Journal of Halacha and Contemporary Society

Number I
Spring 1981/Pesach 5741

published by
Yeshiva Rabbi Jacob Joseph

edited by
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TO OUR READERS:

The complexities of life in modern society offer many challenges to the individual seeking to come to terms with the demands of rapidly changing realities. In particular, the Torah-observant Jew seeks to accomodate shifting moral issues to the dictates of eternal religious values.

In the centuries of the Diaspora, Rabbis and scholars have always addressed the problems facing Jews in an alien society in thousands of Responsa and compendia of Jewish law and philosophy. Unfortunately, this vital literature which is so pertinent to the existential needs of the observant Jew, is virtually inaccessible to the average layman, who is not familiar with its terminology and techniques. Thus, moral and ethical issues are discussed in society, without the observant Jew having access to that vast body of information which would provide understanding of the authentic Jewish position on issues facing our society.

It is the purpose of this Journal to study the major questions facing us as Jews in the twentieth century, through the prism of Torah values. We will explore the relevant Biblical and Talmudic passages, and survey the halachic literature including the most recent Responsa. The Journal of Contemporary Halacha does not in any way seek to present itself as the halachic authority on any question, but rather hopes to inform the Jewish public of the positions taken by Rabbinic leaders over the generations.

A special debt of gratitude is owed to the Members of the Board of the Yeshiva Rabbi Jacob Joseph for their financial support in bringing this project to fruition. I cannot find the words to convey my deep appreciation in particular to Dr. Marvin Schick, President of Yeshiva Rabbi Jacob Joseph, without whose vision and dynamic leadership this endeavor would never have been initiated or completed. My appreciation also to my wife for her patience and assistance in the preparation of this volume.

Alfred S. Cohen

TABLE OF CONTENTS

Rabbi J. David Bleich

The Prohibition Against Intermarriage

Among Jews no practice is more widely abhorred than is intermarriage. Commitment to take as a marriage partner only a fellow member of the Jewish community is not only a matter of religious obligation but the bedrock of Jewish ethnic identity.

A popular folk saying observes that wherever there are two Jews, there are three opinions. It seems that in the area of Halakhah the number of opinions often increases geometrically according to the number of authorities writing about or discussing any given topic. In the area of intermarriage, this is simply not the case. There is little, if any, disagreement, and there are very, very few hairs to split.

There is a well known ancedote about a modern synagogue that was wont to conduct annual meetings. Each year

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the chairman of each of the standing committees was called upon to deliver a report. Year after year, the chairman of the Ritual Committee was called upon, and year in, year out, he stood up and delivered a two word report: *"Men davent*—we pray." Then, one year, after the composition of the congregation had undergone a radical change, he rose at the annual meeting and delivered a three word report. On that occasion he declared: *"Men davent nisht!"* The question of intermarriage can be dealt with quite briefly: *"Men tor nisht!*—It is not permitted!" In reality there is very little more to say about the subject. *"Ha-mefursamot einan tzrikhot ra'ayah*—Matters which are well known do not require substantiation."

Yet, although aversion to intermarriage is universally recognized, the sources and nature of the halakhic prohibitions surrounding intermarriage are less widely known, even by those throughly dedicated to a Jewish life-style. Indeed, while Jewish law clearly and unequivocally forbids intermarriage, the biblical source of this prohibition has been a matter of considerable debate and discussion among rabbinic authorities over the centuries.

There are grounds for assuming the existence of an interdiction against intermarriage pre-dating the Sinaitic covenant. This is manifest in the biblical narrative concerning the incident which occurred between Dinah, the daughter of Jacob, and Shechem, the son of Hamor, as well as the subsequent narrative concerning Tamar, the daughter-in-law of Judah. The Torah censures the actions of Shechem in harsh terms: *"Ki nevelah asah be-Yisra'el*—He has committed a heinous deed in Israel; *ve-chen lo ye'aseh*—and such a deed cannot be sanctioned" (Genesis 34:7). The *Brisker Rav,* Rabbi Yitzchak Ze'ev Soloveichik, examines this verse and offers an illuminating interpretation. Given the structure of society in antiquity, Shechem's action was not entirely unparalleled. It must be remembered that Hamor ruled the area as an abolute monarch.

Shechem was a member of the aristocracy, a princeling, and, quite apparently, could do as he wished with any damsel in his father's domain. Why, then, is the deed deemed so heinous? The *Brisker Rav* points out that the Gemara, *Avodah Zarah* 36b, declares that at an early point in history, the Court of Shem, the son of Noah, promulgated a decree against intermarriage. When Tamar is found to be with child, Judah passes judgement: "Bring her forth, and let her be burnt." Tamar is condemned to death but her punishment is, in terms of Halakhah, incongruous. She was ostensibly a widow at the time. Fornication is not a capital transgression. The Gemara indicates that Tamar was punished, not for simple harlotry, but for the infraction of having violated the edict of the *Bet Din* of Shem, i.e., for apparently consorting with a gentile. The Gemara declares that even in the pre-Sinaitic era there existed a prohibition forbidding members of the family group from which stemmed the progenitors of the people destined to become the community of Israel from intermarrying with members of a gentile nation. From the early dawn of history the people of Israel sought to preserve their ethnic purity and legislated against intermarriage.

A decree of the Court of Shem does not, however, establish a biblical prohibition. Subsequently, we find Ezra and later Nehemiah decrying intermarriage, but in neither instance do we find an explicit reference to a biblical prohibition. Nehemiah goes so far as to pronounce a curse: "In those days also saw I the Jews that had married women of Ashdad, of Ammon, and of Moab . . . And I contended with them and cursed them . . ." (Nehemiah 13:23-25). Since Nehemiah pronounces a curse upon those who behave in this manner, there is strong reason to assume that such conduct must have been banned by virtue of an explicit prohibition. The question then is: where is the scriptural locus of the prohibition concerning intermarriage?

1. Lo Titchaten Bam

A. Rambam

The most obvious source of this ban is Deuteronomy 7:3: "Neither shalt thou enter into marriage with them; thy daughter thou shalt not give unto his son, nor his daughter shalt thou take unto thy son. For he will turn away thy son from following Me, that they may serve other gods." However, the source which appears to be the most evident is not necessarily the most correct. The exegetical problem attendant upon this apparently explicit reference is whether the prohibition encompasses only the "Seven Nations" who at that time inhabited *Eretz Yisra'el,* or whether it includes all gentile nations as well.This verse is immediately preceded by an introductory sentence in which the Torah states, "When the L-rd thy G-d shall bring thee into the land whither thou goest to possess it, and shall cast out many nations before thee . . . seven nations greater and mightier than thou." The prohibition occurs within a specific historic context, viz., entry into the promised land and conquest of the seven indigenous nations who inhabited *Eretz Yisra'el.* These seven nations are specifically enumerated in this verse. It is in this context that the Torah admonishes, "Neither shalt thou enter into marriage with them."

The Gemara, *Avodah Zarah* 36b, records a difference of opinion regarding precisely this point. The Gemara states ex-

plicitly, "The prohibition against marrying non-Jewish women is biblical as it is written, 'Neither shalt thou enter into marriage with them.' " According to the Sages, the biblical prohibition is limited to the Seven Nations specifically enumerated in this verse. According to the opinion of the Sages, marriage with members of other gentile nations is forbidden only by virtue of rabbinic decree. R. Shimon ben Yochai disagrees with the Sages and maintains that the concluding phrase of this verse, "For he will turn thy son from following Me," serves to broaden the prohibition to encompass marriage with members of other nations as well. R. Shimon ben Yochai reasons that Scripture explicitly states the rationale underlying the prohibition as a means of extending the ban to encompass all non-Jews. The fear expressed in this explanatory phrase certainly is not limited to marriage with a member of one of the Seven Nations, but is a valid consideration with regard to marriage between a Jew and any non-Jew.

In examining Rambam's codification of this law in his *Mishneh Torah, Hilkhot Issurei Bi'ah* 12:1, we find that he rules in accordance with the opinion of R. Shimon ben Yochai:

> A Jew who cohabits with a non-Jewish woman of any of the gentile nations in the manner of matrimony, or a Jewish woman who cohabits with a non-Jew in the manner of matrimony incurs the biblical punishment of lashing, as it is written, "Neither shalt thou enter into marriage with them; thy daughter thou shalt not give unto his son, nor his daughter shalt thou take unto thy son." Both the Seven Nations and all [other] nations are included in this prohibition. This is made explicit through Ezra, "And that we would not give our daughters unto the peoples of the land,

nor take their daughters for our sons." (Nehemiah 10:31)

The quotation of Nehemiah 10:31 is obviously intended to establish that the prohibition against intermarriage applies to all gentile nations. In ruling in this manner, Rambam follows the opinion of R. Shimon ben Yochai who maintains that the prohibition, "Neither shalt thou enter into marriage with them," is applicable not only to the Seven Nations indigenous to the land of Canaan, but applies to all non-Jews equally.

Rambam's formulation of this ruling, however, raises a separate problem with regard to the question of intermarriage. He declares that cohabitation is biblically forbidden, but he qualifies this statement by adding that only cohabitation *derekh ishut*—in the manner of matrimony—is forbidden. Rambam was obviously troubled by the usage of the phrase *"lo titchaten*—thou shalt not enter into marriage" in conjunction with the prohibition against intercourse between a Jew and a non-Jew. The use of the phrase *"lo titchaten"* in this context is a halakhic anomaly. It is axiomatic that there can be no *chitun*, i.e., marriage in the halakhic sense, between a Jew and a non-Jew. The institution of *kiddushin* (matrimony) as a category of Halakhah has no application insofar as non-Jews are concerned. A marriage contracted between a Jew and a non-Jew requires no *get* (religious divorce) for its dissolution, since it is a nullity *ab initio. Kiddushin*, with all its halakhic ramifications, applies only to a matrimonial relationship in which both parties are members of the Jewish faith-community. Yet, paradoxically, the Torah, in speaking of forbidden intercourse between a Jew and a non-Jew, states, "Thou shalt not enter into *marriage* with them." Rambam resolves this difficulty by postulating that this term is not to be understood as a reference to matrimony in the narrow legal sense, but as a term designed to

describe the conjugal context within which cohabitation with a non-Jew is proscribed. Thus the prohibition *lo titchaten bam* is understood as referring not simply to any act of cohabitation, but rather to cohabitation *"derekh ishut"*, i.e., in a manner analogous to matrimony, viz., within the context of a permanent conjugal relationship.

Rambam's position is very clear. Intermarriage between a Jew and and any non-Jew is biblically proscribed; cohabitation under those conditions constitutes the violation of a negative commandment and carries with it the penalty of corporal punishment. The biblical prohibition is limited to cohabitation which takes place within the context of a permanent conjugal relationship, a state which, from the point of view of Jewish law, is roughly analogous to the secular notion of a common-law marriage.

B. Tur

Tur Shulchan Arukh, Even ha-Ezer 16, disagrees with Rambam with regard to two salient points. Firstly, the *Tur* disagrees with the Rambam in maintaining that the definitive ruling of Halakhah, and hence the normative position of Judaism, is not in accordance with the opinion of R. Shimon ben Yochai, but rather is in accordance with the opinion of the Sages. Accordingly, the prohibition "Neither shalt thou enter into marriage with them" is to be understood as referring only to intercourse with members of the Seven Nations who inhabited *Eretz Yisra'el* at the time of entry into the promised land, but is not applicable to members of other non-Jewish na-

tions. Secondly, the *Tur* understands the words, *"lo titchaten*—thou shalt not marry" quite literally as referring to actual *chitun*, i.e., marriage in the technical halakhic sense of the term. Since there cannot be a marriage, in the halakhic sense of the term, between a Jew and a non-Jew, the position of the *Tur* is that the prohibition must of necessity be limited to marriage between a Jew and a member of the Seven Nations who has converted to Judaism. The *Tur* thus understands the prohibition *"lo titchaten"* as referring to a) the Seven Nations and b) the Seven Nations *be-gerutan*—only subsequent to their conversion. According to the *Tur*, the prohibition "Neither shalt thou enter into marriage with them" applies only after one of the members of the seven indigenous nations of the land of Canaan has converted to Judaism. Prior to conversion the prohibition *"lo titchaten bam"* simply does not apply. Hence the *Tur* declares:

> It appears to me, that [this prohibition] applies only to the Seven Nations for we do not rule in accordance with R. Shimon ben Yochai. And even with [members of] the Seven Nations there are no lashes for [the transgression] of *lo titchaten* other than after they have converted. However, while they are gentiles, "marriage" is not possible.

Nevertheless, the severity of the stricture against intermarriage tends to indicate that, even according to the *Tur*, some form of biblical prohibition against intermarriage with non-Jews who are not members of the Seven Nations must exist. The question to be resolved is the nature of the biblical prohibition.

2. Kana'im Poge'im Bo

A. The Prohibition

Although the prohibition is not expressly formulated in Scripture, the action of Phinehas, described in Numbers 25:6-8, serves to establish that cohabitation with a non-Jewess is proscribed, at least under some circumstances. The concept of *"kana'im poge'im bo"* is one which is well known to students of Halakhah. Halakhah prescribes that, subject to certain limitations, a Jew who is apprehended *in flagrente delicto* in the act of cohabiting with a non-Jewess may be executed summarily. Translated literally, *"kana'im poge'im bo"* means that zealots may take justice into their own hands and may execute the transgressor on the spot. There are, to be sure, many halakhic fences which serve to limit implementation of this principle. First, punishment may be meted out only while the act is actually in the course of being performed. According to some authorities, the usual *hatra'ah* or warning must be administered.[1] Most significantly, the rule which applies is: *"Halakhah ve-ein morin ken"*; while the punishment is justified, no one may be instructed to carry it out. Nevertheless, a person who acts in accordance with this principle acts in accordance with Halakhah. The Gemara, *Sanhedrin* 82a, describes Phinehas' action with regard to Zimri as having been

1. R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer*, I, no. 38, citing Rashi, *Sanhedrin* 81b, and the reported view of R. Shlomo Heiman, declares that such action is permitted only to "zealots," defined as *kesherim* whose motives are entirely noble and whose intentions are exclusively for the sake of Heaven.

based upon this principle. Zimri was engaged in an act of fornication with a Midianite woman and, while yet in the midst of the coital act, was executed by Phinehas.

It certainly stands to reason that a breach of law punishable by death at the hands of a zealot should not go completely unpunished in the absence of a zealot who feels called upon to act summarily. The Gemara, *Sanhedrin* 82a, states that the punishment for such a deed is *karet*, death at the hands of Heaven. In support of this statement the Gemara cites the verse, "Judah hath dealt treacherously, and an abomination is committed in Israel and in Jerusalem; for Judah hath profaned the holiness of the L-rd which he loveth, and hath married the daughter of a strange god. May the L-rd cut off to the man that doeth this" (Malachi 2:11-12). In rabbinic literature this punishment is referred to as *karet me-divrei kabbalah*, death at the hands of Heaven as recorded in the words of the Prophets.

The punishment to which Malachi refers is incurred not only by one who is guilty of public cohabitation with a member of the Seven Nations, but also by one who cohabits with *any* gentile woman. It is clear that this punishment applies to cohabitation with any gentile woman for two reasons:

1. The narrative concerning Phinehas, described as an application of the principle of *kana'im poge'im bo*, involved Cozbi, the daughter of Zur, a Midianite woman. Midian was not one of the Seven Nations indigenous to the land of Canaan. The Gemara states that all persons subject to execution at the hands of *kana'im* are culpable with regard to *karet*. It follows, therefore, that death at the hands of Heaven is incurred by one who consorts with any non-Jewess.

2. Malachi inveighed against intermarriage in a historical epoch during which the Seven Nations were no longer extant. Sennacherib, king of Assyria, conquered virtually all of the civilized world of his day and in order to solidify his rule engaged in massive population exchanges (*Yadayim* 4:4;

Berakhot 28a; and *Yoma* 54a). As a result, the Seven Nations, which had originally inhabited Canaan, are no longer ethnically identifiable. Malachi, who lived much after the reign of Sennacherib, could not possibly speak of the Seven Nations as contemporaneous peoples. Therefore, it is clear that, in admonishing his contemporaries and in announcing that the punishment of *karet* would be the fate of those who consort with gentile women, Malachi refers to all gentiles, not merely to members of the Seven Nations.

The problem, then, is how is it possible to establish a biblical prohibition on the basis of a prophetic verse? The commandments and legal strictures of Judaism are contained in the Mosaic code as recorded in the Pentateuch. The Gemara, *Shabbat* 104a, unequivocally declares that the Prophets had no license to establish novel prohibitions which are not contained in the Pentateuch; they may make no additions to the Law revealed at Sinai. Therefore, since Malachi describes cohabitation with a non-Jewess as punishable by death at the hands of Heaven, it follows that a biblical prohibition must have already existed.

Rambam, in his *Commentary on the Mishnah, Sanhedrin* 9:6, and Ramban, in his commentary on Rambam's *Sefer ha-Mitzvot*, the second *shoresh*, resolve this problem by explaining that there did indeed exist a prohibition prior to Malachi's exhortation. This prohibition, although unrecorded in the Pentateuch, has the status of a *halakhah le-Mosheh me-Sinai*, one of the manifold ordinances handed down to Moses at Mount Sinai. As such, this prohibition constitutes an intrinsic component of the Oral Law. Thus, the prohibition against cohabitation with a non-Jewess is endowed with the status of a biblical law since it was transmitted by Moses to the community of Israel. Malachi's admonition served merely to record what, until that point in Jewish history, had been an oral tradition. The

identical thesis, although in a different context, is set forth by the Gemara, *Sanhedrin* 22b.

B. Public and Private

It has been established that cohabitation with a gentile woman is, at least under some circumstances, forbidden by virtue of divine command. The question requiring further analysis is whether the prohibition with regard to cohabitation is limited to acts of public fornication or whether it emcompasses private acts as well. The halakhic category of *kana'im poge'im bo* applies only to instances of public fornication. The zealot is granted license to conduct a summary execution only if the culpable act is a brazen and public one. The zealot dares not act in this manner if the transgression is performed in private. The question, then, is whether the punishment of *karet* to which the Gemara and Malachi refer, and the prohibition for which this punishment is incurred, are similarly limited to instances of public fornication, or whether death at the hands of Heaven as well as the prohibition for which such punishment is decreed, are attendant upon private acts of fornication as well.

It is precisely this point which is the subject of considerable dispute among halakhic authorities. Two early authorities, Rambam and *Nemukei Yosef* in their commentaries on *Sanhedrin* 82a as well as *Sefer ha-Chinnukh*, no. 420, followed by *Chelkat Mechokek*, in the latter's commentary on *Even ha-Ezer* 16:5, and apparently by Rema as well, maintain that the punishment of *karet* is limited to acts committed in public. Another early authority, Rabbenu Nissim, in his commentary on *Sanhedrin* 82a, states that he is in doubt with regard to this point. *Bet Shmu'el*, in his commentary on *Even ha-Ezer* 16:4, cites *Derishah* and *Bach* in remarking that insofar as the biblical prohibition and the prescribed punishment

are concerned, there can be no difference between public and private acts. Insofar as the provision of *kana'im poge'im bo* is concerned, the zealots may take the law into their own hands only in matters affecting public morality; but, insofar as the intrinsic prohibition is concerned, there exists no essential difference between a public act and a private one. Accordingly, rules *Bet Shmu'el,* the prescribed punishment for cohabitation with a non-Jewish woman is death at the hands of Heaven, whether the act is committed in public or in private.

However, insofar as the prohibition attendant upon intermarriage is concerned, this controversy is entirely academic. This highly significant point is made by the nineteenth-century authority, *Maharam Schick,* in two separate responsa, *Even ha-Ezer* no. 37 and no. 155, as well as by his contemporary, R. Zevi Hirsch Chajes, in a footnote appended to the latter's *Minchat Kena'ot (Kol Kitvei Maharatz Chayes,* II, 998). The principle established independendently by these authorities is that cohabitation within the context of matrimony, as that term is conventionally understood, must be considered to be a public act. The rationale underlying this thesis is not at all difficult to fathom. It is a principle of Halakhah that certain acts, while ostensibly performed in private, are nevertheless considered to be public in nature. Thus, with regard to certain aspects of the law of testimony it is not necessary for witnesses to have direct knowledge of the sexual act itself; witnesses testifying to seclusion of the two parties are deemed *ipso facto* to be witnesses to the sexual act. The Gemara, *Sanhedrin* 74b, describes Esther's cohabitation with Ahasuerus as a public act. Although there is no reason for assuming that Ahasuerus violated prevailing norms of modesty in his relationship with Esther, the Gemara finds it necessary to seek grounds justifying what is described as public adultery on the part of Esther. Here, then, is clearly a case of an ostensibly private act which is halakhically categorized as a public act.

The reason for this categorization is quite simple. A Jew is obligated to suffer martyrdom rather than renounce his faith-commitment. He is therefore obliged to allow himself to be killed rather than permit himself to be coerced into committing a transgression in public when such an act is construed as a renunciation of Jewish teaching and practice. This obligation is mandated by the commandment concerning *kiddush ha-Shem,* sanctification of the Divine Name. It is, of course, necessary to establish the precise definition of a "public" act for purposes of this obligation. The commandment is couched in the words, "And I shall be sanctified among the children of Israel" (Leviticus 22:32). On the basis of Talmudic exegesis, the Gemara, *Sanhedrin* 74b and *Berakhot* 21a, establishes that a Jew is obligated to sacrifice his life rather than profane the Name of G-d in this manner only if it is demanded that the act of profaning the Name of G-d be performed publicly in the presence of the "congregation". The term *"ẻdah"* or congregation is defined as denoting a group of ten Jews. An act is, therefore, considered to be performed in public if it is witnessed by ten people. Nevertheless, *Shakh, Yoreh De'ah* 154:5, rules that for purposes of the *mitzvah* of sanctification of the Divine Name, an act is considered to be a public one not only if it is witnessed by ten persons, but even if the act is merely *known* to ten people. A transgression of which ten people have knowledge constitutes a "public" act of profanation of the Divine Name.

Of crucial significance in defining the nature of the prohibition against cohabitation with gentile women is the terminology employed by Malachi in castigating those who transgressed in this manner. Malachi, assailing the abominable nature of this deed, declaims ". . . for Judah hath profaned the

holiness of the L-rd." This sexual relationship is described by the prophet as *chillul ha-Shem,* profanation of the Divine Name, and hence as being tantamount to a renunciation of Judaism. Accordingly, both *Maharam Schick* and R. Zevi Hirsch Chajes argue that, even assuming that the prohibition against cohabitation with a non-Jewess is limited to public acts, consorting with a gentile woman within the context of a matrimonial relationship constitutes the transgression of a biblical prohibition. Both authorities argue that intermarriage, despite the absence of sexual acts of a public nature in the literal sense, constitutes a public profanation of the Divine Name. The essence of matrimony is the establishment of a permanent conjugal relationship between two individuals. Cohabitation between marriage partners is presumed as a matter of course and hence is a matter of public knowledge. Therefore, marriage to a non-Jewish woman is tantamount to public cohabitation even though no person has seen the couple actually engaged in a sexual act. For this reason, cohabitation within the context of intermarriage constitutes a violation of a biblical prohibition punishable by death at the hands of Heaven according to all authorities, including those who maintain that private sexual acts do not fall within the parameters of this prohibition.

C. Women

One further point requires clarification. The provision for *kana'im poge'im bo* applies only to the case of a Jewish male who consorts with a non-Jewish female. What is the status of a Jewish woman who intermarries or publicly consorts with a non-Jewish male? Ramban, in his *Milchamot ha-Shem,*

Sanhedrin 74b, declares that the punishment of *kana'im poge'im* does not apply to a Jewish woman who cohabits with a gentile. A number of early authorities (including Rambam, cited by Rabbenu Nissim, *Yoma* 82a; *Chiddushei ha-Ran, Sanhedrin* 74b; *Nemukei Yosef, Sanhedrin* 74b; and *Tosafot, Kiddushin* 75b) maintain that there is no *chiyyuv karet* associated with such an act, i.e., that the act is not punishable by death at the hands of Heaven and, indeed, is not the subject of a biblical proscription.[2] However, *Hagahot Mordekhai, Yevamot* 4:108, asserts that *kana'im poge'im* applies to a Jewess who consorts with a gentile no less than to a male Jew who consorts with a non-Jewess.[3] *Chazon Ish, Even ha-Ezer* 4:10, expressly indicates that, according to this opinion, the punishment for a Jewess who consorts publicly with a gentile is identical in every respect to that of a Jewish male who consorts with a non-Jewish female.[4]

Maharam Schick demonstrates that even those previously cited early authorities who maintain that a Jewish woman who consorts with a gentile does not incur the penalty of *karet* would nevertheless agree that, despite the absence of this severe punishment, the act constitutes a violation of a divine edict. The biblical prohibition against intercourse with gentiles applies equally to both sexes according to *Maharam Schick,*

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2. See also *Noda bi-Yehudah,* II, *Even ha-Ezer,* no. 150, and R. Israel Jacob Algazi, *Kehillat Ya'akov, Tosafot de-Rabbanan,* sec. 77.
3. See *Teshuvot Bet Yitzchak, Even ha-Ezer,* I, no. 29, sec. 1, who maintains that this is also the position of *Tosafot, Yevamot* 16b. See also the similar opinion of *Maharik, shoresh* 175, and R. Joseph Saul Nathanson, note to *Noda bi-Yehudah,* II, *Even ha-Ezer,* no. 150.
4. See also R. Ezriel Hildesheimer, *Teshuvot Rabbi Ezriel, Yoreh De'ah,* no. 189.

even though the punishment for a male is more severe than for a female. In demonstrating the cogency of this conclusion, *Maharam Schick* refers to the previously cited verse, Nehemiah 10:31. It is this verse which is adduced by Rambam in order to show that the prohibition encompasses all gentiles. Nehemiah refers explicitly to both "our daughters" and "our sons" thereby demonstrating that both Jewish males and Jewish females are forbidden to cohabit with non-Jews.

Another authority, *Avnei Milu'im, Even ha-Ezer* 16:1, adduces yet another proof in establishing a biblical commandment prohibiting a Jewess from cohabiting with a non-Jew. According to *Avnei Milu'im,* the primary reference of the verse "For he will turn away thy son from following Me" (Deuteronomy 7:3) is to a Jewess who consorts with a non-Jew and applies only secondarily to a Jew who cohabits with a gentile woman. In the latter case, argues this authority, a child born of the liaison is a gentile and cannot properly be spoken of as "*thy* son", since Jewish law recognizes no relationship between a Jewish father and his non-Jewish progeny. However, since the child of a Jewish mother is a Jew even if the father is a non-Jew, a filial relationship does exist in Jewish law between the child and the mother. Accordingly, concludes *Avnei Milu'im,* in speaking of intermarriage as being forbidden "For he will turn away *thy* son from following Me" the verse must be addressed primarily to Jewish women. Hence, this verse serves to establish the existence of a biblical prohibition against cohabitation between a Jewess and a gentile.

3. Lo Yiheyeh Kadesh

It may cogently be argued that yet another prohibition is associated with the act of cohabitation with a gentile. This

prohibition is based upon Deuteronomy 23:18: *"Lo tiheyeh kedeshah mi-benot Yisra'el ve-lo yiheyeh kadesh mi-benei Yisra'el."* This passage is rendered in standard English translation as "There shall be no harlot of the daughters of Israel, neither shall there be a sodomite of the sons of Israel." Rashi, following one opinion presented in *Sanhedrin* 54b, does indeed understand the term *"kadesh"* as referring to a male prostitute who makes himself available for homosexual activity. Rambam, *Sefer ha-Mitzvot, lo ta'aseh,* no. 350, records the latter part of this verse as an injunction against homosexual relations. However, this passage was not universally understood in this manner by Jewish exegetes. Rambam, *Hilkhot Ishut* 1:4, understands the first section of this verse as establishing a prohibition against fornication. Sexual intercourse between unmarried persons constitutes a violation of this commandment according to Rambam. *Targum Onkelos* translates this verse as follows: "No Jewish woman of the daughters of Israel shall marry a slave and no male of the children of Israel shall marry a female slave." *Maharam Schick* and others point to the fact that the verse in the original Hebrew does not specify cohabitation with a slave.[5] They observe that *Targum Onkelos* speaks of a slave simply as an example of the type of sexual liaison to which reference is made. Instead of rendering a literal translation the *Targum* offers an example of a sexual relationship between individuals who cannot be united in matrimony with the implication that all comparable relationships are likewise included in the prohibition. Fornication between an unmarried male and an unmarried female does not fall within the scope of this prohibition according to the *Targum* because

5. See commentary of Ramban, *ad locum.*

such persons are eligible to contract a valid marriage. The prohibition, for the *Targum,* is limited to a situation in which matrimony is halakhically precluded but includes cohabitation between any male and female who are halakhically incapable of contracting a valid marriage. A liaison between a Jewish male and a non-Jewish female slave or between a Jewish woman and a male slave is merely an instance of such a relationship. According to this analysis, *Targum Onkelos'* example of a slave serves as a general paradigm applying to all situations in which marriage between the two individuals is a halakhic impossibility. It follows, therefore, that since Jewish law does not under any circumstances recognize the existence of a matrimonial relationship between a Jew and a non-Jew, the prohibition *"lo yiheyeh kadesh"* is applicable in all cases of intermarriage.

4. Rabbinic Edicts

In addition to the biblical prohibitions which have been discussed, cohabitation with non-Jews is proscribed by virtue of two rabbinic edicts. The first of these, recorded in *Avodah Zarah* 36b, is the previously mentioned decree of the Bet Din of Shem forbidding a Jewish woman to consort with a non-Jew. The Gemara, *Sanhedrin* 82a, reports that subsequently, during the Maccabean period, the *Bet Din* of the Hasmoneans similarly promulgated a decree forbidding sexual intercourse between a Jewish male and a non-Jewess. The latter decreee forbids all acts of fornication and, moreover, prescibes corporal punishment for violation of this edict. There can, then, be no question that not only is intermarriage between a Jew and a non-Jew for-

bidden, but that all forms of sexual intercourse between a Jew and a non-Jew constitute a violation of Jewish law.

* * *

To be sure, an analysis of halakhic prohibitions and their ramifications does nothing for the resolution of a problem which currently has reached epidemic proportions. The solution lies in an undertaking of an entirely different nature.

We would do well to focus our attention upon the last chapter of the Book of Nehemiah in which Nehemiah inveighs against intermarriage. Upon careful examination of the text one notes that before addressing himself to the problem of intermarriage, Nehemiah first expresses his concern regarding Sabbath observance. He addresses the populace and tells them of how he saw people publicly carrying their wares in the streets of Jerusalem for sale on the Sabbath. Before he speaks of intermarriage and before he admonishes his listeners to put away their non-Jewish wives, he tells them how he personally went and locked the gates of the walls surrounding Jerusalem so that no one would be able to bring merchandise into the city on the Sabbath. Only then does he address himself to the problem of intermarriage. Nehemiah was very well aware of the fact that, before one attacks the problem of intermarriage, it is first necessary to do something about the problem of commitment. Only after the problem of commitment has been addressed in a resolute manner can one address oneself to the problem of intermarriage.

There is a well-known story which bears repetition.[6] The

6. See Immanuel Jakobovits, "The Problem of Intermarriage," transcript of the Annual Lecture of the Jewish Marriage Education Council, London, 1967, p. 14.

anecdote involves a young man who arrives at a train station and, spying an elderly gentleman, walks over to the gentleman and asks him what time it is. The elderly man just stares at him and does not answer. The young man asks a second time, "What time is it, please?" and, again, no reply. The young man asks a third time. Finally, he says, "I asked you nicely and politely to tell me the time. Why don't you answer?" Thereupon, the elderly gentleman turns to the young man and says: "My friend, if I tell you the time, then, when the train arrives, you will board the train with me and you will sit down next to me. You will begin talking to me and then you will ask me where I live. When we reach our destination, you will find some excuse to come to my house. When you come to my house, you will see that I have an attractive daughter. You will begin dating her and eventually you will marry her. But I don't want a son-in-law who doesn't even own a wristwatch!" These things can be prevented only at a very, very early stage. The time to prevent them is in early childhood; and the way to prevent them is by providing an intensive Jewish education, an education which is geared to promoting observance of *mitzvot*.

Where one finds intensive education, deep commitment and maximum observance, instances of intermarriage are much, much lower than elsewhere. We live in an open society and, of course, there may well be individuals who will be lost to our community no matter what we do. Those are the exceptions which prove the rule. The chances of a Bridget marrying a Bernie are statistically very high, but the chances of a Bridget marrying a Baruch or a Berel are remote, to say the least.

Quite apart from the gravity of the formal prohibition, Jews have always seen intermarriage as the greatest threat and danger to their very survival. In his commentary to the Song of Songs, Rashi eloquently gives voice both to our perception of the extent of this peril and to our conviction that, as a community, we will never succumb.

Song of Songs 8:9 declares "If she be a wall we shall build upon her a turret of silver; but if she be a door we shall enclose her with panels of cedar." According to Rashi, G-d addresses Israel and describes two alternative modes of conduct open to Israel in the Diaspora. The community of Israel may resolve to "be a wall," and to comport itself as if fortified with "walls of brass" (Jeremiah 1:18) which cannot be penetrated, i.e., Israel may gird herself as a defensive wall, withstand incursions and refuse to allow the nations to infiltrate through intermarriage. If Israel acts in this manner "a turret of silver" will be erected, i.e., Israel will survive to witness the rebuilding of the Holy City and the Temple. However, if the community of Israel "be a door which revolves on its hinges," the result will be far different. If Israel wavers and succumbs to every alien knock, opening her door to foreign nations through intermarriage, rather than being fortified with non-corroding silver, her doors will be lined with wooden panels which are exposed to rot and decay. The corrosive effect of intermarriage is such that the community decays and withers away.

In the immediately following verse the Jewish people reply with the resounding words: *"Ani chomah*—I am a wall!" In effect, Israel addresses the Almighty, proudly assuring Him that all fears for her future are unjustified. The Jewish people vows to comport itself, not as a door, granting entry to all who knock, but as a fortified wall, jealously guarding the security and integrity of the nation.

In an open society, the losses sustained as a result of intermarriage are staggering and painful. There is no greater or more pressing problem which besets the contemporary Jewish community. Nevertheless, the words *"Ani chomah"* resound over the centuries as a vow and as an assurance that the integrity of *Klal Yisrael* as a people will be preserved through the

fortitude of those who stand firm in their commitment to uphold the covenant between the Jewish people and the G-d of Israel.

Dr. Avraham Steinberg

Induced Abortion According to Jewish Law

Introduction

The debate and controversy on abortion exist as long as civilization exists. The deliberate cessation of pregnancy is a practice which goes back to antiquity, but it was usually performed illegally, or with great reluctance as a medical necessity.

There are legal, religious, moral and practical considerations deeply involved in the delicate and intimate issue of abortion. In this article I propose to consider the question from the standpoint of Halacha: to understand what Halacha views as the basic issues regarding the pregnant woman, her needs and rights; and also to study the rights of the unborn child. Regardless of the philosophical and moral argument—both pro

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and con—which have caused heated debate all over the world, the only valid approach for a committed Jew is to seek the guidance of the Halacha, and to follow the solution proposed by Jewish law.

Nevertheless, we cannot be blind to the reality that societal influences greatly color the value structure of all of us. The more we participate fully in the modern world, the less we can ignore the deep impression which current mores and beliefs make upon even the deeply-committed and practicing Jew. Thus, as abortion becomes not only a possible, but sometimes even a purportedly desirable option, it is vital that we do know just what it is that Jewish law teaches on the subject. This article will discuss the many sources which forbid abortion, and explain in which situations exceptions might be considered.

Let me emphasize before proceeding further, that this article is not in any way intended to indicate the "psak halacha," the actual law. For that, as for all questions of Jewish practice, the sincere Jew must turn to his competent Rav for instruction. Each situation has unique features, and the Posek has to consider myriad details in arriving at his final decision. My intention, rather, is to elucidate the principles upon which the ultimate "psak halacha" is based, so that we may better appreciate the profound wisdom of our Torah.

A. Types of Abortion

Abortions can be classified into two basic categories: spontaneous and induced. Induced abortion—which this article discusses—is divided into two main groups: medical (therapeutic) abortion, perfomed legally by a physician, and criminal abortion, carried out against the law. Throughout the ages both secular legal systems and Halacha have attempted to define permitted and prohibited forms of induced abortion; the

status of criminal abortion was determined according to such definitions.

B. Abortion in Antiquity

The majority of religious authorities and legislators of ancient cultures opposed induced abortion.[1]

1. Buddhism prohibited it for religious reasons and severly punished transgressors. Abortion was treated as murder in Hindu regulation. Assyrian law sentenced the woman to death. Even the Egyptians imposed stringent penalties on persons performing induced abortions. We find dissenting opinions among the Greeks—some regarded abortions as a general and well-known phenomenon, while others prohibited harming the fetus.[2] Roman law banned abortions from the second century, C.E., instituting penalties such as hard labor, exile, confiscation of property and so on.[3]

2. Christianity took the extreme position in prohibiting abortion from the moment that a woman became pregnant.[4] Abortion is the medical subject mentioned most frequently in ecclesiastical literature. The religious ban on performing abortions is absolute, even including situations in which continuation of the pregnancy constitutes a definite threat to the woman's life.

We can identify various formulations and promulgations in church literature stressing this absolute prohibition. For example: Any intervention likely to unavoidably cause elimina-

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1. See I. Jakobovits, Jewish Medical Ethics, Bloch Publishing Company, 2nd ed., New York, 1975, pp. 170-172.
2. ibid.
3. Encyclopaedia Hebraica, Vol. 15, "Abortion", p. 85.
4. For Christian views see Jakobovits, ibid., pp. 174-78.

tion of non-viable products of conception is forbidden in any event, even if the goal is desirable.[5] Therefore, "when grave complications . . . occur in the early months of pregnancy . . . the Catholic physician . . . must withdraw from the case. If there is no other physician to attend the woman, he must let her die."[6] One rationalization of this attitude is that "better two deaths than one murder."

3. Most known "Physician's Oaths"[7] refer negatively to abortions. In Hippocrates' (460-370 B.C.) Oath the matter is formulated as: "I will not at any time give a woman any drug or instrument for the purpose of causing abortion".[8] (Or, according to another translation, "I will not insert any device in a woman to abort the fruits of conception.") The oath of Assaf HaRofeh (6th century) refers to a specific problem within the overall context of abortion—"and do not administer an abortificant to an adulterous woman." Amatus Luzitanus (1511-1568) declared in his vow: "No woman has aborted her unborn child with my assistance".[9]

C. Abortion in Early Jewish Sources

This section presents a brief summary of the discussions referring to abortion in the Torah and in the Talmud, which constitutes the basis for every Jewish legal discussion in the later literature.

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5. A. Klarman, *The Crux of Pastoral Medicine*, Ratisbonne, 1912, p. 135.
6. O'Malley & Walsh, *Essays in Pastoral Medicine*, New York 1906, p. 54.
7. See the list of formulations of oaths—D. Margalit, *Derekh Yisrael baRefuah*, Publication of the Medical Academy, Jerusalem 5730, Chapter 24.
8. Regarding the authenticity of this statement see Jakobovits, ibid., p. 172.
9. See A. Steinberg, "Prayers and Oaths of Patients and Physicians" in *Book of Assia*, R. Mass Publication, 2nd ed., Jerusalem 1978, pp. 248-256.

The crux of the discussions hinges on whether the prohibition of terminating a pregnancy prior to term is to be considered of Biblical origin (mi d'oraitha) or whether the prohibition stems from Rabbinic decree (mi d'Rabbanan). This is a crucial distinction in Jewish law: A prohibition *d'oraitha* is generally not set aside except to save a life (pikuach nefesh); however, if the Rabbis are the ones who forbade the act, then they also retain the right to remove or modify that prohibition. Therefore, if abortion is forbidden by the Torah, there would be relatively few instances in which we could halachically permit it. But if the Rabbis made that regulation, they can also make exemptions to that rule as they consider proper or necessary.

1. In the Torah, there is no source related to this matter. The only time it is even mentioned is:

> *"If men fight, and hurt a pregnant woman so that her fruit departs from her, and yet no further harm ensues: he will surely be punished according to the demands of the woman's husband, and he shall pay as the judges determine. However, if harm ensues, a life is to be given for a life.*[10]

As noted in the Sages' commentaries, the word "harm" in the above verse applies to the woman; that is, if there is no other injury to her other than miscarriage, those responsible must pay a monetary fine to her husband. However, if as a result of the blow, "harm" came to the woman—i.e., she died—then the one responsible is sentenced to death.[11] According to this reading of the verses, the Torah herein is not

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10. Exodus 21:22.
11. *Mechilta,* Mishpatim, ch. 8; *Baba Kama* 42a; Also see A. Aptowitzer, "The Status of the Fetus in the Jewish Penal Code" in *Sinai* 11 (5702). pp. 1-32.

referring at all to induced abortion in the usual sense, which is when the mother needs or requests an abortion for any reason.

2. The sole Talmudic source dealing directly with abortion for medical reasons is the following Mishna:

> *"If a woman is undergoing difficult labor, the child is cut up within her and extracted limb by limb, as her life takes precedence over its life. However, if the greater part of the fetus has already appeared (and is endangering the mother's life), it may not be touched, as one life (the child's) is not set aside for another life (the mother's).*[12]

This situation involves a threat to the mother's life *during delivery.* The Mishna distinguished two cases: until most of the fetus has appeared, it may be dismembered in order to save the mother. But if the child has already appeared, even if it endangers the mother's life, one is not permitted to harm it, as "one life is not set aside for another life." It is evident from this Mishna that, were the fetus *not endangering* the mother's life prior to its birth, it would certainly be forbidden to destroy it. This is the ruling of the Rambam, in Hilchot Rozeach 19, as well as of the Shulchan Aruch.

3. The Talmud specifically discusses criminal abortion in only one place: "In the name of Rabbi Yishmael, it was said, a Noachide (Gentile) is executed even for a fetus."[13] Rambam follows this in stating: "A non-Jew who murdered a person, even a fetus within its mother, is executed for it."[14] This is the accepted ruling of Jewish law—that a Noachide who performs an abortion is deserving of the death sentence, in accordance with the teaching of Rabbi Yishmael.

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12. Mishna Ohalot 7, 6.
13. *Sanhedrin* 57b.
14. Rambam, Hilchot Melachim 9, 4.

In Hulin 33, Tosafot further elaborates on the Biblical origin of the prohibition of destroying a fetus by reasoning *a fortiori* that since a Gentile is definitely forbidden to perform an abortion, it stands to reason that a Jew may likewise not do it. If even a non-Jew may not do this act, how could it be permissible for a Jew?

Yet, in Nidah 44, Tosafot challenges the conclusion of the above citation. In the latter instance, they argue that a Jew is allowed to destroy a fetus. Later commentaries, including the Maharitz Chayus[15] and Rabbi Yaakov Emden[16] debate the implications of the apparent contradiction between the two Tosafot texts. In conclusion, we are not in a position to state categorically that the prohibition of destroying a fetus originates in the Torah itself, nor can we say that all authorities accept it only as a Rabbinic regulation. There are eminent authorities for either point of view.

One fact is however agreed amongst all Poskim—that even those authorities who rule that an abortion is an "issur d'oraitha", would not inflict the death punishment for such an act (based on Mishna Nidah 5,3).

It is worth noting in the continuation of the text in Erchin 7a, the ruling of the Sages that if a pregnant woman is sentenced to death, we do not wait for her to give birth before executing her. Teshuvot Ahiezer, section 3, 65:14, discusses the implications of this text.

4. The Zohar[17] specifically deals with criminal abortion, reasoning that he who does it "contravenes the creation of the L-rd and His handiwork."

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15. Maharitz Chayus, Nidah 44b.
16. R. Yaakov Emden, Nidah 44b.
17. Zohar, Exodus, Warsaw ed., 1876, p. 3, column 2. See also: *Encyclopedia Hebraica*, ibid., p. 89.

However, in the Talmud as well as in the pre-seventeenth century legal texts, there is no reference to criminal abortion among Jewish sources, though the theological literature of antiquity and the Middle Ages include many comprehensive treatments of this subject. Several authors have offered various explanations of this fact. The most reasonable is Weiss' explanation[18] that "apparently, murder of fetuses has never existed in Jewish society during any period" and thus there was no need for specific discussion of this problem.

In several places in the Talmud we find a discussion of non-criminal abortion, i.e., a description of situations where abortion is permitted under certain conditions. These sources comprise the central basis for Rabbinic discussions of various aspects of the problem during the era of the *Poskim*.

In commenting on the Mishna cited previously (concerning an abortion to save the life of a woman giving birth), the Tosefta adds: "The person who cuts up the fetus within the woman with the court's permission and harms the woman thereby—if it was unintentional, he is not punished; but for an intentional harm he is liable, because we must strive toward a better world."[19] What this means is that if a person performing the abortion unintentionally harms the woman, we do not hold him liable, because if we did, no one would ever try to save the woman's life by aborting the child, for fear that he would be punished for any accident which might occur. It is clear that this kind of abortion was not only permitted by the Rabbis but was seen as a beneficial act.

Thus, one can see that few sources in the Bible or the Talmudic literature deal with abortion. The common denominator in the cases mentioned in the Talmud is the existence of specific, infrequent and exceptional conditions.

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18. Weiss, A.H., *Dor Dor v'Dorshav*, New York & Berlin, 1924, Vol. II, p. 23.
19. Tosephta Gittin, 4, 7.

D. Reasons for Prohibiting Abortion

The Rabbinic authorities who have determined and interpreted Jewish law have unanimously taken a negative attitude towards abortion. All agree that some prohibition against inducing an abortion does exist. However, we do find differences of opinion as to the nature, severity and grounds for this prohibition, according to strict halachic rulings and criteria.

Those who presume that abortion is prohibited by the Torah (mi d'oraitha) attempt to refer and compare this prohibition to other existing and accepted prohibitions in the Bible, making an abortion into an offshoot of other forbidden acts, such as murder or wounding. However *all* agree that it is not actually considered murder, and that a Jew is not punishable by death for feticide.

Another reason for prohibition of abortion is that "withholding life is a negation of the injunction 'to be fruitful and multiply' as well as 'diminishing the Divine form' ".[20]

Rabbi Uziel (1880-1953) formulated it thus: "On the one hand, one must prohibit abortion of a fetus . . . as said in the Gemara . . .: Every Jew who is not involved in 'multiplication' is considered to be shedding blood. . . . Ben Azzai said, as if he sheds blood and diminishes the Form . . . how much more so for him who performs an act reducing the potential existence and growth of one Jewish life." The Zohar[21] further elaborates and stresses that abortion contains an element contravening the creation and handiwork of the L-rd.

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20. Responsa Binyan David #47, note 3; Mishpatei Uziel, Part 3, Choshen Mishpat #46.
21. Zohar, Exodus, Warsaw ed. 1867, p.3, column 2. See also: *Encyclopedia Hebraica,* ibid. p. 89.

Another reason for prohibiting abortion is the danger to the woman involved in the procedure,[22] in accordance with the assumption that every abortion is considered to be dangerous.[23] It is therefore forbidden to endanger a woman by performing an abortion. However, most of the Rabbinic authorities dealing with this aspect of the problem have concluded that when abortion is permitted for an accepted reason, the risk nowadays is not a limitation any more, because "the physicians are experts in these matters and there is little danger."

That ascribing the proper reasons for prohibiting abortion is not merely an intellectual exercise is illustrated in a real case which was presented to Rabbi Unterman: A Nazi had raped a Jewish woman, who had become pregnant. The Nazi now brought the woman to a Jewish doctor and demanded he perform an abortion. In this case, it would be crucial to know whether an abortion is forbidden because it is murder, or for some other reason. A Jew must allow himself to be killed rather than commit a murder; however, if some other lesser issur is involved, then it would be permissible to perform an abortion to save one's own life.

E. Stages of Pregnancy and Childbirth

In determining whether an abortion is to be permitted, the Rabbis took into account a number of factors, including the stage of pregnancy or childbirth during which the abortion is to be performed. Depending upon the stage, the issur may be stronger or there might be more reasons for granting a lenient ruling (heter). In the Talmud, the entire span of pregnancy is

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22. Responsa *Beit Shlomo*, Choshen Mishpat, no. 132.
23. Ramban in *Torat ha'Adam*, cited in Rosh and Ran, Yomah 83a.
24. Responsa *Mishpatei Uziel*, ibid.

seen as a single unit and the various stages of birth are differentiated from it. In contrast, the later Rabbinic authorities in explaining the Talmud differentiate also between various stages even during pregnancy.

1. Based on the Talmudic definition[25] "until 40 days, it (the fetus) is considered as natural fluid", many Rabbinical authorities derived[26] that for the first forty days of pregnancy, the fetus should not be referred to as a life, and some concluded that it was permissible to abort it at that stage. Accordingly, Rabbi Weinberg (1892-1966) wrote: "Several later authorities maintained that prior to 40 days, feticide is essentially permitted."[27]

However, Rabbi Unterman, the former Chief Rabbi of Israel, is of a dissenting opinion.[28] He does not consider 40 days as constituting any border line whatsoever in terms of abortion, which he prohibits during the entire course of pregnancy. His basis is that most women deliver a normal and viable infant, and therefore the fetus from the moment of conception is to be regarded as a living soul. Indeed, there are those who permit desecrating the Sabbath for its sake even before forty days.[29]

2. Another Talmudic statement further supports an additional stage of pregnancy as a critical period for abortion, in

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25. *Yevamoth* 69b. The talmudic dictum "mere water" is stated in regard to a wife of a Cohen, whose husband has died, even though if she is pregnant she cannot continue to eat terumah; for the forty days following the death of her husband, she may continue to eat terumah, for even if she is pregnant the child is considered "mere water".
26. Responsa *Chavot Ya'ir*, No. 31; Responsa *Torat Chesed*, Even Ha'ezer, no. 42; Responsa *Achi'ezer*, part 3, end of no. 65; Rabbi Zweig, *No'am*, vol. 7, pp. 36 ff.; Responsa *Tzitz Eli'ezer* part 7, no. 48, ch. 1, note 8; and many others.
27. Responsa *Sridei Esh*, part 3, no. 127.
28. Rabbi Unterman, No'am, vol. 6, p. 1 ff.
29. See *Rosh* and *Ran*, end of tractate Yomah.

the view of a number of Rabbis. This source in the Talmud is the statement, "When is the fetus recognized . . . three months."[30] That is, the end of the first trimester is the point at which a woman's pregnancy is externally discernible. Rabbi Ovadia Yoseph, Chief Rabbi of Israel, writes: ". . . and in our case, the fetus is not yet three months old. It appears that according to this opinion, a Noachide is not executed for it and a Jew is not prohibited by the Bible against it, as recognition of the fetus is not possible at less than three months."[31] Apparently, those Rabbis who apply the injunction against abortion more strictly, do so with respect to the later stages of pregnancy, not to the first three months.[32] In the words of Rabbi Chaim Ozer Grodzenski, "it seems to me that a Noachide is not killed for this (performing an abortion before forty days), and also for a Jew it is possible that there is no prohibition from the Torah."[33]

3. As noted, the Talmud differentiates several stages of childbirth:[33] the onset of labor (termed "sitting on the birthing stool"); regular contractions; and crowning (the appearance of the head). In the Gemara it states that a woman sentenced to death was not executed if she had reached this last stage; the execution was delayed until after she gave birth.[34]

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30. *Nidah*, 8b.
31. Responsa *Yabi'a Omer*, part 4, Even Ha'ezer no. 8.
32. Responsa *Chavot Ya'ir*, no. 31; Responsa *Pri Ha'sadeh*, part 4, no. 50. The list of those reasoning that the prohibition is from the Bible or from the Sages is long, and a number of authors have consolidated these lists. *Sedai Chemed* Maracha Alef #52, Responsa *Yabia Omer* (R. Ovadia Yosef), part IV, Even Ha'ezer no. 8, Responsa *Achiezer*, part III, question 65, sec. 14; also see the summary of Rabbi Jakobvits, ibid., pp. 190-191.
33. Mishna *Arachin*, 7, 1.
34. According to the text of the Yerushalmi, *Shabbat* 14, 4, and Yerushalmi, *Avodah Zara* 2, 2.

From the time that the head or most of the body[35] appears, the injunction "a life is not set aside for another life" takes effect. At this moment religious law considers the infant to be equivalent to a grown person under most criteria. If he is expected to live, the mother's life cannot be preserved at his expense.

In sum, most of the Rabbinic authorities consider the age of the fetus and the stage of childbirth to be significant factors when discussing the stringency of the prohibition against abortion.

F. Indications for Abortion

In general, the indications for induced abortion can be divided into two categories: a) maternal and b) fetal.

The reasons for abortion related to maternal factors fall into the following groups: 1. The mother's life is endangered by the pregnancy or delivery; 2. The mother's life is endangered by a systemic organic disease, pre-dating the pregnancy and exacerbated by it; 3. A maternal systemic organic disease, exacerbated by the pregnancy, but not life-threatening; 4. Hastening of maternal death as a result of pregnancy (in the event of a disease with a poor prognosis in any case); 5. Maternal mental disease caused or exacerbated by pregnancy; 6. Organic disease of an isolated organ, exacerbated by pregnancy; 7. Extra-marital pregnancy due to adultery, promiscuity or rape; 8. Social, economic and other factors.

Fetal-related reasons for abortion are: 1. Maternal disease liable to cause birth-defects in the fetus; 2. An iatrogenic condition liable to cause birth-defects, particularly drugs and radiation; 3. Genetic disease inherited by the fetus.

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35. According to the text of the Mishna, *Ohalot*, 7, 6.

In contradistinction to the Catholic prohibition of abortion under *any* circumstances, there is no such view in Judasim. We have indeed found a variety of opinions among the Rabbinic authorities in reference to various indications—some are more stringent than others—but all do permit abortion in certain situations.

a) Maternal indications for abortion

1. The mother's life is endangered as a result of pregnancy or delivery: This is the clearest case in which abortion is permitted, as stated plainly in the Mishna cited previously: "If a woman is undergoing difficult labor, the child is cut up within her." A few authors[36] have concluded that according to Jewish law, abortion is permitted *only* in such a situation—and not in any other case. Some examples they would include in this category are extreme cases of toxemia of pregnancy, placenta praevia, placenta abruptio, pathological presentations, etc. However, this extreme position is a minority view, and other Rabbinic authorities have extended permission to include other situations.

2. The mother's life is endangered by a disease pre-dating the pregnancy, which is exacerbated by it: This involves severe stages of diabetes, heart disease, kidney disease or other systemic diseases exacerbated by pregnancy, which are liable to threaten the woman's life. As mentioned above, most Rabbinic authorities are quite lenient regarding performing an abortion in such cases to save the mother.[37] However, there are some authorities who maintain that it is permissible to abort a fetus only when *it* is threatening the life of the mother. In the cases

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36. *Pachad Yitzchak*, s. v. Nefalim: *Responsa Ko'ach Shor*, no. 20.
37. Responsa *Beit Shlomo*, loc. cit.; Responsa *Pri Hasadeh*, loc. cit.

we are discussing, it is not the *fetus*, but rather the *disease* which is endangering the mother, and therefore they would not permit an abortion. Nevertheless, Rabbi Chaim Ozer Grodzenski, the leading "posek" in the earlier part of this century, clearly did not accept this theory. In the case of a woman with serious heart disease, he permitted an abortion.[38]

The problem of a severe medical condition threatening the mother's life was the most frequent organic-medical difficulty encountered in reference to abortion. Indeed, in the 1957-58 Yearbook of Gynecology, a gynecologist wrote that "medical care has greatly advanced today so that only isolated diseases justify an abortion." D. Ehrlich[39] noted that this declaration is somewhat optimistic in that present-day medical care has actually created new problems in this area, such as kidney failure and dialysis, prosthetic heart valves, etc.. We can thus see that in terms of abortion this area is not negligible.

3. A maternal systemic organic disease, exacerbated by pregnancy, but not life-threatening: We are dealing with the group of diseases discussed in section (2) above, such as diabetes, heart disease and the like. However, in this case, the condition, according to the physician's assessment, is not severe enough to threaten the mother's life. Most of the Rabbis maintaining that abortion is only prohibited by the Sages (d'Rabbanan), do consent to performance of an abortion in such situations.[40] In contrast, it is obvious that the authorities

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38. R. Chaim Ozer, ibid., permitted an abortion to be performed on a woman who was suffering from a severe heart condition. It was felt that to allow the child to proceed would have endangered the life of the mother.
39. Ehrlich, D., "The Medical Background for Interruption of Pregnancy in Jewish Law" in *Book of Assia*, pp. 70-77.
40. Responsa *Rav Pe'alim*, Part 1, Even Ha'ezer, no 4; Responsa *Tzitz Eli'ezer*, part 6, no. 48; and others.

who prohibit abortion even in the life-threatening situations mentioned in section (2), would also forbid it in these cases.

4. Hastening of maternal death as a result of pregnancy: A situation in which the mother has a disease with a terminal prognosis and we fear that the pregnancy might hasten her death. The problem halachically arises from her precarious situation—her life is not termed "life" in the accepted sense, but rather "life for an hour" (Chayei sha'a). Is it permitted to terminate a fetus's life in order to save a mother's "life for an hour"? One contemporary source[41] dealing with this issue, in the case of a pregnant woman with lung cancer, concludes that abortion is permitted even for that "life of an hour".

5. Maternal mental disease caused or exacerbated by pregnancy: That is, manifestly psychiatric disease rather than minor psychological disorders. As known, pregnancy can bring out repressed or latent mental problems, although pregnancy-related psychosis is fairly rare (approximately 14:10,000). The more frequent disorders are schizophrenia, mania-depression and psychoneurotic reaction.[42] In the Rabbinic literature dealing with this matter, it is termed "an attack of nervous disease"; some have permitted abortion[43] and some have prohibited it.[44]

It is not that the mental disorders would of and by themselves be sufficient grounds for performing an abortion; however, if the psychological disturbance might so unbalance the mother's mind that she is liable to kill herself, then we have a different situation. Here, depending on the circumstances, it might be "pikuach nefesh". In the case of a woman suffering severe post-partum depression, Rabbi Moshe Feinstein permit-

41. Responsa *She'ilat Yeshurun*, part 1, no. 39.
42. Kolb, L.C., *Noyes Modern Clinical Psychiatry*, 7th ed., Saunders Co., Philadelphia 1968, pp. 123, 24.
43. Responsa *Pri Ha'aretz* Yoreh De'ah, no. 2; Responsa *Levushei Mordechai*, Choshen Mishpat, no. 39.
44. Responsa *Ko'ach Shor*, no. 20.

ted birth control, for fear that a further pregnancy would precipitate a life-threatening mental condition.[45]

6. Organic disease of an isolated organ, exacerbated by pregancy: Referring to a situation in which pregnancy is liable to threaten a specific maternal organ. Essentially, the problems discussed include loss of vision (such as due to a detached retina) and loss of hearing.[46] The two authorities who handled these particular problems concluded that abortion was permitted. Rabbi Ovadiah Yoseph[47] determined that those declaring the prohibition of abortion to be of Rabbinic origin would permit it in the case of an endangered organ; but in the opinion of those who have stated that abortion is prohibited by the Bible and permitted only to preserve the mother's life, it may not be performed for an endangered organ.

7. Extra-marital pregnancy: Involving pregnancy as a result of incest, adultery, promiscuity or rape. Rabbinic law distinguishes between two situations: the pregnancy of an unmarried woman, whose child is eligible to join the Jewish community (although he is labeled "flawed"), as opposed to a married woman's pregnancy, which would result in the birth of a bastard (mamzer), who is forbidden to join the community.

Some Rabbinic authorities[48] prohibited abortion in both

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45. R. Feinstein, *Iggeroth Moshe,* Even Haezer no. 65.

46. Responsa *Chavot Ya'ir,* loc. cit.; Responsa *Lechem HaPanim,* last volume, no. 19; *Sefer Chassidim,* no. 1518.

47. Responsa *Mishpatei Uziel,* part 3, Choshen Mishpat, no. 46-47.

48. Responsa *She'ilat Yavetz,* part 1, no. 43; Responsa *Mishpatei Uziel,* loc. cit. The case involved a married woman who became pregnant through an adulterous relationship. She later repented and wanted an abortion. Even though we cannot inflict the death penalty today, the rule still applies that the woman is guilty and should be put to death. Hence the child is really to be put to death, even though his mother, the adulteress, will not be put to death. It is even possible that one "would be performing a Mitzvah by the abortion." This rule applies even if she were impregnated at the hands of a non-Jew.

cases, as there is no difference between a legitimate fetus, a "flawed" one, or a mamzer in terms of its right to life. One is not permitted to destroy them. On the other hand, there are Rabbinic authorities who do differentiate between the above situations,[49] contending that there is no excuse to permit abortion in a promiscuous single woman, but the abortion of a bastard is allowed. One line of reasoning is that the adulterous married woman deserves the death penalty anyway, according to Jewish law. Because her execution would also cause the death of her fetus (and as we have noted, we do not delay the execution of a pregnant woman), therefore its right to exist is less than usual and abortion is permitted.

In the Responsa *Rav Pe'alim*, we find an even more far-reaching position. The author quotes sources permitting abortion even in the case of a promiscuous single woman, because "a flaw in the family is a degradation and desecration of the L-rd's name."[49]

8. Social, economic and other factors: This group of indications includes the most frequent grounds for requesting an abortion. In a 1965-66 survey conducted in Israel, it was found that 27% of the women applying to the Sick Fund for an abortion justified their request with socio-economic reasons.[50] One can assume that this number almost certainly does not reflect reality, as "socio-economic abortions" are usually performed outside of institutions.

The Jewish authorities discuss and debate this indication at length. Obviously those who state that preservation of the mother's life is the only basis for permitting abortion, prohibit performing one when the only justification is merely socio-

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49. Responsa *Rav Pe'alim*, part 1, Even Ha'ezer, no. 4.
50. Yeshurun-Bermann T., "Reasons for Applications for Abortions Due to Undesired Pregnancy," *Harefu'ah*, 76:452 (1969).

economic. Indeed, some Rabbinic authorities stress this point in their prohibition. The overall Jewish perspective is anti-abortion; therefore situations involving any superficial needs, particularly when they are inadequately defined, are prohibited by all Jewish authorities.

On the other hand, there are authorities who have permitted abortion "for a great need" or "extreme suffering"[51]—definitions which are inexact and do not specifically refer to physical conditions. One might wish to include social and economic hardships within these terms. But obviously the rational solution for economic problems should be within the framework of economy and social care, and not by abortion.

b) Fetus-related reasons for abortion

1. Maternal diseases likely to cause fetal defects: We are dealing with viral diseases of the mother, especially at the beginning of pregnancy, which can cross the placenta and are liable to cause birth-defects, as in the case of the rubella virus discovered in 1941 by Gregg in Australia.[52] Since then, this phenomenon has been widely investigated and numerous relevant articles have been published. Aside from rubella—foremost among the viruses harmful to the fetus—other viruses and parasites are known or suspected to have teratogenic effects: mumps, cytomegalovirus, smallpox,[53] herpes simplex, syphilis and toxoplasmosis.[54] I will not discuss this subject at length, but will present only the Jewish legal aspect of the topic.

As this problem has arisen only during the last forty

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51. Responsa *Tzitz Eli'ezer*, part 7, no. 48.
52. Gregg, N.M., "Congenital Cataract Following German Measles in Mother," *Trans. Ophtalmol. Soc. Aust.* (1941), 35-46 Book of Assia.
53. Freier, Z., "Influence of Viral Diseases on the Fetus."
54. Leading article, "Subtle Effects of Perinatal Infection," *New England Journal of Medicine*, (1974), 290:337-38.

years, there are few written opinions on it in Jewish law. Most Rabbinic authorities prohibit abortion under such circumstances. The approach is that defective individuals have a right to live equal to that of healthy persons, and we do not have the authority to select who will live and who will die. Moreover, in case of maternal teratogenic viremia there is a reasonable danger that the abortion will destroy a healthy, non-defective fetus, as only a certain percentage is affected (and according to many researchers this occurs in a fifth of rubella-affected mothers, or fewer cases, depending on the stage of pregnancy). So far there is no specific way of predicting whether the particular fetus is indeed defective, and all that can be said is a statistical estimate. This fact adds to the moral concern in performing an abortion in such cases. Rabbi Unterman has issued an absolute prohibition in the light of these findings: "There is an absolute prohibition against aborting a fetus . . . even before forty days it is forbidden. And the suspicion that rubella might have harmed it does not come under the law of saving a life (because we have never learned that in order to protect it from injury, one deprives it of its life—a strange idea!), but because the parents have to relieve themselves of the burden of caring for him, and a prohibition which involves a form of murder is not set aside because of suspicion."[55] (We must note that Rabbi Unterman's viewpoint is that the general prohibition of abortion is based on regulations against murder and is a Biblical prohibition.)

In contrast, the decision to permit abortion in such cases considers the parents' anguish, which are basically the harsh psychological implications for a pregnant woman who suspects that she is carrying a defective fetus in her womb and that his entire life will be one of affliction and suffering.

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55. Rabbi A. Unterman, *No'am*, ibid.

Some[56] permit abortion within the first forty days of pregnancy (on the strength of their assumption that abortion is essentially not forbidden by the Bible), and tend to also permit it after forty days in consideration of the parents' anguish. Nevertheless the majority of current Poskim are opposed to abortion for this reason.

It should be noted that disagreements of the psychiatrists and psychologists also center around the psychological aspect. Some emphasize that this can be an indication for abortion, though on the other hand there are those who feel that this case is a contra-indication to abortion, because women blame themselves afterwards for committing a murder and enter severe depressive reactions.[57]

2. *An iatrogenic situation liable to cause birth-defects:* There are two main factors involved in this section: certain drugs taken by the woman during pregnancy, and penetrating radiation for medical examination and treatment. The most notorious drug is Thalidomide, produced by Chemie Gruenthal. Approximately 6000 defective children were born as a result of its use by pregnant women as a tranquilizer. This firm faced a trial lasting for a year and seven months, during which 120 witnesses were called. The firm was obligated to pay compensation totalling 30 million dollars.[58] From a medico-legal and Jewish standpoint the problem was publicized following the trial of Mrs. Susan Van de For in November 1962 in Belgium. She ingested 11 Thalidomide tablets at the beginning of her pregnancy and subsequently delivered a daughter who lacked hands and had deformed legs. She killed her child, but

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56. Rabbi Y. Weinberg, *No'am*, vol. 9, p. 193; Responsa *Tzitz Eli'ezer*, part 9, no. 51, section 3, ch. 3, note 9.
57. Calderon, M.S., *Abortion in the United States*, 1958, p. 129.
58. See *New England Journal of Medicine* (1971), 284:481.

escaped a murder conviction by the decision of a jury of 12 men who deliberated for six days, on the grounds that she had saved her daughter from a life of suffering. This trial generated numerous medico-legal discussions. A special article stating the Jewish viewpoint was published,[59] and its conclusion totally contradicted the verdict. In the author's opinion it is forbidden to kill such a child on legal or traditional grounds. Moreover, it is also prohibited to abort a fetus, despite the existence of radiographic evidence that the child will lack limbs.

There are other drugs which are now known or suspected teratogens. Among these one can list cytotoxic drugs, certain antibiotic preparations and anticonvulsants.[60] The rulings in such cases essentially follow that of the Thalidomide situation.

In reference to radiating a woman—if an x-ray is needed to clarify certain specific diseases, such as IVP, films of the GI tract, of the skeleton, etc., or if they are therapeutic, such as in the case of a tumor—teratogenic effects are also known. Essentially it is similar to the Thalidomide situation.

3. Genetic diseases of the fetus: By making use of new scientific developments it is now possible to examine the fetus while it is still in the uterus in a number of ways, and to identify various genetic diseases, mainly involving chromosomal and enzymatic defects.

a. The most important examination is amniocentesis—obtaining amniotic fluid and examining the sample. The topic is halachically similar to the case of rubella in a pregnant woman, but one should emphasize that there is an important difference between them. With amniocentesis, the physician is

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59. Rabbi Z. Zweig, "On Abortion," *No'am*, vol. 7, p. 36.
60. See: Pomerance, J.J.-Jaffe, S.J., "Maternal Medication and its Effects on the Fetus," *Current Problems in Pediatrics*. vol. 4, no. 1 (November 1973).
61. See particularly: Rabbi M. Feinstein, in *Sefer Ha'Zikaron Le Hagaon R. Abromski*, p. 461, as opposed by Rabbi E.J. Waldenberg in *Hilchot Rofim U'refuah* (edited by Dr. A. Steinberg), p. 33.

now able to select and destroy only the potential defectives. Certainly, according to the authorities who maintain that abortion is forbidden by the Bible and can only be performed to save the mother's life, there is no way that one can permit abortion in these cases. The assumption that neither the physician nor even the parents are the judges to decide who will live and who will die, is true in this situation, as it is in the rubella or Thalidomide cases.

On the other hand, those who have declared that abortion is forbidden by rabbinical injunction and thus permitted in the case of anguish and problems of the parents—the same considerations should apply here to permit abortion. Moreover, in the case of a defect or a serious disease which was verified by sampling the amniotic fluid, there is less moral concern, as we can be certain that the particular fetus is indeed defective, and we do not destroy a normal and healthy potential human being. However, most contemporary halachic authorities, and foremost among them Rabbi Moshe Feinstein, forbid abortion in any fetal indication, including genetic disorders verified by amniocentesis.

G. Factors Facilitating the Decision to Perform an Abortion

In the cases in which the religious authorities decided that one *is* permitted to perform an abortion, there is a tendency to seach for legal methods of easing the prohibition against abortion. It is possible to briefly summarize several "recommendations" provided by Rabbinical authorities:

1. When there is an indication for abortion, it should be performed as early as possible—before 40 days of pregnancy or within the first trimester.
2. It is preferable to carry out the abortion "by a drug", that is, preparations which cause abortion, without direct manipulation of the uterus.

3. In this manner one should consult with a specialist who is as experienced as possible, because there is a danger to the woman in the process of abortion itself, and this aspect must be carefully considered.

Summary

I have tried to show in this article the basic Jewish attitude toward abortion. Human life is of the utmost value in Jewish philosophy and law, and therefore much effort is put into preserving good and healthy life. This basic viewpoint is transferred to fetal life as well. Therefore abortion is fundamentally forbidden. However, the Jewish law differentiates between a born and an unborn life, and when these two collide—the former is preferred. This gives the basis for the possibility of certain indications for abortion, as we have shown.

Privacy: A Jewish Perspective

Rabbi Alfred S. Cohen

What is privacy, and why is it so important to us? That is a question which is becoming increasingly and disturbingly relevant to the way the individual interacts with society; the manner in which society seeks to find solutions to this question is one dimension of its entire philosophy of the dignity of the individual, of the rights of society, and of the balance which ought to pertain between these spheres of interest.

Privacy: A Negative Approach

Invasion of privacy is feared in the Anglo-American tradition as an encroachment of government upon the rights of the individual, and a person's right to protect his privacy has more than once been the cause of overt defiance of Government, sometimes even of revolution. As a sacred perogative of the in-

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dividual against the power of the Crown, it was hailed by Lord Chatam in Parliament in 1766:

> *The poorest man, may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; all his forces dare not cross the threshold of the ruined tenement.*[1]

The Twentieth Century has indeed been witness to the stark destruction of human nature and "civilization" which is the result of the ruthless elimination of privacy in modern police states. In Nazi Germany, in the Soviet Union and her satellites, in Communist China, the destruction of the individual's sense of his own privacy was one of the principal methods used to gain control over the minds and the will—and the bodies—of the populace. With ample justification, the invasion of privacy is resisted as the first step to a totalitarian state.

Privacy: A Positive Approach

In America, the unwelcome realization that technology makes possible heretofore unbelievable incursions into the private domain and a concern with the all-encompassing nature of governmental intervention in social as well as commercial relationships, have led to many drives for formulating legislation which could protect the individual and curtail government (or some other agent) from invading the privacy of individuals. All this effort concentrates on a *negative* goal—preventing the violation of privacy. Although recognizing the value of protecting privacy, over the ages Jewish thought has concentrated rather on the *positive* values of privacy. Albeit we are

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1. A Treatise on Constitutional Limitation, by Thomas M. Cooley, Boston: Little, Brown, & Co. p. 365, 1883.

concerned to prevent undue invasion of privacy we find that our Sages wrote primarily on the many ways in which privacy is a desideratum in itself, an essential ingredient in the formation of the complete human being.

Privacy in its simplest form can be understood as the environment in which a person is able and free to develop his unique talents without interference from external factors. The Maharal of Prague had a beautiful insight into the great wisdom of the Creator in His design of the human body. In expounding on a Talmudic passage in Ketubot (5b), the Maharal comments—"why are a person's fingers shaped like rounded nails or pegs? So that if he hears unworthy words, he may take his fingers and place them upon his ears, so that he will not have to listen . . . And were he not fashioned in this way, then Man would have been considered created deficient. The explanation of this is . . . that there is a difference whether someone beholds a scene which is unworthy of him, or whether he overhears something not good . . . for if he sees an act of murder or some other evil things, there is not in this seeing an acceptance and acquisition. However, when someone hears something, he has perforce accepted it—it enters into his mind and has an effect on his thoughts."[2]

Under the American Constitution, a person's home and his body cannot be violated. The Maharal sees an even more basic protection of privacy—the privacy of the senses, privacy of the human mind. Privacy is the primary need of an individual, a right which the Maker wants each person to exercise wisely. We are the ultimate arbiters of what thoughts, visions, words, and concepts will be allowed to enter our own inner sanctum, the privacy of our minds. G-d created Man with the ability—nay, the responsibility—to guard carefully the purity of his privacy. This moral lesson is even evident, ac-

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2. מהר"ל , נתיב הצניעות, פרק ב'.

cording to the above Talmudic passage, in the way the human ear is formed. The entire ear is hard, but the little flap over the aural opening is soft so that it can be readily pushed down to cover the ear, preventing the intrusion of words that one does not choose to hear.

In the *Mesilas Yesharim*, Rabbi Moshe Chaim Luzatto considers the ways in which a person can develop moral perfection. There are three things which will keep the person away from perfection of character:

The first of these is the care and the concerns of the world. The second is laughter and ridicule; and the third is society (that is, the company a person keeps can prevent his achieving high moral status).[3]

Even if one has worked on his own character to develop good traits and to grow closer to the Al-mighty in holiness, there are times when he will fail to do what he knows is right because he will be afraid that his friends or associates will make fun of him; at other times, a person's desire to be friendly with people who are on a lesser moral level than he, may similarly keep him back from doing what he knows is right.

Thus we must realize how the intrusion of other people's deeds and values can invade the privacy of the individual; and because of this invasion, the individual may fail to realize his own potentials and become subject to the tyranny of public opinion.

The world in which we live intrudes upon our senses, forming and shaping our thoughts, whether we will it or not. As the Maharal taught, a person must choose what he will permit to enter his privacy. The Rambam goes even further, and writes that if a person finds himself in an environment which he considers to be having an undesirable influence upon him,

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3. "מסילת ישרים" פרק ה'.

and he is unable to guard himself sufficiently from its negative onslaughts—"let him then withdraw and go to live in caves . . . and deserts". (*Hilchot Deiot* 6:1).

Why is it that a person so desperately needs privacy? Surely it is to develop his own unique combinations of talents and abilities with which the Creator endowed him. Only by utilizing his innner abilities and talents can any individual attain fulfillment of his own self and approach an understanding of the personal relationship which exists between himself and G-d. This coming close to the G-dhead is what we term *Kedusha*—holiness, and it cannot be attained in a setting wherein the individual does not have the privacy of "inner space".

The pages of Jewish history are replete with holy individuals who understood the truth of that which is expressed in the *Mesilas Yesharim*. Moshe Rabbenu fled to the desert in order to be able to be by himself and communicate with G-d, and that is when he beheld the vision of the Burning Bush. In more recent times, the Baal Shem Tov, the Vilna Gaon, and the Chazon Ish are famous for the intervals during which they would totally withdraw from human society, even from the circle of family and disciples, in order to develop their own mind and character. Privacy was the essential prerequisite for the fulfilment of the great powers of intellect and spirit.

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Hillel the Wise said, "If I am not for myself—who will be for me?" Yet Hillel ended his aphorism thus: "But if I am only for myself—then what am I?" (*Ethics of the Fathers* 1:14)

The individual needs the privacy of his own thoughts and ideas in order to fulfill his personal destiny—and as such he can contribute the greatest benefit to the community. We consistently advocate that the ultimate good is that which benefits not only one, but the community, and particularly the Jewish people as a whole. The most praiseworthy scholar is he who

learns in order to be able to teach others.[4] Man's perfection, attained in a vacuum, is not what G-d desires. Each person's individual moral growth, which will foster the excellence and moral growth of his fellow human being, is the true direction of Jewish teaching and endeavor. Consequently, there are occasions when the individual must set aside his private life in order to fulfill the demands upon him as a member of society. This principle is often illustrated in Talmudic literature:

Respect for the dead and comfort of the bereaved are religious teachings which are commonly accepted even by those who neglect most other mitzvos in the Torah. This phenomenon is not based on any special status of the laws of mourning in Torah law, but rather illustrates how highly regarded and how deeply ingrained these concepts are in the Jewish psyche. Nevertheless, the *Shulchan Aruch* directs that a doctor (if he is needed) and a *melamed*, a Torah teacher of young children, ought to observe the *Shiva* only for *three* days, rather than the full seven, because the community needs their services.[5]

This extraordinary halachic statement implies that the individual must allow the public to invade his private world—his sorrow and his loss—for the welfare of the community which outweighs his own need for and right to privacy.

Another startling example of the lengths to which privacy may be invaded for the benefit of others is found in the following Talmudic account: (*Berachos* 62a)

> *Rabbi Akiva said, 'One time I followed Rabbi Yehoshua (his teacher) into the bathroom, and I learned from him three laws . . .' Ben Azai said to him: 'How could you have such nerve before your*

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4. פרקי אבות.
5. יורה דעה שצ"ג.

own teacher!' To which Rabbi Akiva responded: 'It, too, is Torah, and I must learn it . . .'

In the same vein, the Talmud relates that Rav Kahana once hid under the bed of his teacher, Rav. Later, he even dared to question Rav about his (sexual) conduct with his wife, and when Rav expressed amazement that his disciple had violated this most personal aspect of his life, Rav Kahana too answered—"It is Torah, and I must learn it." (Ibid.) Nor do we find any censure of his behavior; apparently the privacy of the individual is of lesser value than the benefit of the community, which can learn how to improve their own behavior by copying the Torah leaders.

Elsewhere, the Gemara relates an incident of a rabbi whose sister had died, but he did not find out about it until much later. When the messenger brought him the report, he immediately took off his shoes. Then he turned to his student and said, "Let us go to the public baths." The Gemara tried to find explanation for his odd conduct, and the response is revealing: He did this because he wanted to teach his disciples three laws concerning mourning—that a mourner may not wear shoes, that a person who hears about a death long after it happened need only mourn one day, and that even a short part of the day is considered as a whole day (that was why he suggested going to the public baths, which a mourner would not be allowed to do; *Pesachim* 4a). Thus, even in his sorrow, the true Jewish leader realizes that his responsibility to instruct his disciples in the ways of Torah takes precedence over his private grief.

This last is a difficult concept for the modern Western mentality to accept. However, let us understand that it is not just that each individual has obligations to the group which override his private preferences. The other side of the coin is that each person is an integral and essential unit in the whole, and if he is deficient, then the whole is lacking.

On *Yom Tov*, there is a particular commandment

"vesamachta", to rejoice. "Availut", mourning, is forbidden during Yom Tov.[6] When the entire community rejoices, no individual is permitted to retain his private grief. He functions as part of the group, gaining with the entire nation the merit to be loved by G-d. The involvement in his personal grief would inhibit the individual from partaking in the elevation of the spirit which is possible only as a national experience. Thus each person draws sustenance and strength from his existential participation in the unique destiny of the Jewish people.

The Home

From the time of its formation as a nation, the Jewish people has lived with respect for the privacy of others. "How goodly are thy tents, O Jacob . . ." (Numbers 24:5) was the spontaneous hymn of admiration which burst from Balaam, who had actually come to curse the camp of the Israelites in the desert. What was so "goodly" about their dwelling places? Our Rabbis (*Bava Bathra* 60a) respond that Balaam was deeply impressed by the way the Jewish encampment was laid out, so that no one's door faced the doorway of anyone else. In this way, each person was assured that no one could look into his private world.

If the Jew's privacy at home is assured, how much more so is physical intrusion into his home forbidden! The Torah (Deuteronomy 24:11) prohibits a creditor from even entering the premises of the debtor to claim what is owed him or to take a pledge. Sifre (the Tannaic commentary to Numbers and Deuteronomy) notes that this prohibition applies also to a worker who comes to demand his pay. He must wait outside, and may not enter the employer's house to collect that which is rightfully owed him. This is particularly significant in that, by Torah law, the employer is expressly forbidden to delay the

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6. מועד קטן כא:.

prompt payment of a laborer's wages. What this means then is that, even when a person transgresses the Torah's command, his right to privacy remains protected; even to redress a wrong, the worker may not enter the employer's house.

The Talmud (*Bava Metzia* 113) teaches that the Court messenger who was instructed to carry out a judicial decision and seize a pledge for the creditor, could not enter the home of the debtor. The Rambam adds that if the creditor decides to seize it on his own initiative, he is punished by whipping if damage occurs to that pledge (although he is legally entitled to have it). We thus see how far human dignity is recognized and preserved by Jewish law.[7]

The concept of privacy was further expanded by the famous "*herem* Rabbenu Gershom" instituted in the eleventh century by the illustrious Rabbi Gershom of Mayence, the "Light of the Exile."[8] According to this universally acclaimed edict, it is forbidden for a person to intercept or to read someone else's letter. This ruling must certainly be recognized as a hallmark in the annals of legislation for protection of the privacy of the individual.

Hezek Re'Iyah—Impingement of Privacy

In Jewish law invasion of privacy was tantamount to

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7. Rambam הלכות מלוה ולוה פרק ג הלכה ד'. If no damage occurred to the pledge, the man would not be lashed by the Court, in accordance with the rule לאו הניתק לעשה אין לוקין עליו.

8. יורה דעה של"ד — באר הגולה also ספר הלקט, Volume I, #173, based on the verse in Vayikra 19:16 לא תלך רכיל בעמך . There is some question as to why an edict of excommunication (herem) was required to forbid an act which is already forbidden by the Torah. It is suggested that people might not have taken seriously an admonition to refrain from reading private letters, not realizing that actually it was a Biblical prohibition (derived from the issur of לא תלך רכיל). Alternatively, it is possible that since confidentiality of the mails was absolutely essential for commercial enterprise, it was considered necessary to issue a herem for such an invasion of privacy.

trespass or theft, and similarly punishable. There are ample precedents through centuries of Jewish legal writings to indicate that the individual is entitled to prevent the public from intruding upon or sometimes even knowing about his private doings, correspondence, and other aspects of his private domain. Included in this concept is "hezek re'iyah", "damage" incurred by visual prying. Thus, the famous Talmudic teaching that a neighbor is obligated to share the expense of building a privacy fence between two courtyards *(Bava Bathra* 60a). There are many practical implications for this law, which is elaborated upon in great detail in the *Shulchan Aruch*. For example:

> *Someone who wants to put a window in a wall facing upon the courtyard of his neighbor, whether it be a large or small window, whether high or low—the owner of the courtyard can prevent him from doing so by claiming that 'you will harm me by looking in. Even if it is a high window, you can go up on a ladder and look in on my courtyard.'*[9]

In another case, where the neighbor had already installed a window without objection from the courtyard owner, the Beis Yoseph would allow it to remain, but the RaMo in his gloss notes that many legal authorities dispute the right of the neighbor to maintain even a long-standing window over the objection of the courtyard owner. The invasion of privacy was classified as a "hezek", an actual damage, against which a property owner could sue in the Jewish court. In the Responsum literature, too, we find many questions posed to Rabbinic authorities about "hezek re'iyah", which give evidence of its wide practical application and vigorous enforcement. Sometimes property owners attempted to prevent installation

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9. אבקת רוכל תשובות ב"י קכ"א.

even of *non-transparent* glass windows, claiming that their privacy thus was less secure than when only brick walls faced their courtyards. We also find a complex analysis of the permissibility of installing a *movable* window pane to replace a *stationary* window pane. The courtyard owner objected that a movable window pane afforded the neighbor a clear view of the courtyard, whereas the fixed pane of glass often got dirty and gave more privacy![10]

In writing about the Fourth Amendment and the *Halacha*, Rabbi Norman Lamm analyzes the impact of the ruling that neighbors share equally in the expense of installing a privacy fence:

> *Interestingly, the Halacha does not simply permit one of the erstwhile partners to build a fence for his own protection, and then require his neighbor to share the expense because he, too, is a beneficiary, but demands the construction of the wall so that each prevents* himself *from spying on his neighbor. Thus, Rabbi Nachman said in the name of Samuel that if a man's roof adjoins his neighbor's courtyard—i.e., the two properties are on an incline, so that the roof of one is approximately on level with the yard of the other—the owner of the roof must construct a parapet four cubits high. In those days, most activity took place in the courtyard, whereas the roof was seldom used. Hence, without obstruction between them, the owner of the roof could see all that occurs in his neighbor's courtyard and thus deprive him of his privacy. This viewing was regarded as substantial damage as if he had physically invaded his premises. Therefore, it is incumbent upon the*

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10. פתחי תשובה קנד ס"י ס'ק ט.

owner of the roof to construct the wall and bear all the expenses, and so avoid damaging his neighbor by denying him his privacy.[11]

Privacy of a Public Figure

As in every legal or ethical system, no one value can be absolute. Inevitably, the clash of conflicting needs requires some modification in practical circumstances.

So, too, privacy, while important and protected by Jewish law, is nevertheless not viewed as the ultimate value before which all others must recede. Rabbinic teachings indicate that we must consider carefully what harm will devolve to a person from the invasion of his privacy—as against the possible benefit that will accrue to others as a result thereof.

In the following section I propose to explore the extent to which public figures are entitled to preserve the secrecy of their private lives.

The term "public figure", as used here, is not limited to famous individuals. It will be employed in a relative sense: in any social grouping, a person who by virute of rank, vocation, charisma, or other distinguishing feature is placed in a position where he or she takes precedence over others, or who is admired by others, may be considered a "public figure". Within this frame of reference, a teacher or principal, a Rabbi, an elected official, a judge, sometimes even parents, become people set apart from the crowd, people to whom others turn, whom they may emulate. In that sense, they bear a special responsibility.

It may sound trite, but in assuming "public office," a person undertakes a special trust. In such instances, even the most intimate facets of a person's lifestyle may at times rightfully belong in the public domain. (The "public" here can be

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11. *Judaism* - Summer 1967 (Volume 16/Number 3).

defined to correspond to the scope of the "public figure's" sphere of influence). Parents are entitled to know not only that their child's teacher has qualified for a license; they also have every right to be assured about the moral probity of the person molding the delicate psyches of their offspring. Here it is very relevant to know not only a person's professional competence, but also his moral worthiness.

Jewish thinking takes this prerogative further, extending it to anything at all which would shed light upon the ethics or character of a person who holds a position of respect in the community, for that person will consciously or unconsciously be emulated by the public. The President may be a highly-accomplished diplomat and lawmaker, but if he is morally corrupt, he can cause untold damage to the national character, and the people have a right to be protected from his influence. Furthermore, if he already holds such a position of eminence, he is not entitled to be protected from revelations which might tarnish his image; on the contrary.

The Talmud instructs us to "expose the hypocrites", and Rashi explains that "those who are wicked but act as if they are righteous, it is proper to expose them . . . because people learn from their deeds, thinking that they are righteous people . . ." (Yuma 87b).

We know that the Torah considers the relationship between child and parent a hallowed one, akin to the respect which a person should feel for the Al-mighty.

Similarly, the student must have an overwhelming sense of awe for his Rebbe, his teacher. The Talmud taught that a true disciple will look upon his mentor "as one of the Angels who minister to G-d" *(Chagiga 15b)*.

We might think that since admiration and respect are so desirable, the Torah would bid us foster these emotions in a child or student. However, in his vital book on the laws of

intra-personal relationships, *Shmirat Halashon*, the Chofetz Chaim wrote:

> *Despite this, if one person sees in another person an ugly characteristic, such as conceit or pride or some other bad traits . . . it is proper that he report this thing to his child or student, to warn them not to associate with him in order that they not learn from his deed . . .*[12]

This is absolutely astounding in view of the great respect the Torah demands for elders. Nor is the above an isolated or anomalous instance. Elsewhere in *Shmirat HaLashon*, the Chofetz Chaim notes the advisability of publicizing a person's evil deeds (and this is not considered *lashon hora* (slander) "if his intention is that people will, thereby, avoid these evil deeds, when they hear how others despise evildoers . . .".[13]

The impact of his words are clear: It is not only permitted, it is indeed a virtual *mitzva* to invade a person's privacy and expose the sordid truth so that the public will not be misled, nor—and this is the operative purpose—be influenced to emulate a person whose true character does not meet the standards of Torah. If we are bidden to shatter the very natural and desirable admiration which a child feels for his parent or a student for his teacher, then it follows that the privacy of any person who is in a position to be imitated must be violated in order to protect the public.

Rabbenu Yonah wrote *Shaare T'shuva* (Gates of Repentance) in the 12th century, and it is still a basic handbook of Jewish morality and ethics. Choosing his words very carefully, he wrote:

> *If you know well that a person is not truly G-d-*

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12. הלכות איסורי לשון הרע כלל ד' אות ו'.
13. Ibid., כלל ו אות ד'.

> *fearing, and he continuously goes in a path which is not good, it is a mitzva to speak derogatorily about him and to reveal his sins, and to cause people to despise sinners, so that people will learn to have contempt for evil deeds* (para. 218).

What it amounts to is that any person in the "public" eye has to be prepared to sacrifice his privacy, in part or in toto; the ordinary rules safeguarding a person's privacy just can not apply to him.

In the second century, during the period of Hadrianic persecutions in Israel, a Babylonian scholar undertook the functions of the Sanhedrin, which was unable to meet during the turbulent war years. Afterwards, however, when peace was restored, this scholar refused to relinquish those functions and defied the newly-reconstituted Sanhedrin.

Thereupon, the Sanhedrin sent two scholars to Babylon. When the two scholars entered the Yeshiva in Babylon where that scholar taught, he greeted them and asked them why they had come. "We have come to learn Torah from you," they responded. Upon hearing this, the Rabbi stood up and announced to all—"These two are the greatest scholars of the generation." However, as he began lecturing, they contradicted all his proofs: when he wished to permit something, they proved it should be forbidden; when he wanted to forbid, they showed it was really permissible. Annoyed, he wanted to brand them as imposters and fools, but they told him—"It is too late, you have already announced to everyone how wise and how great we are." What then was their purpose in coming, the Rabbi wanted to know, since it was obvious that they had no true desire to learn from him? Their actual purpose, they revealed, was to discredit him totally in the eyes of the people, who heretofore had so much respect for him. Why did they want to do this? Because he was unfit to exercise the

prerogatives which he had assumed for himself, and only through discrediting him could they break the respect and allegiance which the people had undeservedly bestowed upon him.

In analyzing this incident, the Talmud asks a profound question: We understand why, when the Babylonian Rabbi permitted something, the two scholars forbade it—after all, no harm will come if people are a little more strict in interpreting the law. But when he forbade something which really was forbidden, and they permitted it—how could the two Rabbis allow something which is actually prohibited? To which the Talmud responded—all this is worth it, *just so that people do not follow a leader who does not merit his position.*[14]

It is told about Rabbi A. I. Karelitz, known as Chazon Ish (1878-1953), that he loved to reminisce about "gedolim" (outstanding Torah scholars and leaders), and incidents in which they played a role. Now, the Chazon Ish was well-known as a person who had spent decades closeted in his study, filling every minute of every day for years, engrossed solely in learning Torah. How then, could he waste his time in idle chitchat about other Rabbis? But he explained that we learn not only from the formal legal opinions published by brilliant Talmudists, but equally from their casual conversations and from their reactions to ordinary human occurrences. And if sometimes even a revered leader fell short of the ideal in his actions, the Chazon Ish did not hesitate to relate that as well—so that the masses would not blindly follow. (Interestingly, however, one time a visitor launched into a story about a certain public official, and the Chazon Ish held up his hand to stop him. "No, no," he admonished, "that person is by no

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14. ברכות סג'.

means a *Gadol,* and to talk about him is certainly not allowed; it is only gossip."[15]

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The above references serve to show why a public figure cannot be treated in the same way as a private individual, and why it is sometimes important to invade his privacy, in order to prevent his having a detrimental influence upon the character of people. In America in the past few years particularly, we have all become familiar with the deleterious effects upon public morality of the pecadilloes of public officials. Cynicism has become so prevalent that many feel we cannot even blame anyone for engaging in the virtual epidemic of falsity, chicanery, cheating and theft which plagues our society. After all, if Presidents and Senators can do it, why shouldn't everyone? Of course, this is not a justifiable excuse for wrongdoing, but the very expression of such a sentiment echoes the erosion of public morality which such actions have caused. Recent history reflects how well our Sages understood the human condition.

Necessary Information—Or Gossip?

A word of caution: Due to the unrestrained excesses of the news media nowadays, it is necessary at this point to qualify what was explained above. The permissible invasions of privacy which we noted extend *only* to those data which are essential for protection of the public. But while it is necessary for

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15. This is a personal experience of the Chazon-Ish's grandnephew, as related to this writer.

    The Chazon Ish in one of his letters (חלק ב קלג) notes that once his Shabbat was disturbed since he feared he had spoken evil against a scholar, but assures the reader that it had to be said for one is obliged to know the ways of scholars. However, he admonishes his audience not to add on even an extra word lest he be speaking evil talk against a Torah scholar.

me to know that the bank president has been jailed three times for embezzlement, it is not my right to know that he has been married three times. In other words, the permission to invade another's privacy, once granted, is not all-inclusive. Since it arises from my right to know what I need to know in order to protect myself, it logically and rightfully ceases at the point where the intrusion into the other's personal life does nothing other than satisfy my curiosity or prurience.

A beautiful example of this is found in a Talmudic passage expounding the Torah. In Bamidbar, we read about the five daughters of Zelaphchad, who wanted to inherit land in Israel, since they had no brothers and their father had died in the desert "for his sin". That is all that the Torah says about Zelaphchad, (Bamidbar 27:1-11); but in the Talmud (Shabbos 96b), Rabbi Akiva identifies Zelaphchad as the man who chopped wood on the Sabbath and was put to death for the desecration (Bamidbar 15:32-36).

"Rabbi Judah ben Bethaira said to him: 'Akiva, one way or the other, you will have to answer for what you said. If you are right (and Zelaphchad was the Sabbath-desecrator), the Torah concealed (that fact) and you divulged it . . . and if he was not (the Sabbath-desecrator), then you have maligned a righteous person." Thus we see how seriously our Rabbis took the infraction, as an unwarranted revelation of a person's private life. The yardstick to measure permissibility of exposure can only be the perceived benefit to the group, whether that entity is as small as the family unit or as large as the nation. And if there is no benefit, there can be no excuse for intrusion.

In the Talmud (Sanhedrin 31a) the rule is set that the debates and deliberations of judges in the Sanhedrin could not be divulged. No member of the Sanhedrin court was even permitted to say, "I voted to acquit, but my colleagues voted to find the person guilty, and what could I do, they were in the

majority and would not accept my view." The confidentiality of the deliberative process in judicial proceedings is absolutely essential if the members of the court are to act without constraint, without fear of reprisal from the guilty parties. One time, one of the jurors revealed how he had acted in a case—*twenty-two years* after it happened. Rav Ami immediately expelled that scholar from the Sanhedrin, for a judge who reveals such secrets cannot serve as judge. One who has no regard for the privacy of the judges has no right to be one of them.

There has been a great deal of publicity in the past few years about the news media's prying into every remote corner of a person's life in order to satisfy the curiosity of the masses (and to sell papers). Some of the violations are justifiable, but others clearly are not. A few years ago, Jacqueline Kennedy Onassis was constrained to sue in court for the invasion of her privacy by one photographer, who dogged her steps and hounded her continually. Mrs. Onassis unquestionably is a famous figure, but it is hard to imagine how the invasion of her privacy in any way operated to the benefit of the world. On the contrary, that was probably just the kind of action that Justices Warren and Brandeis had in mind when they castigated the "yellow press" as publishers of gossip, which serves only "to occupy the indolent" and "belittles" the object of the gossip.

On the other hand, the news media did the American public a great service a few years ago when they revealed the unsteady psychiatric history of the Vice-Presidential nominee, Thomas Eagleton. Although it was clearly an invasion of his privacy, it was a fact which was vital for the electorate to know. That does not necessarily imply that the resultant brouhaha which forced Eagleton to withdraw the nomination was justified. The impact of the revelation is separate from the essential necessity for the revelation. Once the revelation was made, it was up to each voter to decide if the fact of such a history was relevant to the office being sought.

As far as public figures are concerned, easily the most notorious incident in recent history is the accident at Chappaquidik, in which Edward Kennedy nearly drowned and a young campaign worker lost her life.

Let us discuss this incident only to illustrate our point. Should Edward Kennedy have to suffer the limelight's being turned on his role in this tragedy? Is he entitled to have the Court records sealed, as other defendants have? Why should the American people be entitled to know whether or not he was having an affair with his secretary?

As far as the Jewish viewpoint applies, we have to say the following: people are entitled to know the true facts regarding the accident for a number of reasons. How does this man—who might well be President and hold in his hands the lives of millions—react in a crisis? What will he do when his split-second decision can spell life or death for someone else? Does he "lose his cool" or does he function well in stress? Clearly, this invasion of his privacy is a crucial bit of information for the intelligent selection of a national leader.

As to the question of his possible liaison with the dead young woman—many will say that that has absolutely no bearing on his competence to carry out the weighty responsibilities of a President. In a limited sense, they are right. But we know that a public figure such as the President surely represents to the country far more than a mere office-holder with many responsibilities. He is admired, imitated, and respected, particularly by the young. And if he is deficient in his moral probity (and for most people, even in modern America, adultery still fits into that category), then he is not worthy of filling a position which has such a central influence in molding the moral character of the generation. Jimmy Carter was ridiculed when he announced that he would seek to fill high administration posts with people who had a solid family life. But on the other hand, we are all aware that there has been a

serious breakdown of morality in America and at least part of that is due to the example set by leaders of society. So maybe a person can be a good Commerce Secretary even if he is unfaithful to his wife—but directly or indirectly, it is bound to have a negative effect on the moral outlook of the public.

The Truth Even When It Hurts

The tendency to gossip is an almost universal failing, despite the fact that it is strictly forbidden as "*lashon hora*". In speaking *lashon hora* we are perpetrating a terrible invasion of another person's privacy, by publicizing that which he would want to keep hidden. Yet even here, there are some surprising twists in the halacha, which can perhaps be illustrated by a personal experience:

The young man sitting across the desk from me was visibly perturbed. After exchanging perfunctory pleasantries, he blurted out his problem. "Rabbi," he said, "you keep telling us that Torah offers the guidelines for any and all situations that may arise, that it is eternally relevant and modern. Well, I'm faced with a very serious dilemma, and I would really appreciate it if you can advise me . . .

"We live in a two-family house, and the girl upstairs is dating a friend of mine. My problem is, Rabbi, that long ago he confided to me that he suffers from diabetes, since childhood. I know that the girl doesn't know. What should I do? If they ask me about my friend, should I tell them this? If they don't ask, should I offer the information anyway? What about my friend—I don't want to hurt his chance at happiness, but I feel guilty about hiding this from the girl. What should I do?"

It was not just the young man seeking advice who was unsure of what justice really demanded. There are many others among us, as well, who do not know the correct response. So I decided to explore the question with him and present the resolution in a way that would help him understand the principles behind the decision.

Most of us at one time or another are endowed with the power to reinforce or destroy a prospective undertaking, purely by what we say. It was this type of situation—whether a *shiduch*, or a contemplated business partnership, or a job application—that Rabbi Meir Hacohen, the sainted Chofetz Chaim z''l, addresses in one part of his classic treatise, *Shemiras HaLashon*.

In a recent address, Justice Lewis F. Powell described the current thrust of Supreme Court decisions as "a more traditional and in my view a sounder balance . . . evolving between the rights of accused persons and the right of a civilized society." When the Chofetz Chaim spoke from Radin, not Washington, a hundred years ago, it was precisely this type of delicate balance that he sought, realizing that while a diabetic young man seeking to marry has the right to keep his personal affairs private, the young woman is also entitled to know fully the circumstances of the situation she is entering. It took a *gaon* of the Chofetz Chaim's caliber to show how to walk the tightrope between the commandment not to speak evil of one's fellow man—*"Lo seileich rochil be'amecho"*—and the mitzva not to stand idly by as another person is being harmed—*"Lo sa'amod al dam re'acho"* (both in Vayikra: 19,16).

I quoted the Chofetz Chaim's decision: that one must tell a suitor or businessman about serious deficiencies in the prospective partner.[16] In rendering this *halachic* decision the author of *Shemiras HaLashon* was well aware of the con-

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16. The Chofetz Chaim does not elaborate upon a most vital point—at what point should one volunteer information about deficiencies in a prospective partner? There is certainly going to be a very great difference in the reaction of a girl who learns that a young man is seriously ill *before* she ever meets him—and that of a girl about to announce her engagement to the fellow. One obviously must consult a competent authority on such a matter.

troversy his words could generate. As if anticipating the challenges and arguments, he prefaced his *psak* with a detailed explanation of the reasoning and sources upon which he relied in permitting the invasion of privacy.*

His decision is predicated upon two Talmudic sources: In *Sanhedrin* 73, the *Gemora* describes the Biblical prohibition *"Lo sa'amod . . ."* as referring to a situation when "one sees his friend drowning in the river or threatened by bandits and does not help him." Thus we see that one is obligated to try to save his friend not only from death but also from financial or other losses. A further proof is deduced from a requirement stated in the *Gemora*[17] that one *must* (—not just *may*) —publicize illegal land acquisition to protect the lawful owners.[18]

My young visitor was quite surprised. He had been worrying that he was tempted to resort to a most blatant type of *lashon hara* (tale-bearing)—and I was telling him he was not only *permitted*, but that he was actually *obligated*—to tell what he knew. "Yes," I assured him, "your duty to save your fellow man from harm takes precedence, provided certain conditions are met."

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*It is interesting to note that the Chofetz Chaim admits his hesitation, realizing some people would seize upon certain paragraphs as a "heter" for lashon hora, or that they might unjustifiably elaborate upon or draw conclusions from what he wrote. Nevertheless, he decided to set down the halacha so that those honestly seeking the truth might find it. He relied on an incident in Bava Bathra 89b: Rabbi Yochanan ben Zaccai was perplexed, for he had become aware of devious business practices being used by some Jewish merchants. If he denounced such activities publicly, perhaps some heretofore honest persons would learn how one could cheat; but if he remained silent, people would lose respect for the Rabbis, as being unaware of the realities of life. The Gemara concludes on the verse כי ישרים דרכי ה' צדיקים ילכו בם ורשעים יכשלו בם "The ways of G-d are straight; the righteous will walk in them, the sinners will stumble on them."

17. Bava Bathra 39b.

18. Ibid.

The young man had been motivated by a conflict of two admirable instincts. In presenting the decision emphasizing one of them, it was essential that the other not be lost. So even while outlining his duty to "tell it like it is," I took special pains to stress the necessity of being on guard against careless gossip—a much more prevalent vice than not saying enough. Even in this case where "telling" is warranted, there are strict guidelines to be considered, as outlined by the Chofetz Chaim:

a) *Do not exaggerate or dramatize the situation that you are reporting.* Diabetes or heart disease are serious health problems—but just how seriously are the persons affected, and how greatly may their disabilities affect their children? Did the prospective bride have a brother who died of Tay-Sachs disease? That does not mean that she is necessarily tainted or even a carrier. Keep things in perspective. One is obligated to state the situation simply, so that the person involved can then determine on his or her own the implications of the problem.

b) *Weigh your words carefully.* Don't blurt out the first thoughts that come to mind. First ponder whether that which *you perceive* as a fault is *actually* a flaw, or only your personal judgment. —If Chaim is a quiet fellow, that doesn't mean he is "depressed" or "odd." —If Berel is a trusting soul, that doesn't make him a simpleton. The information rendered must be *relevant and important to the decision being made.*

Surprisingly, the Chofetz Chaim did not stipulate that one must have first-hand knowledge of the problem before reporting it. On the contrary, even hearsay has to be passed on! The *Gemora*[19] criticizes Gedalia ben Achikom (the Jewish governor whose assassination precipitated a total exile of Jews from Eretz Yisroel), for ignoring the warnings of a man called Yochanan that there were plots against him. Since they were "only rumors," he did not give them much thought—and was

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19. Nidah 61a.

indeed murdered by those plotters. Even if one only overhears rumors that damage is being contemplated against another, he is bound by *halacha* to pass on these suspicions.[20]

c) In telling about these deficiencies or flaws, one's motive must be *purely* to prevent some loss or damage to the recipient of the news, and not even incidentally to pass on a juicy piece of gossip or to satisfy a grudge against the offender. For example: *Rosenberg want to hire Hilda as a maid. Levy knows that Hilda is a thief; moreover, she once insulted him. Levy must inform Rosenberg, to alert him against being robbed; but if he also wants to even the score with the insolent maid, he would be guilty of "tale-bearing."* (The solution to this problem is not to withhold the information, but rather to purify one's heart.)

However, if we are convinced that the detrimental knowledge will not sway the person to break the partnership or the *shiduch*, we are forbidden to tell him at all. Since we cannot ward off the damage, why heedlessly besmirch someone's reputation?

d) Even if all the above conditions have been met, one should still seek an alternative to being the bearer of evil things. The Talmud[21] tells us that when Joshua prayed to the Al-mighty to reveal to him who had taken from the *cheirem* (sanctified booty) of Jericho, G-d answered—"Do you think I am an informer? Draw lots and find out for yourself!" We need no clearer indication that the role of "tale-bearer" is an undesirable one. If there is information your friend *must* have, try to help him get it through some means other than directly informing him.[22]

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20. Ibid., commentary of the *Rosh*.
21. *Sanhedrin* 11a.
22. There is also no obligation to volunteer information that a person could easily ascertain for himself, if he would bother to investigate.

e) Perhaps the most elusive and difficult condition to meet is the last one the Chofetz Chaim stipulates: One has to gauge the effect one's words will have upon the person spoken *about*. Sometimes the harm that will come to the subject through such revelation will outweigh the prevention of harm to the other party. Recent studies have shown that people known to suffer from sickle-cell anemia or epilepsy or who have had (successful) cancer operations are often stigmatized, fired from their jobs, and treated as pariahs. The person with flaws or deficiencies has rights, too, and they must likewise be protected.

> *If Reuven is considering entering a business partnership with Shimon, should I inform him that Shimon was expelled from school for forgery? Only if my words nullify the advantages that might have accrued to Shimon—becoming Reuven's partner—but affect him no further. But if, by telling Reuven about Shimon's past I not only prevent his promotion to partnership, but cause him to be fired altogether, then I am doing him more harm than I would have spared Reuven, and I must remain silent.*[23]

It is obviously impossible to lay down universal guidelines for the legitimate invasion of privacy. The underlying message must be awareness and restraint.

Privacy in Marriage

The difficulties inherent in selecting a marriage partner fade into insignificance before the far more complex challenge of building a solid marriage.

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23. The Chofetz Chaim explicitly writes that in this case one must disregard the possibility that the offender has repented. The prospective partner has a right to know about events in his past that may shed light on his character.

There is no relationship in human experience which is so based on mutual trust and love as the marital union. Closeness between husband and wife is essential to the full flowering of the harmony and trust which form the foundation of a good relationship. Nevertheless, every marriage counselor (and millions of ordinary individuals, also) will attest to the fact that *too* much closeness, too much identification with the spouse can spell the death of a healthy relationship. A person can feel stifled in a smothering closeness. It is wise and healthy for each person in a marriage to retain some measure of his or herself that is private.[24] I am not advocating that each necessarily have a private or secret bank account, or go on separate vacations, although there are those who recommend such actions. But each person in a marriage must retain his or her individual identity; privacy is a human need which must be realized, even in a marriage.

It is not only psychology which advises that it is unwise to "tell all." The Prophet Micah warns, "From her who lies in your bosom, guard the gates of your mouth," which Mezudas David explains, "Do not tell your wife something which ought to be hidden."[25]

To what extent does Jewish law circumscribe conversation between a married couple, and are there any religious boundaries to revelations between them? After all, "A man's wife is like his own body"—why should there be any restrictions at all?

As we have noted previously, a man or woman is fully entitled to inquire and seek to find out information he or she

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24. The laws of tziniut which apply even to the intimacies of marriage also indicate the desirability of each person's retaining some part of himself private. This is true not only in the physical sense.

25. Michah 7:5. See Gemara in Taanit 11b and Chagiga 16b. However, אין מקרא יוצא מידי פשוטו.

needs to know about a prospective spouse. A person has the right to enter into a relationship knowing all the facts. However, once married, a little discretion is more than wise; certain aspects of a person's thoughts or past are better buried. The *Shulchan Aruch* (Code of Jewish Law), for example, writes that a widow who remarries should not continue to observe the "yahrzeit" (anniversary of death) of her first husband.[26] While her second husband surely is aware of it, it is not desirable to bring the fact to his conscious attention. A woman's privacy is so important that the Talmud says one of the four types of people whom G-d abhors is a person who enters *his own home* without warning. If he is not expected, let him knock first, lest he disturb his wife's privacy.[27]

Conversations between married partners should be circumspect as well. In seeking to determine the *halachic* guidelines for permissible revelations between them, we have to consider three categories:

(1) "I have never found anything better for a person than silence," comments Rabbi Shimon ben Gemaliel (Avot, perek 1:7) and this piece of advice applies equally to marriage. It is not necessary for a husband or wife to reveal to each other every thought, every oversight, every unworthy incident, whether in the past or in the present. A person is entitled to preserve some privacy of thought—and indiscretion.

(2) One might feel that it is unnecessary even to mention that a revelation to others of personal aspects of a marital relationship is strictly forbidden for either partner. Unfortunately, it does have to be said. Human nature being what it is,

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26. כל בו פרק ב ס' ד אות ל"ד, שו"ת ציץ אליעזר חי"ה ס' ל"ד.

27. Pesachim 112a. See the Rashbam, who applies the verse concerning the Cohen Gadol, whose garments had little bells sewn to the hem, ונשמע קולו בבואו אל הקודש. Especially interesting is the comment of the Avot of R. Nossan, the seventh chapter, third Mishna.

numerous tidbits may well slip out over a casual cup of coffee with a neighbor or a co-worker. But your spouse certainly has as much right to privacy as a stranger—and since it is strictly forbidden to talk about another person (lashon hora), certainly your spouse should feel secure that you will not reveal things about him or her! Even when the relationship is breaking up, each partner must guard against the natural tendency to explain to relatives and friends just what a beast, what a monster the other was, and why he/she is the aggrieved party in the divorce action.

(3) The most sensitive area governed by the halacha is that which dictates what a husband or wife may properly repeat to the spouse, concerning what was told to them in confidence. A lawyer, a doctor, a Rabbi, a principal, or others, may be privy to intimate information. What can such a person rightfully share with his/her spouse? Most people would think that if one can trust the discretion of his or her partner, it would be permissible to tell. But it happens that this is a common fallacy, for *the exact opposite is true.* The Gemara *(Yuma* 4b) teaches that when a person tells you something, do *not* think that you can repeat it to others unless you are warned—"Don't tell, it's confidential." On the contrary, *anything* at all which someone tells you must be treated with strict confidentiality, unless or until he gives you permission to repeat it.

Sometimes a family counselor or Rabbi or teacher will have information about a person or family which he has to know as a consequence of his involvement with them. Often this information is of the most intimate nature, and quite often it concerns family situations which nobody would want anyone to know. It is essential to guard oneself from revealing or even alluding to anything of this sort—not to colleagues, not even to one's husband or wife. It would be a breach of halacha.

Professional Confidences

The laws which have been discussed till now are basically guidelines for the individual in his customary social milieu, in dealings with family or friends. However, a new vista in halacha is opened when we consider these religious restrictions in their application to certain professions, wherein there is a great potential for conflict between professional ethics or requirements and the dictates of halacha.

The twentieth century has introduced us to the concepts of psychoanalysis, the healing of a troubled mind through revelation and unburdening of secret experiences deep within the psyche. Where must a doctor, or psychologist, or lawyer draw the line—may he reveal what was told to him in his capacity as a professional counselor? To do so would be to violate the principle of strict confidentiality which is the cornerstone of the trust upon which these relationships are founded. On the other hand, the professional counselor is bidden, like any other Jew, "lo ta-amod al dam re-acha"—he may not fail to act to save his fellow Jew from harm. Thus if a psychologist knows that one of his schizophrenic patients is dating another Jew, doesn't he have an obligation to warn the prospective spouse, in the same way that every Jew is obligated to warn another Jew of a potential hazard?

It is a complex problem, and the halachic indications are difficult to specify. The questions can be divided into two areas of inquiry: First, let us examine the problem from the point of view of the professional counselor's right to protect his own professional standing and secure his livelihood. It is quite obvious that if a lawyer reveals his clients' peccadilloes to others, he will shortly have no clients. Moreover, an individual whose professional ethics demand strict confidentiality, such as a doctor or psychoanalyst, may lose his job or even his license to practice if he does not hold his tongue. Would Jewish law then require him to reveal detrimental information about his

patients, even if in doing so he endangered his own livelihood?

The rule of thumb followed by poskim is that a Jew is not required to spend more than 1/5 of his income in the fulfilment of a mitzva. For example, if a man has $100, and an ethrog costs $50, he would not have to purchase one (Ramo אורח חיים תרנ"ו). However, there is disagreement between the authorities as to whether this rule applies only to positive commandments (mitzvot asai) or also to negative ones (mitzvot lo-ta'aseh). The Ramo (Ibid.) cites the Rashbo and Raavad in his contention that it is forbidden to violate a negative commandment, no matter how much it costs him. For example, even if a person would lose half his customers were he to close his store on Shabbos, he is nevertheless forbidden to keep it open. But the Chasam Sofer, among others, does not wholly accept this dictum. In his commentary on Shulchan Aruch, and also in his Responsa (חשן משפט קע"ו) the Chasam Sofer distinguishes between violating a mitzva through *doing* some action or violating it by *failure to act;* for him, this is the criterion rather than whether there is a positive or negative mitzva involved. For example, he states that it is absolutely forbidden to eat produce of Israel which was grown in the Sabbatical year (Shmita), since this is an act which violates the positive mitzva; no matter what the financial loss incurred in order to buy produce which is not grown in the Sabbatical year, a person may not do anything to violate the mitzva. Following the same line of reasoning, the Vilna Gaon (Yoreh Deah קנ"ז אות ה'), relying upon a text in Sanhedrin 83a, maintains that one need not incur an expense of more than 1/5 of his income in order to avoid transgressing a negative commandment, provided that the person did no action, but merely failed to act to prevent the violation. This view is shared by the Pischay Tshuva, Sefer HaChinuch, and Pri M'gadim.[28] [29]

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28. פתחי תשובה יורה דעה קנ"ז ס"ק ד, חינוך מצוה תקפ"ח, פרי מגדים אורח חיים תרנ"ו.

Our research shows that the majority of Halachic authorities accept the position that a person whose livelihood depends upon maintaining the confidentiality of revelations made to him, need not jeopardize his position by telling those secrets. Although keeping silent might violate the negative mitzva of not standing by and allowing another Jew to be harmed, yet as long as he is not violating the mitzva by *doing* any action and, were he to act he would endanger his own livelihood, then he is permitted to remain silent.

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The second Halachic issue to be explored regarding the revelation of professionally-acquired secrets is somewhat less direct. Even if there would be no monetary loss involved for the counselor nor danger to his ability to practice his profession, yet there remains the question whether professional counseling could continue as a viable activity if the public could not rely upon the absolute inviolability of a confidence. Would a person ask a lawyer's help in defending himself against a charge if he feared that thereby the secrets of his business or behavior might be revealed to society? Would parents turn to a child psychologist for guidance if thereby the child's deficiencies became known to others? Obviously, fear of exposure would preclude many persons from seeking help which they desperately need.

Therefore, we have to consider not only the personal professional status of a Jewish lawyer or doctor or psychologist, but also the welfare of the Jewish community as a

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29. Even the Ramo is not totally opposed to this principle. Although as previously cited, Ramo wrote that one must not violate a negative mitzva no matter what the case, yet in another context (יורה דעה קנ"ז), Ramo wrote that one need not go to extraordinary expense to bury a corpse found by the side of a road. This is a negative mitzva, not to leave the body unburied. See גיליון מהרש"א ibid.

whole. Is it beneficial for the community to have available to it people with the skill and knowledge to help those in pain, or in confusion, or in confrontation with the law? I think yes, very much so. Can we then allow this benefit to the community to take precedence over the rights and prerogatives of the individuals within that community? Or do our obligations to the individual—in our case, to warn a person of a hazard he may be facing—have a prior validity?

Although this specific question is not directly answered by poskim, the preponderance of Rabbinic opinion in this area, as we will explain below, leads clearly to the conclusion that the public need overrides the personal welfare of the individual.*

The Gemara sets a rule: "Ain podim et ha-shevuim yotair me'al demayhem." We do not pay an excessive ransom for a hostage, even if it is within the power of the community to meet such an expense. Why? Because if the community allows itself to be thus victimized once, there will be no end to the kidnappings for exorbitant ransom. Therefore, to save the community from such a threat, we simply do not ransom the individual who is being held for exorbitant ransom. He may die, but in the long run the community will benefit. The Israeli Government's absolute refusal to ever ransom hostages is a modern example of the relative efficacy of such a policy.

In the Talmud and elsewhere we find a variety of amendments made to Jewish law, "mipnei tikkun olam", to improve society. An instance of this is the report in the Gemara (Sanhedrin 81b) that the Beth Din used to *execute* persons who

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* The glaring exception to this rule: If a city is beseiged by the enemy, and they declare: "Give us one person, and we will kill him and let all of you go free. And if not, we will kill all of you," the Halacha is that all of them must die; that they may not turn over an innocent person to be killed, even if that will save the entire community. See Maimonides פרק ה' יסודי התורה, quoting ירושלמי תרומות, פרק ה'.

transgressed by moving muktzeh on Shabbat. Now, muktzeh is a relatively minor restriction enacted by the Rabbis, certainly not deserving of death for its neglect. However, since that generation was lax in Shmiras Shabbos, the Courts applied the death penalty even for minor infractions, so as to re-establish strict Shmiras Shabbos. Another example of the principle that the law may be bent for the ultimate welfare of the community is in the "takkana" (Sanhedrin 2b) that any three men, even if they are not truly competent and conversant with all the halachos, may act as a Beth Din in certain cases of borrowing and lending money. This enactment was passed so as to make it simple to borrow and lend money. The Rabbis feared that if there were a lot of "red tape" involved, people would hesitate to lend money to the needy, and since this was seen as a desirable and necessary service for the poor, the Rabbis made it very easy to form a Beth Din, so there would be no excuse not to lend.

The outstanding Responsum on this topic was penned by the Chasam Sofer,[30] in a case where the Rabbis of a town wanted to declare a "herem" on a certain sinner (excommunication), but they were afraid that this action might drive him away from Judaism altogether. In his Responsum, the Chasam Sofer distinguishes between privately rebuking a person for his misdeeds, if one fears that the reprimand might drive him away from the religion—this is forbidden—and excommunicating a person who has publicly flouted the religion. In the latter case, the Rabbis are clearly required to declare him in herem, in order to "remove a 'michshol lo-rabim' ", a public menace. Even if banning a sinner publicly may drive him from the religion, the Rabbis cannot allow public and flagrant violation of the Torah to go unpunished, for if they do, others will

30. See רמ"א יורה דעה של"ד.

think that there is nothing wrong with such sinful behavior, and they too will sin. Therefore, regardless of the outcome to the individual, the public must be protected.

From these examples we can derive the principle that the good of the entire group, the amalgam of many individuals, is of a higher value than the welfare of any particular individual. It may unfortunately be true that if a lawyer does not reveal to his friend that the person with whom he plans a business partnership has an unsavory criminal record, that person might indeed enter into a disastrous relationship—yet to do otherwise and betray the confidence of a client may do even greater harm to the community as a whole.

What has been written herein ought to be considered only as a general guideline for the professional counselor faced with a conflict between his religious morality and his professional ethics. Let each person take great care in choosing the proper course of action in each particular situation.

Privacy in Communications

One of the most famous laws regarding the protection of privacy is the *herem Rabbenu Gershom* which forbids the reading of another person's letters. Upon pain of excommunication the *herem* forbids the opening or reading of a letter belonging to someone else. Even Sephardic Jews, who were not within the area of Rabbenu Gershom's direct influence, adopted this ban almost universally.

The ban derives from the Torah's prohibition: "Be not a tale-bearer among your people." Reading personal correspondence is another form of invasion of the privacy of an individual, and must be proscribed. The *herem* continues in force today and has at least equal validity in our time as it did in the more simple lifestyle of the Middle Ages; by extension it undoubtedly applies to electronic forms of spying and eavesdropping as well.

Wire tapping and other invasions of privacy by electronic methods used to be devices employed only by government agencies or master spies in exotic novels. However, as the electronics industry emerges from its infancy, their use is increasingly commonplace, from the businessman spying on the competition to the rejected spouse seeking evidence in a divorce suit. As electronic communications replace or join the written word in importance, they pose a serious potential threat to the confidentiality of communications. The *herem* banning the reading of someone's mail would equally forbid clandestine eavesdropping.

We have little difficulty in accepting the *herem* of Rabbenu Gershom as a necessary barrier protecting the privacy of individuals. But how far does that ban reach? Is the confidentiality of communication a value of high priority or of relatively minor importance? Let us explore that question with regard to familiar recent events.

National Security

Former President Richard Nixon was responsible for more than just two years of upheaval on the American scene. The entire Watergate scandal with its concomitant cover-ups and mud-slinging, revealed a true Pandora's box of chicanery and generally sordid activities which certain officers of the Government tried to shield under the blanket of "national security". The President also refused to hand over his private tapes, and justified certain actions, on the grounds of "national security".

The issues he raised have not yet been resolved and continue to be a source of controversy and confrontation in our society. Although "national security" during Watergate was quickly recognized as a code-word for cover-up, we do nevertheless have to address the underlying question, which is a valid one: May the Government of a country claim that the requirements of national security shield it from being forced to

reveal its "private" activities? In addition there is an allied problem, arising from the revelations of Watergate excesses, of whether or where there are limits to the Government's right to invade the privacy of an individual for "national security" purposes.

The President argued, and was echoed by the F.B.I. and C.I.A., that those sworn to protect the nation from danger could undertake any means they found necessary to accomplish that goal. According to this argument, if the C.I.A. or F.B.I. have good cause to think someone is a spy or is somehow dangerous to America, or is (even possibly inadvertently) helping someone who is dangerous, then they can resort to any form of invasion of privacy in order to gather evidence or information. Eavesdropping, spying, wiretapping, theft of files—all can be rationalized.

Theoretically, at least, Jewish legal thinking would probably support this position, even though it seems extreme. (I say only theoretically, because I realize that recent experience has taught us that we must police our policemen.)

We have mentioned that Rabbenu Gershom enacted numerous *takkanos* and *haramim*, not only the one concerning letters. An equally famous *herem* is his edict forbidding a man from being married to more than one woman at a time.[31] One of the circumstances where the *herem* is not in force is if the *herem* would have the effect of preventing the performance of a mitzva. For example, if a man dies without children, his brother must marry the widow, the mitzva of *yibum* (the levirate marriage). If we follow the *herem* however, a married brother will not be able to perform the mitzva of *yibum;* therefore, our Rabbis indicate that we would suspend the *herem*, for Rabbenu Gershom *never intended it to apply in such a case.*

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31. אבן העזר א:י.

Another edict of Rabbenu Gershom is that a man may not divorce his wife against her will. However, here, too, there are exemptions. If his wife is considered a *overes al das*, if she does not adhere to the laws of the Torah, he may divorce her even without her consent.[32]

Now, if Rabbenu Gershom did not intend for the restrictions to apply in the above instances, if he himself in legislating them specified that they were not absolute, then it is inconceivable that he would not have set aside these edicts when it came to *pikuach nefesh*—a dangerous situation involving life and death.[33]

What is "national security" if not the life-and-death of a national state? If we are being spied upon by foreign governments, if some of our nationals are betraying our military secrecy, should we not use any means at our disposal to find out and prevent its continuance? Is the spy's privacy more sacred than the country's security? It would seem illogical for it to be so.

Actually, there is precedent for this approach within the framework of Jewish jurisprudence. The Jewish courts were very strictly governed by a code of evidence which gave an alleged criminal every benefit of every doubt. There had to be two witnesses against him, and their testimony had to be virtually identical in every detail[34] (if one observed the event from

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32. Ibid.
אבל ביבמה לא החרים והוא הדין בכל מקום שיש דיחוק מצוה כגון ששהה עם אשתו שנים ולא ילדה. אמנם יש חולקים וס"ל דחרם ר"ג נוהג אפילו במקום מצוה.

33. This line of reasoning was also followed by Rabbi Chaim David Halevy, Chief Sephardic Rabbi of Tel Aviv, in a question involving a teacher's claim that he should be allowed to intercept mail of a certain student in order to secure information necessary to prevent him from following sinful ways. However, no clear-cut decision was reached. Sh'maatin, an Israeli periodical, Tammuz 5736, as reported by Rabbi J.D. Bleich in **Tradition, Spring 1977.**

34. מכות ה:.

the roof, while the other was facing the criminal, and they did not see each other, their testimony is inadmissible). Even if two witnesses saw a murder take place, but did not warn the murderer that it was forbidden—and specify what punishment the Courts would mete out—then he could not be executed!

In the entire panorama of Jewish law, there is only one exception to these rules—when the accused is a *maisis*—one who incites a fellow Jew to commit idoltary.

"The one who incites to idoltary needs no warning (to be found guilty)", writes the Rambam (Hilchos Avodas Kochavim 5:3). Furthermore, although we never resort to entrapment in seeking a conviction, it is permissible when someone is suspected of inciting to idoltary (Ibid.). In all capital cases, the judges are exhorted to exercise mercy, to try and find some saving grace. But it is forbidden to seek to justify a "maisis" or seek clemency on his behalf.

Why is the law so harsh for a "maisis?" One possible answer is that the actions of a "maisis", who tries to wean others from the service of G-d and to join him in idoltary, *jeapordize the very existence of the Jewish people*. G-d, so to speak, will tolerate a great deal of evil from Israel—but when we reject our covenant with the Al-mighty and abandon His worship, then we have abandoned our *raison d'etre*, our very cause for being a nation. The "maisis," in modern terminology, threatens the *national security*. What our *halacha* teaches us in such a case is that we abrogate our rules protecting suspects, we close our hearts to pity, indeed we must be ruthless in defense of national security.

Thus it follows that a State must be given wide latitude in defense of its national security, which is vital to its very existence. Whereas wire-tapping and eavesdropping cannot be condoned under ordinary circumstances, for the protection of the State we must apply a different measure.

The Individual and Society

We have noted previously that there cannot be a law which governs all situations equally. The revelation of a person's private life may become desirable as the benefit to the public increases, and as a function of the harm which might ensue upon retention of that privacy.

In the past few years, as American privacy law has grown through numerous judicial decisions and legislation by the states, certain developments have occurred which are not always in consonance with Jewish teaching. Here again, we will inspect the new trends in order to come to a better understanding of our own religious teachings on the subject.

In 1971, a very interesting verdict was rendered in a suit involving invasion of privacy. A disabled veteran named Dietmann had been pretending to be able to cure all sorts of ills, employing powers which were totally imaginary. Hearing about this, a magazine reporter posed as a potential patient seeking a cure for cancer, and managed to record the ensuing "medical" advice which Dietmann prescribed for him. Secret recordings were made and pictures clandestinely taken; shortly thereafter, the magazine published an exposé of the quack, and he was arrested for practicing medicine without a license.

The noteworthy feature is this case, which is now part of the law of the land, is that notwithstanding the fact that Dietmann was found guilty of quackery, he subsequently filed suit against the magazine, *and won*, for invasion of his privacy! Albeit he was doing something illegal and potentially detrimental to the public welfare, the Court ruled that his right to privacy remained inviolate.[35] *

35. "The Press, Privacy, and the Constitution", New York Times Magazine, August 21, 1977.

* Recent Supreme Court cases have upheld the right of a woman to have an abortion as she sees fit, because the Constitution guarantees her the privacy of her own body. Jewish law is unequivocally opposed to such reasoning. No person's privacy entitles him or her to use his body contrary to the dictates of the One Who made that body.

Jewish teaching could not approve of such protection of privacy. While it is true that an individual has an *a priori* right to privacy, society has its prerogatives as well. Foremost is the right of the social group to be protected, which it cannot be if vital information is withheld from it. If a doctor is not qualified—why should he be privileged to hide that fact from those to whom he offers services? It flies in the face of logic (and, of course, *halacha*), to say that the law protects his privacy.

If a lawyer is unscrupulous or a dentist inept or a mechanic incompetent, it is not only permissible, it is a virtual *mitzva* to save people from becoming their victims. Once a person places himself in a position where people entrust to his care their children or their health or wealth, that part of his character or past which is relevant (but *only* that part) to the proper performance of his task cannot be shielded from public scrutiny.

Conflict between two opposing rights is inevitable when we have on the one hand a person's desire to keep his personal life private as opposed to the equally legitimate wish of the consumer (or patient or employer) to be well informed.

This antagonism of interests leads us to discussion of a broad area of human relations which is becoming increasingly the subject of debate: what are the proper limits to the information which a prospective employer—including the government—may require from the candidate for a job?[36]

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36. The wonders of technology have made possible situations right out of "1984", and we are hard-pressed to know how to deal with them. New York State has recently completed a project (other localities will surely follow) to put all employment and earnings data on a master computer. The data stored in this computer bank is seen, by many opponents, as a further unwarranted intrusion into people's private affairs. Since the data

Focussing on this problem, *The New York Times* reported:

> Fill in name, address, Social Security number. List past employers and dates of employment. Give three references. Indicate salary expected, hours available. Note all health problems. Sign here if all information given in this application is true to the best of applicant's knowledge.
>
> Finally, take lie detector test.
>
> This request is becoming the bottom line in job hunting. . .[37]

When he published *Shmiras Halashon* a century ago, the Chofetz Chaim had already anticipated our modern problems:

"It is an important principle to know that if a person wants to let someone into his affairs—for example, to hire him in his business, or to go into partnership with him . . . it is permissible for him to go around and ask and inquire from others . . . so as to prevent possible loss to himself (by hiring an un-

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bank is used by a variety of government agencies to check on a wide range of information, the data stored for each individual is often far more extensive and detailed than is necessary for any specific inquiry. This conjures up nightmares of government clerks (or perhaps some unscrupulous outsider) privy to the private details of a person's life. It also leaves great problems—who will decide which details will be divulged—and to whom.

Jewish law teaches that the good of the individual must at times be abrogated for the good of the group. However, here it is hard if not impossible to weigh such ephemeral concepts. Is it sufficiently important for the state to catch welfare cheats to endanger the privacy of millions of people, who might now be prey to blackmail or unfair revelation of derogatory information? I do not think we can easily posit a rule which will fit all situations, and I view the technological marvels with great unease.

37. The New York Times, August 19, 1977.

qualified or dishonest employee). And it is permissible to reveal even very derogatory information, since his intention is not to harm (the prospective employee) but he is telling the truth in order to save his fellow man from potential harm . . ."[38]

The crucial question in the invasion of an applicant's privacy, as Jewish law sees it, has to be the relevance of that information to the proper performance of the employee's job. Most companies should not be entitled to require polygraph (lie-detector) tests as a routine prerequisite for employment, but certainly there are numerous instances when such inquiry would be wholly justified. To ask a person if he or she is a homosexual is a blantant violation of that person's rights, if the position applied for is a bank teller or a sales clerk. There is no evidence whatsoever that homosexuals are any more or less dishonest than heterosexuals. However, the exact same question is very properly vital information when a school board wants to hire a teacher or bus driver. If the individual is strongly attracted to little children, that should be known before he is hired.

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38. שמירת הלשון הלכות רכילות כלל ט also שמירת הלשון כלל ד' אות א'.

The source of this is Rashi's commentary to Shavuous 39. Further, in Yevamot 87b, we find an incident involving a woman whose husband died. Since they had a child, the widow required no yibum or chalitza, and thereafter remarried. Subsequently, the child of the first marriage died, and since the first husband now had no offspring, the Rabbis had to decide whether the woman now required chalitza. The Courts decided that she did not, based on the logic of the verse, "For her (the Torah's) paths are pleasant ones . . ." It could never be the wish of the Torah to force an action which would engender ill-will between a man and his wife. Since the second husband would possibly feel revulsion for his wife if she underwent chalitza, it was not required. The Chofetz Chaim therefore concludes that we cannot seriously believe that the Torah, whose ways are pleasant, would place restrictions upon a businessman which could result in his joining with a partner who could cause him tremendous financial damage.

We cannot posit a rule regarding lie-detector tests which will apply equally to all involved; it will depend on the nature of the job sought as well as the nature of the questions asked in each situation.[39]

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Judaism places a great emphasis upon the dignity of the individual, and there are numerous statutes which make it a sin to remind a person that at one time he used to be a sinner; it is even forbidden to remind or mention that a proselyte was once not a Jew. We will accomplish no good and only shame a person by reminding him or others of his unfortunate past.

Would we then approve of laws such as have recently been passed, which would permit the expunging of criminal records after a period of time has passed without another arrest? In Rhode Island a statute has been passed to allow destruction of misdemeanor records after completion of sentence, and in other states records of marijuana convictions may be destroyed.

This may sound very noble, giving the repentant sinner a "clean slate," but it is a terrible disservice to people who may want to enter into relationships of trust with a former thief or addict, unaware of the full dimensions of the situation in which they intend to be involved. Jewish law, while sensitive to the rights of the individual, does not give them precedence over the rights of other individuals to be protected and forewarned, and to enter into situations knowing all the facts beforehand.

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39. The many restrictions and conditions surrounding character investigation are considered elsewhere in this article. We should note that all restrictions governing checking the background of a prospective spouse apply also to one investigating a prospective partner, with the added reservation that one should be careful not to ask an evaluation from a person who might harbor professional jealousy.

Also, as noted earlier, the application of principles to a wide cross-section of the population, without thought to the myriad inconsistencies of life, cannot but result in laws which are unfair, resulting inevitably in travesties of justice.

> *In Britain, the situation is . . . forbidding: There, it is a crime to publish the fact of a prior conviction if an individual has not served more than 30 months in prison and has not been arrested again within seven years. Thus, if an English equivalent of Spiro Agnew (if that can be imagined), should run for Parliament eight years after his felony conviction,* no *mention could be made of the conviction in the British press.*[40]

Our Rabbis teach that if one exercises mercy at a time when he should be firm, he will end up being cruel to those whom he ought to be treating with mercy. This is happening in America today, with the courts and legislators floundering, unable to arrive at an equitable philosophy of privacy law. Halacha has no such problem. Our laws are specific, and carefully detailed. Nevertheless, that is not enough to assure justice—that is up to each individual, to the extent that he is dedicated to learning the Law and following its dictates.

The Privacy of a Mitzva

One cannot complete a study on the topic of privacy without touching upon one aspect of that subject about which people are generally oblivious. We refer to the relationship between man and G-d.

So accustomed are we to hearing lavish praise heaped upon public benefactors at testimonial dinners, so inured have we become to the fulsome and extravagantly-phrased lauding

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40. The New York Times, ibid.

of honored persons, that possibly we have lost sight of the reality that this is antithetical to Judaism's teaching.

Through all history, there are many persons who have pondered deeply and sought to find an answer to the eternal question: "What does the L-rd require of man? What does G-d want us to do?" And through the ages, we have been given many answers. But the Prophet Micah condensed all the laws, all the teachings of the Torah and the Rabbis into one pithy response:

"Know then, what it is that G-d requires from thee—naught but to do justice and follow righteousness—*and walk modestly with G-d*".

The words of the Prophet are striking: "hatznea leches". Of all the descriptive words which Micah could have chosen to illustrate the manner in which one should "walk with G-d," tzinius (modesty) seems the least likely. We could appreciate "walk honestly" or "go with alacrity", "walk in purity", "walk with kindness . . . love . . . humility . . ." But "hatznea leches"? What did the Prophet have in mind?

If we ponder the experiences of our people, as we observe the behavior of the great individuals whose activites and beliefs shaped our national character, we will find exemplified that quality of "hatznea leches." Our forefathers worshipped G-d privately, without fanfare and not for the public admiration which would accrue to them as "holy men." The relationship between a person and his Maker is the most intimate, the most private of all. The individual neshama strives for the heights of spiritual achievement in the privacy of anonymity, lacking any audience but One. Purity of deed, single-minded sanctification occurs when a person seeks to impress only the Creator, when he is not performing for the public, seeks no admiration and expects no credit. Sincere devotion to G-d is a private encounter of the most personal nature.

Avraham Avinu

Let us re-examine the Biblical accounts of our forefathers, and we will recognize this to be true. The pinnacle of the Patriach Avraham's dedication to G-d was expressed in the series of events which we call the *Akeda,* wherein G-d tested Avraham by asking him to sacrifice his son Yitzhak. After all the trials and hardships which Avraham Avinu had to overcome, this was the most difficult to undertake.

We can well be amazed at the fortitude and love with which Avraham accepted that trial. Yet we must be astounded at the way he went about it—he did not even tell his wife Sarah where he was going. It was strictly between himself and G-d, and no one else need know. Imagine the heartbreak in a father's heart; think of the stupendous heights of dedication to G-d which Avraham achieved at that moment—and yet he wanted no one to know. At least gather the disciples around, or the leaders of the neighboring tribes—let the world recognize how great is the belief which moved Avraham to sacrifice his entire life's endeavor for the sake of his G-d. But no, Avraham prepared for the Akeda without telling anyone. Even the servants who accompanied him on the way were left at the foot of the mountain. Avraham and his son go, alone, up the mountain. There will be no audience. This is not being done for glory, not even as a lesson in Divine devotion *(kiddush hashem).* It is a private encounter, closed to the view of any being. The relationship between G-d and man is a private bond. "What is it that G-d wants from man? . . . *hatznea leches* . . ." go quietly, without fanfare. Do your mitzva in a hidden manner.

Yaakov Avinu

After Yaakov had an encounter with the Angel of Esau, he was given the name Israel instead of Yaakov. The Angel explained the choice of name: "Israel, because you fought *im Elokim*" and the Targum Onkelos renders this—because you

fought *before G-d*—you engaged in your religious activities only before G-d, you were not interested in the adulation of the masses, but only in satisfying the will of the Al-mighty. Therefore, he merited the elevation from Yaakov to Israel.

Moshe Rabbenu

Moshe Rabbenu was the one individual in all history, chosen from the millions who have peopled this earth, to be the link between G-d and His people in the giving of the Torah at Mount Sinai. Of Moshe, the Torah writes that Hashem found him uniquely suited to be the ultimate "servant of G-d." Even in the early stages of his career, we find Moshe Rabbenu as a "loner," a shepherd in the desert, one who searched for communion with G-d by himself. It was in the desert that G-d appeared to Moshe in the Burning Bush, and it was indicative the circumstances in which man can hope to reach out to his Creater—alone, without an audience, with no motive other than service to G-d.

So total was Moshe's dedication of his entire being to Hashem, that after *Mattan Torah,* Hashem instructed him to separate from his wife, so that he would always be ready for a visitation from the Al-mighty. *But nobody knew that Moshe had separated from his wife.* So private was the relationship, so modest was Moshe, so unconcerned with admiration for his unique election by G-d to a role unparalleled in world history, that not one person other than his own wife was aware of the fact that G-d had elevated him beyond the status of any other prophet. Only when Tzippora his wife let slip a sigh, did Moshe's own sister and brother become cognizant of his exalted position. Here we see again that the relationship between the individual and Hashem rightfully is totally private, not a subject for the knowledge of others.

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It is not only prayer and devotion which ought to be performed privately. Many mitzvos should ideally be performed

without thought to public approbration or notice of the act. Of course, the best-known of this category is *tzedaka,* whose highest pinnacle is "mattan besaiser," giving in secret—a private act in which neither the donor nor the recipient knows the identity of the other—nor does anyone else even recognize that tzedaka is being given. For us, who are so accustomed to munificent donations being publicly announced and applauded, it is a startling feature of the *mitzva,* that it is preferably done privately. (There are certainly compelling reasons why we have found it necessary to abandon *mattan besaiser* in favor of public acclaim for giving charity, but this is not the place to dwell upon those reasons. Nevertheless, the weaknesses of human nature do not alter the desired mode of performing mitzvos.) If no one is aware of a great financial sacrifice, if neither admiration nor gratitude will accrue from an act of kindness, then the mitzva is being done *lishma,* purely for its own sake, as a private act of devotion to G-d, and as *chesed* to another human being. In this, it is akin to care of the dead prior to burial, which our Rabbis call *chesed shel emes,* true generosity of the heart. When a person expends time and effort in the necessities of preparing a corpse for burial, he expects no thanks from the dead and he knows no recompense will come to him. It is an act done purely for the *mitzva.* When charity is distributed privately, it approaches the elevated level of *chesed shel emes.*

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"How goodly are thy tents, O Jacob, thy dwelling places, O Israel." We return to the blessing of Balaam, a paean of admiration torn from his unwilling mouth. As we indicated, the beauty of the Jewish home which so impressed Balaam was the privacy of the tents, pitched in such a way that no doorway faced another doorway. The family and the home have ever been the bulwark of the Jewish nation, the secret defense

against the vicissitudes of environment, hate, and distractions of the world.

We would do well to give thought to those things which we permit to encroach upon the private sanctuary of our homes. Whether they be material posessions or books, TV, friends, let us recognize that they influence us, that they constitute an instrusion of the outside world upon the privacy of the home. We have every right to be selective, therefore, in determining what people, ideas, words or even physical objects we allow entrance. As the Maharal teaches, Man was created with overwhelming wisdom by the Creator. He was given the physical means to maintain the privacy of his mind and body. Let him exercise those prerogatives wisely.

Rabbi Hershel Schachter

"Dina De'malchusa Dina": Secular Law As a Religious Obligation

Normative Judaism is concerned not only with religious ritual; a major area of concern is the relationship of the individual to the society in which he lives, and to others in that polity. A familiar exemplification of this principle is evident in the Ten Commandments, wherein the first five speak of the man-G-d relationship, and the second tablet teach the proper attitudes in the man-man relationship.

When the Jewish people lived in their own political and social milieu, the laws of the Torah governed their environment. However, in the centuries of our Diaspora, one of the most difficult areas of adjustment has been in finding the proper mode of accommodating the rules of a secular or Christian society to a Torah *weltanschauung*. The Torah-true Jew does not lose sight of Torah ideals, even while subject to the discipline of another system. The topic which we will discuss herein, is to what extent the laws of the Torah are superseded or ignored or adapted—or perhaps *not* superseded or ignored—by the realities of existence in a non-Torah framework.

So, for example, we have to consider the committed Jew in his role as American citizen, tax-payer, businessman, profes-

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sional. To what extent does being a "good Jew" require a person also to be a "good American"? How about cutting corners on one's income tax—is it prohibited by the religion? Do American ceremonies of marriage and divorce have validity in the eyes of halacha? Should two Jews who enter a business partnership be guided by American law or by the Shulchan Aruch—or both? What if there is a conflict?

The basis of any accommodation of Torah principles to secular law lies in the Talmudic dictum, "Dina de'malchusa dina". In several places, the Gemara quotes[1] the principle of the teacher Shmuel, that the laws of the government are binding on Jews, even when they differ from the laws of the Torah. The main application of this principle is the collection of taxes. The government officials are permitted to collect taxes, and the cash or property they collect in taxes are considered as legally belonging to the government, and not considered as stolen property in their hands.

The right of the government to levy taxes is restricted only to a bona fide government, and does not apply to any pirate who decided on his own to rob the masses in an organized fashion.[2] Even when it is the official government levying the taxes, if the system of taxation is unjust, as for example—if one segment of the population is discriminated against and is taxed more than another—then, too, this principle does not apply. Shmuel formulated his principle by stating "*Dina* de'malchusa dina," "The *law* of the government is binding", but not "*Gazlanusa* de'malchusa," "The *robbery* of the government".[3]

Before proceeding with an analysis of the specifics of the principle "Dina de'malchusa dina," we ought to point out that

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1. Bava Kama 113a; Bava Bathra 54b; Nedarim 28a; Gittin 10b.
2. Rambam Hilchot G'zeloh V'avedah, end of Chapter 5, section 18.
3. Ibid, section 14; Magid Mishnah to section 13; Choshen Mishpot 369, section 8 in Ramo.

this is a much more narrow concept than is often imagined. "Dina de'malchusa dina" cannot be interpreted to mean that the law of the land is the law, period. Were this so, it would mean that wherever the law of the land is different from the law of the Torah, it is the law of the land which we are to follow. This is absurd, for it would reduce Judaism to a practice of rituals alone, and would effectively nullify about half of the Shulchan Aruch.

Rather, we take the principle "Dina de'malchusa dina" to indicate that in certain *areas* and under certain, specific *circumstances*, the halacha requires that we be governed by the dictates of the sovereign state in which we live rather than by the teachings of the Torah alone. We will now consider some of those areas.

The Mishna in Nedarim[4] tells us that in order to avoid paying taxes, one may even swear what *might seem to be* a false oath, which under normal circumstances would not be allowed. In commenting on this Mishna, the Gemara asks, but why should we allow this even for the purpose of avoiding paying taxes, if the government is legally entitled to collect their taxes? Why consider this a case of "sha'as hadechak" and "oness", to permit what seems like a false oath? To this the Gemara answers that the Mishna is obviously referring to a case where "Dina de'malchusa" does not apply: a) either the tax-collector was not authorized by the government, but is merely collecting for a pirate; or b) the government sold the right to collect taxes to a private individual, who is unjustly holding up the public to pay much more than the government needs in order that he himself should gain a tremendous profit; in such a case we no longer are dealing with a "dina de'malchusa," but rather a "chamsonusa" or a "gazlanusa

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4. 28a.

de'malchusa," an unfair tax, which the government has no right to levy.

What is the halachically-binding force of the taxes levied by the government? Why isn't the money collected by the government—without the consent of the individual taxpayer—considered as stolen property? The Mei'ri[5] and the Vilna Gaon[6] both maintain that this is based on the "Parshas Melech": In the Book of Shmuel I (Chap. 8), the prophet Shmuel warns the Jewish people against the evils of a King; among other things, Shmuel warns that he will tax the people heavily. In the Talmud[7] there is a dispute as to the understanding of "Parshas Melech", this chapter dealing with "the evils of the King". Was the prophet Shmuel warning the nation by exaggerating the limits of royal authority, and mentioning things that the King was not really legally authorized to do; or was Shmuel portraying accurately the rights and privileges of the King? The halacha has accepted the second understanding of that Parsha, that "Kol ho'omur beparshas melech", everything spoken of in that section of the Book of Shmuel, "melech mutar bo", the King is legally entitled to do. Since levying taxes is mentioned among the various warnings of Shmuel Ha'novi, we can clearly derive from this section in the Novi the right of the government to tax the people.

This suggestion of the Mei'ri and the Vilna Gaon is, of course, assuming that the Parshas Melech applies to all kings, both Jewish kings in Eretz Yisroel, and non-Jewish governments ruling over other countries. Tosafot in their comments on that discussion in Gemara Sanhedrin[8] limit the Parshas

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5. Commentary to Nedarim.
6. Commentary, Choshen Mishpot 369, sub section 34.
7. Sanhedrin 20b.
8. Ibid, section beginning "Melech..."

Melech only to a *Jewish* king ruling over *all* of Eretz Israel. This is obviously in contradiction to the opinion of the Mei'ri and the Vilna Gaon. Other objections were raised against the suggestion of the Mei'ri and the Gaon by the D'var Avrohom.[9]

This dispute between Rabbinic authorities is not just a hair-splitting technicality. Upon the resolution hinges the major question of whether a Jew living under a non-Jewish government has to consider the laws of the land as legitimately binding upon him or not. For example, would the government of the United States, whether through the President or the Congress, have the status of a "King" (i.e., the legitimate ruler), or not; and if so, what are the limits of the ruler's power?

It is not necessary at this point to follow through to the end of the technical dispute; suffice it to record that practical halacha generally accepts that the ruler does have certain legitimate powers over the individuals under his control, and that to some extent, as part of keeping the Torah, Jews must accept these restrictions or guidelines. We will now proceed to examine the nature of that power.

According to the Ramban,[10] the rights of the government to tax are very limited. Only such taxes that had already existed in the past may be continued. The king has no right to institute any *new* taxes, even if they are just and fair. The Ramban seems to have understood the basis of "Dina de'malchusa" for the purposes of taxation as being based on the principle of "hischaivus mi'daas," one's own personal acceptance of an obligation. The fact that the people have been paying taxes in the past is taken as an indication of their willingness and their

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9. Volume I, page 14, in footnote.
10. Quoted by Magid Mishnah, Hilchot G'zelah, Chapter 5, section 13.

agreement to continue to pay them; and anyone who accepts upon himself any monetary obligation, is obliged to pay that debt.[11]

This view of the Ramban was not shared by the majority of the Rishonim. In their view, the king may even institute new taxes, and they too will be legally binding, provided they are fair and just and do not discriminate. Where then is the Biblical source for the principle of "Dina de'malchusa dina"? If one

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11. Whatever is commonly practiced (minhag ha'medinah) is considered as if all the people had expressly accepted upon themselves to follow. In the Talmud we find this principle regarding cases where all that is needed is a T'nai (condition) to regulate an already existing legally-binding agreement. (Yerushalmi, Bava Metziah, beginning with Chapter 7). The Ramo, Choshen Mishpat (Chapter 46, section 4) quoting the Terumas Hadeshen, has extended this principle to apply even to cases where no previous binding agreement (hischaivut) had been enacted, and this understood and assumed agreement to follow the minhag ha'medinah is what actually serves to create the obligation.

    Usually, a monetary obligation does not become legally binding until an act of Kinyan is done. (For example: a shtar—a document—is handed over to the one who is acquiring the obligation; or a Kinyan suddar is made.) This is required only where the obligation is towards a private individual. If, however, one is obligating himself to the public, or to the government, no formal "act of acquisition" (maaseh Kinyan) is needed. See Hadorom, Nisson 5740, pp. 29-30, Chazon Ish, Orlah, (I,15) Comments of Rabbi Akiva Eiger to Choshen Mishpot, Chapter 333, section 2.

    Therefore, according to the view of the Ramban, all that is needed is that the minhag ha'medinah should establish the individual's implicit agreement to pay his taxes to the government; and although there is no formal maaseh Kinyan, the obligation in this case would be legally binding.

    See D'var Avrohom (Vol. I, p. 13a), and Chazon Ish, end of volume on Choshen Mishpot, collection of essays on miscellaneous topics (16,9), who gave different interpretations to the view of the Ramban.

does not accept the opinion of the Vilna Gaon, should this lead us to assume that this principle of "Dina de'malchusa" is only of Rabbinic origin?

That was indeed the view of the Bais Shmuel,[12] one of the major commentaries on the Shulchan Aruch, that "Dina de'malchusa dina", is only "Miderabanan," (of Rabbinic origin). However, most Poskim following him have not accepted his view, and have assumed that the principle of Shmuel is of Biblical origin—Midoraisa.[13]

At first, it may seem to matter little whether the authority of the ruler to make regulations rests upon a Biblical or Rabbinic basis; in either case, the regulations would be binding upon the Jew. Actually, however, the resolution could have quite far-reaching consequences. For example, if the *Torah* accepts government regulation as binding, then transactions conducted in accordance with the law of the land would have the same force as those executed in accordance with Torah stipulations. Thus, the sale of chometz before Pesach could be effected by a simple bill of sale, which would be legal under secular law; there would be no need for the various forms of kinyan and transferral of property which the Rabbis undertake.

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A new approach to the issue of the halachic legitimacy of secular law was developed by the last Rabbi of Kovno, Rabbi

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12. Commentary to Even Haezer, Chapter 28, sub-section 3.
13. Avnei Miluim, Even Haezer; Tshuvot Chasam Sofer, Yoreh Deah responsum 314, D'var Avrohom, Volume I, p. 9.

Avraham Dov Ber Cahana Shapiro, in his classic work, Dvar Avrohom:[14] The Talmud shows[15] from various verses that "hefker Bes Din hefker", that the Rabbinic Court has the authority to take away someone's property, and to declare it ownerless (hefker); and even to declare that it should be considered as if that property belongs from now on to someone else, despite the fact that the other person made no "kinyan" or formal "act of acquisition."[16] This ability of the Bes Din to declare as hefker someone else's property, is not due to the "authority of Torah" they possess, for here they are *not* following the laws of the Torah, but rather due to "governmental authority" possessed by the Bes Din. Therefore, the Biblical passages which indicate to us the power of the Bes Din to make something hefker apply also to non-Jewish jurisdiction, and

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14. Volume I, p. 12a.

15. Gittin 36b.

16. Rashba, Gittin. There is a major dispute between the Kzos Hachoshen and the Nesivos to Choshen Mishpot, Chapter 235, section 7, regarding this principle of Hefker Bes Din. Do the Psukim indicate that Min Hatorah (Biblically) Bes Din only has the ability to declare someone's property as Hefker, and their authority to declare that it belongs to somebody else is not Mid'oraitho; or should we assume that even the ability of the Bes Din to declare that someone's property should belong to another person is also Biblical in origin? The major difference in this issue would be whether something acquired through a Kinyan D'rabonon belongs to the person only Mid'rabonon or even Mid'oraitho. Could one use a Lulav and Esrog which he acquired merely by having picked it up (Hagboho) without having paid for it (payment constituting the Kinyon Mid'oraitho, and Hagboho being only a Kinyan Mid'rabonon) on the first day of Succos, where the mitzvoh d'oraitho requires that it must belong to me? See Divrei Yichezkiel by Rabbi Yechezkiel Burstein, Chapter 56, where he shows that this Machlokes between the Kzos and the Nesivos is rooted in a much earlier disagreement amongst the Rishonim.

are actually the source of the principle of "dina de'malchusa".[17] It is interesting to note that the famous Chassidic Rebbe of Sochochov, Rabbi Avrohom Friedman, in his classic work "Avnei Nezer," a contemporary of the "Dvar Avrohom", developed a very similar notion in his fascinating responsum[18] dealing with the case of a son-in-law interested in inheriting his father-in-law's rabbinical position.

Assuming that the government has the legal right to levy taxes, and that the citizens are obligated to pay these taxes, like any other debt that any individual owes to someone else, the question now arises, what would be the status of one who does not pay his taxes; or does not pay the full amount that he should legally be paying? If an individual owes money to someone else and fails to pay, he violates the aveirah of "lo

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17. According to the view of the Nesivos (in note 16), that Biblically the Bes Din only has the ability to declare someone's property as ownerless, Rabbi David Rappaport explains in his work Zemach Dovid (pp. 110-111) that the basis of this principle runs as follows: the Bes Din (and hence, the government as well) has the authority to act as if they were the true owners of the property. Therefore, just as the owner himself could declare his property as Hefker (ownerless) without any need for any additional action (maaseh Kinyan), so too the Bes Din can declare it as ownerless without the need for any act of Kinyan. But regarding declaring someone else as the owner, just as the true owner himself was unable to transfer ownership of his property to someone else without a formal act of Kinyan, so too the ability of the Bes Din to declare someone else as the owner would only be Mid'rabonon in nature, and not Min Hatorah.

    With respect to accepting upon oneself a monetary obligation towards the government, just as the individual could have accomplished this without the need for any formal act of Kinyan (see above note 11), so too the government has the ability—Min Hatorah—to levy taxes upon individuals, and the obligation to pay those taxes would be the same as in the case where the person himself had accepted that debt.

18. Yoreh Deah, Responsum 312, sections 46-52.

sa'ashok" and possibly also the aveirah of "lo sigzol".[19] If someone should refrain from paying the taxes due to a Jewish government, these two violations will apply.

[This raises an interesting incidental question—is there any *religious* restriction against changing American dollars into Israeli currency on the famous black market in Israel? Since this is a Jewish government, would it be a violation of these two prohibitions? It would seem that technically these particular issurim would not apply; in changing money for a higher rate, one is not actually stealing anything, nor is he failing to pay the government a legitimate tax. I do not mean to imply that other issurim might not be applicable.[20]]

If however it is a non-Jewish government to which one owes taxes, the following question arises: The Talmud clearly forbids "gezel akum" stealing from a nochri, but "hafka'as halva'oso" is allowed.[20a] That is to say that although theft from a nochri is forbidden, *not paying back* a debt which one owes to a nochri is not considered an act of gezel (theft). If this be the case, then the non-Jewish government has all the legal right to

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19. According to the Talmud (Bava Metziah 61a and 111a) one who fails to pay his debts violates both the Laws of "Lo Sigzol" and "Lo Saashok". The Rambam (at the very beginning of Hilchot G'zeloh V'avedah) clearly distinguishes between these two violations; Lo Sigzol only applies when a person takes away someone else's property. If someone fails to pay his debts, he violates only Lo Saashok. The commentary Maggid Mishnah attempts to discover a source in the Talmud for the Rambam's view.

20. Any government regulations imposed for the purpose of protecting the consumers or for enhancing the economy, etc., are halchically binding based on another aspect of the principle of "Dina de'malchusa". One of the major functions of any king (or government) is to keep law and order in his country. "The king preserves his country by insisting on mishpot" (Proverbs 29,4). See Avnei Nezer in note 18. This aspect of "Dina de'malchusa" will be covered later in our discussion of "makin ve'onshin shelo min hadin".

20a. Bava Kamma 113b.

levy just and fair taxes; still, what is to forbid the individual from failure to pay his taxes on the grounds that "hafka'as halva'oso" (non-payment of a debt) of a nochri is allowed?

If one fills out a tax form with false information in such a way that he pays less than he really owes the government, this involves a violation of "sheker," dealing falsely with others.[21] The question remains however, is it ossur if one simply never fills out any tax form at all, or does not pay sales tax, where there is no problem of "sheker", but is merely a situation of one's not paying his debts to a nochri? This question has practical immediacy, with the proliferation of myriads of little business enterprises which are not registered with the government. The private basement businesses neither collect nor pay sales tax. Is it "muttar" for an observant Jew to maintain such a store? Furthermore, may one *buy* from such a store? And would it even be permissible to report to the pertinent government agencies the existence of this illegal business? Does the principle of "Dina de'malchusa dina" apply in such a case?

To the question of whether it is permissible to operate a store and not collect or not pay sales tax, we find a mixed response. In the view of the Vilna Gaon[22] and other Poskim,[23] not paying the secular government that which it is owed is permitted. But if one might possibly create a situation of "chilul hashem" by not paying his taxes, there is no doubt that the

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21. See Vayikro 19-11, that one is forbidden to falsify in money matters. If one signs a false oath, according to many Poskim this is a violation of Shvuas Sheker. (See Teshuvos Rabbi Akiva Eiger 30-32.) Even if one has not violated either of these injunctions, the Talmud (Kiddushin 45b) points to the Biblical passage in the book of Tzefaniah that the Jewish people must be especially outstanding in the area of honesty and truthfulness, and must never lie or falsify, even when there is no monetary issue involved.
22. Choshen Mishpot 369, sub-section 23.
23. Kesef Mishneh to Hilchot G'zeloh V'avedah, Chapter 5, section 11.

"heter" of "hafka'as halva'ah" of akum does not apply. In the *rare instance* where (a) there is no question of signing a false statement, and (b) there is no possibility of causing a chilul hashem, this group of poskim does not consider it forbidden.

However, the Ramo[24] in his comments to the Shulchan Aruch, as well as the Baal HaTanya (R. Schneuer Zalman of Liady), have both rejected this view. They feel that although "hafka'as halva'ah" of a private individual and nochri may be permissible, this principle has no application with respect to paying of one's taxes to the government. The reasoning for this distinction is as follows: The government not only imposes the tax, but in this instance also requires that the individual send the taxes to it.[25] The principle "Dina de'malchusa dina" cannot only create an obligation of a debt, but it can also obligate one to do specific actions—such as paying the debt. Therefore, although considering the Biblical law alone, one would not be required to pay one's debts to the non-Jewish government (following the principle that hafka'as halva'ah of a nochri is muttar), yet, based on the rule "Dina de'malchusa dina", he would

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24. Choshen Mishpot 369, section 6, in Ramo.

25. See Mishneh Lemelech, end of Chapter 5, Hilchot Gezelah Veavedah. According to the view of the Kzos (mentioned above in note 16), the Bes Din (and therefore also the government) has the authority both to declare ownership and non-ownership, but does not necessarily have the power to otherwise act as if they themselves were the Baalim. Following the opinion of the Nesivos, however, (mentioned above in notes 16 and 17) that the Bes Din acts as if they were the Baalim, we can understand quite well how they are able to impose upon an individual an obligation to do a specific action (as, for example, to fill out his tax form and pay his taxes) and not just to create the Chiuv Momon (the debt). Just as the individual could have accepted upon himself as a Poel (a worker) the obligation to do a specific job, so too the Bes Din (or the government) can impose such an obligation upon him, as if he himself had agreed to it.

still be required to pay his taxes just as if he had accepted the obligation of payment willingly by himself.[26]

If we accept the latter argument prohibiting maintaining a business without paying sales tax for the merchandise sold, what is the status of a prospective customer? May he buy in such an establishment? Rabbi J.B. Soloveitchik has said that it is forbidden to buy there, because of the Biblical prohibition "lifnei ivair" (one may not tempt or make it attractive for someone else to commit a transgression). However, as far as reporting the illegal shopkeeper to the authorities, this would be forbidden, as we will show later in our discussion.

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The first area of "Dina de'malchusa dina", as we have seen, is in the taxation function of government. A second area is minting coins and establishing the value of the currency. According to the Shach in his commentary on the Shulchan

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26. There is yet another significant view amongst the Rishonim regarding the right of the government to levy taxes. According to the opinion of some Baalei Tosafot, (see Ran to Nedarim 28a beginning B'Muchas), just as a landlord is entitled to charge rent for the use of his apartment, so too the government owns the land of its country and is entitled to charge rent (in the form of taxes) for the individual's right to stay in that country. Following this view, the Israeli government would not have the power to levy any taxes upon Jewish people living in that country, for all Jews are entitled to live there rent-free. Although some claim in the name of the Chazon Ish that he felt one could rely on this opinion, it would seem to me that this view was not shared by the majority of the Poskim.

In addition it should be noted that even to this opinion, only the first aspect of "Dina d'malchusa" would be excluded in Eretz Yisroel, namely, regarding the government's right to levy taxes. With respect to the other three areas of "Dina D'malchusa Dina", all Rishonim would agree that they apply even in Eretz Yisroel.

In this essay I have followed the D'var Avrohom (Vol. I, p. 14, in note) in dividing the topic into four parts: (1) taxation; (2) minting of currency; (3) keeping law and order and punishing criminals; and (4) introducing a legal system.

Aruch,[27] this is a specific function of government. If the government should suddenly change the monetary system, and declare new coins as legal tender, even if the new coins are intrinsically of much lesser value than the older ones, the principle of "Dina de'malchusa" definitely will apply.[28]

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27. Yoreh Deah 165, sub-section 8.
28. This point is most relevant with respect to two areas of Halacha: (1) the law is that Maaser Sheini (the second tithe on vegetation grown in Eretz Yisroel) may only be eaten if it is first redeemed into cash. Although one may redeem Hekdesh, or redeem a first-born son using "Shoveh Kesef" (commodities), the pidyon or redemption of Maaser Sheini requires "Kesef sh'yesh olov Zurah". (Talmud B'choros 51a). This would imply that in America, one who happens to have some Maaser Sheini could only redeem it in American coins; and one in France could only redeem his Maaser Sheini into French currency. Those groups who do not recognize the present Israeli government, and consider the Zionists as pirates who took over Palestine from the Arabs illegally, would not be able to redeem their Maaser Sheini in Israel using Israeli currency.

    (2) Regarding the prohibition against collection of interest on debts: If a loan of English money were made in the United States, and at the time the debt were due the American currency had gone down due to inflation, one would not be permitted to repay the full amount of English money he had borrowed but only the amount it was worth in American money at the time of the loan. (See Bris Yehuda, end of Chapter 18.) If however one had borrowed cash of the local currency, and the value of the money had increased by the time the debt was due, he would be permitted, and indeed obligated to pay in full the entire amount of money he had borrowed. The Halacha declares that cash always retains the same value, and only commodities fluctuate in their value. See Igrot Moshe, Yoreh Deah, Volume II, Responsum 114.

    Some view money as an evil of society, and feel that a more perfect society would prevail if it were eliminated. The Chazon Ish has pointed out (Yoreh Deah 72:2) that in his opinion this can not be true. Since the Torah requires that for the redemption of Maaser Sheini only cash may be used and not commodities, apparently currency is an essential component of the ideal Torah-oriented government. Wherever Jews are in control of a government, it would be proper for them to see that their country should have a system of currency.

A third, and most significant area of application of "Dina de'malchusa" is the right of any government, Jewish or non-Jewish, to punish criminals as they see fit, for the purpose of keeping law and order.[29] The Gemara states[30] that there was a tradition that "the Bes Din may issue corporal punishment or monetary fines even when not warranted by the Torah". The Ran commenting on that Gemara points out that this permission not only applies to a Jewish religious Bes Din, but even to a secular or non-Jewish government. Proof to this is shown by Ritva from the Talmudic story[31] of Rabbi Eliezer ben Rabbi Shimon who was by profession a policeman for the Roman government, and would arrest Jewish criminals and have them punished based on circumstantial evidence. His contemporary Rabbi Yehoshua ben Korcha was angry at him for "giving over" fellow-Jews to the Roman government to be punished by death. Rabbi Eliezer answered that he was "cleaning out the Jewish vineyard of its thorns," whereupon Rabbi Yehoshua ben Korcha replied, "let the master of the vineyard (G-d) clean out his own vineyard."

Similarly, Rabbi Yishmael ben Rabbi Yosi was also appointed by the government as a policeman for the purpose of identifying Jewish criminals who were to get the death penalty. The prophet Eliyahu appeared to him, and recommended that he give up his position. And the if the Roman government would not allow him to resign, Eliyahu urged him that if need be, he should leave the country, just in order not to have to hand over the Jewish criminals. The Ritva points out that neither Rabbi Yehoshua ben Korcha nor Eliyahu ha'Novi said it was *forbidden* to be in such a position. They merely argued that it was *not proper* for these prominent rabbis to do that type of work.

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29. See Avnei Nezer in note 18, and note 20.
30. Sanhedrin 46a.
31. Bava Metziah 83b-84a.

Mesirah

The above case is unrelated to the prohibition against "mesirah". A "mossur" is one who aids a pirate, or a crooked government official, or a tyrant-king to obtain money illegally from his fellow Jew. Even if the Jew has actually done something wrong, but if the secular government or the ruler would exact a punishment far beyond that which the crime should require, then it is likewise forbidden to report him. If, however, the government is entitled to its taxes, or is permitted to punish criminals as offenders, there is no problem of "mesirah" in informing goverment officials of the information needed for them to collect their taxes or to apprehend their man.

One critical point should however be added: There is no problem of "mesirah" in informing the government of a Jewish criminal, even if they penalize the criminal with a punishment more severe than the Torah requires, because even a non-Jewish government is authorized to punish and penalize above and beyond the law, "shelo min hadin", for the purpose of maintaining law and order. However, this only applies in the situation when the Jewish offender or criminal has at least violated *some* Torah law. But if he did absolutely nothing wrong in the eyes of the Torah, then giving him over to the government would constitute a violation of "mesirah."

The Shulchan Aruch points out, however, that in most cases, "mesirah" is still not allowed, for a different reason: This is the rule regarding "aveidas akum", property lost by a nochri. "Aveidas akum" may only be returned in a case of chilul hashem. Under ordinary circumstances, a Jew should not return something lost. Now, in our case, the non-Jewish

government is searching, so to speak, for its missing man or its missing money, and one is not permitted to help them.[32] If, however, it is known that the only ones who can testify on the government case against a Jewish criminal are Jewish people, and by not testifying it will become clear and evident that Jews are covering up for other Jews who are guilty of crimes, then "Mishum Chilul Hashem", the Shulchan Aruch explicitly requires[33] the Jews to testify in the non-Jewish court of law even though this will lead to the prosecution of his fellow-Jew.

How could Rabbi Eliezer ben Rabbi Shimon and Rabbi Yishmael ben Rabbi Yosi have undertaken to act as policemen? Doesn't the Shulchan Aruch indicate that it is forbidden to hand over a criminal unless there is a possibility of desecration, chilul hashem, involved? But these two were salaried officials acting in the line of duty! Their informing on fellow-Jews was not done merely as a favor to the Roman government (which would be forbidden as "aveidas akum"). Rather, they were being paid to hand over the criminals; they were not returning the lost "article" to the government but were rather engaging in actions for which they were being paid. If a non-Jew hires a Jew and pays him as a worker, and his job is to look for lost articles, this will not fall under the category of "aveidas akum". The Jew who is returning the lost article is doing so as a "job" and not as an act of hashovas aveidah. The same is true of the Jewish investigator for the non-Jewish government. But even in this job, which is permitted, there is a limitation as we have noted previously—if the Jew did absolutely nothing wrong in the eyes of the Torah, then it is forbidden to hand him over.

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32. Sanhedrin 76b.

33. Choshen Mishpot, Chapter 28, section 3.

Harboring a Criminal

A problem related to this situation is that of harboring a criminal. The Talmud[34] tells about such a situation which proved a vexing dilemma for the Rabbis: There were some people from Galilee who were accused of murder, and were running away from the government to avoid prosecution. They came to Rabbi Tarfon and asked if he would hide them in his house. Whereupon the Rabbi told them: "If I will not hide you, the government officials will apprehend you and punish you. But on the other hand, if I should choose to hide you—maybe I am not allowed to! Our Rabbis have said that although one may not *believe* "loshon horah" (slander) told about others, still one *must be cautious* and act as if the story might be true. In that case, I am not allowed to hide you. Therefore, I recommend that you go and hide on your own."

What does this anecdote teach about the actual halacha of abetting an alleged criminal? Rashi comments that if it were true that the fugitives had really killed, it would not be permissible to hide them, for one may not help a murderer hide from the police. Tosafot, however, quotes the Sheiltot, who had a different way to understand Rabbi Tarfon's comment: "If it is true that you are guilty, and I hide you, then I too will be punished by the government for harboring a criminal. Therefore, for the sake of protecting myself, I do not want to hide you." From this Tosafot we might infer that they disagree with Rashi—i.e., that Tosafot feels that one *may* hide a criminal from the hands of a non-Jewish court, and that the only reason Rabbi Tarfon was reluctant was that he was fearful that then the government would punish him.

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34. Nidah 61a.

But the Maharshal in his commentary[35] points out that we would be incorrect in making such an inference from the Tosafot. Tosafot agrees wholly with Rashi that one may not obstruct justice by actively hiding a criminal from the hands of the court. Just as this applies to the Jewish court, so too it applies to a non-Jewish court. And although the Temple does not stand, and the Jewish court may not administer the death penalty today,[36] the non-Jewish courts are not so restricted, and one *may not* assist the criminal in escaping from the law. There is a specific sin in harboring a criminal, even from the secular courts. This is the commandment of "u-beearto horo mikirbecho",[37] to eradicate the evil from our midst. According to Rashi, this is what Rabbi Tarfon was afraid of neglecting, and therefore was loathe to hide them. The reason why Tosafot and the Sheiltot did not interpret Rabbi Tarfon's comment the same way Rashi did, is because of another factor: Rabbi Tarfon had not yet ascertained the guilt of the people who had come to him, and he should have assumed that they were innocent and therefore aided them in hiding from the police, were it not for the fact that (according to Tosafot) if he were caught, he himself might be punished for harboring the criminals.

This discussion leads us to another very perplexing modern problem—how can an observant Jewish lawyer act in good conscience to help a defendant escape the consequences of his misdeeds? Although this is not the context in which to discuss the full implications of the principle, we may state briefly that if a lawyer knows that his client has committed a crime, it is *forbidden* for him to help the criminal escape the consequences of his act, by relying on some technical legal

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35. Ibid.
36. Sanhedrin 52b.
37. See comments of Ramban to Sefer Hamitzvot, end of Shoresh 14; and Megillat Esther there, note 3.

points or other devices. The lawyer, just as any Jew, is directed by the Torah to "eradicate the evil from our midst", and may not actively assist someone to avoid his punishment.[38]

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A major issue with respect to "Dina de'malchusa" is, to what extent do we follow the secular law of the land, as opposed to the laws of the Torah.

In the area of issur ve'heter (religious laws) there is no doubt at all that "Dina de'malchusa" has no application.[39] Just because the American law does not forbid working on Shabbos, or remarrying without a religious "get" (divorce), we cannot say that "Dina de'malchusa dina". This principle is certainly only to be applied in the area of dinei momonot (money matters). The reason for this is simple enough to understand. The basis of "Dina de'malchusa" is identical with the principle of "hefker Bes Din", which only has application in that area.

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38. Mishna Halochos by Rabbi Menashe Klein, Volume 7, p. 366b.
39. See S'dei Chemed (Grossman edition, N.Y.) Vol. II, p. 70. Reform groups have erroneously distinguished between marriage and divorce requiring a religious marriage ceremony, while not requiring a religious Get. Their reason for this distinction is that while we recite Brochos (blessings) at the Jewish marriage, no Brochos are recited at the time of a Get. This would seem to indicate that having a Jewish marriage is a Mitzvah whereas obtaining a Jewish Get is not a Mitzvah but merely a Jewish law. The government's laws are able to substitute for the Jewish laws, but not for the Jewish Mitzvos.

    It is questionable as to whether this is the true reason for the lack of a Brocha at the time of a Get. (See essay of Rabbi Yosef Ibn Palat on the topic of reciting blessings on various Mitzvos, printed in the beginning of the sefer Avudraham.)

    But even if this point were to be accepted, that giving of a Jewish Get does not constitute a Mitzvah, the conclusion that the secular law of the land may be followed in the area of divorce is definitely an error. Anything outside of the area of Dinei Momonot, cannot be covered by the principle of "Dina d'malchusa dina".

In addition, Rabbenu Yona notes[40] that even within the area of dinei momonot, the laws of the secular courts only apply when the case in question involves a Jew and a non-Jew, or when both parties are non-Jews. Any case between two parties both of whom are Jewish, is only subject to the Torah laws of jurisprudence as set forth in the Shulchan Aruch Choshen Mishpat. The Chazon Ish wrote in his essay[41] on "Dina de'malchusa", that in his opinion none of the Rishonim (earlier commentaries) disagreed with this view of Rabbi Yona.

The Shach, however, points out[42] two exceptions to this rule: 1) Whenever the halacha is such that if a t'nai (a condition) were stipulated, then the Torah laws would be altered, then we assume that although the laws of the secular courts do not apply where both litigants in the case are Jewish, still we say that the fact that the common practice in that area (where non-Jews are involved) is in accordance with the laws of the secular courts, there is an understood agreement of a t'nai (condition), that secular law be followed.[43] For example: If someone

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40. Quoted by Rashba, Gittin 10b.

    If, however, the secular government enacts laws of price control or rent control, it would seem that even if both the landlord and the tenant were Jewish, these laws would apply to them as well. The only area Rabbenu Yona applied his principle (that "Dina d'malchusa" only applies when only one Jew is involved) is this fourth area of introducing a legal system. Establishing price controls is a function of government (Bava Bathra 89a) belonging to the third area of keeping law and order. It should therefore apply even in a situation where no non-Jews are involved at all. (See "Dina D'malchusa Dina," Shmuel Shiloh, pp. 175-176.)

41. End of volume on Choshen Mishpot, essay 16 on miscellaneous topics, section 1.

42. Choshen Mishpot, Chapter 73, sub-section 39.

43. In this type of case, we are not really following "Dina de'malchusa", but rather our own law, Dina D'Dan (see Chazon Ish mentioned above in note 41), which does allow one to alter the laws by adding on a Tnai. See Bava Metziah 94a.

leaves his watch with a jeweler to be repaired, according to the law of Torah as explained by the Talmud,[44] that jeweler would be responsible for the watch, even in the event of a burglary in the jewelery shop, where the jeweler was not at fault, and suffered a great loss himself. If, however, the jeweler would have stipulated a condition at the very outset, and specified that he does not accept any responsibility for any burglary, then he would not have to pay. If the *secular law* relieves the jeweler of any responsibility in such a case, then even if both the jeweler and the customer are Jewish, and no explicit stipulation of such a condition were made, nevertheless we would assume that established secular law would be considered like the "minhag ha'medina" (the local custom), and therefore we would also assume that this condition was obvious and understood, although it was never formally verbalized.[45]

2) A second exception would be where the halacha has no explicit law pertaining to the case at hand, so that the secular law of the courts is not in *contradiction* to the Torah-law. In this case, according to the opinion of the Shach, the "Dina de'malchusa" is binding even in cases where both parties involved are Jewish. For example: in any case involving corporations, or buying futures, where the Talmud and the Shulchan Aruch have nothing to say on the matter, the secular laws would be binding even between two Jews.

The Chazon Ish[46] took strong issue with this second point of the Shach—he said there are no blank areas where the halacha has nothing to say. Of course, the Talmud has no discussions of corporate law or futures, but *based on* the Talmudic

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44. Bava Metziah 80b.
45. See above note 11.
46. Mentioned above, in note 41.

law we can figure out what the halacha should be in any given area. Therefore, there is no area of secular law outside the purview of the halacha, and secular law may not be followed.

Even in a case between a Jew and a non-Jew, the halacha is not all that clear that secular law should be followed. The Mishna in Gittin[47] states that all deeds completed by the secular non-Jewish courts are valid and acceptable, except for a "get" (a religious bill of divorce), which must be written "lishma", and signed by religious Jews. The Talmud questions the scope of the statement of the Mishna, that all documents and deeds in the area of dinei momonot (monetary matters, as opposed to religious matters) are valid. The Talmud seeks to determine whether the document is a "shtar rayah" (a proof), indicating that one party owes another party money, or that one party has already sold his property to another party; or whether the document of the non-Jewish court is a "shtar kinyan", (a bill of sale), namely, that is serves as the vehicle for the *transfer* of the property, or as the vehicle *to create* the indebtedness. In the first instance, where the document serves merely the purpose of "rayah" (proof), we can understand why the deed of the non-Jewish court should be accepted, because we know that the courts are reliable and would not issue a false document. Hence, we consider it as acceptable evidence that the one party really owes the money to the other, or that the one party really transferred ownership of his property to the other party. But in the case of a "shtar kinyan", where the document is serving as the vehicle whereby the legal transaction *should take effect*, or with which the indebtedness *is initiated*, how can we say that the deed of the non-Jewish court is to be accepted; the transaction never took place in a legal fashion (according to Jewish law) and the indebtedness never was effected in a halachically legal manner.

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47. 10b.

In response to this question the Talmud offers two suggestions: a) Based on the principle of "Dina de'malchusa dina", the secular non-Jewish courts are empowered to effect and create a "kinyan" (a transfer of property) or a "hitchayvut" (an indebtedness), according to the laws that they themselves set down.

b) Perhaps the Mishna only declares as acceptable documents of "rayah", but not those serving the purpose of "kinyan", which the Mishna would declare as invalid.

The Rishonim are puzzled with the need for the second suggestion of the Gemara. Isn't the principle of "Dina de'malchusa dina" universally accepted? Why shouldn't a transaction between a Jew and a non-Jew, effected according to the laws of the secular courts, be legally binding?

Because of this difficulty, some Baalei Tosafot[48] were led to understand that the second suggestion of the Gemara, (which is accepted as the final decision and the more authoratative view among the Amoraim), is of the opinion that "Dina de'malchusa dina" is limited to the government's right to collect taxes and the like, where the law is *for the benefit of the government.* This they take to mean is the *literal* translation of "Dina de'malchusa"—the laws *on behalf* of the government—such as laws of taxation and the like. But the legal system enacted by the government would not be included in the scope of "Dina de'malchusa dina".

The Ramban[49] attacks this view as totally unacceptable. Although the Ramoh in his additions to the Shulchan Aruch quotes the above Tosafot in one place[50], he himself makes it clear in another place[51] that this is *not* the accepted view.

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48. Quoted by Magid Mishnah Hilchot Malveh Veloveh, beginning of Chapter 27, and by Shach, Yoreh Deah, Chapter 165, sub-section 8.
49. Quoted by Shach, loc. cit.
50. Choshen Mishpot, end of Chapter 74 and end of Chapter 369.
51. See Shach in note 48, and Shach to Choshen Mishpot, end of Chapter 74.

As to the difficulty in the Gemara—why there was a need at all for the second suggestion, since "Dina de'malchusa dina" is universally accepted even in this type of case—the other Rishonim explain[52] that the Talmud wanted to cover even a case where the court was a private institution and was not authorized by the government. But the legal system of a court of law, which is under the auspices of the government, *would be* binding in cases involving a Jew and a non-Jew, even though that legal system does not correspond to the Torah law.

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The Chazon Ish pointed out the Gemara[53] which states that when a Jew and a non-Jew appear before a Jewish Bes Din, in a case where there is a discrepancy between Jewish law and the secular law, then if the Bes Din can acquit the Jew based on the secular law, they should do so, and tell the litigants that they have followed the secular law; but if by following the Jewish law, rather than secular law, the Jew will be acquitted, then they should render their decision based on Jewish law, and tell the parties that they have followed Jewish law. The Chazon Ish writes that one could have understood the Talmud to be saying that this is really the law—that the Jew is entitled to whatever benefits he can possibly get from following *either* system of law, since both systems apply to his case against the non-Jew, as far as he is concerned. However, we see that the Rambam[54] did not understand the Gemara in this fashion. Basically, whenever a non-Jew is involved in the case, *only* the secular laws are binding—to the exclusion of the Torah laws. And if the Jew's opponent in the case is a "Ger Toshav" (a non-Jew who has formally accepted upon himself the seven

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52. See commentaries of Rashba and Ran to Gittin.
53. Bava Kamma 113a.
54. Hilchot Melochim, end of Chapter 10.

Noachite mitzvot, and is therefore assumed to be a decent religious and observant person), then only the secular law must be followed. Only if the Jew's opponent in the case presented to the Bes Din is a non-Jew of the lower class, then the Rabbis *penalize* the heathen to have the judges favor the Jew by following either Talmudic law or the secular law, depending upon which is better for the Jew.

It is still unclear from the Talmud, as well as from the Rambam, as to the exact nature of this penalty. Does this mean that if the case between the Jew and the heathen were brought up to a Bes Din, then they should issue such a decision? Or does it mean that even *before* the case comes up, as soon as the *situation presents itself,* this penalty is already in effect; and even if the non-Jew converts to Judaism (or becomes a Ger Toshav) before coming to the Bes Din, the judges must apply this Talmudic penalty? The Chazon Ish dwells at length upon the exact details of this point in his essay on "Dina de'malchusa".[55]

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We have noted previously that the principle "Dina de'malchusa dina" is generally operative in the area of monetary matters. Thus, it would be logical to assume that if a Jew dies, leaving only a secular will, it would be considered valid. However, this is not the case, for two reasons: a) if the din-Torah is between the rightful heirs, and other Jews or Jewish organizations designated in the will, then "Dina de'malchusa" does not apply. This principle applies only when

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55. Mentioned above, in note 41, section 8.

at least one of the litigants is not Jewish; b) according to Rambam,[56] issues of inheritance are not only labeled as monetary matters (dinei momonot), but also, at the same time, as a matter of religious law (issur veheter). The Torah refers to the laws of inheritance as "chukas mishpat". Although "mishpat" has the meaning of "a monetary law", "chok" has the connotation of "a religious law." Since the will, then, can be considered a religious instrument and not only a financial transaction, it must conform to the requirements of Torah law.

Although the topic requires a great deal of discussion and explanation, which is not possible here, it would be correct to state that, in many circumstances, a secular will executed by a Jew is *not* valid.[57]

In the Torah,[58] the laws of inheritance are noted. And although the Torah does give a person the right to make a will,[59] it is only under the following two conditions: (1) The will is only valid if it is instructed when the testator is sick, and in the state of a "schechiv mira".[60] (2) The will can only choose from among the relatives who are directly in line to inherit,[61] to change the amounts of their respective yerusha (inheritance). For example, if a man dies leaving sons, daughters, and a wife, strictly speaking according to the halacha, only the sons get the

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56. Hilchot Ishut, Chapter 12, section 9; Hilchot Nachalot, beginning of Chapter 6. The Rambam's view is shared also by Tosafot, Ktubot 50b, beginning Umai Aliyah.

    See also Rabbi Yosef Rosen, Tzofnas Paaneach, (Tshuvot, New York,) no. 313.

57. See essay by Rabbi Mordechai Willig on the "Halacha of Wills" in "Chavrusa," (publication of Rabbinic Alumni of Yeshiva University,) Kislev, 5740.
58. Bamidbar, Chapter 27.
59. Bava Bathra 130a.
60. Choshen Mishpot, Chapter 281, section I.
61. As above, in note 59.

yerusha, which they divide evenly among themselves. If the father makes a tzavaah (will) when he is sick, he can see to it that not all the sons get an even share. He cannot, however, accomplish, even with a will, that his wife or his daughters should get any yerusha. He also cannot accomplish, even with leaving a will, that the first-born son should not get his "pi shnayim" (double share).[62]

For that purpose, one of two methods is required: a) the halacha has a principle of "mitzvah lekayeim divrei hames".[63] Rabbinically, the desires of the deceased person must be honored, at least with respect to where his money should go.[64] This principle applies only in the case where the person has handed over that amount of money to someone else during his lifetime specifically for the purpose of seeing to it, after his death, that it reaches the hands of the desired recipients.[65] Rabbi Chaim Ozer Grodzenski of Vilna[66] entertained the thought that handing over a will to a lawyer might possibly substitute for the handing over of the amount of money itself, but he later rejected that notion. Only in the case of a will to leave the

62. Bava Bathra 126b.
63. Gittin 14b.
64. See Torah Shleima (by Rabbi Mendel Kasher) to Breishis, Parshas Vayechi, (47-30), note 126, regarding the applicability of this principle to other wishes of the deceased, outside of the area of distributing his wealth.
65. Tosafot, Gittin 13a, beginning V'ho; Choshen Mishpot, Chapter 252, section 2.
66. Teshuvot Achiezer, Vol. III, responsum 34.
Rabbi Yaakov Ettlinger in his responsa work "Binyan Zion", Vol. II, 24, maintains that the Shulchan Aruch has not really accepted the view of the Tosafot that Hushlash Mitchila Lekach is needed. His arguement is not that convincing, and obviously was not accepted by Rabbi Chaim Ozer, who often quoted and relied on decisions of the Binyan Zion; in this instance he did not even quote his view.

money to charity did he feel that the will should be binding Rabbinically, despite the lack of "hushlash mitchillah lekach" (having been handed over specifically for that purpose). b) The Ramo in Shulchan Aruch[67] refers to a second method of apportioning one's inheritance, which would not require having the money put away in escrow. For example, if a man feels that at the time he will die, he will leave over *less* than a hundred thousand dollars, and he would like to leave half of his inheritance to his wife, he should legally obligate himself as of today to his wife (by having someone else give him a "suddar", a handkerchief, or any other k'li, representing the wife,[68]) to the amount of fifty thousand dollars, collectible only on the day he dies,[69] on the condition that his rightful heirs have the option of invalidating his debt by paying off his widow with half of their inheritance. Or, if he would like to leave *all* of his money to his wife, he should obligate himself towards his wife in a debt (by someone giving over a handkerchief or any other useful object,

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67. Choshen Mishpot, Chapter 281, section 7.
68. See Tosafot, Kiddushin 26b, beginning Hochi Garsinon.
69. If the obligation would take effect immediately, the recipient of the grant could insist on collecting right away. The testator was not interested in giving away all his money yet. If the obligation were made in such a way that it could not be collected until after death, the entire Kinyan would not be legally binding at all. One cannot enact obligations set to take effect only after his death. If the Kinyan Sudar were to be made now, and it would be stipulated that no obligation at all should take effect until the day before he dies, it would also not be legally valid for two reasons: 1) since at the time the obligation is supposed to begin to go into effect, the action of the Kinyan Sudar is completed already, and this would constitute a case of Kolsa Kinyono. (Only according to the Rambam is there no problem of Kolsa Kinyono with a Kinyan Sudar done now to take effect at a later time. See Ran to Nedarim 27b, beginning V'ho, and Kesef Mishnah to Hilchot Mechira, Chapter 11, end of section 13.)

2) If something is to take effect at a time which cannot be determined until later, we are not able to declare that we have determined retroactively (huvrar hadovor lemafreia) that the matter took effect at the earlier

for that purpose) in an amount in excess of the amount of money he expects to leave over at the time of his death. The debt should be said to take effect immediately, and should be collectible on the day of his death.

To cover the possibility of divorce, in which case he would *not* be interested in leaving his present wife any or all of his inheritance, he can make this "kinyan suddar" for the purpose of creating the hischayvus (indebtedness) towards his wife on the condition ("all hatnai") that "he does not change his mind before he dies." In this way, he has left himself the possibility to change his will, if that turns out to be necessary.

The topics discussed herein are but a brief summation of the principle "Dina de'malchusa dina". As indicated, this is a principle having ramifications in a broad range of Jewish law and thought, and is particularly relevant in the context of the Diaspora.

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time. This is the meaning of the principle Ain Breira regarding issues which are d'oraitho.

It is because of all of these above considerations that it must be specified that the Kinyan Sudar is to effect the actual obligation of the debt immediately, and only the right of the recipient to collect is delayed till the later time.

We still seem, however, to be faced with a problem of Breira. Regarding the actual date that the recipient acquires the rights of collection of the debt, this can only be determined retroactively after the death of the testator. Shouldn't this still pose a problem of using Breira? An answer to this point can be found in the commentary of the Ran to Nedarim 45b.

Whenever the key part of the Chalos (that which is being effected) is not involved in any problems of retroactive determination, even though regarding some of the minor details of the case we must rely on Breira, this does not bother us.