Journal of Halacha and Contemporary Society

Number XXXVIII

Published by
Rabbi Jacob Joseph School

Journal of Halacha and Contemporary Society

Number XXXVIII
Fall 1999 / Sukkot 5760

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Rabbi Jacob Joseph School

The Journal of Halacha and Contemporary Society

Sukkot 5760
Number XXXVIII Fall 1999

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Surrogate Motherhood in the Case of High-Risk Pregnancy

Rabbi Eli D. Clark and Dr. Ze'ev Silverman

Introduction

Surrogate parenting arrangements have engendered substantial discussion among halachists concerning the question of maternity, *i.e.*, whether the legal mother of the child born from a surrogate arrangement is the birth mother or the genetic mother.[1] Yet, while the maternity issue has been extensively analyzed, halachic authorities generally have not focused their attention on the broader range of moral and legal issues relating to surrogacy. In order to explore a number of fundamental halachic issues raised by surrogate motherhood, this paper attempts to address the following question: How would halacha address the propriety of surrogate parenting in the case of a high-risk pregnancy?

Suppose, for example, a pregnant woman's life is threatened by her pregnancy. As a general matter, halachic principles justify

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1. See text accompanying nn. 16-35 below.

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aborting the fetus to save the life of the pregnant woman.[2] However, medical technology now permits the implantation of a preembryo or conceptus to the uterus of another woman; it may also become possible to transfer a post-implantation embryo or fetus from the genetic mother to a surrogate. In such case, the surrogacy option offers what is arguably a greater benefit than that of a genetically–related child for an infertile couple; it allows saving the life of the embryo/fetus.[3] Thus, the choice in this case is not between surrogate parenting and infertility but between surrogacy and the death of an embryo/fetus.

Such a scenario should not be dismissed as merely hypothetical. Conditions which could render pregnancy life-threatening are not rare.[4] If a woman with such a condition became pregnant, would halacha mandate therapeutic abortion or permit the transfer of the fetus to a host mother in a surrogacy arrangement?

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2. See text accompanying nn. 5-6 below.

3. Infertility represents an immense personal tragedy for those who suffer from it. But many arrangements and procedures available to infertile couples today are neither mandated by halacha nor represent a fulfillment of the commandment of procreation. Consequently, some halachists have expressed a certain hesitancy toward embracing some of these arrangements and procedures. On this issue, see the comments of Rabbi J. David Bleich, "Surrogate Motherhood," *Tradition* 32:2 (Winter 1998): 146-49.

4. Severe respiratory, pulmonary and auto-immune disorders can seriously increase the risk of mortality from pregnancy. For example, women with Marfan's syndrome, a genetic disorder, are discouraged from becoming pregnant if they have previously exhibited cardiovascular complications. See P. Tsipouras, *et al*., "Heritable Disorders of Connective Tissue and Pregnancy," in N. B. Isada, *et al*., eds., *Maternal Genetic Disease* (Stamford, 1996).

Abortion and *Rodef*

Under Jewish law, a fetus which threatens the life of its mother may be aborted.[5] The source for this principle appears in the Mishnah: "If a woman in labor has a [life-threatening] difficulty, one dismembers the embryo within her, removing it limb by limb, for her life takes precedence over its life."[6] The question, however, is whether abortion of the fetus in such a situation is absolutely mandated. In other words, is one obligated to abort the embryo/fetus or may one pursue an alternative course, if available, which would preserve the life of the embryo/fetus as well as eliminate the threat to the mother's life?

The statement of the Mishnah, "Her life takes precedence

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5. On the halachic view of abortion, see Abraham Steinberg, ed., "Happalah," *Entzyklopedyah Hilchatit Refu'it* 2 (Jerusalem, 1991), 47-115; R. Aharon Lichtenstein, "Abortion: A Halakhic Perspective," *Tradition* 25:4 (Summer 1991):3-12; Abraham Sofer Abraham, *Nishmat Avraham* (Jerusalem, 1986), *Choshen Mishpat*, 220-39; Basil Herring, *Jewish Ethics and Halakhah for Our Time* (New York, 1984), 25-45; R. She'ar Yashuv Cohen, "Happalah Melachutit le-Or Ha-Halachah," *Halachah u-Refu'ah* 3 (Jerusalem, 1983), 86-90; R. Yechiel Michel Stern, "Happalah Melachutit," in *Ha-Refu'ah Le-Or ha-Halachah* 1 (Jerusalem, 1980), 1-147; Immanuel Jakobovits, "Jewish Views on Abortion," in Fred Rosner and J. D. Bleich, ed., *Jewish Bioethics* (New York, 1979), 118-33; Shiloh Refael, "Happalot Melachutiyyot," *Torah she-be-`al Peh* 18 (1976): 89-94; R. Ovadyah Yosef, "Hafsakat Herayon le-Or Ha-Halachah," in A. Steinberg, ed., *Sefer Assia* 1 (Jerusalem, 1976), 78-94; A. Steinberg, "Happalah Melachutit le-Or Ha-Halachah," *ibid*., 107-24; J. D. Bleich, "Abortion in Halakhic Literature," *Tradition* 10:2 (Winter 1968):72-120 (= *Contemporary Halakhic Problems* [New York, 1977], 325-71); David Feldman, *Marital Relations, Birth Control and Abortion in Jewish Law* (New York, 1968), 251-294: F. Rosner, "The Jewish Attitude Toward Abortion," *Tradition* 10:2 (1968):48-71 (= *Modern Medicine and Jewish Ethics* [New York, 1991], 133-54).

6. *Ohalot* 7:6.

over its life," clearly establishes that saving the mother's life is halacha's first priority, but the Mishnah does not rule out the use of alternative methods to save her life. Thus, the *locus classicus* for therapeutic abortions does not *per se* mandate such abortions where alternatives are available.

In his formulation of the abortion rule, Rambam writes that abortion is justified in the case of a fetus which threatens its mother's life, "because it is like a *rodef* (pursuer) seeking to kill her."[7] Whether or not a fetus in the womb or birth canal may be viewed as its mother's pursuer has been a matter of considerable controversy among halachic authorities. The Gemara, for example, presents an opinion that the fetus threatening the life of its mother is not a *rodef*; rather, the woman is pursued "from heaven," *i.e.*, by an act of God.[8] A number of attempts have been made to reconcile this statement with Rambam's view classifying the fetus as a *rodef*.[9] Nevertheless, if the fetus does have a status of *rodef*, the question of whether a therapeutic abortion is absolutely mandatory is readily resolved: A pursuer may be killed only if a less severe measure, such as maiming, would not prevent the pursuer from committing his crime.[10] Similarly, according to Rambam's view, a fetus may be killed for threatening the life of its mother only

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7. *Mishneh Torah, Hilchot Rotze'ach* 1:9. Cf. *Shulchan Aruch, Choshen Mishpat* 425:2. A *rodef* is one who is threatening the life of another and therefore may be killed either in self-defense or by third-party intervention.

8. *Sanhedrin* 72b. Indeed, Rambam himself states that the threat posed by the fetus to the mother during childbirth is "*tiv`o shel olam* (the nature of the world)." See the sources cited in the previous note.

9. See the sources cited in J. D. Bleich, *op. cit.*, 88-94; D. Feldman, *op. cit.*, 277-81; A. S. Abraham, *op. cit.*, 236-39.

10. *Mishneh Torah, Hilchot Rotze'ach* 1:7. Cf. *Shulchan Aruch, Choshen Mishpat* 425:1.

if less severe measures would not prevent the threatened harm.[11] Thus, Rambam clearly would sanction a non-lethal alternative to abortion.

One interpreter of Rambam goes further. According to R. Isaac Lamperonti, a fetus is considered a *rodef* only if it is the sole threat to the pregnant woman's life. However, in the case of a woman who suffers from a preexisting medical disorder, the fetus would not be a *rodef*, because other circumstances are contributing to the woman's ill-health. In such case, reasons R. Lamperonti, abortion is not permitted.[12]

A number of more recent authorities would agree that abortion to save a mother's life is not absolutely mandatory, though they do not apply the rule of *rodef*. R. Isser Judah Unterman, late Chief Rabbi of Israel, contends that abortion constitutes *avizrayhu shel retzichah* (an appurtenance of homicide); he therefore prohibits aborting an embryo or fetus where a non-lethal alternative is available.[13] R. Solomon Drimmer takes the position that abortion is permitted only in cases in which death from pregnancy is certain; in any other case, he prohibits abortion.[14] R. Drimmer bases his conclusion on the following rationale: in the eyes of halacha, abortion itself represents a health risk to the mother. Therefore, where pregnancy creates a risk of death, but no certainty, such risk is balanced by the risk which halacha associates with abortion, and the proper course is to refrain from intervention of any

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11. See R. Moses Samuel Horowitz, *Responsa Yedei Moshe* (Pietrokow, 1898), 4:8; R. Solomon ha-Kohen, in *ibid.*, 5:8; R. Isaac Schorr, *Responsa Ko'ach Shor* (Kolomea, 1888), no. 20.

12. R. Isaac Lamperonti, *Pachad Yitzhak* (Lyck, 1864), s.v. *nefalim*, 79b.

13. "Be-Inyan Piku'ach Nefesh shel Ubbar," *Noam* 6 (1963):1-11 (= *Shevet mi-Yehudah* [Jerusalem, 1983], 359-67). Cf. *ibid.*, 94.

14. *Bet Shelomoh* (Lemberg, 1891), *Choshen Mishpat*, no. 120.

kind. R. Eliezer Judah Waldenberg rules that a pregnant woman with terminal cancer is permitted to carry to term, though the pregnancy might shorten her own life.[15] It seems likely then that most contemporary *poskim*, like R. Waldenberg, would permit a potentially life-threatening pregnancy to end in abortion, but would not mandate it where an alternative is available.

The Surrogacy Option

Assuming that abortion is (at least) not mandatory where non-lethal options exist, the question remains whether surrogacy is a legitimate alternative under Jewish law. Surrogate parenting arrangements might be prohibited halachically for any of the following reasons: (1) doubts regarding maternal identity; (2) risk of adultery and incest and consequent *mamzerut*; (3) *hotza'at zera le-vatalah* (wasteful emission of semen); (4) health risks to the host; and (5) moral considerations. These issues will be explored below.

Maternity Issues

As observed above, the advent of surrogate motherhood has provoked extensive discussion among contemporary halachists regarding the question of maternity, *viz*., whether the genetic mother or gestational mother is considered the halachic mother of the resulting child.[16] The earliest halachic

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15. R. Rabbi Eliezer Judah Waldenberg, *Responsa Tzitz Eliezer* 9 (Jerusalem, 1967), no. 239.

16. Maternity is a determining factor in a wide range of halachic issues, including primogeniture, mourning obligation, consanguinity, and personal status as Jew/gentile. For a summary of views on the competing maternity claims of in the case of surrogate motherhood, see A. Steinberg, ed., "Hafrayah Chutz-Gufit mi-Toremet Zarah," *Entzyklopedyah Hilchatit Refu'it, op. cit*., 129-38; Daniel Sinclair,

attempt to resolve competing claims of maternity dates from 1908, in an analysis of a case of ovarian transplant.[17] The conclusion -- that the transplant recipient is the legal mother of any offspring -- is premised on an analogy to a talmudic rule of horticulture which states that fruit of a seedling grafted onto a mature tree is treated as fruit of the tree.[18] A similar ruling was issued some twenty-five years later.[19]

"Surrogacy and Cloning," *Le'ela* 44 (October 1997):24-27; Mordechai Halperin, "Terumat Chomer Geneti be-Tippulei Poriyyut -- Hebetim Refu'iyyim ve-Hilchatiyyim," *Torah she-be-al Peh* 33 (1992):101-15; *idem*, "Applying the Principles of Halakhah to Modern Medicine: In Vitro Fertilization, Embryo Transfer and Frozen Embryos," *Proceedings of the Association of Orthodox Jewish Scientists* 8-9 (1987):197-212; Joshua Ben-Meir, "Horut Mishpatit ve-Horut Genetit ba-Halachah," *Assia* 12:3-4 (47-48) (December 1989), 80-88; *idem*, "Hafrayat Mavchanah -- Yichus Ubbar ha-Nolad le-Em Pundaka'it u-le-Em Biyologit," *Assia* 11:1 (41) (May 1986):25-40; Michael J. Broyde, "The Establishment of Maternity and Paternity in Jewish and American Law," *National Jewish Law Review* 3 (1988):117-52; J. D. Bleich, "In Vitro Fertilization: Maternal Identity and Conversion," *Tradition* 25:4 (Summer 1981):82-102 (= *Contemporary Halakhic Problems* IV (New York (1995), 237-272); A. S. Abraham, *op. cit.*, *Even ha-Ezer*, 15-17. Regarding the establishment of maternity under U.S. law in a surrogacy situation, see Malina Coleman, "Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction," *Cardozo Law Review* 17:3 (January 1996):497-530.

17. R. Benjamin Aryeh Weiss in *Va-Yelaket Yosef* 10 (1908), no. 9 (= *Responsa Even Yekarah* [Drohobitsch, 1913], no. 29), cited in Azriel Rosenfeld, "Judaism and Gene Design," *Tradition* 13:2 (Fall 1972):77. The case of ovarian transplant was hypothetical in 1908 (although falsely reported as factual) and remains so today.

18. *Sotah* 43b. Fruit of a mature tree is permitted to be eaten, as opposed to the fruit of tree grown in the first three years after planting which is forbidden as *orlah*.

19. R. Yekutiel Aryeh Kamelhar, *Ha-Talmud u-Mada`ei ha-Tevel* (Lemberg, 1928), nos. 44-45, cited in J. D. Bleich, "Survey of Recent Halakhic Periodical Literature," *Tradition* 13:2 (Fall 1972):128 (=

On the issue of surrogate parenting arrangements, the majority of authorities have ruled that the gestational mother -- not the genetic mother -- is the legal mother of the child transplanted as an embryo/fetus. One of the first to address the issue, R. Zalman Nehemiah Goldberg, grounds his holding in a talmudic rule that twins conceived by a gentile mother who converted to Judaism during gestation are considered children of the same mother, *i.e.*, maternal brothers.[20] Given that conversion to Judaism generally severs all familial relationships for purposes of halacha, the twins' relationship to their mother cannot derive from their conception, because it preceded the mother's conversion. Therefore, maternity must be established by birth, at which point the mother had already converted to Judaism.[21] R. Eliezer Judah Waldenberg, R. Aaron Soloveichik, R. Israel Meir Lau, R. Moses Hershler, R. Moses Sternbuch and R. Joseph Elyashiv also rule that the halachic mother in a surrogate arrangement is the birth mother.[22]

Contemporary Halakhic Problems [New York, 1977], 108). See also R. E. J. Waldenberg, *Responsa Tzitz Eliezer* 7 (Jerusalem, 1963), no. 206; 10 (Jerusalem, 1970), no. 25:26:3.

20. *Yevamot* 97b.

21. R. Zalman Nehemiah Goldberg, "Yichus Immahut be-Hashtalat Ubbar be-Rechem shel Acher," *Techumin* 5 (1984):248-59. R. Goldberg allows that R. Jacob of Lissa might conclude that the genetic mother is the legal mother. See R. Solomon Lifschutz, *Responsa Chemdat Shelomoh* (Warsaw, 1836), *Even ha-Ezer*, no. 2.

22. R. E. J. Waldenberg, *Responsa Tzitz Eliezer* 20 (Jerusalem, 1995), no. 49; R. Moses Soloveichik, "Be-Din Tinok Mavchanah," *Or ha-Mizrach* 100 (1981), 122-28; R. Israel Meir Lau, *Yachel Yisrael* 1 (Jerusalem, 1992), no. 29; R. Moses Hershler, *Halachah u-Refu'ah* 1 (Jerusalem, 1980), 316; *idem*, "Tinok Mavchanah ba-Halachah," *Torah she-be-`al Peh* 25 (1984):124-29; R. Moses Sternbuch, *Bi-Shvilei ha-Refu'ah* (1986), 29-36 (tr. *Pathways in Medicine* [Netanya, 1995], 108-13); A. S. Abraham, *Nishmat Avraham* 4 (Jerusalem, 1981), 183-86. But see R. E. J. Waldenberg, *Responsa Tzitz Eliezer* 15 (Jerusalem, 1985), no. 45,

An alternate theory exists, though it has not been embraced by the preponderance of contemporary halakhic authorities. R. Ezra Bick, a *rosh yeshivah* at *Yeshivat Har Etzion* in Israel, notes that the case of the mother who converts does not prove that birth, in and of itself, is sufficient to determine legal maternity in the absence of a genetic relationship.[23] Rather, in the conversion case the woman is also the genetic mother of the twins. Hence, it is possible that maternal identity is determined at the time of conception, then formalized when the fetus leaves the womb. Moreover, while conversion generally annuls pre-existing familial relationships, a pregnant woman's conversion would sever her own familial ties, but not that of the embryo/fetus in her womb.[24] Therefore, R. Bick focuses on a talmudic passage which poses an unresolved question regarding giving birth to a first-born animal: "If two wombs were attached together and [a fetus] emerged from one and entered the other,

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stating that a child born through in vitro fertilization has no halachic parents. In an unpublished letter, R. Waldenberg draws an analogy between surrogate motherhood and the ovarian transplant discussed in the responsum of R. Benjamin Weiss cited in n. 17 above. R. Waldenberg argues that, just as the recipient of an ovarian transplant is the legal mother of any offspring, the gestational mother is the halachic mother of a child born in a surrogacy arrangement See A. S. Abraham, *op. cit.*, 184-85. However, the analogy is difficult to understand. In the case of an ovarian transplant, the organ becomes a permanent organ of the recipient and subsequent offspring would be conceived in her body. In contrast, the ovum implanted in a surrogate is expelled at parturition and may be fertilized in vitro.

A New York court also concluded that a gestational mother who received an egg from an anonymous donor was the legal mother of a child born in a surrogacy arrangement. See *McDonald v. McDonald*, 196 A.D.2d 7, 608 N.Y.S.2d 477 (1994). The court based its decision on the surrogate's intent to procreate and raise the child.

23. R. Ezra Bick, "Yichus Immahut be-Hashtalat Ubbarim," *Techumin* 7 (1986):266-70.

24. See Rashi, *Yevamot* 98a, s.v. *ha de-amur*; *lo teima.*

what is the law? [Do we say] its own [womb] is exempted (*i.e.*, is treated as giving birth to a first-born), while the one not its own is not exempted; or perhaps the one not its own is also exempted."[25] The Gemara answers, "*Teku*," *i.e.*, leaves the question unresolved. But R. Bick points out that the use of the term "*dideih* (its own)" indicates that the Talmud views the first animal -- where the fetus was conceived -- as the mother and views the second animal -- which gives birth to the young animal -- as not the mother.[26] On this basis, R. Bick concludes that conception determines halachic maternity, rendering the genetic mother, as opposed to the host mother, the mother for halachic purposes.[27] Dr. Itamar Warhaftig and the late R.

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25. *Chullin* 70a.

26. This analysis is also cited in A. S. Abraham, *Nishmat Avraham* 5 (Jerusalem, 1983), 120-21 and R. Z. N. Goldberg, *op. cit.*, 253. However, R. Goldberg dismisses the talmudic passage as a proof of maternity by interpreting it as relating to a fetus that had completed its term.

27. A number of state courts in the United States have ruled that the genetic mother is the legal mother in the case of a surrogacy arrangement. See *Belsito v. Clark*, 67 Ohio Misc.2d 54, 644 N.E.2d 760 (1994); *Johnson v. Calvert*, 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776 (1993).

In a subsequent article, R. Bick adopts a different approach, arguing that the halachic sources do not provide a clear answer to the question of maternal identity in a surrogacy situation. Eschewing what he calls "conventional halachic methodology," R. Bick presents a novel application of the Brisker method, surveying the aggadic literature to derive the "conceptual framework" underlying the rabbinic definition of maternity. He contends that *Chazal* conceived the roles of male and female in procreation in quasi-agricultural terms, whereby the male deposits a seed in the fertile "ground" of the woman. Accordingly, the maternal role in procreation would be fulfilled, in the typical surrogacy situation, by the gestational mother. See R. E. Bick, "Ovum Donations: A Rabbinic Conceptual Model of Maternity," *Tradition* 28:1 (Fall 1993):28-45.

Solomon Goren also adopt this conclusion.[28]

R. Abraham Isaac Kilav adopts an intermediate position between R. Goldberg and R. Bick. As a general rule, he concurs with R. Goldberg that maternity is established at birth, as indicated by the case regarding the convert who gives birth to twins. However, R. Kilav also adduces a number of sources indicating that a mother who converts to Judaism may give birth to a gentile.[29] On this basis, he concludes that a child's Jewishness is determined by genetic relationship; once the child's Jewishness is established, maternity of the child is determined by birth. Thus, if the genetic mother is gentile and the gestational mother is Jewish, the child is a gentile and bears no relationship to the surrogate.[30] Conversely, if the genetic mother is Jewish and the surrogate is gentile, the child is Jewish and bears no relationship to the surrogate. But if both genetic and gestational mothers are Jewish, the maternal identity turns on birth; hence, the surrogate is the child's halachic mother. R. Kilav also concedes that, in the eyes of certain authorities, the child born of a surrogacy arrangement may not be treated for certain purposes as the natural sibling of the gestational mother's

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28. Itamar Warhaftig, "Kevi`at Immahut: Be-Shulei ha-Devarim (He'arat ha-Orech)," *Techumin* 5 (1984):268-69; *Ha-Tzofeh*, 17 December 1984, cited in M. Halperin, *op. cit*., 207; cf. sources cited in J. D. Bleich (above, n. 16), 96, n. 2.

29. See *Yevamot* 78a, indicating that the fetus of a pregnant convert requires immersion; *Kiddushin* 69a; *Mishneh Torah*, *Hilchot Avadim* 7:5; *Shulchan Aruch, Yoreh Deah* 267:61.

30. But see R. M. Soloveichik, *op. cit*., who writes in the name of his father, R. Aaron Soloveichik, that an embryo from a gentile woman implanted in a Jewish woman within forty days of conception would be halachically Jewish, based on the principle that an embryo less than forty days old is "mere water." See text accompanying nn. 70-71 below.

other children.[31]

The question of who is the halachic mother of the fetus has direct and practical implications for the implementation of surrogacy arrangements. Because of the severity of the prohibition against incestuous sexual relationships, halacha prescribes a strict policy aimed at preventing unintended incest. This aim of preventing incest may impose certain limitations on a surrogacy arrangement, depending upon whether the genetic or birth mother is the legal mother in the eyes of halacha. According to the school of thought ascribing maternity to the gestational mother, a Jewish surrogate mother would be the legal mother of the child born through the surrogacy arrangement and, hence, any of her other children would be natural siblings whom the child would be prohibited from marrying. However, if the child is unaware of the identity of the surrogate mother, as is likely in a commercial surrogacy situation, the child could unintentionally engage in an incestuous marriage with its own sibling. Indeed, a number of contemporary authorities prohibit surrogacy arrangements *le-chatchillah* for this reason.[32]

To prevent such a tragic consequence, the identity of the surrogate must be conveyed to the child; alternatively, the role of host could be restricted to non-Jewish women. In the case of a gentile surrogate, the resulting child would not be Jewish, and the child could then be converted by the donor couple, in the same manner as parents engaging in a standard adoption, thus halachically eliminating any filial relationship to its natural siblings. In this way, no unintended incest could result from a

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31. R. Abraham Isaac Kilav, "Mihu Immo shel Yillod, he-Horeh o Ha-Yoledet," *Techumin* 5 (1984):260-67.

32. *Ibid.*, 184-86. The *poskim* who so prohibit are R. Auerbach, R. Elyashiv and R. Waldenberg.

surrogacy arrangement.[33] Similarly, the most stringent view, which assumes that both the genetic and gestational mother may have a maternal relationship to the child born of a surrogacy arrangement, could mandate use of a non-Jewish surrogate. On the other hand, according to the school which views the genetic mother as the legal mother of the child, the identity of the surrogate mother has no legal consequences for the child. Therefore, the surrogate parent may be a Jew or gentile, a family member or a total stranger, with no concern that the child may later engage in unintended incest.

Adultery

In addition to the risk of incest, a surrogacy arrangement may raise concerns of adultery. Halacha defines adultery as sexual intercourse between a married woman and a man who is not her husband. A number of contemporary halachic authorities have extended this prohibition to artificial insemination of a married woman with sperm from a donor (AID).[34] Other halachists, including R. Moses Feinstein, disagree,

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33. Cf. R. Z. N. Goldberg, "Takalot ha-Alulot li-Tzmo'ach me-Hashtalat Ubbarim," *Techumin* 10 (1989):273-81, discussing the problem of unintended incest in a situation involving the anonymous donation of an ovum. However, R. Goldberg does not address the situation in which the identity of the surrogate -- whom R. Goldberg regards as the halachic mother -- is unknown to the child. Note that R. Goldberg's apparently permissive view regarding an anonymous ovum donation is disallowed by R. Elyashiv. See A. S. Abraham, *op. cit.*, 184.

34. See, *e.g.*, R. Judah Leib Tzirelson, *Responsa Ma`archei Lev* (Kishinev, 1932), no. 73; R. Samuel Woszner, *Responsa Shevet ha-Levi* 3 (Bnei Brak, 1976), *Even ha-Ezer*, no. 175; R. Menachem Kirschenbaum, *Responsa Menachem Meshiv* 2 (Lublin, 1936-38), no. 26; R. Dov M. Krauser, "Hazra`ah Melachutit," *No`am* 1 (1958):122ff; R. Ovadyah Hadaya, "Hazra`ah Melachutit," *ibid.*, 130-37; R. Abraham Lurie, "Dilma Lav Aviv Hu," *Ha-Posek* 114 (Heshvan 1949), 1-754-56, *Ha-Posek*

arguing that insemination in the absence of sexual intercourse cannot constitute an adulterous act, though AID may still generally be prohibited for other, less fundamental reasons.[35] An important consequence of this debate, in addition to the severity of prohibition, is the status of the child born as a result of AID; if AID constitutes adultery, a resulting child would be a *mamzer*, but if no adultery is involved, the child would avoid such status.

AID is frequently used to impregnate the surrogate in cases in which a prospective mother is incapable of donating ova. According to the more lenient school of thought, of course, as long as no intercourse takes place, no adultery can occur. Hence, no matter which surrogacy procedure is adopted, no issue of adultery arises. However, according to the more stringent opinion which equates AID with adultery, the question remains whether surrogate parenting could violate the prohibition against adultery.

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115 (Kislev 1949), 1-772-74; R. E. J. Waldenberg, *Responsa Tzitz Eliezer* 3 (Jerusalem, 1954), no. 27. For summary discussions, see M. Halperin, "Applying the Principles of Halakhah to Modern Medicine: In Vitro Fertilization, Embryo Transfer and Frozen Embryos," *Proceedings of the Association of Orthodox Jewish Scientists* 8-9 (1987):197-212; J. D. Bleich (above, n. 3), 149-53; *idem, Judaism and Healing: Halakhic Perspectives* (1981), 80-84; R. Y. M. Stern, "Hafrayah Melachutit," *op. cit.*, 1-102 (second pagination); F. Rosner, "Artificial Insemination in Jewish Law," *Judaism* 19 (1970):452-64 (= *Modern Medicine and Jewish Ethics*, 85-99); Immanuel Jakobovits, *Jewish Medical Ethics* (New York, 1975), 244-50, 261-66; A. S. Abraham, *op. cit.*, *Even ha-Ezer*, 11-13.

35. See, *e.g.*, R. Shalom Mordechai Schwadron, *Responsa Maharsham* 3 (New York, 1961), no. 268; R. Aaron Walkin, *Responsa Zekan Aharon* 2 (New York, 1951), no. 97; R. Mordechai Jacob Breisch, *Responsa Chelkat Ya`akov* (Jerusalem, 1951), no. 24; R. Yechiel Jacob Weinberg, *Seridei Esh* 3 (Jerusalem, 1966), no. 5; R. Ovadyah Yosef, *Responsa Yabi`a Omer* 2 (Jerusalem, 1956), *Even ha-Ezer*, no. 1; R. Solomon Zalman Auerbach, "Hazra`ah Melachutit," *No`am* 1 (1958):165; R. Joshua

At first blush, the answer would appear to depend upon two factors: the marital status of the surrogate and which surrogacy procedure is under consideration. If the surrogate is an unmarried woman, no adultery can occur, for the simple reason that halachic adultery must involve a married woman. If the surrogate is a married woman, adultery could become an issue, depending upon the nature of the procedure used to impregnate the surrogate.[36] Currently two such procedures are available. One, known as gamete intrafallopian transfer (GIFT), involves the implantation of sperm from the genetic father and ova from the genetic mother into the Fallopian tube of the surrogate. From a halachic perspective, the implantation of sperm into the reproductive tract of the surrogate renders GIFT analogous to AID. Consequently, given a surrogate who is a married woman, GIFT would likely be considered adultery according to those authorities who so classify AID. An alternate procedure, zygote intrafallopian transfer (ZIFT), involves (a) in vitro fertilization of the donor mother's ovum with the sperm of her husband, followed by (b) implantation of the zygote into the surrogate. If the surrogate were a married woman, would this procedure constitute adultery?

No authority has been found who addresses this question. However, it appears to these writers that a strong argument could be made that no issue of adultery would arise in such a case. In the case of AID, stored frozen semen from a donor is thawed and introduced by a physician into the vaginal canal of the woman. Although the introduction is by mechanical means, the procedure nevertheless mirrors sexual intercourse. In contrast, where a fertilized ovum is implanted into the surrogate, the sperm *qua* sperm no longer exists. This argument

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Baumol, *Responsa Emek Halachah* (New York, 1934), no. 68; R. Ben Zion Uziel, *Responsa Mishpetei Uziel, Even ha-Ezer* 1 (Tel Aviv, 1935), no. 19; R. M. Feinstein, *Responsa Iggerot Moshe, Even ha-Ezer* 1 (New York, 1961), nos. 70, 71.

would become still stronger when applied to the case of an implanted fetus, a procedure which future technology may someday allow.

An analogous issue may arise with respect to incest. Among the women who may be willing to serve as a surrogate mother are close relatives of the donor husband or his wife. However, a husband is forbidden to engage in sexual relations with a number of his or his wife's female relatives, such as a sister or mother. Consequently, the permissibility of certain relatives serving as hosts in a surrogacy arrangement would depend upon whether the surrogacy procedure in question is viewed as the halachic equivalent of sexual relations.[37]

Hotza'at Zera le-Vatalah

An additional halachic consideration implicated by surrogacy arrangements, according to some authorities, is *hotza'at zera le-vatalah* (wasteful emission of semen).[38] As explained above, ZIFT involves in vitro fertilization (IVF). However, a small number of *poskim* prohibit IVF under any circumstances.[39] This view is primarily based on two halachic concerns, unintended incest, as discussed above, and *hotza'at zera le-vatalah*. These authorities reason that fertilization outside

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36. Cf. the Israeli Surrogacy Law (1996) § 2[3][a], generally prohibiting a married woman from serving as a surrogate, but permitting an exception in special cases.

37. Cf. the Israeli Surrogacy Law (1996) § 2[3][b], prohibiting any relative of the sperm or ovum donor from serving as a surrogate.

38. On this principle, see *Entzklopedyah Talmudit* 11 (Jerusalem, 1965), 129-41.

39. See R. E. J. Waldenberg, *Responsa Tzitz Eliezer* 15, no. 45; R. M. Sternbuch, *op. cit.*; cf. the comments of R. Meir Amsel, *Ha-Ma'or* 244 (May-June 1978), 44-45. For similar reasons, some authorities prohibit artificial insemination. See the sources cited in n. 34 above. See also

the body of a woman is unnatural. Therefore, the discharge of semen for purposes of IVF will result in waste of all of the donated semen, if the IVF is unsuccessful, and waste of the excess semen if the IVF is successful. In either case, *hotza'at zera le-vatalah* is an inevitable result of IVF. However, most contemporary authorities reject this argument, ruling that IVF is permissible for infertile couples.[40]

Risk to Host Mother

Another critical halachic issue regarding surrogacy arrangements is whether they pose serious risks to the physical health of the host. As noted above, two procedures are generally available for creating a surrogacy arrangement: GIFT, in which sperm and ovum from the genetic parents are implanted directly into the uterine tube of the surrogate, and ZIFT, in which a fertilized egg or preembryo is implanted. Gametes or zygotes are obtained from the donor and implanted into the host either via laparoscopy under general anesthesia or transvaginally with only local or no anesthesia. Each of these procedures presents inherent risks, primarily related to the possibility of hemorrhage following perforation of the Fallopian tube during cannulation, and introduction of infection. In addition, the risk of ectopic pregnancy may be increased following these procedures.[41]

Moses Drori, "Ha-Handassah ha-Genetit: `Iyyun Rishoni ba-Hebetim ha-Mishpatiyyim ve-he-Hilchatiyyim," *Techumin* 1 (1980):280-96; A. Steinberg, ed. (above, n. 16), 128-29.

40. See the sources cited in n. 35 above. See also R. A. Nebenzahl, "Hafrayah be-Mavchanah -- He'arot," in A. Steinberg, ed., *Emek Halachah* 2, 92-93; R. O. Yosef, cited in M. Drori, *op cit.*, 287.

41. See M. G. Chapman, "Assisted Reproduction," in G. Chamberlain, ed., *Turnbull's Obstetrics* (London, 1994), 283-98; M. Ribic-Pucelj, *et al.*, "Risk Factors for Ectopic Pregnancy After *In Vitro* Fertilization and Embryo Transfer," *Journal of the Association of Reproduction and Genetics* 9 (1995):594-98; N. Rojansky and J. G.

Nevertheless, the process of embryo transfer as currently practiced has proven to be safe, with no greater incidence of lethal complications to the recipient than occur during the course of routine pregnancies.[42]

Of course, pregnancy itself is associated with potentially lethal complications, such as the sepsis and acute hypertension associated with preeclampsia.[43] In addition, studies continue regarding the potential for psychological harm to the surrogate resulting from the surrender of the child after birth. It seems reasonable to assume, however, that any such psychological risk would be similar or equivalent to the risk associated with routine and universally accepted adoption arrangements. Finally, technology may soon develop permitting transfer of a post-implantation embryo or a fetus through surgery, with the attendant risks of general or "spinal" anesthesia and post-operative infection, as well as potentially problematic challenges to the host immune system by introduction of a foreign body.

As a general rule, halacha permits an individual to bear the risks of surgery for the purpose of saving one's life or improving one's health.[44] However, in the ordinary case of a surrogate mother, no threat to her health exists prior to undergoing the implantation procedure. To the contrary, with respect to the surrogate, surgical implantation would constitute elective surgery, which is generally prohibited in Jewish law.[45]

Schenker, "Heterotopic Pregnancy and Assisted Reproduction -- An Update," *Journal of the Association of Reproduction and Genetics* 7 (1996):594-601.

42. *Ibid.*

43. W. M. Barron, "Hypertension," in W. M. Barron, *et al*., eds., *Medical Disorders During Pregnancy* (St. Louis, 1996), 1-12.

44. Regarding self-endangerment in halacha, see generally R. Ze'ev Metzger, "Hatzalah ve-Sakkanah ba-Halachah," in *Ha-Refu'ah le-Or ha-Halachah* 4 (Jerusalem, 1985), 1-64; A. Steinberg, ed., "Sikkun Atzmi,"

Even where a transfer procedure involves no surgery, the surrogate exposes herself to the potentially lethal risks of pregnancy. Indeed, halacha assumes that the activity of child-bearing poses a direct physical threat to the health of the mother.[46]

In the case of a high-risk pregnancy where therapeutic abortion is indicated, the immediate justification for the transfer procedure is saving the life of the fetus. Whether the life of a fetus warrants exposing the surrogate to serious health risks depends upon the resolution of two questions: (1) Under what circumstances does halacha permit or even mandate risking one's life to save the life of another? (2) Does halacha view the opportunity to save fetal life as equivalent to the opportunity to save human life generally?

The first issue is one of general application. Jewish law posits an obligation to save the life of another. The Torah states, "You shall not stand idly by the blood of your fellow,"[47] and the Talmud determines that this obligation includes monetary expenditures to effect a rescue.[48] However, whether this obligation extends to physical endangerment is the subject of some dispute among halachists.[49]

Entzyklopedyah Hilchatit Refu'it 5 (Jerusalem, 1996), 3ff.

45. Elective surgery involves causing a wound, which is halachically prohibited even when self-inflicted. See generally *Entzyklopedyah Talmudit* 12 (Jerusalem, 1967), 679-87.

46. See generally *Entzyklopedyah Talmudit* 22 (Jerusalem, 1995), 350-62.

47. Leviticus 19:16.

48. *Sanhedrin* 73a, which also invokes Deuteronomy 22:2 as a source for the obligation to rescue.

49. In addition to the sources cited below, see R. Naftali Zvi Judah Berlin, *Ha-Amek She'elah* (Jerusalem, 1953), *She'ilta* 147:4; R. Meir Simchah of Dvinsk, *Or Same'ach, Hilchot Rotze'ach* 7:8; R. Abraham

R. Joseph Caro, citing *Hagahot Maimuniyyot*, holds that one is indeed obligated to risk one's life to save the life of another.[50] R. Caro's source is a story in the Palestinian Talmud in which R. Simeon b. Lakish declares his intention to risk his life to rescue a colleague abducted by brigands.[51] From this, R. Caro derives the principle that self-endangerment is mandatory to save another from certain death. This view is also adopted by R. Yair Chayyim Bachrach[52] and R. Chayyim David Abulafia.[53]

In contrast, R. David ibn Zimra (Radbaz) rules that anyone who risks his life to save another acts improperly.[54] Radbaz was addressing a particularly horrifying situation, in which a person was ordered by a despot to sacrifice a limb or else another person would be put to death. In such a case, he concluded , one who permitted his limb to be cut off would be a "pious fool." On the basis of this ruling, R. Eliezer Judah Waldenberg has written that self-endangerment to save another's life is prohibited.[55]

Zvi Eisenstadt, *Pitchei Teshuvah, Choshen Mishpat* 426; R. Solomon Zalman of Lyady, *Shulchan Aruch ha-Rav*, *Hilchot Nizkei Guf ve-Nefesh*, chap. 5; R. Yechiel Michel Epstein, *Aruch ha-Shulchan, Choshen Mishpat* 426:4. For summary discussions, see A. Steinberg, ed., *op. cit.*, 3-11; J. D. Bleich, "Compelling Tissue Donations" *Tradition* 27:3 (Spring 1993):59-61 (= *Contemporary Halakhic Problems* 4 [New York, 1995], 275-79); R. Z. Metzger, *op. cit.*, 10-30; R. Meir Joseph Schlousch, "Im Chayyavim le-Hikkanes le-Safek Piku'ach Nefesh kedei le-Hatzil Chavero," *Halachah u-Refu'ah* 3 (Jerusalem, 1983), 156-63.

50. *Kesef Mishneh, Hilchot Rotze'ach* 1:14; *Bet Yosef, Choshen Mishpat* 425. However, R. Joshua Falk, *Sefer Me'irat Enayyim, Choshen Mishpat* 426:2, notes that R. Caro does not codify this statement in the *Shulchan Aruch* and explains this omission as a consequence of the silence on this issue of earlier codifiers. See the sources cited in the previous note.

51. *Terumot* 8:4.

52. *Responsa Chavvot Yair*, no. 146.

53. *Responsa Nishmat Chayyim, Derushim* 11a.

Nevertheless, most contemporary halachic authorities insist that risking one's life to save the life of another is neither mandatory nor prohibited, but a noble and pious act.[56] They also qualify this principle somewhat. Thus, among those who permit undergoing surgery to save the life of another, such permission is limited to situations in which the survival of surgery is likely[57] or the successful rescue of the threatened life is almost assured.[58]

The preceding discussion deals only with the general saving of human life. However, these sources do not address whether these principles apply to saving fetal life. For the minority who prohibit undergoing surgery to save the life of another, the distinction is immaterial: self-endangerment would be prohibited in any case. But with respect to those who view the risking of life to save another as mandatory or permitted, the question remains whether such a rule would extend to a case in which fetal life is at risk.

The Value of Fetal Life

Is the life of an embryo/fetus of equal value to a mature human or even a neonate? The Mishnah states that the execution of a condemned woman who is pregnant is not postponed until after the birth of the child.[59] Commenting on this rule, the Talmud presents the opinion of R. Judah in the name of Samuel

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54. *Responsa Radbaz* 3 (Warsaw, 1882), no. 627.

55. See, *e.g.*, R. E. J. Waldenberg, *Responsa Tzitz Eliezer* 9, no. 45:13; 10 (Jerusalem, 1970), 25:7.

56. See, *e.g.*, R. I. J. Weisz, *Responsa Minchat Yitzhak* 6 (London, 1955), no. 103; R. M. Feinstein, *Responsa Iggerot Moshe, Yoreh De`ah* 2 (New York, 1973), no. 174:4.

57. See, *e.g.*, R. S. Woszner, *Responsa Shevet ha-Levi* 5 (Bnei Brak, 1983), no. 119.

that an abortion should be induced before execution in order to spare the woman the indignity of miscarrying at the time of the execution.[60] Thus, in certain situations the halacha subordinates the life of a fetus to the dignity of its mother, clear evidence that the preservation of fetal life does not represent a supreme halachic value on a par with the preservation of life of one already born.[61]

The Talmud also refers regularly to a fetus as "the limb of its mother."[62] This conception of the fetus is illustrated in the rabbinic interpretation of the verse in Exodus: "If men strive together and hurt a woman with child, so that her fruit depart and yet no harm follow, he shall be surely fined."[63] The *Mechilta* explains: "As compensation for the loss of the fetus."[64] In other words, the punishment for causing the miscarriage of a fetus -- as for causing any physical injury to a person–is monetary damages.[65] This rule draws a clear line between pre- and postnatal life. Purposeful destruction of the latter constitutes a capital crime. In contrast, feticide occasions liability for no more than financial compensation. A number of rabbinic authorities have noted this distinction and explicitly concluded that life of

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58. R. I. J. Weisz, *op. cit.*

59. *Arachin* 1:4. For a general review of this and other sources on the halachic status of a fetus, see A. Steinberg, ed., "Ubbar," *Entzyklopedyah Hilchatit Refu'it* 5, 115-47.

60. *Arachin* 7a. Note, however, that R. Yair Chayyim Bachrach prohibits aborting the fetus carried by a condemned woman, on the grounds that abortion would result in "*hashchatat zera* (the "destruction of semen)." See *Responsa Chavvot Yair*, no. 31.

61. Cf. R. Joseph Trani, *Responsa Maharit* 1 (Lemberg, 1861), nos. 97, 99.

62. *Chullin* 58a; *Gittin* 23b; *Nazir* 51a; *Baba Kama* 88b; *Temurah* 31a. Regarding whether this view is adopted for halachic purposes, see n. 101 below.

63. Exodus 21:22.

an embryo/fetus is not equivalent to the life of one already born.[66]

An additional consideration is the talmudic statement that an embryo/fetus less than forty days' old is "mere water."[67] This phrase appears in a discussion relating to the right of the daughter of a kohen to eat *terumah* after the death of her husband, not to the relative value of pre- and post-natal life. Nevertheless, a substantial number of authorities invoke the statement in support of leniency regarding abortion in the first forty days after conception.[68]

All of these sources clearly indicate that the halachic status of the unborn fetus is not equal to that of one already born. Yet a number of texts accord a high value to the life of a fetus. Thus, the Talmud rules that one may desecrate the Sabbath in order to save the life of a fetus of a woman who has died in childbirth.[69] On its face, this rule indicates a high value in saving fetal life. Ordinarily, the desecration of the Sabbath is a capital crime; one has limited permission to desecrate the Sabbath in order to save a human life, on the theory that the

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64. *Mishpatim*, *Nezikin* 8.

65. Cf. the statement of the Mishnah, *Niddah* 5:3, that one who kills a day-old infant is liable for murder, implying that such liability does not attach to feticide.

66. See, *e.g.*, R. J. Falk, *Sefer Me'irat Enayim*, *Choshen Mishpat* 425:2; R. Ezekiel Landau, *Noda` Bi-Yhudah* 2 (Vilna, 1904), *Choshen Mishpat*, no. 59; R. Tzvi Hirsch of Brody, *Responsa Tiferet Tzvi* (Warsaw, 1811), *Orach Chayyim*, no. 14.

67. *Yevamot* 69b. Cf. *Niddah* 3:7, which states that a fetus that is less than forty days old does not render the mother *teme'ah*.

68. See, *e.g.*, R. Meir Dan Plocki, *Chemdat Yisrael* (Pietrokow, 1927), no. 176; R. Chayyim Ozer Grydzinski, *Responsa Achi`ezer* 3 (New York, 1946), 65:14; R. Joseph Rosen, *Responsa Tzofenat Paane'ach* (Dvinsk, 1931), no. 59; R. S. Drimmer, *Responsa Bet Shelomoh*, *Choshen Mishpat*,

life that will be saved will observe many more Sabbaths.[70] The extension of this rule to the life of a fetus suggests that the value of fetal life too overrides the Sabbath laws.[71] Yet, most post-talmudic authorities explain this rule as a limited dispensation that does not represent a general obligation to save fetal life.[72] Moreover, according to some authorities, Sabbath desecration is warranted only for a fetus which is more than forty days old.[73] On the other hand, a number of halachists assume that one is obligated to save fetal life and that Sabbath desecration is warranted even for a fetus which is less than forty days old.[74]

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no. 162; R. Y. J. Weinberg, *Seridei Esh* 3, no. 349, in the name of Maharit; R. I. J. Unterman, *Shevet mi-Yehudah* (Jerusalem, 1955), 9ff; R. E. J. Waldenberg, *Responsa Tzitz Eliezer* 9, no. 236.

69. *Arachin* 7b.

70. *Shabbat* 151b.

71. See, *e.g.*, *Tosafot, Niddah* 44b, s.v. *ihu.*

72. R. Moses Nachmanides, *Torat ha-Adam*, in *Kitvei ha-Ramban* 2 (Jerusalem, 1964), 29, s.v. *u-ve-Hilchot Gedolot*; *idem, Chiddushei ha-Ramban* to *Niddah* 44b; R. Solomon ibn Adret, *Chiddushei ha-Rashba* (Jerusalem, 1987), *loc. cit.*, s.v. *ve-he-horgo chayyav*; R. Nissim Gerondi, *Chiddushei ha-Ran* (Bnei Brak, 1981), *loc. cit.*, s.v. *mai ta`ama*; R. J. Trani, *Responsa Maharit*, nos. 97, 99; R. David ibn Zimra, *Responsa Radbaz* 2, no. 695; R. Y. H. Bachrach, *Responsa Chavvot Yair*, no. 31; R. S. Drimmer, *Responsa Bet Shelomoh, Choshen Mishpat*, no. 132; R. N. Z. J. Berlin, *Ha-Amek She'elah, Sheilta* 167, s.v. *ve-davar zeh barur.* See also the sources cited in A. Steinberg, ed., *op. cit.*, 129, n. 199.

73. R. M. Nachmanides, *Torat ha-Adam*, *op. cit.*, in the name of "*ika de-sevira leih*"; R. D. ibn Zimra, *op. cit.*; R. N. Z. J. Berlin, *op. cit.* On the significance of the forty-day threshold for a fetus, see nn. 67-68 above and accompanying text.

74. *Sefer Halachot Gedolot* (Jerusalem, 1992), *Hilchot Yom ha-Kippurim*, 188, s.v. *ve-haicha de-ika choleh*; R. E. Landau, *Noda Bi-Yehudah* 2, *Choshen Mishpat*, no. 59; R. Chayyim Soloveitchik, *Chiddushei Rabbenu Chayyim ha-Levi, Hilchot Rotze'ach* 1:9. Cf. R. M. D. Plocki, *Chemdat Yisrael*, "Indexes and Addenda," 17; R. I. J. Unterman, *op. cit.*, 29ff; *idem,*

Likewise, contemporary authorities are divided on the obligation of risking life to save a fetus.[75] The late R. Solomon Zalman Auerbach, for example, rules that a woman cannot be required to undergo Caesarean section in order to save the life of the fetus in her womb.[76] R. Joseph Elyashiv disagrees.[77] Yet, even R. Auerbach agrees that a woman is permitted to assume the risk of surgery for the preservation of fetal life.[78] Thus, in the case of a willing surrogate, it appears that saving fetal life may justify exposing a prospective host to the physical risks associated with a surrogacy procedure.

Moral Considerations

A number of compelling moral objections have been raised against surrogate motherhood. One key concern is that of economic exploitation. Critics have pointed out that poor women are the most likely candidates to serve as surrogates, lured by the offer of financial compensation, while only more affluent couples would be able to afford to "employ" a surrogate.[79] Fearing the potential for economic exploitation, since the late 1980's a number of jurisdictions have enacted legislation barring the commercialization of surrogacy

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Noam 6 (1963):1-11. Ramban takes an intermediate position: one is not obligated to save fetal life, but one desecrates the Sabbath for a fetus that is not forty days old. See *Torat ha-Adam, op. cit.*

75. On this question, see R. Samuel Rosowsky, "Dinei Hatzalah u-Piku'ach Nefesh be-Ubbar," in M. Hershler, ed., *Halachah u-Refu'ah* 5 (Jerusalem, 1988), 83-105.

76. Cited in R. Joshua Neuwirth, *Shemirat Shabbat ke-Hilchatah* (Jerusalem, 1979), 189, n. 4.

77. Cited in A. Steinberg, ed., *op. cit.*, n. 189.

78. See n. 79 above.

79. See, *e.g.*, D. R. Bromham, "Surrogacy: Ethical, Legal and Social Aspects," *Journal of the Association of Reproduction and Genetics* 12

arrangements.[80] Despite these early attempts to prohibit the practice, surrogacy arrangements–commercial and non-commercial alike– continue to gain popularity, and several hundred children are born through them every year.[81] Nevertheless, the enforceability of a contract between a donor couple and prospective host mother continues to be a source

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(1995):509-16; E. Blyth, "Section 30–The Acceptable Face of Surrogacy?" *Journal of Medical Ethics* 20 (1993):87-92.

80. Surrogacy contracts are illegal in New York, Utah, Washington and the District of Columbia. See New York Domestic Relations Law § 123; Utah Code Annotated § 76-7-204(1)(d); Washington Revised Code Annotated § 26.26.250; D.C. Code Annotated § 16-402. Surrogacy contracts are unenforceable, but not illegal, in Arizona, Indiana, Louisiana, Michigan, Nebraska, North Dakota and Tennessee. See, Arizona Revised Statutes Annotated § 25-218(A); Indiana Code Annotated § 31-8-2-1; Louisiana Revised Statutes Annotated § 9:2713(a); Michigan Comp. Laws Annotated § 722.855; Nebraska Revised Statutes § 25-21,200(1); North Dakota Cent. Code § 14-18-05; Tennessee Code Annotated § 36-1-102(44)(a). Cf. Surrogacy Arrangements Act, 1987, H.R. 2433 (Great Britain), prohibiting the solicitation of women to serve as surrogates; Surrogate Parenthood Act 1988 (Queensland, Australia), prohibiting surrogacy arrangements in any form, with or without payment; Infertility (Medical Procedures) Act 1984, no. 10163 (Victoria, Australia), criminalizing making or receiving payment related to a surrogacy arrangement. According to Malina Cohen, *op. cit.*, 505, France banned surrogacy agreements in 1991.

Most other states have not enacted laws restricting surrogacy arrangements. Florida and Nevada generally allow enforcement of surrogacy agreements. See Florida Statutes Annotated § 742.15; Nevada Revised Statutes Annotated § 126.045. In addition, Arkansas, New Hampshire and Virginia permit the enforcement of judicially supervised surrogacy agreements. See Arkansas Code Annotated § 9-10-201; New Hampshire Revised Statutes Annotated § 168-B:21; Virginia Code Annotated § 20-159 to -165.

81. See, *e.g.*, the news report of the first surrogate birth in Israel, *Jerusalem Post*, February 20, 1998. 1997 estimates of the total number of children born from surrogacy arrangements in the United States

of controversy among jurists and ethicists.[82]

In order to analyze the halachic treatment of a surrogacy contract, one first must determine what kind of contract it is. The contract could be viewed as an adoption contract, whereby the host mother agrees to surrender custody of the child to the donor couple in exchange for payment.[83] This is the likeliest analysis, especially if one assumes the surrogate is the (sole) halachic mother of the child. Alternatively, if the genetic mother is the halachic mother, the contract could be viewed as a labor contract, in which the surrogate receives money in exchange for carrying and delivering the child of the donor couple.[84]

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range as high as 5,000.

82. See, *e.g.*, B. Steinbock, "Surrogate Motherhood as Prenatal Adoption," in T. A. Mappes and D. DeGrazia, eds., *Biomedical Ethics* (New York, 1996), 505-09. A number of state courts in the United States have refused to enforce surrogate parenting agreements. See, *e.g.*, *Soos v. Superior Court*, 179 Ariz.Adv. Rep. 22, 897 P.2d 1356 (1994); *Re Adoption of Paul*, 146 Misc.2d. 379, 550 N.Y.S.2d 815 (1990); *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988); *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981). Other courts have concluded that such agreements are enforceable. See *In re Adoption of Baby A*, 128 Or.App. 450, 877 P.2d 107 (1994); *Johnson v. Calvert*, 5 Cal.4th 84, 19 Cal.Rptr. 494, 851 P.2d 776 (1993); *Surrogate Parenting Associates, Inc. v. Commonwealth*, 704 S.W.2d 209 (Ky, 1986).

83. This analysis has been adopted by a number of state courts in the United States. See the decisions cited in the previous note.

84. This analysis was adopted in the unreported case of *Yates v. Keane* (Cir. Ct. Mich., January 21, 1988), cited in *In re Baby M*, 537 A.2d 1227, 1251, n. 11. It also has been suggested that a surrogacy contract involves "renting" the womb of the host mother. From a halachic perspective, however, the same rules would apply to such an agreement as apply to a labor contract. An alternate theory would treat the newborn child as the *perot* (usufruct) of the mother. In the agricultural context, *perot* may be bought and sold as an interest separate from its source, such as a field or a tree. However, the halachic sources do not apply this principle to human beings.

In the case of an adoption contract, it is unlikely such an agreement is halachically enforceable, although a *bet din* could endorse the contract's assignment of custody to the donor couple. The assignment of custody by halacha generally follows established principles designed to serve the best interests of the child.[85] Thus, as a general rule, infants must remain in the custody of their mother and should not be taken from her as long as she is nursing them.[86] However, this rule may apply only to a child who is old enough to recognize its mother.[87] Therefore, it is possible that a mother could surrender custody of a newborn before it became able to recognize her.[88] Yet, a general presumption exists that boys under the age of six and girls of any age should remain with their mother.[89] Nevertheless, some halachic authorities have diverged from this principle where the welfare of the child would be better served by assigning custody to the father.[90] In particular, where the mother's economic situation is poor, as is common in commercial surrogacy situations, custody of a child may assigned to the

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85. For a general survey of these principles in halachic literature, see Eliav Shochetman, "On the Nature of the Rules Governing Custody of Children in Jewish Law," *The Jewish Law Annual* 10 (1992), 115-57.

86. See the sources cited *ibid*., 122, n. 36.

87. See *Tosefta, Ketubot* 5:9; *Tosefta, Niddah* 2:4; *Ketubot* 59b-60a; *Mishneh Torah, Hilchot Ishut* 21:16; *Shulchan Aruch, Even ha-Ezer* 82:5.

88. Cf. R. Ovadyah Hadaya, *Responsa Yaskil Avdi* 2, *Even ha-Ezer*, no. 10.

89. *Tosefta, Ketubot* 11:4; *Ketubot* 65b, 102b; *Mishneh Torah, Hilchot Ishut* 21:16, 17, and the sources cited in E. Shochetman, *op. cit*., 124-30, 138-46.

90. See, *e.g*., *Responsa Darchei No`am, Even ha-Ezer*, no. 26, cited in E. Shochetman, *op. cit.*, 125; R. Samuel de Modena, *Responsa Maharashdam, Even ha-`Ezer*, no. 123, cited in E. Shochetman, *op. cit*., 143.

more affluent father.[91] In sum, while halacha might ratify the assignment of custody by a surrogate mother to a donor couple, it would not treat an agreement to that effect as legally binding.[92]

In the case of a labor contract, the general rule provides that a laborer is free to withdraw from an agreement to work, even after performance of the labor has begun.[93] The Gemara opposes compelling a person to perform any kind of labor against that person's will, because such compulsion constitutes an infringement of liberty and a form of servitude.[94] Where the employer suffers an irretrievable loss as a result of an employee's withdrawal (*davar ha-avud*), the worker who withdraws generally is obligated to compensate his former master for the full amount of such loss.[95] But if a surrogate mother wishes to withdraw from a surrogacy agreement during the term of her pregnancy, it would be necessary for her to either (a) make a prospective claim of custody, which would be governed by the principles discussed above, or (b) terminate the pregnancy, for which she would be liable to pay damages. Therefore, if a surrogacy contract constitutes an agreement by the host mother to perform services, the surrogate would be legally bound by the halachic rules applying to laborers.

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91. See R. Moses of Padua, *Responsa Maharam Padua* (New York, 1995), no. 53, and the sources cited in E. Shochetman, *op. cit.*, 145-46. In the case of a surrogate mother who is not Jewish, the paternal obligation to provide religious and moral education may override the gentile woman's claim to custody. Cf., *e.g.*, *Responsa Radbaz* 1, nos. 263, 360.

92. Cf. the sources cited in A. Steinberg, ed., *op. cit.*, 126.

93. *Baba Metzia* 10a and parallels; *Mishneh Torah, Hilchot Sechirut* 9:4.

94. *Ibid.*

95. *Ibid.* For a general discussion of labor contracts in halacha, see Aaron Levine, *Free Enterprise in Jewish Law: Aspects of Jewish Business Ethics* (New York, 1980), 33-57.

Although surrogacy arrangements have been criticized as "baby selling," halacha would likely not view a surrogacy agreement as the "sale" of an unborn child. As Rabbi J. David Bleich notes, surrogacy contracts usually are entered into before an egg is fertilized, at which point the embryo cannot be sold because it is a *davar she-lo ba la-olam* (a non-existent thing).[96] Indeed, the Gemara reports a view that, even after fertilization, an embryo/fetus remains a *davar she-lo ba la-olam* until birth, or until its existence becomes discernible.[97] Even assuming that a fetus could be sold, it is not clear that the mother would be treated as its "owner" for purposes of making such a sale. There is a well-known dispute regarding whether a fetus is viewed as the limb of its mother.[98] In addition, there is a dispute regarding the money paid to the father for causing a miscarriage;[99] some authorities view the payment as compensation, indicating that the father has a kind of economic "ownership" of the fetus, while other authorities view the payment as a fine, suggesting that a fetus does not have an "owner" for halachic purposes.[100] For these reasons, it would be difficult in the extreme to view a surrogacy agreement as a halachic contract to "sell" the fetus.

A second concern voiced by critics of surrogate arrangements relates to concerns that surrogacy, pursued on a widespread basis, could lead to a "commodification" of children, whereby infants are viewed less as human beings than objects of commerce. The value of motherhood itself, in this view, could be reduced to a kind of paid labor. With this in mind, R.

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96. R. J. D. Bleich, *op. cit.*, 159.
97. See *Baba Batra* 142a.
98. See the sources cited in A. Steinberg, ed., *op. cit.*
99. See text accompanying nn. 63-64 above.
100. See the sources cited in A. Steinberg, ed., *op. cit.*

Immanuel Jakobovits declared that "to use another person as an 'incubator' and then take from her the child she carried and delivered for a fee is a revolting degradation of maternity and an affront to human dignity."[101]

Halacha ascribes to human life both value and sanctity. The inestimable value of the lives of individuals, as opposed to humanity generally, is encapsulated in the famous rabbinic dictum, "One who saves the life of a single Jew is as one who has saved the entire world."[102] Any activity which would devalue or diminish the value of any individual human life would clearly run contrary to the spirit of Jewish law. Nevertheless, halacha does draw distinctions between ordinary circumstances and extreme situations. Activities which are generally discouraged may become permitted or even obligatory when circumstances warrant. The need to address questions on a case-by-case basis is fundamental to the halachic process. Therefore, without in any way discounting the general concerns regarding mass involvement in surrogate parenting, the legitimacy of surrogacy in a specific situation, such as a high-risk pregnancy, remains a halachic possibility.

Where the cause of the high-risk pregnancy is a heritable disorder, surrogate parenthood raises a third issue, namely, preventing the inheritance of defective genetic material. Proponents of eugenics would argue that, ethically speaking, a woman with a serious genetic disorder should be prevented from employing surrogacy in a manner that would pass on to a resulting child her abnormal and deleterious gene(s).[103]

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101. I. Jakobovits, *op. cit.*, 265.

102. *Sanhedrin* 37a and parallels.

103. See Laura Purdy, "Genetics and Reproductive Risk: Can Having Children Be Immoral?" in T. A. Mappes and D. DeGrazia, eds., *op. cit.*, 480-88.

Instead, such a woman who wishes to have children should follow some alternative method, such as adoption or artificial insemination of a surrogate.

Jewish law is not oblivious to the health of an individual's prospective children. Thus, for example, the Talmud advises against marrying a spouse from a family with a history of epilepsy or leprosy.[104] On the other hand, halachic authorities have resisted translating concern for the health of one's progeny into a blanket exemption from procreation.[105] Thus, R. Moses Feinstein has ruled that a man with a heritable genetic disorder is nevertheless obligated to marry and procreate.[106] R. Solomon Zalman Auerbach has expressed ambivalence on this issue.[107] However, these rulings are limited to Jewish males, who are obligated by halacha to procreate.[108] In contrast, a woman is not obligated to bear children.[109] Therefore, with respect to women who wish to prevent the birth of children with serious genetic disorders, some *poskim* have permitted the use of various

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104. *Yevamot* 64b.

105. See A. S. Abraham, *op. cit.*, 1, 68-70.

106. *Iggerot Moshe*, *Even ha-Ezer* 4 (New York, 1985), no. 73:2. See also R. E. J. Waldenberg, *Responsa Tzitz Eliezer* 15, no. 43. Cf. *Berachot* 10a, which recounts a legend in which the prophet Isaiah informs Hezekiah of a Divine decree of death as punishment for failing to fulfill the obligation of procreation. When Hezekiah protests that he forbore in order to thwart a prophecy that his future children would be unworthy, Isaiah rebukes him: "How do you presume to delve in to God's secrets? What you are commanded you must do, and what is pleasing to God He will do."

107. See A. S. Abraham, *op. cit.*

108. See generally *Yevamot* 6:6; *Mishneh Torah, Hilchot Ishut* 15:2; *Sefer ha-Chinnuch*, no. 1; *Shulchan Aruch, Even ha-Ezer* 1.

109. See the sources cited in the previous note. But see Tosafot, *Gittin* 41b, s.v. *lo tohu* and parallels. Cf. *Chiddushei ha-Ran*, *Kiddushin* 41a.

forms of contraception, ovarectomies, and tubal ligation.[110]

Conclusion

Surrogate motherhood involves a varied range of halachic issues, including maternal identity, incest, *mamzerut*, contract law and the obligation to procreate. Despite the complexity of these issues, they would not appear to dictate an absolute prohibition on surrogate motherhood, at least according to the majority of halachic authorities. Although the use of surrogate motherhood procedures for the purpose of circumventing infertility raises a host of troubling moral issues, these concerns are generally less relevant in the case of a high-risk pregnancy, where the aim of the procedure is preserving fetal life. Indeed, though an authoritative ruling has yet to be issued on the question, there seems little doubt that halacha could approve of a surrogacy arrangement in lieu of a therapeutic abortion.

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110. See R. M. Feinstein, *Iggerot Moshe, Even ha-Ezer* 1, no. 62 and *Even ha-Ezer* 3, no. 12; R. Abraham Bornstein, *Responsa Avnei Nezer, Choshen Mishpat*, no. 127; and the permissive view of R. S. Z. Auerbach, cited in A. S. Abraham, *op. cit*. But see R. I. J. Weisz, *Minchat Yitzhak* 3 (London, 1962), 26:1.

A Holiday At Sea?

Rabbi Tzvi Goldberg

For many centuries, rabbis have been overseeing kosher food products in the marketplace. Due to the advances of modern food production and the complexity of the industry, kosher food supervision has been organized in countries throughout the world and even on the high seas. The current worldwide explosion of cruise ship travel vacations has resulted in the proliferation of "kosher cruises" to meet the needs of the kosher consumer. However, there is an issue that must be dealt with before one decides to embark on such a cruise. This is the issue of travel with regard to Shabbat.

The Gemara in *Shabbat* 19a[1] cites the following *Braita:*

> The rabbis have taught – "One is forbidden to embark on a journey by boat less than three days before Shabbat." When is this applicable? For a purpose which is not a mitzvah, but for a mitzvah it is permissible. And [when traveling for a mitzvah within three days of Shabbat] the passenger must make arrangements with him [the gentile captain] to stop the boat before Shabbat,[2] [but

1. All references not annotated can be found in *Shabbat* 19a, or *Orach Chaim* 248, as appropriate.

2. See *Shevitat HaYam* by Rabbi Eliezer Yehuda Waldenberg, (author of *Responsa Tzitz Eliezer*), pg. 13, who cites differing explanations regarding the arrangements that must be made. See also note 14.

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> one need not be concerned] even if [the captain reneges on his agreement and] the boat doesn't stop. These are the words of Rebbi. Rabban Shimon Ben Gamliel says he does not have to [make such arrangements.] And from Tyre to Sidon [which are within a day's journey of each other] even on Friday it is permitted [to embark].

The passage above clearly states that within three days of Shabbat it is forbidden to undertake a journey with no mitzvah purpose. However, the Gemara is silent with regard to the reasoning behind the prohibition, leading to a multitude of opinions regarding the nature of this *gezaira*.[3] We will examine these opinions, analyze their halachic ramifications, and then discuss the operative halacha.

I Opinions of the Rishonim

1-**Baal Hamaor:** An element of danger exists on a boat from storms and other nautical hazards. Therefore, a seafarer will probably have to desecrate Shabbat. This *chilul* Shabbat would actually be permissible, as is all *chilul* Shabbat in any life-threatening situation. Nevertheless, one may not go on the boat before Shabbat because he is knowingly placing himself in a situation where *chilul* Shabbat may be necessary, and it appears as if he is not concerned about *chilul* Shabbat. (However, if he disregards the halacha and does go on the boat, he *must nevertheless* save himself if necessary.) This restriction applies only three days prior to Shabbat. But Sunday, Monday, and Tuesday are called *acharai* Shabbat[4] (literally, after Shabbat), i.e. they are connected to the previous Shabbat, and he need not concern himself yet with next Shabbat. Therefore, at the

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3. See Meiri who refers to the difficulty surrounding this issue. (*"nitbalbilu hameforshim b'inyana").*

4. *Gittin* 77a.

beginning of the week he can place himself in a situation which may ultimately necessitate *chilul* Shabbat. (The concept of *acharai* Shabbat is also the source for another well-known halacha – namely that one who did not make *havdalah* after Shabbat can do so through Tuesday.[5])

2- **Rabbeinu Chananel** - Rabbeinu Chananel sees the source of this prohibition as the *issur* of *techum* (lit. boundary). It is forbidden on Shabbat to travel outside of one's *techum*, (2000 *amot*, less than a mile). According to Rabbeinu Chananel, the *Braita* above must be referring to a boat that is scraping the river bed or traveling in shallow water, with less than 10 *tefachim* (approx. 35 inches) between the bottom of the boat and the ground.[6] The traveler is then bound to the rules of *techum*. But if the boat would be in deeper water, there is no *issur* of *techum*, which does not apply to movement above 10 *tefachim*.[7]

Other *Rishonim* have great difficulty in explaining Rabbeinu Chananel's view, because why then is it permitted to embark more than three days before Shabbat? In fact, Rif and Rosh reject this opinion primarily due to this problem. However, perhaps we can explain that even according to Rabbeinu Chananel, one is not actually transgressing the prohibition of going outside the *techum* in this case because one is passive on the boat;[8] nevertheless, it is improper to get on a boat on which it will seem as if he is transgressing the laws of *techum*. Therefore

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5. *Pesachim* 106a; *Orach Chaim* 299:6.

6. *Beit Yosef* in explanation of Rabbeinu Chananel.

7. The Gemara (*Eruvin* 43a) discusses this question and does not resolve the issue. Rambam *(Responsa* (Blau) #308) writes that we should rule leniently since it is a question of rabbinic decree. The prohibition of *techum* over water is certainly only rabbinic in nature, (even according to Rambam who is of the opinion that 12 *mil* is biblically forbidden). See *Orach Chaim* 404.

8. See Rashbam (below I,7).

if one gets on the boat at the beginning of the week, he need not be concerned with Shabbat at that point (similar to *Baal Hamaor*.)[9]

3- **Rif** (and Rambam[10] and Rosh) – *Chazal* learn from the words of the Prophet Isaiah[11] that every person is obligated to have *Oneg Shabbat*, to enjoy the Shabbat, through partaking in delectable food and drink. Therefore, since people commonly get seasick during the first 3 days of boat travel due to the constant motion, we are concerned that the traveler will not be able properly to enjoy Shabbat. After being on the boat for 3 days, however, the average person has adjusted to the boat's motion, and his Shabbat will not be disturbed. It is therefore permitted to leave more than 3 days before Shabbat.

Rif adds that according to his explanation, the reason for the permissibility of travel for purposes of a mitzvah (as stated in the *Braita*) is readily understood. When one is involved with one mitzvah, he is freed from obligations of another mitzvah.[12] Therefore, one who is traveling for the sake of a mitzvah need not concern himself with the mitzvah of *Oneg Shabbat*.

4-**Ramban**[13]– The *Braita* is referring to a case where a majority of the passengers are Jewish.[14] Furthermore, running a ship

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9. *Bach* explains that Rabbeinu Chananel's explanation is similar to that of *Baal Hamaor*, but does not explain how this is so. *Shulchan Aruch Harav* 248:5 gives an explanation which is similar to what we have written above.

10. *Hilchot Shabbat* 30:13.

11. Chap. 58, verse 13.

12. See *Succah* 25a.

13. Also see *Bach* who explains *B'hag* along the lines of Ramban.

14. *Aruch Hashulchan* (248:6) brings support for Ramban from the end of the *Braita*. The Jew is instructed to make a deal with the non-Jewish captain to stop the ship before Shabbat. If the majority of

involves *melachot* (activities) forbidden on Shabbat (e.g. tying knots). Therefore, when it is close to Shabbat (i.e. within three days,) it *looks* as if one is asking the non-Jews running the ship to desecrate Shabbat on behalf of the Jewish majority. However, more than three days before Shabbat it is permissible to embark because essentially the non-Jewish crew members are doing the *melacha* for themselves, regardless of which day the ship embarks.[15] The crew is anxious to finish the journey as soon as possible, but the Jewish passenger does not care whether the ship travels on Shabbat.[16]

Thus, according to Ramban, in a case where the majority of passengers are non-Jews, one would even be permitted to go on the boat right before Shabbat, because we assume the *melacha* is carried out on behalf of the majority. [17]

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the boat's passengers are non-Jews, then the captain would not agree to consider the request of the minority. Perhaps the Jews could inform the captain that he actually need not stop (as the *Braita* states that one not need be concerned even if the ship does not stop), in which case he would agree to make this "condition". However, this would certainly be a *chilul hashem* (because it looks like a sham.) Therefore, the *Braita* must be referring to a case where most of the passengers are Jewish, and thereby have the leverage to make a deal with the captain.

However, *Nishmat Adam* (*Hilchot Shabbat, klal* 4) explains that the condition which the Jews must make with the captain is that he will not call upon them to do *melacha* on Shabbat. It would appear that according to this explanation, even a minority of Jews would be able to arrange this with the captain, and we would not be able to show from this requirement that the *Braita* is discussing a Jewish majority.

15. *Yalkut Yosef* (*Shabbat* 1:248:note 1).

16. We must explain Ramban in this way, for if the Jew specifically intends to travel on Shabbat, the non-Jew is then doing *melacha* for the Jew, and it would be forbidden to embark on *any* day of the week. See below, note 60, and accompanying text, quoting *Pri Migadim*.

17. See *Shabbat* 122a, regarding a non-Jew who lights a candle for

5- **Tosafot**[18] (*Shabbat* 19a , *Eruvin* 43a)–The Rabbis prohibited '*shat*'–floating or swimming – on Shabbat, in order to provide a safeguard and deter a person from building a raft (*Baitza* 36b). Tosafot state that one is also not allowed to be on a boat on Shabbat, because it is similar to floating.[19,20] According to this opinion, *Chazal* restricted such travel by requiring one to embark three days in advance. This requirement is intended to remind a person that there is a fear of his violating Shabbat, and consequently he will be careful not to build a raft.[21]

6- **Tosafot** (*Eruvin* 43a)- The prohibition is due to the possibility that the traveler may come to pilot the ship for a

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a group of whom the majority are non-Jews .

There are *poskim* (for example *Responsa Tashbetz* 4:11) who understand that Ramban is simply going along the lines of *Baal Hamaor*, and is concerned that in a situation of *pikuach nefesh*, non-Jews will do *melacha* for the Jews. See, however, *Responsa Chatam Sofer* (6:97) who writes that Ramban and *Baal Hamaor* have two distinct explanations. *Baal Hamaor* prohibits even with a majority of non-Jewish passengers aboard, because if there is *pikuach nefesh* each Jewish passenger will have to desecrate Shabbat. Ramban is not concerned about a *pikuach nefesh* situation; if it happens, one is permitted to desecrate Shabbat. He is concerned only with the issue of non-Jews doing work for a majority of Jews. In addition, *Beit Yosef* and *Pri Migadim* refer to Ramban and *Baal Hamaor* as separate opinions. This is our assumption above.

18. *Responsa Tashbetz* (4:11) cites a similar opinion in the name of Rav Hai Gaon.

19. Tosafot, *Shabbat* 19a, imply that it was included in the prohibition of *shat* (*m'shum shat*). Tosafot, *Eruvin* 43a, and similarly *Tur* seem to understand that it is only similar to *shat* (*d'dami l'shat).*

20. Meiri rejects this explanation. In his opinion, going on a boat is so dissimilar to *shat* as to preclude any confusion that would necessitate a *gezaira.*

See also *Beit Yosef* who points out other difficulties with this explanation.

21. Ibid. See *Aruch Hashulchan* (248:1) for an alternate explanation.

distance of 4 *amot*. This would be forbidden because the ocean is a *Carmelit*, an unenclosed area where *Chazal* forbade one to carry.[22] *Chazal* required one to go three days in advance in order that he recognize that there is a fear of his violating Shabbat, and consequently he will be careful not to pilot the boat.[23]

7-**Rashbam** [24]– The above *Braita*, which prohibits travel, is following the opinion of *Beit Shammai*, but according to *Beit Hillel*, whose opinion is authoritative in halacha, travel is actually permitted. This is based on the Mishnah which writes that *Beit Shammai* is of the opinion that it is forbidden to do *melacha* on *erev* Shabbat unless there is enough time to finish it before Shabbat. *Beit Hillel*, on the other hand, permit a person to start a *melacha* on *erev* Shabbat even if the *melacha* continues by itself on Shabbat.[25] Rashbam explains that the *issur* being done on a

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22. It would seem Tosafot are referring to a ship which is propelled manually, where one's actual rowing would be moving the ship, otherwise it is difficult to see how this could be classified as carrying. See *Shevitat HaYam* (pg. 68), who suggests a similar understanding of Tosafot.

23. *Beit Yosef* .

24. Quoted by Tosafot *Eruvin* 43a.

25. Mishnah *Shabbat* 17b. A support for Rashbam's opinion is that the *Braita* is cited in the Gemara following this Mishnah.
A difficulty with Rashbam's explanation is that the Gemara writes that *Beit Shammai* only forbade starting a *melacha* on Friday if that *melacha* would be biblically forbidden on Shabbat. In such a case, *Beit Shammai* made a *gezaira* on Friday also. In our issue of going outside the *techum*, we are dealing with a rabbinical decree. (See *Korban Netanel* (*Eruvin* chap. 4, par.3, note 2) who also points out this difficulty.) Perhaps we are afraid that he will go outside 12 *mil*, which could be biblically forbidden. But on water, even Rambam agrees that 12 *mil* is *d'rabanan* (see note 7 above). Perhaps for *Beit Shammai* to make a *gezaira* it is sufficient that *techum* in general is an issue which could involve a biblical prohibition (on land.)

boat is travel outside the *techum*.[26] Since he gets on before Shabbat, and the boat goes outside the *techum* without his involvement, *Beit Hillel* permit this.[27]

The *poskim* have completely rejected this explanation[28] for two reasons. Firstly, why would the *Tanaim* interest themselves in discussing the opinion of *Beit Shammai?*[29] It would seem logical that this *Braita* follows *Beit Hillel,* and therefore must be considered when determining the halacha. Secondly, *Beit Hillel* only permitted setting out traps on *erev* Shabbat and the like, where one does nothing on Shabbat itself. But here the person will be going outside the *techum* on Shabbat![30]

II Support for *Baal Hamaor* and Rif from the Gemara

Upon examination of *Orach Chaim* 248, we find that not all of the above opinions are codified as halacha. Only the opinions of Rabbeinu Chananel, Rif, and *Baal Hamaor* are cited. Let us briefly examine some of the support for two of these opinions, which surely affected the determination of the halacha.

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26. Why this would be forbidden is unclear, since there is no *issur* of *techum* above 10 *tefachim*(see note 7 above). Perhaps according to Rashbam we are discussing a boat within 10 *tefachim* of the ground as Rabbeinu Chananel explained (above I,2). Or perhaps Rashbam feels that since the Gemara left this question unanswered, we must rule stringently.

27. Rashbam writes that according to *Beit Hillel* one could board the boat even on Shabbat, and could subsequently travel, since he does not contribute to the boat's travel.

28. *Beit Yosef* declares that no halachic decisor has even mentioned Rashbam's opinion.

29. Rashbam himself points out this difficulty with his own explanation. *Beit Yosef* also cites *Hagahot* in the name of Rivah who asks this.

30. *Rivash* #18, *Sefer Hateruma* (*Hilchot Shabbat* #224).

The Gemara that follows the above-quoted *Braita* continues:

> It is forbidden to lay siege to non-Jewish cities less than three days before Shabbat. But if they started [the siege prior to the three-day limit] they do not stop [for Shabbat].

Since this Gemara follows immediately after the discussion about going on a boat, one might well expect to find some similarity between the two cases. Indeed, according to two of the explanations quoted above, there is a direct connection.

Baal Hamaor writes that just as there is danger on a boat, there is danger in war. Therefore, one may start the war only at the beginning of the week, which is connected to the previous Shabbat.[31] Otherwise, one must be concerned that he will violate Shabbat. Thus, there is a clear connection between the two cases according to *Baal Hamaor.* [32]

According to Rif also, the two texts are analogous. The reason for the prohibition of starting a siege before Shabbat is that for three days the soldiers are extremely frightened and nervous and cannot enjoy Shabbat. After three days of fighting they are somewhat used to the fighting and can be more settled

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31. See *Responsa Melamed L'hoil* (O.C. #42), who applies this explanation of *Baal Hamaor* to a case of one inducted into the army, where he will be forced to desecrate Shabbat.

32. Perhaps even the next Gemara could be explained in this manner also. The Gemara writes that in the house of R. Gamliel they used to give white clothes to a non-Jewish laundry at least three days before Shabbat. The simple explanation is that it generally requires three days to clean these clothes, giving time for the laundry to be completed before Shabbat. But according to *Baal Hamaor,* we could explain that the clothes take more than three days to clean, but the beginning of the week is connected to the past Shabbat. See *Responsa Binyamin Ze'ev* (#220) who also seems to interpret this way.

on Shabbat. Therefore, according to Rif too, there is a direct correlation between the cases.

However, according to other *Rishonim*, this Gemara is not connected to the previous topic, and is placed here only because it is also applicable three days before Shabbat. (The other *Rishonim* do not explain why there is a prohibition of going to war within three days of Shabbat.)

III Practical differences among *Rishonim*

1. Ocean/River

Rambam[33] writes that according to his explanation (which is the same as that of Rif, seasickness on a boat), the prohibition is limited to traveling on an ocean. However, if one is traveling on a river, where there is not as much motion, he is permitted to embark even on *erev* Shabbat.[34] According to Rabbeinu Chananel, the opposite is true. A *river* (within 10 *tefachim* of the ground) is where the problem exists. On an ocean, there is no *issur* because it is much deeper and there is no problem of *techum.* According to all the other explanations, there is no difference between a river and an ocean.[35]

2. Wednesday

We have assumed in this essay that the three-day prohibition commences on Wednesday. This seems to be the assumption

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33. *Responsa* (Blau) #308.

34. See *Bach* (*s.v. v'rav Alfas*) who explains in a slightly different way – the problem on the ocean is that because of the motion one cannot guard oneself from the effects of the salty air. But on a river, although there is much motion, there is no salty air (see below V,3).

35. Rif and Rosh are assumed to agree with Rambam on this point, since they have all explained the *Braita* in the same way.

of many *poskim*.[36] Moreover, according to *Baal Hamaor*(above I,1), this must be so. Clearly he bases his opinion on the Gemara which explains that the week is divided into two sections – Sunday through Tuesday, and Wednesday through Friday. In the latter half of the week, one needs to be concerned about the coming Shabbat.

However, Rosh, who is concerned with the problem of seasickness, cites the *Tosefta* which indicates that on Wednesday one is permitted to embark. The three-day prohibition refers to Thursday, Friday, and Shabbat. This is in consonance with Rosh's explanation of the *Braita*, as Rosh considers two days enough to get used to the boat's motion. The Vilna Gaon is also of the opinion that one may embark on Wednesday.[37]

3.Yom Tov

According to *Mishnah Berurah*,[38] whatever restrictions apply to Shabbat also apply to Yom Tov.[39] For example, if Yom Tov is on Wednesday, the three-day prohibition would apply to the beginning of the week too, restricting one's voyages for that week.[40]

In *Shaar Hatziyun* (248:2) the *Mishnah Berurah* declares that this halacha is true according to *all* the differing opinions cited above (section I). However, this statement bears further

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36. See *Magen Avraham* (248:3).

37. See *Mishnah Berurah* (248:4).

38. 248:5.

39. See *Kaf Hachaim* 248:8 who also states that Yom Tov has the same halachot as Shabbat.

40. If one follows the opinion of Rosh and the Vilna Gaon that the 3 days include Shabbat, then in the case of a voyage before Yom Tov it follows logically that Yom Tov is included. In our example, then, on Sunday one would still be permitted to depart.

examination. The comparison between Shabbat and Yom Tov is certainly true with regard to the issues of seasickness (Rif's opinion) which is a matter of disturbing one's enjoyment and would apply to Yom Tov as well. The same holds true for the concerns that one should not make a raft or pilot a boat (Tosafot), which activities are forbidden on Yom Tov also. However, we could question this statement at least with regard to *Baal Hamaor* (and those *Rishonim* who follow the same basic reasoning.)

The concept of a day having a relationship with the three days prior to and after it would seem to be unique to Shabbat. Although technically the last day of the week, Shabbat is also the focal point of each week, and draws with it days prior to it and after it. We have no indication that Yom Tov has anything more than a casual relationship with the days preceding and following it. This is portrayed in the halacha that *Mishnah Berurah* himself cites(*O.C.* 299:16), that if one misses *havdalah* after Yom Tov, he has only one day to make it up. (Even this allowance is due to the fact that day follows night in the Jewish calendar. Therefore, the next period of daylight is still halachically considered the same day as the previous night, and one can make *havdalah* any time during the next Jewish calendar day after Yom Tov.[41])

4. Re-embarking

An additional factor to contend with, and which may also depend on the varying opinions of the *Rishonim* with regard to this issue, is the question of a ship which departs early in the week, but docks temporarily within three days of Shabbat, as many cruise ships do. Is one permitted to re-embark, this being a continuation of the original trip, or should we view this as the beginning of a trip which is prohibited on those days? One could argue that with regard to the issue of seasickness, if a

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41. See Rabbi Akiva Eiger in his notes to *O.C.* 299.

traveler is already used to the ship's motion after being on board for three days, then a short stop will not subject him to illness again upon reboarding, and this would be permitted. An argument to be lenient could also be made according to the view that the three-day requirement was to remind a person not to desecrate Shabbat. Perhaps the fact that he started his trip during the permitted days is a sufficient reminder. Or perhaps the fact that he is stepping onto a boat within 3 days of Shabbat was enough for the rabbis to forbid it, without regard to the underlying reasoning (*Lo Plug.)* This specific issue has apparently not been discussed by the early *poskim*. Rabbi Herschel Shachter is of the opinion that *Chazal* would probably have viewed reboarding as a continuation of the original trip, and as long as the trip commenced during a permitted time frame, it may be continued.[42]

IV Docking before Shabbat

If the boat ends its journey before Shabbat, our discussion is a moot issue. Even though the *Braita* declares that "One may not embark…within three days of Shabbat", the prohibition exists only if he will be traveling on Shabbat. This is evident from the *Braita* which we have quoted. Firstly, the *Braita* writes that for a mitzvah, one may embark even on *erev* Shabbat, but one should try to make arrangements for the boat to stop before Shabbat. Apparently such an arrangement would void all problems. Secondly, the *Braita* also permits a trip from Tyre to Sidon, leaving on *erev* Shabbat, because as Rashi explains, it is a one-day trip and he will be able to stop before Shabbat.[43]

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42. Personal communication.

43. Incidentally, *Beit Yosef* writes that this one-day trip is permitted even if one cannot be certain he will arrive before Shabbat, as long as with good travel conditions one can arrive before Shabbat. (*Magen Avraham*,248:5 (based on inference from *Beit Yosef*, see *Pri Megadim*)

Eliya Rabba[44] explicitly extends this to a two-day trip leaving on Thursday, and it would seem logical to further extend this to a three-day trip leaving on Wednesday. Since the ship will dock before Shabbat, one is permitted to embark.[45]

V Application of *Rishonim* to Current Times

As stated above, in order to reach a decision regarding the halachic disagreements of the *Rishonim*, we turn to *Shulchan Aruch*. In *Orach Chaim* 248, only the opinions of Rabbeinu Chananel, Rif, and *Baal Hamaor* are cited. This means that we have to take into account the issues of *techum*, seasickness, and danger. Each of these concerns must be resolved in order to permit embarking within three days of Shabbat.

On modern cruise ships there would be no problem of *techum* because the water in which they sail is always much deeper than 10 *tefachim*.

Let us now examine the problem of seasickness. One could claim that on modern cruise ships (which are really like floating hotels) this should not be a concern. Rambam (see III,1 above) permitted travel on a river because there is no seasickness to deal with. Modern cruise ships, even on an ocean, would

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permits even if conditions are not good at the time of departure.) One is permitted to assume favorable conditions will prevail. This issue comes to light in the not uncommon situation of people being delayed from leaving for their destinations on Friday until only with good travel conditions can they hope to make it in time for Shabbat. This text in *Beit Yosef* would seem to indicate that they would be permitted to embark. See Meiri who states that this was common practice (*aiyn choshishin l'mikreh.*) However, see *Mishnah Berurah* (249:3) who insists one must allocate ample time to arrive at his destination. See *Biur Halacha*.

44. *O.C.* 248:2.

45. See *Ra'avan* (beginning of #60).

seemingly be more comfortable, with less seasickness, than boats of earlier times on a river. For example, one contemporary cruise guide writes, "Modern cruise ships, unlike their earlier transatlantic predecessors, are relatively motion free vessels with computer-controlled stabilizers, and they usually sail in comparatively calm waters." [46]

Indeed, Meiri wrote that perhaps we should be lenient with regard to boats of *his* time– and this was in the 13th century. He writes:

> Perhaps in these times all should be permitted [to embark]; due to the expert abilities of the shiphands there is not that much distress [for the passengers].

However, we can counter this with a number of points.

There are definitely people who do get seasick on cruise ships. Even though the boat does not toss in the sea, the waves and constant motion can often wreak havoc on one's equilibrium.[47] *Responsa Tzitz Eliezer*[48] and *Yalkut Yosef* [49] reject Meiri. *Yalkut Yosef* writes:

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46. *Fodor's Worldwide Cruises 1998,* pg. 35.

47. Ibid. "The most common minor medical problems confronting cruise passengers are seasickness and gastrointestinal distress….If however, you do feel queasy, you can always get seasickness pills aboard ship.(Many ships give them out for free at the front desk.)"
(In truth, there are a number of factors which affect the likelihood of getting seasick. They include the size of the ship (the larger ships are generally steadier); the ship's construction(e.g. a deeper draft (the measurement of the ship's waterline to the lowest point of its keel) will usually perform better); destination (sheltered waters are not as rough); and cabin location. See *Fieldings Worldwide Cruises 1997* (pg.1064)).

48. Vol.1:21.

49. *Shabbat* 1:248:note 1.

> Even though from Meiri we can find support for those who embark even on *erev* Shabbat … nevertheless, it is not clear that we should permit this as a proper course of action. We have heard that many get seasick when traveling on the ocean, even nowadays…and the Meiri himself was not certain if he should be lenient. In [books of] other *Rishonim* we do not find this distinction at all, and even in modern times we see that notwithstanding all the advances and comforts on ships, many people are physically disturbed by the turbulent sea, and get seasick…and my father [Rav Ovadiah Yosef] has concurred with this opinion.
>
> Even if this affects only a minority, Rambam[50] writes that traveling on a boat is forbidden due to a minority (*miktzat*) of people who become ill.

Perhaps we should say that even though circumstances have changed the original enactment of the rabbis still applies.[51] For example, *melacha* was forbidden on the afternoon of *erev* Pesach since it is the time of the slaughter of the Pesach sacrifice. The enactment is still in force[52] even though we no longer have the Pesach sacrifice. Perhaps, due to the original decree, travel is still restricted even in the case of a boat that does not cause seasickness. Rambam, who permits travel on a river, seems to indicate that the decree allows leeway where the reasoning behind it does not apply. However, it is probable that Rambam learned this from the *Braita* itself – the *Braita's* expression is

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50. *Responsa* (Blau), #308.

51. See *Baitza* 5a, *Davar shebiminyan tzarich minyan acher l'hatiro*.

52. Tosafot *Pesachim* 50a, s.v. *Makom*. However, sometimes we find laws that are no longer in force due to changes in circumstances, e.g. *mayim megulim*, the prohibition of drinking uncovered water. See *Pri Chadash* (*Y.D*. 116). Also, see *S'dai Chemed, Maarechet Daled* 20,21 for further references.

"*aiyn mafligin*," one may not embark. As pointed out by Rashi,[53] *mafligin* denotes going onto an ocean, not a river. Therefore, we have no right to make our own distinctions.

Bach writes that it is not the motion itself that makes people ill, but rather the motion makes it difficult to protect oneself from the effects of the salty, rotten (*sirchon*) air. According to *Bach's* explanation it is possible that any improvements in the ships' level of comfort should not be considered significant, since the air has not changed and the motion may be enough to let the air affect the passengers.

Along this same line of reasoning, Meiri permits one who is a veteran seafarer to embark even on *erev* Shabbat, as he will not be affected by the motion. Here, too, *Tzitz Eliezer* and *Yalkut Yosef* reject this, "for every person will say that the trip will not bother him." In addition, *Shevitat HaYam*[54] argues that from Rambam's statement that traveling was forbidden due to the minority of people who get seasick, we can infer that he argues with Meiri on this point. Rambam is apparently of the opinion that the rabbis' enactment applied to all, even those who usually do not get sick. So, too, it follows that the enactment applies to those who travel regularly; apparently the rabbis allowed no exceptions to their *gezaira*. *Yalkut Yosef*, however, is willing to rule leniently for one whose job is aboard a ship, such as a captain or sailor.

With regard to danger (and subsequent *chilul* Shabbat,) there would seem to be no concern for a modern-day ship on the ocean. Ships are no longer the dangerous means of travel they once were. There is no reason to worry about possible *chilul*

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53. *Shabbat* 19a s.v. *aiyn mafligin*. See also *Talmud Yerushalmi* (*Shabbat* 1:8) and *Midrash Tanchuma* (*Shelach*) where the wording explicitly refers to an ocean.

54. Pg. 35.

Shabbat on the part of the passengers.[55] However, we must still take into account the possibility that we have no right to permit travel on an ocean once the rabbis forbade it, despite the inapplicability of the reasoning behind it, as above.

It is relevant to note here that *Beit Yosef*[56] writes that although according to the halacha one should be concerned with the opinion of Rif, nevertheless, we may not criticize someone who relies on Ramban. In other words, were people to disregard the problem of seasickness they could not be criticized as long as the boat's passengers are mostly non-Jews, which is the requirement necessary to permit travel according to Ramban. (One should note that *Beit Yosef* limits his statement to the effect that we need not deter those relying on this opinion. However, we would not encourage such a course of action.)

The practical relevance of this statement is dependent upon the particular capacity of each cruise ship. Some are relatively small, carrying 100 or fewer passengers, while the "mega-ships" accommodate over 2000 passengers. In the latter case, a (kosher) cruise would probably be an arrangement made by an individual entrepreneur who has booked a number of cabins among the regular passengers. The majority of passengers would probably be non-Jews. In that case, according to *Beit Yosef*, one could not be censured for departing even close to Shabbat. However, if Jews do comprise the majority of passengers, the crew is viewed as doing *melacha* for the Jews, and this leniency would not apply.

There is another possibility; that the Jews may be in the

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55. See *Shulchan Aruch* (*O.C.* 248:2) who permits embarking on a voyage on a river. Yet in 248:4 he cites *Baal Hamaor*. Apparently *Shulchan Aruch* feels that on a river there is no danger. The same could be said for our oceans.

56. Cited by *Biur Halacha*(248:3).

majority, but the ship is on a regularly scheduled cruise, and would depart even without the Jews on board (much as an airline adheres to its schedule without regard to how many passengers are flying.)[57] In this scenario, the crew is doing the *melacha* for the non-Jews on board, and this would be permitted.[58]

VI Amirah L'Akum

Until now our assumption has been that the only issue is travel within 3 days of Shabbat. On Sunday, Monday, or Tuesday, one is permitted to embark. However, this assumption bears further scrutiny. In a case where the majority of passengers are Jews, even embarking at the beginning of the week may be difficult to permit. *Pri Megadim*[59] points out that according to all opinions, when the Jew has a need or desire to travel specifically on Shabbat there is a problem of *amirah l'akum*, (asking a non–Jew to do work) which is forbidden regardless of which day of the week one departs. On a cruise with a specific itinerary, the Jew may very well want to travel on Shabbat also, in order to enjoy the full schedule of ports-of-call, and this would thus be forbidden.[60]

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57. In a situation where *all* of the passengers are Jewish, this leniency would not apply.

58. This is how *Beit Yosef* understands Ramban's requirement of a majority of non-Jews. This assures us that the boat would also go without the Jews.

Tiferet Yisrael (*Kalkelet Shabbat, Melechet Shabbat* 9) states this leniency clearly. See also *Shulchan Aruch Harav* 248:3, *Shemirat Shabbat K'hilchata* 30:55, and *She'arim Metzuyanim B'halacha* 74:4.

59. *M.Z.* end of 248. See, however, *Shevitat Hayam* (pg. 44).

60. A passenger may claim that he would not care if the boat did not travel on Shabbat, even if he were to miss stopping at some of the ship's destinations. Perhaps in that case the non-Jews would be

However, as stated above, if the boat is embarking on a regularly-scheduled cruise, in all likelihood it would embark even with only the minority of non-Jews on board, as opposed to canceling the entire cruise. Therefore, the *melacha* being done would be done in any event, and the Jews are not viewed as having the crew do *melacha* for them.

In addition, there is one innovation since the times of the Gemara (and *Pri Megadim*) which might allow one to embark at the beginning of the week, even with a majority of Jews on board. This is the auto-pilot. According to research done by the author, there exists technology aboard ships which allows them to be set on course and sail without intervention at all on Shabbat. This is often done when sailing a straight course between two points in the open sea. Therefore, any piloting done by the crew is not considered to be done for the Jews, it is *ahl da'at atzman*, for the non-Jews' own purposes. The possibility of having the boat run without *melacha* would lead us to view all *melacha* done by the non-Jews as for their own purposes, not as carrying out the Jews' wishes.[61] However, the scope of the lenient position due to the auto-pilot is limited. Wherever the ship needs a human pilot, such as when negotiating narrow straits, in congested areas, and when docking in port, the auto-pilot cannot be used. Therefore, this leniency needs careful consideration before being applied practically.[62]

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considered to be doing *melacha* for themselves. We question this assumption, since the passenger is paying for a cruise which travels on Shabbat and the cruise line would be held accountable if it simply abstained from travel on that day.

61. See, for example *Turei Zahav* 276:5, and *Mishnah Berurah* 27. Also see the article by Rabbi Alfred Cohen, "The Live-In Maid," *The Journal of Halacha and Contemporary Society*, vol. XXII,pg. 27.

62. At this point, it is appropriate to note that in any instance where it is permitted to board within 3 days of Shabbat (e.g. for

VII Conclusion

It would seem that according to halacha it is questionable if one would be allowed to embark on a cruise within three days of Shabbat. (As for Wednesday , we have mentioned a dispute in the *poskim.)* Contemporary authorities are concerned with the problem of seasickness even today.

However, as *Beit Yosef* has indicated, those who depart even close to Shabbat are not to be censured for relying on Ramban, as long as the majority of passengers are non-Jews. But, if most of the passengers are Jewish, this would lead to additional questions of *amirah l'akum*, as above.

The purpose of this essay is not to decide the halacha in question, but rather to point out the halachic issues involved. One must certainly consult with proper rabbinical authority before embarking on a cruise.

In addition to the above issues, there may be others also, which could be more severe. These include mixed swimming aboard; crossing the dateline; docking on Shabbat;[63] difficulties with kosher supervision on a ship; and the Shabbat problems of electric devices on board.[64] These are beyond the scope of this article. An individual must also take into account *Hashkafa* – the Torah outlook– on such a cruise. How does the Torah regard this kind of a vacation? Does the proper atmosphere necessary for a Torah Jew exist on such vacations, especially

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mitzvah purposes, or if relying on Ramban), it is also permitted to board *on* Shabbat if a *kinyan shevita* is carried out (see *O.C.* 248:3). However, the author is of the opinion that for a pleasure cruise this should not be attempted, due to the likelihood of encountering challenges to one's Shabbat observance (e.g. checking in, luggage and passport handling).

63. This leads to questions of *techum* upon disembarking.

64. E.g. electrical locks and doors.

with regard to Shabbat and Yom Tov?[65] The Torah directs us in *all* aspects of our lives, defining for us *permitted* behavior, as well as guiding us in determining *appropriate* behavior.

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65. See Rambam *Hilchot Yom Tov* 6:20.

Tumtum and *Androgynous*

Rabbi Alfred Cohen

There are a number of places in the Talmud where mention is made of a person termed "*tumtum*" and also one characterized as "*androgynous*". (The latter obviously refers to an androgynous person–a hermaphrodite–meaning one who has male as well as female characteristics. This condition can range from the extremely rare true hermaphrodite to variations of intersex, ranging from a female pseudohermaphrodite to a male hermsaphrodite.) A *tumtum* has been defined as a person with no specific male or female genitalia, a condition which is exceedingly rare. Probably, both terms are often employed to describe a far more common occurrence, a person born with ambiguous genital signs.

The general tendency in medicine today is to take steps (surgery and/or hormone therapy) to render the child either male or female, by suppressing or removing the ambiguous features. This is done out of the belief that it would be well nigh impossible for a child to develop a normal social or marital life without a definite sexual identification.[1]

In this paper we will probe the halachic ramifications which result from these complex situtations.

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1. These medical interventions are not always wholly successful and can cause problems as the child grows, psychological as well as physical. This issue will be discussed later.

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What Causes A Tumtum/Androgynous And What Can Be Done

In order to understand the dimensions of the situation, a little medical knowledge is necessary:

> Both male and female genitalia come from the same original tissue [in the developing fetus], and at one time are identical. The only thing that causes these tissues to become male or female is the result of hormones and their actions [upon the developing tissue]....A hormone is defined as a substance that is made in one part of the body and influences another part. This requires that the substance is made correctly, it is secreted into the blood stream, or fluid surrounding cells properly, and that the tissue it is supposed to reach is able to recognize it and respond to it. This process is not dependent on the presence or absence of a Y chromosome. (The chromosome responsible for determining male sex).
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> ...The Rabbis were correct. On the forty-ninth day, a substance called sexual determining factor is made in embryos with a Y chromosome (the gene that codes for this substance is found only on the Y chromosome)...Sex is determined by having a Y chromosome...However, it is possible to have a case where this substance is not made in a genetic male. The result would be a female in every sense of the word except perhaps fertility. (This is an EXTREMELY rare event).
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> ...In a normal fetus, the testicles are the source of testosterone. However, there are situations where testosterone is made by another part of the body. This will transform a fetus with ovaries and a uterus [to develop some outward signs of masculinization of the genitals]...Depending on the amount of testosterone and how soon after fertilization it is present will determine how closely

> these genitals resemble male genitals...The reverse problem also exists. If the fetus cannot detect testosterone, then female genitals will develop despite the presence of testicles ....It is also possible that one will see degrees of this problem... Scientifically speaking, a true hermaphrodite is determined by looking at the tissue that is either an ovary, or a testicle, and finding that it is both.
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> From a medical point of view, when a child is born with ambiguous genitalia, it is always possible to determine the genetic sex....Likewise, it is almost always possible to determine what the problem is (i.e., too much testosterone made, or if it is not being detected properly by its target tissues). [In other words, it is possible for a person to look like a female and yet to have XY chromosomes, indicating it is a male genetically. However, there are practical considerations–even determining the true genetic sex of the child does not always make it possible to correct the problem.][2]

These anomalous situation arise, to a lesser or greater degree, far more often than most people are aware (one out of thousands of births). Although medical science has made remarkable advances in analyzing and treating the problems, it is important for parents (the situation is almost always dealt with in early infancy) to realize that there are numerous halachic considerations which also have to be taken into account. In the following pages, we will try to highlight some of the problems and the suggested solutions.

There is a great deal of debate among rabbinic authorities

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2. Letter to author in June, 1998, from Dr. Andrew Fink, Albert Einstein Medical Center, New York.

about what to do with a person who is a *tumtum/androgynous*.[3]

Let us touch briefly on some of the halachic questions that may arise when this difficult situation presents itself: (A) Is it permissible to take a child who might be a boy and turn him into a girl (it seems that medically this is often the easier and more practical way to solve the problem of dual or ambiguous sexual characteristics). This is a halachic issue since a boy would grow up to have more mitzvot to perform than a girl, and therefore Jewish law has to consider whether it is permissible to take this step. (B) In order to make the child "look normal", it is sometimes necessary to remove some of the genitalia, thus effectively rendering the child sterile. (Although the child may be unable to beget children in any case.) For example, it is relatively simple for surgeons to remove some of the ambiguous external genitalia and then construct a vagina for the child, thereby turning it into a "girl", at least outwardly. However, this "girl" will not be able to have children, since she has no uterus. Is this permitted, in light of the halacha that it is forbidden to neuter even an animal, let alone a human being?

It is also necessary to factor in the medical reality that even if certain "cosmetic" changes are made, this will not necessarily effect a "change" in the person's sexual identity, which may remain ambiguous. Removing masculine-appearing genital tissue will not necessarily assure that this child will develop as a female, because the receptors for feminine hormones may be absent, or masculinizing hormones may still be secreted by the body. The reverse is also true – " turning" the ambiguous child into a boy cannot assure that he has the receptors to develop secondary male characteristics at puberty.

Since this problem occurs with more frequency than many

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3. See Rav Sternbuch's article in *Assia*, Book I, p. 142; *Nishmat Avraham, Even HaEzer* 44:3.

people realize, and since medical science can do many things now which were not feasible before, these situations raise very real and very difficult dilemmas which major *poskim* are trying to address at the present time. The present study will seek to explain the halachic background and also the rulings of the rabbis on these issues, from talmudic times until the present.

The *Tumtum /Androgynous* In Rabbinic Literature

Let us start with a review of the relevant halachic material:

Already in the Talmud we find differences of opinion as to the status of people born with double or ambiguous genitalia:

1. There is doubt whether this is a male or a female.[4]

2. This person is *sui generis*, one of a kind, and the rabbis did not determine whether the person is male or female.[5] This dictum can be understood as saying that the hermaphrodite is neither a man nor a woman,[6] or that there is doubt (*safek*) about if it is a male or a female.[7]

3. He is partly male and partly female.[8]

4. Certainly male.[9]

The *Shulchan Aruch* rules that there is doubt if this person is a male or a female, and therefore,

A *tumtum* or *androgynous* who betrothed [a woman] or

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4. This is the opinion of R. Yose in *Yevamot* 81a. See also *Bikkurim* 4 and *tanna kama, Mishnah Shabbat* l34b.

5. *Beraita, Yevamot* ibid.

6. Ramban, *Yevamot, Kuntres Acharon.* Rosh, *Bechorot 5:8.*

7. Ri, Tosafot *Yevamot,* ibid.

8. Tosafot, *Yevamot* ibid; Ra'avad, *Shofar* 2:2.

9. R. Eliezer, Mishnah *Yevamot* 81a.

> whom a man betrothed, the *kiddushin* (betrothal) are in doubt and the individuals need to have a *get* due to doubt.[10]

The Ramo appends his comment: "And there are those who maintain that a hermaphrodite is certainly male."

The Rambam writes,

> Someone who has male organs and female organs is termed a hermaphrodite *(androgynous)*, and it is questionable if he is a male or a female. And whoever has neither male nor female [organs visible] but is "closed" (*atum*), is called a *tumtum*, and this [child] is also a [matter of] doubt. If the *tumtum* is "torn" [i.e., the "closing" (covering) is opened] and is found to be male, then he is certainly a male; and if it is found female, then she is a female.[11]

Although the Mishnah in Chapter 4 of *Bikkurim* records the ways that a hermaphrodite is similar to males and ways he is similar to females, the normative halacha is that an *androgynous* has to follow the stricter opinion in halacha as it refers to males

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10. *Even HaEzer* 44:5; Rambam, *Milah 3:6, Nezirut 2:1, Ishut 2:24, Eidut 9:3; Orach Chaim 331:5.*

11. *Hilchot Ishut* 2:24.

It is interesting to note that Rambam omits the word *vadai* (certainly) when ruling on the girl.

There are other definitions as well of who is considered an *androgynous* in Jewish law. The *Be'er Heitev, Orach Chaim, Hilchot Shofar* cites the *Magen Avraham*, who quotes the Rif as maintaining that an *androgynous* is sometimes a male and sometimes a female (apparently, it changes from time to time in the same person). However, the *Be'er Heitev* notes that this opinion is not to be found in the copies of the Rif's commentaries available to us. Apparently, he finds the authenticity of such a reference implausible.

and also the stricter halachic opinion as it applies to females.[12] According to this formula, he would be obligated to have a *brit*, although it would be done without a *beracha*.[13] Although only men are prohibited from shaving with a razor, the *androgynous* would also be forbidden. Only a male *kohen* is bound by the special laws forbidding becoming impure, but the hermaphrodite *kohen* similarly would be thus restricted. And, unlike women, the hermaphrodite is required to observe all positive mitzvot which are time-bound (*mitzvot aseh she'hazeman gerama*).[14]

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12. Rambam, *Hilchot Avoda Zara* 12:4.

13. Ibid, *Milah 3:1; Yoreh Deah 265:3.* According to Ra'avad, the *beracha* should be recited. It is interesting that Ra'avad requires this not because he considers the hermaphrodite to be a male but because it is his policy that when a biblical mitzvah is performed, even in a doubtful situation, the blessing must be recited.

When should the *brit* of a *tumtum* take place? In *Bava Bathra* 127a, the Gemara records the opinion of R. Shizbi that it is not performed on the eighth day. Although the question of when to make the *brit* is discussed there, the Gemara does not resolve the issue. The *Rishonim* also disagree on the matter, with some arguing that the opinion of R. Shizbi was rejected by the Talmud, and therefore the eighth day is the proper one for the *brit,* even if it is Shabbat. Others maintain that it should be done on the eighth day, but not if that falls on Shabbat; yet another group considers that the *brit* should not be done on the eighth day but rather at the earliest possible occasion.

14. Ritva in *Bechorot* 6, note 58, cites the "scholars of science" about a case where a hermaphrodite was married to a woman and fathered children, and subsequently married a man and also had children (as a woman). According to the Ritva, this person is a *min bifnei atzmo*, i.e., a species of its own, and not a questionable male nor a questionable female (*safek*). This is cited in *Sefer HaBrit*, p. 87. Rav Emden, in *She'elat Yaavetz 1:171*, brings the case of a child born with what appeared to be a split down the length of what seemed to be the male organ; the child urinated from an opening in its body, not from

Laws Of The *Androgynous*

The *Rishonim* basically held two differing approaches on how to regard a hermaphrodite, and these two approaches form a consistent policy in their rulings on various situations.[15]

The majority opinion of the early decisors (*Rishonim*)[16] holds that the status of an *androgynous* is in doubt (*safek*)–we cannot be sure whether the case involves a male or a female. Consequently, these rabbis rule that one must follow the stricter opinion in a case of doubt, as we have already mentioned. Thus, the hermaphrodite must don *tefillin* and *tzitzit*, must have a *brit*, although without recitation of the blessing, is forbidden to shave the face with a razor, and if it is the child of a *kohen*, must follow the rules prohibiting contact with the dead and other forms of *tume'ah*. The hermaphrodite should wear men's clothing and may not put on the garb of a woman.[17] According to this view, the hermaphrodite can marry a woman but cannot be married by a man–"*nosei isha aval lo nisa*".[18] However, it is their belief that the hermaphrodite is not able to have children.[19]

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the organ. Rav Emden ruled that the child was definitely a female and no *brit* should be performed, inasmuch as he considered the purported "male" organ in this child to be merely some kind of growth from the female body (possibly an enlarged clitoris).

15. Where there is an exception to the usual approach, it is usually due to a specific biblical verse, such as when making a *brit* on Shabbat or concerning the obligation to go up to Jerusalem on the Festivals.

16. Rif, *Yevamot*; Rambam, *Milah* 3:6, *Ishut* 2:24; *Orach Chaim 331:5; Yoreh Deah* 194:8 and 315:3.

17. In order to prevent the hermaphrodite's marrying a male.

18. *Bikkurim*, chapter 4, mishnah 2.

19. Rambam, *Yibum veChalitza* 6:6. It is extremely difficult to understand just what Rambam means in his *Commentary to the Mishnah, Yevamot* 2:3, in stating that an *androgynous* cannot have a son. Was he

Thus, marriage would not be an obligation, only an option.

The other body of opinion about the hermaphrodite is that we are dealing with a full-fledged male.[20] Consequently, these rabbis maintain that the hermaphrodite is obligated by Jewish law to marry.[21]

The differences between the two groups continue into the question of *yibum* and *chalitza.* (When a man dies without offspring, his brother must marry the widow [*yibum*] or else release her through the ceremony of *chalitza*). Since it is the contention of the majority group that the *androgynous* cannot father children, his wife would not need *yibum* and he could not perform either *yibum* or *chalitza* for his sister-in-law. However, the second group maintains that the *androgynous* must perform *yibum/chalitza.*[22]

Tumtum

In defining the talmudic term "*tumtum*", Rambam writes

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of the opinion that the *androgynous* is not able to have children, or only that he cannot produce a male offspring? It has been suggested that some of the ambiguity may arise from the fact that the *Commentary to the Mishnah* was originally written in Arabic and the present Hebrew text is a translation. The ambiguity, thus, may be a function of the translation, not of the text.

20. *Even Ha'Ezer 44:5, 172:8; Yoreh Deah* 268.

21. *Minchat Chinuch* 1 considers that an *androgynous* is able to have children. This leads to an interesting problem: if the *androgynous* married a man, would a *get* (Jewish divorce) be required? *Even HaEzer* 44:5 writes that it would be required, based on a teaching by Ramban in *Ishut 4:11.* Ra'avad says that no *get* is needed, since in this case there is no female who needs a permit to remarry or because no marriage ever existed between the two individuals, inasmuch as both are males.

that it is someone "in whom neither masculine nor feminine [genitalia] are discernible."[23] *Tiferet Yisrael*[24] explains that "the place of the male or female organs is covered with skin."

Unlike the *androgynous*, whose sexual identification is always ambiguous, the *tumtum* is either a male or a female, depending on what is determined after the covering of the sex organs is removed. Nevertheless, in the Gemara we find expressed two variant opinions concerning the *tumtum*: (a) this is a person whose gender is in doubt, or (b) this is a different kind of person altogether (*briah bifnei atzmo*).[25] Normative halacha rules that a *tumtum* is treated as doubtfully male or doubtfully female (*safek*), who has to follow the stringent opinions as they apply either to males or to females.[26]

(However, if there are testicles in the proper place, even absent a penis outside the body, the child is considered a male

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22. *Even HaEzer* 172:8.

23. *Ishut 2;* Rashbam *Bava Bathra* 140b.

24. *Yevamot* 88; he also adds that there is a small opening to allow for urination.

25. *Bechorot* 42b, according to the opinion of the *tanna kamma*; see also the opinion of Rav Chisda on 41b.

26. In *Hilchot Avoda Zara* 12:4, Rambam discusses what the Jewish law would be concerning an animal who presents the same situation. He refers to a dispute on this matter in the Gemara (*Bechorot* 42a), with one opinion being that the place from which the animal urinates will determine its gender. The opposing opinion holds that urination cannot be the determining factor–inasmuch as this animal is clearly different from the norm in certain ways, perhaps all the sexual organs are also different from the norm, and therefore there is no proof from this one point. In a human being, the place of urination cannot be the determining factor, since both male and female organs develop in the fetus from the same place.

for almost all *dinim*.)[27]

The *tumtum* is obligated by Jewish law to observe all mitzvot as they apply to men, even those mitzvot from which women are exempt. Thus, for example, he must don *tefillin*[28] (even according to those opinions who would not permit women to don them). Similarly, there are opinions in the Gemara that women should not engage in Torah study,[29] yet the *tumtum* is obligated, inasmuch as he might be a man.[30]

A further halachic question arises if the *tumtum/androgynous* were born to a *kohen*. Since the Torah forbids any non-*kohen*

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27. *Chagiga 4a, Yevamot* 72a. However, see *Hagahot Chatam Sofer, Orach Chaim 689:3; Minchat Chinuch* 280, where the opinion is expressed that although this child is not a female, it also is not definitely a male.

28. *Pri Megadim, Orach Chaim 39:1; Mishnah Berurah* 38:10.

29. *Sota 22: "kol hamelamed bito Torah k'ilu melamdah tiflut."*

30. *Minchat Chinuch* 419. Whether or not the father of this child can be compelled by the Jewish courts to spend money for teaching his child Torah is debated between the *Minchat Chinuch* and the *Avi Ezri*. In *Minchat Chinuch* 613, the author rules that a *tumtum* is obligated (like every Jewish man) to write a *Sefer Torah*. See, however, the opinion of the *She'agat Aryeh* 30 and 31, that unlike other men, a *tumtum* cannot have *shatnez* in his *tzitzit*. See, ibid No. 190, whether there is a problem of the *tumtum's* violating the prohibition *bal tosif*, which precludes adding mitzvot to those in the Torah. He also rules that *tefillin* written by a *tumtum* are not kosher to be used. In a similar vein, he discusses whether a *tumtum*, the son of a *kohen*, could participate in the priestly blessing, since the Torah forbids a non-*kohen* from partaking in this ritual. He opines that if the *tumtum* cannot give the priestly blessing, nevertheless he should go up to the *duchan* with the other *kohanim* but not make the blessing. As regards giving testimony in a *Beit Din*, the *tumtum* may not (for he may be a woman), except in certain cases. See *Minchat Chinuch, mitzvah 75* and *Choshen Mishpat 35:14.*

(male) from giving the priestly blessing, there is some question whether a *tumtum/androgynous* could participate in this ritual. Some opine that he would not be permitted but, nevertheless, may go up to the *duchan* with other *kohanim.* [31]

On the question of a *tumtum's* performing the mitzvah of *yibum/chalitza,* there are three opinions, which seem to define the situation:[32]

(a) Some maintain that if surgery on the *tumtum* reveals that he is indeed a male, he is obligated to perform *chalitza* and similarly his widow would require it.[33] (It is a mitzvah for the

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31. *Oneg Yom Tov, Orach Chaim* 15. An additional problem when operating on an intersex child of a *kohen* might arise due to the specific commandment not to make a blemish in holy things (*matil mum be'kodshim*), and the child of a *kohen* is holy. Possibly it would be forbidden to operate on this child and remove some of its organs. A lenient ruling on this question is given by *Beit Yosef, Even HaEzer* 6, who opines that today one may operate to amputate the finger of a *kohen* if necessary, even if his life is not in danger. See Rambam, *Issurei Mizbeach* 1:7; Gemara *Avoda Zara* 13b; Tosafot *Bechorot* 33b, s.v. *"arel"*. Responsa *Sho'el Umaishiv* 5:23 permits the operation, but only if the surgeon is not Jewish.

32. Mishnah *Yevamot* 81a. If an operation reveals male organs, and if the person can grow a beard (which is a sign that he is not a eunuch), there exists a difference of opinions as to his status. Furthermore, if this *tumtum* fathered children, the Gemara in *Yevamot* records two opinions: (a) he is obviously not a eunuch or (b) his wife is an adulteress.

33. If no surgery is performed, there would certainly be no *yibum*, the purpose of which is to "father a child for his brother"–and this person cannot do that. The *Encyclopedia Talmudit* brings the ruling that after a *tumtum* dies, it is forbidden to operate on his corpse (because of disrespect to the dead) to find out his true sexual identity (even for the purpose of determining whether his widow can remarry without *yibum*).

brother of a man who died without children to marry the widow and have a child with her, to perpetuate the dead brother's name (*yibum). Chalitza,* which is performed today instead of *yibum*, releases the woman from this relationship. Since only a brother capable of having children can do this mitzvah, there may be some question about the *tumtum.*) This is unlike the rule governing an animal *tumtum* which even after surgery proving masculinity, is still considered a *saris* (incapable of having offspring) inasmuch as rabbinic thinking assumes that if one thing went wrong in the sexual development, possibly other things could also have gone wrong in this area. In the case of a human being, some rabbis apparently feel this rule does not always apply.

(b) Rabbi Yehudah holds that the *tumtum* is unable to have children (*saris chama*) and therefore he would not be able to perform *chalitza*, nor would his widow require it. It is considered as if he is not a brother (see Rashi ibid). Even if surgery (or genetic tests) would show that he is indeed a male, since he is a *saris* (eunuch), there would be no *yibum/chalitza*.

(c) Maybe he is a *saris* (unlike opinion (b), where it was taken as a fact). Although we cannot be certain, this opinion maintains, we nevertheless do have to consider this a possibility (*choshesh*). Therefore, the *tumtum* should not perform *chalitza* for a brother's widow if there are other brothers who can do it. But absent other brothers, he should be the one to do it, inasmuch as he may indeed not be a *saris chama.* Similarly, if the *tumtum* dies, his wife would need *chalitza* because of the doubt.

In his ruling on this question, the author of *Shulchan Aruch*[34] writes,

The *tumtum* performs *chalitza* but not *yibum*, because

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34. *Even HaEzer* 172:9.

> [his status] is doubtful. But if he is "torn" [i.e., operated on] and found to be a male, then if he wishes, he may perform *yibum/chalitza.* But there are those that say he is a doubtful case, and therefore we should be strict [i.e. and not allow him to perform these rituals].

Specific Halachic Problems

Doctors usually want to "fix" the hermaphrodite or one who has ambiguous sexual organs by turning the child into a "girl" through removal of the male organs. (They also usually construct a vagina-like opening and administer hormones or hormone-suppressants, as needed.) Consequently, one of the first issues that has to be dealt with is the biblical prohibition of "*petzua daka"* (*Devarim* 23:2), marriage with whom is forbidden by the Torah.[35]

Furthermore, as noted, the *androgynous* is considered by Jewish law as possibly a male and possibly a female, and therefore obligated to observe all the commandments incumbent upon a man. By turning the person into a female only, the doctors are taking away from this person the ability and the privilege of performing certain mitzvot. Again, this is a halachic problem.

If the doctors turned this child into a female (through surgery and hormone therapy) but the child is actually a male,[36] and

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35. The author of *Nishmat Avraham, Even HaEzer* 44, reports that Rav. S.Z. Auerbach wrote to him that the prohibition of *petzua daka* refers only to the *issur* of such a person getting married, but that there is no special negative commandment about making someone into a *petzua daka.* This should not be confused with the negative commandment of *sirus*.

36. This possibility is not as bizarre as it sounds. In 1998,*The New*

this "female" grows up and gets married to a man–would this constitute a homosexual relationship, which is strictly censured by the Torah?[37]

To avoid these multiple problems, Rav Sternbuch writes[38] that a child with ambiguous sexual indicia should always be "turned" into a male rather than a female. The only exception[39] would be in the case of a child which is clearly a female (verifiable by her having all the external female organs), although possessing in addition certain ambiguous traits.[40]

One of the leading *poskim* in the world today is the Israeli sage, Rav Eliezer Waldenberg, author of *Tzitz Elizer*, who is often consulted particularly on medical problems. A doctor was once confronted with a case of a child born with apparent intersex characteristics, and he turned to Rav Waldenberg for guidance. In addition to addressing the specific problem, Rav Waldenberg availed himself of this opportunity to expand upon his view concerning similar situations and how they should be dealt with.

The child in question was born with external organs which seemed to be female; however, there also seemed to be an organ resembling testes. Further complicating the situation was that a chromosomal test of the infant indicated it was a male.

York Times featured an article about an individual to whom this was done. For decades, the child was brought up as a female, but "it never felt right." Finally, he had the operations reversed and assumed his true identity as a man–even getting married to a woman! See further on this at the end of this article.

37. In *Hama'or* Kislev-Tevet 5733, Rabbi Amsel suggests that even administering female hormones to a male may be forbidden, under the prohibition of a man's wearing women's garments.

38. *Assia* I, p. 144.

39. *Nishmat Avraham*, ibid, reports that Rav Auerbach agreed with

After surgery, it was found to have no internal sexual organs. The doctor wrote that it was medically easier to make the child into a girl, but asked two questions: is it permissible to make a child whose genetic identity is male, into a female? Furthermore, is it forbidden to remove the "testes"?

In his responsum, Rav Waldenberg lays down the principle that in these matters, the determining factor is the appearance of the external organs: the key is the visual perception. Consequently, he rules that since all the external organs of this child are of a girl, it is a girl.[41] The only problem is removal of the testes, which is forbidden due to the prohibition of castration. However, in this case he rules, since the child is a girl, one can remove the testes, since that operation is not what would make her sterile. Furthermore, even if a child were an *androgynous*, it would still be permissible to remove the testes, without violating the prohibition of sterilization–since in any case this child is not capable of having a child. This conclusion is based on the *Minchat Chinuch*,[42] who rules that the prohibition against sterilizing (*sirus*) cannot apply to a person who cannot have children anyway.[43]

Having given an answer to the specific problem raised by the doctor, Rav Waldenberg then proceeds to expand upon the topic. Considering that this issue is on the cutting edge of

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him on this point.

40. For example, sometimes what appears to be a penis is in reality an enlarged clitoris.

41. *Tzitz Eliezer,* XI, no. 78.

42. 291, note 4. See also *Chatam Sofer, Even HaEzer* 20 and 17.

43. However, see the *Chazon Ish, Even HaEzer 13, s.v. "vehaRashba".* In *Shabbat* 111a, the Gemara states that the prohibition of *sirus* (castration, sterilization) does not apply to an elderly person. Even though the Gemara ultimately rejects this view, the *Minchat Chinuch*

modern medical knowledge and technique, his responsum is a highly pertinent foundation for addressing the halachic issues which are now arising.

In the view of Rav Waldenberg, even if a true *androgynous* were born, having both sets of external organs (a circumstance which is very rare), it is permissible to remove some of these excess organs. This ruling is predicated on the halachic and medical conclusion that the child would not be able in any case to have children. The next question then is which set of organs to remove or modify? According to Rav Waldenberg, it is preferable to make this child a boy, for two reasons:

(A) Since there are those who opine that an *androgynous* can have children, and

(B) Since we are not certain whether the child is actually a boy or a girl, by removing the female organs we are making the child into a boy, who will be able to perform more mitzvot. Consequently, that is the desirable choice.

At this point, Rav Waldenberg adds a most controversial opinion: if it were advisable (medically) to turn this hermaphrodite into a female, that option is halachically permissible. By removing the male organs, the child will be able to function as a female. According to him, the sexual identity of the child is not established until *after* the procedure.[44] He is also of the

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apparently feels that the concept has validity, even if it did not apply to the particular situation under discussion in the Talmud. See also, *Sefer Hasidim* 620 and *Assia* I, p. 143.

44. He maintains that this is also the opinion of the Meiri in *Yevamot;* in my view, it may also be the solution to a cryptic statement by the Rogachover Rebbe in his *Tzafnat Paneach (Yibum, chap. 10, Kelaim 10, Shut 60:144).* The Rogachover writes that the sexual identity of a *tumtum* who is operated on becomes established only at that point, and not retroactively. However, this is disputed by the opinion

opinion that it is best to perform this procedure while the child is still quite young, before it is obligated to perform mitzvot.[45] There is a further caveat added by Rav Waldenberg: before any organs are removed, it is necessary to determine if the procedure would indeed result in the child's being truly a female (presumably this could be determined by means of sophisticated medical scans and/or genetic analytical tests).[46]

A third opinion on this matter is expressed by Rav Eliashiv,[47] whose view is that if this ambiguous child were transformed into a "girl" by medical science, it would be forbidden for any man to have sexual relations with her. Since her "vagina" is merely an opening constructed by doctors, there are no sexual relations but rather "wasting of the man's seed", which is an act forbidden by the Torah (*Vayikra* 18:22).[48] Furthermore, in his commentary on this verse, Ibn Ezra cites the opinion of Rabbenu Chananel, which posits that intercourse between a male and another male who has an artificial vagina is considered sodomy.

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expressed in the Tosafot *Yevamot 83, s.v. "Beria.."*, which holds that the surgery merely reveals and elucidates that which was really there before, but hidden from our view.

45. See the question of R. Neuwirth, cited in *Nishmat Avraham, Even HaEzer* p.137.

46. Rav Waldenberg does speculate whether we should conclude that nature has changed (because today it is possible to determine this) or whether we should conclude that medical science has perfected treatment of the situation. For an understanding of why it might make a difference which rationale is employed, and when it is proper to fall back on the argument that there has been a change in our physical nature, see the article by Rabbi Dovid Cohen on *"Shinuy Hatevah"* in the *Journal of Halacha and Contemporary Society*, Vol. 31.

47. In *Shevilei Harefuah, 5739*, pamphlet 2, 5739.

48. See *Even HaEzer* 20: "Whoever has sexual relations with a woman

In summary, we are left with three halachic opinions:[49]

(A) Make the child into a boy.

(B) It is preferable to make the child a boy, but it is permissible to make it a girl.

(c) It is forbidden to make it a girl.

Sex Change

The option of "changing" a person's sex which the halacha addresses is certainly and obviously not merely fulfilling someone's whim. According to *Nishmat Avraham,* there is no question that this is not permitted for a normal male/female.[50]

Even in cases where doctors felt it was necessary to alter or "adjust" the sexual identity of a child born with ambiguous genitals, or for some other traumatic reason, it seems that the procedure is not as successful as it may superficially appear to be. A case was recently reported in the news media[51] of a boy who, due to a dreadful accident when he was eight months old, was "turned into a girl" by his concerned doctors. In spite of surgery, hormone administration, and all the cultural trappings of a girl–dolls, dresses, etc.–the child's transition was not as seamless as it appeared. "...Despite his feminized body and

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via one of her limbs, is to be punished by the Court (because of "wasting seed")."

49. *Avnei Nezer, Yoreh Deah* 322, describes a child born with a penis and testicles; however, there is no opening in the penis, but rather at the point where the penis and testicles meet. He rules that the child is certainly a male and requires a *brit*. The *Beit Yosef Even HaEzer* 5 quotes the Rosh that such a child is certainly capable of begetting children and that he requires *milah.*

50. *Nishmat Avraham, Even HaEzer* 44, note 3. Interestingly, he cites no proof for his ruling. However, see *Tzitz Eliezer* XXV, chapter 26,

upbringing, John in fact rejected his new gender. He tore off the dresses, dreamed of becoming a mechanic and even tried to urinate standing up–despite his reworked anatomy." "I thought I was a freak or something," he told the study's authors. After finally finding out the truth about his status, he proceeded to have his breasts removed and his genitals rebuilt. At 25, he married a woman and adopted children.

Researchers say that this case, though unusual, has important implications for the issue of influencing sexuality. "You can't magically decide somebody is either male or female."[52]

Some unusual problems do occasionally arise if a *tumtum* or *androgynous* was "fixed" as an infant and later in life feels the need for a change in sexual identification. Rav Eliezer Waldenberg spends a considerable amount of time examining various aspects of this dilemma:[53] If, after marriage, a man or woman undergoes a sex change operation, does the other spouse have to give (or receive) a *get?* Although he does not specifically say so, it is apparent from his writing that Rav Waldenberg assumes that any person undergoing such a change must have been originally a *tumtum/androgynous*, who was operated on to create a specific sexual identity.[54] Rav Waldenberg even spec-

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no.6.

51. *Newsweek,* March 24, 1997, p.66.

52. Ibid.

53. *Tzitz Eliezer*, Section 10, 25:26:6. He cites the *Terumat HaDeshen* 102, Rashi to *Yevamot* 49a, *Minchat Chinuch 203, Birkei Yosef Even HaEzer 17,* and others. It is noteworthy that this question is also discussed in *Teshuvot Besamim Rosh, ibid,* but not quoted by Rav Waldenberg. Possibly this is due to the problematic authorship of *Besamim Rosh* which, although attributed to the Rosh, who lived in the 13-14 century, could not have been written by him. Or at least, some of the responsa were not written by the Rosh. As a case in point, the one at issue here mentions an opinion of the *Noda Biyehuda*,

ulates what blessing this person should recite in the daily prayers–those for a man or a woman?[55] Perhaps, he suggests, the blessing should be reworded, "Blessed are You....who changed me into a...."

Is Surgery Required?

How about the option of doing nothing–what would be the halachic status of a *tumtum/adrogynous*?

The optimal response when a *tumtum* or *androgynous* is born might appear to be to seek medical advice and employ whatever surgical techniques are available to obviate the problem or at least to seek to determine the true sexual identity of the child.

Surprisingly, the *Rishonim* do not agree as to the correct halachic approach: Rashba[56] opined that the child should be operated on if possible, and, if found to be masculine, should be circumcised.[57]

Tosafot, however, were of the opinion that there actually

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who lived in the eighteenth century!

54. In passing, Rav Waldenberg touches on a different halachic question: he is of the opinion that if the female organs were removed from an individual and transplanted into another female (who was lacking them), who thereafter conceived and bore a child, that child is definitely the offspring of the birth mother, not the organ donor.

55. It is interesting that he does not relate this to the similar problem which a convert has concerning the blessing "...who has not made me a gentile..."

56. *Yevamot* 70a, *"efshar lo achshav likora, uvar mimhol hu."* See *Sefer Habrit*, pp.94-95, for various explanations of these divergent opinions.

57 *Yevamot*, ibid. R. Akiva Eiger writes in his notes to *Yoreh Deah* 262:3 that "there is no obligation to operate on and [subsequently] to circumcise a *tumtum*, and this is clear..." Surprisingly, he does not

exists no imperative to perform surgery in order to determine the sex of the child (which procedure would clarify the child's sex and consequently also its halachic requirements, depending if it was a boy or a girl).[58] Tosafot specifically comment, "although it would seem reasonable [to obligate surgery to uncover the true status], he is not required to [undergo] surgery." No explanation is given for this paradoxical conclusion.

It is very interesting to note that recently, perhaps as a backlash to all the medical engineering which is performed in our modern society, some opposition has begun to surface to the concept that whatever can be improved, should be "improved."

> [Hormone treatment is adminstered to children who are considered too tall or too short by society's standards.]
>
> The same kind of intended beneficence drives the medical management of children born intersexed. Many physicians...recommend early cosmetic surgery to try to erase the signs.
>
> What's wrong with these "normalization" technologies? First, it isn't clear that they work....Of the follow-up studies that have been done on intersex surgeries, none examine the psychological well-being of the subject in any real depth.
>
> ....These treatments often backfire. Children subjected to these kinds of treatments often report feelings of inadequacy and freakishness...And the treatments are not without physical risks. For example, intersex surgeries all too frequently leave scarred, insensate, painful and infection-prone genitalia.

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58. *Pesachim* 28b, s. v. *"arel"*; *Yevamot 70a, s.v. "arel"*.

> [Some people] confess to liking their unusual anatomy. But this is the absolutely forbidden narrative–not only rejecteing normalization but actively preferring the "abnormal."[59]

In other words, some doctors and psychologists now seem to approve the option of not trying to "fix" phenomena which may seem bizarre to the average person but which might actually be a preferable option for the person involved. Perhaps what needs adjustment, they suggest, is not the child but society's perceptions of what is desirable or not.

As a final comment, let us note that although the question is peripheral to our study, halachic literature does refer to people who take steps to avoid being put in a situation where they will have to perform a mitzvah. For example, a man avoids wearing a four-cornered garment so that he will not have to wear *tzitzit*;[60] or a person camps out in the desert, where inevitably he will have to transgress the Sabbath;[61] or he leaves a room so as not to have to stand up in honor of a Torah scholar.[62] Perhaps leaving a *tumtum/androgynous* in limbo is an analagous situation.

Thus, choosing not to operate on a *tumtum/androgynous* is a further halachic question which needs to be resolved.

With the birth of a child who deviates from the norm, there

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59. *The New York Times*, July 28, 1998, p. F4.

60. See *Menachot* 41a, where the Talmud opines that at a time of Divine anger, this person will be punished for his avoidance of the opportunity to perform a mitzvah. However, the *Chida*, commenting on the *Haftarah* of *Parashat Chukat,* says if these actions are done in order to avoid controversy, it is permissible.

61. See *Shut Tzemach Tzedek, Yoreh Deah* 92.

62. *Kiddushin* 32b. See also *Sdei Chemed, Ma'aracha 40, kellal 134.*

is an immediate rush to seek the best advice available. Parents pursue the finest doctors, the hospitals with the most modern procedures and facilities, read up on the latest technologies, in order to give their child the optimum opportunities in life. Our purpose in this article has been to bring to the awareness of the public the reality that medical advice must be pursued in tandem with religious guidance. A child's spiritual welfare, no less than the physical one, deserves and requires input from the finest sources, the most learned and knowledgeable rabbis, so that indeed the child will have the best opportunities to fulfill whatever destinies the Allmighty has determined.

Destruction of Fruit-Bearing Trees

Dr. Moshe Gartenberg
and Rabbi Shmuel Gluck

Introduction

When most of us think of the mitzvah of *bal tashchit*, it is in the context of the destruction of objects–we refrain from wasting food or destroying pencil stubs. But, in fact, the Torah presents this mitzvah in a far different context– the prohibition of the destruction of fruit-bearing trees. In *Parshat Shoftim*, as part of the discussion of the laws of *milchama* (national war), the Torah states:

> When you lay siege to a city for many days, do not destroy the trees therein by swinging an ax against them, because from them you will eat....but a tree of which it is known not to be food-yielding, that you may destroy.[1]

Although this *Parsha* discusses the prohibition of the destruction of fruit-bearing trees only during times of war, the *issur* (prohibition) applies as well to the destruction of such trees during times of peace. The Rambam writes:

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1. *Devarim* 20:19.

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> Not only during siege, but in any situation...he gets lashes.[2]

Over the past centuries, with the majority of the Jewish population dwelling in cities, there was little cause or need to destroy fruit-bearing trees. But with more of the current Jewish population in *Eretz Yisrael* and the Diaspora living in agricultural or suburban settings, it has become essential for one to be familiar with the mitzvah of *bal tashchit* in the setting originally presented in the Torah.

One of the many criteria used to determine the severity of a *mitzvat lotsa'aseh* (negative commandment) is the level of punishment incurred for its transgression. In this light, it should be noted that *Sifri* counts the prohibition of cutting down fruit-bearing trees as both an *aseh* (positive commandment) as well as a *lo ta'aseh*.[3] Furthermore, besides the punishment of *Malkot* (lashes) normally incurred for transgressing a *lo ta'aseh*, there is an additional punishment of *mita bedai shomayim* (early death). This is illustrated by the Gemara *Bava Kamma* which relates:

> Rabbi Chanina states: My son Shivchot did not die [for any other reason} than as punishment for cutting down a fig tree before its time.[4]

Thus, although the Torah itself makes no explicit reference to *mita bedei shomayim* for transgressing the mitzvah, the Gemara attributes this severe level of punishment for transgression of *bal tashchit*. Furthermore, as we shall discuss below, the destruction of fruit-bearing trees is categorized by many authorities as an act that entails *sakana* (a level of personal danger).

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2. Rambam, *Hilchot Melachim*, 6:8.
3. *Sifri, Devarim* 20:19.
4. *Bava Kamma*, 91B.

One would imagine that because this mitzvah is *halacha l'maaseh* (currently applicable) and because the punishment that may be incurred is so severe, the halachic details of this mitzvah would be subject to scrupulous study on the part of the general Torah-observant population. That this is not the case is at least partially due to the fact that details of the mitzvah are not found in a single source, but are spread throughout the Responsa literature. It is hoped that this article will, at minimum, bring together some of the dispersed literature and familiarize the reader with of the basic issues of the mitzvah of *bal tashchit*.

Who Is Included In the *Issur?*

Both males and females who are of age are prohibited from destroying fruit-bearing trees,[5] despite the fact that, during war, the destruction of the enemy's trees would normally be performed by male soldiers.

The Definition Of A Fruit-bearing Tree

Two issues are relevant here: 1) what species of trees are "fruit-bearing"? and 2) what level of fruit production need be yielded by the tree?

Trees which produce types of fruit normally used for human consumption are clearly within the prohibition. The status of trees such as oaks which yield acorns eaten by animals is less clear. Exactly what trees are included in the term *eitz ma'achol* (a tree that yields food) that is used in the Torah?

Haktav V'hakabalah writes:

> It is probable that this [the Torah's description] excludes trees within the forest that produce fruits and nuts, for

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5. *Sefer Hachinuch,* mitzvah 529.

> even though they are food for animals and some people, they are not really food for people because they are coarse and damaging."[6]

According to Rabbi Dovid Feinstein, the criterion to be used in current times is whether the fruit is sold in supermarkets and other such stores.[7] Working with this principle, trees which yield such produce as acorns, crab apples and wild berries would be excluded from the prohibition.

The question of what minimal annual yield of fruit need be produced by a tree in order for it to be considered fruit-bearing is discussed by several *Rishonim* (Rambam[8] and Rabbeinu Yerucham as quoted by *Yabia Omer*).[9] Their source is the Gemara *Bava Kamma*, which states that if a tree yields so small an amount of fruit (*davar muat*) that no one will bother to toil for it, then the tree may be cut down. The Gemara then proceeds to determine the minimum amount of produce required:

> Rav says: "Any date tree that bears a *kav* [approximately 1.19 liters] of dates is forbidden to be cut down." The question was posed: we find that the minimum quantity [of olives] that must be yielded by an olive tree in order that it may not be cut down is a quarter *kav* [and not a whole *kav*]? To this Rav replied: "An olive tree, because of its importance, is considered productive even with a lesser amount than required of less important trees." [10]

The *Sifri* derives an exemption of cutting down older fruit-bearing trees whose yield is small, from the Torah's use of the

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6. *Devarim* 20:20.
7. Related to authors in conversation.
8. *Hilchot Melachim*, 6:9.
9. *Yoreh De'ah*, 12.
10. *Bava Kamma*, 91B.

words "*asher teida*" (that you *know* that they [the trees] are non-fruit-bearing). The implication is that the determination of whether a tree's yield is sufficient is subject to human assessment that the tree has aged and is no longer capable of yielding the requisite amount of fruit.[11] *Lechem Mishneh* writes that if one seeks to cut down a fruit-bearing tree that is exempt from the *issur* because of its low level of yield, and one can also fulfill one's needs by cutting down a non-fruit-bearing tree, it is preferable to select the non-fruit-bearing tree.[12]

Ownerless Trees

The prohibition of *bal tashchit* applies not only to trees owned by the person engaged in the destruction, but even to trees owned by another Jew or a Gentile. According to the *Shulchan Aruch Harav*, even trees of *hefker* (ownerless trees) are included, since they are no worse than trees owned by Gentiles.[13]

Har Tzvi concurs with this ruling. He argues that the Torah singles out the destruction of trees during war but still permits the destruction of the enemy's city itself. Thus, with respect to the *issur*, trees have a special status which makes their destruction more severe than the destruction of other material items. Because of this, the destruction of trees is forbidden even if they are *hefker*.[14]

Yehudah Ya'aleh disagrees, citing Gemara *Avodah Zarah* 5a that one may not make one's animals drink from water that was left uncovered (for fear that a snake left its venom in the water and that those who drink the water will eventually die).

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11. *Sifri, Devarim* 20:19.
12. *Hilchot Melachim*, 6:9.
13. *Hilchot Shmirat Haguf V'Nefesh*, 14.
14. *Hilchot Sukkah*, 102.

One may infer from the Gemara's wording (*one's* animal) that one may make a *hefker* animal drink from this water, even though it might result in the animal's death. The implication is that the *issur* of *bal tashchit* does not apply to animals or trees that are *hefker*.[15]

Means Of Destruction

All forms of destruction are prohibited. *Sifri* writes that this includes even *goreim* (indirect forms of destruction), such as the diversion of a tree's source of water. On the other hand, the *Sifri* implies that passive neglect that results in the death of the tree is outside the bounds of the prohibition.[16]

Destroying Portions Of A Tree

Whether one is prohibited from destroying a part of a fruit-bearing tree is a matter of question. In his commentary to Gemara *Kiddushin*, Rashi implies that a destructive act that causes an item to lose value is included in the general *issur* of *bal tashchit*.[17] On the other hand, Rashi's position, as understood by *Shiltei Hagiborim* in *Avodah Zarah*, is that there is no *issur* in maiming an animal (so that its value has been diminished) so long as it still can perform some valuable functions.[18] It would follow from this opinion of Rashi that, if the tree can still produce some fruit (a valuable function) after a portion of it has been removed, there is no transgression.

The *Mishneh Lamelech* in his commentary on the Rambam similarly maintains that there is no *issur* to cut off branches

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15. Responsa, *Yoreh De'ah*, 164
16. *Sifri, Devarim* 20:19.
17. *Kiddushin*, 32A.
18. Commentary to *Rif, Avodah Zorah,* 4A.

from a fruit-bearing tree. He writes:

> The Torah's prohibition of *bal tashchit* [occurs] only when the tree along with its roots have been cut, but in the case that only branches were cut, I am unaware of a source [to prohibit its destruction].[19]

Har Tzvi explains the basis for the *Mishneh Lamelech's* position. The *issur* of *bal tashchit* is to destroy the tree. Cutting off branches of a tree is a form of pruning and has the opposite effect, as pruning the tree will actually cause it to grow better.[20] It follows from this argument that, according to the *Mishneh Lamelech*, any destruction of a portion of a tree that does not result in its improvement is forbidden.

The *Yechaveh Daat* quotes several authorities who hold that cutting off parts of a tree is included in the *issur* of *bal tashchit*. They argue that while the punishment of *malkot* (lashes) is forthcoming only when the entire tree has been destroyed, the destruction of part of a tree is nevertheless forbidden because of the rule "*chatzi shiur osrah Torah*."[21] This means that a full *shiur* (amount) is required to incur punishment for the transgression but transgression of less than the full Torah-designated amount of an *issur* is still prohibited. Whether this rule applies to the mitzvah of *bal tashchit* may be dependent on the dispute as to whether, in general, the rule of *chatzi shiur* applies to *issurim* that do not involve the eating of food.[22]

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19. *Hilchot Issurei Mizbeach*, 7:3.

20. *Hilchot Sukkah*, 101.

21. Vol. 5, 46.

22. There exists a difference of opinion whether the *issur* of *chatzi shiur osrah Torah* exists on a *d'oraita* (Torah-prohibited) level on *lo ta'asei* which do not involve eating or whether the *issur* is only *d'rabbanon* (prohibited by Rabbis), Responsa *Torat Chesed*, 44; *Avnei Nezer, Yoreh De'ah*, 259; *Chacham Tzvi*, 86.

Cutting Down A Tree For Constructive Purposes

The Rambam writes:

> ...but it is permissible to cut a tree if it is damaging other trees or if its wood is valuable. The Torah does not prohibit [the cutting of trees] unless it is a destructive act.[23]

The determination of exactly what constitutes a non-destructive act is the subject of much discussion in the halachic literature. In the following sections we discuss some of the types of non-destructive acts which may make the cutting down of fruit-bearing trees permissible.

Cutting Down Trees To Use Their Wood; Clearing Land For Construction

Shulchan Aruch Harav, on the basis of the Gemara *Bava Kamma* 91B, permits cutting down fruit-bearing trees either to use the wood for construction when such wood is valuable, or to use the wood to provide personal heating when no other fuel is available.[24] Rosh, in his commentary on that text, writes:

> "... if he needs the location of the tree, it [the destruction] is permissible."

Based on this *Rosh*, the *Taz* concludes:

> "....and from this [the opinion of the Rosh], I have permitted someone who had trees on his land to cut down a tree, even if it is fruit-bearing, in order to build a house on it. The house would need to be of greater

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23. *Hilchot Melachim*, 6:8.

24. *Hilchot Shmirat Haguf V'Nefesh*, 14.

value than the tree".[25]

One may not destroy a fruit-bearing tree to satisfy a personal need. *Chavot Yair* is of the opinion that the desire to either extend a yard or to create a garden to make available more sunlight or to have a place for walking is not sufficient reason to cut down a fruit-bearing tree. He adds, however, that if a tree blocks out light from a window, it may be cut down since the tree is then considered to be destructive in nature. [26] *Sh'vut Yaakov* is uncertain whether an exemption is applicable in this case.[27]

Cutting Down A Tree To Observe A Mitzvah

Be'er Sheva writes:

> ...it is possible that for an important mitzvah it (the destruction) would be permissible.[28]

Yechaveh Da'at is of the opinion that the *issur* of *bal tashchit* does not apply when it stands in the way of the mitzvah. As has been pointed out, the *issur* of *bal tashchit* only applies when there is no constructive motive for cutting down the tree. Cutting down a fruit-bearing tree to enable one to perform a mitzvah (such as cutting down a tree and burning the wood to use to cover the blood of a slaughtered bird when no other material is available) would be considered a constructive act.[29] To back up this position, *Shiltei Hagiborim* notes that one is required to rend a garment when in mourning although this constitutes

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25. *Yoreh De'ah*, 116:6.
26. Responsa, 195.
27. Responsa, *Choshen Mishpat*, 159.
28. Responsa, 24.
29. *Yoreh De'ah*, vol. 5, 46.

the destruction of the garment.[30] Such a destructive act is permissible because a mitzvah is accomplished in the course of performing the destructive act.

Replanting An Existing Tree

Under certain circumstances it is permissible to uproot a tree to replant it somewhere else. *Yaavetz* writes:

> If one uproots the vine and it will live, and one plants it somewhere else, there is no concern [of transgressing] the *issur*.[31]

Chaim B'yad cautions that, when uprooting a tree, one must be careful to preserve all roots and branches and to replant it immediately. He adds that if there is even a small chance that it will not be replanted properly, this option should be avoided.[32]

Chatam Sofer is somewhat more lenient. He agrees that one should not remove an older tree that cannot be replanted under the guise of replanting it. Yet he allows the removal of a tree, if it is reasonable to believe that the tree can be properly replanted and if a large sum of money is at stake.[33]

Fruit Trees That Cause Damage

The Gemara *Bava Kamma* 91B relates the following incident:

> Shmuel's sharecropper brought him some dates. He [Shmuel] ate some of them, and they had the taste of grapes. He asked, "Why is this?" The sharecropper

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30. Commentary to *Rif Avodah Zarah,* 4A.
31. Responsa, vol. 1, 76.
32. Responsa, 24.
33. Responsa, *Yoreh De'ah*, 102.

> responded "It was grown between the vines." Shmuel then remarked that, "If the taste of the grapes have been weakened to such an extent, you may bring me from its trunk."

Rif and Rosh in their commentaries to that text interpret it to mean that since the date tree absorbed so much flavor from the vines, it no doubt weakened them. Since the existence of the date tree was destructive to the grape vines, it may be cut down. Rambam also concludes that a tree that is destructive to other trees may be cut down.[34]

Removal By A Non-Jew

Avnei Tzedek writes that a Jew may not hire a Gentile to cut down a fruit-bearing tree. He argues that an employee is considered an extension of the employer.[35] *Notea Sorek* adds that an independent contractor is not considered an extension of the owner and as such he would be permitted to remove such trees.[36] Most *poskim* do not rely on this exemption, but will use it in conjunction with other factors. *Yabia Omer* writes:

> In my view, to avoid problems, one should sell the tree to a Gentile, with [payment of] money and a contract, and then have the Gentile cut down the tree.[37]

The Risk Of Premature Death

Does the punishment of an early death that is associated with transgressing the *issur* of *bal tashchit* apply to instances

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34. *Hilchot Melachim*, 6:5.
35. *Hilchot Sheluchim*, 11.
36. Responsa, *Yoreh De'ah*, 12.
37. Responsa, *Yoreh De'ah*, vol. 1 9:6

when it is permissible to destroy a tree? The opinion of *Yabia Omer* is that it does not apply. He writes:

> If there is no *issur,* then there is no danger, for one is dependent on the other.[38]

Yaavetz disagrees. He bases his opinion on two sources. The first is the text quoted above regarding the death of Rav Chanina's son for cutting down a date tree prematurely. Rav Chanina could not attribute his son's early death to any cause other than destruction of the tree. It follows that his son Shivchot must have been a *tzaddik.* If this were the case, Shivchot would not have committed any *issur,* and he was still subject to premature death despite the fact that no *issur* was committed. Thus one can conclude that a danger of premature death exists even when the destruction is halachically permitted.[39]

His second proof comes from a story related in *Bava Kamma* 92B:

> Rava, the son of Rav Chama, had a date tree growing adjacent to the border of Rav Yosef's garden. The birds that came to the tree dirtied the garden and damaged it. Rav Yosef demanded that Rav Chama cut down the tree. To this, Rava, the son of Rav Chama, replied, "I won't cut it down because Rava said one may not cut down a tree that still produces a *kav* of fruits..... If you wish to do so, you may cut it down."

A tree that attracts birds who dirty the garden may, by law, be cut down. The fact that Rav Chama, nonetheless, refused to cut it down indicates that even in a *halachically* permitted case, there still exists a level of danger.

As noted above, *Yabia Omer* disagrees with *Yaavetz.* He

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38. Ibid.

39. Responsa, vol. 1, 76.

considers it inconceivable that Rambam, Rosh, and *Taz,* when listing situations for which destroying trees is permitted, would not mention the additional concern of *mita bedei shamayim*.

Yabia Omer also attempts to refute each of *Yaavetz'* proofs. He claims that in the first case, Shivchot destroyed the tree in error. He thought that the tree was not producing the sufficient quantity of fruit for the *issur* to apply. In fact, the quantity of produce did warrant the *issur*. Thus, when he cut down the tree, he had the status of a *shogeg* (one whose transgression is based on a false impression). The reason that he was punished by premature death was that he was a *tzaddik,* and a *tzaddik* is punished for the slightest infraction (including a *shogeg*). However, when the destruction of a tree is totally permissible, no punishment of premature death is incurred.

R. Yehuda Hechasid writes that a tree that is fruit-bearing should not be cut down in any case, even in those situations listed above.[40] Many commentators, including *Chida*, point out that the majority of the restrictions mentioned by R. Yehuda Hechasid are rules that are permitted according to halacha.[41] The restrictions come from reasons such as *sakana* (danger), or kabbalistic reasons or *minhag* (custom).

Is the general public required to follow the writings of R. Yehuda Hechasid? *Chaim B'yad* writes:

> One who transgresses them [R. Yehuda Hechasid's restrictions] will not avoid punishment.....Issues of danger are more serious than issues of halacha.[42]

On the other hand, *Chida* writes:

> If one wants to be stringent when it is permissible.....it

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40. *Tzavoat Reb Yehuda Hechasid*, 45.

41. Responsa, 23.

42. Responsa, 24.

is enough to allow a Gentile to cut it down.[43]

In contrast, *Shem Arye* writes:

> ...and one who is not concerned (with the restrictions of R. Yehuda Hechasid) need not be bothered by them.[44]

In regard to another of R. Yehuda Hechasid's restrictions, *Rav Mo*she Feinstein writes:

> Following R. Yehuda Hechasid's restrictions is a matter of personal choice and is not something that can be imposed on an individual.[45]

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43. Responsa, 23.
44. Responsa , 24.
45. Responsa, *Iggerot Moshe*, *Yoreh Deah* III 133.

May A Doctor Refuse to See Patients?

Rabbi Avrohom Blaivas

May a doctor take a break from his daily routine? This question was posed to Rav S.Y. Elyashiv by a rabbi whose father was a doctor.[1] The doctor, when summoned at his home at night or during his free time, sometimes refused to treat these patients, because he sensed that if he interrupted his rest and helped those patients now, he would be unable to function properly in his role as a physician the following day. Although in such instances he turned away patients, nevertheless, the words of the *Shulchan Aruch*, which compares a doctor who does not assist the ill to a murderer, weighed heavily on his conscience.[2] Was he allowed to send them to a different physician, or is it necessary for a doctor to tend to whoever arrives at his door, at any hour? Under what circumstances may a doctor tell a patient to seek help elsewhere?[3]

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1. *Sefer Hazikaron* for R. Zolti (*Moriah* 5747).

2. *Y.D. 336:1.*

3. This is not to suggest that a doctor can never close his office to take a break. The question here, howerer, is whether a doctor may ever refuse to treat a sick person who specifically asks for his help. And if he is–does that permit apply in all cases, irrespective of the severity of the patient's condition?

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Before answering these questions it is necessary to understand the underlying roots of the physician's obligation, as well as the extent of that obligation. The purpose of this paper is to explore those areas.

The Obligation

The *Shulchan Aruch* writes:

> The Torah gave permission to a doctor to heal, it is a mitzvah, and it is in the category of *pikuach nefesh* (saving a life). If one refrains from it, he is considered a murderer. This is true even if there are other doctors to heal the patient, because a person is not privileged to be healed through everyone (שלא מן הכל אדם זוכה להתרפאות).[4]

The *Tzitz Eliezer* explains the reasoning behind the dictum "a person is not privileged to be healed through everyone", based on the Gemara (*Avoda Zara 55a*) that when Heaven decrees an illness upon a person, it simultaneously decrees that he will not recover until a certain day and time, with a distinct medication, and only by a specific doctor.[5] Therefore, only a particular doctor is able to effect his restoration to health.

The *Prisha*[6] wonders why the *Shulchan Aruch*[7] calls the physician's obligation a mitzvah. The Gemara, quoting Rav Yishmael, learns the *pasuk* "ורפא ירפא" (*Shemot 21:19*) as giving permission for someone to act in the healing process, but not as a requirement to do so.[8] The *Prisha* elucidates that once it is

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4. *Y.D.* 336:1.

5. *Tzitz Eliezer, Chelek 13, Siman 56, # 2.*

6. In the *Tur 336*.

7. Ibid. *Prisha's* question is actually asked on the *Tur*, but it applies to the *Shulchan Aruch*, as well.

8. *Bava Kamma 85a.*

established that it is not forbidden to engage in medical treatment, it automatically falls under the rubric of *pikuach nefesh*, where one is obligated to intervene to save the life of another.

The question now remains, what mitzvah is a doctor fulfilling when attending to a sick person?

The Source Of The Mitzvah

There are five major sources quoted in *sefarim*:

1) The Rambam states that the obligation to heal comes from the *pasuk* "והשבתו לו" (*Devarim 22:2*), the requirement of returning lost objects to their owners.[9]

2) Both the *Minchat Chinuch*[10] and the *Maharsha*[11] comment that once the Torah includes restoring a person's health in the charge of returning lost objects, the negative command of "לא תוכל להתעלם" (*Devarim 22:3*), which prohibits one from ignoring lost articles, should be operative as well.

3) The Rambam further states that any one who has the ability to save someone's life and does not, violates the prohibition "לא תעמוד על דם רעך" (*Vayikra 19:16*), idly standing by while another Jew is in danger.[12]

4) The Ramban understands the *pasuk* "וחי עמך" (*Vayikra 25:35*), which referrs to aiding a poor person, as a positive mitzvah that necessitates helping another Jew survive. This would include the requirement of saving a life.

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9. *Pirush Hamishnayot* to *Nedarim, Perek 4*.
10. *Mitzvah 237,* in the *Kometz Haminchah*.
11. *Sanhedrin 73a.*
12. *Hilchot Rotzeach 1:14.*

5) The *Tzitz Eliezer*, based on the Ramban in *Torat Ha'adam*, indicates that the commandment "ואהבת לרעך כמוך" (*Vayikra 19:18*),which requires a person to treat his fellow Jew in the same way as he would himself, obligates a doctor to involve himself in caring for patients, even in a non-life threatening situation.[13]

The Extent Of The Obligation

Having confirmed that doctors are indeed obligated to attend to sick people, it must be determined how far reaching that requirement is. Clearly, if a doctor were to tend to patients at all hours of the day and night, it would not be long before he himself would be ill. Is a person then compelled to endanger his health for the assistance of others?

In *Beit Yosef* (*C.M. 426*), Rav Yosef Caro cites the opinion of *Hagahot Maimoniot* who brings a story from the *Talmud Yerushalmi* (*Terumot 8:4*). Rav Imi was captured and was in a situation of certain death. Rav Yonatan gave up hope for his safe return and decided to take no action, whereupon Reish Lakish volunteered to go save him, saying, "I will either kill or be killed." The *Hagahot Maimoniot* concludes, based on this narrative, that one is actually obligated to risk his life in order to save someone who faces a certain death. (חייב להכניס עצמו בספק סכנה להציל חבירו מודאי סכנה.

The *Tur* (*ibid*.) quotes the Gemara in *Sanhedrin (73a)*, which says that if a person is drowning or is set upon by wild animals or thieves, a bystander is responsible (חייב להצילו) to save him because of the maxim "לא תעמוד". He also brings the Rambam (*Hilchot Rotzeach 1:14*), who slightly modifies the words of the Gemara by stating that one is obligated to intervene only when he is able to save the person in danger (יוכל להצילו). This

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13. *Ramat Rachel, Siman 21.*

discrepancy is pointed out by the *Bach* (*ibid.*) to demonstrate that whereas a cursory reading of the Gemara's statement might compel a person to act regardless of the possible dangers to himself because there is always a remote possibility that he might be able to aid the victim without injury to injure himself, the *Tur* uses the Rambam's statement to illustrate that a person would *not* be forced to place himself at physical risk in order to rescue someone else.

The *Sefer Me'irat Ainaim* (*ibid*.), mentions the *Beit Yosef*, that one is obligated to enter a dangerous situation to attempt to save another, and notes that although Rav Yosef Caro mentions the opinion of the *Hagahot Maimoniot* in his commentary on the *Tur* (*Beit Yosef*), he does not codify this opinion in the *Shulchan Aruch* (his work on normative halacha), presumably because neither the Rif, Rambam, Rosh, nor *Tur* cite this theory, either. The *Pitchei Teshuva* (*ibid*.) refers to an *Agudat Aizov* that illustrates that the *Talmud Bavli* disputes this ruling of *Talmud Yerushalmi*, and it is due to this contention that none of the halachic codifiers mention it as normative Jewish law. In the interest of brevity, suffice it to say that accepted halachic opinion is that one is not required to place himself in a perilous situation to aid another Jew who is in definite danger.[14]

Now that we have established that normative halacha does not expect someone to place himself at risk to save others, we might be inclined to answer our original question, is a doctor permitted to refuse patients, by simply stating that working all the time will clearly put the doctor in physical danger.[15] Rav

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14. For additional discussions of this topic see *Sh'ailot Uteshuvot Ha'Radvaz 218* and *627; Ha'emek Sh'aila 147:4; Meshech Chochma, Shemot 4:19; Chavot Yair, 146; Iggerot Moshe, Y.D. 2, Siman 174, Anaf 4; Tzitz Eliezer Chelek 9, Siman 45; Encyclopedia Talmudit* entry on *Hatzolat Nefashot.*

15. This was in fact the theory advanced by the rabbi (the doctor's

Elyashiv declares that this alone would not suffice to exempt a physician from tending to the sick. He reasons that if this is the sole dispensation, then a doctor would constantly have to weigh if skipping a meal or sleeping a little less, would actually harm him to the extent that he would be in danger. If the doctor feels that missing a meal, or sleeping a few hours less would not make him ill, he would be required to care for the patient.

The *Minchat Chinuch* and *Chochmat Shlomo*

The *Minchat Chinuch*[16] writes that if a person is trying to commit suicide, there is no obligation to save him.[17] He deduces this from the fact that the source of the mitzvah to save a life stems from the commandment to return lost property (השב תשיבנו). Just as one is not directed to return something which the owner no longer wants (*C.M. 261:4*), so too, if a person is intentionally "throwing his life away" one would not be charged to return it to him. That being the case, continues the *Minchat Chinuch*, the negative command of "לא תעמוד" also would not apply, since the positive mitzvah is not operative in this case.

A similar idea is advanced by Rav Shlomo Kluger in the *Chochmat Shlomo* (*C.M. 426*). The order to return a lost object (והשבתו לו), has a dispensation of "והתעלמת מהם", that on occasion a person is exempted from returning lost things. For instance, if he would have to embarrass himself (זקן ואינו לפי כבודו) in the

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son) who posed the question to Rav Elyashiv, as a means of reassuring his father.

16. *Kometz Haminchah, Mitzvah 237.*

17. Rav Y.F. Perlow in *Sefer Hamitzvot of R. Saadia Gaon* writes the same theory and proof as the *Minchat Chinuch*. In the notes to the *Machon Yerushalaim Minchat Chinuch* the writer cites an explanation of the opinion of the *Minchat Chinuch*, and brings many opinions opposed.

process of retrieving the object, the Torah allows him to "look away" and not return the item to its owner. Rav Shlomo Kluger posits, since the mitzvah to rescue another is derived from the command to return misplaced objects, if a person would have to disgrace himself to save a life, he would not be obliged to do so, from this same dispensation of "והתעלמת מהם" . He also says that we need not be concerned with the dictum of "לא תעמוד", because it would not apply independent of "והשבתו לו".[18]

If, as these *Acharonim* hold, the mitzvot of "לא תעמוד" and "והשבתו לו" always function together, and in a case where one is exempted from "והשבתו לו" there would be no obligation of "לא תעמוד", because the entire basis of lifesaving originates from returning lost objects, then it might be possible to say that if a doctor is eating or sleeping in order to renew his energies to treat other patients, he is in the category of one who is occupying himself with a mitzvah, who is then exempt from engaging in a different mitzvah (העוסק במצוה פטור מן המצוה).[19] If this is true, a doctor would not only be allowed to refuse patients, but obligated to do so!

Rav Elyashiv strongly refutes this idea. He says it is a well known concept in the Torah that nothing stands in the way of *pikuach nefashot*, other than the three cardinal sins. According to the conclusion reached above, it would be possible to say that if one was taking his *lulav* and *etrog* on *Succot*, not only would he not have to help, but he would be forbidden to help someone who is drowning! This is patently absurd. He therefore feels that,were there only the *pasuk* "והשבתו לו" , we might be able to say that one who is involved with one mitzvah is exempt

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18. The conclusions of both the *Minchat Chinuch* and the *Chochma*t *Shlomo* are strongly refuted by Rav Elyashiv (ibid.) and Rav Moshe Feinstein (*Iggerot Moshe, Y.D. 2, Siman 174, Anaf 3*).

19. *Chidushei Ha'Ritva, Succah 25a.*

from another. Once the Torah uses the extra *pasuk* of "לא תעמוד" to introduce the new concept of requiring the outlay of money to save a life, it is then evident that "לא תעמוד" does not require "והשבתו לו" to be in effect. After all, one of the principles of returning objects is that one does not have to pay out money for this mitzvah. Evidently, if "לא תעמוד" obligates monetary outlay, it must then be totally independent of "והשבתו לו".[20]

A Person Is Not Privileged To Be Healed Through Everyone

Let us now examine exactly what the obligation of a doctor is, in a city where there are many other physicians. Does the physician's obligation in such cases derive from "והשבתו לו" alone, or is "לא תעמוד" operative as well? Additionally, can we say that "והשבתו לו" has no bearing if the patient has another physician available?

The Mishnah *Nedarim (33a)* states that a person may take an oath *(madir)* to forbid another person *(mudar)*. from deriving pleasure either from him or his property. Nevertheless, the *madir* may return a lost object to the forbidden person, the *mudar*. A later Mishnah (*ibid. 38b*), as explained by the Gemara (*ibid. 41b*) says the *madir* may engage in the healing of the *mudar*, however he may not treat his sick animal. The *Talmud Yerushalmi* (*ibid. 4:2*) questions why the *madir* can not tend to the sick animal, does it not fall into the category of "returning a lost item"? Answers the *Yerushalmi*, we are dealing here with a situation where there are others to heal the *mudar's* animal. If so, continues the Gemara, why is the *madir* allowed to treat the *mudar* himself, let him go to a different doctor? The Gemara

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20. See also *Shulchan Aruch Harav* (*Hilchot Nizkei Haguf, Siman 8*) who states explicitly that these two mitzvot are separate from each other.

responds with the tenet, "a person is not privileged to be healed through everyone" (לאו מן הכל אדם זוכה להתרפאות). Therefore, the *madir* can take care of the *mudar*, even where there are other physicians available. The Ran (*ibid. 41b*) explains the *Talmud Bavli* in the same fashion as the *Yerushalmi*, where even though there are other doctors available, the *madir* may still heal the *mudar* due to the concept "a person is not privileged to be healed by everyone."

Rav Elyashiv understands the Ran as implying that absent this concept, the *madir* would not be able to involve himself in the aiding of the sick *mudar*. Why not? Why should it be any less of a responsibility than returning a lost object, which a *madir* may restore even if there are others to return it? The difference is that absent the principle of "not everyone is privileged to heal", there is no obligation for a specific individual to heal, assuming there are other doctors around. The responsibility rests solely upon the ill person to seek his healing. The dictum "לאו מן הכל" comes to demonstrate that perhaps it is not only up to the sick person to search for his cure, for possibly Heaven has decreed that only the *madir* will be capable of effecting his recovery. The *madir* may therefore treat the *mudar.*

Using the identical logic, we can posit the converse as well. Perhaps the *mudar's* cure will come *only* from a different doctor, as opposed to coming from the *madir*, and if the *madir* treats him he will be unsuccessful, because the patient's recovery rests with a different doctor.

Rav Elyashiv points out that if this is true, then if there are many doctors ready to treat the patient, there is no longer a requirement of "לא תעמוד" for a physician who turns away a patient. Since the sick person needs only one doctor, who is to say that his recovery will not come through a different doctor? The physician who declines to treat a patient, obviously will not fulfill the obligation of "והשבתו לו" (restoring his health),

but his only responsibility to heal where other doctors are available arises from the mitzvah of returning lost objects, and that being the case, the doctor is not nullifying the command of "לא תעמוד".[21]

Rav Elyashiv goes even further, trying to show that the whole injunction of "לא תעמוד" is relevant only when there exists a life-threatening situation (סכנת נפשות). Upon examining the Gemara *Sanhedrin (73a)*, we find that the only cases presented are those which represent dangers to survival, such as rescuing a drowning individual, and saving someone from thieves or wild animals. The Rambam as well (*Hil. Rotzeach 1:14*) mentions similar cases.

It would seem further that the Gemara *Nedarim*, which teaches the principle that "not through everyone is a sick person privileged to be healed" is also germane only to a dangerous predicament. The Rambam,[22] Ritva, and Meiri[23] all describe the case of the *madir* and *mudar* as involving a seriously ill patient.[24] The *Korbon Ha'aida*, writing on the *Yerushalmi* (*Nedarim 4:2*), also indicates that the patient is dangerously ill.

The Mourning Physician

The *Pitchei Teshuva* (*Y.D. 380:1*) quotes *Chamudei Daniel* in

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21. It is not clear why the dictum "לא תוכל להתעלם" is not operative in this situation.

22. *Pirush Hamishnayot* to *Nedarim, Perek 4*.

23. *Nedarim 41a.*

24. However, the Rambam in *Hilchot Nedarim 6:8* makes no specific reference to a seriously ill person. The *Keren Orah* on *Nedarim 41b* questions what the Gemara would derive from a case of *pikuach nefesh,* once it has already been established that the entire Torah is violated for the sake of saving a life. He therefore concludes that the Gemara is not dealing with a case when the *mudar* is dangerously ill.

regard to a mourner during the *shiva* period, who is usually not allowed to engage in business, or even to leave his home. However, if the mourner will sustain a significant loss (דבר האבוד), an intermediary may tend to his business in his place. The *Chamudei Daniel* indicates that included in this dispensation is the significant loss that others might suffer (דבר האבוד דאחרים). The example is a doctor who is summoned during *shiva* to treat a *very sick person;* the ruling is he may go to help that patient.[25]

The *Tzitz Eliezer*[26] cites *Shevut Yaakov,*[27] who, like the *Chamudei Daniel*, concludes that in the case of a seriously ill patient, a doctor who is in mourning may leave his house to help, even when many other doctors are around, because of the tenet "לאו מן הכל".[28] It would seem from these sources that

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25. *Lev Avraham 2, Perek 14, Ha'arah 25* writes that the *Pitchei Teshuva* implies that this would include even a non-seriously ill patient. In *Sefer Zichron Meir, Availut, Chelek 1, Perek 4, Siman 7, Ha'arah 75,* the author questions Dr. Abraham's conclusion, because the language of the *Pitchei Teshuva* is that he was called upon by a "חולה גדול" . See note 27.

26. *Tzitz Eliezer, Chelek 13, Siman 56, sif katan 2.*

27. *Shevut Yaakov, Chelek 1, Siman 86.*

28. *Nishmat Avraham* (*Y.D. Siman 380 sif katan 1*) quotes Rav Shlomo Zalman Auerbach, who wonders why a doctor in mourning can treat only the seriously ill. If one is fulfilling a mitzvah even by treating a non-seriously ill patient, why should a mourner not be allowed to leave his house and attend to these people as well? It appears to me that it may be possible to answer this question with the idea established by Rav Elyashiv. If one is seriously ill then by calling a specific doctor he is activating that physician's obligation of "לא תעמוד" and of "לאו מן הכל" , which will require the physician to act. However, if the patient is not dangerously sick, even if the doctor is not in mourning he can turn this person away and send him to a different doctor for assistance; surely then if he is in mourning we could understand that he might not be allowed to go and aid the patient.

this permission applies only when it comes to caring for a dangerously ill person, just as Rav Elyashiv has previously established.

The Physician Who Charges Exorbitant Fees

The *Shulchan Aruch* (*Y.D. 336:3*) writes that if one has medicine which is needed by an ailing person and refuses to sell it unless the sick person gives him a very large sum of money, i.e. much higher than the normal price, the sick person can agree to pay the high price and after getting the medication pay only the normal cost.[29] However, in the case of a doctor who forces a patient to accede to an unreasonable fee, the patient is obligated to pay whatever price the doctor stipulated, the rationale being that he agreed to pay for someone's medical expertise, a commodity which is basically priceless שחכמתו מכר (לו ואין לה דמים).[30] The Ramo, as explained by *Turei Zahav* (*ibid*.), elucidates this idea further. Even though the physician has a positive mitzvah to treat this patient, this is not a mitzvah *specific to him*. Theoretically anyone can obtain a medical education and thereby gain the knowledge to treat the sick. Since this doctor went to medical school to learn how to care for the ill, his expertise is considered invaluable, and he can demand and receive any compensation that he desires, even if it is excessive, and if his fee is not met he may refuse to help the sick person.[31]

The *Tzitz Eliezer* is bothered by an apparent contradiction between this halacha and the halacha governing *milah*

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29. The original source for this idea is the Ramban in *Torat Ha'adam* (Chavel translation, P.44).

30. This halacha, as well, is derived from Ramban (*ibid*.).

31. See also, *Bach* and *Prisha* (*Y.D. 336*) on this.

(circumcision).[32] The Ramo (*Y.D. 261*) writes that a *mohel* can be forced to do a circumcision even for free, if there is no other *mohel* in the city. Why should the situation of a *mohel* be any different than the case of a doctor, whereby the doctor can exempt himself from acting if his fee is not met? The *mohel* should be able to contend, identically to the doctor, that anyone could have acquired the skill to perform circumcisions, and therefore it is not incumbent upon him alone to perform this *milah*.

The *Tzitz Eliezer* explains that in actuality there is no difference between these two cases. The *mohel* is able to refuse the circumcision, so long as there is another *mohel* available. Where there is no other *mohel*, he can be coerced to conduct the *milah* without receiving compensation. Likewise, if a doctor would be the only person in a city capable of rendering adequate medical care, he would also be forced to act and not be able to demand remuneration. The aforementioned case of the physician being allowed to refuse treatment of a patient, unless the patient acquiesces to extravagant payments, is restricted to the circumstance of there being other doctors in the city who can adequately aid the patient. Only in those instances can a doctor assert that the mitzvah is not his exclusive responsibility, and it falls equally on everyone else.

The *Tzitz Eliezer* quotes the *Levush* and the Radvaz[33] who also assert that the case of the doctor is limited to when the patient has other physicians to go to. The Radvaz in his explanation of this halacha states that even the Ramban (who is the *Shulchan Aruch's* source for this law) would admit that if there are no other satisfactory doctors available, then the mitzvah falls exclusively on this specific doctor, and if he continues to

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32. *Ramat Rachel, Siman 25.*

33. *Shailot Uteshuvot Ha'Radvaz, Chelek 3, Siman 986 (556).*

refuse treatment of this patient, he violates the positive command of "והשבתו לו".

The above discussion is highly pertinent to our analysis. We see from the *Tzitz Eliezer*, and more specifically from the statement of the Radvaz, that when there are other doctors to care for an ailing individual, a doctor who declines to aid a patient does not violate the charge of "והשבתו לו". This insight, in conjunction with Rav Elyashiv's understanding of the mitzvah of "לא תעמוד", that a doctor is not defying the mitzvah by turning away a patient so long as there are alternative physicians, demonstrates that in most of our modern cities, a doctor who does not see a patient transgresses neither the positive command of "והשבתו לו", nor the negative tenet of "לא תעמוד".

Halachic Conclusions

In terms of normative halacha, Rav Elyashiv writes that provided three conditions are fulfilled, a doctor may refuse to take a patient:

1) There is a large number of physicians in the area.

2) The sick person will certainly be able to obtain a doctor to treat him.

3) The situation is not an emergency nor a dangerous predicament.

The Maharsham deals with a different aspect of the question, whether there is a problem of עינוי הדין (delaying a judgment). He discusses the case of a rabbi who eats or sleeps before providing an answer to a question that was posed to him.[34] He notes that the rabbi is forbidden to delay pronouncing judgment

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34. *Sh'ailot Uteshuvot Ha'Maharsham, Chelek 2, Siman 210*; quoted by *Nishmat Avraham, Chelek 4, Section Y.D., Siman 336, S'if Katan 1.*

only if an answer is clearly evident to him. However, if the Rav would have to search for an answer, there is no עינוי הדין if he eats or sleeps in the interim.

He cites a *Braita*[35] that indicates the severity of delaying a response. The *Braita* tells that R. Shimon ben Gamliel was crying, when he and R. Yishmael were sentenced to death by the Roman government.[36] R. Yishmael suggested that perhaps the reason for the severity of the punishment was that, maybe once while R. Shimon was eating or sleeping a woman came to ask on her *niddah* status, and his attendant told her that he was asleep. The Torah teaches (*Shemot 22:22*) that it is improper to pain another, and this warning is immediately followed by the *pasuk* "והרגתי אתכם בחרב" (I will kill you by the sword). Perhaps the harshness of his death arose from the fact that R. Shimon caused the woman to wait for an answer, and thereby caused her pain.

From here we see that causing one to wait for a response is a serious offense, in this case even punishable by death. The Maharsham explains, however, that by the letter of the law there is no real issue of delaying a reply. The narrative of R. Yishmael and R. Shimon is simply relating what would be considered an exceptionally pious act (מילי דחסידותא). If the attendant sinned and R. Shimon had no knowledge of the events, what fault does he have that warrants his being punished in this manner? The strictness of the judgment upon them can only be because *Hashem* is exceedingly demanding of the righteous (הקב"ה מדקדק עם הצדיקים כחוט השערה).

He further elucidates, and this is relevant to the circumstance

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35. *Mesechta Semachot* (*perek 8*).

36. There are two versions of the *Braita*. One has R. Yishmael as crying, the other version says it was R. Shimon who cried. The Maharsham seems to follow the version that it was R. Shimon.

of a doctor as well, that a person is not required to cause himself pain to relieve the pain of others. The *Braita* in *Semachot* is not in accordance with practical Jewish law, since halacha follows the opinion of R. Akiva, that a person's own life is given priority over the life of another.[37] The Maharsham conclusively states that one would not have to give up his time for eating, sleeping, and resting in order to alleviate someone else's discomfort, and this principle should likewise apply in the case of a non-seriously ill patient.

The *Nishmat Avraham*, quoting from Rav Neuwirth, adds that if the only reason that a dangerously ill person requests a specific doctor is because he knows that this physician will not charge him, the doctor has no obligation to come to this patient's aid.[38]

Even with all the aforementioned ideas, it would be best for any practicing physician to be mindful of the words of the *Aruch Hashulchan* (*C.M. 426:4*):

> Everything is according to the situation, and each case should be balanced and weighed. A person should not be careful with himself excessively... anyone who saves a Jewish life, it is as if he saved the entire world.

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37. See Gemara *Bava Metziah 62a*. It is unclear to me why this logic should apply even in non-dangerous situations. It would seem that the argument of R. Akiva and Ben Petura is only referring to a case of סכנת נפשות. However, in terms of strictly exerting oneself for another, this principle may not apply, and one would be required to cause himself a little extra trouble for the sake of another.

38. *Nishmat Avraham, Chelek 4, Section E.H., Siman 115*.

Kashrut of Exotic Animals: The Buffalo

By: Rabbi Ari Z. Zivotofsky, Ph.D.

Introduction

The kosher food industry in the U.S. is booming, amounting to around 4 billion dollars a year.[1] The modern affluent kosher consumer is forever looking for new and varied cuisine to tantalize his palate, making it not only intellectually stimulating but financially significant to investigate the kashrut of uncommon animals and the criteria for such a determination. In recent years goose, deer, and buffalo have been added to the menus of several kosher N.Y. restaurants and/or butcher

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1. See http://www.jewishworldreview.com/0798/kosher.html based on information provided by the consulting firm Integrated Marketing Communications. The *Wall Street Journal*, (Craig S. Smith, "A Colombo-Like Rabbi Certifies Food in a Land of Pork Lovers" 12/3/98) reported that sale of kosher food in the US was 3.25 billion dollars in 1997, which was a 12% increase over 1996.

I would like to thank Rabbi Reuven Halpern, Avi Pollak, Dr. Doni Zivotofsky, D.V.M., and Dr. Bernard Zivotofsky, Ph.D. for assistance in various aspects of this work. A special debt of gratitude is owed to Stanley Searles, Curator of Birds at the Cleveland Metroparks Zoo, and Dr. Rob Lofstedt, Professor of Theriogenology at the Atlantic Veterinary College, Prince Edward Island, Canada, for help with the scientific information in this article.

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shops.[2] While the kosher status of the first two items is relatively non-controversial, the status of buffalo raises an interesting question.

For the purpose of identifying kosher animals, the *Shulchan Aruch (Yoreh De'ah 79*, 80, 82-85), based on Leviticus 11:1-27 and Deuteronomy 14:3-20, divides the animal kingdom into five categories, four of which have kosher members. The categories with kosher members are: terrestrial mammalian quadrupeds, fish, birds, and invertebrates. The fifth category – bugs – has no kosher members. In addition, all creatures that do not fit into one of the above categories, such as all reptiles and amphibians, are not kosher. For each of the four categories with kosher members, the Torah specifies a means to indicate whether a particular species is kosher, and in many cases the rabbis clarified, elaborated and added to the indicators.

Kosher Signs:

Within the mammalian quadruped category, which includes both *behayma (*"domesticated" animals) and *chaya (*"wild" animals), an animal is defined by the Torah as kosher if it chews its cud[3] (*ma'alay gayra)* and has hooves that are fully

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2. See Matthew Goodman, "Bringing Buffalo to New York with Relish", *Forward*, November 13, 1998, page 23, regarding a Manhattan restaurateur's plans to bring kosher buffalo to his restaurant. Over the last several years there was a kosher butcher shop in Brooklyn, N.Y. that was selling buffalo meat that had been slaughtered in Baltimore under Star-K supervision, and a number of years ago Levana's restaurant in Manhattan, N.Y. sold buffalo under Kof-K supervision.

3. Animals that chew their cud are known as ruminants and usually have four stomachs. While all four-stomached animals are ruminants, among three-stomached animals some are ruminants (infraorder Tragulina–such as mouse deer) and some are non-ruminants (infraorder Ancodonts–such as hippopotamuses).

split (*mafreset parsah v'shosa'at shesa prasot).*

In addition to the physical indicia, the Torah (Deuteronomy 14:4-5) lists ten kosher "species". According to the Talmud (*Chullin 80*a) these ten (and their subcategories) are the only species in the world that have both kosher requirements.[4] Either method is sufficient: One may conclude that an animal is kosher either upon observing the physical indicia, or by recognizing it as one of the ten kosher species (Rambam, *Ma'achalot Assurot 1:8*; *Aruch Hashulchan 79:*4).

The Torah further enumerates four non-kosher animals which have only one kosher sign. Among these are the pig, which has split hooves but does not chew its cud, and the camel, which chews its cud but does not have split hooves.[5]

While grazing, ruminants quickly swallow the raw food into the first stomach (rumen–*keres*) where it is partially digested and made into soft round balls–the infamous cud. When the animal has some free time this cud is ruminated back to the mouth where it is more completely chewed by the molars, and acted upon by copious amounts of saliva. This process occurs many times. It is then sent to the second stomach (reticulum or honeycomb bag–*beit hakosot*). There, it is further broken down and when it is finely ground and fermented it is sent to the third stomach (omasum or psalterium–*hamses*). Here the juices are squeezed out and it is passed to the fourth stomach (abomasum–*kaivah*) where it is acted upon by "normal" digestive juices and "true" digestive activity takes place.

4. See also comments 4 and 9 of Radal to *Pirkei D'Rebbi Eliezar*, chapter 11.

5. The other two are the *arnevet* and *shafan*. *Arnevet* is often identified as hare or *Lepus* (European common hare = *Lepus capensis* or *Lepus europeaus*; Mountain, blue or arctic hare = *Lepus timidus*). In modern Hebrew *shafan* is the *arnav habayit*–domesticated rabbit (*Oryctolagus cuniculus*; order Lagomorpha, family Leporidae). The biblical *shafan* may be the hyrax, Syrian coney (*Procovia syriaca*) or rock badger. None of these are true ruminants. They excrete moist pellets which they then eat, giving the appearance of chewing their cud. It is possible

Based on a pleonasm, *Chazal* concluded that the Torah's list of single indicator animals is exhaustive rather than paradigmatic, and hence they felt comfortable establishing corollary indicators (*Chullin 59a; Shulchan Aruch, YD* 79:1). They asserted that any animals that chews its cud is kosher if it is not one of the three biblical exceptions. They also stated that all animals that do not have upper incisors, canines, or soft front tooth-like structures are ruminants and are kosher, with the singular exception of the young camel.[6] This dental property is considered sufficient evidence to establish that an animal is kosher. Thus, if one were to come across an unknown animal that was not a young camel and found it to have no upper incisors, he may eat it.

The rabbis further stated that every animal that has completely split hooves also chews its cud and is therefore kosher, with the singular notable biblical exception, the pig. Thus, any unknown species that has split hooves and is not a pig[7] is permissible.

Chazal boldly added an additional identifying feature of kosher animals that seemingly has no basis in the written Torah and is based solely on an oral tradition received by Moses at Mount Sinai. Other than the wild donkey,[8] no non-kosher species

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that this too is biblically regarded as chewing of cud or it is possible that all modern attempts at identifying these species are seriously flawed. On *arnevet* and *shafan* see Yehuda Feliks, *Animals and Plants in the Torah* (Hebrew), 1984, Jerusalem, pages 23 and 87 and *Responsa of Rabbi Yitzchak haLevi Herzog,* 1990 *YD:*1:23,24.

6. In other words, the adult camel and the other two biblical examples, while being ruminants, nonetheless posses these "teeth" that are not found in kosher animals.

7. If it has horns it is definitely not a pig (*Sefer haEshkol*; *Shulchan Aruch,* YD 79:1) or a young camel (*Kaf haChaim,* YD 79:6).

8. In Hebrew *arod*. Its true identity is uncertain.

has meat under the tail (?Musculus obturator internus?) with grain that runs both warp and woof. Therefore, if one slaughters an unknown animal and finds that the grain of its meat runs both ways, and knows that it is not a wild donkey, the meat is permitted.

Finally, the Mishnah (*Niddah* 51b), at least according to Rashi's understanding, states that horns alone are enough to declare an animal kosher, since all horned animals are kosher.[9]

The kosher animals within the mammalian quadruped category would seem to include not only the animals commonly thought of as kosher such as cows (Bos taurus), sheep (Ovis aries), goats (Capra hircus), and deer, but such exotic animals as the pronghorn (Antilocapra americana), moose (Alces alces), the 6-foot, 1500 pound Giant Eland (Taurotragus derbianus), giraffe (giraffa cameloparbalis), and the Bongo (Boocerus eurycerus). If so, what could conceivably be a problem with respect to buffalo?

The Problem With Buffalo:

Despite the apparent simplicity of the kashrut rules, buffalo poses an interesting question for a variety of reasons: there are various types of "buffalo" that exist; it is mentioned in rabbinic literature; and there is a uniquely American bison, often mistakenly referred to as buffalo.

There are four types of animal that can legitimately be called buffalo.[10] The European bison (Bison bonasus), also known as

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9. See Gra, *YD* 79:3. cf. the seemingly contradictory halacha in *OC* 586:1 regarding the non-acceptability for Rosh Hashanah, of a shofar made from a non-kosher animal and how the later authorities dealt with this.

10. Before discussing buffalo, one important caveat needs to be mentioned: The biblical *min* ("species") is not the same as the

a wisent, is the most closely related to the American bison. The Asiatic water buffalo (Bubalus arnee or Bubalus bubalis) of which there are four subspecies and is native to South Asia, India, Nepal, Sri Lanka, and Borneo was probably well-known to ancient rabbinic Jewish authorities. The African buffalo (Syncerus caffer) has three subspecies and, as its name applies, is native to Africa, in general sub-Saharan.

The species of particular interest, the American "buffalo," is technically really a bison. It is either classified as Bos bison,[11] grouping it in the same genus as true cattle, or as Bison bison, putting it in a family distinct from true cattle, but together with the European Bison.

If it could be determined what the buffalo was called in days of yore, it would greatly simplify matters: The kosher indicia would be superfluous and the biblical list of ten kosher species could be utilized. According to Professor Yehuda Felix[12]

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taxonomist's. Thus, it should be clear that when "sheep" is listed as kosher it also includes wild sheep such as the European mouflon (*Ovis musimon*) and the North American bighorn (*Ovis canadensis*), which have split hooves and chew their cud, and not just domestic sheep (*Ovis aries*) (See *Aruch Hashulchan*, YD 79:4). Similarly, *zvi*, mentioned in the Bible (Deuteronomy 14:5) as a kosher species and usually translated as deer, would include not only the "common deer" but many of the other cloven-hoofed, cud-chewing deer, a not insignificant list of 38 different species. Similarly, probably all 127 species of antelope, cattle, goats and sheep found in the family Bovidae are kosher. Thus, although the Torah includes all kosher animals in ten *minim* (plural of *min*) it includes approximately 157 scientific species of cloven-hoofed ruminants.

11. There are two subspecies of bison-plains bison (*Bison bison bison*) and wood bison (*Bison bison athabascae*). The wood bison is on the verge of being bred out of extinction since the introduction of the plains bison to its region. For our discussion these two subspecies can be lumped together.

12. See *Encyclopedia Judaica* 4:1467.

the water buffalo, at one time found in large numbers in the Chula Valley in Israel and raised by the Bedouin there until the 1940's, was known as the *meri*, an animal that was sacrificed and eaten in biblical times (see II Samuel 6:13; I Kings 1:9,19). Other authorities identify *t'oh*, found in the list of kosher animals in Deuteronomy 14:5, with the water buffalo. This seems questionable since *t'oh* is a non-domesticated animal (*chaya*) and the water buffalo is domesticated. Yet others have identified the water buffalo with the biblical *re'em* (e.g. Numbers 23:22, 24:8; Deuteronomy 33:17), an animal that seems to have been accepted as kosher. Again, the problem is that the water buffalo is highly domesticated and the *re'em* seems to have been a quintessentially undomesticatable animal (see Job 39:9-12).[13]

The European bison is also sometimes identified with the *t'oh*, although the Talmud (*Chullin* 80a), *Targum Yonatan,* and Rashi all imply that *t'oh* is a wild ox. Another candidate for the buffalo from the list in Deuteronomy is the *yachmar.* Although usually translated as an antelope or a type of deer, the Abarbanel (I Kings 5:13) identifies it as a buffalo.

Attempting to identify the water buffalo with a biblical animal is problematic because Bubalus bubalis is native to India, and was probably not introduced to western Asia, i.e. the biblical lands, until shortly before the Common Era, near the very end of the biblical period.

By the post-talmudic period it is possible to identify the water buffalo with almost certainty. "Buffalo" appears as a

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13. See *Jewish Encyclopedia* (1903) 3:423. The *re'em* is mentioned in Psalm 29 which is recited every Friday evening as part of *Kabbalat Shabbat*. It is also used as part of an allegorical phrase in a special prayer for sustenance that may be inserted into the sixteenth blessing of the weekday *shmone esrei*. The phrase, taken from *Shabbat* 107b and *Avodah Zarah* 3b, implies that God sustains all creatures from the biggest to the smallest. The *re'em* symbolizes the largest, and it clearly refers to a large, powerful creature with long horns.

transliterated word in the sixteenth-century *Shulchan Aruch (YD 28:4). T*he *Be'er Hagola* tracks the source of that halacha to the *Agur* (Rabbi Yaakov Landau, 15th century) who was quoting Rabbi Yishaya Ha'achron of 13th century Trani, Italy.[14] In contemporary Italian the word buffalo is still used to refer to water buffalo, an animal that is raised domestically as cattle in parts of Italy. It is from the milk of water buffalo that mozzarella cheese was originally made near Naples, Italy, and in southern Italy it is still used to make "authentic" mozzarella cheese. This would lead one to suspect that Rabbi Yishaya Ha'achron, and hence also the *Shulchan Aruch,* were referring to water buffalo, and they had no doubt that it is a kosher *behayma* (domesticated animal).[15]

Mesorah And Hybridization:

The American "buffalo" can obviously not be found in any of the earlier literature and hence presents its own dilemma. It would seem that according to the *Shulchan Aruch (YD 79:1)* no *mesorah* (tradition)[16] is required to establish that a specific mammalian quadruped is kosher–it simply needs to possess

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14. See *Agur* 1099 and *Mordechai, Chullin* 653. Our editions of the *Mordechai* have "rufloe", but it is undoubtedly a misprint of "buffalo". (I thank my friend Professor Marc Shapiro for pointing this out.)

15. Rav Yosef Karo, the author of the *Shulchan Aruch*, says that the custom is to treat the buffalo as a *behayma*– domesticated animal. The Ramo, living in Poland and geographically removed from the source of this halacha, may have been unfamiliar with the water buffalo of Italy. He was equivocal, and wrote that the buffalo is kosher but should be treated as a *safek* (doubt) and have the stringencies of both a *behayma* and a *chaya*.

16. This is as opposed to birds which do require a *mesorah*. See Ari Z. Zivotofsky, "Is Turkey Kosher?" *The Journal of Halacha and Contemporary Society*, 35:79-110, Spring 1998. It is posted on line with permission at http://www.kashrut.com/articles/turkey/.

the requisite physical characteristics of chewing its cud and having fully split hooves– characteristics which all four "buffalos", including the American bison, possess. The *Pri Megadim (Siftei Da'at,* YD *80:1), Kaf haChaim* (80:*5),* and *Pitchei T'shuva (YD:80:1) all s*tate explicitly that the physical indicia are sufficient to establish a species as kosher.

Commenting on the section of the *Shulchan Aruch* (*YD 80)* that discusses whether a particular kosher animal is a *behayma* or a *chaya,* the *Shach (YD* 80:1) mentions the notion of traditions regarding terrestrial mammalian quadrupeds. The *Pri Megadim* writes that he is baffled by the suggestion that this *Shach* should be relevant to the question of the kosher status of an animal, and that a tradition should be needed to establish its permissibility. The identifying features are biblical and clear, and there should be no need for a *mesorah*. Furthermore, this *Shach* is not in *YD 79,* where the kosher animals are identified.

Nonetheless, and despite the cogency of the *Pri Megadim's* argument, the *Chochmat Adam* (3*6:1)* and *Beit Yaakov* (41; cited by *Pitchei T'shuva*) add a puzzling twist to this *Shach,* and assume he was addressing the kosher status of an animal. Hence, they require a *mesorah,* an oral tradition, in order to declare a species of animal kosher. The *Beit Yaakov* says that the two biblical signs would suffice to identify a kosher *behayma*, but are not sufficient to identify a kosher *chaya*, and either the "horn signs" detailed in *YD* 80 or a *mesorah* is also required.

To further complicate matters, the *Chazon Ish (Hilchot behayma v'chaya tahora:11:letters 4 &* 5) writes that the *Chochmat Adam* is correct in his analysis. Furthermore, "we" (meaning Jews from Lithuania) have accepted the *Chochmat Adam* in general and therefore have no choice but to accept that a *mesorah* is needed and no new animal species may be permitted.[17]

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17. I have been told by a reliable person that the *Simlah Chadasha*

Former Chief Rabbi of Israel, Yitzchak haLevi Herzog (*YD*:1:20 - *Kuntrus P'nei Shur)* dealt with the need for *mesorah* for animals when he was asked by the French rabbinate about the zebu (Bos indicus–sometimes called brahman or humped cattle in the US; family–Bovidae), a type of humped cow originally from India that spread to Sri Lanka, China and North Africa and then worldwide. Rabbi Herzog was vehemently opposed to those who argued that a *mesorah* is required, and suggested that they are violating the biblical prohibition of *bal tosif*–not adding commandments.[18]

There is an additional factor that in my opinion renders the debate between those who require a tradition and those who don't of little relevance to either the zebu or bison (American "buffalo") questions. With regard to quadrupeds, the Talmud offers an irrefutable, undisputed test of the kashrut of an animal that cannot be challenged on subjective grounds. *Bechorot 7a* declares that kosher and non-kosher species cannot cross-breed. Thus, if two species can hybridize, and one is known to be kosher, it is proof positive that the other is kosher as well. This is cited (Rambam, *Ma'achalot Assurot* 1:13) as an halachically valid means of distinguishing between kosher and non-kosher animals, and should obviate any need for a mesorah, when it can be applied.

The zebu not only passes this "hybridization test", but produces live, fertile offspring with other domesticated cattle (Bos taurus; family–*Bovidae*). The American Bison and a wide

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requires a *mesorah* on *bedikat haray'a*–the inspection of the lungs for pathologies that render an animal non-kosher. If true, this would be an halachic impediment to eating "new" species, such as American bison. However, I have been unable to locate the source for this assertion.

18. This prohibition is based on Deuteronomy 13:1. See *Sefer haChinuch* 454 and *Encyclopedia Talmudit* 3:326-330.

variety of cattle have been interbred regularly since 1957 to produce fertile[19] "beefalo" offspring, a product that has gained in popularity in the last several decades due to its ease of handling and the lower fat content of its meat.[20] European bison appear to have a chromosome complement that is very similar to that of domesticated cattle. They breed with relative ease and both direct and reciprocal crosses produce fertile females, although the male offspring are usually infertile or sterile. Because of their ability to inter-breed with known kosher species, and the not-insignificant fact that they possess both biblical indicia, the zebu and European and American bison should all be viewed as kosher beyond doubt.[21]

Conclusion:

The debate about a need for a *mesorah* does not seem applicable to the buffalo question, and for a variety of reasons it appears that all four "buffalos," and most certainly the water buffalo and the American bison, are kosher. There is not yet a stampede for kosher buffalo, but based on my informal survey of several cities it certainly appears that there is some desire for it. I do not know how the major kashrut organizations would rule in a case where there was truly a need for a *mesorah* according to the *Chazon Ish* and none existed. To my knowledge

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19. The females are fertile in the F1 generation, the males are infertile until the crossbreed is at least 86% pure, at which point males are also fertile.

20. To my knowledge no kosher beefalo is commercially available. Yet. I am unsure whether the following is halachically significant. Most of these hybrids are with taurus males and bison females. When bison bulls impregnate domestic cows it rarely goes to term as a result of hydrops amnion.

21. I have been unable to find information regarding crosses between the African buffalo or the Asiatic water buffalo with known kosher species.

there are no other recent responsa that address this *Pri Megadim* vs. *Chazon Ish* dispute.

Although the debate was not relevant here, there are certainly species where it would have ramifications. For example in 1993 a new species of animal was discovered in Vietnam.[22] The wild saola (Psudoryx nghetinhensi, also known as the Vu Quang bovid) is the first large land vertebrate discovered in more than 50 years. Despite its being Old World there is clearly no tradition regarding its kosher status. It seems to be an unusual antelope with long, straight horns. Scientists are unsure even how to classify it. Originally it was put in a new genus in the bovine group together with oxen and elands. Now some people are grouping it with goats.[23] Either way, this odd, elusive creature that is possibly on the verge of extinction exhibits both kosher indicia and yet lacks a *mesorah*–a perfect test case for this debate.[24]

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22. See V.V. Dung, et al, *Nature* 363, 443-445; 1993.

23. See *Nature*, 396, 410; December 3, 1998.

24. Nothing is known about its ability to hybridize.