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

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

Manuscripts which are submitted for consideration must be typed, double-spaced on one side of the page, and sent in duplicate to the Editor, Rabbi Alfred Cohen, 5 Fox Lane, Spring Valley, New York, 10977. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles which concern halachic practices of American Jewish Life.

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The Journal of Halacha and Contemporary Society

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TABLE OF CONTENTS

The New York State *Get* Bill and its Halachic Ramifications

Rabbi Chaim Malinowitz

Introduction

In 1980, the New York State legislature passed what has become known as "the old New York State *Get* Bill."[1] This was in response to a perceived, ever-growing problem of spouses whose partners refuse to give/accept a *Get*, leaving them in a state of *Igun*. *Igun* – being chained – classically refers to a woman whose husband's whereabouts are unknown; hence, she is unable to remarry, nor does she have a husband. Of late, our community has come to know of the "modern-day *agunah*", when a husband refuses – for any reason (including mean-spirited ones) – to give his wife a *Get* in a situation that the wife would describe as a dead marriage.[2] This at times also leads to extortionist demands

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1. DRL 253.

2. Actually, as many a *Bet Din* can attest, the further "right" one goes on the religious spectrum, the more frequently this problem exists for men as well. That is to say, their wives are refusing to *accept Gittin*, and the men are in a state of *igun* due to Rabbenu Gershom's ban against bigamy. Although a man has an option unavailable to a woman – a *Heter Meah Rabbonim* (the procedure through which a man is granted permission to marry a second wife if his wife refuses to accept a *Get*) – that procedure is drawn-out, costly, and, many times, ultimately unsuccessful.

Dayan, Bet Din of Kollel Harabbonim, Monsey, and a Senior Editor of the Schottenstein Talmud published by Artscroll.

being made in "return" for a *Get*. This situation has worsened, in part, due to the lack of a sense of community where a strong central Bet Din's order to give a *Get* would almost automatically be listened to, as well as the lack of societal cohesiveness to ostracize the recalcitrant party.

The 1980 bill in New York essentially stated that the party initiating a divorce proceeding in the civil courts must certify that he or she has removed any "barrier to remarriage," as defined in that law. This effectively conditioned the procuring of a civil divorce for the party enlisting the aid of the courts upon the giving/receiving of a *Get*. The bill won the support of a broad spectrum of *Poskim*, who held that it was in no way coercive or otherwise problematic; with the approval of those who decide areas of Jewish Law, the law was passed.

However, this statute is obviously limited: for example, it only withholds a civil divorce but cannot compel a *Get*; it applies only to the plaintiff in the suit; it requires only an affidavit that the condition has been met. Yet these limitations helped to give impetus to rabbinic approval – for the court never directly ordered a party to give/receive a *Get*, nor is there any provision for the recalcitrant party to be penalized in any way. (There is no halachic problem in withholding from a person something that he is requesting (and is not necessarily due him) unless he gives a *Get*.[3])

Contrary to popular wisdom, there are stringent grounds which must exist for a *Heter Meah Rabbonim* to be granted – merely the wife's refusal to take a *Get* is most definitely *not* one of them. However, the plight of women who are *agunot* is doubtlessly more in the public eye, and this article therefore generally addresses the perspective of women *agunot*.

3. *T'shuvot Rivash* 127 and countless other responsa dealing with coercion.

Given these limitations, however, pressure continued to grow for a better *Get* Bill. And so in 1992, without benefit of public hearings or input from a range of *Poskim*, a second *Get* Bill was passed.[4] This "new *Get* Bill" directs the courts, when determining the distribution of marital assets, to take into account a "barrier to remarriage" (as defined in the first *Get* Bill). There are thirteen factors which a judge is directed to take into account when determining this distribution, and this bill tells a judge to weigh the effects of a "barrier to remarriage" upon all of these factors. The bill then goes on to direct a judge to do the same regarding the eleven factors presently taken into account when deciding an amount for "maintenance" (alimony). And since a judge must specify his reasons for setting these awards, a situation was created where the husband can now suffer a financial loss explicitly for his refusal to give a *Get*.

Canada also has passed a *Get* Law[5] – to this writer's knowledge, unapproved by *Poskim* – which contains all of the problems of the New York State law, and to a much greater degree. In England there are rumblings about some sort of legislative remedy for *agunot*, as there are in many other jurisdictions. This article points out the fundamental halachic concerns with the New York State bill, and, it is hoped, can serve to help evaluate other potential legislative "solutions".

In the view of this writer, the problems with the New York State *Get* Bill are so many and varied, that the wonder is not the opposition it has met, but rather that it has any support whatsoever. Many contend that the Jewish community is immeasurably better off without the bill than

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4. DRL 236 B.

5. Act of June 12, 1990, Ch. 18, I Statutes of Canada (1990).

with it since, as we shall see, the bill represents a dangerous time-bomb to the validity of many *Gittin*. Hence, ultimately, it endangers the sanctity of the Jewish family.

In addition, ironically, the bill may actually be counter-productive. The halachic process, which, under most circumstances solves *Igun* problems *when followed through,* is undercut by "solutions" such as these. By encouraging people to avoid a *Bet Din* and avoid having to justify their demands by the standards of halacha, it only helps frustrate Rabbanim and Rabbinic Judges who seek halachic solutions. It teaches litigants to ignore the *Bet Din* process and rulings and, indeed, to second-guess them. The overwhelming majority of *Igun* cases, after all, *are* solved – by rabbinic leadership along with community pressure. If the public is taught by well-meaning and not-so-well-meaning activists that the halachic route is to be avoided and ignored, then although there may be a few *agunot* helped by (one hopes) valid *Gittin*, there will be many many more who find their problems compounded.

Section One

Apart from the bill's flaws with respect to the validity of *Gittin*, there are three other anti-halachic effects. In the opinion of this writer, these effects are so manifest, so incontrovertible, that it is mystifying that any Orthodox Rabbi, much less any rabbinic institution, can be in favor of it.

I. The first basic flaw in the *Get* Bill is that it is intended to aid in procuring a *Get* – even if there is no reason according to Jewish law to assume a *Get* to be appropriate.

Halacha does not sanction a *Get* on demand. True, by biblical law, a man can divorce his wife against her will, without giving any reason whatsoever (although it is religiously

forbidden for him to do so until he has "due cause").[6] The woman, on the other hand, cannot initiate the act of divorce, although she can claim to have certain specific grounds for a divorce. In other words, she can become the plaintiff in a *Din Torah* (a legal suit before a *Bet Din*), claiming that a *Get* is due her. If she wins her case, the *Bet Din* will order the husband to give a *Get*.

However, about one thousand years ago, the famous *Cherem* (a decree under penalty of ban) of Rabbeinu Gershom was instituted, stating that a woman cannot be divorced without her consent.[7] Thus, the "playing field" was evened. As Rabbeinu Asher states in his famous dictum,[8] "The Rabbis acted to equalize the woman's power with the man's." Now, for all practical purposes, *neither* side in a marital dispute is *entitled* to a *Get* unless there exist very specific grounds for one. To procure a *Get* without mutual consent, a litigation process has to be undertaken – a *Din Torah* – and the *Bet Din* ultimately rules if a *Get* is legitimately "deserved," and whether or not there is a basis for obligating or, at times, for compelling, the husband/wife to give/receive a *Get*. The parties have the right, indeed the obligation, to bring their proofs, testimony, claims and counter-claims to the *Bet Din*. They may want to submit "legal briefs" – halachic responsa why their "case" calls for a *Get*. This is usually done through a rabbinic lawyer. This article is not intended to explore those grounds: they can be as varied as non–support, social behavior which adversely affects the spouse, or lack of fulfillment of other marital obligations.[9] The halacha is not uniform in

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6. *Shulchan Aruch Even Ha'ezer* 119:3,4.

7. Ibid, Ramo, Paragraph 6.

8. *T'shuvot HaRosh* 42:1.

9. Other grounds can be found in various places in *Shulchan Aruch Even Ha'ezer* from Chapter 66 to Chapter 154.

respect to all of them. Sometimes the halacha is merely that a divorce is appropriate; at times it describes divorce as a mitzva; sometimes as an absolute obligation – and, at times, even calls for forms of coercion to be used, or a "*Heter Meah Rabbonim*" to be obtained by the husband.[10] Thus, at the present time, the lack of "*Get* upon demand" is true both for the wife demanding a divorce and a husband wanting his wife to take one.

Without this halachic process, no one is justified in assuming that a *Get* is obligatory or even appropriate. Halachically, the marital state cannot be rent asunder on a mere whim, or because of boredom or lack of excitement or inconveniences. Rather, there must be halachic grounds for a *Get*.

[The above is true in the absence of mutual consent. If there is mutual consent, halacha always allows for a *Get*, although Judaism traditionally frowns upon divorce. This is in contrast to many other legal systems, Western ones included, where a long, often costly process to establish responsibility for the dissolution of a marriage is the norm.]

These laws which govern the grounds for a *Get* are the same as all Torah laws which govern our lives: Just as the laws governing *Tzitzit, Tefillin, Shabbat, Lulav* and business dealings are those dictated to us by *Shulchan Aruch*, so, too, are the halachic rules which concern grounds for divorce. Anyone purporting to live a life governed by halacha must orient his/her thinking in this direction. Therefore, action

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10. See footnote 2. In most cases, grounds for a *Heter Meah Rabbonim* are simply the grounds under which the woman is obligated to take a *Get*. See *Shulchan Aruch, Even Ha'ezer* 1:10, 115, and 119:6. And, if the situation would be reversed, the husband would be obligated, and at times compelled, to give a *Get:* ibid, Chapter 154.

taken by anyone to facilitate a *Get* for a man/woman if the *Get* is halachically unjustified, even if that action does not halachically invalidate the *Get*, is anti-halachic. [This does not refer to friendly persuasion. Surely an outsider, considering it irrational for a spouse to continue a marriage when the other spouse wants a divorce for any reason, would consider it correct to advise a party to take/receive a *Get*. But any action beyond such friendly persuasion is morally wrong.]

Lack of appreciation of this basic premise – that a *Get* is not to be obtained merely because one wants one – explains much of the erroneous thinking of the proponents of the *Get* Bill. Nothing in the bill limits its effects to where a competent halachic authority – a *Bet Din* – has found a *Get* called for. Surprisingly, the proponents of the bill have not felt a need to address this issue, although it seems that it is a call for "*Get*-on-demand" – an anti-Halachic statement! (Try to imagine a bill passed in the New York State legislature which mandates that A pay B money, even when their monetary dispute is unresolved – and A maintains vehemently that he owes no such money!)

At first, the proponents of the "new *Get* Bill" claimed that a responsum from Rabbi Yitzchak Liebes *sh'lita*,[11] the head of the *Bet Din* of Igud Harabbanim, justified and validated such a law: what was completely ignored was that this responsum is based on the premise that there is a pre–existing verdict of a duly constituted *Bet Din* obligating the husband to give a *Get*.

The *Get* Bill is constitutionally suspect as well. By inviting civil courts to impose financial consequences for the failure of a spouse to remove a religious barrier to remarriage, the law usurps the substantial body of religious law concerning

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11. *Beit Avi, Even Ha'ezer* 169.

when and under what circumstances a *Get* is appropriate. This is an encroachment upon religious law, and represents an erosion of our religious rights. For example, the husband may be entirely justified according to halacha in not giving his wife a *Get* and withholding support if the wife left the household *without due cause*.[12] (This, then, is entirely different than the first *Get* Bill, which limited its effects to withholding the relief of the courts (i.e., a civil divorce) from a recalcitrant party who is himself or herself requesting it, an area obviously within the province and discretion of the secular courts.) Should a civil court judge be issuing a ruling designed to elicit an uncalled-for *Get*?[13]

II. Furthermore, resorting to the secular courts to resolve disputes is strictly forbidden in Jewish Law.[14] This transgression is described by the *Shulchan Aruch* as akin to blasphemy and "taking up arms" against the Torah.[15] The Rashba[16] warns against confusing this prohibition with the dictum *Dina D'malchuta Dina* ("the law of the land is law").[17] Even if both parties agree to go, and in fact stipulate in writing

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12. *Shulchan, Aruch Even Ha'ezer* 70:12; 77:2,3.

13. It is indeed ironic that *Chazal* (*Gittin* 88b) disqualified an otherwise valid *Get* because of fear it would lead to women enlisting the aid of civil authorities to procure a *Get* from their husbands. And in modern times, in New York State, part of the Orthodox world cheers a secular law which is designed to do exactly that!

14. *Shulchan Aruch, Choshen Mishpat:* Chapter 26.

15. Ibid, Paragraph 1.

16. *T'shuvot Rashba,* cited by *Bet Yosef* in *Tur, Choshen Mishpat,* Chapter 26.

17. *Dina D'malchuta* has specific, limited applicability to certain monetary rights, and a *Bet Din* would rule on its applicability to a specific case. It has nothing to do with utilizing the secular courts, which is described as a monumental *chillul Hashem.*

that they will utilize the civil court system, it remains forbidden by halacha.[18] And this is true even if the secular courts would rule exactly as a *Bet Din* would – that is to say, if their law exactly matched ours concerning the rules of evidence, procedural matters, and the verdict itself based on the particular circumstances.[19] [There are certain circumstances which allow for utilizing the civil courts, but permission must be granted by a *Bet Din* which has ruled that these circumstances exist.][20]

This prohibition is a most severe one, no matter how lackadaisical an attitude people have towards it. It hardly behooves the Orthodox community, its institutions and its organizations, to take steps which encourage people to transgress this prohibition, which is, of course, exactly what this bill does. It approves of – no, it prods – people to utilize the civil courts for their monetary disputes and advises people how to turn this forbidden action to one's advantage in obtaining a *Get*. (A *Get* that one may not be entitled to according to halacha!)

This issue has not been addressed by the bill's proponents. It is the height of irresponsibility for anyone to advocate or even to implicitly approve of such actions.

III. As we have noted, the prohibition of resorting to the secular courts holds true even if every court action happens to follow all the rules of the *Shulchan Aruch*. If there are any differences, the additional issue of out-and-out theft arises, if the courts award money or privileges to either party.[21] (Even in circumstances where one had received

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18. *Shulchan Aruch, Choshen Mishpat* 26:3.
19. Ibid, Paragraph 1.
20. Ibid, Paragraph 2.
21. *T'shuvot Tashbatz* II, 290.

permission from a *Bet Din* to "use the courts" one is prohibited from keeping any monies he is not entitled to according to halacha.[22])

The *Get* Bill encourages a woman to use the civil courts to set rates of maintenance and "equitable distribution" despite the fact that she might not be entitled to that money according to Jewish law. For example, let us say a woman has no due cause (halachically) for a *Get,* but has opened a case as the plaintiff in the civil courts for a divorce. Rabbi Akiva Eiger discusses just such a case,[23] and compares this woman to a classic *Moredet* (a rebellious wife) who is not entitled to receive any support whatsoever. Certainly, too, "equitable distribution" has no halachic equivalent, but is merely the transference of property from one party to the other by state fiat; this money, then, does not belong to the acquiring party *al pi din*.[24] (The chances of "equitable distribution" being covered by the rule of *Dina D'malchuta Dina* are almost nil.

The Ramo[25] refers to such "laws":

> .....because that rule (*Dina D'malchuta Dina*) is only said when the King benefits, or when it is for the general welfare, but it was never meant to blindly follow their rules, for, if so, that would mean the end of Torah Law.

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22. See *N'tivot* to *Shulchan Aruch, Choshen Mishpat* 26:8; see *Aruch Hashulchan*, ibid 26:2.

23. *T'shuvot*, Vol. II, 82.

24. In the event that a prenuptial agreement (which can certainly be encouraged) does not exist, there is no *obligation* after a *Get* to support one's former wife (besides the *Ketubah* payment). Full child support is, of course, halachically mandated. Also, there is ample room for a properly empowered *Bet Din* to ensure that a former spouse not be left poverty-stricken and helpless after a *Get*.

25. *Shulchan Aruch, Choshen Mishpat* 369:11.

Many *Poskim* simply limit *Dina D'malchuta Dina* to matters concerning monetary relations between the authorities and the public.[26] In addition, the arbitrariness with which equitable distribution money is parcelled out probably would preclude its inclusion in this rule[27] – every single case involves thirteen factors which are quite subjective and up to the individual judge. In addition, there is no law which *mandates* "equitable distribution" – it is merely the state's distribution of property in the absence of any other arrangement. Surely that cannot be construed as permission to ignore Torah rulings on these matters! At the very least, it would take the jurisdiction of a duly-constituted *Bet Din* to conclude that *Dina D'Malchuta* applies in any particular individual's case.

Can the Jewish community accept a law which encourages a husband's being forced to give money to his spouse which she may not be entitled to according to Jewish law? Encouraging the use of "equitable distribution" or maintenance awards without a *Bet Din* ruling to that effect – for any purpose – is plainly wrong.

Section Two

The above problems, troubling as they are, pale in significance in comparison with the bill's effect upon the very validity of *Gittin* issued in the State of New York. The bill states, in effect, that a judge may, when determining maintenance and/or "equitable distribution", take into account the fact that a barrier to remarriage still exists, i.e., the husband/wife is not giving/receiving a *Get*. As originally

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26. See *T'shuvot Maharik* 187. See *Shach, Choshen Mishpat* 73:39, for other reasons for its inapplicability.

27. Based on *Rosh, Nedarim* 28a.

understood by all, and, as the proponents of the bill intended, (judging by the outpouring of kudos from various women's organizations[28]) this has the bottom-line effect of costing the spouse who is refusing to give/receive a *Get* a not inconsiderable amount of money, thus prodding him/her into acquiescence. Whether this is characterized as a penalty, an inducement, or as a practical way of dealing with a tragic situation is not relevant. The point is that a spouse's continued refusal can result in a substantial loss of money.

The need to give a *Get* or to face substantial loss of money, or the threat thereof, constitutes "coercion" according to Jewish law and, on a biblical level, invalidates a *Get* given as a result of such coercion. This requires some elaboration:

A most basic rule in *Hilchot Gittin* is that a *Get* must be given (and received by the wife, post-*Cherem d'Rabbeinu Gershom*) of one's own free will.[29] If the husband is coerced, the *Get* is invalid.[30] [31]The oft-quoted dictum *kofin osoh ad sheyomar rotzeh ani* – "we coerce him until he states 'I want to'" applies *only* in cases when (a)specific grounds for that verdict exist, (b) the *Bet Din* renders a verdict of *kofin* (we force him), and (c) the coercion is carried out by the *Bet Din* or others implementing its verdict.

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28. *Jewish Press*, July 24, 1992.

29. Rambam, *Gerushin* 1:1,2.

30. *Shulchan Aruch, Even Ha'ezer* 134:5. See *T'shuvot Maharam Mintz* 17, *Nodah BiYehudah* II,129 and Ramo, *Even Ha'ezer* 119:6, for discussions of the validity of a *Get* received by a wife against her will post-*Cherem d'Rabbeinu Gershom.*

31. The exception to this is when a *Bet Din* has ruled, based on the facts and evidence presented, that the husband may be coerced into giving a *Get*. The reason it is valid in such a case is explained by the Rambam, *Hilchot Gerushin*, 2:20.

Various types of invalidating coercion include physical punishment,[32] physical restraint (jail),[33] monetary loss,[34] or threats of any of the above.[35] Any of these coercive situations which brings about a *Get* without a verdict of *kofin* invalidates that *Get*. (Even in a case where the coercion is self-imposed, i.e., where the husband has willingly and legally bound himself to be penalized if he doesn't give a *Get*, the consensus of *Poskim* is that if he subsequently tells us that he is giving the *Get* only due to the penalty, he is viewed as being coerced – by himself! In these cases, most authorities view his previous state of mind as now being an "external" force upon his present wishes, and hence coercive in nature.[36])

The halacha discusses many forms of invalidating coercions: in all these situations, by definition, there is no "free will." "Free will", it should be noted, is a legal halachic term – not what you or I might characterize as "he wanted to do it." If, for example, A threatens to do significant bodily harm to B unless B gives him something; we might say that given these circumstances, B certainly wants to perform that act; however, halacha does not view the motivation as free will, and the act is totally invalid, the result of an invalidating coercion. Conversely, a husband or wife may not "want" to

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32. Based on Mishnah *Gittin* 88b, and from countless sources discussing coercion.

33. Based on sources discussing coercion: *Rivash* 127, *Mabit* I 22, and countless others.

34. *Choshen Mishpat* 205:7, *T'shuvot Rabbi Betzalel Ashkenazi* 15; also from cases in *Shulchan Aruch, Even Ha'ezer*, Chapter 134.

35. *Torat Gittin* on *Even Ha'ezer* 134:5 and others. Actually, every case of coercion is in reality merely a threat that the future holds more of the same.

36. Ramo, *Even Ha'ezer*, 134:5, and commentaries.

get divorced – yet, realizing the marriage is over, agree to the *Get*. This represents no halachic problem at all, because if no coercion exists, ultimate acquiescence is deemed "free will".

Thus, if a husband/wife appears before a *Bet Din* stating that he/she wants to give/receive a *Get*, that statement, and any actions that follow in its wake, are totally meaningless if brought about by a coercive action or the threat of one. The statement "I want," even if true in a certain *practical* sense, is halachically meaningless as long as coercion exists. And since the *Bet Din* merely oversees the giving of the *Get*, its lack of knowledge of possible coercive circumstances obviously is not relevant. Therefore, if at any time in the future, (even after a subsequent marriage, G–d forbid) it becomes clear that a halachically-invalidating coercion existed, the *Get* is retroactively invalid!

As long as a coercive situation exists, the halacha assumes that "free will" does not. In such a case, any "will" which may exist on the husband's part would be deemed *D'varim Sheb'lev Aynom D'varim* (unperceived intentions are not recognized in Jewish law as having any legal standing) and hence halachically meaningless. Every *Get* procedure also contains in it a statement by the husband (and sometimes by the wife as well) nullifying any statement he may have ever made affecting the validity of the *Get*.[37] This is known as *Bitul Moda'ot* – the husband's nullifying any statements he may ever have made claiming he is under duress; obviously, *Bitul Moda'ot* is meaningful only if there is in fact no coercion! A *Moda'a* – statement of duress – would invalidate a subsequent *Get* even if no actual coercion

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37. *Shulchan Aruch, Even Ha'ezer* 134:1.

existed.[38] For that purpose, the husband is told by the *Bet Din* to nullify any such possible statements. But his statement of "I want to give the *Get*" and his nullification of *Moda'ot* are meaningless if any coercion *does* exist![39]

Consequently, if a *Get* is given in circumstances where it is even just *plausible* that coercion is a factor, it would be under a cloud until its validity could be determined beyond any doubt. In other words, a *Bet Din* would have to make a thorough determination that no coercive situation ever existed. Such a task would be difficult if not impossible, due to the many subtleties and subjective factors which exist regarding halachic coercion – in certain cases, it might even depend on the character of the coercee![40]

Superficially, though, the *Get* Bill might be construed as "indirect coercion". Indirect coercion occurs when the party is being coerced for a different matter, and the giving of the *Get* can free him from that coercion. This is not deemed coercion on the *Get*, and hence the *Get* would be valid.[41] In our case, it could be argued that the transfer of money from husband to wife in accordance with a court's ruling in a divorce proceeding is not a direct threat to produce a *Get*; rather, the husband's giving the *Get* will indirectly free him from having to pay that "extra" money. However, upon reflection, it is clear that this is not so. All *Poskim* agree that the above rule about indirect coercion applies only if the coercion for that "side matter" is in and of itself halachically

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38. Ibid, Paragraph 2.

39. Ibid, Paragraph 7; see also *Pitchei T'shuvah* 134:4.

40. See *Pitchei T'shuvah, Even Ha'ezer* 134:15 where he discusses the unbearable burden placed on *Rabbanim* in just such instances.

41. *T'shuvot Rivash* 127.

justifiable.[42] If, however, the coercion for that "side matter" is halachically not justifiable, then the coercion is tantamount to coercion directly on the *Get*, and invalidates it.

Even if the equitable distribution aspect of the New York State law is a sincere attempt to have a woman in this situation be self–sufficient, that does not diminish the fact that "equitable distribution", especially in such a forum, has no halachic basis (see Section One). Also, there is no objective formula to determine a woman's actual needs and link them to her being awarded a specific amount of money. Furthermore, as we have explained,the maintenance award is halachically suspect as well: When a wife is a plaintiff in secular court demanding a divorce from her husband, until a *Bet Din* can determine the facts and the halacha, we must suspect, if not assume, that there is no halachic obligation for support. Although in many cases the woman may be entitled to support, the burden of proof before a *Bet Din* is upon her. In the absence of a *Bet Din* ruling that the husband must give her this money, we have, then,what is *halachically* deemed coercion on the *Get* itself. This situation, then, where the courts might decide to award a woman considerable alimony or "equitable distribution" money unless she receives a *Get*, is considered coercion according to Jewish law and might invalidate all *Gittin* given under such implicit threats.

For the first months after the bill's passage, the fact that the *Get* Bill created a coercive situation was vehemently denied. It was suggested that the wording "where appropriate" that appears in the bill refers to a *Bet Din* ruling that coercion is called for.[43] It was also suggested that monetary loss does

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42. Ibid; see also *Tashbatz* I, 1.

43. Actually, HaRav Elyashiv states in a letter disseminated

not constitute an invalidating coercion. When confronted with clear–cut halachic rulings that it does, it was suggested that at least the part of the bill which deals with maintenance could be justified, since the husband, if no *Get* was forthcoming, is halachically obligated to support his wife. (This argument, as shown above, is also wrong.) In any event, no steps were ever taken to amend the bill so that it would deal only with maintenance, and not "equitable distribution".

Some of the bill's proponents claimed to be relying on a responsum from Rabbi Yitzchak Liebes, *Sh'lita*,[44] (written many years ago) that seems to validate a *Get* given in such circumstances (not dealt with are the problems raised in Section One.) It was never publicized that (a) In Rabbi Liebes' case there was a clearcut *Bet Din* verdict that the husband was *obligated* to divorce his wife (the *Get* Bill has no such qualification) and (b) Rabbi Liebes, realizing the innovative ruling he was propounding, (that monetary penalties of this nature might not invalidate a *Get* a person was obligated to give, even in the absence of a verdict of *kofin*) concluded his responsum by stating emphatically that he refuses to rely on his own conclusion in the absence of the concurrence of other *Poskim*.

It can also be argued that as long as the *Get* Bill remains law, any couple coming to a *Bet Din* for a *Get* might have problems procuring an "unclouded" one. The possibilities of coercion, after all, are varied. An obvious case would be if the couple's case is already in the civil courts and they are awaiting the judge's verdict regarding monetary matters.

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to *Poskim* in America that even following a verdict of *kofin*, utilizing the *Get* Bill would constitute coercion, since the secular courts do not mean to fulfill the *Bet Din's* verdict but are carrying out their own mandate.

44. See footnote 11.

There are other, more subtle, possibilities. A husband just being threatened with the consequences of this bill is likely to acquiesce; hence, once again, invalidating any subsequent *Get*. (As stated above, the halacha views even threats of coercion, when likely or possible, as an invalidating factor.) What about a letter from the wife's lawyer to the husband's *before* any case is opened in court, gently "reminding" him of the bill's provisions? What about an angry woman telling an unwilling-to-divorce husband "see you in court"? What about the expenses involved in hiring a lawyer and getting involved in a debilitating court case? Surely any of these potential scenarios are a distinct possibility; in a contested divorce, an outright probability. How could a *Bet Din* determine with certainty that these scenarios did not occur?

At best, the bill creates a situation where every *Bet Din* would have the burden of investigating the motivation of any husband who is involved in, or has been threatened with, civil divorce proceedings. Hopefully, this theoretically could be done. But is this the purpose of the bill? What does it solve if, when it functions as provided for, it creates invalid *Gittin*? At the very least, the law creates a situation where spouses will be tempted to be devious with the *Bet Din* which is processing the *Get* in attempting to procure an (invalid) *Get* by misstating their true motivations.

In all-too-many situations, it will be impossible to prove the facts in a conclusive way. This may place all New York *Gittin* under a cloud, and thereby create a whole new class of *agunot*! We are dealing with something that potentially affects the entire Jewish community in a very serious way. If women receive Jewish divorces of questionable validity, their subsequent marriages might be adulterous and their subsequent offspring might be *mamzeirim*. These possibilities are indeed horrifying. Although the bill's purpose is commendable – to try to help *agunot* – it blunders into pitfalls without any regard to the consequences: an unfortunate

triumph of style over substance.

The *Get* Bill has another quixotic twist to it. Granted that a *Get* given as a result of economic duress is halachically invalid, the bill, by placing the threat of what are in effect financial sanctions over the heads of the litigants, thereby creates a situation where "free will" can no longer be determined to be existing. Paradoxically, then, the barrier to remarriage, which the bill seeks to obviate, cannot halachically be removed – by virtue of the coercion of the bill itself! This cruel "Catch-22" situation is a reason to have hope that the bill, upon challenge, will be overturned in the courts. As long as it has not been, though, and remains law, the bill obviously *does not* reckon with halachic will: Otherwise, it would be a self-contradictory joke, for it calls for willful action in a way which *halachically* produces coercion. (Any coercive action taken to produce a *Get*, after all, obviously does not reckon with halachic will – otherwise, the coercive action would be futile and pointless.)

Proponents of the bill have of late incorporated some of the above reasoning and have done an about-face (following a clear-cut ruling from two halachic giants of our generation, Rav S.Y. Elyashiv, *Sh'lita*, and Rav S.Z. Auerbach, *Sh'lita*, [in a letter disseminated to *Poskim* and other *Rabbanim*] that the "new *Get* Bill" represents invalidating coercion). After months of claiming that the bill did not represent an invalidating coercion, a new, but sophistic, interpretation was suggested: Granted the bill does create a coercive situation, the bill still represents no problem – precisely because it coerces the husband to give a *Get*! Since the law defines "a barrier to remarriage" as one that can willingly be removed, the husband (or wife) to whom the bill would apply need merely go to *Bet Din*; the *Bet Din* (presumably) will refuse to arrange the *Get*; and the party can then go back to the court and claim that he/she wants to remove the barrier – but the *Bet Din* will not let them! The court will

surely realize, the argument goes, the strength of this claim, and the bill's provisions will be aborted; true, no *Get* will have been procured, but at least the husband/wife will come to a *Bet Din*, who will then attempt to resolve the issue.

This approach is highly specious:

A: As a matter of principle, does it make sense to have a law which results in an invalid *Get if it works as written*, while we pin our hopes on its *not* working? Would we agree to legislation calling for printed *Tefillin* and *Mezuzot* to be sold as being halachically valid, with the expectation that our learned scribes and expert Rabbis will "catch" the invalid ones?

B: The claim that a judge will view the bill as coercive in determining whether or not the barrier can be removed willingly is absurd. No legal system views fulfilling its dictates as being unwilling and hence invalid. When a judge orders a contract to be drawn up under threat of contempt of court, can the litigant claim afterwards that the contract is invalid, drawn up without consent due to his fear of imprisonment?

C: As a practical matter, isn't it naive to assume that the husband will inform the *Bet Din* that he is being coerced by the bill? Wouldn't his lawyer, who certainly must consider that a judge would order maintenance and marital property based on the de-facto "undivorced" situation, advise him not to do anything that would obstruct the *Get* proceedings? A person being coerced to give a *Get* would obviously cooperate and just tell a *Bet Din* "*Rotzeh Ani*– I want to give the *Get*." Consider this case: If A threatens B to give a *Get* to his wife or he will be physically assaulted, and B believes him – would B go to the *Bet Din* and announce the threat, then go back to A and say "I tried to give the *Get* but the *Bet Din* wouldn't let me?" Or would he make sure to keep quiet and cooperate fully with the *Bet Din* proceedings?

D: The coercive effects of the bill can be very subtle and might have been utilized without the parties being aware of the halachic problem of coercion that exists. One example: Many months previously a wife may have threatened her husband to give her a *Get* or else she would take him to court and utilize the *Get* Bill. Will the *Bet Din* be able to make a proper determination if such an event indeed occurred? Remember that a halachically-coerced person honestly *feels* that he *does* want to give the *Get* – but that feeling has been produced by coercion and is *halachically* invalid.

It is puzzling that those who believe in this convoluted interpretation of the *Get* Bill absolutely *refuse* to support an amendment which would clarify that the purpose of the bill is indeed merely to have the parties submit their *Get* dispute to a *Bet Din*. (An amendment has been proposed many months ago which would do exactly that.)

They might also consider, in order to remove "a stumbling block", informing the various activist groups who have been so vociferous in hailing the bill's ability to procure a *Get* from a recalcitrant spouse, that the bill's only accomplishment is to transfer the entire matter to a *Bet Din*. One suspects that were these groups to be so informed, there would no longer be anyone objecting to repeal of the entire bill.

In summary, the "new *Get* Bill" represents an ever–present danger. It is, in fact, a convincing argument for those who proclaim the danger of having secular laws come to the "aid" of our community's halachic problems. Every day it remains law is a day too long.

Comments on the New York State "*Get* Law"

Rabbi Gedalia Dov Schwartz

Much controversy and confusion have been generated in regard to the enactment of the 1992 Amendments to Section 236B of the Domestic Relations Law, known as the "*Get* Law."* Because the 1992 law amends the Equitable Distribution Law of 1980 and allows the court to consider a "barrier to remarriage" in ruling upon the disposition of marital property and establishing maintenance, there are certain rabbinic authorities who understand the new law as coercing the husband to give a *get* out of fear of financial penalties. They consider that the new law authorizes the court to directly compel the husband to give a *get* under the threat of monetary penalties. Under Jewish law, a *get* given under compulsion is not valid. Thus, if this evaluation of the new law is correct, it would have serious consequences in the granting of religious divorces in N.Y. state.

Before reviewing the actual law itself, it is important to understand the source of the background material regarding the matter of a "*get me'usseh*, or coerced *get*.

It is a basic principle in the laws of *gittin* (religious divorce),

*A *get* is a divorce recognized by the Jewish religion, issued by a rabbinic court (Bet Din).

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that the husband must give the *get* of his free will without compulsion.[1] Consequently, interference with the husband's free will involvement in the *get* procedure would raise the question of a *get me'usseh*, a coerced *get*.

There are certain specific cases where the halacha prescribes coercion as a legitimate means of effecting a *get* in order to remove the wife from an intolerable situation.[2] In regard to the proper use of coercion in such situations, the Gemara[3] discusses and establishes the guidelines for the exercise of this method for the executing of a *get*. It is required that the Bet Din first deliberate and rule that the husband is in the category of one who must be compelled to give the *get*. Only then is compulsion employed.

After due deliberation, the Bet Din may employ even physical methods for compliance, and even non-Jews may act as its agents. They are to state to the recalcitrant spouse: "Do what the Jewish court has told you to do!" These procedures are discussed in the Gemara,[4] and are considered legitimate and effective, as long as there is adherence to the guidelines applicable in the specific case. The principle of permissible coercion must be initiated and decided by a Bet Din *before* employing non-Jews to carry out the *get* procedure. If it is initiated by non-Jews without the ruling of a Bet Din, even if such a ruling were in favor of a *get*, the *get* would be considered "*pasul*" (invalid).

In a situation where Bet Din has determined that a coerced

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1. Mishnah, *Yevamot*, Chap. XIV, 1.

2. Mishnah, *Ketubot*, Chap. VII, 10; *Shulchan Aruch, Even Haezer*, 144.

3. *Gittin* 88b, *Baba Bathra* 48a.

4. *Gittin* ibid.

get is proper, and non-Jews are carrying out their ruling, there is a difference of opinion whether the non-Jews must clearly state, "Do what the Bet Din of Israel are telling you!"

According to R. Meir Halevi,[5] if they do not mention the Jewish court, the *get* is *pasul* even if the Bet Din has ruled that he must be coerced. However, the Rosh disagrees and rules that the *get* is valid even if the non-Jews made no mention of the Bet Din's ruling, as long as that ruling permitted coercion.[6]

In regard to the method of coercion which may be employed, there is a controversy whether actual physical force may be used in a case where the Talmud only used the expression "*yotsi,*" i.e. the husband *should* divorce his wife, or whether he is to be told that he is *obligated* by law to divorce his wife and if he refuses he may be called an "*avaryan*", a law-breaker. Because of this dispute the Ramo rules that physical force should not be used in these cases, in order to avoid a possible *get me'usseh."*[7] But where the relationship is forbidden, he states that physical force may be used to compel the giving of a *get* .[8]

In situations where physical force is not permitted, the Bet Din can declare sanctions against the husband which amount to virtual excommunication and ostracism.[9] Although Rabbenu Tam ruled that in the case of "*mavis alai,*" (i.e. the wife claims, "My husband is repulsive to me") the husband should give a *get* but Bet Din cannot use direct

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5. *Tur, Even Haezer* 134.

6. *Shulchan Aruch,* ibid, par.8,9.

7. *Bet Yosef* 134; Ramo, ibid.

8. Ibid.

9. *Shulchan Aruch, Even Haezer* 154: 21; Ramo, ibid.

physical force, he favored all sorts of community sanctions and ostracism against the husband until he gave a *get*. Nor did he consider this in the category of a "*get me'usseh*" since the man had an option to go to another community that did not have such sanctions.[10]

Are threats of possible monetary sanctions or penalties considered as coercion to render a *get me'usseh*? If there is a self-imposed monetary penalty for not giving a *get*, some authorities have ruled that such a *get* is not a *get me'usseh*, but others rule that it is.[11] The ruling of the Ramo in the *Shulchan Aruch* is that *ab initio* the possible fine should be removed before the *get* procedure; however, if it were carried out without its removal, the *get* is valid since he was not directly coerced for the *get*.[12] Consequently, in any *Sidur Haget* (Jewish divorce proceedings), statements are made by the husband in order to remove even the remotest possibility of compulsion in the *get* process. There should not be even a tinge of a *get me'usseh*. However, it is quite clear from the above ruling of Ramo that if *b'dieved*, a *get* was issued because of any monetary fine, etc., the *get* is valid.

The question of any implicit monetary coercion or coercive actions (*oness*) taken against others, which may indirectly influence the husband's decision to cooperate in the *get*, occupies a great deal of space in the *Bet Yosef's* commentary on the above section of *Even Haezer*. The prevailing current opinion does not consider such indirect pressures as being in the category of a *get me'usseh*.[13] This is reflected in the above-cited passage in Ramo, who excepts

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10. *Bet Yosef* 134 and Ramo, ibid.
11. Ibid.
12. Ibid. Ramo, ibid, 40.
13. Ramo, ibid.

only the case of pressures which are exerted on a father in order to compel the son to give a *get*. Otherwise, as defined by *Tashbatz*,[14] it is not considered as an "*oness*" (involuntary) if it is not directly applicable to the husband.

The Gaon R. Yoav Weingarten discusses the problem of *oness mammon*, possible monetary pressures on the husband. He cites the Rabbenu Yerucham[15] in the case of a woman who seized notes due to her husband, whereupon the husband gave a *get* which Rabbenu Yerucham ruled was kosher. After an analysis of the concept of "*ratzon*" (will), the *Chelkat Yoav*, following the guidelines of the Torah,[16] explains that where no direct reference is made to the *get*, but the husband understands that he can avoid the possible loss by voluntarily giving the *get*, then it is not considered an *oness* and the *get* is valid.[17]

In a series of responsa, the late gaon Harav Yitzchok Isaac Halevy Herzog[18] discussed in depth the question of possible coercion as far as a *get me'usseh* is concerned. In view of the practice of rabbinic tribunals in Israel to compel a recalcitrant husband to pay *mezonot* (support) to his wife who is demanding a *get*, the decision on this point has serious halachic implications. It might seem that the husband is under compulsion to give a *get* in order to be relieved of the burden of payments; however, since the husband cannot remarry because of the "*Cherem* of Rabbenu Gershom" (a medieval enactment which forbids a man to be married to two women at the same time) this latter factor could possibly

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14. No. 1; also cited in *Bet Yosef, Even Haezer*, 134.
15. *N'tiv* 24, *Chelek* 1.
16. *Gittin* 134, 4.
17. *Chelkat Yoav, Dinei Oness*, 5.
18. *Haichal Yitzchak*, I, 1-5.

be the reason for his voluntary cooperation in giving a *get*, since he clearly states that he is giving the *get* of his own free will. (In other words, the husband can be considered to be giving the *get*, not because of the financial pressure but because of the permissible rabbinic pressure which prohibits his own remarriage unless he divorces his first wife). He finds basic support for this approach in the analysis of the *Oneg Yom Tov*:[19] the very fact that he wants to be free to marry is in the category of "*onseh dinafshei*," self-imposed coercion, which is not considered a true *oness*, inasmuch as the coercion is not directed towards giving a *get* but rather to freeing himself from being attached to his wife so that he may marry another woman.

Also the ruling of Rambam[20] is utilized by Rav Herzog: In a case where the woman finds it intolerable to live with her husband because she finds him repulsive, the Rambam rules that the husband can be physically coerced; this opinion is mentioned and considered where monetary sanctions are being invoked by the Bet Din. Although the ruling in the *Shulchan Aruch* does not condone any physical coercion, following the opposition of Tosafot,[21] nevertheless, this situation was joined with the other concepts if not directly forcing the *get*.[22] Consequently, Harav Herzog rules that in the case of extreme *igun* and possibility of promiscuity, *mezonot* (support) should be mandated by the Bet Din.

In regard to a question concerning a government ruling not to grant a civil divorce if a *get* is not being given, Hagaon R. Moshe Feinstein, *zt'l*, addressed the matter of *mezonot*

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19. 149.

20. *Hilchot Ishut* Chap XIIII, 8.

21. *Ketubot* 63b.

22. Viz: *Haichal Yitzchak*, ibid, 2,1.

(sustenance) being imposed by the secular court.

> "With regard to your... question, if a secular judge imposes upon the husband, when he refuses to give a *get*, to make a payment of money to her for her *mezonot* and all her needs, is such a *get* considered a *get me'usseh*? Behold until he divorces his wife, he is responsible for her *mezonot* and all of her needs according to the *Din* (Jewish law), and she is even permitted to petition the secular courts for an order to compel him to provide her with *mezonot* and all of her needs. Even though the secular courts will order more than would a Bet Din, because those courts will compel him to support her even if she works and profits, when those courts order him to provide her with *mezonot* and with all of her needs under any circumstances, it is evident that if he divorces her in order to rid himself of this responsibility, that such a *get* is not considered a *get me'usseh* and that it is a "kosher" *get, l'chatchilah.*[23]

In a direct response to the establishment of the proposed amendment to the original "*Get* Law", Harav Hagaon R. Yitzchok Liebes, Head of the Bet Din of the Igud Harabbonim, published a *teshuva* (responsum) in his *sefer Bait Avi,*[24] in which he rules that the law does not intrude in the problem of *get me'usseh*. In his extensive discussion of the background sources, he emphasizes the approach of the *Torat Gittin*, that since the possible pressure created is not directly directed towards the actual *get* process, but rather towards the husband's choosing to unburden himself from a financial

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23. *Iggerot Moshe, Even Haezer* Vol. 4, 106. See also Vol. 3, 44. For further discussion in regard to *Ketuba* and *Mezonot* in the case of a recalcitrant husband, see *Chikrei Halacha* (p. 261-282) by Harav Shear Yashuv Hacohen, Rav of Haifa.

24. Vol. V, 169.

obligation by giving a *get,* then it cannot be considered as a *get me'usseh.* Although he writes there are *poskim* who consider monetary coercion in the category of *oness,* not like the opinion of Rabbenu Yerucham, he feels that the critical issues of *igun* and its consequences ("*Shaat Hadechak*"), allow for leniency in this very serious situation.

As to the objection raised that the amended *get* law would give power to the secular courts directly to coerce a husband to give a *get,* it has been pointed out by legal experts that the language of the statute states that the removal of a "barrier to remarriage" is by the voluntary act of the husband. The court will *not* directly coerce the husband to give a *get,* especially if a Bet Din has ruled for whatever reason that he is being denied a *get.*[25]

As in the past, nowadays every competent and qualified *mesader gittin* in the Bet Din setting is careful to rule on the cooperation and willingness of the husband in following the *get* process. One has to remember that even absent the existence of the *Get* Law, every Bet Din is faced with the need to determine the husband's free-will cooperation. Who knows what type of pressures or threats may exist for each participant in the *get* procedure? It comes down to the principle of "*Ain L'dayan elah ma sh'einov ro'ot,*" it is up to the perception of the judge. Consequently, the *Get* Law does not serve as a vehicle of non-halachic issuance of *gittin.* Rather, it is concerned with the plight of *agunot* who have been placed in an untenable position in regard to their family life and financial stability. Any alleviation of this situation is an important constructive step.

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25. For a complete legal analysis of the "*Get* Law," see the memorandum of Marvin E. Jacob, Esq., dated June 14, 1993, published in the Jewish Press.

A competent Bet Din, alert to all possibilities of a possible *get me'usseh* will continue to function in supervising *get* procedures, since the *get* law does not provide for direct coercion by the secular courts. Placing financial responsibility on the husband when not terminating the marriage does not, as illustrated above in the *Iggerot Moshe*, cause concern for a *get me'usseh*. Consequently, the *Get* Law will serve as a facilitator in many cases of *igun*.

In conclusion, the controversy engendered by the law serves as a continuing reminder to every qualified Bet Din to be aware of the demands of the halachic standards of proper *get* procedure and to heighten consciousness for its legitimate and complete implementation.

Multi-Fetal Pregnancy Reduction

Yitzchak Mehlman

In vitro fertilization, a highly sophisticated method of treating infertility, is currently being employed routinely. With it, several ethical and religious questions arise. The procedure requires the retrieval of several eggs, at times even two dozen eggs. To achieve the current approximately twenty per cent success rate, at least four eggs need to be fertilized in vitro and placed in the uterus. This would allow for implantation of all four embryos, or as many as are originally placed inside the uterus.[1]

Herein lies a major question, that of multi-fetal pregnancy reduction. While the aim is to have only one of the embryos originally placed in the uterus implant, there exists the possibility of several embryos implanting. Generally, Jewish law permits abortion when the mother's life is threatened, constituting a maternal indication for abortion.[2] The issue

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1. "In Vitro Fertilization – Embryo Transfer in the United States: 1988 Results from IVF-ET Registry," *Fertility and Sterility*, 53:13-20, Jan., 1990.

2. Generally, Rabbi J. David Bleich, "Abortion in Halachic Literature," *Jewish Biotehics*, ed. Fred Rosner and J. David Bleich (N.Y.: Hebrew Publishing Company, 1979), pp. 134-77.
The generalizing of this law is predicated on the aim of providing

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that must be addressed is whether it is permissible to reduce a multifetal pregnancy where the fetuses themselves are endangered due to the excessive demands of multifetal pregnancies. Within this context, the therapeutic indication for reducing the number of fetuses pertains to the fellow fetuses. Is there a halachic basis for this therapeutic indication? And even if there is, the question exists whether a woman may initially put herself in that situation, knowing the possibility may arise requiring reduction of fetuses.

These are very delicate and difficult questions which require direct answers for those who would wish to avail themselves of the new technology. But the issues and possibilities raised are so very new that as yet there has not been a substantial response by leading halachic decisors (*poskim*). This study is offered as a tentative introduction to the problem and its subtleties, with a number of suggested directives based on various halachic principles. We preface this study with an absolute disclaimer to be offering anything other than an outline of the question as a halachic issue.

Before expounding the idea of multifetal pregnancy reduction, other issues must be explicated about the pre-implantation state. It is common protocol to retrieve at one time more eggs than will be implanted during any one procedure. These "extra" eggs are fertilized and stored as embryos (or preembryos). There are various reasons for retrieving these "extra" eggs. Firstly, the increased ovulation and retrieval procedures that need to be performed have

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an approach to the topic. Specific laws and distinctions are to be considered separate from the goal of this paper. Certain strictness of the Noahide laws (those divinely ordained laws incumbent on the non-Jew) exists, particularly with reference to the indications for abortion, the time of gestation, and the punishment ascribed to the one who performs the abortion.

their difficulties and risks; thus a single accumulation of eggs is preferred. These "extra" eggs are retrieved in the event that subsequent tries at implantation are required. Further reasons for retrieving the increased number of eggs is for the purpose of donating them or for research. It should be noted that only fertilized eggs can be stored.

Considering that the success of in vitro fertilization may rest on the additional eggs retrieved, the question arises as to the status of these embryos prior to implantation with regard to humanhood. Does halacha permit the unused embryos to be discarded? Can research be performed on them?

The Ethics Committee of the American Fertility Society has deliberated many of these issues. They concluded that "the human preembryo is not a person but is entitled to respect because it has potential to become a person. This view limits the circumstances in which a preembryo may be discarded or used in research..."[3]

The Department of Health, Education, and Welfare offers an argument for the possibility that the embryo should be included in the laws protecting humanity, claiming: "1. The embryos are biologically alive. 2. There is a continuity of development between earlier and later stages of embryonic and fetal life."[4]

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3. Roger D. Kempers et al, (eds.), *Ethical Considerations of the New Reproductive Technologies, Fertility and Sterility, Supplement 2,* 53:6, June 1990, p. 82s.

4. Department of Health, Education and Welfare, (1979), Appendix: *HEW Support of Research involving Human In Vitro Fertilization and Embryo Transfer,* Ethics Advisory Board, Washington, D.C.: Author cited in Angela Marmaduke et al., "In Vitro Fertilization and Embryo Transfer Dilemmas," *Nursing Forum,* 24:3,4, p. 26, 1989.

An opposing argument, offered by some secular ethicists, states that the right to life exists only for those beings that "at least at a minimal level" possess the capacity for the characteristics including consciousness, autonomy, rationality and the ability to relate to others, generally speaking, those capacities that are distinctive of human beings.[5] The embryo would, therefore, not be protected by this right.

The Jewish halachic stance differs substantially from the aforementioned. And even within the context of Jewish law, differing opinions emerge.

The questions in Jewish law of the permissibility of donating eggs and sperm with regard to maternity, paternity, incest, and bastardy need to be addressed separately, as do the questions regarding the procurement of sperm. Additionally, the permissibility of placing an embryo into the womb of a *niddah* is a question to be discussed separately. (A *niddah* is a woman during the period of menstruation until ritual purification, when marital relations are prohibited.)

To answer the question as to the "humanhood" of the pre-implanted embryos we must first ask, "When does life begin?"

In Genesis 9:6, the Torah teaches,

שופך דם האדם באדם דמו ישפך, כי בצלם אלקים ברא את האדם

Whoever sheds man's blood within man, his blood shall be shed : for in the image of G-d made He man.

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5. H. Kuhse et al., "The Moral Status of the Embryo," in W. Walters and P. Singer (eds.) *Test Tube Babies: A Guide to Moral Questions, Present Techniques and Future Possibilities*, (New York: Oxford University Press, 1982), p. 60.

According to the Talmud, this verse means that for a non-Jew, the killing of a fetus is punishable by death. The inference is as follows:

> משום ר' ישמעאל אמרי, אף על העוברין, מאי טעמיה דרבי ישמעאל? דכתיב, שופך דם האדם באדם דמו ישפך, איזהו אדם שהוא באדם הוי אומר זה עובר שבמעי אמו.

> In the name of Rabbi Yishmael it has been said, "A non-Jew is held accountable for killing a fetus, as the Scripture states, 'whoever sheds man's blood within man, his blood shall be shed.' What is meant by 'man's blood within man?' This refers to the fetus within the womb of its mother."[6]

Because the fetus within the womb from the moment of conception is considered to be "in the image of G-d," abortion is not permitted.

However, this is not an absolute law for, as was stated, under certain conditions abortion may be permitted, namely when it is therapeutically needed for the mother's well-being.[7]

The term "therapeutically indicated" has a wide range of subsets; from the non-life threatening, for example diabetes, to the life-threatening situation. In order to decide which therapeutic subsets allow for abortion, a case to case decision is needed by a competent rabbi. To help the rabbi make his decision, the age of the fetus is a factor; as the Talmud states, "עד ארבעים מיא בעלמא היא" "Until forty [days] it is mere fluid,"[8] affording the rabbis leniency in their evaluation of the case at hand.

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6. *Sanhedrin* 57b.
7. Bleich, *op. cit.*
8. *Yevamot* 69b.

However, after forty days, the rule is to be much stricter.

Under what category is abortion to be placed? The Torah does not treat abortion as homicide, deduced from the passage in Exodus 21:12:

> מכה איש ומת מות יומת
>
> He that smites a man, so that he die, shall be surely put to death.

Only if one smites a "man" (i.e., a human who is viable), is it labeled as homicide.[9] Instead, the Talmud considers the fetus as an extension, "a limb of its mother,"[10] not as a being unto itself.

Combining the aforementioned ideas, we can formulate: Although the fetus is a physical extension of the mother, it is at the same time a "man within a man" and therefore protected under the laws against feticide. The understanding is that although a fetus is not an independent life, for it has no independent capability of viability, at the same time, it already possesses a soul, and thus potentiality. An Aggadic passage of the Talmud states,

> מאימתי בא לעולם הבא?... איתמר רבינא אמר משעה שנזרע, דכתיב זרע יעבדנו.
>
> From when does a person acquire a place in the world to come? Ravinah sates, "From the moment that conception occurs, as it states, 'Their seed shall serve Him' (Psalms 22:31)."[11]

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9. *Sanhedrin* 84b.

10. *Chullin* 58a; Rashi *Arechin* 7a, Heading: "*Ein Mamtinin...*;" see also *Notes* of Rabbi Akiva Eiger on *Arechin* 7a.

11. *Sanhedrin* 110b; *Sotah* 20b.

Similarly, the embryo even in the Petri dish, by virtue of its potential to serve G-d, by virtue of its potential for independent life, earns for itself a status at least above that of a mere clump of cells.

However, from the Talmud and its commentators it would appear that the title of fetus and the application of the term "feticide" applies only so long as the fetus is contained within the womb or relying on its mother for substance; so long as it can be considered as a limb of its mother. But when we cannot associate the fetus with the fetal container, the laws of feticide would not apply.[12]

The idea of "—cide", independent of the issue of actual viability is found with reference to the law against the spilling of seed in vain in the Talmud,

> ואמר ר' אליעזר, "מאי דכתיב ידיכם דמים מלאו? אלו המנאפים ביד"

> And Rabbi Elazar asked, "What is meant by 'Your hands are full of blood (Isaiah 1:15)?' It refers to those who spill seed with their hands."[13]

The Talmud associates a murderous act with the spilling

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12. See Rashi on *Arechin* 7a, Heading: "*Ma'mtinin Lo*," "דכיון דעקר ונע ממקומו גופא אחרינא הוא" "That since it [the fetus] is uprooted and has moved from its place [as in the process of delivery] it must be considered a separate being."

See also Tosafot on *Niddah* 44a, Heading: "*Ee'huoo*" which states that the criterion for homicide is whether the fetus is relying on its mother for life. I posit that according to Tosafot since the pre-implanted embryo relies for sustenance on its own internal environment, it is similar to Tosafot's "fetus placed in a box," as a form of life unto itself that cannot merely be discarded without any consideration.

13. *Niddah* 13b; *Tur, Code of Jewish Law,* Vol. *Even Ha'Ezer,* Chapter 23, paragraph 1.

of seed. A possible understanding of this is that the spilled semen and similiarly the embryo in the Petri dish represent the potential for life and therefore may not be discarded without a good reason.

A second approach to the question of discarding fertilized eggs still in vitro might be based on the *Havot Yair*, who maintains that abortion in general is prohibited based on the prohibition of "spilling seed in vain," Onanism.[14] This understanding would most likely include the intentional destroying of a non-implanted embryo as well, independent of the concept of "potential for life."

There are several rabbinic scholars who are of the opinion that embryos outside the womb may be treated as mere clumps of cells and do not need any consideration in discarding them. In response to an inquiry in this regard by Dr. Richard Grazi,[15] Rabbi Haim David Halevi and Rabbi Mordechai Eliyahu offer the following opinions: Rabbi Halevi states that the embryos in vitro are not protected by the Jewish laws governing abortion and may be discarded so long as they were not "chosen for implantation," because these laws apply only to what is contained within the womb.[16]

Rabbi Eliyahu takes a similar approach by maintaining that only those embryos which are destined to be implanted assume the title "live fetuses." By contrast, those embryos

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14. R. Yair Chaim Bacharach, *Havot Yair*, no 31.

15. See R. Grazi, J. Wolowelsky, "Multifetal Pregnancy Reduction and Disposal of Untransplanted Embryos in Contemporary Jewish Law and Ethics," *American Journal of Obstetrics and Gynecology*, 165:5 Nov. 1991, pp. 1268-71.

16. R. Haim David Halevi, "Concerning Multi-Fetal Pregnancy Reduction and the Halachic Stand Concerning Embryos In Vitro," *Assia*, nos. 47-48 (12:3-4), Kislev 1990. pp. 14-15.

in vitro which were not chosen to be implanted are permitted to be discarded. It would seem, according to Rabbi Eliyahu, that the criterion in deciding how to treat the not-yet-implanted embryos is whether they have a "destinity to live." If they do not, then we can treat them as mere cells.[17]

Rabbi Ahron Soloveichik takes a somewhat different approach: Every Jewish couple is charged by G-d to procreate and build a family. Only under certain circumstances are a husband and wife permitted to use contraception and birth control to abate this charge. And even when granted the permission by a competent rabbi who has assessed the validity of the request, only certain methods of contraception are accepted by Jewish Law. The basis for allowing contraception under certain conditions can be found in the Talmud (*Niddah* 45a).

Rabbi Soloveichik explains that when the Talmud considers the fetus from the time of conception until forty days as "מיא בעלמא -mere fluid" (*Yevamot* 69b), it means to approach it with the same laws governing contraception. The understanding is that when contraception is permitted by Jewish Law, by reason of constituting a valid purpose, then, while it is preferred to prevent fertilization, if conception has already occurred, terminating the pregnancy within forty days is also permitted (after due questioning of an halachic authority). Since, in our case the extra frozen embryos will not be used, regardless, Rabbi Soloveichik considers this a valid reason to destroy them. As far as the question of spilling seed by destroying the fertilized egg, Rabbi Soloveichik considers that Jewish law permits the spilling of seed under certain conditions where necessity dictates,

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17. R. Mordechai Eliyahu, "Destruction of Embryos and Multifetal Pregnancy Reduction," *Tehumin* (Tzomet, Israel) vol. 11, 1990, pp. 272-273.

such as in our case.[18]

However, Rabbi Soloveichik emphasizes that while in practice, we treat the fetus before forty days as we do birth control, we cannot, at the same time, lose sight that from the moment of conception potential life on some level has begun. Therefore, great care must be exercised to fertilize only that amount of eggs that the doctor deems absolutely necessary to achieve a successful pregnancy, taking into consideration the possibility of future attempts.[19]

Additionally, since according to some halachic authorities, women are prohibited to destroy their seed, namely ova, doctors must take care to be minimalistis in the number of eggs that they retrieve.[20]

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Heretofore, we have examined the status of the pre-implanted embryo with regard to humanhood. We have also discussed the permissibility of aborting an implanted fetus when therapeutically indicated to assure the mother's

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18. Rabbi Ahron Soloveichik, private interview at Washington Heights, N.Y., December 16, 1992. Note for this and all future references to this interview: Rabbi A. Soloveichik emphasized during the interview that he was dealing with the issues on a theoretical level, not on a practical level. Therefore, each case must be analyzed separately by an halachic authority before acting.

19. Ibid.

20. Ibid. Author's note: Perhaps this can be derived from Tos. *Niddah* 13a, Heading: "*Nashim*," who state that a woman is not bound by the law of Onanism vis-a-vis her ova so long as the release of the ova is an internally contained process. However, once we procure the eggs into an external Petri dish, the prohibition and, hence, requirement to be minimalists in this process of retrieval, would exist.

well-being. Now we turn to the issue of aborting, or "reducing" the number of fetuses in the womb in the case of multifetal pregnancy.

The question of multifetal pregnancy reduction needs to be examined from various perspectives. The first perspective is that of the mother's well-being. Any pregnancy, even a singleton, has its inherent risks, including hemorrhage, infection, toxemia, and vascular accidents.[21] To reduce a pregnancy due to any of these risks could not be labeled as "therapeutically indicated" because risks are a natural component of pregnancy, concerning which people have to put aside their fears, because G-d has charged, "Be fruitful and multiply" (Genesis, 1:28). This idea could be further expounded based on the verse in Psalms 116:6, שומר פתאים ה' "The Lord preserves the simple."

According to Jewish law, one is generally not permitted to rely on miracles, especially when one's life is threatened. Rather, the halacha dictates that man is to be cautious even for remote complications. However, at the same time, a person has to act based on what the circumstances are now. If a person is not in any immediate danger but only a risk of harm exists with regard to future health, one may proceed based on statistical probability and rely on heavenly intervention.[22]

Many of the complications associated with singleton pregnancies have an increased incidence in multiple gestation.[23] Even in light of these increased incidences, one

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21. Norbert Gleicher (ed.), *Principles of Medical Therapy in Pregnancy* (N.Y.: Plenum Medical Book Company, 1985), p. 26.

22. "*Ein Somchin Al Ha'Neis*," *Talmudic Encyclopedia* (1990), I, 679-681. See footnote 24, citing *Responsa of Bnei Zion.*

23. AH MacLennan, "Clinical Characteristics and Management

could not automatically label a multiple gestation as a therapeutic indication for reduction to prevent maternal morbidity and mortality. A "therapeutic indication" implies that a disease or condition requires a curative procedure. When only a *risk* of acquiring that disease or experiencing that condition exists, even be it an increased risk, one may not necessarily consider it to be of therapeutic indication. Rather, the accepted protocol would be to monitor and observe. Risk implies possibility, while a therapeutic indication would require at least probability. Additionally, as was mentioned, taking risks is an integral part of the natural order of pregnancy. Once a women agrees to these risks by becoming pregnant, especially with the help of Assisted Reproductive Technology, she can no longer consider the risks associated with multiple gestation as a therapeutic indication for abortion.

The second perspective that must be taken when considering multifetal pregnancy reduction is the effect that the large number of fetuses, in the same womb, have on each other. The increased percentage of mortality and morbidity of fetuses in a multiple pregnancy as compared to a singleton is primarily due to the increased incidences of preterm birth and intrauterine growth retardation.[24] Preterm delivery is directly related to the number of fetuses concurrently in the womb.[25]

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of Multiple Gestation," *Maternal-Fetal Medicine: Principles and Practice,* ed. Robert Creasy and Robert Resnik, (Philadelphia: W.B. Saunders Co., 1989), pp. 580-91.

24. Ibid. p. 580.

25. Marc Dommergues et al., "Embryo Reduction in Multifetal Pregnancies After Infertility Therapy: Obstetrical Risks and Perinatal Benefits are Related to Operative Strategy," *Fertility and Sterility,* 55:809.

According to one report, multifetal pregnancy reduction has benefit only up to triplets, as reducing triplets did not show a definitive improvement in pregnancy outcome. According to the report, the statistics are accurate provided that the cases of multiple gestation were managed expertly, with greater attention provided by the health care provider.[26]

Similar guidelines were proposed based on a study in France where no clear, significant advantage was found in reducing triplets.[27] The practice of reducing gestation only until triplets is accepted even in light of the reported nearly sixfold higher rate of neonatal deaths in twins as compared to singleton pregnancies.[28] However, it must be noted that the sixfold higher rate takes into consideration all multiple pregnancies without accounting for the number of chorionic gestations, namely, whether each fetus has its own surrounding fetal membrane. The fact is that "the outcome of multichorionic gestations is improved when compared with series of monochorionic twins."[29] Despite the increased rate of neonatal deaths and complications in twin pregnancies, doctors advise not to reduce twins, in order to allow for some "margin of error." However, the latter study would advise reducing triplets, since they have a two-to-four increase in perinatal deaths and morbidity, i.e. *abnormalities* as a result of prematurity, as compared to twins.[30]

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26. Richard P. Porreco et al., "Multifetal Pregnancy Reduction of Triplets and Pregnancy Outcome," *Obstetrics and Gynecology*, 78:335-39, Sept. 1991.

27. Dommergues, pp. 805-11.

28. Jon L. Kiely, "The Epidemiology of Perinatal Mortality in Multiple Births," *Bulletin of the New York Academy of Medicine*, 66:618-37, November-December, 1990.

29. Porreco, p. 335.

30. Mark I Evans et al., "Selective First-Trimester Termination

The aforementioned reports have demonstrated the increased risk of mortality and morbidity to the fetuses of multiple pregnancies. The issue that remains is whether, from the perspective of Jewish law, there exists the notion of killing one fetus to prevent the morbidity and mortality of the others. Statistically, it would seem that the therapeutic indication for the reduction of pregnancy vis-a-vis the fetus is not based on the *possibility* of neonatal mortality but, rather, on the *probability* of neonatal mortality. Hence, we have a situation whereby not reducing the number of fetuses in the womb threatens the entire pregnancy. The issue of reducing to "merely" prevent birth defects, given that at birth two-thirds of twins show some signs of growth retardation, is muted by the almost sixfold increased rate of neonatal death in twins.[31] Basically, then, the issue is primarily one of sacrificing one fetus to save the other.

In order to begin to examine the issue at hand, we must first understand the permissibility, in Jewish law, of a therapeutic abortion with regard to the mother's life. When the fetus threatens the mother's life, the fetus is considered similar to a "pursuer", and the halacha requires us to do anything necessary to save the one being pursued, in this case, the mother. This law of self-defense is codified as follows:

> לפיכך העוברת שהיא מקשה לילד מותר לחתוך העובר במעיה בין בסם בין ביד מפני שהוא כרודף אחריה להרגה.
>
> Therefore, if the pregnant woman is having difficulty [of a life-threatening nature] in delivery [so long as the head or the greater part of the body has not yet emerged], it is permitted to destroy the fetus in the womb whether by an

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in Octuplet and Quadruplet Pregnancies: Clinical and Ethical Issue," *Obstetrics and Gynecology*, 71:289-96, March, 1988.

31. MacLennan, p. 580.

abortifacient or by hand, since the fetus is considered similar to one who is pursuing after the mother to kill her.[32]

The primary source for the law of pursuer can be found in Exodus 22:1,

אם במחתרת ימצא הגנב והכה ומת אין לו דמים

If a thief be found breaking in, and be smitten that he die, there shall be no blood [guilt] on his account.

As the Talmud states,

אם בא להרגך השכם להורגו

If he comes to kill you, you rise up first to kill him.[33]

Understandably, if another way to ensure the safety of the one being pursued is available, such as by incapacitating the pursuer short of killing him, it should be employed.[34]

However, once the head or greater part of the body of the infant emerges it is no longer permissible to kill the infant to save the mother.[35] Rashi understands that once its head emerges, the child is considered as if born and a separate life, and one may not take one soul to save another.[36] Maimonides (Rambam) explains that since the nature of the world is such that babies in the process of delivery pose a threat to their mother's life, they cannot be considered as "pursuers."[37] Rather, we should employ the principle that

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32. *Shulchan Aruch, Choshen Mishpat,* 425:2.
33. *Sanhedrin* 72a.
34. Rambam, *Hilchot Rotze'ach,* 1:7.
35. *Sanhedrin* 72b.
36. Ibid, Rashi; Heading: "*Yatzah Rosho.*"
37. Rambam, *loc. cit.,* 1:9.

one soul cannot be sacrificed to save another. Finally, the Jerusalem Talmud explains according to Rabbi Chisdah,

שאין את יודע מי הרג את מי

that we do not know who is endangering whose life.[38]

Therefore, the law of the pursuer does not apply.

It is evident from the Jerusalem Talmud that the law regarding the pursuer cannot apply to the question of multifetal pregnancy reduction: although each fetus inherently threatens the lives of its siblings by virtue of the multiple gestation, we cannot single out a specific fetus and declare it to be the "pursuer" of its siblings. The situation is such that all the fetuses are in essence both the pursuers and the victims of that pursuit. The law of pursuer applies only where it can be established that one is "pursuing" and hence, threatening, the life of another.

In terms of Maimonides' explanation, the principle of not sacrificing one soul to save another could have relevance, especially in light of his use of the term "*Nefesh*", literally, soul, when referring to the fetus in the womb. As cited by Mainonides, when *natural order* establishes a state whereby one being threatens another being of equal status, such as the mother and the infant, once in the throes of birth we apply the law of "אין דוחין נפש מפני נפש", it is not permitted to sacrifice one soul to save another."[39]

Similarly, in the case of multiple gestation, although the fetuses are placed in the womb using Assisted Reproductive Technology, nevertheless they implanted via a natural process. Therefore, since natural order established the threat

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38. Jerusalem Talmud: *Sanhedrin* 8:9.

39. *Ohalot*, 7:6.

of one fetus against the other, they are all protected by the law against sacrificing one being to save another of equal status.

This idea is further illustrated in the Jerusalem Talmud, where the following case is discussed:

> תנו לכם אחד מכם ונהרוג אותו ואם לאו הרי אנו הורגין את כולכן אפילו כולן נהרגין לא ימסרו נפש אחת מישראל.
>
> If one group of people say to another, "Give us any one of you and we will kill him, and if not then we will kill all of you," even if all are killed, one may not hand over even one person of Israel.[40]

Once again, the rationale, according to Rabbenu Asher, is that one is not permitted to sacrifice one soul to save another.[41]

The *Kesef Mishneh*, a commentator on Maimonides' *Mishneh Torah*, understands the case cited by the Jerusalem Talmud slightly differently. He bases the prohibition on the Jewish law regarding the three cardinal sins of murder, illicit relations, and idolatry, where one is required to give his life rather than transgress these sins. The reasoning behind the application to murder is:

> מי יימר דדמא דידך סומק טפי, דלמא דמא דההיא גברא סומק טפי.
>
> Who says that your blood is any redder than his? Perhaps, the blood of the other individual is redder.[42]

The Meiri offers one exception to the rule. He states:

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40. Jerusalem Talmud: *Terumot*, 8:10.

41. Rabbenu Asher (Rosh) on *Terumot*, 8:12.

42. R. Yosef Karo, *Kesef Mishneh* on Rambam, *Hilchot Yesodei HaTorah*, 5:5; R. Meiri, *Bet HaBechirah*, Vol. *Sanhedrin* 72b.

אין צריך לומר בסיעה של בני אדם והיו בינהם טריפה, שימסרוהו ואל יהרגו שהרי ההורגו פטור.

It goes without saying that if within the [threatened] group there is a "*Trei'fah*" [generally referring to one whose sickness will not allow him to live past twelve months] then it is permitted to give him over, [even if he was not singled out by bandits] and not let themselves be killed, since the one who kills such a person is not guilty of murder.[43]

Possibly we may apply the sources cited to our case of multiple gestation, where no fetus is singled out as destined to be killed. Rather, the situation is one of "give us any one of you or all will die," where the law is that no soul can be sacrificed to save another, since the blood of one fetus is no redder than the next. However, the Meiri's logic would apparently permit the killing of any of the fetuses, since if left unreduced they would all die within nine months, and thus they are all considered "*Treifot*." The law regarding a *Treifah* is that no punishment is given for the one who takes its life.

Another possible allowance, despite the established law of not sacrificing one to save another, can be offered based on the opinion of the Maharam Chalva'ah. This scholar entertains the thought that the logic of "one's own blood is no redder than his neighbor's," applies only so long as a choice is being made, namely, my life or his. The classic case is when a criminal says to someone, "Kill him or I'll kill you." In this instance the person must make a decision – his life or mine. By contrast, in the case where the criminal says, "Kill him or I'll kill both of you," the person is no longer sacrificing the other man's life to save his own, since,

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43. Meiri, *Sanhedrin* 72b.

regardless, the other man will be killed. He is not deciding to have the other man killed instead of him, for that other person will be killed anyway. Rather, he is deciding to save himself without its being at the expense of the other man. Hence, the logic of "my blood is no redder than his blood" is never employed.[44]

Based on this reasoning, in the case of a multifetal pregnancy, one could argue that it is no longer a question of who should die and who should live, since if left unreduced, all would die. Rather, it is a case of saving the remaining fetuses by permitting the killing of the excess fetuses.

This application to the issue of multifetal pregnancy reduction can be challenged in two ways. Firstly, in the case cited by the Maharam Chalva'ah, the other man was chosen by the bandits to be killed regardless, and thus this is analagous to a case where bandits singled out an individual to be killed lest all of them be killed. The Jerusalem Talmud cites a dispute among the rabbis in this case.[45] According to Rabbi Shimon Ben Lakish, it is permitted to hand over that singled-out person, provided he was previously convicted of a capital offense. This opinion is held by Rambam as law.[46]

By contrast, Rabbi Yohanan maintains that even if that individual is innocent of all crimes, the group may hand him over to save themselves. A reason for the permissiveness in this case, in contrast to the case where no person is singled out and it is not permitted to hand anybody over, is given by the *Tosefta,* which explains that in the case

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44. R. Moses Chaliva, *Ma'haram Chalva'ah* on *Pesachim,* 25b.

45. Jerusalem Talmud: *Terumot* 8:10.

46. Rambam, *Mishneh Torah, Hilchot Yesodei HaTorah,* 5:5. See also *Shulchan Aruch, Yoreh De'ah,* 157:1, which cites both opinions and leaves it unresolved.

where a specific person is singled out, so long as it is impossible for him to escape the group may give him over. The reason is that since he will die anyway, the group may hand him over to save themselves.[47] We are not sacrificing one soul to save another, because the first soul is already sacrificed by virtue of the fact that the bandits will kill him regardless.[48]

However, in the case of multiple gestation, no fetus is singled out as destined to be killed. In essence, each fetus has its own claim to life and it would not be permissible to take one life to save another. It is not the case that the fetus we choose to kill would die anyway, since we have the capability of choosing a different fetus to achieve the same result.

A second challenge is from the Meiri who, while citing the logic of the *Ma'haram Chalva'ah,* adds an additional stipulation. In the case where the bandits say, "kill him or we'll kill both of you," the person is permitted only to hand over the other man to the bandits, since the possibility exists that they will not kill him and will only kidnap him for ransom or even decide not to go through with it and let him live. But he may not kill the other man himself at the behest of the kidnapers.[49]

Accordingly, in the case of multifetal pregnancy reduction, although it is granted that there is no escape unless the "extra" fetuses are reduced, it would not be permitted to "reduce," since it would entail the definitive taking of a life instead of leaving it to the natural course of nature.

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47. *Tosefta*: *Terumot* 7:23; Rashi on *Sanhedrin* 72b, Heading: "*Yatzah Rosho.*"

48. R. Karo, *Kesef Mishneh* on Rambam, Ibid.

49. Meiri on *Sanhedrin*, 72b.

Rabbi Zilberstein offers a different approach to the issue of multifetal pregnancy reduction. According to some halachic authorities, if it is clear that a woman in the travails of labor, with the head of the infant already delivered, will surely die as will the infant, it is permissible to save the mother by killing the baby.[50] The reason we choose to kill the baby over the mother is because the baby has not yet established for itself the surety of life due to the possible complications of the neonatal period. This idea causes us to redefine the original halacha concerning delivery, where once the fetus emerges as described, it is no longer permissible to kill the infant to save the mother, as referring to where the circumstance is such that there lacks the surety that both will die.

Using a similar logic of no way out, the *Lechem Mishneh* explains the opinion of Rabbi Shimon Ben Lakish – that even in a case where a person was singled out, the group may only give him over if he had previously been convicted of a capital crime – as referring only to where there does not exist a possibility for this singled-out person to escape. Otherwise, it is not permitted to hand him over.[51]

Rabbi Zilberstein formulates that we should not take into account the momentary extension of life for one fetus (because, in any case, he will be killed) when we are able to assure an extended life for the others. The perspective that he takes is that our actions are *saving lives* in a fashion where, as an unfortunate aside, someone else will end up dying. This is further illustrated by the case where a building falls on a group of people who will all die unless tractors are used to save some of the lives. Rabbi Zilberstein maintains

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50. *Yad Ramah* on *Sanhedrin*, 72b; cf. *Maharam Chalva'ah*.

51. R. Abraham di Buton, *Lechem Mishneh* on Rambam, Ibid.

that some halachic authorities would allow the tractors to move in and save those lives that it can, even at the expense of those people who are alive and might be plowed over by the tractor and die.[52]

The formula and cases cited by Rabbi Zilberstein all seem to be referring to instances where an individual is singled out, whether by virtue of lack of necessary viability, as in the case of the travails of labor, or whether directly, as in the classic case cited by the Jerusalem Talmud, or whether by virtue of his lack of accessibility, as in the case of the tractor. Despite this, Rabbi Zilberstein applies these ideas to the case of a multiple pregnancy where all the fetuses have an equal chance of living and no fetus is at a disadvantage based on its location, health, or any other circumstance. Rabbi Zilberstein does so based on a commentary by the *Tiferet LeMoshe*, which states that in the case where bandits demand that a group give over one person to be killed, without specifying which one, it is permitted to use a lottery to decide which person to give over. He cites as proof the biblical story of Jonah where it was decided to throw Jonah overboard based on a lottery, in order to save the people remaining on the boat. Accordingly, it would be permissible to decide which fetuses to kill based on a lottery or on chance.[53]

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52. R. Jacob Joshua Ben Zvi Hirsch, *Hakdomat Pnei Yehoshua*, cited and explained by Rabbi Zilberstein, "Responsa: Multifetal Pregnancy Reduction," *Assia*, nos. 45-46 (12:1-2), Tevet 1989, p. 66.

53. R. Moses Ben Abraham Zvi of Grodno, *Tiferet LeMoshe*, cited in R. Abraham Zvi Hirsch Eisenstadt, *Pitchei Teshuvah* on *Shulchan Aruch, Yoreh Deah*, 157:13.

Rabbi Zilberstein explains why the Jerusalem Talmud and *Tosefta* do not offer the solution of drawing lots with regard to the case where no person is singled out. He posits, based on several commentaries, that a lottery can be employed only if it is certain that by not giving anyone over, all would be killed. However, if

Rabbi Zilberstein combines the aforementioned formula and the idea of using chance to decide which fetuses to remove, to answer the question concerning multifetal pregnancy reduction. He states that those who would take the most strict approach in the situations cited, would do so only in cases dealing with people who have established for themselves viability. In such cases they would state that if no one was singled out, it is not permitted to hand anyone over to be killed. However, in the case where the fetuses are in the womb of their mother, they are not viable, and therefore, those same halachic authorities might be more lenient and permit the killing of some of the fetuses to save the rest.

Rabbi Zilberstein considers the reduction not as an act of killing, since they are not viable beings, but rather a means of saving the remaining fetuses who need intervention in order to establish eventual viability. He does not consider pregnancy reduction as destroying potential life, since if we do not reduce, they would all probably not live. He has an additional condition, namely that the reduction not be done directly but by means whereby the doctor induces the fetus to abort itself.[54]

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the circumstances are such that there exists the possibility that the one selected by the lottery could have escaped had he not been handed over, the lottery cannot be employed to begin with, and they all must allow themselves to be killed. (The commentaries cited by Rabbi Zilberstein include: *Yad Ramah* on *Sanhedrin*, 72b; *Maharam Chalva'ah* on *Pesachim* 25b; *Lechem Mishneh* on Rambam, *Hilchot Yesodei HaTorah* 5:5.)

54. R. Y. Zilberstein, pp. 62-8; Rambam *Hilchot Rotze'ach*, 2:2; R. Avigdor Nebentzal, "Giving Narcotics to a Sick Person," *Assia* 4, pp. 260-62.

Rambam maintains that murdering even by indirect means is a capital crime whose punishment is meted out by G-d.

The position of *Tiferet LeMoshe,* cited by Rabbi Zilberstein, is not universally accepted. The *Chazon Ish* asks why the Jerusalem Talmud itself did not discuss the use of a lottery. Furthermore the *Chazon Ish* maintains that a lottery can be employed only under special circumstances, such as a prophetic directive.[55] Such was the case of Jonah, where all the ships in the immediate vicinity were traveling amidst the calm waters, other than the ship carrying Jonah. Thus, it was clear that a member of that ship was a sinner being punished by G-d.[56] According to the *Chazon Ish*, ordinary people may not decide based on a lottery unless the parties affected agree to decide based on a lottery. The reason is that an individual is permitted to volunteer to give his life in order to save another.[57]

The case of multiple gestation is such that no fetus is a definite sinner, nor can we establish that G-d wants a specific fetus killed and act based on chance, trusting that we are acting as agents of G-d. It would be impossible, according to the *Chazon Ish*, to know how to choose which fetus to reduce and which to leave, even in face of the reality that if none are taken, all will die.

There are several other halachic authorities who discuss the issue of multifetal pregnancy reduction. Rabbi Chaim David Halevi posits that while abortion may be a question of homicide, nevertheless, in the case where the fetus under the current circumstances will not be able to establish viability, one may be lenient. Therefore, in the case of a

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55. R. Avraham Yeshaya Karelitz, *Chazon Ish* on *Sanhedrin*, chapter 25.

56. *Sefer HaChasidim*, chapters 701 and 679; Zilberstein, pp. 63-4.

57. *Chazon Ish*, ibid.

multiple pregnancy where if we were not to reduce, statistics show a low probability for eventual survival, one can be lenient and reduce the number of fetuses to allow the remaining to be born healthy and complete. Rabbi Chaim David Halevi also stipulates that, understandably, the earlier into the pregnancy one can reduce the better, but no time limit is established.[58]

Rabbi Mordechai Eliyahu maintains a similar position. Rabbi Eliyahu considers the fetus as a "pursuer" to its siblings in the womb. Therefore, since each fetus is considered as a pursuer, any one of them can be reduced allowing the remaining to live. He adds that while the reduction can be done at any stage of the pregnancy, it is best to perform it within forty days from the time of conception.[59]

Rabbi S. Z. Auerbach is quoted as permitting the reducing of a multiple pregnancy to save the remaining fetuses. No reasoning is offered. [60]

Rabbi Ahron Soloveichik approaches this issue from a different perspective.[61] Pregnancy with regard to the status of the fetus can be divided into four stages, the last being when the forehead or the greater part of the fetus' body emerges. Once this stage occurs, Jewish law considers the fetus as a full *Nefesh,* fully protected by the laws against homicide. The first stage is, as was described earlier, from the time of conception until forty days. During this stage, while we are to treat the fetus as a form of life, in practice we apply to it the laws governing birth control. The second

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58. Chaim David Halevi, pp. 14-15.

59. R. Mordechai Eliyahu, pp. 272-273.

60. R. S. Z. Auerbach, cited in R. Abraham S. Abraham, *Nishmat Avraham, Choshen Mishpat,* 425:1:21, p. 234.

61. R. Ahron Soloveichik, private interview.

stage is that of forty days from conception until the labor process begins; the third stage[62] includes the labor process until the forehead or the greater part of its body emerges.

During the second stage, the fetus is considered as a "limb" of its mother (*Chullin* 58a). As a result, the laws concerning the fetus during this stage stem from the fetus' very description. Jewish law forbids one to cause injury to oneself or to another. Hence, one cannot abort the fetus, a "limb" of its mother, just as one cannot electively amputate a limb.[63]

With regard to the third stage, there is a difference of opinion amongst the Rabbis. Rabbi Shneur Zalman, in his book *Torat Chessed,* maintains that Rambam (*Hilchot Rotzeach*, 1:9) holds that the laws of homicide begin to protect the fetus from the onset of labor. Therefore, during this stage, one would be permitted to take the life of the fetus only to save the life of the mother.[64] The reason we opt to save the mother instead of the fetus is based on the "Laws of Self-Defense," where the fetus is considered a "pursuer" of its mother, as was discussed earlier.[65] Rabbi Chaim Soloveichik further explains that during the third stage, although we apply the laws of homicide, we still consider the fetus only as a partial *Nefesh,* soul. Consequently, when the mother's life is challenged by the fetus, the life of the mother, who has a completely formed soul, takes precedence over that of the fetus.[66]

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62. *Arechin* 7b, "When she is sitting on the travailing stone [lit. the birthing stool]... since the fetus is uprooted [during the labor process] it is considered as a separate being."

63. R. Ahron Soloveichik, private interview.

64. Ibid, citing R. Shneur Zalman, *Torat Chessed.*

65. Ibid.

66. Ibid, citing R. Chaim Soloveichik.

Rabbi Chaim Soloveichik further explains why we consider the fetus as a "pursuer" even when it is seemingly acting without intention to do harm. He postulates that in essence there are two types of "pursuers." The first is a voluntary agent acting with intention to kill, who is not only held liable but is also considered as sentenced to death. Because of this consideration one is permitted to take his life to save the one he is "pursuing." The second type of "pursuer" is a mechanical agent. This type puts others in danger, without intention, rather by its mere presence.[67] An example of this type is given by Rambam (*Hilchot Chovel U'Mazzik*, 8:15): If a ship is sinking as a result of too much weight, one is permitted to consider the luggage as "pursuers" of those on the sinking ship. In such a situation, the one who throws the luggage overboard is not held responsible to reimburse the owner. Similarly, a fetus who unknowingly threatens the life of its mother during labor is considered as a mechanical "pursuer." In such a case we sacrifice the fetus to save the mother, who, as a complete *Nefesh*, takes precedence.[68]

According to other halachic authorities, including Rashi and the Ramo, the laws of homicide do not apply until the forehead or the greater part of the body has emerged, namely stage four. Until that point the fetus remains protected only by the laws prohibiting one to cause harm to another. According to these opinions, during the third stage the halacha does not even consider the fetus as a partial *Nefesh*.[69]

Applying these concepts to the question of multi-fetal pregnancy reduction, Rabbi Ahron Soloveichik formulates

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67. Ibid.
68. Ibid.
69. Ibid.

the following opinion: Each stage must be analyzed separately. Before forty days from conception, birth control is permitted when a valid purpose exists. The fetus at this stage is not even considered a partial *Nefesh*. The goal of saving the remaining fetuses by aborting some clearly constitutes a valid reason to permit "birth control."[70]

During the second stage, from forty days after conception until the time that labor ensues, abortion violates the laws against electively causing oneself harm. During this stage, when the fetus is likened to a limb of its mother, Jewish law would maintain that just as a person would be permitted to sacrifice one limb to save the other limbs, similarly, a person would be permitted to abort some of the fetuses to save the others.[71]

Finally, with regard to the third stage, where according to the most stringent view the fetus is a partial *Nefesh*, we could explain as follows: One is permitted to take the life of the fetus to save the mother, considering the fetus as a mechanical "pursuer." This is not because the fetus is considered sentenced to death, but rather because we intend to *save* the mother's life. In other words, our goal is not to kill the fetus but to save the mother. This case must be considered unique in that generally, when two lives are equally threatened by each other, we may not choose to save one at the expense of the other, as the Talmud states (*Pesachim* 25b)," who says that your blood is any redder than his? Perhaps the blood of the other is redder." However, this concept would not apply in our case since the mother is a full *Nefesh*, whereas the fetus is a partial *Nefesh*. Therefore, the mother's life must necessarily takes precedence.

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70. Ibid.

71. Ibid.

Applying these concepts to the issue of multifetal pregnancy reduction: Even though the fetuses are all of equal status in that they are all partial *Nefashot* (souls), the aforementioned concept of "Who says your blood is any redder...," applies only where there exists the possibility that one party may escape. However, in the case of a multi-fetal pregnancy if we were not to reduce, all of the fetuses would die. Additionally, since all of the fetuses are considered as mechanical "pursuers" of each other, while we do not consider any of them to be "sentenced to death" we are still required to perform an act of "saving lives" by reducing the pregnancy.[72] Understandably, it is preferred to perform the reduction at the earliest stage possible.[73]

The question which remains is how to choose which fetus to abort. In the case of the sinking ship where some of the luggage needed to be thrown overboard, the understanding was that the most accessible luggage was to be chosen. Similarly, we choose to abort the fetus that is most accessible, in order to ensure a successful procedure. In this way, the procedure to reduce the pregnancy would be done in accordance with minimizing the risk to the remaining fetuses.[74]

With regard to the method of performing the reduction, since the halachic allowance (at least during the third stage,

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72. Ibid. See also R. Yair Chaim Bacharach, *Chavot Yair*, no. 31:

"...לא נקרא ממית נפש שהרי עכ"פ סופו למות ולחיי שעה דעובר לכ"ע לא חיישינן.

"... it is not called killing a soul since in the end it [fetus] will die, and for the momentary lifetime of the fetus, according to all, we are not concerned."

73. Ibid.

74. Ibid.

of pregnancy) involves causing oneself injury, any reduction procedure would result in injury to the fetus, and all are thus considered alike. There would, therefore, be no difference between a procedure involving a direct act of reduction or an indirect act.[75]

According to those who allow for the reduction of fetuses, the question arises as to how far this "reduction" may go.

Rabbi Eliyahu and Rabbi Chaim David Halevi are of the opinion that the number should be decided by the doctors for each patient individually.[76] Rabbi Zilberstein examines the dilemma – should the limit be based on the desire to assure that the remaining fetuses will live? Or should we abort the minimum number possible, even if thereby we have only somewhat improved the chances for the remaining fetuses? Rabbi Zilberstein hesitates to give a definite answer. Rather, he feels that the doctors should decide based on statistical probability.[77]

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Finally, there is the issue of permitting the placement of so many embryos initially, knowing that there exists the possibility that a reduction will need to take place. The *Teshuvot Bet Yaakov* writes that one should not travel with a person who has been convicted of a capital crime, since in the event that the felon would be singled out by bandits to be given over to be killed lest they kill the entire group, the group would be required to hand the felon over.[78] His

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75. Ibid.

76. R. Eliyahu, p. 274; R. Chaim David Halevi, pp. 16-7.

77. R. Zilberstein, pp. 67-8.

78. *Teshuvot Bet Yaakov*,, Chapter 147, cited in R. Eisenstadt, *Pitchei Teshuvah* on *Shulchan Aruch, Yoreh Deah*, 157:14.

view is that one should avoid situations where it might be required to sacrifice a soul to save another. (The fertility pill could be a different issue since the number of ova that are let down and subsequently fertilized still remains in the realm of G-d's natural process. By contrast, with in vitro fertilization, it is the doctors who place the large amount of embryos into the womb.)

Similarly, the *Kesef Mishneh* explains that although the law technically permits handing over a felon to bandits in order to save the group, Rambam certainly does not advocate putting this principle into action. Evasive measures should be taken, for we must be very scrupulous to preserve the life of an individual.[79] Understandably, one can counter the logic of Maimonides by stating that the preservation of the singled-out felon results in the sacrifice of the rest of the group. The difference is that according to Maimonides' approach the group is passive in allowing themselves to be killed, as opposed to actively handing over an individual to be killed. Applying the concept espoused by the *Kesef Mishneh* to the issue at hand, one can argue that although technically it may be permitted to reduce the "extra" fetuses to save the remaining, nevertheless, since we are not to resort to employing this permissibility, perhaps we should avoid such circumstances and place less embryos into the womb, despite the lowering of the odds of a successful implantation. However, the *Kesef Mishneh* may not be applicable to the question of multifetal pregnancy reduction, since with regard to the fetuses there is no viability per se, only a potential for viability, perhaps allowing for our scrupulousness to preserve life to be tempered by our desire to achieve a successful pregnancy.

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79. *Kesef Mishneh*, ibid. R. David Halevi, *Turei Zahav* on *Yoreh Deah*, 157:7.

In a further attempt to resolve the question of putting ourselves in such a situation to begin with, we should consider that the placing of extra embryos into the uterus using assisted reproductive technologies is justified by its necessity to achieve a successful implantation. According to Rabbi Ahron Soloveichik's response to the question of multifetal pregnancy reduction, the prohibition against performing an elective abortion between the period of forty days from conception and the onset of labor is premised on the prohibition against causing harm to oneself. Concerning this prohibition, the Talmud explains that while a son cannot cause injury to his father, he is however permitted to draw blood for medicinal purposes. The reason for this allowance is that the father would be willing to overlook the injury done, in order to be healed. Similarly, explains Rabbi Soloveichik, a woman would prefer to have the pregnancy reduced than either to lose the entire pregnancy or not to be able to bear children at all. Children are the cure for this woman's sterility. Therefore, a woman is permitted to initiate the use of assisted reproductive technologies regardless of the potential consequences. [80]

The protocol of assisted reproductive technologies is justified scientifically since it meets the two criteria necessary to establish a "proportional relationship" between the means and the end. The first criterion is that "there must be no other way to achieve the end; in this instance, the end is preserving a viable and desired pregnancy. Second, in choosing among the means available one must select those that result in the least harm and most good for all involved."[81]

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80. R. Ahron Soloveichik, private interview.

81. Mark I. Evans et al., p. 296. R. Daniel Mehlman offers a philosophical approach to deal with this issue.

Conclusion

In conclusion, while Assisted Reproductive Technologies has afforded many families the gift of life, it has also given rise to many ethical questions. I have tried to analyze some of those questions. My goal was not to answer the ethical dilemmas but to offer a framework by which they could be analyzed. The sources and interpretations that shed light on these questions are numerous, and only a few have been presented here.

We look forward to a future when, with G-d's help, the technologies will have been refined and many of the questions we have raised will have become moot. Regarding the challenging halachic situation today, it is well to bear in mind a statement by Rabbi Moshe Feinstein: "The truth of

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G-d offers man a directive when trying to establish the moral integrity of an action. In Deuteronomy (18:13) it states,

תמים תהיה עם ה' אלקיך.

"Thou shalt be whole-hearted with the Lord thy G-d."

Rashi comments on this verse,

"התהלך עמו בתמימות ותצפה לו, ולא תחקור אחר העתידות, אלא כל מה שיבא עליך קבל בתמימות ואז תהי' עמו ולחלקו."

"Walk with G-d in whole-heartedness and depend upon Him and do not seek into the future; but whatever befalls you, accept it with whole-heartedness and then you will be with Him and His portion."

As explained by R. Daniel Mehlman in a private interview at Lido Beach, N.Y., June, 1991, Rashi can be understood to mean that when deciding to do an action, such as placing embryos into the womb, one need be concerned only with the immediate indication, namely, to increase the odds of having at least one embryo implant. One need not consider the future complications that this action may have, namely, that if several embryos implant some will need to be reduced. Rather, after completing the first step in the process, put your trust in G-d and deal with the next step when it occurs in order to merit being "with Him and His portion."

the matter is that we are not to let a heavenly voice tell us how to decide the Jewish law. Rather, after careful inspection and understanding of the sources by a halachic specialist..., the conclusion that he draws is to be trusted as being דברי אלוקים חיים, the will of G-d."[82]

Despite all the difficult questions that have been raised and that need to be raised, let us not lose sight that Assisted Reproductive Technologies is a great gift to mankind. These technologies allow couples who have not been able to be co-creators with G-d, to have children. As the Talmud states, "ת"ר שלשה שותפין הן באדם, הקב"ה, ואביו, ואמו" "Our Rabbis have taught, there are three partners in the creation of man, G-d: his father and his mother."[83]

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82. R. Moses Feinstein, *Iggerot Moshe*, Vol. I, Introduction.
83. *Kiddushin* 30b.

Paternity

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Translated by
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A. Definition of Paternity and Its Importance

In many situations, it is important to determine paternity status which results in a mutual relationship that determines the obligations and rights of a father vis-a-vis his son or daughter and those of the son or daughter vis-a-vis their father. These include the genealogy; the prohibition of forbidden sexual relations; the determination of bastardy; inheritances; the obligations on the father to feed his children, to educate them, to circumcize his sons and redeem the firstborn, to teach them Torah, to provide them with wives and to teach them a trade or profession; the rights of a father in regard to keeping objects that his daughter finds and the work of her hands; the obligation of a son or daughter to honor their father and the prohibition of their striking or cursing him; and more. Aside from Jewish legal

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considerations, there are also various emotional and societal issues regarding the child, the mother, the father, and society, which develop after a positive or negative determination between the alleged father and the child.

In the situation where a man denies that he is the father of the child or claims that he does not know whether he is the father – such as the case where a woman has relations with a number of men but claims that he is the father of the child – the question which has to be adjudicated is how to use scientific methods to determine and establish the paternity of the child. One must differentiate between a legally married couple, where there is the presumption *(chazakah)* and probability *(rov)* that the husband is the father of the child – if he claims that he is not the father, the burden of proof is on him – and the case of the single woman who claims that so-and-so is the father of the child. In the latter case, the burden of proof is on her, because just as she cohabited with so-and-so, she might well have cohabited with others. [1]

The various methods of clarification of paternity are based on the scientific fact that various characteristics are inherited from the father and the mother. These characteristics can be examined to clarify whether the husband or the adulterer sired the child.

In this section are discussed the various arguments and tests that might be acceptable in the clarification of paternity in a case where the alleged father denies that he is the father of a specific child, but the child's mother claims that he is the biological father.

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1. See Maimonides, (Rambam) *Mishneh Torah, Yibum VeChalitzah* 3:4.

πPMaternity can be established definitively if one observes a woman giving birth to the child. In general, this is a factual question.[2] Even if she was not observed giving birth to this child, she is presumed to be the mother of all her small children that cling to her and cleave to her.[3] In rare instances, the question of maternity can be raised as in the case where infants were exchanged in the hospital or elsewhere, either accidentally or intentionally, or in cases of child kidnapping.[4]

There are several scientific systems through which one can disprove or establish paternity.

B. Scientific Background

Foreign bodies, usually proteins, which stimulate the formation of specific antibodies upon entering into the body, are called antigens. The plasma proteins that are created in the body in response to the antigens are called antibodies. These antibodies are specific, namely each antibody can "recognize" and attack only a specific antigen, like a key and a key-hole. The adherence of an antibody to an antigen is the beginning of a long process of eliminating the foreign body and serves as a fighting mechanism to protect the body from invasion of hazardous materials, i.e., viruses, bacteria, fungi, etc.

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2. See *Nazir* 49a - "His mother certainly gave birth to him."

3. *Kiddushin* 79b and Rashi's commentary there; Maimonides, *Mishneh Torah, Issurei Biyah* 20:6; *Tur, Even Haezer* #3. This presumption applies even in cases of forbidden sexual relationships. See *Kiddushin* 80a, where there is a difference of opinion among the talmudic Sages; *Mishneh Torah, Issurei Biyah* 1:20; *Tur, Even Haezer* #3.

4. The classic example is the case in which King Solomon gave his famous ruling. I Kings 3:16-22.

The HLA system is a specific system of antigens that covers the surface of all nucleated cells in the body. It was first discovered on the surface of the white blood cells which are called leukocytes, and therefore were termed Human Leukocyte Antigens – HLA, but they exist on all nucleated cells of the body. If an organ is transplanted from one person into the other – if the HLA system of the transplanted organ is identical to the recipient's cells, such as in the case of identical twins, the transplant will be accepted, because the host's immune system will not recognize the transplanted tissue as foreign. However, if the HLA of the transplanted tissue is different, the tissue will be rejected by the host, because his immune system will react to the tissue as to a foreign body.

The HLA system is genetically determined. Each nucleated cell in the body carries upon its surface 12 different HLA antigens – six come from the father and six come from the mother. Each HLA antigen is created by a specific gene that is located in the chromosome.

HLA testing is performed on a blood sample. The white blood cells are separated and the HLA is tested on them. Each HLA antigen is defined as well as their gene location. For example HLA-B5 means antigen no. 5, whose responsible gene is located on the chromosome in position B.

An enzyme is a substance, usually a protein, that is capable of producing or catalyzing chemical reactions in the body. An isoenzyme is one of the multiple forms in which an enzyme may exist.

1. *Testing for Blood Group/Types*

Red blood cells have on their surfaces a number of antigens of different groups such as type A, B, AB and O, or more specific and detailed types such as M-N-S, Duffy, Kell, Kidd, Rh and others. If examination of the blood types of

the mother, the child, and the alleged father show an impossible specific combination, one can conclude that the alleged father is not the child's father. For example, if the alleged father is blood type OO, the mother type AB, and the child type AB, it is impossible that the alleged father is the child's father since the child did not inherit any major blood type from this man.

The scientific accuracy of disproving paternity by means of testing for blood group types is 93%.[5] By this system of testing one can only *negate* paternity but cannot establish paternity with certainty. The reason is that many people have identical groupings of these blood types, and it is therefore not possible to state that a specific person is the father of the child.

2. *Tissue Typing*

This method is more scientific and more accurate in establishing paternity. The testing is based on the identification of antigens of the HLA class which are the antigens that match the tissues of the body. These antigens are inherited; some of a person's HLA class antigens come from the mother and others from the father. This method of heredity testing is predicated on the matching of specific tissue antigens on the surface of cells of all body tissues. These antigens are found on the surface of every cell in the body that has a nucleus within the cell, thus excluding red blood cells which have no nucleus.[6] This method of tissue typing and matching in man reveals a tremendous variety of tissue types. Every cell in the body carries on its surface twelve different HLA antigens, six different antigens

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5. Dodd BE, *Medical Science Law* 20:231, 1989.

6. Since this method was first used to detect human leukocyte antigens on white blood cells, it was termed HLA.

inherited from the father and six other antigens from the mother. As a result, there are about one million different genotypes.[7] Because of the multitude of different characteristics in various populations, the ability to pinpoint tissue types even in the embryonic stage of a person, and because of the lack of influence of environmental changes on tissue types, this method is considered to be the most reliable in determining paternity, serving as a unique genetic fingerprint of each person.

3. *Testing for Specific Blood Isoenzymes*

Molecular substances known as isoenzymes are transmitted through heredity in a dominant manner. These isoenzymes are tested for by electrophoresis which is the migration of a liquid in an electric field in which various molecules settle at different sites according to their electrical characteristics, melting points, and molecular size. By this method one can examine a number of types of isoenzymes[8] and compare their presence in the blood of the alleged father and the child.

The combination of these three methods – blood typing, tissue typing and isoenzyme analysis – can disprove paternity with an accuracy of 98 to 99.9% and establish obligatory paternity with an accuracy of 95 to 99.8%.[9] It is not possible to prove paternity scientifically with absolute 100% certainty,

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7. For more information on the scientific background see the essays (in Hebrew) of H. Brautbar, M. Halperin and D. Nelkin in *Assia* Volume 5, 5746 (1986), pages 149-162, and the book by D. Chelek, *Hochachat Avahut*, Haifa, 1987, pages 136-146.

8. Phosphoglucomutase-1 (PGM-1); adenylate kinase (AK); glyoxalate (GLO); acid phosphatase (AP); adenosine deaminase (ADA); Haptoglobin (HP).

9. Professor H. Brautbar's opinion for the district court, cited in *Hochachat Avahut*, pages 143-145.

because there may occur a laboratory error, and because scientific perceptions and understanding may change. All these, however, are negligible with appropriate conditions; therefore, their accuracy, as stated above, is close to absolute certainty.

4. *Anthropological Examinations*

This method compares many varying and different elements in the structure of a person, especially in his facial characteristics. From this, one can arrive at a conclusion with a scientific accuracy of between 70 and 99%.

5. *Molecular Genetics*

In this method, one tests the DNA structure which is the hereditary substrate found within chromosomes. One can compare the DNA structure of the child to that of the alleged father. Moreover, with this method one can clarify the relationship of the alleged father not only to a child but also to an embryo still in its mother's womb, by means of testing the amniotic fluid.[10]

C. Jewish Legal (Halachic) Approach

1. The halacha has set guidelines for establishing paternity: In the case of a legally married couple, the assumption is that the child is the son of the father based on the rule of the majority *(rov)* (the majority of coital relationships are ascribed to the husband),[11] or on the rule of presumption *(chazakah)* (we presume that he is the father).[12] This rule

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10. For sources to explain the scientific theories, see Terasaki PI. *J.Fam.Law 16:* 543,1978; *Hochachat Avahut,* pages 149-164; *Assia, loc. cit.*

11. *Chullin* 11b.

12. Jerusalem Talmud *Kiddushin* 4:8; see also *Nazir* 49a.

applies even in the case of a suspected adulteress.[13] Even if the husband is away for up to twelve months, we assume that the fetus delayed in the mother's womb even for such a long time and we attribute paternity to the husband.[14]

A father is believed when he says, "This son is my firstborn."[15] Even if another son is presumed by others to be the firstborn, the father is nevertheless believed.[16] Similarly, a man is believed to disqualify his son by stating that he is a bastard *(mamzer)*.[17] If a man says that one child is not his son, some rabbis rule that he is not believed[18] but

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13. *Sotah* 27a; *Mishneh Torah, Issurei Biyah* 15:20; *Tur, Shulchan Aruch, Even Haezer* 4:15. If the woman was known to be very promiscuous, there is a difference of opinion among the rabbinic decisors whether or not one applies the rule of the majority and the presumption that he is the father. See *Otzar Haposkim* #4 sections 49-52 and *Encyclopedia Talmudit* s.v. *av(a)*.

14. *Yevamot* 80b: Ramo's Gloss to *Shulchan Aruch, Even Haezer* 4:14. See also *Otzar Haposkim, loc. cit.*, sections 46-48. From the scientific viewpoint, the duration of pregnancy is 268 days on the average; in 1 of 42 births, it is 284 days; in 1 of 740 births, it is 293 days; in 1 of 31,000 births, it is 301 days; and in 1 of 3,400,000 births, it is 310 days. See Krause HD, *Illegitimacy: Law and Social Policy*, New York, 1979, p. 143, n.63. See also *Meiri* on *Yevamot* 80b, which states that a fetus can remain in the womb up to fifteen months.

15. *Baba Bathra* 127b, based on the law of *he shall acknowledge his son*, Deut. 21:17.

16. Ibid. 128b, where there is a difference of opinion among the talmudic Sages; *Mishneh Torah, Nachalot* 2:14; *Tur, Shulchan Aruch, Choshen Mishpat* 277:12; see also *Ha'amek She'elah, Sheilta* 41.

17. *Kiddushin* 78b, where there is a difference of opinion among the talmudic Sages. *Mishneh Torah, Issurei Biyah* 15:15; *Tur, Shulchan Aruch, Even Haezer* 4:29.

18. Commentary *Shiltei Gibborim* on *Kiddushin* 78b; *Hamachriya* #64; *Yam Shel Shlomo* commentary on *Kiddushin* Chapter 4,

others rule that even in such a case he is believed.[19] Some rabbis write that the father is not believed if the mother contradicts him.[20] He is also believed only in a case where he is presumed to be the father (such as the offspring of his legally married wife). However, if a single woman says, "This is the son of so-and-so," and he claims that she became pregnant from a bastard, he is not believed to disqualify him.[21] In many situations, the rabbinic decisors *(poskim),* especially the rabbinic courts in Israel, limit the credibility of the husband based on the law of "acknowledgment" (Deut. 21:17) and rely more on the principles of presumption *(chazakah)* and majority *(rov)* in that the majority of coital relationships are ascribed to the husband.[22]

In the case of a son of a single woman, some rabbis state that the only way to establish paternity is by the acknowledgment of the alleged father; if he denies that he is the father, there is no way to establish paternity.[23] But some say that if he persists in his denial, it is permissible to seek supportive evidence from the testimony of witnesses[24] and

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paragraph 15.

19. Maimonides, *loc. cit* 15:16. See also Responsa *Chatam Sofer, Even Haezer,* Part 1 #13; Responsa *Eyn Yitzchak, Even Haezer* #7.

20. *Tosafot Rid* commentary on *Kiddushin* 78. See also the commentary of *Siftei Cohen,* on *Yoreh Deah* 305:23; *Shaar Hamelech, Issurei Biyah* 15:17; Responsa *Chatam Sofer,* loc. cit. Responsa *Rabbi Akiva Eger* #128.

21. *Terumat Hadeshen* #267; Gloss of Ramo on *Even Haezer* 4:29.

22. See B. Shareshefsky's *Dinei Mishpachah,* third edition, Jerusalem, 5744 (1984), pages 456-461; and see the lengthy essay by Chief Rabbi A. Kahana-Shapira in *Techumin,* Vol. 9, 5748 (1988), pp. 11-27.

23. Responsa *Rivash* #41-42; *Shulchan Aruch, Even Haezer* 71:4.

24. For example, if his father and mother were incarcerated in prison – *Chullin* 11b.

to force the alleged father to swear under threat of excommunication, in order to clarify the paternity of the child.[25] According to some, the manner of conduct of the alleged father may serve as clarification of paternity. For example, if he registers the child's name with the same name as his relatives,[26] or if he tries to convince the mother during pregnancy to undergo an abortion, or if it is clear that the alleged father lived with the woman during the appropriate time to induce this pregnancy and where it is not known that during that time the woman cohabited with other men.[27]

2. A number of ways to clarify the paternity of a child are used by rabbinic decisors and in rabbinic courts including the resemblance of the facial appearance between the child and the alleged father or between the child and the alleged adulterer. There are different opinions as to whether such resemblance helps clarify the paternity of a child.[28]

Some sources indicate that such resemblance is helpful. Other sources, however, consider that it is possible for an adulteress to become pregnant from her husband but, during cohabitation, to picture in her mind the likeness of her illicit

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25. Responsa *Rashbatz*, Part 2 #18. See also Freiman in *Hapraklit* 25, 5729 (1969), pp. 167-170; Judge Elan, Supreme Court Civil Appeals file 66/77, *Piskei Din* 34(1), 229.

26. Responsa *Rosh*, Principle 82, section 1. See also the comments of Judge Zilberg, Supreme Court Civil Appeals file 26/51, *Piskei Din* 5(2), 1347-1348.

27. Responsa *Mishpetei Uziel* 70:15:4. See also the comments of Judge Shareshefsky, Supreme Court Civil Appeals file 473/75, *Piskei Din* 31 (1), 40.

28. *Baba Metzia* 87a and in Rashi's commentary at the beginning of the scriptural passage *Toldot*. See also *Torah Shelemah* Chapter 25, section 61.

lover and the child will resemble him.[29] This line of reasoning would weaken the importance of resemblance.

3. The establishment of paternity based upon blood group testing is debated by the rabbis of our generation. Since this method cannot scientifically establish paternity with absolute certainty, it is clear that it is not possible to obligate the alleged father to provide sustenance to the child or for the child to inherit that man based solely on a "positive" result of that test. However, if the result is negative – that is to say, according to the blood types of the child, the mother, and the alleged father, it is *impossible* that the latter sired the child – the rabbis discuss whether the tests can exempt the man from providing sustenance and remove the child from being considered an heir. Some rabbis do not accept such evidence since the scientific accuracy in this matter is neither perfect nor absolute.

Furthermore, in contrast to this scientific approach, the opinion of the talmudic sages is that blood is derived solely from the mother.[30] Therefore, it is not meaningful to

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29. *Numbers Rabbah, Naso* 9:1. So too, in Responsa *Maharsham*, Part 3 #161, the author states that one cannot rely on facial features to disqualify the child. See the comments of Judge Zilberg, Supreme Court Civil Appeals file 407/60, *Piskei Din* 15, 213; Judge Kister, District Court of Tel-Aviv, Civil file 363/58, *Psakim Mechoziyim* 33, 229.

30. *Niddah* 31a "The mother provides the red semen from which are formed skin, flesh, blood, and hair, and the black of the eye." This version is also found in the *Sheiltot, Yitro, Sheiltah* 66; in the commentary *Ha'amek She'elah,* loc. cit., and in the commentary of the Gaon of Vilna on *Niddah* 31a. See also the essay by D. Frimer in *Assia,* Volume 5, 5746 (1986), p. 191, note 36 where numerous sources containing this statement are cited. This version became Jewish law (halacha) in regard to the case of a man, two of whose sons died as a result of circumcision, who

compare the blood types of the child with that of the alleged father.[31] Some rabbis distinguish between the blood as a whole which, in the opinion of the talmudic sages, is derived from the mother, and the blood cells and blood tissues which can also be derived from the father, as is known in science.[32] Some rabbis state that in the case of the son of a married couple where, on the one hand, there is the presumption that most coital relationships are ascribed to the husband and, on the other hand, the presumption that the blood of most children is identical to that of their parents, if blood type testing determines that the child's blood is not identical to that of the alleged father, a stalemate is produced between

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married another woman who sired a son for him, as to whether he is allowed to circumcise this third son. See *Sefer HaAgudah, Shabbat,* Chapter 20, folio 164; Commentaries of *Ramo, Bet Yosef* and *Bach* on *Yoreh Deah 263:2; Commentaries of Turei Zahav* (*Taz*), on *Yoreh Deah* 263:1 and of *Hagra* on *Yoreh Deah* 263:4; *Devar Yehoshua,* Part 3, *Even Haezer* #5:4; Responsa *Iggerot Moshe, Yoreh Deah,* Part 1, #154.

31. *Shaare Uziel,* Part 2, Section 40, Chapter 1, paragrah 18; Responsa *Devar Yehoshua,* Part 3, *Even Haezer* #5; Responsa *Divrei Yisrael, Even Haezer* #8; Responsa *Mishneh Halachot,* Part 4, #163; Responsa *Tzitz Eliezer,* Part 13 #104; Rabbinic Court in Haifa, *Piskei Din Rabbaniyim,* Part 2, pp. 123-124. However, see also *Lev Avraham,* Volume 2, p. 17 where the author cites Rabbi Shlomo Zalman Auerbach: "Perhaps the words of our Sages are not that simple and do not relate at all to blood types. Even without this reason, one should not rely on these tests." See also Frimer's essay in *Assia* op.cit. p. 195, note 61. He explains that Rabbi Auerbach meant that the words of the Talmud pertain to imaginary and metaphysical problems and not to natural or biological problems. The reason one should not rely on blood testing is the fact that such testing derives from the rules of "majority" *(rov)* and "doubt" *(safek).*

32. Ruling of the Rabbinic Court in Haifa, file 1755 for the year 5716 (1956); *Piskein Din Rabbaniyim,* Volume 2, pages 119 and 122.

the aforementioned presumptions. Therefore, they rule that the alleged father is exempt from providing sustenance for that child.[33]

In regard to applying the laws of inheritance, as long as there is no definitive test to prove the relationship between the child and the alleged father, the child cannot inherit him because of the doubt. In regard to the child, the law is the same as for any doubtful heir.[34] As for assessing bastardy *(mamzerut),* one does not rely on these tests.[35]

Some rabbis write that where the alleged father is not married to the child's mother the rule of the presumption that most coital relationships are ascribed to the husband is not invoked. Therefore, there remains only the concept that the majority of children have blood identical to their parents. On this basis, an alleged father is not obligated to provide sustenance for the child where the blood tests negate his paternity.[36] Some rabbis rely completely on the testing of blood types to determine paternity,[37] even to prohibit a

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33. Rabbinic Court of Tel Aviv-Yafo, file 1005 for the year 5720 (1960); *Piskei Din Rabbaniyim,* Volume 5, page 346; Responsa *Yad Ephraim* #7.

34. See the laws of an heir in *Tur, Shulchan Aruch, Choshen Mishpat* #280; *Even Haezer* #163.

35. *Mishmeret HaChayim* #37; Rabbinic Court in Tel Aviv - Yafo, file 1005 for the year 5720 (1960); *Piskei Din Rabbaniyim,* Volume 5, page 346. Regarding the imposition of the death penalty for striking or cursing one's father, it is possible to convict the son based on tests which confirm paternity or to acquit the son based on tests which negate paternity, since in matters of life and death *(dinei nefashot),* we rely on the principles of "majority" *(rov)* and "presumption" *(chazakah).* See D. Frimer's essay in *Assia,* op. cit. pp. 204-206.

36. D. Frimer, p. 200.

37. Commentary *Mishneh Avraham* on *Sefer Chasidim,* Part 1

woman from living with her husband by invoking the law of an adulteress,[38] who may not return to her husband after committing adultery.

The difference of opinion in the various rabbinic rulings is based on a number of considerations. Some rabbis say that the difference of halachic opinion relates to the fundamental halachic question of how to arrive at a ruling in a situation where (a) the Jewish legal question is dependent on scientific information and is not derived from a scriptural verse or a tradition given to Moses at Mount Sinai, and (b) the position of the talmudic sages is at variance with scientific opinion. Our situation is such an example, the question being whether the father has a genetic part in the blood of the child or whether all blood is derived from the mother.[39] For other rabbis, however, the difference of opinion relates to the question of whether the talmudic text includes the phrase "blood is derived from the mother" or whether the text is correct as we have it without the word "blood" (thus implying

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#291 based on *Sefer Chasidim* #232 in the name of Rav Saadia Gaon, who relied for the classification of paternity on the testing of the blood and the bones of the son and of the father; Responsa *Mishmeret HaChayim* #37; Rabbi Isaac Herzog cited in the essay of Frimer p.196; Responsa *Yaskil Avdi,* Part 5, *Even Haezer* #13; Ruling of the Supreme Rabbinic Court in Jerusalem on the ninth day of Iyar, 5714 (1954), cited in *Yaskil Avdi, ibid.* See also *Yad Ephraim* (Weinberger) #7. Concerning Rav Saadia Gaon who is cited in *Sefer Chasidim,* see *Mateh Moshe, Halachot Uminhagim* #765; *Eliyahu Raba, Orach Chaim* #568:9:15; Novellae *Reshash* on *Baba Bathra* 58a.

38. Responsa *Mishmeret HaChayim* #37; Rabbinic Court of Tel Aviv-Yafa, file 1005 for the year 5720 (1960), op.cit.
They too were in doubt about the application of the law of bastardy.

39. See the summary of legal opinions in Frimer's essay and Rabbi S. Dichovski in *Assia,* Vol. 5, 5746 (1986), pp. 163-178.

that a child's blood is derived from both mother and father).[40] Yet other rabbis point out that the question of whether or not the blood is derived solely from the mother is the basis for a difference of opinion elsewhere in the Talmud.[41]

4. The determination of paternity based on the methods of tissue typing and isoenzyme analysis has been accepted by two rabbinic courts in Israel. Here there is no question of a difference of opinion between the talmudic sages and science as to whether the heredity of the blood is derived solely from the mother or in partnership with the father because HLA testing is performed on white blood cells and HLA types are shared by all body tissues. Furthermore, tissue types can be legally viewed as a "majority" in nature which is not dependent on the habits of human beings – an absolute majority where one need not be concerned about a minority. Therefore, this majority is better than the principle which says that most coital relationships are ascribed to the husband, which is a majority based on human habits. Therefore, this final legal ruling *(psak din)* is enforced only in regard to the provision of sustenance for the child, but not to establish bastardy, for which purpose a one-hundred-percent certainty is required, while scientific methods provide only a somewhat lesser accuracy.[42]

By contrast to the above rulings, the Supreme Rabbinic Court in Jerusalem has decreed that HLA testing cannot be used at all to establish paternity, that the doubts on this

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40. See Responsa *Iggerot Moshe, Yoreh Deah,* Part 1 #154.

41. Ibid.*Yad Ephraim* #7; Responsa *Devar Yehoshua,* Part 3, *Even Haezer* #5.

42. Rabbinic Court in Ashdod, ruling of Rabbi Dichovski, cited in note 39. Rabbinic Court in Haifa, file 8734 for the year 5746 (1986).

matter from the Jewish legal point of view are tremendous,[43] and that this method of testing is insufficient to definitively establish paternity without additional supportive evidence.[44] This court also ruled that judicial courts do not have the power to force this testing, and if one of the parties refuses to be tested, one cannot use this refusal as evidence against that party.[45]

In regard to the question of bastardy, some rabbis prefer to refrain from performing scientific tests to establish paternity in the case of a married couple and to rely on the presumption that the husband is the child's father. All of this in the face of the fact that scientific methods such as tissue typing can establish paternity with a high degree of accuracy.

This discussion of various factors impacting on Jewish legal rulings is intended only to present an overview of the situation and to examine the complexities of implementing halachic principles in the scientific age.

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43. Supreme Rabbinic Court in Jerusalem, appeals file 86 for the year 5747 (1987).

44. Ibid., appeals file 241 for the year 5745 (1985).

45. Ibid., appeals file 86 for the year 5747 (1987). However, see the essay of D. Frimer, pp. 205-207, which concludes that a court has the power to coerce testing which can assist the court in arriving at its decision. Therefore, if the court believes that these are tests to clarify paternity in a manner acceptable in Jewish law, it can force the parties to undergo such testing. Further in regard to tissue typing, see Responsa *Devar Yehoshua,* Part 3, *Even Haezer* #5; Responsa *Mishneh Halachot,* Part 4, #164.

Fruits from the Holy Land in America: Is There an Obligation to Separate *Teruma* and *Ma'aser*?

Rabbi Michael J. Broyde

I. Introduction

The establishment of the Jewish state of Israel and the resettlement of Israel by vast numbers of Jewish farmers has revitalized the study of those portions of Jewish law that deal with agricultural laws. Indeed, nearly all of these rules are not completely applicable to produce grown outside Israel by Gentiles.[1] Israel as an agricultural center has generated numerous questions of agricultural halacha whose primary importance is to the Jews residing in Israel; these are generally

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1. It is worth noting that there were *rishonim* who thought that *teruma* and *ma'aser* should be separated by Jews living outside of Israel, just as *challah* is; see opinions cited in Tosafot, *Chulin* 7a. Indeed, it is clear that there were *tanaim* and *amoraim* who followed that practice; see *Berachot* 36a, *Beitza* 12b, *Bechorot* 27a. However, the halacha is clear that there is no obligation to separate *teruma* outside of Israel and its immediate vicinity; see *Shulchan Aruch Y.D.* 331:1.

Indeed, except for *teruma* and *ma'aser*, the Talmudic Sages decreed some form of observance outside of Israel of each of the other agricultural commandments; thus, *chadash, revai, kelaim,* and *leket* are all applicable in some form. See generally, *Encyclopedia Talmudit* "*Chutz LaAretz*" 13:330, 331-341.

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addressed by rabbinic authorities living in Israel.[2]

This article deals with an agricultural problem confronting diaspora Jewry because of the presence of Israeli fruits outside of Israel: must one separate *teruma* from produce grown in Israel for export and now being sold in America? The presence of desirable Israeli fruits and vegetables as well as the preference among many Jews[3] for Israeli products has made this issue particularly relevant in the last few years.

II. Introduction to the Laws of *Teruma* and *Ma'aser*

There is a general biblical obligation to separate *teruma, ma'aser,* and *terumat ma'aser* from the agricultural produce of Israel. In the time when the Temple was standing and ritually pure *cohanim* and *levi'im* functioned in society, the following four categories of agricultural tithes were made:

1. *Teruma* was separated for a *cohen* and was not to be eaten by anyone else. Although according to Torah law one could fulfill the obligation of separating *teruma* with an infinitesimally small amount, the Sages by decree established

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2. For a perusal of the many works written in these topics, see past issues of *Hatorah Vehamedina* or *Techumin*. It is worth noting that modern Israeli decisors devote a considerable amount of their intellectual energies to this field. For example, nearly 25% of the multi-volume work *Tzitz Eliezer* by Rabbi Waldenburg addresses issues related to agricultural laws, as does nearly 40% percent of *Minchat Shlomo,* by Rabbi Shlomo Zalman Auerbach.

3. This preference has some halachic basis. One who buys products and produce of Israel -- which helps those who are living in Israel fulfill the commandment of living in Israel -- himself might have a partial fulfillment of the biblical obligation of settling Israel; see Comments of Ramban on Rambam's *Sefer Hamitzvot,* commandment four; see also *She'arim Metzuyanim Behalacha* 173:4 in the *Kuntress Ha'acharon.*

that it is is not proper to give less than one-sixtieth or more than one-fortieth.[4]

2. *Ma'aser Rishon* was the 10% of the remaining produce which was given to a *levi,* but which could be eaten by anyone (after *terumat ma'aser* was removed) and was not ritually holy like *teruma.*[5]

3. *Terumat Ma'aser* was 10% of the *ma'aser rishon* that had to be separated and given to a *cohen.* Like *teruma,* this could only be eaten by a ritually pure *cohen.*

4. *Ma'aser Sheni* or *Ma'aser Ani* was an additional 10% separated out. *Ma'aser sheni* could be eaten by anyone, but only in Jerusalem (or redeemed and the money spent in Jerusalem) and *ma'aser ani* was given to a poor person to eat anywhere.[6]

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4. Rambam, *Teruma* 3:1-2. According to many authorities, there are two separate commandments, one to separate *teruma,* and the other to give it to a *cohen;* see comments of *Maharatz Chayas, Gittin* 20a. Rabbi David Cohen of Congregation Gevul Yavetz notes that from the language of Rambam as well as the presentation of this issue in the Gemara, it would appear that one has only three choices of level of giving: one-fortieth, one-fiftieth or one-sixtieth. According to this, giving one fifty-third or one forty-fifth is prohibited.

5. It is disputed whether ten percent really was given, or whether a slightly smaller amount was given because a portion was already given to the *cohen.* According to one approach, if one had 100 bags of wheat, and the *cohen* was given two as *teruma,* the *levi* received only 9.8 bags of wheat; according to the other approach, what the *cohen* received was not deducted from the *levi's* accounting of 10%; see Tosafot *Gittin* 25a (*asara*) for both possibilities.

6. Produce of the first, second, fourth, and fifth years of the *shemita* cycle required *ma'aser sheni* to be taken, while produce of the third and sixth years required *ma'aser ani.* For an excellent

Since at least the destruction of the Second Temple, the ideal method of distribution has not been possible. There are no *cohanim* who are ritually pure and can eat *teruma;* therefore the custom is to separate out *teruma*[7] in the minimal amounts possible and allow this produce to be destroyed. Thus, slightly more than 1% is separated out as *teruma* and the rest may be eaten by anybody. If *teruma* and *ma'aser* are not separated out, the produce is *tevel* and may not be eaten by anyone.

III. Are *Teruma* and *Ma'aser* Biblical or Rabbinic Obligations Nowadays on Fruits of Israel?

Before discussing the issue of separating *teruma* in America, it is necessary to establish the nature of the obligation to separate *teruma* in Israel. There is a twofold dispute concerning the nature of the obligation to separate *teruma* and *ma'aser* for fruit. The first is the nature of the obligation generally in Israel: is it biblical or rabbinic? The second is, from what is one biblically obligated to separate – only grain, wine, and oil, or even fruit from trees? These two disputes are crucial, as the general rule is that cases of doubt are resolved in favor of the stricter alternative when a biblical prohibition is at issue, whereas when a rabbinic prohibition is involved, frequently one can be lenient in a case of doubt.[8]

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review of these issues, see Rabbi Yaakov Luban, "Separating Terumah and Ma'aser", *Jewish Action* 53:2, pages 50-52 (1993). For a more detailed discussion of the different categories, see R. Aharon Zakai, *HaBayit HaYehudi* 8:1 (1-33).

7. In this article, the word *teruma* will be used to refer to both *teruma* and *terumat ma'aser,* since their status is for all intents and purposes the same for the issues discussed.

8. See generally *Shulchan Aruch, Yoreh Deah* 242; see also note 65.

Based on different opinions found in the Talmud, *rishonim* disagree as to whether the obligation to separate *teruma* and *ma'aser* is biblical or rabbinic nowadays. Two basic opinions are present. Rambam states that the obligation to separate *teruma* is currently only rabbinic in nature.[9] Ravad (and others) disagree and rule that the obligation is biblical.[10] *Shulchan Aruch* rules that:

> Currently, even in places sanctified by the return from Babylon in the time of Ezra, the obligation to separate *teruma* and *ma'aser* is not from the Torah, but is only rabbinic. . . . *Ramo: There are those who disagree and rule that the obligation now is biblical, but this is not the custom.*

Thus, the consensus – but by no means unanimous[11] – opinion of authorities is that the obligation to separate *teruma* is rabbinic only.[12]

So, too, there is a dispute concerning the obligation to separate *teruma* from the produce of trees. Ravad clearly states that the biblical obligation is limited to grain, oil, and

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9. Rambam, *Teruma* 1:26.

10. Ravad, commenting ibid.

11. See generally *Semag*, Positive Commandment 133, and *Yechave Da'at* 6:49 for a review of the various authorities; see also *Kerem Tzion Halachot Pesukot*, ch. 1, for a review of this issue and references to recent authorities who are inclined in this direction or who treat this issue as still in doubt.

12. *Turei Zahav Y.D.* 331 (1) and *Levush Y.D.* 331:1-3 indicate that he accepts Rabbi Karo's view, whereas *Shach*, writing in *Nekudat Hakesef*, is uncertain. The consensus of authorities, however, clearly is that the obligation is only rabbinic; see *Encyclopedia Talmudit*, "Eretz Yisrael" 2:199, 219-222; *Minchat Yitzchak* 1:85; *Pesakim Uketavim shel HaRav Herzog, Mitzvot Hateluyot Ba'aretz* 1; *Yechave Daat* 6:49.

wine products; that opinion is accepted by many *rishonim.*[13] On the other hand, Rambam indicates that there is no difference in obligation between fruit and grain.[14] (However, all agree that the obligation to separate *teruma* from vegetables is only rabbinic.)[15]

The sum total of these two disputes is that according to all authorities the obligation to separate *teruma* from the product of fruit trees or vegetables is clearly only rabbinic in nature – whether this is because the obligation to separate currently is always rabbinic, as most rule, or because only grain, oil, and wine are encompassed by the biblical obligation, as some rule.

Thus, in the case under discussion – the obligation to separate *teruma* from Israeli fruits and vegetables sold in America – the absence of even a possible biblical violation is significant.

Is Produce that Leaves Israel Obligated in *Teruma* and *Ma'aser*?

The issue of the obligation to separate *teruma* from Israeli produce that leaves the boundaries of Israel is clearly discussed by the Mishnah and the Jerusalem Talmud. The Mishnah in *Challah* 2:1 recounts:

> Fruits from outside of Israel that come into Israel are obligated in *Challah*. If they leave Israel and go out of Israel, Rabbi Eleazer rules that they are obligated, and Rabbi Akiva rules that they are excused.

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13. Ravad commenting on Rambam *Ma'aser* 1:9; Rashi and Tosafot on *Bechorot* 51a; Ramban, *Bava Metzia* 88b; Rosh *Meshantz* commenting on *Ma'asrot* 1:1.

14. *Ma'aser* 1:9.

15. Ibid, Rambam and Ravad.

The Jerusalem Talmud (*Challah* 2:1) comments on this mishnah as follows:

> *Fruits from outside Israel*: It states "To the land that I am bringing you to there" (Numbers 15:18). There you are obligated and you are not obliglated in the area outside of Israel; this is the opinion of Rabbi Meir. But Rabbi Yehuda states that concerning fruits from outside Israel that come into Israel, Rabbi Eleazer relieves them of the obligation and Rabbi Akiva obligates them. What is the reason for Rabbi Eleazer? The Bible states, "bread of the land" – and not bread from outside Israel. What is the reason for Rabbi Akiva? The Bible states, "To the land that I am bringing you to there." There you are obligated but you are not obligated outside of Israel.

According to Rabbi Akiva, produce that is brought out of Israel is not obligated in *teruma* or *ma'aser*.[16] Nearly all of the decisors accept the opinion of Rabbi Akiva as normative.[17] Based on this Mishnah and Gemara, Rambam states that:

> Fruits of Israel that go outside Israel are excused from the obligations of *challah, teruma,* and *ma'aser,* since it states "To the land that I am bringing you to *there*." There you are obligated – outside of Israel you are excused. If the fruits go to Syria, they are obligated [in *challah, teruma,*

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16. See *Mareh Panim* on *Challah* 1:1.

17. See Rambam's commentary on the Mishnah, *Challah* 2:1; Bartenura's commentary on the Mishnah, *Challah* 2:1; Rambam, *Teruma* 1:22; *Tur* and *Shulchan Aruch,* quoted infra. This ruling is an application of the general talmudic rule that the law is in accordance with Rabbi Akiva when he is in a dispute with one of his colleagues. It is thus surprising that *Sefer Yeraim* rules that one should accept the strictures of both Rabbi Akiva and Rabbi Eleazer; see *Sefer Yeraim* 148 and the explanation of *To'afot Re'am* as to this rule. *Yeraim's* rule has not been accepted.

and *ma'aser*] rabbinically.[18]

Contrary to this ruling is the opinion of Ravad. Commenting on Rambam discussed above, Ravad states:

> To me it appears that Rabbi Akiva and Rabbi Eleazer are arguing only about the presence or absence of a biblical obligation. Rabbi Eleazer accepts that the biblical obligation follows the final *location* of the fruit and Rabbi Akiva rules that it follows the *time* when *ma'aser* would become obligatory – which is final processing.[19] But all agree that fruits that leave Israel and are processed outside Israel are obligated rabbinically [in *teruma* and *ma'aser*].

Thus, Ravad rules that after final processing in Israel the fruits are biblically obligated and even fruits that are removed prior to final processing are rabbinically obligated.

Radvaz and *Mishneh Lemelech,* in their commentaries on the same Rambam text, indicate their partial agreement with Ravad and assert that Rambam, too, agrees that fruits that are already obligated in Israel in *teruma* and *ma'aser* cannot have their obligation removed by taking the fruits out of Israel.[20]

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18. Rambam, *Teruma* 1:22 and *Teshuvot HaRambam* 129. For similar comments, see *Tosafot HaRosh, Challah 2:1; Semag,* Positive Commandment 133; and *Meiri, Challah* 2:1. This article will not deal with the special status of Syria in terms of laws limited to the geography of Israel; for a discussion of that issue, see Rambam, *Teruma* 1:2-8.

19. Throughout this article, the term "final processing" will be used as the functional translation for the terms *meruach,* which literally means "smoothing out" and *gemar melacha* which literally means "final work". Both of these terms refer to that activity last done to the fruit before it is ready to be sold. This term will be further discussed at the end of section IV.

20. As noted above, *Beit Yosef* in his commentary does not accept this understanding of the Rambam and clearly indicates that

These authorities argue that the opinion of Rabbi Akiva quoted in the Mishnah which excuses fruits brought out of Israel from *teruma* and *ma'aser* is limited to fruit which leaves Israel *prior to the time at which it becomes obligated in ma'aser and teruma.* The logic of these authorities is impressive. Essentially, they argue that it is halachically impossible that a product should be prohibited to be eaten in Israel, but once this same item is physically removed from Israel, it is permissible to eat it. Thus, they argue that the Mishnah must be referring to produce that is removed from Israel prior to the time it is obligated in *teruma* and *ma'aser.* However, as logically impressive as this insight is, it is important to realize that nowhere in the Mishnah, Tosefta, or Jerusalem Talmud – the authoritative sources of these rules – is this limitation found.[21]

Rambam's opinion is that removal from Israel eliminates the obligation. See, too, *Minchat Chinuch* 284, who also understands Rambam that way and vigorously defends the position of Rambam. An examination of Rabbi Chaim Heller's edition of Rambam's *Sefer Hamitzvot* reinforces *Minchat Chinuch's* understanding of Rambam, in that Rambam clearly limits *teruma* and *ma'aser* to the physical land of Israel in his explanation in the *Sefer Hamitzvot;* see Positive Commandments 126-129. See also *Chidushei Rav Chaim Halevi Soloveitchik al HaRambam, Teruma* 1:22, who also appears to accept this as the approach of the Rambam.

Other *rishonim,* too, appear to adopt the opinion of Ravad; see *e.g.,* comments of *Rash Meshantz* on *Challah* 2:1, whose explanation is contingent on the correctness of Ravad's assertion concerning final processing.

21. This criticism is voiced by Radvaz commenting on *Teruma* 1:22, concerning Ravad's opinion that there is always a rabbinic obligation, but it is just as applicable to Ravad's primary assertion. In addition, one could conceptually reply that just as *teruma* (and *ma'aser)* is a *mitzvah hateluyah ba'aretz* (an obligation connected to the land of Israel) so, too, the prohibition of *tevel* could be an *issur hataluy ba'aretz,* a prohibition connected to the land.

Among commentaries on the Mishnah *(Challah* 2:1), both the opinions of Rambam and Ravad are presented. Rav Ovadia Bartenura in his classical commentary interprets the Mishnah in harmony with Rambam's understanding. *Mishnah Rishonah* adopts the explanation of Radvaz and *Mishneh Lemelech.*[22] Rabbi Akiva Eiger reviews the various opinions without indicating which is in his opinion correct.[23]

However, it is the opinion of Rambam which is quoted almost verbatim by *Tur (Yoreh Deah* 331), *Bach*[24] and *Beit Yosef. Shulchan Aruch* quotes only the position of Rambam and states:

Fruits of Israel brought out of the Land of Israel are

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22. See also commentary of *Mishnah Rishonah* and *Tosafot Yom Tov* on *Demai* 2:1.

23. Rabbi Leibes, in *Beit Avi* 1:85-86, states that this is an indication that Rabbi Akiva Eiger agreed with the formulation of the halacha as found in *Shulchan Aruch,* which is in accordance with Rambam's understanding.

24. *Bach* explicitly discusses the issue of time of processing and concludes that the halacha is in harmony with Rambam and not Ravad. The relevance of the *Bach* on *O.C.* 210, which cites the opinion of Rabbenu Yonah (on *Berachot* 32a, *Rif* pages) that this matter is still in doubt, is debatable, since *Bach* resolves this dispute in *Y.D.* 331. Indeed, there is a significant problem in the text of this Rabbenu Yonah, as noted by *Perisha* (15). *Bach* cites a version of Rabbenu Yonah which makes his insights not relevant to the issue discussed in this article. Even if the text of *Perisha* is correct, one could claim that this case is a case of doubt which *Bach* resolved liberally, since the prohibition involved is rabbinic in nature. The same could be said about the comments of both *Beit Yosef* and Rabbenu Yonah. Indeed, the wording of the *Tur* itself indicates that the ruling discussed in *O.C.* 210 is dependent on physical presence in Israel and not source of origin. That would make *Tur O.C.* 210 and *Y.D.* 331 consistent.

exempt from the obligation to take *teruma* and *ma'aser*.[25]

None of the classical commentaries on *Yoreh Deah (Shach, Taz*[26] or *Gra*[27]) indicate disagreement with the ruling of

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25. *Y.D.* 331:12. *Levush (Yoreh Deah* 331:12) summarizes the rule as follows: Fruits of Israel that leave Israel are excused from *challah, teruma* and *ma'aser,* since it says "that which I bring you to there" – there you are obligated and outside Israel you are excused. Even fruits of Israel are excused from being separated since it is obvious that fruits from outside Israel are excused [from *teruma*] since *teruma* is an obligation of the land.

Levush clearly understands the nature of the obligation to separate *teruma* as dependent on physical presence in the land of Israel. *Shach* too appears to adopt the formulation of *Levush;* this is particularly noteworthy because he labels produce exported to Israel as biblically requiring separation if final processing occurs in Israel, yet clearly avoids stating that produce that is processed in Israel and then exported needs separation of *teruma.*

Any attempt to explain the position of *Shulchan Aruch* here in light of his comments in *Y.D.* 331:70 are likely not to succeed, as the words "outside of Israel" found in *Y.D.* 331:70 most likely refer to those areas immediately surrounding Israel, like Syria, which have their own independent obligation to separate *teruma.*

26. As noted by *Mikveh Mayim* 6:34 on this topic, silence by *Taz* and *Shach* when there is a clear dispute among the *rishonim* can only mean agreement with the position of the *Shulchan Aruch.* This is particularly true given the fact that *Shach* comments on a number of other halachic rules found in that same paragraph.

27. The position of the *Gra* is quite unclear and it might have some relationship to the position taken by *Gra* on the status of "sold produce" and its obligations. *Gra* addresses this issue at great length in his commentary on *Y.D.* 331 in notes 8, 9, 21 and 29, and this is related to the position taken by *Shach* 331(21-22) whether a product that is rabbinically obligated in *teruma* because of one rabbinic decree is any different from produce that is obligated because of two rabbinic decrees. Both Rabbis Meltzer and Kotler discuss the position of *Gra* at great length, although they reach opposite conclusions as to what his position is on the topic.

Shulchan Aruch on this matter. Indeed, Rabbi Karo (the author of the *Shulchan Aruch)* in his commentary on Rambam *(Kesef Mishneh)* clearly defends this ruling as being Rambam's position.[28] However, the *Tzvi LeTzadik,* commenting on *Shulchan Aruch* Y.D. 33:12, disagrees. He states:

> This is limited to when final processing occurs outside Israel; however, when final processing occurs in Israel, there is no exemption for [Israeli] fruits found outside of Israel.

So, too, Rabbi Yechiel Michel Epstein, writing in *Aruch Hashulchan He'atid,* agrees with this approach and rules that fully formed fruit must have *teruma* and *ma'aser* taken in order to be eaten even when they are taken out of Israel.[29]

In sum, there are two approaches to this issue. Many authorities, including apparently *Shulchan Aruch* itself, rule that produce, even if obligated in *teruma* and *ma'aser* when in Israel, is excused from the obligation upon removal from Israel. Others disagree and rule that once produce is obligated in *teruma* and *ma'aser,* it is always obligated in *teruma* and *ma'aser.*

Modern Analyses: Israeli Apples and Oranges in the Diaspora

The establishment of the State of Israel with a large Jewish population and the commitment of resources on the part of

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28. See *Kesef Mishneh* on *Teruma* 1:22. It is clear that Rabbi Karo, aware of the critique of Rambam by Ravad, is nonetheless accepting the position of Rambam as normative.

29. *Teruma* 57:2. *Mikveh Mayim* 6:34 attempts to argue that there is a conflict between *Aruch HaShulchan* here and his comments on *Yoreh Deah* 331 and elsewhere. His analysis appears unpersuasive on this point, however.

the Israeli government to agricultural development has made what was previously an issue reserved primarily to theoretical discourse into a practical question of Jewish law.[30] Modern decisors of halacha have fallen into three schools of thought on this issue: some, in accordance with the opinion of the *Tzvi LeTzadik,* rule that there is an obligation to separate *teruma* from fruits of Israel outside of Israel; others accept the opinion of the *Shulchan Aruch* and rule that no separation is needed; finally, some rule that it is better to separate *teruma,* but it is not required according to minimal halacha.

Two very detailed responsa permitting the eating of fruits and vegetables from Israel without separating *teruma* can be found in Rabbi Yitzchak Isaac Leibes' work, *Beit Avi,* and in a *teshuva* by Rabbi Issar Zalman Meltzer. Rabbi Leibes, after reviewing the discussion found in the Gemara, *rishonim,* and *Shulchan Aruch* discussed above, adds a number of factors which indicate to him that it is appropriate to allow the eating of this food without any separation.[31] Initially, he notes that *Shulchan Aruch* rules that there is no obligation to separate *teruma* once it physically leaves Israel. Second, he cites the position of *Maharsham* (1:72) who states that even those authorities who rule that produce grown in Israel requires separation limit their opinion to produce not grown for the sake of export. *Maharsham,* however, rules that produce grown explicitly for export, according to all authorities, need not have *teruma* separated.[32] Additionally,

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30. The Rabbinate of Israel does not typically separate *teruma* from produce designated for export (unless the fruit is clearly marked with a *hashgacha);* see "Separating Teruma and Ma'aser", *supra* note 6, where a letter from the Israel Rabbinate is reproduced indicating that *teruma* is not separated.

31. *Beit Avi* 1:85-86.

32. Such an approach can be implicitly found in *Chatam Sofer*

he notes that according to all authorities (see above) the obligation to separate *teruma* from fruits and vegetables, is only rabbinic nowadays.[33] Thus, based on these multiple doubts, it is permissible, in Rabbi Leibes' opinion, to eat such fruit.

A similar approach can also be found in the works of Rabbi Issar Zalman Meltzer.[34] Rabbi Meltzer initally defends the view of Rambam that it is the final location of the produce which determines the need to separate *teruma* and *ma'aser*. He then discusses the possibility that much of the processing and harvesting of the fruit in fact done by Gentiles, who frequently own the orchards at that point. So, too, he notes that the underlying obligation currently for *teruma* and *ma'aser* is rabbinic only. Finally, he quotes a famous responsum of *Mabit*[35] which states that there are certain circumstances where the Sages of the Talmud imposed a rabbinic obligation to separate *teruma* and *ma'aser* as a fence around the biblical obligation. Since the biblical obligation is

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6:63 as well (see also *Chatam Sofer* 1:128) and *She'elat David Y.D.* 18; it is explicitly argued with by *Achiezer* 4:43.

33. In addition, he asserts that while this produce has the status of being presumptively prohibited (אתחוק איסורא) to which one does not normally rule that doubts in a rabbinic prohibition are not enough to permit it (see *Shach Y.D.* 110:17), such is not the case with fruits and vegetables since this principle is limited to items that have a clear source in a biblical prohibition; see *Avnei Nezer O.C.* 489. Also, he notes that Rambam rules that fruit harvested to be sold anywhere and not to be eaten by its owner is obligated in *teruma* only rabbinically, Rambam *Ma'aser* 2:1.

For a reply to Rabbi Leibes, see *Shraga Hameir* 5:98, by Rabbi Schneebalg of London.

34. Published in *Kerem Tzion, Otzar Haterumat* 2:128.

35. Rabbi Moshe Trani *(Mabit)* 2:196.

no longer present generally,[36] one can be permissive of certain rabbinic prohibitions, claims the *Mabit.* In addition, Rabbi Meltzer discusses the possibility that there is no *re'iyat penai habayit* for much of the fruit, which too is a factor to rule permissively, as absent it according to many authorities there can be no biblical obligation to separate *teruma.*[37] Rabbi Meltzer concludes that "I am inclined to say that [fruits that leave Israel] are excused completely from the obligation."[38] Indeed, similar conclusions can be found in a number of other modern authorities[39] such as *Shoneh Halacha* and perhaps in *Mishnah Berurah* also.[40]

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36. See section II.

37. Along with all of the other requirements to be fulfilled before something becomes *tevel* (such as *gemar melacha*) many *rishonim* rule that the produce must be brought to the house; see *Teshuvot Hageonim HaKadmonim* 107; *Teshuvot Rashba* 1:361. See generally *Baba Metzia* 88b. This is even more so an issue in cases where there has been no *gemar melacha.*

38. This responsum was written in response to the responsum of Rabbi Meltzer's son-in-law, Rabbi Aharon Kotler, which is discussed *infra.*

39. *Mishpat Cohen* 46 (accepting position of Maharsham); *Torat HaAretz* p. 128 (combination of factors); *Mikveh Mayim* 6:34 (combination of factors); *Shearim Metzuyanim Behalacha* 173:4 (same); *Responsa Eretz Tzvi* (R. Aryeh Tzvi Frimer) 99 (same); *Tzeida Laderech* 94:2 (same). *Chochmat Adam, Mitzvat Ha'aretz* 1:16 cites two opinions on this matter, with the opinion that there is no obligation the primary one; *Aser Te'aser* 21. It can be implied as well from *Tzitz Eliezer* 5:19 (but see 1:9) and perhaps as well from *Divrei David* 44. See also *Shealat Yavetz* 1:127 who appears to adopt this formulation also.

40. *Sha'ar Hatziun* 649(48), while discussing an *etrog* of *tevel* states that one need not be fearful of this issue outside of Israel since "outside of Israel there is no prohibition of *tevel* at all since there is no *teruma* and *ma'aser* outside of Israel." He makes no distinction based on where the fruit originated, but rather focuses

Rabbi Moshe Malka adds an additional factor. According to many authorities, the obligation to separate *teruma* for produce that is sold does not fully develop until the item comes into the possession of the final purchaser (who intends to eat it).[41] According to this rationale, fruits shipped to America for export (as opposed to fruits purchased in Israel by a tourist and carried out in luggage) is excused from the obligation to separate, since the obligation to separate does not apply to the fruits until they are in the supermarket in America, and are thus excused even according to *Mishneh LeMelech* and Radvaz.[42]

The middle position is taken by Rabbi Yitzchak Weiss in

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on where the *etrog* is now, in accordance with Rambam's view. This approach is even clearer in *Shoneh Halacha* (648:33) who adopts this language verbatim concerning Israeli *etrogim* outside of Israel and starts his discussion of this topic with the words *"Etrog* of *tevel* in Israel" (as distinct from *"etrog* of *tevel* from Israel" which is the formulation used, for example, in *Netai Gavreal*, Laws of the Four Species, 36:2). The position of *Shoneh Halacha* is made even clearer by his discussion in the next paragraph concerning *shemita* and *orla etrogim* where he clearly discusses Israeli produce exported. The fact that he feels no need to discuss separating *teruma* for exported Israeli *etrogim* but instead relies on his general statement that there is no need to separate *teruma* outside of Israel – when he discusses the problem of *orla* and *shemita* for exported *etrogim* – indicates that he accepts Rambam's formulation and he understands *Mishnah Berurah* to be agreeing with him. (*Shoneh Halacha* was written to record the practices and decisions of Chazon Ish; see also note 53.)

Kaf Hachaim 349(41), on the other hand, indicates that there is a need to separate *teruma* from exported *etrogim* and states that quite clearly in his commentary; it is uncertain if he, too, is basing his analysis on *Mishnah Berurah.*

41. See *Rambam, Masser 2:3, Shitah Mekubetzet, Bava Metzia* 88a in the name of Ritva, Ramban, and Rashba.

42. See *Mikveh Mayim* 6:34.

Minchat Yitzchak 1:84-5. He too reviews the various positions taken by the *rishonim* and *Shulchan Aruch* on this topic,[43] adding the leniencies that no biblical obligation exists when the produce never enters the house of the grower,[44] and the approach of the *Maharsham,* concerning fruit to be exported. However, Rabbi Weiss notes that the *Chazon Ish*[45] clearly disagrees with the opinion of *Maharsham* that fruit grown for export is exempt. In addition, he adds that this produce is an object that can become permissible *(davar sheyaish bo matirim).*[46] Since it can become permissible through the simple act of separation, there is no need to accept a more permissive stance. He concludes that "[the obligation to separate *teruma*] is in doubt and certainly it is best to separate *teruma* and *ma'aser* without a *beracha."*[47]

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43. His initial discussion concerns the general status of the sanctification of the land of Israel.

44. *Shulchan Aruch* 331:83.

45. *Demai* 15:4. For an interesting reply to the discussion of the Chazon Ish, see Rabbi Avraham Horowitz, *Kinyan Torah* 2:135.

46. As a general rule, in a case where an item can easily be made permissible through a small time delay or other minor activity, halacha does not apply the normal rules of *bitul;* see *Shulchan Aruch Yoreh Deah 102* and *Encyclopedia Talmudit"Davar Sheyaish Bo Matirim" 7:5-29.*

47. The position of Rabbi Chaim Ozer Grodzinsky is unclear to this writer and might be similar to *Minchat Yitzchak's.* In *Achiezer* 2:39 he indicates some acceptance of Rambam's position (see paragraphs 1-3, 9-10, and 16) but he also frequently relies on Ravad and *Mishneh Lemelech.* (It is possible that he understood this dispute to depend on how one resolved the issue of the ability to sell portions of Israeli land to Gentiles nowadays, see par. 16). In *Achiezer* 4:43 a letter is reproduced in which he asks if Israeli oranges (presumably sent to Lithuania) have *teruma* and *ma'aser* separated. The second half of this responsum (after he was told that *teruma* was not taken) contains the following

A number of modern authorities advance a completely contrary rule and require the separation of *teruma* from all produce of the land of Israel. The two primary authorities who adopt this rule are Rabbi Moshe Feinstein and Rabbi Aharon Kotler, although they do so for different reasons. Rabbi Feinstein (in *Iggerot Moshe* Y.D. 3:127) after summarizing the various schools of thought in the *rishonim* and *acharonim*, resolves the dispute as follows:

> Nonetheless, as a matter of halacha, all of the acharonim accept the novel insight of the Mishneh leMelech concerning fruits that leave Israel after processing [discussed in part II]. Thus all fruits after they are obligated in terbuma and ma'aser [in Israel] must be separated, [otherwise] the prohibition involved is one of tevel [unseparated fruit].48

Thus, Rabbi Feinstein clearly rules that such fruits and vegetables must have *teruma* and *ma'aser* separated.

Rabbi Aharon Kotler, in a long and detailed letter *(teshuva)*

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phrase: "In truth it is difficult to rely on *Bach* [that no separation is required] since Ravad states explicitly against this ..." So, too, he states that he disagrees with the lenient ruling of *Maharsham* concerning fruits for export. However, in a very enigmatic statement, he appears to exclude from this strict ruling fruit which is not eaten by the one who grew it but was *both* sold and exported, and he ends the letter by stating "certainly one should make an effort to arrange for supervision [to separate *teruma*] at the least for produce sold in Israel," thus indicating a difference between produce exported and produce sold in Israel. This difference might be based on what he states in 2:14(4), concerning the status of fruit that is sold, and the position of Ramban, Ravad, and Ran; see generally Rambam *Ma'aser* 2:1-2 and commentaries *ad locum*, and his deference to the opinions of *Chatam Sofer* and *She'elat David*, cited in note 32, which accept this approach.

48. It is worth noting that Rabbi Feinstein clearly acknowledges that his position is not the position of *Shulchan Aruch*, which he understands to accept the ruling of Rambam.

to his father-in-law Rabbi Issar Zalman Meltzer (whose opinion is discussed above), essentially adopts the same position as Rabbi Feinstein.[49] He makes the following arguments:

1] Cases of doubt whether to separate *teruma* and *ma'aser* are to be resolved in favor of separation, for that was the decree of the Sages concerning *demai*.[50]

2] There is a dispute among the *rishonim* and *acharonim* concerning fruits that leave Israel after processing or fruits grown to be sold; however, he states that it is unclear what Rambam's position is, and Ravad clearly is strict on this matter.[51]

Thus he concludes that fruits that were fully obligated to have *teruma* and *ma'aser* separated from them in Israel must have it done in America. On the other hand, he agrees that it is possible that fruits that were never obligated in *teruma* and *ma'aser* at the time that they left Israel[52] might not, in fact, become obligated outside of Israel. Similar views can be

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49. *Mishnat Rav Aharon* 1:40. See also *Chelkat Ya'akov* 2:78.

50. *Demai* is that produce which comes from people who perhaps separate *teruma* and perhaps do not.

51. Since both Radvaz and *Mishneh Lemelech* interpret Rambam too as being limited to fruit removed prior to final processing; see section III.

52. This occurs on a halachic level when there is no ראיית פני הבית (literally: seeing of the house) in Israel or when there is no *gemar melacha*. Produce is only obligated to be separated according to biblical mandate after certain events happen, such as *gemar melacha* and, according to some, *re'iyat penai habayit* and, according to some, both; see *Respona Rashba* 1:361. For a list of the events which rabbinically obligate one to separate *teruma*, see *Shulchan Aruch* 331:83; see also note 37.

found in the works of other authorities.[53]

Two other sets of factors perhaps incline one to be lenient in this matter. Rabbi Ovadia Yosef and others are quoted[54] as permitting the eating of fruit purchased in the market *even in Israel* without separating *teruma,* based on the presence of three factual doubts that are of halachic significance:

1] Maybe the produce came from an area of Israel (like Eilat) not obligated in *teruma;*[55]

2] Maybe the produce was grown by a Gentile, and thus not obligated in *teruma;*

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53. See *e.g.* Rabbi Y.M. Tukachinsky, *Kitzur Dinai Eretz Yisrael 40:12* (reprinted in many versions of the *Kitzur Shulchan Aruch) Hama'aser Vehaterumot 3:16* (particularly n. 27 and 31) (same) and *Chazon Ish, Demai* § 15:4 and *Shevi'it* 2:2, who notes that the custom is to be strict on this matter; but see *Chazon Ish, Demai* § 5:3 who indicates that one perhaps could be permissive, and *Shoneh Halacha* cited in note 40; *Kaf HaChaim* 649(40) also indicates that he accepts this view; see note 41. See note 59 for a discussion of the view of Rabbi Menashe Klein.

Kinyan Torah 2:135 advances a lengthy explanation of the grounds to be lenient on this matter, but concludes "who is great enough to act contrary to the giant of our generation, the Chazon Ish, and it is the custom of *Charedi* communities to separate *teruma*... all that I have written should only be a *limud zechut* on those who are not careful..."

To the extent that there is a custom, it appears to this author that the common custom is to separate *teruma* for Israeli produce brought to America; see *Shraga Hameir* 5:98 who notes that this is the custom.

54. See generally R. Aharon Zakai, *Habayit Hayehudi* 1:76(6) in the name of Rabbi Yosef; see also *Yabia Omer* 6:24 and *Yaskil Avdi* 8:8(5).

55. For a discussion of the precise halachic boundaries of Israel, see *Encyclopedia Talmudit* "Eretz Yisrael" 2:199, particularly the map between pages 208 and 209.

3] Maybe the local rabbinate already took *teruma* (even though they normally do not).

In addition, for canned fruit or fruit brought to market around *shemita* year, the possibility exists that the fruit was produced in the sabbatical year with the sanctity of *shemita* fruit and is thus exempt.[56] These rationales apply even more strongly to fruit sold in America whose precise origin in Israel is completely unverifiable.

A second significant factual issue is present also. Discussion with various agricultural specialists indicates that frequently Israeli fruits and vegetables that are to be sold in America are typically picked and packed in Israel absolutely unripe *(e.g.,* the tomatoes, bananas and persimmons are harvested completely green or inedible) with the expectation that they will ripen in transit prior to their being sold in America.[57] In situations where that is true, even those authorities who normally require that *teruma* be taken from Israeli produce in America, would most likely rule permissively, as these authorities focus on when *gemar melacha* – final processing – occurs, and a strong case can be made that final processing can never occur according to halacha before the fruit or vegetable is edible.[58] Thus, the

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56. However, it is important to note that vegetables (and perhaps fruit) grown in reliance on the *heter mechira,* but harvested by Jews, is obligated in *teruma* and *ma'aser;* see *Shulchan Aruch Y.D.* 331:19 and Rabbi Chaim David Halevi, *Mekor Chaim* 5:276(21). For a discussion of the propriety of the *heter mechira,* see Rabbi Yitzchok Gottlieb, "Understanding the *Heter Mechira*" *Journal of Halacha and Contemporary Society,* 26, (1993).

57. This factual possibility was first suggested to me by Dr. David Blumenthal at Congregation Beth Jacob in Atlanta.

58. See Rambam *Ma'aser* 2:3-4 where he states (without dispute) that unripe fruit is not obligated in *teruma* and *ma'aser* and may

location of the final processing would most likely be on a ship outside the boundaries of Israel. According to nearly all authorities, there would be no obligation then to separate *teruma* since *gemar melacha* (final processing) did not occur in Israel.[59]

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be eaten without first being separated for *teruma*. See *Encyclopedia Talmudit* "Gemar Melacha" 6:173-199 for a discussion of what constitutes *gemar melacha* for various produce.

Rabbi Eliezer Waldenburg uses this rationale as one factor concerning the obligation to take *teruma* and *ma'aser* from coffee beans and cocoa, which are inedible, he states, until processing; *Tzitz Eliezer* 5:19. The issue in dispute concerns the time when bitter olives are obligated in *teruma* and *ma'aser*. Radvaz is quoted as ruling that the time of *gemar melacha* is when these olives are pickled or salted, which makes them edible; *Pe'at HaShulchan* rules that since at completion of harvest these olives are naturally bitter, harvest is the time of *gemar melacha;* see *Pe'at HaShulchan Ma'aser Ani 13.* As noted by Rabbi Tzvi Pesach Frank (see *Yerechon* 5634:16) the halacha is in accordance with *Pe'at HaShulchan.* However, in the case of fruits picked prior to ripening, even the second view would admit that there is no obligation to separate *teruma* and *ma'aser* as the fruit is not in its natural form or edible.

A related issue is the presence or absence of *re'iy'at penai habayit,* without which according to many *rishonim* there is never a biblical obligation to separate.

59. It would only be the position of the Ravad that such fruits need separation rabbinically. Neither Radvaz, nor *Mishneh LeMelech* nor *Shulchan Aruch* supports that view. This author has found only one work which indicates that such a position need be followed – *Kerem Tzion Halachot Pasukot* 25:1 (some say). Rabbi Padwa, in *Chashev Haefod* 2:19, indicates that the custom to be strict about this issues is out of deference to the opinion of Ravad.

Rabbi Menashe Klein *(Mishneh Halachot Tanina* 2:238) accepts the view of *Mishneh Lemelech* and states that one must separate *teruma.* However, he adds that that is only true if their status as *tevel* is certain; if however there is even one doubt as to whether the fruits are obligated, the fruit becomes permissible as it is a

Conclusion

This article started with a discussion of the basis for the obligation to separate *teruma* currently and concluded that the obligation even in Israel is rabbinic in nature for all fruits and vegetables. We then noted a dispute among the *rishonim,* early *acharonim,* and modern commentators as to whether one has to separate *teruma* and *ma'aser* from such produce once it leaves Israel. Finally, we have discussed various factual scenarios where one is uncertain if *teruma* and *ma'aser* need be taken. A practical conclusion can be suggested:

1] One who carries unseparated produce *(tevel)* directly out of Israel proper, and thus knows that the produce comes from a Jewish farmer in halachic Israel, should separate *teruma* and *ma'aser,* since many authorities rule that to be rabbinically required, and that is the custom.[60] However, one should do so without a *beracha,* since numerous authorities rule that fruits and vegetables – even once obligated in *teruma* and *ma'aser* in Israel – lose that obligation upon leaving the boundaries of Israel proper.[61]

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case of doubt on a rabbinic prohibition. Thus, on a practical level, in this author's opinion he would rule that there is no obligation in America.

60. See *Iggerot Moshe* Y.D. 3:127. In most cities in Israel produce sold in the supermarket has already had *teruma* separated by rabbinical authorities in Israel. While there are some authorities who reject certain halachic liberalities used by the Israeli rabbinate in separating *teruma* in Israel, in this author's opinion, certainly it is appropriate to rely on that separation in America, where the need to separate is in doubt.

61. See *Minchat Yitzchak* 1:84-85. Rabbi Moshe Sternbuch, after accepting that one needs to separate *teruma* in this case, states that this is done without a blessing, as the matter is in halachic doubt; *Teshuvot Vehanhagot* 1:668 (revised edition). But see R.

2] One who encounters fruits or vegetables sold in the United States as a "product of Israel", with no other information given as to its origins or its rabbinic supervision, need not separate *teruma* and *ma'aser.*[62] This is so, based on the presence of numerous halachic and factual doubts as to the obligation to separate *teruma* outside of Israel. They are as follows:

(a) Many authorities, cited above, rule as a matter of halacha that outside Israel one never needs to separate *teruma;*

(b) Rabbi Ovadia Yosef's factual analysis rules that one need not separate *teruma* from fruit purchased in the market even in Israel, since the fruit might come from Gentile farmers or areas outside halachic Israel that are part of Israel's political boundaries;

(c) According to some authorities, fruits produced exclusively for export do not need to have *teruma* separated from them.

Aharon Zakai, *HaBayit HaYehudi* 8:2 (21) where he indicates this as only a possible approach.

62. This author does not consider himself qualified to resolve a dispute which has split the giants of this century (Rabbi Feinstein and Kotler on one side and Rabbis Braun, Kook, Leibes, and Meltzer on the other). However, in this case, Rabbi Kotler's responsa clearly indicate that were *gemar melacha* to take place outside of Israel, he too would consider ruling permissively (and such appears to be the case factually now). Rabbi Feinstein's responsum simply does not address any of the numerous factual doubts present in these types of cases or discuss the possibility that fruits produced for export need not have *teruma* separated at all (in accordance with *Maharsham* discussed above). One suspects that Rabbi Feinstein's responsum was discussing the situation addressed in "case one" of the conclusion, concerning a person who takes oranges from a kibbutz in Israel and then brings them to America by hand.

(d) The fruits might have left Israel prior to ripening and thus *gemar melacha* occurred outside Israel;

(e) The produce might already have had *teruma* separated by Israeli rabbis;

(f) For the year 5754 (1993-1994) there might be no obligation because it is a *shemita* year;[63]

Particularly since fruits and vegetables are currently obligated in *teruma* and *ma'aser* only rabbinically, even in Israel proper, the presence of these many factors is enough to eliminate completely the obligation outside of Israel. One who wishes to be strict in this matter and separate *teruma* and *ma'aser* without a blessing should do so (תע"ב המחמיר).[64]

This is a case of multiple factual and halachic doubts concerning a rabbinic prohibition, and thus it is proper to rule permissively according to halacha.[65]

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63. It is important to note that not each of these doubts is present in every fruit each year. Thus, for example, few citrons *(etrogim)* are harvested from Gentile orchards; but in the case of citrons the rabbinical authorities try very hard to separate *teruma* before shipping. On the other hand, few tomatoes have *teruma* separated from them; but they are shipped typically green and inedible and frequently come from Gentile farmers and territories outside halachic Israel. The same is true for Israeli persimmons. Oranges are quite frequently harvested and processed by Gentiles, and there are groves outside halachic Israel; typically they are shipped slightly immature; in addition, rabbis in Israel sometimes do separate *teruma* from oranges. Indeed, these conditions can change from year to year and factual information always requires updating.

64. Although to do so on vegetables, which are always inedible when shipped out of Israel, seems unnecessary.

65. See *Shearim Metzuyanim Behalacha* 173:4 where such a combination of rationales is explicitly found; see also *Responsa Eretz Tzvi* (R. Aryeh Tzvi Frimer) 99 who does the same; see also

3] Produce which is sometimes a product of Israel and sometimes not and whose point of origin cannot be easily determined (such as canned grapefruit sections which are now sometimes a product of Israel when sold in America)[66] certainly need not have *teruma* separated, as all of the leniencies of point two are applicable, as well as a final leniency – it is quite likely that the produce is not even a product of Israel. In this case there is no need at all to be strict on this matter.[67]

Tzeda Laderech 94:2 for a similar conclusion. Indeed, there is an underlying dispute as to precisely how many uncertainties need to be present to permit food when *teruma* and *ma'aser* is concerned. Some understand one doubt to be sufficient (see comments of Rabbis I.Z. Meltzer and M. Klein); some rule two doubts need be present (see comments of Rabbi Aharon Kotler); and some rule three doubts must be present (see comments of *Gedulei Tzion* 151(3)). The reason that more factors inclining one towards leniency need be present in the case of *teruma* is that the Sages explicitly decreed that doubtful *teruma (demai)* must be separated. However, as demonstrated by Rabbi Ovadia Yosef in *Yabia Omer* 6:28, that principle clearly has its limitations and most likely is not applicable at all to a case of doubt as to the presence of an obligation to separate, rather than factual doubt as to whether a person actually did separate.

66. See "Separating Terumah and Ma'aser," *supra* note 6, where this is recounted.

67. So, too, when one is eating in the house of one who does not separate *teruma* – even if one's personal practice is to separate – it is inappropriate to publicly separate *teruma* if it will embarrass the host. This is even more true when one simply does not know for certain the person's personal practice. In addition, there are many circumstances where one can eat a small snack of fruit that should need separation without separating *teruma;* this is called the permissibility of eating אכילת עראי, see *Shulchan Aruch Y.D.* 331:83. One who wishes to separate *teruma* in a context where visibly doing so might embarrass a person should be aware that there is a procedure for eating most of the produce, leaving a

small amount over, and separating *teruma* from that piece later. This is explicitly permitted for *challah* in the diaspora; see *Y.D.* 323:11 and is implied by the *Derisha Y.D.* 331 (13) to be permissible for *teruma* also.

On the other hand, a person who knows another to be strict on this matter should not feed that person this fruit without first informing him of its status, as it is improper to feed a person a food which he thinks is prohibited whether or not the "true" halacha reflects that prohibition; see Broyde and Hertzberg, "Enabling Another to Sin", *Journal of Halacha and Contemporary Society* 19:5 section IV:C (1988).

The *Bracha* for Hydroponically-Grown Produce

Rabbi Ari Hier

As the population of the world burgeons and arable land seems to be growing scarcer all the while, science has forged ahead and discovered many new technologies to increase agricultural productivity. One of the most exciting and creative of these new discoveries is hydroponics.

> Hydroponics can be defined as the science of growing plants without the use of soil, but by the use of an inert medium, such as sand, gravel...to which is added a nutrient solution containing all the essential elements needed by the plant for its normal growth and development.[1]

This new reality raises some interesting halachic questions; for one, what *bracha* (blessing) is to be recited on such fruits and vegetables? Can one correctly call them "fruits of the ground?"

The Talmud speaks of a case that forms the basis of our hydroponic/halachic discussion. One of the reasons why this case is so fascinating is that it may be the earliest allusion to the technological future of growing "out of the ground." The case is that of the mushroom:

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1. Resh, Howard M., Ph.D. *Hydroponic Food Production*, Woodbridge Press, 1991. p. 23.

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> Our rabbis taught: Over anything which does not grow from the ground, such as the flesh of cattle, beasts, birds, and fish, one says [the blessing] ..."by whose word all things were created" (*shehakol*). Over...morils and truffles one says *shehakol*."[2]

How can we possibly make the generic *shehakol* blessing for mushrooms when they obviously grow "from the ground?"

> Abaye said: "They do indeed spring up from the earth, but their sustenance is not derived from the earth!"[3]

Abaye's statement has considerable implications not only for mushrooms, but for all hydroponically-grown food. If one can be certain that the plant is receiving no sustenance from the soil, but is instead receiving its necessary nutrients from some other source,[4] then halachically we cannot view that fruit or vegetable as having grown *from* the ground; rather it is merely growing *in* the ground. Our rabbis somehow knew mushrooms to be such a case.

We, of course, could never pronounce with any degree of halachic certainty that a given tree or vegetable which is located in the ground is merely being supported there without any nourishment. But in the case of a tomato bush growing in a bucket of rocks in the corner of someone's office, there is certainty about its source of sustenance. Therefore it is proper to say *shehakol* before eating hydroponically-grown fruits and vegetables even though they are species which normally require more specialized blessings. Rabbi Ovadiah

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2. *Berachot* 40b.

3. Ibid.

4. For example, it is the opinion of the *Magen Avraham* that mushrooms derive their nourishment from the air. *Orach Chaim* 204:4.

Yosef confirms this in his "ground-breaking" article:

> As far as hydropinically-grown produce is concerned, there is no sustenance whatsoever derived from the soil...the blessing recited over them should be *shehakol*, as is the case for mushrooms.[5]

There are two points which should be clarified at this time. First, although it is true there is a difference in blessings between a soil-raised and a hydroponically-grown apple, this difference is based on a botanical subtlety:

> In soil both the organic and inorganic components must be decomposed into inorganic elements...before they are available to the plant. These elements...are exchanged into the soil solution where they are absorbed by the plant. In hydroponics, the plant roots are moistened with a nutrient solution containing the elements.[6]

What Abaye is really pointing out is that no matter how this apple was grown, it had to receive the same necessary inorganic elements through a liquid medium; since one process is based on a natural soil solution and the other relies on a man-made solution,[7] we must make a distinction between them. The distinction is the blessing we say for it.

The second fact we should note is that the case of the mushroom must be truly unique; there are no other examples

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5. *Yechave Daat* 6:12 p. 77.

6. Resh, *Hydroponic Food Production*, p. 37.

7. There are "organic" hydroponic solutions available which meet the rising demand of the strictly organic farmer, but because they do not contain any soil solution these should not make any difference in this discussion. If, however, you add a handful of soil to water and attempt to grow something via this combined solution, there will be grounds to necessitate the normal, more specific blessing. See *Nechpa Bakesef, Yoreh Deah* 1:5.

of plants living in the ground which have no nutrient interaction with the ground.

However, some disagree with the *psak* of Rav Ovadiah Yosef. The *Shevet HaLevi* believes that one should not make a distinction in blessings for hydroponically-grown produce because they are not fully equivalent to the unique mushroom:

> ...It would seem that [hydroponics] is not like mushrooms. For every mushroom derives sustenance from the air, while this [hydroponically-raised] fruit or vegetable belongs to a species that is generally grown in the earth.[8]

The *Shevet HaLevi* chooses to ignore how any individual food item was grown, but focuses rather on the larger picture of how the species normally grows. A mitigating factor and objection to his approach is appearing on the horizon. There are staggering statistics that suggest an enormous rise in the overall quantity of hydroponically-raised produce; certain countries already boast that they grow more flowers hydroponically than in any other way. A time may come when we will not be able to say that a given species is "generally grown in the earth."

For those who do hold like Rav Ovadiah Yosef, there is an interesting problem. Does the hydroponically-raised individual fruit or vegetable (of a species normally grown in the ground) have any halachic connection with the earth? For example, if one were to accidentally make the blessing *"...borei pri haetz"* before eating a hydroponically-grown apple, would this blessing be acceptable?

One might first try to answer this by examining what the same law would be in the case of the mushroom, i.e.

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8. *Shevet HaLevi* 205:204.

can one who accidentally said the blessing *borei pri ha'adama* rely on this blessing for the mushroom? The *Aruch HaShulchan* suggests that in such a case the erroneous blessing would be valid because, after all, mushrooms do grow *in* the ground even if they do not grow *from* the ground.[9] The problem with a hydroponically-raised fruit or vegetable is that it doesn't seem to have any connection with the soil of the earth whatsoever.

Still, Rav Ovadiah Yosef rules that, just as for the mushroom, one who mistakenly recites *borei pri ha'adama* on a hydroponically-grown tomato may rely on the blessing. Why? He lists a few reasons, but one in particular should raise some questions. He claims that because the *Aruch HaShulchan* allowed a mistaken *borei pri ha'adama* to work on mushrooms, the same should be true for hydroponics. However, as was pointed out, the *Aruch HaShulchan's* reasoning was that the mushroom grew while still physically located in the ground; a tomato growing in a bucket in the corner of an office, on the other hand, has no connection with any ground at any time.

Careful scrutiny of Rav Ovadiah Yosef's wording,[10] however, reveals that he never intended to discuss situations of office-produced tomatoes. Instead, he was ruling only regarding a situation in which trenches had been dug in order to replace soil with an inert hydroponic medium such as sand or gravel. In such a case we can see the similarity to mushrooms, where these vegetables are being grown in the ground without deriving any sustenance from the ground.

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9. *Aruch HaShulchan, Orach Chaim* 204:5.

10. *Yechave Daat* 6:12, "...For the water [i.e. nutrient solution] in such a [hydroponic] system *divides* between the seed and the soil."

It is extremely doubtful that the *Aruch HaShulchan* himself would ever have allowed a mistaken *borei pri ha'adama* to be valid for a tomato grown indoors, as described above.[11]

Dayan Falk, in his work *Machaze Eliyahu*,[12] speaks with the greatest proficiency when referring to the field of modern hydroponics. He is compelled to distinguish immediately between two major methods of hydroponic gardening: 1) growing fruits or vegetables in a system completely removed from the earth (i.e. indoors), and 2) growing in a system such as Rav Ovadiah Yosef describes, in which trenches are dug in the ground and produce is grown through an inert medium.

Dayan Falk rules that in the first case it is appropriate to say *shehakol*. He deduces this from a *Yerushalmi*[13] in tractate *Kela'im* that remains uncertain whether one can recite *"...Hamotzi lechem min ha'aretz"* on bread made from wheat grown in a container full of soil but totally separated from the ground itself. This is accomplished halachically by making sure that there are no holes in the bottom of the container so that no exchange can take place between the plant and the ground below. The *Yerushalmi* does not make any certain conclusion regarding the wheat, even though it was grown in soil. Perhaps, conjectures Dayan Falk, the difficulty lies in the text of the blessing itself – can one really say "...He who brings forth bread from the land" when the wheat never touched the land? If this is true, then surely the rabbis in

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11. One might still be able to argue that a mistaken *borei pri haetz/ha'adama* should be sufficient based on the opinion of the *Shevet HaLevi* discussed above. Perhaps in the case of a mistake we should rely on his opinion that the more specific blessing should always be said.

12. 28:4.

13. Jerusalem Talmud, *Kela'im*, chapter 7.

the *Yerushalmi* would have no doubt about wheat or fruit or vegetables grown in an office in a hydroponic planter; they would be very certain that the words "land" and "earth" are inappropriate in blessings for such foods. Such certainty would compel us to make a *shehakol* over hydroponically-grown produce.

But perhaps the *Yerushalmi* fails to render a decision for an entirely different reason. Maybe it is certain that *Hamotzi* is inappropriate in the case of this bread, but feels that we should always stick to the "normal" blessing notwithstanding how any individual batch of wheat or vegetables was produced. If this was their reasoning, then the rabbis would be in doubt about hydroponically-grown produce.

Dayan Falk notes that what emerges is an interesting *safek* (doubtful situation): it is unclear what the *Yerushalmi* is uncertain about. On the one hand, they may not have arrived at a conclusion regarding the bread, but they are sure about the *shehakol* blessing for hydroponically-grown produce; or, they have the same problem with hydroponics as they do with the bread. Therefore, since we have a principle, "when in doubt regarding a blessing, be lenient,"[14] it is best to use the broader blessing in both these cases. Thus, on the bread in question one should say, *"...borei minei mezonot"* just in case the actual mention of *aretz*, land, is inappropriate, and on our office-grown tomato one should say *shehakol*. In the second method of hydroponic farming, Dayan Falk concludes that the same *safek* still exists and therefore it is better to make the more general blessings.[15]

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14. *Shabbat* 23a.

15. This latter case poses some possible problems, however. What stops the roots from growing down through the gravel into the soil itself? Does there have to be some sort of a barrier between the hydroponic medium and the ground?

Finally, what do you do if you arrive in a supermarket and buy a head of lettuce without knowing if it was grown normally or hydroponically?

> Regular fruits and vegetables found in the marketplace...are mostly grown in the ground.[16]

According to this logic one should say the normal, specific blessing since the majority of fruits and vegetables available are grown in the earth. But produce demographics are changing; amidst dwindling resources such as water, land, and fertilizer (many hydroponic systems are "closed" and recycle nutrients), more and more hydroponically-raised fruits and vegetables (and even flowers) are becoming a necessity. Can we rely on the majority principle if we shop at a store which we suspect purchases from hydroponic growers, and are we obligated to find this information out?

Hydroponics is rapidly changing the face of the world we live in. Even in Israel, the parched desert of Ein Gedi is now dotted with stunning vegetation being grown in sophisticated recirculating hydroponic systems. NASA now boasts of being able to sustain people in space using hydroponically-grown food. But however the lettuce or tomato of tomorrow arrive, they will be rooted in a stabilizing "four cubits of halacha"[17] which always wants to know what Torah principle can be revealed by this new challenging circumstance.

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16. *Yechave Daat* 6:12. To understand why we do not say here "when in doubt regarding a blessing, be lenient," see page 79 of his *teshuva*.

17. *Berachot* 8a.

Letters To The Editor

To the Editor:

Rabbi Yitzchok Gottlieb's article "Understanding the *Heter Mechira*," *J. Hal & Contemp. Soc.*, Spring (1993), was an excellent survey of the issues involved in the *heter mechira* and truly enlightened the reader as to the questions involved and the positions taken by the various authorities. However, the final section of the article — dealing with citrons (*etrogim*) produced in Israel during *shemitah* year — touched on an area of relevance to those living in the diaspora, and did so in a manner that might have unintentionally left the reader somewhat confused as to what the normative halacha is. The article recounted a dispute between Rabbis Feinstein and Teitelbaum concerning the use on Succot of citrons produced during the sabbatical year which are "worked on" (נעבד) or watched (שמור) — Rabbi Teitelbaum ruled that one may not, and noted that Dayan Grunfeld appeared to be strict on this matter.

However, the overwhelming majority of halachic authorities who have addressed this issue have concluded that citrons produced during the *shemitah* year are completely permissible for use as one of the four species during Succot, even when watched or worked, when purchased through the process of *havla'ah* or *hakafa* or if *be'ur* or *hefker* or *oztar beit din* are done. Many of these different actions are easily done by the purchaser, and the latter ones are the routine practice of many *etrog* growers during the sabbatical year.

Besides Rabbi Feinstein (*Iggerot Moshe O.C.* 1:186), those authorities who accept that such an *etrog* is permissible (without necessarily accepting the *heter mechira*) include Rabbi Shlomo Zalman Auerbach, *Minchat Shlomo*, pages 230-231; Rabbi Abraham I. Karelitz, *Chazon Ish, Sheviit* 10:6 and 7:25; Rabbi Eliezer Waldenburg, *Tzitz Eliezer* 6:39 and 11:69; Rabbi

Yitzchak I. Leibes, *Beit Avi* 1:52-54; Rabbi Joseph B. Soloveitchik, cited by Rabbi Bronspeigel in *Beit Yitzchak* 15:33-40, Rabbi Lichtenstein in *Daf Kesher* 1-376, and by Rabbi Reichman in *Shiurim of Rabbi Soloveitchik, Succah* 39b; and Rabbi Yechiel Michel Epstein, *Aruch HaShulchan He'atid, Shemitah VeYovel* 21:6-8. Even Rabbi Naphtali Tzvi Yehuda Berlin, one of the most vigorous opponents of the *heter mechira*, clearly indicates that such an *etrog* fulfills the obligations of the holiday; *Meishiv Davar* 2:56. Rabbi Leibes' responsa contain a particularly insightful and detailed analysis of the issues presented.

If one adds to that list the numerous authorities who accepted the validity of the *heter mechira* generally and thus obviously accepted these *etrogim* as fulfilling the mitzvah (such as Rabbi Ovadia Yosef, Rabbi Yizchak I. Herzog, Rabbi Tzvi Pesach Frank, Rabbi Yechiel M. Tukachinsky, Rabbi Kook and Rabbi Shlomo Y. Zevin and many others), one sees that the overwhelming majority of halachic authorities of the last 50 years approved of using Israeli *etrogim* grown or harvested during the *shemitah* year.

One is, in fact, hard pressed to find another preeminent halachic authority who accepts the analysis and conclusions of Rabbi Teitelbaum which prohibit such *etrogim* if they are worked or watched.* Indeed, common practice in the observant community has traditionally followed the lenient rules and procedure. At the end of his responsum on this topic, Rabbi Feinstein remarks:

> Thus, one should not be concerned that one Gaon prohibited these *etrogim* to fulfill the mitzvah with them.

Similar sentiments are found in the recent work of Rabbi Aharon Zakai (*Habayit Hayehudi* 8:23 (31)), who states:

> We have strong authority and weighty principles to rely on to permit one to fulfill the mitzvah of *etrog* with one

> produced in Israel during the sabbatical year that is watched or worked. This is true even if the *etrog* is not sold to a gentile...Even those who trivialize the central principles of the *heter mechira* can fulfill the obligation with these *etrogim*.

This is even more true for those segments of the observant community who are not generally strict for the unique insights of Rabbi Teitelbaum, the late revered Satmar Rebbi.

In sum, the overwhelming majority of halachic authorities accepts that one fulfills one's obligation with Israeli *etrogim* grown during the *shemitah* year.

Rabbi Michael J. Broyde
Rabbi Howard Jachter

(We write this letter only because such *etrogim* are sold next year, Succot 5755 (1994). One should consult a rabbi as to the permissibility of eating the *etrog* after the holiday.)

* For a more detailed discussion, see R. Eliyahu Weissfish, *Arba Minim HaShalem* 129-136 and 308-324.

Rabbi Gottlieb responds:

I am very appreciative of Rabbi Broyde's and Rabbi Jachter's interest in my article "Understanding the *Heter Mechira*." They correctly point out that there are many authorities who, although chary about means of acquiring an *etrog shamure*, would agree that with such an *etrog* one fulfills his positive obligation of the Four Species. In my article I did not deal with the subject of forbidding any purchase of such an *etrog* while nevertheless maintaining that with it one fulfills his obligation, as that is principally an academic issue. It would be an unusual circumstance for one to find in his possession an *etrog* that originally had not belonged to him and was also forbidden to be purchased

by any means or devices. Nonetheless, I feel that Rabbis Broyde and Jachter have contributed a valuable addition to the subject.

As to the point raised concerning normative halacha and common practice, I must take issue with Rabbis Broyde and Jachter. If they are referring to the purchasing practices of the religious communities that do not abide by the *Heter Mechira*, it is entirely evident that *Otsar Beit Din* (read non-*shamure*) citrons are the exclusive market in those areas, clearly indicating the position represented by Rabbi Teitelbaum and Dayan Grunfeld. If, rather, they are discussing common, accepted halacha in a scenario where one did not purchase such an *etrog* but somehow acquired it through other means, and wishes to determine if he can fulfill his obligation therewith, I question how Rabbis Broyde and Jachter ascertained this to be normative practice. Most persons never come across a single such instance, certainly not of sufficient frequency to make a demographic pronouncement.

Once again, I would like to thank Rabbis Broyde and Jachter for their scholarly perusal.

Sincerely,
Yitzchok Gottlieb

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Correction

In the article concerning the procedures to be followed on Erev Pesach when it occurs on Shabbat, there is an error about the time until which *chametz* may be eaten. The article incorrectly states that it may be eaten until the tenth hour, when of course the cut-off time is actually the end of the *fourth* hour of the day. I thank the many readers who contacted us on this point and regret having fostered any misunderstanding.

A. Cohen

Dear Rabbi Cohen:

I just read your article in the latest issue of *Journal of Halacha and Contemporary Society*, (Fall 1993), concerning Erev Pesach on Shabbat. On page 120 it states, "However, if one decides to adopt the option of using egg matzoh....furthermore, it would not be necessary to get up early to *daven* so as to eat *chametz* before the time when it is no longer permitted."

I think that this point needs to be reviewed. According to our מנהג that we do not eat מצה עשירה on פסח, it is אסור to eat it from the זמן of איסור אכילת חמץ. See the תשובה from ר' משה זצ"ל which you cite:

וז"ל: ולכן פשוט שטוב לאכול בב' הסעודות מצה עשירה אף הנילוש בביצים אבל לאכול רק עד זמן שרשאין לאכול חמץ למנהגנו שאין אוכלין מצה עשירה בפסח וגם לא בערב פסח אחר זמן היתר אכילת חמץ להרמ"א ס' תמ"ד עכ"ד.

Rabbi Yitzchok Isbee
Rav, Agudath Israel
Brooklyn

Rabbi Cohen responds:

Dear Rabbi Isbee:

Thank you for your letter. Not only are you correct about Rabbi Feinstein's position that one should not eat egg matzoh after the time when eating *chametz* is forbidden, but I would like to point out that already hundreds of years ago the Maharil and the *Sho'el Umaishiv*, 141:a and 175, shared this view. However, in light of the fact that many *Acharonim* do not agree with them, but on the contrary recommend eating the egg matzoh as I suggested, I felt my conclusion was

justified. These *poskim* include the *Noda Biyehudah* 21, *Aruch Hashulchan* 444:5, *Shulchan Aruch Harav, Chok Yaakov* 1, and *Pri Megadim* 1.

Let me cite the words of the *Noda Biyehudah*:

> Therefore, it appears to me that the halachic conclusion is that until *chatzot* [roughly midday] it is certainly permissible to eat "enriched matzoh" [egg matzoh] on Erev Pesach; and one who rules that it may be eaten all day has not lost anything, if it is even a minor need, even if it is not needed for a sick or aged person.

Consequently, although the position taken by R. Moshe Feinstein should perhaps have been noted for the sake of completeness, the article is correct in conveying the preponderance of halachic opinion as approving the eating of egg matzoh on Erev Pesach later in the day. Since not eating egg matzoh on Pesach is itself a *chumra*, and since there are so many outstanding *poskim* who permit eating it past the fourth hour on Erev Pesach, it seems obvious that one is permitted to be lenient. Nevertheless, those who choose to follow the stricter opinion of R. Feinstein certainly may do so.

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To the Editor:

I read with great interest Rabbi Jachter's article on glass utensils in the Fall 1993 issue of the *Journal*.

It is my information that all caterers in hotels and other facilities that have non-kosher kitchens use their own pots and dishes but use the glassware of the facility. I am told that the protocol is that the hotel gives the caterer clean glasses that have been washed in the hotel dishwasher, and the kosher caterer then proceeds to serve in these glasses. He then washes the glasses in his kosher dishwasher and

returns them to the hotel. One caterer told me that when he engages a hotel for Pesach, he doesn't have the glasses ritually immersed because they are the property of a non-Jew.

When Rabbi Shimon Eider was the *Mashgiach* in La Vista Hotel he saw to it that they had separate glasses for meat and for dairy. To my knowledge that was the only large hotel that provided this luxury. *Pook chazoo.*

In my home the table is set with spotlessly clean glassware. Probably in your home as well. I have attended weddings where the glassware had lipstick stains, grease stains and encrusted "dirt." On many occasions I pointed this out to the caterer who invariably offered to replace it with a clean one. I've gotten the same reaction from the resident *Mashgiach* at a resort hotel where they use the same glasses for meat and dairy. When I protested that I could be put in the position of placing a lard smear in my mouth (at a catering establishment) or a butter smear during a meat meal (at a resort hotel), I was subjected to irate lectures on *Nifsal Meiachilat Kelev, Bolea, Poleit* and so on; everything but *Dofen Akumah* (this being the Succoth issue).

You would do a great service to *Klal Yisroel* if you could be instrumental in getting the large *Hashgacha* organizations to institute a policy of separate glasses for meat and dairy, and no use of the glassware of non-kosher caterers.

Very truly yours,

Pace H. Chesir, CPA