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Rabbi Alfred S. Cohen**

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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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Is Canned Tuna Kosher?
Rabbi Herschel Schachter

Is Canned Tuna Kosher?

Rabbi Herschel Schachter

Whether one is permitted to use canned tuna is a question which has been discussed in halachic circles for a number of decades. In order to be kosher, a fish must have fins and scales; tuna unquestionably does have fins and scales and is a kosher fish. Nevertheless, by the time the consumer opens the can, there is absolutely no evidence of this. For this reason, several halachic authorities, including Rav Henkin,¹ forbade consumption of canned tuna unless there is a *Mashgiach T'midi* (permanent Jewish supervisor) at the place of manufacture to inspect and assure that the fish going into the cans do qualify as kosher. Others, on the other hand, have taken a more lenient position on the question. The purpose of this paper is to explain the lenient position (which, in practice, is relied on to some extent by all those who certify the kashrut of tuna fish).

Our discussion will address the following topics:

- A) Since Rav Henkin *z. l.* already forbade consumption of tuna canned without the constant supervision of a kashrut inspector, is anyone entitled to permit it?
- B) Is there a requirement to examine each fish before consumption, to confirm that it has fins and scales?
- C) Can one rely on Gentiles to make this inspection? What weight is to be given to the fact that the Gentiles have

1. *Kol Torah*, p. 29, 1964. *Hapardes*, 1966, p. 33.

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established a system which is followed meticulously and does not allow for error?

- D) Can we rely on the "majority" (*rov*)? In other words, since most fish caught in the net are tuna, can we rely on that? Does it matter how much of a "majority" exists?
- E) What questions arise in the processing of the fish? Does the *issur* of *bishul akum* have to be taken into consideration?

This paper will discuss only the halachic ramifications of processing the *fish*, and does not address the question of the oils or other products added to the fish.

A. When one Authority proscribes:

There are those who argue that, since Rav Henkin issued his prohibition concerning tuna some twenty-five years ago, no other scholar is entitled subsequently to permit it. The Gemara (*Avoda Zara* 7a) teaches that

One who seeks a ruling from a *posek* who forbids the matter in question, may not seek a ruling from another authority who will permit it.

On this theme, the *Shach* rules²

Even after the fact, where a second authority was consulted and allowed it, the matter remains proscribed.

However, it is extremely important to understand that the rule stated above that one rabbi may not permit that which his colleague has banned is totally irrelevant here. It holds true only when the latter authority would rule on the very same object or deed that his colleague has proscribed. But when the object or deed in question is not the one that the preceding authority ruled on, then of course the latter may state his finding on the situation.³

2. *Yoreh Deah* 242.54

3. See *Ramo*, *ibid*, citing *Maharik*:

...but in any other case, who can make the erroneous statement

Obviously, the cans that Rav Henkin, z. l., banned no longer exist and are not the cans presently in question.

Secondly, let us note that the lenient view on this matter does not originate from myself but is a ruling received from our teacher, Rav Yosef Dov Soloveitchik, who takes the lenient view in this matter.⁴ Similarly, it is known that Hagaon Rav Aharon Kotler, z. l., ruled that one may eat Bumble Bee tuna (which at that time had no rabbinic supervision whatsoever). Many other halachic authorities took a similar position regarding canned tuna. I would therefore like to clarify this opinion, held by my teacher, Rabbi Soloveitchik, and all those who concurred with his ruling.

B. Characteristics of Kosher Fish

Repeated examination of tuna has ascertained that it has fins and scales and is therefore a kosher fish. The rule concerning fish is unlike that of birds, whose kosher status is restricted to those birds concerning which the Jewish community has a tradition of kashrut.⁵

Many years ago, an objection was raised concerning one

that the second *posek* may not allow it? If so, when a *chacham* errs in ruling on any issue, the error will remain for all time, for no authority will be empowered to rule otherwise. Another thing: halachic literature is replete with references to Rashi who enlightened Israel and on whose wisdom the world stands. Nevertheless there are many instances where Rashi prohibits and Rabbeinu Tam, his grandson, rules leniently.

4. Rabbi Soloveitchik forcefully reiterated this position and was publicly heard to declare that he considers canned tuna permissible.
5. Responsa *Zichron Yehuda* (son of Rosh); Responsa of the Frankfurter Dayan, *Menachem Meishiv* 31; *Minchat Yitzchak* 3:71. See also *Darkei Teshuvah* on *Yoreh Deah* 73:4 who cites Responsa *Beit Shlomo*:

...While we find rabbinic injunctions banning the partaking of certain kosher species of fowl because they bear a strong resemblance to species which are unkosher, we need not be so stringent regarding fish and ban something which the Torah and our sages, z. l. specifically allowed.

variety of tuna, the skip jack, which is lacking scales on its tail, near the fins, and near the jaw. Now, the Ramo (*Yoreh Deah* 83, 1.) specifically recommends that we be strict regarding finding scales in just these places. However, the *Kaf Hachayim* (ibid., no. 3) brings the view of *Pri Megadim* and other *poskim* that this strict position of the Ramo refers only to a fish which has but one scale, the fear being that somehow this scale is not really from the fish itself but became attached by accident. In such a case, we must check the location, to be sure that at least the scale is in the strategic place. But when a fish has many scales, it is of no consequence on which part of the body they appear.

In fact, the skip jack tuna has numerous scales on its body. Many years ago, Rav Soloveitchik was shown this fish and, after personally checking its scales, declared it to be kosher.

C. Must fish be examined to assure Kashrut?

There are those who would ban canned tuna on the grounds that no fish is deemed to be kosher unless the existence of fins and scales has been ascertained by direct examination. Since the fisheries in Puerto Rico, where the fish are processed, have no Jews present to check each fish individually for these characteristics, the task being performed by the non-Jewish workers, one could argue that there is no basis for regarding the processed fish as kosher. This rationale is obviously incorrect, however, for we rule that

... where it [the fish] is currently devoid of them [fins and scales] and will eventually grow them, it may be eaten. (*Avoda Zara* 39a)

Clearly, it is impossible to examine fins and scales that are not yet in existence. How then does the Gemara permit the consumption of this fish? We must conclude that the need to ascertain the existence of fins and scales is merely a prerequisite for establishing the kashrut of a fish species. Once this has been done and we recognize a fish as belonging to such a species it is kosher *despite the fact that*

the particular fish in question itself has never been examined for these characteristics.^{6,7}

Still, even though each fish need not be examined as long as we know that it belongs to a kosher species, the question arises that *canned* tuna is a total unknown to us, for all traces of fins and scales have been removed along with the skin. How can we be sure that the can contains tuna? Can we rely on the inspection of the Gentile factory workers in Puerto Rico? We know that the testimony of a non-Jew in kashrut matters is generally not accepted. Let us, however, consider the question from a different vantage point.

D. No craftsman willingly jeopardizes his livelihood.

It is a well-established halachic principle that although we may not rely on the evidence of a non-Jew relevant to the kashrut of a food item, yet if we can be certain that he is telling the truth, in certain cases we may rely on him. Jewish law operates on the principle that every individual, including the non-Jew, is concerned with maintaining his reputation as a reliable craftsman or worker; it is not worth it to him to endanger his livelihood by selling an object

6. See *Darkei Teshuvah* 83: he notes that according to *Minchat Chinuch* (Mitzvah 154), one who ate a fish and examined it only for the presence of fins but did not search for scales, has violated the precept of inspecting a fish for its kosher traits. *Darkei Teshuvah*, however, comments that this applies only to a fish which is not recognizable to us as being of a kosher species. But if we discern that it is of a kosher species, then all concur that it is unnecessary to check it for kosher characteristics on every occasion.

Darkei Teshuvah 79 reiterates this position when dissenting from *Sefer HaChinuch* (Mitzvah 153), who states that it is a positive precept to examine an animal for its kosher characteristics. One who is untrained in discerning these kosher traits and did not examine the creature, but instead relied on the fact that he observed that it had one kosher characteristic and ate from it, has violated the positive precept of checking for kosher traits, even if later he finds out that it was indeed kosher. To this, *Darkei Teshuvah* adds

...This is true only of creatures unknown to us till now which are not easily recognized as being members of a kosher species. But an animal clearly discernible as being part of a kosher species need not be examined regularly for kosher traits.

7. See *Beit Shmuel* in his commentary to *Avoda Zara* 39a, who cites Rambam in

under false circumstances since thereby he can ruin his entire reputation and business.

This principle is clearly pertinent to our discussion.

The Gentile fishermen on the fishing boats meticulously seek to limit their catch not only to tuna but to those specific tuna known as albacore and skip jack. They do this because the canneries will not buy any other type of fish from them, nor any other kind of tuna other than the two species enumerated. The canneries are not motivated here by considerations of kashrut, for all species of tuna are kosher. They have more pragmatic concerns in mind. The canneries are set up to process these two species of tuna with maximum efficiency; they are therefore unwilling to take in any other type of tuna. For purposes of quality control, they will not permit the introduction of albacore whose appearance differs from the rest.

Thus, while it is true that a heathen may not bear witness in question of kashrut, nevertheless, we may rely on these Gentile fishermen to verify the kashrut of the fish, not as witnesses, but as a simple truth of human nature. An artisan will not do anything to jeopardize his means of livelihood. They are always careful to use nets especially made to catch these types of fish. They examine the fish when the catch is made. Whatever they cannot sell to the cannery they throw back into the ocean to make more room on the boat for the saleable fish. The fishermen examine their catch once

Moreh Nevuchim that the kosher traits identify the fish as belonging to a kosher species.

While Ramban (in his commentary to Torah) views the kosher traits as prerequisites for establishing the kashrut of each fish, *Chatam Sofer* refers to a question raised by a correspondent: Our rule is that if a fish will eventually grow the fins and scales it is deemed kosher, even prior to the growth of the kosher characteristics. How can Ramban say that fins and scales are prerequisites to kashrut? Refer there for his resolution of this problem (*Chatam Sofer, Yoreh Deah* 75).

At any rate, no matter how we resolve Ramban, *Darkei Teshuvah*'s principle remains evident, viz., that it is impossible to consider the inspection of the fins and scales as the factor which determines the kashrut of the fish. Rather, as long as the fish is recognized as belonging to a kosher species, we may eat it without inspecting it for fins and scales.

again on shore prior to its sale. The buyers examine the fish before purchase to assure that the fish is the type necessary for production. They check once again prior to processing in the cannery.

We must emphasize that motivation for their fastidiousness is not fear of exposure and ensuing penalties, so that the argument might be made that where profits far exceed penalties, they would take the risk of using non-kosher fish. Rather, their procedures are designed specifically for two types of tuna and it is in their own interest to assure that no other fish enters their machinery. In addition anyone who has ever visited the canneries is aware of the meticulousness with which the workers eliminate any unkosher species because their presence has a detrimental effect on the other, kosher fish.⁸

E. The Power of "Majority" (*rov*).

Despite the great care taken to assure that only albacore and skip jack enter the tuna cannery, we must admit of the possibility, however remote, of some other fish becoming mingled with the catch and inadvertently being processed with the kosher fish. Can

8. See *Yabia Omer* (volume 5, *Yoreh Deah* 9) who concurs with those who rely on the certainty that a craftsman will not jeopardize his livelihood, to establish the status of the oil (that the fish is packed in) as kosher and contains no oil from a non-kosher species of fish (*ibid.*, 4), while rejecting this very same rationale for identifying the species of fish itself (*ibid.*, 3). The distinction is difficult to understand, for the Gemara in *Avoda Zara* 34b states specifically that one may rely on this law of human nature to identify a fish as kosher. No *mashgiach* has ever found any nonkosher fish in a cannery. In fact, they have never found in the factory any other species of tuna other than albacore, skip jack, or yellow fin. This case is similar to the case in the Talmud where we rely on the certainty that a craftsman will do nothing to jeopardize his livelihood. We are forced to conclude that the author of *Yabia Omer* is referring to a situation where this consideration is non-existent, where profit maximization is achieved without segregating one particular species. But where business concerns dictate that only one species of fish be processed, then reliance on the above rule of behavior is beyond dispute. We know it to be true after many years of having *mashgichim* visit the factories and substantiate the facts as we have stated.

we nevertheless claim that each can of tuna may be assumed to contain only kosher fish, based on the principle that since the overwhelming majority of the fish are kosher, each can is entitled to the presumption that it belongs to this "majority" (*rov*)? While logically this is an attractive and compelling position, and we will discuss it below more fully, we do have to consider the trenchant argument of Rivash (Responsum 192) that since the Torah specifically instructs us to determine kashrut of fish via physical inspection of fins and scales, this establishes an obligation to examine each fish individually and precludes our attributing it to one of the prevailing species without proof. However, as we shall see in the discussion of "prevailing probability" below, even Rivash would concur with a lenient position where the possibility of finding an unkosher fish mixed in is so very remote.

F. Different types of prevailing probabilities (*rov*):

Since in actual practice we are relying on the presumption that almost all fish being processed in the tuna canneries are tuna and therefore we may assume that the can contains only tuna, we must examine the halachic legitimacy of such a position. Does Jewish law permit our acting on the strength of a logical assumption, absent actual physical inspection?

It is clear from the Gemara that there are various categories of "prevailing probabilities" (*rov*):

- I. A slim majority such as where there is only about a 51% chance of one probability over its alternative. In this case, where a "thin" probability is pitted against a status quo situation (*chazakah*), the two are considered to be equally weighted (Tosafot, *Avoda Zara* 41b). The reason that prevalent probability normally outweighs the status quo rule is that the former serves to indicate what the facts of the situation are while the "status quo" merely asserts a rule of conduct to be followed and can not ascertain the facts. But we only accept the "prevalence" as a logical necessity where "prevalence" is strong. But where the majority forces involved just barely outweigh the opposing probability (such as a

majority of 51%), it is considered no better than a mode of behavior, (*chazakah*) and both sides of the case are given equal weight.

- II. A strong "prevailing probability" (such as where there is a 70% or 80% probability factor).⁹
- III. An overwhelming majority, which renders the alternative remote (such as a probability factor of 90%). The distinction between II and III above may be found in *Chidushei Ramban* and in *Milchamot* to the first *perek* of *Chulin*; it is cited as being the rule in *Yoreh Deah*, (39:1) and *Shach*, (ibid, no. 2): Wherever direct examination can clarify the situation, these means should be employed and we may not attribute the facts to the "prevailing probabilities" when they are of category II. But when category III is what we have, then examination is unnecessary.
- IV. Topping the list is a prevailing probability of such predominance that the alternative is one in a thousand. In such a case, *Chatam Sofer* lays down the principle¹⁰ that this factor is so negligible that normal people do not reckon with it at all. In such a case we conclude that "G-d watches over fools," i.e., the danger is so minimal that doing it violates no precepts.¹¹

Clearly, a probability of one in a thousand is considered so negligible as to be non-existent, and thus absolves us from the precept of examining the fins and scales of each fish individually.¹²

See responsa *Har Zvi* Y.D.: 74 who discusses a lenient reading

9. See *Tosafot Kiddushin* 80a s.v. *Smoch Miutah L'Chazakah*.

10. *Responsa Chatam Sofer*, *Yoreh Deah* 338, cited in *Pitchei Teshuvah Yoreh Deah* 357,1.

11. *Chatam Sofer's* principle contradicts that of Maharam Schick (*Yoreh Deah* 244) who writes regarding the contemporary need for *metzitzah*:

Even when prevailing medical knowledge tells us that the risk to the child is one in a billion we may violate the Sabbath for the child.

Most authorities concur with *Chatam Sofer*.

12. See Responsa of Rivash who says this explicitly:

of Rivash in the context of his own lenient ruling.

The first two reasons he adduces for his position also apply to the subject under discussion:

- A) Where the unkosher species is never to be found, even Rivash himself concurs that we rely on the prevailing probability (as cited in note 12, regarding the bearded vulture and the osprey).
- B) Rivash's intent was to indicate that we should not rely on the prevailing probability in a situation where the Torah specifically directs "You shall segregate," which it does in connection with the examination of birds. This shows that inspection of birds is a positive precept. Consequently, wherever the possibility of inspecting the creature exists, one is obliged to check and segregate the unkosher birds. (Rivash implies the same in Responsum 191); *but where examination is completely impossible, then we rely on probability.* The same logic employed by the author of *Har Zvi* in the case of birds applies as well to the tuna situation.

H. The Ban on Chilek and Rashi's Opinion:

There is another theoretical basis for issuing a ban on consumption of canned tuna. In *Avoda Zara* 35b the Mishnah states: "The following are items of non-Jews which are forbidden . . . and chilek." Discussing this on p.39a, the Gemara explains, "Why is

Since the Torah commanded us to examine the characteristics of each bird to ascertain that it is not one of the 24 nonkosher species... we must therefore be alert for any of the 24 species even though each constitutes a small minority except for the bearded vulture and the osprey which are completely absent from inhabited areas, as Ramban states: "They are found only in deserts and extremely remote islands at the edge of civilization." But where the possibility of their appearance exists, then each bird is suspect, as we say by animals "he must be capable of recognizing a wild ass," despite the fact that the wild ass represents an insignificant percentage of the total kosher animal population.

chilek banned [after all, it is a kosher fish]? Because a conglomeration of fish comes up with it..." Rashi (ibid 35b) sees the rationale for the ban in that

nonkosher fish similar in appearance to *chilek* are brought in the nets with it; therefore, it makes no difference whether it is shredded or not. We must be wary of the one [non-kosher] fish in a thousand among them which resembles [*chilek*]...

This talmudic discussion would seem to indicate that despite our earlier rationale for permitting fish to be eaten without inspection since there is virtually no chance of its being non-kosher, there does nevertheless seem to be a rabbinic requirement for such inspection when kosher and non-kosher fish are caught intermingled in the nets. This too, however, is a misleading impression. Careful study of the wording of the commentaries and authorities on the subject reveals that although all define *chilek* as Rashi does, the phrase "One in a thousand" does not appear in any other commentary, including Rashi's own commentary on *Rif* — with the exception of the *Or Zarua*: 196. Clearly, most commentaries disagree with Rashi on this point and hold that when the probability is merely one in a thousand not even a rabbinic obligation to examine each fish exists.

There is a further point which I consider to be the primary rebuttal; *Rashash* in *Succah* 18A discusses the kosher fish called "shtinkes" in the vernacular, and notes:

... These fish too are frequently netted intermingled with small unkosher fish which are indistinguishable... Everyone assumes them to be kosher, and no one voices any objections, may G-d forgive us.

Nevertheless, he does permit consumption of this fish, concluding that

we can resolve this by saying that Rashi in *Avoda Zara* defines *Tzachante* as *chilek*, etc. [It has no fins and scales but will eventually grow them and should therefore be kosher. Why did they ban them? Because

a conglomeration of similar looking nonkosher fish are usually netted with them...] We derive from here that the ban [on *chilek*] was only decreed when the fish is immature and its fins and scales are not grown in yet. At that stage it is indistinguishable from nonkosher fish. But once its fins and scales have grown in, it is easily recognized. In *Yoreh Deah* 114:16 the *Shach* concurs with this position.

Small fish without fins and scales which well eventually grow them, may be eaten according to Rashi, to Rambam in his commentary to the Mishnah, and also to Bartenuro. The implication is that other small fish which have no scales may be eaten, for they are distinguishable from nonkosher fish. All *Rishonim* define the status of *Chilek* in the same say; namely that the ban applies only prior to the inevitable appearance of scales in the mature fish. Similarly *Kaf Hachayim* on *Yoreh Deah* concurs with *Shach*. See also the text of Rambam's *Commentary on Mishnah*:

We ban it because it is netted with similar species which are nonkosher and which are easily confused with it and very few people can distinguish it. However, it must be examined. What needs clarification is why *chilek* is listed in the Mishnah with items belonging to Gentiles. Even if it belongs to Jews it is forbidden!

The same reasoning applies in our case. Tuna are caught when mature, and their scales are easily discernible; they are readily distinguishable as tuna. Consequently, the ban on *chilek* as discussed by *Shach* and all *Rishonim* has no bearing on their status.¹³

Furthermore, there are experts who are quite capable of

13. See *Responsa Menachem Meshiv* (ibid.):

"The tuna that we eat are very large and are totally unlike *chilek* which are immature, not having developed their scales. It is for this reason that they are indistinguishable from nonkosher fish."

distinguishing the kosher *chilek* from nonkosher fish and the Talmud specifically permits them to be eaten:

"Chilek belonging to an expert [non-Jew] may be eaten... (Avoda Zara 39).

The realities of the tuna industry conform to these guidelines. For their own financial interests fish processors repeatedly examine the fish intake of the cannery to assure that they are processing only albacore tuna which conforms to the appearance of standard albacore, as explained above.

Moreover, the Mishnah is referring to a case where we are *certain* that small unkosher fish are netted along with the kosher fish. It is only here that Rashi maintains the rabbis banned the entire conglomeration even if the kosher species is a thousandfold more numerous than the nonkosher one. But in our case, there is no certainty at all that the unkosher species is present in the cannery. On the contrary, the fishermen, the factory workers and the factory owners meticulously seek to package only albacore matching the industry-wide standards. Consequently, it is erroneous to draw conclusions about the halachic status of tuna based on the precedent of the *chilek* ban.

I. The problem of *Bishul Akum*

Perhaps the tuna should be forbidden because it is cooked in the factory by Gentile workers, thus making it *bishul akum*? *Minchat Yitzchak* (3:26:6) rules leniently, based on two considerations: The tuna is cooked in the factory by a work force whose identity is unknown to the consumer. (Editor's note: the reason for the rabbinic edict forbidding consumption of food cooked by a non-Jew is to discourage social intercourse, which could lead to intermarriage — an unlikely result when the cook and the consumer remain unknown to each other). He also notes that the fish is not actually cooked but rather steamed; some latter-day halachic authorities hold that "steaming" is equivalent to "smoking" which is not included in the ban on *bishul akum* (*Darkei Teshuvah*: 14). Rabbi Ovadiah Yosef¹⁴

considers canned fish permissible for the second reason alone and omits the first reason. However, his discussion applies *only to sardines*, for he was told by experts knowledgeable in the methods of processing sardines that prior to their being cooked in cans they are steamed, cooking them slightly until they are fit to be eaten. Thus they are not included in the edict of *Bishul Akum*, for they were already rendered fit for consumption by the steaming process, prior to being cooked in the cans. But tuna, which is cooked in cans in hot water without any prior steaming, according to him may not be eaten.¹⁵ However, other rabbis dissent¹⁶ and do permit the use of canned tuna; the rationale is not that in factory production the customer never meets the cook, but rather that steaming is considered equivalent to smoking.

Apparently the cooking process varies from place to place. Reliable *mashgichim* (Kashrut supervisors) report that the tuna sold here in America is already edible after the first steaming. Reliance on this rationale is a basis for being lenient concerning this ban.¹⁷

14. *Responsa Yabia Omer* 5, *Yoreh Deah* 9.

15. See *Shevet Halevi* 6: 108:6 who writes that currently the manner in which sardines are processed has been changed.

They are no longer salted prior to being prepared but are placed in cans containing oil and are steamed after the cans are sealed shut. The steam causes the oil to boil and the sardines are thus cooked in the oil. Therefore, the sardines should be included in the ban on *Bishul Akum*... Those who rule leniently rely on the principle stated in some *sefarim* that the cooking done in a factory where the food is thus being prepared for tens of thousands of people is not included in the ban of *bishul akum*, where the intent was to discourage intermarriage. However, I heard directly from the *Chazon Ish*, z.l. that we should be stringent in this matter."

16. See *Beit Avi* 3:115.

17. See text of *Yabia Omer* 3 and *Minchat Yitzchak* 4:81. See also *Shabbat* 51a that the law may be different for a "prominent person." Note the discussions in *Shevet Levi* 3, *Minchat Chinuch*, *Shach*, (Ibid. 152), *responsa Divrei Yosef*, *Aruch Hashulchan*, and *Tosafot* to *Shabbat* 51; *Chatam Sofer Responsa Orach Chaim* 15.

J. When the Flavor of Forbidden Foods is Absorbed

One more issue must be considered: when the cans are filled with fish to be brought in to the steam room, they are placed on plastic carts. Although the *mashgichim* in the factories are diligent to see that nonkosher fish are not cooked in the same steaming room with the kosher fish, sometimes the same carts that previously served for cans containing nonkosher fish (such as cat-fish) may be used, (within 24 hours) for cans of tuna. Perhaps there is justification for concern that the flavor of the nonkosher fish will pass from the hot cans into the cart, and later, in a reversal of this process, from the carts into the kosher tuna while it is being steamed?

Chemists maintain that it is impossible for flavor to pass either through a can to the cart or, conversely, to go from the cart and infiltrate a can. If they are correct, then further discussion is pointless. However, let us proceed on the assumption that their conclusions are not completely verified. Jewish law considers that flavor from nonkosher food which passes into kosher food can render it nonkosher.¹⁸ But when the kosher substance is abundant and when the amount of steam in the room exceeds the amount of forbidden flavor that the carts could possibly have absorbed by far more than a sixty-to-one ratio, then the absorbed flavors cannot render the food nonkosher. Nor need we be concerned that sometimes the steam will not be sixtyfold more, for this is just not how it is processed.

The Rashba¹⁹ considers what happens when a small amount of unkosher flavor is absorbed into a vessel. However in our case, the food is not cooked in the carts but in the cans and any non-kosher flavor absorbed by the carts would first have to pass through the abundant steam in the room before it could be absorbed by the cans. In this instance all authorities concur with Rashba's lenient ruling, for the rabbis only banned the use of a *vessel* in this manner

18. *Pitchei Teshuva*; 84: notes; *Nachlat Zvi* at length.

19. *Shulchan Aruch*, *Yoreh Deah* 99, *Responsa of Rashba*.

and did not issue their decree in a case like this.

This distinction would also apply to explain the permissibility of using carts used within the past 24-hours for the processing of nonkosher fish. Normally it is rabbinically prohibited to use a non-kosher pot, even after 24 hours, to cook kosher food. But this prohibition only applies to the pot in which the kosher food is actually being cooked. Here the cans are kosher. The carts do not directly contain the kosher food which is now being cooked. Therefore we assume that this rabbinical prohibition does not apply.

I have previously written a lengthy essay clarifying various rabbinic approaches to the subject of "flavor" and when it is considered the "essence." This subject is beyond the scope of the present essay.

Let us review our conclusions:

Tuna is a kosher fish. Albeit it is processed and canned by non-Jews, we may rely on their very strong motivation and concern to market only the quality of fish which will assure them continued economic viability. Furthermore, the chance of nonkosher fish getting mixed in with the tuna is a statistically remote possibility, so obscure as to be halachically irrelevant. The ban which rabbis placed on the consumption of kosher fish (*chilek*) mixed in with nonkosher ones applies only when the signs of kashrut are not as yet visible in the young fish, but does not apply after signs appear in the mature fish. This ban has been shown to have no pertinence to the actualities of tuna productions. Nor are the strictures of *bishul akum* pertinent, according to many authorities. (However, the Sefardic tradition is generally more strict in applying rules of *bishul akum*, and some Sefardic leaders have announced a ban for their constituents on the consumption of tuna).

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Tumeah Of A Kohen:
Theory and Practice
Rabbi Alfred S. Cohen

Tumeah of a Kohen: Theory and Practice

Rabbi Alfred S. Cohen

Among the more recondite aspects of the Jewish religion is the concept of *Tumeah*, which is usually translated, for lack of a better term, as "spiritual or ritual impurity." Most of the laws of *Tumeah* are delineated in the Book of Leviticus, and many of them concern the special level of purity mandated for kohanim, the priests involved in the Temple service. With the destruction of the Temple, (Beth Hamikdash,) some nineteen hundred years ago and with the elimination of the sacrifices and rituals which required the high level of purity, many of the laws of *Tumeah* have lapsed, all the more so since the means of purification from *Tumeah* have in many cases ceased to be available. Consequently, the awareness of *Tumeah* has all but vanished from the daily lifestyle of even the observant Jew.

But one of the few requirements concerning *Tumeah* which has definitely not been suspended by the destruction of the Beth Hamikdash concerns the biblical injunction that a male kohen not come in contact with a corpse or limb of a dead person.¹ This prohibition is not connected with the Temple service and is not

1. וַיֹּאמֶר יְהוָה אֶל־אַaron וְלְנֹפֶשׁ לֹא יִתְמַא בְּעַמּוֹר

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dependent on the requirement for a kohen to serve any ritual function. It is, and has always been, a special requirement for male kohanim not to become *Tameh* (defiled) through contact with the dead. (The only exceptions sanctioned by the Torah are for his father, mother, brother, unmarried sister, wife, son, or daughter.²) This special mitzvah of kohanim is one which they have taken care, throughout the ages, to observe meticulously.

As stated in the Torah, the *issur* teaches that it is forbidden for a kohen not only to touch a dead body,³ but even to be in the same room. From the sheer volume of rabbinic responsa which have been written on the subject, we may conclude that this prohibition can at times present considerable difficulties for the kohen. Recent decades have brought some surprising permutations to questions which had been raised in an earlier, simpler age.

The present study will address a number of these problems as well as the more novel situations which have arisen, and report the opinions of the Torah scholars as to how the kohen should proceed. Special attention will be given to some of the unexpected problems presented by travel in the jet age. Among the other topics to be covered herein are medical training for a kohen, potential pitfalls in seeking medical attention, employment limitations. Through analysis of the very complex issues involved and suggested solutions, hopefully there will emerge a heightened appreciation for the ingenuity, scope, and precision of the halachic process.

Fortunately, death is not such a common occurrence that the prohibition to be under the same roof as a corpse need present an inordinate burden to a kohen. Under ordinary circumstances in the past, it often amounted to little more than an occasional restriction or modification of his lifestyle. But myriad changes wrought in our

2. But he may only attend their funerals if the body is whole. What if the deceased had an amputated limb? Is the body "whole" if some internal organ has been removed? See *ק"ס* רנ"א; *חולק* ב, *างראות משה* י"ד רנ"א.

Is he permitted to go to the burial if other people are buried nearby? See *างראות משה* י"ד רמ"ט רנ"ב.

3. *רמב"ם הלכות טומאת מת*, פרק ב.

everyday living patterns in recent decades require a reassessment of even the most mundane activities, for hidden halachic pitfalls crop up in unexpected ways. Within the past few years, the Orthodox Jewish world has been made aware of potentially serious difficulties in an area which had seemed quite innocuous — travel. Specifically, the question has been raised whether a kohen may fly in an airplane!

One may well ask, what problem could there be in flying? Yet there are two which might be major: if the plane flies over a cemetery, it might constitute a violation of the purity which the kohen is bound to maintain. Secondly, in the past few years much more than in the past, people are choosing the option of burial in Israel,⁴ and the almost universal mode of transport is via airplane. More often than not, El Al is the carrier chosen. May a kohen who wants to visit Israel fly with El Al? Does he have to be concerned that there may be a body in the aircraft hold?⁵ Does he have to make inquiries prior to boarding?

To explain the problem a bit more fully, we should note that although the coffin is carried in a separate cargo area of the plane, it may nevertheless be *assur* for the kohen to be on board because, according to most rabbinic opinions, the kohen must not come under the same roof as a dead person (*Tumeat Ohel*). Since halacha considers that *Tumeah* "rises", then even if the body is in the underbelly of the aircraft it may render the entire plane *Tameh* as far as the kohen is concerned.

The issue of airplane flight for a kohen has been raised only recently, with the result that not many *poskim* have responded to it in writing. Consequently, it is difficult to establish specific guidelines. It is reported that a Rav in Bnei Brak permitted kohanim to fly El Al, relying on the reasoning that since most planes do not carry coffins,⁶ a kohen is entitled to proceed on the assumption that

4. This is not the place for a full discussion of the wisdom of such a practice, although we should note that at times Rav Moshe Feinstein did express opposition to this practice.

5. *שעריהם מצינים בהלכה ר'ב אותן ו'*

6. On this point, of going according to the majority, see

his plane is free of any problem. But the premise upon which this ruling is based seems highly questionable: the public relations department of El Al estimates that during the winter, when there are fewer flights per week, some 80% of the planes leaving New York for Israel have a body aboard; in the summer, when flights are more frequent, the percentage is about 60%.

This author has been told that one of the *Roshei Yeshiva* in Baltimore allegedly ruled that a kohen may fly in an airplane without concern, because there is a separation between the cargo area and the seating area — the carpet on the floor. (The deck itself, being made of metal, cannot serve as a barrier to the *Tumeah*, as will be explained later.) This carpet becomes a barrier which prevents the *Tumeah* from "rising" any further; consequently, the kohen is not "together" with the dead body.

On the face of it, this argument bears a superficial resemblance to the position expressed earlier in the century by Rav Tzvi Pesach Frank,⁷ which was itself based on the advice which Rav Diskin gave to a kohen who had to ride in a wagon which was to pass over a cemetery. He told him that a plain wooden board (פְּשׁוֹתִי בְּלֵי עַצְמָה) placed underneath the body of the wagon would constitute an effective barrier between the *Tumeah* of the cemetery and the interior of the wagon. However, Rav Shlomo Zalman Auerbach⁸ takes exception to a comparison of the wagon and the plane. A wooden plank, being of a material which does not itself "absorb *Tumeah*" (מקבל טומאה), can be an effective barrier. However, the plane is made entirely of metal, and metal certainly does absorb and transmit *Tumeah*. The carpeting on the floor of the cabin is held in place by the metal underflooring, and because of this cannot be considered as constituting a barrier between the cargo hold and the seating area of the aircraft.

7. פְּרִי מְגִדְּרִים ט"י ק"י פ"ד אֵם בְּרוּכָן צְרִיךְ לְבָרָר אָוֹלִין בַּתְּרַדְּךְ שְׁעָרִים מְצֻוּנִים בְּהַלְכָה ר'ב אֹוֹת ח' חָלָק ר'.

8. חָרָב צְבִי יוֹיָד ר'י'פ.

8. אֲהַלּוֹת וְאַתָּא מְנֻחָה שְׁלָמָה עַיְבָּר ד"ה עָד בְּעַנֵּן הַנִּילָּי based on the Mishnah in *Sukkah* 1:1. This is the same reason that one may not rest the *S'chach* of a *Sukkah* on metal supports — metal "receives" *Tumeah*.

TUMEAT KOHEN

Some kohanim have tried the expedient of calling the airline before the flight to ascertain whether there will be a coffin transported. However, this too is not a fail-safe maneuver. Very often, El Al does not know until an hour or two before takeoff whether there will be a body on board, and this leaves the traveler in limbo. Furthermore, Rav Breisch seriously doubts whether one can rely on the airline personnel to be strictly candid in responding to such a question. Since some passengers might be squeamish about flying on a plane carrying a dead body, they may well decide to suppress such information. "It is well known that the administrators of the airline hide this information from the passengers so that they will not know that a corpse is also flying with them."⁹ Accordingly, some kohanim have taken to calling the undertakers who arrange for burial in Israel, to find out if a body will be transported on a particular flight.

In response to the need for clarification of the issue and in order to obviate any problems which might arise for a kohen, the Institute of Science and Halacha in Israel has proposed that if the coffin were encased in a large plastic box or sheath in the cargo hold, the problem would be eliminated,¹⁰ for the sheath would function as a barrier blocking the *Tumeah* from rising. It is reported that El Al has purchased one thousand such boxes, but only time will tell if these tactics will be considered adequate in the eyes of halachic authorities.¹¹

We have noted that a basic problem for the kohen in travel derives from the halachic principle that *Tumeah* "rises" or "spreads" from the dead body (or part thereof). Accordingly, there would be a problem not only in a plane *carrying* a corpse, but also for one *flying over* a cemetery, or for that matter, for a train or bus

9. חליקת יעקב חלק שני ק"ט ד"ה אבן: משפט עוזיאל יוזיד ב' קכיא.

10. The Institute for Science and Halacha has published a book (see note 13) which suggests solutions for the problems of Kohanim in hospitals. Some of the solutions will be appropriate for other situations as well.

11. Rabbi Auerbach has serious reservations about accepting this lenient ruling. See מגחת שלמה ע"ב.

crossing a bridge which traverses a cemetery.

In assessing the halachic difficulties, it is necessary to get some definitions of the situation, to understand the scope and extent of the difficulties. Some specific questions have to be asked: How far does *Tumeah* rise? How is it contained? How have cognate situations been handled in the past?

In *Berachot* 19b, the Gemara tells about kohanim in Jerusalem who, in their great desire to get a glimpse of the king, used to "jump over the coffins" so as to get a closer look. How were they allowed to do this, wasn't there *Tumeah* rising from the coffins? Here the Gemara explains that there was the space of a *tephach* (about 3-5 inches) between the body and the top of the casket, and this space created a barrier to the spread of *Tumeah*. From here we learn that if there is the space of a *tephach* separating the dead from a wall or other partition, that puts a stop to the spread of *Tumeah* — but only insofar as biblical law (*d'oraitha*) is concerned. For fear that a kohen might not be careful enough, the rabbis enacted an additional regulation to the effect that even if there does exist a *tephach* space between the dead person and a wall, the *Tumeah* spreads anyway. However, this *Tumeah*, being rabbinic and therefore of lesser potency, may be waived for the sake of a mitzvah — in the talmudic case, to see the king.

Moreover, this precedent is not sufficient for us to be able to consider the *Tumeah* emanating from a casket as only rabbinically but not biblically forbidden. *Tosafot*¹² comment that the kohanim were permitted to "skip over the caskets" because these were undoubtedly not entirely closed. If the container or room in which a dead person lies is completely closed, a different rule applies: it is then considered a "sealed grave," a "*kever satum*" from which *Tumeah* does most definitely rise. Nor does a *tephach* within the container halt the spread of *Tumeah*.¹³ Since all caskets nowadays

12. ברכות יט.

13. Differing opinions on a "*Kefer Satum*" are discussed by R. Levi Yitzchak Halperin in פתחות טהרה (Purity of the Gates), Institute for Science and Halacha, Jerusalem, 1978, p. 80. An additional extension of the *Tumeah* of a

are shut tight, we cannot employ this rationale in seeking a lenient ruling. In fact, most if not all *poskim* conclude that *Tumeah* does rise from a coffin and from a cemetery, and this *Tumeah* is probably biblical in degree.

How, then, can *Tumeah* be contained? The operative principle which is most germane to a solution of this problem is that any material which does not itself "absorb" the *Tumeah* can serve as an effective barrier to its spread. But if the object itself receives the *Tumeah*, it cannot be efficacious as a barrier. In the words of Ramo:¹⁴

כל דבר המקבל טומאה אינו חוץ

Anything which receives *Tumeah* cannot separate [the *Tumeah* from its surroundings].

Included in this category of "ineffective barrier" is anything made of metal, even if it is only plated with metal.¹⁵ Furthermore, a vessel or receptacle, no matter how large, cannot act as a screen to stop the flow of *Tumeah*.

However, there is a potential mitigating factor of great import in the present circumstance and, for that matter, in many of the questions concerning *Tumeah* for a kohen: there is substantial

corpse mentioned in *אהלות*, פרק ז טומאה לעזתא. Ultimately, the body will have to exit the room, to be buried. The pathway which will be taken by those transporting the body out of the room also becomes *Tameh*, even before the body is carried out. However, in a plane the coffin will be removed via the cargo door, so this will not affect the status of the passengers. However, in a ship or a hospital, the body may have to be taken through halls, stairs, decks, and elevators, spreading the *Tumeah* considerably. There is discussion among the *poskim* whether this applies to *all* the doorways and halls the body passes through, or maybe all the possible exit ways. Some question whether the principle affects the status of the kohen at all. See הר צבי השולחן שע"ט: שדי חמוד ערך ט, כלל מד. See also last paragraph of יוז"ד רפ"ג. Aggrotot meshah, Avnei ha'ozar chalik י"ס ל"ד.

14. יוז"ד שע"א ז ק.

15.. writes about an alloy or mixture of metal with other substances. Aggrotot meshah יוז"ב קע"ה rules that we consider the object to be composed of its majority component.

rabbinic opinion to the effect that the corpse of a non-Jew does not convey *Tumeah* at all, or at least not to the extent of a Jewish corpse. It is evident that resolution of this point of law is crucial in arriving at a halachic decision on the matter.

Already in the Gemara¹⁶ there is recorded a debate on this very issue, although no conclusion is offered. The *Shulchan Aruch*, while indicating that it is not forbidden for a kohen to be in contact with the body of a non-Jew, nevertheless warns that "it is proper to be careful"¹⁷ and the *Ramo* in his gloss adds "and it is proper to be strict."¹⁸ Because these are worded as *admonitions* and not *rulings*, it is clear that the two major halachic decisors do *not* consider the body of a non-Jew as rendering *Tumeah*, however desirable it might be to avoid it. Consequently, this diminishes the extent of the problem of flying over a cemetery, since the overwhelming majority of them will not be Jewish.

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The problems which have been discovered in airplane flight, while novel, are really just a new twist in the perennial problems which travel has raised for kohanim. These problems have proliferated over the decades and centuries, but there does not seem to have evolved a uniform rabbinic resolution to them.

In the last century, Rabbi Yitzchak Elchanan Spector (the Kovno Rav) wrote that he would be willing to sanction a kohen's traveling on a train which passed through a cemetery, if two other rabbis would concur with the ruling.¹⁹ A mitigating factor, as far as he was concerned, was that the cemetery in question was not a Jewish one. As we have seen, many *poskim* tend to be lenient on this point. Writing about a kohen's flying over a cemetery in a plane, Rav Breisch comments that "it seems that people are not

16. יבמות ס"א.

17. יי"ד שע"ב ב'.

18. שם.

19. אלמד להועיל וייד קלג אותן ג' חון איש וייד רבייא אותן ח' הר צבי וייד ר'פ; שואל ומשיב חלק ג' ב"מ"ג.

careful about this, and they have [adequate precedent] upon which to rely.”²⁰

Despite this trend, there have been outstanding *poskim* who disagree: the *Chazon Ish* forbade it²¹ and there were others who objected to the ruling of the Kovno Rav.²² When a new highway was being built over an ancient burial ground in the nineteenth century, the Maharam Schick advocated exhumation and transfer of the coffins — ordinarily a very strict prohibition — rather than permit a road to be constructed in a place where kohanim would be exposed constantly to the *Tumeah*.²³

A further complication to the whole question of travel in a bus, train, or plane which pass through or over a cemetery is the fact that a moving object (such as the vehicle), according to some opinions, is not a sufficient barrier to the *Tumeah*. The controversy arises from a discussion in the Gemara²⁴ concerning an *eruv techumim*. On Shabbat a Jew is not permitted to walk beyond the city limits more than 2000 *amah* (about 7/8 mile), unless before Shabbat he deposited some articles of food along the road — an *eruv techumim*. If he has done so, he is able to continue for another 2000 *amah*. However, the food for the *eruv* must be accessible to the person; in the particular talmudic case, the person was a kohen and the food was deposited in a cemetery adjacent to the road. Was it a valid *eruv*, since the kohen could not enter the cemetery and thus would not have access to it? R. Yehudah opines that it was still valid because theoretically, if the kohen were transported into the

20. חילقت יעקב חי"א ס' יב אות ח.

21. ר' י"ד ר"א אות ט.

22. צץ אליעור יב - ס"ב, ס"ג who discusses a similar problem for a kohen in a bus, as well as the problem of trees from a cemetery overhanging the road, and what effect it might have on the question. See also חותם טופר שם: האלף לך שלמה י"יד ש"ב מג"א שי"א; שע"ב - ב: חותם טופר שם: האלף לך שלמה י"יד ש"ב for discussion about a room adjacent to a room in which there is a body; whether this situation is similar to two cars in a train is discussed in שערדים מוציאים בהלכה ר"ב מהר"ם שיק יו"ד שנ"ג.

23. מהר"ם שיק יו"ד שנ"ג.

24. ערוביין בו.

cemetery in a box, he could retrieve the food. At that point, the Gemara objects that a moving barrier cannot be considered an adequate divider (קָسְבָּר אֹהֶל זָרוֹק שְׁמֵי אֹהֶל). However, another viewpoint recorded in the Gemara maintains that even if the box or screen is moveable, it might nevertheless qualify as a barrier and the kohen remain undefiled inside the container.²⁵

The latter opinion is not accepted by the majority of rabbis, neither in the Talmud nor in the Codes; in writing his compilation of Jewish law, the Rambam rules²⁶

הנכנס לארץ העכו"ם בשידעה תיבת ומגדל הפורחים באוויר
טמא, שאהל זרוֹק אַיְנוּ קָרְוִי אֹהֶל

if someone enters a forbidden area in a "box or tower that move through the air" he becomes *Tameh*, because a moving container (אֹהֶל זרוֹק) cannot qualify as a sufficient barrier, and thus he is not shielded from the *Tumeah*.

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When rabbinic scholars approach a question of Jewish law, they often do not address it from one angle only. Rather they are apt to take into account also other general principles of halacha which transcend the specific issue. These general principles of halachic jurisprudence require deeper explication than is possible here, but we shall allude to one which has been discussed in the context of the *Tumeah* of a kohen.

25. ל: שם נויר נה. It is interesting to note that this law is not codified in the *Shulchan Aruch*. Tosafot consider that the debate in the Gemara is only about a moving container after it comes to rest whether it can separate the *Tumeah* from others. Tosafot consider that all agree that while it is in motion it cannot serve as a barrier. In this respect it is like a flying bird as discussed in Mishnah *Oholoth*, chapter 8, first mishnah.

26. רמב"ם, הלכות נירות וט. Also הלכות טומאת מת יאה. See רמב"ם, הלכות אבל גי, נויר מג; משנה למלך יאה; פבי יהושע if this is a biblical or a rabbinic stricture.

It is contrary to Torah law to get any pleasure or benefit whatsoever from idolatry. In *Pesachim* 25b, the Gemara takes up the question of a person who passes by an idolatrous temple and whiffs the aroma of its incense, which is a forbidden pleasure. Is he liable for sniffing the aroma? It depends, responds the Gemara: **אָפָשָׁר וְקָא מִיכְוִין** — if he could have gotten to his destination by taking a different route and, when he passed by the altar, if he intentionally sniffed its incense — then he is definitely guilty of a transgression. Even if **לֹא אָפָשָׁר וְקָמִיכְוִין** he could not have gone by a different path but nevertheless, when he passed by he did intend to enjoy the aroma, once again he is culpable. However, **לֹא אָפָשָׁר וְלֹא קָא מִיכְוִין** if there was no other way he could go and he had no intention or desire to sniff the incense, then it is permissible for him to go, and he incurs no sin.

In their analysis of the talmudic text, the Tosafot limit these terms somewhat: “It was possible for him to go another way” means that he could have found an alternate route without excessive bother (*טֹרֶח*). And as concerns his “intent”, there cannot be any question about a person’s intent if a situation is inevitable (*פְּסִיקָּה רִישָׁה*). If the result is automatic and inevitable, it is considered that the person intended it to happen. These refinements of the terms by Tosafot are accepted as the proper meaning of the talmudic passage.

Rav Breisch and Rav Gifter, of the Telzer Yeshiva in Ohio, engaged in an extensive exchange of letters, debating to what extent the talmudic passage cited above impacts on the situation of a kohen’s difficulties in travel, and whether we may draw some halachic precedents from it.²⁷ Does the kohen really have a choice about his mode of travel, or his selection of carrier? Does he have to go by boat or train, or switch planes a few times, in order to avoid the problem of flying in an El Al plane? Is it really his intent to be on the same plane with a coffin, and does that make any difference in the halacha?

Rav Breisch was inclined to see the lack of viable alternative

27. *חֲלַקְתִּי עַקְבָּה חֲלַק בָּה קָעִים - קָעִים*.

methods of travel as well as lack of any benefit for the kohen in traveling on the same conveyance with a coffin as mitigating factors, which might permit such travel for a kohen. Rav Gifter, however, was adamant in refusing to accept this rationale as an excuse to permit a kohen to fly in the same plane as a coffin.

Safek Tumeah

In most issues of Jewish law, if an element of doubt arises concerning the facts, we tend to be strict if infringement of a biblical requirement is involved (**ספק דאורייתא לחומרה**) but more lenient if the doubt exists on some issue of rabbinic enactment. The one exception to this rule is *Tumeah*. When there is a question about *Tumeah*, the principle which determines whether to be strict or lenient depends on the *location*. If the doubtful situation arises in a private domain (**רשות היחיד**) then the person is considered definitely *Tameh*,²⁸ but if it occurs in the public domain, he is "pure" (*Tahor*).²⁹

Now, then, what type of "domain" is a bus or a plane? On the one hand, it fits the description of a "private domain" since it is an enclosed place. Yet, in a different sense it is a "public domain", for the Gemara rules that if three or more people are present, it is public.³⁰ If the latter designation applies, it would result in more lenient rulings, for "in case of doubt of *Tumeah* in a public place, it is permitted." In practice, however, there has been a certain degree of hesitancy on the part of rabbis to accept and apply this leniency categorically.³¹

Moreover, it is important to note that this leniency can pertain only to the question of passing over a cemetery in a conveyance and

תוספות, חולין ט: ד"ה החטם.

29. See regarding the application of this halacha, and Tosafot שוטה כה: נזיר לו: who maintain that if it occurs at night, we are always more strict. 30. *Yeshuah v'Yeshuah*.

30. יג ינש

31. וְאֶת בְּנֵי קָרְבָּן בְּנֵי קָרְבָּן הַלְקָתָת יַעֲקֹב בְּ קָעֵט Rav Breisch writes to R. Mordechai Gifter that even if the three persons are women or non-Jews, the rule holds true.

has no effect on the separate issue of flying or riding in a vehicle which contains a deceased person.

Ultimately, on the question whether a kohen may enter a plane on which there is a good chance that a body is being transported, lenient rulings are not easy to come by. Rav Moshe Feinstein writes:³²

It is forbidden for a kohen to enter there, because all the airplanes... have a place underneath where the packages are placed, and a corpse [might] be there... It is all one vessel, and it is made of metal which absorbs the *Tumeah*, and consequently [the metal] does not separate the *Tumeah*, and thus the kohen becomes *Tameh*.

Parenthetically, we should note that Rav Feinstein himself suggests a possible argument which would attenuate his strict position, but he refuses to accept it because he finds no precedent for it in the Talmud: One could argue that since the Torah enumerates specific metals — gold, silver, copper, iron, stannum and lead — only these metals and none other acquire the *Tumeah* which they enclose. One could theorize that a plane constructed of aluminum or some other metal not listed by the Torah does not absorb *Tumeah*. However, Rav Feinstein rejects this rationale,³³ and Rav Breisch concurs that this cannot be the basis for a *heter*.

What should a kohen do if in the middle of his trip he discovers that a body is being transported along with him? Must he disembark at the first possible stop? Obviously this is not a modern dilemma only, and could easily have arisen in the past. In fact, much has been written on it. Rabbenu Tam³⁵ rules that a kohen

32. Regarding an *Ohel Zaruk* and whether it serves as an enclosure, Rav Feinstein in *אגירות משה ז"ד*, קנ"ד says very little need be said, since the Kohen boards the plane when it is not in motion and becomes *Tameh* right away. See

שערם מצוינם בהלכה ר"ב, אות ח' ד"ה וא"י מותר לכהן.

33. שם.

34. חלקת יעקב חלק ב' ק"יב.

35. שבועות י"ז, נויר מב.

who knowingly remains in contact or on a vessel with a dead body, thereby violates his priesthood. Ramo writes³⁶ that "if a kohen is sleeping and a person dies in the same house, others must wake him and tell him so that he can leave." These dicta clearly indicate that the traveler must leave his conveyance at the first feasible opportunity. However, many rabbis note that if the traveler will be stranded on the road or if it is very cold outside, he might rely on the opinion of the *Shach* who considered it an *issur* of rabbinic (and not biblical) origin, which is of less severity. In cases of great discomfort or inconvenience, therefore, the regulation might be waived.³⁷

Our study of rabbinic writings leaves no room for doubt that the *issur* for a kohen to travel in a vehicle with a dead body has been universally accepted. *Poskim* even debate whether the kohen needs *kapara* (atonement) if he unwittingly found himself in such a situation.³⁸ They conclude that formal *kapara* is not required, based on the position of the *Shulchan Aruch*³⁹ that *kapara* is due only if the person knew that he should take precautions and failed to do so.⁴⁰

Taking the issue one step further, for many *poskim* it is so obvious that flying on a plane with a body is *assur* for a kohen that they go so far as to question whether *any* Jew is permitted to put a body on a plane — inadvertently causing a kohen to transgress. Since no Jew may do anything which could cause a fellow Jew to

36. *שע"ב* - *א*.

37. *פתחי תשובה* שיע'בג, שורת מהרי"ץ חיות כב, שער הוקנים חלק ב' דף צ"ו.

See also על אבלות סימן ה הערכה 18; שם, אותן ז'ות. There he discusses whether one must inform a *chazan* who is a Kohen, and leading the services on Yom Kippur, that someone has died in the synagogue. Perhaps he should be allowed to continue without being informed? Similarly, he discusses whether Kohanim should remain in shul to "duchan" if suddenly someone dies.

38. *חולקת יעקב* ב'יק"ט, ד"י"ג.

39. *י"ז קפ"ה*.

40. Whether or not we can apply this lenient ruling to flying on planes bound for Israel in this day and age is questionable.

sin (לפנֵי עֹור), would it not be a violation to place a coffin on a plane?

In answer to this question, Rav Breisch⁴¹ permits it, based on a precedent set by the *Taz*, who ruled that "it is permitted to give charity to a poor person even if he is in doubt whether the beggar will wash his hands before eating, for the doubt [whether the beggar will fulfill the mitzvah of washing] cannot exempt one from the certain obligation to fulfill the mitzvah of *Tzedaka*."⁴²

We see from this that one may take a chance on being the instrument for causing another person's sin, if in doing so, he will fulfill a mitzvah himself. In the plane situation, there also exists a doubt — maybe there won't be a kohen on board — and arranging for the burial of the dead is a great mitzvah;⁴³ therefore, one may proceed without qualms.

There is one further "escape hatch" which has to be considered in dealing with laws for kohanim, relating not just to travel situations, but to all the problematic situations which the kohen might encounter: maybe the kohanim of today are not "real" kohanim?

In past ages, many Jewish families proudly maintained their "family tree", a detailed genealogical list which was passed on from generation to generation, to substantiate their lineage. At that time, it was felt that a kohen could prove without doubt his unimpeachable descent. Today, however, it is rare for a kohen to be

41. *חֲלַקְתִּי עַדְךָ חֲלֵק בְּ קִיט*.

42. See *שֶׁמֶן אֶכְרָהָם*, *שֶׁמֶן אֶכְרָהָם*, who even permits giving charity and food to a beggar even if one knows that he will not wash his hands prior to eating, due to ignorance. See also *צִין אֶלְיוֹן חֲלֵק בְּ ס'ג* who discusses whether a restaurant owner may sell food to customers who he knows will not wash their hands before eating.

43. See if the prohibition of *לפנֵי עֹור* applies in a case where it is *לֹא שָׁאַלְנוּ שָׁוָה בְּכָל*.

See also *שְׁעָרִים מְצֻוִּים בְּהַלְכָה ר' ב' אֶת ח' ד' ח' הַמּוֹבְּלִים מֵת בְּאֹירָן* also. However, one should note his caution in *אֶת כ'* to a Kohen not to enter a tunnel if he knows that there is also a hearse in the tunnel, transporting a body.

able to do so. It is possible that two or three generations ago a grandfather of the kohen might have married a woman forbidden to him, and doubt arises whether his offspring are indeed entitled to be considered pure kohanim.⁴⁴ Should we take this element of doubtful lineage into account in applying the laws to kohanim today? Some rabbis bristle at the very suggestion: "G-d forbid that we spread calumny about the lineage of kohanim in this age."⁴⁵ On the other hand, there are quite a number of rabbis who do take the element of doubt into account in weighing their decisions regarding kohanim.⁴⁶

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Let us turn now to other areas of concern for the kohen in trying to preserve his "pure" status in the modern world. In some ways, this has become more difficult in the complex, urbanized society in which we live in the twentieth century. The following discussions are intended only to highlight some new areas of concern for the kohen.

Hospitals

Since invariably some of the people who are treated in

44. Do the laws of a Kohen apply to a Kohen-mamzer?

See **אבן העור טז** ז' ויד'ו. **דבר אברהם כ'יו;** **שוחית עוגן יום ק'כ'** If a Kohen has a physical blemish which would have disqualified him from serving in the Temple, he is nevertheless definitely included in all the regulations for Kohanim. However a *chalal* is definitely not (a *chalal* is the child of a Kohen who married a divorcee or some other woman forbidden to him).

45. כלל צ"ב כ"י מערבה חמץ שדי.

46. שדי חמד חלק ג: 183-188; חילך יעקב א-יב. חותם סופר ייר' ק' נ' א' challenge the notion that we should consider Kohanim today as "doubtful" concerning their lineage (and therefore be lenient about the laws of *Tumehah*). If we consider a Kohen as only possibly a true Kohen, we ought to apply the same standard to a female Kohen, and say that if the daughter of a Kohen gives birth to a son, he must have a *pidyon haben* because maybe he is not descended from a Kohen. Since we don't do this for a female, we cannot cast doubt only on the males.

hospitals do not recover, these are considered as places where a dead body is likely to be found. Does this mean that a kohen should not check into a hospital for treatment (of a *non-life threatening* illness), since there might be a body in the morgue? Even if no one has died that day, difficulties can arise from limbs which are amputated or which may be in the hospital lab, for parts of a body convey the same *Tumeah* as the corpse itself. (Of course, if his life is in danger, there is not the slightest question that he may seek treatment). This is a practical question whose solution is of primary concern for every kohen.

We have already noted that most *poskim* have concluded that the presence of a non-Jewish corpse does not render a kohen *Tameh*; this conclusion opens the way for permitting kohanim to utilize hospitals freely for (certainly outside the land of Israel) the majority of patients there are not Jewish. Relying on the majority rule, we posit that the bodies in the morgue are probably not Jewish, thus removing any problem.⁴⁷

Another basis for being lenient in this regard derives from the position of the *Shach*⁴⁸ who contends that if the kohen is not in the same room with the dead but only in an adjacent one, albeit under the same roof, a violation of rabbinic law takes place, but not of biblical law; while most *poskim* do not accept his contention, at times they do let it serve as a contributing factor for a lenient ruling. In order to abide by a rabbinic enactment, a person is not obligated to expend extraordinary amounts of money, such as would be required for equivalent medical care at home, nor does he have to endanger his health, as he would have to do if he could not enter the hospital for treatment. (If it were a biblical violation, his health or wealth would not necessarily be sufficient reasons for waiving the *issur*).⁴⁹

47. שבות יעקב א-צח; אגרות משה יי"ד ב'יקס"ו; חלקת יעקב א-כו.

48. ש"ר יי"ד שע"ב.

49. For discussion of the question of the wife of a Kohen giving birth in a hospital, see *ר' וקרא כא* and the commentaries thereon, as well as *אוי"ח שמ"ג* as well with particular attention to the *מגן אברהם*.

Kohen-Doctor

In all cultures and in all ages, the medical profession has been revered and admired. Small wonder, then, that many young Jewish persons aspire to join this noble calling. Are there any grounds for condoning a kohen's becoming a doctor? Not only does the training require him to dissect cadavers, but he will also constantly be exposed to (at least to risk of) dead bodies in the hospital where he practices. There is virtually no rabbinic authority who sanctions medical training for a kohen, despite the hardship this decision may bring.

A number of years ago, a certain *kuntress* (pamphlet) was published on this question and came to the attention of Rav Shimon Schwab of Washington Heights, who sent it to Rav Moshe Feinstein for comment. Rav Feinstein at first refused to read it, vehemently rejecting the very premise of the *kuntress* that medical training for a kohen might be permissible.⁵⁰ His immediate reaction was that it is so obviously forbidden that even were the greatest rabbis in the world to try to permit it, we would not consider their opinion. He compared it to a passage in the Gemara (*Yevamot* 104) which declares that even if the Prophet Elijah himself appears and expounds a law contrary to our prevailing custom, we are not to listen to him.

At first, Rav Feinstein was under the impression that the author's thesis was that since all Jews nowadays are considered to be unavoidably *Tameh* anyway, there is no reason not to increase their *Tumeah*; this premise he dismissed as totally unacceptable.⁵¹

50. אגרת משה ז"ד ג, קנייה.

51. The Raavad, contemporary of the Rambam, expresses the notion that once a person is *Tameh* he is totally *Tameh*, and there is no addition to it. This would mean, then, that since every Jew today is considered as being unavoidably *Tameh*, the Kohen would not need to be careful about the laws of *Tumeah*. None of the early rabbis (*Rishonim*) and none of the later ones (*Acharonim*) accept this position. Interestingly enough, however, some rabbis were willing to take his opinion into consideration as a mitigating factor (although never the deciding one) in ruling for a Kohen.

ראב"ד פרק ה' מנירות י"ז; משנה למל, אבל, ג-א; כתר כהונה אותן ביז"ד
See

However, finally he acceded to the request to respond to the specifics of the *kuntress*.

Rav Feinstein notes that the author attempts a lenient ruling based on the argument of *pikuach nefesh* — that the kohen-doctor would be able to save lives. This reasoning, too, he rejects as “emptiness and nonsense” (הבל ושטוות). One is only obligated to heal the sick if he knows how; there is no requirement for any person to go out and study medicine so that he will be able to practice it! In the same way, one is not obligated to go out and earn money to become rich so that he will have what to give a poor man; rather, if he has money when a beggar asks, then he must give him.

He also responds to the contention that many leading kohen-rabbis in the Middle Ages (*Rishonim*) were practicing physicians⁵² by noting that in those days, medical training and practice did not entail dissection of bodies nor treatment of the ill in hospitals.⁵³ Consequently, medieval medical practice did not necessitate exposure to the many halachic prohibitions which would be presented to the kohen today.

In the early part of this century, Rabbi David Z. Hoffman wrote that he was asked whether a kohen who was presently studying in medical school could receive the synagogue honor of

Furthermore, the *Mishneh LeMelech* and the *Nodah Biyehudah* maintain that it was never the intention of the Raavad to permit a Kohen to add *Tumeah* to his previous *Tumeah*. Rather, he only meant that the Kohen does not receive the punishment of *malkot* (lashing) for doing so. This conclusion is based on the Raavad's *Tamim Deah* 236.

52. A comprehensive list of early rabbis who were doctors although they were Kohanim can be found in *Jewish Medical Ethics* by Rabbi Immanuel Jakobowitz, chapter 20, footnote 27.
53. For an elaborate discussion of the topic of a kohen in medical school, see the *כל בו על אבלות טימן ה*, *אות כ"ב* where the author finds no justification for any lenient ruling. *יד רמה י"ד קכ"ט* forbids a Kohen to attend any school where there is a skeleton present (quoted by *ג"כ*), although not everyone agrees that it is forbidden for him to be in the same room as a non-Jewish body.

being called up to the Torah as a kohen.⁵⁴ In his responsum,⁵⁵ Rabbi Hoffman expresses reservation about how strong a protest ought to be made about the kohen's attendance in medical school, since we may be fairly certain he will not change his ways, convinced as he is that his undertaking is noble. Furthermore, Rabbi Hoffman distinguishes between one who is presently in school and one who has already completed his studies, for if we honor a person who is currently violating the halacha, it may look as if we are giving credence to his (mistaken) belief that he is allowed to attend. However, the situation is not analogous for the one who has already graduated; in this case, Rabbi Hoffman feels we may be lenient.

The question of training for dentistry, while presenting similar difficulties, is not quite the same. Dental practice itself scarcely poses any danger that the kohen will have to come in contact with the dead, but the training does usually involve extensive dissection of cadavers. However, possibly one could argue that if the kohen had a lab partner who did all the physical dissection while he watched, it might be permissible, since the cadavers are almost certainly those of non-Jews. However, many *rabbanim* advise kohanim not to undertake such a course of action.

If despite the negative indications about medical training, a kohen has nevertheless completed his studies, he is faced with additional painful decisions in the conduct of his practice. Is he permitted to enter the room of his patient who is in death throes? May he enter after the demise in order to certify the cause of death?

54. The question of refusing to call the medical student up as a Kohen for the reading of the Torah does not hinge upon his open violation of Torah law; if he were a known eater of bacon there would still be no question about calling him up to the Torah as a Kohen. But a Kohen who openly violates the laws regarding his status as Kohen is not entitled to be given the honor of a Kohen. Other questions such as this have also been addressed by halachic decisors: May a non-Sabbath observant Kohen go up to the *Duchan*? *אגורתה משה או"ח זי"ט זי"ז*. May a non-believer get an *aliyah* *כב זי"ח זי"ג*? *צ"ץ אליעזר זי"ט זי"ז*. Also, *כב זי"ח זי"ג*. *כ"א*, *ז"ט זי"ח זי"ג*.

55. *מלמד להוציא או"ח ל"א*.

Are conscientious Jews permitted to call in a kohen-doctor to examine the body for the purpose of signing a death certificate, or would they be guilty thereby of tempting a fellow Jew to violate the Torah, which is in itself a transgression for them? (לפניהם עור)

Everyone agrees that until the patient is actually dead, there is no *Tumeah* in the room. Nevertheless, the Gemara (*Nazir* 43) debates whether by merely entering the room where a person is about to die, the kohen has not desecrated his priestly status. In the *Shulchan Aruch*,⁵⁶ the law is codified that

מ"מ אסור ליכנס לבית שיש שם גוסס

It is forbidden [for a kohen] to enter a house wherein someone is dying.

Here the *Ramo* adds,

Although there are those who permit it, it is good to be strict on this.

However, there is no dispute that if the kohen enters the room with the intent and hope of treating the ill person, he may do so. This is true even if there is another physician available, for the patient's own personal doctor is always preferred above any other, his treatment being considered most effective and desirable for the patient.⁵⁷

But once the patient has died, the kohen must definitely avoid entering his room. Only if the government will not allow the dead to be buried without a medically certified death certificate and there is no one else who can do it, may Jews call him in to perform this task. In this case, the dispensation arises from the great disgrace of leaving a Jew unburied — the Torah commands even the High Priest to defile himself in order to attend to the burial of a *met mitzvah*, a body which will not be buried without his personal intervention.⁵⁸

56. שלחן ערוך יו"ד ש"ע.

57. For various opinions, see קי"א.

58. מ"מ מ"מ. A *Met Mitzvah* is a corpse which has no one to take care

Employment

Are there any reasonable grounds for a kohen to accept employment in a hospital, even not as a doctor? Indeed many *poskim* forbid a kohen from taking such a job. R. Moshe Feinstein⁵⁹ opines that even if it is "only" a rabbinic *issur*, there is still no sanction for violating a precept just to earn a living. However, he would allow him to take the position provided he could leave the building as soon as someone died there. There are others⁶⁰ who consider it *assur* because of the limbs or body parts that are often in the hospital; however, outside the land of Israel, one could probably be lenient on this point, since the majority of bodies or limbs would be those of non-Jews; as we have noted, most *Acharonim*⁶¹ rule that we can be lenient regarding the cadavers of non-Jews.

A different approach to this question also appears in other responsa: when the kohen starts working on his shift, we may assume that there are no dead bodies in the hospital, and he is permitted to be there. If in the course of the day people died and the kohen were obliged to leave, his departure would endanger the welfare of the patients in the hospital; this would justify his staying on the job. However, this line of reasoning only applies to a kohen whose work is essential for the welfare of the other patients, and the rationale cannot be extended to all kohanim.⁶² The *Kol Bo*, however, does find grounds to justify a kohen's taking employment in a large hospital⁶³ and even permits him to accept a chaplaincy there.⁶⁴

of its burial. Jewish law requires that the first person who passes by even if it is the *Kohen Gadol*, the high priest, must immediately see to it that the body is buried.

59. אגרות משה יו"ד רמ"ח.

60. שערם מצוינים בהלכה רב נ'.

61. רגול מרכיבה שע"ב נ' ב: ערך השולחן ה' תשובה רע"א ח; אבני נור יו"ד תכ"ח.

62. שו"ת טוב טעם ורעת, ספר ג' חלק ב', ריב' ב.

63. כל בו על אובלות או.

64. שם, אות ז'.

Transplants

A question which could not have been asked forty years ago is potentially of great concern for kohanim: is it permissible for a kohen to get an organ transplant? Halachically this might present a major problem even if the organ were removed from a live donor, for once removed, the organ is considered "dead" and thus transmits *Tumeah*.⁶⁵ In an undated responsum, without indication to whom he is writing, Rav Feinstein addresses this problem; after lengthy examination of the principles involved he does permit the transplant, explaining that since the organ will be placed within the body cavity, there will only be "*Tumeah be-luah*", *Tumeah* which is covered up and hence no longer subject to the ordinary rules of *Tumeah*. He follows a somewhat different line of reasoning for a transplant which will not be internal, such as a cornea, but he does ultimately permit it.⁶⁶

Rav Unterman, at the time he was Chief Rabbi of Israel, expressed his opinion that an organ that can "come alive" again after transplantation cannot logically be considered "dead" and therefore transmits no *Tumeah*.⁶⁷

Kohen-Soldier

While the establishment of the State of Israel has brought untold benefit to millions of Jews, the creation of a totally Jewish society has engendered novel situations which the halacha must address. One of these concerns the kohen in Israel, where universal conscription makes it virtually inevitable that a goodly number of kohanim will serve on the front and be involved in warfare. The *Shulchan Aruch* teaches that a kohen who has killed someone, even

65. According to the *nedor u-bi-horaah* יו"ד ר"ט the prohibition for a Kohen to come in contact with a dead limb extends even to his *own!* The only exception is a tooth. See *הר צבוי יו"ד רע"ז* *מגשנה אוללות גג* as well as *אגרות משה יו"ד ר"ל*; *הר צבוי יו"ד רפ"א*.

66. See also *אגרות משה יו"ד ר"ל*; *הר צבוי יו"ד רפ"א*.

67. *שבט יהורה שער ראשון כ"א*.

accidentally, may no longer go up to the *Duchan* to bless the nation:⁶⁸

בָּהָן שָׁהָרַג אֶת הַנֶּפֶשׁ אֲפִילוֹ בְּשׁוֹגָג לֹא יִשָּׂא אֶת כְּפִיו אֲפִילוֹ
עֲשָׂה תְּשׁוּבָה.

However, Ramo amends this ruling somewhat.⁶⁹

וַיֹּשֶׁ אָמַרְתִּים שָׁם עֲשָׂה תְּשׁוּבָה נֹשָׂא כְּפִיו... וַיֹּשֶׁ לְהַקֵּל עַל
בָּעֵל תְּשׁוּבָה שֶׁלֹּא לְנַעַל דַּלְתָּה בְּפָנָיהם, וְהַכִּי נָהָוגָ.

There are those who say that if he did *teshuva* [repented] he may [recite the blessing]... and we should make it easy for those who repent, not to shut the door in their faces; and this is the custom [i.e., to allow them to go up to the *Duchan*].

If the *Shulchan Aruch*'s dictum were to be followed stringently, it would have the effect of imposing a severe penalty on kohanim who have served on active duty in the Israeli army. In seeking redress for this problem, the *poskim* have to determine whether the law applies regardless of whether a Jew or a non-Jew is killed, what is the "repentance" which is required, and whether the reality that the kohen was acting in self-defense makes any difference in the ultimate halacha. A most exhaustive study of the entire problem was undertaken by Rabbi She'ar Yashuv Cohen in *Techumin*,⁷⁰ where he explains the viewpoints of numerous rabbis who find reason to allow the soldier to go up to the *Duchan*. Rabbi Ovadia Yosef, in dealing with the question, arrives at similar conclusions.⁷¹

68. אוֹיֵח קְפִיָּה לְיִהָ.

69. שם.

70. Volume 6 (ח' שטמ"ה).

71. בָּהָן חַלְקָה הַיּוֹם, ט"ז. In this he also discusses the status of a Kohen who accidentally killed a fellow Jew while driving a car. Here the situation is not so simple: a great deal will depend on the culpability or negligence of the driver, whether he was the cause or contributing cause to the fatality, or whether it was totally beyond his control. The judgment of the secular court in determining guilt is also to be taken into consideration.

This brief survey of the laws of *Tumeah* as they pertain to a kohen in modern times is certainly not intended to be an exhaustive study. It has been our intention simply to draw attention to some new variations of an age-old situation. In reviewing these problems, we are stirred by the hope that the time will soon come when "death will be vanquished forever," and these laws will become obsolete. At that time, kohanim can look forward to learning and implementing those other laws which are given exclusively to them — the laws of *Avodah* (service) in the Beth Mikdash.

Skin Grafting And Skin Banks
In Jewish Law
Rabbi Fred Rosner

Skin Grafting And Skin Banks In Jewish Law

Dr. Fred Rosner

In the first volume of a compendium of halacha entitled *Techumin*¹ published in Israel in 1980, Rabbi Shaul Yisraeli wrote an article entitled "The Treatment of Burns by Skin Transplantation from the Dead." The question posed to Rabbi Yisraeli was whether or not it is permissible to prepare human skin from deceased people and store it in skin banks so that it is available for grafting or transplantation to burn victims in times of emergencies such as wars or fires. Most if not all rabbis accept the ruling of Rabbi Ezekiel Landau² that biblical and rabbinic laws are suspended when danger to life is involved only if the patient whose life is to be saved is present and identified (*lefanenu*). The question regarding skin banks is that the potential recipients are not presently identified. Yet in times of emergency, the skin must be immediately available. Furthermore, skin grafting after burns is also

1. Yisraeli, S. "Ripuy Keviyot al yedei hashtolat or min hamet." *Techumin* Vol. 1, 1980 (Winter 5740) pp. 237-247.
2. Landau, E. *Responsa Noda Biyehudah, Madura Tanina, Yoreh Deah* No. 210.

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performed for cosmetic and functional reasons without there being any danger to the life of the patient if the graft is not performed. Is such skin grafting permissible?

Rabbi Yisraeli divides his presentation into three parts: a) the prohibition of deriving benefit from the skin of the deceased and whether or not permission for its use by the deceased prior to his death is acceptable in Jewish law; b) whether or not it is permissible to derive benefit from the skin in a manner different than its normal usage; c) whether or not there is an obligation to bury skin and not to leave it unburied overnight.

The talmudic commentary *Tosafot*³ is of the opinion that the skin of the dead is not biblically forbidden. The prohibition of deriving any benefit from the dead is derived from the heifer whose neck was to be broken (*eglah arufah*).⁴ The prohibition of deriving benefit from the *eglah arufah* is in turn derived from the word "forgive" (*kaper*) which is mentioned in regard to the *eglah arufah*⁵ just as it is mentioned in regard to sacrifices (*kapara*) from which no secular benefit may be derived. However, the skin of sacrifices is permitted. Therefore, the skin of the *eglah arufah* is permitted and so, too, the skin of the dead is permitted. This is the reasoning of *Tosafot*.

The talmudic commentary of Rabbi Samuel Adels, known as *Maharsha*,⁶ cites Maimonides⁷ from whom Adels deduces that hides of sacrifices offered to idols are only prohibited if the hides are offered to the idols. Since the prohibition of deriving benefit from a sacrifice is derived from the *eglah arufah* and the skin of the *eglah arufah* is not prohibited, as stated by *Tosafot* above, it follows that Maimonides is also of the opinion that the skin of the dead is not biblically forbidden.

On the other hand, the opinion of *Rabbenu Tam*⁸ is that the

3. *Niddah* 55a, s.v. *sheyma*.

4. Deuteronomy 21:1-9 and *Avoda Zara* 29b.

5. Deuteronomy 21:8.

6. Adels, S. *Gilyon Maharsha* on *Avoda Zara* 29b, s.v. *ve'orot levuvim*.

7. Maimonides, M. *Mishneh Torah*, *Hilchot Avoda Zara* 7:3.

8. Commentary of *Rabbenu Tam*, in *Tosafot Sanhedrin* 48a, s.v. *meshamshin*.

skin of the dead is biblically proscribed because skin is no worse than shrouds specifically prepared for the dead, deriving benefit from which is prohibited. This opinion is also shared by Ritva⁹ and by Rabbi Solomon ben Adret, known as Rashba¹⁰ who cite the Talmud¹¹ to prove that even hair from a dead human being is prohibited because death renders the body prohibited for any use. Rashi¹² states that natural human hair never "lived" and is, therefore, not affected by death. For this reason, Maimonides rules¹³ that one is permitted to derive benefit from the hair of a deceased person. This reasoning, however, is only applicable to hair, since skin "lived" and should therefore be prohibited according to all opinions, thus posing a difficulty according to the view of Tosafot cited above that the skin of the dead is permissible.

Rabbi Yisraeli attempts to reconcile the apparently opposing views of Tosafot and Rabbenu Tam. He explains that the prohibition of deriving benefit from shrouds prepared for the dead relates to the honor of the dead, and the deceased, while still alive, can instruct that his honor be waived just as he can instruct that no eulogy be recited in his honor. Rabbenu Tam proscribes the use of skin from a deceased only if he did not specifically instruct that one forego honors on his behalf after he dies. But if he did so instruct, there is no prohibition at all in using the skin for burn victims, not because of the need to save their lives but because there is no biblical prohibition to forbid it.

Another consideration relating to the use of human skin from the deceased for transplantation to burn victims is whether or not the prohibition of deriving benefit from the dead also extends and includes the prohibition of deriving benefit from something in a manner other than its normal usage. The Talmud¹⁴ states that with

9. *Novella Ritva* on *Niddah* 55a.

10. Adret, S. *Responsa Rashba*, Part 1, No. 365.

11. *Arachin* 7b.

12. Commentary of Rashi on *Arachin* 7b.

13. Maimonides, M. *Mishneh Torah*, *Hilchot Avel* 14:21.

14. *Pesachim* 24b.

regard to all the prohibited articles in the Torah, we do not flagellate on their account except when they are eaten or used in the normal manner of their consumption or usage, respectively. For example, if one eats raw forbidden meat, he is exempt. Tosafot¹⁵ point out that in regard to sacred things including sacrifices, the only prohibition is in their use in the normal manner of their usage. Since the prohibition of deriving benefit from the dead is derived from the heifer whose neck was broken (*eglah arufah*) and the latter prohibition is derived from an analogy to sacrifices,¹⁶ it follows that the *eglah arufah* is only forbidden in the normal manner of its usage. This is the reason why Maimonides excludes *eglah arufah* from the list of things which are prohibited even in a manner different than their normal usage.¹⁷ It also seems logical, therefore, that deriving benefit from the dead is only prohibited in the normal manner of its usage.

Rabbi Yisraeli cites other opinions which posit that the prohibitions of deriving benefit from sacrifices, from *eglah arufah*, and from the dead extend even to the manner other than their normal usage. He attempts to reconcile these opinions with those expressed by the Talmud, by Tosafot, and by Maimonides as cited above. Rabbi Yisraeli concludes that without the deceased's permission while he was still alive, there is a biblical prohibition of using his skin after his death, according to Rabbenu Tam. This prohibition extends even to its use in a manner different than its normal usage such as storage in a skin bank for transplantation to a living human being. Such transplantation would only be permissible if the patient requiring the skin transplant is clearly identified and the procedure is needed because of danger to his life. For actual or potential danger to life, all biblical and rabbinic commandments except the cardinal three (idolatry, murder and forbidden sexual relations) are suspended.

However, if the deceased gave permission for the use of his

15. *Pesachim* 26a, s.v. *shayni*.

16. *Avoda Zara* 29b.

17. Maimonides, M. *Mishneh Torah*, *Hilchot Yesodei Hatorah* 5:8.

skin after his death, even Rabbenu Tam would agree that it is only prohibited if used in the manner of its normal usage. But if it is used in a manner different than its normal usage, there is no biblical prohibition involved. There is a difference of opinion discussed by Tosafot¹⁸ as to whether or not there remains a rabbinic prohibition. In either event, it is permissible according to all opinions, to transplant skin from a deceased to a patient even in whom there is no danger to life since the skin is considered as being used in a manner different than its normal usage. An analogy is cited in the Talmud¹⁹ about Rabina who was rubbing his daughter with undeveloped olives of *orlah*²⁰ as a remedy. He was permitted to do so either because his daughter was in danger from an inflammatory fever or because he was using the olives in a manner different than their normal usage.

The final part of Rabbi Yisraeli's article deals with the questions of whether or not there is an obligation to bury human skin, and whether or not there is a prohibition of "leaving part of the dead unburied until the morrow."²¹ After citing and discussing various sources and opinions, Rabbi Yisraeli concludes that there is no commandment to bury skin and there is no prohibition of leaving it unburied. The issue of shame or disgrace of not burying the skin of the dead is not applicable if one used it for the healing of a patient or for sparing the patient pain and suffering and perhaps even saving his life. Furthermore, as mentioned before, if the deceased gave permission during his lifetime for his skin to be used for healing purposes, there is no prohibition involved in its use. Even according to the opinions of those who state that it is forbidden to derive benefit from human skin, it is permitted to do so for transplant purposes because that is considered to be using it in a manner different than its normal usage and hence permitted

18. *Avoda Zara* 12b, s.v. *elah*.

19. *Pesachim* 25b.

20. Newly planted trees whose fruits are forbidden for the first three years.
Leviticus 19:23ff.

21. *Deuteronomy* 21:23.

even for a patient in whom there is no immediate danger to life. Finally, Rabbi Yisraeli states that it is even permissible to prepare human skin for this purpose (i.e., skin banks) even before the patient who needs a skin graft has been identified since, prior to its use, there is no question of deriving benefit therefrom. When a burn victim or other needy patient presents, then it is certainly permissible because of the medical indication.

The Israeli incursion into Lebanon in 1982 resulted in numerous casualties including seriously burned soldiers who required skin grafting. The Rabbinic Council of the Israeli Chief Rabbinate was instructed by the country's two Chief Rabbis to research the topic of skin transplantation from deceased human beings to patients burned in war or in other situations. The deliberations and conclusions of the Council are summarized by Rabbi Shalom Meshash, Chief Rabbi of Jerusalem, in 1986 in an article entitled "Skin Banks for the Treatment of Burns".²² Rabbi Meshash's takes issue with many of the points made by Rabbi Yisraeli in his 1980 article. Rabbi Meshash's article is followed by another article written by Rabbi Yisraeli entitled "Skin Transplants from the Dead"²³ in which the latter refutes all the criticisms of Rabbi Meshash. There then follows an exchange of letters between these two prominent rabbis.²⁴

Rabbi Meshash begins his article by citing the mandate to the Rabbinic Council by the Chief Rabbis to investigate the topic of transplanting skin from the deceased onto patients who were seriously burned or wounded in war. There is no question if a burned victim is at hand that it is permissible to do so if his life is actually or potentially at stake because danger to life sets aside all biblical prohibitions. The question is whether or not it is

22. Meshash, S. "Bank or letsorech ripuy keviyot." *Techumin*. Vol. 7, 1986 (5746), pp. 193-205.

23. Yisraeli, S. "Hashtalat or mayhamet." *Techumin* Vol. 7, 1986 (5746), pp. 206-213.

24. Meshash, S. and Yisraeli, S. "Or hamet (Chalifat michtavim)", *Techumin*, Vol. 7 1986 (5746), pp. 214-218.

permissible to prepare skin in advance from the deceased and to store it in a skin bank for later use when the need arises. Rabbi Meshash points out that each member of the Council had before him the 1980 article and opinion of Rabbi Yisraeli which, in answer to the question, ruled in the affirmative.

Rabbi Yisraeli had cited the opinion of Maimonides that hair and skin of the deceased are not biblically prohibited. However, asserts Rabbi Meshash, Rabbi Yisraeli omitted several citations from Maimonides in which the latter clearly prohibits the use of skin but not hair from the deceased.²⁵ Rabbi Meshash also states that there is even a difference of opinion, based on a talmudic argument between Rav and Rabbi Nachman bar Yitzchak²⁶ about the permissibility of using the hair of the deceased. However, the majority of rabbinic decisors including *Tur*, *Ritva*, *Ramban* and *Rashba* rule like *Rabbenu Tam*²⁷ that the skin of the dead is certainly prohibited. Rabbi Meshash takes issue with Rabbi Yisraeli's interpretation of *Rabbenu Tam* that the use of skin from the deceased is permissible if the latter specifically instructed that one may forego honors on his behalf after he dies. Rabbi Meshash is of the opinion that a person does not have the right to forego such honors. Rabbi Ben Zion Uziel²⁸ states that a person does not have title over his body. Rabbi Moshe Shick²⁹ and his teacher Rabbi Moshe Schreiber³⁰ assert that a person cannot disgrace his own body nor forego honors due him because his body and soul are not his but belong to Almighty G-d. Similarly, Maimonides³¹ states that the life of a murdered person is not the property of the avenger of blood but the property of G-d.

On the other hand, Rabbi Yisraeli is of the opinion that all

25. Maimonides, M. *Mishneh Torah*, *Hilchot Tumat Met* 3:11; *Hilchot Ma'achalot Assurot* 4:21, and *Hilchot Avel* 14:21.

26. *Arachin* 7b.

27. Commentary of *Rabbenu Tam* in *Tosafot*. *Sanhedrin* 48a, s.v. *meshamshin*.

28. Uziel, B.Z. *Responsa Mishpetei Uziel*, *Yoreh Deah* No. 28; p. 212a.

29. Schick, M. *Responsa Maharam Schick*, *Yoreh Deah* No. 344.

30. Schreiber, M. *Responsa Chatam Sofer*, *Yoreh Deah* No. 336.

31. Maimonides, M. *Mishneh Torah*, *Hilchot Rotseach* 1:4.

these rulings apply to a person's body but not his skin since skin is compared to shrouds and therefore a person is allowed to renounce honors due him in regard to the use of his skin just as he can forego honors due him in regard to the shrouds in which he is to be buried.

Rabbi Meshash also puts forth the thesis that the prohibition of deriving benefit from the dead is not derived from the laws pertaining to sacrifices but only from the heifer whose neck was to be broken (*eglah arufah*). Furthermore, the prohibition of the *eglah arufah* after its neck was broken is not derived from the laws of sacrifices. He also cites many sources that the prohibition of deriving benefit from the dead applies even if the skin is used in a manner different than its normal usage. Rabbi Meshash rejects Rabbi Yisraeli's conclusion that the skin of a deceased human being does not require burial. On the contrary, states Rabbi Meshash, he who fails to bury the skin of the deceased violates the biblical prohibition of leaving a body unburied overnight.³² He cites evidence in favor of this viewpoint from the talmudic commentary of *Tosafot* and from the novellae of Rabbi Nissim Girondi, known as *Ran*.³³

Following his lengthy remarks, Rabbi Meshash concludes that it is not possible to permit the removal of human skin from the deceased to store it for later use except for a situation of danger to life where the patient whose life is to be saved is before us here and now (*lefanenu*) according to the classic ruling of Rabbi Ezekiel Landau.³⁴ However, in our times, when there are wars in the world, and specifically in the land of Israel which is surrounded by enemies, there is hardly a day that passes without someone getting killed, and certainly during actual times of war. Therefore, says Rabbi Meshash, "I searched and found" two possible grounds to perhaps permit skin transplantation using human skin from the deceased. The first reason is to counter the requirement of Rabbi

32. Deuteronomy 21:23.

33. Girondi, N. *Chiddushei HaRan* on *Chullin* 122a.

34. Landau, E. *Responsa Noda Biyehudah, Madura Tanina, Yoreh Deah*, No. 210.

Ezekiel Landau and Rabbi Moshe Schreiber³⁵ that the dangerously ill patient must be at hand (*lefanu*) in order to allow the suspension of all biblical prohibitions in order to save his life. If the patient is not at hand, even rabbinic prohibitions may not be waived. However, in our era, says Rabbi Meshash, quoting Rabbi Isaiah Karelitz, known as *Chazon Ish*,³⁶ there is no difference whether the patient is at hand or not, if the disease or dangerous medical condition is very common, for then it is as if the patient is at hand and one may suspend biblical prohibitions such as desecrating the dead and take skin from the deceased and store it in a skin bank because it will likely be used very soon for a burn victim. The situation is analogous to enemies besieging an Israeli city near the border as described in the Talmud.³⁷

Rabbi Shlomo Goren³⁸ also quotes *Chazon Ish* and provides support for his viewpoint from the talmudic commentary of *Tosafot*³⁹ which implies that if a dangerous medical condition is common, it is permissible to perform certain otherwise prohibited acts on the Sabbath even if the patient is not yet at hand. Therefore, continues Rabbi Meshash, since we are concerned about all the dangerously ill people throughout the land, common illnesses involving danger to life (such as cancer) are considered to constitute an equivalency to the dangerously ill patient being at hand (*lefanenu*). Furthermore, since we in Israel are constantly in a state of war, one can certainly allow the storing of human skin in skin banks for later use. Rabbi Meshash also cites Rabbi Ben Zion Uziel⁴⁰ who comments on Rabbi Landau's requirement of *lefanenu* as follows:

. . . to be sure, there are always many extant patients
who are ill with that disease. And if we do not know

35. See reference 30 above.

36. Karelitz, I. *Chazon Ish, Hilchot Avelut* No. 208:7

37. *Eruvin* 45a and *Taanit* 21b.

38. Goren, s. *Me'orot*, Part 2.

39. *Pesachim* 46b, s.v. *rabbah*.

40. See reference 28 above.

of any at this precise moment, tomorrow or even today, we will be apprised thereof. The situation is not at all comparable to the preparation of medications (*sechikat samamanim*) which can be compounded at any time or prepared from yesterday [i.e., before the Sabbath]. But in this situation [of autopsy to determine the cause of death], if the autopsy is not performed on this body because of the prohibition [of desecrating the dead], it will never be performed... and [the lack of vital information to be gained from the autopsy] may be responsible for the death of many people...

Rabbi Moshe Feinstein⁴¹ rules that autopsy is permitted where a patient died after he received experimental chemotherapy for cancer, or received an experimental antibiotic or an unproven vaccine for the treatment or prevention of an infectious disease, or underwent an operation in which a new or experimental surgical technique was employed. In each of these situations, it is imperative to ascertain whether or not the drug or vaccine or surgical technique contributed to the patient's death and/or benefited the patient. Such information is critical for the physician in his decision regarding the possible use of the same drug, vaccine, or operation for other extant patients. Thus, Rabbi Feinstein also defines *lefaneenu* to include patients with common life-threatening diseases even though a specific patient whose life is to be saved has not yet been identified.

The same reasoning is used to allow the donation of corneas to eye banks and blood to blood banks without an immediate transfer from donor to recipient. Since the permissibility of organ transplantation rests primarily on the overriding consideration of *pikuach nefesh* (danger to life), it would seem that the recipient

41. Rosner, F. and Tendler, M.D. *Practical Medical Halachah*, New York 2nd Edition, Association of Orthodox Jewish Scientists and Feldheim Publishers, 1980, pp. 67-69.

would have to be at hand (*lefanenu*). Rabbi Meyer Steinberg,⁴² however, rules that since the number of blind people is large, it is as if there is always a recipient at hand. Rabbi Isser Yehuda Unterman, in his remarks on eye transplants⁴⁴ also permits blood donations to blood banks for the same reason.

The reason offered by Rabbi Meshash to allow the use of human skin for transplantation from the deceased onto burn victims is the thesis cited by Rabbi Unterman⁴⁵ whereby an organ that functions when transplanted from a cadaver into a live recipient does not involve the prohibition of deriving benefit from the dead. If part of the deceased is "alive" and functioning in another person, the prohibition does not exist because the Torah prohibited deriving benefit from the "dead" but not from the "alive". So, too, the dry bones (i.e., human skeletons) which Ezekiel brought back to life were fully alive, did not convey ritual uncleanness, and it was permitted to derive benefit from them.

Rabbi Meshash's final statement in his essay "Skin Banks for the Treatment of Burns"⁴⁶ is the following:

For the above cited reasons, many rabbinic decisors permit the taking of skin from the deceased for the use of extant patients who may present at a later time, and one can rely on this ruling in actual practice. However, the Rabbinic Council of the Chief Rabbinate was correct in limiting this procedure to the banking of only fifty skins and no more. Had it not been so, we would again be faced with the concerns of the *Noda Biyehudah* [Rabbi Ezekiel Landau] that we might come to perform anatomical dissection on all dead people. The procedure should also be performed in great privacy in a manner that does not constitute a desecration of the dead.

42. Steinberg, M. *Noam*, Vol. 3, 1960, pp. 87-96.

44. Unterman, I.Y. *Shevet Yehudah*, Jerusalem, 1955, pp. 313-322.

45. Unterman, I.Y. *HaTorah VeHamedinah*, Vol. 5-6, p. 210

46. See reference 22 above.

In his 1986 article on skin transplantation from the dead,⁴⁷ Rabbi Yisraeli reiterates the opinion of Tosafot and Maimonides that it is permissible to derive benefit from the skin of the deceased. Even Rabbenu Tam allows such benefit — if the deceased asked that one forego any honors due him — since the prohibition of deriving benefit from skin of a dead person relates to a violation of his honor and if he wishes he can forego that honor. Yisraeli admits that a person can only forego such honors in regard to his skin and his shrouds but not his body. Yisraeli reviews and rebuts all the arguments against the contents of his 1980 article made by Rabbi Meshash in his above-described essay. Rabbi Yisraeli concludes that there are three opinions in regard to the prohibition of deriving benefit from the dead.

- 1) The view of Tosafot (*Niddah* 55a and *Zevachim* 71b) that there is no prohibition in regard to the skin of the dead.
- 2) The view of Rabbenu Tam (*Sanhedrin* 40a) that there is a prohibition of deriving benefit from his shrouds. However, if the deceased while alive specifically instructed that one use the skin after he dies, there is no prohibition because he is allowed to issue such instructions and they are valid.
- 3) The view of Nachmanides and others is that the skin of the deceased is prohibited from being used just like the rest of the body. The source of the prohibition is derived from sacrifices and, therefore, the prohibition applies only if the skin is used in the normal manner of its usage. However, since the use of skin for transplantation and other medical usages is in a manner other than its normal usage, there is no prohibition involved.

The two 1986 essays by Rabbis Meshash and Yisraeli are followed by an exchange of letters between the two rabbis⁴⁸ in which they each reiterate and amplify their respective viewpoints regarding the permissibility of deriving benefit from the skin of deceased human beings.

47. See reference 23 above.

48. See reference 24 above.

They both conclude, however, that the use of human skin from the deceased for transplantation to burn victims or others who have immediate need thereof is entirely permissible because of the overriding consideration of *pikuach nefesh* (actual or potential danger to life). The two rabbis also sanction the storage of human skin in skin banks in Israel for later use because it is very probable that it will be needed in view of the frequent occurrence of burns both during war and even in peacetime. This fact makes Jewish law consider the situation as if the potential recipient is already identified, thus satisfying the requirement of Rabbi Ezekiel Landau that the patient whose life is to be saved is at hand (*lefanenu*). Rabbi Meshash, however, limits skin banking to the needs of fifty patients and insists that the skin removal procedure be performed in great privacy with preservation, as much as possible, of the dignity and honor of the deceased skin donors.

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The Use Of Modern Inks
For Sifrei Torah

Rabbi Chaim Twersky

Today's society is faced with many challenges. One of the most significant is the use of modern inks in the production of Sifrei Torah. This is a subject that has been the subject of much discussion and debate. The use of modern inks has become increasingly popular, especially among younger students and teachers. Some argue that modern inks are superior to traditional inks, while others believe that they are inferior. The question is, what is the best choice for a Sifrei Torah? In this article, we will explore the pros and cons of modern inks and traditional inks, and provide some guidance on how to choose the best ink for your Sifrei Torah.

Modern inks are often used in the production of Sifrei Torah. They are made from a variety of materials, including pigments, resins, and solvents. These inks are generally more durable and less likely to fade or discolor over time. They are also easier to apply and can be used on a wider range of surfaces, including paper, plastic, and metal.

Traditional inks, on the other hand, are made from natural materials, such as

animal blood and plant extracts. These inks are often more expensive and less durable than modern inks, but they have a unique, traditional quality that is often sought after in certain types of Sifrei Torah.

The Use of Modern Inks for Sifrei Torah

Rabbi Chaim Twersky

The question has been posed whether one may use the advances of ink technology to create a better *dyo* (ink) for use in the writing of *sifrei torah*, *t'fillin* and *mezuzot*. The question, although interesting enough as a theoretical inquiry, has some practical ramifications as well. The ink that is presently being used (and has basically been the standard for several centuries for almost all *soferim*), although adequate, certainly has room for improvement. The standard *dyo* has two defects, (1) it will invariably turn red after several decades, and under certain circumstances even earlier, which can create a significant halachic problem¹ and 2) the ink will, after a long period, lose its adherence to the parchment and begin to flake. None of these problems are crucial, for since *sifrei torah*, *t'fillin* and *mezuzot* will usually last for several decades, most people would consider that quite adequate. However, there are cases in which severe conditions create early aging and people do have to replace their *t'fillin* and *mezuzot* sooner than they had expected. Furthermore, if *sifrei torah*, *t'fillin* and *mezuzot* could be made in a way that would last several centuries, rather than decades, most

1. There are *poskim* who hold that once the color of the ink is no longer black, the *sifrei torah*, *t'fillin* and *mezzuzot* are no longer *kasher*.

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would consider this to be a worthwhile improvement over the present. The use of a better *dyo* would have some practical advantage.

In order to arrive at an halachic answer, it would be in order to review the *shitot harishonim* (views of earlier rabbis) with regard to the definition of *dyo*, and to determine the opinion of the major *poskim*, and then to see what technical improvements are possible within the framework of halachic *dyo*.

Dyo in the Time of the Rishonim

From the disputes among the *Rishonim* it can be learned that at the time of Rabbenu Tam there were several methods of making *dyo* in the various countries. In France the *dyo* was produced entirely out of wood. A certain type of wood was boiled in water until an extract was produced. The extract was a hard gummy substance that, when dissolved in water, could be used for writing.

In Germany and in Spain, the *dyo* was made out of gallnut extract and wood resin. Gallnuts (a plant-like parasite that grows commonly on oak trees) were boiled in water. Wood resin (gum arabic) was then added to the resultant liquid, and commonly copper or iron sulfate was also added. (It should be added that this is the basic formula that is still used by most *soferim* today.)

The Rambam gives the formula for making ink as the combination of carbon beads with gallnut extract. From the description, there is a slight indication that this was a common method of making the ink in his time.

The Mishna in *Megillah* states the following:

If [a megillah] was written with *sam*, *sikara*, *kumus* or *kankantum*, the megillah will be *passul*. [A megillah will] only [be kosher] if it is written with *dyo*.

From this mishna we may infer that *sam*, *sikara*, *kumus* or *kankantum* are not valid whenever *dyo* is required. The definition of some of these invalid writing materials are somewhat obscure and this is part of the source of the dispute among the *Rishonim* as to the definition of *dyo*.

There are three basic approaches in the *Rishonim* with regard to the definition of *dyo*.

The Shita of Rabbenu Tam

The opinion of Rabbenu Tam is quoted by the *Tosafot*.² Rabbenu Tam states that the *dyo* that was in use in his time in France was valid, but not the *dyo* that was being used in Germany (and Spain). The ink that was being used in Germany, which Rabbenu Tam said was *passul*, was basically made out of the extract of gallnuts. Rabbenu Tam raised two objections to this *dyo*, both based on the *Talmud*. (1) It can be inferred from a text in *Tractate Niddah*³ that *dyo* is a hard substance that is dissolved when ready for use, and the German type of ink exists only in a liquid state. (2) The *Gemara* in *Gittin*⁴, which allows the use of any type of writing material, states that gallnut water may also be used. Now, if the extract of gallnut is *dyo* then the *Gemara* would be stating something quite superfluous. Evidently, gallnut extract is not *dyo*, and if it is not *dyo*, then it may not be used for *sifrei torah*, *t'fillin* and *mezuzot*.

The Shita of the Ramban

The Ramban⁵ takes a position exactly opposite to Rabbenu Tam. According to the Ramban, the *dyo* referred to throughout the *Mishna* is principally made of gallnut extract along with other ingredients. He bases this on two passages. The *Yerushalmi* mentions putting a substance into a *dyo* that does not have gallnut extract, implying that the standard *dyo* is made of gallnut extract. Furthermore, there is a *beraitha* which states the following:

All saps are good for *dyo*, but the sap of the *k'taf* is best. All oils are good for *dyo*, but the oil of the olive is the best.

2. *Megillah* 19a, *Gittin* 19a.

3. *Niddah* 20b.

4. *Gittin* ibid.

5. ibid.

This applies well to the *dyo* made of gallnut extract.

The Ramban answers the objections of Rabbenu Tam. (1) In fact if the ink made of gallnut extract would be boiled long enough, it would be possible to obtain from it a hardened substance which could be dissolved to be used for ink, and the text in *Niddah* could be referring to this.

(2) Although the Gemara in *Gittin*⁶ does imply that ink made of gallnut extract is not kosher, this could refer to ink that is made by merely soaking the gallnuts in the water, where the gallnut substance dissolved in the water would be so weak that its effect would be negligible. If the gallnuts are cooked and the gallnut substance is itself dissolved in the water, which is the standard way of making this *dyo*, it would be kosher *dyo* and indeed this is the standard *dyo* to which the Mishna refers.

The Meiri⁷ quotes Rabbenu Tam and he argues, along with the Ramban, that the texts quoted by Rabbenu Tam are insufficient to prove his case. He adds another possible answer to the question raised by Rabbenu Tam, that perhaps gallnut extract and water alone are not *dyo*, but if gum arabic is added, it would be considered *dyo*. However he does not agree with the Ramban that the *dyo* to which the Gemara refers constantly is the same that is in common use, principally made of gallnut extract, as the Ramban claims, since the Gemara does mention that *dyo* is a solid substance, and the *dyo* made of gallnut extract is not commonly found as a solid substance to be dissolved in water. Instead, the Meiri claims that any black ink is valid and can be considered *dyo*. This brings us to the third *shita*.

The Shita of the Rambam

The Rambam defines *dyo* in the following statement.⁸

6. *ibid.*

7. *Kiryat Sefer* 1:4

8. Rambam, *Hilchot T'fillin* 1:4

How is *dyo* made? Smoke particles from [the burning of] oils, tar or wax are collected and are mixed with the sap of a tree and a bit of honey. These are then cooked for a long time and crushed and made into cakes. These are then dried and put away for future use. When the time comes to use them they are dissolved in gallnut juice or any similar substance. This is the best ink to use for *sifrei torah*, *t'fillin* and *mezuzot*. If either of the three [*sifrei torah*, *t'fillin* and *mezuzot*] were written with ink made of gallnut extract, *kankantum*, which is permanent and not soluble, it is nonetheless kosher. If so [one might ask] what was meant by the halacha that only *dyo* may be used? Only to exclude inks that are a different color than black, such as red, green, or similar colors. If *sifrei torah*, *t'fillin* and *mezuzot* are written, even one letter, in any other color, or even gold, they are *passul*.

The Rambam's halachic opinion is clear. *Dyo* is preferably made of a black substance that is soluble.⁹ However, black ink made of any material is kosher. The Meiri, as we have seen, also accepts the Rambam's opinion. Rabbenu Simcha, quoted by the *Bet Yosef*¹⁰ also agrees with the Rambam.

Poskim

The *Tur*¹¹ states the requirement to write *t'fillin* with *dyo*, but he does not define *dyo*. The *Bet Yosef*¹² quotes the opinion of Rabbenu Tam, but he brings the opinion of the Rosh, the Rambam, and Rabbenu Simcha in disagreement with Rabbenu Tam. In the

9. We use the word soluble in a non-scientific sense. Carbon is not soluble in water and in ink is correctly described as a colloidal suspension. The meaning of water soluble here is that if the parchment were to be soaked in water, the water would erase the ink. This is related more to the reaction of the ink to the parchment and the binding qualities of the ink, than to the coloring agent.

10. *Orach Chaim* 32

11. *ibid.*

12. *ibid.*

Shulchan Aruch, only the opinion of the Rambam is mentioned¹³ by the *mechaber* (Rabbi Karo). The Ramo¹⁴ states that it is preferable to use ink made of wood alone. The *Mishnah Berurah*¹⁵ gives two possible interpretations of the Ramo. Possibly the Ramo means the Rambam's preference to use ink that is water soluble, and alternatively, the Ramo would prefer the use of the ink that is kosher according to Rabbenu Tam. In practice it is acknowledged that the common ink that is used is the ink made of gallnut extract, gum arabic and *kankantum*.

The definition of *kankantum* is assumed by most of the *Rishonim* to be vitriol, a metal sulfate [either iron sulfate or copper sulfate]. Rashi, however, defines it as *atramentum*. In any case, it is an agent which, when added to the ink, will make it unsoluble.

The question as to whether *dyo* must be capable of being dissolved by water or not is a *Tannaitic* dispute.¹⁶ The dispute is centered on the fact that the Torah requires that the *parsha* of *sotah* be written as a *sefer* and then dissolved in water. R. Yishmael inferred from here that *dyo* must be capable of being dissolved in water. The halacha does not follow his opinion, except for the fact that according to the Rambam [and perhaps the Ramo] preferably, ink should be dissolvable by water.

It should be clear that the ink formula stated by the Rambam stands outside the objections raised by Rabbenu Tam. The ink formula of the Rambam is also a solid substance and in the formulation of the ink substance itself, gallnut extract was not used.

The *Birkei Yosef*¹⁷ in explaining why the *dyo* formula given by the Rambam was not in use, explained that his formula does not adhere well to the parchment and as a result, often leads to *passul sifrei torah*, *t'fillin* and *mezuzot*. The formula of gallnut extract, vitriol and gum arabic better stands the test of time.

13. *Orach Chaim*, and *Yoreh Deah* 271:10

14. Both in his gloss on *Orach Chaim* and *Yoreh Deah*

15. *Biur Halacha*, *Orach Chaim* 32

16. *Sotah* 20a

17. *Birkei Yosef* 32

Dyo and Ink Science

Ink has three qualities. 1) It has a coloring agent. 2) It is a colloidal suspension. That is, it is made of very small particles which are suspended in a medium, and not a substance which is dissolved in a liquid. 3) It has a binding agent which keeps the small particles attached to the paper or parchment.

Dyo is an ink. The binding agent is the gum arabic, or resin. The iron sulfate combines with the gallnut extract to form jet-black particles. (The color of the iron sulfate crystals before they are exposed to the gallnut is blue.) The active ingredient in the gallnut extract is tannic acid or gallotannic acid, which combines especially well with parchment. The reddish discoloration that is left on the parchment after the ink is removed is the result of the action of the tannic acid on the parchment. Tannic acid, as its name implies, is used as a tanning agent in the treatment of animal hides.

The iron sulfate which is the blackening agent in the *dyo*, is subject to oxidation. FeO_2 , or iron oxide, is a common substance known to all of us as rust. This is the source of the reddening of the ink over a long period of time. In humid conditions and in warmer climates, the oxidation will take place more rapidly.

Over a long period of time, as a result of exposure to the air, gum arabic will lose its adhesive qualities. This is the cause of the flaking of the ink when the *parshiot* get older.

Carbon black, the blackening agent in the Rambam's formula, has an advantage over iron sulfate. Carbon doesn't react quickly with oxygen, and the result of carbon oxidation is a colorless gas (CO_2 or CO). Consequently, if carbon is used as the blackening agent, the ink will never discolor. (In fact, the Dead Sea Scrolls, which were made of carbon ink, stayed black over a period of some 2000 years.)

There should be no question that ink made of carbon black would be halachically as good, if not better than ink made with iron sulfate and gallnut extract, and it will have the added advantage of longevity.

What remains is the binding agent. As noted by the *Birkei Yosef*, gum arabic as a binding agent with carbon does not work

well. If modern methodology could come up with a solution to improve the binding ability of gum arabic, this would be the best ink possible. In the absence of a method to improve gum arabic, the question we must deal with is whether binding agents are permissible with man-made substances such as acrylics. These substances are stronger and more flexible than gum arabic, and would therefore last longer and bind better than gum arabic.

As we have seen, the Rambam and the *Shulchan Aruch* do not give any restrictions as to either the binding agent or the blackening agent. Consequently, any black ink would be kosher. The question that might be asked is whether according to the Ramo, who suggests that preferably inks should be made of wood products, one ought not use acrylic based inks.

If we assume that the Ramo meant to advocate the use of water soluble inks, then acrylic based inks would not fall into this category. However, neither would the inks that are presently being used, since the iron sulfate also makes the ink undissolvable in water.¹⁸ If the Ramo meant to prefer the use of the ink of Rabbenu Tam, there is a possibility that the ink of Rabbenu Tam is not too different than the one suggested by the Rambam, and that the creation of ink by the cooking of wood is the same as a combination of carbon and wood resins. If so, it is possible that an ink made of carbon and acrylic would be halachically preferable to the present ink.

The annotator of the Ramo in *Yoreh Deah* quotes, as the source for the Ramo, a text in *Zohar*¹⁹ that says that ink should be made of wood products. Again, iron sulfate is not a wood product, and our ink is therefore not entirely made of wood products. Consequently, although acrylic based ink would not have this feature, it would not be worse than iron sulfate/gallnut extract inks which are also not entirely wood based. If desired, carbon can be obtained from wood combustion, and gum arabic could be added to

18. *Sotah* 20a

19. *Trumah*

the acrylic so that the quality of having ink made of wood products could be satisfied.

Conclusion

According to the Rambam, whose opinion is the halacha, the requirement of *dye* is only that the color be black. Consequently, any ink which is black can be used for *sifrei torah*, *t'fillin* and *mezuzot*. The use of a modern binding agent ought not be proscribed by the halacha, and should be sought to improve the longevity of *sifrei torah*, *t'fillin* and *mezuzot*. It is even possible (but not certain) that a carbon based ink would be halachically preferable because it might conform to the criterion of Rabbenu Tam.

Halachic Implications Of
Cosmetic Surgery
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Introduction

Plastic surgery has rapidly become one of the wonders of modern medicine. Through the utilization of highly sophisticated reconstructive surgical techniques, it is now possible to literally transfigure the face and body of burn and accident victims. These skills can be applied, as well, to the amelioration of certain types of congenital deformities. In addition, cosmetic or elective plastic surgery has made great strides. It is now possible to reverse some of the more obvious signs of aging via the medium of "lifting" the face and various parts of the torso. Moreover, if a person feels that a particular facial feature or section of the body is too large or unseemly, this too can be altered to more closely approximate their vision of perfection.

Elective reconstructive surgery, however, presents *poskim* (halachic decisors) with certain difficulties. Herein, one is seeking to alter one's features or figure in order to appear more beautiful/handsome and appealing. True, significant negative body image or facial self-perception factors undoubtedly serve as the impetus for these types of operations. Nonetheless, as their very name suggests, they are without any medical mandate. Given this, the *Acharonim* (recent decisors) identify two major problems that

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are associated with cosmetic surgery: *chavalah* (wounding) and *l'hachnis et atzmo l'sakanah* (to voluntarily enter into a health threatening situation). We therefore turn to a brief analysis of these topics in order to more fully appreciate the scope of their decisions.

Chavalah (Wounding)¹

Deuteronomy 25:3 provides us with the source for the Torah's prohibition of *chavalah*. Therein it states: "Forty stripes he may give him and not exceed, lest he will continue to strike him above these with many stripes and your brother will become contemptible in your eyes." The *Sifri* makes the following comment upon this verse: "If he [the judge] will exceed [the forty lashings], he will violate a negative commandment," namely, *chavalah*.² The Rambam codifies this law in its generalized sense:³

It is prohibited for a person to wound either himself or another human being. Moreover, wounding is not all that is prohibited. In addition, anyone who strikes

1. For a thorough treatment of this subject see *Encyclopedia Talmudit*, vol. 12, s.v. "Chovel."

2. *Ketubot* 33a and Rashi's comment s.v. "U'farchinan" clearly indicate that the phrase in the Torah of *lo yosif... pen yosif* is to be understood as the warning against wounding one's fellow. Rabbi Shabbetai Meshorer (*Siftei Chachamim*) explains Rashi's comments upon our Torah verse and of the Gemara in the following fashion:

Here at first [the judge had the guilty party flogged] with the full permission of the Torah. Nonetheless he is admonished: 'Do not add' [to the stripes]: One can derive a *fortiori* that if a person strikes his fellow without cause that he has certainly violated a negative commandment.

3. *Mishneh Torah, Hilchot Chovel U'Mazik*, 5:1.

There are two suggested readings in the standard text of the word "contentious." One is *derekh nitzyon* (in a contentious fashion), and the other is *derekh bizayon* (in an embarrassing manner). Rabbi Shabbetai Frankel's corrected edition, however, records only the first. Moreover, in the exhaustive listing of textual variants that appears toward the end of his work, there is no mention of any other *bona fide* text. See Frankel ed., *Mishneh Torah, Sefer Nizikin — Mugah v'Shalem* (Jerusalem: 1982).

a worthy Jew (*adam kasher miyisrael*) be they young or old, male or female, in a contentious fashion is in violation of a negative commandment. As it says in the Torah: "You shall not continue to strike him."⁴

If we apply this ruling to elective reconstructive surgery, it initially appears that we are stymied. Since there is an absence of medical need for these operations, it seems as if the physician would be prohibited from performing them. His use of the scalpel might very well be considered to be wounds inflicted upon a perfectly healthy body, rather than carefully guided surgical strokes. Thus, *chovel b'chaveiro* (wounding another) looms as a potential stumbling block before cosmetic surgery.

In addition, the person who chooses this form of plastic surgery may fulfill the definition of *chovel b'atzmo* (one who wounds himself).⁵ *Baba Kama* 91a-b is the focal point for a discussion of this category of *chavalah*. It records the tannaitic dispute as to whether or not it is permissible for an individual to inflict injury upon himself.⁶

The Rambam, in *Hilchot Chovel U'Mazik* 5:1 as well as in *Hilchot Shevuot* 5:17, follows the opinion that prohibits self-inflicted injury. His view is accepted by Rabbi Moshe of Coucy in *Sefer Mitzvot Gadol*, prohibitions nos. 70 and 248. Moreover, Rabbi Shlomo ben Aderet (Rashba), in his commentary to our text, maintains this prohibition even if the injury will eventuate in pleasure (*nachat ruach*).⁷ Tosafot, too, proscribe self-inflicted injury

4. Cf. *Sefer HaMitzvot l'HaRambam*, negative commandment 300, *Mishneh Torah*, *Hilchot Sanhedrin*, 16:12, *Tur*, *Choshen Mishpat*, 420:1 and *Shulchan Aruch*, *ibid.*

5. *Encyclopedia Talmudit*, *ibid.*, pp. 681-682.

6. Tosafot s.v. *elah tannai* he explains that both these approaches are in fact derived from Rabbi Akiva rather than from two different sages of the mishnaic period.

7. For Rashba, *chovel b'atzmo* is a Torah violation. He is joined in this view by Rabbeinu Nissim (Ran) and Rabbi Yehuda HeChasid (*Sefer Chasidim*). See *Encyclopedia Talmudit*, *ibid.*, p. 681, note 33 for exact citations and other relevant sources.

even if it is deemed to be "necessary."⁸

Some authorities, however, reflect the opposite point of view in regards to *chovel b'atzmo*. Thus, Rabbis Meir Abulafia (Rama)* and Yoel Sirkes (*Bach*) both allow it.⁹ Rabbi Shlomo Luria in *Yam Shel Shlomo* (*Baba Kama*, chapter eight, section 49) adds an important qualification to the opinion of those who rule leniently in this matter:

Even according to the Rama, self-inflicted injury is allowed if and only if it serves some purpose. If it is devoid of the same, everyone agrees that it is prohibited. [This is so] since it is forbidden to harm even clothing and other items based upon the negative commandment of "You shall not destroy" (Deuteronomy 20:19).

Hence, even this more permissive group allows *chovel b'atzmo* only upon the condition that there is a manifest need for same.

Based upon our presentation, it is clear that *chavalah*, both in the form of *chovel b'chaveiro* as it applies to the physician and *chovel b'atzmo* as it applies to the patient, is a formidable impediment to halachically sanctioned cosmetic reconstructive surgery. Indeed, as we shall see, it is an issue with which all *poskim* grapple.

The Prohibition of Voluntarily Entering into a Health-Threatening Situation¹⁰

Berachot 32b contains a story from the mishnaic period that

* Not to be confused with Ramo, Rabbi Moshe Isserles.

8. *Baba Kama* 91b, s.v. *elah hai*. Many other *poskim* agree with the previously cited authorities. These include: Rabbi Isaac Alfasi (*Rif*), Rabbeinu Asher (*Rosh*), Rabbi Yaakov ben Asher (*Tur*) and Rabbi Yosef Karo (*Shulchan Aruch*). See *Encyclopedia Talmudit*, *ibid.*, p. 682 for specific citations. Rabbi Jacob Joshua Falk (*P'nei Yehoshua*) to our Gemara, however, rules that if there is great need for the *chavalah*, then all parties agree that it is permissible: "afilu b'chovel b'atzmo shari heycha d'ika tzorech gadol."

9. See *Shita Mekubetzet* to our Gemara and *Tur*, *Choshen Mishpat*, 420, for Rabbi Abulafia's opinion. Rabbi Sirkes' *pesak* appears as a gloss to *Tur*, *ibid.*, s.v. "hachovel b'atzmo."

10. For an excellent presentation of this topic in the context of cigarette smoking

apparently took place during one of the many cycles of anti-Jewish persecution. It is a basic text for the study of our topic. Given its centrality to our discussion, it is quoted here in full.¹¹

Our sages taught: It occurred that a certain righteous individual (*chasid*) was praying on the [side of the] road. Along came a non-Jewish general and greeted him. He, however, did not return the greeting. The general waited until the *chasid* completed his prayers. He said to him: "You good for nothing (*raika*)! Is it not written in your Torah: 'Only take heed and guard yourself very carefully...'? If so, why is it that when I greeted you, you refused to greet me? If I [now decide to] cut off your head with a sword, who is there who will demand your blood from me [i.e., who will stop me]?" The *chasid* responded and said: "Wait a moment until I have had a chance to appease you by my words." He said to him: "If you were standing before a king of flesh and blood and your friend came along and greeted you, would you have responded to him?" He said: "No." "And if you would have replied to him what would the king have done to you?" He said to him: "The king would have cut my head off with a sword." [The *chasid* responded and] said to him: "Is my instance not an *a fortiori* situation? For if you are standing before a king of flesh and blood who is here today and tomorrow in the grave [and yet you would never answer another person's greeting in his presence] so, too, in my case. I was standing before the holy King of Kings who lives and

and Jewish law, see Dr. Fred Rosner's article, "Cigarette Smoking and Jewish Law" in volume IV of this journal, pp. 36-38. In order to avoid redundancy, we will not discuss the *Rishonim* sources found therein. Instead, we will concentrate primarily upon the analysis given to our topic by the *Acharonim*.

10. As noted by Rabbi Raphael Rabinowitz in his *Dikdukei Sofrim* on this passage, there are a number of textual variants in the manuscripts that differ from the standard printed Vilna edition. Hence, we will utilize the version of this text as it appears in the geonic work *Halachot Gedolot*, Rabbi Ezriel Hildesheimer ed., (Jerusalem; 1971) vol. I, p. 80 since it most closely approximates the texts of the manuscripts.

exists [forever] all the more so [would I refuse to respond to someone else before Him]." The general was immediately placated. The *chasid* then departed and went to his home in peace.

The straightforward implication of this passage is that it is forbidden intentionally to place oneself needlessly in danger. It is less apparent though, as to whether this is rabbinically or biblically proscribed.

Among the *Acharonim*¹² who interpret the verse: "Only take heed and guard yourself very carefully..." (Deuteronomy 4:9) and its use in our Gemara as referring to a biblical prohibition, may be found Rabbis Aryeh Leib ben Elijah (*Shame Aryeh*, no. 27), Alexander Sender ben Ephraim Zalman Schor (*Tevu'ot Shor*, no. 13, subsection 2), Yechezkel Landau (*Noda b'Yehudah*, second edition, *Yoreh Deah*, no. 10) and Yosef Babad (*Minchat Chinuch*, commandment 547). In contrast, Rabbi Mordechai ben Abraham Jaffe (*Levush HaMalchut*, *Yoreh Deah*, no. 116, section one) clearly indicates that this prohibition is rabbinic in character.¹³ Thus, virtually all *Acharonim* agree that it is prohibited to voluntarily place oneself in danger. The only point of contention is the status of this law.¹⁴

It is well known that all surgery necessitates a variety of risks that range from idiosyncratic reaction to anesthesia to post-operative complications. Given these statistically significant concerns, Jewish law usually allows an operation if and only if the benefits outweigh the risks and there is no other way to effectuate a cure. Aesthetically motivated reconstructive surgery, however, does contain all the elements of danger attendant upon such a procedure

12. See note 10.

13. Yet, he seems to contradict himself in this same work on *Choshen Mishpat*, no. 427 wherein he states that "entering into a place of danger is biblically prohibited." This requires further exploration.

14. For an in-depth exposition of these sources see *HaRefuah L'Or HaHalacha*, vol. IV: *Hatzalah v'Sakana b'Halacha*, Rabbi Yitzhak Ralbag, gen. ed., (Jerusalem: The Institute for the Examination of Medicine in Jewish Law, 1985), pp. 1-9.

but is devoid of any curative purpose. Therefore, it might very well be placed under the category of voluntarily entering into a life threatening situation. This issue, like *chavalah*, is explored by a number of *poskim* in the course of their analysis of our topic.

The Approach of Rabbi Eliezer Waldenberg

Rabbi Waldenberg's collection of responsa entitled *Tzitz Eliezer* contains a responsum that analyzes the halachic concerns associated with cosmetic reconstructive surgery.¹⁵ In his examination of the topic, he identifies four problems: the lack of dispensation for the physician to "heal" for aesthetic purposes, *chavalah*, theological concerns associated with changing G-d's handiwork, and the prohibition of placing oneself in danger.

Concerning the first issue, as to whether or not non-therapeutic elective surgical procedures fall under the physician's Torah mandate to heal, Rabbi Waldenberg states:

In regards to plastic surgery that has been recently performed by physicians for many people with the purpose of beautifying their limbs and so forth in the absence of any illness or pain, there is ample evidence to complain against this. The Torah never granted the physician the dispensation to heal in this instance (if one could even call this "healing").

The normative position in Jewish thinking is that theoretically, it would be forbidden for anyone to heal the sick who, after all, are afflicted by G-d, were it not for the specific permission granted in the Torah for a doctor to heal. Hence, the first problem Rav Waldenberg envisages is that a physician who performs surgery in the absence of clear and present medical danger is operating without the Torah's permission to heal. Quite simply, from a Torah perspective, he is engaging in malpractice. In even stronger terms: he is not functioning as a surgeon at all.¹⁶

15. Volume XI, no. 41 subsections 8 and 9.

16. Concerning the physician's obligation to heal and the parameters under which

Next, Rabbi Waldenberg focuses upon the concern of *chavalah*. He first addresses *chovel b'atzmo*: "There is no permission for people to allow doctors to wound them for this purpose." He then follows suit with *chovel b'chaveiro*: "In addition, there is no permission for the physician to perform these incisions." His elaboration upon this statement points out that these surgical procedures have nothing to do with the restoration of a patient's health. In such a case, the surgeon's scalpel becomes a sophisticated weapon rather than a tool of medicine!

In addition to opposing cosmetic surgery on halachic grounds, Rav Waldenberg rejects it as being inconsistent with the Torah's *Weltanschauung*.

Wounding for the purpose of aesthetically motivated concerns is excluded from the general category [of healing] since there is no restoration of health but rather wounding in order to alter the patient's body according to his perception and to improve upon the form engraved upon him by his Creator or to make him appear young and to contradict the decree of the King of the Universe.

He maintains that it violates the G-d-given uniqueness that is bestowed upon every human being. After all, he avers, who are we to declare our Creator's handiwork to be physically flawed? "One must know and believe that there is no artist like our G-d. He, may His name be blessed, fashions and stamps upon each person of His creation according to the godly form and image that befits him. And regarding this, one must neither add nor detract."¹⁷

he is duty-bound to function, see Rabbi Dr. Norman Lamm's article: "Is It a Mitzvah to Administer Medical Therapy?" in this journal, vol. VIII, 1984; "Providing and Accepting Medical and Psychiatric Treatment," by Dr. Sylvan Schaffer, *ibid.*; and Rabbi Dr. J. David Bleich, *Judaism and Healing: Halakhic Perspectives*, (New York: Ktav, 1981), pp. 6-7 and footnote 9.

17. Rabbi Waldenberg employs this mode of reasoning, as well, in the course of his rejection of *in vitro* fertilization. In *Tzitz Eliezer*, vol. XV, no. 45, he states: ". . . the very order of Nature has been altered" in the act of conception taking place outside of the woman's body. This is one of the reasons for his

The final argument that he marshals in his repudiation of elective plastic surgery is the prohibition of deliberately entering into a life-threatening situation:

All the more so, beyond any doubt, is it forbidden for an individual to put himself on this account into a situation of the usual kinds of danger that are associated with all operations.

Hence, based upon the halachic problems of the absence of any "dispensation to heal" in connection with elective cosmetic surgery, *chavalah*, the theological concerns of altering G-d's creation and the prohibition of placing oneself in danger, Rav Waldenberg concludes his responsum by stating:

Therefore it appears as a matter of actual halachic practice, according to what I have stated above, that it is forbidden for an individual to allow plastic surgery to be performed upon his person. Moreover, it is forbidden for the physician to perform such incisions for cosmetic purposes...¹⁸

The Approach of Rabbi Moshe Feinstein

Although elective reconstructive surgery has been forcefully rejected by Rabbi Waldenberg, a number of other major *poskim*

rejection of this procedure.

18. A negative ruling regarding our subject is shared by Rabbi Y.Y. Weiss in his collection of responsa entitled *Minchat Yitzchak*. In vol. 6, section 105, subsection 2, he concludes that cosmetic surgery is forbidden. He differs, however, from Rav Waldenberg's approach by rejecting *chovel b'atzmo* and *chovel b'chavero* as being relevant concerns. He maintains that Rambam in Chapter 5, *halacha* 1 of *Hilchot Chovel U'Mazik* only prohibits wounding if it is performed in a contentious and purposefully harmful manner (*derekh bizayon*). Cosmetic surgery certainly does not fall under this category. Rabbi Weiss agrees with Rav Waldenberg by recognizing the unmitigated nature of the prohibition of placing oneself in danger that is associated with elective reconstructive surgery. Based upon these grounds, he forbids it.

It must be noted, however, that Rabbi Waldenberg *does* allow plastic surgery to reconnect limbs or digits of the hand. See *Tzitz Eliezer*, vol. XIII, no. 90.

have defended the polar opposite position. These decisors include, but are not limited to, Rabbi Moshe Feinstein, Rabbi Yaakov Breisch, and Rabbi Shlomo Zalman Auerbach.¹⁹ In order to avoid redundancy by explicating each of these opinions, we will discuss herein only one which well illustrates how far removed this position is from the one adopted by Rav Waldenberg.

Rav Moshe Feinstein's responsum provides a stark contrast to that of the author of *Tzitz Eliezer*. Unlike Rabbi Waldenberg, who perceives four separate areas of concern, Rabbi Feinstein limits himself to but one issue: *chavalah*. We may surmise that he maintained that the plastic surgeon who performs cosmetic surgery is operating well within the parameters of the Torah's definition of a physician. He does not discuss the theological problems which Rav Waldenberg associates with these procedures. Moreover, by its omission, it is possible to suppose that he did not view the problem of placing oneself in danger as a serious consideration in this instance. Thus, all that remains is *chavalah*.

Rabbi Feinstein examines *chavalah* from the viewpoint of the definitional context provided by the Rambam.²⁰ He explains that the Rambam specifically requires a wound to be given in a contentious and injurious manner in order to be placed under the legal rubric of *chavalah*. Therefore, all "wounds" according to

19. Their respective opinions and others are to be found in the following: *Iggerot Moshe, Choshen Mishpat*, part II, no. 66; *Chelkat Yaakov*, vol. III, no. 11; *Mishneh Halachot*, vol. IV, nos. 246 and 247; Rabbi Avraham-Sofer Avraham's work, *Nishmat Avraham: Hilchot Cholim, Rofaim, v'Refuah, Choshen Mishpat*, (Jerusalem: 1986), p. 217 and *No'am*, vol. 6, 1963, p. 273. An earlier English-language analysis of the responsa on our subject is to be found in Rabbi Dr. Bleich's book, *Contemporary Halakhic Problems*, vol. I, (New York: Ktav and Yeshiva University Press, 1977), pp. 119-123. Given the incisive nature of this presentation, and in order to avoid repetition, we shall limit ourselves primarily to the opinion of Rav Feinstein. It should be noted that although his decision was rendered in a private responsum in 1964, it was not published until 1980. It appeared in a collection of Hebrew articles on the topic of Bio-Medical Ethics edited by Rabbi Moshe Hershler entitled: *Halacha U'Refuah*, vol. I (Jerusalem: 1980). Subsequently, it was reprinted, in 1985, in *Iggerot Moshe*.

20. See note 3.

halacha are *physical* wounds. The opposite formulation, however, is inaccurate since only some, but not all, physical wounds are considered wounds in the eyes of the halacha. For Rav Feinstein, cosmetic plastic surgery serves as a clear example of a physical but non-halachic wound. In other words, the surgeon is not inflicting a "wound" upon his patient; the stricture against inflicting a wound does not apply to his case at all. Therefore, by the Rambam's criterion, elective reconstructive surgery should be permissible:

But the Rambam writes regarding the prohibition of striking a worthy Jew that this refers to an injury that is given in a contentious fashion (and according to one variant version — embarrassing fashion — see the original text). And if this is so, in our instance wherein the wound is to beautify her, behold it is neither contentious nor embarrassing in nature. Therefore, the prohibition [of wounding] is completely irrelevant. In addition, if the prohibition of striking one's fellow obtains solely in a contentious and embarrassing situation, this would be the case, as well, regarding self-inflicted wounds. One, therefore, ought not to prohibit it when it is for the purpose of beautification which [by definition] is not performed in a contentious or embarrassing fashion.²¹

Rav Feinstein does not limit his response to the analysis of *chavalah* according to the Rambam's definition. He opines that even if one were to reject the Rambam's conclusion, it would still be permissible to perform *chavalah* upon one's fellow. This is the case since two conditions are fulfilled: it is freely chosen *and* for the individual's true benefit. Additionally, if the wounding meets these

21. Rav Moshe Feinstein buttresses his interpretation of the Rambam with several talmudic sources that support his conclusion. These include *Baba Kama* 91b and *Sanhendrin* 84b. From the latter source, he concludes that the prohibition of *chavalah* that is derived from *lo yosif* (Deuteronomy 25:3) never applied to healing situations. Moreover, even if the *chavalah* is "not for curative purposes, if it is done in such a manner wherein it is for his benefit, then it is neither contentious nor embarrassing and it is permissible according to the Rambam's reasoning."

two criteria, there is also fulfillment of the commandment "and you shall love your neighbor as yourself" (Leviticus 19:18).

But [if the wounding takes place] according to the desire of one's (male) fellow, then according to all opinions it is permissible even without any textual support...

If so, in regards to a young girl who wishes to beautify herself, whereas this is for her benefit and according to her desire, one may unquestionably allow this even of one does not agree with the Rambam's original interpretation of *chavalah* wherein it must be performed in a contentious and embarrassing fashion.

In his closing words, Rav Feinstein explicitly states that one may rule a *fortiori* that if elective reconstructive surgery is allowed in the case of a male, and it does not violate the prohibition of *chavalah*, this is certainly the case in regards to a young girl:²²

But one must say that since [the wounding] is for cosmetic purposes, it is perforce for his benefit since he desires it. There is, therefore, no prohibition of *chovel*. From here we may adduce an explicit proof to our case. All that we have said heretofore is a *fortiori* true in the case of a young girl where beauty is of even greater need and benefit than in regards to a man. This is found in *Ketubot* 49b: "Rabbi Chiya taught: 'A woman's purpose is beauty' (*ain isha elah l'yofi*)."²³ Therefore, beyond question, one would consider that it [elective plastic surgery] is for her good. And it is, thus, permissible to "wound" her for cosmetic purposes.

22. Rav Feinstein bases his concluding remarks on a mishnaic phrase found in *Bechorot* 45a. Therein, in the context of enabling slightly flawed kohanim to become acceptable for the Temple sacrificial services, the Mishnah states: "If a kohen had an extra finger and he cut it off, if the severed digit has a bone in it, then he is not ritually acceptable. If not, he is ritually acceptable." He notes that the Mishnah certainly allows this elective cosmetic amputation since it does not condemn it in any fashion.

Conclusion

This paper has presented a sampling of the rabbinic opinions regarding elective cosmetic surgery and offered an analysis of the halachic principles involved. Since it is obvious that rabbinic opinions vary widely, the proper course of action for any individual contemplating such surgery would be serious personal consultation with an appropriate rabbinic authority.

Turth Telling To Patient With Terminal Diagnoses

Rabbi Gary Joseph Lavit

Truth Telling to Patients with a Terminal Diagnosis

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Introduction

This paper deals with the dispute, within Orthodox Jewish law and practice (halacha), over the issue of truthful disclosure to patients concerning their terminal diagnoses/prognoses. The preponderance of opinion, as reflected in the halachic literature, which we herein review, is heavily weighted in opposition to truthful disclosure. It is reasoned by these sources that survivability/longevity is dependent upon hope/high-morale, which is undermined by knowledge of the truth. While the connection between hope and survivability can be reasonably demonstrated, the supposedly negative effects of truthful disclosure upon hope/morale have, on the other hand, not been adequately demonstrated and are challenged in this paper.

The intent of the halacha is to prevent any emotional harm to the patient which would have the effect of shortening his life. This paper questions the methodology usually recommended to achieve that intent. Our examination of the ethical issues, empirical evidence, and expert opinion based upon experience, brings us to the conclusion that in many cases, truthful disclosure can improve morale rather than damaging it, thereby contributing to extended longevity; and therefore, where appropriate, truthful disclosure is to be preferred over suppression of the unpleasant, as a fulfillment

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of the requirements and objectives of the halacha.

I. Truth-Telling in Halachic Perspective

Before we approach the specific subject of truth-telling to the terminal patient, it would be useful to review the principle of truth-telling in general, from a Jewish point of view.¹

The Bible itself commands: "Keep far away from a matter of falsehood."² The Talmud, in the name of Rabbi Chanina, states that "The seal of God is truth."³ And in *Perek Chaylek*, the Talmud condemns liars as one of four classes of people who will not be admitted to the Divine Presence in the World to Come.⁴

The Mishna in *Avot* (1:18) says that the world depends upon three things: Truth (אמת), Law/Judgment (דין), and Peace (שלום). Some commentators⁵ appear to explain these three things in consequentialistic terms (viz. that human society is held together by them), but we shall presently see that truth is a primary, independent value. These commentators are simply pointing up the consequences that accrue to society as *added benefits* of these values.

Another issue which can easily be brought to mind by this mishna is the question of the conflict of values. This mishna names three important values; there may be others, too, as we shall see. Are these values absolute? What happens if there is a conflict amongst them?

1. The Talmud briefly discusses the diplomatic "white lie" in *Bava Metzia* 23b and *Ketubot* 17a. The "white lie" does not fall within the purview of this paper.

2. *Exodus* 23:7

3. חותמו של הקב"ה אמרת. The statement is made in *Yoma* 69b, *Sanhedrin* 64a, *Shabbat* 55a.

4. *Sanhedrin* 103a

ואמר ר' חסדא אמר ר' ירמיה בר אבא ארבע כיתות אין מקבלות פנוי שכינה ... שקרים ... דכתיב דבר שקרים לא יכח לנדר עני

Translation: "Rav Hisda said in the name of Rabbi Yirmiya b. Abba, 'Four classes will not be received before the Divine Presence ... liars ... as it is written [Psalms 101:7], "The speaker of lies shall not tarry in My sight.'"

5. Rabbeinu Ovadia mi-Bartenura, and the Meiri cited by Pinkhas Kahati, *Mishnayot M'vuarot*, (Israel: Keter Press, 1974) Vol. 8, p. 322.

According to R. Saadia Gaon,⁶ the principle of truth-telling is a basic axiom not only of ethics but of knowledge itself. In his epistemology,⁷ R. Saadia cites three primary sources of knowledge: (1) sense perception or direct observation; (2) "intuition of the intellect;"⁸ and (3) logical inference. As his illustration of the second, he cites the notion, taken to be self-evident to the human mind, that "truthfulness is good and deceit is abhorrent." So axiomatic is this notion that it can be used as an illustration without the need for proof nor for utilitarian justification.

(For completeness, mention should be made here of R. Saadia's small, apparent concession to consequentialism in the process of rejecting it. He points out the mutual exclusion between the facts and a lie and says that the consequence of this contradiction is "grotesque" to the soul. He then goes on to give the familiar definition of utilitarianism in terms of pleasure versus pain and roundly rejects it.)⁹

The importance of truth-telling as a fundamental ethical principle in Judaism is made clear from the above. The rightfulness of truth-telling, as R. Saadia presents it, is independent of the benefit or harm of its consequences. In contemporary ethical terminology, then, we can classify truth-telling as a "deontological principle" in Judaism.

Now let us explore the question to which we alluded above, when citing the Mishna in *Avot*. Putting it in the language of contemporary ethicists: Is truth-telling, in Judaism, an absolute

6. R. Saadia ben Yosef al-Fayyumi (892-942). As Gaon and head of the academy at Sura, he was the intellectual representative and leader of world Jewry in his time. His *Emunot V'Deot* is the first systematic presentation of Jewish philosophy. The original work was written in Arabic. It was translated into Hebrew by Yehuda ibn Tibbon c.1186. A scholarly translation into English is also available. (See note 8 below.)

7. *Emunot V'Deot*, Introductory Treatise: ch. 5.

8. English translation of *Emunot V'Deot*: Saadia Gaon, *The Book of Beliefs and Opinions*, translated by Samuel Rosenblatt, (New Haven: Yale University Press, 1948), p. 16. The term in the Hebrew is *מְרַעַת הַשְׁבָּל*.

9. Saadia, *Emunot V'Deot*, Treatise III: Chapter 2. Rosenblatt translation, pp. 142f.

duty — an unconditional duty which holds in all circumstances — or a *prima facie* duty — one which can be set aside by other duties of higher priority or greater weight?

It has been argued¹⁰ that truth-telling is a *prima facie* duty, not an absolute one, as illustrated in *Genesis* 40:15-17, wherein the brothers of Joseph fabricate a message from their recently deceased father, for the purpose — in their perception — of maintaining peace within the family and possibly saving their own lives.

Also in the Torah (*Genesis* 18:12, 13) G-d informs Abraham, who is then ninety-nine years old, that he and his wife Sarah, eighty-nine years at the time, will have a child. Sarah, overhearing this, laughs disbelievingly within herself, saying, "After I am grown old shall I have [sexual] pleasure, and my husband is [too] old?!" Yet when G-d reports Sarah's lack of faith to Abraham, for purposes of religious instruction, He alters her words and reports Sarah to have said, "Shall I indeed bear a child, and I am [too] old?!" deliberately concealing Sarah's doubts of her husband's masculinity.

Commenting on the Talmud's exegesis of this passage, Rashi says: "Sarah had spoken degradingly, but when the Holy One Praised be He revealed the matter, . . . He altered the matter for the sake of peace." The Talmud, there, emphasizes, "Great is peace, for even the Holy One Praised be He alters [the truth] for it." In certain cases, peace takes priority over truth.

Another example occurs in the same section of talmudic commentary. The Biblical reference is *1 Samuel* 16:1, 2. In this passage, God, who is displeased with King Saul, commands Samuel to go to Bethlehem to appoint another king. But, objects Samuel,

10. Nechama Leibowitz, *Iyunim B'Sefer Bereshit*, (Jerusalem: Department of Education & Culture of the World Zionist Organization, 1970), pp. 403-407. (Also available in English translation)
11. *Yevamot* 65b. My teacher, Rabbi Morris J. Besdin of blessed memory, suggested that it was more than interpersonal peace between man and wife that G-d was protecting. He was also sensitive to Abraham's internal peace and wholeness; G-d protected him from a crushing blow to his ego.
12. Leibowitz, *ibid.*

"How can I go? If Saul hears it, he will kill me." And the Lord said, "Take a calf with you and say, 'I am come to sacrifice to the Lord.' "

God has provided the prophet with a subterfuge by which to avoid the king's wrath and preserve his own life. The Talmud (quoting Rabbi Ila'a in the name of Rabbi Elazar b. Shimon) cites this incident to prove that it is not merely *permissible* to alter the truth; it is *obligatory*. Rashi sums it up: "The Holy One Praised be He commanded [Samuel] to alter [the truth]."

The Talmud, in its discussion of the preceding passage, compared the relative weights of truth-telling and the promotion/preservation of *peace*. Bakhya ibn Pakuda in his *Duties of the Heart* spells out the competing duties as truth-telling and the preservation of *life*. The preservation of life is one of the highest duties. One who fails to take precautions, where indicated, to protect himself from death, commits a grave sin. Even though the prophet was setting out on a divine mission, he was cautious about danger to his life. Lesser human beings, says Bakhya, certainly need to be cautious and not depend on faith alone where mortal danger is involved. The method (subterfuge) commanded by G-d to Samuel is not exceptional; it is paradigmatic. Preservation of life takes priority over truthfulness.¹³

As we shall see below, the duty to preserve life outweighs not only truth, but almost all other commandments of the Torah as well.

II. "Moral Traces"

In the preceding section we established that truth-telling/avoidance of deceit is a *prima facie* duty which must be waived for the sake of peace or for the preservation of life. However, when for reasons of these overriding duties, we are obliged to waive the duty of truthfulness, do we do so without reservation? When the halacha permits — or even requires — a lie,

13. *Duties of the Heart*, "Treatise on Faith": Chapter 4, as cited by Leibowitz.

can the lie be told without compunction? Is it considered wholly meritorious, or does the waiver of truth-telling by an overriding duty leave some vestige of wrongfulness attached to the lie?

Among contemporary secular ethicists there is some discussion about the status of a *prima facie* duty which has been overridden or outweighed by other duties. Even though the overridden duty is non-operative in the specific situation, it nevertheless remains morally relevant. In the view of these ethicists, such an overridden duty "does not simply disappear or evaporate. It leaves what [Robert] Nozick calls 'moral traces,' which must be taken into account. Although such a duty is not operative, there are traces of its violation. Every attempt must be made 'to minimize the effects of the violation'."¹⁴

Tension arises whenever a duty or commandment is waived or deferred by another duty or commandment.¹⁵ A classic example in the Talmud and the Codes is that "any possible danger to life displaces [the laws of] the Sabbath" — and other laws as well (כל ספק נפשות דוחה את השבת). This operating principle having been stated by the Mishna, the Gemara almost immediately goes into a discussion of how — in another instance, when the dietary laws are to be displaced by the needs of a seriously ill person — the violation of the displaced laws should be minimized.¹⁶

14. Beauchamp & Childress, pp. 45, 47. The authors cite Robert Nozick, "Moral Complications and Moral Structures," *Natural Law Forum*, 13 (1968): 1-50.

15. I am not referring here to the specific mechanism of *הוּא תָוֹהַת לֹא תַעֲשֶׂה* ("a positive command displaces a negative command" — where in conflict). That mechanism is not applicable to our discussion, for two reasons: (1) the prohibition against falsehood is not an *איסור לאו* (a "Thou shall not"), but rather an *איסור עשה* (a prohibition deriving from a positive command, viz. "Keep far from a matter of falsehood"); (2) speech is not considered an action.

16. For detail see *Yoma* 83a; note the discussion of *בָּלְמָוָס* starting with and following the Mishna. See also Maimonides, "Hilchot Shabbat" 2:1.

In another place (*Menachot* 63b-64a), the Talmud engages in considerable discussion to explain the reasons of the sages for not adopting the views of Rabbi Yishmael and Rabbi Chanina. The minority view of these two *tannaim* was that even though the prohibitions of the Sabbath are displaced by the commandment of harvesting of the *Omer* on the proper date, the violation of the Sabbath should be kept to a minimum. The sages — the authoritative majority —

The key word in the above is **דחויה** — displaced (or very literally “pushed” aside). There are other ways, however, in which a commandment or prohibition may be made non-operative. One such way is when a conflicting halachic requirement has the effect of transforming a prohibited act into a permitted one. When prohibited becomes “permitted” — **הוותרה** — there is no trace of any violation; that which is permitted in a specific situation may be done without any reservation, even though the same act might ordinarily violate a prohibition.¹⁷ It must be kept in mind, however, that the “permission” is limited in scope and does not exist where not generated by the conflicting duty.¹⁸ Even though there is no violation, therefore, circumspection is required to avoid stepping outside the limited conditions of the “permitted” prohibition — the conflict of requirements which generates “permitted” status — and committing a violation.

One might arrive at the misimpression that a third way in which a prohibition may be made non-operative is by its being transformed into a positive commandment. Rabbi Ila'a was quoted above as saying that in certain instances lying is a mitzvah — a commandment or obligation. This can easily be misunderstood. As Maimonides explains, the laws of the Torah can never be contradicted, even by a prophet, except as a “ruling of the hour” for a unique exigency; a prohibition cannot, otherwise, be turned

are required to provide ample reasons, discussed in the Gemara, to justify their position. (Their principal reason had to do with public education in an area of polemic dispute between the sages and the Sadducees, a deviant group.)

Maimonides, “*Hilchot Shabbat*” 1:7,8 codifies two important examples brought by the Talmud (*Menachot* 64a) which show (1) that life-saving pushes aside the prohibitions and penalties of the Sabbath; and (2) that, wherever possible, the violations should be minimized. i.e. the prohibitions, although displaced, still carry a trace of “violation,” even though non-culpable.

17. This distinction between **הוותרה** and **דחויה** is made in *Pesachim* 77a and applied in 79a (starting with the Mishna). See also Maimonides, “*Hilchot Bee-at HaMikdash*,” 4:15.
18. An example of this is the “permitted” performance of the daily burnt offerings in the Holy Temple at the *required* times, even on the Sabbath, although the act of burning is strictly prohibited on the Sabbath under ordinary conditions.

into a positive commandment.¹⁹ The statement of Rabbi Il'a does not mean that lying is a positive command — not under any circumstance. Rather, what is meant is that life-preservation is a positive command and that lying is the necessary means for its fulfillment under certain circumstances. The prohibition²⁰ against lying is, then, either "displaced" or "permitted" under those circumstance — not made into a positive commandment.

It is evident that the halacha makes a distinction between two types of overridden, non-operative prohibitions. Such a prohibition might have been: "displaced" (דחויה); or "permitted" (הוותרה). Only in the first of these is there any sense of violation which need be minimized. In the second, there are no "moral traces." It is difficult to determine or to prove into which of these two categories lying falls when its prohibition is overridden by life-preservation.

If "displaced," the violation should be minimized. One way to minimize violation is to be passive about it. This is the halachic notion of **שֵׁב וְאַל תַּעֲשֵׂה** — "Sit and don't do anything."²¹ Since the prohibition against lying is technically a positive rather than a negative command,²² its violation can be minimized by passively not telling the truth. That is fairly simple so long as the patient does not explicitly ask for information. When he does, however, advocates of "passive" suppression resort to evasion and

19. Maimonides, *Hilchot Yesodot HaTorah*, 9:1-4.

20. Actually it is an **איסור עשיה** — a prohibition implied by a positive command (viz. "Thou shall keep far from a matter of falsehood") — rather than a directly stated prohibition. The legal effect is that violation does not technically involve an active transgression of a "Thou shall not," but rather the passive failure to observe "Thou shalt." The penalty is lower, but the ethical effect — infidelity to the truth — remains the same.

21. This approach is employed even to override Torah law by man-made rabbinic law. A good example is the rabbinic injunction against sounding the Shofar on a Rosh Hashana coinciding with the Sabbath, even though the Torah commands it to be sounded on Rosh Hashana. The rabbis, concerned that the Shofar would be carried from place to place in violation of the Sabbath, legislated that it was not to be sounded. This they were able to do by means of the notion of **שֵׁב וְאַל תַּעֲשֵׂה** — passive non-compliance with the Torah command.

22. See note 20 above.

obfuscation. Though their intent is "benevolent deception," they pride themselves on not having told a lie.

If an actual conflict exists between life-preservation and truth-telling, then the use of "passive" suppression is an admirable attempt to minimize or avoid a violation even though it is overridden and non-operative. If such a conflict does not exist, then "passive" suppression is no more than a circumvention of a fully applicable duty.

Regardless of whether the prohibition against deceit is "displaced" or "permitted," it can be so only if an actual or possible (ספק) conflict of duties exists. Such a conflict or the possibility thereof must be *real* and not merely *presumed*. For if it is presumed too easily, without good basis, the result may be unjustified lying or unwarranted "passive" suppression.

III. The Halachic View of Truthful Disclosure to Terminal Patients

The preservation of life is one of the highest of practical duties. With the exception of three prohibitions and the requirement of sanctifying G-d, any and all of the commandments of the Torah must be put aside when in conflict with the duty to preserve life.²³ Even if the danger to life is remote or uncertain, halacha takes no chances; the "doubtful danger" is to be treated as though it were a certain danger, requiring the overriding of any other duties that might possibly conflict with life-preservation.²⁴

23. *Yoma* 82a states the priority of life-preservation as follows:

אין לך דבר שעומד בפני עצמו ונפש חיין וגוילו עירית ושביכות דמיים

The priority of life-preservation over the other laws of the Torah is learned from the Torah itself, which instructs, "Ye shall keep My statutes and My laws, which a man shall do them *and live by them*." (Lev. 18:5) "Live by them and not die by them," the sages learned. (*Yoma* 85b).

24. *Yoma* 83a ל'ק נפשות להקם — In case of "doubt of mortal danger, [we are] lenient [with regard to the observance of conflicting commandments]." The nature of the doubt discussed by the Gemara is a difference of opinion amongst expert physicians or between patient and physician, regarding the needs of the patient or the seriousness of his condition.

CARE OF THE TERMINALLY ILL

Psychological factors are considered, too. A lamp may be kindled on the Sabbath, for example, in the room of a seriously ill patient even though the patient be blind because, says the Talmud, the patient will have a greater sense of security if she senses that her caregivers can see. Concern for the patient's state of mind or emotional well-being is adequate reason to override even the Sabbath;²⁵ state of mind has an effect upon health and life.

Hopelessness as a cause of death has been repeatedly demonstrated. Rabbi J. David Bleich cites several studies and experiments which confirm or strongly suggest this conclusion. Researchers conducting one such experiment, performed on rats, attributed death of rats in the experiment to "emotional reactions" causing "overstimulation of the parasympathetic system." The specific emotional reaction tested was hopelessness. Other studies involving human beings have produced similar findings, connecting the emotional state of hopelessness with a resulting deterioration in circulatory and neurological functions leading to premature death.²⁶

Sissela Bok also writes that a sense of hopelessness or an attitude of giving up in the face of the inevitable has been seen to trigger "physiological mechanisms which allow death to come more quickly."²⁷

The obvious implication for halacha is that anything which might produce a sense of hopelessness in the dying patient must be carefully avoided. Since depression and despair can hasten death, everything possible must be done to maintain hope.

25. *Shabbat* 128b. The case involves a woman in childbirth on the Sabbath.

26. J. David Bleich, *Judaism and Healing: Halakhic Perspectives*, (New York: Ktav Publishing House, 1981), pp. 30, 31.

27. Sissela Bok, *Lying: Moral Choice in Public and Private Life* (N.Y.: Vintage Books, 1979) p. 248. The author cites the research of Lewis Thomas, who describes "a pivotal moment . . . when the organism concedes that it is finished and the time for dying is at hand, and at this moment the events that lead to death are launched, as a coordinated mechanism. Functions are then shut off, in sequence, irreversibly, and, while this is going on, a neural mechanism, held ready for this occasion is switched on." (This quotation from Thomas can be found in "A Meliorist View of Disease and Dying," *The Journal of Medicine and Philosophy*, 1 (1976), pp. 212-21).

The preponderance of halachic sources presume that unhappy news has an almost automatic and nearly universal hope-crushing effect. Bad news is depressing and must, therefore, be suppressed from the seriously ill person.

The *Shulchan Aruch* instructs caregivers and visitors not to inform a terminally-ill patient of the death of a close relative for whom he would normally be obliged to mourn, lest he become emotionally “torn-up over it” (*שׁמָא תַּרְפֵּךְ רָעָתָו עַלְיוֹ*). Furthermore, we must not carry out any of the practices of mourning in his presence — even if he has learned of the death, according to the commentary of the *Shach*, because the full realization of such unpleasant news will “break his heart” (*ישַׁבֵּר לְבָו*). The *Shach* adds that the subject of the death of even a stranger will cause the patient to fear his own death. Therefore, says the *Shulchan Aruch*, we are to *silence* those who might come to console him (*משתיקין מפניהם את המנהמיין*).²⁸

The approach advocated by the Codes and by their original sources in the Talmud may go back even further. In *II Kings* 8:7-10 Ben-Hadad the king of Aram sends a messenger to the prophet Elisha to inquire of the prophet whether or not the king would recover from his illness. The prophet tells the messenger to go back and tell the king, “‘You shall surely live,’ even though G-d has revealed to me that he shall surely die.” Bleich cites this text, as well as a number of rabbinic commentaries, to prove that Scripture itself provides the precedent for lying to a patient about his terminal prognosis. “Candor might hasten the death of the patient,” says Bleich. “Lack of truthfulness, in such situations, is not merely

28. *Shulchan Aruch: Yoreh Deah* 337. The *Be'er Hagola* (a reference commentary) gives *Tractate Smachot* as the source for this ruling. I was unable to find the source in that tractate. Rabbi Y.M. Epstein in his *Aruch HaShulchan* (*Yoreh Deah* 337:1) tells us:

לפננו לא נמצא זה וכן כמה דבריהם הביאו הקידושים ממש זו ולא נמצא לפננו כי אין נמצאת אצלנו במלואה.

The tractate is no longer extant in full; our versions of it are incomplete. The ruling is, however, repeated (and cross-referenced to *Smachot* Chapter 9, by the *Mesoret HaShas*) in *Moed Katan* 26b near the bottom of the column.

permissible, or even commendable, but mandatory.²⁹

In speaking of טירוף הרעת — the emotional "tearing-up" of the patient — the halacha is expressing a concern for the inner integrity or wholeness of a person. Halacha recognizes that the ability of a person to live is seriously affected by that inner sense of wholeness (לילימות). Certain things can have the effect of "tearing" it up, of crushing all hope, of so devastating a person that he will lose all will to live and will actually die of a "broken" spirit. Bad news about himself — such as a diagnosis of inoperable cancer affecting vital organs — is presumed to have such an effect.

The practice advocated by the halacha with regard to truth-telling is, then, clearly founded upon the opinion that there is always, or almost always, a conflict of duties between life-preservation and truth-telling. In the next section we shall explore to what extent this conflict does indeed exist.

IV. Contemporary Clinical Evidence and Opinion

The Arguments Against Truth-Telling

In secular literature three arguments are used to support suppression of the truth and even direct deception of the seriously ill or dying.³⁰

The first argument is that knowledge of the truth will harm the patient. This is the view of the halacha. Telling a patient that he has a serious illness from which he may possibly die might cause him to die faster. Since the duty to preserve life overrides the duty to be truthful, lying becomes permissible and even obligatory.³¹

The second argument is that patients do not really want the truth. Regardless of what they say about it, they would rather not

29. Bleich, pp. 28-29. Immanuel Jacobovits, *Jewish Medical Ethics*, (New York: Bloch Publishing Co., 1959), pp. 120-21 makes the same point.

30. See Bok, p. 239ff and "Editorial: On telling dying patients the truth," *Journal of Medical Ethics*, 8 (Sept. '82) pp. 115-16.

31. Bleich, p. 29.

be told bad news. The belief in this position is supported by a certain demonstrable percentage of patients who, indeed, deny what they have been told about their disease.³² Although this argument is not used by the halacha, it warrants mention here, because in some of the clinical evidence and opinions which follow, the phenomenon of denial or partial denial is connected with the issue of hope and morale, which have direct bearing on the first argument.³³

The third argument is that it is "impossible successfully to communicate the truth." This is because of the lack of *absolute* knowledge and certainty on the part of the medical profession; the inability of the patient to understand; and flaws in the communication process. The "truth" that is conveyed may not turn out to be the truth. Since perfect truth is unattainable, according to this argument, "it does not matter whether or not we lie when we have good reason to do so."³⁴ Although I have heard this argument cited verbally by adherents to the halacha, I have not found it in

32. One study conducted in England during the late 1950's looked into just this point. 231 cancer patients were included. 7% disapproved of having been told, 19% denied they had been told, and most of the remainder "said they were glad to know the truth." See Jean Aitken-Swan & E.C. Easson, "Reactions of cancer patients on being told their diagnosis," *British Medical Journal*, (March 21, 1959), pp. 779-83.

Another study conducted in the United States by Gilbertsen and Wangensteen "Should the doctor tell the patient that the disease is cancer?: surgeon's recommendation," in *The Physician and the Total Care of the Cancer Patient*, (New York: American Cancer Society, 1962), pp. 80-85 "found that 4% of a sample of surgical patients appeared to become emotionally upset at the time of being told and remained so throughout the course of their illness." — Cited in: Ned H. Cassem and Rege S. Stewart, "Management and Care of the Dying Patient," *International Journal of Psychiatry in Medicine*, Vol. 6(1/2) 1975, p. 297.

33. It should be noted, however, that clinical evidence belies this argument. The results of one British study, for example, "indicate that patients are likely to appreciate truthful information. Most were not acceptant of the silence, the untruths or the inadequate opportunities to talk seriously." — John Hinton, "Talking with people about to die," *British Medical Journal*, Vol. 3, (July 3, 1974), p. 26.

See also the studies cited in the previous note.

34. Bok, p. 12.

any of the halachic literature. It is its absence from the halachic discussion that merits mention here. That absence, as well as its own logical weakness, rules out the argument from any further discussion on our part.

Let us then return to the first argument — the only one that we need to consider — and examine the evidence and the expert opinions based upon experience that are available to us.

It is well known that "treatment is enhanced by a favorable psychological environment." Panic or severe depression adds acute stress to existing disease.³⁵ Very bad news abruptly conveyed or given to someone unable to tolerate it can trigger panic or severe depression and set into motion a physiological reaction which Sissela Bok calls a "dying response."³⁶ This has been seen to occur often enough to warrant considerable caution and skill in speaking with the seriously ill patient.

An example of the lack of such caution, skill, and sensitivity and of the harm which can be brought upon the patient is related by Dr. Lawrence Goldie of the Royal Marsden Hospital in London:

One patient . . . not suspecting that anything serious was amiss, went to hospital for "blood test." Subsequently, because of the nature of the results, an appointment was made for him with a physician. Without preamble, the consultant presented him with the news that he had a very serious form of leukaemia! The patient collapsed and was incontinent of urine and faeces.³⁷

Such callousness and rough technique on the part of the physician induced an emotional response from which the patient may never have recovered. Poor technique of this sort, and/or the

35. Norman Cousins, "A layman looks at truth telling in medicine," *Journal of the American Medical Association (JAMA)*, Vol. 244, No. 17 (October 24-31, 1980), p. 1930.

36. Bok, p. 248,49. See above, note 33.

37. Lawrence Goldie, "The ethics of telling the patient," *Journal of Medical Ethics*, Vol. 8 (September 1982), p. 129.

lack of follow-up while the patient digests the information are, in Goldie's words, "like performing a skillful surgical operation and then leaving the skin unsutured, the wound uncovered, and the patient deteriorating."³⁸ That the consequences are disastrous should be no surprise.

On the other hand, truthful disclosure and open conversation with the gravely ill patient is often the very thing that the patient needs and from which he can benefit.

Benefits

Numerous studies and a wealth of clinical experience reveal that the "risks of disclosure" [have been] grossly overestimated,³⁹ while, on the other hand, the benefits are substantial, even measurably so.⁴⁰ Fear and anxiety are reduced; co-operation with treatment is improved; pain, understood, is better tolerated; isolation from family and caregivers is relieved, giving the patient the emotional benefit of genuine human contact.⁴¹ No one study would be proof in itself, due to limited sampling and possible quirks in procedure. When taken together, however, there is a substantial weight of evidence which the halacha cannot but take into account.

Amelioration of Anxiety

Fear of the unknown can be one of the most debilitating of all emotions. "Lack of information can greatly increase anxiety and stress," leading to severe depression and withdrawal from the struggle of life. Knowledge can dispel the fear, and reduce the level of anxiety.⁴² "Corrosive worry" about what is unknown, but

38. *Ibid.*, p. 132.

39. Maxwell Boverman, "Truth telling in medicine," a letter in *JAMA*, Vol. 248, No. 11 (Sept. 17, 1982) p. 1307.

40. Bok, p. 247.

41. Aitken-Swan & Easson, p. 782.

42. Thurstan B. Brewin, "The cancer patient: communication and morale," *British Medical Journal*, Vol. 2 (Dec. 24-31, 1977), pp. 1627.

vaguely suspected, can be more debilitating than knowledge of unpleasant facts.⁴³ Some patients in a British study verbalized it well:

"If they don't tell you, you just keep worrying and wondering, 'Have I got it?' so it's much better to know." "If you know what's the matter you know what to expect, but if you're in the dark and they're treating you for this and that and you don't really know, it worries you more." "A person worries more if it's a mystery."⁴⁴

It is for this reason that numerous studies have reported results, "indicating that most patients with a potentially terminal disease wish to be fully informed about their illness and its management."⁴⁵

In one study, published by John Hinton, a comparison was made of the moods and opinions of 80 terminal patients receiving equally adequate medical care in four different types of setting: a hospice for the terminally ill, in which "patients could readily discuss their condition and the possible outcome, including dying"; a foundation home for cancer patients, whose communication policy "was for greater reticence about cancer or dying unless patients were clearly intent on knowing"; an acute hospital's radiotherapy wards in which "frank talk about dying was infrequent"; and hospice outpatients dying at home.

The study showed unambiguously that patients were least depressed and anxious at the hospice and firmly favored the more open communication available there. The setting "with freer communication had less anxious and irritable patients . . . and, perhaps, less depressed patients . . . Hospice patients were significantly less troubled over the outcome of the illness. . . Acceptance of dying tended to be less troubled with more liberal

43. Bok, p. 247.

44. Aitken-Swan & Easson, p. 780.

45. Patricia M. Reynolds et. al., "Cancer and communication: information-giving in an oncology clinic," *British Medical Journal*, Vol. 282 (May 2, 1981) p. 1451.

debate," while conversely, the "less open approach was associated with more troubled patients."⁴⁶

Improved Attitude toward Treatment and toward Pain

Seriously ill patients experience a sense of loss of control in the hospital environment. Doctors, nurses, and technicians are doing things *to* them. Tests, operations, and procedures are being performed *upon* them. They may be so weak as to require help even in attending to their personal, private, hygiene needs. The patient often, even usually, feels that he is an imprisoned body being acted upon by others. The mood of depression induced by this state of affairs is anything but the "favorable psychological environment" which enhances treatment.

An explanation by the physician to the patient — of what is known about his disease; of the methods and purposes of diagnostic tests; of the symptoms and sensations that might be expected; and of the benefits that might be achieved by various forms of treatment, even if they be only palliative — gives the patient the sense that he is part of his own care, that he is an active participant *with* the doctor, rather than an imprisoned body being manipulated by others. While being truthful about the medical problems and the pain and discomfort that might be expected, the doctor can, at the same time, place emphasis upon his hopes for benefit from treatment — no matter how limited — and tell the patient what he, the patient, can do to enhance the effectiveness of that treatment. Even the doctor who has nothing to offer other than medication to suppress the pain of an inoperable cancer, can give the patient the assignment of eating well to "keep up your strength." In my own experience, I have seen a despondent patient take on new strength and resolve *after* being informed of his terminal diagnosis by a doctor who gave him the hope of pain-control and the assignment to eat as he could. Prior to being informed of his diagnosis, the patient had been considered a

46. John Hinton, "Comparison of places and policies for terminal care," *Lancet*, January 6, 1979, pp. 29-32.

suicide-risk due to his bewilderment, pain, and severe depression.

This experience is consistent with the findings of a number of studies which have reported that "even when the news is bad, patients often express relief because the truth removes doubt and gives them a rational explanation" for tests and procedures and "for the concern of their doctors."⁴⁷ Aitken-Swan and Easson found that patients "felt that to know the truth helped them to fight better, it gave them additional resources to call on, they submitted to treatment in a different spirit, and they worried less."⁴⁸

Relief from Isolation

Isolation or abandonment by others ranks high on the list of fears and complaints of dying patients.⁴⁹ Avoidance, by caregivers, of patients whom they feel unable to help is only one form of this problem. The patient can usually sense that others have given up on him. He may be angry about it. Or he may give up on himself, too.

Relevant to our study is another form of isolation — isolation from genuine human contact, emotional isolation — which affects the dying patient to his detriment. Whenever anyone is withholding or concealing the truth, he must necessarily withhold more than only some information. It is inevitable that he withhold a large part of himself. When a person is not open, he is not real, he is not genuinely himself. Despite the pleasant facade of one who is concealing unpleasant facts or feelings, the patient can almost always sense that it is a facade, that the person facing him is not "all-there," that there is what I would call an invisible sheet of plexiglass between himself and the well-intentioned concealer or suppressor. The dying patient is, in this way, deprived of genuine human contact — which he needs now more than ever.

Genuine human contact is not only comforting; it may be the link to "This World" that makes a person want to continue to live.

47. Goldie, p. 132.

48. Aitken-Swan & Easson, p. 782.

49. Cassem & Stewart, pp. 295 & 302.

Concealment and suppression usually result in "procedures [which] intensify the sense of distance and uncertainty and can even become a substitute for comforting human acts."⁵⁰ The very tension and unhappiness that we seek to avoid are instead induced, "as the patient begins to sense that his family, whom he had always trusted, are deceiving him and leaving him to suffer his fears alone."⁵¹

The dying patient usually knows that he is dying. He "knows that his wife knows, but they do not speak of it to each other! . . . This restriction on free speech, and the truth, disrupts any normal intercourse, so that couples instead of growing together, wither in each other's arms."⁵² I have seen this happen, in one case, even where the facts were not concealed but where husband and wife attempted to protect each other from emotional pain by hiding their true feelings. The intense stress was relieved and the burden lightened when they were able to be truthful and genuine with each other — when they were able to touch each other emotionally. The ability to talk freely and openly, to share the burden, lightens the load and keeps the patient in contact with the world of the living.⁵³

Contraindications and Precautions

Adverse Reactions

In a small but not insignificant number of patients, truth-telling, no matter how well it is done, produces the adverse reaction feared by the halacha — the reaction which has been described as a "dying response." Others unable to tolerate the truth are capable of forgetting or denying it even after having been told.⁵⁴ In either

50. Bok, p. 244.

51. Charles Fletcher, "Listening and talking to patients," *British Medical Journal*, Vol. 281 (Oct. 18, 1980) p. 1057.

See also Richard T. Silver, "The dying patient: a clinician's view," *American Journal of Medicine*, Vol. 68 (April 1980) pp. 473-75.

52. Goldie, p. 128.

53. Cassem & Stewart, p. 300.

54. See above, no. 32.

instance, concern for harm to the patient (as well as respect for the patient's implicit wishes) requires that such a person be allowed to remain in as much ignorance as he or she desires or needs.

For this reason, the method employed by the truth-teller — often but not necessarily the physician — must include prior and ongoing assessment of patient response, in order to detect any adverse reaction and to alter or discontinue "administration" of the truth as appropriate. There is nothing strange or unusual about this; medication is often administered in much the same manner.

Methods of Assessment and Administration

Most advocates of truth-telling emphasize the importance of doing so responsibly; of being available and present to the patient for any signs of distress; of being available and present to the patient as he or she absorbs and digests the information; of exercising good judgment, timing, and sensitivity to the patient's mood; and of not imposing information upon the patient when he or she is not prepared to accept it — even if that means never.

The manner in which the information is conveyed is as important as the information itself in determining the nature of the patient's response to it. Anxiety and fear can be more than reduced; they can be subordinated to hope. Even the most dismal statistic — if the patient's personality and intellect make statistics appropriate — can be conveyed in a manner which, without lying, leaves a "route-out," a reason to hope for survival. While some patients do not like to dwell upon the unpleasant once they already know about it — and they should not be forced against their will — with other patients "optimism carries more conviction when salted with some unpalatable facts and possibilities,"⁵⁵ which give more credibility to the doctor as "not hiding anything."

Not all patients react the same way to truth-telling, and disclosure needs to be "administered" in accordance with the needs of the patient.⁵⁶ Some patients, "tense and suspicious that they are

55. Brewin, p. 1626.

56. See Hinton, "Talking with people about to die," for a broad sampling of the

being kept in the dark, badly need more information," but not necessarily every last detail.

Other patients feel ill at ease with technical explanations. Such a patient is concered with "immediate needs and fears," and not with "diagnostic labels or long-range forecasts."

Some desperately hope for reassurance that their condition is not dreadful or try to maintain "aggressively cheerful optimism." Such a patient "will be deeply upset, or angry, or both . . . if given a diagnosis or prognosis that he is striving to reject."⁵⁷

Other patients want the full facts. Nevertheless, the truth-teller might need to assess whether the patient will appreciate or despise guarded optimism, and whether the patient will tend to put an optimistic or pessimistic slant on such words as "possibly" or "probably."⁵⁸

A number of different methods have been used to determine how much information should be given to a particular patient. In an experiment conducted in Australia, patients were given a choice about the types of information they would like to receive. The categories of information were: (1) diagnosis; (2) treatment; (3) symptoms to be anticipated; (4) examinations and tests that will be necessary; (5) palliative measures available; (6) prognosis ("what the outcome might be"). The vast majority of patients elected to receive information in all the categories. The highest percentage — 97% — wanted to know about "tests, treatments, and side effects." The lowest percentage — 88% — wanted information about prognosis. Patients were given exactly, and only, the information that they requested. No adverse reactions were experienced. Subsequent follow-up, at five days and at six weeks, showed a high level of recall and understanding by patients of what had been told to them. The researchers also found that this method, of "explicit categorisation," had averted the situation of "some patients being

variety of patient response to and desire for the truth, as reflected in their own words.

57. Brewin, p. 1624.

58. *Ibid.*

provided with information they did not wish to have.⁵⁹

Another method, suggested by Cassem and Stewart, is for the physician to tell the patient, *prior* to the diagnostic workup, that "after all information is gathered, the two of them will sit down . . . in private to discuss the test results. This gives those who don't want to know or who want someone else to know instead of them a chance to say so."⁶⁰

Some patients give mixed messages, indicating confusion about the facts and verbalizing a desire for information, but not really wanting to know, if it is unpleasant. Such a patient will usually forget or deny having been told, even if informed repeatedly.⁶¹ When speaking with a person who might fall into this category, it is best to use non-specific, somewhat vague terminology to begin with. Names and labels need not be placed upon this disease initially. If the patient wants more specific information, he will make that clear and the information may then be given. If, on the other hand, the patient is afraid to know or emotionally unable to deal with bad news, this will become apparent and the information can be withheld.⁶²

Receptivity and response to unpleasant information varies not only from patient to patient, but even within the same patient from day to day or from hour to hour. A patient's mood may be affected by "varying proportions of acceptance, denial, optimism, and pessimism,"⁶³ by his or her level of pain, by a fluctuating degree of difficulty in eating and in bodily functions, and by extraneous factors such as interpersonal relationships and changes in the weather.

The truth-teller must, therefore, be sensitive to the individual patient and to the mood of the moment. Before disclosing — or

59. P.M. Reynolds *et. al.*, pp. 1449-51.

60. Cassem & Stewart, p. 297.

61. Bok, p. 242.

62. Brewin (p. 1626) advises "talking to the patient in such a way that he is, in effect, given the choice of . . . denial or acceptance."

63. *Ibid.* p. 1624.

while in the midst of disclosing — an unfavorable diagnosis, an assessment must be made of the patient's receptivity, so that the truth not be imposed upon someone who might be harmed by it. "Sometimes a vital clue," says Brewin, "is not the patient's first question, but his second question (or the absence of a second question), after we have begun to give him some explanation of what is going on, watching to see how he takes it. The patient . . . guides us as to what we should say."^{63a}

This last point is very important. Too often people put themselves into the shoes of others and guess or fantasize what other people think and feel. Goldie describes the harm inflicted upon others when we act upon such fantasy or self-projection instead of investigating the actual mental/emotional state of the patient:

Mr. P decided, when his [terminal] cancer . . . was discovered, to forego any treatment for it. A year later he was referred to the psychotherapist because he was thought to be "depressed." When interviewed it turned out that he was depressed because his vision was blurred and he could not co-ordinate sufficiently to write. And this, it turned out, was due to the side-effects of three drugs which were "anti-depressants" and tranquilisers and three drugs which were for the relief of pain. He had been given these drugs because it was presumed that he would be in pain, yet he said he had never complained of pain. The tranquilisers were given because it was thought he would be anxious as death was close. He said that he was not afraid of dying but he was concerned about the possibility of dying through choking, with no relief available. In effect he had been given drugs without having a condition which required them, and his ability to think and act as he wished, constructively, had been taken away from him.⁶⁴

63a. *Ibid.*

64. Goldie, p. 132,33. The author goes on to report that the drugs were stopped and

The halacha rules that a gravely ill person should not be told the severity of his condition, because the knowledge that his case is hopeless will cause him anguish leading to an earlier death. When such information would *not* be detrimental to his psychological or physical well-being, the halacha might not require or recommend such withholding. No policy or treatment or of truthful disclosure can be determined *a priori* and applied uniformly to all patients. To decide that the truth must be disclosed to or withheld from a given patient, without assessing the patient, "is equivalent to prescribing for patients without examination."⁶⁵

Maintenance of Hope

One of the main concerns in the truth-telling debate is the assumption that hope and the truth are mutually exclusive — that hope cannot be maintained in the face of the diagnosis of a terminal condition — that the truth about such a condition can only prompt despair. The experience of many of those who deal directly with patients on a daily basis belies this assumption.

In the words of one clinician, "It is almost always possible to combine frank and accurate disclosure of the truth with an invigorating infusion of hope."⁶⁵

Even the patient with terminal cancer can truthfully be told that there are statistically a few lucky, blessed, or highly motivated patients who survive when they are not expected to; that treatment to prolong life may well exceed the projections of its limited success; that miracles happen; that new treatments and cures are being developed constantly; and that with luck, blessing, and determination, "you can be one of those who beat the odds."

the patient went home. There, he went over household affairs with his wife, teaching her how to do many of the odd jobs for which she had previously depended on him. He continued to live actively and without giving-up, until three days prior to his death, at which time his condition required re-admission to the hospital.

65. *Ibid.* Howard Brody, "Hope," a commentary in *JAMA*, Vol. 246, No. 13 (September 25, 1981), p. 1411.

Even when survival is not likely there can still be hope. "Hope is not automatically equated with survival. Hope means different things to different people; and hope means different things to the same person as he moves through different stages of his illness and his emotional reaction to it."⁶⁶ Hope may mean the ability to eat solid food and maybe even to enjoy a good meal. Hope may mean relief from pain, easier breathing, a better night's sleep. A dying person may strive to live longer — and succeed — in order to see a son graduated, a granddaughter married, the family together on a holiday. The 34-year old mother of young children may keep herself going from day to day on the hope of hearing her toddler talk, on the desire to be involved as long as possible in the lives of her husband and children. The religious person may look forward to participating in worship services or otherwise observing the next Sabbath or holy day.

While these extremely limited hopes may strike us as tragic and tear at our hearts, they may be cause for great optimism in the patient. I, myself, have seen hopes such as these serve as incentive for people to endure what we might regard as a "very poor quality of life," but in which they found value. (I have also heard of people's spirits being crushed temporarily over the news of impairments which we might consider minor.) If we *listen* to patients and learn of *their* concerns, we can almost always help them find realistic causes for optimism and for hope.

An experienced physician advises his colleagues "always to have a plan and to tell the patient what it is If there is a reasonable chance of achieving one or more short-term objectives (less pain, easier breathing, a better night's sleep), this needs to be explained to the patient in a suitably positive . . . way. Seldom, if ever, is it true to say that 'nothing can be done.'"⁶⁷

The most necessary factor for maintaining hope in the patient is an air of hopefulness for him in those around him. An openness,

66. Brody, p. 1411.

67. Brewin, p. 1623. See also Silver, p. 474.

a willingness to talk and to listen to the patient, conveys a positive, hopeful attitude. By contrast, protective secrecy may be detected by the patient and interpreted as "something terrible and hopeless which they're trying to keep from me."

This does not mean that every patient should be told the truth. We have already cited evidence of the inability of some patients to tolerate it. Even the same patient who accepts the truth at one point may deny or "forget" it at another point. He may understand the truth when he is with one person, and not know anything at all about it when he is with another person. Patients may move from acceptance to denial and back again, or vice versa. This movement is part of an internal hope-maintaining mechanism.

Regardless of what is or is not said to a particular patient at a particular time, however, morale is maintained by showing interest, which reflects hope, in the patient. Neither secrecy nor truthfulness can maintain hope, when imposed upon the patient against his mood and wishes. The question of hope does not end with whether or not the truth has been told. The maintenance of morale is dependent upon continued interest, attention, and openness to the patient throughout his illness.⁶⁸

Summary of the Evidence

Summarizing the evidence presented in this section, we have shown that many persons afflicted with terminal illness desire information about the illness and about the nature and purpose of procedures and treatments. These patients benefit from such information, honestly and sensitively presented, in the following ways: amelioration of anxiety and fear; hopefulness for the potential benefits of treatment as described by the physician; better toleration of pain and discomfort; enhanced co-operation in and response to treatment; alleviation of much-feared alienation. All of these benefits make for a psychological climate conducive to a positive will to survive.

68. *Ibid.* p. 1625.

Some patients (19% in one study) who cannot tolerate bad news repress or deny it. Almost all patients are capable of momentary or partial denial, as needed, to protect themselves from intense psychological pain. A small number of patients (7% in a British study, 4% in an American study), incapable of tolerating or of denying bad news, experience a morale-damaging shock when informed of their disease.⁶⁹ This can be avoided, however, by careful assessment of the patient prior to and during information-giving, so that the information may be withheld from these specific patients.

The manner in which information is conveyed has an effect upon how it is received. Presentation must be tailored to the individual patient and to the moment. Continued attention and concern must be shown the patient following information-giving while he digests the full import of the information, and throughout his illness. Even when long-term survival does not appear possible, the situation is not hopeless. Limited goods, other than survival, can be hoped for and can provide motivation to go on.

V. Discussion

We have cited numerous studies and clinical findings — and there are many more which time and space do not permit us to include — which show that truth-telling often, though not always, benefits the terminally ill.

The tendency of advocates of suppression is to dismiss the findings of these studies as too subjective and unreliable. The concurrence of such a large number of independent researchers and clinicians, from a wide variety of backgrounds, dealing with diverse patients, is largely ignored.

The approach of many halachic scholars to this issue is typified by J. David Bleich, who says that the evidence and the findings⁷⁰ are

essentially irrelevant to our concern . . . No universal

69. See above, n. 32.

70. Specifically those of Dr. Elizabeth Kubler-Ross, as though there were no others.

generalizations may be drawn with regard to the reactions of all patients. Not *all* [emphasis is Bleich's] patients react in the manner described by Dr. Kubler-Ross. [Some patients experience] devastation . . . and consequent loss of a desire to live . . . The *possibility* [emphasis is Bleich's] of adverse reaction is sufficient reason for eschewing a policy of full disclosure. Jewish law is concerned with the foreshortening of even a single human life. Accordingly . . . the possibility of hastening death in at least some patients must be the determining consideration.⁷¹

It is well known that a statistical risk of death is present in almost every type of major surgical operation, in general anesthesia, and in certain invasive diagnostic procedures. Yet the halacha does not uniformly prohibit the use of these tests and treatments. Halacha looks not at actuarial tables, but rather at the risk/benefit ratio of the procedure as it applies to the specific patient who is contemplating it. The well-known halachic principle, somehow strangely ignored, but applicable here, is *כל מקום דיכoli לברורי מברין* — "wherever [we are] able to clarify empirically, we clarify empirically."⁷²

The evidence and expert opinion based upon experience indicate that the benefits or risks of truth-telling to an individual patient can be assessed empirically in the course of treating the patient. With proper assessment and careful administration, the risks can be avoided/reduced, and life prolonging benefits can accrue.

The *Shulchan Aruch* itself prescribes truthfulness tempered with hope when imminent death is anticipated:

[When the patient's condition has] leaned toward death, [we] say to him, "Confess." And [we] say to him, "Many have confessed and not died, and many

71. Bleich, p. 29.

72. Statistical rules and mechanisms — such as *קבוע*, *רובה*, *ספק*, *חוקה*, and *ספק ספק* — are employed in determining halacha only when/because there is no empirical means of determining the facts.

who did not confess have died. And on the merit that you confess [repentance is implicit in confession], you may live. [i.e. Death is not certain; there is still hope.] Whoever confesses [thereby attaining reconciliation with God] has a portion in the World to Come."⁷³

The *Shulchan Aruch*, as explained by the *Shach*, recognizes the emotional risks involved to the very fragile patient. Nevertheless, it prescribes that we minimize the risks — by not engaging in the confession in the presence of persons who tend toward emotional outbursts — and instruct the dying person to confess for his own spiritual benefit. Here is an excellent example of the relevance and application of risk/benefit ratio in truth-telling — with hope — to the dying patient. The risks of emotionally-induced harm cannot be reduced to zero. They are, however, reduced to a reasonable level when measured against the benefits.

The *Shulchan Aruch* and the sources from which it derives (as discussed in the *Shach*) reserve such candor for the very end — when death seems near. The reason for enjoining against truthful discussion during the earlier course of the illness is the presumption of high risk and no benefit.

But we have shown in the preceding section that the benefits deriving from openness and candor often place truth-telling on the side of life-preservation rather than in conflict with it. The practical halacha, therefore, is dependent on the effect which truth-telling will have.

VI. Conclusions

The insights of sages and prophets into human nature must be taken seriously. The sages were concerned about the adverse effects upon longevity of the seriously ill, which can result from disclosure/discussion of bad news. Any halachically valid approach must take into account this concern.

In some cases, halacha requires suppression of unpleasant

73. *Shulchan Aruch: Yoreh Deah* 338:1.

truth and even outright lying to the very seriously ill person. There are instances in which it has been determined that the patient will very likely react to the truth in such a manner as may result in the shortening of his or her life. In such instances, the truth stands in opposition to life. It is not lying that the halacha requires, but rather the preservation of life — with deception as the means.

In some cases, however, concealment of the truth may cause the patient more life-shortening stress than truthful disclosure and open discussion of the unpleasant. In such cases, where it has been determined that such stress can be reduced and survivability can be extended by means of truthfulness, the halacha requires the telling of truth *with hope*, and with sensitive and conscientious — but honest — spiritual and emotional support throughout the illness. Aside from the independent duty to avoid falsehood, the halacha requires the preservation of life — with truth-telling as the means.

It is our contention that it *can* be determined, prior to or during the initial stages of disclosure, whether an individual patient can be expected to experience benefit or harm from knowing about his or her medical condition. Such a determination must be made, or at least attempted, prior to deciding upon a course of either concealment or disclosure.⁹⁷ To practice truthful disclosure upon

97. Three reasons can be offered for the message of benevolently deceitful optimism which the prophet Elisha sends the dying king of Aram. (See above):

- (1) The patient regards the prophet as a messenger of G-d Himself. A terminal prognosis from the prophet would be taken as a death-sentence from G-d.
- (2) Elisha was communicating to the patient only through a long-distance messenger. He would not be able to be there, in person, to help the patient digest the information, or to provide the "caring presence" that is such an essential part of the "pastoral care" of the dying.
- (3) Through the power of prophecy Elisha knew not only the prognosis, but also the emotional reaction to bad news that could be expected *in the patient* — especially if the bad news came from him. His "assessment" of this patient — both physically and emotionally — was accomplished automatically through prophecy, without the need for examination.

I think it is safe to say that the occasion would be rare indeed in which any of these three reasons would apply to ordinary people, such as physicians, dealing with ordinary patients.

the patient who will die sooner on account of it, is a serious violation of the all-important duty to preserve life. To practice concealment/suppression/deception upon the patient who might live longer when he knows and understands his condition, is a double-violation: (1) the needless and unjustified breach of the principle of honesty; and (2) the failure to take available means to preserve or extend the life of another human being.

From Our Readers

November 2, 1987

To the Editor:

I have perused the latest edition of the Journal of Halacha and Contemporary Society (Volume XIV), and would like to share some comments with you. The article in question deals with *Stam Yeinam*.

Firstly, some minor corrections: On page 74, footnote 37 should read הילכה י"ה not הילכה י"א. Also, footnote 38 should read הילכה א instead of הילכה ד. This is missing in the Warsaw and Vilna editions, but in the Rome edition (שנת ר"ע) which is uncensored, the text reads "אֲדֹמִים עֲבוֹדֵי עֶזֶז הַן וַיּוֹם רָאשׁוֹן הוּא יּוֹם אַיִלָּם" "The Edomites (i.e., Romans, i.e. Christians) are idolators and their festival day is Sunday." Evidently, the author of the article was using a different text, for the Rambam clearly maintains that Christianity is *Avoda Zara*.

I am concerned with the Haskalic comment on page 75, which attributes different halachic attitudes to the rabbis based on their geographic location. "One might suggest that the difference between Rambam and the Meiri may have resulted from the fact that the former dwelled among Moslems while the latter's home was in the Christian world." This statement leaves the unfortunate impression that rabbinic views and consequent halachic decisions are influenced and limited by the environment in which the rabbi lives, rather than arising from the internal criteria of the halacha itself. I cannot believe that the Journal of Halacha would wish to foster such a mistaken impression. Most probably the author intended to indicate that Rambam and Meiri based their evaluation of Christianity on the practices of the Christians which they witnessed in their own time. The practice of Christianity in twentieth century America is certainly not identical with Christian practice in twelfth century Europe. Religious fervor and dedication

might conceivably be markedly different in the newly-Catholic parts of Spain which the Rambam passed through, from the cosmopolitan Provence of the Meiri where the pope felt obliged to declare a Crusade against Christians because there was so much laxity in observance and heresy in belief. If this was the author's intent, he or the editors should have specified it.

A further problem arises from the author's giving what I consider unwarranted weight to the approach of the Meiri, which is replete in his *Sefer on Tractate Avoda Zora*. (It is also explicated by Jacob Katz in his *Exclusiveness and Toleration*). It seems that the Meiri for all practical purposes removes Gentiles from the category of idolators, describing them as "nations bound by ways of religion." This is quite a novel approach, wherein he renders Gentiles as virtual *goyim*, and it was possibly written that way due to the pressure of the (Christian) censors. Its validity is thus suspect; even if not, it is still only a solitary opinion (*דעת יחיד*) which stands in opposition to the accepted halachic posture adopted by a wide range of rabbinic authorities.

Sincerely yours,

DOVID COHEN

Rav of Bais Hamidrosh

Gul Yaavetz

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Rabbi Poleyeff Responds

Rabbi Dovid Cohen's comments are indeed welcome as they come from an acknowledged *talmid chacham* and respected scholar. There are two main areas upon which he comments and to which I wish to respond.

In regard to Rabbi Cohen's comment that the Meiri's view (that the Christians of today are not classified as *Akum*) is a *daat yachid*, this is not entirely so. His may be a minority view but he is nonetheless joined in this opinion by R. Moshe Rivkes of 17th century Lithuania in his *Choshen Mishpat* (באר הגולה) on *תכ"ה סק"ש* ש"ע.

R. Yaakov Emden of 18th century Germany in *שאלה ותשובות* 13b acknowledges that not every non-Jew is automatically an *Akum* when he declares: "Non-Jews outside of Israel are not idolworshippers. They are merely maintaining their forefathers' custom."

Rabbi Cohen further states that the Meiri was subject to censorship, and thus the authenticity of his view may be called into question. Clearly some sort of support is necessary to prove this contention; "probably" is hardly sufficient. In fact, no evidence appears to exist that censorship was common in the 13th century Provence where the Meiri flourished. Further, the practice of censors was to cut out or blacken objectionable passages or sections of the writer, not to add statements or to eliminate just enough words so as to change the intent of the author. The current version of Meiri's view of the halachic status of the Christians of today is surely the correct one.

In regard to Rabbi Cohen's comment about a haskalic implication, he answered that one himself. There was no intent to suggest that rabbinic views and halachic decisions are influenced by environmental factors. The halacha remains the same and is inviolate. Whether it is *applicable* in a particular area is another matter. An idol-worshipper is the classical *Akum* referred to by the sages. Whether the non-Jews of Rambam's Spain or Meiri's France were *Akum* is a question of definition, not of change in the halacha.

That different situations result in different halachic conclusions, not in changes in the halacha, is not uncommon. In *Iggerot Moshe* (1959) *Yoreh Deah*, no. 35, for example, there appears the question of the permissibility of the purchase of salads produced by an individual who is not careful to inspect cabbage for the existence of bugs. In the process of his discussion, R. Moshe Feinstein declares that cabbage in Europe required inspection, but that which is grown in the United States does not, because of the laws requiring spraying. The halacha did not change. Insects may not be eaten. But where the required action was made unnecessary by some other halachically-accepted action, inspection may not be required. Since the responsum was

published in 1959, the laws in the U.S. have once again brought about a change in circumstances, which may again have an effect on the practical halacha. Since 1959, spraying with DDT has become illegal, and today insects may be far more prevalent in cabbage and other agricultural produce than when the responsum was written.

If this distinction was not clear in the article, then I am indebted to Rabbi Cohen for having called our attention to it.

RABBI ISRAEL POLEYEFF