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The Live-In Maid

Rabbi David Katz

I was recently told the following story by a rabbi in Flatbush. A family in his synagogue employs a Polish maid who previously worked for another *frum* family. The current mistress of the house instructed her maid to make them dinner, but the maid refused. "I'm not allowed to turn on the stove," she explained. "My previous employers were most insistent that I never turn on the stove." The current family did not know what their maid was talking about, and thought she was making it up. One phone call to their rabbi just to make sure confirmed that the gentile maid was indeed correct, while her current employers, both graduates of yeshivas and Bais Yaakov's, were ignorant of a basic rule of *kashrut*.

The modern American phenomenon of both husband and wife having full-time jobs has led to an increasing use of full-time help, or live-in maids, to care for the household and children. The presence of a live-in maid in an Orthodox Jewish household presents a number of problems of which most people are unaware. In this article we will draw attention to some of the halachic issues involved.

Yichud

Halacha prohibits a Jewish man or boy from being alone with a

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woman or girl if the boy is at least nine years old and if the girl is at least three years old. Originally, *mid'oraita,*[1] this prohibition involved one Jewish male being alone with one Jewish female *ervah,* that is, any relative forbidden him by incest laws, a married woman, or a *nidah* other than his own wife. The most important exceptions to this rule are parent and child, grandparent and grandchild, and brother and sister.[2]

The prohibition was extended by the Rabbis (*mid'rabanan*) to include *Yichud* with an unmarried female who is not a *nidah,* with a gentile of the opposite sex, and in certain situations where there are more than one male and one female.

Having a gentile maid living in one's home may therefore lead to a violation of the prohibition of *Yichud mid'rabanan* if any male member of the household ever finds himself alone in the house with the maid. What steps need to be taken to avoid this problem? Let us examine the possible halachic remedies.

Ishto Imo

The Mishnah in *Kiddushin 80b* reads:

> *...R. Shimon omeir: af ish echad mityached im shtei nashim bizman sheishto imo. Veyashen imahem bapundeki, mipnei sheisto mishamarto...*
>
> R. Shimon says: Even one man may be alone with two women [*yichud mid'rabanan*] when his wife is with him. He may sleep with them in an inn, because his wife watches him.

The halacha follows this view (*Shulchan Aruch, Even Haezer 22:3*).

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1. While there is some controversy as to whether the Rambam (*Issurei Biah 22:2*) classifies *yichud* as *mid'oraita* or not, practically every other authority clearly regards *yichud* as *mid'oraita* (see *Dvar Halacha* p. 1 for a full discussion).
2. Some authorities maintain that the prohibition of *yichud mid'oraita* extends to *chayvei lav,* that is, a man and a woman forbidden by the Torah to marry although if they did, their offspring would not be *mamzerim* (for example a Kohen and a divorcée). For the significance of this opinion to our discussion see n.5 below.

As long as the wife is in or around the house, there is no prohibition of *yichud* with anyone.[3] What if the wife is not at home? The answer to this question depends upon how one interprets the phrase *ishto imo*, "his wife is with him." Is this to be understood literally, that unless she is actually present he may never be alone with another woman? Let us first examine a similar exemption mentioned in the Gemara.

The Gemara *Kiddushin* 81a gives the rule: "*Ba'alah ba'ir ein choshashin mipnei yichud*, If her husband is in town we need not worry about *yichud*." Rashi explains that she will not sin with another man because she is afraid that her husband may suddenly show up and catch her in the act. Rashi maintains that the prohibition of *yichud* still applies in such a case; the Gemara merely meant to say that no penalty of *malkut* is incurred if her husband is in town. Tosafot (ibid., *D.H. "Ba'alah"*) and other authorities understand the Gemara to say that when the husband is in town there exists no prohibition of *yichud* at all, and she may be alone with another man. The *Shulchan Aruch (EH* 22:8) follows this point of view and permits *yichud* if the husband is in town.[4]

In this case the mere presence of the husband in town serves as an inhibiting factor, *mirsas*, to the wife. In fact, the *Chazon Ish* rules (*Dvar Halacha* p.28) that even if it is in the middle of the day, when the husband is at work and never comes home, the rule of *Ba'alah ba'ir* still applies.

Is the presence of the wife in town an equally inhibiting influence on the husband? May we say that just as there is a *heter* of *Ba'alah ba'ir* there is one of *ishto ba'ir*? Yes, say a number of authorities, particularly the *Beit Shmuel* 22:22, based upon the *Kesef Mishneh Hilchot Talmud Torah* 2:4. However, a number of the other opinions, including the Meiri and Maharsham (*Dvar Halacha* p.79) disagree and point to the fact that the Gemara uses

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3. Even if she is asleep. See *Otzar Haposkim IX pp. 97-98.*
4. A number of authorities say that *lechatchila* one should follow Rashi's view and not rely upon the *heter* of *Ba'alah ba'ir (Dvar Halacha p. 104)* though the *Chazon Ish* ruled leniently (*ibid.*).

different terms for each exemption: a)in the case of the husband, he may be *ba'ir*, in the city, but b) the wife must be *imo*, actually *with him.*

Because of this difference, R. Meir Arik *(Imrei Yosher,* Volume 11 9:8) says that the *heter* of *ishto ba'ir* will apply only if the wife is out of the house, but may shortly return. If she has a job or activity thet keeps her away from the house for an extended period of time, the husband is not permitted to be alone with another woman.

There is, though, another leniency possible, pointed out by the Tchebiner Rav *(Dovev Meisharim* I, 5). The problem in our case involves *yichud* with a gentile maid, which is not prohibited *mid'oraita.* The *Chocmat Adam (Binat Adam 126:27)* says that even those who agree with Rashi that *yichud* is prohibited even when the husband is in town (see above) may rely upon Tosafot's opinion permitting *yichud* if there is more than one man or one woman present. In that case, since *yichud* is only *mid'rabanan* we may be lenient. Accordingly, one may rely upon the lenient ruling of the *Beit Shmuel* permitting *yichud* even if the wife is not at home but in town, when the *yichud* question is *mid'rabanan.*[5]

Libo Gas Bah

There may, however, be complicating factors. The abovementioned talmudic text in *Kiddushin,* discussing *yichud* , tells how R. Yosef took steps to prevent any *yichud* between his own wife and R. Bavoi, a houseguest. The reason was that since the houseguest was a personal friend of R. Yosef's wife, *"libo gas bah,"* he was accustomed to her, at ease in her presence. In such a case, the husband's mere presence in town may not inhibit a relationship between the wife and her male friend. This is indeed the halacha in the *Shulchan Aruch EH* 22:8.

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5. However, if the husband is a Kohen, *yichud* with a gentile may be prohibited *mid'oraita* according to those who include in the biblical prohibition *chayvei lav* (see note #2 above); a Kohen is specifically prohibited by *Vayikra 21:7* from marrying a gentile. In that case the leniency of the *Dovev Meisharim* would not exist.

In other words, there is no extenuating circumstance of *ba'alah ba'ir* in a case of *libo gas bah*, where the wife is friendly with the other man.The same limitation would then apply to a husband whose wife is not at home, namely, he may not be alone with any woman with whom he is friendly and at ease.

How friendly is "friendly"? How is *libo gas bah* defined? Could it apply to a maid? Rambam says any man and woman who grew up together or who are related and friendly would be considered *libo gas bah.* The *Shulchan Aruch* adds to the list any man the husband warned his wife not to see, and the *Aruch Hashulchan* adds any man or woman who have a friendly business relationship.

As to the family members' relationship to the live-in maid, it is obvious that no definite rulilng can be given (see *Dvar Halach* 7:17 where the question is left open (*tzarich iyun*)). Each situation is different. It is clear, though, that purely in terms of *yichud*, a certain social distance between employer/family and employee (or at least between male members of the family and the maid) is called for to avoid the *yichud* complications of *libo gas bah* which are created when the wife is not home.

Shomrim

Unmarried male family members cannot rely upon the *heter* (leniency) of *ishto imo/ishto ba'ir.* What steps must be taken to avoid the problem of *yichud mid'rabanan?* If there is another male Jew[5a] over the age of six[6] present in the house, Ramo 22:5 rules that

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5a. There is a controversy whether the other need be a *kasher* or not. Usually, *yichud* is not permitted between a Jewish female and a *parutz* . The term *parutz* is variously defined as:
   a. Someone totally ignorant of Jewish law.
   b. Someone who deliberately violates Jewish law.
   c. Someone known to be sexually immoral.
   See *Dvar Halacha* p.117 who discusses the situation of one Jewish woman, one *Kasher* man and one *parutz.* Whether this would apply to a case where the woman is not Jewish, however, is unclear.

6. *Dvar Halacha* p.52; some require a boy of seven years old; others say nine years old. *Ibid. Otzar Haposkim IX p. 152.*

there is no violation of *yichud* . The Mishnah in *Kiddushin* permits this, Rashi says, because each male will be too embarrassed to commit such a sin in the presence of the other.

This leniency may be relied upon only during the daytime, says Ramo, or possibly until bedtime *(Dvar Halacha* p. 130). Late at night, however, there must be a total of three male Jews in the house.

Shomrot

Under certain circumstances *yichud* may be avoided if other females are present in the house:

1) Ramo (*ibid.*) also rules that if there are three women in the house, there is no *yichud* violation.[7] This is based upon the opinion of Rashi (82a *D.H. Lo*) that while it is feared that one man may succeed in seducing two women (each of whom will cover for the other), we do not fear that he will succeed with more than two women (Tosafot and others disagree).

2) The Gemara 81b says that there is no *yichud* problem if there is present a girl who is old enough to understand the sexual act when she sees it, but too young to be herself subject to sexual seduction. The reason for the leniency is that since she will tell others what she has seen, the adults will be afraid to sin in her presence. There are different opinions as to the exact age of such a girl.[8]

Interestingly, it may actually be preferable to have a young boy present based upon the rule of *shmirat tinoket* (see below), namely, that the youngster will be mature enough to understand the sexual act when he/she sees it but too young to be subject to sexual seduction. Ordinarily, the Rambam prohibits any *yichud* between one woman and any number of men (absent her husband, *Hilchot Issuurei Biah 22:8*), as does R. Yosef Karo (unlike the lenient ruling of the Ramo). The reason is that they fear the others may themselves become "partners in crime" (*Magid Mishnah, ibid.*). If the other male is too young to be lured into sin, however, even the Rambam would allow *yichud*. See *Neti'vot Lashabbat* (by the author of *Sefer Hamakneh*) quoted in *Otzar Haposkim p.151.*

7. Even three female gentiles. *Dvar Halacha* p. 131
8. R. Moshe Feinstein says the girl must be seven years old (*Oholei Yeshurun p. 7*). Others maintain that it all depends upon the maturity of the individual girl (*Yaskil Avdi EH V 22*).

3) The *Chazon Ish* ruled that if one's mother, daughter, or sister is present in the house, there is no violation of *yichud* (*Dvar Halacha* p. 108). Their very presence inhibits him from sinning with another female because he is afraid that they may find out.

Locked Doors

In the abovementioned story of R. Yosef and his houseguest R. Bavoi, the Gemara relates that R. Yosef removed the ladder from below the room where R. Bavoi was sleeping so as to prevent any possible *yichud* between the houseguest and R. Yosef's wife. The question arises, if there was really a fear that the houseguest and the wife might want to get together secretly behind R. Yosef's back (because they knew each other so well, as the Gemara says), why was removal of the ladder sufficient to prevent *yichud* problems? Wasn't it still possible for the wife to restore the ladder to its original place when her husband fell asleep?! As a deterrent, removal of the ladder was clearly inadequate.

Based upon this observation, R. Chaim Sonnenfeld (*Salmat Chaim,* Bnei Brak 1982, p. 61) reaches the conclusion that deterrence is not required to avoid *yichud*. It is not necessary, for example, for a man and woman who are in different rooms in the same house to have the door between their rooms locked by a third party who is the only one who has the key, so that they are physically prevented from entering each other's rooms. It is sufficient merely to have a *heker*, a recognizable act or sign, such as removing the ladder in the case of R. Yosef, or having either the man or the woman who are alone in the house in separate rooms lock the door of their room. Even though they are able to open the door, the fact that they have locked it serves as a reminder, a *heker*, and that alone will prevent them from sinning.[9]

At what point is a girl too old to act as a deterrent!? Some say nine years old, others say twelve. See *Dvar Halacha* p. 52.

9. This is also the opinion of the *Tzitz Eliezer VI* pp. 185-6 who, however, points out that this is speaking of a case of two *kasher* persons, such as R. Yosef's wife and R. Bavoi, who are not ordinarily suspected of wanting to sin. Otherwise, a mere *heker* is insufficient and an actual deterrent is required.

Accordingly, if one finds himself in the house alone with the maid, apparently it would be sufficient to lock his door to avoid *yichud*.

The *Chazon Ish* (*Dvar Halacha* p. 139), however, maintains that all we see from the Gemara's case is that we do not suspect the woman of restoring the ladder; therefore, if the woman locked the room, it is a sufficient *heker*. But we do not see that if R. Bavoi himself would have been able to restore the ladder, there would have been no problem. Therefore, it is not sufficient for the man to lock his room.[10]

In fact, the *Dvar Halacha* (p. 196) says that the position of the *Chazon Ish* would not permit *yichud* with a gentile maid who locks the door of her room because in her case it cannot be assumed that a mere *heker* will deter her from opening the door of her own volition. In a number of instances, the Talmud indicates that it does not have a high opinion of her sexual morality. For example, in *Avodah Zarah 25b*, the Gemara says, "*goy ein ishto m'shamarto*," a gentile does not feel inhibited by the presence of his wife from engaging in sexually immoral behavior with another woman. Rashi explains that this is due to the fact that she is not above such behavior herself. Furthermore, by rabbinical decree, all non-Jewish men who have sexual relations with a non-Jewish female are regarded as if they have had relations with a *zonah* (prostitute)(*Avodah Zarah* 36), an epithet which is another indication that no halachic reliance may be placed upon her avoidance of immoral behavior.

Petach Patuach Lireshut Harabim

The Gemare 81a quotes R. Yosef that if the door is open to a *reshut harabim*, a public place, there is no problem of *yichud*. The

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10. Support for the position that in *yichud* questions we are more suspicious of the man than of the woman is found in a responsum of the Rashba I:587. The Rashba was asked why Rashi says that one man may be alone with three women even if they are *prutzot*, while one woman may not be alone with three men who are *prutzim*. Rashba replied that men are more liable to sin in these matters than women.

fact that others will see what is going on inside the house will inhibit the man and the woman from sinning. There is a well-known controversy as to whether the door has to be actually open, or whether it is sufficient if it is unlocked. Although R. Akiva Eiger (*Teshuvot #100)* is strict on this issue, most authorities are not.[11] Accordingly, one may be alone with the maid if the house door is unlocked, or if it is locked and a friend has the key and could enter at any time (if the friend is at work or far away or unlikely to enter for some reason, there would be no *heter*). See *Dvar Halacha* p. 30.

Bishul Akum

The Mishnah in *Avodah Zarah 2:6* says that the rabbis prohibited eating foods cooked by gentiles. Rashi says that they did so in order to place an impediment to social intimacy and intermarriage between Jews and gentiles *(chatanut),* as well as to prevent a Jew from being fed non-kosher food by a gentile host *(shema ya'achilenu davar tamei).* The prohibition involves kosher food, however; even if the food was cooked in a Jew's utensils and in his presence, with no possibility of contamination by non-kosher substances, that food may not be eaten by a Jew.

Obviously, whenever a maid is involved in making dinner, as is often the case when both parents are tying down full-time jobs and get home at the end of a long working day, the problem of *bishul akum* needs to be addressed.

The prohibition does not extend to all cooked foods. Any food usually eaten in a raw state (as well as cooked) may be eaten by a Jew even if cooked by a gentile. Thus, cooked fruit, or even boiled water, coffee,[12] or tea made by the gentile maid presents no problem.

A second limitation mentioned by the Gemara is that the prohibition extends only to foods "fit to be served at royal tables to accompany the bread," that is, foods that would be part of a formal

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11. *Teshuvot Rashba #1251; Mabit I:287; Radvaz I:121; Binyan Tzion 138; Tzitz Eliezer VI 40:23; Dovev Meisharim 5; Chazon Ish (Dvar Halacha p. 27.)*
12. Some contemporary authorities do not permit coffee. See *Shevet Halevi II 45*

meal for VIPs. Which foods are included in this category is the subject of much discussion, as it varies from country to country and culture to culture. In any event, the modern American family's dinners in the course of an average week certainly include cooked foods deemed by halacha to be fit to be included in a formal fancy dinner. As far as the type of food is concerned, then, there is no real way to avoid the problem of *bishul akum.*

One possible *heter* discussed at length among the *poskim* involves the well-known view of R. Avraham ben David (author of *Sefer HaEshkol*) quoted by Tosafot (*ibid. D.H. "elah"),* that the prohibition of *bishul akum* was never extended to food cooked by a gentile maidservant working in a Jewish home. Since one is not going to become socially intimate with an employee who is paid to cook dinner, nor is the employee going to feed the employer non-kosher food if she does not want to be fired, the reasons Rashi gives for the enactment of the prohibition do not apply. Rabbenu Tam disagrees and maintains that no exceptions were made in the original enactment.[13]

The *Terumat Hadeshen (Hagahot Sha'arei Dura 75)* suggests another basis to permit cooking in a Jew's house by a non-Jewish employee. He says that "It is the custom to permit gentile maids to cook. Perhaps the reason is that they assume that it is impossible that some Jewish member of the household not participate in the cooking, for example by stirring the fire." In other words, the *Terumat HaDeshen* says that people in his time (15th century) relied upon the fact that the food is not *totally* cooked by the gentile (see below), *not* upon the contention that the original prohibition did not extend to employees cooking in a Jew's house.

The Ramo (*YD 113:4*) rules that one may rely a priori *(lechatchila)* on the *heter* of the *Terumat HaDeshen.* In practice, however, the ruling of the Ramo is not followed. First of all, the ruling does not apply if no other family members are home, as in

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13. The *heter* of R. Avraham ben David should not be confused with the view of Ramban (quoted by Ra'Ah in *Bedek Habayit* p. 187) and Rashba *(Teshuvot haMeyuhasot LeRamban #284)* that the *issur* of *bishul akum* does not extend to foods cooked by the slave of a Jew, that is, a slave *owned* by a Jew.

the scenario where both parents are working and supper is being prepared for them in the afternoon. Secondly, the *Shach (113:10)* insists that any inadvertant stirring of the fire by the Jewish household member does not suffice to remove the prohibition. The *Shach* holds that the Jew must stir the fire (or otherwise significantly participate in the cooking, see below) for the conscious purpose of avoiding *bishul akum*. The *Shach's* position in effect vitiates the *heter;* in practice, one family member must always be present and consciously participate in the cooking. In general, other later authorities hold that the Ramo's ruling may be relied upon only in extremities that require the ruling of a competent *posek* (see, for example, *Aruch Hashulchan 113:4).*

As previously mentioned, our rabbis did not prohibit food cooked by a gentile if a Jew participated in the cooking. How significant must such participation be? The Ramo, unlike R. Yosef Karo, rules that it is enough to turn on the fire (*ibid.* 7). It seems that this would help in the case of a gas stove whose pilot light is turned on by the Jew. Increasingly, however, gas ignition stoves are being replaced by electronic ignition stoves and microwave ovens which have no pilot lights. In this important contemporary respect, it is becoming increasingly difficult to avoid the problem of *bishul akum* unless the employer or another Jew actually does the cooking, or participates in it. It would seem that the only other way to avoid the problem of *bishul akum* in regard to these modern stoves would be through the use of timing devices that could be set earlier in the day by the Jewish employer to turn on the stove at the time of cooking dinner. In such a case, the maid would be allowed to cook the food because the Jew has "lit the fire."*

Ma'achal Ben Drusai

In *YD 113:8* the *Shulchan Aruch* rules that if the food is one-third cooked by a Jew, there is no problem of *bishul akum.* Accordingly, the maid may warm up frozen foods that are already cooked, such as frozen dinners.

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* The halacha may be somewhat different in a Sephardic household.

Keilim

In *YD 113:16* the *Shulchan Aruch* rules that any pots or dishes used by the gentile in cooking (absent the above-mentioned exceptions) become *treif* and must be kashered, regardless of the fact that no non-kosher substance ever came into contact with those pots or dishes. This means that the maid may not even cook for herself anything she is prohibited from cooking for her employer, unless she has a separate set of dishes for her exclusive use, a complicated affair at best. Indeed, based on this text in *Shulchan Aruch*, R. Moshe Feinstein prohibited *ever* leaving a maid alone in the house, precisely because of the fear that she may somehow "*treif* up" the dishes, either by using her own non-kosher food, or by mixing up meat and dairy dishes or pots (*Iggerot Moshe YD I 61*). The same fear exists that she may use them to cook for herself.

Leaving any gentile alone with food is problematical, and is forbidden by the *Shulchan Aruch YD 118:10* unless there is a *mirsas*, the fear of losing one's job if the Jewish employer finds out that the food has been tampered with or exchanged. Therefore, as long as a maid has reason to fear the possible immininent return of her employer (or any other Jew), the factor of *mirsas* allows us to assume the food has not been tampered with (or that she has not cooked for herself with their dishes). However, if, as is the case with families where everyone is at work or in school during the day, there is no real prospect of imminent return by any household member, then the maid may not be left alone with the food.[14] The

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14. *Bediavad*, if it happened that she was alone with the food, it is not necessary to assume the worst; if there is no evidence that the food was tampered with, the food remains kosher. This is based on two halachic assumptions: first of all, the gentile did not tamper with the food because she had nothing to gain thereby (see below). She can use her own pots and the kosher food which were set aside for her use by the employer; why would she deliberately use the pots which she was told were off limits to her? Why would she introduce non-kosher food into the house and seriously offend their religious sensibilities if there was sufficient kosher food that she could eat *(Teshuvot Beit Sh'arim YD 198)*? Secondly, the rule of *chazakah d'meikara* says that in the absence of any evidence that the food was actually tampered with, we assume that the food remains in the same

only other *heter* is the rule of the *Shulchan Aruch (ibid.)* that we need not fear leaving the maid alone with the food if she has nothing to gain from tampering with the food; we do not suspect that she would deliberately, *lehach'is*, wish to cause the religious sensibilities of her employers to be offended. There have, however, been more than a few reports of cases recently where these assumptions do not seem to have prevented just such tampering with food by live-in maids. In this regard, it is worthwhile to note the pertinent remarks of the *Ben Ish Chai* (in his *Rav Pealim IV OC 6)*:

> Anyone with a brain in his head understands how many mishaps can occur in such a situation even if the Jewish employer pops in and out of the kitchen *(yotzei venichnas)*. This alone should be enough to discourage people from allowing a gentile employee into their kitchen.

Shabbat

Kablanut

At first glance, it would seem that employing a maid on Shabbat is contrary to the ruling of the Ramo (244:5):

> If a Jew hires a gentile to do whatever work is needed within the contracted period (including Shabbat), it is, according to all views, forbidden.

A Jew may neither tell a gentile to do any work for him on Shabbat nor benefit from the Shabbat work of any gentile (except for the cases listed below). Indeed, the *Mishnah Berurah (30)* says,

> Because of the Ramo's ruling, one should object to maidservants doing their employer's work on Shabbat — even when they do it outside the Jew's house and even if not instructed by their employers to do it — for the maids have been hired for all jobs.

How, then, may a maid be employed on Shabbat nowadays? Let us examine the basis of the ruling of the Ramo. The Rambam (*Hil. Shabbat 6:12*) rules:

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state it was left in by the employer before the gentile maid had the opportunity to cause mischief (*Kaf HaChayim 118:120*).

> One may arrange with a gentile to do some work, stipulate the renumeration for it, and leave it to the gentile to do the work on his own; this is permissible even if the gentile works on Shabbat. Similarly, hiring a gentile for a long period of time is permissible, even if the gentile works on Shabbat. Thus, if one hires a gentile for one or two years to do some writing or weaving, the gentile may write or weave on Shabbat, since this is the same as if one had contracted with a gentile for the writing of a book or the weaving of a garment, in which case the gentile may do the work whenever he pleases — providing, however, that no daily reckoning is made of his wages.

The Raavad disagrees. He disputes the analogy made by Rambam between the case of contracting with a gentile for the writing of a book and the case of hiring the gentile for a year to do some writing. According to the Raavad the latter case is not *kablanut*, contracting. As explained by the *Magen Avraham*, the view of the Raavad is that since the Jewish employer might conceivably need writing to be done on the following day, and had the gentile not worked on Shabbat, he would not be able to do both writing jobs simultaneously, it turns out that the Jew is benefiting from the work the gentile did on Shabbat. R. Yosef Karo *(ibid.)* rules according to the Rambam.

If, however, the Jew hires a gentile by the year to do all jobs, then it is almost certain that on a subsequent day the Jew will need the gentile for some other piece of work; in that eventuality the Jew will have benefited from the fact that the gentile did work on Shabbat. In such a case, even the Rambam would agree that it is forbidden to benefit from the gentile's work. Hiring a full-time maid certainly seems to fall into this category; hence the above-mentioned stricture of the *Mishnah Berurah*.

However, in a case where there is no likelihood that the gentile will be needed for work on Sunday, it would seem the Rambam's original view would stand. The employer no longer benefits from the work done on Shabbat, since the gentile could have done the same work on Sunday, when he would have been free of any other assignment on the part of the employer. Accordingly, the

Maharsham (*Da'at Torah, ibid.*) points out:

> Nowadays gentile employees do not work on Sundays, their holiday; therefore any work they do on Shabbat, they do because they choose to do so, in order that they will not have to do that work on Sunday [which they could do if they wished. DK]. This is especially true if the employer expressly tells them that any work they do not do on Shabbat they should do on Sunday. However, this matter requires further study.

In a similar vein, R. Moshe Feinstein is quoted as saying (in *Sanctity of Shabbat* p. 91) that maids in America nowadays are not like those of former times who were like indentured servants and were bound to serve their employers seven days a week with no vacation, etc. Instead, the current maids are much more independent and are more in the nature of contractors who hire out their services and who feel free to quit their jobs if any of the working conditions are not to their liking. Any work they do on Shabbat, they do because they choose to do that work on that day so that they will not have to do that work later in the week. Since it is *they* who choose to do the work on Saturday even though they have the option to do the work on another day, it is considered as if they are doing the work on Shabbat at their own initiative, *not* because of the specific directive of their employer. In that case the Jew may benefit from the work, just as he may benefit from any work a gentile contractor does for him on Shabbat, as long as the contractor has a clear option of doing that work on another day of the week.

In practice, this means that the employer should tell the maid when she is hired that she does not have to do any work which is defined as *melacha* (even in the type of case where the employers are permitted to benefit from that *melacha*) on Shabbat itself if she would rather do them on another day of the week. If she, herself, then chooses to do it on Shabbat, that is her business.

Mar'it Ayin and Amira L'akum

There is, however, another aspect to this problem: *mar'it ayin*

(appearances). The *Chaye Adam (Hilchot Shabbat* 3:10) says that a gentile contractor may not perform any work for a Jew on Shabbat on the Jew's premises because it *appears* to the passerby as if the Jew directed the gentile to do that work on that day, a violation of *amira l'akum.* This is true even if it is well-known in the town that the gentile is a contractor. The *Mishnah Berurah* 252:17 concurs (although *Maharam Schick O.C.95 & 97* as well as *Maharshag O.C. 41* disagree). According to this view, every maid, even if considered a contractor, is prohibited from performing any *melacha* (work) for her employer in the Jew's house.

Concerning this point, R. Moshe Feinstein *(ibid.)* maintains that such a *mar'it ayin* problem applies only to those tasks the maid does not ordinarily perform as part of her daily routine. Someone seeing her perform an unusual task (involving a *melacha*) will assume that the employer must have directed her to perform that task today, on Shabbat. However, the ordinary routine tasks and chores performed by the maid every day of the week without direct daily orders from the employers are not the kind of tasks that an outsider would assume the employer, an observant Jew, directly ordered her to perform on Shabbat. Thus, such tasks need not be prohibited because of the fear that others may assume the maid was directly ordered to do them on Shabbat.

In light of the ruling of the *Chaye Adam,* it becomes necessary to distinguish between the basic halachic principles governing the relationship of Jew and gentile in terms of work on Shabbat.

Halacha forbids a Jew to tell a gentile to do any *melacha* for him on Shabbat, whether that *melacha* is *mid'oraita* or *mid'rabanan*

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15. Introductory note: The laws of *amira l'akum* and *melechet goy* are complicated, and it is not the purpose of this article to present more than a general survey of the problems one ought to be aware of in hiring a maid whose job includes Saturdays. It is hoped that the reader (especially if he employs such a maid) will be stimulated to make a study of these laws. The best works on the subject in English are chapters 30 and 31 of *Shmirat Shabbat* (the English edition of R. Yehoshua Neuwirth's *Shemirat Shabbat Kehilchata)* and *The Sanctity of Shabbos,* by Rabbi Simcha Bunim Cohen, from which much of the following section was culled. These works should be read by every employer.

(Amira l'akum shvut).[16] In addition, the Jew may not benefit from any *melacha* a gentile does for him (or for any Jew), even if the gentile was not told to do so *(Melechet goy assurah).*[17]

However, there are important exceptions to these rules. In certain situations, *Chazal* permitted directly telling a gentile to do certain *melachot.* In other situations, although the Jew may not tell the gentile to do the *melacha,* nevertheless, if the gentile did it without being directly told to do so, the Jew may benefit from the *melacha* (see below).

It seems that even the *Chaye Adam* would agree that where halacha allows the Jew to tell the gentile to perform a certain *melacha,* an employer could instruct his maid to perform that *melacha* because the fear of *mar'it ayin* would not apply. After all, even if passersby think that he instructed her to do that *melacha,* there is no problem because he may in fact legitimately do so.

For example, in certain cases the rabbis even permitted *telling* a gentile to perform a *melacha d'oraita* and benefiting from that *melacha.* The most common example would be to ask the maid to turn on the heat in the winter, based on the rule *hakol cholim eitzel tzin'ah,* that is, everyone has the status of an ill person (for whom *melacha* may be performed by a gentile) when it comes to the cold, since a chilled temperature can cause illness. Based on this reasoning, R. Moshe Feinstein *(Iggerot Moshe OC III 42)* says that one may likewise tell a gentile to turn off the air conditioner in the house if it gets too cold.[18]

What about asking the maid to turn on the air conditioner on a

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16. The rabbis prohibited a Jew telling a gentile to perform work on Shabbat, lest the Jew treat Shabbat lightly as a result of this loophole and end up doing work himself (*Rambam Hil. Shabbat 6:1*). According to Rashi (*Avodah Zarah 15a*), it was prohibited because of *daber davar* (Isaiah 58:13).
17. The logic behind this rule is that if a Jew were to be allowed *bediavad* to benefit from work done on his behalf, he would treat the prohibition of *amira l'akum* lightly.
18. Of course, it would depend on how cold the house is, and whether there is any actual danger of sickness. Elderly people and small children, for example, would obviously be more prone to catching cold.

hot summer day? The *Minchat Yitzchak (III 23-24)* permits this because he considers turning on an air conditioner to be a *melacha d'rabanan,* from which a Jew may benefit to alleviate discomfort *(shvut d'shvut bimkom tza'ar).* [19]

Also, the rabbis allow telling the maid (or any gentile) to perform a *melacha d'rabanan* that would enable the Jew to perform a mitzvah. Thus, the maid may carry in the street *(karmelit - issur d'rabanan)* anything the Jew needs to perform a mitzvah, such as a siddur or *sefer,* food for *oneg Shabbat,* anything a guest might need *(hachnosat orchim),* or some other item that would promote *oneg Shabbat.*[20]

Similarly, the *Mishnah Berurah (Biur Halacha 253 "lehachem")* rules that, though the employers may not ask the maid to cook for them on Shabbat because *bishul* is a *melacha d'oraita,* they may ask her to reheat previously cooked dry food needed for the Shabbat meal *(oneg Shabbat);* to do so is prohibited only *mid'rabanan (chazara)* . She must, however, use an existing flame, since to turn one on would involve a *melacha d'oraita (mav'ir).*[21]

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19. Other authorities consider turning on an air conditioner (or any electrical appliance) to be a *melacha d'oraita* and would not permit asking a gentile to do it, or to benefit from it if a gentile did so, even to alleviate the discomfort of the heat (*Encyclopedia Talmudit VIII p. 653*).
20. Even those who do not use the *Eruv* because they follow the *Biur Halacha* (364:2) may, as far as *melechet goy* is concerned, rely upon the ruling of the Ramo that, absent *Shishim ribo,* a street is not considered a *reshut harabim (Mishnah Berurah 325:11).* See *The Sanctity of Shabbos* p.33 to the effect that the maid may even carry across a major thoroughfare (such as Ocean Parkway) to enable a Jew to perform a mitzvah.
21. The *Chazon Ish* disagrees. He argues that what is prohibited is not simply the *act* of placing the cold cooked food on the stove (*chazarah*). If it were a question of the act of *chazarah,* then indeed a gentile could perform that act for the Jew. Since *chazarah* is rabbinically prohibited and asking a non-Jew to perform a *melacha* is likewise rabbinically prohibited, it would be a case of *shvut d'shvut bimkom mitzvah.* However, the *Chazon Ish* argues, what is prohibited is not the *act* of *chazarah,* but the very *presence* of the cold cooked food on the stove, no matter how it got there. Since the rabbis prohibited placing the cold cooked food for fear the Jew may come to adjust the fire on the stove (*shema yechateh*) (or because it appears as if he is cooking raw food on

Liquid foods, including soupy cholents, are more problematic because the Ramo rules that the principle *yesh bishul achar bishul b'lach* applies to cold liquid food. This means that reheating the cold liquid food would involve a *melacha d'oraita*, which would rule out asking the maid to reheat the cold, previously cooked cholent, no matter how essential it is to the Shabbat daytime meal. There are, however, those who say that in such a case one may in fact tell her to do so if the food is not placed by the maid directly on the fire or *blech*, but in an unusual place, such as alongside the fire, or on top of a pot which is on the *blech*.[22]

When it comes to moving *muktzah* for her employers, it depends on the kind of *muktzah*. If the article is a *kli she-melachto l'issur*, such as a hammer, a pen, or an umbrella, it may be moved by a Jew to use it in a permissible way (*letzorech gufo*) such as using the hammer to crack nuts, or *letzorech m'komo*, i.e., if one needs the place occupied by the hammer. A Jew may not, however, move it to protect the object itself (*meichama letzel*), such as from rain or thieves. But the Jew may tell the maid to move it.[23] [24]

Shabbat — *michzei kemivashel*), then regardless of how the food got there, the temptation to adjust the fire and the appearance of the Jew's cooking raw food is still there. Thus, the presence of the food on the stove is objectionbable *per se* and must be removed. As the *Chazon Ish* puts it: "even if a monkey places the food on the stove, the Jew must remove it." As proof, he cites the ruling of the *Mishnah Berurah* himself (*ibid. no.10*) that where food that was less than one third or one half cooked was placed on the stove on Friday just before Shabbat in violation of the rabbinical prohibition of *shehiya* (a prohibition likewise based on the fear lest the Jew come to adjust the fire on Shabbat), the Jew is obligated to remove the food from the stove.

The *Chazon Ish* does, however, permit warming the food in front of a fire (at some slight distance from the fire), or on top of a kettle that is standing over a fire (on top of a pot which is on the *blech*), as this would not fall under the purview of the prohibition of *chazarah* because it does not resemble cooking, *cf. Shulchan Aruch OC 253:5 (Shoneh Halachot 253: 30* from *Chazon Ish OC 37:21).*

22. *Sanctity of Shabbos* p.39.
23. *Mishnah Berurah 308:15.* R. Akiva Eiger disagrees (*Hagahot R. Akiva Eiger* on *Magen Avraham 279:9*).
24. An automobile is a *kli shemlachto l'issur (Shmirat Shabbat Kehilchata 20:77*).

If the article is *muktzah machmat chisaron kis*, such as valuable household appliances, or *muktzah machmat gufo*, such as a pet animal or a household plant, the Jew may not move it even for the above reasons. But there are circumstances where he may ask the maid to do so, although with restrictions.[25]

In all of these cases, the employer is permitted by halacha to actually tell the maid to perform the *melachot* described; thus there is no fear of *mar'it ayin*. As we shall see, there are other situations where a Jew is permitted to benefit from a *melacha* performed by a gentile provided the Jew does not actually *tell* the gentile on Shabbat to do that *melacha*. In other words, sometimes the prohibition of telling a gentile to do work remains in force even where the prohibition of benefiting from that work does not (see later for specifics, viz. indirect benefit or *p'sik reisha*). In such instances, it would seem that the *Chaye Adam* and the *Mishnah Berurah* prohibit a maid from performing those *melachot* for her employer even though he never actually tells her to do anything. Why? Passersby might conclude that the employer *told* her to perform those *melachot* and thus violated the prohibition of *amira l'akum*.

Other Opinions

Not all *poskim* suscribe to the strict view of the *Chaye Adam* that there is a fear of *mar'it ayin* even when it is clear that the

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If it was in one's garage (where there would be no problem of *mar'it ayin*), the Jew could open the car door to take out something he needs if the lights would not go on. That would be a of case *tzorech m'komo*. Closing the door, however,would be *mechama l'tzel*, for the protection of the car. The Jew may not do it, but the maid may do it for him. R. Moshe Feinstein is even more lenient and allows the Jew to close the car door (see his response to a query on this question in the back of *The Halachot of Muktza*, response no. 7).

As a matter of fact, the maid may open the car door for her employer to get something out of the car even if the lights in the car go on. This is based upon the previously-discussed *heter* of *p'sik reisha* in a case of *amira l'akum* .

25. *Mishnah Berurah 279:14*. If the object is *muktzah machmat chisaron kis* , the Jew is not allowed to move it indirectly (*OC 311*).

gentile performing a *melacha* in a Jew's house is a *kablan* (contractor). The source of this fear is a ruling of Maharam Rottenberg (*p'sakim*, ed. Kahana 193), quoted by the *Beit Yosef* 244 as "an Ashkenazi responsum." Maharam Rottenberg says that an activity which may be permissible (i.e., work done under contract) when it takes place far from the eyes of any Jew (i.e., in an area where there are no Jews living) is nevertheless prohibited in an area where Jews are present. The fear is that the members of his household or, alternatively, guests staying in the area, may misinterpret what they see and conclude that the work being performed by the gentile is not under contract but is being performed by the gentile for the Jew for a daily wage. Such an arrangement, of course, would violate the Shabbat laws. In other words, even if the family members and others are familiar with the local scene and the halachic arrangements made to avoid violations of Shabbat employment prohibitions, there exists the fear that "guests", (i.e., visiting Jews not familiar with those arrangements because they are not locals) may misinterpret what they see and conclude that the Jew hired the gentile to work for him on Shabbat. This fear is sufficient cause to prohibit the gentile's performing that contracted work on the Jew's premises, or indeed anywhere else known to the public as belonging to the Jew.

In the last century a number of *poskim* have argued that since what is feared is misinterpretation on the part of outsiders *(orchim)*, if the *orchim* are informed of the measures taken to insure that no violation of halacha occurs, such as the fact that the work performed by the gentile for the Jew on Shabbat is work under contract/*kablanut*, there would be no reason to worry about possible misinterpretation.

Thus, R. Shlomo Kluger (*Sefer Hachayim 31a*) permitted work performed by gentiles under contract in a building owned by a Jew, provided that the Jew sold the building to the gentile before each Shabbat. What about the problem of *mar'it ayin*? Won't the other Jews who do not know of this arrangement, and who indeed know that the building is owned by the Jew, assume that the Jew is the owner on Shabbat as well, thus concluding that the workers are employees working by the day? To this R. Shlomo Kluger responds

that the local Jews are indeed aware of the custom of selling the building to the gentile before each Shabbat. As for *orchim*, unaware of the local custom, "The visitor certainly knows that if this were a case of Shabbat desecration, the townspeople would surely have discerned it. Even if the owner is suspected of desecrating the Shabbat, all the other people of the town are certainly not suspected of it."

Thus, R. Shlomo Kluger argues that when *orchim* see a Jew doing something that can be interpreted two ways, either as a violation of halacha or as being in conformity with halacha, we may assume that the *orchim* will give the Jew the benefit of the doubt since other Orthodox Jews in the area permit the action without protest. Their silence will be viewed by the *orchim* as confirmation of the fact that proper steps have been taken to assure that halacha has not been violated.

Along somewhat similar lines, the Maharam Shick *(OC 95)* permitted a Jew to have contract work performed in his factory on Shabbat because everyone in the town was aware that the gentile workers were under contractr. As for *orchim*, we may assume that when they see what appears to be a violation of halacha, they will ask the local Jews what is going on. The local Jews will then enlighten them to the fact that the workers are under contract and that no violation of Shabbat is taking place. As an example of such reasoning, Maharam Shick cites the Gemara in *Megillah 22a*, where it is assumed that one entering a synagogue in the middle of the reading of the Torah will not reach the conclusion that the Reader has read less than three verses, even if it appears to him at first that indeed that is what happened. The reason, the Gemara says, is because we assume that if it appears that such is the case, we assume the person will surely ask the other worshipers in the synagogue how such a thing is permitted without protest; the other worshipers will thereupon inform him that the Reader has in fact read the minimum three verses.

Thus, if it is possible to publicize the fact that work being performed by the gentile is under contract, there need be no fear of misinterpretation on the part of *orchim*. Furthermore, the fact that Orthodox Jewish neighbors (including rabbis) allow such work to

be performed without protest will necessarily lead *orchim* to the conclusion that the work is being performed in a manner consistent with halacha.

The question is, are either of these two factors applicable to the contemporary employment of a maid on Shabbat? Obviously, this depends on how well known are the complicated rules governing work performed on Shabbat by a gentile. Do the local rabbis publicly inform their congregants that anyone employing live-in help must take certain steps to ensure that the Shabbat laws are not violated? If so, if it is public knowledge in that locality that all maids have the genuine option of not performing certain tasks on Shabbat, then it seems that according to the abovementioned *poskim* (i.e., R. Shlomo Kluger, Maharam Schick, and Maharshag), it would be permissible for the maid to perform certain chores in addition to those mentioned above (although the *Chaye Adam* and *Mishnah Berurah* would disagree). If it is not public knowledge that she has this option, then all opinions would prohibit her from performing those kinds of work.

What kinds of work are we speaking about? As stated previously, a Jew may not benefit from *melacha* a gentile performs for him (or for any other Jew), even if the gentile was not told to do so.

There are, again, important exceptions to *this* rule. First of all, the rabbis prohibited only benefit which *directly* results from the *melacha* performed by the gentile. Thus, one may not benefit from the maid's turning on the lights, because the light is a direct result of the *melacha* of turning on the electricity. However, one *may* benefit from the maid's turning *off* the lights, because the darkness in the room is an *indirect* result of the lights having been turned off. Turning off the lights did not *create* the darkness; it merely *resulted* in the darkness. One could not *tell* the maid to do so on Shabbat because of the prohibition of *amira l'akum*, but one could *hint* to her to turn the lights off. If the employer speaks to her *before* Shabbat commences, halacha is even more lenient and the employer may hint quite broadly before Shabbat that he would like the lights turned off Friday night. (For example, he may say to the

maid on Friday afternoon, "Why didn't you turn off the lights after the meal last Shabbat?").[26]

Other examples of indirect benefit which may be hinted at would be to wash the dishes or the floor, clean the table for after Shabbat, or fold the laundry.[27]

Similarly, the rabbis did not prohibit any benefit from a *melacha* which merely adds to what was already there. Thus, a maid could turn the lights higher, since the lights were already on and people could see and read by the original light; therefore the employer may hint to her to do so.[28]

The rabbis did not prohibit a Jew from benefiting from a *melacha* performed by a gentile for his own sake.[29] By extension, the employer may instruct the maid to perform a task on Shabbat which may be accomplished without violating Shabbat. If the maid then chooses to perform the task by doing a *melacha*, that is considered the maid's personal choice and as if she is doing the *melacha* for her own sake (i.e., for her own convenience). Accordingly, an employer may tell the maid to wash the dishes (for the next meal, for example). Since it is possible to wash the dishes in cold water without using a sponge, it is permissible even if the maid washes them in hot water with a sponge, because that is her personal choice.[30]

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26. Exactly which kind of *remizah*, hinting, is permitted, is the subject of some discussion among authorities. The proper thing to do is to describe the situation to the maid, so that she can reach her own conclusion as to what is desired. One should be careful not to actually mention the *melacha*. For example, it is proper to say: "I can't sleep because the light is on." Do *not* say:"Do you think you could do something about the lights?" or:"I wish the lights were turned off."
27. *Sanctity of Shabbos* p.93.
28. However, anything that could not be read by the original light (e.g. small print) may not be read with the aid of increased light.
29. This ruling applies only if the maid did the *melacha* primarily for herself. If she did it both for herself as well as for her employer, the rules are more complicated. See *Sanctity of Shabbos* pp.15-19.
30. The classic example of this is the ruling of the Ramo 276:3) that "it is permissible for one to instruct a gentile to accompany him and bring along a lamp that has already been kindled, since the gentile is doing nothing more than

Another important leniency concerns *p'sik reisha*. The Ramo (253:5) says that

> It is a common practice on Shabbat to have non-Jews remove pots of food from ovens [in which the pots have been stored to retain their heat] and place them next to, or on top of, a heating stove before it is lit and only later to have the gentile maidservant light the stove [in order to heat the house, which is permitted because of *"hakol cholim eitzel tzina"*, and not in order to heat the food (*Mishnah Berurah* no. 99), whereupon the food will become boiling hot once again].

As the *Mishnah Berurah* explains,

> Even though the warming of the food will be an unavoidable result (*p'sik reisha*) of the lighting of the stove, for the food will automatically be warmed, nevertheless, where the prohibition of telling a gentile (*amira l'akum*) is involved, which is a rabbinic prohibition involving no physical act, we are not so stringent and permit even a *psik reisha*.

Accordingly, one may tell the maid to do something which is not forbidden, even if the act will inevitably result in a *melacha d'oraita*. Thus, if one forgot to unscrew the bulb inside a refrigerator before Shabbat, he may tell the maid to open the refrigerator, take out the food for Shabbat, and close the door, because turning the refrigerator light on and off is merely a *p'sik reisha* of the act of opening and closing the refrigerator, an act which is itself permitted. He should not, however, tell her to unscrew the bulb, because then the extinguishing of the light would not be a *p'sik reisha*; it would be the intended *melacha*. R. Moshe Feinstein (*OC II 68*) permits even telling her to unscrew the bulb if

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a mere movement of a (*muktzah*) lamp for the Jew. "The *Mishnah Berurah* explains that "since a Jew could move the *muktzah* lamp in an unusual manner, such as by the back of his hand, between his elbows, or by some similar manner, no prohibition is involved even if the gentile carries it in a forbidden manner."

she will not be around later when more food will be needed for the Shabbat meals.

Similarly, though a Jew may not turn on the hot water tap on Shabbat because it would inevitably result in cold water entering the water heater and being heated, he may tell the maid to do so.

In each of these cases, there is a possibility of *mar'it ayin*. A passerby might believe that the Jewish employer *instructed* the maid to turn on the light, instead of *hinting* to her to do so. He may think that the employer told her to perform the actual *melacha* instead of some other permitted task, the inevitable result of which is the *melacha*. Or he may not be aware of the fact that the employer told her to perform a task which need not involve *melacha*, although the maid subsequently chose to perform the task with a *melacha*.

Thus, in these cases, a maid would not be allowed to perform these tasks for her employer, according to the *Chaye Adam* and the *Mishnah Berurah*, even were the actual facts of the case known to neighbors and friends. According to R. Shlomo Kluger, Maharam Schick, Maharshag, and others, the maid may perform those tasks if the facts are sufficiently well known in that commumity.

How well known? Here the halacha depends on the social reality. The problem is that most Orthodox Jewish employers are not familiar with the fine points of halacha. Unless they are guided by a competent Rav, they may very well require their maid to perform her work on Shabbat with no option to do it on Sunday, in which case they definitely violate Jewish law. If only a few ask a *she'elah* and are properly instructed by their Rav, they violate the strictures of *mar'it ayin* according to all opinions. Until this subject is discussed and publicized in all the synagogues and other public places, unless the halachic guidelines become widely accepted in real life, employers will continue to be quite limited in what they may have their live-in maids do for them on Shabbat.

Conclusion

Realistically speaking, employing the services of a maid in accordance with the requirements of halacha on Shabbat is virtually impossible according to the *Mishnah Berurah*. First of all, the employer has to leave it up to her whether or not to perform any

task involving *melacha*, and the employer has to really mean it. He may not pressure her to do those chores on Shabbat. This is not too realistic a situation in contemporary employment. Secondly, even if the employer provides her with that option, the maid remains quite limited in what she may do; she is restricted to those cases where *amira l'akum* is permitted. The normal workload of a maid is bound to transgress these limited activities unless the employer is at least something of a *talmid chacham* and knows the dos and don'ts, or unless his local rabbi provides constant and close guidance.

Other *poskim* allow a somewhat wider range of chores to be performed by the maid, but still subject to the basic limitation that all *melachot* remain optional: for example, if the employer asks her to turn on the hot water for him, she has the right to refuse. Furthermore, the more liberal point of view of these *poskim* only applies where it is common knowledge that the maid has the genuine option not to perform *melacha*. In how many communities today is this common knowledge?

Because of these halachic difficulties, it is clear that, realistically speaking, employing a live-in maid on Shabbat is highly problematical.

Beyond the strictly legal issues dealt with in the pages of the *Shulchan Aruch* and the *poskim*, it is necessary to call attention within the framework of this article to a real problem caused in our communities by the widespread hiring of such full-time help. Many are already familiar with the too-numerous incidents of these maids actually bringing up the children while their parents are away all day on the job. Too often the same parents who spend quite a bit of money on their children's schooling unwittingly allow an alien philosophy and outlook to undo a good part of what the children are taught in school. We are not simply talking about maids who teach their young wards the Lord's Prayer, or who take them to church, or any of the other "horror stories" not written about in the papers, but nevertheless known to so many of us. The problem is one of the *hashpa'ah*, the formative influences of a Jewish child's formative years, excercised, even with the best intentions, by those of a non-Jewish, and sometimes even an anti-Jewish, culture. To this problem, indeed, it is difficult to find a halachic solution.

"Sheimot" and Their Disposal

Rabbi Jacob Schneider

I. Introduction

Perhaps the best indication of the "love affair" which the Jews have with the Torah is their treatment of sacred writings and books. A point in case is the common practice of picking up and kissing a sacred book which has fallen to the ground.[1] This reverence and affection, which is manifest during the book's lifetime, become even more pronounced "posthumously." When the book is worn out and no longer usable, it is placed in a specially designated storage area,[2] and oft times transferred later for burial in the local cemetery. The invention and perfection of the printing process (and particularly, the dizzying technological advances which have been made during the last half-century) have imperiled this beautiful practice. Quite simply, the current infrastructure for the disposal of sacred works is no longer sufficient to meet the demands for the proper disposal

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1. See *Sefer Chassidim* no. 18 who permits one who is in the middle of the *Amidah* to pick up a sacred book which has fallen on the floor (if it is disturbing his concentration). See *Imrei Shalom* Vol. 2 no. 14, who proves that one may actually leave his place of prayer and walk to the fallen book in order to raise it.
2. Adherence to this practice has yielded the treasure troves of the Cairo Genizah. For over one thousand years, the chamber in the women's gallery of the Ben-Ezra synagogue served as a repository for all types of *sheimot*. Due to the dry climate these documents were remarkably well preserved.

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of reams upon reams of sacred writings. The many Torah pamphlets, newsletters, newspapers, magazines, and study sheets that are produced, cannot be provided with a dignified manner of disposal. The purpose of this essay is to explore the dimensions of this problem and examine several possible solutions.

The Biblical Prohibition

The Talmud states that it is forbidden to erase the name of God.[3] The source for this prohibition is the biblical verse:

לא תעשון כן לה' אלקיכם

You shall not do so to the Lord, your God.[4]

Coming on the heels of the positive commandment to destroy any vestige of idolatry and pagan sites of worship, this verse is understood as a negative commandment against the destruction of all that is sacred. This includes: a) any item belonging to the *Bet HaMikdash* (Holy Temple),[5] and b) God's name.[6] The prohibition against erasure of God's name is limited to seven[7] specifically enumerated names. They are as follows: the Tetragrammaton [יקוק], 'Adonai' [אד-ני] 'El' [א-ל], 'eloha' [אלו-ה], 'Elohim'[א-ל-הים] 'Elohai'[אל-הי] 'Shaddai' [ש-די] and 'Zebaoth' [צב-אות].[8]

Other names of God (e.g., רחום [Merciful One]) are considered merely as descriptive appellations and, as such, are not included in the prohibition. Rabbi Shabbetai HaCohen rules that the names of God in languages other than Hebrew, (e.g., God, Dieu), are viewed strictly as descriptive terms and possess no sanctity.[9]

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3. TB, *Shavout* 35a.
4. Deuteronomy 12:4
5. TB, *Makkot* ibid.
6. TB, *Shavout* , ibid.
7. See *Kesef Mishneh* ad. loc. for variant reading.
8. The eight Divine names listed here are classified as only seven. The Tetragrammaton is not pronounced as it is written, but rather as 'Adonai'. Hence, the first two Divine names are considered as one. See *Kesef Mishneh* ibid.
9. *Siftei Cohen*, YD, 179:11.

The Rabbinical Prohibition

The biblical prohibition, which is limited to the destruciton or erasure of the seven names of God, was expanded rabbinically to include the destruction of any portion of Scripture and its translations and commentaries. As Maimonides puts it:

> It is forbidden to burn or destroy by direct action any sacred texts, their commentaries, and their explanations.[10]

The source for this prohibition is found in a talmudic passage. Before citing the passage, it is necessary to understand its historical background.

Originally, the Oral Torah, as its name implies, was to be transmitted only orally. It was prohibited to commit the Oral Torah to writing. In addition, there existed restrictions in regards to the writing of the Written Torah. It was to be written in its original language (Hebrew), with specifically prescribed characters (Assyrian script), with certain inks, and only upon parchment. In fact, there existed an opinion that if these laws were contravened (i.e.the Oral Torah was committed to writing, or the Written Torah was not written according to specifications), then the ensuing written material (regardless of its value) was not permitted to be read or studied.

During the talmudic period (third to sixth century C.E.), the Rabbis realized that the Jewish people were in danger of forgetting the Torah. In order to insure the perpetuation of Torah study, they permitted the Oral Torah to be written and relaxed the restrictions in regards to writing the Written Torah. Henceforth, one was allowed to write the Written Torah in any language and script, with any ink, and upon any material.

Rabbi Yosse ben Yehuda relates that in times prior to the dispensation, Rabban Gamliel had a tub of mortar overturned upon a Targumic version of the book of Job, due to the fact that it was

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10. Rambam, *Hilchot Yesodei HaTorah* , Chap. 6 sec. 8.

not written in Hebrew. Rebbe questioned the authenticity of the event and said:

וכי מותר לאבדן בידים

> Is it permitted to destroy them [these writings] with one's own hands?[11]

Although these "illegal" writings are not deemed as functional study material, nonetheless, their sanctity is such that they may not be destroyed. If this is so in the era prior to the dispensation which relaxed the rules in regard to the transmission of the Torah, it is all the more true that in the post-dispensation era, Torah writings may not be destroyed.

The Burial Of Holy Writings

How does one dispose of these holy writings? In regards to a Torah Scroll the Talmud presents us with clear-cut guidelines.

> A Torah Scroll which is worn out may be interred by the side of a Torah scholar ....Rabbi Aha bar Jacob said: It should be put in an earthenware vessel.[12]

As explained by Rabbi Nissim ben Reuben, a fourteenth century talmudic commentator, the insistence upon an earthenware vessel (as a container for the Torah scroll), is a further manifestation of our concern for the sanctity of the Scroll. Even upon burial, steps are taken to delay the inevitable disintegration.

What about the translations and commentaries upon the Torah? We have seen earlier that one is prohibited, albeit rabbinically, to destroy them, Must one afford them the same treatment as a worn-out Torah Scroll (i.e. burial in an earthenware vessel), or may they be disposed of in some other manner? The *Magen Avraham* [13] seems to imply that all Torah works must be interred in the same honorable manner in which a Torah Scroll is

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11. TB, *Shabbat* 115a.
12. TB, *Megillah* 26b.
13. *O.H.*, 154:9.

buried. However, the author of *Pri Megadim* [14] writes that this approach is not commonly practiced. Similarly, the *Kaf HaChayyim*[15] writes that the other holy writings are buried, but not necessarily in an earthenware vessel. Further substantiation of this position is found in the *S'dei Chemed*[16] who cites the opinion of *Zera Emet* (authored by the eighteenth century Italian codifier, Rabbi Ishmael ben Abraham HaCohen) that the other Holy Writings (in contradistinction to the Torah Scroll) are placed in bags and buried.

The Problem and Two "Supply-Side" Solutions

Compliance with even the more lenient and prevalent opinion of non-earthenware vessel burial has proven to be of great hardship. Throughout the ages, rabbis have written about the accumulations of "*sheimot* "(literally: "names", i.e. of God, but a term commonly used for all worn-out sacred books, which may not be destroyed) and the inherent problems associated with these collections. The problems include the expense of burial, the fire hazard created by huge piles of "scrap" paper, and the frequent desecration by gentiles of these pages of sacred writing.

Most recently, Rabbi Moshe Feinstein has suggested that we deal with the problem from the "supply side." He advocates two suggestions to minimize the staggering amounts of *sheimot* that Jews are generating.[17] One, he counsels teachers against assigning to their students the writing of Torah verses and commentaries. He writes that an oral review of the subject is sufficient, just as it was in his youth (in the Eastern European *heder*). He adds that teachers who wish to teach the skill of writing should provide their charges with secular material to write! Secondly, he advises publishers to print smaller and more specific volumes. For example, why publish the weekday, Shabbat, and Yom Tov liturgy under one cover? The wear-and-tear inflicted upon the weekday section is many times

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14. *Aishel Avraham* , ibid.
15. *O.H.*, 154:37.
16. Vol. 1, p. 163.
17. *Iggerot Moshe O.H.* Vol. 4, sec. 39.

that to which other sections are subjected. Rather, the various sections should be published separately. This practice would yield Yom Tov and Shabbat *Siddurim* which "will last decades upon decades" and drastically reduce the amount of *sheimot*. Rabbi Feinstein sagaciously adds, however, that his one voice against the planned obsolescence of the book-publishing industry will be virtually ignored, and, hence, a solution must still be found.

Is Burning an Alternative?

A novel solution was proposed by the early 18th century halachic authority, Rabbi Jacob Reischer.[18] He writes that when faced with the *sheimot* situation in Prague, he was resolute in his approach to the matter — they must be stored in a safe and secure container until their eventual burial. Upon assuming the rabbinate in Metz, he was confronted with the identical problem, but on a much larger scale. Noting the proliferation of *sheimot* in the wake of Pesach-cleaning (a phenomenon which, according to my observation, has continued to the modern day), and the insufficiency of "the synagogue attics" to serve as their repositories, he turned his attention to the possibility of burning the *sheimot*. He reasons that although the actual burning of *sheimot* involves either a biblical transgression (for destroying one of God's seven names) or a rabbinical transgression (for the destruction of other Torah writings), it is nevertheless preferable to the inevitable disgrace that will otherwise befall them.

In support of his "lesser of the two evils theory," he cites the example of suicide. Suicide is considered a most heinous sin. To take one's own life is treated more stringently than an act of murder. The Midrash, however, states that King Saul, who impaled himself on his sword because he knew the Philistines would capture him and torture him to death, did not act illegally. As reprehensible as suicide is, it becomes the preferred choice where the alternative would be torture and death. By the same token, the burning of *sheimot*, as odious as it may seem, becomes the disposal-of-choice, when viewed against the backdrop of more degrading and disgraceful options.

He therefore opines that where other more conventional

solutions are not viable, it is permitted to burn Torah writings. He concludes, though, that the ash should be buried next to a Torah scholar.

Rabbi Yechezkel Katzenellenbogen, in a series of responsa in his work, *Knesset Yechezkel*,[19] strongly disputes this ruling. Even with the best of intentions, it is absolutely prohibited to burn the *sheimot*. He rejects Rabbi Reischer's adducement of King Saul's suicide as proof that a one-time intentional destrucion is preferable in situations where the inevitability of the sacred writings' destruction will be preceded by the probability of their shameful and ignominious treatment. He cites Rabbi Shlomo Luria's opinion[20] that King Saul was exonerated for his suicide on entirely different grounds. King Saul committed suicide to prevent the death of the Jews who would otherwise have perished in the battle to rescue their king. As such, the parallel drawn from King Saul's suicide is invalid. He does rule, however, that in order to facilitate their burial, they may be placed in wooden containers (which are presumably cheaper than earthenware ones) or directly into the ground.

The consensus of halachic authorities throughout the ages has been to follow the more stringent opinion which forbids burning, the seeming lack of a viable alternative notwithstanding.[21] However, some rabbinic authorities make the point that the lenient opinion may be followed in dealing with Torah works which have no mention of God's name. Being that the nature of the prohibition is merely rabbinical, as mentioned earlier, it may be permissible to burn them in order to avoid more drastic desecration. Rabbi Isaac Weiss[22] follows this line of thought, to some degree, and permits the burning of Anglo-Judaic newspapers which contain Torah thoughts, in situations where they would otherwise be treated sacrilegiously.

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18. Responsa *Shevut Yaacov* , Vol. 3, no. 212.
19. *Y.D.* no. 37
20. *Yam Shel Shlomo, Bava Kamma,* Chap. 8, sec, 59.
21. *Kaf HaChayyim O.H.* 154:37.
22. Responsa *Minchat Yitzhak* Vol. no. 18, sec. 18.

Oral Torah and Written Torah

Rabbi Moshe Feinstein, in a lengthy responsum to his grandson, offers a possibility towards the amelioration of the *sheimot* problem.[23] The gist of his approach is based upon the aforementioned distinction between the Written and Oral Torah. The Oral Law, by its very definition, was not to be committed to writing. The legalization of the Oral Torah's writing was based solely on the need of the Jewish people to continue studying Torah. Hence, the sanctity of Oral Torah writings is but a function of their ability to serve as learning texts. Once they have become torn or otherwise dysfunctional, they do not retain their sanctity. Therefore, a page torn from a Talmud which is no longer utilized for study is no longer considered a sacred item. The Written Torah, on the other hand, is intrinsically holy. Even in situations where it no longer functions as a viable text, it nevertheless retains its sanctity. For this reason, Rabbi Feinstein argues, Oral Torah writings, including Talmud, Midrash, halacha works, and commentary upon the Written Torah, which have ceased to serve as actual study-texts, may be destroyed. However, texts of Written Torah and mentions of the seven Divine names, by virtue of their intrinsic sanctity, may not be disposed of cavalierly. Rather, they should be disposed of in the traditional Jewish manner of interment. Rabbi Feinstein adds one caveat: Even the Oral Torah writings, which lose their sanctity due to their loss of functionality, are not to be destroyed personally by hand. It is permitted, however, to place them in a bin, from which they will be taken for incineration or recycling.

The Issue of Intention

Rabbi Isaac Elhanan Spektor, in dealing with the disposal of the printers' proofs of sacred works, makes a point which has bearing upon the many Torah writings found nowadays in newspapers and magazines. Based upon the wording of

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23. *Iggerot Moshe, O.H.* Vol. 4, sec. 39. Disposal of sacred writings is also discussed in *Tzitz Eliezer,* Vol. III, #1.

Maimonides, he writes that the sanctity of Torah writings exists only where the writer intended to sanctify them. If the writer had no such intention, or certainly, in instances where the writer explicitly wished that the written material be devoid of sanctity, the written material is viewed merely as a mass of individual letters and words and is not deemed holy.[24] He advises printers to declare verbally, before making the proofs, that their intention is not to invest their printed matter with any sanctity.

Rabbi Isaac Weiss cites this ruling and adds that in regard to Anglo-Judaic newspapers which contain some Torah writings, no such explicit declaration is necessary.[25] He adduces the opinion of Rabbi Benjamin Aharon ben Abraham of Solnik who permitted the prevalent practice of disposal of the margins of sacred works. Rabbi Benjamin Aharon writes that halachically the sanctity of Torah writings extends to the margins as well. Nonetheless, since the common practice is to cut off the margins, it is as if the original writers of the book explicitly stipulated that the margins should be excluded from the sanctity from which they otherwise would have been imbued.[26] Rabbi Weiss opines that the publishers of these newspapers, knowing full well in advance that the Torah portions will not be disposed of in the traditional manner, desist from sanctifying them. In additon, since it is the common practice to destroy these papers, it is unnecessary for the publishers to stipulate verbally their desire to refrain from investing the text with any sanctity. Rather, the situation alone attests to the fact that these writings are not classified as sacred.

Rabbi Spektor issues one important qualification to his rule. Although the printers' proofs (or Torah articles in English newspapers) are not treated as holy writings, they are to be treated no less respectfully than "accessories of religious observances." Although the Talmud rules that "accessories of religious observances" may be thrown away (and don't require interment),

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24. Responsa *Ein Yitzhak, O.H.* no. 5.
25. Responsa *Minchat Yitzhak* , Vol. 1 no. 18. sec. 19.
26. Responsa *Mas'at Binyamin* , no. 100.

nonetheless, the Ramo[27] cites the opinion that they should not be treated with disgrace. Therefore, although there is no prohibition to destroy or erase these Torah writings, nonetheless, one is not allowed to treat them as ordinary household garbage.

Recycling

I would like to propose another solution to the burgeoning *sheimot* problem. The credit for this method goes to the newly-rejuvenated environmental movement in this country. Recycling — the panacea for many of the world's environmental woes — may serve as the optimum solution for the *sheimot* dilemma. This proposed usage of recycling as a vehicle for dealing with the proliferation of *sheimot* is based upon a principle elucidated in the aforementioned responsum of Rabbi Isaac Elhanan Spektor.

Rabbi Spektor, in dealing with the disposal of the printers' error-filled first proofs, makes an important distinction between the biblical prohibition of erasing any one of God's seven names, and the rabbinic prohibition against erasing Torah writings. The rabbinic prohibition is limited to the *unnecessary* erasure of Torah writings. As the *Sefer HaChinuch* writes:

> The rest of the Sacred Writ....it is permissible to erase for any particular purpose.[28]

However, the seven Divine names may not be erased even for a constructive purpose. He does add, however, that where the erasure benefits the selfsame name of God, it is permitted.

This distinction is also found in the considerably earlier writings of Rabbi Shimon ben Zemah Duran.[29] Rabbi Duran was asked about the custom of teachers writing biblical verses (of the week's Torah portion) on tablets for their students. With the advent of a new week (and a correspondingly new Torah portion), are the teachers permitted to erase the verses and replace them with more

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27. *O.H.* Sec. 21 no. 1.
28. *Sefer HaChinuch* no. 437.
29. Responsa *Tashbez* Vol. 1 no. 2.

contemporary material? Rabbi Duran permits the practice. As proof, he cites the parallel prohibition of destroying any part of the Holy Temple and the corresponding dispensation for "constructive destruction" (i.e. to rebuild or refurbish the *Bet HaMikdash*). By the same token, he argues, one may erase Torah verses to rewrite other more applicable verses in their stead. He stops short, though, of permitting the erasure of the seven Divine names for such purposes. He, therefore, advises teachers to refrain from writing any one of God's names on these tablets.

This being the case, it stands to reason that it would be permitted to recycle *sheimot* (which contain no mention of God's seven names) for their usage in other holy books. The reduction of the paper to pulp, which occurs in the recycling process, serves the "particular purpose" of providing newly-recycled paper for yet other Jewish books. It is important to stress that this erasure can be deemed justifiable only if it serves as a means for generating other Torah works. The dispensation of "particular purpose" which the *Sefer HaChinuch* provides does not include anything short of wanton destruction. The erasure of Torah writings, with the intent of replacing them with secular writ, is certainly prohibited. Similarly, the recycling of *sheimot* for their usage in notepads, books, and detergent cartons is a sacrilegious act which is prohibited. However, the recycling of *sheimot* as a means for providing paper for other Torah works may be an idea whose time has come. As stated earlier, this solution does *not* address the issue of *sheimot* in its literal sense — the seven Divine names. By virtue of their sanctity and the corresponding biblical injunction against their destruction, it is forbidden to erase them even in the process of generating a supply of paper for future Torah works.

Afterword

We have attempted to delineate the problems and solutions which exist in regard to the disposal of *sheimot*. Despite the leniencies and dispensations, there exists a sense that the current state of affairs leaves something to be desired. Indeed, Rabbi Aaron Walkin, in response to a questioner who inquired about the advisability of publishing a Jewish newspaper in Romania, argues

that all the leniencies exist after the fact (once the newspaper has been printed). However, "who can permit the practice of originally printing these works....knowing full well that they will be destroyed and treated shamefully?"[30]

The question is a valid one, and must be faced honestly. Indeed, Rabbi Moshe Feinstein's practice was to desist from writing Scriptural verses on the invitations to his children's weddings.[31] Perhaps the only valid answer to this question is mentioned in passing by Rabbi Menashe Klein.[32] He states the aforementioned dispensation to commit the Oral Torah to writing as a possible precedent for this apparent breach of halacha: In the truest sense, Torah writings should not be published in situations where they will not be afforded the respect which they are due. However, the profusion of information (printed and disposable material) with which we are bombarded mandates that Torah-dissemination, too, must utilize this medium. The paramount importance of the perpetuation of Torah study permits us to override the directive of safeguarding the Torah's sanctity. The acknowledgement of this practice as a concession, rather than a desired condition, will yield important results. Rabbi Moshe Hayyim Luzzatto writes that "every leniency requires analysis"[33] [i.e. to determine its validity]. It therefore would behoove publishers, who publish sacred writings which inevitably will be treated improperly, to critically examine the proposition whether the intended benefit of Torah study outweighs the risk of Torah desecration.

Summary

The proliferation of Torah publications (especially those in English) has cast a heavy burden upon the traditional methods for the disposal of *sheimot*. We have seen, however, that in a majority of cases, the prohibition to destroy these writings is of a rabbinic nature. Thus, certain leniencies (i.e. controlled burning) may exist.

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30. Responsa *Z'kan Aharon* Vol. 2, y.d., no. 70.
31. *Iggerot Moshe* Y.D. Vol. 2 no. 135.
32. Responsa *Mishneh Halachot* Vol. 7 no. 183.
33. *Mesilat Yesharim*, Chap. 6.

Others argue that much of this printed matter is devoid of sanctity due to original lack of intent, or current lack of functionality. Despite their lack of sanctity, they must be treated with a modicum of respect, no less than "items of mitzva-observance." Thus, they should not be intermingled with foul and repulsive garbage. In addition, I have advanced the possibility of recycling this material for its usage in the printing of other Torah works. It remains to be seen whether this solution is techincally feasible. Above all, the publishers of this material must make a serious benefit-loss analysis before undertaking the publication of Torah writings. In respect to this analysis, the bottom line is not a financial one. Rather, the crucial issue is whether the Torah dissemination that is to be gained can outweigh the risk of possible Torah desecration.

Judaism and the Environment

Rabbi Eli Turkel

I. Introduction

The media are constantly informing us of dangers to the environment: oil spills damage the beaches and kill fish and birds; building a dam may destroy entire species of animals; holes in the ozone layer allow dangerous levels of radiation; smog caused by car exhausts already pollutes and endangers many cities around the globe; poisonous gases leak from chemical plants and harm thousands, not to speak of the dangers from nuclear reactors. In this article we will explore ways that the Torah or Rabbis mandate for protecting the environment.

In halacha there are three main categories of laws that impact on man and his environment. First, there is *bal tashchit* (בל תשחית)which forbids wanton destruction of property. Second, there are laws governing torts between neighbors (הלכות שכנים). Finally, the Torah forbids ownership of materials that can cause harm (לא תשים דמים בביתך).

Bal Tashchit

Environmental concerns frequently conflict with the desire to improve our material position. This conflict already appears in the Bible. On the one hand, man is commanded to study and harness nature and subjugate it for human progress, *"vekivshuha"*, וכבשה.[1]

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1. *Bereshit* 1:28.
Some writers, (e.g. Glucken "Man Against Nature: An outmoded

Prof., Tel Aviv University, Israel

On the other hand, man is commanded not to destroy materials unnecessarily, *"lo tashchit"* לא תשחית.[2] Quoting Rabbi Soloveitchik,[3] "Man must be creative in both the material (ארץ) and the spiritual (שמים) realms. There are diseases to conquer (ורפא ירפא), rivers to control, miseries to extirpate (מלאו את הארץ וכבשוה), conquering and settling Eretz Yisrael (כבוש וישוב הארץ)," all of which are mitzvot.

The Torah tells us that particular territories were assigned to each nation, to develop according to their creative genius, while Eretz Yisrael was assigned to the Jews (בהנחל עליון גוים בהפרידו בני אדם יצב גבולות עמים למספר בני ישראל).

Mankind has an obligation to develop the world beyond the natural state he found it in. As an example of man's need to perfect nature, Rabbi Akiva[4] draws attention to ears of wheat as they grow in nature and compares them with the bread produced by man. However, *"vekivshuho"* implies a struggle, a struggle between mankind and nature; as with every struggle there is a price to be paid. Part of this price is the increase in pollution with its consequent effect on the lives of all living things.

Furthermore, although man has tremendous power in the world, nevertheless, man does not have free rein to do as he wishes with the world. The Torah[5] teaches us that if one chances to meet a bird sitting on its eggs or chicks, one may not take the mother bird

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Concept,"in *The Environmental Crisis: Man's Struggle to Live with Himself*, ed. H.W. Helfrich, Jr. New Haven, NY, pp.129-130); Toynbee, "The Religious Background to the Present Environmental Crisis," *International Journal of Environmental Sciences* 3, 1972, p.142; and White, *Science*, p155, 1967, pp. 1203-7) have claimed that modern man's drive for technology and against nature derives from this verse in *Bereshit*.

As we see in this article, this is definitly not the viewpoint of Judaism, which stresses in numerous places the deep connections between man and nature and man's duty to preserve nature.

2. *Devarim* 20:29
3. Rabbi Besdin, *Reflections of The Rav*, Dept. Jewish Agency; see also "Lonely Man of Faith" *Tradition*, Spring 1965, and also *Divrei Harav*.
4. *Midrash Tanchuma Tazria* 5.
5. *Devarim* 22:6

with the children, but rather must send away the mother bird and only then take the eggs or chicks. Ramban there explains that killing the bird and its children together is morally the equivalent of destroying the entire species and hence to be avoided. Thus, according to Ramban one should be careful to avoid killing entire species of animals even if it is for man's benefit.

How does the Torah view man in relation to his environment? We may gain some insight from the biblical prohibition to cut down trees, even as a military exigency:

> כי תצור אל עיר ימים רבים להלחם עליה לתפשה לא תשחית את עצה לנדוח עליו גרזן כי ממנו תאכל ואותו לא תכרות כי האדם עץ השדה לבא מפניך במצור

> When you besiege a city for many days to fight and conquer it, do not destroy its trees, because you eat from them [the trees] and do not cut it down, for is the tree of the field a person, that it should fall before you in siege?[6]

It is not clear what the last phrase of the verse "is the tree a person" means. Rashi understands it as a rhetorical question implying that one should not cut the tree, for it is not like a man, who is being besieged, and should not be threatened. Thus, according to Rashi, the prohibition of "do not destroy - *lo tashchit*" arises because the trees do not belong to man; mankind has no right to inflict damage on the vegetation of the world. Ibn Ezra disagrees with Rashi, claiming that the prohibition arises because man depends on trees for his livelihood.

According to Rashi the prohibition is a basic one. Man does not have the right to destroy nature without a good reason. In disagreeing, Ibn Ezra says that the prohibition is for man's own benefit, not for the benefit of nature.

However, even according to Rashi, who interprets the prohibition as based on the tree's "rights," there are limits to these rights. It is ultimately the good of man which determines the limits

6. *Devarim* 20:19

on the destrucion of the ecosphere, as will be explained hereinafter.

Rav Saadiah Gaon[7] enumerates at great length the rights of man under the rubric of "conquest of nature," (וכבשה). He includes using animals and fish for food and medicine, pearls from shells, constructing dams for power, extracting metals from the earth, etc. The Talmud[8] and Midrash teach that everything in the world was created with a purpose. Even flies, wasps and other insects can be used for medical purposes or are messengers of G-d. *Ein Yaakov*[9] explains that without this Gemara we would have no right to kill these insects. However, when man gets direct benefit from them, they can be destroyed. Just as man is allowed to eat animals, so too he may kill animals or insects for use in medicines. However, except for such purposes, there is no justification in destroying animal life. *Ein Yaakov* further explains the Gemara as teaching us to follow G-d's example. Just as He created the world with good sense and purpose, so man should not change anything in this world without giving it deep thought.

The position of *Ein Yaakov* summarizes the Torah view towards the environment: Man has the right to make changes in his environment since the world was created for man's benefit. However, man should exercise this privilege judiciously. We should take into account that G-d created everything as it is with a good purpose, and thus we should not change or pollute our surroundings without giving it serious consideration. While *ve-kivshuho* is a right and a privilege, it is also a responsibility and is limited by *bal tashchit*.

II. Wanton Destruction

As previously mentioned, the Torah prohibits the destruction of fruit trees while besieging a city. Even indirect destruction — for

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7. Rav Saadiah Gaon, *Commentary on Genesis* (in Arabic and Hebrew) ed. Moshe Zucker, pp.53-54 and pp. 258-2598.
8. *Shabbat* 72b. See also *Bereshit Rabba, perasha* 10:7. Even insects can act as messengers of G-d, see *Midrash Tanchuma* beginning of *Chukat*. An example is a gnat that tortured Titus (*Gittin* 56b).
9. *Ein Yaakov* on *Shabbat* 77b.

example, diverting a stream of water from the tree — is forbidden.[10] The Talmud extends this as a prohibition to tear clothing, destroy buildings, waste money, fuel, food or drink, or in general ruin anything that can benefit people. Even if one destroys property to instill fear in his family (e.g. breaks dishes to frighten children), he transgresses this biblical prohibition. Maimonides[12] disagrees and says that only the destruction of fruit trees is biblically proscribed, while other cases are rabbinically prohibited. Moreover, the prohibition of destroying fruit trees applies only if the destruction is wanton and purposeless. However, if one cuts down the tree because the wood is worth more than the fruit, one does not violate the prohibition. Rosh[13] extends this to a case where one needs the place where the tree is growing.

Based on this reasoning, Rabbi Landau[14] (the *Nodah Biyehudah*) states that hunting animals is not prohibited by either *bal tashchit* or the prohibition to cause animals unnecessary pain (צער בעל חיים) since there is a benefit. Neverthless, Rabbi Landau points out that only wicked people such as Nimrod and Esau are identified in the Bible as hunters. Hence, hunting is a profession that should be avoided, if possible.

We can gauge the importance of preserving trees from the report of Rabbi Chanina[15] that his son died because he had cut down a fig tree. Among those who will never see a blessing from their activity in their lifetimes, the Talmud[16] lists people who destroy good trees. R. Yaakov Emden [17] (*Yavetz*) struggles with both these passages. We have already seen that destruction of fruit

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10. Rambam, *Hilchot Melachim* 6,8; *Sifre* to *Devarim* 20:19.
11. *Shulchan Aruch Harav, Hilchot Sh'mirat Guf Vanefesh* p.14. See also the *Nodah Beyihudah , Yoreh Deah* 10, who says that if there is no use to the ownerless property, e.g. wild animals in a forest, there is no prohibition of *bal tashchit*.
12. Rambam, *op cit*, 6:10.
13. *Pesachim* 50b.
14. *Nodah Biyehudah*, ibid.
15. *Pesachim* 50b.
16. *Bava Bathra* 91b; see also *Yoreh Deah* 11b; 16, n.o.6.
17. *Shealat Yavetz*, I,66.

trees is a violation of biblical law. If so, why does the Talmud stress the dangers involved, if there is the stronger case of a biblical prohibition? Furthermore, we would assume that no *Amora* (Talmudic Rabbi) would transgress a biblical prohibition — why then did the Rabbi's son cut down a tree? Hence, he concluded that personal danger and punishment apply even in cases where one does not actually violate the biblical prohibition of destroying trees — for example, if one derives benefit from the wood of the tree. Consequently, he concludes that one should never cut down a tree regardless of the justification. Rabbi Yehuda Hechasid[18] also wrote that one should not cut down fruit trees. The commentators again explain that even when there is no specific biblical prohibition, there is nevertheless danger. The son of Rabbi Chanina would not have violated a biblical law. If he died because of cutting down a tree, obviously it was a circumstance which, from the vantage of pure law, allowed destruction of the fig tree.

Chatam Sofer[19] disagrees with *Yavetz* and rules that if the place of the tree is needed, it is permissible to cut it down. Only if the benefits are doubtful is there a danger. *Chatam Sofer* further observes that if it is possible to uproot the tree with its root system and replant it elsewhere, it is prohibited to destroy the tree. Others have a custom to sell the tree to a gentile (even in cases where destroying the tree is justifiable) or leaving the tree to dry out by itself and only afterwards cutting it down. Rabbi Wosner[20] opines that the compartive worth of a tree depends on local custom. Thus, in modern societies one may cut down a tree even to plant a vegetable garden, since most people prefer a garden to trees in their front lawn. When the tree is in the way of building a synagogue or if its roots are damaging graves, Rabbi Wosner concludes that it is

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18. *The Ethical Will of Rav Yehudah Hechasid*, #45. See Comments of Maharsham Berzon on the page.
19. *Responsa Chatam Sofer, Yoreh Deah* No. 102; *Responsa Chavat Yair* No. 195; *Responsa Binyan Zion* I, No. 61.
20. *Responsa Shevet HaLevi*, I, 112 and II, 46, 47. Rabbi Wosner points out that driving a speeding a car is more dangerous than crossing a river with strongly flowing water and so is certainly prohibited.

immediately permissible to remove it; however, even in this case it is preferable to ask a non-Jew to chop it down.

From the above discussion, it is evident that the prohibition of destroying fruit trees is more stringent than many other biblical laws although it seems to be an ordinary prohibition. The *Netziv*[21] explains that man himself is identified with trees: the Torah wishes to stress that man is part of the cycle of nature and thus should be particularly careful about any unnecessary destruction. Although the Torah views the world as having been created for the benefit of man, the mitzva of *bal tashchit* comes to remind man that he is part of nature, that man himself is thus similar to the tree, and that mankind must carefully guard the world's resources and not squander them. The Talmud states[22] that one should even pray for a sick tree in addition to taking care of it physically. *Chinuch* continues that the message of this mitzva is for everyone to appreciate and conserve the good in the world and not waste even the smallest seed; only evil people destroy worldly goods, thereby ultimately destroying themselves.

In practical terms, the prohibition of *bal tashchit* coincides with the need to conserve energy resources. The Talmud prohibits covering lamps because it makes the oil burn faster. Extrapolating from this, we may say that one should not leave on lights when not in use, wasting electricity and ultimately the natural fuel used to generate the electricity. Similarly, other ways of wasting energy, e.g. not using thermostats, could be included in the prohibition of the Gemara, as would wasting gasoline by running the motor for extended periods of time when the car is not in use.

The prohibition of *bal tashchit* applies even when the property being destroyed is ownerless, *hefker*.[23] Thus, the destruction of wildlife through oil spills, industrial pollution, or similar catastrophes, are all prohibited by this law.

In summary, *bal tashchit* forms a counterbalance to *vekivshuho*. *Vekivshuho* instructs man to subjugate the world for

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21. *Ha'amek Davar* to *Devarim* 20:19.
22. *Shabbat* 67a.
23. See note 11.

his benefit, while *bal tashchit* teaches man that as part of nature he should conserve his resources and not destroy nature unless there are strong overriding considerations.

Even in cases where the destruction is technically legal, there are personal dangers to man. Rabbi S. R. Hirsch[24] connects the two principles: Under the concept *bal tashchit* purposeless destruction is forbidden, so that our text becomes a most comprehensive warning to human beings not to misuse their G-d-given position as masters of the world to capriciously or merely thoughtlessly wreak destruction on anything on earth. Only for wise use did G-d lay the world at our feet when He said to Man, "subdue the world and have dominion over it."

III. Relations between Neighbors

Today it is generally recognized that pollution has both an economic and a human cost. Water pollution requires the construction of water treatment plants. Smog and acid rain blacken the exterior of buildings. Agricultural output is diminished by a lack of soil conservation. Some countries are beginning to keep track of an "environmental gross national product." These economic factors are in addition to the dangers to human beings. In this section we discuss the obligations of a person to prevent damage to property and life.

Before discussing details of this law, we need to understand the general approach of halacha to damages. The Torah states that the entire world belongs to G-d (לה' הארץ ומלואה). As such, man does not have complete control over anything in the world. At one extreme, even man's body is not completely his to do as he sees fit. Suicide is an offense to G-d equivalent to murder, and the person will be punished in the world to come.[25] One does not have the right to cause unnecessary harm to oneself or to give someone else permission to damage him.[26] (Thus, it is questionable whether one

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24. Rabbi Hirsch on *Devarim* 20: 20.
25. Commentary of Radvaz to Rambam, *Hilchot Sanhedrin 18:6* see also Rav Zevin, *Le'or ha-Halacha, Mishpat Shiluk.*
26. Rambam, *Hilchot Chovel Umazzik* 6:1. *Shulchan Aruch, Choshen Mishpat,* 420:31. *Shulchan Aruch Harav, Hilchot N'zikei Guf Vanefesh* 4.

may undergo plastic surgery for purely cosmetic reasons.)

When a person causes damages to property, he has to make restitution. However, beyond the money he owes, he has also sinned. One who damages property is required to do *teshuva* even though full restitution has been made.[27] If the damage is negligible (worth less than a *peruta*) he is liable for "stripes" (lashes).

A general rule in torts is that one is not liable for indirect damage (גרמא פטור בנזיקין). Nevertheless, one is prohibited from causing indirect damage. This arises because damage has an "*issur*" aspect to it in addition to the financial aspect.[28] In this article we will be concerned mainly with cases where one is prohibited from damaging other people or property but shall not concern ourselves whether one could actually collect payment for these damages.

The second chapter of *Bava Bathra* deals with the laws between neighbors and lists many circumstances in which a person is required to remove hazardous materials even if they have not caused damage. For example, one can be prevented from digging a pit next to his neighbor's wall, as the hole will weaken the wall. Similarly, one cannot use an oven if the heat will cause damage to an upstairs neighbor.

There is a fundamental area of disagreement between the rabbis and Rabbi Yosi. The rabbis state that על המזיק להסיר הנזק, it is the responsibility of the potential damager to prevent damages, while Rabbi Yosi claims על הניזק להסיר הנזק, that the one to be damaged must prevent it. The Gemara[29] explains that they argue only about a potential damage, but for an immediate damage (גיריה דיליה), everyone agrees it is the damager's responsibility. Thus, according to Rabbi Yosi, one can plant a tree near a neighbor's yard even though the roots will eventually cause harm to his property, yet one may not dig a hole, since the hole immediately weakens the ground.

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27. Rambam, *Hilchot Teshuva* 1:1 and 2:9.
28. Meiri, *Bava Bathra* 23a, see also R. Shimon Shkop to *Bava Bathra* 87.
29. *Bava Bathra* 18b and 22b. The exact definition of "גיריה דיליה" is controversial. See Rashi and Tosafot to *Bava Bathra* 22b, as well as Ramban and Rosh. Also Rambam, *Hilchot Shecheinim* 10:6; *Encyclopedia Talmudit*.

Rosh [30] was asked about someone who made a hole in his ground so that when it rained, the water rose out of the well and flooded the neighbor's basement and also caused a stench in the neighbor's yard. Rosh responded that according to all opinions in the Talmud, the first party had to remove the possibility of damage. The second party is unable to do anything to defend himself since all houses have yards and basements and the damage is extensive.

The Talmud also introduces "zoning laws" mandating that certain industries must be situated outside city limits. Industries which produce bad smell, — e.g. tanneries, meat packing, and also cemeteries — must be located at least 50 *amot* outside the city.[31] Similarly, all industries which produce smoke must be at least 50 *amot* outside the city. The Talmud says that in Jerusalem one may not have large ovens because they blacken the walls, while Rabbi Nathan extends this to all cities. These laws are based on the fact that damage to the whole community is more severe than damage to an individual.

There are many cases where the court cannot prevent the establishment of certain practices because of possible damage to an individual, but can prevent it if the general public is endangered. Thus, one may not have a permanent threshing floor[32] within 50 *amot* of a city; even if the threshing floor preceded the city it must be removed, though with proper compensation. The kernels of wheat from the threshing floor may harm the people of the city. Rashi emphasizes that not only do the particles harm people, but they also dry out the vegetation in the surrounding areas. If the damage were to an individual, we could not insist on the dismantling of a preexisting factory. However, if there is a hazard to the general public, even preexisting industries can be removed.[33]

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30. *Tur, Choshen Mishpat* 155,21.
31. *Bava Bathra* 25a.
32. Ibid. 24b.
33. Ibid. See also *Shulchan Aruch, Choshen Mishpat* 155 and *Aruch Hashulchan,* ibid no. 21. If the government pressures a small group to move or else it will punish the entire community, they must move for the sake of the community. Similarly, in other cases individuals must give up their claims in deference to the entire community and can only claim compensation for the damages incurred.

Similarly, one cannot establish a threshing floor on one's private property inside the city unless there is sufficient room to prevent any kernel of wheat (or other dust particles) from reaching outside the property.

Beyond the general zoning laws, special rules apply to the land of Israel to increase its beauty and encourage people to live there. The Mishnah states[34] that all trees must be planted at least 25 *amot* outside the city and that sycamore or carob must be 50 *amot* away in order to preserve the beauty of the city. Tur[35] explains that this law applies only in Israel; *Bet Yosef* further states that in his day this law doesn't apply even in Israel since the Jews do not govern the country. Logically, then, this law should apply again in modern-day Israel. The rabbis instituted many decrees to facilitate the beautification of the land of Israel and to prevent the desolation of the country, for they gave the settlement of Israel a very high priority.

In most cases, if the one damaged acquiesces to the damage, he gives up his subsequent right to object. However, for certain categories of damage, even an oral declaration giving permission is meaningless, since these damages are so great that a person does not realize the full implications of giving up his rights.[36] Rabbenu Tam[37] says even if he made a formal agreement (*kinyan*) in front of witnesses, he can still change his mind. Among the things in this special category are outdoor bathrooms and smoke.[38] The Jerusalem Talmud qualifies this to apply only to permanent (most of the day) smoke. Rabbenu Tam says that one may object and prevent the use of even temporary smoke that bothers the neighbors. Furthermore,

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34. Mishnah *Bava Bathra* 2:7.
35. *Tur*, ibid., and *Shach*, #12. The Ramah (רמ״ה) disagrees. See also R. Arieli, *Einayim Lemishpat, Bava Bathra* 24b.
36. *Bava Bathra* 23b.
37. Ibid., ד״ה אין חוקה לנזיקין see also *Shulchan Aruch Harav, Hilchot Nizkei Mammon* #18.
38. Tosafot (ב״ב כג א ד״ה בקוטרא) say that this applies only to exposed bathrooms but not to modern bathrooms that are enclosed. Ritva, ibid., says that it depends only on the odor emitted. See *Shulchan Aruch*, ibid.#38.

smoke and outdoor bathrooms are only *examples* of damages that people cannot tolerate; when there are other types of damages which people find intolerable, the same law applies.[39] Ramban[40] explains that only for monetary damages do we rely on assumed consent (חזקה), but when there is damage to a person's body, he can change his mind even after he has consented.

As an application of this principle, Rabbi Feinstein discusses[41] the question of smoking in a public place, e.g. a *Bet Medrash*. He decides that any objector can prevent people from smoking, since smoke directly affects others. Furthermore, smoke causes physical harm and not just discomfort. Rabbi Feinstein goes further and opines that theoretically one could even collect payment for these damage. Rabbi Waldenberg[42] seconds this opinion and adds that even if the smoke enters a public area, one can object to it, and certainly if it enters one's private property. Furthermore, even if one had already agreed to the smoking, he can change his mind based on the latest medical reports. However, *Chazon Ish* seems to disagree in part.[43] He says that the laws of an outdoor bathroom apply only if the odor is so offensive that one could not say the *Shema*. However, if the air from the bathroom is odorless but harmful, one cannot object. Presumably, this would also hold for the laws of smoke.

The *poskim* have taken various positions. Rabbi Eliashiv[44] says that smoking in a *Bet Medrash* is to be decided by a majority vote since it is a commonly accepted practice to smoke. According to this opinion, if smoking is prohibited in most places because of health reasons, then Rabbi Eliashiv would agree that one person could

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39. Jerusalem Talmud, *Bava Bathra* Chapter 2, Halacha 2; Ritva, *Bava Bathra* 23; *Tur*, ibid. 55.
40. Ramban, *Bava Bathra* 59a.
41. Responsa *Iggerot Moshe Choshen Mishpat* II 18; also, *Assia*, Vol. 5, pp. 248-251.
42. Responsa *Tzitz Eliezer*, Vol. 15, #39; Vol. 17,#22; also *Assia*, Vol. 5, pp. 252-257; R. Gross, *Shevet Hakehati*, I, 332.
43. *Chazon Ish* to *Bava Bathra* 22.
44. *Responsa Yeshiv Moshe* of R. Eliashiv, pp.227-8.

object to any smoking in the room. It is not clear why Rabbi Eliashiv and the *Chazon Ish* do not consider the health problem as constituting direct damage.

In addition to control over air pollution, halacha is concerned with water pollution. The *Tosefta* states that one may wash his body in public pools. However, if the feet are muddy, he may not wash them in the public pool.[45] If the water is used for drinking, one should never use it for bathing. Rabbi Yehuda Hechasid states[46] that one should not bathe in a swimming area if he has a skin disease (שחין) because the next person might get it. The Talmud[47] also gives rules for use of water when several cities draw from the same river. The city closer to the source has a prior claim for use of the water for any reason — whether for human consumption or for animals or even for laundry.

One of the main questions facing the modern environment movement is the frequent conflict between environmental concerns and jobs. Talmudic and rabbinic literature have long respected the dichotomy. The sages of Narbonne[48] felt that one could not force a person to close a chimney in his house even when the smoke entered someone else's window. The reason is that the house owner has no other alternative and cannot be forced to move. The Talmud says that one may not operate a smithy or similar device in one's home because of the noise and the people who are constantly entering and leaving, disturbing the neighbors' quiet. *Chatam Sofer*[49] says that the Gemara is talking about a case where these types of business should be in a part of town zoned for commercial places. However, if one cannot move the business to the market place, he is not required to give up his livelihood to stop the noise. The reason for this is that neighbors cannot collect payment for

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45. *Tosefta Bava Metzia* Chapter 11, p. 31.
46. *Sefer Chasidim* No. 161.
47. *Nedarim* 80b; see also *Sheiltot*.
48. Meiri, ibid., 23a.
49. *Responsa Chatam Sofer, Choshen Mishpat* #192; *Pitchei Teshuva* indicates that there are circumstances where one would be required even to give up his livelihood in order to prevent damage to someone.

indirect damages. Nevertheless, one can prevent his neighbors from causing indirect damage.

However, if a person's livelihood is at stake, this prohibition does not apply. Meiri[50] explains that the difference between a store at home or a smithy is that a store belongs in the market place and not in the local courtyard.

Maharsham considered the case of owners of barrels of dye which emitted a foul odor.[51] He decided that one cannot prevent them from continuing their business, for two reasons. First, people in the town have become accustomed to the smell. Furthermore, many of the Jews in this town make their living by selling these dyes. Maharsham[52] considers the case of a fully enclosed bathroom. He says that the neighbors cannot object even initially, since the bad odors have been reduced to a minimium.

Another concern of rabbis was noise pollution, which is only now beginning to be recognized as a problem in modern communities. One cannot open a store in the local courtyard since it prevents the neighbors from sleeping, due to the traffic to and from the store. This damage is considered so severe that it is included in the category of things about which neighbors can change their mind, even if they did not object originally.

Although Rav Caro[52] rules that one can protest the noise of machinery in a private home (קול הפטיש וקול הריחיים), Ramo disagrees. *Chatam Sofer* explains that in the days of the Gemara, people worked at home and sold the goods at the marketplace. Hence, one cannot stop the use of tools such as a hammer or grindstones, because the other person has no other place to use them. According to this explanation, with modern zoning laws, it is possible that Ramo might agree that one can restrict the use of noisy machinery to industrial zones. Similarly, Rivash[53] states that one can prevent the use of noisy machinery even in the home if the

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50. *Bava Bathra* 23a.
51. *Responsa Maharashdam, Choshen Mishpat,* 462.
52. *Responsa Maharsham,* I, 178.
53. *Shulchan Aruch , Choshen Mishpat,* No. 156, 2. See *Bet Yosef* for a discussion of the various opinions.

neighbor suffers from headaches or if the noise damages wine in a preexisting winery.

IV. Avoidance of Dangerous Objects (לא תשים דמים בביתך)

Immediately after the mitzva of send the mother bird away before taking the eggs or chicks, the Torah commands us to build a fence around our roofs so that we will "not bring blood into our house", if a person should fall from the roof.[54]

The Torah enjoins us to build a fence on the roof to prevent danger to others. Even in cases where the neighbor does not sue to prevent damages, on our own we must make sure that no dangerous condition exists on our premises.[55] The Talmud teaches us that this law applies not only to rooftops but to all dangerous objects. As examples, one is not allowed to own a wild dog or a faulty ladder. On a stormy day, Rav Huna used to survey the buildings of his city and order the demolition of all unsafe structures.[56] The Mishnah[57] states that one is not allowed to keep a dog in a city unless it is chained. The Gemara says that one who raises a dog is like one who raises pigs, and a curse applies to both groups of people. A Jewish court can force the owner to kill his wild dog and remove a potential danger to the community.[58] Even if a public building, such as a synagogue, has a roof that is frequently used, a fence is required, and public funds are to be used to erect it.[59] We are stringent about doubtful situations concerning safety even more than doubts concerning biblical prohibtions,ספק סכנה חמור מספק איסור תורה.

In addition to the commandment exhorting us not to harbor any dangerous situation in our dwellings, it is also forbidden due to

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54. *Responsa Rivash*, No. 196.
55. *Devarim* 22:8.
56. Rambam, *Hilchot Rotzeach*, 11:44; see also *Chinuch*, No. 546 and *Minchat Chinuch* No.53.
57. *Ta'anit* 20b, *Ketubot* 41b.
58. *Bava Kamma* 83; see also Rambam, *Hilchot Nizkei Mammon* 5:9; *Shulchan Aruch, Choshen Mishpat* 409, 3.
59. Rambam, *Hilchot Talmud Torah* 6:14. *Bava Kamma* 15b.

the mitzva of "guarding" our bodies and our health, השמר לך ושמר נפשך. *Minchat Chinuch* explains[60] that the prohibitions are biblical when the objects harm other people, e.g. a roof without a fence or a dilapidated ladder. However, the prohibition is only rabbinical if the danger applies only to oneself, e.g. drinking unsafe water.

The *Tosefta* [61] lists a group of activities that one may do only if there is a minimum distance from possible damages. For example, Rabbi Yosi says that one must distance a beehive from the city by at least 50 *amot*, so that they will not sting people. Most commentators learn that this law is part of the laws of neighbors, which we presented previously. However, Rabbi Abramsky[62] has a novel way of interpreting this *Tosefta*. He claims that bees are dangerous and so keeping them near a city violates לא תשים דמים בביתך. It makes no difference whether or not people come to the house, as in the case of a dilapidated ladder, but rather that the bees chase the people. In either case the prohibition exists. Rabbi Abramsky further claims that according to *Chinuch* this prohibition applies even when the bee sting is not life threatening but only very uncomfortable.

According to Rabbi Abramsky, it is possible that industrial plants which deal in dangerous chemicals or other harmful materials must be sufficiently far away from populated areas so that no harm can occur. Similar rules may also affect building of nuclear plants. In all these cases, not only the rules of הלכות שכנים, "Laws between Neighbors," pertain, but also the biblical prohibition of *lo tasim damim beveitecha.*

V. Applications

Conservation of energy is certainly included under the mitzva of *bal tashchit.* Therefore, every person is commanded to do whatever he can to reduce waste of resources. This includes not using electricity unnecessarily, not wasting fuels of any kind, recycling materials, etc.

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60. *Minchat Yitzhak*, V, No. 122.
61. *Minchat Chinuch* No. 546.
62. *Tosefta, Bava Bathra*, Chap 1, No. 7.

Factories that produce constant smoke which bothers nearby residents can be forced to construct special smokestacks or scrubbers to remove all offensive odors. Moreover, according to Rav Feinstein and other authorities who do not allow smoking in public buildings because of health hazards, neighbors should also be able to prevent a factory from issuing dangerous smoke even though it has no odor. Rabbi Feinstein[63] stresses that smoking in a closed room is prohibited; although many people contribute to the harm that smoke causes, they are all responsible. Similar reasoning may apply to automobile exhaust or acid rain, which causes smog harmful to people and buildings. It is clear that factories can be prevented from dumping chemicals into public waterways that may harm other people along the riverside. One may not even wash filthy feet in public waters or bathe in the waters if one has a health condition that can contaminate other people using the waterways. If the water pollution does direct damage, one should even be able to collect damages in court.

We previously showed that the prohibition of *bal tashchit* applies even if the damage is indirect, e.g. diverting water from a tree. Nevertheless, it is not clear if very indirect damage would also be included under this reasoning. Thus there may not be a prohibition against using an aerosol can that might damage the ozone layer or using phosphates that damage wild life, since all these damages are very indirect. Nevertheless, the spirit of the law is that one should not do any action that even remotely causes unnecessary damage. Certainly, one would not be permitted to allow any oils spills that harm animals or fish, although one could not collect damages for this destruction since the fish and birds are not private property. However, damage to beach areas would have to be paid to whichever agency was in charge of that area.

The greatest arguments arise when there is a conflict between environmental concerns and people's livelihood. *Chatam Sofer* decided that one need not give up one's occupation because it is a nuisance to one's neighbors. According to this, one could not prevent lumber companies from cutting trees on their property as

63. *Chazon Yechezkel,* ibid.

long as there was no undue waste. Even edible fruit trees can be cut down if there is sufficient justification, but this should be avoided in most circumstances. *Chatam Sofer* indicates that if the damage is severe enough, the courts can force a person even to give up his job, but he doesn't give any details of the extent of this exception.

There are several topics that we have not discussed, which impact on practical decisions. Foremost is "*Dina De'Malchuta Dina*," the impact of government regulations on halacha.[64] Thus, many cases of pollution that are not prohibited by halacha may nevertheless be prohibited by government laws, which then gives them halachic status. Another point which we have glossed over is the question of priority. In many cases the ability to prevent damage a priori depends on which party was the first in the neighborhood. These laws are very complicated and beyond the scope of this article.[65]

We conclude by quoting the *midrash* :[66]

> בשעה שברא הקב"ה את האדם הראשון נטלו והחזירו על כל אילני גן עדן ואמר לו: ראה מעשי כמה נעים ומשובחין הן וכל מה שבראתי בשבילך בראתי. תן דעתך שלא תקלקל ותחריב עולמי. שאם תקלקל אין מי שיתקן אחריך.
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> When G-d created Adam he took him to see all the trees of the Garden of Eden and said to him: "See how good they are. Everything that I have created, I created for you. Pay attention that you don't destroy my world for if you destroy it, there is no one to fix it afterwards."

That the world was created for man's benefit implies obligations as well as privileges. If man destroys his environment, he will pay the price. To prevent such damage, G-d commanded us to appreciate nature and to preserve it.

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64. See note 41.
65. Rav H. Schachter, *Journal of Halacha and Contemporary Society*, Vol. 1, pp. 103-130.
66. See for example, *Responsa Rabbi Akiva Eiger* No. 151. Rav Shach, *Avi Ezri, Hilchot Shecheinim*.
67. *Kohelet Rabbah, perasha* 6:28.

Ethical Guidelines for Treatment of the Dying Elderly

Rabbi Zev Schostak

I. Jewish Ethical Perspectives

The Jewish legal-ethical system, known as halacha, governs virtually every aspect of Jewish life. In medical decision-making, halacha offers us direction in the area of medical ethics and conduct.

Halachic precedents and guidelines for prudent decision-making have become increasingly important in our fast-paced, sophisticated world of medical technology. With recent legislation for advance directives expressed through a living will or a healthcare proxy, we are now compelled to think about and articulate our views concerning the initiation or refusal of various medical treatments/therapies should we become incapacitated at a later date. The Cruzan case and advance-directives legislation have brought medical-ethics concerns to the forefront and it behooves us to review the issues involved. It must be emphasized, however, that we are offering here only a review of the halachic thinking on these issues without presuming to offer halachic solutions. Each case must be dealt with on an individual basis; only a halachic expert is qualified to weigh the factors in each instance and render a definitive ruling.

Halacha deems the sanctity of life, the preciousness of every moment, as the uppermost consideration. In fact, with few

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exceptions the imperative to preserve life supersedes concerns about the "quality of life" in medical decision-making. Quality of life concerns have, in fact, prompted a former Governor of Colorado to advocate euthanasia for the elderly and a Michigan doctor to create and use the so-called "death machine."[1] Arguments for the "quality of life" — limited medical resources for an ever growing population, patient rights, and death with dignity — while superficially appealing, are perceived in Judaism as nothing more than man playing G-d, intervening unduly in the eternal process of life and death. Jewish law vigorously asserts that life, even that of a terminal, demented, elderly patient, is of infinite value; it must be preserved no less than the life of a young and alert child with a hopeful long-term prognosis.[2]

This bold position is presented in a classic case (*Yoma* 83a) where the Mishnah directs one to remove debris that has fallen upon another on Shabbat even though the victim may live for only a short time. Jewish legal codes and responsa[3] elaborate that this victim must be saved even where his skull was crushed and he may live for only a few minutes. Though this victim may have been moribund, mentally incompetent, or a minor, his life must be saved.[4]

A more dramatic illustration of this principle is that of a triage decision in a facility which has only one respirator. The machine is connected to a deathly ill, disoriented 90 year old. May this dying patient be removed from the respirator in favor of a young accident victim who has just arrived, who will surely die without it, but will probably recover with it? Here, too, halachic authorities rule that

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1. Governor Richard D. Lamm of Colorado in March, 1984, declared that elderly people who are terminally ill have the "duty to die and get out of the way." In June 1990, Janet Adkins, a victim of Alzheimer's disease, used a suicide device invented by Dr. Jack Kevorkian.
2. *Halachah Urefuah,* Volume 2, p. 189, in an article entitled, "Treatment of a Moribund Patient and Establishing the Time of Death" by Dr. A. S. Abraham. Also, *Iggerot Moshe, Choshen Mishpat,* Volume 7, 73:2.
3. *Shulchan Aruch, Orach Chaim* 329:3-4. Also, *Tzitz Eliezer* 9:17 and 10:25.
4. *Biur Halacha* on *Mishnah Berurah, ibid, ad. loc.* Also, *Tzitz Eliezer,* Volume 8:15, Chapter 3.

the dying elderly patient *already on the machine* may not be removed from the respirator even though it could be reconnected to the young accident victim.[4] The rationale for this ruling is most significant: Every second of life is of infinite value, whether granted to young or old, to the disabled or retarded, or to a fully functional, coherent individual. By removing the old man from the respirator in favor of the young one, we are in effect declaring that the old man's life is less valuable than that of the young one. *De facto*, we play G-d when we pass judgment on the "quality of life." (However, in a case where neither of them has been placed on the respirator, priority may at times be given to the young accident victim who has the better prognosis for long-term recovery.[5])

Every life-saving measure — even extraordinary ones — must be utilized to prolong life, with few exceptions, the most common one being severe, unremitting pain and suffering. The source of this concept is also found in the Talmud (*Ketubot* 104a), which describes the fatal illness of the great Rabbi Judah the Prince, known simply as "Rebbe." Rebbe's pious maidservant, upon seeing her master's suffering, prayed for his demise, and even interrupted his students from praying for his life. Since the Talmud does not criticize her conduct or in any way reject it, Rabbenu Nissim, a major talmudic commentator, concludes, "There are times when one should pray for the sick to die, such as when the sick one is suffering greatly from his malady and his condition is terminal..."[6] Contemporary authorities have applied this passage to the treatment of the critically ill in extreme pain, by allowing them to refuse "extraordinary" life-saving measures and to receive intensive doses of pain-killers.[7]

G-d entrusts us to safeguard our bodies and preserve our health. He grants us the legal status of a bailee,[8] who must make every effort to watch the article he is given, protecting it from loss

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5. *Iggerot Moshe, Choshen Mishpat*, Volume 7, 73:2.
6. *Nedarim* 40a.
7. See n.2.
8. As heard from Rabbi Dr. J. D. Bleich, interpreting the Ran to *Nedarim* 40a, at a lecture at Young Israel of Ave. K, Brooklyn, on 4/19/90.

and damage. Interestingly, this concept of guardianship is expressed clearly in the words of the Torah, "Only watch yourself, surely watch your soul..." (Deut 4:9) which Maimonides[9] and others say refers to protecting one's health.

Another primary source for saving another's life is the verse, "And you shall restore it [i.e., the lost article] to him" (Deut 22:2). The Talmud (*Sanhedrin* 73a) reasons that if one is obliged to return lost property to its rightful owner, then he must certainly restore that "owner's" life and health,[10] wherever possible. Once again the issue of refusal of medical treatment is raised: if the rightful owner chooses to abandon his property and not seek its return, why can't the seriously ill patient, under certain circumstances, forego the restoration of his health?[11] Others argue that the analogy between property rights and human life is flawed. While one may exercise proprietary rights over his possessions, he does not "own" his body; it belongs to G-d.[12]

May a seriously ill patient request a high-risk procedure (i.e., where he may die immediately as a result of that procedure) when there is a possibility of long-term survival? At the outset, we must evaluate a number of factors: How do we define "high-risk?" Is the procedure experimental? What are the mortality statistics for this procedure in the general population, and how do they relate to this particular patient's case history? Also, what is the probability for long-term survival, and what do we mean by "long-term" — three months, six months, a year, or more?[13]

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9. *Mishneh Torah, Rotzeach,* 11:4.
10. Maimonide's *Commentary to the Mishnah, Nedarim* 6:8. Also, *Teshuvot Atzei Ha-Levanon,* 61, who extends this passage to include restoring health in non-life-threatening situations. See also *Halacha Urefuah,* Volume 2, pp. 133-134.
11. *HaKometz Mincha* on *Minchat Chinuch* Mitzvah 237, and *Hochmat Shlomo* to *Choshen Mishpat,* 426. See also article by Rabbi Herschel Schachter, appearing in the *Beit-Yitzchak Journal,* 5746 issue.
12. *Iggerot Moshe, Yoreh Deah,* Volume 2, 174:3. For primary sources, refer to *Mishneh Torah, Sanhedrin,* 18:6, and *Rotzeach* 1:4, and later authorities, *Sefer Chasidim* 723; *Shulchan Aruch HaRav, Nizkei Haguf V'Nefesh,* 4; *Responsa of Rivash* 484 and *Chazon Ish, Nezikin,* 19:5.
13. See *Darchei Teshuvah,* to *Yoreh Deah* 155:2,6, citing Rav Shlomo Kluger, who concludes that survival of less than one year is considered "hourly life."

Recent responsa find talmudic precedent to this notion of one's risking his immediate life (lit., "hourly life") when there is a possibility of long-term (lit; "enduring indefinitely" or "perpetual") survival.[14] The Talmud (*Avodah Zarah* 27b) raises the issue of whether an individual may risk his life by receiving potentially life-saving treatment from a heathen physician who may kill him. May he risk his certain short-term life of a day or two[15] against the possibility of a long-term cure? The Talmud rules that he may risk his short-term survival because "we are not concerned about hourly life" when there is a possibility of long-term survival.

II. Resuscitation and Tube-feeding Issues

In a skilled-nursing geriatric facility, the chaplain confronts vexing ethical issues on an almost daily basis.[16] Often he is called upon to advise about resuscitation protocol in the absence of a DNR (Do Not Resuscitate) order. What are the doctor's moral-ethical obligations to revive a seriously ill, aged patient who has been thus "coded", when the medical odds for survival are almost nil?[17a-d] Is he permitted to perform CPR on this frail patient (a

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14. *Ahiezer*, 2:16; *Binyan Tzion* 1:111; *Beit Meir (Yoreh Deah)* 339:1; *Tzitz Eliezer*, 4:13 and 10:25 and *Iggerot Moshe, Choshen Mishpat* Volume 7, 74:5. However, note the *Shvut Yaakov*, 3:75, who qualifies the decision by requiring a majority of expert medical opinion with the approbation of the leading halachic authority in the city.
15. Rashi, ad loc.
16. Forty-two states already have living-will laws. Eighteen states, including New York, allow health-care proxies. This year, a new Federal law takes effect, the "Patient Self-determination Act." This measure states that patients entering a federally-funded hospital or nursing home must receive written information about state laws and their rights under those laws to refuse treatment.They must also be notified of the institution's practices so that they can select one that will respect their wishes. In addition, every institution is required to record whether the patient has, in writing, rejected life support.

17(a) Murphy D.J., Murray AM, Robinson BE, Campion EW. "Outcomes of cardiopulmonary resuscitation in the elderly." *Ann. Internal Med.* 1989; 111:199-205

17(b) Podrid, P.J. "Resuscitation in the elderly: a blessing or a curse?" *Ann. Internal Med.* 1989; 111:193-195

procedure so severe that brittle ribs are often broken) when this patient may in fact be moribund, in which case, according to Jewish law, he may not even be touched?[18] What is the doctor's legal mandate to resuscitate when there is no DNR order? Would the legal concerns impact on the halachic considerations?

The geriatric chaplain must also recommend policy in another critical area: what should the facility's position be towards a patient who refuses to be fed through a nasogastric tube or through a gastrostomy? Medically, both of these procedures are similar in that food and hydration are introduced into the patient's functioning gastrointestinal tract when he is unable to swallow or eat normally. The nasogastric tube is inserted into a patient's nostril and guided through the esophagus into the stomach. Though this is a relatively simple procedure, it can lead to serious side effects such as pneumonia, dehydration, and diarrhea.[19] Moreover, it is not uncommon for patients who are irritated by the tube to pull it out.[20]

17(c) Applebaum GE, King JE, Finucane TE, "The outcome of CPR initiated in nursing homes," *J. Am. Geriatric Soc* 1990; 38:p.199

17(d) Fader AM, Gambert SR, Nash M., et al "Implementation of a do-not-resuscitate (DNR) policy in a nursing home." *J.Am. Geriatr Soc* 1989; 37:544

17(e) Tresch DD, Thakur RK, Hoffman, RG, et al. "Should the elderly be resuscitated following out-of-hospital cardiac arrest?" *Am.J. Med,*. 1989; 86:145-150.

17(f) Longstreth WT, Cobb LA, Fahrenbruch, CE, Copass MK. "Does age affect outcomes of out-of-hospital cardiopulmonary resuscitation?" *JAMA* 1990; 264: p.2110.

18. *Shulchan Aruch, Yoreh Deah,* 339:1. However, if there is even a remote chance that the moribund patient (*goses*) will survive, though only briefly, the doctor must continue to treat him. See *Halacha Urefuah,* 2:185

19(a) Ciocon JO, Silverstone FA, Grauer LM, Foley CJ, "Tube feedings in elderly patients." *Arch. Intern. Med.* 1988; 148:429-423. The authors, based on their research at a major metropolitan geriatric center, conclude that "tube alimentation in the elderly can be continued for long periods but is associated with a high frequency of complications." Dressner, Boisabaim, "Ethics, Law and Nutritional Support," *Arch. Intern. Med.* 1985; 145:122

19(b) Pritchard, V. "Tube feeding – related pneumonias" *J. Gerontol. Nursing* 1988; 14:32-36

20. Eisenberg P., Spies M, Metheny NA. "Characteristics of patients who remove their nasal feeding tube," *Clin. Nurse. Spec.* 1987; 1:94-98

The more permanent procedure is a gastrostomy, where the feeding tube is surgically implanted directly through the abdominal wall into the stomach, which also presents some risk for seriously ill patients.

The serious moral dilemma facing the Jewish nursing facility is evoked in the following scenario:

Mrs. Goldberg has executed a living will (or appointed a health care proxy) and has expressed, in "a clear and convincing manner," that she refuses the initiation of any tube-delivered nutrition or hydration in the event that she becomes seriously incapacitated. Must a Jewish nursing home admit her if her expressed wishes conflict with its moral or religious philosophy?

In Jewish law, would the home's refusal to provide food and water through tube-feeding be tantamount to murder, or would tube-feeding be perceived as primarily therapeutic in nature, which could then be appropriately refused since it involves medical procedures with some degree of risk to the sick, elderly patient? This scenario becomes even more complex if the facility inserts a tube when Mrs. Goldberg has trouble swallowing, but is otherwise in relatively good health. Then, Mrs. Goldberg suffers a major stroke and becomes, by her own definition, "seriously incapacitated." Must the institution withdraw the tube or stop the feeding, in accordance with Mrs. Goldberg's wishes? Or may she be discharged to another facility which would abide by her advance directives?

My colleagues and I have had to grapple with these issues in recent months, as "living wills" and health-care proxies have come into more common use. In the process, I have consulted with other chaplains, halachic authorities, and with medical and legal experts. I have also reviewed much of the current literature and research studies, paying close attention to the area of geriatrics. Finally, I have attempted to formulate a practical position paper to establish resuscitation and tube-feeding guidelines that are medically viable, halachically appropriate, and compatible with the laws of New York State and our country.

III. Resuscitation of the Elderly

Cardiopulmonary resuscitation (CPR) is a relatively recent development in medical science, having first become standard practice in the early 1960's.[21] Then, almost every patient who had no pulse or respiration was routinely resuscitated. Later, in the mid-70's, there was serious concern that attempts to resuscitate certain hospital patients could be considered unduly invasive since their prognoses were not improved.[22] Today, in addition to basic CPR, emergency medical technicians (EMTs) or paramedics are trained in the use of sophisticated electronic equipment and techniques: rhythm recognition, pharmacology, intubation, intravenous and intracardiac methods and defibrillation.[23]

In a skilled nursing home setting, where many residents are frail and suffer from irreversible illness, the resuscitation issue is particularly significant. Indeed, it really is not one single issue but a myriad of complex legal and halachic questions:

If CPR is a life-prolonging measure, may a competent patient refuse it in advance? May a doctor withhold CPR from patients in case of terminal irreversible illness where death is not unexpected?[24]

Immediate resuscitation attempts of younger patients, such as accident victims who have no prior history of serious medical problems, are imperative. The general effectiveness of CPR efforts in these situations is undisputed: in most cases, the victim is restored to his former physical and mental state. However, in a nursing home, where the vast majority of residents who receive CPR will not survive (and the few who do may suffer residual neurological or other medical problems), the widespread practice of CPR has been challenged.[17 a,b,c,d]

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21. Jude J., Koawenhaven W., Ing W et al. "Cardiac arrest: Report of application of external cardiac massage on 118 patients." *JAMA* 1961; 178:1063:1070
22. "Standards for cardiopulmonary resuscitation and emergency cardiac care: V. Medicolegal considerations and recommendations — Orders not to resuscitate." *JAMA* 1974; 227:864-866.
23. Supra 17c, p. 197 and 17e, p.145.
24. "Standards and guidelines for cardiopulmonary resuscitation and emergency cardiac care: VII. Medicolegal considerations and recommendations — Orders not to resuscitate." *JAMA* 1980; 244:506-507

Some researchers declare that CPR is "rarely effective for elderly patients" and that they and their families "have a right to know the truth about the poor outcomes of cardiopulmonary resuscitation."[17 a] Others favor a more radical proposal: not to offer CPR to nursing home residents. Though they concede that this across-the-board policy "might be unfair to the small number of residents who have a reasonable chance of survival, it would protect the many residents who now undergo CPR without having genuinely consented."[17 c]

There are significant studies and clinical reports that differ markedly from the above and assert that "elderly patients can benefit from attempted resuscitation, from out-of-hospital cardiac arrest." They cite earlier studies that between 2% (in rural areas) and 9% (in urban areas) of patients aged 70 or older survive to hospital discharge after out-of-hospital cardiopulmonary arrest; their own research findings also confirm that "rapid and efficient resuscitation from out-of-hospital cardiac arrest can extend the life of elderly patients, especially if ventricular fibrillation underlies the cardiac arrest."[17f] Researchers at the Medical College of Wisconsin in Milwaukee compared elderly and younger patients and concluded that "even though elderly patients are more likely than younger patients to die during hospitalization, the hospital stay of the elderly is not longer, [they] do not have more residual neurologic impairments, and survival after hospital discharge is similar to that in younger patients."[17e,25]

Virtually all researchers would agree on one point: a small percentage of elderly CPR patients *do* survive! This would support a clear halachic position: attempts to resuscitate the elderly are mandated in the absence of a DNR order unless they are medically futile. As long as a percentage of elderly patients — however small — survive after CPR, the doctor must attempt resuscitation; to

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25. Supra, 16e. See also Bellamy PE, Oye RK "Admitting elderly patients to the ICU: Dilemmas and solutions." *Geriatrics* 1987; 42:61-68; Galati RS, Blan GL, Horan MA. "Cardiopulmonary resuscitation of old people," *Lancet*, 1983; 2(8344): 267-269. Both of these studies suggest that the severity of the illness or cardiac dysrhythmia are more accurate predictors of outcome than age per se.

withhold it, would in effect deny the patient any possibility for survival. This argument has been advanced most convincingly by Dr. Fred Rosner in a letter to the *Annals of Internal Medicine* (1989; 111:687):

> In the study by Murphy and colleagues, [17a] 22.3% of patients were successfully resuscitated and only 3.8% (19 patients) survived the cardiopulmonary resuscitation and were discharged from the hospital. Is it ethical to withhold cardiopulmonary resuscitation from all these patients because only 3.8% are discharged from the hospital? Do these patients not have the same right to life as you and I? Podrid[17 b] asks whether it is reasonable or fair to use critical care beds, which are costly and in short supply, to provide intensive care for patients who are unlikely to recover or even survive the hospitalization. For the 19 elderly patients who were discharged from the hospital, the answer is a resounding yes...Human life is sacred and of infinite value. When the time comes for an elderly person to die, nature may be allowed to take its course. However, if the patient has a potentially reversible condition, resuscitation should be attempted, even if the patient is one of the least favored or most disadvantaged members of our society.

In New York State, the law[26] is generally compatible with the halachic position. In the absence of a DNR order, New York State presumes that every patient admitted to a hospital consents to the administration of CPR in the event of cardiac or respiratory arrest. While an attending physician may issue a DNR order without the consent of a competent patient who "would suffer immediate and severe injury from a discussion of cardiopulmonary resuscitation," he must first comply with a detailed protocol.[27] The attending physician can issue a DNR order if he determines (with the

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26. N.Y. Public Health Law, Art. 29-B
27. Ibid, Public Health Code Section 405.42: (C) General Provision, 1-2 and (E) Decision-making by an Adult with Capacity, 3, Therapeutic exception.

concurrence of another authorized physician) that, "to a reasonable degree of medical certainty" resuscitation would be *medically futile* (i.e., CPR will be unsuccessful in restoring cardiac and respiratory function or the patient will experience repeated arrest in a short time period before death occurs.)

Halachically, may a doctor refrain from this potential life-saving action when he is reasonably certain that it is medically futile?

Underlying the ethical concern is the fundamental issue of whether CPR is regarded as an "ordinary" or "extraordinary " measure. There is no common law obligation to provide patients with extraordinary care and such treatment may be withheld.[28] Though there is much debate in the literature about the definition of these terms, Kelly's formulation is quite precise:

> Ordinary means of preserving life are all medicines, treatments, and operations, which offer reasonable hope of benefit for the patient and which can be obtained and used without excessive expense, pain , or other inconvenience...Extraordinary means of preserving life...means all medicines, treatments, and operations, which cannot be obtained without excessive expense, pain or other inconvenience, or which, if used would not offer a reasonable hope of benefit.[29]

It would appear that attempts at CPR in a medically futile situation would be deemed "extraordinary," according to this definition. Resuscitation would not offer a reasonable hope of benefit and much pain and inconvenience would likely accompany the procedure. Most legal authorities, in fact, consider CPR to be extraordinary care in the case of a terminally ill patient and beyond

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28. Ramsey R: "On (only) caring for the dying: *The Patient as a Person,*" Yale University Press, 1970, pp. 113-164
29. Ibid, p.122. Today, it can be argued that the "ordinary-extraordinary" appellations are passe'. In our fast-paced world of medical technology, what may today be an "extraordinary" procedure will be "ordinary" tomorrow. See F. Rosner, *Modern Medicine and Jewish Ethics*, p. 218 (1986).

the scope of services that a physician is required to provide.[30]

Halachic authorities rule that the patient may refuse to initiate extraordinary treatment when his condition is irreversible (i.e., the proposed treatment promises only to extend his life somewhat but not to cure the illness), particularly if he objects because of the pain involved.[31] Thus, a patient whose medical condition is futile, who stops breathing or experiences cardiac arrest, does not have to be resuscitated if this procedure will contribute to his pain.[32]

Jewish law, in general, establishes another major criterion in determining the permissibility of a questionable act. It distinguishes between an act of commission (*kum v'aseh*), taking an active role in performing a questionable act, and an act of omission (*shev v'al taaseh*), refraining from any action whatsoever. In medical treatment, for example, halacha might not permit an act of commission, such as disconnecting a terminal patient from a respirator; however, it might permit not connecting him in certain instances, i.e., an act of omission. In the former, the physician actively engages in a possibly forbidden act, while in the latter, he remains passive. This would explain why he may not be required to *initiate* CPR in a medically-futile situation and why a terminal patient could refuse major surgery or painful treatments, which

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30. LeBlang TR, "Does your hospital have a policy for no-code orders?" *Legal Aspects of Medical Pract,* 1981; 9:1-5, 9:5-8

31. The opinion of Rabbi Shlomo Zalman Auerbach, cited by Dr. A.S. Abraham in *Halachah Urefuah,* 2:189. Thus, a diabetic whose leg was amputated as a result of his illness may refuse the amputation of his other leg when the disease has spread and gangrene has set in. Though he will die imminently without the amputation, the operation will not reverse his underlying condition; in addition, his expected pain and suffering may be too much for him to bear. Similarly, Rabbi Auerbach rules a terminal cancer patient — close to death, whose disease has metastasized — may refuse extraordinary treatment (such as radiation treatments or chemotherapy), but may not refuse ordinary, routine treatments such as oxygen, nutrition and hydration. See also *Iggerot Moshe, Choshen Mishpat,* Volume 7, 74:1. Rabbi Chaim Ozer Grodzinski, the leading halachic authority of pre-War Europe, determined that a patient who is critically ill may refuse surgery, according to Rabbi Yisrael Gustman, a member of Vilna's Rabbinical Court, as reported to Rabbi Dovid Cohen.

32. *Iggerot Moshe, Yoreh Deah,* 2:174 and *Tzitz Eliezer,* 13:89

may prolong his life somewhat but only with much suffering. Conversely, a comatose patient on a respirator could only be detached from that machine if it were determined that he was dead.[33]

While the distinction between withholding and withdrawing treatment has significant implications in Jewish law, it is at best irrelevant in secular ethics and law. In an opinion to a Jewish nursing hime in the Midwest, the home's counsel addresses this point:

> Ethically, when the patient, or surrogate, in collaboration with the responsible health care professionals, decides that a treatment underway and the life it provides are more burdensome that beneficial, there is sufficient reason to stop. There is no ethical requirement that once treatment has been initiated, it must continue against the patients' wishes or when the surrogate determines that it is more burdensome that beneficial from the patients' perspective.

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33. Rabbi Eliezer Waldenberg in *Tzitz Eliezer*, 13:89, treats this issue comprehensively. In a responsum to Dr. David Mayer, Director General of Shaarei Zedek Hospital in Jerusalem, he discusses the serious question of how one establishes the death of an accident victim who has been resuscitated and attached to a respirator, but who may, in fact, be dead (e.g., no spontaneous cardiopulmonary activity). Disconnecting this patient from the respirator to ascertain whether he is capable of breathing on his own might be prohibited as an "act of commision." Conversely, refraining from any action might allow a corpse to be artificially maintained indefinitely — a degradation of the deceased who must be buried immediately and who might also cause spiritual impurity to *Kohanim* in the interim. Dr. Mayer proposes a novel solution: connect the respirator to a time clock which would shut it for a brief period at regular intervals. During these intervals, physicians should conduct the necessary clinical tests to determine whether the patient's condition is hopeless. If his condition is deemed medically futile, the doctors would not be required to restart the machine (after the clock has turned it off). In effect, the introduction of the time clock has transformed this treatment from a possible act of commission (pulling the plug) to one of omission (not restarting the machine). Rabbi Waldenberg relates this situation to that of a moribund (*goses*) patient (*Yoreh Deah*, 339) and praises Dr. Mayer's suggestion.

> Legally, as well, nothing makes stopping treatment a more serious legal issue than not starting treatment. In fact, it may be argued that not starting treatment that might be in a patient's interest is more likely to be held wrong in civil or criminal proceedings than stopping the same treatment when it has proved unavailing. The Supreme Court of New Jersey noted in *In re Conroy* , 98 N.J./ 321,486 A. 2d 1209 (1985): "It might well be unwise to forbid persons from discontinuing a treatment under circumstances in which the treatment could be permissibly withheld. Such a role could discourage families and doctors from even attempting certain types of care and could thereby force them into hasty and premature decisions to allow a patient to die."[34]

IV. Advance Directives — Living Will vs. Health Care Proxy

The fact that both halachically and legally the patient has the right to refuse treatment under certain circumstances is truly significant. However, he may still have cause for concern: while his wishes may be followed when he is mentally and physically competent to participate in his own decision making, what assurances does he have that this will be the case if he should become incapacitated? How can he anticipate and plan for his needs under those circumstances? In response to this scenario, two legal mechanisms were developed: the "living will" and the "health care proxy" (also known as a "health care power of attorney").

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34. In a communication 6/1/89 to the Milwaukee Jewish Home from Robyn S. Shapiro, Esq. of Quarles & Brady. Excerpted with permission. According to Rabbi Dovid Cohen in an address to the Association of Orthodox Jewish Scientists in May, 1990, the surrogate may only assess the wishes of the incapacitated patient; halachically, he (or she) may not decide on his own what he feels may be in the best interests of the patient. This position is largely supported in the N.Y. State regulations (N.Y. Public Health Law, Art, 29-B:f,5,1): "The surrogate shall make a decision regarding cardiopulmonary resuscitation on the basis of the adult *patient's wishes, including consideration of the patient's religious and moral beliefs...*" *Only if the patient's wishes are unknown and cannot be ascertained* may the surrogate make a determination "on the basis of the patient's best interests." (italics added)

A living will is essentially a document prepared by a competent adult which instructs medical personnel regarding utilization of various procedures in the event that the adult becomes incapacitated. Generally, the "will" is utilized as a directive to *withhold* or *withdraw* treatment in advance of an "incurable or irreversible mental or physical condition with no reasonable expectation of recovery."[35] In this document, individuals may specify forms of treatment that they would refuse such as cardiac resuscitation, mechanical respiration, tube feeding, antibiotics, and maximum pain relief. While the "living will" could be used to *request* that these and other treatments be utilized, in practice this is rarely the case.

By contrast, the health care proxy does not necessarily relate to various types of anticipated medical treatments. It is simply a legal form to appoint a trusted individual to serve as a proxy or health care agent to make medical treatment decisions on behalf of the principal who signs the form. The proxy operates with a power of attorney to make these decisions in the event that the principal becomes incapacitated. It is best that the principal discuss his feelings with his proxy about which treatments should be taken or withheld, so that the latter will decide in accordance with the wishes of the former.

Upon careful analysis, neither of these advance directives is ideal. The living will, precisely because it is so specific, tends to be somewhat rigid. No one can possibly anticipate with certainty every medical contingency; in fact, one's specific directives may later prove to be inapplicable or inappropriate. As a result, the principal is "locked in" to an irrevocable treatment mode which may be medically contraindicated once he has become incapacitated; indeed, if he could talk, he might well reconsider his decision. Another consideration: in the fast-paced world of medical technology, new drugs and treatments might appear that would have impacted in his original directives. The inflexibility of his living will might not allow for these developments.

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35. From the generic text of the living will, prepared by the Society for the Right to Die, New York, 1990.

By contrast, the great advantage of the health care proxy is its flexibility, which better allows for changing diagnoses and medical breakthroughs. This flexibility is created by giving great latitude to the proxy and this broad power (of attorney) also poses its greatest danger. To wit: Agudath Israel, a major advocacy group for Orthodox Jewry, objects to the N.Y. health care proxy bill primarily because it accords too much authority to agents to decide the fate of the patient. In a strongly-worded statement, it declares:

> Even though the bill is couched in terms of the agent making decisions in accordance with the principal's wishes or best interests,[34] Agudath Israel believes that the potential for abuse of that awesome decision-making authority is self-evident. If the social good of permitting people to designate trusted relatives or friends to make health care decisions on their behalf can be achieved only by granting such third parties an essentially unlimited right to decide that their principals should die, we think the price to pay is too high.

In order tc overcome this most serious objection, Agudath Israel has carefully crafted a "Halachic Health Care Proxy." The Halachic Proxy form directs the agent to make all health care (and post-mortem) decisions in accordance with halacha by consulting with a designated rabbinic authority or Orthodox organization. This directive assures the principal that his wishes will be fulfilled by a loved one in consultation with the same halachic authority he would have chosen had he been able to do so.[36]

V. Tube Feeding in the Elderly

Does the patient's right to refuse treatment in a medically futile situation extend to food and water provided through a nasal or gastric tube?[37] Would a facility that fails to provide these staples

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36. Chaim Dovid Zwiebel, Esq., "The Halachic Health Care Proxy: An Insurance Policy with Unique Benefits," *The Jewish Observer*, September 1990.
37. Ibid, Section II, pp. 5-7

to its patients be guilty of "patient abuse?" Does the provision of "food" through a tube transform a "feeding " into a therapeutic procedure? Legally and morally, is this common procedure an "ordinary" treatment since it offers "reasonable hope or benefit for the patient and...can be obtained and used without excessive expense, pain or other inconvenience?"[38] If tube-feeding is indeed "ordinary", may it be denied or refused? Or is this treatment "extraordinary" since it presents an increased degree of risk and inconvenience to the elderly?[39] Would the halachic criteria for refusing feeding tubes be more demanding than those applied to refusal of CPR?

Legally, New York courts have confirmed the rights of a competent adult to refuse medical treatment (absent an overriding state interest), even when the treatment may be necessary to preserve that person's life.[40] However, when the adult is no longer competent to make medical decisions, the state's highest court, the New York Court of Appeals, has applied the most rigorous standard, that of "clear and convincing evidence," before life-sustaining treatment can be terminated or withheld.[41] Under this standard, the trier of fact must be persuaded that the patient, when competent, held a firm and settled commitment to terminate life support under circumstances like those which may have actually arisen. This would preclude common hearsay of the "momma told me so..." variety.

New York courts have also ruled on two other critical concerns of the tube-feeding issue. First, the Appellate Division, Second Department, in *Delio v. Westchester County Medical Center*,[42]

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38. See note 29.
39. See notes 19 and 20.
40. *Matter of Westchester County Medical Center (O'Connor)* 72 N.Y. 2d, 517, 534 N.Y.S. 2nd 886 (1988). *Fosmire v. Nicoleau*, 75 N.Y. 2nd 218, 551 N.Y.S. 2d 876 (1988); *Matter of Storar*, 52 N.Y. 2d 363, 438 N.Y.S. 2d 266 (1981).
41. *Matter of O'Connor* and *Matter of Storar*, supra.
42. 129 A.D. 2d 1, 516 N.Y.S. 2d 677 (1987). Most other states equate artificial nutrition and hydration with medical intervention. See *McConnell v. Beverly Enters*, 209 Conn. 692, 553 A. 2d 596 (1989). *In re Gardner*, 534 A.2d 947, 954, (Me, 1987) and authorities cited therein.

viewed nutrition and hydration by artificial means as being the same as the use of a respirator or other life-support equipment; they are both *medical* procedures. Additionally, the Court did not distinguish between *termination* of nutrition and hydration and *withholding* this treatment. Consequently, the Court, citing the *Storar* precedent, ruled that there must be "clear and convincing evidence" that the patient has expressed a desire to discontinue life-prolonging treatment such as artificial feeding under these circumstances. This "clear and convincing" standard was validated again in the *Cruzan* case by the United States Supreme Court.[43] While the Court recognized that competent adults have a protected liberty interest in refusing life-sustaining measures, *including artificial nutrition and hydration*, it held that the State of Missouri was not required to allow the Cruzan family to discontinue their daughter Nancy's treatment. Indeed, the Court affirmed the authority of a state to require that a request for withdrawal of life-sustaining treatment be supported by clear and convincing evidence of the patient's wishes.

While the courts have respected the rights of individuals to refuse artificial nutrition and hydration, they do not compel nursing homes to honor such directives where the homes have notified the resident (and/or the family) upon admission of their policy to provide artificial nutrition and hydration at all times (unless medically contraindicated). This position is based on a recent case which received much local media attention, *Elbaum v. Grace Plaza*.[44] In *Elbaum*, the husband of a resident in Grace Plaza wished to permanently enjoin the facility from providing artificial nutrition and hydration to his wife. The Appellate Division, Second Department, overturned a lower court decision and ruled that the wife had made a firm and settled decision while competent to decline the treatment under her present circumstances; she had, in fact, extracted promises from her husband and family members not to prolong her life if she were in a persistent vegetative state. The

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43. *Cruzan v. Director, Missouri Department of Health* 110 S. Ct 2841 (1990).
44. 148 A.D. 2d 244, 544 N.Y.S. 2d 840 (1989).

Court held that the wife's interests were not outweighed by those of Grace Plaza to preserve what it claimed to be the ethical integrity of the facility and medical profession. *The nursing home had failed to make its policy against the withdrawal of the gastrointestinal tube known to the family until after the family requested the removal of the tube.* Thus, the family had every reason to believe that the wife's wishes would be honored upon her admission to the home.

The implications of this case are clear: where the nursing home provides notice of its treatment policies and ethical standards to the prospective resident (and/or family) upon admission, the interests of the home would supersede those of the entering resident. The resident would then have to consider another facility, or determine whether this nursing home would transfer him to another facility that would respect his wishes, in the event it became necessary to terminate his artificial feeding.[45]

VI. Ethical Issues

The predominant legal view equating artificial nutrition (tube-feeding) with life-preserving medical treatment is shared by a wide range of physicians' groups and ethicists. They see no logical distinction between the removal of a respirator or discontinuing artificial nutrition. Just as a respirator may be required to maintain an oxygen flow to lungs which are not functioning, so tube feeding may be necessary when the alimentary-digestive system is impaired due to disease, trauma, or bodily deterioration.[46] A seeming consequence of this view is that the patient's right to refuse medical treatment applies with equal force to the refusal of artificial nutrition and hydration.

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45. From a communication 10/18/90 to the Gurwin Jewish Geriatric Center from Andrew B. Roth, Esq. of Nixon, Hargrave, Devans & Doyle. Excerpted with permission.

46. American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs*, 2.18 (1986); President's Commission for the Study of Ethical Problems in Medicine and Medical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, pp.88-90, (1983). The Hastings Institute, *Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying*, pp. 57-62, (1987)

There should be no legal or moral distinction between a DNR order and an order not to provide tube-feeding. Yet, in practice, this is not always the case. In about half of the forty states which have living will statutes, nutrition is either circumscribed or excluded from the forms of life-prolonging treatments which may be rejected.[47] This would seem to reflect the opinion of legislators that not feeding a terminal patient is more like euthanasia than turning off a respirator. In fact, a leading constitutional scholar, Professor Yale Kamisar, has labeled court actions terminating artificial nutrition to stable, comatose patients as bringing America to "the brink" of active euthanasia. Professor Kamisar proposes that the courts treat nourishment as being different from other forms of medical treatment, or distinguish between "dying" patients who have clearly expressed a wish to forego nutrition and those who have not.[48]

Some ethicists suggest that providing nutrition and hydration to patients who have an irreversible disease is an act of caring which should be offered even when it may not prolong their lives. The dying patient still deserves palliative care for comfort's sake:

> These are things done for no purpose except to care. To give a cup of cold water to a man who has entered upon the course of his own particular dying is to slack the thirst of a man who will soon thirst again, and thirst until death. When a man is irreversibly in the process of dying, to feed him and to give him a drink, to ease him and to keep him comfortable — these are no longer given as a means of preserving life. The use of a glucose drip should often be understood in this way. This keeps a patient who cannot swallow from feeling dehydrated, and is often the only remaining means by which we can express our present faithfulness to him during his dying.[49]

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47. "Comparisons of the Living Will Statutes of the Fifty States," 14 *J. Contemp. L.* 105, 121 pp. 123-129, (1988)
48. Kamisar, "The Right to Die, or License to Kill?," 124, *N.J. L.J.*, p. 1359 (1989)
49. P. Ramsey, *The Patient As Person*, p. 129 (1970). This position would seemingly

Perhaps the most cogent argument of ethicists who oppose termination of artificial feeding to stable, comatose patients is the "slippery slope" theory. Simply put, in situations where the patient has not provided advance directives, any decision to terminate his or her medical therapy, including artificial feeding, would tend to be subjective. Who determines the quality of life of a patient in a persistent vegetative state, if, in fact, such a state can accurately be diagnosed?[50] More importantly, would a decision to terminate treatment in this case ultimately lead to decisions to terminate the treatment of mentally incompetent patients? Where do we draw the line? If one "pulls the plug" on a comatose patient because he has become a vegetable with no human qualities, why not terminate life-sustaining treatment to a terminal, severely retarded patient who has been no more than a vegetable since birth? If, however, one subscribes to the "sanctity of life" position, the line is clear: man cannot properly assess the value or relative quality of life. We must necessarily conclude, by virtue of the very existence of the mentally and physically-retarded, that the value of human life is determined by G-d. "Quality of life" is a subjective determination which often leads to the dangers of the slippery slope. "Sanctity of life," however, is the unequivocal position that all human life is valuable and that life-sustaining efforts can only be suspended under clearly-defined guidelines. As we indicated at the outset, the danger of the quality-of-life, slippery-slope rationale is particularly

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apply only to conscious, sentient patients who are capable of recognizing and appreciating such care, not to comatose patients. The degree of discomfort felt by comatose patients who are deprived of nutrition is somewhat of a gray area. See also Thomasma and Brumlik, "Ethical Issues in the Treatment of Patients with a Remitting Vegetative State," *Am. J. Med.* 373 (1984).

Dr. Elizabeth Kubler-Ross, the well-known psychiatrist, was asked whether unconscious patients in a coma should be given intravenous feedings. She noted that, in her experience, a great many unconscious patients in comas who were fed intravenously are now healthy and fully-functioning individuals. However, if brain waves indicate death, she maintains that intravenous feedings should be stopped. See E. Kubler-Ross, *Questions and Answers on Death and Dying*, p. 81 (1974).

50. Steinboch, "Recovery from Persistent Vegetative State?: The Case of Carrie Coons, " *Hastings Center Report.*, July-August 1989, at 14, 15.

acute in our society, where critical-care beds are at a premium and cost factors may unduly influence triage decisions.[51]

VII. Tube-Feeding in Halacha

The late internationally-renowned halachic authority Rabbi Moshe Feinstein, in a series of responsa on medical issues, discussed the question of feeding a terminally-ill patient intravenously. He maintains that providing proper nutrition is imperative, even in situations where intravenous feeding might only prolong a life of pain. The only exception to this rule would be where artificial nutrition would be medically contraindicated. Rabbi Feinstein further declares that this procedure is so vital that it may be administered involuntarily. He distinguishes, however, between involuntary feeding, where the patient disagrees with the doctor's orders, but ultimately consents, and force-feeding, where he protests or must be physically restrained in order to be fed. In the latter, Rabbi Feinstein posits that the psychotrauma experienced by a dying patient whose wishes are thwarted might hasten his death (see *Bava Bathra 147b*).[52]

A major authority in Israel, Rabbi Shlomo Zalman Auerbach, considers artificial nutrition to be routine, "ordinary" treatment which may not be refused or withdrawn, as one might do with "extraordinary" treatment. Consequently, a dying patient, suffering from metastatic cancer, must receive oxygen and the artificial nutrition and hydration which he requires — even if he is suffering and in great pain. Rabbi Auerbach compares these treatments to providing insulin, blood transfusions, and antibiotics, which may not be withdrawn, even in cases of terminal patients.[53]

Rabbi Herschel Schachter and Rabbi Chaskel Horowitz (the Viener Rav) maintain that artificial nutrition and hydration are medical procedures which a terminal patient may direct to be withheld.[53a]

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51. See, *supra, Jewish Ethical Perspectives,* p.1.
52. *Iggerot Moshe, Choshen Mishpat,* Volume 7,74:3 and 73:5.
53. *Halachah Urefuah,* Volume 2, pp. 131, 188-189.
53a. Personal communication to this writer. Rabbi Schachter's sources are cited in

Rabbi Schachter bases his ruling on the opinions of *Mor Uketziyah* (by Rabbi Yaakov Emden) on *Shulchan Aruch, Orach Chaim* 328. It is R. Emden's opinion that the obligation to save lives is comparable to the obligation to restore articles (*hashavat aveidah*). Just as one who is in extreme discomfort is not required to return a lost article, so may a suffering, terminal patient refuse medical treatment to restore his lost health. Rabbi Schachter also finds difficulty with Rabbi Auerbach's contention that one must provide a dying patient, who is suffering, with nutrition and hydration against his will, while simultaneously praying for his demise to spare him any further suffering.

Rabbi Horowitz, a noted authority in the Chassidic community, issued his decision on behalf of the Aishel Avraham Resident Health Facility in Williamsburg. He considers artificial nutrition and hydration to be a medical therapy on par with other surgical procedures, which may be refused by critically ill, terminal patients. Rabbi Horowitz also advances a novel rationale to permit withdrawal of feeding tubes — "the law of the land prevails (lit., is the law)."[54]

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the *Beit-Yitzchak Journal*, 5746. Rabbi Horowitz issued his ruling, based on sources cited in this article, on behalf of the Aishel Avraham Facility in Williamsburgh.

54. In the Talmud, this principle is known as *dina d'malchuta dina*. Since the law of the land recognizes the rights of individuals to write advance directives to both withhold and withdraw artficial nutrition and hydration, Jewish law must respect these rights as well. Rabbi Horowitz' application of this "law of the land" principle is somewhat dubious. In the Talmud, this principle is operative only in civil law and pertains to royal edicts regarding property rights; it is not employed in capital cases or in life-and-death issues (*Gittin* 10b and *Nedarim* 28a). Moreover, even in civil law, only "royal" edicts are considered — not laws and statutes administered by the courts. (*Responsa of the Rashba*, cited in *Beit Yosef, Choshen Mishpat* 369:26 and *Darchei Moshe* 369:3). Finally, the analogy of the "law of the land" would respect the rights of individuals to issue advance directives to withdraw tube-feeding, it would not mandate that any institution whose official policies conflict with such directives honor them, where that institution has duly informed the resident of its tube-feeding policy prior to admission.

Regrettably, many Jewish homes have felt compelled to adopt a policy

VIII. Conclusions

With few exceptions, the halachic imperative to preserve life supersedes quality of life considerations in Jewish medical ethics. Indeed, quality of life decisions are perceived, in many cases, as nothing less than sanctioned euthanasia. Sanctity of life advocates assert that life — even that of a terminal, demented old man — is of infinite value. In practical terms, we may not disconnect such an individual already on a respirator from that machine in favor of a young accident victim with a more favorable long-term prognosis.

The imperative to preserve and prolong life, wherever possible, should be uppermost in making medical decisions. However, in cases of terminal illness where the decision to utilize certain treatments, surgery, or therapies may possibly increase the patient's pain or be considered medically futile, then the patient, according to many decisions, would be entitled to reject such treatment in advance. Additionally, a critically ill patient might be exempt from safeguarding his health as a bailee would in cases of extreme hardship.

CPR and other resuscitation procedures are generally considered to be "extraordinary" means of reviving individuals who experience cardiac arrest. In the elderly, CPR is clearly a seriously invasive procedure which may even result in the breaking of brittle bones during its compression phase. Moreover, there is much debate in the medical literature about the efficacy of CPR in the elderly, where only a small percentage of those resuscitated survive for any substantial length of time. Nonetheless, halacha declares that, in the absence of a DNR (Do Not Resuscitate) order, the medical staff is required to resuscitate an elderly patient. The sanctity of each second of human life makes every life-prolonging effort worthwhile — our own subjective, quality-of-life

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which would respect directives to "pull the tube," against their better moral/halachic judgment. In these cases, the halachic concern of actively withdrawing the tube (*kum v'aseh*) might be mitigated somewhat by maintaining the tubes in place, but not refilling them with the nutrients at the scheduled times — an act of omission (*shev ve'al ta'aseh*). See footnote 33, *supra* and footnote 11.

considerations notwithstanding. To walk away and not resuscitate is to relegate the patient to an almost certain death. Halacha would probably, however, respect the decision of an elderly terminal patient to request a DNR order since CPR is, after all, a traumatic, extraordinary procedure with doubtful benefit. It seems that Jewish law would not demand an aggressive "act of commission" — against the patient's wishes — in these circumstances.

It should be noted that, medically speaking, tube feeding (even the insertion of a nasal gastric tube) is considered a therapeutic procedure. It is also noteworthy that, both legally and ethically, there is no distinction between withholding or withdrawing medical treatment. In halacha, however, the difference between the two is extremely significant. Legally, it is of utmost importance that the health care facility communicate its philosophy and policies vis-a-vis tube feeding, DNR, and other treatments to all entering residents upon admission; a belated, after-the-act disclosure may subject the institution to legal liability.

In terms of the preferred halachic form of advance health care directive, it seems health-care proxy is preferable to the living will. A living will is a fixed document which lacks the flexibility to accommodate rapidly changing patient diagnoses and medical breakthroughs that might have impacted on the original directive. However, a major drawback of the health care proxy is that it grants to a trusted relative or friend virtually unlimited authority to render "life-and-death" decisions even in the uncharted areas where the principal's wishes were not clearly expressed. To remedy this situation, the principal is urged to appoint a halachic authority to serve as his health-care proxy and candidly communicate his wishes and feelings about possible treatment alternatives to him.

It should be evident that there are a host of difficult and perplexing decisions which potentially await the very sick patient and/or his family, with no simple resolution available. This study has sought to make people aware of potential problems before they arise so that, hopefully, they will be better prepared to seek halachic guidance as required.

The Physically and Mentally Disabled

Insights Based on the Teachings of Rav Moshe Feinstein

Rabbi Moshe D. Tendler, Ph.D and Fred Rosner, M.D., F.A.C.P.

Introduction

Practical and ethical questions regarding the disabled and their interaction within Jewish society have not received much attention from halachic authorities. Yet, these questions have considerable humane, legal, ethical, and financial implications.

Jewish law (halacha) recognizes that some Jews have physical and emotional limitations which prevent them from observing all biblical and rabbinic precepts. Jewish law exempts the disabled from any guilt they might feel because of their inability to perform certain commandments, thus affirming that the basic worth and spirituality of the disabled is not diminished in any way. Halacha

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urges them to achieve their fullest potential as Jews, while exhorting society to assist them in making their religious observance possible.[1]

But the resources of society are not limitless, and the limited resources of the Jewish community are insufficient to permit duplication of facilities to provide universal access to the handicapped and disabled. Recommendations concerning societal obligations to the handicapped must of necessity recognize their limitations. Cooperative efforts involving several communities should be encouraged so that facilities such as schools and mikvehs will be available even if the facility is located at a considerable distance from the handicapped person's home.

The resolution of conflicts between the needs of the individual and the obligations of society is the responsibility of Torah leadership which must mediate the balancing of these two forces. Allocation of charitable funds in Judaism is considered to be the proper role of the local *Bet Din.*[2] Funds needed for the proper care of the disabled may require the attention of a national organization to properly allocate the scarce funds of the Jewish community.

The societal obligation to care for the mentally disabled is sensitively depicted by Rabbi Moshe Sofer with reference to an eighteen year old woman: "Neither her sustenance nor medical care is the sole responsibility of her father. She should be considered as one of the poor whose care is the obligation of the community.[3]

Different disabilities and varying degrees of disability can affect the halachic status considerably. For example, while a modification or dispensation of a halachic obligation may be offered to a person with one type of disability, no such dispensation may be offered for a person with another disability. The individual attention of a recognized rabbinic decisor (*posek*) is required to "grade" the degree of disability as to its halachic import.

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1. Feinstein, M. *Am Hatorah,* second edition, part 2, pp 10-12; *P'ri Megadim* 343, *Aishel Abraham,* states that a deaf mute and a minor have some intellect and must be educated to their fullest potential.
2. *Shulchan Aruch, Yoreh Deah* 256:3.
3. Sofer, M. Responsa *Chatam Sofer, Yoreh Deah* #76.

We have examined the unique problems of the Orthodox disabled as they attempt to fulfill their obligations under Jewish law. In this essay, we explore some of the many ethical and practical questions concerning the disabled in relation to the Sabbath and Jewish holidays, marriage and procreation, prayers and other legal obligations. In all cases, however, final decisions must be made by a competent halachic authority.

Celebrating the Sabbath and Jewish Holidays

A disabled person has the same halachic status with regard to the Sabbath and *Yom Tov* (Jewish holiday) as any other person and is bound by the same regulations. Thus, a disabled person may not desecrate the Sabbath and must fast on Yom Kippur — unless there is a possible danger to life, in which case all biblical and rabbinic rules and regulations save three are waived. However, there are special rules that apply to the disabled.

Orthopedics

A disabled person who cannot walk unaided may go through a public thoroughfare on the Sabbath using a wheelchair, cane, crutches, or walker[4] even in the absence of an *eruv*. Jewish law considers these mechanical aides that substitute for body parts as part of the person. But if an aide is used only to provide additional stability for someone who can walk without assistance, it is then considered as if the person were carrying the mechanical aide and its use would be prohibited on the Sabbath.

It is not permissible, in the absence of an *eruv*, to ask another Jew to push the wheelchair on the Sabbath. However, a non-Jew may provide assistance if there is considerable distress to the disabled person in not going to the synagogue on the Sabbath or *Yom Tov*. It is permissible for a *talit* to be carried on the seat or in the back pouch in the wheelchair because the *talit* is considered to be subsidiary to the wheelchair. The situation is similar to carrying a child who is holding a stone on the Sabbath.

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4. Feinstein, M. Responsa *Iggerot Moshe, Orach Chayim*, Part 4 #90.

On the Sabbath, a disabled person may wear leg braces because they are considered an article of clothing.[5] Other prostheses, such as artifical limbs, may also be put on, taken off, and worn — even though a public throughfare — because these devices are considered part of the person's body.

Mechanized wheelchairs and electronic devices pose serious halachic problems if used on the Sabbath or *Yom Tov*. Starting an electrical motor on the Sabbath is prohibited. Even if a non-Jew turns on the motor, others may think that a Jew started the motor. The use of an electric wheelchair in public on the Sabbath and *Yom Tov* should, therefore, be avoided. A new indirect (*Grama*) switch being developed in Israel may permit the use of an electric wheelchair on the Sabbath, when no other means of locomotion is possible.

For medical purposes, one may wear an electronic device on the Sabbath, such as an electronic back brace for the treatment of scoliosis, or an electronic nerve-stimulating device for the control of severe pain. Such devices are considered halachically as items of clothing, because they serve the physical needs of the individual and are worn on the body and not carried in hand or pocket so there is no prohibition of carrying involved.[6] It is assumed that electric signal lights are disconnected and that no heating elements are involved.

Passing through automatic doors on the Sabbath poses a halachic problem, even if there is no other accessible entrance. The disabled person should wait until a non-Jew passes through the doors; he can then pass through without activating the electronic mechanism himself. Similarly, a regular elevator may not be used on the Sabbath by a disabled person unless a non-Jew happens to use it for his own purpose.[7] However, elevators with "weighing platforms" that adjust the current to the load may not be used on the Sabbath.

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5. *Shulchan Aruch, Orach Chayim* 301:16.
6. Feinstein, M. Responsa *Iggerot Moshe, Orach Chayim*, Part 4 #81.
7. Ibid. *Orach Chayim*, Part 2 #80.

It is prohibited for a disabled person to be driven to the synagogue on the Sabbath even if he cannot get there any other way.

Vision

A blind person must light Sabbath candles on Friday night, as long as there is no danger to the person or to anyone else. A blind person may be accompanied by his guide dog into the synagogue.[8] Since the dog is enabling its master to fulfill the commandment of public praying, it is not a desecration of the synagogue. A blind person may use a cane on the Sabbath to walk in a public thoroughfare because the cane is considered as an article of clothing, if he cannot walk without the cane.[9]

A blind or partially-sighted person may carry braille or large print prayer books, bibles, and other Hebrew books on the Sabbath only within an *eruv*. A blind or visually-impaired person may not use a tape recorder or radio on the Sabbath even if it is turned on before the Sabbath because it violates the rabbinic edict of creating a sound or causing a sound to be heard (השמעת קול).[10] It is especially meritorious (*chesed*) under the general law of visiting the sick to help him overcome his loneliness and seclusion by visiting him on the Sabbath so that the absence of the auditory stimuli from the radio or tapes not cause him to become depressed.

A blind person is required to say the blessings and prayers for the sanctification of the New Moon (*Kidush Levanah*).[11] For the lighting of the Chanukah *menorah*, it is preferable when possible for others to recite the blessing for him.[12] A blind person cannot perform the search for unleavened bread (*chometz*) prior to Passover; another member of the family should do so.

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8. Ibid. *Orach Chayim, Part 1* #45.
9. *Magen Avraham, Shulchan Aruch, Orach Chayim* 301:18 and personal communication from Rav Moshe Feinstein.
10. Feinstein, M. Responsa *Iggerot Moshe, Orach Chayim,* Part 3 #55 and Part 4 #84.
11. *Mishnah Berurah, Orach Chayim* 420:1.
12. Ibid 675:9 and *Aruch Hashulchan 675:5.*

Different rules apply for those who are partially-sighted but not blind. A partially-sighted person may use a cane on the Sabbath only if he uses it during the week as well, and if it is essential to his safety. A partially-sighted person may not carry eyeglasses in his pocket on the street on the Sabbath. If the person needs special glasses for reading only, he should wear bifocals. A partially-sighted person may not use electronic magnification on the Sabbath to improve reading or to make reading possible, unless it is left on continuously from before the Sabbath.[13]

Hearing

On the Sabbath, a hearing-impaired person may wear a hearing aid because it is considered an article of clothing, but he may not adjust the volume. If the hearing aid is built into his glasses, he can wear it or its battery in a public thoroughfare on the Sabbath. But a hearing aid may not be carried in one's pocket, because that would not be considered part of the person's body or clothing.[14] However, a battery pack may be designed as part of a belt to permit Sabbath use. The halachic principle involved is as described above — namely, the item is worn and not carried, and serves the physical needs of the individual.[15]

It is permissible to use a microphone to enable a hearing-impaired person to hear the cantor and the reading of the Torah on weekdays, but not on the Sabbath or *Yom Tov* even for hearing the blowing of the ram's horn (*shofar*) on Rosh Hashanah.[16] However, a microphone may be used to enable a hearing-impaired person to hear the reading of the *Megillah* on Purim.[17] A deaf or hearing-impaired person may also fulfill the requirement of hearing the Torah and *Megillah* readings by reading these himself.[18]

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13. Feinstein, M. Oral Communication.
14. Ibid. Responsa *Iggerot Moshe, Orach Chayim*, part 4 #85.
15. Ibid. Part 4 #81.
16. Ibid. Part 4 #83.
17. Ibid. Part 2 #108.
18. *Mishnah Berurah* 689:5.

Persons with other disabilities such as mental retardation, learning disabilities, epilepsy, or other acute or chronic illness or conditions must fulfill all biblical and rabbinic rules and precepts to their fullest potential.

Marriage and Procreation

A disabled person has the same rights, privileges and obligations applicable to all Jews regarding ritual family purity, marriage, and procreation. In regard to family purity laws, there must be a special sensitivity regarding women who are orthopedically disabled. Special provisions should be made to assist them in and out of the mikveh. Husbands may accompany their wives into the ritualarium (mikveh)[19] and special access should be provided, such as a ramp, lift, or pulley system. If a mikveh shower is not accessible, a disabled woman may forgo this final shower since she bathed at home. The pre-mikveh examination can be assisted by another woman if the disabled woman cannot physically examine herself or, if blind, others can view the examination (*bedikah*) cloth.[20]

Disabled persons have all the obligations incumbent upon other Jews, including the obligation to procreate, unless the disability makes child care impossible.[21] The use of birth control by or sterilization of sexually active mentally retarded or mentally ill adults should not be routinely condoned.[22] Expert rabbinic consultation is critical in evaluating individual cases.

Abortion is not permissible, even when a disabled woman will be unable to care for her child.[23] Society must assume the care of the child. Adoption by a Jewish couple is preferable to institutional care.

If a disabled couple cannot have children, adoption is

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19. *Shulchan Aruch, Yoreh Deah* 195:16 and gloss of *Ramo* there; see also Responsa *Noda Biyehuda*, 2nd edition, *Yoreh Deah* #122.
20. *Shulchan Aruch, Yoreh Deah* 196:7.
21. Feinstein, M. Personal Communication.
22. Feinsein, M. Responsa *Iggerot Moshe, Orach Chayim*, Part 2 #88.
23. Ibid. *Choshen Mishpat*, Part 2 #69

recommended. Studies have shown that despite physical, emotional, or psychological disabilities in the parents, adopted children placed among such parents suffer no ill effects. But adopting in Judaism does pose some halachic problems. Some stem from the lack of knowledge of the genealogy of the biological parents; others, because legal adoption does not alter the fact that strangers (the adopted children) are comprising a family unit. However, the prohibition of being secluded with a member of the opposite sex does not apply as long as both parents are alive and the child was adopted when very young.[24]

For more detailed questions regarding marriage and procreation, a competent rabbinic authority should be consulted.

Prayers and Other Legal Obligations

Within their limitations, disabled men are obligated to pray three times daily, and, if possible, to attend synagogue services in order to pray with a quorum of ten men (*minyan*). A disabled man is obligated to wear a prayer shawl (*talit*) and to don phylacteries (*tefillin*) on weekdays.

A man whose left arm is atrophied or paralyzed should still don phylacteries on that arm. However, a man whose left arm is missing should don *tefillin* on his right arm.[25]

A person with an indwelling urinary catheter should recite prayers and blessings after first covering the catheter and, if possible, the collecting bag. This rule also applies to a colostomy stoma and bag. It is assumed that there is adequate odor control.[26]

A disabled person who attains the age of thirteen should be helped to participate in a *Bar Mitzva* ceremony. A boy should be called up to read the Torah portion of the week and, if he is able, to recite the appropriate blessings. If necessary, a Torah scroll should be brought to the home and a *minyan* assembled for the Torah readings. A girl at age twelve years should be acknowledged at an appropriate home celebration.

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24. Ibid. *Even Haezer*, Part 4 #64:2.
25. Ibid. *Orach Chayim*, Part 1 #8 and 9.
26. Ibid. Part 1 #27.

Miscellaneous Halachic Rulings

1. A disabled person, if not mentally disabled, is counted as part of a *minyan*.
2. A disabled person may testify as a witness in a legal proceeding.
3. A disabled person must fast on Yom Kippur, eat matzah on Passover, hear the blowing of the *shofar* on Rosh Hashanah, and perform all commandments incumbent upon a Jewish adult, as his disability allows.
4. A wheelchair-bound person may observe the laws of mourning from the wheelchair during the week of *shivah*.
5. A wheelchair-bound person may put on his *talit* and *tefillin* and even recite the *Amidah* prayer from the wheelchair.[27]
6. A blind person may pray and recite blessings from memory.
7. A partially-sighted or blind man may grasp the arm of his wife prior to her going to mikveh in order to help him cross the street. Similarly, she may use sign language on the hand of her deaf and blind husband.[28]
8. A partially-sighted (but not totally blind) person may serve as a witness for the signing of a marriage contract or bill of divorce or other legal proceeding.
9. A partially-sighted person may read from the Torah for others, lead prayer services, and serve as a cantor.
10. For a deaf person who is about to be married, one may dispense with the reading of the marriage contract (*ketubah*) or one can use sign language as a substitute for reading it.[29]
11. Deaf-mute persons are absolved from fulfilling commandments incumbent upon a Jewish adult.
12. All disabled people must observe all dietary laws, even when confined to hospitals, nursing homes, and institutions. These laws, however, apply only to oral

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27. *Shulchan Aruch, Orach Chayim* 94:6.
28. *Shulchan Aruch, Yoreh Deah* 195:15.
29. Feinstein, M. Responsa *Iggerot Moshe, Even Haezer,* Part 1 #87.

feedings, not nasogastric, intravenous, or gastrostomy feedings.[30]

Individual, Family and Societal Obligations to the Disabled

Individuals, family, and society are obligated to assist the disabled, wherever possible, in leading as full and productive a life as possible.

Home care of the disabled is preferred to institutional care, even if this increases the financial and psychological strain on the family. In many institutions, the mortality rate far exceeds that of home-care patients so that institutionalization is often a life or death decision. Community leaders must come to the aid of families burdened with a disabled member to make home care feasible. The stress on the other family members may be so severe, in the absence of such help, that there is no choice other than institutional care.

Individuals should help disabled persons get to the synagogue and to put on *talit* and *tefillin*. The disabled should be helped to recite blessings and to perform mitzvot, within their limitations.

Society should treat disabled persons as full members of the community, with no discrimination. Within the financial resources available, society should provide appropriate facilities and services for the disabled. Access to services and other religious functions should be provided to the disabled, within the financial capabilities of a synagogue or Jewish community center, by constructing ramps and even a Sabbath elevator. The mikveh should be made accessible, so the disabled woman can enjoy normal marital relations.

Synagogues, schools, and libraries should provide reading materials in large print or braille for the blind or visually-impaired and sign language interpreters for the deaf or hearing-impaired. Private education should be provided for disabled children who are physically unable to attend school. Special schools should be available for disabled children with special needs.

It is recognized that these considerations on behalf of the disabled obviously require significant expenditures which may not be possible in smaller communities.

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30. Ibid. *Orach Chayim*, Part 2 #88 and *Yoreh Deah*, Part 2 #59.