ורפא ירפא

And You Shall Surely Heal

The Albert Einstein College of Medicine Synagogue Compendium of Torah and Medicine

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ISBN 978-1-60280-126-4

Distributed by
KTAV Publishing House, Inc.
930 Newark Avenue
Jersey City, NJ 07306
Email: orders@ktav.com
www.ktav.com
(201) 963-9524
Fax (201) 963-0102

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This publication is sponsored by
Dassie and Marvin Bienenfeld

Dedication to Eli Steinberger, *zt"l*

The Talmud in Masechet Sotah describes the profound sense of hopelessness which the Jewish people felt upon their arrival at Yam Suf. With the Egyptians on one side and a large body of water on the other, B'nei Yisrael were in a state of despair. Moshe Rabeinu threw up his arms in prayer, *prima facie* the classic Jewish response. Surprisingly, however, the Talmud tells us that Hashem was not pleased, "*Yedidi tov'im bayam v'atah ma'arich bitfilah*—My beloved are drowning at the sea, and you are supplicating with lengthy prayer." Although somewhat astonishing at first blush, the Talmud's description of Hashem's response highlights a crucial and critical lesson: Although something may seem insurmountable and unachievable, it may not be. Go out and try. The results may be astonishing.

Eli Steinberger, *zt"l,* embodied and epitomized this message. Eli struggled with what may have seemed to be insurmountable disabilities. But, with a smile always shining on his face, Eli did not complain or expect any special treatment. Indeed, it was so telling that even his closest friends did not know the source of his disabilities! Rather, *b'simcha*, with joy, he made it his mission not only to accomplish, but to uplift others as well. Whether analyzing a *blat gemara*, discussing computer science, studying biology, playing classical music, or analyzing chemical equations—all of which he mastered, Eli's gifted mind and multitude of talents were easily apparent. His way was a synthesis of Torah and science, and his life

was lived to the fullest, always trying to gain more knowledge and understand the wondrous ways of Hashem.

Regardless of his limitations, Eli would not settle for mediocrity. He set his goals high and had the perseverance to see them through no matter what seemed to be in his way. He insisted on applying to the top graduate schools in the country regardless of the challenges such decisions might pose in light of his condition. It was with little surprise that he received acceptances from all of the schools he applied to.

Never one to complain, a task that for most people would be an impossible obstacle was seen by Eli as a simple opportunity that with effort was "easy" to overcome. And, while for those of us watching from afar his results were indeed astonishing, for him they simply epitomized the message that Hashem gave Moshe by Yam Suf: Nothing is impossible, with effort anything is possible.

Eli was a scholar both in Torah study and scientific knowledge. With dreams of attending graduate school and pursuing a career in scientific research, Eli always made it his mission to use his God given talents to help others. Though his professional dreams were not realized, he certainly accomplished his mission of helping others, leaving a lasting impact on the many who were fortunate to know him. Countless stories have been told of the remarkable rapport that Eli developed with his *rabeim*, professors, and doctors. One physician who treated Eli during an unexpected hospitalization in Miami, Florida, recounted how he insisted on bringing his children to meet Eli, someone with unmatched character, brilliance, charm, and strong will.

With Eli's synthesis of Torah and science in mind, it is fitting that the Einstein shul's first *Torah and Medicine Journal* will be dedicated in his memory. And, particularly at this special moment, we realize that as much as we—literally and figuratively—may have carried Eli, Eli truly carried us.

Noam Salamon
AECOM class of 2011

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Editor's Preface

This journal came into being long before the articles it contains began to be culled and edited a few months ago. Its beginnings took root four years ago as the idealistic vision of Rabbi Alex Mondrow, the new Albert Einstein College of Medicine rabbi. Rabbi Mondrow saw in the unique AECOM synagogue, composed solely of Jewish medical students and their families, great potential for the dedicated and creative study of medical halakha and ethics. As the first step in cultivating his vision of blending the worlds of Torah U'Mada, the traditional halakha and cutting-edge scientific knowledge, Rabbi Mondrow recruited Rabbi Howard Apfel, M.D., to deliver biweekly medical halakha classes to the students. Drawing upon his vast clinical experience and expertise in the area of practical halakha, Rabbi Apfel captivated the students and encouraged continued investigation into the complicated topics covered.

Not wanting his congregants to be limited to hearing Torah and medical halakha second-hand, Rabbi Mondrow thought it prudent to not only encourage students' independent study, but also to put their ideas in print. Hence the idea of publishing a medical journal founded, written, and edited by Einstein students was born. This journal afforded students the opportunity to articulate their ideas in a public forum, and further promised to be the only medical halakha journal published in the English language.

However, as students just beginning our medical careers, the prospect of investigating, studying, and publishing complex medical and halakhic topics seemed daunting. An idea taught to us by Rabbi Apfel came to mind that was suitable to address our concerns.

The Talmud in *Berachot* (60a) suggests a prayer for one who is undergoing a medical procedure, in this case blood-letting, the "standard of care" of that time for most illnesses. "Rav Acha states: One who goes to let blood prays, 'May this be for a cure, may You heal

me, for You are a *faithful* healer, Your cure is a *true* cure.'"[1] Commentators note the interesting characterization of God as the "faithful healer" who is capable of attaining a "true cure." Presumably, this formulation is meant to contrast God's medical proficiency with that of man, who is not considered a "faithful healer," nor able to deliver a "true cure." What exact feature of God's "medical services," so to speak, is underscored in this statement by Rav Acha? The *Ben Yehoyada* explains that human physicians may perform procedures or prescribe medications that, while undertaken with noble intentions and even accomplishing beneficial results, nonetheless have unwanted and unpredicted consequences.[2] God, on the other hand, is capable of complete and perfect care, such that it will not cause negative side-effects in a different area. Thus, while striving to provide the best medical care, physicians must acknowledge God's role as the "true healer," and ultimately look only to Him for a "true cure."

Particularly as students, we are keenly aware of the limitations of our medical treatments as well as the ease with which we as humans can err. In acknowledging that we are human and fallible, we readily admit that we do not possess the "faithfulness" of God, nor do we have His insight or ability to facilitate a "true cure." However, as students, we strive to perfect our actions, constantly learning and studying to better prepare ourselves for the responsibility of patient care. In researching and studying various medical halakha topics, we similarly hope to apply the same method of pursuit and discovery, of investigation and understanding. As neophytes naive to the worlds of both medicine and medical halakha, the task of synthesizing the two and mastering each is intimidating. Slowly, as our professional and religious careers advance, we hope to learn and progress to the point where our medical acumen and our halakhic assuredness will be at the pinnacle of our true potential. This journal

[1] Translation from www.dafyomi.co.il/berachos/points/br-ps-060.htm.

[2] Commentary on *Brachot* 60a. Thanks to Rabbi Apfel for showing us this source.

represents our humble first steps toward a better understanding of a few of the issues in the vast world of medical halakha.

On behalf of the Einstein Synagogue, we would like to express gratitude to Dr. Edward Burns for his continued support and flexibility in helping the synagogue deal with its myriad of unique circumstances and considerations.

Dr. Herbert Dobrinsky was instrumental in securing the funds and technical assistance necessary to publish this work.

We extend great thanks to Rabbi Reichman for his insight and input in putting together this issue. He "coached" many students, myself included, during their medical halakha research electives and has been an invaluable resource in furthering our Torah education.

The entire medical halakha program owes a tremendous debt of gratitude to Rabbi Apfel for his commitment to the biweekly classes. While working out one meeting a week around the schedule of a busy doctor and father would be challenging, finding time to meet with students twice a week is nothing short of miraculous. We appreciate the content and, equally important, the methodology, which will ultimately guide us in furthering our own understanding of medical halakha in the future.

Without the hard work of the two past presidents of the AECOM shul, Elly Rosman and Edo Pollack, the program might never have come to fruition. While on the shul board, I witnessed first-hand their efforts to lay the groundwork for our program.

Finally, as mentioned previously, none of this would be possible without the tireless efforts of Rabbi Mondrow. Three years in the making, Rabbi Mondrow's *über*-vision has become a reality. The weekly classes, the dinner, and this journal are all pieces in the puzzle that Rabbi Mondrow has been working toward for the duration of his time at Einstein, and are a testimony to his great vision and dedication to the community.

Jonathan Wiesen, M.D.
AECOM Class of 2009

Introduction

Some fifty years ago with the publication of his seminal dissertation on Jewish medical ethics, Rabbi Immanuel Jakobovits ushered in the contemporary era of medical halacha. Subsequent contributions, continuing up to the current state of Jewish bioethics literature as exemplified by the multivolume encyclopedic works of Dr. Avraham Steinberg and Dr. Abraham Abraham, have led to the steady and impressive expansion of the field. By now we have a become accustomed to regular contributions from such luminaries as Rabbi J. David Bleich, Rabbi Dr. Moshe Tendler, and Dr. Fred Rosner on the varied aspects of medicine and Jewish law. For most of us, the ultimate influence that this has had on our professional medical and/or rabbinic careers is difficult to quantify but extremely significant. Moreover, this new discipline has greatly impacted both the clinical and academic realms of medicine, as these works, and their authors, are consistently sought out in the resolution of many difficult real-life dilemmas.

As you open the pages of this volume, you will likely expect it to be just another book on Jewish bioethics, in a world replete with similar works and already quite fluent with embryos, stem cells, organ transplantation, cloning, and chromosomes. However, this is no ordinary volume. We are now entering the second generation of contemporary medical halacha authors, and this volume is a product of that generation. The collection of essays it offers represents a unique contribution to the history of medical halachic literature for a number of reasons.

Unlike any previous publication in this field, the essays herein are composed primarily by medical students. While there have been occasional, isolated contributions by students to the medical halachic literature, this represents the first-ever book of medical halachic essays by young physicians in training. Why do we feel that this particular genre is so significant? Simply put, medical students today

are spending more time immersed in high-level Torah study than in any previous generation. As a result, these young medical students in training are also becoming prodigious scholars of rabbinic literature, demonstrating an impressive grasp of halachic sources. It is not uncommon for students to postpone, or at times even take temporary leave of, their medical training to spend dedicated time in a yeshiva environment. Moreover, these gifted individuals maintain the intensity of their Torah pursuits without detracting from the seriousness of their dedication to medicine. The content of these essays accurately reflects this development.

The dual higher education of medical students in medicine and Jewish law is a relatively new and growing trend. There have been similar trends, the likes of which were seen at the height of Italian Renaissance, when students such as Avtalion Modena shuttled from the *Bais Midrash* of the Maharam of Padua to classes in anatomy (quite possibly with Vesalius) in the medical school of the University of Padua; when students like Binyamin Wolf Gintsberger wrote a learned question to Rabbi Yaakov Emden about anatomical dissection and later wrote his doctoral dissertation on medicine in the Talmud; when medical students like Binyamin Mussafia wrote a lengthy commentary on the *Arukh*; when Rabbi Yitzchak Lampronti completed his medical training, then went on to write the first halachic encyclopedia, *Pachad Yitzchak*; and when the young physician Ben Zion Frizzi wrote six volumes (over 1,000 pages) on the medical and scientific aspects of the Talmud. But the current trend far exceeds its historical predecessors in scope and numbers.

While the phenomenon itself is unique, the university of origin of many of these students likewise deserves mention. The Albert Einstein College of Medicine is a world-renowned medical school under the auspices of Yeshiva University, a Jewish institution embodying the Torah U'Madda philosophy. It is clear that this affiliation has in no small part contributed to the development of the Torah scholar–physician model. It is noteworthy that this volume is, to our knowledge, the first-ever published volume on medical halacha by Jewish medical students in a Jewish medical school.

The topics addressed in this volume range literally from the beginning of life to the end of life. Complex halachic topics, such as *niddah* and Shabbos, are analyzed in light of the current practice of medicine. Cutting edge topics, such as stem cell research, concierge medicine, and advances in the understanding of gender-changing operations are presented. There is much rich, new material for the reader's enjoyment and fulfillment. The volume, while continuing the age-old tradition of addressing medical issues from a halachic perspective, will hold a unique place in the library of medical halacha.

It has been a true honor for us to be associated with this worthwhile endeavor, and we look forward to the future products of this and subsequent generations. May we be *zocheh* that these efforts translate into a *refuah shlaimah* for all of *cholei amo Yisrael*.

b'vrachat kol tuv,

Rabbi Howard Apfel, M.D.
Rabbi Edward Reichman, M.D.

From the Current Rabbi

Alex Mondrow

Sometime in the early 1950s Rav Yitzchak Hutner, *zt"l*, the great Rosh Yeshiva of Yeshivas Chaim Berlin, received a letter from a student. In the letter, the student candidly and humanly described the challenges and conflicts he faced while engaged in his secular career. It seems that the student had accepted as axiomatic that to live a life of Torah while having a secular career meant he was to live a "double life." Rav Hutner quickly, but sensitively, rejected this axiom:

> It is superfluous for me to tell you that I would never, under any circumstances, agree to a "double life." Indeed, one who rents a room in a house in order to live a settled life and then rents another room in a hotel in which to be a guest is certainly living a double life. But one who rents an apartment with two rooms in it has a "broad life," not a double life.[1]

Rav Hutner then recounted the story of a visit he had once paid to the founder of Shaare Zedek Hospital in Yerushalayim, Dr. Moshe Wallach, *zt"l*. During his visit, Rav Hutner saw Dr. Wallach approach a sick patient upon whom he was about to perform surgery. Dr. Wallach asked the patient for his mother's name in order to pray for him before the operation. Such is the way of a broad life—the

[1] *Pachad Yitzchak* Igros u'Kesavim 94.

Rabbi Mondrow is currently the rabbi at Congregation Birkat Shmuel, the Albert Einstein College of Medicine Synagogue. He received his semichah from the Rabbi Isaac Elchanan Theological Seminary and is completing his doctoral training in the Combined School-Clinical Child Program at the Ferkauf Graduate School of Psychology of Yeshiva University.

recitation of a chapter of Psalms for a sick patient by the doctor who is about to perform the surgery!

It was in the spirit of educating toward such a broad life that this journal was dreamed. Its vision, however, is even more ambitious, in line with a vision spelled out by the illustrious Rav Yosef Dov Soloveitchik, *zt"l*, the Rav. In the concluding portion of a letter in which he addressed the founding of the Albert Einstein College of Medicine, the Rav wrote that as Orthodox Jews, we must excel

> in demonstrating to the world that the Torah Jew need not cower in a corner and gaze with sadness and resignation as life and the world pass him by. The Orthodox Jew must demonstrate that he navigates with pride the flow and currents of the modern world and participates in a life that is racing ever more rapidly towards new horizons and great accomplishments in the domains of science and technology. We must demonstrate that in all cultural, social and scientific situations a Jew can study Torah and live as a faithful Torah Jew. We must show the world that not only does the Halakhah not restrain the intellectual and emotional capacities and worldly knowledge of the Jew, on the contrary, it deepens and broadens them greatly.[2]

In many ways the Rav's thoughts are similar to Rav Hutner's. However, Rav Soloveitchik's vision seems to supersede Rav Hutner's inasmuch as the latter's presents an *a posteriori* approach to a given reality, while the former's is an *a priori* mandate addressing a yet unknown one. Moreover, in Rav Hutner's understanding, the Torah life and a secular career, while still under one roof are nevertheless still in two separate rooms, whereas Rav Soloveitchik issues a challenge to integrate the two and contain them both in one majestic space.

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[2] J. B. Soloveitchik, *Community, Covenant and Commitment* (Jersey City, N.J., 2005), p. 91.

Thus, while this journal's mission is to promote the living of the broad life so aptly described by Rav Hutner, it hopes, ultimately, to be a fulfillment of the challenge of the Rav. In fact, it is particularly in the context of medical school, rather than the actual practice of medicine, that such a charge can best be actualized, as it reflects an understanding of the fact that there is much more to medical school and becoming a doctor than just the study of medicine. It involves the development and integration of a way life, a *Weltanschauung*. This holistic medical training as Torah Jews, then, translates into the practice of a different type of medicine, one that broadens and deepens the experience of the doctor and, of course, the experience of the patient. This journal is the AECOM shul's contribution to that goal.

I want to thank all those who contributed articles, especially the student contributors. Yours are broad lives in which you have begun to fulfill the ideal set out by the Rav. *Cheilchem l'Oraisa!* We owe a tremendous debt of gratitude to the editors—Yonatan Wiesen, Judah Goldschmiedt, Raphy Hulkower, Daniel Strauchler, and Josh Kra—for their skilled and diligent work in editing this book. Finally, on a personal note, I thank Yonatan Wiesen for making my dream his own, then guiding and ensuring its transition into reality. Once the seed of this project was planted, Yonatan nurtured and cultivated it, investing many, many hours so that this beautiful volume—this tree, if you will—would grow into the magnificent volume that it has become. May you, the shul, and *K'lal Yisrael* continue to see it bear fruit.

Rabbis and Faculty

Preservation of Life Pushes Away[1,2] (*Docheh*) Shabbos

Clarifications within the General Discussion, and in the Opinion of Rambam

Yaakov Neuburger

I.

A. Yoma 85a

> R. Yishmael, R. Akiba, and R. Elazar b. Azaryah were once traveling on the road. . . . this question arose in front of them: From where do we know that preservation of life trumps the Shabbos? R. Yishmael responded and said, [From the following verse:] "if the thief shall be found in concealment"—and if this person [is one] about whom it is uncertain as to whether he came for monetary reasons or for homicidal purposes. . . . R. Shimon b. Menasya said, [From the verse] "And the children of Israel shall keep the Shabbos" (Shemos 31); the Torah said "desecrate one Shabbos for him in order that he be capable of observing many *Shabbosos*." R. Yehudah said in the name of

[1] Translated by Yehuda Salamon. *Translator's note:* This article was translated with the permission of Rabbi Neuburger from Beit Yitzchak. The translation was not reviewed by the author prior to publication.

[2] The Hebrew word *docheh*, used throughout the text, has different connotations and nuances. Depending on context, it has been rendered as "trumps," "casts aside," "pushes away," "suppresses," or "supersedes."

Rabbi Neuberger is a rosh yeshiva at the Yeshiva Program/Mazer School of Talmudic Studies at Rabbi Isaac Elchanan Theological Seminary, and is also the spiritual leader of Congregation Beit Avraham in Bergenfield, NJ. From 1986-1990, he was the Rav at the Yeshiva University's Albert Einstein College of Medicine and the Jack D. Weiler Hospital.

> Shmuel, If I had been there, I would have said that [my source] is better than theirs: "And live by them" (Vayikra 18)—and do not die by them. Rava said that all of them [these sources] have refutations, except for that of Shmuel, which cannot be refuted. . . . And [based on] all of them, we find [them to be the sources for] the case of certain death, but in a case of uncertainty, [still] how do we know it [that preservation of life trumps Shabbos]? That of Shmuel lacks a disproof.

The general assumption is that the exegetical interpretation of Shmuel ("And live by them—and do not die by them") has been conclusively accepted, as evidenced by the fact that we learn the rule that Shabbos is to be violated even in cases of possible danger from Shmuel's interpretation exclusively, and not from the other sources suggested in the above-mentioned discussion. That assumption, however, can be challenged as follows: according to R. Shimon b. Menasya, whose source for the law is "desecrate one Shabbos so that he observe many *Shabbosos*," one could conclude that only in cases of "certainty," i.e., where it is clear that the ill patient will definitely live to observe other *Shabbosos*, will we allow the violation of Shabbos (cf. Rashi there). As such, in cases of "doubt," i.e., when it is unclear if the patient will survive until the next Shabbos, one would not be allowed to violate Shabbos on his or her behalf. Presumably this logical extrapolation prevents the allowance of Shabbos violation in cases of "doubt" to be learned from R. Shimon b. Menasya. However, this logic can similarly be implemented within Shmuel's opinion as well. When the Torah states "and live by them," perhaps the implication is that the fulfillment of the commandments should pose no *certain* danger. However, if observance of a commandment will only *potentially* cause harm, one cannot implement "and live by them" to excuse oneself from observance.

I would like to suggest the following explanation for why the Talmud elects for the former interpretation within Shmuel. Chazal based their extrapolation on the change of language in the verse

(Vayikra 18:5), "And you shall guard My statutes, and My laws that a person shall do them, and live by them, I am God." In that verse the verbs change from the future tense ("and you shall guard," "he shall do") to a stronger, declarative form of "and live!" This grammatical shift implies that we are obligated to "preserve life" when performing the commandments. Therefore, a commandment cannot be fulfilled if it comes at the cost of even a potentially life-threatening situation. This inference is implicit in Rashi's comments in D'H 'That of Shmuel': "that a person shall execute the commandments [so] that he should definitely live by them, and not that he should come through that performance to potentially deadly circumstances." The declarative charge is therefore meant to mandate the violation of Shabbos in cases of possible danger.

B. We further need to frame our study in light of the discussion in Tractate Sanhedrin 74a:

> R. Yochanan said in the name of R. Shimon b. Yehotzadak, "They voted and concluded in the attic of the house of Nitza in Lod, that all transgressions in the Torah, if we were to say to a person 'Transgress and you will not be killed,' that he should do so, but not in the cases of idolatry, immoral acts, and murder." . . . But the *baraisa* states in the name of R. Yishmael, "From where do we know that if they said to a person 'Serve this false deity and you will not be killed,' that he should serve the idol and not be killed? The verse states 'and live by them'—and he should not die by them."

Interestingly, R. Yishmael does not utilize the phrase "and live by them" in the previous source in Yoma, while he implements it here to learn that one should violate any sin to save one's life. Perhaps, then, the discussion in Yoma, which deals with the source for the law that "preservation of life trumps Shabbos," expands the suppression of *mitzvos* in the face of human endangerment, over the allowance of the Talmud here in Sanhedrin.

A number of issues emerge which require clarification. First of all, we must elaborate the manner in which the Talmud in Yoma extends the suppression of commandments in the face of endangerment. We further need to understand why R. Yishmael utilizes "and live by them" in Sanhedrin (thereby allowing one to violate sins under the threat of death), yet searches for another interpretive source for the law that Shabbos is superseded by preservation of life in Yoma. Finally, we must clarify why Shmuel, an *amora*, relied on the source of "live by them," in spite of the omission of this source among earlier *tannaim* (cf. Rashash in Yoma).

The Mabit, in *Kiryat Sefer*, at the beginning of the second chapter of Laws of Shabbos, explains that the passage in Sanhedrin teaches that a person who is directly in danger, i.e., a situation of certain danger, is allowed to save himself by violating *mitzvos*. The Talmud in Yoma, however, is clarifying the source that possible danger, as well, can push off the laws of Shabbos, and that *all* are required to save another in peril, even if it involves violating specific *mitzvos*. (Cf. Tosafot Yom Ha-Kipurim, where he attempts to argue with this idea; further see *Tzitz Eliezer*, vol. 8, 15:1.)

C. Our explanation can be supported by a statement made in the commentary of the Ba'alei Ha-Tosafot on the Torah (*Moshav Zekeinim*, Vayikra 18:5):

> They said [in the name of] the gaon Ibn Hofni, "From where did our Rabbis learn such a grave thing as to be lenient in the commandments, upon whose performance the whole worlds depends? Perforce Moshe Rabeinu must have *received this explicitly*—for in his own life, they (*B'nei Yisrael*) obviated the grave commandment of circumcision, whose neglect incurs divine excision, in the desert. Moshe was there with them, and they did not perform it for this very reason: 'that a person should do them, and live by them'—but not die by them. For if they had circumcised their children, they would have died for

the very reason stated in Sefer Yehoshua (5:7), "because they had not circumcised them on the way."

Performing a circumcision in the desert was only potentially a life-threatening danger, as seen from the fact that the Levi'im circumcised themselves in the desert (*Sifrei Be-Ha'alotecha* 20, as quoted in Rashi, Devarim 33:9; see Malbim on Yehoshua 5:4). If this is indeed true, then the Jewish people must have had a tradition to interpret the verse "and live by them" as meaning "and not to die by them," as explained above, and therefore even a case of possible danger is justification for deferring the obligation of *mitzvos*.

D. Based on the Mabit and the *Moshav Zekenim*, it is possible to reconcile the discussion in Sanhedrin with the one in Yoma. The simple interpretation of "and you shall live by them" that the Jews in the desert received was that one must not bring *oneself* into a potentially life-threatening situation through the performance of a mitzvah. This idea is articulated by R. Yishmael in Sanhedrin, who believes that the phrase "to live by them" obligates an individual to actively transgress a law in order to avoid placing himself in a dangerous situation. However, he did not extend this law to allow *others* to actively violate a mitzvah to save another from death.

Shmuel then explained his interpretation, based on the declarative verb usage in the verse (as noted by the *Kiryat Sefer*), that every person has the responsibility to transgress his or her own commandment in order that other individuals can continue to "live through them," i.e., via observance of the commandments, and thus, even in situations of potential danger to others, one can violate commandments.

II.

A. In analyzing the decisions of the Rambam, it appears that he has a different understanding on the matter. The supercommentaries on the Rambam debate whether the Rambam holds that the obser-

vance of Shabbos is merely suppressed (*dechuyah*) when a life is at stake, or whether violating Shabbos observance is entirely permitted (*hutrah)*.

On the one hand, at the beginning of chapter 2 of Laws of Shabbos, the Rambam writes: "Shabbos is *suppressed* in the face of the endangerment of life, like all other *mitzvos*." It is clear that the Rambam was precise in his wording, as evidenced by his formulation in another situation where Shabbos observance is pushed aside. In Laws of Approaching the Temple 4:39, the Rambam writes:

> And any time-specific sacrifice, whether of public or private [interests], suppresses Shabbos and ritual impurity . . . (14) If the entire weekly priestly serving body is ritually impure due to contact with a corpse, another weekly group should come . . . (15) And why is it that we pursue the purity of another serving body? Because the impurity was not entirely removed in the public venue; rather, it stands in its impermissible state, and only now is it pushed aside due to extenuating circumstances. And we only push away something which should be pushed away where it is impossible. Because of this, the High Priest's forehead plate is necessary to atone for such behavior.

Based on this second ruling, one can argue that the Rambam had a similar understanding in the Laws of Shabbos: prohibited labor performed on Shabbos remains in a forbidden state in theory, however it is pushed aside in cases of mortal danger. This is the approach found in the *Kesef Mishneh*. On the other hand, the Rambam continues in Laws of Shabbos (2:32):

> The general rule of the matter is that Shabbos, in the case of a dangerously ill patient, is like a weekday for anything that is necessary in treating them. (33) When these actions are performed, they should not be done by a gentile, minor, servant, or woman, so that Shabbos should not become light in their eyes, only through the greatest of Jews and their scholars . . .

Now it would appear that the Rambam intends to qualify his language at the beginning of Laws of Shabbos. Here he is explaining that Shabbos observance is not merely suppressed but is completely permitted in cases of mortal danger. This is the approach held by the Rema (Responsum 76) and Avnei Nezer (Orach Chaim 455:5).

Regardless of which approach one uses to explain the Rambam (i.e., *hutrah* or *dechuyah*), his language still poses a dilemma, for he uses two different terms in the two different passages that explicitly contradict one another!

B. There are other problematic statements in the Rambam that also need to be addressed. The Rambam writes in Laws of Shabbos (1:33):

> It is forbidden to delay in the desecration of Shabbos for the sake of a dangerously ill patient, as it says "that a person should do them, and live by them"—and not die by them. You see that the laws of the Torah are not vengeful, but rather provide compassion, kindness, and peace to the world . . .

Why did the Rambam wait until paragraph 33 to divulge the source of the law explicated in paragraph 1? He should have written that Shabbos is pushed away in situations of danger just like other *mitzvos*, as it says "that a person should do, etc.," as he did at the beginning of chapter 5 in Fundamentals of the Torah (Yesodei Hatorah)!

Furthermore, why did the Rambam feel the need to expand upon the source of the law and add his continuation, "You see that the laws, etc."? Why does this statement belong in the middle of the paragraph?

C. In order to better understand the Rambam in our chapter, it is necessary to examine his language in Laws of the Fundamentals of the Torah, chapter 5. At the beginning of that chapter, in his discussion of the commandment to sanctify the name of God, Rambam writes:

> When an idolater rises and coerces a Jew to transgress any one of the commandments spoken in the Torah on pain of death, he should violate that commandment and not die, as it is said by the commandments, "that a person should perform them and live by them"— and live by them, and not die by them . . .

In the sixth paragraph, the Rambam adds:

> . . . just as they [the sages] said in cases of external coercion [that the commandment should be violated], so too they said of sickness . . . and therefore we provide medical treatment using any of the prohibitions of the Torah in the case of danger . . .

From the language of the Rambam, we see that he is presenting a novel idea—that the law that one may violate any Torah prohibition for medical treatment is an additional aspect of "and live by them," the same source which taught us that we are not required to sacrifice our lives in order to observe the commandments. Therefore, the Rambam codifies the commandment of "and live by them" by the discussion of coercion, and repeats it in the context of diseases and similar conditions. The Rambam understands that pushing away a mitzvah for the sake of healing—whose basis is found in Pesachim 25a and in our discussion in Yoma 84a—is an expansion of the law that one may violate commandments when under coercion, as well as an enhancement of the imperative "and live by them." By coercion, the observance of the mitzvah would lead to the death of the one who performs it—and, as such, one is not obligated in its fulfillment. However, by a medical emergency, where the survival of the ill person is brought about directly through the violation of a commandment, the Rambam expands the allowance further and explains that it is "like a weekday." In such a case, rigid observance of the mitzvah is an impediment to the individual's survival.

In light of this distinction between mitzvah observance being the *cause* of death and being an *impediment* to survival, it is possible to reconcile the discussions of Yoma and Sanhedrin, and to explain

their similarities, as well as their disparities. In Sanhedrin, the topic under discussion is the law of coercion, and we learn that the mitzvah of " 'and live by them'— and do not die by them" means that a person cannot cause his own death through an attempt to uphold the *mitzvos*. In Yoma, however, the Gemara is deciding the parameters of the rule that "preservation of life trumps Shabbos." When the act of survival will violate the commandment to observe Shabbos, how do we know that this desecration is sanctioned? As we explained based on the commentary of the *Moshav Zekenim* (Vayikra 18:5), the sages had a tradition from the generation of the desert, an entire generation who did not circumcise their children for fear of life-endangerment. That generation's actions taught the sages the concept of "and live by them." R. Yishmael, in citing this tradition in Sanhedrin, understands that one does not have to uphold a mitzvah whose performance will cause one to die or put one's life in danger. However, the tradition did not clearly mandate that one can actively violate a mitzvah in order to save lives or heal. Shmuel, in Yoma, expands the meaning of the interpretive tradition to include the mitzvah of saving an ill patient from his or her disease, even through the violation of a mitzvah.

D. In Laws of Shabbos 2:3, the Rambam writes: "And it is forbidden to pause in the desecration of Shabbos in the case of a dangerously ill person, as it says, 'that a person should perform them, and live by them'—and he should not die by them." The language of the Rambam indicates that there is a special prohibition against delaying in saving a life due to observance of Shabbos. This prohibition is also learned from the mitzvah of "and live by them." Therefore, one who delays life-saving activity for any reason may transgress the mitzvah of "do not stand near the blood of your friend." Furthermore, even if the mitzvah of Shabbos exonerates a person from this indirect manslaughter, it would not undo the mitzvah of "and live by them." Thus, a person who pauses in saving a life because he or she is searching out ways to avoid desecration of Shabbos may be violating two commandments according to the Rambam.

E. In light of this, the seemingly superfluous language of the Rambam in Law of Shabbos 1:33 is now clearer. "You see that the laws of the Torah are not vengeful, but rather provide compassion, kindness, and peace to the world." These words are not merely a homiletical tangent placed in the discussion of the laws of the preservation of life. Rather they are the guidelines of the mitzvah "and live by them" as laid out by the Rambam in paragraph 3. Through that mitzvah, the mercy and kindness of the Torah can be perceived. In contrast, one who pauses during the attempt to save life in order to keep a commandment of God, denigrates the Torah, for it is as though the laws of the Torah are being advertised as a system which devalues life.

The Rambam understood all of this from the emphasis that the Gemara placed on the opinion of Shmuel in that even uncertain cases of danger cast aside the laws of Shabbos. If even uncertain cases of danger can push off Shabbos observance, then certainly one is prohibited to delay in violating Shabbos observance, as this delay may add to the level of potential danger.

F. Furthermore, now it is also possible to explain why the Rambam varies his wording when describing how Shabbos observance may be violated in order to save a life. In the Rambam's introduction of Laws of Shabbos, chapter 2, he writes that "Shabbos is cast aside next to life-endangerment just like all other *mitzvos*." In paragraph 2 of Laws of Shabbos, he changes his description to state "the general rule is that Shabbos, with regard to a dangerously ill person, is like a weekday for any necessary matters." Why does he change his description? The answer is based on the Rambam's distinction between mere suppression (*dechuyah*) and complete permission (*hutrah*) of Torah violations, as learned from Laws of Approaching the Temple. If the former term applies, and the *mitzvos* are merely suppressed, we must still search for venues where it is possible to keep them. That is, we try to keep both of these ideals—the preservation of life and observance of the *mitzvos*. However, if the latter term applies, then our obligation is simply to preserve life unequivocally. As we

have explained within Rambam's undertanding of the obligation to preserve life, since even a potential threat to life pushes away any obligation to perform a mitzvah, it is prohibited to hesitate in order to observe both. In this way, Shabbos is not only suppressed due to the reason of life-endangerment, but it is also like a weekday with regard to life-endangerment. In other words, in reality we do not tarry when it comes to saving lives in an attempt to keep Shabbos, which results in its being treated just like a weekday. However, in instances where one does not cause any loss by taking time, we search out ways to preserve Shabbos and life, as Rambam says in paragraph 11 (according to the *Kesef Mishneh*), "and anything possible to be changed should be done ahead of time. For example, where her friend brings to her [the woman who had given birth] a vessel suspended in her hair; and if it is not possible, she can bring it in its normal way." As such, Rambam used both description regarding Shabbos. One to emphasize its nature of being *hutrah* when life is as stake, and one to emphasize that it is merely *dechuyah* when the situation allows for one to plan out Shabbos-minded options ahead of time.

G. Therefore, the Rambam waited until paragraph 33 to introduce the source of this ruling. He waited until he had illustrated the specifics of the law of the life-endangerment suppressing/overriding Shabbos. Only then did he label the source and explain the parameters of the law at length, since all of the details in the earlier paragraphs helped to define the law.

H. Now it is also clear why the Rambam introduced the chapter with the formulation "Shabbos is suppressed in face of life-endangerment" and deviated from the language of the discussion of the Gemara, "From where do we know that preservation of life pushes away Shabbos?" According to our analysis, and based on his understanding of the mitzvah of "and live by them," it is not that the *mitzvah of saving life* exclusively pushes Shabbos away; rather, it is the *endangerment of life* that pushes away Shabbos, so that *we do*

not enter into a situation where life is endangered because of a commandment![3] Saving a life would merely suppress Shabbos observance and we would still be required or allowed to delay in order to try to avoid its violation. The endangerment of life is what actually pushes away and completely permits Shabbos violation.

[3] Translator: Only 'endangerment of life' is bolded by the author. The other bolding and emphasis is mine.

The Study of Medicine by *Kohanim*

Edward R. Burns

There is a strong and well-known tradition that a *kohen*, a priestly descendant of the Biblical tribe of Levi, is not permitted to study medicine. While the reasons behind this prohibition clearly stem from concerns of ritual defilement, the blanket proscription is a relatively new phenomenon. Many illustrious rabbinic scholars through the ages were both *kohanim* and physicians. The Talmud relates that both Rav Yishmael and Samuel along with Rav Chanina ben Dosa filled the dual position of being great scholars and physicians despite being priests. It was only from the eighteenth century onward, when the study of human anatomy on deceased corpses became an integral part of a physician's education, that the issue of *kohanim* studying medicine became problematic. This review will summarize the main points of the leading English-language articles written by acknowledged experts in the field of Jewish medical ethics on this subject. The reader is urged to explore the bibliography of sources provided to gain a more profound historical appreciation of the numerous minority opinions on the topic that are not quoted here, due to their non-acceptance by the predominant rabbinic authorities of the modern age.

BASIS OF THE PROHIBITION

The Torah in Vayikra (21:1) forbids the sons of Aaron to defile themselves by contact with a human corpse either by direct touch or by being under the same roof, known as *tumas ohel*:

> And the Lord said to Moses: Speak to the priests the sons of Aaron, and say to them: There shall none defile himself for the

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> dead among his people; except for his kin that is near to him, for his mother and for his father, and for his son, and for his daughter . . .

There is thus a Biblical prohibition against a *kohen* touching or being in the same room as a Jewish corpse except for the above-mentioned close relatives, as well as a wife, brother, and sister. Numerous Talmudic and post-Talmudic discussions have dealt with the defiling nature of a Jewish versus a non-Jewish corpse. The prevailing opinion is that a Jewish corpse can defile both by touch and *tumas ohel*, whereas a gentile corpse only defiles by touch but not by being in the same room. There is, however, considerable disagreement on this last point, with a number of authorities opining that even gentile corpses defile by *tumas ohel* similar to Jewish corpses.

Given that the study of gross anatomy, defined as the dissection of a human cadaver by a medical student, is a major requirement of virtually every medical school in the United States, it is clear that an observant *kohen* cannot undertake the study of medicine if active dissection is required.

One question that remains open is whether a *kohen* may be permitted to study medicine if given special permission to fulfill his anatomy requirement by observing, but not participating in, the dissection. According to the opinion that gentile corpses do not cause impurity simply by being under the same roof or, more specifically, room ceiling, it is conceivable that there is room for a permissive approach.

Based on known data, one can be confident that the overwhelming majority of cadavers made available for medical student dissection are not of Jewish origin. Using the legal concept of *rov*, or majority rule, there is ample allowance to consider every cadaver as being non-Jewish. Thus, there would be no intrinsic objection to a *kohen'*s standing in an anatomy lab and observing a dissection, provided he does not actually touch the cadaver. He could, for example, use a laser pointer to specifically designate anatomic structures for

learning or exam purposes. This allowance would only be countenanced by those who hold the opinion that gentile corpses do not defile by being in the same room. There is a strong minority view, however, that gentile corpses defile priests in an identical manner to Jewish corpses. It should be noted that the use of the masculine pronoun when referring to a *kohen* is intentional, as women who are the daughters of a *kohen* are totally permitted to study medicine.

The practical defect in the reasoning of the preceding paragraph is the great unlikelihood that any medical school would grant an exemption from the dissection requirement. Physical participation in the dissection of a corpse is widely considered one of the most important aspects of medical training that sensitizes future physicians to respect their patients, and is therefore unlikely to be dispensed with. Indeed, the introduction of computerized virtual 3-D anatomy to replace conventional dissections has not occurred because of the perceived importance of this rite of passage. Should such an exemption be given, or were computerized substitutes for dissection introduced, then a reexamination of the prohibition would be in order.

There have been rabbis who have ruled that *kohanim* who are very desirous of studying medicine should be allowed to study anatomy because of their future ability to save lives, but these rabbis are not considered by rabbinic scholars to be authorities on this matter. Indeed, Rabbi Moshe Feinstein, arguably the twentieth century's leading Orthodox Jewish legal scholar, strongly objected to this line of reasoning, stating that one is only obligated to heal and save lives if one is already a practicing physician. He states:

> It is prohibited for priests to study medicine in medical schools in countries where it is necessary to have contact with corpses. One should not point to some of our ancient sages who were both priests and physicians and were able to learn all of medical science by oral teaching without any observations on or physical contact with corpses. In our times, this is impossible and therefore is prohibited.

One semi-permissive opinion is that of the Chatam Sofer, who argued that a *kohen* is able to study medicine if he can do so without becoming ritually defiled, even if in the future, as a practicing physician, he may have to set aside the sanctity of the priesthood in life-saving situations. The relevance of this opinion, however, is minimized by the unlikelihood of finding a medical school in the United States that would permit a medical student to be excused from the anatomy dissection requirement.

In summary, then, it is prohibited for a *kohen* to participate in the dissection of cadavers. If a *kohen* is given an ironclad written exemption from this requirement as well as the handling of other human tissues, such as bones and human histology and pathology specimens and slides, then it may be permitted for him to attend medical school, providing he can pass all exams in gross and microscopic anatomy without actively participating in these activities.

KOHANIM IN THE HOSPITAL

Another problem with a *kohen*'s studying medicine is the high probability that he will encounter a deceased Jewish body during his clinical training, when, as a student, he is incapable of functioning as a fully trained physician licensed to provide life-saving care. If a *kohen* is already a physician, then the injunctions against defilement do not apply in situations where life-threatening disease is present, since a *kohen* is allowed to defile himself "to save a life." That permissive ruling does not, however, extend to the study of medicine, but only to the practice of medicine. The argument that today's study will permit a *kohen* to save lives in the future is non-operative inasmuch as the permissive principle of practice only applies if the patient with life-threatening illness is immediately at hand.

Once a priest has become a physician, the question arises as to whether he is permitted to practice medicine, to treat terminally ill patients, and to visit and treat non–terminally ill patients in a hospital where corpses are frequently present. Many authorities allow these visits, but some are more restrictive and permit them only when

there are no other physicians present. Most authorities do, however, permit a *kohen* to treat terminally ill patients. According to Rabbi Feinstein, the problems of defilement by corpses in a hospital are mitigated for practicing physicians (as opposed to students) by the physical structure of hospitals, where each patient room and treatment area is considered to be a separate compartment. Therefore, a *kohen* passing by in a corridor or who is in another room is not considered to be in the same room as the corpse.

CONCLUSIONS

The overwhelming majority of authoritative rabbinic scholars prohibit the study of medicine by a *kohen* in any school where the dissection of human corpses is required. If a student is given permission to learn anatomy by observation of dissection without participation there is room for leniency, although the problem of encountering corpses in the hospital for an as yet unlicensed medical student remains.

Medical schools in the United States remain heavily committed to the teaching of gross anatomy because of the strong feeling that dissection provides a multidimensional understanding of the human body, highlights anatomical variability, fosters learning in a peer group as part of a team, and incomparably introduces medical students to the comprehension of death and humanistic care. Non-participation in dissection is either not permitted or severely frowned upon because of the strong belief that the study of anatomy involves far more than learning the names of the body's parts and that dissection provides a multidimensional understanding and unique appreciation of the human body. The use of plastic models and computerized technologies is still considered an adjunct to the teaching process.

If a *kohen* chooses to ignore the stated prohibitions and studies anatomy nevertheless, he is permitted to practice medicine once he achieves his medical degree and license.

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Verapo Yerape: Diverse Approaches to the License to Heal

Howard Apfel and Avi Apfel

> Everything is divinely determined and every human being has individual Divine Providence. However, it is God's will that physicians serve as his agents to heal the sick. Therefore, God grants humans the intellectual ability to diagnose illnesses, to prescribe treatments, and to cure sicknesses and wounds.[1]

Essays regarding the role of the physician within the Jewish tradition often begin with introductory remarks similar to those quoted above. Surprisingly, most authors of such statements seem to expect no more than a superficial review, for they rarely offer further elaboration of the underlying message. Honest appraisal of their deeper meaning, however, can leave one fairly perplexed. While the opening assertion contends that the prognosis for all health-related concerns is divinely preordained, the statements that follow suggest that physicians nevertheless can (and therefore presumably should) contribute tangibly to the inevitable outcome.

[1] Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics*, trans. Fred Rosner (Jerusalem: Feldheim, 2003), p. 636.

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In truth, the rationale for such an ostensibly pointless arrangement seems to defy cogent explanation.[2] If every outcome was truly predetermined, of what practical use is the physician healer? With no conceivable material consequence to his involvement, are not his diagnoses meaningless and his treatments perfunctory? In fact, from the perspective of this rudimentary analysis, exclusive focus on heartfelt prayer would seem to be a far more sensible approach for the afflicted than wasting valuable time and energy diligently searching for the best doctor.

In reality, however, sensible members of our modern, progressive Jewish society do not manage their health matters with that particular mindset. The notion that they might rely on some miraculous alternative that would obviate the need for personal effort seems not only foolish, but categorically unsafe. Instead, like everyone else, we routinely take for granted the inevitability of attending to our own particular medical concerns. There is no doubt that even a very pious and observant Jew will seek out optimal professional medical assistance whenever faced with a serious medical challenge.

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[2] Of course this conundrum may be just another manifestation of the proverbial and unsolvable contradiction between divine foreknowledge and human free will in general. An omniscient all-knowing God unquestionably "knows" all outcomes, yet somehow, human actions are nevertheless considered meaningful. Rambam, Hilchot Teshuva 5:5. See also the well-known comments of the Raavad, who takes the Rambam to task for raising this unsolvable problem. Although there are no claims to a definitive response to this issue, there have been attempts to offer possibilities for improved understanding. For example, Rav Avigdor Neventzal, in his commentary on *Parshat Chaye Sarah*, suggested that while ultimate outcomes may be predetermined by God, the means of achieving those ends *are* in the hands of men. Specifically, our spiritual decision-making, whether in the form of negative decisions (*aveirot* or sins) or positive ones (*mitzvot*) will determine by what route a set given outcome comes about. As an example, Rav Neventzal offered Pharaoh's decision to not let the Jewish people out of Egypt. It was predetermined at that point in history, in that particular location, that a great sanctification of God's name would take place. Pharaoh had the option of allowing it to come about through his acquiescence and thus be counted amongst the *chasidei umot haolam* (righteous gentiles). Instead, because of his refusal, Pharaoh is remembered as a villain, and he and his people suffered greatly. Either way the predetermined great *kidush Hashem* still took place.

Most importantly, the basis for this "real-life" observation is not just the nervous reaction of frightened, overly health conscious individuals. Rather, the pragmatic approach described, accurately reflects the overwhelming historical and contemporary rabbinic attitude toward the issue.[3] Thus, the well-advertised Jewish rejection of a fatalistic response to human sickness can be properly described as "traditional."[4] It has been thoroughly documented and shown to be generationally consistent, supported by numerous affirming statements going back to the times of the Gemara,[5] the *rishonim,*[6] and the *achronim*.[7]

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[3] Of course there have been throughout Jewish history isolated cases of exceptions to this rule. Most are familiar with the Ramban's commentary on Vayikra 26:11, where he describes the ideal of forgoing man-made cures for divine intervention. This, however, is generally explained as a description of unique spiritual times, perhaps *yemot ha'mashiach*, when the Jewish people are at a very high spiritual level deserving of such direct divine intervention. Other rare examples of this attitude are Ibn Ezra's and Rabbeinu Bachya's (Shmos 21:19) comments on limiting the license to heal to man-made maladies alone. Finally, the father of the Avnei Nezer (Choshen Mishpat, no. 193) was noted by his son to have given halachic permission to an individual in his time who wished to forgo standard medical care and rely on prayer alone.

[4] This very reasonable approach is often underscored by contrasting it with a more radical submissive stance espoused by other, presumably less enlightened religious groups. See Immanuel Jakobovits, *Jewish Medical Ethics* (New York: Bloch, 1975), pp. 1–3. Thus, it has been often pointed out that the pious amongst the Karaites and certain large sects of early Christians viewed standard medical interventions as "an attempt to deify earthly things." Any similar sentiments noted in the Tanach or its commentaries are explained away as outliers or exceptional circumstances, certainly not representative of the mainstream Jewish view.

[5] See, for example, Taanis 22b, Bava Kama 85a, Mishna Nedarim 4:4, and Bava Metzia 107b.

[6] See, for example, Rashba in *Sefer Issur Va'Heter*, chap. 60, secs. 8-9, and Responsa, sec.1, no. 413. See also among related many comments of the Rambam, *Perush Ha'Mishna* to Nedarim 4:4 and Pesachim 4:10, as well as *Shemoneh Perakim*, chap. 5. See also Ramban in *Toras Ha'Adam*, perek Ha'Chovel.

[7] For example, R. Nissim Ashkenazi in *Sefer Ma'aseh Avraham*, Yoreh De'ah, no. 55; Rav Eliezer Waldenberg in *Responsa Tzitz Eliezer*, pt. 15, sec. 38; *Birkei Yosef*, Yoreh De'ah 336:2–3; Rav Ovadia Yosef, *Yechavei Da'at* 1:61; *Sefer Shevet Yehudah*, no. 336; and *Sefer Kreiti u'Pleiti* 188:5 among many others.

Aside from the obvious consistency of this view throughout the ages, most of the writings on this issue also convey a refreshing sense of Jewish unity regarding it, across the hashkafic spectrum as well. Thus, even those typically identified as religiously zealous or *chareidi* (if not overtly anti-secular) in their general posture fully accept the legitimacy of human efforts to fight disease. Practically speaking, so-called right-leaning rabbinic figures such as the Chida[8] or Chazon Ish[9] were just as likely to insist that a patient seek medical attention when appropriate as were Rav Samson Raphael Hirsch[10] or Rav Yosef Dov Soloveitchik.[11]

VERAPO YERAPE

Unquestionably, the starting point for all subsequent discussion regarding the propriety and utility of human healing is the well-known derivation from *verapo yerape* (Exodus 21:19) by *Tanna debai Rebbe Yishmael* (Bava Kama 85a): *mikan shenitna reshut larofeh lerafot* ("from here the physician was given license to heal"). This serves as an unambiguous declaration that, at least from a practical perspective, the practice of medicine is divinely sanctioned. At most, the need for Biblical backing admits to an underlying concern (a *havah aminah*) for a potential philosophical difficulty instigated by man's trespassing on divine territory. The conclusion however, is clear; the Torah explicitly granted us permission to do whatever we can to fight both internal and external disease. Moreover, the halacha actually takes the divine consent one step further. In accordance with the comments of several *rishonim*,[12] the *Shulchan Aruch* upgraded the status of this *heter* (sanctioning) to that of a *mitzvah hiyuvit* (religious obligation).[13] Chief Rabbi Immanuel Jacobovits,

[8] *Birkei Yosef*, Yoreh De'ah 336:2–3.
[9] *Emunah U'Bitachon* 1:6 and *Kovetz Iggerot* 136.
[10] See *Collected Writings*, vol.2, p. 449, as an example.
[11] See, for example, the quotation from *The Lonely Man of Faith* below in text.
[12] In particular based on the Ramban in *Toras Ha'Adam* cited earlier.
[13] Yoreh De'ah 336:1.

in his classic work *Jewish Medical Ethics*, summed up his discussion of this issue as follows:

> These laws indicate unmistakably that while encouragement was given for the sick to exploit their adversity for moral and religious ends and to strengthen their faith in recovery by prayer, confidence in the healing powers of God was never allowed to usurp the essential functions of the physician and of medical science.[14]

RETHINKING *VERAPO YERAPE*

As noted, our discussion of the physician's license to heal to this point has been fairly typical. It is, however, also far from complete, and in that sense, misleading. Ironically, the primary weakness of the classic depiction of the license to heal is in the very aspect that appeared at first to be its greatest strength. By giving the false impression that there is a solitary, unified rabbinic understanding of the *reshut*, *shenitna larofeh lerafot*, one is denied access to *verapo yerape*'s most profound underlying implications.

This deficiency is best brought to light by returning to our opening dilemma and allowing (or forcing) ourselves to contend with its philosophically difficult implications. How do those who promote the absolute indispensability of human medical intervention reconcile this with a generally acknowledged belief in divinely controlled, predetermined healing? Or, in other words, (partially borrowed from the summary remarks of Rabbi Jacobovits above) in light of divine determination of outcome, what exactly *are* "the essential functions of the physician"? In what sense have they *not* been "usurped by confidence in the healing powers of God"? As was already implied above, the answers to these questions will, in truth, depend on to whom you address them.

To be precise, the deeper message and actual utility of *verapo*

[14] Jacobovits, *Jewish Medical Ethics*, p. 22.

yerape has been expressed in two very diverse ways. On the one hand, the words *reshut le'rafot* have been translated by some in a very literal manner, deriving from them no more than what they actually seem to say; man is granted "permission to heal" and absolutely nothing more. In contrast, others have interpreted the significance of *ve'rapo yerape* in a way that goes well beyond a simple literal translation. Rather than merely granting permission to heal, *reshut le'rafot* was expanded to express an enthusiastic endorsement of involvement in a great and honorable occupation. Predictably, while the latter proudly publicized the matter in laudatory if not promotional terms, the former tended to disclose it only reluctantly, in an almost apologetic tone.

Proponents of the latter, optimistic view will often attest to its religious authenticity by pointing out the considerable number of great rabbinic figures throughout Jewish history known to have practiced medicine with great skill and enthusiasm.[15] Perhaps Rav Soloveitchik offered the most explicit illustration of this approach in a footnote to his famous essay *The Lonely Man of Faith*. After introducing the reader to the wonderful world of majesty (the attainment of dignity and triumph over our environment) for which man intuitively strives, the Rav described its endorsement by the halacha as follows:

> The unqualified acceptance of the world of majesty by the Halacha expresses itself in its natural and inevitable involvement in every sector of human majestic endeavor. . . . This acceptance, easily proven in regard to the total majestic gesture, is most pronounced in the Halacha's relationship to scientific medicine and the art of healing. The latter has always been considered by the Halacha as a great and noble occupation. . . . God wants man to fight evil bravely and to mobilize all intel-

[15] Obviously the Rambam is the most well known, but Ramban was also an active physician. See, for example, *Shu't Rashba* 1:167 describing some of the Ramban's medical activities.

> lectual and technological ingenuity in order to defeat it. The conquest of disease is the sacred duty of the man of majesty and he must not shirk it.[16]

The Rav's oft-reiterated message here is fairly well known. Man must actively confront all the challenges of life, not out of a desperate need for self-preservation, but rather as a divinely sanctioned opportunity to achieve personal greatness. Apparently, nowhere is this prospect more obvious then in the Torah's encouraging the physician to perfect his skills and implement his talents in the battle against disease. The ultimate success of the therapeutic endeavor is a manifestation of a very special medical partnership between man and God. Without a doubt, according to this view, man's material efforts are tangible in the truest sense of the word and, even more to the point, indispensable to a positive outcome.

> Man must first use his own skill and try to help himself as much as possible. Then, and only then, man may find repose and quietude in God and be confident that his effort and action will be crowned with success. The initiative, says the Halacha, belongs to man; the successful realization, to God.[17]

In contrast, the literalist camp understood the permission granted by *verapo yerape* as a constrained *bedieved* (after the fact) consent designed to allow therapeutic intervention only when absolutely necessary. All things being equal, disease was to be cured solely by the One who brought it in the first place. To some degree, the license to heal could be understood in a vein similar to the general dispensation to override other prohibitions when human life is in danger based on *vechai bahem* ("and you shall live by them") (Yoma 85a). It was an authorization that was granted begrudgingly,

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[16] Rav Yosef Soloveitchik, *Lonely Man of Faith*, pp. 52–53.
[17] Ibid.

out of a seemingly desperate necessity to save human life.

Furthermore, we are cautioned by this approach against being misled by what appears on the surface to be a physician's triumph or achievement. Any outwardly admirable human medical accomplishments are, in actuality, no more than an illusion. In truth God has never relinquished His role as the sole practitioner in curing disease. Genuine *emunah ve'bitachon* (belief and trust) always did and still really does demand that we seek out restoration of health through prayer alone. Physician assistance is, for unclear reasons (yet undoubtedly somehow related to deficient human merit), an obligatory formality, an unfortunate distortion of what was meant to be. It is no exaggeration to characterize the license to heal for this group and the requirement for human involvement altogether, as a regrettable deviation from the ideal fully spiritual life originally intended for mankind in general, and for the Jewish people in particular.

In a letter (later printed in the Torah journal *Zichron Yaakov* in 5739) the Chazon Ish described medical efforts as follows:

> Just as in an acquisition of money or wealth, human attempts to acquire are no more than the fulfillment of an obligation, and heaven forbid we think "by my strength and my awesome hand, etc." So too human effort to save lives is also *just* a mitzvah, and we must remember that we do not possess the power to do anything. Rather, with our therapeutic efforts we are merely awakening the gates of mercy that our actions fulfill that which is requested, and one who prays and laments over the saving accomplishes *more* than one who actually is involved in the effort.

Reading this excerpt, one is immediately struck by the expression "just a mitzvah." The word "just" generally connotes something of minimal value. Is a mitzvah ever a trivial matter? Rather, "just" here must imply: as opposed to something more. What has greater value than a mitzvah? Obviously, the Chazon Ish was attempting to nullify what he considered a prevalent misconception about the

function and effectiveness of therapeutic interventions attempted by man. Evidently, he felt the need to emphasize that the actions of even a highly trained physician do not necessarily have any direct concrete effect of their own. The physician may think he is doing substantially more, but in reality he is at most demonstrating concern or sincerity of effort, in a sophisticated, albeit inferior, form of prayer. Our natural tendency to marvel at the intricacy of open-heart surgery or the achievements of a gifted surgeon is, in truth, totally misplaced. He has in reality repaired nothing, and he and we must remain ever mindful of that verity. No matter how delicate the procedure, or tenuous the condition of the patient, the operator has simply performed a mitzvah and nothing more.[18]

In a carefully designed analogy, the Chazon Ish compared medical intervention to the acquisition of wealth. Many are familiar with the *gemara* (Beitza 16a) that states that an individual's *parnasa* (income) is predetermined every year at Rosh Hashana irrespective of his efforts. According to this interpretation, the same can be said for the saving of a life in distress. In both contexts the outcome is fully divinely predetermined and our material efforts, practically speaking, are irrelevant yet somehow necessary.[19]

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[18] For ego-driven men, and at times physicians have been known to be considered a somewhat proud group, this perspective is obviously not readily acknowledged. Moreover, to the physician who has dedicated considerable time and effort to learning the art and science of medicine, and has spent countless sleepless nights at bedsides actively fighting disease, the notion that these efforts might be pointless is particularly difficult.

[19] *Kovetz Iggerot* 136. It is worth noting the fact (and we will return to this later) that the Chazon Ish himself appears to question the far-reaching implications of his characterization in the very next sentence. There, he continues as follows: "However, the matter requires *shikul* (weighing, contemplation), since in a situation in which the rescue is clearly dependent upon a human action, [if he does not act] he transgresses the prohibition 'do not stand idly by the blood of your fellow.' " It is interesting that this is not the only place where the Chazon Ish revealed a conciliatory tone in this area. Elsewhere, in a different correspondence with an individual asking about the correctness of seeking medical assistance, he projected an even more open attitude toward medical intervention: "*Uke'she'ani*

Our objective for the remainder of this paper will be to uncover the possible origins of these two very different expressions of the license to heal and better understand the practical repercussions that stem from them. Furthermore, we hope to demonstrate in what regard, and to what degree, the particular viewpoints noted in this context reflect a far broader hashkafic debate that has encompassed many other areas of human activity.

ORIGINS OF THE CONFLICT

The earliest indication of a philosophical tension over medical interventions was introduced in the Talmud (Berachot 60b) by way of a dispute over what benediction should be said when an individual submits himself to a medical procedure.[20]

> R. Acha said: One who goes to have his blood let says: May it be Your will, Hashem, my God, that this therapy should serve me as a remedy, and that You should heal me, for you are God, the faithful Healer, and it is your remedy that is truth. *For it is not the place of people to seek medical treatment, but so have they accustomed themselves*. Abaye said: A person should *not* say this, for a *baraisa* was taught in the academy of R. Yishmael, "And he shall provide for healing"; from here that authority was given to a physician to offer treatment.

What is the essence of the disagreement between R. Acha and Abaye? *Prima-facie* (and consistent with Rashi's comments here) the debate appears to be very closely related to our previous discus-

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le'atzmi (when I am to myself) *hineni choshev et hishtadlut hativiit bameh shenogea labriut* (I consider efforts to preserve health) *le'mitzvah ve'chova* (as a mitzvah and obligation). *ke'achat hachovot le'hashlamat tzurat ha'adam*, *asher hitvia hayotzer B"H be'matvea olamo* (as one of the obligations designed for the completion of man that the Creator instilled into the fabric of His world)."

[20] Bloodletting was an accepted medical practice for both therapeutic and prophylactic purposes.

sion. Perhaps R. Acha and Abaye are simply debating the legitimacy of seeking conventional medical therapy rather than, or in addition to, seeking divine mercy. While R. Acha is making a statement that doing so is wrong, Abaye appears to be pointing out that based on the teaching of the academy of R. Yishmael, it is totally acceptable. Does not that *pashut pshat* (simple rendering) directly parallel the viewpoints of the Chazon Ish and Rav Soloveitchik, respectively? Tempting as this simple explanation may be, it is obviously not correct, since it is quite unlikely that the Chazon Ish rejected Abaye's (generally accepted) position for that of R. Acha. Granted that with some other Tannaitic backing R. Acha could theoretically dissent from the teaching of the academy of R. Yishmael; nevertheless, as emphasized earlier, all subsequent commentators and codes of Jewish law clearly did not. Therefore, it is most likely that the medical intervention dichotomy originates within an understanding of Abaye's view alone.

Nevertheless, the subtleties of Abaye's position might be best appreciated through its contrast to R. Acha's statement, which is where we will begin. What exactly was R. Acha's objection to the patient's seeking medical intervention that warranted a declaration of *viduy* (admission and verbalization of guilt) and repentance in the first place? Two very different explanations are offered by the *rishonim*. On the one hand, many understood R. Acha's final position to simply be that one should not seek any earthly assistance for medical problems, such issues being in God's jurisdiction alone.[21] In line with this, these commentators suggest, we must assume that Abaye also acknowledged that human trespass on divine territory was the underlying tension in the discussion. Thus, according to this overall approach, both R. Acha and Abaye understood that in the ideal, man's recourse in fighting disease *should* be limited solely to prayer that the divine edict be lifted. Not only are material human

[21] Tosafot and Rashba (Baba Kama 85a), for example, noted that without *verapo yerape* we would have thought that "he who smites should heal, and anyone else who attempts to do so is trying to override a heavenly decree."

efforts completely unnecessary, they should be considered in every respect *unlawful* as well.

What, then, according to this approach was the amoraic debate? While R. Acha and Abaye share a common ideal, it is apparent that they part ways on its practical application to man's current reality. R. Acha's addition of the *vidoy*, "for it is not the place of people to seek medical treatment, but so have they accustomed themselves," reveals his position that the original ideal opposition to human involvement remains fully intact and legally binding. It is still absolutely forbidden for man to be involved in medical therapy on any level. Nevertheless, he continues, due to human frailty mankind illegitimately gets involved anyway, and therefore beseeches God for salvation despite the shameful display of weakness. Evidently, even *le'maskana* (as a final ruling) seeking healing through the medical procedure in the first place was a serious and, more to the point, *sinful* mistake. According to R. Acha, davening for restoration of health and avoiding the procedure altogether would have been a far more righteous alternative.[22]

How, then, does Abaye, who obviously sees things differently, respond? Based on the teaching of the academy of R. Yishmael he replies that "a person should not say this"; truthfully, no *vidoy* is necessary, no sin was actually committed. The ideal may be true, but it corresponds to a different time and very different set of circumstances. In our current situation, once divine permission was granted, seeking medical intervention is crucial and advisable. It is beyond any doubt *legal*. Despite this ultimate sanctioning, however, the message to be emphasized by this overall rendering was that even Abaye agrees in principle that medical interventions remain nonvirtuous encroachments on strictly divine territory.

An entirely different understanding of the Talmudic discussion was suggested by others. For example, the Talmudic commenta-

[22] As noted, this extreme view does not appear to have a contemporary counterpart.

tor Ben Yehoyada[23] points out that the expression "and it is your remedy that is *truth*" is quite unusual. In what sense does healing specifically relate to truth? One can easily understand describing it as thorough, or reliable, but why characterize it principally as truth? Apparently, Ben Yehoyada went on to explain, Chazal were emphasizing here the fact that inherently human endeavors are potentially fraught with error and subject at times to horrific failure. This gloomy reality manifests itself, if not directly at the time they are attempted, perhaps later on in the form of unforeseen complications. In that sense, as acts of proper healing, human interventions are patently false. Divine healing, on the other hand, is absolutely true in that it is exact and guaranteed, without overt or hidden risk.

With this alternative understanding of the Talmudic text, one could explain the statement "For it is not the place of people to seek medical treatment" as meaning: Since human therapy is imperfect, it may be dangerous and should therefore really be avoided, perhaps even *al pi din* (by law). In this vein, the words "but so have they accustomed themselves" could then be explained as: Despite the inherent risks, we take our chances anyway, therefore God, please protect us. To this Abaye responded: No, despite the relative limitations and dangers of human therapy, the Torah has granted license (and perhaps dispensation for mistakes)[24] for doctors to try their best and for patients to seek their assistance.[25] This construct is fully consistent with one of the suggestions the Ramban offered for understanding our *sugya* in his *Toras Ha'Adam*: "lest the physician say, Why do

[23] Yosef Chaim of Baghdad (1832–1909) was a leading Sephardic authority on Jewish law and Kabbalah. He is best known as author of the work Ben Ish Chai.

[24] See Ramban, loc. cit. in Toras Ha'Adam.

[25] Perhaps to be understood along the lines of the well-known halachic principle in risk taking: *keivan di'dashu bei rabim shomer pesaim Hashem* ("in cases where the risk is reasonable, God protects the simple"). Alternatively, perhaps it is also related to the *gemara* in Bava Metzia (112b), where dispensation to take reasonable risks is allowed in order to allow for one to make a living.

I need this trouble, perhaps I will err and kill souls inadvertently; therefore the Torah gave permission to heal."[26]

Unlike the previous analysis of the debate noted above, within this latter framework neither R. Acha nor Abaye makes any reference to the need for an official divine consent to heal. Presumably this is because there is an underlying assumption that human involvement in medical therapy in the first place (were it not dangerous) is perfectly permissible and perhaps even laudable. In Da'at Kohen, Rav Abraham Isaac Kook expresses this approach as follows:

> The essence of effective healing based on medical science is in doubt, for if it were definitive how could anyone entertain the possibility that it would not be obligatory . . . *even on illness that has come from heaven*? Rather, [and only] because effective medicine is fundamentally in doubt . . . therefore permission was necessary.[27]

It has been suggested by some that the assumption that human involvement in medical intervention is elementary, and does not require specific Biblical support, actually stems from a *svara rishona peshuta* (straightforward logical assumption).[28] As a Talmudic source for this, many cite the famous rejoinder of R. Yishmael and R. Akiva to the farmer who took them to task for meddling in divine concerns after they had attempted to give him sound medical advice.[29] The two great *tannaim* pointed out what seemed to them to be a very obvious flaw in the farmer's reasoning. A physician is no more interfering with God's designs by making use of his intellect and available natural resources for medical therapy than a farmer is in working the land and harvesting produce from it for the production of food. Notably, R. Yishmael and R. Akiva did not resort to

[26] See Ramban, loc. cit. in Tora*s* Ha'Adam.
[27] Da'at Kohen, no. 140.
[28] Jacobovits, *Jewish Medical Ethics*, loc. cit.
[29] *Midrash Socher Tov* (Shmuel 4:1).

Biblical verse or *drash* to make this contention, relying instead, it seems, solely on logical deduction.

Not surprisingly, the Rambam, *kedarko* (as is his way), reiterated these rationalist sentiments in fairly strong terms.[30] The Mishna (Pesachim, chap. 4) mentions some of the actions for which *Chizkiyahu ha'Melech* was praised. Among these commendable accomplishments, was his hiding of the *sefer refuah* (a book capable of providing incredible cures for any disease). Rashi commented on that the reason this act was praiseworthy was because the book's fail-safe cures prevented people from more properly pleading divine assistance for their ills. After first offering a completely different understanding of the Mishna, the Rambam, in very strong language, denounced the implications of Rashi's comments as quite foolish.

The Rambam's condemnation is at the very least reminiscent of the retort of R. Yishmael and R. Akiva to the farmer, if not derived directly from it. In summary, then, the obvious message offered by all these great sages is that human involvement in both the manufacture and employment of medical treatments requires no more divine dispensation than planting, harvesting, and eating from earth's produce when one is hungry.[31]

As further indication that the Rambam did *not* require *verapo yerape* to sanction medical practice, it is important to realize that he never cited that *drash* in the context of describing the Biblical source for the mitzvah of medical practice. Instead he does refer to an al-

[30] See Rambam, commentary on the Mishna (Pesachim 4:4).

[31] It should be noted that some have taken issue with the entire premise of this last point. They would contend that man's working the land and making use of its bountiful gifts itself required special divine dispensation in the form of *bezeat apecha tochal lechem.* According to this, a totally opposite conclusion to ours would be drawn. From this perspective, the comparison that the tannaitic sages and the Rambam were making regarding working the land or eating its products might actually support the need for specific divine consent for all human endeavors. This point of contention is significant, and we will return to discuss it in greater detail shortly. See Rabbi J. David Bleich, "Cloning: Homologous Reproduction and Jewish Law," Tradition 32 (1998): 47–86.

ternative verse, *ve'hashevota lo* ("and you will return it to him") as the Biblical source for the *obligation* to heal. Similarly, when codifying our opening *sugyah* regarding what benediction is fitting before undergoing a medical procedure, although the Rambam clearly paskens like Abaye, he again makes no mention at all of *verapo yerape* or any license to heal. Instead he merely excludes the negative statements suggested by R. Acha.

In summary, in developing the philosophical underpinnings of the debate between R. Acha and Abaye, two very different attitudes emerge. One position derived a significant Torah concern for illegitimate human interference in heavenly decrees. The other position rejects the underlying assumption of infringement altogether. Absent the pragmatic issue of individual fallibility, human involvement in medical therapy per se is intuitively legitimate.

Still, is the uncovering of this underlying debate of any practical importance? Having granted that the consensus of normative opinion indisputably sides with Abaye, does it still matter that there is a difference in understanding the broader conflict underlying that conclusion? In other words, granting (like Abaye) that for all intents and purposes we certainly are allowed to participate in medical care, is there any formal halakhic or *hashkafic* consequence related to the constellation of factors leading up to that authorization?

Interestingly, the author of the *Tur* presented both views as equally viable alternatives in his halachic work without deciding between them.[32] Similarly, while clearly codifying Abaye's conclusion as normative, the Shulchan Aruch somewhat conspicuously does not take a stand on the reasoning underlying that decision nor the need for *verapo yerape* in the first place.[33] This gives the impression that perhaps there is no practical *nafka mina* (halachic ramification).

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[32] Yoreh De'ah, no. 336.

[33] It is possible to speculate that the *Shach* and *Taz* (ad loc.) were debating this very issue. In explaining the basis for the need of a license to heal mentioned by the *Mechaber*, the *Shach* only presents the second option (fear of physician error). In contrast, the *Taz* (generally more prone to theoretical discourse) elaborates at

Nevertheless, the contrast between the two positions described is fairly obvious. For that reason, one might project that the contemporary opponents in the hashkafic debate described above would align themselves neatly within the most fitting projected world outlook. Thus, while the Chazon Ish would be expected to follow the first view (which requires divine dispensation to heal), Rav Soloveitchik would probably be expected to prefer the second. It is conceivable, therefore; that the contemporary debate over the significance of *verapo yerape* simply parallels that fundamental *machloket*.

length on the first (healing being fundamentally off-limits to man). However, neither the Shach nor even the Taz in his long discussion appears at first glance to convey a practical consequence of their respective explanations.

Is There Life After Life? Superfetation in Medical, Historical and Rabbinic Literature[1]

Rabbi Edward Reichman, MD

Case Report

On January 18, 2008 a unique medical case was reported in the British newspaper, the *Daily Mail*. Two babies were carried in the same womb, born only one minute apart, yet Thomas and Harriet Mullineux are not twins. They were conceived three weeks apart thanks to an extraordinary twist of nature. Their mother Charlotte had been pregnant with twins when at seven weeks she miscarried one of them. But two weeks later, she discovered, after undergoing a follow-up ultrasound, that she was carrying another fetus - conceived separately and still growing in her womb. The surviving twin and the new baby were born in May of 2007.

This case, which may represent an extraordinarily rare, and not well documented, phenomenon, is the substance of this brief essay. We shall address the medical, historical and halakhic aspects of this case.

Superfetation in Historical and Medical Literature

The process whereby a woman becomes pregnant and then subsequently conceives again during another ovulatory cycle is called

[1] A version of this article appeared in *Shalom Rav* (self-publication, 2008), a tribute volume to Rabbi Shalom Rosner formerly of Congregation Bais Ephraim Yitzchok (Woodmere, NY) upon his aliyah to Eretz Yisrael.

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superfetation. Superfetation has been discussed for centuries, and the possibility of conception during an existing pregnancy has been debated since antiquity. It was assumed to be possible by Hippocrates, Aristotle and Pliny. William Harvey reports that a certain maid, pregnant from her master, in order to hide her knavery, went to London, where she delivered a child in September. She then returned home. In December of the same year she was unexpectedly delivered of another child, assumedly a product of superfetation, which proclaimed the crime that she had so cunningly concealed before.[2] Modern medicine, however, remains skeptical of the possibility of superfetation.

One must distinguish between superfetation, whereby a woman already pregnant conceives again from a later ovulation, from what is termed superfecundation, when a woman ovulates two eggs during one cycle, yet there are two separate instances of fertilization, even possibly days apart. The possibility of superfecundation has been accepted since antiquity and clearly proven scientifically in the DNA age in cases when twins have been identified genetically as having two different fathers.[3]

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[2] For an extensive review of the premodern sources discussing superfetation, see G. M. Gould and W. L. Pyle, *Anomolies and Curiosities of Medicine* (W. B. Saunders, 1896), 46-48. See also Y. V. O'Neill, "Michele Savonarola and the *fera* or blighted twin phenomenon," *Medical History* 18(1974), 222-239. Our discussion is about the possibility of natural superfetation. With the advent of assisted reproductive technologies, and the intentional introduction of reproductive seed or fertilized embryos at both different times and locations, the possibility of superfetation increases significantly. Hormonal manipulation further increases the possibility by reversing the body's normal mechanisms for preventing a second simultaneous pregnancy.

[3] The first scientifically proven case of superfecundation was recorded by G. K. Doring, 1960 (cited in O'Neill, op. cit., at note 67), but there have been a number of others subsequently. See, for example, E. Girela, et. al., "Indisputable double paternity in dizygous twins," *Fertility and Sterility* 67:6(June, 1997), 1159-1161. On superfecundation, see F. Rosner, "Superfecundation in mythology, history and poetry," *New England Journal of Medicine* 300(1979),49; D. Rabinerson, et. al.,

Proving superfetation beyond reasonable doubt, however, has remained elusive. Even in the modern age of ultrasound and DNA testing, it has not been unanymously accepted as possible. Modern reproductive physiology teaches that once pregnancy is achieved, it is generally not possible for a woman to conceive again subsequently until after the completion of the pregnancy. Once a first pregnancy is achieved, progesterone, secreted by the corpus luteum and then subsequently by the placenta, supresses further ovulation and additionally makes the female reproductive tract much less receptive to male reproductive seed. It has been observed that twins are occasionally of significantly different sizes or weights and some consider this proof that they were conceived at different times. The size or weight disparity, however, is not sufficient proof, as there are a number of other medical conditions to which this can be attributed. A number of articles have appeared over the last few decades claiming to have confirmed superfetation with differing levels of confidence.[4] However, an article from 2003 denies any possibility of superfetation and attributes all such cases to other phenomena.[5]

"Superfecundation and superfetation--the forgotten entities," (Hebrew) *Harefuah* 147:2(February, 2008), 155-8. The most curious and convincing examples of superfecundation are those in which children of different colors, either twins or near the same age, are born to the same woman. Depending on the race of the parents, however, this phenomenon can be explained without resorting to the rare case of superfecundation.

[4] For example, N. Baijal, et. al., "Discordant twins with the smaller baby appropriate for gestational age--unusual manifestation of superfoetation: a case report," *BMC Pediatrics* 7:2(January 19, 2007); A. Harrison, et. al., "Superfetation as a cause of growth discordance in a multiple pregnancy," *Journal of Pediatrics* 147:2(August, 2005), 254-255; T. Steck and S. Bussen, "Conception during pregnancy (superfetation)," Human Reproduction 12:8(August, 1997), 1835-1836; J. Bertrams and H. Preuss, "A case of twins with probable superfetation," (German) *Zeitschrift fur Rechtsmedizi* Journal of legal medicine 1980;84(4):319-21.

[5] I. Blickstein "Superfecundation and superfetation: Lessons from the past on early human development," F*etal and Neonatal Medicine* 14:4(October, 2003), 217-219.

Despite the logical and scientific conclusion that superfetation is not possible, many such cases have been recorded throughout history. There are two approaches to these cases. Either they are all attributable to some other phenomenon, and indeed superfetation is impossible, or alternatively, despite scientific evidence to the contrary, superfetation is possible, although admittedly exceedingly rare.

Superfetation in Rabbinic Literature

The notion of superfetation is found in rabbinic literature and is first discussed in the Talmud.[6]

תלמוד בבלי מסכת יבמות דף יב עמוד ב

תני רב ביבי קמיה דרב נחמן, שלש נשים משמשות במוך: קטנה, מעוברת, ומניקה; קטנה - שמא תתעבר ושמא תמות, מעוברת - שמא תעשה עוברה סנדל, מניקה - שמא תגמול בנה וימות

The Gemara in Yevamot discusses three cases for which the use of a "*mokh,*" a form of contraceptive, is permitted.[7] The common denominator of these cases is the concern that some medical harm that may result from a pregnancy. One of the three women permitted to use a *mokh* is one who is pregnant, lest her fetus become a *sandal*. Rashi *ad loc* describes a *sandal* as a malformed, non-viable

[6] For previous discussions on this topic, see I. Jakobovits, *Jewish Medical Ethics. A Comparative and Historical Study of the Jewish Religious Attitude to Medicine and its Practice* (New York, Bloch Publishers, 1959), 325, n. 132; F. Rosner (Trans. and Edit.) *Julius Preuss' Biblical-Talmudic Medicine* (New York, Sanhedrin Press, Division of Hebrew Publ. Co. 1978), 386-87; D. M. Feldman, *Birth Control in Jewish Law: Marital Relations, Contraception and Abortion as set forth in the classic texts of Jewish Law. (*New York, New York University Press, 1968), 180-187; A. Steinberg, "Twins: Medical and halakhic perspectives," (Hebrew) in A. Steinberg, ed., *Sefer Assia* 2 (Schlesinger Institute, Jerusalem, 5741), 232-239; S. Kottek, "Twins in Jewish and historical sources," (Hebrew) in A. Steinberg, ed., *Sefer Assia* 2(Schlesinger Institute, Jerusalem, 5741), 240-245.

[7] The identity of a *mokh*, whether used before or after relations, and the nature of its contraceptive effect is a matter of rabbinic debate. This sugya is the main source of contemporary discussions on the permissibility of contraception in general. See

fetus with no recognizable human facial features.[8] The simple explanation of this passage is that when a pregnant woman becomes pregnant subsequently with another child, one fetus will physically restrict the growth of the other, whose development will be retarded, resulting in a malformed fetus appearing like a *sandal*. This seems to accept the possibility of superfetation. Rashi indeed explains that the second pregnancy impedes the development of one of the fetuses, resulting in a gross malformation resembling a *sandal*, and a resultant miscarriage. Tosefot,[9] however, argues against Rashi's position and points out that the Talmud Bavli explicitly rejects the possibility of superfetation. The relevant passage is found in Gemara Niddah 27a.

תלמוד בבלי מסכת נדה דף כז עמוד א

א"ר אבין בר רב אדא אמר רב מנחם איש כפר שערים, ואמרי לה בית שערים: מעשה ונשתהה ולד אחד אחר חבירו ג' חדשים, והרי הם יושבים לפנינו בבית המדרש. ומאן נינהו? יהודה וחזקיה בני רבי חייא. והא אמר מר: אין אשה מתעברת וחוזרת ומתעברת! אמר אביי: טיפה אחת היתה ונתחלקה לשתים, אחד נגמרה צורתו בתחלת ז', ואחד בסוף ט'.

In this passage the Gemara recounts a story of two brothers who were born three months apart and subsequently survived, as evidenced by the fact that they were both students in the yeshiva to-

D. M. Feldman, *Birth Control in Jewish Law: Marital Relations, Contraception and Abortion as set forth in the classic texts of Jewish Law* (New York, New York University Press, 1968); M. D. Tendler, "Contraception and Abortion," in F. Rosner, ed., *Medicine and Jewish Law* (Jason Aronson; Northvale, NJ, 1993); J. D. Bleich, "*B'sugya d'shalosh nashim*," in his *B'Nitivot HaHalakha* 3 (New York, 5761), 1-4.

[8] Most identify the *sandal* with the fetus compressus (compressed) or fetus papyraceous (flattened remarkably through loss of fluid and most of the soft tissue) described in the medical literature. See Preuss, 386 and Feldman, 183. See O'Neill, op. cit., 229 for a discussion of all the possible consequences of the death *in utero* of a twin fetus, including a description that would fit well with the Talmud's term *sandal*.

[9] Yevamot 12b, s. v., *shema*.

gether at that time. In fact, these siblings were none other than the children of R' Chiya, Yehuda and Chizkiya. The Gemara then queries: How could this be possible, when Mar states that a woman cannot become pregnant again if she is already pregnant (i.e., superfetation is *not* possible). The Gemara responds that this was *not* a case of superfetation, rather, conception occured at one time and the reproductive seed divided into two. One child was born at seven months gestation, while the other was born at nine months.[10]

If the Talmud Bavli explicitly rejects the possibility of superfetation, Tosafot asks, how could Rashi use this idea to explain why a

[10] This explanation itself requires further elaboration. The word used is "*tipah*," which usually refers to the male reproductive seed prior to fertilization. Splitting of the male seed is not physiologically possible, nor would it, by itself produce two embryos. If "*tipah*" refers to the embryo, which was split, then the brothers would have to be identical twins. Excluding superfetation, the simplest explanation is that two eggs were ovulated and fertilized, yet they were born at different times. This is a known, though uncommon, occurrence termed interval delivery in modern scientific terminology. This however would not explain the phrase, "*tipah achat hayta v'nechlikah l'shtayim*."

There is a notion in *Chazal* that babies born in the seventh and ninth months are viable whereas those born in the eighth month are not (see, for example, T.B. *Shabbat* 135a and *Yevamot* 80a). This was a prevalent notion in antiquity and the Middle Ages. On the Jewish sources on this notion, see *Chazon Ish* Y. D., 155; A. S. Abraham, *Nishmat Avraham* (English) (Mesorah: Artscroll), vol. 1, 185, 228 and vol. 3, 244; Pieter W. Van Der Horst, "Seven Months' Children in Jewish and Christian Literature from Antiquity," in his *Essays on the Jewish World in Early Christianity* (Gottington, 1990), 233-47; Neria Gutal, "*Ben Shemona: Pesher Shitat Chazal B'nogaia L'vladot Bnei Shemona*," *Assia* 55-56(1989), 97-111; Ron Barkai, "A Medieval Hebrew Treatise on Obstetrics," *Medical History* 33(1988), 96-119, esp.101-104. For further information on the secular sources see Ann Ellis Hanson, "The Eight Months' Child and the Etiquette of Birth: Obsit Omen!," *Bulletin of the History of Medicine* 61(1987), 589-602; Sarah George, *Human Conception and Fetal Growth: A Study in the Development of Greek Thought From Presocrates through Aristotle* (Doctoral Dissertation, University of Pennsylvania, 1982), 204-233; C. R. King, "The eight month fetus: Classical sources for a modern superstition," Obstetrics and Gynecology 72:2(August, 1988), 286-287; R. Reiss and A. Ash, "The eight month fetus: Classical sources for a modern superstition," 71:2(February, 1988), 270-273.

pregnant woman may use a *mokh*. Tosafot answers that according to Rashi, the phrase "*ain isha mitaberet v'chozeret u'mitaberet*" does not mean that a woman cannot *conceive* subsequently if she is pregnant, rather, it means that even though she can conceive, the product of such a conception will not survive to viability, but will invariably be miscarried as a malformed *sandal*. Therefore, according to Rashi, it would appear that while superfetation is technically possible for conception, it is not possible for viability. Thus, the production of two healthy, viable children from superfetation, such as the sons of R' Chiya, is not possible.

Rabbeinu Tam, however, maintains that even conception after existing pregnancy is not possible. (i.e., even superfetation for conception is not possible.) He therefore posits an entirely different explanation as to why a pregnant woman may use a *mokh*. According to Rabbeinu Tam, if a woman is pregnant with twins, and has relations with her husband, it is possible the male reproductive seed alone may interpose between the two fetuses and cause one to be malformed in the shape of a *sandal*.

While the Talmud Bavli clearly maintains that "*ain isha mitaberet v'chozeret u'mitaberet*," which is variously interpreted by Rashi and Rabbeinu Tam as either superfetation is not possible at all, or it is possible only for conception, but not to viability, the position of the Talmud Yerushalmi appears to be otherwise.

The passage from the Yerushalmi below seems to explicitly affirm the possibility of superfetation.[11]

תלמוד ירושלמי מסכת יבמות פרק ד דף ה טור ג /ה"א

מה אנן קיימין אם בשבא עליה לאחר מיתת בעלה מיד הוכר עוברה לאחר שני חדשי' ניתני בן ט' לזה ולזה בן ז' לזה ולזה אלא כן אנן קיימין כשבא עליה לאחר שני חדשי' והוכר עובר' לאחר ג' חדשים ניתני היבמה לא תחלוץ ולא תתיבם עד שיהו לה חמשה חדשים אלא כן אנן קיימין כשבא עליה לאחר ארבעים יום והוכר עוברה לאחר חמשים יום הרי יש כאן שלימין לראשון ומקוטעין לשני ש"מ

[11] Jacobovits n. 132, p. 325; Preuss, 387. Both interpret the Yerushalmi as limiting the possibility of superfetation to coitions that occur within forty days of each other.

שהאשה יולדת לחדשים שלימים את שמע מינה שהן שתי יצירות את שמע מינה שהאשה יולדת לחדשים מקוטעין את שמע מינה שהאשה מעוברת וחוזרת ומתעברת את שמע מינה שהאש' אינה מתעברת משני בני אדם כאחת ופליגא על דרבנן דאגדתא דרבנן דאגדתא אומרי' ויצא איש הביניים ממערכות פלשתים ממאה ערלות פלשתים שהערו בה מאה ערלות פלשתים אמר רבי מתנייה ולא פליגין עד שלא נסרח

However, this reading is not accepted by all. The *Korban HaEdah* on the Yerushalmi amends the text to read that a pregnant woman *cannot* again become pregnant, in consonance with the Talmud Bavli. Rabbi Chaim Yosef David Azulai, while not amending the text of the Yerushalmi, nonetheless concludes that the statement, "*at shema mina she-ha'isha mitaberet v'chozeret u'mitaberet*" means that a woman may indeed be able to conceive during pregnancy, but only a non-viable fetus would result, similar to the position of Rashi. Based on his reading of other passages in the Yerushalmi[12] he maintains that the Yerushalmi does not accept the possibility of superfetation with the birth of a healthy, living viable second child.

In *Sefer Chasidim* by R' Yehudah HaChasid (12th century) it is written that within forty days a woman can become pregnant from two men. This appears to be referring to a case of superfetation, where a woman can become pregnant from one man, then subsequently become pregnant from another man.[13]

In the 15th century R' Shimon b. Tzemach Duran mentions a case of superfetation in the course of answering a query on the laws of *niddah*:

> A sage testified that he saw [the case of] a woman in Rome who gave birth to a child and, after four months, went into labor and gave birth to another child. When they brought her

[12] Especially *Niddah* Chapter 3, p. 51, *halakhah* 4.

[13] Alternatively, it may be referring to another case discussed in the Gemara about the possibility of a woman conceiving one child who is the product of two fathers. This notion merits its own analysis.

> before the Great Church for an explanation, she declared that when she was in her fifth month of pregnancy, she cohabited with another and became pregnant by him; the first child, she said, is her husband's and the second another's. They accordingly "stoned" her. This case was listed in the medical books to show that the retentive power of the womb [can be very strong] and that there are women who, however, are inordinately weak and miscarry.[14]

In the early 18th century, R' Yitzchak Lampronti, Rabbi/physician, graduate of the University of Padua, writes in his encyclopedia *Pachad Yitzchak,*[15] that occasionally a pregnant woman may again conceive and achieve a second pregnancy. This seems to go against the conclusion of the Talmud Bavli. However, a closer reading reveals that R' Lampronti is referring here to superfecundation, as opposed to superfetation. He brings proof to his comment by citing a case from America of a woman who bore twins one after another, but the twins were of different colors, assumedly from different fathers. This more likely refers to a case where the woman engaged in relations with two different men within a short period after she ovulated two eggs, each egg being fertilized by a different man. As discussed above, superfecundation, as this is called, has been accepted since antiquity and scientifically proven in modern medical literature.

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[14] Translation by Feldman, op. cit.

[15] S.v., *m'uberet*. On R' Lampronti, see D. Ruderman, "Contemporary science and Jewish law in the eyes of Isaac Lampronti and some of his contemporaries," *Jewish History* 6:1-2(1992), 211-224; D. Margalit, "R' Yitzchak Lampronti: Rabbi, physician, lexicographer," (Hebrew) in his *Chakhmei Yisrael k'Rofim* (Jerusalem, Mosad Harav Kook, 5722) 152-174; H. Savitz, "Dr. Isaac Lampronti: Rabbi, physician, teacher, preacher, encyclopaedist," in his *Profiles of Erudite Jewish Physicians and Scholars* (Chicago, Spertus College, 1973), 29-32. For a collection of all the medical matters in R' Lampronti's magnum opus see D. Margalit, "Medical articles in the encyclopedia Pahad Yitzchak by R. I. Lampronti," (Hebrew) *Koroth* 2:1-2(April, 1958), 38-60.

Abraham b. Mordechai Halevi (Cairo, 17th cent) ponders the halakhic implications of the Talmudic statement, "a woman cannot conceive if already pregnant," and assumes it is not an absolute statement, but rather a reflection that superfetation is an extremely rare occurrence. Thus, he is willing to invoke its possibility in selective halakhic circumstances.[16] For example, with respect to *tumat leidah* (the impurity associated with childbirth), if a woman gives birth to a second child shortly after the first, he would assume the more common circumstance that the two pregnancies were conceived at the same time. Therefore, a woman need not begin a new counting of days of impurity. However, regarding possible danger to a pregnant woman, he would be concerned about the small possibility of superfetation and its impact on the existing fetus, and would allow use of a contraceptive *mokh*. It is Rabbi Halevi's third case that spawned a lengthy response by R' Chaim Yosef David Azulai (known as *Chida*).[17] In this theoretical test case Rabbi Halevi states that if a woman gives birth very shortly after her husband leaves for a long journey, and then gives birth again some months later (seven or nine), we may exonerate the wife of any possible wrongdoing by assuming that she conceived again while pregnant. Consequently, the second child, as the first, is a product of her husband. This presupposes not only that a woman can conceive while pregnant, but assumes superfetation with a subsequent live birth.[18]

It is this last presupposition with which the *Chida* takes issue. Rav Azulai engages in a lengthy review of the halakhic literature relating to the notion about whether a pregnant woman can again become pregnant and concludes that although there are debates about the possibility of conceiving while pregnant (see the foregoing), none of

[16] *Gan HaMelech,* 130, in *Ginat Veradim*.
[17] *Birkei Yosef*, E. H., 4:8.
[18] Rabbi Halevy's case asssumes the wife conceived while in her later stages of pregnancy and gave birth to the second child seven or nine months after the delivery of the first. Even modern science does not record or acknowledge this extreme case of superfetation.

the rabbinic authorities accepts the possibility of superfetation with subsequent live birth of both fetuses, an assumption made by Rabbi Halevi in his third case.

Rav Azulai mentions two major areas where the issue of superfetation is discussed in rabbinic literature. One is the passage in *Yevamot* above. He notes that even though Rabbeinu Tam maintains that conception after pregnancy is not possible, he acknowledges that according to Rashi conception is indeed a possibility. However, even according to Rashi, if superfetation did occur, one of the fetuses would certainly become a *sandal* and be severely malformed and non-viable. Even Rashi would concur that the birth of two healthy children through superfetation is impossible. Rather, the talmudic phrase "*ain isha mitaberet v'chozeret u'mitaberet*" is to be interpreted to mean that a pregnant woman cannot have a viable second child from superfetation.

The other area that Rav Azulai discusses in order to prove that superfetation with the birth of viable children is rejected by all *Rishonim* is a case of twins where one dies prior to thirty days, and the other survives. In general, a child who dies prior to 30 days after birth is considered a *nefel*, a non-viable child, and no mourning practices are observed. However, if there is strong evidence that it was a viable child, mourning may be required. In a case of twins, if one child survives, it may reflect upon the status of the other twin, who may likewise be considered viable, even though death occurred prior to 30 days. As such, mourning for the deceased twin may be required. This is indeed the position of the *Rashbatz*, as cited by R' Azulai, that mourning for the deceased twin is required despite the occurrence of death prior to thirty days.[19] This argument presupposes that the twins were conceived at the same time. In fact, the *Rashbatz* cites the passage in the Bavli that "*ain isha mitaberet v'chozeret u'mitaberet*" as proof to his position. If, however, one assumes that a pregnant woman can again conceive at a later time, it

[19] See Y. Baumel, *Emek Halakha* 1:5 for further discussion of the case of mourning for twins.

is possible that the child that died prior to 30 days was indeed of an earlier gestational age and was in fact not viable. Mourning would thus not be required.

R' Yosef Karo codified a variation of this case in his *Shulchan Arukh*, but the questionable integrity of our printed text has led to much debate about its interpretation.[20] The printed text reads: There are some who say in a case of twins- If one dies within thirty days, and the second twin lives, *and dies*, after thirty days, we do not mourn for him.

According to this version, if the first twin died before thirty days, and the second died after thirty days, we do not mourn even for the twin that lived longer. The *Levush* (as cited in the *Taz*) explains that if the second twin is ill at the time of the first twin's death, since they both derive from the same conception, both are considered non-viable, and mourning is not required even for the older twin. The *Taz* is in wonderment of this decision, as how could one refrain from mourning for a child that survived more than thirty days, whatever the circumstances may be? He maintains that the original source of this halakha was not a case of neonatal death of the second twin, rather, the second twin survived. He maintains that the word "*vamet*" (and dies) should be removed from the text. In this case, the halakha states that even though the second twin survived, mourning is not required for the *first* twin who died before thirty days. While the *Taz* argues convincingly that this is clearly a more logical alternative than that of the *Levush*, this decision is not consistent with the logic and decision of the *Rashbatz* cited above, who would require mourning for the first twin, even if he died within thirty days, based on the notion that "*ain isha mitaberet v'chozeret u'mitaberet*."

While Rabbi Azulai railed against Rabbi Halevi for accepting the possibility of superfetation (with the birth of two healthy children), one of his close friends and colleagues, Rabbi Yom Tov Algazi, seems to have accepted the possibility as well. In Rabbi Yom Tov

[20] Y. D. 374:9 and commentaries *ad loc*.

Algazi's commentary on the Ramban's work on *Hilchot Bechorot*,[21] he questions the pronouncement of the Talmud Yerushalmi that one can fulfill the mitzvah of *pru urvu* through the birth of a mamzer.[22] As the mitzvah could only be accomplished through illicit, biblically forbidden relations, the mitzvah should be nullified under the rule of *mitzvah ha-ba b'aveirah* (a mitzvah performed through the violation of a Torah prohibition). Rabbi Algazi offers a novel case that would allow the fulfillment of the mitzvah despite the production of a mamzer. If a man's brother dies childless, he is required to perform *yibum*. However, one must wait three months after his death (the time frame defined in the Talmud by which it would be physically apparent that a woman is pregnant) lest his wife be pregnant, in which case *yibum* may not be required.[23] In this case, the surviving brother waited the requisite three months, but, despite physical appearance to the contrary, the wife turned out to be pregnant. The resultant child of their union would be a mamzer, but the brother's act, which was an *ones* (purely accidental and unforseen), was not in violation of any prohibition. Therefore, this would not fall under the umbrella of *mitzvah ha-ba b'aveirah*.

In the 1910 edition of the journal *Vayelaket Yosef*, Rabbi Yisrael Klein questioned the solution of Rabbi Algazi on the grounds that the Talmud clearly states in *Niddah* 27 that a pregnant woman cannot conceive again. How is it possible then for a woman three plus months pregnant to conceive a second child that will be born as a mamzer? Rabbi Klein was unable to find a satisfactory answer to his question and left the issue unresolved.

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[21] Rit Algazi on Chapter 8 of Ramban *Hilchot Bechorot*, published in the back of the Vilna Shas *Bechorot*, p. 56, column 4, s. v. *ulam*. See Yerushalmi *Yevamot*, Chapter 2.

[22] Rabbi Algazi addresses the debate as to whether the statement of the Yerushalmi that one can fulfill the mitzvah of *pru urvu* is definitive or left unanswered.

[23] The child would have to be born alive to preclude *yibum*. Pregnancy alone is not sufficient, as the Torah states "*uben ain lo*."

Some years later, Rabbi Ephraim Billitzer recounted Rabbi Klein's question and provided a creative solution.[24] According to Rabbi Billitzer, in the case discussed by Rabbi Algazi the man who died had two wives. The surviving brother performed *yibum* with one wife after three months, but the other wife was subsequently found to be pregnant, obviating the need for *yibum*. Thus, there would be no concern about superfetation, no case of *mitzvah ha-ba b'aveirah*, as it was an *ones*, the resultant child would be a mamzer, and the mitzvah of *pru urvu* would be fulfilled.[25] Rabbi Billitzer acknowleges that this key fact that the man had two wives is not specifically mentioned in the text by Rabbi Algazi. While this is indeed a clever solution, it appears to be a case of *ikar chaser min hasefer*.

I would humbly suggest a different possible solution to the question posed by Rabbi Klein. While it is true by all accounts that the Talmud Bavli rejects the possibility of superfetation (with the birth of two healthy children), as Rabbi Algazi's close friend, Rabbi Azulai, convincingly proves, however, Rabbi Algazi's entire discussion revolves around a passage in the Yerushalmi (that one can fulfill the mitzvah of *pru urvu* through the birth of a mamzer). The Yerushalmi appears to explicitly reject the opinion of the Talmud Bavli,[26] and accepts the possibility of superfetation. Therefore, the original question of Rabbi Klein in *Vayelaket Yosef* does not apply.

The notion of superfetation also arose in another context in the 18th century. It was not always clear throughout history how twins were formed embryologically. For example, some maintained that twins could not be formed from one marital act, while others believed that one act could create multiple births. This issue finds its expression in a homily of Rav Yonatan Eyebeschutz and serves as

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[24] *She'ailot U'Teshuvot Yad Ephraim* E. H., 1.

[25] Rabbi Billitzer does find a possible allusion to it based on a turn of phrase of the Rit Algazi.

[26] Rabbi Azulai, op. cit., is of the opinion that even the Yerushalmi rejects the possibility of superfetation with the birth of two healthy children.

the basis of a question of suspicion of infidelity posed to Rabbi Yechezkel Landau.

In discussing the lineage of David Hamelech, Rabbi Eyebeshutz queries why the progeny of the union of Yehuda and Tamar should be considered tainted.[27] After all, prior to *matan Torah*, the obligation of *yibum* devolved upon the father as well as on the brother. Therefore, Yehuda was fulfilling a mitzvah through his union with Tamar and the resulting progeny should not only be free of stain, they should be considered superior. To answer this question, Rabbi Eyebeschutz posits that only the first coition fulfills the mitzvah of *yibum*, and furthermore, twins cannot be born of one coition, but rather require two. As a result, only the first of the twins, who was conceived through the process of a mitzvah, is associated with royalty. The second twin however, would be susceptible to stain.

It is this notion of the requirement of two coitions to produce twins that was read and integrated by an eighteenth century European businessman. Prior to his departure on a long journey, this man engaged in marital relations with his wife. Upon his return some months later, his wife gave birth to twins. Remembering the homily of Rabbi Eyebeshutz, he assumed his wife must have been unfaithful and approached Rabbi Yechezkel Landau for rabbinic advice.[28]

Rabbi Landau roundly criticizes the questioner and dismisses out of hand the scientific ideas discussed in Rabbi Eyebeschutz's essay. He further adds that not only are two coitions not required to produce twins, rather, based on talmudic passages (cited above), sequential coitions could not produce two viable twins, as one would invariably become a *sandal*. Here Rabbi Landau invokes the talmudic dictum that superfetation (with the subsequent birth of two viable children) is not possible. In fact, as discussed above, while superfetation is debated, the possibility of superfecundation is universally accepted. Twins could indeed be produced through sequential coitions in a case of superfecundation.

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[27] *Yaarot Devash* (Lvov, 5623), 100a.
[28] *Nodah biYehuda Tinyana* E. H., 81.

Conclusion

For centuries the rabbis have debated the possibility of superfetation, and while some have accepted it as a possibility, the Talmud Bavli, by most accounts, clearly rejects the possibility of superfetation with viable progeny. There are a number of passages in the Talmud that seemingly conflict with our modern understanding of science, and numerous approaches have been developed to address them.[29] The passages discussing superfetation, until now, have not been numbered amongst them. It has not been possible to determine with absolute scientific certainty that superfetation is possible. How are we to view the current case report from England? Will this current case cause us to add the talmudic discussions on superfeta-

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[29] The phrase that has been used to resolve these apparent conflicts is *nishtaneh hateva* (nature has changed). For treatment of this fascinating and complex topic see A. Steinberg, (F. Rosner, trans.), Encyclopedia of Jewish Medical Ethics (Feldheim, 2003), s.v. "change in nature"; D. Frimer, "*Kevi'at Avhut al yedei Bedukat Dam be-Mishpat ha-Yisraeli u-be-mishpat ha-Ivri,*" in M. Halperin, ed., *Sefer Assia* 5(Jerusalem, 1986), 185-209; D. Cohen, "*Shinuy Hateva*: An Analysis of the Halachic Process," *Journal of Halacha and Contemporary Society* 31(Spring 1996); S. Sprecher, "*Divrei Chazal ve-Yedi'ot Mada'iyot*," *B.D.D.* 2(Winter 1996), 2-39; S. Sternberg, "I. M. Levinger, *Ma'or le-Massekhet Hullin u-le-Massekhet Bekhorot*," *B.D.D.* 4(Winter 1997), 81-102 (English section); Z. Lev, "*Neriah Moshe Gutal, Sefer Hishtanut ha-Teva'im be-Halakhah*," *B.D.D.* 4(winter 1997), 81-96 (Hebrew section); A. Carmell, M. Goldberger, and S. Sternberg, comments and response on Sternberg's earlier book review *B.D.D.* 6(Winter 1998), 57-84 (English section); N. Gutal, "*Hishtanut Teva'im*," *B.D.D.* 7(Summer 1998), 33-47; D. Malach, "*Hishtanut ha-Tevai'im ki-Pitronot le-Stirot Bein Dat le-Mada*," Techumin 18(5758), 371-383; Yehuda Levi, *The Science in Torah: The Scientific Knowledge of the Talmudic Sages* (Feldheim, 2004); N. Slifkin, *Mysterious Creatures* (Targum Press, 2003), 17-41; M. Halperin, "Science and medicine in the Talmud: *kabbalah o actualia*," Assia 71-72(January, 2003), 90-102; R' Eliezer Roth, "Did Rambam really disagree with Chazal in matters of medicine?" response to Dr. Levinger Assia 71-72(January, 2003), 87-89; S. Z. Leiman, "R. Israel Lipshutz and the mouse that is half flesh and half earth: A note on Torah U-madda in the nineteenth century," in *Chazon Nachum* (New York, Yeshiva University Press, 1997), 449-458; N. Gutal, *Sefer Hishtanut ha-Teva'im be-Halakhah* (*Machon Yachdav*, Jerusalem, 5758).

tion to the list of passages that seemingly conflict with our modern understanding of medicine, or, like its predecessors in recent medical literature, will the gestational disparity be attributed to another medical phenomenon?[30] We reserve judgment while we await the final scientific analysis of this case. While advances in DNA testing and ultrasound have significantly enhanced our ability to assess the phenomenon of superfetation, the definitive study of this phenomenon remains a desideratum.

[30] There are features of this case that make it more convincingly a case of superfetation as, according to reports, an ultrasound was performed when the younger twin was at a very early gestational age. This precludes the possibility of confusing this with, for example, a twin-twin transfusion or severely size-discordant twins from other causes.

Collaborative Reproduction: Unscrambling the Conundrum of Legal Parentage

A. Yehuda Warburg

AN AMERICAN LEGAL VIEW

In the opening lines of her book *Science at the Bar,* Sheila Jasanoff, Pforzheimer Professor of Science and Technology Studies at Harvard University, writes:

> American political culture derives its distinctive flavor as much from faith in scientific and technological progress as from a commitment—some might even say an addiction—to resolving social conflicts through law. These powerful cultural predilections have brought the institutions of science and technology into turbulent confrontations with the legal system. . . . discoveries in the biological sciences have revolutionized our ability to manipulate the basic processes of life so as to fight infertility, aging, hunger and disease.[1]

The intersection of science and law in general, and the advent of reproductive technology beginning in the late 1970s in particular, has wreaked havoc on the legal notions of parenthood.

[1] Sheila Jasanoff, *Science at the Bar: Law, Science & Technology in America*, Cambridge, 1995, 1–2.

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The new noncoital reproduction options—traditional surrogacy and gestational surrogacy—raise the issue of determining legal parentage. The most common surrogacy arrangement involves an infertile couple, often due to the wife's infertility. In order to have a child who is genetically related to one of them, the couple seeks the services of another woman, called a surrogate mother. The surrogate agrees to conceive a child through artificial insemination of the husband's sperm and carry the child to term. Upon birth, the surrogate agrees to relinquish her parental rights and transfer custody of the child to the father. In most cases, a formal adoption of the child by the wife is required.

A second type of arrangement entailing embryo transfer may be used in cases where a woman is fertile, but is unable to carry a child to term. In this situation, the father and genetic mother may conceive an embryo through in vitro fertilization (hereinafter IVF) and then have it implanted in the surrogate's womb. The surrogate would carry and give birth to the child. In this situation, the surrogate bears a gestational relationship to the child. Whereas, in the traditional surrogacy arrangement, the surrogate is using her egg and another man's sperm, in the gestational surrogacy pattern, the surrogate carries the child to term using the wife's egg and husband's sperm implanted in her uterus. In this arrangement, the egg donor, i.e., the wife, and the genetically related father intend to raise a child who enjoys a genetic and gestational bond with another woman, i.e., the surrogate. In the traditional surrogacy scenario, the genetically related father and the wife who is genetically and gestationally unrelated to the child intend to raise a child who enjoys a gestational tie with the surrogate. In either of these arrangements, the contracting couple agrees to pay a fee to the surrogate and reimburse her for any medical expenses associated with the pregnancy.

When both the genetic and gestational parents desire custody of the child, how should motherhood and fatherhood be defined? The fragmentation of biological maternity by artificial insemination and IVF obliges one to take a Solomonic approach, asking in an either/or fashion: Which mother is the child's mother? Is it the genetic,

gestational, or the unrelated intending mother? Which father is the child's father? Is it the sperm donor, the unrelated intending father, or the surrogate's husband? Does the law simultaneously recognize more than two individuals as parents of the child?

This essay attempts to arrive at the differing conceptions of parenthood emerging from American law that settle claims to parentage posed by the genetic parents, the gestational surrogate of the child, and the intended parents. Though some jurisdictions have promulgated statutory schemes,[2] most have not, leaving courts to resolve these surrogacy arrangements by following common law presumptions, by identifying genetic and gestational bonds, or by invoking contract principles or the child's best interests standard. The varying judicial responses will be viewed within the context of the voluminous legal scholarship which has sought rules to determine legal parenthood. This article then evaluates a number of definitional standards of the term "parent" in adoption and collaborative-reproduction arrangements between Jews as suggested by contemporary discussions in Jewish law.

The most famous case involving traditional surrogacy is the New Jersey Superior Court[3] and New Jersey Supreme Court[4] opinions *In re Baby M*. The case involved a surrogate arrangement entered into between William Stern, the biological father, and Mary Beth Whitehead, a gestational host. Mr. Stern and his wife contracted with Mrs. Whitehead, wife of Richard Whitehead and mother of two children, to donate her egg, have it fertilized in vitro with Mr. Stern's sperm, carry the child to term, and relinquish her rights upon birth. In return, the Sterns agreed to pay her $10,000 and to assume

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[2] See e.g. ARK. CODE ANN. SEC. 9-10-201 (1998); N.H. REV. STAT. SEC. 168-B:23 (1994); UTAH CODE ANN. SEC. 76-7-204 (Michie 1995) & WIS. STAT. SEC.69.14 (1) (h) (West 1999). Pursuant to the above legislation, the husband, the sperm donor, of the artificially inseminated woman is the father of the child.

[3] 217 N.J. SUPER 313, 525 A. 2D 1128 (1987).

[4] 109 N.J. 396, 537 A. 2D 1227 (1988).

all her medical expenses. Upon birth, the surrogate changed her mind, absconded to Florida with the child, and sued for maternity. After apprehending the Whiteheads, the Sterns commenced with a custody claim in New Jersey family court requesting the enforcement of the preconception surrogacy agreement.

The opinion of Judge Sorkow, before whom the case was heard in the New Jersey Superior Court, proceeded from the assumption that there were two competing families offering dual-parent care, and two "mothers" prepared to accept responsibility for the child. The court began by stating[5]:

> Justice, our desired objective, to the child and the mother, to the child and the father, cannot be obtained for both parents. The court will seek to achieve justice for the child. This court's fact finding and application of relevant law must mitigate against the heartfelt desires of one or the other of the natural parents.

In short, the court initially recognized that the claims of Mr. Stern and Mrs. Whitehead were based on biological grounds rather than legal entitlement. Pursuant to statute N.J.S.A. 9:17–44, given Mr. Whitehead's refusal to consent to the artificial insemination of his wife, paternity was accorded to Mr. Stern, the sperm donor, who was genetically related to the child. Although maternity can be severed into various components, apart from her stated intent in the surrogacy contract to relinquish parental rights upon the child's birth, Mrs. Whitehead, by all of the other criteria that aid in determining parenthood, appears to be the one. She is genetically and gestationally related to the child; she expressed a post-birth intention to serve as a mother, and her reluctance to surrender her child would lead the court to conclude that she is a mother in fact, if not in law.

Yet the court depicts Mrs. Whitehead in the following manner:

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[5] *Baby M*, supra n. 3, at 1132.

> Mrs. Whitehead has been found too enmeshed with the infant child and unable to separate her own needs from those of the child. She tends to smother the child with her presence even to the exclusion of access by her other two children. She does not have the ability to subordinate herself to the needs of this child. The court is satisfied that . . . Mrs. Whitehead is manipulative, impulsive, and exploitive.[6]

In the words of one legal commentator,[7] the court construed her maternalistic feelings as having "run amok." As evidence for her maternal unfitness vis-à-vis her child, the court referred to her breach of the preconception agreement.[8] Despite the surrogate's gestational bond and post-birth intent to raise the child, the court invoked the legal standard of "the best interests of the child" and concluded that she was unfit to raise this child.[9] Consequently, all of her parental rights were terminated and permanent custody was awarded to Mr. Stern and mandated adoption by Mrs. Stern, who were lauded as "credible, sincere and truthful people."[10]

Though the court treated the dispute as a custody battle between a father and mother, employing the standard of the child's best interests, nevertheless Judge Sorkow focused upon the surrogacy arrangement itself. Given that the drafters of state statutory schemes did not contemplate this type of an agreement, the court concluded that legislation governing adoption and baby-selling could not apply to the *Baby M* scenario. Hence, contract principles, constitutional rules, and *parens patrie*, which he termed a "viable independent standard for termination of parental rights,"[11] were utilized to re-

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[6] Id., at 1170.
[7] Janet Dolgin, *Defining the Family* (New York, 1997), 123.
[8] *Baby M*, supra n. 3, at 1169.
[9] However, the court admitted that she was a fit mother to raise her older children. *Baby M*, supra n. 3, at 1140 & 1170.
[10] Id. at 1170. See also id. at 1167–70.
[11] *Baby M*, supra n. 3, at 1171.

solve the case.[12] Since the Sterns invested time, energy, and emotion in finding the gestational host and initiating pregnancy in reliance on her promise, the court argues that the preconception intentions of the parties should be respected; hence, one cannot justify the reneging decision of the surrogate after giving birth. In effect, the court upheld the validity of the agreement.[13]

Mrs. Whitehead appealed to the New Jersey Supreme Court was and granted certification.[14] The court affirmed the trial court's custody award to Mr. Stern, but reversed the trial court's termination of Mrs. Whitehead's parental rights by invalidating the surrogate contract and the order allowing Mrs. Stern to adopt the child. The case was remanded to the trial court for a determination of the surrogate's visitation rights. Whereas the trial court upheld the surrogacy contract, the Supreme Court chose to invalidate the agreement on statutory and public policy grounds.[15] Rather than suggesting a new legal framework addressing the surrogacy arrangement, the court noted that "the factual issues confronted and decided by the trial court were the same as if Mr. Stern and Mrs. Whitehead had had the child out of wedlock, intended or unintended."[16]

Following in the footsteps of the trial court findings, the Supreme Court concurred that the biological delineation of family provides the bright-line definition, i.e., Mr. Stern is the legal father, and Mary Whitehead is the genetic and gestational mother. Consequently, in treating the arrangement as analogous to private placement adop-

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[12] Id. at 1157, 1159, 1166.Whether specific performance of the surrogate's surrender obligation is to be enforced, see Margaret Radin, Market Inalienability, and 100 *Harv. L. Rev.* 1849, 1921–36 (1987) and Note, Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers, 99 *Har. L. Rev*. 1936, 1954 (1986).
[13] However, this excludes the provision purporting to give Mr. Stern control over abortion. Id. at 1159. Some have argued that the recognition of the contract was cloaked in the garb of the child's best interests standard. See Judith Areen, Baby M Reconsidered, 76 *Georgetown L.J.* 1741, 1751 (1988).
[14] *In the Matter of Baby M*, supra n. 4.
[15] Id. at 1240–1244, 1246–1248, 1250.
[16] Id. at 123.8.

tion, the court terminated Whitehead's maternal rights and awarded custody to Mrs. Stern. Applying the paradigm of adoption to the surrogacy arrangement, the court then proceeded to view the contract, in essence, as baby selling, which is prohibited by New Jersey statute.[17]

At first blush, surrogacy and adoption are similar, and therefore adoption statutes possibly could govern the outcome of surrogacy disputes. Both surrogacy and adoption provide for the termination of parental rights and surrender of child to an individual who is not the legal parent. Additionally, issues of revocability and child's best interests are major concerns in both types of arrangement.

However, to assert that there exist certain common fact patterns and standards emerging from these arrangements is to ignore certain distinctions that argue in favor of treating the situations differently. Rejecting the analogy, one commentator observed:

> In surrogacy (1) the intended father is in most cases the biological father; (2) through their surrogacy contract the intended parents accept responsibility for the child from the moment of conception, thus protecting the interests of the child in having a secure home regardless of impairment in the child or of any changes of circumstances among the adults involved . . . and (3) there is less duress on the woman who agrees to give up the child, since she makes her decision even before conception and is typically a married, secure woman with children of her own. In contrast, the woman who gives up the child for adoption is most often an unmarried teenager for whom this is her first pregnancy (as does the biological father), and who lacks the financial resources to take care of the child.[18]

[17] Id. at 1240. If payment to obtain a child is illegal, then payment for adoption and egg and sperm donation should equally be outlawed. See Richard Posner, The Regulation of the Market in Adoptions, 67 *B.U.L.* 59, 71 (1987). Cf. the trial court's conception of the arrangement as a contract for gestational services rather than a contract for the sale of a baby. See *Baby M*; supra n. 3, at 1157.

[18] Elliot Dorff, *Matters of Life and Death* (Philadelphia, 1998), 65.

Despite these differences as well as others,[19] the court treated the surrogacy contract as a subsection of adoption and construed the adoption statutes to arrive at these conclusions, even if the statutory language dictated otherwise.[20]

Utilizing the child's best interests standard for custody award and adoption placement, the Supreme Court agreed with the trial court that awarding custody to the Sterns was in the child's best interests. However, this standard did not apply to the termination of the surrogate's parental rights. According to New Jersey adoption law, in the absence of intentional abandonment, parental neglect, or parental unfitness, parental rights could not be terminated.[21] The surrogate's behavior did not satisfy statutory requirements; therefore, her rights could not be terminated.[22] Given the surrogate's retention of her parental status and the illegality of the contract providing for the surrogate's contractual relinquishment of parental rights, Mrs. Stern was precluded from adopting Baby M and in effect furnished the grounds for Mrs. Whitehead's claim for visitation.[23]

Though parenthood based upon biology was clearly defined in *Baby M,* technological advances permit the separation of biological motherhood into its genetic and gestational components, two claims to parenthood that have defined natural motherhood since time immemorial. *Johnson v. Calvert*,[24] a case similar to *Baby M,* except that the surrogate bears no genetic bond to the child, was the first case litigated where two women submitted conflicting claims to motherhood grounded on their biological connections to a child. In this case, Anna Johnson, a single mother, was hired as a surrogate to gestate an embryo created with the gametes provided by a mar-

[19] Girardeau Spann, Baby M & and the Cassandra Problem, 76 *Georgetown L.J.* 1719, 1728 (1988).
[20] *Baby M*, supra n. 4, at 1240–46.
[21] Id. at 1242, 1251–52.
[22] Id. at 1251–1252.
[23] In a subsequent proceeding, Mrs. Whitehead was awarded visitation rights. See *In re Baby M*, 225 N.J. Super. 267, 542 A. 2d 52 (Ch. Div. 1988).
[24] 81 P. 2d 776 (Cal. 1993).

ried couple, Mark and Crispina Calvert. Pursuant to the contract, upon birth of the child, Johnson was to surrender parental rights to the Calverts. A few months prior to the child's birth, the parties appeared in court disputing the child's parentage. All three California courts that heard the *Johnson* case ruled in favor of the Calverts, but for different reasons.

At trial, given their genetic connection, the court recognized the Calverts as the baby's parents:

> Who we are and what we are and identity problems particularly with young children and teenagers are extremely important. We know that there is a combination of factors. We know more and more about traits now, how you walk, talk, and everything else, all sorts of things that develop out of your genes, how long you're going to live, all things being equal, when your immune system is going to break down, what diseases you may be susceptible to. They have upped the intelligence ratio of genetics to 70 percent now.[25]

The court found Crispina Calvert to be the baby's "genetic, biological and natural mother" and Mark Calvert to be the baby's natural father, while Anna Johnson was "a gestational carrier" who was like a foster parent knowing that one day the natural mother may regain custody of her child.[26]

The appellate court affirmed, finding statutory authority regarding the parent-child relationship rather than biological truths that the Calverts were the parents.[27] Relying upon a provision of the Uniform Parentage Act (UPA), incorporated into the California Civil Code, that allows a man and a woman to be deemed "natural" parents based upon blood tests which indicate genetic similarities between

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[25] *Johnson v. Calvert*, No. x-1633190, slip op. at 8 (Cal. App. Dep't Super. Ct. Oct. 22, 1990).
[26] Id. at 5–6, 17.
[27] *Anna J. v. Mark C.*, 286 Cal. Rptr. 369, 373 (Ct. App. 1991).

the individual and child provided the basis for the California Court of Appeals to affirm the trial court's findings.[28]

However, the Supreme Court acknowledged that either a genetic function or a gestational function could serve as grounds for declaring natural maternity under California law.[29] In the absence of a legislative preference for either biological contribution and the invocation of biological truths in favor of a particular woman, the Supreme Court declared that the agreement was not "on its face, inconsistent with public policy,"[30] and relied on the contract to determine the parties' intentions.

As the court observed:

> Although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.[31]

Pursuant to the statute, both women demonstrated viable claims based on genetic or gestational contributions toward establishing legal motherhood. Since there was no clear legislative preference for either claim and California recognizes only one mother,[32] the court concluded that the preconception intents of the Calverts was the dispositive factor, and Johnson became the facilitator of the couple's intent. Had Johnson expressed her intentions to raise the child *prior* to negotiating the surrogacy contract, the Calverts would have withdrawn from the arrangement.[33]

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[28] Id. at 373–74.
[29] *Johnson v. Calvert*, 851 P. 2d 776, 780–781 (Cal. 1993).
[30] Id. at 783.
[31] Id. at 782.
[32] Id.
[33] Id.

George Annas, a leading bioethicist, has criticized the reasoning of *Johnson v. Calvert*:

> [The *Johnson*] opinion contributes little to the resolution of whether the genetic or the gestational mother should be considered the legal mother of a child. Calling the genetic mother the "natural" mother simply begs the question; it does not answer it. . . . In human reproduction men contribute only genes; women contribute both genes and gestation. The question is what rules society should adopt now that these maternal contributions can be separated.[34]

To argue that the *Johnson* court failed to provide a solution for gestational surrogacy arrangements shows an unwillingness to admit that the court held that preconception intentions determine legal parentage.

What, in fact, were the parameters of the court's reasoning? Adopting a contractual paradigm, was the court enthroning individual autonomy in collaborative reproduction decision-making and abandoning the traditional biological connections to the child? Was the court formulating a rule that the preconception intentions of a genetic mother will be recognized over the changed intentions of the gestational mother? The majority opinion had, in Judge Kennard's view, decided to rely upon intent to identify the Calverts as legal parents without considering Johnson's interests:

> [I]n making the intent of the genetic mother who wants to have a child the dispositive factor, the majority renders a certain result preordained and inflexible in every case: as between an intending genetic mother and a gestational mother, the genetic mother will, under the majority's analysis, always prevail. The majority recognizes no meaningful contribution by a woman

[34] George Annas, Using Genes to Define Motherhood- The California Solution, 326 *New Eng. J. Med.* 417, 419 (1992).

> who agrees to carry a fetus to term for the genetic mother beyond that of mere employment to perform a specified biological function. . . . the gestational mother's biological contribution of carrying a child for nine months and giving birth is likewise an assumption of parental responsibility.[35]

In fact, this conclusion is a misrepresentation of the majority opinion. The court observed that "under our analysis, in a true 'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law."[36] In other words, if the gestational mother had been the intending mother, she would have been deemed the child's natural parent.

The next year, with *Johnson* as its backdrop, the New York Court of Appeals decided *McDonald v. McDonald*, which scrutinized parentage in the context of gestational surrogacy and recognized the gestational mother as the natural mother because she was the intending mother.[37] In the words of the court:

> In the case at bar, we have a true "egg donation" situation, and we find the reasoning of the Supreme Court of California on this issue to be persuasive. Accordingly, the Supreme Court, Queens County, correctly held that in the instant "egg donation" case, the wife, who is the gestational mother, is the natural mother of the children, and is, under the circumstances, entitled to temporary custody of the children with visitation to the husband.[38]

In short, the *McDonald* holding and the majority opinion of *Johnson* convey the rule "that courts should look to intentional parentage to

[35] *Johnson v. Calvert*, supra n. 29, at 797–798.
[36] Id. at 782, n. 10.
[37] 608 N.Y. S. 2d 477 (N.Y. App. Div. 1994).
[38] Id. at 480.

resolve an apparent biological 'tie' but not to grant parentage to someone lacking any biological connection to the child involved."[39]

In one case, the courts may choose the genetic mother as the legal parent due to her intent to raise the child, and in the other the gestational mother may be chosen as the intended mother. Following in the footsteps of *Johnson*, the *McDonald* court refused to evaluate the case from the child's perspective and thus rejected the application of the child's best interests standard to resolve maternity disputes in gestational surrogacy cases.[40]

This framework for invoking intentional parentage within the context of biological parenthood continued to garner support in *In re Marriage of Moschetta*.[41] In a case involving a traditional surrogacy arrangement, Robert Moschetta, the genetic father, and his wife, Cynthia Moschetta, contracted with a surrogate who was to be inseminated with Robert's sperm, and who consented in exchange for $10,000 to carry the fetus to birth and surrender the baby to the Moschettas. Aware of the couple's marital problems while she was in labor, the surrogate changed her mind regarding the arrangement. After the birth of the baby, Mrs. Moschetta filed for divorce and demanded custody of the baby. Finding no question about biological parenthood to settle, in short, no "tie to break,"[42] the Court recognized Mr. Moschetta and the surrogate as the legal parents and awarded them joint and physical custody. Arguing for Cynthia's maternity in order to preclude having to share custody of his baby with the surrogate, Mr. Moschetta contended that Cynthia had received the baby

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[39] Janet Dolgin, Choice, Tradition, & the New Genetics: The Fragmentation of the Ideology of the Family, 32 *Conn. L. Rev*. 523, 538 (1999–2000). See also, Dolgin, supra n. 7, at 185–187.

[40] *McDonald*, supra n. 37, at 480 & *Johnson*, supra n. 35, at 782, n. 10. In fact, some states adopt this standard for custody determination rather than for parentage determination. See e.g. UTAH CODE ANN. SEC. 76-7-204 (1995) & WASH. REV. CODE ANN. SEC. 26.09. 191; 26.09187 (3) (West 1997). Cf. Id. 799, 801 (Kennard, J., dissenting).

[41] 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994).

[42] Id. at 896.

into her home and therefore should be declared its mother. Refusing to establish parentage based upon the parties' intentions sans reference to biological bonds, the court found no genetic or gestational ties between Cynthia and the baby. Consequently, Cynthia could not be deemed the mother of this child. Finally, the court declined to enforce the surrogacy contract, which was incompatible with the state's adoption laws.[43] In effect, in the absence of a biological connection, Cynthia was not deemed a legal parent. Attempting to unearth the biological criteria for parenthood in statutory law, the court noted:

> [T]he framework employed by *Johnson v. Calvert* of first determining parentage under the Act is dispositive of the case before us. In *Johnson v. Calvert* our Supreme Court first ascertained parentage under the Act; only when the operation of the Act yielded an ambiguous result did the court resolve the matter by intent as expressed in the agreement. In the present case, by contrast, parentage is easily resolved in Elvira Jordan [the surrogate] *under the terms of the Act*. Here, apropos the language in *Johnson v. Calvert* . . . the two usual means of showing maternity—genetics and birth—*coincide in one woman*.[44]

Though the above-discussed cases premise maternity upon either biology, biology coupled with pre-conception intent of the parent, or adoption, *Buzzanca*, involving a gestational surrogacy arrangement, posited a type of parentage *ab initio* that lacks any biological connection to the child.[45] In that case, Mr. and Mrs. Buzzanca contracted with a surrogate to gestate an embryo created from anonymous donors. The couple separated, and Mrs. Buzzanca claimed maternity. The identities of the genetic donors were unknown, the surrogate declined to claim the baby, and the Buzzancas, the intend-

[43] Id. at 894–895.
[44] Id. 895.
[45] *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

ing parents, were not biologically related to the baby. Expanding the *Johnson* intent standard, the court argued that they were the intending parents, despite the absence of biological ties to the baby.[46] Their parentage, i.e., intending parents, was established by their arrangement for the surrogate to become pregnant through the utilization of an embryo created by anonymous donors.[47]

Finally, the court concluded that intending parents serve the best interests of the child and consequently custody should be awarded to the intending parents.[48] This two-pronged approach of initially defining intentional parentage and then arriving at a custody determination based on the child's best interests originated in *Johnson*. As the court observed,

> The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers. The mental concept must be recognized as independently valuable; it creates expectations in the initiating parents of a child, and it creates expectation in society for adequate performance on the part of the initiators as parents of the child.[49]

In place of the biological parentage paradigm and "adoption default model" applied by the courts in other cases of collaborative reproduction, *Buzzanca* applied an intentional-parent construct to be determined apart from the biological facts while simultaneously serving the child's best interests.

The varying paradigms at work in these cases of reproductive technology have been aptly summarized elsewhere:

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[46] Id. at 288–290. For the court's misreading of the *Johnson* holding, see Janet Dolgin, An Emerging Consensus: Reproductive Technology & the Law, 23 *Vermont L. Rev.* 225, 250, n. 166 (1998).
[47] Id. at 288.
[48] Id. at 293.
[49] *Johnson*, supra n. 29, at 783.

> there are three . . . models on which society and the law ground parentage. One model permits the transfer of parentage from one parent or set of parents to another. This sort of parentage does not follow automatically from a child's birth. The second assumes parentage follows automatically from the nature of the biological case. Finally, the third model presumes parentage at the moment of a child's birth, but as the result of legal (cultural) presumptions and not as the result of assumptions about nature itself. . . . Thus, there are two paradigms for determining a child's parentage *ab initio*. One predicates parentage on reproductive facts. The other predicates parentage on presumptions about some social aspect of familial relationships. The sort of parentage *ab initio* constructed in *Johnson* and expanded in *Buzzanca* is presumptive, not biological parentage.[50]

Biological parentage and presumptive parentage are the pole stars for understanding the court decisions emerging from the various collaborative reproduction cases.

Upon further examination, the emerging yardstick of presumptive parentage is reflective of America's "habits of the heart"—Tocqueville's expression for the amalgam of traits essential to our national character and its impact upon the transformation of American family law during the last thirty years. As Robert Bellah and his colleagues, for example, have observed:

> Tocqueville . . . saw the family, along with religion and democratic political participation, as one of the three spheres that would help us to moderate our individualism. . . . Much has changed since Tocqueville's day. . . . Given the enormous American emphasis on independence and self-reliance . . . the survival of the family, with its strong emphasis on interdependence and acceptance, is striking. . . . the network of kin-

[50] Dolgin, supra n. 46, at 259.

> ship has narrowed and the sphere of individual decision has grown. . . . The sphere of individual decision within the family is growing. For one thing, it is no longer considered disgraceful to remain unmarried. . . . Further, no one has to have children. Finally, one can leave a marriage one doesn't like. Divorce as a solution to an unhappy marriage, even a marriage with younger children, is far more acceptable today than ever before.[51]

In short, the shift from a familial to contractual orientation has laid the groundwork for family members to view themselves "as a collection of individuals united temporarily for their mutual convenience and armed with rights against each other."[52] In the legal context, this perception has been translated into private ordering of behavior. This "privatization process"[53] has led to the development of prenuptial and post-nuptial arrangements, treating married persons as separate individuals, and a shift from fault-based to no-fault divorce. Marriage has been redefined as the pursuit of individual fulfillment, and parenting has been reconceptualized as an opportunity for individual happiness rather than its value to society and promoting child welfare. Finally, the traditional nuclear family has been challenged by consensual alternatives to marriage, such as co-

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[51] Robert Bellah et al., *Habits of the Heart* (New York, 1985), 85, 89–90. The truth, as Oscar Wilde said, "is rarely pure and never simple" (Wilde, *The Importance of Being Earnest*, Act I); hence, to explain the transformation in family law in terms of a single overarching factor is destined to fail. Thus, this interpretation does not purport to explain all of the strands of family law. However, this line of thought will be helpful in explaining the trend in the emerging definition of parenthood within the context of collaborative reproduction.

[52] Carl Schneider, Moral Discourse and the Transformation of American Family Law, 83 *Michigan L. Rev.* 1803, 1859 (1985).

[53] See Frances Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 *Harvard Law Review(*1983), 1474; Jana Singer, The Privitatization of Family Law, 1992 *Wisconsin Law Review*, 1443, 1446–1449; Lenore Weitzman, *The Marriage Contract* (New York, 1981).

habitation and same-sex marriages and the emergence of intimate contract ordering.[54]

The recognition of surrogacy contracts reflects the extension of the trend in family law toward privatization of family issues. In fact, this shift has not gone unchallenged. There is an ongoing debate in legal scholarship whether a contractual paradigm should be applied to establishing parentage in the context of reproductive technology.[55] Following in the footsteps of the legal scholars who propound the adoption of a contractual model, the majority opinion in *Johnson v. Calvert* invokes intent-based motherhood, championing preconception intentions. As the court noted, the contract model is premised upon the notion that the interests of the genetic mother and the gestational mother as reflected in their preconception agreement are explicit, bargained for, and relied upon.

For *Johnson*, legal parenthood is awarded to the contracting parents, or as the literature would identify them, the intending parents who have intended to bring the child into this world. Addressing the parties' intentions, the court found that but for the Calverts' ac-

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[54] Gregg Temple, Freedom of Contract & Intimate Relationships, 8 *Harv. J. L. & Pub. Pol'y* 121 (1985).

[55] For those who advocate a family law model, see Martha Field, *Surrogate Motherhood* (Boston, 1988); Carl Schneider, Surrogate Motherhood from the Perspective of Family Law, 13 *Harv. J.L. & Public Pol'y* 125 (1990); Alexander Capron & Margaret Radin, Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood, 16 *Law*, *Medicine & Health Care*, 34 (1988); Barbara Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York, 1989); Margaret Brinig, A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement, 81 *Va. L. Rev*. 2377 (1995).

For the contractual model advocates, see Andrea Stumpf, Note, Redefining Mother: A Legal Matrix for New Reproductive Technologies, 96 *Yale L.J*. 187 (1986); June Carbone, The Role of Contract Principles in Determining the Validity of Surrogacy Contracts, 28 *Santa Clara L. Rev.* 581 (1988); John Hill, What Does It Mean to be a " Parent"? The Claims of Biology as the Basis for Parental Rights, 66 *N.Y.U. L. Rev.* 353 (1991); Richard Epstein, Surrogacy, The Case for Full Contractual Enforcement, 81 *Va. L. Rev*. 2305 (1995).

tions, the baby would not exist. Relying upon the analysis of Hill,[56] a proponent of the intentionalist theory, the court invoked the " 'but for' causation argument" and claimed that "the child would not have been born but for the efforts of the intended parents."[57] Hence, the intended parents as against any others would be accorded parental status. At the core of this intent theory is that the intending mother should be afforded parenthood because she orchestrated the procreative process and the honoring of the agreement gives rise to certain expectations. Aside from the instrumental role of the intended mother and the concomitant expectations engendered upon reliance on the agreement, the existence of intent vests feelings of motherhood between her and the baby. Relying upon the words of Stumpf,[58] *Johnson* explained,

> The mental concept of the child is a controlling factor of its creation, and the *originators of that concept merit full credit as conceivers*. The mental concept must be recognized as independently valuable; it creates expectations in the initiating parents of a child, and it creates expectations in society for adequate performance on the part of the initiators as parents of the child.[59]

Giving effect to contractual intent lays the groundwork for the development of a mothering relationship accompanied by a societal expectation of parental responsibility vis-à-vis the child.

However, as Justice Kennard noted in her dissent, it is inappropriate to examine family law through the lens of tort law, property law, and contract law. The opinion asserted unhesitatingly that the

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[56] Hill, supra n. 55, at 41.

[57] *Johnson*, supra n. 29, at 782. For a critique of this argument, see Melinda Roberts, Good Intentions & a Great Divide: Having Babies by Intending Them, 12 *Law & Philosophy*, 287, 312–315 (1993).

[58] Stumpf, supra n. 55, at 196.

[59] *Johnson*, supra n. 29, at 783.

conceiving of a child mentally is invoking the realm of intellectual property-ownership rights akin to an individual who conceives of an invention.[60] In short, the *Johnson* holding, in the words of Dolgin,

> seems to obliterate the long-standing difference in Western culture between relationships based in status and relationships based in contract, because it seems to merge the family with the world of business and commerce, to define family relations as negotiable ties between otherwise unconnected, autonomous individuals.[61]

In effect, for Kennard, the shift from a familial orientation to a contract framework lends credence to Hafen's characterization that "ours is the age of the waning of belonging."[62] This atomism critique, which decries the focus on the individual, his psychic fulfillment, and the commodification of human relationships, and advances the need to develop "belonging"-type relationships that stem from the reservoirs of strength and compassion we carry within ourselves, resonates either as a communitarian or a feminist agenda.

As Marsha Garrison observes, "while communitarian thinkers are a diverse group, they uniformly favor a de-emphasis on abstract individual rights; they tend to emphasize the individual's embeddedness in various communities of interests, such as the family."[63]

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[60] *Johnson*, supra n. 29, at 795–797 (Kennard J., dissenting).

[61] Janet Dolgin, Just a Gene: Judicial Assumptions about Parenthood, 40 *U.C.L.A.* 637, 692 (1993). The interplay of status and contract in the panoply of court decisions in collaborative reproduction is a recurring theme in Dolgin's writings. See Dolgin, supra n. 7, at 63–93, 259–260 & Janet Dolgin, An Emerging Consensus: Reproductive Technology & the Law, 23 *Vermont L. Rev*. 225 (1998).

[62] Bruce Hafen, Individualism & Autonomy in Family Law: The Waning of Belonging, 1991 *B.Y.U. L. Rev.* 1 (1991).

[63] Marsha Garrison, An Evaluation of Two Models of Parental Obligation, 86 *Cal. L. Rev.* 41, n. 205 (1998). For communitarian critiques of the increased contractualization of family law, see Schneider, supra at note 52; Milton Regan, Jr., Market Discourse & Moral Neutrality in Divorce Law, 1994 *Utah L. Rev.* 605,

For feminists, the values of care, commitment, and responsibility must replace "the norms of the marketplace."[64] Hence, the surrogacy contract represents the commodification of a woman's procreative capacity and undermines her identity and personhood.[65]

Whether, to some degree, legal scholars have overstated the extent to which the introduction of a contractual approach in family law has contributed to the development of marriage as an institution of self-fulfillment and gratification rather than commitment and interconnectedness is subject to debate,[66] however, the underlying significance of *Johnson* and the subsequent holdings lies elsewhere. As will be shown, these cases address the broader debate regarding the proper role of contractual intent in establishing parenthood in multifarious situations.

The writings of John Hill and Margorie Shultz, which serve as the backdrop for these cases and have been the most influential in advocating a theory of parenthood based upon intentionality, set

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620, 627; Mary Glendon, *Abortion & Divorce in Western Law* (Boston, 1987), 112–119; Martha Minnow, Forming Underneath Everything That Grows: Toward a History of Family Law, 1985 *Wis. L. Rev.* 819, 894 (1985. Margaret Brinig aptly notes that "much of the communitarian literature . . . sets a mood rather than providing an agenda." Margaret Brinig, Status, Contract, & Covenant, 79 *Cornell L. Rev.* 1573, 1573 (1994).

[64] Minnow, supra n. 63, at 885–889; Katherine Bartlett, Re-Expressing Parenthood, 98 *Yale L.J.* 293, 311–312 (1988). For attempts to demonstrate the compatibility of contract and commitment, see Margaret Brinig & Steven Crafton, Marriage & Opportunism, 23 *J. Legal Studies*, 869, 873 (1994); Lloyd Cohen, Marriage, Divorce, & Quasi Rents: or " I Gave Him the Best Years of My Life," 16 *J. Legal Studies*, 267, 272–273 (1987); Marjorie Shultz, Address at the Law & Society Association Annual Meeting (June 17, 1994) where Shultz points out that "intention and contracting is a primary way to build relationships."

[65] Margaret Radin, Market-Inalienability, 100 *Harv. L. Rev.* 1849, 1932 (1987). See also, Cass Sunstein, Incommensurability & Valuation in Law, 92 *Mich. L. Rev.* 779, 850 (1994).

[66] Jennifer Wriggins, Marriage Law & Family Law: Autonomy, Interdependence, & Couples of the Same Gender, 41 *B.C. L. Rev.* 265, 278–285 (2000).

clear parameters for the application of this intent model.[67] Professor Hill, for example, argues that "what is essential to parenthood is not the biological tie between parent and child but the preconception *intention* to have a child, accompanied by the undertaking of whatever action is necessary to bring a child into the world."[68] Though Hill weighs and rejects various arguments in according priority to genetic or gestational parents over the claims of intentional parents, nevertheless, the model does not govern in all cases. As Hill states,

> Intentionality acts as a trump for the intended parents when conflicting claims are made by parties who have contributed biologically to the creation of the child. Intentionality, however, is not the only way to acquire parentage. Where no party has intended to create a child, as in the case of the unplanned child, there are no intentional parents. Thus, the claims of the biological parents would take precedence.[69]

For Hill as well as for Shultz,[70] the model is relevant only in cases of collaborative reproductive agreements. Adopting this regnant view of the limited application of the intent rule, *Johnson*, *McDonald*, and *Moschetta* looked to intentional parentage to trump a biological tie

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[67] Hill, supra n. 55; Marjorie Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 *Wisconsin Law Review*, 297.

[68] Hill, id. at 414.

[69] Hill, id. at 387. This bargained-for-intention which is determinative of legal parenthood is predicated upon a formal contract rather than a mere gratuitous promise upon which the intent parent relied. See Hill, id. 387, n. 184, 415–416; Dolgin, supra n. 61, at 259. Cf. Marsha Garrison, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 *Harv. L. Rev*. 835, 862, n. 128 (1999–2000). Additionally, the intended parents must have utilized "morally permissible measures," such as refraining from kidnapping and willingness to provide "minimally adequate conditions to be able to raise and care for the child." See Hill, id. at 356, n. 12.

[70] Shultz, supra n. 67, at 324.See also, Shoshana Hillers, A Labor Theory of Legal Parenthood, 110 *Yale L. J*. 691, 703 (2001)

but not to award parentage to someone lacking any biological connection to the child. However, *Buzzanca* demurred, relying on the notion of intent, moved beyond the parameters of these holdings and the influential writings of Shultz and Hill, and allowed parenthood to be determined apart from biological ties.

In short, *Buzzanca* views parenthood as a functional status, rather than one derived from biology or legal entitlement. Adopting this approach has led courts[71] and legal scholarship[72] to limit the rights of parents who have failed to accept responsibility for their children and to grant "parental" rights to nonparents who are intending parents. In effect, pursuant to this perspective, all types of nontraditional family relationships potentially could be granted by the courts and legislatures the status of marital families.

> In effect, parenthood is to be viewed, like adoption, as "essentially the factitious creation of blood relationships between persons who are not so related."[73] The ties between the adopted child and his natural parents are severed, and the adoptive

[71] Ira Ellman, Paul Kurtz, and Elizabeth Scott, *Family Law: Cases*, *Text*, *Problems* (3rd Ed. 1998), 724–728; Harry Krause, Linda Elrod, Marsha Garrison, and J. Oldham, *Family Law: Cases*, *Comments & Questions* (4th ed. 1998), 700–02, 710–11.

[72] Katharine Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed, 70 *Va. L. Rev.* 879, 902–19 (1984); Note, Looking for a Family Ressemblance: The Limits of the Functional Approach to the Legal Definition of Family, 104 *Harv. L. Rev.* 1640, 1643–50 (1991); Nancy Polikoff, The Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 *Geo. L.J.* 459 (1989–1990); Leslie Harris, Reconsidering the Criteria for Legal Parenthood, 1996 *Utah L. Rev.* 461, 480; Dolgin, supra n. 7, at 226.

[73] Huard, The Law of Adoption: Ancient & Modern, 9 *Vanderbilt L. Rev.* 743 (1956). Forty three years later, the law continues to structure adoption "in imitation of biology." See Elizabeth Bartholet, *Family Bonds: Adoption*, *Infertility and The New World of Child Production* (Boston, 1999), 93, 170; Radhika Rao, Assisted Reproductive Technology & the Threat to the Traditional Family, 47 *Hastings L. J.* 951, 957 (1996); Shultz, supra n. 55, at 320. However, statutory prohibitions

parents have all the rights and responsibilities of a biological parent, including a duty to support the child. Similarly, an adopted child has all the rights of a biological child, including the right to inherit.[74] Analogously, reproductive technology, by separating the biology of parenthood into various components, has allowed the emergence of a notion of parentage focusing on relationships rather than biological ties and defined these relationships as legally equivalent to the status of biological parenthood. Both adoption and the emergence of functional parenthood from various holdings dealing with collaborative technology have attempted to mirror as closely as possible the natural family via a system of legal regulations.

A JEWISH LEGAL VIEW

Does Jewish law impart recognition to the notion of functional parenthood? Let us focus upon Jewish adoption law and its normative implications for collaborative reproductive technology. Without addressing the entire range of ties between adoptive parents and their adopted child, let us briefly deal with the question of support of an adoptive child, the most frequently discussed issue during the last fifty years in Jewish adoption law.[75]

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against incestuous marriages do not apply to adoptive relationships. See *Missouri ex rel. Miesner v. Geile*, 712 F. Supp. 1061 (Mo. Ct. p. 1988); *Israel v. Allen*, 577 P. 2d. 762 (Colo. 1978); *Bagnardi v. Hartnett*, 366 N.Y. S. 2d 89 (Sup. Ct. 1975). Secondly, the unwillingness to erase the biological past is indicated by the trend of unsealing adoption records as well as a move towards open adoptions in which biological and adoptive parents are involved in jointly parenting a child. See Marsha Garrison, supra n. 69, at 890–891.

[74] Homer Clark, *The Law of Domestic Relations*, Minn. 1968, 602. On the other hand, most states have legislated severing the right of inheritance from natural parents. See 2 C.J.S. *Adoption of Persons* Section 146 (1972 & Supplement 2001); *Little v. Smith*, 943 S.W. 2d 414 (Tex. 1997).

[75] Rabbinical Court Decision 2323/1951 (unpublished); Baruch Ezrachi, The Dimensions of Obligation in Child Adoption (Hebrew), 4 *Noam* 94 (1961); Moshe Findling, Child Adoption (Hebrew), 4 *Noam* 63 (1961); Abraham Rudner,

The support obligation is a monetary obligation which creates a monetary debt upon the obligor vis-à-vis the obligee.[76] The *rishonim* (a designation given to 11th–15th century decisors) advanced four possible modes of establishing this monetary obligation: by means of effectuating a *kinyan*, i.e., a symbolic act; by signing a *shtar*, i.e., a deed; by transferring money; or by a prescribed verbal commitment in the presence of witnesses. The normative opinion allows for the creation of a monetary obligation either by submitting a *shtar* to the obligee or by a verbal commitment.[77] Advocating the employment of a *shtar* in 1957, R. Eliezer Goldschmidt, an Israeli rabbinical court *dayan* (an arbiter of Jewish law) drafted a document to be utilized by adoptive parents in obligating themselves to support and educate their adoptive children. In effect, the *shtar* serves as a concrete articulation of the parties' firm resolve to undertake the obligation (i.e., *gemirat da'at*).[78]

The incorporation of a support obligation in a *shtar* poses a difficulty. Seemingly, according to Rambam,[79] *mezonot*, i.e., maintenance, is to be categorized as a matter which is an undefined sum,

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Child Adoption & The Duty to Support a Friend (Hebrew), 4 *Noam* 61 (1961); Mordechai Hakohen, Adoption According to Jewish Law (Hebrew), 48 *Sinai* 204 (1961); Ben Zion Uziel, *Shaarei Uziel*, 2: Gate 39, Chapter 1; 3 *Piskei Din Battei Din Harabbanayim* (hereinafter *PDR*) 109; 4 *PDR* 374; Ido Divon, Obligations of Child Support in Adoption (Hebrew), 9 *Dinei Israel* 183 (1978–80); Herschel Schachter, Adoption in Jewish Law, *Yeshiva University Chavrusa*, April 1982; Shlomo Dichovsky, The Parental Obligation to Support Adoptive Children (Hebrew), 15 *Techumin* 278 (1994).

[76] *Shulchan Aruch* (hereinafter *SA*) *Hoshen Mishpat* (hereinafter HM) 60:6; R. Shimon Shkop (Lithuania and U.S., 1860–1940), *Shaarei Yosher*, Gate 5, Chap. 2.

[77] For an overview of the *rishonim* regarding this matter, see Ezrachi, id. & Divon, id. For the normative position, see *SA*, HM 40:1.

[78] For the text of the agreement, see Dichovsky, id. 291. For a proposed modification of the document, see Itamar Warhaftig, *Undertaking in Jewish Law* (Hebrew) (Jerusalem, 2001), 500–503. For the efficacy of a *shtar* without an accompanying *kinyan*, see R. Moses Maimonides (Egypt: 1135–1204) (hereinafter Rambam) *Mishne Torah* (hereinafter *MT*), Mechirah 11:15, *SA* HM 40:1.

[79] *MT* Mechirah 11:16

i.e., *davar sheino katzuv*. In other words, although the adoptive parent may obligate himself to maintain the child for a specific time, the amount of support is not specified. Consequently, the obligor is bereft of firm resolve, i.e., *gemirat ha-da'at*, to obligate himself in support. Hence, such an agreement should be invalidated. However, given the fact that most decisors disagree with this position,[80] therefore, such a maintenance agreement, despite its undefined nature, is legally effective.

Alternatively, some decisors contend that according to Rambam, should the obligor receive something in exchange for undertaking the obligation, one has transformed a unilateral obligation into a bilateral obligation, which will be legally effective in an agreement with a provision providing for an "undefined sum" of the duty.[81] Consequently, citing the Talmudic dictum *behahi hana'ah de . . . gamar umeshabed nafshe,* i.e., "regarding the benefit he receives . . . he resolves to undertake the obligation," a rabbinical court concludes that the benefit accrued by the adoptive parent in raising this child serves as an essential building block, imparting validity to the *shtar* or verbal commitment for the support obligation.[82] Here, in the *beth*

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[80] R. Shabbetai Rapaport (Poland, 1621–1662), Shach *SA* HM 60:12; 3 *PDR* 109, 110–120; 363, 365–66; 4: 193, 198; 289, 298–300; 11: 240. Cf. 9 *PDR* 251; 11:252; Rudner, id. at 64, n. aleph.

[81] R. Judah Rosanes (Turkey, 1657–1729), *Mishneh Lemelech*, *MT*, Mechirah 11:16; R. Aryeh Loeb Heller (Poland, 1745–1813), *Kezot Hahoshen* HM 60:2; R. Jacob Lorberbaum (Poland, 1760–1832), *Netivot Hamishpat* HM 60:3: R. Abraham Eisenstadt (Poland, 1813–1868), *Pitchei Teshuvah SA* HM 60:3 in the name of the *Urim veTummim*. According to R. Yom Tov Ishbili (Spain, 1250–1330), Ritba, *Ketuboth* 101b, the Rambam's position cannot be understood in this manner. In fact one of the Rambam's responsa contradicts this interpretation. See *Teshuvot* Rambam, No. 114. For an attempt to resolve the seeming contradiction. See 3 *PDR* 109, 119–120.

[82] 3 *PDR* 109, 118; Dichovsky, supra n. 75, at 282. For the meaning of the expression *behahi ha'anah*, see Shamma Friedman, Hana'ah & Acquisitions in the Talmud, 3 *Dine Israel* 115 (1972); Berachyahu Lifshitz, *Promise: Obligation & Acquisition in Jewish Law* (Hebrew), Jerusalem, 1988, 209–19; Warhaftig, supra n.78, at 60, 88, 375–383, 425–426.

din's words, the efficaciousness of the benefit is "akin to money." In other words, the psychological benefit functions like a *kinyan,* similar to the operation of *kinyan kessef,* i.e., the transfer of money.[83]

However, is there a basis for enforcing a support obligation in cases where the adoption document fails to address the issue of maintenance? As we mentioned, to impart legal force to an agreement creating obligations requires that it is objectively evident that the parties involved have firmly resolved to finalize the agreement, i.e., *gemirat daat*. A formal symbolic act, i.e., *kinyan*, attests to the presence of *gemirat daat* or contributes to the realization of *gemirat daat*.[84] Adopting this framework, evidence of *gemirat daat* can be obtained by means of verbal consent alone, sans consummation by means of a *kinyan*. For example, owing to the benefit that parents derive from matrimonial ties, i.e., *hana'ah*, the parents of a prospective groom and bride firmly resolve to bind themselves without a formal *kinyan* to certain premarital monetary obligations.[85] Analogously, owing to the benefit of adoption, the parents firmly make up their

[83] Ezrachi, supra n. 75, at 117. For the antecedents for this premise, see *Ritba*, Kiddushin 6b; R. Moshe ben Nachman (Spain, 1140–1270), Ramban Kiddushin 7b; R. Isaac Herzog (Israel, 20th cent.), *Pesakim Uketavim-Shealoth Uteshuvoth Bedinnei Hoshen Mishpat* 9:111 & *Teshuvot Nachal Yitzchok* 40:3–4, 6; Isaac Herzog, *The Main Institutions of Jewish Law* (New York, 1965), vol. 1, 146–147.

[84] For an overview of decisors and academic scholars who espouse this view, see Ron Kleinman, *Merchant Customs (Lex Mercatoria) Relating to Methods of Acquisition in Jewish Law: Kinyan Situmta* (Hebrew) (Ramat Gan, 2000), Unpublished Dissertation, 106–110. For an alternative explanation, see Kleinman, id.123–125; Shillem Warhaftig, *The Jewish Law of Contract* (Hebrew) (Jerusalem, 1974), 2.

[85] *Talmud Bavli* (hereinafter TB) Ketubot 102b; R. Jacob Tam (France: 1100–1171), *Tosafot* Ketubot 102b, s.v. *alibeh*. Whether the ascertaining of this pleasure is grounded in rabbinic legislation or *umad hadaat*, i.e., a presumption, is subject to debate. See R. Menachem b. Solomon Meiri (Provence, 1249–1316), *Meiri* Kiddushin 9b: R. Ezekiel Landau (Prague: 1713–1793), *Teshuvot Noda Beyehuda*, *Mahadura Kamma*, HM 27–28. For additional sources, see Warhaftig, supra n. 78, at 375–383, 421–426; Kleinman, supra n. 84, at 111–120.

mind and. without the implementation of a *kinyan*, becomes obligated in supporting their adoptive child.[86] The *hana'ah* that the parents derive from adoption is sufficient motivation to bind them to their promises and obviates the necessity of a *kinyan*. Adoption is an example of a situation in which a verbal agreement can effectuate a contract. According to certain decisors, the mere existence of *gemirat daat* predicated upon the presence of benefit *without* a verbal commitment may suffice to create this obligation.[87]

The invoking of *gemirat daat* without an accompanying *kinyan* is predicated upon the assumption that one can expand the cases of "benefit" to be utilized as a yardstick to ascertain *gemirat daat* beyond the situations enumerated in the Talmud.[88] Following in the footsteps of his father, Hazon Ish contended that the efficacy of such an agreement was limited to the cases mentioned in the Talmud.[89] Hence, adopting this approach preempts the application of these grounds for enforceability of the obligation.

In the absence of a written adoption arrangement or in dealing with an arrangement which fails to provide for maintenance, are there additional grounds for enforceability? One suggestion is that the adoptive parental duty provides an example of the creation of an obligation based upon *arevuth*, i.e., surety.[90] Generally speaking, in a conventional surety, an individual guarantees to pay the obligation of another person. The creditor must proceed first against the principal debt in order to satisfy the debt; and failing that, he is then allowed to recover payment from the guarantor. The creditor's willingness to loan the money is grounded upon reliance on the surety's promise to repay the loan. Since the guarantor receives

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[86] Ezrachi, supra n. 75, at 94, 111, 148; Dichovsky, supra n. 75, at 280–281.
[87] Dichovsky, id. 281.
[88] For a listing, see R. Abraham Karelitz (Israel, 1878–1953), *Hazon Ish*, Bava Kamma 21:5; *Heichal Yitzchok* 40: Anaf 3–4.
[89] *Hazon Ish*, Bava Kamma 22 & 21:5.See also, R. Isaac b. Sheshet (Spain: 14th cent.), *Teshuvot Ribash*, no. 129; 5 *PDR* 289, 297.
[90] Dichovsky, supra n. 75, at 285.

hana'ah in being trusted by the creditor, a surety's obligation does not require a *kinyan* to be valid.[91] However, according to certain authorities,[92] this surety relationship is recognized even in the absence of the guarantor's agreement to repay the money. The factor which is instrumental in giving validity to this repayment obligation is the guarantor's feeling of responsibility to avoid causing a financial loss to the individual who relied and trusted in him. Hence, despite the absence of a surety agreement, the psychological benefit engendered by the creditor's trust obligates him. Analogously, since the adoptive child could have been adopted by another family who would have provided food and clothing, consequently implied in the adoption proceeding is the adoptive parent's willingness to assume the support duty, a conventional responsibility incurred by all adoptive parents. This adoptive parental willingness to support is akin to an *arev* who feels responsible for the adoptive child's trust and reliance upon him. Hence, the adoptive parental obligation to support his child.

However, numerous authorities reject this special institution of *arevuth* based upon an obligation.[93] Second, even if one recognizes the efficacy of this type of *arevuth*, R. Farbstein, a contemporary decisor, argues that adoption cases must be distinguished from conventional monetary agreements.[94] For example, if one forwards money to an individual to engage in a commercial transaction for their mutual profit and the person fails to execute his assignment,

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[91] *TB* Bava Batra 173b. For the invoking of the reliance element without adopting the *arevuth* principle, see *Teshuvot Mishpetei Uziel*, EH 4.

[92] *Hiddushei Haritba Hahadashim* Bava Metzia 73b; 75b; R. Solomon ben Adret (Spain: 1235–1310), *Shittah M'Kubbezet*, Bava Metzia 118a; *Netivot Hamishpat* HM 306:6; 3 *PDR* 18, 30.

[93] R. Isaac b. Samuel (France: 12th cent.), *Tosafot Hari*, *Shittah M'kubbezet*, id.; R. Asher b. Yechiel (Spain: 1250–1327), *Piskei Harosh*, Bava Metzia, 5: 69; R. Mordechai b. Hillel Ha*kohen* (Germany, 1240–1298), *Mordechai*, Bava Kamma , 9: 114–115; R. Moses Margoliot (Lithuania, 18th cent.), *Penei Moshe*, *Talmud Yerushalmi* Bava Metzia 5:3

[94] Dichovsky, id.

pursuant to the above opinion, the individual has a right to collect consequential damages due to his reliance on the promisor's words. In the words of one decisor, "the promisee relied upon him and gave him money upon reliance; he therefore is obligated to compensate him for the incurred loss from relying upon the promise; due to the benefit he resolves to obligate himself, like a guarantor."[95] Since he relied upon his promise to engage in the transaction, the resulting damage occurred. Consequently, the promisor is obligated to reimburse the promisee for damages, similar to a guarantor who is obligated to make repayment. In effect, the lost profits arising from inactive capital generate a monetary right to compensatory damages. Adoption, to the contrary, is dealing with a child who is the beneficiary of a gift rather than exercising a monetary right. Hence, the surety arrangement cannot be extended to cover cases of adoption.

Alternatively, the argument has been advanced that the adoptive parental responsibility of support involves the fulfillment of a *hiyuv*, i.e., obligation, namely the mitzvah of *tzedakah*, i.e., charity.[96] Given the fact that *tzedakah* is *mammon sheain lo tovin*,[97] i.e., monies without determinate plaintiffs, the failure to donate is not justiciable. Whereas, for example, the failure to repay a loan gives rise to a *zechut teviyah,* i.e., the claim and initiation of legal proceedings by a plaintiff, the evasion of one's *tzedakah* obligation gives an adoptive child no legal redress against a recalcitrant parent who fails to furnish support. As the Israeli Rabbinical Court notes, "The obligation of *tzedakah* . . . is an obligation upon the individual, but he is not obligated to the recipient. . . . There is a general obligation of *tzedakah* . . . without a creditor to whom he is duty-bound to pay his obligation."[98] Despite the absence of a determinate recipient, the

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[95] Ritba in the name of his teacher, supra n. 92. For an elucidation of this position, see this writer's " The Theory of 'Efficient Breach': A Jewish Legal Perspective" in *Judaism and Economics* (Aaron Levine ed., Oxford 2010).

[96] 3 *PD R* 109,116; Cohen, supra n. 75; Dichovsky, supra n. 75, at 286–287.

[97] *BT* Bava Kamma 36b & 93a; Hullin 103b.

beth din explains, that a deserving, needy individual can approach the *beth din*, and as "father of orphans"[99] it can compel an adoptive parent to fulfill his *tzedakah* obligation.[100]

Aside from the issue of the absence of a plaintiff in the context of a *tzedakah* obligation, the scope of the duty is quite limited. Clearly, amounts of *tzedakah* were fixed at a tithe, limiting the potential donation. Second, the donor's and recipient's financial conditions become relevant factors. An adoptive parent may be obligated to provide support only after providing for his or her own needs.[101] Or if the adopted child is financially independent, there would be no obligation to give *tzedakah*.[102] Hence, there will be numerous situations where an adopted child will be bereft of clothing and food and become a public charge, dependent upon communal charity funds.[103]

In sum, the underlying premise of these varied solutions for obligating an adoptive parent to support his adopted child[104] is that adoption does not reflect the "factitious creation of blood relationships between persons who are not so related."[105] As R. Gedaliah

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[98] 1 *PDR* 145, 154–155.

[99] *BT* Gittin 37a & Bava Kamma 37a.

[100] *PDR*, id.

[101] *Shach*, *SA* Yoreh Deah (hereinafter YD) 240: 5, 248:1; R. Moses Isserles (Poland, 1525–1572), *Rema* YD 251:3.

[102] *Mishpetei Uziel*, EH 74; 2 *PDR* 301;4: 7; 7:136, 149–151.

[103] *TB* Nedarim 65b; *SA* YD 257:8.

[104] Others have suggested that upon an adoptive parent's consent to an adoption, the parent has accepted all the secular legal responsibilities vis-à-vis the adopted child, including maintenance. See Nahum Rakover, Adoption in Mishpat Ivri (Hebrew) 11 *Deoth* 55 (1960); Schachter, supra n. 75; Dichovsky, supra n. 75, at 285. Another suggestion is that upon the child's entrance into the adoptive parent's domicile, the parent becomes automatically obligated to support the child. See Dichovsky, supra n. 75, at 285, n. 3. According to all these approaches, there is an implicit assumption that upon reaching majority and becoming an individual of financial means, the adoptive child needs not reimburse his adoptive parents for their financial outlay of his living expenses. Though this conclusion seems to contradict the ruling in *SA* HM 290:24, nevertheless see *Rema*, YD 253:5 & *Teshuvot R. Akiva Eger*, *Pesakim* 147.

Felder observes,

> The Jewish family is built from its inception upon a natural foundation, based upon a blood tie and unlike ancient nations who accepted a stranger into the family, adopted him and his rights were identical to the rights of a son, this approach is foreign to Jewish law.[106]

Had adoption reflected the natural parent-child tie, there would be a similar support obligation as exists with regard to the nuclear family; a duty not contingent upon resolving certain contractual issues via the means of a *kinyan*, *gemirat daat*, *ha'anah*, employing a special *arevuth* arrangement, or applying the norms of *tzedakah*. In short, the adoptive parent-child relationship is reflective of the laws of obligation and *tzedakah* rather than anchored in biology.[107]

Given our conceptual understanding of the Jewish view of adoption, does contemporary Jewish law recognize functional parenthood as the defining yardstick for establishing legal parentage within the context of collaborative reproductive arrangements between Jews? Does "intending parenthood" as envisioned by *Johnson* and its progeny find any support in our contemporary Jewish legal tradition? To

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[105] Huard, supra n. 73.

[106] *Nachalat Zvi*, vol. 1, p. 180.

[107] While attempting to structure adoption support law upon these varying grounds, the system simultaneously did not sever the ties between the natural parents and the adoptive child. Hence the requirement of open adoption records, see R. Joseph Henkin (U.S., 1880–1973), *Teshuvoth Ibra* 2: 72; R. Menashe Klein (U.S., 21st cent.) *Mishne Halakhoth* 4: 167, 170; For extenuating circumstances which allow the adoptive parent to conceal the natural parents' names from their adoptive child, see *Igros Moshe*, YD 1: 162; R. Samuel Werner (Israel: 20th cent.), *Mishpetei Shmuel*, *Mahadura Tanina*, No. 3.

For an excellent overview of demonstrating that Jewish legal authorities recognized that biological ties between the adoptive child and his natural parents are not severed while simultaneously creating an adoptive relationship without treating it identical to a biological tie, see Nili Maimon, *The Laws of Child Adoption* (Hebrew) (Tel Aviv, 1994), 510–588.

unravel the answer to this question, we shall address whether there exists a support obligation of offspring collaboratively reproduced either through artificial insemination utilizing the husband's semen, i.e., AIH, and artificial insemination utilizing another man's semen, i.e., AID. Both types of insemination involve the emission of semen into the female genital tract without sexual intercourse. Our analysis will establish the relationship between paternity and child maintenance within the context of collaborative reproduction. Does this relationship reflect the adoptive parent's ties to his adopted child? Subsequently, we will address contemporary approaches defining maternity in reproductive technology.

One of the frequently cited sources addressing this problem is the comment of the thirteenth-century French decisor R. Peretz b. Elijah of Corbeille, the author of the *Hagahot Semak*:

> A woman may lie on her husband's sheets but should be careful not to lie on sheets which another man slept lest she become impregnated from his sperm. Why are we not afraid that she become pregnant from her husband's sperm and the child will be conceived of a *niddah* [menstruating female]? The answer is that since there is no forbidden intercourse, the child is completely legitimate [lit. kosher] even from the sperm of another. . . . However, we are concerned about the sperm of another man because the child may eventually marry his sister.[108]

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[108] Cited by R. Yoel Sirkes (Poland, 1561–1650), *Bah*, *Tur* YD 195; R. Samuel Halevi (Poland: 1586–1667), *Turei Zahav*, YD 195:7; R. Samuel b. Phoebus (Poland, 17th cent.), *Bet Shmuel*, EH 1:10; R. Moshe Lima (Lithuania, 1605–1658), *Helkat Mehokek*, EH 1:8; *Mishneh Lemelech*, *MT*, Ishut 15:4.
Though the above decisors concur that the child so conceived is legitimate *ab inito,* nevertheless there are various extant manuscripts of the *Hagahot Semak* which indicate that a child conceived *sine concubito* is a "son of a menstruant," and after the fact, i.e., *be-di-avad*, the child is legitimate. See R. Hayyim Joseph Azulai (Israel: 1724–1806), *Birkei Yosef*, EH 1:14; R. Joshua Boaz (Italy: 16th cent.), *Shiltei Gibborim Shevuot*, The beginning of chapter 2; Joseph Green,

Whether or not a woman can, in fact, be impregnated by sperm while lying on bed sheets, R. Peretz recognizes the empirical possibility of conception *sine concubito*. Second, the offspring is considered legitimate even if the wife were forbidden to her husband on account of her status of ritual impurity, i.e., menstruating.[109] The majority of decisors subscribe to this position, and due to the creation of the paternal ties, the father is obligated to support the child.[110]

However, R. Peretz demurs in the case of a couple who resort to AID, i.e., insemination from the semen of an anonymous donor, not the husband; a situation reminiscent of the traditional surrogacy arrangements. Though AID is not to be equated with adultery due to the absence of sexual intercourse, nevertheless there is a concern that an incestuous relationship may develop at a later date when the child will marry his own sibling. In addition to the concern regarding a future consanguineous marriage, there are numerous halakhic-moral considerations which have been expressed:

Artifical Insemination (Hebrew), 5 *Sefer Assia* 112, 114–116 (1986). Cf. with others who contend that according to the *Birkei Yosef* the child has no father. See Michael Corinaldi, The Legal Status of a Child Born from Artificial Insemination from an Alien Donor or a Donated Ovum (Hebrew) 18–19 *Shenaton Hamishpat Haivri* 295, 302–303 (1992–1994).

For the impact of extant manuscripts upon the validity of the above decisors' rulings, see generally R. Ovadiah Yosef (Israel, contemporary) *Teshuvot Yabia Omer* EH 2:1, subsection 10; R. Shlomo Z. Havlin, Trends in the Publication of the Books of *Rishonim* (Hebrew), 8 *Hamaayan* 36 (1968); Moshe Bleich, The Role of Manuscripts in Halakhic Decision-Making, 27 *Tradition* 22 (1993); Yaakov Spiegel, *Chapters in the History of the Jewish Book: Scholars and Their Annotations* (Hebrew) (Ramat Gan, 1996), 479–514.

The translation of the excerpt from *Hagahot Semak* has been culled from Fred Rosner, *Modern Medicine and Jewish Ethics* (New York, 1986) 93–94.

[109] See R. Moshe Feinstein (U.S., 20th cent.) *Igros Moshe,* EH 2:18.

[110] See Isaac Indig, Maintenance Obligation in Cases of Artificial Insemination (Hebrew), 2 *Dine Israel* 83, 85–99 (1971); J. David Bleich, *Contemporary halakhic Problems* (New York, 1995), 240, n. 9; For dissenting opinions, see Indig, id.; Rosner, supra n. 108, at 96–97; Bleich, id.

> From a psychological point of view, AID is detrimental to the marriage, for it makes the husband feel deficient and lacking function. The couple may thus become estranged, thereby frustrating the whole purpose of allowing AID which is to create conjugal harmony. . . . In the halakhic literature, we find many expressions of spiritual opposition to the act itself. Some of the authorities have termed AID ugliness, abomination, prostitution and licentiousness. . . . Should AID be permitted, there arises the grave moral fear that semen of one donor, or a group of donors, may be used to "produce" a whole generation, justified on the eugenic grounds of improving the strain. This would lead to genetic selection, which is detrimental to the institution of the family. . . . There are some authorities who forbid AID because of the halakhic problems which would arise should it be permitted. Thus, for example, a woman who was a real adulteress could claim that she had conceived by artificial insemination, or a woman undergoing AID might be brought to real adultery with the donor.[111]

Nevertheless, if the procedure is implemented, R. Peretz concludes, the child is legitimate, a position accepted by various contemporary decisors.[112] Others have argued that the implantation of a stranger's semen even without sexual intercourse constitutes adultery plain and simple, and the offspring is considered a *mamzer* or a "doubtful *mamzer*." [113] Whereas in other legal systems a child born out of wedlock where no capital crime has been committed has the status

[111] Moshe Drori, Artificial Insemination, in *Jewish Law & Current Problems* ed. Nahum Rakover (Jerusalem, 1984), 203, 210–212. *Igros Moshe*, EH 1: 71, 2:11; R. Yechiel Weinberg (Switzerland, 20th cent.), *Seridei Esh* 3:5; *Mishpetei Uziel* EH 19; R. Ovadiah Hadayah (Israel, 20th cent.) *Yaskil Avdi*, 5: EH 10; *Ziz Eliezer* 3:27; 9:51 and many others.

[112] R. Menachem Kirschenbaum (twentieth cent.), *Menachem Meshiv* 2:26; R. Yehoshua Baumol (U.S., 1880–1948). *Emek Halakhah* 1:68; *Mishpetei Uziel* EH 19; *Igros Moshe*, EH 1:10, 71 & 2:11

[113] Indig, supra n. 110, at 100–104; Rosner, supra n.108, at 96–97.

of a bastard, in Jewish law there must be an incestuous act involving a capital crime in order to be labeled a *mamzer*.[114] In other words, those authorities who accorded the child the status of a *mamzer* or a *safek* (doubtful) *mamzer* have expanded the concept of *mamzer*. The status of *mamzeruth* is created by any individuals who cannot consummate a valid marriage as well as by individuals involved in an adulterous relationship.[115]

Regardless of whether one considers the child perfectly legitimate or a *mamzer*, the common denominator of the various opinions is that the donor of the sperm is obligated to provide maintenance for the offspring. However, the nature of the obligation may differ. The sources of child maintenance can be based upon either rabbinic legislation or the norms of *tzedakah*. *Mezonot* based upon rabbinic enactment is a direct obligation of the father to his child which is absolute and unconditional, irrespective of the financial situation of the father or of the children. A *tzedakah* obligation, on the other hand, as we mentioned, is conditional on the financial ability of the father to provide for the child and the inability of the child to provide for himself.[116] If *mezonot* is based on the norms of *tzedakah*, it is questionable whether the child has legal standing to sue. As an Israeli Rabbinical Court observes:

> If the obligation is out of charity, one who is able is obliged to give, but this is an obligation applying to him and he is not indebted to the recipient. Even if he is obligated to give charity to a specific person, as in the case of a father to his son . . . it is not an indebtedness to the son.[117]

On these grounds, the son is bereft of legal standing to sue his father.

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[114] *TB* Yevamoth 45b; *SA* EH 4:13.
[115] J. David Bleich, *Bioethical Dilemmas* (New York, 1998), 248–249.
[116] 1 *PDR* 145, 156–157
[117] *PDR*, id.

Adopting the first approach, which recognizes the legitimacy of offspring who are a product of AID, inexorably leads to the conclusion that the *mezonot* obligation is a direct one. On the other hand, if the product of this collaborative reproduction arrangement is accorded the status of a *mamzer* or a *safek mamzer*, there is a dispute regarding the source of the *mezonot* duty, whether it is based upon rabbinic legislation or *tzedakah*.[118] In short, this obligation whether direct or based upon *tzedakah*, is engendered by paternity, regardless of the child's personal status.

However, we are dealing with an *anonymous* donor of semen; hence the identity of the father is unknown. Unable to trace his father's whereabouts, the child will be bereft of food and clothing. The question arises whether the husband of the wife who provided the gametes, conceived, and gave birth to the child becomes obligated to maintain the child. Regardless of whether one views AID as adultery or not, the wife requires the husband's prior consent before undergoing the procedure.[119] In the absence of his consent, the husband is exempt from child support.[120]

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[118] *Shach*, *SA* HM 87: 57; 1 *PDR* 145, 156–157; 2 *PDR* 154. Cf. R. Israel Isserlein (Germany: 15th cent.), *Terumat Hadeshen*, *Pesakim* 37 who expresses a doubt regarding this conclusion.

[119] Clearly, if the procedure is subsumed in the category of adultery (see text accompanying n. 113) the obtaining of the husband's consent cannot nullify the prohibition. A husband's consent to continue to living with his adulterous wife is no defense.1 *PDR* 5, 12.

See Joseph Green, Artificial Insemination in Case Law & Legislation in the State of Israel (Hebrew) 5 *Sefer Assia* 125, 127, n. 9 (1986). Despite the irrelevancy of the husband's consent regarding the impropriety of the act, nevertheless authorities concur, that the wife is bound to her husband by a "*shi'ebud*," i.e., lien regarding conjugal relations. See this writer's Solomonic Decisions in Frozen Preembryo Disposition: Unscrambling the Halakhic Conundrum, 36 *Tradition* 31, 37, n. 8 (2002) and Spousal Emotional Stress: Proposed Relief for the Modern-Day Agunah, 55 *The Journal of Halacha and Contemporary Society* 49, 54, n. 14 (2008).

Without her husband's consent, her participation in this procedure constitutes an infringement of the lien. *Igros Moshe* EH 1:71; R. Eliezer Waldenberg (Israel,

Given the absence of a paternal tie to the child, what are the grounds for obligating the husband in child support? There are two possible bases for the duty. First, it could be construed as an *implied condition* of marriage. The wife desires the procedure in the belief that the offspring represents her last remaining opportunity for genetic motherhood—in talmudic parlance, "wanting a staff to lean on and a spade for burial." [121] In contemporary times, this woman's cause of action has been understood as a means to contribute to her psychological as well as her material well-being.[122] However, this cause of action will not serve as a defense if the wife undergoes the procedure without her husband's consent.[123] Due to his consent, she is willing to remain married to him and views her continued commitment in exchange for her husband's readiness to support the offspring produced from the insemination process.

Alternatively, a more far-reaching position is evidenced in the 1977 decision of a Haifa Regional Rabbinical Court. Predicating its decision upon the position that AID is not considered adultery, the *beth din* notes:

> Since he has agreed to the procedure, therefore all the obligations that flow from this fact accord him the status of an *arev,*

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contemporary) *Ziz Eliezer* 13:97; Unpublished Haifa Regional Rabbinical Court Decision cited in Green ad. locum, 133.

Whether a wife's undertaking this procedure without her husband's prior consent is grounds for divorce, see R. Mordechai Breisch (Switzerland: 1895–1977), *Helkat Yaakov* 1:24; *Ziz Eliezer*, 9:51 ; 13:97; R. Shmuel Halevi Wosner (Israel: contemporary) *Shevet Halevi* 3: 175; R. Isaac Weiss (Israel, contemporary) *Minhat Yitzchok* 4:5; *Igros Moshe,* EH 1:71.

[120] In fact, R. Waldenberg advances the notion that the absence of consent to the adulterous act of AID is an infringement of his *shi'ebud*, resulting in child support exemption. See *Ziz Eliezer* 13: 97: 4. For the exemption of child support and the wife's medical expenses in cases of a husband's refusal to consent to the procedure, see *Igros Moshe* EH 1:10 (end); 71

[121] *TB* Yevamot 65b

[122] 1 *PDR* 8; 4: 356. Cf. Ramban, *Milhamot,* Yevamoth 20b, s.v. *veod hu.*

[123] *Ziz Eliezer* 13:97.

> i.e., guarantor, and clearly under these circumstances all the ingredients that obligate an *arev* exist.[124]

Given the absence of a *kinyan* and an explicit commitment to child support, one contemporary writer questions the efficacy of this *arevuth*.[125] However, as we discussed in our examination of the varying frameworks for establishing a support duty for an adoptive child, *ha'anah* can create an *arevuth* which will mandate a support obligation.[126] As in the case of the adoptive child, the obligation is a product of the relations between the adoptive parents; similarly, in our issue at bar, the duty materializes due to spousal ties. As the Haifa *beth din* observes, in the case of a recalcitrant husband, the wife as the plaintiff is submitting a claim for *mezonot* based upon the halakhic norms of obligations vis-à-vis her husband rather than representing the child as a guardian ad litem enforcing a direct obligation owed by the husband to the child.[127]

As one contemporary scholar argues,

> The court did not base the husband's support liability on his direct commitment to support the child. . . . instead, the court held that the husband is obligated to pay the mother for supporting the child. A direct obligation to support the child would be invalid for two reasons. First, at the time the husband consented to the AID procedure, the child was obviously not yet conceived. Most authorities hold that an obligation made to one who did not exist at the time of the obligation was made is not valid. Second, under Jewish law, to become valid a

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[124] Green, supra n.119, at 133. Clearly, he is not the father of the offspring and therefore there exists no *mezonot* obligation similar to a natural father's duty. See *Taz*, EH 1:8; R. Malkiel Tenenbaum (Poland, 19th cent.) *Divrei Malkiel* 4:107; *Sreidei Esh* 3:5.

[125] Id. at 133, n. 38.

[126] Text accompanying nn. 84–92.

[127] Green, supra n. 119, at 134, n. 39.

> transaction generally requires the performance of a formal act (*kinyan*). No such act was performed, and therefore no valid agreement was made in this case.[128]

The systemic limitations of a possible direct duty vis-à-vis the child, i.e., the absence of a *kinyan* and obligee at the inception of the obligation, serve as the grounds for the nonapplicability of the direct duty. Consequently, the support obligation emerged as a result of the husband's acceding to his wife's request to undergo the procedure. Hence, there exists a husband's duty to his wife to pay for the child's expenses.

In sum, paternity is established based on biology rather than parental intent. In the framework of collaborative reproduction, whether it is AIH or AID, the sperm donor becomes the legal father of the offspring, regardless of his personal status in the eyes of Jewish law.[129] In effect, reproductive noncoital arrangements reflect coital

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[128] Chaim Povarsky, Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish & American Law, 29 *U. Toledo L. Rev*., 409, 444 (1998)

[129] R. Shlomo Z. Urbach, Artificial Insemination (Hebrew)1 *Noam* 145 (1958); *Minhat Yitzchok* 1:50; 4:5; Cf. *Birkei Yosef*, supra n. 108; R. Menachem Kasher, *Torah Shelemah*, 17, Addendum, 4:16; *Ziz Eliezer* 9:51; 15:45; Waldenberg, Test-Tube Babies (Hebrew) 5 *Sefer Assia* 84, 89–90 (1986). Despite the fact, that Jewish law emphasizes biological identity, status and lineage, nevertheless, one of the rationales advanced by decisors who construe AIH as a form of adultery indicates that countervailing considerations will sever the father's biological status. According to the Talmud (*TB* Yevamot 23a; Yevamot 98b; Kiddushin 17b), upon conversion and intermarriage, all familial relationships are severed based upon the rule of *afkerei rachmanah lezares* (hereinafter: *afkerei*), the legal system abandons the sperm. Analogously, in our case and relying upon the precedent-setting responsum of R. Menachem Fano (1548–1620) *Rama Mefano* No. 116, authorities argue that *afkerei* dictates that a woman's insemination by another man (AID) severs any genealogical relationship between the sperm donor and the child. See *Emek Halakha* 2:10; *Ziz Eliezer* 9:51; 15:45, *Sefer Assia*, id. at 305; Corinaldi, supra n. 108, at 305.

For an additional example of the implementation of "*afkerei*" in artificial

reproduction, wherein paternity is created biologically on the basis of having provided the sperm in the context of sexual intercourse either with one's marital partner or with one with whom he has been involved in an adulterous or incestuous relationship. In the absence of paternity, as in the case of the husband in an AIH procedure, support is based on the law of obligations or the norms of *tzedakah* rather than a direct duty imposed by the legal system. Regarding the duty of maintenance, the husband in AIH and an adoptive parent possess identical obligations.

In contrast to determining paternity, with the advent of reproductive technology the answer to the question of who is the child's mother, depending on the context, is not so easily resolved. Regarding traditional surrogacy, such as the *Baby M* and *Moschetta* cases, where the genetic and gestational mothers are identical, maternal parentage is clear-cut. However, in situations where there is the implantation of an embryo or a fetus from a genetic mother to a surrogate mother, the issue of maternity becomes more complex. In such cases of gestational surrogacy, numerous contemporary decisors have raised the question of maternity, i.e., whether the genetic mother, the gestational mother, or both the genetic and gestational mothers are considered the halakhic mother of the resulting child. As in numerous other instances, contemporary authorities resort to the use of analogical reasoning and legal logic, i.e., *sevarah*. Earlier halakhic sources are scrutinized to determine the relevant rules and these are then applied to the new situation. As the *Hazon Ish* observes, "one cannot make a distinction between explicit rules and those which are not explicit. Indeed, no rules are not explicit, for

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insemination, i.e., postmortem sperm implantation, see R. Yechezkel Landau (Prague, 1713–1793), *Noda Beyehuda*, *Mahadura Kamma* EH 69; Urbach, supra n.129, at 155; R. Moshe Hershler, Halakhic Problems of Test-Tube Babies, *in Halakha & Medicine* (ed. M. Hershler), Jerusalem: 1980, 207, 214–215.

R. Shaul Yisraeli (Israel, 20th cent.), *Havot Binyamin* 3: p. 686–687; Yitzchok Breitowitz, Halakhic Alternatives in IVF—Pregnancies: A Survey, 14 *Jewish Law Annual* 29, 91–94 (2003).

everything is explicit in our Torah."[130] Jewish law responds to the challenge in accordance with its own inner logic and on the basis of its prescribed methods, procedures, and canons of interpretation, relying on its own sources to resolve this question.

Among present-day legists there is a heated discussion concerning this problem. Rabbis Shlomo Goren and Itamar Warhaftig regard the genetic mother as the legal mother. In accordance with a tannaitic source cited by both the Jerusalem and Babylonian Talmuds,[131]

> There are three partners in the creation of man: the Holy One, his father, and his mother. The father contributes the semen from which the child's bones, sinews, nails, the brain, and the white in his eye are formed. The mother contributes the red from which the skin, flesh, blood, hair, and the black of the eye are formed. And the Holy One contributes the spirit and the breath, facial features, eyesight, hearing, the power of speech . . . understanding and intelligence.[132]

Upon fertilization, fatherhood and motherhood are defined genetically and the womb of the surrogate mother is merely a medium for growth of the embryo.[133]

The significance of conception can be demonstrated from the ritual law that the milk of a *treifa*, i.e., an animal possessing a physical defect in one of its organs, is not included the prohibition of mixtures of meat and milk. As R. Akiva Eiger states:

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[130] *Sefer Hazon Ish*, HM, Likkutim 16:1.

[131] A tannaitic source is one of the sources of Jewish law which was recorded between the first century C.E. ando 220 C.E.

[132] *TY* Kilayim 8:3; *TB* Niddah 31b. R. Goren, *Torat Harefuah* (Hebrew) (Jerusalem, 1999), 271.

[133] Itamar Warhaftig The Validity of a Surrogate Agreement (Hebrew) 16 *Techumin* 181, 185 (1997) & Establishment of Maternity: Addendum (Hebrew) 5 *Techumin* 268–69 (1984).

> It is questionable whether the milk of a *treifa* is included in the prohibition, according to the principle that a *treifa* cannot give birth, and hence is unable to be a mother. See Sanhedrin 69a (where the Talmud excludes from the laws of the rebellious son one who has reached the majority three months earlier, as he is considered to be a [potential] father and not a son. He is capable of impregnating a woman from when he attains majority, and after three months the pregnancy is evident, at which time, he is called a father.) This implies that the father of an embryo is considered to be a father. Similarly, in our case, the *treifa* is capable of being a mother, since she can conceive, although she cannot deliver (see *Shach* 57, 45). The mother of the embryo is also considered a mother. However, it is possible that the parent of an embryo is considered a parent only if the embryo will be delivered in the future. A *treifa*, however, who cannot deliver, is not considered to be a mother while pregnant. Subsequently, I discovered that the *Issur Veheter* (31, 14) ruled that the milk of a *treifa* is included in the Torah prohibition of milk-meat because it was impregnated before she became a *treifa*, she is capable of delivering even when a *treifa*. Accordingly, the milk of an animal born a *treifa* will not be included in the prohibition.[134]

According to this line of reasoning, motherhood is established by conception. Hence, in a gestational surrogacy arrangement, the genetic mother is the legal mother.

In contrast, earlier twentieth-century decisors such as Rabbis Binyamin Weiss and Yekutiel Kamelhar found corroboration for the rejection of genetics as determinative in the laws of plant graft-

[134] R. Akiva Eiger, *SA* YD 87:6. Translation is culled from R. Zalman N. Goldberg, Maternity in Fetal Transplants, in *Crossroads*: *Halacha & the Modern World* (ed. E. Rosenfeld, Alon Shvut, 1987), 71, 72.

ing.[135] The fruits of a tree are forbidden as *orlah* during its first three years of growth. The Talmud Sotah 43b adds a caveat that a fruit of a seedling grafted onto the mature tree loses its legal status and is not considered *orlah*. Analogously speaking, in our issue at bar, the offspring of a fertilized ovum implanted in a surrogate assumes the identity of the nurturing woman rather the genetic mother. However, R. Yaakov Ariel contends that the *orlah* analogy is flawed. Whereas the seedling, upon being grafted, loses its identity, the fetus is distinct and eventually will exit the surrogate's womb and therefore one could claim that it assumes identity from the woman who is the gamete provider.[136]

The absence of the offspring's identity is underscored by the Talmudic statement that a fetus less than forty days old is "mere water." [137] Hence, argue R. Aaron Soloveichik, R. Shaul Yisraeli, R. Mordechai Halperin, and R. Yehoshua Ben-Meir,[138] the lack of identity implies the absence of legal parentage. Even though genetics is the basis of fatherhood, the birth mother is the legal mother. Seemingly, this source seems to be dispositive regarding this issue. However, numerous decisors argue that an embryo during the first

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[135] R. Binyamin Weiss, *Even Yekarah* 3:29; R. Yekutiel Kamelhar, *Hatalmud Umada'ei Hatevel* (Lemberg, 1908), 44–45. Though both respondents are applying the laws of plant grafting to ovarian transplants, the analogy equally applies to gestational surrogacy. See J. David Bleich, *Contemporary Halakhic Problems* (New York, 1977), 107–108.

[136] R. Yaakov Ariel, Artificial Insemination & Surrogacy (Hebrew), 16 *Techumin* 171, 177 (1997).

[137] *TB* Yevamot 69b.The legal significance of this description of the formation of the embryo, for purposes of the laws of *teruma* (i.e., priestly tithes) and abortion is beyond the scope of this presentation.

[138] R. Moshe Soloveitchik, The Law of Test-tube Babies (Hebrew) 100 *Ohr Hamizrach* 122, 125 (1980) in the name of R. Aaron Soloveitchik; R. Shaul Yisraeli, *Havoth Binyamin* 2:68 R. Mordechai Halperin, Modern Perspectives on Halachah & Medicine, in *Medicine & Jewish Law* (ed. F. Rosner, New York, 1990), 175; R. Yehoshua Ben-Meir, Legal & Genetic Parenthood in Jewish Law, 12 *Jewish Law Annual* 153, 165–166 (1997).

forty days of gestation may acquire property and inherit.[139] Hence, the recognition of legal capacity is not conditional upon the embryo's future development. Analogously, one could argue that the establishment of parenthood is not contingent upon a particular stage of fetal development.

Third, the rejection of genetics as a determinant of motherhood emerges from the Talmudic law of conversion, a frequently cited argument in favor of those legists who invoke birth as the determinant of maternity.[140] The Talmud observes,

> Twin brothers who are converts or emancipated slaves do not perform *yibum* or *chalitza* [for each other],[141] nor is one prohibited [from marrying] the other's widow. (Rashi—Even if the [first] marriage was contracted after the conversion, as a convert is like a newborn child and therefore he does not have the relationship of brotherhood, even [with a child] from the same mother.) If their conception was before conversion and their birth after conversion, they do not perform *yibum* or *chalitza* (Rashi—Because *yibum* is dependent on the father's side, and they do not have a father), but are prohibited from marrying each other's widow (Rashi— . . . because of the prohibi-

[139] R. Menachen Hameiri (Provence: 1249–1316) citing "the majority of commentators" in *Sefer Beth Habehira Tractate Bava Batra* 141a; Rambam, *MT*, Mechirah 22:10; R. Joseph Caro, *Beth Yosef*, HM 210 in the name of the *Ittur*; *Sema* HM 210:4. in the name of the *Tur* and *SA*.

[140] R. Moshe Hershler, Halakhic Problems with Test-Tube Babies (Hebrew) in *Halakha & Medicine* (ed. M. Hershler, Jerusalem, 1980), 316; R. Zalman N. Goldberg, Fetal Implants (Hebrew) 5 *Techumin* 248, 252 (1984); R. Abraham Kilav, Test-Tube Babies (Hebrew) 5 *Techumin* 260, 261 (1984), R. Moshe Hershler, Test-tube Babies in Jewish Law (Hebrew) in *Halakha & Medicine* (ed. M. Hershler, Jerusalem, 1985), 90, 93.

[141] *Yibum* is levirate marriage (Deut. 25:5) of the widow of a man who died childless and is survived by a brother. He is obligated to either marry her or renounce his duty by means of a ceremony called *chalitza*, literally, removing a shoe, severing the bond between the brother-in-law and the sister-in-law.

> tion of the wife of a brother on the mother's side, as the mother is like any Jewess who bears children).[142]

Based upon the Talmudic rule that "a non-Jew who converts is akin to a newly born child,"[143] an individual who converts to Judaism legally severs all of his non-Jewish familial ties for purposes of Jewish law. Nevertheless, the twin brothers who were conceived by a non-Jewish woman who converted during her pregnancy are considered brothers from their common maternal lineage and are proscribed from marrying each other's wives. Given that upon conversion all previously established familial ties are legally severed, why are the twin brothers obligated to refrain from marrying each other's wives? Obviously, the brothers never converted but are Jewish due to being born from a Jewish mother. The filial relationship is reestablished at the time of birth. As Rashi observes, "the mother is like any other Jewess who bears children."[144] Since at the time of birth the mother was Jewish, her offspring are Jewish and are therefore obligated to refrain from incestuous relationships. Accordingly, birth rather than conception establishes parenthood. Analogously, the legal mother in a gestational surrogacy arrangement is the surrogate mother.

At first glance, it would appear that this source resolves our question. In fact, it is corroborated by various Talmudic dicta which indicate that a child conceived by a non-Jewish woman who converted during pregnancy is exempt from conversion and that such a child is obligated in various laws of the firstborn.[145] Here again, birth establishes maternity, with attendant obligations mandated for the Jewish offspring. Second, implicit in this understanding of the twin-broth-

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[142] *TB* Yevamot 97b. The translation is culled from Goldberg, Fetal Implants, id. at 72.

[143] *TB* Yevamot 22a, 62a, 97b; Bechoroth 47a. For the notion that the process of conversion by means of circumcision and immersion in a ritual bath, i.e., *mikvah*, is viewed legally as a physical transformation, see Tosafot, Sanhedrin 68b, s.v. *katan*.

[144] R. Solomon b. Isaac (France, 1040–1105) Yevamot 97b, s.v. *aval hayavin*.

[145] TB Yevamot 78a, Bechoroth 46a.

ers passage is that only the pregnant woman undergoes conversion and the child is born as a full-fledged Jew. Various legists argue[146] that this line of reasoning is in consonance with the majority opinion[147] that *ubar yerech imo*, literally, the fetus is its mother's thigh. Since the fetus is viewed as an integral part of the mother, therefore, upon her conversion, she becomes a Jewess and the child is born as a Jew. However, if one contends that *ubar lav yerech imo*, literally, the fetus is not its mother's thigh, then the fetus possesses its own legal identity. Hence, the fetus while in his mother's womb undergoes his own independent conversion.[148] Consequently, there is no compelling reason to claim that the child's lineage to his mother is established at birth rather than at conception. Pursuant to this line of reasoning, logic dictates that maternity is determined by conception. Alternatively, one can argue that only with regard to the Talmudic cases which explicitly raise the issue of *ubar yerech imo* or *lav yerech imo* ought this controversy be of concern. However, in Talmudic cases such as the twin brothers which fail to invoke this

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[146] R. Yechiel Epstein (Belarus, 1829–1908), *Aruch Hashulhan* HM 268:1; R. Aryeh Leib Heller (Galicia, 1745–1813), *Avnei Millu'im* EH 13:4; R. Zvi Pesach Frank (Israel, 20th cent.) *Har Zvi* YD 223–224

[147] In addition to over a dozen sources cited by Abraham Steinberg, *Encyclopedia of Jewish Medical Ethics* (Hebrew) Jerusalem, 1996), 125–126, n. 178, see *Aruch Hashulhan* HM 268:11; R. David b. Zimra (Egypt and Israel, 16th cent.) *Teshuvot Ridbaz* 1:188.The Rambam's stance regarding this issue is unclear. For a listing of numerous commentators who attempt to clarify his position, see Steinberg, id., and R. A. Eiger, *Derush Vehiddush Ketuboth* 11:1.

[148] Given the fact, that the fetus is in its natural state of development, i.e., *in utero*, the mother and the fetus underwent conversion by the same immersion. See *TB* Yevamoth 78a. This conclusion is predicated upon the fact that the mother's body is not an interposition with the fetus. See R. A. Eiger, supra n. 147, at s.v. *vehatosfoth*. Upon birth, the child will require circumcision in order to finalize his status as a convert. See Ramban, *Hiddushin* Yevamoth 47b; Rashba, *Hiddushin* Yevamoth 47b. For the ramifications of the status of this newly born uncircumcised child, see R. Naftoli Tropp, *Hiddushin Ketuboth*, No. 28; *Hiddushin* Yevamoth, No. 11; Cf. with Ritva, *Hiddushin* Yevamoth 47b who argues that the fetus in his mother's womb is like a female who requires immersion only.

dispute, one must refrain from introducing it.[149] Hence, there is no compelling reason for us to explain this Talmudic dictum in light of this controversy.

Nonetheless, the analogy between the pregnant gentile woman who converted and our situation of gestational surrogacy is flawed. Implicit in the employment of this analogy is that one can extend the norm governing the twin-brothers case, which is predicated upon one set of fact patterns, to our fact pattern, i.e., surrogacy, which is in relevant respects similar. Regarding the conversion case, based upon the rule that "a convert is akin to a newly born child," all his natural ties have been legally severed, including to his mother, a gamete provider. In effect, his only biological mother is the one who brought him into this world. Though in terms of reality, his gestational mother is identical with the conceiving mother, nevertheless for purposes of Jewish law, based upon his newly born status as a convert, it is a different mother. Hence, in such a situation, birth establishes maternity. On the other hand, in a gestational surrogacy arrangement, the child has *two mothers*, a genetic mother and a gestational one, and possibly maternity is determined by the genetic one.[150] Therefore, R. Levi Halperin argues that in the case of the offspring of a fertilized ovum of a Jewish couple which is implanted in a surrogate and carried to term, maternity (as well as paternity) is determined by genetic origin.[151] In fact, it has been contended that even though conversion annuls familial ties, it cannot erase the biological fact that the birth mother is identical to the genetic mother in the conversion scenarios. In other words, the inference from the conversion situation is that in order for maternity to be based upon parturition, the gestational mother must have been the genetic mother. The conversion scenario proves that the establishment of maternity based upon birth is contingent upon the reality of genetics

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[149] Elyakim Ellenson, The Fetus in Halakha (Hebrew), 66 *Sinai* 20, 28–29 (1970)
[150] R. Yaakov Ariel (Israel, 21st cent.) Artificial Insemination & Surrogacy, 16 *Techumin* 171, 175 (1997).
[151] R. Levi Halperin (Israel, 21st cent.) *Maasheh Hoshev*, 3: 37.

rather than that parturition is the sole determinant of maternity.[152] Hence, the laws of conversion cannot serve as an analogy to demonstrate that the gestational surrogate is the legal mother of the child.

In sum, the common denominator of these proofs is either that a particular source offers a clear answer to our question, such as R. Akiva Eiger's observation regarding the law of *treifa*, or the source is open to analogy and counter-analogy, as in the cases of plant grafting and conversion. Interestingly enough, we find sources that invoke the possibility that both conception and parturition are determinants of maternity, i.e., dual-motherhood. For example, in summarizing a Talmudic source, suggestive of a theory of dual-motherhood as propounded by Professor Low,[153] R. Bleich observes:[154]

> Analogously speaking, is fetal development to be determined by the conceiving mother, similar to the stalk's growth in its initial location which is determinative or by the gestational mother which is akin to the additional grain growth after transplantation which is determinative? Since regarding the case of the grain, the Talmud leaves the situation open and rules that the stringencies of both identities must be invoked, similarly, in a surrogacy arrangement, the fetus should be regarded as having two mothers.

Though all these sources do not address our issue explicitly, the common denominator is that contemporary legists substantiate their claims by distilling the literary sources of the tradition by employing logic and analogical reasoning in order to arrive at their positions.

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[152] R. Ezra Bick, Ovum Donations: A Rabbinic Conceptual Model of Maternity, 28 *Tradition* 28, 29 (1993). Cf. J David Bleich, Maternal Identity Revisited, 28 *Tradition* 52 (1994).

[153] Prof. Zev Low, Test-Tube Baby: The Status of a Surrogate Mother (Hebrew) in 2 *Emek Halakha* 163, 165–169 (1989)

[154] Bleich, supra n. 110, at 254–255. For an additional source underwriting this theory, see Bleich, id. 257.

Given our overview of their thought processes which indicate the intrinsic difficulties with each posture, it is not surprising to find a minority of decisors argue logically, without recourse to precedent, that the fetus is bereft of a natural mother (and equally a biological father). In fact, cognizant of this unique approach to our question, R. Bleich summarizes this approach and reacts to it on purely logical grounds. R. Bleich observes:

> It is forbidden to consume newly harvested grain crops until the *omer* has been offered in the Temple on the second day of Passover. That offering renders permissible not only harvested grain but also grain in the field that has taken root, but which has, as yet, not fully matured. Any crop planted subsequent to the offering of the *omer* does not become permissible for use as food until the following Passover. The Gemara, Menahot 69b, posits a situation in which a stalk of grain is planted and has reached a stage of development equal to a third of its ultimate growth. . . . having reached this stage of development, the stalk is removed from the ground before the *omer* is offered and replanted after the offering . . . and ultimately reaches its normal state of growth. The question posed by the Gemara . . . Is the identity of a stalk of grain determined with finality as soon as it is halakhically recognized as grain? If so, then, having acquired identity and status as grain before the offering of the *omer*, it retains the identity of "pre-omeric" (and hence presently permissible), grain even if a significant portion of its growth occurs after the offering of the *omer*. . . . Or do we regard the portion of the grain added as a result of accretion . . . as having an independent identity, since that growth occurs subsequent to a second "post-omeric" (and hence as yet forbidding) planting?
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> R. Eliezer Waldenberg, *Ziz Eliezer*, XV, no. 45, has advanced the novel view that . . . a child born of an in vitro fertilization has neither a father nor a mother. . . . Rabbi Waldenberg's rea-

> sons, which are not based upon cited precedents or analogy to other halakhic provisions, are three in number: (1) fertilization in the course of in vitro procedure occurs in an "unnatural" manner through the intermediacy of a "third power" extraneous to the father or mother, i.e., the Petri dish. (2) Conception occurs in a manner "that has no relationship to genealogy." (3) In natural reproduction the ovum remains "attached" to the body and is fertilized therein. Maternal identity is consequent solely upon fertilization that occurs while the ovum is yet attached to the mother's body. Thus, upon "severance" and removal of the ovum from the mother's body any genealogical relationship between the ovum and the mother is destroyed. . . . In response to the first argument it must be stated that the Petri dish is not a "third power" and in no way contributes biologically or chemically to the fertilization process. It is simply a convenient receptacle. . . in which fertilization may occur. Rabbi Waldenberg's second argument . . . is entirely conclusory. In order to demonstrate that no maternal relationship exists, some evidence or argument must be presented that would serve to demonstrate that genealogical relationships are generated solely in utero. Whatever cogency the third argument may have is lost if it is recognized that parturition, in and of itself, establishes a maternal relationship.[155]

This give-and-take based on logical argumentation without resorting to source citation adds an additional dimension to the heated debate regarding the determinants of maternity. Essentially, whereas the other contemporary decisors utilize analogical reasoning to arrive at their conclusion, R. Waldenberg extrapolates the unperceived association, the unifying characteristic which informs the myriad of details, to articulate the concept which underlies the many disparate

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[155] Bleich, id. 238–239. For a similar approach to R. Waldenberg's, see R. Yehudah Gershuni, The First Test-Tube Baby in the World According to Halakha (Hebrew) 27 *Ohr Hamizrach* 15 (1979).

facts. For the Netziv, decision-making is a reflection of an ongoing process of employing either sheer untrammeled logic, i.e., *pilpul*, or analogical reasoning, i.e., *medama milta lemilta*.[156] Our discussion regarding the definition of maternity reflects the exercise of both types of reasoning.

In sum, the absence of a clear-cut answer to our issue has allowed legists to resort to the use of analogies and counter-analogies from such diverse areas of the legal system as the laws of conversion plant grafting, dietary laws, agricultural law,[157] animal husbandry law,[158] and inheritance law,[159] and to the employment of sheer logic to establish a determinant of maternity,[160] and animal genealogy to define maternal parenthood.[161] In the absence of a clear-cut determinative answer to our question and/or in light of the emergence of counter-analogies from the heated discussions regarding this matter, authorities have even attempted to yield a halakhic solution based upon various aggadic sources, an obviously problematic approach.[162]

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[156] *Haamek Davar*, Exodus 34:1, Numbers 15:33, and Deuteronomy 10:6. See this writer's *Two Concepts of Contemporary Rabbinic Authority: A Phenomenological Sketch* (forthcoming).

[157] Goldberg, supra n. 140, at 257–258; Goldberg, supra n.134, at 74–75; *Maasheh Hoshev*, supra n. 151, at 35;Ariel, supra n. 150, at 176.

[158] Goldberg, supra n. 134, at 74–75; R. Ezra Bick, Maternity in Fetal Implants, in *Crossroads: Halacha & the Modern World* (ed. E. Rosenfeld: Alon Shvut, 1987), 79, 82–84.

[159] *Maaseh Hoshev*, supra n. 151, at 35.

[160] Waldenberg, supra n. 155.

[161] *Maasheh Hoshev*, supra n. 151, at 35–36.

[162] During the last ninety years, moving beyond the conventional canons of halakhic methodology, legists attempted to arrive at solutions based upon the use of aggadic statements, an obviously problematic approach. See listing in Bleich, supra n. 152, 54–55. In addition, see Bick, supra n. 152, at 38–43 and many others. For an attempt to develop a halakhic conceptual model of maternity based upon aggadic statements, see R. Ezra Bick supra n.152. For a scathing critique for adopting this methodology, see Bleich, supra n. 152, at 55–56.
For the lack of authoritativeness of aggadah, see *TY* Hagiga 1:8, Peah 2:4, Horayoth 3:5; R. Sherira Gaon (Pumbedita: 968–1004), *Otzar Hageonim*,

Contemporary discussions regarding collaborative reproduction reflect our understanding of contemporary Jewish adoption law. The severance of parenthood into genetic, gestational, and intentional components creates indeterminancy of parentage. The Jewish legal response to this indeterminancy is to recognize "biologism" rather than functional and intentional parenthood as the yardstick for establishing legal parentage. Hence, some decisors contend that genetics determines motherhood, others look to parturition, others argue parturition which is contingent upon genetic makeup, others propound a dual-motherhood theory, and some insist that collaborative technology undermines biologism and conclude that the child is bereft of legal parentage. In short, the significance of biology is paramount in the definition of familial relationships (maternal as well as paternal), whether established by coital reproductive or collaborative reproduction.

Hagigah, *Teshuvoth*, 48–49, R. Hai Gaon (Baghdad, 939–1038), *Otzar Hageonim Berachoth*, *Teshuvoth*, 357; *Otzar Hageonim*, *Berachoth*, *Commentaries 135; Otzar Hageonim Hagigah*, *Commentaries*, 69; Rambam, *Moreh Nevukim*, Introduction (end); R. Yair Bachrach (Germany, 1638–1702) *Havot Yair*, 124; *Nodah Beyehuda*, *Tanina* YD 161; *Yabiah Omer*, 1, YD 4, s.v. *ivra*. For additional sources, see Yaakov Elbaum, *Lehavin Divre Hakhamin* (Hebrew) (Jerusalem, 2000), 13–41; Berachyahu Lifshitz, Aggadah & its Role in the History of the Oral Law (Hebrew), 22 *Shenaton Hamishpat Haivri* 233 (2003).Cf. R. Judah b. Bezalel (Prague, 1525–1609), *Sefer Be'er Hagolah* (Jerusalem, 1971), 6, p. 135. However, according to certain authorities, absent any Talmudic dicta to the contrary, one can derive norms from aggadic statements. See R. Yaakov Reicher (Austria, 18th cent.), *Shevut Yaakov* 2:178; R. Menasheh Klein (U.S., 20th cent.), *Mishneh Halakhoth* 2:44; R. Zvi Hirsch Chajes, Darkkhay Ha-Hora'ah, sec. 2 in *Kol Kitvei Maharatz hajes* (Jerusalem, 1958) 1;251. Regarding our issue, there is no explicit Talmudic source contradicting the aggadic statements. In fact, the interpretation of certain sources will corroborate these aggadic conclusions. Hence, the utilization of aggadah to arrive at a normative conclusion would be permissible.

CONCLUDING REMARKS

Cases like *Marvin*, *Baby M*, and their respective progeny give one the opportunity to participate in the ongoing debate about what marriage in society should be.

> Cases are not neatly packaged in the categories established by legislative or judicial rules but exhibit surprising configurations of their own, bringing to the surface hitherto unseen tensions and contradictions in our social life and culture. The legal case is always a narrative; and as a narrative . . . can always be a way of testing the presuppositions of the culture, forcing to the bright center of the mind difficulties we wish to push back into the twilight.[163]

How would intending parenthood redefine or reconstitute parenting? To what degree has the privatization process, which involves private norm creating and private decision-making, impacted upon collaborative reproduction technology?[164]

Our review of the holdings in collaborative reproduction technology reflects the legal uncertainty about the comparative significance of biological criteria vs. contractual criteria in establishing legal parentage. Whereas some courts continue to affirm the long-standing yardstick of biology, others have advocated the employment of the universe of contract to expand the definition of parenthood.[165] As we pointed out, the decisions invoking contract principles have served as grounds for acknowledging the paradigm of the nuclear family but also legitimate non-nuclear relationships that share the essential characteristics of traditional relationships.[166]

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[163] James White, *When Words Lose Their Meaning*, 265 (Chicago, 1984).
[164] See supra, text accompanying n. 63.
[165] See supra, text accompanying nn. 3–71.
[166] See supra, text accompanying n. 72.

In contrast to the role of contractual ordering in American domestic relations, the implementation of private ordering in Jewish family law functions quite differently. The laws of lineage, i.e., *yuhasin*, including the laws of legal parentage, are grounded upon the norms of the Jewish legal system rather than heredity and genetics. Hence, in certain situations the system will impart recognition to genetic facts of procreation, while in others the system will sever the link due to certain normative considerations.[167]

As we saw, maternity is based upon biology rather than intent. Regarding paternity in collaborative reproduction, whether it is AIH or AID, the sperm donor becomes the legal father of the offspring, irregardless of his personal status in the eyes of the system.[168] All of his monetary obligations vis-à-vis his child are a function of his status as a father. What is the status of the husband who consented to the AID procedure? In contrast to Jewish law, numerous American jurisdictions have adopted in whole or in part Section 5 of the Uniform Parental Act, which provides that the husband who consents to the AID procedure is treated as if he were the natural father and donor of the semen.[169] In effect, by designating the husband as the legal father and by denying the identity of the sperm donor, there is a conscious attempt to place this technologically created family into the traditional family defined by blood, marriage, or adoption. For Jewish law, the husband is viewed as akin to an adoptive parent whose monetary obligations, such as child support vis-à-vis his wife's offspring, are grounded upon the law of obligations or the norms of *tzedakah*.[170] These monetary duties are recognized even in the context of AID, which is prohibited by Jewish law. Even though a husband's consent to allow his spouse to be impregnated by a donor will not legitimate the procedure in the eyes of Jewish law, the system will either impart validity to the husband's monetary duties

[167]See supra, text accompanying n. 128.
[168]See supra, text accompanying n. 112–115.
[169]Povarsky, supra n. 128, at 435.
[170]See supra, text accompanying nn. 119–128.

or infer the existence of these duties vis-à-vis the offspring emerging from this procedure. However, in contrast to American law, in Jewish law there is a distinction between the technologically formed family and the traditional one. The husband who consents to an AID procedure, despite his duties vis-à-vis the child created by artificial insemination, is not recognized as his legal father.

The Jewish legal system is reluctant to grant legal validity to parenthood established by intent, choice, and commitment. However, at the same time, the system recognizes that in cases of parentage based upon collaborative reproduction the undertaking of agreements which emerge from the implementation of this technology are to be recognized and require the Jew of the covenant-faith community to comply with the obligations created by the execution of these agreements.[171]

[171]See supra, text accompanying nn. 108–128.

Students

Abortion of the Diseased Fetus in Jewish Law

Ari Berger

INTRODUCTION

The legalization of abortion seized a prominent position among the many social upheavals of the 1970s, carrying with it a plethora of questions for ethical debate. Although superficially boiled down to a question of pro-choice versus pro-life, the modern question of abortion is multifaceted and multidisciplinary. While the debate of abortion-on-demand centers around an analysis of a woman's maternal rights over her body versus fetal rights and fetal status, the full scope of pregnancy termination includes questions of fetal quality of life, fetal life expectancy, psychological impact on mother, child, and family, as well as risks to the mother. Abortion is unique amongst the many social revolutions of the later twentieth century in that it remains a hotly debated topic with unusually strong political import and medical attention.

Historically, the treatment of abortion in Halacha was sparse in comparison to the myriad of works and treatises addressing other areas of Torah law, for the simple reason that abortion rarely presented as a question of practical significance requiring conclusive analysis—until the modern era, that is.[1] With the abortion debate flung across America, prominent rabbis and Jewish educators scrambled to enlighten the Jewish community with the halachic perspective on abortion, lest the masses draw their own conclusions based solely on

[1] Dr. Abraham Steinberg, trans. Dr. Fred Rosner, in *Journal of Halacha and Contemporary Society*, vol. 27 (Spring 1994), p. 36. Quoting A. H. Weiss, *Dor Dor v'Dorshav* (New York and Berlin, 1924), vol. 2, p. 23.

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secular argumentation or on insightful teachings of another religion. Thus, numerous articles appeared in Jewish publications with the goal of imparting the Jewish-halachic outlook.[2] These works gathered the principal, foundational Jewish texts on abortion and then traced how the rabbinic authorities throughout the generations understood and applied these sources. Often, the pages of these texts are filled with complex argumentation regarding details of the law, while the spirit of the law pervades and emerges from the analyses. Both aspects were important to convey to Jewish communities, especially those active in the secular debate.

While expositions of the gamut of halachic literature and Jewish thought on abortion needed to be made available to the Jewish public, there remained a yet greater need for the contemporary halachic decisors, the *poskim*, to evaluate the abortion question with all its modern trappings and issue halachic rulings on the matter. As social reform pushed abortion-on-demand, medical advances yielded a new field of therapeutic abortion. Prenatal diagnostic techniques enabled recognition of fetal anomalies and diseases *in utero*, sparking new ethical conundrums in the age-old question of abortion. A trickle of halachic inquiry commenced as religious couples began to find themselves confronted with these dilemmas. Thus emerged

[2] The reader is directed to the following articles, among others: J. David Bleich, "Abortion in Halachic Literature," in *Jewish Bioethics* (Hebrew Publishing Co., 1979), pp. 134–177. Basil F. Herring, "Abortion," in *Jewish Ethics and Halacha for Our Time: Sources and Commentary* (Ktav Publishing House, Yeshiva University Press, New York, 1984), pp. 25–45. Aaron Lichtenstein, "Abortion: A Halachic Perspective," trans. Nathanial Helfgott, in *Tradition*, vol. 25, no. 4 (Summer 1991), pp. 3–12. Fred Rosner, "The Jewish Attitude Toward Abortion," *Tradition*, vol. 10, no.1 (Winter 1968), pp. 48–71. Fred Rosner, "Abortion," in *Modern Medicine and Jewish Ethics* (Ktav Publishing House, Yeshiva University Press, New York, 1986), pp. 139–160. Avraham Steinberg, "Induced Abortion According to Jewish Law," trans. Fred Rosner, *Journal of Halacha and Contemporary Society*, vol. 27 (Spring 1994), pp. 29–52.

a sizable collection of contemporary halachic responsa as reality compelled the generation's rabbinic leaders and Talmudic masters to undertake thorough examination of abortion in halacha and arrive at definitive conclusions.

A few trends surfaced from all this literature. Early and late halachic authorities vary widely in their interpretation of primary texts and consequently in their rulings on abortion. One finds an unusually broad scope of opinions. Regardless of this fact, Judaism halachically and historically eschews abortion-on-demand;[3] consequently the major concern of Jewish law, ethics, and the contemporary halachic debate concerns therapeutic abortion, an issue both presented by and evolving with modern science. Maternal concerns in regard to abortion, such as danger to the mother's life and health, psychological well-being, or social standing, have received the bulk of ink in past halachic literature, whereas fetal aspects, such as anatomic malformations or potential developmental delay, have attracted less attention. This paper seeks to explore abortion in Jewish law as it applies to questions of fetuses with suspected or confirmed birth defects, particularly in light of responsa from the last three decades.

Halachic Disclaimer. This article represents an attempt to review, analyze, and present a topic in Jewish law, but should not be used to arrive at any halachic decisions. Every case bears its own unique details and subtleties, thus requiring review by a competent halachic authority capable of prescribing an appropriate course of action in accordance with Jewish law.

DESCRIPTION OF CASES

Factors Requiring Analysis

Many questions abound when one begins to contemplate the ethical implications of pregnancy termination for fetal considerations.

[3] Rabbi Yair Bacharach, *Chavot Yair*, no. 31.

The most important of these fall into the following categories, each of which will be briefly addressed in this section: How do we view fetal life and, consequently, the termination of that life? How significant is the life expectancy of the child and the projected quality of its life? How do we consider cases where the fetus's status remains uncertain? Is the anticipated psychological impact on the mother and family of halachic significance? Finally, does the burden associated with raising such a child impact halacha?

Status of Fetal Life. At the extremes, we can view fetal life either as equal to that of an adult human or as an insignificant conglomerate of dividing cells—and numerous possibilities reside in between. If the fetus assumes the status of an adult human, then we should equate its murder, feticide, with homicide and punish accordingly. A fetus viewed as non-human may be considered of absolutely no importance. Alternatively, we might view it as an extension of the sperm and egg, thereby guaranteed at least the same legal protection afforded a gamete.

Along different lines, the fetus may be viewed as a part of the mother or as an alien entity within her. On the one hand, it physically resides within the mother, receiving all its nutrition, oxygen, and protection from her, yet it is also a genetically unique, immunologically foreign, and physically partitioned being. If viewed as its own organism within the mother, then perhaps it should be granted its own rights. Alternatively, when seen as part of the mother, as just another organ, abortion becomes an act of self-mutilation, not one of homicide.

To further complicate the matter, it is conceivable that the fetus's status changes during pregnancy, such that at one point it is considered non-human, while after further development it acquires a higher status. Clarifying the issue of fetal status is most critical: Once we categorize fetal status, it assumes the laws that apply to that category, providing a framework through which to view the fetus.

Life Expectancy. Some congenital diseases minimally shorten the

life expectancy of the afflicted, while others severely truncate life. Is there a stronger argument for terminating a fetus that will only live two decades or only a handful of years? Some prenatally diagnosable diseases allow for survival of mere months or days following parturition; perhaps we should not even consider a fetus or child as alive unless it possesses a certain measure of viability. What of a fetus that cannot survive pregnancy?

Quality of Life. An ultrasound that shows missing limbs preordains a life of physical handicap. Alternatively, some diagnoses carry certainty of reduced mental capacity. Still other diseases implicate a life of illness, infections, hospitalizations, surgeries, or transplants. Does the predicted quality of life play a role in determining the appropriateness of abortion?

Uncertainty of Malady. In many cases an assessment of the facts may disclose one of the following types of situations: An infected fetus will exhibit mental retardation, but the likelihood of infection is only 15 percent. Exposure to a drug causes teratogenicity one-third of the time. The fetus possesses a genetic disease that has 80 percent penetrance. How much weight do these numbers carry when addressing abortion?

Psychological Impact. Raising a child with disability or illness represents a severe emotional toll on the parents. The matter is compounded by expectations of early-childhood demise. The pain and anguish of witnessing the physical deterioration and accompanying suffering of one's own child is unimaginable. Can this play a role in assessing pregnancy termination?

Burden. A child with abnormality or disease places a great burden upon those raising it. It may require arduous attention, assistance, medical care, physical therapy, speech therapy, special education, and medical devices. Furthermore, there is the unfortunate reality that once-stable marriages may be strained to the point of divorce.

Perhaps the parents feel unequipped and unprepared for this situation or wary of the financial responsibility. Additionally, to some, such a child will frankly inconvenience them and sorely disrupt their current lifestyle with which they are content. How are these issues evaluated when considering abortion?

CASE STUDIES

A concise presentation of some of the more common cases that face Jewish couples may prove most effective in enabling the reader to properly conceptualize the issues at hand. It is in these contexts that the multitude of aforementioned theoretical questions must be asked, argued, elucidated, and applied.

Down Syndrome. Trisomy of chromosome 21 causes the common and characteristic disease known as Down syndrome. On average, these patients live into the fifth decade of life[4] and exhibit marginal mental retardation. Down children manifest a higher rate of congenital abnormalities and greater health risks for specific problems. However, many children and adults with Down syndrome possess near-normal health status on a daily basis. A karyotype performed following amniocentesis or chorionic villi sampling (CVS) can confirm this diagnosis prenatally and is considered definitive.

Cystic Fibrosis. Mutation of the CFTR gene leads to the autosomal recessive disease called cystic fibrosis. Patients with cystic fibrosis are now expected to live into their thirties.[5] Cystic fibrosis is characterized by variable expression, such that symptoms can range from mild to life-threatening. Although mental capacity remains normal,

[4] Q. Yang, S.A. Rasmussen, and J.M. Friedman. "Mortality Associated with Down Syndrome in the USA from 1983 to 1997: A Population-based Study," *Lancet* (March 2002), 359: 1019–25.

[5] Cystic Fibrosis Foundation, Patient Registry 2003 Annual Report (Bethesda, Maryland), p. 4.

some individuals affected with cystic fibrosis live difficult lives that often include a myriad of medications, many hospitalizations, surgeries, and even transplantation. Amniocentesis or CVS enables prenatal diagnosis by genetic testing. This results in a definitive diagnosis, especially if the mutations were previously identified in the parents.

Tay-Sachs Disease. Tay-Sachs disease represents another autosomal recessive disease caused by mutation of the Hexosaminidase A gene. However, in contrast with cystic fibrosis, Tay-Sachs is uniformly fatal in early childhood, with a relatively uniform onset and progression of symptoms. The disease begins to present at about six months of age and progresses to manifest any combination of the following: loss of acquired abilities, vision loss, hearing loss, paralysis, and behavioral changes. The child's health progressively deteriorates until death at around age five.[6] Prenatal diagnosis for Tay-Sachs is accomplished in the same manner as cystic fibrosis.

Thalidomide. The tranquilizing drug thalidomide came into use in the early 1960s. Among the indications for use was the alleviation of the morning sickness that commonly accompanies pregnancy. Regrettably, researchers later realized that thalidomide therapy posed devastating teratogenic effects, most commonly phocomelia-agenesis of the limbs. Thalidomide was subsequently removed from the market; however, many currently prescribed medications are known to cause significant birth defects. Deleterious exposure to the fetus can occur even before the mother discovers that she is pregnant.

Anencephaly. Anencephaly is a failure of the brain and skull to completely form during fetal development. Tragically, even if the fetus

[6] National Tay-Sachs & Allied Disease Association (www.ntsad.org/pages/t-sachs.htm).

survives to pregnancy, it will only live a few hours to days.[7] This condition can sometimes be diagnosed prenatally by ultrasound.

ABORTION IN HALACHA

This section aims at identifying and exploring the primary sources—Biblical, Talmudic, and medieval—associated with the issue of abortion in halacha. These serve as the springboard for developing a legitimate halachic perspective regarding pregnancy termination. Two critical tasks lie at hand. First, is termination halachically prohibited? Second, if halachically prohibited, what is the source of the prohibition? Whatever laws apply to the source will apply similarly to abortion.

Biblical and Talmudic Primary Sources

Bereishit 9:6. The verse in Genesis 9:6, an injunction issued to Noah following the flood, states: *Shofeich dam ha'adam ba'adam damo yishafeich* —"One who spills the blood of a man, by a man, his blood shall be split." Translated in this way, the basic meaning of the verse teaches that one human who slays another is put to death by Noachide law. However, a purely literal translation renders the verse as "one who spills the blood of *a man within a man* (*ha'adam ba'adam*), his blood shall be spilt." The Talmud, Sanhedrin 57b, expounds as follows:

> *Mishum Rabbi Yishmael amru af al ha'ubarim. Mai ta'amah di'Rabbi Yishmael? Dichtiv "shofeich dam ha'adam ba'adam damo yishafeich." Eizehu adam shehu ba'adam? Havei omer ze ubar she'bimiei imo.*

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[7] National Institute of Neurological Disorders and Stroke (www.ninds.nih.gov/disorders/anencephaly /anencephaly.htm)

> They said in the name of Rabbi Yishmael: [A non-Jew is put to death] even for fetuses. What is the reason for Rabbi Yishmael? Because the verse states "One who spills the blood of a man within a man, his blood shall be spilt." Who is *a man within a man*? Say this is a fetus in the insides of its mother.

Thus, this verse prohibits abortion to non-Jews. While this statement goes unchallenged in the gemara, some nevertheless maintain that it represents only the view of Rabbi Yishmael, and that the matter is actually a subject of Talmudic debate.[8] The fact that the Talmud learns about feticide from a verse dealing with homicide suggests a similarity, if not an equation, between the two.

Shemot 21:22. Exodus 21:22–23 reads,

> *Vi' chi yinatzu anashim vi' nagfu isha harah vi' yatzu yiladeha . . . anosh yianeish ka' asher yashit alav ba' al ha' isha . . .*
>
> When men fight and they strike a pregnant woman and her offspring come out . . . he shall surely be punished in accord with what the husband of the woman assesses against him . . .

This verse imposes upon an individual responsible for the miscarriage of a fetus the payment of monetary compensation, known as *dimei vladot*, to the father of the fetus. It indicates that feticide is viewed as a monetary violation, not a capital crime.[9] Further evidence comes from the verse *vi' lo tikchu kofer la' nefesh rotzeiach asher hu rasha lamut ki mot yumat*—"and you shall not take atonement-money[10] for the life of a killer who is guilty for death, for he

[8] See *Achiezer*, vol. 3, no. 65:14. Also, *Shu" t Tzitz Eliezer,* vol. 9, no. 51, chap. 2 sec. 3.

[9] Both the *Yad Remah* in his commentary to Sanhedrin 72b and the Ramban in *Toras Ha' Adam* (p. 28, Chavel ed.) bring up this seeming discrepancy.

[10] Translation of *kofer* as "atonement-money" is taken from Nosson Sherman, *The Chumash,* Stone ed. (Mesorah Publications, 1998), p. 932. The oral tradition, in

must be put to death" (*Bamidbar* 35:31); this explicitly prohibits monetary recompense in place of the death penalty as punishment for murder. If so, the Biblical requirement to pay *dimei vladot* appears to indicate that we do not categorize feticide as murder.[11]

Ohalot 7:6 and Sanhedrin 72b. The mishna in Ohalot 7:6 states:

> *Ha'isha she'hi mikashe leileid michatchin et ha'vlad bi'meieha u'motziin oto eivarim eivarim mipnei she'chayyeha kodmin li'chayyav. Yatzah rosho ein nogin bo she'ein dochin nefesh mipnei nefesh.*
>
> The woman who is in difficult labor, we cut up the fetus in her insides and remove it piece by piece, because her life takes precedence to its life. If the majority of it emerged, we may not touch it, for we do not push aside life in place of life.

A number of points may be raised regarding this mishna. First, the mishna clearly states that maternal life takes precedence over fetal life. A number of reasons can be suggested. Perhaps fetal life holds

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Sifrei 161, teaches that the word *kofer*, usually meaning spiritual atonement, here refers to monetary payment—as if the murderer desires to atone for the crime by paying with his money instead of paying with his life.

[11] Furthermore, the Talmudic dictum *kim lei bi'dirabbah minei* teaches that when a crime incurs two punishments, a Jewish court only metes out the more severe punishment. One opinion in the Talmud posits that even in cases where the severe punishment cannot be implemented, the less severe punishment is still deferred. This argues against feticide as a capital crime, for if it is, there should be no monetary compensation whether or not a more severe punishment is imposed. This argument is advanced by Rabbi Meir Plocki, *Chemdat Yisrael*, p. 175, as quoted by Rabbi J. David Bleich, op. cit., p. 139. However, one may argue that feticide is indeed a capital crime, and specifically because there is generally no monetary payment in such an instance did the Torah have to explicitly obligate *dimei vladot*. Alternatively, as shown below, a Jew never receives capital punishment for feticide; therefore, the obligation of *dimei vladot* may be considered the only punishment that exists.

a lower status than an adult life. Alternatively, fetal viability may be considered uncertain, dictating that the mother, whose status as living is certain, takes precedence.[12] Maybe the mother comes first solely because she is the provider and maintainer of the fetus, and therefore it is secondary to her needs. Maybe maternal life is viewed as actual, whereas fetal life is merely potential.

The final line of the mishna teaches that once the baby has emerged from the womb, it may no longer be killed to save the life of the mother. The mishna now identifies it as a *nefesh*, a life. This implies that the unbirthed fetus is not a *nefesh*,[13] possibly explaining why we terminate it to save the mother. Still, the phrase "her life takes precedence to his life" implies that the fetus does have some sort of life, *chayyim*.[14] The exact difference between the mishnaic usage of *nefesh* versus *chayyim* is unclear. Last, how do we understand the scope of the mishna's case, "the woman who is in difficult labor"? Does this mean to permit abortion only when the fetus threatens the mother's life?[15] Maybe the mishna limits abortion to a woman in clear, imminent danger from the fetus, such as a failing delivery. What if the danger is certain but not yet imminent? Alternatively, we can read the mishna as teaching the opposite: even once labor has begun, we can abort the pregnancy; certainly prior to labor we can abort.[16]

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[12] *Shita Mikubetzet*, Talmud Arachin 7a, n. 5.

[13] Rashi, Sanhedrin 72b, s.v. *yatza rosho*.

[14] *Sheilot U'Tshuvot Maharit*, vol. 1, no. 97.

[15] The mishna*'s* terminology, *mikashe leileid*, appears to come from the verse in Bereishis 35:16, *vi'yisu mi'beit el . . . va'teled Rachel va'tikash bi'lidtah*, "And they traveled from Beit El . . . and Rachel gave birth and she had difficulty in her labor." In this incident the danger to Rachel apparently arose during the labor itself, and it led to her untimely death.

[16] Rabbi Ben Zion Uziel entertains both of these possibilities. The rationale behind the final idea is that once labor has begun, the fetus is detached from the mother and could be viewed as its own entity. If we permit abortion even at this stage, we would certainly permit it when the fetus remains attached to the mother. See *Mishpitei Uziel*, vol. 3, Choshen Mishpat, no. 46, secs. 1 and 2.

The gemara in Sanhedrin 72b expounds upon this mishna:

Amar Rav Huna: Katan ha'rodeif nitan li'hatzilo bi'nafsho. Kasavar rodeif eino tzarich hatra'ah lo shna gadol vi'lo shna kattan. Eisvei Rav Chisda li'Rav Huna: "Yatzah rosho ein nogin bo she'ein dochin nefesh mipnei nefesh" vi'amai rodeif hu? Shani hatam di'mishmaya ka radfi lah.

Rabbi Huna said: A minor who is a *rodeif* [pursuer] may be killed in order to save [the pursued]. He holds that a *rodeif* does not require *hatra'ah* [warning]. Rabbi Chisda challenged Rabbi Huna [from the mishna in Ohalot]: "If the majority of it emerged, we may not touch it, for we do not push aside life in place of life." But why, he is a *rodeif*? [The implication is that this fetus is threatening the life of the mother, giving it the status of *rodeif*, yet we are not permitted to kill it. The gemara questions that it must be because a *rodeif* requires proper *hatra'ah,* thus posing a challenge to Rabbi Huna's position.] There it is different, because she is being pursued from heaven.

Should the fetus that endangers its mother's life be considered a *rodeif*, as the questioner in this gemara assumes, then it may be killed at once, as the law provides for anyone who pursues the life of another.[17] However, attributing the status of *rodeif* to a fetus would prove quite novel, since a fetus obviously lacks malicious intent, nor is it even responsible for being in such a position.[18] Whether we indeed view a fetus as a *rodeif* depends on how we understand the gemara's answer. One possible interpretation understands that "pursued from heaven" rejects the notion of a fetus as a *rodeif*; the lack of intent or culpability makes it ridiculous to deem a fetus a pursuer;

[17] Provided that killing the pursuer is the only viable option for thwarting the murder.

[18] *Tiferet Yisrael*, Ohalos 7:6, n. 10.

instead, any time a fetus endangers its mother we should view it as a heavenly decree. If so, we need to find another reason why the antepartum fetus is killed to spare the mother. Alternatively, we could interpret the answer as referring only to the time of birth. A fetus really *can* be a *rodeif*; the gemara's answer only informs us that once the fetus has emerged, we no longer view the situation as fetal pursuit but as heavenly pursuit.[19]

Niddah 44a. The mishna in Niddah 43b–44a teaches:

> *Tinok ben yom echad . . . vi'hahorgo chayyav . . .*
>
> A one-day-old baby . . . one who kills him is liable . . .

At face value this source permits abortion, teaching that one is culpable only for the murder of a birthed fetus. Alternatively, the mishna may refer merely to liability for the death penalty, teaching that one is put to death only for committing infanticide, not feticide. Nevertheless, feticide would remain strictly forbidden regardless of the punishment ascribed to it. How could abortion be considered an act of murder yet remain unpunishable? Perhaps the death penalty cannot be imposed due to a legal technicality, such as the inherent inability to prove that the offender killed a viable conceptus.[20] While other technical-legal answers are suggested,[21] Meiri posits that capital execution was withheld from the offender because of its relative

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[19] This is possibly Rambam's understanding, as will be presented further on.

[20] Rabbi Yeshayah Pick as exposited by Bleich, op. cit., p. 173, n. 70.

[21] Rabbi Eliyahu Mizrachi surmises that since the majority of pregnancies yield viable offspring, the preceding argument would fail to spare a criminal from the death penalty. However, he proposes the following similar—albeit one step more technical—argument: Since there is lack of certainty regarding the viability of the fetus at the time of the crime, the *hatra'ah* given to the offender would be considered *hatra'at safek* thereby precluding a death sentence from ever being issued in such a case. (*Hatra'ah*, warning, is a legal concept prerequisite to the trying of any capital case in a Jewish court of law. Briefly, it requires warning

swiftness and decency. In its stead, divine providence orchestrates a more painful, protracted, torturous death for the perpetrator of so heinous a crime.[22]

Arachin 7a. The mishna and gemara in Arachin 7a discuss a novel case:

> **Mishna:** *Ha'isha she'yatza leihareig ein mamtinin lah ad she'teiled. Yashva al ha'mashbeir mamtinin lah ad she'teiled…*
>
> **Gemara:** *Peshita, gufa hi! Itztarich salka datach amina ho'il u'ketiv "ka'asher yashit alav ba'al ha'isha" mimona di'baal hu vi'lo lifsidei minei; ka mashma lan. Vi'eima hachi nami? Amar Rabbi Avahu amar Rabbi Yochanan: Amar kra "u'meitu gam shneihem" li'rabbot et ha'vlad.*
>
> *"Yashva al ha'mashber, etc." Mai taama? Keivan di'akar gufa achrina hu.*
>
> *Amar Rav Yehudah amar Shmuel: Ha'isha ha'yotza leihareig makin otah kineged beit harayon kidei she'yamut ha'vlad techila kidei she'lo tavo lidei nivul.*
>
> **Mishna:** A [pregnant] woman who is going out to be killed, we do not wait for her to give birth. If she has sat on the birthing stool, we wait for her to give birth.

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the criminal that the crime he is about to commit is a capital crime punishable by death, thereby assuring his full awareness of the gravity and consequences of his impending actions. *Hatra'at safek*, literally a doubtful warning, is a technically invalid form of *hatra'ah*.) Rabbi Eliyahu Mizrachi, commentary to Exodus 21:12, as quoted by Bleich, op. cit., p. 137.

[22] Quoted by Rabbi M. D. Tendler during his undergraduate bioethics course at Yeshiva University, September 23, 2003. The author was unable to locate where in his writings Meiri offers this comment.

> **Gemara:** This is obvious, it's her body! We need it because I might have thought that since the verse writes "as the husband of the woman will impose upon him," [the fetus] is the property of the husband and he should not lose it; therefore this law is taught [i.e., to kill the mother with her fetus]. And let us say this [i.e., not to allow the fetus to die, since legally it is the monetary property of the father]? Rabbi Avahu said in the name of Rabbi Yochanan: The verse says, "and also the two of them shall die," to include a fetus.
>
> "If she has sat on the birthing stool, etc." What is the reason [that we wait until she delivers]? Once [the fetus] detached, it is a separate entity.
>
> Rabbi Yehudah said in the name of Shmuel: A woman who is going out to be killed, we strike her opposite the uterus in order that the fetus should die first in order that she not become repulsive.

Here, the Talmud seemingly regards fetal life quite lightly. Not only does the mishna say that we kill a fetus along with its condemned mother, but the gemara exclaims that this should be obvious![23] Furthermore, Shmuel states that we do not simply allow the fetus to die with the mother, but we actively terminate its life prior to her execution. Why? Merely because it will be more shameful to the deceased mother should a partially living fetus emerge from her mutilated and disfigured body. Thus, the concern to preserve the remaining vestiges of this criminal's dignity after her death suffices to permit feticide. Moreover, the statement "it's her body" bears uncanny resemblance to the contemporary pro-abortion argument that a woman is entitled to exercise her wishes over her own body.[24] Indeed, this

[23] See *Chavot Yair*, no. 31.

[24] In truth, the statement *gufah hi* is not a reference to a woman's autonomy over her body, but espouses the perspective of the fetus as a part of the mother's body.

gemara can be understood as defining a fetus as an organic part of the mother's body and not a separate entity unto itself.

However, there exist alternative ways to comprehend this gemara. Perhaps the court executes the fetus along with its mother because it was included in the sentence of death.[25] Once destined to die, an issue of human dignity, however slight, may permit a termination that hastens fetal death by only a few minutes. We can additionally suggest that Rabbi Yochanan comes to teach that the death of the fetus along with its condemned mother is a Biblical directive, necessary specifically because we would have thought otherwise. The Torah obligates this course of action despite the gravity of feticide in most other instances.

Arachin 7a–b. The gemara in Arachin continues discussing tragic pregnancies and presents the following law:

> *Amar Rav Nachman amar Shmuel: Ha'isha sheyashva al ha'mashber u'meitah ba'shabbat miviin sakin u'mikarin et kreisa u'motziin et ha'vlad.*
>
> Rabbi Nachman said in the name of Shmuel: A woman who sat on the birthstool and died on the Sabbath, we bring a knife and cut open her abdomen and remove the fetus.

Mainstream Jewish thought does not identify with the attitude that an individual has the right to do with his body whatsoever he desires, as exemplified by the Biblical prohibition on tattooing (see *Vayikra* 19:28). Rather, one's body is viewed as a gift and a tool whose utilization in this world is both an opportunity and a responsibility. The way one uses one's body is thus governed and guided by halacha.

[25] Rashi to Arachin 7a. Rashi understands that waiting for the fetus to be born depends on whether the mother went into labor before the trial's conclusion or not. Apparently, if the trial concluded and then the mother entered labor, we could still kill the fetus along with her even though it is no longer part of her body.

This source obliges one to violate the Sabbath in order to save the life of a fetus.[26] This suggests that fetal life is true life whose preservation requires forgoing even Biblical commandments.[27] However, we could argue that until the mother dies we view the fetus as an appendage of her, not qualifying for the violation of the Sabbath on its behalf. Only once the mother has died do we view the fetus as a distinct, live entity trapped inside what is now a mere carcass.[28]

Yoma 82a. The mishna here reads as follows:

> *Ubrah she'hiricha maachilin otah ad she'tashiv nafsha*.
>
> A pregnant woman who smelled [food on Yom Kippur and has an urge to eat it], we feed her until her desire subsides.

This seems to represent another source that permits the transgression of severe Biblical statutes in order to save a fetus. Here, a pregnant woman immersed in the fast of Yom Kippur feels an urge to eat. Perhaps the anxiety and angst engendered by this craving will endanger the fetus. We therefore permit her to eat despite the gravity of the Yom Kippur fast.[29] This perspective places fetal life in high regard. However, the gemara can be understood as concerned with the mother's health, not with that of the fetus. One could argue that we would rather the fetus miscarry than transgress the laws of Yom Kippur, except that a miscarriage compromises the health of the mother.[30] If so, the concern is actually for the safety of the mother.

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[26] See the gemara's continuation for a discussion of the details of the case as regards the violation of Shabbat.
[27] See *Behag* as quoted by Ramban, *Torat HaAdam*, Chavel ed., *Kisvei HaRamban*, vol. 2. pp. 28–29. See also *Ritvah*, Niddah 44a, s.v. *dichtiv*.
[28] See *Tosfot*, Niddah 44a, s.v. *ihu*; Ramban, loc. cit.
[29] *Behag* as quoted in the *Ran*, Yoma 3b, in the pages of the *Rif*, s.v. *vi'katuv*.
[30] Ramban, loc. cit. *Chavot Yair*, no.31.

Sanhedrin 84b. The Talmud here is amidst a discussion detailing what crimes are subject to the death penalty. It questions the implication of the disparate language employed by the Torah regarding murder:

> *Vi'itztarich limichtav "makeh ish," vi'itztarich limichtav "kol makeh nefesh." Di'i katav rachmana, "makeh ish va'meit," hava amina ish di'bar mitzvah in, kattan lo; katav rachmana "kol makeh nefesh." Vi'i katav rachmana, "kol makeh nefesh," hava amina afilu nefalim afilu ben shimona; tzrichi.*
>
> And we need the verse "One who strikes a man [and he dies, he shall surely be put to death]" (Exodus 21:12), and we need the verse "Anyone who strikes a soul [according to witnesses should the killer be killed . . .] (Numbers 35:30). Because if God had [only] written, "One who strikes a man . . .," I would have thought "a man" who is Bar Mitzvah yes, but a minor no; therefore, God wrote, "Anyone who strikes a soul . . . " [to teach that one is also put to death for the murder of a child]. And if God had [only] written, "Anyone who strikes a soul . . .," I would have thought [one is put to death for the murder of] even a nonviable infant, even a nonviable fetus [therefore, God wrote, "One who strikes a man . . ." Thus, both verses are] needed.

Through Biblical exegesis this passage derives that a Jew is not put to death for terminating the life of a nonviable infant or fetus. The initial reaction to this gemara asserts that the offense must not be a capital crime.[31] Others, however, understand the gemara as teaching that abortion does not incur the death penalty despite remaining a capital crime (this notion was treated above in the discussion of Niddah 44a). Indeed, that is the context of the passage—the question of

[31] Rabbi Yosef Trani, *Teshuvot Maharit*, vol. 1, no. 99.

what crimes actually receive the death penalty. Regardless, this passage remains altogether inconclusive, because it speaks of one who kills a nonviable fetus but does not discuss the law of a viable fetus, the latter being arguably more morally problematic.

Yevamot 69b.

> *Amar Rav Chisda . . . vi'i mi'abra ad arba'im maya bi'alma hi*.
>
> Rabbi Chisda said . . . and [even] if she becomes pregnant, until forty [days] it is merely water.

This source seemingly states that a fertilized egg achieves no status as human until forty days of gestation.[32] If this is indeed the case, then we may guiltlessly terminate any embryo within forty days from conception. We find other laws tied into this forty-day period. Anytime a woman gives birth she commences a phase of ritual impurity. This holds true even if she miscarries; however, the loss of an embryo less than forty days old does not engender such impurity.[33] Furthermore, the first issue of the womb, whether alive or not, receives the status of *bechor*, firstborn; however, should the birth be that of a fetus less than forty days old, it is not considered the first issue of the womb and the subsequent birth is deemed the firstborn.[34]

Primary Sources: Rishonim

Having discussed the critical sources in the Torah, Mishna, and Gemara, we now turn to the *rishonim* (medieval rabbinic authorities),

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[32] Interestingly, forty days of gestation is now embryologically closely associated with the initiation of the fetal heartbeat.
[33] Niddah 30a, as cited by Bleich, op. cit., p.143.
[34] Bechorot 47a, as cited by Lichtenstein, op. cit., p. 6.

whose interpretations of the above sources form the framework for understanding the topic at hand. Our understanding and legitimate interpretation of Talmudic literature comes through the approaches and understandings advanced by the *rishonim*, as they represent the primary commentators on the gemara.

Tosfot, Sanhedrin 59a and Chullin 33a. In two places, *Tosfot* discuss the Talmudic dictum that "there is nothing which is permissible for a Jew but prohibited to a non-Jew."[35] They question how this applies to the law of feticide, for which the death penalty applies to the gentile but not to the Jew. They answer that both Jews and gentiles are equally prohibited from feticide and differ only in the punishment meted to them. According to this opinion, the prohibition for Jews is Biblically ordained, just as it is for gentiles.

Tosfot, Niddah 44a. Here *Tosfot* ostensibly adopt the diametrically opposing view.[36] *Tosfot* assume that there exists no prohibition of feticide employing the strong language *mutar li'horgo*—"it is permissible to kill it."[37]

Ramban, Toras Ha'Adam. The position taken by Ramban (Nachmanides) in his work *Torat Ha'Adam* begs presentation because it brings to bear a number of the above sources, providing an insight into the various ways of interpreting and aligning them.[38] Ramban cites the opinion of *Behag* that we violate Yom Kippur, and hence other commandments too, in order to preserve the life of a fetus.

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[35] Sanhedrin 59a, s.v. *leka*. Hullin 33a, s.v. *echad*.

[36] s.v. *ihu*.

[37] Note that we do not consider these differing opinions within *Tosfot* an internal contradiction, for this commentary was compiled from the contributions of hundreds of scholars over a few generations. It stands in contrast to a work authored by one individual, where we go to great lengths to resolve apparent contradictions.

[38] *Torat Ha'Adam.* Chavel ed., *Kitvei HaRamban*, vol. 2. pp. 28–29.

Behag apparently derives this law from the mishna in Yoma quoted above. Additionally, the gemara in Arachin makes a similar provision by permitting Sabbath desecration to save the fetus of a mother who has died in labor.

Ramban attacks this position with three immediate questions. First, the mishna in Ohalot 7:6 says that when the mother experiences difficulty in her delivery, we dispose of the fetus; there is no requirement to save its life. If so, why should we concern ourselves with saving its life on Yom Kippur or the Sabbath? Moreover, the mishna in Niddah 44a records that we only put to death one who murders an infant, not a fetus. Again this implies that fetal life is of marginal importance. Finally, the Torah imposes monetary penalty (*dimei vladot*) upon the terminator of pregnancy, not capital punishment, indicating that it views a fetus more as property than as human life. We know that we violate commandments such as Sabbath and Yom Kippur only when necessary to preserve human life, but if these three sources all imply that fetal life is not equivalent to human life, then how can *Behag* defend his view?

Ramban has now presented five sources, two of which he claims support the notion that fetal life equals human life and three that seem to oppose it. Methodologically, resolving such a contradiction requires siding with one group of sources and understanding the second group in light of the veracity of the first. Alternatively, one could posit that the two groups represent dissenting opinions within the Talmud and that the issue is actually a Talmudic debate. However, Ramban chooses neither of these, claiming instead that while he has accurately presented both groups of sources, another factor requires consideration. True, the latter three sources show that fetal life is not of great significance, yet we still violate commandments to preserve this life in accord with *Behag*'s two sources. Ramban invokes the Talmudic principle that rationalizes Sabbath violation for an individual in need of medical care: "Violate over him one Sabbath in order that he may observe many [future] Sabbaths."[39]

[39] Shabbat 151b.

If so, argues Ramban, we may violate the Sabbath even for a fetus, whose life is yet insignificant, because one day he will grow to observe many Sabbaths.

However, Ramban quotes a second opinion in resolving this contradiction: Really fetal life is insignificant in accord with the latter three sources; the former two require reinterpretation, as follows. On Yom Kippur one feeds the mother because her own life will be imperiled should she miscarry, not due to our concern for the fetus. The second source only permits Sabbath desecration after the mother has died. While the mother is alive, the fetus relies upon her for life and therefore is considered subordinate to and part of her body. At this point it may be killed and the Sabbath may not be violated on its behalf. However, once the mother dies, the fetus becomes its own entity, achieving the status of an adult human whose life must be saved. Note that Ramban does not entertain the possibility of viewing fetal life as human life while reinterpreting the latter three sources, yet this apparently is the position of *Behag*.

Rambam, Mishna Torah. Rambam (Maimonides) codifies this law in the most unusual, unique manner:[40]

> *Harei zu mitzvat lo taaseh she'lo lachus al nefesh ha'rodeif. Lifikach horu chachamim sheha'ubra she'hi mikashe leileid mutar lachtoch ha'ubar bi'meieha bein bi'sam bein bi'yad mipnei she'hu ki'rodeif achareha lihorga. Vi'im mishe'hotzi rosho ein noggin bo she'ein dochin nefesh mipnei nefesh vi'zehu tivo shel olam.*
>
> This is a negative commandment [of the Torah]: To not have mercy on the life of a pursuer. Therefore, the Sages directed that the pregnant woman who is in difficult labor, it is permissible to sever the fetus in her innards whether by medication or by hand because it is like he is pursuing after her to kill her.

[40] *Mishna Torah*, *Hilchot Rotzeiach* 1:9.

> But if it is from [the time that] he has emerged his head, we do not touch him, for we do not push aside life in place of life, and this is the nature of the world.

Questions abound concerning this passage. What compelled Rambam to append this law of abortion to the law of not acting mercifully toward one who pursues the life of another? Why does Rambam call the fetus a *rodeif* (pursuer)? Can we even attribute to a fetus the halachic status of *rodeif* ? Moreover, why does Rambam say that the fetus is "*like* he is pursuing," and not simply that "the fetus *is* pursuing after her to kill her"? If the fetus is indeed a *rodeif*, what difference does it make if his head has emerged or not—either way he is endangering his mother's life and should be killed to save her? Finally, Rambam adds his own closing phrase, "and this is the nature of the world." Where does this come from, what does it mean, and why is it necessary?

Proper interpretation of this Rambam is of utmost importance because his halachic work is considered among the most preeminent and because another great, authoritative codifier of halacha, Rabbi Yosef Cairo, chose to codify this law by quoting Rambam almost verbatim.[41,42] Opinions abound regarding this Rambam; one contemporary medical-halachic work compiles fourteen variant explanations by Maimonidean commentators, many of which differ vastly from one another.[43] Because a lengthy analysis lies beyond the scope of the present essay, this source is best left without further comment rather than risk misrepresenting or undermining the true breadth of the matter.

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[41] *Shulchan Aruch*, Choshen Mishpat 425:2.

[42] Bleich, op. cit., p. 147. *HaRefuah Li'Ohr HaHalacha*, p. 25, notes that both the *Smag* (*Hilchot Ritzichah*, negative precept 164), and *Rabbeinu Bechayei* (*Devarim* 22:26) closely follow the Rambam's position and language as well.

[43] Michael Stern, *HaRefuah Li'Ohr Ha'Halacha* (2000, Institute for the Investigation of Medical Halacha, Jerusalem), chap. 8.

Maharit. Rabbi Yosef Trani of Constantinople, known by the acronym Maharit, represents another important early source.[44] Much controversy centers around correctly evaluating Maharit's position, since two contradictory responsa appear a few pages away from one another in his work. Nevertheless, Maharit is noted for suggesting that the prohibition of abortion for Jews stems from the prohibition of inflicting a wound upon another individual—the act of *chabbalah,* itself learned from the verse in *Devarim* 25:3.[45] With this he demonstrates that the general abortion prohibition need not derive from the laws of murder. Yet even if we accept this as the position of Maharit, ambiguity remains: Is the problem one of wounding the fetus or of wounding the mother? Perhaps Maharit innovates that while murder is defined only as terminating a full human life, a fetus is still enough of an entity that one may not physically harm it.[46] Alternatively, Maharit may view the fetus as a mere limb of the mother; nevertheless, just as one may not damage the mother's arm, so too one may not damage her embryo. Either way, the innovation lies in finding abortion Biblically prohibited but not deriving from murder. Categorizing abortion under the rubric of *chabbalah* carries with it numerous leniencies. Clearly, the prohibition of *chabbalah* does not ban inflicting wounds necessary for medical treatment. If so, abortion could be permitted should the pregnancy present the mother with illness, pain, or anguish, even though not life-threatening.

Chavot Yair. Rabbi Yair Bacharach, the author of *Chavot Yair*, is classically quoted as founding the position that the prohibition of abortion stems from *hashchatat zera'*, destruction of seed, which

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[44] *Sheilot U'Tshuvot Maharit,* vol. 1, nos. 97 and 99.

[45] *Sifrei,* Devarim 25:3. Rambam, Hilchot Sanhedrin 16:12.

[46] On the other hand, Rabbi Aryeh Lipsheutz, in his *Aryeh Dibei Ilai*, Yoreh De'ah, no. 14 (as quoted by Bleich, op. cit.), asks whether it makes sense that one is permitted to murder a fetus but there is a prohibition on wounding it: you can cut its throat but not its finger?!

prohibits ejaculation outside the context of marital relations.[47] Since the embryo develops from the sperm, destruction of the embryo is synonymous with destruction of sperm. A somewhat different formulation: The Torah evidently prohibits *hashchatat zera'* because it desires that the semen be used to create life. If so, destroying an embryo violates this injunction. This represents another approach that recognizes feticide as Biblically prohibited but not as an offshoot of homicide.

Main Perspectives on Abortion

From the preceding discussion emerge a variety of perspectives on how Jewish law views the act of feticide. Four main approaches to this issue are commonly elucidated, each of which carries its own associated laws, halachic principles, and implications. Adopting any view presupposes cogent explanation of Talmudic sources and requires adoption of other principles logically or legally extending from it.

The first approach posits the prohibition of abortion as an act of murder. This position must view the fetus as its own entity with an inherent, undeniable claim to life. Homicide represents one of the three cardinal sins; categorizing abortion as such would imply that a physician must give up his life rather than commit feticide.[48] The only consent for abortion will come in situations where the Torah sanctions taking of life, such as *rodeif* or capital punishment. Other considerations, no matter how grave, will not permit an abortion. If

[47] Rabbi Yair Bacharach, *Chavot Yair*, no. 31.

[48] However, a number of authorities qualify this in various ways. Perhaps feticide is not exactly homicide but an *avizrayhu* (appurtenance) of it. Rabbi Unterman, in *Noam* 6, 52, suggests that only an *avizrayhu* whose prohibition is explicitly stated in the Torah assumes the principle of *yehareig vi'al ya'avor*, "be killed and do not transgress." Since feticide is not explicitly stated but learned by Talmudic exegesis, we would not apply this principle to it even though it falls under the category of murder.

understood as an act of murder, then we can comprehend the fact that non-Jews are put to death for violation of feticide. Further implications include laws that apply to a murderer that should now apply to the aborter; e.g., invalidation as a witness and from performing the priestly blessing ritual.

Maharit's position, which prohibits abortion under the rubric of *chabbalah*, wounding, is altogether different. Here, the fetus might be viewed as an organic part of the mother with no inherent claim to life; rather, its safety is guaranteed vis-à-vis the notion that one may not inflict damage upon their body. Certainly if presented with the option of transgressing the prohibition of *chabbalah* or sacrificing one's life, one must transgress. Furthermore, wounding is permitted in situations of medical need. If our concern regards wounding of the fetus, then we might permit any abortion within forty days of conception, when the fetus is called mere water. Yet, if the issue resides with wounding of the mother, one may not wound her regardless of the stage of pregnancy.[49] With this perspective, however, it becomes more difficult to explain why non-Jews should be put to death for committing abortion.[50]

The third position views abortion as a prohibition of *hashchatat zera'*, destruction of seed. This too does not call for sacrifice of life and would be permitted in cases of danger to life. This approach perceives the fetus as an extension of the gametes from which it arose, not as its own life form. The issues that must be addressed are those that pertain to the laws of *hashchatat zera'*. Adopting this position demands a rigorous understanding of *hashchatat zera'*, since the differing opinions on that issue will impact its application to abortion.

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[49] Unless by defining a fetus of less than forty days as "mere water" one can claim that the physician is not wounding the mother but removing water from her.

[50] Rabbi Moshe Feinstein writes that as long as abortion is Biblically prohibited to both Jews and non-Jews (thereby in accord with the principle "there is no thing which is permissible for a Jew but prohibited to a non-Jew"), it matters not that the prohibitions differ in their details or punishments. See *Igrot Moshe*, Choshen Mishpat, vol. 2, no. 69, sec. 1.

The final approach claims that feticide assumes no true Biblical proscription; nevertheless, it is rabbinically prohibited. This view must perceive the fetus as either a non-human or non-living entity within the mother.[51] Accepting this position would engender a very lenient approach to feticide, for the principles regarding rabbinic decrees include *bi'makom tza'ar lo gazru rabbanan*, " in a situation of suffering the rabbis did not decree," and *bi'makom sakana lo gazru rabbanan*, "in a situation of danger the rabbis did not decree." These statements inform us that the rabbis enacted their decrees with the stipulation that they do not apply in cases of extenuating circumstances. If so, we find abortion generally prohibited, with the exclusion of cases that qualify as extenuating.

THEORETICAL APPLICATIONS

The entire preceding discussion built a conceptual framework for how to view abortion in halacha; it lays the groundwork for shifting this discussion into practical terms. We can now begin to apply the concepts dealt with in the case studies presented in the second section of this paper.[52]

If we accept the approach that the Torah bans abortion as an act of *ritzicha* (murder), we immediately sense its severity. The Torah views all human life as imbued with the same basic quanta of sanctity and thus with equal claims to life. Equating termination of an

[51] Presumably, were the fetus to be viewed as an organic part of the mother like any other limb or organ, the issue of *chabbalah* would present.

[52] This application remains theoretical, serving more as an exercise than an attempt to arrive at proper halachic conclusions. Only the basic, fundamental sources were presented to construct a framework for viewing the topic; the multitude of various analyses, argumentation, and subtle distinctions within each source could not all be addressed. Countless halachic and extra-halachic factors influence the final conclusion of the halachic decisor; therefore, the following discussion aims at presenting a theoretical approach to the practical issues based on the principles that emerge from a basic overview of the topic. How the actual halachic authorities ruled in various cases will be presented in the fifth section.

embryo with homicide effectively assigns the fetus human status. Therefore, just as we murder no human for exhibiting disease or retardation, so too we terminate no embryo earmarked for a life of Down syndrome, cystic fibrosis, or Tay-Sachs. Obviously, the physical, emotional, or financial difficulties that the parents of this child will encounter pale in opposition to murder. The only discussion centers around cases such as the anencephalic, where survival is on the order of days. Here, one could suggest that a mass of cells incapable of survival never assume human status.

Should comprehensive analysis lead one to prohibit abortion as an act of *chabbalah* (wounding), the perspective changes dramatically. If we perceive the offense as a crime against the fetus, then the fetus maintains some sort of quasi-human status: nonhuman in that destroying it fails to qualify as homicide,[53] yet enough of a status to prohibit one from assaulting it. Apparently we must view abortion as a Biblical prohibition, but not a cardinal sin. Thus, danger to maternal life could override fetal protection, but financial, emotional, and psychological considerations do not suffice. However, if we view the *chabbalah* of abortion as a crime against the mother, the fetus is no longer endowed with human status but seen as a limb of the mother, and the *mother* is the victim of abortion. From this perspective, we could morally argue to destroy a mass of cells destined to generate a diseased child, since these cells lack inherent value. Halachically, we would reason that destroying a diseased body part destined to produce agony and pain does not constitute *chabbalah* .

Categorizing feticide under the ban of *hashchatat zera'* carries different notions. While the embryo may not possess inherent value as a human life form, the Torah, by prohibiting its destruction, does place inherent value in its preservation. This again pits a Biblical prohibition against the pain and suffering of raising a diseased child.[54]

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[53] By nonhuman I do not mean that the fetus is viewed as some other life form, but that it has not yet achieved status as a human life.

[54] It should be noted that some authorities postulate that if feticide stems from

The final viewpoint on abortion takes the position that no such Biblical prohibition exists; the Torah emplaced an injunction only upon non-Jews. If so, a fetus maintains no status other than as monetary property of the father,[55] and whimsically terminating it should present no halachic or moral concern. Nevertheless, we presume the act to be rabbinically prohibited, considering the centuries of staunch reluctance to terminate a pregnancy without indication for its necessity.[56] Reduced in severity, a rabbinic ban both curtails abortion-on-demand and carries the aforementioned leniency of *bi'makom tza'ar lo gazru rabbanan*, "in a situation of suffering the rabbis did not decree." Therefore, the rabbinic prohibition would be suspended where completion of pregnancy will legitimately cause the mother great distress and emotional pain. However, defining with certainty what type of fetus prompts excessive emotional suffering remains open to debate. There are numerous content, emotionally healthy, socially integrated families that have a child with special needs, whether because of chronic illness, physical handicap, or mental retardation. The question of where to draw the line in determining this imprecise "emotional suffering" contains ample subjectivity. One might suggest that the more severe diseases, those with fairly trun-

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the prohibition of *hashchatat zera'*, then it should incur the punishment of *mitah bi'yedei shamayim*, "death at the hands of heaven," parallel to violating destruction of seed. See *Zechusa DiAvraham*, cited by *Chemdat Yisrael*, p. 175, no. 7.

[55] This holds true to the point that whenever an abortion is permitted, the father of the fetus must also consent to the termination, for the fetus is monetarily considered his property. See Rabbi Eliezer Waldenburg, *Shu"t Tzitz Eliezer,* vol. 14, no. 101:4.

[56] *Chavot Yair*, in the middle of his dense two-page analysis, interjects that based on his preceding analysis abortion would be completely permissible from a Biblical perspective were it not for the clear custom to the contrary in the Jewish community to protect against promiscuity and illicit relationships. This posits the prohibition as *minhag* (custom). Likewise, the responsa *Emunat Shmuel* (quoted by *Tzitz Eliezer* 7:36 and 9:51–3:2:2) feels that feticide is not prohibited even rabbinically but by some lesser means (*kitzat issur*), which he leaves imprecisely defined.

cated life expectancy and extreme debilitation, would achieve this threshold. Diseases with multiple-decade life-spans and marginal suffering would not qualify, because many parents—despite the need for extra effort, expense, and support—have succeeded in such situations. The borderline cases would await professional evaluation of the mother's emotional stability, optimism, and ability to cope with adversity before arriving at a conclusion.

CONTEMPORARY *POSKIM*

This section will present the positions of numerous contemporary *poskim* (halachic decisors), as well as some of their argumentation and rationale. Frequently, the *posek* will address only the specific question or case as presented to him; however, we can often deduce how he must have understood the issue in general to arrive at his specific conclusion.

Maharit. Rabbi Yosef Trani, a seventeenth-century scholar commonly known by his acronym Maharit, authored a pair of well-known responsa published a few pages from each other in his work *Teshuvot Maharit*.[57] Unfortunately, they are famous, in part, because of their apparent contradiction of each other and seemingly incongruous flow. Nevertheless, in responsum no. 97 Maharit is recognized as introducing the idea that the prohibition of feticide derives from *chabbalah*. In no. 99 he concludes that for a Jew—in a case of the mother's need—performance of an abortion would be permitted "since it is to heal the mother." This seems to follow from the *chabbalah* position, because the injunction against wounding does not apply to medical procedures. However, much controversy remains surrounding the true position of Maharit.

Achiezer. In the *Achiezer*, his collection of responsa, Rabbi Chaim Ozer Grodzinsky concludes that Rambam's designation of a fetus as

[57] Rabbi Yosef Trani, *Teshuvot Maharit*, vol. 1, nos. 97 and 99.

a *rodeif* was only necessary for instances where labor had begun, at which time the fetus has detached from the womb.[58] However, before this stage even Rambam considers the fetus a mere limb of the mother! Of course, we sacrifice one limb to save the entire being. This position also appears to view abortion as prohibited under the rubric of wounding.

Sridei Aish. The following question was presented to Rabbi Yechiel Weinberg and discussed in his *Sridei Aish*:[59] Doctors say that if a pregnant woman becomes infected with rubella, the majority of fetuses will exhibit deafness, blindness, or retardation; therefore, the law in England requires the termination of such pregnancies. Can a Jewish doctor perform this abortion? After a lengthy discussion, Rabbi Weinberg concludes that termination may take place but only prior to forty days from conception. This is because many authorities imply that before forty days the embryo is not yet halachically considered a fetus, and many others hold that even after forty days there is room for leniency regarding abortion. As for Rambam's opinion that a fetus can be terminated only when deemed a *rodeif*, many commentators vary widely in their understanding of this Rambam, and many others argue with the Rambam. However, Rabbi Weinberg appended a concluding footnote remarking that he had recently discovered Rabbi Unterman's position prohibiting even less than forty days and therefore he prefers to leave the subject to further investigation.

Chazon Ish. We can deduce the view of Rabbi Yeshaya Karelitz from his commentary, the *Chazon Ish*.[60] He cites the Talmudic teaching that we may not take one life to save another, for we do not know whose life is of greater value. This principle does not ap-

[58] Rabbi Chaim Ozer Grodzinsky, *Sheilot U'Tshuvot Achiezer*, vol. 3, no.72:3. See also vol. 3, no. 65:14.
[59] Rabbi Yechiel Weinburg, *Sheilot U'Tshuvot S'ridei Aish*, vol. 3, no. 137.
[60] Rabbi Yeshaya Karelitz, *Chazon Ish*, Hilchos Rotzeiach 1:9.

ply when one of the entities is a fetus; fetal life is significant, but secondary to human life. Thus, we violate Sabbath to save the life of a fetus, but we will terminate a fetus in order to spare any other life. This position permits feticide only when it may save the life of another individual.

Igrot Moshe. Rabbi Moshe Feinstein, recognized as one of the leading halachic authorities of America in the later twentieth century, voiced his opinion prohibiting feticide as an act of murder (*ritzicha*) in his responsa *Igrot Moshe*.[61] If so, a fetus may be terminated only if it threatens the life of the mother with certainty. This prohibition applies even prior to forty days.

Rabbi Auerbach. Rabbi Shlomo Zalman Auerbach, recognized as one of the leading halachic authorities of Israel in the latter twentieth century, is quoted as ruling stringently in accordance with the opinion of Rabbi Feinstein in all cases.[62]

Rabbi Yosef. Rabbi Ovadiah Yosef, one of the foremost Sephardic *poskim*, assumes the position that abortion is Biblically prohibited.[63] However, he writes that both abortion prior to three months and pharmacologically induced abortion are only prohibited rabbinically. If so, in cases where bearing the child will bring the mother extraordinary pain and anguish, the pregnancy may be ended either within three months or pharmacologically.

Tzitz Eliezer. Rabbi Eliezer Waldenberg, author of the responsa *Tzitz Eliezer*, argues that an exhaustive study of the topic finds legitimate

[61] Rabbi Moshe Feinstein, *Igrot Moshe*, Choshen Mishpat, vol. 2, nos. 69 and 71.
[62] Rabbi Abraham Abraham, *Nishmat Avraham*, Choshen Mishpat 425:2, subsec. 15 (p. 230). The opinions of Rabbi Auerbach are cited as personal correspondence throughout the section on abortion, pp. 220–239.
[63] Rabbi Ovadiah Yosef, *Yabiah Omer*, vol. 4, Even HaEzer, no. 1, as cited by Rabbi Avraham Avraham in *Nishmat Avraham*, vol. Choshen Mishpat 425:2, par. 4.

positions at all points of the spectrum—those who equate feticide to homicide and those who hardly see a prohibition involved.[64] Therefore, due to the severe emotional pain and suffering of raising a child with a critical disease, one may follow the lenient opinion and opt for an abortion. Rabbi Waldenberg specifically addresses Tay-Sachs disease and initially permitted termination through the first trimester. Upon subsequently learning that doctors could not feasibly diagnose Tay-Sachs within three months, Rabbi Waldenberg re-evaluated the issue. He then extended his lenient ruling to permit abortion until seven months into pregnancy.[65] Because the fetus could survive birth after this time, he felt that it maintains a more human status and should no longer be terminated. However, Rabbi Waldenberg ruled differently concerning Down syndrome cases. Here, in contrast with Tay-Sachs, he felt it inappropriate to issue a general ruling permitting termination. Children with Down syndrome normally live longer, have manageable medical conditions, can be integrated into society, and can provide their parents with much fulfillment. Nevertheless, recognizing that in some families a Down birth could precipitate emotional instability capable of threatening the family structure or marital relationship, Rabbi Waldenberg permitted evaluation on a case-by-case basis. In cases where such a risk is legitimately suspected, he permits termination.[66]

Mishpitei Uziel. Rabbi Ben Zion Uziel assumes an even more lenient stance.[67] His initial four pages of analysis bring numerous proofs completely permitting feticide without reservation. However, in the closing two paragraphs he proposes that there remains one argument to prohibit abortion: terminating a pregnancy precludes fulfillment

[64] Rabbi Eliezer Waldenburg, *Sheilot U'Tshuvot Tzitz Eliezer*. vol. 9, no. 51:3. See also vol. 7, no. 36 and vol. 14, no. 100.
[65] Ibid., vol. 13, no. 102.
[66] Ibid., vol. 14, nos. 101 and 102.
[67] Rabbi Ben Zion Uziel, *Mishpitei Uziel*, vol. 3, Choshen Mishpat, nos. 46 and 47.

of the commandment *piru u'revu u'milu et ha'aretz*, "be fruitful and multiply and populate the land."[68] Thus, Rabbi Uziel concludes by prohibiting abortion when the intent is only to kill the fetus, but permits abortion anytime we perform it for the needs of the mother, "even a weak need."[69] Note that even this lenient opinion cannot condone the abortion of a diseased fetus for fetal concerns, but only with an argument based on the mother's needs.

Ya'vetz. Rabbi Yaakov Emden espouses a radical, heavily criticized opinion regarding aborting a *mamzer*, a fetus conceived from an illicit relationship.[70] Following the bulk of his discussion, an issue beyond our scope, he interjects that "even regarding a regular [i.e., non-*mamzer*] fetus there is room to permit abortion in a case of great need . . . to save the mother from a terrible situation that would cause her great pain." Nevertheless, Rabbi Emden felt satisfied with a passage in the *Zohar* explicitly prohibiting abortion to issue his halachic conclusion prohibiting abortion in respect to a non-*mamzer* fetus.

Rabbi Goren. Rabbi Shlomo Goren, the first chief rabbi of the modern State of Israel, addresses the issue of terminating a Down syndrome fetus.[71] He writes that from the perspective of the child himself, there is no reason to abort. They live happy lives that are almost normal, and for the most part they are able to care for themselves. Therefore, amniocentesis should not be performed even for women above the age of forty when the incidence of Down syndrome rises to 1–2 percent. However, in a situation where amniocentesis was performed and a diagnosis of Down syndrome resulted, the mother's and family's health and emotional state require assessment. If evaluation concludes that a birth will trigger severe problems, then

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[68] Genesis 1:28. Also Genesis 9:7.
[69] Rabbi Uziel does not consider the embarrassment of a pregnant unwed woman sufficient "need."
[70] Rabbi Yaakov Emden, *Sheilat Ya'avetz*, no. 43.
[71] Rabbi Shlomo Goren, *Meorot*, Spring 5740 (1980), vol. 2, pp. 26–27.

abortion can be considered as an exceptional leniency. Rabbi Goren stresses that every case must be examined by a geneticist, a mental health professional, and finally a competent halachic authority who can integrate all the information and issue a *pesak*. Absent from his discussion is the latest gestational time when the abortion can take place.

Rabbi Unterman and Rabbi Zweig .[72] The recent work *HaRefuah Li' Ohr HaHalacha* (Medicine in the Light of Halacha) dedicates a couple of hundred pages to the topic of abortion in halacha. A chapter addressing the issue of aborting fetuses feared to have contracted rubella cites two more opinions worthy of mention.[73] Rabbi Isser Yehudah Unterman, the second chief rabbi of Israel, writes that he cannot permit feticide based on some possibility of fetal anomalies. Even when certain that a fetus lacks a limb, Rabbi Unterman equates terminating a pregnancy with killing a deformed human being. This holds true even prior to forty days of gestation. Rabbi Unterman then offers his own view: Parents only desire an abortion because of the burden inherent in raising a physically or mentally handicapped child. They are frankly not interested in such inconveniences. This is not a valid reason for terminating a pregnancy.

Rabbi Moshe Zweig, former chief rabbi of Belgium, is cited in the same vein. Abortion is permitted only for the health of the mother, which is not the case when the fetus possesses an abnormality. Here, the mother's selfishness drives her to seek an abortion so as to not be burdened with this sort of child. Such parents mask their feelings by claiming that really they seek abortion to spare the baby from a life of suffering, pain, and so on. Rabbi Zweig finds no room for leniency in these cases.

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[72] Rabbi I.Y. Unterman, *Noam*, vol. 6. See also in his work *Shevet MiYehudah*, vol. 1, no.1. Rabbi Moshe Zweig, *Ohel Moshe*, vol. 3. no.15. See also his article in *Noam*, vol. 7, pp. 36–56

[73] *HaRefuah Li' Ohr HaHalacha*, ed. Rabbi Michael Stern (Institute for the Investigation of Medicine in Halacha, Jerusalem, 5760/2000), chap. 9, pp. 110–113.

CONCLUSION

Our halachic analysis has brought to bear an unusually broad spectrum of rabbinic perspectives, ranging from those who equate feticide with homicide to those who hardly take issue with it; from those who categorically reject abortion save for cases of imminent threat to the mother's life to those who went to great lengths in assembling a legitimate leniency. It must be noted that each *posek* accomplished this while remaining faithful to the Talmudic texts and to the traditional methodology used in their analysis.

Incredibly, despite the enormous heterogeneity of positions and the numerous impassioned debates, one issue emerges undisputed. The quality of life of the potential child is not taken into account. Absent from the preceding pages is any argument that one should terminate a diseased, malformed, or retarded conceptus in order to spare the forthcoming infant a life of pain or suffering. Rather, every argument permitting termination centers around *maternal* concerns for abortion in conjunction with an analysis of fetal status in halacha: the less the status of the fetus, the more weight maternal needs can assume in the halachic analysis.

Rabbi Moshe Feinstein addresses the mother of two children whose unspecified defect produced illness, suffering, and death by age two. Concerning future pregnancies, even ones predetermined to harbor a diseased fetus, he indicates that while the impact on the mother warrants exploration, from the perspective of "the fetus, it is better for him to be born than to not to be born, for [all opinions agree] that one who is born can enter the world-to-come from the time of birth."[74] Thus, life as an infant possesses inherent value; life as a fetus remains debated. Should, in our conclusion, the fetus not attain status as a full life, we still choose life—the life of the mother. We scrutinize the mother's emotional, psychological, and physical

[74] Rabbi Moshe Feinstein. *Igrot Moshe*, Even HaEzer, vol. 1, no. 62. See Talmud Sanhedrin 110.

status to ascertain whether this pregnancy will impact her detrimentally, and then we act in accordance with the complex demands of her life. Thus, perhaps the two seemingly antithetical positions on abortion become two sides of the same coin—the pursuit, defense, and exaltation of that which Judaism holds most sacred: the sanctity of life itself.

Jewish Bioethical Perspectives on the Therapeutic Use of Stem Cells and Cloning

Netanel Berko

INTRODUCTION

Many exciting advances have taken place in medicine in the past few years. What was once considered science fiction is now routinely used to treat disease. Some of the most significant of these breakthroughs have occurred in the fields of stem cells and cloning.

Stem cells are relatively undifferentiated cells that can continue dividing indefinitely. There are two types of stem cells, embryonic stem cells and adult stem cells. While both are referred to as stem cells, they have different characteristic properties. Embryonic stem cells have limitless growth potential and can differentiate into any cell type. If they are put back into an early embryonic environment, they can give rise to all the tissues and cell types of the body.[1] On the other hand, adult stem cells are more restricted and can only give rise to certain types of cells.

The curative potential of these techniques appears unbelievable. For example, a patient dying of renal failure today faces few viable medical options. While doctors now can only resort to temporizing—not curative—methods, such as dialysis and kidney transplantation, future research promises the use of stem cells to grow a new kidney for the person. In fact, embryonic stem cells could be manipulated for use in any part of the body.

[1] Bruce Alberts et al., *Molecular Biology of the Cell*, 4th ed. (New York: Garland Science, 2002), chap. 22.

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However, this potential miracle cure brings a host of ethical problems. The primary controversy centers on how the embryonic stem cells are obtained. Cells can only be taken from human embryos that have already started the developmental process. Both medical and religious ethicists must grapple with questions of the life and nature of these embryos, and their proper place in scientific research.

The use of stem cells leads to a far more futuristic field, that of human cloning. The method of cloning includes the transfer of a nucleus from a somatic cell into an enucleated egg, producing a virtual genetic copy of the donor of the somatic cell. Once the cell develops to the blastocyst stage, it can be used for either therapeutic or reproductive purposes. In reproductive cloning, the blastocyst is implanted into a uterus to develop into a person, while in therapeutic cloning embryonic stem cells are extracted from the inner cell mass of the blastocyst, which is then destroyed.[2] The possible uses of cloning include allowing childless couples to conceive a child and producing genetic matches for organ transplantation. However, scientifically creating and manipulating a new life form poses deep ethical and theological problems. Can society play God and make a child to use his organs?

The rapid pace of development in the field of genetics and molecular biology may portend the routine use of these technologies within the coming years. With these developments comes the urgent need to examine them from an ethical and religious perspective. Jewish tradition contains a deep history of sources and literature, from which theologians attempt to draw information to tackle the difficult, and often unforeseen, questions presented.

The principles of Jewish bioethics are not determined simply by discussion between academics. Rather, as Rabbi Abraham Isaiah Karelitz (the *Hazon Ish*) wrote, "Ethical imperatives are . . . at one with the directives of Halakhah [Jewish law]. It is Halakhah which determines that which is permitted and that which is forbidden in the

[2] Tom Strachan and Andrew P. Read, *Human Molecular Genetics*, 3rd ed. (New York: Garland Science, 2004), 613.

realm of ethics."[3] Thus, a proper determination Halakhah's conclusion is the cornerstone of understanding the general Jewish ethical approach.

The purpose of this paper is to survey the halakhic sources that have potential bearing on the clinical applications of stem cells and cloning. The specific issues involved in the therapeutic use of stem cells and cloning rest heavily on determining Judaism's general view on the practice of medicine and on the practical application of scientific discoveries for the betterment of mankind. As such, we begin with a general survey of the Torah's view of science and discovery. Following this, we will consider a number of sources that could apply specifically to stem cells and to cloning.

MAN AS HEALER

Judaism views God's ways as mysterious and unknowable. While humans can attempt to understand His ways, they must always acknowledge that they lack access to the complete picture and reasoning. As a result, one could conclude that anything that occurs in this world is a manifestation of God's will, and man should not try to tamper with it in any way. This line of reasoning is particularly applicable to illness and treatment of disease. When a person is stricken with an illness, the ailment is presumably God's will, and, therefore, man should not try to cure the disease and prevent the manifestation of God's divine plan.

Support for this stance may be found in a number of sources from the Bible. The Book of Exodus declares, "All ailments that I have placed on Egypt I shall not place on you, for I am God your healer."[4] Since God assures His nation that He is the divine healer, man has no place to begin tinkering with healing. Similarly, later in Exodus God assures the Jewish nation that He will "remove all illness from your

[3] *Emunah*, *Bitahon Ve'Od*, p. 21.
[4] Exodus 15:26.

midst."[5] Additionally, the Book of Job explains that God "wounds and heals."[6] Finally, the Book of Chronicles recounts a critique of King Assa for seeking help from doctors during his illness instead of trusting in God to heal him.[7]

The idea that one should place his trust in God and not seek treatment from his fellow man is also seen in a number of places in the Talmud. The Talmud records in two separate locations that King Hizkiah performed three acts that the sages approved of, one of which was removing the Book of Remedies[8] from circulation,[9] thereby possibly preventing doctors from curing sick patients. In another place, the Talmud writes that "the best of doctors will go to *Gehenom* [hell]."[10]

Based on these sources, one is tempted to conclude that Judaism condemns man's attempts at medicine, criticizing them as interfering with the divine will. However, a closer look at the above sources can cast this subject in a different light. When King Assa is disparaged for seeking doctors, the commentators explain that the criticism is only because Assa turned exclusively to doctors, without appealing to God for help.[11,12] However, had Assa believed that God would send him a cure *through* physicians, then it would have been permissible to seek a physician's help, even for wounds inflicted

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[5] Exodus 23:25.

[6] Job 5:18.

[7] II Chronicles 16:12. "And Assa became ill . . . and even during his illness he did not seek God but his doctors."

[8] *Sefer Refu'ot*.

[9] Pesahim 56a; Berachos 10b.

[10] Mishnah, Kidushin 82a.

[11] *Mezudat David* on II Chronicles 16:12 explains the verse as "he did not seek God—to pray to him; rather he went to doctors, and placed his trust in the doctors alone."

[12] In *The Lonely Man of Faith*, Rabbi Joseph B. Soloveitchik offers a slightly different explanation. He says that the doctors that Assa turned to were "priest-doctors who employed pagan rites and magic in order to 'heal' the sick." Rabbi Joseph B. Soloveitchik, *The Lonely Man of Faith* (New York: Doubleday, 1992), 90.

by God.[13] Thus, there is nothing inherently wrong with seeking a physician's help, provided that one is mindful that the physician is simply an agent of God.

Similar explanations are given by the commentators to explain the statements mentioned in the Talmud regarding medicine. Rashi explains that the sages approved of Hizkiah's disposal of the Book of Remedies "because [the people's] hearts would not turn to God for sick people because they were immediately cured."[14] Again, we see nothing inherently wrong with man attempting to cure illness; only when man trusts solely in himself and in his ability to the extent that he forgets from where the cure is really coming is there a problem. Rashi utilizes the same line of reasoning to explain the phrase "the best of doctors will go to *Gehenom*." Rashi clarifies that the doctor referred to is one who "does not fear illness . . . and who does not subjugate his heart to God . . . and who has the ability to cure poor people, but does not do so."[15] In other words, the doctor will not end up in *Gehenom* simply because he practiced medicine, but rather because he was brazen. This idea is similarly expressed in *Pirkei Avot*, where Yehuda ben Tema states that "the brazen go to *Gehenom*."[16]

Thus, it seems that Judaism does not view healing in a negative light. There are, in fact, many sources that point to the supreme importance of helping people in need. The Talmud states that "if any human being saves a single soul of Israel, Scripture regards him as if he had saved an entire world."[17] Further, the Talmud derives from the verse "do not stand idly by your neighbor's blood"[18] that one

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[13] *Bach (Bayit Hadash)* on the *Shulhan Arukh*, Yoreh De'ah 336:1.

[14] Rashi on Pesahim 56a. In his commentary to the same passage as it appears on Berachos 10b, Rashi adds that Hizkiah did this so that the people would beg God for mercy.

[15] Rashi on Kidushin 82a.

[16] Pirkei Avot 5:24.

[17] Sanhedrin 37a.

[18] Leviticus 19:16.

must help a person in danger.[19] Jewish law mandates that extreme measures be taken to help a person whose life is in danger; even the Sabbath must be violated to try and save a person's life.[20]

The Talmud eventually used a verse in Exodus[21] to derive that a physician may practice medicine: "It was taught in Rabbi Yishma'el's school: 'and he shall surely heal,' from this we derive that a doctor is given permission to cure."[22] However, Tosafot notes that if not for the repetitive language in the verse,[23] man would only have been able to cure wounds inflicted by man, and not those inflicted by God.[24] The Talmud's ruling is codified as the law in the definitive code of Jewish law, the *Shulhan Aruch*, "permission has been granted to the physician to heal, and it is a mitzvah, and it is considered part of *pikuah nefesh* [saving an endangered life]."[25, 26]

When defining the law that it is permissible to practice medicine, the sources understood the tension that existed between tampering with God's will and helping one's fellow man.[27] After resolving the issue, Jewish sages then went further to obligate humankind to heal and practice medicine. Jewish sages used two different sources to adduce this requirement. The Rambam writes that "the physician

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[19] Sanhedrin 73a.

[20] *Shulhan Arukh*, Orach Hayim 328:3.

[21] Exodus 21:19.

[22] Bava Kama 85a. This passage also appears in Berachos 60a.

[23] "And he shall surely heal" is written as *verappo yirappeh*.

[24] Tosafot on Bava Kamma 85a, s.v. *she'nitna*. However, Ibn Ezra, in his commentary on the Torah, Exodus 21:19, disagrees. He writes that man is only permitted to heal wounds inflicted by other men, and not wounds inflicted by God.

[25] *Shulhan Arukh*, *Yoreh De'ah* 336:1.

[26] Saving an endangered life takes precedence over almost all other commandments. This is derived in the Talmud, Yoma 85b, from Leviticus 18:5, "You shall observe My decrees and My laws, which man shall carry out and *by which he shall live*." See also Rambam, *Mishneh Torah*, Hilchot Shabbat 2:3.

[27] See above, regarding Tosafot on Bava Kamma 85a. Also, *Shulhan Arukh*, Yoreh De'ah 336:1 addresses this issue: "Do not say that God has smitten and I will heal, for it is not man's place to practice medicine, yet they have done so anyway . . . therefore we are taught that man has permission to heal."

is Biblically obligated to heal the sick of Israel. This is included in the verse 'and you shall return it to him.' "[28] Thus, according to the Rambam, healing is not only permissible but it is Biblically mandated, as part of the commandment of *hashavat aveidah* (returning lost items; healing is considered restoration of the body to its healthy state). The idea that healing is included in the commandment to return lost items is also mentioned in the Talmud.[29] In contrast, the Ramban uses a different verse to show that healing is Biblically obligated.[30] He includes healing in the commandment of "love your neighbor like yourself."[31] Based on this verse, the Ramban writes that any doctor who is knowledgeable in this field is obligated to heal.[32] Thus, both the Rambam and the Ramban agree that man is not only permitted to heal others, but is in fact required to do so by Jewish law.

To highlight Judaism's encouragement of man's participation in the healing process, it is instructive to consider the following statements. The Talmud cautions scholars to only dwell in cities in which all essential needs, both spiritual and physical, can be attended to. Ten things are mentioned as necessary, one of them being a doctor.[33] As Rabbi Soloveitchik states: "The art of healing has always been considered by the Halakhah as a great and noble occupation . . . unlike other faith communities, the halakhic community has

[28] Deuteronomy 22:2.

[29] Bava Kama 81b. "From where do we know that returning a person's body is also Biblically mandated? From the verse 'and you shall return.' "

[30] It is interesting to note that the Ramban, in his commentary to Leviticus 26:11, writes that in an ideal world people would turn only to God when they were sick, and not consult physicians. However, he explains, this approach is not applicable in the world we live in.

[31] Leviticus 19:18.

[32] *Torat Ha'adam: Inyan Hasakanah*, ed. Rabbi Haim Dov Shaval (Jerusalem: Mossad Harav Kook, 1994), 42–43.

[33] Sanhedrin 17b. "Any city that does not have these things, a scholar may not dwell in." Included in the list is a doctor.

never been troubled by the problem of human interference, on the part of the physician and patient, with God's will."[34]

MAN AS CREATOR

We have established that man is permitted, and indeed obligated, to heal. Our sages do not view man in this capacity as tampering with the divine will, but rather consider it a noble endeavor. However, does this permissive view also extend to more revolutionary techniques? While Judaism permits therapeutic acts such as performing a surgical operation, creating a new person or regenerating body parts may be beyond the realm of religious permission.

One could postulate that when man creates a body or life form, he is adding to God's creations in a more radical manner than other productive ventures. Since God did not originally create the intended object, man does not have the right to create as God does, thereby directly altering the divine plan. The Book of Psalms declares, "How great are your works, God, You make them all with wisdom."[35] Specifically, if man begins creating his own beings, he may be implying that God's works were not made with wisdom. To determine whether the use of stem cells and cloning for therapeutic purposes would be permitted, we must first establish whether these techniques would be considered tampering with the divine plan of creation.

From an analysis of the original Biblical creation narrative we can gleam certain insights into how God himself views His own creation.[36] The phrase "And God saw that it was good" appears six times during the description of creation.[37] The end of the story of the creation reads, "And God saw all that He created, and behold

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[34] *Lonely Man of Faith*, 89.
[35] Psalms 104:24.
[36] Genesis, chap. 1.
[37] Genesis 1:4, 10, 12, 18, 21, 25.

it was very good."[38] When man adds to creation, therefore, perhaps he intrinsically asserts that while God viewed His creation as "very good," it in fact lacked some essential items, leaving a need for improvement. Further, the first three verses of the second chapter in Genesis state four times that God completed his creation and rested from work.[39] If God so clearly completed His work, man cannot resume it.

While these sources appear to imply that man in the role of creator is tampering with the divine plan, it is possible to read the Biblical account of creation in a different light. Perhaps God wanted man to be His partner in creation, and to help Him make the creation complete. One could say that "Let *us* make man"[40] reflects God's view of creation—God created, but wanted to have man participate as well. Before God created man, He said that man should "exercise dominion" in the world, and after man was created, God told him to subdue the earth.[41] Ramban, in his commentary on these verses, explains that man is to rule in a strong manner over the land itself.[42] Similarly, when man was told to subdue the earth, Ramban explains, God gave man power and license over the land to do with it as he pleases.[43]

From the very fact that the Torah records the whole story of creation, Rabbi Joseph B. Soloveitchik inferred that "we may clearly derive one law from this manner of procedure—that man is obliged to engage in creation." He continues further, that when God created the world, He left a place for man to engage in creation. As such,

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[38] Genesis 1:31.

[39] For example, Genesis 2:2. "And with the seventh day God completed His work that He had made, and with the seventh day He ceased from all His work that he had made."

[40] Genesis 1:26.

[41] Genesis 1:26, 28.

[42] Ramban on Genesis 1:26.

[43] Ramban on Genesis 1:28. Radak, in his commentary on this verse, echoes the Ramban, saying that "man should rule over the creations on the earth."

man is obligated to complete what God purposely left "deficient" in His creation.[44]

Man is unlike other life forms that can merely react to their environments. Rather, humanity must play an active, enterprising role in the world, creating and discovering continually. God did not create the earth with cities built for man to live in and fires made to keep man warm; He left these for mankind to construct. God intended creation to be a work in progress, with man contributing according to his ability. This idea is emphasized in the second chapter of Genesis: "for with the [seventh day] He had ceased from all His work which He, God, had created *to continue shaping it*."[45] It would seem that a different phraseology, such as "as He had shaped it," would be more appropriate for a work that had been completed. The wording in this verse implies that creation is a work in progress, with man as God's partner. God's imperative to Adam as He placed him on earth was to work the land and to guard it,[46] clearly establishing for him a dual active role—to work the land; to create and develop it, and also to guard, keep and protect it. This idea is furthered in Psalms, which states, "The heavens are God's, but the earth He has given to mankind,"[47] to improve and develop it. This duality is reflected by contemporary rabbinic thinkers. Rabbi Joseph B. Soloveitchik wrote that "Man reaching for the distant stars is acting in harmony with his nature which was created, willed and directed by his Maker. It is a manifestation of obedience to rather than rebellion against God."[48] Similarly, in Rabbi Aharon Lichtenstein's discussion of Genesis 2:15 ("to work the land and to guard it"), he writes that man is charged with a creative task—to develop, to work, and to innovate. " 'To work' is not meant simply to maintain the

[44] Rabbi Joseph B. Soloveitchik, *Halakhic Man* (Philadelphia: Jewish Publication Society, 1983), 101. "The peak of religious ethical perfection to which Judaism aspires is man as creator."
[45] Genesis 2:3.
[46] Genesis 2:15.
[47] Psalms 115:16.
[48] *Lonely Man of Faith*, 20.

original standard; rather, we have been given the right and the duty to try to transcend it. . . . Man was empowered and enjoined to create something better, as it were."[49]

Man is inherently inquisitive, aspiring to discover and create. In fact, it is only through these discoveries that man can appreciate the greatness of God. In the *Mishneh Torah*, the Rambam writes that the way to love and fear God is to learn about the intelligence in the wonderful creations of God.[50]

STEM CELLS

We have so far addressed the broader issues that apply both to the use of stem cells and cloning for therapeutic purposes, and particularly the imperative to heal and create. We now encounter the more specific issues which apply to the use of these two techniques.

Perhaps the most important source to consider when discussing the boundaries of man's performance in the areas of science and technology is the words of the *Tiferet Yisrael* in his commentary on the Mishnah tractate *Yadayim*. He writes that "Anything for which there is no reason to forbid is permissible with no need for justification, because the Torah has not enumerated all permissible things, [but] rather forbidden ones."[51] The *Tiferet Yisrael* introduces a very important principle that has widespread ramifications for scientific research.[52] As new techniques evolve with no specific prior prohibitions, Judaism should view them as permissible. Unless related exclusions can be utilized to forbid the new science, Judaism should

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[49] Rabbi Aharon Lichtenstein, *By His Light: Character and Values in the Service of God*, ed. Rabbi Reuven Ziegler (Alon Shevut: Yeshivat Har Etzion, 2002), 9.
[50] Hilchos Yisodei Torah 2:2 and 4:12.
[51] *Tiferet Yisrael* on Yadayim 4:3.
[52] However, with this power comes incredible responsibility. Man must use his creative abilities to do good. If man emulates God as a creator, he must also emulate His other qualities. See Deuteronomy 8:6, 19:9, 26:17, 28:9, 30:16; Sotah 14a; Rambam, *Sefer HaMitzot*, positive commandment 8.

not reject them offhand as radical, but rather should possess an open and welcoming view of the developments.

Using the principle from the *Tiferet Yisrael*, we shall consider the possible prohibitions regarding the use of stem cells and cloning. While traditional halakhic sources obviously do not specifically address the use of embryonic stem cells or the production of human clones, we will consider other cases whose principles can be utilized to shed light on how the Halakhah views these particular advances.

The primary problem with regard to the use of embryonic stem cells is the source from which they are procured, namely a human embryo. The method of harvesting embryonic stem cells inevitably involves destruction of the early human embryo from where they are culled.[53] This relates most closely to the more familiar discussion of abortion.

There are two seemingly contradictory references in regard to feticide in the Torah. On the one hand, Scripture states in Exodus, "If men shall fight, and they collide with a pregnant woman, and she miscarries, but there will be no fatality . . . he shall pay."[54] Rashi explains that the term "but there will be no fatality" refers to the woman's being harmed. Thus, the killing of the fetus alone does not result in the death penalty, rather the punishment for feticide is monetary. Conversely, the Torah states in Genesis: "Whoever sheds the blood of man within man, his blood shall be shed."[55] This verse seems cryptic; what does "the blood of man within man" mean? The Talmud explains: "Who is a 'man within a man'? It must mean a fetus in the womb of his mother."[56] The halakhic community rules in accordance with the view expressed in the latter verse, as suggesting more serious ramifications for harming a fetus, and thus performing an abortion is prohibited.[57]

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[53] *Human Molecular Genetics*, 612.

[54] Exodus 21:22.

[55] Genesis 9:6.

[56] Sanhedrin 57b.

[57] For a complete discussion of this topic, see Immanuel Jakobovits, "Jewish Views on Abortion," and J. David Bleich, "Abortion in Halakhic Literature,"

The Talmud differentiates the various stages of development of the embryo/fetus. In the tractate of Berachot the Talmud discusses the prohibition of praying for something that has already occurred. However, it states that during the first forty days of pregnancy, one may pray regarding the gender of the embryo, since during the first forty days the gender remains undetermined.[58] This is mirrored in the Halakhah that states: "One who prays for something that already happened, such as . . . if his wife is pregnant and he says: 'May it be God's will that my wife has a boy,' this is a prayer in vain. This is true only once forty days of inception have passed, but within forty days, his prayer is useful."[59]

Clearly, the status of the early embryo[60]—that is, the embryo during the first forty days of development—has a fundamentally different status than the embryo and fetus in subsequent stages of development. As Rabbi Aharon Lichtenstein writes, "In the early stages of pregnancy . . . the missing element of full life is not merely that birth has yet to occur, but rather the absence of full development and the fact that in its current state it is not viable outside the womb."[61]

Elsewhere in the Talmud, a name is given to this first stage of development. In the tractate of Yevamot, the sages discuss the status of a daughter of a *kohen* whose non-*kohen* husband died. The law states that an unmarried daughter of a *kohen,* as well as the daughter of a *kohen* who is no longer married and who has no children, may eat *terumah* (the priest's share of the crop). However, should the daughter of a *kohen* have a child from a non-*kohen*, she may no longer eat *terumah*. During the analysis of the case in which the

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in *Jewish Bioethics*, ed. Fred Rosner and J. David Bleich (Hoboken, N.J.: Ktav Publishing House, 2000), 139, 155.

[58] Berachot 60a.

[59] *Tur*, Orach Hayim 230.

[60] The stages of human development as denoted by the terms embryo and fetus differ from the halakhic delineation of development. The term "early embryo" will be used to refer to the first forty days of development.

[61] Rabbi Aharon Lichtenstein, "Abortion: A Halakhic Perspective," *Tradition* 25:4 (1991) pp. 3–12.

daughter of the *kohen* is no longer married, the following question is posed: Shouldn't we wait to see if the woman is pregnant before allowing her to eat *terumah*? The answer is that there is no need to wait, because "until forty days it [the early embryo] is mere liquid,"[62] thereby ascribing to the early embryo a fundamentally different status.

The differentiation between the early embryo and later stages of development is not simply a theoretical suggestion in the Talmud. The Rambam cites the case discussed in the Talmud as the accepted law: "The daughter of a *kohen* married to an Israelite whose husband died may . . . eat *terumah* beginning on the night [of the death of her husband] for forty days . . . because for the first forty days an embryo is considered nothing but mere liquid."[63]

Since the early embryo does not have the status of the subsequent embryo and fetus, it is possible that the prohibition of abortion that applies to the developing human would not apply to this early "mere liquid" stage. In the words of Rabbi Lichtenstein: "It would thus be logical to assume that such an abortion would not be classified as an act of murder. Murder, it would appear, is defined as the termination of currently existing life, and not the curtailment of potential life."[64]

Returning to the *Tiferet Yisrael*'s principle, Judaism apparently possesses no source that prohibits the destruction of an early embryo. This, coupled with the fact that the stem cells derived from the embryos are being used in an attempt to heal, would suggest that their use would be permitted. Nevertheless, the fact that an early embryo has the potential to develop into a human being means it must be treated with respect, and one should not conclude from this argument that abortions as a rule are permitted on embryos within forty days of fertilization.

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[62] Yevamot 69b.

[63] Hilchot Terumot 8:3.

[64] Rabbi Aharon Lichtenstein, "Abortion: A Halakhic Perspective."

CLONING

When considering possible prohibitions that may relate to cloning, the most prominent one seems to be *kil'ayim* (forbidden mixtures): "You shall not mate your animal into another species, you shall not plant your field with mixed seed."[65] The Torah describes the commandment of *kil'ayim* as a *hok*—a decree whose reason is not known.[66] However, the Ramban does try to rationalize the commandment of *kil'ayim,* suggesting that "the reason for [the prohibition of] *kil'ayim* is that God created all of the species in the world . . . and He commanded that they propagate according to their species and they shall not change forever. . . . One who combines two species . . . negates the laws of nature, therefore God commanded 'You shall observe My decrees.' "[67]

Before encountering this explicit prohibitive verse, one could have assumed that *kil'ayim* would have been permissible, stemming from God's commandment to Adam to work and guard the land. However, sources consider *kil'ayim* inherently different, placing it outside the realm of normal human behavior. When discussing the prohibition of *kil'ayim*, *Sefer HaHinuch* explains that "God knows that everything He wrought is perfectly suited to its purpose, as it is needed in His world."[68] This statement does not imply that man is forbidden to create; rather, it establishes boundaries within which man is allowed to work. The natural order established by God, as represented by the term *l'menayhu*,[69] imposes a limit beyond which man cannot go. While man is encouraged, and in fact obligated, to create and work, his efforts must remain within the framework of

[65] Leviticus 19:19.
[66] Rashi on Leviticus 19:19.
[67] Ramban on Leviticus 19:19. God's command for all species to propagate according to their species (*l'menayhu*) is found in Genesis 1:12, 21, 25.
[68] *Sefer HaHinuch*, Mitzvot 244, 245.
[69] See above, n. 66.

the natural order. God desires that the world should be settled in the natural way that was set for it at the beginning of creation.[70]

Like *kil'ayim*, cloning is an activity that is beyond the realm of the natural order. Natural biology dictates that humans are created by the union of two gametes. When humans step in and fuse a somatic cell with an enucleated egg, the normal reproductive process is completely bypassed, and any semblance of natural human creation utterly dismissed.

Furthermore, a Talmudic account from the tractate of *Sanhedrin* appears to substantiate the prohibition against human cloning. The Talmud relates that Rava created a man and sent him to Rav Zeira. When Rav Zeira saw that Rava's creation could not speak, Rav Zeira immediately destroyed it. Rava's creation is commonly referred to as the *golem*, a creature who was fashioned mystically from the dust of the land.[71] Some authorities use the clear differences between the *golem* and a clone to suggest that cloning would not be prohibited based upon this Talmudic passage, emphasizing that the *golem* was created from dust through the use of mystical incantations, while a clone would be created scientifically from human cells in a biologically acceptable manner.[72] However, Rav Zeira's harsh, immediate response against another life form reflects Judaism's clear abhorrence of creatures obtained from unnatural means. Such a response leaves little room for distinguishing between the verbal capacities of these unnaturally created lives, and represents an admonition against continuing such practices.

On the other hand, there is a passage in the Talmud which one could interpret as an endorsement of cloning. The Talmud in tractate Niddah states that if a woman gives birth to a creature that has the form of an animal, it is still considered human.[73] One might con-

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[70] *Sefer HaHinuch*, Mitzvah 62.

[71] Sanhedrin 85b.

[72] See, for example, J. David Bleich, "Survey of Recent Halakhic Periodical Literature," *Tradition* 32:3 (1998): 58.

[73] Niddah 23b. A similar concept is discussed in Bechorot 5b: "The product of an

clude that, even if a clone is unnatural, if its origin is human, it can be considered a human creature. However, such an explanation betrays a misunderstanding of the statement's true intent. The Talmud addresses an unfortunate *de facto* situation**,** that is, the birth of an unnatural creature whose species status requires clarification. How this life form was created is not discussed, or endorsed by the Talmudic sages. The Talmudic passage describes a *bedieved* (*ex post facto*) situation, and does not recommend such a process *lechatchilah* (before the fact), and therefore could not be used as encouraging the process of cloning.

These sources suggest that cloning would not be halakhically acceptable. While God gave man control over the world, He did establish certain limitations within which man is allowed to work. Jewish law prohibits cloning for the same reason it abhors *kil'ayim*; both practices deviate from the natural reproductive capacities of species, and therefore fail to remain within the constraints of natural law. Therefore, just as making a mixture of seeds is prohibited, on the grounds that it creates an alien species, the production of a clone would be likewise forbidden.

CONCLUSION

Dealing with the Jewish perspective on new scientific techniques requires a careful examination of traditional sources that were not composed to address our contemporary questions. However, by applying the principles established in these sources, we can attempt to clarify Judaism's view on innovative technologies and techniques, such as the use of stem cells and cloning. Certainly, many more issues will continue to arise as the use of stem cells and cloning in medicine becomes more mainstream, requiring additional careful consideration as new techniques are developed and refined.

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impure animal is impure, and the product of a pure animal is pure, regardless of the appearance of the animal."

Rabbi Shlomo Zalman Auerbach's Stance on End-of-Life Care

Aryeh Dienstag

In recent years, the problem of the dying patient has become one of the moral-medical problems and has produced stormy arguments in many societies. The most significant factor involved in the moral dilemma is the great advancement of modern medicine and technological interventions that have made possible prolongation of life in situations that were impossible in the past.[1] Additional considerations include that people die in institutions as opposed to at home, the incorporation of individuals with different value systems in treating patients who themselves have different value systems, the more pronounced involvement of society in medical-ethical decision-making, and the consideration of allocating scarce resources due to the large quantity of resources taken up by the terminally ill.[2] The question of extending life is often complicated by the fact that a dying patient is suffering, thereby semantically exchanging "extending the patient's life" with "prolonging his or her death." The trend in medical ethics is to focus on patient autonomy, allowing the patient to decide on whether he or she desires life-extending treatment in this situation. Recently, there have been calls to curtail the power invested in patients due to the concept of futility and the need

[1] Paul Ramsey, *The Patient as Person* (New Haven: Yale University Press, 197), p.116.

[2] Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics* (Jerusalem, Feldheim, 2003), p. 1062.

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to ration precious medical resources.[3] In this essay we will focus on the perspective of Rabbi Shlomo Zalman Auerbach, thereby understanding his approach to these modern medical-ethical dilemmas.

Rabbi Auerbach was the dean of a rabbinical school for decades and was a preeminent, though untitled, decider of Jewish law in Israel. Rabbi Auerbach dealt with cutting-edge modern halachic issues, particularly in regard to medicine and technology. Rabbi Auerbach approached inquiries with sensitivity to the human condition as well as fidelity to Halacha.[4] It is this quality which particularly makes Rabbi Auerbach unique in the area of caring for a dying patient.

One of the primary questions with regard to the treatment of the terminally ill is to what extent one has to treat a patient, taking into account the severity of the patient's illness, his or her long-term prognosis, and the discomfort he or she was experiencing. Two rabbinic deciders who had extreme positions on this issue were Rabbi Eliezer Waldenberg and Rabbi Moshe Feinstein. Rabbi Eliezer Waldenberg, in his work *Ramat Rachel*, connects the questions of whether one is allowed/required to do everything in one's power to save the life of a dying patient (*goses*) and whether one is allowed to desecrate the Shabbat in order to do so. Rabbi Waldenberg explains that the dispensation given to save a life on Shabbat is not based on utilitarian decision-making, but rather is based on the principle of "you should live by them and not die by them," as explained by the Talmud in Yoma 85b. Rabbi Waldenberg claims that if you are to desecrate the Shabbat to save a terminal patient, then one is required

[3] Alan Jotkowitz, " 'May It Be Your Will That Those Above Overcome Those Below': Rav Moshe Feinstein and Rav Eliezer Waldenberg on the Care of the Dying Patient," Jakobvits Center for Jewish Medical Ethics, Faculty of Health Sciences, Ben-Gurion University of the Negev, Beer-Sheva, Israel.

[4] Aharon Lichtenstein, *A Portrait of Rav Shlomo Zalman Auerbach zt"l: Leaves of Faith* (Jersey City, N.J.: Ktav, 2003), p. 247.

to extend their life even if they are suffering.[5] Rabbi Waldenberg further elaborates on this point and states that it is not the patient's or family's decision whether to accept or reject treatment, and that a physician is required to extend life at all costs.[6] At the opposite side of the spectrum, Rabbi Feinstein concluded, "If a physician is unable to alleviate a patient's suffering, just to extend his suffering life with medications, they should not do so."[7] Rabbi Feinstein explains that a physician's obligation to cure the sick does not apply when a physician has no ability to cure the underlying disease, and, at the same time, a physician has a requirement to alleviate suffering.[8]

Rabbi Auerbach's approach lies between these two extremes. Although he allows extraordinary measures to be implemented for a terminal patient, he also enables a patient to refuse such interventions. He states: [9]

> Many debate the question of treatment of a terminal patient (*goses*).[10] There are those who think just as one desecrates the Shabbat for temporary life (*chayei shaah*), so too one is obligated to force a patient [to accept the treatment] on this, for he does not own himself to give up on even one minute. However, it makes sense if the patient suffers from great pain and suffering or even from very strong emotional pain, I think it is required to give the patient food and oxygen even against

[5] *Responsa Ramat Rachel* vol. 5 no. 28, Rabbi Waldenberg gives further proof and rationalizations to extend life in the responsa *Tzitz Eliezer*, vol. 9 no. 47 and vol. 14 no. 80.
[6] *Responsa Tzitz Eliezer*, vol. 18 no. 62.
[7] *Responsa Iggrot Moshe*, Choshen Mishpat, pt. 2 no.74:1.
[8] Ibid.
[9] *Responsa Minchat Shlomo*, pt. 1, chap. 91, 24 no. 2.
[10] The question of whether a *goses* is equivalent to a terminal patient is beyond the scope of this article.

his will, but it is permitted to refrain from giving medications that cause pain to the patient if the patient requests this.[11,12] However, if the patient is God-fearing and this will not disturb his mind too much, it is preferable to tell him that one hour of

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[11] Professor Avraham Steinberg published a guide on how to treat patients in an ICU; the protocol was reviewed and approved by Rabbi Shlomo Zalman Auerbach and Rabbi Shmuel Vosner:

(1) The following protocols pertain to patients in the ICU that fulfill the following conditions:

(a) Patients who were accepted into the ICU on the assumption that there was hope to save their life.

(b) Patients who received intensive care, including mechanical ventilation, treatment for infections, treatment to sustain blood pressure, treatment to prevent clots and bleeding, blood transfusion, parental feeding and permanent monitoring of blood pressure, pulse, breathing, and oxygen saturation.

(c) Patients who after all that was done above experienced irreversible failure of at least three vital organ systems, and when all the doctors who are caring for them, which includes all the doctors of the ICU, and all the specialist consults for the various medical problems of the patients, have decided that there is no chance to save their lives, and their death from their disease is expected in a short time, and specifically on condition that the patients are suffering, therefore we can assume that they [the patients] would not want to continue with unending suffering.

(2) These rules are true for all patients in an ICU, whether they are adults, children, or newborns.

(3) *The central halachic principle in relationship to these patients is based on the balance between the requirement to save a life and the prohibition of shortening life actively (with one's own hands), and the need to reduce further unending suffering on the other hand.*

(4) Therefore one should act accordingly:

(a) One should not start any new treatment that will lengthen the life of suffering of these patients.

(b) One should stop ordering new tests, such as blood tests that are supposed to asses the status of the patient, since the patient suffers because of them, and there is no purpose in performing these tests.

(c) There is no purpose in checking and guarding the patient in this condition, including checking the blood pressure, pulse, oxygen saturation (even

though these are done automatically with machines that are attached to the patient beforehand), and there is no need to treat the state of the patient based on the values that are shown on the screen, since the patient is suffering, and there is no purpose in these tests.

(d) One should continue treating the patient with pain-killers in order to reduce the amount of pain and suffering the patient experiences.

(e) It is prohibited to do any action that will lead to the immediate death of the patient. If it is questionable whether the given action will lead to the immediate death of the patient, it may not be performed.

(f) Therefore it is prohibited to disconnect a patient from a respirator, if the opinion of the doctors is that it is possible that his breathing is completely dependent on the machine. It is prohibited to immediately and completely stop medications such as dopamine, which are intended to maintain the blood pressure of the patient, if it is the opinion of the doctors that it is possible the blood pressure will fall immediately and the patient will die immediately.

(g) It is permitted to change or end therapy, if the opinion of the doctors is that the patient will not die immediately (even if because of the action the patient will die in a number of hours), as long as the doctors deduce that the patient is suffering, under the condition the changes will be done over a set of stages, with an analysis of the state of the patient after the changes have been made.

(h) Therefore, it is allowed to lower the rate of breathing of the respirator until the rate that the patient still breathes with his own force; it is allowed to lower the oxygen concentration that is flowing to the patient via the machine until it reaches 20 percent, which is the normal room oxygen concentration; one may lower the level of dopamine, as long as there is no serious change in the blood pressure of the patient, or even if there is a change but it will not lead to the immediate death of the patient; one may stop the total parental nutrition of the patient and change it to nasogastric tube or even to give only IV water and glucose; one may stop giving medications that are meant to prevent clots from forming or bleeding, such as heparin and H2 blockers; one may stop the giving of insulin to lower the level of glucose in the blood. All of this is on condition the patient is suffering.

(i) Therefore, it is permitted to refrain from refilling medications or restarting treatments that are given in a discrete basis and not on a continuous basis, for example: to stop treatment with dialysis; to stop treatment with dopamine after the bag is done; to refrain from replacing the IV bag of antibiotics after the bag is completed. All of this is if the patient is suffering.

(5) These protocols are only applicable on patients who fall into the category

> repentance in this world is preferable then all of life in the next world, as is seen in Tractate Sotah 20b[13] that it is a "merit" to suffer seven years rather than to die immediately.

Rabbi Auerbach seems to accept the inherent value of every moment of life, while at the same time acknowledging that heroic measures are not mandated in every case. This dichotomy is particularly evident from the fact that Rabbi Auerbach permits the violation of Shabbat to save a *goses*, while concluding that one is not obligated to save that very same *goses* on a weekday. Although Rabbi Auerbach addresses the possible inconsistency in the aforementioned paragraph, he gives no explanation why this should be so.[14]

Further, Rabbi Auerbach feels that the worth of human life is immeasurable and therefore must be saved in many situations, even when the life itself appears pained, unproductive, or potentially "not worth living":

> Even though it is simple and clear that the life of [fully] paralyzed people is not worth living. . . . We are commanded to

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of all of the above-mentioned requirements. In any other case a competent rabbinic authority should be asked.

Steinberg, Avraham, "Rules Governing a Doctor in an ICU," *Assia*, 1998, nos. 63–64, pp.18 ff.

It should be noted that Professor Abraham S. Abraham disagrees with the assertion that Rabbi Auerbach agreed with some of the protocols written above; Abraham S. Abraham, *Nishmat Avraham*, Yoreh Deah, siman 320 D:1, p. 320.

[12] The Gemara states that the life of a *sotah* is extended while she suffers, as opposed to her dying immediately. Maimonides quotes the law as follows, "A *sotah* who has merit of learning Torah, even though she is not obligated in it, does not die immediately . . . but suffers greatly for a year or two or three according to her merit and dies with a swollen abdomen and her limbs falling off" (Maimonides, Sotah 3:20). Rabbi Waldenberg, in his book *Tzitz Eliezer*, vol. 14 no. 80, uses this as a proof for his position that life must be extended at all costs.

[13] In general Rabbi Auerbach will often not spell out the precise reasoning for his positions, and instead leaves it to the reader to figure out his rationale.

[14] *Responsa Minchat Shlomo*, pt. 1, chap. 91, 24, no. 1.

> extend the life of paralyzed people, and if he is sick we are commanded to desecrate the Shabbat because the idea of life has no measurement to measure its worth. . . . Furthermore, it seems to me that even if the sick person is really suffering, according to Halacha one is commanded to pray that he die, as it is written in the *Ran* in Nedarim (40a) and it is brought down in the deciders, even at that time when one is praying that the patient die, he must work to save the patient's life many times and desecrate the Shabbat to save him.[15]

Here Rabbi Auerbach seems to create another contradictory reality where a patient's life is not worth living, to the extent that one is commanded to pray for the patient's death, but one is also commanded to intervene to save the patient. However, in spite of the commandment to seemingly preserve life at all costs, in this specific responsa Rabbi Auerbach did not require a patient to undergo surgery that, although potentially life-saving, would have made her a quadriplegic. Instead, he concluded that this was a case of nonintervention, and, therefore, one might rely upon God's mercy and not perform the surgery.[16] It would seem therefore that Rabbi Auerbach would require the saving of the life of a person whose life can at the time of the danger, be categorized as "not worth living" while allowing a person to choose an almost certain death through inaction, when the course of action to save life would result in "a life not worth living". The common denominator in all of these cases is that Rabbi Auerbach uses the patient's wishes to adjudicate the question at hand, and his halachic interventions are utilized to protect the patient's desires.

It is of note that Rabbi Auerbach concludes that a life of suffering is preferable to a quick death, based on the Talmud in Sotah, while there is a story in the Talmud Ketubot, which is also quoted by

[15] Ibid.

[16] Talmud Babli, Ketubot 104a.

the *Ran* in Nedarim that Rabbi Auerbach himself references, which reaches the opposite conclusion, i.e., that there are cases where death is preferable to life:

> On the day that Rebbe was dying, the rabbis instituted a fast and begged for mercy and proclaimed that anyone who said that Rebbe was dying should be stabbed with a knife. The housemaid of Rebbe climbed to the roof and said, "The heavens are requesting Rebbe and the earth is requesting Rebbe, may it be your will that the earth should overcome the heavens." When she saw how many times Rebbe had to go to the bathroom and remove his tefillin and the suffering involved, she said, "May it be your will that the heavens will overcome the earth." When she saw that the students continued to pray, she took an urn and threw it to the ground; the students stopped praying [because of the sound of the urn breaking] and Rebbe's soul departed.[17]

Rabbi Feinstein derives from this story there are times when a patient should refuse certain medical treatments if they will serve only to extend his suffering.[18] Furthermore the aforementioned *Ran* in Nedarim concludes from this story that it is sometimes appropriate to pray for the death of a patient who is suffering. It is therefore unclear why Rabbi Auerbach believed that a life of suffering is better then a quick death based on the Talmud in Sotah, when there are other sources that seem to contradict this approach.

The conventional view in Jewish medical ethics, which is upheld by Rabbi Auerbach, is that a person is not the owner of his own body because a person's body is owned by God.[19] Therefore, conceivably,

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[17] *Responsa Iggrot Moshe*, Choshen Mishpat, pt. 2 no.73:1.
[18] *Responsa Minchat Shlomo* pt. 1, chap. 91, 24, no. 2, Rabbi Shlomo Zalman Auerbach, *Consent for Medical Decisions*, *Brakha l'Avraham*, pp. 135–136.
[19] Steinberg, *Encyclopedia of Jewish Medical Ethics*, p. 1055.

one should have no autonomy over medical decisions that pertain to one's own life.[20] This is stated explicitly by Rabbi Yaakov Emden, an eighteenth-century Jewish scholar, who wrote with respect to an individual who refused therapy on Shabbat, that he may be forced to accept treatment:[21]

> In the case of an illness or wound which is exposed and about which the physician has certain knowledge and clear recognition and deals with a proven medication, it is certain that we always, in every matter and manner, impose therapy on a patient who refuses in the face of danger, because the physician has been granted permission [by the Almighty] to cure; for example, to do surgery, to open abscesses, and to splint a limb, even to amputate a limb, in order to rescue the individual from death. In all such cases, we perform the surgery even against the will of the patient because of [the act of] life-saving. We ignore his will if he does not want to suffer and prefers death to life, and we even amputate a full limb if this is necessary to save his life, and we do all that is necessary for the saving of life against the will of the patient. This obligation is incumbent on every individual because of the command to "not stand idly by your friend's blood." And the decision does not depend on the opinion of the patient, and he does not have the right to commit suicide.[22]

Based on many responses of Rabbi Auerbach, however, it seems that autonomy is a viable means to adjudicate medical decisions, and may even be the primary mechanism to do so. In the aforementioned response, Rabbi Auerbach allows a patient to refuse medical care

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[20] Shimon Glick, "Who Decides, the Patient, The Physician, or the Rabbi?" *Jewish Medical Ethics*, no. 1 (www.medethics.org.il/articles/JME/JMEB1/JMEB1.10.asp).

[21] Rabbi Jacob Emden, *Mor u-Ketzi'ah*, Orach Hayim 328.

[22] *Responsa Minchat Shlomo*, pt. 1, chap. 91, 24 no. 2.

and shorten his life rather than accept medical care, and, while living in suffering, have time to study Torah and repent.[23] Thus he permits the substitution of a potentially morally undesirable option, as determined by a literalist application of the supreme value of human life, for a morally preferable one. In another responsum, Rabbi Auerbach allows a terminally ill patient to take a pain reliever (such as morphine)[24] that will lower his breathing rate and therefore shorten his life, using the rationale of *shomer petaim Hashem* (God watches fools) and the commandment to "Love thy neighbor as oneself." [25]

> Being that suffering is very hard on a person and hard to tolerate, as we see from the Talmudic dictum "Had Hananyah, Mishoel, and Azaryah been tortured they would have acceded,"[26] it is evident that we must have mercy on the patient and lessen his suffering and palliate his pains, in particular because it is possible that strong pains weaken and harm a patient more than the medications [to ease the pain]. If the patient is conscious, I believe that it is necessary to tell the patient what

[23] *Nishmat Avraham*, Yoreh Deah 399 D, no.1, p. 321.

[24] *Responsa Minchat Shlomo Tanina*, chap. 86, no. 2; Shimon Glick, "Questions with Rabbi Shlomo Zalman Auerbach: Shortening the Life of Patients Dangerously Ill," 5757, Schlezinger Institute, Jerusalem, *Assia* 59–60. It should be noted that Rabbi Neventzal argued with this opinion in *Assia*, no. 4, pp. 260–262, "The Giving of Medication to a Dangerously Ill Patient in Order to Lower Their Pain." On the other hand Rabbi Eliezer Waldenberg, who is much more stringent than Rabbi Auerbach with regard to extending life by means of extraordinary measures, does allow the giving of pain medication that will possibly shorten the life of the patient based on the allowance for a physician to heal from the verse "and you shal surely heal" (Jotkowitz, "May It be Your Will That Those Above Overcome Those Below, 1).

[25] Talmud Babli, Ketubot 33b.

[26] *Responsa Minchat Shlomo Tanina*, chap. 86 no. 2, it should be noted that Rabbi Auerbach's position here is very similar to the Catholic concept of double effect (John Paul II, *Euthanasia: On Moral Medicine* [Grand Rapids, Mich: William B. Eerdman's, 1989], p. 443), except that Rabbi Auerbach limits the scope to cases where the medication will not result in the patient's immediate death.

> is being done to him, if in any event he knows his present state. However, even if he is not aware [of his state], in any event, we have found in Talmud [Babli] Sanhedrin 84b, and look at Rashi over there, " 'One shall love thy neighbor as thyself'; Israel was prohibited to do to others what they themselves would not want for themselves." In the case in front of us, any patient would prefer to palliate his pains even if this would hurt his body, therefore we have a presumption that this is the will of the patient. It is self-evident that this is only when the purpose is palliative in nature, and the fact that this hastens his death is likened to a *pesik reisha* [inevitable side-effect] that is undesirable. We also find in the Talmud in many places where people do many things that are dangerous, however, since many treat upon it [i.e., are willing to accept the risk], it is considered *shomer petaim Hashem* [God watches fools]. Since it is the way of all patients to do this, it is good to apply the principle of *shomer petaim Hashem* [God watches fools] in our case, and we must palliate the pain. May God have mercy.[27]

In a recently republished responsum Rabbi Auerbach wrote to Professor Avraham Steinberg, Rabbi Auerbach extended the level of autonomy of a patient even further, in requiring patient consent for medical treatments. Rabbi Auerbach responded to the question of whether a doctor is considered to have performed battery if he or she performs therapy beyond the accepted practice or if there was not appropriate consent: "It seems to me that if the therapy was beyond the accepted therapy, then the doctor has assaulted the patient, even if this was done with the best of intentions."[28] He further states,

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[27] Rabbi Shlomo Zalman Auerbach, *Consent for Medical Decisions*, *Brakha l'Avraham*, pp. 135–136. Rabbi Auerbach said this in reference to the responsuma of Rabbi Emden quoted above, which was quoted in Professor Steinberg's question to Rabbi Auerbach.

[28] Ibid.

"I think that even in a dangerous situation a doctor cannot perform a dangerous surgery, or amputate a hand or foot, without the consent of the patient, even if the doctors are certain that the procedure is necessary. If the patient is unconscious, the family members may consent for the patient based on their assumption of what the patient would want. However, if there is no danger whatsoever, the patient himself must consent."[29] He qualifies this later on in his response, as he notes that there is assumed consent for hospitalized patients for most therapies in the hospital (since they were hospitalized on their own will), but "for a surgery or a difficult [painful] test, consent maybe needed."[30] In contrast to his earlier guidelines requiring specific patient consent, he limits the need for informed consent significantly; a doctor can simply say "This is my recommendation, and if you don't want to follow my advice, you can go to a different doctor or a different hospital."[31] In terms of psychiatric patients, Rabbi Auerbach allows treatment against their will, though it is preferable to obtain a family member's consent.[32, 33]

Professor Steinberg addresses the contradictions raised by Rabbi Auerbach and explains that there is a tension between the obligation to save life and the obligation to alleviate suffering.[34] It seems that the obligation to reduce pain is based on the commandment of "Love thy neighbor as thyself," while the obligation to save a life is

[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] *Nishmat Avraham* quotes Rabbi Auerbach as saying that a pregnant woman can elect to abort a fetus that is endangering her life because she can say, "I don't want to provide nutrition to this fetus because it now endangers my life" (*Nishmat Avraham*, Choshen Mishpat 425 (A) Abortion no. 6, p. 285). This further attests to Rabbi Auerabch's support for autonomy in medical decision-making, even in a case of abortion.
[33] Steinberg, "Rules Governing a Doctor in an ICU," pp. 18 ff.; Steinberg, *Encyclopedia of Jewish Medical Ethics*, p. 1052.
[34] B. Freedman, *Duty and Healing: Foundations of a Jewish Bioethic* (New York: Routledge, 1999), pp. 139–142.

based on "Thou shalt not stand by on thy neighbor's blood." This tension creates a gray area, wherein a patient may decide what he or she wants. Although a person generally is not considered the owner of his or her body, Rabbi Auerbach does not believe that this is a valid reason to restrict the autonomy of a patient. Quite the contrary, he gives the patient a large swath of autonomy approaching that of conventional medical ethicists. Professors Benjamin Freedman and Shimon Glick offer theories that may provide some insight into Rabbi Auerbach's rationale. Freedman explains that although there is a commandment on any Jew to heal a sick person, the obligation is first and foremost on the family.[35] Glick, on the other hand, provides a different understanding of the relationship between the individual and the body. One receives one's body as property from the Almighty and is commanded to look after and eventually return it; therefore one is the steward of the body. As such, it is only natural that the patient, i.e., the guardian, should make intelligent and insightful decisions on the goods he is responsible for, i.e., his body.[36] This is not to say that an individual is given free rein to throw away his life and refuse medical care under normal circumstances. However, in cases where there is a contradiction between the duty of palliating pain and delaying an inevitable or imminent death,[37] the patient is trusted as the arbitrator.[38]

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[35] Glick, "Who Decides, the Patient, the Physician, or the Rabbi?"

[36] It is obvious to Rabbi Auerbach that in cases where one can give the patient anything more then a fleeting extension to life, the "immeasurable value of life" reigns supreme and the patient is forced to accept treatment (*Responsa Minchat Shlomo*, pt. 1, chap. 91, 24 no. 1). This may be based on the *Minchat Chinuch*, quoted there by Rabbi Auerbach, who differentiates between a person who is dying and one who is not dying.

[37] It is possible that Rabbi Auerbach is not fully confident in medical science and believes that a patient may have more intuition into his disease then a physician. As the officiator at Rabbi Auerbach's wedding, Rabbi Abraham Isaac Kook, wrote, "It seems that their words [of doctors] that are established only has a possibility, because even according to themselves things cannot be taken as absolute truth, because there are times that one of them—and sometimes many—who say that this is an absolute truth of medical science, and many decide that it is indeed

Furthermore, we may postulate an answer to the contradiction Rabbi Auerbach posed in his responsum with regard to Shabbat. In the aforementioned responsum, Rabbi Auerbach noted that his position creates a complex reality where we may be permitted to desecrate Shabbat to treat a patient, while the patient is given the autonomy to refuse that very treatment. Perhaps the laws of Shabbat are always set aside for the obligation to save a life, while the concomitant value of avoiding severe pain may allow a patient to refuse treatment. In other words, the rule of "thou shall live by them, and not die by them" precludes the normative Shabbat legislation if the implementation of its laws will lead to a patient's death, even if death is imminent or unavoidable. The patient, however, is not obligated to take the Torah up on this dispensation.

Another point of interest is that Rabbi Auerbach recommends that a patient elect to live a life of suffering rather then have an easy death. The physician, however, can never elect to extend the suffering of a patient, and is instead obligated to reduce suffering, even if it ultimately shortens the patient's life. The implication is that one cannot be righteous at another's expense without that person's permission.

Finally, it may be useful to outline the ethical imperatives of Rabbi Auerbach which may be derived from the discussion above.

1. Immeasurable value of life; this includes:
   a. The sanctity of life as a general ethical consideration.

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the truth, and later on a new generation comes and researches that all their are words are nothing and emptiness, and what one builds another destroys, therefore their words are only an assumption" (*Daat kohen*, chap. 140, p. 259). This is also seen in his approach to allowing medical science to create a new definition of death: "one is not to rely on medical science to establish whether a patient has definitely died, and what a doctor says it is certain to me is a wonder, because the idea of certainty is pertinent only with regard to things that are between a person and his maker; however, [be careful] not to spill the blood of another man" (*Minchat Shlomo* 2–3. *Tanina*, chap. 86, pt. 5, 4 Cheshvan 5753, pt. 2). Rabbi Auerbach's faith in medical science is beyond the scope of this paper.

b. The importance of extending life so that one can take advantage (i.e., via repentance and Torah study).
2. Autonomy—the patient's right to choose between various options.
3. Reducing suffering of a patient—this seems to correlate with the value of beneficence in the vernacular of medical ethics.

In cases where principles intersect, one must carefully investigate and understand the different considerations.

In conclusion, this article summarizes the various responsa of Rabbi Shlomo Zalman Auerbach with regard to end-of-life treatment, and underscores the various axioms that Rabbi Auerbach implemented to adjudicate the cases. What is striking about Rabbi Auerbach's approach is the significance he gives to the patient's wishes in deciding the patient's medical care. Rabbi Auerbach's position likely stems from his entrenchment in the halachic system as well his strong sensitivity to the human condition.

The Division of Scarce Resources and Triage in Halacha

Judah Goldschmiedt

Despite the great leaps that modern medicine has taken as far as development and implementation of cures to countless human diseases, there are still quite a great many limitations present when trying to deliver these treatments. Clinicians are quite adept at matching and delivering a pint of donated blood or a donated organ to a patient in need, but are often limited by its availability. Likewise, a physician may be able to attend to a trauma victim rushed into the emergency room, but here too he is limited in the situation of a tragic catastrophe that fills the emergency rooms of an entire city. Even with the constant growth of the field of palliative care, physicians in other fields often find themselves caring for terminally ill patients and are forced to decide how much of their time and effort should be spent with this terminal patient as opposed to another patient, one with a far greater prognosis for recovery. In an ideal world there would be no shortage of transplantable kidneys, intensive care unit beds, or medically trained professionals to deal with each of these clinical scenarios. However, this is obviously not the case. These situations are commonplace to all in the medical field, and these decisions are constantly being made in order to allocate the resources that a doctor or medical facility has at its disposal at any given time. These determinations may be life-and-death issues of who is to live and who is to die, or they may present as a more subtle question as to who will receive a flu vaccine this year and who will not. It is worthwhile to delve into the ethical background that Halacha (Jewish law) puts forth in dealing with these situations in order to better under-

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stand what the Halacha would call on each of us to do when making decisions of the division of scare resources.

The traditional Biblical and talmudic texts do not address this issue directly, as these scenarios obviously are, to some degree, an invention of modern science and the infrastructure we have in place for its distribution. There are, however, two key sources and countless opinions in their interpretation that will be crucial to the development of the applicable Halacha in the cases we are to discuss. The first is recorded in the Talmud:

> Two people were traveling on the road, and one of them has a flask of water. If both drink, they will both die; if one drinks, he will arrive at the [next] town. Ben Peturah expounded: It is better that they both drink and die, and neither of them witness the death of his fellow man. Until Rabbi Akiva came and taught, "and your brother shall live with you" (Leviticus 25:36)—your life takes precedence over the life of your brother.[1]

A second source is one found in the context of *tzedaka* (charity) and *pidyon shvuyim* (rescuing of captives). Here the Mishna states:

> A man takes precedence over a woman regarding saving life and to return his lost objects. A woman takes precedence with regard to providing her with clothes and to be redeemed from captivity. When they are both at equal risk of being [sexually] degraded, then the man takes precedence over the woman.
> A *kohen* takes precedence over a *levi*; a *levi* to a *yisroel;* a *yisroel* to a *mamzer*; a *mamzer* to a *nesin*; a *nesin* to a convert; a convert to a free slave. When do we say this? When they are all equal, but if there was a *mamzer* who was a *talmid chacham* [Torah scholar] and a *kohen gadol* who was an *am ha'aretz*, then the *mamzer talmid chahcham* would take precedence.[2]

[1] Talmud Bavli, Baba Metzia 62a.
[2] Mishna Horayot 3:7–8.

The absence of any definitive details in these cases is what leads to the various discussions and disagreements among the commentators who grapple with the application of these two very important sources. One question that needs to be addressed within each of the various opinions is the seemingly independent nature that these two sources seem to have in relation to each other. What I mean is that there is no mention of the *yichus* (lineage) of the travelers, nor is there any mention of their relative degrees of *talmid chacham* status. In his essay on the topic, Dr. Moshe Sokol suggests that the reason for this is that the travelers' case is clearly dealing with divisible resources, whereas the case from Horayot clearly is not. That being the case, it would make no difference what the *yichus* or *chachma* level of the traveler might be, because the question may not be that of who but how many will be saved.[3] Sokol maintains that only when dealing with indivisible resources do we consider the *yichus* of those in question. We will see from further discussion that this presumptive difference may, in fact, be irrelevant according to some of the most basic commentaries.

Our analysis begins with the travelers' case and the debate between R. Akiva and Ben Peturah. We must first understand what their argument is, and only then can we apply it to our current dilemmas. There are two major schools of thought among the commentators regarding how we are to understand the R. Akiva/Ben Peturah dispute and we will address each individually. The first understanding is that which is found in the writings of Rabbi Naftali Tzvi Yehuda Berlin, the Netziv (1817–1893).[4] The Netziv understands the dispute as revolving around the central issue of whether or not the saving of one life is greater than the temporary saving of two lives. In other words, the dispute can be framed as: Are we equally concerned for *chayei*

[3] M. Sokol, "The Allocation of Scarce Medical Resources: A Philosophical Analysis of the Halakhic Sources," *AJS Review* 15, no. 1 (Spring 1990) p. 69.

[4] *Ha'amek She'ela*, Sheilta 147:3. This approach is also implied in the writings of R. Avrohom Yeshaya Karelitz, the Chazon Ish. See Chazon Ish: Choshen Mishpat, Likutim Baba Metzia, chap. 20.

sha'ah (temporary relief) in respect to *chayai olam* (a more permanent relief)? Therefore, the disagreement is as follows: Ben Peturah maintains that *chayei sha'ah* is considered equally with respect to the *chayai olam*, and therefore here we should do what we can to maintain both lives. The Netziv explains that Ben Peturah's insistence upon dividing the water is based on the logic that we should provide temporary relief to each and hope that they will chance upon a previously unknown resource. R. Akiva maintains that the verse is to be understood as putting a higher degree of emphasis on one's life precisely because a *chayei olam* is more valuable. Therefore only one life, a *chayei olam*, should be saved. It is important to note that the issue of who gets the water, according to R. Akiva, is entirely secondary to the real issue at hand. For R. Akiva the Halacha emphasizes that in this case only one life is to be saved. Secondarily, regarding the decision of who it is that will drink the water, R. Akiva maintains that the owner of the water is the preferred one.[5] Not only is the issue of who drinks a secondary matter to R. Akiva, so too is the ownership of the flask. According to his view, R. Akiva would maintain that even in a case of third-party allocation of the same water, saving one life would still be preferred, and the decision of who will be the recipient is to be decided some alternative way. Because the Talmud seems to concur with the opinion of R. Akiva,[6] this will be very important when dealing with the majority of hospital settings where the patients at hand do not have any ownership rights to the services, medication, or organs that will be used in their treatment. According to this view, although the Halacha does demand that the

[5] This too is learned from the verse.

[6] Although there does not seem to be any direct codification of this law in any of the classical *p'sak* texts, the fact that the Talmud itself seems to stress that Ben Peturah's opinion was only proposed "until R. Akiva came and taught" is an apparent support of R. Akiva's principle. There is even a possibility that the opinion of Ben Peturah was never meant as authoritative *p'sak* in the first place. See Aaron Enker's *Hekhrekh ve-Tzorech Binei Onshin* (Ramat Gan: Bar-Ilan University Press, 1977).

treatment be given entirely to one patient, the decision of who will receive the treatment will need to be clarified.

The second major school of understanding in the case of the travelers is found in the works of Rabbi Chaim Ozer Grodzinski, the *Achiezer* (1863–1940).[7] This also would be the logical conclusion based on the commentary of the *Maharsha*.[8] The central issue here is that the water is owned by one of the travelers. In this case, the Talmud is dealing with a specific case where A and B are traveling and A has with him a flask of his own water. In this scenario, the dispute of Ben Peturah and R. Akiva plays out as follows. Ben Peturah maintains that the ownership of the water is not relevant to this issue because it is a life-or-death situation.[9] Therefore the law requires that they share the water. R. Akiva's response to this claim is that since the verse says "with you," it is clear that the Torah insists that ownership of the water makes A entitled to its use. According to this approach, if the water were owned by both travelers, as in a partnership, or were owned by an independent third party, R. Akiva's verse would not be applied at all and he too would insist that the water be divided. This conclusion would need to be applied in practical cases as well, as it is the shared view of both Ben Peturah and R. Akiva. Therefore the hospital or clinician, being a third party in possession of the treatment, would be required to divide the available treatment despite the fact that there will only be temporary relief by its distribution.[10] This novel and striking understanding is in fact

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[7] *Achiezer*, Yoreh Deah 16:3.

[8] *Chidushai Agadot*, Baba Metzia 62a.

[9] It would seem that the argument of Ben Peturah that "and not one of them witness the death of his fellow-man" is stressing the point that each has an obligation in the saving of the other's life as he would in any other situation. As such, the only solution would be for each to fulfill his obligation of saving while at the same time being saved himself.

[10] As pointed out by M. Sokol (p.77), if the result of the division produced *no* result at all, the resource would be considered indivisible. Here we speak of some type of limited response.

found among many of the contemporary *poskim*.[11] It is important to point out that according to the understanding put forth by Sokol for understanding the interplay between the two Talmudic sources, subscribing to the approach of the *Achiezer* would render the hierarchies set forth in Horayot as applicable only in cases of indivisible and neutrally owned resources. All other cases would be addressed by the travelers' case and its application.

Although these two approaches initiate some major differences, they both present certain real situations where decisions have to be made as to who will receive the treatment at hand. For the approach of the *Netziv*, this will arise in all cases where one life, a *chayei olam,* can be saved and neither party owns the resources, even if the resources are considered divisible. For the *Achiezer*, this will come up whenever there is a third-party allocation of indivisible resources, irrespective of the relative prognoses of the patients at hand. The question that will arise for each pertains to what to do in each of these respective situations. For the answer to this dilemma, I believe that all major *poskim* enlist the framework and the extensions of these notions based on the Mishna in Horayot. My goal here is to show and elaborate on the many different criteria that may be consulted. It is, however, very noteworthy that at many junctures, the prioritization and degree to which these various categories relate to one another is not addressed. As a result, application of these hierarchies is limited to an "all other things being equal" scenario. At the same time, there is yet another limitation that this framework faces in that, very often, these schema carry no weight in an American hospital setting and would be difficult to apply. Not only is it unlikely to find on hospital admission questionnaires the question of "*kohen*, *levi*, or *yisroel*" but also it is also unlikely that presentation of this fact at grand rounds would produce anything other than a chorus of laughter. As a result, they will usually only represent a

[11] See Rabbi Eliezer Waldenberg in *Shut Tziz Eliezer*, vol. 9 responsum 28:3, and Rabbi Moshe Shternbuch in *Tshuvot Vehanhagot*, Choshen Mishpat, responsum 858.

theoretical or ideal order of prioritization. Let us now examine each of these categories.

YICHUS

Yichus is the major theme of the Mishna in Horayot. Here we see that a *kohen* precedes a *levi*, a *levi* before a *yisroel*, and so on. Of the categories we will soon see, this is one which would, at least theoretically, be the easiest to employ. We would not need much effort to ascertain the status of this individual in his community. Even the possibility of the patient's being a *mamzer* should be relatively easy to find out. However, this is not as simple as it looks. In a work that we will cite often on these issues, R. Ya'akov Emden writes that he "questions whether this is enough in order to cause the determent of others." [12] In these words, R. Emden casts doubt on all assumptions of *yichus* that we use today, especially in cases like ours, where the result will be some loss to others.[13] Although he has no direct proof that we would question these lineages, he finds support for this idea in the silence of the major works of *p'sak* (rabbinic ruling) in regard to even mentioning these hierarchies.

SOCIAL NEED

Although not explicit in directly relevant sources, we do find that there are instances where a greater social need for a particular individual will heighten his or her right to life-saving interventions. Here I am referring to the Talmud in Horayot, which extends the list from the Mishna and says that a *mashuach milchama* comes before a *s'gan*. [14] Unlike the *s'gan*, who serves as the back-up to the

[12] Rabbi Ya'akov Emden's *Birat Migdal Oz*, Perek Even Bohen, pinah aleph, chap. 89.

[13] This he contrasts with other rights afforded to different family *yichus* situations, where there is no actual loss to others.

[14] Talmud Bavli, Horayot 13a

kohen gadol (high priest), the *mashuach milchama* leads the people in war. Rashi explains that this is because "the nation needs him, the *mishuach milchama,* more than the *s'gan*."[15] This is based on the Talmud in Nazir which explains this law as a result of the fact that many more people are reliant on the *mishuach milchama*.[16] Here we find that the impact of an individual on the nation as a whole or, by extension, on the community at hand, is a very important factor that needs to be considered. As a result, a pillar of a community, a public leader or a person of social prominence would be favored over a lay commoner.

PERFORMANCE OF MITZVOT

The Mishna tells us that "a man comes before a woman" and does not give any explanation. The commentaries on this Mishna point out that this prioritization is based on the fact that men are obligated in more mitzvot, since women are exempt from time-restrained mitzvot (commandments).[17] As a result, men are considered "more holy." It is important to note that here the commentaries and, by extension, the Mishna, are not concerned with the performance of the mitzvot in order to create this hierarchy; it is merely being obligated by the commandment that is the issue at hand. This rigid interpretation implies that a woman will always be obligated in fewer mitzvot than a male counterpart and therefore, no matter how righteous she is, and no matter how unrighteous he may be, the man will always be treated first. On this note, R. Emden stresses that even were the female to be one who engages and excels in all mitzvot, she would still only be evaluated in relation to those mitzvot that she is, in fact, obligated to keep.[18] However, R. Emden does extends this rationale

[15] Ad loc. *lehachayoso*.
[16] Talmud Bavli, Nazir 47b.
[17] See Rambam, *Peirush Hamishnayos*, as well as R. Ovadia M'Bartenura ad loc.
[18] Ibid., chap. 95. This strict interpretation of the Rambam and Bartenura yields the conclusion that there is no novelty in her observance of optional commandments in relation to a male's parallel obligation.

to a new degree in that he says within one subset of prioritization, a closer adherence to the observance of the mitzvot will certainly be of merit.[19] This nuance is one which would be almost impossible to implement, but it warrants mentioning in that it is the first time we see that observance levels, and not only obligation levels, are being considered in these discussions. R. Emden extends this idea even further and considers the capacity and ability to fulfill mitzvot as relevant standards.[20] If, after all, the holiness that is a result of mitzvot is a relevant factor, so too must the prospect of the fulfillment of the same mitzvot be considered. Here he prioritizes those capable of producing offspring to those incapable, and even a person with arms, who has the ability to don *tefillin,* to an armless person who cannot. This novel approach will produce major difficulties for any who wish to adhere to them, as assessment of these values would be near impossible.

Another instance where this comes up is the closing clause of the Mishna, which prioritizes a *mamzer talmid chacham* before a *kohen gadol am ha'aretz*. One possibility for this criterion of prioritization can be that it is not a new clause but simply an extension and example of two categories already mentioned. Certainly, one who is a *talmid chacham* carries with him a great deal of social need as well as the fact that he most probably exhibits a greater degree of observance of mitzvot. Sokol maintains that this concept, that of *talmid chacham*, is to be considered as a separate criterion.[21] He supports his claim with several proofs from various Talmudic sources. True as it may be, this distinction yields few differences at the end of the discussion.

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[19] Although he only compares a righteous and pious woman to a nonpious woman, I see no reason to interpret this nuance to only female-female comparisons. Rather, it implies that observance of mitzvot is a virtue that is to be considered in these situations.

[20] Ibid., chaps. 91–92.

[21] Ibid., pp. 79–80.

DEGREE OF NEED

When presented in a manner in which there may be equal demand upon a physician's talents, there is precedence in Halacha that would require the physician to treat the patient who is most in need. This would be true not only in the most obvious cases, where one would be required to tend to the critically ill before those with minor injuries, but also in cases of relative degrees of pain and anguish. The source for this is the previously quoted Mishna which states, "When they [a man and a woman who are captives] are both at equal risk of being degraded, then the man takes precedence over the woman." The commentators explain that the reason for this is that with regard to being ravaged by their respective captors, a male's pain would be far greater than a female's.[22] This being the case, the Mishna tells us that a man's rescue takes precedence over a female's.[23] Although it is somewhat obvious that a critically wounded patient would be treated before those with minor injuries, this Mishna, when applied, would dictate that the patient who is experiencing more pain and would benefit from the doctor's attention is to be given the treatment above a similar patient not in pain.

RELATION

The concept of relation to the caregiver is not a unique one to the medical field. The law actually originated regarding the laws of charity, as the Talmud states, "Between your poor [relatives] and the poor of your city—your poor come first." [24] Thus we find that there is a right that exists among those closest to the caregiver to pro-

[22] See Bartenura ad loc.

[23] Although it is puzzling that the Bartenura and others feel the need to use this as the explaination of this clause in the Mishna rather than explaining that when a male and female are in equivalent situations we revert back to the original concept that prioritizes men based on their obligation in mitzvot.

[24] Talmud Bavli, Baba Metzia 71a.

ceed others in receiving this care. Since, at its most basic core, care for the sick is a form of care-giving, it would make no difference whether this care was being allocated by a hospital or an individual physician. As such, the closeness of relationship would most certainly come into play. This would require a hospital, physician, or a donated organ to be directed to those within its immediate vicinity before being transported elsewhere.

ABILITY TO MAXIMIZE LIFE

This category includes not only the prioritization of those who project to respond better to the particular treatment but also those who will be able to be more fruitful in the future and produce offspring.[25] This is based on the scheme of R. Emden, where he states that a "young man before a healthy old man, a healthy old man before a sick one, a sick man before a castrated male, a castrated male before a critically ill patient, a critically ill patient before a *treifah*."[26,27] This extension is not entirely original, as we see earlier that there is prioritization given to those who would definitively benefit from a treatment before those who may or may not.[28] What is unique here is that it is not only the degree of illness and future prognosis are factors, but even outside issues impact how we view the results of healing this patient. It is this point that makes this assessment quite remarkable. According to R. Emden, the perspective that we must take when evaluating the success of a certain treatment does not end merely with the end of a surgery, the successful recovery from that

[25] The concept of producing offspring falls under two categories in the scheme of R. Emden, both as a commandment to be fulfilled and also as a measure of maximization of life. See Ibid., chap. 92.

[26] A *treifah* is one who is terminally ill and will not live a full twelve months. See *Shulchan Aruch*, Yoreh De'ah, chap. 29. This category of *treifah* is to be considered more ill than a critically ill patient.

[27] R. Emden, chap. 92.

[28] See *Pri Megadim–Mishbetzos Zahav*, Orach Chaim 328:1.

surgery, or even the absence of recurrence of the illness; rather, we are required to evaluate the cumulative length, quality, and productivity that the treatment produces. Perhaps this idea may be most obvious in cases where we are to consider giving a donated organ to either a twenty-year-old healthy male or a ninety-year-old post-op cancer patient with a history of malignancies and congestive heart failure, but not all cases will be this drastic. This evaluation does create a very broad and challenging dilemma in many situations.

INITIATION OF TREATMENT

On the issue of initiating treatment there is a very compelling responsum found in the writings of Rabbi Moshe Feinstein.[29] Here R. Feinstein delineates that all of the methods and schemes that may be discussed in regard to the Mishna in Horayot can only be applied in situations where both patients were to enter into the physician's care simultaneously. Only in cases such as these would the physician be in a situation where he has to chose which of the lives demands his attention. R. Feinstein continues to explain that if one patient were to come under the physician's care first, provided that they are both life-threatening situations, we are not concerned at all for anything that the second patient has favoring his being treated. He could be a *kohen*, a pillar of the community, a *talmid chacham* who is in more severe pain with a far better prognosis and it would not make a difference. R. Feinstein bases this on two points. He maintains as his first point that as soon as a patient enters a doctor's care he is entitled to that care until it is delivered. R. Feinstein does not give any source for this concept, but its inclusion among many other contemporary *poskim* seems to indicate some uniformity in the acceptance of this moral obligation.[30] The second argument made by R. Feinstein is that if the doctor were to leave the care of the first patient and tend

[29] *Igros Moshe*, Choshen Mishpat, vol. 2, responsum 73.

[30] See R. Shmuel Vosner in *Shut Sheivet Halevi*, vol. 6 responsum 242, and also R. Shlomo Zalman Auerbach, quoted in *Nishmat Avraham*, Yoreh De'ah, p.156.

to the second, this would be a clear sign that the prognosis of the first is not as good as the second's, if not more ominous. This being so, the patient will certainly suffer great emotional strain that will inevitably contribute to the hastening of his demise. This, of course, would be considered an act of manslaughter in Jewish law.

"It Is Upon Him to Bring the Proof": A Note on Historiography, Printing, and the Power of Hearsay in a Position of Rabad

Yaakov Jaffe and David Shabtai

One of the most original but also controversial positions of the twelfth-century Talmudist Rabad (Rabbi Abraham ben David) of Posquières was his ruling that the prohibition that prohibits *kohanim* from incurring ritual defilement no longer applied.[1] Rabad's ruling has been consistently challenged and called into question on both logical and historical-critical grounds. Historically, the analysis of Rabad's opinion is a paradigmatic case of the power of hearsay, the role of "luck" in publishing the positions of the *rishonim*, and the impact of these positions on Jewish law, particularly in light of what the authors believed to be the Rabad's true opinion on the matter.

Rabad's position is formulated succinctly in his glosses to Maimonides' *Mishneh Torah*. Rabad challenges Maimonides' reading of a key Talmudic passage in Nazir 42b and concludes:

[1] Rabad uses the words *ba-zeman ha-zeh*, "in our days," over the course of his presentation—implying that the law is entirely inapplicable in our day and that even infant *kohanim* who had never come into contact with impurity could be lenient. *Responsa Hatam Sofer* no. 340 takes the phrase literally, but still argues that Rabad did not mean to say the prohibition did not categorically apply today. A nonliteral reading seems to be the most accurate, though, when the words are viewed in the context of Rabad's and the Talmudic discussions, as will be discussed below.

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> Since we say [that] the law follows Rabbah whenever he disagrees with Rav Yosef, then a *kohen* who contacts a second [source of] impurity is exempt from punishment, even if he has separated himself [and is no longer in contact with] the first [source of] impurity. And [since] today all *kohanim* are considered to be ritually impure [anyway], there is no further *hiyyuv* of contracting *tum'ah*, and whoever says there is such a *hiyyuv*—it is upon him to bring the proof (Hilkhot Nezirut 5:16).

The Rabad's novel view, in which he appears to stand alone,[2] is consistently regarded as marginal and certainly not normative.

The nature of the debate about this ruling turned in a historical-critical direction following a series of rulings issued by Rabbi Moshe Sofer in a responsum dated 1837. In one of his most famous responsa,[3] R. Sofer notes, without much fanfare, that Rabad himself retracted his lenient opinion in *Temim De'im*, no. 336 and adopted a more conventional, stricter posture.

From then on, any citation of Rabad's position as support for leniency in matters of *tum'at kohanim* included one of two caveats: either that Rabad's comments in his glosses to *Mishneh Torah* are to be understood as merely providing an exemption from lashes, with-

[2] *Sefer Mizvot Katan* of R. Yitzhak of Corbeil also disagrees with Rabad, insofar as he codifies the laws of priestly defilement (89) and never mentions Rabad's leniency. The phrase "*tum'at kohanim* in our days," used earlier in the work (48), does not mean to imply that the laws of priestly defilement are different in our day from the days of the Temple, but rather to say that the laws of defilement are different from the laws of Temple service which no longer apply in our day. Hatam Sofer suggests in the aforementioned responsum that *Semak* concurs with Rabad, but even he later questions this comparison.

[3] This responsum was famously written to R. Zevi Hirsch Chajes, regarding the question of delaying burial for verification of death. It also relates directly to Hatam Sofer's general approach toward Moses Mendelssohn, the great defender of the waiting practice. See, Meir Hildesheimer, "The Attitude of the Hatam Sofer Toward Moses Mendelssohn," *Proceedings of the American Academy for Jewish Research* 60 (1994): 141–87.

out carrying a real exemption, in light of *Temim De'im*, no. 336; or that Rabad recanted his earlier lenient position and later adopted a more stringent approach in *Temim De'im* that should be taken to be his final decision on the matter.

We can make four claims about the historical context of this position of Rabad, as explained below.

1. A close reading of much of the subsequent discussion of Rabad's opinion yields a fascinating revelation: The reference to Rabad's stringent position, as described in *Temim De'im*, is consistently referred to by proxy via *Hatam Sofer*'s responsum, and not by direct reference, citation, or quotation of *Temim De'im* itself. Thus, it appears that very few, if any, of these post–*Hatam Sofer* authorities actually read *Temim De'im* no. 336.

And perhaps for good reason. *Temim De'im* was first independently published in Lemberg in 1811, around the time that *Hatam Sofer* first notes the rereading of Rabad's opinion in the glosses to *Mishneh Torah*.[4] Few before *Hatam Sofer* make reference to this passage of *Temim De'im* simply because the book was harder to come by before the 1811 printing. This is most likely the text of *Temim De'im* to which *Hatam Sofer* refers.

The second printing of *Temim De'im*, in Warsaw in 1897, was substantially shorter than its predecessor, including only 226 of the 248 entries printed in the first edition. The 1897 edition only contained those parts of *Temim De'im* that were not printed elsewhere. Entry no. 336 was deleted from the reprinting, erased from the records of history, and unavailable to later authorities.

The initial 226 sections of *Temim De'im* include original responsa by major Provençal *rishonim* of the twelfth century (with a clear majority by Rabad himself). These responsa were preserved in the 1897 edition because they were not printed in any other late-

[4] *Temim De'im* was first named and published in 1622 as part of the larger work *Tumat Yesharim*, collected by Tam ibn Yahya. *Tumat Yesharim* has not been published since.

nineteenth-century work. In contrast, the latter twenty-two sections consist of Rabad's glosses to *Hilkhot ha-Rif* and his short responses/glosses to *Ba'al ha-Ma'or*'s critical comments to the same were left out of the 1897 edition.

The exclusion of these sections was the result of the Romm family's 1884 publication of the complete Babylonian Talmud in Vilna, which marked a historical milestone in Jewish learning. The "complete" Talmud now included many early and late commentators, including *Hilkhot ha-Rif*. The publishers also included supercommentaries where appropriate, culling from various manuscripts and earlier printings. One new inclusion was Rabad's glosses to *Rif*'s *Halakhot*, first published in *Temim De'im* in 1622 and 1811. Unfortunately, many of these glosses were not presented on the same printed page as the *Hilkhot ha-Rif* and were instead included in the supplementary pages of commentary after the *Rif*.

Temim De'im no. 336, to which *Hatam Sofer* refers, was initially part of this larger collection of glosses to *Hilkhot ha-Rif* in tractate *Makkot*, which was incorporated in the Vilna *Shas* of 1884. These glosses were tucked away on page 5a of the standard 1884 Vilna edition of the *Tosefta* to Shevu'ot and Makkot, which was printed at the end of the volume of those tractates. The glosses were now visible and accessible to everyone who had a copy of the Romm *Shas*, albeit slightly hidden from the eye. As all of Rabad's glosses to *Hilkhot ha-Rif* were now publicly and popularly available (as they are today in the standard reprinting of the Vilna *Shas*), the publishers of the 1897 second edition of *Temim De'im* felt that they could print a shorter work, omitting these recently published pieces. Authorities who opened the 1897 *Temim De'im* were thus unable to find the statement of Rabad to which *Hatam Sofer* referred. There was similarly no reference directing their attention to Rabad's comments to *Hilkhot ha-Rif Makkot* which were easily available, if they only knew where to look.

The third edition of *Temim De'im*, printed in New York, 1958, was a direct reprint of its 1897 predecessor, and still lacked entries past number 226. Only in Jerusalem in 1973 was a reconstruction of

the complete *Temim De'im* undertaken, seeking to restore the sections omitted from the 1811 edition. Most *poskim* who referred to Rabad's position only as quoted by *Hatam Sofer* had neither the 1811 nor 1973 edition of *Temim De'im*. As such, they could never be certain as to its exact formulation and similarly, could not have known that they most likely owned the text of *Temim De'im,* no. 336, as printed in the Vilna *Shas*.[5]

One responsum of *Avnei Nezer* (YD, no. 466) raises an even more striking issue concerning the challenge to uncover the true words of Rabad. Written in 1895, this responsum appeared before the 1897 edition of *Temim De'im*, but indicates that R. Abraham Borenstein had access to the earlier 1811 edition that contains Rabad's position intact. Still, *Avnei Nezer* doubts whether he had the correct text of Rabad on account of his lack of access to the original 1622 Venice printing. Inspection of the 1622 edition found in the library at the Jewish Theological Seminary reflects that the wording of the 1811 edition is no different from that of the 1622 edition.

2. In identifying the actual source-text of Rabad, it is important to note that it is part of his glosses to *Hilkhot ha-Rif*. By all accounts, these glosses were completed by 1185—eight years before Rabad even began working on his glosses to Maimonides' *Mishneh Torah*.[6] Presumably it would therefore be untenable to maintain that Rabad recanted his (later) lenient position as articulated in his glosses to *Mishneh Torah* in favor of his (earlier) stringent approach published earlier in *Temim De'im* no. 336. If Rabad changed his mind at all, his conclusion was almost certainly the lenient one, the opinion expressed in his later work.[7] Moreover, some argue that Rabad's lan-

[5] See *Shu"t Yabi'a Omer*, YD 10:52, as well as other responsa cited in the following notes.

[6] On Rabad's glosses to *Hilkhot ha-Rif*, see Isadore Twersky, *Rabad of Posquièeres* (Philadelphi: Jewish Publication Society, 1980), 117–19; on Rabad's glosses to *Mishneh Torah*, see ibid., 125.

[7] See *Iggerot Moshe*, YD 1:230, sec. 2, who wonders which was the initial and which the final position of Rabad. R. Feinstein allows for either possibility as he

guage in his glosses to *Mishneh Torah* is clearly intended to reflect normative halakhah, whereas his comments to *Hilkhot ha-Rif* seem to be more like critical commentary. Perhaps one could therefore conclude that Rabad ultimately decided in favor of the lenient position, the opposite conclusion of *Hatam Sofer*.

3. A further clarification comes to light upon considering the genre of Rabad's position. Several authorities categorized Rabad's position as formulated in *Temim De'im* as a responsum; apparently they had never seen the actual text but were merely relying on *Hatam Sofer*'s testimony.[8] They would therefore be referencing the classic Sephardic debate as to how to ascertain a writer's true position when his novellae or glosses contradict his position as expressed in a responsum.[9] However, since Rabad's position as articulated in *Temim De'im* is in actuality part of his general glosses to *Hilkhot ha-Rif*, and not a responsum, it should not be considered to be categorically distinct from his glosses to *Mishneh Torah*. In fact, the opposite argument could be easily put forth. In his glosses to *Hilkhot ha-Rif*, Rabad comments as a student probing his master's work, analyzing and questioning in an attempt to clarify and understand. Rabad's tone in his glosses to *Mishneh Torah* takes on another character entirely. Written in his older years, they appear to be a visceral response to what Rabad saw as Maimonides' innovative spirit; Rabad challenged Maimonides' positions and chose to state his opinion clearly and openly. As such, it would be fair to argue that the glosses to *Mishneh Torah* more accurately reflect Rabad's

admits that he was unaware of the history behind the penning of these works. It is also clear from R. Feinstein's discussion that he was also unaware that *Temim De'im* no. 336 was part of Rabad's glosses to *Hilkhot ha-Rif*, as he suggests that it was possibly a responsum. It is likely that R. Feinstein never saw Rabad's actual text and relied on the second-hand, abridged testimony of Hatam Sofer.

[8] *Shu"at Ateret Paz* 2, YD 3.

[9] See R. Ovadiah Yosef, *Shu"t Yab'a Omer*, OH 2:30:11, EH 3:20:30; idem, *Shu"t Yehaveh Da'at* 1:45; idem, *Taharat ha-Bayit* 1, p. 375, and the numerous sources cited therein.

true opinion, more so than his comments to *Hilkhot ha-Rif*. In light of this understanding, this entire construct of Sephardic sophistry falls by the wayside.

4. An analysis of both of Rabad's pieces reveals that each offers a completely opposite reading of Nazir 42b. The Talmud first cites the position of Rabbah, who maintains that *kohanim* are not prohibited from contracting *tum'ah* after having previously done so (*tum'ah ve-tum'ah*) and then cites Rav Yosef, who argues that *kohanim* are indeed prohibited from defiling themselves in such a manner. In attempting to clarify the disagreement more sharply, the Gemara posits two different possible situations: when contact with the first *tum'ah* is maintained when coming into contact with the second *tum'ah* (*tum'ah be-hibburin*), and when contact with the first *tum'ah* has been lost prior to contacting the second *tum'ah*; the first would be permitted, the second prohibited.

The Gemara is unclear as to which of the *amoraim* holds to this distinction. Were Rav Yosef to differentiate between these two cases, it would mean that Rabbah maintains that a *kohen* who contacts a second *tum'ah* has not violated any prohibition even if he no longer maintains contact with the first *tum'ah*. Once the *kohen* has become defiled, contracting a second *tum'ah* does not and cannot change his status and therefore cannot incur a violation. Conversely, were Rabbah to differentiate between these two situations, he would hold that the only case in which a *kohen* does not violate a second prohibition is when he remains in contact with the first *tum'ah* at the time he contacts the second. Once his connection to the first *tum'ah* is lost, he is prohibited from contracting a second *tum'ah*. According to this second reading, Rav Yosef would be stringent in both situations.[10]

[10] Even though his personal status remains unaffected by this second contact, the Torah prohibits him from coming into contact with *tum'ah*, regardless of thr possible consequences or lack thereof. See R. Hershel Schachter, *Be-Ikvei ha-Tzon* (New York: Beit ha-Midrash de-Flatbush, 1997), no. 35, and R. Yitzchak Elhanan Spektor, *Kovetz Shi'urim* 2, no. 41.

Most commentaries, such as the Tosafists and Maimonides (according to one interpretation), adopt the second reading. Provençal commentaries, such as Menachem Me'iri (*Beit ha-Behirah*, Nazir 42b, s.v. *zeh she-bi'arnu*) and Rabad in his glosses to Hilkhot Nezirut, offer the former approach.

Rif cites the Mishnah Makkot 3:8, which rules that if a *kohen* was repeatedly admonished not to contract *tum'ah*, he would receive a separate set of lashes for each *tum'ah* that he encounters. *Rif* does not elaborate upon this Mishnah nor add any other details. It is against this backdrop that Rabad issues his critique. Rabad notes that the Gemara Nazir (42b) explains that this ruling as only applicable when the *kohen* has relinquished contact with the first *tum'ah*; when the *kohen* retains contact with the initial *tum'ah*, contracting a second *tum'ah* does not incur lashes. In other words, Rabad criticizes *Rif* for failing to reproduce the Talmud's caveat regarding *tum'ah be-hibburin*. A casual reader might err in his halakhic decision-making were he to base his rulings on this Mishnah as presented by *Rif* and, as such, Rabad referred the reader to the appropriate discussion in Gemara Nazir.

Recalling the Provençal interpretation of the discussion in Nazir, Rabad understood that Rif adopted the position of Rav Yosef in the Gemara. To Rabbah, the Mishnah Makkot as it stands cannot reflect correct practice; Rif's citation of the Mishnah without comment is therefore tacit acceptance of Rav Yosef's position. Rabad's critique, then, is that Rif has misrepresented the position of Rav Yosef, as it was understood in Provence.[11] In essence, Rabad offers the same reading of the pivotal Talmudic passage in both his glosses to Rif and Maimonides—with the only difference being that in the former he presents the position of Rav Yosef and in the latter the position of Rabbah.

[11] Meiri also understands that Maimonides rules in accordance with Rav Yosef as understood by the Provençal scholars. However, it is more likely that Maimonides really means to adopt the position of Rabbah as understood by the Tosafists (see *Lehem Mishneh*, ad loc.).

Rabad is firm in his glosses to *Mishneh Torah* in accepting the halakhah as formulated by Rabbah. B.T. Bava Batra 114b posits that in all disputes with Rav Yosef the halakhah follows Rabbah, save for three unique cases. With this in mind, it seems that Rabad's glosses to *Rif* do not reflect his normative halakhic position, but rather only a critique of *Rif*, on *Rif's* own terms, i.e., following the opinion of Rav Yosef. Rabad himself is content to adopt an entirely distinct approach and an entirely different set of facts.

It is important to note that even Rabad's final, authoritative position as articulated in his glosses to *Mishneh Torah* is not without ambiguity. Rabad's suggestion that modern-day *kohanim* no longer have any *hiyyuv tum'ah* can be read in two different ways. The simplest reading argues for absolutely no prohibition for modern-day *kohanim* to contract *tum'ah*.[12] Later authorities, however, argued for a more limited explanation of Rabad—indicating that while a modern-day *kohen* who contacts *tum'ah* would not incur the Torah prohibition of lashes, he nonetheless violates a rabbinic enactment. These *poskim* read the word *hiyyuv*, not as a general prohibition, but strictly of one incurring corporal punishment. R. Nattan Adler adopted this approach and convinced R. Yechezkel Landau of its veracity.[13] As such, R. Landau amended his previously held position and henceforth understood Rabad's opinion that contracting *tum'ah*, even for modern-day *kohanim* entailed a rabbinic violation.[14] In this context, *Hatam Sofer* remarks that some thirty years after R. Adler's meeting with R. Landau, he found textual support for his revered teacher's explanation of Rabad's opinion. Yet, as we have noted, such support seems to be grounded in a less complete analysis of the relationship of the two statements of Rabad. The aforementioned responsum of *Avnei Nezer* similarly challenges

[12] *Mishneh le-Melekh*, Hilkhot Avel 3:1; *Shu"t Rabbi Akiva Eiger*, Tinyana, no. 18.

[13] See *Shu"t Hatam Sofer*, YD 338, who describes this rabbinic consultation in Prague of 1783.

[14] *Dagul me-Revavah*, YD 372.

Hatam Sofer on these grounds. Rabad never spoke of a rabbinic prohibition in *Temim De'im*. There is room to conclude that *Temim De'im* spoke of a Biblical prohibition within Rav Yosef's opinion, while the glosses to *Mishneh Torah* referred to a complete exoneration and leniency.[15]

The final words of the Rabad's gloss are meant as a clear challenge to Maimonides' ruling, in demanding proof for the latter's incriminating assertion. Moreover, it is difficult to contend that Rabad was referring to a hypothetical scenario of corporal punishment that is not in effect today, while explicitly referring to the situation of modern-day *kohanim*.[16]

"Whoever says there is such a *hiyyuv*—it is upon him to bring the proof."

[15] *Avnei Nezer* also discussed which of Rabad's two opinions should be considered more halakhically valid and what the Talmudic basis is for each. See his lengthy discussion in responsa YD, nos. 466, 468, and 470.

[16] See *Shu"t Yehaveh Da'at* 4, no. 58, who cites a possible reason for discussing the hypothetical case of lashes as pertaining only to the fact that one who has incurred a punishment of lashes, even today when this punishment is not practiced, is disqualified from acting as a witness.

Laws of Medical Treatment on Shabbat

Dov Karoll

The permissibility of treatment of the ill on Shabbat varies from mandated and required even when numerous *melachot* would need to be violated, to permitted, provided it does not violate any *melachot*, to prohibited for the simple fact that it is medical treatment. What factors lead to such a great disparity?

The primary, crucial distinction at work here is between medical treatment that involves saving a life (*piku'ach nefesh*), which is permitted and even required, even if it means violating the normal rules of Shabbat, and providing medical treatment in other cases, regarding which the rules are more complex.

When is medical treatment required even if it involves violating *melachot*? The Rambam is very clear on this issue:[1]

> It is forbidden to delay in violating Shabbat for a person who is dangerously ill (*choleh she-yesh bo sakkana*), as it says [in the Gemara, based on a verse]: "[Regarding the laws of the Torah] 'man shall fulfill them and live,'[2] rather than fulfill them to die."[3] We learn from here that the laws of the Torah are not to

[1] Hilchot Shabbat 2:3. This passage is also cited in *Shemirat Shabbat Ke-Hilchatah* at the beginning of his discussion of the laws of *piku'ach nefesh* on Shabbat (32:1). Translation mine.

[2] Vayikra 18:5.

[3] The verse is cited, and the law is derived, in the Gemara Yoma 85b, where this explanation of Rav Yehuda in the name of Shmuel is one of many sources provided for the notion of saving lives overriding Shabbat observance (starting on 85a). Of the many possibilities suggested, this derivation is the Gemara's preferred

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> achieve vengeance in the world, but rather they bring compassion, loving-kindness, and peace to the world. And those heretics who claim that this is a violation of Shabbat and it is prohibited, about them the verse states, "and I [God] have given them evil decrees, and laws by which they cannot live."[4]

Thus the Rambam rules that when human life is in danger, violation of Shabbat that can help save the person's life is not optional; it is obligatory. Earlier in the same chapter (2:2), the Rambam characterizes the approach one is to take to treating a dangerously ill person: "The general principle is: When it comes to a dangerously ill person, with regard to all matters that the sick person needs, Shabbat is to be treated just like a weekday." Furthermore, he rules, based on the Gemara, these actions should not be carried out by children or by gentiles, but by adult Jews, to emphasize that this is not a questionable allowance but the proper mode of action. The *Shulchan Aruch* rules, based on overwhelming evidence, that it is a mitzvah to violate Shabbat for a dangerously ill Jew, with a premium placed upon swiftness to action.[5] Any treatment which is considered to be necessary for the patient's treatment, or even if its exclusion carries a risk of deterioration, is to be provided on Shabbat.[6]

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source, because the Gemara understood this source to imply that even in cases of *safek*, where there is uncertainty regarding the life-saving value of the treatment, the violation is mandated.

[4] Yechezkel 20:25.

[5] Sec. 328:2, the first part based on the Gemara Yoma 84b, Rambam 2:1, and *Tur* 328:2, and the second part based on the Talmud Yerushalmi, Yoma 8:5. The *Mishna Berura* there (6) adds that if the sick person is wary of others violating Shabbat on his behalf, he should be coerced to change his mind, and informed that this is *chasidut shel shtut*, "foolish piety."

[6] See *Be'ur Halacha* (328:4, s.v. *kol*), where he has a lengthy discussion of whether one can violate Shabbat even for treatment without which the patient's life is not considered endangered, and concludes, based on numerous sources, that one cannot violate the Shabbat under such circumstances. Nonetheless, he ends off by explaining that anytime there is some chance that the person's condition will deteriorate if the treatment is not administered, then Shabbat is to be violated to provide it. See also *Mishna Berura* 328:42.

As indicated above, the nature of situations where lives are in danger is such that time is of the essence. Any delay in carrying out the actions necessary to help the sick person, whether to ask a rabbi whether the actions are permitted, or anything else, is a grave violation, for it could lead to the deterioration of the person's condition. Anyone who is in a position to help is required to do so immediately.[7] There is an important theoretical debate that has some bearing upon this question, referred to in halachic literature as the question of whether life-saving actions that violate Shabbat are *huttera*, permitted altogether, or *dechuya*, set aside. While some authorities rule that the former is true, and thus any treatment that is deemed necessary is to be applied with no questions asked,[8] other authorities rule in accordance with the latter approach, that every necessary action overrides the Shabbat prohibition. Two exemplars of the latter approach are the Rema and the *Mishna Berura*, who rule that if the treatment can be provided in a manner that involves a lesser violation of Shabbat with *no delay* involved for the patient, then this is preferable. Thus, if one performs the action involved with a *shinui*, i.e., in a manner that is clearly different from the way the action is normally performed but does not detract from the effect or efficiency

[7] The Talmud Yerushalmi, Yoma 8:5, has a very clear, three-part expression on this matter. First, the faster one acts the better. Second, one who is asked is looked upon negatively. (The implication is that one is asking a rabbi, who should have made clear in advance to people that saving lives takes precedence over Shabbat observance, so that they would act and not ask, as explained by the *Terumat Ha-Deshen* 58, quoted in the *Beit Yosef*, as well as in the *Korban Ha-Eida* on that Yerushalmi and in the *Aruch Ha-Shulchan* 328:1.) The third phrase is that one who consults with others rather than acting is considered to have spilled blood, as the sick person's status could deteriorate in the interim. This line is quoted in the *Tur* and the *Shulchan Aruch* (328:2, 13).

[8] This is the first view cited by *Mishna Berura* 328:39 from the Rosh in the name of the Maharam, though the *Mishna Berura* himself rejects it, as below. It is the position of the *Tashbetz* 3:37, s.v. *Ha-Ramban*, and the *Avnei Nezer* 2:455. For a full treatment of the differing views on the subject, see *Responsa Yechaveh Da'at* 4:30.

of the action, they rule that this is preferable.[9] However, even these authorities insist that if any substantive delay would result from the modification, it is to be avoided.

This does not mean that no advance preparation is necessary for anticipated cases of *piku'ach nefesh*. Rabbi Akiva states as a "general principle" in the Mishna on Shabbat 130a, in the context of a *berit mila* that will take place on Shabbat, that any preparatory activity that could have been done before Shabbat which involves a *melacha* cannot be done on Shabbat. In the case of *berit mila* on Shabbat, this factor is immanent, as such *beritot* only take place when the boy was born on the preceding Shabbat. This qualification is cited in the *Tur* and the *Shulchan Aruch*, in both Hilchot Shabbat[10] and Hilchot Mila.[11] By the same principle, a woman in her ninth month of pregnancy, when there is a reasonable chance that she may go into labor on Shabbat, should prepare whatever she can before Shabbat to minimize the need for Shabbat violations should she go into labor on Shabbat.[12] In most other cases of *piku'ach nefesh* for patients, the need is generally sudden and unexpected, in which case this principle does not apply. However, in other cases, where there is reason to suspect that some need may arise, such as a doctor on call, or in cases of ongoing care, where some preparation can be done in advance to minimize the violation on Shabbat, those preparations should be made. However, if there is a major inconvenience involved in the preparation, one is not obligated to do so.[13]

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[9] Rema's comment on *Shulchan Aruch* 328:12, *Mishna Berura* 328:35. The *Mishna Berura* qualifies even further that if using a *shinui* would cause some slight delay that would not be critical to the patient's health, then it remains advisable.

[10] OC 331:6.

[11] YD 266:2.

[12] The earliest source I found for this is the *Sefer Chasidim* (the numbering varies in different editions, but it is 855 in the edition I found, same as the number cited by the *Mishna Berura*). This *Sefer Chasidim* is cited by the *Magen Avraham* and by the *Mishna Berura* (both in 330:1), and the *Mishna Berura* is cited by *Shemirat Shabbat Ke-Hilchatah* (32:34 and in nn. 1001–1102 there).

[13] *Shemirat Shabbat Ke-Hilchatah* in the above source, based on a ruling of Rav Shlomo Zalman Auerbach, cited in n. 104 there.

What qualifies as a sickness that can be treated on Shabbat? The Gemara, Rambam, *Tur*, and *Shulchan Aruch* all list many illnesses and situations for which one can violate Shabbat and for which one cannot.[14] Following is a short list of contemporary maladies based on a collection I saw, but clearly the general principle, rather than the particulars of the list, is the crucial factor. The principle is that one should violate the Shabbat for any malady which doctors, including gentile doctors,[15] say involves a danger to the life of the patient.[16] According to many views, even the opinion of a Jew who is not a medical expert can be relied upon in regard to violating Shabbat in the absence of a doctor.[17] As such, the main determination that needs to be made is whether the person's life is in danger, and, if so, what treatment is necessary and helpful to ameliorate that situation. It is worth noting that even if there is some doubt as to whether the person's life is in danger, or whether the particular action will contribute to the saving of the person's life, the action should be performed anyway; even *safek piku'ach nefesh*, actions that can reasonably be thought to contribute to *piku'ach nefesh* but lack certainty or even prevailing likelihood, are permitted, and even mandated, on Shabbat.

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[14] Gemara Avoda Zara 27–29, Rambam 2:4–6, *Tur* and *Shulchan Aruch* in 328:9 list various illnesses one by one. There are lengthy discussions of what treatment is allowed and what treatment is not. But at the root of most of these discussions is the question of defining a particular situation as life-threatening or not.

[15] This is explicit in the *Mishna Berura* (328:25) and implicit in the *Shulchan Aruch* and Rema (328:10).

[16] Rambam 2:5, *Tur* and *Shulchan Aruch* (328:10).

[17] This is the ruling of the *Tur* (328:10), quoted as the view of the Ri, for which one can be lenient based on the rule *safek nefashot le'hakeil*, that in cases of doubt regarding performing *melacha* to save a life one should perform it, cited in the *Shulchan Aruch* there as the view of "some" without a dissenting view, so it is presumably accepted. The *Mishna Berura* there (*Be'ur Halacha,* s.v. *ve-yesh*) cites the views of the Rambam and the Ran, who disagree, and explains that the *Shulchan Aruch* cited this view based on the aforementioned principle. However, given that there is a dispute in the matter, the *Mishna Berura* recommends that it is proper to have a non-Jew perform the treatment if possible.

The 39 Melochos lists and goes into some detail regarding many situations as examples of cases where one can violate Shabbat for *piku'ach nefesh*. I am citing an abridged version of this list, just to help gauge the type of sickness that is relevant here. In addition to cases where the danger is apparent, such as suspected heart attack and stroke, he lists numerous other cases where there may be some risk, even if it is not immediately obvious in all the cases. These include significantly higher than usual temperature with no apparent cause (Rav Moshe Feinstein mentions 102° F),[18] internal wounds or hemorrhages, intense internal pain, punctured veins, arteries, or blood vessels, compound fractures, deep wounds, infected wounds which are swollen, ailing internal organs, heatstroke, serious bites from insects or other animals, poison, and loss of consciousness.[19]

There is an additional question regarding *piku'ach nefesh*, based on a more literal understanding of the phrase "saving of a soul."[20] The *Shulchan Aruch* rules that one may violate Shabbat to save someone from being forcibly converted to another religion, even if the person's life is not in physical danger, the rationale being that saving someone's spiritual life (when it is being taken away by force) is equivalent to saving his physical life in this regard.[21]

Does the approach cited above regarding the importance of saving the life of a fellow Jew, even if it means suspending the normal rules of Shabbat, apply to saving the life of a gentile? The Gemara (Avoda Zara 26a) rules that a Jew may provide medical treatment to

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[18] *Iggerot Moshe,* OC 1:129.

[19] Pages 501–505.

[20] A strictly literal translation would be "extraction of a soul," based to the Talmud's case (Mishna Yoma 83a) of extracting a person trapped under rubble.

[21] Sec. 306:14 The *Beit Yosef* (306:14) brings the source of this ruling from Tosafot in Shabbat 4a and other places, where a few different explanations are given. Based on the underlying rationale of these reasons, the *Mishna Berura* (306:56–58) cites a few qualifications to this ruling. One is that the person was forcibly removed and did not come along willingly. A second is that the person is being removed permanently from Judaism, and not that the person is being forced to violate a sin on a one-time basis.

an idolater during the week (provided he is paid for his efforts) but not on Shabbat. The Gemara states that the gentile will understand that one may only violate Shabbat for the care of those who are required to observe it. This is also the ruling cited in the *Tur* and the *Shulchan Aruch*,[22] as well as the *Mishna Berura*.[23]

Many contemporary authorities have ruled that this principle is not applicable today, and I believe their views can be differentiated into two basic approaches.[24] The mainstream approach responds to the claim of the Gemara that gentiles will understand if Jews are unable to treat them on Shabbat, recognizing that Shabbat violation is only justified for the sake of those who are themselves Shabbat observers. Many authorities over the last few hundred years ruled that the understanding which the Gemara takes for granted cannot be assumed in modern society.[25] Rather, they claim, if Jews refuse to treat gentiles on Shabbat, this refusal could have disastrous ramifications, either for the doctor himself or for the Jewish community as a whole. As such, they rule that one should take whatever actions

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[22] YD 154:2.

[23] Sec. 330:8, and in the *Be'ur Halacha* (330:2, s.v. *kutit*). The *Mishna Berura* decries the doctors who neglect this halacha and violate the laws of Shabbat to save gentile lives, which he says has no basis. Notwithstanding the very strong language of the *Mishna Berura*, there does seem to be good basis in *poskim*, both before and after the *Mishna Berura*, for doctors who act in this way. See the next paragraphs for details.

[24] Clearly no *poskim* debate the validity of the reasoning of the above sources; the question is whether there is some change, either in the reaction of the gentiles to this perceived discrimination (as in the first approach), or in the status of the gentiles themselves (as in the second approach).

[25] The earliest source I found indicating this is *Responsa Chatam Sofer* (YD 131). Other sources include, but are not limited to, a *teshuva* by Rav Moshe Feinstein (*Iggerot Moshe,* OC 4:79), Rav Eliezer Waldenberg (*Tzitz Eli'ezer*, sec. 8, responsum 15, chap. 6, sec.12—it is a short paragraph from a very long *teshuva* on matters related to medical issues), and Rav Yitzchak Weiss (*Minchat Yitzchak* 1:53). A summary of this approach is found in the *Piskei Teshuvot* (330:2). (Note that there is a printer's error in the citation of the *teshuva* from *Iggerot Moshe*, as it says 49 instead of 79. This is corrected above.)

are necessary to save the life of a gentile, even if it requires violation of Shabbat laws. Within this approach, one should try to minimize the Shabbat violation required, and should only take those Shabbat-violating actions that are truly necessary. Nonetheless, advocates of this approach generally assume that any violation is justified on the grounds that the deleterious consequences of nontreatment could themselves endanger the lives of Jews, and are thus to be understood as *piku'ach nefesh* for Jews, which, as above, is permitted unconditionally.[26]

Alternatively, some authorities take a more principled approach to making this allowance in contemporary society, regardless of concern for the deleterious results of not saving gentile life. The mechanism for this approach is to limit the Gemara's ruling to gentiles of the type that were common in the society of Talmudic times, i.e. idolaters, claiming that it is not applicable to the gentiles in our society. One source cited as a basis for this view is the Ramban, who counts helping and saving a *ger toshav*, a gentile who has accepted the seven Noahide laws, including violating Shabbat to save his life, as a mitzvah.[27] If one takes the position of the Ramban (and Rav

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[26] The *Chatam Sofer* mentions this as a possibility—if the ill-will could result in danger, then Torah-prohibited *melachot* are permitted. The *Iggerot Moshe* mentions this as a general concern, even if the individual doctor is not worried about his particular case, he raises a possible uproar resulting from this type of behavior, either on the part of the citizenry or the government. The *Tzitz Eli'ezer* explains that the doctor should have in mind that he is acting to save himself and Jewry in general from deleterious consequences rather than to save the gentile patient. The *Minchat Yitzchak* raises the possibility, mentioned by some of the aforementioned *poskim* as well, that the external pressures to perform the action lower it from a *de-orayta* to a *de-rabbanan* based on the principle of *melacha she-einah tzericha le-gufah*, a *melacha* performed for ulterior or abnormal purposes. Once it has been reduced to a *de-rabbanan*, he can permit based on the general rule of *eiva,* ill-will. While this understanding of the principle is itself controversial, it exemplifies the recognition that there needs to be a permit for *melachot de-orayta*.

[27] "Omitted positive *mitzvot*," listed in the Rambam' s *Sefer Ha-Mitzvot* at the end of the *mitzvot asei*, mitzvah 16.

Ahron Soloveichik points out that there are others who take this view as well), the question then remains whether contemporary gentiles are defined as *gerei toshav*. Rav Nachum Rabinovitch, rosh yeshiva of the Hesder Yeshiva in Maaleh Adumim and author of *Melumedei Milchama*, a book of responsa related to army service and security matters, applies the aforementioned principle of the Ramban, and cites authorities who rule that the gentiles of today are generally defined as *gerei toshav*. As such, he rules that saving the life of a gentile is warranted on Shabbat.[28] My teacher and rosh yeshiva Rav Aharon Lichtenstein of Yeshivat Har Etzion explained to me that while the views that take the first approach address the practical issue, justifying saving the life of a gentile under certain conditions, they sidestep the fundamental issue. Rav Lichtenstein said that were he to be confronted with a case of violating Shabbat to save the life of a gentile, he would act to save the life of the gentile on principle, relying on those views that allow for it in principle, not based on societal concerns alone. Rav Lichtenstein also mentioned that his rebbe and father-in-law, Rav Yosef Dov Soloveitchik, ruled that this was permissible even in cases where there would be no problem of negative results, independent of such issues.[29] Along similar lines, Rav Ahron Soloveichik cites numerous sources regarding the status of *ben noach* and *ger toshav*, leading to the conclusion that saving the life of a gentile is warranted based on the notion that saving the life of a gentile mandates Shabbat violation on substantive grounds.[30]

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[28] Responsum 43, pp. 144–146. He states his opinion regarding an innocent Christian or Muslim (as opposed to a terrorist). He also claims that taking care of enemies in accordance with international regulations is also warranted to prevent ill-will toward Jews (along the lines of the first approach), a ruling for which he cites several sources.

[29] I heard Rav Lichtenstein express this idea in a *tish* in his home on Shabbat Parshat Lech-Lecha, 5762 (October 27, 2001). I followed up with him personally in the course of preparing this document, on 9 Tammuz 5763 (July 9, 2003).

[30] This idea is discussed in *Od Yisrael Yosef Beni Chai*, in the third article, titled "Be-inyan Mevakerin Cholei Akum mipenei Darkei Shalom," on pp. 17–28. He

PROHIBITION OF MEDICINE

As mentioned above, in situations where there is no threat to life, medical treatment on Shabbat is far more limited. The extreme example of this involves cases where all medicinal treatment is prohibited per se. The rabbis forbade healthy people with minor ailments from taking medicine on Shabbat. The reason for this prohibition was based on the fact that in Talmudic times, and until relatively recently, most medicines needed to be ground up, which is a violation of the *melacha* of *tochen*, grinding. In order to prevent the preparation of medicines, which would usually lead to the violation of this *melacha*, medicinal treatment was prohibited.[31] Most authorities rule that this prohibition still applies fully to medicines nowadays, even though it is not common for people to grind up medicines, and the medication being discussed for Shabbat is generally ready-made and available within the home.[32] (Purchasing the medication on Shabbat in cases where there is no danger is problematic for reasons pertaining to commerce.) There are some authorities who, while not writing off the decree altogether, are more lenient on certain aspects

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cites numerous sources that support his claim, as well as explaining those which do not seem to fit this model at first glance. The sources regarding *ger toshav* include, in addition to the Ramban cited above, Rashi (Arachin 29b), Rabbeinu Yona, *Sefer Yereim*, Ra'avad (*Hilchot Issurei Bi'a* 14:8), the *Ba'er Ha-Gola* (CM 266, 425), the *Aruch Ha-Shulchan* (YD 254:3), the Rema (OC 156) with the Gra, ibid., and Rav Eliyahu Henkin (*Ha-Darom* 10, Elul 5719 [1959], pp. 5–9). The article, however, does not focus on the practical ruling. This information I heard from Rav Mosheh Lichtenstein, who told me in the name of the late Rabbi Dr. David Applebaum HYD, a very close student of Rav Soloveichik who was a practicing physician, that Rav Soloveichik told him that saving lives of gentiles is warranted even in the absence of the external concerns mentioned above. Thanks to Rav Mosheh Lichtenstein also for the reference to the article.

[31] Based on the Gemara Shabbat 53b, Rambam 21:20, *Tur* and *Shulchan Aruch* (328:1).

[32] Note the sources cited below, who deal with instances in which medicine is permitted and all maintain the assumption that there is a general problem. One example is Rav Moshe Feinstein's view (*Iggerot Moshe*, OC 3:53).

of medicinal treatment, taking into account the changes and differences in the preparation of medications from the way it was done in previous generations, not applying the decree to treatments that were not technically included in it originally.[33]

One example is that medication prescribed for an extended period to help recovery from illness can be taken on Shabbat even after one feels better.[34] Medication for a minor malady that is effective only if taken every day is a subject of debate. According to some authorities, including the Chazon Ish, one may continue taking the medicine on Shabbat.[35] According to other authorities, including

[33] *Yalkut Yosef* (*Hilchot Shabbat,* pt. 4, pp. 135–139), a collection of halachot by Rav Yitzchak Yosef, son of Rav Ovadya Yosef (the book has his father's approbation, stating that he stands by its rulings), cites a combination of reasons to allow for medical treatment in many cases, each with sources to back it up. Particularly noteworthy for Ashkenazim drawn to this approach are the citations from Rav Shlomo Kluger (in *Sefer Ha-Chayim* 328:6 and in *Shenot Chayim*, pt, 1, 152:5, which should be 4 but it is labeled 5, as is the one after it) and Rav Avraham Chaim Naeh (in *Ketzot Ha-Shulchan*, *Badei Ha-Shulchan*, 134:7, pt. 2). Rav Kluger discusses whether medicines one began taking before Shabbat are excluded from the decree, for even in the time of the Gemara these would have been prepared in advance, and there would be no concern for grinding. He also distinguishes between medicines that are ground, to which the decree applies, and medicines that are boiled, to which the decree never applied (even though cooking is also prohibited on Shabbat). Rav Naeh does not rule conclusively in this direction, but says that it can be combined with other mitigating factors to allow for treating minor ailments. He refers to the prohibition as being a prohibition that is not as severe as it was, for the reasons mentioned. Thanks to Rav Doniel Schreiber for referring me to the *Yalkut Yosef*.

[34] Based on *Iggerot Moshe* (OC 3:53), *Shemirat Shabbat Ke-Hilchatah* (34:17); cited in *Piskei Teshuvot* 328:28 with no dispute and in *The 39 Melochos* (p. 485) as a matter of "general agreement."

[35] *Shemirat Shabbat Ke-Hilchatah*, chap. 34 n. 76, as well as the *Piskei Teshuvot* (328, n. 100), cite the *Minchat Shabbat* (commentary on the *Kitzur Shulchan Aruch*) 91:9, who quotes the *Sefer Ha-Chayim* of Rav Shlomo Kluger, that all agree that if one started treatment before Shabbat, it can be continued on Shabbat, and that medicines which are not prepared by grinding can be taken under such circumstances. He also cites the *Chazon Ish*, quoted in the *Imrei Yosher* (Mo'ed

Rav Moshe Feinstein and Rav Shlomo Zalman Auerbach, one may do so only in situations where missing a dose of the medication will cause the person to fall ill, in accordance with the definition of a *choleh she-ein bo sakana*, who is allowed to take medicine, as will be explained below.[36]

Furthermore, only treatment that is defined as medicinal is prohibited. And not every treatment is halachically defined as medicinal. Below are several issues where there is discussion among the authorities as to whether or not the decree applies, and, accordingly, whether or not these treatments are permissible on Shabbat.

• *Foods that provide nutritional or medicinal value:* Any foods or drinks that are consumed by healthy people are permitted to be consumed, even if they have therapeutic value, even if the person taking them would not normally eat these foods, and even if the person is taking them specifically for their therapeutic value.[37]

• *Vitamins:* It is debated whether vitamins are considered medicine or food. Rav Moshe Feinstein rules that if the vitamins are taken for added strength and disease resistance, and not to strengthen a person who is otherwise weak (which would be prohibited as medical treatment), then taking them does not fall under the ban on medication.[38] Similarly, Rav Yosef Dov Soloveitchik is quoted as saying that taking vitamins is basically another form of ingest-

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99), as taking this position. *Shemirat Shabbat Ke-Hilchatah* also quotes the *Shenot Chayim* (also by Rav Shlomo Kluger) to this effect.

[36] Rav Feinstein in *Iggerot Moshe,* OC 3:54. Rav Auerbach is quoted in *Shemirat Shabbat Ke-Hilchatah,* chap. 34 n. 76.

[37] Based on a Mishna, Shabbat 109b (14:3 in Mishnayot), Rambam 21:22, *Tur* and *Shulchan Aruch* in 328:37.

[38] In the same responsum mentioned above. He explains that since the person is not ill, there is less cause for concern about getting "carried away" and grinding, and therefore cases where the person is totally healthy were not included in the ban. This is to be distinguished from minor ailments, which is precisely where the ban applies.

ing the nutrients from foods, and, as such, is permitted.[39] Others disagree and claim that this is a form of medicine being taken by healthy people, precisely the case regarding which the decree was issued, and is thus prohibited.[40] Rav Shlomo Zalman Auerbach distinguishes between different types of vitamins: those taken as a replacement for the nutritional content of particular foods are permitted as the foods themselves would be, while those taken to strengthen the person beyond the effects of regular foods are prohibited as medicines.[41]

• *Preventive medicine:* Along the lines of the preceding discussion, taking medication for a condition one anticipates coming about, such as antacids before eating food that one expects to give heartburn, is also permitted.[42] Similarly, one is allowed to take medicine to prevent suffering from seasonal allergies, where the medication is taken to prevent the onset of the symptoms.[43]

• *Nonmedicinal treatments:* This will depend on what type of "treatment" it is; spraying deodorant (stick deodorant is problematic for other reasons)[44] and applying talcum powder to absorb

[39] From a *shiur* by Rav Doniel Schreiber at Yeshivat Har Etzion, 5762 (YHE-CD project 5762, CD 1, *shiur* 15).

[40] *Berit Olam* (*Melekhet Refu'a*, 38) and *Responsa Mishneh Halachot* (4:51), based on *Mishna Berura* (328:120). Note that Rav Moshe Feinstein, in the *teshuva* mentioned, provides an alternative explanation (limitation) for the basis of this approach, the quotation from the *Mishna Berura*.

[41] Quoted in *Shemirat Shabbat Ke-Hilchatah* (chap. 34, n. 85). All information in this paragraph, except where otherwise noted, is based on *Piskei Teshuvot* (328:30).

[42] *The 39 Melochos*, pp. 483–484, based on the previously cited *Iggerot Moshe*.

[43] From Rav Doniel Schreiber in the *shiur* mentioned in n. 39 above.

[44] *The 39 Melochos* lists "Using solid deodorant sticks" among examples of *memarei'ach*, a *tolada* (subsidiary) of the *melacha* of *memachek* (p. 917). The prohibited activity performed is the smoothing of a semisolid substance, since you spread it on yourself and you want it to stay there. He mentions that it is permissible to use roll-on deodorant, which works in a different manner. My thanks to Rav Yaakov Francus for his help in explaining this concept.

perspiration, applying ice to a bruise, and wearing a brace are all permitted.[45]

• *Brushing teeth on Shabbat:* This too is a matter of debate. I found four different positions, with some differences between them (see notes), among modern authorities. (1) Rav Moshe Feinstein, Rav Yitzchak Yaakov Weiss, Rav Eliezer Waldenberg, Rav Moshe Zweig, Rav Shlomo Zalman Auerbach, and Rav Neuwirth (*Shemirat Shabbat Ke-Hilchatah*) rule that brushing teeth with toothpaste is prohibited.[46] (2) Rav Avraham Chaim Naeh rules that using toothpaste (by hand) is permitted, but that using a toothbrush is prohibited.[47] (3) Rav Yechiel Yaakov Weinberg rules that

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[45] Spray deodorant is permissible because it is considered hygienic treatment rather than medical, as explained in *The 39 Melochos*, p, 479, based on *Shulchan Aruch* (328:22) and common practice. Talcum powder is considered to absorb and not heal, as explained in *Shemirat Shabbat Ke-Hilchatah* (34:12). Ice treatment and braces are permissible as treatments never performed medicinally, as explained in *Chayei Adam* (*Hilchot Shabbat* 69:5) (the examples come from *The 39 Melochos*, p. 484; braces are also mentioned in *Shemirat Shabbat Ke-Hilchatah* 34:29–30).

[46] Rav Feinstein's ruling appears in *Iggerot Moshe*, OC 1:112. He rules that if one does not apply toothpaste or wet the brush before or after, then it is permitted to use a toothbrush. But I did not put this in the third category, which permits normal use of a toothbrush. This *teshuva* is quoted in *The 39 Melochos* on p. 919, as an example of *memarei'ach*, a *tolada* (subsidiary *melacha*) of *memachek* (as above in n. 44), and n. 55 there (p. 685). Rav Weiss's ruling appears in *Minchat Yitzchak* (3:48). Rav Waldenberg's ruling is in *Tzitz Eliezer* (pt. 7, 30:2). Rav Zweig, in *Ohel Moshe* (2:98), explains that there is a problem of medical treatment, since toothpaste is made under medical supervision, and people use it for dental health, as well as problems in using both toothpaste and a toothbrush per se, even separately. A letter (*teshuva*) of Rav Auerbach's is cited in the *Seridei Eish*, in response to Rav Weinberg's *teshuva* on this topic, explaining that brushing is something that could be permitted, but the custom is to prohibit; he mentions one technical problem (see below for the source). The source in *Shemirat Shabbat Ke-Hilchatah* is 14:34 (the sources on this topic, other than Rav Soloveitchik and Rav Auerbach, are quoted in fn. 95 there. Note the correction in the citation of the *Seridei Eish*).

[47] In the *Ketzot Ha-Shulchan* 138, in n. 31 of the *Badei Ha-Shulchan*, s.v. *mutar le'shafshef*. He prohibits use of a toothbrush because of *uvdin de-chol*, that is, he

brushing teeth with a toothbrush and no toothpaste is permitted.[48] (4) Rav Hershel Schachter cites Rav Yosef Dov Soloveitchik as having ruled that brushing teeth normally is permitted.[49] Rav Ovadya Yosef, in four consecutive responsa, discusses numerous potential problems that can come up with regard to brushing teeth, and concludes that brushing teeth is permitted so long as you do not always bleed when you brush. And even if you sometimes bleed from the brushing, it is still permitted to brush with a toothbrush and toothpaste. Nonetheless, he recommends having a special toothbrush set aside for Shabbat, to avoid the problem of *uvdin de-chol*, engaging in an activity that is a markedly weekday activity. He also rules that one should not rinse off the brush after one's final use of it on Shabbat, comparable to not washing dishes that one will not need for the rest of Shabbat.[50]

• *Soap:* Regarding bar soap, there are a number of reasons cited for why it should be prohibited, with a general consensus that it is prohibited.[51] With regard to liquid soap there is some debate.

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considers it to be a markedly "weekday" (non-"*Shabbosdig*") activity, not because of the more substantive issues cited above in the first position.

[48] Rav Weinberg in Responsa *Seridei Eish* 1:30.

[49] *Nefesh Ha-Rav*, p. 168.

[50] Responsa *Yabi'a Omer* (pt. 4, OC, 27–30). In no. 27 he deals with the aforementioned issues of *memachek* and *memarei' ach*. In no. 28 he deals with the issue of *nolad*, that a new substance is being created. In no. 29 he explains why there is no problem of medical treatment and the decree against grinding medicine does not apply. In no. 30 he deals with the issue of *sechita*, squeezing out material, with regard to the toothbrush. Thanks to Rav Shlomo Levi, rosh kollel at Yeshivat Har Etzion, for his help in understanding the ruling not to wash the brush. I noticed afterward that a similar explanation is provided in *Menuchat Ahava* (20:6), by Rav Moshe Levi of Bnei Brak, who also rules in accordance with Rav Ovadya Yosef.

[51] The Rema (326:10) rules that it is prohibited to wash one's hands with "*borit*, which is called *zayif* in Ashkenaz," which is understood to be a reference to soap. The *Mishna Berura* (326:29–30) rules in accordance with the Rema and cites further reason to prohibit based on the *Tiferet Yisrael*, who felt that soap in his time was even more problematic than the soap of the Rema. Accordingly, Rav Avraham Chaim Naeh (*Ketzot Ha-Shulchan* 146, *Badei Ha-Shulchan* 32),

Rav Moshe Feinstein mentions that many people permit the use of liquid soap, but states that the reason for this leniency eludes him, and he rules that it, too, is prohibited. Nonetheless, other authorities, including the *Aruch Ha-Shulchan* and Rav Avraham Chaim Naeh, rule that use of liquid soap is permitted, and this is the ruling cited in *Shemirat Shabbat Ke-Hilchatah*, with the caveat that it is better to prepare the soap before Shabbat.[52] *The 39 Melochos* cites both views, and mentions that as a result of this dispute some people dilute the liquid soap to make it "especially thin," to eliminate the potential problem.[53]

• *Removal of splinters or other foreign items that have entered one's body:* This too is permitted, provided that the removal will not necessarily cause bleeding. ("Not necessarily" meaning that even if it is possible that bleeding will result, the action is permitted so long as one cannot be *sure* that there will be bleeding. This is because the resultant bleeding is unintentional, if not undesired, and so as long as bleeding does not necessarily result,

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Shemirat Shabbat Ke-Hilchatah (14:16) and *The 39 Melochos,* pp. 915–916, rule that using solid soap is prohibited. However, in their footnotes, each of them deals with the reasons cited for this prohibition and whether or not they should apply to our soap, which is apparently different from the soap that was first discussed by the *poskim* mentioned above. Each concludes that our soap is prohibited, in light of the custom not to use soap, and, more modern sources, such as Rav Moshe Feinstein (*Iggerot Moshe* OC 1:113), rule unequivocally that it is prohibited (Rav Feinstein wrote after Rav Naeh). Furthermore, *The 39 Melochos* points out (p. 916) that if the soap has become soft in a dish with an accumulation of water, the problems mentioned above may still apply. *Shemirat Shabbat Ke-Hilchatah* (n. 49) cites Rav Shlomo Zalman Auerbach that this may be considered something which could have been permitted, but the custom is to forbid, which is also binding under normal circumstances. However, in light of this, it seems that under extreme circumstances there may be room to permit use of soap in cases other than the exception cited by *The 39 Melochos*.

[52] The source in the *Aruch Ha-Shulchan* is 328:11 (end). The source in Rav Naeh's book is the same as in the preceding note, at the end of sec. 32. The source in *Shemirat Shabbat Ke-Hilchatah* is also in the same section as above, with n. 50.

[53] Page 916.

it is permitted. This is called *davar she-eino mitkavein*, and the prohibited case is called a *pesik reisha*.)[54]

"SICK BUT NOT ENDANGERED"

Between the poles of life-saving treatment and the limits on treatment of the healthy lies the intermediate case and the rules of the non-endangered ill. The term in halacha for this middle group is *choleh she-ein bo sakana*, literally translated as a person who is sick but whose life is not in danger. In other words, halacha defines a category of sickness that, while not severe enough to be classified as involving danger to life, nonetheless does not fall into the category of healthy people discussed above. Before providing examples, it is worth defining the general principles of what can be done for or by such a person.

The decree against taking medicine applies only to healthy people with minor ailments and not to a *choleh she-ein bo sakana*. Furthermore, if the person needs some medical care that requires the violation of Torah-based laws of Shabbat, they can be performed for him by a gentile.[55] (The general prohibition against asking gentiles to violate Shabbat on your account is known in halacha as *amira le-akum* or *amira le-nochri*.)[56]

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[54] Regarding splinters: the Mishna *Shabbat* 122b (17:2 in the Mishnayot) states that one may use a needle to remove a splinter, which is cited in Rambam 25:8, *Tur* and *Shulchan Aruch* in 308:11. Puncturing an abscess (swelling): the Gemara Shabbat 107a explains that if it is done only to release the liquid, with no intention of creating an "opening," meaning as a professional medical treatment, then it is permissible. This is cited by the Rambam in 10:17 and the *Tur* and *Shulchan Aruch* in 328:28. (This is external in that it relieves pressure rather than heal a malady.)

[55] *Mishna Berura* (328:1) mentions that the decree of medicine does not apply, and the *Shulchan Aruch* (328:17) rules that Shabbat violations can be performed by asking a gentile.

[56] The rules governing *amira le-nochri* are beyond the scope of this article. For more on this, see Shabbat 121a and 150a, *Shulchan Aruch* OC 306–307, *Shemirat Shabbat Ke-Hilchatah* chaps. 30–31 and *The 39 Melochos*, pp. 63–89.

There is a major debate regarding exactly what a Jew can do in terms of violating other laws of Shabbat for such individuals. The *Shulchan Aruch* cites four views, and states that the preferred view is that in standard cases rabbinic violations immediately necessary for the treatment that cannot wait until after Shabbat are permitted if performed with a *shinui*, i.e., in an abnormal way that mitigates the severity of the violation. Similarly, it is permissible to move or utilize an item which is *muktzeh* if it is necessary to attain treatment.[57] There is one exception where this rule is relaxed according to the *Shulchan Aruch*, and it will be explained below in the listing of examples. Regarding the performance of Torah-prohibited *melachot* with a *shinui* (which is considered a more severe rabbinic prohibition), *Shemirat Shabbat Ke-Hilchatah* cites a group of authorities who are lenient in this matter, and cites Rav Shlomo Zalman Auerbach as stating that one can rely upon this view when a Torah-prohibited *melacha* is necessary to treat the individual, and there is no gentile available to perform it.[58]

What illnesses are defined as *choleh she-ein bo sakana*? The *Shulchan Aruch* lists many different illnesses and their treatments,[59] the principles of which will serve as the basis for modern application. For our purposes it is useful to deal with contemporary lists. *Shemirat Shabbat Ke-Hilchatah* lists numerous examples or criteria for *choleh she-ein bo sakana*, though he is careful to qualify it by pointing out that this category precludes any situation where there is a possible risk to the person's life. [60]

- *Lying down:* The "classic" case is a person who is so sick that he or she needs to lie down rather than move around freely.
- *Fever:* The second cases is someone suffering from a fever at a temperature with which people do not normally leave home

[57] *Shemirat Shabbat Ke-Hilchatah* 33:6 cites this law as well as sources for it.
[58] 33:2, n. 17*.
[59] 328, especially secs. 20–36, 39–41.
[60] 33:1.

(*Shemirat Shabbat Ke-Hilchatah* cites a source which mentions 38° Celsius, which corresponds to 100.4° Fahrenheit, but points out that one should respond in each case in accordance with how sick the person is or seems, as opposed to one specific numerical cut-off point).[61]

• *Great pain:* The third example is pain that weakens the whole body, such as a migraine headache.

• *If the person feels healthy now:* A person who is currently healthy but may become ill if he or she does not receive medical treatment also falls into this category.

• *One of a person's limbs is at risk of losing its normal function, and doctors assess that there is no risk of the situation becoming worse if treatment is delayed until after Shabbat:* As alluded to above, the *Shulchan Aruch* rules that in this case, rabbinic prohibitions can be violated even without a *shinui*. However, for Torah-based *melachot*, the action should preferably be performed by a gentile. *Shemirat Shabbat Ke-Hilchatah* cites in the name of Rav Shlomo Zalman Auerbach that if it is difficult to find a gentile to help, one may perform the action with a *shinui*. In a footnote on his description of this case, *Shemirat Shabbat Ke-Hilchatah* cites Rav Eliezer Waldenberg, who wrote that he was told by doctors that nearly every case where a particular limb is at risk there is some risk for the entire body, and, as such, he considered such cases to be defined as *choleh she-yesh bo sakana*, with the result that the stringency mentioned above does not apply, and Torah-based *melachot* are to be violated by Jews, even in an ordinary way, on behalf of such a person.[62]

• *A woman who has given birth:* This encompasses the period starting from the eighth day postpartum (until then she is considered to be a *chola she-yesh ba sakana*) until the thirtieth day. These numbers apply in cases where the woman's status is nor-

[61] Note 2 in chap. 33, on the section cited above.

[62] Note 9, referring to *Responsa Tzitz Eliezer*, pt. 8, 15:10, sec. 9.

mal; obviously if she is in a weaker state than normal, the rules that apply to that level of sickness are in effect.

• *A young child who needs medical attention:* A child in need of medical help is generally considered to be a *choleh she-ein bo sakana*, and the restrictions mentioned above regarding healthy people do not apply.

In sum: if faced with an individual whose life may be in danger, one must take any and all action to help save the person, and while planning ahead is recommended in the relevant cases, considering approaches that minimize the violation is only permissible if it does not take extra time. Acting reasonably and appropriately, even at the cost of Shabbat violations, is not only permissible, it is a great mitzvah.

In cases where a person has fallen ill, but there is no reason to think that the person's life is in danger, medicines may be provided, and, if necessary, most actions that do not involve Torah-prohibited *melachot* may be undertaken, preferably with a *shinui*. If Torah-prohibited *melachot* are necessary, then the services of a gentile should be sought, and if there is a risk of losing a limb and the intervention is absolutely necessary, a Jew may perform a Torah-prohibited *melacha* with a *shinui*.

However, in cases where a person feels a little bit under the weather or has some slight discomfort, most authorities rule that medicinal treatment must be avoided altogether. Exceptions are cited for activities beneficial to one's health that are not defined as medical or medicinal. As noted above, there are some authorities who allow for more treatments even in these cases, with certain limits and parameters.

Eye of the Beholder: Ophthalmic Illness in Talmudic Literature

Elan Rosenblat

It is difficult to ascertain the medical knowledge that the authors of the Talmud possessed. Medical topics were generally discussed in reference to ethical or judicial matters without further elaboration on pathophysiology. Using the sparse references available, this paper will give a brief insight into medicine during Talmudic times.

The eye is used in many different contexts in the Biblical and rabbinic literature**.** It is used metaphorically in reference to one's general appearance ("eye of the earth"), positive things ("good eye"), and negative things ("evil eye") (Exodus 10:5, Avot 2:9, Berakhot 20a). Talmudic authorities refer to the eye as a well or spring and, based on its production of tears, felt it was the water supply of the human body. For example, in discussing the reason for the flood, Rav Jose said, "The generation of the flood became arrogant only as result of the eyeball, which resembles water" (Sanhedrin 108a). Furthermore, the word for "eye" in Hebrew, *ayin*, is derived from the word *ain*, which is defined as "spring" (Genesis 16:7, Sanhedrin 108). Based on the belief that the eye was like a spring, the mechanism by which brain injury was thought to cause blindness was believed to be overflow of fluid from the brain to the eye. This corresponds to the Hippocratic theory that all diseases are related to the balance of humors or fluids (Gordon 758).

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TALMUDIC PERCEPTION OF ANATOMY

The Talmudic knowledge of anatomy was derived mainly from dissection of animal eyes, because many Jewish laws require examination of animals after slaughtering (Mansour). Their beliefs regarding the anatomy of the eye included that it was an organ embedded in fat and protected by the skull and eyelashes, and that it was made up of seven layers which translate into the modern-day ocular conjunctiva, sclera, cornea, choroid, retina, iris, and lenticular capsule (Gordon 760). Another sophisticated belief in comparison with Hippocratic medicine involved the relationship between the eye and the heart, as explained in the Zohar: "In the interior of the eye are found many small nerves and blood vessels. The center pillar produces sight, one branch goes up to the top of the head, and another branch terminates at the heart" (Gordon 762). The idea that the eye was connected to the heart sprouted the belief that major diseases have ocular manifestations. Interestingly, the letter *ayin*, which is also the Hebrew name for "eye," pictorially demonstrates the path of the optic nerve (see Figures 1 and 2).

Figure 1. The Hebrew letter *ayin*.

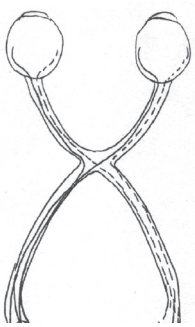

Figure 2. The path of the optic nerve.

PATHOPHYSIOLOGY OF OCULAR DISEASE

The rabbis of the Talmud gave various possible causes for eye disease. In tractate Pesachim the rabbis discuss the influence of food on health. There it is taught that Babylonian *kutach* (a dip composed of sour milk, moldy bread crumbs, and salt) blinds the eyes, coarse bread, fresh beer, and raw vegetables remove one five-hundredth of a person's eyesight, while refined bread, fatty meat, and old wine illuminate the eyes (Pesachim 42a) In a separate tractate Rabbi Yohanan said that "[excessive] walking is harmful to the eyes" (Kethuboth 111a). This thought is reiterated in tractate Berakoth, where an unnamed master scholar is quoted as saying, "Long strides diminish a man's eyesight by a five-hundredth part. What is the remedy? He can restore it by [drinking] the sanctification wine of Sabbath eve" (Berakoth 43b). In tractate Nedarim, R. Johanan ben Dahabai said that children are born blind "because they look at 'that place,' " referring to a woman's genitals (Nedarim 20a). Another prominent belief was that smoke was an ocular irritant, from the verse "as vinegar to the teeth, smoke to the eyes" (Proverbs 10:26). Some authorities felt that the substance of tears influenced the health of the eyes. R. Eleazar said: "A limit has been set for [the tears of] the eye. [There are three kinds of tears which are beneficial;] tears caused by a drug, mustard, and collyrium, but the tears caused by laughter are best of all. There are three kinds of tears which are harmful: tears caused by smoke, weeping through [grief, and straining in] a privy, but [tears which result from the death] of a grown-up child are worst of all" (Lamentations Rabbah 2:15). Displaying an advanced understanding of genetics, the Talmud discusses the offspring of a blind man: "It is obvious that the seed is mixed up, for otherwise the blind should produce a blind offspring" (Hullin 69a).

The importance of cleanliness was a relatively progressive preventative measure used by Jews in Talmudic times. Poor hygiene was felt to be detrimental to vision, as seen in Tractate Sabbath: "If the hand [be put] to the eye, let it be cut off" (Sabbath 108b). In tractate Nedarim, Rav Jose quotes Samuel as saying that "scabs of the

head [caused by not washing clothing] lead to blindness." Based on this quote, Rav Jose felt that laundering was even more important for one's health than bathing. Prenatal care was also thought to be important for eye health, as Rav Ashi is quoted in reference to a pregnant woman as saying, "One who eats cress will have bleareyed children. One who eats fish brine will have children with blinking eyes. . . . One who eats eggs will have children with big eyes" (Ketuboth 60b–61a).

DESCRIPTIONS OF SPECIFIC OPHTHALMIC DISEASES IN THE TALMUD

The Talmud describes many different eye diseases and gives different explanations for their causes, many of them homiletic in origin. One example is with nystagmus, a condition where one has unintentional horizontal or vertical movement of the eyes. Rabbah explains that the eyes of the residents of Tigris move to and fro because they live in dark homes (Berohoth 59b). Ptosis, drooping of the eyelids, may have been seen with Jacob: "Now Israel's eyes were heavy with age, he could not see" (Genesis 48:10). The use of the word "heavy" is a reference to the weakness of the upper eyelids. The modern understanding of age-related ptosis is involutional deterioration of the levator aponeurosis. Furthermore, it is clear that Jacob's visual capabilities were intact, as a few verses earlier it says, "Then Israel saw Joseph's sons" (Genesis 48:8). Another condition possibly described in the Talmud is presbyopia, an age-related decrease in one's ability to see near objects, as in "The eyes which used to see at distance do not now see even near" (Leviticus Rabbah 18:1).

Another Biblical reference to ocular disease is observed with Leah. In Genesis 29:17 it is written, "Leah's eyes were weak, and Rachel was beautiful in appearance." The Bible's comparison of Leah's eyes to Rachel's beauty alludes to the fact that Leah's condition influenced her appearance. The Talmud elaborates, for Rab states that Leah thought she was to be wed to the wicked Esau,

"and she wept until her eyelashes dropped" (Baba Bathra 123a). Blepharitis, one possible explanation for Leah's malady, is defined as a chronic inflammation of the eyelid margins causing redness, itching, and irritation of the eyes which in some cases can lead to loss of eyelashes. The cause of the disease is still unclear, but it has associations with staphylococcal infection and seborrhea. There are other instances in the Talmud where loss of eyelashes is attributed to excess weeping, such as the story of Rabban Gamliel, who, after hearing that his neighbor had died, "wept in sympathy with her, until his eyelashes fell out" (Sanhedrin 104b). Another reference to eyelashes is seen in the Mishnah, where a priest is disqualified from performing his priestly services if he lost his eyelashes (Bekhoroth 7:3).

PRACTICAL IMPLICATIONS OF OCULAR DISEASE

A relevant example which has practical implications in Jewish law is the different eye diseases which may disqualify a priest from performing the priestly service. This topic is dealt with extensively in the Mishnah Bechoros, which disqualifies one who has no eyebrows, has only one eyebrow, or is a *charum*. The Mishnah explains a *charum* as follows: "One who can paint both his eyes with one movement. Both his eyes are low, one eye is high, or one eye is low, or he focuses on the lower story and the upper story simultaneously, one who cannot bear the sun, one who has unmatched limbs or watery eyes. One whose eyelashes fell out is unfit for reasons of unsightliness" (Bechoros 7:3). This passage references strabismus, a misalignment of the eyes. This disease entity can be caused by many things, including congenital amyblopia or injury to the nerves involved in ocular movement (cranial nerves three, four, and six). This passage also makes references to the aforementioned blepharitis as a disqualifier. Other examples of eye diseases which disqualify priests are seen in Tractate Megillah: "a man whose eyes run should not lift up his hands . . . a man blind in one eye should not lift up his hands." However, in both of these cases the Talmud maintains that

if the community is comfortable with such an individual performing his priestly duties, then he is permitted (Megillah 24b).

Another practical application of eye disease in the Talmud involves disqualifying an animal for sacrifice. The Talmud (Bechoros 38a) disqualifies any animal "if the *ris* (eyelid) of its eye was punctured, notched, or split, if there is a *dak* in its eye or an intermingling or a *chilazon nachash* or a grape-shaped growth." Rashi translates *dak* as "cloth." He seems to understand *dak* as a cataract, a clouding of the lens. Rambam defines *dak* as a spot in the eye. The word *dak* is used previously in Leviticus in reference to blemishes that disqualify a priest (Leviticus 21:20). A *nachash*, which is also the Hebrew word for "snake," is thought to be a pterygium, a benign growth which creeps (like a snake) onto the cornea (Mansour). An "intermingling" is defined by the Talmud as "something that mixes the color of the eyes" (Bechoros 38b). This condition is now described as a coloboma, which is an iris sector defect caused by insufficient closure of the embryonic fissure. The following Mishnah continues with the topic of eye blemishes, discussing "white flecks or water in the eye." Both of these conditions lead to complete blindness and may be another example of cataracts.

The Talmud's understanding of ocular disease still has halachic implications today. In tractate Abodah Zarah, Mar Samuel is quoted as saying, "If one's eye gets out of order, it is permissible to paint it [treat it medically] on the Sabbath, the reason being because the eyesight is connected with the mental faculties." Rab Judah follows by saying that in any case of discharge, pricking, congestion, watering, inflammation, or the initial stages of an eye illness, one may violate the Sabbath in order to treat the eye (Abodah Zarah 28b). It is clear from these two passages that the Talmud felt that almost any ocular symptom would be considered a serious medical condition which warrants desecration of the Sabbath. Interestingly, some benign disease entities, such as conjunctivitis (bacterial infection of the eye), which ordinarily would not warrant desecration of the Sabbath from a medical standpoint, meet the criteria as set by the Talmud to allow desecration of the Sabbath in their treatment.

This paper has considered a few of the interesting examples where the Talmud discusses ophthalmic disease. The information presented is only a limited sample of the medical topics discussed in the Talmud. When analyzing the Talmud in a scientific light, it is important to reiterate that the descriptions of ocular disease occur in both practical and homiletic matters and may not accurately reflect the author's medical knowledge.

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The Physician on the Sabbath

Juliana Rosenblat

The Sabbath is an integral part of every observant Jew's life. Therefore, it is imperative for observant doctors to be well versed in what allowances are made for medicine on the Sabbath. Doctors should study and develop expertise in the laws of Sabbath so that they will not transgress the laws of them.[1] This paper delves into various issues that observant doctors come across in their practice of medicine on the Sabbath.

GENERAL PRINCIPLES

It says in the Torah, "Remember the Sabbath day, to keep it holy. Six days you shall labor and do all your work; but the seventh day is a Sabbath for the Lord your God, in it you should not do any manner of work, you nor your son, nor your daughter, nor your servant, nor your cattle, nor a stranger that is within your gates."[2] Rashi explains that the word *zachor* means both "observe" and "remember"; he explains that both words were spoken simultaneously, and that both are of equal importance.[3] Therefore, even if a patient's care prevents a doctor from physically observing the Sabbath, he still must remember it in all of his actions.

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[1] *Yesod Vesoresh HaAvodah* 6:3, as cited in the *Encyclopedia of Jewish Medical Ethics*, p. 865. It should be noted that many topics presented in this summary article are complex, and readers are encouraged to investigate issues thoroughly on their own.

[2] *Shemot* 20:7–10.

[3] Rashi 20:7.

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FOUR MAIN CATEGORIES OF THE SICK

Life-Threatened

The Rambam says that the general rule is that the Sabbath is like a weekday for a person whose life is in danger.[4] Even if the patient will live for only a short time (a few hours), one is still obligated to desecrate the Sabbath to help him.[5] There are five main subcategories of this grouping:

1. A patient who feels that he is in life-threatening danger even if his physician does not think so (but if the disagreement pertains to a recognized diagnosis, the patient's opinion is disregarded).
2. A patient who the doctor believes is seriously ill (even if there is only a possibly that he is seriously ill, and even at the stage where the disease is not yet serious but the doctor believes it may become serious if not treated on the Sabbath).
3. A patient who is able to move around on his own, but who can still become seriously ill if not treated on the Sabbath (e.g., a diabetic who runs out of insulin).
4. A patient who is in a state of illness that our sages have defined as being dangerous, even if that condition is no longer deemed so by current medical professionals (e.g., a woman in the first seven days following delivery of a child or a woman who had an abortion after forty days of pregnancy).
5. A patient whose limb is in danger (because in almost all cases when a limb is in danger the medical state can easily progress to a state that is life-threatening; thus someone whose limb is in danger is considered as though he has a life-threatening illness).[6]

It is a basic principle of Judaism that doctors are required to set aside the laws of the Sabbath if someone's life is in danger or possible danger.[7] Not only is it their obligation, but a who physician

[4] Rambam, *Hilchot Shabbas* 2:2.
[5] *Sh'miras Shabbas Kehilchasa* 32:2.
[6] *Nishmat Avraham* on an introduction to siman 328 of the *Shulchan Aruch*.
[7] *Shulchan Aruch* Orach Chayim 328:6.

takes precious time to ask questions about whether or not to violate the Sabbath is considered to have "shed blood" because of the delay the inquiry causes in the patient's treatment. This concept can be derived from the Torah verse "You shall guard My decrees and My laws that man shall carry out and *by which he shall live,* I am Hashem."[8] Taken literally, this means that God would not want man to die on account of keeping His commandments.

There are different opinions as to whether the laws of the Sabbath are temporarily suspended, *dechuyah,* or totally inoperative, *hutrah,* in order to save a life.[9] According to the rabbis who hold that the laws are totally inoperative, everything can be done for a patient as if it were a weekday.[10] Among the rabbis who believe that the Sabbath prohibitions are only temporary suspended,[11] one should take precautions to minimize the violation of Sabbath to the greatest extent possible. This would include delaying treatment until after the Sabbath, and preparing extensively before the Sabbath begins. If it is not a dire situation, one must be sure to carefully calculate the needs of the sick person before desecrating the Sabbath. For example, one should preferentially violate rabbinical prohibitions as opposed to Biblical ones.[12]

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[8] *Vayikra* 18:5.

[9] *Encyclopedia of Jewish Medical Ethics*, p. 866.

[10] *Tosafot* (*Responsa Yechaveh Daat*, pt. 4 no.30:5); other sources as cited in the *Encyclopedia of Jewish Medical Ethics*, p. 866: *Responsa Ravad* no.49; *Responsa Maharam Rottenberg* no.200 (cited in *Rosh*, Yoma 8:14 and *Responsa Rosh* no.64:5): *Mordechai*, Shabbat, end of 466; *Responsa Tashabatz*, pt. 3 no.37; *Responsa Rama* no.76; *Magen Avraham* 328:9; *Responsa Rabbi Y.A. Herzog*, *Orach Chaim* no.3; *Responsa Yechaveh Daat*, pt. 4 no. 30; *Responsa Yabiya Omer*, pt. 7, Orach Chayim no.58 and no. 53:5.

[11] Rashi, according to *Beit Joseph*, Orach Chayim 328, s.v. *uma shekatav rabenu*; Other sources as cited in the *Encylcopedia of Jewish Medical Ethics*, p. 866, Ramban, cited in *Magid Mishneh*, Shabbat 2:11; *Responsa Rashba*, pt. 1 no. 689; *Ran*, Beitzah 17a; *Responsa Radvas*, pt. 4 no. 66 and 130; *Bei'ur HaGra*, Yoreh Deah 155:24 and 266:25; *Shulchan Aruch Harav*, Orach Chayim 328:13l; *Minchat Chinuch*, Musach HaShabbat after Hotzaah.

[12] *Sh'miras Shabbas Kehilchasa*, 32:28, 29, 65–70.

One may not prophylactically desecrate the Sabbath by such preventive care as can be administered after the Sabbath without concern about exacerbating or worsening the patient's condition.[13] If treatment for a person (even in a life-threatening condition) involves a direct Biblical *melacha* (prohibition) and can be postponed until after the Sabbath without any ill-effects, one should postpone it.[14] For example, if a patient requires an x-ray but it need not be performed immediately, one should wait until after the Sabbath to take the x-ray.

If a life-threatening situation arises on the Sabbath, it is preferable that the physician be Jewish as opposed to a gentile. One reason for this is that if people see a non-Jew dealing with the situation, they will mistakenly think that only gentiles are permitted to desecrate the Sabbath to save a life. However, if danger to the patient is not imminent and a *melacha* must be transgressed, it is better that a gentile perform that *melacha*.[15] In a *shiur*, Rabbi Dovid Ostroff suggested that turning out the light to enable a patient to sleep is an example of this. The Rambam similarly states that before a Jew turns off the light to let a seriously ill patient sleep, he should explore alternative options, such as covering the lights or moving the patient to another room.[16]

The Non–Seriously Ill Patient

There are six main categories of non-seriously ill patients, as follows:

1. One who is bedridden or feels generally ill (e.g., a patient with influenza).
2. One who has a high temperature that would prevent most people from going out (even if this particular patient is not confined to his bed).

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[13] *Responsa Iggrot Moshe*, Orach Chayim, pt. 3 no.69.
[14] *Sh'miras Shabbas Kehilchasa* 32:23.
[15] *Sh'miras Shabbas Kehilchasa* 38:1–3.
[16] Rambam Shabbat 2:11; *Mishnah Berurah* 328:1.

3. One who has severe external pain that makes him feel weak even if he is not bedridden.

4. One who, although able to move around, will be forced to remain in bed if not given prophylactic treatment (e.g., an asthma or migraine sufferer).

5. One whom our sages have defined as a "non–seriously ill patient," such as a woman from the eighth to thirtieth day post-childbirth or abortion (only an abortion after forty days of pregnancy), or a young child who requires treatment.

6. A child until the age of nine or ten.[17]

To treat a "non–seriously ill patient" a Jew may only violate rabbinic, not Biblical, laws. When transgressing rabbinical laws, the physician should attempt to do these acts *b'shinui* (in an unusual manner), but if this is not possible, a Jew may desecrate the rabbinic laws in the regular way.[18, 19] If a specific treatment is necessary on Sabbath, or even if it will quicken the patient's treatment after the Sabbath, a Jew may ask a gentile to do whatever is necessary for the well-being of such a patient, even if it involves violating direct Biblical laws.[20] For example, one is allowed to take an x-ray on the Sabbath in a non-life-threatening situation if it will make the patient's recovery faster. It is interesting to note that it is not necessary to instruct a non-Jew to do work that a Jew is permitted to do, even if it involves transgressing a rabbinic prohibition.[21] Therefore, a Jew would be permitted to give a subcutaneous injection (a rabbinic prohibition), but would need a gentile to give an intravenous drip (which may be a Biblical prohibition).

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[17] *Nishmat Avraham*, inroduction to siman 328, pp. 182–183.

[18] Orach Chayim 328:17; *Mishnah Berurah* 57.

[19] *Mishnah Berurah* 328:102.

[20] *Mishnah Berurah* 328:47.

[21] *Sh'miras Shabbas Kehilchasa* 38:4–13.

The Patient with Minor Illness, or with Aches and Pains

This category includes patients who are only slightly ill, such as someone with an irritating cough or headache, but who is not ill enough to become bedridden. In this situation, a Jew is forbidden to break any laws to help, whether Biblical or rabbinic. Additionally, the patient may not take any medications. A non-Jew, on the other hand, is allowed to desecrate rabbinic laws in order to help the patient.[22]

A Patient with Discomfort

This category includes people experiencing some discomfort—for example, someone with a mild cough or skin ailment. No treatment is allowed for a patient in this category, even if it is done by a non-Jew.[23] It is interesting to note that Rav Moshe Feinstein ruled that even though a healthy person who takes vitamins daily is allowed to take them on the Sabbath, someone who is sick and does not normally take them cannot, as the ill individual would be taking the vitamins only because he feels sick.[24]

LAWS CONCERNING THE PHYSICIAN

Driving on the Sabbath

A physician should drive to a seriously ill patient on the Sabbath as he would normally during the week.[25] However, if he thinks there is a possibility of having to drive on the Sabbath, he should prepare beforehand. One opinion states that if a physician knows that he will have to be at the hospital on the Sabbath, he should arrange to sleep near the hospital to avoid driving home on the Sabbath.[26]

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[22] *Mishnah Berurah* 328:52.
[23] *Mishnah Berurah* 328:3, 83.
[24] *Responsa Iggrot Moshe*, Orach Chayim 3:54.
[25] Heard from S. Z. Auerbach *z"l* by Abraham S. Abraham as cited in "Halachot for the Physician on the Sabbath and Festivals," p. 46.
[26] *Responsa Iggrot Moshe*, Orach Chayim 4:79.

However, other opinions do not believe that he must sacrifice his and his family's enjoyment of the Sabbath in order to avoid desecrating the Sabbath for a dangerously ill patient.[27] Assuming that he stays home, he should turn off the lights in the car before the Sabbath. If he forgets to do this (and has time), he should do it once the car door is closed.[28] Even if there is no *eruv*, the physician is allowed to carry all essential documents with him (e.g., an insurance card and license), though he should do so with a *shinui* (in an unusual manner, such as in his shoe). Once in the car, he should take the shortest possible route and should not use the radio or other instruments that are not necessary components of getting to the hospital.[29] All of these rules apply only to experienced drivers. If these restrictions may endanger the driver or pedestrians at all, the physician should drive normally to avoid any further danger on the trip.[30]

Once he has reached his destination, he must leave the documents in his car and leave the car running with the keys in the ignition. If there is a real possibility that the car may be stolen, he is allowed to take his keys from the car in an unusual manner, even if there is no *eruv*.[31] When he reaches his destination, he may not turn off the car lights unless there is a possibility that he will need the car to drive to another seriously ill patient on the Sabbath and is certain that the battery will die. The car motor should not be turned off if, by turning off the motor, the lights on the dashboard and inside the car will also be turned off, unless leaving it on can result in a dangerous situation, such as a child entering the car. If this is a fear, the motor can be turned off in an unusual manner.[32]

A physician may be driven to the hospital by a non-Jew to help a non–seriously ill patient if it is too far to walk.[33] A member of the

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[27] *Sh'miras Shabbas Kehilchasa* 32:104 (Rabbi S.Z. Auerbach).
[28] *Sh'miras Shabbas Kehilchasa* 40:54.
[29] *Sh'miras Shabbas Kehilchasa* 40:50.
[30] *Sh'miras Shabbas Kehilchasa* 40:62
[31] "Halachot for the Physician on the Sabbath and Festivals," pp. 46–47.
[32] *Sh'miras Shabbas Kehilchasa* 40:58–60.
[33] *Sh'miras Shabbas Kehilchasa* 38:13

house staff who lives close to the hospital and is due to come in on the Sabbath morning is allowed to spend Friday night away from his home and be driven to the hospital by a non-Jew. However, he cannot travel to a destination that is more than an 11.5 kilometer, *twelve mil* (*techum*) radius from the city limits. In this situation, even a non-Jew would not be able to drive him to the hospital.[34] An attending physician, on the other hand, is allowed to stay more than 11.5 kilometers from the hospital if it is not certain that he will need to go in on the Sabbath, and even if he did, it would only be for a seriously ill patient. Once he has come into the hospital, though, he is not allowed to be driven home even by a non-Jew.[35]

In all cases, it is preferable to use a non-Jewish driver. The physician can also then ask the driver to carry all of his medical equipment into and out of the car. One should try to arrange to pay the driver after the Sabbath, even if it means giving the driver a significant tip. If the driver refuses to wait until after the Sabbath, the physician is permitted to give the appropriate payment, but cannot ask for change or a receipt.[36]

A physician who leaves home and drives to visit a seriously ill patient may not drive back home unless there is a significant chance that his services will be needed at home to treat another seriously ill patient. If he was driven by a non-Jew, he is allowed to return home with him, provided that the distance to the Jewish physician's home is less than 11.5 kilometers. He is even allowed to call a non-Jew to request that he take him home even if it is just for his pleasure, for example to be with family for the rest of the Sabbath.[37]

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[34] Written to Abraham S. Abraham by Rabbi J.J. Neuwirth as cited in "Halachot for the Physician on the Sabbath and Festivals," p. 48.

[35] Heard from Rabbi J.J. Neuwirth as cited in "Halachot for the Physician on the Sabbath and Festivals," p. 48.

[36] *Sh'miras Shabbas Kehilchasa* 38:13.

[37] *Sh'miras Shabbas Kehilchasa* 40:69.

Writing on the Sabbath

In today's hospitals, there are certain protocols for filling out medical information for or about a patient. Some of the information is imperative for the patient immediately, and other, routine things could have implications for the future. It is important for an observant doctor to make the difficult distinction between things that directly impact the patient's care and those that are asked as a matter of routine.[38] While a doctor is permitted to write something that is imperative for a seriously ill patient on the Sabbath (e.g., a prescription, referral letter for the emergency room, important chart details), he may not write something that does not immediately benefit the patient.[39] Since it is a Biblical prohibition to write by hand on paper on the Sabbath, there are other alternatives which would involve only rabbinic desecrations that would be preferable if one is able:

1. It would be preferable to ask a non-Jew to do all the required writing. This is also permissible for a non–seriously ill patient.[40] Practically this might not be possible in many hospitals.

2. A right-handed person should write with his left, and vice versa, as doing so would be considered a significant *shinui* and would only be rabbinically prohibited.[41] If writing in this manner would cause any sort of delay or might cause errors because of the illegible writing, it should not be done.[42]

3. There are some who rule that writing in Hebrew is a Biblical prohibition while writing in another language is rabbinic.[43] Others disagree and believe that writing in any language transgresses a Biblical law.[44]

4. According to some, it is permitted to use a special ink on the Sabbath that dissolves after a day so that the writing is not permanent. There are

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[38] *Encyclopedia of Jewish Medical Ethics*, p. 878.
[39] *Nishmat Avraham*, 340:4 (D).
[40] *Sh'miras Shabbas Kehilchasa* 40:4.
[41] *Mishnah Berurah* 340:22.
[42] *Encyclopedia of Jewish Medical Ethics*, p. 879; *Nishmat Avraham* 340:4 (D).
[43] *Rama*, Orach Chayim 306:11.
[44] *Magen Avraham* 340:10.

also some chemical or fluorescent substances that can be used to conceal writing unless the writing is viewed with a special instrument. This is permissible because some opinions state that the Biblical prohibition of writing extends only to compositions that last for more than twenty-four hours.[45]

5. While some feel that writing on a computer on the Sabbath transgresses a Biblical prohibition,[46] others believe that it does not involve any prohibition of writing or erasing, assuming that the computer lights are not turned on, the writing on the screen is only temporary, and the computer is turned on before the Sabbath.[47]

6. If a patient needs a dose calculated on the Sabbath, it is preferable for the doctor to use a pocket computer (without a printer) to be certain that the numbers will erase themselves after a short time, to prevent violation of a Biblical law.[48]

7. Some rabbis rule that that using a tape-recorder to record patient information does not violate the laws of writing and erasing on the Sabbath.[49] Others say that it transgresses "building" (*boneh*) on the Sabbath.[50] (Because of the electricity that flows through a tape-recorder while using the microphone, some rabbis do not allow using certain tape-recorders.) If the current flows from batteries rather than from an electric generator, and if the type of microphone that is permitted is used, tape-recorders are allowed for recording essential information about a patient.[51] It is now possible to have a tape-recorder engineered with a device that delays the response (*grama*). Therefore, the combination of certain permissible types of microphones with the indirect recording mechanism make using the

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[45] *Responsa Minchat Shlomo* no. 91:11.

[46] *Responsa Shevet Halevi*, pt. 6 no. 37:1.

[47] *Halacha U'refuah*, vol. 5 (5748), pp. 134 ff. as cited in the *Encyclopedia of Jewish Medical Ethics*.

[48] Encyclopedia of Jewish Medical Ethics based on Responsa *Iggeret Moshe*, Orach Chayim, pt. 3 no.31.

[49] *Responsa Iggrot Moshe*, Orach Chayim, pt. 3 no.31.

[50] Rabbi J.J. Neuwirth et al., *Assia*, vol. 1 (5736), pp. 3 ff., as cited in the *Encyclopedia of Jewish Medical Ethics*, p. 879.

[51] Rabbi S.Z. Auerbach, *Kovetz Maamarim*, *Chashmal Beshabbat;* Rabbi S. Goren, *Machanayim* 5718, cited in the *Encyclopedia of Jewish Medical Ethics*, p. 879.

tape-recorder a much better way of recording data than writing by hand on paper.[52]

A Jew is not allowed to write a discharge order for either a hospitalized patient or a patient treated in the emergency room. However, he is able to ask a non-Jew to write one for a patient who is not seriously ill.[53] He may even ask a non-Jew to write a discharge letter for a healthy patient if not writing the order would cause difficulties for the hospital or for other patients.[54] A Jew is not able to write (or even to tell a non-Jew to write) a death certificate on the Sabbath unless not writing it would cause a delay in burial or otherwise dishonor the deceased individual.[55]

Today, there are many procedures and surgeries that require written consent. It is preferable that a Jewish patient avoid writing on the Sabbath and attempt to give oral consent in the presence of witnesses as opposed to signing a document. They can then sign the document after the Sabbath. It is also permissible for a non-Jew to sign on behalf of the observant patient. However, if the hospital or doctor refuses to treat the patient unless his name is signed on paper, he is allowed to sign (for a necessary treatment). This rule also applies to family members of the patient if he is unable to sign for himself.[56]

Use of Medical Equipment on the Sabbath

Telephone. One should not use a telephone on the Sabbath for a non–seriously ill patient. If one needs to use the phone for a patient in this category, they should ask a non-Jew to remove the receiver before speaking into it, as using a telephone causes many lights to be turned on and off, both at the receiving end and at the central

[52] *Encyclopedia of Jewish Medical Ethics*, p. 879.
[53] *Sh'miras Shabbas Kehilchasa* 40:44.
[54] Rabbi S.Z. Auerbach, cited in *Nishmat Avraham*, Orach Chayim 340:6.
[55] Rabbi S.Z. Auerbach, cited in *Nishmat Avraham*, Orach Chayim 340:6.
[56] *Sh'miras Shabbas Kehilchasa* 40:21.

telephone exchange.[57] For a dangerously ill patient, it is required that one use the telephone as necessary. However, if possible, one should still try to ask a non-Jew to lift the receiver or one should lift it in an unusual manner.[58] One may speak as long as necessary on the Sabbath on behalf of a seriously ill patient. It is also permissible to maintain polite conversation, though one should attempt not to deviate from topics relevant to the patient. One is allowed to replace the phone on the receiver so as to receive any other calls about seriously ill patients; however it should be replaced in an unusual manner (*shinui*).[59] A doctor who is home for the Sabbath is permitted to answer his telephone because of the possibility that a seriously ill person could be calling. It is preferable, though, that he lift the receiver in an unusual way.[60]

Imaging or X-Ray Machines. Usage of radiological modalities or other imaging techniques on the Sabbath involves many prohibitions such as writing and erasing, lighting, and extinguishing. Therefore, their use is permitted only for dangerously ill patients in a situation that cannot wait until after the Sabbath. Since there is no worry of batteries burning out or of ruining the machine, one should turn on the imaging machine before the Sabbath in anticipation of caring for a dangerously ill patient.[61]

Electrocardiogram. Use of this machine also involves transgressing many prohibitions, including writing (on the paper), lighting and extinguishing fire (in turning the instrument on and off), and smearing the ointment or jelly on the electrodes and on the patient. As such,

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[57] *Responsa Yabiya Omer*, pt. 1, Orach Chayim no.20. It should be noted that in the modern age, there is no central telephone exchange.
[58] *Sh'miras Shabbas Kehilchasa* 32:40.
[59] *Sh'miras Shabbas Kehilchasa* 32:42.
[60] *Sh'miras Shabbas Kehilchasa* 32:47 and 40:9.
[61] *Sh'miras Shabbas Kehilchasa* 40:32.

this machine is also only allowed to be used on the Sabbath for seriously ill patients.[62]

Otoscope/Ophthalmoscope. These instruments are battery-powered tools used to examine the middle and external ear and the eye, respectively. If it is necessary to use these instruments on the Sabbath, it is preferable that they be turned on in an unusual manner. Additionally, the lights should not be turned off (extinguishing) unless there is a reasonable chance they will be used that same day and the batteries will die, in which case they are permitted to be turned off *b'shinui*.[63]

Thermometer. It is permissible to measure a patient's temperature on the Sabbath with a (non-digital) thermometer.[64] A thermometer is not considered to be *muktzah* and, therefore, it is permitted to handle it on the Sabbath.[65] It is permissible to use a celluloid thermometer on the Sabbath only if the colors change without any letters or numbers appearing, or if the letters or numbers are there already and just become colored (not created).[66] One is not permitted to use an electronic thermometer under any circumstances on the Sabbath. Even if a patient is dangerously ill or even if the thermometer was turned on before the Sabbath, it is not permitted. One must be sure to find a regular, non-electronic thermometer.[67]

Beeper. A doctor who is on call is permitted to leave his house carrying his beeper into a public domain (defined as public by rabbinic,

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[62] *Sh'miras Shabbas Kehilchasa* 40:31

[63] *Encyclopedia of Jewish Medical Ethics*; for technical details, see Rabbi Y. Rosen, *Assia*, vol. 2. (5741), pp. 184 ff.

[64] *Sh'miras Shabbas Kehilchasa* 40:2 and n. 3.

[65] Rabbi S.Z. Auerbach in n. 3 of *Sh'miras Shabbas Kehilchasa* 40.

[66] Rabbi S.Z. Auerbach in n. 8 of *Sh'miras Shabbas Kehilchasa* 40.

[67] *Yalkut Joseph*, pt. 4 (4) 328.37, as cited in *Encyclopedia of Jewish Medical Ethics*, p. 881.

not Biblical criteria), as long as he carries it in an unusual manner.[68] If he is going to visit a patient who is dangerously ill, he is permitted to carry his beeper even if the place is defined as public by Biblical standards. He should make sure his beeper is an integral part of his clothing (like his belt).[69] Ideally, someone who knows that he will need his beeper would have two beepers, one at home and one in shul, thereby minimizing the Sabbath desecration. Additionally, it is best that the beeper automatically relay a message and that one does not have to push buttons to activate it.[70] Interestingly, the beeper itself is not *muktzah* for a doctor because it has a useful purpose for the doctor on the Sabbath.[71]

The mitzvah of keeping the Sabbath is arguably the most essential and significant mitzvah in an observant Jew's life. As a physician, while in certain situations one is obligated to help the patient even if it means desecrating the Sabbath, in others it is prohibited from assisting the patient if it involves a Sabbath violation. As such, it is imperative for every observant physician to be knowledgeable about what he/she can or cannot do in regard to patient care on the Sabbath. The main points discussed in this paper are the differences between categories of sick people, since the amount of *melacha* the physician is allowed to transgress is dependent on the category of the sick patient before him, writing on the Sabbath, driving on the Sabbath, and the use of certain medical equipment on the Sabbath. The halachic information covered in this paper is only a fraction of the information that an observant physician needs to know in order to perform the ever-important mitzvah of observing and remembering the Sabbath.

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[68] *Responsa Iggrot Moshe*, Orach Chayim pt. 4 no.81.
[69] Rabbi S.Z Auerbach, cited in *Nishmat Avraham*, pt. 4, Orach Chayim 301:1.
[70] Rabbi M. Hershler, *Halacha U'refuah*, vol. 5 (5748), pp. 31 ff., as cited in *Encyclopedia of Jewish Medical Ethics*, p. 880.
[71] Heard by Abraham S. Abraham from Rabbi J.J. Neuwirth as cited in "Halachot for the Physician on the Sabbath and Festivals," p. 43.

Hilchot Niddah and Gynecological Procedures

Eliyahu C. Rosman

Abstract

The laws of family purity (Hilchot Niddah) are central to Orthodox Judaism. These laws forbid a husband and wife to have intimate physical contact during a woman's menstrual period. Throughout the generations, there has been much discussion regarding what other vaginal bleeding aside from normal menstruation would place a woman in the category of a niddah, cause her to separate from her husband, and eventually necessitate her to follow the steps that return her to a state of cleanliness when she would again be permitted to her husband. These laws are very pertinent in this day and age, when gynecological procedures have become widely used and are becoming more technologically advanced. While it would take a heroic effort to discuss each procedure and its application to the above laws, what follows is a brief highlight of the issues that serve as the background and basis for these issues.

Beginning with an overview of the laws of *niddah*, we will discuss the rabbinic understanding of the female reproductive anatomy that serves as the template for which the rabbis categorized different areas of bleeding and bleeding from wounds inside the reproductive tract. Next we will explore whether or not any uterine opening is considered to be associated with bleeding (even if it goes unnoticed). This topic encompasses the questions of what is the halachic-anatomic opening of the uterus and how big the opening needs to be dilated in order to be considered open. Finally, we will touch on the

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question of whether a doctor is trusted to state where and what is the source of any blood that woman may see.

This article will hopefully serve as a guide to anyone who desires to understand the material that serves as the basis of the questions that Orthodox women may ask their gynecologist when undergoing a procedure or test. This article is not intended to serve as the basis upon which any halachic (Jewish legal) decisions are made, and as always a competent halachic authority must be contacted when any question arises.

INTRODUCTION TO THE LAWS OF *NIDDAH*

> When a woman has a discharge (*zavah*)—her discharge from her flesh being blood—she shall be in her state of separation (*niddah*) for a seven-day period.[1]
>
> If a woman's blood flows for many days outside of her period of separation, or if she has a flow after her separation, all the days of her contaminated flow shall be like the days of her separation.[2]

Biblically, a woman who sees a flow of blood can be placed into two categories. The first one, *niddah,* refers to a woman who has a flow of blood that comes from natural physiological bleeding.[3] The *niddah* period lasts for seven complete days. The second category, *zavah,* refers to a woman who sees blood in the eleven days between two *niddah* periods.

The rabbis taught that there are two conditions that must be met in order to render a woman either a *niddah* or *zavah*. First, the blood that the woman sees must emanate from the uterus.[4] They derived

[1] Leviticus 15:19.
[2] Ibid. 15:25.
[3] Rabbi Shlomo Zalman Auerbach, quoted in *Nishmat Avraham* Yoreh Deah 187:5, states that a woman "only becomes a *niddah* when bleeding is a natural phenomenon."
[4] *Torat Kohanim- Metzorah Parashat Zavim* 4:6.

this law from the verse concerning the punishment for one who lies with a woman who is a *niddah*. The verse states: "A man who shall lie with a woman in her affliction [i.e., during her menses] and has uncovered her nakedness, he will have bared her source (*makor*) and she has bared the source of her blood; the two of them will be cut off from the midst of their people."[5] The rabbis understood the term *makor* to refer to the uterus, and consequently, only blood that comes from the *makor* will transform a woman's status to that of a *niddah* or *zavah*. Second, in order for a woman to become a *niddah* she must see the blood in the normal way that one would see natural uterine bleeding. Consequently, if she were to insert a tube into her uterus and extract blood, she would not become a *niddah*.[6]

Rabbi Yaakov ben Asher (ca.1275–ca.1340), in his classic legal code *Arbah Turim*,[7] explains that a woman must feel the blood leaving her uterus in order to become a *niddah*. Additionally, even if the blood has not traveled outside her body, once it passes a place called the *beit hachitzon*, the "external chamber," she becomes a *niddah*. After seeing any bleeding, even a spot smaller than the size of a mustard seed, a woman must count seven days (including the day on which she first saw the blood), examine herself to make sure that her bleeding has ceased, and on the eighth day she may immerse in the ritual bath, the *mikvah,* thereby returning to her initial state of cleanliness.

Rabbi Zechariah Mendel (d. 1706) [8] explains that the *Tur*'s requirement of a woman to feel the blood leave her uterus is only necessary for a woman to become a *niddah* according to Biblical law;[9] however, according to rabbinical law she may become a *niddah* without any sensation if other specific criteria are met.

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[5] Leviticus 20:18.

[6] *Arbah Turim* Yoreh Deah 188:3, *Shulchan Aruch* Y.D. 188:3.

[7] Y.D. 187.

[8] *Baer Heiteiv* Y.D. 183:3.

[9] Rabbi Tzvi Hirsch Eisenstadt (1812–1868) in *Pitchei Teshuva* explains that there are three different sensations that would cause a woman to become a *niddah* under Biblical law: (1) she feels her body shaking (*nizdazeah gufah*), (2) she feels her uterus opening (*niftach mikorah*), (3) she feels a wet flow (*zivat davar lach*).

The criteria for which a woman becomes a *zavah* are relatively complex and are beyond the scope of this work. One important detail, however, is that if a woman sees blood for more than three consecutive days during the *zavah* period, she becomes a *zavah gedolah* and has to wait for seven days in which no blood is seen before she may enter the *mikvah*. The *Tur* explains that through the generations the women of Israel have taken upon themselves to wait seven clean days (as would a *zavah gedolah*) whenever they see a drop of blood the size of a mustard seed (even during the *niddah* period) so that no mistake would be made between a *niddah* and *zavah*.[10]

Rama (Rabbi Moshe Isserles, 1530–1572) states that the custom in all of the Eastern European lands (and followed by all Ashkenazi Jews today) is that a woman waits five complete days after seeing any flow of blood before beginning the counting of her seven clean days.[11] While in the *niddah* state, a woman is forbidden to have coitus or any intimate physical contact with her husband until she immerses in the *mikvah*.

ANATOMY

Jewish law is based upon a long history of legal decisions beginning with the Bible and continuing until the present day. One major issue that presents itself in our current discussion is the correlation between the anatomic terms used by the early rabbis and those found in current anatomical textbooks. What follows is a brief discussion touching on the Talmudic sources upon which the rabbis based their understanding of the female anatomy and the opinions of latter-day rabbis on how to mesh the views of many centuries ago with the ongoing discoveries in the field of medicine.[12]

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[10] Y.D. 183.

[11] *Shulchan Aruch* Y.D. 196:11.

[12] For a lengthy discussion of the many opinions on this subject, see *The Laws of* Niddah by Rabbi Binyomin Forst, vol.1 pp. 423–428. and *Nishmat Avraham* Y.D. pp. 76–79.

The Mishnah states:

> The sages spoke of a woman in metaphor: [There is in her] the chamber (*cheder*), the antechamber (*prozdor*), and the upper chamber (*aliyah*). The blood of the chamber is unclean, that of the upper chamber is clean. If blood is found in the antechamber, and there arises a doubt about its character, it is deemed unclean, because it is presumed to have come from the source.[13]

The Talmud comments:

> The chamber is within, the antechamber is without, and the upper chamber is built above them, and a duct (*lul*) communicates between the upper chamber and the antechamber. If blood is found anywhere from the duct inwards, and there is any doubt about its character, it is deemed unclean, but if it is found anywhere from the duct outwards, and there is doubt about its character, it is deemed clean.[14]

A later Mishnah demarcates the point in a woman which blood must pass in order for her to become unclean: "All women are subjected to uncleanliness [if blood appeared] in the outer chamber (*beit hachitzon*)."[15]

The Talmud questions the location of the outer chamber: [16] "Which is the outer chamber? Reish Lakish replied: All that part which, when a child sits, is exposed." After rejecting the view of Reish Lakish, Rabbi Yochanan offers his own explanation, "As far as the *bein hashinayim*."[17]

[13] Niddah 17b.
[14] Ibid.
[15] Ibid., 40a.
[16] Ibid., 41b.
[17] Rashi explains that the *bein hashinayim* is a type of sphincter that resembles teeth.

The Talmud concludes that the *bein hashinayim* is an internal place corresponding to the location that the male organ reaches during coitus.

Two medieval commentators attempt to explain the anatomy referred to in the above Talmudic passages. *Rashi's* (Rabbi Shlomo Yitzchaki 1040–1105) opinion, as explained by Professor Yehudah Levi,[18] is that the *makor* refers to the uterus, the *aliyah* to the urinary bladder,[19] the *cheder* to the vagina, the *prozdor* to the vestibulum vaginae (between the labia minora), the *lul* to the urethra, and the *bein hashinayim* to the hymen/ residual hymen.

The second opinion, that of Rambam (Rabbi Moshe ben Maimon, 1135–1204)[20] is adopted by most modern rabbinic authorities. Rambam states that the terms *rechem*, *makor*, and *cheder* all refer to the place where the fetus develops, the uterus. He continues that the neck of the uterus is called the *prozdor* and is the place where the head of the fetus is "gathered" during pregnancy and which opens wide during labor. The *aliyah* refers to the fallopian tubes, and the *lul* refers to a hole that opens from the fallopian tubes into the *prozdor.*

There is much discussion regarding how to understand the details of Rambam's description. Rabbi Moshe Sofer (1763–1839) asserts that Rambam is correct in his description of the female anatomy and that the opinion expressed by Rashi and others are inconsistent with the information accepted by physicians of his day.[21] He explains that according to Rambam, the *bein hashinayim* is the same place as the opening of the uterus and corresponds to what is today known as the external os. Dr. Abraham Abraham echoes this opinion and writes that it is clear that according to Rambam that the *prozdor* includes

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[18] *Assia* vol. 63–64 (December 1998), p. 169.

[19] Rabbeinu Chananel, Baba Batra 24a, quoted in *Nishmat Avraham* Y.D. p. 77, from *Sinai*, vol. 23 (Nissan 1948), states explicitly that the *aliyah* refers to the place from where the urine comes.

[20] *Mishnah Torah* Hilchot Issurei Biah 5:3–5.

[21] *Respona Chatam Sofer* Y.D. 177.

the cervix and the vagina, and that the *bein hashinayim* is the external os.[22]

Rabbi Feivush of Krakow gives an alternative explanation of *Rambam's* description.[23] He maintains that *prozdor* corresponds to the cervix, the *bein hashinayim* to the internal os, and the external compartment is the area from the external os to the external opening of the vaginal canal. Additionally, he states that the *aliyah* refers to the ovaries and fallopian tube, and the *lul* is the ligaments that hold the *aliyah* in place.[24]

NONMENSTRUAL BLEEDING

Only blood that is due to menstruation or any cause that physiologically mimics the consequences of menstruation, namely the shedding of the uterine endometrial lining, will cause a woman to be a *niddah*.

The Talmud explains how a woman is to ascertain whether the blood that she sees is coming from her normal hormonal flow or from an alternative source:

> How does a woman examine herself? She inserts a tube within in which rests a painting stick to the top of which is attached an absorbent cloth. If the blood is found on the top of the cloth, it is known that the blood emanated from the source (*makor*), and if no blood is found on the top, it may be known that it emanated from the sides. If, however, she has a wound in that place, she may attribute the blood to her wound. If she has a fixed period, she may attribute it to her fixed period, but if the nature of the blood of her wound is different from that of the blood of her observation, she may not so attribute it. A wom-

[22] *Nishmat Avraham* Y.D. 183: introduction to the laws of *niddah*, p. 77. He questions the Rambam's description of the *aliyah*, *lul*.

[23] Quoted in *Responsa Bach HaChadashot* 34.

[24] Perhaps the suspensory ligament of the ovary, the round ligament of the uterus, or the broad ligament of the uterus.

> an, furthermore, is believed when she says, "I have a wound in the source from which blood is discharged"—so says Rebbi. Rabbi Shimon ben Gamliel ruled: The blood of a wound that is discharged through the source is unclean.[25]

Both the *Tur* and the *Shulchan Aruch* quote the preceding passage.[26, 27] Rabbi Meir of Lublin (1558–1616), rejecting the view of Rabbi Shimon ben Gamliel, explains that the ability to attribute blood to a wound applies even if the wound is in the uterine lining itself, and the blood that is being discharged is the same blood that would be discharged during menstruation.[28] The *Beit Yosef*, however, maintains that one may only attribute blood to wounds that are outside the uterus.[29]

R. Yoel Sirkis (ca. 1561–1640) states that one could only ascribe the blood to a wound if one knows that there is a wound in the exact place from where the blood is coming.[30] The *Beit Yosef,* quoting Rashba (Rabbi Shlomo ben Aderet, 1235–1310), disagrees and states that a woman is believed if she says that she has a wound even if she does not know that the wound is bleeding.[31, 32] R. Shabtai

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[25] Niddah 66a.

[26] Y.D. 187:5–6.

[27] Ibid.

[28] Quoted *in Pitchei Teshuva*,Y.D. 187:22, and *Torat Shelamim* 187:15.

[29] Y.D. 188:3.

[30]*Bach*, loc. cit. He bases this on the above Talmudic passage (Niddah 66a) that states "a woman is believed if she says that she has a wound in her uterus (*makor*) from which blood is discharged." He points out that the wording of the *braita* is that she specifically states that the wound is in the *makor*, and not just that she has a wound. If she were vague in her description of the wound, *Bach* rules, she would not be believed and would be considered a *niddah*.

[31] Ibid. 187:5b; *Darchei Moshe* (187:7), *Bach* (187:4) agree with *B"Y* explanation of Rashba.

[32] *Beit Yosef* explains that the Tosefta (Niddah 8:2) which is the source of the Talmudic statement quoted above does not include the words "from which the blood is flowing." Consequently, the law is that a woman is believed if she says that she has a wound regardless of whether she has any evidence that it is the source of the blood.

Hakohen of Vilna (1622–1663) argues with the *Beit Yosef*'s interpretation of Rashba and maintains that Rashba opines that while she does not need to know that the wound is currently bleeding, she must be certain that the wound is one that generally bleeds.[33]

R. Yaakov Lorberbaum (1760–1832) explains that a woman must know that she has a uterine wound only if she feels the sensation of blood being discharged from her uterus.[34] If, however, she has no such sensation, as long as she knows that she has a wound in any location (inside her reproductive tract) that is discharging blood, she may attribute the blood to the wound and would not be a *niddah*.

Rama, in his gloss to the *Shulchan Aruch,* explains that a woman may only attribute blood to a wound if she has a fixed menstrual cycle (*veset kavuah*).[35] Such a woman can attribute any blood to such a wound even if she is unsure that the wound is bleeding.[36] Likewise, a woman with a variable menstrual cycle (*veset she'aino kavuah*) who is unsure of the source of the blood (it may not be from the uterus) may ascribe it to the wound without knowing if the wound is bleeding. However, a woman who is sure that she has a wound in her uterus may only ascribe the blood found to the wound if she is certain that the wound is bleeding. He limits the application of these criteria to bleeding that occurs at a time other than her expected menstrual period. If, however, she sees bleeding around the time that she normally expects to see blood, she would become a *niddah* even if the above criteria apply.[37]

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[33] *Shach* Y.D. 187:24. See *Responsa Chacham Tzvi* 46 quoted in *Aruch Hashulchan* Y.D. 187:51, who explains Rashba in the same manner.

[34] *Chavot Daat* 5:4 quoted in *Pitchei Teshuvah,* Y.D. 187:22.

[35] Y.D. 187:5.

[36] The *Shach* (187:21) explains that she may attribute the blood to the wound even if she has no reason to believe that it is bleeding.

[37] This point is very relevant to numerous gynecological procedures that are performed around a woman's expected period. According to Rama, even if one is certain that a wound is the source of a woman's bleeding, she would still be considered a *niddah*.

Rabbi David Halevi (1586–1667)[38] and R. Lorberbaum[39] reject the first opinion of Rama and state that a woman who sees blood may never attribute the blood to a wound unless she is sure that the wound is bleeding.[40]

While Rama is of the opinion that when a woman attributes bleeding to a wound, she is completely clean,[41] R. Mendel states that while such a woman is permitted to her husband,[42] she must count the requisite seven clean days just like any other woman who sees blood.[43] Rabbi Avraham Yeshaya Karelitz sides with Rama and writes, "Blood that comes from a scratch in the lining of the uterus in which the blood is spouting in the same manner as would a cut/wound in any other part of the body is pure,"[44] and thus the woman would not have to separate from her husband or count seven clean days.

What If a Woman Sees Blood from a Wound during Her Seven Clean Days?

R. Yechiel Michel Epstein (1829–1908),[45] R. Shalom Mordechai Schwadron (1835–1911),[46] R. Moshe Feinstein,[47] and R. Shlomo

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[38] *Taz* Y.D. 187:10.
[39] *Shach* Y.D. 187:22.
[40] See *Pitchei Teshuva,* Y.D. 187:28, who writes that *Responsa Noda b'Yehudah* 41 and 47, *Responsa Heishiv Rebbi Eliezer* 2, and *Responsa Brit Avraham,* Y.D. 44, 53, 54 all side with Rama.
[41] The *Bach* agrees with Rama. See *Pitchei Teshuvah* 187:27, who quotes *Responsa Noda b'Yehudah* 41, who quotes the position of Rama but writes that he cannot rule like Rama because the *Shach* disagrees.
[42] *Baer Heiteiv* Y.D. 187:16. He quotes that the *Shach* agrees with his position.
[43] The law states that a woman who bleeds three times after coitus must get divorced from her husband. Since this woman has found that her bleeding is due to a wound, it would not require her to divorce her husband.
[44] Letter to Dr. Moshe Taub in *HaPardes* vol. 35 no.6 (March 1961).
[45] *Aruch HaShulchan,* Y.D. 187:61.
[46] *Responsa Maharsham* 1:25.
[47] *Responsa Igrot Moshe,* Y.D. 2:69.

Wosner[48] state that as long as she was able to complete her *niddah* days with a clean checking (*hefsek taharah*) and does one more check on the first day of her seven clean days, she is able to attribute any subsequent bleeding to a wound, as explained above. However, R. Mendel states that one may not attribute any blood to a wound if it is found during the first three days of the seven clean days.[49] R. Elchonon Ashkenazi (late 18th cent.) has the most stringent opinion and states that one may not attribute blood to a wound during the entire seven clean days.[50] Consequently, the requisite seven clean days would be broken and the woman would need to start counting a new set of days.

BLEEDING DUE TO UTERINE OPENING

The Mishnah states: "If a woman aborted a shapeless object, if there was blood with it, she is unclean, otherwise she is clean. R. Yehudah rules: in either case she is unclean."[51]

The Talmud comments: "Explains R. Nachman ben Yitzchak: The point at issue between them is the question whether it is possible for the uterus to open without bleeding (*ee efshar l'ptichat hakever b'lo dam*)."[52]

The Rosh (R. Asher ben Yechiel, 1250–1327) explains that the rabbis (the first opinion brought in the Mishnah) are of the opinion that it is possible for the uterus to open without bleeding, while R. Yehudah opines that any uterine opening is accompanied by bleeding (even if it is not seen) and would render a woman a *niddah*.[53]

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[48] *Shiurei Shevet Halevi,* Y.D. 187:5:3. He quotes *Chavot Daat,* Y.D. 196:3 and *Responsa Avnei Miluyim* 23, who both are of this opinion. Rabbi Wosner quotes the opinion of *Resp*onsa *Chatam Sofer* 177 that all one needs is a clean *hefsek taharah*, but R. Wosner says that practically one may not rely on such a lenient opinion.

[49] *Baer Heiteiv,* Y.D. 187:20.

[50] *Sidrei Tahara*,Y.D. 187:14.

[51] Niddah 21a.

[52] Talmud Niddah 21a.

The Rosh decides the law according to R. Yehudah. R. Yom Tov Lipman Heller (1579–1654) qualifies the opinion of R. Yehudah to apply only to large pieces that are discharged.[54] He states that small pieces would not lead to a sufficient opening of the uterus to cause bleeding. Rambam explains the disagreement in the Mishnah in a similar manner as does the Rosh but decides in favor of the rabbis' opinion.[55]

What is Considered the Opening of the Uterus?

While the Talmudic discussion of whether or not there is inevitable bleeding with uterine opening is limited to uterine opening from an internal stimulus, R. Yechezkel Landau (1713–1793) expands the above idea to even include an opening of the uterus by an external stimulus.[56] He writes that it makes no difference whether a doctor opens the uterus with his finger or an instrument, or whether the woman is young or older (post-menopausal); anytime the uterus is opened there will be bleeding. R. Landau himself writes that the *Tefilah L'Moshe* disagrees and states that only an internal opening of the uterus will cause bleeding.[57, 58]

R. Moshe Sofer writes that a finger is unable to reach the opening of the uterus, and therefore, if a doctor uses his or her finger to do an

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[53] Niddah 3:1.

[54] *Maadnei Yom Tov* comment 4.

[55] *Peirush HaMishnayot* Niddah 3:1.

[56] *Responsa Noda B'Yehudah* ed. 2 Y.D. 120.

[57] 188. R. Wosner (*Shiurei Shevet HaLevi* Y.D. 188:3:4) quotes R. Avraham Yeshaya Karelitz (*Chazon Ish* Y.D. 83:1) who, based on the *Beit Yosef*, agrees with the *Tefilah L'Moshe* and writes that R. Baruch Taam interprets the *Beit Yosef* in the same manner.

[58] The *Aruch HaShulchan* (Y.D. 188:51) quotes the position of the *Tefilah L'Moshe* and states that it is forbidden to say such a thing (*chalilah lomar ken*). He explains that it makes more sense that an external opening of the uterus would cause bleeding than to say that a particle discharged from the uterus would cause bleeding.

internal vaginal exam there is no need to worry about uterine bleeding.[59] R. Yitzchak Yaakov Weiss (d.1989) writes that even during a bimanual vaginal exam where the doctor presses down on the woman's belly while internally checking the vaginal area, one need not worry about uterine opening as long as four conditions are met: (1) the doctor states that he did not reach the uterus, (2) no blood was found during the examination, (3) she did not feel the uterus being opened, and (4) she examines herself after the doctor's exam and does not find blood.[60]

Most modern authorities rule in concordance with the opinion of R. Yechezkel Landau cited above. They disagree, however, as to what is considered the location of the opening of the uterus. Rabbi Moshe Feinstein[61] and Rabbi Tzvi Pesach Frank[62] are of the opinion that an instrument of the requisite size must enter the internal os in order to render a woman a *niddah*, while Rabbi Shlomo Zalman Auerbach[63] and Rabbi Shmuel Wosner[64] maintain that entrance into the cervical canal (the external os) would render a woman a *niddah*.

Size of the Uterine Opening

The *Tur* and the *Shulchan Aruch* follow in the footsteps of the Rosh and rule that it is impossible to have uterine opening without bleeding.[65,66] However, they both explain that this rule only applies to large pieces that are discharged; any piece as small as the diameter of a hollow tube (*shfoferet*) would not lead to bleeding. While

[59] *Responsa Chatam Sofer* 2:179.
[60] *Responsa Michat Yitzchak* 3:84.
[61] *Iggrot Moshe,* Y.D. 1:83.
[62] *Responsa Har Tzvi,* Y.D. 152.
[63] Quoted in *Nishmat Avraham,* Y.D. 194:2.
[64] *Shiurei Shevet Halevi*,Yoreh Deah 188:13:4.
[65] Y.D. 188:3.
[66] Ibid.

there is no discussion in either work as to the diameter of a *shfoferet,* the *Beit Yosef* maintains that it corresponds to the diameter of the thinnest reed (*dak shebidakin*).[67]

There is disagreement amongst the rabbis as to the size of uterine opening (both internal and external) that would automatically lead to bleeding. As mentioned above, the *Beit Yosef* gives a vague measurement—the size of the smallest reed. R. Avraham Bornstein (1839–1910) writes that any opening greater than the size of a forty-day-old fetus would lead to uterine bleeding.[68, 69] R. Ezriel Dov from Karson quotes from the work *Tiferet Tzvi*, who writes that any opening smaller than the size of a thumb (~1 inch) is not considered an opening.[70] He himself writes that that the opening may not be any wider than a pinky (~15mm).[71] R. Moshe Feinstein writes that any opening less than the size of the average index finger would not be considered wide enough to render a woman a *niddah*.[72] He states that the average index finger is 0.75 inches (~19mm).

RELIANCE ON A DOCTOR'S TESTIMONY

As mentioned previously, a woman is believed when she says that she has a wound that is discharging blood. What happens if a physician tells a woman who is bleeding that a wound is the source of the blood? Additionally, to what extent is a physician trusted if he states that the instrument used in a specific procedure never entered the uterus?

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[67] Y.D. 188:6b. The *Prisha* (Y.D. 188:8), *Shach* (Y.D. 188:12), *Taz* (Y.D. 188:6), and *Torat Shelamim* (Y.D. 188:8) all quote this opinion of the *Beit Yosef*.

[68] *Responsa Avnei Nezer* Y.D. 224

[69] Rabbi Moshe Dovid Tendler, in a lecture given at Yeshiva University in his bioethics class, stated that the size of a forty-day old fetus corresponds to ~19mm.

[70] *Siftei Levi* 188:12 based on the size of a *pika* (plug) mentioned in Mishnah Oholot 7:4.

[71] *Pri Deah* on *Taz* 188:13.

[72] *Responsa Igrot Moshe* O.C. 3:100, *Dibrot Moshe* Baba Kama 16:9. He bases the size on the Mishnah Oholot 7:4; see n. 63.

The *Tur*[73] quoting the *Sefer Hatrumah*, writes, "A woman who wishes to seek medical treatment must be treated before she establishes herself [as a woman who bleeds during coitus].[74] However, after she has already established herself, it requires further analysis if we can rely on the treatment and if she can subsequently have coitus with her husband; even if he is an expert physician."

The *Shulchan Aruch*[75] adds, "And there is an opinion[76] that permits [relying on the treatment] if an [observant] Jewish doctor stated that she is healed. Additionally, if the woman sees that her blood flow has ceased due to her treatment, and it is evident that the treatment worked, one may even rely on a gentile physician."[77]

The *Bach* writes that if the physician has already treated a different woman who has not yet established herself as a bleeder, any subsequent woman may rely on such a treatment as effective and would

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[73] Y.D. 187:8.

[74] That is, before three episodes of bleeding. The halacha states that a woman whos bleeds secondary to coitus three times is forbidden to her husband and the couple must divorce.

[75] Y.D. 187:8.

[76] The opinion quoted is that of the *Ritzva* quoted in *Beit Yosef* Y.D. 187:8 and by R. Yehoshua Falk Katz (d. 1614) in *Perisha* Y.D. 187:8:4.

[77] R. Yosef Caro (*Beit Yosef* Y.D. 187:8) explains the basis of this ruling. The Talmud Yerushalmi (Shabbath 6:2) states that a physician is believed if he says that a certain amulet is an effective treatment and that he has seen it treat on three separate occasions. He writes that although one could raise questions as to the application of that case to ours, since there the treatment was proven three times, "Nevertheless, my mind leans toward permitting her [to her husband]" even after one effective treatment. He continues that he cannot permit the woman by relying even on the opinion of an expert gentile physician because "Their mouths speak falsehood" (Psalms 144:8).

R. Avraham Sofer (*Responsa Chatam Sofer* 2:158) explains that generally, if a doctor, based on all the information that he could possibly attain, believes that a certain treatment would cure a specific disease, then the only reason that we would be skeptical of using the treatment would be that perhaps he has erred in his analysis of the nature of the treatment or disease. Therefore, as long as the treatment was successful once, we know that his analysis was correct and we can subsequently rely on it for future patients.

be permitted to her husband even after she has been established as one who bleeds following intercourse with her husband.[78]

R. Yaakov Reisher (1670–1733) brings proof from the following Talmudic passage that there is room to rely on the testimony of physicians to state that a woman has a wound in her uterus that is discharging blood:[79]

> R. Eleazar ben R. Tzadok stated, "A report of the following two incidents was brought up by my father from Tib'in to Yavneh. It once happened that a woman was aborting objects like pieces of red rind, and the people came and asked my father, and my father asked the sages, and the sages asked the physicians, who explained to them that the woman had an internal sore [the crust] of which she cast out in the shape of pieces of red rind. She should put them in water and if they dissolved she should be declared unclean. And yet another incident occurred . . . and the sages asked the physicians, who explained to them that the woman had a wart in her internal organs and that was the cause of her aborting objects like red hairs.[80]

In his analysis of this passage, R. Reisher writes that the fact that the sages asked the physicians proves that they would rely on their answer and that the decision to place the discharge in water seems to have been upon the advice of the physicians.[81] He concludes that one may definitely rely on the testimony of two separate expert physicians (even if one is a gentile) as long as the one who poses the question to them is a competent rabbinic authority.

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[78] Y.D. 187:8. This opinion of the *Bach* is quoted by the *Shach* (28), *Baer Heiteiv* (21), and *Torat Shelamim* (27).

[79] *Responsa Shvut Yaakov* 1:65.

[80] Niddah 22b.

[81] As opposed to *Responsa Rosh* 2:18, who questions why the sages seem to have ignored the advice of the physicians. See *Responsa Chochom Tzvi* 46 and *Responsa Chatam Sofer* 2:158 for answers to the Rosh's question.

R. Yechezkel Landau[82] and R. Avraham Sofer[83] maintain that as long as there is substantial evidence (*raglayim l'davar*) that the testimony of the physician is correct, one may rely even on expert gentile physicians. R. Sofer elaborates that one may only rely on Jewish physicians to state that a certain condition exists in nature but not to declare that a specific person is afflicted by such a condition.[84] R. Feinstein adopts the position of R. Sofer but writes that the physician is believed if he states that blood is coming from a wound if he sees the wound, knows that the wound exists, or predicts that bleeding will occur following a certain procedure.[85]

R. Schwadron, quoting from *Responsa Shem Aryeh*, writes that since nowadays doctors have the ability to look inside the vaginal canal and the uterus, they are believed if they say that they see a wound or anything that would cause bleeding.[86,87] He writes that as long as the statement is not subjective but rather is based on something that he actually witnesses himself, even a gentile physician would be believed in his testimony.[88] R. Wosner adopts this position

[82] *Responsa Noda B'Yehudah* ed. 1 Y.D. 55.

[83] *Responsa Chatam Sofer* 2:175.

[84] *Responsa Chatam Sofer* 2:175, 2:173, 2:158, 4:61. R. Sofer in responsum 2:175 entertains the possibility of relying on the testimony of a gentile physician because of the reasoning that he would not jeopardize his professional reputation by lying. He concludes, however, that even though such a rationale would justify reliance on a gentile's testimony, since past rabbinic authorities have not accepted such a ruling, he could not accept it either. Additionally, he explains that an observant physician would not lie because of the severity of unlawfully permitting a woman to her husband—a transgression that carries with it the punishment of *karet* (excommunication).

[85] *Responsa Igrot Moshe* Y.D. 4:17, 2:69, O.C. 3:100.

[86] *Responsa Maharsham* 1:24, 1:25, 1:114, 2:72.

[87] Even HaEzer 12.

[88] R. Schwadron in responsum1:24 quoting R. Bachya ibn Pakuda on his commentary on Exodus 21:19 writes that a physician is only believed on external ailments but not on internal ones. He states that now that a physician can see internal structures as well, he may be relied upon for any ailments that he can

as well.[89] R. Epstein writes emphatically that one could rely on the testimony of expert physicians under all circumstances.[90]

CONCLUSION

As discussed above, there are numerous factors that are important for rendering a decision as to a woman's *niddah* status. A woman should always ask her physician to take note if he or she saw any bleeding prior to any manipulation. If the doctor states that there was indeed blood emanating from the cervical os (and no abnormal pathology is found to be the source of the blood), then chances are that the bleeding is normal menstrual bleeding and the woman would be considered a *niddah*. If, however, no blood was found prior to the procedure, then the following questions need to be clarified:

1. What is the name of the procedure/test that was performed?
2. Where were the instruments inserted (vaginal canal, cervix, external os, internal os, etc.)?
3. What was the diameter of the instruments that were used?
4. Was any wound made (either by scraping, removing, or any other traumatic manipulation)?
5. Having the answers to these questions available at the time that any question is posed to a rabbinic authority would greatly aid the rabbi's rendering an appropriate halachic ruling in a timely manner.

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see. Additionally, in responsum 1:13 he writes that since nowadays many Jewish physicians publicly violate the Sabbath, they would lose their credibility when it comes to legal matters. However, as long as two such physicians give the same testimony independently and there is reason to believe that what they say is true, one may even rely on them.

[89] *Shiurei Shevet HaLevi,* Y.D. 187:8:3.

[90] *Aruch Hashulchan,* Y.D. 188:65–72. There no mention as to the religion of the physicians to whom he is referring.

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Concierge Medicine and Halacha

Noam Salamon

A physician who does not charge for his services is worthless.

—Talmud Bava Kama 85a

A physician who refuses to treat the indigent is worthy of going to hell.

—Rashi, explaining Talmud Kiddushin 82a

PRESENTATION OF CONCEPT

Over the past few decades, physician frustration has grown over decreased reimbursements, increased malpractice costs, greater onerous administrative paperwork, and additional burdens on the physician.[1]

This has especially affected primary-care physicians, leading to a reduction in the number of students pursuing a career in primary care. In response, the last few years have seen an upsurge of concierge medicine practices. Concierge, or boutique, medicine charges a fee in exchange for enhanced services and increased access.[2] The patient agrees to pay an annual fee, or retainer, to a physician (which is not a substitute for insurance), while the physician in return agrees to provide additional services beyond typical care. This is provided based on the increased availability of the primary-care physician resulting from capping the number of patients that the physician allows in his

[1] This article appeared in full in the Spring 5769 edition of the *Journal of Halacha and Contemporary Society*.

The author would like to acknowledge Rabbis Drs. Edward Reichman and Howard Apfel for their helpful input and insights.

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practice (typically from 3,000–4,000 down to 100–600). Organized and centralized concierge medicine has recently developed into a franchised market in which organizations, such as MD and MDVIP, have led to the increased prevalence of this so-called boutique medicine.[2] Fees for such services range from $60 to $20,000 annually, with an average between $1,500 and $2,000 (MDVIP charges $1,800; MD charges $20,000).[3] Proponents of the program argue that it improves quality care and increases the attention and time allotted to a patient's appointment. For example, in MDVIP a patient is guaranteed a comprehensive physical examination and a follow-up wellness plan as well as medical records in CD-ROM format, personalized Web sites for each patient, same- or next-day appointments that start on time, as well as unhurried visits.[4] Furthermore, concierge medicine gives the physician financial security, allowing him to focus primarily on medicine, with less emphasis on financial burdens. This would diminish physician burnout from overwork.[5] However, detractors worry that concierge medicine will lead to elitism, discrimination, patient abandonment, restricted access to medicine, and reduced quality care for the general population. Eighty-five percent of physicians' current patients would be dropped from their current physician. If a majority of primary-care physicians become boutique doctors, it will exacerbate an already tiered healthcare system, leaving quality care in the hands of the wealthy, while overburdening the

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[2] Portman, *J Health Life Sci Law*. 2008 Apr;1 (3):1, 3–4 fn. 1, 35.

[3] Government Accountability Office (GAO). "Report to Congressional Committees, Physician Services: Concierge Care Characteristics and Considerations for Medicine," GAO-05-929 (August, 2005). Available at www.gao.gov/new.items/d05929.pdf.

[4] Carnahan, "Law, Medicine and Wealth: Does Concierge Medicine Promote Health Care Choice or Is It a Barrier to Access?" *Stan L & Pol Review*. 121, 123–129 & 155–163 (2006). Also Portman, *J Health Life Sci Law.* 2008 Apr 1 (3): 27.

[5] "Boutique Medicine: When Wealth Buys Health," CNN.com, October 19, 2006, "Doctors' New Practices Offer Deluxe Services for Deluxe Fees," *New York Times*. January 15, 2002, and "For a Retainer, Lavish Care by Boutique Doctors," *New York Times*, October 30, 2005.

remaining patient population, who will then receive sub-par care. Moreover, concierge medicine may allow a physician to selectively choose patients who are healthier and require less maintenance. This will leave sicker patients to a more drained and less accessible health care system.[3, 4] Furthermore, treating only those who can afford the retainer, according to the New York Attorney General's Office, might violate non-discrimination laws.[6]

HALACHIC ANALYSIS

The goal of this paper is to explore the halachic issues that may occur for a physician looking to become a boutique physician. This article will analyze the power of the physician to charge for health-care services rendered. Specifically, what is a physician allowed to charge, and is there a concept of overcharging regarding patient fees? Furthermore, is a physician allowed to deny care to a patient, especially for monetary reasons?

Physician Fees

The Talmud explains that if a person takes a vow to avoid giving benefit to someone, he can still administer medical treatment to him.[7] *Rishonim* explain that healing a person is a positive Biblical commandment, something that a person cannot take a vow against.[8] Exactly what commandment is being fulfilled by healing a sick person? The Talmud[9] and *Sifre*[10] explain the verse *vehashevota lo*,[11]

[6] Joseph Baker, Chief of Health Care Bureau of New York Attorney General's Office, April 2004: "If you are treating patients differently based on ability to pay, that may run afoul of New York State [non-discrimination] laws" quoted in "Patients with Perks: Advocates Say 'Concierge Medicine Is Like Having the Neighborhood Doctor Back; Critics Call it Elitist," *Newsday*, Jan 1, 2005, B06.
[7] Nedarim 38b.
[8] Ran and Rosh, ibid.
[9] Sanhedrin 73a.
[10] Deuteronomy 22:2.
[11] Ibid.

"you shall return it to him," as applying not merely to inanimate objects but also to the obligation on a person to return the health of a person who is sick. Although a literal interpretation of the verse would seem to be focusing on returning property, the Talmud expands the scope of the verse's application by explaining that there is no greater act of returning than to restore someone's health.[12] It is this verse that Maimonides[13] and the Ran[14] quote as the source for the Biblical obligation to heal a sick person. Even those *rishonim* who disagree with Maimonides and the Ran do so over a minute detail, regarding exactly which verse is the source of the commandment. However, they all agree that a Biblical obligation exists. For example, Nachmanides cites the verse *vichei achicha emach*,[15] "let your brother live with you," while others[16] quote the verse *lo ta'amod al dam re'echah*,[17] "you shall not stand aside while your fellow's blood is shed." Assuming the commandment of healing the sick is on a Biblical level, irrespective of the exact source,[18] many *rishonim* wonder how it is possible that a physician can charge for his services ,since the Talmud[19] explains, based on the verse *re'ey lemaditi chukim u'mishpatim*,[20] "see I have taught you the laws," that just as Moses was taught laws from God without payment, so too teachers should educate without receiving payment.[21] The concept of not receiving payment is not localized to the positive commandment to teach the Torah but applies to all positive command-

[12] Bava Kama 81b.
[13] Pirkei Avot 4:5.
[14] Nedarim 41b.
[15] Leviticus 25:36.
[16] *Tosafot HaRosh* and *Tosafot Rid* commenting on Brachot 60a.
[17] Leviticus 19:16.
[18] Some practical differences do exist regarding exactly which verse to deduce the obligation from. See *Bracha L'Avraham*, p. 216 fn. 24.
[19] Nedarim 37a; see also Meiri there.
[20] Deuteronomy 4:5.
[21] Some *rishonim* (Ran and Maharsha commenting on Nedarim loc. cit.) interpret the Talmudic passage as follows: Just like Moses taught the Jewish people the *Torah* for free, so too you should teach it without charging.

ments.[22] Thus, just as a teacher is forbidden to receive money for practicing his profession, so too a physician cannot be allowed to receive payment for his services.

However, the Talmud takes it for granted in many places that a physician does in fact get paid for his services. For example, the Talmud mentions: "A person with eye pain should pay the doctor [to treat him]."[23] Similarly, in a different tractate, the Talmud comments on a person who is successful, "You will be considered a crafted physician and will get a large salary."[24] Interestingly, the Talmud's example of a vocation that receives a large salary is a physician. Finally, and most strikingly, the Talmud comments on physician salaries, "A physician who practices for free is worthless."[25] Many *rishonim* explain this passage as follows: if a physician were to work for free, he would not be able to fully concentrate on the patient's care and needs.[26] Having a salaried physician is important in ensuring the proper quality of care and attention to the patient. Thus, a seeming contradiction exists as to whether physicians are allowed to receive fees for their service according to Jewish law.

Although many *rishonim* provide answers to this question, it is important to first elucidate two observations as to where this question would apply. First, the contradiction may only exist where the verse *vehashevota lo* would apply—to a patient who has already been diagnosed and is being treated for a known ailment.[27] However, well visits, checkups, physical examinations, or preventive procedures may not fall under the rubric of returning a person's health and would thus pose no problem in charging money according to Jewish law. Only if the patient has lost his health and the physician is actively returning it to him would there be a fulfillment of

[22] *Beit Hillel* commenting on *Shulchan Aruch*,Yoreh Deah 336:6.
[23] Ketubot 105a.
[24] Sanhedrin 91a.
[25] Bava Kama 85a.
[26]Rosh commenting in Bava Kama 8:1, *Shitah Mikubetzet*, ibid.
[27] For example, according to Maimonides (see n. 13).

a positive Biblical commandment.[28] It is also a possibility that preventive medicine, although not falling under the category of returning lost property, may be Biblically obligatory according to many *Rishonim*,[29] based on a separate obligation of *heshamer lechah ushemor nafshechah*,[30] "protect yourself and guard your soul." If this were the case, charging a fee for preventive medicine would remain problematic. Second, it should be noted that some explain the positive commandment of healing a person as being contingent on the success of the treatment.[31] If a person recovers, then the physician has done a positive commandment, but if the treatment fails and the person remains ill, then no commandment has been fulfilled. This would seem to fit well with those who use the verse *vehashevota lo* as the source for healing the sick. Just as a person fulfills the obligation of returning a lost article when the owner is again in possession of his object, so too a physician should fulfill his obligation when the patient has reacquired his health. Thus, according to the *Yad Avraham*, as long as the physician charges for his services rather than for the outcome of the treatment, there would appear to be no contradiction as cited above.[32]

To answer the seeming contradiction, the following question is posed by many *rishonim*. If the Biblical obligation to heal a sick person is derived from the verse *vehashevota lo*,[11] then why does the Torah have a more explicit reference for healing a person: *verapo yerapey*,[32] "you shall surely heal him"? While this seemingly extra-

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[28]See *Halacha U'Refuah*, vol. 2 p. 142, *Responsa Maharam Shik*, Yoreh Deah 343, *Encyclopedia Talmudit*, vol. 10 p. 345.

[29] Maimonides *Yad Chazakah Rotzeach* 11:4 and *Shulchan Aruch*, Choshen Mishpat 427:8. (The *Minchat Chinuch*, no.546, questions whether Chazal referred to this verse only as pertaining to avoiding forgetting God or also to protecting one's physical body.) For further discussion, see Buchbinder, "Preventive Medicine," *Journal of Halacha and Contemporary Society*, vol. 42, pp. 70–101.

[30] Deuteronomy 4:15.

[31] *Yad Avraham*, Yoreh Deah 336:1, also see Rabbi Lamm in *Journal of Halacha and Contemporary Society*, vol. 8 pp. 7–10.

[32] Exodus 21:19.

neous verse has many interpretations,[33] many explain that this verse gives the physician legal permission to collect a fee for his work despite the general concept of abstaining from collecting money when performing a Biblical obligation.[34] Thus, the "permission" that the Talmud explains based on the verse *verapo yerapey* is the permission to accept a fee for medical services. However, although this Biblical exegesis is documented and supported by many *rishonim*, it does not appear in the codified Jewish law. What does appear in the magnum opus of Jewish law is a prohibition regarding physicians receiving payment for services rendered.[35] However, a physician may be compensated for having refrained from his other employment that he could have been involved in while delivering services to the patient (*s'char batalah*)[36] and for time and effort (*s'char tirchah*).

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[33] Tosafot, Rashba, and *Tosafot HaRosh* commenting on Brachot 60a—includes healing for diseases that are not directly caused by man; Rav Kook, *Daat Cohen* 140—The verse gives permission to treat when it is uncertain; *Shach*, Yoreh Deah 336:1—a warning to treat people lest a person avoid treating someone for fear of killing them; *Torah Temimah*, Exodus 15:27 and Deuteronomy 22:2—since the main source for healing is only an exegesis by the rabbis, another verse is necessary to unequivocally mention the obligation. Alternatively, *verapo yerapey* only gives permission for the physician to heal, but *vehashevota lo* elevates healing the sick to a Biblical obligation; Ibn Ezra, Exodus 21:19—The Torah only gives a physician the power to heal external visible injuries (*Krayti U'Playti* 188:5—since only in external injuries can a physician make an accurate diagnosis; however, regarding internal injuries where the physician cannot see the injury, it is the speculation and imagination of the physician and not pure scientific knowledge that makes the diagnosis) (author: one wonders what category modern imaging would fall into). Author: the simple context of the verse *verapo yerapey* refers to an assailant's obligation to reimburse the individual attacked for the money he has spent for medical care. This may thus not be a compelling source for an obligation to heal a sick person, but rather a source for specific monetary obligations in a case of tort (see also *Gur Aryeh*, Exodus 21:19).

[34] Rashi, Onkolus, and *Targum Yonatan* on verse *verapo yerapey*, Exodus 21:19; also Tosafot and *Tosafot HaRosh* on Brachot 60a.

[35] *Shulchan Aruch*, Yoreh Deah 336:2.

[36] For exactly how to pay a person for *s'char batalah*, see *Encyclopedia Talmudit*, vol. 11 p. 82–83.

The logical explanation given as to why some payments are acceptable and not others is as follows: *S'char batalah* and *tircha* are permitted by the *Shulchan Aruch* because they are not directly a part of the Biblical obligation, while payment for knowledge and teaching a patient is prohibited because they are the essence of the Biblical obligation to heal the sick.[37] Based on this differentiation, Rav Gedalyah Rabinovitz points out that *s'char tirchah* should be prohibited just like payment for knowledge because there is a Biblical obligation to invest time and effort to save a person's life.[38] He thus explains that *s'char tirchah* is only permissible if the sick person is not in danger, in which case there is no obligation to seek out the sick person immediately. Thus, even charging for time and effort (*tirchah*) is prohibited in many cases. Furthermore, defining in contemporary times exactly what is considered time and effort and what is considered knowledge and teaching can at times be ambiguous. For example, some hold that writing a prescription is considered teaching a patient,[39] while others understand it as a function of the physician's time and effort.[40] Thus, although the *Shulchan Aruch* delineates what a physician can charge, it would appear to be difficult to extrapolate into a contemporary medical practice.

The source of paying for *s'char batalah* appears in the Talmud in a discussion of a witness (who by bearing witness to an event is avoiding a Biblical negative commandment) who may be paid for missed employment.[41] The cases in this talmudic passage appear to revolve around individuals who are partaking in a Biblical commandment but have another source of employment. Thus, it would appear that payment of only *s'char batalah* would be limited to an individual who is not fully employed in a field that involves a Biblical obligation. However, if such an individual is engaged full-time in

[37] *Halacha U'Refuah*, vol. 2 p. 141, based on Nachmanides, *Torat Haadam* and Kiddushin 58b.
[38] *Halacha U'Refuah*, vol. 2 p. 142, explaining Nachmanides.
[39] *Tzitz Eliezer* 5 (*Ramat Rachel)* no. 24.
[40] *Aruch Hashulchan*, Yoreh Deah 336:3, *Aseh Lechah Rav*, vol. 3 no.31.
[41] Bechorot 29b.

a Biblical obligation, such as modern-day physicians, it would be impossible to pay them for their missed wages since they do not have an alternative occupation.[42] Using the same logic, Rav Moshe Feinstein[43] and Rav Shlomo Zalman Auerbach[44] rhetorically ask that even if a physician was only able to charge for *s'char batalah*, how would it be calculated in a person who is not dually employed? Should one assume that if they were not physicians they could have entered into a high-reimbursement profession? This is unknown, based on pure speculation, and not computable. Additionally, the *Tashbetz* and *Tosafot Yom Tov* purport that the prohibition of a physician collecting for more than *s'char batalah* (i.e., knowledge and time) does not apply if the two parties agreed to the fee in advance.[45] Thus, many modern-day halachic authorities have determined it to be halachically permissible for a physician to collect a fee even for his knowledge and time.[46]

It is important to note that it is codified in Jewish law by the Ramo that if a person is wealthy it is forbidden to earn money from teaching Torah.[47] If this Ramo is applied to the case of a physician, one must question how the Ramo would approach the talmudic passage mentioned above stating that any physician who works for free is worthless.[26] To help understand whether the Ramo would apply this talmudic passage to a physician, a deeper analysis is necessary of the reasons behind the above-mentioned passage. The context of the passage deals with a person who injures another and is obligated

[42] Ketubot 105a according to *Nishmat Avraham*,Yoreh Deah 336; Rosh, Bechorot, loc. cit.; Tosafot Ketubot 105a, *Tosafot Yom Tov* commenting on Bechorot 4:6, Responsa of Radbaz, vol. 2, 622, *Iggerot Moshe*, Yoreh Deah, vol.4 no.52.

[43] Responsa. Yoreh Deah. vol. 4 no. 52, see also Responsa of Rosh 56:5,who points out that *s'char batalah* exists only if a person has a job that he has taken a break from.

[44] See *Nishmat Avraham*, Yoreh Deah 336.

[45] *Responsa Tashbetz* 1:145, *Tosafot Yom Tov*, ibid.; see further discussion below.

[46] See *Encyclopedia of Jewish Medical Ethics*, p. 801, also see further discussion.

[47] *Shulchan Aruch*, loc. cit. Also see *Kesef Mishneh*, *Talmud Torah* 3:10, Tosafot Ketubot 105a, *gozrei gezeirot*.

to pay his medical bills. The Talmud explains that the injurer may not force the injured to get free medical care, since the attention and care of the physician would be called into question if he was not receiving any money. Thus, the talmudic passage may be limited to a case of attempted coercion of the injured party into a free physician over another, more expensive option. The passage might not reflect halachic reality and may rather be only a justified claim that the injured party may use when choosing a physician. Alternatively, some interpret this talmudic passage as reflecting the obligation of the patient and not addressing a physician's responsibility.[48] If a physician would like to treat pro bono, he may.

It is also important to note that Maimonides, himself a physician, disparages teachers of Torah who receive any payment whatsoever from teaching.[49] Many *rishonim* argue with Maimonides point by point on his numerous proofs.[50] One such dissenter, the *Tashbetz*, argues forcefully that Maimonides was a unique figure in his time—respected as a superb physician and Torah scholar.[51] It would be easy for him to not have to collect fees for his work due to his stature. However, most other people, who are not of such stature, need to actively seek a livelihood. If they did not collect a payment for their services, they would starve to death! If this position of Maimonides was applied to all Biblical obligations, as most halachic authorities hold,[52] it would be prohibited for a physician to charge any money, including *s'char batalah*. It is possible to argue that Maimonides' position may only apply to teaching Torah, because the many passionate reasons he gives for not taking a wage are specific to Torah learning[53] and would not necessarily apply to

[48] *Shoshanat Ha'amakim*, *verapo yerapey*, no. 71, see later discussion regarding refusal to treat.
[49] *Peirush Hameshnayot*, Avot 4:5, *Yad Chazakah*, Talmud Torah 3:10; position elucidated by *Tosafot Yom Tov* commenting on Mishnah Bechorot 4:6.
[50] *Kesef Mishneh*, ibid.
[51] Responsa 147.
[52] *Beit Hillel*, ibid., Nachmanides, *Torat Haadam*.
[53] *Talmud Torah* ibid.

other positive commandments.[54] Just as the rabbis instituted a payment for someone who returns a lost object and fulfills a positive Biblical commandment,[55] so too the rabbis can institute the payment of fees to physicians.[56]

Prima facie it would appear that Nachmanides, also a physician, disagrees with almost everything that has been presented thus far, arguing that the practice of medicine is incongruent with a God-fearing existence.[57] In his discussion regarding the ultimate blessings, he writes that the Jewish people will be above the rules governing nature. No disease will exist, for God is the ultimate physician. "Those who seek out the prophets cannot seek out a physician. There is no place for a physician in the house of a God-fearing person." Nachmanides explains that the purpose of the verse *verapo yerapey* is to give a physician the ability to treat a person who inappropriately sought out medical help. It would seem, according to Nachmanides, that there is no Biblical obligation for a physician to treat a patient and thus no legal impediment to the collection of fees. However, if this is in fact his opinion, many questions surface. First, how does Nachmanides explain the talmudic passage in Bava Kama 81a which specifically states that healing the sick is a Biblical commandment. Furthermore, the *Tzitz Eliezer* poses another question,[58] based on a different talmudic passage which rejects sanctioning a prayer for a sick patient that focused on not seeking human help in disease.[59] The rejection of this prayer by the Talmud is upheld after

[54] See also *Even Haezel Gezeylah* 3:12 and *Encyclopedia Talmudit*, vol. 11 pp. 80–81.

[55] Using the precept of *hefker bayit din hefker*; see Maimonides, *Peirush Hamishnayot*, Nedarim 4:2; *Tiferet Yisrael*, Nedarim 4:2; Rosh, Bava Metziah 2:28; and *Encyclopedia Talmudit*, vol .11 pp. 80–81.

[56] See *Halacha U'Refuah*, vol. 2 p. 140; *Machaneh Efraim* 17 differentiates between returning lost objects where there is no obligation to seek out a lost object and a seriously ill person where the Torah requires a physician to seek out such a person.

[57] Leviticus 26:11.

[58] *Tzitz Eliezer*, vol. 5:20 (*Ramat Rachel*).

[59] Brachot 60a.

citing the verse *verapo yerapey*. Thus, permission is also given to the *patient* to seek medical attention, and he is not obligated to rely solely on a miracle. Moreover, Nachmanides himself cites the verse *verapo yerapey* and *vechai achichah imach* as a positive commandment.[60] The *Nishmat Avraham* suggests that Nachmanides may be referring only to a patient seeking medical attention as a preventive measure where there is no hint of a disease.[61] However, the *Nishmat Avraham* points out that such a stance is against the view of contemporary halachic authorities like Rav Shlomo Zalman Auerbach and Rav Moshe Feinstein.[62] With these points in mind, many contemporary halachic authorities explain Nachmanides' opinion, rejecting human intervention in curing disease, as referring to a precise time and specific circumstances during the rule of the prophets of early Jewish history.[63] However, he never intended to apply this to the circumstances of the Diaspora, when prophetic times have ceased.

Determination of Fee

From the preceding discussion, halachic authorities have determined that it is legal according to Jewish law for a physician to charge money (since a physician does not have a different full-time job from which he receives compensation)[43] for services rendered. However, it is important to understand exactly how a physician can determine his fees and whether he may charge a high fee. The *Shulchan Aruch*, in discussing the fee that witnesses to a divorce document receive, points out that a clause exists stipulating that if due to them a problem arises, they would have to pay for another divorce document.[64] Therefore, due to their monetarily high-risk activity, these witnesses are allowed to charge a high fee. The *Nishmat*

[60] *Torat Haadam* "Inyan Hasakanah," Leviticus 25:36.
[61] Yoreh Deah 336, p. 274.
[62] See *Nishmat Avraham*, Yoreh Deah 336, p. 275.
[63] *Tzitz Eliezer*, loc cit.; *Yechaveh Daat* 1:81.
[64] Even Haezer 130:21.

Avraham feels that this case would apply to physicians as well.[65] Furthermore, the *Tashbetz* mentions that as long as the fee was discussed before the administration of treatment, there is no legal hindrance for the physician to charge a high fee.[66]

Furthermore, it is essential to understand whether a physician who charges a high fee would be allowed to collect the fee. Would he be violating a Jewish prohibition of overcharging?[67] Can the physician legally collect from the patient who has not paid, and is the patient allowed to claim a reimbursement if he does pay the high fee? The *Shulchan Aruch* rules in a case where someone is fleeing from jail and employs a sailor to assist him in crossing a river for a very large fee:[68] the person is only obligated to pay what a normal fee for crossing a river would be.[69] If this ruling were extrapolated to a physician, it would appear that although a physician may have the ability to charge a high fee, the patient may not have an obligation to pay the full fee, and thus the physician would not have the right to collect the full unpaid fee. Some *rishonim* and *acharonim* do apply this ruling to the case of a physician.[70] However, most commentaries on the *Shulchan Aruch* do not apply this ruling to the case of a physician.[71] They write that once the patient agrees to the physician's

[65] Yoreh Deah 336:M.

[66] Responsa 1:145.

[67] See Bava Metseyah 49b for further details.

[68] Choshen Mishpat 264:7.

[69] *Yam Shel Shlomo Shlomo*, Bava Kama 10:38, gives two reasons: First, there is a set fee that sailors usually get for the trip. Alternatively, he already has a Biblical obligation to save this person; see also *Shitah Mekubetzet* in the name of Ramo—the employer can claim that he was joking with the employee in regard to the extra amount.

[70] *Mordechai*, Bava Kama 172; Responsa of Radvaz 3:556; Ritva, Yevomot 106a—since he only agreed to the payment due to the stress of his sickness. See also Rashi and Tosafot, Bava Kama 116b.

Author: It would appear that according to the second explanation of the *Yam Shel Shlomo* (n. 70), a physician who makes a high fee would not be able to collect the entire fee since he too is involved in a Biblical obligation.

[71] Ramo, *Taz*, and *Shach*, Yoreh Deah 336; also *Yam Shel Shlomo*, Bava Kama 10:38, and *Mordechai* 174; see also Nachmanides, *Torat Haadam*, Shaar Hasakanah.

terms, it is incumbent on the patient to pay the agreed-upon amount. Furthermore, even according to the opinion that a physician may only charge for *s'char batalah*, if they agreed upon a payment for the physician's knowledge and expertise, the patient is still obligated to pay in full, irrespective of how large.[72] Moreover, if the patient has already paid the fee, he has no legal standing to request that it be returned in part or in full. The above case of the runaway, according to these halachic authorities, is unique in that the employment of the sailor is temporary and fixed, unlike a physician's job, which is not bound by time. It is thus the normative halachic opinion that a patient must pay the physician the entire agreed-upon fee, no matter how large.[73] A psychological explanation is given by some *acharonim* as to why this is the case:[74] It will prevent people from avoiding choosing a career as a physician, and it will prevent physicians from refusing treatment unless they are paid in full from the beginning.[75]

An argument does exist among halachic sources as to whether this rule applies if there is only one physician in a city. Many feel that if only one physician is located in the city, then there is no obligation for the patient to pay the entire high fee.[76] Others,[77] including

[72] Ramo, Choshen Mishpat 264:7—since it is a normative practice to pay physicians a high fee. See also Rosh, Bava Metziah 2:28 and *Lechem Mishneh Gezeylah* 12:7 (explaining the opinion of Maimonides), who understands that the person must pay whatever the agreed-upon amount was, without any limits. See also *Ketzot Hachoshen* 264:2. *Chidushei R. Shimon Shkup*, Bava Kama 19, who argues that even though the Rosh permitted large fees, he did have a maximum amount based on the maximum salary that the person could have made in his other profession. How the Rosh, according to the interpretation of Rav Shkup, would apply this maximum amount is unclear, since modern physicians do not have alternative occupations. See nn. 43–45 above.

[73] Similar to *Shulchan Aruch* and Ramo, Choshen Mishpat 264.

[74] *Mateh Moshe Gemilut Chasadim* 4:3 and *Tzedah Laderech* 5, no. 2:2, elaborated in *Encyclopedia of Jewish Medical Ethics*, p. 801.

[75] See below if this is allowed.

[76] *Levush*, Yoreh Deah 336; Radvaz, Choshen Mishpat 264:7; Responsa Radvaz 3:556; *Tzitz Eliezer* 5:25 (*Ramat Rachel*).

[77] *Yam Shel Shlomo*, Bava Kama 10:38.

the Ramo,[78] disagree and hold that even when there is only one physician in the city, if the patient and physician agree upon a certain price, no matter how high it may be, the patient is obligated to pay it in full. However, this ruling would not hold true if the patient indicated at the time of agreeing to the high payment that he was doing so due to extenuating circumstances.

Many contemporary halachic authorities have determined, using the above principles, that it is legal for physicians to charge a high fee. Rav Moshe Feinstein explains that people would not dedicate themselves to the study of medicine were they not assured an acceptable fee (and it is as if the patient had agreed in advance—see above).[79] In a similar vein, some cite the high cost of medical education and the large debt that most students accrue.[80] If a physician were not allowed to charge a high fee to pay back these large debts, it would be another factor steering people away from becoming physicians, especially primary-care physicians.[81] Additionally, since modern physicians do not have other employment, it is permitted for them to charge for their time and knowledge,[43, 44, 45] something that is truly priceless.[82] In the same responsum as mentioned above, Rav Moshe Feinstein gives an additional explanation. Many patients prefer a high fee if it means greater availability and better quality of care. This further benefits the patient by preventing the physician from needing to seek alternative sources of livelihood and allows him to focus solely on the practice of medicine. Thus, charging of a fee, even a high one, is something that is beneficial to the com-

[78] Choshen Mishpat 264:7; see also *Encyclopedia of Jewish Medical Ethics*, vol. 3 p. 801.

[79] *Iggerot Moshe*, Yoreh Deah 4:52.

[80] Since studying medicine is not Biblically mandated; *Barkai* 5745, vol. 2 pp. 32–33, *Halacha U'Refuah*, vol. 2 p. 141, *Responsa Teshuvot Vehanhagot*, vol. 1 no. 887.

[81] For these and many other contemporary concerns of primary-care physicians, see "The Physicians' Perspective: Medical Practice in 2008" by the Physicians Foundation (www.physiciansfoundations.org/usr_doc/PF_Report_Final.pdf).

[82] Nachmanides, *Torat Haadam* end of Shaar Hamichush; Nachmanides and Rashba, Yevamot 106a; *Yam Shel Shlomo*, Bava Kama 10:38.

munity. However, this permutation would not exist if the fee was overly exorbitant, in which case it would be prohibited,[83] and those who charge such a fee would not reap the reward for the Biblical obligation of healing the sick.[84] Although not specifically discussing physicians,[85] the Talmud, commenting on Biblical verses, discusses and condemns a person who works for the community conducting a Biblical obligation while receiving an exorbitant salary.[86] Likewise, R. Ovadya MeBartenurah, comments on a Mishnah stating that the judgment of judges who accept a salary are void: "There are rabbis who charge ten gold coins for half an hour to write a divorce document. . . . Such a rabbi, in my eyes, is a thief and a rapist . . . and I would be concerned that the divorce document is worthless."[87]

Exactly how should a fee be considered typical and how should it be considered excessive? Dr. Aviad Hacohen elucidates the difficulty in a precise determination.[88] He comments that pricing in medicine is dependent on many factors, such as time and degree of expertise necessary for a procedure. Furthermore, the need, as expressed by the patient and/or a third party, is imperative in establishing proper pricing. For example, the psychological effect on the patient, the potential loss of function, and potential cosmetic implications may also be included in determining a suitable fee.

Refusing Patients

The Torah proclaims that there is an obligation to not stand idly by your friend's blood, *lo ta'amod al dam re'echah*.[89] The Talmud and *Shulchan Aruch* associate this verse with abstaining from as-

[83] *Halacha U'Refuah*, vol. 2 p. 141; *Brachah L'Avraham*, pp. 237–238.
[84] *Responsa Teshuvot Vehanhagot*, vol. 1 no.887.
[85] Based on discussions presented above, a physician may also be considered as practicing a communal profession that fulfills a Biblical obligation.
[86] Shabbat 56b and 139a, commenting on the sons of Samuel.
[87] Bechorot 4:6 (Author's translation).
[88] *Brachah L'Avraham*, pp. 230–231.
[89] Leviticus 19:16.

sisting a person who needs health care.[90] Furthermore, as discussed above, there is a positive commandment to heal those who are sick.[8] Additionally, the Maharsham[91] cites the verse discussing the prohibition against making an orphan suffer, "If you inflict suffering on him [orphan or widow] . . . I will kill you," as applying to all types of suffering that one person causes to another, whether passive or active.[92] Thus, it would appear that if a physician denied a patient treatment, he would be violating a positive and (possibly) two negative Biblical precepts.[93] It is therefore understandable that Rashi explains the statement in the Talmud "The best physicians go to hell"[94] as pertaining to a physician who has the ability to treat a destitute individual but refuses to help the patient. This raises a number of significant questions: Can a physician take a vacation, can he retire? Must a physician answer all calls at night and while resting? How would a patient who has the funds but refuses to pay a fee be characterized? Although the physician should be treating patients as much as possible, it should not come at the expense of the quality of care that a patient receives. The more patients a physician has, the busier he will be and the less time will be available for each patient. Moreover, a physician who is overworked may lack the same focus that he would have if he worked fewer hours with fewer patients. The psychological needs of the physician should also be considered, because taking breaks and avoiding burnout may be necessary to ensure the best quality of care. Moreover, the busier a physician is, the increased chance that a mistake can occur. Even inadvertent

[90] Sanhedrin 73a, Yoreh Deah 336:1.

[91] Responsa 2:210 (second responsum—responding to the Aderet).

[92] Exodus 22:22–23.

[93] *Iggerot Moshe*, Yoreh Deah, vol.2 no.151: These obligations would not pertain to a non-physician, since there is no obligation for a person to learn medicine in order to save someone's life. Rather the obligation is for a person to do what he can with what he has. (*Responsa Levushai Mordechai*, Orach Chayim 29, and *Responsa Chelkat Yaakov* 1:82 disagree and hold it is an obligation to study medicine.)

[94] Kiddushin 82a.

mistakes are seen by many *rishonim* as having some physician liability and needing reparations.[95] Similarly, many contemporary halachic authorities consider the accidental inappropriate injection of the wrong drug as being similar to an intentional act.[96] Thus, an overload of patients can overburden the physician and compromise patient care, potentially leading to careless mistakes.[97] It is plausible to suggest that setting limits on the number of patients will be beneficial for all parties.

Recent halachic sources highlight that in the modern, developed world, it is uncommon for cities to have a shortage of physicians. If a physician were to refuse, either passively or actively, to respond to a sick patient, there are ample other physicians who can treat that person. Thus, Rav Shalom Elyashiv writes that if a person is not seriously ill and not in need of urgent care, if a physician is eating, sleeping, or resting, he is not obligated to tend to the patient.[98] However, a seriously ill patient falls into a different category. The *Tzitz Eliezer* writes that although a physician who does not aid a seriously ill patient in a time of need may not monetarily be responsible for damages, he nevertheless has an obligation to come to the patient's aid.[99] If he does not, he will be punished by the Heavens. The *Nishmat Avraham* comments that this distinction may not apply if the inactivity occurred after the physician began treating the patient.[100] The Talmud explains that if a person delineates that he is depending on someone, then that person is liable for any loss incurred.[101] The *Shulchan Aruch* applies this law even if the statement

[95] *Tzitz Eliezer* 5:23 (*Ramat Rachel*) explaining the opinions of the Ramban, *Tur*, and *Shulchan Aruch*.
[96] Ibid. and *Responsa Minchat Yitzchak* 3:105 unlike *Responsa Chatam Sofer* 1:177 (Responsa to Orach Chayim).
[97]Similar to arguments made in the Libby Zion case of 1984; see "Libby Zion," *New York Times*, March 6, 1984.
[98] *Zichron LehaGriv Jolte* 5747; see also *Kobetz Ateret Shlomo*, vol. 7 188:2.
[99] Responsa 19:63.
[100] Yoreh Deah 336.
[101] Bava Kama 100a.

was not specifically stated but was implied and obvious (e.g., the implied relationship between a physician and a patient).[102] Thus, the *Nishmat Avraham* concludes that a physician who denies treatment to an existing patient is also liable monetarily.[103] Consequently, it would appear that a distinction is made in Jewish law regarding refusal to treat a person being dependant on the severity of sickness and where a pre-existing physician-patient relationship has already been established.[104]

An important halachic discussion exists surrounding the case of a physician who refuses to treat a patient due to lack of funds. As quoted above, Rashi explains the statement in the Talmud "The best physicians to Hell"[105] as pertaining to a physician who has the ability to treat a poor person but refuses to help the patient. If a person truly cannot afford the medical treatment, a rabbinic court can force him to treat the patient.[106] However, the courts can only coerce the physician if there are no other physicians in the city. Otherwise, it is not possible to coerce one physician over another, and it is the responsibility of the court to raise money to pay a physician to treat the poor.[107] Although the Talmud comments that "a physician who receives no payment is worthless,"[108] this does not mean that a physician cannot heal pro bono; rather it means to say that a patient is obligated to pay what he can.[109]

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[102] Choshen Mishpat 306:6.

[103] In the name of Rav Shalom Elyashiv.

[104] A similar delineation exists in common law: A physician is not obligated to treat every patient unless a physician-patient relationship has been established. See Katz and Marshall, "When a Physician May Refuse to Treat a Patient," *Physician's News*. February 2002 (available at www.physiciansnews.com/law/202.html).

[105] Kiddushin 82a.

[106] *Responsa Teshuva Meyahavah*, Yoreh Deah 3:408.

[107] *Tzitz Eliezer* 15:40:7—delineates the possible Biblical prohibitions if such a fund is not established and discusses the Biblical verses that are fulfilled when such a fund is established.

[108] Bava Kama 85a.

[109] *Shoshanat Ha' amakim*, *verapo yerapey* no. 71; see also Taanit 21b and *Gilyonei Hashas*, Bava Kama 85a.

Throughout history, practicing Jewish physicians have highlighted the importance of treating the poor. Yitchak Yisraeli highlights this in a statement to physicians: "There is no greater mitzvah than treating the poor."[110] R. Eliezer Pappa contends that the quality of care offered to the indigent must be comparable to that offered to the wealthy.[111] A physician who is called upon must act quickly, irrespective of time or economic status. Furthermore, from as early as the thirteenth century to the Nazi ghettos, Bikur Cholim societies have been set up to allow those who cannot afford medical care to receive adequate attention.[112] The *Chafetz Chayim* raises the question of whether a community that does not set up a fund to care for the poor would be, in effect, violating the prohibition of *lo ta'amod al dam re'echah*, "not standing idle by the blood of your friend."[113]

An interesting contemporary application of a physician's ability to refuse to care for patients occurred during a physician's strike in Israel in 1983, which lasted four months.[114] At the time Rav Shlomo Zalman Auerbach permitted the strike on condition that it did not threaten patients' lives.[115] He specified that physicians might not abandon the hospitals and might not make themselves unavailable by traveling far distances. As the strike progressed, Rav Shlomo Zalman Auerbach and Rav Yaakov Yitzchak Weiss clarified the practical level of staff that physicians must supply during the strike as being the level that would be supplied on Shabbat (which would be the medically determined level needed to ensure saving a life if there were an emergency and to ensure proper care for the hospitalized patients).[116] Thus, halachic authorities throughout Jewish

[110] *Mussar Harofim*, no. 30; see also "Oath of Assaf" (quoted in F. Rosner, *Ann Int Med* 63:317, 1965) and "Oath of Jacob Zahalon" (in *Otzar Hachayim*).
[111] *Peleh Yoetz*, no.510, *rofeh*.
[112] For further details, see *Encyclopedia of Jewish Medical Ethics*, vol. 3 p. 1120, and *Brachah L'Avraham*, pp. 221–223.
[113] *Ahavat Chesed*, vol. 3, Bikur Cholim 48b.
[114] Strikes in Israel also occurred in 1973 (one month) and 1976 (three months).
[115] Cited in *Nishmat Avraham*, Choshen Mishpat 333:1.
[116] Cited in *Encyclopedia of Jewish Medical Ethics*, p. 803.

history have balanced the personal and psychological needs of the physician with the importance of the destitute and severely infirm receiving adequate access to health care.

CONCLUSION

The surge in the number of primary-care physicians in the United States converting their practices into concierge, or retainer, practices raises many halachic questions, such as: Can a physician charge for direct medical care? Can he charge a large fee for medical access? Can he limit his patient pool while transitioning into a concierge practice?

As highlighted above, although providing medical care is a Biblical obligation, and one may only charge *s'char tirchah* and *s'char batalah*, this may not be the case with contemporary physicians, who practice medicine as their sole source of income. Furthermore, it should be noted that to avoid common-law issues, it has been advised that concierge physicians clearly stipulate in their contract with the patient exactly what services the retainer fee covers and that the stipulated services are of a non-medical nature.[117]Accordingly, a concierge physician would not charge a fee for direct medical services. Thus, the payment is not contingent on the performance of a Biblical obligation and would be exempt from the prohibition of charging by a Biblical commandment.

Both Jewish and United States law recognize, except for emergencies, a physician's right to choose where he or she practices and whom they treat.[118] However, once a person is an existing patient, it is imperative, according to both Halacha and common law, that his treatment is continuous and he is not abandoned. According to United States Law and the American Medical Association's ethical code, it

[117] Portman, *J Health Life Sci Law*. 2008 Apr;1 (3):1, pp. 26, 37.

[118] Assuming that no laws are violated (e.g., discrimination laws). For a more detailed discussion regarding common-law applications, see "Principles of Medical Ethics" (www.ama-assn.org/ama/pub/category/2512.html). For a more detailed discussion regarding Halacha, see the discussion above regarding denial of care.

is forbidden for a physician to abandon a patient.[119] A physician is obligated to transition all of his patients into their new retainer practice, whether they will continue to be patients or not. Those patients who will not be part of the new practice must continue to be cared for until they can be safely incorporated to a new physician. The entrance of a physician into a concierge practice must be tempered with the strong emphasis placed in Halacha and Jewish literature on the necessity for a Jewish physician to treat the indigent. This is a point that the AMA has itself highlighted—the need for concierge physicians to offer charitable medical care.[120] Interestingly, it has been noted by a study that among concierge medical practices, 84 percent provide charity care, and many continuously see patients despite not having paid the retainer fee.[121]

At the present time, it has been determined by the United States government that concierge medicine is too small to reach the level where it limits the access of patients (specifically Medicare patients) to healthcare. Retainer practices have been limited to larger cities with sizable population pools, as opposed to rural areas with few primary-care physicians.[122]

It was recently noted that "as the economic pressure on physicians and their traditional medical groups intensifies . . . more retainer practices are likely to surface around the country."[123] As time continues and concierge medicine evolves, it is imperative to re-evaluate the halachic and common-law ethical dilemmas that arise.

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[119] "AMA Report to the Council on Medical Services of Special Physician-Patient Contracts," CEJA Report 9-A-02 (June 2002); and Portman, *J Health Life Sci Law*. 2008 Apr;1 (3):1, p. 30.

[120] AMA "Principles of Medical Ethics"; AMA, "Report of the Council on Ethical and Judicial Affairs: Disrespect and Derogatory Conduct in the Patient-Physician Relationship" (June 2003).

[121] Alexander GC, et al. "Physicians in Retainer Practice: A National Survey of Physician, Patient and Practice Characteristics," 20 *J Gen Internal Med.* 1079–1082 (Dec. 2005).

[122] GAO report, supra n. 2.

[123] Portman, *J Health Life Sci Law*. 2008 Apr;1 (3):1, p. 8.

The Rabbi Who Ate on Yom Kippur: Israel Salanter and the Cholera Epidemic of 1848

Ira Taub

Abstract

Rabbi Israel Lipkin (1810–1883), better known as Rav Yisrael Salanter, an outstanding religious and ethical leader of nineteenth-century Lithuanian Jewry, made a celebrated and deeply controversial decision in the fall of 1848. As a devastating cholera epidemic reached its peak just as the solemn fast of Yom Kippur was approaching, Salanter publicly advocated eating on Yom Kippur, so that his community would not be made more vulnerable by a day of fasting. While Salanter was an innovator in many areas of Jewish thought, his attitude toward Halacha, the canon of Jewish law, was based upon traditional sources and authorities. In order to analyze this controversial episode in Eastern European Jewish history, it is important to consider the impact and contemporary understanding of cholera in the context of how infectious disease and life-saving interventions are treated in Halacha.

YOM KIPPUR, 1848

The second of eight cholera pandemics lasted from 1829 to 1852, spreading through all of Europe, and leaving a trail of devastation across much of Russia and the surrounding regions.[1, 2] In contrast to the waxing and waning character of the contagion in Western Europe, the infection spread continuously in Eastern Europe and

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Russia throughout the mid-nineteenth century, killing millions in the process.[2, 3, 4]

Rabbi Israel Lipkin (1810–1883), better known as Rav Yisrael Salanter, was an outstanding religious and ethical leader of the Lithuanian Jewish community at the time.[5] Vilnius, or Vilna as it was known to Jews, the city where he lived and taught, had been hit hard by cholera in the summer of 1848. In the early fall, as the fast-day of Yom Kippur approached, he was concerned that fasting would make the community more vulnerable to the disease.[5, 6]

Rabbi Lipkin's reported decision was to publicly advocate the suspension of the fast that year, an ad hoc public health measure that left a long trail of controversy. The following account of the incident is excerpted from "Three Who Ate," a short story published nearly eighty years later in which the episode is dramatized:

> It is Atonement Day in the afternoon. The Rabbi stands on the platform in the centre of the Synagogue, tall and venerable . . . . [The] people are waiting to hear what the Rabbi will say, and one is afraid to draw one's breath. And the Rabbi begins to speak.
>
> His weak voice grows stronger and higher every minute, and at last it is quite loud. He speaks of the sanctity of the Day of Atonement and of the holy Torah; of repentance and of prayer, of the living and of the dead, and of the pestilence that has broken out and that destroys without pity, without rest, without a pause—for how long? for how much longer?
>
> . . . and I hear him say: "And when trouble comes to a man, he must look to his deeds, and not only to those which concern him and the Almighty, but to those which concern himself, to his body, to his flesh, to his own health . . . There are times when one must turn aside from the Law, if by so doing a whole community may be saved. With the consent of the All-Present and with the consent of this congregation, we give leave to eat and drink on the Day of Atonement."[5]

According to this account, Salanter openly flouted a community norm by eating on a solemn fast-day; no doubt, his reputation for exceptional piety was instrumental in giving him the credibility to do so. From a legal standpoint, the episode set a precedent for abrogation of the fast as a precautionary measure against illness. As such, it also attracted the attention of legal antagonists, who polemicized against it in the years that followed. Among them was Rabbi Betzalel HaKohen, a senior rabbi and jurist, who wrote, some twenty years after the event:

> It is my obligation to make it known for all generations this great matter—that for three successive years greater than 12,000 men and women who fasted [on Yom Kippur during the cholera epidemic] throughout our lands and no ill befell any of them—and this was known to virtually the entire world at the time.[7, 8]

The somewhat dramatic account cited above was a response to then alleged timidity and hesitancy on the part of the other rabbis in Vilna to take the necessary steps. While there is an inherent bias in the Talmudic sources in favor of violating the fast for even a suspected danger to life, such an action on a mass scale is not discussed directly;[9] and few were willing to endorse such an unusual move. In fact, Salanter's decision was regarded as so radical in some circles that further embellishments of the story cast him as a virtual crusader against the rabbinic establishment, sanctioning the violation of the Sabbath during the epidemic and even threatening to overturn legal rulings of the rabbinic courts.[6, 10]

It should be noted that there are serious questions regarding the historicity of these stories.[5, 6] Most published accounts, including the short story excerpted above, were based upon second- and third-hand sources, almost never with input from those who were alive at the time.[11] Some are from individuals at ideological odds with Salanter's traditional beliefs, who undoubtedly altered the account

to serve their own agenda. For example, it has been argued that the story is actually based upon a prank, during which secularists posted a forged letter from Vilna's leading rabbis that gave wholesale permission to eat on Yom Kippur.[11]

In an alternative version of the story, Salanter acted in cooperation with the other rabbinic authorities to encourage a shortened service that would allow worshipers to spend time outdoors in the fresh air.[6,11] Cake was available in a side room, and individuals who felt weak were encouraged to taste a small amount. In this account, Salanter took the somewhat less radical step of encouraging a minor modification of the fast, and only for the infirm. What is noteworthy here is the public and widespread encouragement of that step, which went somewhat beyond what the other authorities were willing to permit. It is easy to see how this could be the kernel of truth within the other, somewhat embellished, accounts.[11]

Whatever actually transpired, much of what was written both in support of Salanter and against him reflects differing ideas about the extent to which the fast could be compromised for uncertain public health goals. A limited number of primary sources produce a vast spectrum of opinions about violating the fast as a preventative measure. The reputation of the protagonist is clearly emblematic of the importance of this issue.[5] In fact, the episode is widely quoted in popular works on Jewish law as a prime example of how well-intentioned religious objections must be suppressed in the face of pressing medical need to violate a prohibition.[12,13]

RABBI ISRAEL SALANTER

Israel Salanter was a unique personality within the world of Lithuanian Orthodoxy because of his achievements in traditional scholarship and, more famously, his development of an innovative psychology of ethical and religious development. The social and religious milieu in which he lived and taught was a culture under siege, both from the relentless anti-Semitism and hostility of the Russian government and the surrounding populace and from the

Haskala (Enlightment), a modernizing movement that took on a stridently anti-religious tone among many young Russian *maskilim,* as it adherents were called.[5, 6]

Salanter's innovation was a drive to integrate his community's traditional modes of study and worship with a new and passionate focus on *mussar*, or personal religious and ethical development. He emphasized the commitment of significant blocks of time to intense personal reflection, with a fixation on the study of penitential texts, sometimes at the expense of such traditional priorities as Talmud study. The *Mussar* movement began to attract followers in the late 1840s over the opposition of many traditionalist rabbis, who viewed it as an idiosyncratic and possibly schismatic philosophy. Ironically, Salanter also came under frequent attack in the secularist press, which viewed him as a charismatic apologist for the traditionalist camp.[5, 6]

Salanter, then, was a figure who, while respected for his personal piety and integrity, was controversial even before the events of 1848. Still, in spite of his innovative tendencies, his behavior was firmly based upon traditional sources and authorities, and his thinking on the need to eat on Yom Kippur indisputably drew from sources within Halacha. In order to analyze how Salanter's response to the epidemic fit within those primary sources, it is therefore important to consider the impact and contemporary understanding of cholera; the efficacy of eating as a counter-measure against the illness, as perceived by Salanter's medical contemporaries; and finally, broader factors that affected how cholera was viewed from the perspective of Jewish thought and Jewish law.

EATING ON YOM KIPPUR: AN ANALYSIS

On Yom Kippur, a day considered the most sacred in the Jewish calendar, eating and drinking are among the activities against which adult Jews are adjured, and violation of the fast is regarded as a particularly severe offense.[14, 15] Even pregnant and nursing women, although absolved from most other fasts, are included in the prohibi-

tion.[16] The holiday was widely observed and familiar, even within rapidly secularizing segments of the Lithuanian Jewish population.

The requirement to fast is waived when it is deemed to endanger the life of an individual, as preserving life is an over-riding concern that trumps nearly every other consideration in Jewish law.[17, 18, 19] The Talmud cites the verse in Leviticus 18:5, "You shall therefore keep My statutes and My laws, which if a man do, he shall live by them; I am the Lord," and reads it as follows: " 'he shall live by them'—but he should not die because of them."[20]

While the concept is stated in a somewhat pithy form, the Talmud applies it to a number of detailed scenarios, including that of an individual deemed to be severely ill on Yom Kippur:

> A pregnant woman who smelled food and became ravenously hungry—we feed her until she is satisfied. A person who is ill—we feed him according to the opinion of medical experts; if there are no such experts present, we rely on his own opinion until he is satisfied.[21]

Several important points are implicit in this passage. First, both the pregnant woman and the ill person referred to are assumed to be in mortal danger due to their hunger. As Rashi, the seminal eleventh-century commentator, notes, the former case is actually a twofold danger threatening both the life of the mother and the potential life of the fetus.[22] Second, timely delivery of food to the patient is viewed as being curative, as both the pregnancy and the illness cited in the latter case are viewed as insufficient to cause the patient's demise without the added impact of hunger.

Feeding a patient on Yom Kippur requires the careful balance of psychological versus organic factors. On one hand, the Talmud later states that bystanders are required to quietly remind the pregnant woman that it is Yom Kippur. Rashi notes that this knowledge alone may be a sufficient motivation to carry the patient through the immediate crisis and complete the fast.[23] On the other hand, the Talmud cites a verse that "the heart knows its own suffering" [24]—that is, the

patient's own subjective certainty of the gravity of his illness trumps any doubts that other may harbor regarding the necessity of eating, including even doubts expressed by medical experts.[25]

Where some credible evidence exists that fasting *may* pose a danger to the patient, the burden of proof is on the physician to prove that fasting does *not* pose a danger. All that is required is the potential for the exacerbation of a dangerous illness; the physician need not state directly that the patient may die.[18] Even an action with a statistically narrow chance of effecting a cure is permitted in such a case.[9]

The passage in the Talmud continues with a description of the method of feeding forbidden items to a ravenously hungry pregnant woman, wherein she is fed small amounts in a stepwise fashion:

> A pregnant woman who smells sacrificial meat or pork [both categories of forbidden food]—we dip a small spindle into the gravy of the [forbidden] food and place it in her mouth. If that is sufficient to satisfy her—it is well; if not, we feed her the gravy itself. If that is sufficient to satisfy her—it is well; if not, we feed her the fat [of the forbidden food] itself. [21]

The animating principal behind this course of action is, as later noted by the Talmud, to feed the patient a quantity or type of food that represents the least severe infraction, thus minimizing the violation. Similarly, the Talmud later constructs a hierarchy of infractions that are deemed less severe, and hence preferable in this case.[25] As Maimonides implies in his work, the forbidden food can be regarded as a temporizing measure to hold the patient over until the food can be consumed under permissible circumstances.[26] When the crisis passes, the full obligation to fast returns immediately.[27]

This principle, when applied to eating on Yom Kippur, requires that, when possible, a patient be fed small amounts of food at long intervals, to minimize the prohibition by avoiding an overt act of eating, a practice described as *pachot pachot m'kshiur* (eating by half-measures).[28] Later authorities codified a method for feeding the

dangerously ill patient on Yom Kippur while skirting a strict violation of Biblical law, relying on generally accepted definitions of the minimal volume of solid food that constitutes eating.[29]

A direct parallel to the decision faced by Salanter can be found in an 1836 responsum from the prominent authority R. Moses Sofer. He argued that, when faced with the danger posed by cholera, the prohibition against eating on Yom Kippur could be suspended even for a healthy person, and even where the mere possibility exists that such an action could be life-saving. However, he prefers that less extreme measures be taken where possible, even to the point of avoiding any public prayer on Yom Kippur, rather than suspending the fast. When the fast itself is judged by physicians to be injurious, R. Sofer prefers eating by half-measures, as mentioned above.[30] This dispensation is limited to life-threatening situations, and the fast is not suspended as a precautionary measure for less severe health concerns.[31]

In summary, there is strong precedent within the corpus of Jewish law for feeding a dangerously ill patient on Yom Kippur. What distinguishes the classical scenarios from the incident in Vilna are three major factors: first, the Talmud and later codifiers regarding eating as a response to an existing illness, rather than a prophylactic measure against the possibility of illness; second, care is taken to ensure that there is a real and credible threat to the patient's life that can be ameliorated by eating; and third, the generally accepted opinion that, if possible, the food be consumed in a manner that minimizes the prohibitions involved. With this background, the immediacy of the danger posed by the cholera epidemic can be examined.

NINETEENTH-CENTURY CHOLERA PANDEMICS

Vibrio cholerae, a gram-negative bacterium native to coastal salt waters in South Asia, was, for most of human history, a sporadic pediatric illness confined to that area.[1, 2, 32] Its primary method of transmission is either through direct contact or via contaminated food or drinking water. Once ingested, the organism secretes a toxin which

paralyzes active transport of sodium and chlorine, resulting in accumulation of fluid in the intestinal lumen.[33] Progress from the first onset of symptoms can be rapid and relentless; voluminous stools ensue, leading to hypovolemic shock that, if not reversed, can cause death in a matter of hours.[32, 33] An early description vividly captures the morbidity and terror of an attack:

> Diarrhoea, at first feculent, with slight cramps in the legs, nausea, pain or heat about the pit of the stomach, malaise, give the longest warning. . . . When violent vertigo, sick stomach, nervous agitation, intermittent, slow or small pulse [and] cramps . . . give the first warning, then there is scarcely an interval. . . . Vomiting or purging . . . come on; the features become sharp and contracted, the eye sinks, the looks is [*sic*] expressive of terror, wildness and . . . a consciousness on the part of the sufferer that the hand of death is upon him.[2]

The first cholera outbreak to spread widely beyond India began in 1817, and spread by both ship and overland route to Syria and the Crimean region; within ten years, it was rampant in both Persia and southeastern Russia, and it had spread throughout Western Europe by 1831.[1, 34] It was endemic in Russia for near fifteen years thereafter, and the year 1848 marked the most destructive year ever for the epidemic, with nearly 1 million reported deaths in that one year alone.[35]

The spread of the disease was precipitated by religious pilgrimages and troop movements, but increased exponentially as a result of steamship and railroad travel.[1, 2, 36] Quarantine and port closure, the usual methods of containment, failed; as the British soon learned, attempts to limit sea trade had a devastating economic impact that produced little more than improvements in evasion of the regulations. [34, 37] Only seasonal factors could hamper its spread; the disease spread most virulently in the late summer (the time of year when Yom Kippur fell out), and tended to dissipate during the coldest part of winter.[1, 35]

Cholera's spread did not spare the Jewish communities of Europe, particularly the densely populated villages in the Pale of Settlement and the ghettoized urban neighborhoods in which Jews were often concentrated. While it was widely agreed that the disease impacted Jews less than their neighbors (with some series showing Jewish mortality 50 percent lower than that of other communities), one season of cholera could still cause deaths in the thousands.[38] Cholera inspired fear in the Jewish communities in its path; its approach alone was sufficient to inspire the creation of new liturgical and homiletical texts.[39, 40] Even its name, which when transliterated into Hebrew can be read as "evil sickness," reflects the place it held in the Jewish popular imagination.[8, 39]

Before 1850, contemporary scientific and medical knowledge about the cholera epidemic was garnered from first-hand observation of the effects of the illness, and its epidemiology and etiology were still largely the subject of speculation.[32, 41] The first widely published observations were made by British military and naval physicians, and, naturally, the most remarkable aspect of the illness was the rapidity of its spread within confined areas. Early medical accounts favored the dramatic, such as an early account of an "invasion . . . so sudden and violent that horsemen were stricken from their steeds," so that fear and panic were the inevitable prodrome to the actual appearance of the disease.[2] The backdrop of war, revolution, and social upheaval that characterized the era magnified this panic, with rioting, government repression, and intense political acrimony also accompanying its spread.[3, 42] Jews, ever conscious of the flares of anti-Semitism that often accompanied such events, had many reasons to be nervous (Jews, particularly immigrants, were in fact often scapegoated for cholera outbreaks).[34, 37]

Views of the etiology of the disease coalesced around two familiar schools of thought, the miasma theory and the germ theory of disease.[34] The former attributed the disease to invisible, easily transmissible, but fundamentally noncontiguous "vapors or miasma arising from filth or decay."[41] This could take the form of contaminated air, "the exudations of . . . bodies in a state of decomposition,"

or a substance in the soil spread via earth floors.[36, 43] The strength of this theory was its ability to explain how the disease spread through crowded urban areas and killed rapidly, as if it were a poison, and proponents of the theory often advocated fresh, open air as a preventative measure against the illness.[32, 41, 43] The belief that the disease was caused by an infectious biological agent was not taken seriously by many prior to 1850.[2, 3, 43] Even John Snow's famous 1855 "water pump" experiment, in which he elegantly proved the contagious nature of the illness, failed to convince most of his contemporaries, and Koch's description of the bacteria was still nearly forty years away.[44]

Whatever their beliefs may have been about the origin of the illness, contemporary physicians had a wide arsenal of treatments to deploy against cholera. Bleeding, purgatives, and caustic substances had a prominent place in contemporary therapy, as did heavy metals and arsenic.[32, 41, 43] Flannel belts were in wide use at the time, as it was believed that keeping the abdominal viscera warm could benefit patients greatly.[1, 32, 34] Occasionally, alcohol and opium found their way into the treatment protocols of the time.[36, 41] Interestingly, intravenous rehydration, the therapy that ultimately proved to be curative, had been demonstrated and published in Scotland in 1832. Unfortunately, such therapy not only failed to reach Eastern Europe and Russia, but it failed to attract any significant attention even within the English medical establishment.[32 45 46] Salanter's medical contemporaries were thus faced with a relatively new and terrifying illness whose mysterious etiology precluded any rational approach to prevention or therapy.

RELIGIOUS ATTITUDES AND RESPONSES

Historically, the best-preserved clerical responses to the cholera outbreak were those expressed in the Protestant churches of Western Europe, which echoed the socially conservative view that the disease was particularly harsh on "drunkards and filthy wicked people."[1] Divine intervention and divine punishment were often held respon-

sible for the toll taken by the disease. Such views were widespread even in nations like England, where in March 1832 a fast-day proclaimed by Parliament at the urging of evangelical members and traditional churchmen enjoyed wide popular support. During this ad hoc day of atonement for the purported sins of an increasing dissolute and secular society, churches were filled with worshipers from all social strata.[47]

Despite the conservative conclusions reached by Protestant churchmen, concerns for amelioration of spiritual and public health problems were not necessarily mutually exclusive, as illustrated by a series of pamphlets written at Oxford. Although the spiritual failings that led to the scourge held a prominent place, careful record-keeping and epidemiological methodology also led to a number of surprisingly forward-looking conclusions about improving ventilation, drainage of sewage, and other public health concerns.[48] The traditionalist authors were not bound to a fatalistic acceptance of illness, notwithstanding their belief that the epidemic was the will of God.

Among faiths with a highly eschatological bent, cholera was viewed as a portent of the end of days. Many of the features of the disease fit in with received wisdom about the pestilence that was to sweep the world in the era before the final redemption. Indeed, the Talmudic notion that "once the destroyer is set loose on the world, it does not distinguish between good and evil" resonated with what was transpiring.[49] Among Mormons, there was an initial belief that God had designed the plague to sweep away evildoers whilst protecting His righteous from any harm, a theology that was to prove untenable following epidemics that struck Zion's camp and other groups of the migrating faithful in North America.[50] While these ideas were largely borrowed from Old Testament imagery and theology, they did not resonate with Jews at the time.

Eastern European rabbis had little to say from a theological or theodicial standpoint, aside from traditional and somewhat pro forma calls to prayer and supplication.[30,39] A contemporary prayer composed at the height of the epidemic has, from the standpoint of style

and content, little to distinguish it from a liturgical response to any other event.[40] Against the backdrop of the repeated persecutions and suffering that these communities experienced, cholera presented few new themes for reflection or religious thought.

In contrast, rabbinic attitudes in the more Westernized Jewish communities of England and the United States were reflective of both a belief in the ultimately benign nature of divine providence and the opportunity to use the feelings of fear and helplessness as a springboard to both improvements in social justice and a return to traditional religion.[51] One finds few real calls to action in the sermons; as one American rabbi wrote, "all human foresight is in vain to ward off the instruments of vengeance which the Lord holds in his hands." [52] Ironically, Rabbi Salanter, the originator of a system regarded by moderns as morbidly preoccupied with otherworldly notions of sin and punishment, stands out among his contemporaries as *the* paramount crusader for preserving life in this world.

Pragmatic responses to the outbreak received far more emphasis in the Jewish community, as there was extensive precedent in Jewish law for the basic practice of preventative medicine during epidemics. Contemporary rabbinic authorities were aware of their morbidity and mortality,[53] and were in agreement with the establishment of a fairly broad program of sanitary and hygienic measures, including suspending normal mourning and burial practices.[54] Existing practices, such as inspection of meat by the ritual slaughterer, were harnessed and augmented as a potential barrier to infection.[55] Obligations to visit the sick were suspended where an illness was attributed to infectious etiology, and permission was granted even for wholesale abandonment of communities.[56, 57] Even physicians could be barred from the synagogue if suspected of contact with infectious matter.[58] Jewish law appreciated that epidemics were the quintessential "act of God," and prior obligations under monetary or family law could consequently be suspended.[59, 60]

It should be noted, however, that rabbis and scholars often took a direct and proactive role in caring for those afflicted by epidemics, despite the danger involved and even the lack of a normative

obligation to do so. In Lithuania, the city's rabbis took the lead in establishing committees to minister to the sick, and, in fact, Salanter headed the relief committee in Vilna and encouraged his students to participate.[5,6] Similarly, the German sage R. Akiba Eger was reportedly honored posthumously by King Frederick William III of Prussia for his role in caring for the sick during a cholera epidemic.[61] Thus, the rabbinic response was often informed by a direct familiarity with the illness.

JEWISH LAW AND INFECTIOUS DISEASE

Cholera illness itself posed a threat to life that easily passed the Talmudic threshold of a dangerous illness; however, the *threat* of cholera posed a more thorny question. On one hand, the individual in question is completely healthy, and, if not infected, can tolerate the fast easily. On the other hand, he stands in the path of a dangerous epidemic that could reduce a patient from perfect health to death in hours. For a violation as severe as eating on Yom Kippur, does the mere threat of a serious infection trump the sanctity of the day?

In earlier rabbinic sources, the threat of a dangerous infectious illness was sufficient ground to suspend a number of important observances. Traditional stringencies, such as the practice of not eating prior to the completion of shofar blowing on Rosh Hashana, were removed during epidemics for individuals who felt weak.[62] Relatively remote health concerns could trigger the suspension of minor observances or fasts as a precautionary measure, with even the psychological comfort of a susceptible population viewed as sufficient grounds for leniency.[63] More serious violations of Jewish law must reflect a clear and present danger to an existing patient, a concept referred to a *choleh lafaneinu*.[64] Otherwise, one could construct a number of absurd scenarios under which serious violations would be condoned, such as continuous violation of the Sabbath "just in case" a patient were to appear at one's door.

Salanter consulted with doctors prior to his ruling, and in fact instructed his followers that the physicians' advice carried the force

of a Biblical obligation.[6] Medical expertise is valued in Jewish law as one source of empirical evidence that influences a rabbi's decision, such as the necessity of eating on Yom Kippur. However, such advice is rarely elevated to the level of an independent religious obligation. In fact, later authorities expressed deep skepticism about the advice of physicians who were hostile to traditional Judaism, particularly with regard to such issues as eating on Yom Kippur.[65] Moreover, Russian physicians were widely distrusted even from a professional standpoint, and the cholera epidemic did little to enhance their reputation.[66,67] Salanter thus showed an unusual level of deference to medical opinion, no doubt motivated by an overwhelming concern for the well-being of his community.

The importance that Salanter ascribed to the opinions of Vilna's doctors must be tempered by an appreciation of how little contemporary medicine actually knew. Although Russian medicine at the time was less sophisticated than its Western European counterpart,[67] some of the current beliefs seem to have circulated in Lithuania. For example, Salanter's congregants were reportedly advised to walk around in fresh air,[5] advice possibly derived from the soon-to-be debunked miasma theory, although the consequence of the advice, in relieving crowding and close proximity, may have delayed the spread of infection. Certainly, it was more useful advice than what transpired in many Russian provinces, where local priests organized large penitential gatherings that served only to spread the epidemic further.[67]

What is clear is that a logical, unified medical approach to the illness was absent, and even a basic preventative program was decades away. Any use of Salanter's actions as halachic precedent must therefore also take into account the enormous lacuna in medical knowledge that existed at the time.

The claim that Salanter moderated the observance of the fast, sanctioning a modified form of eating under particular circumstances, is more consistent with his legal temperament.[6] His concern for the welfare and health of the congregants was in keeping with his ethical leanings, but in this scenario, his loyalty to Halacha remains

uncompromised. In this case, his adoption of an accepted, albeit lenient view places him well within the mainstream of his contemporaries.[11] It can be broadly stated that Rabbi Israel Salanter, like most nineteenth-century rabbinic decisors, combined a sort of scientific agnosticism about the causes of disease with a pragmatic deference to doctors when the community's needs warranted it. At the same time, they were careful not to allow an epidemic to serve as a spur to the lowering of a community's religious standards, but framed their responses under the banner of a higher religious commitment to preserving life.

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Don't Judge a Book? Surgical Changes to Anatomical Features in Traditional and Modern Thought[1]

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BACKGROUND

The methodology of halakhic decision-making involves the application of traditional values or laws to modern dilemmas. These issues may either be scenarios that by chance simply never arose or situations that could never have occurred due to social, political, or scientific developments. We have witnessed advances over the last half-century in the realm of the medical sciences that have, with no exaggeration, completely undermined and altered the "classical" assumptions, methodology, and practice of medicine. Contemporary rabbinic figures, therefore, must grapple with medical technologies for which there is no real halakhic precedent because they would have been unfathomable even a few decades ago.[2]

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[1] Much of the content of this article originally appeared in J. Wiesen and D. Kulak, "Male and Female He Created Them: Revisiting Gender Assignment and Treatment in Intersex Children," *Journal of Halacha and Contemporary Society* 54 (2007): 5–30.

[2] For a contemporary analysis of situations of changing halakhic decisions in light of changing medical data, see Dr. Edward Reichman, "Don't Pull the Plug on Brain Death Just Yet," *Tradition* 38, no. 4 (2004): 63–64, where he eloquently states: "In the field of contemporary medical halacha, it is not only preferable, but mandatory, to reevaluate the state of medical science when practically applying any legal decisions of the past. Medicine is an evolving science, and our under-

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This tension is acutely felt regarding issue of halakhic medical definitions. It is often unclear whether halakhic medical classifications are the result of the most advanced scientific data available at the time, or strict guidelines for halakhically defining the issue at hand independent of scientific nomenclature. The topic of this paper, the halakhic definition of gender, provides an excellent case study for this issue.

The Rambam (Ishut 2:24–25) states:

> One who has male organs and female organs is called an *androgynous* and is *safek* if it is male or female, and there is no sign by which it would be known conclusively if it is male or female forever. And one who is lacking both male and female signs, rather [its organs are] covered, is called a *tumtum* and it is too a *safek*, but if the *tumtum* is torn and found to be male, he is considered male, and if found to be female is considered a female.

The Rambam is generally understood to mean that gender is defined by the external anatomical features of the individual in question.[3] As such, if both male and female organs are present, the designation of *androgynous* is made. If the reproductive organs are covered, i.e., a *tumtum*, then simply uncovering and revealing the organs is enough to designate the gender of the individual, for that will reveal *de facto* which anatomical features are truly present. Assuming that the

standing of the human body is continually expanding. . . . Had the authorities . . . been presented with the current medical literature, [they would] have decided differently."

[3] *Shu"t Tzitz Eliezer* 11:78 (1); Edan Ben-Ephraim, *Sefer Dor Tahapuchot*, pp.112–115, where a number of responsa on the issue are quoted: *Mishana Halachot* (R. Menashe Klein) 6:47; *She'eilat Shaul* (R. Shaul Breish) E.H. 9. See also the responsa of R. Asher Weiss in the same book, pp. 280–282. This is also the opinion of R. Bleich, *Judaism and Healing*, p. 83, Dr. Abraham Steinberg, "Hermaphrodite" (Description of Hermaphrodites and Their Status in Jewish Law), *Encyclopedia of Jewish Medical Ethics* (New York: Feldheim), p. 465, and R. Abraham Abraham in *Nishmat Avraham*, Yoreh Deah 262:11.

Rambam's definition of gender is solely based on external anatomy, our primary query must be addressed. Was the Rambam simply utilizing the best of the scientific knowledge that was available to him at that time, in which the only reliable markers of gender were the anatomical landmarks, but if more accurate indicators ever became available, such as DNA typing, then would they have been acceptable if not preferred? Or was he issuing a strict halakhic decision, describing precise halakhic criteria for determining gender that are independent of the time, place, or historical context in which they were produced? The former will be referred to as the "flexible read" approach, and the latter as the literalist approach.

This issue is of great significance in contemporary times because a great number of diagnostic modalities exist today which did not in the Rambam's day. The arguments for the utilization of such tools, as well as those prohibiting their usage, particularly regarding DNA testing, have been discussed at length in other contexts.[4]

Proper gender assignment is of great importance for two reasons.[5] First, it is necessary to appropriately classify individuals as male, female, or hermaphrodite (*androgynous*/*tumtum*), due to the myriad of halakhic ramifications thereof. Further, in intersex children, a proper

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[4] See *Techumim* (no. 21, p. 121), where R. Vozhner (along with R. Karelitz and R. Moshe Klein) designates the areas where DNA evidence is acceptable. His position is that, generally speaking, DNA evidence is acceptable in situations where there is no counter-pressure to its ability to conclusively prove certain facts. For example, whereas it is accepted for *aveilut* and *kevurah*, and in certain situations for *yerusha* and even to free *agunot*, it is not in *mamzeirut* (because we try not to assign the status of *mamzeirut* in general) or *harsha'a* (because there is a specific requirement to have two individuals as witnesses). Regarding the utility of DNA testing for paternity, see Avraham Steinberg, "Paternity," *Journal of Halacha and Contemporary Society* no.38 (Spring 1994): 69–84; R. Mordechai Haperin, "*Kevi'at Avahut B'emtzaut Ma'arechet Te'um Harekamot Hamerkazit* (HLA)," *Techumim*, no. 4 and *Assiah,* October 1982, pp. 6–19. For more on inheritance, see R. Tzvi Yehudah Ben Yaakov, "*Kviat Yoresh al smach bedikat DNA*,"*Techumim*, no. 22, pp. 412–426.

[5] For a more complete discussion of the topic, see Wiesen and Kulak, "Male and Female He Created Them" (n. 1 above).

understanding of the individual's gender and the pathophysiology of its condition are crucial for selecting a fitting treatment plan.

THE FLEXIBLE READ APPROACH

As mentioned above, a close analysis of the Rambam provides ample room for one to claim that his criteria were based on the scientific data that were available to him at the time, but would not preclude other diagnostic methods. Were he aware of the highly sensitive testing modalities commonly utilized today, such as DNA testing, then he would certainly have allowed them to be implemented for gender determination. For one, he does not mention any explicit Biblical verse or traditional ruling to this effect, nor does one exist in the rabbinic literature, at least not to the author's knowledge. The Rambam does not reference a specific source to buttress his opinion. Further, the Rambam was a talented and progressive physician who often incorporated cutting-edge scientific knowledge into his halakhic positions. An issue like gender determination, which at face value is a description of a scientific reality, would likely be defined by him scientifically. Finally, a close read of the Rambam shows that he never explicitly states that gender is *only* to be determined anatomically. While he accepts as a given the diagnostic usage of external anatomy, that is likely because there was no other option available. In the absence of a specific statement defining gender only in terms of the external anatomy, one could conclude that as other means for determining gender become accepted as the scientific standard, as DNA and chromosomal testing have today, that those tools would also be taken as a given as a means of establishing gender.

A number of authorities accept DNA testing in gender determination, both as primary and secondary (*l'chatchila* and *b'dieved*) means. R. Moshe Tendler believes that gender identification is best achieved by DNA testing, in conjunction with a complete physical, radiological, and systemic assessment.[6] R. Asher Weiss believes

[6] Email communication on November 5, 2006.

that DNA testing can be utilized as a confirmatory test in gender assignment, but not as the primary modality.[7] Both of these opinions allow usage of DNA testing in some capacity, presumably believing that the Rambam would not contend against today's diagnostic capabilities, which are clearly more accurate than what was available to him.

THE LITERALIST APPROACH

A more conservative reading of the Rambam would maintain that *only* external anatomical features could be used in determining the gender of the individual in question.[8] This would preclude the use of any modern imaging, such as ultrasound or computed tomography (CT), DNA or genetic tests, or hormone or enzyme assays. This could be for one of three reasons:

1. The Rambam, in essence, issued a strict halakhic ruling that only external anatomical features are recognized by halakha to determine gender.
2. Even if the Rambam himself might have allowed these other testing methods had he been aware of them, we do not have the ability to "put words into his mouth." All we are left with, then, is what he assumed, that gender classification is done via anatomical features.
3. The Rambam might have allowed other tests, but *these* particular tests are all invalid for other reasons (e.g., DNA testing is never recognized by halakha).

R. Eliezer Waldenberg maintains one of the most extreme positions.[9] He was asked what the status was of a child who had the external appearance of a female, but was found to have an unde-

[7] Responsum of R. Asher Weiss in *Sefer Dor Tahapuchot*, pp. 280–282.
[8] See n. 3.
[9] *Shu"t Tzitz Eliezer* 11:78 (1).

scended testicle and to be genetically male. He responded that because the external characteristics of the child were female, and the Rambam's position is that gender is determined exclusively by the superficial appearance, the child was completely female—not even a hermaphrodite. Individuals need not resort to "special investigations," such as DNA and imaging, if the gender of the individual is obvious to the naked eye. Further, because the child is considered undoubtedly female, the internal testicle could be removed without any concern for castration.

R. Waldenberg goes further and states that, because the gender is determined only by the external features, then were a surgeon to decide that the best course of action would be to reconstruct the child as a male, then the child would postoperatively be considered undoubtedly male by virtue of its external appearance! This is an extremely literal interpretation of the Rambam's rule, applied in a monumental and progressive fashion. Because the child's gender is determined exclusively by anatomical features, were the reproductive organs to change, the child's gender would change as well, and the child would have the complete halakhic status of its new state.

The *Tzitz Eliezer*'s novel application of the Rambam's law, allowing surgical procedures to change the gender of the child in question, is discussed regarding sex-change operations in adults as well. If a child's gender could be altered surgically, perhaps R. Waldenberg would concede that even an adult who undergoes a gender transformation would also be considered to have a new halakhic gender. Dr. Avraham Steinberg maintains that according to R. Waldenberg, any surgery performed on an individual has the capacity to change the gender of a person, including trans-gender operations, as the only determination of a person's gender is his or her ultimate anatomy.[10] Thus, a man who undergoes a sex-change operation would then be exempt from all commandments that women are not obligated in. R. Yosef Shapran, however, does not believe that R. Waldenberg's

[10] "Surgery" (Transsexual Surgery), *Encyclopedia of Jewish Medical Ethics* (New York: Feldheim), p.1037.

responsa would accommodate such an extension, as he was dealing only with the particular case of an intersex baby who had dual or ambiguous genitalia.[11] In the case of an adult who undergoes a surgical procedure, there is no evidence that R. Waldenberg would agree that his or her halachic gender could be changed.

CONCLUSION

In the context of this small topic, we have analyzed a fundamental question regarding halakhic decision-making in situations where a particular precedent has been set, but is challenged by modern technological advances that may undermine the traditional criteria. Namely, gender has always been determined anatomically, either because it was the best scientific information available or because the true halakhic definition of gender is the external appearance. While some accept modern diagnostic modalities as a means of precisely clarifying gender, others maintain strict adherence to the classical teachings, though often with novel applications, such as the *Tzitz Eliezer*.

This is only one of many issues that have arisen in the last half-century in the domain of medical halakha, where traditional definitions and rulings have been challenged by the ever-advancing medical technology we are privy to. Here the famous comment of the *Tiferet Yisrael* is applicable, that "Anything for which there is no reason to forbid is permissible with no need for justification, because the Torah has not enumerated all permissible things, rather forbidden ones."[12] In other words, in the absence of a specific prohibition that would be violated, Judaism should welcome scientific advances and work to incorporate them into our lives. In this issue, as in all others, the challenge before us is to integrate the traditional methodologies with the modern diagnostic and therapeutic alternatives available in a halakhically acceptable manner.

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[11] R. Y. Shapran, " *Nituach l' hachlafat hamin*," *Techumim* no. 21.
[12] Yadayim 4:3.