

Washington University Global Studies Law Review

Volume 8 | Issue 4

January 2009

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Recommended Citation

Steven F. Friedell, *Some Observations About Jewish Law in Israel's Supreme Court*, 8 WASH. U. GLOBAL STUD. L. REV. 659 (2009),
https://openscholarship.wustl.edu/law_globalstudies/vol8/iss4/4

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SOME OBSERVATIONS ABOUT JEWISH LAW IN ISRAEL'S SUPREME COURT

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ABSTRACT

This Article considers whether the Israeli Supreme Court's effort to incorporate the parts of Jewish law that deal with secular subjects is internally flawed. The use of Jewish law differs from the use of the law of other jurisdictions. Typically courts rely on other jurisdictions' precedents to show that a rule is practical, that the court is not overstepping its authority, and that adoption of the rule will lead to interstate or international uniformity. The use of Jewish law does not satisfy these goals. There is concern that the religious elements of Jewish law are pervasive and that much of Jewish law is not well suited for a modern society. This Article considers the approach of looking to Jewish law, not for specific rules that will be applied, but as a storehouse from which one can seek enlightenment. Even under this approach, this Article finds that some Israeli Supreme Court cases have misapplied Jewish law either by taking Jewish law out of context or by reading modern legal concepts into Jewish law. This Article suggests ways that some of these cases could have better employed Jewish law and also describes cases that have properly done so. It concludes that, when used properly, Jewish law can help to link Israeli law to a rich cultural heritage.

I. INTRODUCTION

For almost a century—and for a variety of motives—some have sought to find a way to integrate parts of Jewish law into the law of what has become the State of Israel.¹ The proponents of this effort have coined the

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1. See 4 MENACHEM ELON, JEWISH LAW 1588 (1994) [hereinafter ELON TREATISE]. For a study of different strands within the movement, see Assaf Likhovski, *The Invention of "Hebrew Law" in Mandatory Palestine*, 46 AM. J. COMP. L. 339 (1998); Amihai Radzyner, *Ha-mishpat ha-'ivri eino Halakhah (u-vekhoh zot yesh bo 'Erekh)*, [Mishpat 'Ivri Is Not Halakhah (But It Still Has Value)], 16 AKDAMOT 139, 141–43 (2005). For rabbinic objections to *Mishpat 'Ivri*, see Amihai Radzyner, *Between Scholar and Jurist: The Controversy Over the Research of Jewish Law Using Comparative Methods at the Early Time of the Field*, 23 J.L. & RELIG. 189 (2007). See generally YUVAL SINAI, YISUM HA-MISHPAT HA-IVRI BE-VATEI HA-MISHPAT BE-YISRAEL [APPLICATION OF JEWISH LAW IN THE ISRAELI COURTS] (2009).

term “Mishpat ‘Ivri” (literally, “Hebrew law,” but often mis-translated as “Jewish law”) to refer to those parts of Jewish law that deal with matters typically treated by Western legal systems.² The effort has helped spawn a tremendous body of scholarship determined to apply modern methods of research and analysis to a vast body of legal literature.³ There has been a phenomenal growth in the understanding of the linguistic, textual, historical, and doctrinal aspects of over two millennia of Jewish law. If for nothing else, the Mishpat ‘Ivri movement deserves credit for contributing to this phenomenon.

Some Israeli Supreme Court judges use Jewish law even when Israeli law requires the courts to fill lacunas in the law by referring to English common law.⁴ This practice gained support when the Knesset adopted the 1980 Foundations of Law Act, which provides in part: “Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in light of the principles of freedom, justice, equity and peace of Israel’s heritage.”⁵ In 1992 the Knesset passed a basic law on human dignity and freedom that seeks “to establish . . . the values of the State of Israel as a Jewish and democratic state.”⁶ This, too, has been used as a basis for the use of Jewish law.⁷

2. This Article will use the term “Jewish law” to refer to the Halakhah, the entire body of rabbinic law.

3. See NAHUM RAKOVER, A BIBLIOGRAPHY OF JEWISH LAW (1975); NAHUM RAKOVER, THE MULTI-LANGUAGE BIBLIOGRAPHY OF JEWISH LAW (1990).

4. See MOSHE SILBERG, TALMUDIC LAW AND THE MODERN STATE 150 n.45 (1973) (examples of cases).

5. Foundations of Law, 5740-1980, 34 LSI 181 (1979–80) (Isr.). Israeli judges disagree over how this statute affects the use of Jewish law. Compare 4 ELON TREATISE, *supra* note 1, at 1835–38 (A court should use Jewish law when a statute is ambiguous, when general terms such as “negligence” are involved, or when legislation does not define a term.), with AHARON BARAK, JUDICIAL DISCRETION 89 (1989) (A court is to look to the principles of Israel’s heritage listed in the statute only if it can find no other answer in statutes, case-law, or by analogy.), and HCJ 1635/90 Jerczewski v. Prime Minister [1991] IsrSC 45(1) 749, 859 (Barak, J.) (holding that the Foundations of Law Act is intended to apply to lacuna in legislation and not to the development of the law), translated in ELON CASEBOOK, *infra* note 45, at 422, 432–33. See Leon Sheleff, *When a Minority Becomes a Majority—Jewish Law and Tradition in the State of Israel*, 13 TEL AVIV U. STUD. IN L. 115 (1997). For a middle position, see Arye Edrei, *Madu’a Lanu Mishpat ‘Ivri [Why Teach Jewish Law]*, 25 ‘IYUNEI MISHPAT [TEL AVIV U. L. REV.] 467, 480–81 (2001) (obligation to look to Jewish law is for comparative purposes, but not for binding precedent or for investigating the extent to which one should adopt the advice of Jewish law); Hanina Ben Menachem, *Chok Yesodot Ha-mishpat ha-‘ivri-Chovat Tsuit ‘o Chovat Hiva’atsut [The Foundations of Law Act—How Much of a Duty?]*, 13 SHENATON HA-MISHPAT HA-IVRI 257 (1988) (stating there is a duty to consult Jewish heritage).

6. Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

7. E.g., CA 506/88 Shefer v. Israel [1993] IsrSC 48(1) 87, translated in [1992–1994] IsrLR 170, and in ELON CASEBOOK, *infra* note 45, at 592, 638.

Israeli courts apply Jewish law in different contexts, and some of these applications have created tension within Israel's largely secular society. This Article will not discuss issues of marriage and divorce, for which Israeli Jews are governed by Jewish law.⁸ Nor will it address the tension that arises when the Israeli Supreme Court determines whether a rabbinic court or religious body has complied with a statutory mandate.⁹ Rather, this Article will focus on the Supreme Court's use of Jewish law as an aid for filling gaps in the law in areas such as torts, contracts, and criminal law.

This Article will not address the difficulties facing the Mishpat 'Ivri movement of enabling a largely secular bar, unfamiliar with the sources and methodologies of Jewish law, to use that law effectively.¹⁰ Rather, this Article will examine whether the project is internally flawed. That is, even if Israel's bench and bar desired to comply with the movement's aims, could its goals be attained? This Article will describe some of the difficulties inherent in the goal of incorporating Jewish law; it will focus on a few Israeli Supreme Court cases that illustrate some of the stumbling blocks to incorporation or that show how the effort has succeeded. When used properly, Mishpat 'Ivri serves to ground decisions in a rich legal heritage.

In part, the problem posed by Mishpat 'Ivri is that of any legal transplant: the way a rule operates depends on how it meshes with other substantive and procedural rules; borrowing a rule from another source can have unintended consequences. This can happen even when the borrowing occurs within a given legal system¹¹ and all the more when the borrowing

8. See 4 ELON TREATISE, *supra* note 1, at 1757. This Article will not address the use of Jewish law by the Knesset in forming legislation. For a discussion of that issue, see *id.* at 1624–1729; Brahyahu Lifshitz, *Israeli Law and Jewish Law—Interaction and Independence*, 24 ISR. L. REV. 507 (1990).

9. See, e.g., H CJ 1912/97 Rish v. Supreme Rabbinical Council [1998] IsrSC 52(5) 650 (holding that the Supreme Rabbinical Court can require advocates appearing before it to wear a head covering); H CJ 465/89 Raskin v. Religious Council [1990] IsrSC 44(2) 673 (holding that the rabbinical council lacks authority under statute to determine whether a restaurant is not kosher because it allows a belly dancer to perform; statute requires council to consider only whether the food as prepared and served is kosher). See Itim Haim Shapiro, *Those Appearing Before Rabbinical Courts Must Cover Heads*, JERUSALEM POST, Dec. 22, 1998, at 5; *Belly Dancer's Appeal Sways Israeli Court*, N.Y. TIMES, May 29, 1990, at A3.

10. See 1 ELON TREATISE, *supra* note 1, at 1925–27 (addressing some of the objections to Mishpat 'Ivri); Elyahkim Rubinstein, *Preface of NAHUM RAKOVER, LE-SHILUVO SHEL HA-MISHPAT HA-'IVRI BA-MISHPAT HA-YISRE'ELI* [JEWISH LAW AND ISRAELI LAW—ON THE PROCESS OF INTEGRATION] 11–13 (1998) (on the importance of knowing Jewish law).

11. For example, the Jones Act, 46 U.S.C. § 30104 (2006), governing rights of a seaman injured by an employer's negligence, incorporates the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51–59 (1908), which governs the rights of railway workers. Although the FELA is the railway

is between different legal systems. The problem is compounded by Mishpat ‘Ivri’s incorporation of only certain aspects of Jewish law—those that deal with matters typically handled by a secular state such as contracts, torts, property, and criminal law. Although the object is understandable, the boundaries between the secular and the religious are not always clear within Jewish law.¹²

The multiple systems of law that are embodied in Jewish law itself add another level of complication.¹³ In addition to the rabbinic law that seeks to understand and elaborate upon the law that is based on the Torah (“Formal Law”), rules are created by multiple institutions: rabbinic courts have the power to enact emergency rules,¹⁴ local Jewish communities can institute and enforce their own regulations,¹⁵ and, as recognized by Jewish commentators, the Jewish king (and by extension any Jewish governing body) had the power to apply his own system of law.¹⁶ Because non-Jewish medieval authorities granted Jewish communities a large measure of autonomy, Jewish communities developed a variety of changes based on local custom,¹⁷ and in some circumstances, Jewish courts also enforced the law of the non-Jewish government.¹⁸ Another difficulty is that many Jewish communities lost their autonomy with the rise of the Emancipation at the end of the eighteenth century. Thus, there are often conflicting authorities within the formal legal system of Jewish law. Because there is no supreme authority to resolve these conflicts, there is a greater degree of

worker’s sole claim against the employer for injuries, the seaman can also recover against the employer and the vessel for unseaworthiness, maintenance, and cure. Moreover, although the FELA and Jones Act allow for jury trials in federal court, the seaman has the option of precluding the defendant from demanding a jury trial by designating his claims as maritime claims under FED. R. CIV. P. 9(h). These differences give the seaman advantages not possessed by the railway worker. *See* Atl. Sounding Co. v. Townsend, 129 S. Ct. 2561, 2575 n.12 (2009) (holding that a seaman can recover punitive damages for the willful and wanton failure to pay maintenance and cure even though such damages might not be available under the Jones Act and the FELA).

12. *See infra* Part II.

13. *See generally* Arnold N. Enker, *Aspects of Interaction Between the Torah Law, the King’s Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137 (1991).

14. *B. Yevamot* 90b. Throughout this Article, I will use the convention of indicating a tractate of the Babylonian Talmud by prefacing the tractate with “B.” Tractates in the Jerusalem Talmud will be indicated by prefacing the tractate with “J.”

15. *B. Bava Batra* 8b.

16. RABBEUNU NISSIM GERONDI (1320–1380), DERASHOT 11, *translated in* MICHAEL WALZER ET AL., 2 JEWISH POLITICAL TRADITION 156, 158 (2000) [hereinafter DERASHOT 11]. *See also* *B. Bava Kamma* 96b (imposing liability on a notorious thief even though he would have been exempt under the law); RESPONSA RASHBA (1235–1310) 3:393 (necessary for society to apply non-Torah law in matters of personal injury).

17. *See* 2 ELON TREATISE, *supra* note 1, at 896–97.

18. The rabbis recognized the principle that “the law of the kingdom is the law.” *E.g.*, *B. Gitin* 9b. *See generally* 1 ELON TREATISE, *supra* note 1, at 64–74.

uncertainty about how they ought to be resolved than what might be expected in other legal systems. This has forced proponents of Mishpat 'Ivri to maintain that judges should reject those aspects of Jewish law that are impractical or unsuited for a modern Israeli society.¹⁹

Consequently, if Mishpat 'Ivri is to work at all, judges and legislators must choose from a vast array of Jewish sources. The often-unidentified criteria for choosing which rules to adopt may be ones that seek to promote morality, desired social policy, administrative efficiency, or other notions of justice. Since the object of Mishpat 'Ivri is unprecedented in Jewish history, whatever criteria are used must arise from outside the Jewish legal system. Therefore, if Israel's courts adopt aspects of Jewish law, the result will be a hybrid of Jewish legal rules, external legal rules, and external values.

In what way does a secular court's citation of Jewish law differ from a court's use of another jurisdiction's precedents? Although all courts that cite decisions from other jurisdictions make selective use of precedent, their purposes may differ from those of secular courts that cite Jewish law. A court has at least three possible reasons for citing decisions of another jurisdiction. One is to show that the rule is likely to be functional since at least one other jurisdiction has adopted it. Second, the court looks less arbitrary. Whenever a court makes law, there is always concern that it might be abusing its role by acting more like a legislative body. Citation of another jurisdiction's precedent helps to show that the rule it is announcing is a product of reason, not merely the court's whim. Third, the court provides assurance that there will be some degree of uniformity among jurisdictions that will aid interstate or international commerce.

Citation of Jewish law, however, may not provide the same advantages. Because the rules of Jewish law may have developed under very different

19. 4 ELON TREATISE, *supra* note 1, at 1929 (accepting Jewish law solutions “when the judge concludes that it accords with the needs of the time”); *id.* at 1939 (incorporating principles of Jewish law when they are suitable for use); Likhovski, *supra* note 1, at 354 (clarifying that proponents of Mishpat 'Ivri sought to use the principles or spirit of Jewish law but not its “dead letters”); Radzyner, *Between Scholar and Jurist*, *supra* note 1, at 219–20 (view of Asher Gulak calling for an adapted and refined system while preserving the underlying principles); Silberg, *supra* note 4, at 148–49 (stating that the new code “will accept, wherever possible, the basic principles of Jewish law” but will “winnow and sift,” “pour out the wine that has become sour,” and “fill it with new wine.” “This is undoubtedly a question of taste, of an historic sense and a sense of reality.”). As Judge Drori expressed it, the Israeli court looks to the *principles* of Jewish law but not necessarily the rules with all of their details. CC (Jer) 2220/00 Mifalei Te'urah v. Israel Postal Auth. [2003] IsrDC Tak-Makh 2003(2) 16,627, ¶ 104 (discussed *infra* note 148). *Cf.* CA 89/51 Mitova Ltd. v. Kazam [1952] IsrSC 6(1) 4, 11–12 (S. Cheshin, J.) (Although the legislature borrows terms from Jewish law it may intend for them to have a meaning supplied by other sources.), *translated in* 1 NAHUM RAKOVER, MODERN APPLICATIONS OF JEWISH LAW 38, 41.

economic, social, and political circumstances, they may not all be functional in today's world. Also, because Jewish law often presents a judge with a vast range of conflicting decisions from which to choose, the citation of Jewish law may do little to reduce the appearance that the court is imposing its will rather than engaging in reasoned decision-making. Further, deciding in accordance with Jewish law does not necessarily provide uniformity with other jurisdictions.

The proponents of Mishpat 'Ivri have tried to deal with some of these problems. They have recognized that Mishpat 'Ivri must sift through the corpus of Jewish law and discard archaic elements and select only those rules that fit the needs of a modern society.²⁰ In some instances, the long and complex development of Jewish law may signal that a rule of Jewish law was well thought out and tested.²¹ Also, although reliance on Jewish law will not necessarily result in international uniformity, it can bolster a sense of pride, a sense of continuity, and may aid in uniting segments of Israeli society that hail from different lands and cultures.²²

Part II of this Article will examine some of the challenges of incorporating non-religious aspects of Jewish law into a modern legal system. These include the difficulty of separating secular and religious components and some of the ways in which the rules of Jewish law are impractical. Part III will focus on problems that have arisen when the Israeli Supreme Court has taken Jewish law out of context and when it has improperly read modern doctrines into Jewish law. Part IV will provide examples of Israeli cases that have made good use of Jewish law.

II. CAN A RELIGIOUS LEGAL SYSTEM BE MADE SECULAR AND PRACTICAL?

The terms "secular" and "religious" have no obvious counterpart in rabbinic Hebrew. Rabbinic law distinguishes between commandments that relate to matters between man and God and those that relate to relations between people, but it is understood that all harms done to another person

20. See *supra* note 19 and accompanying text.

21. Avraham Tennenbaum, *Al Ma'amado Ha-ra' ui shel ha-Mishpat ha-'Ivri* [*The Proper Status of Mishpat 'Ivri*], 3 SHA'AREI MISHPAT 393, 409–10 (2002). Judge Tennenbaum gives as an example the Jewish law rule that one may not kill another to save his own life. Although one might disagree with the particular example on the grounds that the rule is a moral or religious teaching and not a rule of criminal law, he correctly demonstrates that some Jewish law rules demand careful consideration. Judge Tennenbaum acknowledges that some long-standing rules of Jewish law, such as the prohibition of homosexual acts, are not appropriate to modern circumstances. *Id.* at 412.

22. See 4 ELON TREATISE, *supra* note 1, at 1939.

are also harms against God.²³ The Talmudic topics span a range from matters that seem obviously religious, to matters that look to be only secular. Sabbath observance, sacrifices, dietary laws, and ritual purity all appear to be religious in nature. Torts, contracts, property law and the like look highly secular. However, matters are not so clear-cut. Religious subjects must be studied alongside civil subjects because the Talmud interweaves the two. For example, part of the Talmudic discussion of the construction of a booth used on the holiday of Sukkot turns on a complex discussion of laws of more general application, such as whether people can make legally binding decisions about situations that will arise in the future.²⁴ Similarly, the Talmud derives the agent's power to act on behalf of the principal in part from the laws governing sacrifices and heave offerings (*Terumah*).²⁵

Religious considerations are also woven into matters that would otherwise be considered secular. For example, in many instances the Talmud concludes that a person has no liability under the laws of man but is liable under the laws of God.²⁶ A rabbinic court could advise a person to atone by paying compensation, by going into exile, or by other acts of self-denial even if not otherwise obligated to do so.²⁷ A tortfeasor must not only compensate the victim, but must also seek the victim's forgiveness.²⁸ Yet, at times, the goal of atonement overrides other objectives. For example, rabbis enacted that if a thief sincerely offers to pay for stolen property that no longer exists, the owner shall decline the offer so that other thieves will not be discouraged from repenting.²⁹

The religious character of the law permeates its procedures and rules. For example, in Talmudic times attorneys could not represent parties to a

23. See 1 ELON TREATISE, *supra* note 1, at 4.

24. *B. Sukkah* 23b–24a.

25. *B. Kiddushin* 41a-b.

26. For example, placing poisonous food before another's animal thereby injuring the animal, giving fire to a minor or other incompetent who then burns another's property, or frightening another person. *B. Bava Kamma* 56a. See generally 4 ELON TREATISE, *supra* note 1, at 1724–26.

27. E.g., RABBI SOLOMON BEN ABRAHAM HA-KOHEN (c. 1520-c. 1601), RESPONSA MAHARSHAKH 4:31 (a second generation converso who informed the Venetian Inquisition about the *mohel* who circumcised him, thereby causing him indirect harm, ought to compensate the *mohel* for his losses as part of the converso's need for atonement); RABBI MEIR BEN GEDALIAH (1558–1616), RESPONSA MAHARAM OF LUBLIN 43–44 (prescribing methods of atonement for those who occasioned another's death); SHULHAN ARUKH, *Yoreh Deah* 336:1 (exile for physician who killed a patient by mistake).

28. See SHULHAN ARUKH, *Hoshen Mishpat* 422:1. See generally 1 ELON TREATISE, *supra* note 1, at 145–60.

29. CODE OF MAIMONIDES, *Laws Concerning Robbery and Lost Property* 1:13.

suit, partly because the judges desired to hear the truth from each party.³⁰ They believed that two individuals standing face to face before a religious tribunal would be less inclined to plead falsely and more inclined to compromise.³¹ Attorneys, however, might be unaware of all the relationships between the parties and would be more likely to assert the full array of rights available to their clients, delaying resolution of the suit. In the Talmud, Rav applied the phrase from Ezekiel 18:18, “and acted wickedly against his kin,” to a person who appears as an attorney.³² Similarly, rabbinic courts took seriously the religious implications of an oath and were reluctant to impose them on parties. A court could impose a compromise judgment to avoid forcing a party to take an oath.³³ In yet another example, Jewish law provides that if a healthy person sent an agent to deliver a sum of money to another, the agent was to deliver it even if the sender died. The rabbis declared it a *mitzvah* (commandment) to fulfill the dead man’s wishes.³⁴

The rabbis reinforced the religious nature of criminal proceedings by requiring that two witnesses warn a defendant immediately prior to the commission of an offense that he is about to commit an offense punishable by death or lashes as the case may be, and the defendant must respond that he not only understands the warning, but that he intends to perform the act anyway.³⁵ As Professor Enker has shown, a person committing a crime under these circumstances is rebelling openly against God.³⁶

Moreover, the entire purpose of Jewish law has a mystical aspect. As the Torah instructed, one purpose of the law was to make the Israelites a “kingdom of priests and a holy nation.”³⁷ The Talmud teaches that a rabbinic judge, by applying law correctly, has the capacity to become as if he were a partner with God in Creation.³⁸ The law is seen as the will of God, and its application and development are part of a continuing revelation of God’s will.³⁹ Not only is the law always in the process of

30. See generally Dov I. Frimer, *The Role of the Lawyer in Jewish Law*, 1 J.L. & RELIG. 297 (1983).

31. Rashi, *B. Shevuot* 31a, at “Zeh ha-ba be-harsha’ah.”

32. *B. Shevuot* 31a. The Tosafot created an exception for clients unable to adequately represent themselves, saying that in such an instance, the attorney is performing a *mitzvah*, such as fulfilling the commandment to restore lost property. Tosafot, *B. Shevuot* 31a, at “Zeh ha-ba be-harsha’ah.”

33. SHULHAN ARUKH, *Hoshen Mishpat* 12:2.

34. CODE OF MAIMONIDES, *Laws Concerning Original Acquisition and Gifts* 4:5; *B. Gitin* 15a.

35. *B. Sanhedrin* 40b; CODE OF MAIMONIDES, *Laws Concerning the Sanhedrin and the Penalties Within Their Jurisdiction* 12:1 to :2, 16:4. See Enker, *supra* note 13, at 1137–38.

36. Enker, *supra* note 13, at 1144.

37. *Exodus* 19:6.

38. *B. Shabbat* 10a.

39. See, e.g., NUMBERS RABBAH 19:6 (“Matters not revealed to Moses were revealed to Rabbi

formation,⁴⁰ but the participants in that process are engaged in continual revelation. The Talmud teaches that a judge can either cause the Divine Presence to dwell among the Jews or to depart from them depending on whether he applies the law correctly.⁴¹ As Rabbenu Nissim expressed it in the fourteenth century, the principal purpose of the Torah law is to bring the Jewish people into an intimate relationship with God, whereas the king's law and the law of the various peoples are only intended to preserve social order.⁴²

Mishpat 'Ivri assumes that one can strip away the religious elements of Jewish law and leave the rules necessary for conducting a civil state.⁴³ How can that be done? What is left of law that imposes liability only in a court of Heaven or that seeks a wrongdoer's atonement in place of liability, if one strips away the religious element? A secular court could either create a rule of full liability⁴⁴ or none at all, or advise the defendants of their moral obligation,⁴⁵ but its rule will not embody the spirit of the original. A secular court lacks the authority of a religious court advising on divine judgment. Moreover, a Heavenly "obligation" is not the same as a moral obligation because it includes the idea that God will know whether

Akiva and his colleagues."); *J. Sanhedrin* 4:2 (God would not reveal to Moses the meaning of a rule in each case but would only reveal all the arguments pro and con that a human court might devise together with the principle that whatever a majority of a court would decide would be the law.).

40. Cf. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 28 (1921) ("Nothing is stable. Nothing is absolute. All is fluid and changeable. There is an endless 'becoming.'").

41. *B. Sanhedrin* 7a.

42. DERASHOT 11, *supra* note 16, at 157. See also MAIMONIDES, *GUIDE FOR THE PERPLEXED* 3:27 (The Torah aims at establishing good relations among men so that man can achieve the superior perfection of becoming an intelligent being.); Rabbi Abraham Isaac Kook, *Petichot le-Mesekhtot Bava Kamma ve-Sanhedrin* [*Introduction to Tractates Bava Kamma and Sanhedrin*], 7 *TECHUMIN* 273, 275 (1986) (The Torah combines a lower level of knowledge that promotes social order with a higher level of knowledge that leads to spiritual elevation and insight.).

43. Another criticism voiced against receiving part of Jewish law into the law of the state is that it would injure the integrity of Jewish law. Izhak Englard, *The Problem of Jewish Law in a Jewish State*, 3 *ISR. L. REV.* 254 (1968). For Justice Elon's response, see 4 *ELON TREATISE*, *supra* note 1, at 1906–14. Justice Englard seems to have acceded to Justice Elon's view. See *infra* text at note 194. Another concern is that Mishpat 'Ivri will lead to a theocracy. For discussion of this see 4 *ELON TREATISE*, *supra* note 1, at 1930–31; Menachem Elon, *'Od le-'inyan Chok Yesodot ha-Mishpat* [*More about the Foundations of Law Act*], 13 *SHENATON HA-MISHPAT HA-'IVRI* 227, 243–50 (1987).

44. See CA 6370/00 *Kal Binyan v. A.R.M. Rananah Bldg. & Leasing, Ltd.* [2002] *IsrSC* 56(3) 289, discussed *infra* at note 194. Haim Hermann Cohn, *Divine Punishment*, in 5 *ENCYCLOPAEDIA JUDAICA* 708, 710 (Fred Skolnik & Michael Berenbaum eds., 2d ed. 2007) (contending that an Israeli court under the influence of Jewish law should in some circumstances compel a litigant to go beyond the letter of the law).

45. See CA 350/77 *Kitan Ltd. v. Weiss* [1979] *IsrSC* 33(2) 785, 809, translated in MENACHEM ELON ET AL., *JEWISH LAW (MISHPAT 'IVRI): CASES AND MATERIALS* 50 (1999) [hereinafter *ELON CASEBOOK*], and in 2 *RAKOVER*, *supra* note 19, at 581 (recommending that the defendants compensate the plaintiffs even though they are not legally obligated to do so).

and to what extent the defendant is liable as He knows everything, even each person's intentions, motives, and feelings.⁴⁶

Even if the proponents of Mishpat 'Ivri can satisfactorily ignore the religious elements of Jewish law, they must still deal with many impractical aspects of that law. Justice Menachem Elon offers a definition of Mishpat 'Ivri as including "only those subjects covered in the parts of the *Shulhan Arukh* titled *Even ha-Ezer* and *Hoshen Mishpat* (plus certain 'legal' matters contained in the two other parts of the *Shulhan Arukh*, such as the law of usury in the part titled *Yoreh De'ah*)."⁴⁷ *Even Ha-Ezer* deals primarily with marital issues; *Hoshen Mishpat* deals primarily with judicial procedure, torts, and various other monetary subjects.

An examination of *Hoshen Mishpat* reveals some of the difficulties of incorporating it into Israeli law. The first section of *Hoshen Mishpat* delineates the jurisdiction of rabbinic courts. Although these courts have jurisdiction over injuries caused by a person to property, they lack power to collect much of the damage in cases of personal injury.⁴⁸ They must instead place the defendant under a ban until he satisfies the plaintiff.⁴⁹ The second section of *Hoshen Mishpat* describes the emergency powers of the court:

Any court, even those that lack ordination, that sees the people unrestrained in the commission of sins (and provided that the times require it), may adjudicate capital and monetary cases and all matters of punishment even if the matter lacks perfect testimony. If

46. RABBI MENACHEM MEIRI (1249-c. 1310), BEIT HA-BEHIRAH, commentary to *B. Bava Kamma* 56a (God, who knows what is in a person's heart, will exempt those who had absolutely no intention to cause harm.). See generally *Dinei Shamayim*, in 7 TALMUDIC ENCYCLOPEDIA 382, 395–96 (1977) (conflicting opinions concerning the rights of a person to whom a Heavenly obligation is owed); Rabbi Michael Avraham, *Ha'im ha-Halakha hi "Mishpat 'Ivri" [Is the Halakhah Mishpat 'Ivri?]*, 15 AKDAMOT 141, 150 (2004) (limitations of liability in Jewish law can be explained because of belief in Divine justice).

47. I ELON TREATISE, *supra* note 1, at 105.

48. SHULHAN ARUKH, *Hoshen Mishpat* 1:1-3. When a person's body causes personal injury, Jewish law theoretically allows five types of damages, depending on the defendant's state of mind at the time of the wrongful act. The basic damage is *nezek*, the diminution in the value of the defendant—determined as if he were valued in the slave market—caused by the injury. Although all defendants owe *nezek* regardless of the defendant's state of mind, the rabbinic court cannot collect it. If the defendant acts with inadvertence that is deemed close to intent, then the defendant is theoretically liable for pain, medical expense, and loss of time. If the defendant acted intentionally, he is theoretically liable also for humiliation. Of these elements, the rabbinic court lacks authority to collect pain and humiliation.

If a defendant's property causes personal injury (which would include damage caused by an animal or injury caused by an obstacle created by the defendant), then the only item theoretically allowed is *nezek*. Once again the rabbinical courts lack jurisdiction to collect these amounts.

49. SHULHAN ARUKH, *Hoshen Mishpat* 1:5.

the defendant is violent, they may use non-Jewish authorities to strike him. All of their actions should be for the sake of Heaven. . . .⁵⁰

As Rabbi Joshua Falk explains in his commentary, if the society is law-abiding except for the defendant, the court nonetheless has the power to punish him in this extralegal fashion.⁵¹ If, however, the court judges that the people are themselves unrestrained, it may establish its own rules to contain them and may punish all who violate the rules even if they are generally law-abiding.⁵² In short, the emergency powers of the court give it full authority to adopt rules necessary to preserve order in society.

What is a secular court to make of these provisions? If the court restricts its jurisdiction as provided in section 1 of *Hoshen Mishpat*, in most tort cases it cannot collect judgments, but instead can only place defendants under a ban. The ban, which was designed to cut the defendant from social and religious ties with the community, would be ineffective in an urban, largely secular, society.⁵³ If the secular court looks to section 2 of the code, it has full license to adopt law as it sees fit to prevent “sins,” provided it acts “for the sake of Heaven.” Even if the court were to interpret this to mean that it can adopt measures within its competence that it deems necessary to prevent a breakdown of order as long as it acts without ulterior motive, the provision proves too much—the court already has that power.

Thus, Justice Elon instead may not have meant to include the jurisdictional rules of *Hoshen Mishpat* in Mishpat ‘Ivri. Similarly, it is likely that Mishpat ‘Ivri will not include the evidence rules of formal Jewish law.⁵⁴ According to Jewish law, parties are able to plead but they cannot testify. Two witnesses are required to establish most matters. Should two other witnesses contradict the first pair, the testimony is thrown out—because the judges do not weigh the credibility of the

50. SHULHAN ARUKH, *Hoshen Mishpat* 2:1. The parenthetical language is the gloss added by Moses Isserles (1520–1572).

51. Rabbi Joshua Falk (1555–1614), *Sefer Meirat Einayim*, commentary to SHULHAN ARUKH, *Hoshen Mishpat* 2:1.

52. *Id.*

53. *Cf.* IZHAK ENGLAND, RELIGIOUS LAW IN THE ISRAEL LEGAL SYSTEM 30–31 (1975) (In Israeli society, breach of a religious norm does not entail an organized sanction.).

54. Rabbinic courts possessed the power to adopt more lenient rules of evidence as part of their emergency powers or acting under the “king’s law.” *E.g.*, RABBENU ASHER BEN YEHIEL (1250–1327), RESPONSA ROSH 107:6 [hereinafter ROSH]; CODE OF MAIMONIDES, *Laws Concerning the Sanhedrin and the Penalties Within their Jurisdiction* 24:1. *See also* SHULHAN ARUKH, *Hoshen Mishpat* 2:1; *supra* text accompanying note 50. *See generally* Haim Hermann Cohn & Yuval Sinai, *Witness*, in 21 ENCYCLOPAEDIA JUDAICA 115 (Fred Skolnik & Michael Berenbaum eds., 2d ed. 2007).

witnesses.⁵⁵ There are many restrictions on who can testify.⁵⁶ For example, no person may be a valid witness if he is related to a certain degree to a party, has a financial interest in the outcome,⁵⁷ or if he is not religiously observant.⁵⁸ In a largely secular society, these rules would make it extremely difficult for most parties to present their claims. The matter is even more extreme in criminal cases. In addition to the rule that a person be warned by the victim before committing an offense,⁵⁹ the trial court grills witnesses on small details and dismisses the case if there is inconsistent testimony.⁶⁰

One can respond that rabbinic courts in medieval times relaxed the restrictions described above in both criminal and civil cases. They did so, however, under their emergency powers or under the power of the king's law to devise rules for the proper ordering of society.⁶¹ Although this may show that an Israeli court follows in this tradition by following modern rules of procedure and evidence,⁶² there seems little point in using Jewish law merely to confirm the court's power.

A court would also encounter many difficulties when applying Jewish law to torts. As I have shown elsewhere,⁶³ in general, Jewish law significantly limits a tort defendant's liability as compared with modern

55. SHULHAN ARUKH, *Hoshen Mishpat* 38. See Arnold Enker, *Self-Incrimination in Jewish Law—A Review Essay*, 4 DINÉ ISRAEL 107, 112–13 (1973).

56. See generally Cohn & Sinai, *supra* note 54. Among other restrictions, witnesses who are related to each other or to a judge may not testify. In general, only males over the age of thirteen can testify. SHULHAN ARUKH, *Hoshen Mishpat* 33, 35.

57. SHULHAN ARUKH, *Hoshen Mishpat* 33:10. See also *id.* at 7:12 (discussing the disqualification of judges).

58. A “wicked” person may not testify, and a person is wicked if he has performed an act punishable by either lashes or death. Consequently, the ineligible include one who does not keep kosher or observe the Sabbath and holidays, and one who lends or borrows money on interest. Moreover, even if one otherwise valid witness knows that a second witness is “wicked,” he may not testify even if he knows that the second witness would testify truthfully. Agnostics and heretics cannot testify, nor can non-Jews. SHULHAN ARUKH, *Hoshen Mishpat* 34.

59. See *supra* text accompanying note 35.

60. MISHNAH, *Sanhedrin* 5:1 to :3.

61. Enker, *supra* note 13, at 1138–39.

62. See *CrimA 543/79 Nagar v. State of Israel* [1981] IsrSC 35(1) 113, 163–70 (Elon, J.) (using Jewish legal history to approve the use of circumstantial evidence and confessions in a murder case), translated in ELON CASEBOOK, *supra* note 45, at 200, and in 1 RAKOVER, *supra* note 19, at 396. See Avraham, *supra* note 46, at 153–54 (The formal law is ill-suited for a democratic and liberal state, and the principles of the king's law are the same as those of natural law.).

63. Steven F. Friedell, *Some Observations on the Talmudic Law of Torts*, 15 RUTGERS L.J. 897 (1984). In that article, I speculated that limited liability may have come about in part because “the Babylonian rabbis generally considered themselves without jurisdiction in tort cases.” *Id.* at 906. I now think that that was wrong because the rabbis' lack of jurisdiction only extended to collecting judgments. Rabbis continued to hear cases and impose bans on those liable until they paid an adequate sum to the plaintiff. See SHULHAN ARUKH, *Hoshen Mishpat* 1:5.

systems. There is no respondeat superior liability in Jewish law.⁶⁴ A defendant owes nothing for pain or medical expense unless he acted with a degree of inadvertence that borders intention.⁶⁵ If a defendant creates an obstacle that injures a plaintiff, or if the defendant's animal injures a plaintiff, then the defendant owes nothing for medical care or pain.⁶⁶ There is no liability under the laws of man for indirect damages.⁶⁷ According to some, the plaintiff collects no recovery unless the defendant acts with greater fault than the plaintiff.⁶⁸ Jewish law allows no damage in the case of wrongful death unless the defendant's vicious animal causes death, in which case the defendant would pay a fine to the decedent's family.⁶⁹ If damage is caused by an obstruction created by the defendant, there is no liability for damage to inanimate objects.⁷⁰ If damage is caused by fire,

64. *B. Kiddushin* 42b. See generally Aaron Kirschenbaum, *A Cog in the Wheel: The Defence of "Obedience to Superior Orders" in Jewish Law*, 4 ISRAEL YEARBOOK ON HUMAN RIGHTS 168 (1974).

65. *B. Bava Kamma* 26a–27a; Rashi, *B. Bava Kamma* 26a at "Nezek 'In 'Arba'ah Devarim La." If a person is suddenly knocked off a roof by a wind of normal velocity and he injures someone below, he is considered to have acted inadvertently but close to intentionally and is therefore liable for depreciation, pain, and medical expense. If, however, the wind is of unusual velocity, then he is considered to have acted under compulsion and is liable only for depreciation. If a person while sitting has a stone on his shirt of which he is unaware, he is considered to have acted under compulsion when he stands up and the stone falls on another. If he had known the stone was there but later forgot about it, he is considered to have acted inadvertently—but not inadvertently close to intentional—and is liable for depreciation only. *B. Bava Kamma* 26b.

66. CODE OF MAIMONIDES, *Laws Concerning Damage by Chattels* 7:3.

67. See *supra* note 26 and accompanying text. There are three principal approaches to the problem of indirect damages. One is that liability is only imposed if the damages are clearly going to happen, if the defendant acted directly against the thing injured, and if the damage occurred immediately. Rabbenu Asher ben Yehiel (1250–1327) ("Rosh"), commentary to *B. Bava Batra* 2:17; Rosh, commentary to *B. Bava Kamma* 9:13. Another approach was that liability was imposed only in situations that were a matter of common occurrence. See Tosafot, *B. Bava Batra* 22b, at "Zot 'Omeret Gerama Be-Nezakin 'Asur" (view of the Ritzvah, Rabbi Isaac ben Abraham). The third approach was that there was liability only in situations where the damage was certain to happen. Nahmanides (c. 1194–1270), *Kuntres Dina Degarme*, in HIDDUSHEI HARAMBAN 127 (Moshe Hirshler ed., 1969). There are many variations on these approaches, including one that says that indirect damages are not imposed when the defendant caused them inadvertently. Shakh, commentary to SHULHAN ARUKH, *Hoshen Mishpat* 386:1. The approaches retain sufficient flexibility to permit rabbinic courts to reach desired results. See generally Steven F. Friedell, *Nobody's Perfect; Proximate Cause in American and Jewish Law*, 25 HASTINGS INT'L COMP. L. REV. 111, 120–33 (2002).

68. RABBI SOLOMON LURIA (1510–1574), YAM SHEL SHELOMO, commentary to *Bava Kamma* 3:26; RABBI MENACHEM MEIRI (1249–1315), BETH HABEHIRA, commentary to *Bava Kamma* 26b–27a; RABBI JONATHAN HA-KOHEN OF LUNEL (1135–1210), PERUSH R. YONATAN HA-KOHEN ME-LUNEL LE-BAVA KAMMA 73 (S. Friedman ed., 1969).

69. See CODE OF MAIMONIDES, *Laws Concerning Damage by Chattels* 10:2 to :4 (fine due when animal killed on three prior occasions); CODE OF MAIMONIDES, *Laws Concerning Wounding and Damaging* 4:5 (no wrongful death damages due when a person kills another); *B. Bava Kamma* 26a (no ransom to be paid); *B. Ketubot* 35a (no damages to be paid). A "vicious" animal is one that caused similar damage on at least three prior occasions, provided the owner has received proper warning.

70. *B. Bava Kamma* 54b.

there is no liability for the destruction of concealed property.⁷¹ Jewish law does not recognize the concept of the “eggshell skull” so that a defendant causing personal injury is only liable for damage that ordinarily results.⁷² When damages are allowed, Jewish law limits liability by measuring damages in a way that intentionally favors the tortfeasor.⁷³ For example, damages for pain are measured by how much a person would pay to avoid having to endure the pain.⁷⁴ Damages to crops or trees are also measured in a way that limits liability.⁷⁵

In the case of medical malpractice, the defendant’s exposure is even less under the classical sources of Jewish law. The *Shulhan Arukh* provides that if a physician mistakenly injures a patient, a licensed physician is not liable for hurting a patient under the laws of man but might be liable under the laws of Heaven.⁷⁶ If a physician causes a patient’s death, then the physician might be liable for exile under the laws of Heaven.⁷⁷ Although some rabbis in the latter part of the twentieth century widened the physician’s liability through liberal interpretation of the classical sources,⁷⁸ others adhere to the older view.⁷⁹

In some other respects Jewish law favors the tort victim in comparison with Western legal systems. It does not have a statute of limitations applicable to tort claims.⁸⁰ As we have seen, it recognizes a religious obligation to compensate in some instances where no legal obligation exists,⁸¹ and it imposes a religious obligation to appease tort victims even if compensation is paid.⁸² Moreover, the rabbinic court is required to instruct the defendant about these religious obligations.⁸³ Even if a secular court could successfully strip away the religious elements, one would be left with a legal system that would be impractical.

71. *B. Bava Kamma* 61b.

72. SHULHAN ARUKH, *Hoshen Mishpat* 420:2.

73. *B. Bava Kamma* 47a; RABBI SOLOMON LURIA (1510–1574), YAM SHEI SHLOMO, commentary to *Bava Kamma* 8:1.

74. *B. Bava Kamma* 85a.

75. *B. Bava Kamma* 58b.

76. SHULHAN ARUKH, *Yoreh Deah* 336:1.

77. *Id.*

78. See generally Steven F. Friedell, *Medical Malpractice in Jewish Law: Some Parallels to External Norms and Practices*, 6 CHI.-KENT J. INT’L & COMP. L. 1 (2006).

79. See J. David Bleich, *Medical Malpractice and Jewish Law*, 39 TRADITION 72, 88–90 (2005); Hovel, in 12 TALMUDIC ENCYCLOPEDIA 679, 743 (1974).

80. *Supra* text accompanying note 26.

81. *Supra* text accompanying note 28.

82. SHULHAN ARUKH, *Hoshen Mishpat* 422:1.

83. See 1 ELON TREATISE, *supra* note 1, at 147.

One might be tempted to think that there is precedent in Jewish history for separating religious and secular law and avoiding the impracticalities of Jewish law. In Talmudic and post-Talmudic times, rabbis and Jewish communities recognized that much of the Formal Law was impractical and devised a supplemental legal system based on emergency powers and the power of a Jewish king.⁸⁴ This poses a serious difficulty for the proponents of Mishpat 'Ivri. Should they restrict their sources of Jewish law to that of the Formal Law, they would be left with a highly impractical system. Should they instead choose to adopt the rules of the Jewish communities in the Talmudic and post-Talmudic periods (generally up until the end of the eighteenth century), they would need criteria for deciding which of these rules to apply and might still be left with rules that would seem highly impractical today. Should they instead adopt only the view that the Knesset and the courts have the power as representatives of the Jewish community to adopt rules necessary for the governance of the state, the entire concept of Mishpat 'Ivri would collapse as the Knesset and the courts already have those powers.

Mishpat 'Ivri, an amalgam of all of these approaches, uses the full range of Jewish law to shed light on issues presented.⁸⁵ Justice Barak offered a possible answer to the problems posed in this part of the Article when he explained that Israeli courts use Jewish law not “as a normative system from which we seek a binding rule, but only as a storehouse from which we seek enlightenment.”⁸⁶ Although this approach gives the Israeli judge power to translate religious norms into secular ones and to avoid Jewish law when it does not meet society’s needs, this approach can also give rise to some problems. It can result in taking Jewish law concepts out of context and reading modern concepts into Jewish law. We will treat these issues in the next part of this Article.

84. See *supra* text accompanying notes 14–15.

85. E.g., CA 418/03 Osem Food Indus., Ltd. v. Samja [2004] IsrSC 59(3) 541, 574 (Automobile no-fault statute is supported by the Knesset’s power to make rules under the king’s law.); CrimA 877/84 Gali v. State of Israel [1986] IsrSC 40(4) 169 (using formal law of robbery); *Nagar*, IsrSC 35(1) at 163–70 (using Jewish communities’ use of circumstantial evidence).

86. CA 546/78 Bank Kupat AM v. Hendeles [1980] IsrSC 34(3) 57, 67, translated in ELON CASEBOOK, *supra* note 45, at 331, and in 1 RAKOVER, *supra* note 19, at 7. See Tennenbaum, *supra* note 21, at 421 (endorsing this approach).

III. SOME DIFFICULTIES WITH MISHPAT ‘IVRI

A. *Law Out of Context*

Whenever a court cites an earlier decision it always takes the earlier case out of context to some degree because no two cases are the same. There are, however, some situations where the supposed precedent arose in such a different legal setting that it is not helpful to rely upon it. A Jewish law rule that appears to be relevant might turn out upon closer examination to have such different elements and functions that it does not fit into the Israeli legal system. Also, courts might cite Jewish law for the proposition that a certain act is wrongful but ignore details of Jewish law that eliminate or mitigate the wrong. This part of the Article will examine some Israeli cases where this has occurred.

1. *Robbery v. Theft*

In *Gali v. State of Israel*,⁸⁷ the defendant snatched a box of diamonds worth about \$500,000 from the foreman of a diamond-polishing plant who was standing in the plant’s courtyard. The foreman was taken by surprise and did not resist, although he and another then chased Gali without success. The police later apprehended Gali, and he was convicted of robbery and sentenced for up to ten years imprisonment.⁸⁸ Gali argued that his crime, if any, consisted of theft. Under Israeli statutes, a person convicted of robbery can be imprisoned for up to fourteen years,⁸⁹ increased by an additional six years if there are aggravating circumstances.⁹⁰ Gali would have faced a maximum sentence of only three years had he been convicted of theft.⁹¹ Instead, he was convicted under a 1977 statute: “A person who steals a thing, and at the time of the act or immediately before or immediately thereafter, carries out or threatens to carry out an act of violence to any person or property in order to obtain or

87. *Gali*, IsrSC 40(4) at 169, translated in ELON CASEBOOK, *supra* note 45, at 217, and in 2 RAKOVER *supra* note 45, at 732.

88. Four years of that sentence were conditional. He was also sentenced for conspiracy and extortion. The Supreme Court reversed the conviction for conspiracy. *Id.* at 177–79, translated in ELON CASEBOOK, *supra* note 45, at 218.

89. Penal Law, 5737-1977, Special Volume LSI 8 § 402(a) (1977) (Isr.). The penalties prescribed in the statute are maximums. *Id.* § 35. In rabbinic Hebrew the word for robbery is *gezeilah*. The Penal Law uses a different word, *shod*.

90. The penalty is increased if the defendant uses a dangerous weapon or if he acted in a group, wounded or struck a person, or committed some other act of violence against a person. Penal Law § 402(b).

91. Penal Law § 384.

retain the thing . . . is said to commit robbery”⁹² An earlier statute made “actual violence” an element of robbery.⁹³ Israeli cases construing the 1977 statute state that merely snatching an object from another is theft, but if the owner of the object expressed active resistance, then the crime was robbery.⁹⁴ Although this rule had substantial support in England⁹⁵ and the United States,⁹⁶ others criticized it on the grounds that it “put a premium on criminal skill and adroitness.”⁹⁷

A three-judge panel of the Israeli Supreme Court upheld Gali’s conviction, each justice employing different reasoning.⁹⁸ Justice Elon thought that there was a difference between “actual violence” and “violence,” and that snatching an object from another who is aware of the taking constitutes “violence.” He also wrote that this was consistent with Jewish law. He quoted parts of Maimonides’s definitions of these acts:

Who is a thief? One who takes someone’s money secretly, without the knowledge of the owner But if he takes it openly and publicly by force, then he is considered not a thief but a robber. Who is a robber? One who takes someone’s money by force, such as snatching an object from his hand.⁹⁹

92. Penal Law § 402(a). A slightly different translation appears in ELON CASEBOOK, *supra* note 45, at 218.

93. Criminal Code Ordinance, Ch. XXXII, art. 387 (Palestine 1936). This statute, adopted during the British mandate over Palestine, was based on the Cyprus Criminal Code and the Queensland Criminal Code of 1899, which in turn sought to codify English common law. Norman Abrams, *Interpreting the Criminal Code Ordinance, 1936—The Untapped Well*, 7 ISR. L. REV. 25 (1972). A later English statute uses the word “force” rather than “violence.” Theft Act, 1968, ch. 60 § 8(1).

94. CrimA 707/83 Patromelio v. State of Israel [1984] IsrSC 38(4) 821; CrimA 524/82 Vadrud v. State of Israel [1983] IsrSC 37(2) 553; CrimA 70/73 Elharar v. State of Israel [1973] IsrSC 27(2) 561. See also CrimA 877/84 Gali v. State of Israel [1986], IsrSC 40(4) 169, 181–82, *translated in* ELON CASEBOOK, *supra* note 45, at 219.

95. See J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 504 (5th ed. 1983). In *R. v. Dawson*, (1977) 64 Crim. App. 170, the court said that the jury should be left to decide whether jostling a victim to cause him to lose his balance constituted the use of force.

96. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 696–97 (1972).

97. See *Gali*, IsrSC 40(4) at 182 (quoting *People v. Santiago*, 405 N.Y.S.2d 752, 756 (N.Y. App. Div. 1978)), *translated in* ELON CASEBOOK, *supra* note 45, at 219.

98. Justice Levin concurred, saying that although there was no difference between “violence” and “actual violence,” it was enough for the crime of robbery that the defendant committed a forceful physical act against the victim. *Id.* at 204, *translated in* ELON CASEBOOK, *supra* note 45, at 221. Justice Barak concurred saying that the facts met the requirements for actual violence. *Id.* at 207, *translated in* ELON CASEBOOK, *supra* note 45, at 222.

99. *Id.* at 199 (quoting CODE OF MAIMONIDES, *Laws Concerning Theft* 1:3 and CODE OF MAIMONIDES, *Laws Concerning Robbery and Lost Property* 1:3), *translated in* ELON CASEBOOK, *supra* note 45, at 220–21.

Justice Elon's reliance on Jewish law was misplaced. Jewish law defines the two wrongs differently from the way Israeli law does. In Jewish law, theft is committed in secret whereas robbery is committed openly without concealing the appropriation of the goods.¹⁰⁰ Although in his legal code Maimonides includes the use of force in the definition of robbery, he includes the examples of one who "enters another's premises without his permission and takes articles . . . or if one enters another's field and eats its produce."¹⁰¹ Maimonides also said that a person who picks up a lost article and fails to return it violates the commandment forbidding robbery,¹⁰² as does an employer who delays paying wages.¹⁰³ The common element appears to be an act of misappropriation that is brazen, meaning it is done while the actor knows he is likely to be observed. In the *Guide for the Perplexed*, Maimonides does not mention the element of force but says that only things that are in the open can be robbed.¹⁰⁴ A more recent code, the *Arukh Ha-Shulhan*, rules that an armed bandit would be a robber if he takes the property in public and in front of the owners, but he would be a thief if he does so in a closed place and his victims hide in fear while their property is stolen.¹⁰⁵ By contrast, theft

100. See Rabbi Yechiel Michel Epstein, ARUKH HA-SHULHAN, *Hoshen Mishpat* 348:4; SHULHAN ARUKH, *Hoshen Mishpat* 348:3. The Arukh Ha-Shulhan does not mention the use of force in its law of robbery, saying only that if someone takes another's property openly and in public he is a robber and not a thief. *Id.* Even if he enters another's house while the owner is away he commits robbery if he removes the objects from the house in an open manner. See CODE OF MAIMONIDES, *Laws Concerning Robbery and Lost Property* 4:12; SHULHAN ARUKH, *Hoshen Mishpat* 364:2.

The classic Talmudic discussion of these wrongs contains two views of the difference between a thief and a robber. According to one view, a person who hides in order to steal something is a thief. The other view is that if one hides so well that the owner is not aware of his identity when the objects are stolen, he is not a robber but a thief. According to this view, if he hides only so that his victims should not flee with their property, he is a robber. *B. Bava Kamma* 79b. See also BERNARD S. JACKSON, THEFT IN EARLY JEWISH LAW 26–28 (1972); MOSES JUNG, THE JEWISH LAW OF THEFT (1929), reprinted in 4 ABRAHAM M. FUSS, STUDIES IN JEWISH JURISPRUDENCE (1976).

The Jerusalem Talmud contained a rule: "If one stole before witnesses, he is a thief, and if he did so before the owner, he is a robber." *J. Sanhedrin* 8:3, 11:2. Later Jewish law differed in two respects: witnesses who are not parties to the case are necessary to impose liability for any tort unless the defendant admits liability, and as shown above, it is not necessary for robbery to be in the presence of the owners as long as the stolen goods are not concealed. Nonetheless, the statement captures the idea that secrecy, or the lack thereof, is all that distinguishes theft from robbery. In *Gali*, Justice Elon mistakenly said that robbery in Jewish law requires the awareness of the victim. IsrSC 40(4) at 199, translated in ELON CASEBOOK, *supra* note 45, at 221, and in 2 RAKOVER, *supra* note 19, at 733.

101. CODE OF MAIMONIDES, *Laws Concerning Robbery and Lost Property* 1:3.

102. CODE OF MAIMONIDES, *Laws Concerning Robbery and Lost Property* 11:2. See also SHULHAN ARUKH, *Hoshen Mishpat* 259:1.

103. CODE OF MAIMONIDES, *Laws Concerning Hiring* 11:2 (based on *B. Bava Metzia* 111a). See CA 719/78 Ilit, Ltd. v. Elko, Ltd. [1980] IsrSC 34(4) 673, 686 (Elon, J.), translated in 1 RAKOVER, *supra* note 19, at 475; see also SHULHAN ARUKH, *Hoshen Mishpat* 359:7.

104. MAIMONIDES, *GUIDE FOR THE PERPLEXED* 3:41.

105. ARUKH HA-SHULHAN, *Hoshen Mishpat* 348:4.

under Israeli law need not be in secret, and robbery need not be done openly. Instead, theft requires an intent to permanently deprive an owner of his property and a carrying away of that property without the owner's consent;¹⁰⁶ robbery consists of theft committed by violence or threat of violence to persons or property.¹⁰⁷ Although the two systems' definitions overlap, they are not the same.¹⁰⁸

Even if Israeli law had adopted Jewish law's definition of theft and robbery, *Gali's* reliance on Jewish law would have been ironic. Jewish law imposes greater liability on thieves than on robbers, the opposite of the view taken by the Israeli statute. In Jewish law a robber only has to return the stolen object or pay its value.¹⁰⁹ By contrast, a thief ordinarily has to pay the owner double. Moreover, if he steals a sheep or ox and then either sells it or slaughters it, he has to pay the owner four or five times the value of the animal.¹¹⁰

The Jewish law of theft and robbery serves both religious and practical goals. The Talmud teaches that one who steals in secret compounds his offense by demonstrating a greater fear of man than he does of God, thinking that God is less powerful than man.¹¹¹ In his *Guide for the Perplexed*, Maimonides explains the matter in practical terms, reasoning that there is a greater need to deter theft than robbery.¹¹² He explains that robbery is less common than theft and that it is harder to identify a person who steals in secret. He further explains that the law imposes a higher penalty for stealing a sheep or ox because owners usually leave them outside, making them easier to steal, and if the thief sells or slaughters the

106. Penal Law § 383(a)(1). It is also theft to deceitfully use property that is in his possession for another lawful purpose. Penal Law § 383(a)(2). Although the Israeli law distinction between theft and robbery parallels the treatment in the United States, there are some parallels in United States law to the Jewish law approach. See *Rhodes v. State*, 580 So. 2d 92, 94 (Ala. Crim. App. 1991) (“[L]arceny is secret in nature”); *Commonwealth v. Davis*, 66 S.W. 27, 27 (1902) (“Larceny . . . is accomplished secretly, or by surprise or fraud.”).

107. Penal Law § 402.

108. The difference between the two legal systems may be illustrated as follows: if a person sneaks into another's home while the owners are away, destroys a locked box in order to remove its contents, and then conceals the loot in a bag and sneaks out again, Jewish law would see this as theft but Israeli law would see it as robbery. Jewish law would consider it theft because it was done in secret; Israeli law would see it as robbery because of the violence in breaking the property. By contrast, if a person steals a purse left on a park bench in full view of the owner, Jewish law would consider this to be robbery while Israeli law would see it as theft. It would be robbery under Jewish law because it was done in the open but would be theft in Israeli law because no violence occurred.

109. CODE OF MAIMONIDES, *Laws Concerning Robbery and Lost Property* 1:5.

110. CODE OF MAIMONIDES, *Laws Concerning Theft* 1:6.

111. *B. Bava Kamma* 79b.

112. MAIMONIDES, *GUIDE FOR THE PERPLEXED* 3:41.

animal it would be hard to catch the thief.¹¹³ Israel has taken a different approach. It sees a greater need to deter and punish those who use force or the threat of force to steal.¹¹⁴

The Israeli Supreme Court was within its rights to conclude that the Knesset intended to severely punish purse-snatchers and the like.¹¹⁵ Justice Elon said that such acts have become common and can result in the victim's death.¹¹⁶ However, in seeking support in Jewish law's definition of robbery, *Gali* takes Jewish law out of context. *Gali*'s act constituted robbery under Jewish law for different reasons than those required by the Israeli statute. Moreover, it is ironic that the court relied on Jewish law, which treats robbers leniently.

A district court made better use of Jewish law in *State of Israel v. Grachin*,¹¹⁷ where the defendants tricked an elderly man and his elderly sister to go into a room on the pretense that the defendants were about to purchase some jewelry. The defendants locked the two in the room and stole the jewelry and some other items. The defendants did not use force or threats. The District Court upheld a conviction for robbery, determining that the act involved "violence" in part because the common usage of that word described what took place. The court said that as long as the victims were aware of what the defendants were intending to do and opposed it, the act would be robbery. It held that the fear imposed on the victims would be enough to satisfy the statutory term "violence." In doing so the court cited a source of Jewish law that defined a violent person as "a strong person who does not listen to the *bet din* (religious court) and

113. *Id.* The practical and religious concerns also explain the rule in Jewish law that a thief who admitted his offense was liable for the value of the stolen object but exempt from paying the fine. CODE OF MAIMONIDES, *Laws Concerning Theft* 1:5. The admission removes the difficulty of identifying the thief, and it is a step in atoning for the religious offense.

114. Israel also punishes more severely theft committed by types of people who abuse a relationship of trust, such as employees stealing from their employers (seven years), public employees stealing public property (ten years), officers and directors stealing from the corporation (seven years), and those acting under a power of attorney under certain circumstances (seven years). Penal Law §§ 390–393. Although these kinds of thefts are often done in secret, secrecy is not an element of the offense. Penalties for these thefts are less than the penalty for robbery. Cattle thieves face up to four years of imprisonment. Penal Law § 393a.

115. Justice Elon stressed in his opinion that the law ought not to reward professional criminals who steal goods suddenly without the victim's resistance. Still, his decision would classify an "expert" pickpocket a thief, not a robber. CrimA 877/84 *Gali v. State of Israel* [1986], IsrSC 40(4) 169, 196–97, translated in ELON CASEBOOK, *supra* note 45, at 219.

116. *Id.* at 198, translated in ELON CASEBOOK, *supra* note 45, at 220. See also Commonwealth v. Brown, 484 A.2d 738, 742 (Pa. 1984) ("A victim who is aware of the taking of property from his person is apt to reflex action to protect himself and his property and thus may be injured by the felon.").

117. CrimC (TA) 869/81 [1983] IsrDC (1) 265, *rev'd sub nom.* CrimA 524/82 *Vadrad v. State of Israel* [1983] IsrSC 37(2) 553.

whom people fear.”¹¹⁸ The court did not try to determine whether the act would have constituted robbery under Jewish law.¹¹⁹

The issue in both *Gali* and *Grachin* was the meaning of the term “violence” and how Jewish law might help to shed light on the definition.¹²⁰ Even that inquiry was risky, however, as words do not have a static meaning but one that varies with context.

A better way to use Jewish law is to explicitly apply Maimonides’s idea that the Torah imposed a more severe sanction on thieves because it was more common for people to steal in secret than in the open, and because it was harder to catch thieves than robbers. Today it happens that theft committed by means of violence is a more serious crime. Nonetheless, the principle that a more severe sanction attaches to a more serious violation remains the same. *Gali* makes sense under Maimonides’s rationale if the Knesset concluded that purse-snatching had become as common and as serious a problem as asserted by Justice Elon.¹²¹ It is less obvious that the acts in *Grachin* are of that nature.

2. Sabbath Driving

*Horev v. Minister of Transportation*¹²² illustrates another ironic use of Jewish law. The case involved an order by the Ministry of Transportation to close a certain Jerusalem street to all vehicular traffic except for emergency purposes during times of prayer on Sabbaths and religious holidays. The street was in a largely religious neighborhood, and its closure caused minor disruptions to non-observant travelers. The issue for the court was whether the order was valid in that it infringed on the right to travel. The court needed to balance the interests of some people’s right to travel against the protection of other people’s religious sensibilities.

A majority of the court voted to strike down the order because the Ministry of Transportation had not adequately considered the interests of the neighborhood’s non-observant residents.¹²³ Unsurprisingly, some

118. *Id.* ¶ 20 (quoting *Alam*, 2 TALMUDIC ENCYCLOPEDIA 11 (1976)), translated in 2 RAKOVER, *supra* note 19, at 878. See SHULHAN ARUKH, *Hoshen Mishpat* 98:4.

119. It would have been theft under Jewish law according to the *Arukh Ha-Shulhan*. See *supra* note 105 and accompanying text.

120. In *Gali*, Justice Elon also found Jewish law helpful in defining the term by finding the source for the word in Aramaic as used in the Talmud. IsrSC 40(4) at 193, translated in 2 RAKOVER, *supra* note 19, at 732.

121. See *supra* text accompanying note 116.

122. HCJ 5016/96 [1997] IsrSC 51(4) 1, translated in [1997] IsrLR 149.

123. *Id.*, translated in [1997] IsrLR 149, 230. The court split 3–3–1 on the merits. Three justices would have struck down the order entirely; three thought that the transport ministry needed to consider

justices cited Jewish law to show the centrality of Sabbath observance to Jewish life.¹²⁴ For example, the Talmud said, “Jerusalem was destroyed only because [they] desecrated the Sabbath therein.”¹²⁵ Surprisingly, one justice used Jewish law to show the importance of the public’s right to use public roads.¹²⁶ Justice Cheshin quoted the Mishnah, “[h]e whose field is traversed by a public path and he closed it, substituting [another path] at the side, forfeits that which he has given, and [that which he has appropriated as] his does not pass into his possession.”¹²⁷ As Justice Cheshin observed, Jewish law forbids a person from taking part of a public way even if he gives a path in exchange.¹²⁸

Part of the difficulty with Mishpat ‘Ivri is that the premises of Jewish law differ from those of Israeli law. Jewish law has a religious premise: it preserves an orderly society to enable the Jewish people to fulfill their other obligations to God. Jewish law starts not with the right to travel but with the obligation to observe the Sabbath to thereby honor God.¹²⁹ Unless a person’s life is in danger, one’s liberty to travel on the Sabbath, even if it involves only walking, is limited, as one may not go more than two thousand cubits beyond a town’s limits.¹³⁰ By contrast, Israel places a greater emphasis on promoting individual liberties.¹³¹ As applied to the issue in *Horev*, a modern democracy places a high value on the right to travel and the right of each individual to choose whether to practice a religion. Therefore each person’s right to decide whether to travel on the Sabbath can only be limited if justified by some great public need.¹³²

the views of non-observant residents who were affected by the closure; one justice would have supported a closure of the road during the entire Sabbath and holidays but to prevent a deadlock voted to allow the transport ministry to reconsider the closure. *Id.*

124. *Id.* at 43 (Barak, J.), translated in [1997] IsrLR 149, 195; *id.* at 181–82 (Tal, J.), translated in [1997] IsrLR 149, 375–78.

125. *Id.* at 181 (Tal, J.) (citing *B. Shabbat* 119b), translated in [1997] IsrLR 149, 377.

126. *Id.* at 151 (Cheshin, J.), translated in [1997] IsrLR 149, 325.

127. MISHNAH, *Bava Batra* 6:7.

128. *Horev*, IsrSC 51(4) at 151, translated in [1997] IsrLR 149, 334–35.

129. See, e.g., *Exodus* 16:29 (prohibition against travel on the Sabbath); *Exodus* 20:10 (Sabbath observance to remember creation); *Deuteronomy* 5:14 (Sabbath observance to remember redemption from Egypt).

130. SHULHAN ARUKH, *Orah Chayyim* 397:1. See generally 10 JEWISH ENCLYCLOPEDIA 600 (1905). Even though travel within a town’s limits is not prohibited, and even though riding on an animal on the Sabbath is prohibited only by rabbinic decree, the Talmud records that a rabbinic court once stoned a man to death for riding on a horse on the Sabbath. *B. Sanhedrin* 46a.

131. *Horev* also involved the right of non-observant Israelis to be free from religion. Even though Judaism recognizes the notion of free will when it comes to religious belief and practice, Judaism considers observance to be obligatory, not optional.

132. *Horev*, IsrSC 51(4) at 52–53, translated in [1997] IsrLR 149, 206–07.

Justice Cheshin's opinion appears to view Jewish law as if it is a collection of distinct rules from which one can pick and choose. Although Jewish law protects the public's right to travel, it does not protect the right to use public roads in violation of the Sabbath. In a similar way, using Jewish law's reverence for the Sabbath to support the street closure also causes a strange result. As Justice Tal observed, closing the street would result in drivers taking longer routes that would cause an even greater desecration of the Sabbath.¹³³

For those who want Israel to be a purely secular state, Justice Cheshin's use of Jewish law would seem proper. Jewish law protects the right to travel—a secular issue—and one can ignore what Jewish law has to say about Sabbath travel. Those opposed to imposing religious restrictions on non-believers might delight in the irony that the public's right to use roads is protected by Jewish law. Even some who are religiously observant might approve of the reasoning that allows each person to choose whether and how to observe the Sabbath. However, if the purpose of Mishpat 'Ivri is to help unify the people by grounding legal decisions in the Jewish heritage, the use of Jewish law here might be counterproductive. Some might be offended by the use of Jewish law to promote a violation of the Sabbath that interferes with another's observance of the Sabbath. It seems very doubtful that Jewish law can successfully resolve the issue in *Horev*.

3. *Negligent Misrepresentation*

The case of *Amidar National Co. for Immigrant Housing in Israel v. Aharon*¹³⁴ is an example of a court applying a liability rule of Jewish law without regard for the limitations that Jewish law imposes. In that case, a new immigrant sought to open a workshop where he could operate as a locksmith. He sought the assistance of Amidar, a company partly owned by the Israeli government that specializes in providing real estate to new immigrants. Amidar's employee, Abraham Zaken, helped Aharon find a site that it rented to him on the condition that he use it only for a locksmith's business. The lease contained an exculpatory clause stating that Aharon would be solely responsible for any liabilities arising from his use of the property and that he would hold Amidar blameless. It turned out that the property was not zoned for use as a locksmith shop. The neighbors

133. *Id.* at 179, translated in [1997] IsrLR 149, 364.

134. CA 86/76 [1978] IsrSC 32(2) 337, translated in ELON CASEBOOK, *supra* note 45, at 145, and in 2 RAKOVER, *supra* note 19, at 544.

complained, and Aharon was convicted and ordered to close his shop. He relocated his business and sued Amidar for several items of damage. The district court disallowed some items for insufficient evidence but awarded damages for loss of business before he was required to close the shop, for lost business from the time the old business was closed until his new shop was opened one hundred days later, and for temporary reduction in clientele.¹³⁵ The district court found that Amidar had been negligent and was liable for its negligent misrepresentation. In doing so it relied on an Israeli Supreme Court case that imposed liability for an expert's negligent misrepresentation but which left open the possibility that non-experts might not have such liability.¹³⁶ The district court agreed with the dissenting judgment in a Privy Council case that said that non-experts and experts should be subject to the same liability and also ruled that the exculpatory clause was ineffective.¹³⁷

The Supreme Court affirmed. Justice Landau agreed with the district court's reasoning and suggested that perhaps a non-expert had an even greater responsibility.¹³⁸ This was dictum, however, as Justice Landau thought that Amidar was an expert.¹³⁹ Justice Cohn concurred, pointing out that Aharon had reason to believe that Amidar was an arm of the State.¹⁴⁰ He did not address the issue of a non-expert's liability. Justice Elon also concurred in the judgment and attempted to show that the liability of both the expert and non-expert for negligent misrepresentation was consistent with Jewish law.

Justice Elon traced the development of Jewish law in this area from the Talmud to the latest code of Jewish law at the beginning of the twentieth century. The core text in the Talmud reads:

It was stated: If a *denar* was shown to a moneychanger [and he recommended it as good] but it was subsequently found to be bad, in one Baraita it was taught that if he was an expert he would be exempt but if an amateur he would be liable, whereas in another Baraita it was taught that whether he was an expert or an amateur he would be liable. R. Papa stated: The ruling that in the case of an

135. *Id.* at 342. The district court mistakenly calculated the lost time as 125 days, but the matter was corrected by the Supreme Court.

136. CA 106/54 Weinstein v. Kadimah [1954] IsrSC 8 1317.

137. Mutual Life & Citizens' Assurance Co. v. Evatt, [1971] A.C. 793, 810 (P.C. 1970) (appeal taken from High Ct. of Aust.) (U.K.).

138. *Amidar*, IsrSC 32(2) at 341, translated in ELON CASEBOOK, *supra* note 45, at 146.

139. *Id.*, translated in ELON CASEBOOK, *supra* note 45, at 146.

140. *Id.* at 343, translated in ELON CASEBOOK, *supra* note 45, at 147.

expert he would be exempt refers to [people such] as Dankcho and Issur who needed no [further] instruction whatever, but who made a mistake regarding a new stamp at the time when the coin had just . . . come from the mint.

There was a certain woman who showed a *denar* to R. Hiyya and he told her that it was good. Later she again came to him and said to him, 'I afterwards showed it [to others] and they said to me that it was bad, and in fact I could not pass it.' He therefore said to Rab: Go forth and change it for a good one and write down in my register that this was a bad business. But why [should he be different from] Dankcho and Issur who would be exempt because they needed no instruction? Surely R. Hiyya also needed no instruction?—R. Hiyya acted [beyond the letter of the law]. Resh Lakish showed a *denar* to R. Eleazar who told him that it was good. He said to him: You see that I rely upon you. He replied: Suppose you do rely on me, what of it? Do you think that if it is found bad I would have to exchange it [for a good one]? Did not you yourself state that it was [only] R. Meir who adjudicates liability in an action for damage done indirectly, which apparently means that it was only R. Meir who maintained so whereas we did not hold in accordance with his view?—But he said to him: No; R. Meir maintained so and we hold with him.¹⁴¹

Post-Talmudic authorities differed over the proper interpretation of this text, as to the effect of payment upon the duty owed and whether a duty was owed even if the plaintiff did not explicitly state that he relied on the moneychanger.¹⁴² A late nineteenth-century code of Jewish law, the *Arukh Ha-Shulhan*, sums up the matter this way:

Liability arises not only when some actual act is done but also, at times, when a mere statement is made, such as when a coin is shown to a moneychanger to ascertain whether it is good and acceptable, and the latter says it is good but it is found to be bad or counterfeit. If payment is made for the opinion, the moneychanger is liable to make restitution; if not he is free from liability, provided he is an expert and requires no instruction. If, however, he is not an expert, he is liable [even when he receives no payment]. A

141. *B. Bava Kamma* 99b–100a (based on the Soncino translation).

142. *Amidar*, IsrSC 32(2) at 351–56, translated in ELON CASEBOOK, *supra* note 45, at 150–53, and in 2 RAKOVER, *supra* note 19, at 547–51.

moneychanger is liable when he is relied upon expressly or by implication. Otherwise he may say that he did not know that reliance was placed on him alone without consulting others and therefore he was not meticulous in examining the coin. Others maintain that even if nothing was explicitly said he is also liable, because all who show a coin to a moneychanger implicitly rely upon him completely. The Rema wrote that the former interpretation is correct. When payment is made, even if there was no express reliance, such reliance is implied. This obligation arises because of the law of indirect causation¹⁴³

There are several difficulties with applying these sources to *Amidar*. First, as mentioned earlier,¹⁴⁴ Jewish law has no concept of respondeat superior and so would not hold *Amidar* liable. Further, the rabbinic sources discussed by the Court do not speak about negligence. The expert who requires no further instruction is not liable if not paid; the paid expert is liable, as is the amateur whether paid or not, provided there is adequate reliance.¹⁴⁵ The standard is strict liability, not negligence.¹⁴⁶ There was no showing that Aharon paid for the advice, only that he rented a store from *Amidar*. Consequently, if Aharon had sued *Zaken*, and if *Zaken* was an expert requiring no further instruction, then Jewish law would have denied liability. If Aharon had paid *Zaken* or if *Zaken* were regarded as not sufficiently expert, then *Zaken* would have been liable even if not negligent. Moreover, Jewish law severely limits liability for indirect damages. In the moneychanger cases cited by Justice Elon, the damages were limited to the value of the coin itself. As Rabbi Eleazar said to Resh Lakish, “[d]o you think that if it is found bad I would have to exchange it [for a good one]?”¹⁴⁷ In other contexts some rabbinic authorities do not impose liability for lost profits; other authorities do, but only if the damages are clearly and certainly caused by the defendant.¹⁴⁸ If these

143. ARUKH HA-SHULHAN, *Hoshen Mishpat* 306:13.

144. See *supra* text accompanying note 64.

145. See *supra* text accompanying note 143.

146. On whether the concept of negligence exists in Jewish law, see *infra* text accompanying notes 178–91.

147. See *supra* note 141.

148. See 10 PISKEI DIN YERUSHALAYIM [DECISIONS OF THE JERUSALEM RABBINICAL COURT] 273, 277–79 (2006) (In light of the conflict among the sources, damages are due only under the laws of Heaven for rents that the buyer of an apartment lost as a result of seller’s failure to make repairs.); ARUKH HA-SHULHAN, *Hoshen Mishpat* 292:20 (liable where damages are clear); RABBI ARYEH LEIB HA-COHEN, KETZOT HA-HOSHEN 333:2 (lost profits not allowed for damage to property but allowed in case of personal injury); RABBI YAIR BACHRACH, RESPONSA HAVOT YAIR 151 (Bailee who hired a horse for eight days and was prevented from returning for it for a month is not liable for the owner’s

theories of liability were applied to *Amidar*, Aharon would have been compensated for the rent he paid, but probably not for his consequential damages.

Jewish law appears to seek the least penalty necessary to deter conduct that might cause harm. Lack of respondeat superior liability means that liability will rest solely upon the person most immediately responsible for the injury. Also, limiting liability for misrepresentation is consistent with Jewish law's policy of measuring damages in a manner favorable to tortfeasors.¹⁴⁹

Moreover, any legal system that regulates misrepresentation needs to balance two conflicting interests: the desire to protect innocent plaintiffs who have been harmed by relying on false statements and the desire to protect defendants from unlimited liability for unintentional misstatement.¹⁵⁰ In confronting this problem, Jewish law imposes strict liability but balances this by imposing limited liability solely upon the person who made the misstatement and by imposing no liability on unpaid experts. By contrast, Israeli and English law expose the speaker and his employer to a wider range of damages but require a showing of negligence. A court needs to be careful not to upset the delicate balance of these interests by mixing elements of law from different systems.¹⁵¹

lost profits.); RABBI BENJAMIN SALNIK, RESPONSA MASAT BINYAMIN 28 (There is liability where defendant prevented a person from paying a sum of money which he would otherwise have been compelled to pay.); RABBI SOLOMON LURIA, YAM SHE'EL SHLOMO, commentary to *Bava Kamma* 9:30 (no liability for lost profits); RABBI MEIR BEN BARUCH, RESPONSA MAHARAM OF ROTHENBERG 4:821 (Prague ed.) (no liability for lost profits). See generally *Gerama Be-Nezakin*, *Geramei*, 6 TALMUDIC ENCYCLOPEDIA 461, 483 (1975).

In CC (Jer) 2220/00 *Mifalei Te'urah v. Israel Postal Auth.* [2003] IsrDC Tak-Makh 2003(2) 16,627 (Drori, J.), the court awarded compensation for lost profits after a bid for the construction of mailboxes that was improperly awarded to another company that lacked the qualifications to fulfill the order. The court gave several reasons why this should also be the case under Jewish law: rabbinic legislation ought to impose liability because the damages were of a kind that was common, the defendant was a public authority and ought to do the right thing, a public authority's Heavenly obligation can be enforced, and to prevent future breaches of this kind. The court said that under the 1980 Foundations of Law Act, it was required to apply the *principles* of Jewish law but not necessarily the *decisions* that would be reached under Jewish law. *Id.* ¶ 104. See also Moshe Drori, *Liability for Indirect Damage and Lost Profits*, 26 *TECHUMIN* 341, 349 (2005); Menachem Elon, *Gerama and Garma*, in 7 *ENCYCLOPEDIA JUDAICA* 502–03 (Fred Skolink & Michael Berenbaum eds., 2d ed. 2007) (describing case).

149. See *supra* notes 65–75 and accompanying text.

150. *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931).

151. Cf. Willis L. M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 *COLUM. L. REV.* 58, 72 (1973) (It would be inappropriate to apply one state's strict liability rule with another state's unlimited liability rule to produce a result that would not be reached had the law of either state been applied to both issues.).

The problem is similar to the phenomenon of *dépeçage* in conflict of laws, where the laws of different states govern different issues within a case such that the case may be decided in a way that no state would decide it if its law applied to all issues. *Dépeçage* can be justified when each state's interest is vindicated, provided that the same state's law is applied to issues that are linked.¹⁵² When an Israeli court uses a rule of Jewish law, Israel is the only interested state, and the court needs to be sure that the Jewish law rule does not distort Israel's policies.

The court also has an obligation not to misconstrue the Jewish law rule, as will be discussed in the next part of this Article.

B. Bootstrapping

1. Escaping Water

A court relying on Jewish law to fill a gap in Israeli law can be led into reading into Jewish law the very remedy that it seeks to find there. This happened in *Amidar* when the Court read a negligence requirement into the Jewish law of misrepresentation.¹⁵³ It also happened in *Mefi Co. v. Ashkenazi*.¹⁵⁴ The case involved a dispute between the owners of two nearby apple orchards. The plaintiffs sued for damage caused by water that escaped from the defendant's land. Under an applicable statute, the defendant would be liable unless it could show absence of negligence.¹⁵⁵ The majority of the Court held that the defendant was liable because it could not show lack of negligence even though it used a common method of irrigating its land.

In his dissent, Justice Cohn thought that the defendant had met its obligation because it used its property in a common and normal manner. He relied on English cases such as *Rylands v. Fletcher*,¹⁵⁶ and on what he thought was a similar rule in Jewish law. In *Rylands*, the House of Lords

152. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 97–104 (5th ed. 2006); Reese, *supra* note 151.

153. See *supra* text accompanying notes 145–46.

154. CA 302/67 Mefi Co. v. Ashkenazi [1968] IsrSC 23(1) 211, translated in 2 RAKOVER, *supra* note 19, at 524.

155. Civil Wrongs Ordinance § 51 (Palestine).

156. (1868) 3 L.R.E. & I. App. 330 (H.L.) (appeal taken from Eng.) (U.K.). Among other authorities, Justice Cohn relied on *Wilson v. Waddell*, [1876] App. Cas. 95 (H.L.) (U.K.) (stating that by removing coal from his mine, the defendant caused water to percolate and flow into plaintiff's mine and that defendant had the right to use his property in the "natural course of user"); *Smith v. Kenrick*, (1849) 137 Eng. Rep. 205 (Q.B.) (U.K.) (There were two adjoining coal mines and water released by the defendant caused damage; the defendant was not liable for natural consequences as long as they were not the result of negligent or malicious conduct.).

imposed strict liability on the owners of a mill for damage to a nearby coal mine caused by flooding from a reservoir that was constructed on the defendant's property. Lord Cairns said that an owner would not be liable for using his property in the "ordinary course," but if an owner used his property in a "non-natural" manner, then he did so at his peril.¹⁵⁷

Justice Cohn mistakenly thought that Jewish law made a similar distinction between normal and exceptional uses. As background he correctly stated the rule of Jewish law that if one indirectly causes damage to one's neighbor's land by some activity on one's land, one is not liable, though if one directly and immediately causes damage one would be liable.¹⁵⁸ He showed that the rabbis applied this rule to exempt the owner of an upper story who poured water on a concrete floor where the water was first absorbed and later seeped down, damaging a lower story. If the water had poured down at once, however, the defendant would have been liable.¹⁵⁹

But then Justice Cohn wrote, "[t]he foregoing applies when the use is normal and common but not when it is 'exceptional,'"¹⁶⁰ citing a responsum by the Rosh, Rabbenu Asher ben Yehiel (1250–1327), that involved a person's well that overflowed with rainwater, damaging another's cellar.¹⁶¹ The Rosh said that the well owner must remove the cause of the damage. The problem with Justice Cohn's reasoning is that the Rosh based his decision not on the defendant's use of the well being "exceptional" but on the damage being direct and immediate once the well overflowed.

At first glance one might take issue with the Rosh and contend that the defendant's installation of the well was an indirect and remote cause of the plaintiff's damage. Indeed, the facts of the case before the Rosh seem similar to the situation where the owner of the upper story causes the concrete floor to gradually absorb water that leaks below. If so, the well owner ought not to have been liable. The Rosh's rationale, however, was more compelling. He gave what today would be called an economic analysis of the problem:

In our case, when the rainwater falls it is collected in the well, and after awhile when it is full, the [waters] penetrate [the plaintiff's]

157. *Rylands*, 3 L.R.E. & I. App. at 338–39.

158. *Mefi*, IsrSC 22(1) at 219, translated in 2 RAKOVER, *supra* note 19, at 525.

159. *Id.*, translated in 2 Rakover, *supra* note 19, at 524–25 (quoting CODE OF MAIMONIDES, *Laws Concerning Neighbors* 10:5–6). Maimonides's ruling was based on the Talmud. *B. Bava Mezia* 117a.

160. *Mefi*, IsrSC 22(1) at 219, translated in 2 RAKOVER, *supra* note 19, at 525.

161. ROSH 108:10.

wall and flow into his cellar causing great loss. It is not at all similar to [the case of the upper storey owner.] In that case the upper storey owner cannot remove the source of the damage to another place because he cannot be without water. Moreover, the lower storey owner can easily fix the concrete ceiling so that the waters will not fall on him.¹⁶²

In modern terminology, the Rosh interpreted the rule in the upper story case as imposing the loss on the cheapest cost avoider.¹⁶³ The implication is that the Rosh thought that in the case before him the defendant could have placed his well elsewhere at little cost whereas the homeowner would incur higher costs.¹⁶⁴ If Justice Cohn had applied the Rosh's rationale to the case before him, he would probably have come to a different conclusion because it is likely that the defendant could have more efficiently prevented the damage than the plaintiff.

2. Negligence

Another instance of reading a common law doctrine into Jewish law occurred in *Eliyahu Insurance Co. v. Yunan*,¹⁶⁵ which involved occupants of a car who were injured when rocks that were being blasted struck their vehicle. Justice Rubinstein delivered the opinion with two justices concurring. The Court held that the victims' sole remedy for their injuries was against those responsible for the explosion. Justice Rubinstein expressed his displeasure with the no-fault statute that makes vehicle drivers and owners responsible when injuries result from a traffic accident.¹⁶⁶ The statute makes drivers and owners absolutely liable¹⁶⁷ and prevents persons injured in traffic accidents from recovering in tort from

162. *Id.*

163. GUIDO CALABRESI, THE COST OF ACCIDENTS 139 (1970); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1118–19 (1972).

164. See RABBI YAAKOV LORBERBAUM (c. 1770–1832), NETIVOT HA-MISHPAT, *Bi'urim* 155:3 (commentary on the Shulhan Arukh stating that a defendant is required to remove the source of damage when the plaintiff's costs of preventing the damage are high); Ruth Sonshine, Jonathan Reiss, Daniel Pollack & Karen R. Cavanaugh, *Liability For Environmental Damage: An American and Jewish Legal Perspective*, 19 TEMP. ENVTL. L. & TECH. J. 77, 109 (2000).

165. CA 10721/05 [2006] IsrSC Tak-El 2006(4) 1387.

166. Road Accident Victims Compensation Law ("Road Accident Law"), 5735–1975, 29 LSI 311 (1974–75) (Isr.). The statute has since been amended several times. For a discussion of the statute, see David Kretzmer, *No-Fault Comes to Israel*, 11 ISR. L. REV. 288 (1976).

167. Road Accident Law § 2(b). Owners are responsible only if the vehicle is used with their permission. *Id.* Liability is imposed "whether or not there was fault on the part of the driver and whether or not there was fault or contributory fault on the part of others." Road Accident Law § 2(c).

third parties for unintentionally caused injuries.¹⁶⁸ Moreover, drivers cannot recover contribution from third parties.¹⁶⁹ Justice Rubinstein held that the accident was not “in consequence of the use of a motor vehicle,” as required by the statute,¹⁷⁰ because the rocks could have injured anyone in the vicinity, and the accident’s connection to the use of the vehicle for transportation was too remote.¹⁷¹

Justice Rubinstein relied on Jewish law, saying that it established moral values that one must use greater care to avoid injury to others than to oneself, and that people who create obstacles on the public way are liable to those who are injured thereby—as the latter cannot be expected to look out for such obstacles.¹⁷² He said that Jewish law takes the approach that “liability [is owed] to those who are found on the roads who go about innocently, for their burden of care is small relative to those, the source of the injury, who have a higher burden of care.”¹⁷³ He thought the Knesset ought to permit, therefore, the victim to pursue the wrongdoer from a moral point of view.¹⁷⁴

What, however, is the “burden of care” that Jewish law imposes on actors? Under Israeli law the blasters would not be liable unless they were negligent,¹⁷⁵ and the question arises whether Jewish law recognizes that concept. Justice Rubinstein said that according to Professor Shalom Albeck, Jewish law takes the view that negligence (*peshi’ah*) is the basis of tort liability and that a person is liable when he “engages in behavior that a person ought to foresee will cause injury if the matter is common and likely to happen . . . ; however, if the injury is so remote that people do not ordinarily foresee it, then it is indirect damage for which they are exempt.”¹⁷⁶ Justice Rubinstein thought that this reasoning justified holding the blasters liable.¹⁷⁷

168. Road Accident Law § 8(a).

169. CA 3765/95 Hussein v. Torem [1996] IsrSC 50(5) 573.

170. Road Accident Law § 1 (defining “road accident”).

171. The statute applies to “an occurrence in which bodily damage is caused to a person as a result of the use of a motor vehicle” whether the same is moving or stationary. *Id.*

172. *Eliyahu*, CA 10721/05 [2006] IsrSC Tak-EI 2006(4) 1387, ¶ 9. The Tosafists in the twelfth through fourteenth centuries were the first to express the principle. Tosafot, *B. Bava Kamma* 23a, at the second “U-Lehayev Ba’al Ha-gachelet”; *B. Bava Kamma* 27b at “‘Amai Patur ’Iba’ei Lei Le’iyunei.”

173. *Eliyahu*, CA 10721/05 [2006] IsrSC, ¶ 9.

174. *Id.*

175. Tort Ordinance (New Version) § 38 (1968). That section shifts to the defendant the burden of showing a lack of negligence when damage is caused by a dangerous thing. Section 41 of the statute incorporates the doctrine of *res ipsa loquitur*. See *Eliyahu*, CA 10721/05 [2006] IsrSC ¶ 3(2).

176. *Id.* at 23 (quoting Shalom Albeck, PESHER DINE HA-NEZIKIN BA-TALMUD [GENERAL PRINCIPLES OF THE LAW OF TORT IN THE TALMUD] 20, 44 (1965)). In rabbinic Hebrew the term

The opinion read a concept of negligence into Jewish law, defined in terms of foreseeability, which is not supported by the classical texts taken as a whole. As I have shown elsewhere,¹⁷⁸ although Professor Albeck's theory explains some of the rules in Jewish tort law,¹⁷⁹ it does not explain others. For example, the Talmud specifies different levels of compensation due, depending on whether the injury is caused directly by a person's activity or whether it is caused by his property or obstacles he created.¹⁸⁰ Compensation for medical expenses and pain are owed only if the injury is committed by a person's activity and only if the person acts either intentionally or with inadvertence bordering on intention.¹⁸¹ In some cases only half damages are due.¹⁸² A person is required to exercise *greater* care for an ox that has not previously caused damage than for an ox that has a known propensity for damage.¹⁸³ In some situations there is no liability for foreseeable damage. For example, if a fire spreads to a neighbor's land, one is not liable for damage to objects that are not in the open.¹⁸⁴ This also occurs in many situations where Jewish law imposes no liability for indirect damage.¹⁸⁵ For example, if one hires people to give false

peshi'ah refers to inadvertence that is close to intention. See Rashi, *B. Bava Kamma* 26b, at "Le-'Inyan Arba'ah Devarim Patur." Albeck uses it to mean negligence. See Shalom Albeck, *Torts*, in 20 ENCYCLOPAEDIA JUDAICA 63 (Fred Skolink & Michael Berenbaum eds., 2d ed. 2007).

177. *Id.*

178. Steven F. Friedell, *Liability Problems in Nezikin: A Reply to Professor Albeck*, 15 DINÉ ISRAEL 97 (1989–90); Friedell, *supra* note 63.

179. E.g., *B. Bava Kamma* 52b (one who covers a pit left in the public way that camels occasionally use ought to foresee that they will be there and make the covering strong enough); Rashi, *Bava Kamma* 3b, at "Diko-ah 'Aher Mi'urav Bah" (one ought to foresee that a normal wind will spread a fire).

180. For example, there is no liability if one places objects on a roof to dry them and they are blown off by an unusual wind and injure a person below. *B. Bava Kamma* 29a. If a person on top of the roof, however, is blown over by the unusual wind he would be liable for damage. *B. Bava Kamma* 27a.

181. See *supra* notes 65–66 and accompanying text.

182. If an ox that gored another had not gored another animal or person in the past, the owner was liable for half damages. See *Exodus* 21:35. Some cases of unusual injury are derivatives of "horn." See, e.g., CODE OF MAIMONIDES, *Laws Concerning Damage by Chattels* 1:8 (if an ox damaged by pushing, sitting, kicking, or biting).

183. *B. Bava Kamma* 45b; SHULHAN ARUKH, *Hoshen Mishpat* 396:1.

184. SHULHAN ARUKH, *Hoshen Mishpat* 418:13.

185. *Supra* note 67. Rabbi Shabbetai ben Meir Ha-Kohen (1621–1662) held that liability is imposed on indirect damages that are of common occurrence if they are the specific kinds of situations that were described in the Talmud. Shakh, SHULHAN ARUKH, *Hoshen Mishpat* 386:1, :24. Rabbi Yair Bachrach (1638–1702) gave a broader definition but one that still falls shy of imposing liability for foreseeable damages. He wrote that according to the Ritzvah, for one who imposes liability for indirect harms that commonly occur, it is not sufficient that the damages are common at the time of the defendant's act. The harms must be generally common. BACHRACH, *supra* note 148, at 45. That responsum dealt with a case where Shimon had a German court attach wine belonging to Reuben. A few days later the French army invaded and took the wine. Rabbi Bachrach gave several reasons for

testimony in a case where he is not a party, the Talmud says that one's tort liability is only in the court of Heaven.¹⁸⁶ Similarly, one is only liable in a Heavenly court if one places poisonous food before an animal that kills the animal when eaten.¹⁸⁷ If a person throws someone else's objects out a window and the defendant removes some cushions that would prevent them from breaking, some hold that the defendant is not liable for the damage because he did not directly cause it.¹⁸⁸ One would have to stretch the concept of foreseeability beyond reasonable limits to bring these and similar rulings within the ambit of the negligence doctrine. In fact, Justice Silberg thought that the Jewish law of torts was based on the concept of absolute liability subject to a defense of absolute compulsion.¹⁸⁹ Some sources of Jewish law suggest that in some circumstances the appropriate standard of care is that which is customary.¹⁹⁰ Several sources suggest a defendant is liable for injuries caused directly by his actions if he behaved in an unusual manner unless the plaintiff behaved in a manner that was at least as unusual.¹⁹¹ These doctrines are not the same as the modern concept of negligence.

Professor Albeck's approach tries to incorporate negligence concepts from Western legal systems into Jewish law. When Justice Rubinstein relies on this approach as a means of using Jewish law to support Israeli law, we have come full circle.

exempting Shimon, including that disturbances of that kind are not generally a matter of common occurrence even though the loss of the wine was to be expected under the circumstances.

186. *B. Bava Kamma* 56a. The rule is codified in SHULHAN ARUKH, *Hoshen Mishpat* 32:2.

187. *B. Bava Kamma* 47b.

188. *B. Bava Kamma* 26b; see Rosh, *supra* note 67. Maimonides disagreed with the Rosh. CODE OF MAIMONIDES, *Laws Concerning Damage by Chattels* 7:7. The Shulhan Arukh contains conflicting views on this point. See SHULHAN ARUKH, *Hoshen Mishpat* 386:4.

189. CrimA 17/59 Maor-Mizrahi v. Attorney General [1960] IsrSC 14 1882, 1893–95, translated in 1 RAKOVER, *supra* note 19, at 436–38. See also Irwin Haut, *Some Aspects of Absolute Liability Under Jewish Law and Particularly Under the View of Maimonides*, 15 DINE ISRAEL 7, 29–31 (1989–90). The post-Talmudic authorities dispute whether the obligation for damage caused by one's property is due to a failure to guard it or by virtue of one's ownership of the object. See Sinai, *supra* note 1, at 572.

190. E.g., TOSEFTA, *Bava Kamma* 10:29 (if a worker or a poor person climbs a tree at a place where this is common, they are not liable for breaking a booth in the process); *J. Bava Kamma* 10:4 (if a worker or a poor person climbs a tree at a time when this is the practice, then they are exempt from breaking a booth in the process); Nahmanides, NOVELLEA, commentary to *B. Bava Mezia* 82b (“in torts [like those classified as ‘fire’] we do not require a heightened standard of care as is true of a paid bailee; rather if he took the precautions that people take he is exempt from tort liability”); Tosafot, *B. Bava Kamma* 23a, at “Be-she-shimer Gachalto” (even though dogs can break down an ordinary door, one who takes precautions that people take against such break-ins is not liable). This is similar to, but not the same as, the modern concept of negligence. Cf. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (“[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices.”).

191. See *supra* note 68.

It might be argued that the opinions in *Mefi* and *Yunan* were written with the hope of influencing rabbinic courts and rabbinic authorities to change the law. Jewish law, like any legal system, is not fixed. It develops applications of established doctrine and refines and replaces older ones. Although an Israeli court is within its rights to say that some parts of Jewish law doctrine do not fit the needs of modern society, it is important for their own institutional reasons that these courts not misstate a precedent's meaning.

Moreover, Jewish law, like other legal systems, resists frequent, rapid, and radical change. Although rabbis have occasionally borrowed rules of law from surrounding legal systems,¹⁹² they have also been sensitive to displacing revered doctrines. As the Rashba, Rabbi Solomon ben Abraham Adret, wrote about 700 years ago when asked to apply a non-Jewish law of inheritance instead of rabbinic law:

This would uproot all of the laws of the perfect Torah. Why would we then need our holy books compiled by Rabbi [Judah the Prince, author of the Mishnah] and later by Ravina and Rav Ashi [compilers of the Babylonian Talmud]? They would teach their children the gentile's laws, and build patched altars in the gentile's study houses. Heaven forbid that a thing should not happen to Israel. Heaven forbid, lest the Torah wrap itself in sackcloth.¹⁹³

3. *Good-faith Bargaining*

A better way to handle the need for change is to highlight the common goals that exist between Israeli and Jewish law and suggest that rabbinic authorities consider changing some aspects of Jewish law. Justice England's opinion in *Kal Binyan v. A.R.M. Ranarah Building & Leasing, Ltd.*¹⁹⁴ provides a good example. In that case the defendant solicited bids for a construction project from ten different companies. The plaintiff's bid was the lowest, and the two sides worked out all of the terms subject to formal approval by the defendant's board of directors. The board

192. See 1 ELON TREATISE, *supra* note 1, at 63. It is also possible that non-Jewish law has influenced Jewish law indirectly when non-Jewish law has shaped widely shared expectations of the Jewish community. For an example involving medical malpractice, see Friedell, *supra* note 78.

193. Original translation by author of RABBI SOLOMON BEN ABRAHAM ADRET (c. 1235-c. 1310), RESPONSA RASHBA 6:254. The responsum is discussed in Nahum Rakover, *Jewish Law and the Noahide Obligation to Preserve Social Order*, 12 CARDOZO L. REV. 1073, 1120 (1991).

194. CA 6370/00 [2002] IsrSC 56(3) 289.

ultimately rejected the plaintiff's bid in favor of another contractor who had not participated in the bidding process.

In an earlier proceeding, the Supreme Court determined that the defendant had not negotiated in good faith and returned the case to the district court to determine the amount of damages.¹⁹⁵ An Israeli statute provides that a party that does not bargain in good faith is liable for "damages."¹⁹⁶ The issue for the Supreme Court on the second appeal was whether the plaintiff could recover expectation damages in addition to reliance damages. The court unanimously held that under the circumstances, the plaintiff was entitled to recover both types of damages. Two of the three judges wrote opinions. Justice Barak indicated that in most cases of bad faith negotiations, only reliance damages are allowed because the extent of the expectation damage is unknowable, regardless of whether a contract would have been formed.¹⁹⁷ However, when the breach of the duty of good faith bargaining occurs at an advanced stage, the principle of returning the parties to the status before the breach requires allowing expectation damages.¹⁹⁸

Justice Barak referred to no sources of Jewish law, citing only secondary sources concerning Israeli and European contract law. By contrast Justice England's opinion derived almost entirely from Jewish law sources. Although he ultimately accepted Justice Barak's reading of the statute,¹⁹⁹ Justice England's opinion considered whether Jewish law might be helpful if the issue before the court revealed a lacuna in the law within the meaning of the Foundations of Law Act of 1980.²⁰⁰

Justice England's opinion provides an overview of the Jewish law of contracts. In Jewish law, words alone are insufficient to create a contract.²⁰¹ Although there is a strong religious obligation to bargain and transact business in good faith, a party is not formally bound until there is a formal acquisition.²⁰² If a buyer has paid for an item but has not yet performed the formal act of acquisition, then whichever side cancels the transaction is to receive a prescribed curse by the rabbinic court but suffers

195. CA 4850/96 Kal Binyan v. A.R.M. Rananah Bldg. & Leasing, Ltd. [1998] IsrSC 52(5) 562.

196. Contracts (General Part) Law, 5733-1973, 29 LSI 117, § 12 (Isr.).

197. *Binyan*, IsrSC 56(3) at 300-01.

198. *Id.* at 301.

199. *Id.* at 310.

200. See ELON TREATISE, *supra* note 1 and accompanying text.

201. *Binyan*, IsrSC 56(3) at 306.

202. *Id.*

no other penalty.²⁰³ The purpose of the curse is to encourage the defaulting party to change his mind.²⁰⁴

In cases where no money has been paid, the religious sanctions for bad-faith bargaining are less severe. Such a person might be deemed “untrustworthy and the sages are displeased with him.”²⁰⁵ In some instances the disappointed party has the right to feel resentment, and even if not legally obligated, some parties might be encouraged to act out of piety.²⁰⁶

Justice Englard recognized the dilemma of the secular court seeking to incorporate Jewish law. The secular court can neither render a rabbinic court decision, nor can it impose religious sanctions on a party.²⁰⁷ Justice Englard thought the court must decide whether to adopt the Jewish law’s determination that the person bargaining in bad faith has committed a wrong, and then decide whether to impose liability for expectation damages as a substitute for religious sanctions. Similarly, he suggested that imposing such damages would develop Jewish law and might help rabbinic courts adopt the same rule either as matter of custom or by virtue of the rabbinic rule that the “law of the kingdom is the law.”²⁰⁸

Justice Englard’s opinion begins by looking to Jewish law to fill a gap in Israeli law and ends by suggesting how Israeli law might help change Jewish law. As mentioned, Justice Englard based his decision on Justice Barak’s reading of the statute. However, one could read the opinion as a hint to rabbinic courts and rabbinic authorities to consider changing Jewish law so as to allow recovery of expectation damages. The opinion might even serve as an invitation to the religious leaders to engage in a process of mutual development of the law. It is not clear, however, that rabbinic leaders will adopt the suggested reform. As Justice Englard recognized, later rabbinic authorities disagree over whether a party bargaining in bad faith is obligated to pay even the other side’s reliance costs.²⁰⁹ Further, some Jewish law sources recognized that in certain

203. *Id.*; SHULHAN ARUKH, *Hoshen Mishpat* 204:1. The curse is as follows: “He who punished the generation of the flood, [the people of the dispersion following the incident of the Tower of Babel], the people of Sodom and Gomorrah, and the Egyptians who drowned in the sea, He will punish whoever does not keep his word.” 1 ELON TREATISE, *supra* note 1, at 148; SHULHAN ARUKH, *Hoshen Mishpat* 204:4.

204. ARUKH HA-SHULHAN, *Hoshen Mishpat* 204:2.

205. 1 ELON TREATISE, *supra* note 1, at 149–50.

206. *Binyan*, IsrSC 56(3) at 308.

207. *Id.* at 310.

208. *Id.*

209. *Id.* at 309. The opinion cites two responsa. The first, Moses Sofer (1762–1839), RESPONSA HATAM SOFER, *Yoreh Deah* 246, concerns a father who breached his oral agreement to hire a certain

circumstances, the innocent party has, to some extent, taken the risk that the other side would back out of the negotiations.²¹⁰ Also, Jewish law's position on awarding compensation for lost profits is problematic.²¹¹ Despite these difficulties, Justice England's opinion suggests a way for rabbinic courts and rabbinic authorities to change the law if they feel it warranted.

IV. IS JEWISH LAW AN APPROPRIATE SOURCE OF PRECEDENT?

There are many instances where Israeli judges have referred to Jewish law while avoiding the problems this Article has identified. Two examples arise in the bioethics field. In *Belker v. State of Israel*,²¹² the defendant was charged with murder after he threw his wife from the fourth floor of a building, causing her to become "brain dead."²¹³ The defendant contended that since his wife's heart and breathing continued as long as she was given artificial respiration, she was not dead. In the course of its decision, the Court reviewed the development of Jewish law over the centuries. It recognized that Jewish law originally defined death as the lack of respiration, that subsequent authorities saw respiration only as evidence of heart function, that others added a requirement of "lying still as a stone," and that among modern authorities there are some who accept the concept of brain death.²¹⁴ The lesson drawn was that "the tendency of the rulings was always to correlate the halakhic signs of death with the medical knowledge concerning the physiological processes of the human body in each era."²¹⁵

Another outstanding decision was *Shefer v. State of Israel*,²¹⁶ which involved a mother's request for the right to deny respiration and intravenous medications other than painkillers to her young daughter who

mohel to circumcise his son. After the *mohel* spent money in reliance, the father hired another. Rabbi Sofer suggested that even though the damages were indirect and so would not be collectible under the formal law, as a matter of piety the father ought to honor his agreement with the *mohel* especially in light of public humiliation that he caused the *mohel*. In the other responsum, RESPONSA MINHAT YITZHAK 4:104, Rabbi Isaac Jacob Weiss (1902–1989) discusses several earlier responsa, some imposing liability as direct damages, some exempting liability in a court of man but imposing liability in a court of Heaven, and some recognizing that there might be liability for a rabbinic fine.

210. RESPONSA MINHAT YITZHAK 4:104.

211. See *supra* note 148 and accompanying text.

212. CrimA 341/82 [1986] IsrSC 41(1) 1, translated in ELON CASEBOOK, *supra* note 45, at 701.

213. *Id.*, translated in ELON CASEBOOK, *supra* note 45, at 701.

214. *Id.* at 31–39, translated in ELON CASEBOOK, *supra* note 45, at 707–10.

215. *Id.* at 34, translated in ELON CASEBOOK, *supra* note 45, at 708.

216. CA 506/88 [1993] IsrSC 48(1) 87, translated in [1992–1994] IsrLR 170, and in ELON CASEBOOK, *supra* note 45, at 592, 638.

suffered from Tay-Sachs disease. In a lengthy opinion, Justice Elon reviewed the development of views within Judaism on the physician's duty to heal, the extent of a patient's right to refuse treatment, and distinctions between passive and active euthanasia. Justice Elon placed the earlier sources in their historical context and noted differences of opinion among modern rabbinic authorities concerning the proper application of older sources to problems faced by modern medicine.²¹⁷ The rabbinic sources suggest goals that are sometimes in conflict: physicians have an obligation to save a patient's life even against the will of the patient, doctors may not take steps to prolong the life of a dying patient if there is no hope of a cure and the treatment would prolong the patient's suffering, and doctors may not shorten the life of a dying patient.²¹⁸ Justice Elon drew upon this data when formulating a doctrine that synthesized the values of a Jewish and democratic state. In doing so, Justice Elon recognized that a synthesis of these values is not always possible. For example, the rule in Jewish law that a doctor must treat a dying patient against his will when such treatment will be beneficial cannot be reconciled with the view of Western democracies that a person can ordinarily refuse to receive medical care.

Another case that makes good use of Jewish law is *Ben Shahar v. Mahlev*.²¹⁹ In a dispute involving the sale of an apartment, the parties entered into a consent judgment providing that if the buyer failed to make certain payments he would need to vacate the apartment. The buyer became paralyzed and defaulted six months after entering into the consent judgment. When the buyer's son learned that the seller sought to have his father evicted, he deposited the amount due with the court and sought to reopen the judgment. Although the common law gives courts a narrow power to reopen consent judgments,²²⁰ the Israeli Supreme Court held that it has the inherent power to give relief to the tenant on equitable grounds. In the course of his opinion, Justice Cohn drew on several sources of Jewish law that demonstrate a rabbinic court's power to modify court orders when necessary in the interest of justice.²²¹ Justice Cohn recognized

217. *Id.* at 134, translated in [1992–1994] IsrLR 170, 235, and in ELON CASEBOOK, *supra* note 45, at 649.

218. *Id.* at 139–43, translated in [1992–1994] IsrLR 170, 240–45, and in ELON CASEBOOK, *supra* note 45, at 651–53.

219. FH 22/73 [1974] IsrSC 28(2) 89, translated in 2 RAKOVER, *supra* note 19, at 657.

220. The court quoted H. D. Warren, *Annotation, Power to Open or Modify "Consent" Judgment*, 139 A.L.R. 421, 430 (1942), noting that some American courts made an exception in case of minors and persons under disability where there was a change of circumstances. *Ben Shahar*, IsrSC 28(2) at 93.

221. *Ben Shahar*, IsrSC 28(2) at 99–100, translated in 2 RAKOVER, *supra* note 19, at 659–60.

that the rabbinic sources did not involve consent judgments. Nor did he suggest that Israeli courts adopt the same tools as those used in rabbinic courts. Rather, he took a broad view of the underlying policy of promoting justice that he found in the rabbinic sources.

In another case, *Shakdiel v. Minister of Religious Affairs*,²²² the court decided that a woman could not be excluded from membership on a religious council because of her gender. The religious council's function was to maintain religious services and make them available to local residents. Justice Elon held that an Israeli statute prohibiting discrimination against women applied to the case. He wrote an extensive opinion showing a variety of viewpoints throughout Jewish history on the question of women's rights to govern, vote, and study Torah. Maimonides had ruled that women could not be appointed to any official position.²²³ In the twentieth century, Rabbi Abraham Isaac Kook expressed his opinion that women should neither vote nor serve in office.²²⁴ Other modern rabbis disagreed with these views based on history, morality, and political need.²²⁵ The opinion showed tension in Jewish law between a need to preserve continuity and a desire for creativity and development.

In *Rosenstein v. Solomon*,²²⁶ the defendant used force to dispossess another of land that he claimed belonged to him. The trial court decided the merits in favor of the defendant. The issue before the Supreme Court was whether the defendant should have relinquished control of the land prior to bringing suit. The Israeli statute governing the matter is ambiguous. It provides:

Justice Cohn discussed the rule that a person who deposited a document embodying his rights with a court and declared that if he did not return within thirty days the document would be void. He was unavoidably prevented from returning within thirty days. Although there was a difference of opinion in the Talmud, see *B. Nedarim* 27a, the law developed that in case of duress the stipulation is void. CODE OF MAIMONIDES, *Laws Concerning the Sanhedrin and the Penalties Within Their Jurisdiction* 7:10. Similarly, if a debtor paid part of the debt and deposits a bond for the entire debt with a third person, declaring that if he does not pay the remaining debt within a certain time that the bond should be delivered to the creditor, the law developed that the stipulation would be effective if made in the presence of a distinguished court. However, an exception was made if illness or "a river" prevented the debtor from meeting his obligation. CODE OF MAIMONIDES, *Laws Concerning Sale* 11:13 to :14. Finally, Justice Cohn drew support from the general power of a rabbinic court to declare property ownerless and to assign it to another. See CODE OF MAIMONIDES, *Laws Concerning the Sanhedrin and the Penalties Within Their Jurisdiction* 24:6.

222. HCJ 153/87 [1988] IsrSC 42(2) 221, translated in ELON CASEBOOK, *supra* note 45, at 493.

223. CODE OF MAIMONIDES, *Laws Concerning Kings* 1:5.

224. See *Shakdiel*, IsrSC 42(2) at 248–49, translated in ELON CASEBOOK, *supra* note 45, at 498–99.

225. See *id.* at 251, translated in ELON CASEBOOK, *supra* note 45, at 500–01.

226. CA 756/80 [1984] IsrSC 38(2) 113, translated in ELON CASEBOOK, *supra* note 45, at 178, and in 2 RAKOVER, *supra* note 19, at 533.

Whoever dispossesses the possessor of land otherwise than pursuant to Section 18(b) must return the land to the possessor. However, this provision does not detract from the authority of the court to adjudicate the rights of both parties at the same time, and the court may award possession as it deems just and under such conditions as it deems appropriate, pending the final decision on the merits.²²⁷

Ottoman law, which had previously governed real estate matters in the State of Israel, required the party who dispossessed the other of the land to give up possession before proceeding to adjudication.²²⁸ Continental law also took this view.²²⁹ By contrast, English common law allows for self-help.²³⁰ A member of the Knesset also referred to Jewish law as allowing self-help in legislative debates.²³¹

A majority of the Supreme Court panel held that the trial court acted within its discretion. Justice Kahan wrote that “flagrant use of force” does not deprive the defendant of the right to self-help.²³² Justice Elon dissented, observing that the plaintiffs had peacefully worked the land for a long period of time and that the defendants had forcefully seized the property from them.²³³ Although the issue of whether one may resort to self-help was disputed in the Talmud, Justice Elon stated, “[t]he vast majority of halakhic authorities accept the view . . . that one may resort to self-help, even if he would not suffer any loss by bringing a lawsuit.”²³⁴ Justice Elon then noted that some medieval rabbis either disallowed self-help entirely, limited it to cases of hot pursuit, limited it to situations where “it is clear and known to all” that the property was stolen from the one resorting to self-help, or limited the means by which one could use it in reclaiming the stolen property.²³⁵

Jewish law sources can support just about any imaginable solution, from allowing self-help, to disallowing it, to allowing it with conditions. Had Justice Elon merely relied upon the rabbinic precedents that

227. Land Law, 5729-1969§ (Isr.). Section 18(b) permitted self-help within thirty days of a dispossession. *See Rosenstein*, IsrSC 38(2) at 125, *translated in ELON CASEBOOK*, *supra* note 45, at 178.

228. *See Rosenstein*, IsrSC 38(2) at 118, *translated in ELON CASEBOOK*, *supra* note 45, at 179.

229. *Id.*, *translated in ELON CASEBOOK*, *supra* note 45, at 179.

230. *Id.* at 118–19, *translated in ELON CASEBOOK*, *supra* note 45, at 179.

231. *Id.* at 127, *translated in ELON CASEBOOK*, *supra* note 45, at 181.

232. *Id.* at 140, *translated in ELON CASEBOOK*, *supra* note 45, at 187.

233. *Id.* at 136, *translated in ELON CASEBOOK*, *supra* note 45, at 186.

234. *Id.* at 129, *translated in ELON CASEBOOK*, *supra* note 45, at 183, *and in 2 RAKOVER*, *supra* note 45, at 534.

235. *Id.* at 129–32, *translated in ELON CASEBOOK*, *supra* note 45, at 183–84, *and in 2 RAKOVER*, *supra* note 45, at 534–35.

disallowed or limited the right to self-help, he would have met one of the goals of Mishpat 'Ivri by grounding his decision in Jewish law. A broader view would suggest that the principle underlying the disparate rules is that each court must decide for itself what is best suited to the circumstances and needs of the time. Justice Elon took an even broader view: "Deciding the law for the sake of truth and peace, according to needs of the time, is a meta-principle."²³⁶ His opinion made effective use of Jewish law by seeking a broad principle to apply to the case.

V. CONCLUSION

One conclusion to be drawn from this brief look at Israeli cases is that, while it is natural to attempt to resolve an issue based on a particular rule of Jewish law, one needs to be careful to evaluate that rule in its legal and historical context. The problem is more serious than the one faced by courts when they rely upon precedents of other jurisdictions. Jewish law precedents from another age will not necessarily be practical today or fit into the Israeli legal system. For example, the Talmud may regard the elements constituting acts such as "robbery" or "misrepresentation" differently than courts today.²³⁷ Even if a particular rule of Jewish law does fit, it might be used in ways that violate the spirit of Jewish law. For example, one should not expect Jewish law to endorse a violation of the Sabbath, as was done in the *Horev*.²³⁸ In some instances, the desire to use Jewish law is so strong that the court turns Mishpat 'Ivri on its head, reading the desired rule back into Jewish law.²³⁹

Although this Article has been critical of some decisions by the Israeli Supreme Court and has identified some problems with its use of Jewish law, Jewish law can serve a useful purpose in the Israeli legal system. Even when its rules do not fit the needs of the time, it is possible for a secular court to find an underlying principle that remains valid and useful. Courts must consider values inherent in their culture when they interpret

236. *Id.* at 134, translated in ELON CASEBOOK, *supra* note 45, at 186, and in 2 RAKOVER *supra* note 19, at 537 (internal quotations omitted). Justice Elon quoted a responsum by Jacob Reischer, an eighteenth century Polish halakhic authority, which addressed a dispute between partners over the division of a jointly owned basement. One of the partners demanded the part of the basement that adjoined his dwelling. Although there was older authority that in such circumstances the partner could claim that "might makes right" and assert that "[h]e who knows that truth is on his side may do everything to assert his right," Rabbi Reischer decided that the partners should cast lots. RESPONSA SHEVUT YA'AKOV, *Hoshen Mishpat* 2:167.

237. *See supra* Parts III.A.1 & 3.

238. *See supra* Part III.A.2.

239. *Supra* Part III.B.

precedents and statutes. Jewish law embodies many of the values of the Jewish people. Moreover, a judge should cite any source that makes the opinion more persuasive, be it Shakespeare,²⁴⁰ Lewis Carroll,²⁴¹ T.S. Eliot,²⁴² Yiddish sayings,²⁴³ or the Talmud.²⁴⁴ Just as judicial outlooks are shaped by a host of influences, including popular culture and literature, it is also natural for judges writing in Hebrew to use terms and expressions that originated in Jewish law, and to draw upon the extensive legal tradition that defined their meanings.

When courts cite material from Jewish law, one can fairly question whether Jewish law influenced the decision, was cited merely to provide support for a decision reached on other grounds,²⁴⁵ or was cited to demonstrate to a partially skeptical audience that Jewish law can be relevant to modern problems. Even when its influence on the outcome is minimal, Jewish law can be a source of pride, can play a role in developing a sense of national identity, and can help ground a decision in a rich religious legal tradition.²⁴⁶ It is a tradition that is part of the national heritage of all Jews, be they religious or not.

240. E.g., *Ben Shahar v. Mahlev*, FH 22/73 [1974] IsrSC 28(2) 89, 95–96 (Berinson, J.) (quoting from *The Merchant of Venice* and explaining Portia’s motive for her argument that a court must not depart from precedent). Cf. *Bloch v. Frischholz*, 533 F.3d 562, 569 (7th Cir. 2008) (Wood, J., dissenting) (explaining the religious animosity in *The Merchant of Venice*).

241. CA 6339/97 *Rooker v. Solomon* [1999] IsrSC 55(1) 199, 254 (M. Cheshin, J.) (Humpty Dumpty on the meaning of words). Cf. *Montana Sports Shooting Ass’n v. Montana*, 185 P.3d 1003, 1010 (Mont. 2008) (Nelson, J., dissenting) (same).

242. *Rooker*, IsrSC 55(1) at 253 (“Words strain, Crack[.]”). Cf. *Trevino v. General Dynamics Corp.*, 876 F.2d 1154, 1155 (5th Cir. 1989) (Jolly, J., dissenting) (same).

243. CA 7325/95 *Yedi’ot Aharonot, Ltd. v. Krauss* [1998] IsrSC 52(3) 1, 93 (M. Cheshin, J.) (“half the truth is a whole lie”). Cf. Alex Kozinski & Eugene Volokh, *Lawsuit, Shmasuit*, 103 YALE L.J. 463 (1993) (“Yiddish is quickly supplanting Latin as the spice in American legal argot.”).

244. Cf. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 400 (1999) (discussing the Talmudic sages’ beliefs about judges who take bribes); BERNARD J. MEISLIN, *JEWISH LAW IN AMERICAN TRIBUNALS* (1976).

245. See M. Bass & D. Cheshin, *Jewish Law in the Judgments of the Supreme Court of the State of Israel*, in 1 *JEWISH LAW ANNUAL* 200, 212 (1978) (Jewish law used for “decoration”).

246. See *Ben Shahar v. Mahlev*, FH 22/73 [1974] IsrSC 28(2) 89, 98, translated in 2 RAKOVER, *supra* note 45, at 657; 4 ELON TREATISE, *supra* note 1, at 1939.