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Informing on Others to A Just Government

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I. Introduction

This article addresses the question of whether and when Jewish law permits, prohibits, or mandates that a person inform governmental authorities of the fact that a Jew is violating one or another aspect of secular law. In particular, this article will focus on the application of the classical rules of informing (*mesira*) to modern day America, with its (procedurally) just system of government.

"Informing" is itself not a sufficiently precise translation of the Hebrew term *mesira.*[1] Jewish law discusses three different problems: informing a bandit that a person has money or some other item of value; informing an abusive government of the same, and informing the government that someone has violated its laws. As is well known, Jews have very often lived in situations where government was unjust towards Jews, or where criminal elements ("bandits") formed the basis for government, and telling the abusive government that a Jew had money or that a Jew had broken the law was a dangerous act. Indeed,

1. The exact Hebrew term that is generally used is *mesira,* although sometimes the word *malshin* is used.

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this conduct often directly caused people to have their money taken, themselves beaten or tortured and sometimes simply murdered. The talmudic Sages had no choice but to enact rabbinic decrees prohibiting such informing.[2] This article focuses on how these rabbinic decrees may or may not apply in a just government, which only acts to punish law breakers.

Furthermore, this article is **not** discussing the proper response to violent criminals or people whose conduct endangers others or the community as a whole.[3] Even in unjust

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2. See *Bava Kama* 115b-117b.

3. Endangering the community is not limited to cases of communal punishment, or immediate short term danger. Rabbi Yitzchak Adlerstein notes the following incident recounted to him by Rabbi Mordechai Kaminetsky, in the name of Rabbi Yaakov Kaminetsky.

> There was a period in the 1970's when a group of rogues were smuggling valuables in *tefillin* (phylacteries) and other religious articles that would usually evade inspection; thus the thieves assumed their scheme would be successful. Often they would send these religious articles with unsuspecting pious Jews and asked them to deliver them to certain locations near their final destinations. When United States customs officials got wind of this scheme they asked a few Orthodox Jewish agents to help crack the ring. In addition to preserving the sanctity of the religious items, the customs authority felt that Jewish religious agents would best be able to weed out knowing accomplices from unsuspecting participants who had been duped.
>
> The Jewish customs agent in charge of the operation decided to confer with Rabbi Yaakov Kaminetzky on this matter. Though his advice on how to break the ring remains confidential, the grandson reports that he explained how the severity of the crime was compounded by its use of religious items:
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> "Smuggling diamonds in *tefillin*," he explained, "is equivalent to raising a white flag, approaching the enemy lines as if to surrender, and then lobbing a grenade. That soldier has not only perpetrated a fraud on his battalion and the enemy; he

societies, it was clear that one must bring such people to the attention of the secular authorities, if that was the only way to get them to cease their violent ways. This article addresses the problems of informing as it relates to violators of non-dangerous law or non-violent or regulatory laws, from tax cheaters to zoning violators and prescription drug abusers. This article is **not** discussing serial killers, armed robbers, sexual predators or muggers. They must all be informed upon if that is needed to protect society.[4]

II. Classical Jewish Law and Informing: An Overview

Even though Jewish law expects people to observe the law of the land, and even imposes that obligation as a religious duty,[5] the Talmud recounts – in a number of places – that it is prohibited to inform on Jews to the secular government, even when their conduct is a violation of secular law or even of Jewish law. While there are a number of exceptions to this prohibition (explained further in this section), the essential

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> has betrayed a symbol of civilization. With one devious act, he has destroyed a trusted symbol for eternity – forever endangering the lives of countless soldiers for years to come. These thieves, by taking a sacrosanct symbol and using it as a vehicle for a crime, have destroyed the eternal sanctity and symbolism of a sacred object. Their evil actions may cause irreparable damage to countless honest religious people. Those rogues must be stopped, by any means possible," he exclaimed.

4. This article is not really even discussing the question of whether one may inform on another whose conduct recklessly endangers people without malicious intent, such as a person with uncontrolled epilepsy who hides that fact from the government when seeking a driver's license; see e.g, R. Moshe Sternbuch, *Teshuvot ve-Hanhagot* 1:850 (the authorities may be apprised of one who drives recklessly or without a license).

5. See *Shulchan Aruch, Choshen Mishpat* 369:8.

halacha is that Jewish law prohibits informing, absent specific circumstances. Even if secular government were to incorporate substantive Jewish law into secular law and punish violations of what is, in effect, Jewish law, Jews would still be prohibited from cooperating with such a system.[6] Indeed, classical Jewish law treats a person who repeatedly informs on others as a pursuer (*rodef*) who may be killed to prevent him from informing, even without a formal court ruling.

The prohibition of informing derives from three different talmudic incidents,[7] whose central theme is that informing on a Jew so that others take the property of the one informed upon is both prohibited and tortious. One of the talmudic incidents[8] clarifies that the act of informing causes one to be in the formal status of a pursuer , whose life may be taken to prevent the act of informing from occurring.

The reason for the rabbinic decree positing that an informer (*moser*) is a life-threatening pursuer (*rodef*) is simply stated by Rabbenu Asher:

> One who runs to inform so that Jewish money is given to a bandit (*anas*)[9] is analogized by the rabbis to one who is running after a person to kill him... Just as when

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6. Consider a secular government that makes it a violation of secular law for a person to cut down fruit trees for no purpose (which is also a violation of Jewish law); Jewish law would prohibit informing the secular government of such a violation.

7. See Mishnah, *Bava Kama* 116b, *Gittin* 7a and *Bava Kama* 117a-b.

8. *Bava Kama* 117a, where a talmudic Sage actually killed a person who was going to inform on another.

9. Precisely translating the word *anas* is important – but hard. The word denotes an illicit oppressor. Thus, a rapist is an *anas*, as is an armed robber. A cat burglar would not be called an *anas*, since he sneaks into empty dwellings to steal.

> an antelope is caught in a net, the hunter has no mercy towards it, so too the money of a Jew, once it falls into the hands of bandits, the bandits have no mercy on the Jew. They take some money today, and tomorrow all of it, and in the end, they capture and kill him, since perhaps he has more money. Thus, an informer is like a pursuer to kill someone, and the victim may be saved at the cost of the life of the pursued.[10]

According to Rabbenu Asher, what makes informing worse than any other act which improperly damages another Jew is that informing puts a person in danger of life and limb – even when the initial act of informing is over a small money matter. Once one is enmeshed with these types of people, one never can tell what will happen, and even death can result. Thus one who informs is like a pursuer who might kill.

Mordechai states the matter differently. He writes:

> Even though as a general matter we do not push into a pit [to kill] any tort-feasor, even a thief or an armed robber, the reason an informer is different is that the pagans gain and the Jews lose through this conduct; this is disgusting, and one who regularly trains himself to engage in such informing to pagans – his status is worse than other tort-feasors.[11]

According to *Mordechai*, informing is different from any other act which causes damage because the Rabbis decreed that a person who regularly involves himself in ensuring that Jews lose and Gentiles improperly gain is engaging in an evil activity and forfeits his normal rights as a Jew.

A complete review of the rules related to informing is both

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10. *Teshuvot haRosh* 17:1.
11. *Mordechai, Bava Kama, Hagozel* §117.

complex and beyond the scope of this paper,[12] but a simple understanding of the nuanced rules is needed to understand why a just government might be different.

Eight rules can be given that outline the general approach halacha takes. Their actual application to real-life situation will be discussed hereinafter:

1. It is prohibited to inform on a fellow Jew to a Gentile, whether the act of informing is about monetary matters or

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12. For a more complete review, see *Pitchai Choshen*, Volume 5, Chapter 4 and *Dinnai Momonot*, Volume 4, Chapter 5.

The question that is worthy of pondering is the relationship between the obligation to redeem captives (found in *Yoreh Deah* 253) and the prohibition to inform. In cases where there is no prohibition to inform (where informing is permitted, see *Darchai Teshuva* 157:53 and more generally Part III of this article) a logical case can be made that there is no mitzvah to redeem people jailed due to being reported (as they are in prison properly) when there is nothing wrong with informing. This exact observation is made in the name of Rabbi Shlomo Zalman Auerbach in a recent work, *Ve'aleyhu lo Yibol*, volume 2:113-114, which recounts in the name of Rabbi Yehuda Goldreich:

> I asked Rabbi Auerbach about a particular Jew who stole a large sum of money and he was caught by the police in America. He was sentenced to a number of years in prison in America. Was it proper to assist in the collection of money for him [we were speaking about a large sum of $200,000] in order to fulfill the mitzvah of redeeming captives to have him released from prison (possibly for bail)?
>
> When Rabbi Auerbach heard this he stated "Redeeming captives?! What is the mitzvah of redeeming captives here? The mitzvah of redeeming captives is only when the Gentiles are grabbing Jews, irrationally, for no proper reason, and placing them in prison. According to what I [Rabbi Auerbach] know, in America they do not irrationally grab Jews in order to squeeze money from them. The Torah says 'do not steal' and he stole money – on the contrary, it is good that he serve a prison sentence, so that he learns not to steal!"

physical security.[13] One may not inform on a Jew, even if the Jew is a sinful and bad person.[14] (But see further below)

2. One who informs is liable to pay damages if his act of informing damages another.[15] As a general rule one is not liable for torts done to another by a third party; informing is an exception to this rule.[16]

3. Even without the order of a Jewish law court, (but only in certain cases!) one may kill a person who has certainly set out to inform on another, prior to the act of informing, as informing poses a danger to the one who is informed upon.[17] Once the person informs, one may not kill the informer as punishment for the sin, and one may not steal from an informer (unless taking his property will stop him from informing).[18] One who regularly informs may be killed without warning.[19]

4. One who troubles the community through misconduct may be informed upon; so, too, one who engages in conduct that endangers members of the community [as noted earlier,

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13. *Shulchan Aruch, Choshen Mishpat* 388:9 (one who informs is denied a place in the world to come).

14. Ibid.

15. Ibid, 388:2, *Sema* 388(5) and *Shach* 388(13).

16. This is derived from the talmudic incident recounted in *Bava Kama* 116b and the comments of Rashi ad locum s.v. *deachve achvi* who notes that the informing is without any direct act of the informer, but yet the informer is still liable. Even in cases where the informer is not generally liable (such as when the informer is coerced) if the informer actually takes the goods with his own hands from the Jew, the informer is generally liable; *Shulchan Aruch, Choshen Mishpat* 388:2.

17. Ibid. 388:10.

18. Ibid. 388:11, 13.

19. Ibid. 388:14. There is a dispute between various decisors about whether such a person may be killed directly or indirectly. Compare *Shulchan Aruch* with Ramo *id.*

including not only a person whose actions are violent or dangerous but also one whose activities may endanger the Jewish community by casting them into disrepute] may be informed upon.[20] One who hits others or is violent may be informed upon.[21]

5. When a Jew owes money to a Gentile, and the Jew is seeking to improperly avoid payment of the money, and another Jew informs the Gentile, who then collects the money rightfully owed to him, that is not called informing, as the Jew only has to pay that which he ought to pay, anyway.[22] Payment of taxes to the government is exactly such a debt.[23] Some say such informing is frowned on when it gratuitously benefits a pagan, and others say such conduct is proper.[24] All agree that when such conduct leads to a desecration of G-d's name, it is prohibited to decline to report such a person.[25]

6. A Jew who is threatened with physical harm unless he informs on another is not called an informer if he delivers

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20. *Shulchan Aruch, Choshen Mishpat* 388:12. Even a person who drives recklessly may be informed upon as such conduct endangers members of the community. See note 4.

21. Ramo commenting on *Shulchan Aruch, Choshen Mishpat* 388:7, and *Shach* 388:45.

22. Ramo, ibid, 388:12.

23. *Shach, Choshen Mishpat* 388:20 and *Pitchai Choshen,* Volume 5, Chapter 4:15, note 44.

24. Compare *Be'er Hagolah, Choshen Mishpat* 388:(*70*) (proper to report) with Ramo, commenting on *Shulchan Aruch Choshen Mishpat* 388:12 (improper to report). This is because – even when there is no sin in helping a Gentile, halacha nonetheless directs that one should not involve oneself in a matter, where one need not be involved, when a Jew loses and a bad Gentile (pagan) or an apostatized Jew benefits.

25. *Bava Kama* 113b.

information, and he is not liable for the damage caused.[26] There is a dispute as to whether such conduct is proper or simply immune from liability.[27]

7. There is a dispute about whether a Jew who is threatened with economic harm unless he illicitly informs on another is called an informer or not, and whether such conduct is permitted or not.[28]

8. Many authorities rule that no liability is present if one informs on another to save one's own property without any gratuitous intent to hurt the other person.[29]

Taken at face value, these rules would prohibit a person from calling the governmental authorities when he is aware of illicit activity by a Jew unless the informer is himself under duress to inform, or the criminal is violent or threatening the community, or the informer is merely allowing the victim to reclaim what is his anyway or, according to some decisors, the informer does so to protect his own property.[30] In cases of desecration of G-d's name, informing is also sometimes permitted. These rules, by their simple direct application, would prevent a person from informing on his neighbor who is cheating on his taxes (since the government imprisons such people, and

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26. *Shulchan Aruch, Ibid.* 388:2-3.

27. Compare *Sema* 388:(13) (such conduct is prohibited, but generates no liability) with *Taz* 388:3 (s.v. *harai ze patur*) (such conduct is completely proper and without sin).

28. Compare Ramo *Choshen Mishpat* 388:3 (liable) with *Shach* 388:22 (exempt).

29. See Ramo's comments, ibid, 388:5; *Responsa of Ramo* 88 endorses the view that informing, when done to save one's own property, is not considered informing. See also *Responsa of Maharshal* 19.

30. For specific sources, see *Shulchan Aruch Choshen Mishpat* 388:2-3, 388:12, and *Shach* 388(45) and Ramo, ibid 388:5.

does not merely retake the money owed), violating non-safety related zoning law, stealing cable television from the cable company, and a host of other violations of American law. Informing on a serial killer, mugger, assaulter, child abuser, or any other violent criminal would unquestionably be required.

The next section considers whether just governments have different rules according to Jewish law.

III. Informing on People When Government is Committed to Procedural Justice – Five Opinions of Contemporary Decisors

How do the halachic rules of informing apply to a just government of laws – with non-discriminatory laws properly enforced by police who obey the laws, and who punish people in accordance with its laws? We make certain assumptions about American law that need to be stated, inasmuch as our conclusions herein are predicated on these assumptions:

> The governments of the United States of America and the various states are just and proper governments that do not, in general, punish people beyond the dictates of the secular law.[31] They are not corrupt governments, nor are they generally motivated by anti-Semitism.[32]
>
> As a matter of American law, people cannot be compelled to go to a Jewish law court (a *beit din*) to resolve claims against them if they do not wish to submit to the *beit din*. In America, *batai din* are unable to adjudicate matters

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31. However, it is important to add that while secular law punishes people without any anti-Semitic overtones, still the punishments meted out are not – typically – the punishments directed by Jewish law

32. Of course, one should not misunderstand these assumptions and posit that the secular government never makes mistakes or acts corruptly or has no employees whose conduct is anti-Semitic.

that require physical punishment, incarceration, or restraint of people, and cannot respond in emergency situations when force is needed.

As will be shown, disagreeing with any one of these assumptions will frequently lead to significant changes in the applicable Jewish law of informing.

One additional point needs to be made about American law, as it impacts on the relevant Jewish law. As a general proposition, members of our secular society are not obligated, according to American criminal or tort law to report violators of American law.[33] In modern American law, unlike Jewish law, if one did not cause the violation or have some other special relationship either to the victim or the criminal, one bears absolutely no legal obligation to intervene to stop a crime or even call the police.[34] In American law one need not report one's neighbor for tax fraud, or call the police when one witnesses a crime, or rescue a drowning person from a river.

Halachic authorities have presented a broad variety of responses to the issue of whether the *issur* (prohibition) of informing applies today, in a just society. Their attitudes range from virtual abrogation of the *issur*, to reduction of its strictures, to maintaining that it remains in force today as always, albeit

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33. See Restatement (Second) of Torts § 314 (1965): "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does **not** of itself impose upon him a duty to take such action." As one well-known police officer stated "there is no law requiring citizens to report a crime ... or to stop a crime," quoted in Jennifer Bagby, "Justifications For State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required to Call For Help," *Indiana Law Review* 33:571 at 572 (2000).

34. See Jessica R. Givelber, "Imposing Duties on Witnesses to Child Sexual Abuse: a Futile Response to Bystander Indifference," *Fordham Law Review* 67:3169-3205 (1999).

possibly for somewhat different reasons. We will examine their responses and the rationales offered for their various positions.

A. The View of the Tzitz Eliezer, Rabbi Eliezer Yehuda Waldenberg: No Prohibition to Inform when Government is Just

The view that the prohibition of informing does not apply to a government that protects property rights and is generally governed by law and order is first articulated in the writings of Rabbi Yechiel Michel Epstein (19th-20th centuries) in his *Aruch Hashulchan*. He states:

> **Note:** As is widely known, in times of old in places far away, no person had any assurance in the safety of his life or money because of pirates and bandits, even if they took upon themselves the form of government. It is known that this is true nowadays in some places in Africa where the government itself is grounded in theft and robbery. One should remind people of the kingdoms in Europe and particularly our ruler the Czar and his predecessors, and the kings of England, who spread their influence over many lands in order that people should have confidence in the security of their body and money.... **On all of this [the presence of looting and killing] hinges the rules of informing [*moser*] and slandering [*malshin*] in the Talmud and later authorities, as I will explain infra: These rules apply only to one who informs on another to bandits and so endangers that person's money and life, as these bandits chase after the person's body and money, and thus one may use deadly force to save oneself.**[35] (emphasis added)

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35. *Aruch HaShulchan, Choshen Mishpat* 388:7.

The question of whether the writer of *Aruch Hashulchan* really meant what he wrote about the Czar's heading a just government or whether he wrote it for the sake of the Russian government censor, is still a matter in dispute, although that does not alter the gist of his argument.[36] Rabbi Eliezer Waldenberg explicitly adopts the view of the *Aruch Hashulchan*. In the course of discussing whether one my inform on a teacher who is molesting children, Rabbi Waldenberg states:

> Even in the understanding of the secular court system it appears that there is a difference between primitive and enlightened governments, as is noted by the *Aruch Hashulchan* in *Choshen Mishpat* 388:7, where it states that "every issue related to informing found in the Talmud and *poskim* deals with those faraway places where no one was secure in his money or body because of the

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36. This matter is discussed extensively by Justice Menachem Elon in "Extradition in Jewish Law" *Techumin* 8:263-286, 304-309 (1988) and Rabbi J. David Bleich, "Extradition," *Techumin* 8:297-303 (1988), and Rabbi Shaul Yisraeli, "Extradition," *Techumin* 8:287-296 (1988). While one can dismiss the words of the *Aruch Hashulchan* as put in for the censor, there are at least three logical reasons why one might conclude that the words in the text actually reflect the normative Jewish law view of the *Aruch Hashulchan*. They are:

(1) All apologetic remarks for the benefit of the censor in *Choshen Mishpat* in the *Aruch Hashulchan* are found in star footnotes in italics at the bottom of the page. This passage is found in the text and not in italics.

(2) His mention of the British government is unexplainable if directed to the censor. Britain and the Czar were not allies at this time, and he is clearly referring to the British democratic tradition.

(3) The *Aruch Hashulchan* gives a logical and halachic explanation for his view, which he never does when speaking to the censor.

Indeed, this writer notes that one could almost state that if there is a hand of the censor, it is not in terms of the *principle* that informing does not apply to just governments, but to the remark that the Czar is just!

> bandits and pirates, even those who had authority, as we know nowadays in places like Africa." Such is not the case in Europe, as the *Aruch Hashulchan* notes. ... **I write this as a notation of general importance in the matter of the laws of informing**.[37] (emphasis added)

The halachic predicate for this view is that the repeated use of the term bandit (*anas*) throughout the many halachic texts dealing with informing is to be limited to its simple meaning – it is only prohibited to inform "bandits" about people's activities. The many different rules limiting when one can inform on a Jew are limited to cases where the people to whom one is informing are unethical and unjust individuals or one informs to an unethical and unjust government.

The language of the *Tur* supports this:

> One who delivers another's money into the hands of a bandit, whether the bandit is Jew or Gentile, must pay damages that he caused, since he caused a loss of money....[38]

A close examination of the words of Rabbenu Asher quoted above[39] does indeed indicate that it is the fear of improper murder or torture of the victim that caused this rabbinic decree.

Rabbi Yosef Shalom Elyashiv also explicitly adopts this logic. A questioner asked:

> The Office of Religious Affairs in our location has been

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37. *Tzitz Eliezer* 19:52. The genuineness of the view of the *Aruch HaShulchan* is also noted by Rabbi Gedalia Dov Schwartz in "The Abused Child–Halakhic Insights," *Ten Da'at*, Spring 1988, p. 12. One could claim that the view of the *Bach*, as cited in the *Darchai Teshuva* 157:53, is identical to that of the *Aruch Hashulchan*.

38. *Tur, Choshen Mishpat* 388:2.

39. *Teshuvot haRosh* 17:1.

> robbed of collected money on more than one occasion. All of the indications point to one of the workers, but all of our efforts have not led this person to confess. We are asking if it is proper to call the police, who after investigation, if successful, will bring the suspect to secular court. The matter could be serious, as we suspect that the person is the father of a large family, and this person is connected to Torah activities; it is possible that there will be a desecration of G-d's name, Heaven forbid. On the other hand, public money is missing, and who knows what else is gone.

Rabbi Elyashiv replied:

> See *Responsa Panim Me'erot* 2:155 dealing with our matter of one who found an open chest, and much was stolen from it. There is reasonable grounds to believe that one of his workers did this act of theft. Is it permissible to inform on this worker to the secular authorities? He proves from *Bava Batra* 117 and *Bava Metzia* 25 that there is a religious duty on the judge in this matter to hit and punish, based on the knowledge that he has, when his knowledge is correct. He then quotes from the incident with Rabbi Heshel and the view of the *Shach* but at the end he concludes "nonetheless I [the author of *Panim Me'erot*] say that is it improper to report him to secular authorities, as our talmudic sages recount 'they treat him like a caught animal' and one must be afraid that they will kill him." From this it is clear that such is not applicable in our times [Rabbi Elyashiv's]. **By the halacha it would be proper to report him to the police.** But, you ponder the possibility that this will lead to a desecration of G-d's name, and it is not in my

ability to evaluate this, since I do not know the facts.[40]

This view posits that when fear of death or torture is functionally gone, the rabbinic decree prohibiting informing does not apply. According to these authorities this is true even when the government has no right (according to Jewish law) to enforce this particular law on its Jewish citizens or is punishing them in a manner far beyond that permitted by Jewish law, and even applies when the government is arresting an apparently innocent person, as the system as a whole is just and fair. Even non-violent criminals or people who violate regulatory directives (such as zoning laws) may be informed upon, in this view.

This approach posits that informing – even when the government does (as a matter of after-the-fact truth) use the information provided by the informer to produce an improper result – is not a classical tort at all in the eyes of Jewish law, but was a special rabbinic decree prohibiting conduct that was not intrinsically tortious, and that the rabbinic decree prohibiting informing was limited to situations of banditry.[41] Thus, in

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40. Rabbi Sinai Adler, *Devar Sinai* 45-46 (Jerusalem, 5760). See also the view of Rabbi Shlomo Zalman Auerbach, quoted in note 12, which concludes,"According to what I [Rabbi Auerbach] know, in America they do not irrationally grab Jews in order to squeeze money from them. The Torah says 'do not steal,' and he stole money – on the contrary, it is good that he serve a prison sentence, so that he learns not to steal!"

41. Rabbi J. David Bleich writes:

> Jewish law also posits severe strictures against delivering either the person or property of a Jew to a Gentile. Thus, *Shulchan Arukh* [sic] declares that the person and property of even a "wicked person" and a "transgressor" remain inviolate even if that individual is a source of "trouble" or "pain" to others. There is, however, an inherent ambiguity in this proscription. There may be reason to assume that the

situations where there is no prohibition to inform, there is no violation of Jewish law to inform. Any damage that is caused is not attributable to the informer but to the one who does the damage.

B. The View of Rabbi Ezra Batzri: There Are No Just Legal Systems and No Just Prisons

Rabbi Ezra Batzri, in his modern multi-volume treatise on Jewish commercial law, *Dinai Mamonot*, responds to the view discussed in the *Aruch Hashulchan* above. After stating the view that informing is prohibited, he notes the following:

> Do not be surprised by the rules in this chapter, and think that they are inapplicable nowadays since governments are enlightened and democratic... This should be thought true only by the very naive, as even in democracies... when there is a matter that involves the government, the matter is treated as out of the normal protocol as happens when matters relate to security of the state. **All rules of informing are applicable even currently.** Anyone who knows and understands and sees not only what is externally visible, and what previously was, will see that only the external appearance has changed – the outside has changed – but the central characteristic [of government] has not

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prohibition is limited to turning over a person or his property to the custody of an "oppressor" who inflicts bodily or financial harm in a manner that is malevolent or entirely extralegal. Indeed, the terminology employed by the *Tur Shulchan Arukh* ("*Tur*") in codifying this provision of Jewish law lends credence to such a restrictive interpretation since *Tur* incorporates the term *"anas"* or "oppressor" in recording the prohibition. Rabbi J. David Bleich, "Jewish Law and the State's Authority to Punish Crime," *Cardozo L. Rev*. 12:829, 830 (1991).

> changed. **Even if they bring all matters to court, it is clear that, through interrogation and the police, government can destroy people and in many places they do, in fact, destroy people**.[42] (emphasis added)

Rabbi Yaakov Yeshaya Blau, author of the multi-volume *Pitchai Choshen,* raises a related point as a possibility. Even if the justice system works up until the point of incarceration:

> [N]onetheless, the punishment of imprisonment is analogous to endangering a person's life by informing on them in a way that endangers their life, **since imprisonment poses a possibility of life- threatening conditions**.[43]

Rabbi Blau proposes the possibility that even if a justice system works only to incarcerate people who are deserving of incarceration, nevertheless jail is a most unpleasant place to be, with physical duress exactly of the type the Talmud imagined, and thus informing on a person in a way that might produce a prison sentence is prohibited.[44] Evaluating this type of claim is very difficult, but Rabbi Blau's observation has a certain amount of merit. One well-known commentator on prisons in America observed:

> Prisons, never safe places, are growing increasingly dangerous to inmates. The most recent Department of Justice research shows that 14% of all prison inmates –

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42. Rabbi Ezra Batzri, *Dinai Mamonot* 4:2:5n.1 at page 86.

43. *Pitchai Choshen* 7:4 in note 1, in the course of a lengthy discussion of this issue.

44. In this view, prison has the status of an indeterminate sentence (*mas she'ayn lo kitzvah*, see *Rashba* 1:1105, and *Pitchai Choshen* volume 5, Chapter 12, paragraph 5 in the notes) which is definitionally void according to Jewish law, in that in prison one is subject to random extra-judicial punishment by both the guards and fellow prisoners.

> and 20% of those under the age of 25 – have been assaulted while in prison.[45]

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45. See John R. Williams, "Representing Plaintiffs in Civil Rights Litigation Under Section 1983", 596 PLI/Lit 117, 160 (1998). See also Sharone Levy, "Balancing Physical Abuse by the System against Abuse of the System: Defining 'Imminent Danger' Within the Prison Litigation Reform Act of 1995," 86 *Iowa L. Rev.* 361 (2000), which notes that:

> Studies demonstrate that life in prison is becoming more dangerous, and prison violence is increasing. In 1996, the U.S. Department of Justice found that fourteen percent of all inmates were assaulted while serving prison sentences. Further, not all of these incidents occur between inmates. Guards often subject both male and female prisoners to rape and physical abuse.

Assuming that the numbers are correct, a very strong case can be made that abuse in prison is a statistically noticeable event and must be considered an event of some real possibility (a *mi'ut hamatzuy*) with all of the ramifications associated with that. Consider how one would respond if a judge explicitly sentenced a non-violent felon to "three years in prison where he might be raped by fellow prisoners as part of his sentence." We would all recognize that such a sentence is wrong and improper and ought to be defied, even if that meant no punishment for such a person, as this was the only sentence government can actually provide. Rabbi Blau is arguing that such is exactly the reality of a prison sentence for a non-violent prisoner sent to a prison with violent inmates (as is the norm outside of the Federal prison system). See for example "Rape in Prison," *The New York Times*, April 22, 2001, Section 4; Page 16; Column 1 which states:

> Because convicted criminals enjoy little public sympathy, **prison guards and wardens routinely turn a blind eye as prisoners in their custody commit vicious sexual assaults on their fellow inmates**. Out of sight and out of mind for most Americans, rampant sexual abuse behind prison walls scars its victims for life, transmits H.I.V., and mocks the constitutional prohibition against cruel and unusual punishment.
>
> A disturbing new report by Human Rights Watch **documents how rape in America's prisons has become commonplace**, ... An academic study of inmates in men's prisons in four

According to Rabbi Blau, it is in prison where halacha now fears that the observations of the Rosh are correct – people are abused and tortured without any basis in law.

In the approach of either Rabbi Batzri or Rabbi Blau, one divides cases of informing into three types of categories. One situation occurs when the person being informed upon is violent or threatens violence or induces harm to others or endangers the welfare of the community. Such a person may be informed upon, as Jewish law recognizes the need to remove these people from the community, even if they might be harmed by the brutal prison system. The second situation is that of non-violent criminals (white collar crimes such as intentionally bouncing checks, or recreational personal drug use). Because the prison system might be brutal to them, Jewish law rules that one may not inform on them to the police because the punishment imposed on them is unacceptable according to Jewish law. Other areas of informing, such as parking violations, building code violations, unintentional environmental damage, and the like, where arrest and detention are usually not a possibility, would not be prohibited by this rationale.

This observation – that prisons are treacherous places with tortious conditions incapable of punishing people justly – has a powerful practical logic to it and seems factually persuasive. If American society cannot run a criminal justice system that

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> Midwestern states found that as many as one in five prisoners reported at least one instance of forced sexual contact since being incarcerated....
> America's two million prison inmates have been lawfully deprived of their liberty, but they have not been sentenced to physical and psychological abuse. Yet Human Rights Watch found that prison authorities rarely investigate complaints of rape, and prison rapists rarely face criminal charges. **Most prisons make little effort to prevent sexual assaults and provide minimal attention for victims.** (empasis added)

punishes non-violent criminals properly, Jewish law should not be an accomplice to a criminal justice system that in fact brutally punishes people for non-violent offenses.

C. The View of Rabbi Yitzchak Shmelkes: Informing as a Tort in a Just Government

Rabbi Yitzchak Shmelkes advances a novel answer to the question of informing in a just society. He states:

> Such a person does not have the status of a pursuer, as there is no fear nowadays that such informing will lead to danger to life, and certainly such a person is not ineligible to serve as a witness according to Torah law ....[46]

According to Rabbi Shmelkes, one must make a factual determination as to whether informing can lead to life-threatening conditions. If it can, then the informer would be a pursuer; otherwise, such conduct is a generic tort and while damages have to be paid, one is not considered a pursuer (*rodef*). One might not even be deemed a "sinner" but merely a tort-feasor.

A similar view is seemingly endorsed by Rabbi Yaakov Yeshaya Blau, in *Pitchai Choshen*:

> Many decisors found some merit (*lamdu zechut*) on the kings and governments of their time [so] that the rules of informing did not apply. But it is widely known that in these kinds of works the hand of the censor is present. In circumstances they wrote [or left out] matters out of fear of the censor or the government, or at the least because of hatred of the Jews (*aiva*), and it is thus hard to learn from these sources. **Nonetheless, in my humble opinion, there is an acceptable aspect of this view**

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46. *Beit Yitzchak Yoreh Deah* 49(12).

> **[that informing does not apply in a just society] since the essence of the prohibition to inform even on monetary matters is "lest they come to kill you." It is clear that in a country where the government is just, even though informing is clearly prohibited, nonetheless there is no fear that they will kill you. Thus an informer is no different from any other damager of the property of another, and none of the strictures concerning informing which can result in physical duress apply**....[47] (emphasis added)

To understand this view, one must accept that there are at least two distinct components to the rules of informing: the tort component of damaging another, and the sin of endangering the life of another through informing. In a society where, in fact, there is no danger of life and limb through informing to the governmental authorities, the informer loses his status as a pursuer, according to the view of Rabbi Shmelkes.

Indeed – although Rabbi Shmelkes does not state so explicitly – when only the tort prohibition is present, the only reason informing is prohibited is because one is improperly damaging the property of another. Absent the danger – both economic and physical – informing becomes merely a tort. It is an unusual tort according to Jewish law in that the causation is indirect, but that would be the essence of the remaining rabbinic decree – that informing on another person improperly creates liability according to Jewish law.[48] In fact, the halacha does become much more complex in that once informing is treated like any other form of damage, it becomes permissible to engage in

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47. *Pitchai Choshen*, Volume 5 Chapter Four, note 1.

48. As opposed to most forms of gossip, which do not ever lead to liability. See *Pitchai Choshen*, ibid, paragraphs 21-29.

informing any time damaging another is permissible.[49] Thus, for example, consider the case of one who was improperly disposing of waste oil into another's backyard. If this person's misconduct did halachically recognizable harm to another, and that person needed to abate the harm being done him, he could call the relevant governmental organizations, which would issue the suitable regulatory remedy. However, according to the rationale of Rabbi Shmelkes, if one simply called the relevant authorities in a case in which there was no harm to oneself, such action would be prohibited according to Jewish law, as it would be causing damage without any right to do so according to Jewish law.[50] One would then be liable for the full damages one did, including lawyer's fees and the like.

D. The View of Rabbi Shmuel Wosner: Informing is Permitted when Jewish Law Recognizes Secular Law as Valid

Another view relates the prohibition of informing to the legality (from the perspective of Jewish law) of the secular government's actions. In this view, informing is prohibited only when the government seeks to enforce secular law that Jewish law does not consider obligatory upon Jews, according to Jewish law.

Consider, for example, Rabbi Shmuel Wosner's discussion of whether one may work as a tax auditor for the government:

In the matter of one who works in the tax offices, and

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49. Or where the tort causes no damage, such as when one informs on a person for a debt that he is liable to pay according to Jewish law; see text accompanying note 43 for a further explanation of this.

50. The statement in *Shulchan Aruch Choshen Mishpat* 388:10 that "it is permitted to kill an informer in any place, even nowadays..." would, according to Rabbi Shmelkes, not be applicable when informing will never lead to harm.

> when he sees one who defrauds the government he has to report him to the courts. That person wants to know if he is in the status of an informer or whether "the law of the land is the law [applies, and is thus proper]."
>
> It is clear that according to the halacha, taxes – without dispute or controversy – are covered by the obligation to obey the law of the land....
>
> On the question of informing to the government, it is clear from the incident discussed in *Bava Metzia* 83b with Rabbi Eleizer who informed upon a person to the government, that this conduct was permitted because of loyalty to the government, even though they said to him "how long will you hand over G-d's nation to be killed?" That is because this matter relates to the danger to the life of a Jew. So, too, that which Elijah recounts to Rabbi Yishmael [that he should cease informing] is applicable, but the technical halacha appears that this matter has a benefit to the government....[51]
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> See also Ramo *[Choshen Mishpat]* 388:11 who notes that if one wishes to flee to avoid paying a Gentile what he actually owes him, and another reveals this information, the latter person lacks the status of an informer....That which is relevant to the government and its designee, there is no sin. Nonetheless, *ab initio* it is better not to accept an appointment to engage in such activity, since it entails informing on one even in a permissible way, which is not the conduct of the righteous, as is noted in

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51. Rabbi Wosner adds: "In the *Biur Hagola Choshen Mishpat* 388 it states 'it is already well established by decree and custom that the leaders of the community are careful not to lie or cheat Gentiles, and they inform on and give permission to reveal [about those] who take improperly...'."

> the Jerusalem Talmud *Teruma* 8:4.... Furthermore this case is not analogous to other cases as those cases involve danger to life when the Gentiles are informed; this case is different because punishment imposed on the violator nowadays never involves mortal danger.[52]

In this view, informing is a violation of halacha only when Jewish law does not recognize the inherent right of the secular government to enforce its actions. Whether the conduct one is reporting violates autonomous Jewish law (absent secular law) is completely irrelevant to this mode of analysis. Whether the person is punished in a manner consistent with Jewish law also does not matter, because Jewish law only prohibits informing when secular law is invalid in the eyes of Jewish law.[53]

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52. *Shevet Halevi, Yoreh Deah* 58. Rabbi Wosner also refers to *Maharam Alsheich* 66 who notes that one cannot be considered an informer (*moser*) when the activity one is informing on violates "the law of the land." That view is also hinted at in *Darchai Teshuva, Yoreh Deah* 157(53).

53. See *Niddah* 61a which states:

It was rumored about certain Galileans that they killed a person. They came to Rabbi Tarfon and said to him, "hide us." Rabbi Tarfon replied, "What shall I do? If I do not hide you, you will be seen. Should I hide you? The Sages have said that rumors, even though they may not be accepted, nevertheless, should not be dismissed. Go and hide yourselves."

The reason Rabbi Tarfon declined to aid is in dispute, and this dispute is undoubtedly related to this issue. Rashi states that the reason Rabbi Tarfon would not help these people was because if they were guilty, helping them would be prohibited. This would imply that Jewish law prohibits aiding defendants who might be guilty. Tosafot and Rosh disagree and argue that the reason he would not help was because he was afraid that the government would punish him for helping criminals escape, but that helping them is halachically permitted; Tosafot, *Niddah* 61a (s.v."*atmarinkhu*") and *Tosafot ha-Rosh* on *Niddah* 61a, both quoting R. Aha mi-Shabha, *She'iltot*, Numbers

In this writer's opinion, this approach is broadly predicated on the conceptual analysis of Rashi, commenting on the Talmud, who seems to accept the premise that Jewish law recognizes that the secular government may properly enforce any law validly promulgated under the rule "the law of the land is the law" (*dina de-malchuta dina*), even against Jews.[54] Maintaining law and order is unquestionably a permissible function of government, as is collecting taxes. Indeed, since Judaism accepts that Gentiles are empowered by Noachide law (through the commandment of *dinim*) to make and enforce laws, it is not a far leap of logic to observe that such criminal laws, once made, are binding upon Jews to the extent that Jewish law does not mandate a different result. If that is so, the Jewish community may assist in the enforcement of Noachide law without stepping afoul of the rabbinic prohibition of informing (*mesira*).[55]

As noted by Rabbi Wosner, this approach can be found explicitly in a number of talmudic incidents, and the commentaries of various *Rishonim* on it. The Talmud states:

> Rabbi Eleazar son of Rabbi Simeon was brought to the court [and appointed to be a police officer], and he proceeded to apprehend thieves. Rabbi Joshua son of

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129.

54. See e.g., Rashi, commenting on *Gittin* 9b ("*Chutz megitai Nashim*") who explicitly relates secular law to the mitzvah of *dinim*, and Rashi, *Niddah* 61a ("*michush leah mebay*") who, as understood by *Tosafot ha-Rosh*, adopts the view that if one kills and flees from the government, Jewish law prohibits one from assisting him to avoid the punishment of secular law, since secular law is proper in punishing in that case. For more on this, see Michael Broyde, *The Pursuit of Justice: A Jewish Perspective on Practicing Law* (Yeshiva University Press, 1996) at pages 83-87.

55. For a more complete analysis of this issue see Nahum Rakover, "Jewish Law and the Noahide Obligation to Preserve Social Order," *Cardozo L.R.* 12:1073, 1098-1118, and App. I & II (1991).

> Karchah sent word to him, "Vinegar, son of wine! [i.e., inferior son of a superior father]: How long will you deliver the people of our God for slaughter?" Rabbi Eleazar sent the reply, "I eradicate thorns from the vineyard." Rabbi Joshua responded, "Let the owner of the vineyard come and eradicate his thorns". . . . A similar incident befell Rabbi Yishmael the son of Rabbi Yosi. The prophet Elijah appeared to him and rebuked him. . . . "What can I do – it is the royal decree," responded Rabbi Yishmael. Elijah retorted "Your father fled to Assia, you flee to Laodica [i.e., you should flee and not obey]."[56]

Thus, the Talmud records that two sages were rebuked for assisting the government in the prosecution of criminals, indicating that this conduct is not proper, or at least the subject of a dispute between Rabbi Eleazar and Rabbi Joshua. A number of commentaries advance an explanation which changes the focus of this reprimand. Rabbi Yom Tov Ishbili (Ritva)[57] states that even Rabbi Joshua – who rebuked Rabbi Eleazar for working as a police officer – admits that it is only scholars and rabbis of the caliber of Rabbi Eleazar and Rabbi Yishmael who should not assist the government as prosecutors or police officers. Even for these individuals such conduct was not prohibited, but only frowned upon.[58] Many authorities agree with this

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56. *Bava Metzia* 83b-84a. For an excellent analysis of the issues raised by secular enforcement of criminal law, see Rabbi J. David Bleich, "Jewish Law and the State's Authority to Punish Crime," *Cardozo L.R.* 12:829 (1991); see also idem., "*Hasgarat Poshea Yehudi she-Barah le-Eretz Yisrael*," *Or ha-Mizrach* 35:247-269 (1987).

57. Ritva, commenting on *Bava Metzia* 83b, as quoted in R. Betzalel Ashkenazi, *Shittah Mekubetzet*, ibid.

58. This understanding might be based on an inference from the Jerusalem Talmud, *Terumot* 8:4 which indicates that this conduct is only prohibited to the pious.

explanation.[59] According to this analysis, it is undignified for scholars to act as government agents in these circumstances – but all others may. There is no technical prohibition to inform in such cases.

According to Rabbi Wosner's conceptual observation, the scope of the prohibition to inform is inversely related to the scope of the obligation to obey the law of the land, about which there are three principal perspectives:[60]

The *Shulchan Aruch* considers that secular law is binding upon Jews under Jewish law only as it directly affects the government's financial interests, such as taxes or tolls.[61] The Ramo[62] agrees but also includes secular laws enacted for the benefit of the community as a whole. On this point, *Schach*[63] disagrees with Ramo, if these enactments are contrary to Jewish law obligations.

While there is substantial debate about which approach to follow, nevertheless, it seems that most modern authorities agree that, at least outside the State of Israel, Ramo's view should be applied. These include Rabbi Moshe Feinstein,[64] Rabbi

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59. See *Ran*, commenting on *Sanhedrin* 46a; R. Solomon ben Aderet, *Teshuvot Rashba* 3:29; R. Yosef Karo, *Beit Yosef*, *Choshen Mishpat* 388; *Taz*, *Yoreh Deah* 157:7-8; R. Tzvi Hirsch Shapira, *Darkei Teshuvah*, commenting on *Yoreh Deah* 157:1; R. Meir Simhah of Dvinsk, *Or Sameah*, *Melachim* 3:10; and R. Moshe Schick, *Teshuvot Maharam Schick*, *Yoreh Deah* No. 50.

60. For a thorough exposition, see Rabbi Hershel Schachter, "Dina De'Malchusa Dina": Secular Law as a Religious Obligation, *Journal of Halacha and Contemporary Society*, Vol. 1, No. 1 (Spring 1981).

61. *Shulchan Aruch, Choshen Mishpat* 369:6,11.

62. Ibid, 369:11.

63. *Shach* on *Shulchan Aruch, Choshen Mishpat* 73:39.

64. *Iggerot Moshe, Choshen Mishpat* 2:62.

Eliyahu Yosef Henkin,[65] Rabbi Yosef Soloveitchik,[66] and Rabbi Yoel Teitelbaum.[67]

Based on this approach one could argue that informing is permitted if the person on whom one is informing has actually violated secular law that Jewish law deems valid, and the informer gains from governmental enforcement, or from abatement of the tort.[68] So, too, in a situation where silence would lead to a desecration of G-d's name and informing would lead to a sanctification, informing would be permitted. However, some of these same authorities are not prepared to make this conclusion.

E. The View of Rabbi Feinstein and Rabbi Breisch: The Prohibition is Unchanged by a Just Government

The view of Rabbi Breisch (explicitly) and Rabbi Moshe Feinstein (implicitly) is that the rules relating to informing are unrelated to the status of the government as just or unjust,

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65. *Teshuvot Ibra* 2:176.

66. This is implied in *Nephesh Harav* at pages 267-269 and has been confirmed by other sources.

67. *Divrai Yoel* 1:147.

68. Rabbi Hershel Schachter posits:

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

R. Hershel Schachter, "Dina De Malchusa Dina: Secular Law as a Religious Obligation," *Journal of Halacha & Contemporary Society* 1:103, 118 (1981). In contrast with this, see the statements of Rabbi Feinstein, in the text above.

proper or improper. In three distinctly different responsa, Rabbi Feinstein appears to posit that the prohibition of informing remains identical in a just society.[69] In 1961 Rabbi Feinstein answered a question concerning whether the communal rabbinate may report to the police a person who had been selling not kosher food as kosher, if instead, he is willing to consent to a *din Torah* by the rabbis themselves. Rabbi Feinstein writes:

> I received your letter with regard to an evil doer...In my opinion, even though his sin is great, and he shows no repentance, nonetheless so long as we cannot say that the Jewish judges cannot judge him, one may not turn the matter over to the secular authorities.... **In addition, since it is certain that the secular authorities will adjudicate the matter through incarceration or a fine inconsistent with Jewish law, one must be fearful of the prohibition of informing, as it is prohibited to inform on a Jew to the secular authorities, whether through danger to his body or his money, even if he be a sinner**.[70] (emphasis added).

No mention is made of the fact that the secular authorities (in this case, the state of Maryland) will adjudicate the matter fairly (i.e., consistent with its laws) or that prison was the proper penalty according to secular law. Rather, Rabbi Feinstein adopts

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69. There is no doubt, from many different responsa that Rabbi Feinstein wrote that he considered the government of the United States to be a proper government, to which full fidelity to the law of the land is expected. Consider the following statement: **"Because of the fact that the government is a pious one**, whose whole purpose is to benefit all of the inhabitants of the land, the government has created a number of programs to benefit students...." *Iggerot Moshe, Choshen Mishpat* 2:29 (emphasis added).

70. Ibid, 1:8.

the view that unless one of the exceptions permitting informing is present, it is prohibited to inform on a person according to Jewish law, inasmuch as the punishments imposed by secular law violate Jewish law, and thus may not be imposed on a person lest one violate the prohibition of informing.[71]

This view is repeated again in Rabbi Feinstein's discussion of whether one can be a tax auditor for the government. He states:

> In the matter of one who wants to be an auditor for the government such that on occasion one will encounter the tax returns of one who has cheated, and he will detect the fraud, [and will thus report it to his superiors] and will be like one who informs the government, and they will punish this person more than he is liable according to Jewish law. It seems logical to me that since anyone who examines tax returns will encounter the fraud, and even if this person declines the job, others will take the job and discover the fraud, one sees from this that the one who commits the fraud suffers no loss whether this person takes the job or not, and thus the one who cheats loses nothing whether or not this person takes the job; and without a loss there is no prohibition.[72]

Again, Rabbi Feinstein posits that there is no justification to inform on a person even given the just American government. Rather he provides a narrow "technical" explanation for why this particular activity of informing while working for the IRS

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71. Of course, Rabbi Feinstein accepts that if the person will not consent to attend a *beit din* or will not listen to the directive of that *beit din* after the fact, such a person may be informed upon; this conduct falls under the category of "troubling the community"; *Shulchan Aruch, Choshen Mishpat* 388:12.

72. *Iggerot Moshe, Choshen Mishpat* 1:92.

is not prohibited to this particular person. It seems that in a case where if any particular person did not inform, the cheater would **not** be caught, then it would be prohibited to inform, according to Rav Feinstein.

Indeed, in a responsum entitled "May One Inform on a Thief to the Courts of the Land," Rabbi Feinstein states:

> It is prohibited for us to inform on a person for a matter where the punishment is unfounded in Jewish law. In Jewish law, theft is resolved through restitution as measured by an expert, and secular law punishes through imprisonment, unfounded in Jewish law.[73]

Although Rabbi Feinstein provides no explicit discussion of whether a just government is of any relevance, he repeatedly focuses on the fact that the punishment imposed by the secular government is contrary to Jewish law in its magnitude or scope.

A different rationale is explicitly stated by Rabbi Ya'akov Breisch, who notes that the rules which prohibit informing cover even cases where there is no threat of bodily harm. Rabbi Breisch was asked:

> Is the prohibition of informing specifically when they are chasing after Jews, and thus if one informs on one's friend they punish him because he is a Jew, but if a Gentile did this they would not punish him, then one is called an informer (*moser*), or it is even nowadays, when they are not pursuing Jews through law, and if a Gentile had violated the law they would punish him as what he did is a crime, is that too called informing as defined in *Shulchan Aruch, Choshen Mishpat* 388?

Rabbi Breisch answers:

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73. Ibid, 5:9(11).

> One who looks in *Shulchan Aruch* and other decisors will see explicitly that there is no difference, and even when one uses secular courts to reclaim his own, the matter is in dispute in *Choshen Mishpat* 388:5, and the *Shach* views such a person as an informer. A similar view is taken in *Brachot* 58a concerning . . . [a person who slandered the government] and such a person became a pursuer [to destroy the government] and he was killed. Even though it is certain that if a Gentile had done the same thing... they would have punished him, still Rav Shelai considered him an informer (*moser*) and killed him; while it is true that this case is different in that Rav Shelai was certain that they would be punished for mocking the government.... Even the money of a Jew, once it falls into the hands of a Gentile, they show no mercy on it, as is quoted in *Shulchan Aruch* and other decisors, and as a matter of normative halacha this matter does not change... That which we have seen in recent times [the Holocaust] provides proof to this.[74]

Rabbi Breisch is stating that even when there is no illicit harm to the Jew's body, money is taken contrary to Jewish law, and that alone validates the rabbinic prohibition against informing.

Both of these approaches find considerable halachic justification in the alternative approach developed by the *Rishonim* to explain the conduct of Rabbi Eleazer and Rabbi Joshua in *Bava Metzia* 83b-84a.[75] This approach rejects the opinion of Rabbi Eleazar that one may serve as a police officer and informant, and accepts that Rabbi Joshua, who rebuked Rabbi

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74. *Chelkat Yaakov, Choshen Mishpat* 5 (new edition), 3:96 (old edition).

75. Discussed above in text.

Eleazar, represents the normative opinion which prohibits this conduct.[76] If Rabbi Joshua's opinion is normative, then the only time it would be permitted to assist the secular government in criminal prosecutions is when the person poses a threat to others or to the community through his conduct[77] Both of these situations are based upon the rules of a pursuer (*rodef*). Indeed, in Jewish law, one who poses a threat to the life of others must be prevented from accomplishing the intended harm; force, even deadly force, may be used in such a case without the need for a court hearing. This threat need not be limited to the possibility that the criminal will actually harm another, but includes such factors as the possibility that in response to a Jew's being apprehended for committing a crime, other Jews will be injured or anti-Semitism will be promoted.[78]

Following the approach of either Rabbi Feinstein or Rabbi Breisch, one divides cases of informing into two types of categories, no different in a procedurally just society than in an unjust society. One situation occurs when the person being informed upon is an individual who is violent, or threatens violence, or endangers the welfare of the community. Such a person may be informed upon. In all other cases, informing is prohibited and is subject to the rules of informing, as explained

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76. Such an approach can be implied from Rambam, *Rotzeah* 2:4; Tosafot, *Sanhedrin* 20b; R. Moshe Schreiber, *Chatam Sofer*, *Likkutim* 14; and R. Bleich, "State's Authority to Punish Crime," at 840-844.

77. See R. Shimon Duran, *Tashbetz* 3:168, and Ramo, *Choshen Mishpat* 388:12, both of whom address communal dangers. See e.g., R. Shmuel di-Medina, *Maharashdam, Choshen Mishpat* 55:6; R. Moshe Sternbuch, *Teshuvot ve-Hanhagot* 1:850 (the authorities may be apprised of one who drives recklessly or without a license).

78. See Ramo commenting on *Shulchan Aruch, Choshen Mishpat* 388:12 (discussing one who counterfeits coins), 425:1. For a complete analysis of the various permutations of this rule, see R. Yaakov Blau, *Pitchei Choshen* Volume 5, chapter 4.

previously.[79] Perhaps in cases where the outcome is identical in secular law and Jewish law, we may assume that Rabbi Feinstein would aver that there is no problem of informing, as there is no damage (as quoted above in Section III, from *Iggerot Moshe, Choshen Mishpat I:92).*

IV. Hypotheticals and Conclusion

This article has sought to explain the Jewish law prohibition of informing, with a particular focus on how the prohibition applies to a just system of government. One group of decisors posits that just governments are exempt from the prohibition of informing, either because the entire prohibition did not apply when government was just, or because governments that operate within the confines of the Jewish law principle that the "law of the land is the law" are exempt. Another group posits that the prohibition applies even to just governments, since the rabbis did not want Jews assisting in the punishing of Jews in a manner inconsistent with Jewish law – even if the government itself can engage in this conduct, Jews should not help it. A third group of decisors posits that the system – even as it appears just – is not, and thus informing is prohibited.

For the sake of relevance, let us consider six simple cases to elaborate on the various views. (Assume in each of these cases that such a person will not obey the directives of a *beit din* to stop, and the community and its *beit din* are powerless to stop such a person.)

1. A Jew regularly assaults people. May one inform on

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79. Indeed, one authority has argued that on a functional level there is no difference between the various approaches because disobedience of the law generally will surely lead to anarchy and crime, and thus all significant violations of the law can be punished under the pursuer rationale. R. Zvi Hirsch Chajes (*Maharatz Chayes*), *Torat Nevi'im* Ch. 7.

him to the police?

This case is straightforward. All agree that such a person must be informed upon. Thus, one must report allegations of child abuse (sexual or physical) when one is aware of it, (according to some, even if this means that the child might be placed in a Gentile foster home).[80]

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80. Abraham Sofer Abraham, *Nishmat Avraham* Volume 4, pages 307-11, quotes responsa from Rabbis Auerbach, Elyashiv and Waldenberg in agreement on this point, that one must report cases of child abuse. No alternative view is quoted in this enclyopedic work. Rabbi Abraham writes:

> A child or infant who is brought to a hospital with symptoms of being a battered child... it is prohibited, after an investigation to return him to his home as they will continue to beat him until he might die. Because of the real danger, it is obligatory for the doctor to inform the courts, and with an order from the court, place the child with a foster parent or agency. There is no problem of informing since we are dealing with danger to life and the parents are the pursuers. This is permitted even if they will place the child, due to no choice, with a family or agency that is secular. It is incumbent upon the Jewish court to do everything in its power to insure that the child is placed with an observant family or agency. Particularly in the diaspora it is important that the Jewish court work to insure that the child not be placed with a Gentile family or agency. Rabbi Shlomo Zalman Auerbach agreed with all of the above.
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> Rabbi Yosef Shalom Elyashi recounted to me that it is permitted for the doctor to inform the authorities even if it is possible that the child will be placed with a family or agency that is not Jewish ....
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> Rabbi Waldenberg wrote "if there is a real risk that the parents will continue to hit the child .... it is obligatory for the doctor to report the matter to the police..."
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> Sexual abuse is no different than physical abuse. [Rabbis Waldenberg, Elyashiv and Auerbach agree that reporting is mandatory also.] Rabbi Elyashiv writes "there is no difference

2. A Jew is a regular non-violent vandalizer of property. May one inform on him to the police?

If the person rises to the level of one who makes the community suffer by regularly doing such vandalism, then all agree that such a person may be informed upon to the police.[81] However, if one does not rise to such a level, then whether one may report such a person depends on which view of informing one accepts.[82] According to the view of Rabbi Waldenberg, who permits informing generally, or those authorities who permit informing when secular law is valid in the eyes of Jewish law,[83] or Rabbi Shmelkes, who think that informing is merely a tort, one may inform in this case if one is the victim of such conduct (since government will treat this person justly, and one is permitted to do a tort to one who damages his property, if that will cause him to stop).[84] However, in the view of Rabbi Feinstein, who rules that no aspect of informing has changed, or Rabbi Batzri, who rules that any form of incarceration creates improper informing, such informing is wrong.

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between boys and girl since one is dealing with a seriously life-wounding event (*pegiah nafshit*) and a danger to the public ... this is much more serious than theft and one certainly must report this matter to the school administration and if nothing is done, even to the police, even in the diaspora."

81. One who causes trouble to the community as a whole is treated as a violent person; *Shulchan Aruch, Choshen Mishpat* 388:12.

82. Without a doubt, of course, one may seek a *heter arkaot* and sue this person for the damage done. However, normally such tort-feasors are judgment proof, and thus such a strategy is ineffective.

83. I.e, the approach of Rabbi Wosner to informing combined with the approach of Rabbi Henkin to secular law.

84. According to Rabbi Wosner, such informing is not even violation of the conduct of the pious, since one is informing to protect his own possessions. In a case of *chilul hashem,* one also may inform according to this view. According to Rabbi Shmelkes, one tort justifies another.

3. A Yeshiva has built a building with a non-dangerous[85] zoning violation in place.[86] May one inform on them to the zoning authorities?[87]

According to the view of Rabbi Waldenberg, because informing is no longer sinful in a just government, such conduct is permitted. According to those authorities who permit informing when secular law is valid in the eyes of Jewish law,[88] although such conduct is not called "informing", it is nevertheless prohibited for other reasons in Jewish law–unless being silent leads to desecration of G-d's name or informing leads to a sanctification of G-d's name, in which case informing is mandatory.[89] But it would only be permitted when the informer stands to benefit concretely from the enforcement of the zoning violation[90] or when it is the informer's job to find such violators. According to the view of Rabbi Shmelkes, such conduct is not prohibited as informing, but is a tort, and would only be permitted in cases where tortious conduct is permitted. According to Rabbi Feinstein, such conduct is prohibited.[91]

4. A Jew is a recreational marijuana user (but not seller), who grows his own marijuana in his backyard. May

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85. Once a zoning violation becomes hazardous, informing is clearly permitted if the institution will not otherwise fix the problem.

86. Such as a building without an elevator for those in wheelchairs or with exterior lights that violate local zoning regulations.

87. The zoning authorities will not arrest anyone, but will mandate the fixing of the violation and could even condemn the building.

88. I.e, the approach of Rabbi Wosner to informing combined with the approach of Rabbi Henkin to secular law.

89. See *Shulchan Aruch Choshen Mishpat* 266:1.

90. Such as when the zoning violation decreases the value of one's own residence.

91. Rabbi Batzri's view is hard to discern.

one inform on him to the police?

According the view of Rabbi Waldenberg, such conduct is permitted since informing is not wrong in a just government. According to Rabbi Batzri, such informing is prohibited and makes the informer a pursuer, as it will land the drug user in jail, and that is prohibited. According to those authorities who permit informing when secular law is valid in the eyes of Jewish law,[92] although such conduct is not informing, it is prohibited for other reasons. It would only be permitted when the informer stands concretely to benefit from the arrest, or it was one's job to arrest such people. According to Rabbi Feinstein, such informing is prohibited and makes the informer a pursuer (unless this conduct is one's job, and if he did not do it, someone else would or the person violating the law would be detected anyway).[93]

5. A Jew is knowingly and intentionally cheating on his United States taxes. May one inform on him to the Internal Revenue Service?

According to the view of Rabbi Waldenberg, such conduct

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92. I.e, the approach of Rabbi Wosner to informing combined with the approach of Rabbi Henkin to secular law.

93. Rabbi Shmelkes' view is hard to determine as he takes no view on whether jail is by definition dangerous.

Consider as well the case of a securities dealer, who is aware of insider training by another dealer. The question of what to do when one is in a profession where everyone bears an American law obligation to report violations of American law, (such as a securities dealer with regard to insider trading), is complex. This forces the question of whether fear that one will himself be seriously punished if one does not inform on another gives rise to any halachic leniency and is thus permitted. See Rabbi Alfred Cohen, "On Maintaining a Professional Confidence", *Journal of Halacha and Contemporary Society*, No. V11 (Spring 1984).

is permitted because informing is not wrong to a just government. According to Rabbi Batzri, such informing is prohibited and makes the informer a pursuer, as it will land the tax cheater in jail, and that is prohibited. According to Rabbi Wosner, although such conduct is not informing, it is prohibited under the rubric of doing gratuitous harm to another, and would only be permitted when the informer stands to benefit concretely from the arrest,[94] or when it was one's job to detect such people or when being silent leads to desecration of G-d's name or informing leads to a sanctification of G-d's name, in which case informing is mandatory.[95] According to Rabbi Feinstein, such informing is prohibited and makes the informer a pursuer (unless this conduct is one's job, and if he did not do it, someone else would and the person would be detected anyway).[96]

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94. Such as when the government knows about the cheating and actually suspects the informant of being the cheater.

95. See *Shulchan Aruch Choshen Mishpat* 266:1.

96. Rabbi Shmelkes' view is hard to determine.

Cheating Medicaid or Medicare would seem to be no different than cheating on taxes. Consider a simple case of a doctor who is in a medical practice with another doctor who is forging the first doctor's signature on Medicare reimbursement forms; may the first doctor inform on the second? This case is relatively simple as informing is the only certain way the first doctor can preserve his own Medicare rights. He is informing for direct personal benefit, and thus such conduct would be permitted, even more so since Medicare fraud only very rarely results in jail sentences.

A much harder hypothetical involves a Jew who is involved in non-violent criminal activity with a group of Jews and who – alone – is caught by the police. The other members of the criminal ring are not caught and their identities are still unknown. The District Attorney offers this defendant a deal, in which if he reveals the identity of his fellow criminals he will serve no jail time. Otherwise, a full penalty will be imposed. While a full analysis of this matter is quite complex, it is clear that one who informs out of fear of being punished himself

6. A rabbi in New York repeatedly performs Jewish weddings aware of the fact that the couple have not been issued a civil marriage license, and do not wish to have one issued, in violation of New York law.[97]

This law is of debatable constitutionality, perhaps only applies in situations where the couple wants to be married according to civil law, and is on the outer limits of the proper application of "the law of the land is the law."[98] Only Rabbi Waldenberg's view would permit informing in such a case, although performing such a wedding is a deeply unwise idea

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is not generally deemed an informer; *Choshen Mishpat* 388:2. However, many authorities deem such conduct a sin; see *Pitchai Choshen* volume 5 Chapter 4, notes 31 and 32 and Chapter 12, paragraph 5 and 27. According to the view of Rabbi Waldenberg, such conduct is permitted as informing is not wrong in a just government. According to Rabbi Batzri, this conduct saves one's life, while endangering the life of others, and is wrong. According to Rabbi Wosner's approach, if this is an area where the authority of the secular law is valid in the eyes of Jewish law, such conduct is permitted. According to Rabbi Feinstein, such informing is prohibited and perhaps even makes the informer a pursuer.

97. New York Domestic Relations Law Article 3, Section 17 states:

If any clergyman or other person authorized by the laws of this state to perform marriage ceremonies shall solemnize or presume to solemnize any marriage between any parties without a license being presented to him or them as herein provided . . . he shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine not less than fifty dollars nor more than five hundred dollars or by imprisonment for a term not exceeding one year.

98. Attempts by government to restrict purely ecclesiastical activity (such as a Jewish wedding ceremony) are subject to strict scrutiny, and one would have to show an otherwise unattainable governmental interest to be valid as an American law. While one could imagine such a government interest in preventing out-of-wedlock fornication generally, such is no longer the case in our secular society.

for many different reasons.[99]

The application of talmudic rules to modern life is complex and difficult, and frequently requires that one ask questions that until modern times were not asked, for social conditions made the question irrelevant. This article has sought to indicate the wide range of rabbinic opinion on a most important issue. We note that major differences in halachic rulings may arise from a seemingly minor divergence on a preliminary point. As always, only one well versed in Jewish law is qualified to render guidance for proper procedure to follow in any given situation.

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99. This case is readily distinguished from the case of a man who is religiously divorced from his wife but still civilly married to her, who now wishes to religiously (but not civilly) marry another woman. In that case, there are many more serious grounds for prohibiting, such a religious ceremony. Two are readily apparent: First and most significantly, such conduct is a *chillul* hashem in that the man and woman who are religiously married to each other are conducting an adulterous relationship in the eyes of secular society. Second, the secular law that is being violated in that case is the bigamy statute, whose validity is without contest in halacha through *dina demalchuta* (except, perhaps, in cases of *yibum* for Sefardim; see *Yabia Omer Even haEzer* 8:26).

Embryonic Stem Cell Research In Jewish Law

Fred Rosner, M.D. and Edward Reichman, M.D.

Introduction

In 1978, Louise Brown, the world's first "test tube" baby, was born as a result of in vitro fertilization (IVF). Since that time, the field of assisted reproduction has blossomed, with new techniques being pioneered involving the manipulation of the human sperm, egg, and other cells for the purpose of creating another human being. As the technology evolves, the rabbinic authorities continually address the new halachic ramifications. The Jewish views on artificial insemination, in vitro fertilization, surrogate motherhood and cryopreservation of sperm, eggs, or fertilized zygotes for later use are discussed at length elsewhere.[1]

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1. F. Rosner, *Modern Medicine and Jewish Ethics*, 2nd edit. (Ktav and Yeshiva Univ. Press; Hoboken, N.J. and New York, N.Y, 1991); J. D. Bleich, *Bioethical Dilemmas: A Jewish Perspective* (Ktav Publishers; Hoboken, N.J., 1988); A. Steinberg, *Encyclopedia of Jewish Medical Ethics*,

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The present essay addresses the status of human zygotes or embryos prior to implantation, with particular focus on their potential use for stem cell research. Are these embryos persons? May they be discarded or used for medical research?

Human Embryos: What Is Their Status?

In vitro fertilization of human eggs by human sperm often produces an excess of zygotes or embryos, which are frozen for possible later use. Considerable discussion concerns the status of such frozen embryos. Some people maintain that life begins at conception, whether in vivo or in vitro; hence, frozen embryos are already human beings and may not be discarded or used for medical research. Other people view cryopreserved embryos to be the property of the men and women whose gametes created them. Yet others consider in vitro embryos to have no human status at all, but to represent human tissue no different than any other human tissue such as kidney or bone marrow cells. These differing views on the status of human embryos underlie the debate about the disposition of excess embryos and their possible use for medical research.[2]

In the United States, the National Institutes of Health (NIH) has recently issued guidelines that describe in detail the scientific and ethical criteria needed for government funding of stem

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(Schlesinger Institute at the Shaare Zedek Medical Center; Jerusalem, 1988-1998); A. S. Abraham, *Nishmat Avraham*, (Schlesinger Institute, Jerusalem, 1993-1994).

2. See, for example, S. A. Beyler, et. al., "Disposition of Extra Embryos," *Fertility and Sterility* 74:2(August, 2000), 213-215; G. J. Annas, "Ulysses and the Fate of Frozen Embryos – Reproduction, Research or Destruction," *New England Journal of Medicine* 343:5(August 3, 2000), 373-376; V. H. Eisenberg and J. G. Schenker, "The Ethical, Legal and Religious Aspects of Preembryo Research," *European Journal of Obstetrics and Gynecology* 75(1997), 11-24.

cell research. The NIH is still prohibited from funding the creation of embryos for research purposes in which the embryos are "destroyed, discarded or knowingly subjected to risk of injury or death."[3]

Private funding for embryo research is not restricted. Research on human embryos discarded from fertilization clinics has for years been enmeshed in the politics of abortion.[4] Proponents of research funding by the NIH argue that stem cell research has nothing to do with abortion. It is not the same as fetal tissue research, the federal funding of which was banned by Presidents Reagan and Bush, Senior. On August 9, 2001, President George W. Bush advanced a compromise position on the use of stem cells for research by allowing federal funding for research on existing stem cells lines that have already been removed from embryos, but not for research that would destroy embryos to create new stem cell lines.

The Stem Cell And Its Potential Uses

Definition of a Stem Cell

The process of human development begins from a single cell formed at conception, when a sperm cell unites with an egg. As this cell starts dividing, a cluster of cells is formed, with cells beginning to form different types of human tissue. At this time, the cluster of cells is smaller than a pinpoint. This process, called differentiation, allows some cells to become liver cells and other cells to become nerve cells or skin cells and so on. These early cells are called "stem" cells and give rise to all the different cells in the body.

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3. J. Stephenson, "Green Light for Federally Funded Research on Embryonic Stem Cells," *JAMA* 28:4(2000), 1773-1774.

4. M. J. Fox, "A Crucial Election for Medical Research," *The New York Times,* Nov. 1, 2000, p. A35.

Source of Stem Cells[5]

1) Embryonic stem cells

Embryonic stem cells are derived from human embryos. In the process of harvesting the stem cells, the embryo is irreparably damaged and can no longer be used for implantation. The embryos themselves can have at least three possible origins – surplus embryos from fertility treatments, embryos created expressly for stem cell research, and embryos resulting from cloning technology.

2) Adult stem cells

Adult stem cells can be found in umbilical cord blood and in living human beings. Most every organ system in the human body has stem cells which can repair or replace damaged tissue. Adult stem cells are different in nature, and have more limited research potential, than embryonic stem cells. While embryonic stem cells can potentially develop into any cell type, such as heart, liver or bone (pluripotent), most adult stem cells can form only a limited number of cell types (multipotent). In addition, while adult stem cells are few in number and difficult to isolate, embryonic stem cells are easily identifiable and can divide indefinitely, producing an endless supply of cells. Adult stem cells also take longer to grow in the laboratory.

3) Stem cells derived from aborted fetuses

Stem cells can also be derived from aborted fetuses, and studies indicate potential clinical use of such stem cells.[6]

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5. The overview of stem cells is a simplification and intended only to provide a basis for the ensuing halachic discussion. For more information see the website of the National Institutes of Health, www.nih.gov.

6. W. Dunham, "Study Points to Stem Cell Fetal Brain Treatments," Reuters News Service, July 26, 2001. Dunham reports that scientists

Potential Uses for Stem Cells

Theoretically, virtually any disease could be treated by stem cells. Some diseases result from cellular malfunction or destruction and stem cells could be used to replace lost cells. For example, after a heart attack, the muscle cells in the heart could be replaced with the use of stem cells. Researchers at the Technion and Rambam Hospital in Haifa have used embryonic stem cells to grow human heart cells successfully in the laboratory and showed that human embryonic cells can produce insulin.[7] If one needed an organ transplant, stem cells, in theory, could be guided to develop into a complete organ, such as the liver, or lung, which could replace the diseased one. Scientists are currently using stem cells to try to develop cures for diabetes, Parkinson's disease, cancers and genetic diseases. The safety and efficacy of stem cell therapy, however, still remains to be determined.

The Halachic Approach To The Pre-embryo

The objective of this essay is to outline some of the halachic issues related to the use of embryonic stem cells for research. **Our discussion will be restricted to the halachic status of the pre-implantation embryo, or so-called pre-embryo, and its use as a source of stem cells. We will not address the use of aborted fetal tissue[8] or the propriety of cloning[9] as potential**

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injected stem cells derived from an aborted human fetus into the brain of a laboratory monkey still in its mother's womb and found that they integrated nicely, pointing to the possibility of repairing brain abnormalities in human fetuses.

7. *British Medical Journal* 323(October 6, 2001), 771.

8. See J. D. Bleich, "Fetal Tissue Research: Jewish Tradition and Public Policy," in his *Contemporary Halachic Problems* (Ktav Publishing House; New York, 1995), 171-203. While fetal tissue obtained from a spontaneous miscarriage would circumvent the issue of abortion, it

sources for stem cells. This is intended only as an introductory theoretical paper to allow for future comment, expansion and refinement as the science continues to evolve.

The Status of the Pre-Embryo

The foundational halachic question relating to the use of the pre-embryo is the determination of its legal identity. Which paradigm should be applied in order to consider the permissibility of the use of the pre-embryo for stem cell research? There are two possibilities: either the pre-embryo has the status of a fetus in utero, or it is like reproductive seed which has been emitted.

1) Pre-Embryo has the status of a fetus in-utero

Some rabbinic writers suggest that the pre-embryo be equated with the fetus in-utero, thereby placing the discussion of the halachic status of the pre-embryo within the parameters of the abortion debate.[10] The status of the pre-embryo would then depend upon the various positions regarding the

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would still raise the same halachic issues about the burial of, and derivation of benefit from, the fetus.

9. M. J. Broyde, "Cloning People and Jewish Law," *Journal of Halacha and Contemporary Society* 34(Fall 1997); J. D. Bleich, "Cloning: Homologous Reproduction and Jewish Law," *Tradition* 32:3 (1998); J. D. Loike and A. Steinberg, "Human Cloning and Halachic Perspectives," *Tradition* 32:3 (1998); Symposium on cloning and genetic engineering in *Torah U'Madda* 9(2000); Stephen Werber, "Cloning: A Jewish Law Perspective with a Comparative Study of Other Abrahamic Traditions," *Seton Hall Law Review* 30(2000).

10. See, for example, Y. Weiner, "The Halachic Status of an Embryo In-Vivo and In-Vitro," in his *Rapo Yerapai* (Jerusalem Center for Research; Jerusalem, 1995), 121-34; Y. Breitowitz, "The Pre-Embryo in Halacha," at http://www.jlaw.com/ Articles/ preemb.html; D. Eisenberg, "Stem Cell Research in Jewish Law," at www.jlaw.com/Articles/stemcellres.html.

prohibition of abortion,[11] as listed below:

a) Murder – According to this approach, a Jew who performs an abortion is guilty of homicide, though not punishable in a court of law. Although one would receive divine punishment for this offense, capital punishment is reserved for murder of a being accorded the full legal status of *nefesh*,(soul), and not for murder of a fetus.

b) Wasting or destroying the male seed – Some subsume the prohibition of abortion under the prohibition of the destruction of male seed, *(hashchatat zera).* Furthermore, one is destroying something which could potentially develop into life. This latter logic is more compelling for the pre-embryo than for male seed alone. Some argue, however, that the prohibition of hashchatat zera applies only in the *wasteful emission* of seed, not in its destruction thereafter.[12]

c) Tort law, wounding, assault and battery – One of the primary sources regarding abortion appears in Exodus 21:22-23: If a pregnant women is accidentally induced to have an abortion, financial compensation must be paid to her husband.

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11. While the issue of abortion is treated extensively elsewhere, the aspects relevant to stem cell research will be discussed here. For a general discussion on abortion in Jewish law, see J. D. Bleich, "Abortion in Halachic Literature," in his *Contemporary Halachic Problems* 1(Ktav; New York, 1977), 325-71; D. M. Feldman, *Marital Relations, Birth Control, and Abortion in Jewish Law* (Schocken Books; New York, 1968); A. Lichtenstein, "Abortion: A Halachic Perspective," *Tradition* 25:4(Summer 1991), 3-12; F. Rosner, *Modern Medicine and Jewish Ethics* (2nd Ed.) (Ktav; New York, 1991); A. Steinberg, *Entzyclopedia Hilkhatit Refuit* 2(Schlesinger Institute; Jerusalem, 1991), s.v., "*hapalah*."; M. D. Tendler, "Contraception and Abortion," in F. Rosner, ed., *Medicine and Jewish Law* (Jason Aronson; Northvale, NJ, 1993); Y. Z. Zand, *Birkat Banim* (Jerusalem, 5754).

12. Regarding the laws of *hashchatat zera*, see the entry in *Entzyclopedia Talmudit*, v. 11.

Consequently, some apply the legal principles of injury to the case of abortion.

d) *Hatzalah*: the obligation to preserve life, and its correlates – A number of biblical sources indicate that one is enjoined to preserve a human life, and this obligation may apply to the fetus, by virtue of its potential life. It is argued that if fetal preservation is considered obligatory, then fetal termination must conversely be prohibited.

In addition, one must also consider the halachic status of the embryo prior to forty days of gestation. The Talmud, in a number of places, refers to the pre-40 day fetus as "mere water," with resultant halachic ramifications.[13] Whether this 40-day distinction has practical applications to the abortion debate depends largely on which approach is invoked. Since stem cells are harvested prior to 40 days of embryonic development, this debate directly impacts on the permissibility of stem cell research.

If one considers abortion akin to homicide, the 40-day distinction is irrelevant, as killing any pre-term fetus is prohibited. Therefore, the pre-embryo could not be used for stem cell research. Alternatively, one could argue that a post-40 day fetus has some legal status, albeit less than a full human being. Consequently, the killing of such a fetus is considered criminal. A pre-40 day fetus, on the other hand, is considered mere water, and its demise of lesser, or no, legal consequence. Therefore, stem cell research would be allowed.

If abortion is a correlate of the prohibition of wasting the male seed, there should be no difference at 40 days, as the

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13. On the pre-40 day fetus, see J. D. Bleich, *Contemporary Halachic Problems* 339-47; Y. Breitowitz, "The Pre-Embryo in Halacha," at http://www.jlaw.com/Articles/preemb.html; R. Henkin, "Abortion before 40 days" (Hebrew) Assia 59-60 Iyar, 5757 15:3-4.

destruction of male seed would happen even at day one. Therefore, harvesting stem cells from a pre-embryo would constitute a violation of *hashchatat zera*.

If abortion is prohibited as an extension of the obligation to preserve life, perhaps by extension, stem cell research would be prohibited; or, perhaps, a pre-40 day embryo would not even meet the criteria for "potential life". In any case, whatever one's position towards the pre-40 day fetus, it should be equally applicable to the pre-embryo.

2) Pre-embryo is like emitted reproductive seed.

In actuality, however, **all the major rabbinic authorities do not consider the pre-embryo akin to a fetus in-utero,** primarily because the pre-embryo is both outside the womb and furthermore requires implantation in order to facilitate the ultimate birth.[14] Support is marshaled from Genesis 9:6, "Whoever sheds the blood of man in man by man shall his

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14. S. H. Wosner, cited in A. Y. H. Friedlander, ed., *Sefer Chasdei Avraham, Hacholeh Behalachah* (Brooklyn, N.Y., 1999), 312-317; L. Y. Halperin , Responsa *Maaseh Choshev*, Part 3#2; M. Eliyahu, "Destruction of fertilized eggs and pregnancy reduction" (Hebrew), *Techumin*, 11(1990), 272-274. C. D. Halevi, "Concerning pregnancy reduction and the halachic view of test tube babies," (Hebrew)*Assia* (Jerusalem), No 47-48 (Vol 12:3-4), Kislev 5750 (1990), 14-17; S. Yisraeli, *Chavat Binyamin*, 3:108, section 3, n. 2; Y. Zilberstein, "Choosing embryos for implantation to prevent [the birth] of defective children and for the determination of a baby's sex," (Hebrew) *Assia* (Jerusalem), No 51-52 (Vol 13:3-4), Iyar 5752 (1992) pp. 54-58. The concept that an embryo only becomes ensouled when it is implanted in the womb was first articulated by Rabbi Moshe Hershler in 1980, "Halachic questions about a test tube baby," (Hebrew) in *Halachah u'Refuah* 1(Regensburg Institute; Jerusalem and Chicago, 1980), 307-320. Should science advance to the point that a pre-embryo could develop into a complete human being outside a woman's womb, some of these arguments may have to be reevaluated.

blood be shed." According to rabbinic tradition, this verse refers to the prohibition of abortion, the "man within man" referring to the fetus. It is therefore argued that only killing an actual fetus in-utero is considered abortion, but an entity outside the womb is simply not a fetus according to Jewish law. **This renders the entire literature of abortion irrelevant to a discussion about the use of embryonic stem cells.**

The status of the pre-embryo is therefore relegated to the status of the individual's reproductive seed once it has been emitted,[15] or is possibly subject to the laws of *hashchatat zera* if they apply in this case.[16]

R. Wosner maintains that even the authorities who make no legal distinction prior to 40 days gestation, and would, for example, allow Sabbath violation for a pre-40 day fetus, would agree that the pre-embryo does not merit such legal protection.[17] R. Elyashiv agrees that the pre-embryo is not considered a fetus, and there is no prohibition to discard it.[18] R. Halperin adds that if one wishes to remove all doubt about the disposition of the pre-embryo, one should use it for life-saving medical

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15. See A. Nebenzal, "The rights of inheritors to frozen reproductive seed," (Hebrew) *Techumin* 17, 347-48.

16. R. Wosner, op. cit.; *Entzyclopedia Talmudit*, v. 11, s.v., *"hashchatat zera."*

17. On the issue of Shabbat violation for a fetus, see Breitowitz, op. cit.;Y. Weiner, "The Halachic Status of an Embryo In-Vivo and In-Vitro," in his *Rapo Yerapai* (Jerusalem Center for Research; Jerusalem, 1995), 121-34; A. Kolodsky, "Violation of the Sabbath to save a fetus," (Hebrew) *Ateret Shlomo* 6(Institute for Science, Technology and Halacha: Jerusalem, 5761), 225-231.

18. Rabbi Y.S. Elyashiv ruled that preimplantation screening of in vitro fertilized zygotes for the presence of neurofibromatosis is permissible. It is then allowed to implant only unaffected embryos and to discard the affected ones to insure the birth of a healthy baby. (A. Steinberg, Personal communication, January 9, 2001).

purposes. If one may dismember and kill a fetus in-utero to save the life of the mother, he argues, one can surely use the pre-embryo, whose status is even less than the fetus, for life-saving purposes. According to R. Halperin, therefore, it may be preferable to utilize the pre-embryos for stem cell research than to actively discard them.[19] R. Tendler, likewise, does not accord the pre-embryo the same status as the fetus in-utero and states that both implantation and 40 days of gestation are required to bestow "moral status" on the embryo.[20]

Among those who would allow discarding of excess embryos, some stipulate that this permissive ruling applies only to embryos not selected or destined for implantation.[21] Embryos intended for implantation may not be destroyed by

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19. L. Y. Halperin, "The use of frozen embryos for medical research," (Hebrew) in his *Maaseh Choshev* 3(Institute of Science and Technology in Halacha; Jerusalem, 5757), 55-62. He rejects the option of donating the embryo to another couple. To passively allow the pre-embryos to decompose would probably be less objectionable, as this would constitute a case of *shev v'al ta'aseh*.

20. "The Judeo-biblical tradition does not grant moral status to an embryo before forty days of gestation. Such an embryo has the same moral status as male and female gametes, and its destruction prior to implantation is of the same moral import as the 'wasting of human seed.' After forty days – the time of 'quickening' recognized in common law – the implanted embryo is considered to have humanhood, and its destruction is considered an act of homicide. Thus, there are two prerequisites for the moral status of the embryo as a human being: implantation and forty days of gestational development. The proposition that humanhood begins at zygote formation, even in vitro, is without basis in biblical moral theology." Testimony of Rabbi M. D. Tendler, *Stem Cell Research and Therapy: A Judeo-Biblical Perspective, Ethical Issues in Human Stem Cell Research*, Volume III: Religious Perspectives, September 1999, p.H-3, (cited in Eisenberg, op. cit.).

21. See, for example, M. Eliyahu, op. cit.

virtue of their potential life.[22]

While not receiving extensive treatment in the discussion about disposition of the pre-embryo, there is one argument that at least deserves mention. The pre-embryo is invisible to the naked eye, and is seen only through the lens of a microscope. In general, halacha does not acknowledge microscopic phenomena and considers them nonexistent.[23] For example, while it is forbidden to ingest insects, the prohibition does not extend to microscopic organisms. Hence, we are permitted to drink water and breathe the environmental air, both of which contain countless microorganisms. One could argue that since halacha does not acknowledge the existence of the microscopic pre-embryo, there would be no prohibition to discard it, or, a fortiori, to use it for stem cell research.[24]

Ownership Rights to the Pre-Embryo

Assuming halacha allows stem cell research, who owns the proprietary rights to the pre-embryo? Is consent for such use required, and if so, from one or both parties?If the stem cells will be used for *pikuach nefesh* purposes, is no consent required?

The nature of ownership rights is interrelated with the debate about whether the pre-embryo is equated with the fetus in-utero. If it is to be treated as identical to the fetus in-utero, one could

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22. One could argue, as discussed below, that the status of potential life is only bestowed upon a fetus in-utero.

23. Bleich mentions this argument in his *Bioethical Dilemmas* (Ktav Publishers; Hoboken, NJ, 1998), 210-211 and notes 19-20.

24. Given the fact that the donors to the pre-embryo bestow great significance upon it, and rabbinic authorities have struggled to determine the nature of its ownership rights, it would be difficult to argue that the pre-embryo, analogous to microscopic bacteria, does not exist at all in the eyes of Jewish law.

apply the rabbinic discussion about monetary compensation for fetal loss in order to establish ownership rights.

To determine whether a fetus in-utero is considered property, in which case one can argue about ownership rights, or whether the fetus is an independent being not subject to parental ownership, contemporary rabbinic authorities turn to the following talmudic passage discussing compensation for accidentally-induced miscarriage, or feticide.[25]

> If a man while meaning to strike another man [incidentally] struck a woman who thus miscarried, he would have to pay compensation for the loss of the fetus. How is compensation for the fetus fixed? The estimated value of the woman before her miscarriage is compared with her value after miscarriage…. And this amount will be given to the husband. If, however, the husband is no longer alive, it would be given to his heirs. If the woman was a freed slave or a convert [and the husband, also a convert, is no longer alive], there would be complete exemption.
>
> …. Rabbah said: This rule applies only where the blow was given during the lifetime of the convert [husband] and it was only after this that he died, for since the blow was given during the lifetime of the convert, he acquired title to the impending payment. But where the blow was given after the death of the convert, it was the mother who acquired title to the embryos, so that the defendant would have to make payment to her. Said R. Chisda: "O, master of this [teaching]! Are embryos packets of money to which a title can be acquired? It is only when the husband is there that the Divine Law grants payment to him, but not when he is

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25. *Bava Kamma* 49a.

no more."

The identity of the recipient of compensation should, theoretically, determine ownership. Since the husband alone receives the money, he must, perforce, be the owner of the fetus. However, the nature of the laws relating to compensation in the case of the death of the husband, or if the husband is a convert (*ger*), necessitates a more careful analysis. According to Rabbah, if the husband is dead, his inheritors can claim the compensation, and if the pregnant woman was married to a *ger*, and was struck after the death of her husband, she receives the compensation, as a *ger* has no legal inheritors. The implication is that Rabbah considers the fetus to be property, with its disposition following the laws of inheritance. Rav Chisda, however, declares, "is a fetus a packet of money to which a title can be acquired?" Rather, Rav Chida maintains, if the husband is alive, he receives the money; if he is dead, no compensation is given. It appears that Rav Chisda does not consider the fetus as property and grants the fetus status as an independent being. Therefore, the compensation for feticide mentioned in the Torah is not an application of an existing legal principle, but rather, a unique law (*chidush*) establishing a fine payable only to the husband, if he is alive.

The Rosh basically adopts the position of Rav Chisda, while Rambam subscribes to that of Rabbah. Rabbinic authorities consider this the fundamental argument about whether the fetus is considered property, and if so, whose.[26]

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26. For detailed discussions on the issue of compensation for feticide see S. Yisraeli, "The status of frozen embryos prior to implantation," (Hebrew) in A. Steinberg, *Entzyclopedia Hilchatit Refuit* 4, 22-44; Y. Arieli, "Refusal of a spouse to continue the IVF process," (Hebrew) *Assia* 67-68(February, 2001), 102-125; L. Y. Halperin, "The use of frozen embryos for medical research," (Hebrew) in his *Maaseh Choshev* 3 55-62; idem., "Damage claims against parents by handicapped

If one considers the pre-embryo to be of a lesser, or different, status than the fetus in-utero, then the aforementioned talmudic discussion about compensation bears no relevance to the determination of ownership of the pre-embryo. This is the position of R. Yisraeli,[27] who asserts that the pre-embryo, which requires implantation in order to elevate it to the status of a fetus, is considered property, and not a human life, in the eyes of the law. As such, the husband and wife are subject to the conventional laws of partnership. In general, if two parties enter into a business arrangement to sell a particular product, neither party may retract until the completion of the deal, or until the product is sold during its customary season of sale. In the case of the pre-embryo, the completion of the deal would be the birth of a child (or, perhaps, the implantation of the pre-embryo). Despite this general principle, however, R. Yisraeli would allow the husband, in case of divorce, to rescind his agreement, since divorce is an unforeseen circumstance in the partnership. Had the husband known at the outset that their marriage would end in divorce, he never would have consented to the IVF procedure and the production of pre-embryos.[28] In any case, both parties have equal rights to the pre-embryo. R. Halperin likewise maintains that both parties have equal rights to the pre-embryo.

There are some cases where rabbinic authorities grant superior rights to the woman, such as in a case where a separated or divorced woman wishes to implant a pre-embryo in herself or a surrogate, despite her husband's objection.[29] This theoretical

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children," (Hebrew) ibid, 291-324.

27. S. Yisraeli, ibid.

28. R. Arieli, op. cit., disagrees with this analysis and claims that even if you apply the partnership paradigm, neither party can retract their consent.

29. S. Rappaport, "Enforcing an agreement to perform IVF,"(Hebrew)

right of the wife, however, is restricted to use of the embryo for implantation and subsequent production of a child. If the intended use is for stem cell research, which involves the destruction of the embryo, there is no reason why one party's rights should supercede the other's.

Another issue raised in these debates is the concern of forced or coerced parenthood. If the wife wishes to implant the embryo in herself or in a surrogate, the husband would be forced to have a genetic and possibly halachic[30] child against his will. Similarly, if the husband wishes to implant the embryo into his new spouse, the ex-wife could claim forced parenthood.[31] This is not an issue when the embryo will be used for stem cell research.

Embryos Created Specifically for Stem Cell Research

If stem cell research is allowed on surplus fertilized embryos, can one prospectively create an embryo, which will be destroyed to harvest its stem cells for research purposes? The halachic impediment in this case lies in the procurement of the reproductive seed. There is an unequivocal prohibition against the wasting and purposeless destruction of male seed, and, indeed, some rabbis prohibit any artificial reproductive procedure based on this prohibition.[32] There is no analogous

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Assia 67-67(February, 2001), 126-130. See also article by I. Warhaftig in *Techumin* 16, 184-85.

30. There is a rabbinic debate as to whether the sperm donor, even if it is the husband, is considered the halachic father. Also, if the surrogate mother is not Jewish, according to those who maintain that the gestational mother is the halachic mother, the child would not be halachically related to the husband.

31. See Rappaport and Warhaftig, op. cit.

32. A. Steinberg, *Entzyclopedia Hilchatit Refuit* 1, s.v., *hazra'ah melachutit*, esp., p. 151.

prohibition against wasting the female seed.[33] The majority of *poskim*, however, allow sperm procurement if the husband will ultimately fulfill *pru urvu* (reproduction) with the use of that sperm.[34] In the case of surplus fertilized embryos, the eggs were initially created for the purpose of implantation. As a result, the initial sperm procurement was halachically sanctioned.[35] Is there halachic justification to procure sperm or eggs for stem cell research, when no fulfillment of *pru urvu* will result? The only possible justification for setting aside the prohibition of *hashchatat zera* is for a potentially life-saving endeavor (*pikuach nefesh*). As stem cell research is targeting a cure for diseases such as diabetes and cancer, one could argue that the threshold for *pikuach nefesh* is met.[36] While this broad application of the laws of *pikuach nefesh* is arguable, we believe the point to be moot. Given the existence of tens of thousands of surplus embryos from fertility treatments, there is currently no reason to generate new embryos for stem cell research.

Whether one can prospectively create an embryo for therapeutic, as opposed to research, use of the stem cells is another matter. Whether one uses the stem cells for research or therapy, the resultant embryo will be destroyed, and no child can possibly result. However, in a therapeutic scenario, there may be a compelling reason to produce new embryos.[37]

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33. *Entzyclopedia Talmudit*, v. 11, s.v., "*hashchatat zera*."

34. Ibid.

35. Assuming the procedure was done with rabbinic approval.

36. See J. D. Bleich, "Fetal Tissue Research: Jewish Tradition and Public Policy," in his *Contemporary Halachic Problems*, 171-203

37. Regarding intentional abortion (and possibly prior conception) for the sake of using fetal tissue for transplantation, see See E. Bakshi Doron, "Conception for the purpose of fetal tissue transplantation to cure one's father," (Hebrew) *Techumin* 15, p. 11; J. D. Bleich, "Fetal Tissue Research: Jewish Tradition and Public Policy," in his

In the year 2000, a couple in Colorado had a child who suffered from a rare form of usually fatal anemia, which could only be treated with a bone marrow transplant. The couple used in-vitro fertilization and pre-implantation genetic testing to select, and subsequently implant, an embryo which could be a potential stem cell and bone marrow donor for their daughter.[38] When the child was born, the umbilical cord blood stem cells were harvested and successfully transplanted into their daughter.

In this case, two halachic issues are relevant – the propriety of harvesting the sperm, and the disposition of the surplus, genetically-tainted embryos, discussed above. This couple chose to undergo IVF in order to potentially cure their other child. Rabbinic authorities have allowed the use of IVF and pre-implantation genetic testing in order to produce a disease-free child, such as in cases of sex-linked disorders.[39] The husband's fulfillment of *pru urvu*, coupled with the cure or prevention of disease, serves as the halachic basis for this decision. In the Colorado case, there is not only the husband's fulfillment of

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Contemporary Halachic Problems, 171-203.

38. D. Josefson, "Baby Bred to Provide Stem Cells for Sister," *British Medical Journal* 321(October 14, 2000), 918.

39. Rav Auerbach, cited in A. S. Abraham, *Nishmat Avraham* 4, *E.H.*, 1:1, p. 180; Y. Zilberstein, "Choosing embryos for implantation to prevent [the birth] of defective children and for the determination of a baby's sex," (Hebrew) *Assia* (Jerusalem), 51-52(Vol 13:3-4), Iyar 5752 (1992) pp. 54-58; R. V. Grazi and J. B. Wolowelsky, "Use of Cryopreserved Sperm and Pre-embryos in Contemporary Jewish Law/Ethics," *Assisted Reproductive Technology – Andrology* 1995; 8:53-61. Also, as mentioned above, Rabbi Y.S. Elyashiv ruled that preimplantation screening of in vitro fertilized zygotes for the presence of neurofibromatosis is permissible. It is then allowed to implant only unaffected embryos and to discard the affected ones to insure the birth of a healthy baby. (A. Steinberg, Personal communication, January 9, 2001).

pru urvu, there is an additional factor of potential *pikuach nefesh* – saving the life of the older sibling.[40] While the rabbis have not yet addressed such a case where a couple undergoes IVF to produce a child that will help cure someone else, these factors might argue in favor of such a procedure.

A likely future scenario involves a couple with a child suffering from a condition treatable with stem cell therapy, who could undergo IVF with pre-implantation genetic testing to produce an embryo for stem cell harvesting. The stem cells would then be used to treat the child. In this case, since no child is produced, disease-free or otherwise, there is no fulfillment of *pru urvu* to justify the procurement of sperm. What remains is the *pikuach nefesh* element alone. Whether the potential to save the life of the existing child would outweigh the prohibition of *hashchatat zera* (destruction of the male seed) and justify the procurement of sperm to produce embryos for stem cell transplant is a question for future discussion.

Conclusion

The overwhelming majority of rabbinic authorities do not accord the pre-embryo the same legal status as the fetus in-utero and consider the status of the pre-embryo equivalent to emitted reproductive seed. As a result, these authorities see no halachic objection to discarding surplus embryos (not designated for implantation), and by logical extension, to the use of the embryos for stem cell research. In fact, it can be argued that use of pre-embryos for stem cell research is preferable to actively discarding them, since they will be used for a potentially life-saving purpose. Most authorities would require consent from both the egg and sperm donors in order to use the pre-embryo

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40. The procedure of pre-implantation genetic testing also insures that the resultant child is free of the potentially fatal anemia.

for stem cell research.[41]

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41. As an additional stringency, the research should ideally fall under the rabbinic definition of *pikuach nefesh*, as suggested by R. Halperin. One could argue that since the pre-embryo has only the status of emitted reproductive seed, and is anyway destined for destruction, the threshold for *pikuach nefesh* which would justify its use would be considerably lower than otherwise.

Rabbinic Coercion: Responsibilities and Limitations

Rabbi Alfred Cohen

Introduction

In May 2001, the Rabbinical Council of America issued a "Resolution on sanctions to be imposed on one who withholds issuance or receipt of a *get*" (see Appendix for text). In it, the RCA seeks to foster communal or at least congregational measures of shunning or embarrassing the recalcitrant spouse, in the hope that social and economic pressures, together with synagogual loss of respect, will eventuate issuance or receipt of the *get*.

Understandably, this Resolution was not issued in a vacuum – the past two decades have seen increasing instances of failed marriages dragging on for years because of the refusal of one of the partners to give or receive a *get*. In the overwhelming majority of these cases, it is the husband who withholds the *get*, often due to anger or a desire to wrest some advantage from his wife in their court battles. "Horror stories" of women "chained" (*aguna)* to a man who, despite a secular divorce, is still her husband in the eyes of Jewish law, are not uncommon. As a married woman, the *aguna* cannot re-marry; this awareness has led and may further lead to desperate measures on the part of some women in this predicament.

The Resolution of the RCA is a response to this brutalization of women and an attempt to find a way to help them, within

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Rebbe, Yeshiva University H.S. for Boys, N.Y.

the confines of the halacha. The RCA is not alone in finding manipulation of Jewish law in order to punish or take revenge upon another Jew as an abhorrent and despicable phenomenon, which must be treated with utter revulsion. In the past generation, the revered Rav Eliyahu Henkin *zt"l* already used very strong language in castigating recalcitrant husbands: He wrote that anyone who withholds a *get* from his wife for some ulterior motive is a thief – and worse, for it is considered

> ...akin to bloodshed (*abizrayhu d'shefichat damim*), even if the woman refuses [to have marital relations with] her husband. If they tried to make peace, and that did not work, and 12 months have passed, it is a mitzvah for him to divorce her... *and in this generation, withholding the divorce in this kind of situation can G-d forbid lead to sexual immorality.*[1] (emphasis added)

In order to appreciate why the RCA advocates certain measures and not others, it will be helpful to have an understanding of the mechanics of issuing a *get* in a disputed situation, and to understand how the halacha, as it has been interpreted over the centuries, has confronted the issue, with all its limitations and possibilities.

This paper will address these questions. Our focus will be not only the RCA Resolution but also other recent attempts to solve the *aguna* problem, including a number of "Get Laws" promulgated in New York State, as well as several versions of pre-nuptial agreements which have been formulated. None of them is really the perfect solution which will make the problem go away, but each addresses part of the problem and offers part of the solution. As we shall see, the limitations and problems with each of these arise, to a certain extent, from strictures inherent in the Jewish law itself.

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1. Rav Eliyahu Henkin, *Edut LeYisrael*, 46.

According to the Torah, (*Devarim 24:1*), in order for a marriage to be dissolved, the husband must give his wife a bill of divorcement (*get*). If both agree to end the marriage, a *get* is a simple procedure. But if the man is unwilling, that creates a barrier to issuance of the *get*, inasmuch as the biblical verse clearly specifies that this "giving" has to be of his own volition.[2]

Nevertheless, there are certain situations when a woman simply refuses to live with her husband any more and may turn to the *Beit Din* to extricate her from the marriage. The approach of halacha has always been to try and be fair to both partners; if possible, the *Beit Din* would try to effect a reconciliation. If that didn't work, they tried to have the marriage come to an end, while protecting the rights of either party.

The Talmud[3] addresses the situation of a "rebellious" wife (*moredet*), questioning whether her husband must divorce her and if so, if she is still entitled to the monies promised in her *ketubah*.[4] After some discussion, the conclusion of the halacha

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2. If the wife refuses to accept the *get*, other procedures and laws come into play, but that is not the focus of this study, which addresses the *aguna* situation.

3. *Ketubot* 63a. The halacha is brought in the *Shulchan Aruch, Even Haezer* 77.

4. In Judaism, when a woman marries she receives a *ketubah* which, despite the romantic notions one might entertain, is actually a document obligating the husband to support his wife financially, including in case of divorce. However, in cases of the wife's failure to live up to her obligations as a wife, sums may be deducted from the *ketubah*, or the *Beit Din* may even rule that she has entirely forfeited her *ketubah*.

If the woman requests a *get* from the *Beit Din*, it is the obligation of the *Beit Din* first to determine the grounds for dissolution of the marriage. The rabbis are bidden to question her and probe the reasons she won't cohabit with her husband. Did he perhaps insult her, and she is trying to get even? Perhaps they can effect a reconciliation and

is that the term *moredet* is employed by the Gemara to designate a woman who refuses to engage in marital relations with her husband, specifically, a *moredet* who justifies her refusal by the claim *ma'us alai*, which literally means "he disgusts me".

There is a considerable body of halachic material dealing with this situation from all angles.[5] As Rambam writes in *Mishneh Torah*, the Jewish law is that in such a case the husband must divorce her,[6] for a woman cannot be forced to live with someone who repels her:

> The woman who withholds marital relations from her husband is called a *moredet*. [We] ask her why she rebelled [against him]; if she says "he disgusts me and I cannot willingly be intimate with him", [we] force him... to divorce her, for she is not like a captive who is to [be forced to have] sexual relations with one she hates. And she leaves [the marriage] without her *ketubah* [money].[7]

Even if the husband wants to stay married to her, the *Beit Din* forces him to give her a *get* (a Jewish divorce). So, for example, a woman might approach the *Beit Din* with the claim, "My father chose this man for me and forced me to marry him, but I never liked him. I find him repulsive and want to get out."[8] According to Rambam, under such circumstances, the

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convince her to continue in her marriage. However, if she responds that "he disgusts me," it is the Gemara's opinion that no reconciliation can take place. (See Rosh *Ketubot* 34 as well as Rambam, *Hilchot Ishut* 14:8, and *Even Haezer* 77:2,3).

5. See *R. Chaim Or Zarua* 155.

6. According to Tosafot, *Ketubot* 63a, he may divorce her; according to Rashi,ibid, he must divorce her. In either case, she forfeits her *ketubah.*

7. *Hilchot Ishut* 14:8.

8. See for example, Responsa *Tzitz Eliezer* IV, 21.

rabbis must compel the husband, even against his will, to grant her her freedom. Moreover, even if the woman does not claim that "he disgusts me" but bases her refusal to live with him on other grounds, the attitude of Jewish law generally has been that if no reconciliation is possible, there is no point in their staying married and the marriage ought to be dissolved. The rationale for expanding the category of "*moredet*" to include other women who refuse marital relations will become self-evident in the course of this study.

The object of the present study will be to explore the issues which a *Beit Din* is mandated to consider when approached to facilitate a *get* and to assess the extent of coercion or communal pressure which the rabbinate or *Beit Din* may properly exercise in order to enforce the dictates of halacha. One may wonder why there should be any hesitation at all on the part of *Beit Din* to force Jews to follow their directives; but we will see that, inasmuch as the Torah specifies that the husband must act of his own free will in giving a *get*, the *Beit Din*'s forcing him to divorce accomplishes nothing. The *get* in such a case is invalid ab initio. Consequently the rabbis have had to devise ways to induce a man to divorce, short of overt compulsion. This is the central dilemma which creates the *aguna* predicament, and that is the spirit which informs the RCA Resolution, which may at first seem unduly timid until we appreciate that the RCA is figuratively navigating the shoals of halachic procedures, which can be quite complex.

Much as the halacha seeks to protect a woman's rights and dignity, it cannot remain oblivious to the reality that the situation can easily be manipulated. Not being naive, the halacha has to consider the possibility that the woman might be making the claim "he disgusts me" not because she actually finds him repulsive but rather because "she has her eye on someone else," and knows that by making this claim she will get her divorce forthwith. It is certainly not the desire of Jewish law to facilitate infidelity.

Moreover, if in truth her claim of "he disgusts me" is just a calculated ruse, then the *get* which the *Beit Din* forces upon the man will be invalid (since the force was not warranted)! According to Rambam, a woman who remarries after receiving such a document is actually a married woman committing adultery.[9] Thus, when the woman goes off with her paramour, she is in reality a married woman committing adultery, not a divorcee. Any children she bears thereafter will be *mamzerim*. Consequently, the *Beit Din* has to investigate her claim very carefully before proceeding. They may cause more harm by precipitous action than by reluctance to get involved.

On the other hand, the *Beit Din* also has to consider whether their failure to facilitate relief for the woman claiming she despises her husband might goad her, out of frustration or anger, to be unfaithful to her husband (*shema teitzei le'tarbut ra'a)*. This eventuality has to be factored in to the actions a *Beit Din* will undertake, even if they suspect that she is claiming *"ma'us alai"* as a subterfuge to get her Jewish divorce.[10] This is certainly a concern in the modern age, for many women nowadays will simply not accept that they are "chained" forever to men they are not living with. Particularly since many men have found unscrupulous means to circumvent the strictures of halacha, since technically by biblical law a man can have more than one wife – the situation is fraught with peril that these women will turn to illegitimate means to "free" themselves. In the case of such women remarrying there is the dreadful potential for creating numerous *mamzerim* in the Jewish community, as we have noted. This, of course, is the reason for all the modern attempts to find a viable solution within the parameters of Jewish law.

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9. *Hilchot Gerushin* 2:20.

10. Ibid.

As indicated, a factor of overwhelming importance is the Torah imperative that a *get*, in order to be valid, must be executed by the husband of his own free will. This immediately raises the question, how can the Jewish court *force* him to divorce her, which patently results in his being coerced to do what he doesn't want to do? The Rambam justifies such judicial action:

> They [*Beit Din*] beat him until he says, "I am willing"... And why does this not nullify the *get* inasmuch as he is being compelled?...Because we do not call it "coerced" except for someone who was forced or pressured to do something which he is not required to do by the Torah...but someone whose evil inclination prompts him not to do a mitzvah or to commit a sin, and who is beaten until he agrees to do something which [the Torah] obligates him to do...is not considered "forced".[11]

Rambam's rationale is simple: every Jew basically wants to do the right thing, and it is really only his *yetzer hara* holding him back. By beating him, we are allowing the good in him to surface. This does not disqualify the *get*.

Despite this clear ruling of Rambam, most *Rishonim* do not accept his opinion.[12] It is the position of the Rosh[13] that although

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11. Ibid.

12. The opinion of Rashba on this point is the subject of debate. *Beit Shemuel* 7 writes that Rashba agrees with Rambam, but *Be'er Hagolah*, #6, holds that Rashba is in disagreement.

13. Based on a mishnah at the end of *Nedarim.* There, the Mishnah considers the confluence of two halachic rules: (a) If a person says that something is forbidden to him/her, then the person is believed and that thing is forbidden to him/her. (b) A married woman who had relations with someone else is forbidden to her husband. But the Mishnah says that if a woman claims that she committed adultery and is therefore forbidden to her husband, we do not accept her testimony, for perhaps she "has her eye on someone else" (*"shema*

there may have been rare instances in the previous Geonic era in Babylon[14] when a man was forced by the *Geonim* to divorce his wife, that was done only for fear that, without such intervention, the woman might be desperate enough to abandon Judaism altogether. He also conjectures that the *Geonim* may have used coercion because they knew that in their day, no woman would ever invent such a fraudulent claim. But in our own day, writes the Rosh (early 14th century!), the rabbis surely have to assume the worst and suspect that any such claim made by a woman may well arise from immoral motives:

> And just because she is following the stubbornness of her heart and has put her eye on another man and wants him more than the husband of her youth – should we [the *Beit Din*] fulfill her lust and force the man, who loves the wife of his youth, to divorce her? G-d forbid for any judge to rule this way![15]

The *Beit Yosef* echoes this approach:

> Since the rabbis disagree on this matter [about forcing

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natna eineha be'acher") and is using this claim as a means of having the *Beit Din* force her husband to divorce her.

14. Roughly, 640-1040 CE.

15. *K'lal* 43:8. Rabbenu Tam, the Ri, the Maharik (*Shoresh* 29 & 63) and Ran also agree. See *Responsa Rosh* 35:1.

For a full listing of all the sources on this question, see *Yabia Omer* III 60:18. In 60:19, the author, Rabbi Ovadia Yosef, discusses what procedure should be followed by Yemenite Jews, who follow the rulings of Rambam, when they come to Israel (where the rabbinic majority has not accepted the Rambam's position on this matter). He further questions whether any community is entitled to follow the minority view of Rambam and force a man to divorce his wife if she claims he disgusts her. In 60:20, Rabbi Yosef does agree to allow the *Beit Din* in Israel to force a Yemenite man living in Israel to divorce his wife on these grounds--and to jail him if he refuses to comply.

> the husband to divorce her], why should we insert our heads between great mountains, to create a forced *get* contrary to the [Jewish] law, and permit a married woman [to go with another man]? And furthermore, because of our sins, the daughters of Israel are wanton (*prutzot*)...and it is necessary to suspect that she might have put her eyes on someone else; and whoever forces [a divorce based on] this claim, is increasing bastards (*mamzerim*) in Israel.[16]

Under these circumstances, with such strong rabbinic disapproval and with the stakes so high – if the *get* is fraudulently forced she is an adulteress and her future children *mamzerim* – it is no wonder that rabbinic courts are very hesitant to act precipitously to free a woman from an unhappy marriage. In particular, they are exceedingly reluctant to force a *get* based on the contention, "I can't stand him."

This is evident in two responsa included among the responsa of the Ramo,[17]concerning the tribulations of a certain Rachel, daughter of a talmudic scholar in Venice, who had married Reuven, from Prague. Their agreement was that they would live for the first year in Venice and thereafter settle in Prague. Reuven, however, turned out to be a ne'er-do-well and squandered all their marriage money; he abandoned his wife and went back to Prague, where he engaged in crooked dealings

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16. *Even Haezer 77*, s.v. *"umiyeish"*.

17. Responsa 36 and 96. Although they are included in the *Responsa of the Ramo*, these two are actually signed by two other rabbis. Perusal of the responsa reveals another anomaly -- they do not agree with one another! In #36, the author will not rely on the response of the Rosh 35:2, while in #96, the author does; furthermore, in #36, the author quotes the opinion of Rosh in *Ketubot* 5:34, while the author of #96 does not. Why these disparate opinions were both attributed to the Ramo is a mystery.

and finally had to flee for his life. After wandering to many places, he ultimately returned to his wife and fathered a son, who at the time of the dispute was thirteen years old. After a while, he ran away again, and sent neither money nor food to provide for his family. At this point, Rachel demanded a *get*, with the plea that she couldn't stand even to look at him.

Albeit both responsa ultimately conclude that the woman is entitled to a divorce – neither rabbi is prepared to force the divorce based on her claim that she despises him. One relies rather on the fact that the husband has failed to live up to his obligation to support her (see *Ketubot* 77), while the other rules that since the husband is unable to live in the locale where he had promised to live with her, he must divorce her (see *Responsa of the Rosh* 43:1, cited by Ramo).

Although the rabbis are understandably very cautious when it comes to a woman's claim "*ma'us alai*", when they are convinced that the plea is authentic, they are willing to force a *get*. Even the Rosh,[18] who is generally strongly opposed to the proposition that a man should be forced by *Beit Din* to divorce his wife, nevertheless notes, in another case of a woman demanding a *get*,

> However, in this particular case, her brother has told me the reasons why she refuses to live with him; and [therefore] you, the judge, are to investigate the matter to see if there are grounds for her claim.

This ruling of Rosh again points in the same direction – if the rabbis recognize that the woman is truly repelled by her husband, or that he abuses her,[19]it is proper to force him to bring the marriage to an end.

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18. *Klal* 43:8.
19. *Even Haezer* 154.

In a *teshuva* with far-reaching implications, Rav Eliezer Waldenberg outlines all the relevant halachic opinions concerning a woman who wants a *get* predicated on her claim "*ma'us alai*",[20] based on a responsum written by Rav Duran,[21] and concludes,

> Even though [we] don't [generally] force the man to divorce [her], nevertheless, if she gave a valid explanation for her claim, [we] do force him to divorce her....Based on all that has been said [by halachic decisors], there is a broad area for discussion about forcing him to divorce her in an instance where her claim of "he disgusts me" has a clear basis, and the *Beit Din* sees it as a need of the moment to force him to divorce her, so that the woman not go "in a bad way" [i.e., act immorally].

Rav Waldenberg continues in his responsum to advocate that the rabbis in Israel would do well to force the husband in certain situations to divorce his wife or at least to support her, even if she is living elsewhere. His plea has not gone unheard; the rabbinic courts in Israel today increasingly are prepared to jail the husband in a variety of marital disputes.[22]

Thus we find a major *posek* of the modern era prepared to employ coercion in order to effect a *get*, in a situation where the *Beit Din* is certain that the woman indeed despises her

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20. *Tzitz Eliezer IV*, 21; in V, 26, Rav Waldenberg cites others who agree with his ruling.

21. In a later responsum (V:26), Rav Waldenberg notes that the authority he was citing was actually R. Avraham Ibn Tayub, not R. Duran as he had mistakenly written.

22. Regulations of the Chief Rabbinate of Israel, 1953. See *Rivash* 484.

spouse and is not making this claim just to carry on an affair.[23]

Nor is this a singular responsum, for Rav Waldenberg reiterates his stand in a number of places.[24] Among the valid reasons for coercing a *get*, he mentions wife-beating, hospitalization due to spousal abuse, and a husband who does not observe the Sabbath laws or who eats *chametz* on Pesach. The common thread in all these situations is that her reasons for seeking a divorce are quite evident and it is not necessary to assume she has an immoral motive in seeking a divorce.[25]

Employing Force

Who should force a man to divorce his wife, even in a case where she is legitimately entitled to one? When Jews lived under their own government, or even in self-governing communities in the Diaspora, the directives of *Beit Din* were executed by qualified personnel. Not everyone who considers himself to be carrying out Torah law may employ force against a fellow Jew (although this is a maneuver which occasionally

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23. His responsum is based on *Chut Hameshulash, IV, le'sefer Tashbetz; Tur* I:35.

24. *Tzitz Eliezer* VI, 43:2 and VII, 34:2.

25. It is most instructive at this point to consider a ruling of the Ramo, that if the woman got her *get* because she claimed that her husband disgusted her, and then turned around and married someone else (the implication being that she merely used this claim as a ruse to force her husband to grant the divorce)--the *Beit Din* should force the *second* husband to divorce her. *Yoreh Deah* 228:20. In this context, it is evident that Ramo accepts the premise that if a woman can't stand her husband, the *Beit Din* must get him to give her a *get.* In *Even Haezer* 154:21, he writes, "But no person should be forced to divorce or to do an act until clear proof is adduced, inasmuch as we maintain that a *get* that was coerced improperly is not valid. And we cannot permit a married woman [to remarry] out of doubt [whether the divorce should be forced]."

well-meaning but misguided zealots abrogate to themselves in the modern age).

The Gemara records an encounter between two famous rabbis: Rabbi Yosef once forced a man to grant a *get*, whereupon Abaye expressed surprise – "But [how could you do it, since] we are only common people (*hedyotot*)!?"[26] If the great Abaye held himself to be only an ordinary person for this procedure, obviously the *dayanim* involved indeed have to be experts.[27] If unqualified or unauthorized (by a *Beit Din*) people decide to use coercion, it is of no avail, for it invalidates the *get*.

What is evident from our study is that only a properly constituted and highly qualified *Beit Din*[28] can legitimately force a man to divorce his wife; private individuals who hire some ruffians (even Jewish ones) to beat up a recalcitrant husband in order to force his acquiescence have not accomplished anything: Even if they are able to extract a *get* from him, it is invalid on its face and cannot serve to break the marriage bond.

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26. Of course, Abaye, the greatest rabbi of his day, who is cited dozens and dozens of times in Gemara, was not a "commoner". What he meant was that, living in Babylon, he and all the other Babylonian rabbis did not have the technical, historical *semicha*, which can only be given in Israel. And although Babylonian rabbis were certainly qualified and permitted to force a *get* if necessary, Abaye in his humility felt that Babylonian rabbis should act cautiously; thus, forcing a *get* was probably a "daring" and rare judicial practice.

27. *Gittin* 88b. The *Encyclopedia Talmudit* V, p. 702, cites a responsum of Rambam to the effect that only a duly-authorized *Beit Din* may force a *get*.

28. As seen in *Chatam Sofer, Even Haezer* 2:64; *Avnei Nezer, Even Haezer* 167:1; *Oneg Yom Tov* 168, based on their understanding of the Gemara in *Gittin* 88b cited above. This requirement is reiterated in the *Chazon Ish* 99:1, based on his interpretation of Rambam in *Hilchot Gerushin* 2:20. See also *Ketzot* 3:1, and *Beit Halevi*, end of Part I, p. 176. See also *Meromei Sadeh, Bava Kamma* 15.

Moreover, it is potentially a disaster, if the woman, thinking she is free, marries another man and/or has children with him.[29] The normative halacha holds that only a duly qualified *Beit Din* may coerce a *get*. Acutely aware of this proviso, the RCA Resolution carefully advocates only limited societal pressures upon a recalcitrant spouse (see Appendix).

Dinei Demetivta

The Gemara relates that in talmudic times, marital problems were dealt with in a number of ways. In the case of a woman who refused her husband marital intimacy, an elaborate process was instituted, designed to prompt her to reconsider. For twelve months she received no financial support from her husband, and the *Beit Din* would weekly publicize her refusal; they also deducted from her *ketubah.* The purpose of these tactics was to try to effect a reconciliation.[30]

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29. Actually, there is a minority opinion (*Netivot, Choshen Mishpat 3:1; Sefer Get Me'usah* I, 24) which holds that it need not be a *Beit Din* which forces the man to divorce, in a situation where the woman is entitled to her freedom. This opinion cites a talmudic text as precedent (*Bava Kamma* 28a): the Gemara teaches the law of a Hebrew slave who has chosen to remain a slave to his master until the Jubilee year. When the Jubilee arrives, however, the slave wants to remain a slave anyway, so that he can continue to live with the Canaanite slave woman whom his master has given him as consort. This option in the Jubilee is clearly forbidden by the Torah, and the Gemara says that the master can beat the slave to force him to leave. According to the minority, this shows that even a private individual is empowered to force another Jew to do the right thing. (It is difficult to accept this reasoning, for the master is not just an ordinary individual, he is rather the one responsible for the slave, and one could argue that it is not possible to generalize from this example. The master could be considered similar to a father, who is permitted to hit his child, although in general it is forbidden to strike another Jew.)

30. *Ketubot* 63b.

Cognizant of the dreadful dilemma faced by a woman without a husband and without a *get*, the rabbis through the ages have suggested various procedures to alleviate her situation. In the days of the *Geonim* (after the Talmud was finalized), women placed in this predicament often turned to outsiders for help, sometimes even to non-Jews for support, sometimes even abandoning their allegiance to Judaism altogether. Consequently, the *Geonim* modified the earlier practice and enacted a regulation that the husband divorce his wife promptly, rather than trying to induce her to reconsider. The change in procedure is termed "*dinei demetivta*".[31]

This procedural change (*takana*) was still in force in the days of the Rif, at the end of the *Geonic* period; however, thereafter, it seems to have lapsed. Most *Rishonim* follow the ruling of Rambam, who writes:

> The *Geonim* said that they, in Babylon, had other procedures for a *moredet*, but those procedures did not spread to most Jews, and many great [rabbis] dispute them [the procedures] in most places. And it is proper to follow and to rule according to the law of the Gemara.[32]

Criteria For Coercion

In *Ketubot* 77a, the Talmud lists a number of conditions which would require a man to give his wife a *get*: if he has "*polypus*", an offensive odor from the nose or mouth; "*sh'chin*", boils; someone who works at something which leaves a repulsive odor clinging to him; or anyone who has married someone

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31. For an understanding of the mechanics of this *takana*, see *Tosafot Rid*, brought in the *Or Zarua* 754, as well as *Responsa Rosh* 43:8.

32. *Hilchot Ishut* 14:13,14. See also *R. Chaim Or Zarua* 157, who writes that there is no one who may uproot a regulation of the Great *Beit Din (Geonim)* of Babylon.

forbidden to him, such as a kohen to a divorcée. The Mishnah and Gemara both employ the term *"kofin oto"*, which means he is to be forced to divorce in those circumstances.[33]

The talmudic ruling "*kofin oto*", "we force him" is problematic for the rabbis, who are hard pressed to give specific limits and definitions of this "force". Does it countenance physical abuse? Does it mean we can employ whatever means it takes? Or only verbal persuasion? In the text in *Ketubot*, the Gemara cites a verse in Proverbs 29, "With words [alone], a slave is not admonished," which would give credence to the interpretation that the Gemara advocates physical coercion.

However, *Beit Yosef* 154 brings proof from a text in the Jerusalem Talmud that the term *"kofin"* is limited to verbal pressure: "We say to him, 'the Sages have already required you [to do this].'" Similarly, at the conclusion of their discussion of the issue, Tosafot, as well as the Rosh,[34]conclude that no positive action should be taken to force a *get* until a clear proof is given that she is entitled to one. "For we rule that a *get* forced by a Jew is invalid, and a married woman should not be permitted [to divorce and remarry] out of doubt."

Three questions arise at this point:

1) Are we to assume that only the circumstances listed in the Gemara warrant a *get* being forced, or should we consider them rather as paradigms of situations which no woman should have to tolerate? If the latter is correct, then perhaps other maladies or problems could similarly require that the *Beit Din* force him to grant a *get*.

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33. See Ramo 154 in the *Pitchei Teshuva*, #5, discussing whether his apostasy, or if he violates the *cherem Rabbenu Gershom* by marrying a second wife, are grounds for a forced *get*. In *se'if* 3, the Ramo discusses the case of a man who beats his wife.

34. See Tosafot, *Ketubot* 70, s.v. "*yotzi"*; and Rosh, *Yevamot* 64a.

2) When the Talmud says he is to be "forced" – does it mean physical force, such as beating or imprisonment, or does it intend only moral or social pressure, such as proclaiming in shul that he refuses to comply with rabbinic orders, or perhaps withholding synagogue honors from him, or other public sanctions?

3) What about outsiders (such as family or friends) exerting pressure or influencing his decision by getting involved in other matters which affect the husband? For example, if the man is put in jail for failure to support his family, or for failure to pay other debts, is it legitimate halachically for her family to pay his debts if he promises to divorce her, or is this undue coercion?

Review of rabbinic opinion over the centuries indicates that these questions have occupied a great amount of concern. But there are further issues which we also have to consider before we can arrive at a clear understanding of the answers to these questions.

Radvaz

In his responsa, Radvaz turns to the question of getting Gentiles to beat up a man who beats his wife, and he responds in the negative to this suggestion.[35] He counters that in the Gemara we have cited which lists the various men who must be forced to divorce their wives, there "the Sages understood the feelings of all women, that they would not be able to tolerate someone who has *polypus*, and therefore the Sages permitted to dissolve the marriage by forcing a *get*." In the present situation, however, the husband is sometimes very nice to her, although at other times he is despicable. But Radvaz will not permit physical abuse of the man; rather, he counsels employing verbal and communal pressure. He notes that the Rashba similarly

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35. *Sheilot Uteshuvot Radvaz*, IV, 157.

refused to permit (physical) coercion except in the specific instances listed in the Gemara.

Evidently, Radvaz interprets the Gemara, when it instructs *"kofin"* (we force), as intending physical abuse, but restricting that physical coercion only to those specific cases listed in the Gemara. In other cases, different forms of persuasion must be used:

> Rather, what should they do? They should excommunicate him so that he will not hit her. If he repents [his behavior], fine; but if not, they announce publicly that he is excommunicated. If he repents, fine, but if not, we fine him [he has to pay her] her *ketubah*. If he repents, fine; but if not, we punish him by [using] Gentiles, for he has transgressed the [biblical prohibition] not to continue hitting. And we imprison him because he hit her.[36] But we do not mention to him at all that he should divorce his wife. But if he should get up, on his own, and divorce her, this is not considered coercion, inasmuch as he deliberately brought upon himself this coercion. But to force him to divorce by means of excommunication or physical punishment and certainly not by [having a] Gentile [beat him] – I do not see this and cannot agree at all to this; and in my eyes, [if she thereafter marries and has a child] this child is close to being a *mamzer*.

Harchakot de'Rabbenu Tam

Notwithstanding the popular negative image erroneously attributed to Jewish law as being inimical to the interests of

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36. Rashi, *Pesachim* 91, s.v. *"beit assurim"*, also mentions putting him in jail. This concept is also found in *Shita Mekubetzet, Ketubot 64a and Yabia Omer, Even Haezer*, 20:18, VI.

women, it is instructive to find that, unlike all other cases where the *Beit Din* may not act unless approached by one of the parties, that rule does not prevail here. Jewish law sees the *Beit Din* as being charged with the obligation to assure that women are treated equitably, to go out and champion the cause of an oppressed woman even without her asking, and at all costs to protect her interests. Since in many instances women are vulnerable and weak when battling their husbands, there is always the fear that a desperate woman will run off with some other man or even abandon her faith if she sees no other resolution to her dilemma. Thus, the Rashba[37] exhorts the *Beit Din* to go to the limits of Jewish law to help her.

Rabbinic literature abounds with exposition of the principle that communal pressure, short of physical abuse, is the optimal (sometimes only) weapon in the rabbinic arsenal, and should be employed as needed.

Even assuming that none of the universally-accepted halachic conditions for compelling a *get* exist (as listed above), there are still acceptable halachic maneuvers to help extricate a woman from a marriage in which she is miserable. In the twelfth century, the acclaimed Rabbenu Tam advocated certain communal pressures, termed *"Harchakot de'Rabbenu Tam"*, in order to help "trapped" women. Albeit he denounces using physical force against the husband, he does not approve of letting the man do whatever he wants:

> All our rabbis agreed and issued a strict decree for all men and women of the House of Israel, and all those who have joined with them, that they should not speak with him [the recalcitrant husband], nor do business with him, and not help him live nor feed him nor give him to drink nor lend to him nor visit him when he is

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37. *Responsa*, 46.

ill.[38]

In his exposition of the law, the Ramo adds that, if the need arises, one can heap on further *"harchakot"*, such as not circumcising his child nor burying anyone in his family until he agrees to do what *Beit Din* orders.[39] Inasmuch as these are very severe measures, they are to be utilized only if and when the *Beit Din* is convinced that the wife is truly being subjected to intolerable conditions and is not just looking to find a way to marry someone else.[40]

Although not a common occurrence, the *Harchakot de'Rabbenu Tam* are sometimes the only tool available and therefore necessary. A number of years ago, Rav Eliezer Waldenberg, Rav Ovadia Yosef and Rav Kolitz were asked to rule on a divorce action instituted by a woman who had been married for 20 years and never had children. Despite repeated medical attempts, the couple had not been able to conceive; nevertheless, the doctors were of the opinion that, with another man, the woman might well be able to have children. Feeling her biological clock ticking, the woman asked for a *get*, which the husband refused; even the decree of *Beit Din* that he should divorce her was of no avail. Finally, the three rabbis ruled that

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38. Rabbenu Tam, *Sefer Hayashar* 24 and 77;see also *Mordechai, perek hamadir.*

39. *Even Haezer* 154:21. In *Yoreh Deah* 334:6, discussing *nidui* (excommunication), Ramo even permits expelling his children from *cheder* or not letting his wife into the shul. These are considered valid sanctions inasmuch as they are imposed *"lemigdar miltah"*, i.e., to maintain communal discipline, following the talmudic teaching in *Yevamot* 90b**.** His ruling is not met with universal approval, for since his wife and children haven't erred, why should they be penalized? In our own time, *Yabia Omer* 8:25 appears to side with the latter opinion.

40. *Responsa Rashba* 7: 414.

the *Harchakot de'Rabbenu Tam* could be instituted – and the man finally capitulated.[41]

One wonders why such harsh communal sanctions are not considered as "forcing the man to divorce against his will?" Furthermore, we have seen repeated warnings by major halachists that the man may not be excommunicated *(nidui)*, yet the sanctions advocated by Rabbenu Tam seem, in effect, equivalent to *nidui*.[42] Is this semantic legerdemain? *Pitchei Teshuva* addresses this concern:

> The man who will not divorce his wife when the Sages are instructing him to release her, is to be punished for transgressing the dictates of the Torah and [consequently] it is permitted to promulgate these sanctions against him.[43]

The reasoning here is that the harsh measures are not imposed in order to force the divorce but rather to force his compliance with the Torah, which dictates that he must abide by rabbinic instructions. Communal discipline in every society, be it religious or secular, demands that all individuals be subject to court orders and not flout them with impunity.[44]

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41. See *Tzitz Eliezer, XVII 51; Yabia Omer VII:23, VIII:25.*

42. *Yabia Omer VII; Even Haezer* 23.

43. *Even Haezer* 154:29.

44. A similarly pro-active attitude is evidenced by Rosh in a totally different situation, where a lender appealed to *Beit Din* to prevent his borrower from absconding. Rosh ruled that *Beit Din* is not only permitted but required to confiscate the borrower's money before he leaves town, "for it is a clear Jewish law (*din gamur*) that everybody is obligated to save an oppressed person from the one who is oppressing him, with all the means at his disposal;" *Bava Kamma, perek I, #5; Choshen Mishpat* 73:15,16. In *Choshen Mishpat* 4:1, Ramo writes that although technically women are not qualified as witnesses before a Jewish court, it is obvious that if women are the only witnesses, they

For any society to function effectively and peacefully, its members must be treated with dignity and respect. Respect for the law and communal discipline cannot exist unless the citizens feel that they are being treated fairly and equally. Consequently, our rabbis gave broad latitude to Jewish courts and rabbinic leadership to assure that all members of the community adhere to the rabbinic standards, without exemption or recognition of privilege. If Jewish courts are perceived as "toothless tigers", unable to compel uniform compliance with their directives, individual Jews will soon begin to ignore rabbinic orders and communal observance of Torah standards will falter and soon dissipate.

Another rationale for excluding the *Harchakot de'Rabbenu Tam* from the category of actions which produce a forced, and thus invalid, *get* is given by the *Mordechai*.[45] In his view, "force" refers to something *done to* the recalcitrant husband, but the sanctions of Rabbenu Tam, on the contrary, mean that he is being *shunned* by the community – they will have nothing to do with him! There is nothing they are actively doing to coerce him; rather they are *withholding* from him the honors he would like to have (hoping that this will induce him to give in).

The *Mordechai* cites a ruling in the name of Rabbenu Tam:[46]

If a man betrothed a woman and she doesn't want [him

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should certainly be called to testify, and their testimony is valid. In another case, a woman stole money from an orphanage, and Ramo allowed *Beit Din* to declare that no one could marry her until she returned it, "in order not to strengthen the hands of a sinner." *Choshen Mishpat* 358:5.

45. *Gittin* 469; *Yabia Omer*, ibid. See also *Sheilot Uteshuvot Penei Yehoshua, Even Haezer* 75; and *Rivash* 484.

46. *Gittin* 469, questioning whether a man who won't or can't work must divorce his wife. The *Mordechai* is referring to a citation from Rabbenu Tam's *Sefer Hayashar*, 24. See also *Maharik se'if* 166.

> any more], [we] do not force him to divorce her, neither by Jewish law nor by [going to] secular courts. However, if he is jailed for taxes or some other matter, [we] can tell him, "we won't help you to get out of jail until you divorce [your wife]," for this is not coercion, since they don't do anything to him, only they refrain from helping him.

Although Rabbenu Tam has unquestionably been one of the greatest halachic authorities in the Torah world for many centuries, his shunning measures have not met with universal approbation.[47] Furthermore, since they are invoked so sporadically, there have been rabbis who objected on the grounds "this was never done before in our community!" In the final analysis, the major authorities have accepted these strictures only as a last-ditch weapon in the rabbinic arsenal, to be utilized only if absolutely necessary.

The point of disagreement among *poskim* seems to revolve around the word "*yotzi*", "he shall divorce [her]"– does it mean that the man should be physically forced to divorce her, or is it only other pressures which can be brought to bear? This debate is not just a semantic exercise, for the Gemara has expressly forbidden an improperly "forced *get*": "*get hame'useh shelo kedin pasul.*" In essence, then, the debate is about what can be considered "proper" coercion, and what is excessive and therefore produces an invalid *get*.

Despite Rabbenu Tam's preeminence, not all halachic decisors are prepared to go as far as he; the range of opinions is recorded by the *Shulchan Aruch,* who adds:[48]

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47. See the responsa of Rav Waldenberg and Rav Yosef, as well as *Pitchei Teshuva* 154:30; see also *Shu't Maharam Lublin I:139; Aruch Hashulchan* 154:63.

48. *Even Haezer,* 154:20; *Avnei Nezer Even Haezer* 2:177.

> All those about whom [the Talmud] said they must divorce their wives are to be coerced, even with whips. And there are those who say that whichever person was not specifically listed [in the Talmud as having to divorce] should divorce his wife, but without being coerced by whips. Rather, we say to him, "the Sages have obligated you to divorce, and if you will not do so, it is permitted to label you [publicly] as a sinner."

To the above statement in *Shulchan Aruch,* the Ramo appends the following caution:

> Inasmuch as there is rabbinic disagreement [on this matter], it is proper to follow the restrictive opinion and not whip [the husband] into submission, so that the *get* not be considered forced.... but in any case, it is still possible to decree to all Jews not to do him any favor and not to do business with him, but with the proviso that they not excommunicate him.[49]

In developing his position, Ramo indicates that although he will not allow beating the man to force a *get,* he not only doesn't object but actually advocates pressuring the man over some other matter so that he will agree to divorce her. Thus, if the man is not engaging in marital relations with his wife, which is his Torah obligation, it is permissible to physically beat him to live up to his obligations, with the hope that he will give the *get* in order to avoid the punishment.[50] (He is not

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49. In *Sh'eilot Uteshuvot Rabbi Akiva Eiger Tinyana* 74, Rav Eiger writes that any woman whose complaints about her spouse are justified, cannot be considered a *moredet* for withholding conjugal relations. All the *dinei metivta* apply to her, even if she tolerated the situation for many years.

50. Ramo to *Even Haezer* 154:20. See also *Aruch Hashulchan* 154, *se'if 3*. See also *Chazon Ish*, *Even Haezer* 99:3, who adduces sources to

being beaten to give a *get* but to live up to his marital obligations).

The Mishnah in *Gittin* 88 indicates that "a *get* forced by a Jew is valid ('*kosher*')," meaning that if the *Beit Din* coerced him into giving a *get*, it is valid.[51] The Ramo, however, rules that if a man is forced to give a *get*, even if later he receives money for doing so, it is still a "*get meuseh*" and not valid.[52]

In studying the rulings and criteria of various *poskim*, we sense that it is hard to pin down the exact parameters of "valid coercion", almost akin to trying to hit a moving target. In a word, it is difficult to define precisely what may be done halachically to compel a man to divorce his wife.

Self-imposed Coercion And Prenuptial Agreements

What was once an outrageous phenomenon has become in our times a not unusual scenario – a man refusing to grant his wife a *get*, often out of spite or to win some desired advantage in custody or financial battles. A relatively new device introduced a number of years ago, to protect a Jewish woman

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maintain that a man cannot be forced to live with his wife.

51. See also *Erechin* 21a and Rambam, *Hilchot Gerushin* 2:20; there are, however, two provisos: that they are enforcing the requirements of Jewish law in this coercion and that he does, ultimately, acquiesce. As we have noted in the text, considering something as being done freely and willingly when the person is under pressure, is a problem. See the words of Rambam on this, at the end of the laws cited. See also *Teshuvot Haradvaz, chelek 5, shenei alafim* 95, who brings an incident where the secular court sent people to force the Jew to give his wife a *get*. The Radvaz rules that as long as the Gentiles are present, the *get* is considered forced and thus invalid: the Mishnah says that a *get* forced by *a Jew* is valid, not by Gentiles.

52. *Even Haezer* 135:8. See *Pitchei Teshuva*, ibid, #16, who cites other sources who consider a *get* given under such circumstances as being valid. *Rabbi Chaim Or Zarua* 126 voices a similar opinion, but see Ritva, *Kiddushin* 51, s.v. "*veho*".

from becoming "chained" in the unfortunate eventuality of a marital breakup, was the rabbinically-designed pre-nuptial agreement. Such a document, for example, might stipulate that in the event one of them wants a *get*, the one refusing will have to pay a "fine" of, say, $1000 a day to the other. Before we get into the advisability of such an agreement, we have to understand certain requirements of the Jewish law to effect a valid *get*.

There is extensive discussion in the halacha about the validity of a self-imposed penalty in effecting the *get*. In *Bava Bathra* 47b, the Gemara considers the validity of a self-imposed sanction to force an action, as opposed to external factors forcing an individual to do something, such as someone's imposing his will on that person. The *Shulchan Aruch* seems to weigh in on the "pro" side:

> And even if he divorces because of a promise to divorce which he swore on his own, the *get* is "kosher", inasmuch as in the first place no one forced him [to swear] to it.[53]

Based on the talmudic distinction, the *Aruch Hashulchan* also rules,[54]

> But only when *external* coercion is applied [is it considered invalid], but a self-imposed sanction is not called "forced".... And what is called "a self-imposed sanction"? For example, if he loves his wife but she hates him and aggravates him until, because of this, he gives her a *get*: inasmuch as the *get* itself was given of his own will, albeit he was pressured from another side [i.e., his wife's treatment of him], this is called that "he

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53. *Even Haezer* 134:4. Although there is a question here of *asmachta*, this can easily be addressed by the *Beit Din* .

54. Ibid, 134:22.

forced himself."

Similarly, if the man and his wife have agreed to divorce, and he gives money to a third party so that, in the event that he fails to give the *get*, she gets the money, *Aruch Hashulchan* considers this a valid self-imposed sanction.[55] On the other hand, in the same scenario, if the husband wants to back out of the *get* but she pressures him with the money, and in order not to lose his money he relents and does give the *get*, he rules "this would be totally forced" and not valid.

Despite the express approval of major halachic figures, there are numerous rabbinic disclaimers,[56]who consider self-imposed pressure as pressure; under their view, the *get* is forced and invalid. Treading carefully, the Ramo writes,

> And one should be careful *ab initio* [not to do this] ...however, if he already divorced her on account of this... the *get* is valid.[57]

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55. Ibid, 134:23. See also *Bava Bathra* 46b, which describes a sanction which a man may impose on himself: "Until I give my wife a *get*, I swear not to eat fruit."

56. See *Pitchei Teshuva Even Haezer*, ibid, No.10.

57. *Even Haezer* 134:4, *Pitchei Teshuva* No. 9. See *Torat Gittin* #4, which questions whether it can be considered coercion if a woman steals money from her husband and refuses to return it unless he gives her a *get*.

In Jewish law, there is a principle that when a dispute arises between two parties, either one has the option of claiming *"kim li"*, which means, "I agree with the rabbi who supports my position." Can this device be employed only in monetary issues or in all areas of Jewish law? See *Teshuvot Rabbi Akiva Eiger Tanina 77; Pitchei Teshuva* 154:28.

Sheilot Uteshuvot Beit Ephraim Even Haezer 70, seeks to define what is meant by coercion; threatening a man for a paltry sum of money cannot be considered coercion, nor can any other minor inconvenience qualify as such.

Although pre-nuptial agreements have been touted as the "magic bullet" to end the *aguna* problem, in all honesty it is not desirable to establish a system which is only *bide'eved* (post facto) halachically binding. Jewish marriages and re-marriages are sacred and should not rest on questionable legal principles. Since the Ramo gives such grudging and half-hearted approval to the concept which is the cornerstone of the original rabbinic pre-nuptial agreement, it was decided to modify it and find a better remedy.

Subsequently, as a result of the concern for a process which was being challenged in many halachic quarters, a new type of pre-nuptial agreement was formulated, which addresses these concerns and seems to obviate any halachic problem. Instead of imposing an enormous fine upon the man in the event that he fails to deliver a *get*, which could be interpreted as "force", (albeit self imposed) resulting in a *get me'useh*, in the new version the groom only obligates himself to pay a certain amount (say $100 a day) for his wife's food and maintenance in case of secular divorce, until he grants a *get*. Paying for his wife's needs is a legitimate lien on the assets of a Jewish husband, and any pre-nuptial promise to live up to this obligation is not considered coercive. (Truth be told, often the reason that men in any society agree to a divorce is to free themselves of financial obligations to their wives!)

Other Inducements

Aruch Hashulchan rules that if the man decides to give the *get* in order to prevent grief to a third party, it is a valid *get*. For example, if publicizing that he refuses to give his wife a *get* embarrasses his employer and threatens his job, the *get* obtained by this pressure is valid.

We have to examine this proposition a little more closely. Is it legitimate to put pressure on relatives of the husband, thereby compelling him to issue the divorce to prevent distress

or damage to his family? There is considerable debate on this point. Ramo seems to permit it, writing,

> There are some who say that only forcing the man himself is called "coercion" but if a person is pressured so that his friend will give a *get*, even a father [pressured] for his son or the reverse, it is not called coercion.[58]

But then, Ramo continues,

> But there are those who are strict, when it pertains to a father and his son.

The rationale here is that since the relationship is so close, it is as if the man himself were being coerced.[59]

The thinking on the question of harassing a third party is that most people will not divorce their wives if they really don't want to, not even to prevent distress to family members. And if a man does give a *get* under circumstances of pressure upon his relatives, we can posit that he is really doing it of his own free will and just uses the pressure as an excuse to justify his capitulation.[60]

The *Aruch Hashulchan* further notes that the man cannot just turn around and say that he was forced. If he did not demur during the giving of the *get* or indicate that he was being pressured, even though he is actually giving the *get* to escape some external problem – such as that he is in jail and will be freed if he divorces his wife – then it is not considered a *get me'useh*.[61] This rule prevails, however, only if the external

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58. *Even Haezer* 134:5.

59. Ramo, ibid; see *Pitchei Teshuva*, #12, for variables on this *psak.*

60. *Mabit*, 2:138.

61. *Aruch Hashulchan, Even Haezer* 134:24. See Ramo, ibid, *se'if* 4 and *Pitchei Teshuva* 134, #11, who brings sources who opposed this

coercion is itself justified; otherwise, it is unjustifiable coercion and the *get* is invalid.

In yet another example, the *Aruch Hashulchan* rules that if a man is in the process of giving his wife a *get* and decides to leave in the middle, and he is locked up until he gives the *get*, this is not a *get me'useh*, even though he is granting it in order to get out of prison.[62]

This brief perusal of a number of halachic rulings indicate that pressuring a man to give his wife a *get* is quite problematic and may actually result in an invalid procedure, which can have dreadful consequences, as we have noted.

A variety of legal subterfuges to avoid the *get* being considered forced have been suggested over the centuries. One remedy instead of coercion looked promising: halacha says that if a person sells an article because he is pressured, we nevertheless consider it a valid sale, theorizing that when he receives the money for his property, he is satisfied; therefore, ultimately he sold it willingly.[63] Perhaps we can extend this rationale in the following way: put pressure on the husband, in any way short of physical abuse, to divorce his wife, and when he gives the *get*, hand him a sizeable amount of money to compensate for the pressure. On this, the Ramo comments,

> And even if he receives money for granting the *get*, we cannot argue that because of this he has become reconciled to the divorce.

Thus, clearly, giving someone money after he has knuckled

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ruling. The same is found in *Torat Gittin s.k.*4, predicated on a ruling of *Beit Yosef, Choshen Mishpat* 240.

62. 154:8.

63. *Bava Bathra* 48. A full list of those who address this issue can be found in *Pitchei Teshuva #17.*

in to the pressure does not remove from the *get* the stigma of pressure.[64]

Threats

Returning to the question of acceptable coercion to extract a *get* from the husband, we must consider whether the threat of force alone, even if ultimately no force is used, can disqualify a *get* as *me'useh*. In *Bava Bathra* 47b, the Gemara postulates a situation where a man sells his field, when he really doesn't want to, because he is threatened with forfeiture. The Gemara rules that the sale of the property is invalid, since it resulted from a threat.[65] We can thus see that Jewish law considers a threat alone as sufficient to render a transaction invalid.

The Meiri likewise rules,[66]

> It is [not only] when they ultimately [physically] force him, but rather also if they confuse and frighten him, this is total coercion, and the greatest of our [rabbinic] commentators have written thus.[67]

Despite his strong words, the reality is that there are some rabbinic authorities who would not rank mere threats as invalidating a *get*. They reason that many people boast about their exploits and "talk big", but that there is no need to take

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64. *Even Haezer* 134:8. Other suggestions have been offered by *Ein Yitzchak* 2:33, having the husband swear that he is acting of his own free will. But see the Rashba on this, IV-40.

65. The same can be derived from *Gittin* 14a.

66. *Bava Bathra*, ibid, and *Gittin* 88b.

67. Raavad, *Temim Dei'im* 234:49-4, as well as Rambam, *Hilchot Mechira* 10:4, Ritva, *Bava Bathra,* ibid; *Responsa Rashba 2:276; Choshen Mishpat* 205:7.

them seriously.[68]

Staking out a path somewhere in the middle of these two extremes is the Gra, who distinguishes between threats made by a private individual and those made by *Beit Din*. Citing Rav Hai Gaon, he rules that,

> [W]ith a *Beit Din* it is permitted, for the listener thinks that it is not their wont to beat up people or to do improper things, while this [thought process] doesn't apply for ordinary people.[69]

The *Ba'er Heitev*[70] writes that it really is up to the *Beit Din* to make the judgment call: "if the one who boasts of what he will do is a violent person, known to do such things and beat up people, and he has the power to carry out [his threats]... in such a case we don't apply the dictum that 'it is common for people to exaggerate.'" Most *poskim* follow this line of thought – they take threats seriously, especially from a person who is known as a violent person; making threats, therefore, seriously compromises the validity of ensuing divorce proceedings.

New York State Get Law

In 1983, the New York State Legislature passed into law a

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68. Ramo, *Choshen Mishpat* 205:7, citing Maharik, *shoresh* 176, who derives it from the Gemara *Shavuot* 46.

69. *Choshen Mishpat*, ibid, #19.

70. Ibid, #13. The same sentiment is found in Tosafot, *Shevuot* 46a, s.v." *avid*", discussing people who make threats but don't carry them out, who note that this would not apply to people who commonly make threats and are known to carry them out. This approach may also be inferred from *Gittin* 14a.

measure known as "the Get Law."[71] To much brouhaha from its supporters, the law was lauded as short-circuiting the power of recalcitrant husbands to hold their wives hostage by refusing a *get*. The law authorizes a secular judge in the state court to withhold issuance of a legal divorce until all barriers to remarriage of either spouse have been removed. Theoretically, this law is not coercive in any way, since there is no punishment for failure to remove such barrier (i.e. give or accept a *get*). There were, however, obvious limitations to this law:

a) If one of the partners is not interested in marrying again, he/she can hold up the proceedings indefinitely.

b) It only helps the partners who filed for divorce.

Consequently, a further "Get Law" was needed, and duly passed in 1992 (Domestic Relations Law 236B). This law goes much further in pressuring for a *get*, in that it instructs the judge in a divorce action to weigh the effect "a barrier to re-marriage" might have upon a spouse. The law directs the courts to consider withholding of a Jewish divorce as one of many factors when it determines equitable distribution of the marital assets. In other words, putatively there is a monetary penalty if either party holds up the *get*.

It has been argued that this possible financial penalty for the husband if he refuses to give a *get* is in effect a threat. Consequently, some argue that in New York State with this threat hanging over his head, a husband can *never* be considered as acting of his own free will when he gives the Jewish divorce![72]

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71. Domestic Relations Law 253. For a lengthy discourse on the New York State Get Laws, see R. Yitzchak Breitowitz, *Between Civil and Religious Law.*

72. See the articles by Rabbi Schwartz and Rabbi Malinowitz, debating this issue, in *Journal of Halacha and Contemporary Society*, Vo. XXVII, p.5 ff and p. 26 ff.

On the other hand, it is equally possible to consider the clause in the law as guaranteeing the woman maintenance and financial support, which is a perfectly legitimate aspect of a divorce settlement.

This law represents somewhat of a nuance in the endeavor to find some way to prevent angry (or greedy) husbands from "chaining" their wives, in that the financial coercion or threat derives not from *Beit Din* but rather from the secular government. But as we have seen, any coercion upon the husband which is not mandated by the *Beit Din* adjudicating his case, invalidates the *get*.

Contemplating what kind of inducements or threats hamper the *get* process, R. Moshe Feinstein has written that if a man gives a *get* so that he can rid himself of financial obligations to his wife and finalize a secular divorce, and thus be free to re-marry, it does produce a *get me'useh*.[73] However, one should note that Rav Feinstein was writing his responsum to a rabbi in Johannesburg, South Africe, where different legal conditions may prevail; therefore, we cannot be certain that it is valid to extrapolate Rav Feinstein's remarks in that context to the present situation.

Elsewhere, Rav Feinstein distinguishes between a person who is not opposed to a divorce but is essentially withholding the *get* in order to extract a better financial settlement or some other advantage from his estranged wife, and a man who is adamantly opposed to the divorce *ab initio*. Rav Moshe sees no

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73. *Even Haezer* IV 106, "concerning the issue of trying to get a law passed in Parliament that whoever divorces will be obligated to release his wife with a kosher *get* in a kosher Jewish *Beit Din*.....And thus, even monetary coercion such as in this case, where the government will obligate him to give her his [money] as a penalty for not giving his wife a *get* -- this is considered a forced *get*, given under pressure so that he will not suffer financially."

reason not to pressure the former, but would abstain from undue pressure in the latter case, which might indeed produce an invalid *get*.[74]

The main argument for not invalidating a *get* issued pursuant to the new Get Law is the rationale that the husband is giving the *get* of his own free will, and the only issue here is that he is seeking to get a more advantageous settlement (by giving a *get*).[75] In other words, we can interpret the situation not as a penalty imposed for not giving a *get*, but rather as a provision imposed by the secular court for the maintenance of the wife (financial support).

The halachic equation appears straightforward: if the Get Law imposes a penalty for no *get*, it makes the *get* invalid; if the Get Law merely assures the wife of adequate support in the event there is no *get*, it is valid.[76]

What further remains to be resolved is the halachic impact of the court's awarding financial support in a manner which is not consistent with Jewish law – is the fact that the financial settlement is contrary to halacha considered to be a form of coercion? Indeed, Rav Shlomo Zalman Auerbach and Rav Eliashiv do consider economic pressure as unwarranted coercion which invalidates a *get*.[77] But Rav Feinstein has ruled that court-imposed financial support of the wife is part of the support to which she is entitled; since it is not improper, it does not invalidate a *get*.[78]

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74. *Iggerot Moshe*, *Even Haezer* III,44.

75. Ibid.

76. A plus, as far the halacha is concerned, is that the Get Law takes nothing away from the husband if he fails to issue a *get*.

77. *Moriah* 19:1-2, 58:61.

78. *Even Haezer* IV, 106, "and even if they [the secular court] add that he must support her even if she works and earns money also....It

Non-rabbinic Involvement

Having studied rabbinic admonitions to the *Beit Din* to protect the rights of women and not allow them to be held "captive" by a vengeful husband, we still have to realize that not every woman who wants a divorce should rightfully be able to call upon the *Beit Din* to champion her cause. As was noted at the outset, the halacha is mindful of the possibility that a woman seeks release from her marriage "because she has her eye on someone else." In such a case, obviously, the *Beit Din* should not invoke the various sanctions and pressures which have been devised over the ages. But how are the members of the *Beit Din* to know when they are justified in their pronouncements against a husband? Perhaps he is the injured party, rather than the reverse?

In many marital disputes heard by secular judges, it is often impossible to determine the truth, since there are rarely eye-witness accounts. After all, it is hardly likely that an abusive husband will whack his wife in public. Rather than descend to a "he said/she said" imbroglio, courts often turn to "experts" to help them determine the truth, whether in the field of forensics or psychiatry or any other "scientific" area. Are Jewish courts permitted to utilize the services of such "expert" witnesses?

Looking for some guidance in the halachic literature, we find in *Shulchan Aruch*[79] that if a woman refuses to visit her in-laws or to let them into her house, because she claims that they cause her all kinds of problems, we are to consider her complaint valid. Here the Ramo appends,

But this is so only when it is evident to *Beit Din* that

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is clear that if he gives her a *get* in order to rid himself of this obligation, it does not fall into the category of making it a *get me'useh*..." since by giving the *get* the man is always freed from these obligations.

79. *Even Haezer* 74:10.

> there is substance to her complaint that they do her harm and cause strife between her and her husband...and it is our practice to send a trustworthy man or a woman to live with them until they can clarify [for us] who is the cause of the strife and controversy.

Even though a woman is technically not qualified to give testimony in a Jewish court, the Ramo advocates using a woman's testimony to give credence to her claim before *Beit Din*. We may therefore properly assume that he would likewise countenance the testimony of a professional scientist or social worker in similar circumstances.

In a cognate situation of marital strife, Ramo again advises sending in "others" to live with them "to see on whose account [there is strife], and if she curses him for no reason, she is to be divorced and forfeit her *Ketubah.*"[80] By using this precise terminology, Ramo signals that these "others" may not be qualified as witnesses in a Jewish court, but since they nevertheless may be in a position to clarify the truth, their testimony should be heard. In other words, it seems that the evidence of anyone who can provide the *Beit Din* with honest or skilled insights should be considered.

In a terse addendum to this discussion, Ramo concludes:

> And if we cannot determine who is the cause [of the marital strife], the husband is not to be trusted if he says that she is the one who starts up, because all [Jewish] women have the presumptive status of being honest (*becheskat kashrut*).[81]

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80. Ibid, 154:3. See also Ramo, *Choshen Mishpat* 35:14, and Rambam, *Hilchot Sanhedrin* 24:1,2.

81. The case under litigation before the Ramo was of a man who hits his wife, claiming that he does so because she curses him and

It seems, therefore, that if the *Beit Din* entertains any doubts about the dynamics of the separation process which has led to a situation of *igun* of the woman, it would be prudent for them to investigate thoroughly before activating community sanctions, calling in psycholgists and social workers involved in the case if necessary.

Conclusion

Although this study has been an halachic endeavor, I believe that in truth the solution to the *aguna* problem lies essentially not in the field of halacha and coercion but rather in the field of ethics and *mussar*.

We have discussed *ma'us alai, moredet, get me'useh, kofin oto*, and other technical terms. But we have not discussed the real cause of all the misery so many families are experiencing. We Jews used to take pride in not falling prey to all the social evils besetting the rest of society. Jewish family life was a sacred institution, termed *kiddushin* at its onset and buttressed by sanctified institutions. Now, unfortunately, our divorce rate and our dysfunctional family numbers come close to rivalling those of the secular society.

Why are we failing? What are we teaching – or not teaching – our young people at home and in school? Why are men withholding *gittin*, where have they picked up such behavior?

It is all fine and well to talk about pre-nuptial agreements,

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their children; however, the reason Ramo rules that the wife is believed rather than the husband is that since he is clearly the one hitting her, the burden of proof is upon him. A similar sentiment is expressed in the *Responsa of Rashba* VII, 473: "If we are unable to determine who is telling the truth, we will not believe the husband who says his wife did something wrong, "inasmuch as all women have the presumption of rectitude (*kashrut*)."

community sanctions, economic boycotts, withdrawal of synagogue honors, governmental enforcement – but in truth we should be appalled that it has come to this. I am reminded of a passage in the Gemara *Yoma* (18b and 19b) which describes the protocol related to the service of the High Priest (*Kohen Gadol*) on Yom Kippur. The representatives of the Great *Beit Din* had to question and caution him closely, making him swear that he would not change an iota in the prescribed ritual in the Holy of Holies. Then they would burst into tears and he would burst into tears. They wept that they had to suspect him of potential wrongdoing, and he wept that they thought he might do the wrong thing.

We too should weep, at the need to explore arcane options and establish communal interventions to save increasing numbers of women from an horrific fate. We should weep that nowadays a young man and woman preparing for marriage have to involve themselves in preparing for divorce as well. We seem to have forgotten the Midrash which says that even the *mizbeach* weeps when a husband divorces his wife.

Although I am not so naive as to deny the need for all these precautions, I am pained that we are not spending more time in training young men and women to be good people, to respect others, to learn how to grapple with problems and how to compromise. Moreover, the time for intervention is not when a divorce is imminent, but when young people start dating, to let them know that they should be looking for a spouse who shares their life goals and religious convictions. Couples have to know that marriage takes work; and although there is a *parsha* of *get* in the Torah, it is intended only after all other measures fail.

Appendix

Resolution On Sanctions To Be Imposed On One Who Withholds Issuance Or Receipt Of A Get

Rabbinical Council of America

Resolved that our community will impose sanctions against any party who withholds consent to the issuance or receipt of a *Get* under the following conditions:

1) Where a married couple has separated in contemplation of a divorce and has been living apart for a year.

2) One of the parties has filed for issuance of a civil divorce, and

3) One of the parties has made a verifiable, formal written request for the unconditional termination of the marriage by execution and receipt of a *Get*.

4) The other party has refused to comply with the request for a *Get* and has not appeared before the Beth Din of America or its designee to explain this non-compliance within 3 (three) months following the fulfillment of the prior three conditions.

Note: If after the party appears before the Beth Din of America or its designee and the Beth Din rules that sanctions should not be adopted, or should be adopted in modified fashion, it shall be the determining body in this matter.

Sanctions

Thereupon, our community will adopt the following sanctions against the recalcitrant party:

A. He or she shall not be permitted to occupy any elective or appointive position, nor to serve as an employee, within the Institution or within any of its affiliates.

B. He or she will be excluded from membership in the Institution or in any of its affiliates.

C. He or she will not be given any honor or recognition, or

be granted any right or privilege of participation within liturgical services on any occasion whatsoever.

D. He or she will have his or her name announced on a regular monthly basis at the conclusion of Shabbat service, and published in the Institutional bulletin, with respect to his/her refusal to comply with the request for a *Get,* with a call to the membership to limit their social and economic relations to such persons, until such time as they participate in the *Get* process.

The Source of *Techelet*: Response to Dr. Singer

Baruch Sterman, Ph.D.

We would like to thank Rabbi Cohen for allowing us to respond to the article "Understanding the Criteria for the *Chilazon"* by Dr. Singer, which appeared in number XLII of this Journal. The primary goal of the P'til Techelet Foundation is to encourage and promote interest in the topic of *Techelet*.

Objections raised by Dr. Singer

Dr. Singer makes a sweeping statement at the beginning of his article that cannot go unchallenged. He states that "the strongest criteria for identifying the *chilazon* come from the Gemara *Menachot*" and specifically from the *braita* in *Menachot* 44a. This assertion is very difficult to reconcile with the fact that most *Rishonim*, in their discussion of the topic, do not quote this *braita*. Both the Rif and the Rosh, who quote many other statements about *techelet*, do not mention these criteria at all. Both the Rambam and the *Smag* selectively choose from among the criteria in the *braita*, ignore one of those criteria (i.e., that it rises once in seventy years), and add to or alter the other signs. The Maharil, when stressing how easy it should be to reintroduce *techelet* based on finding the *chilazon*, refers to the signs brought in the *Smag*, and not those of the *braita*. Clearly, the *Rishonim* did not take the criteria of the *braita* at face value. They treat these statements as general descriptive identifiers, not as distinct and essential characteristics of the *chilazon*. With this in mind, let us examine the arguments in detail.

1. The murex Trunculus is not the color of the sea

First of all, Dr. Singer's assertion, that the term "*gufo*" means the soft body of the mollusc, is not compelling. As mentioned, the *braita* provides general descriptive information regarding the *chilazon*. It would make most sense to describe the outward appearance of the organism before going on to its internal appearance, especially given that internal examination requires painstaking procedures (e.g., carefully breaking open the shell and extracting the snail). Moreover, the general description would most naturally be that of the *chilazon* in situ – covered in its characteristic sea-fouling (and not after it has been assiduously polished).[1]

When it is alive in the ocean, the murex Trunculus snail has a greenish color, and anyone who has seen it underwater is struck by its camouflage and resemblance to the sea. This fact is a perfect explanation of the term *"domeh l'yam."* Indeed, this interpretation is not new; the commentary to *Sefer Yetzirah* similarly understands this passage.[2]

Furthermore, the word "*domeh*" implies similarity and not absolute equivalence. When something is identical in property, the Gemara states it explicitly. For example, when the Gemara explains that the color of *techelet* is identical to the color of *kala ilan*, it states that only *Hashem* can distinguish between the two.[3] The term *domeh* is not used. The *Chacham Zvi*[4] states that the term "*domeh*" implies a certain "similarity" in a property and nothing more.

Some have even suggested that all the criteria enumerated

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1. Dr. Yisrael Ziderman, "Reinstitution of the Mitzvah of *Techelet* in *Tsitsit*" (Hebrew), *Techumin*, Vol. 9 (1988), p. 430.

2. *Commentary on Sefer Yetzirah* attributed to the Raavad, Introduction, *netiv* 8.

3. *Bava Metzia*, 61b.

4. *She'eilot Utshuvot Chacham Tzvi*, responsum 56.

in the *braita* come to explain the conclusion, namely, why *techelet* is expensive.[5] The fact that the snail resembles its surroundings would then explain why it is so difficult to obtain – since it would require highly trained fishermen or divers to search for it. This would make sense only if the outward appearance of the snail resembled the sea; the color of the hidden body would be irrelevant.

2. The murex Trunculus is not a fish

Sea snails are halachically fish. The opinion of the *Rishonim*, including the Rambam in some places,[6] is that all sea creatures are fish. Furthermore, when the Rambam[7] distinguishes between sea animals, fish, and sea *sh'ratzim*, shellfish fit in to the more focused subdivision of fish. The examples he gives of sea animals are all larger creatures that have limbs for leaving the water, (seal, frog, sirens); the *sh'ratzim* are the likes of worms and leeches. Sea snails do not fit either of these – and thus fall into the remaining category of "fish".[8]

The Oxford dictionary defines fish:

> In popular language, any animal living exclusively in the water; primarily denoting vertebrate animals provided with fins and destitute of limbs; but extended to include various cetaceans, crustaceans, molluscs, etc. In modern scientific language (to which popular usage now tends to approximate) restricted to a class of vertebrate animals..."

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5. Y. Rock, "Renewal of *Techelet* and Issues on *Tsitsit* and *Techelet* " (Hebrew), *Techumin*, Vol. 16 (website expanded version), p.15, n.57.

6. See *Hilchot Tumeat haMet* 6,1 and compare to *Hil. Keilim* 1, 3.

7. *Hilchot Ma'achalot Asurot* 2, 12.

8. Shlomoh Taitelbaum, *Lulaot Techelet*, P'Til Techelet, Jerusalem, 2000, pp. 126-36.

After the definition there is a note: "Except in the compound shell-fish, the word is no longer commonly applied in educated use to invertebrate animals." To say that murex/*chilazon* is not a fish, is an anachronism. As such, the murex mollusc fits neatly into the description "*briato domeh l'dag*".

3. The murex does not have a 70-year cycle

Both the Radzyner and Rav Herzog dealt with this problem and did not feel that it was a sufficient reason to disqualify their candidates for the *chilazon*. As previously mentioned, the Rambam does not bring it when citing the *braita*. As Rav Herzog himself puts it, "Science knows nothing of such a 'septuagenarian ' appearance of any of the denizens of the sea."[9] Rav Herzog and the Radzyner suggest that the cycle mentioned refers to periods of greater or lesser availability or accessibility, but that the animal itself is always obtainable.[10]

Though no intrinsic characteristic of the murex would explain this cyclic property, the archeological evidence may offer a clue. At the sites where ancient dye installations have been found, the crushed shells were often used as part of the walls of adjacent buildings. One finds that the size of the snails decreases over time. This fact indicates that the snails suffered from over fishing, and that they became increasingly hard to obtain over time. This extrinsic feature might explain the periodicity, that due to over fishing, the murex population would need time to replenish itself before a new expedition could reasonably hope to procure a sufficient amount.

Interestingly, the Rambam replaces this criterion with the

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9. Herzog, *The Royal Purple,* page 69.

10. I should point out that there are those who explain that this is referring to a supernatural exodus onto land (Chida, *Ptach Aynayim, Menachot* 44a).

phrase, "and it is found in the salty sea," which most interpret as the Mediterranean. Perhaps the Rambam understood the phrase, "and it comes up once in seventy years," in terms of its complement – namely, if you can find it on land very infrequently, then the rest of the time it is found in the sea.

4. The amount of dye in each murex is too minute

How minute is too minute? Approximately two tons of snails will provide enough dye for ten thousand sets of *tsitsit*. A small village in Greece consumes that amount for snacks in one week. Is that too much or too little?

5. The chemical tests to determine true *techelet*

Based on discussions with scientists and Talmudists, it is clear that no one completely understands the chemical tests brought by the Gemara, and interpreted by the Rambam and Rashi, to distinguish between *techelet* and *kala ilan*. One thing is clear though: a sample subjected to the described procedures that does not fade, passes the *techelet* test. We have tested *techelet* dyed with murex according to the analysis described by both the Rambam and by Rashi, and it did not fade. Therefore, there is no challenge that arises from this criterion to murex *techelet*.

The fact is, however, that indigo (*kala ilan*) dyed wool also passed the chemical tests. To reiterate, this is not a problem as far as murex *techelet* is concerned, but rather an academic problem in understanding the Rambam and the Gemara. I personally have proposed that although there may be no difference molecularly between the two, and therefore according to the methods currently used to dye wool, there is no discernible difference in quality between them, historically, this was not always the case. When dyeing according to natural methods in the ancient world, *techelet* was dyed in a completely different manner than indigo. The former was fermented together with the meat from the snail. Current research by John Edimonds in

England has shown that bacteria present in the snail meat plays an active part in the reduction of the dye. On the other hand, indigo was chemically reduced in an entirely different manner. Consequently, it is quite reasonable that the quality and fastness of wool dyed with *techelet* according to the method employed in vat dyeing with snails, would have differed from that of *kala ilan*. This may have been the basis for tests that attempted to distinguish between the two. Nobel chemist Prof. Roald Hoffman has told me that he finds this proposition to be plausible.

It should also be stressed that regardless of one's opinion as to the efficacy of these tests in differentiating between *techelet* and *kala ilan*, one incontrovertible fact must be understood: *techelet* and *kala ilan* are visually indistinguishable.[11] And since the blue dye from the murex is molecularly equivalent (and needless to say – visually equivalent) to *kala ilan* dye, the murex *techelet* is undoubtedly the exact color of the *techelet* of *chazal*. This fact is a sufficient condition for the determination that murex *techelet* is kosher – even if there may be another *techelet* which would also be kosher. This will be explained more fully below, number 8.

6. *Techelet* comes from a live *chilazon*

This is one of the more powerful proofs supporting the murex as the *chilazon*. The enzyme required for dye formation quickly decomposes upon the death of the snail, and so the glands that hold the dye precursor must be crushed while the snail is alive or soon after. In experiments, we have seen that as soon as two hours after death, the quality of the dye is severely degraded. Dr. Singer's assertion that "the Gemara is speaking not of a few hours, but mere moments after death" is totally arbitrary. That assertion is even more implausible

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11. Ibid.

considering that this property is mentioned by both Pliny and Aristotle specifically regarding the murex. Since the murex loses its dye quality a few hours after its death, and those scholars express that fact by saying that the dye must be obtained from live snails, it follows that the Gemara's use of the same terminology would certainly sustain a two-hour *post mortem* limit.

7. Equating *techelet* with purpura and the color of purpura

The *Chavot Ya'ir* in his *M'kor Chayim*[12] states clearly that the *chilazon* used for dyeing *techelet* is the purpur. The *Shiltei haGiborim* also states explicitly that it is the *purpura.*[13] The *Musaf la'Aruch* defines purpura as the "Greek and Latin word for a garment of *techelet*." The *Midrash haGadol* from Yemen[14] quotes Rav Chiya as saying, "the purpura of the kings is made out of *techelet*," and the *Aruch* suggests that the word "Tyrian" (apparently Tyrian purple) is Latin and Greek for the color *techelet*. The Ramban[15] also says that in his time only the king of the nations (i.e. the Emperor) was allowed to wear *techelet*, thus equating it with purpura. The Radzyner Rebbe notes[16] that the ancient chroniclers frequently mention *techelet* as a most precious dyestuff, perfected in Tyre. Obviously, he too believed *techelet* was purpura.

The other points raised by Dr. Singer regarding the identification of purpura with *techelet* are simply not accurate.

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12. 18, 2.

13. Ch. 79; see *Lulaot Techelet*, page 100, for more information about this work.

14. *Bamidbar* 4: 5.

15. *Sh'mot* 28:2.

16. *P'til Techelet,* Introduction.

Vitruvius specifically states that one of the shades that can be obtained from the purpura is blue (lividum).[17] Moreover, we have noticed that one can obtain a blue color from murex Trunculus without even exposing it to sunlight – simply by steaming the wool immediately after the dyeing. It is hard to believe that we amateurs, who have been dyeing for less than a decade, would know more than the ancient dyers who made their livelihood working with these dyes for more than 2,000 years.

Furthermore, one would not expect to find anything but purple archeological stains since while the glands are being stored for dyeing, and during the fermentation process, the vat color is purple. Only during the very short dyeing stage itself (and possibly, not until after the dye process was completed, if steaming was used), would the dye turn blue.

Lastly, Dr. Singer's question as to why the ancients would have wanted to dye blue with murex when indigo was more readily available is anachronistic, since murex dyeing in the Mediterranean dates back to the time of Avraham, whereas indigo reached the region only 1,500 years later. (Though ancient Egyptians used a blue coloring for eye makeup, there was no blue dyeing of garments with any material other than the murex.)

8. The equivalence of murex *techelet* with *kala ilan* indigo

As stated previously, the primary halachic guides for any discussion of techelet are Rav Gershon Henoch Leiner and Rav Herzog. Both of them are unequivocal in their assertion that techelet was the color of the mid-day sky. Rav Herzog clearly

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17. Vitruvius, *De Architectura* (ed. H. L. Jones), Loeb Classical Library, Cambridge, London 1930) Book VII, c. VII-XIV, p. 113-129.

identified the color of techelet as identical to indigo and claims that this is also the opinion of the Rambam.[18] The Gemara itself explains that only Hashem can distinguish between techelet and kala ilan (i.e., indigo).[19]

Furthermore, both the Radzyner and Rav Herzog state that if one finds a candidate for the chilazon that satisfies these two criteria – that the color of the dye is sky-blue, and that its dye is fast and strong – then that organism must be acceptable as a kosher source for techelet.[20]

Both Rav Herzog and the Radzyner offer the same line of compelling proof for this assertion. If there were another chilazon that satisfies these criteria, but is not kosher for techelet, then why would the Gemara not warn us regarding its use? The Gemara cautions only of kala ilan, a plant substitute for techelet, but never mentions any alternative sea creature that might mistakenly be used for techelet. Either that hypothetical species is also kosher, or there is only one species in the world (or in the Mediterranean) that satisfies both those criteria.[21] Murex Trunculus provides a dye which is the color of techelet. Its dye is among the fastest dyes that exist.[22] It was well known throughout the ancient world and is found off the coast of Israel. There can be no doubt, then, that according to Rav Herzog and the Radzyner, this species must be a kosher source for techelet.[23]

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18. Ibid, page 94.

19. *Bava Metzia*, 61b.

20. *Sefunei Temunei Chol*, page 14, 1999 edition.

21. Herzog, ibid, page 73.

22. Personal correspondence with the late Prof Otto Elsner, professor of Ancient Dye Chemistry at the Shenkar College of Fibers.

23. Though Rav Herzog studied the murex Trunculus, he provisionally rejected it, primarily because the process for obtaining

Let us not forget the fact that techelet has been lost for 1,300 years and therefore much of what has been written is based on assumptions and conjecture. It is highly doubtful that each and every statement regarding techelet or the chilazon will suitably apply to any candidate. Nevertheless, it is our opinion that the murex Trunculus fits the descriptions of chazal in an overwhelming majority of instances.

Criteria for determining kosher *techelet*

There are numerous descriptions found throughout the Gemara, Midrash, *Zohar* and other Judaic sources regarding *techelet* and the *chilazon*. In order to begin to apply them it is important to understand, first and foremost, that it is essentially impossible to reconcile all of those sources with any candidate, or, for that matter, with each other. For example, the Gemara asserts that the *chilazon* is found in the Mediterranean,[24] the Zohar claims that it is found in the Kineret,[25] while the Rambam states that it is to be found in the *"Yam Hamelach."*[26] Needless to say, there is no species that lives in all three habitats.

Secondly, it is essential to distinquish between *aggadic*

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blue dye visually equivalent to *kala ilan* was not then known. The process was not discovered until 1980 by Professor Otto Elsner of the Shenkar College of Fibers. I should also point out that there is no species other than the muricae currently known that produces a dye similar in color to indigo and neither is there any archeological evidence for other species being used in the ancient world for dyeing. In order to assume that the *chilazon* of *chazal* is different than the murex, one would need to accept both the fact that knowledge of that organism eludes modern science as well as the fact that the detailed archeological survey of the Mediterranean has not uncovered any hint of such an animal.

24. *Shabbat* 16a.

25. *Zohar*, 11, 48b.

26. *Hilchot Tsitsit*, 2:2.

statements versus *halachic* statements. For, as with every issue in Jewish thought, though we must strive to understand the aggadic material, we are bound in deed by the halachic instruction. One method to determine if a statement is halachic in nature is to find its use as the basis for an actual halacha. Conversely, if a statement is never used in a formal halacha, it quite often remains in the realm of a non-binding aggadic statement. For example, the Gemara relates that the *chilazon* and the proficiency in *techelet* dyeing were a special gift to the tribe of Zevulun. Nevertheless no certificate of *yichus* proving descent from that tribe is required before accepting *techelet* from a dyer! In this case, the "criterion" lies clearly within the aggadic realm.

On the other hand, the following are a number of statements relating to *techelet* and the *chilazon* which do find their way into formal halacha, and these must be addressed with due rigor.

1. *Techelet* is the color of *kala ilan*.

All of the laws regarding *kala ilan* are based on this fact, including the *sugyot* in *Bava Metzia* (61b) and *Menachot* (40a and 43a). *Techelet* obtained from murex Trunculus is identical in color to *kala ilan*.

2. *Techelet* is a fast dye that does not fade.

The Gemara bases its chemical tests on this fact (*Menachot* 43a) – *"lo ifrid chazute, keshayrah* – if it does not change its appearance, it is kosher [for *techelet*]." The Rambam states this explicitly "*tzviyah yeduah sheomedet b'yafya* – a dye which is known to be steadfast in its beauty" (*Hilchot Tsitsit*, 2:1). Murex *techelet* has been tested by independent fabric inspectors at the Shenkar College of Fibers and received excellent marks for fastness. I can personally testify to my own *techelet*, worn every day for the past ten years, that has not faded or changed color at all.

3. *Techelet* dyes on wool, but does not take to other fabrics. (*Yevamot* 4b – "*techelet amra hu* – *techelet* is [dyed] wool").[27]

Murex *techelet* binds exceedingly tight to wool, but not to cotton or synthetic fibers.

4. The dye from the *chilazon* is more potent when taken from a freshly killed *chilazon* – but one must kill the animal in order to extract the dye.

The Gemara in *Shabbat* (75a) bases one of the fundamental principles of *Hilchot Shabbat* on this fact, namely *p'sik reisha d'lo nicha lei* – an inevitable act [lit. cutting off a head] that is undesirable. As mentioned previously, the enzymes responsible for transforming the precursor of the dye into actual dye upon exposure to oxygen do not survive long after the death of the snail. Consequently, within a few hours after death, the murex can no longer be used for dyeing.

Finally, it is instructive to mention two not commonly referred-to sources written in the early 1890's as critiques of the Radzyner's *techelet*.[28] Both discuss the various sources and measure the Radzyner's *techelet* against them. The most forceful objections are based on the fact that Radzyn *techelet* did not meet the "halachic" criteria enumerated above. The authors of these works contend that (a) Radzyn *techelet* is not the color of the sky, (b) that it fades when washed with soap, and (c) that

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27. Rashi does not follow this reasoning. On the other hand, the *Yerushalmi Kelim* (9: 1) says *"Ma pishtim k'briata af tsemer Ubriato"* just as linen remains its own color, so too wool [only can become *tamei nigei b'gadim*] in its natural color [and not dyed]." We see from there that only wool is dyed, not linen.

28. Hillel Meshil Gelbshtein, Introduction to *Ptil Techelet,* printed in A*bir Mishkenot Yaakov* by the same author, and an article *"Techelet me'Iyay Elisha"* by Mordechai Rabinovits.

the material from the dye can be obtained from dead sepia *Officinalis*, (and not exclusively from live organisms). On the other hand, as has been demonstrated herein, murex *techelet* would indeed be acceptable precisely according to all these criteria.

It is our hope that these and other issues relating to *techelet*, to the identification of the murex Trunculus as the *chilazon*, as well as the investigation of other candidates, will continue to spark discussion within the walls of *batei midrash* all over the world. Any argument that is for the sake of Heaven has great merit and will serve to unite *k1al yisrael* in its search for truth and proper *kiyum hamitzvot*.

Letters

To the Editor,

Having spent much spare time over the past several years studying murex Trunculus *techelet*, I was most gratified to find that I had arrived at the same conclusion, and for many of the same reasons, as Dr. Mendel E. Singer; namely that murex Trunculus is not the *chilazon*.

Although the space of a letter does not permit some of the other arguments against the murex Trunculus, nevertheless, allow me to add some points to Dr. Singer's essay.

On page 11, Dr. Singer writes about the small amount of dye produced by a single murex snail, only 4 or 5 drops. It should be pointed out that the discussion about the culpability for *Disha* in *Shabbat* 75a is thus completely without basis, since the minimal volume required for culpability is that of a *grogrit*, a dried fig. And clearly, the Gemara is discussing extracting the mucus of a single *chilazon*.

On page 16, Dr. Singer assumes that the "*nartik*" or *malvush* of the *Midrashim* is a shell. Despite the fact that we lack an adequate explanation for these words, there is only the one opinion, that of Rabbi Binyomin Mosufa, that *nartik* means a shell. All the other *Rishonim* and *Acharonim* refer to the *chilazon* as a fish, ignoring the word *nartik*. No doubt this is because there is a perfectly good word for snail in the Mishnah *Shabbat* 77b, "*shavlul*". This is also used in an Aramaic form in the Gemara *Menachot* 42b, "*shavlulita*". The contention that the Sages of the Talmud held the *chilazon* in their hands, and did not use the word snail for it, but chose to call it a fish, is completely untenable.

On page 17, Dr. Singer discusses the meaning of the word "*potze'a*", and he accepts Rabbi Herzog's understanding that

there is a connotation in *potze'a* of cracking a hard shell. Sad to say, Rabbi Herzog was inexplicabley mistaken in this understanding. In both biblical and mishnaic usage, *potze'a* carries no connotation of a hard object. One of numerous such examples is the Mishanah *Ketubot* 43b, *"Patza'a Bifaneha"*, "he wounded her face." According to Radak's *Sefer Hasharoshim*, *Potze'a* refers to incising a smooth surface, splitting, cutting, wounding, or causing a fissure. See also Rashi, *Shemot* 21:25 and *Shir Hashirim* 5:7. It is the usage of "splitting" that is found in *Shabbbat* 122b, "*Liftzo'a Egozim*", to split, not to crack, nuts.

A small experiment demonstrates why the Gemara there speaks of using a *kurnos*, a blacksmith's hammer, for opening nuts. When a walnut is struck smartly with a light 1/4 lb. hammer along the seam where the halves join, the shell at the contact point is crushed. But when it is merely tapped with a heavy 1 1/4 lb. hammer, it splits in half all the way around.

In other places *potze'a* is used for splitting the limbs from a tree or splitting a stretched string.

On page 19, Dr. Singer discussed the color of the "blood". The murex mucus is not blood, neither biologically nor in color. P'til advocates attempt to cope with this problem by writing the word thus, "blood". The implication here is that the "ancients" were imprecise in their use of language. However, there happen to be excellent words used in the Talmud for mucus: *Rir*, *Leicha*, and *Maya* are some of them.

On page 22, Dr. Singer quotes Dr. Ziderman that it is absurd to think that non-Jews would use murex dye, when indigo was available. In this reasoning Dr. Ziderman was already preceeded in the responsa of the Radbaz. But the most trenchant proof is from the prophet Yechezkel, who informs us in chapter 27 verse 7 that in the sixth century B.C.E., at the height of Tyrean commercial hegemony over the Mediterranean Basin, Tyre was importing, not manufacturing *techelet*.

On page 27, Dr. Singer writes of the silence of the Gemara about the murex. The *Beit Halevi* of Brisk, quoted in the forward to *Ein Hatechelet* page 13, rejected the Radzyner's *techelet* based on a most penetrating question. He asked, how is it possible that the *mesorah* (tradition) could have been lost, that this commonly available squid is in fact the fabulous *chilazon*? And since it is common, the *Beit Halevi* continued, then there is a *mesorah* that the squid is not the *chilazon*!

Tyrean dye faces even more severe objections, since it was massively produced throughout the Middle East, and continued to be produced in Constantinople until May 29, 1453. Beside the omission from the Talmud, there is not one hint by Rashi, the Rambam, or any other *Rishon*, that Tyrean purple manufactured in the sunlight was actually the much sought-after *techelet*. The proposition that the sages of the Talmud and the *Rishonim* were ignorant of facts on a subject of deep concern to them, facts that were commonly known in the world around them, is a proposition that is impossible to accept.

In note 11, Dr. Singer pronounces P'til Techelet's efforts as "inspiring". I find their efforts rather distressing. P'til is attempting to foist on an unexpert public a halachic practice through marketing methods and thereby establish the precedent of a *Minhag*. At the same time, their stand ignores the words of the *Rishonim* and exhibits a cavalier attitude towards the Gemara itself. The Gemara *Menachot* that gives the description of the *chilazon* is dismissed by P'til as "homiletic". If P'til succeeds, they will have contaminated the halachic process.

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