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A Comparative Analysis of the Jewish Law and the Secular Perspective on International Human Rights (part of the article, “Human Rights in the Bible, an Exchange of Ideas”).

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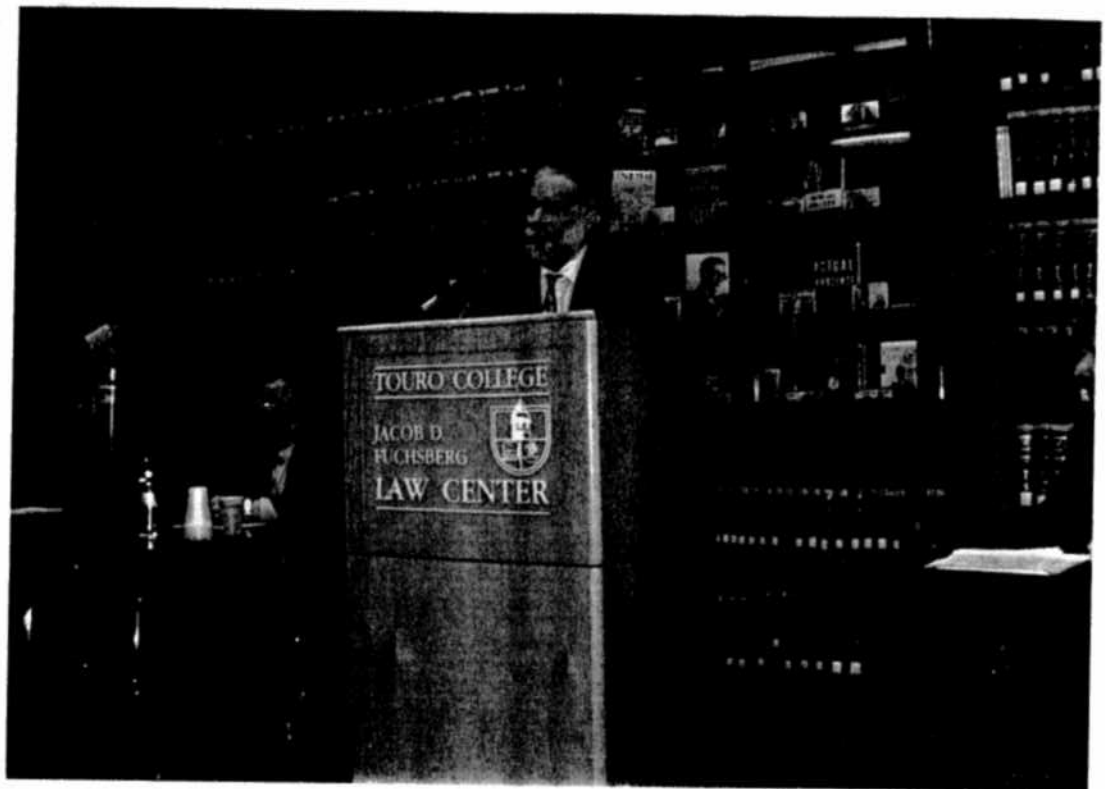
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Professor Abbott Katz, Deputy Chair of the Touro College Sociology Department, speaking at the Institute's symposium, "The Function of Presumptions in Jewish and American Law – Are They Real or Fictions? A Legal and Sociological Perspective" (See p. 46).

Human Rights in the Bible

(An Exchange of Perspectives)

The following exchange between Professor Chaim Povarsky and Professor Richard Klein on human rights in the Bible had its inception in a symposium sponsored by the Institute of Jewish Law at Touro Law Center. During that symposium Professors Povarsky and Klein expressed different views about human rights in the Bible, reflecting conflicting perspectives - the Jewish traditional perspective and a secular perspective. The essence of that debate, including additional thoughts expressed by the dialogists, is presented here.

It begins with an opening discourse on the biblical perspective by Professor Povarsky, followed by Professor Klein's comparative analysis of the Jewish law and secular perspectives on human rights, followed by Professor Povarsky's response.

Professor Chaim Povarsky (Opening discourse):

Over the years the Bible has served as an inspiration for human-rights activists. Biblical values such as protection of life and property rights, the principles of freedom and human dignity, the principles of justice and due process of law, and the virtues of loving-kindness and compassion, have become the foundations of the western culture. The first European settlers of America in Massachusetts chose the Bible as their law, primarily because it promotes human rights. Some biblical principles, however, seem to violate Western notions of human rights, raising questions among scholars as to whether the Bible should still be seen as an authority on human rights.

I will first discuss briefly a number of human rights included in the Bible, and then discuss some biblical principles which seem to ignore human rights. This will be followed by an analysis of G-d's agenda in creating the universe and human beings, which is the basis of the biblical perspective on human rights.

Protection of human life. The Bible regards human life as sacred and is deeply concerned about its preservation. Intentional homicide is a capital crime;¹ but while an unintentional homicide is not a capital crime, the inadvertent killer may be sentenced to a life of exile in one of the cities of refuge.² Unlike many other legal systems, the Bible views saving human life as one of the most important duties. According to the Talmud, except for three cardinal commandments one may violate all biblical commandments to save human life.³

Protection of property. The Bible is concerned about the protection of the property of others. For instance, according to the Bible one must save another's property from loss or damage; one must pick up lost chattels, seek their owners and return the chattels to them. In the meantime the finder must keep and take care of the lost chattels.⁴

Liberty and Freedom. Slavery was common in the biblical era and continued to be practiced until the 20th century. Although the Bible recognizes slavery in principle,

¹ EXODUS 21:12.

² See NUMBERS 35:9-29; DEUTERONOMY 19:1-10; Maimonides, MISHNEH TORAH, The Book of Torts, the Laws of Murder and Preservation of Life 5:1-11.

³ TOSEFTA, SHABBATH 15:14; Maimonides, MISHNEH TORAH, The Foundations of the Law 5:1.

⁴ DEUTERONOMY 22:1-3; Maimonides, MISHNEH TORAH, The Laws of Robbery and Lost Objects 11:1-2, 14.

the biblical concept of slavery differs from the modern concept of slavery. While other societies treated slaves as property, in Jewish society slavery was actually a long term service relationship. Scripture states:

If your brother becomes impoverished with you and is sold to you, you shall not work him with slave labor. *Like a laborer or a resident shall he be with you...* For they are my servants whom I have taken out of the land of Egypt; they shall not be sold in a manner of a slave.⁵

Jewish slaves were released from slavery after six years of servitude. A Jewish slave could redeem himself from slavery at any time by paying his master for the remaining years of his servitude. If the Jubilee year, which takes place every fiftieth year, falls during the six years of servitude, the Jewish slave is released immediately. But even this form of Jewish slavery has not been practiced for the last 2400 years.⁶ A non-Jewish slave may also redeem himself from slavery at any time by paying his master his value. If his master caused him an injury, such as knocking out his tooth or cutting his finger, he becomes free. Likewise when a Jubilee year arrives, the non-Jewish slave is released immediately from servitude.

Jewish law imposes special moral obligation on masters of Jewish slaves. For instance, the living conditions of the slave must be similar to those of his master, and if the master cannot afford proper conditions for both of them, the slave comes first.⁷ Based upon these principles, the Talmud states that one who purchases a slave is actually purchasing a master for himself.⁸ Additionally, the Bible prescribes that one who kidnaps a person, uses his services and eventually sells him for slavery, is subject to capital punishment.⁹ Redeeming people from captivity is one of the most important duties in Jewish law.¹⁰

⁵ LEVITICUS 25:39-40, 42

⁶ See B. Talmud, ARACHIN 29a, stating that Jewish slavery can only exist when the law of the Jubilee year applies. This law has not applied for the last 2400 years.

⁷ B. Talmud, KIDUSHIN 22:1; Maimonides, MISHNEH TORAH, The Laws of Slaves 1:9. See also, Rabbi Menachem Hameiri, BEIT HABECHRAH, Kidushin 20a, citing Geonic scholars who hold that those obligations of the master are of moral nature, and not legally binding.

⁸ *Id.*

⁹ DEUTERONOMY 24:7; Maimonides, MISHNEH TORAH, the Book of Torts, the Laws of Theft 9:1-2.

¹⁰ B. Talmud, BAVA BATHRA 8a-b; Maimonides, MISHNEH TORAH, The Laws of Gifts to the Poor 8:10.

Human Dignity. The Bible stresses the dignity of human beings. Man was created in the divine image, in a spiritual sense, and must be treated accordingly. When G-d was about to create man, Scripture quotes G-d saying: "Let us create a man in our image."¹¹ And after Adam and Eve were created Scripture says, "And G-d created man in his image, male and female He created them...."¹² The Mishnah prescribes: "Your fellow-man's honor should be as cherished by you as your own."¹³ It is strictly prohibited to humiliate people¹⁴ or speak evil about them.¹⁵ Even executed criminals must be treated with dignity. Scripture provides, "His (the criminal's) body shall not remain for the night on the gallows; rather you shall surely bury him on that day, for a hanging person is a curse of G-d."¹⁶ Rashi, the great biblical commentator, explains that the hanging of an executed criminal is a disgrace of G-d, because man is made in G-d's image.

Due process of law. Under Jewish law, judges are obligated to maintain a fair trial and due process of law. They are required to pursue justice and treat the parties equally.¹⁷ A judge must not be harsh with one and lenient with another.¹⁸ The parties must be allocated the same amount of time for presenting their arguments, and must even be dressed equally, so that one should not impress the judges more than the other.¹⁹ A judge is allowed to hear arguments only in the presence of all parties.²⁰ Translation of the parties' arguments in the court is not acceptable unless the judge understands the language and hears the arguments made by the parties.

These biblical principles are examples of the principles that may have inspired modern human rights advocates. However, as mentioned previously, some biblical principles may be construed as ignoring human rights. Here are some examples:

¹¹ GENESIS 1:26

¹² *Id.* at 1:27

¹³ Mishna, AVOT 2:10

¹⁴ B, Talmud, BAVA METZIA 58b

¹⁵ LEVITICUS 19:16.

¹⁶ DEUTERONOMY 21:22-23.

¹⁷ DEUTERONOMY 16:19; Maimonides, MISHNEH TORAH, The Book of Judges, The Laws of Sanhedrin 21:1.

¹⁸ Maimonides, *Ibid.*

¹⁹ *Id.* at 21:1-2.

²⁰ *Id.* at 21:7.

Freedom of religion. The belief in G-d is the first of the Ten Commandments.²¹ According to the prophet Havakuk, belief in G-d is the most basic principle in the Bible.²² Unlike secular societies that host multiple religions, the Bible prohibits worshipping idols or any object besides G-d. Idol worshipping is a capital crime.²³ Thus, the Bible clearly denies freedom of religion.

Freedom of speech. There are some restrictions in the Bible on freedom of speech. For instance, blasphemy is strictly prohibited.²⁴ Tale bearing or evil speech (*leshon hara*) is prohibited even if it is true, unless there is a good purpose in doing so.²⁵

Annihilation of nations. Although life is sacred and homicide is a capital crime under the Bible,²⁶ in two cases the Bible requires the annihilation of certain nations, including their women and children. These were the Canaanite nations that resided in the land of Israel prior to the conquest of the land by Israel approximately 3300 years ago,²⁷ and the Amalakites, who attacked the Jewish people soon after their exodus from Egypt.²⁸ Although those nations were very corrupt and evil, under modern international law and notions of human rights, killing women and children is considered a gross violation of human rights.

The status of women in divorce proceedings. According to biblical law, only the consent of the husband, not that of the wife, is required for executing a valid divorce.²⁹ In the tenth century C.E., based upon broad authority given in the Bible to Jewish courts to pass by-laws, which may suspend biblical law, the court prohibited divorcing a wife against her will. However, it has been debated whether divorcing a wife without her consent in violation of the rabbinical law is valid today.

Before we elaborate on the biblical perspective on human rights, it is important to note that the Bible regards what today are called human rights as human duties. One has

²¹ EXODUS 20:2-5.

²² HAVAKUK 2:4; B. Talmud, Makkot 24a.

²³ Exodus 22:19; Maimonides, MISHNEH TORAH, The Book of Knowledge, The Laws of Idolatry 2:5.

²⁴ EXODUS 22:27

²⁵ LEVITICUS 19:16; Maimonides, MISHNEH TORAH, The Book of Knowledge, the Laws of *Deos* 7:2; Jerusalem Talmud, PEAH 1:1.

²⁶ EXODUS 21:12.

²⁷ DEUTERONOMY 20:16-18

²⁸ EXODUS 17:8.

²⁹ B. Talmud, YEBAMOT 112b.

a duty to protect others and treat them with dignity, but one has no right to be protected and treated with dignity. The Bible, for instance, speaks about the duty to treat others with love and respect; the duty to preserve the life and freedom of others; the duty to salvage another's property; and the duty not to slander people. The Bible does not mention the right of a person to be treated with love and respect, nor does the Bible mention an individual's right to life, freedom and property.

Even the obligation to pay off a debt is described in the Talmud, according to one opinion, not as the creditor's right but as the debtor's religious duty.³⁰ According to this opinion, minor orphans of a deceased debtor are not obligated to pay their father's debt, because minors are exempted from the biblical commandments.³¹

In Western legal systems a duty implies the existence of a correlative right; rights and duties are two sides of the same coin. As discussed previously, in Jewish law a duty may exist even without a corresponding right. A violation of such duties may result in punishment either by the court or by G-d; however, the person who was affected by those violations does not necessarily have a right to sue the offender. Jewish law is therefore said to be a duty-oriented rather than right-oriented legal system. As much as the Bible is concerned with the physical wellbeing of human beings, its focus is on the elevation of peoples' spiritual levels, which may be achieved by fulfilling duties rather than seeking the satisfaction of rights.

Although Jewish law is a legal system embodying virtually all legal subjects that may be found in its western counterparts, Jewish law and western legal systems are based on different foundations, which may result in conflicting principles. For the purpose of this discussion, it is prudent to briefly mention some of the basic underlying premises of the Jewish legal system.

The most fundamental biblical principle is the existence of an almighty G-d, Who created the entire universe for the purpose of accomplishing His agenda. In essence, G-d's agenda seeks to elevate human beings to the highest spiritual level. However, this requires a tremendous effort on the part of human beings, as prescribed in the Torah.

³⁰ See B. Talmud, BAVA BATHRA 174a

³¹ *Id.*

Since all other nations, except for Israel, refused to accept the Torah,³² it remained primarily the duty of the Jewish people to carry out G-d's agenda by observing the Torah. Other nations are only obligated to observe the seven Noahide laws.³³

Another Jewish fundamental principle is that this world is merely a passage to an eternal world, known as *Olam Habah*, or the World to come, where those who made the required efforts, including non-Jewish people, will find their eternal happiness in the presence of G-d. Failure of societies to accomplish G-d's agenda may result in the annihilation of entire communities, nations and even the entire world, depending on the spread, extent and gravity of the violations, which may have undermined the underlying purpose for their creation.

The Midrash relates that prior to the creation of this world G-d created other worlds and destroyed them.³⁴ The Midrash does not discuss the reason for the creation and destruction of those worlds; however, it may be assumed that the creatures in those worlds did not live up to G-d's expectations, and that G-d found no purpose in their continued existence. Support for this theory may be found in the biblical story about the flood in the days of Noah. If not for Noah who was a righteous man, the entire world would have been destroyed by the flood. Apparently, in the previous worlds created by G-d there were no righteous people who could save those worlds from annihilation.³⁵

The biblical requirement to annihilate the Canaanite and Malachite nations should be viewed in the context of G-d's agenda, which is the purpose of the creation of the universe. The biblical laws are actually a guide for people to accomplish G-d's agenda in the creation of the world. Because G-d is compassionate, He does not punish sinners immediately, but rather, He gives them a chance to repent and change their ways.³⁶ An illustration of G-d's treatment of sinners is the biblical description in the Book of Jonah of the great city of Nineveh that was doomed to be destroyed by G-d, but was spared

³² *MIDRASH RABA*, Lamentation 4 (introduction); TANA DE'VEI ELIYAHU ZUTA Ch. 11

³³ B. Talmud, SANHEDRIN 56a-b.

³⁴ *MIDRASH RABA*, Genesis 9:2; *MIDRASH RABA*, Kohelet 3:14.

³⁵ Incidentally, the Midrash's story about the existence of other worlds prior to the current one may explain the archeological discoveries of skeletons of people and animals believed to have lived hundreds of thousands years ago. These discoveries seem to contradict the biblical description of the creation of the world which took place less than six thousand years ago. The existence of previous worlds that were destroyed may resolve this contradiction.

³⁶ EZEKIEL 18:32

because the people of that city repented before meeting their perilous fate.³⁷ The Canaanite and Malachite nations were also given ample time to rectify their corrupt behavior, but they failed to do so.

Another area where Judaism differs from Western law is in the notion of freedom of religion. Freedom of religion, from a Jewish perspective, would mean that people are allowed to ignore G-d's agenda and reject His laws. As mentioned previously, this may lead to the destruction of the society, which should be avoided at all costs. Because Western societies are secular, and many of their members believe in different religions, it makes sense for these societies to guarantee freedom of religion. But Western societies would not allow people to elect an authoritarian regime that would put an end to basic democratic principles; nor would those societies be criticized for doing so. Religion in a religious society is much more essential than democracy in a secular democratic society.

The gender inequality in divorce proceedings is not an indication of discrimination against women; it rather results from the biblical concept of marriage and men's duty to be fruitful and multiply, of which women are exempted.³⁸ Men and women were given different duties and functions according to G-d's agenda, which is also reflected in the physiological and character differences between men and women, as designed by G-d.

For the accomplishment of their different duties men and women were given different tools. The husband's dominant role in the divorce proceedings is needed for carrying out his duty of procreation in the most perfect way. Over the centuries, the rabbis realized that many husbands do not utilize those tools in a proper way, but rather abuse them; they subsequently restricted the power of the husband, as mentioned previously.

The biblical treatment of human rights may be compared to the way an army treats its troops. Troops may be denied certain human rights; also, not all troops are treated equally in the army. However, nobody would criticize the army for violating the human rights of its troops. The army has a goal to protect the country and defeat its enemies, which may require the denial of certain human rights and different treatment of

³⁷ YONAH 3:1-10

³⁸ B. Talmud, YEVAMOT 65b; Maimonides, MISHNEH TORAH, The Book of Women, The Laws of Marriage 15:2

its units based on their different duties and assignments. Similarly, the Bible has an agenda which may sometimes require the denial of certain human rights and different treatment of people based on their duties and assignments, according to G-d's agenda.

Professor Richard Klein:*

A Comparative Analysis of the Jewish Law and the Secular Perspective on International Human Rights

Although the Bible may have "served as an *inspiration* for human rights activists",¹ the development of the doctrine and law of human rights is most assuredly a consequence of the secularization of western culture. Whereas the secular foundations of modern human rights theory were expressed in the European declarations of rights as well as in the American Declaration of Independence,² these concepts of fundamental human rights find their genesis in the natural rights theories of John Locke.

Locke, at the end of the 17th century, concluded that the natural state of man is a state of perfect freedom, a state of equality "wherein all the Power and Jurisdiction is reciprocal, no one having more than another."³ It was, however, not until the formation of the United Nations in 1945 that there was an attempt to establish the legal foundation for the law of international human rights. Prior to the conclusion of the Second World War, there had been no international treaty that obligated nation-states to adhere to any internationally recognized set of standards enumerating the rights of individuals residing within the nation.

It was the response to the revelation of the horrors of the Holocaust that prompted the creation of the United Nations; the Charter's Preamble made it clear that the furtherance of human rights was to be a basic and primary objective of the new world

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¹ See Chaim Povarsky, Opening discourse, *supra* p. 67 (emphasis added).

² See Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 Notre Dame L. Rev. 305, 308 (1987).

³ John Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government* (1698), reprinted in John Locke, *TWO TREATISES OF GOVERNMENT* 269-71, 402 (Peter Laslett, ed., 1988).

order.⁴ The Preamble refers to the Declaration as “a common standard of achievement for all peoples and all nations.”⁵ Despite the decidedly secular nature of the U.N., there is today a significant presence of religious institutional power. The Holy See (the Vatican) has Permanent Observer status as a non-member state, and The Organization of Islamic Conferences, which represents 53 countries, plays a major role in the development of some areas of U.N. policy.

The U.N. Charter, however, went no further than vague and general references to human rights; it was left for the Universal Declaration of Human Rights,⁶ three years later, to lay out some specifics.⁷ But the Declaration itself was not a treaty, therefore no specific legal obligations and responsibilities were imposed.⁸ The General Assembly, therefore, determined that a covenant, a treaty on human rights, should be created. Two separate covenants – one which focused on political rights⁹ and the other which

⁴ See, Preamble of the United Nations Charter: “We the Peoples of the United Nations determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small... do hereby establish... the United Nations.” U.N. Charter pmb. (1945) reprinted in Center for the Study of Human Rights, Columbia University, Twenty Four Human Rights Documents at 1 (1992).

⁵ *Id.*

⁶ Universal Declaration of Human Rights, G.A.Res. 217A, art. 2, U.N. Doc. “A/180 (1948) The drafting of the Declaration was the task of the UN Commission on Human Rights which was chaired by Eleanor Roosevelt. Proposals and counter proposals were submitted by each of the fifty eight member states, the integration of all the views into one document was a huge undertaking, and a huge accomplishment. The Commission assigned one single author, René Cassin, who had been the principle legal adviser during the war for General Charles De Gaulle, to be in charge.

⁷ There were no countries that voted in the General Assembly to oppose the Declaration, but there were eight abstentions. A group of Moslem countries advocated deleting Article 18, the right to change one’s religion, from the Declaration. James Piscatori, comments to Ernest Gellner, Human Rights and the New Circle of Equity: Muslim Political Theory and the Rejection of Skepticism, in Human Rights in Perspective: A Global Assessment 113, 129, 130-131 (1992). Opposition to the concept of an individual being free to change his religion was rooted in the traditional Shari’a law of apostasy, and the Muslim who does repudiate his faith in Islam, even if done indirectly, has committed a capital offense. See *id.* at 131. Abdullahi A. An-Na’im, *Human Rights in the Muslim World Socio-Politics Conditions and Scriptural Imperatives: A Preliminary Inquiry*, 3 Harv. Hum. Rts. J. 13, 23 (1990).

⁸ The Declaration, nevertheless, clearly outlines general human rights principles that nations were expected to follow. Articles 3-20 refer to what should not be done to citizens, and Articles 22-27 primarily refer to the obligations of states to act on behalf of its people. This second set of responsibilities is conditioned on the “organization and resources of each state.”

⁹ International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, 993 U.N.T.S. 171 (1966), in Human Rights and the Administration of Justice: International Instruments 35 (Christopher Gane & Mark Mackarel eds., 1997). Article 2

established economic, social and cultural rights¹⁰ – finally resulted. One of the prime achievements of the Declaration and the covenants has been to establish the principle that nations may indeed be accountable to the world community for the manner in which they treat their own citizens.

Professor Povarsky notes that the Bible regards the concept of human rights to consist of duties and not actual *rights*, but the International Covenant on Civil and Political Rights (the Political Covenant) is, indeed, clearly focused on the establishment of individual rights. Therefore, the Covenant establishes, for example, the right of the individual to practice one's religion in the way that he chooses,¹¹ to criticize his government,¹² and to exercise his freedom of speech¹³ without fear of retaliation.

The focus of the International Covenant on Economic, Social and Cultural Rights¹⁴ (the Economic Covenant) is on the State's obligation to protect and to promote the economic and the social well-being of its citizens.¹⁵ Jewish law does not encompass

requires states to enact legislation or adopt other measures to ensure the stated rights. The Covenant created the Human Rights Committee to monitor compliance; each state that is a signatory to the covenant must submit periodic reports to the Committee.

¹⁰ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16 at 49, U.N. Doc. A/6316, 993 U.N.T.S. 3 (1966), in *Human Rights and the Administration justice: International Instruments* 39 (Christopher Gane & Mark Mackarel eds., 1997).

¹¹ International Covenant on Civil and Political Rights, *id.* at Article 18 which provides for the "freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in a community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

¹² Article 18 of the Covenant, *id.*, provides for "everyone to have the right to freedom of thought" and Article 19 guarantees the right "to impart information and ideas of all kind" whether verbally or in print.

¹³ See Article 19 at *id.*, guaranteeing the right to freedom of expression.

¹⁴ See *supra*, note 8.

¹⁵ The Economic Covenant, unlike the Political Covenant, uses vague language which can be claimed by some to indicate that the "rights" deemed to be economic are more appropriately deemed long-term "goals". Article 2, for example, declares that "Each State Party . . . undertakes to take steps. . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant." (emphasis added). The United Nations Committee on Economic, Social and Cultural Rights attempted to explain why, unlike the Political Covenant, the economic rights were more aspirational in nature:

While the full realization of the relevant rights may be achieved progressively, steps toward that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

A state party which claims that it has been unable to comply with its basic obligations under the Covenant "must demonstrate that every effort has been made to use all resources that are at its

the concept that those who govern are obligated to ensure a state which protects social and cultural pluralism. Nor does Jewish law embrace the identification and existence of economic human rights, although there is the role of *tsedaka*, the obligation of the *individual* to make charitable donations.

Economic and political rights ought most appropriately be viewed as interrelated with one another.¹⁶ The Fifth Session of the General Assembly first stated the principle that the “enjoyment of civil and political freedoms and that of economic, social and cultural rights are interdependent” and whenever “the individual is deprived of his economic, social and cultural rights, he does not represent the human person who is considered by the Declaration to be the ideal of the free man.”¹⁷ The welfare states of western and northern Europe are testimonials to the ability and desirability of states to realize the interrelationship of economic and political rights and to act to protect and enforce each.

The essence of much of a secular perspective on human rights revolves around choice. One ought to have the freedom to choose which religion, if any, one wishes to follow and the manner in which he or she will observe the teachings of that religion. This right is one deemed so basic that the exact same language establishing religious freedom is articulated as Article 18 in *both* the Universal Declaration of Human Rights¹⁸ and the Political Covenant:¹⁹ “Everyone shall have the freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his

disposition in an effort to satisfy, as a matter of priority, those minimum obligations.” Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), UN Doc. E/1991/23, Annex III.

¹⁶ See, e.g., Daniel A. Bell, *The East Asian Challenge to Human Rights: Reflections on an East West Dialogue*, 18 Hum. Rts. Q. 641, 645 (1996).

¹⁷ United Nations General Assembly Resolution 543 (VI). At the time that this Resolution was adopted—1950—it was assumed that one covenant establishing both political and economic rights would be written, but the next year, the Assembly decided instead to draft two separate covenants. The third paragraphs of the Preambles of each Covenant use identical language to enforce the view of the interconnectedness of political and economic rights.

¹⁸ See *supra* note 5.

¹⁹ See *supra* note 7.

choice..."²⁰ The concept of freedom on choice in religious matters has been extended by the Convention on the Rights of the Child to apply to children as well.²¹

The General Assembly of the United Nations considered violations of human rights resulting from religious beliefs to be so widespread that, in 1981, it enacted a Declaration on the Elimination of All Forms of Religious Intolerance and Discrimination Based on Religion or Belief.²² Yet, as Professor Povarsky acknowledges, the most fundamental principle of Jewish law *is* the recognition of God's existence, and, Povarsky claims, "freedom of religion" is just code language for a Jew or non-Jew choosing to "*ignore G-d's agenda* and neglect the observance of His laws."²³ Not only is the worshipping of idols as practiced in many Eastern religions deemed by the Bible to be a capital crime,²⁴ but Professor Povarsky warns us that failure to do what God requires of us "may result in the annihilation of entire communities, nations, and *even the entire world*."²⁵

Such is hardly the foundation for tolerance, for respecting the choices of those who decide *not* to live one's life in adherence to the requirements of Jewish law. Not only is there the biblical account of God's destruction caused by the flood, but Professor Povarsky strongly implies that even though the Midrash doesn't provide the reasons that God destroyed other previous worlds that he had created, it's clear that God had seen no

²⁰ Article 18, Universal Declaration of Human Rights, G.A. Res. 217 A, art. 2, U.N. Doc. A/180 (1948), International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, 993 U.N.T.S. 171 (1966).

²¹ Convention on Rights of the Child. Nov. 20, 1989, arts. 14, 30, G.A. Res. 25, annex. U.N. GAOR, 44th Sess., 61st plen. mtg., Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990). Nothing, of course, precludes religious leaders from instructing children on the fundamental precepts of the religion -- however hierarchical, however patriarchal.

²² Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/51 (1981).

²³ See Povarsky, *supra*: "Freedom of religion from a Jewish perspective, would mean that people are allowed to ignore G-d's agenda and neglect the observance of His laws."

²⁴ See EXODUS 22:21 ("He that sacrificeth unto any God, save unto the Lord only, he shall be utterly destroyed"). In fact, one is called upon to destroy the idols of the pagan Gods: "The graven images of their gods shall ye burn with fire: thou shalt not desire the silver or gold that is on them. Nor take in unto thee, lest thou be snared therein: for it is an abomination to the Lord, thy God." DEUTERONOMY 7:25.

²⁵ See Povarsky, *supra* (emphasis added).

reason for these worlds to continue to exist since the inhabitants “did not live up to G-d’s expectations.”²⁶

The right of women not only to be free from discrimination²⁷ but to have entitlements equal to those of men²⁸ is absolutely basic to the secular perspective of human rights. Important contributions to gender equality on an international level have been made in the employment area by conventions of the International Labor Organization, and on the educational front by the United Nations Educational, Social and Cultural Organization. Gender equality is not just a guarantee of equal political rights as stated in the Charter to the United Nations and in the subsequent Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, but is also included in the International Covenant on Economic, Social and Cultural Rights.²⁹

Let me respond to Professor Povarsky’s perspective regarding what he acknowledges is “gender inequality in divorce proceedings” in Jewish Law.³⁰ The Professor, while noting the “husband’s dominant role”, nevertheless assures us that this “is not an indication of discrimination against women.”³¹ I maintain that’s exactly what it is. It is the husband in Jewish law who maintains a veto power over whether or not a divorce shall occur. There will be no divorce unless the husband writes and delivers the *get*, the bill of religious divorce, to his wife.³² Any second “marriage” of a woman, who,

²⁶ See Povarsky, *supra* text accompanying notes 34-35.

²⁷ See Universal Declaration of Human Rights; *supra* note 5, stating that “everyone is entitled to all the rights and freedoms . . . without distinction of any kind, such as . . . sex.” Article 2. See also International Covenant on Civil and Political Rights, *supra* note 7, Article 3 requiring countries to “undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present covenant.”

²⁸ The Charter of the United Nations may have been somewhat ahead of the times when in 1945 its Preamble expressed a determination to affirm “the equal rights of men and women.” U.N. CHARTER pmbl. (1945), reprinted in CENTER FOR THE STUDY OF HUMAN RIGHTS, COLUMBIA UNIVERSITY, TWENTY FOUR HUMAN RIGHTS DOCUMENTS at 1 (1992).

²⁹ Article 2 of the Covenant, *supra* note 8, states that economic, social and cultural rights are not to be diminished because of discrimination based on sex.

³⁰ See Povarsky, *supra*.

³¹ See Povarsky, *supra*.

³² See Maurice Lamm, THE JEWISH WAY IN LOVE AND MARRIAGE (1980) at p. 47. Lamm adds that, “the Torah demands absolutely and unequivocally that marriage be terminated by normal religious divorce (*get*).” *Id.*

in the absence of receiving the *get*, nevertheless attempts to remarry, will not be recognized and any resultant children would be deemed illegitimate.³³

The plight of the *agunah*, the woman who wishes a divorce but whose husband will not grant her one, is surely a reflection of the unequal distribution of power between the couple, at least as far as being able to terminate the marriage is concerned; the *agunah* may have to remain the wife of her husband for an indefinite period of time. If she proceeds to attempt to move on from the marriage on her own and cohabits with another man, she will be committing adultery. And, to add insult to injury, the husband who refuses to grant his wife the *get*, can himself live with another woman and not be deemed an adulterer, and his children from such a liaison will not be considered bastards. Professor Povarsky would have us accept this state of affairs, which “make sense”, because, as he maintains, “the Bible requires *men*, not *women* to be fruitful and multiply.”³⁴

The effects of the power inequality concerning divorce may have a very significant impact on the financial and emotional well being of the wife. The all-powerful husband may withhold consent to any *get* unless he wins concessions from his wife as far as claims for alimony, child custody or distribution of property. Any individual's independence is closely related to financial security, and the imbalance involved in the power to achieve a divorce is a very serious roadblock to the equality of women under Jewish law. One Justice on the Israeli High Court of Justice commented in

³³ The child of an *agunah* is deemed a *mamzer*, and it is not only that child that is considered illegitimate, but all children who are the offspring of that individual as well. The illegitimacy of the *mamzerim* is carried on through future generations, an indication of how seriously Jewish law deems the woman's transgression to have been. See DEUTERONOMY 23:2: “A bastard shall not enter into the congregation of the Lord; even to his tenth generation shall he not enter into the congregation of the Lord.”

³⁴ Not all commentators are so clear that God's first command, “Be fruitful and multiply and replenish the earth” refers only to men. Indeed in the language which precedes that phrase in Genesis 1: 28, God, after having created male and female, is specifically giving them the command: “And God blessed them, and God said unto them, Be Fruitful and multiply. . .” Haim Cohen has written that if the language were in the nature of a divine command it would be addressed to women as well as to men, but if it was only a blessing it need not be viewed as imposing any duty on women. Haim Cohen, *Human Rights in Jewish Law* (1984) at 168. Cohen does conclude that the duty is incumbent solely upon men because in Genesis 35:11, God instructs Jacob that he has the duty to multiply, and that “in the act of procreation the man is the active and the woman only a passive party.” Cohen, *Id.*

Rephaeli v. Rephaeli,³⁵ a case where a husband refused to give a divorce to his wife from whom he had been separated for over six years, that the slave was better off than a woman is under rabbinic law, because the slave would have been able to be released from bondage after seven years³⁶

In Jewish Law, it is the husband, and not a court, who performs the act which constitutes a divorce.³⁷ It is no less a source than Deuteronomy which provides that “when a man hath taken a wife, and marries her, and it come to pass that she find no favor in his eyes, because he hath found some uncleanness in her: then let him write her a bill of divorcement and give it in her hand, and send her out of his house.”³⁸ No civil court-ordered divorce has any significance under Jewish law, only the religious divorce would be considered valid.³⁹

A power imbalance in a marriage for Jews is of critical import because of the very central role of marriage in Jewish life. It is marriage which enables someone to spiritually “complete oneself.”⁴⁰ It is exclusively the prerogative of the man to bring about and consecrate the marriage, and although Jewish law permits a man to marry as

³⁵ *Rephaeli v. Rephaeli*, 51(1) P.D. 198 (1997).

³⁶ Comments by Justice Cheshin as reported in Frances Raday, Roundtable: an Exchange with Ronald Dworkin, Culture, Religion and Gender, 1 International Journal of Constitutional Law 663 (2003).

³⁷ Louis Epstein, THE JEWISH MARRIAGE CONTRACT (New York: Jewish Theological Seminary of America 1927 (reprinted by Arno Press 1973)). There are strong parallels here with Islam. See *Mohammed Ahmed Khan v. Shah Bano Begun*, 2 S.C.C. 556 (1985), where the Chief Justice of the Supreme Court of India noted, disapprovingly, that the “Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed for no reason at all.” *Id.* at 559. The Indian Supreme Court, in disregard of Islamic Shari’a Law, required maintenance payments to be provided by the Moslem husband to his divorced wife.

³⁸ DEUTERONOMY 24:1. The Bet Din, a rabbinic court, may for practical purposes act to ensure that the technical requirements of the divorce have been complied with.

³⁹ The right of a Moslem woman to obtain a divorce has long been a controversy in India. Under the existing law, even though a woman can seek a divorce, it is the husband who makes the decision whether or not to permit the divorce. *Triple Failure*, India Today, December 11, 2006, at 48. However, the All India Shia Personal Law Board, the body which has for the last 35 years been overseeing Islamic laws, has approved a new marriage contract providing for a new interpretation of Islamic personal law. *Id.* Under the new contract, women will no longer be subjected to their husband’s automatic ability to prevent a divorce. *Id.*

⁴⁰ Moses Gaster, THE KETUBAH (1974) at 5.

many wives at one time as he chooses,⁴¹ a woman must be married to only one man at a time.⁴² It is, in fact, a capital offense for a wife to commit adultery,⁴³ but the male adulterer would be put to death only if the woman he was with was married, i.e. belonged to another.⁴⁴

Professor Povarsky writes that the “Bible regards what is today called human rights, as duties” and that “Jewish law is said to be a duty-oriented rather than a right-oriented legal system.”⁴⁵ What the Professor does not comment on is that *women* are exempt from a whole range of positive duties. Women are exempt from the duty of teaching their sons or training them for a vocation. Women are exempt from the duty of studying and learning,⁴⁶ the paths one needs to take in order to develop an understanding of the complexities of the religion and the laws. If it is the man who is the one who exclusively has the *knowledge* about that which so controls the everyday existence of the observant Jew, surely *power* accompanies the knowledge.

It is not just knowledge of Jewish law and religion that is possessed by the husband, all of the marital property is to be in the possession of the husband.⁴⁷ So Professor Povarsky's applauding the Biblical protection of property rights must surely be tempered. The husband is the sole inheritor of his wife, but a widow does not receive any

⁴¹ See Haim Cohen, HUMAN RIGHTS IN JEWISH LAW (1984) at 170 (citing B.YEVAMOT 65a; M. KIDDUSHIN 2:6-7, Maimonides, Ishut 14:3).

⁴² *Id.* (citing M. Sanhedrin 9:6; Maimonides, Ishut 1:3). The apparent explanation for the ban of polyandry was the need to know the identity of the father of the child the mother gives birth to. See Emmanuel Rackman, Judaism and Equality, in Milton Konvitz, editor, Judaism and Human Rights (2001) at 35-36.

⁴³ See Leviticus 20:10 (“the adulteress shall surely be put to death”) and Deuteronomy 22:22.

⁴⁴ *Id.*

⁴⁵ See Povarsky, *supra*.

⁴⁶ Haim Cohen, *supra* note at 169. Jewish law does make clear that certain duties do apply equally to men and to woman. See, e.g., LEVITICUS 20:15 “If a man lie with a beast, he shall surely be put to death” and Leviticus 20:16 providing for the same “duty” for women to refrain from lying down with a beast, with the same punishment for a female violator. In both instances, the beast is to be killed as well.

⁴⁷ The husband acts as trustee for property that may have been acquired, by gift or inheritance, by the wife during the course of their marriage. See Emanuel Rackman, Judaism and Equality, in Milton Konvitz editor, JUDAISM AND HUMAN RIGHTS, (2nd ed.2001) at 37. The husband is not even responsible for the debts of his wife, even if she does own property which is, of course, in his control and possession. The only exception would be if the wife's debts were incurred with the husband's authority. Cohen, *supra* note at 169-70 (citing Rema ad Hoshen Mishpat 96:6).

inheritance from her husband.⁴⁸ The former wife may only receive either maintenance payments from her husband's estate or her *ketuva*, her property which had been in the possession and custody of her husband during the marriage.⁴⁹

Restrictions on the rights of married woman are many, including the prohibition of the mother's sale of her infant daughter into bondage; such "privilege" is reserved for the father.⁵⁰ Professor Povarsky discusses Jewish law and the practice of slavery, and it would hardly mollify the humanistic secularist to be informed by the Professor of how many years a Jewish slave, as contrasted to other slaves, had to have "work" before being released from slavery,⁵¹ or even that "Jewish law is concerned about the *treatment* of slaves."⁵² A leading Jewish Law scholar, Emanuel Rackman, has concluded that Jewish law "frowned upon the emancipation of the non-Jewish slave,"⁵³ a concept that is hardly likely to win acclaim by secular humanists.⁵⁴

Professor Povarsky discusses the requirement that judges, under Jewish law, provide a fair trial; what he fails to mention is that women cannot serve as judges.⁵⁵ But

⁴⁸ *Id.* at 173 (citing M. Bava Batra 8:1; Maimonides, Ishut). The male descendants are the inheritors of the husband; only if there is no son does a daughter inherit. Num. 27: 8 instructs that "If a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter" (emphasis added).

⁴⁹ *Id.* (citing M. KETUVOT 9:1; Maimonides, Ishut 18:1).

⁵⁰ *Id.* at 170.

⁵¹ See EXODUS 21:2 ("If thou buy a Hebrew servant, six years shall he serve; and in the seventh he shall go out free for nothing.").

⁵² Professor Povarsky *supra* (emphasis added).

⁵³ Emanuel Rackman, Judaism and Equality, in Milton Konvitz, JUDAISM AND HUMAN RIGHTS (2001) at 43. Rackman writes that authorities believed that the non-Jewish slave may have preferred to continue on as a slave. *Id.* at 43-44.

⁵⁴ To be sure, as is the case with the vast majority of contemporary societies, slavery within the Jewish community no longer exists. According to Maimonides, MISHNEH TORAH, the Book of Acquisition, The Laws of Slaves 2:10, such laws are applicable only when the law of the Jubilee Year is in effect.

⁵⁵ The prohibition against women serving as judges in the religious courts of Israel required Israel to issue a Reservation (restriction) on the applicability of certain provisions of the Convention on the Elimination of Discrimination Against Women, (See G.A. Res. 34/180, 34 U.N. GAOR (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 12 (entered into force Sept. 3 1981)) [hereinafter CEDAW]. Israel, upon signing the Convention, issued the following Reservation:

The State of Israel hereby expresses its reservation with regard to article 7(b) of the Convention concerning the appointment of women to serve as judges of religion courts where this is prohibited by the laws of any of the religious communities in Israel.

Convention on the Elimination of All Forms of Discrimination against Women, K.A. 31,180 at 195. A "reservation" in accordance with standards of international law permits a country to legally commit itself to generally abide by a treaty yet to exercise its rights not to apply some of the provisions of the treaty.

serving as a judge is not the only role in a legal proceeding that is restricted to males; women, traditionally, have not been able to serve even as witnesses.⁵⁶ And since the ruler of the land is to be chosen amongst the *brethren*,⁵⁷ the principle evolved that “for all offices in Israel only men and not women are to be appointed.”⁵⁸ This establishes, and is the basis for, a patriarchal society, and clashes directly with gender equality. Patriarchy certainly has its roots in the earliest portions of the Bible, the punishing of Eve at the Garden of Eden. Genesis 3:16 informs that “Unto the woman he said I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thou desire shalt be to thy husband, and he shall rule over thee.” And man is to be punished for having listened to woman. “Because you have listened to the voice of the woman... cursed is the ground because of you, in toil you shall eat of it all the days of your life; thorns and thistles it shall bring forth to you... You are dust and to dust you shall return.”⁵⁹

Judaism is not the only religion, to be sure, where conflicts exist between traditional religious beliefs and customs, and equal rights for women. The primary international human rights document concerned exclusively with women’s rights is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁶⁰ The Optional Protocol took effect in 2001 and strengthened CEDAW in that it permitted an individual woman to bring complaints directly before a CEDAW Committee.⁶¹ The drafters of CEDAW were certainly aware of the clash between religious traditions and women’s rights, and clearly imposed the requirement that states modify practices which are “based on the idea of the inferiority or the superiority of the

⁵⁶ But see Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. Int’l and Foreign Aff. 339, 356 (2000-2001) (noting that halachic authorities and rabbinical courts (Batei Din) have often developed ways to accept the testimony of women).

⁵⁷ DEUTERONOMY 17:15 instructs that “one from among thy brethren shall thou set king over thee” (emphasis added).

⁵⁸ Maimonides, *Melakhim* 1:5, as cited in Cohen, *supra* at 175.

⁵⁹ GENESIS 3:17.

⁶⁰ Convention on the Elimination of all Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 12 (entered into force Sept. 3, 1981).

⁶¹ Optional Protocol on the Elimination of Discrimination Against Women, G.A. Res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000) (entered into force Dec. 22, 2000).

sexes or on stereotyped roles for men and women.”⁶² All appropriate measures, including legislation, must be undertaken to modify or abolish “customs and practices which discriminate against women.”⁶³ Many Moslem countries, however, filed Reservations when ratifying CEDAW in order to continue to apply Shari’a [Islamic law] to the role of women within the family.⁶⁴ On the other hand, the Hindu Marriage Act did remove a number of instances of inequality in the family law for Hindus residing in India.⁶⁵

Awareness of the conflict between religious traditional practices and women’s equality was also addressed by the Human Rights Committee which was formed as part of the Political Covenant⁶⁶ and was designed to interpret and elaborate on the Covenant.⁶⁷ The Human Rights Committee’s General Comment on the Equality of Rights Between Men and Women holds that no group or person, in the name of the right to practice one’s religion, can violate women’s equality rights.⁶⁸ States are, in fact, obligated to ensure that religious attitudes are not used to justify violations of women’s right to equality.⁶⁹

Perhaps no statement about the possible inherent tensions between orthodox religious adherence and fundamental human rights norms has been stronger than that issued by the European Court of Human Rights in *Refah Partisi (Welfare Party) and Others v. Turkey*⁷⁰ in 2002. The Court stated that “it is difficult to declare one’s respect for democracy and human rights while at the same a time supporting a regime based on shari’a which clearly diverges from Convention [the European Convention of Human Rights] values, particularly with regard to... its rules on the legal status of women and the

⁶² Optional Protocol on the Elimination of Discrimination Against Women, G.A. Res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000) (entered into force Dec. 22, 2000).

⁶³ CEDAW. *Supra* note 46, Article 5(a)(emphasis added).

⁶⁴ *Id.*, Article 2 (f).

⁶⁵ See the Reservations of Algeria, Bangladesh, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Saudi Arabia, Tunisia and Turkey.

⁶⁶ Hindu Marriage Act, New Delhi, India (1955) C.I.S. (Part II).

⁶⁷ See *supra* note 7.

⁶⁸ Political Covenant, *supra* note 7, Article 28.

⁶⁹ Human Rights Committee General Comment 28, CCPR/C/21/Rev.1/Add. 10, 5, 32.

⁷⁰ *Id.*

⁷⁰ *Refah Partisi (Welfare Party) and Others v. Turkey*, 35 Eur. H.R. Rep. 56 (2002).

way it intervenes in all spheres of private and public life in accordance with religious precepts.”⁷¹

In Israel, despite numerous challenges, the courts have generally refused to intervene in issues relating to family law since the orthodox religious courts have been granted jurisdiction over such matters.⁷² The international committee which was formed to assess the progress of countries in implementing the Convention on the Elimination of Discrimination against Women,⁷³ “suggested” to Israel that in order to guarantee equality in marriage and family relations, secular legislation ought to be introduced and jurisdiction over such matters should be transferred to the civil courts.⁷⁴

Dr. Povarsky mentions only blasphemy and slander as restrictions on freedom of speech.⁷⁵ Yet Deuteronomy 13:6-11 provides that if one’s brother, child, wife or friend secretly says that you should go and serve other gods, that individual shall be stoned to death for those words.⁷⁶ This prohibition of *apostasy* certainly conflicts with the right to freedom of speech, conscience and association. Banning conduct and thought which is deemed to constitute heresy is repugnant to freedom whether it is a tenet of Judaism, or of any other religion.

In the secular perspective of human rights, the death penalty is increasingly perceived of as a violation of human rights norms. Whereas the 1966 International Covenant on Civil and Political Rights provided that the death penalty “may be imposed only for the most serious crimes,”⁷⁷ the 1989 Second Optional Protocol to that Covenant⁷⁸

⁷¹ Id. at 87.

⁷² A major exception to this general policy is the 7 to 4 decision in March, 2005 of the Israeli High Court of Justice wherein the Court held that the state must recognize non-Orthodox conversions where the actual conversion process was finalized outside the state of Israel. Therefore, for the purpose of defining a Jew under the Law of Return, recognition of a conversion by the Orthodox Conversion Court will no longer be required.

⁷³ Article 17 of the Convention called for the establishment of the Committee on the Elimination of Discrimination Against Women.

⁷⁴ Report of the Committee on the Elimination of All Forms of Discrimination Against Women, 16-17 Sessions, 1997, at 91.

⁷⁵ See Povarsky, *supra*.

⁷⁶ Jewish idolaters are treated more severely than pagans because those raised as Jews are expected to know better than to disobey God. See Haim Cohen, HUMAN RIGHTS IN JEWISH LAW 159 (1984).

⁷⁷ International Covenant in Civil and Political Rights, *supra* at Article 6(2). The Covenant prohibited the death penalty completely for those less than 18 years of age. Article 6 (5).

states that “abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights.”⁷⁹ Yet the Bible subjects 36 offenses to the death penalty.⁸⁰ Leviticus 20:9, for example, provides that “every one that curseth his father or his mother shall be surely put to death.”⁸¹ Leviticus 20:13 provides for death for males who lie “with a male as with a woman.”⁸² There is no explanation in the biblical texts, nor do Orthodox adherents demand any rationale for either the disapproval of the homosexual contact or why death is the appropriate sanction.⁸³ No explanation is required because the Bible informs that “the Torah of the Lord is perfect... the statutes of the Lord are right.”⁸⁴ And whereas the Universal Declaration of Human Rights⁸⁵ provides that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,”⁸⁶ the Bible prescribes death by burning, stoning, beheading and strangulation – depending on the offense.⁸⁷ Idol worship⁸⁸ and cursing one’s parents, for example, lead to stoning as the form of death; a false prophet faces strangulation.⁸⁹

In order for there to be more of an accord between Jewish law and modern secular human rights concerns, changes in certain age old traditions and customs would be most helpful. One organization concerned about human rights issues relating to Orthodox women has adopted the phrase “where there is a rabbinic will, there is a halachic way.”⁹⁰ There has been increased participation by females in halachic studies, and

⁷⁸ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. Res. 44/128, 44 U.N. GAOR Supp. (No. 49) at 206, U.N. Doc. A/44/49 (1989).

⁷⁹ *Id.* at Preface.

⁸⁰ The Code of Maimonides, Book 14: The Book of Judges, Sanhedrin 15:13 as cited in Irene Rosenberg, *Of God’s Mercy and the Four Biblical Methods of Capital Punishment*, 41 N. 4 Criminal Law Bulletin 2, August 2005 at footnote 64.

⁸¹ LEVITICUS 20:9 continues: “he hath cursed his father or mother, his blood shall be upon him.”

⁸² LEVITICUS 20:9 – 16 all relate to instances where the death penalty is sanctioned; 10-16 all relate to sexual offenses.

⁸³ Indeed, Professor Povarsky writes that the duty to observe God’s rules “does not depend on the understanding of them, but rather on the fact that they were given by G-d.” See Povarsky, *infra*.

⁸⁴ PSALMS 19:8-10.

⁸⁵ *Supra* note 5.

⁸⁶ *Id.* at Article 5.

⁸⁷ See Irene Rosenberg, *supra* note 63.

⁸⁸ See *supra* text and footnote 20.

⁸⁹ Rosenberg, *supra*, note 63.

⁹⁰ See Homepage of Goedkosjer, www.joedkosjer.org//agunot.htm.

whereas Jewish law, in Orthodox eyes, certainly precludes women from attaining a position as a rabbi⁹¹ or even that of posek (halachic decider), some Orthodox Jewish women in Israel have recently become the first “halachic advisers.”⁹² And in the U.S., an Orthodox woman has recently been designated a *rosh kehillah*, the head of a congregation.⁹³ Kehilat Orach Eliezer functions, essentially as a modern Orthodox community, and the new leader, an expert in Jewish bioethics, will perform many of the functions of a rabbi. She will deliver sermons, teach classes on Jewish texts, and answer questions concerning the application of Jewish law.⁹⁴

As women increasingly strengthen their grounding in the Torah, Talmud, and Gemara, other inroads might take place as well.⁹⁵ Edah (“community” in Hebrew) was established in 1996 with a focus on addressing some major modern day challenges yet maintaining a “passionate and total commitment to halakhah.”⁹⁶ The first conference of Edah, entitled “Orthodoxy Encounters a Changing World,” was held in 1999 and was attended by over 1,500 Orthodox men and women.⁹⁷ As would be expected, women’s issues were at the forefront of concern,⁹⁸ and a Task Force on Agunot was established.⁹⁹

⁹¹ Women, however, do serve as full rabbis in both the Conservative and Reform branches of Judaism.

⁹² A Step Up for Orthodox Women, Jerusalem Post, Oct. 8, 1999 at p. 6 B. To be sure, not all in the Orthodox world welcomed the women; members of the Shas and United Torah Judaism political parties condemned the development. *Id.*

⁹³ “An Orthodox Jewish Woman, and Soon, a Spiritual Leader,” New York Times, August 21, 2006.

⁹⁴ *Id.* The woman leader, Dina Najman, will not, however, be able to actually read from the Torah, lead services, or even be counted toward a *minyan*.

⁹⁵ For example, women “pleaders” (advocates) appearing in rabbinical courts have grown in number and today may even become certified to appear before the rabbinical judges. *Id.*

⁹⁶ See International Committee of Jewish Women, Newsletter No. 4, Summer 1999.

⁹⁷ *Id.*

⁹⁸ Rabbi Saul Berman, an attorney and founder of Edah, has highlighted the significance of the greater involvement of modern Orthodox women in religion and commented that “[m]odern Jewish women will not tolerate being inferior to men.” *Id.* at 2.

⁹⁹ *Id.* There are a number of organizations focusing on the agunah issue. See e.g. the International Jewish Women’s Human Rights Watch, and the International Coalition for Agunah Rights. The Coalition has a Prayer for Agunot which includes the following: “Creator of Heaven and Earth... Grant wisdom to the Judges of Israel. Teach them to recognize oppression and rule against it.” International Coalition for Agunah Rights, Prayer for Agunot www.goedkosjer.org/agunot.htm. The International Council of Jewish Women is comprised of 52 Jewish women’s organizations in 47 countries. The President’s column in the Council’s newsletter of April, 2005 contained the following: “[W]e as Jewish women can not forget that in spite of our liberation from slavery over three thousand years ago, there are hundreds of Jewish women in agunah, not free to have a life of their

Yet the immutability of Jewish law in the eyes of the most Orthodox of believers is likely to prevent significant accommodation between the religious and the secular. As Exodus 28:43 provides, the laws “shall be a statute for ever unto him and his seed after him.” And Maimonides emphasized the certainty of this: “It is explicitly and clearly laid down in the Written Law that its norms stand forever and evermore: the Law suffers no change, no diminution and no addition.”¹⁰⁰

Whereas traditional Judaism defers to text which dates back over 2,600 years, the secular laws, treaties, declarations, protocols and conventions are ever-expanding. Many, especially western, societies have become increasingly conscious of the need to honor individual choice, and to respect, protect and tolerate differences. Human rights theory emphasizes the independence, autonomy and responsibility of each individual. Secular human rights doctrine aspires to *protect* individuals from control by the source of power, the state. Monotheistic religions such as Judaism, however, traditionally are founded in the subjection of the individual toward God’s will. One cannot, therefore, be terribly sanguine that the contrasts between the secular perspective of human rights and that of the orthodox adherents to Jewish law will diminish. The all-encompassing nature of Jewish law, governing virtually every aspect of human existence, makes the challenge all the greater. Yet, one may, perhaps, find some hope that the secular human rights activist as well as the observant Orthodox will be able to unite behind the mandate of Deuteronomy that “Justice, Justice shall you pursue” (Deuteronomy 16:20).

own, chained to an unwanted or non-existent marriage who cannot be released without her husband’s consent.” International Council of Jewish Women, Newsletter, April 2005, at p. 1.

¹⁰⁰ Maimonides, YESSODEI HA TORAH 9:1, as cited in Cohen *supra* note 26 at 2.

Professor Chaim Povarsky:

In response to Professor Klein, I will first elaborate in general on the biblical perspective on human rights, and then discuss some biblical principles he criticized based upon an inaccurate or incomplete description of those principles. Professor Klein did a good job of outlining the secular perspective on human rights. However, his discussion of human rights in the Bible is based entirely on a secular perspective on human life which provides the foundation for the international law of human rights. This secular view fails to take into account the biblical perspective on the world and human life, which is the basis of the biblical treatment of human rights.

Concepts of human rights may vary from one society to another, and even from one generation to another in the same society, depending on the scale of values and goals of the society at any specific time. Human rights in any society are deeply intertwined with the values and goals of the society. Discussing human rights in one society based on the values and goals of another, or discussing human rights in one generation based on the values and goals of another generation even in the same society, is meaningless. Different treatment of human rights by different societies does not necessarily indicate a greater or lesser concern with human rights, but rather different values and goals of those societies.

Values and goals of a society are generally based on the tradition, beliefs, or philosophical theories of that society. The treatment of human rights in the Bible is a result of its absolute belief in the existence of a Creator who created the universe and human beings in order to accomplish His agenda. According to the Bible, G-d is the only true reality, without which nothing can exist. As Scripture states, "You have been shown in order to know that the Lord He is G-d, there is none beside Him."¹ This is a totally different reality from the one perceived by non-believers. Discussing G-d's existence, Rabbi Moshe C. Luzzatto, a great 17th century Jewish cabbalist and philosopher, writes:

Every Jew must know and believe that there exists a first being, without beginning and end, which brought all beings into existence and continues to sustain them; this being is G-d.... It is also necessary to know that G-d's existence is imperative. It is absolutely impossible that He should cease to exist. It is further necessary to know that G-d's existence does not depend on anything else at all. His existence is intrinsically

¹ DEUTERONOMY 4:35.

imperative... G-d must be absolutely one; it is impossible that there exist more than one being whose existence is intrinsically imperative. Only one being can possibly exist with this necessarily perfect essence, and therefore the only reason all other things have the possibility of existence is that G-d wills them to exist. All other things therefore depend on Him, and do not have intrinsic existence.²

One may deny that reality; however, a society that believes in it cannot be criticized for not adhering to the U.N. Charter on Human Rights, which is inconsistent with G-d's rules. If there is a G-d who gave the law, as described in the Bible, who can question the quality of His laws or criticize them for being inconsistent with the U.N. Charter? Man may and should try to understand G-d's rules,³ and indeed Jewish authorities elucidated most of G-d's rules; however, the duty to observe those laws does not depend on the understanding of them, but rather on the fact that they were given by G-d.⁴

Some authorities divide the biblical laws into two categories: comprehensible and non-comprehensible laws. Also the non-comprehensible laws have a reason, only the reason was not revealed by G-d, because He wants people to obey them not because of their reason, but rather because this is His will.⁵ Although man may not understand the reasons for all divine laws, the Bible assures the people that they are good and just laws:

The Torah of the Lord is perfect, restoring the soul;... The statutes of the Lord are right, rejoicing the heart; The commandment of the Lord is pure, enlightening the eyes;... The judgments of the Lord are true and are righteous altogether.⁶

G-d's rules are right, pure and true not only because they promise a happy life, but primarily because they were designed to accomplish G-d's agenda for human beings, which goes far beyond a happy life in this world. Professor Klein extensively cites the Bible, but he ignores the biblical perspective on human life; the purpose of the creation of the universe, and G-d's agenda in general, without which the discussion of human rights in the Bible is meaningless.

² Rabbi Moshe C. Luzzatto, THE WAY OF G-D, Part 1, Ch. 1, Par. 1, 3-4, 6.

³ See Maimonides, THE GUIDE TO THE PERPLEXED, Part 3, Ch. 31; Ramban's commentary on Deuteronomy 22:6.

⁴ See Rabbi Avraham Ibn Ezra, YESOD MORAH, Gate 8.

⁵ Rabbi Seadia Geon, EMUNOT VE'DEOT, Ch. 1.

⁶ PSALMS 19:8-10.

To use an example I mentioned in my opening discourse, Professor Klein's criticism of the Bible may be compared to one criticizing the army for violating basic human rights by forcing the troops to fight and sacrifice their life; denying them liberty and freedom of movement and action, while entirely ignoring the army's ultimate goal to defeat the enemy and protect the nation, which dictates its treatment of the troops. According to Jewish philosophy, based upon the Bible, the entire world is a battlefield, in which man is fighting his greatest enemy, the evil inclination, which threatens to destroy his life in this world as well as in the world to come. Rabbi Bachya ben Joseph ibn Paquda, the great 11th century Jewish moralist and philosopher, describes man's greatest enemy as follows:

O man, you should know that the greatest enemy you have in this world is your own [evil] impulse, which is interwoven with the powers of your soul, and intertwined in the character of your spirit, associated with you in governing your senses and spiritual faculties, privy to the secrets of your soul and to what is hidden inside you. [It is] your counselor in all your willful movements, whether observable or concealed. It lies and waits to incite you at your every step; you are unaware of it, but it is aware of you; you are unmindful of it, but it is not unmindful of you.⁷

The purpose of the creation of human beings, and indeed the entire universe, according to the Bible, is to give human beings a chance to fight and win this battle, thereby achieving high spiritual standards, establishing a close relationship with G-d, and eventually being eligible for eternal life. The biblical commandments were designed to help individuals win that battle and accomplish G-d's plan for the universe and mankind. To accomplish His plan in the most perfect way, G-d assigned different roles to men and women based upon their physiological and character differences.⁸ Because of their different roles, the capacities and instructions given to them may be different. Certain human rights which Professor Klein discusses, including absolute gender equality, are not realistic under G-d's plan, and must be ignored or even condemned for undermining G-

⁷ DUTIES OF THE HEART, Ch. 5, Par. 5.

⁸ The physiological and character differences do not make any of the genders superior to the other. Both men and women have strengths and weaknesses, which help creating the bond of marriage between them in which they complement each other. Discussing the creation of Adam and Eve, Scripture says: "He created them male and female; He blessed them and called their name Man on the day they were created. Based upon this scriptural text the Talmud stated that without a woman a man is not a complete man; he is missing joy, happiness, blessing, scholarship, strength and peace. See B. Talmud, YEBAMOT 62b-63a.

d's agenda. Just as G-d cannot be criticized for creating different genders with different physiological features and character traits, so too He cannot be criticized for assigning them different roles to accomplish His plan.

Professor Klein writes that the concepts of fundamental human rights find their genesis in the natural rights theories of John Locke, who concluded that the natural state of man is a state of perfect freedom. From a Torah perspective the natural state of man is very far from freedom; indeed, in his natural state a man is totally controlled by his natural and evil impulses. Education may help man in overcoming the evil inclination; however, man cannot achieve total control of the evil inclination without adherence to the Bible. As the Talmud quotes G-d as saying, "I have created the evil inclination, and also created the Torah as its antidote."⁹

Professor Klein seems to list human rights, as articulated in the 1945 U.N. Charter and the International Declaration on Human Rights, at the top of a society's scale of values, above most other values. However, this is not the case. Although human rights are of great significance, they are not at the top of the values in any society. Every society develops its own scale of values, and the location of a value on that scale may vary from one society to another.

For instance, preservation of human life is one of the most important values in most modern societies; to save life, human rights may be suspended. Thomas Hobbes, the 17th century British philosopher, believed that the highest value of a society is its survival, and the best way to secure its survival is through an authoritarian regime, even though this would result in denying virtually all human rights. Although Communist regimes support human rights, and many of them have replaced authoritarian regimes which suppressed human rights, those communist regimes believe that economic equality is one of the most important values, and to achieve that goal citizens may be denied many liberties and freedoms, including freedom of speech, freedom of press, freedom of religion, freedom of trade, freedom of traveling, and freedom to elect representatives who believe in a different scale of values. Discussing democracy in Russia, Ms. Veronika Krasheninnikova, President of the Council for Trade and Economic Cooperation (USA-

⁹ B. Talmud, KIDUSHIN 30b.

CIS), and Representative of the City of St. Petersburg in the United States, stated recently:

Now, if you talk about democracy to the Russians you have to put it in the Russian terms, if you want to be understood. And the key elements in the Russian system of values and what they expect from their state is justice, stability and order.”¹⁰

In Western societies as well, human rights may not be considered paramount; many other interests and values may take precedence over human rights. For instance, to protect its vital interests, a state may send tens of thousands of troops to war, where they may be killed or injured. The state’s interest takes precedence over the basic human right to life. States violate property rights by collecting taxes and confiscating property, to satisfy public interests. Also, states pass zoning laws, which restrict land owners’ use of their property. Thus, the public’s interest in the collection of taxes, confiscation of property and restriction on the use of property takes precedence over one’s property rights.

A state may prohibit bigamy, incest and pornography, thereby denying an individual’s freedom, because it believes that certain moral values take precedence over individual freedom. The state mandates elementary and high school education, because it believes that the public interest in education is more important than a student’s right of freedom. A state prohibits the opening of stores on Sunday, because it believes that observing Sunday is a higher value than freedom of trade. In all of these cases a state is not violating human rights, but rather pursues values and goals it believes to take precedence over those rights.

A Jewish society that believes in God and the Bible considers the biblical laws and values of greatest significance, being indispensable for human life and happiness. Thus, pursuing these laws and values may take precedent over many human rights. The biblical perspective on human life and its values is totally different from that of secular Western societies. Secular Western societies are basically concerned with human temporary life in this world, and seek to make it as comfortable as possible. By contrast,

¹⁰ www.pbs.org/newshour/bb/europe/july-dec06/russia_07-14.html - 57k

the Bible regards human life in this world as a temporary experience intended to elevate man's spiritual standard.

According to Jewish philosophy, man is made of a body animated by what is called an animating or animal soul, and by a divine soul. While the animal soul derives from the earth, the divine soul derives from G-d.¹¹ It is man's duty to rise from his animal status, associated with his body and animal soul, and obtain a spiritual status associated with his divine soul, and elevate his body and animal soul along with him.¹² Man's greatest happiness and accomplishments are the achievement of high spiritual standards, which draw him close to G-d. All man's other interests and achievements pale against this one.

Although biblical law is eternal, Scripture granted the Jewish Supreme Court, the Sanhedrin, as well as judges in every generation, who are totally committed to Jewish law, the power to suspend – but not abolish - many biblical laws, as well as pass by-laws, subject to some restrictions. Some of the biblical principles criticized by Professor Klein were suspended many years ago by Jewish courts, as discussed below.

Jewish law is known to be a duty-oriented rather than a right-oriented system. Most duties in the Bible are not based on correlative rights, but rather are independent; they are duties to G-d, intended to elevate the individual and the society. Because the goal of Jewish law is man's spiritual elevation, one must seek to fulfill duties rather than seek rights. Seeking rights may give one materialistic benefits but would not lead to spiritual growth. This does not mean that under Jewish law one has no rights. Surely, a person may sue another in court for violating his rights or for causing him damage;

¹¹ When God created the animals He said, "Let the earth bring forth living creatures, each according to its kind, animals and creeping things, and the beasts of the land, each according to its kind." Genesis 1:24. However, when G-d created man, He said, "And 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. It does not mean that the earth is the ultimate source of animals or any other product; it was G-d Who ordered the earth to bring forth plants and animals. Also, according to Jewish philosophy, G-d is the ultimate source of all powers and all existence (*see e.g.* Rabbi Chaim of Valozin, NEFESH HACHAIM p. 2-3, 149-52 (1989), citing early authorities). Thus, G-d is also the source of the power of the earth. Nevertheless, the animal soul is not a divine soul, but rather a product of the earth, while the human soul is a divine soul..

¹² *See* Luzzatto, THE WAY OF G-D, Part 1, Ch.4.

halachic sources speak of the right of ownership and the right to bring an action.¹³ However, these rights may be interpreted as a right to enforce the defendant's duty rather than to protect the plaintiff's rights.¹⁴

For example, Scripture states, "Whoever sheds the blood of man, by man shall his blood be shed; for in the image of G-d He made man."¹⁵ Thus, homicide is a capital crime because killing a human being is like damaging the image of G-d. One has a duty to save another's life or property, but the other has no right that his life or property be saved. Children have a duty to honor their parents, but parents have no right to be honored by their children. Although one has no right to be loved, one of the basic principles in the Bible is, "You shall love your fellow as yourself."¹⁶ All these duties are owed to G-d rather than to other fellow men. These principles guarantee both the physical well-being and the spiritual elevation of the entire society.

Although Jewish law requires Jewish communities to get involved in philanthropic endeavors,¹⁷ the primary duty rests on the individual. By collecting taxes for philanthropic purposes a state may assist many people; however, the citizens who were forced to pay the taxes would not experience much moral or spiritual elevation. The direct involvement of individuals in philanthropic activities accomplishes both purposes – the relief of the needy and the spiritual growth of those who are involved in those activities.

¹³ This seems to be the opinion of Rav Huna (son of Rav Yehoshua) which was adopted by most authorities. See B. Talmud, BAVA BATHRA 174a. However, according to Rav Papa the obligation to pay off a debt is based upon a *mitzva*, the debtor's religious duty to pay the debt, rather than a monetary obligation. Rabbi S. Shkopp (SHA'AREI YOSHER, Part 3, Ch.5), however, maintains that even according to Rav Papa the debtor's religious duty to pay off his debt is a result of a prior legal determination as to the plaintiff's right to the money.

¹⁴ This interpretation may explain the Jewish legal principle of *kim lei be'deraba minei* (literally, "exercise on him the more severe punishment"), according to which a defendant may not be required to pay damages to the plaintiff if the former committed a capital crime at the time he caused the damage to the plaintiff. Because the damages are the defendant's duty rather than the plaintiff's right, the defendant's harsher punishment would exonerate him from paying the damages.

¹⁵ GENESIS 9:6.

¹⁶ LEVITICUS 19:18. See Jerusalem Talmud, NEDARIM 30b.

¹⁷ See, e.g., Maimonides, MISHNEH TORAH, The Laws of Gifts to the Poor 9:3 (based on Mishna, PAIHA 8:7). Maimonides states that there has never been a Jewish community who did not have funds for charity. Members of the communities were required to contribute to those funds, and may be forced by the community to do so.

Professor Klein argues that the biblical warning that failure to obey G-d may result in severe divine punishments is hardly a foundation for tolerance and respect of those who decide not to adhere to the biblical commandments. Professor Klein does not regard a state's warning of severe punishment for those who disobey its laws as hardly a foundation for tolerance and respect of those who decide not to adhere to the laws of the state. It appears that the issue is not tolerance but rather the validity and binding power of the law. Professor Klein seems to apply the secular perspective on the Bible to a Jewish religious society that believes that the Bible is the highest law.

Tolerance is one of G-d's attributes. Scripture describes G-d as "compassionate and gracious, slow to anger and abundant in kindness and truth."¹⁸ The prophet Ezekiel quotes God saying, "Do I desire at all the death of the wicked man... is it not rather his return from his ways, that he might live?"¹⁹ However, G-d's tolerance is not limitless; He does not forgive sinners who never repent. The Talmud states that a person who says that G-d is forgiving [without repentance] his life may be terminated,²⁰ as Scripture says, "The Rock, perfect is His work, for all His paths are justice."²¹ According to the Bible, those who disobey G-d undermine the purpose of their creation and may as well undermine the purpose of the creation of the entire universe, depending upon the extent and gravity of the disobedience.²² Obviously, G-d cannot be tolerant to those people, who threaten to cause so much damage not only to them, but also to society

Also Professor Klein's argument that the harsh punishment the Bible imposes on those who entice people to serve other gods is in conflict with the right to freedom of speech, demonstrates an attempt to impose a secular perspective on a religious society. Nobody would regard harsh punishment imposed by a state on those who entice people to rebel against its authority as a violation of freedom of speech. Again, the issue is not freedom of speech, but rather the lack of belief in the Bible by those who criticize its principles.

¹⁸ EXODUS 34:6.

¹⁹ EZEKIEL 18:23.

²⁰ B. Talmud, BAVA KAMA 50a.

²¹ DEUTERONOMY 32:4.

²² See JEREMIAH 33:25; B. Talmud, PESACHIM 68b (stating that without the Torah the world cannot exist).

Professor Klein argues that under Jewish law the husband is in full control over the divorce proceedings. Indeed, as I mentioned in my opening discourse, the Torah gave the husband the right to divorce his wife even against her will, and also allowed the husband to marry more than one woman. This is so because the primary purpose of marriage according to the Torah is to allow the husband to fulfill the *mitzva* of procreation, which applies only to men, who were given the power and capacity to carry out the roles given to them by G-d. However, in the 10th century, Rabbi Gershom Meor Hagola and his court reduced significantly the husband's power by prohibiting bigamy and denying the husband the right to divorce his wife against her will. Today, a husband or wife who wants to get divorced must bring the case to a Jewish tribunal and show a valid ground for divorce.

The lack of a woman's right under biblical law to practice bigamy as well as her lack of duty to procreate do not reflect disrespect for women, but are rather based on reality and social considerations. The practice of bigamy by a woman would produce children who would not know who their father is, while bigamy by the husband does not cause this problem. Also, bigamy by a woman would not increase her fertility, while bigamy by the husband might increase significantly his fertility. As to the *mitzvah* of procreation that applies only to men, it may be based on the principle mentioned in the Talmud,²³ according to which it is the habit of man to seek a woman and not the other way around. It would be disgraceful for women to look for men in order to carry out the *mitzvah* of procreation.

Discussing the marital property under Jewish law, Professor Klein states that "all of the marital property is to be in the possession of the husband." This is not the case. The husband may have the right to manage his wife's property for the benefit of the household, but it does not belong to him. Furthermore, even the husband's management rights depend on the wife's consent. Before their marriage a woman may stipulate that her husband should have no rights whatsoever in her property,²⁴ retaining for herself full control over her property.

²³ B. Talmud, KIDUSHIN 2B.

²⁴ See, e.g., Maimonides, MISHNEH TORAH, The Book of Women, The Laws of Marriage 12:6.

If the woman is willing to allow her husband to control her property, she may do it in two ways. According to one way, the husband is responsible for the capital, which means that upon divorce or death of the husband he or his estate must return to her the value of the property at the time he received it. The husband may use the property and even totally consume it for the benefit of the household, but cannot sell it, and eventually the capital returns to her.²⁵ This property is called “Iron-Sheep property.” According to another way, the husband is allowed to use the property for the benefit of the household, but not consume it, and certainly not sell it. In this case the husband would not be responsible for the property. The wife will receive back her property, as it is, upon divorce or her husband’s death.²⁶ This property is called “*Melog* property.” The wife may designate part of her property as Iron-Sheep property, and part as *Melog* property.

It is true that according to biblical law a widow does not inherit her husband’s property. This principle reflects the concern that family property should remain in the possession of the children. If the widow inherited her husband’s property and then remarried and died, the property of the first husband might pass to the children of the second husband. However, a woman may stipulate before her marriage that she will receive a share of her husband’s assets or an increased Ketuba amount, to which she will be entitled in case of divorce or her husband’s death. Thus, it is up to the woman to decide whether she would receive a share in her husband’s estate.

As an indication of the mistreatment of women under biblical law, Professor Klein mentions the *agunah* problem, which involves a married woman, who is stuck in a dead marriage because her husband refuses to give her the Get. However, under Jewish law a Jewish court may force a husband to give his wife the Get, if she can prove a valid ground for divorce; although it may not be easy to prove it, and the courts are sometimes reluctant to exercise their power.²⁷ The *agunah* problem arises primarily in countries which do not recognize the jurisdiction of Jewish courts. However, solutions have been suggested to resolve this problem in other countries as well.²⁸

²⁵ Maimonides, *ibid*, 16:1-2; SHULCHAN ARUCH, Even Haezer 85:2

²⁶ *Id.*

²⁷ For a list of grounds of divorce, see B. Talmud KETUBOT 77a. Those grounds include diseases, ill-treatment, abuses, non-support, mental pressure, incompatibility, bad breath and others.

²⁸ For a list of books and articles discussing solutions to the *agunah* problem, see

Professor Klein's criticism of the status of woman in observant Jewish families may create the impression that the women in those families suffer terribly. Professor Klein quotes an Israeli judge stating that a slave was better off than a woman under rabbinic law. However, a glance into the life of the vast majority of Jewish religious communities would discover united and happy families. Women in those families gladly chose the traditional Jewish way of life, and would not change their life for a secular life for any price, despite the equality it may offer to women. They believe in the Torah, its goals and values; they trust their husbands and feel confident in their marital relationships. The divorce rate in these families is the lowest among Jewish communities.

Justice Menachem Elon, former vice-president of the High Court of Justice in Israel, wrote that the talk about the liberalization of the Jewish woman from her subjugation to the halacha and to her husband is irresponsible, and at the very best indicates painful ignorance. Generally, Elon writes, the fate of the Jewish woman was not of subjugation, but rather of respect and appreciation, love and friendship. The woman is the home. The magnificent institution of the Jewish family throughout the generation was the product of the work and spirit of the mother of the house.²⁹

Professor Klein suggests that the Halacha be changed to allow equal roles for men and women in observant Jewish communities. While suspension of biblical law and change of certain halachic principles are possible in the Jewish legal system, as discussed above, these suspensions and changes could be made only by authoritative bodies, and according to the law. Throughout Jewish history, there have been many attempts to change the law. Some questioned the authority of the Torah or the Oral law, or the authority of the sages to interpret the law, and tried to modify and reform the Jewish law.

Examples of such movements were the Sadducees, a Jewish religious sect that was active between 200 BCE until the fall of Jerusalem in 70 CE. The Sadducees rejected Jewish observances that were not explicitly written in the Torah. As opposed to the Pharisees, they denied the Oral law and the authority of the sages to interpret the law, and

<http://users.aol.com/agunah/bib-agun.htm>.

²⁹ Menachem Elon, Introduction to his book (in Hebrew) *THE STATUS OF THE WOMAN* (Hakibutz Hameuchad, 2005).

sought to reform the Jewish law. The Sadducee movement vanished after the destruction of Jerusalem. Also Christianity was initially a Jewish movement seeking to reform the law by focusing on moral values rather than fulfilling practical biblical commandments. Eventually, this movement broke away from Judaism.

Another Jewish sect that broke away from the Jewish community was the Karaites in the 8th century, CE. The Karaites believed that only the Torah has divine authority, while the Mishna and the Talmud, which are basically a commentary on the Torah, are not divinely inspired. Rabbi Seadia Geon, a great 9th century Jewish authority, debated the Karaites and exposed their baseless arguments. The sect lost many of its followers, and today only a few families practice Karaite beliefs. In the 19th century, some Jewish reform movements started off with minor modifications of Jewish law and the Jewish tradition, and ended up with major changes, creating in fact a totally different law and religion.

Professor Klein argues that the biblical capital crimes are not in accord with the 1996 International Covenant on Civil and Political Rights, as the biblical capital crimes also include crimes that are not deemed most serious. As examples of such crimes in the Bible he mentions cursing one's father or mother and homosexual relationships. He further argues that the forms of execution in the Bible are contrary to the 1948 Universal Declaration of Human Rights which prohibits cruel and inhuman punishments.

First, not every cursing of a parent is a capital crime; but only cursing a parent by G-d's very holy name. Using G-d's name for such an abominable matter is a serious crime.³⁰ Second, Professor Klein tries to impose a secular set of values on the Bible. As discussed previously, the Bible's goals are totally different from the secular goals, and the scale of values is determined accordingly. It is meaningless to discuss biblical punishments while ignoring the biblical scale of values. Third, the punishments in the Bible were intended primarily for educational purposes, to alert the people about the seriousness of the crimes, but were not intended to be practiced, except for rare

³⁰ See Maimonides, MISHNEH TORAH, The Laws of Rebels 5:2.

instances.³¹ The Mishna states that a court that executes a defendant once in seven years – and according to one opinion once in seventy years – is considered an injurious court.³²

Professor Klein criticizes some biblical principles related to slavery. Here are some facts about the biblical approach to slavery. First, slavery in the Jewish community

³¹ The requirements for the exercise of capital punishment are so strict in favor of the defendant that it is practically impossible to sentence a person to death. For instance, two qualified eye-witnesses are required; circumstantial evidence and the defendant's confession even in court are not admissible as evidence; the two witnesses must warn the defendant just before he commits the crime that he is going to commit a capital crime, and he must respond that he knows that but will nevertheless do it. See Maimonides, *Mishneh Torah*, The Laws of Witnesses 5:2. 12:2; the Laws of Sanhedrin 12:1-3, 18:6; B. Talmud, Sanhedrin 9a.

³² See Mishna, MACKOT 1:10. The evidentiary and procedural rules in criminal cases in Jewish law are entirely in favor of the defendants. See Mishna, SANHEDRIN 4:1; Maimonides, MISHNEH TORAH, The Laws of Sanhedrin 11:1. The educational purpose of punishment in the Bible was also mentioned in connection with the eye-for-an-eye principle. Under Jewish law, this principle should not be interpreted literally. An eye for an eye means a monetary payment rather than actually knocking out the aggressor's eye. See Mishna, BAVA KAMA 8:1; B. Talmud, BAVA KAMA 83b; Maimonides, MISHNEH TORAH, The Laws of Wounding and Damaging 1:1. Discussing the eye-for-an-eye principle, Maimonides quotes Scripture saying, "And if a man inflicts a wound in his fellow, as he did so shall be done to him" (LEVITICUS 24:19), which seems to indicate that the aggressor will be treated in the same manner he treated the victim, contrary to the Talmudic interpretation. Maimonides explains that this Biblical text should not be interpreted literally, but rather as a lesson to the aggressor that he deserves to be treated in the same manner he treated the other. However, in reality he would only have to pay money for the injury. Maimonides, *ibid* 1:3

Another case that demonstrates the educational purpose of punishment in the bible is the case of the Rebellious Son. DEUTERONOMY 21:18-21. Scripture provides:

If a man will have a wayward and rebellious son, who does not hearken to the voice of the father and the voice of the mother, and they discipline him, but he does not hearken to them, then his father and mother shall grasp him and take him out to the elders of his city and the gate of his place. They shall say to the elders of the city, "This son of ours is wayward and rebellious; he does not hearken to our voice; he is a glutton and a drunkard." All the men of the city shall pelt him with stones and he shall die, and you shall remove the evil from your midst, and all Israel shall fear and they shall hear." *Id.*

On the face of it, this biblical principle is very cruel and inhumane. According to the Talmud, this principle of the rebellious son has never been exercised and will never be exercised. It was written only for the purpose of studying it and receiving reward. B. Talmud, SANHEDRIN 71a. The reason why this principle has never been, and will never be exercised is the extremely unlikelihood that the requirements for the application of this principle could ever be met. See Mishna and Talmud, SANHEDRIN, *ibid*. According to one interpretation, this principle teaches that the love of G-d should surpass parents' love for their child. See Rabbi Behaye's commentary on Deuteronomy 21:21. This reminds us of G-d's command to Abraham to slaughter his son Isaac, which never took place but was intended only to test Abraham's love for G-d. In addition, this principle may teach parents the danger of a rebellious son, as the Talmud quotes Rabbi Yosi the Galilean saying that the rebellious son is punished not for his current deeds, but rather to prevent him from pursuing a criminal career. The Torah predicted that eventually he will spend all his parent's assets, and will start robbing other people. B. Talmud, SANHEDRIN 72a.

has not existed since the destruction of the First Temple over 2400 years ago.³³ Second, slavery was a common and legitimate institution throughout the entire ancient world. Ancient Egypt in particular is described in the Bible as the House of Slaves. Egypt's society and economy were based on slavery and the oppression of nations and individuals. Slavery continued to be common practiced until the 20th century, and in some countries it is practiced even today. In the United States it was practiced until the end of the 1860-1865 Civil War.

Under the social, political and economic conditions in the ancient world slavery was not entirely negative; it served some positive purposes. Lack of security and a poor economy forced many people to sell themselves or their children into slavery to secure a safe and better life. Thieves who could not repay the value of the stolen property were sold by the court into slavery to pay off their debts to the victims. Under those conditions it was impossible and perhaps even undesirable to abolish slavery altogether.

It is interesting to note that one of the first commandments in the Torah, written after the Revelation at Sinai, is about slavery.³⁴ Scripture does not discuss the acquisition of slaves, but rather focuses on their redemption.³⁵ This demonstrates the purpose of Scripture to minimize the hardships of slaves. One who was sold by the court into slavery is freed after six years of slavery or at the Jubilee year, whichever comes first.³⁶

Scripture expresses its opposition to slavery by discouraging a slave from staying with his master after six years of slavery. If a slave insists on staying with his master, the master must bring him to the court and bore his ear through with an awl, and then the slave may continue to serve his master until the Jubilee year.³⁷ The Talmud explains the reasons for this procedure: "The ear [of the slave] that heard at Mount Sinai [G-d saying]

³³ See Maimonides, MISHNEH TORAH, The Book of Acquisition, The Laws of Slaves 2:10 (stating that slavery applies only when the law of the Jubilee year applies. The law of the Jubilee year has not applied since the destruction of the first Temple over 2400 years ago. See Maimonides, MISHNEH TORAH, The Laws of the Sabbatical and Jubilee Years 2:4. .

³⁴ EXODUS 21:1-11.

³⁵ *Id.* at 21:2-4, 6, 11.

³⁶ See Maimonides, MISHNEH TORAH, The Book of Acquisition, The Laws of Slaves 2:2. However, one may sell himself into slavery for more than six years. Also this person is freed in the Jubilee year.

³⁷ EXODUS 21:5:6.

‘the children of Israel are my slaves,’ and he insists on being a slave of another master, his ear should be bored.”³⁸

Professor Klein criticizes the Bible for discriminating against non-Jewish slaves by denying them the right to be freed after six years of slavery. There are two reasons for this different treatment. Many biblical laws apply only to Jews because of the principle of reciprocity. For instance, Jewish people are prohibited from taking from, and giving to fellow Jews interest on loans, but are allowed to take from and give to non-Jews interests on loans. Since non-Jews take interests on loans given to a Jew or anybody else, non-Jews who take loans from Jews or anybody else should also pay interest. Similarly, non-Jews do not free their slaves, whether Jews or non-Jews, after six years of slavery; therefore, a Jew need not free his non-Jewish slave after six years of slavery.

Another reason for the different treatment of non-Jewish slaves is that mentioned previously in connection with the ear boring of the Jewish slave. Because Jewish people are G-d’s slaves, they are not supposed to become slaves of another master, and are freed after six years of slavery. It does not apply to non-Jewish slaves who do not observe the biblical commandments, and are not considered G-d’s slaves.

As to a father’s right to sell his daughter into slavery, first, as I mentioned previously,³⁹ slavery has not applied in the Jewish community for over 2400 years. Second, this principle applied only if the father had become so poor that he owned practically nothing, not even clothes to cover himself. The sale of the daughter is then the only way to save her from starvation and a most miserable life.⁴⁰ Third, even under these circumstances, the court must compel the father to redeem his daughter from slavery.⁴¹ Fourth, the ultimate purpose of the sale of the daughter is not for slavery, but rather for marrying either the master or his son; therefore, she can be sold only to one

³⁸ See B. Talmud, KIDUSHIN 22b. Also see Rabbi Baruch Halevi Epshtein, TORAH TEMIMA, Exodus 21, par. 57, saying that this reasoning refers to a thief who was sold by the court into slavery and refuses to leave his master’s house after six years. It does not apply to one who sold himself into slavery, to whom, according to Halacha, the boring procedure does not apply. See discussion in B. Talmud, KIDUSHIN 14b, and Maimonides, MISHNEH TORAH, The Laws of Slaves 3:6.

³⁹ See *supra*, Povarsky, Opening Discourse, note 6 and text.

⁴⁰ See Maimonides, *supra* note 36, at 4:2.

⁴¹ *Id.*

who himself or whose son could marry her.⁴² Fifth, the daughter gets automatic freedom at the age of 12½, or after six years of slavery or in the Jubilee year, whichever comes first.⁴³

Professor Klein criticizes the Bible for giving only the father, but not the mother the right to sell a daughter into slavery. First, as I mentioned, although the father has the right to sell his daughter, the Bible is not satisfied with the father's action, and requires the court to force him to redeem her immediately; certainly, there is no point in extending this right to the mother. Second, as I mentioned, the father can sell his daughter only if he became penniless and does not even own cloth to cover himself. Under Jewish law, the father, but not the mother is obligated to support children. Thus, if the father is penniless and cannot fulfill his duty, it is his responsibility to ensure the survival of his daughter.

Professor Klein criticized me for discussing the requirement that judges, under Jewish law, conduct a fair trial; but failing to mention that women cannot serve as judges, and not even serve as witnesses. Obviously fair trial and qualification for serving as a judge or a witness are totally different issues. As to the ineligibility of women to serve on the bench, it should be noted that this issue is subject to debate among early Jewish authorities. Many authorities believe that a woman is qualified to serve as a judge,⁴⁴ as illustrated in the case of Deborah who was the chief Justice of Israel for many years in

⁴² Maimonides, *supra* note 36, at 4:11.

⁴³ *Id.* at 4:4-5. Discussing the treatment of slaves in the Bible, Rabbi Barry Dov Lerner of the Foundation for Family Education (FFFE) writes:

Using the traditional commentaries, including Rashi and Ibn Ezra (11th century), it was possible for a man living thousands of years ago in ancient Israel to place his minor daughter with a household, intending that the purchase-money paid to the father was a bride price; she would marry the master of the house or his son. It was not a sale into slavery or even into indentured servitude but rather service in a new household. She cannot be abused in any fashion. When she is betrothed to his son or to himself, she is protected as a daughter or a wife. She can leave that house after six years, or in the Jubilee Year, or when she reaches adulthood, whichever comes first. She can't be sold to another. These laws refer to a historical period dating back thousands of years ago when Judaism uniquely came forward to distinguish between human beings and property. It would take a great deal of space and time to explain these differences, but Jewish law is perceived today by scholars to have been a major advance over the legal codes of the nations surrounding ancient Israel. Not only were human beings protected, Judaism protected in law all socio-economic levels of humanity, while other legal codes would put the value of property above that of human life depending upon socio-economic status.

⁴⁴ See, e.g., TOSSAFOT, Bava Kama 88a, and Nida 3a; CHINUCH, commandment # 77; Ritva Kidushin 35a; Rashba, Bava Kama 15a.

the biblical time.⁴⁵ They also found support to their view in the biblical phrase, “And these are the ordinances that you shall place before them,”⁴⁶ which was interpreted in the Talmud to mean that the laws apply equally to men and women,⁴⁷ including, according to these authorities, the eligibility to serve as a judge. However, the law has been decided according to the authorities who believe that women are not qualified to serve as judge.⁴⁸ According to this view, Deborah was an exception.

According to the Torah, courts have been set up not only for settling disputes and punishing criminals, but also, and perhaps more significantly, to teach the people the laws of G-d,⁴⁹ and educate them on the virtues of Justice and righteousness, integrity and truthfulness, doing good and avoiding any wrongdoing.⁵⁰ To be qualified for this multifaceted role, judges must not only be knowledgeable of the law, wise, honest and truthful, but also G-d fearing, righteous, humble, and despise money.⁵¹ Judges who committed a sin, or are biased or have any interest in the case are not qualified to serve on the bench.⁵² Adjudication is a holy mission; the Talmud states that a judge who renders a fair decision is like a partner of the Holy One in the act of creation.⁵³ According to Scripture, G-d is present in the courthouse when the judges sit in judgment.⁵⁴ As mentioned previously, men and women were given different roles and capacities to achieve their common goals. Although the Torah assigned the adjudicatory role to men, who apparently may generally be more qualified to accomplish those religious and

⁴⁵ JUDGES 4:4

⁴⁶ EXODUS 21:1.

⁴⁷ KIDUSHIN 35a.

⁴⁸ See *Shukchan Aruch, Choshen Mishpat* 7:1.

⁴⁹ See EXODUS 18:13-15. In response to the question by Jethro, Moses' father in law, why he was sitting and judging the people all day long, Moses replied: “Because the people come to me to seek G-d.” See also PSALMS 82:2, stating, “G-d stands in the Divine assembly, in the midst of Judges shall he judge,” which was interpreted in the Talmud to mean that G-d's spirit is present in the courthouse when the judges sit in judgment. See B. Talmud BERACHOT 6a. These sources indicate the divine mission of the court to educate people how to observe G-d's commandments.

⁵⁰ See CHINUCH. Commandment # 491.

⁵¹ See e.g., Maimonides, MISHNEH TORAH, The Book of Judges, The Laws of Sanhedrin 2:7-8. SHULCHAN ARUCH, CHOSHE MISAHPAT 7:11

⁵² See SHULCHAN ARUCH, *ibid*, at 7:8-12.

⁵³ B. Talmud, SHABBATH 10a.

⁵⁴ See *supra*, note 49, quoting from B. Talmud BERACHOT 6a. See also 2 CHRONICAL 19:7: “He said to the Judges: Take care in what you do for it is not for man's sake that you judge but for G-d, and He is with you in the matter of judgment.”

educational objectives in the most perfect way, the parties may elect a woman to adjudicate their case.⁵⁵

As to women's ability to serve as a witness, it is inaccurate to say that women are unable to testify. There are many instances in which a woman's testimony is accepted. For instance, a woman's testimony is admissible in cases in which one witness is sufficient;⁵⁶ in matters about which only she has the information;⁵⁷ or in matters of which women are more knowledgeable and accurate than man, including monetary cases;⁵⁸ as well as in monetary matters involving rabbinical law.⁵⁹ Generally, a woman may testify in cases where her testimony is just a matter of credibility.⁶⁰ In many cases, especially where two witnesses are required, the witnesses have a tremendous power that goes way beyond their numerical value and credibility, as reflected in the principle according to which the testimony of two witnesses is equal to the testimony of even a hundred witnesses.⁶¹

Two witnesses have a special status in Jewish law based not only on their credibility and mental capacities, but also on many other qualities. To qualify as a witness one must be righteous, impartial, sincere, earnest and responsible; this guarantees maximum precision and accuracy of the testimony. A person cannot be a witness in his own case,⁶² nor can his relatives act as witness in his case⁶³. Maimonides points out that the reason for the lack of capacity of relatives as witnesses is not the partiality of the relatives, as is evidenced from the rule according to which the relatives cannot testify even against the party they are related to; it is rather a biblical decree.⁶⁴

⁵⁵ See Maimonides, MISHNEH TORAH, The Laws of Sanhedrin 7:2.

⁵⁶ Maimonides, MISHNEH TORAH, The Laws of Witnesses 5:2; Menachem Hameiri, BEITH HABECHIRA, Pesachim 4b; CHIDUAHEI HARITVA Ketubot 72a; CHIDUAHEI HARAN, Chulin 10b.

⁵⁷ See e.g., Rema, CHOSHEN MISHPAT 35:14; Rabbi Yoseph Kolon, RESPONSA MAHARIK, responsum 179.

⁵⁸ See e.g., Rabbi Isselin, TERUMAT HADESHEN, Part 1, Ch.353;

⁵⁹ B. Talmud, BAVA KAMA 114b; Maimonides, MISHNEH TORAH, The Book of Torts, The Laws of Robbery and Lost Objects 6:16.

⁶⁰ See Rabbi Yoseph Bavad, MINCHAT CHINUCH 27:4.

⁶¹ See e.g. B. Talmud, SHAVUOT 42a (stating that "two [witnesses] are like a hundred, and a hundred [witnesses] are like two"); Maimonides, MISHNEH TORAH, The Laws of Witnesses 18:3.

⁶² See B. Talmud, MACKOT 6a

⁶³ Maimonides, *ibid* 13:1.

⁶⁴ Maimonides, *ibid* 13:16.

Also, people who have no knowledge of the Bible and the Mishnah, and lack ethical values are disqualified to act as witnesses.⁶⁵ This includes people who eat in the street in front of other people.⁶⁶ Also, excluded are people who committed a sin.⁶⁷

Such a high level of qualifications is required for testifying in cases involving capital crimes, marriage and divorce or monetary disputes. Women generally lack this level of qualifications just as many men do, and therefore women cannot testify in these cases, except for monetary cases where no qualified witnesses are available or where women have better knowledge and understanding than men, as mentioned previously.

In conclusion, human rights just as human duties are not determinate and conclusive. They are instituted for the benefit of individuals and the society as a whole. Different societies may have different views about these benefits, and determine the rights and duties of their members accordingly. Human rights have been defined differently in different societies and at different times. The 1945 International Code of Human Rights is relatively young, and already many revisions of the Code have been made or suggested since its foundation.

As opposed to the unstable and constantly changing man-made codes of human rights, the divine code is eternal and stable, although subject to suspensions by authorized bodies. The biblical law that has withstood numerous attempts of revision for thousands of years would certainly not change in order to adapt to current trends of human rights. The biblical concern about the well being of individuals and the protection of their life, property and reputation is unique even today. Examples are the duty to rescue one's life and property; the legal obligation to give loans and charity to the poor; the commandment that people love each other; the prohibitions against hatred and jealousy, and the prohibition against causing any kind of aggravation to others.

René Cassin, the former President of the European Court for Human Rights and one of the drafters of the International Code of Human Rights, said in one of his speeches that the purpose of human rights is to make sure that the world should not be built on human suffering. However, human pleasure and suffering are not determinative concepts,

⁶⁵ Maimonides, *ibid* 11:1.

⁶⁶ Maimonides, *ibid* 11:5

⁶⁷ Maimonides, *ibid* 12:1.

depending primarily on the goals and aspirations of a society. The biblical perspective on human pleasure and suffering is not entirely consistent with the perspectives of many societies today, and consequently the biblical perspective on human rights may differ from the secular perspective.



On January 22, 2007, Touro Law Center celebrated its new, state-of-the-art facility in Central Islip, N.Y., with a Ribbon Cutting ceremony. Pictured along the ribbon (l-r): Touro alumnus Bruce Gould, Touro College President Dr. Bernard Lander, Touro Law Center Dean Emeritus Howard Glickstein, Touro staff member Greg Smith, Suffolk County Executive Steve Levy, Professor Barbara Swartz and Alumni Association President Harold Somer.