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# **Journal of Halacha and Contemporary Society**

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Edited by  
Rabbi Alfred S. Cohen

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The Journal of Halacha and Contemporary Society is published twice a year by the Rabbi Jacob Joseph School, Dr. Marvin Schick, President. The Rabbi Jacob Joseph School, located at 3495 Richmond Road, Staten Island, New York, 10306, welcomes comments on this issue and suggestions for future issues.

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 Halacha and Contemporary Society does not in any way seek to present itself as the halachic authority on any question, but hopes rather to inform the Jewish public of the positions taken by Rabbinic leaders over the generations.

Manuscripts which are submitted for consideration must be typed, double-spaced on one side of the page, and sent in duplicate to the Editor, Rabbi Alfred Cohen, 1265 East 108th Street, Brooklyn, New York, 11236. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles which concern halachic practices of American Jewish Life.

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## From the Legacy of Rav Moshe Feinstein, z"l

*Translated by Rabbi Anshel Berman*

*Editor's Note:*

*Last year the Jewish community suffered a great loss with the passing of the Gaon, Rav Moshe Feinstein, z"l.*

*Rav Feinstein's great erudition and scholarship gained for him a universal reputation as a leading posek in our generation. Considering that no words or eulogy can evoke an adequate appreciation of the stature of our beloved "Reb Moshe," we offer here one from the hundreds of responsa he wrote on the most crucial questions of halacha in the modern world.*

*This article is not a summary but an almost literal translation of the original.*

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*Choshen Mishpat, Part II, Responsum 74  
23 Adar 5744*

To My honored Kinsman, Rav \_\_\_\_\_:

A. [On the question of] giving the terminally ill medicines which neither give nor ease pain but serve only to extend life; [and on the question of] precedence of healing:

I delayed replying to your inquiry due to my poor health, may you be spared such travail. I will now reply immediately within the

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*Rabbi Anshel Berman is an alumnus of Mesivta Rabbi Chaim Berlin and is currently a Chaver in Kollel Kahal Tomchei Torah.*

constraints of my condition and the time available to me, following the sequence of your letter. You began by requesting additional clarification of my responsum to Dr. Ringel and Dr. Jacobowitz (Responsum 73).<sup>1</sup> Actually, I fail to see the urgency for further clarification on this matter, I do not understand what you were referring to when you said that the law might be misinterpreted. For my ruling is perfectly clear and simple: Doctors should not administer treatments to the terminally ill which can neither cure nor ease suffering and serve only to prolong the misery of the patient. This is inferred from the talmudic description of Rebbe's final illness.<sup>2</sup> The rabbis' prayers were unsuccessful in bringing about a cure for Rebbe or in lessening his agony. They succeeded only in prolonging his ordeal for as long as they maintained their prayers. Rebbe's maid servant, who was wise in the Torah's ways, said, "May Heaven prevail over the prayers of mortals!" Seeing that her prayers could not be effective as long as the rabbis continued their supplications, she took a jug and smashed it in order to silence them. At that moment [when they stopped praying] Rebbe passed away. This incident is cited in the Talmud to teach us that Rebbe's maidservant acted correctly.

Ran comments (*Nedarim* 40a) that Rav Dimi concurred with Rebbe's maidservant. Ran rules that when prayers cannot effect a cure nor ease suffering, the supplicants should pray that the patient die, since such a wish is for the patient's own good.

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1. Rav Feinstein, z'l, refers here to a landmark responsum he had written to the above Torah-observant doctors who had requested a ruling on such sensitive issues as: whether a physician may abstain from treating an incurable patient; which patients have precedence in treatment; hysterectomies; abortions; surgery for the hopelessly ill, etc.

2. *Ketubot* 111:

On the day that Rebbe was very sick and then passed away, the rabbis proclaimed a fast day and prayed for mercy. Rebbe's maidservant went to the attic (to pray). She said, "Heaven wants Rebbe and Earth wants Rebbe. May Earth overcome Heaven!" When she saw Rebbe (who was suffering from an intestinal disease: Rashi) in agony due to his inability to wear his *Tefillin* because of his severe diarrhea, she said, "May Heaven prevail over the prayers of mortals!"

While we cannot use this source to justify praying for a patient's death (our prayers are not as well received as they might be, and the ineffectiveness of our entreaties does not justify praying for the victim's demise) nevertheless, we can derive from here that a physician should not administer medicine to a patient which will neither cure him nor alleviate his torment but will serve only to prolong his agony. Of course, where the medicine will serve to prolong the patient's life and thereby allow us time to locate a doctor with sufficient expertise to cure him, then the medicine should be given despite the fact that it will only prolong his agony. Nor is it necessary to obtain the patient's consent in this matter. However, it is best to try to have the patient agree to this step. For to forcibly prolong his agony in order to gain time to bring in another physician could be dangerous to the sick man. However, if he refuses to cooperate towards this end under any circumstances, then his objections should be overridden and the treatment administered.

This is clearly the position taken by Ramo in *Yoreh Deah* 339:1, when he states that one is obliged to remove anything which might impede death even where doing so hastens the victim's demise. The rationale for this ruling can only be that by removing the hindrances to death one is shortening the dying man's suffering. For in the absence of such suffering there is no logical reason to allow removal of death impediments. On the contrary, such impediments must be introduced where there is no pain. It can only be to the dying man's agonies that Ramo is addressing himself in his ruling.

Even if we are to assume that the scriptural obligation of healing does not apply where the illness is incurable and further ministrations will only serve to prolong the suffering for hours or even days, or in a situation where the terminally ill patient has no pain, since the verse states "you shall heal..." without qualification, nevertheless, in the absence of suffering why should we attempt to remove something which impedes death? The reason can only be because the dying man experience pain when death is hindered. Certainly, Ramo and his predecessors are stating the law

of past generations on this subject. And it is an accurate, correct ruling.

This ruling applies even to expert doctors. When they know of no cure for an illness they should not prescribe medicines which neither heal, alleviate suffering, nor give the patient additional strength to tolerate the agony. Only when the treatment serves to calm the patient should he be given such medicine. It is for this reason that the sages decreed that a dying man's gift is binding with merely a verbal commitment. [Knowing that his dying wish will be fulfilled will calm him.]

However, we should not infer from here that we may assume that a disease is incurable merely because a plethora of physicians deem it to be so. Rather, one is obligated to summon every available doctor, even those of lesser stature than the physicians currently in attendance. For sometimes a lesser physician diagnoses more correctly than his senior colleagues. Even in other areas we sometimes find that excessive mental facility causes errors (*Baba Metziah* 96b). An elementary point is sometimes hidden from the wisest of men, while a lesser sage hits upon the correct ruling. The same holds even more so for healing, especially since the status of the physicians is not clearly defined. Nor is one privileged to be cured by any doctor at random.

I later discovered that what you meant [in your request for clarification of the original ruling] was that since this ruling considers "quality of life" and permits us to passively abstain from ministering to the patients, perhaps we should be concerned that the wicked will use it as a basis to expand the definition of "quality of life" to justify refraining from caring for the mentally ill or for one who has been reduced to a vegetable state through an accident, G-d forbid, or similar cases. In truth I fail to see any reason to misconstrue my words to mean that there is no obligation to treat the mentally ill or those deemed by the wicked to be vegetables best left untreated when afflicted by illness, in the absence of pain, where treatment will restore physical health and a normal life span. For every *Ben-Torah* and G-d fearing person knows that we are obligated to treat and heal every human being to the best of our abilities regardless of the level of his mental faculties.

Nor does one patient take precedence over another except for those mentioned in the concluding section of Tractate *Horiot*.<sup>3</sup> Even these latter must be weighed carefully before ruling in actual practice. Even where one patient takes precedence in halacha over another, his status is so only where the time required for both ill people is equal. The physician should go to the first patient to whom he is summoned, for his obligation to go to the patient is immediately triggered by the call. The second patient, having not yet called, has not engendered such a responsibility. Only where the second patient is more seriously ill than the first should the physician attend to the second victim since his illness is more severe. It is for the doctor to decide in this matter. Similarly, if the doctor knows how to cure the second patient while his visit will only serve to calm the first patient, logic appears to dictate that he should first go to the patient that he knows how to heal. However, there are occasions when the physician should first go to calm the patient. This is so when the patient will take his doctor's refusal to give him precedence as an indication that he is beyond help. He will despair of receiving any aid from physicians and this may endanger his life. The doctor should consider his decision carefully and analyze his responsibility to heal when he is the only physician in the area or in a large city where each of the patients considers him his personal physician.

B. Should one treat a terminally ill patient who has contracted a second disease despite the fact that he cannot cure the first illness?

According to what my grandson, [Rav Mordechai Tendler] tells me, you posed another question unrelated to my responsum but which was of a general nature: When it is impossible to cure the patient, but the physician can administer drugs which will enable him to live a normal life span with the agonies of his illness,

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3. A male has precedence over a female in a rescue operation and in having lost possessions returned. A female takes precedence over a male in being supplied with clothing and being released from prison.

is there an obligation to do so? Let us first look into another problem: What is the doctor's responsibility if he can cure the patient but not give him normal longevity of life? When a patient is dangerously ill from a secondary disease which, if cured, will still leave him a victim of his original illness with its inherent suffering, must he heal the second disease?

Certainly anyone, even when ill from one disease, wants and must have a cure for a secondary disease although a solution for the primary disease is unknown. Even when the secondary sickness is unaccompanied by pain, the patient seeks a cure. Therefore, the protests of the victim who refuses treatment should be disregarded since they represent abnormal behavior. But when the patient is in agony and his suffering cannot be alleviated nor his illness cured, in such cases people would rather die than live with such suffering ("perhaps flogging is a more stringent punishment than death" *Ketubot* 33b). Perhaps then there exists no obligation to treat such a patient when he refuses a cure which only prolongs his tormented life? Even when we cannot know the victim's wishes we may assume that he would not wish to live on in his present condition, and there is no obligation to treat him.

However, in the overwhelming majority of cases there are relatives, parents, brothers, or other kin or whoever is involved in the sick man's treatment, upon whom the burden of decision rests according to the halacha. Actually, this obligation evolves on anyone who knows of the patient and knows of a doctor with greater expertise than those in attendance. However, since the patient has parents and brothers and kinfolk, and since there are extant ineffective treatments which may do more harm than good, a non-relative must obtain permission from the victim's parents or brother when he knows of a cure. To allow access without permission to anyone who feels he can heal the patient is unthinkable. But their permission is relevant only when no expert doctor is available; then the obligation to bring him into the case as quickly as possible rests on every concerned party.

The doctor must come immediately and perform to the limits of his ability and knowledge. Should the proper treatment be unknown to him, another physician should be brought in from

elsewhere. Should the patient be unable to meet his medical expenses, the primary obligation for assuming the financial burden rests on his closest relatives. But responsibility also falls squarely upon all residents of the victim's city to take funds from the community chest and to collect monies from private sources in the city and from wherever possible in order to cover all medical costs.

However, we find in the case of Rav Chanina Ben Tradyon<sup>4</sup> who was being burned at the stake that he said that he was forbidden to hasten his demise for to do so would be to violate the ban on suicide. Nor did he permit other Jews to hasten his death. Certainly, if another Jew were permitted to do so, he too would have been allowed to shorten the agony of burning. Nor does the Talmud mention that Rav Chanina's hands or any part of his body were tied such that he was unable to remove the woolen sponges

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4. *Avoda Zara* 18a:

The rabbis taught us: When Rav Yosi Ben Kisma fell victim to his final illness, Rav Chanina Ben Tradyon went to visit him. R. Yosi said to him, "Chanina, my brother! Don't you know that heaven has granted this nation [the Roman Empire] the power to rule? They have destroyed His home and burned His temple and killed His zealous followers and eliminated the best of His servants and still they prevail! I have heard that you sit and engage in Torah study with a Torah scroll clasped to your bosom before large public gatherings which you have summoned (in violation of Roman edicts). I wouldn't be surprised if they burned you together with the Torah scroll in fire . . ." Not long afterward R. Yosi B. Kisma passed away and all Rome's prominent citizens went to his funeral to eulogize him. On their return they discovered R. Chanina B. Tradyon engaged in Torah study, a Torah scroll clasped to his bosom, before a large public gathering which he had summoned. They brought him wrapped in the Torah scroll and surrounded him with twigs and kindled a fire. They brought woolen sponges, soaked them in water and placed them on his heart so that he would not die quickly. . . . His disciples said to him, "Open your mouth and the fire will enter your body [hastening your death]!" He said to them, "Better that the One who gave my soul take it than that I inflict harm on myself!" The executioner said, "Rabbi! If I make the flames higher and remove the woolen sponges from your heart, will you guarantee me a share in the World to Come?"

"Yes"

"Swear!"

He swore. He immediately heaped fuel on the flames and removed the woolen sponges from his heart. R. Chanina quickly perished.



from his body. Nor is it plausible to say that he feared the executioner, for the latter could not easily harm him more than he could harm himself. Nor could the executioner inflict upon him more than death by burning at the stake, which is harsh death. Clearly, Rav Chanina's lack of action can only be attributed to the fact that he was not permitted to remove the wet sponges to hasten death, just as it was forbidden for him to open his mouth. This prohibition was obvious to his disciples as well. It was only the act of opening his mouth that they held was permitted. They reasoned that since, if his mouth had been open, Rav Chanina would have had no obligation to close it and prolong his life to suffer the terrible agony of being burned to death, then opening his mouth was also permitted. Rav Chanina answered that opening the mouth was also forbidden since it had been closed.

However, he did allow the executioner to remove the wet woolen sponges and to add fuel to the flames. He promised him *Olam Habo* [eternal life] for his efforts, perhaps because he held that a non-Jew may violate the ban on murder for the sake of R. Chanina's welfare. He could also assure him of *Olam Habo* for this act since hastening Rav Chanina's death was an act of great kindness to the rabbi. Nor was the injunction of "place no stumbling block before a blind man"<sup>5</sup> applicable here, since Rav Chanina was not violating this ban by performing an act of any kind and was sparing himself pain. Also, it could be that a non-Jew may commit a mercy killing while a Jew may not perpetrate such an act. This distinction is implied by the wording of the biblical injunction which admonishes a Jew, "do not murder," implying a ban on murder of any kind regardless of the motive. But the injunction to non-Jews is "... He who spills another man's blood..." which infers malicious intent. Mercy killing is not

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5. Under the rubric of "not putting a stumbling block before a blind man," our rabbis taught that it is wrong to cause someone to do an act which is forbidden to him. The question therefore arises, how was Rabbi Chanina allowed to tell the executioner to remove the sponges, thus causing him to die more readily? Wasn't he causing the man to sin in hastening his death? This contention is countered in the text of the responsum.

spoken of in terms of spilling blood.

I have written at length to clarify this issue because clarification here is of the utmost importance. This is especially true when we consider that, on rare occasions, it is necessary to rule on these matters in actual practice. These issues require extremely profound study. Our discourse will help enlighten us as to the proper rulings in actual practice. The subject is monumental in its decision-making aspect, fraught with the utmost responsibility. Tremendous research is required; the question is literally one of saving human life. One must gather around him as many Torah sages as possible in conjunction with all the medical expertise he can muster. Only then can we hope that G-d will grant us the intelligence to rule properly in this extremely serious matter.

C. Should one feed a terminally ill person intravenously? Should one do so forcibly?

In my responsum to the doctors I wrote that one must give oxygen to a terminally ill patient even though no cure will result, because it eases the sick man's suffering; for inability to breathe is tremendously painful, and oxygen relieves this suffering. Therefore, you ask whether we must intravenously feed a terminally ill patient who is unable to eat normally in order to extend his life span while prolonging his suffering, when we feel that he has no pain in abstaining from food. Clearly, we must feed him food that will cause him no harm, for food surely strengthens him somewhat, despite the fact that neither the patient himself nor his attendants are aware of this effect.

Our ruling in this matter is not to be compared with the question of giving medicines to a terminally ill patient. The distinction is obvious: Food is a natural substance which must be consumed to insure survival. Every living creature must eat except for someone ill with high fever. The latter's nourishment is obtained from the heat of his fever ("his fever nourishes him" *Yevamot* 71B). In this case he should not be force-fed even under doctor's orders. This includes even those foods which are normally fed the ill. Even where force feeding is permissible, it is only so when the patient is an adult and eats voluntarily but without zest,

complying with the requests of others.

But one should never compel a sane adult to eat by employing physical force. Certainly when the patient feels that eating is harmful to him, he should not be coerced into doing so even when the physician says that food is necessary and beneficial. For when the patient feels that eating is dangerous it is perilous to ignore his wishes. We see that it is possible to harm a dying man by ignoring his wishes in other matters, to the extent that a dying man's oral bequest is binding (*Bava Bathra* 174B). Certainly we must be fearful of harming him by ignoring his wishes regarding his treatment. However, we must influence him to comply with the doctor's orders. If he refuses we can do nothing. If there is a way to give him the medicine without his knowledge, we should do so if the doctor is a known expert trusted by the public. If this is unclear, we should not administer medicine to a lucid adult patient without his consent unless it is absolutely clear that the drugs will not harm him.

As I mentioned earlier, you asked whether, in the obligation to heal, there is a distinction between a short reprieve from death replete with pain, and achieving a normal life span extended significantly. However, when a normal duration of life can be attained, we must treat the patient. True, I did not refer to this matter. Actually, it is illogical to make a distinction between the two, for a case can be made contrary to ours. Since we cannot reach a decision on this matter, should the question arise in actual practice, the decision must be made by the patient, or, in the case of a minor, by his parents or brother. The burden of decision rests on them more than on anyone else.

D. Should one pray that the patient die?

You also suggested a need for further clarification of the support we brought to our position allowing the cessation of prayers for the terminally ill, as Ran mentions in his ruling on withholding treatment in such a case.<sup>6</sup> Certainly the example of

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6. Ran, *Nedarim* 40a

Rebbe's handmaiden strongly reinforces our position, for we see that her prayers prevailed over those of the Torah greats whose supplications were apparently not answered. Someone like Rav Chanina Ben Dosa, whose prayers are well received, should adhere to Ran's ruling: If he sees that his prayers are ineffective, then he should realize that the patient can live no longer. At this point people such as these must pray for the patient's death in order to ease the sick man's suffering. As Ran writes, "sometimes one must pray for the patient's death when it is for the victim's own good."

This holds true only when it is clear that the rabbis' prayers are not being accepted in Heaven, a criterion unknown to us in our generations, even concerning the supplications of Torah greats, unless perhaps there are certain individuals unknown to us to whom this standard could pertain. These unique individuals should conduct themselves in accordance with Ran's ruling which cites Rav Dimi in stating that there are times when one should pray for the patient's death, as in the case of Rebbe's handmaiden. But we refer here solely to praying for the terminally ill man's demise, not to committing an act which shortens his life. Such a deed is forbidden even when it is for the victim's benefit, and its perpetrator is subject to death by the sword like any murderer who is motivated by hatred or anger to commit this evil act.

E. Risking sudden death for a chance at a normal life; who may make this decision? Must the patient acquiesce? May a patient refuse an operation which will leave him a cripple?

Until this point we have replied to your questions about the responsum I wrote to the above mentioned doctors. You subsequently requested that I clarify in writing a number of responsa of mine cited by my grandson. Generally, each case must be considered individually. As far as whether the rule mentioned in the Talmud, that we risk a dying man's final days of life for a chance at achieving a normal life span for him, is obligatory or voluntary,<sup>7</sup> I have already written in *Iggerot Moshe, Yoreh Deah*

7. *Avoda Zara* 27b:

"A terminally ill patient may be treated by a heathen [for what can the

III:36 that it is voluntary where there is only a fifty per cent chance of success. However, where the doctor feels that the operation or a particular treatment will succeed, then he must go through with it. However, if surgery on internal organs is called for, where extreme care must be exercised, then the proper choice of a surgeon is paramount. Only an expert, who is known to have consistently performed this operation successfully, with great skill and dexterity, only such a surgeon may be called upon to do the operation competently and, with G-d's help, heal the patient. In emergencies we may rely on a physician who is a reputed expert, despite the fact that his actual skill and dexterity are unknown. For usually a surgeon is skillful and may be relied upon in an emergency. If time is of the essence, one must rely on any available doctor and whatever method of treatment he elects to use. He must administer the treatment even if he is uncertain as to its efficacy and can say only that he knows that it is good for the patient and may succeed in curing him.

But the above is true only where we are certain that the treatment will not harm him. If there is a possibility that the procedure will cause the patient further damage, this course of action should not be followed even where that is a chance that the patient will be healed by it. This is true even where the doctor says that in his opinion he will be cured by the treatment. For since he does not have the expertise to decide such matters, his statements on the subject bear no weight. However, if the patient wishes to do what the doctor recommends because he feels that he will be cured, or if the patient expresses his willingness to proceed despite uncertainty of success and the chance of further harm resulting from the procedure, it stands to reason that if he cannot be dissuaded he should be permitted to proceed. For our misgivings

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heathen do to him? He is doomed to die anyway. Perhaps the heathen will cure him: Rashij. How can we allow him to be treated by a heathen? The heathen might kill him and rob him of the remaining time he has to live? The chance that he will cure him outweighs our fear that he will deprive the patient of the time left to him by murdering him."

about the possible negative results of the treatment under considerations are outweighed by the fear of the damage that will be wrought to the patient resulting from the suspicion sown in his mind by our refusal to take the suggested course, that we do not wish him to recover. In any event, medicines held to cure usually do. This is true only when there is mere apprehension of possible harmful effects resulting from the treatment, not when the danger is real. In such a case, a thorough investigation should be made until a consensus of expert opinion is reached on this matter and the sick person is consulted. Such is my humble understanding of the matter. May G-d prevent us from error in all matters especially in this one which involves danger to human life.

If the patient refuses to risk sudden death for fear that he might not recover from the operation and the doctors themselves are in doubt about the chances for a cure, there is certainly no obligation on the patient's part to consent to the surgery. The patient may indeed risk sudden death for a chance at recovery but only when there is fifty per cent chance of such a result occurring. However, if most patients recover as a result of this procedure then the patient must elect this course of action. If most patients die as a result of this treatment, then the following must be considered: If the procedure will not shorten his life any more than he would have lived without the operation, we might also require him to agree to the surgery. But in this case it is difficult to rely on the physician's assessment. Therefore, we should logically adhere to the wishes of the victim and his family. If they want to have the operation they may. If they refuse they should not be coerced into consenting. If the family wishes the surgery but cannot cover the expense, funds may be raised for this purpose by soliciting donations. The purpose of the collection may be described as helping to pay for surgery for an indigent, ill person. This statement need not be modified to explain that the operation's success is by no means assured. Everyone knows that no physician can speak with certainty regarding the outcome of surgery. In addition, since the patient desires performance of the operation, it is perilous to withhold it from him, as we mentioned earlier. This danger supersedes his present jeopardy.

If the patient is a child or even an adult who is incapable of making a decision, his parents and family may make the decision, for most patients rely on their parents or close relatives to choose what is best for them. In the absence of family it is clearly the local Beth Din that should make the decision.

Let us consider a situation where the patient refuses surgery which will leave him crippled for life. If, according to the doctors, he cannot survive without the operation and there is no reason to put the chance of the victim's becoming mentally ill if we ignore his pleas into our equation, either because death is a clear and present danger, or because death is a worse fate than insanity, then we must certainly have the surgery performed against his will in order to save his life, even if he must be tied down. This is surely true where the possibility of insanity is outweighed by fear of the certainty of death. For the chances of a mental breakdown are somewhat remote when we consider that the doctors state that the operation will result in his cure.

However, it is unclear whether we are obliged to do this to an adult. For it could be that even the rabbinic opinion that holds that it is forbidden to inflict a wound upon a person is of this opinion only when the harm inflicted is perpetrated by a physical act. Although the argument might be made that fasting, which is also the infliction of pain but is done passively, is nevertheless prohibited, possibly this it is because fasting is considering tantamount to a physical act since eating and drinking are natural human physical needs. But medical treatment, which is not part of the regular natural order of humanity is, in abstention, not a physical act, while its indulgence may be considered a physical act despite the fact that it is perfectly natural for a person to seek to be healed. Thus, it is possible that abstaining from medical treatment may not be considered perpetrating harm to oneself. It could be therefore, that there is no obligation on anyone to prevent another person from passively harming himself, either physically or financially, since passiveness is not considered an act in these cases. Nevertheless, it is more reasonable to say that every ill person has an obligation to heal himself, even through surgery, as long as the surgeon is an established, competent expert in this surgical



technique. Even where his competence is not in this specific operation, nevertheless, as a surgeon he is called upon to act with much skill and dexterity and may therefore be considered an expert in all surgical areas. Most probably, his skill and dexterity, prerequisites for all surgery, will be applied here too.

Your brother (my son-in-law) and his son added many other questions which I have answered in a separate responsum [published later as Responsum 75].

I remain your friend and kinsman,

MOSHE FEINSTEIN



## AIDS: A Jewish View

*Dr. Fred Rosner*

### **Introduction:**

The acquired immunodeficiency syndrome (AIDS) has been described as this century's greatest health peril. Thousands have already died from the disease and there is no cure in sight. The emotional toll on patients with AIDS, their families and their caregivers needs to be actively and aggressively addressed. The public hysteria should be alleviated by a well planned, coordinated and implemented educational program involving not only health professionals but the mass media and press which have in part fueled the public fear about AIDS. Prudent practices in the health care and private industry work places have been suggested and should be followed. Governmental involvement in terms of increased AIDS treatment and research funding is sorely needed. Finally, public policy decisions need to be made with compassion and understanding and the conviction that this disease can be tamed and eventually overcome by a concerted effort of all parties concerned.

### **Homosexuality and Drug Abuse in Judaism**

Ninety per cent of all patients with AIDS are homosexuals or intravenous drug abusers. The Torah labels homosexual intercourse

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*Director, Department of Medicine, Queens Hospital Center  
Affiliation of the Long Island Jewish Medical Center;  
Professor of Medicine, Health Sciences Center, State  
University of New York at Stony Brook.*

as an abomination<sup>1</sup> and ordains capital punishment for both transgressors,<sup>2</sup> though minors under thirteen years of age are exempt from this as from any other penalty<sup>3</sup>. This biblical directive is codified by Rambam:<sup>4</sup>

In the case of a man who lies with a male, or causes a male to have connection with him, once sexual contact has been initiated, the rule is as follows: If both are adults, they are punishable by stoning, as it is said, "Thou shalt not lie with a male", i.e., whether he is the active or the passive participant in the act.

The prohibition of homosexuality proper is omitted from the *Shulchan Aruch*, which omission reflects the virtual absence of homosexuality among Jews rather than any difference of views of the criminality of these acts.<sup>5</sup> The Torah only refers to incidents involving homosexuality in regard to the sinful city of Sodom<sup>6</sup> and in regard to the conduct of a group of Benjaminites in Gibeah, leading to a disastrous civil war.<sup>7</sup> Isolated cases are also described in the Talmud.<sup>8</sup>

Rabbi Jakobovits cites rabbinic sources for the strict ban on homosexuality which is included among the seven commandments of the sons of Noah:<sup>9</sup> It is an unnatural perversion debasing the dignity of man, it frustrates the procreative purpose of sex, and it damages family life. He concludes that Jewish law rejects the view that homosexuality is merely a disease or morally neutral.

In an earlier issue of this Journal, Rabbi Barry Freundel posited that Jewish law views the homosexual or drug addict as no different

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1. Leviticus 18:22

2. *Ibid.* 20:13.

3. *Sanhedrin* 54a.

4. *Mishneh Torah, Hilchot Issurei Biah* 1:14.

5. Jakobovitz, I. *Encyclopedia Judaica*, Jerusalem, Keter, 1972, volume 8, pp. 961-962.

6. Genesis 19:5.

7. Judges 19-20.

8. *Sotah* 13b and Jerusalem Talmud *Sanhedrin* 6:6, 23C.

9. *Sanhedrin* 57b — 58a.

than a Sabbath desecrator or an adulterer.<sup>10</sup> He has no greater or lesser rights or obligations and deserves no special treatment or concessions. The term "homosexual," says Freundel, is inappropriate. We should refer to this individual as a person engaged in homosexual activity. The term is not a noun but an adjective. The Jewish community should, therefore, deal with the practitioner of homosexuality as a full-fledged Jew, albeit a sinner; he should be counselled and treated and be the concern of outreach and proper education.

The use of consciousness-expanding drugs such as LSD or other addictive substances is generally considered to be proscribed by the halacha. According to Rabbi Moshe Feinstein, the harmful effects of marijuana is one of the reasons to prohibit its use.<sup>11</sup> The same can be said about smoking in Judaism.<sup>12</sup> Certainly the abuse of narcotics and other substances by the intravenous and other routes is detrimental to one's health and, therefore, prohibited in Judaism, for the Torah instructs us not to intentionally place ourselves in danger: "Take heed to thyself, and take care of thy life"<sup>13</sup> and "take good care of your lives."<sup>14</sup> The avoidance of danger is exemplified in the biblical commandment to make a parapet for one's roof so that no one fall therefrom.<sup>15</sup> Hence, the smoking of marijuana and the abuse of intravenous narcotics, which constitute a definite danger and hazard to life, are considered pernicious habits and should be prohibited. The subterfuge of "it is no concern of others if I endanger myself" is specifically disallowed by Rambam<sup>16</sup> and the *Shulchan Aruch*.<sup>17</sup>

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10. "Homosexuality and Judaism," *Journal of Halacha and Contemporary Society*, No. II. Spring 1986, pp. 70-87.

11. *Iggerot Moshe, Yoreh Deah*, Section 3 #35.

12. Rosner, F. *Modern Medicine and Jewish Ethics*, Hoboken, N.J. and New York, N.Y., Ktav and Yeshiva Univ. Press, 1986, pp. 363-375.

13. Deuteronomy 4:9.

14. *Ibid.* 4:15

15. *Ibid.* 22:8

16. *Mishneh Torah, Hilchot Rotze'ach* 11:4 ff.

17. *Shulchan Aruch, Choshen Mishpat* 427 and *Yoreh Deah* 116.

### Jewish Legal Questions Relating to AIDS

Not only is the intentional endangerment of one's health or life by the use of intravenous drugs prohibited in Jewish law, but wounding oneself without fatal intent is also disallowed in the Talmud<sup>18</sup> and the Codes of Maimonides<sup>19</sup> and Rav Yosef Karo.<sup>20</sup> Since most patients with AIDS are homosexuals and/or drug addicts, they are considered sinners, thereby raising a variety of Jewish legal questions. Should a Jewish drug addict who develops AIDS as a result of sinful activity be treated any differently than any other patient? Should the Jewish homosexual who develops AIDS as a result of "abominable" behavior be treated? Does Judaism teach compassion for all who suffer illness irrespective of whether or not the illness is the result of practices which Judaism abhors and prohibits? Should every effort be made to heal these patients or at least alleviate their pain and suffering? Is a physician or nurse or other health worker obligated to treat a patient with AIDS or other contagious disease if there is a risk that they may contract the illness from the patient? Should the Jewish community expend resources for AIDS research and treatment since most such patients are sinners? Should not the resources better be allocated to the health of law-abiding citizens? Can patients with AIDS be counted in a quorum of ten men (*minyan*)? Can they serve as cantors or Torah readers? Should they be given honors in the synagogue? Can a *kohen* with AIDS go up to the *duchan* and offer the priestly blessing? Can a patient with AIDS serve as a witness in a Jewish legal proceeding? Is a patient with AIDS to be given all the usual burial rites? Is mourning to be observed for such a patient? These and other halachic questions pertaining not only to AIDS patients but to sinners in general were addressed in two separate discourses delivered by Rabbi Hershel Schachter and Rabbi Moshe Tendler, both senior faculty members at Yeshiva University. The following discussion is based in part on those discourses.

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18. *Baba Kamma* 91b.

19. *Mishneh Torah*, *Hilchot Chovel Umazik* 5:1.

20. *Shulchan Aruch*, *Choshen Mishpat* 420:31 and *Orach Chayim* 571.

### Obligation of the Physician to Heal a Sinner

The physician's license to heal is based on the biblical phrase "and heal he shall heal"<sup>21</sup> from which the talmudic Sages<sup>22</sup> deduce that divine authorization is given to the human physician to heal. In his biblical commentary, Rabbi Moses Nachmanides, known as Ramban, states that since the physician may inadvertently harm his patient, divine permissibility to heal was necessary to absolve the physician of responsibility for any poor medical outcome, provided he was not negligent. Other commentaries assert that since sickness is divinely inflicted as punishment for sin, divine permission to heal is required to allow a human physician to intervene and provide healing.

Maimonides expands the permissibility for the human physician to heal into an obligation or mandate based on the biblical commandment for restoring a lost object to its rightful owner<sup>23</sup> — if a physician is able to restore a patient's lost health, he is obligated to do so. If a patient dies as a result of a physician's refusal to heal him, the physician is guilty of shedding blood for having stood idly by.<sup>24</sup> A detailed discussion of the physician's obligation to heal in Judaism can be found elsewhere.<sup>25</sup>

G-d cherishes the life of every human being and therefore requires all biblical and rabbinic commandments except idolatry, incest, and murder to be waived in order to save the life of a person in danger (*pikuach nefesh*). The Sabbath must be desecrated to save a human life.<sup>26</sup> But is the desecration of the Sabbath allowed and/or mandated to save the life of a sinner who is guilty of a crime such as homosexuality for which the death penalty might be imposed?

The Talmud<sup>27</sup> permits the killing of a pursuer (*rodef*) to

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21. Exodus 21:19.

22. *Baba Kamma* 85a.

23. Deuteronomy 22:2.

24. *Mishneh Torah, Hilchot Rotze'ach* 1:14.

25. Rosner, F. *Modern Medicine and Jewish Ethics*. pp. 7-13.

26. *Shulchan Aruch, Orach Chayim* 328:2.

27. *Sanhedrin* 27b.



prevent him from killing the person he is pursuing; the one who kills him has no sin because the pursuer is considered to be legally (halachically) like a dead man (*gavra ketila*). For the same reason, one may *not* desecrate the Sabbath to save the life of the pursuer if a building collapses on him and his life is in danger. The same is true of a person sentenced to death by the court (Beth Din) in that one may not desecrate the Sabbath on his behalf if his life is in danger because he, too, is halachically considered like a dead man. However, a sinner who has not been sentenced by the Beth Din is considered as a live human being. As a result, although he is a transgressor, all biblical and rabbinic commandments must be suspended to save his life. Therefore, it seems clear that patients with AIDS should be treated medically and psychosocially no differently than other patients, and physicians and other medical personnel are obligated to heal patients with AIDS. The Talmud<sup>28</sup> clearly states that every life is worth saving without distinction as to whether the person whose life is in danger is a criminal or transgressor or law-abiding citizen. In fact, the Talmud requires that one expend money from one's own pocket to provide whatever is necessary to save another's life.

Some contemporary writers<sup>29</sup> raise the issue of the difference between a provocative sinner (*mumar lehachis*) and a lustful sinner (*mumar lete'avon*). The Talmud rules<sup>30</sup> that a provocative sinner is not to be helped but actually hindered (*moridin velo ma'alim*). The commentary of Rashi there and the code of Maimonides<sup>31</sup> interpret a provocative sinner to refer to one who habitually and willfully sins. On the other hand, one who only occasionally sins out of lust or appetite is considered like one whose life and property are to be protected and carefully treated.<sup>32</sup> It would seem therefore that

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28. *Ibid.* 73a.

29. Novak, D. personal communication.

30. *Avodah Zarah* 26b.

31. *Mishneh Torah, Hilchot Rotze'ach* 10:12.

32. Commentary of Tosafot, *Avodah Zarah* 26b s.v. *ani*; Maimonides' *Mishnah Commentary on Nedarim* 4:4; *Shulchan Aruch, Choshen Mishpat* 425:5.

physicians and other health personnel have an obligation to care for patients with AIDS no differently than for other patients.

### Danger to Medical Personnel Treating Patients with AIDS

Jewish law requires that if one sees his neighbor drowning or mauled by beasts or attacked by robbers, he is bound to save him.<sup>33</sup> Elsewhere the *Shulchan Aruch*<sup>34</sup> rules that if one observes a ship sinking with Jews on board, or a river flooding over its banks thereby endangering lives, or a pursued person whose life is in danger, one is obligated to desecrate the Sabbath to save them. The commentaries of *Mishnah Berurah*<sup>35</sup> and *Pitchei Teshuvah*<sup>36</sup> add that if there is danger involved to the rescuer, he is not obligated to endanger his life because his life takes precedence over that of his fellow man. If there is only a doubtful risk (*sofek sakanah*) to the rescuer, he should carefully evaluate the small risk or the potential danger to himself and act accordingly.

What should a physician do if his patient is suffering from a contagious disease which the physician might contract? Is the physician allowed to refuse to treat the patient because of the risk or the fear by the physician of contracting the disease? What if the risk is very small? What is the definition of *sofek sakanah*? If there is a 50% chance of the physician contracting the disease from his patient, halacha would certainly agree that such odds are more than doubtful and the physician would not be obligated to care for that patient without taking precautionary measures to protect himself. If he wishes to do so in spite of the risk, his act is considered to be a pious act (*midat chasidut*) by some writers, and folly (*chasid shoteh*)<sup>37</sup> by others. But if the risk is very remote, the physician must care for that patient because "the Lord preserveth the

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33. Sanhedrin 73a. *Shulchan Aruch*, Choshen Mishpat 426:1. *Shulchan Aruch*, Orach Chayim 329:8.

34. *Shulchan Aruch*, Orach Chayim 329:8.

35. *Mishnah Berurah* 329:19.

36. *Pitchei Teshuvah*, Choshen Mishpat 426:2.

37. *Mishnah Berurah* 328.

simpletons."<sup>38</sup> This phrase is invoked in the Talmud<sup>39</sup> in relation to the remote danger of conception in a minor child and discussed in great detail by Rabbi Moshe Feinstein<sup>40</sup> in a lengthy responsum concerning the use of a contraceptive device by a woman in whom pregnancy would constitute a danger to her life. Contraception, states Rabbi Feinstein, is permissible for *sofek sakanah* but not where the risk is extremely small. Rabbi Shneur Zalman of Lublin<sup>41</sup> and Rabbi Chayim Ozer Grodzensky<sup>42</sup> respectively discuss whether the above biblical phrase is invoked for a minor risk (less than 50%) or for a very remote and rare risk.

Rabbi Yitzchok Zilberstein<sup>43</sup> discusses the case of a female physician in her first trimester of pregnancy who is called to see a seriously ill patient with rubella (German measles). The physician is at 50% risk of acquiring rubella and possibly giving birth to a seriously defective baby (blind, deaf, or mentally retarded) or she may abort or have a stillbirth. Although there are no fetal indications in halacha which would allow abortion, Rabbi Zilberstein posits that halacha considers miscarriage to be a situation of *pikuach nefesh* and rules therefore that the female physician is not obligated to care for a patient with rubella.

The question as to whether or not a person is obligated to subject himself to a risk in order to save another person's life is discussed in great detail in several recent articles<sup>44</sup> and briefly summarized by Professor A.S. Abraham<sup>45</sup> in an article on human experimentation. The matter is related to the well-known difference

38. Psalms 116:6.

39. *Yevamot* 12b.

40. *Iggerot Moshe, Even Haezer* #63.

41. *Torat Chesed, Even Haezer* #44.

42. *Achiezer*, part 1 #23.

43. Zilberstein, Y. *Assia* (Jerusalem), Vol. 11 #11 (Nissan 5746), May 1986, pp. 5-11.

44. Hershler, M. *Halacha Urefuah*, Jerusalem, Regensburg Inst., Vol. 2, 1981, pp. 52-57; Sloshtitz, M.Y., *Halacha Urefuah*, Vol. 3, 1983, pp. 158-163; Metzger, A. *Harefuah Le'or HaHalachah*, Jerusalem, Vol. 4, 1985, pp. 10-34; Abraham, A.S. *Hamayan*, Nissan 5742, pp. 31 ff.

45. Abraham, A.S. *Assia* (Jerusalem) Vol. 5 1986, pp. 18-23.

of opinion recorded in the two Talmuds. The Jerusalem Talmud<sup>46</sup> posits that a person is obligated to potentially endanger his life (*sofek sakanah*) to save the life of his fellow man from certain danger (*vadai sakanah*). This position is supported by Rabbi Meir Hacoen<sup>47</sup> as cited by Rav Yosef<sup>48</sup> and by Rav Karo himself.<sup>49</sup> On the other hand, the Babylonian Talmud<sup>50</sup> voices the opinion that a person is not obligated to endanger his life to save that of another even if the risk is small (*sofek sakanah*). The ruling from the Jerusalem Talmud is omitted from the Codes of Rif, Rambam, Rosh, *Tur*, and Ramo.

The prevailing opinion among the various rabbinic sources seems to be the one cited by the Radvaz:<sup>51</sup> If there is great danger to the rescuer, he is not allowed to attempt to save his fellow man; if he nevertheless does so, he is called a pious fool. If the danger to the rescuer is small and the danger to his fellow man very great, the rescuer is allowed but not obligated to attempt the rescue, and if he does so his act is called an act of loving kindness (*midat chasidut*). If there is no risk at all to the rescuer or if the risk is very small or remote, he is obligated to try to save his fellow man. If he refuses to do so, he is guilty of transgressing the commandment "thou shalt not stand idly by the blood of thy fellow man."<sup>52</sup> This approach is also adopted by recent rabbinic decisors including Rabbi Moshe Feinstein<sup>53</sup> and Rabbi Eliezer Yehudah Waldenberg.<sup>54</sup> Since the risk to physicians and other health personnel in caring for AIDS patients is infinitesimally small (less than a fraction of one per

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46. *Terumat*, end of chapter 8, according to *Ha'amek She'elah, She'iltot* 147:1.

47. Known as *Hagahot Maimuni*.

48. *Keseph Mishneh* Commentary on *Hilchot Rotze'ach* 1:14.

49. *Bet Yoseph, Tur Shulchan Aruch, Choshen Mishpat* 426.

50. *Sanhedrin* 73a, according to *Agudat Aizov, Derushim* folio 3b and *Hashmatot* folio 38b.

51. *Radvaz*, Part 5 (Part 2 in *Leshonot HaRambam*, section 1, 582); *Radvaz*, Part 3 #627, and *Sheiltot Radvaz* 1:52.

52. *Leviticus* 19:16

53. *Iggerot Moshe, Yoreh Deah*, Part 2, #174:4.

54. *Tzitz Eliezer*, Vol. 10 #25:7.

cent), it follows that a physician is obligated under Jewish law to care for such patients.

The same logic is used to allow but not require healthy people to donate a kidney to save the life of a close relative dying of kidney failure. Most rabbis, including Rabbi Ovadiah Yosef,<sup>55</sup> Rabbi Jacob Joseph Weiss,<sup>56</sup> Rabbi Eliezer Waldenberg,<sup>57</sup> and others<sup>58</sup> support this halachic position.

### Visiting Patients with Infectious Diseases such as AIDS

It is a duty incumbent upon everyone to visit the sick, for G-d visits the sick<sup>59</sup> and we must emulate Him.<sup>60</sup> Rabbi Jakobovits<sup>61</sup> points out that the question whether the duty to visit the sick extends to visiting patients suffering from an infectious or contagious disease was already answered with a qualified affirmative by the Ramo<sup>62</sup> against the view of some later authorities who questioned the need to expose oneself to the hazard of contagion in the fulfillment of this precept. Ramo holds that there is no distinction in respect of visiting the sick between ordinary and infectious diseases, with the sole exception of leprosy. A recent re-examination of this question, continues Rabbi Jakobovits, leads one to the conclusion, based on several talmudic narratives,<sup>63</sup> that the ruling of Ramo applies only to an infection which would not endanger the life of the visitor even if he caught it, but that one is not required to risk one's life for the sake of fulfilling merely the rabbinic precept of visiting the sick, nor can anyone be compelled to serve such patients. Elsewhere<sup>64</sup> Rabbi Jakobovits asserts that in

55. Yosef, O. *Halachah Urefuah*, Vol. 3, 1983, pp. 61-63.

56. Weiss, J.J. *Responsa Minchat Yitzchok*, Part 6 #103:2.

57. Tzitz Eliezer, Vol. 10 #25:7.

58. Meiselman, M. *Halachah Urefuah*, Vol. 2, 1981, pp. 114-121. Hershler, M. *Halachah Urefuah*, Vol. 2, 1981, pp. 122-127.

59. Genesis 18:1.

60. *Sotah* 14a.

61. Jakobovits, I. *Journal of a Rabbi*, New York, Living Books, 1966, p. 156.

62. *Responsa Ramo* #19 (end).

63. *Nedarim* 39b, *Berachot* 22b, and Rashi in *Shabbat* 30a.

64. Jakobovitz, I. *Jewish Medical Ethics*, New York, Bloch, 1959, pp. 108-109.

practice, the view of Ramo did not prevail and approval was expressed for the custom not to assign visitations of plague-stricken patients to anyone except specially-appointed persons who were highly paid for their perilous work. Rabbi Jakobovits also cites the seventeenth century records of the Portuguese Congregation in Hamburg<sup>65</sup> which indicate that even the communal doctors and nurses were exempt from the obligation to attend to infectious cases and that the required services were rendered by volunteers entitled to special remuneration.

Rabbi Yekuthiel Yehudah Greenwald<sup>65</sup> states that if there is hope to heal the patient from his illness, one is obligated to visit and serve him even if there is a risk of contracting the disease because, according to the Jerusalem Talmud, one is obligated to accept a small risk in order to save one's fellow man from a definite danger. However, if there is no chance of saving the patient, one should not endanger one's own life by visiting the patient.<sup>66</sup>

The Talmud states<sup>67</sup> that those sent to perform a religious duty do not suffer harm (*shiluchei mitzvah aynon nizakin*). This rule is also codified in Jewish law<sup>68</sup> but only where there is no danger involved to the person performing the precept. Where there is prevalent danger (*hezekey matzui*), the rule may not apply and the person may be foolhardy to risk his life to perform the precept (*chasid shoteh*). However, if the risk is infinitesimally small such as one in a thousand or less, the person should fulfill the precept.

The risk of contracting AIDS by visiting or touching the patient seems to be nil. No case of AIDS has yet been contracted by casual contact with an AIDS patient. The virus is only transmitted through the blood and by sexual contact. Hence, physicians are obligated to care for patients with AIDS and everyone is obligated to visit patients sick with AIDS. The only precaution one need take

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65. Cassuto, J. *Jahrbuch der Juedisch-Literarischen Gesellschaft*, Vol. 10, 1912, pp. 252 and 280 (in minutes dated 1664 and 1666).

66. *Mishneh Torah, Hilchot Shemirat Hanefesh* 1:7.

67. *Pesachim* 8b.

68. *Turei Zahav (Taz) on Shulchan Aruch, Orach Chayim* 455:3.

is to avoid sticking oneself with a needle used to draw blood from or given as an injection to an AIDS patient.

### Allocation of Resources for AIDS Research and Treatment

Some people claim that governmental and societal resources should not be devoted to AIDS research because the disease is self-inflicted. This approach is obviously invalid because some patients acquire AIDS through no fault of their own, i.e., through blood transfusions as in hemophiliacs, or transplacentally as in infants born of AIDS mothers. Even if a disease occurs only in sinners, society is still obligated to expend resources to try and conquer the disease, and physicians are obligated to heal patients suffering from that disease. The Talmud<sup>69</sup> clearly states that every life is worth saving without distinction as to whether the person whose life is in danger is a criminal or law-abiding citizen.

The problem of the allocation of the resources of society when money for health care and medical research is limited is discussed in greater detail elsewhere.<sup>70</sup> Similarly, physicians have to allocate their time and energy among their various patients, raising halachic questions such as the permissibility (or prohibition) for a physician to leave one patient to care for another much sicker patient. This topic, however, is beyond the scope of this essay.

### Can Patients With AIDS Be Counted As Part of A Minyan?

May patients with AIDS who are homosexuals and/or drug addicts be counted as part of a quorum of ten men (*minyan*)? The *Shulchan Aruch*<sup>71</sup> states that a sinner who transgressed the decrees of the Jewish community or who committed a biblical or rabbinic transgression can be counted as part of a *minyan* as long as he was not excommunicated. Even if he was excommunicated and cannot be counted as part of a *minyan*, a sinner is allowed to pray in the synagogue unless the congregants strongly object.<sup>72</sup> The *Mishnah*

69. *Sanhedrin* 73a.

70. Rosner, F. *Modern Medicine and Jewish Ethics*, pp. 339-354.

71. *Shulchan Aruch, Orach Chayim* 55:11.

72. *Ibid.* 55:12.



*Berurah*<sup>73</sup> cites the *Pri Megadim*, who says that this rule applies only if the sinner is one who sins occasionally out of lust or appetite (*mumar le-te'avon*), but a provocative sinner (*mumar le-hachis*) or one who worships idols or who publicly desecrates the Sabbath is judged like a non-Jew and cannot be counted for a *minyan*.

Rabbi Yechiel Weinberg<sup>74</sup> quotes earlier Hungarian rabbis who say that today no Jew is excommunicated and, therefore, all Jews, even sinners, can be counted as part of a *minyan*. However, he continues, other rabbis say that if a person is worthy of being excommunicated by virtue of transgressions he has committed, he cannot be counted as part of a *minyan* even though he is not actually excommunicated. The clarification of this rabbinic disagreement is important, for homosexuality is a sin for which the transgressor is worthy of being excommunicated. Nevertheless, this responsum of Rabbi Weinberg is difficult to understand in view of the clear statement in *Shulchan Aruch* that unless the sinner is actually excommunicated, he may be counted as part of a *minyan*.

### Can Patients With AIDS Lead Synagogue Services?

The question has been raised as to whether or not a patient with AIDS can lead services in the synagogue as a cantor (*shaliach tzibur*) or Torah reader. Jewish law requires<sup>75</sup> that the cantor be worthy, be free of sins, and not have a bad name even when he was younger. Moreover, he should be humble and desired by the congregants, have a sweet voice, and study Torah regularly. Rabbi Moshe Isserles<sup>76</sup> asserts that if someone transgressed unintentionally (*beshogeg*) and repented, he is allowed to serve as a *shaliach tzibur*, but not if he sinned intentionally (*bemayzid*) because he had a bad name before he repented. The *Mishnah Berurah*<sup>77</sup> cites *Magen Avraham*, who quotes many rabbinic decisors that even if one

73. *Mishnah Berurah* 55:11:46.

74. *Responsa Seridei Aish*, Part 2 #6.

75. *Shulchan Aruch, Orach Chayim* 53:4.

76. *Ramo on Orach Chayim* 53:5.

77. *Mishnah Berurah* 53:5:22.

sinned intentionally, he can serve as a *shaliach tzibur* if he repented. However, on fast days and on the High Holy Days, one should not appoint him as a cantor, although once appointed he should not be removed.

For the High Holy Days, one should seek out a cantor who is most worthy, most learned in Torah, who has performed many meritorious deeds, who is married, and over thirty years of age.<sup>78</sup> The *Mishnah Berurah*<sup>79</sup> adds that the cantor and the one who blows the *shofar* should have fully repented from their sins, although one who begins as a cantor or *shofar* blower should not be removed. It thus seems that if an AIDS patient has repented from his sins, including the sin of homosexuality, and if he meets the above qualifications and is acceptable to the congregation, it is permissible to have him lead synagogue services or blow the *shofar* or read from the Torah.

### Should a kohen with AIDS Recite the Priestly Blessing?

Is it permissible for a *kohen* to offer the priestly benediction (go up to the *duchan*) if he has AIDS related to homosexuality or drug addiction? The *Shulchan Aruch*<sup>80</sup> states that if a *kohen* killed someone even unintentionally he should not offer the priestly blessing even if he repented. Ramo adds, in the name of many rabbinic decisors: "If he repented, he is allowed to recite the priestly blessing and this is the practice which one should follow."

The *Shulchan Aruch*<sup>81</sup> also asserts that if the *kohen* is an apostate he should not recite the priestly blessing although some rabbis allow him to do so if he repented. If a *kohen* is intoxicated, he should not recite the priestly blessing.<sup>82</sup> So, too, if he married a divorced woman.<sup>83</sup>

However, continues Rav Karo,<sup>84</sup> if none of the above

78. Ramo on *Orach Chayim* 581:1.

79. *Mishnah Berurah* 581:1:11.

80. *Shulchan Aruch*, *Orach Chayim* 128:35.

81. *Ibid.* 128:37.

82. *Ibid.* 128:38.

83. *Ibid.* 128:40.

84. *Ibid.* 128:39.

circumstances which prevent a *kohen* from reciting the priestly blessing are present, even if he is not careful about the observance of other commandments, he is allowed to recite the blessing. The *Mishnah Berurah*<sup>85</sup> explains that such commandments include even serious prohibitions such as forbidden sexual relationships (*arayot*). It would appear, therefore, that a *kohen* with AIDS is permitted to offer the priestly benediction. *Mishnah Berurah*,<sup>86</sup> quoting the *Zohar*, adds that if the *kohen* is despised by the congregation, he should not recite the priestly blessing. The reason why even a *kohen* who has sinned is allowed to offer the priestly blessing is that one should not prevent him from performing the positive commandment of blessing the people, thus adding to his sins by not allowing him to fulfill this and other commandments.<sup>87</sup>

Someone might ask: what good is his blessing if he is a sinner? The answer is that the *kohen* only recites the words but the actual blessing comes from G-d, as it is written: "and I will bless them."<sup>88</sup>

### Should a Patient With AIDS Be Honored in the Synagogue?

The Talmud<sup>89</sup> states that it is prohibited to flatter the wicked in this world because it encourages them to believe that they are not doing anything wrong. Furthermore, if a homosexual AIDS patient is honored in the synagogue by being called up to the Torah, people may be misled into thinking that his behavior is acceptable. Thus honoring a sinner might constitute transgression of the negative precept of "not placing a stumbling block before the blind."<sup>90</sup> The same question arises when a person who publicly violates biblical commandments is honored at a testimonial dinner. Is not the bestowing of such an honor prohibited because it misleads the sinner and the public into believing that the person's violations are being condoned?

85. *Mishnah Berurah* 128:39:143.

86. *Ibid.* 128:10:37.

87. *Hasagot of Ravad*, Jerusalem 5744, (1984), *Hilchot Nesiyat Kapayim* 15:6.

88. Numbers 6:27

89. *Sotah* 41b.

90. Leviticus 19:14

Rabbi Feinstein<sup>91</sup> discusses the case of a very philanthropic and charitable Jewish physician who performs many deeds of loving kindness but is married to a non-Jewish woman. Ordinarily, one should not give this physician any honors in the synagogue because of "the stumbling block that is being placed before the blind" in that such honors might mislead him into believing that his marriage to a non-Jew is not wrong. However, if the honor might lead the sinner to repent, or if one tells him that what he is doing is wrong, it is permissible to give him the honor. In the case under discussion, Rav Feinstein concludes that it is permissible to have the physician open and close the holy ark and remove and subsequently return the Torah to the ark because all the congregants know that he is being honored because of his philanthropy and good deeds, thus the honor does not represent acquiescence to his wrong-doing. Furthermore, the public is in need of his services (*rabim tzerichim loh*) because of his expertise as a physician and he may, therefore, be accorded the aforementioned honor.

However, the *Chatam Sofer*<sup>92</sup> rules that one should not call a sinner to the Torah for a portion of the Torah reading (*aliyah*) because of the aforementioned possibility of misleading the sinner and/or the public into believing that the sin is being condoned.

### Can a Patient With AIDS Serve as a Witness?

Maimonides<sup>93</sup> lists ten classes of individuals who are ineligible to attest or testify before a Jewish court: women, slaves, minors, the mentally deficient, deaf-mutes, the blind, transgressors, the contemptible, relatives and interested parties. Transgressors are ineligible as witnesses by biblical law, for it is written: "Put not thy hand with the wicked to be an uprighteous witness"<sup>94</sup> which is interpreted as "accept not the wicked as a witness."<sup>95</sup> Maimonides

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91. *Iggerot Moshe, Orach Chayim*, Part 2 #51.

92. *Chatam Sofer, Orach Chayim* #15.

93. *Mishneh Torah, Hilchot Eydut* 9:1.

94. Exodus 23:1.

95. *Mishneh Torah, Hilchot Eydut* 10:1.

then enumerates the various types of transgressors, including those who are liable to be flogged, thieves, robbers, tricksters, gamblers, usurers, as well as idlers and vagabonds who are suspected of spending their leisure time in criminal activity.<sup>96</sup>

How should one classify the transgressions of homosexuality and drug addiction, the most common risk factors for the development of AIDS? Those who sin unintentionally are eligible to serve as witnesses, but AIDS patients who are homosexuals know what they are doing. Perhaps such patients can be considered to lack self-control over their strong desire; Jewish law states that a person who sins under compulsion is divinely exempted from punishment (*onus rachamanah patrey*). Support for this position can be found in the talmudic commentary known as Tosafot<sup>97</sup> who quote the passage<sup>98</sup> which states that one who is suspected of adultery is nevertheless eligible as a witness.

### **Burial, Funeral Rites and Mourning For an AIDS Patient**

Two cases known to this writer involved AIDS patients who died, where the members of the burial society (*chevra kadisha*) refused to perform the ritual purification of the deceased (*taharah*) because of their fear of contracting AIDS. It is now known that one cannot acquire AIDS by casual contact and their fear was unfounded. However, the problem arises with deceased individuals who had a real contagious disease vis-a-vis the ritual purification for the dead. If the members of the burial society can take precautions such as wearing masks, gloves, and gowns, they should do so. If they cannot or will not do so out of fear, they are not obligated to perform the *taharah* because the latter is only a custom and not a law.<sup>99</sup>

Are the laws of mourning (*avelut*) to be observed for a homosexual patient who died of AIDS? Jewish law states<sup>102</sup> that

96. Ibid. 10:2-5.

97. Tosafot on *Sanhedrin* 9b s.v. *liretzono*.

98. *Sanhedrin* 26b.

99. *Chochmat Adam*, beginning of the customs of the *chevra kadisha*.

102. *Shulchan Aruch*, *Yoreh Deah* 345:5.

there is no mourning for those who cast off the yoke of commandments and act like apostates. However, if they repent, mourning is observed for them. Rabbi Abraham Sofer<sup>103</sup> distinguishes between a sinner who suffers for weeks, months or years before his death and one who died suddenly. The former probably repented, the latter did not. Therefore, AIDS patients who suffer for variable periods of time before their death should probably be mourned on the assumption that they repented.

It is certainly not proper to honor an AIDS patient after death by naming a school or playground after him. The Talmud<sup>104</sup> interprets the biblical phrase, "But the name of the wicked shall rot,"<sup>105</sup> to mean that rottenness enters their names in that none name their children after them. If it is public knowledge that the AIDS patient was a sinner, he should not be honored after death by having a person or thing named after him. It is also a punishment for the wicked not to honor them after death.

### Use of the Ritualarium (Mikvah) by Women Fearful of Contracting AIDS

The Talmud states<sup>106</sup> that if wine or olive sap falls into a ritual bath or ritualarium (mikvah) and changes its color, it becomes invalid. Based on this ruling, some rabbis prohibit the addition of chlorine to a mikvah because the color of the water is changed to green. As a result of this prohibition, some women are afraid of using such a mikvah for fear of contracting AIDS from the water used by other women whose husbands may have AIDS. However, this fear is totally unfounded since AIDS cannot be transmitted through water but only by sexual contact or through blood or blood products. Secondly, most rabbis do not prohibit the use of chlorine because only a minute amount is used to provide antisepsis of the mikvah water. (Sufficient chlorine to make the water change color

103. Responsa *Ketav Sofer*, *Yoreh Deah* #171.

104. *Yoma* 38b.

105. Proverbs 10:7.

106. *Mikva'ot* 7:3.

to green would be intolerable to humans and produce serious eye irritation and skin burning. The greenish color of some mikvahs is due to the green or blue tiles lining the mikvah.) Furthermore, the rabbis who prohibit the use of chlorine because of the problem of the change in the appearance (*shinuy mareh*) of the water can offer the solution of using chlorine crystals rather than liquid chlorine. The addition of solids such as foods or chemicals, states the talmudic commentary called *Mishnah Acharonah*,<sup>107</sup> does not invalidate a mikvah even if the color of the water is thereby changed.

### Circumcision of a Baby with AIDS

The AIDS virus can be transmitted through the placenta from an AIDS-suffering woman, usually a drug addict or sexual partner of an AIDS man, to her unborn fetus. AIDS in newborns or infants is a rare but well-recognized disorder. Is it permissible or mandatory to perform a ritual circumcision (*brit milah*) on such a male infant on the eighth day of life? Must it be postponed until the child recovers from the illness? But there is no cure for AIDS! How does one perform the *metzitzah*, or sucking, which is part of the ritual circumcision? May *metzitzah* be omitted in cases of AIDS?

In a lengthy article, Dr. Abraham Steinberg<sup>108</sup> discusses medical-halachic considerations in the performance of *brit milah*. He reviews the reasons for this divine commandment and the various medical conditions for which the circumcision may or must be postponed. Steinberg cites numerous rabbinic responsa which address these issues. The rules on these matters can be found in the classic codes of Maimonides<sup>109</sup> and Rav Yosef Karo.<sup>110</sup>

If an infant has a generalized illness from which he is not expected to recover, but the physicians state that circumcision would not in any way endanger the infant nor add to the illness,

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107. *Ibid.*

108. Steinberg, A. *Assia* (Jerusalem) 5743 (1983) Vol. 4, pp. 207-228.

109. *Mishneh Torah*, *Hilchot Milah* 1:1ff.

110. *Shulchan Aruch*, *Yoreh Deah* 260 ff.

*brit milah* should be performed, preferably on the eighth day.<sup>111</sup> Some rabbis rule<sup>112</sup> that a baby who cannot live for twelve months should be circumcised on a weekday but not on the Sabbath. The *Chatam Sofer*<sup>113</sup> gave a similar ruling in the case of a baby who was not expected to live three months.

On the other hand, Rabbi Bakshi-Doron<sup>114</sup> refused to allow a baby with spina bifida and paraplegia to be circumcised in spite of the medical testimony that the baby had no feeling in the lower half of his body and would not be harmed medically by a *brit milah*. This rabbi and others rule that circumcision should be postponed in any baby with a generalized illness "until it recovers". Most infants with AIDS are critically ill, and circumcision is usually medically and therefore halachically contraindicated.

### Conclusion

At the same time that we condemn homosexuality as an immoral act characterized in the Torah as an abomination, we are nevertheless duty bound to defend the basic rights to which homosexuals are entitled. The Torah teaches that even one who is tried, convicted and executed for a capital crime is still entitled to the respect due to any human being created in the image of G-d. Thus, his corpse may not go unburied overnight.<sup>115</sup> The plight of Jewish AIDS victims doomed to almost certain death should arouse our compassion.

In Judaism, the value of human life is infinite. Whether a person is a homosexual or not, we are obligated to give him proper care if he is sick, charity if he is needy, food if he is hungry, and a burial after death. If he breaks a law of the Torah, he will be punished according to the transgression. Even if AIDS is a punishment by G-d for the sin of homosexuality, Jewish tradition

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111. *Minchat Yitzchok*, Vol. 5 #11.

112. *Maharam Schick*, *Yoreh Deah* #243.

113. *Chatam Sofer* #64.

114. Bakshi-Doron, E. *Halachah Urefuah*, Vol. 2, 1981, pp. 268-272.

115. Deuteronomy 21:23.



teaches us that such a divine affliction may serve as an atonement for that sin or the patient may repent while ill, making the AIDS victim even more deserving of our mercy and loving kindness as a fellow Jew.

The compassion of Jewish law in requiring treatment for AIDS patients, however, should not be confused with acquiescence of the behavior of homosexuals who develop AIDS. Under no circumstances does Judaism condone homosexuality, which we characterize as an abomination. Nevertheless, the patient with AIDS should be treated and his life saved. To stand idly by and see the homosexual die without trying to help him is prohibited.<sup>116</sup> Evil should be banned but the evildoers should be helped to repent.<sup>117</sup>

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116. Leviticus 19:16.

117. Psalms 104:35.



## Artificial Insemination

*by Rabbi Alfred S. Cohen*

A number of years ago, a great controversy erupted among leading rabbinic decisors, a dispute which generated a totally uncharacteristic outburst of invective, heat, and partisanship in the halachic world. Scholars all over the world were astounded at the sharp tone and bitter disagreements engendered by a point of law, for generally the tone of rabbinic intercourse is elegantly cordial, and the fine points of halacha are disputed in a measured intellectual atmosphere. Not so the question of permitting artificial insemination.

In cases where a woman is not able to conceive a child by her husband in the natural manner, it may at times be possible to impregnate her by means of a medical procedure whereby sperm is introduced into the uterus. There are a number of potential halachic pitfalls in this. The major questions of Jewish law which troubled the great authorities who addressed the question repeatedly in the course of more than twenty years of controversy are as follows: (1) Is the child born of a married woman who became pregnant from someone other than her husband, by means of a medical procedure, considered a *mamzer*, who as the product of an illicit relationship is forbidden from ever marrying another Jew? (2) Even if the woman's husband could qualify as the sperm donor, may she be artificially inseminated at a time when she is a *Niddah*? (3) Another question

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*Rabbi, Young Israel of Canarsie  
Rebbi, Yeshiva University High School*

concerns which method of extracting sperm from the husband for the purpose of artificial insemination of his wife is sanctioned under Jewish law.

The authorities who dealt with these questions often did so with uncharacteristic emotion; also highly unusual is the frequency with which they returned to write on the topic again and again, qualifying and defining their previous opinions, at times almost retracting. After all is said and done, it is still difficult to assess how much weight, in practical terms, is to be given to their several pronouncements. So, for example, Rav Moshe Feinstein, who was the major authority to render a number of "lenient" (i.e., permissive) responsa, at one point noted that "in actual fact, I never told [anyone] to do it."<sup>1</sup> Furthermore, he also writes that "I never gave permission" to any woman to undergo artificial insemination, for there is no halachic imperative for her to bear children; it is only the man who has a mitzvah of "be fruitful and multiply." He also expressed the fear that it might cause deep antagonism between the man and his wife if she has children and he doesn't.<sup>2</sup> But he notes elsewhere that "if the husband agrees, and they are deeply unhappy [at their inability to have children], it can be permitted."<sup>3</sup>

Indignant condemnation of the practice was voiced by the eminent author of *Chelkat Yaakov*, Rav Yaakov Breisch, a leading posek of the twentieth century:

כמובן שמצד דתנו האיסור ברור ומבורר שלא לעשות דברים  
 כעורים ומכוערים כאלו הדומים למעשי ארץ כנען  
 ותועבותיהם.

It is understood that from the point of view of our religion it is clear that these ugly and disgusting

1. אגרות משה, אבן העזר ד', ל"ב"ה.

2. שם. However, in the first responsum which he wrote on the subject (אבן העזר א"י), Rav Feinstein, quoting the Gemara in יבמות סה, emphasizes how deeply our rabbis were aware of the great desire women have to have children, and how fervently the Matriarchs prayed to be blessed with children; also, that lack of children can be grounds for divorce.

3. אבן העזר ב"י א"ע ע"א.

things should not be done, for they are similar to the deeds of the Land of Canaan and their abominations.<sup>4</sup>

Yet later Rav Breisch conceded that a child so conceived was acceptable.<sup>4a</sup>

It is not hard to understand why the topic of artificial insemination did and continues to evoke such strong reaction, on the part of laymen and scholars as well. Having children fulfills one of the most fundamental emotional needs which people have. The anxiety and anguish of couples who are unable to conceive cannot fail to move others, who may try to help them medically, psychologically, or with religious advice. If by some miracle of modern medicine it would be possible for a sterile couple to have a baby, there is a great deal of pressure upon the medical and religious community to make this feasible. Not only is there great emotional pressure and empathy for the pain which the unhappy couple experiences, but there is also a strong religious basis for finding a way to enable them to have children. The first mitzvah in the Torah is "be fruitful and multiply," and if a way exists for an otherwise barren couple to fulfill this mitzvah, it might serve as an additional positive factor in arriving at a halachic decision.

On the other hand, the purity of the Jewish family is an absolutely fundamental and important value in our religion. As Rashi notes in his commentary to the Torah,<sup>5</sup> G-d Himself attests to the purity of the Jewish families in the desert, attaching His name, so to speak, to each clan in order to verify that indeed the sons are the offspring of their fathers. The prohibition of adultery is included in the Ten Commandments which the Jews received as a group standing at Mount Sinai. Regardless of any emotional pain and longing which a childless couple may suffer, conception of a child under circumstances which might be adulterous cannot in any way be sanctioned. Thus it is of overriding importance to determine the halachic status of the act of artificial insemination as well as of

4. חלק איכר, חלק ביקצ"ה, חלק ג מ"הי"א.

4a. See further in text.

5. במדבר.

the child produced by such a method. The vehemence of the controversy is not a feature of the rabbinic personalities involved but rather of the crucial importance of the decisions, which would have repercussions for all generations.

The artificial insemination controversy is also a testament to the dynamic nature of Jewish law and the brilliance of Torah scholars who are able to find in the eternal parameters of halacha solutions to the most complex problems raised by modern science and technology.<sup>6</sup>

What was the basis for Rav Feinstein's lenient opinions, and on what grounds was he challenged?

In his earliest responsum on the subject,<sup>7</sup> Rav Feinstein was asked about the status of a woman who had undergone artificial insemination — was she considered an adulteress? This is not a simple problem: what is that the Torah forbids, when it outlaws adultery — the *physical* act of union of a woman with a man other than her husband, or any union of his sperm and her egg, no matter how or where? Rav Feinstein's position on this crucial point is unequivocal: he maintains that the relationship of adultery arises only when there is a forbidden *physical* union between a woman and another man. In the absence of a sexual relationship, the child which the married woman bears by means of artificial insemination is wholly legitimate in the eyes of Jewish law. Not only that, but the husband may continue to live with his wife, something a man may not do if his wife has had an adulterous relationship (i.e., by Jewish law, the cuckolded husband must divorce his wife).

Rav Feinstein relies on a precedent established by Rabbenu Peretz and cited by Rabbi David Halevi (the *Taz*) in the seventeenth century, as well as on the fact that the Gemara often quotes with

6. Among those who have written on this topic are the following:

שו"ת דברי מלכאל ד"ק י"ז; לבוש מרדכי ד"ק י"ט; רמ"א כ"ה י"ב; אוצר הפוסקים חלק ט פ"ט י"ז ודף פ"ז; יביע אומר חלק ב' אבן העזר א; ציץ אליעזר חלק ג' כ"ז; האלף לך שלמה אבן העזר ל"ה; עמק הלכה ח"א ס"ח; אחיעזר גי' כ"ד; שו"ת יעב"ץ א"מג; תשובות רמ"א ס"ק; המאור תשכ"ד.

7. אבן העזר א"י, ע"ע"א; ראה ג"כ אבן העזר גי' י"ד; אבן העזר ב"י י"ב, ט"ז; י"ח; אבן העזר ד' כ"ז, ל"ב; אגרות משה יו"ד גי' י"ד.

great respect the teachings of Ben Sira, who was reputedly conceived in an artificial manner, without any hint of opprobrium for him.<sup>8</sup> The halachic issue expounded upon by the *Taz* concerns a woman's sleeping in a bed wherein a man had previously lain:

אשה נדה יכולה לשכב אסדינים של בעלה ונוהרת מסדינין  
ששכב עליהן איש אחר, פן תתעבר משכבת זרע של אחר  
ואמאי אינה חוששת פן תתעבר בנדוהתה מש"ז של בעלה  
ויהא הולד בן הנדה, כיון שאין כאן ביאת איסור הולד כשר  
לגמרי.

A woman who is *Niddah* may lie on the sheets of her husband but has to be careful about [lying on] the sheets where another man had lain, lest she become pregnant from sperm [which might be on the sheet] of another man. And why doesn't she have to be concerned about becoming pregnant when she is a *Niddah*, and the child would be a "child of *Niddah*?" *But since there is no forbidden sexual act, the child is completely acceptable.*<sup>9</sup> (italics added)

Based on this, Rav Feinstein reaches an important conclusion: if there is no forbidden sexual act, the child is quite acceptable according to Jewish law. He concludes that the only reason the *Taz* said a woman should not sleep in a bed previously occupied by another man is that if she were to become pregnant this way, her child might later unwittingly marry a sibling, unaware that he is not really the child of his legal father. Therefore, Rav Feinstein cautions that a child conceived by artificial insemination might have to be careful not to marry another child of the same sperm donor. However, this consideration poses no problem for Rav Feinstein, for two reasons: obviously, the majority of girls will *not* be in the

8. But in his responsum (אבן העזר א"ע"א) Rav Feinstein rejects absolutely the suggestion that the sperm of the husband and another donor be mixed and then used for the artificial insemination. He labels this simply a ploy to fool the husband into thinking the child might be his and make him feel better about the whole procedure. See מחלוקת רש"י ותוספת, סוטה מב.

9. ב"ש אבן העזר, יו"ד קצ"ה ז; ראה ג"כ משנה למלך ט"ו מאישות; שער המלך סוף הלכות יבום.

category of possible sisters; moreover, the overwhelming majority of sperm donors are likely to be non-Jews, whose children according to Jewish law would not be considered siblings of the child in question. We are entitled to rely on the "majority" rule, and therefore to permit this child to marry any other Jew. He also notes that *Otzar Haposkim*<sup>10</sup> cites a number of authorities who allow artificial insemination. Under the circumstances, once it has already been done, even if without previous rabbinic permission, he feels there are sufficient grounds to rule the child to be without halachic blemish.

Once the determination has been made that it is only the sexual act which constitutes an adulterous union, a number of other decisions inevitably ensue. As already noted, based on this determination, Rav Feinstein rules that the husband may continue being married to the woman who underwent artificial insemination. Obviously, if there is no adulterous relationship, there is no reason for them not to stay married. Following the same line of reasoning, he permits a girl born of artificial insemination to marry a Cohen,<sup>11</sup> despite the explicit ruling of the *Shulchan Aruch* that

כותי הבא על בת ישראל וילדה ממנו בת אותה הבת פגומה  
לכהונה.

If a non-Jew came to a Jewish girl and she bore from him a daughter, that daughter is "blemished" as far as marrying a Cohen.<sup>12</sup>

Since he holds that there is no illicit relationship attached to artificial insemination, there is no basis for not permitting the child to marry a Cohen. In effect, Rav Feinstein has decided that the biological or genetic factor in itself plays no role and cannot render the child "blemished." In conclusion, however, he writes that if the woman was artificially inseminated without the consent of her husband, the man is under no obligation to tender any manner of

10. אבן העזר א"א.

11. שם א"י.

12. אבן העזר ד"י"ז.



financial support for the child.

The reaction to these halachic statements was vehement and heated, although at times the grounds for condemnation were not explicated. So Rav Breisch, while calling the act "abominable, forbidden, disgusting, and grounds for divorcing a woman against her will," nevertheless himself writes that "if after all a child was born in this manner, and we have to determine if it is a *mamzer* or not, since we have no clearcut decision from our earlier rabbis on this except for Rabbenu Peretz...the child is acceptable, and similarly we have no grounds for declaring the woman forbidden to her husband."<sup>13</sup>

Rav Breisch did remonstrate with Rav Feinstein on his decision, however, and in his own compendium of responsa printed both his objections and Rav Feinstein's response to them, as well as a point-by-point rebuttal of Rav Feinstein's explanation.<sup>14</sup> Since the correspondence between them touched on additional halachic positions on which they differed, let us review the other opinions Rav Feinstein penned on the subject of artificial insemination, a question to which he returned a number of times.<sup>15</sup>

As mentioned, Rav Feinstein holds that if no forbidden sexual act takes place, the child is totally "kosher." However, there are other possible transgressions of Jewish law involved, the most serious one being the manner of collecting the sperm from her husband, assuming that he is to be the donor. (If the donor is not Jewish, this question does not arise). By Jewish law, it is forbidden to "waste" sperm (*zera levatala*); the generally accepted application of the *issur* is that if a man emits sperm not during sexual union, it is "wasted."<sup>16</sup> However, Rav Feinstein rules that since the sperm

13. חלק ג' מרח.

14. שם חלק ג'.

15. אבן העזר איי ע' ע"א; אבן העזר ב"א, ט"ד"י"ח — גי"ד.

16. שו"ת דברי יואל קדו; רמ"א אבן העזר ב"ג"ה; פתחי תשובה, שם; אוצר הפוסקים חלק ט.  
According to the halacha, if a man is afflicted with certain genital abnormalities or damage, he is not permitted to get married. In *Yevamot* 76a, the Gemara describes a method of testing the man, to determine if the disqualifying genital perforation still exists; this test involves emission of sperm. Rav Feinstein reasons that since the Talmud was willing to permit emission of sperm in a non-sexual context for

will ultimately be used by the doctor to inseminate the man's wife, it cannot be termed "going to waste."<sup>17</sup> On the other hand, he does have reservations about the method of collecting the sperm, because some of the methods employed, such as masturbation, are forbidden according to the halacha. The preferred way would be for the doctor to remove the sperm from the woman after coitus with her husband, although Rav Feinstein is opposed to the couple's having relations in the doctor's office, as being indecently immodest.<sup>18</sup>

In a further lenient ruling,<sup>19</sup> Rav Feinstein decided that if a woman is able to conceive only during the time that she is a *Niddah*, she may be artificially inseminated with her husband's sperm at that time, and there is no problem with her offspring.

Those in opposition to the lenient opinions expressed by Rav Feinstein are many and formidable. The fierce rejection of these views by the late Rebbe of Satmar is well known, but others also took Rav Feinstein to task. As mentioned, Rav Breisch not only wrote his own responsum on the subject in his *Chelkat Yaakov*, but also personally corresponded with Rav Feinstein in a vain effort to get him to retract. Without going into the technical details of his strong objections, it will be highly informative to consider the actual final rulings with which he concludes:

- 1) It is forbidden for a woman to become pregnant through artificial insemination by a donor other than her husband.
- 2) It is possible that if the husband is the donor, artificial insemination might be permitted.
- 3) If a woman had it done anyway, the child is not a *mamzer*.
- 4) The female offspring of artificial insemination may not

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the purpose of determining whether this man can get married, then by extension other emissions of sperm, if for a worthwhile purpose such as having a child by artificial insemination, can similarly be permitted. However, Rav Teitelbaum argues that the Gemara permitted this type of test only to determine if the man is qualified to get married, which is of overwhelming importance. However, in the case under discussion in the responsa, the man already is married, and no *heter* may be applied to his case.

17. שם בתשובותיו.

18. אגרות משה אבן העזר ע"א; ראה נדה יג.

19. אבן העזר ב"ח.

marry a Cohen. However, if unwittingly she did marry a Cohen, no divorce is mandated.

5) The woman who underwent the procedure may nevertheless continue living with her husband, but if it was done without his knowledge or consent, he may divorce her, even against her will.

Despite his emphatic denial of the validity of any lenient ruling, Rav Breisch does not offer proofs or halachic precedent to support his opposition to the position taken by Rav Feinstein. And, as noted, he agrees that the child is not a *mamzer*.<sup>20</sup>

Nevertheless, Rav Breisch's opposition was not based on an emotional repugnance to the artificial insemination. He painstakingly reviewed Rav Feinstein's response to his own letter of objection and published a detailed rebuttal to Rav Feinstein's position.<sup>21</sup> Some of the major points which he made are as follows:

(1) Rav Breisch raised an objection from a totally different vantage point of halacha, that of *Chilul Hashem*. The terrible strictures associated with causing a *Chilul Hashem*, a "desecration of the name of G-d," are well known. But it is not only when a Jew acts in a shameful manner that he perpetrates a *Chilul Hashem*. Great care must also be exercised so that Judaism as a religion not be denigrated or held in contempt by others. Thus, the *Sefer Chassidim* cautions:

אם יש דבר שהעכו"ם נוהגין איסור וליהודים אינו אסור,  
אסור לו ליהודי שיאכל פן יתחלל שם שמים על ידו.

If there is something that the Gentiles are accustomed to consider forbidden, but for the Jews it is not forbidden, [nevertheless] it is forbidden for a Jew to eat it, lest the Name of Heaven be desecrated thereby.<sup>22</sup>

In the same vein, the author of the commentary *Magen Avraham* to the *Shulchan Aruch* notes:

20. שו"ת חלקת יעקב, חלק ג'.

21. שם.

22. ספר החסידים תתכ"ט.

לענין לבנות בית הכנסת בשבת על ידי קבלנות עכו"ם ראיתי  
שגדולים לא רצו להתיר כי בזמן הזה שאין העכו"ם עושין  
מלאכה ביום חגם תהי' חילול השם בזה.

On the matter of having Gentiles build a synagogue on Shabbat [even though they are being paid for the job and not being paid by the day, under which circumstance it is permitted] I have seen that great rabbinic authorities did not wish to permit it, because in these times, when the Gentiles do not work on their holiday, there would be a *Chilul Hashem* [if we were to allow work to be done on our holy day.]<sup>23</sup>

Rav Breisch concludes therefrom that we Jews may not be more permissive on moral or religious issues than are non-Jews, for to be so would be to invite contempt in their eyes for our religion. Hence, since the Pope and the Catholic Church have condemned artificial insemination, it degrades Judaism to be more lax on this issue than they are.

(2) Rav Breisch raised another halachic question which had so far not been addressed in this context, the question of *chalitzah*. According to biblical law,<sup>24</sup> if a man dies without children, his widow is to marry his brother, who will father a child with her (*yibum*). If the brother-in-law does not marry the widow, he must release her from her ties to the family by a procedure called *chalitzah*. Now, objected Rav Breisch, if a woman has children by artificial insemination from another donor, she will still require *chalitzah* in case she is widowed (since the child was not from the husband) but it won't be done because it will be thought that the couple did have children. Another problem could arise if the brother-in-law was conceived through artificial insemination, which would render him not actually the brother of the deceased husband. Once again the biblical requirement for *chalitzah* would be frustrated. Rav Breisch opposes conceiving a child in such a way as to confuse the genealogy of the family and to render irrelevant

23. מגן אברהם או"ח רע"ב.

24. דברים כ"ה: ה"י.

certain Torah requirements. Artificial insemination introduces unconscionable confusion in the family line, a confusion which has numerous unacceptable and unforeseeable repercussions in the area of family law.

(3) The overwhelming importance of absolute certainty of paternity is repeatedly affirmed in Jewish law. For this reason, the *Shulchan Aruch*<sup>25</sup> rules that a woman who was divorced or widowed may not remarry for ninety days. Therefore, writes Rav Breisch, in order to be certain as to the paternity of the woman's child, the husband and wife would have to abstain from conjugal relations for ninety days prior to the artificial insemination. Furthermore, once she becomes pregnant this way, they will have to abstain from relations throughout the pregnancy and lactation period of the baby. (This is due to a rabbinic decree forbidding a man to have relations with a woman carrying the fetus or nursing the child of another man, even if she is now his wife.<sup>26</sup>)

(4) Rav Breisch also mentions a responsum of the Satmar Rebbe,<sup>27</sup> based in part on a teaching of the Ramban, which opposes artificial insemination. Although the Rebbe's views will be discussed more fully hereinafter, since Rav Breisch cites the Rebbe in support of his own opposition, it is appropriate to elucidate this point here.

The verse in the Torah forbidding adultery<sup>28</sup> seems to have a redundant word:

וְאִשָּׁת עַמִּיתְךָ לֹא תִתֵּן שְׂכַבְתָּךְ לְזֶרַע ...

Thou shalt not lie carnally with thy neighbor's wife  
for seed...

Ramban<sup>29</sup> focuses on the word "לְזֶרַע", "for seed." Why was it necessary to add this word? He suggests that "possibly it says 'for

25. אבן העזר ד"יז.

26. שם.

27. שו"ת דברי יואל ק"ז ק"י; ק"מ המאור תשכ"ד.

28. ויקרא י"ח: כ.

29. שם ק"ז אות ה'.

seed' to mention the reason for the prohibition, because [if there is adultery] it will not be known whose seed it is, and from this many greatly disgusting and awful things will come upon both of them."

From this teaching, the Satmarer Rebbe derives the principle that an integral factor in the prohibition of adultery is the mixing up of the "seed" (sperm). As far as he is concerned, adultery occurs when the sperm of a man is deposited in the body of a woman married to someone else. Since this is precisely what occurs in artificial insemination, he furiously castigates any attempt to declare this procedure acceptable under Jewish law.

On the basis of these arguments Rav Breisch appealed to Rav Moshe Feinstein to reconsider and retract.

After expressing his reluctance to involve himself in controversy, Rav Feinstein nevertheless did respond to the letter of Rav Breisch.<sup>30</sup> He rejected the first contention, that we may not be more lenient than non-Jews because it will lower the esteem of Judaism. Could one imagine, he queries, that something which Gentiles abstain from on account of their religion should become the standard which Jews must adopt?! The religious beliefs of others cannot be guidelines for us in the practice of our religion. Rather, he explains, the intent of the religious teachings cited is that we Jews are not permitted to be more lax in ethical or esthetic matters. If others abstain from certain foods, for example, as being disgusting, then it would be wrong for us to indulge in them, even if they are halachically permitted. However, if non-Jews abstain from certain foods or practices due to their religious convictions, this should have no bearing on our conduct. Thus, the ruling of the Catholic Church on the issue of artificial insemination has no relevance for us.

As for *chalitzah* and Rav Breisch's fear that the true paternity of the child will be unknown, rendering performance of the mitzvah impossible, Rav Feinstein cannot accept that as sufficiently urgent grounds for preventing a couple from having a baby

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30. דברות משה סוף בתובות; שו"ת חלקת יעקב שם.

through artificial insemination. Referring to another responsum of his,<sup>31</sup> Rav Feinstein extols the great mitzvah of raising an orphan. Should one not marry a widow because her orphans might mistakenly be thought of as his children and might unwittingly later marry other children of their true father? Of course not! By the same token, we should not preclude the birth of a child through artificial insemination due to some fear that later on there will be confusion as to the brother's true identity in case of *chalitzah*. However, to this Rav Breisch subsequently responded<sup>32</sup> that the two cases are not analogous. In the case of adoption, the father and mother or others who know what happened will be sure to inform the children of their true identity, but in an instance of artificial insemination, the parents, on the contrary, are likely to be anxious to cover up the true facts, and a problematic situation might well arise in the future.

Rabbi Feinstein agrees with Rav Breisch that the husband and wife would not be able to have marital relations for three months prior to the conception, in order to be certain that the woman is definitely not already pregnant by her husband. On the other hand, Rav Feinstein posits that if the doctor certifies categorically that the husband is incapable of fathering any children, this precaution would not have to be observed. As for abstaining during pregnancy and lactation, Rav Feinstein does not agree that it is required, for that is a rabbinic regulation and, according to him, such a ruling applies only in situations which are common. But "for cases which rarely occur, the rabbis did not make regulations."<sup>33</sup>

Rav Feinstein also rejects as invalid the position of the Rebbe of Satmar, for the methodology of halacha is such that one is not entitled to derive a halachic principle from a non-halachic commentary. Surely one cannot accept the Ramban's commentary as being halachically binding. Were one to do so, we would have to

31. אגרות משה ב"א.

32. שו"ת חלקת יעקב חלק ג'. See also the question about the way the ריב"ן understood the question of המסוללות.

33. אגרות משה, חלק ב' ע"א; ראה ג"כ אגרות משה אורח חיים חלק א, חלק קדשים סי' ט"ו; ציץ אליעזר ג' וגם חלק ט, נ"א.

conclude that if a man is sterile, there is nothing wrong with his committing adultery. Of course this is an absurd contention. Nor can we imagine, continues Rav Feinstein, that Ramban meant to imply that a married woman may run off with her lover, because it will be clear to all whose children she is bearing?! The teachings of the *Sefer Hachinuch* and of the Ramban definitely have an ethical lesson we should learn, but they cannot become the basis for a legal ruling.

At the end of the responsum, Rav Feinstein returns to a matter he brought up earlier, the question of immodesty. Rav Breisch considers the entire procedure of artificial insemination as being immodest and wrong. Rav Feinstein counters that one can only be considered immodest if the intention is to be immodest or to satisfy one's lust. If the procedure is entered into from a sincere desire to bear children, there is no immodesty attached to it. However, he does maintain that it is immodest for a couple to engage in coitus even in a private cubicle of the doctor's office, even if for the medical purpose of extracting sperm to be used in artificial insemination.<sup>34</sup>

Without question, the fiercest opposition to the lenient views expressed by Rav Feinstein came from the Rebbe of Satmar, Rabbi Yoel Teitelbaum. Despite his avowed principle that a *posek* should not write on a question more than once,<sup>35</sup> and notwithstanding his admission of great physical weakness, the Rebbe felt compelled to clarify his vehement opposition to a halachic position which he considered not only mistaken but potentially destructive. In all, there are five separate responsa in the Rebbe's writings on this topic, starting when he was still in Europe.<sup>36</sup> It is interesting to contrast the mild tone employed in the early work, when the subject was fairly remote in technical feasibility, with the fire-and-brimstone of his later writings. None of his letters are addressed specifically to Rav Feinstein, and one can only speculate what

34. אגרות משה, אבן העזר א"י.

35. שו"ת דברי יואל ק"י.

36. ק"מ.



impression they may have made on him.

The Satmarer Rebbe's position stands in stark contrast to that of Rav Feinstein—the Rebbe holds that the issue of a woman and a man who is not her husband is considered a *mamzer*. It is not the act alone which is forbidden, but the biological union of egg and sperm, no matter how accomplished. Even absent any forbidden sexual contact or union, if a woman becomes pregnant from a man other than her husband, her child is a *mamzer*, forbidden to be accepted by other Jews.

Based on the same hypothetical situation of a woman's sleeping on sheets used by another man, the Rebbe relies on leading rabbinic precedents which arrived at a radically different conclusion from that of Rav Feinstein. He cites one recorded in *Shiltei Gibborim*:<sup>37</sup>

נשאל להר"ם למה אין נוהרין מלשכב האשה כשאינה  
טהורה בסדינים ששכב בעלה דשמא תתעבר מאותו הזרע  
ויהיה הולד בן הנדה כמו שחוששין שלא תשכב בסדינים  
ששכב בהם איש אחר פן תתעבר בטיפת זרע שהטיל באותן  
הסדינים כההיא דבן סירא והשיב דכיון שהולד שהוא בן נדה  
הוא כשר לכל דבר אין חוששין לה ואפילו שהוא פגום.

Rabbi M— was asked why we are not careful about letting a woman who is in a state of impurity lie on the sheets which her husband used, out of fear that she may become pregnant [from sperm which might be on the sheet] and the offspring would be the "child of a *Niddah*," in the same way that we are careful not to let her lie down on the sheets used by some other man, lest she become pregnant. Indeed, this was the case with [the conception of] Ben Sira.<sup>38</sup> And the rabbi answered that since a "child of a *Niddah*" is acceptable for all things, we are not worried about it, even though he will be blemished.

37. נדפס סביב הרי"ף סוף פרק שני דשבועות.

38. The Rebbe devotes quite some time to show why, despite this, Ben Sira was not considered to be a *mamzer*.

This case, although superficially similar to the case used by Rav Feinstein, actually implies a totally different conclusion. It leads the Satmar Rebbe to rule that a child conceived by artificial insemination is totally unacceptable, for in the instant case, the rabbinic opinion is clearly that a woman must not become pregnant by the sperm of some other man; moreover, the rabbis unequivocally forbade any practice which might lead to that eventuality.

In the context of his several responsa on the topic, the Rebbe also devotes considerable time and space to defending his reliance upon the biblical commentary of a leading authority such as the Ramban, to derive halachic principles. If the Ramban gave a reason for a mitzvah, that reason ought to serve us as a guide and furnish us with a better understanding of the mitzvah, particularly when we can learn from this how to be more strict and more careful in our observance.

As for the point raised by Rav Feinstein, that since most donors are non-Jews, we do not need to be concerned that the child will grow up to marry his siblings, Rabbi Teitelbaum responds with a different approach altogether, citing the desirability of genealogical purity. Why should we permit the admixture of other peoples to contaminate the pure lineage of the House of Jacob? He counters also that on questions of *yichus* (family purity) we do not follow the majority, and he feels that Rav Feinstein has no right to brush aside halachic objections just because they present only a faint possibility. If that were truly the case, argues the Rebbe, the whole discussion in the Gemara and rabbinic books has no validity. After all, how often and how likely is it that a woman becomes pregnant from sperm which might be on a sheet? How likely was it even in the days of the Gemara that a child so conceived might grow up to marry his sibling? Yet the rabbis were concerned enough about it to legislate against it. Thus we see that on the issue of pure lineage, "מעלה עשו ביוחסין," the rabbis applied a higher standard.

As for the opinion of Rabbenu Peretz cited by *Taz*, the Rebbe counters that in that instance, no *act* took place, and for that reason the child was accepted. But in artificial insemination there is indeed

an act, and this renders the offspring polluted.

In his responsum, Rav Feinstein allowed the husband to donate sperm for his wife as long as it did not result from masturbation. Although agreeing with the conclusion, the Rebbe does not accept the reasoning, although he does appear to be willing to have the doctor remove from the woman any sperm which was deposited in a normal act of coitus, and to use this for artificial insemination, even if the entire procedure has to take place in a private room in the doctor's office.<sup>39</sup>

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The controversy over artificial insemination was protracted over decades, and the rabbis involved returned to the vexing issue over and over. Even at this date, it is difficult to discern the final halachic decision of the rabbis involved, because sometimes the protagonists agreed on one point but not on others. Certainly, the issue continued to present a troubling dilemma which was not diminished by the poignant human needs wanting resolution. In a letter which is unusual for so forthright and outspoken a *posek*, Rav Feinstein, the authority who firmly and surely answered thousands of questions with a rare combination of erudition and confidence, returned one more time to this topic. This letter could almost be considered a retraction, although not quite. He writes,

But I never permitted [it] except in a case of extreme need, when the woman was in great distress, for it is clear to all that only an expert rabbi, great in Torah and outstanding in teaching may judge such matters... and because of this [when it came to me] I forbade it, and G-d forbid that any rabbi should permit it based on my book... They are not fit to rule on an issue as grave as this... It is necessary to make a restriction so that under no circumstances should anyone be lenient on this other than an outstanding rabbi.<sup>40</sup>

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39. דברי יואל, שם, ק"דו.

40. חלקת יעקב ג'מ"ז.



## Price Controls and Consumer Advocacy

*Rabbi Yitzchok Adlerstein*

### Introduction:

Consumer advocacy appears to have found a place in the American Torah community. A state agency in New York monitors prices of kosher foodstuffs and warns the kosher-consuming public of attempts by merchants to secure windfall profits. A prominent rabbi in Baltimore successfully imposes a price ceiling each year in the sale of *etrogim*, and thus makes quality items available to the public at a cost well below what *etrog* vendors charge in other cities. In Los Angeles, a rabbi found a source abroad for inexpensive but halachically correct *mezuzot*. Not only did they replace the non-kosher variety sold until then in the book stores, but they brought down the average price of all kosher *mezuzot* available.

There is still reluctance on the part of many Torah-true Jews to militate in order to make the cost of kosher items more favorable to the consumer. It is frequently assumed that the Torah places no restrictions on the profit of a vendor other than the prohibition of deceptive charging above the market value. It is likewise assumed that if all vendors hit on a similar margin of profit, they effectively determine the actual market value and are fully entitled to exact from the public whatever the market will sustain. Given the Torah's

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*Director, Jewish Studies Program, Yeshiva University of Los Angeles*

regard for the free enterprise system,<sup>1</sup> perhaps consumers have no right to try to limit the privilege of the merchant to charge what he wants.

Halacha does, however, impose restraints upon profit taking in commerce. With the exception of the biblical injunction against *ona'ah*, these strictures belong to the class of law known as *takanot*, or edicts made to ensure the public good. Studying these measures will help consumers understand what direction their advocacy should take in applying Torah law to the contemporary situation.

### Ona'ah

The Torah<sup>2</sup> forbids deceptive pricing. This prohibition is an adjunct to the general prohibition against stealing.<sup>3</sup> Both buyer and seller are covered by this law; it is as unlawful for a buyer to purchase at a price below the established market value as it is for a vendor to overcharge his customer.<sup>4</sup> Depending on the extent of the over- or underpricing, the Torah allows for either relief from damages or nullification of the transaction.<sup>5</sup> When the variation from the established price is within a range of tolerance, there is no relief from damages. It is doubtful, however, as to whether one may knowingly take payment that varies at all from the accepted value.<sup>6</sup> When a vendor informs a prospective customer of the extent of his intended overcharging, and the customer agrees, there is no violation.<sup>7</sup>

The rules of *ona'ah* impose no barrier to excessive profit-taking. If vendors find that consumers will tolerate a given price for

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1. See Rabbi Aaron Levine's *Free Enterprise and Jewish Law*, Ktav, N.Y., 1980, for a full treatment of the similarities and differences between Torah law and the free enterprise system. This author is indebted to Rabbi Levine for his help in discussing some of the ideas in this article.

2. Leviticus 25:14.

3. *Tur*, *Choshen Mishpat* 227.

4. *Shulchan Aruch*, *Choshen Mishpat*, 227:1.

5. *Ibid.* 227:2.

6. *Rosh*, *Baba Metzia*, 4:7; *Choshen Mishpat*, 227:6.

7. *Choshen Mishpat*, 227:21.

a commodity, and that price becomes the market-wide standard, no deception is involved, and no charging beyond the accepted norm has taken place. Protection for the consumer must come from a different halachic source.

### Market Manipulation

The Talmud takes a dim view of those who artificially influence market prices to their own advantage. G-d's wrath will not escape those who swallow up the impoverished by taking advantage of short supply to raise prices.<sup>8</sup> Market manipulation is seen as tantamount to lending at interest,<sup>9</sup> causing insufferable loss to the poor,<sup>10</sup> and a violation of the Torah's concern that "your brother shall live with you."<sup>11</sup>

Historically, the rabbis took specific measures to contain market tampering. Violators of these laws were subject to corporal punishment by officers of the court<sup>12</sup> and to fines and forced compliance with the regulations.<sup>13</sup>

Hoarding of essential produce in Israel or any Jewish community is proscribed.<sup>14</sup> However, only a purchaser is subject to this ordinance; producers may store up their entire harvest.<sup>15</sup> Allowance is made for *shmitah*: produce may be purchased in advance of anticipated shortfalls during the three affected years.<sup>16</sup> On the other hand, hoarding by *anyone* is forbidden during times of famine, beyond a one year's supply for familial needs.<sup>17</sup>

Within the land of Israel itself, even greater consumer protection is provided. Essential produce is to be sold by the

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8. *Baba Bathra*, 90B, based on Amos 8:4-8.

9. Rambam, *Mechirah*, 14:6.

10. Rashbam, *Baba Batra*, 90B, s.v. *otzrei*.

11. *Sma*, *Choshen Mishpat*, 231:25, note 43.

12. *Choshen Mishpat*, 231:21.

13. Rambam, *Geneivah*, 8:20.

14. *Choshen Mishpat*, 231:24.

15. *Ibid.*

16. Rambam, *Mechirah*, 14:6.

17. *Choshen Mishpat*, 231:24.

producer alone, unless it is in plentiful supply.<sup>18</sup> Where the middleman improves on the raw material, as in baking bread, there is no injunction.<sup>19</sup> Supply and lower prices are bolstered by a ban on the export of essential foodstuffs to other countries and even between governmental entities within Israel.<sup>20</sup>

### Profit Limitation

The most far-reaching of all the restrictive enactments was laid down by the *Amora* Shmuel:

One who profits should not profit more than a sixth.<sup>21</sup>

(The "sixth" is the rabbinic "outside" sixth, or a sixth of the final price. It is what we would consider a 20% mark-up.)

Shmuel does not amplify upon his law. What we know about it comes through inference from other sources, as discussed by *Rishonim* and later authorities.

### Calculating the Profit-Margin

One such source takes into account expenses and labor charges incurred by the merchant when necessary for the operation of his business.

Rav Yehuda fit 48 *kuz* [a liquid measure] in a barrel. The barrel was purchased for 6 *zuz*. Rav Yehuda sold the contents [piecemeal], at the rate of six *kuz* to a *zuz*. Subtract 36 [*kuz*] for the six [*zuz* that was his purchase cost], and there remain 12 [as Rav Yehuda's profit]. Subtract eight for what is lost to absorption by the barrel, and there remain four for him. But did not Shmuel teach, "One who profits should not profit more than a sixth [and Rav Yehuda should have seen to it to take the full 20% allowed him, and not

18. Ibid. 231:23. Rashi, *Yoma* 83A, s.v. *Otzar*, sees the restriction applying to produce and all essential items.

19. Rashbam, *Baba Bathra*, 91A, s.v. *ein*.

20. *Choshen Mishpat*, 231:26.

21. *Baba Batra* 90A.



satisfied himself with a return of four on an investment of 36]?" There are the container and the dregs [which he also gained as profit]. If so, he exceeded the 20% allowance! There was [the cost of] his own labor, and [the wages paid to] a professional wine decanter.<sup>22</sup>

The Rosh<sup>23</sup> concludes from this passage, that the 20% limit is placed only on a wholesaler or other middleman who sells his wares in large lots. A retailer who sells a bit at a time is entitled to add on the cost of "his effort and all his expenses, and take his 20% beyond them."

This view is conspicuously absent in the Rambam. The *Bach*<sup>24</sup> takes this as a rejection of any provision for the expenditure of effort. The Rosh's opinion is codified in *Shulchan Aruch*,<sup>25</sup> however. The *Sma*,<sup>26</sup> moreover, maintains that all legitimate expenses are first added to the item's cost, and then 20% of this *total* is used in figuring allowable profit. The merchant thus gains 20% on the cost of his labor and expenses besides the same margin on the initial item cost.

*Sma* also observes that personal effort on the part of the merchant is a feature of all commercial activity. Yet the Rosh apparently discounts this factor, except where a significant consumption of time<sup>27</sup> is involved, as in the case of the wine merchant who had to make himself available often to sell the wine in small parcels. Effort involved in the actual purchase and subsequent resale of an item do not entitle the merchant to profit beyond the 20% mark.

Where the market cost of the item changes between time of

22. *Baba Metzia*, 40A.

23. *ad loc.*

24. to *Tur Shulchan Aruch*, *Choshen Mishpat*, 231, s.v. *chayavim*.

25. *Choshen Mishpat*, 231:20.

26. *ad loc.*, note 37.

27. The Ritva here in *Shita Mikubetzet*, s.v. *v'katav*, adds a few words that may represent a different view: "... and he is idled from his work." To the Ritva, the extent of effort may not be as important as its impact on his other capital-generating activity.

purchase by the merchant, and the time of its resale, the increased value may be used in calculating acceptable profit.<sup>28</sup>

### Exemption of the Producer

The Gemara, *Yevamot* 91A, says:

One may not profit two-fold with eggs. Meri bar Meri said, "Rav and Shmuel disagree about this. One of them said, '[What is prohibited is selling for] two [what was purchased] for one.' [The other] one said, 'One vendor to [another] vendor.'"

One of these two opinions prohibits a profit of 100% of cost. A lesser profit, although well in excess of 20%, is apparently tolerated. This, of course, flies in the face of Shmuel's own dictum fixing profit at a 20% maximum.

One resolution is offered by the Rashba:<sup>29</sup> the Gemara here deals with one who raises his own chickens, not one who buys up eggs from different producers for subsequent resale. Ordinarily, no profit limit is imposed in such circumstances, but an exception is made for eggs. The implication is clear: the 20% limit applies only to merchants involved in resale, but not to original producers.<sup>30</sup>

### Commodities Included

Shmuel does not specify what items are covered by his legislation. The Rambam,<sup>31</sup> followed by the *Tur* and *Shulchan Aruch*,<sup>32</sup> restricts the 20% limit to "life-essential items," such as wine, oil, and flour."

The *Magid Mishna*<sup>33</sup> suggests that the Rambam assumed this limitation because the Gemara<sup>34</sup> restricts the hoarding prohibition to

28. Rashbam, *Baba Batra* 90A s.v. *vehamistaker*; *Shulchan Aruch*, 231:20.

29. in *Tosafot* ad loc., s.v. *chad*.

30. The same is likely held by the Rashbam, who introduces Shmuel's dictum by specifying "like a merchant who buys large quantities of wine and fruit from a wholesaler in order to sell a little at a time."

31. *Mechirah*, 14:2.

32. *Choshen Mishpat*, 231:20.

33. *Mechirah*, 14:2.

34. *Baba Batra* 90B.

these items, contrasting them to "spice, cumin, and pepper," which may be stored up for later resale.

He finds support for the extrapolation from hoarding to profit-limitation in the passage about eggs cited above. Meri bar Meri knew that Rav and Shmuel authored the two positions about double profit, but was unable to associate a particular position with a particular author. Since he knew that Shmuel in general subscribed to a 20% limit on profit, why did he not assume that the position allowing up to 100% profit on eggs was incompatible with Shmuel?

We are forced to conclude, claims the *Magid Mishna*, that there is a fundamental difference between eggs and whichever commodities Shmuel deals with in general. Eggs are not "essential" food items; the 20% limitation applies only to essential items.

This conclusion is contested by R. Yosef Karo.<sup>35</sup> Eggs decidedly are essential. They are certainly more important than oil, which is accepted as one of the paradigmatic examples of what Shmuel indeed was talking about. In fact, *all* edibles are considered essential items. When the Rambam qualifies what is considered essential, he contrasts wine, etc., not with spices, but with "roots, such as costus and frankincense." "*Machshirei ochel*," or ingredients helpful in the preparation of food, such as spices, should indeed be considered essential, and subject to the 20% rule. Only that which is completely inedible is excluded. The passage concerning eggs may be dealt with in different manner (see later).

A third position is maintained by R. Joshua Falk.<sup>36</sup> The Rambam seemingly contains internal contradiction. He first restricts the excess-profit interdict to essentials such as wine, oil, etc. This would imply that anything of lesser import, e.g. spice, lies outside of the law. On the other hand, the Rambam goes on to give examples of excluded items: roots, frankincense. This would indicate that he holds anything more essential, such as spice, to be included.

35. *Kesef Mishnah* to Rambam, *Mechirah*, 14:2; *Beit Yosef* to *Tur*, 231, s.v. *ba-meh*.

36. *Derisha*, *Tur*, loc. cit., note 28; *Sma*, *Shulchan Aruch*, *ibid.*, 231:20, note 36.

The solution to this problem is, he suggests, a three-tiered system. Food items that are most essential are limited by the 20% rate. *Machshirei ochel*, such as spices, form a middle ground, where some restriction applies, but not a stringent 20%. Here there is a profit ceiling of 100%. For inedibles, a merchant may charge whatever he can get. This view is accepted by later authorities such as *Shulchan Aruch HaRav*<sup>37</sup> and *Aruch HaShulchan*.<sup>38</sup>

One further question concerns essentials that are raw and unprocessed. Does unmilled grain fall in the 20% category, or do we restrict the law to things comparable to wine, oil, and flour, that are readily consumable? Rabbi Abraham Wahrmann<sup>39</sup> leaves this issue unresolved.

All sources so far cited understand Shmuel's law to be limited to food items. An earlier view of R. Hai Gaon<sup>40</sup> sees the 20% maximum as applying to *anything* that a person knows is needed by his fellow Jew. This view is not cited, however, by later decisors.

### Hardship Provisions

In explaining the provision for 100% profit in the case of eggs, Rashbam<sup>41</sup> first observes that eggs are not all that essential. He then adds that a profit of only 20% does not justify the exceptional amount of effort involved in gathering eggs from widely dispersed producers. We therefore permit the seller to take more than the customary 20%.

It is possible that halacha provides sympathetic relief for the otherwise untenable position of the egg merchant. It is also possible that the principle here is a different one: that we may artificially intervene to make a particular industry more attractive, in order to stimulate a strong source of supply to the consumer.<sup>42</sup>

37. *Hilchot Midot U-Mishkalot*, par. 17.

38. *Choshen Mishpat*, 231:20.

39. *Kesef Ha-Kedoshim*, *Choshen Mishpat*, 231:20.

40. *Sefer HaMikach U-Mimkar*, section 60.

41. s.v. *b'beitzim*. The two approaches of the Rashbam are cited halachically by *Sma*, *Shulchan Aruch*, op. cit., 231:22, note 41.

42. A resolution to a problem raised by R. Issur Zalman Meltzer in *Even HaAzel*

(The *Aruch HaShulchan*<sup>43</sup> writes that we may sometimes face a problem the reverse of Shmuel's. "In our lands, we must cry out in a contrary fashion. Merchants charge so little for all sorts of goods, that poverty is multiplied, as well as problems for the commercial system. Our sages permitted 20% profit even in foodstuffs; in other commodities, they should take much more!" He stops short, however of calling for actual intervention.)

### Individual or Community Responsibility

*Shulchan Aruch*<sup>44</sup> cites the opinion of R. Meir HaLevi Abulafia (Ramah): "These words [Shmuel's law] hold true only where there is a Beth Din to specify proper prices to all merchants. But if all sell for whatever they can, an individual [scrupulous merchant] is not obligated to sell at a lower price."

Rabbi Moses Rivkes<sup>45</sup> believes that the Rambam as well subscribes to this view. The Rambam begins his discussion of pricing with the statement, "Beth Din is obligated to establish price guidelines, and to maintain officers to enforce them."

Does this mean that responsibility for Shmuel's law rests solely with the court and not with the individual merchant? Rabbi Isser

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suggests itself. We earlier cited Tosafot *Baba Batra* 90A, and their difficulty in understanding why eggs were treated differently than other objects, where only 20% profit is allowed. The Ribam responds that where effort is expended, profit in excess of 20% is permitted, as is evident from the Gemara about R. Yehuda the wine-merchant. The *Even HaAzel, Mechirah*, 14:2, asks why eggs should be permitted a five-fold increase in profit level, since the added margin for wine, with its attendant investment of effort, doesn't come close to this allowance.

It is possible that the Ribam means that we permit the egg seller profit far beyond the usual formula, because without such latitude, selling eggs would simply not be a financially attractive occupation. The consumer would be left with no supply at all, or at the mercy of the unscrupulous, who would flout Torah law and charge even more in the absence of competition.

43. *Choshen Mishpat*, 231:20.

44. *Choshen Mishpat*, 231:20.

45. *Be'er Ha-Golah* to *Choshen Mishpat*, *ibid.*, note 4. He bases this supposition on the familiar Gemara regarding eggs. The difference between the 20% rule and the 100% margin, is that the former is addressed to the court alone, while the latter applies even to the individual merchant.

Zalman Meltzer thinks that this is the case.<sup>46</sup>

Some find such a position difficult. The Gemara *Baba Batra* 89a questions whether the court must appoint officers to enforce both price guidelines, as well as weights and measures, or just the latter. Shmuel himself is of the opinion that officers are not appointed to control prices.<sup>47</sup> If this be the case, his 20% rule must be aimed at the individual.

Whatever the actual view of the Rambam, the opinion of R. Meir HaLevi as cited in *Shulchan Aruch* is the source of much popular confusion. It is commonly used as a rationalization to disregard Shmuel's edict. After all, if a number of merchants will ignore halacha anyway, why should a minority of merchants be

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46. *Even Ha-Azel* to Rambam, *Mechirah* 14:2.

47. While this Gemara would also seem to contradict the view of R. Meir HaLevi, this is not the case. He maintains (ad loc. number 132) that the official whose position Shmuel rejects is *not* a supervisor of price maxima. Rather, he is meant to prevent consumer fraud by unscrupulous merchants who charge too little, and employ loss leaders to lure customers, and then give them inferior merchandise or use faulty weights. There is no reason to believe, according to the Ramah, that the court does not indeed intervene in price-structuring.

The Rambam, however, takes the Gemara the way most do — as referring to an enforcer of profit limits. The *Magid Mishnah* points to it (and its conclusion against Shmuel) as the source of the Rambam's opening contention that the court must supervise prices. If Shmuel himself rejected such intervention, then his dictum must have been directed at the individual merchant.

Perhaps the *Even Ha-Azel* will explain that even Shmuel maintains that it is the court that structures prices, but rejects the notion of a court-appointed (and community financed) enforcer. This, however, seems difficult. Alternatively, he may hold that the Rambam rejects Shmuel's own conception of his law in favor of one favored by his opponents in *Baba Batra* 89A. The very crux of the argument there may be whether a price-control system is in the province of the court, or of the individual.

If the Rambam does see the 20% rule as binding on individual merchants as well as the court, a problem in his phraseology would be cleared up. The Rambam first writes that the Beth Din is responsible to appoint officers, etc., so that merchants cannot charge what they wish, but no more than 20%. He then uncharacteristically repeats himself: "And the merchant should not profit more than 20%." It is likely that the first lines are addressed to the court; the last line emphasizes that in the absence of a court, the individual is expected to do his best in complying with the law.

martyrs, especially if the halacha itself tells them not to?

A more careful reading of the original Ramah<sup>48</sup> shows that this is not necessarily valid reasoning. To the words cited by *Shulchan Aruch*, relieving the individual merchant of the duty to stay within the halachic limit where others exceed it, the Ramah adds the following:

... since when the produce of the [scrupulous] merchant is depleted, the others will sell theirs at an inflated price anyway ... and we certainly do not wish to cause him a direct loss.

The Ramah does not suspend the law in the absence of an effective court. He does hold that halacha performs a cost/benefit analysis. Where individual compliance with the law will be of negligible benefit to the majority of consumers, and cause definite loss of profit to the merchant, the halacha of 20% becomes inoperative.

There is an important consequence in focusing on the loss to the merchant, rather than the absence of an effective court. If the law always remains in effect even for the individual, but excuses him from unjustifiable losses, it should follow that the halachically observant merchant must still see to it that he does not charge *more* than his competitors. He is not obligated to settle for diminished profit, but should not be allowed to add injury to the intent of the law beyond the *fait accompli* of the non-observant. This conclusion is in fact reached by the *Shulchan Aruch HaRav*.<sup>49</sup>

It seems to this author that there is another point germane to any discussion of practical implementation of Shmuel's law. The chief concern of the Ramah here is that little good will accrue to the community if an individual merchant keeps within the suggested profit limits, since his own merchandise will be quickly exhausted. This may very well hold true for exhaustible commodities. In fact, however, there are commodities of interest to the Jewish community

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48. to *Baba Batra* 90A, number 144. It is quoted by the *Tur*, loc. cit.

49. *Hilchot Midot u-Mishkalot*, #17.

today that are so easily replenished that the reasoning changes dramatically.

Take the price of a typical item, suppose wine, in a community outside New York. There are four stores that provide kosher specialty items to the observant community, all within close proximity to one another. Three proprietors charge whatever they can get; the fourth wants to act in consonance with halacha. Is he entitled according to the Ramah to charge whatever his competitors charge?

I believe that the answer may often be no. If he restricts his profit to the halachic norm, consumers will learn of it. They will purchase their wine from him, rather than from his competitors. When he runs out he can send for more from a virtually limitless supply from the New York distributor. If all Jews of that community buy wine from him, it will not put a dent in the supply available at the point of origin.

Other proprietors will have no recourse but to lower their prices as well or lose their wine sales altogether. If the halachically "honest" merchant adjusts his prices downward on other items as well, he may soon corner the market unless his competitors follow suit. Thus, compliance with the law by even the minority may accomplish precisely what Shmuel wanted it to.<sup>50</sup>

The above analysis probably breaks down in larger communities, where the effect of any individual merchant is lost in the volume of the competition. Even here, however, expert determination is necessary to gauge the potential effect compliance with Shmuel's profit limit could have.

### Non-food items

The earliest recorded attempts at protecting the Jewish consumer did not revolve around food or Shmuel's dictum.

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50. This analysis may be what the *Aruch HaShulchan* 231:20 had in mind when he tersely offered this qualification to the Ramah: "However, if the court knows that by doing so [asking the minority to abide by the approved price list] it will compel the others to sell as they do, they should force those who will listen to them."



It happened in Yerushalayim that the price of two pairs of birds [used for the mandatory offerings of women after childbirth] rose to two golden *dinari*. R. Shimon ben Gamliel said, "By this Dwelling! [the Temple; he took an oath] I will not rest until they are reduced to [silver] *dinari*." He entered the Beth Din and taught, "A woman who is obligated to bring five childbirth offerings . . . may bring one offering, and thereafter eat holy meat [she is ritually pure]. She need not bring the others." The price of two pairs of birds changed that day to two quarter-*dinari*.<sup>51</sup>

Rashi<sup>52</sup> explains that R. Shimon ben Gamliel actually suspended a Torah requirement, in order to prevent a more serious violation. At the inflated price, he feared that some women not able to afford even a single offering, might eventually partake of some other offering while remaining ritually impure, and face the punishment of excision.

Consumers have long complained about the high price of kosher meat. While production costs inherent in the kosher trade must create somewhat of a price increment, many people still believe that prices are fixed at an unaffordable level. Prices are often arbitrarily raised before holidays, when demand is greatest. Many believe that this does impact upon those who can least afford it and curtails their ability to secure holiday necessities for their tables. And many Jews of marginal commitment to kashrut look at kosher meat prices and decide that this is another mitzvah they can forgo. Can the above source be seen as a mandate for the community to take dramatic steps, such as meat boycotts, in order to bring prices down?

A responsum by Rabbi Menachem Mendel Krochmal<sup>53</sup> does see the incident above as a model for bold intervention to facilitate mitzvah performance. The non-Jewish fish merchants of his town realized that Jews would pay exorbitant prices to have their

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51. *Keritut*, 1:7, 8A.

52. ad loc. s.v. *nichnas*.

53. Responso *Tzemach Tzedek* (*hayashan*), number 28.

traditional fish on Shabbat and charged accordingly. The community retaliated by agreeing that no person, rich and poor alike, would buy any fish at all for two months. They asked their rabbi's approval. He responded favorably, noting that if R. Shimon ben Gamliel could suspend Torah law, they could certainly suspend what was only a custom. His chief concern was not the fact that the whole community had been taken advantage of, but that the poor would not be able to afford the fish, just as R. Shimon ben Gamliel's concern was for the poor.

The conclusion of this responsum is accepted by the *Magen Avraham*.<sup>54</sup> The *Pri Megadim*,<sup>55</sup> however, questions it. R. Shimon ben Gamliel gained protection for a negative mitzvah by sacrificing a positive one (bringing the remainder of the offerings). That was a reasonable return on the investment. In the case of the fish he sacrificed, albeit temporarily, the same mitzvah he wished to protect. Furthermore, R. Shimon ben Gamliel's measure was reversible. After prices stabilized, women could then bring their back due. The enhancement of Shabbat's honor that fish brings could never be regained for those Sabbaths lost. He also questions whether any court today has authority comparable to that of R. Shimon ben Gamliel necessary to tamper with religious observance.

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54. to *Shulchan Aruch Orach Chaim*, 242:1. See also op. cit., 656:1, where he deals with the issue of *hidur mitzvah*, in his context, procuring a better looking *etrog* at a higher price. The *Magen Avraham* cautions that such a purchase is meritorious only when the customer believes that his proffering of a better price will not drive up the price of *etrogim* in general.

The concept of intervention against artificially inflated prices is also endorsed by the 18th century R. Judah Ayash of Algiers in his *Responsa Beth Yehudah*, *Yorah Deah* 32, and the 19th century R. Chaim Halberstamm in his responsa to *Choshen Mishpat*, *Divrei Chaim* 24.

55. to *Magen Avraham* 242:1. Similar objections are brought in the glosses of R. Moshe Sofer ad loc. The latter, though, does point to the last Mishna of the fourth chapter of *Gittin*. According to the commentary of the Rambam there, the rabbis at one point suspended the obligation of *bikurim* (bringing the first fruits to Jerusalem) from land sold by a Jew to a non-Jew, and then repurchased by a Jew. This would create the impression that the holiness of the land was somehow diminished because of the non-Jew's possessions, and lower his asking price for repurchase.

Nonetheless, since no biblical or rabbinical mitzvah was involved, he too concurs.

There is, therefore, some basis for the community to fight back against unfair pricing, even where some religious precept (on the level, at least, of *minhag*) may temporarily suffer, as long as there is no actual abrogation of Torah or rabbinic law.

### Community Self-Regulation

Where no conflict with any religious practice is involved, the right of effective consumerism is even more definitively stated. The Gemara<sup>56</sup> flatly states that townspeople have the right to regulate weights, prices, and wages, and to impose fines upon those who ignore their regulations.

There are two distinct ways of understanding this Gemara. The implication from Rashi is that a majority of townspeople can force the minority to comply with their *takanot*. Rabbenu Tam, however, sees the right of the people to enforce communal edicts as limited to those previously accepted by *all* the people. The majority does not have the right to impose its wishes on the dissenting minority, unless the latter reneges on a previous accord.

R. Samuel ben Moses di Medina of the 16th century considers the evidence on both sides of this issue.<sup>58</sup> He concludes that a majority of *Rishonim* (early commentators) side with Rashi and uphold the right of the majority to dictate terms to the minority, at least if the majority is represented by the recognized heads of the community. R. Moses ben Chaim Alshekh<sup>59</sup> of the same century also upholds this right.

Thus, there is ample halachic precedent for the community protecting its interests through its own enactments, even where a minority element might sustain a loss.<sup>60</sup> And the focus of their

56. *Baba Batra* 8B; *Shulchan Aruch*, *Choshen Mishpat*, 231,:27 cites this as law.

57. cited in Mordechai, ad loc. number 480.

58. *Responsa Maharashdam*, *Yoreh Deah* 117.

59. *Responsa Maharam Alshekh* 59.

60. R. Mordechai ben Yehuda HaLevi of 17th century Egypt (in *Responsa Darchei Noam*, *Choshen Mishpat* 38) makes explicit the notion that Rashi and Rabbenu

enactment can be anything at all, not just the items covered by Shmuel's law.

### Summary

A number of conclusions obtain:

- 1) Halacha does place a 20% maximum on profits.
- 2) The ceiling only applies to food items.
- 3) Only resellers, not producers, are generally covered.
- 4) The 20% is calculated after figuring in all relevant expenses.
- 5) There is generally no restriction on the number of middlemen who may profit.<sup>61</sup>
- 6) Special allowance is sometimes made to insure an equitable return for a person's effort.
- 7) Where others do not comply with halachic guidelines, the halachically observant individual need not comply alone. He still may not exceed the price charged by others, however, and may be required to charge a lesser price if doing so will force others to follow suit.

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Tam only conflict where a given measure is beneficial to some and detrimental to others. Where all involved stand to gain, but some obstinately refuse to acquiesce, even Rabbenu Tam would agree that the majority can enforce their view. He also maintains that where the many will sustain some damage without legislative relief, and the few will not sustain any loss but will merely refrain from profit, that the many may certainly have their way.

The Gemara also stipulates that no agreement by the people is valid unless endorsed by the eminent halachic authority of the area, if one indeed exists. This requirement is also waived if no one stands to lose by the agreement (Ramo, *Shulchan Aruch*, *ibid.*, 231:28). The context of this stipulation is a discussion of the right of trade and craft groups to self-regulate. It is not clear if this requirement holds also for the agreement of the town as a whole. (See *Sma*, *ad loc.*, number 45, who maintains that the townspeople may act on their own, unlike the opinions of the Ramo and the *Shach*.)

Since almost any action considered by consumers today might cause real loss to some parties, and in the absence of a legally empowered community board that can speak for an entire population, it seems likely that any measure contemplated would require the approval of halachic authorities.

61. See Rashbam, *Baba Batra*, 91A. He posits that competition will keep the price down.

- 8) Bold measures may be taken to facilitate the performance of mitzvot by the community, especially in protecting opportunities for the poor.
- 9) The community has the general right to legislate purchasing policies.

It is hoped that Torah-conscious consumers will find a way to implement the ethic voiced a few hundred years ago by Rabbi Israel Lipschitz:<sup>62</sup>

It is not proper to be too oppressive to people in all matters concerning the observance of Torah and mitzvot, which is the purpose of all creation.

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62. *Tiferet Yisrael, Bechorot*, 4:6.



## Contemporary Issues in the Laws of Yichud

*Rabbi Azarya Berzon*

May a woman travel in a car on a deserted road with a man to whom she is not married? Is it halachically permissible for a man and a woman to be alone together in an elevator? Is a man permitted to take his date to a drive-in movie theater, or to a secluded park? May a woman be alone with her physician, counselor, or employer? May a foster parent be alone with an adopted child of the opposite sex? All these questions hinge on an application of the laws of *Yichud* — the prohibition of a man and a woman being alone together.

The laws of *Yichud* are complex and deserve study. Some observant Jews are under the impression that *Yichud* applies only to a situation when one man is alone with one woman in a locked room. The fact is that there are numerous situations in which the prohibition of *Yichud* is involved. In modern society problems of *Yichud* frequently arise in a novel setting. This is partly due to technological inventions, such as the automobile and the elevator, but is mainly a result of sociological changes in modern living. Nowadays women leave the confines of their homes and associate with men in places of work and entertainment far more than they did in the past. The prevalence of contemporary relationships between members of the opposite sex, e.g. intimate friendships,

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*Rebbe, Yeshivat Sha'alvim, Israel*

extended engagements, adoption, etc., has made it imperative for *Poskim* to clarify the principles of *Yichud* laws in a modern context.

Perhaps the most significant single factor contributing to current problems in *Yichud* is the general acceptance of sexual permissiveness by the secular society in which observant Jews live. It is the purpose of this essay to explore some of these problems. In order to understand these issues we must first examine the nature of the prohibition of *Yichud* and the principles involved, and thus be in a position to deal with the practical application of these principles in modern social settings.

It should be noted here that the laws of *Yichud* are an integral part of that area of halacha which governs relationships between men and women. The principle that underlies these halachot is that sanctity and modesty are fundamental elements of the Torah view of life and must be manifest in human behavior. *Yichud* is the Torah way of guaranteeing the principle of *T'zniut* (modesty) and *Kedusha* (holiness) in relationships between the sexes, and thus preventing temptations which could lead to other serious violations of Jewish law.

### I. Is *Yichud* a biblical prohibition?

In three places<sup>1</sup> the Talmud describes *Yichud* as an *issur d'oraitha* (of biblical origin). This is surprising since there is no explicit mention of the prohibition in the Torah, nor does the Gemara derive *Yichud* from an explicit scriptural source; instead, it adduces this *issur* from an allusion (*remez*) in a verse.<sup>2</sup> Generally, laws derived from allusions are considered to be rabbinic (*de'rabbanan*) in status. The Rambam<sup>3</sup> seems to define *Yichud* as rabbinic, apparently basing this conclusion on the lack of any

1. *Kiddushin* 80b; *Sanhedrin* 21a; *Avodah Zarah* 36b.

2. *Kiddushin* 80b: "It is written, 'If thy brother, the son of thy mother, entice thee, etc.' (Deuteronomy 13:7). Does only a mother's son entice, and not a father's son? But this teaches that a son may be alone with his mother, but not with any *erva* (mentioned) in the Torah."

3. *Hilchot Issurei Bi'ah*, 22:2.



explicit biblical source. However, the list of *Rishonim*, both of Ashkenazic and Sephardic background, who classify *Yichud* as a biblical prohibition, is long and impressive.<sup>4</sup>

If *Yichud* is biblically prohibited, the question that may be posed is on what grounds did the Talmud permit it in certain instances where the leniencies cannot be traced to biblical sources? Perhaps the explanation is that *Yichud* belongs to a class of regulations which, while biblical in origin, were left to the sages for determination of their parameters, where and under what circumstances and conditions they are or are not to be applied.<sup>5</sup>

## II When does *Yichud D'oraitha* apply?

The biblical laws of *Yichud* apply when a man and a woman whose relationship is defined halachically as "*erva*" (loosely, a potentially adulterous or incestuous relationship) are alone together. The following situations are exceptions to this rule:

1. Relatives who have no sexual disposition toward one another, e.g. parents and children, grandparents and grandchildren, brothers and sisters.<sup>6</sup>

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4. For a complete list, see Rav Avraham Horowitz's treatise on the laws of *Yichud*, entitled *D'var Halacha*, page 1. Two *Rishonim* categorize *Yichud* under the biblical prohibition of "Thou shalt not approach a woman in the impurity of her menstrual flow, to uncover her nakedness" (Leviticus, 18:19), Rav Moshe Coucy, *Sefer Mitzvot Gadol*, Lavin, no. 126; and Rav Aaron Ha'Levi, *Sefer Ha'Chinuch*, no. 188. The *Sifra* (*Acharei Mot*, 13:2.) interprets this verse as a prohibition against sexual relationship other than intercourse with an "*erva*". According to these *Rishonim*, *Yichud*, although not involving physical contact, is considered "approaching", and is part of this prohibition. As to the question why then the necessity for an allusion from the passage in Deuteronomy, apparently this was necessary in order to provide a basis for the broader interpretation of the term "approaching", mentioned in Leviticus, to include *Yichud*. The *prima facie* understanding of this term would limit the prohibition to acts involving physical contact, such as hugging and kissing.

5. See Rambam, *Hilchot Shabbat* 21:1, regarding *issurei shvut*; Rabbenu Nissim, *Yuma*, beginning of the eighth *perek*, pertaining to *issurei innui*; *Sefer Ha'chinuch*, no. 323, regarding *issurei melacha* on *Chol Ha'moed*.

6. *Kiddushin* 80b and 81b; *Shulchan Aruch*, *Even Ha'Ezer*, 22:1, and *Pitchei Teshuvah*, 22:2; *D'var Halacha*, pp. 14-16.

2. Situations which lack privacy, e.g. a room the inside of which can be seen by passersby looking through the windows or doorway.<sup>7</sup>

3. When one of them is a child, whose intercourse does not qualify as a biblically prohibited act, e.g. a boy below the age of nine, or a girl below the age of three.<sup>8</sup>

4. Situations in which the psychological state of the man or the woman precludes a sexual disposition, e.g. after the death of a close relative, prior to burial;<sup>9</sup> or a husband with a wife who is a *niddah*.<sup>10</sup>

### III. Two Definitions of *Yichud D'oraitha*.

Whether or not "biblical" *Yichud* applies in an additional category is an issue on which there is a dispute among *Poskim*. Suppose all the necessary conditions for *Yichud d'oraitha* exist, i.e. a man is alone in a private place with a woman who is forbidden to him, yet there is no possibility of consummating intercourse, or the situation when certain deterring factors prevail which make it reasonable to assume that no intercourse will take place. The law in these cases would depend on which of two definitions of *Yichud d'oraitha* is correct: (1) *Yichud* is forbidden by the Torah because privacy of a man and a woman may result in sexual intercourse, or (2) the Torah prohibits *Yichud* because in itself *Yichud* is considered objectionable. The first definition views *Yichud* as a *gezerah*, a restraining law designed to prevent forbidden intercourse, and would therefore limit *Yichud* to situations in which

7. *Kiddushin* 81a: "If the door is open to a public area, we are not afraid of *Yichud*." *Shulchan Aruch, Even Ha'Ezer*, 22:9; *Pitchei Teshuva*, *ibid.* 22:8; *D'var Halacha*, p. 38, paragraph 10. See *Otzar Ha'Poskim*, vol. IX, p. 137, citing *Nishmat Kol Chai*.

8. *Shulchan Aruch, Even Ha'Ezer*, 22:11

9. *Kiddushin*, 80b: "Abba Shaul said, 'In the time of grief one's passions are subdued.'" Rashi, beginning with "*ve'Rabbanan*", indicates that if there were no doubt about the veracity of the fact that there was *aninut*, even the rabbis would agree with Abba Shaul and permit *Yichud*.

10. *Rashba, Torat Ha'Bayit*, 7:2; *Chazon Ish, Nashim*, 34:6. See also *Bet Shmuel, Even Ha'Ezer*, 22:16.

there is such a possibility. The latter definition would have *Yichud* applying in all circumstances, despite the unlikelihood of intercourse, since *Yichud* per se is objectionable.<sup>11</sup> (This definition would be appropriate for the *Rishonim* who classify *Yichud* as *Kreva* — “approaching” an *erva*.)

Resolution of the following problems will depend on the two definitions we have offered:

1. Does *Yichud* have a minimum duration of time (*shiur*) less than which is not prohibited? Many *Poskim* assume that *Yichud* has a *shiur*, equivalent to the time it takes to perform intercourse.<sup>12</sup> Others assume that *Yichud* is prohibited regardless of its duration.<sup>13</sup>

2. Does *Yichud* apply in the case of a male who is suffering from a physical ailment which makes it impossible for him to perform sexually?<sup>14</sup>

3. Is there any relaxation of the laws of *Yichud* in connection with a married woman in her own house, since one could reasonably assume that she would be afraid of her husband's coming home? We do find in the Gemara (*Kiddushin* 81a) the following statement: “Rabbah said, ‘When the husband is in the city the normal laws of *Yichud* do not apply.’” *Tosafot* and other commentaries accept the *prima facie* reading of the text and say that the deterring factor of the woman's fear would permit *Yichud*. But *Rashi* interprets the text to mean that even though there is a deterrent, the prohibition is in force, albeit without the usual punishment of *makkat mardut* — lashing.<sup>15</sup>

4. Would *Yichud* apply in a closed room, where passersby have no way of seeing what is going on inside, but the door is

11. This definition would be appropriate for the *Rishonim* who classify *Yichud* as *Kreva* — “approaching” an *erva*. See Rav E.M. Shach, *Avi Ezri*, end of *Hilchot Issurei Bi'ah*. He attributes this definition to *Rashi* who prohibits *Yichud* with a married woman even when her husband is within the city.

12. See footnote 57.

13. See footnote 59.

14. See *D'var Halacha*, p. 19, paragraph 9; Rav Eliezer Waldenberg, *Tzitz Eliezer*, Vol. VI, p. 230. See also *Iggerot Moshe, Even Ha'Ezer*, Vol. IV, no. 65.

15. Rav Shach, *op. cit.*, end of *Hilchot Issurei Bi'ah*.

unlocked so that anyone may enter the room at will? Many *Poskim* permit it. The fear of being “caught” by an unexpected visitor is a sufficient deterrent and will inhibit a sexual act.<sup>16</sup> Other *Poskim*, however, take the stringent view and opine that only when the man and woman are in a place which is visible to all is *Yichud* permitted.<sup>17</sup> According to them external deterrents which may inhibit sexual freedom do not remove the *issur*.

The questions noted above subsume most of the common situations where *Yichud* is precluded by virtue of the Torah's decree. In addition to the biblical prohibition, the rabbis over the ages have established additional safeguards to avoid the violation of forbidden sexual relations. No discussion of practical guidelines for behavior in this area is possible without reference to these additional regulations, for halacha — normative, practical law — is based on both the original biblical as well as the later rabbinic regulations.

#### IV *Yichud De'rabbanan*

Three categories of *Yichud* are prohibited by virtue of rabbinic decree:

1. Although the Torah forbids *Yichud* only between a man and woman who is an *erva* for him (loosely, an adulterous or incestuous relationship), the Court of King David included unmarried women also in the ban.<sup>18</sup> (Whether *Yichud* with an unmarried woman who is a *niddah* is rabbinic or biblical, is a matter of controversy among *Poskim*.)<sup>18a</sup>

2. The prohibitions of *Yichud* between a Jewish man and a non-Jewish woman and a Jewish woman with a non-Jewish man instituted by the Court of Shammai and Hillel.<sup>19</sup>

16. *Pitchei Teshuva, Even Ha'Ezer*, 22:8, citing *Teshuvot Radbaz*, Vol. I, no. 121; *D'var Halacha*, pp. 27-28.

17. *Pitchei Teshuva*, *ibid.*, citing *Teshuvot R. Akiva Eger*, no. 100; *D'var Halacha*, pp. 30-31.

18. *Avodah Zarah*, 36b; *Even Ha'Ezer*, 22:2.

18a. *Otzar Ha'Poskim* Vol. IX 2:2.

19. *Avodah Zarah*, 36b; *Even Ha'Ezer*, 22:2.

3. The prohibition of *Yichud* of one man with two women is mentioned in the Mishna, *Kiddushin* 80b. The Mishna permits *Yichud* in the case of two men with one woman.<sup>20</sup> The Talmud stipulates that the two men must be "*Keshairim*" (moral), not *prutzim* (immoral).<sup>21</sup> Biblical *Yichud* is limited to the case of one man with one woman. In the presence of a third individual there is no privacy.<sup>22, 23</sup>

Whereas in the case of *Yichud d'oraitha* two definitions were offered, with respect to *Yichud de'rabbanan* only one definition exists. The rabbinic prohibition of *Yichud* is in the form of a classical rabbinic enactment (*gezera*) designed to prevent violation of the biblical prohibition of forbidden intercourse. Although the biblical *Yichud* law only applied to an "*erva*", the rabbinical prohibitions expanded it to include an unmarried woman and a non-Jewish woman, both of whom are not within the category of "*erva*". While *Yichud d'oraitha* was applicable only in the case of one man with one woman, rabbinic *Yichud* would apply even to a group of three or more. Whenever the Rabbis felt the need to prohibit a situation which could lead to sexual intercourse they did

20. The Gemara explains that a man is embarrassed to perform an immoral act in the presence of another man, whereas a woman will not necessarily be deterred from performing an immoral act in the presence of another woman.

21. Three definitions of a "*parutz*" are offered by *Poskim*:

- 1) Someone who is totally ignorant of Jewish law;
- 2) Someone who deliberately violates Jewish law;
- 3) Someone who is known to be sexually immoral.

See *D'var Halacha*, pp. 113, 116, 162; (on page 115, he cites the opinion of some *Poskim* that one who violates the laws of *Yichud* is considered a *parutz* in all sexual matters). *Otzar Ha'Poskim* p. 110, cites Mahari Mintz to prove the third definition. That the terms "*kasher*" and "*parutz*" do not refer to levels of religious observance, but only to sexual morality, is made clear in a responsum of Rabbenu David ha'Cohen, a leading disciple of Mahari Mintz. This he wrote in *Teshuvot RaDach*, Bayit 20, *Cheder* 5, in a somewhat different context. See also *Tzitz Eliezer*, vo. VI, p. 175.

22. *Teshuvot ha'Rashba*, no. 587, infers from the fact that the Gemara seeks a logical reason for the prohibition of *Yichud* of one man with two women, that the *issur* is rabbinic.

23. See *Pitchei Teshuva*, *Even Ha'Ezer*, 22:1

so. This leads us to the conclusion that no *Yichud de'rabbanan* exists where there is *no possibility* of consummating the sex act or there are deterring factors which inhibit the act and it is therefore reasonable to assume that no intercourse will take place.

Thus, even those *Poskim* who define *Yichud* as objectionable per se accept the following leniencies in *Yichud de'rabbanan*:

1. It does not apply to a man who is physically incapable of intercourse.

2. It does not apply in the case of a closed but unlocked room into which anyone may enter at will.<sup>24</sup> The same leniency would apply to a locked room when the following three conditions exist:

a) the keys to the room are in the possession of another individual;

b) the one possessing the keys is a Jewish male who is not a *parutz*;

c) there is reason to expect that this person will enter the room during these hours.<sup>25</sup>

3. *Yichud* with a married woman whose husband is in town would be permitted if another woman is present with her. Even Rashi who holds that the *issur* applies in the case of a married woman whose husband is in town (see above), would in this instance agree that the wife's fear of her husband's possible arrival is sufficient to permit *Yichud*. In the presence of a second woman, where it is only a rabbinic prohibition, this deterrent would permit *Yichud*.<sup>26</sup>

4. Not only does the fear of being caught permit *Yichud de'rabbanan*, but also the fear of others finding out about what may have happened. Thus, the Gemara in *Kiddushin* 81b permits

24. See *D'var Halacha*, p. 27, citing Rabbis Akiva Eiger and *Bet Me'ir* who are "strict", and Rashba, and Radbaz and others who are "lenient". See also *Tzitz Eliezer*, vol. VI, p. 231, and *She'arim Metzuyanim b'Halacha*, no. 152, par. 5.

25. *D'var Halacha*, p. 30, paragraph 3, citing Rav Dov Weidenfeld in *Teshuvot Doveiv Mesharim*: see also his note 11. See also Rabbi Aaron Felder, *Oholei Yeshurun*, p. 14, No. 32, where he quotes R. Moshe Feinstein who is even more lenient in case of need.

26. *D'var Halacha*, p. 89, cites *Doveiv Mesharim* and *Chazon Ish*.

*Yichud* in the presence of a young girl who is mature enough to understand the sexual act when she sees it but too young to be herself subject to sexual seduction. The reasoning behind this leniency is that since the child will tell others what she has seen, the adults will control their impulses in her presence.<sup>27</sup> The *Poskim* apply this principle also to *Yichud* in the presence of a young boy.<sup>28</sup>

Based on this talmudic text, the rabbis also derived another rule: When one of the women present is not sexually disposed towards the man involved, such as his mother, grandmother, sister or daughter, that woman is considered to be like a "chaperone" and *Yichud* is permitted.<sup>29</sup> The inhibiting factor in this instance is not fear, since relatives would be unlikely to spoil the reputation of their family, but rather embarrassment. The assumption is that a

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27. *Even Ha'Ezer*, 22:10. The exact age of the young girl is a matter of debate amongst *Poskim*. Some *Poskim* include even a five year old girl in the category of "old enough to understand." See *D'var Halacha*, p. 50, and Rabbi Leib Tropper, *Yichud: A Concise Guide*, p. 26. Cf. *Otzar Ha'poskim*, Vol. IX, p. 151, and *Tzitz Eliezer*, vol. VI, p. 215. According to Rav Moshe Feinstein, cited in *Oholei Yeshurun*, page 7, the girl must be at least seven. Rav Ovadiah Hedaya, in *Yaskil Avdi*, *Even Ha'Ezer*, Vol. V, no. 22, states that there is no absolute age applicable to all girls, but rather the age is relative to the maturity of each particular girl.

As to the age when a girl is herself sexually interested and can no longer serve as a deterrent, some *Poskim* maintain that the age is nine. See R. Leib Tropper, *ibid.*, and *D'var Halacha*, *ibid.* Others assume that until the age of twelve a girl is "too young to be sexually inclined." See *Tzitz Eliezer*, *ibid.*, and *Oholei Yeshurun*, *ibid.*

28. *Ramo*, *Yoreh De'ah*, 192:4, and *Shach*, sub-paragraph 14. See *Otzar ha'Poskim*, vol. IX, p. 150, paragraph 43. As to the minimal age of a young boy, the *Chazon Ish* rules that he should be six. See *D'var Halacha*, p. 52. According to Rav Elchanon Ashkenazi, *Sidrei Taharah*, *Yoreh De'ah*, 192:13, the male child should be at least seven. Some *Poskim* require that he be nine. See *Otzar ha'Poskim*, vol. IX, p. 152, and *D'var Halacha*, *ibid.*

As to the maximum age of the boy, some say eleven, others twelve. See *D'var Halacha*, *ibid.* Rav Waldenberg, however, is lenient until the boy is thirteen years old. See *Tzitz Eliezer*, vol. VI, p. 215, and R. L. Tropper, p. 26.

29. *Otzar ha'Poskim*, vol. IX, pp. 100-102. See also Rav Moshe Feinstein, *Iggerot Moshe*, *Even Ha'Ezer*, II, no. 15.

man would control his impulse rather than humiliate himself in the presence of his mother, daughter, etc.

5. The presumed aversion of humiliation is also the basis for the Mishnaic ruling (*Kiddushin 80b*,) [that two men are permitted to be alone with one woman]. The Gemara stipulates that this applies only if the men are trustworthy; in the case of *prutzim* it is prohibited regardless of how many *prutzim* are present.<sup>30</sup> A man is embarrassed to be observed performing a sexual misdeed only by someone to whom such behavior is disdainful, which deterrent is absent in the case of *prutzim*. A further limitation is the Gemara's requirement that if two men and one woman are travelling on a road, the presence of a third man is required.<sup>31</sup> The *Poskim* assume that this requirement of three men applies in a deserted area such as a field, or even in an apartment within the city, at nighttime.<sup>32</sup>

6. A man may be alone with three women. In a deserted area, or late at night, *Yichud* is permitted with four women, but not with three.<sup>33</sup>

7. A man may be alone with a woman if his wife is present or nearby. It is clear that a man would not engage in sexual relations with another woman in the presence of his wife. The *Poskim* extend this *heter* to include a situation of one man alone with two women even if his wife is not present, but is located within the city. Since one man with two women is only *Yichud de'rabbanan*, the constraining fear of being caught by his wife is sufficient to permit *Yichud*.<sup>34</sup>

## V. *Yichud* and the Working Woman

Hundreds of years ago, the laws of *Yichud* between an

30. Ramo, *Even Ha'Ezer*, 22:5

31. *Kiddushin* 81a. The reason given in the Gemara is that should one of the men need to leave the premises for a distance, the other man will be left alone with one woman.

32. Ramo, *ibid.*; *D'var Halacha*, p. 130.

33. Rashi in his commentary on the second Mishna, for *Kiddushin*, 82a; cf. *Tosafot*, *ibid.*; Ramo, *ibid.* For a list of *Rishonim* who concur with Rashi, see *D'var Halacha*, p. 131, paragraph 1.

34. *D'var Halacha*, pp. 79-80, citing *Doveiv Mesharim*.



employer and his employee were already the subject of considerable controversy. Apparently, it was common practice in a number of Jewish communities for Jewish women to work in non-Jewish homes or to be in the company of non-Jewish men during the conduct of business. In the eighteenth century Rav Yair Bacharach, in *Teshuvat Chavat Ya'ir*, no. 66, cites a responsum by Rav Meir Stern, who in turn cites an earlier responsum by Rav Meir Katzenellenbogen, known as Maharam Padua, in which the latter harshly criticizes the practice of unescorted Jewish women frequenting non-Jewish market places. The Maharam considers this practice a flagrant violation of the laws of *Yichud*. R. Stern offers justification for the conduct of these women, suggesting that the *issur* of *Yichud* with a non-Jew is no longer in force. The historical basis for the regulation prohibiting *Yichud* with a non-Jewish man was the suspicion that he might act promiscuously with the Jewess. In his time, however, he felt such a suspicion was no longer valid since the non-Jew would be afraid of incurring the severe punishment (burning at the stake) meted out to a non-Jew having intimate relations with a Jewish woman.

*Chavat Ya'ir* strongly disagrees with R. Stern, arguing that since sexual encounters occur in secrecy, the authorities would not find out about it, and thus fear of punishment is no deterrent. Furthermore, he argues, the rule regarding rabbinic enactments is that even if the motivating reason behind the *gezera* is no longer applicable, the *gezera* remains nonetheless.

In a later responsum, Rav Moshe Epstein in *Bet Moshe, Even Ha'ezer*, 22:3, claims that the issue of *Yichud* with a non-Jewish male arises from a dispute between Rashi and Tosafot in *Avodah Zarah* 25b, regarding an "*isha chashuva*," a Jewish woman "of significant status" in social and political circles. According to Tosafot, a statement of Rav Idi in the Gemara permits the "woman of status" to be alone with a non-Jewish man. The Tosafot explain the reasoning behind Rav Idi's lenient ruling: a non-Jew would be afraid to rape a woman who commanded great respect in social and governmental circles. Rav Idi was not concerned with the possibility of a Jewish woman's willingly committing a sexual act with a non-Jew, but only with the possibility of rape. Rashi, however has a

different interpretation of the Gemara, according to which Rav Idi applies the prohibitions of *Yichud* even to an "*isha chashuva*." According to Rashi, the law of *Yichud* with a non-Jew is based not only on the possibility of rape, but also on that of seduction. *Bet Moshe* claims that Tosafot would permit *Yichud* with a non-Jew in his days because of the fear of the legal consequences of an act of rape. Furthermore, *Bet Moshe* concludes that the argument that a *gezera* remains in force despite the inapplicability of its rationale does not hold in the case of *Yichud* with a non-Jewish male.<sup>35</sup> Although the *Shulchan Aruch* decides in favor of Rashi, *Bet Moshe* states that in extenuating circumstances we may rely on the opinion of Tosafot. A case of financial need would constitute an extenuating circumstance for a lenient ruling. However, at the end of the responsum, *Bet Moshe* states that according to those who want to be strict (*machmir*), the practice should be avoided.

The *Chazon Ish*, *Even Ha'ezer*, no. 35, offers two different interpretations of "a woman of status." The first is that unlike other Jewish women, she can and will sue in a court of law, and her case would be dealt with seriously. The second is that she has sufficient political clout to see to it that the government takes punitive measures against her attacker and is able to obtain a promise from the authorities that to avoid publicity and scandal, no trial will take place. *Chazon Ish* explains that the status of the Jewish woman of today would depend upon these two interpretations. If the special status of the "*isha chashuva*" is that she can and will sue in a court of law, all Jewish women today can be classified as "*chashuvot*." The second interpretation, however, assumes that only a woman influential enough to activate the judicial process could be classified as *chashuva*, for the average woman would not sue in court because of her great embarrassment caused by such publicity; therefore the non-Jew would not be deterred by fear of legal action. This interpretation would allow no

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35. Since the original *gezera* was lenient in the case of an *isha chashuva*, we can also be lenient here without vitiating the *gezera*.

leniency for Jewish women in our times since they generally lack the political power which characterizes an *isha chashuva*. The *Chazon Ish* leaves this question unresolved.<sup>36</sup>

It was common in the Egyptian community of the 16th century for Jewish women to work in the homes of non-Jews. A significant responsum written by Rav David ibn Zimra in *Teshuvot Radbaz* III, 481, justifies this practice. Radbaz suggests two concepts which had not been mentioned previously in the context of the *Yichud* laws. The first is "*bi'avodateihu tarud*", meaning that people are so engrossed in their work that they have no interest in sexual escapades.<sup>37</sup>

The second concept is that one will not risk ruining his reputation and a profitable business relationship by committing a sexual offence. Ostensibly, the Radbaz derives this idea from the general principle which underlines a variety of halachot: "*chazakah al uman shelo mafsid umnato*", i.e., a craftsman will not willfully jeopardize his reputation.<sup>38</sup> A sexual offense against an employee by a non-Jew would be totally contrary to his self-interest. Although Radbaz considers his reasoning halachically sound, he does not approve of Jewish women being alone with their non-Jewish employers on the grounds that it encourages immodest behavior.

The principles employed by Radbaz and others to justify *Yichud* for a working woman have been utilized to decide

36. See *D'var Halacha*, p. 76, note No. 26, and p. 100, paragraph 14. Cf. Ritva, *Avodah Zarah*, 23a. See also *Oholei Yeshurun*, p. 104, note 1. See also *She'arim Metzuyanim be'Halacha*, no. 152, par. 3.

37. Apparently the Radbaz bases his reasoning on the ruling of the Gemara in *Avodah Zarah*, 20b, concerning animal breeders. Although it is forbidden to watch animals while they are mating, the prohibition does not apply in the case of a professional animal breeder. The reason given in the Gemara is "*bi'avodateihu tarud*," that he is so absorbed in his labors that sexual thoughts do not enter his mind. Since the women were employed by men who were themselves occupied with their craft, the mood of all was impersonal and businesslike. Such an environment would tend to repress sexual interest.

38. For a discussion of the parameters of this principle, refer to *Talmudic Encyclopedia*, vol. XIII, p. 700.

contemporary problems in *Yichud*. It seems, however, that the prevailing halacha in this area has accepted the stringent view. Two prime explanations are responsible for this development: 1) sexual promiscuity, including the employer-employee relationship, is rampant in our society; 2) even those of the earlier *Poskim* who were inclined to be lenient in the case of non-Jewish employers agreed that the weight of halachic evidence supported the more stringent view. They justified the practice mainly for Jewish women who were in dire financial straits. But in the affluent society of our day, contemporary *Poskim* are reluctant to rely on leniencies.

In terms of practical halacha today, the Jewish working woman must be careful not to be alone with a non-Jewish man in her place of work unless *one* of the following conditions prevails:

a) That the door of the place of work is unlocked, so that passersby may enter at will. This is meaningful only if the time and location are such that it is reasonable for people to enter.<sup>39</sup>

b. That a Jewish male is also present. During late hours two Jews are required.<sup>40</sup>

c. That a child of a specific age is also present.<sup>41</sup> (See earlier discussion about the age of the child).

d. That her husband is within hearing distance of the working place.<sup>42</sup> Some *Poskim* would allow *Yichud* even if the husband is anywhere in the city providing he can visit her in her place of work whenever he wishes.<sup>43</sup>

The stringent view, however, maintains that the leniency which applies to a married woman whose husband is within the city is only applicable in the case of *Yichud* with a Jewish male, where the reason for the prohibition of *Yichud* is to prevent seduction. In the case of *Yichud* with a non-Jew the prohibition of *Yichud* is also to prevent rape. Only when the husband is so close that he would

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39. *D'var Halacha*, p. 43, paragraph 18.

40. *Ibid.*, p. 117, and citation from Rav Y.L. Diskin on page 162.

41. *Ibid.*, p. 53, par. 4.

42. *Ibid.*

43. *Ibid.*, citing Radbaz and others.

hear her cries if attacked would the problem of rape be removed and *Yichud* permitted. The lenient view disagrees and maintains that the issue of rape need not apply in our society whose laws and penal system are devised to prevent it.<sup>44</sup>

With regard to *Yichud* of a Jewish man with a non-Jewish woman, any of the first three conditions mentioned above would permit it. If the husband of the non-Jewish woman is present<sup>45</sup> or if there are three non-Jewish women present,<sup>46</sup> *Yichud* is permitted.

We will now consider how the principles which were utilized by *Poskim* in the working-woman controversy apply to other contemporary issues.

#### VI. *Yichud* and the Physician

The sensitive subject of *Yichud* in the case of a woman under the care of a male doctor has been discussed in recent responsa. Halacha classifies medical treatment as a religious obligation incumbent both upon the patient seeking help and the physician applying his knowledge and skill in an endeavor to heal. *Yichud*, on the other hand, is a religious prohibition, and cannot be treated lightly. The conflict between medical procedure and the law of *Yichud* seems to be inherent in the very nature of the two. Privacy in medical treatment is necessary both for the doctor and the patient. A physician can function at his optimum when he can give all his attention to the medical checkup, unhindered by intrusion or interference. A patient will cooperate well with the physician when he or she is at ease. In the case of a female patient, anxiety about the possibility of someone's barging into the examination room while she may be undressed can be so unnerving that the next time she needs a doctor, she might decide to stay home and suffer rather than subject herself to the degrading experience of a medical checkup.

The halacha is acutely aware of human sensitivities and has

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44. Ibid. See also footnote 36.

45. See *Otzar ha'Poskim*, vol. IX, p. 134.

46. *D'var Halacha*, p. 131, par. 2.1

always protected the dignity of a human being. It would not allow a medical examination to be exposed to the public eye. But privacy, which is necessary for proper medical treatment, is also the very element on which the prohibition of *Yichud* is based. The halacha, therefore, must address itself to the question of how Jewish law can obligate medical procedure and simultaneously insist on the observance of the regulations of *Yichud*.

A number of *Poskim* have suggested that a satisfactory medical examination does not require total privacy, while in the case of *Yichud* nothing less than total privacy constitutes a violation of Jewish law. Rav Eliezer Waldenberg, in *Tzitz Eliezer*, VI, no. 40, chap. 12, suggests a number of permissible ways of providing limited privacy for a patient that would not be in violation of the laws of *Yichud*: 1) the door of the examining room is closed, but not locked, and three people or a married couple are present in the waiting room; 2) even if the door is locked, if the key is in the hands of someone anywhere in the city, who can open it at any time; 3) the husband of the woman who is being examined is in the city;<sup>47</sup> 4) the doctor's office is located in one of the rooms of the doctor's residence. The last condition would permit *Yichud* even if the door is locked.<sup>48</sup>

A common denominator in the permissive rulings of contemporary *Poskim* is reliance on the rationale of the Radbaz, as explicated above, with regard to a working woman: 1) a

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47. See also Rav S. Katz, *Kedoshim Tihiyu*, p. 148, who quotes Rav Mordechai ben Eliyahu as having applied this leniency to a doctor making a "house call" to a female patient when the door of the house is locked. Rav Eliyahu also applied the leniency of the *Doveiv Mesharim*, cited in *D'var Halacha*, p. 30, who permitted *Yichud* in a locked room when the members of the family have keys and may enter at will. See also *She'arim Metzuyanin be'Halacha*, no. 152, par. 5.

48. Rav Waldenberg assumes that the presence of his wife in the same building is sufficient for a leniency. See also *Assia*, Vol. II, pp. 91-92, notes 9-13, for an explanation of the view of some *Poskim* who disagree with Rav Waldenberg.

These rules apply in the case of a female doctor or nurse with a male patient. See R. Katz, *ibid*.

Rav Moshe Feinstein, quoted in *Oholei Yeshurin*, page 3, permits *Yichud*

professional would not risk his reputation, and thereby his livelihood; 2) a person while engrossed in his work is not disposed to sexual temptations; 3) the fear of governmental punishment will prevent him from committing sexual offenses. It is obvious that these principles apply quite well to the case of the physician. The *Poskim*, however, did not go so far as to permit *Yichud* with a physician based solely on the principles of the Radbaz. Although *Yichud* is prohibited by most *Poskim* in a situation in which outsiders would not enter unless they first received permission,<sup>49</sup> they are willing to rely on the minority view that as long as the door is unlocked, there is no *Yichud*. This leniency is due to the fact that the Radbaz's principles apply in this case.<sup>50</sup>

It would not be correct to say, however, that all *Poskim* are lenient in this case. Rabbi Leib Tropper in his *Yichud: A Concise Guide*, p. 20, quotes Rabbis Joseph Eliyashiv and Chaim Scheinberg as having permitted *Yichud* with a doctor in an unlocked room only where there are three other Jewish doctors or nurses in the clinic. This is merely an application of the general rule of a room which opens to a public area. Rav A. Horowitz<sup>51</sup> expresses a similar view. Rav Yitzchak Weisz, *Minchat Yitzchak*, VII, 73, permits *Yichud* with a physician in only two situations: 1) the patient's husband is present in the waiting room, and the door of the examination room is slightly ajar; or 2) the patient is accompanied by another woman in the examination room. The husband of the accompanying woman must be within the city and must be aware of his wife's exact whereabouts. In this latter situation the door may be closed if there are workers who occasionally enter the examination room at will.

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with a doctor even if the door is locked, provided that another person is in the office. Rav Ovadiah Hadaya, in *Yaskil Avdi*, II, nos. 17 and 18, permits *Yichud* with a physician even when there are no people waiting in the office, if the examination takes place at an hour in which people generally come to visit the doctor and wait in the anteroom.

49. *D'var Halacha*, p. 27 and p. 38, par. 8. R. Leib Tropper, op. cit. p. 19, par. 2.

50. See *She'arim Metzuyanin be'Halacha*, no. 152, par. 3.

51. *D'var Halacha*, p. 45, and his note #43.



In *A Halachic Guide to Nurses in Hospitals*, Rav. J. Neuwirth of Jerusalem notes that observant doctors and nurses, when administering medical treatment to patients in hospital rooms, must be careful not to violate the laws of *Yichud* by locking the door. In an article in *Assia*<sup>52</sup> Rav S. Aviner cites many sources to prove that the laws of *Yichud* apply even when the male or female patient is very ill.

To summarize this thorny question: the requirements of taking care of the sick do not in and of themselves remove the *issur* of *Yichud*. We have indicated a number of options which might be exercised in order to avoid infringement of the prohibition — measures such as leaving the door of the examination room ajar or having a companion accompany the individual who is being examined.

The question of *Yichud* with a professional counsellor or psychologist is a more serious one and should be examined in the light of the considerations mentioned above. The application of the principle of "*bi'avodateihu tarud*" seems less appropriate than in the case of physician, for the elements of friendship and empathy which often characterize a counsellor-client relationship can engender an intimacy which demands a more stringent approach to the application of *Yichud* laws. A study of the special laws of *Yichud* with respect to an intimate relationship such as counseling is beyond the scope of this paper.

## VII *Yichud* in an Automobile

As noted, *Yichud* is permitted in situations which inherently lack privacy. This general rule can be applied to the case of an automobile whose windows permit outsiders to see what is going on inside the vehicle. In a responsum published in *Taharat Yom Tov*, vol. VII, p. 57, Rav Yosef Gruenwald permits *Yichud* in a car for this reason, but limits the *heter* to travel within the city where there are passersby during the day and the night. This would effectively

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52. Rav S. Aviner, in *Assia*, a journal of halacha and medicine, edited by Dr. A. Steinberg, vol. II, p. 92.



preclude *Yichud* 1) when driving outside the city since it is unlikely that people could see what is happening inside; 2) if the car is moving through a deserted area even during the day; 3) when driving on side-streets during the late hours of the night when hardly anyone is on the streets. But Rav Menashe Klein, *Mishneh Halachot*, vol. VI, no. 227, writes that in our time since there is a steady flow of traffic and the roads are well-lit, there is no *issur* of *Yichud* even at night. R. Klein opines that there can be no absolute rule in this regard for the halacha depends upon the particular situation. If there is no traffic, *Yichud* applies even during the day; if there is traffic, there is no *Yichud* even at night.

Rav Moshe Feinstein, in *Iggerot Moshe, Even Ha'Ezer*, vol. IV, no. 65, expresses a more stringent view. According to him a man and a woman should preferably not travel together in a car even if they are driving on roads where there are many cars, the reason being that even during the daytime the driver may veer off the main road onto a secluded area. In fact, Rav Feinstein states that technically there is no *issur* of *Yichud* when driving in an automobile since people can observe what is happening inside the vehicle. Halacha does not suspect a kosher individual of deliberately creating a situation of *Yichud*. Therefore he permits it in case of great need. As an example of "great need" he suggests the case of woman who solicits a ride from a Jew who happens to be driving in the same direction. For the man to deny her that ride would seem cruel. He also permits it even in the case of a non-Jewish woman asking for a ride, for the sake of avoiding enmity to Jews.

A similar view is expressed by Rav Levi Yitzchak Gruenwald (*Taharat Yom Tov*, *ibid*). Rav Gruenwald argues that despite the fact that the driver is occupied with his driving and is in no position to engage actively in an immoral act, he can at any moment pull over to the side of the road. Rav Gruenwald, however, prohibits it only in the case of night driving through dark streets or on inter-city highways, which he considers a bona fide case of *Yichud*. On the face of it, this ruling conflicts with the statement of the Gemara, *Kiddushin* 81a, that a man and a woman are permitted to be alone together in a room with an open door, despite the fact that at any moment the door could be closed. Apparently, Rav

Gruenwald would explain it in the following manner: there is a difference between an open room which at the moment does not constitute a place of *Yichud*, and an automobile at night which is a place of *Yichud*. The very fact that the man and woman are alone together inside the car, covered by the mantle of darkness, is privacy. The driver's preoccupation with the act of driving is merely temporary and can be changed at any moment. Halacha suspects that even a *kasher* may be overcome by temptation and park the car on the side of the road to perform an immoral act. It is likely that Rav Gruenwald would prohibit a man and woman driving in a car at night in dark streets or at night on inter-city roads even in situations of need.

Rav Eliezer Waldenberg, in *Tzitz Eliezer*, vol. VI, p. 212, discusses the question of two men travelling by car with one woman from one city to another, in which case it was noted that the presence of a third man is required. However, since intercity highways nowadays cannot realistically be considered "secluded," R. Waldenberg advances arguments to support the position that even at night, the presence of two men with one woman is sufficient. Thus, he considers it permissible for a man to remain in a cab or bus when traveling at night even when there is only the driver and a woman in the vehicle.

In his book *Kedoshim Tihiyu*, p. 146, Rabbi S. Katz quotes Rav Mordechai Eliyahu, the Sephardic Chief Rabbi of Israel, as permitting a man to travel in a car with only two women at night when there is traffic, or during the day even when there is no traffic. However, when driving at night through an area where there is little traffic, Rav Eliyahu requires the presence of three women. Evidently, the lateness of the hour enhances the privacy in the car because the darkness makes it difficult to see inside the car, and there are fewer cars on the road. The trouble is that these two factors are difficult to assess. When is it so dark that the car is considered a private domain? Supposing one cannot see the inside of the car from a distance of a few yards but could see when only a few feet away, is it *Yichud* or not? How "light" is light traffic and how "heavy" is heavy traffic?

In summing up the "bottom line" on this complicated issue,

we may conclude that the consensus of halachic opinion is that a man and woman should try to avoid a situation where they will be driving alone at night; although technically it may be possible to justify such an activity, it is far more desirable to take precautions against such an eventuality.

Actually these problems are rooted in the disagreement between halachic decisors regarding the *heter* of *Yichud* in a room with a door that opens to a public place. In our time when people usually do not enter an unlocked room unless they first knock, would lenient *Poskim* still be lenient today? We find that a controversy exists on this issue as well. There are those who are stringent,<sup>53</sup> but the *Chazon Ish* permits it on the grounds that there are “wild” people who will barge into a room without knocking or receiving permission to enter.

There is yet another issue in the questions concerning a locked room. Rav Dov Weidenfeld, in *Doveiv Mesharim, Even Ha'Ezer*, no. 5, permits *Yichud* in a locked room if members of the family have keys and may enter at will. Rav A. Horowitz extends this *heter* to a case where only one person possesses a key to the locked room (see footnote 25). Still another controversial issue is the case of a locked room where one can see inside only by standing on a bench or on a chair. Rav Moshe Feinstein, in *Iggerot Moshe, Even Ha'Ezer*, vol. IV, no. 65, prohibits it but Rav Sholom Schwadron, in *Teshuvot Maharsham*, vol. II, no 76, permits it.

53. See *Teshuvot Binyan Tzion*, no. 134, and Rabbi Leib Tropper, *Yichud: A Concise Guide*, p. 19, who cites a number of concurring contemporary *Poskim*.

53a. Rav Feinstein claims that even though the sex act cannot be performed by the driver while he is driving, nevertheless *Yichud* is prohibited because of the possibility of hugging and kissing. He does not offer any proof for his assumption. In fact, in a subsequent responsum published in *Iggerot Moshe, Even ha'Ezer*, vol. IV, no. 65, he totally rejects this assumption and proves that *Yichud* applies only where there is a possibility of performing the sex act. In that responsum R. Feinstein prohibits *Yichud* in an automobile for a different reason, i.e. because the driver may park the car in a secluded place.

The original view of Rav Feinstein is shared by some *Poskim*. See *Otzar ha'Poskim*, vol. IX, page 90, and Rabbi Leib Tropper, *Yichud: A Concise Guide*, page 22, footnote 12, and Rav Solomon Braun's letter to Rabbi Tropper, published on page 8 of the *Guide*.

It seems that those *Poskim* who are lenient in the halacha of a room whose door opens to a public place consider full privacy as a condition for the state of *Yichud*. The stringent *Poskim*, however, permit *Yichud* only when there is a strong deterrent that will inhibit violation of sex laws. It thus seems likely that those *Poskim* who are lenient regarding a room with a door which opens to a public area would also be lenient in the case of *Yichud* in an automobile even when traveling at night, for even the remote possibility of being observed in the car by others nullifies total privacy.

The ruling by Rav Eliyahu mentioned above needs clarification. Generally, the laws of *Yichud* dictate two avenues of behavior: a) a situation which is not *Yichud*, in which one man is permitted to be with one woman, and b) a situation which is *Yichud*, in which case a man may not be alone with less than three women. Rav Eliyahu, however, suggests another possibility. Apparently, he applies the halachic principle of "*safek de'rabbanan l'kulah*" (i.e. in case of doubt regarding a rabbinic prohibition, the lenient ruling is followed) to the problem of *Yichud* in an automobile. In two instances there exists a "*safek*": 1) driving during the day in an unpopulated area; 2) driving at night in an area where there is traffic. Rav Eliyahu classifies these two cases of *Yichud* in an automobile as "*safek*." Since we have seen that *Yichud* with two women is a rabbinic prohibition only, Rav Eliyahu permits one to be lenient in case of doubt. He is of the opinion, however, that two situations are clear and beyond doubt. *Yichud* of one man and one woman in an automobile driving in the day time in a populated area is permitted; but they may not drive at night in an area where there is no traffic, unless at least three women are present.

In practice, then, a person who is concerned about the law of *Yichud* has to undertake certain precautions. A young lady who lives in a sparsely populated area would be well-advised to see to it that her male escort bring her home during those hours of the evening when people are still in the streets. By the same token, a man should be careful about *Yichud* when his "date" lives in a private home in a suburban area, since he may be expected to drive her through a private lot in front of her home, at some distance

from the main road. Since *Yichud* is a constant factor in dating, especially in the evening, young men and women should be encouraged to familiarize themselves with the laws.

Sometimes the requirements of the laws of *Yichud* conflict with other halachic desiderata, at which time a *Posek* must decide the proper priorities. In *Iggerot Moshe, Yoreh De'ah*, II, no. 82, Rav Moshe Feinstein discusses the question of the permissibility of an escorted woman traveling by cab to a mikvah located in a nearby city. Although the exact circumstances of the case are unclear, it seems that the trip was to take place after dark so that only with great difficulty could passengers in other cars view the inside of the cab. Rav Feinstein assumes that the presence of a steady flow of traffic is technically sufficient to remove the status of *Yichud* from the situation. But this alone would not be enough to permit it<sup>54</sup> were it not for other considerations: 1) the cab driver is preoccupied with his work, i.e. driving the cab; 2) the driver would be afraid to risk losing his license by sexually offending his passenger; 3) the mitzvah of going to mikvah is an extenuating circumstance, and the mitzvah should not be postponed. Rav Feinstein prefers that the husband accompany his wife on the trip, but if this is impossible he permits the woman to travel alone.

Here we find another example of a *Posek* applying the principles of the Radbaz to a *Yichud* situation. We do not find that these principles by themselves would be sufficient grounds for a *heter*; but when combined with other factors, they do contribute to a lenient ruling, especially when no alternatives are available. It is possible that in a case of a trip which was not for the purpose of a mitzvah, or even if for a mitzvah, one which could just as easily have been postponed until a time when no *Yichud* problem existed, Rabbi Feinstein might have taken a more stringent view.

Rav Solomon Braun<sup>54</sup> permits a woman to be alone at night in

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54. See *She'arim Metzuyanin be'Halacha*, no. 152, par. 3. R. Braun cites *Ezer Mikodesh, Even Ha'Ezer*, 22:5, which permits a woman to be alone in a taxi with a non-Jewish driver.

a taxi with a non-Jewish driver if there is traffic on the streets. This accords with the view of those *Poskim* who follow a liberal interpretation of the "room which opens to a public place," and is also based on the opinion of those who consider fear of punishment for rape as a valid deterrent. Whereas Rav Feinstein's *heter* is contingent on extenuating circumstances, Rav Braun does not mention any special conditions for his ruling.

Rav S. Katz, in *Kedoshim Tihiyu*, p. 147, quotes Rav Mordechai Eliyahu as having ruled that a woman can remain in a bus alone with the driver at night providing that there is traffic on the route that they are traveling. But when there is no traffic or people walking in the streets, she should get off the bus. If, however, there may be danger involved in leaving the bus, then she should continue her trip.

It is well to bear in mind that the regulations concerning *Yichud* formulated in the Gemara were legislated in a social context quite different from our own, and adjustments might be called for. As an example, the rabbis considered a room which was open to public access or view as a place where a man and woman could safely be alone together, reasoning that the fear of being seen engaged in intimacies would in itself be sufficient to deter them from such behavior. Unfortunately, such a presumption can no longer automatically be made in today's promiscuous society.<sup>55</sup> Since some *Poskim* consider *Yichud* as a regulation to prevent not only sexual intercourse but lesser violations as well, it is well to avoid situations or locales where loose behavior would not arouse any comment, for there would be no psychological or social deterrent to make *Yichud* acceptable. Understandably, the licentiousness of the modern age must have some impact on the laws of *Yichud*, but it is not possible to pinpoint all the situations or places which must be avoided. The individual who is concerned about observing the laws of *Yichud* properly must employ discernment and introspection in the conduct of his or her social life.

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55. See *Otzar ha'Poskim*, vol. IX, p. 141. See also *Tzitz Eliezer*, vol. VI, p. 202.

### VIII *Yichud* in an Elevator

The question of *Yichud* in an elevator has been discussed extensively in recent halachic literature. A list of *Poskim* who have written responsa on this subject appears in a volume published by the Institute for Science and Halacha (Jerusalem) entitled *Electricity in Halacha* (Part I, pp. 305-307). Careful study of this literature reveals that *Poskim* who permit *Yichud* in an elevator present two arguments to support their position: 1) Since the elevator can be summoned by anyone who presses a button on any floor of the building, it is the same as in the case of a room whose door opens into a public area and can be opened by anyone at will; 2) the man and woman are alone in the elevator for less than the minimal time which constitutes *Yichud*. (The exact *shiur* (minimal time) of *Yichud* will be discussed later.)

The comparison of an elevator to a room which opens to a public area is arguable, however, for the circumstance are not truly equivalent. In a room, there is never a moment of absolute privacy, and fear of intrusion inhibits them throughout. But in an elevator there is no similar possibility of sudden intrusion. The seclusion that prevails in the elevator when it moves between floor approaches that of a locked room.<sup>56</sup> Rav Eliezer Waldenberg in *Tzitz Eliezer*, VI, p. 229, presents the first argument mentioned above, and adds that since the ascent of the elevator is like the "flash of the eyelid" and the door opens immediately and people wait outside constantly to enter the elevator, *Yichud* should be even more permissible there than in the case of a door which opens to a public area. In his introductory remarks addressed to the author of *Dvar Halacha*, Rav Shlomo Zalman Auerbach notes that even in a room which opens to the public there is always a short interval in which the man and woman may be alone, and yet it is permitted. He argues that there is no difference, therefore, between the elevator and the room that is easily accessible to the public. However, those *Poskim* who prohibit *Yichud* in an elevator are not

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56. See Rav Solomon Braun, *She'arim ha'Metzuyanim be'Halacha*, vol. IV, 152:6; *Otzar ha-Poskim*, vol. IX, p. 145.



persuaded by these arguments and assume that while the elevator is in motion there is real privacy.

Many leading rabbis permit "seclusion" in an elevator due to the brevity of the interlude.<sup>57</sup> However, the assumption that *Yichud* has a "minimal time" (*shiur*) is questionable and needs to be analyzed in the light of the two possible definitions of *Yichud d'oraitha*.<sup>58</sup> In his responsum on *Yichud* in an elevator Rav Shmuel Wosner, *Shevet ha'Levi* III, no. 182, argues that *Yichud* is a form of "approaching an *erva*," and is therefore objectionable per se, even absent the possibility of sexual intercourse. He notes further the fact that no minimum time for *Yichud* is mentioned in the Gemara or by the *Rishonim*. A number of other *Poskim* also express a stringent view on this question.<sup>59</sup> Rav Chaim Scheinberg<sup>60</sup> takes the stringent position on the elevator, arguing that *Yichud* is a prohibition designed to prevent not only sexual intercourse but also hugging and kissing, and is therefore applicable even in a short span of time. We have seen that Rav Moshe Feinstein, in his responsum on *Yichud* in a taxi, expresses the same view (see footnote 53a).

Two significant comments are added by Rav Avraham Horowitz:<sup>61</sup> 1) Even if we accept the stringent view that *Yichud* is forbidden even for a moment, it is still possible to permit a man and woman to ride in an elevator together if we accept the halachic opinion that compares an elevator to a room with a door which

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57. Rav Ya'akov Breisch, *Chelkat Ya'akov*, vol II, no. 14; Rav Yitzchak Weisz, *Minchat Yitzchak*, vol. IV, no. 94; Rav Solomon Braun, *She'arim Metzuyanin be'Halacha*, ibid. See also *Iggerot Moshe, Even ha'Ezer*, vol. IV, no. 65; Rav Eliezer Waldenberg, ibid. Rav Yonatan Steiff, *Otzar ha'Poskim*, ibid. Rav C.Y. Teitelbaum *Levushei Yom Tov*, vol. I, no. 44; Rav Avraham Horowitz, *D'var Halacha*, p. 155, note 1;

58. It should be noted that *Yichud de'rabbanan* definitely requires a *shiur*. See text of this article.

59. Rabbis Levi Yitzchak Gruenwald (Tzelemer Rav) and Joseph Gruenwald (Popper Rav); Rav M. Lev, (Temeshever Rav), ibid; and *She'erit Ya'akov*, cited in *Tzitz Eliezer*, vol. VI, p. 229.

60. Quoted by R. Leib Tropper, p. 22.

61. *D'var Halacha*, p. 155 and pp. 197-201.



opens to a public area. 2) On the other hand, even if we accept the lenient view that *Yichud* occurs only after a minimum time span, one might argue that nevertheless it is prohibited in an elevator, based on the ruling of Rav. Y.L. Diskin<sup>62</sup> who states that the principle of "*chatzi shiur*"<sup>63</sup> ("half" the minimum time; i.e. even a moment) applies to *Yichud*. Rav Diskin forbade a man and a woman from entering a private place with the intention of leaving before the *shiur* of *Yichud* is reached for the reason that the two may choose to prolong the period of privacy.<sup>64</sup> However, R. Horowitz distinguishes between the case addressed by Rav Diskin and that of an elevator. In Rav Diskin's case it is possible that the couple may decide to extend their stay together until the full *shiur* of *Yichud* is realized, but in the case of an elevator, the duration of time when the elevator is moving between floor is always less than the *shiur* of *Yichud* and it is not up to the couple to prolong that time. Therefore, he argues, even R. Diskin might permit it in an elevator.

The discussion would have been concluded at this point, except that Rabbi Horowitz expresses fear that there may be a flaw in his reasoning. By pressing a button, the man could bring the elevator to a halt between floors, and therefore the principles of *chatzi shiur* and *Yichud* could be applied to the case of an elevator.<sup>65</sup> Consequently, R. Horowitz leaves this issue unresolved in the original edition of his *Dvar Halacha* on *Yichud*. In a subsequent edition, however, he presents a series of proofs that the halacha does not suspect a "*Kasher*" of purposely tampering with

62. *Teshuvot Ma'haril Diskin*, vol II, Kuntress Acharon, 5:206.

63. See Yoma 74a: "Rav Yochanan says a "*chatzi shiur*" is biblically prohibited... since it can be joined [to another "*chatzi shiur*]."

64. There is a controversy among *Achronim* whether Rav Yochanan's ruling applies even when a *chatzi shiur* cannot be joined to another *chatzi shiur* in order to constitute a full *shiur*. For a complete list of references, see *Talmudic Encyclopedia*, vol. XVI, pp. 600-604.

65. Rav Waldenberg rejects the applicability of *chatzi shiur* to *Yichud*. See *Tzitz Eliezer*, VI, p. 229. He also assumes that no one would tamper with the elevator while it moves between floors, since people waiting for it will sense that something wrong is happening.

an elevator to bring about a state of *Yichud*.<sup>66</sup> Although Rav Horowitz concludes that *Yichud* in an elevator is permitted, he limits his permissive ruling to those hours of the day or night when people use the elevator regularly. He is also hesitant to permit it in the case of a woman with a "*parutz*" (an immoral person) or a non-Jew, for the halacha may take into consideration the possibility of the man's stopping the elevator between floors.<sup>67</sup>

As far as the final halacha on this issue, the conclusions of *Poskim* fall into three general categories: 1) Those who permit *Yichud* in an elevator without limitation or reservation (Rabbis Waldenberg, Auerbach, Eliashiv); (2) those who permit it but encourage one to be stringent whenever possible (Rabbis Breisch, Teitelbaum, Weisz);<sup>68</sup> 3) those who take the stringent view (Rabbis Vosner, L.Y. Gruenwald, Joseph Gruenwald, Chaim P. Scheinberg).<sup>69</sup>

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66. *D'var Halacha, Hosafot Chadashot*, p. 198. The problem of *Yichud* in an elevator should not be compared to R. Diskin's stringent ruling in the case of *chatzi shiur*. The latter is prohibited since the man and woman are in a situation of *Yichud* right from the beginning, without fear of interference; the halacha considers the possibility that temptation may overpower them and cause them to extend their stay together until the full *shiur* of *Yichud* is reached. In the case of the elevator, however, there is no *chatzi shiur* of *Yichud* to begin with since the elevator is always programmed to stop at certain floors and this will prevent them from reaching a *shiur* of *Yichud*. Since being alone in an elevator is not *Yichud*, the halacha does not consider the possibility that temptation will overpower the pair and cause them to change the course of the elevator, thereby extending their stay to the full *shiur* of *Yichud*.

67. *Ibid.* See also p. 201. According to those *Poskim* who accept the equation between the elevator and a room which opens to a public area, the *heter* would apply even in the case of a *parutz* or non-Jew. See *D'var Halacha*, p. 43. Furthermore, as far as a non-Jew is concerned, some *Poskim* feel that in our time, due to severe legal punishments, the halacha does not consider the possibility of rape (see footnote 36).

68. See Rabbenu Yonah, *Sefer Ha'yirah*, no. 237, who states that it is preferable to avoid *Yichud* with one woman in a room which opens to a public place.

69. According to those *Poskim* who are of the opinion that there is a *shiur* for *Yichud*, it is generally assumed to be a minimum of five minutes. Rav A. Horowitz, however, cites *Poskim* whose reasoning leads him to conclude that the *shiur* is only 35 seconds. He, therefore, prohibits *Yichud* in an express elevator

*Poskim* discuss also the question of a woman's riding in an elevator which is operated manually by an operator.<sup>70</sup> In *Taharat Yom Tov*,<sup>71</sup> Rabbis Naftoli Hoenig, Yonatan Steiff, and Y.M. Rappaport offer three reasons for being lenient about this: 1) The time lapse between one floor and the next is less than the *shiur Yichud*; 2) the concept of "*bi'avodateihu tarud*" applies in this case, i.e. the operator at work knows that diverting his attention from proper operation would be dangerous for himself and his passengers; 3) the operator is afraid to commit an offense against his passenger because of civil punishment and loss of his job. As we have seen, the latter two concepts were advanced by Radbaz and have been utilized by *Poskim* in other contexts.

### IX *Yichud* and Adoption

Halachic issues pertaining to the relationship between an adoptive parent and his or her adopted child are manifold, and cover a wide range of areas. In general, the halachot relevant to adoption derive from two fundamental principles: 1) Raising another's child with parental love is an act of *chesed* of the highest order. An adoptive parent who raises a child in a Torah environment is considered, as far as moral and spiritual aspects of the parent-child relationship are concerned, as if he begot the child.<sup>72</sup> 2) As far as personal status is concerned, however, Jewish law maintains that only the child's natural parents can determine his status. The laws of forbidden relationship apply only to blood relatives, not to adoptive ones.<sup>73</sup> It thus follows that the leniency formulated by the

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which cannot be stopped between floors if the elevator travels eight or more floors at a time (the exact number of floors will depend upon the elevator), for in that case the man and woman are alone together for more than 35 seconds.

70. *D'var Halacha*, pp. 198-200.

71. See *Otzar ha'Poskim*, vol. IX, p. 145.

72. *Sanhedrin*, 196: "Whoever rears an orphan in his own house is considered by the Torah as if he fathered the child." See Rabbi Melech Schacter's essay "Various Aspects of Adoption" in *The Journal of Halacha and Contemporary Society*, Fall, 1982, pp. 104-113.

73. M. Schacter, "Various Aspects of Adoption," pp. 94-95.

Gemara, *Kiddushin* 81b, that a parent may be alone together with his child of the opposite sex, technically applies only to natural parents. Rashi explains that this leniency is based on the Gemara in *Sanhedrin* 64a, which states that the Men of the Great Assembly were successful in subduing the temptations of the *yetzer harah* for immoral relationships between parents and children and between siblings. The reference there is to blood relatives only, for there is nothing to indicate that the sexual drive of any other type was removed.

In a letter to the editors of *Otzar Ha'Poskim*,<sup>74</sup> the Lubavitcher Rebbe, Rabbi M.M. Shneerson, decries the fact that pious Jewish couples, meticulous in their observance of Jewish law, adopt children and pay no regard to the laws of *Yichud* which apply in every detail to them. He writes, "I have read a number of books and articles which discuss various halachic questions pertaining to adoption. The situations dealt with are generally in the area of theory and of *safek*; whereas situations of *Yichud* are practical and definitely arise even when the child is still young." Similarly, Rav Eliezer Brizel in a pamphlet dealing with the laws of adoption<sup>75</sup> writes that the laws of *Yichud* with regard to adopted relatives are even more stringent than the general ones. The relationship between adopted relatives can be classified as an intimate one. The Gemara (*Kiddushin* 81a) rules that in the case of *Yichud* between intimate friends, the usual leniency of a door which opens to a public place does not apply. Letters of agreement to R. Brizel's opinion, included in his pamphlet, are written by Rabbis D. Weidenfeld, Y. Konievsky (Steipler Rav), and E. Atiya (Rosh Yeshivat Porat Yosef). The same view is reportedly held by the *Chazon Ish* and his disciple, Rav Avraham Horowitz,<sup>76</sup> and by Rabbi Joshua Ehrenberg (Head of the Beth Din in Tel Aviv).<sup>77</sup>

However, a lenient view on this issue is presented by Rav

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74. Vol. IX, p. 259.

75. *Zichron Akedat Yitzchak*, pp. 33-37, cited in *Otzar ha'Poskim*, vol. IX, p. 263.

76. *D'var Halacha*, p. 103, par. 20.

77. *D'var Yehoshua*, vol. III, *Even Ha'Ezer*, no. 16.

Eliezer Waldenberg in *Tzitz Eliezer*, Vol. VI, pp. 226-228. Admitting that Rashi's explanation of the talmudic test would limit *Yichud* to blood relationships, R. Waldenberg claims that an entirely different explanation could be offered. Basing himself on a citation from the *Levush*, a sixteenth century rabbinic source,<sup>78</sup> R. Waldenberg argues that the leniency with regard to *Yichud* of parents and children need not be traced to the text in *Sanhedrin*. It is based on the fact that the intimate relationship between parents and children precludes sexual disposition between them. A mother's relationship to her son, developed over a long course of time in raising him, is one which is not conducive to sexual feelings. Similarly, a father's relationship to his daughter is one of fatherly rather than sexual love. Immediate members of a family growing up together become accustomed to each other and are not sexually disposed to one another. This type of relationship was not the object of the prohibition of *Yichud*. R. Waldenberg argues that in light of the explanation of the *Levush*, the case of adoptive relatives would be in the same category as that of blood relatives mentioned in the Gemara. Adopted children and their adoptive parents feel the same as natural ones toward each other.

The same reasoning was advanced by the Sephardic Chief Rabbi of Tel Aviv, Rav Chaim David Halevi, in his work *Aseh Lecha Rav*, pp. 194-201. In addition to the above mentioned *Levush*, R. Halevi quotes the Meiri and the *Aruch Hashulchan* to prove that the reason for the leniency in the case of natural parents and children, and brothers and sisters, is that there is no sexual temptation in these relationships. The same can be applied to the case of adoptive parents and their adopted children and also between the adopted brothers and sister. Both Rabbis Waldenberg and Halevi stipulate that the *heter* only applies if the adoption began during infancy of the adopted child, i.e. a boy below the age of nine, or a girl less than three.<sup>79</sup> Both rule that the *heter* is not

78. *Levush, Even ha'Ezer*, 22:1.

79. After a boy or girl has reached these ages, the prohibition of *Yichud* is fully binding. The *heter* only applies when the relationship developed between the adoptive parent and the adopted child at a time when *Yichud* was permissible.

limited to *Yichud*, but applies to hugging and kissing as well. Whereas R. Waldenberg discusses the situation in which the adopted child is ignorant of the fact that he is adopted, R. Halevi extends his lenient ruling to the case where the boy or girl is aware that he or she is an adopted child. Although R. Waldenberg does not address the question of *Yichud* between an adopted boy and his "sister" or an adopted girl and her "brother", R. Halevi explicitly permits it.

Rav Waldenberg suggests an alternative basis for his lenient ruling. The case of adoption, he argues, is comparable to that of *Yichud* of a man with his wife while she is a *niddah*. Various *Poskim*, including the *Chazon Ish*, explain that the permissibility of *Yichud* in the latter case is due to the fact that the husband and wife are accustomed to living together and during the *niddah* period are not sexually disposed toward one another. If *Yichud* is permitted because of the nature of the relationship between husband and wife during the period of *niddah*, it should be equally permitted in the case of adopted relatives raised from infancy as natural relatives because they are not sexually disposed to one another.

Rav Waldenberg takes this comparison one step further. Two *Rishonim*<sup>80</sup> state that the leniency in the case of *niddah* is a result of the difficulty of observing the laws of *Yichud* within the context of normal married life. It would be next to impossible to demand that a husband and a wife live separately for almost half of every month. These *Rishonim* should also be understood in light of our previous explanation that the parameters of *Yichud*, while biblical in origin, were left to the Sages to determine. It is a well-known principle in Jewish law that the rabbis refrain from imposing halachic restrictions which the majority of observant Jews are unable to observe.<sup>81</sup> Rabbi Waldenberg applies this logic to the case of adoption. To impose the restrictions of *Yichud* on the parents of

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80. Rav Eliezer of Metz, *Sefer Yeraim*, no. 192; Rosh, *Kitzur Piskei Niddah*.

81. *Avodah Zarah*, 36a; *Baba Batra*, 60b; Rambam, *Hilchot Mamrim*, 2:5. See *Talmudic Encyclopedia*, vol. I, pp. 602-604.

adopted children would be in effect to render the practice of adoption totally impossible for observant Jews. In this case the restriction would be classified as a "restriction which the majority of Jews cannot observe."

Both Rabbis Waldenberg and Halevi note that pious Jews adopt children and raise them as their own without adhering to the restrictions of *Yichud*. To Rabbi Halevi this practice supports the lenient position. The halacha recognizes that in cases of doubt, "*puk chazi mah amma de'bar*", i.e. let the prevailing custom establish the law.<sup>82</sup>

In defining his lenient ruling, Rabbi Waldenberg points to an incident recorded in Tosafot to *Yevamot* 2a. The Talmud debates whether the rabbis could make a ruling whereby a woman would retroactively require *chalitza* (a technical release) in order to remarry. Tosafot explain that the rabbis negated the suggestion, because halacha would never impose such a burden on a woman at that point since "the ways [of the Torah] are ways of pleasantness," (Proverbs 3:17).

Rav Rafael J. Chazan, in *Chikrei Lev, Even Ha'Ezer*, no. 17, states that this principle is the basis for the leniency with regard to *Yichud* in the case of a man with his wife when she is a *niddah*. It would not be "the way of pleasantness" to require a married couple to live separately from the moment the wife becomes a *niddah*. R. Waldenberg applies the same reasoning to the case of parents who adopt an infant younger than the minimal age of *Yichud*. To impose the restrictions of *Yichud* when the child reaches the age when *Yichud* is applicable, after the parents have raised the child and have developed the bonds of love and attachment, would be contrary to the halachic principle of "the ways of the Torah are ways of pleasantness," and therefore it must be assumed that in this case the Torah would not prohibit *Yichud*.

Although both Rabbis Waldenberg and Halevi are firm in their decision to permit *Yichud* in the case of adoption, they both emphasize the role played in the decision-making process by the

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82. *Eruvin*, 14b; *Yerushalmi*, *Yevamot*, 40a (Chapter VIII, Halacha 3).



plight of unfortunate children whose parents cannot or will not raise them. Indeed, the halachic reasoning of the *heter* itself is based at least in part on the responsibility of the community vis-a-vis these children.

The question of *Yichud* in case of adoption of a non-Jewish child (to be converted in the presence of a Beth Din) is not discussed in the responsa of these two rabbinic authorities. In the latter situation it is the pressing need of the adoptive parents who were not fortunate to have children of their own which may serve as a cause for seeking a *heter*. If the leniency here is based on the argument presented by the *Levush*, the permissibility of *Yichud* would apply to the adoption of non-Jewish children as well.

To the knowledge of this writer, only two lenient responsa have been published on this issue. Rabbi Joseph B. Soloveitchik of Boston has been quoted as also tending to be lenient.<sup>83</sup> At the present writing, this halachic issue has not been fully clarified.

This brief survey of the myriad situations in which the halacha of *Yichud* may play a role has been presented with the view to heightening the awareness of the public to the need to be informed about the parameters of the halacha and to take appropriate precautions in that regard.

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83. Rabbi Melech Schacter, *Ibid.*, p. 96.



## Fetal Rights and Maternal Obligations

*Rabbi Zave Chaim Rudman*

### Introduction:

Medical and scientific advances coupled with a recent, often litigation-driven resurgence of ethical considerations, have pushed the question of fetal rights to the forefront of national consciousness. Notwithstanding the current secular legality of abortion, certain states have passed laws making it a crime to kill a fetus. In one famous case, a mother who gave birth to a brain-dead child after failing to follow her doctor's instructions has been charged with violating the law.<sup>1</sup> Secular bioethicists have debated many questions raised by this trend. For example, it has long been established that the state cannot force someone to donate any organ, even blood, to save another's life. Can it do more for a fetus? Can the state coerce a woman to take care of her fetus? In more general terms one can ask: What are the responsibilities of a woman towards the fetus she is carrying?

In this article we shall explore the halachic background of these and similar questions. Initially we will investigate the broader problem of coercing a non-cooperative patient to undergo medically sound and acceptable treatment. Following this we will expand the discussion to include the problem of therapies with non-definite

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1. Newsweek, International Edition, December 1, 1986, p. 54.

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*The author is a member of the Kollel Chofetz-Chaim,  
Jerusalem, and a Rebbe in Yeshivat Or David*

prognoses. Is it halachically permissible to force anyone to undergo experimental medical treatment, or even standard major invasive surgery, in a situation where its efficacy has not been established? Turning to the fetus, we will summarize the discussions of the *Rishonim* on the relationship between fetal and maternal health, i.e., is a danger to the fetus automatically treated as a danger to the mother? In the event that the fetus's health is treated separately from the mother's health, we can then ask: Is the mother obligated to do all in her power to save the fetus? Finally, even if she is not *obligated* to do so, does the pregnant woman have the option of endangering herself for the sake of the fetus?

The halachic literature includes extensive discussions of the first three questions, with more limited analyses of the last two. Consequently, we shall concentrate on the answers to the first three questions and indicate in more general terms the halachic approach to the other questions posed above.

### Coercive Therapies

The questions of forcing an established or questionable course of treatment on an unwilling patient are clearly discussed in the halachic literature. At the most fundamental level, when one refuses to eat on Yom Kippur even where it is necessary for his health, there are those who say that he can be forced to eat. As the Ran says, he is a *chasid shoteh*,<sup>2</sup> a pious fool. However, this is not exactly the question we are investigating, inasmuch as it is possible to differentiate, halachically, between the intrinsically normal and necessary act of eating and the acts performed during even "routine" medical therapy.

With respect to medicine, the *Magen Avraham*<sup>3</sup> says that a non-cooperative patient can be coerced into taking medicine on Shabbat. Rabbi Akiva Eiger<sup>4</sup> declares that this is so even on weekdays. His statement is explained as follows: It is well known

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2. Ran quoted in the Radvaz, Part 1, *Siman* 885.

3. *Magen Avraham*, *Siman* 328 s'k 6.

4. *Hagohot*, Rabbi Akiva Eiger on *Shulchan Aruch* idem.

that the use of medicine on Shabbat is often restricted. Thus, we may interpret the *Magen Avraham's* ruling as pertaining only to an individual who would ordinarily take the medicine but who now declines it for fear of transgressing the Sabbath laws. However, one may conclude that a patient who refuses medicine at any time could not be coerced, in general. Therefore, Rabbi Akiva Eiger states unequivocally that a non-cooperative patient can be coerced into taking medicine at any time that it is determined to be necessary for his health.

What is the biblical source for the rulings of the *Magen Avraham* and Rabbi Akiva Eiger? The *Mor U'Ketziyah*<sup>5</sup> says that this is based on the mitzvah of "Thou shalt not stand by your friend's blood."<sup>6</sup> The Gemara in *Sanhedrin*<sup>7</sup> learns from this verse that one cannot stand by idly as his friend drowns in a river, but must do all that is in his power to save the drowning person. Similarly here, even if the patient chooses pain and death over life, one cannot stand by idly. For example, if someone's leg is infected and endangering him, it can be amputated even against his will. One can do all that is necessary to save the patient's life even against his will. Furthermore, everyone is responsible in such a case because of the commandment "Thou shalt not stand . . ." This matter is not dependent on the decision of the patient, since his life is not his own possession for him to choose to destroy it.

The *Tosafot Chaim* suggests another source.<sup>8</sup> He brings the Gemara in *Baba Kamma*<sup>9</sup> that cites a verse in *Bereshit*, "Even your own blood of your souls I will require."<sup>10</sup> From this verse the Gemara derives the prohibitions of suicide and of self-inflicted wounds. Note that this is not a binding negative commandment (*lav*) as was the verse cited by the *Mor U'Ketziyah*. On the one hand it is more specific (as it relates to self-imposed harm) and on the other

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5. *Mor U'Ketziyah* on the *Magen Avraham*, loc. cit.

6. *Vayikra* 19:16

7. *Sanhedrin* 72a.

8. *Tosafot Chaim* on the *Chaye Adam*, Chapter 142, Sect. 43.

9. *Baba Kamma* 91b.

10. *Bereshit* 9:5; see *Torah Temima* there.

hand it is more general (as it definitely includes non-fatal situations).

In this article we have used the term coercion rather than force since coercion can mean either persuasion or actual preemptive physical force. In fact, the *Aruch Hashulchan* only mentions coercion by persuasion,<sup>11</sup> while the *Mor U'Ketziyah* implies that physical force can be used,<sup>12</sup> since he states that it is even permissible to amputate a limb against the patient's will.

There seems to be a source in the Gemara for coercion by physical compulsion: The Mishna at the end of Chapter 7 in *Ketubot* says that a man who is a "*mukah sh'chin*" (explained as leprous in the medical, not halachic, sense) must divorce his wife because she will cause him to rot.<sup>13</sup> The Gemara says that we force them to get divorced even if both are agreeable to the marriage; this is one of the cases where the Beth Din can force a *get* through physical coercion.<sup>14</sup> Rashi's comment that "his skin will rot" is amplified by the *Tosafot Rid* who explains that he will be harming himself since marital relations will cause pieces of his rotting skin to fall off.<sup>15</sup> This does not seem to be a life-threatening situation, since the Mishna states "because of the loss of flesh," rather than "because of the threat to his life," and yet physical coercion is permissible. Consequently, this could be construed to be a proof for the *Mor U'Ketziyah*, that the coercion is even in the physical sense.

While one could claim that from this Gemara we can only prove that Beth Din has the power to stop someone from actively damaging himself, *Mor Uketziyah* quite specifically allows the compulsion of any definitive therapeutic measure. He discusses two potential situations: In the case of an internal disease, where the doctor himself is unsure as to the nature of the disease and/or its therapy, if another doctor, or even the patient alone, doubts the effectiveness of the medicine, the patient has the right to reject it. In

11. *Aruch Hashulchan*, *Siman* 618, s"v 4.

12. *Mor U'Ketziyah*, loc. cit.

13. *Ketubot* 77a.

14. *Shulchan Aruch*, *Even ha'Ezer*, *Siman* 154, Sects. 1 and 21.

15. *Ketubot* 77b.

such a case, "fortunate is he who refrains from doctors in general and does not place his trust in flesh and blood but in the hands of the Healer."

However, in a case where the disease is external and obvious, and the therapy is known and effective, one is allowed to administer any medicine or perform any operation, including an amputation,<sup>16</sup> even against the patient's will. Thus, *Mor U'Ketzieh* quite clearly defines the ability of Beth Din to coerce a patient when there is a clear-cut cure. One could argue that nowadays, with the host of modern diagnostic tools available, even an internal disease may be included in the category of "open and obvious" diseases. This must be decided obviously on a case by case basis.

It is written that the Riva, when he was sick with the illness that eventually proved fatal, still refused to eat on Yom Kippur. When asked why, he replied with the well known halachic dictum, "A definite and a doubtful, the definite takes precedence." The Radvaz, when asked about this story, said that one cannot generalize from this case. The halacha is that even the slightest chance of prolonging life, and even for the shortest amount of time, overrides any halachic consideration of Yom Kippur. He therefore suggests that the Riva could have felt that even eating would not help his condition. This is what his statement meant: "My definite knowledge that eating would not help takes precedence over the doctor's possible knowledge that eating would help." The Radvaz mentions that he had ruled on a similar case previously and had stated that this is not piety, it is tantamount to murder.<sup>17</sup>

In a recent article in *Techumin* a similar case is discussed. A person brought to the hospital was told that he needed an immediate operation, but the operation would either cure him or he would not survive it. The patient, afraid that his body would be used for an autopsy if he did not survive the operation, refused to permit the operation. The author marshalls all his sources to prove

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16. *Mor U'Ketzieh*, loc. cit.

17. *Responsa Radav*, loc. cit. and *Siman* 1139.

that halachically the doctors had the right to coerce him, even if his fears were well grounded.<sup>18</sup>

Rav Moshe Feinstein, *z'tl*, also discusses this issue, but approaches the matter from a totally different aspect. In order for coercion to be allowed, he introduces the condition that the psychological harm suffered by a patient who is coerced into treatment may not outweigh any benefit gained from the treatment. If the treatment is itself dangerous (i.e., potentially fatal) but the majority of patients undergoing this treatment live, although the patient should undergo the treatment he is not coerced. However, if the treatment will cure him, even if he will be left a cripple, the patient can be physically compelled to accept the treatment. While Rav Moshe Feinstein raises the possibility that we may not be allowed to coerce an adult who is fully aware of what he is doing, his final opinion leans towards allowing the use of physical compulsion, qualified by the previously mentioned requirement that the possible psychological harm not outweigh the physical benefit.<sup>19</sup> Interestingly, Rav Feinstein does not quote any earlier sources in his discussion of the problem.

To summarize, it seems from the above discussion that in general, one can force a patient to be healed against his will, unless the psychological damage caused by the coercion outweighs the benefit.

### **Relationship of Fetal and Maternal Health:**

The main source for answering our third question, whether a danger to the fetus is also a danger to the mother, is the Gemara in *Yuma* (82a). The Mishna says, "A pregnant woman who smelled [and therefore craves] food on Yom Kippur is fed until she is satisfied." Rashi comments, "The fetus smells the food and desires it, and if she does not eat both are in danger." The Rosh quotes the *Be'hag*, "A pregnant woman can be fed when we are sure that if she does not eat her fetus will uproot itself [i.e., abort], even in a

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18. *Techumin*, Part 2, pp. 325-336.

19. *Iggerot Moshe, Choshen Mishpat*, Part 2, Chaps. 73-74.

situation where a live birth after eating is only a possibility." The Ramban says that from this halacha it seems that where there is the danger of miscarriage alone, one can eat on Yom Kippur. He explains that while there are those who say that for a fetus alone one does not transgress, the reasoning of the *Tanna* in this Mishna is that every miscarriage entails an assumption of danger to the mother and vice-versa, for every woman who miscarries is assumed to be in danger. The Rosh also states that Rashi agrees with him, as Rashi says, "Both are in danger."<sup>20</sup> Thus it would seem to be an argument between Rosh, Ramban, and Rashi, who say that there is a strong tie between fetal and maternal health, and the *Be'hag* who rejects this point of view. The *Dagul Me'Revavah* accepts the view of Rosh and Ran as normative halacha.<sup>21,22</sup>

The *Mishnah Berurah*<sup>23</sup> says that in the case brought in the Gemara (*Yuma* 82a) the mother and fetus are endangered and it makes no difference when in the pregnancy this happens. However, in the *Sha'ar Ha'Tziyun*<sup>24</sup> he says that according to Rashi this danger only begins on the fortieth day of pregnancy. He deduces this from Rashi's statement that "the fetus desires,"<sup>25</sup> since a fetus

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20. Rosh, *Yuma*, Chapt. 8, *Siman* 13.

21. *Dagul Me'Revavah* on the *Shulchan Aruch*, loc. cit.

22. The *Tur* formulates this halacha by stating that either the mother or the fetus may be in danger. The *Beit Yosef* cites Rashi, Rosh, and Ran that it is impossible for one to be in danger without the other. In the *Shulchan Aruch* no distinction is made between a danger to the mother or to the child. This is in accordance with his decision in the *Beit Yosef* which follows Rashi. The *Dagul Me'Revavah* says, "If there is only danger to the fetus, see *Magen Avraham* in *Siman* 330, but the Rosh and Ran wrote that one never finds a danger to the fetus without an accompanying danger to the mother, because every miscarriage is assumed to be dangerous to the mother." The text of *Magen Avraham* which he quotes cites the argument between Ramban and the *Be'hag* as to whether one can desecrate Shabbat for a fetus. The *Dagul Me'Revavah* then points out that for our question the argument has no relevance, because they were discussing the status of a fetus whose mother dies during childbirth. We are discussing a mother and fetus during pregnancy when their lives are tied together. See *Tur* and *Shulchan Aruch*, *Orach Chaim* 617:2.

23. *Mishnah Berurah*, *Siman* 617, s''k 1.

24. *Sha'ar Hatziyun*, *ibid.*, s''k 1.

25. Rashi (*d''h Ubur*), *Yuma* 82a.

is considered cognizant only after the fortieth day. Therefore, Rashi's discussion of the feelings of the fetus implies a fetus at least forty days old. He continues, "Examine Rabbenu Manoach, the matter requires study." The text of Rabbenu Manoach he refers to is a commentary on the Rambam<sup>26</sup> which says that the Mishna's choice of a case involving a pregnant woman was not because this is true only for a pregnant woman. This halacha applies to any person: it is only that the case more commonly arises with a pregnant woman. This would obviously negate the implication from Rashi.<sup>27</sup>

The *Korban Netanel* on the Rosh asks, "How can the Rosh categorically state that one cannot find a danger to the mother without danger to the child? Is it not possible to find a woman who has had numerous miscarriages, and each time it did her no damage at all?"<sup>28</sup> This question is difficult to understand. For example, if someone lived through three heart attacks without medical attention, would one deny him such attention on Shabbat because he is a *muchzak*<sup>29</sup> to survive them? The *Nachal Eshkol* disagrees

26. Rambam, *Hil. Shvitat Asor*, Chap. 2, Halacha 9.

27. The *Sha'ar Hatziyun* also quotes a text of *Eshkol*. The *Eshkol* says that "any pregnant woman whose fetus moved is in danger, both in the beginning and the end of pregnancy." The *Eshkol* does not differentiate between before and after the fortieth day of the pregnancy. It would therefore seem to be an argument between Rashi and the *Eshkol* and Rabbenu Manoach as to whether or not one would eat on Yom Kippur prior to the fortieth day. There is a second argument between Rashi and the *Eshkol* as to whether the tie between fetal and maternal health exists prior to the fortieth day of pregnancy (*Sefer HaEshkol*, Halberstadt Edition, p. 117).

There is one problem I found with the *Sha'ar Hatziyun*. The Ran in *Yuma* on this Mishna explains it in a similar vein as Rashi, "the fetus smells the food and she desires it," and goes on to state that the Mishna's choice of a case about a pregnant woman is purely incidental. This halacha is equally applicable to a man who is healthy. It would seem that according to the *Sha'ar Hatziyun* these two statements are contradictory. The first half is Rashi and the second follows Rabbenu Manoach. Based on the Ran one could say that even Rashi did not mean what the *Sha'ar Hatziyun* claimed he meant. If the implication from Rashi is true, the Ran is contradicting his own second statement.

28. *Korban Netanel*, loc. cit., 20.

29. Established by precedence.



with the *Korban Netanel* in a similar fashion.<sup>30</sup> He says that even if a woman miscarried numerous times, this time, since she is weaker, she may be in danger. And even the application of the principle of *chazakah* (presumption) is questionable, since it is not more generally applicable than the principle of *rov* (majority) which, in a case of danger, is not accepted as a determining factor.<sup>31</sup>

From the above it would seem that the answer to our third question is as follows: There is an argument between the Rosh and *Be'hag* as to whether there is an automatic tie between maternal and fetal health. Since the halacha is decided according to the *Be'hag* in the original case (i.e., does one desecrate Shabbat to save a fetus), one could claim that there is no substantiation for the thesis of the Rosh. However, the Rosh himself says that he is not debating the *Be'hag*'s point of halacha, but is stating a fact concerning the fetal-

30. *Nachal Eshkol*, Halberstadt Edition, Part 2, p. 120.

31. The *N'tziv*, in his commentary on the *She'iltot*, raises another issue (*Ha'amek Davar*, 167, s"v 17). He says that even Rashi and the Rosh must agree that not in every case is there an automatic tie between maternal and fetal health. He cites a Gemara in *Yevamot* (42a) which discusses a woman marrying while pregnant. The Gemara says that one cannot marry a pregnant woman because in the course of relations he may crush the fetus. If so, why are we not afraid of this occurring with his own child?

The Gemara answers that in the case of his own child he will be careful. The *N'tziv* says, "If a miscarriage is also a danger to the woman, even if it is not his own child he will be careful not to crush the fetus so as not to endanger his wife." Therefore, the *N'tziv* concludes, we see that only by a miscarriage brought about by weakness or fasting can the Rosh postulate an intrinsic tie, but not in every case.

It would seem though, that the *Dagul Me'Revavah* disagrees with the *N'tziv*. He cites the Rosh as a plain fact without any qualifications. One could possibly disagree with the *N'tziv*'s proof from the Gemara for he only cites part of the Gemara. The Gemara continues to say, "If he is careful about his own fetus, he will also be careful about it." A second reason for this halacha as explained by Rashi is that he will be careful even if it is not his own child because a person does not intentionally plan to kill a *nefesh*. One could argue that the use of the word "*nefesh*" means that Rashi refers to the mother rather than the fetus. Rashi in *Sanhedrin* 72a states quite clearly that a fetus is not a *nefesh*. Therefore Rashi is following his own halacha in *Yuma*, that there is a tie between fetal and maternal health, and the question of the Gemara is exactly that: "How can he intentionally kill a *nefesh*, i.e., his own wife?"

maternal relationship. Therefore, inasmuch as *Dagul Me'Revavah* cites the Rosh without qualification or dissent, it would seem to be the view he accepts. From the *Mishnah Berurah*, one could only prove the halacha concerning the case of the Mishna in *Yuma*. The *N'tziv*<sup>31</sup> would disagree with the *Dagul Me'Revavah* and claim that this tie is not universal.

The comments of the Rosh concerning the intrinsic relationship between the mother and her fetus lead to another very interesting halachic consideration. If, in halachic terms, something is a danger, but medical science as we now understand it says that it is not, how do we act? The *Shemirat Shabbat K'hilchatah* cites a lengthy list of references on this subject.<sup>32</sup> However, such a discussion is beyond the scope of this article and deserves an article of its own.

### Fetal Rights and Maternal Obligations

The fourth question we raised, as to whether there is an obligation to save a fetus, is an issue discussed by later *Poskim*. They base their conclusions on the argument between the *Be'hag* and the Rosh as to whether one can desecrate Shabbat to save a fetus.<sup>33</sup> The *Tur* seems to side with the view that one can desecrate the Sabbath.<sup>34</sup> Most of the *Poskim* argue that if one is allowed to desecrate Shabbat, then saving a fetus must be an obligation since it is impossible to have a situation where it is an *option* to desecrate Shabbat. The only reason one is allowed to desecrate Shabbat is to fulfill the obligation of saving a life.<sup>35</sup>

The question as to whether the mother can place herself in danger in order to save the fetus is comparable to another question already discussed in the halachic literature. Does one have the responsibility or right to endanger oneself to save a friend? While

32. *Shemirat Shabbat K'hilchatah*, Chap. 32, Note 29.

33. *Yuma* 82, Rosh Sect 17.

34. *Siman* 330.

35. *Iggerot Moshe, Choshen Mishpat*, Part 2, Chapt. 69, Sect. 3. Also see *N'tziv, She'iltot* Chapt. 167, for an opposing view.

the *Sema* quotes the *Yerushalmi* in the affirmative<sup>36</sup>, the major *Poskim* do not mention this *Yerushalmi*. The *Pitchei Teshuva* explains that the *Bavli* (Babylonian Talmud) disagrees with the Jerusalem Talmud, and that is the reason why most *Poskim* do not consider it.<sup>37</sup> However, it seems that the argument between the *Bavli* and *Yerushalmi* is limited to whether or not one is obligated to endanger oneself. If a person is willing to endanger himself, it seems he is allowed to do so. However, this might only be in a case where, by endangering himself, he would definitely save the other person.<sup>38</sup> The situation in the case of a fetus is much more nebulous and would depend on the specific situation. For example, consider the case of a woman who must take a particular medicine in order to maintain her own health. This medicine may be harmful to the fetus. Is she allowed to forego her needed medication for the sake of the fetus? The specifics to consider are related to the severity of the reaction to her stopping the medication and the degree of potential danger to the fetus. Another common problem exists where an expectant mother has premature contractions and the medication prescribed to stop these contractions will affect her heart, with potential permanent damage. Each case would have to be judged on its merits.

However, from this discussion of the halachic background and principles, some guidelines begin to emerge. According to the view of the *Dagul MeRevavah* (that fetal and maternal health are always intrinsically linked), one can conclude that it is permissible to physically coerce a woman to do what is necessary to save her fetus, since she will concurrently keep herself out of danger as well. According to the *N'tziv*, who does not accept this fetal-maternal linkage as being inevitable, permission to coerce would depend on the degree of danger to the mother rather than to the fetus. If the therapy is only for the sake of the fetus, the woman may not be obligated to undergo a life-threatening therapy against her will.

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36. *Sema* on *Choshen Mishpat*, *Siman* 426, s''k 2.

37. Loc. cit., Sect. 2.

38. See further *Minchat Yitzchak*, Part 6, p. 103.

However, she would most likely be allowed to voluntarily place herself in a potentially dangerous situation if the fetus could be saved.

Finally, according to Rav Moshe Feinstein, one must rely on convincing the patient; a patient who is easily frightened cannot be coerced, only convinced. If the patient is already unconscious, one could claim that the *post facto* knowledge that a procedure was done against her will is not sufficient to cancel the procedure.<sup>39</sup> It follows from Rav Moshe Feinstein's reasoning, that where the therapy is not a danger to the woman, it is an obligation to save the fetus. However, this matter still requires further clarification.

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39. See also *Choshen Mishpat*, Part 2, Chapt. 74.