Nathan Lewin

Nathan Lewin is a Washington lawyer and vice-president of the National Jewish Commission on Law and Public Affairs ("COLPA"). He has argued 27 cases in the Supreme Court of the United States including several that affect Jewish religious observance.

PROTECTING JEWISH OBSERVANCE IN SECULAR COURTS

The Talmud in *Sanhedrin* (91a) relates the wonderful story of the first Jewish advocate on behalf of the Jews in a foreign court, and, with minor differences, the account appears also in *Megilat Ta'anit*. When Alexander the Great swept into Jerusalem sometime between 325 and 320 B.C.E., the Africans, Egyptians, and Ishmaelites separately petitioned his court for title to the Land of Canaan and for return of the gold and silver carried away at the time of the Exodus. A modest hunchback priest named, according to the talmudic text, Geviha ben Pesisa, volunteered to defend against these claims in the court of Alexander. His advocacy resulted not only in rejection of the claims made against the Jews, but in successful counterclaims that compelled the petitioners to flee the jurisdiction and forfeit their own property to the Jewish people.

Assertion of Jewish communal rights in secular courts does not raise the same halakhic issues as do private lawsuits between Jewish disputants. The prohibition against taking legal claims to *arkaot* rather than presenting them, in the first instance, to rabbinic *batei din,* does not apply at all to lawsuits against non-Jews or to legal claims against agencies or officials of a secular government—even if the officials happen, at a particular time, to be Jewish. Nor is the assertion of a communal claim the same as a private grievance.

Following a series of severe condemnations of *moserim* (informants), Maimonides in the Laws of Personal Injury (*Hovel u-Mazik* 8) concludes: "One who causes difficulty and irritation to the community may be handed over to the gentiles to be beaten, imprisoned, and fined." And the *Shulhan Arukh* (*Hoshen Mishpat* 388:12) draws the same distinction between private and communal harm, forbidding recourse to secular authority only when the grievance is individual.

TRADITION 38:1 / © 2004
Rabbinical Council of America

In an interesting discussion of the application of this principle to reckless drivers who endanger others living in the neighborhood, Dayan Yitzchok Weiss, *zikhrono livrakha*, noted in *Minhat Yitshak* (8:148) that there was no articulation of the source for this distinction before it was explained by *Hatam Sofer* and his son, *Ketav Sofer*. They derived it from the Talmud in *Gittin* (7a), where Mar Ukva was advised by Rabbi Elazar, on the basis of a verse in *Psalms* (39:2) not to deliver his *personal* enemies to the authorities, but would have permitted the community's enemies to be handed over. In any event, the distinction is an established principle, and contemporary halakhic authorities have required only a warning by Jewish communal representatives before legal action in secular courts or agencies is initiated against Jews who endanger Jewish lives or undermine Jewish observance. R. Moshe Feinstein, *z"l*, advised the Baltimore rabbinate to first bring a *shohet* who was selling non-kosher meat to the rabbinic tribunal before reporting him to the authorities (*Iggerot Moshe, Hoshen Mishpat* vol. 1, no. 8). And Dayan Weiss imposed the same requirement of warning ("*hatra'a*") on those who intend to report Jewish speeders on the highway. But neither *posek* forbade recourse in such instances to secular courts.

With all the great liberties granted to Jews in today's United States — probably the greatest *malkhut shel hesed* in the history of the Jewish people—the struggle continues over important aspects of religious observance. Even at a time when there appears to be a religious resurgence in America, and acceptance of Jewish religious observance has advanced so far that the country almost elected a *shomer Shabbat* Vice-President, battles over religious rights rage in the courts. Our adversaries today are not the anti-Semites of old. More frequently, they are *ahenu benei Yisrael*—our Jewish brethren who, in keeping with the current phenomenon of "Jew versus Jew," take to the courts (or force us to seek court protection) over Jewish observance. Four cases on my recent (February 2003, Adar I 5763) litigation docket are illustrative. A fifth area—discrimination in private and public employment against observant Jews—continues to be a battleground in which we win some and lose more.

THE TENAFLY ERUV

The growing Orthodox community of Tenafly, New Jersey, decided in June 1999, under the leadership of attorney Chaim Book, to construct an *eruv* to facilitate Sabbath observance for residents of the town, quaintly called the Borough of Tenafly. The Jewish mayor of Tenafly

resisted signing the formal government proclamation that is halakhically required, and the leaders of the community applied to the Bergen County government, which unhesitatingly made the formal declaration (as scores of other local governments have gladly done). The plastic-strip *lehis* were then attached to telephone poles by Cablevision employees as a public service. The same plastic strips are used by Cablevision to cover its own cable wires attached to poles on Tenafly's right of way.

Some local residents then roused opposition to the *eruv*, resulting in rancorous public meetings of the town's residents and of the Town Council. Much anti-Orthodox vitriol was uttered during these meetings by Jews who did not want an influx of Orthodox families into Tenafly. The Council ultimately voted 5-to-0 to require removal of the *eruv*. The Tenafly Eruv Association, Chaim Book, and three other individual leaders filed a lawsuit against Tenafly in federal district court alleging religious discrimination. During a four-day hearing held in federal court in Newark on the request that a court order prevent removal of the *eruv*, members of the Town Council testified that they harbored no anti-Orthodox feeling, and claimed that they were motivated by a desire to keep the telephone poles clear, as a long overlooked town ordinance prescribed. The federal trial judge considered the matter for more than half a year, and he ruled in favor of Tenafly.

I represented Book and two other individuals on appeal to the United States Court of Appeals in Philadelphia. The *eruv* won the appeal because, regardless of whether the Town Council was subjectively biased against Orthodox Jews, Tenafly had permitted its telephone poles to be used regularly for non-religious displays such as public protest ribbons, lost dog signs, and house-number signs. The appellate court said that if Tenafly allowed these secular uses of its telephone but prohibited plastic strips that were being used for a religious observance, it was, in effect, unconstitutionally discriminating against religion. After the Court of Appeals' decision, the Orthodox community tried vainly to bring the dispute to an end, even agreeing to forgive approximately $800,000 in attorneys' fees that, under the civil rights laws, Tenafly now owed to the New York law firm that had undertaken trial of the case. Tenafly rejected this very generous settlement offer because its terms would have guaranteed the right to maintain and enlarge the *eruv*. The Borough decided to carry the battle to the Supreme Court of the United States. Not surprisingly, the Supreme Court refused to hear the case. Even after the rebuff from the Supreme Court, Tenafly is continuing to battle the eruv with a renewed proceeding in the federal district court seeking to hold

Cablevision liable for its costs in defending against the Eruv Association's lawsuit. The case is still in litigation as this article goes to press.

What aroused the Tenafly neighbors and could have justified their attack on the *eruv*? The *eruv* was an effort to improve the quality of life in Tenafly for young Orthodox families and to attract additional Orthodox couples. Its only visible manifestation was the 183 plastic strips attached to telephone poles. There was, unquestionably, much anti-Orthodox sentiment behind the opposition to the *eruv*. Taking Tenafly to court served two distinct purposes: (1) It preserved a classic religious institution that facilitates Sabbath-observance in Tenafly. (2) It was an appropriate response to very aggressive bigotry by some residents of Tenafly, Jews and non-Jews, to keep Orthodox families out of the area. The success of the legal battle will, one hopes, deter those in other communities from interfering with the establishment of *eruvin*. If Tenafly is forced by court order to pay a whopping attorneys' fee to the Orthodox community's lawyers, the deterrence will be even greater.

The legitimacy of an *eruv* is worth fighting for in court. Two earlier litigations involved *eruvin* that were initially permitted by local governing bodies, which neighbors (mostly Jewish) or misguided civil-liberties zealots tried to bring down. In Belle Harbor, New York, in 1985, local residents claimed that an *eruv* consisting of sea walls and telephone wires violated the First Amendment's Establishment Clause. I recall arguing the case before five judges on New York's Appellate Division, Second Department, and having to respond to a vicious anti-Orthodox harangue by the Jewish attorney who represented the *eruv*'s opponents. He mocked the assertion that an *eruv* was designed to enable families to attend synagogue together by allowing carriages and strollers to be wheeled to the synagogue. "When the mothers come to these Orthodox temples," he said, "the Orthodox don't want to see them. They shut them off in other rooms or behind partitions."

His argument was so stridently and openly anti-Orthodox ("These folks really want to close all the stores in the neighborhood on Saturdays.") that I told the court that, even if it meant digressing from my constitutional argument, I had to answer his offensive remarks. A female judge who was on the extreme right of the bench seemed to rally to my side. "I, too, was very offended by his statements," she said. I became less sure that I had an ally when she added, "He kept talking about mothers wheeling strollers and carriages to the synagogue but why aren't the *fathers* wheeling the strollers?" The Appellate Division went on to permit the *eruv* by a 5-to-0 vote.

In 1987 the New Jersey chapter of the American Civil Liberties Union (which also opposed the Tenafly *eruv* in 2001) initiated a federal lawsuit against an *eruv* in Asbury Park, New Jersey, on the ground that it violated the Constitution's First Amendment. Since the *eruv* is not visible to anyone other than the *shomerei Shabbat* who depend on it (and often not even to them) and it does not cost the taxpayer a penny, this lawsuit seemed to be a foolish exercise in purely theoretical constitutional jurisprudence. But when I complained to the leadership of the national ACLU, I was told that each state's organization is independent, and New Jersey's chapter was free to bring a case without national approval. A young African-American female District Judge in New Jersey then rejected the ACLU's position, and no appeal was ever taken.

The Tenafly case was the first in which local government had *opposed* an *eruv*. It is an unfortunate example of what has become a trend in the United States: opposition by authorities in a local community, aroused frequently by non-Orthodox Jewish residents, to an increasing Orthodox Jewish population. Zoning laws are being administered unequally and unfairly to prevent enlargement of Orthodox synagogues and the establishment of Orthodox *minyanim* in housing developments. If local laws can be invoked to prohibit *eruv*in, development of Orthodox communities with growing families will be hindered. That made the Tenafly *eruv* case particularly important, even beyond remedying Tenafly's particular history of anti-Orthodox bigotry.

THE CINCINNATI MENORA

Cincinnati's premier downtown city-owned plaza is called Fountain Square. It has always been the site of private displays and demonstrations, as well as official city-sponsored events. In 1990 and in 1991, Chabad of Ohio had to litigate with the city (and fight the local Jewish community-relations council and the American Jewish Congress) over the right to place its private 18-foot-high *menora* in Fountain Square during Hanukka. The city first argued that allowing a religious display, even if privately sponsored, in a "public forum" would violate constitutional rules regarding separation of church and state. We challenged that proposition (as we did in a host of other *menora* cases), and when Cincinnati lost this battle, the city tried a new tack. (This was, by the way, the *only* time a Jewish judge ruled in our favor in the entire history of litigation over *menoras.*) In the following year, Cincinnati prohibited any private display from being maintained at Fountain Square overnight,

reasoning that an 18-foot-high *menora* would not be placed there if it had to be removed each night. I brought suit again for Chabad. The same federal district judge and the court of appeals found that this new regulation was an unconstitutional pretext to suppress speech, and they invalidated the rule.

In 2002—after the Jewish federal district judge who had ruled in Chabad's favor had died—the city tried again. It passed an ordinance prohibiting all non-governmental displays in Fountain Square during the last two weeks of November, all of December, and the first week in January. Chabad's request to display the *menora* between November 29 and December 9 had been on file since November 2001. It was turned down after the new ordinance was adopted.

Chabad filed a federal lawsuit challenging the new Cincinnati ordinance. The federal district judge held a hearing on Monday, November 25, and issued her decision favoring Chabad and finding the ordinance unconstitutional on Wednesday, several hours before Thanksgiving. Within two hours, the city went to three judges on the federal court of appeals and obtained a stay of the District Judge's order. That meant that the *menora* would not go up as planned on Friday afternoon ahead of the first night of Hanukka.

I learned of this development while in my office on Thanksgiving Day. I worked past midnight on an application to the Supreme Court Justice who has jurisdiction over Ohio, John Paul Stevens. He had legal authority to set aside the stay order entered by the Court of Appeals and to allow Chabad's *menoras* to be displayed. My application arrived at the Supreme Court at 11:00 a.m. on Friday, less than 6 hours before candle lighting time. At 4:30 p.m. that afternoon—just as Shabbat and the holiday were beginning—Justice Stevens overruled the three judges of the Court of Appeals and allowed the *menora* to go up. (It was finally erected on Monday morning.) But Cincinnati still did not give up. It ran again to the Court of Appeals seeking a "clarification" from that court, and then to the full Supreme Court to get Justice Stevens overruled. Both of the city's efforts were resoundingly unsuccessful, but Cincinnati continued the battle by appealing the District Court's ruling to the Court of Appeals for the Sixth Circuit. That court turned down Cincinnati's appeal, so that the Cincinnati *menora* seems safe for the time being.

Although no Jewish organization formally opposed the Cincinnati *menora* in court during this latest round, the local Jewish community council issued a public statement disagreeing with Chabad's position and supporting the city. Opposition from secular Jewish organizations to the

display of a private *menora* on public property has been the consistent earmark of *menora* litigation for the past 15 years. The landmark Chabad *menora* case arose in Pittsburgh, where the Catholic mayor of the city agreed to place the *menora* besides Pittsburgh's Christmas tree, in celebration of the "Season of Lights." The ACLU and the American Jewish Congress—which is so obsessed by Chabad's *menoras* that to this day it persists in what it seems to view as a *milhemet mitsva* (or, *le-havdil,* a crusade) against *menoras*—sued to eliminate the *menora*, as well as a crèche in a county courthouse nearby. (A Jewish judge on the Court of Appeals wrote the majority opinion ruling against the *menora* and the creche.) I argued for Chabad in the Supreme Court, where the *menora* won by 6-to-3 even while the crèche lost 5-to-4. (The head of the ACLU's Washington, DC, office quipped to me as we were leaving the Supreme Court on the day the Supreme Court announced its decision, "Congratulations, Nat, for having turned this into a Jewish nation.")

It is time, I think, to refute in writing a libel that the American Jewish Congress has disseminated against Chabad and against me ever since it lost the Pittsburgh *menora* case. The AJC says falsely, to this day, that the *menora* case was won in the Supreme Court because Chabad and its lawyers argued that the Hanukka *menora* was a secular, rather than religious, symbol. In fact, my brief emphasized to the Court that a *menora* was a religious symbol, and Justice Blackmun's majority opinion stated several times that the *menora* was a religious symbol. Once he even said, "The Christmas tree, unlike the *menora*, is not itself a religious symbol."

Did the Pittsburgh *menora* case involve an important religious observance? The program of the Lubavitcher Rebbe, *z"l*, to achieve *pirsumei nisa* by erecting large Hanukka *menoras* in public squares all over the world probably brought pride and self-respect to many Jewish families in cities like Pittsburgh. The Supreme Court decision has confirmed the right to display large *menoras* in public squares all over the country, including the magnificent display each Hanukka on the National Mall in Washington, D.C. But the litigation has had even greater impact. As I explain below, it established legal principles that are likely to produce unanticipated dividends to the entire Jewish community by permitting financial aid to Jewish religious day schools.

In 1989, the year in which we won the *menora* case in the Supreme Court, Pittsburgh welcomed a new mayor, Ms. Sophie Masloff, who was a member of the American Jewish Congress. So in the same year that the Supreme Court ruled in favor of the proposition that Pittsburgh could

constitutionally include a *menora* in its city display, we had to litigate *against* Mayor Masloff, who announced soon after our Supreme Court victory that she would exclude the *menora* from Pittsburgh's holiday display in December 1989. (The American Jewish Congress applauded.)

That case was the beginning of a major shift in legal strategy from arguing that *menoras* are permissible under the First Amendment's Establishment Clause to arguing that, if privately sponsored, they are constitutionally entitled to protection under the First Amendment's Free Speech Clause. We won that principle in the Pittsburgh litigation, assisted by a last-minute ruling from Justice William J. Brennan, Jr., a Catholic Supreme Court Justice who was a staunch believer in free exercise of religion and free speech. In 1989 (the Jewish year 5750), the first Hanukka candle was lit on Friday night—just as it was in 2002 (5763 in our calendar). And in 1989, we defeated Mayor Masloff in the district court in Pittsburgh. The judge ruled that the front steps of Pittsburgh's City Hall were a "public forum" where Chabad had a constitutional right to display its *menora*.

The Court of Appeals for the Third Circuit did in 1989 what the Sixth Circuit Court of Appeals did in 2002. On the Wednesday before Hanukka the Third Circuit stayed the order issued by Judge Barron McCune, who had directed on the preceding day that permission be granted for a *menora* display, On my way back from Los Angeles on a "red-eye" flight on Thursday night, I drafted an application asking Justice Brennan to vacate the Court of Appeals' stay and allow the *menors* to be displayed in front of Pittsburgh's City Hall. My application was delivered to the Supreme Court early on Friday, *Erev Hanukka*. Just as Justice Stevens did 13 years later, Justice Brennan signed an order permitting the *menora* display at about 4:00 p.m. on Friday, as I was home lighting my first Hanukka candle. (The City of Pittsburgh in 1989, like the City of Cincinnati in 2002, asked the full Supreme Court to vacate Justice Brennan's order. Mayor Masloff lost that request by a 6-to-3 vote.)

The "religious speech" cases, typified by the *menora* litigation, have become critical in later development of constitutional law relating to religious observance. In a number of *menora* cases—including one I argued before 15 federal judges in Cincinnati, Ohio, and a second I argued before 11 federal judges in Atlanta, Georgia—we established the legal doctrine that a privately sponsored religious display such as a *menora* was fully entitled to the protections given to secular speech by the First Amendment. The American Jewish Congress and other secular Jewish groups had been contending that private speech was entitled to

be expressed in a "public forum" only if it dealt with secular subjects. Any speech or display that was religious would, they claimed, be ascribed to the government if it appeared on government property, and government was prohibited from engaging in religious expression. While sitting in court and planning how to refute this argument, I composed a limerick that I recited to the judges. The Court of Appeals for the Eleventh Circuit thought it worthwhile quoting in its unanimous opinion favoring a *menora* in the rotunda of the Georgia state capitol building (see vol. 5 of *Federal Reporter 3d,* p. 1394):

> It seems to a young rabbi of Chabad
> That the Constitution is exceedingly odd
> To protect all speech in a public place
> On AIDS, abortion, or race,
> But to prohibit any person's mention of God.

The principle that religion may not be discriminated against is now very useful in the fight for governmental aid to religious schools. It also supports the assistance that government now gives to "faith-based" charities. This proves that the narrow legal question raised in an individual case is not an adequate measure of its historic value. One must be *"roeh et ha-nolad"* —anticipate where a new legal doctrine will go—a quality of wisdom that I cannot claim to have had when I actually litigated the Pittsburgh *menora* case.

NEW YORK'S KOSHER FOOD LAW

New York enacted a law in 1915 that made it a crime for a vendor who has "intent to defraud" to sell food labeled "kosher" if it does not meet "Orthodox Hebrew religious requirements." Inspectors from the State's Department of Agriculture & Markets enforced this law with on-site visits. A Long Island meat market that had encountered difficulties with the inspectors initiated a lawsuit in federal court to declare the kosher-food fraud law unconstitutional on its face as a preference for religion. Only the official state agency was sued, and we feared that the civil-servant lawyers assigned to the case by the attorney general's office would not adequately defend *kashrut*. So we gathered a group of "intervenors" consisting of Assembly Speaker Sheldon Silver (who had initiated helpful amendments to the law), all the national Orthodox Jewish organizations, and representative kosher butchers and kosher

consumers, to apply to become full parties to the case. We were granted that status.

In July 2000, a (Jewish) District Judge in Brooklyn ruled that the kosher food fraud law was unconstitutional because state officials were being required to enforce a "religious code." The three (Jewish) appellate judges who fortuitously comprised the Court of Appeals agreed that the law was unconstitutional because, by prescribing Orthodox standards, it was "taking sides in a religious matter."

The State of New York (through its current Attorney General Eliot Spitzer) and our group of "intervenors" both filed petitions asking the Supreme Court to review this decision because it effectively invalidates not only New York's law but also the laws of 15 other States that use Orthodox standards in their kosher-food fraud laws. The Court told our adversaries to file a response to our petitions—usually a favorable sign— but the Court ultimately refused to hear the case. As a result of the decision invalidating New York's law, a new statute was enacted in New York that requires disclosure of the basis for a claim that an establishment isselling "kosher" food.

Protecting *kashrut* is not a recent problem. The Humane Slaughter Act was passed by Congress in 1957. Due to the unrelenting and, at times, truly heroic efforts of my father, Dr. Isaac Lewin, *z"l*, it included a provision that defined kosher slaughter and the steps preparatory to kosher slaughter as an approved "humane" method. In 1974, animal-rights advocates initiated a lawsuit to declare this provision unconstitutional as a religious preference. Had the animal-rights lobby won this case, it would have been unlawful for any U.S. government agency to purchase kosher-slaughtered beef. Kosher meat would also have become far more expensive for the ordinary consumer. I represented the leading national Orthodox Jewish organizations that intervened to defend the law. A three-judge federal court agreed with our defense of *shehita* and the Supreme Court summarily approved of that decision in 1975.

New York's kosher food fraud law has demonstrable consequences that should be appreciated by the Orthodox community. To be sure, fully committed observers of *kashrut* do not rely on the government's enforcement of consumer fraud laws when they decide what foods to purchase. Most subscribers to *Tradition* will look to see what rabbi or organization provides the *hekhsher* for the food product, and very few if any will consume a cooked food which has no *hekhsher* just because the vendor represents it as "kosher." So why is it important to defend the constitutionality of New York's kosher food law?

The primary reason is that the law, like many consumer protection provisions, protects the careless more than the careful. The consumer who follows the Latin aphorism *caveat emptor* needs legal safeguards much less than the casual consumer. There are surely thousands of casual consumers in New York, including tourists, who want to eat kosher food if it is available and are be willing to pay a premium price to get it, but who might settle for non-kosher food if they can find none that is kosher. The label kosher has meaning to them, and their understanding should be shielded by law. These consumers are protected by New York's law more than the meticulous *shomer kashrut*.

The battle has now become one of principle. Until very recently, even the Reform, Reconstructionist, and Conservative movements admitted that "all branches of Judaism accept the kosher requirements which have been developed in the Orthodox tradition over the centuries as the standard applicable to all, whether liberal or traditional in observance." That is the language of a brief submitted in the New Jersey Supreme Court in 1992 on behalf of the Anti-Defamation League and the New Jersey Orthodox, Conservative, Reform, and Reconstructionist rabbinic organizations. The ADL brief said that "Jewish authorities in New Jersey uniformly hold that kosher dietary standards are those established by Orthodox Judaism." The American Jewish Congress also filed a brief in New Jersey in 1992 declaring unequivocally that New York's kosher-food law (unlike New Jersey's, they then said) was constitutional because a vendor cannot be found guilty unless he intends to defraud his customers. But the same organization took a 180-degree turn and filed a brief opposing the New York law when the constitutionality of New York's statute came before a federal court of appeals one decade later. There seems to be no explanation for these totally contradictory positions other than the rancor that has developed in these ten years between Conservative and Orthodox.

In these three areas—*eruv*, *menora* and *kashrut*—Orthodoxy is suffering an assault from within America's Jewish community. There is little objective justification for the in-court opposition of Conservative and Reform Jews to the legal rights sought by the Orthodox parties in these cases. But it is our own Jewish people who are frequently trying to suppress *eruvin* and *menoras* and have been inhibiting the enforcement of *kashrut* laws. It is ironic that the *rashei teivot* (initial letters) of *eruv*, *menora* and *kashrut—ayin, mem* and *kaf*—spell "*amkha*," or your nation.

THE HETER ME'A RABBANIM LAWSUIT

A wealthy woman who is a member of Brooklyn's Hasidic community initiated a civil lawsuit in the New York state courts against members of a *Bet Din* that issued a *heter me'a rabbanim* under which her husband was halakhically permitted to remarry even though she had refused to accept a *get*. She alleged that there had been no actual rabbinic court proceedings and that the *bet din's* members had been bribed $50,000 to issue the *heter*. She claimed that the rabbis had defamed her in her religious community with the contents of the *heter* and that they had caused her other tortious harms. She hired a non-Jewish partner of a major New York litigation law firm and spent several million dollars in fees before she had a falling-out with her lawyer.

I represented the *Bet Din* since the inception of the litigation. Although the validity of a *heter me'a rabbanim* involves a host of thorny halakhic questions (many of which the plaintiff's non-Jewish lawyer tried to explore in depositions of the rabbis and others), and religious questions are beyond the constitutional jurisdiction of any secular American court, the assigned trial judge (who happens to be Jewish) refused to dismiss the case. He also refused to acknowledge the undisputed evidence that there had been no bribe and that, before deciding to issue the *heter*, the *bet din* had held a hearing in which it received the testimony of two witnesses. The Jewish trial judge's ruling that the case should proceed to trial was reversed by the Appellate Division, First Department, of New York's Supreme Court. The court ruled not only that it had no jurisdiction to review a rabbinic tribunal's procedures and issuance of a *heter*, but also that the plaintiff's claims were "unsubstantiated and speculative, and conclusively refuted by defendants' documentary evidence." This was a vindication not only of an important constitutional principle but also of the integrity of the *bet din's* members. New York's highest court—the Court of Appeals—has now turned down two requests to review the Appellate Division's decision, and the only possible avenue left to the plaintiff is to try for review in the Supreme Court of the United States, where her chances are equal to a *kapparot* rooster's on *erev Yom Kippur*.

One of the most important goals of litigating on behalf of Jewish religious observance may be to keep the courts out of internal religious matters. Religious freedom requires autonomy for religious institutions and respect for the religiously motivated decisions of clergy and others in positions of religious authority. A secular judge cannot be given the

authority to look over the shoulder of a rabbi or a *bet din* resolving a religious issue. In an era when distinctions based on gender are presumed to be invidious, a woman's eligibility for an *aliya* or for *edut* would not be beyond a court's writ if rabbinic rulings could be reviewed in a court of law. Indeed, there was even a notorious recent case in which two rabbis well known in the Orthodox community were sued for making disclosures of private facts that halakhic duties required them to disclose. Fortunately, New York's highest court saw the danger to religious liberty in allowing such a lawsuit, and it directed that the case be dismissed.

Protecting legitimate *batei din* against lawsuits by unhappy parties seeking vengeance should be a communal responsibility. Rabbis do not yet have the equivalent of malpractice or corporate director-and-officer insurance that will protect them if they are sued. But suing the rabbi has become acceptable in recent years, and our community is too willing to believe the worst that can be alleged against a rabbi in a secular court of law.

The incendiary allegations of corruption in the *heter meah rabbanim* case have been thoroughly discredited. Instead of pursuing the sensational claims he had made of rabbinic malfeasance that generated mammoth publicity, the plaintiff's lawyer spent hours during depositions quarreling with the rabbis over halakhic issues such as the appropriate period and proper form to respond to a *hazmana* from a *bet din*, whether a *bet din's seruv*, or order of contempt, must be written, what grounds suffice for issuance of a *heter,* what qualifications the hundred rabbis who endorse a *heter* must have, whether their signatures must be preserved, and whether a *heter* takes effect before the husband is given a formal release (*pittur)*. To say that these questions should not be considered by a secular court is obvious. Nonetheless, they are part of the record in this case.

This is another instance in which the danger has come from within. This time, however, it is not secular Jews who are forcing an issue of Jewish religious observance to be aired in court. It is, rather, someone who professes to respect Orthodox institutions but has nonetheless brought religious issues to a secular court.

RELIGIOUS OBSERVANCE IN EMPLOYMENT

The most common area of litigation involving Orthodox religious observance continues to be employment. Enormous efforts are currently being made to enact a federal law that would protect religious employ-

ees in private employment more effectively than the existing Civil Rights Act provision, which I drafted and which was adopted in 1972 following a miraculous lobbying effort that culminated with a victory in a Senate-House Conference Committee considering two versions of amendments to the Civil Rights Act on, of all days, Purim 5732. Courts have read the current federal law requiring "reasonable accommodation" to an employee's religious observance very narrowly, and legislative repair is badly needed.

One court that has resisted the trend is the same court that recently decided the Tenafly *eruv* case, the United States Court of Appeals for the Third Circuit that sits in Philadelphia. It considered a lawsuit brought by a *shomer Shabbat* associate professor of education at William Paterson College in New Jersey. Her teaching, scholarly achievement, and service received outstanding reviews until she encountered a new dean and head of her department who made her life difficult because she kept *Shabbat* and observed the *yamim tovim*. Requests were made that she come to work on Saturdays, department meetings were called for Friday afternoons, and the professor was verbally abused because of her religious observance. An unsympathetic district judge ruled against her, finding that there was inadequate evidence of religious discrimination. At the urging of Agudath Israel, I wrote a friend-of-the-court brief for COLPA (the National Jewish Commission on Law and Public Affairs) on her appeal, contending that she had been harassed because of her religious observance. I also presented oral argument to the federal appeals court in Philadelphia at her lawyers' request. The court of appeals ruled in her favor, and Judge Samuel A. Alito, Jr., who concurred in that result, quoted the following excerpt from my brief:

> When an employer deliberately reschedules important meetings for Friday afternoons, the message to an Orthodox Jewish employee is clear as a bell. Such rescheduling tells the employee that continued observance of his or her faith will be viewed as incompatible with adequate job performance. Repeated requests that work be done on Saturdays or Jewish holidays—or telephone messages left on a Jewish religious holiday demanding an "immediate" response—are aimed directly at an employee's religious observance. Criticism of an employee's effort to reconcile his or her schedule with the observance of Jewish holidays delivers the message that the religious observer is not welcome at the place of employment.

Judge Alito (who has, by the way, been mentioned as a possible

Bush appointee to the Supreme Court) said that these considerations satisfied him that the professor was being put by her superiors to a "cruel choice" that the law forbids between her religion and her employment. Unfortunately, this case is a rarity. Most courts that have confronted employment discrimination claims by Orthodox Jews in the past few years have ruled against the employee.

Jewish observances have, over the past two decades, received greater respect, and *shemirat Shabbat* has become more mainline because of Senator Joseph Lieberman's visibility. But the lawyer's greatest challenge in religious discrimination cases is to persuade the judge that conduct that seems strange—be it how one is dressed, what he or she eats or does not eat, how prayer is conducted, or how religious holidays are practiced—is a bona fide, deeply held matter of conscience. The lawbooks are filled with cases in which exotic demands were made by religious observers, such as the Native American who would not give his child a social security number and the Amish employer who would not pay Social Security tax. Judges are skeptical, and I think they frequently reject religious observance claims because they just can't bring themselves to believe that the claim is devoutly held.

This skepticism affected, I think, an early government employment case that I took to the Supreme Court. When Simcha Goldman, an Air Force psychologist who was also a *musmakh* and had been a chaplain in the U.S. Navy, was ordered in May of 1981 to remove his yarmulke while in the hospital at March Air Force Base in California, he called me. Air Force chaplain Michel Geller had sought and obtained my help years earlier when the Air Force directed him to shave off his beard. In each case, I filed a lawsuit in the federal court for the District of Columbia, claiming that the practice was religiously motivated and was, therefore, protected by the Free Exercise Clause of the First Amendment. The "beard case" was successful at the first level, in the United States District Court, and the government threw in the towel and never even sought to appeal. But after we won the "yarmulke case" in the same District Court, the Department of Defense, then headed by Caspar Weinberger (who was heard to say in a staff meeting that "I would rather lose on the MX missile than lose on the yarmulke"), insisted on taking an appeal. To my surprise (and that of the government lawyer who argued the case in the Court of Appeals), a very liberal panel of appeals judges, including Judge Abner Mikva, who had been a leader of the "Jewish Caucus" when he was a Congressman from Illinois, ruled against the yarmulke.

Three of the Court of Appeals' full complement of eleven Circuit Judges were ready to grant Goldman a rehearing when I presented the constitutional issue to them. Two—Judges Antonin Scalia and Ruth B. Ginsburg—received their heavenly reward for this favorable vote years later when they were promoted to the Supreme Court. The third—then the most junior and staunchly conservative—was Kenneth W. Starr, whose *sekhar*, I suppose, is yet to come.

The case ultimately went to the Supreme Court, where five Justices rejected the argument I made that wearing a yarmulke was a religious observance that was so unobtrusive and imposed no burden on anyone else that it should be constitutionally protected even in the military services. After that close 5-to-4 defeat, Congressman Stephen Solarz of Brooklyn introduced legislation that ultimately passed the Congress and required the military to permit the wearing of yarmulkes.

In the early 1980's yarmulkes in courtrooms and in law offices were not as ubiquitous as they are today. And, except on the heads of fearless Jewish chaplains and Dr. Simcha Goldman, they were never seen in the military. I received my share of criticism for taking Goldman's yarmulke case to the Supreme Court. After all, R. Moshe Feinstein, *z"l* ruled that it is permissible, if necessary for *parnassa*, to sit bareheaded in one's office (*Iggerot Moshe, Hoshen Mishpat,* vol. 1, no. 93). And the popular *Concise Code of Jewish Law*, by Rabbi Gersion Appel, had cited this *teshuva*. (The government lawyers found the citation and quoted it in their Supreme Court brief.) Weren't there more important religious observances to protect in Supreme Court cases, I was then asked, than wearing a yarmulke in a military hospital?

The answer is, I think, that one never knows which is the *mitsva kalla* and which is the *mitsva hamura*. And I have never thought it was my prerogative to make that determination. In 1975, while I was doing a visiting professorship at the Harvard Law School, I was contacted by a probation officer in Washington, D.C., who was being told by district judges that he should remove his yarmulke in court. I brought his case to the Chief Judge of the United States District Court, to whom I sent my own translations of talmudic texts and of the *Mishna Berura*. Fighting that battle and Simcha Goldman's yarmulke case resulted, I think, in the respect now shown to yarmulkes in boardrooms, law offices, hospitals, courts, and even military bases.

On the other hand, respect for religious observance does not necessarily require elaboration of its details. In the Chabad *menora* case that went to the Supreme Court, I provided only a rudimentary discussion

of Hanukka in my brief, even while emphasizing that the *menora* is a religious symbol of the holiday. Justice Blackmun, who wrote the majority opinion, was apparently fascinated by the subject. On his own (aided, no doubt, by his law clerks), he did extensive research. The result is the only Supreme Court opinion in the *United States Reports* that describes the history and observance of a Jewish religious holiday in meticulous detail. Besides explaining the *mitsva* of lighting candles, Justice Blackmun provides two slightly variant translations of the *berakha* on *hadlakat nerot*, and cites the *gemara* in *Shabbat* 21b. While agreeing with Justice Blackmun's conclusion, Justice Anthony Kennedy acknowledged that "before studying these cases, I had not known the full history of the *menora*, and I suspect the same was true of my colleagues." Our job is to generate the respect and the interest that will lead the judge to search out "the full history" on his own.