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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.

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On the Practice of Law According to Halacha

Rabbi Michael J. Broyde

I. Introduction

The practice of law as a profession has received little written scrutiny in the eyes of halacha, although it has been a profession practiced by observant Jews for many years. Much of what will be addressed in this article has not yet been discussed by the various halachic authorities in the United States.¹ This article tentatively concludes that many of the issues commonly thought to be

1. The practice of secular law in Israel poses certain additional problems unique to Israel's status as the promised land. These issues will not be addressed in this article. For an overview of these issues, see Rabbi Waldenburg, *Tzitz Eliezer* 12:82 (and the authorities cited therein) and compare with Justice Elon, *Hamishpat Haivri*, (3d ed.) p. 1606-1613. So, too, this article does not address the role of lawyers in *beit din*. For an excellent analysis of that issue, see R. Nachmun Rackover, *Hashelichut veHaHarsha BaMishpat Haivri*, and Kirshenbaum, "Representation in Litigation in Jewish Law," *Dine Israel* 6:26 (1975).

This article also does not address a number of issues raised by all commercial interactions with the secular society at large, including lawyers. While undoubtedly important, these issues are not directly related to the practice of law.

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halachically problematic within the practice of law, in fact are not, and that the profession of law has many areas of practice within it that are permissible.

This article is divided into three parts, each of which addresses different issues within the practice of law. The first section addresses a number of systemic problems associated with the practice of law by Jews, the most significant of which is the prohibition of litigating in secular courts. The second section addresses some of the very common practices of lawyers which, while not a mandatory part of lawyers' professional lives, have become so common that lawyers must know the halachically permissible scope of such activity. The best example of this is assisting in interest-bearing transactions. The third section addresses some issues raised by the practice of criminal law by a Jew whether as a witness, prosecutor, or defense attorney.²

I. SYSTEMIC ISSUES

1. Litigation in Secular Courts

A. Rules

Although much has been written about the history of the

2. An equally pressing issue is the general tension between the Sages' negative attitude toward adversarial systems of justice (and lawyers) and a Jew's practicing law in such a system. It is clear that the halacha did not encourage the use of lawyers within the system of *batei din* except in the most unusual instances, such as for a person who cannot formulate his own defense. However, this might not be relevant to a discussion of being a lawyer *within* an adversarial system of justice. Certainly halacha acknowledges that an adversarial system of justice is sometimes just and proper. As the Rashba in his responsa(2:393) stated "The propriety of advocating depends on the circumstances and upon one's inner intentions, since Jewish law, which is true, favors only that which is true and the judge is obligated to decide a matter in accordance with the truth." Thus, the repeated admonitions not to use *orchei din* (*Avot* 1:8; *Ketubot* 52b, 86a; Rambam *Hilchot Sanhedrin*, 22:10) can perhaps be limited to using *orchei din* within a system that does not require or desire them. Rabbi Dov Frimer has addressed this issue. See Frimer, "The Role of a Lawyer in Jewish Law," 1 *J. Law & Religion* 297 (1983).

prohibition of litigating in secular court³ (in Hebrew, *arcaot*) and the critical role it played in continuing the development of Jewish law as a practical system of law, the scope of the prohibition can be summarized in four distinct rules:

1. In order for there to be a prohibition of litigating in secular court,⁴ both the plaintiff and the defendant must be Jewish.

Although there is a minority opinion to the contrary in the name of Rabbi Shimon Duran (*Tashbetz*, 2:290) that the prohibition applies even when a non-Jewish litigant wishes to go to a Jewish court, this opinion has been generally rejected by most authorities as not the normative opinion of halacha.⁵

2. Any time the defendant, be he Jewish or not, will not go to a Jewish court, one may, after seeking rabbinic permission, summon him to secular court.

Since the time of the *Geonim* it has been accepted that a plaintiff could resort to secular court if his opponent refused to appear before a *beit din*. Thus, for example, Rav Palti Gaon learns from the talmudic saying "if a person calls to another [to rebuke

3. This area of the halacha has been addressed in prior issues of this journal; see Krauss, "Litigation in Secular Courts," 2 *JHCS* 35 (1982). It is thus not necessary to repeat the reasons for the prohibition of *arcaot* or its many application. This article will address only its impact on lawyers and the practice of law.

Whether this prohibition is biblical or rabbinic is of some dispute; see *Kovetz HaPoskim al Choshen Mishpat* 3:26(1) (p.176). The *Sema* assumes it is rabbinic; see *Sefer Meirat Enayim, Choshen Mishpat* 26:11.

4. There is no difference among the courts of idol worshipers, non-Jewish monotheists, and secular courts for the purposes of this rule. Almost all authorities agree that the prohibition of *arcaot* applies to all non-Jewish courts of any type; see *Tashbetz* 4:6 (the prohibition applies to Muslim courts).

5. *Kovetz*, *supra* note 3, at p. 178-180

Even if one were to accept the *Tashbetz*'s position, in this author's opinion, a lawyer may assume that a non-Jew would not consent to use a *beit din* to arbitrate his disputes, and the Jew may proceed to use secular court until the non-Jew advises him that he wishes to use a *beit din*. The non-Jewish litigant would have to indicate that he wishes to litigate in a Jewish court.

him] and he does not answer, he may throw a wall on him" (*Bava Kamma* 92b) that "From here we derive that if Reuven has a claim against Shimon, and Shimon refuses to come to *beit din*, Reuven can take him to secular court to recover what belongs to him" (Rosh, *Bava Kamma* 8:17). Rav Sherira Gaon also allows appearing before secular courts in such circumstances,⁶ and this rule is quoted by all the codes. The *Shulchan Aruch* (*Choshen Mishpat* 26:2) rules that if the defendant is stubborn and refuses to appear before a *beit din*, the plaintiff may go to a *beit din* first. If the defendant does not appear, the plaintiff should receive permission from the *beit din* to take his claim to the secular courts.

3. A litigant who wishes to go to *beit din* solely as a means of procrastination and will not abide by an unfavorable decision of the *beit din*, is not considered as one who will go to Jewish court.⁷

Another way in which a plaintiff or defendant will occasionally misuse *beit din* occurs through the mechanism of each side choosing its own judge and the two judges choosing the third judge (in Hebrew, *Zabla*). In many circumstances, as already noted by the earliest *Rishonim*, an unscrupulous person will choose as his "judge" a person who will not decide the case except in his favor, and who will not consent to the choice of the third judge unless that judge also will decide the case in his backer's favor (Rosh, *Sanhedrin* 3:2). Such "judges" unquestionably violate halacha when they behave in that manner, and sincere adherents to halacha

6. *Beit Yosef* commenting on *Tur, Choshen Mishpat* 26:2.

7. This is a very common event. A litigant who will not sign a binding arbitration form which, in the state of New York, allows a Jewish court to enforce its judgments in secular court, might be considered as if he will not follow the decision of the Jewish court. Many halachic authorities do not require that one first go through an unnecessary and not binding Jewish court proceeding before one goes to secular court in such a case.

On the other hand, the decision to seek a preliminary injunction before going to *beit din* is not a form of using *arcaot* in violation of halacha; *Iggerot Moshe, Choshen Mishpat* 2:11.

are not obligated to participate in such a hearing under any circumstances.

4. A Jewish defendant may litigate in secular court when the plaintiff improperly summons him into secular court in violation of Jewish law. Thus, from the perspective of a lawyer, the prohibition is only to represent plaintiffs, and not defendants.⁸

The reason for this rule is obvious. A Jewish defendant may litigate in secular court once improperly summoned, for the same reasons that he may summon a defendant to secular court who refuses to allow *beit din* to decide a case.⁹

The cumulative effect of these four rules is that a lawyer who wishes to observe halacha may not, under any circumstances, represent a Jewish plaintiff in a civil action when the Jewish defendant¹⁰ wishes to go to *beit din*.

Although there is one contemporary authority who disagrees (Rabbi Menashe Klein, *Mishne Halacha* 7:255; 3:214), the consensus of opinion seems to be that there is no prohibition in representing a Gentile in a legal dispute with a Jew. The logic of permitting such representation is apparent: in any situation in which the litigant may himself properly go to secular court, there is no prohibition for a lawyer to represent him in secular court. Since the non-Jewish litigant may go to secular court, a Jewish lawyer may represent him. (See also note 12).

Conceptually it should be permissible to aid one Gentile in his legal disputes with another, as they are not obligated to observe

8. See R. Ovadia Yosef, *Yechave Daat* 4:65.

9. Counterclaims may also be pressed if, as in most legal systems (see e.g. *Fed. R. Civ. Proc.* 13), they are waived if not presented. Even permissive claims, after rabbinic permission is sought, may be presented, since the plaintiff in such a case will only very rarely consent to *beit din*'s deciding other claims.

10. Sometimes determining who is the defendant is quite difficult. It would appear that the identity of the "real party in interest" is determinative for the purposes of *arcaot*, and the "named party," if it does not control the litigation, is halachically irrelevant. Thus, when an insurance company fully compensates a defendant for its loss, and controls the litigation, the identity of the named party is not relevant. In cases of partial indemnification that would not be the case.

Jewish law nor to go to *beit din*.¹¹ The primary rationale for the prohibition of litigating in secular court is that Jews should use Jewish law and Jewish courts to arbitrate their disputes, and that a decision not to, and not to use *beit din*, represents an undermining of the validity of halacha. Such a rationale is obviously inapplicable in a dispute where one of the parties is not bound (according to halacha) to use *beit din* as the basis of resolving his disputes.

B. Limitations

It is important to focus on the prohibition of litigating in secular court as it applies to lawyers and not to litigants. A careful reading of *Choshen Mishpat* 26, where the halachic rules of this topic are located, indicates that the prohibition applies only to the litigants whose decision it is to use the secular courts. It would seem thus that the status of the lawyer who is the “agent” (in a certain sense) of the litigants is only that of an “aider” to the litigants, and he is not himself in violation of the underlying prohibition. This has been already noted by R. Ovadia Yosef (*Yechave Da’at* 4:65) where he states that a lawyer who aids one in a lawsuit violates only *lifnei iver*.¹²

Rabbi Menashe Klein (*Mishne Halacha* 7:255; 3:214) advances a rationale for ruling to the contrary and mandating that the substantive prohibition of litigating in secular court applies to a lawyer as well as the client. Rabbi Klein maintains that since the lawyer is the primary actor in the legal field, and the client remains in the background and is typically invisible in court, the prohibition

11. This is true even if one accepts Ramban’s opinion (*Genesis* 34:13) that the commandment of *dinim* incorporates Jewish commercial law into Noachide law, since it certainly does not incorporate the obligation to use a *beit din*. Many authorities reject Ramban’s opinion on this issue; see e.g. R. Naphtali Tzvi Yehuda Berlin, *Ha’amek Shealah*, 2:3. See also *Teshuvot Ramo* 10; *Teshuvot Chatam Sofer* 6:14.
12. This is also apparent from the famous dispute as to whether one can be a witness in secular court in a dispute that actually should be heard in *beit din*. Both sides only discuss whether such conduct is prohibited on *lifnei iver* grounds. No one argues that the substantive prohibition of litigating in secular court is violated by a facilitator; See *Sha’ar Hamishpat*, *Choshen Mishpat* 26:1 *Responsa of Ramo* 52.

of litigating in secular court should apply to the lawyer as well. He thus prohibits a Jew from functioning as a lawyer in any situation in which a *beit din* could in theory hear the case, as a Jewish lawyer may not appear in the secular courts.

One can argue with his analysis in a number of ways. First, there are no textual proofs in the Talmud that the prohibition applies to anybody other than the litigants since it is the client/litigant who decides where a lawsuit should be brought and who can prevent the prohibition of *arcaot* from applying. The lawyer cannot make that decision. Second, the wording of this discussion by all of the major *Rishonim* inclines one in that direction, as they all codify the primary prohibition as preventing one from being *judged* by secular courts. As the Rambam (*Hilchot Sanhedrin* 26:7) states:

All who are judged by non-Jewish law or in their courts, even if their law is similar to Jewish law, are regarded as having reviled, cursed, and committed violence against the laws of Moses our teacher.

So too, the *Shulchan Aruch* (*Choshen Mishpat* 26:1) posits:

It is forbidden to be judged before non-Jewish judges and their courts, even if they apply Jewish law and even if both litigants agree to be judged by them. One who goes to be judged by them is evil, and is regarded as having reviled, cursed, and committed violence against the Torah of Moses our teacher.

The Talmud (*Gittin* 88b) also emphasizes only the prohibition to be “judged” in secular court when it states:

Rabbi Tarfon would say: “Every place where you find non-Jewish law courts, even though their laws are like the laws of Israel, you are not permitted to resort to them for judgment, since it says, ‘these are the laws that you will place before them,’ that is to say, ‘before them’ [Jews] and not before non-Jews.”

The use of the phrase “to be judged” in all of the sources seems to limit the prohibition to being a litigant.

Thus, even in the situation where all of the principals are Jewish, all acting improperly in bringing the lawsuit to secular court instead of *beit din*, logic would yet indicate that the lawyer be classified only as an aider and not as a litigant.¹³

C. *Lifnei Iver*

Having established that when it is prohibited for a litigant to use the secular courts, typically the prohibiton upon the lawyer is not one of *arcaot* but of *lifnei iver*, it is worth noting that there are many situations in which it is permissible to aid one in the committing of a sin even though it would be prohibited to commit the sin oneself. There are situations where, for financial or other reasons, it is permissible to aid a sinner in the commission of his sin where, if the observant Jew would not aid him, others would do so.¹⁴ Thus, the Ramo states that any time others (perhaps even only other Jews¹⁵) can aid one in the commission of a sin, an observant Jew can do so as well, because no additional sinning occurs. According to the Ramo, it is only "pious people" who should conduct themselves according to the stricter opinion which maintains that such conduct is rabbinically prohibited.

The *Shach* and *Nodah BeYehuda* maintain that any time in which the party committing the sin is a *mumar*, that party is to be treated like a non-Jew for the purposes of this law only, since the rabbinic obligation to rebuke a sinner does not apply to an apostate.¹⁶ Thus a lawyer, whose only prohibition to litigate in

13. See also note 77.

14. Much of the discussion of the *lifnei iver* aspects of this article is more fully explained in Hertzberg & Broyde, "Enabling a Jew to Sin: the Parameters," 20 *Journal of Halacha & Contemporary Society* 1 (1990) [Hereinafter *Lifnei Iver*]. The reader is referred to that article for more detail.

15. Whether the "others" can be Jews or must be non-Jews is a dispute among the latter authorities. According to many authorities, the tradition is to conduct oneself in accordance with those who maintain that the "others" must be non-Jews. This dispute, however, is not relevant to lawyers in America, as there are many Gentile lawyers. This is perhaps not true in Israel. See *Lifnei Iver*, *supra* note 14, at 13-14.

16. *Shach*, *Yoreh Deah*, 151:6; R. Yechezkel Landau, *Daggul Merevavah*, commenting on *id.*; *Lifnei Iver*, *supra* note 14 at 15-16. If the *mumar* in fact has

secular courts is based on the prohibition of "placing a stumbling block in front of a blind person" may, according to many authorities, do so in any situation where the plaintiff, who is improperly going to secular court, is himself not observant and will go to secular court with a different attorney if this attorney declines to represent him.

D. Arcaot and Dina Dimalchuta

One other issue must be addressed in a discussion of *arcaot*: the type of litigation to which it applies. Public causes of action, *i.e.*, those types of actions created by secular governments or courts under the rubric of "the law of the land is the law" and which aid the government in its task of governing (*dina dimalchuta*), may be permissibly litigated in secular court in many cases. This is obviously true of criminal cases as will be discussed in section III, but it has applications in many other areas of the law also. One may unquestionably litigate against the government or its (coincidentally Jewish) agents, such as the Securities and Exchange Commission, the Environmental Protection Agency, or the Internal Revenue Service, or engage in any litigation where the primary cause of action was created by the secular government and involves public litigation in order to "make the world a better place"¹⁷ and not to resolve individual disputes (even if individual disputes are incidentally resolved).

the status of *tinok shenishbah* the *Shach's* leniency alone would not apply. However, the *Daggul Meravavah*'s transformation of *mumar* to *maizid* would probably still allow for this leniency. According to the *Daggul Meravavah*, so long as the person is knowingly transgressing and will not heed rebuke, there exists no rabbinic prohibition. It therefore becomes possible to consider a person a *tinok shenishbah* vis-a-vis many halachot and yet consider him a *maizid* with regard to the rabbinic prohibition of *lifnei iver*. For an explanation of why this is so, see *Chazon Ish, Orach Chaim* 87 (23) § 16.

Even if one were to accept Rabbi Klein's thesis that the lawyer violates the prohibition of litigating in secular court and not merely *lifnei iver*, this is only true when the plaintiff also is Jewish and also violating the prohibition. It is counter-intuitive to maintain that a Jewish lawyer violates the prohibition of litigating in secular court when he aids someone who is properly in such a court.

17. See e.g. *Shulchan Aruch, Choshen Mishpat* 269:8 and *Sema* 21.

Classifying such litigation is not always easy. For example, one might argue that declaring bankruptcy is a private, rather than public, action and therefore improper or ineffective under Jewish law to the extent it diminishes the rights of the Jewish creditors, and a lawyer may not aid a Jew in such a declaration. However, there is a responsum by Rabbi Feinstein to the contrary, stating that it is permissible to avail oneself of the secular bankruptcy laws and that such laws are valid according to halacha as "the law of the land" (*Iggerot Moshe, Choshen Mishpat* 2:62;3 *Halahcha URefuah* 348 (1983). The rationale for Rabbi Feinstein's opinion is that bankruptcy was instituted not only to protect an individual debtor or creditor, but to further a general governmental interest in the organized economy and to encourage investment in the economy. Thus, when the secular government allocates the debtor's assets in a manner contrary to that used by halacha,¹⁸ a Jew must honor this division, even to the extent of returning money already in his control. Rabbi Feinstein states:

Thus, the laws promulgated by the government in the case of one who indebted himself and does not have the ability to pay back his debts — what is called bankruptcy — and he is a debtor to many creditors, and the government appoints a commission of three men to divide the money and property to all creditors in proportion to the money owed to them, [these laws] are valid: It is prohibited for any creditor to take for himself because this is one of the laws applicable to all in the country and thus falls under the rubric of "the law of the land is the law" as the Ramo states. This is even more true in a corporation which involves Gentiles [as creditors as well].

While Rabbi Feinstein does not explicitly state that the discharge of an individual's contractual debts in bankruptcy is recognized by halacha, he clearly implies this when he says "It is prohibited for any creditor to take for himself [absent permission

18. *Ketubot* 93a; *Shulchan Aruch, Choshen Mishpat* 104.

from the Bankruptcy Court].” After the assets are distributed, no further permission will ever be given — under American law¹⁹ — to take future monies of the debtor. Rabbi Feinstein expresses no doubt that this is correct in the case of a corporation, (which never after a bankruptcy liquidation, and rarely after a bankruptcy reorganization, receives new capital) due to the presence of shareholders.²⁰

While it is possible to disagree with Rabbi Feinstein’s application to bankruptcy (although no one has done so in print), there are many areas of the law where the government’s purpose is to benefit society as a whole and not to create rules of individual dispute resolution, even though such rules have incidentally been created. For example, the Environmental Protection Agency, in the process of seeking funds to pay for environmental cleanup of toxic waste dumps, frequently will reorder the priority of liens on a property so as to insure adequate funds to pay for a cleanup (see 42 U.S.C. #9607-08). This type of reorganization frequently will affect the rights of private parties. Once a plan of this type is approved, it would appear that the halacha recognizes the reorganization of the obligations even between the original Jewish landowner and a Jewish lienholder, for the same reason explained in Rabbi

19. Actually that might not necessarily be true. The questioner in the responsum resided in Switzerland, where a bankrupt debtor receives no discharge for unsatisfied debts. Creditors holding claims related to pre-petition debts receive a certificate stating the amount unpaid. The creditor, however, is stayed from collecting on the debt as long as the debtor has not been able to gain ‘new fortune.’ Therefore, “in Swiss practice, the defense of not having gained ‘new fortune’ effectively prevents creditors from collecting on their claims.” Huber, “Creditor Equality in Transnational Bankruptcies,” 19 Vand.J. Transnat'l L. 741 (1986).

20. One could understand this responsum as an application of the *Shach*’s opinion (*Choshen Mishpat* 73:39) that in any case in which the halacha was silent, *dina dimalchuta* provided the *mandatory* answer (the *Chazon Ish* (*Choshen Mishpat*, essay 616) thought this wrong) or that if the case involved a common commercial practice, *beit din*, when hearing the case, should assume that the parties have made a condition of accepting the secular law. A careful reading of the responsum indicates that the approach of the *Shach* was not what was intended.

Feinstein's responsum concerning bankruptcy. Furthermore, in such a case a Jew may litigate in secular court against the government or its agent (even if the specific agent is Jewish) to enforce his societal, rather than individual, rights — even if the outcome of the case affects the private rights of other Jewish parties.²¹

The scope of the powers of the secular government under *dina dimalchuta dina* ("the law of the land is the law"), while a critical issue to observant Jews, is a topic beyond the scope of this article.²² Suffice it to state that a lawyer may not assist a client in an action which is prohibited by *dina dimalchuta*, and accepted by the halacha as a proper application of *dina dimalchuta*, since the lawyer's conduct would also violate the law of the land.²³

2. Professional Confidentiality

The bar, like many professions in America, has developed internal rules regulating the conduct of lawyers. Many of these regulations are innocuous, and address either purely professional

21. Thus for example any litigation which requires the plaintiff to function as a *quoniam* (*quo tam pro domin rege quam pro se simpos sequitur* "who brings the action as well for the king as for himself") litigant may be brought in secular court. (For further discussion of this issue, see section III:A and particularly note 79.)

22. See generally, Rabbi H. Schachter, "Dina Dimalchuta Dina" 1 *JHCS* 103(1981). There are four distinct theories as to the scope of powers of the secular government under *dina dimalchuta*, each of which limit its reach. The first theory is the (societal) contract theory (Rashbam; *Bava Batra* 554b; Rashba *Nedarim* 28a) which gives *dina dimalchuta* the same power as any contract under halacha. The second theory limits *dina dimalchuta* to the power to raise taxes, and gives the secular government plenary power (based on a rental theory) only over this narrow field; see *Shach, Yoreh Deah* 165 §8. The third theory assigns *dina dimalchuta* the power of *hefker beit din*, but only on a *derabanan* level; *Beit Shmuel, Even Haezer* 28 §3. The fourth theory assigns the secular government the power of *hefker beit din* *hefker* on a Torah level; see *Devar Avraham*, 1 p.9.

23. In fact there might be situations in which *dina dimalchuta* is inapplicable but a lawyer could nonetheless not aid a violation of the secular law, because of his special promise (taken at the time of admission to the bar) to uphold the law (a

issues (e.g. politeness) or issues of substance whose result is in harmony with halacha (e.g. prohibition of theft). One rule, however, has created quite some controversy and poses a dilemma for observant Jews. That rule is the requirement that a lawyer keep confidential information given to him by a client even if others will be harmed through the lawyer's silence. Two versions of this regulation are in force, depending on whether the state has adopted the Model Rules or the Model Codes.²⁴

The Model Rule (Rule 1.6) states:

- (a) A lawyer shall not reveal information relating to representation of a client...
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;

The Model Code (DR 4-101) adopts a different formulation of the obligations of a lawyer to keep confidences. It states:

- (C) A lawyer may reveal:
 - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

It is apparent that the professional regulations advocated by the Model Rules, and accepted in those states that have adopted them, are incompatible with the obligations of a Jew to prevent harm from befalling a fellow Jew, if possible.²⁵ The Torah requires

promise which the halacha recognizes as binding). In this case, even though citizens' actions violating the law are halachically permitted, the lawyer's conduct would be prohibited; see Rabbi A. Cohen, "On Maintaining A Professional Confidence," 7 *JHCS* 73, 78-81 (1984).

24. The Model Code was endorsed by the ABA in 1969 and the Model Rules in 1982. They differ in many ways. In theory, each state develops its own regulation guiding professional conduct; however, every state except California bases its regulations on either the Rules or the Code.

25. This has been noted by others. See Tucker, "The Confidentiality Rule: A Philosophical Perspective with Reference to Jewish Law and Ethics," 13 *Fordham Urban L.J.* 99 (1984).

a Jew to inform his fellow Jew of potential harm, based on the verse (Leviticus 19:16) "do not stand by while your brother's blood is being shed." As has been noted by many (see *Sema, Choshen Mishpat* 426:1) this obligation applies not only to saving lives but to preventing monetary loss. Thus, if there were no secular regulation of this area, a lawyer who learned that his client was planning to cause monetary loss through impropriety would be halachically obligated to warn the potential victim, and thus prevent the loss.²⁶

Most states, including New York, New Jersey, and California, have simply declined to adopt the Model Rules on this issue and instead enforce the Model Code's test, which allows for disclosure of confidences to protect a person from financial loss caused by fraud or other criminal activity by a client. Thus, the secular obligation is roughly consistent with the requirements of halacha in those states that have adopted the Code. Furthermore, that appears to be the current trend in legal ethics in the United States.²⁷

In those states that have adopted the Code as the basis for their law, the only conflict that actually occurs is when the intent of the client to harm is not sufficiently clear as to meet the standard of the Model Rules ("reasonably believes") but suffices for the halacha (which perhaps only requires "more likely than not").²⁸ In that narrow case, or in a state that has adopted the Model Rules as the basis for its decisions, a direct conflict occurs.

In such a situation a lawyer must tread gingerly. The obligation to rescue a fellow Jew from harm is a very serious one.

26. Rabbi Cohen, in his article "On Maintaining A Professional Confidence," 7 *J. Halacha & Contemporary Society* 73 (1984), advances various reasons why the halacha might not, even in the face of loss of life, require the breaching of a confidence. It is unclear to what extent the halacha would actually accept the "policy" reasons advocated by Rabbi Cohen in the context of the practice of law. It seems logical that society never gains from allowing lawyers, who serve no therapeutic role, to keep confidences as to future misdeeds; it is only as to past misdeeds that privacy benefit is present.
27. See *Annotated Model Rules of Professional Conduct* Rule 1.6 (ABA 1984); *People v. Fentress*, 425 N.Y.S.2d 485 (Sup. Ct. 1980).
28. See Rabbi A. Cohen, "Privacy: A Jewish Perspective," 1 *J. Halacha & Contemporary Society* 53, 74-78 (1981).

However, there is no obligation to rescue one from harm if the rescuer will suffer financial harm. As Rabbi Alfred Cohen has stated:

Our research shows that the majority of halachic authorities accepts the position that a person, whose livelihood depends upon maintaining the confidentiality of revelations made to him, need not jeopardize his position by telling those secrets. Although keeping silent might violate the negative mitzvah of not standing by and allowing another Jew to be harmed, yet as long as he is not violating the mitzvah by *doing* any action and, were he to act he would endanger his own livelihood, he is permitted to remain silent.²⁹

Thus, where a lawyer knows that he will be disciplined³⁰ by his fellow lawyers and lose his ability to earn a living, it is quite possible that the obligation to rescue is suspended.³¹ Observant lawyers should, however, realize that the Model Rules enforce a rule contrary to halacha, and Jews should work to see it changed.

- 29. Rabbi A. Cohen, "Privacy: A Jewish Perspective," pp.53, 84; See also Rabbi A. Cohen, "On Maintaining A Professional Confidence." This rationale is even stronger when the lawyer merely allows the client to withhold material information. It would be legally improper to withhold material sought in discovery proceedings (see Fed. R. Civ. Pro. 26).
- 30. In this author's opinion a lawyer should violate the current interpretation of the professional regulations and do as halacha requires him to do, since it is unlikely that such a person will, in fact, be disciplined. The rationale for obeying the law discussed in note 23 is inapplicable to disciplinary rules, since they do not have the status of "law" in America. A survey of the various casebooks and hornbooks, as well as Westlaw (database MLS-CS and FLS-CS) reports no occasions where a lawyer was disciplined for disclosing information improperly when, in this author's opinion, such disclosure would be compelled by halacha.
- 31. An additional reason can be advanced when a lawyer breaches a confidence to avoid purely financial harm to another. Nothing is gained when one person saves his fellow Jew a sum of money when the act of saving costs an equally significant sum. See Kirshenbaum, "The Good Samaritan: Monetary Aspects" 17 *J. Halacha & Contemporary Society* 83, 84-87 (1989).

3. Oath Taking and Cross-examining

A: Swearing

According to halacha a Jew should avoid taking verbal³² oaths (where God's name is used) as part of his or her daily life, and it has become accepted that one who is pious declines to use God's name in an oath, even if such action causes the loss of money owed.³³ Accordingly, when possible, it is better to "affirm" rather than "swear" according to halacha. The United States, as well as all fifty states within the Union, accept that an "affirmation" without any invocation of God has the same legal effect as an "oath" and secular courts allow all who desire to affirm rather than swear to do so.³⁴

A related issue is the taking of an affirmation (or when permitted, an oath) by a man not wearing a yarmulke or other head covering. As an initial matter, it must be established when it is permissible for men to go without a head covering. A number of modern authorities have addressed this issue. The consensus is that if it is needed for advancement in business or in order to retain one's livelihood, it is permissible for a man to go without a head covering so long as God's name is not invoked; see *Aruch Hashulchan* 2:10 *Iggerot Moshe*, *Orach Chaim* 3:2; *Choshen Mishpat* 1:93.

The question of taking an oath bareheaded has been addressed by a number of authorities, with various decisions given. While some prohibit such oaths (see *Responsa Nachalat Binyamin* 30), most allow such conduct if it is absolutely necessary since, according to technical halacha, a head covering is not required in those circumstances (see *Keneset Hagedolah*, *Yoreh Deah* 157; *Beit Lechem Yehudah* (on *id.*); *Shaar Ephrayim* (on *id.*); *Beit Hillel* (on

32. Written oaths or affirmations are not recognized by the halacha as a form of oath or testimony; See *Shulchan Aruch*, *Choshen Mishpat* 28:11.

33. See *Gittin* 35a; Rambam, *Hilchot Shevuot* 12:12; *Shulchan Aruch Orach Chaim* 156:1; "Vows and Swearing," *Shana BeShanah* 5728 p. 128.

34. See generally, "Oaths and Affirmations," 58 Am.Jur. 2d 1043 §3 ("No distinction is drawn between an oath and an affirmation").

id.); *Bechor Shor, Shabbat* 118b). This is even more true under American law since an “oath” which does not mention God can be taken.

B. Proper Cross-examination

Lawyers, like all Jews, are prohibited from speaking falsely or derogatorily about people without just cause.³⁵ Many lawyers, to whom advice-giving is a central part of their professional life, must know when it is permissible (or prohibited) to repeat negative comments heard about another. The general outlines of when this type of conduct is prohibited and when it is mandated have been addressed numerous times, and do not bear repeating in this article.³⁶

One particular issue, however, is uniquely confronted by lawyers — when may one, in the process of litigating, expose a person’s prior misdeeds to undermine the credibility of his testimony. It is well accepted that a lawyer may, in the process of cross-examining a witness, subject the witness to questioning if such questioning seeks to demonstrate that the witness is not telling the truth, or the complete truth, even if (or because) that embarrasses the witness.³⁷ However, it is most likely prohibited for a lawyer to attack the credibility of a witness whom the lawyer knows to be telling the truth, in order to cast *false* doubt on the truthfulness of the testimony. That would seem to be a violation of the Torah’s commandment of “distancing oneself from falsehood” (“*midevar sheker tirchak*” Exodus 23:7) as well as embarrassing another in public (“*halbanat pnei chavero berabim*”) for no reason.³⁸ Many violations of these laws also violate the Code of

35. The classic work on this topic is Rabbi Yisroel Meir Kagan’s *Chafetz Chaim*. Three distinctly different things are prohibited: *Lashon Hara* (saying something negative though truthful about another); *motzi shem ra* (making a false negative statements about another); and *richilut* (recounting to others gossip heard about them).

36. See e.g. R. Zelig Pliskin, *Guard Your Tongue*.

37. To rule to the contrary would prevent truth seeking in many court proceedings, since the verdict often reveals one of the litigants to be a liar.

38. *Sotah* 10b. See also *Bava Metzia* 58b. *Shavuot* 30b-31a recounts an example of

Professional Responsibility for lawyers, which prohibits the presentation of evidence designed to mislead the jury or other litigants.³⁹

So, too, a lawyer may not cooperate with a client's desire to present a false defense in a civil matter. (Criminal defenses will be dealt with in part III:B.) A false defense occurs when a client seeks to deny liability based upon the plaintiff's inability to prove his case in a court of law. Thus, when a client comes to a lawyer and says that he is being sued for refusing to repay a loan, and the client states that he did in fact borrow the money from the plaintiff but that the whole transaction was oral, and the plaintiff cannot prove the loan, a lawyer may not aid the client in this false defense since the client must actually deny the loan to triumph by law. This is a clear application of *midevar sheker tirchak*, of distancing one's self from lies.⁴⁰

II. PRACTICAL ISSUES

1. Usury (*Ribbit*)

The topic of charging interest on loans is an enormously complicated one, and the tension between Jewish law and common secular commercial practice is very great. Halacha forbids⁴¹ the charging of interest on loans between two Jews absent certain circumstances — the most common being a *heter iska*. This article will assume that the typical lawyer will not be able routinely to convince clients to use a *heter iska*, and it does not address the ramifications of using a *heter iska*.⁴²

midevar sheker tirchok in a legal proceedings. It is possible that it is permitted to cast false doubt as to the truthfulness of a portion of a person's testimony, if that is needed to undermine the viability of other sections of his testimony which actually are false. See *Shulchan Aruch, Choshen Mishpat* 4:1, 28:11.

39. Model Code Of Professional Responsibility, DR7-102 (A) (4).
40. So, too, it would appear that in a civil matter a lawyer cannot seek a demurrer, based on a failure of proof on the issue of liability if he knows that money is actually owed.
41. For a general overview of this topic, see Stern, "Ribbit, A Halachic Anthology," 4 *J. Halacha & Contemporary Society* 46 (1982).
42. For an excellent recent analysis of the effect a *heter iska* has on transactions

More likely than not, it is this area, and not the prohibition of litigating in secular court, that poses the greatest challenge to one's ability to function as a lawyer according to halacha. However, these difficulties are not limited to the practice of law, but are present in all areas of commercial transactions, from real estate to banking and retail sales. In fact, the violations committed by a lawyer assisting in these transactions are of a considerably lower degree than the one actually engaging in such transactions. The primary obligation not to charge interest falls on the one engaging in the prohibited transaction, and not on the lawyer assisting. Furthermore, a lawyer, like a businessman, can establish standard practices which eliminate most halachic questions.

A. Limitations

Two initial substantive limitations exist on the scope of the prohibition to charge interest. The most significant restriction on the prohibition of charging or paying interest is that it is permissible to charge or pay interest on loans to Gentiles, businesses owned by Gentiles, or corporations controlled by or primarily owned by Gentiles. In the diaspora virtually all banks fit into this category.⁴³

The second limitation relates to Jewish-owned corporations. As has been ruled by Rabbi Feinstein and others,⁴⁴ any time the

according to American law, as well as a brief discussion of other issues relating to charging interest, see Resnicoff, "A Commercial Conundrum: Does Prudence Permit the Jewish "Permissible Venture [*Heter Iska*]?" 20 *Seton Hall L.R.* 77 (1989).

10. There are in fact many situations where a *heter iska* is halachically impossible. For example, a Jewish plaintiff who litigates in secular court against another Jew and triumphs, frequently has available the possibility of receiving pre or post judgment interest. It is improper to take such interest in some circumstances.
43. *Shulchan Aruch, Yoreh Deah* 159:1; R. Moshe Sternbuch, *Tam Ribbit* 81:1-4; R. Y. Blau, *Brit Yehudah* 30:16. Although this article is not the place to address this issue in detail, most authorities permit one to lend money to a *mumar*, although not to borrow money from a *mumar*; see *Shulchan Aruch* 159:2. The distinction between a *mumar* and a *tinok shenishbah* in our current society, however, is difficult to define; see *Tam Ribbit* 81:4; *Brit Yehudah* 30:8-15.
44. Rabbi M. Feinstein, *Iggerot Moshe, Yoreh Deah* 2:62, 63; *Shelot Utешivot Maharshag, Yoreh Deah* 5; *Shelot Uteshuvot Tsafnat Paneach* 184.

borrower does not personally obligate himself to repay the loan, but only accepts the limited liability of a corporation, no violation of the laws of taking or paying interest occurs. Obviously since the underlying interest-bearing transaction is permitted, an observant lawyer may assist in the arrangement in any situation where the borrower is borrowing as a corporate entity and not as an individual, since this entails limited rather than unlimited liability.⁴⁵ Even those who argue with Rabbi Feinstein's approach and maintain that according to halacha a corporation is treated no differently from a partnership for the purpose of borrowing with interest, do concede that a corporation's paying interest is only prohibited according to rabbinic, and not Torah, law⁴⁶ — a factor whose significance will be explained further.

Most commercial interest-bearing transactions which require the assistance of a lawyer involve the lending of money either to a corporation, from a bank, or most typically, both.

B. Ribbit Derabanan and Lawyers

From the perspective of a lawyer, one other significant limitation has to be explained. Many common forms of interest charging are only prohibited according to rabbinic decree rather than Torah law. In any situation in which only a rabbinic prohibition of interest charging is violated, the prohibition for a lawyer to aid in the prohibited transactions is one not of lending with interest, but of aiding a sinner. While this is not true in theory, since the Talmud (*Bava Metzia* 75b) recounts that all who facilitate the prohibition of lending with interest violate the biblical prohibition of lending with interest (Exodus 22:24 and Leviticus 25:36-37) as well as *lifnei iver*, it is accepted that the substantive

45. In a situation where the owner of the corporation must also sign a personal liability note, this permissive ruling does not apply. On the other hand, a limited (and perhaps even a regular) partnership that borrows on a "non-recourse" basis most likely is a corporation for the purposes of this ruling.

46. See R. Y. Blau, *Brit Yehudah* 7:66 (quoting all of the authorities who argue with Rabbi Feinstein). However, even those who argue with Rabbi Feinstein concede that only a rabbinic prohibition is involved. *Id.* n. 66.

prohibition on the facilitator does not apply when the underlying prohibition is only rabbinic in nature.⁴⁷

A careful study of the laws of *ribbit* leads one to conclude that in all transactions where the lender loans the money through the issuing of a check, rather than directly in cash or commodities, the lender violates only the rabbinic prohibition of charging interest — even if the loan were of a type that was normally biblically prohibited.

Before this is explained halachically, it is important to understand what a check is, and how it works, according to American law. While the layman might view money on deposit in a bank as a form of bailment, this is incorrect. Rather,

[s]uch funds become the property of the bank, which can commingle and use them as it sees fit... The depositor acquires, in return for the deposit, a claim on the bank as its general, unsecured creditor, and in some accounts, authority to write a check, payment order, or draft against that claim in favor of another person.⁴⁸

In essence, money deposited in a bank is a debt owed by the bank to the depositor. A check issued against an account with a positive balance is a simply a direction to the bank to repay the debt owed to the check writer to a third-party. This understanding of a check has significant impact on the halacha, and has been widely recognized by a number of authorities. For example, many authorities treat the sale of a check at a discount,⁴⁹ (assuming there

47. See *Shulchan Aruch, Yoreh Deah* 160:1 and particularly, *Chave Daat, Yoreh Deah*, 160:1 and *S'deh Chemed* 6:26(3) (stating that most authorities agree with the *Chave Daat*). For a complete discussion of this issue, as well a discussion of whether other authorities disagree, see R. Y. Schreiber, *Tam Ribbit*, 160:1, n. 3 & 4.

48. Smedresman & Lowenfeld, "Eurodollars, Multinational Banks, and National Laws," 64 *N.Y.U. Law Rev.* 733 (1989), paraphrasing Michie on Banks & Banking, 5A, ¶(A)4(b) (1983). A bank is a bailee on a safe deposit box, since it does not have the right to use the valuables in the box.

49. I.e., "A" will write a check to "B" payable immediately for \$30 and "B" will sell the check to "C" for \$25 in cash.

is money in the account to cover the check, consideration has been given for the issuance of the check, and the check is not post-dated [thus making it a violation of the criminal law to stop the check absent cause]) not as a form of prohibited interest payment since all that is actually occurring is the purchasing of a debt. (See e.g. R. Chazan, *Chikrei Lev, Choshen Mishpat* 2:155; R. *Brit Yehuda* 15:17, n. 38-39.)⁵⁰

Once the mechanism by which a check works is understood, it can be argued that no biblical violation of the laws of lending with interest is possible whenever the funds loaned are transferred by check (providing that the bank used by the lender is owned by a Gentile). In any situation in which one Jew desires (in violation of halacha) to lend money with interest to another Jew, but, instead of lending the money in cash, directs that the money loaned be paid through a check, no *biblical* violation of the laws of lending with

50. Rabbi J. David Bleich, in a recent article in *Tradition*, has argued that this analysis of the halacha is incorrect because under relevant American law the issuer of the check has the right to stop the check at any time after issuing and that a check does not by itself create any obligation to the payee and is not a promissory note; see Uniform Commercial Code §3-408. Thus, discounting is improper. See Rabbi J. D. Bleich, "Survey of Recent Halachic Literature: Checks," 24 *Tradition* 74 (1989).

I believe this is an incorrect assessment of the American law for the repayment of loans. Once consideration is given for a loan, the check issued for the loan constitutes a request to transfer the debt owed by the bank from the issuer to payee. While the bank will honor the check writer's stop payment order, such an action is a fraud by the payor, is illegal, and will result in both criminal and civil penalties under American law if the check was issued with consideration. The fact that a stop check order will be honored only indicates that the law has chosen to absolve the bank from liability so as to allow the bank not to investigate the merits of each stop payment order. The issuer of the check remains liable for the amount of the check. Thus, under the Uniform Commercial Code (UCC) §2-403 it is well established that "A seller's contention that no title in goods can pass where there has been a dishonored check given for the purchase price has been rejected by the courts applying the [Uniform Commercial] Code." A. Squillante & Fonseca, *Williston on Sales*, §23-10 (p. 353) (1974). It is only in the case of a gift that American law will allow the issuer to stop payment for virtually any reason. Even in that case, however, the intentional issuing of a bad check is a crime; see Model Code §224.5

interest has occurred. This is so because the lender is actually only directing a Gentile (the bank) to transfer money the Gentile owes the lender (the money on deposit in the bank) and to convey the debt to a new (and Jewish) borrower. When the borrower cashes the check, money previously owed by the bank to the lender is now owed by the Jewish borrower to the lender. A debt owed to a Jew (and the obligation to pay interest on that debt) was transferred from a Gentile borrower to a Jewish borrower.

Although it is true that the net effect of this transaction is that one Jew owes money (and interest) to another Jew, the fact that the money was not directly transferred from one Jew to another, but rather was passed through a Gentile "middle-man" is of enormous halachic significance. While the status of using a Gentile as a front for an otherwise prohibited interest-bearing transactions is a topic of much controversy within halacha, and was a topic of significant dispute among the *Rishonim*, it is now well-accepted that the prohibition involved in authorizing an interest-bearing loan through a Gentile "middle-man" is best only a rabbinic one.⁵¹

A second reason can also be advanced for labelling virtually all interest-bearing commercial transactions as violating only *ribbit derabanan*. While the prohibition to lend with interest is violated whether cash or commodities are lent and repaid, it is also accepted that the biblical prohibition is not violated when one lends with interest a note of indebtedness (*shtar chov*) and is repaid with a note of indebtedness as well. (For example, "A" loans "B" a \$1,000 AT&T bond for a year on the condition that "B" returns to "A" a \$1,500 AT&T bond at the year's end.) Such a transaction violates

51. See Ramo, *Yoreh Deah* 168-9, 3,9.; *Brit Yehudah* 33:1-6, and the notes accompanying §6. A number of authorities maintain that this transaction is permitted; most maintain that this transaction is rabbinically prohibited. Rambam, but no other authority, maintains it is a biblical prohibition.

The basis for ruling that no biblical violation can occur whenever a Gentile "middle-man" is used, is that halacha accepts that according to Torah law, a Gentile cannot (for most actions) be an agent for a Jew. Since there would be no agency *min hatorah*, there can be no *issur torah*. The fact that the money actually originates from the Jew is what would create the rabbinic prohibition.

only the prohibition of *ribbit derabanan*.⁵² There is also no doubt that "checks have the status of notes of indebtedness" for the purpose of the laws of prohibited interest⁵³ and that in any loan in which both the loan and the repayment are by check, no violation of the Torah prohibition of lending with interest can occur. The halacha would view the two checks as identical to the two AT&T bonds in the above example. Only a rabbinic violation of the laws of lending with interest has occurred since only *shtarei chov* (notes of indebtedness) are used by the parties.

Accordingly, virtually all modern day commercial transactions involving a Jewish borrower and lender involve only *ribbit derabanan* since almost all such transactions are done through a Gentile bank and involve checks rather than cash. Any time a transaction is arranged such that the lender does not give the money directly to the borrower (and vice versa upon repayment of the loan) no biblical violation of the interest-charging prohibition has occurred.⁵⁴ As has been stated above, any time the prohibition to lend is only rabbinic, the prohibition to assist the borrower of the lender is only *lifnei iver*.

Once the prohibition on the lawyer is reduced to *lifnei iver* (as it is in all cases of *ribbit derabanan*) many liberalities come into play. This is even more true in our current legal market where there are many lawyers vying to assist a transaction, and each lawyer is capable of doing the work without the assistance of other lawyers. This situation, which is halachically classified as "*chad ibra*

Even if the bank is owned by Jews, some authorities still maintain that the lender has not violated any *issur torah*, since *ain shaliach lidevar averah*. It would be the Jewish bank that violates Torah law — the Jewish lender has only violated rabbinic law; See *Ramo Shulchan Aruch, Yoreh Deah* 160:16 and *Shach* commenting on *id.* Many authorities reject this rule; see *Brit Yehudah* 6:12 and the notes accompanying as well as R. Hoffman, *Melamed Lehoil, Yoreh Deah* 59.

52. The reasons for this ruling is beyond the scope of this article. For a complete explanation, see *Tosafot, Bava Metzia* 61a; *Tur, Yoreh Deah* 161; *Shach, Yoreh Deah* 161:1 *Chave Daat* 161:1; *Brit Yehudah* 2:7 (and particularly notes 17, 18, and 19).
53. *Brit Yehudah* 2:7 note 19. The reason this is so is explained in text above.
54. *Shulchan Aruch Yoreh Deah* 160 1-16; *Brit Yehudah* 6:1-8.

denahara" (literally "one side of the river") reduces the *lifnei iver* prohibition to at most only a rabbinic prohibition. As discussed previously⁵⁵ the scope of the prohibition of placing a stumbling block in front of a blind person is subject to dispute, and in a situation where there are many lawyers who are either not observant or not Jewish, a strong case could be made that that prohibition does not apply.

Thus, a lawyer who aids in the typical interest-bearing transaction should be aware of the various *lifnei iver* issues involved in these transactions and can, according to many authorities, conduct himself, with care, in a manner not in violation of the halacha.⁵⁶ This is particularly true in the current legal market where many other lawyers are willing to do the work if this lawyer declines to do so.⁵⁷

The laws of charging interest are among the most complex in Jewish law, and have been at tension with the general commercial practices of the society Ashkenazic Jews have lived in for more than the last 300 years, perhaps more than the last 800 years.⁵⁸ Difficult as these issues are, solutions do exist, and one should hesitate to foreclose as halachically impermissible any of the more common professions — law or other.

2. Wills and Inheritance

This section will not focus on the permissibility of a classical secular will according to halacha,⁵⁹ but rather only on the permissibility of a lawyer's writing such a will as a service (for a

55. Section I:1:C; see also *Lifnei Iver*, supra note 14.

56. See Section I:1:C and specifically note 14.

57. It is worth noting that if a religious lawyer were to involve himself in these prohibited transactions and help design them so as to reduce (even if not eliminate) the prohibitions involved, such conduct by the lawyer is permitted once the transactions are prohibited only rabbinically; see Rabbi Akiva Eiger, *Yoreh Deah* 181:6.

58. Jews charging interest to fellow Jews was a problem that already plagued the Tosafists in the 1200's France; see *Tosafot, Bava Metzia* 71A (*Kegon*).

59. For an overview of this topic in halacha, see Dick, "Halacha and the Conventional Last Will and Testament," 2 *JHCS* 5 (1982).

fee) to a client who desires to use a secular will. Since there are many halachic authorities who recognize a secular will as a post-facto valid means of transferring one's assets,⁶⁰ it is likely that a lawyer can aid in the creation of such a document — even if the lawyer himself is of the opinion that such a document is not halachically acceptable — because it is not the lawyer who is using the will, but the client, and the client will simply go to another lawyer. The prohibition upon the lawyer in this context is at best only to "place a stumbling block in front of a blind person" since the client could certainly write the will himself or go to another lawyer for the will writing. This is especially true if one accepts Rabbi Feinstein's opinion that the will validly transfers the property, and, as is the case of the typical will, the bulk of the estate is left to the halachic heirs. Even if the lawyer does not accept Rabbi Feinstein's opinion, the fact that the client does is sufficient.⁶¹ From the perspective of the lawyer, the prohibition of *lifnei iver* would not apply since the sinner thinks his conduct is

60. Two distinct issues are present when discussing secular wills: the first one is the appropriateness of bequeathing one's assets to people who are not the proper heirs according to halacha. There are numerous opinions on how much of one's estate may be left to other than the proper heirs — these opinions range from the majority to only deminimis amounts; see *Id.* p 3-7.

The second issue is whether a will is a halachically valid means of transferring assets after death — *i.e.* is the property devised through a will actually owned by the legatee or by the heirs mandated by Torah law. This is the fundamental issue from the perspective of a lawyer, because if the transfer is not valid, the lawyer is assisting in a theft. Rabbi Feinstein states that such a method of transfer is valid; see *Iggerot Moshe, Even Haezer* 1:104. Although some authorities argue with him — see Dayan Grunfeld, *The Jewish Law of Inheritance* and R. Feivel Cohen, *Kuntres Midor L'dor: Laws of the Torah Relating to the Writing of a Will and the Distribution of One's Estate* — certainly it is appropriate to rely on Rabbi Feinstein's opinion as to the validity of the transfer as most authorities acknowledge that at the least the transfer is valid; see *Maharsham* 224; *Binyan Zion* app 24; *Sefer Ikre Hadat, Orach Chaim* 21; *Perach Mateh Aharon* 1:60. Even Rabbi C.O. Grodzinski states that a *beit din* would enforce such a will, although he thinks they are halachically improper; see *Michtavei Achiezer* 3:24.

61. This is based on the fact that one may, without violating *lifnei iver*, assist a person in an action that some authorities consider permissible if the person

proper, and has competent halachic authorities who agree with him, and others will do the aiding if an observant lawyer does not.

The substantive prohibition of devising one's estate to heirs other than those directed by the Torah — a prohibition whose scope is subject to great dispute, and the severity of which is limited by the Talmud's statement that one who does so acts only "without the spirit of the Sages"⁶² — seems on its face not to apply to merely assisting in the creation of such a document.⁶³ Of course, in a situation where a will considered halachically valid by all authorities would be drafted if the client knew about the various opinions, it is unquestionably preferable to encourage the client to draft such a document.

Thus it very likely that no significant halachic problems are associated with a lawyer's writing a will for a client, even if there are halachic difficulties associated with a person's using a will of this type as a way to devise all or most of his estate. The lawyer's role in will writing is not one of being a principal, but only that of an aider. In particular once the client leaves the bulk of his estate to family members who would inherit under Torah law, virtually all the halachic obstacles to being a lawyer for such a will disappear.

3. Arbitration

As a general rule, halacha favors the use of compromise (*peshara*) rather than law (*din*) to resolve legal disputes.⁶⁴ Thus, it is certainly appropriate for a Jewish lawyer to encourage the use of arbitration as a substitute for litigation between two Jewish clients who cannot privately settle their dispute and will not go to *beit din*. Ideally such an arbitration would take place under the direction of a

himself accepts this opinion, even if the aider does not. See *Lifnei Iver*, supra note 14, at 16, 25-32.

62. *Bava Batra* 133b; Rambam, *Hilchot Nachalot* 6:11; *Shulchan Aruch, Choshen Mishpat* 282:1.

63. Thus it is only considered "preferable" not to be a witness for such document; see Rambam, *Hilchot Nachalot* 6:11; *Shulchan Aruch, Choshen Mishpat* 282:1.

64. See Bressler, "Arbitration and the Courts in Jewish Law," 9 *J. Halacha & Contemporary Society* 105, 107-112 (1985).

beit din, although compromise or arbitration is certainly valid under the direction of secular arbitrators.⁶⁵

A frequently asked question is whether an observant Jew *must* consent to the use of secular binding arbitration (*i.e.*, not from a *beit din*) rather than use the secular courts in a case where the defendant will not go to *beit din*. For example, in the case of an observant Jewish plaintiff in a lawsuit in which the Jewish defendant refuses to go to a *beit din*, but indicates that he would consent to a secular arbitrator, is such a defendant considered as one who "will not go to a Jewish court" thus permitting an observant Jew to summon him to secular court, or must the observant Jew consent to secular arbitration to spare the defendant from having to litigate in secular court?

It is this author's opinion that the plaintiff need not consent to secular arbitration in this case, since according to halacha, arbitration is not mandatory and can never be imposed upon a plaintiff or defendant without his consent.⁶⁶ Therefore, the plaintiff may compel the defendant to use a *beit din* or may use the secular courts once the Jewish courts give him permission to do so. It is worth noting, however, that the decision to use arbitration is especially desirable because arbitration is preferred over *din* and, additionally, one is saving the defendant from violating the prohibition of litigating in secular court.

4. Family Law Issues

The interaction between halacha and secular law is most problematic in the field of family law (*i.e.*, marriage, divorce, and child custody). It is in this area that many of the values that are at the core of halacha have been rejected by normative American society. This corruption of family values has, in a few circumstances, even had significant impact on the practices of the Orthodox community in America. When an attorney practices

65. Rabbi Akiva Eiger, *Choshen Mishpat* 3; Rabbi Eliezer Waldenburg, *Tzitz Eliezer* 11:93.

66. See *Shulchan Aruch*, *Choshen Mishpat* 12:1-3.

family law either between two Jews or (regrettably enough) between a Jew and a Gentile who are married or seeking to become married, it is very important to analyze carefully the halachic implications of the legal advice given.

Unlike halacha, where marriage and divorce are essentially private contracts, the United States requires family arrangements to be sanctioned by the government — in the case of divorce and custody, by the courts.⁶⁷ Thus, lawyers are frequently called upon to advocate, and mediate, disputes between spouses who are seeking a divorce and disputing custody of the children.

A number of basic issues need to be addressed. As an initial matter, a lawyer may not advise a client, for financial or social reasons, to stay married to someone whom the halacha prohibits one from living with.⁶⁸ Thus, in an intermarriage, it is incumbent upon the lawyer either to give no advice as to how to salvage the marriage or to counsel the client not to try to save the marriage. Giving advice to continue a halachically prohibited relationship is most likely a Torah violation of *lifnei iver*. It is possible that even advising a client how to salvage a marriage which is only rabbincally prohibited is itself a Torah violation of *lifnei iver*.⁶⁹

Similarly, it would seem incumbent upon an observant attorney who is aiding a Jewish couple seeking a divorce to advise the couple that they must also seek a divorce which is proper according to halacha. While a lawyer may continue to represent clients who have indicated that they will seek only a secular divorce,⁷⁰ experience from many rabbis in this field indicates that many non-religious couples will in fact seek a halachically proper

67. I have addressed some of these issues elsewhere; see "The Establishment of Maternity and Paternity in Jewish and American Law," 3 *National Jewish Law Review* 117,147,153 (1988).

68. This was first pointed out in a slightly different context by R. Yosef while discussing the role of a therapist; see R. Ovadia Yosef, *Yabia Omer* 3:21 where he discusses numerous issues that relate to being a marriage counsellor for non-religious Jews.

69. See *Lifnei iver*, *supra* note 14, at 15 n.14.

70. For reasons explained in Section I:1:C and *Lifnei iver*, *supra* note 14.

divorce once the obligation to do so, and the consequences of not doing so, are clearly presented to them.

So too, it would seem that it is prohibited for a religious lawyer to aid a religious Jew who is seeking to use the halachic requirement that a couple be properly divorced (*i.e.*, that a *get* be given) in order to demand money from a spouse lest he or she be left halachically incapable of remarrying. Aiding or encouraging a person to extort money as payment for a *get* when such conduct is prohibited would undoubtedly violate both the "bad advice" and "aiding a sinner" aspect of *lifnei iver*.⁷¹

Child custody arrangements are also problematic. Courts in the United States will not allow the arbitration of child custody disputes in any forum other than the secular court. Thus, while a *beit din* can decide such matters, its decision can be challenged in court by a dissatisfied parent. Unlike monetary disputes, which most states enforce without reviewing the merits of a *beit din's* determination, courts in custody disputes will review all arrangements *de novo*. Thus, notwithstanding halacha's clear rules for determining the appropriate parent (or other) to receive custody, in the case of divorce or incapacity, there is no guarantee that the court will accept them.⁷²

It would be a serious violation of halacha for a lawyer to advise a client to refuse to go to *beit din* to arrange child custody matters, or to ignore the ruling of *beit din* once its judgment is given. The use of the secular courts, which place considerably less emphasis on the proper religious training of children, can (absent a prior agreement between the parents) result in arrangements

71. Unlike many situations where the lawyer's advice or assistance is only "one side of the river," in the context of providing advice of this type the religious lawyer is most properly categorized as "two sides of the river" since in reality only religious attorneys best provide this type of advice. Nor is this a case of permissible *lifnei d'lifnei* as that too is prohibited when all the participants are Jewish; see *Tosafot, Avoda Zara* 15a.

72. For recent English articles on this topic, see Warburg, "Child Custody: A Comparative Analysis" *Israel Law Review* 14:480 (1981); Schaeffer, "Child Custody, Halacha and Secular Approaches," 6 *JHCS* 33 (1983).

contrary to the dictates of halacha and thus the best interest of the child. These considerations are even more true when one of the parents seeks to withdraw from the Orthodox community. In such a circumstance it is obviously better that an observant Jew not represent that parent in court, in that the lawyer cannot argue that it is "in the best interests of the child" to be placed in the custody of the non-observant parent. The presence of an observant lawyer advancing this argument might actually add credibility to the non-observant parent's claim.

In short, child custody arrangements ordered by *beit din* will not automatically be honored by the secular courts, and it is a violation of halacha, as well as a grave damage to the child, for a lawyer to assist the court in declining to follow the order of *beit din*.

III CRIMINAL LAW

Three distinct issues are involved in an attorney's practicing criminal law according to halacha. The first is when is it permissible to inform upon a person for committing a crime and to be a witness at trial; the second, and related issue, is whether one may be a prosecutor of criminals. The third issue is whether one may represent a person who has been accused of a crime, and what types of defenses can one present.⁷³

1: Being a Witness, Informer, or Prosecutor

There are no contemporary written responsa which prohibit being a witness against or informing upon a Jew who has committed a violent crime. It is worth quoting a statement by Rabbi Herschel Schachter, a *Rosh Yeshiva* at Yeshiva University, which appeared in the first issue of this journal, on this topic:

73. It goes without saying that a lawyer may represent his client in a plea bargaining situation where the client is going to plead guilty but seeks a reduced sentence. In such cases the lawyer is not actually functioning as an officer of the court at all. Such negotiations are the end result of more than 98 percent of the criminal indictments issued in the United States.

One critical point should however be added: there is no problem of "mesirah" in informing the government of a Jewish criminal, even if they penalize the criminal with a punishment more severe than the Torah requires, because even a non-Jewish government is authorized to punish and penalize above and beyond the law, "shelo min hadin" for the purpose of maintaining law and order. However, this only applies in the situation where the Jewish offender or criminal has at least violated some Torah law.⁷⁴

Accepting this opinion as the normative one in halacha, it is permissible and perhaps even a fulfillment of the commandment to punish evil, to inform on, and be a witness against, people who have committed violent crimes. Of course, a person who testifies must be scrupulously careful that he tells only the truth as he knows it. Given the fact that we are lacking our own system to punish violent criminals, it seems incumbent upon all Jews to aid the government in its just prosecution of crime, as no other mechanism exists to prevent the triumph of chaos over order.⁷⁵

To a great extent being a prosecutor is similar to being a witness — both vitally aid in the prosecution of criminals. In

74. Rabbi H. Schachter, "Dina Dimalchuta Dina" 1 *Journal of Halacha & Contemporary Society* 103, 118 (1981).

75. For a fascinating proof to this proposition, see *People v. Drelich*, 506 N.Y.S.2d 746 123, A.D.2d 441 (2d App. Div. 1986). In this case, Mr. Drelich appealed his murder conviction on the grounds that his confession of the "brutal stabbing murder of his 23-year-old pregnant wife" to his communal rabbi ought not to have been admitted at trial. The rabbi testified against the defendant and recounted the confession, which resulted in his conviction. The court determined that no rabbi-penitent privilege attached, as "the defendant's communications to Rabbi were made for the secular purpose of seeking assistance in the retention of counsel, and in negotiating with the prosecutor's office and securing other assistance in connection with the preparation of his defense to the charges."

At trial the rabbi testified that his action in bringing this issue to the attention of the secular authorities, and his testimony at trial, were both compelled by halacha as a fulfillment of the obligation to eradicate evil ("uviorata hara mikerbecha"). Rabbi Menashe Klein appears to prohibit this type of conduct; see Rabbi M. Klein, *Mishne Halacha* 7:285. For a response, see Rabbi S. Turk, *Pri Malka* 876:2.

situations in which it is permissible to inform on a Jew for the commission of a crime, and thus assist in his imprisonment, one might think it is also permissible to be the prosecutor against him. However, that is not completely correct. The Talmud (*Bava Metzia* 83b-84a) states:

Rabbi Eliezer the son of Rabbi Shimon once met an officer of the Roman government who had been sent to arrest thieves. He gave the officer shrewd advice as to how to detect them. Upon hearing this, the government appointed Rabbi Eliezer to arrest thieves, which he proceeded to do. Rabbi Yehoshua ben Korcha rebuked him, asking how long he [Rabbi Eliezer the son of Rabbi Shimon] would give over Jews to be executed by the Roman government. Rabbi Eliezer replied, "I am weeding out thorns from the vineyard." Whereupon Rabbi Yehoshua retorted, "Let the Master of the vineyard weed out the thorns."

A similar thing befell Rabbi Yishmael the son of Rabbi Yosi. The prophet Eliyahu appeared to him and rebuked him . . . "What can I do — it is the royal decree," responded Rabbi Yishmael. Eliyahu retorted, "Your father fled to Asia, you flee to Laodicea."

Thus, two of the greatest talmudic sages were rebuked for being professional prosecutors.

A number of *Rishonim* advance an explanation for this reprimand which changes its focus. The *Ritva* (commenting on *id*) rules that it is only scholars and rabbis of the caliber of Rabbi Eliezer and Rabbi Yishmael who should not be prosecutors or police officers — and even for these individuals such conduct was not prohibited, but only frowned on. According to this mode of analysis, it is only rabbis who should not engage in this type of work — but all others may.

Even if one were to decline to accept the *Ritva*'s analysis, it is possible to distinguish between aiding a mobster or tyrant and aiding the government of the United States of America, a government which has been classified by all modern authorities as a

righteous government.⁷⁶ The *Shulchan Aruch* (*Choshen Mishpat* 388:9-10) explicitly limits the prohibition of *mesirah* to reporting a Jew to an *unjust* government. Accepting this mode of analysis, it is only prohibited to aid a government in the prosecution of criminals if the government, like the Roman government, is not a fair and just one. It would be permissible to be a prosecutor in the United States according to this mode of analysis.⁷⁷

Additionally one could argue that any action which the secular government may take within the scope of the rule of *dina dimalchuta dina* (the law of the land is the law) which is binding on Jews, the government may enforce through criminal and civil penalties, and Jews may aid in this enforcement. The keeping of law and order is unquestionably one such function. A proof to this can be found in Rabbi Feinstein's decision allowing one to be a tax auditor for the government in a situation where the audit will result in the prosecution of Jews for evading taxes.⁷⁸ He allows such conduct on the grounds that the secular government is entitled to collect taxes and thus a Jew may aid them in that proper goal.⁷⁹

76. See *Iggerot Moshe Choshen Mishpat* 29 and Rabbi Schachter, *supra* note 74, at 118 ("A 'mossur' is one who aids a pirate, or a crooked government official or a tyrant").

77. The *hashavat aveidat akum bechinam* problem is not significant because the Jew is being paid to work; he is not working for free. So too, the prohibition found in *Choshen Mishpat* 28:11-12 is inapplicable when the legal advice or testimony is both true and paid for (or the withholding of it would cause a *chillul hashem*).

78. Rabbi M. Feinstein *Iggerot Moshe, Choshen Mishpat* 1:92. It is incorrect to maintain that Rabbi Feinstein is referring to a tax auditor who can only recommend civil and not criminal penalties, as no such position exists. Rabbi Feinstein's rationale hinges on the legitimacy of the government's collection of taxes, and not on the penalties available to the government.

79. Another example can be found in Rabbis Henkin and Feinstein's well known opinion that rent control regulations are binding on Jewish landlords when they lease apartment to Jewish tenants; *Iggerot Moshe Choshen Mishpat* 2:55. It seems apparent that once rent control is binding on Jews, one may be a governmental inspector for the agency which is charged with insuring that the rent control regulations are observed.

In summary, in any situation in which the secular government may, according to halacha, enforce its laws against Jews, and a Jew is breaking that law in a way that indicates he is a danger to society, it is permissible for an observant Jew to aid the government, either as a prosecutor or as a witness, to apprehend the criminals.

2. Defending the Guilty

Having established that it is permissible to aid in the prosecution of criminals, it is now necessary to determine if one can aid criminals in their defense, and if so, what type of help is permitted. According to the American adversarial system of justice, while a lawyer may not lie on behalf of his client, he must defend his client zealously even if he knows the case against his client is factually true. This is so because the government bears the burden of proving guilt beyond a reasonable doubt in all criminal cases.

An initial question must be addressed: may a person, according to halacha, plead "not guilty" to a crime that he knows he has committed but which the government cannot prove, or must an observant Jew plead guilty if he actually is guilty? It would appear that one may plead innocent even if one knows that one is factually guilty. According to halacha, a confession is not admitted in court, and in fact does not prove guilt.⁸⁰ Requiring a person to plead guilty if he actually is, and thus waive his right to a trial, is tantamount to requiring a person to confess to his crime. An observant Jew thus may plead innocent so as to force the government to prove its case according to law.⁸¹

80. Rambam, *Hilchot Sanhedrin* 18:6; R. Norman Lamm, "The Fifth Amendment and Its Equivalent in Jewish Law," 17 *Decalogue Journal* (Jan. 1967).

81. While it might appear to some that a defendant is lying when he pleads "not guilty" when he knows he is factually guilty, such is a misunderstanding of American law. A defendant need not plead to any offense. In the absence of any plea, a plea of "not guilty" is entered (in harmony with the notion of innocent until proven guilty). Thus, by entering a plea of "not guilty", a defendant does not assert that he is actually innocent — that he can only do through testimony — but only that he wishes to be tried in a court of law. A proof to this comes

So too, when the government has not proved its case, a defense lawyer may advise the jury to acquit his client simply because the evidence has not proved "beyond a reasonable doubt" that his client is guilty. This is true, in this author's opinion, even if the client has told the lawyer that he is factually guilty. In the American legal system, just like halacha, the government bears the burden of proving each element of a criminal charge, and in any situation in which the government has not done so the defendant is legally entitled to an acquittal. Any other rule is tantamount to requiring an observant Jew who is actually guilty of a crime to plead guilty according to the halacha, even if the government cannot prove its case to the satisfaction of the jury. A Jew, like all other citizens, is entitled to a trial in which the government meets its burden of proving guilt.

The scope of a lawyer's role in aiding a criminal defendant is directly connected to a discussion in the Talmud (*Niddah* 61a) where Rabbi Tarphon was approached by a group of people who were fleeing the authorities. It had been rumored that these people had committed a murder. Rabbi Tarphon declined to help them, but rather urged them to hide themselves. The reason R. Tarphon declined to aid is in dispute — and this dispute is critical to understanding the halachic status of criminal defense work.

Rashi states that the reason R. Tarphon would not help these people was because if they were guilty, helping them would be halachically prohibited. This would imply that it is halachically prohibited to aid defendants who *might* be guilty. Tosafot and Rosh (quoting the *Sheiltot*, Numbers 129) disagree and argue that the

from the legal rule that a person who testifies that he is innocent when he is not actually innocent, can be prosecuted for perjury, but merely pleading "not guilty" when one is actually guilty, is not grounds for a perjury charge.

The identical distinction is present in halacha. A person is not guilty of a crime, and liable for punishment, until *beit din* actually pronounces him guilty. In civil cases, on the other hand, the obligation to repay starts at the time of the action, and *beit din* only enforces a preexisting obligation. The court establishes the status in criminal cases; in civil cases the court only reveals the already established fact.

reason R. Tarphon would not help them was because R. Tarphon was afraid that the government would punish him for helping criminals escape, and that helping the accused is actually permitted halachically. Most *Rishonim* accept the reasoning of Tosafot and Rosh (see e.g. Meiri on *id.*). According to this explanation, any help which the government allows one to provide to defendants (e.g. being a defense attorney) would be permitted.

The *Chochmat Shlomo* and Rabbi Akiva Eiger argue that this ruling of Tosafot and Rosh applies only in cases where, in the aider's (the lawyer's) mind, the guilt of the defendant is in doubt. In the case of known guilt, no help is permitted. Basing himself on this ruling, Rabbi Schachter states:

If a lawyer *knows* that his client has committed a crime, it is forbidden for him to help the criminal escape the consequences of his act, by relying on some technical legal points or other devices. The lawyer, just as any Jew, is directed by the Torah to "eradicate the evil from our midst," and may not actively assist someone to avoid his punishment.⁸²

Thus, according to Rabbi Schachter a lawyer may not advance "technical legal points or other devices" when the client is known to be actually guilty. On the other hand, it is apparent (from the Rosh, *Niddah* 9:5) that the defendant must be presumed innocent by the lawyer.⁸³

It is also important to distinguish between those situations in which the lawyer advances a false defense or "technical legal points" and those situations in which the lawyer advances defenses that truly mitigate the seriousness of the crime, or cast doubts on the validity of the government's case. For example, under Rabbi Schachter's ruling, it would seem that while a lawyer cannot advance in trial a defense of "my client did not commit the crime"

82. Schachter, *supra* note 74, at 121-122. Rabbi Schachter, in footnote 38, cites Rabbi Menashe Klein, *Mishne Halacha* 7 p.366b.

83. One could argue that all defendants who have not told their lawyers that they are factually guilty, have the status of "in doubt" until conviction at trial. The overwhelming majority of defendants are in this category.

when the client has informed his lawyer to the contrary,⁸⁴ a lawyer may advance numerous defenses which indicate to the jury that a guilty verdict is not appropriate. Thus, he may advance an insanity defense, or a defense of necessity, duress or inadvertence, providing that the client has told him that these mitigating factors are present or the lawyer reasonably believes them to be present. So, too, any rule of evidence or law whose goal is one of "truth seeking" and whose violation by the prosecution (or defense) casts doubt on the credibility of the evidence, may be invoked by a lawyer to the benefit of a client, since such rules promote justice by the court.⁸⁵

In the more typical case where the client does not tell the lawyer he is guilty and instead protests his innocence (notwithstanding the evidence to the contrary), it would seem that a complete defense would be permitted according to the Rosh and Tosafot. In such a case, a lawyer may advance all defenses which are tenably true and which the client represents as correct. Obviously a lawyer may also advance a defense that the facts as stated by the government do not constitute a crime under the relevant statute and thus the client ought to be acquitted.⁸⁶

84. And also violates many professional ethics rules; see section I:1:2 and *supra*, note 81. Obviously a lawyer may not use techniques at trial whose sole purpose is to confuse the finder of fact or to produce error and a reversal on appeal. Both of these tactics are unethical.

85. Thus, for example, both hearsay evidence and a confession given only after torture may be suppressed as the evidence's validity may be reasonably doubted. The status of the prophylactic rules occasionally promulgated by the Supreme Court in the field of criminal procedure (e.g. *Mapp v. Ohio*, 367 U.S. 643 (1961) could be debated. While these rules were not authorized in order to insure justice in any particular case, they are part of the government's program to reduce violations of law by governmental officials and to promote justice in society at large. While the efficacy of such a policy could, and frequently is, debated by lawyers, there is little doubt that the goals these policies seek to advance are ones which the halacha respects, and also a fulfillment of the obligation to eradicate injustice from society. A balance must be struck. The damage to society through the release of criminals would have to be weighed against the injury to society through illegal, and sometimes criminal, actions of law enforcement personnel which would otherwise go unpunished. This problem does not easily resolve itself.

86. For example, in a prosecution for criminal tax fraud the defense frequently

Moreover, an understanding of R. Tarphon's dilemma different from that advocated by the *Chochmat Shlomo* is possible. The *Sheiltot* (which the *Chochmat Shlomo* did not have) and hence *Tosafot* and *Rosh*, might in fact make no distinction between known guilt and mere rumors of guilt. R. Tarphon might have hesitated to act solely out of fear of violating the secular law (and being punished for that violation). Under this explanation, the sole limitation upon aiding a person accused of a crime would be the danger to the aider. All aid permitted by the government (and hence without any danger to the provider) would be permitted. The *Aruch Lenair*, by R. Yakov Ettlinger, advances exactly such an explanation of this topic. He denies that there is any intrinsic halachic obstacle to aiding criminals who seek help — and he asserts this as Rashi's opinion as well as that of *Tosafot* and *Rosh*. He states:

In my opinion one could state that Rashi is not arguing with the *Sheiltot*. When Rashi states that it is prohibited to save the murderers, he does not mean that it is prohibited according to halacha to save them, but rather that secular law prohibits that conduct. Once secular law prohibits one from saving them, it is halachically prohibited also, since saving these individuals would involve great risk to the savior.⁸⁷

If this approach is correct, (and it certainly reflects the literal words of *Tosafot* and *Rosh*) any form of aid legally permitted by the secular society (e.g. being a defense attorney) would be halachically permitted, as it is only because of the danger to the aider that one may not act to help a criminal. In the absence of a

argues that not only was no crime committed, but that the tax return of the defendant was properly filed, and the IRS is misinterpreting the relevant tax law. It is permissible under halacha to challenge the IRS's understanding (called Regulations) of the Internal Revenue Code, as the executive branch of the federal government is *not* constitutionally given the power to interpret laws in a manner that binds citizens. That task is left to the judiciary, whose interpretation binds the other two branches as well as the citizenry. Thus, in America, *dina dimalchuta dina* applies only to laws that the judiciary sanctions as valid.

87. See also *Asifat Zekanim*, *Niddah* 61a and *Chiddushei Mahari Shapira*, *Niddah* 61a for other authorities who accept this approach.

secular prohibition to aid such individuals, there is also no halachic prohibition.

This analysis does not obviate the obligation to eradicate evil from society (*uviarta hara mekirbecha*), which is certainly applicable. Particularly when read in light of American law, Rabbi Ettlinger's position appears logical. Since the secular government *requires* that a criminal be represented by a competent lawyer at trial (if he desires one) and that a conviction is invalid absent this representation, a lawyer's participation as a defense attorney is also a fulfillment of the obligation to eradicate evil from within society, because without such representation no convictions would be valid under American law. According to the *Aruch Lenair*, the only type of aid prohibited is that which the secular government does not allow.⁸⁸

Of course, according to both approaches a lawyer may not assist a client in the creation of a false defense — *i.e.*, allow his client to commit what the lawyer knows to be perjury or to advance other improper defenses. Needless to say, such conduct is prohibited under relevant American law as well.⁸⁹

It is an over-simplification of the criminal justice system to peg (as the popular press has often done) an attorney defending one popularly deemed guilty, as engaging in improper activity and using his skill as a lawyer to the detriment of society. Numerous individuals whose guilt was never doubted by the public when their trials started have been shown, through able defenses, to be factually innocent of the charges leveled. Regrettably enough, history is also full of innocent people who were punished because of unavailable or incompetent defense attorneys. The zealous advocacy of truthful defenses enhances, rather than detracts from, justice in society.

88. On a practical level, there is nearly no distinction between the positions taken by the *Chochmat Shlomo* and the *Aruch Lenair*. The sole point in contention would be whether a lawyer could advance defense at trial not on the merits for a person who has acknowledged to the lawyer factual guilt.

89. See Subin, "The Criminal Lawyer's 'Different Mission': Reflections on the 'Right' to Present a False Case," 1 *Geo. J. Legal Ethics* 125 (1987) (stating that false defenses are improper and ethical lawyers do not use them); *Nix v. Whiteside*, 475 U.S. 157 (1986) (lawyer may, and most states require that he must, inform the court of a perjury by his client).

Conclusion

Although the practice of law, like all fascinating journeys, is full of pitfalls, the observant lawyer can steer clear of these snares and engage in a religiously proper, economically, intellectually, and socially rewarding practice of law encompassing many areas of law within the American legal system. This is not to say there are no limitations upon what a religious Jew may do; but with care and study these obstacles can be overcome.

Postscript

One problem many lawyers confront relates to the financial stresses one encounters periodically in the legal profession. There is pressure to over or double bill in many instances, a practice that might be a form of theft from a client. One is occasionally tempted to deceive others to avoid the financial repercussions of mistakes or to blame others when the fault lies within oneself. Law, more than most profession, leaves much to the good judgment and honesty of its practitioners, and some are occasionally enticed to violate these trusts for personal gain. It is that temptation that must be resisted.

Additionally, many attorneys, in their drive towards professional achievement, ignore other areas of life to which Torah places a high priority — from teaching one's children and being a companion to one's spouse (or even being married and having children), to compliance with kashrut and other ritual laws that can sometimes be an obstacle to professional advancement. Finally, many observant lawyers apportion their time so that there is no opportunity to continue their intellectual growth in Judaism and Torah — an error of enormous magnitude. Regrettably, in many law firms the practice of law involves a commitment in excess of 60, or even 70, hours per week. These dangers are the most serious problems confronting attorneys in the practice of law, and they are the challenge that must be met.

This article is dedicated in memory of my grandfather Morris Broyde ר' משה אהרון בן ר' יצחק יוסף who returned to his Maker on June 25, 1990 (2 Tammuz, 5750).

Rabbi Moshe Feinstein's Influence on Medical Halacha

Fred Rosner, M.D., F.A.C.P.

Introduction

I was privileged to know Rabbi Moshe Feinstein, of blessed memory, personally for many years. He received my Torah-learning partner Rabbi Dr. Melvin Zelefsky and me every few weeks for a halachic discussion or *farher*. He was extremely gracious to me when I called him on the phone and interrupted his *shiur* (Talmud discourse) to ask him about an autopsy consent. He personally offered me halachic (Jewish law) guidance in many areas on many occasions. My task here is to describe Rabbi Feinstein's influence on medical halacha as objectively and dispassionately as possible. I will concentrate on thirteen areas in medicine where he had a major influence, including the study and practice of medicine on the Sabbath, Tay-Sachs screening and abortion, contraception, sterilization, artificial insemination, circumcision, dentistry, psychiatry, smoking and halacha, visiting the sick, and *kohanim* (priests) studying medicine.

One of my earliest contacts with Rabbi Feinstein was during my first week in medical school. Our initial activity was the dissection of a human cadaver. I was chosen by my fellow students

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to consult with Rabbi Feinstein on this matter. His ruling was that since most cadavers are non-Jewish, it is permissible to dissect a cadaver for the sake of studying anatomy as part of our medical training. Furthermore, since the prohibition of *issur hana'ah* (deriving benefit from the dead) does not apply to non-Jewish bodies, it is permissible to perform autopsies on them.¹ The text of Rabbi Feinstein's responsum indicates that he did not arrive at this conclusion lightly and without considerable struggle to reconcile his ruling with the prohibition, enunciated by the author of *Shulchan Aruch*, of deriving benefit from a Gentile cadaver.

The Physician and the Sabbath

One of the areas where Rabbi Feinstein made major contributions to medical halacha and where he had enormous influence on medical students and physicians alike is in the practice of medicine on the Sabbath and on Jewish holidays.

During our third and fourth years in medical school, we served clerkships and subinternships on the wards of various hospitals, and that is when our problems related to the Sabbath and the Jewish holidays came to the fore. In a series of extremely helpful responsa, Rabbi Feinstein detailed for us the laws of healing on the Sabbath and their application to our questions about carrying, writing, using elevators, telephones, beepers and electric or battery-operated instruments on the Sabbath, turning lights on and off, incising boils and suturing lacerations, scrubbing at surgery, giving injections, infusions, and drawing blood on the Sabbath, attending lectures and conferences or delivering a lecture on the Sabbath, traveling by car to the hospital or having to live near the hospital, treating non-Jews on the Sabbath and collecting fees for house calls on the Sabbath, training in hospitals without Sabbath obligations, and many more.

I vividly remember my first Sabbath in the hospital as an intern. I was on the seventh floor on a medical ward and heard my name paged over the loudspeaker. Out of ignorance, I did not pick

1. Responsa *Iggerot Moshe*, *Yoreh Deah*, Part 1 no. 229.

up the closest phone to answer my page but ran down eight flights of stairs, through the basement tunnel to the building across the street where the telephone operators were located. To my exasperation I learned that I was needed on the sixth floor of the first building that I came from. I ran up the stairs and took care of the problem for which I was called. This kind of activity continued throughout that Sabbath. On Saturday night, I was totally exhausted and called Rabbi Feinstein, who emphatically told me that I had done the wrong thing. I should have picked up the nearest telephone and answered my page because it might have been an emergency. "But ninety-nine calls out of a hundred are not emergencies," I protested. Even if only one out of a hundred calls is a real emergency, replied Rabbi Feinstein, you must answer all one hundred because you do not know which call will be the emergency. Furthermore, continued Reb Moshe, if running up the stairs to see your patient takes more time than the elevator or leaves you panting and may thus interfere with your ability to properly evaluate the patient's problem, you have not observed the Sabbath at all but transgressed the commandment of healing on the Sabbath.

Rabbi Feinstein classified many, if not most, hospitalized patients as dangerously ill (*pikuach nefesh*). According to him, even if a patient brought his illness upon himself through negligence, the Sabbath must be desecrated on his behalf.² The codes of Jewish law, including the *Shulchan Aruch*³ and *Mishneh Torah*,⁴ rule that a physician must perform all acts required for the care of his patients and not limit himself exclusively to those things which would remove the danger to life. For a dangerously ill patient, it is permitted to carry through a public thoroughfare the instruments and materials necessary for the patient's care. Such items include the stethoscope, keys to narcotics or medication cabinets, radiographs, and the like. Wherever possible, and where no delay in time or loss of efficiency would result, the carrying of these

2. *Ibid.* no. 127.

3. *Shulchan Aruch, Orach Chayim* 328:4.

4. Maimonides, *Mishneh Torah, Shabbat* 2:1.

materials should be effected in an unusual manner. Handkerchiefs, house keys, and other nonmedical items may not be carried through the street on the Sabbath even in an unusual manner.

Writing on the Sabbath is permitted only when absolutely essential to save life, and where no alternative exists. Since writing or typing on the Sabbath is a biblical prohibition, whatever writing can be postponed until after the Sabbath without endangering the proper care of a critically ill patient must be so delayed. A physician is urged, wherever possible, to hire a non-Jewish attendant to do whatever writing is essential and to perform otherwise prohibited acts on the Sabbath such as driving the car. For a house officer, a nurse, clerk, secretary, or any other non-Jewish person available in the hospital might be asked to write routine histories, physical examinations, routine medication and treatment orders, laboratory requisition slips, progress notes, and the like. It is preferable to use the electric name plate printer on the Sabbath to identify the patient's name and other vital items on a laboratory slip rather than to write out the slip by hand.⁵

Where the above alternatives are not possible, and where it is essential to the preservation of life that the physician write, he is permitted to do so. Wherever possible, and where no delay in time or loss of efficiency would result, writing should be done in an unusual manner (*shinuy*). Writing with the left hand, in a right-handed person, is considered an unusual manner. What is considered essential to the preservation of life? For example, recording the initial relevant history and physical findings of a critically ill patient (e.g., following a heart attack) admitted to the hospital on a Friday night may be permitted. However, only information that is of significant or perhaps essential value to another physician who may be called upon to assist or take over the care of the patient may be recorded. This ruling of Rabbi Feinstein excludes the writing of social, personal, family, and past medical and surgical histories except where directly relevant to the patient's

5. *Iggerot Moshe, Even Haezer*, Part 4 no. 73:4.

present illness. Also excluded is the recording of physical findings that do not bear directly on the patient's immediate problem.

Other examples of writing permitted on the Sabbath are recording the progress of a woman in labor, vital signs of a postoperative patient, and drug allergies or sensitivities. If the physician's signature is required to obtain needed drugs (e.g., narcotics) or services (e.g., oxygen) for a seriously or dangerously ill patient, he may sign his name. Although this signature is only a legal requirement unrelated to actual patient care, it is classified as a necessary act, if the nurse refuses to provide the essential drugs or services to the patient without it, and thus the signature is permitted. One is not permitted to sign a death or birth certificate on the Sabbath, even with a *shinuy*, since there is no issue of preserving life.

Regarding the use of elevators on the Sabbath, Rabbi Feinstein rules that if delay or loss of efficiency might result from a physician's using the stairs, he is obligated to use the elevator to visit his dangerously ill patient. If it is an automatic elevator, the physician may operate it himself. If there is an elevator operator, his religion is irrelevant since he has the same permissibility as the physician himself to help in the care of the patient by bringing the physician there. If no other seriously ill patient is waiting for his services, the physician should walk down the stairs rather than use the elevator.

In regard to the telephone and beepers on the Sabbath, Rabbi Feinstein rules that a house officer may answer all phone calls or paging or beeper messages on the Sabbath since most if not all hospitalized patients are considered in the category of dangerously ill. Most, if not all, messages a house officer receives in the hospital relate to his patients. The house officer may make such calls as are required to care for his seriously ill patient. He should not, however, make calls for non-emergency needs. For example, he should not call the laboratory to obtain results of an elective blood test. If the laboratory is nearby, and if no undue delay or loss of efficiency in caring for the patient is involved, then even important blood test results should be obtained in person, not by phone.

A physician in private practice should secure a telephone

answering service or an automatic phone recording and answering machine or hire a non-Jewish attendant to receive and make phone calls. A beeper may be hooked onto one's belt and carried on the Sabbath under the license that it is now part of the normal garb of a physician.⁶ If the doctor is "beeped" either in the synagogue or at home for an emergency, he should take a taxi to the hospital or the patient's home rather than drive his own car. However, if an undue delay is expected in securing a taxi, the physician may drive his own car. Rabbi Feinstein rules that a physician is allowed to return from the hospital after an emergency call, preferably with a non-Jewish driver.⁷ The key consideration in permitting the physician's return is to remove any reluctance to go again in the future for another emergency.⁸

Turning on electrically or battery-operated instruments such as flashlights, ophthalmoscopes, endoscopes, electrocardiogram machines, respirators, pacemaker-defibrillators and the like is not only allowed but mandated where necessary for the proper care of a critically ill patient. For such a patient, the physician is obligated to perform his diagnostic and therapeutic services in the most efficient manner possible, and with adequate illumination and instrumentation. If a non-Jew is available to activate such instruments, he should be asked to do so. The instruments may not be turned off on the Sabbath except by involving non-Jewish personnel, unless it is likely that the instrument will be needed again for the same or another critically ill patient. If the actual working of the instrument requires an on-off cycling by the physician, it is permitted. However, disconnecting the instrument solely to preserve the life of the battery or bulb is not condoned.

Puncturing a boil or abscess and expressing its contents (*mapis mursa*) is permitted on the Sabbath, provided this is done specifically as a temporary measure to alleviate suffering. Routine biopsies for diagnostic purposes are not allowed. Because of the danger of infection or possible infection, traumatic injuries of the

6. *Ibid. Orach Chayim*, Part 4 no. 81.

7. *Ibid.* no. 80.

8. *Ibid.* Part 1 no. 131.

skin, i.e., lacerations that are of sufficient magnitude to require stitches, may be repaired by suturing on the Sabbath. Since the natural history of untreated infected wounds is such that septicemia and potentially fatal outcome may result, lacerations are considered in the category of *pikuach nefesh* (danger to life). Although the prophylactic use of antibiotics might eradicate any infection that might develop, these considerations do not remove the laceration from the category of *pikuach nefesh*, and thus it may be sutured on the Sabbath.

Rabbi Feinstein never hesitated in giving us his time, his guidance, and his expert rulings. No question was rejected by him as too simple or self-evident. He carefully listened as we presented to him question after question, week after week, month after month, year after year. He made life bearable for us when we served in the hospital on the Sabbath caring for patients. His answers were practical, pragmatic, helpful, and clearly geared to our needs as Torah-observant Jewish physicians. He told us that the drawing of blood for tests should be viewed as involving biblical prohibitions on the Sabbath. Therefore, it should be limited to critically ill patients. The necessity of administering blood, blood products, antibiotics, chemotherapy, glucose, or other solution usually means that the patient is classified as critically ill by halachic standards. Therefore, all activities necessary for the most efficient method of accomplishing this act must be undertaken for the benefit of the patient.

Thus, tearing tape, opening the box containing the infusion set, tearing gauze paper containers, applying antiseptic to the area of injection before and after the injection or infusion, and the like, are all permitted on the Sabbath. If possible, and if no loss of time or efficiency is involved, the Sabbath violations should be minimized. If it is possible to tear tape and make other preparations before the Sabbath, this should be done. If feasible, the antiseptic swab or medication should be applied in a hemostat-held gauze pad so as to approximate the situation referred to in Jewish law as a "sponge with a handle."

Rabbi Feinstein ruled that it is the responsibility and duty of a physician to treat his patients with consummate skill and

competence. Any failure to achieve this competence disqualifies the individual from continuing in his role as a physician. Therefore, within the framework of halachic permissibility, the medical student or house officer must sacrifice some of the "spirit" of the Sabbath in order to obtain the maximum training in his chosen profession. With the clear understanding that there will be no violation of Sabbath law such as taking notes, operating laboratory equipment, etc., the student should attend those lectures and conferences that will add significantly to his mastery of the art and science of medicine. The same principle applies to the physician in practice who may attend certain vitally important conferences on the Sabbath to maintain or improve his level of competence in medical practice, provided no Sabbath laws are violated. The availability of tapes now partially obviates the need to attend general conferences. However, where personal contact with the lecturer is critically important it may be permitted on the Sabbath.

Similarly, if a physician or dentist is invited to deliver an important paper or lecture on the Sabbath, he is permitted to do so provided that he does not desecrate the Sabbath in any way. Hence, he must be within walking distance and may not ride the elevator to the lecture room. He may not use the microphone or other amplifying device, nor use audiovisual material such as slide or movie projectors, and may not write on a blackboard. The appearance of the physician's or dentist's name on the printed program does not violate any Jewish law.

One of the most controversial rulings of Rabbi Feinstein in regard to the Sabbath is his strong position in regard to the obligation of a Jewish physician to treat a non-Jewish patient. Reb Moshe said that the Sabbath laws, both rabbinic and biblical, are set aside when a Jewish physician is actively involved in the care of a patient, Jew or non-Jew.⁹ Where the doctor is present, he cannot refuse to treat a patient because he is not Jewish. Nowadays, physicians can find colleagues to cover for them on the Sabbath. This rule applies, of course, only in a medical situation that Jewish

9. *Ibid.* Part 4 no. 79.

law (i.e., halacha) classifies as *pikuach nefesh* (danger to life). Rabbi Feinstein's position is based on the ruling of Rabbi Moshe Schreiber, the *Chatam Sofer*.¹⁰ The impact of not treating a non-Jew, on the safety of all Jews, was a key consideration in Rabbi Feinstein's ruling. His opinion was that under present day societal ethics even the author of *Mishnah Berurah* would concur. Rabbi Feinstein also rules that if a physician knows beforehand that he will have to be in the hospital on the Sabbath, he should arrange to sleep in or near the hospital on Friday night.¹¹ Many more responsa deal with the physician's conduct on Sabbath and *pikuach nefesh* and Shabbat.¹²

The Patient and the Sabbath

Rabbi Feinstein was concerned about the patient at least as much as the physician and issued a variety of rulings regarding the patient and the Sabbath. He allows a hearing-impaired person to wear a hearing aid on the Sabbath.¹³ He also allows a disabled person who cannot walk without a cane, crutches, walker, wheelchair or the like to go out on the Sabbath using these mechanical aids. They are considered in Jewish law to be as his own legs. If, however, they are only used to steady the gait of someone who can walk unaided, their use on the Sabbath is prohibited.¹⁴

Rabbi Feinstein also allows the measurement of body temperature with a thermometer on the Sabbath even for a patient who is not dangerously ill, since this act does not involve any prohibition at all.¹⁵ The degree of fever for which the Sabbath may be desecrated on behalf of a patient varies. Rabbi Feinstein rules

10. Responsa *Chatam Sofer*, *Yoreh Deah* no. 131; abstract printed in the margin of *Shulchan Aruch, Orach Chayim* 329.

11. *Iggerot Moshe, Orach Chayim*, Part 1 no. 131.

12. *Ibid. Choshen Mishpat*, Part 2 no. 79 and *Orach Chayim*, Part 4 no. 79.

13. *Ibid. Orach Chayim*, Part 4 no. 85.

14. Rabbi M. Feinstein, Personal communication, based on *Shulchan Aruch, Orach Chayim* 301:15-17.

15. *Iggerot Moshe, Orach Chayim*, Part 1 no. 128.

that certainly for 102°F one sets aside the Sabbath. Even if someone feels ill at 101°F and asks for Sabbath-prohibited help, one should do so because it is no worse than any external injury for which one desecrates the Sabbath if the patient so requests. In the case of a child who cannot describe a sensation of fever, continues Rabbi Feinstein, if one observes that the child is extremely uncomfortable or gives other signs of illness, even if the temperature is only 100°F or above, one desecrates the Sabbath. If the fever is due to an illness of the lungs or any other internal organ, one desecrates the Sabbath even if there is only low grade fever. But if a person has low grade fever due to an ordinary cold, one should not desecrate the Sabbath on his behalf.¹⁶

For the comfort of a critically ill patient, one is allowed to turn lights on and off either to perform diagnostic or therapeutic procedures or purely for the patient's comfort. A sleep-disturbing lamp may be turned off to give the critically ill patient much-needed rest. If no direct benefit to the patient would result, turning a light off on the Sabbath is prohibited. Rabbi Feinstein also allows the husband or mother of a woman in labor to accompany her in a taxi or car to the hospital on the Sabbath to avoid the potential for danger to her life because of her fear of traveling alone.¹⁷

Food consumed on the Sabbath for medical purposes is permissible.¹⁸ Mixing foods with medicines to disguise them from recognition is permissible if the medication needs to be taken on the Sabbath.¹⁹ If a patient who is allowed to take medication on the Sabbath for a serious illness also suffers from another minor ailment for which one is not allowed to take medication on the Sabbath, the patient is not permitted to take the latter medication. In the preparation of the medication for the minor ailment, one has to be concerned about biblical prohibitions such as pounding medicines, cooking, and carrying on the Sabbath. However, if the minor ailment does not require another medication but can be

16. *Ibid.* no. 129.

17. *Ibid.* no. 132.

18. *Ibid.* no. 130.

19. *Ibid.* Part 2 no. 86.

treated by increasing the dose of the medication for the serious illness, the use of such an increased dose is permitted.²⁰

The Patient and Jewish Holidays.

For a patient who must eat on Yom Kippur, Rabbi Feinstein rules that the patient need not recite the *Kiddush* or sanctification of the Festival over a cup of wine or other beverage since he fulfills the obligation with the *Kiddush* in the prayer service of Yom Kippur.²¹ If a patient is not dangerously ill on Yom Kippur but needs to swallow pills without water to prevent another serious illness from occurring, he is permitted to do so.²² Rabbi Feinstein quotes Rabbi Yisrael Salanter who, during a cholera outbreak, instructed all the healthy townspeople to eat on Yom Kippur because hunger makes one more susceptible to cholera. If physicians state that a woman who had two post-partum psychoses might have another nervous breakdown if she fasts, that woman must eat on Yom Kippur.²³ In two separate responsa, Rabbi Feinstein also rules that a patient who is not allowed to fast on Yom Kippur should not have an intravenous feeding line inserted to avoid oral feeding, since the insertion of the needle into the vein solely for that purpose constitutes the infliction of a wound (*chavalah*), which is prohibited on Yom Kippur as it is on the Sabbath.²⁴ Finally, in regard to Yom Kippur, Rabbi Feinstein allows the use of vitamin suppositories for a patient who becomes so weak from fasting that he nearly faints.²⁵ Another lengthy responsum deals with the oral consumption of vitamins by healthy people on the Sabbath. Obviously, on Yom Kippur these are prohibited.²⁶

In regard to Passover, if a patient following surgery has to take pills that might contain *chametz*, he is permitted to do so. In fact,

20. *Ibid.* Part 3 no. 53.

21. *Ibid. Choshen Mishpat*, Part 1 no. 39.

22. *Ibid. Orach Chayim*, Part 3 no. 91.

23. *Ibid. Even Haezer*, Part 1 no. 65.

24. *Ibid. Orach Chayim*, Part 3 no. 90 and Part 4 no. 101:3.

25. *Ibid. Orach Chayim*, Part 4 no. 121.

26. *Ibid.* Part 3 no. 54.

Rabbi Feinstein rules that the patient is obligated to take the pills even if they definitely contain *chametz* and even if the patient is not now dangerously ill, since the pills became "nullified" as a food before Passover and constitute necessary medicine.²⁷ (This presupposes that the *chametz* in the pills is not edible as a food.)

Kohanim (Priests) and Medicine.

The problem of whether or not a *kohen* (priest) is permitted in modern times to study and practice medicine has been debated in the rabbinic responsa literature for over a century.²⁸ The majority of rabbis answer in the negative. Rabbi Feinstein states that there is no obligation for a *kohen* to study medicine.²⁹ He strongly rejects the permissive rulings of some rabbis which are based on the *kohen's* strong desire to study medicine, on the fact that most corpses nowadays are non-Jews which, according to some authorities, do not defile by overshadowing (*tumat ohel*), and because a *kohen*-physician would later save lives. Rabbi Feinstein states that one is not obligated to study medicine to become a physician any more than one is obligated to conduct a lot of business to become rich in order to give charity. R. Feinstein disapproves of such a permissive viewpoint, stating that "it is foolish and vain and should not be articulated by any intelligent person." R. Feinstein also strongly denounces *kohanim* (priests) who rely on this opinion and attend medical school:

It is clear to me that if the *kohanim* who study medicine and ritually defile themselves through contact with corpses would really wish to know the true law in this regard, they would know whom to ask . . . rather, they are not at all concerned about this prohibition and delude themselves . . . by claiming to have found [a lenient ruling in] some pamphlet upon which they rely.

. . . .

27. *Ibid.* Part 3 no. 92.

28. Rosner, F. "Priests (*Kohanim*) Studying and Practicing Medicine" *Journal of Halacha and Contemporary Society*, no. 8, (Fall) 1984 pp. 48-61.

29. *Iggerot Moshe*, *Yoreh Deah*, Part 2 no. 155.

It is absolutely clear that it is prohibited for a *kohen* to ritually defile himself through contact with a corpse, and this fact is well known throughout the world. Therefore, it is absolutely clear that even if the most learned rabbis in the world would be lenient [and say otherwise], one should not listen to them . . .

It is prohibited for *kohanim* to study medicine in medical schools in countries where it is necessary to have contact with corpses. One should not point to some of our ancient Sages who were both *kohanim* and physicians and were able to learn medical science by oral teachings without any physical contact with corpses. In our times, this is impossible and therefore it is prohibited.

Rabbi Feinstein permits a *kohen* to work in a hospital if he can leave the hospital when a death occurs and if most patients are non-Jews.³⁰ Rabbi Feinstein allows *kohanim* who are not physicians to visit patients in the hospital to fulfill the commandment of visiting the sick (*Bikur Cholim*) because of "great need" such as emotional pain and anguish.³¹ He thus permits such visits to a parent or child or spouse or to one's wife's relatives because we assume that most patients are non-Jews and any corpses or parts thereof in the hospital at any given time are those of non-Jews and do not impart ritual defilement by being in the same room or building with a Jew.

Rabbi Feinstein discusses whether or not a *kohen* is permitted to travel on an airplane in which a Jewish corpse in the baggage compartment is being transported to Israel for burial. Since the plane is made primarily of metals such as aluminum and magnesium, and not of one of the six metals which the Torah specifies as transmitting defilement — gold, silver, copper, iron, tin, and lead — it may be that the body in the hold of the plane does not defile the entire plane. Rabbi Feinstein concludes that the matter requires further study.³² In another responsum, Rabbi Feinstein

30. *Ibid* Part 1 no. 248.

31. *Ibid.* Part 2 no. 166.

32. *Ibid* no. 164. See Cohen, A. "Tumeat Kohen, Theory and Practice", *Journal of Halacha and Contemporary Society*, no. 15, Spring, pp. 25.

rules that if an autopsy is performed on a *kohen*, his immediate family may arrange and implement his burial without concern about ritual defilement.³⁴ Finally, in regard to a *kohen*, Rabbi Feinstein wrote a very long responsum about a *kohen* who needs to receive an organ or flesh from a cadaver.³⁵

The topics of organ transplantation and the use of organs of medical research are discussed by Rabbi Feinstein in numerous responsa.³⁶

Dentistry

Several of Rabbi Feinstein's responsa deal with dentistry. One lengthy responsum deals with temporary fillings and dental prostheses and ritual immersion (*tevilah*).³⁷ In brief, all permanent bridgework, or cemented or wired (i.e., permanent) braces do not constitute an interposing barrier (*chitzitzah*) and therefore do not hinder the regular process of *tevilah*. However, removable dentures, removable braces, removable bridges, and the like must be removed before *tevilah*. All fillings, whether temporary or permanent, that were fashioned by a skilled dentist are not a *chitzitzah*. *Tevilah* may be performed without their removal unless they have been improperly placed and must be removed and corrected by the dentist, in which case *tevilah* must be postponed until such correction is made. For example, a filling that is interfering with chewing and must be corrected by the dentist, or a bridge that is painful because further correction must be made on the device, should be fixed before *tevilah*.

The application of a surgical dressing on the gums during extensive gum work may require delay in the time of *tevilah*. However, says Rabbi Feinstein, if stitches in the mouth are deeply embedded in the gums and are not readily visible, they are not

34. *Ibid.* no. 165.

35. *Ibid.* Part 1 no. 230.

36. *Ibid.* Part 1 no. 229a, 230 231, 232; Part 2 no. 150, 174; Part 3 no. 140, 141; and *Choshen Mishpat*, Part 2 no. 72.

37. *Ibid.* *Yoreh Deah*, Part 1 no. 97.

considered an interposition.³⁸ Plastic coverings on the teeth, however, which are only temporary in nature, must be removed before *tevilah*.³⁹ In another responsum on dentistry, Rabbi Feinstein rules that if a person has pain, it is permissible to fix the teeth even on *Chol HaMoed* (Intermediate Days of Festivals).⁴⁰ Obviously, if there is no pain and if no harm will come from waiting, the patient should postpone the visit to the dentist until after the holiday. A patient with false dentures need not secure a separate set for the Passover holiday.

Smoking and Jewish Law

For many years, I have had numerous intensive discussions with prominent rabbis about smoking and halacha. It has been my personal opinion as a non-rabbi that in the light of overwhelming medical evidence showing the causal relationship of cigarette smoking to cancer of the lung, heart disease, chronic bronchitis, bladder and head and neck cancer and other ailments, Jewish law should absolutely prohibit this practice.⁴¹ Yet, very few rabbis prohibit smoking, although most condemn the practice as foolhardy and dangerous. In his first very brief responsum on this subject in 1964, the year of the first Surgeon General's report on smoking, Rabbi Feinstein asserts that although it is proper not to begin smoking because of the possibility of becoming ill therefrom, one cannot say that it is prohibited because of the danger, since many people smoke, and the Talmud states that "The Lord preserveth the simple." Furthermore, continues Rabbi Feinstein, many rabbinic scholars from previous generations as well as our own era smoke. In addition, even for those who are strict and do not smoke because of their concern about possible danger to health or life, there is no prohibition in lighting the match for those who smoke.⁴² Rabbi

38. *Ibid.* Part 2 no. 87.

39. *Ibid.* no. 88.

40. *Ibid. Orach Chayim*, Part 3 no. 78.

41. Rosner, F. *Modern Medicine and Jewish Ethics*, Ktav and Yeshiva Univ Press, Hoboken, NJ and New York, NY 1986, pgs 363-375.

Feinstein reconfirmed his opinions in a later responsum dated 1981, addressed to me and published in the last volume of his responsa.⁴³ The explanation of his view is that "The Lord preserveth the simple" is a concept which is applied to low incidence natural dangers. The phrase *dashu bo rabim* (the multitude are accustomed to it) means that society recognizes and accepts the risk, similar to flying in an airplane or walking across a busy boulevard. Although many people may develop lung cancer from smoking, it represents a very small fraction of the many millions of people who smoke. Overeating or failure to exercise properly may involve a far greater risk to health than smoking, yet no rabbi prohibits overeating or sedentariness.

I still do not fully understand this reasoning and continue to press my personal views about the dangers of smoking and my conviction that it should be halachically prohibited. Nevertheless, I accept Rabbi Feinstein's ruling unhesitatingly. He was my *posek* (rabbinic decisor). He was the *posek* for the Association of Orthodox Jewish Scientists. He was the *posek hador*, the rabbinic decisor for the entire Jewish world during the generation in which he lived. His written responsa and other writings are sacred and accepted as authoritative by all Jews.

On the other hand, in view of the deleterious effects of exhaled smoke on others in close proximity to the smokers, Rabbi Feinstein prohibits such passive smoking. He rules that even if the exhaled smoke is only annoying to others, smokers are obligated to smoke in private or far removed from other people. Those whose smoking causes discomfort, headache, or harm to the health of non-smokers are considered as *mazikin*, people who inflict damage on others. Therefore, concludes Rabbi Feinstein, smokers are prohibited from smoking in the *bet hamidrash* (house of Torah study) or *bet hakeneset* (synagogue) if there is even one person who objects.⁴⁴

Rabbi Feinstein also prohibits the smoking of marijuana

42. *Iggerot Moshe, Yoreh Deah*, Part 2 no. 49.

43. *Ibid. Choshen Mishpat*, Part 2 no. 76.

44. *Ibid. Yoreh Deah*, Part 3 no. 35.

because it is harmful to the body.⁴⁵ Even those people who suffer no physical damage may suffer mental harm in that marijuana confuses the mind and distorts one's abilities of reasoning and comprehension. Such a person is thereby not only preventing himself from studying Torah but also from performing other precepts. Marijuana use, continues Rav Feinstein, can also bring on extreme or uncontrollable lusts and desires. Furthermore, since the parents of marijuana users are usually opposed to its use, the users violate the biblical commandment of honoring one's father and mother. Other prohibitions may also be involved in marijuana use, and therefore, he concludes, one must use all one's energies to uproot and eliminate this pernicious habit.

Psychiatry

Rabbi Feinstein wrote several responsa dealing with psychiatric issues. In one case he rules that a psychotic patient who was healed but still hospitalized for observation need not be removed from the hospital against medical advice in order to hear the blowing of the *shofar* on Rosh Hashanah.⁴⁶ He permits a woman who has had two post partum psychoses to use contraception since another pregnancy would be a serious threat to her mental health.⁴⁷ In another case, Rabbi Feinstein allows the institutionalization of an incurable psychotic girl although she will be fed non-kosher food there.⁴⁸ He also permits the sterilization of this girl to prevent her from engaging in promiscuous sexual behavior. Rabbi Feinstein expresses disapproval of hypnosis in general but permits it for medical purposes.⁴⁹ Finally, he discusses the use of irreligious or agnostic psychiatrists to treat mental illness in Jews.⁵⁰ He expresses concern that psychologists and psychiatrists whose entire therapy

45. *Ibid.*

46. *Ibid. Orach Chayim*, Part 1 no. 172.

47. *Ibid. Even Haezer*, Part 1 no. 65.

48. *Ibid. Orach Chayim*, Part 2 no. 88.

49. *Ibid.* Part 3 no. 44.

50. *Ibid.* Part 2 no. 57.

consists of verbal analyses and analytical deductions may speak words of agnosticism or impose their value system on their patients. But if they are expert physicians and promise that they will not speak words that are contrary to the tenets of our faith or the commandments of the Torah, one might be able to rely upon them because experts do not lie. One should certainly try to locate a psychiatrist who is an observant Jew. If none is available, concludes Rabbi Feinstein, one should arrange with the therapist that he not speak on matters relating to the Jewish faith or the religious lifestyle. In a related responsum, Rabbi Feinstein was asked about a patient who had a choice between two physicians, one who was Torah-observant but not a specialist and another who was an atheist but a specialist.⁵¹ He answered that one should go to the most expert physician, even if he is an atheist since the overwhelming majority of physicians, whether Gentiles or irreligious Jews, perform their healing tasks appropriately and have nothing to do with religious heresy.

Bikkur Cholim (Visiting the Sick)

In a responsum about visiting the sick by telephone, Rabbi Feinstein points out that the precept of visiting the sick is more than just paying a social call but includes helping the patient in some tangible way and praying on his behalf.⁵² One cannot provide this help over the telephone. Nevertheless, if someone is unable to visit the patient at the bedside, that person partially discharges his obligation of visiting the sick by telephone because he at least performs one of the three parts of the precept, i.e., comforting the patient. Prayers may be recited on behalf of a seriously ill patient even on the Sabbath and Jewish holiaays, says Rabbi Feinstein in another responsum.⁵³ A personal visit to the patient's bedside might also stimulate the visitor to pray more intensely for the patient.

51. Feinstein, Rabbi M' in *Halachah Urefuah* (Edit, M. Hershler), Vol. 1, 1980, pg. 130.

52. *Iggerot Moshe, Yoreh Deah*, Part 1 no. 223.

53. *Ibid. Orach Chayim*, Part 1 no. 105.

Perhaps, he continues, prayers are more readily answered in the patient's room because the *Shechinah* (Divine Presence) is said to rest at the head of the patient's bed. Finally, in yet another responsum, Rabbi Feinstein says that a person cannot delegate his obligation of visiting the sick to another person; even a prominent individual should visit a simple person.⁵⁴

Circumcision

When I was in post-doctoral training as a fellow in hematology in 1962, I took care of many hemophiliac patients. At that time, I asked Rabbi Feinstein whether it is permissible to circumcise a hemophiliac boy by infusing blood products to reduce the risk of bleeding. He said "no" and gave me a single word explanation: "*lechesheyerapeh*", when he is healed, then one can perform the circumcision. I told Rabbi Feinstein that hemophilia is a genetic disorder for which there is no cure. His answer again was "*lechesheyerapeh*," when he is healed.

His first responsum concerning a boy whose brothers died following circumcision is dated 1947.⁵⁵ His logic is that even with the advent of blood products to replace the missing clotting factor, the risk of bleeding following circumcision is still substantially greater in a hemophiliac child than in a normal infant. This logic is based on the ruling enunciated by Maimonides in his *Mishneh Torah*.⁵⁶

One may circumcise only a child that is totally free of disease, because danger to life overrides every other consideration. It is possible to circumcise later than the proper time when the perinatal period is over and the danger of prolonged bleeding of the otherwise healthy child is no longer viewed as potentially life-threatening, but it is impossible to restore a single [departed] soul of Israel forever.

54. *Ibid. Yoreh Deah*, Part 1 no. 222.

55. *Ibid. Part 1* 154.

56. *Mishneh Torah, Milah* 1:18.

In 1969, I published an article on hemophilia in the Talmud and talmudic writings.⁵⁷ Again I asked Rabbi Feinstein whether a hemophiliac boy can be circumcised and his answer was the same: "*lechesheyerapeh*." In more recent years, with the availability of blood clotting hemophilic factor concentrates, the risk of circumcision has decreased significantly, so that Rabbi Feinstein permitted it. An underweight baby can be circumcised as soon as it reaches adequate weight. For a baby who had an exchange transfusion, an additional seven day waiting period is required before circumcision can be allowed.⁵⁸

In another responsum, Rabbi Feinstein rules against the use of the *Mogen* (Bronstein) circumcision clamp because if the clamp is left on for more than a minute or so, complete hemostasis results, so that no drop of blood flows freely, thereby invalidating the circumcision.⁵⁹ He also expresses concern that the use of clamps in general might lead to circumcision's becoming a surgical rather than a ritual procedure, performed by non-Orthodox physicians, clergymen or laymen rather than by an Orthodox Jew. He also says that the baby suffers more when a clamp is used.⁶⁰ He therefore recommends a simple shield or butterfly as a guard for ritual circumcision. Numerous other responsa deal with technical aspects of circumcision.⁶¹

Tay-Sachs Disease and Abortion

One of the controversial areas where Rabbi Feinstein's opinion was sought is Tay-Sachs screening, amniocentesis, and abortion of Tay-Sachs-affected fetuses. In 1973, the Association of Orthodox Jewish Scientists sent a delegation, of which I was a member, to ask Rabbi Feinstein about the advisability for a boy or girl to be screened for Tay-Sachs disease, and if it is proper, at what age the

57. Rosner, F. "Hemophilia in the Talmud and Rabbinic Writings." *Annals of Internal Medicine*, Vol. 70, pp. 833-837, 1969.

58. *Iggerot Moshe, Yoreh Deah*, Part 2 no. 121.

59. *Ibid.* Part 2 no. 119.

60. *Ibid.* Part 3 no. 99.

61. *Ibid.* Part 1 no. 155, 156, 157, 158; Part 2 no. 118, 120, 123; Part 3 no. 97, 98, 100, 101, 102, 105.

test should be performed. We further asked him whether screening should be performed as part of a publicized screening program or only as a private test. His answer was:

It is advisable for one preparing to be married to have himself tested. It is also proper to publicize the fact, via newspapers and other media, that such a test is available. It is clear and certain that absolute secrecy must be maintained to prevent anyone from learning the result of such a test performed on another. The physician must not reveal these to anyone . . . These tests must be performed in private and, consequently, it is not proper to schedule these test in large groups as, for example, in Yeshivas, schools, or other similar situations.⁶²

Rabbi Feinstein also points out that most young people are quite sensitive to nervous tension or psychological stress and, therefore, young men (below age twenty) or woman (below age eighteen) not yet contemplating marriage should not be screened for Tay-Sachs disease. Finally, Rabbi Feinstein strongly condemns abortion for Tay-Sachs disease and even questions the permissibility of amniocentesis which proves the presence of a Tay-Sachs fetus, since amniocentesis is not without risk, albeit small.⁶³

Rabbi Feinstein was also asked about the use of contraceptives by a woman who gave birth to two Tay-Sachs babies, both of whom died in infancy. In that case, he disallowed the use of the contraceptive diaphragm but permitted the use of spermicidal foams and jellies.⁶⁴ Rabbi Feinstein also allows the use of spermicidal foams and jellies by a woman who should not become pregnant because of danger to life.⁶⁵ However, he does not allow sterilization of a woman with mental anguish who had previously given birth to two physically defective children,⁶⁶ nor for a woman who gave birth

62. *Ibid. Even Haezer*, Part 4 no. 10.

63. *Ibid. Choshen Mishpat*, Part 2 no. 71.

64. *Ibid. Even Haezer*, Part 1 no. 62.

65. *Ibid. Part 3* no. 21.

66. *Ibid. no. 12.*

to two blind children.⁶⁷ Instead he suggests that she practice contraception.

The objections to amniocentesis and abortion in Jewish law are predicated on considerations surrounding the fetus. Extreme emotional stress in the mother leading to suicidal intent might constitute one of the situations in which abortion would be sanctioned. If a woman who suffered a nervous breakdown following the birth (or death) of a child with Tay-Sachs disease becomes pregnant again, and is so distraught with the knowledge that she may be carrying another child with the fatal disease that she threatens suicide, Jewish law might allow amniocentesis. If this procedure reveals an unaffected fetus, the pregnancy continues to term. If the result of the amniocentesis indicates a homozygous fetus with the Tay-Sachs disease, rabbinic consultation regarding the decision of whether or not to perform an abortion should be obtained. No general rule of permissiveness or prohibition can be enunciated in regard to abortion in Jewish law. Each case must be individualized and evaluated on the basis of its merits, taking into consideration all the prevailing medical, psychological, social, and religious circumstances. Two lengthy responsa on abortion were published in the last volume of Rabbi Feinstein's responsa.⁶⁸

Contraception

There are at least twenty-five responsa in the *Iggerot Moshe* which deal with contraception. Most methods of contraception are discussed. For example, Rabbi Feinstein allows the use of a diaphragm in a case where pregnancy would be dangerous.⁶⁹ If there is great danger, he even allows the use of a condom by the male if other methods of contraception cannot be used.⁷⁰ Rabbi Feinstein was very concerned that his lenient rulings in these cases should not be widely applied. He writes that he thoroughly investigated not only the medical danger of pregnancy but also the

67. *Ibid.* no. 13.

68. *Ibid. Choshen Mispat*, Part 2 no. 69 and 70.

69. *Ibid. Even Haezer*, Part 1 no. 63.

70. *Ibid.*

character of the married couple as to their level of Jewishness, Jewish practice, and G-d fearing nature. He gave lenient rulings for finite periods of time and asked couples to return to him periodically to reassess the situation.⁷¹ In the case of a man who wanted to marry a woman with serious kidney disease, Rabbi Feinstein allowed the use of a diaphragm until the renal disease improved. He also said that if bedrest throughout pregnancy removes the danger, then the diaphragm is not allowed. He asked that his ruling not be widely publicized. Since Rabbi Feinstein himself decided to publish his views in his responsa, it is not contrary to nor disrespectful of his wishes to discuss them here.

Rabbi Feinstein's first responsum on the oral contraceptive pill, written in 1962, allowed the temporary use of the pill by a woman who already had two children, a boy and a girl, who would have a difficult time raising more children until the first two were somewhat older. The pill does not violate the prohibition of emitting semen for naught.⁷² Rabbi Feinstein voices concern about vaginal bleeding and spotting from the pill. He also allows the pill to be used by a woman who is weak and would find pregnancy difficult even if she has not yet had two children. After three years, when she has regained her strength, she should stop using the pill.⁷³

In another responsum he writes that temporary sterility in a male for about six months following contraceptive injection does not violate the prohibition against castration.⁷⁴ The intrauterine device (IUD) should not be used to prevent pregnancy in a woman with varicose veins who cannot take the pill, because the IUD causes bleeding and may be an abortifacient. Rather, Rabbi Feinstein suggests the use of the diaphragm where pregnancy would constitute a danger to the mother.⁷⁵ He also allows the use of spermicidal jellies but claims they are unreliable and, therefore, the diaphragm is preferable. There is no permissibility however for the

71. *Ibid. Even Haezer*, Part 1 no. 64.

72. *Ibid. Even Haezer*, Part 2 no. 17.

73. *Ibid.* Part 3 no. 24.

74. *Ibid.* no. 15.

75. *Ibid.* no. 21.

man to use the condom, and the case must be reassessed in two years because the danger of pregnancy may no longer be present.⁷⁶ The pill is discussed in several additional responsa.⁷⁷

In the case of a man who was angry when he learned that his wife who had already given him five children was using a diaphragm because of mental illness, Rabbi Feinstein ruled that the husband should not be upset and should continue living with her.⁷⁸ He suggested, however, that the wife's illness be reevaluated after a few years to determine whether the danger of pregnancy has receded. He also asked that his ruling not be widely publicized lest people apply leniencies in other cases where such may not be allowed.⁷⁹ The rhythm method is also discussed by Rabbi Feinstein.⁸⁰ He allows this method of contraception only after the couple has already had two children and only if it would be difficult for them to have and raise more children.

Rabbi Feinstein allows a woman to use contraception following a cesarian section delivery until the danger from another pregnancy passes, even for up to a year or more depending on the medical circumstances.⁸¹ In another responsum, he reiterates the permissibility of the use of either the diaphragm or the pill by the woman, but not a condom by the husband, where pregnancy might be dangerous.⁸² A couple that was guilty of child abuse was temporarily allowed for two years to use the diaphragm as a method of contraception because of the mother's mental illness.⁸³ Similarly, Rabbi Feinstein allows the use of the diaphragm because of depression in the mother.⁸⁴ He again advises against the pill and against the IUD because they cause vaginal bleeding and spotting.

76. *Ibid.*

77. *Ibid.* Part 4 no. 72 and 74.

78. *Ibid.* Part 3 no. 22.

79. *Ibid.*

80. *Ibid.* Part 1 no. 102 and Part 4 no. 32:3.

81. *Ibid.* Part 4 no. 62:2.

82. *Ibid.* no. 67.

83. *Ibid.* no. 68.

84. *Ibid.* no. 69.

If a woman insists on using a diaphragm to prevent pregnancy even though she does not suffer from any medical or psychiatric illness, the husband is allowed to remain with his wife and cohabit with her.⁸⁵ Rabbi Feinstein disallows a sick man from marrying a woman who would use a diaphragm to prevent pregnancy.⁸⁶ Only maternal illness can allow the use of contraceptives. Finally, Rabbi Feinstein discusses the use of contraception to enable a woman to care for a sick child,⁸⁷ and the obligation of a man with Marfan's Syndrome to marry a fertile woman who can become pregnant and give birth.⁸⁸

In summary, Rabbi Feinstein rules that in Jewish law contraceptive methods and devices cannot be used except for specific medical indications such as rheumatic heart disease, severe renal disease, and similar situations, where pregnancy may constitute a serious threat to the health of the mother. Jewish law requires that the marital act be as normal as possible. When medical indications, which include psychological factors, necessitate the use of a contraceptive technique, Jewish law grades methods of contraceptive techniques from least to most objectionable in the following order: oral contraceptives, chemical spermicides, diaphragms and cervical caps to be used by the wife, condoms, and coitus interruptus. The most objectionable method, and one that is least often permitted under Jewish law, is the use by the male of the condom, or withdrawal (i.e., coitus interruptus).

Sterilization.

Surgical or physical impairment of the reproductive organs of any living creature violates Jewish law, except in cases of urgent medical necessity. In the case of males, upon whom the biblical commandment to be fruitful and multiply rests, only a risk to life (e.g., cancer), can justify such procedures. Hence, unless medically

85. *Ibid.* no. 70.

86. *Ibid.* no. 71.

87. *ibid.* no. 73:1.

88. *ibid.* no. 73:2

demanded, the ligation of the vas deferens during prostatectomy should be avoided. The prohibition against impairing the male reproductive organs and functions is unrelated to man's fertility. It applies even to a man known to have become sterile or impotent, whether by reason of age or of anatomic or physiologic aberration that occurred after birth. If he was born sterile, the above prohibition may not apply. Vasectomy as a "population control" technique is not condoned in halacha. It is forbidden to assist at such surgery in any way on man or animal.

Rabbi Feinstein permits surgery on a child with an undescended testicle even if the testicle may have to be totally removed.⁸⁹ He disallows hysterectomy in a case where the woman has mental illness, renal disease, and varicose veins. He suggests that she use a diaphragm since another pregnancy might be dangerous for her life.⁹⁰ As mentioned above, he also disallows sterilization of a woman who gave birth to defective children,⁹¹ or in another case, to two blind children.⁹² Even reversible Fallopian tube tying or cutting is not permissible because this constitutes a forbidden act of castration.⁹³ Rabbi Feinstein is strongly opposed to vasectomies even in men who are already infertile.⁹⁴ He also objects to the cutting of the vas deferens during prostate surgery unless it is absolutely essential medically.⁹⁵

Rabbi Feinstein disallows the sterilization of a woman following several cesarian sections,⁹⁶ or in cases where pregnancy would be dangerous, unless no other method of contraception can be used.⁹⁷ Fear of pregnancy by a woman is not sufficient reason to

89. *Ibid.* Part 1 no. 12.

90. *Ibid.* no. 13.

91. *Ibid.* Part 3 no. 12 and Part 4 no. 35.

92. *Ibid.* Part 3 no. 13.

93. *Ibid.* Part 4 no. 32.

94. *Ibid.* no. 30 and 31.

95. *Ibid.* no. 28-29.

96. *Ibid.* no. 33.

97. *Ibid.*

allow sterilization; only if her life is in danger is this procedure permitted.⁹⁸

Artificial Insemination and Fertility Testing

Artificial insemination using the semen of donor other than the husband (A.I.D.) is considered by most rabbis to be strictly prohibited for a variety of reasons, including the possibility of incest, confused genealogy, and problems related to inheritance. However, without a sexual act involved, many rabbis hold that the woman is not guilty of adultery and is not prohibited from living with her husband.⁹⁹ The child born from A.I.D. does not carry any stigma of illegitimacy, according to most. In an extremely controversial ruling in 1959, Rabbi Feinstein permitted the use of semen from a Gentile for insemination into a Jewish woman because all the technical problems of A.I.D. do not exist in such a case.¹⁰⁰ Although he was strongly criticized for this ruling, he reiterated its correctness in a much later responsum dated 1981.¹⁰¹

The use of the husband's sperm for artificial insemination is certainly permissible.¹⁰² If the husband happens to be a physician it is preferable that he perform the insemination.¹⁰³ If a woman has a short menstrual cycle, Rabbi Feinstein allows her to be inseminated with her husband's sperm even during her *niddah* period.¹⁰⁴ Similarly, he allows such a woman to shorten her *niddah* period and begin counting her seven "clean days" immediately upon complete cessation of her menses, even before six days to allow her cohabitation with her husband to coincide with early ovulation, to permit a pregnancy to result.¹⁰⁵ Sperm analysis and sperm

98. *Ibid.*

99. *Ibid.* Part 1 no. 10

100. *Ibid.* no. 71.

101. *Ibid.* Part 4 no. 32:5. See Cohen, A. "Artificial Insemination" *Journal of Halacha and Contemporary Society*, 13, Spring, 1986, pp. 43.

102. *Ibid.* Part 2 no. 18.

103. *Ibid.* *Yoreh Deah*, Part 3 no. 54.

104. *Ibid.* *Even Haezer*, Part 2 no. 18.

105. *Ibid.* *Yoreh Deah*, Part 2 no. 84.

procurement for fertility testing are permissible, according to Rabbi Feinstein, and do not violate the prohibition of emitting semen for naught since the semen may be used to fulfill the commandment of procreation.¹⁰⁶ Preferably, the sperm should be obtained by a method other than masturbation. Rabbi Feinstein also wrote a lengthy responsum on testicular biopsy as part of fertility testing.¹⁰⁷

Miscellaneous Responsa

Many other medical and medically-related topics are discussed in the hundreds of responsa in the seven volumes of *Iggerot Moshe*. A small sampling is all that time and space will allow: A blind man is allowed to be accompanied by his guide dog into the synagogue.¹⁰⁸ It is preferable that he sit with his dog near the door so as not to disturb those congregants who fear animals. A patient with a paralyzed left arm still dons phylacteries on that arm.¹⁰⁹ A patient with an indwelling catheter may recite his prayers if he covers the catheter and collection bag.¹¹⁰ Rabbi Feinstein prohibits a man from taking medication to dye his hair.¹¹¹ He allows a person to donate blood for financial compensation.¹¹² He allows people to be professional ballplayers for a livelihood even though there is a chance they may be injured.¹¹³ He prohibits the elective consumption of vitamins on the Sabbath by healthy people.¹¹⁴ Labor should not be induced purely for the sake of convenience.¹¹⁵ Rabbi Feinstein is not critical of people who suffer hunger by going on a strict diet to lose weight to look handsome or pretty.¹¹⁶ He also

106. *Ibid. Even Haezer*, Part 1 no. 70; Part 2 no. 16; Part 3 no. 14 and Part 4 no. 27.

107. *Ibid.* Part 2 no. 3.

108. *Ibid. Orach Chayim*, Part 1 no. 45.

109. *Ibid.* no. 8.

110. *Ibid.* no. 27.

111. *Ibid.* no. 82.

112. *Ibid. Choshen Mishpat*, Part 1 no. 103.

113. *Ibid.* no. 104.

114. *Ibid. Orach Chayim*, Part 3 no. 54.

115. *Ibid. Yoreh Deah*, Part 3 no. 74 and *Orach Chayim*, Part 4 no. 105:6.

116. *Ibid. Choshen Mishpat*, Part 2 no. 65.

discusses cosmetic surgery for girls concerned about finding a mate.¹¹⁷ There is even a very unusual responsum, dated Purim 1981, on the death penalty, in response to an inquiry by the Governor of the State of New York.¹¹⁸

Conclusion

How does one assess the influence of this humble man, Reb Moshe, as he was known by everyone? A recent book on the life and ideals of HaGaon Rabbi Moshe Feinstein¹¹⁹ states that for half a century in America these two-words — Reb Moshe — were synonymous with Torah greatness, encyclopedic knowledge, compassion, generosity, piety, faith and countless other precious and sacred concepts. He left us many legacies. He was a giant in halacha. He was a giant in the fear of G-d. He was a giant in prayer. He was a giant in modesty. He was a giant in humility. He was a giant in kindness. He was a giant of inspiration to his countless students and disciples among whom I was privileged to be one.

He was also the rabbinic decisor (*posek*) for the medical students and physicians of the Association of Orthodox Jewish Scientists. He answered literally hundreds of our questions, some in writing, many more orally. He gave us the ability to practice medicine as Torah-observant Jews. He was practical and pragmatic, understanding and sensitive, knowledgeable and down to earth. He was never timid. His answers to us were clear, concise, precise, and to the point. His answers adhered scrupulously to the laws of the Torah but also were in keeping with high standards of medical practice. All those years he was our guide and our inspiration, and his memory lives on in our hearts and in our minds.

117. *Ibid.* no. 66.

118. *Ibid.* no. 68.

119. Finkelman, S. *Reb Moshe. The Life and Ideals of HaGaon Rabbi Moshe Feinstein.* New York, Mesorah Publications, 1986, 270 pgs.

Attitudes and Methods in Jewish Outreach

Rabbi Moshe Weinberger

Introduction

The Rambam writes: "The Torah has already ensured us that ultimately, at the end of her exile, Israel will repent and will be immediately redeemed."¹

In a penetrating article, R. Bezalel Zolti suggests that *teshuva* is not merely a means of achieving redemption. Repentance is itself redemption, since the individual is literally liberated from the exile of sinfulness. Therefore, God's commitment to the national redemption of Israel must necessarily include His guarantee that a nationwide *teshuva* movement will one day be initiated.²

1. *Hilchot Teshuvah* 7:5. According to the *Kesef Mishneh*, the source of this ruling is R. Yohanan's statement in Talmud *Yoma* 86b: "Great is *teshuva*, for it hastens the redemption."

2. *Moriah*, Av 5733 — Tishrei 5734.

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It seems that our generation is destined to redeem the force of *teshuvah* and, of course, to be redeemed by its restorative powers. There have always been *ba'alei teshuvah*, but there has never been such a mass *teshuvah* movement.

In the modern era, R. Samson Raphael Hirsch saved a part of German Jewry from certain spiritual extinction. Many of the Jews of Russia and Lithuania were influenced by the outreach work of Habad, Bratslav, and Navaradok. Consider this excerpt from the classic Musar treatise, *Madregat HaAdam*:

Therefore, one who has it in his power to further the cause of Torah, must not remain inert or give priority to his own efforts to seek repose, but he must summon upon his energies to wander from place to place and establish outposts of Torah and fear of Heaven. For whom will He hold accountable for the lowered state of Torah and fear of God if not those who possess the ability to propagate it? They are not free of their responsibility until they have brought every place under the banner of Torah.³

The *Chafetz Chaim* also wrote a good deal about this subject:

And you must know that, just as when we see a person drowning, we are obligated to seek someone who is able to swim in the depths of the sea to rescue him, so must we search for people who are qualified to draw the hearts of their fellow Jews to the service of God.⁴

As with all creative movements, there is always the risk of forsaking principles and guidelines, but the Torah teaches that noble ends never justify questionable means.

In an address delivered some years ago, one of the halachic giants of our era, R. Moshe Feinstein, discussed this issue, basing himself on Leviticus 19:4, "Do not turn to idols." The Gemara

3. See the final chapter of this work, "To Turn The Many To Righteousness" translated by Shraga Silverstein (Feldheim, 1986).

4. See *Hizzuk ha-Dat* 2-4 and *Davar be-Itto*, chap. 18.

explains that this verse refers to ideas that tend to become idols in themselves, ideologies not based on Torah. If you do not follow the Torah meticulously, you may make idols of your own ideas. Indeed, R. Moshe remarked, a certain conceptual confusion is frequently to be found among those who are engaged in enlightening those who are seeking religious faith; this conceptual anarchy unquestionably disqualifies these "guides" for the task. Yet those who seek guidance must be provided with reliable teachers. The one who takes this task upon himself must be extremely secure in his own faith, which must be founded on a proper interpretation of Torah. He must be meticulous in adhering to the teachings of our Torah leaders, and must not be misled by false ideologies or foreign methodologies.⁵

The question of the halachic problems that might be presented by innovative programming is one of the many quandaries that confront the *kiruv* professional.

We must consider the following issues, among others.

1. What is the nature of the obligation to attract Jews back to Torah observance? Is this an individual or a communal responsibility?
2. Is one commanded to appeal to Jews who are apathetic or perhaps antagonistic in their attitudes toward Orthodox Judaism?
3. Is there any point in admonishing a sinner to repent when his adopting a Torah-true lifestyle is unlikely, but, as a result of his contact with the *kiruv* worker, the prospective *ba'al teshuvah* loses his status as an "unintentional transgressor"?
4. Must *ba'al teshuvah* yeshivas follow a policy of open enrollment? Are we obligated to teach Torah to all Jews who seek religious guidance?
5. May a person leave a Torah community in order to be an outreach worker in an assimilated community, thereby exposing his family to the danger of secularization?
6. May a *kiruv* worker conduct mixed classes? May halachic

5. *Jewish Observer*, June 1975.

concessions be made in synagogue services in order to attract *ba'alei teshuvah*?

7. May *kiruv* projects be undertaken in conjunction with non-Orthodox rabbis and temples?

8. May a non-Orthodox Jew be invited for Shabbat if he insists on driving during the day?

9. Is one obligated to contribute money to *kiruv* organizations?

10. What is the nature of spiritual suicide?

The present work is a modest effort to discuss some of the halachic problems that confront the outreach worker. Obviously, this is not a halachic handbook for the *kiruv* professional. Those who are involved in *kiruv* work must be in constant contact with a halachic authority and refer all questions to a competent *posek*. It is difficult to devise uniform standards in an area which by its very nature is so varied. We are nevertheless compelled to begin the inquiry.⁶

ADMONISHING THE APATHETIC

Limits

Logic and reason dictate that admonition is improper in the case of an individual who is clearly unreceptive. Thus, it is stated in the Gemara in the name of R. Elazar b. Shimon, "Just as it is a mitzvah to say that which will be heard [i.e., seriously considered], so it is a mitzvah *not* to say that which will not be heard." R. Abba concludes that it is an *obligation* to remain silent, as it is written: "Do not admonish a scoffer lest he despise you." Rashi explains that it is written "you shall admonish" and this refers to someone who is willing to accept the admonition.⁷

There is a clear objective in *tochachah* and *mecha'ah* —

6. Editor's Note: The following essay will deal with only a number of these issues, which are discussed fully in the author's book.

7. As quoted in Dr. Levi's *Sha'arei Talmud Torah*. See *Shabbat* 54b, 55a.

correction of the past and prevention of future problems. These are two major elements in the process of *teshuva*. However, when this dual objective seems to be unrealistic due to the sinner's neglect of religion, it is perhaps a mitzvah to remain silent. In such a case *tochachah* (reproof, reprimand) might be counterproductive.

However the oft-mentioned Gemara which obligates one to be silent under such circumstances appears to contradict another text in *Arachin* which states:

To what extent is the mitzvah of *tochachah*? Rav said: Until the recipient is prepared to strike the admonisher. Shmuel said: Until the point where he is ready to curse the admonisher. And according to R. Yochanan: Until he insults the admonisher.⁸

Here we are told to ignore the apparent apathy of the sinner and to persevere in the *tochachah*. Many *Rishonim* and *Acharonim* have grappled with this seeming contradiction and as a result formulated important guidelines on the nature of the obligation to "bring back" a wayward Jew.

Group *Tochachah*

The *Nimmukei Yosef* makes the following distinction:

There [in the Gemara which encourages continuous effort], we are dealing with one individual. However, in a case which involves many people, the other method [silence] is used.⁹

When a group of people is transgressing, the rule of "not saying something that won't be heard" is invoked. Only when an individual is involved is there an obligation to continue with the *tochachah* despite the lack of receptiveness. This opinion is the source of the ruling of the Ramo in *Shulchan Aruch*. He writes:

If one knows that one's admonition will not be effective, one should not give admonition to a group

8. *Arachin* 16b. See *Bava Mezia* 31b (Rebuke even one hundred times).

9. *Nimmukei Yosef* on *Rif* (end of chap. 6 of *Yevamot*).

of people more than once. Since one knows that they will not listen, one should not continue to admonish them. An individual, however, must be admonished until he strikes or curses the admonisher.¹⁰

A qualitative as opposed to quantitative distinction is made by Ritva and is also found in *Sefer Hasidim*:

If one knows that one's words will not be accepted, one must not admonish. When the Gemara stated [the rule] to admonish till the sinner insults [the *mochi'ah*], it was referring to a son who is admonished by a parent or sibling. In other words, since the son is loved by the parent or sibling, repeated rebuke will not be harmful. However, another person, if subjected to continuous admonition, will begin to despise the one who is trying to help him, and there is a possibility that he will cause the *mochi'ah* harm by taking some vengeful action against him. In such a case, *tochachah* should not be given.¹¹

According to these authorities, the nature of the relationship between the admonisher and the sinner determines the success probability of *kiruv*. It is not enough that one seeks to influence an individual. The individual must be someone who is close enough to the *mochi'ah* to accept repeated rebuke from him without being stirred to reprisal or absolute rejection.

10. 608:2. One author has suggested two explanations for this distinction. (1) It is very unlikely that an entire community will repent, since the sin has become an acceptable form of behavior. Each individual becomes insensitive to rebuke since he may simply hide behind the cloak of his neighbors and friends and claim that he is no better nor worse than they are. Any attempt to stop a specific sinful act will be viewed as an attempt to oppress the masses with new unfounded stringencies. (2) The Rambam has told us that it cannot be expected that a policeman be placed in every house. It is extremely difficult to influence and sway large groups of people, and at most a small number will be affected (*Yelammed Da'at*, p. 525).

11. *Sefer Chasidim* (Mosad Kook ed.), no. 413. See R. Reuven Margulies' notes in *Mekor Chesed*. See also Ritva, *Chiddushim*, *Yevamot* 65b.

Test For *Kiruv*

Since authorities concur that when there is little or no likelihood of successful *kiruv*, the mitzvah of *tochachah* does not exist, two essential questions must be answered:

1. How are we to determine whether or not *tochachah* will have successful results?
2. In a case where no obligation to rebuke exists, may an effort nevertheless be made to draw an individual or community back to Torah observance? Would this be considered a mitzvah? What about the risk of making Jews better informed but no more observant of Torah law? Perhaps they are better off uninformed (i.e., they will be sinning unwittingly, not intentionally).

In response to the first question, R. Yehudah Henkin summarized a number of relevant sources found in the *Rishonim* and *Acharonim*:

1. Rashi (*Beitzah* 30a): "Do not interfere with a matter that they have become accustomed to and will not reject." This seems to refer to the pursuit of a sinful lifestyle as opposed to an occasional divergence from halacha.
2. Mordechai (*Beitzah* 68b): "Let the Israelites [retain their customary way in this matter], if their departure from halacha is due to a custom which itself is the result of a confusion between what is forbidden and what is permitted. However, if divergence from halacha is unintentional, we are obligated to direct them to the proper path, since they may listen [to us] since they have not become accustomed to the custom from their fathers [ancestors]." The Mordechai introduces the problem of sinful behavior that has been vindicated in an individual's eyes by virtue of the fact that the preceding generation was already accustomed to this delinquent form of religious observance.
3. *Me'il Zedakah* (no. 19): If a sinful act has become publicly acceptable, it is apparent to us that admonition will go unheeded.
4. *Semag*, *Semak*, *Yereim*, *Rosh*, and others: "If it is clear to him." The possibility of success or failure depends upon the judgment of the individual who is considering a particular *kiruv* project.
5. *Ketav Sofer* (*Even ha-Ezer* 47): "In a place where Torah

scholars are ridiculed, it is certain that *tochachah* will not be accepted." Where Orthodox Judaism and its halachic authorities are scorned, it may be assumed that *tochachah* will be useless.¹²

The *Chazon Ish* was quoted as saying:

In a situation where *tochachah* is useless, there is no obligation to rebuke even a sinner who is violating a prohibition which is explicitly stated in the Torah. The mitzvah of *tochachah* exists only when there is at least a reasonable possibility of effectiveness. If, however, it only angers the scoffer and causes additional scorn, then there is no mitzvah of *tochachah* whatsoever.¹³

Kiruv Despite a Heter?

The question now remains as to whether or not *kiruv* work may still be initiated despite the presence of one of the exempting factors discussed above. The Gemara has stated:

Just as one is commanded to say that which will be [carefully considered], so is one commanded to refrain from saying something which will not be [carefully considered]. Rabbi Abba said: It is an obligation [to be silent].¹⁴

According to this it is an obligation, not an option, to remain silent when rejection is anticipated. The rationale of this obligation is discussed by the Maharal.

Where rebuke goes unheeded, the word of God is disgraced, the sinner ignores the will of the Creator when admonished. This is the greatest disgrace to the Torah. Therefore, just as [the admonisher] brings honor to God by stating that which will be obeyed, so

12. *Tehumin*, vol. 2, p. 272. See R. Yeshayahu ha-Levi Horowitz's introduction to *Shenei Luhot ha-Berit*.

13. *Pe'er Hador*, vol. 3, p. 195, n. 122. See also R. Nahman of Bratslav's *Sefer ha-Middot, Tochachah* no. 7; Hillman, *Iggerot Ba'al ha-Tanya* 56.

14. *Yevamot* 65b.

too is it a mitzvah not to say that which will not be accepted. Rabbi Abba contends it is an obligation to be silent since addressing such people can cause [the admonisher] to be more despised and causes evil to befall him.¹⁵

The halachic basis, however, is much more complex. In the Gemara we are told:

We have learned in the Mishnah: It is forbidden to clap or dance on a festival. Despite this, we see that in our times these are in fact all being done and nothing is said [by way of admonition]! . . . *Let the Jews be, it is preferable that they be unintentional rather than willful sinners.*¹⁶ (italics added)

This is a very bold statement, and standing alone, it would undermine the very basis for all *tochachah* and *kiruv* work. However, other talmudic dicta dispute whether one should remain silent in the face of violation of Torah law (*de-Oraita*) or perhaps only if it is a less well-known rabbinic enactment.

According to the Rosh, the principle of "it is preferable that they sin unintentionally" is limited to rabbinic prohibitions and to Torah prohibitions that are not explicitly stated but are derived from passages in the Torah. The Rashba, who agrees with this interpretation, explains it in the following manner: "If something is not expressly prohibited by the Torah, people are unaware of its seriousness and are lax in its observance."¹⁷

Similarly, the Meiri writes: "Prohibitions that are not well known by the masses."¹⁸

The Ramo, in fact, rules accordingly in his gloss on the *Shulchan Aruch*.

The principle of "it is preferable that they be regarded

15. *Netivot Olam; Netiv ha-Tochachah*, chap. 2.

16. *Beizah* 30a. See also *Shabbat* 148b, *Bava Batra* 60b.

17. *Chiddushei ha-Rashba, Beizah*.

18. Meiri, *Beizah*. See also Ran citing *yesh omrim*; the *Maggid Mishneh, Shevitat Asor* 1:7 interprets the Rambam this way.

as unintentional sinners" is applied to all types of sin, even those which are from the Torah if the prohibition is not explicitly stated in the Torah. If, however, a prohibition is clearly stated in the Torah, we must protest its being violated.¹⁹

Almost all *poskim* concur with the ruling of the Ramo.²⁰ According to this, although the application of "it is preferable" is quite restricted, it does nevertheless apply to countless rabbinic injunctions and myriad Torah laws which are not explicitly stated in the Torah itself.

How do we reconcile this with the entire concept of *kiruv*, whose goal is to expose those Jews who are completely unfamiliar with halacha to the rich detail of authentic observance? On the other hand, many Jews who would have remained in the category "unintentional sinners" would be transformed into "intentional sinners" when they are taught the rabbinic laws but remain noncommitted to observing them.

A Different Approach

In order to resolve this dilemma we must turn to a fascinating remark found in the *Shittah Mekubbezet*:

The Ritva bore testimony to a comment made by a great Ashkenazic authority, which in turn he heard from the rabbis of France and the Rav of Rothenburg, that the principle of "it is preferable" applied only in talmudic times. In our days, however, people are

19. 608:2. See *Resp. Mahram Alashakar* 35 and *Yam Shel Shelomoh, Beizah* 30a. It is noteworthy to mention the Hida's understanding of the *Ba'al ha-Ittur* which is even less restrictive: "The only instance in which we must protest a Torah transgression by an individual who we are certain will continue to violate that prohibition is when we are in a position of authority over the sinner. When it is not within one's power to force another to comply there is no obligation to admonish if one expects to be ignored." *Birkei Yosef*, quoted in *Biur Halacha* 608, s.v. *Mochin bo adam*. See also *Resp. Tzitz Eliezer* 13:63 for a lucid explanation of this approach.

20. *Mishnah Berurah, Aruch ha-Shulchan, Kaf-haChayyim, Shulchan Aruch ha-Rav* 608.

overly lenient in a number of areas of observance, and it is therefore proper to "place a fence around the Torah" by protesting even rabbinic violations, and penalizing the violators, in order to ensure that the law will not be either intentionally or unintentionally neglected.²¹

This approach is understandable when dealing with Jewish communities that have become completely estranged from Jewish tradition. It encourages an activist role on the part of observant Jews who must spare no effort to educate those who are ignorant of halacha. On the whole, it discourages any reliance upon the rule of "it is preferable." All Jews must be informed; hopefully, they will return to authoritative tradition.

21. *Shittah Mekubbezet*, *Beizah* 30a, cited by *Machzit ha-shekel*, O.H. 608. See *Resp. Mishneh Halachot* 7:119, whose understanding of this issue is difficult to comprehend.

There is an opinion found in *Chazal* which has been clearly influenced by the concerns expressed in the *sugya* of "it is preferable" and the talmudic dictum "just as it is a mitzvah, etc."

In *Arachin* 16b we read the following: "R. Tarfon said: 'I would be surprised if there exists anybody in this generation who is able to tolerate and be positively affected by rebuke. If one tells a person [sinner], 'Remove the splinter from between your eyes', he responds, 'Remove the beam from between your eyes.' ' R. Eliezer b. Azaryah said: 'I would be surprised if there is anyone in this generation who knows how to rebuke properly!'"

It would seem that according to this Gemara it is no longer possible to carry out the mitzvah of *tochachah*. The performance of this mitzvah is an extremely delicate matter. Its effectiveness depends upon a myriad of factors which are difficult to determine with any degree of certainty. The Gemara's statement emphasizes that what was always difficult is now nearly impossible.

The Malbim in his explanation of the aforementioned *Chazal* writes: "There are three conditions in the mitzvah of *tochachah*: (1) The one who is fulfilling the mitzvah must himself be innocent of the sin. (2) The one who is being rebuked must be a person who is able to tolerate disapproval. (3) The actual *tochachah* must be done in such a manner that the individual is not humiliated. R. Eliezer b. Azaryah was pointing out that in his generation there was no one who could honestly claim to be sinless. R. Tarfon remarked that no one is able to be rebuked, and R. Akiva later mentions that no one knows how to admonish a fellow Jew without causing him embarrassment" (Leviticus 19:17).

Rav Y. Y. Weiss in *Responsa Minhat Yizhak* 4:79 quotes the commentary

This is all true as far as a general perspective or approach is concerned. All mitzvot, whether of Torah or rabbinic origin, must be taught. Nevertheless each individual case must be weighed very carefully. All authorities agree that the goal here is to correct the religious behavior of a fellow Jew, not to add to his culpability.

Earlier, we discussed factors which indicate that admonition would, in all probability, not be well received. According to the *Ketav Sofer*, these factors or indicators must be evaluated for each particular case. Very often, the individual who has slowly begun to observe mitzvot must be protected from minute details of halacha in areas for which he is clearly unprepared. As the Rashba noted, "If something is not expressly prohibited by the Torah, people are unaware of its seriousness and are lax in its observance." Unfortunately, in our society nonobservant Jews are usually completely unaware of most Torah laws other than those mentioned

of the *Chafetz Chayyim* on the above *Chazal*: "Since this is the case, just as it is a mitzvah to say something that will be heard, so it is a mitzvah not to say that which will be ignored. This is true with the exception of a transgression that is explicitly taught in the Torah, in which case one must always protest, as it is ruled in *Shulchan Aruch*" (*Torat Kohanim* 19:17).

Rav Weiss expresses his amazement that the *Chafetz Chayyim* appears to have accepted the literal understanding of *Chazal*'s statement. If this is true, writes R. Weiss, according to those *poskim* who maintain that "it is preferable to sin unintentionally" applies even to something explicitly stated in the Torah, one would *never* be permitted to admonish whenever it appears that the *tochachah* will not be effective. This, he says, would undermine the entire mitzvah of *tochachah* in our times, and would contradict all that is found in *Shas* and *poskim*. Therefore he writes: "It is obvious that *Chazal* only intended to encourage all 'admonishers' [e.g., outreach professionals] to perfect their own behavior in order that their words be well received. If they do not first do this, the sinner will simply respond by pointing to the admonisher's deficiencies, 'Take the beam out from between *your* eyes!' The rebuke of a truly God-fearing person will be found acceptable and perhaps effective. *Chazal* never intended, God forbid, to exempt anyone from the mitzvah of *tochachah* for this reason."

R. Weiss goes on to cite numerous authorities who support his contention that the Gemara's statement is *not* halachically oriented but rather is meant to encourage increased spiritual integrity on the part of people involved in *kiruv* if they wish to accomplish more than they destroy. See *Resp. Zichron Yehudah* 2:88 and *Resp. Maharshal* 55.

in the Ten Commandments or those which are universally known to Jews and non-Jews alike.

Thus, although we may *carefully* proceed to enlighten the masses, we must be continuously vigilant of the effect of our lessons upon the individual, and we must therefore consult Torah authorities as to when silence is in order and the principle of "it is preferable" is operative. Otherwise, we may be held responsible for the intentional negative behavior of a fellow Jew. *Kiruv* which causes distancing is counterproductive and a disservice to all parties involved.

Associations and Methodologies: What Risks May We Take

R. Avraham Weinfeld, in discussing the subject of *kiruv rechokim*, (drawing a person distant from Torah closer to religious observance) raises a problem which demands our attention in the form of thorough and honest halachic inquiry.

It is certainly a great mitzvah to return wayward sons to the embrace of the Torah, but, despite the importance of this mitzvah, it too has conditions and restrictions. If any of these restrictions are ignored, the attempt of *kiruv* is transformed into a sin. Whenever a Jew seeks to know if a prohibition may be violated in order to perform a mitzvah, he must consult the *Shulchan Aruch* or inquire of a halachic authority. Similarly, regarding the question of leniencies and halachic compromises for the purpose of making Torah Judaism more accessible to the repentant Jew, we must always turn to the Torah in order to know if such steps may be taken... Unfortunately, there are some who follow the improper path and are always prepared to make concessions and relinquish parts of the Torah in order to be *mekarev rechokim*. However, the truth is that it is *not* the love of fellow Jews that motivates such people, nor are they greater lovers of our people than the strictly observant Jews who refuse to make compromises for the sake of sinners. The reason they are prepared to make halachic concessions is that they lack full faith in the holiness of halacha, and the

conviction that the Torah is the purpose of life. They view the Torah as being, God forbid, only a means to the preservation of the Jewish people. Therefore, whenever, in their opinion, scrupulous observance of a specific halacha will cause a Jew to reject Judaism, these people will ignore the laws of the Torah. The objective of these individuals (in *kiruv*) is the wholeness of the Jewish nation, and in their eyes this end justifies all the means. The true Torah way utterly rejects this approach. The objective, the end, of halacha is holiness, and in *order to attain this end the means themselves must be holy and pure according to all the laws of the Torah*.²² (italics added)

R. Weinfeld expresses the concerns of any God-fearing Jew. Ultimately, as in all other areas of life, it is halacha alone which must dictate the actions of a Jew, and only the Torah may determine what is the will of God and what is not. In the world of *kiruv rechokim* there is a great danger that the ends might appear to justify all means, that the great cause of bringing a Jew under the wings of the *Shechina* transcends normative halachic limits and engages the "green light" of *piku'ach nefesh* and, hence, the suspension of other "less significant" laws. This attitude can affect the nature of one's own commitment as well as one's expectations of the Jew whom one is bringing near. Most sadly, this approach often contradicts the will of Him who has commanded us to influence our fellow Jews.

A very common dilemma bedevils persons involved in bringing fellow Jews closer to religious observance: Is the "teacher" permitted to transgress a "minor" infraction in order to prevent the sinner from incurring a major sin? There are a member of discussions in the Talmud concerning this type of situation.

Exception to the Rule

The Gemara in *Shabbat* 4a discusses the case of bread that was mistakenly placed in an oven at the onset of the Sabbath by an individual who did not realize that it was Shabbat. Upon

22. *Resp. Lev Avraham*, p. 251.

discovering that it was Shabbat he wanted to remove the bread before it became baked. In this case, two prohibitions are involved, one of Torah origin, the other rabbinic. Allowing the bread to bake causes that individual to have violated an *av melachah* (primary category of work) of Torah origin. But *Rediyat ha-pat* (the removal of the bread) is considered forbidden only by rabbinic decree.

Rav Shila understands that the case involves two people. The first is the one who mistakenly put the bread in the oven and subsequently departed. The second is another Jew who discovered this potential *melachah* and sought to prevent his fellow Jew from violating a Torah prohibition by scraping out the loaf, an act which is forbidden by rabbinic decree. Rav Shila maintains that this is permitted. The Gemara, however, immediately asks: "Do we tell a man to commit a sin so that his friend may benefit?"

Rashi explains this as meaning:

Do we tell someone to go and commit a minor transgression in order to prevent his friend from committing a sin that would make him worthy of severe punishment?

The principle of "we do not tell one to sin" has a number of significant exceptions. The *Ketav Sofer*, in a responsum, engages us in a lengthy analysis of Tosafot's qualifications of this principle, as well as the opinions expressed by the other *Rishonim* and *Acharonim*. His own summary is crucial to the present discussion.

1. According to Tosafot in *Shabbat* and *Gittin*, we always say, "Let a person commit a minor sin in order to enable his friend to perform a great mitzvah."²³

2. When it is a person's own fault and he has intentionally or unwittingly created a "sinful situation," we do not tell another to sin in order to save him, since his downfall is the result of his own actions. However, if he was negligent and forgot to do something that would have prevented the sin from occurring or would have enabled him to perform a mitzvah, we say, "Sin in order to save

23. Tosafot *Shabbat* 4a.

him," since he did not, in reality, commit a forbidden act.

3. We instruct Reuven to sin in order to save Shimon from sin if it is Reuven who was initially responsible for Shimon's being led astray. This is true even if Shimon transgresses the *issur* with full intent, since it is Reuven who initiated the problem to begin with. It is therefore permitted for him to violate a minor *issur* in order to save himself from being the cause of Shimon's sin. (This emerges from a *sugya* in *Eruvin* 32a-b.)

4. According to the Tosafot in *Gittin* 41b, even if a person has sinned intentionally we may sin in order to benefit the public by removing the stumbling block from its midst. From the Tosafot in *Shabbat* it is possible to learn otherwise.

5. According to Tosafot in *Bava Batra* and *Pesachim* 59a, the only time we may ask someone to transgress is for the purpose of enabling another to perform a great mitzvah, i.e., procreation, and only when this would require the suspension of an *issur* which is formulated as a positive commandment.

6. According to the Rashba, it is forbidden to sin for the purpose of enabling any individual to perform even a great mitzvah such as procreation. The only *heter* is to save the public or to enable many people to perform a mitzvah. In such cases, we would do so even if the public or group of people intentionally transgressed.

7. According to the *Shiltei Giborim* quoted in the *Magen Avraham*, it is forbidden even for the purpose of public benefit.²⁴

As far as our discussion is concerned, the conditions stated by Tosafot are of great importance. The two qualifications which are most crucial are: (1) The Gemara only forbids transgression for the sake of someone else when the other's potential sin is the result of intentional neglect (*peshi'ah*). (2) When a mitzvah which is "great" or any mitzvah which affects the public stands to be performed, one may transgress for another's sake even though the problem is the result of the other's negligence.

24. *Ketav Sofer*, O.H. no. 62.

In Our Own Time

Until now we have analyzed the fundamental principles, qualifications, and conditions which must all be taken into account when considering the use of the perilous method of sinning for another's sake. Great care was taken by the *Shulchan Aruch* and the *Ramo* to confine the application of this method to clear uses of compulsion and great mitzvot (physical and spiritual *piku'ach nefesh*). The *poskim* all dealt with clear and identifiable threats to an individual's attachment to Judaism: They also made clear distinctions between *Ones* (compulsion) and *peshia'ah* (intentional neglect). The quandary we are left with is how to classify the alienated, assimilated Jew of the twentieth century. In order to answer this, we are again challenged by the dispute of the *Acharonim* as to whether or not the estrangement of modern Jews entitles them to the halachic label of *tinokot she-nishbu*, i.e., Jews who can in no way be categorized as intentional sinners (*poshe'im*) because they have been "held captive" by non-Jews since infancy and thus have not been able to learn about their heritage. Naturally no two cases are identical and it is impossible to make any generalizations. *Acharonim* may be divided into two camps depending upon their evaluation of modern nonobservant Jews. Obviously, the camp to which a particular authority attaches himself would serve to determine whether he would classify the modern alienated Jew as an intentional sinner or as one who is somehow the victim of compulsion. It is also obvious that if we assume the stricter stance and label most nonobservant Jews as intentional transgressors of halacha, there is little to discuss as far as *kiruv* is concerned, and certainly there would be no place whatsoever for halachic concessions.²⁵ Therefore, we must assume the liberal approach if we intend to discuss the issue of active outreach, *kiruv*.

25. A fair and well-documented case is made for this approach by R. Yeshaya Binyamin Holzer in *Yelammed Da'at* (Monroe, N.Y., 5744). This entire work, though respectfully written, is a strongly worded refutation of the Lubavitch method of outreach and may offend readers of more moderate orientation. In

Sacrifices For Kiruv

The question must now be asked: What must we be prepared to sacrifice for the purpose of *kiruv*? Two basic types of concessions are often expected of someone involved in *kiruv* work. The first type may be termed "general," although it has specific ramifications. The second form of concession may be termed "specific," although it has broad general ramifications.

1. May a person leave a Torah community (with its yeshivas, *mikvahs*, etc.) in order to be a pioneer outreach worker in an assimilated community which does not offer the spiritual conveniences or perhaps even necessities of Torah living? May someone remove his children from a vibrant, strong, Torah environment and bring them to the tempting world of a secular community?

2. May a person in *kiruv* conduct mixed Torah classes? What if the female participants are immodestly attired? May someone in *kiruv* conduct special instructional services at the expense of his own *tefillah be-zibbur* (*davening* in a *minyan*)? May someone in *kiruv* make concessions in the halachic requirement for a proper separation between men and women (in the synagogue) because of concern that a valid *mechitza* might offend potential *ba'alei teshuva*? May someone in *kiruv* violate the prohibition of abetting a transgressor by inviting potential *ba'alei teshuvah* to Shabbat services or to his house in the knowledge that they will have to drive a car or take public transportation? May a *kiruv* project be undertaken in conjunction with a local Conservative or Reform temple which is allowing the use of its premises for the purpose of conducting adult outreach seminars? May the rabbis of these institutions be honored for their assistance? May mixed social gatherings be conducted introducing men and women of similar

truth, with the exception of a rare polemical outburst (never mentioning Lubavitch by name), R. Holzer sticks to the classical method of halachic analysis. His book is therefore an important presentation of the restrictive position regarding *kiruv* and deserves serious consideration and study.

permissive backgrounds? May someone expose his wife and children to such events?

These are just a few of the perplexing questions the person considering *kiruv* might consider. It is superfluous to say that each person must consult his rabbi or a competent halachic authority concerning each of the above questions. It would be impossible and foolish to address all of these problems in the context of the present discussion, and no attempt shall be made to do so. I will, however, attempt to provide some basic guidelines and hope that the idealistic man or woman considering or presently involved in *kiruv* will realize that these questions do exist and that a carte-blanche *piku'ach nefesh* declaration is forbidden and opposed to the most basic principles of the Torah they wish to disseminate.

Before discussing the question of whether it is permitted to settle in a nonobservant community, we must first determine the nature of the individual's responsibility to travel to another town, perhaps a distant one, for the purpose of *kiruv*. We must ask whether one is *ever* obligated to travel to a distant town in order to fulfill a positive commandment. This question was raised by the *Chayyei Adam*, who left it unresolved.²⁶ The Maharsham, in a short responsum, rules that one is not obligated to travel to another town in order to do a mitzvah. He bases his decision upon the Gemara's discussion of the mitzvah of sending away the bird's mother. In the Torah we are told, "If you come across a bird's nest on any tree or on the ground and it contains baby birds or eggs, then if the mother is sitting on the chicks or eggs, you must not take the mother along with her young. You must first chase away the mother, and only then may you take the young" (Deuteronomy 22:6). The Gemara comments: "I might think that one is obligated to climb mountains and hills in order to find a nest. It is therefore written: 'If you come across a bird's nest,' [the mitzvah applies] if you happen to find one!" Rashi explains that since the Torah twice says *shale'ah teshalah* (chase away), we might think that there is an obligation to seek an opportunity to fulfill this mitzvah. In order

26. *Chayyei Adam* 68:19. See *Nishmat Adam*.

to dispel this possible interpretation, it is written: "If you come across."

The Maharsham writes that obviously under normal circumstances we would not consider the possibility of the Torah requiring us to actively seek the opportunity to fulfill a mitzvah if that search would entail the climbing of hills or mountains. He then quotes a statement found in the Midrash which makes this point explicitly clear. In Psalms it is written: "Seek peace and pursue it" (34:14). The sages point out that the concept of "pursuit" is not found regarding any other mitzvot. Only peace must be actively pursued. Concerning other commandments the Torah writes "If you see" or "If you come across," meaning that if the commandment comes your way you must take the opportunity to fulfill it, but if it does not, you are not required to observe it. This would apply even if it were known for sure that the mitzvah was accessible in the second location. This, writes the Maharsham, is more explicit than the Gemara dealing with the bird's nest, since it is not certain that he will find a nest on the mountain or hill.²⁷

Going Out of Town

Taking the above into consideration, it is fascinating to note that there are authorities who insist that when the mitzvah of *tochahah-kiruv* is involved, there is in fact an obligation to go "out of town." The *Sedei Chemed* cites the opinion of the *Divrei Menahem*, who maintains that there is evidence in the Bible itself that *tochachah* is to be distinguished in this respect from other mitzvot. In I Samuel we read: "And Samuel judged Israel all the days of his life. And he went from year to year in circuit to Beth-El and Gilgal and Mitzpah and judged Israel in all these places."²⁸ According to the *Divrei Menahem*, each Jew, just like the prophet Samuel, must actively pursue sinners in order to admonish them and cause them to repent.

The *Sedei Chemed* then cites *Resp. Ma'archei Lev*, who

27. *Resp. Maharsham* 1:209.

28. I Samuel 7:15-16.

disagrees with this conclusion.²⁹ According to this authority, there is no halachic expectation that a person seek sinners in order to attract them to Judaism. As far as the prophet Samuel is concerned, the *Ma'archei Lev* posits that perhaps a great leader of a generation, a *gadol ha-dor*, is in fact responsible for pursuing the mitzvah of *tochahah*. Also, it is quite likely that Samuel was not obligated to travel from town to town, but opted to do so as a personal *chumra* (stringency). However, there is no obligation for anyone to extend himself to such a degree for the purpose of *kiruv*.

However in the Mishnah we are taught: "In a place where there are no men, strive to be a man."³⁰ The *Tiferet Yisrael* explains:

If you see that the generation is "more unsound than sound" [unrestrained], and you feel the "spirit of God" stirring within you, you must gird yourself with trust in Him, assume a position of leadership, and set those who have strayed from the way of Torah upon the proper path... Therefore, even if you are in reality an average person but you are among others who are weaker than yourself, you appear as a giant compared to them. You must be a "man," the little knowledge that you have is great in the eyes of those who have less than you.³¹

Thus it may very well be that capable and qualified individuals are the Samuels of each generation who are required to pursue the mitzvah of *tochahah*, seeking Jews who have abandoned Torah and drawing them back to its loving embrace.³²

29. *Sedei Chemed, Assifat Dinim heh* 2 (Friedman ed., 5727). vol. 6, p. 381.

30. *Avot* 2:5, *Berachot* 63a.

31. *Tiferet Yisrael, Avot* 2:5. See also Rabbeinu Yonah on the Mishnah. See *Chatam Sofer, H.M.* 177, who discusses each individual's responsibility to safeguard the preservation of the Torah.

32. According to the author of *Resp. Mahaneh Hayyim* 2:22, if you know of a certain Jew in another town who has fallen in the way of sin, and are in a position to help, you must travel to that town. See, however, *Shevilei David, O.H.* 486. See also *Yitav Lev, Va-Yeze*, p. 80.

Let us now consider the problem of removing oneself and one's family from a Torah environment and resettling in a secular or perhaps religiously antagonistic community for the purpose of *kiruv*.

Neighborhood

In the Mishnah in *Avot* we read:

R. Yose b. Kisma said: 'I was once walking on a road when a man met me and greeted me, and I returned his greeting. He said to me, 'Rabbi, from what place are you?' I told him, 'From a great city of scholars and scribes.' He said to me: 'Rabbi, would you be willing to live with us in our place? I would give you a million gold dinars and precious stones and pearls.' I answered him, 'Were you to give me all the silver and gold and precious stones and pearls in the world, I would live nowhere but in a place of Torah.' '³³

According to *Midrash Samuel*, R. Yose refused the man's offer despite the fact that the major objective of this request was to provide the man's town with a scholar who would instruct the townspeople and teach them how to observe the laws of the Torah.³⁴

The halachic principle upon which R. Yose's refusal was predicated is elucidated by the Rambam in *Hilchot De'ot*.

It is natural to be influenced, in sentiments and conduct, by one's neighbors and associates, and observe the customs of one's fellow citizens. Hence, a person ought constantly to associate with the righteous and frequent the company of the wise, so as to learn from their practices, and shun the wicked who are benighted, so as not to be corrupted by their example. So Solomon saith, "He that walked with the wise, shall be wise; but the companion of fools shall smart for it" [Proverbs 13:20]. And it is also said, "Happy is the man that hath not walked in the

33. *Avot* 6:9.

34. *Midrash Samuel* on *Avot*, cited by *Tiferet Yisrael*. See also *Meiri* on *Avot* 1:7.

counsel of the wicked" [Psalms 1:1]. So, too, if one lives in a country where the customs are pernicious, and the inhabitants do not go in the right way, he should leave for a place where the people are righteous and follow the ways of the good.

The *Divrei Malkiel* touches upon the risk of establishing oneself in a nonobservant environment which may affect one's attitude toward Torah and mitzvot. He does not assume that the individual will necessarily be led astray, but he does recognize the imminent danger of causing that which is described as *kalut rosh* (irreverence), which is the result of continuous exposure to such an environment.³⁵

Indeed, there is greater danger of being negatively influenced by a nonobservant Jew than by a Gentile, since the Orthodox Jew is naturally repulsed by Gentile behavior, and, in general, the non-Jew makes no active attempt to mislead or corrupt the observant Jew. Unfortunately, a great number of nonobservant Jews have a need to ridicule or make light of Orthodox Judaism.³⁶

R. Moshe Dov Wolner of Ashkelon was asked by a person in *kiruv* whether it was permissible for him to leave a city bustling with Torah activity in order to move to a remote town for the purpose of initiating an outreach program there. R. Wolner concludes that there is no obligation to endanger the spiritual quality of one's life in order to elevate another's, and if the second town does not have an enclave of Torah-observant Jews the

35. *Resp. Divrei Malkiel*, Y.D. 2:9, sec. 2.

36. See *Minhat Elazar* 1:74, which forbids wine touched by a Shabbat violator and insists that the rationale of the original decree to prevent social intermingling with non-Jews applies to alienated Jews as well. In this famous responsum he writes: "The whole purpose of the decree is to prevent the influence of non-Jewish behavior upon those who are God-fearing. Should we nullify this decree with unfounded rationalizing which would allow us to attach ourselves to the Shabbat violators in order to be *mekarev* them?!" See also *Resp. Machaneh Chayyim* H.M. 2:24 and *Yabia Omer*, vol. 1, Y.D. 11.

outreach program should not be undertaken.³⁷

A liberal, though cautious, approach is also advocated by one of the great Hasidic masters, the Rebbe of Komarna.

Do not exhibit love or extend intimate friendship to a wicked person. Nevertheless be careful not to reject him, and perhaps he will eventually repent. It is therefore advisable to try to attract the wicked to Torah while not becoming close friends with them or entering into any form of partnership with them.³⁸

The *Chafetz Chayyim* notes that although Avraham Avinu wanted Ishmael and Isaac to remain together so that Isaac would have a favorable influence upon Ishmael, Sarah, who was the greater in prophecy, understood that there was as great a chance that Isaac would be influenced by Ishmael. God told Abraham to listen to Sarah, and Ishmael was sent away. This incident involving our forefathers should serve as a sign to the children.^{38a} The *Chafez*

37. *Sheilat Chemdat Zevi* 1:44

38. *Nozer Hesed*, *Avot* 1:7. In *Responsa Lev Avraham*, R. Weinfeld quotes the *Orchot Chayyim*, written by R. Gershon Hanoch Henich Leiner, the Radziner Rebbe: "We have been taught that 'the left arm should push the *rasha* away while the right arm draws him near.' At the beginning of that section of the Midrash it is written: 'Do not be overly righteous or overly wicked.' The reading of this is that a person must always align himself with the method of moderation in relation to the sinner. He must not show him great friendliness or intimacy, nor may he reject him entirely. One should not decide that an individual is a totally incorrigible sinner, but rather he must focus on his positive characteristics and attempt to bring him to complete repentance. However, a sinner who exhibits great bitterness and despicable personality traits must not be pitied. Even though such a person may not be a great sinner, do not attempt to draw him near, since the damage that may result from his behavior may affect many people. Befriending such an individual causes more harm than good... We have therefore been taught [*Avot de-Rabbi Nathan* 9] 'Do not attach yourself to a *rasha* even for the purpose of drawing him back to the ways of the Torah.' This does not contradict the sages' commandment to draw all Jews to the life of Torah [*Avot* 1:12]. In that Mishnah it is written 'Be among the disciples of Aaron, loving peace and pursuing peace, loving people and bring them closer to Torah.' Here it is implied to love the sinner. This does not mean that we may actually become intimately attached to him."

38a. *Chafetz Chayyim* on the Torah, *Va-Era* p.62.

Chayyim himself repeatedly warned his students not to enter into religious discussions with freethinkers in the hope of attracting them to Torah.

The halachic restrictions cited above have motivated a number of modern-day Jewish philosophers and moralists to include precautions of this nature in their works. One of the great *ba'alei musar* of the twentieth century, R. Eliyahu Dessler, discusses the danger involved in *kiruv* in a number of passages in his classic *Michtav me-Eliyahu*.

People are accustomed to thinking that the environment can affect only children or weak-minded adults. This is not true, for even the greatest individuals are influenced by their environment... The effects of an environment are remarkable, for even if a person settles in an area which is weak in observance for the purpose of strengthening Judaism there, in his heart he has already consented to make certain concessions and compromises in his service of God which he would never have made had he not gone there. He already knows that his family may be influenced in the worst manner. This person, aware of all these dangers, and certain that there will be problems, nevertheless moves to that town. Conversely, if a Jew decides to uproot himself and move to a more religious area, he has already decided in his heart that his children will be God-fearing Jews even if he has not yet achieved that status.³⁹

...Would we not say that R. Yose b. Kisma could have exerted a great influence upon the weaker town and yet he refused to move there, for fear that he himself would be negatively influenced? We learn from here a great principle: if one wishes to bring Jews closer to God, the Torah does not advise him to settle in their place in order to influence them there. Instead he must remain in his place of Torah and struggle to help these Jews and draw them near. In this way he will not be negatively influenced... It is

39. *Michtav me-Eliyahu*, vol. 1, pp. 153-155.

impossible that a person who goes to live with nonobservant Jews for the purpose of *kiruv* will not be influenced by their actions and outlook. Therefore, such a person is in grave danger, particularly if his actions are not *entirely* motivated by a desire to please God. He will be taught by them instead of teaching them.⁴⁰

We have been taught by the *Chovot ha-Levavot* that only someone who is spiritually whole and inwardly pure may truly influence the *inwardness* of students and bring them to greatness . . . However, if a person's own heart is numb and his spiritual progress is stunted, how can he deceive himself into thinking that he will truly be successful or even that he will be elevated by teaching others?! . . . Sadly, our generation is one of pitiful superficiality filled with superficial aspirations that are far from being for the sake of heaven.⁴¹

R. Reuven Grozovsky, one of the great postwar spokesmen of the Lithuanian "Yeshiva World," discusses at length the urgency of restoring lost souls to the body of the Jewish people and the greatness of the mitzvah of *ahavat yisrael*. Nevertheless he warns:

One must always be vigilantly on guard, since according to the halacha we do not tell someone to sin in order to benefit another Jew. The foundation of the mitzvah of loving God is the fear of God and to take precautions not to violate any of the commandments . . . Whenever one is engaged in a war, there is great danger that when he leaves his camp and enters enemy territory he may be captured instead of defeating the enemy. The method of propagating Torah to the masses has been taught to us by our teachers throughout the generations, and if we abandon this strategy we are liable to be ensnared in the web of idolatry. This is especially true of our generation.⁴²

40. *Ibid.*, vol. 2, p. 113.

41. *Ibid.*, vol. 3, p. 32.

42. *Ba'ayot ha-Zeman*, p. 44.

R. Moshe Feinstein was asked if it is permitted to accept a position as an instructor in the religious school of a Conservative temple. He ruled that although it is important to try to influence the children of the members of the congregation by teaching them Torah and mitzvot, it is nevertheless not advisable that such a position be accepted. His primary concern is the "possibility that he [the prospective teacher] will be in any way influenced by these people, since by working there he will have to befriend even the heretics among them." R. Moshe, however, is hesitant to forbid this in the case of an individual whose livelihood depends on the job. He insists, however, that working in such a place is not in the spirit of the sages. He concludes:

If this young man [who is considering the position] truly seeks to be involved in the field of Jewish education for the sake of heaven, there is much that can be done in Orthodox synagogues, and by improving these schools he will be able to attract the children of Jews outside the Orthodox community as well.⁴³

In effect, R. Moshe's responsum is typical of what can be termed the "passive" school of *kiruv*-outreach. The ideology of this school is identical to that of the active one. They share the same concern for the welfare of every Jew, in both a physical and a spiritual sense. The advocates of each school are sincere Jews filled with *ahavat yisrael* and motivated by an urgent need to bring other Jews closer to God. Methodology is what distinguishes one approach from the other. The "passive school" believes that there are no "extrahalachic" allowances for the purpose of *kiruv*. The guidelines of halacha must be adhered to at all times, and the *Shulchan Aruch* determines what sacrifices one is permitted to make in order to fulfill his obligations of *arevut* and *tochachah*. Thus, according to this approach, heartfelt idealism may not justify

43. *Iggerot Moshe*, Y.D. 2:107; see also 2:106 and 1:139. See *Aviad* (Mosad HaRav Kook, 5746), pp. 281-293, for a detailed study of R. Feinstein's halachic response to the Conservative movement.

taking one's children to a totally secular environment, just as it does not justify an involvement with a non-Orthodox congregation for the purpose of helping the children of its members.⁴⁴ The general attitude of those who subscribe to this approach is "your own life takes precedence." This is not, God forbid, a selfish neglect of other Jews, but is based on what is perceived as the conclusive decision of the great halachic authorities throughout history.⁴⁵

Nevertheless . . .

Despite all the considerations discussed above, the reality is that prominent *roshei yeshivat* and Hasidic *rebbes* have sent their students "out of town" for the purpose of working with estranged Jews living there. I have personally been told by prominent students of two of the greatest American *roshei yeshiva* of our generation, R. Aharon Kotler and R. Yaakov Kaminetsky, that both of these leaders literally guaranteed that the children of sincere *marbizei torah* would not be adversely affected by growing up "out of own."⁴⁶ Also, under almost all circumstances, *roshei yeshiva* will not send an individual family to such an environment. Instead they have established complete microcosms of the "in town" Torah community by building *kehilot* whose activities center around the yeshiva and *kollel*. Thus there are built-in support units which

- 44. The Maharam Schick forbids the study of various subjects for the purpose of facilitating better communication with secularized Jews (*O.H.* 70).
- 45. R. Binyamin Forst has brought to my attention a fascinating ruling of the *Sha'arei Teshuvah* (483). Two individuals have access to only one *kezayit* of matzah that is *hefker* (ownerless). The question is: should it be divided or eaten entirely by one of them? The author cites *Resp. Beit Yehudah*, who maintains that whoever found the matzah should keep it for himself and observe the mitzvah. Just as we rule that "your life takes precedence" in financial, secular matters, so too in spiritual matters. He also cites the *Iggeret Shemuel*, who writes that although one is forbidden to trick someone in any way in financial matters, this is not the case in spiritual matters. Since each person is commanded to perfect himself, if a mitzvah is available he may use even underhanded methods in order to be privileged with the mitzvah, and he should not be righteous at the expense of his personal spiritual progress.
- 46. See the final chapter of the Alter of Navordok's *Statute of Man*, where he discusses the unique divine assistance and protection of community leaders.

protect the spiritual integrity of the new community while allowing for extensive outreach activity in the area. This has generally been the method of *kiruv* extolled and praised by our leaders.⁴⁷ Of course, some unique individuals are sent out of town by their *roshei yeshiva* to help catalyze a local "Torah Revolution." There are no general principles that apply to such instances, and all the factors that relate to the particular family must be taken into consideration. Nevertheless, the principle which states "your own life takes precedence" must always receive due priority.

Cooperation With Non-Orthodox Institutions

One of the most sensitive issues confronting the outreach professional is the question of whether to allow local non-Orthodox institutions to participate in *kiruv* programs. The dilemma is a harrowing one. How can someone in *kiruv* be effective in making Orthodoxy attractive to Conservative or Reform Judaism if he publicly spurns all non-Orthodox attempts to join forces with him for the purposes of Jewish "awareness and unity"? Furthermore, in rejecting the very people whom he does not want to alienate, he has severed major artery of financial support for his programs.

R. Moshe Feinstein was very outspoken in his disapproval of any such activities, and a number of responsa have been published in which he explicitly forbids coordinating programs with non-

47. The Alter of Navordok wrote: "There is another approach of community service, however — that of united fellowship; which is geared to spur the proliferation of yeshivot and study groups in all places, town, city, and village, to bring the entire young generation under the banner of Torah and fear of God. This is an obligation from which no one can plead exemption; for everyone can further the cause of Torah in his own way — whether by giving classes, or forming study groups, or attracting others and drawing them closer, or attending to material requirements, or journeying to gather together the youth of the surrounding areas, or providing lodging for them and looking after their personal needs, or directing a Talmud Torah and the like... It is possible to establish groups for Shabbat observance and for the maintenance of *mikva'ot* in all cities, and so in respect to all matters affecting the strengthening of religious observance" (English edition of the final treatise of *The Stature of Man*, pp. 42-43). See also *Chafetz Chayyim*, introduction to *Chomat ha-Da'at*.

Orthodox institutions or congregations.⁴⁸ He also hesitates to condone the use of their facilities for activities that are entirely Orthodox.⁴⁹

Nonkosher Means — Kosher Ends

Seminars and Torah lectures are but two features of an outreach program. All *kiruv* professionals are keenly aware of the importance of social events as a framework in which young Jewish men and women may meet. This is a powerful weapon in the ongoing battle against intermarriage. Notwithstanding the importance of these events, we must be careful once again to avoid the common and mistaken attitude that all is permitted to save Jewish souls. It is true, however, that lenient rulings can be applied, as long as they were made by recognized *poskim*.

R. Moshe Feinstein was asked about social dances taking place under the auspices of an Orthodox congregation (though *not* in the sanctuary itself!). He was told that if the young men and women did not have an opportunity to meet in the shul they would attend dances, etc., with non-Jews under circumstances presenting an

48. *Iggerot Moshe*, Y.D. 2:100, O.H. 2:51, 61, Y.D. 1:149 See R. Yosef Epstein *Mitzvot ha-Shalom*, pp. 324-330, 370-383.

Here the question of publicly honoring such people is raised. R. Avraham Weinfeld writes: "It is clear from all the above that it is absolutely forbidden to participate in such an event [honoring such a sinner] even if one's intentions are solely for the sake of Heaven, e.g., the construction of *mikva'ot* in Israel... God forbid, we are not allowed to use forbidden and disgraceful means in order to accomplish holy ends. This is the great tragedy of our generation. Decisions in matters such as these, upon which the universe stands, are left in the hands of business people who are ignorant of Torah and base their decisions upon their own reasoning and business acumen. Thus, the Torah is dealt with like a piece of merchandise that is bought and sold in the marketplace according to private considerations with the intent of immediate profit. It has been forgotten that the halacha and all matters are determined by God and we cannot deal with mitzvot like stocks or bonds, where one is traded for another in order to 'profit' *more* mitzvot. We are commanded by God to completely observe the Torah in all of its purity and not to make business transactions with it."

See *Iggerot Moshe*, O.H. 1:21.

49. *Iggerot Moshe* (Y.D. 2:107-108, O.H. 3:28, 4:91 section 6).

infinitely greater number of halachic problems. Naturally, if there was to be any hope of attracting these Jewish young people, they could not be kept from participating in that which is minimally expected at such events, mixed dancing. R. Moshe absolutely forbade the arranging of such social activities or any others that involve clear violations of halacha. First of all, R. Moshe explains that a Jewish *kehillah* cannot involve itself in activities which may cause a Jew to violate a prohibition. Furthermore, he insists, the entire premise of this proposal is mistaken, since if the nonreligious young people feel like it they will attend mixed dances under non-Orthodox or non-Jewish auspices in any case.⁵⁰

One might contend that we must at least provide an alternative which might attract the average secularized American man and woman. Nevertheless, R. Moshe's opposition to such events taking place under the auspices of an Orthodox institutions can be very well understood. We are reminded of a statement made by one of the great biblical commentators of the Middle Ages, R. Yizhak Arama, the author of *Akedat Yizhak*:

A minor sin if done with the consent of a rabbinic court, with public knowledge and acceptance, is transformed into a heinous sin for which the entire congregation is blamed and cannot be forgiven.⁵¹

Nevertheless, there are those who argue for a more liberal stance.

Rav Weinberg concludes a responsum on the subject with a statement that is crucial to our entire discussion:

We have been taught that at times there is no choice but to "go against the Torah in order to preserve it." Thus, the Oral Tradition was put into writing because "it is better that one letter be removed from the Torah

50. *Ibid.*, O.H. 4:35. For a detailed analysis of the issue of mixed dancing, see R. Shmuel Katz, *Kedoshim Tihyu*, pp. 35-57. See also *Resp. Minhat Yizhak* 5:99, 3:109-112, and *Resp. Mishneh Halachot* 4:72.

51. *Akedat Yizhak*, *sha'ar* 20. See *Resp. Yabi'a Omer*, vol. 1, O.H. 30; *Yehaveh Da'at* 1:48; *Badei ha-Shulhan* and *Gufei Halachot*, Y.D. 183; *Resp. Rivash* 425; and *Resp. Yehudah Ya'aleh*, E.H. 140.

than the entire Torah be forgotten." . . . Certainly only *Chazal* had the power to make such decisions, to know exactly when a law can be revoked and what should be changed, and the Torah was not given into the hands of every person to make such decisions. Nevertheless, in the case of this youth movement, [discussed in his responsum] where there is no clear-cut prohibition involved, but rather customs and precautions of pious modesty, it appears that a liberal stance can be taken. This *heter* applies only to France, where emergency methods must be used so that Torah not be forgotten . . . Obviously if there are individuals who desist from participating in such activities they should not be ridiculed or ostracized, God forbid, since in truth they are adhering to the ancient customs of their ancestors.

In his closing paragraph R. Weinberg emphatically urges that additional organizations of this type be established which will inject new life into the veins of Judaism by reclaiming the lost youth of Western Europe.⁵²

Thus, R. Weinberg convincingly plays the role of an eloquent spokesman for a more liberal (active) approach to outreach while carefully defending the dignity and sanctity of halacha.

Chilul Shabbat

Another common problem in *kiruv* is that of inviting Sabbath guests who will either arrive or depart on Shabbat by car or public transportation. The obvious problem involved here is the prohibition against being completely or partially responsible for another Jew's sinning.

Although this is a common problem, there is very little in print which deals with it.

We do, however, have two responsa from Rav Feinstein in which he addresses this issue. The first is a ruling made in 1953, in which R. Moshe makes a crucial distinction between the general

52. *Seridei Esh* 2:8.

prohibition of placing a “stumbling block” before the blind and the more serious violation of actually provoking or inciting another Jew to sin (*meisit*). When the guest lives far enough away to make it unlikely though possible that he will walk the distance, there is an *issur* of *lifnei iver* in inviting him for Shabbat, since there is an assumption that he might use his car. Inviting someone who lives beyond the normal distance that one would walk involves the *issur* of actually provoking another Jew to sin (*lifnei iver*). If one does not specifically invite a particular person and instead makes a general announcement offering anyone who comes to shul a prize (as in the case of a *kiruv* organization for younger children), there is still the possibility of violating the *issur* of *lifnei iver*. This is so because even if your intention is only to have the children who are nearby walk over, you know that there are others who will be driven.⁵³ In a responsum written in 1964, R. Moshe repeats his *pesak* and adds that it is important to actually encourage those within walking distance to walk and not drive.⁵⁴

The only other written source that I have found which addresses this issue is a brief responsum by R. Moshe Sternbuch. It deals with a young man who has become a *ba'al teshuvah* and wishes to expose his parents to the beauty of Shabbat by inviting them to spend Shabbat with him. Unfortunately, the parents will agree to come only if they can drive home at some point during Shabbat. Remarkably, R. Sternbuch does not quote any sources and redefines the prohibition of *lifnei iver* as applying only when one actually intends to cause the other Jew to stumble, to sin. If, however, one's intentions are to help the other Jew, there is no transgression. This young man claims that his parents are violating Shabbat continuously at home, and if they come for at least part of Shabbat they will observe the laws. Therefore, R. Sternbuch permits the invitation as long as the son explicitly asks his parents to spend the entire Shabbat with him and tells them how it pains him to see them travel on Shabbat. R. Sternbuch adds that care

53. *Iggerot Moshe*, O.H. 1:98.

54. *Ibid.* 4:71.

must be taken to prevent the *Chilul Hashem* that would result from the neighbors' seeing the car pull up at this man's house on Shabbat. Therefore, the car should be parked at some distance from the son's house.⁵⁵

In an unpublished *responsum* recently sent to the administration of Yeshiva Ohr Someach in Jerusalem, R. Shlomo Zalmen Auerbach, one of this generation's foremost *poskim*, writes:

Even an individual living far from the synagogue may be invited to come for Shabbat, as long as he is informed that a room in the area has been reserved for him. Even if he openly denies any intention of taking up the offer, we are not obligated to retract the invitation nor must we warn him not to drive.

This brief survey of the *kiruv* situation should serve to awaken us to the great problems, as well as the great responsibilities, involved in undertaking outreach. Yet, what a great contribution is made by those who do succeed in returning the lost sheep to the fold!

55. *Resp. Teshuvot ve-Hanhagot*, 358.

His Money or Her Life? Heinz's Dilemma in Jewish Law

Rabbi Mark Dratch

Living by ethical principles in an imperfect world tests a person's character. How do we resolve the tensions created when moral principles conflict? Moral development theorist Lawrence Kohlberg presented the following dilemma in order to measure the sophistication of a person's moral thinking:

In Europe, a woman was near death from a special kind of cancer. There was one drug that the doctors thought might save her. It was a form of radium that a druggist in the same town had recently discovered. The drug was expensive to make, but the druggist was charging ten times what it cost him to make. He paid \$400 for the radium and charged \$4000 for a small dose of the drug. The sick woman's husband, Heinz, went to everyone he knew to borrow the money and to try every legal means, but he could only get together about \$2000, which is half of what it cost. He asked him to sell it cheaper or let him pay later. But the druggist said, "No, I discovered the drug and I'm going to make money from it." So, having tried every legal means, Heinz gets desperate and considers breaking into the man's store to steal the drug for his wife. Should Heinz steal the drug?¹

1. Lawrence Kohlberg, *The Psychology of Moral Development: The Nature and Validity of Moral Stages*, (San Francisco: Harper and Row, 1984), p. 640.

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By rating responses to this and other stories on a six stage scale, Kohlberg measured the way respondents resolved issues that arose from the conflicts between respect for rules and society on the one hand and the demands of human rights and values on the other. The more a person felt bound by the absolute dictates of law the less sophisticated his moral development; the more he valued the rights and attitudes of all parties involved, the more advanced his moral thinking.

Another dilemma: In order to save his life during the Nazi occupation of Warsaw, a man, under pressure from the SS, revealed the location of his brother's hidden wealth. Should he have done so? Both brothers survived the war and live in Israel. Must the man now compensate his brother for the losses he caused?

May a person steal medication or money or food in order to save his life? Although interests of self preservation dictate an immediate affirmative response, the issue must be addressed from both ethical and legal perspectives. Are moral dictates inviolate? If not, under what circumstances may they be breached? How does the American legal system respond to Heinz's dilemma? How does the halacha, the Jewish legal system, guide a husband who, in order to save his wife's life, has no alternative but to break the law?

American jurisprudence recognizes that laws ought to promote the achievement of positive values, and that sometimes law must be violated in order to protect the greater good of society. Thus, the *necessity defense*, based on this principle of the greater good, vindicates the violation of a law if necessary to prevent a greater harm from occurring. Philosophers such as Lord Francis Bacon took this principle to its extreme, stating, "If a man steals viands [food] to satisfy his present hunger, there is no felony or larceny."² Jurists, however, are leery of a liberal application of this defense. The Washington State Court maintained that "economic necessity has never been accepted as a defense to a criminal charge"³ and the California Appellate held that "even in such dire circumstances [as

2. Bacon's Maxims, Reg. 5.

3. *State v. Moe* 174 Wash. 303, 24 P2d 638 (1933); *Rex v. Holden* 168 Eng. Rep. 607 (Cr. Cas. Res. 1809).

stealing bread to feed starving babies], so far as the particular defense is concerned, the law itself is powerless to accept the excuse.”⁴

Most jurisdictions do accept such a defense, although the extent to which they allow it differs. The New York statute is typical of what some refer to as “choice of evils” or “competing harms” legislation:

[C]onduct which would otherwise constitute an offense is justifiable and not criminal when: . . . such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the injury sought to be prevented by the statute defining the offense in issue.⁵

Under what circumstances in Jewish law may the biblical prohibition “Ye shall not steal”⁶ be breached? Is it permissible to appropriate another’s property in order to save a life?

At first glance the answer appears obvious. “Thou shalt not stand by the blood of thy neighbor”⁷ is the biblical admonition for saving life. Furthermore, the Talmud posits that all biblical precepts may be violated in order to save a life except for three prohibitions: idolatry, murder, and illicit sexual activity.⁸ Since stealing is not one of these three cardinal sins which require martyrdom instead of transgression, it appears that one may steal in order to save a life.

While this position is supported by the talmudic record of an

4. *People v. Whipple*, 100 Cal. App. 261, 279 p. 1008 (1929).

5. New York Penal Code, par. 35.05 (2).

6. Leviticus 19:11. The prohibition of stealing found in the Decalogue refers to kidnapping. See *Sanhedrin* 86a.

7. Leviticus 19:16. See *Sanhedrina* 73a.

8. *Sanhedrin* 74a. Transgression of these prohibitions violates the minimal moral conditions of a worthwhile life.

enactment by Joshua which allows a person to trespass, and even to destroy, another's property in order to save his life,⁹ it is contradicted by a number of other talmudic sources. *Baba Kamma* 60b records that King David consulted the Sanhedrin as to whether his army was permitted to destroy private property that the Philistines were using as camouflage in order to attack it.

The answer they dispatched to him was: [Generally speaking] it is forbidden to rescue oneself through the destruction of another's property; you, however, are King, and a king may break [through fields belonging to private persons] to make a way [for his army], and nobody is entitled to prevent him [from doing so].

Rashi explains the Sanhedrin's response to David: the King's army, for reasons of security and by right of eminent domain, is permitted to confiscate property in life-threatening situations; individuals are not.¹⁰ According to one authority, Rashi understands the normative halachic ruling to be that stealing, regardless of motivation¹¹ — even to save a life — is forbidden.¹² Indeed, Rashi understands this to be the normative halachic ruling.¹³

Support for this position can be found in many sources. Rambam holds that the talmudic sage R. Meir maintains that rather than signing a document which would assign funds to the wrong party, witnesses should accept martyrdom.¹⁴ Meiri quotes the talmudic account of a certain pious person who, because of a heart ailment, was required to drink fresh milk daily. A goat was brought into his house and tied to the legs of his bed despite the rabbinic

9. *Baba Kamma* 81a.

10. *Baba Kamma* 60b, s.v. *vayatsilah*.

11. See *Baba Metsiah* 61b which proscribes theft even if the thief's intent is to pay the aggrieved victim double the value of the property he stole.

12. *Responsa Binyan Tsiyon*, no 167.

13. *Baba Kamma* 60b, s.v. *vayatsilah*.

14. *Shittah Mekubetset* to *Ketubot* 19a. See *Nachal Eshkol*, 1868, II, p. 118; *Teshuvot Maharam Shik*, *Yoreh Deah*, nos. 347-348; *Sedei Chemed*, I, pp. 17-19; *Glosses of Maharatz* on *Baba Kamma* 60b.

injunction against raising such animals in the Land of Israel — they generally graze unrestrictedly, robbing the pasture lands of others. Despite the fact that owning the goat was a medical necessity, his colleagues, upon visiting their sick friend, commented, "An armed robber is in the house of this man, how can we come in to see him?"¹⁵ R. Yaakov Ettlinger, author of *Responsa Binyan Tsiyyon*, finds that the talmudic sage R. Yose concurs with this absolute stand.¹⁶

R. Yehuda and R. Yose were walking together when a ravenous hunger seized R. Yehuda. He seized a shepherd and devoured his bread. R. Yose said to him, "You have robbed the shepherd."¹⁷

R. Yose admonished his colleague for thievery even though such an act was necessary to save his life.

Why are these authorities so strict with regard to the theft prohibition? Commentators offer a number of explanations. Some consider theft a fourth cardinal sin to be added to the list of idolatry, murder, and illicit sexual relations.¹⁸ Others opine that theft, although an independent injunction, may nevertheless be considered a derivative and complementary prohibition (*abizrayhu*) of murder and thus share the stringency of required martyrdom.¹⁹ This close relationship between property and life can be seen in the Torah's assumption that a person will not passively allow his property to be stolen and may even at times kill a thief in order to protect himself and his possessions. Indeed, it is in the case of the intruder who enters a house in order to steal that the Talmud,

15. *Baba Kamma* 80a.

16. *Responsa Binyan Tsiyyon*, no. 169 quoting *Yoma* 83a.

17. *Baba Kamma* 79b-801.

18. See Jerusalem Talmud *Avodah Zarah* 2:11 and *Mareh Panim* which equates the Talmud's statement with that of R. Meir in *Ketubot* 19a.

19. Martyrdom is required for an *abizrayhu* of a cardinal sin even though it is not intrinsically a capital offense. See Ran to *Pesachim*, beginning of chap. 2; *Nemukei Yosef*, *Maor* and *Milchamot* to *Sanhedrin*, end of chap. 8; *Ramban*, *Torat Ha'adam*, *Sha'ar Hasakanah*; *Shach* to *Yoreh Deah* 157, no. 10; *Responsa Chavot Yair* no. 182.

Sanhedrin 82a, says, "If he comes to kill you, forestall by slaying him [first]."²⁰

R. Ettlinger maintains that the talmudic sage Rabbah b. Bar Chana's explanation of the permissibility of violating the Sabbath laws in order to save human life sheds light on our discussion. Rabbah's reasoning is based on two assumptions: 1) that the Sabbath may be violated in order to perform the Temple rite; and 2) that the Temple ritual may be interrupted so that an officiating priest may offer testimony which might save a life. He reasons *a fortiori*: If it is permissible to violate the Sabbath in order to perform the sacrificial rite, which itself is suspended in order to save human life, then certainly the Sabbath may be violated for the sake of saving human life. However, while the prohibition of Sabbath work is suspended because of the requirements of the Temple ritual, the injunction against stealing is not, as the prophet Malachi admonished, "And you have brought that which is stolen . . . Thus you bring the offering; shall I accept this of your hand? says the Lord" (*Malachi* 1:13). R. Ettlinger continues his discussion: Since the Sabbath laws are overridden in order to save a life only because they are waived with regard to the sacrificial requirements, the proscription of theft, which is not waived for the Temple ritual, may not be suspended even in life-threatening circumstances.²¹

Most authorities advocate more permissive approaches in the resolution of the tension between the lifesaving obligation and the stealing prohibition, the most lenient of which removes from any such deed any hint of stealing. Raavad maintains that since the prohibition of stealing is lifted (*hutra*, abolished, as opposed to merely *dechuyah*, suspended) in a life-threatening situation, no

20. *Yad Mosheh*, no. 7 in the name of *Or Zarua*. See *Semachot* 2:10 which calls a thief a murderer and an idolator. See also *Choshen Mishpat* 358:3.

21. *Responsa Binyan Tsiyyon*, no. 167. One should not distinguish between ritual and moral obligations, maintaining that it is the former, and not the latter, that may be suspended in life-threatening situations. See the encounter between David and Achimelech in I Samuel 21 in which the laws of levitical purity are not suspended. See, however, *Teshuvot Bet Yehudah, Yoreh Deah*, no. 47 which makes such a distinction.

criminal act has been performed and, hence, no compensation is required.²² *Teshuvot Maimuniyyot* elaborates that since the theft prohibition is waived, the appropriater is not considered a transgressor (*rasha*) and, hence, there is no obligation to compensate. This is true only when money is stolen to save life. If, however, money is stolen in order to protect one's personal property, such an act is forbidden and the thief is *rasha*.²³

There may be a further limitation on Raavad's duress-generated exemption from liability, one which takes into account the source of that duress. In *Hilchot Yesodei HaTorah* 5:4 and 6, Rambam distinguishes between a case where the money is the direct cause of the threat to life and the case when another's money is used to remove the life-threatening circumstances:

... If one is obligated to die rather than transgress, and he transgresses instead, he has desecrated the Name of God ... Nevertheless, since the transgression was done under duress, he is not flogged and it is unnecessary to say that he is not put to death, even if he murdered under duress. One is flogged or executed only if he violated [these prohibitions] willingly.

The rules applied to duress are likewise applied to illness. What is the case? One who is deathly ill ... may be treated by violating every prohibition in the Torah, except for idolatry, illicit sexual activities, and murder which may not be violated even in cases of danger. If [these prohibitions are violated], the court administers the punishment that is appropriate for him.

Rambam here distinguishes between the situation in which the prohibited activities of murder, idolatry or illicit sex themselves create the duress and force the violation of these prohibitions, as opposed to the case in which the duress is due to another cause, for example illness, from which the person wants to save himself by

22. Gloss to *Mishneh Torah*, *Hil. Chovel uMazik* 8:4. See also *Even haAzel*.

23. *Teshuvot Maimuniyyot*, *Hilchot Chovel uMazik*, no. 20. See R. Yehoshua Baumol, *Responsa Emek Halacha* 1:27 and 11:56. See *Baba Kamma* 117b.

violating one of these restrictions. In the former case, the violater is exempt from punishment; in the latter he is not. Although many authorities disagree, *Siftei Kohen* maintains that this distinction is held by Raavad as well.²⁴

So far we have outlined two approaches to Heinz's dilemma: 1) Stealing is forbidden under all circumstances and Heinz is morally and legally barred from doing so, even to save his wife's life in this manner; and 2) since the medication is necessary to save a life, taking it is not considered stealing and, if taken, there is no liability to compensate the original owner. A third approach, the halachically normative one, allows for the appropriation of another's property — with the condition that restitution be made. Thus, *Sanhedrin* 74a,

For Rava said: If a man was pursuing after his fellow [to slay him], and broke some utensils, whether of the pursued or of some other person, he [the pursuer] is free from liability. Why so? He is liable to be killed.

The pursuer's exemption is in accord with the talmudic principle *kim lei bederabbah minei*, i.e., he who has committed two offenses simultaneously, one of which is a capital crime, receives only the more severe punishment. The Talmud then continues,

If the pursued broke some articles: if they belonged to the pursuer, he is not liable for them; if to someone else, he is. If they belonged to the pursuer he is not liable — because [the pursuer's] property is not more precious than [the pursuer's] life [which the pursued is allowed to take in self defense]. If they belonged to someone else he is liable — because he saved himself at his neighbor's expense.

Thus, the pursued may appropriate another's property in order to save his life, but he must compensate the owner. The Talmud then discusses the obligation of a third party who is saving not his life, but that of another:

24. *Shach* to *Choshen Mishpat* 388, no. 24. See also *Even haAzel*; *Yam She-Shlomo*, *Baba Kamma*, ch. 10, no. 52; *Ralbag* to II Samuel 21:7.

But if one pursuer (a third party) was pursuing a pursuer to save [the latter's victim] and broke some utensils, whether of the pursuer or of the pursued or of any other person, he is not liable for them. According to strict law this should not be so, but if you will not rule thus, no man will save his neighbor from a pursuer.

In essence, the third party should be liable for the damages he caused and for the money he appropriated. However, in order to assure that a Good Samaritan, an uninvolved third party, will become involved and not refrain from helping someone in distress, he is relieved of liability.²⁵

This approach, permitting theft and calling for compensation, was posited by Tosafot in their explanation of the Sanhedrin's ruling to King David²⁶ and it is this approach that has been codified by Rambam²⁷ and *Shulchan Aruch*.²⁸

A similar attitude is recorded by Rashba in his consideration of the dispute between ben Peturah and R. Akiva narrated in *Baba Metsia* 62a:

If two are travelling on a journey [far from civilization], and one has a pitcher of water such that if both drink, they will [both] die, but if only one drinks, he can reach civilization — ben Peturah taught, "It is better that both should drink and die, rather than one should behold his companion's death." But R. Akiva came and taught, "'That your brother may live with you,' (Leviticus 25:36) your life takes precedence over his life."

25. See Aaron Kirschenbaum, "The 'Good Samaritan' and Jewish Law," *Dine Israel* 7, 1976.

26. *Baba Kamma* 60b, s.v. *mahu lehatsil*.

27. *Hil. Chovel uMazik* 8:12-14.

28. *Choshen Mishpat* 358:4 and 380:3. *Responsa Maharam ben Beruch*, no. 39 maintains that even if one is rescued against his will, he must, nevertheless, compensate the rescuer. See also Ramo to *Yoreh Deah* chap. 252, no. 12. See, however, *Responsa Rashbash*, no. 509, who questions Maharam's reasoning, although he defers to his decision.

While R. Akiva maintains that a person may not sacrifice his own life in order to save that of another, he does agree with ben Peturah, in the case when his life was not in danger, that he must share his water with his friend. Elaborating upon R. Akiva's position, Rashba posits that appropriation of another's property in order to save life is not considered theft at all. He reasons that since one is obligated to save someone either through personal involvement or through financial outlay, "stealing" the money is merely helping someone fulfill his fraternal obligation; compensation, however, is required.²⁹ Similarly, *Chatam Sofer* suggests that the Torah actually assigned another's money to an endangered individual. Hence, he is not stealing — he is taking money to which has legal title, but which he must repay.³⁰

This third approach is difficult to understand. Unlike the first approach which absolutely forbids stealing in all cases, it maintains that stealing, at times, is permissible. And unlike the second which waives liability when the motivation for stealing is the biblical obligation of saving of a life, it holds the thief responsible for his deeds. If it is stealing, why is it permissible? If it is permissible, why is there liability?

Let us consider three resolutions to these questions:

One resolution may be suggested in line with the exposition of *Teshuvot Maimuniyyot* cited above. Sin results in the transformation not only of the sinner's moral standing, but of his legal status as well. A sinner is classified as a *rasha* (wicked person),

29. *Responsa Rashba* 4:17. See also Gloss of Rashba to *Baba Kamma* 81b. *Piskei haRosh* to *Sanhedrin*, chap. 8, no. 2, maintains that the financial obligation on the lifesaver holds only when the endangered himself lacks the financial resources to hire others to save his own life. See also *Responsa haRosh*, *kelal* 85, no. 2 and *Choshen Mishpat*, 426. A similar obligation is codified in the case of hostages by Ramo, *Yoreh Deah*, chap. 252, no. 12. See *Shach* to *Choshen Mishpat*, chap. 426, no. 1 and *Responsa Bet Yaakov*, no. 148. *Responsa Rashba*, vol. III, no. 426, however, maintains that compensation by hostages is unnecessary since their redeemers expended money in the fulfillment of a religious obligation.

30. *Responsa Chatam Sofer*, *Yoreh Deah* 319. See also *Responsa Achiezer*, *Yoreh Deah* 16; *Minchat Chinuch* 296.

a consequence of which is his disqualification from being accepted as a valid witness in a Jewish court. Now, while the extenuating circumstances of saving a life remove the status of *rasha* from the thief, he remains a thief. Because he is not a *rasha*, the appropriation of money does not disqualify him from serving as a valid witness in a Jewish court. Because he did steal, however, he is a thief who is responsible for financial compensation of the loss he caused.

A second resolution is offered by *Yad Ramah*.³¹ Saving oneself with another's property is permissible because of the *ones*, the duress caused at the time that the individual does not have access to his own resources to save his life. There being no alternatives by which this person can save his life, the duress permits violation of the biblical prohibition. However, following one's successful rescue the saved does have access to his personal financial resources and the duress no longer endures. At such time repayment of the property appropriated or damaged is possible. No longer barred by any duress, the original exemption no longer applies.

A third resolution may be posited in light of an understanding of the relationships between one's right of self preservation and duties such a right may impose upon others.

A right is a claim an individual (the right-holder) can make on another to either act, or refrain from acting, in such a manner that protects the interests of that individual. Should the claim be exercised and the duty not be done, it would be justifiable, other things being equal, to coerce fulfillment of the duty bearer's responsibility.

Although the Jewish tradition does not recognize the concept of rights *per se*, its system of commandments and obligations does create duties which are comparable to those considered by modern society to be the demands of human rights. For example, a duty not to steal implies another's right to private property. An obligation to save one's life at almost any cost implies a right to life. The matter

31. Gloss to *Sanhedrin* 73b.

we must consider, then, is the nature of another's duty entailed by one's right to life.

A right may entail another's duty to behave or refrain from behaving in a certain way, even providing for use of coercive means to assure compliance. Thus, strangers have a duty not to trespass on the private property of another. But there are rights that people may claim which may place no specific duty on anyone in particular. For example, a person may have a right to proper health care. It may be, however, that no duty is imposed on any particular medical professional to provide such care.

What duties may a person in a life-threatening situation expect from others? As discussed above, the Torah articulates both positive and negative commandments which obligate a person to save another's life: "And thou shalt restore him to himself" (Deuteronomy 22:2) and "Thou shalt not stand by the blood of thy brother" (Leviticus 19:16). From these verses, the Talmud, *Sanhedrin* 73a, derives responsibility for both personal as well as financial involvement of the life saver. But what type of duty is this? Is it one which dictates coercive measures should the potential lifesaver hesitate in performing his duty? Or is it a duty which cannot be forced upon him unwillingly or unknowingly? Does "Thou shalt not stand by the blood of thy brother" automatically entitle a person to the benefit of another's services or the use of his resources?

In general, the halacha provides coercive means for enforcing the dictates of the Torah.³² Thus, the Talmud *Chullin* 132b records:

It has been taught: [The limit of thirty-nine lashes] applies to negative precepts, but in the case of positive precepts as, for instance, when a man is told, "Make a *sukkah*," and he does not make it, or "Perform the commandment of the *lulav*," and he does not perform, he is flogged until his soul departs!

It is clear that the Sages are empowered to assure the fulfillment of positive obligations. Their role in the enforcement of

32. See *Arachin* 26a and *Kiddushin* 50a.

prohibitions and the meaning of the phrase, "this applies only to negative precepts," are subject to dispute.

According to Rashi, this talmudic selection is contrasting the punitive nature of lashes for negative precepts to the coercive quality of lashes for positive ones. Thus, while flogging may be used to coerce the fulfillment of positive commandments, the mechanism of coercion is not available to prevent the violation of negative ones. Floggings in the case of negative precepts are limited to thirty-nine and are purely punitive in nature. He adds that coercion is not mandated in cases which involve financial loss to the person. Rambam joins Rashi in this distinction between positive and negative commandments. In describing the guidelines he used to codify his list of the 613 commandments, Rambam writes,

When I shall mention a commandment, positive or negative, which entails some punishment [for violation], I shall mention that punishment by saying, "He who violates it is liable to death [by the hands of Heaven], or extinction, or a certain sacrifice, or flogging, or one of the death penalties inflicted by the Court, or payment." And wherever no punishment is mentioned . . . it is not for us to punish them. But as regards all positive commandments, if the time of the performance is still applicable, we are to flog him who refuses to do it until he dies or performs [the commandment], or until such time as the obligation passes, for he who violates the [positive] commandment of dwelling in a Tabernacle is not to be flogged for his sin after [the passing of the holiday of] Tabernacles.³³

Others maintain, however, that coercion is applicable to negative precepts and that lashes were used to prevent their violation. The Talmud here contrasts the extent to which lashes are meted out in each case.³⁴ However, such coercion for Torah

33. *Sefer haMitzvot, Shoresh 14.*

34. *Chiddushei haRan* to *Chullin* 132b; *Hafla'ah* to *Ketubot* 49b; *Peri Megadim*, *Sefer Shoshanat haAmakim*, *kelal* 9; *Minchat Chinuch, mitzvah* 9.

prohibitions is subject to limitations. *Minchat Chinuch* holds that coercion is the sole prerogative of the Court. Individuals may not exert force upon others in order to prevent violation of the Torah.³⁵ Another authority maintains that coercion may be implemented only for the fulfillment of the essential aspects of a commandment; ancillary duties are not subject to enforcement.³⁶ For example, the essential obligation of circumcision is the act of circumcision itself, but the father's personal participation in the act is ancillary; properly slaughtering an animal is the essential obligation, but for the slaughterer to personally cover its blood is ancillary.

This discussion of the coercive element in positive and negative commandments is useful in our analysis of the obligation to repay money appropriated from another while saving one's life. Although the specific mechanism of lashes as means of coercion is not relevant to our deliberations, appropriation of another's property in order to coerce him unwillingly or unknowingly³⁷ to fulfill his life-saving obligation is a form of coercion and is, therefore, analogous. Although coercion is the prerogative of the court and not of the individual, the halacha does permit a person to take the law into his own hands and to appropriate another's property when the process of resorting to proper legal channels will result in inequitable financial loss.³⁸ According to the Talmud, the life-saving obligation is defined by both positive and negative precepts. Thus, *Sanhedrin* 73a,

Whence do we know that if a man sees his neighbor drowning, mauled by beasts, or attacked by robbers, he is bound to save him? From the verse, "Thou shalt not stand by the blood of thy neighbor." But is it derived from this verse? Is it not rather from

35. *Minchat Chinuch*, *mitzvah* 8.

36. *Binat Adam* to *Chayyei Adam*, *Issur veHeter*, no. 7.

37. See Raavad to *Baba Kamma*, Atlas edition, *Miluim* p. 358, who maintains that a person incurs financial liability only when he is present at the lifesaving scene. See also R. Chayyim Palagi, *Nishmat Kol Chai*, vol. II, *Choshen Mishpat*, no. 48.

38. *Baba Kamma* 27a; *Choshen Mishpat* 4:1; *Hilchot Sanhedrin* 2:12.

elsewhere? Viz., Whence do we know [that one must save his neighbor from] the loss of himself? From the verse, "And thou shalt restore him to himself." From that verse I might think that it is only a personal obligation, but that he is not bound to take the trouble of hiring men [if he cannot deliver him himself]; therefore, this verse teaches that he must do so.

The positive commandment of restoration, a verse which speaks in the first instance of returning lost property and which is extended to requiring the restoration of a person's health and life, necessitates only personal involvement. It is the negative precept, "Thou shalt not stand by the blood of thy neighbor," which dictates financial involvement as well. Can a person be coerced to fulfill these obligations?

According to the authorities who permit enforcement only with regard to positive commandments, coercion is relevant only to the positive obligation of "Thou shalt restore him to himself," and not to the negatively phrased prohibition, "Thou shalt not stand by the blood of thy neighbor." Hence, a person can be compelled to fulfill the positive obligation of participating personally in a life-saving operation. He cannot, however, be forced to spend any money, an obligation which falls under the purview of the prohibition. His property is not subject to any claim entailed by the endangered's right of self preservation.

In addition, the essential component of the life-saving commandment is just that — saving a life. The Talmud posits that the essential obligation derives from the verse, "Thou shalt restore him to himself," and this verse teaches that this duty is, first and foremost, a personal one. An ancillary requirement necessitates that one must even expend his financial resources to do so. Thus, coercion may be applied to assure the fulfillment of the essential obligation which prescribes a person's physical involvement; it may not be applied to his ancillary financial responsibility. Furthermore, Rashi maintains that coercion is not applicable when financial loss is involved.³⁹

39. *Chullin* 132b, s.v., *kegon omrim leih asei sukkah*.

While the exigencies of mortal danger convince most authorities to permit a person to save his life by appropriating another's property, the legal inability to force another to comply with his financial responsibility to save a life obligates the individual to compensate the other for the money he used.

The obligation upon the lifesaver to expend his financial resources, as well as the permission of the endangered to save his life with another's money, is dependent upon the subsequent repayment of the appropriation. What if the lifesaver knows that the endangered cannot repay him; must he, nevertheless, hire others to save his life? What if the endangered knows that he can never repay the money he appropriated; may he, nevertheless, take the other's property? *Yad Ramah* maintains that there is no obligation upon the lifesaver, and no permission granted to the endangered, if compensation is impossible.⁴⁰ Others hold that the financial obligation, as well as permission to appropriate financial resources, maintains even when compensation is impossible.⁴¹

Let us briefly consider Rambam's formulation of the lifesaving obligation. In *Hilchot Rotseiach* 1:14 he writes,

Anyone who can save [someone's life] and does not do so transgresses, "Thou shalt not stand by the blood of your brother." Similarly, if one sees his brother drowning in the sea, accosted by robbers, or attacked by wild animals and can save him personally, or can hire others to save him, and does not save him... transgresses "Thou shalt not stand by the blood of your brother."

40. Gloss on *Sanhedrin* 73a. See *Keli Chemdah* to *Parshat Vayeitsei*, pp 190ff; *Chavot Yair*, no. 146.

41. Meiri to *Sanhedrin* 73a; *Responsa Mahari Weil*, no. 157; *Shulchan Aruch haRav*, *Hilchot Nizkei Guf vaNefesh*, 67; *Marcheshet* vol. 1, no 43; *Gilyonei haShas* to *Sanhedrin* 73a, *Responsa Mahersham*, vol. 5, no. 54; R. Chayyim Palagi, *Nishmat Kol Chai*, vol. II, *Choshen Mishpat*, no. 48. *Responsa Mahershdam*, *Yoreh Deah*, no. 24, maintains that the measure of a person's ability to compensate is based upon the time of the rescue and that if, at such time, the rescued does not have the resources to pay his lifesaver, he is exempted from any obligation of compensation.

Minchat Chinuch questions why Rambam in contradiction to the talmudic account in *Sanhedrin* 73a, claims that it is only the “brother’s blood prohibition” that is violated by not saving a person’s life and ignores the positive commandment of “Thou shalt return him to himself.” The difficulty with Rambam’s statement may be resolved, however, by understanding his reading of the talmudic passage.

Whence do we know that if a man sees his neighbor drowning, mauled by beasts, or attacked by robbers, he is bound to save him? From the verse, “Thou shalt not stand by the blood of thy neighbor.” But is it derived from this verse? Is it not rather from elsewhere? Viz., Whence do we know [that one must save his neighbor from] the loss of himself? From the verse, “And thou shalt restore him to himself.” From that verse I might think that it is only a personal obligation, but that he is not bound to take the trouble of hiring men [if he cannot deliver him himself]; therefore, this verse teaches that he must.

As discussed above, Rashi understands this passage to teach us that the lifesaving obligation is derived from both the positive and negative commandments, with the thrust of our passage highlighting the additional financial responsibility that the “brother’s blood prohibition” adds to the pre-existing personal obligation prescribed by the positive commandment. Rambam, however, understands the development of the Talmud’s reasoning quite differently. According to his reading, the Talmud first posits that the lifesaving obligation is derived from the “brother’s blood prohibition.” When the objection is raised that the verse “Thou shalt restore him to himself” already teaches that responsibility, Rambam maintains that the Talmud rejects that verse as a source of the obligation because it is not sufficiently inclusive; it only mandates personal involvement. The “brother’s blood prohibition,” being broader in its demands — requiring a person to do all that he can, both personally and financially, to save another’s life — is accepted by the Talmud, according to Rambam, as the sole source of the lifesaving mandate. Hence, Rambam’s ruling is consistent with his reading of the Talmud.

Let us return to the cases under consideration. According to our evaluation, Heinz, finding no legal alternative, is permitted to steal the medication in order to save his wife's life. The strict interpretation which considers theft an inviolate prohibition regardless of circumstance is not normative. The halacha, furthermore, relieves Heinz of any criminal responsibility or financial liability, holding — with *Tosafot*, *Rambam*, and *Shulchan Aruch* — that although third parties should be held liable for property they appropriate in order to save another's life, declaring them financially responsible may retard, or even prevent, their involvement and lead to the loss of innocent life. Clearly, in situations where lawful means of rescue are both available and immediately accessible, resort to unlawful measures is prohibited.

In the case of brother A who saved his life by revealing to the SS the location of his brother B's hidden wealth, the Rabbinical Court of Tel Aviv was forced to decide between conflicting claims. Brother B, the one whose money was taken, claimed that his brother, A, could have saved himself by giving the Nazis his own money. As such, brother A saved his life by appropriating another's property and should, therefore, be liable in accordance with the opinions of *Tosafot*, *Rambam*, and *Shulchan Aruch* discussed above. Furthermore, he accused brother A of saving his personal property by handing over B's money, an act for which he is certainly liable. An evaluation of this issue is beyond the scope of this paper. Brother A claimed that because the Nazis knew of brother B's money, and knew nothing of his own, he was the victim of extortion and had no responsibility to save his brother's wealth by sacrificing either his life or property. Since it was unable to determine the facts in the case, because brother A did admit to having used brother B's money to save his life, and because brother A was able to recover his property after the war, the court arranged a compromise monetary settlement that was acceptable to both parties.⁴²

42. Y. Frankel, "A Holocaust Survivor Who Saved Himself with His Brother's Money" in *Crossroads: Halacha and the Modern World* (Jerusalem: Zomet, 1987), pp. 87-90.

Living by ethical principles in our imperfect world creates many dilemmas for the moral personality. At times, challenges created by Nature or by the activities of human actors call into question those principles and test one's commitment to live by them. The circumstances in which moral principles may be breached for the greater good of society or of saving one's life deserve rational and mature evaluation. It is only through dedication to living a life devoted to the Good, and by contemplating one's principles and commitments prior to their being called into question, that one can hope to pass these tests of faith and, like our patriarch Abraham whom God tested ten times, be able to "walk before [God] and be wholehearted" (Genesis 17:1).

To The Editor

Your Pesach 5750 issue featured a letter from Rav Dovid Cohen, who would like to shed a new light on the "Land for Peace" controversy.

Briefly, his contention is that Jews being exiled from their land is in itself a *Chilul Hashem* for it is interpreted by the nations that G-d cannot defend His people. Consequently, states the author, "Naturally, *pikuach nefesh* cannot supersede *Chilul Hashem*."

May I suggest that the word "naturally" is misleading and possibly even wrong, for it implies that this is a truth which is not debatable. In correspondence I had with him, and also in a telephone conversation with my dear friend R. Dovid, I asked for the source for his statement, which he gave as Rabbenu Yonah שער תשובה ג' אות קפ"ז-קפ"ח ו. ט. של שלמה ב"ק פ"ד סי' ט.

Both these authorities, however, discuss the obligation to sacrifice one's life rather than falsify a Torah statute or value שמחויבים אנו למסור על קידוש השם, ואם ח"ו ישנה הרין היה ככופר בתורת משה. In both these cases, it seems to me, the *Chilul Hashem* arises from the fact that Jews are forced to change a law of the Torah or to deny Torah values, which would be "k'fira" in the Torah of Moshe Rabbenu and indeed a great desecration of the laws and beliefs of Judaism, truly requiring *mesirut nefesh*.

Nevertheless, we are still lacking a source for the need to sacrifice one's life in the scenario depicted by the Navi Yechezkel, when the Jews are exiled from their land. Herein there is no uprooting of any specific law of the Torah. To state that it is natural and obvious that *pikuach nefesh* cannot supersede such an eventuality does still require a more exact and precise source than the ones given.

May I interpolate, however, that even if a biblical source were to be found, I still would find it difficult to accept Rav Cohen's contention. Does he suggest that we retain the disputed areas in Eretz Yisrael, even at the possible risk and cost of losing many lives? In the context of *Chilul Hashem* as portrayed by the prophet Yechezkel, which lies in the perceived inability of G-d to defend his

people from exile, is the alternative of remaining in Eretz Yisrael and losing many, many lives not the same *Chilul Hashem* — or perhaps even worse? Would Rav Cohen have suggested to those exiled in the days of Yechezkel that they remain in the Land and be killed rather than cause a *Chilul Hashem* by being exiled? What difference is there in the *Chilul Hashem* of either alternative?

In truth, the root cause of that *Chilul Hashem* is in the fact that the Jewish people, having sinned, became liable for Divine Retribution. Given the choice that retribution would mean either exile from the land or else retaining the land at the cost of losing many lives— I would say that naturally saving Jewish lives would be the correct choice.

Sincerely yours,
Rabbi Avrohom Gurewitz

(The author of this letter is Rosh Yeshiva of Yeshivat Ner Moshe in Jerusalem.)

To the Editor:

In the last issue of the Journal, you continued the ongoing discussion regarding the relinquishing of territories in Eretz Yisrael in exchange for peace, with a letter from Rabbi Dovid Cohen. In his letter R. Cohen argues that an additional, if not decisive, factor to consider in the discussion is that of the *Chilul Hashem* — the desecration of G-d's name — inherent in the relinquishing of territories out of "weakness." As a source of this contention, R. Cohen cites the verse in *Yechezkel* 36:20: "And they desecrated my holy name when it was said of them these are Hashem's people but they departed his land." A closer reading, however, of the entire section in *Yechezkel* leads one to the conclusion that this passage has little relevance to our discussion. Let me cite here at length from this chapter (verse 16-22) including the verse cited by R. Cohen.

The word of Hashem came to me saying: Ben Adam,
the family of Israel dwell on their land and
contaminate it, by their way and actions... So I
poured my anger upon them because of the blood

which they poured upon the earth and they had defiled it with their idols — so I scattered them among the nations and they were dispersed among the lands. According to the their ways and their doings did I judge them; and they came to the nations to which they came, and they desecrated my holy name even when it was said of them, 'These are Hashem's people but they departed his land;' but I pitied my holy name which the family of Israel desecrated among the nations to which they came. (italics mine)

Clearly this section is not discussing the "relinquishing of territory", but another phenomenon: the exile of the Jewish people because of their sins and G-d's direct interpretation of that event to his prophet and people.

Moreover, the meaning of the *Chilul Hashem* referred to in this section is far from clear on a *P'shat* level. Rashi contends that the implication inherent in the exile of the Jewish people and the destruction of the land is that somehow G-d is not powerful enough to stop these calamities. The Artscroll edition brings a commentary that desecration of G-d's name arises from the fact that "the people who claimed to be G-d's special and chosen nation could act in such a way that caused the land to spew them forth." Or it might be referring to — as hinted by verse 21 — "which the family of Israel desecrated among the nations to which they came," actions and sins which the Jews do among the nations in which they now dwell after exile. This is the view adopted by *Da'at Mikra*.

Be that as it may, clearly the focus in the whole chapter is on exile of the people in the context of destruction and the inherent or possibly consequential desecration (Verse 21) of G-d's name attendant upon that situation. Not one verse as read in context even hints to any other topic such as relinquishing territory. I fail to see the possible analogy between destruction of the land and exile of the people to foreign nations such as Babylon, and the relinquishing of some territories in the interest of peace (according to the proponents) when the Jews living there might even remain and at worst would return to the sovereign Jewish state of Israel! Such an analogy does not appear in *Tanach*; without explicit divine

statements to that effect there is little that may be derived regarding our issue.

Secondly, even if we grant R. Cohen's thesis that relinquishing territories in the quest for peace, and not only exile and destruction, creates a *Chilul Hashem*, his next step is highly questionable. R. Cohen assumes that since relinquishing territory can be termed a *Chilul Hashem*, automatically the principle of *Yeihareig V'Al Yaavor* — the obligation to give up one's life rather than violate the sin — applies. This logical jump assumes that all acts termed *Chilul Hashem* by Judaism are of the same degree. But is this really true? For example, the Talmud records and Rambam codifies in *Hilchot Yesodei HaTorah* that a scholar who buys food on credit or walks in public with a spot on his garment has committed a *Chilul Hashem*. Would R. Cohen suggest that according to the Rambam a *Talmid Chacham* would have to give up his life rather than go out in the street with a spot on his suit!? Is such a thing conceivable? Clearly not, and this simply illustrates that all acts termed *Chilul Hashem* cannot be lumped together, and not all of them generate an obligation of martyrdom.

Finally, even if we would grant R. Cohen's thesis as *P'shat* in the *Navi*, the application to contemporary events is highly questionable for one major reason. The methodology employed in his argument wholly avoids standard and conventional halachic discussion. Even if his reading of the prophet be correct, when do we ever *Pasken* a question of Jewish law, let alone matters of life and death for *Klal Yisrael*, based on an interpretation of a passage in *Nach*? Is this "Darkah Shel Torah?" Where are the sources in the Gemara and *Poskim*? Can we simply ignore the fact that his understanding of the chapter finds no echo in any of the standard and authoritative halachic literature? Can we really use a particular reading of a verse in *Yechezkel* to render "moot" (in R. Cohen's words) an issue that the greatest of halachic titans have been struggling with for the last 20 years, citing Gemarot, Rambams,

Poskim and the like, relating to issues such as *Lo Tehcaneim*, *Milchama*, *Pikuach Nefesh* and *Kibbush Ha'aretz*?

Sincerely,

Rabbi Nathaniel Helfgott

(The author of this letter is a *Rebbi* in Frisch Yeshiva High School, Paramus, N.J.)

Rabbi Cohen responds:

In response to the points which Rabbi Gurewitz and Rabbi Helfgott have raised, let me cite the following:

- 1) I communicated orally with Rabbi Gurewitz about my sources, as he mentions. In addition, the *Yereim* (יראים השלם סימן ש"מ) equates all the instances of *Chilul Hashem* mentioned in the Gemara, without differentiating between various types, and indicates that they are all included in the halacha of *mesirut nefesh*. *Tzivion Ha-amudim* ווי העמודים על הסמ"ק ח"א סימן ג' אות ג ו ח"ב (סימן פ"ה אות א') writes elaborately on this question and concludes in consonance with my position.
- 2) I do not really understand the first part of Rabbi Helfgott's letter, but since he is ready to grant me the right to offer *p'shat* in the verse, I won't belabor the point. My understanding in ויחללו את שם קדשי באמר ... עם ה' אלה ומארציו יצאו is the same as the point that Moshe Rabbenu made in his entreaty (*Bamidbar* 14:16) "... מבלי יכולת ה'" — "It is beyond the power of *Hashem* to bring this nation to the land which he promised them and [therefore] He annihilated them in the desert." This perceived inability of *Hashem* to protect his people is a *Chilul Hashem*.
- 3) Nor do I quite grasp what he means by my "methodology." If the Vilna Gaon could make a ruling about the writing of the name "Batsheva" in a *get* based on a verse in *Tanach*, as interpreted by the Gemara in *Sanhedrin*, why is it absurd for me to understand a verse as a *get* (see *Bava Kamma* 102)? Since it is a *Chilul Hashem* to leave Eretz Yisrael under pressure, and according to the *Yereim* and Rabbenu Yonah there is an obligation of *mesirut nefesh*

in such a case, this is a syllogism which is normative halachic reasoning.

I made it clear that I am not ruling halachically based on the above reasoning. Rather, my remarks were intended to "awaken" scholars to this point, which I think should be considered. I am thankful to those who commented on my letter for indeed considering my point, albeit they came to a different conclusion than I. Nevertheless, I continue to maintain that it is a thought which needs to be considered

Sincerely,
Rabbi Dovid Cohen

P.S. Permit me to add a postscript by relating something which I heard from a reliable source.

Some years ago a noted Orthodox communal leader approached a well-known Jewish public figure, active and influential in politics, asking him to contact the Soviet authorities for help in getting the release of a Jew who was in a *pikuach nefesh* situation. The public person indicated that he would be prepared to exert his influence, but with the understanding that it would be a "barter" situation — he would expect a favor in return. This individual indicated that he was reluctant to use his influence unless the Jewish leader would assure him that he would actively campaign for him in a forthcoming Senate bid. The Jewish leader told him that he would answer within a short time.

The Jewish leader then turned to Rav Yaakov Kaminecki, z"l, whose response was that support from an Orthodox Jewish leader for a Jewish public figure who flagrantly rejected Torah standards (he was married to a Gentile woman) was equivalent to a *Chilul Hashem*. Even the *pikuach nefesh* situation of the Soviet Jew would not abrogate nor mitigate the situation of *Chilul Hashem*.

One can intelligently conjecture that the text in Rabbenu Yonah which we have cited was his source. Incidentally, when Rav Eliezer Schach, *shlita*, was notified of this ruling, he concurred.

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