Jerusalem was always inhabited by the Jewish people, except for the periods it was conquered by other nations that did not allow the Jewish people to live in the city. But once the prohibition was removed the Jews have always returned to the city.

In the seventh century, the Islamic religion was established. The Muslims conquered Jerusalem, as part of their effort to spread their religion by conquering the entire ancient world. The Muslims allowed the Jewish people to return to the city. At the end of the seventh century, the Muslims built the Dome of the Rock on the Temple Mount, and in the beginning of the eighth century they built the El-Aqsa mosque on the Temple Mount. Because of these mosques, which are still there, as well as the Muslims' belief that Mohammed ascended to heaven from the Dome of the Rock, Jerusalem is considered the third holiest city for the Muslims after Mecca and Medina in Saudi Arabia.

At the beginning of the eleventh century, the Muslims destroyed the synagogues and the churches in the city. At the end of the eleventh century, the Christian crusaders conquered the city from the Muslims and established what is called the "Kingdom of Jerusalem," which lasted for ninety years. At the end of the twelfth century, Salah-a din, a Kurdish Muslim general, captured the city from the crusaders and allowed the Jewish people to return to it. And from the twelfth century on, the population of the Jewish people in Jerusalem and in the Land of Israel in general kept growing steadily.

In the 12<sup>th</sup> and 13<sup>th</sup> Centuries distinguished Spanish Rabbis came to Jerusalem; among them were Rabbi Moshe ben Maimon (Maimonides), Rabbi Yehuda Halevi, and Rabbi Moshe ben Nachman (Nachmonides). Also, in the 13th century 300 English and French Rabbis settled in Jerusalem. During that period, different Asiatic tribes, such as Tartars, Mongols, Mamelukes and the Ottomans, ruled over Jerusalem at different times. Most notably among them were the Ottoman Turks, who in 1517 conquered the land and the city of Jerusalem, along with many other

countries in the Middle East, and ruled over the region for four hundred years until 1917, about the end of the First World War.

The Jewish population in the city and in the land in general continued to grow during that period. Jerusalem was at that time divided into four quarters: the Jewish quarter, the Islamic quarter, the Christian quarter and the Armenian quarter. In 1860, the first Jewish settlement outside the walls was built. Since then, West Jerusalem grew rapidly, and exceeded by far the old city.

In 1917, toward the end of the First World War, Great Britain conquered large parts of the Ottoman Empire, including the Land of Israel and Jerusalem, and ruled over those territories based upon a mandate it received from the League of Nations, which was succeeded by the United Nations. In 1947, the United Nations presented the Partition Plan, according to which the land was to be divided between the Jews and the Palestinians. The Jewish people accepted the plan, but the Palestinians rejected it.

In 1948, Ben-Gurion, the Jewish political leader, declared the establishment of the State of Israel with Jerusalem as its capital. In response, seven Arab countries attacked the newly established Jewish state, determined to destroy it. Miraculously, the tiny state of Israel with its small population, many of them Holocaust survivors, defeated their numerous and heavily armed enemies. After the war, the Land of Israel was divided among Israel, Egypt and Jordan. Israel occupied most of the land, Jordan occupied what is known as the West Bank, and Egypt occupied the Gaza Strip.

West Jerusalem remained in the hands of Israel and became its capital while the Jordanians occupied the old city of Jerusalem. The Jordanians took the Jewish people, who lived in the Jewish quarter of the old city, into captivity. In 1950, Jordan annexed the West Bank, including the old city of Jerusalem. Although in an armistice agreement the Jordanians agreed to allow all members of other religions to visit their holy sites in the old city, they did not keep their promise, and the Jewish people were barred from visiting their holy sites in the old city until 1967, when it was conquered by Israel.

In 1964, the Palestinian Liberation Organization (P.L.O.) was established. Its goal, as stated in its national charter, was to destroy the State of Israel and establish a Palestinian state over the entire Land of Israel. The P.L.O. began a series of attacks on Israel. P.L.O. terrorists from the West Bank and Gaza would cross the border to Israel and indiscriminately kill Jewish civilians, including women and children.

In 1967, the Six-Day-War, which was initiated and coordinated by Egypt, Jordan and Syria, threatened the very existence of the State of Israel and of its Jewish population. Miraculously, the war ended with a remarkable Israeli victory, in which Israel conquered from the Jordanians the entire West Bank, including the old city of Jerusalem. In 1980 Israel extended its law to apply to the old city, and thus the old city has been restored to its historical status as the capital of Israel, and became part of the larger capital, which now included west and east Jerusalem. In 1988 Jordan renounced its claims of sovereignty over the West Bank, including Jerusalem.

A number of conclusions may be drawn from the history of Jerusalem. First, as you may have noticed, throughout its history Jerusalem has never been the capital of any state other than the state of Israel, perhaps except for the twelfth century when it was part of the so called "Kingdom of Jerusalem." Second, whereas for Christians and Muslims the old city was significant only as a religious site, for the Jewish people the significance of Jerusalem throughout its entire history was based on both religious and national ties and aspirations. Jerusalem has always been regarded by the Jewish people, and until the current Israeli-Palestinian dispute also by the world, as the capital of Israel.

Third, although the Romans called the land of Israel Palestine, there has never been a Palestinian state. The territory called Palestine was inhabited for the past thousand years by different ethnic and religious groups of people, such as Arabs, Jews, Christians and Armenians, who were living in the land under the rule of various conquerors. Jordan and Iraq did not exist in those days, and the Arabs who lived in all of those lands were members of the same nation, the Arab nation, as they consider themselves even today. There was no difference between the Arabs who lived in Palestine and the Arabs who lived in Jordan or Iraq. Great Britain and France, which ruled over the territories they had conquered from Turkey, determined the territorial divisions among the various states that exist today in the Middle East.

Thus, in 1967, when Israel conquered the old city, it did not take it from Palestine, but rather from Jordan, which captured it in 1948 along with the West Bank, at the end of the British mandate. Jordan, which initiated the 1948 war against Israel together with the other Arab countries, had no right to Jerusalem and the West Bank. And thus, after it was attacked in 1967, Israel was entitled to reclaim its capital Jerusalem, as well as the other parts of the West Bank.

Fourth, although for many years the Jewish population in the old city, as well as in the Land of Israel in general, was a minority, the Jewish people have never abandoned Jerusalem and the Land of Israel

voluntarily. Except for certain periods when they were expelled from the city, Jewish people have always lived in Jerusalem.

I mentioned earlier that the dispute between Israel and the Palestinians over Jerusalem is also a highly emotional issue. Generally, the citizens of most nations feel deep sentiments about their capitals. However, the emotions the entire Jewish nation has felt toward Jerusalem, even while most of the nation was separated from their homeland, are unprecedented. Because of the long historical, religious and national ties between the Jewish people and Jerusalem, the city became part of Jewish life in many respects; it penetrated deep into the souls and hearts of the people, and just mentioning Jerusalem would fill the heart of every true Jew with deep emotions and longing.

Perhaps the most profound emotions toward Jerusalem were expressed by King David in the Book of Psalms, as follows: “If I forget you O Jerusalem, let my right hand forget its cunning; if I do not remember thee, let my tongue cleave to the roof of my mouth; if I do not set Jerusalem above my highest joy”(Psalms 137:5). In another context, when King David approaches Jerusalem, his emotions overflow, and he says:

I was glad when they said to me, let us go into the house of the Lord; when our feet stood within thy gates. O Jerusalem, O Jerusalem, built as a city that is compact together. There the tribes used to go up, the tribes of the Lord, an appointed practice for Israel, to give thanks to the name of the Lord.... Pray for the peace of Jerusalem; they who love thee shall prosper; peace be within thy walls and prosperity within thy palaces; for my brethren and companions' sake I will now say, peace be within thee; for the sake of the house of the Lord our G-d I will seek thy good (Psalms 122:1-9).

One of the great Jewish liturgical poets in the twelfth century, Rabbi Judah Halevi, who lived in Spain and was yearning for Israel and for Jerusalem, writes as follows:

My heart is in the east (Jerusalem) and I am in the west (Spain)... My heart [longs] for G-d's Temple, and before G-d I long intensely.... For there the divine presence resides.... You are the royal palace and you are G-d's throne of glory... Who shall make me wings, so that I might wander far away, I would cause my shattered heart to wander amidst your shattered ruins; I would fall on my face upon your soil and intensely cherish your stones and favor your dust... How can food and drink taste pleasant to me, when I witness the dogs dragging away your leonine youth?...

Jerusalem has always been the aspiration of the Jewish people, as is demonstrated in their prayers. Jewish people pray three times a day in

the direction of Jerusalem. The prayer includes a special reference to Jerusalem:

And to Jerusalem, Your city, may You (G-d) return in compassion, and You may rest within it as You have spoken. And You may rebuild it soon in our days as an eternal structure, and may You speedily establish the throne of Your servant David within it.”

A similar prayer may be found in the grace after meals. Also, as Ilene mentioned, for thousands of years Jewish people sing at the end of the Passover, as well as at the end of the holiest day of Yom Kippur, the following song: “Next year in Jerusalem, next year in the rebuilt Jerusalem.”

Jerusalem was the location not only of the king and government of Israel, but also of its legislature and judiciary. The Great Sanhedrin, which was both the legislature and the supreme court, was located on the Temple Mount in Jerusalem, which was the basis of its authority. According to the Talmud there were one hundred and ninety-four tribunals in Jerusalem, and a similar number of synagogues. In addition, Jerusalem was the social center of the nation; it unified all of the tribes of Israel, who lived in different regions of the country. Three times a year, during the holidays, multitudes of people from different tribes throughout the country would come to Jerusalem to celebrate the holiday in the city, as the Torah requires.

But perhaps the most significant feature of Jerusalem is its holiness. Jerusalem is the holiest city of the Jewish people, primarily because the Holy Temple was located on the Temple Mount in the old city. The Bible refers to the Temple as the House of G-d. When the Jewish people came out of Egypt and wandered in the wilderness, G-d ordered them to build the Tabernacle, which was a temporary sanctuary. G-d said, “Let them make me a sanctuary, so that I may dwell among them.” Thus, the Tabernacle and later the Temple were the House of G-d.

Likewise, when King Solomon completed the construction of the Holy Temple he prayed to God and said: “I have surely built Thee a house to dwell in, a settled place for Thee to abide in forever” (I Kings 8:13). Not only the Jewish people regarded the Temple as the House of G-d; also other nations did so. When King Solomon completed the building of the Temple he prayed to God and said: “Moreover, concerning a stranger who is not of thy people, Israel, but comes out of a far country for thy name’s sake... When he shall come and pray towards this house, hear thou in heaven, thy dwelling place, and do according to all that the stranger calls to thee for.” And, indeed many gentiles came to the Holy Temple to pray;

thus, it was the House of God not only for the Jewish people, but for others as well.

Jerusalem was holy not only because of the Temple, but also in its own merits. There are many laws that reflect the holiness of the city. I will mention just a few of them (for a complete list of laws that apply to Jerusalem based on its special holiness, see Maimonides, *Mishneh Torah*, The Book of Worship, The Laws of the Temple 7:14). As you know, people used to bring sacrificial offerings to the Temple. The owners of some of those offerings were allowed to eat them (except for the parts that were burned on the Altar). Because the offerings were sacred, they could not be taken out of Jerusalem, but rather had to be eaten in the city, which indicated the holiness of the city.

Also, because of the holiness of the city it is prohibited to leave the dead in Jerusalem overnight, but rather they must be buried on the same day they died, or must be taken out of the city (*see* Bava Kamma 82b). Likewise, with some exceptions it is prohibited to bury the dead in Jerusalem (*see* Tosefta, Smachot ch.14; Tosefta Megila 1:7). These laws, as well as many others, demonstrate the holiness of the city of Jerusalem.

According to Maimonides, the holiness of Jerusalem was permanently established when Joshua conquered the land in approximately 1300 B.C.E. It retained its holiness even when other nations conquered the land, and drove the Jewish people out of their home. Although the Land of Israel lost its sanctity during the seventy years the country was under the Babylonian occupation, Jerusalem retained its holiness. Maimonides explains that the sanctity of the land derived from its conquest by Joshua; therefore when the Jews were not in control of the land anymore the holiness was gone. The sanctity of Jerusalem, however, derived from the presence of G-d's spirit (the *Shechina*) in the city, which has never left the city (Maimonides, *Mishneh Torah*, The Book of Worship, The Laws of the Temple 6:16).

Not all commentators agree with Maimonides regarding the continuous sanctity of Jerusalem even during the conquest of the land by the Babylonians, or even later (*see, e.g.,* Rabad's glosses on Maimonides, *ibid.*); however, they may agree with him that G-d's spirit (the *Shechina*) has never left Jerusalem.

It is important to note that the high level of holiness and the religious significance of Jerusalem apply only to the old city of Jerusalem, which was surrounded by walls at the time of King David and King Solomon. West Jerusalem, which was built by the Jewish people over the past two centuries outside the walls of Jerusalem, does not have the

special holiness and religious significance of the old city, rather, as far as holiness and religious significance are concerned, it is regarded just as the rest of the Land of Israel, which is also holy, but on a lower level (*see e.g.*, B. Talmud Mackot 12a; Tosafot, Shavuot 15b, *s.v. amtu*).

Enlarging the city of Jerusalem and extending its sanctity to include the new sections of the city would require the approval of the Jewish king (or government), a prophet, the *Urim ve'Tumim* and the Great Sanhedrin consisting of seventy-one members (*see* Maimonides, Mishneh Torah, The Book of Worship, The Laws of the Holy Temple 6:11). Since there have not been prophets, *Urim ve'Tumim* as well as the Great Sanhedrin for thousands of years, any addition to the old city of Jerusalem that was built during the past 2500 years could not obtain the special holiness and religious significance of Jerusalem. Thus, surrendering the old city of Jerusalem to the Palestinians actually means surrendering the entire holy city of Jerusalem, as well as the entire ancient capital of Israel.

The issues we discussed so far, including the history of Jerusalem, the emotional and social factors, as well as the special holiness of the city, may explain the strong and inseparable ties between the Jewish people and the city from a Jewish religious and national perspective. Other aspects and events, such as the history of the city from an Israeli and international perspective, the significance of the occupation of the land by Israel for thousand of years without ever willfully abandoning it, the significance of the occupation of the city over the years by different regimes, the status of the Palestinians as a nation and a legal entity, the significance of the occupation of the city by Jordan until 1967, the international interests in the city, the demographic structure of Jerusalem, its many religious sites, and its geographic location today as part of the greater Jerusalem, as well as the Arab aggression against the State of Israel since its creation in 1948, especially the Six-Day War (including constant shooting by Arabs from the walls of the old city into West Jerusalem, prior to the Six-Day War), may perhaps affect the status of Jerusalem, its occupation by Israel and its unification with the western part of the city, as the capital of Israel from an international legal perspective. However, I will leave discussion of these issues to our two other speakers.

From a Jewish religious and legal perspective, the claim of Israel to Jerusalem is based primarily on the rights of the Jewish people to the entire Land of Israel, given to them by G-d. Scripture relates that G-d ordered Abraham, the forefather of the Jewish nation, to go to the land of Canaan, and upon arrival G-d promised him, "To your offspring I will give this land" (Genesis 12:7). And again, after Abraham separated from Lot, his nephew, G-d said to him, "Raise now your eyes, and look out from where you are: northward, southward, eastward and westward. For all the land that you see, to you will I give it and to your descendants

forever” (Genesis 13: 14-15). And later when G-d made a covenant with Abraham, He repeated His promise, as Scripture relates, “On that day G-d made a covenant with Abraham, saying, ‘To your descendants have I given this land, from the river of Egypt to the great river, the Euphrates river” (Genesis 15:18).

Although the Jewish and the Arab peoples are both descendants of Abraham from his two children, Isaac and Ishmael, G-d made it clear that the land will go to Isaac’s children, the forefather of the Jewish people. When G-d told Abraham to drive out his son Ishmael from his house for his misbehavior, He said to him: “Be not distressed over the youth of the slave woman (Hagar, the mother of Ishmael); whatever Sarah (Isaac’s mother) tells you heed her voice, since through Isaac will offspring be considered yours” (Genesis 21:12). And God repeated that promise to Isaac, when He said to him, “Sojourn in this land, and I will be with you and bless you; for to you and your offspring will I give all these lands, and establish the oath that I swore to Abraham your father” (Genesis 26:3).

G-d also made this promise to Jacob, the son of Isaac and the father of the twelve tribes of Israel. Scripture says, “And behold, G-d was standing over him (Jacob), and He said, ‘I am G-d, G-d of Abraham thy father (grandfather), and G-d of Isaac; the ground upon which you are lying, to you will I give it and to your descendants’” (Genesis 28:13). Likewise, later on, when the Jewish people, the descendants of Abraham, Isaac and Jacob, were enslaved in Egypt, G-d sent Moses to deliver to the Jewish people the following message,

I am G-d, and I shall take you out under the burden of Egypt... and I shall bring you to the land about which I raised my hand (swore) to give it to Abraham, Isaac and Jacob, and I shall give it to you as a heritage (Exodus 6:6-8).

G-d indeed took the Jewish people and brought them to the Land of Israel which He promised to their forefathers. As I mentioned earlier, in their long history, the Jewish people were expelled several times from their land, but that was not because G-d backed out of His promise, but rather, as Scripture describes, the expulsions were a result of the people’s sins, and G-d assures the Jewish people that eventually, after they will be punished and repent, He will return them to the land. For instance, Scripture quotes G-d saying to the Jewish people:

But if you will not listen to me, and will not perform all these commandments; if you consider my decrees loathsome and if your being rejects my ordinances... so that you annul My covenant; then I will do the same to you; I will assign upon you panic, swelling lesions and burning fever... and you will sow your seeds in vain, for your enemies will eat it... And you I will scatter among the nations; I will unsheathe the sword after

you, and your land will be desolate and your cities will be a ruin... Perhaps then their unfeeling heart will be humbled, and then they will gain appeasement; I will remember My covenant with Jacob and also My covenant with Isaac, and also My covenant with Abraham, and I will remember the land... (Leviticus 26:14-16, 33, 41-42).

And in another context Scripture says:

It will be that when all these things come upon you – the blessings and the curse that I have presented before you – then you will take it to your heart among all the nations where the Lord, your G-d, has dispersed you, and you will return unto the Lord, your G-d, and listen to His voice, according to everything that I command you today, you and your children, with all your heart and all your soul; then, the Lord, your G-d, will bring back your captivity, and have mercy upon you, and He will gather you in from all the nations to which the Lord, your G-d, has scattered you” (Deuteronomy 30:1-3).

That promise was realized at least twice in the Jewish history. The first time was in the fourth century, B.C.E., when the Jewish people returned to Israel after the destruction of the first Temple and seventy years of exile in Babylon. The second time was in the 20<sup>th</sup> century when the Jewish people returned to the Land of Israel after a long exile among many nations for nineteen Centuries, starting with destruction of the second Temple by the Romans in the first century, C.E. In both cases, the return of the Jewish people to Israel was a slow process, but each time they rebuilt their state with its capital Jerusalem.

But not only do the Jewish people have a biblical right to the Land of Israel and Jerusalem, they also have a duty to possess the land and settle there, as Scripture prescribes, “And you shall possess the land and settle in it, for to you have I given you the land to possess it” (Numbers 33:53). And again, “Behold, the Lord thy G-d has placed the land before you, go up and possess it, as the Lord, G-d of thy forefathers, has spoken to you. Do not fear and do not lose resolve” (Deuteronomy 1:21). When Moses died and his disciple Joshua became the leader of the Jewish people, G-d said to him, “Moses my servant is dead; now therefore arise, go over the Jordan [river], you and all this people, to the land which I give them, the children of Israel. Every place that the sole of your foot will tread upon—that I have given to you, as I said to Moses... Be strong and courageous, for you will cause this people to inherit the land which I swore to their fathers to give them” (Joshua 1:2-6).

An indication of G-d’s disapproval of surrendering part of the holy land to foreigners may be found in *Midrash Rabba* (an early commentary on the Torah), which discusses the biblical story of Lot and his uncle, Abraham (Genesis 13:7-12). When a dispute broke out among their

shepherds over grazing land, Abraham suggested to his nephew to separate and choose any piece of land for himself. Lot chose the plain of the Jordan River, which was well watered. *Midrash Rabba* notes that G-d was displeased with Abraham, saying, "I told him [Abraham] that I gave the land to his children, and he designates Lot, his nephew, as his heir" (*See Midrash Rabba*, Genesis 41:11). This clearly indicates that surrendering of any part of the Land of Israel is, at the very least, inappropriate, if not prohibited.

Early authorities debated whether the biblical commandment to the Jewish people to conquer the land still applies today (See, e.g., Ramban's glosses on Mamonides' *Sefer Hamitzvot*, Commandment #4). It would appear that the debate concerns conquering the land; however, it is agreed that the Jewish people are not allowed to surrender voluntarily any part of the land. One of the arguments in support of the view that the conquest commandment does not apply today is based upon the oath that the Jewish people took in the Babylonian exile after the destruction of the first Temple. According to the Talmud, the Jewish people swore at that time never to conquer the land by force and never to rebel against any other nations (*see* B. Talmud, Ketubot 141a).

Does it mean that the Jewish people today are not allowed to take possession of any part of the land and settle there? Rabbi Shimshon ben Shimon (descendant of Ramban, known as Rashbash) suggested that according to Ramban, who holds that the conquest commandment applies today, the oath only prohibits a forcible conquest of the land by the public. However, it does not prohibit individuals from taking possession of the land and settling there (*see Responsa Rashbash*, ch. 1,2, and 3). This is apparently also Rashi's understanding. Rashi interpreted the oath "not to go up the wall," to mean "not to go up together by force" (Rashi, Ketubot 111a, *s.v. Shelo*), implying that individuals may take possession of the land.

As to the application of the oath to the current situation in Israel, at first glance it would appear that since Israel is acting as a nation and by force, the oath should apply and the conquest of the land should be prohibited. Contemporary scholars have suggested a number of arguments why the oath should not apply today. First, the 1917 Balfour Declaration authorized the Jewish people to establish their homeland in the land of Israel. Second, according to the United Nation's 1947 Partition Plan the land was to be divided between the Jews and the Palestinians, giving the Jewish people permission to establish their own state. And third, the termination in 1948 of the British Mandate over the land created a political vacuum, which the Jewish people were allowed under the oath to fill and establish their state.

According to those scholars, because England and the international community have given permission to the Jewish people to establish a Jewish state, and because of the political vacuum left when England's

mandate over the land of Israel expired, the oath did not apply. The situation today, they argue, could be compared with that which existed at the time of Ezra the Scribe (in the fifth century B.C.E.), when the Jewish people returned to Israel from the Babylonian exile, reconquered the land and rebuilt the Holy Temple. The oath did not apply then because Cyrus, the king of Persia, who ruled over the land, gave the Jews a license to return to and rebuild their land. Similarly, in the twentieth century, the Jewish people were given permission from Great Britain and the United Nations to return to their ancient homeland and establish their state (*See, e.g., Rabbi Shlomo Chaim HaCohen Aviner, Clarification of the Prohibition not to Conquer the Land by Force*, 20 Noam 108, 113; Rabbi Shaul Yisraeli, *Ceding the Land of Israel to Non-Jews*, 10 Tehumin 53 (1988/89)).

Those arguments, however, may be challenged. As to the Balfour Declaration, it never materialized. Although the Jewish people continued to immigrate to the Land of Israel, large parts of the land were inhabited by the Palestinians or remained vacant. In the meantime, England changed its policy, and in 1939, it passed laws drastically restricting Jewish immigration and the purchase of land by Jewish people. Some scholars argue that England could not rescind the Balfour Declaration because the Jewish people had already acquired rights over the land based on that declaration. However, the Arabs inhabited most of the Land of Israel at that time, in particular Judea and Samaria, while the Jewish people were a minority. Thus, the Jews did not acquire rights over most of the land, and certainly did not obtain sovereignty over the land.

As to the Partition Plan, it allocated only a small portion of the Land of Israel to the Jewish State, less than the area Israel occupied in 1948. Thus, the oath still applied to most of the land, which was not allocated to the Jews under the plan. Also, the argument that the termination of the British mandate left a vacuum which Israel could fill, has no merits. The land was not left free of foreign rule; rather, in 1948 England turned its mandate over the Land to the United Nations, which was then legally considered the authority and the sovereign.

It is true that shortly after the declaration of independence by Israel most members of the United Nations recognized the new state; however, they did not recognize the borders of the state, which were left to negotiation between the Jews and the Arabs. Furthermore, the recognition did not apply to Judea and Samaria, which were mostly occupied by the Arabs and were not recognized by the nations as part of Israel.

Although the oath may still apply today, it is not relevant to the current Israeli-Palestinian dispute. The problem Israel faces today is not whether to conquer land but rather whether to retain the land it already

possesses. The oath prohibits a forcible conquest of the land; it does not require the surrender of land after it was legally conquered by Israel. The conquest of the land by Israel was a result of the War of Independence and the Six Days War, which were forced upon Israel by Arab aggression, and in the process of self-defense Israel seized the ancient land of Israel. Those actions of self-defense were certainly not prohibited under the oath.

The massive Jewish resettlement in the Land of Israel, which started in the 15th century and continued without interruption until England restricted Jewish immigration and purchase of land in 1939, was a peaceful movement, generally encouraged by the Arabs who lived in the land which was mostly desolate, swampy and malaria stricken. This resettlement was perfectly permissible under the oath.

In conclusion, based upon biblical law, historical facts and deeply rooted national, religious, social and emotional ties, Jerusalem is and will always be part of the Land of Israel and its eternal capital. As we have seen, after the Jewish people lost their sovereignty over the Land of Israel and Jerusalem, no nation has established a viable independent sovereign state in the Land of Israel and Jerusalem, and none except the Jewish nation has any valid claim of sovereignty over Jerusalem. People may have property claims, and religious leaders may have administrative and supervisory claims over religious sites. Those claims, however, may be satisfied, and were satisfied in the past, under the authority and sovereignty of Israel, much better than under any other authority. Thank you.

**Professor Ilene Barshay:**

Thank you, Professor Povarsky. Our next speaker is Professor Harry Reicher, a noted barrister, editor and diplomat who was born in Prague, and grew up in Australia. We are going to have a different kind of an accent now. Professor Reicher, who has taught at many law schools in Australia and here in the United States, is also the Director of International Affairs for the Agudath Israel World Organization, and is its representative to the United Nations.

In this capacity, he has worked on promoting international human rights, particularly freedom of religion. He has also been involved in the effort to protect and preserve Jewish cemeteries and schools in Eastern Europe, and has worked with the Claims Conference and World Jewish Restitution Organization in matters dealing with Holocaust restitution and reparations claims.

Professor Reicher, editor of the first indigenous Australian international law casebook, currently teaches a wide range of courses at

the University of Pennsylvania Law School, including International Human Rights and Law and the Holocaust, the first course of its kind at any law school. He attended law school at Monash University in Melbourne and did post-graduate work at the University of Melbourne and Harvard Law School. Professor Reicher will discuss Jerusalem from an international legal perspective.

**Professor Harry Reicher:**

Thank you, Professor Barshay. Let me say what a pleasure it is to be here at Touro, and see a number of old friends, beginning with Dean Glickstein and members of the faculty. The first time I had the pleasure of speaking here was eight-and-a-half years ago at the invitation of Professor Dan Subotnik, and my topic was Australian corporate taxation. I also want to extend warm appreciation to my neighbor in Flatbush, Professor Chaim Povarsky--we live just a few blocks away from one another, although we never see one another there--for his gracious invitation to participate in tonight's program, an invitation that I accepted with alacrity.

I want to compliment Professor Povarsky on the natural progression of the presentations tonight; the conceptualization of the evening was excellent, beginning with the excellent opening remarks by Professor Barshay, and then Professor Povarsky's historical and theological dimensions, following which we now move to my own dimension, which is international law, and finally Tal Becker, with the political dimension, will bring us back to reality.

My theme is the international law perspective, and while that is of considerable interest, particularly to the law school community, nevertheless it is unfortunate that international law ultimately will not play a major role in the resolution of the problems surrounding Jerusalem, and the different claims to it. The reason for that has been very well articulated, initially by Professor Barshay in her opening, and then in some detail by Professor Povarsky.

The emotions run far too high, because of the theological, ideological, historical, sociological, and other perspectives which all the different protagonists bring to bear on the issue of Jerusalem. Nevertheless, it is interesting, at the very least, to examine the issue from the perspective of international law, and my aim tonight is to trace the history of Jerusalem through the main events in international law, a number of which have already been touched on by Professor Povarsky. What I would like to do, in particular, is to analyze some of the primary documents to see first-hand how that international law perspective has developed. To that end, I have

taken the liberty of making photocopies of some of the major documents, and we will traverse them briefly.

The starting point is the First World War. At that time, the whole of the territory known as Palestine, including Jerusalem, was, as Professor Povarsky pointed out, under the rule of the Ottoman Empire. At that time, 1914, there was no Israel of course, but there was also no Jordan, Syria, Lebanon or Iraq. They were all part of the Ottoman Empire, and on the map on page one we can see a perspective of the territory known as Palestine in 1915. Válayets and Sanjacks are Ottoman administrative units. The only sovereign power that controlled Jerusalem at that time was the Ottoman Empire, the Turks, and certainly there is no such independent, sovereign entity as the state of Palestine.

What happened was, that the Turks entered the First World War, and made two fateful decisions, one of which was arguably correct, and the other indubitably incorrect. The arguably correct decision was to join the First World War, because basically everyone else was in it, so why not them. The indubitably incorrect decision was that they joined on the losing side, and one of the great lessons of history, whether or not you are an international lawyer, is that if you are going to enter a war, get in on the winning side.

Even before the end of the First World War, there was talk about the Ottoman territories, and how they should be carved up after the war was over, and that brings us to the first document in the saga, which is the Balfour Declaration, on page two. This is a copy of the original Balfour Declaration, which is in the British Museum. We have all heard about it, we have all read it no doubt, but this is the actual document itself signed by Lord Alfred Balfour.

The Balfour Declaration is in fact an important red herring in the context of the international law history of Jerusalem. It is a red herring because it had no effect whatsoever on international law, but it is an important red herring for two reasons. First of all, because people think it is important, and secondly, and more importantly, because it was later incorporated and converted into something that was significant in international law, namely, the League of Nations Mandate for Palestine. It is a document that was of no legal significance for two reasons. First of all, it did not even purport in its terms to give the Jews anything. It talked about Britain's viewing with favor the establishment of a Jewish national home, and it went on to talk about England's using its best endeavors: "will use its best endeavors" is the way it was put. Both of those phrases are critical, and both of them indicate that far less than a grant of territory was contemplated, let alone effected, by this document.

The second important reason why it has no effect was that at that time Palestine was not Britain's to give. The Turks had not yet lost the war, and while it was anticipated that the Turks would lose the war, that had not yet happened. The Balfour Declaration was made in the context of discussions between British and the French about how to carve up the Ottoman holdings in the Middle East. Eventually the Turks did lose the war, and the allies took control of Palestine, including Jerusalem. When I talk about Palestine, I mean the territory known as Palestine, as it was referred to in the League of Nations Mandate. The critical point about here is that the acquisition by the victorious allies of Jerusalem, as part of the territory of Palestine, was considered a lawful acquisition under international law as it stood at that time.

Before the First World War, international law viewed war as a legitimate instrument of foreign policy, so a country that coveted its neighbor's land could amass an army, declare war, invade the land and, in the event of victory, claim ownership. That era, referred to by some as "the good old days," was put to an end by the First World War, because immediately after the First World War, beginning with the Covenant of the League of Nations, the international legal system began to whittle away at the unfettered right to wage war, especially aggressive war.

In 1928, over fifty nations signed the Kellogg-Briand Pact, the Treaty of Paris, as it was known, to prohibit waging aggressive war. The process reached its apotheosis in the Charter of the United Nations of 1945, in which Article 2, paragraph 4 expressly outlaws what in colloquial parlance would be termed aggressive warfare. But at the time of the First World War, acquisition of territory by conquest was recognized by international law. In any event, the Allies won control of the territories in a defensive war.

When the Allies gained control over Jerusalem, they promptly handed it over to the League of Nations, which set up a system of mandates. The concept behind this system of trusts was that there were certain territories which had been occupied as colonies by the losers of the First World War, which were not yet ready administratively and politically for independence. The territories would be handed over to some of the great colonial powers, like Britain and France, so that they would be developed under the tutelage of those great powers, and brought to a state where they were administratively and politically ready for independence, and then they would be granted independence.

The League of Nations set up a mandate for the territory of Palestine, including Jerusalem, and that was spelled out in the League of Nations Mandate for Palestine, which is found on page three of the handout. This was the trust, if I can put it in domestic legal terms. As far as we are

concerned, this document has three salient features. The first is that it expressly incorporated the terms of the Balfour Declaration, as seen in particular in the preambular paragraphs in the left hand column, where there is talk of “putting into effect the declaration originally made on November the 2<sup>nd</sup>, 1917, by the Government of His Britannic Majesty, and adopted by the said powers in favor of the establishment in Palestine of a national home for the Jewish people,” etc. And then the declaration is repeated in Article 2, which is the operative provision.

Salient feature number two is, that the only beneficiary of this mandate, of this trust, was the Jewish people. The expressed object of this mandate was the ultimate goal of the establishment of a Jewish national home in Palestine. In other words, there was no other beneficiary named in the mandate, albeit that, and very importantly, provision was made for the civil, political and religious rights of minorities to be respected, but that was as part of the overall scheme of the establishment in the long run of a Jewish national home.

The third salient feature is a curious provision in Article 25, in the third column of page three. It applied to that part of Palestine, which lay on the east bank of the Jordan River; we can see it on the map on page four. The original Mandate for Palestine encompassed both the territory of Israel proper, the West Bank, and also what we now know as Jordan; in the map it is referred to as Trans-Jordan. All of that was part of the original mandate for Palestine. Britain took over the mandate and ran Palestine, but not as sovereign or owner. In addition, France took a mandate over what we know today as Syria and Lebanon.

Britain ran the territory of Palestine solely as mandatory power, acting on behalf of the League of Nations, which had entrusted Britain with the responsibility of bringing the territory of Palestine to the administrative and political condition which would enable independence, and independence in a particular form, namely revolving around the creation of a Jewish national home.

The next step in the chain of title, as it were, is the demise of the League of Nations, and the rise in its place of the United Nations. The United Nations charter set up a trusteeship system, which was the equivalent of the old League of Nations mandate system. The League of Nations transferred the mandate system to the United Nations, which accepted it within the framework of the trusteeship system under the UN charter. Britain, for its part, accepted the oversight of the United Nations in place of the old League of Nations, so that Britain continued to accept its responsibilities, albeit as delegate of the United Nations.

Finally, in 1950 the International Court of Justice affirmed the takeover by the United Nations of the mandate system in the *Southwest Africa* case, which raised questions analogous to those in relation to the mandate for Palestine. In the case of Southwest Africa, the Union of South Africa conducted the mandate on behalf of Britain, and questions arose as to the continuity of that mandate after the demise of the League of Nations, and the rise of the UN in its place. The International Court of Justice affirmed the transfer that I have sketched.

We know that Britain experienced enormous difficulties, to put it mildly, in administering the mandate. In 1947, Britain asked the United Nations to put the question of Palestine on its agenda, and formulate recommendations to Britain, as mandatory/trustee, at that stage, with the view to trying to effect a resolution of the enormous difficulties that Britain was facing.

The UN duly put the issue of Palestine on the agenda of the General Assembly. The General Assembly created a commission on Palestine, called the United Nations Special Commission On Palestine (UNSCOP), which took evidence in the Middle East, in particular, and elsewhere, examined the history, examined all the records that were available, and formulated resolutions and recommendations which were then presented to the General Assembly. The General Assembly adopted the recommendations of UNSCOP, which led to Resolution 181 that recommended two things: first, that the territory of Palestine that was left under the Mandate be partitioned into an Arab state and a Jewish state. Second, so far as is relevant here, it recommended that Jerusalem become a *corpus separatum*, a separate entity, to be administered directly by the United Nations under the trusteeship system.

It is important to bear in mind that the status of Resolution 181 was, and has always remained, in the nature of a recommendation. In other words, under the relevant articles of the United Nation Charter, the General Assembly only has authority to make recommendations, and can, under no circumstances, make binding decisions. The only organ of the United Nations that can make binding decisions is the Security Council. Resolution 181 was accepted by the Jews and rejected by the Arabs. That is of considerable irony, in the light of recent history, although to read the latest documents in the United Nations, coming out of the Committee on the Inalienable Rights of the Palestinians, as it is called, one would be absolutely certain that Resolution 181 was accepted by all sides, and has just been sitting there for over fifty years waiting to be implemented.

Be that as it may, after the Jews accepted Resolution 181, and the Arabs rejected it, we know that Britain withdrew, Israel declared independence, and Israel was invaded by the seven Arab states, as

Professor Povarsky has pointed out, leading to what is known as Israel's War of Independence.

It is important to pause for a moment, because when Israel declared independence, Israel did not "take the territory" from anyone. There was no sovereign power or authority in the territory of Palestine. The last sovereign power was the Turkish Empire; Britain had been administering the territory of Palestine purely and solely as mandatory power, as trustee.

When the dust settled after the Israeli War of Independence a series of armistice agreements resulted in Israel's control of West Jerusalem and Jordan's control of East Jerusalem. On maps five and six we can see a representation of these most recent steps that I have traversed. On page five, we can see how Israel would have looked had the partition plan of Resolution 181 been put into effect, and we see how the Arab state contemplated by that resolution would have looked. We can also see Jerusalem there as a *corpus separatum*, surrounded by the contemplated Arab state. On page six, we can see a comparison of the borders contemplated by the partition resolution and the borders that emerged after the War of Independence. And that basically is the way the borders remained until the Six Day War of 1967.

The point of the map on page six is that it shows that Israel ended up in control of considerably more territory on the West Bank, and in control of West Jerusalem. Those are the two salient features that leap out of this map. The two questions here are: What was Jordan's status in East Jerusalem after the War of Independence, and what was Israel's status under international law in West Jerusalem?

As far as Jordan is concerned, there are two aspects to the answer. The first is that the armistice agreement between Israel and Hashemite Kingdom of Jordan made it absolutely clear that the borders between the two countries were temporary, and were not to be construed as constituting borders agreed to in a final peace treaty. Quite the contrary, it was contemplated that those borders would remain temporary until a peace treaty was entered into between the two countries.

In other words, and this was expressly put into the document, Jordan could not acquire any rights over East Jerusalem as a consequence of the War of Independence and the armistice agreement. That is the first point. The second point is, more generally, that the war in which Jordan acquired the territory of East Jerusalem was a war of aggression; it was Jordan, together with other Arabs states that invaded the nascent state of Israel. And there is a long-standing principle in international law that a wrong cannot give effect to legal rights; or lawful rights cannot arise from a legal wrong. In 1947, without question, a war of aggression was

outlawed under international law. That had been made absolutely clear two years earlier, in the UN Charter, and then at the Nuremberg Trials; therefore, under any view Jordan, having invaded Israel, could not acquire any territory in East Jerusalem.

Notwithstanding this legal obstacle, Jordan annexed East Jerusalem, as part of the West Bank. On page seven, we see a resolution adopted by the House of Deputies of Jordan in 1950, which united the two sides of the Jordan River, resulting in Jordan's dropping the prefixed "trans" from its title. From 1949 until 1967, Jordan controlled East Jerusalem, but under international law could not acquire any lawful rights there. By comparison, Israel took control of West Jerusalem from no sovereign power and, secondly, it did so in the context of a war of self-defense.

It is clear from Article 51 of the United Nations Charter, among many other things, that a war of self-defense is not unlawful. Article 51 expressly reserves to states the right to defend themselves. Consequently, the principle of lawful rights not arising from an unlawful act certainly does not apply in the case of Israel's takeover of West Jerusalem.

The next major step took place in 1967, with the Six Day War, when Israel, as we know, took control of East Jerusalem. The critical point is that, once again from Israel's perspective, this was a war of self-defense, notwithstanding the attempts by the Arab states to portray it as a war of aggression. Israel therefore took East Jerusalem lawfully, from a party that had itself been in possession, but could not acquire any lawful rights. There is a very interesting, and quite seminal piece, that was written by Judge Steven Schwebel, who became President of the International Court of Justice. It was published in 1970, in the American Journal of International Law, and examines the relative rights of aggressors and self-defenders vis-a-vis the acquisition of property. The analysis is clear that if a country acts in self-defense, it can not be said to be acquiring property illegally.

At the very least, the country that acquires territory in the course of a lawful war of self-defense is not obliged under international law, and indeed cannot be expected under international law, to give it back unless and until it is guaranteed peace in a way that will prevent repetition. In other words, the right to self-defense does not expire with the end of the war. The right of self-defense includes taking such steps as are necessary to ensure that there is not a repetition, and in fact that was confirmed by Security Council Resolution 242, which is on page eight. The central point about Resolution 242 which has to be stressed, is that it was accepted by all sides. It was passed unanimously, as we can see, including the positive vote of the Soviet Union, which was the primary backer of the Arab states at that time.

In addition, it has been accepted ever since as the cornerstone of all peace discussions and peace negotiations. When Israel and Egypt signed a peace treaty, the cornerstone was expressed to be Resolution 242. This resolution also lies at the heart of the Oslo agreements between Israel and the PLO, beginning in 1993, and it also lies at the heart of the agreement between Israel and Jordan, establishing peace between those two countries.

There are two central sides or aspects to Resolution 242. Usually, only the first one is mentioned, which requires “withdrawal of Israel armed forces from territories occupied in the recent conflict.” Interestingly and importantly, it doesn’t say “all” territories, and was quite deliberately framed so as not to say all territories. But the second side is “termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace.”

Those two aspects of Resolution 242 are inextricably intertwined. The preambular part says that the establishment of a just and lasting peace in the Middle East should include the application of *both* the following principles: linkage of any withdrawal by Israel to a just and lasting peace, in the terms expressed by subparagraph two. What that means, among other things, is that Israel is not obliged to withdraw from one centimeter of territory unless it is guaranteed genuine peace.

In 1967, Israel extended its law to East Jerusalem. It was done by administrative fiat without specific reference to Jerusalem, as indicated on page nine. On page ten, we can see Israel’s Basic Law regarding Jerusalem, which declared the united Jerusalem, east and west, as the capital of Israel. Certainly, as far as Israel’s internal law is concerned, the basic law on page ten is absolutely valid. The question is, what is its status as far as international law is concerned. On the basis of what we have discussed, what emerges is that, since the end of the First World War, the only state which has been in lawful possession of both parts of Jerusalem, as a sovereign power, is Israel.

Israel is the first state to be in sovereign control of Jerusalem since the Ottomans. What that means is, that there is a very powerful case that Israel is, at the very least, not obliged to move out of any part of Jerusalem until it is guaranteed absolute peace. But, I would go one step further. The theory behind the principle that an aggressor cannot acquire lawful rights is that international law deters aggression by requiring that an aggressor must give back captured territory. The other side of that argument is that a defender that acquires territory should be able to keep it as a deterrent to aggressors. If international law wants to deter aggressors, then one very

effective way of doing that is to say, if you are an aggressor, and you lose territory, it is gone, so think twice about it. That is a logical corollary of the theoretical underpinnings of the principle of international law that I have adumbrated.

But a second point is presented here. When there is talk about Israel giving back East Jerusalem or part of it, the question is, back to whom?" The PLO was not the party in occupation in 1967. During the Six Day War, Israel took control of East Jerusalem from Jordan, which has long relinquished any claim over East Jerusalem and the whole of the West Bank. In any event, as we have seen, Jordan was in occupation of those territories unlawfully. To talk about Israel giving "back" East Jerusalem is a concept that is very difficult to understand in those terms alone.

Let me conclude my presentation by referring to the Israel/PLO peace agreement, in particular, the Declaration of Principles, which contemplated commencement of permanent status negotiations between Israel and the PLO. This provision is found on page thirteen, in subparagraph two. More significantly, subparagraph three states: "It is understood that these negotiations" - that is, permanent status negotiations - "shall cover remaining issues, including Jerusalem."

So, the Rabin Government, in signing these Oslo agreements, apparently put the status of Jerusalem - the permanent status of Jerusalem - on the negotiating table. There is debate about what that really meant; whether it meant the sovereignty of Jerusalem, or whether it meant access to Jerusalem, or whether it meant control over religious sites, and so on. But there it is clear that the "permanent status" of Jerusalem, whatever that means, was put on the negotiating table in the Oslo agreements.

History has probably bypassed the Oslo agreements, but it is interesting in any event to have a look at that provision in light of the excursus that I have developed here about the international law history.

### **Professor Ilene Barshay**

Thank you, Professor Reicher. So far we have had the historical and Jewish legal approach, as well as the international legal approach. It looks to me like we have an open and shut case but that is never the case. So, perhaps before we have questions and answers we will get one more view from our last and final speaker, Mr. Tal Becker. Mr. Becker has a bachelor's degree, a law degree with honors, an LL.M and is pursuing a doctorate at Columbia University. He serves at present as legal advisor to the Permanent Mission of Israel to the United Nations. He has represented

Israel in various United Nations bodies and in a variety of bilateral and multilateral negotiations.

In addition, Mr. Becker was one of the legal advisors to the Israeli delegations throughout negotiations conducted in the context of the Middle East process at Camp David. He has served as assistant legal advisor at the ministry of foreign affairs in Jerusalem and as an international law expert in the military advocate general's office.

Mr. Becker regularly lectures on issues relating to international law and the Middle East and has published several articles on these subjects. He is an active member of the Israel branch of the International Law Association and a member of the committee of experts on the accountability of international organizations of the ILA.

**Tal Becker, Esq.:**

Thank you very much. It is a pleasure to be here for two reasons. First, it is a great pleasure to follow Professor Reicher, because I was a student of his in Australia and he gave me my start in international law. But it is a particularly surreal pleasure for me because I spend my days at the United Nations. The kind of statements we heard first from Professor Povarsky and then Professor Reicher are very rarely, if ever, heard at the United Nations. I am not familiar with a single delegate who would accept the positions presented by those two speakers. So, it is a pleasure for me to be in an environment where I hear these kinds of arguments. I am going to be a little bit more, if I can dare to say, realistic regarding what has been going on with Jerusalem and what was actually discussed in the negotiations on Jerusalem at Camp David.

I am going to briefly look at the negotiations themselves: what happened? What positions did the parties take? Then I am going to conclude with a number of observations which I would like to make about Jerusalem. I have to say that I am going to come across tonight at the other side of the coin, but there is a perspective that is missing here and that is a Palestinian viewpoint.

We are having this lecture on the eve of the of November 29, 2001, which is the anniversary, as you might have noticed from Professor Reicher's presentation, of the Partition Resolution, which suggested the two-state solution. Thus, it is a particularly appropriate time to discuss Jerusalem, even though the chances of Jerusalem's appearing as a subject for negotiations in the near future are rather slim.

Professor Reicher correctly pointed out that the issue of Jerusalem was deferred to the permanent status negotiations. The parties agreed that

the issue of Jerusalem needed to be negotiated and discussed. But under the Oslo process, which commenced in 1993, the parties stipulated that Jerusalem, refugees, borders and some other subjects were just too difficult to deal with at the outset. The rule was: let us build trust between the parties, let us transfer some powers to the Palestinians, let us deal with the less controversial issues, and only afterwards let us come to Jerusalem. There was an agreement more or less that there would not be negotiations with respect to Jerusalem. There were academic circles and different groups, which held back channel discussions with respect to Jerusalem, but nothing formal was discussed.

When it comes to negotiating Jerusalem the only time that the issue has been discussed in depth between the parties, beyond the clear declarative positions, which have been held for years, was at Camp David and a few months thereafter. In that context, it is important to remember that the Camp David negotiations were not intended to be negotiations on a final permanent status agreement, a comprehensive peace settlement. The negotiations were on what was called a “FAPS” - a framework agreement on permanent status and they were only going to deal with some key principles; the details were to be figured out later.

I think as far as we at the Foreign Ministry and those involved in the negotiations were concerned, there are really four aspects to the question of Jerusalem. The first, and the one which has been discussed a lot and which was the focus at Camp David, was the issue of sovereignty, that is the political question as to what should be the status of Jerusalem. We were dealing with this very interesting, symbolic and powerful term “sovereignty” and considering who would have sovereignty over the neighborhoods of Jerusalem, West and East Jerusalem, as well as the question of whether and how there would be any kind of division of sovereignty. But perhaps the primary question was over the holy sites in Jerusalem, particularly the Temple Mount. Now, that is a very loaded question and, as people have mentioned, it is a very emotional because it touches very much on the narrative of both sides to the conflict and on the legitimacy that each side perceives its position to have.

If Palestinian sovereignty in Jerusalem is not recognized, the Palestinians view that as a statement going to the very legitimacy of their cause. Similarly, for Israelis the idea that Jerusalem, with which we have had such a connection over time, and which has been no other state’s capital, should be divided touches a very raw nerve.

But in addition to the sovereignty question, there are other aspects to the negotiations over Jerusalem, which are perhaps a little bit less known. The one people are more familiar with relates to the access to the religious sites and religious worship. There is a very delicate status quo

between different Christian sects, Muslims and Jews as to how the religious sites are administered and what kind of access there is to them.

This aspect was not touched on too much at Camp David even though it is something in which Muslims, Christians and Jews around the world have an interest. The third issue with respect to negotiations which we did not discuss relates to whether Jerusalem could be an open city and what are the implications of that status. The Palestinian position is quite clear. In the negotiations they wanted sovereignty over East Jerusalem including the old city but at the same time they wanted the city to be an open city.

That position has a lot of implications, one of which relates to security. If two states have a border between them, and yet there is a gaping hole, where there is an open city, which is the capital of these two states, then the possibility of security breaches, illegal immigration and other kinds of things comes into play and needs to be considered.

The fourth aspect of negotiations, which is a major concern to residents of Jerusalem, relates to municipal services; that is, day-by-day, who would take care of the population of Jerusalem, particularly if there is going to be some kind of division. For instance, if there is a Jewish house next to a Palestinian house in eastern neighborhoods, would there be a Jewish/Israeli garbage truck to pick up the garbage, and then a Palestinian garbage truck to pick up Palestinian garbage? Would there be shared road services, shared water services, sewage and so on? Now, those questions are mundane, but they are very complicated and took up quite a bit of our time in preparations towards negotiations. These are different aspects of the Jerusalem issue which unfortunately or fortunately, depending on your perspective, never came up in the negotiations.

The main issue, as I said relates to sovereignty, which has emotional, spiritual and political relevance as well. Up until the negotiations took place, the two parties had mutually exclusive positions on this issue. Israel's position was that Jerusalem including East Jerusalem and the old city should be the permanent indivisible capital of the State of Israel, and that there would be no transfer of sovereignty of any part of it.

At the same time, Israel recognized rights to access. As Harry mentioned, there was a position at that time which said: yes, we agreed to negotiate Jerusalem, but we did not mean negotiating dividing Jerusalem. What we meant was to talk about access to religious sites because after all, the argument went, depending on who you are talking to, that the connection of the Palestinians or Arabs to Jerusalem is a religious connection not a political one.

The Palestinian position on the other hand, calls for Palestinian sovereignty at least over East Jerusalem and the Temple Mount with a possibility of some degree of access to the Western Wall for Jewish worshippers. There are certain Palestinian circles which talk about claims on West Jerusalem, but the official negotiating position presented to the Israeli side relates to East Jerusalem. The Palestinian claims to East Jerusalem were based on a number of arguments, drawing - and this might surprise you - on a lot of the documents that Professor Reicher himself presented. They relate to the legitimacy or illegitimacy of those documents, to the principle of the inadmissibility of acquisition of territory by war, even if it is a war of self-defense, and so on. Different kinds of arguments have been raised, but I will not get into the legal claims.

As we approached the permanent status negotiations under the Barak government, Prime Minister Barak was very determined; I think that is the right term, to try to reach an end to the conflict by concluding a permanent status agreement. At that time, there was a gradual shift in Prime Minister Barak's language. In May 2000, just a few months before the permanent status negotiations took place at Camp David, Barak said, and I quote, "only those who do not understand the depth of the total emotional bond of the Jewish people to Jerusalem could possibly entertain the thought that Israel would actually concede even a part of Jerusalem."

That was very much Barak taking the traditional Israeli position. But as we got closer to the Camp David talks Barak's language changed, which indicated that there was some room for movement. Before he boarded the plane on his way to Camp David, Barak said that one of the aims of the negotiations was to secure a Jewish Jerusalem recognized by the international community, larger and more vibrant than any in history. That is a very clever political way of saying something different from the usual statement about Jerusalem within its present municipal borders being the eternal capital of the State of Israel.

Now, just with respect to the issue of recognition I want to make the point that there is no state, including the United States, which recognizes Israel's claim to sovereignty over East Jerusalem. If, on the other hand, in the context of a peace agreement Israel would have sovereignty over East Jerusalem, then I imagine there would be overwhelming international recognition of Israeli sovereignty. That was one of the things Barak was trying to market, that is if there is an agreement then we will have recognition of Jerusalem as the capital of Israel, something which we longed for.

As I said, Camp David was the first attempt to deal in a meaningful way with the issue of Jerusalem, with each party getting beyond the rhetoric and trying to see if there was any room for negotiation. With the

wisdom of hindsight, it is quite easy to say that at the first attempt of dealing with an issue it is a little naive to think that an agreement could be reached, and that two weeks later the principles of an agreement, not just on Jerusalem but on borders, refugees and so on, would be accepted. Nevertheless, the parties made an attempt, leaving the issue of Jerusalem to the last days of the summit as President Clinton came back from his 1998 meeting in Japan.

Because the issue of Jerusalem at the Camp David summit was so sensitive, neither the Palestinians nor the Israelis were able to put out some kind of compromise proposal. It was basically left for President Clinton himself to draw out some kind of parameters for an agreement and then see what the response of each side would be.

Clinton's Camp David proposal basically spoke about the following, and again it only related to the sovereignty issue: Palestinian sovereignty over the Muslim and Christian quarters of the old city; Israeli sovereignty over the Jewish and Armenian quarters; Palestinian sovereignty over the outer neighborhoods of East Jerusalem which were most proximate to what would be a Palestinian state. As to the inner neighborhoods of East Jerusalem and the Haram al Sharif/Temple Mount sites, there would only be Palestinian administration or control; that is Palestinian custodianship but not sovereignty.

I was part of a kind of support team during the Camp David negotiations and when the word "custodianship" came out we frantically pored over any law books and religious books to try to understand what the term "custodianship" means – does it have any kind of connotation connected to sovereignty? What historical precedents are there and so on? The Clinton intention clearly was not to have Palestinian sovereignty on the Temple Mount, but custodianship. Now, on a very fateful evening, the last evening of the Camp David talks, each party was required to respond to the Clinton proposal.

The Israeli response conveyed to Clinton, resulting from a very intense discussion, was that Israel would accept the Clinton ideas as a basis for negotiation if the Palestinians accepted them as a basis for negotiation. The Palestinian response, from Arafat to Clinton had two elements. The most significant one of them, which I am going to come back to later, was effectively the following: Mr. President if you want me to compromise on my position in Jerusalem I have to ask permission from every Muslim in Indonesia. Now, the second point that came out of the response to Clinton was a clear Palestinian position, which rejected a genuine Jewish connection to Jerusalem, the Temple Mount and the Western Wall.

As the weeks and months went by after the Camp David negotiations there was a clear Palestinian line undermining, or describing as a myth, the Jewish connection to the Temple Mount and the Western Wall and making a reference to a 1930 British document which referred to the Western Wall as Wakf, or Muslim property.

In its more general terms, the Palestinian stance on Jerusalem was one of the major factors which led to the unsuccessful end of the Camp David negotiations. That stance also certainly helped Clinton come out in his press conference, after the Camp David summit, with a statement which, in as clear terms as a President can basically put it, blamed Arafat for not showing the same willingness to compromise as Barak had shown. In the months following the Camp David negotiations, as violence began to rise and acts of terrorism continued, there was a desperate effort on the part of the Barak government to try to keep the framework of the negotiations going.

There were desperate efforts also on the part of President Clinton and it led to a series of talks, which took place in different parts of the world, primarily around Washington. I think it was December 23, 2000 when President Clinton gave a little spin to his Camp David proposal on Jerusalem in what was called the Clinton Parameters - I should point out as a legal point - that Clinton made it clear that his proposals would leave him when he left office, that there was a clear agreement between the parties that nothing would be agreed until everything would be agreed. So at least from a legal perspective Israel in no way views itself as bound by anything it said in the course of the negotiations.

Clinton's subsequent proposal included the following parameters regarding Jerusalem: what is Jewish is Israeli; what is Arab is Palestinian. As a result, the inner neighborhoods of Jerusalem, for instance, which under Camp David most probably were going to be left under Palestinian control, but under Israeli sovereignty, were now by implication to be under Palestinian sovereignty. Because I was not present, I cannot say that this information is the official version of what happened there, but they are based on reports in the press. With respect to the Temple Mount, Clinton's subsequent proposal suggested that there would be Palestinian sovereignty over the Haram al Sharif, the Temple Mount Square, but Israeli sovereignty over the Western Wall and the Holy of Holies of which it is part, and that there could be no excavation below the surface of the Temple Mount without Israeli approval.

There were some variations on that proposal, but the basic notion was that there would now be Palestinian sovereignty on the Temple Mount and a degree of Israeli sovereignty or control under the Temple Mount. We had a very rare situation. I did some research on the precedents in

which sovereignty has been divided horizontally and it is extremely rare. There are some cases, for instance, on the border between France and Italy, where in the tunnel there is French sovereignty and on the hill on top of the tunnel there is Italian sovereignty, but there are not very many such cases.

The notion of horizontal sovereignty came up and was discussed in the press and at the time many ideas were discussed: Why don't we say that God has sovereignty, or just let's leave the sovereignty issue aside or, why don't we give sovereignty to the UN of all things or, what about giving it to the Islamic Organization of Countries (OIC) or Morocco. In short, there were a million and one different proposals. Everything was a variant of somehow dividing responsibility in Jerusalem, but we more or less came to the same obstacles that were faced at Camp David.

Israel's response was we have some reservations but we are willing to explore the ideas if the Palestinians are willing to explore them. The Palestinians, under immense pressure not to make a similar mistake to that which they made at Camp David, gave a response which basically said we are all in favor of your new proposal, President Clinton, now read our reservations. These reservations, if read in detail, amounted to saying, "we agree with your proposal, but with one change, wherever you say yes we would like it changed to no."

As we headed into the year 2001, the negotiations were taken over by the events, and the prospects of coming back to the Jerusalem issue, at least in the near future, seem to be doubtful. I would just make one comment about the Clinton proposal. The Clinton proposal on Jerusalem, I think, has to be looked at in the context of the overall scheme of his proposal, particularly in relation to the refugee issue. What he was more or less saying was: Israel, you concede something significant on Jerusalem; Palestinians, you concede something significant on the refugee issue, primarily that there will be no right of return for refugees to Israel.

When you think about that proposal as a deal, that is Jerusalem for refugees, it does not exactly seem like a logical swap or trade, but there is a certain logic to it: the narrative, the reason why the Jewish people are connected so much to the land, as Professor Povarsky mentioned, is tied to their connection with Jerusalem. The Palestinian claim to the land, their narrative and their legitimacy, is based to a significant degree on the refugee issue, that they lived there, they are inhabitants, and according to them they were uprooted or displaced from there, and they have a right to that area. So each side was being asked to concede on its narrative, and to make some room for the other side on the issue that was closest to it.

Another way of looking at it is to say that Clinton was telling the Palestinians, you can get more or less what you want with respect to your 1967 claims if you give up your 1948 claims. In other words, we can talk about a Palestinian state in a significant part, almost the whole part, of the West Bank; we can talk about East Jerusalem; but we cannot talk about questioning the right of Israel to exist as a Jewish state, and we cannot talk about refugees entering the sovereign territory of Israel.

So much for the negotiations. I would like to make, if I can, a number of quick points or observations about the basic terminology that were used in the negotiations; some of them are very obvious, but I think they are worth mentioning. The first terminology is the word “compromise”. Compromise implies, if you think about it, the notion that you recognize that the other side has rights. It is only because you think your own position is legitimate, and you recognize as well that the other side also has a legitimate position, that you start to discuss the need for compromise. If you do not think the other side has any legitimacy you have little interest or incentive to compromise. On the Jerusalem issue, that is a particularly clear point and I think it is glaringly obvious.

I brought here some statements made in the United Nations, which show that while Israel at the very least has recognized a Muslim connection to Jerusalem, the Palestinian leadership, and at least a portion of the Palestinian people, continue to refuse to recognize a Jewish connection to Jerusalem, as amazingly bizarre as that might seem to us after the lectures we have heard tonight. If you do not recognize the legitimacy of another side’s rights, it is very rare that you are going to be likely to compromise with them.

The second point I want to talk about is “negotiation.” One of the things I have learned in negotiations is that negotiations are not about convincing the other side that you are right. Negotiations are not about bringing forth all the arguments that were brought forth by Professor Povarsky and Professor Reicher to say to your interlocutor, you must be convinced that we are right and you are wrong. Negotiations are about convincing the other side that you are convinced in your own position. In other words, the other side must walk away from a negotiation saying, you know what, these guys are not budging, they have got a really strong case in their minds, they think it is ridiculous to budge on this issue. This enables one party to realize what are the genuine interests of the other party and, accordingly, to make appropriate adjustments in its own position.

The third point relates to the word “concession.” Based on what I have said about compromise and negotiation, if the other side does not recognize your rights as legitimate and if you have not done a good job of

convincing the other side that you are convinced in your own case, any concession you make in negotiation has a risk of being interpreted not as an act of good will, but as an act of weakness. The other side may feel that it has exerted enough pressure to make you budge, and if it just keeps the pressure up you will concede more. That, I think, was the environment or dynamic at Camp David. For whatever reason, and we do not have time to discuss it now, the Palestinian side did not recognize the legitimacy of Israel's claims on Jerusalem. Israel, which, I believe, had conducted much more internal soul searching and dialogue within Israeli society to try to understand the legitimacy of the other party, nevertheless, came across as weak by accepting Clinton's proposals even as a basis for negotiation.

This takes me to the fourth point, which is the Lebanon precedent. Israel's withdrawal from Lebanon had a lot of positive aspects to it. However, one of the negative things, I believe, about the withdrawal from Lebanon was that it was a case where Israel withdrew from territory without an agreement in which the other side recognized Israel's rights. The message that is sent by that act, particularly to extremists, is that you do not need to recognize Israel's legitimacy and Israel's rights in order to get it to withdraw, you just need Israel to bleed enough.

Remember, the withdrawal from Lebanon happened just months before the Camp David negotiations, and Arafat's hand was weakened in terms of his ability to compromise. The extremists in Arafat's camp, that is, if Arafat is considered a moderate, said to him: why do you compromise? Why are you even considering negotiating any of your positions when in the Lebanese case Israel was made to bleed so that it has withdrawn without the Arabs having to recognize the legitimacy of Israel or concede on any claim?

The fifth point I would like to make is related to turning the Jerusalem issues into a religious conflict. When Arafat said to Clinton, I need the consent of every Muslim in Indonesia, what he was saying was that this is a religious issue; and I am speaking to you not as a representative of the Palestinian people and negotiating on their behalf, but rather as a Muslim on behalf of all Muslims. When you bring G-d into the picture negotiations are not easy. Apparently, G-d does not like compromises. I think it might be fair to say that if politics is the art of the possible then religion, at least in our region, is the art of the impossible.

I will just mention two final points. Since we are talking at a Jewish Law Institute I will just mention a few Jewish comments. There is something fascinating about the fact that there are three sites in the Bible where Jews purchased land in the land of Israel. Those three sites are Hebron, Kever Yosef and the Temple Mount in Jerusalem. To me it is absolutely fascinating that those three sites are sites in which the Israeli

claim to them is so fundamentally challenged: Kever Yosef and the disastrous events that happened there at the opening of the intifada; Hevron, where the tension is probably at its highest, at least in the West Bank; and Jerusalem. It kind of makes me think of the phrase in the Bible, “Who even dares to come up to the mountain of God, who can stand in his holy place?”

There is something about these three holy sites, and particularly Jerusalem, in that they are referred to in the Bible as God’s sites and people are fighting so much over who owns them. One of the ways we need to deal with Jerusalem if we ever get back to the negotiations, I think, is to deal with it less as the Jerusalem on high and more as the Jerusalem down here on earth, the Jerusalem where people live, where people are trying to get along with one another.

Arafat has a phrase which he likes to repeat, that is “the peace of the brave,” referring to the peace he made with Rabin. Why was it the peace of the brave? Because, as far as Arafat was concerned, his people were not particularly interested in it, the Israelis were not particularly interested in it, and what you have is two brave leaders grabbing their nations by the scruff of the neck and forcing them to make peace. In my last days in Jerusalem before I came to the UN, I saw a man who was standing at the traffic lights with a sign saying peace of the brave, and it made me think that if we are going to have peace it needs to be peace of the little less brave, peace of the less courageous.

What I mean by that is that we need to work very hard so that each people, not just the leaders but also the people, Israelis and Palestinians, recognize the legitimacy of the other side. This is why dialogue is so important. If people are able to recognize the legitimacy of the other then the leaders do not have to be so brave and we perhaps have more of a chance of a peaceful future. Thank you.

**Professor Ilene Barshay:**

Thank you Mr. Tal Becker. I think we have three different insights, although I do not know that anyone is optimistic here, no matter what the insight is.



*Participating at a symposium entitled, "Human Rights: A Jewish, Israeli, American and International Legal Perspective," sponsored by the Jewish Law Institute, are (from left): Professor Richard Klein, Professor Neil Afran, Professor Chaim Povarsky, Professor Asher Maoz, and Dean Howard A. Glickstein (see p. 38).*

*Professor Asher Maoz of Tel Aviv University Faculty of Law, speaking at a symposium entitled, "Human Rights: A Jewish, Israeli, American and International Legal Perspective." Seated (from left) are: Professor Neil Afran and Professor Chaim Povarsky (see p. 38)*

# Activities of the Institute

## 1. Symposia

(1) In October 2002, the Institute sponsored at the Law Center a symposium entitled, “Human Rights: A Jewish, American and International Legal Perspective.” The panelists were: Professor Asher Maoz of Tel Aviv University Faculty of Law; Professor Chaim Povarsky, Director of the Institute of Jewish Law at the Law Center; and Professor Richard Klein of Touro Law Center. Dean Howard A. Glickstein greeted the audience, and the moderator was Touro Professor Neil Afran.

(2) In March 2003, the institute sponsored at the Law Center a symposium entitled, “The Pursuit of Peace and the Justification of War: A Political, Jewish and International Legal Perspective.” The speakers were: Professor Yossi Olmert of Bar Ilan University, Israel; Professor Chaim Povarsky of Touro Law Center; and Professor Dan Derby of Touro Law Center. Dean Howard Glickstein greeted the audience, and Touro Professor Seymour Moskowitz, visiting Professor from Valparaiso School of Law, moderated the symposium.

(3) On November 18, 2003, the Institute will sponsor at the Law Center a symposium entitled, “Free Will and Intent in a Pressing Environment - Moral and Legal Responsibility: A Philosophical and Jewish ad American Legal Perspective.” The speakers are: Professor Chaim Povarsky of the Law Center; Dr. David Shatz, Professor of Philosophy at Yeshiva University; and Professor Mark Cohen of the Law Center and former Chief Assistant District Attorney in the Suffolk County, New York District Attorney’s Office and Chief of the Office’s Appeals Bureau. Dean Howard Glickstein will greet the audience, and Professor Jeffrey Morris of the Law Center will moderate the symposium.

The Abraham and Lillie Goldstein Charitable Trust supports the ongoing symposia of the Jewish Law Institute.

## 2. The Lillie Goldstein Mobile Judaica Collection

Over six years ago, the Law Library and the Jewish Law Institute at Touro Law Center established The Lillie Goldstein Mobile Judaica Collection 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 loaned free of charge (except for shipment expenses) to a number of law schools across the country, including Chicago-Kent College of Law, Illinois Institute of Technology, the University of Utah School of Law, and Boston College Law School.

For the academic year of 2003-2004, the collection has been loaned to Nova Southeastern University, Shepard Broad Law Center, and for the 2004-2005 year, the Judaica collection will go to the University of Colorado School of Law. Two other law schools have requested the collection for the academic year of 2005-2006.

Law schools that wish to offer Jewish law courses, and borrow the Lillie Goldstein Mobile Judaica Collection for one or two semesters after spring 2006, are advised to contact Mrs. Carol 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) 421-5386, email: [carols@tourolaw.edu](mailto:carols@tourolaw.edu) .

### **3. Jewish Law Syllabi and Email Addresses**

Ten years ago the Institute of Jewish Law had put together a collection of syllabi of Jewish law courses, gathered from teachers of Jewish law at law schools. This collection served the Jewish legal community well, and helped the establishment of courses in Jewish law at law schools.

Recently, the Institute took the initiative of updating its collection of syllabi, to be able to serve better the Jewish law community. Teachers of Jewish law are kindly requested to send copies of their syllabi to the Institute, email address [chaimp@tourolaw.edu](mailto:chaimp@tourolaw.edu), or [povarsky@aol.com](mailto:povarsky@aol.com), for distribution among interested teachers and prospective teachers of Jewish law.

Also, the Institute is currently engaged in gathering the email addresses of professors of Jewish law and subscribers of the Jewish Law Report, to facilitate easy and quick communication. Teachers of Jewish law as well as subscribers of the Jewish Law Report are kindly requested to send their email addresses to the Institute through one of the above email addresses.



*Jewish law students studying Talmud in one of the Judaica collection rooms at the Law Center's library. The collection contains 7377 volumes*



## **CURRENT EVENTS IN ACADEMIA**

### **1. Jewish Law Seminars in Israel**

(1) On April 10-12, 2003, The Jewish Legal Heritage Society, headed by Professor Nahum Rakover, and the Ministry of Justice in Israel co-sponsored a seminar on Jewish law entitled, "The Majority Rule" at the Carlton Hotel, Naharia, the northern city of Israel.

The speakers were: Justice Zvi Tal, former member of the Israeli Supreme Court; Mr. Elyakim Rubenstein, Attorney General of Israel; Mr. Michael Eitan, Chairman of the Constitution and Law Committee at the Israeli Parliament; Professor Eliav Shochetman, Dean of Sharei Mishpat" ("Gates of Law") College; Professor Yaakov Ne'eman, Advocate; Professor Moshe David Haer of the Hebrew University in Jerusalem; Rabbi Professor Daniel Hershkovitz, Dean of the Faculty of Mathematics

at the Technion, Haifa, Israel; Professor Nahum Rakover, Director of the Jewish Legal Heritage Society; Dr. Avi Weinrot, Advocate; and Mr. Yaakov Shapiro, Advocate.

Among the issues discussed were: *The Majority Rule in Judicial and Political Decisions*; *A Split Majority Divided over Conflicting Arguments or Findings*; *The [Judicial] Process of Issuing a Verdict Where the Judges Disagree on the Punishment*; *The Duty to Hear the Minority's Arguments*; *The Validity of Parliamentary Decisions Passed Without a Quorum*; and *Protection of the Minority Against the Majority's Arbitrary Decisions*.

(2) From June 5th through June 7th, 2003, the Jewish Legal Heritage Society and the Department of Jewish Heritage of the City of Jerusalem co-sponsored a series of lectures on Jewish legal issues at the Kings Hotel in Jerusalem.

The speakers were: Rabbi Israel M. Lau, former Chief Rabbi of Israel and President of the Rabbinical High Court of Appeals; Rabbi Sholomo Amar, Chief Rabbi of Israel; Rabbi Shlomo Dichovski, member of the Rabbinical High Court of Appeals; Professor Nahum Rakover, Director of the Jewish Legal Heritage Society; Rabbi Eliahu Avergil, Chief Justice, Rabbinical Court in Be'er Sheva; Mr. Aviad HaCohen, Advocate, of Shaarei Mishpat College; Rabbi Yehoshua Ben Meir; Rabbi Avshalom Katzir; Judge Martin Ritholtz, New York District Court; Yaakov Shapiro, Advocate; Judge Eliahu Ben Zimrah; and Dr. Michael Vigodah.

Among the issues discussed were: *The Duty to Testify When the Witness' Life is Threatened*; *The Authority of Contemporary Torah Scholars*; *Animal Protection: Animal Hunting*; *Is Ignorance of the Law a Defense? Election Bribery: The Admissibility of Circumstantial Evidence*; *Ransoming Captives*; *Jewish Law in American Courts*; *The Karaites: an Irreversible Split*; and *Medical Negligence; The Letter of the Law and Beyond*.

## **2. Conference on Jewish Law at Harvard Law School**

During May 18-20, 2003 the Gruss Chair of Talmudic Civil Law at Harvard Law School and the Institute of Jewish Law at Boston University School of Law co-sponsored a conference at Harvard Law School entitled, "Genesis and Jewish Law."

Participants at the conference were: Professor Charles Donahue from Harvard Law School; Professor Hanina Ben Menachem from Harvard Law School and the Hebrew University in Jerusalem; Professor James Kugel from Harvard University, Faculty of Arts and Sciences; Dr. Yair Lorberbaum from Bar Ilan University; Professor Suzane Stone from Cardozo Law School; Professor Alan Dershowitz from Harvard Law

School; Dr. Marc Hirshman from the Hebrew University in Jerusalem, and Professor Zev Harvey from the Hebrew University of Jerusalem.

Among the topics discussed were: *Genesis and Western Cannon Law*; *The Genesis Rabbah and the Law*; *The Book of Genesis as a Crypto-Legal Text*; *Blood and the Image of G-d*; *The Seven Noahide Laws*; *Genesis and Midrash*; *Reproductive Rights\Obligations and the Genesis Rabbah Narrative*; and *Prehistory, Mythopoeia, and Law in Maimonides*.

### **3. A Symposium in Israel on "Human Dignity in a Jewish and Democratic State."**

The Youth for Jewish Law Society in Israel offers courses in Jewish law for high school students. President of the Society is Professor Menachem Elon, former Deputy Chief Justice of the Israeli Supreme Court, and the chairperson is Professor Aaron Kirschenbaum.

On July 9, 2003, at the graduation ceremony of the tenth term of classes of the Youth for Jewish Law Society, which took place at the Convention Center in Tel Aviv, the Society sponsored a symposium entitled, *"Human Dignity in a Jewish and Democratic State."* The speakers were Professor Menachem Elon; Mr. Elyakim Rubibstein, Attorney General of Israel; and Professor Asher Maoz of Tel Aviv University Faculty of Law.

### **4. The Yale L. Rosenberg Memorial Fund**

Last year, Yale Rosenberg of the University of Houston Law Center, one of the senior teachers of Jewish Law in the United State, passed away. To honor Professor Rosenberg's legacy, the University of Houston Law Center has established the Yale L. Rosenberg Memorial Fund. Professor Sherman L. Cohn of Georgetown University Law Center recently took the initiative and encouraged colleagues and members of the Jewish legal community to contribute to the fund. In his letter Professor Cohn wrote: "Yale cared intensely about all manifestations of excellence. The Yale L. Rosenberg Fund will honor him by fostering and recognizing excellence among students and among scholars."

Professor Rosenberg had published many articles on Jewish and secular law, some of them in co-authorship with his wife, Professor Irene Merker Rosenberg. Yale was a distinguished member of the Jewish legal community in the United States, and served in the past as chair of the Jewish Law Section of the AALS. He spoke at many conferences and symposia on Jewish legal issues. In January 1992, he participated in a symposium sponsored by the Jewish Law Institute at Touro Law Center

entitled, "Torture, Plea Bargaining and Determination of Guilt in Jewish Criminal Law."

### 5. Courses in Jewish Law in American Law Schools.

The Institute has recently sent out a questionnaire to all law schools across the country concerning courses in Jewish law offered in any of the semesters from spring 2003 through spring 2004. The following list is based upon information provided by the schools.

<u>Law School</u>	<u>Title of Courses &amp; semesters</u>	<u>Professor(s)</u>
Boston University School of Law	Jewish Law (spring 2003 & fall 2003)	Neil Hecht
Case Western Reserve University School of Law	Jewish Law (spring 2003 & spring 2004)	Josua Skoff
Columbus School of Law Catholic University of America	Comparative Social Issues Under Jewish Law (spring 2003)	Benjamin W. Mintz
Cleveland State University Cleveland-Marshall College of Law	Judaic Law (spring 2004)	Stephan J. Werber
Creighton Law School	Jewish Legal History (spring 2003& fall 2003)	Lawrence Raful
Duke University School of Law	Jewish Law (spring 2003 & spring 2004)	Martin P. Golding
Duquense University School of Law	Jewish Law (fall 2003 & Fall 2004)	Philip Milch
Emory University School of Law	Jewish Law (Spring 2003)	Michael J. .Broyde
Fordham University School of Law	Jewish Law (Fall 2003)	Abraham Abramovsky
Georgetown University Law Center	Judaic Sources of American Law (spring 2003 & spring 2004)	Sherman L. Cohn, Barry Freundel & David Saperstein
The George Washington University Law School	Jewish Law (spring 2003 & spring 2004)	Matan Lewin
New York University School of Law	Maimonides, Mishneh Torah: Jewish Law & Legal Theory (fall 2003)	Moshe Halbrttal

Northwestern University School of Law	Jewish Law Seminar (Spring 2004)	Mayer G. Freed
Regent University School of Law	Biblical Law (spring 2003 & spring 2004)	Kickasola
Rutgers Law School - Camden	Jewish Law (spring 2003 & spring 2004)	Steven Friedell
SJ Quinney College of Law	Comparative Law: Hebrew Law (spring 2003)	Daniel Greenwood
Texas Tech School of Law	Jewish Law (fall 2003)	Dellas W. Lee
Touro College, Jacob D. Fuchsberg Law Center	Jewish Law (spring 2003), Jewish Legal Philosophy (fall 2003), Jewish Law (spring 2004)	Chaim Povarsky
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*The Right Honourable Lord Woolf of Barnes, Lord Chief Justice of England and Wales, was the law school's Distinguished Jurist in Residence in September 2003. Lord Woolf delivered the Distinguished Jurist in Residence Public Lecture at the Law Center*

*Posing for a picture in the Faculty Conference Room are (from right): Touro Law Center Professor and former judge of the United States Court of Appeals for the Second Circuit George C. Pratt; Touro Law Center Professor Leon Lazer, former Justice of the New York State Supreme Court, Appellate Division, Second Department; The Right Honourable Lord Woolf of Barnes; Dean Howard A. Glickstein; and the Honorable Michel L. Orenstein, United State Magistrate Judge, Eastern District of New York.*

*Participating at a March 2003 symposium entitled, "The Pursuit of Peace and the Justification of War: A Political, Jewish and International Legal Perspective," are (from left): Professor Dan Derby, Dean Howard A. Glickstein, Dr. Yossi Olmert, Professor Seymour Moskowitz, and Professor Chaim Povarsky (see p.38).*

*During the past Sukkot holiday, a group of students pose for a picture in front of the Suckah at the Touro Law Center's Main Entrance*

*A Touro student making the blessing with the four species (citron, palm branch, myrtles and willows) in the Touro Law Center's Suckah*

# **Religious and Political Leaders' Misconduct: A Jewish Legal and Philosophical Perspective**

**By Dr. Chaim Povarsky**

## **Introduction**

In recent years, top political or religious leaders in many western countries have frequently been charged with illegal, immoral or unethical conduct. People tend to regard their leaders as role models whose personal qualities and ethical standards should be emulated. Rightly or wrongly, they believe their leaders to be conscientious, ethical, trustworthy and in control of their own behavior. People's lives and interests are largely affected by their leaders' decisions or actions, and they feel more secure if their leaders demonstrate an ability to make the right decisions and do the right thing. Leaders' misconduct may make people feel insecure and diminish their respect for their government, the law and ethical values.

Whether the multiple cases of recent leaders' misconduct represent a new phenomenon is not entirely clear. It is true that western societies today are more permissive and liberal than in the past, and leaders today may be influenced by that trend and feel free to conduct themselves in a way leaders in previous generations would not have dared. However, this may not necessarily be the case. After all, human nature has not changed much, at least in the last two centuries since the beginning of the so-called enlightenment; and to the extent it has changed, it may have improved, as ideas of justice, freedom, liberty, equality, and the adherence to social values and human rights took root and became common in democratic societies.

The recent discovery and exposure of leaders' misconduct may be a result of the media's freedom and invasiveness today, and the modern means of communication, which facilitate discovery of such misconduct and enable the spread of information more speedily and more effectively. Whatever the case may be, the public is now aware of what is taking place in the private lives of its political and religious leaders, and wonders how to deal with it.

As to the effect of a leader's misconduct on the public, a distinction needs to be drawn between religious and political leaders. As to religious leaders, their good character as well as their ability to inspire people are of paramount importance; consequently, a religious leader's misconduct, whether in public or in private matters, may justify his dismissal.

As to political leaders, the issue is more complicated. A number of questions arise: should political leaders be regarded as professionals who are expected to perform their jobs effectively, rather than being role models? Should there be an absolute distinction between political leadership and spiritual leadership, or between the public life and private life of political leaders? Does immoral and unethical private behavior affect the performance of the political leaders in public matters? Should political leaders be treated as ordinary citizens who may be punished for their misconduct but not necessarily lose their jobs, or should they be forced to step down for neglecting their ethical responsibility, and for the negative impact their misconduct may have on the public at large?

Jewish law provides some insight into these issues from a Jewish religious perspective. The Bible does not conceal, disregard or protect misconduct by its characters, whether they are great leaders, prophets or other righteous people; rather it exposes their misconduct, and generally treats them harshly. Thus, there are many stories in the Bible about leaders' misconduct.

### **Leaders' Misconduct in the Bible**

The leaders of ancient Israel, during 1300-850 B.C.E, combined the function of both political and religious leadership. Moses, Joshua, and the so-called Judges (whose activities are described in the Torah, the Book of Joshua and the Book of Judges, respectively), were both political and religious leaders. During the rest of the biblical age, the period of the kings, the leadership of Israel was divided between political and spiritual leaders; the kings were the political leaders while the prophets were the spiritual leaders, who advised, inspired and admonished the people and the kings alike.

Although political leaders also were also expected to observe the biblical commandments and abide by moral and ethical principles, spiritual leaders were held to a much higher standard, and were punished severely for relatively minor infractions. Thus, Moses was denied entrance to the Holy Land and died in the wilderness because when G-d told him to speak to a rock and extract water from it for the thirsty people in the wilderness, Moses hit the rock rather than speaking to it, thereby reducing to some extent the effect of the miracle and diminishing G-d's glory among the people (Numbers 20:1-12).

Another example is the sudden death of Nadav and Abihu, two of the High Priest Aharon's most righteous sons, while they were burning incense on the altar before G-d (Leviticus 10:1-2). According to Rabbi Eliezer, their sin was that they behaved disrespectfully toward Moses, their teacher, by deciding a law regarding the burning of incense in the

presence of Moses (Eiruvin 63a). According to Rabbi Yishmael, they sinned by entering the holy Temple after drinking wine, which is prohibited (Vayikra Raba 12:1).

In another case reported in the Bible, a prophet was sent by God to deliver a prophecy to the king in Bet-El. The prophet was ordered by G-d not to accept any invitation to eat or drink in that place. After he delivered his prophecy, a false prophet, pretending to speak in the name of G-d, begged of him to come to his house for a meal, and the true prophet, believing him, accepted the invitation. The Bible relates that on his way back the true prophet was killed by a lion for disobeying G-d's order (1 Kings 13:1-24).

By contrast, many Kings of Israel, such as Yerovhom (1 Kings 13:25-33, 14:19-20), Ba'asha (1 Kings, 15:33-16:6), Achav (1 Kings, 16:29-33, 22:34-37), worshiped idols and desecrated G-d's name. Although they were eventually punished for their sins, they nevertheless continued to rule over Israel for many years until they died either naturally or in war. It would appear that because they were political rather than spiritual leaders and their misconduct did not affect their political leadership skills and functions, they were allowed to retain their position.

On the other hand, King Saul, the first king of Israel, was deprived of his kingship because of a political failure; he had pity on an enemy, contrary to G-d's order. The prophet Samuel ordered King Saul, in the name of G-d, to destroy the nation of Amaleq, a long-time enemy of Israel, and not spare anyone. However, Saul had pity on Agag, the King of Amaleq, and did not kill him (1 Samuel 15:7-9). Scripture relates, "Then came the word of the Lord to Samuel saying, 'I regret that I have set up Saul to be king, for he has turned back from following my commandments...'" (ibid. 15:10-11). Samuel rebuked the king, and said to him, "The Lord has torn the kingdom of Israel from you this day, and has given it to your colleague who is better than you" (Ibid, 15:28). Thus, King Saul lost his throne for having pity on the King of Amaleq, in violation of G-d's order.

By contrast, King David, who succeeded King Saul, did not lose his kingship, even for seemingly much graver, but non-political misconduct. Scripture relates:

And it came to pass one evening that David arose from his bed and walked upon the roof of the king's house, and from the roof he saw a woman bathing, and the woman was very good-looking. And David sent [a servant who] inquired after the woman, and [the servant] said [to the king], "Well, this is Bat Sheva, the daughter of Eli'am, the wife of Uriyya the Hittite." And David sent messengers and took her, and she came in to him, and he lay with her... and then she returned to her house.

And the woman conceived, and [she] sent [a message] and told David... "I am pregnant." And David sent to Yoav [the Head of the army] saying, send me Uriyya the Hittite... David asked [Uriyya] how Yoav did, and how the people did, and how the war prospered. And David said to Uriyya, go down to your house and wash your feet... But Uriyya slept at the door of the king's house with all the servants of his lord, and did not go down to his house... [Then] David said to Uriyya, 'Did you not come from a journey, why then did you not go down to your house?' And Uriyya said to David, "The ark and [the people of] Israel dwell in booths, and Yoav [my commander] and the servants (soldiers) of my lord are encamped in the fields, and I will go to my house, to eat and drink and to lie with my wife? ... I will not do this thing." And David said to Uriyya, "Remain here also today, and tomorrow I will let you depart...". In the morning David wrote a letter to Yoav, and sent it with Uriyya. He wrote in the letter, saying, "Set Uriyya in the forefront of the hottest battle, and withdraw from him, so that he may be hit and die" (2 Samuel 11:2-15).

Yoav fulfilled the king's order. He positioned Uriyya in the forefront of the battlefield among the fighters, and some of them, including Uriyya, were killed. When the wife of Uriyya heard that her husband was dead, she mourned for him. When the mourning was over, David took her to his house, and she became his wife, and bore him a son. G-d detested David's behavior, and sent the prophet Nathan to the king, to tell him the following story:

There were two men in one city, one rich and the other one poor. The rich man had many flocks and herds, but the poor man had nothing except for one little ewe lamb, which he had bought and raised, and it grew up together with him and with his children; it ate of his own bread, and drank of his own cup, and lay in his bosom, and was like a daughter to him. And there came a traveler to the rich man, and he spared to take of his own flock and of his own herd to prepare it for the traveler that came to him, but took the poor man's lamb, and prepared it for the man... (*Id.*, at 12:1-4).

The Bible continues:

And David's anger burned greatly against the man, and he said to Nathan, "As the Lord lives, the man that has done this is worthy to die, and he shall restore the lamb fourfold, because he did this thing, and because he had no pity." And Natan said to David, "You are the man! So said the Lord, G-d of Israel, 'I anointed you king of Israel... and gave you the house of Israel and Yehuda... why have you despised the commandment of the Lord to do evil in His sight? You killed Uriyya the Hittite with the sword, and took his wife to be your wife... Therefore the sword will never depart from your house...'. So said the Lord, 'I will raise up evil against you out of your own house, and I will take your wives before your eyes and give them to your fellowman, and he will lie with your wives in the sight of the sun' (*Id.* at 12:5-11).

David acknowledged his misconduct immediately and expressed deep regret. The prophet then told him that G-d would spare his life, but his newborn child would die. Soon after, the child died, and sometime later David's son, Avshalom, rebelled against him, and took his father's concubines, as the prophet Natan predicted (II Samuel 16:22).

It would appear that King David's misconduct was much graver than King Saul's. Yet, King Saul was deprived of his kingship while King David retained his throne, and his dynasty lasts forever, as promised by G-d. It is true that according to the Talmud, King David did not sin, or as the Talmud put it, "whoever says David sinned is nothing but mistaken" (B. Talmud, Sabbath 56a). The Talmud explains that it was the custom in King David's army that before going to war, people would divorce their wives on condition that if they did not return, the divorce would be effective retroactively from the time it was performed (*Id.*, and see Rashi's commentary). Since Uriyya served in King David's army, he had divorced his wife and never returned home, and thus she was considered a divorcee retroactively. Also, according to the Talmud, Uriyya disobeyed King David's order by refusing to go home, for which he deserved to be executed (B. Talmud, Sabbath 56a).

Nevertheless, King David's conduct was extremely wrong, at least morally, as he himself confessed, and he regretted it for the rest of his life, as Scripture relates:

A psalm of David, when Natan the prophet came to him after he had gone unto Bat Sheva: "Be gracious to me, O G-d, according to your steadfast love, according to the multitude of your tender mercifulness, wipe out my transgression. Wash me thoroughly from my iniquity, and cleanse me from my sin. For I acknowledge my transgressions, and *my sin is ever before me...*" (emphasis added) (Psalms 51:1-4).

King David's case may support the assumption that political leaders may not be forced to step down because of misconduct in their private lives. And indeed some contemporary biblical scholars suggest that the difference between King Saul and King David's misconduct may lie in the effect on their political leadership skills. While Saul's misconduct demonstrated softness and weakness, which may have seriously affected his political leadership skills and impair his authority, David's misconduct was of a personal nature, and did not affect his political leadership qualifications.

However, this suggestion is not satisfying. One would assume that a political leader who betrays one of his loyal military men, has an affair with his wife while her husband is serving in combat, and eventually manipulates his death, is not qualified for leadership, which requires

restraint, self-discipline, decency, fairness, and above all compliance with basic moral and ethical principles. Such misconduct, if carried out today by a leader in a democratic society, would certainly result in the loss of his position.

Furthermore, morality and ethics are part of Jewish law. The Torah requires people to follow G-d and emulate His qualities, among others, of loving-kindness, mercy and compassion. Also, one of the basic biblical principles is, “And you shall love your neighbor as yourself” (Leviticus 19:18). King David appears to have violated these basic biblical principles.

It would seem that David was spared his kingship because his misconduct was regarded as a lapse, or a single mishap, derived from a temporary irresistible impulse, and did not reflect a character defect or corrupt personality. David had an excellent record of being G-d-fearing and a most righteous person, a perfect character, a man of justice, truthfulness and compassion, a fierce and brave fighter and a sensitive liturgical poet, which made him most qualified for leadership. Therefore, although he deserved punishment for his misconduct just as any other individual, and perhaps even more than an ordinary individual, he was still qualified for leadership. This explanation, however, requires further analysis of the biblical perception of evil and misconduct, and one’s ability to control them.

### **The Evil Inclination – a Satanic Power**

Criminologists, sociologists and philosophers discuss the source of criminal behavior and misconduct, whether it reflects a genetic or character defect, or whether it derives from external causes, such as child abuse, family problems, improper education, society’s influence and other factors. The biblical perspective is entirely different from the secular theories. Although there may be biological and social factors that instigate misconduct, the Bible attributes misconduct primarily to the existence and action of an “evil inclination,” which is a satanic force created by G-d for the purpose of tempting people, and luring them into sinning and misconduct. This satanic power is part of G-d’s plan designed to challenge people, thereby giving them a chance to grow spiritually by overcoming their evil inclinations (*see* Luzatto, *The Way of G-d*, Part I, Ch. 3). The biological and social factors are generally mere circumstances that may make one’s challenge more or less difficult.

At the beginning of the Book of Job, there is a remarkable and instructive discussion between G-d and Satan, as follows:

And there was a day, when the sons of G-d [the angels] came to present themselves before the Lord, and also Satan came with them. And the Lord said to Satan. "From where did you come?" Satan answered the Lord and said, "[I came] from wandering in the earth and walking in there." And God said to Satan, "Did you notice my servant Job, that there is none like him on earth, a perfect and an upright man, and turns away from evil?" Then Satan answered the Lord and said, "Does Job fear G-d for nothing? Have you not protected him and his house and everything that belongs to him? You have blessed his work and his cattle have proliferated in the land. But now stretch your hand and touch [destroy] everything he possesses, and he will curse you in your face." And the Lord said to Satan, "Behold, all his belongings are in your hands, but don't put your hands on him."

Upon obtaining G-d's permission, Satan had all of Job's property stolen or destroyed, and his children and servants killed. But Job did not budge from his faith in G-d. He declared, "Naked I came out of my mother's womb, and naked I shall return there [to the grave]; the Lord gave and the Lord has taken away, blessed be the name of the Lord" (Job 1:21). When Satan appeared again before G-d among other angels, G-d mentioned to him that he did not succeed in his effort to lure Job into sinning. Satan argued that Job valued his own body more than everything else, and if his body would be touched he will surely curse G-d. G-d then gave Satan permission to touch Job's body, but warned him to spare Job's life. Satan then struck Job with nasty boils all over his body, causing him to sit in the ashes and keep scratching himself, to ease his pains.

The Book of Job continues with a lengthy and remarkable discussion between Job and his friends who came to comfort him, about the significance and purpose of people's suffering, and about Job's complaints against G-d for his unjust sufferings and misfortune. The Book concludes that despite all of his troubles, pain and misery Job did not sin, and eventually G-d restored his wealth and good fortune.

This story illustrates the biblical perception of Satan's role in influencing human behavior, and the purpose of temptations, challenges and suffering of righteous people. The evil inclination, according to Jewish philosophy, is not the true human nature. Man was created in G-d's image, as Scripture states, "So G-d created man in His image, in the image of G-d He created him; male and female He created them" (Genesis 1:27). Likewise, the human soul derives from G-d, as Scripture states, "And the Lord G-d formed the man of dust from the ground, and He blew into his nostrils the soul of life, and man became a living being" (Genesis 2:7). Citing this biblical passage, early commentators noted that, "One who blows, blows from his inside" (Ramban, Genesis 2:7; Rekanti, Genesis 9:2; Rabbi Behaye, Exodus 20:7), meaning that the human soul comes from G-d. Being created in G-d's image and possessing a divine soul, it

may be assumed that people are good in nature, and will seek to do what is good and right; it is rather the evil inclination deriving from Satan that tries to lure them into sinning.

The biblical statement that, “the impulse of man’s heart is evil from his youth” (Genesis 8:21), which may seem to indicate that human beings are bad in nature, was interpreted to mean that the evil inclination begins operating in man’s life from birth, before the child acquires the wisdom and maturity that are required to challenge it (Ramban & Abarbanel, commenting on the Torah, *ibid*); but that evil inclination is not part of human nature, rather a satanic power. This interpretation may be supported by another Scriptural text stating, “Better is a poor and wise child than an old and foolish king...” (Ecclesiastes 4:13). The Midrash explains that the “old and foolish king” is Satan, and the reason he is described as old is because he starts operating on human beings at birth, long before the “wise child,” that is the good inclination (one’s soul and wisdom), starts functioning (that is, at the age of thirteen. See Midrash Raba - an early homiletic commentary on the Bible -Ecclesiastes’ Ch. 4, Par. 9. *See also Zoar, on Genesis, at the beginning of Parashat Vayeshev*). Thus, according to the biblical perspective the evil inclination is an external force deriving from Satan.

Because people are being pressured by the evil inclination, their responsibility for their misconduct may be reduced. After the major flood, which according to the Bible took place in the time of Noah, and which wiped out virtually all of mankind and living creatures (except those rescued in Noah’s ark) as a result of the people’s sins (*see Genesis 6:5-7, 11-13*), G-d decided not to destroy all lives anymore, “because the impulse of man’s heart is evil from his youth” (Genesis 8:21). This argument was interpreted to mean that after the flood, man’s intellectual skills weakened and it became difficult for man to fight the evil inclination that took root in his life, and is therefore not entirely responsible for his transgressions (*see Sepurno, Genesis 8:21*). Although one is required to resist the evil inclination, and would be held responsible for yielding to it, the Bible seems to indicate that the pressure exerted by the evil inclination may reduce man’s responsibility before a divine court.

### **The Evil Inclination Theory and the Law**

The perception of human nature as being inherently good, and the ascription of man’s evil to an external force, the evil inclination, may have legal consequences, as illustrated by Maimonides, the great 12<sup>th</sup> Century Jewish legal codifier, in connection with a Jewish divorce. Maimonides discusses the validity of a Jewish divorce, which was enforced by a Jewish tribunal against the will of the husband, contrary to the principle according

to which a divorce must be executed with the husband's free will. Maimonides offers the following explanation:

Because duress applies only to him who is compelled and pressed to do something that the Torah does not obligate him to do, [as] for example, where one (who) is lashed until he consents to sell something or give it away as a gift. On the other hand, he whose evil inclination induces him to violate a commandment or commit a transgression, and is lashed until he does what he is obligated to do, or refrains from what he is forbidden to do, cannot be regarded as a victim of duress; rather he has brought duress upon himself by submitting to his evil inclination. Therefore, this man who refuses to divorce his wife, inasmuch as he desires to be of the Israelites, to abide by all the commandments, and to keep away from transgressions, it is only his inclination that has overwhelmed him. Once he is lashed until his inclination is weakened and he says "I consent," it is the same as if he had given the *get* (Bill of divorcement) voluntarily. (See Maimonides, *Mishneh Torah*, The Book of Women, The Law of Divorce 2:20.)

Thus, the action of a Jewish Court forcing someone to do the right thing against his evil inclination may not be considered duress. Because an action based on one's evil inclination is not the result of one's true will, once the court removes the evil inclination, the coerced party is presumed to be willing to comply with the court's decision. Obviously, as mentioned previously, the influence of the evil inclination on one's conduct would not exonerate one from responsibility for wrongdoing. However, because evil is an external force one may not be absolutely guilty of wrongdoing, and may be treated with some leniency, as discussed below.

### **Satan's Methods of Incitement**

Confrontation with the evil inclination, or Satan, is a major issue in Jewish law and theology. Jewish theological and philosophical sources extensively discuss Satan's methods and trickery in inciting man to sin. One of Satan's common methods in attempting to dominate one's life is to "steal one's self;" that is, making one believe that one's evil desires are actually part of one's self or part of one's nature, and thus by satisfying those desires one is satisfying one's own will. Most people do not hear Satan telling them, "*You* need to do that," but rather they hear themselves saying, "*I* want to do that." Thus, Satan invades their inner selves, and unconsciously they identify themselves with him. (Dessler, *Michtav M'Eliahu*, vol.1, 255, and vol. 4, 286.)

Another method employed by Satan is to bolster one's imagination even before any wrong was committed, making one feel the pleasure and see the benefits one might gain from the illicit, immoral or unethical deeds, while obscuring the negative consequences of those deeds. Bolstering one's

imagination is one of Satan's powerful weapons, because, as Rabbi Israel Salanter, one of the great Jewish ethical philosophers, observed, imagination has no limits and is not subject to any rules, as opposed to reason, which is limited and subject to rules of logic; thus, one's imagination may carry one far away from reality. Also, Satan operates on one's subconscious, making it very difficult to detect Satan's activities.

Satan's deceptive measures were designed to create a balance between the forces of good and evil, which constantly compete for the domination over man's life. If Satan did not use deceptive measures, one would be able to recognize Satan's destructive measures, and in most cases would not fall into his trap, except where one knowingly and intentionally wants to rebel against G-d. (Sanhedrin 38b; *Ramban*, Exodus 20:17; Rabbi Desler, 4 *Michtav M'Eliahu* 134.) Thus, by deceiving people, Satan has a chance to overpower them. However, regardless of one's ability to choose between good and evil, Satan is still capable of escalating one's desires and passions to such a level that they become irresistible, effectively depriving one of the powers of choice. Under those circumstances, the only way to overcome Satan is through G-d's help

### **G-d's Assistance in fighting the Evil Inclination**

As discussed previously, Job was able to defy Satan and stand steadfast against his efforts to turn him away from G-d. Although it was indeed a marvelous achievement, Job would not have been able to defeat Satan, who used his "heavy artillery" against him, without G-d's help. The Talmud states:

A person's evil inclination [threatens to] overpower him every day, seeking to kill him ...[by enticing him to sin], and if not that the Holy One (G-d) aided [the person] he would not be able to stand up against [the evil inclination.]" (Kidushin 30b.)

Satan is an angel possessing divine power, and, if given permission to use it, no one could defeat him without G-d's help. However, one cannot sit idle and wait for G-d to save him from Satan, but rather one must fight hard to overcome the evil power, and only then may one expect G-d's assistance. Fighting the evil power is the essence and purpose of G-d's plan in letting Satan incite people to sin, in the first place. By constantly fighting and overcoming evil, a person is being spiritually elevated, getting closer to G-d and becoming eligible for eternal life in the world to come.

It should be noted that "fighting evil" means, first and foremost, the evil found in one's self, rather than that found in others. One needs first to

improve one's own conduct before attempting to improve the conduct of others. The idea that G-d assists only those who fight the evil power was articulated in the Midrash (an early homiletic commentary on the Bible), which quotes G-d saying, metaphorically, "Open for me a small opening like the eye of a needle, and I will open up for you an opening like the size of a hall doorway." (Midrash, *Shir Hashirim* 5:3.)

This means that one who fights the evil inclination with little success, and is only able to open his heart for G-d no more than a needle's eye, is helped by G-d to overcome the evil power and enlarge the tiny opening to the size of a hall doorway, allowing G-d to enter his heart. A similar statement may be found in the Talmud (Sabbath 104a), according to which one who starts purifying himself (spiritually) is assisted by heaven in his effort.

### **Misconduct in the Absence of Divine Assistance**

Satan's formidable power and man's inability to overcome him without G-d's help may explain the misconduct committed by righteous people, which seems to be totally unbecoming to their stature and high level of righteousness. For example, Scripture relates that when the Jewish people came out of Egypt and wandered in the wilderness, G-d dropped from heaven a special kind of food called manna, which according to talmudic authorities embodied any taste a person chose. Nevertheless, after a while the people got fed up with the manna, and started crying: "who will feed us meat; we remember the fish we ate in Egypt free of charge, and the cucumbers, melons, etc., but now our life is dried out; there is nothing; we have nothing to expect but the manna." G-d was angry with the people. Nevertheless, He brought a wind that blew quail from the sea, and spread them over the people's camp. However, soon thereafter He hit the people hard for their misconduct, killing many of them (Numbers 11: 4-34).

This story is puzzling. According to early authorities, the Jewish people reached the highest level of spirituality and holiness when they witnessed the Revelation at Sinai, which occurred after G-d showed them many spectacular miracles in Egypt and later on at the Red Sea. How then did they sink to such a low level of mundane desires, causing them to weep and bitterly complain for lack of meat and other food? It may be that because the people did not fight against their desires and evil inclinations, but, on the contrary, Scripture indicates that they "cultivated their craving." (*Id.* at 11-4.) Therefore they were denied G-d's help, without which they had no chance to stand up against Satan, who totally overpowered them.

Similarly, King David's misconduct may have been a result of lack of G-d's assistance. David asked G-d to test him, as Scripture relates: "[A Psalm] of David. Judge me O Lord, for I have walked in mine integrity, and I have trusted in the Lord without wavering. Examine me, O Lord, and try me; test my reins and my heart..." (Psalms 26:1-2.) According to Midrash (Midrash Tehilim, Psalms 18), King David wished to be recognized for his righteousness, so that his name would be mentioned in the prayers just as the name of Abraham the Patriarch is mentioned, and he asked G-d to be tested like Abraham who was tested and prevailed. G-d said to David that he would not pass the test, but David insisted. G-d then tested David in the Bat Sheva case, and he failed (*id.* at Psalms 26). It would appear that because David was overly self-confident, and because G-d wanted to show him that he did not reach Abraham's level of righteousness, he was denied G-d's assistance, which allowed Satan to get hold of him and overpower him.

This principle is also illustrated in remarkable stories about two of the most prominent *tanaitic* scholars in the second century (CE), Rabbi Akiva and Rabbi Meir. The Talmud relates that these Rabbis were accustomed to scoff at sinners for not being able to overcome their evil inclination. One day, Satan appeared to Rabbi Akiva disguised as a woman, perched atop a palm tree. The sight of the apparently very beautiful woman aroused Rabbi Akiva's passions, so he held onto the palm tree and began to ascend it to meet her. When he reached the middle of the palm tree, Satan released him from his grip. Satan said to Rabbi Akiva, "Had it not been proclaimed in heaven: 'Be cautious of Rabbi Akiva and his Torah learning,' I would have made your life worthless" (*see* B. Talmud, Kiddushin 81a), meaning that Satan would have made Rabbi Akiva sin with the woman, thereby destroying his spiritual life.

In a similar case, one day, disguised as a woman standing on the other side of a river, Satan appeared to Rabbi Meir. Again, the sight of the apparently very beautiful woman aroused Rabbi Meir's passions. There was no ferryboat for crossing the river, so Rabbi Meir grasped onto a rope that stretched from one bank to the other, and he proceeded to attempt to cross the river. When he reached the middle, Satan released his grip on him. Satan said to Rabbi Meir, "Had it not been proclaimed in heaven: 'Be cautious of Rabbi Meir and his Torah learning,' I would have made your life worthless" (*Id.*).

It seems that Satan was able to get hold of those two exceptionally righteous and holy men because they were left by G-d to fight Satan alone without G-d's assistance, which is virtually an impossible task. Only when Satan was told from heaven to release his grip on them were they saved. Because Rabbi Akiva and Rabbi Meir scoffed at sinners, believing that Satan could easily be defeated, G-d denied them His assistance, and

allowed Satan to get hold of them to show them Satan's formidable power, so that they would cease scoffing at sinners.

### **Elimination of Idol Worshipping by Heavenly Intervention**

Heavenly intervention is not limited to assisting one in overcoming the evil inclination. Sometimes through Heavenly intervention the evil inclination of an entire society may be weakened, or even removed altogether. An interesting story in the Talmud demonstrates the virtually irresistible desire of the Jewish people in ancient Israel to worship idols, and the sudden disappearance of this desire due to heavenly intervention.

The Talmud relates that Rav Ashi, a popular talmudic scholar (in the fifth century, CE), while studying with his colleagues, quoted Menashe, the King of Judah (in the sixth century BCE), on a legal issue. Rav Ashi referred to King Menashe as "our colleague Menashe." That night, King Menashe, who had long passed away, appeared to Rav Ashi in his dream and reproached him for referring to him as "our colleague." To demonstrate Rav Ashi's scholarly inferiority, King Menashe asked Rav Ashi a question in Jewish law, which Rav Ashi could not answer. Menashe then gave him the answer.

King Menashe was an idol worshipper, so Rav Ashi asked Menashe, "If you are such a great scholar, how come you have worshipped idols?" Menashe replied, "if you were living in my time you would have crawled on four to worship idols" (B. Talmud, Sanhedrin 102b). Thus, while in Menashe's time idol worshipping was virtually an irresistible desire, in Rav Ashi's time the desire for idol worshipping among the Jewish people entirely disappeared.

In this case, the disappearance of the desire for idol worshipping among the Jewish people was a result of heavenly intervention. The Talmud relates that the Men of the Great Assembly, the spiritual leaders of the Jewish people after the destruction of the first Holy Temple, prayed to G-d, asking Him to eliminate the evil inclination involved in idol worshipping, which was responsible for many calamities that befell the Jewish people, including the destruction of the Temple. G-d accepted their prayer, and since then the practice of idol worshipping has disappeared among the Jews (B. Talmud, Yuma 69b).

The irresistible impulse for idol worshipping among the people of ancient Israel, as articulated in the exchange between King Menashe and Rav Ashi (*id.*), may be the reason why this serious offense was treated by G-d with some sense of tolerance. This leniency is demonstrated in G-d's treatment of the Israelite kings who worshipped idols, even though it

seemed to undermine the entire Jewish faith. It should, however, be noted that the practice of idol worshipping at that time did not necessarily indicate a rejection of G-d; on the contrary, the people believed in G-d and were anxious to get close to Him by creating some tangible image that represents G-d or may serve as an intermediary between them and G-d (*See*, for instance, commentary on Exodus 32:1, by Nachmonides, Kli Yakar and Or Hachaim, explaining the making and worshipping of the golden calf by the Jewish people, shortly after the Revelation at Sinai when they thought that Moses their leader had died).

### **Leadership Qualification under Jewish Law**

Jewish law does not draw a distinction between public and private matters. To qualify for a leadership role, whether religious or political, one must be able to restrain one's desires and overcome the evil inclination in both public and private matters. According to the Talmud and Maimonides, a king (as well as any other public leader) must be a person of honor, dignity, humility and compassion; must be tolerant and respectful to everyone; he must strictly obey the law, and must study the Torah constantly and fear God. Power tends to corrupt; therefore, it must be vested in a person with a perfect character, and with strong moral convictions.

One's character and leadership qualifications cannot be determined based solely on one's political, economic or military knowledge, skills and achievements, but also and perhaps primarily based on one's daily conduct and human relationship even in private matters. A perfect character is a prerequisite for leadership.

The Midrash states that when G-d bestows greatness (a leadership position) on a person, He first checks him out on minor things (Midrash Raba, Exodus 2:3). It means that one's eligibility for a leadership role is determined not by one's heroic or publicized deeds or great achievements, but rather based on minor and seemingly insignificant matters. One's conduct in minor matters shows one's real character. For instance, Moses and David were shepherds before they became leaders of the Jewish people, and, according to the Midrash, G-d chose them as leaders because of the extraordinary compassion and sensitivity with which they treated the sheep (*Id.*).

### **Conclusion**

When dealing with leaders' misconduct Jewish law recognizes human weaknesses and the evil forces that govern man's life. Although one must fight those forces and overcome those weaknesses, and yielding to those forces would generally result in a punishment and even loss of one's

leadership position, in the event of a single lapse resulting from an irresistible impulse, a leader may be treated with leniency and be allowed to remain in office.

Generally, an irresistible desire is not an excuse for misconduct; anyone is required to fight bad desires when they first appear, and not let them gain strength and develop into a powerful and uncontrollable force. However, a leader who constantly and successfully fights those evil forces and is in full control of his desires, but fails once due to an irresistible desire and exceptional circumstances, and the failure does not affect his leadership skills, may be allowed to remain in office.

Spiritual leaders are held to a higher standard, and may be dismissed from office even for minor misconduct, which does not reflect a character flaw or a defect in leadership skills or a low moral standard, but affects their ability to influence their followers. By contrast, political leaders may not lose their position for minor misconduct; however, any misconduct, whether in public or private life, which reflects a character defect or a defect in leadership skills or a low moral standard, would disqualify one for a leadership role.



*Touro College founder and president, Dr. Bernard Lander (right) chatting with Jack Weinstein, Senior Justice of United States District Court (Eastern District of New York), and commencement speaker at the Touro Law Center Graduation Ceremony in May 2003.*

*The Honorable Gabriel Bach, former Justice of the Israeli Supreme Court, delivering the public lecture of the 2003 Distinguished Jurist in Residence program*

*The Honorable Gabriel Bach (left), former Justice of the Israeli Supreme Court, was the Law Center's 2002 Distinguished Jurist in Residence. Justice Bach accepted an award from Dean Howard A. Glickstein at the conclusion of his public lecture.*

*Touro College President Dr. Bernard Lander speaking at the donor reception, preceding ground breaking ceremony for the Law Center's new campus in Central Islip. Standing is Law Center's Dean Howard A. Glickstein*

*Preparing for the ground breaking ceremony for the Law Center's new campus are (from left): Mrs. Roseland Fuchsberg Kaufman; Mr. Mark Hasten, Chair of the Board of Trustees, Touro College; Touro College Founder and President Dr. Bernard Lander; Law Center's Dean Howard A. Glickstein; Joshua Pruzansky, Esq., Chair, Touro Law Center Board of Visitors; and Touro Law Center's Assistant Dean for Institutional Advancement Linda Howard-Weisman*

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*Architect' drawing of the new campus of Touro Law Center in Central Islip, Long Island, New York. The ceremonial ground breaking took place on October 26, 2003 (see p. 63).*



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