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Chanifa

Rabbi Alfred Cohen

An international Jewish organization chooses to honor a major contributor – a Jew married to a Gentile; a yeshiva tenders a testimonial dinner in honor of a well-known Jewish philanthropist suspected of major fraud; a rabbinic figure who has achieved notoriety when arrested in a scandal is nevertheless given the honor to officiate at a *chatuna*. These troubling phenomena and others like them are so pervasive as to be virtually commonplace.

Does Jewish teaching consider this permissible – or reprehensible? Isn't giving honor to a person whose disregard of Jewish teachings is public knowledge tantamount to condoning such behavior? What are the religious rules governing this kind of behavior?

As always, we seek guidance from the rabbinic commentators on the Torah. Writing on the verse "*velo tachanifu et ha-aretz*" "You shall not corrupt the land" (*Bamidbar* 35:33), the *Kli Yakar* brings this explanation:

> For whoever gives something to a person who is not qualified for it, so that he [the recipient] will, in turn give him [some benefit]--this is called *chanufa* ("flattery").[1]

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1. See also the Ramban, *Sefer Hamitzvot, shoresh 5,* who enumerates

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Chanifa (sometimes referred to as *chanufa*), which includes being dishonest with one's mouth, is specifically prohibited by the Torah itself, which makes it a serious transgression. Yet there is surprisingly little discussion of this *issur* in contemporary society, although the opportunities for falling into this error are manifold, not only for the individual, but particularly on a communal level.

Does a yeshiva's tendering a testimonial dinner for a non-observant Jew, for example, fall within the purview of *chanifa*? In order to answer that, we need a better grasp of how our rabbis understood the *issur* of *chanifa*.

In *Sotah 41a* the Mishnah relates an episode that took place in Jerusalem some thirty years before the destruction of the Second Temple, during the brief and benevolent reign of King Agrippas, a grandchild of King Herod. At the convocation of the Jewish people (*hak'hel*), which took place once every seven years, the king read the Torah aloud in the Temple courtyard, in the presence of all the people. When he reached the biblical verse *"lo tuchal latet alecha ish nachri" (Devarim* 17), "You [the Jewish people] may not appoint over yourselves [as king] a foreigner," King Agrippas began to weep, because due to his descent from Herod, whose Jewishness was questionable, Agrippas was not really qualified to rule. Whereupon, the rabbis and the people comforted him, calling out, "You are our brother, you are our brother."

Relating this historical episode, the Gemara tersely concludes:

At that instant, the "enemies of Israel" [a euphemism

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this as a mitzvah. However, in his *Commentary to the Torah*, Ramban maintains that this prohibition applies only in the Land of Israel, and/or only in the case of someone who has violated the cardinal sins of bloodshed, incest/adultery, or idolatry.

> for the Jewish people themselves] became guilty of destruction.

What does the Talmud find so reprehensible about the spontaneous outpouring of love for a good and benevolent king, a man who tried to observe the mitzvot, a person who was dedicated to helping the Jewish people? Because of their gratitude, the Jewish people deserved to have their Temple destroyed?!! But, the Gemara[2] explains,

> Any person who flatters, even the unborn curse him; any group which flatters will ultimately be exiled.[3]

Elsewhere, the Gemara goes so far as to declare,

> Four types of people are not accepted before the Spirit of G-d.....[and one of these is] the group of flatterers.[4]

> G-d hates three [types of people, and one of them is] the one who says one thing with his mouth but thinks another thing in his heart [*echad bapeh ve'echad balev*].[5]

Our rabbis also rule that, "The flatterer is worse than one who worships idols, in four ways."[6]

This very strong condemnation by the Gemara is a clear indication that *chanifa* is a particularly reprehensible act which distances one from the *Ribono shel Olam*. Therefore, citing the incident when the Jews consoled Agrippas, accepting him even though the Torah disqualified him, Rabbenu Yonah teaches, "a person is obligated to put himself in [mortal] danger rather

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2. *Sotah* 41b.
3. Ibid.
4. *Pesachim* 113b.
5. Rabbenu Bachya, *Kad Hakemach sha'ar "Chanifa"*.
6. *Pesachim* 113b. Rabbenu Bachya, *Kad Hakemach sha'ar "Chanifa"*.

than bring upon his soul such a shameful sin."[7]

This "shameful sin", which the Torah labels "*chanifa*", is not accurately translated by the word "flattery". Rather, it conveys the sense of perverting the truth by "flattering" someone who is doing something wrong, letting him think his conduct is acceptable. Any time we choose to let a sinner think his sinful behavior is, for some reason, not so bad – we are guilty of *chanifa*. *Chanifa* likewise occurs when a Jewish person gives a false picture of what the Torah says.

The prohibition against "flattery" certainly seems straightforward enough. However, within the context of the realities of communal life in America today, one can foresee problems that might arise were it to be categorically

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7. *Shaarei Teshuva, sh'ar 3, 188*. However, Tosafot do not wholly agree; see Tosafot to *Sotah* 41b, who cite a text in *Nedarim* 22a, where Ulla feared that he had "flattered" a murderer. It seems that one time Ulla was traveling on a journey, and his traveling companion turned out to be a murderer and killed one of the members of Ulla's party. Then the murderer turned to Ulla and asked, "How am I doing?" In fear of his life, Ulla responded, "Fine, you're doing fine." The murderer then left him alone, and Ulla was able to reach his destination safely. But he was deeply troubled, fearing he had transgressed the *issur* of *chanifa*. In recounting the incident, Rav Yochanan apparently approves Ulla's "flattery", because he could have been killed otherwise. Therefore, the Tosafot conclude, one does not have to risk death rather than avoid giving the appearance of approving the actions of a sinner.

See also *Torah Temimah, Bereishit* 33:10, note 3, who expresses the opinion that the case involved not a potential loss of life but rather a potential loss of much money, which he also considers to be an acceptable excuse for "flattery".

See also Rabbi David Cohen, *Birchat Ya'avetz, Al Hazemanim U'Moadim*, for a further explanation of these two opinions.

implemented. Are there any variables, or is it unequivocally forbidden?

Rav Moshe Feinstein was once asked about what to do in the following situation:[8] There was a Jewish doctor, whose services were much needed by the community, and who did many acts of *chesed*. He was, however, married to a non-Jew, wherefore the shul refused to give him any honors. The doctor was offended by this treatment, and the community leaders were troubled about how to treat him. Although fairly confident that as long as his mother was alive he would maintain his ties with the community, they feared that upon her death, he would no longer be willing to help them at all. Were they permitted to modify their behavior, allowing the doctor at least to open and close the Ark when he came to shul?

Rav Feinstein concluded that the question is essentially one of *chanifa*, flattery.[9] After discussing various ramifications of the question, he writes that perhaps one can argue that *chanifa* takes place only when one gives the impression that something which is really *assur*, is permitted to be done. It is "flattery" to tell a sinner that it is acceptable for him to do something which is forbidden. The distortion of Torah teaching is what is forbidden, and to prevent such a distortion, one must be ready even to sacrifice his life.[10] After giving a number of examples

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8. *Orach Chaim* II, 51.

9. In his analysis, he distinguishes between opening the Ark and calling the man up to the Torah, which he considers a greater infraction, and concludes that it is *assur*. *Minchat Yitzchak, chelek 4, siman 10,* p.26, forbids giving an *aliyah* to someone married to a non-Jew, based on the *Chacham Tzvi, siman 38,* and 13 and 43. Interestingly, no mention of *chanifa* is made in any of these responsa.

10. See the *Yam shel Shlomo, Bava Kamma* 38, discussing an incident where the Jews refused to distort the words of the Torah for the Romans, even though they were in mortal danger.

in support of his interpretation, Rav Moshe concludes,

> And therefore one must distance himself, even from flattery such as this [in the present case]. However, to praise him for that which he deserves, there is surely no prohibition; however, to praise him excessively--one ought to distance onself [from it]. Therefore, perhaps in giving him the honor of opening and closing the Ark there may indeed be an aspect of *chanifa*. However, since the prohibition is not clear, and it is more likely that there is no actual prohibition, although it were a good thing to distance oneself from such flattery – [therefore], one can be lenient in this regard...if it is perceived as a great necessity for the congregation and for the people of the city to honor him.[11]

Essentially, Rav Moshe Feinstein rules that in praising those actions which legitimately deserve praise, and not praising the bad that the man may be doing, there is no "flattery". Following these guidelines, it would be permissible to say that the doctor is a benevolent and caring physician; similarly, an honor bestowed on a person which accentuates the positive aspects of his personality and activities does not fall within the definition of *chanifa*.

This is a remarkable responsum, when we consider that it seems to contradict the ruling of Rabbenu Yonah, a major rabbinic figure of the thirteenth century: [12]

Flattery... is to praise a wicked person in front of others,

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11. Rav Moshe writes that it is also *assur* to give false praise even to a non-Jew, because of the biblical prohibition of *lo techanem*. However, in *Iggerot Moshe, Yoreh Deah* II 117, Rav Feinstein discusses making a banquet in honor of a non-Jew and does not mention the prohibition to flatter.

12. *Shaarei Teshuva, Sha'ar 3, 189.*

> whether he [the wicked one] is present or not, even if one does not justify the evil he does...but even if he only says that he is a good person...and even if he does not praise the evildoer except for those things in him which are good...this too is a terrible evil.

According to Rabbenu Yonah, it seems that it is wrong to say good about a bad person under any circumstance. How then can Rav Moshe permit giving the doctor who is married to a Gentile any honor at all?[13] In order to address that question,

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13. We are equating giving an honor to saying that someone is good. See Maharal, *Derech Hachaim* chap. 4, note 17, who permits greeting a wicked person, and this is not considered "blessing" the wicked. Maharal cites the Gemara that it is "permissible to flatter the wicked in this world" – but he does not explain why. (For an interesting explanation, see *Encyclopedia Talmudit*, "Chanifa", note 69.)

It should be mentioned that Rabbenu Bachya (*Kad Hakemach*, ibid.) offers a different rationalization for the permissibility of giving honor to a wicked person: As long as it is done in a way that is open to various interpretations – if the honoree chooses to interpret the action as admiration for himself or his deeds, and he is actually fooling himself about the true motivations and sentiments of the one bestowing the honor, then that is his own error, and one is not liable for "flattering" him. Thus, letting him open the Ark during services is not a testament to his worthiness; if he chooses to take it as such, it might be a mitigating factor in the matter.

The *Encyclopedia Talmudit*, Vol. 16, "Chanufa", mentions a mitigating factor: it is sometimes permitted to look aside when minor infractions are taking place. This is what the Gemara had in mind when it said that "Rebbi [Rabbi Judah the Prince, redactor of the Mishnah] used to give honor to wealthy people," even if they were slightly sinful. A similar sentiment is echoed in the Gemara *Pesachim* 53a, "Were you not Theodus [an influential individual], I would have issued a ban against you." However, since Theodus *was* such an important person, the Gemara felt that putting him in *cherem* for committing a sin unintentionally would cause a *chilul Hashem*.

we need to understand what Rabbenu Yonah's reasons were for ruling as he did. He spells out his reasoning in a later passage:

> Because when he mentions the good [which the person does] but does not mention the bad, and he covers up all the transgressions, those who hear will consider [that man] to be a *tzaddik*, a virtuous person, and they will give him honor, and he will "raise his hand and become strong". And I have already previously warned about the pitfalls and the destructiveness which inheres in honoring wicked people. Therefore, it is not right to mention their righteousness unless one also mentions their wickedness and foolishness....[14]

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14. In no. 192, Rabbenu Yonah writes that praising the wicked also prevents them from repentance, since they are able to rationalize that, on the whole, they are good people.

The Gemara (*Yoma 86b)* teaches that one should expose sinners, and Rashi explains: If one doesn't mention the sinful actions of this person (and they are not publicly known), "people will learn from his deeds, for they consider him to be a righteous person and this will lead to *chilul Hashem,"* inasmuch as people will learn from the sinner, seeking to emulate him, mistakenly taking him to be a good person. Therefore, Rashi holds that it is mandatory to publicize the fact that this person is a sinner, specifically so that people will *not* learn from his ways. The upshot of this analysis seems to be that a major concern of the rabbis in establishing the parameters of *chanifa* is preventing a situation wherein the sinner will become a role model for others to follow.

In light of this concern, a talmudic dictum seems astounding: "It is permitted to flatter wicked people in this world," says the Gemara in *Sota* 41b! Meiri (ibid) and Rabbenu Bachya (*loc cit*) interpret this to mean that it is permitted to treat a wicked person in the same manner as one treats anyone who holds a position of power over the community, and it is even permitted to accord him honor, for everyone realizes that it is being done due to the power of this individual.

Rabbenu Yonah sees the true intent of the Torah as being the prevention of a situation where people could get the impression that the behavior of the "wicked" person is acceptable, and may learn to emulate it. Possibly for that reason, Rav Feinstein allowed saying good things about the doctor, for he was sure that the praise would not mislead anyone.

To recapitulate, our inquiry up to this point indicates that a major component of flattery is the misleading impression one might create that non-halachic behavior is acceptable, given the total picture of the good which the person also does. There seems to be universal agreement that the intent to flatter is what is forbidden, in the sense of praising one whose behavior actually warrants condemnation. Perhaps when it is evident to all that the flattery is a necessary ploy in order to protect the community from the wrath of those who might harm them, it can be permitted.

If all are aware why this person is being honored and they are not going to be influenced by it – does that remove the prohibition? Might this rationalization entitle us to expand the borders of permissible activity? Or are we all, to a greater or lesser degree, guilty of violating this *issur*, whether individually or communally?

Perhaps the realization that people are honored at dinners as a means of raising funds for a worthy institution, mitigates

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Since the Jewish community has a vested interest in staying on the good side of those in power, the Gemara permits it.

Similarly, the *Menorat HaMaor, sha'ar Chanifa,* writes,

> However, wicked people who have power and "their luck is in", it is permitted to give them honor, due to fear of their power; however, not out of affection for them. And also if he fears that they might harm him, he may flatter them (*muttar lehachanifem*).

He further records a "discussion" between Yaakov Avinu and the

the impact of the "flattery". It might be said that no one is misled; most even realize that the purpose of the praise is to encourage others also to work for communal affairs. According to some interpretations of the halacha, this might possibly serve as a rationale to exempt such praise from the category of *chanifa*.

Let us turn to other possible applications of our principles. We have seen that it is *assur* to allow the public to get the wrong impression about a wicked person. Indeed, the Gemara in *Yoma* 86b specifically instructs "It is a mitzvah to publicize the flatterers."[15] Here, the Gemara is applying the term "flatterer" in the sense of "hypocrite", of "living a lie" – i.e., when a wicked person seeks to pawn himself off as righteous, he is lying about the truth of his commitment. This, too, is *chanifa*, and the Gemara is concerned lest an unworthy person be set up as a role model. In this case, *"chanifa"* has been expanded to include *behavior* which can give the wrong impression.[16]

In the light of that analysis, let us examine some aspects of contemporary life. Tabloid headlines scream out the peccadillos of public figures, and their publishers justify the exposure of scandalous behavior by saying that "the public has a right to know." "We're performing a public service by ripping the false facade from public figures who do not deserve the admiration of the public."

There are obvious limits to acceptable rationalization. Let's be realistic–when a newspaper exposes the alleged wrongdoings

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Esav his brother was permitted if it was done as a means of serving the Allmighty. (The first letter of the phrase *mechanfim et haresha'im beolam hazeh* spells "*me'ahava*", i.e., out of love for *Hashem.*)

15. Rabbenu Bachya, ibid., cites the example of Doeg the Edomite, the most learned man of his generation and the head of the Sanhedrin. Nevertheless, the Book of Samuel relates that he spoke *lashon hara.*

16. Rashi, ibid. A further reason for publicizing the truth about a

of the President when he was Governor–what is the purpose? Were people going to take him as a role model, absent this salacious tidbit? Wouldn't it be more correct to say that once it is well known that a certain person is far from saintly in his behavior, every further exposé of this truth is only *lashon hora?* Avoiding the taint of "flattery" by relentless exposure of all a person's faults is hardly the lesson we should be learning from the Torah's teachings.

On the other hand, we always have to bear in mind that although in certain circumstances praising unworthy persons may not be technically prohibited, it remains unwise and undesirable. This is so because although the ones who are called on to praise the person of questionable character may know why it is being done, they have to consider whether our youth know this too. Fulsome praise wrongfully lavished upon the undeserving can cause dreadful harm. Young people are impressionable–either they will truly be impressed by the honoree, focusing on the totality of his deeds, not only the laudable ones. Or, alternatively, they will see through the sham and develop a cynical attitude towards the relationship between communal leaders and the rich and famous, realizing that it is they and not Torah scholars and morally outstanding persons who achieve honor and recognition. Either alternative is fraught with pitfalls.

It is not beyond the realm of possiblity that recent incidents of scandalous behavior by Orthodox Jews, which bring shame upon us and on Judaism, may be the result of the subliminal messages which the Jewish community has been sending out for a long time. Many young people see honor and respect being heaped upon those who are wealthy but otherwise unremarkable. What is to prevent the youth from consciously–or unconsciously–making the equation that it is important to have "big bucks" to contribute to community causes, that "success" is inexorably tied in with wealth, and that few seem to care about the means employed for the accumulation of wealth–it

is the end result which counts. Is it conceivable that community leaders are accomplices in clouding the vision and corrupting the values of the younger generation (who grow up to become the next generation of movers and shakers)? The message we have been sending, for quite a while, is that "money talks".

Imagine if all persons honored at any communal function were only of the highest and most laudable character, not only great financial contributors to the cause. Imagine how powerful a message could be parlayed, if *yir'at shamayim* and *talmud Torah* and *chesed* received the major praise, and not only *tzedaka*!

Consequently, in trying to arrive at the correct balance, it is important to remember the warning of Rav Moshe Feinstein, mentioned earlier, that it is prudent and desirable to distance oneself from giving an impression that less-than-sterling behavior might nevertheless be condoned. Rav Moshe's *obiter dictum* should serve as a formidable constraint upon our behavior.

The Gemara in *Shabbat* 119 has a portentous message: "Jerusalem would not have been destroyed except that they considered big and small people the same." The Maharsha explains that *chanifa* means making everybody the same, whether they are great or insignificant in their deeds. Heaping praise upon those who don't deserve it cheapens the value of truly fine and impressive individuals. It distorts real quality. And a generation which does not know how to revere true greatness will be incapable of producing great people. Every generation which does not correct the sins which brought about the destruction of our *Beit Hamikdash* guarantees that it will not be rebuilt.

Consequently, it is well to bear in mind the concluding remarks of Rabbenu Bachya:

> Inasmuch as the attribute of *chanufa*[sic] renders the person an abomination before G-d, it is proper that a

> person distance himself from this [attribute], and not desecrate his lips with words justifying the wicked or denigrating a righteous person, and [it is proper] that all his words should be sincere and honest, and all the words of his mouth justice.[17]

One final comment, however, is necessary in order to give the full scope of rabbinic insights on the topic of *chanifa*. Despite all that we have said, our rabbis conclude that there are times when *chanifa* may be desirable. The *Orchot Tzaddikim* offers this fresh perspective:

> It is permissible for a man to flatter his wife, or his debtor, or his rabbi so that he will teach him Torah, or his students, so that they will [be willing to] learn from him and hearken to his words....

If the objective of the flattery is to improve relations between people, so that there will be peace in the home or an improved atmosphere for learning Torah, then "flattery" is appropriate.

Another way in which "flattery" may actually be commendable is in the attitude which observant Jews display towards the non-observant. Everyone is familiar with the "three times a year" Jew, but if he feels ostracized when he *does* come, it will certainly be a deterrent to his returning. Thus, it is not unusual to find many synagogues where, on Rosh HaShanah

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17. Since it is unquestionably the preference of Jewish law that one speak only the truth and certainly not "flatter" if possible, it is somewhat disconcerting to notice that rabbis, in writing responsa to questioners, or in their letters, often address their correspondents with titles and compliments of such fulsome praise as to be patently exaggerated. For comments on this practice, see *Sdei Chemed, ma'aracha chet, kellal 140,* who reluctantly concedes that although it is not right to praise a person in this florid manner, yet since it has become the accepted practice, it would cause embarrassment to the recipient of the letter were he not addressed in like manner.

and Yom Kippur, the honors of holding the Torah or opening the Ark are allocated to people who may not have been in a shul since the previous Rosh Hashanah. People whose observance of mitzvot is scant or incidental are nevertheless greeted warmly by the rabbi and leaders of the congregation. Now, that may be because it is not uncommon for people lax in mitzvah-observance to be quite generous for charitable and communal causes. On a positive note, however, much of the warmth and friendship exhibited arise from a sincere desire to make the person feel welcome in a religious setting and, thereby, hopefully to enhance his observance of mitzvot. This motivation is surely commendable.

Conclusion

In our sincere zeal to help Torah grow by building institutions and edifices for our religious institutions, we cannot lose sight of the moral teachings of the Torah, nor may we compromise the major moral imperative to act always in the most upright and honest manner, and to honor only those of sterling character. Rationalizing that the ends justify the means is not a worthy undertaking; it is the directive of the Torah that we be honest and upright not only in our financial transactions but also with our words and deeds.

Child Custody in Jewish Law: A Conceptual Analysis

Rabbi Michael J. Broyde

I. Introduction

The revival of the *beit din* system in the United States has returned the topic of child custody from the theoretical to the practical. Jewish law courts are now hearing child custody matters and issuing rulings. This article will survey Jewish law's approach(es) to several purely halachic[1] issues related to

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1. A number of excellent articles address the unique mixture of law and fact found in this area and survey the applications of the various practical rules developed. The most complete of these is Professor Shochatman's excellent article; see Eliav Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law", 5 *Shenaton LeMishpat HaIvri* 285 (5738) (Hebrew).

In addition, a number of articles address various issues in the field; see Rabbi Chaim David Gulevsky, "Question on the Custody of Children", *Sefer Kavod Harav: Essays in Honor of Rabbi Joseph B. Soloveitchik* 104, (New York, 5744) (Hebrew); Ronald Warburg, "Child Custody: A Comparative Analysis" 14 *Israel Law Review* 480-503 (1978); Maidi Katz, "A Reply to Ronald Warburg" (manuscript on file with the author) (1992); Basil Herring, "Child Custody" in *Jewish Ethics and Halakhah for Our Times*, II:177 (1989); Israel Tzvi Gilat, "Is the Best Interest of the Child a Major Factor when Parents Conflict on Custody of a Child" 8 *Bar Ilan Law Studies* (1980) (Hebrew).

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child custody determinations and will examine the theoretical halachic underpinnings of such determinations.

Specifically, this article is divided into four substantive sections:

1) the theoretical basis for child custody determinations;

2) disputes between parents as to who should have custody;

3) the status of relatives and strangers[2] in child custody disputes, and

4) certain theoretical conclusions based on the previous three sections.

It is the thesis of this article that there are two implicit basic theories used in Jewish law to analyze child custody matters and that different rabbinic decisors are inclined to accept one or the other. Indeed, which of these theories one adopts can substantially affect how one decides many "hard" cases. One theory grants parents certain "rights" regarding their children while also considering the interests of the child, while the other theory focuses nearly exclusively on the best interests of the child.

II. The Theoretical Basis for Parental Custody

The initial question in all child custody determinations is

Professor Shochatman's article is a complete analysis of this area with in-depth collection and discussion of the many Jewish law authorities and a near complete review of the responsa literature. Each of the articles listed above (except perhaps Gulevsky's), as well as this article, in one way or another responds to or complements the analysis found in Professor Shochatman's article.

2. The word "stranger" need not mean a person unknown to the children, but rather denotes a person having no prior legal claim to custody of the children; see *infra* section IV.

frequently left unstated: by what "right" do parents have custody of their children? As explained below, two very different theories, one called "parental rights" and one called "best interests of the child," exist in Jewish law. These two theories are somewhat in tension, but also lead to similar results in many cases, as the best interests of the child will often coincide with granting parents rights.

There is a basic dispute within Jewish law as to why and through what legal claim parents have custody of their children. This dispute is crucial to understanding why Jewish law accepts that a "fit" parent is entitled to child custody -- even if it can be shown that others can raise the child in a better manner.

In the course of discussing the obligation to support one's children, Rabbi Asher ben Yehiel (Rosh), adopts what appears to be a naturalist theory of parental rights.[3] He asserts two basic rules: First, there is an obligation (for a man)[4] to support his children and this obligation is, at least as a matter of theory, unrelated to his custodial relationship (or lack thereof) with the child, or with his wife, or with any other party. A man who has children is biblically obligated to support them. Flowing logically from this rule, R. Asher also states[5] that, *as a matter of law,* in any circumstance in which the marriage has ended and the mother is incapable of raising the children, *the father is entitled to custody of his children*. R. Asher appears to adopt the theory that *the father is the presumptive custodial parent of his children based on his obligations and rights as a natural parent*, presumably subject, however, to the limitation that even a

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3. Rabbi R. Asher ben Yehiel, *Responsa of Asher (Rosh)* 17:7; see also Rabbi Judah ben Samuel Rosannes, *Mishneh Lemelech, Ishut* 21:17.

4. See infra text accompanying note for an explanation of why this is limited to a man, at least as a matter of Torah law.

5. *Responsa of Rabbenu Asher*, 82:2.

natural parent cannot have custody of his children if he is factually unfit to raise them.[6] For the same reason, in situations where the Sages assigned custody to the mother rather than the father, that custody is based on a rabbinically-ordered transfer of rights.[7] While this understanding of the parents' rights is not quite the same as a property right, it is far more a right (and duty) related to possession than a rule about the "best interest" of the child. The position of R. Asher seems to have a substantial basis in the works of a number of authorities.[8]

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6. This could reasonably be derived from *Ketubot* 102b which mandates terminating custodial rights in the face of life-threatening misconduct by a guardian.

7. For a longer discussion of this issue, see Rabbi Yechezkel Landau, *Nodah BeYehudah, Even Haezer* 2:89, and Rabbi Yitzchak Weiss, *Minchat Yitzchak* 7:113, where these decisors explicitly state that even in cases where the mother was assigned custodial rights, the father has a basic right to see and educate his male children. If this right is incompatible with the mother's presumptive custody claim, his rights and obligations supersede hers and custody by the mother will be terminated. This issue is addressed in sections III and IV in more detail.

8. See e.g. Rabbenu Yerucham ben Meshullam, *Toldat Adam veChava* 197a in the name of the *Geonim*; Rabbi Yitzchak deMolena, *Kiryat Sefer* 44:557 in the name of the *Geonim* and Rabbi Yosef Gaon, *Ginzey Kedem* 3:62, where the theory of custodial parenthood seems to be based on an agency theory derived from the father's rights; see also Gulevsky, *supra*, pages 110-112. R. Asher, in his theory of parenthood, seems to state that typically the mother of the children is precisely that agent. When the marriage ends the mother may – by rabbinic decree– continue if she wishes to be the agent of the father because Jewish law perceives being raised by the mother (for all children except boys over six) as typically more appropriate than being raised by the father.

Interestingly, a claim could be made that this position was not accepted by Rabbi Yehuda ben R. Asher, one of Rabbi Asher's children; see *Zichron Yehuda* 35 quoted in *Beit Yosef, Tur, Choshen Mishpat* 290.

There is an alternative theory of parental custody in Jewish law, exemplified in the approach of Rabbi Solomon ben R. Aderet (Rashba).[9]

Rashba indicates that Jewish law always accepts–as a matter of law–that child custody matters (upon termination of the marriage) be determined according to the "best interest of the child." Thus, he rules that in a case where the father is deceased, the mother does not have an indisputable legal claim to custody of the children. Equitable factors, such as the best interest of the child, are the *sole* determinant of the custody. In fact, this responsum could well be read as a general theory for all child custody determinations.[10] Apparently, Rashba sees all child custody determinations as devolving from a single legal standard: *the best interest of the child*. According to this approach, the "rules" that one encounters in the field of child custody are not really "rules of law" at all, but rather the presumptive assessment by the talmudic Sages as to what generally is in the best interest of children.[11]

An enormous theoretical difference exists between R. Asher and Rashba. Although there is no record of any rabbinic directive to transfer custodial rights from parents in a situation where it can be shown that the children are not being raised in their best interests and another would raise them in a better manner,

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9. *Responsa of Rashba (Traditionally Assigned to Nachmanides)*, 38. Throughout this article, the theory developed in this responsum is referred to as Rashba's, as most latter Jewish law authorities indicate that Rashba wrote these responsa and not Nachmanides; see Rabbi David Halevy, *Turai Zahav Y.D.* 228:50 and Rabbi Chaim Chezkeyahu Medina, *Sedai Chemed*, *Klalai Haposkim* 10:9 (typically found in volume nine of that work).

10. For example, see *Otzar HaGeonim, Ketubot* 434 where this rule is applied in the life of the father.

11. See Warburg, pages 496-98, and Shochatman, pages 308-09.

yet at least in theory, that would be the position of Rashba. According to R. Asher, however, parents (or at least fathers)[12] have an intrinsic right to raise their progeny. In order to remove children from parental custody, it must be shown that these parents are unfit and that some alternative arrangement to raise these children consistent with the parents' wishes and lifestyle (either through the use of relatives as agents or in some other manner[13]) cannot be arranged.[14]

This legal dispute is not merely theoretical: the particular

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12. See Katz, pages 16-19, for a discussion of whether this analysis is genuinely limited to fathers or includes all parents. It is this author's opinion that later authorities disagree as to the legal basis of the mother's claim. Most authorities indicate that the mother's claim to custody of the daughter is based on a transfer of rights from the father to the mother based on a specific rabbinic decree found in the Talmud. On the other hand, many later authorities understand the mother's claim to custody of boys under six to be much less clear as a matter of law and are inclined to view that claim based on an agency theory of some type, with the father's rights supreme should they conflict with the mother's; see also sources cited in note 7.

13. For example, sending a child to a boarding school of the parent's choosing; see e.g., P.D.R. (*Piskai Din Rabbani*) 4:66, where the rabbinical court appears to sanction granting custody to the father who wishes to send his child to a particular educational institution (a boarding school) which will directly supervise the child's day-to-day life.

14. It is possible that there is a third theory also. Rabbenu Nissim (RaN, commenting on *Ketubot* 65b) seems to accept a contractual framework for custodial arrangements. R. Nissim appears to understand that it is intrinsic in the marital contract (*ketubah*) that just as one is obligated to support one's wife, so too one is obligated to support one's children. This position does not explain why one supports children out of wedlock (as Jewish law certainly requires, see *Shulchan Aruch, Even Haezer* 82:1-7) or what principles control child custody determinations once the marriage terminates. *Mishneh LeMelech, Ishut* 12:14, notes that R. Nissim's theory was not designed to be followed in practice.

responsa of Rosh (Rabbenu Asher) and Rashba, elaborating on these principles, contain a distinct contrast in result. Rashba rules that when the father is deceased, typically *it is in the best interest of the child to be placed with male relatives of the father rather than with the mother*; R. Asher rules that, as a matter of law, when the mother is deceased, *custody is always to be granted to the father (unless the father is unfit)*. To one authority, the legal rule provides the answer; to another, equitable principles relating to best interest do.

These two competing theories, and how they are interpreted by the later authorities, provide the relevant framework to analyze many of the theoretical disputes present in proto-typical cases of child custody disputes. Indeed, it is precisely the balance between these two theories that determines how Jewish law awards child custody in many cases.[15]

III. Determinations of Custody Between Parents

The Talmud[16] seems to embrace three rules that govern child custody disputes between parents:

1] Custody of all children under the age of six is to be given to the mother.

2] Custody of boys over the age of six is to be given to the father.[17]

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15. See also section IV.

16. See *Eruvin* 82a, *Ketubot* 65b, 122b-123a.

17. *Shulchan Aruch, Even Haezer* 82:7 seems to indicate that the mother may keep custody of the children in all circumstances if she is willing to forgo the father's financial support. Thus, according to *Shulchan Aruch's* way of understanding the rule, children are placed according to these presumptive rules and parents are obligated to support them in these circumstances. Should one parent wish to keep custody beyond the time in which it is in the children's own best interest to stay with

3] Custody of girls over the age of six is to be given to the mother.[18]

The Talmud (*Ketubot* 59b) also indicates that these ideal rules of child custody presuppose that both the mother and the father desire custody of the children and both are financially capable of custody.[19] Jewish law, however, rules as a matter of law that mothers (at least upon termination of the marriage) are under no legal obligation to financially support and maintain their children, whereas fathers are under such an obligation.[20] These

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that parent, the other parent would cease being obligated to pay for their support; Rabbi Moshe Alshich, *Responsa* 38. As has been noted, (R. Yom Tov ben Moshe, *Marit Zalon* 1:16, 2:232 and others) most authorities reject this rule and state that the mother may not keep custody of the children beyond the time in which it would be in the children's own best interest, even if she were willing to do so without child support payments from the father. This appears to be the majority opinion; for a long discussion of this topic see Shochatman, at pages 297-303.

18. For a detailed discussion of the background of these rules, see Herring, at pages 180-187, where the basic texts are translated into English, and Shochatman, at pages 289-292. While there is much discussion in the literature of how precisely these rules have been interpreted, this article focuses instead on what the theoretical underpinnings of these rules are.

19. In classical Jewish law a father provided child support payments, but did not provide alimony. Instead of alimony, the wife was paid a lump sum upon divorce or death of her husband.

20. Maimonides (Rambam), *Mishneh Torah, Ishut* 21:17-18; *Shulchan Aruch Even Haezer* 82:6,8. This presupposes that others can and will raise and support the children if the mother does not. However, in a situation in which a child is so attached to a particular parent that if this parent does not care for him, he will die, Jewish law compels that parent to take care of the child, not because of a special legal obligation between a parent and a child, but because of the general obligation to rescue Jews in life-threatening situations. This situation arises when a woman has been nursing her child and does not wish to continue nursing the child; if the child will not nurse from another

rules are codified in Maimonides' code[21] and *Shulchan Aruch*,[22] and are the basis of much of the discussion found among the later authorities.[23]

The above talmudic rules, read in a vacuum, appear to provide no measure of flexibility at all and mandate the mechanical placement of children into the appropriate category. However, Jewish law, as has been demonstrated by others,[24] never understood these rules as cast in stone; all decisors accepted that there are circumstances where the interests of the child overwhelmed the obligation to follow the rules in all categorically.

It is apparent, however, that this interpretation of the talmudic precepts, which turns these rules into mere presumptions–and allows custody to be given contrary to the talmudic rules–is understood by the various authorities in different ways. Two different issues need to be addressed. First, in what circumstances may one reject the talmudic presumption: need the presumptive custodial parent be "unfit" or is it enough that others are "more fit"? Second, in cases where the talmudic presumption has been rejected, who should then be assigned

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and thus will die absent the mother's nursing, Jewish law compels the mother to care for the child and nurse it as part of the general obligation of not standing by while a fellow Jew's blood is shed; see *e.g., Tur, Even Haezer* 82.

21. Maimonides, *Ishut* 21:17.

22. *Even Haezer* 82:7. It is worth noting that the Ravad, who explicitly takes issue with rule one above (see *Comments of Ravad, Ishut* 21:17) is not quoted as normative by any authority; but see Rabbi Eliezer Waldenburg, *Tzitz Eliezer* 15:50.

23. Indeed, of the major review articles published in the area, all of them use these principles as the organizational framework for their discussion.

24. See Warburg, at pages 495-499; Shochatman, at pages 308-309; and Herring, at pages 207-219.

custody? Is that determination based purely on the "best interest of the child", or must custody be granted to the other parent as a matter of law, assuming that the parent is "fit".[25]

The circumstances in which the talmudic presumption can be rejected are often not explicitly stated; thus it may be unclear whether, in any particular case, the parent presumptively designated to receive custody but denied that right is "unfit", or merely that the other parent is "more fit". However, an examination of the responsa literature and decisions of the Rabbinical Courts in Israel does indicate that two schools of thought exist on this issue. Many decisors rule that these presumptive rules are relatively strong ones and can be reversed only when it is obvious that the parent who would be granted custody (or already has custody) is unfit. Other decisors adopt a lower standard and permit granting custody contrary to the talmudic rules when these presumptions are not in the best interest of the specific child whose case is being adjudicated.

For example, Rabbi David Ibn Zimra (Radvaz) discusses a case where a couple was divorced and the mother had custody of the seven-year-old daughter (in accordance with the rules discussed above). After a short time the mother became pregnant out of wedlock and the father sought to regain custody of his child, based on the moral delinquency of the mother. Radvaz

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25. This article will not address the extremely important question of *how* Jewish law determines parental fitness; for an excellent discussion of that topic, see Rabbi Gedalia Felder, *Nachalat Tzvi* 2:282-287 (2nd ed.) where he discusses the process which should be used by *beit din* to make child custody determinations. Rabbi Felder discusses the practical matters involved in child custody determinations, and he adopts a format and procedure surprisingly similar to that used by secular tribunals in making these determinations. He indicates that *beit din* should interview the parents, consult with a child psychologist, and conduct a complete investigation.

ruled in his favor; however, an examination of his language indicates that it is based on the *unfitness of the mother* to have custody of the children and not merely on the fact that the father could do a better job raising the children.[26] Many, including Maharival,[27] and Rabbi Ovadia Hadayah,[28] agree with this method of analysis.[29]

The contrary approach, based on the best interest of the child, can be found in the responsa of Rabbi Moshe ben Yosef Trani (Mabit) and Rabbi Shmuel ben Moshe (Maharashdam).[30] Mabit describes a mutually agreed upon child custody

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26. Rabbi David Ibn Zimra, *Radvaz* 1:263 cited in *Pitchei Teshuva, Even Haezer* 82:(6). He concludes that the mother is sufficiently unfit that even had the father not sought custody, he would have removed the child from the mother's home. See also Gulevsky, at pages 122-123, who indicates that the standard is "unfitness" rather than "best interest". Katz, at pages 9-16, claims that this school of thought is represented in the Israeli rabbinical courts.

In a different responsum, Radvaz reaches a different result and uses language closer to the best interest of the child; see *Radvaz* 1:126.

27. Rabbi Joseph ben David Ibn Lev, *Responsa Maharival* 1:58.

28. Rabbi Yosef Hadayah, *Yaskil Avdi*, *Even Haezer* 2:2(4) (additional section).

29. See Gilat, at pages 328-335. It can occasionally be found in judgments of the Rabbinical Courts of Israel, see *e.g. P.D.R.* 4:332, although as noted in Warburg, it is not the predominant approach; but see Katz, at pages 1-6.

Excluded from this analysis are those cases where the father denies paternity. The standard of review for those cases involves completely different issues in that Jewish law hesitates to assign custody (and even visitation rights) to a person who denies paternity, even if as a matter of law that person is the presumptive father. For precisely such a case, see *P.D.R.* 1:145 and Katz. at n. 57.

30. Rabbi Moshe ben Yosef Trani, *Mabit* 2:62 and Rabbi Shmuel ben Moshe, *Maharashdam Even Haezer* 123; For a list of similar rulings, see Shochatman, at n. 115-116.

arrangement between divorced parents which one parent now seeks to breach. Mabit states that it appears to him that the agreement is not in the best interest of the children. Thus, it should no longer be enforced, and custody is to be granted contrary to the agreement. He understands the "standard of review" to be the best interest of the child and not unfitness of the parent.[31] So, too, Maharashdam evaluates the correctness of a (widowed) mother's decision to move a child to another city away from the family of the father based on the best interest of the child. He concludes by prohibiting such a move, as he considers it not in the child's best interest.[32] This approach can also be found in the works of many additional authorities.[33] Both Shochatman and Warburg maintain that this is the predominant school of thought among judges in the Israeli Rabbinical courts,[34] who often issue statements supporting this

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31. This issue becomes a little perplexing, since it is not the practice of Jewish courts to second-guess decisions of parents as they relate to their children. As noted by the Supreme Rabbinical Court of Israel "As a general rule the court will not decide against the judgment of the parents merely based on a disagreement of judgment" *P.D.R.* 2:300 quoted in Shochatman, at n.115; but see Rabbi Gedalia Felder, *Nachlat Tzvi* 2:282-87 who justifies this practice. He notes that there is no *res judicata* or law of the case in child custody matters. In addition, a conceptual difference is present between a mutually agreed upon arrangement between parents which they both seek to honor, but with which *beit din* disagrees, and an agreement between the parents which one parent now seeks to void.

32. *Maharashdam, Even Haezer* 123.

33. See *e.g.*, Rabbi Meir Melamed, *Responsa Mishpat Tzedek* 1:23, Rabbi Moshe Albaz, *Responsa Halacha LeMoshe Even Haezer* 6 and Shochatman, at n.100-102 for a list of decisors and rabbinical court rulings accepting this line of reasoning.

34. Shochatman, at pages 311-312, Warburg, throughout the article. For an example of a bifurcated responsum on this topic reflecting both standards of review, each in the alternative, see *Tzitz Eleizer* 15:50.

approach. For example, one rabbinical court noted:

> The principle in *all* child custody decisions is the best interest of the child as determined by the *beit din*.[35] (emphasis added)

and

> *Child custody is not a matter of paternal or maternal rights, but is determined according to the best interest of the child* .... *beit din* is authorized to determine what is in the best interest of the child ... according to the particular conditions of each case.[36] (emphasis added)

Along with the dispute as to when the talmudic rule is to be put aside, there is the second question of who should be considered eligible for custody once the presumptive rules are deemed inapplicable. Most authorities understand the presumptive rules as requiring that in cases where the mother does not wish to have custody (or is unfit or incapable), the children must be given to the father if he is willing and able. Rabbi Yaakov ben Asher, writing in the *Tur,* states this quite clearly when he rules:

> And if the mother does not wish to have the children in her custody after they are weaned, she is free to decline custody of both boys and girl. These children are then given to the father to raise or be raised by the community if they do not have a father.[37]

This understanding of the rules discussed above allows their use only in situations where *both* parents seek custody; it assumes that in cases where only the father seeks custody, he

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35. *P.D.R.* 1:55-56.

36. Ibid. 3:353.

37. *Tur, Even Haezer* 82 (last lines).

always will be given such custody.[38] So, too, one finds support for the complementary proposition that should the father be unavailable or unfit and the mother desires custody, she is entitled to it.[39]

Other authorities strongly disagree with this understanding of the law and allow (after the termination of the marriage) *placing a child with a non-parent rather than a parent*, once the original talmudic presumption is removed and if it is in the best interest of the child.[40] According to this rule, in a situation of death of one parent, once it is determined that placement in harmony with the talmudic rules is ill advised, it is possible to place the child with someone other than a parent if that is in

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38. See also Rabbi Yitzchak Weiss, *Minchat Yitzchak* 7:113. It is possible that this rule is based on the insight that the mother's custodial claim is based on a decree of the Sages and that as a matter of biblical law, the father is always entitled to custody. Therefore, when the mother is deceased or unavailable and the father desires custody, since the rabbinical decree is inapplicable, the father's claim triumphs as a matter of law, assuming minimal fitness.

This type of analysis can be found in a number of Israeli rabbinical court decisions; see *P.D.R.* 13:17,20 ("The father is obligated in his children's support and upbringing. Accordingly the father has full rights to demand that the children live with him ... however, the Sages were concerned about the best interest of the children and therefore found it appropriate to transfer custody [to the mother]..."). Katz, at 9-16, addresses this issue in great length.

39. See *e.g. Comments of Ramo* 82:7 as interpreted by *Chelkat Mechokek* 82:10 and *Beit Shemuel* 82:9. This issue will be discussed at greater length later in the text, as it requires analysis of a number of other issues.

40. *Maharashdam, Even Haezer* 123, where he grants guardianship over a child to a brother-in-law even where the mother is present and fit; *Radvaz* 1:360 (same); but see *Radvaz* 1:263 which predicates this ruling on the fact that the mother is not fit to be a parent.

the child's best interest.[41] Indeed, one authority states this directly: "presumptively a girl is best raised by a knowledgeable woman rather than by a man, *even her father*."[42]

The theoretical basis for these disputes will be discussed in section V.

IV. Strangers and Relatives Seeking Custody

The halachic rules for situations where those competing for custody are not the mother and father but legal strangers to the children raise a very interesting issue as a matter of law: Are relatives considered "strangers"? Do family members other than parents (siblings, siblings-in-law, or grandparents) have a presumptive claim of custody to the children (based on their relationship with the parents) which is terminatable only on the same grounds as the parents' claim itself?[43]

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41. Rabbi Yosef Karo, *Bedek Habayit Even Haezer* 82, explicitly allows placing children with a guardian rather than the mother, if that is appropriate; see also *Marharashdam Choshen Mishpat* 405. See Shochatman, at 308-310, for a list of additional authorities who support this rule.

42. See Rabbi Moshe Chanin, quoted in *Mishpetai Shemuel* 90; for a long list of authorities who agree with this legal rule, see Shochatman, at page 310, n.112. *Maharashdam* (*Choshen Mishpat* 308) states that in a situation in which the mother dies, the Jewish court looks to the best interest of the child to determine who gets custody (in harmony with the opinion of Rashba discussed above).

It is possible that two different standards are present here; to remove a child from one parent and place that child with another parent requires a lesser showing of "unfitness" than to remove a child from one parent and place that child with a stranger; see also Gulevsky, at pages 111-112, for more on this. This author has found no unambiguous statement of this principle in the various responsa.

43. Or do relatives merely compete with all others under the rubric of "best interest of the child?"

The answer to this question is disputed by the various authorities with numerous decisors supporting each position. Rabbi Moshe Isserles' (Ramo) remarks in *Shulchan Aruch* provide the framework for this discussion. After Rabbi Karo states that a daughter resides with her mother even after the mother remarries and the father dies, Rabbi Isserles adds:

> [This rules applies] only if it appears to the *beit din* that it is good for the daughter to remain with her mother; however, if it appears to them that it is better for her to reside in the house of her father, the mother cannot compel the daughter to remain with her.[44] If the mother dies, the maternal grandmother cannot compel that her grandchildren be placed with her.[45]

Rabbi Moshe Lima, in his commentary *Chelkat Mechokek*, explains Ramo's first rulings by stating that Ramo does not rule that the daughter *cannot* reside with her mother, but merely that *it is not obvious* that she must. He adds that if the daughter wishes to be with her paternal grandparent, she is entitled to do so; if she has no opinion, the *beit din* should contemplate whether it is appropriate to uproot the talmudic rule that daughters reside with their mother.[46] He explains the second rule as limited to a case where the father is alive; however, if both parents are dead, the maternal grandmother has a stronger claim to custody of the girls throughout childhood and of the boys until they are six.[47]

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44. Rabbi Eliyahu of Vilna (Gra) rules that the proper resolution of this case depends solely and completely on the wishes of the daughter; *Gra, Even Haezer* 82:11. This is the only case encountered in which the desire of the minor child is deemed by any decisor to be the sole relevant factor.

45. Ramo, commenting on *Even Haezer* 82:7.

46. *Chelkat Mechokek Even Haezer* 82:10.

47. Ibid. 82:11.

Thus, these rules do appear to grant relatives some greater claim than strangers; it would seem reasonable that these rules implicitly are based on the notion that grandparents have the same rights (except vis-a-vis the parents) as their now-deceased children.[48]

The legal basis for these preferences is addressed in the responsa literature in some detail. Four basic legal theories have been set forth. The first asserts that the basic rights and duties of parents are obligations and privileges that are similar to inheritable rights and duties. Thus, in a case where a man who would have had custody of his children dies, his father inherits the right-obligation-mitzvah-duty[49] to educate his grandchildren; along with that right, he is given custody. Similarly , if a woman who would have had custody were she alive dies, her mother would be entitled to custody assuming she is fit, even if others are more fit.[50]

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48. Thus, the maternal grandmother does not usurp the father's claim, as he is a parent. However, the maternal grandmother has a stronger claim than a paternal grandmother to children that would normally go to the mother, since the maternal grandmother "inherits" (in some form) her daughter's claim. For the same reason, it would seem likely that the paternal grandfather has a greater claim than the maternal grandfather to boys over the age of six.

49. This author is uncertain which term to use, as none of these privileges are classically inheritable. Rather, it is assumed that those authorities who treat the matter in this way understand this to be part of the decree of the Sages. Indeed, different terms are best used to denote roles of different people seeking custody.

50. See *Chelkat Mechokek* 82:11, who states this principle as a matter of law, rather than as a matter of best interest of the child.

The explanation of Ramo advanced by *Chelkat Mechokek* is the one most consistent with Ramo's elaboration on this topic found in his commentary on *Tur, Darchai Moshe, Even Haezer* 82. It is also consistent with the comments of Rabbi Meir Ben Yitzchak Katzellenbogen, *Responsa Maharam Padua* 53, which Ramo indicates is the source for

A second theory can be found in Rabbi Mordechai ben Judah Halevi, Responsa *Darchai Noam* (*Even Haezer* 26), in relation to a situation common in our society. The responsum concerns a man who had just ended his second marriage; his first marriage ended in divorce, and his second marriage ended in the death of his wife, with whom he had had a number of children. Being unable to take care of these children himself, he arranged for them to be raised by his first wife, whose marriage with him had ended in divorce. The children's maternal grandparents, from whom the husband was estranged, sought custody. The author of *Darchai Noam* ruled that since the father was alive, his rights to the children still existed and so long as his custodial arrangements were satisfactory, others (perhaps even others capable of providing a better home) could not seek to subrogate his rights.[51]

According to this approach, relatives have greater rights solely because they are most likely to be appointed agents of the parents. Thus, when a particular parent is alive and entitled to presumptive custody of a child,[52] but is in fact incapable of being the custodial parent, the primary legal factor used to determine which "stranger" should receive custody is, who is designated as an agent of the parent.[53] Thus, this responsum

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his ruling. It is possible that this same result is reached by others based on a best interest analysis; see *Radvaz* 1:123 and Rabbi Shimon ben Tzemach Duran, *Tashbetz* 1:40.

51. It is apparent that *Darchai Noam* invokes the additional concept of "the best interest of the child;" however, the repeated focus of the responsum is on rights of the father who is the surviving parent. While there is language used in this responsum that could be interpreted as favoring a pure best-interest analysis, a reading of the whole responsum indicates that *Darchai Noam* is not using a pure best-interest analysis.

52. According to the rules explained in the text .

53. See also *Ginzai Kedem* 3:62, where the right of the father to

adopts a theory of agency rather than guardianship as it relates to parental rights. While the author of the responsum does not phrase the discussion precisely this way, it is manifest that his analysis is predicated on the ability of the father to appoint someone to watch his children (in the absence of the mother).[54] This approach accepts the ruling of R. Asher discussed above, as it addresses these issues from the perspective of parental rights. Such a position is explicitly adopted by Rabbi Moshe Trani who primarily analyzes custody of children as a matter of inheritance of rights and agency law according to Jewish law.[55]

The third theory indicates that all levels of relatives are equal to each other, but in legal advantage to complete strangers. The earliest source for this appears to be *Otzar Hageonim (Ketubot* 59b) which states that when both parents are unavailable (either unfit for custody, unwilling to take custody, or dead) the court should decide between the maternal and paternal grandparents who desire custody, based on the best-interests-of-the-child rationale. There is no acknowledgment of the legal possibility that the children can be placed with complete strangers. This approach seems to be the one most easily found within the words of the Ramo on *Shulchan Aruch* 82:7 and the explanation

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appoint a relative is explicitly mentioned as an option in a case where the father is not capable of raising the child.

54. Indeed, the notion of agency is implicit in R. Asher, and can be found also in works of others .

55. *Mabit* 1:165. There are reasons why one would not adopt a pure inheritance approach. One might accept that, for example, a paternal grandfather is entitled presumptively to custody of a male child above six, even as against the mother. Such a result is found in *Mabit* 1:165 and *Maharit Zahalon* 1:16, 2:232. As explained above, all agree that in a case of unfitness of a parent, custody is denied or abrogated. Thus, unlike ownership of a cow or house, there are situations which can abrogate one's "rights."

of *Chelkat Mechokek,* and draws support from *Beit Yosef* also.[56]

The final possibility, explicitly found in Rashba[57] is that in the case of orphans, based on the principle "the court is the guardian of orphans," a pure best interest of the child analysis is made. Indeed, it is precisely in this category of case that Rashba explicitly states the best interest of the child rule. He writes:

> As a general rule, *beit din* must closely inspect each case [of child custody] very closely, since *beit din* is the guardian of orphans, it is to find out what is in their best interest.

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56. Commenting on *Tur, Even Haezer* 82; see also Rabbi Shimon ben Tzemach Duran, quoted in *Beit Yosef, E.H* 82. This theory is a little difficult to harmonize with the lack of legal obligation imposed upon the mother according to Jewish law. One could read this position as simply being the best interest of the child, with a presumption that when parents are incapable of retaining custody, grandparents are those adults most likely (as a matter of fact) to function in the best interest of the child. If one understood the *Geonim* in this manner, one could easily assert that in modern times where other couples might more readily take custody of the children, the *Geonim* would fall into the camp of Rashba, and rule that child-custody determination are made purely in the best interests of the child.

Alternatively one could posit that grandparents are merely presumed agents or heirs and thus this position is identical as a matter of theory with *Darchai Moshe's* rule, with the psychological insight that grandparents are very likely to be appointed.

It is possible to distinguish between the obligation of the mother and the obligation of the father. The mother, if she desires custody, is entitled by rabbinic decree to custody in those cases explained in section III. However, she is under no obligation to accept such custody. For her, Jewish law treats custody as a privilege or right without a concomitant duty. The father, however, has certain duties and obligations based upon Jewish law's requirements that he support his children. Custody for him is a right and a duty.

57. *Responsa of Aderet (Rashba)*, 38.

Similar observations can be found in the words of many authorities who discuss the status of relatives or strangers in child custody matters.[58] In the case of orphans, where potential custodians are strangers, it would appear that most authorities accept the opinion of Rashba.[59]

V. Conclusion

This article has analyzed various basic disputes among the Jewish law authorities concerning the application of halachic rules in child custody determinations. Essentially three disputes have been discussed: by what standard may one remove a child from the custodial parent; who then is entitled to custody; and what is the status of relatives in custody determinations. All of these disagreements can be regarded as manifestations of the theoretical dispute between Rabbenu Asher and Rashba. According to Rabbenu Asher and those who accept his rule, parents are always entitled to custody if they are fit, even if others would be more fit.[60] So, too, when one parent is incapacitated, dead, or otherwise unfit, the other parent may

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58. Rabbi Meir Abulafia, *Responsa of Ramah* 290; Rabbi Yaakov ben Moshe, *Or Zarua* 1:746; Rabbi Shimon ben Tzemach Duran, *Tashbetz* 2:216. For a long list of authorities who accept this rule, see Shochatman, at n.51.

59. See e.g., *Shulchan Aruch Choshen Mishpat* 290. Thus, the more distant one is from the parents, the more likely one is to have to prove that one's custody actually is in the child's best interest.

60. Indeed Rabbenu Asher states this clearly in *Responsa of R. Asher* 82:2. In this writer's opinion, Rabbenu Asher makes no distinction between mother and father for the purposes of this rule when they are both alive. While it is true that a strong claim can be made that as a matter of Torah law this is only true for the father (see Gulevsky, at pages 106 and notes accompanying that section) one could easily claim that the nature of the rabbinic decree giving the mother custody transfers to her those rights.

assert rights against strangers. Some would go even further with Rabbenu Asher's theory by incorporating some sort of concept of transferable rights to children; upon the death or incapacity of the parents, the children can be transferred to an agent or heir according to the wishes of the parent.[61] Rabbenu Asher's analysis accepts that basically the talmudic rules are to be followed unless they lead to custody being given to one who is not fit or capable.

According to Rashba, the presumed rule is not one of rights but of best interest of the child. In this approach, *beit din* accepts the talmudic rules as presumptively correct and then seeks to determine what actually is the best interest of the child by determining whether the general talmudic presumptions are applicable to any particular child. It is not a system of rights, but a system which seeks to do the best for children, and not for their parents. It thus actually rejects "rule-based" determinations and insists that custody will be given to the most fit person, rather than the one designated by the father (or mother). Thus, fewer default rules and no absolutely concrete ones are found in this system, at least once the parents are

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61. The crucial issue might be why the *beraita*, quoted in *Ketubot* 102b, which indicates that children whose father is deceased do not get placed with paternal relatives lest these children be killed to produce an inheritance, is not normative in Jewish law. As noted by Shochatman, at page 296, nearly all codifiers do not follow this rule. The rejection of this rule must indicate that some sort of additional analysis is taking place. It could be that absent this talmudic source, children would have had to be transferred according to inheritance laws. Once the Talmud indicated that this need not be done, the crucial question is in what circumstances children may be transferred contrary to the technical requirements of unchanged Torah law. Rosh would claim that we reject the talmudic law of placing children with their parents only in cases of unfitness, whereas Rashba must state that this talmudic precedent allows for the transfer of children according to their own best interest.

divorced, separated, or incapacitated.

Which of these two schools of thought is normative within Jewish law has yet to be conclusively established. Indeed, in the real world of adjudicating child custody matters there is a vast area of gray in the middle, where the halachic theory one adheres to hardly matters, as there is frequently a great deal of overlap between the best interest of the child and the rights of the parents. There are many *batai din* (outside of the Israeli Rabbinical Court system) which are more inclined to accept Rosh's approach as reasonable and worthy of consideration,[62] at least in cases where the children are not orphans and both parents are moderately fit;[63] the Rabbinical Courts of Israel, as well as the Beth Din of America, appear more inclined[64] to

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62. See e.g. R. Y. Landau, *Nodah Biyehudah Even Haezer* 2:89; R. Eliyahu Kook, *Ezrat Cohain* 57; R. Shmuel Wozner, *Shevat Levi* 5:208; R. Yitzchak Weiss, *Minchat Yitzchak* 7:113; R. Nathan Goshtanter, *LeHorot Natan Even Haezer* 3:87-89 (cited in Gilat, at n.139); R. Shalom Masas, *Tevuot Shamash* 96; R. Eleizer Waldenburg, *Tzitz Eliezer* 16:44.

63. It is crucial to distinguish between cases where both parents are seeking custody and cases of an orphan. For example, *Radvaz* 1:263 uses Rosh's standard to discuss the case of parental misconduct and transfers custody to another parent. On the other hand, *Radvaz* 1:126 uses Rashba's standard in the case of an orphan when custody is disputed. Situations of dispute between parents are almost always judged by Rosh's standards, whereas in cases of orphans the role of court greatly increases and one will find Rashba's standard accepted. Indeed, decisors will use these different standards without even noting the change in criterion.

64. See *P.D.R.* 4:4 and 6:6 cited by Shochatman, at pages 308-09; see also notes 100-103 of Shochatman for a list of such cases and authorities. See also *P.D.R.* 1:55; 1:145; 2:298; 7:3 cited by Warburg, at n. 73. See also notes 74, 75, 78, and 84 of Warburg for a further list. More than thirty cases are cited in various places throughout the Shochatman and Warburg articles to support this understanding of the rabbinical courts.

accept Rashba's approach and engage solely in determining what is in the best interest of the child, at least when the dispute is between parents.

This article does not discuss in depth the relationship between secular law's child custody rules, and halacha's rules. This topic is vitally relevant, however, as on a practical level, it is very common that *batai din* can enforce their decisions concerning child custody in the United States only when secular courts permit them to be enforced. While in most areas of commercial law secular courts will honor the ruling of a *beth din* when there is a binding arbitration agreement–even if the result is different from that which would be reached under secular law–such is not the case in child custody rulings, as secular courts review *de novo* all child custody determinations.[65] Thus, it is very common for the losing party in a child-custody determination to appeal to the secular courts to overturn the ruling of the *beth din*.

It is critical to understand secular law's public policy concerns as to why courts are less willing to allow child custody disputes to be subject to binding arbitration, and how *batai din* have to respond to that reality. The classic public policy ground is the state's interest in protecting the welfare and best interests of the child, which closely corresponds to the halachic notion of the Jewish court being the "father" of orphans. As Jenkins states, "arbitration awards which adversely affect the best interests of the child will be disregarded by the courts, whose paternal jurisdiction is paramount." The courts traditionally have had the role of *parens patriae*, or super parent, in protecting the best interests of the child in marital disputes. Thus, courts

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65. See Elizabeth A. Jenkins, "Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters" 38 A.L.R.5th 69 (1996; 1998 Supplements).

either have rejected the use of arbitration for child custody disputes or will often only uphold child custody awards if they are in the best interests of the child.

The child custody award of a *beth din* will be reviewed completely, if one parent or gaurdian so requests, but the award from the *beth din* is accepted as evidence by the court. While *de novo* review does not necessarily mean that an arbitration award will be vacated by the court, the *beth din's* award is subject to a great deal of scrutiny by the court. [66]

Essentially, courts will show some deference to the original arbitration award, but use their independent judgment to determine whether to uphold the award. As a practical matter not only must an arbitration agreement and award be written and adhered to according to the procedural rules of the jurisdiction, an award concerning child support also needs to explain clearly the facts behind and reasons for the award. This is important because a court is likely to give more deference to an arbitration award that is explicit in its reasoning.

It is worth noting that a ruling of a *beth din* not grounded in the "best interest of the child" standard will most likely not even be accepted as enforceable in the United States.

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66. Ibid.

Physician-Assisted Dying: Halachic Perspectives

Rabbi Steven H. Resnicoff

Jewish law regards life as a responsibility, not merely as a right. Not only is a person biblically forbidden from committing suicide,[1] but he is required to take affirmative steps to safeguard his life.[2] The precise parameters of these principles are the subject of other publications. This article addresses the halachic responsibilities of a person who encounters someone whose conduct violates these rules.[3]

Halacha rejects Cain's rhetorical question, "Am I my brother's keeper?"[4] Instead, it provides that Jews are legally

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1. Rambam, *Mishneh Torah*, *Hilchot Rotzeach U'Shemirat Nefesh* 2:2.

2. Ibid., 11:4; R. Moshe Sofer, *Shut Chatam Sofer*, *Y.D.* 326.

3. There is a considerable halachic debate as to whether a person who is terminally ill may in certain circumstances passively fail to preserve his life by refusing medical treatment. See, *e.g.*, R. Moshe Feinstein, *Iggerot Moshe, Y.D.* II:174 (3) (there is such a right); R. Shlomo Zalman Auerbach, *Minchat Shlomo* 91 (same). But see R. Eliezer Waldenburg, *Tzitz Eliezer* XV:40(4) (a patient has no right to refuse life-preserving treatment). See, generally, R. J. David Bleich,"Treatment of the Terminally Ill", 30:3 *Tradition* 51 (1996), at 70-77 .

4. Genesis 4:9.

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and spiritually interrelated.[5] As a result, Jews are generally: (1) prohibited from assisting others to violate halacha; (2) obligated to try to prevent such violations; and (3) directed to rescue others who are in physical danger, even if they caused the danger to themselves. After briefly examining the scope of each of these rules, we will apply them to the context of physician-assisted suicide.

PART I: The Prohibition Against Giving Improper Advice And Assisting Someone To Violate Jewish Law

The Torah states that "before the blind, do not place a stumbling block" (*lifnei iver lo titein michshol*).[6] Rabbinic authorities apply the word "blind" to one who, whether because of intellectual ignorance or inadequate religious sensitivity, does not know the proper way to act.[7]

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5 R. Yehuda HeHasid, *Sefer Hasidim* 93, 233, 601. See also R. Aryeh Kaplan, *Handbook of Jewish Thought* II, at 136-137:

> When a single Jew sins, it is not he alone who suffers, but the entire Jewish people. In the Midrash, this is likened to passengers on a single huge ship. Though all the passengers may be very careful not to damage the hull, if one of them takes a drill and begins drilling holes under his own seat, the ship will sink, and all will drown. In the same manner, whenever any Jew does not keep the Torah, all others are affected spiritually. Such actions may even precipitate physical suffering for the Jewish people. [Citations omitted].

6. Leviticus 19:14.

7. Interestingly, there is a debate among Jewish law authorities as to whether this prohibition also applies to the literal case in which one places a physical obstacle in front of a person who is visually impaired. See R. Yitzhak Adler, *Lifnei Iver* (1988 or 1989), at 15-18

Thus, a person is forbidden by the Torah from enabling or convincing another to violate Jewish law.

One of the reasons for this prohibition is that Jews should not actively frustrate *HaShem's* will.[8] While most halachic rules apply only to Jews, some apply to non-Jews as well.[9] Consequently, *lifnei iver* forbids a Jew to enable or persuade another person – Jewish or non-Jewish – to violate any applicable halacha.[10]

There are many detailed rules – and differences of opinion – regarding the precise parameters of the *lifnei iver* doctrine. Although we will not examine all of them, we should identify a few basic propositions.[11] *Lifnei iver* surely applies when one's help is necessary to enable a wrongdoer to violate a biblical

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(citing various views); *Iggerot Moshe*, *Y.D.* I:3 (stating that it applies to such a case).

8. Ibid. (causing another to sin is not prohibited because it is a wrong against the sinner but because it is a wrong against the Almighty), *O.C.*, V:13(9).

9. See, e.g., R. Nahum Rakover, "The "Law" and the Noahides", *Jewish Law Association Studies: The Boston Conference Volume* (1990), pp. 169-180.

10. As a general proposition, Jewish law does not recognize an agency relationship between a person who directly violates Jewish law and some other person. Instead, Jewish law asserts that there is no agency with respect to wrongdoing. See *Kiddushin* 42b; R. Yechiel M. Epstein, *Aruch Hashulchan, C.M.* 182:9-13. See also Israel Herbert Levinthal, "The Jewish Law of Agency," in Edward M. Gershfield (ed.), *Studies in Jewish Jurisprudence* (1971), at 51-58.

11. For a fuller discussion, see Michael Broyde & David Hertzberg, "Enabling a Jew to Sin: The Parameters," XIX *Journal of Halacha and Contemporary Society* 5 (1990).

law.[12]

If, however, the help is necessary only to enable a wrongdoer to violate a rabbinic law, there is a split of authority. Some believe that the *lifnei iver* rule applies, while others contend that only a rabbinic prohibition applies.[13] For simplicity, we will refer to the rabbinic prohibition as *mesayeah bidei ovrei aveirah*, *i.e.*, assisting a wrongdoer.[14]

When the wrongdoer's violation – whether biblical or rabbinic – could be accomplished even without one's help, most authorities maintain that the *lifnei iver* rule is inapplicable.[15] If the wrongdoer is Jewish, however, the general rule is that a

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12. See *Shulchan Aruch, Y.D.* 151:1 and commentaries thereto.

13. Contrast R. Yosef Babad, *Kometz Minchah,* Commandment 232 (citing Tosafot, *Avodah Zarah* 22a, *s.v. talmud lomar*, that enabling the commission of a rabbinic sin constitutes a biblical violation of *lifnei iver*) to R. Yosef Teomim, *Pri Megadim, Eshel Avraham, O.C.* 163:2 (ruling that if the violator is guilty of only a rabbinic infraction, the assister cannot be liable for an *issur mid'oraitha*). See *Lifnei Iver,* at 44-46 (discussing various views).

14. Some *poskim* differentiate between two rabbinic prohibitions, *lifnei iver derabbanon,* and *mesayeah bidei ovrei aveirah*. They contend that the former applies when a rabbinic violation would not have been accomplished without one's help, while the latter applies when a sin would have been committed even without one's assistance. See *Eshel Avraham, O.C.* 163:2. Some *poskim* believe that the *mesayeah* prohibition only applies when one assists a Jew to violate a biblical law, ibid, but most *poskim* disagree. See, e.g., Rabbi Shlomo Kluger, *Tuv Ta'am VaDa'at, Telita'ah*, vol. II, no. 31.

15. See, generally, *Lifnei Iver*, at 21-22. Nonetheless, even where assistance is *unnecessary*, there are situations–such as when an assister directly (*biyadayim*) feeds someone a forbidden substance–in which the assister may still be guilty of violating *lifnei iver mid'oraitha.* Ibid, at 23-31.

Jew who facilitates the violation is guilty of breaching the rabbinic *mesayeah* rule.[16]

The *mesayeah* prohibition arises out of the special interrelationship among Jews. As a result, some authorities argue that the rule is inapplicable to Jews who have totally rejected Jewish law[17] or who are contumaciously violating a particular Jewish law.[18] Other authorities, however, question

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16. See, e.g., R. Abraham Gombiner, *Magen Avraham*, *O.C.* 347, *sif koton* 4; R. Yisroel Meir HaCohen, *Mishnah Berurah* 347; R. Elijah of Vilna, *Biur HaGra*, *Y.D.* 151. With respect to selling to Gentiles items they would use in their religious practices, R. Moshe Isserles (Ramo) states that, while a pious person (*ba'al nefesh*) should be strict, the custom has developed to be lenient when the Gentiles could purchase the items anyway from others. *Shulchan Aruch*, *Y.D.* 151:1. This comment is sometimes characterized as evidence that Ramo allows a person to assist someone–Jew or Gentile–to violate Jewish law when the violation would occur even without the assistance. Yet in a responsum Ramo explicitly states that helping a Jew to sin is rabbinically prohibited even if the help is unnecessary. See *Shut Ramo* 52. Moreover, in *Darchei Moshe HaAruch*, Ramo states that the Gentile religious practices referred to in *Y.D.* 151 did not really constitute idolatry and, for Gentiles, did not actually violate Jewish law. Ramo explains that this is the reason why the lenient custom referred to in *Y.D.* 151 developed. See *Darchei Moshe HaAruch*, *Y.D.* 151; R. Shabtai HaKohen, *Shach*, *Y.D.* 151, *sif koton* 7. Ramo never states that there is a lenient custom to assist actual violations of Jewish law. See, e.g., R. Yair Chaim Bachrach, *Chavot Yair* 185; R. Avraham Shmuel Binyamin Sofer, *Ketav Sofer*, *Y.D.* 83; R. Ahron Kotler, *Shut Mishnat Rav Ahron* I:3; *Iggerot Moshe*, *O.C.* III:27. In fact, by ruling that a *ba'al nefesh* should act stringently even where no violation is involved, Ramo expresses a rather stringent position.

17. See *Shach*, *Y.D.* 151, *sif koton* 6.

18. See R. Yehezkel Landau, *Dagul Mervavah*, *Y.D.* 151.

these exceptions.[19] Moreover, even if the exceptions were theoretically valid, their practical impact may be limited. Many *poskim* indicate that a large part of today's non- observant Jews, because of their limited exposure to Judaism, are not considered to have purposely rejected Jewish law or to have intentionally violated it. [20] As a result, it may be rabbinically prohibited to assist such persons to violate Jewish law.[21]

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19. Among authorities that explicitly reject the view of *Dagul Mervavah*, see, e.g., *Chavot Yair* 185; R. Yehuda Assad, *Shut Yehuda Ya'aleh* I:177; R. Meshulam Rath, *Kol Mevasser* I:48; R. Yaakov Ettlinger, *Binyan Tzion* 15; R. Ezriel Hildesheimer, *Shut Rabbi Ezriel I, Y.D.* 182 (stating, at least as of the nineteenth century in which he wrote, that most of the Jewish law authorities disagreed with *Dagul Mervavah*). Indeed, if a Jew is intentionally sinning, many authorities rule that there is an obligation to rebuke him even if it is clear that the rebuke will be ignored. See *Shulchan Aruch, O.C.* 608; *Mishnah Berurah* 608. Even some authorities who agree with *Dagul Mervavah* contend that one should *a priori* (*l'chatchila*) be strict in accordance with the view of *Magen Avraham*. See, *e.g.*, *Iggerot Moshe, Y.D.* I:72, at 128.

20. See, e.g., *The Laws of Ribis*, p. 98, note 17 (citing R. Shimon Grinfeld (*Maharshag*) and R. Avraham Yeshayah Karelitz (C*hazon Ish*) for the rule that non-observant Jews who were not raised in an Orthodox home must be treated just as observant Jews regarding prohibitions concerning interest-bearing loans). See also R. Yechiel Yaakov Weinberg, *Seridei Eish* II:10; R. David Zvi Hoffmann, *Melamed LeHoyel, O.C.* 5; *Binyon Tzion HeHadashot* 23. But see R. Binyomin Yehoshua Silber, *Az Nidbaru* IX:55; R. Yaakov Weiss, *Minchat Yitzchak* III:79 (relying on the distinction between observant and non-observant Jews to permit the purchase of goods produced by non-observant Jews on the Sabbath, even when the purchase may "cause" such non-observant Jews to work on the Sabbath); R. Ovadia Yosef, *Yabia Omer* II, *O.C.* 15.

21. In a number of *responsa*, R. Moshe Feinstein indicates that one should not do anything that would cause a contemporary non-observant Jew to commit a sin. In one instance, R. Feinstein was

A second purpose of the biblical *lifnei iver* rule *does* arise from the communal relationship that exists among Jews. As members of a community, Jews owe each other special duties. One of those is not to purposely give each other bad advice, either as to spiritual matters (such as advice to violate Jewish law) or as to practical matters. The *lifnei iver* rule prohibits the giving of such advice.[22]

PART II: The Obligation To Prevent Someone From Violating Jewish Law

The Torah tells each Jew who sees another committing a biblical violation that "You must admonish a member of your

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asked if it was permissible to provide *kashrut* supervision to a place which might sell a person milk products immediately after he had eaten meat products (which would involve a rabbinic violation). R. Feinstein wrote, in part: "Many of the people [who eat there] are like *shoggegim* because they do not realize the seriousness of the infraction because of their lack of knowledge. They are like children who were abducted by Gentiles and certainly we are obligated to prevent them from violating Jewish law as much as possible . . ." See *Iggerot Moshe, Y.D.* II:52. This reasoning certainly suggests that one should not help such people violate Jewish law. See also ibid, *O.C.* III:46 (even when no *issur* is involved because one can rely on *rov*, Rav Feinstein rules that one should avoid mailing a letter on *erev* Shabbat if doing so might contribute to a Shabbat violation by a Jew who anyway would not observe Shabbat), *O.C.* IV:71. But cf. ibid, *O.C.* V:13(9).

22. See, e.g.,ibid, *Y.D.* I:3 (the duty not to give bad advice, arising from the biblical *lifnei iver* rule, is an obligation one owes to a fellow; consequently, it applies only to advice given to a fellow Jew), *Orach Chaim* V:13(9). See also R. Aharon HaLevi, *Sefer HaChinuch*, Commandment 232. But see *Minchat Chinuch*, Commandment 232 (questioning this view).

nation."[23] Indeed, if a Jew, A, has the ability to prevent another Jew, B, from violating Jewish law and does not do so, A incurs guilt for the offense that B commits.[24]

If the biblical rule being violated is not explicitly stated in the Torah, if B is not purposely violating the law, and if A is sure that B will not accept the rebuke, A should not admonish B. In such a case, it is better that B violate the law unknowingly rather than knowingly.[25] On the other hand, if the rule is explicitly stated in the Torah *or* B is purposely violating even a rabbinic rule, A is obligated to rebuke him even if A is certain the rebuke will be ineffective.[26]

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23. Leviticus 19:17. See also *Sefer Hasidim* 93:

> All Jews are responsible for each other. If it were not for this responsibility a person would not admonish his fellow about his fellow's sins and he would not pay attention to find out who is a transgressor [and take steps to stop them] ..

See also *Shulchan Aruch, O.C.* 608. A rabbinic rule requires one to admonish against non- biblical violations. See, generally, *Handbook of Jewish Thought II*, at 144. Of course, a variety of detailed rules apply as to when and how to give such rebuke so that it may be effective. Ibid; *Shulchan Aruch, O.C.* 608.

24. *Sanhedrin* 27a: "A person dies because of the iniquity of his brother - to teach you that everyone is responsible for each other. That is where it was possible for them to [effectively] admonish the wrongdoers and they did not do so."

25. An unknowing violation is a less serious breach of Jewish law. *Shulchan Aruch, O.C.* 608. This sort of situation might arise, for example, when B is so certain that what he is doing is permitted that he will not pay any heed to A (especially if B believes that A is much less learned than he about Jewish law).

26. In this situation, B is already violating Jewish law knowingly. Consequently, the argument that "it is better for a person to violate unknowingly rather than knowingly" does not apply.

Of course, there are exceptions to this obligation.[27] For example, A need not rebuke B if A fears that by doing so he will place himself in danger because B will retaliate against him.[28] In addition, several authorities rule that A is not required to rebuke B if B has completely rejected Jewish law. The Hebrew word for "your nation" (*amchah*) is spelled with the same Hebrew letters as the word for "with you" (*imchah*). Consequently, some say that the duty to rebuke applies only to those Jews who are "with you" in the sense that they have not rejected Jewish law.[29] However, it is unclear whether this exception applies to modern, nonobservant Jews who, because they were raised in nonreligious or anti-religious environments, cannot be said to have knowingly rejected Jewish law.[30]

In addition to the duty to verbally dissuade a Jew from violating Jewish law, there is also an affirmative duty, where

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27. See Rabbi Alfred Cohen, "Protest Demonstrations", XXIV *Journal of Halacha and Contemporary Society* 5 (1993).

28. See, *e.g.*, *Mishnah Berurah* 608:7. See also Ramo, *Y.D.* 157, 334, *C.M.* 12. One might expect that a person would be required to spend up to 20% of his wealth to fulfill the affirmative biblical obligation to admonish another. See notes 38-45 and accompanying text, *infra*; *Minchat Yitzchak* V:8. Nevertheless, Ramo, supra, who cites R. Asher Weil, *seems* to rule that a person need not spend *any* money to fulfill the duty to admonish. *See* R. Asher Weil, *Shut Mahariv* 157. See, generally, R. Zvi Hirsch Eisenstadt, *Pitchei Teshuvah*, *Y.D.* 157, *sif koton* 5 (citing various views, including one that suggests a possible obligation to spend all of one's money to fulfill this duty), *Y.D.* 334, *sif koton* 19; *Sefer Hasidim* 405.

29. Ibid, *Biur Halacha*, 608, *s.v. Aval* (citing various authorities); *Aruch Hashulchan, O.C.* 608:7. If, however, you may convince such a person to do the right thing, some say that you must try to do so. See, e.g., *Minchat Chinuch*, Commandment 239.

30. See notes 18-21 and accompanying text, supra.

possible, to take other steps, including the use of physical restraints, to prevent a person from actively violating Jewish law.[31] Nevertheless, just as one is not required to verbally rebuke someone if this will expose one to a significant risk, one need not take non-verbal steps if this will subject one to such a risk.[32]

What if a Jew is passively, rather than actively, violating Jewish law? In a land ruled by a religious, Jewish government, a religious court would coerce compliance, resorting, if necessary, to physical compulsion. There is a debate among authorities whether, in the absence of such a religious court, individuals have the right or responsibility to employ such coercive methods.[33]

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31. Rambam, *Sefer HaMitzvot*, *Mitzvat Aseh* 205. See commentary of Ramban to Deuteronomy 27:26, who says that if one does not prevent others from sinning, the verse, "Cursed is the man who does not uphold all the words of this Torah," applies to him. See also *Handbook of Jewish Thought II*, at 151-153. Rabbinic authorities disagree whether the duty to stop someone from sinning, as opposed to the obligation of admonishing a sinner, is biblical or rabbinic. See, e.g., *Ketav Sofer, Y.D.* 83 (citing these views); R.Yitzhak Belzer, *Pri Yitzhak* I:53 (printing a responsum of Rabbi Naftali Amsterdam discussing these views and concluding that the duty is biblical).

32. See note 28, supra.

33. Contrast, e.g., Rabbi Aryeh Leib, *Kitzot HaChoshen*, *C.M.* 3:1 (arguing that only courts could coerce individuals to perform affirmative commandments) with *Nitivot HaMishpat*, *C.M.* 3:1 (contending that individuals had the right to coerce other individuals to perform such obligations). Many Jewish law authorities have held that coercion could be used, and presumably even by individuals, to force people to take medical treatment. See, e.g., *Magen Avraham, O.C.* 328 (6) ("if the patient refuses to accept the prescribed treatment [because doing so would desecrate the Sabbath], we compel him to do so"); *Iggerot Moshe*, *Y.D.* IV:24(4) (if there is much more than a

PART III: The Duty To Rescue

Jewish law requires a Jew to save another who is danger.[34] Perhaps the clearest textual basis for this rule is the verse that states: "Do not stand idly by your fellow's blood."[35] Other authorities, however, contend that the duty to rescue arises from the verse, "if your fellow is missing something, you shall restore it to him."[36]

Identification of the proper biblical source for this commandment may be important for two reasons. First, the source may determine how much of a sacrifice one must make in order to perform the commandment. Biblical commandments are classified as either negative (*lo ta'aseh*) or affirmative (*aseh*). The general rule is that a person must expend all of his wealth rather than violate a negative commandment.[37] On the other

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50% chance that surgery will cure the patient who will otherwise die, there is an obligation to do the surgery even against the patient's wishes), *C.M.* II:73(5) (same).

34. See, generally, Aaron Kirschenbaum, "The Bystander's Duty to Rescue in Jewish Law," reprinted in Martin P. Golding (ed.), *Jewish Law and Legal Theory* (1993). Interestingly, this duty extends to saving someone from financial, as well as physical, harm. Id.

35. Leviticus 19:16. See, e.g., "Treatment of the Terminally Ill," 30:3 *Tradition* 51, n. 12 at 79.

36. Deuteronomy 22:2; *Sanhedrin* 73.

37. See *Shulchan Aruch*, *O.C.* 656:1. Although this is clearly the accepted rule, for commentators who question it, see R. Boruch Epstein, *Torah Temimah*, Genesis 28:22, and Yitzhak Zilberstein, "Monetary Considerations Regarding the Saving of Human Life," *Assia*, vol. 14, no. 3, p. 50 (discussing authorities).

An interesting issue arises as to whether the obligation to use all of one's wealth would require one to draw on his creditworthiness to borrow funds. Rabbi David ben Shlomo ibn Avi Zimra (*Radbaz*)

hand, a person need not spend more than 20% of his wealth to fulfill an affirmative commandment.[38]

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states that if a Jew is among Gentiles, he must use up all of his money on kosher food rather than eat non-kosher food. Once he has used up his money and cannot afford kosher food, he may, because of duress, eat non-kosher food if it is available. *Radbaz* rules that the Jew need not borrow money from Gentiles to purchase kosher food, because, should he be unable to repay the loan, the Gentiles from whom he borrowed may place him in physical danger. See R. Akiva Eger, *Chidushei Rabbi Akiva Eger*, *Y.D.* 157. In the United States, at least, the risk of physical harm from being unable to repay one's debt is negligible. Consequently, if the risk of physical danger is the only reason why one need avoid violation of a negative commandment by borrowing, it would seem that in the United States, at least, one might have to borrow before being permitted to violate a negative commandment. One might not, however, be required– or even permitted–to borrow beyond one's expectation to repay, because doing so might violate a different negative commandment, the one against stealing.

If a person has no money and is unable to borrow money, would he be required to ask for charity rather than eat non-kosher food? In ruling whether a person is required to make a particular sacrifice in order to avoid violating a negative commandment, Rabbi Moshe Feinstein asks whether the sacrifice is greater than the loss of all of one's wealth. Only if the answer is "no" must the person sustain the sacrifice and avoid the violation. See *Iggerot Moshe*, *Y.D.* II:174(4). R. Feinstein's responsum is not clear as to whether, when applying this test, one must: (1) evaluate how much these burdens would mean to a hypothetical "reasonable person" rather than to the particular person in question; *or* (2) evaluate how much the loss of money would mean to the particular person *if he had money*. Nevertheless, it seems almost certain that under either approach the sacrifice involved in seeking charity would be less than that involved in the expenditure of all of one's resources. If so, one would be obligated to seek charity rather than violate a negative commandment.

38. Ibid. Ramo states that one need not spend a large amount of

There is a debate in Jewish law as to what criterion determines whether a commandment is considered to be negative or affirmative. According to one view, the relevant biblical language is decisive. If the verse which is the source of a commandment directs that one should do something, the commandment is an affirmative one. If the verse directs that one should not do something, the commandment is a negative one. According to this approach, if the obligation to rescue arises from "you shall restore it to him,"[39] the duty would be an affirmative commandment requiring up to 20% of one's wealth, but if it arises from "Do not stand idly by your fellow's blood,"[40] it would be a negative commandment, requiring even all of one's wealth.[41]

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money (*hon rav*) to fulfill a particular affirmative commandment and makes reference to a particular rabbinic decree that one should not distribute more than 20% of one's wealth to the poor. *Id.* It is uncertain precisely how much a person *must* spend, if an expenditure is necessary, in order to fulfill an affirmative commandment. R. Yechiel Epstein seems to believe that one generally need not spend up to the 20% limit. See *Aruch Hashulchan, O.C.* 656:4. Some say that, if necessary, a person must spend at least 10% of his wealth. See R. Yosef Karo, *Beit Yosef, O.C.* 656 (citing this view). There does not seem to be any responsum that clearly explain whether assets such as a medical license are capitalized and counted as part of one's wealth when computing this 10%. R. Shlomo Luria, however, disagrees and states that if someone is very poor it is possible that, with two exceptions, he need not spend any money in order to fulfill an affirmative commandment. See *Magen Avraham, O.C.* 656(7). But see *Biur Halacha, O.C.* 656 (disagreeing with Rabbi Luria).

39. Deuteronomy 22:2. See *Sanhedrin* 73.

40. Leviticus 19:16.

41. See, e.g., *Iggerot Moshe, Y.D.* II:174(4) (ruling that this is the source of the duty to rescue and that it is a negative commandment); R. Zvi Hirsch Shapiro, *Darchei Teshuva, Y.D.* 157, no. 57 (citing *Shut*

The alternative position ignores the form of the biblical language and asks, instead, whether a *violation* of the commandment involves malfeasance or nonfeasance. If a commandment can be violated without doing any act (for example, by *not* putting on tefillin), the commandment in effect requires conduct. Thus, it is a *positive* commandment, and there is no need to expend all of one's wealth to avoid a passive violation. On the other hand, if a commandment can only be violated actively (*i.e.*, through malfeasance, such as stealing), one must avoid a transgression even at the cost of one's entire fortune.[42] The commandment, "Do not stand idly by," effectively requires action and can be violated only by nonfeasance. According to this view, the duty to protect oneself from harm, even if it arose from "Do not stand idly by" would not require more than one-fifth of one's wealth.[43] Nonetheless, some authorities believe that saving a life is a special case, and that to do so one must spend all of one's wealth irrespective of whether the commandment is designated as affirmative or negative.[44]

Zera Emet II:51).

42. See, generally, *Chidushei Rabbi Akiva Eger*, *Y.D.* 157:1; *Mishnah Berurah* 656, *sif koton* 9 (explaining that the more demanding rule applied to an affirmative action contrary to the divine will as opposed to mere inaction).

43. See, e.g., R. Shalom Schwadron, *Shut Maharsham* II:54.

44. R. Yisroel Meir HaCohen(Chafetz Chaim), *Ahavat Chessed* 20:2 (must spend all of one's money to save a life; based on *Bava Metsia* 62a, that although one's life takes precedence over another person's life, one's money does not); R. Avraham Yitzhak HaKohen Kook, *Mishpat Kohen* 144(17) (must spend all of one's money to save another's life). See also R. Ben Zion Meir Chai Uzziel, *Piskei Uzziel Bi'She'elot HaZeman* 48 (approving view of the Chafetz Chaim). Yitzhak Zilberstein discusses various views as to whether one must spend all of one's money to save another's life. Irrespective of what position

Second, at least one authority, Rabbi Yosef Babad, states that if the duty to rescue arises from, "you shall restore it to him," there may be no obligation to rescue someone from his own attempt to commit suicide.[45] This verse, read in context, primarily refers to returning lost property. If a person purposely throws away his property, no one is obligated to retrieve or return it.[46] By analogy, it is suggested that if a person attempts to throw away his life by committing suicide, no one is required to prevent the suicide.[47] The vast majority of authorities,

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someone takes on that issue, he seems clearly to conclude that one must spend all of one's money to save his own life. His logic is that: (1) one must spend all of one's money to avoid violating a Sabbath prohibition, and (2) one must violate a Sabbath prohibition to preserve his life, even briefly. Consequently, he argues, one must spend all of one's money to preserve his life. See "Monetary Considerations Regarding the Saving of Human Life," at p. 50. Assuming, arguendo, that Zilberstein's logic is valid, it seems that the same logic would require a person to spend all of his money to save the life of another person because: (1) one must spend all of one's money to avoid violating a Sabbath prohibition, and (2) one must violate a Sabbath prohibition to preserve someone else's life, even briefly.

45. *Kometz Minchah*, Commandment 232. See also R. Boruch HaLevy Epstein, *Tosefet Beracha*, Leviticus 19:16 (arguing that if a person's terminal, painful condition is such that it would be permissible to pray for his death, one should not rescue him if one sees him drowning himself to end his suffering). R. Shlomo Kluger argues, based on a specific detail regarding the relevant verse, that a person need not rescue someone if the rescue effort would require an act inconsistent with the rescuer's "dignity." This position is explained and rejected in *Iggerot Moshe*, *Y.D.* II:174(3); R. Yitzchak Yaakov Weiss, *Minchat Yitzchak* V:8.

46. *Kometz Minchah*, Commandment *232.*

47. Ibid.

however, reject this argument.[48] They explain that abandoning ownership of one's property is permissible. Consequently, if one does so, there is no reason for the Torah to frustrate one's wishes by requiring another to return it. Suicide, however, is impermissible. A person is not the owner of his life, and he may not abandon his responsibilities to preserve this precious property. Therefore, the Torah requires another to return it.[49]

If necessary to rescue a person, the Torah requires one to violate every Torah law except for those relating to immoral sexual acts, idolatry or murder.[50] Indeed, even if a person is so ill that some Jewish law authorities believe it would be proper to pray for the Creator to take the person's soul and end his life, it is nonetheless required to violate the Sabbath – and, if necessary, to do so repeatedly – to try to preserve that life.[51] Most authorities rule that one must violate the Sabbath rules even to save someone who is trying to commit suicide.[52]

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48. See, e.g., *Iggerot Moshe, Y.D.* II:174(3), III:90; R. Yitzchak Herzog, *Heichal Yitzchak*, *Even HaEzer* I:3; *Tzitz Eliezer* VIII:15, *Kuntrus Meshivat Nefesh*, chapter 4; R. Ovadia Yosef, *Yabbia Omer* VIII, *O.C.* 37 (citing authorities). See also R. Yaakov Weiner, *Ye Shall Surely Heal* (1995), at 41-42.

49. *Iggerot Moshe, Y.D*. II:174(3), III:90.

50. See *Shulchan Aruch, Y.D.* 195:3; 157:1; Rambam, *Mishneh Torah*, *Hilchot Yesodei HaTorah Torah* 5:1. See also *Sanhedrin 84a*; R. Immanuel Jakobovits, "Medical Experimentation on Humans in Jewish Law," in *Jewish Bioethics*, p. 379.

51. See, e.g., *Minchat Shlomo* 91.

52. *Iggerot Moshe, Y.D.* II:174(3), *Y.D.* III:90; *Tzitz Eliezer* VIII:15, *Kuntrus Meshivat Nefesh*, chapter 4; *Yabbia Omer* VIII, *O.C.* 37 (citing authorities); *Comprehensive Guide to Medical Halachah* (1996), at 54 (citing authorities).

PART IV : Applying Jewish Law Principles To Physician-assisted Dying

Our topic, "physician-assisted dying," obviously focuses on people who are alive. Before applying the various Jewish law principles surveyed above to physician-assisted dying, however, we should emphasize that some people who are considered to be dead under secular law may not be dead under Jewish law.

In the last 30 years, there has been substantial secular and religious discussion as to what constitutes death.[53] When the traditional common law criteria – cessation of circulatory and respiratory functions – were satisfied, the Jewish law criteria were also satisfied. Today, however, virtually all states, whether by statute, case precedent or administrative regulation, consider a person to be dead if his circulatory and respiratory functions are artificially sustained and he has experienced an "irreversible cessation of all functions of the entire brain, including the brain

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53. In 1968, an ad hoc committee of the Harvard Medical School announced that "responsible medical opinion" was prepared to expand the criteria of death to include "irreversible coma as a result of permanent brain damage." See The Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Irreversible Coma, *A Definition of Irreversible Coma*, 205 JAMA 337, 339 (1968). Generally speaking, there are two types of cessation of brain function. The first affects only the part of the brain that is believed to be associated with "higher brain function," such as consciousness. The other, more complete cessation of brain function, referred to as "whole brain death" or "brain stem death," occurs when even the brain stem ceases to operate. The Harvard ad hoc committee made it fairly clear that its proposal was only to extend the criterion of death to those who experienced "whole brain death."

stem."[54] Many Jewish law authorities believe that a person may still be alive even after hospitals determine that this secular "brain stem death" criterion is satisfied.[55] Moreover, even some of the Jewish law authorities who may have been willing to accept the brain stem death standard relied on the assumption that brain stem death was the functional equivalent of decapitation, *i.e.*, that the brain no longer had any operative connection with the rest of the body.[56] Nevertheless, studies in

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54. See, e.g., *N.J.SA*. 26:6A-3.

55. See, generally, R. J. David Bleich, *Time of Death in Jewish Law* (1991); R. Aaron Soloveichik, "The Halakhic Definition of Death," *Jewish Bioethics* 302; *The Comprehensive Guide to Medical Halacha 188* (1996) (citing authorities and stating that someone who is clinically brain-stem dead is not considered dead but, rather, is in the category of a possible *goses* such that tests to verify the diagnosis are forbidden); Fred Friedman, "The Chronic Vegetative Patient: A Torah Perspective," *Journal of Halacha & Contemporary Society* 26:88, 91 (1993) (asserting that most contemporary rabbinic authorities "do not accept 'brain death' as sufficient to define an individual as dead" under Jewish law); Yitzchok Breitowitz, *"The Brain Death Controversy in Jewish Law*," at http://www.JLaw.com/Articles/ brain/html.

56. Some of the Jewish law authorities who support the brain stem death standard contend that this was the position of Rabbi Moshe Feinstein. See, e.g., R. Moshe Tendler, Letter to Editor, *Jewish Observer* (October 1991), at 12-14. (asserting that this was R. Feinstein's ruling); R. Shabtai Rappaport, Letter in 12 *Assia*, no. 3-4 (Kislev 5750), pp. 11-13. Whether Rabbi Feinstein actually accepted the brain stem death standard is the subject of much debate. See Dr. Yoel Jakobovits, "[Brain Death and] Heart Transplants: The [Israeli] Chief Rabbinate's Directives," 24:4 *Tradition* 1 (1989), at 9-10, n. 9 (stating that R. Aaron Soloveichik and R. J. David Bleich are among those who argue that R. Feinstein's responsa fail to show that he adopted the brain stem death standard); R. Avraham S. Avraham, *Nishmat Avraham*, vol. 2, *Y.D.* 339 (disputing R. Tendler's interpretation). In any event, Rabbi Feinstein did make it clear, when referring to brain stem death, that

recent years present substantial evidence that the tests commonly used for establishing brain stem death do not, in fact, prove that all brain functions have ceased.[57]

Assuming that a patient is alive, there are essentially five questions Jewish law must consider: (1) may a patient or a physician do an affirmative act to end the patient's life; (2) may someone encourage or assist such affirmative acts by a patient or physician; (3) may a patient or a physician hasten the patient's death by passive conduct; (4) may someone encourage or assist such passive conduct; (5) may or must someone coerce a patient to accept medical treatment.

A. Affirmative Acts To End A Patient's Life

As a general rule, a patient who affirmatively ends his own life violates the prohibition against suicide. There is considerable rabbinic controversy whether there is an exception which permits suicide for the purpose of sanctifying G-d's name and avoiding desecration of G-d's name.[58] This purpose, however,

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he was relying on the assertion of R. Tendler that brain stem death, when confirmed by a nuclide slide, proved that there is no functional connection between the brain and the rest of the body. See *Iggerot Moshe, Y.D.* III:132.

57. See, e.g., Robert D. Truog, "Is It Time to Abandon Brain Death?", *Hastings Center Report 27,* no. 1 (1997):29, 29-30; J. David Bleich, "Moral Debate and Semantic Sleight of Hand", 27 *Suff. U.L.Rev*. 1173 (1993).

58. Rabbenu Tam, a 12th-century scholar, states that "Where people fear that idol-worshipers will force them to sin through torture that they will be unable to withstand, it is a "mitzvah" for them to smite themselves just as in the case in *Gittin* in which the children captured for immoral purposes cast themselves into the sea." Tosafot, *Avodah Zarah* 18a, *s.v*. *Vi'al*. See *Gittin* 57b, which extols female captives who killed themselves by diving into the sea rather than allow

does not typically arise with respect to a medical patient.

Aside from sanctification of G-d's name, why might a patient want to end his life? Perhaps he wants to donate his vital organs to one or more people in an effort to save their lives. Despite the duty to rescue others from danger, however, it is specifically prohibited to forfeit one's own life to save the life of another.[59] Alternatively, perhaps a patient desires to save others from the inconveniences associated with worrying about him or visiting him. But if saving the *lives* of such other people is an inadequate justification, saving them from inconvenience or concern is certainly insufficient. Indeed, the divine purpose behind the patient's condition may even, in part, be to inspire the other people to perform the good deeds associated with caring for the afflicted.

What if a patient wants to commit suicide in order to preserve his assets for the benefit of those who will inherit him? Cases in which this issue arises in connection with a patient's *passive* refusal to accept treatment will be discussed below. But it is at

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themselves to be abused; *Bava Batra* 3b, which tells of a Hasmonean woman who jumped to her death from a rooftop rather than allow herself to be wed by a slave. This view seems to have been relied upon by many throughout Jewish history who, when faced with the prospect of forced conversion, committed suicide. See, e.g., R. Basil F. Herring, *Jewish Ethics and Halachah For Our Time* (1984), p. 76; *Sihot Mussar*, at 36. Nonetheless, not all authorities agree with Rabbenu Tam. See, e.g., R. Shlomo Luria, *Yam Shel Shlomo, Bava Kama* 8:59 (rules that such killings are prohibited). See, generally, *Ye Shall Surely Heal* (1995), at 4-6.

59. As to the prohibition to risk or sacrifice one's life to save another, see *Iggerot Moshe, Y.D.* II:174(4); *Tzitz Eliezer* XVI:23; "Compelling Tissue Donations" 27:3 *Tradition* 59 (1993), 59-61 (discussing authorities). Whether one may risk or surrender one's life to save a group of Jews is a somewhat more complex issue. Contrast *Kol*

least theoretically possible that treatment might be forced upon someone, at his own expense,[60] and he may perceive suicide as the only effective way to protect his wealth. Jewish law rules that suicide is forbidden for such a purpose.

Perhaps a patient might prefer suicide to avoid a life of suffering. Nevertheless, the overwhelming weight of Jewish law does not, at least *a priori*, allow a patient actively to commit suicide in order to escape pain, emotional distress or poverty.[61]

In any of the above scenarios, if someone acted to end the patient's life, that person would not be guilty of "assisted suicide;" he would be guilty of murder – even if the patient asked to be killed. This is true even if the patient is a *goses*[62] on the brink of death. As Rabbi Yehiel Epstein, a nineteenth and early twentieth century authority, points out:

> Even if we see that the *goses* suffers greatly from his *gesisah* and that it is good for him to die, nevertheless it

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Mevasser I:47 (disallowing) to R. Chaim Yosef David Azulai(Chida) *Tov Ayin* 18 (allowing). See *The One vs. the Many in Life and Death Situations*" (discussing various views).

60. For example, secular authorities may regard a patient as legally incompetent even though the patient is competent under Jewish law. This might occur, for example, either because of a flaw in the secular adjudication or a substantive difference between the secular and halachic standards for competency. In such a case, a secularly authorized surrogate decision-maker may be directing that treatment continue despite the patient's opposition.

61. See, e.g., *Jewish Ethics and Halachah for Our Time*, at 77 ("[M]ost authorities likewise disagree with the *Besamim Rosh* [who is quoted as permitting suicide to avoid a life of sickness, pain or poverty]..."); *Pitchei Teshuvah, Y.D.* 345:2 (citing authorities); *Shut Chatam Sofer*, *Y.D.* 326; *Tzitz Eliezer VIII, Ramat Rachel* 29; *Yam Shel Shlomo, Bava Kama* 8:59; R. Yehiel Michoel Tukazinsky, *Gesher HaChaim* I, at 273; R.

> is prohibited to us to do anything that will hasten his death. The world and all that fills it belongs to the Holy One, blessed be He, and such is His wish . . .[63]

Even the late Rabbi Moshe Feinstein, who, as discussed below, allows terminal patients suffering unmanageable pain to passively refuse to temporarily preserve their lives, states that:

> Doing an act to hasten the death [of a *goses*] is proscribed...even though he [the *goses*] is suffering, and doing so would constitute murder, violating the injunction 'Thou shalt not kill.' . . . A person incurs the death penalty if he kills someone suffering intractable pain out of a sense of mercy, even though [the deceased] asked him [to do it].[64]

Indeed, many authorities explicitly state that one is affirmatively required to save a sufferer's life – even if the sufferer is a *goses* and even if one must violate the Sabbath to do so.[65]

Does it matter if the person who hastens the patient's death

Ephraim Oshry, *Responsa from the Holocaust* (1989), p. 34.

62. As to when someone is a *goses*, see *Semahot* 1:1-4; "Treatment of the Terminally Ill," at 81, n. 23.

63. *Aruch Hashulchan, Y.D.* 339:1. See also R. Abraham Danzig, *Chochmat Odam* 151:14 ("[I]t is prohibited to cause [a *goses*] to die more quickly even if he has been a *goses* for a long time and . . . [he] and his relatives are suffering a great deal . . .").

64. See *Iggerot Moshe, Y.D.* II:174(3). See also *The Comprehensive Guide to Medical Halachah*, at pp. 193-194 (citing rules and authorities); Moshe Tendler and Fred Rosner, "Quality and Sanctity of Life in the Talmud and the Midrash", 28:1 *Tradition* 18, 20 (1993).

65. See, e.g., *Iggerot Moshe*, ibid and *Y.D.* III:90; *Tzitz Eliezer* VIII:15,

is a physician? Secularists might argue that there is a special physician-patient relationship that might empower patients and/or physicians to take steps that might not otherwise be permitted. Jewish law recognizes that a physician can possibly provide information, such as a diagnosis of a patient's condition and an evaluation regarding the risks of certain treatment, that is relevant to certain Jewish law issues. Nonetheless, physicians are not given any special authority to terminate a person's life.

A rabbinic dictum provides that "[even] good physicians end up in hell."[66] This is difficult to understand, especially in light of the fact that many outstanding Jewish law authorities, such as Rambam, were excellent physicians. The Tosafist Rabbi Yitzchak HaZakein writes that this statement refers to "those who kill the sick."[67] One commentator interprets this explanation as referring to physicians who practice euthanasia out of "good intentions."[68] Despite those intentions, they are guilty of murder – and receive the appropriate punishment.

Under Jewish law, everyone is prohibited from taking any affirmative steps that may, even unintentionally, hasten a patient's death. This is especially problematic with respect to a patient who qualifies as a *goses*,[69] because any unnecessary touching of such a person could accelerate his death. Consequently, such a *goses*

> ...should not have his pulse, temperature, or blood pressure checked. Blood may not be withdrawn for laboratory examinations, since in any case the results

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Kuntrus Meshivat Nefesh, chapter 4; *Yabbia Omer* VIII, *O.C.* 37 (citing authorities); *Biur Halacha* 329, *s.v. Eleh*; R. Chaim Azulai, *Birkei Yosef, O.C.* 329(4); Tosafot, *Nidah* 44b. See also *Nishmat Avraham*, vol. 2, *Y.D.* 339:2.

66. *Kiddushin* 82a.

67. See *Jewish Ethics and Halachah For Our Time*, at 88.

would lead to no change in the handling of the patient.[70]

B. Encouraging Or Assisting Affirmative Acts To Terminate Life

As explained previously, a Jewish patient who tries to kill himself[71] tries to violate biblical law. Jewish law prohibits one from advising or encouraging the patient to kill himself and requires one to attempt: (1) to dissuade or prevent the patient from killing himself; and (2) to rescue the patient from the danger he poses to himself.

One who advises or encourages such a patient to kill himself, and whose advice or encouragement causes the violation, breaches the biblical *lifnei iver* prohibition.[72] For example, a Jewish doctor who successfully persuades a Jewish patient to wrongfully shorten her life in order to permit her organs to be used for someone else breaches this ban.

Similarly, a person transgresses this rule if he makes it possible for another to commit a sin that would not have been performed without such help.[73] Assume, for instance, that the only way a person is willing to commit suicide is by using a special suicide device owned only by one particular physician. If that physician makes the device available to the patient and the patient uses it to commit suicide, the physician violates the rule against *lifnei iver* – even if the physician is not present

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68. Ibid. (citing view of R. N. Friedmann, author of *Nezer Mata'ai*).

69. See, e.g., *Iggerot Moshe*, *C.M.* II:73(3).

70. *Comprehensive Guide to Medical Halachah*, at 192.

71. The same may be true if the patient is not Jewish. But at least one authority contends that the prohibition against suicide does not apply to non-Jews. *Minchat Chinuch*, Commandment 34.

72. See ibid, Commandment 239 (failure to convince someone not

when the patient actually uses the machine. Even if many physicians owned such devices and they were readily available to the patient, the physician who actually gave one to the patient would violate at least the rabbinic rule against assisting a wrongdoer.

In light of these rules, a Jewish physician may have to be careful in prescribing drugs to a patient who is depressed or who has expressed a desire to die. Although such a patient might be disinclined to commit suicide in ways that are more painful or troublesome, he might be willing to overdose on morphine or other painkillers. The physician might have to dole out such medications in small quantities.

Moreover, Jewish law generally obligates one to try to dissuade such a patient verbally. Not only should one identify the various religious reasons not to commit suicide, but one should emphasize the practical benefits of life, such as the patient's ability to see or speak with family or friends,[74] to

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to commit a sin is a violation of *lifnei iver*).

73. See *Shulchan Aruch, Y.D.* 151:1.

74. See, e.g., Abraham S. Abraham, "Euthanasia," in Fred Rosner (ed.), *Medicine and Jewish Law* (1990), at 126-127:

> I recently treated a patient with end-stage emphysema . . . He managed to painfully gasp out his request that I inject "something to make him sleep forever." He was tired of suffering, tired of burdening his wife and family, and tired of the supreme effort of breathing. Two years previously he had been admitted to our respiratory intensive care unit (ICU) with pneumonia, and had been intubated there for many days. At the time he had written, "Please let me die"; the note was still in his file. This patient's mental and physical pain was truly an agonizing, heartbreaking thing to witness. One of our conversations, during rounds one day and in the

supervise the development of one's business, or to pursue other personal interests. One should strive to deflect the patient even if only temporarily. If there is a particular reason why the patient wants to commit suicide, one should endeavor to eliminate the reason. Perhaps health care personnel may not be providing adequate palliative therapy. If the patient's suicidal ideation is driven by pain, one should ensure that the pain is effectively treated.[75] In addition, if verbal admonishment is ineffective, more forceful intervention is required, unless such intervention would put one at risk.[76]

A patient may be under enormous pressure to refuse

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presence of the patient's wife, left few dry eyes among those in attendance. "What have the last two years been like before your admission to the ICU?" I asked him now.

"A living death, worth nothing," he replied.

"Do you have any grandchildren?" I asked.

"Yes, four."

"Do they visit you?"

"Yes, often," he said and his face lit up.

"And do you enjoy them?" I asked.

"What a question!" he said. "Every minute is Heaven!"

"Worth living for?" I asked. There was no answer.

"Were these two years wasted?" Silence.

75. Modern advances indicate that pain can in fact be effectively controlled in most instances. See, e.g., Albert Einstein, "Overview of Cancer Pain Management," in Judy Kornell (ed.), *Pain Management and Care of the Terminal Patient* (1992), p. 4 ("adequate inventions exist to control pain in 90 to 99% of patients"); Burke J. Balsch and David Waters, "Why We Shouldn't Legalize Assisting Suicide, Part II: Pain Control," http://www.nrlc.org/euthanasia/asisuid2.html.

treatment. Pressure may be generated "internally" – as a result of untreated pain or as a side-effect of particular medication – or externally – from doctors, hospital administrators, insurers, family members, or even private groups seeking to increase the availability of transplantable organs. A person who is aware of such duress may be obligated to seek appointment of a guardian, and may have to be willing to serve as such guardian, to ensure that life-preserving treatment continues.[77] Even if such steps cost money, the duty to rescue obligates the rescuer to use his own money, if necessary, to save the patient's life.[78] In appropriate cases, some authorities might require one to donate blood or bone marrow in order to rescue another.[79]

Furthermore, the duty to rescue applies even to a suicide and authorizes, when necessary, the violation of virtually any Jewish law, other than those regarding sexual immorality,

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Hopefully, additional, aggressive pain palliation research will even further reduce the number of people who experience significant pain.

76. See note 28, supra.

77. It is not practicable here to examine the various Jewish law rules relating to the permissibility of initiating any sort of secular litigation. Nonetheless, rabbinic authorities may well permit such action for the purpose of saving someone's life.

78. If necessary, many authorities would require the rescuer to use up to all of his money. See note 37, supra. In computing the "cost" of keeping a person alive, one may consider the possibility of financial liability under secular law. Nevertheless, it is interesting that in some jurisdictions, secular law may not impose substantial liability for preserving a person's life against the person's wishes. See *Anderson v. St. Francis-St. George Hospital, Inc.*, 77 Ohio St.3d 82, 671 N.E.2d 225 (1996) (no cause of action for treating someone in violation of a do not resuscitate order; and, as to battery, here there is no physical harm, the "victim" can only collect nominal damages). See, generally, Lawrence W. Vernaglia, Annotation, "Propriety Of, and Liability

idolatry and murder.[80] Thus, although one must usually avoid falsehoods, it would be permitted to lie in order to prevent a suicide.[81]

A physician, whether Jewish or not, who tries to kill a patient is attempting to violate the biblical ban against murder. One would be forbidden from assisting the physician. If the physician or patient is Jewish, one would also be affirmatively obligated to try to dissuade or prevent the physician from consummating his plan.[82]

One who could prevent a patient from committing suicide – or a physician from commiting murder – but who does not do so is considered as if he had committed the crime himself.[83]

C. Passive Conduct To Hasten A Patient's Death

1.Passive Conduct by a Patient

The rule that a person must safeguard his life[84] generally forbids a person from refusing life-preserving treatment. There is considerable debate, however, as to whether this general

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Related To, Issuance or Enforcement of Do Not Resuscitate (DNR) Orders," 46 A.L.R.5th 793 (1997).

79. See note 59, supra.

80. See *Shulchan Aruch*, *Y.D.*195:3; 157:1.

81. See, e.g., *Iggerot Moshe*, *C.M.* II:74(1); R. Immanuel Jakobovits, "Ethical Problems Regarding the Termination of Life," in Levi Meier (ed.), *Jewish Values in Bioethics* (1986).

82. If the patient were Jewish, there would also be an affirmative duty to rescue him, as discussed in the preceding text.

83. *Ramo*, *Y.D.* 157.

84. See note 3, supra. See also R. Zev Schostak," Ethical Guidelines

rule applies when one or more of the following factors are present: (1) the patient is terminally ill and the treatment will only prolong the patient's temporary, extremely painful condition; and (2) the treatment is not well-established, is painful, risky and/or is not likely to succeed.

a.Treatment that will only temporarily prolong life, where the patient has a painful condition

Some authorities, including Rabbi Moshe Feinstein and Rabbi Shlomo Zalman Auerbach, rule that terminally ill patients in great pain can, in some situations, refuse treatment that cannot cure but will only temporarily prolong their agonizing existence.[85] Even in these scenarios, however, they do not permit affirmative acts of suicide. As discussed elsewhere, some commentators are reluctant even to permit passive refusal of life-preserving treatment.[86]

b.The Nature of the Treatment Refused

Even some of the authorities who disagree with the approach of Rabbi Feinstein and Rabbi Auerbach permitting terminally ill patients to refuse treatment because of their pain may nonetheless rule that such refusal is justified in individual cases, based on the nature of the treatments involved. Thus, a person is not generally obligated to submit to "unproven" experimental treatments.[87] Indeed, a person may sometimes not even be allowed to take some medications because of the attendant

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for Treatment of the Dying Elderly", XXII *Journal of Halacha and Contemporary Society* 62, 83-85 (1991) (discussing various views); Steven H. Resnicoff, "Physician Assisted Suicide Under Jewish Law," 1 *DePaul Journal of Health Care Law* 589 (dated 1997, published 1998), at 616-622.

85. See, e.g., *Iggerot Moshe, Y.D.* II:174(3); *Minchat Shlomo* 91.

86. See, generally, Resnicoff, "Physician Assisted Suicide Under Jewish Law," at 616-621.

risks.[88]

2.Passive Conduct by a Physician

As discussed above, there may be a few instances in which a Jewish patient is not obligated to take steps to preserve his life. But wherever the patient is so obligated, other Jews are surely affirmatively required to prevent the patient from violating his duty and to rescue the patient from the danger of death.

What if the patient is not refusing treatment but, instead, health care personnel simply fail to provide it? Secular society has witnessed an increasing trend toward empowering physicians to declare certain medical treatments – even life-preserving treatments such as providing nutrition – as medically "futile."[89] Having made this determination, the health care personnel, at least in certain jurisdictions, may then refuse to provide the treatment – perhaps even if the patient or the patient's family want the treatment to be provided.[90]

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87. See R. Yaakov Emden, *Mor Uktziah* 328; R. Alfred Cohen, "Whose Body? Living With Pain," XXXII *Journal of Halacha and Contemporary Society* 39, 49 (1996). See, generally, J. David Bleich, *Contemporary Halakhic Problems* IV, at 203-217.

88. As to what extent a person may risk her life by taking experimental treatment or to reduce pain, see, *e.g.*, *Ye Shall Surely Heal: Medical Ethics from a Halachic Perspective*, at 75- 81; *Iggerot Moshe, C.M.* II:73(9) (allowing surgical removal of patient's testicles in prostrate cancer in order to reduce pain; argues that reduction in pain would prolong patient's life); *The Comprehensive Guide to Medical Halachah*, at 53; Cohen, "Whose Body? Living With Pain," at 49.

89. See, e.g., *Md. Code Ann., Health-Gen*. s 5-611 (1994 & Supp. 1995) (physicians need not provide "ethically inappropriate or medically ineffective" treatment). See also Shiner, *Note*, "Medical Futility: A Futile Concept?," 53 *Wash. & Lee L. Rev*. 803 (1996); Judith F. Daar,

"Medical Futility and Implications for Physician Autonomy," 21 *Am. J.L. & Med.* 221 (1995).

90. Some state cases have held that treatment may not be withheld against the wishes of a patient or, in the case of an incompetent patient, the patient's family, see, e.g., *In re Jane Doe*, No. D-93064 (Sup. Ct. Fulton County, Ga. Oct. 17, 1991), *aff'd*, 418 S.E.2d 3 (Ga. 1992); *In re Wanglie*, No. PX-91-283 (Hennepin County, Minn., P. Ct. June 28, 1991), reprinted in 7 *Issues L. & Med.* 369 (1991). Nevertheless, it is not certain that every jurisdiction will so rule.

In 1994, a decision by the Fourth Circuit Court of Appeals suggested that federal law importantly restricted a hospital's ability to refuse to provide treatment that it deemed to be "futile." Specifically, the Court ruled that, in light of the Emergency Medical Treatment and Active Labor Act (EMTALA), a hospital was required to provide respiratory support to an anencephalic infant even if the hospital felt that such treatment was "morally and ethically inappropriate," *In the Matter of Baby "K,"* 16 F.3d 590 (1994), cert. denied, 115 S. Ct. 91 (1994). The effect of this case, however, is limited by other courts, most of which have held that EMTALA merely requires that a hospital provide an emergency room patient with the same way that it would have treated "any other patient in a similar condition with similar symptoms." See *Marshall v. East Carroll Parish Hospital Service District*, 134 F.3d 319, 323 (5th Cir. 1998) (citing cases). Under this approach, if a hospital determines that providing respiratory support to any similar anencephalic infant is futile, the hospital would be able to refuse such treatment without violating ENTALA.

Moreover, in *Bryan v. Rectors and Visitors of the University of Va.*, 95 F.3d 349 (4th Cir. 1996), the Fourth Circuit itself identified an important limitation on its ruling in *Baby "K."* *Bryan* involved a patient who entered a hospital's emergency room because of respiratory distress. The hospital treated her, stabilized her condition and admitted her as a patient. Nonetheless, twelve days later the hospital, against the express wishes of the patient's family, entered a "do not resuscitate" order. Eight days later, the patient experienced emergency respiratory distress. The hospital, pursuant to the "do not resuscitate" order,

Various factors may fuel such declarations. For example, many secular physicians, who are not attuned to life's spiritual dimensions, may disdain the so-called "quality" of a patient's life and, for this reason, may characterize life-sustaining treatment as futile. In addition, physicians are trained as problem-solvers, and a physician may become frustrated when he believes he is unable to solve the patient's problem, such as when a patient has been diagnosed as in a persistent vegetative state ("pvs").[91] Furthermore, physicians may feel pressure to try to help other, socially-interactive patients, either with the medical resources presently allocated to the pvs patient or with the organs the physicians hope to obtain from the pvs patient when he dies. Similarly, physicians may face certain pressure from the companies that provide medical insurance. Jewish law does not generally recognize this doctrine of futility. A Jewish physician is not authorized to abandon his patient;[92]

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failed to treat her, and she died. The Court held that EMTALA applies only to emergency stabilization prior to a person's being admitted to a hospital. In *Bryan*, once the emergency treatment was provided and the patient was admitted to the hospital, the patient's rights were regulated by state tort law, not by EMTALA.

91. Alas, for purposes of clarity, I reluctantly use the common expression, "persistent vegetative state," which is typically used to refer to patients who are in deep coma and who are not expected to "regain" consciousness. The phrase itself is indicative of the lexicographical gerrymandering of those who would belittle human life. How is it that they are so sure that such patients do not have a level of consciousness that is simply undetected by today's technology? Moreover, how can they be certain that a human life, even if in a state in which consciousness may be lacking, is no different from vegetation? This hubris is exacerbated by those who prefer to say "permanent vegetative state" rather than "persistent vegetative state." After all, it is undisputed that a number of patients who are characterized as "pvs" actually regain socially-interactive

instead, he must try to rescue the patient.

D. Encouragement Or Assistance Of Passive Acts To Hasten Death

A person who convinces a Jewish patient to refuse treatment when the refusal is wrongful violates the biblical rule against *lifnei iver*. Similarly, one who enables such a patient to wrongfully refuse treatment when he could not otherwise have

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consciousness.

92. *Cf.* J. David Bleich, "The Quinlan Case: A Jewish Perspective," in *Death and Dying*:

The Hasidic Seer, the *Hozeh* of Lublin, added a pithy comment: "The Torah gives permission to heal. It does not give the physician dispensation to refrain from healing because in his opinion the patient's condition is hopeless."

This lesson is the moral of a story told of the 19th-century Polish scholar, popularly known as Reb Eisel Charif. The venerable Rabbi was afflicted with a severe illness and was attended by an eminent specialist. As the disease progressed beyond hope of cure, the physician informed the Rabbi's family of the gravity of the situation. He also informed them that he therefore felt justified in withdrawing from the case. The doctor's grave prognosis notwithstanding, Reb Eisel Charif recovered completely. Some time later, the physician chanced to come upon the Rabbi in the street. The doctor stopped in his tracks in astonishment and exclaimed, "Rabbi, have you come back from the other world?" The Rabbi responded, "You are indeed correct. I *have* returned from the other world. Moreover, I did you a great favor while I was there. An angel ushered me in to a large chamber. At the far end of the room was a door, and lined up in front of the door were a large number of well-dressed, dignified and intelligent-looking men. These men were proceeding through the doorway in a single file. I asked the angel who these men were and where the door led. He informed me that the door was the entrance to the netherworld and that the men passing through those portals were those of whom the Mishnah says, 'The best of physicians merits

done so, violates the *lifnei iver* rule. Even if the refusal would have occurred without the encouragement, a Jew who provides such encouragement would, at least according to many authorities, violate rabbinic law.[93] Of course, under the approach of Rabbi Feinstein and Rabbi Auerbach, which treats the subjective state of mind of the person who is sick as a critically important factor, it may be very difficult for one to properly evaluate whether a particular person's refusal of treatment is or is not justified under Jewish law.

Someone who encourages or assists the patient's wrongful refusal of treatment also fails in his duties: (1) to encourage the patient to perform the obligation to safeguard his own life; and (2) to rescue the patient from danger. In this case, a "rescue" might have been accomplished by providing competent counseling or adequate analgesics. If such actions failed, the duty to rescue would require other affirmative efforts to have the patient treated, including the use of one's own money.[94]

Similarly, in a case in which necessary treatment is being withheld from a patient, one must attempt to rescue the patient – perhaps by influencing the health care personnel or hospital administration – or by enabling the patient to change doctors or hospitals. Where the relevant health care personnel are Jewish, then, in addition to trying to rescue the Jewish patient, one also has the obligation to try to convince the health care personnel to perform their own religious responsibility to rescue the patient by providing treatment.

Gehinnom [hell]'. Much to my surprise, I noticed that you too were standing in the line about to proceed through the door. I immediately approached the angel and told him: 'Remove that man immediately! He is no doctor. He does not treat patients; he abandons them!'"

93. See, e.g., *Lifnei Iver*, at 121-151 (citing views).

E. Coercive Treatment

Assuming that a patient is obligated by Jewish law to accept a particular treatment, is a person – such as an attending physician – required to use verbal or physical coercion, if necessary, to ensure that the treatment is accepted? There really are two questions. The first question is whether one has the duty to coerce a patient to fulfill the patient's obligation to preserve his own life. Although Jewish *courts* had such authority, Jewish law scholars debate whether *individuals* have such a right.[95] The second question is whether one, who under Jewish law has an independent obligation to save the patient's life, may use coercion to fulfill that independent obligation. Most authorities seem to assume that the theoretical answer to this question is not only that such a person may, but, if necessary, must use such coercion.[96]

Nevertheless, some argue that coercion could easily be counter-productive because of the adverse psychological impact it may have on the patient.[97] Furthermore, medical uncertainty regarding the effectiveness or attendant risks of a proposed therapy frequently relieves a patient of any obligation to submit to the treatment and similarly relieves others from any duty to administer it. Consequently, although coercion is a theoretical possibility, it is often not a practical choice.

Even if a person would otherwise be commanded to employ coercion, the concomitant costs of performing the

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95. Contrast, e.g., *Kitzot HaChoshen, C.M.* 3:1 (arguing that only courts could coerce individuals to perform affirmative commandments) with *Nitivot HaMishpat, C.M.* 3:1 (contending that individuals had the right to coerce other individuals to perform such obligations).

96. See note 33, supra.

97. See, e.g., *Iggerot Moshe, C.M.* II:73(5).

commandment could be high. The physician might face professional sanctions and malpractice liability.[98] As discussed above, whether Jewish law would require a physician to to sustain such costs depends, in part, on whether the applicable duty is considered an affirmative or a negative commandment. In addition to any possible monetary burden, the use of coercion – at least the use of physical coercion – would also raise the prospect of possible criminal sanctions, which, as a practical matter, might well exceed the personal sacrifice that the Torah imposes.

Conclusion

Jewish law perceives life as a process through which a person sanctifies himself by fulfilling G-d's commandments. Consequently, living is a responsibility, not merely a right. Not only is a person prohibited from rejecting this duty by committing suicide, but he is also affirmatively directed to safeguard his life.

Should someone's life be in danger – whether from his own suicidal impulses or from other causes – fellow Jews are commanded to respond. They are obligated to *prevent* another Jew from violating his halachic obligations, they are proscribed

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98. See Immanuel Jakobovits, "Medical Experimentation on Humans in Jewish Law," in J. David Bleich and Fred Rosner (eds.), *Jewish Bioethics*, at 381 ("His [the doctor's] obligation to save life and health . . . is altogether independent from the patient's wishes or opposition. The conscientious physician may even have to expose himself to the risk of malpractice claims against him in the performance of this superior duty."); *Iggerot Moshe, Y.D.* IV:54(2) ("Even if through this rescue the doctor will become obligated to spend a great sum of money to pay for the [medical] equipment and other medications, he is obligated to do so.").

from *assisting* him to violate his duties and they are required to rescue him from physical danger. The extent of the sacrifice one must make to fulfill these responsibilities, however, remains subject to rabbinic debate.

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Kibud Av V'em Dilemmas

Rabbi Mark Bleiweiss

It is difficult to honor parents *k'hilchata* and please everyone at the same time. Like all mitzvot, *kibud av v'em* needs to be performed as a mitzvah per se, because our Father in Heaven said so. Children should honor their folks *lishma*, in the same way they would wave a lulav or wrap tefillin. But few parents care to be honored as objects. Most like to think that their offspring honor them out of sincerely felt love and admiration. And *kibud av v'em* is one of the few mitzvot that requires customer satisfaction, in which the subjective aesthetic counts.[1]

The general mitzvah to honor parents has two facets – *morah* and *kavod* – each referring to different modes of behavior.[2]

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1. *Yerushalmi Peah* (1:1), "*hoil v'hi retzona hu chvoda*," referring to the parental prerogative to determine the nature of their *kavod*. See *Minchat Chinuch* #33, "*vezeh pashut*," on *mechilat kavod*. The author of *Sefer Chareidim* writes that one who serves his parents punctiliously only because *Hashem* commanded and not because he feels his parents are deserving, has fulfilled *kibud av v'em*, but may have transgressed "*arur mekalel aviv v'imo*" (*Devarim* 27:16). Although parents may not be *gedolim*, vis-a-vis the child they are unique and almost always deserve respect.

2. *Kiddushin* 31b, *Sifra Vayikra* 19:3. See *Shulchan Aruch Yoreh Deah* 240-1 for a summary of *morah* and *kavod* obligations. *Chayeh Adam* (67:3) extends the obligation to honor parents even in *thought*. Rav Herschel Schachter illustrates other everyday forms of practical service for adult sons and daughters, such as joining parents for Shabbat at their invitation, sending photographs and letters if they

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Morah includes all reverential acts, from children standing when their parents enter the room to making sure never to contradict their parents' words. *Kavod* refers to all acts of practical service, making sure parents have the food, clothing, shelter, and physical support they need.

The technical fulfillment of this mitzvah from the Torah should never reduce this ideally unself-conscious relationship to something forced and mechanical. "Here's a glass of water, Dad, sir, can I get you anything else?" "Yes, Mom, I'll take out the garbage, whatever you say, ma'am." Rabbi Tarfon's mother may have been proud, but most contemporary parents would cringe if their youngsters stood every time they entered the room.[3] Honoring parents without patronizing them requires common sense and sensitivity. A child must know what to do at all times under all circumstances to please the folks naturally, not as generic procreation units, but as individuals with preferences, convictions, and idiosyncrasies.

Just as importantly, a child must know when, if ever, *not* to listen to his parents. Like all people, parents can go beyond the pale of acceptable behavior and may cease to deserve the kind of *kavod* the Torah mentions. The Gemara derives from a

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live far away, and enabling parents to spend time with their grandchildren.

3. Ibid. The *Yerushalmi* recounts the extent to which Rabbi Tarfon would go to fulfill the mitzvah of *kibud em*: "Rabbi Tarfon's mother went for a walk in her courtyard on Shabbat and her sandal straps broke [she could not fix them on Shabbat]. Rabbi Tarfon went and propped his hands under her ankles and she walked on them until she reached her bed. Once he fell ill, and when the rabbis came to visit him she asked them to pray for 'her son who had been excessive in his fulfillment of *kibud em*.' They asked, 'What did he do?' She told them. They responded, 'Even if he were to have done this a thousand times over, he still wouldn't have reached half the *kavod* the Torah requires.'"

Torah verse that if a father were to demand from his son to become impure or to refrain from returning a lost item, the son would have to disobey.[4]

What is the extent of this famous law? How far would parents have to go in their apostasy before they no longer qualify for *kavod*? What are the halachic ramifications? Is it okay for a son to carve a *zecher l'mikdash* square on his folks' neatly wallpapered foyer wall? Should he recoil at Aunt Millie's welcome–home bear hug if his parents would become outraged? And what if Mom refuses to *tovel* the dishes? Can he eat her food anyway? A systematic approach is needed to address these nuanced questions, and a competent *posek* who knows the individuals involved must be consulted. But, in general, how does a person approach the awesome responsibility of *kibud av v'em* given the complexity of life?

According to *Sefer Hachinuch*, *kibud av v'em* is a logical expression of gratitude a person feels for being alive, a debt he owes in part to parents.[5] The idea is more radical than it may seem. An abused child and a *mamzer* have to honor their parents, whereas an adopted child has no such Torah obligation.[6]

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4. *Baba Metzia* 32a, *Yevamot* 6a. The Gemara in *Yevamot* 5b explains the derivation of this halacha: "*Yachol kibud av v'em docheh Shabbat, talmud lomar: 'ish imo v'aviv tirau v'et Shabbtotai tishmoru* (*Vayikra* 19:3).'" The *Magid Mishnah* (*Aveda* 11:9) says a son should not listen even if his father has asked him "*sheyavi lo ezeh davar*." In other words, if the father tells him directly to go against the Torah the son certainly should not listen, but even if the father tells him to do something that *unintentionally* goes against the Torah, the son still should not listen; For example, the son cannot agree to bring his father an item on Shabbat if he would have to carry it in public. The father does not have to be evil, even his ignorance of Torah is reason enough to ignore his request.

5. *Sefer Hachinuch*, Mitzvah #33 (*Shmot* 20:12).

6. *Chulin* 11b, *Shulchan Aruch Even Haezer*, 15:11. Rav Melech

The mitzvah is not merely a form of reciprocation for all those changed diapers, suffered temper tantrums, and endless tuition bills; otherwise adopted children would have been obligated too. These acts of kindness deserve to be appreciated, but they do not address the heart of the mitzvah.

Parents are not the only concern within the scope of *kibud av v'em*. Consider the mitzvah's placement within the ten commandments. There is a reason it appears in the first column, with all the other mitzvot-between-man-and-God, and not in the second mitzvot-between-man-and-man set. *Kibud av v'em* is not an abstract ethic meant to strengthen family values. It is an imperative to honor the Creator Himself.

But then why is the mitzvah so subjective in nature? Some parents do not forbid their children to sit in their designated dining room chairs, while others do. If honoring parents is really about honoring *Hashem*, why should parents have any say in the matter at all? The Gemara helps to clarify the ambiguity: "Honoring parents is equated with honoring God, as it says, 'Honor your father and mother,' and later it says, 'Honor God with your possessions.'"[7] The verse in *Mishlei*

Schachter ("Various Aspects of Adoption," *The Journal of Halacha and Contemporary Society*, 4), citing *Shmot Raba* (4), suggests that adopted children might be obligated to exceed ordinary *kibud av v'em* in honoring their adoptive parents, even though they are exempt technically from the mitzvah itself. See Rambam, *Mamrim* 6:11, for a discussion of a *mamzer's* obligations regarding parents.

7. *Kiddushin* 30b, *Baba Metzia* 32a, *Yerushalmi Peah* 1:1, based on verses in *Vayikra* 19:3 and *Mishlei* 3:9. According to the Gemara in *Kiddushin*, when a man honors his parents, it is as if *Hashem* dwells in their midst. When Rav Yosef heard his mother's footsteps, he exclaimed, "Let's rise, the *Shechina* is coming!" (*Kiddushin* 31b). The *Yerushalmi* actually elevates honoring parents in that a child might conceivably have to go begging in order to support them, whereas in honoring *Hashem* a person only has to give *maaser* out of his income,

requires individuals to honor *Hashem* through material wealth which – critically – varies from one person to another. A farmer offers his livestock as *korbanot*, a craftsman donates his goods for *bedek habayit*, ordinary people set aside *trumot* and *maasrot*. The overall requirement is universal, but its implementation is personal, depending on what each individual has to offer. Honoring parents works the same way. A child must intend generally to honor *Hashem*, but must consider the particular needs of his own parents in fulfilling the mitzvah.

Parents should be seen as extensions of the *Borei olam*. By bearing offspring, they come close to emulating Him. They have now taken part in the ongoing drama of creation. The connection runs deeper. As a child grows, he has no immediate knowledge of the Creator. For children, parents are omnipotent. Combined, they represent the awesome Source of justice and wisdom as well as the nurturing *Shechina*, comforting them when they cry, giving despite their children's inability to articulate gratitude. Parents help children to crystallize the foundation of their eventual *emuna*(faith). There tends to be a correlation between effective parenting and a child's ability to develop *yirat shamayim*, although exceptions exist on either side of this rule. What matters most is that parents see their primary roles as *Hashem's* emissaries. It follows therefore that children do not always have to obey parents when parental requests go against halacha.

Which areas of halacha override the child's obligation to obey parents? The Gemara mentions only mitzvot that come from the Torah. Rambam broadens this to include all rabbinic law as well.[8] The underlying principle is that both children

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but if he lacks enough he does not have to go begging.

8. *Mamrim* 6:12. The *Kesef Mishneh* explains that because all rabbinic words fall within the rubric of the Torah prohibition not to stray from rabbinic teaching (*Devarim* 17:11) , rabbinic law assumes Torah

and parents are subservient to their Creator. Parents, too, have obligations concerning their children, to ensure *brit milah* and *pidyon haben* when relevant for their sons, to help them find spouses, to educate them in Torah. Parents who demand that their child go against the Torah or the rabbinic leadership of their generation, themselves become remiss in their obligations. Their particular request should not be heeded. This child must remember, however, that he is exempt only from specifically anti-Torah, anti-rabbinic demands made by parents, but must still continue to fulfill his overall *morah* and *kavod* responsibilities.[9]

Later authorities illustrate this principle. If a son wants to travel away from parents to study Torah in a place where he feels there will be a greater "sign of blessing" for his learning, he can disregard any parental opposition.[10] A son can marry a woman of his choice despite his parents' disapproval.[11] A son

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status.

9. Rav Schachter, private conversation. A parent who makes illegitimate requests still usually deserves *morah* and *kavod*. The child should keep in mind that parents in general love their children more than their children love them, as *Chazal* assume in *Sanhedrin* 72b, and deserve respect regardless of their shortcomings.

10. *Shulchan Aruch Yoreh Deah* 240:13, 25. If a student feels returning for a second year of yeshiva in Israel will bring him closer to *Hashem*, and his parents object, he does not necessarily have to listen to them. *Kibud av v'em* is undermined if deferring to them distances him from *Hashem*. The Gemara in *Megilla* 16b states, "*Talmud Torah* is greater than honoring parents because for all the years Yaakov Avinu studied in Ever's yeshiva he was not punished," whereas for the years he lived with Lavan he was punished for neglecting his obligations to his parents.

11. Ramo, ibid. The Netziv (*Meshiv Davar Yoreh Deah* 50) makes an exception in a case when such a marriage would cause shame to a parent. Rav Schacher points out that parents have no right to run their children's lives. If a son wants to go into Jewish education,

should consciously resist parents who try to prevent him from keeping any rabbinic mitzvah.[12] If a father asks for water just when his son is busy burying a dead person, and no one else is available to complete the burial, the son must ignore the request. If, however, a mitzvah can be completed at a later time or by another person, it is more important that the son first fetch the water.[13]

When exactly does a child draw the line between resisting parents and giving in for the sake of *kibud av v'em*? The Chatam Sofer writes that every commonly accepted Jewish custom (*minhag*) has the authority of a vow, and therefore must by kept even if this means going against a parent's wishes.[14] Which *minhagim* can be considered less commonly accepted? The Maharshal rules that a son should override his father's request not to say *kaddish* for his deceased mother because such an established *minhag* is as binding as rabbinic law.[15] Rav Chaim Pinchas Sheinberg told a son to stop "*shuckling*" *excessively* during his *tefilla* because it embarrassed the young man's father, but that the father did not have the prerogative to stop him from "*shuckling*" altogether.[16] Rav Hershel Schachter says a son who

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parents overreach their authority if they insist that he become a lawyer.

12. *Biur HaGra Yoreh Deah* 240:35, *Pitchei Teshuvah* 240:22, *Aruch Hashulchan* 240:45. The *Tur* (*Yoreh Deah* 240) quotes his father's *psak* (*Teshuvot HaRosh* 15:6) that a son who wants to forgive another Jew should ignore his father's wishes to the contrary. It is not within a father's power to cause hatred between Jews (see the passage from *Baba Metzia* 62a quoted below in note #20).

13. *Shulchan Aruch Yoreh Deah* 240:12.

14. *Teshuvot Chatam Sofer, Yoreh Deah* 170. See also *Yechave Daat* 5:256. The Chida (*Chaim Shaal* 1:5) disagrees: *kibud av v'em* takes precedence over any *minhag* not mentioned explicitly in *Shas* or Midrash.

15. *Yam Shel Shlomo*, *Kiddushin* 1:63.

16. Rav Scheinberg, *Shoalim B'teshuvah*, p. 12.

wants to fast *Bahab*[17] should give in to any parental opposition because so few people observe this *minhag* today.[18]

Can a parent ever lose all rights to *kavod*? Rambam rules that even if a father is a *rasha* (wicked) and does not keep mitzvot, the son must still honor and fear him.[19] Other *poskim* follow the view of the Tosafists that there is no obligation to honor such a parent unless he makes *teshuva* (repentance).[20]

What is the halachic definition of a "*rasha*?" *Rishon Letzion* highlights a distinction Rambam makes between a "*rasha gamur*," (a total *rasha*) whom the son does not honor but still cannot strike, and a simple "*rasha*", who deserves *kavod*.[21]

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17. The Monday, Thursday, and Monday following certain major festivals.

18. Rav Schachter, private conversation. Rav Abba Bronspigel, in a related lecture, encouraged compromise if a son wants a *mechitza* at his wedding and his parents do not: the son should give in because the custom of *mechitzot* at weddings is neither deeply rooted nor universal. Rav Bronspigel's father-in-law, Rav Elie Monk, was surprised when he first saw a *mechitza* at a wedding in the United States since there was no such *minhag* in his home communities in France and Germany. Similarly, Rav Bronspigel says a son should not eat a double *k'zayit* of matzoh on Pesach against his parents' wishes because so many *poskim* deem a single *k'zayit* to be sufficient.

19. *Mamrim* 6:11, *Shulchan Aruch Yoreh Deah* 240:18.

20. Ramo, *Schach, Aruch Hashulchan*, ibid. The *Taz* (240:17) cites the Gemara in *Baba Metzia* 62a, "*lav oseh maaseh amcha hu*," to show that a father does not deserve *kavod* unless he is an upstanding member of *klal yisrael*, but concludes that it is nonetheless forbidden to cause such a father distress. Radbaz (*Mamrim* 6:11) rules that a son whose evil father made *teshuva* would be obligated in *kibud av* retroactively. The implication seems to be that even if a parent is a *rasha gamur*, a son would be well advised to honor him *anyway* in case one day he makes *teshuva* and the son will retroactively have been lacking in *kibud av*.

21. *Rishon Letzion Yoreh Deah* 240 distinguishes between the "*rasha*

According to the Chazon Ish, there are virtually no *reshaim gemurim* in the world today, rendering the view of Tosafot all but inapplicable.[22] Most Jews are so ignorant of Jewish law, that someone who behaves like a *rasha* is usually no different than the hapless *tinok shenishba* (baby kidnapped by Gentiles): he is not evil, he simply does not know better.[23] If a child finds his parents negligent in specific areas of halacha, this is almost always due to their ignorance, and he would be obligated in *kibud av v'em*. Only in extreme cases, such as the case of parents who express unapologetic hostility towards a child's observance out of hatred for religion, does Rav Ovadya Yosef suggest the child sever family ties altogether.[24]

A counterpoint to all these halachot needs to be emphasized.

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gamur" in *Mamrim* 5:12 and the simple "*rasha*" in *Mamrim* 6:11, whose status is similar to that of the "*tinok shenishba*," *Mamrim* 3:3.

22. *Chazon Ish Yoreh Deah, Shechita* 2. The *Shechina's hashgacha* has not been readily apparent since *churban habayit*, so the common sinner today must be approached with understanding and love, and should not be regarded as a *rasha gamur*.

23. Radbaz (*Mamrim* 3:3) has a broad definition of *tinok shenishba*. This category refers to anyone ignorant of Jewish law, even people who have had the law explained to them. Torah law and philosophy are often so subtle and complex, it cannot be assumed that a person not brought up in the system will understand a halacha based on a verbal explanation. If a son were to inform his less knowledgeable mother that there is no authoritative *heter* (permit) for a married woman to appear without a head covering, for example, she would probably be considered a *tinok shenishba* if she continued to go bare-headed in public.

24. *Kitzur Shulchan Aruch Yalkut Yosef* 240-1:4. The *Kitzur* notes that if a parent converts to another religion, the child does not have to honor him either in life or in death. Rav Schachter cites the case of a father who has refused his wife a Jewish divorce *(get)* for twenty years: such a man is evil, and his children should not speak to him. Still, even in these worst-case scenarios, it is forbidden for the child to scorn, curse, or strike the parent physically.

If a son legitimately refuses a parent's request, he must do so with respect and tact, mitigating any hurt or rejection his parent may feel as a result. If a father asks his son to make scrambled eggs for him on Shabbat, the son obviously cannot comply. But the son does have to make *havdalah* and take out the frying pan the instant Shabbat is over.[25]

Children would be wise to approach this topic with a modicum of fear and trembling. According to the *Zohar*, our mother Rachel was punished with death for causing grief to Lavan, even though her noble intention was to save him from idolatry. If such a *tzadeket* (pious woman) could be punished on account of such a *rasha*, how much more should children (who usually are not on the righteous level of Rachel) be concerned with how they treat their parents (who usually have not descended to the moral depths of Lavan).[26]

One way to acquire guidelines in *kibud av v'em* dilemmas is to be aware of how modern *poskim* have approached some of the sensitive issues involved. The following is a sampler of twelve questions that can arise. A *posek* should be consulted for potential variability in individual situations.

What if a father constantly criticizes or teases his son's observance? Does the son have to be quiet if speaking up would cause anger and yelling? The *Mechaber* rules unambiguously that it is forbidden from the Torah for a child to contradict his parent's words. Rebuking parents may only be done in an indirect and unembarrassing way, as when a son asks his father to interpret

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25. Rav Scheinberg, p. 8.

26. Cited by the Chida (*Chaim Shaal*1). *Midrash Tanchuma* at the beginning of *parshat "Lech Lecha"* also notes Avraham Avinu's apprehension that people would think he had abandoned his own evil father. The midrash emphasizes that *Hashem's* words, "*Lech lecha*," were meant to exempt Avraham explicitly from any such obligation.

a passage of Torah that highlights the point of rebuke.[27]

Can a son create a zecher l'mikdash[28]*square in his parents' foyer?* A son cannot fulfill this *minhag* in his parents' home against their will, but he can always learn with his father about its source in the fourth chapter of *Baba Batra* and allow the subject to come up naturally.[29]

Should a son recoil at Aunt Millie's bear hug if his parents would be outraged? Rambam says it is "disgusting and idiotic" to hug and kiss sisters and sisters of parents (as opposed to mothers, daughters, grandmothers, and granddaughters, none of whom present a problem). Some interpret his mild language to mean that doing so is not right, but is also not forbidden *m'ikar hadin*, even *d'rabbanan*. Rav Schachter and other *poskim* allow men to stand passively if their own sisters or their parents' sisters shower physical affection on them, and if recoiling would cause others to mock them. This would not be true if the same scenario involved any other woman.[30]

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27. Rav Scheinberg, p. 12 , based on *Shulchan Aruch Yoreh Deah* 240:2, 240:11, *Sanhedrin* 80b. Rabbi Eliezer was asked the extent of *kibud av v'em*, and he answered, "until his parent takes his wallet and throws it into the ocean, and [the son] still does not embarrass his parent by protesting" (*Kedushin* 32a). Dama ben Netina was a leading city official and general whose mother slapped him in front of his parliament and his troops, at which point her sandal fell and he extended his hand to support her (*Yerushalmi Peah* 1:1).

28. This is an unpainted area left on the wall near a house entrance, representing our sorrow that the house of G-d in Jerusalem is still in ruins.

29. *Baba Batra* 60b, Rambam *Taanit* 5:12, *Shulchan Aruch Orach Chaim* 560:1. See note #14 regarding *minhagim* that are not kept universally, and notes #31 and #32 regarding his inability to impose halacha on his parents.

30. Rav Schachter, based on Rambam *Issurei Bia* 21:6, private conversation. Not hugging Aunt Millie might be considered a harmful

What if Mom won't tovel the dishes? A son who eats in his parents' house technically "borrows" their dishes, and one who borrows dishes is just as obligated *d'rabbanan* to take them to *mikveh* as their owner (whereas if he were a non-borrowing guest in someone else's home, he would be exempt). Although food that comes in contact with such dishes remains kosher, it may be hard to find a lenient opinion permitting the son to use the dishes themselves *lechatchila*, especially those used with non-solid foods.[31] The son might also recommend to his mother Rav Aryeh Kaplan's brief and eloquent formulation of the subject in *Waters of Eden* if she is open to learning.

Should a son have his parents' mezuzot checked if he fears they may be invalid? A guest in a non-Jewish house is obligated to affix a mezuzah on the doorpost of his room if he stays more than thirty days, whereas in a Jewish house he is obligated immediately.[32] Rav Moshe Sternbuch says that this applies only in a commercial guest house, but a person staying with family has no such obligation. A child still might try to persuade his parents to have their mezuzot checked, or to spend his

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midat chasidut, as the Ramchal describes in the twentieth chapter of *Mesillat Yesharim*, if she is the direct sister of either the father or the mother. They will not understand, and in their eyes his recoiling looks "disgusting." But if Aunt Millie is Mom's best friend or an aunt by marriage, it would be forbidden to accept her bear hugs, even if recoiling would outrage the rest of the family. Rav Mordechai Willig suggests developing a cold that erupts in messy sneezes every time Aunt Millie approaches, and the author has found carrying bulky luggage during such interactions to have been helpful as well.

31. Rav Tzvi Cohen in *Tvillat Kelim* 3:1. For a general reference, see *Shulchan Aruch Yoreh Deah* 120:1. A son once *toveled* all his parents' dishes in the middle of the night without their knowledge, accidentally misplacing one of the glasses. He was duly smacked when his mother figured out what he had done.

32. *Aruch Hashulchan Yoreh Deah* 286:48 based on the Gemara in *Menachot* 44a.

own money as a "gift."[33] Rav Scheinberg says that if the issue would cause tension, even if there were no mezuzot on the doorposts at all, the son should keep quiet.[34]

Can a child who adopts his Hebrew name protest if his parents continue to call him by his former secular name? Rav Moshe Feinstein rules that the child cannot protest since there is no prohibition in using a secular name.[35]

Can a parent determine what a child wears? Rav Feinstein questions whether dress custom has *minhag* status at all. Barring issues of *tzniut*(modesty), *shaatnez*, or forbidden clothing styles such as *beged isha*, or *chok akum*, there seems to be no halachic reason to oppose a parent's wishes.[36]

Can a child settle in Eretz Yisrael against his parents' wishes? Rav Ovadya Yosef says he should disregard his parents, especially if his intention is to fulfill the mitzvah *d'oraita* and all the mitzvot dependent upon the land. The parents themselves are obligated to make *aliyah*, so they are unjustified if they try to prevent their child from doing so.[37]

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33. *Teshuvot V'hanhagot* 2:537.

34. Quoted in *After the Return*, by Becher and Newman, Feldheim, 1994, p. 41.

35. *Iggerot Moshe Orach Chaim* 4:66.

36. *Ibid, Yoreh Deah* 1:81. The *teshuva*, however, does not address the issue of *minhag hamakom*, when a parent asks a child to go against the dress code of his community.

37. *Yechave Daat* 3:69, 4:49. For a survey of sources, see Rav J. David Bleich, *Contemporary Halakkic Problems*, vol. 1, Ktav, New York, pp. 9-13. Rav Yosef's *psak* and reasoning are consistent with many *poskim*, including *rishonim* like Maharam Rothenburg (*Teshuvah* 79) and *Mabit* (*Teshuvah* 1:139). The *Shaarei Tzedek* (*Mishpatei Haaretz* 11:5) is less decisive on the issue because of the Gemara in *Kiddushin* 31b in which Rav Ami, with the sanction of Rabbi Yochanan, leaves *Eretz Yisrael* in order to greet his mother. Nevertheless the *Shaarei*

If parents keep a certain minimum level of kashrut, can his son argue with them to raise the level to "glatt"? Rav Scheinberg cites the Ramo's *heter* (permissiveness) to transgress the rabbinic prohibition against eating non-Jewish bread in cases of potential enmity; all the more so, he rules, a child should set aside strict opinions (*chumrot)* and eat his parents' food as long as it is technically kosher.[38]

Can a son refuse a drunken father's request for more liquor? According to Rav Yosef, the son should – politely and respectfully – just say no. Serving the harmful liquor may not be a part of *kavod d'oraita* at all, especially because it may constitute a Torah violation of "*lifnei iveir*, assisting a person in sinful behavior."[39]

Can a child use his parents' dishes if they have a non-Jewish maid? The *Mechaber* rules like Rabbenu Tam, that the rabbinic prohibition against *bishul akum* applies even in Jewish homes and restaurants. Rav Feinstein rules that if the maid was ever left alone without fear that her Jewish employers would return, the dishes become unkosher. However, There may be leniencies depending on the particulars of the situation.[40]

Can parents force a son to spend Shabbat in a non-observant environment if the son himself will not transgress any halacha? No, Rav Scheinberg excuses the son altogether, since honoring parents should make the son feel closer to, and not farther

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Tzedek refrains from giving final *psak* against settling in *Eretz Yisrael*. A minority of *poskim* may favor *kibud av v'em* over *aliyah* (see *Baal Hafla'ah, Parshat "Lech Lecha"*).

38. Rav Scheinberg, p. 16, citing the Ramo, *Yoreh Deah* 112:15.

39. *Kitzur Shulchan Aruch Yalkut Yosef* 240-1:20.

40. *Shulchan Aruch Yoreh Deah* 113: 15, *Iggerot Moshe Yoreh Deah* 1:61. See "The Live-in Maid," by Rav David Katz, *The Journal of Halacha and Contemporary Society,* 12.

from, *Hashem*.[41]

These by no means exhaust the range of possible issues. Can a child offer parents food if they might not make a blessing on it? How does a son broach potential *yichud* problems with step-sisters, relatives, and friends of family? Can he eat his parents' food if he suspects it was cooked on Shabbat (out of ignorance)? Can a son invite parents for Shabbat lunch if he suspects they will arrive by car? Torah is a comprehensive life system that requires constant fine-tuning. Family members are not always fine-tuning on the same level, and it remains the children's responsibility to prevent as many conflicts as possible before they arise.

In the end, parents should not worry that their youngsters' systematic approach to *kibud av v'em* will take the genuineness out of the relationship. True love is best expressed by well-intentioned forethought. Children, in turn, should be careful that their conscientious forethought is motivated by true love and respect. After all, the manner with which they treat their parents may well catch up with them one day when, with God's help, their own children will eventually seek to honor Him.[42]

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41. Rav Scheinberg, p. 15. Shabbat is given for pleasure and not for misery (see *Shaarei Teshuva Orech Chaim* 267:1), and *kibud av v'em* cannot compete with *oneg Shabbat* (see footnote #4).

42. Rashi, *Nedarim* 32a: "*Deb'mida sheadam moded, ba modedin lo*."

The Yahrzeit Light

Steven Oppenheimer, D.D.S.

There is a time-honored tradition to kindle a *Yahrzeit* light in memory of a departed loved one. Lighting a candle is not only an integral part of the mourning period but a way for those who are living to honor and remember the departed soul. Why do we light a candle? What is the source of this custom? Can electric lights be used for a *Yahrzeit* light? What is the connection between a candle and a departed loved one? Must one light a candle in memory of a parent? Is there a problem lighting a *Yahrzeit* candle on *Yom Tov Sheini*? Can a *Yahrzeit* candle be used for *Havdala*? This article will explore the origins and halachic aspects of this universal and traditional Jewish custom.

The *Shulchan Aruch* does not mention the custom of lighting the *Yahrzeit* candle in the laws of *Yahrzeit*,[1] however the *Magen Avraham*[3] does. He cites *Rashal*, who allows one to ask a non-Jew *Erev Shabbat, Bein HaShemashot*,(at dusk) to light a *Yahrzeit* candle. Since people are very careful regarding this, it is for a great need (*Tzorech Gadol*), and resembles a significant monetary loss (*Hefsed Merubah*). From here we can obviously see the importance of the custom. No mention is made, however, regarding the reason or the source for the custom of lighting

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1. *Ibid, O. Ch.* 261:6.
2. *Shulchan Aruch, Y.D.* 402:12.

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the *Yahrzeit* candle, only that people are very careful regarding this custom.

Perhaps the source may be found in Gemara *Ketubot*, [3] where Rebbi commanded, "*Ner Yehei Daluk Bimkomi* [after my death], a candle should be lit in my place." Rashi says this refers to the Sabbath candle which should be lit on the table. The *Shittah Mekubetzet*, however, mentions two concepts which he says are included in Rebbi's instruction of *Ner Daluk*, a lit candle. In addition to lighting a candle on the table *Erev Shabbat*, he mentions that it refers to Rebbi's instruction to light a candle near the bed when he passed away. *Hagahot Ya'avetz* considers the possibility that the source for the custom of lighting the *Yahrzeit* candle is from here, but rejects this idea. Rabbi Yehoshua Boymel concludes that the *Hagahot Ya'avetz* probably did not see the words of the *Shittah Mekubetzet*. Otherwise, he too would have considered this Gemara as a source for the custom of lighting a candle. [4]

Origin of the Custom

Rabbi Yehoshua Boymel suggests that the lighting of a *Yahrzeit* candle in memory of a departed soul has its origin in the Talmud. The Gemara states,

> The following question was put before R. Tanchum of Nevi:
>
> "Is it permissible to extinguish a lit candle for the benefit of a seriously ill person on the Sabbath? .... And as for the question I asked of you, here is the answer: [In Hebrew] a candle is called a *Ner*, and a person's soul is

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3. *Ketubot* 103a.

4. Rabbi Yehoshua Boymel, *Responsa Emek Halacha, chelek bet, siman* 52.

called a *Ner* [5]".

In explanation, Rashi cites the verse from Proverbs, *Ner Elokim nishmat adam*, "the candle of G-d is the soul of man.[6] We see from here that man's soul is compared to a candle. The lighting of a candle evokes the image of the soul. The passage in the Talmud goes on to say, "It is better to allow the candle fashioned by flesh and blood (i.e. man) to be extinguished so that the life of a person [who is] a candle fashioned by G-d, may be preserved." [7] The image of a candle relating to the soul of man is further explained in the *Zohar*. The wick represents the soul and the oil represents the person's body.[8]

Rabbi Ovadiah Yosef [9] brings a different source from the Talmud. The Gemara in *Berachot* (53a) states:

> Any deceased person for whom candles would be lit at his funeral both by day and by night, we do not recite the blessing over the candle [i.e. if the funeral takes place Saturday night, we do not recite *Havdala* over these candles because the candles were lit as a sign of honor and not for illumination].

We see from here that there was a custom to light candles for the departed. (The rule that *Havdala* is not recited over candles lit for purposes other than illumination will be discussed later in the article).

Orchot Chaim writes:

Rabbeinu Asher wrote that there is a custom for everyone

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5. *Shabbat* 30a, b.
6. *Mishlei* 20:27
7. *Shabbat* 30b.
8. *Parshat Balak*. See *Emek Halacha*, loc. cit. for further explanation.
9. *Yechave Da'at, Chelek hey, siman* 60.

> to light a candle on *Erev Yom HaKippurim* to atone for his father and mother.[10]

From the above, says Rabbi Yosef, the custom arose to light candles on the *Yahrzeit* to elevate the souls of the departed. Rabbi Yosef also quotes *Rashal*, mentioned above, who ruled that if one forgot to light a *Yahrzeit* candle in Shul on *Erev Shabbat*, as is the custom in all of *Ashkenaz* (Central and Eastern Europe), one is allowed to ask a Gentile to light the candle if it is *Bein HaShemashot*, during twilight. Since the Jewish world is scrupulous regarding the lighting of a candle in honor of a parent, it is considered a *Tzorech Gadol*, a great need, and is, therefore, permitted.[11] Certainly, by this time, as *Rashal* points out, the custom was deeply rooted in the Jewish community. The custom in Worms and Schneituch was to light a *Yahrzeit* candle.[12] *Kaf HaChaim* writes that this custom is very old and rooted in holy tradition.[13] Many other communities, as well, had the custom to light *Yahrzeit* candles in Shul in memory of a departed loved one.[14]

Ba'Meh Madlikin

Many people use wax candles for *Yahrzeit* lights. Rabbi Yosef HaCohen Schwartz explains that the Hebrew word for wax is *SHa'A'VaH*. The letters (*Shin, Ayin, Vav, Heh*) stand for ***H****akeetzu* ***V****eranenu* ***Sh****ochnei* ***A****far* (arise and exult you who dwell

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10. *Hilchot Erev Yom HaKippurim, Oht* 11.

11. *Responsa Maharshal*, end of *siman* 46.

12. *Minhagim Vermeise*. Rabbi Binyamin Hamburger, Vol. 1. Jerusalem, 5748.

13. *O. Ch.* 610:26.

14. *Sha'arei Teshuva, O. Ch.*, 154:20; M. Eisenstadter, *Responsa Imrei Aish, Chelek aleph, siman*, 40.

in the dust).[15] The letters also stand for ***H****ameyachadim* ***Sh****imcha* ***E****rev* ***V****avoker* (they who unite Your Name night and day).[16] This is why the *Yahrzeit* candle burns night and day. Oil may also be used for the *Yahrzeit* light. Oil in Hebrew is ***SHeMeN***. The letters of *Shemen* make up the basis of the word ***NeSHaMa***.[17]

There are *poskim* who do permit kerosene for *Yahrzeit* and Shabbat candles. Rabbi M. L. Winkler reports that the custom was to use kerosene for Shabbat candles and for *Yahrzeit* candles. He cites the opinion of Maharam Shick[18] that, indeed, kerosene was permitted to be used because the kerosene "at this time" is more refined, it produces a clear light and it does not emit an objectionable odor. Rabbi Schwartz maintains that the use of gas or electricity is questionable because they do not allude to the departed soul.[19] Rabbi Avraham Frankel wrote a letter to Rabbi Schwartz stating that many congregations in Germany used gas for their *Yahrzeit* lights, and Rabbi Natan Levin wrote that gas and electric are permitted for *Yahrzeit* lights.[20]

Rabbi Yitzchak Schmelkes was of the opinion that one could fulfill the mitzvah of Shabbat candle lighting with electric lights.[21] Rabbi Boymel does not allow one to fulfill the custom of lighting the *Yarhrzeit* light with electric lights.[22] He explains that Sabbath lights and *Yahrzeit* lights are different. The Sabbath candles are lit so that there will be light in the house, enabling

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15. *Isaiah* 26:19.

16. Liturgy.

17. Rabbi Y. Schwartz. *Mo'ed Kol Chai*, page 20, Kol Aryeh Research Institute, 1994.

18. *Responsa Maharam Shick*, *siman* 83.

19. Ibid., page 11.

20. Ibid., page 34.

21. *Responsa Beit Yitzchak, Y.D.*, *siman* 120, *oht* 5.

22. *Responsa Emek Halacha*, loc. cit.

Oneg Shabbat (enjoyment of the Sabbath) so people will not have to sit in the dark. Since electric lights also provide light for this purpose, one may fulfill the mitzvah of Shabbat candle lighting with electric lights. The *Yahrzeit* light, however, is not intended for purposes of illumination. Indeed, the *Yahrzeit* light is lit during the day when added light is not needed. The reason for the *Yahrzeit* candle is its association with the soul of the departed loved one that is compared to a candle. This association is lacking in the electric light.

Rabbi Boymel does permit the use of electric lights on the *Yahrzeit* tablets found in Shul. The electric lights on the *Yahrzeit* tablets are similar to the Shabbat candles. The lights are meant to illuminate and give prominence to the names of the departed on their *Yahrzeit,* so that they will be remembered during the prayer services. Since the function is one of illumination, it makes little difference what type of light serves to illuminate. Thus Rabbi Boymel permits the use of electric lights on the *Yahrzeit* tablets in Shul.

Rabbi Ovadiah Yosef is more lenient. He cites the ruling of Rabbi Schmelkes that electric lights may be used to fulfill the mitzvah of lighting Shabbat candles. Similarly, he says, one may use electric lights to fulfill the custom of *Yahrzeit* lights. This is especially true regarding *Yahrzeit* candles that are lit in Shul because the smoke from the candles can blacken the ceilings and walls of the Shul. In addition, there are congregants who may be sensitive to the smell of the burning candles. In this respect, electric lights may be preferable to candles, since electric lights are bright, clean and odorless. Rabbi Yosef brings many *poskim* to support this position. He concludes that it would be especially fitting and of benefit to the souls of the departed if we were to contribute to the costs of the electric bill of the *Beit Midrash*. In this way, the merit of the Torah learning done by the light of the electric lights would be a source of merit to the departed souls.[23]

Kaf HaChaim writes that the *Yahrzeit* candle should be made only out of wax since this is a very old custom rooted in holy tradition.[24] The custom in Schneituch was to light a wax *Yahrzeit* candle in the Shul.[25] The custom in Worms was to light a wax candle in Shul at *Mincha*.[26] The candle was of sufficient size to burn throughout the night and the following day of the *Yahrzeit*. If one could not afford a wax candle, one would light an oil candle in his house.[27]

From the sources, it seems that only an oil lamp or a wax candle is suggestive of a person's soul. Electric lights do not bear an allusion to the soul as mentioned in the sources. Ideally, therefore, a wax or oil candle would be preferable to an electric light. One should use a new candle.[28]

When the day is over and the *Yahrzeit* candle is still burning, one should let it continue to burn until it goes out by itself.[29] Since the *Yahrzeit* candle was lit for the benefit of the departed soul, one should never purposely extinguish it.[30]

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23. *Yechave Da'at, loc. cit.*

24. *Kaf HaChaim, O. Ch.*, 610:26.

25. *Toldot Kehillat Schneituch.* M. Hildesheimer, Vol. 2, page 61, cited in *Minhagim Vermeise*. Binyamin Hamburger, Vol. 1, page 241, footnote 3, Jerusalem, 5748.

26. The custom was to daven *Ma'ariv* immediately after *Mincha*, before sunset.

27. *Minhagim Vermeise,* Vol. 2, page 112.

28. *Mo'ed Kol Chai*, page 20.

29. *Gesher HaChaim*, Chapter 32, page 343; *Mo'ed Kol Chai*, page 20; *Kol Bo Al Aveilut*, page 398; Rabbi Y.D. Harfenes, *Nishmat Yisrael. chelek sheini*, page 783, Brooklyn, 5756.

30. *Nishmat Yisrael*, ibid. Rabbi Harfenes suggests that perhaps if one lit the *yahrzeit* candle on the condition to extinguish it after the *yahrzeit*, it might be permitted.

Kibud Av Va'Em

Lighting a *Yahrzeit* candle in memory of a parent falls within the category of honoring one's parents. Rabbi Boymel writes that since there is a custom to light a candle on the anniversary of a parent's demise (the *Yahrzeit*), and people are very careful to observe this custom, it would seem to be a breach of *Kibud Av Va'Em* (honoring one's parents) if someone were not to light. By not lighting, one appears to be displaying a lack of concern for the honor of one's parents.[31] Since the requirement to honor one's parents after they have passed away is a rabbinic requirement, failure to light a *Yahrzeit* candle in memory of a parent would constitute a rabbinic infraction.[32] If someone has lit a *Yahrzeit* light in the past in memory of a parent, he is required by Jewish law to continue lighting each year. According to the *Chatam Sofer*, it is as if he made a *Neder*, a vow, to light. Abrogation of this would constitute a Torah infraction.[33]

Others opine that once you begin a *Minhag Shel Mitzvah*, a custom related to a mitzvah, even if you have only observed the custom one time, you must continue to observe the custom and are not allowed to stop.[34] The requirement to light a *Yahrzeit* candle is part of the mitzvah to honor one's parents. Therefore, once you have lit a *Yahrzeit* candle in memory of a parent, even only one time, you are required to light every *Yahrzeit* without fail.[35]

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31. *Responsa Emek Halacha, loc. cit.*

32. Ibid.

33. *Responsa Chatam Sofer, Y.D., siman* 107, cited in *Emek Halacha,* ibid.

34. *Responsa Emek Halacha*, ibid, based on *Magen Avraham siman* 470,regarding *Ta'anit Bechorim*.

Rabbi Schwartz writes that the lighting of a candle on the day of the *Yahrzeit* alludes to the fact that only the physical body dies. The eternal soul, which is referred to as a candle, lives on, as it is written, "G-d's candle is man's soul." Rabbi Schwartz relates the following story from *Tiferet Ya'akov*. On his way to Shul one morning, a man was approached by a woman. She told him that she had *Yahrzeit* for her mother that day and gave him candles to light for her in Shul. The man put the candles in his pocket but forgot to light them. That night, the woman's mother appeared to him in a dream and scolded him for not lighting the candles that her daughter had given him. The man awoke in a panic and rushed to the Shul and lit the candles. From this account, says Rabbi Schwartz, we see the tremendous benefit to the departed soul by lighting candles in the Shul in its honor.[36]

The Midrash relates that since Chava was responsible for extinguishing the soul of Adam, women were given the opportunity to rectify this sin by lighting Shabbat candles. Our Rabbis explained that a righteous individual departs this world because of the sins of that generation and not because of his own sins. Rabbi Schwartz explains that we light a *Yahrzeit* candle to make up for any part we may have had in hastening the extinguishing of the soul of the departed.[37] If someone forgot to light a *Yahrzeit* candle and the day has already passed, he should give a donation to a poor person in honor of the departed.[38]

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35. *Responsa Emek Halacha*, ibid.

36. *Moed Kol Chai*, page 19.

37. Ibid.

38. *Responsa Yehuda Ya'aleh, Y.D., siman* 315, cited in *Kol Bo Al Aveilut*, page 398 and *Sefer Penei Baruch, Aveilut BeHalacha,* page 426, Jerusalem, 5746.

Previous Spouse

A woman who observes a *Yahrzeit* for her first husband and remarries, should not light a candle in memory of her first husband,[39] since it may hurt the feelings of the current spouse. Similarly, it is improper for a man who has remarried to light a *Yahrzeit* candle for his previous wife.[40] Our Rabbis were very concerned that a husband or wife should not do anything that might cause needless emotional distress to their spouse. One may, however, recite *Yizkor* in memory of a spouse, even if one is remarried, because this is said quietly and one's spouse would not hear.[41]

In 1835, Rabbi Moshe Sofer, the Chatam Sofer, married his third wife, the widow of Rabbi Tzvi Hirsch Heller. One time, the Chatam Sofer saw her light a *Yahrzeit* candle on the 25th of *Tishrei* in memory of her first husband. Rabbi Sofer was stunned and hurt but said nothing to his wife. However, it bothered him greatly. Alas, only a few years later, Rabbi Sofer himself passed away on the 25th of *Tishrei*, the same day his wife had lit the *Yahrzeit* candle in memory of her first husband.[42]

Motza'ei Yom Kippur

There are differing opinions whether one may recite *Borei Me'orei Ha'Aish*(the blessing for *Havdala*) over candles which have been lit in the synagogue since these candles were intended not for illumination but to lend honor to the day. This applies also to the flame of the Yom Kippur *Yahrzeit* lamps.

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39. Rabbi Ya'akov Schischa, *Toldot Moshe*, Jerusalem, 5756, pages 91-92 in *Pardes Moshe*..

40. *Kol Bo Al Aveilut*, page 404.

41. Ibid.

42. Ibid.; see also *Gesher HaChaim, chelek aleph*, page 338.

On *Motza'ei Yom Kippur*, unlike *Motza'ei Shabbat*, the blessing *Borei Me'orei Ha'Aish* should be made over a flame that was kindled before Yom Kippur (*Ner SheShavat*),[43] and burned on Yom Kippur. If this is not possible, the blessing may be recited over a candle lit from such a fire (i.e. from a *Ner SheShavat*).

There is a fundamental difference in the reason why we light the *Havdala* candle of Yom Kippur and Shabbat. On *Motza'ei Shabbat*, we light the *Havdala* candle to commemorate G-d's teaching Adam how to create fire on the first *Motza'ei Shabbat* of Creation. Since that fire was newly made, the *Havdala* flame may also be new.

On *Motza'ei Yom Kippur*, however, we wish to highlight the difference between Yom Kippur and the other Festivals. On Yom Kippur it is forbidden to use fire for any purpose, whereas on other Festivals fire may be used for cooking. The blessing over the *Havdala* candle on *Motza'ei Yom Kippur* demonstrates that only now may fire be permissible to be used. As such, *Borei Me'orei Ha'Aish* must be recited only over a flame that burned on Yom Kippur but has now become permissible.[44]

Nowadays, with the prevalence of electric lights, one cannot say that the *Yahrzeit* candle[45] lit before Yom Kippur is lit for illumination purposes.[46] Since, according to halacha, one should make *Havdala* on a candle lit for illumination purposes, it would not be proper to use the *Yahrzeit* candle for *Havdala*.[47] If the *Yahrzeit* lamp is the only halachically-permissible fire available, one should light another candle from it and make the blessing,

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43. *Shulchan Aruch, O.Ch.*, 624:4.

44. *Mishnah Berurah* 624:7; see also *Artscroll Yom Kippur Machzor*, page 848.

45. This would also apply to the *Ner HaBari* (the *Gesunt Licht*).

46. Rabbi Simcha Rabinowitz, *Piskei Teshuvot, chelek* 6, page 303, footnote 25. See halachic discussion in the next section.

Borei Me'orei Ha'Aish, over both flames. The *Mishnah Berurah*, citing *Derech HaChaim*, advises that one should avoid such problems by lighting an additional candle on *Erev Yom Kippur* for the specific purpose of using it for *Havdala* on *Motza'ei Yom Kippur*. Since the *Yahrzeit* lamp was lit to honor one's parent, it is preferable not to use this for the *Havadala* candle.[48]

Based on the *Mishnah Berurah*, Rabbi Rabinowitz explains that it is better to make *Havdala* on a *Ner SheShavat* rather than on a *Havdala* candle that was lit from it. [49]This is because a a candle lit from a *Ner SheShavat* is not really a *Ner SheShavat*. Rabbi Rabinowitz says that it seems from the *Mishnah Berurah* that one could use only the one candle that was lit for *Havdala* purposes *Erev Yom Kippur* even though ideally we normally use a candle with at least two wicks (*Avukah*).[50] The use of an *Avukah* may not be necessary for the mitzvah of *Ner SheShavat*.[51] One may, however, light an additional candle from the special *Ner SheShavat*[52] and use the two candles for *Havdala*. This seems to be the prevalent custom.[53]

Yizkor

There is a custom to light a *Yahrzeit* candle whenever *Yizkor*

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47. *Sh. Aruch, O. Ch.*, 298:11. See *Piskei Teshuvot,* ibid., page 304, for further explanation.

48. *Mishnah Berurah* 624:13. *Iggerot Moshe, O. Ch., chelek* 4, *siman* 124, however, permits one to light a *Havdala* candle from a pilot light.

49. *Piskei Teshuvot, loc. cit.*

50. *Sh. Aruch, O. Ch.*, 298:2; *Mishnah Berurah* 298:7.

51. See *Mishnah Berurah* 681:1 who permits one to make *Havdala* on a Chanuka candle.

52. The one especially lit *Erev Yom Kippur* to be used for *Havdala*.

53. *Piskei Teshuvot, loc. cit*., page 304, footnote 26.

is recited.[54] There is a problem, unique to the Diaspora, that arises on Yom Tov regarding the lighting of the *Yahrzeit* candle. The *Yahrzeit* candle is considered a *Ner Shel Batala*, a non-purposeful candle.[55] It is lit in honor of one's parent and not for any Yom Tov purpose. It is forbidden to light a *Ner Shel Batala* on Yom Tov.[56] In Israel, since there is only one day Yom Tov, the *Yahrzeit* candle is lit on *Erev Yom Tov*. In the Diaspora, however, *Yizkor* is recited on the second day of Yom Tov. It would be problematic to light the *Yahrzeit* candle on *Erev Yom Tov Sheini* since the lighting would take place on Yom Tov.

This would also be the case if one had *Yahrzeit* on *Yom Tov Sheini*. The lighting would take place on Yom Tov, but since it does not serve a Yom Tov purpose, it would be forbidden.[57] *Bi'ur Halacha*, however, suggests that one may light the *Yahrzeit* candle where one eats because it adds to the light in the room.[58]

Today, however, with electric lights illuminating our homes, the addition of a *Yahrzeit* candle cannot be said to add to the light in a room. Rabbi Simcha Rabinowitz cites *Be'er Moshe* who points out that a candle in a well-illuminated room is like a *Shraga Be'Tihara*, a candle in broad daylight. Thus, lighting a *Yahrtzeit* candle in a room that is illuminated by electric lights would not add light to the room, and the reasoning of *Bi'ur Halacha*, mentioned above, could not be used.[59]

If the *Yahrzeit* candle is considered a *Ner Shel Batala*, how

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54. *Gesher HaChaim, chelek aleph*, chapter 31, page 337; *Nishmat Yisrael, chelek sheini, siman* 34, page 678. See, however, *Aruch HaShulchan, O.Ch.* 514:19, who disapproves of this custom.

55. *Bi'ur Halacha* 514, *d.h. Ner Shel Batala*; *Kitzur Shulchan Aruch* 98:1.

56. *Shulchan Aruch, O.Ch.* , 514:5.

57. *Mishnah Berurah* 548:3; *Kitzur Shulchan Aruch* 98:1.

58. *Bi'ur Halacha, loc. cit.*

59. *Piskei Teshuvot, chelek* 5, page 397.

can we light it *Erev Yom Tov Sheini*? The *K'tav Sofer* writes that the *Yahrzeit* candle is considered part of the mitzvah of honoring one's parents.[60] The Talmud tells us, "One should honor a parent during his lifetime and one should honor a parent after his death."[61] Since there is a mitzvah to honor a parent after death and lighting a *Yahrzeit* light is part of the mitzvah of honoring parents, one is permitted to light the *Yahrzeit* candle on Yom Tov. Moreover, if a person would not light a *Yahrzeit* candle, he would be saddened and this would take away from his *Simchat Yom* Tov, his enjoyment of Yom Tov. However, cautions the *K'tav Sofer*, one should light the *Yahrzeit* candle in Shul. *Maharil* is of the opinion that one is allowed to light additional candles in the synagogue because it adds to the enjoyment of Yom Tov.[62]

Although we rely on the leniency of the *K'tav Sofer*, the prevalent custom is that people today light *Yahrzeit* candles in their homes and not in Shul. Can one light a *Yahrzeit* candle on Yom Tov at home in a halachically appropriate manner? As Rabbi Ovadiah Yosef points out, candles in the synagogue can blacken the walls and the ceilings and can aggravate the health of individuals praying there.[63] Additionally, the presence of scores of *Yahrzeit* candles burning in Shul on Yom Tov might very well constitute a fire hazard. It seems, therefore, that the custom arose to light in one's home.

Be'er Moshe suggests lighting in a dark room to avoid the problem of *Shraga Bi'Tihara*.[64] *Kaf Ha'Chaim* is of the opinion that one may add as many candles as one wishes when lighting

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60. *Responsa K'tav Sofer, O.Ch., siman* 65.
61. *Kiddushin* 31b.
62. *Responsa Maharil, siman* 53.
63. *Yechave Da'at, loc. cit.*
64. *Responsa Be'er Moshe, chelek* 3, *siman* 76.

the Yom Tov candles, since the additional candles honor Yom Tov.[65] It might be best for those who have the custom to light when *Yizkor* is recited or for those who are commemorating a parent's *Yahrzeit* to light the *Yahrzeit* candle at the same time the Yom Tov candles are lit.[66] In this way, the candles may be viewed as honoring Yom Tov as well as honoring one's parents.

May the merit of lighting the *Yahrzeit* candle in memory of our parents remind us of our eternal link to our previous generations heralding back to Sinai, when we all stood at the foot of the mountain to receive our precious Torah.

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65. *O.Ch.* 514:64.

66. See *Nishmat Yisrael, loc.cit.*, page 679.

Letters To The Editor

To the Editor:

In his excellent article on Electric Shavers (XXXVI, p.88 note 27), David H. Schwartz quotes *Be'er Eshek* 70, who suggests that "beards may be kabbalistically desirable in Israel but not in *chutz la'aretz*" and reporting that "several students of the *Ari zal* would shave their beards...."

Please permit me to add a few comments from some not widely known sources.

The above-mentioned statement of *Be'er Eshek* is disputed by Rav Emanuel Ergas of Livorno in his *Divrei Yosef* (Livorno, Avraham Meldola, 1742, resp. 25). Rav Ergas states that people who are not versed in kabbala should not use it in their writings. He further quotes Rav Binyamin Ha-Kohen of Reggio who held that the assertion of *Be'er Eshek* that R. Menachem Azaria mi-Fano used to shave was false. R. Binyamin ha-Kohen added that "it is not proper (*raui*) to rely on the words of *Be'er Eshek* because several *ba'alei hora'a* disagreed with him in a number of responsa that were contrary to the halacha." Rav Ergas concludes, disputing the suggestion that there is any difference between growing a beard in Eretz Israel and in *Chutz La'aretz* because this mitzva is *chovat ha-guf*. The assertion that Rama mi-Fano did not have a beard is also disputed by *Minchat Elazar* (II:48), who refers to *Sefer Elim* by R. Yosef Shelomo Del Medigo of Candia (*Cfr. Sefer Elim*, Amsterdam, Menashe ben Israel, 1639, p. 29).

Sincerely yours,

DONATO DAVID GROSSER