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

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A Comment on Our Relationship with Gentiles

Marvin Schick

The following brief essay was written for the RJJ Newsletter. It is reprinted here because it discusses a subject that merits attention in this journal. While my comment focuses on ethical considerations, our relationship with non-Jews is obviously a subject of halachic relevance. Hopefully, there now will be articles that explore the halachic dimensions. The situation that I describe is worsening and I have no illusions that what I or others write will result in an improvement any time soon. Too many in our community are trapped in an environment that encourages wrongful attitudes and language. I welcome readers' comments, sent to me at 350 Broadway – Room 1205, New York, NY 10013 or mschick@mindspring.com.

A noted Harvard University professor who is a committed Jew recently told of a student from an Orthodox home and strong day school background who had abandoned religious life because his experience at Harvard showed him the falsehood of what he had been taught about Gentiles.

Likely, there's more – perhaps much more – to this young man's story and journey. Doubtlessly, other factors were at work. Yet, what strikes as too close to home is the reference to derogatory remarks about non-Jews, the sort of gratuitous and nasty fare that is all too common in our religious life and our schools. Such remarks have become

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part of our vernacular. I have heard far too much inappropriate talk, specifically including by people who declaim readily about *shmirat halashon*, of the need to be careful in speech.

It is lamentable that we have to stress the obvious principle that no individual or group is elevated by putting down other people. Groups and individuals are elevated by what they do, not by the behavior of others. For Jews, the concept of chosenness arises only out of our living sanctified lives in accordance with the Torah's commandments. When we speak pejoratively of Gentiles, we may in a sense diminish them, but for sure in the process we are diminishing ourselves.

We also come dangerously close to the forbidden zone of *Chilul Hashem*, of desecrating G-d's name, by deprecating, for no reason other than that they are not Jews, those who are created in the image of G-d. It pains me to say that some of the things I have heard are a form of *nivul peh*, of vulgarity.

There are, we must acknowledge, deep and still open emotional and physical wounds arising from our encounters with the outside world, most horrifyingly in the ineradicable experience of the Holocaust. The admonition expressed here is not intended to soften our feelings about the murder of millions of Jews or the centuries of persecution that preceded the European Churban. Nor should we turn a blind eye toward contemporary anti-Semitism or to cultural excesses and life-styles that are antithetical to Torah values.

In fact, derogatory language against Gentiles generally is not intended to express hostility to that which merits hostility. In a curious way, the impact, if not the intent, of blanket negativism toward non-Jews makes the inadvertent

point that it is not anyone's wrongful actions that are evil but merely one's status as a non-Jew. This notion is at once absurd and abhorrent. It is also rather poor strategy for the Jewish people. After all, there are only a handful of us, and I very much doubt that G-d put us on this earth to wage war against six billion of its inhabitants.

Even if, as I have suggested, the tale of the Harvard student has more to it, it remains that some in our ranks are repelled by the words that they hear about Gentiles and, as a consequence, they move further away from Judaism. Surely, *kiruv* efforts are being undermined by inappropriate language and attitudes.

Those of us in the yeshiva world who have become inured to and accepting of the language that I regard as wrongful are likely to be critical of what I have written here. My suggestion is that they reflect on the example of Torah leaders whom we turn to for guidance. In my experience, I never heard such transcendent leaders as the great Rosh Yeshiva of Lakewood or Rav Moshe Feinstein or Rav Yaakov Kaminetzky or Rav Pam ever employ the kind of language that is so promiscuously used these days by lesser figures in our community.

My further suggestion is that they keep in mind that no one is ever elevated by putting down someone else.

Fetal Intervention: Halacha's Response to a New Bioethical Dilemma

Rabbi Howard D. Apfel, M.D.

Does a physician always have a license to heal? This well known, almost clichéd query has been referred to as the "first question" of Jewish medical ethics.¹ At first glance, the answer seems quite obvious. The Torah clearly sanctions human medical intervention, deriving it from the biblical verse "*verapo yerapeh*"² in the by-now familiar talmudic statement, "*mekan shenitnah reshut larofeh lerapot*".³ Based on several other biblical sources,⁴ the license to practice curative medicine was understood by many to be obligatory, and ultimately codified as such in the *Shulchan Aruch*.⁵

Still, the need for scriptural backing to justify human intervention is in itself illuminating. Implicit in the need to ask the question in the first place is the belief that human

1. Fred Rosner, *Modern Medicine and Jewish Ethics*. Ktav Publishing House Inc. Hoboken NJ, 1991, p.5.

2. Exodus 21:18-19.

3. *Bava Kammah* 85a.

4. For example the Rambam cites "*Vehashevota lo*" (Deuteronomy 22:2) and the Ramban cites "*veahavta lereecha chamocha*" (Leviticus 19:18).

5. *Yoreh Deah* 336:1.

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malady is a manifestation of *gezerat hamelech* (Divine edict) rather than chance occurrence. Perhaps, this can be understood as a direct punishment for previous sins or alternatively as an opportunity for expiation from sin for the afflicted individual or one of his ancestors.⁶ Either way, without specific biblical authorization, one could easily see how meddling in such Divine reckoning should be off limits to human interference.

Viewed that way, one might assume that the permission granted to heal is restricted to fighting disease that has at least had the opportunity to send its intended Divine message. However, to go further and actually preclude the retribution from occurring in the first place may not be allowed. Thus, according to this reasoning, disease must be allowed to be manifest and only then is the *reshut shenitna larofeh* granted. On the other hand, perhaps it is preferable to leave concern for God's system of reward and punishment with Him and simply follow the Torah's lead that disease may be eradicated and take it to its fullest natural conclusion. This, undoubtedly, would include, if not reach its pinnacle, in the physician stopping illness before it even begins. From that perspective for example, vaccinations against infectious agents and prevention of arteriosclerosis can be considered two of modern medicine's greatest achievements. Based on these two contrasting approaches, we can suggest that the second question of Jewish medical ethics ought to be: does a physician have a license to prevent disease before it even develops?

The ultimate affirmative answer to this question may lie in Jewish tradition's firm commitment to *Tikun Olam*

6. See the related discussion in J. David Bleich, *Jewish Bioethics: The Obligation to Heal in the Judaic Tradition*, section on "medical intervention, the theological dilemma", pp. 20-23.

(perfecting the physical world around us). That objective clearly supports the belief that overcoming the challenges of our environment is obedience to, rather than rebellion against, the will of God. Some have derived this ideal from the original biblical command to "fill the earth and subdue it".⁷ Commenting on that verse, the Ramban emphasized that building the world and constructively manipulating its natural elements, were part of the original purpose for which man was given "power and sovereignty" at the time of creation.⁸ Throughout the course of Jewish history many rabbinic authorities have reemphasized and expanded upon this idea.⁹ Most recently, Rav Yosef Dov Soloveitchik referred to the controlling of our physical environment as man's "majestic gesture".¹⁰

Not surprisingly, Rav Soloveitchik saw Judaism's unqualified acceptance of the *Tikun Olam* ideal as "most pronounced" in "the science of medicine and the art of healing".¹¹ In that vein he declared that "the conquest of disease is the sacred duty of the man of majesty" towards which he must "mobilize all his intellectual and

7. Genesis 1:28.

8. Commentary of Ramban to Genesis 1:28.

9. See for example Psalms 8:6-7; Ramban Genesis 1:26, Rav Yosef Dov Soloveitchik, "Majesty and Humility", in *Tradition: A Journal of Orthodox Thought*, Spring 1978, pp.25-37. There he notes: "Underlying the ethic of victory is the mystical doctrine that creation is incomplete." In his essay "Education according to the Eighth Psalm", *Collected Writings*, Vol.III, p.449, Rav Samson R. Hirsch referred to *Tikun Olam* as "the aim, the striving for which makes us into pious souls." These are just a few of a multitude of sources.

10. Rav Yosef Dov Soloveitchik, "The Lonely Man of Faith," *Tradition: A Journal of Orthodox Thought*, 1965 , pp.52-53.

11. Ibid, p. 53.

technological ingenuity".¹² The phrase "conquest of disease" in this context can easily be understood to connote halting its incursion altogether, hopefully leading to its complete eradication. With that, rather than be considered off limits, disease prevention becomes majestic man's ultimate priority.

Until relatively recently, the potential for preventing disease has unfortunately been limited to illnesses acquired after birth. Inborn disorders, on the other hand, could only be confronted long after the anatomic or functional disability had firmly taken hold. Often in those cases, the pathology is so profound that beneficial post-natal treatment is not even available. Sadly, averting such congenital defects has been limited to genetic counseling, contraception, or pregnancy termination.

Genetic engineering therapy holds promise as the ultimate solution to this dilemma.¹³ Complete mapping and manipulation of the human genome could theoretically help avoid many congenital malformations. Practical implementation of this modality, however, appears still to be years away. In the interim, invasive fetal interventions have become an increasingly popular alternative.¹⁴ Improved imaging and laboratory screening during fetal life has led to a greater appreciation of the patho-physiologic pathways leading to various abnormalities. Surgically correcting specific defects at an early stage can potentially help avoid the irreversible pathological changes that would

12. Ibid.

13. Of course, as the origins of many congenital abnormalities are multi-factorial, genetic manipulation may be only half the story. Environment is felt to play a significant role as well.

14. Michael R. Harrison, *The Unborn Patient: The Art and Science of Fetal Therapy*. W.B. Saunders, 2001, pp.3-9.

otherwise ensue. For example, successful in-utero correction of congenital diaphragmatic hernia¹⁵ can prevent devastating pulmonary hypoplasia (under-development of the lungs) if accomplished early enough in gestation. Several other in-utero procedures are currently available, that offer hope to families facing congenital defects that would be far more difficult, if not impossible, to rectify after birth.¹⁶

This innovative area of medicine is clearly exciting and replete with potential for improving the human condition. However, as with all new medical therapies, the risks and benefits of such procedures must be analyzed thoroughly and objectively prior to universal application. For this reason, medical professionals and bio-ethicists, concerned with the ethical repercussions of various fetal interventions, have convened several conferences to discuss these issues and determine treatment guidelines.¹⁷ At these sessions the following major concerns have been raised:

1. Risks and benefits to the mother and her role in authorizing intervention.

15. Congenital diaphragmatic hernia is a defect of the diaphragm that allows the abdominal cavity contents to enter the thorax, thereby impeding normal lung development.

16. Examples of some of the interventions currently available include surgery for spina bifida, obstructive uropathy and hydrocephalus, catheter intervention for congenital heart disease, pacemaker placement for complete heart block and intrauterine transfusion therapy.

17. Anne D. Lyerly et al, "Toward the ethical evaluation and use of maternal-fetal surgery", *Obst and Gyn*, 2001,98:689-697. This article represents an analysis of the major issues that emerged from a multidisciplinary group of experts convened at the National Institutes of Health on July 16-18,2000.

2. Prioritization of resources for medical research.
3. The justification for withholding available but unproven therapy in desperate cases.
4. The appropriateness of risky interventions for **non-lethal** conditions.

This report will attempt to review the ethical considerations raised by the general community and compare and contrast it with the response of halacha.

Risks and benefits to the mother and her role in authorizing intervention

In discussions regarding bio-ethical standards of care, medical ethicists often emphasize the importance of recognizing the existence of two distinct frameworks: an ethical or moral one and a purely legal one.¹⁸ Appreciating this dichotomy when defining a standard of care for fetal interventions highlights a critical concern shared by many bio-ethicists regarding the mother's role in the decision-making process. A legal standard of care has been characterized as focusing primarily "on efficacy and safety, which are beneficence-based considerations applied to both the fetus and the pregnant woman."¹⁹ In this sense, the strictly legal standard totally ignores the autonomy of the pregnant women to decide her own fate irrespective of the consequences to the fetus. In contrast, the moral standard maintains that society "must take account not only of

18. Frank A. Chervenak and Laurence B. McCullough "Ethical Considerations", in: Michael R. Harrison, *The Unborn Patient: The Art and Science of Fetal Therapy*. W.B. Saunders, 2001, p.19.

19. Ibid, p.19. "Beneficence requires the physician to act in such a way as to produce a greater balance of goods over harms for the patient as a result of clinical management."

beneficence-based considerations applied to the fetal patient but also of both beneficence-based and **autonomy-based** considerations applied to the pregnant woman.²⁰ As one observer warned, if the woman's autonomy is ignored completely, there is the risk of overzealous focusing on fetal pathology while treating the pregnant woman as a "fetal container, a non-person without rights to bodily integrity."²¹

These same ethicists add, however, that while the emphasis on safeguarding maternal autonomy is warranted, it must be balanced against an unequivocal maternal and medical responsibility to secure the life and health of the fetus.²² After all, they note, the ethical standard does recognize society's obligation to "take account of beneficence-based considerations applied to the fetal patient." Therefore, as a compromise position, it has been

20. Ibid.

21. George J. Annas, "Protecting the liberty of pregnant patients", *N Engl J Med*, 1987, 316:1213-1214. Furthermore, some argue that the current universal requirement for informed consent may not rectify this problem. Although maternal safety is stressed as a prerequisite in almost all fetal interventions, (Michael R. Harrison, "Fetal surgery". *Am J Obstet Gynecol*, 1996, 174:1255-1264) there is a paucity of data available on the true impact these interventions may have on the mother's long-term health and reproductive future (Anne D Lyerly et al "Toward the ethical evaluation and use of maternal-fetal surgery", *Obst and Gyn*, 2001,98:689-697). Sufficiently informed consent therefore, can never really be obtained, again compromising maternal autonomy. Finally, even assuming a woman's independent right to decide on invasive intervention in these cases and the availability of all relevant information regarding her decision, there is fear that her choice may be influenced by personal or societal expectations about the responsibilities of pregnant woman towards the unborn child.

22. Frank A. Chervenak, *ibid*, p.22.

suggested that a pregnant woman be **morally obligated** to accept the risk of intervention when the following three criteria are met:

1. A high probability of invasive therapy being life saving or preventing serious handicap.
2. The therapy is judged to involve low mortality or morbidity to the fetus.
3. The therapy is judged to involve low mortality or morbidity to the mother.²³

The Jewish Response

According to halacha, one does not have absolute freedom to do whatever one pleases with one's own body. The Rambam and *Shulchan Aruch* state unequivocally "ain

23. Ibid. See also Frank A. Chervenak and Laurence McCullough, "An ethically based standard of care for fetal therapy", *J Matern Fetal Invest* 1991,1:185-190. No specific percentage risk was offered as a cutoff for these criteria that would justify intervention. Interestingly, however, the author elsewhere considered all open abdominal fetal surgery to be too risky to "morally compel" the mother to accept. Intravascular transfusion therapy on the other hand was acceptable. Although there is variability in the degree of maternal risk dependent upon the intervention required for specific procedures being undertaken, the following covers the procedures necessary in the majority of potential cases: Sonography – no known risk, Amniography – slight risk of radiation exposure, Puncture of amniotic cavity – less than 0.5% risk of fetal injury, Chorionic Villas Sampling – approximately 1-2% of spontaneous abortion, Aspiration of fetal bodily fluids – 1-2% risk. Limited data is available on Intravascular Intrauterine Transfusion, Percutaneous Relief of obstructed uropathy and Obstruction in Hydrocephalus – however reports mention "significant morbidity in early results, but improving." For hysterectomy and open fetal surgery they say "unknown, but formidable."

adam rashai lechovel beazmo",²⁴ a person is not permitted to injure himself, an idea supported by many biblical and talmudic statements.²⁵ Elsewhere, the Rambam expands the prohibition:

*There are many things the Sages prohibited because they involved an inherent risk to life. And all who violate those prohibitions and say I will endanger myself, of what relevance am I to others, or I myself do not fear the consequences, is punished with rabbinically instituted lashes.*²⁶

Thus, the halacha clearly denies the concept of personal autonomy when there is even a possibility of self-inflicted injury.²⁷

Nevertheless, two potentially mitigating factors have to be taken into account when determining the permissibility of entering a dangerous situation. First, the halacha recognizes that societal norms, determined by

24. Rambam, *Hilchot Chovel Umazik* 5:1.

25. See *Shevuot* 36a based on the verse "rak hishamer lecha ushmor nafshecha etc." (Deuteronomy 4:15) and *Berachot* 32b, based on that pasuk, as well as "venishmartem meod le nafshotechem" (Deuteronomy 4:5).

26. Rambam, *Hilchot Rozeach* 11:5, (author's translation).

27. One dissenting opinion often quoted in this context is that of Rav Joseph Baabad, author of the *Minchat Chinuch*. He states in Mitzvah 48, that if a wounded party had given permission for someone to strike him, there is no prohibition violated in wounding him. As backing for this contention he writes; "Although I have not found this written explicitly, nevertheless it seems logical." This appears to be a difficult *daat yachid* requiring forced interpretations of seemingly contradictory *sugyot* in the Gemara (example *Sanhedrin* 84b, *Bava Kammah* 90b) and at odds with the rulings of the Rambam and *Shulchan Aruch* as noted above. See comments by Rav Shlomo Yosef Zevin in *Leor HaHalacha* pp. 318-320.

past experience, can authorize participation in potentially hazardous activities. "Kevan dedashu be rabim, shomer petaim Hashem."²⁸ Furthermore, a certain degree of risk taking is allowed in the performance of a mitzvah, "sheluchei mitzvah ainan nizakin."²⁹ Of course, an individual may enter such risky situations (and rely on a measure of Divine protection) only as long as the situation is not one "deshchiach hezeka"³⁰ (where injury is likely). Various *Acharonim* have offered opinions as to the degree of danger that is considered excessive.³¹

Secondly, certain significant benefits accrued by entering the dangerous situation can make taking such chances more acceptable. For example, the Talmud in *Baba Metziah* implies that a worker may put himself at increased risk for the purpose of making a livelihood.³² Similarly, when the risk is taken to benefit a second party, there is also room for greater tolerability.³³

How far this latter assertion should be taken and when it should even be mandatory, however, is subject to debate.

28. See *Shabbat* 129b, *Yevamot* 12b, *Niddah* 31a.

29. *Pesachim* 8b.

30. *Ibid.*

31. See for example *Achiezer*, *Even Haezer* 1:23, *Yabia Omer* vol.6 *Yoreh Deah* 13:13, *Iggerot Moshe Choshen Mishpat* II:76, *Tzitz Eliezer chelek* 9, 17:2:9. See also the very thorough article on "Taking Risks" by Rabbi Dovid Cohen in *The Journal of Halacha and Contemporary Society* 33:37 for an extensive discussion of these issues.

32. *Bava Metziah* 112a. See also *Teshuvot Nodah BeYehuda*, *Mahadura Tinyanah*, *Yoreh Deah* # 10, where he justifies accepting the dangers involved in hunting wild animals if necessary for one's livelihood.

33. See note 31 above. See also *Tzitz Eliezer chelek* 9: 51 and 45:9, and *Iggerot Moshe Y.D.* II 174:4.

The Talmud *Yerushalmi*³⁴ describes the great Tannah Resh Lakish, risking his own life to save Rav Ami. Rav Yosef Karo³⁵ justifies Resh Lakish's actions on the basis of there being a clear-cut threat to Rav Ami's life versus only a doubtful risk to Resh Lakish. One early authority, the Radvaz, accepted the implications of Resh Lakish's courageous actions as mandating such behavior under similar circumstances.³⁶ However, most *Rishonim* did not consider this case normative in their writings, nor did the Rambam or Rav Karo himself record it in their respective codes.³⁷

Nevertheless, despite the absence of any halachic **obligation** to endanger oneself in order to save another, it may still be permitted. Rabbi Moshe Feinstein, for example, while arguing strongly that there could never be an **obligation** to risk one's life, did feel that as long as there was not a definite threat to life, a person is **permitted** to take risks, in order to save another person.³⁸

34. *Nedarim* 80b.

35. Commentary on the *Tur* 426.

36. *Teshuvot Radvaz* brought in *Pitchei Teshuva, Yoreh Deah* 157:15. It is important to note that the Radvaz himself limited the obligation to cases of small risk of death, which he defined as less than 50%. See also *Nefesh Harav* (pp.166-167) where Rabbi Herschel Schachter describes Rav Haim Soloveitchik's opinion that in doubtful risk versus definitive situations, a person is **obligated** to risk his life to save others.

37. As a possible explanation for its lack of normative acceptance, there is another opinion in the Babylonian Talmud cited in the name of the Netziv that is suggested as contradicting the *Yerushalmi*'s opinion. See also *Pitchei Teshuva Choshen Mishpat* 426:2. See also the full discussion of this issue in the article by Rabbi Dovid Cohen noted above (n. 31).

38. *Iggerot Moshe Y.D. II* 174:4.

Based on this conclusion, one might suppose that an ethical, caring mother not only **may**, but perhaps **should**, willingly accept small risks of bodily injury for a perceived benefit to her child. This reasoning however, may be flawed in our context of mother and yet-to-be-born child. Until now we have been discussing one person accepting a risk for a "*nefesh gemurah*", another comparable individual of full human status. However, a fetus is not considered a *nefesh gemurah* in halacha until the birth process has commenced.³⁹ There are many talmudic references supporting this fact⁴⁰ and it has also been confirmed by rulings in both Rambam and *Shulchan Aruch*.⁴¹ For this reason, any conclusions noted above on the obligation or permissibility of an individual to risk his or her life for another already born person, may not apply at all in the case of a fetus. To make that determination more accurately, a more precise definition of the status of a fetus is mandatory.

Greater understanding of the halachic status of a fetus can be garnered from halachic attitudes towards abortion. Despite the indisputable "less than full person" status of a fetus noted above, it is well known that except in certain extreme cases, halacha regards abortion as a severe moral

39. Rabbi J. David Bleich (*Contemporary Halakhic Problems* vol. I chapter XV p.347) defines the moment of birth as "the emergence from the womb of the forehead or the greater part thereof." He cites *Yoreh Deah* 194:10, *Shach* (26) and *Sidrei Taharah* (194:10) among the sources for this definition.

40. *Oholot* 7:6, *Sanhedrin* 72b, *Trumot* 8:12, *Archin* 1:4 and *Rashi Sanhedrin* 72b. See also *Tzitz Eliezer chelek* 7:51, *perek* 3 and Dr. Fred Rosner, *Modern Medicine and Jewish Ethics* pp.136-139, particularly footnote 16.

41. Rambam *Hilchot Chovel Umazik* 4:1, *Shulchan Aruch Choshen Mishpat* 423:1.

offense, albeit less severe than actual murder. This implies that although not a person in the fullest sense, a fetus does attain a standing that minimally guarantees it a right of protection from "unprovoked"⁴² harm. Moreover, it also indicates that the unborn child's mother and society at large have a moral responsibility to protect its well being.⁴³ This view is reinforced by the generally acknowledged permissibility for a Jew to desecrate the Sabbath in order to save the fetus' life.⁴⁴ Therefore, as Rabbi Issur Yehuda Unterman phrased it, at the very least, the fetus is considered a "safek nefesh".⁴⁵

However, whether this "doubtful person" status is sufficient to warrant maternal risk taking is far less obvious. Certainly, as was concluded for an already born individual, there can be no "moral obligation" for her to do so, even if the three criteria noted by the secular ethicists above are met. Although it is tempting to learn permissibility of taking risks from the permissibility of Sabbath desecration, one must always be mindful of the general rule that "*chamurah sacanta meisura*" (danger is considered more severe than a prohibition).⁴⁶ Thus one

42. When the fetus is viewed as a *rodef* (an aggressor pursuing the life of the mother) it is an entirely different story. Based on the Mishnah in *Oholot* (7:6) that mandates embryotomy in order to save the mother and the Gemara in *Sanhedrin* 72b (that describes the fetus as a *rodef* whenever the mother's life is at stake) most consider it mandatory to sacrifice the fetus in order to save the mother.

43. See Rosner, *ibid*, pp. 141-143, for many potential sources for this fetal right to life. See also *Teshuvot Tzofnat Pane'ach* part 1 no.59.

44. Ramban, *Nidah* 44b.

45. Rosner, *ibid*. p.142.

46. *Chulin* 10a.

cannot necessarily draw conclusions from the overriding of prohibitions even as serious as Sabbath desecration, when the alternative is jeopardizing life and limb. Therefore the question remains should – or even may – a woman enter a hazardous situation for the purpose of benefiting her unborn child?

Further insight may be derived from determining the specific prohibition that is involved in cases of abortion. Opinions range from actual murder⁴⁷ to only a rabbinic transgression.⁴⁸ In *Tzitz Eliezer*, Rabbi Eliezer Waldenberg presents the various views among the *Acharonim* on this issue.⁴⁹ In his discussion of a possible halachic ramification between the various positions, Rabbi Waldenberg suggests a difficult case that in principle is similar to ours. The specific issue was whether a woman diagnosed with cancer would be allowed to forgo her treatments (thereby risking her life) for the benefit of the fetus. Rabbi Waldenberg concluded that those who considered abortion to be in the general category of murder (implying therefore near full-person status to the fetus) would allow at least passively⁵⁰ for a woman to accept the personal risk to save the fetus. However, those who considered abortion to be prohibited

47. The novel opinion of Rav Eliahu Mizrahi in his commentary to Exodus 21:12 cited by Rabbi Bleich, op cit, p.331.

48. For example the opinion of Rabbeinu Nissim according to Rav Chaim Ozer Grodzinsky and Rav Eliezer Waldenberg, among others also cited by Rabbi Bleich p.332.

49. *Tzitz Eliezer chelek 8:51 perek 3.*

50. Whether or not active risk taking as occurs in our discussion would also be allowed is unclear from Rav Waldenberg's case. However, Rav Shlomo Zalman Auerbach is cited in a footnote in *Shmirat Shabbat Kehilchata* (perek 36 n 4) as permitting a women to undergo a c-section (despite its inherent risks) even on Shabbat in order to save the life of a fetus.

by the Torah, but not at all in the category of murder,⁵¹ or as only a rabbinic prohibition, may possibly forbid it.

Of course, there is an important distinction that needs to be made between that case and ours before drawing final conclusions. In the case of the woman with cancer, there is presumably a definite risk to life in her refusing her chemotherapy or surgery. In contrast, in most fetal interventions the maternal risks are far less severe or certain.⁵² Obviously, the degree of risk to the mother involved in each case must also be considered in making a final decision.

Finally, in contrast to the approach outlined above for Rav Waldenberg, there is room to suggest that even the most permissive views on abortion (i.e. those implying the least "person" status to the fetus) would nevertheless allow maternal risk taking in order to preserve the fetus. In other words, it is possible to analyze the status of the fetus relative to therapeutic intervention completely independently from its status relative to acts of termination. When contemplating abortion (as for example in order to preserve the life of the mother) one may view the fetus as no more than what its current status qualifies it to be; i.e., merely *yerech imo* (an organic limb of the mother).⁵³ In contrast, when considering preservation of the fetus through therapeutic intervention, the focus may shift to its future status as a viable human being. Anticipation of that future attainment may warrant greater consideration for risk taking on its behalf despite its current limited person

51. One alternative biblical prohibition being *zera levatala*.

52. Michael R. Harrison, *The Unborn Patient: The Art and Science of Fetal Therapy*. W.B. Saunders, 2001, pp.48-50.

53. *Sanhedrin* 80b.

status. Rabbi Unterman employed precisely that reasoning in explaining the rational for allowing Sabbath desecration in order to save the life of a fetus.⁵⁴

Prioritization Of Resources for Medical Research

Ethics committees have frequently pondered the justifiability of funding research for rare conditions, at the expense of those affecting larger numbers of people. It is reasonable that societal decisions be based solely on societal needs. Thus, governmental support for research obviously should emphasize areas that stand to benefit society the most. Not surprisingly therefore, the bio-ethical committee members quoted above concluded that the funding of medical research be considered in the context of societal needs alone.

Differentiation between the responsibility of societal institutions and private individuals in allocating their resources was not specifically addressed. Presumably, this was because of the generally accepted democratic notion that private individuals may do with their own money as they see fit. Nevertheless, one might assume that just as described above for institutions, all individuals should feel morally compelled to direct their limited means towards research related to only the most prevalent conditions. From a purely ethical framework, this might even be true when the less common conditions are more personally relevant

54. *Shevet me-Yehudah*, I, 9f. See also Rabbi Bleich, "Abortion in Halachic literature" in *Jewish Bioethics*. Rabbi Bleich notes that the idea that even theoretical, future status holds halachic weight is clearly evidenced in one reason the Talmud gives for allowing Sabbath violation to preserve a life. Specifically, the notion that it is "better to violate a single Sabbath in order to preserve many Sabbaths," is based on similar reasoning (*Shabbat* 151b).

to the given individual in question.

The Jewish Response

In his commentary on the Mishnah,⁵⁵ the Rambam records that the biblical verse “*Vehashevota Lo*”⁵⁶ (“and you shall return to him”) commands all of us to heal the afflicted either by direct intervention, through the offering of our wisdom and guidance, or through financial assistance. Obviously, for many individuals outside the medical community, this obligation can only be fulfilled through charitable donations.

In his response to a question regarding the significance of donating to hospitals, Rabbi Eliezer Waldenberg emphasized the unique status of charity designated specifically for health related causes.⁵⁷ Rabbi Waldenberg focused on several sources that considered donations to hospitals among the highest forms of charity because of the added accomplishment of saving lives.⁵⁸ Based on our original contention that continued progress in fighting and preventing disease is our ultimate aspiration, the support for medical research and treatment innovation should clearly be placed in the same elevated category. Does halacha mandate or even encourage us to direct these charitable donations to any particular medical focus?

At first glance, when it comes to giving charity, there appears to be no halachic moral drive pressuring individuals to forgo their personal preferences for the sake of society at

55. *Nedarim perek 4*; see also *Hilchot Rozeah 1:14* and *Shulchan Aruch Choshen Mishpat 426* as cited in *Tzitz Eliezer chelek 15:8,2*.

56. Deuteronomy 22:3.

57. *Tzitz Eliezer chelek 15:8,2*.

58. *Ibid.*

large. In fact, one is bidden to do almost the exact opposite. There is strong halachic backing for the idea that an individual is obligated to fund first and foremost, those issues that relate most closely to himself or to his own family. The *Tur*, in the name of Rav Saadia Gaon, states clearly that a person is obligated to assure his own sustenance first before seeing to the needs of others.⁵⁹ Moreover, the Rambam⁶⁰, *Shulchan Aruch*⁶¹ and Ramo⁶² (based on a number of biblical⁶³ and talmudic⁶⁴ sources) all describe a similar hierarchy for general acts of charity:

*Sustaining one's father and mother comes before his children, and the children before his brothers, and they before other relatives. Relatives come before one's neighbors, the neighbors before other residents of the city, and residents of the same city before those of another city.*⁶⁵

Thus it would seem that in halacha, charity certainly does begin at home.

However, further scrutiny in the *Shulchan Aruch* reveals an important distinction in this regard between public and private allocations, similar to that implied above by the secular bio-ethicists. There it states that once a person has

59. *Tur Yoreh Deah siman* 251.

60. Rambam *Hilchot Tzedaka* perek 10.

61. *Yoreh Deah* 251:3.

62. *Ibid.*

63. For example, Deuteronomy 15:7, "ki yehiyeh becha evyon meechad achicha beechad shaarecha etc." See comments of Rashi and *Sifrei* on that verse.

64. *Sifrei* on that verse and *Tanah Debei Eliyahu* perek 27; see also *Bava Metziah* perek 5.

65. Ramo, Y.D. 251:3.

given his money to the community chest without specific stipulation as to where the funds should go, neither he, nor his inheritors have any right to do so. Instead, the community or its representative must now do "what is good in the eyes of God and man."⁶⁶

Rav Moshe Feinstein highlighted and explained this dichotomy in response to a question from a pair of brothers who wanted to bestow all the money they had set aside for charity to their younger brother.⁶⁷ Rav Feinstein compared an individual's right to allocate his own funds according to his own personal preference; to the *tovat hanaah* ("right of benefit") an individual has in relation to giving gifts to a *Kohen*. In that context he pointed out, one may give to the *Kohen* of his choice, disregarding any relative greater needs of other *Kohanim*. In contrast, the *Gabbai* (official) over donations that belong to the entire community, where no individual *Tovat Hanaah* exists, must do what is "right by man and God". This, Rav Feinstein explained, entails giving first to those who need it most. In the event that all potential recipients are considered equal in degree of need, the charity allotments should then be given to all in equal amounts.

Although this halachic split between institutional and private responsibility appears to be quite similar to that alluded to above in general society, two significant differences should be emphasized. First, to the secular ethicist, although a private person should follow the ethical guidelines establishing the priority of giving to prevalent causes, he may choose to give to whomever he pleases. In halacha, as

66. Y.D. 251: 5 "mi shenatan mammon lagabbaim lezedaka ein lo velo le yorshav shum koach bahem, vehakahal yeasu hatov beene elokim veadam."

67. *Iggerot Moshe* Y.D. 144.

we saw, an individual should secure his personal needs first. Furthermore, Rav Feinstein adds that if a person has the means to support both his preferred charity as well as other more needy causes he is legally bound to contribute to each.⁶⁸ Rav Feinstein did not base this conclusion on a subjective sense of fairness, but rather on talmudic statements specifically denigrating those who give all their charity to a single poor person.⁶⁹ As a guideline, Rav Feinstein cites the suggestion of the *Trumat Hadeshen* that at the point the preferred needy individual gets at least a "*Matanah Chashuva*" ("meaningful gift") even if he still needs more, one should nevertheless give to others in need instead.

Assuming that one may extrapolate from Rav Feinstein's comments on allocation of charity to the poor, to our context of funding medical research, we could suggest the following three-tiered approach: First, governmental grants and communal distributions should surely be channeled towards those medical problems affecting the greatest number of people. In contrast, private individuals, not only may, but rather should, allocate their funds to medical causes affecting themselves and their families most. However, once a *Matanah chashuva* has been given, further charity should be directed towards other worthy causes rather than focus all of one's resources on a single personally relevant project.

Demanding and Withholding Unproven Interventions in Desperate Cases

Currently, there is a movement in the bio-ethics

68. See there Rav Moshe's reference to Rabbi Akiva Eger's gloss in *Y.D.* 251.

69. For example Talmud *Eruvin* 63: "*kol noten matnotav lekohen echad mevi raav laolam etc.*"

community to require that all unproven fetal interventions participate in organized protocols as part of regulated clinical trials.⁷⁰ Off protocol use of experimental therapies generates ethical problems for both the patient and the health care provider.

The first issue that needs to be considered is, who has the right to decide the fate of the unborn child who can obviously not make the decision for itself? Should it be the parents, or the physician who is theoretically better informed of the relevant medical considerations? Alternatively, perhaps an objective third party acting as society's representative is most appropriate when an individual cannot speak for himself?

Once the decision maker has been decided, from the perspective of the patient (fetal or otherwise) the issue seems fairly straightforward. Is it morally acceptable for an otherwise terminally ill patient (or in our case for his advocate) to seek out high-risk interventions, despite the absence of data assuring safety or efficacy? Should the patient be allowed to risk an earlier demise than expected by natural history, in the hopes of achieving long-term benefits? This is a fairly old and extensively discussed bioethics issue.

From the perspective of the physician the dilemma is far more complex. The ethical considerations no longer relate to simple, personal risk/benefit comparisons. Instead, medical professionals must make the painful decision between the immediate interests of an individual patient standing before them, and the projected long-term interests of future candidates for a given promising treatment. It is

70. Anne D. Lyerly et al, "Toward the ethical evaluation and use of maternal-fetal surgery", *Obst and Gyn*, 2001,98:689-697.

often difficult for affected families to appreciate the necessity for upholding strict experimental protocols that may exclude their relatives from consideration. This becomes especially trying when the family realizes that no other hope for their loved one exists. Yet, objective assessment of this issue seems to bear out the legitimacy of that seemingly callous approach.

For some, the issue warrants no further discussion; "surgeons do not have an obligation to perform unproved procedures. Rather, they have an obligation to promote the responsible use of these procedures, including the formal investigation of those that appear to be promising."⁷¹ Moreover, they argue, allowing off protocol access to experimental therapies "might reinforce a therapeutic misconception, in that patients might presume benefit if clinicians are willing to offer the innovative treatment outside an ongoing randomized trial."⁷² This, they contend, may then undermine the possibility of obtaining valid informed consent.

The Jewish Response: Who should decide?

The first issue – who has the right to decide the fate of the unborn child – raises an additional consideration from the halachic perspective. Assuming the right to decide will go to the family, should it be the parents together, or perhaps the mother over the father, as the fetus is considered *yerech imo*? The answer no doubt revolves around how far we take the expression "*ubar yerech imo*" ("the fetus is a limb of its mother"). At one extreme, if we view the fetus as a literal organ or limb of the mother, she should obviously

71. Ibid.

72. Ibid.

have the greatest say about its ultimate fate. Perhaps, Rav Chaim Ozer Grodzinsky implies this extreme position in his discussion of the permissibility of performing an abortion in order to save the life of the mother, irrespective of the source of danger to her (i.e. when the fetus is not necessarily viewed as a *rodef* (pursuer).⁷³ Rav Chaim Ozer suggests that surely the abortion is permitted since *ubar yerech imo*, and one may always sacrifice one's own limb in order to save one's own life.⁷⁴ In contrast, Rav Yechiel Yaakov Weinberg is cited as objecting to this approach, based on a different understanding of *ubar yerech imo*. Noting that *Tosafot (Sanhedrin 80b)* did not consider a fetus a *terefah* (terminally ill being) just because its mother happened to be one, Rav Weinberg concludes that a fetus must have a degree of independent life status that limits its literal rendering as a mere limb of the mother.⁷⁵

Assuming that issues of *ubar yerech imo* are not relevant, we are left with the general question as to what the parents' role should be in the medical decision-making process for their unborn child. Clearly, the same problem arises in cases of already born children as well. In general, parents are considered the *Apotroposim Tiviim* (natural caretakers) of their own children with precedence over all others in decisions affecting their well being.⁷⁶ However, does that include going against a physician's expert medical opinion? In a *shiur* delivered at the Albert Einstein Medical College in 1988, Rav Herschel Schachter⁷⁷ was asked a similar

73. *Achiezer* III, no. 72.

74. See related discussion in Bleich op cit. p.151.

75. *Seridei Eish* III, 344. See related discussion by Rabbi Bleich, op cit. pp.151-152.

76. *Encyclopedia Hilchatit Refuit: Haskama MiDaat* pp. 40-42.

77. Oral communication from a participant in the *shiur*.

question. In response, Rav Schachter noted Rav Dovid Zvi Hoffman's⁷⁸ answer to a question regarding a physician's obligation to perform what he considered necessary surgery against the wishes of a child's parents. Rav Hoffman maintained that once the physicians involved recommended surgery to save the child's life, the opinion of the father and mother became inconsequential. As support for this, Rav Hoffman cited the statement in the *Shulchan Aruch Yoreh Deah* (*siman* 336) that a physician who disregards his obligation to heal is guilty of murder. Nowhere in the Torah, Rav Hoffman added, do we find that parents have a right to endanger the lives of their children.

Despite the apparent cogency of Rav Hoffman's remarks in the context of an absolutely indicated medical procedure, this may be less clear cut in less guaranteed medical interventions. For example, one could easily understand the hesitancy of parents to subject a child to an unproven procedure that might result in earlier than expected demise. In the same response, Rav Hoffman addresses this more complicated situation as well. Interestingly, Rav Hoffman does not view this situation much differently than the other, again maintaining a negligible role for the mother and father. Apparently, assuming that the doctor (who Rav Hoffman insisted must solicit the assistance of other expert opinions to render his final decision) concludes that the operation is indicated, no further parental consent would be required for what has been medically decided to be in the best interest of the patient.

Deciding on the Best Interest of the Patient

How then do we decide in our case what is in the best

78. *Melamed Lehoil* 104.

interest of the potentially terminally-ill fetal patient? In halachic discourse this dilemma is generally referred to as risking *chayei sha'ah* ("temporary life") for *chayei olam* ("permanent life"). This topic has been addressed extensively in the classic rabbinic responsa literature⁷⁹ and reviewed in several contemporary English publications.⁸⁰ The reader is referred to these references for a detailed analysis of the primary sources and definitions of the relevant parameters. In short, based on certain talmudic discussions,⁸¹ most rabbinic authorities have concluded that in general, one may risk *chayei sha'ah* for even a small chance at *chayei olam*. However, there are differences of opinion, as to how great a risk one is permitted to take. For example Rav Moshe Feinstein wrote that one could not risk his *chayei sha'ah* unless that risk is less than 50%.⁸² Rav Chaim Ozer Grodzinsky however, disagreed and permitted one to risk *chayei sha'ah* for *chayei olam* irrespective of the degree of risk involved.⁸³ Rav Shlomo

79. See, for example, *Shvut Yaakov chelek 3 sheala 75*; *Shut Achiezer Y.D. siman 17*; *Iggerot Moshe III YD 36*; *Melamed Lehoil II YD 104*; *Beit Meir YD 339:1*.

80. See article by Rabbi Dovid Cohen, "Taking Risks", op cit; also Rabbi Bleich, op cit, in his article on "Hazardous Medical Procedures" pp. 80-84.

81. For example *Avodah Zarah 27b*.

82. Y.D. III 36, quoting the *Mishnat Hachachamim* as maintaining this approach. See also *Tzitz Eliezer chelek 10:25*, chap.5, sec 5, who agrees. However, contrast Rav Moshe's opinion here with his statements in Y.D. II no. 59, where he rules that in cases where death is imminent even *safek rakhok* is enough to warrant taking the risk for *chayei olam* (i.e. even if chances for a cure are less than 50%). Rabbi Bleich (op cit p.83) also cites Rabbi Unterman who allowed risk taking for *chayei olam* even when the risk of losing *chayei sha'ah* was greater than 50%.

83. In the end, while maintaining his own position, Rav Moshe

Zalman Auerbach added that because we are dealing with issues of *pikuach nefesh*, once it is determined that the risk is halachically permitted, it may automatically become halachically mandatory.⁸⁴ Rav Feinstein dissented on that last point, maintaining that one is only **obligated** to risk *chayei sha'ah* if the chances of attaining *chayei olam* are greater than 50%.

Although none of these discussions involved a fetal patient per se, it is logical to assume that in reference to the fetus alone (i.e. isolated from the additional maternal risk involved) similar reasoning and identical conclusions would apply. The fact that a fetus might have less than full person status should not be relevant when deciding between relative risks to a given individual.

The Physician's Dilemma

As noted above, the ethical dilemma for the physician who must withhold or permit improved but unproved interventions from desperate families is arguably the most challenging. Given the validity and seriousness of the societal concerns noted above, it is difficult to justify a general medical or governmental policy mandating off-protocol therapy, even when alternative treatment options do not exist. However, as was suggested earlier (in the section on prioritization of resources for medical research) perhaps an individual medical investigator or private group should have the right on a case-by-case basis to offer the experimental therapy and ignore any greater societal ramifications.

nevertheless adds that in light of Rav Chaim Ozer's weighty opinion, none can object to those who follow it. See also *Bait Dovid*, II, no. 340 who permits intervention when even "one chance in a thousand exists for cure and 999 for death of the patient".

As we saw above in our discussion of prioritization of resources for medical research, at times halacha recognizes a dichotomy between the responsibility of communal organizations and that of an individual. Does such a societal versus individual split exist in halacha even outside the framework of donations to charity? Rabbi Moshe Tendler suggested just such a notion in an article written in 1984.⁸⁵ To support his contention, Rabbi Tendler cited a Mishnah from the tractate *Gittin* (45a) that states that captives should not be redeemed for more than their value to discourage future bandits from similar crimes.⁸⁶ Yet, one *Tannah*, Levi Ben Darga, ransomed his daughter for a very large sum despite the possible negative ramifications. To Rabbi Tendler, this and the Gemara's subsequent discussion of the issue, imply that a private individual need not necessarily concern himself with present or future impact on society and instead may focus on his own personal needs. Therefore, based on this approach, a family could legitimately lobby hard for off-protocol use of a promising therapy, without feeling guilty or being considered selfish and shortsighted. Perhaps, one could even argue that a sympathetic private physician may consider his immediate patient's needs his personal concern and ethically chose to comply with the family's wishes.⁸⁷

84. *Nishmat Avraham* II, 155, note 29, cited by Rabbi Dovid Cohen, *op cit.*

85. Moshe D. Tendler, "Rabbinic comment: Triage of Resources," *Mount Sinai Journal of Medicine* 51 1984, 106-109, as discussed at length by Dr. Fred Rosner in *Modern Medicine and Jewish Ethics: "The allocation of scarce medical resources"*, pp. 386-387.

86. An alternative reason for discouraging the payment of large ransom demands advanced by the Gemara was to avoid overburdening the community financially.

87. That does not necessarily follow from the talmudic case cited.

Intervening for Non-Lethal Conditions

A relatively early reference in the area of fetal surgery (1992) outlined several requirements before even considering implementing in-utero therapy.⁸⁸ One criterion stated was that intervention was indicated only for conditions that would otherwise be lethal to the fetus despite optimal postnatal treatment. Since that time, the indications for fetal surgery have broadened to include clearly non-lethal but severely disabling conditions as well.⁸⁹ Some have even opened up the possibility of purely cosmetic indications such as cleft lip and cleft palate.⁹⁰

Consideration of invasive intervention "merely" to avoid disability introduces several complex dilemmas. Some bio-ethicists have questioned the propriety of tolerating significant maternal and fetal risks for what they consider relatively limited fetal benefits.⁹¹ Others have also emphasized the negative implications such attempts project on individuals with a disability. For example, spina bifida is a serious birth defect potentially resulting in significant physical handicaps, but compatible with a normal life. Critics (particularly advocates for the disabled) insist that parents be informed that "carrying a child with spina bifida

activity is reserved for first degree relatives only.

88. R.W. Jennings et al. "Fetal Surgery". In: M.I. Evans, *Reproductive Risks and Prenatal Diagnosis*, Appleton & Lange, Norwalk, Connecticut, 1992, pp. 311-320. See also *Clinics in Perinatology* 1996, page 469: there it states that in-utero therapy should be considered for congenital anomalies only when "the natural history suggests that the anomalies are associated with significant morbidity and mortality."

89. Lyerly et al, op cit.

90. Ibid.

91. Ibid.

to term is a possible and acceptable option"⁹² and one need not, and perhaps should not, intervene pre-natally at all.

The Jewish Response

What does the halacha have to say about risking the life of a fetus, as well as the additional dangers to the mother, merely to avoid a disability? What about tolerating risk for cosmetic indications alone? Should the negative implications about the disabled be a consideration in this decision at all?

Taking risks for the sake of healing non-lethal conditions is discussed in several contemporary responsa.⁹³ Many authorities make note of a response written by Rav Yaakov Emden⁹⁴ where he appears to condemn those who seek or administer surgery for non-lethal, albeit very painful conditions such as gallstone removal. A translation of his exact language referring to those individuals states that they "do not act correctly" and therefore, it "may not be entirely permissible." The *Avnei Nezer*⁹⁵ is also cited as concurring with this general approach.⁹⁶

Nevertheless, several factors obviate the relevance of this stance to the current issue at hand. First, there are several significant early authorities who do not agree with it even in principle. For example, the *Meiri*⁹⁷ states that the

92. Ibid.

93. Rabbi J. David Bleich, op cit., section on "Plastic surgery", pp. 119-123, *Tzitz Eliezer* 10:25:17:1, and 15:37:2, *Mor U'Kezia* O.H. 338, *Iggerot Moshe Choshen Mishpat* 73:9.

94. *Mor U'Kezia* (O.H. 338).

95. *Yoreh Deah* 321.

96. As cited by Rabbi Bleich, op cit, p.123.

97. *Sanhedrin* 84b.

prohibition of wounding is lifted for painful indications alone. Similarly, the Ramo⁹⁸ as well states that a son may therapeutically wound his father (when no other physician is available) for the sole reason of relieving pain. The implication for both is that the risk inherent to the procedure is not a factor. Furthermore, it may be that Rav Emden and the *Avnei Nezer* were influenced by the state of surgical safety in their time and hence considered the risk too great to accept for non-lethal conditions. In our time, however, most surgical procedures, despite carrying some genuine risk especially under general anesthesia, are considered relatively safe. Rav Moshe Feinstein, for example, permitted surgery to relieve pain in the absence of a life-threatening illness.⁹⁹ Furthermore, minimally, based on "*Kavan dedashu bei rabim, shomer petaim Hashem*" as described above, most authorities today consider surgical procedures for almost any appropriate medical indication as permissible despite the theoretical risks involved.¹⁰⁰

In a response written in 1972, Rav Moshe Feinstein prohibited "dangerous" surgery that was not absolutely necessary as a life-saving measure but rather solely for the purpose of allowing for more normal functioning.¹⁰¹ At first

98. *Y.D.* 241:13.

99. *Iggerot Moshe Y.D.* II 36.

100. Rav Moshe Feinstein, *ibid*; Rav Shlomo Zalman Auerbach quoted in *Nishmat Avraham Y.D.* 2(2) 155. See also other source: brought by Rabbi Bleich, *op cit.*, section on "Plastic Surgery" p.122 footnote 16c. See Rav Waldenberg, *op cit.* for a dissenting view on this issue in relation to plastic surgery.

101. *Iggerot Moshe Y.D.* III:36. In an oral communication Rabbi Moshe Tendler pointed out that in the case of severe pain taking even a high risk procedure should be allowed similar to allowing risking *chayeinu sha'ah* for *chayeinu olam*. An interesting source Rabbi Tendler suggests for this idea is the story of Rebbe Chaninah in the

glance, this appears to contradict his position quoted above that pain alone was a valid indication for invasive intervention. However, here also reconciliation of the difficulty may relate to the relative risk involved at a particular time for a given procedure. Probably, had the response been written at a later time, when most routine surgery carried minimal risk, even improved daily functioning would be considered a valid indication for the surgery.

Based on the preceding discussion, one may safely conclude that non-life threatening conditions should not automatically be dropped from consideration just because the child born with a disability can live a normal lifespan. A life limited by major paralysis and lack of normal excretory function can certainly be regarded as one filled with pain. Even cosmetic indications alone should be considered as well, since many authorities note that psychological and emotional pain can cause as much and at times even greater suffering than physical pain.¹⁰² Obviously every ruling must be decided on a case-by-case basis, where the relative risk is determined against the degree of benefit. Furthermore, in our context the risk to both fetus and mother must be factored in and weighed against the potential benefits to the fetus.

Finally, we opened this analysis noting the firm commitment of Judaism to *Tikun Olam*. God has

Gemara *Avoda Zara*. There, a Jew was permitted to remove the obstacle that was preventing the death of an individual with severe intractable pain, thereby allowing death to occur passively. If passive euthanasia was allowed for the purpose of severe pain relief, then certainly merely risking a hazardous procedure should be allowed as well. However, one may easily be able to differentiate between the permissibility of active versus passive risk taking in this regard.

providentially given man the wonderful opportunity to remedy the imperfections left in this world by Divine design. It is our responsibility to achieve that goal to the highest order attainable. Fetal surgery and other in-utero interventions currently offer the greatest prospect for medicine to prevent otherwise major disabilities associated with significant morbidity. These options may therefore be pursued whenever the benefits outweigh the risks. In no way does this pursuit reflect negatively upon those who courageously battle congenital disabilities plaguing them on a daily basis. It merely reflects man's "majestic" attempt to enhance life and minimize human suffering.

102. Rabbi Yechiel Yaakov Breisch, *Chelkat Yaakov* III no.11; Rabbi Menashe Klein, *Mishneh Halachot* IV, nos.246 and 247. See also Rabbi Bleich, op cit, "Plastic Surgery" pp.121-122, for further discussion of this issue.

The Breakaway Minyan

Steven Oppenheimer, D.D.S.

One of the distinguishing hallmarks of a Jewish community is the *Mikdash Me'at*, the community synagogue. Jews are not an island unto themselves, but must be part of a community. Rabbi Shamshon Raphael Hirsch explained that an individual does not have the ability to preserve the Torah and its commandments in isolation. It is only by associating with a community that we can build a *bayit ne'emani le'Torah*, a proper Torah home, and ensure its transmission to future generations.¹

The synagogue, or *shul*, serves as a place where Jews can congregate to pray, learn Torah and discuss community needs. The community synagogue serves the community by providing for the religious, educational, financial and social welfare needs of the Jews in that community. It also serves as a place for community involvement and activism.

While it is not a new phenomenon, it seems that lately, there has been a proliferation of competing smaller synagogues in the cities and towns of America. Some have referred to this as the *shtibelization* of America.² People are even forming *minyanim* in their homes in spite of the fact that there is a *shul* in their neighborhood. When people are unhappy with the existing synagogue, they leave and start a new one. Is this a positive phenomenon? Does it weaken

1. *Moriah*, Kislev, 5740, page 18; *Shemesh Marpei*, Mesorah Publications, 1993, page 114.

2. *The New York Times*, August 5, 1986, Vol. 135, page B1.

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the community and lead to polarization? Above all, is it halachically appropriate?

Breaking Away

Radvaz was asked if it was proper for a group of Spanish Jews who had been praying together with a group of *Ma'araviyim* (Western Jews, probably referring to Moroccan Jews) to break away and start their own congregation.³ Apparently, there was tension between them and they wanted to have their own *shul*.⁴

Radvaz observes that proper equanimity and decorum constitute fundamental requirements for a congregation to pray together. A person may not pray in a congregation where he is distracted by quarreling, hatred or anger. Jews who pray together congenially and harmoniously achieve a special *sod ha'ibbur*, spiritual unity, that is a prerequisite for collective prayer.

Chazal derive from the verse in *Mishle*,⁵ "berov am hadrat melech," "the King's glory is in the greatness of the assembly", that it is a greater glorification of *Hashem* when the largest number of people worship together. Radvaz explains that *Chazal* were referring to the situation where people congregate in unity. Strife and disharmony do not contribute to the glory of the King.

Radvaz compares the decision where to pray to the decision where to learn Torah: Just as *Chazal* have said "Ain adam lomeid Torah ella be'makom she'libo chafetz,"⁶ "a person only learns Torah where his heart desires", so

3. Rabbi David ben Solomon ibn Avi Zimra was born in Spain in 1479 and died in Israel in 1573.

4. *Responsa Radvaz*, Vol. 3, *siman* 472.

5. 14:28.

6. *Avodah Zarah*, 19a.

too "*Ain ra'uy le'adam she'yitpalel ella be'makom she'libo chafetz*", it is proper for a person to pray in a place where his heart desires.

If someone feels hatred or animosity toward the members of the congregation, he is not allowed to pray together with them. Radvaz, however, points out that people should strive to *daven* together in unity and harmony. "Do not misinterpret my words," declares Radvaz, "and say that I support breaking away from a *shul*." Leaving a *shul* is not a good thing. However, if the choice is between continuous quarreling and fighting, or leaving, it is better to choose the lesser of two evils and *daven* someplace else. Radvaz prefers, however, that people make the effort to join together and pray in harmony.⁷

Machloket Rishonim

Rivash contends that one cannot prevent individuals from establishing their own *shul*, because doing so would be tantamount to preventing them from doing a mitzvah.⁸ Ramo quotes the position of Rivash as the halacha.⁹ The *Pri Megadim* explains that it is a sin to prevent the establishment of a *shul*. However, if there is an existing *shul* and the reason for breaking away is not *le'shem shamayim*, you may prevent the establishment of the breakaway *shul*.¹⁰

After quoting Rivash, that anyone who prevents the

7. *Responsa Radvaz*, Vol. 3, *siman* 472.

8. *Responsa Rivash*, *siman* 253 and 331. Rabbi Isaac ben Sheshet Perfet was born in Barcelona in 1326, and died in Algiers in 1408.

9. *Shulchan Aruch*, *Ch. Mishpat*, 162:7.

10. *Aishel Avraham* 152:6

establishment of a new synagogue, even if there is an existing *shul*, prevents people from performing a mitzvah, *Magen Avraham* concludes with the position of Re'aim. Re'aim maintains that if the *shul* can accommodate everyone, it is prohibited to leave the *shul* and start a new one.¹¹ The *Mishnah Berurah* begins by quoting the position of Rivash but then qualifies it with the more stringent ruling brought by the *Magen Avraham* that it is forbidden to break away if the original *shul* can physically accommodate everyone. The *Mishnah Berurah* concludes with the admonition of Radvaz that we must strive to get along and pray in harmony, and only when there is constant fighting, are we compelled to make a choice between the lesser of two evils and allow separation.¹²

There is a *machloket* (dispute) between Rivash and Re'aim. Rivash holds that the building of a *shul* is a mitzvah in and of itself. Therefore, even if the synagogue can accommodate everyone, and despite the precept of *berov am hadrat melech*,¹³ one may not prevent individuals from building another synagogue. Conversely, Re'aim maintains that a synagogue serves as a "hachana" (preparation) for a mitzvah and as such, if the existing *shul* can accommodate everyone, it is prohibited to leave

11. *Orach Chaim*, 154:23.

12. *Mishnah Berurah*, 150:2. The *Mishnah Berurah* also points out that it is preferable to pray in synagogue with the larger congregation unless there is so much noise and disruption that it is impossible to hear the *davening* and the Torah *laining*, in which case one would even be permitted to pray with a *minyan* in a private home (90:28).

13. *Mishle*, 14:28. It is a greater glorification of *Hashem* when a large number of people perform a mitzvah together, than when each person performs the mitzvah individually. See, for example, *Berachot* 53a.

the *shul* because of *berov am hadrat melech*.¹⁴

Does the position of Rivash, that it is permitted to build another synagogue even when there is an existing *shul*, apply if the separation would harm the original *shul*? Maharam Shick rules that if breaking away would cause the original *shul* a financial loss, then even according to Rivash, it would be prohibited to break away and establish a new *shul*.¹⁵

Maharsham¹⁶ points out that Rivash allows the building of another *shul* even if there is an existing *shul*, while Re'aim disagrees with the position of Rivash. Therefore, since there is a *machloket* between them, Maharsham rules that we cannot prevent people from starting another *shul*, as long as their intentions are *le'shem shamayim*, for the sake of heaven.¹⁷ This would only apply if the establishment of the second *shul* would not disrupt the existing *shul*. Moreover, if the establishment of a second *shul* would disrupt the harmony of the community, it would be forbidden to open a second *shul*, and efforts should be made to exist in one *shul* harmoniously.¹⁸

The *Ketav Sofer* states that *davening* in a house does not have the same *kedusha* as a *shul*.¹⁹ The *Magen Avraham*

14. See *Mikdash Me'at*, by Rabbi Zalman Druck, Jerusalem, 5733 where he brings proofs for the different positions.

15. *Responsa Maharam Shick*, Ch. *Mishpat*, siman 24. See also *Shaarei Teshuva*, siman 150 and *Pachad Yitzchak*, oht 2.

16. Rabbi Shalom Mordechai ben Moshe Shwadron (1835-1911), Galicia, Poland.

17. *Responsa Maharsham*, 5:20.

18. *Responsa Maharsham*, 3:168.

19. *Responsa Ketav Sofer*, *Choshen Mishpat*, siman 39.

states that even though one could *daven* in his house, it is preferable to *daven* in *shul* because *berov am hadrat melech*.²⁰ The *Ketav Sofer* was asked to comment on a *shul* that had split into two because one group felt that the other was behaving improperly. The *Ketav Sofer* declared that it is preferable that people not split apart and form separate *minyanim*, but they should *daven* together because of *berov am hadrat melech*. It is only when there is dissension that does not allow them to pray with *kavana* (proper devotion) that they would be allowed to separate. Separating, however, is not the proper way to behave. The Jewish approach is not to have dissension and not to allow it to cause a split in the community. The only time separation might be acceptable would be for *devarim ha'omdim berumo shel olam*, matters of profound importance, concludes the *Ketav Sofer*.²¹ Rabbi Abraham Bornstein, the Sochachover Rav (1839-1910), also decried separating unless there was a very special reason that justified dividing a community, as it is written, "*berov am hadrat melech*."²²

A rabbi wrote to the Netziv asking if he should start a new *shul* in a community where there was an existing *shul*.²³ He supported his position by pointing out that according to the *Rivash* it was a mitzvah to start a *shul* and a sin to interfere with its establishment, so perhaps it would be a good idea for him to start the new *shul*. The Netziv responded that he found the rabbi's question extremely vexing. In response to the rabbi's quoting the

20. *Magen Avraham*, 90:15.

21. *Responsa Ketav Sofer, Choshen Mishpat*, siman 39.

22. *Responsa Avnei Nezer, Orach Chaim*, siman 36.

23. Rabbi Naphtali Tzvi Yehudah Berlin (Netziv) was born in Mir, Russia, in 1817, and died in Warsaw, Poland, in 1893.

position that it is a mitzvah to build *shuls*, the Netziv responds that *Magen Avraham* (154:23) takes the position that if the *shul* can physically accommodate everyone, it is forbidden to leave the *shul*. The Netziv likens this to an individual *bamah* (altar). [A *bamah* refers to any altar other than the altar of the *Mishkan* or *Beit HaMikdash*]. While it was a mitzvah to build a *bamah* during a brief period in Jewish history,²⁴ it is prohibited to do so now. So, too, leaving a *shul* where there isn't a great necessity constitutes a grave sin, says the Netziv. Ten people praying together do not compare to many people gathered together to praise *Hashem*. The words "ki tov" are not mentioned regarding the second day of creation because of the separation that occurred.²⁵ That illustrates how nefarious it is to separate from a *shul*. "While I am sure you can find points upon which to take issue with me", the Netziv tells the rabbi, "this is clearly a choice between a mitzvah and an *aveirah* and even if you feel that both sides have merit, *shev ve'al ta'aseh adif*, it is better to do nothing. In this case, however, the *aveirah* is evident."

The Netziv cautions that sometimes we act irresponsibly because our personal desires and agendas prompt us to justify our actions halachically, when in reality the agenda is improper. It is wrong to break away, start another *shul* and divide the community.²⁶

Ain Ma'avirin al HaMitzvot

Rabbi Ovadiah Yosef was asked, if there is a synagogue near you, may you go to a synagogue that is farther away?

24. See *Ran, Nedarim* 22a.

25. *Bereishit Rabbah*, chapter 4.

26. *Responsa Meishiv Davar*, 1:46.

Is this a violation of the principle, "*ain ma'avirin al ha'mitzvot*," we do not pass over the opportunity to perform mitzvot?²⁷ Rabbi Yosef asserts that it is permitted to go to the synagogue that you prefer, even if it means passing by a closer synagogue. It is not a violation of "*ain ma'avirin al ha'mitzvot*," and you also get a special reward for "*sechar pesi'ot*," walking a longer distance in the performance of a mitzvah. In addition, declares Rabbi Yosef, even if an individual usually attends a certain *shul*, he may elect to go to a different *shul* that is farther away as long as he has a good reason for doing so, and particularly if he feels there is *to'el ruchanit be'kach*, a spiritual justification for doing so.²⁸

Hasagat Gevul and Darkei Shalom

Rabbi Moshe Feinstein, z"l, was approached by the rabbi of a *shul* who complained that some of congregants had left to start another *shul* in the same neighborhood. The rabbi complained that their leaving caused him financial hardship. The congregants who started the new *shul* countered that the rabbi had changed the *nusach*(format) and some of the *nigunim* (melodies) in the prayer service. Furthermore, the rabbi had cursed, intimidated and denigrated them to the point that *davening* in the rabbi's *shul* was unbearable. To make matters worse, some of the other congregants had made disparaging remarks about

27. If one has the opportunity to perform a mitzvah, one should do so at the earliest opportunity. See, for example, *Pesachim*, 64b, *Yoma* 33a, 58b, 70a, *Megillah* 6b, *Menachot* 64b.

28. *Yechave Da'at*, 2:9. See also *Pitchei Teshuva*, *Yoreh De'ah*, 240:22 who maintains that you may attend the synagogue of your choice, even-against your mother's objection, if you feel you will be able to pray with more devotion.

their Rosh Yeshiva, and that was insufferable. On balance, they decided it would be better to leave and start their own *shul*. They claimed that they did not solicit any of the other members to leave and join their new *shul*. The *shul* rabbi responded that he felt he had a good relationship with all of the congregants and his comments were an attempt to preserve his reputation.²⁹

Rabbi Feinstein responded that it was improper for the congregants to start a new *shul* in the same neighborhood because that was a violation of *hasagat gevul*, interfering with the rabbi's livelihood. By leaving the synagogue and establishing another one, the departing congregants were harming the original *shul* and were causing a financial loss to the rabbi and his synagogue.

It appears from this responsum that the rabbi was the owner of the synagogue. Today, most *shuls* are not owned by the rabbi. The rabbi is employed by the synagogue. While it is true that if the synagogue suffers a financial loss, the rabbi as well as the other employees of the synagogue will also suffer financially, would it make a difference if the rabbi does not own the synagogue? Rabbi Ephraim Greenblatt asserts that it makes no difference: When the congregants leave the synagogue to form a new *minyan*, they cease to pay dues to the original synagogue. The synagogue will no longer have sufficient funds to pay the necessary salaries, and this is considered *hasagat gevul*, declares Rabbi Greenblatt. In these matters, he continues, one should be very careful not to malign the reputation of the rabbi and cause him embarrassment. By leaving the synagogue, you imply that there is something wrong with the rabbi and the synagogue, and proper Jews do not behave

29. *Iggerot Moshe, Choshen Mishpat*, 1:38.

in this fashion. Only *ba'alei machloket* (contentious individuals) would behave this way.³⁰

The Mishnah in *Gittin* (59a) states:

The following proclamations were declared by the Sages because they promote *darkei shalom* (harmony)....The *eruv* should always be placed in the same house, because this is one of the ways that promote *darkei shalom*.

The *Mishnah Berurah* cites Rashi and *Tosafot* in explaining our Mishnah.³¹ Rashi explains that we are concerned that if the bread of the *eruv* was always kept in a certain house, and now it is moved to another location, people may enter the house where the *eruv* had been kept, and, observing that it is no longer there, may suspect that people are carrying on Shabbat in the absence of a proper *eruv*. *Tosafot* offer another explanation: When people see that the *eruv* is no longer present in the house where it had been kept, they might suspect that the *ba'al habayit*, the owner of the house, could not be trusted and so the *eruv* was moved to a more secure home. In either case, people's reputations are being maligned and this can lead to *machloket*. Therefore, because of *darkei shalom*, the *Shulchan Aruch* informs us that it is forbidden to remove the *eruv* from its original location and place it in another house.³²

Rabbi Moshe Feinstein cites this halacha and declares that by leaving the *shul* and starting a new one, the departing congregants cast aspersions on the propriety of

30. Written communication. Rabbi Ephraim Greenblatt is a *talmid muvhak* of Rabbi Moshe Feinstein.

31. 366:27.

32. 366:3.

the rabbi and his *shul* and violate the principle of *darkei shalom*.³³ In this case, however, one might conjecture that *darkei shalom* might not apply since the intimidation and degradation suffered on the part of the departing congregants may be valid and just reasons for leaving.³⁴ Nevertheless, it is still prohibited to leave and start a new *shul*, declares Rabbi Feinstein, for it interferes with the rabbi's livelihood, and this is a violation of *hasagat gevul*.

In the final analysis, Rabbi Feinstein rules that although the separatist congregants subsequently disbanded their breakaway *shul*, they were still guilty of violating *darkei shalom*, having maligned the reputation of the rabbi and his synagogue by their leaving and attempting to form a new *shul*, and so they are required to pay monetary damages to the rabbi. Influencing others to leave a *shul* is not only a violation of *hasagat gevul*, it is also a violation of *lifnei iver*, placing a stumbling block before the blind, concludes Rabbi Feinstein.³⁵

Rabbi Feinstein was asked about the propriety of placing an Israeli and an American flag in a *shul*. Rabbi Feinstein concludes that there is no law that prohibits it, but that it

33. See *Gittin* 60a, *Maharik*, *shoresh* 113 and *Shulchan Aruch*, *Orach Chaim*, 153:17.

34. See *Magen Avraham*, 366:7 and *Pri Megadim*, 153:40.

35. *Iggerot Moshe*, *Choshen Mishpat*, 1:38. It seems from this responsum that the separatist congregants had a very strong case. They claimed that they were subjected to humiliation by the rabbi and their Rosh Yeshiva's reputation was besmirched. Yet Rabbi Moshe Feinstein did not find in their favor. It seems, perhaps, that some information may be missing from this responsum. Rabbi Hershel Schachter told me, however, that he knows of a rabbi who asked Rabbi Dovid Feinstein about this and was informed that there is no information missing from the responsum.

is totally inappropriate to do so. However, he continues, it is wrong for people to use the flag issue as an excuse to start a *minyan* someplace else. It is their evil inclination that motivates them to desire to leave the synagogue.³⁶

Rabbi Shamson Raphael Hirsch notes that sometimes a person may feel that his congregation is lax in a certain area of observance. While he may voice his feelings that improvements need to be made, leaving the congregation is not the proper way to act.³⁷

Solicitation of Congregants

Mabit³⁸ lived in Tzefat where the Sephardic community was so large that two Sephardic synagogues were established, Kahal HaGadol and Kahal Beit Ya'akov. Kahal HaGadol actively courted visitors to come to its *shul*, telling them that they were the more prestigious congregation. As a result, Kahal HaGadol received considerably more financial support from visitors than Kahal Beit Ya'akov. Mabit declared that it was wrong to entice people to come to Kahal Hagadol, and the congregation of Kahal HaGadol was guilty of *gezel*, stealing. We see from here that if actively soliciting members will hurt another congregation in the community, it is not permitted to engage in this type of activity.³⁹

36. *Iggerot Moshe, Orach Chaim*, 1:46.

37. *Moriah*, Kislev, 5740, page 18; *Shemesh Marpei*, Mesorah Publ.

38. Rabbi Moshe ben Joseph Trani (Mabit) was born in Salonika in 1500 and died in 1580. After Rabbi Yosef Caro's death, Mabit became the rabbi of the Tzefat community.

39. *Responsa Mabit*, 3:48.

Halachic Inquiries

1) Is it proper for a group of people to establish a regular Friday night and/or Shabbat afternoon *minyan* in someone's house even though there is a *shul* in the neighborhood?

Rabbi Ephraim Greenblatt comments that when the *shul* is far away and the walk to *shul* is too difficult, a *minyan* may be made close by.⁴⁰

Rabbi Moshe Sternbuch maintains that if the *minyan* did not exist, and people would otherwise go to *shul*, they are not permitted to have a *minyan* in someone's house. Only if the choice is to pray at home without a *minyan* or have a *minyan* in someone's house, may one have a *minyan* in someone's house.⁴¹

Rabbi Hershel Schachter says that it is improper to have a *minyan* in someone's house.⁴² The Talmud *Yerushalmi* explains that "dirshu Hashem behimatzo,"⁴³ seek Hashem where He may be found," refers to the *beit hakeneset*, the synagogue.⁴⁴ The Talmud *Bavli* informs us that "ein tefilah shel adam nishma'at ela bebeit hakeneset," a person's prayer is only heard if he recites it in a synagogue.⁴⁵ The sanctity of the locale augments the efficacy of the prayers, so that even an individual praying

40. Written communication. References to Rabbi Greenblatt are cited from written communication. Rabbi Ephraim Greenblatt observes that the issue of breakaway *minyanim* is one that is often motivated by personal agenda.

41. Verbal communication. All references to verbal communication are direct quotes from conversations with the *posek*.

42. Written communication.

43. *Yeshayahu*, 55:6.

44. *Berachot* 5a.

by himself should preferably pray in a synagogue.⁴⁶ The Talmud tells us that whoever has a synagogue in his neighborhood and does not attend services there, is considered a *shachen rah*, an evil neighbor, quotes Rabbi Schachter.⁴⁷

2) If some people are unhappy for whatever reason with the synagogue to which they belong, may they start another *shul*? May they be prevented from starting the breakaway *minyan*?

Rabbi Hershel Schachter, quoting the *Ketav Sofer*, asserts that it is forbidden to establish a new synagogue unless it is for "devarim ha'omdim be'rumo shel olam," matters of profound importance.⁴⁸ Rabbi Schachter explains that when the *Ketav Sofer* refers to *devarim ha'omdim be'rumo shel olam*, he is referring to a Reform synagogue. If a synagogue does not conduct itself according to halacha, people may leave and start a new *shul*.⁴⁹ We see that the reason for starting a new *shul* must be of fundamental importance.

The Netziv also forbade a *talmid chacham* from establishing a breakaway *shul*. Similarly, Rabbi Schachter

45. *Berachot* 6a. If a person prays at home, he cannot be sure that his prayers will be heard, whereas a prayer offered in a synagogue will certainly be heard (*Lechem Mishneh, Hilchot Tefillah*, 8:1)

46. *Orach Chaim*, 90:9 and *Mishnah Berurah*, 90:23.

47. *Berachot* 8a. The *Tzelach* allows that this may not apply if you pray with a *minyan* in your house. See, however, *Sha'arei Teshuva* (90:17) and *Mishnah Berurah* (90:38) who assert that you still have not satisfied the requirement to pray in a synagogue.

48. Written communication.

49. Verbal communication.

cites Rav Shamshon Raphael Hirsch, who emphasizes the importance of being part of the congregation and not separating from it. Rabbi Schachter quotes the *Magen Avraham* that as long as the original synagogue is physically large enough, it is forbidden to break away. So too, continues Rabbi Schachter, *Magen Avraham*⁵⁰ maintains that it is preferable to pray in a synagogue, *berov am hadrat melech*, than with a small *minyan*.⁵¹

Rabbi Moshe Sternbuch notes that people may want their own *shul* because they are *Chasidish*, *Mitnagdish* or *Sephardish*. There has to be a very good reason to start a new *shul*, comments Rabbi Sternbuch, otherwise it is not proper to start your own *shul* when one already exists in the neighborhood. If there will be an increase in spirituality in the new *shul*, then one cannot stop them. However, if it weakens the existing *shul*, it is not proper.⁵²

If people have a justifiable complaint against the existing *shul*, and the *shul* does not take steps to make corrections, they may start a new *shul*, declares Rabbi Ephraim Greenblatt. We see from here that an attempt must be made to correct any legitimate deficiencies before proceeding to establish a new synagogue.⁵³

3) Some people in the community build a *Kollel* next to a *shul* that has been in existence for many years. People in the community are invited to come and *daven* in the *Kollel*. This causes loss of members and other financial difficulties for the established *shul*. Is it permissible for the *Kollel* to establish a *shul* on its premises in competition with the

50. *Orach Chaim*, 90:32.

51. Written communication and *Be'Ikvei Ha'Tzon*, page 24.

52. Verbal communication.

53. Written communication.

established synagogue? Would it be preferable for the *Kollel Yungeleit* (the members of the *Kollel*) to *daven* in the established community synagogue, help raise the level of the *davening*, and exert a positive influence on the *ba'ale ha'batim*, the other congregants?

Rabbi Ephraim Greenblatt declares that it is prohibited for the *Kollel* to invite congregants from the *shul* to come and pray in the *Kollel*. In many places, observes Rabbi Greenblatt, this can lead to the eventual closing of the established *shul*. It is preferable for the *Kollel* people to pray in the *shul* and have a positive influence on the congregants.⁵⁴

Rabbi Hershel Schachter also maintains that it is preferable that the *Yungeleit* pray in the established *shul*. If the people feel that the pace of the *davening* is too quick in the *shul*, then it would be appropriate to start another *minyan* where the *davening* is at a slower pace. This second *minyan*, however, should be located in and be part of the same *shul*, cautions Rabbi Schachter.⁵⁵

Rabbi Moshe Sternbuch advises that someone should speak to the *Rosh Kollel*, the head of the *Kollel*, and request that they not have services that compete with the *shul*. However, if there will be an increase in *ruchniyut*, spirituality, then you cannot stop people from going to the *Kollel*. Rabbi Sternbuch, however, suggests some type of compromise since it is not advisable for people to leave the *shul*.⁵⁶

54. Written communication.

55. Written communication.

56. Verbal communication.

The *Kehilla*

In Europe, for many years an institution known as the *Kehilla*, or community, existed. The *Kehilla* offered religious, educational, judicial, financial and social welfare services to its members. If there was more than one synagogue, the *Kehilla* provided for its maintenance. In America today, the institution of the *Kehilla* does not exist. While responsibility for the religious, educational, judicial, financial and social welfare services does devolve upon the community, there is no organized body that oversees these needs. As such, the members of the various institutions must raise the necessary funds to ensure the viability of the institutions. Members of the community at large are often approached to help support the various institutions. When institutions and services are duplicated, it is often very difficult to maintain them all.

Large, established synagogues provide a venue for community functions and Jewish life-cycle events. They are involved in the charitable and social needs of the community. The smaller synagogues, known as *shtibelach*, often siphon from the larger established *shuls* the members, money and energy needed for communal care for the poor or efforts to help Israel. The established community synagogue is more than a place for study and prayer. It also serves as a place for community involvement and activism. Part of the attraction of a small synagogue is the social intimacy. It is easier to get closer to the rabbi and the other members. As a result, a person may feel he is a more integral part of the congregation. The challenge for the community synagogue is to preserve the feeling of family and caring that many congregants feel is vital to their *shul* experience. If the community synagogues want to retain members, they must provide for their needs.

One might also make the observation that some people choose to go to a *shtibel* to find a haven from community

obligations. By leaving the community synagogue, a person can avoid his responsibility to the *klal*. Oftentimes, attendance at these smaller *minyanim* carries no more obligation than an occasional donation when receiving an *aliyah*. Even more serious is our concern that children who attend these *shtibelach* are not educated to be aware of their future responsibility to the Jewish community. In this regard, those who escape to the *shtibelach* may fail to educate the next generation as to their religious and social obligations to their fellow Jews, the Jewish institutions and the requirement to safeguard the welfare of the Jewish community. In the long run, in light of these considerations, leaving the synagogue for a *shtibel* may prove to be shortsighted.

Today, in the United States, we are blessed with a resurgence of Torah learning and commitment to *kiyum hamitzvot*, observance of the commandments. For some of us in the pursuit of the proper ambience, there is a feeling that other people are too rich, too poor, too *machmir*, too lenient, too whatever. We wish you well, we bless you, but we can't live with you. We need our own space. Working with other people seems to complicate matters. Let us do our own thing.

While some *poskim* may permit establishing another *shul* in a community where one already exists, it is clear from Radvaz that this is a worst-case scenario. Radvaz says that only if the choice is between continuous quarreling or separation, separation is the lesser of two evils. The *poskim* do not endorse breaking away, and Radvaz makes this point abundantly clear. Rabbi Moshe Feinstein frowned upon breakaway *minyanim* and observed that those who leave may be in violation of *hasagat gevul, darkei shalom* and *lifnei iver*.⁵⁷ Rabbi Chaim Halberstam, the founder of the Tzanz Chasidic dynasty, cites the Belzer Rebbe, his brother the Kaminke Rebbe, and the *Admor* of Ropzhitz as

being against the establishment of competing synagogues.⁵⁸

We are on the threshold of a paradigm shift. Slowly but surely, the breakaway *shtibelach* and competing *kolelim* are siphoning members and resources from the established *shuls*, weakening their viability.⁵⁹ If we believe that a viable community synagogue is vital to the health and growth of a community, then we must collectively and individually reassess our actions. While animosity can prevent a person from concentrating on his prayers, removing the animosity is a better solution than starting a new *minyan*. All the *poskim* who permit starting a new *minyan*, when there is an existing *shul*, do so only with great reluctance.⁶⁰ All prefer that people pray together in harmony, *be'lev echad*. For all of us that should mean exploring every means to get along and grow together in strength rather than splinter off into small factions. Our ability to meet the challenges of the present and avoid the crises of the future depends upon our resolve to work together as a community.

57. When I sent the question of the permissibility of breakaway *minyanim* to Rabbi Elyashiv, I was told that Rabbi Elyashiv felt that Rabbi Moshe Feinstein was against the establishment of breakaway *minyanim* and so, in the United States, people should follow the *pesak* of Rabbi Feinstein. (I did not personally speak to Rabbi Elyashiv, but received this information from his *shamash*, Rabbi Nachum Eisenstein).

58. Responsa *Divrei Chaim*, 2:21. I would like to thank Rabbi Gavriel Zinner, author of *Nitei Gavriel*, for pointing this out to me.

59. Rabbi Pinchas Stolper, former executive vice president of the Union of Orthodox Jewish Congregations, made this assertion in an interview published in *The New York Times*. See footnote 2.

60. Except for Rivash, as explained earlier in the article.

Ransom or Exchange of Prisoners

Rabbi Alfred Cohen

Although it was not uncommon in ancient or medieval times, the seizure of Jews as prisoners or hostages to be held for ransom had mercifully been, until fairly recently, only a bad memory. However, with the escalation of hostilities between Jews and Arabs/Muslims in the decades since the State of Israel was established, it has become again a troubling issue.

Let us make clear at the outset that ransoming a Jewish captive is a "mitzvah of the highest priority"¹ for the Jewish community. Unlike all other mitzvot, money donated for charity, even the very materials collected to build a shul, may instead be exchanged to ransom a Jew being held hostage.²

Nevertheless, the traditional Jewish approach to kidnaping has always been tempered by the talmudic directive: "*Ein podin et ha'sh'vuyin yoter me'al demayhem*," hostages are not to be ransomed "in excess of their worth."³ This strangely-worded passage has generally been taken to mean that in a society where kidnaping was not uncommon (such as was true in medieval times), Jews

1. "Mitzvah rabba", Rambam, *Hilchot Matnot Ani'im*, 8:10. See also *Yoreh Deah* 252; *Mordechai, Dinei Gezeirot* chap. 2; *Shvut Yaakov* 2:4; *Orach Chaim* 153:13.

2. *Yoreh Deah*, *ibid.*

3. *Mishnah Gittin* 45a.

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could redeem their hostages at the "usual" going rate, but should not exceed it. The reason is obvious – if they were to pay more than the usual, bandits would quickly realize it was more profitable to seize Jews rather than others. Ultimately, the entire Jewish community would suffer.

A famous case in point is the seizure for ransom of Rabbi Meir of Rothenburg (Maharam) by a duke in Lombardy in 1286, as Maharam was trying to escape from Germany. Although the Jews collected the money to pay the exorbitant ransom, Maharam refused to allow them to pay it, and in 1293 he died in his dungeon.⁴ His rationale was simple – if the community paid for his liberty, everyone would realize how easy and profitable it would be to traffic in Jewish lives. However, if even the most outstanding Sage of his time was not ransomed, all would realize that kidnaping lesser individuals would surely be without profit.

The dilemma facing the Jewish community, then and now, is easy to understand: every Jewish life is of infinite value, yet paying a ransom surely encourages more of our enemies to seize Jews, which ultimately portends incalculable damage to the entire Jewish community.

This dilemma has taken on particular immediacy in the decades of hostility since the establishment of the State of Israel. In 1970, terrorists hijacked two airplanes departing Israel. Among the passengers was the Rosh Yeshiva of Yeshiva Rabbi Chaim Berlin, Rav Yitzchak Hutner, *zt"l*. His students prepared to offer his captors a large sum of money to effect his release. Writing about that incident, Rav Hershel Schachter comments,

4. Ultimately, his body was ransomed by a wealthy individual, Alexander Wimpfen, who was given the honor of being buried in the adjoining grave.

Although generally in a case of *pidyon sh'vuyim* (rescue of captives) the Jewish community is forbidden to ransom a captive for an exorbitant sum, the ruling in the case of a great scholar is that he should be ransomed even for a sum that exceeds his "worth." [Shulchan Aruch Yoreh Deah 252:4] ...Rav Yaakov Kaminetsky dissented, however, arguing that the mitzvah of *pidyon sh'vuyim* only applies in peacetime, but surely not during hostilities, when the delivery of ransom money to the enemy would strengthen their position.⁵

The present study will address the question of what the halacha would teach us regarding the proper reaction to Israeli (or Jewish) prisoners being seized by terrorists or other enemies and held for ransom. May they be ransomed by the State of Israel? May the State halachically engage in prisoner-trades with neighboring states?

The Gemara⁶ queries whether the Mishnah cited above is stating its rule because paying huge ransoms would be a terrible financial burden on the community or whether the rationale is to discourage our enemies from seizing Jews as hostages.⁷ It is important to determine the reason

5. Rabbi Hershel Schachter, "Land for Peace: A Halachic Perspective", *Journal of Halacha and Contemporary Society*. Number XVI, p. 74.

6. Ibid.

7. The *Rishonim* wonder why the question is not resolved by another talmudic text, in *Ketubot* 52, where one opinion holds that a man must ransom his wife even for ten times her "value" but Rabban Shimon ben Gamliel holds that captives may not be redeemed beyond their "worth". Tosafot there are of the opinion that a wife is an exception to the general rule: just as a person may ransom himself with all his money in order to win his freedom, so too, inasmuch as "his wife is like himself", he can

for the talmudic rule, for if a hostage has a family which is prepared to pay a huge ransom, under the first rationale it would be permissible for them to do so. However, if the second motive applies, even the family would not be allowed to ransom the captive, because doing so would endanger the rest of the community, who would now be vulnerable to similar seizures.⁸ Rambam sees the second reason as being the motive for the Gemara's ruling, for in recording the halacha, he appends "so that [the Jews'] enemies will not pursue them to capture them."⁹

The cryptic phrase of the Talmud, not to redeem captives "in excess of their value" begs for clarification: how does one objectively determine the "value" of an individual? How much he is worth to his family? How much he would bring in if sold in the slave market? How much do non-Jews pay for their hostages in a similar situation? Is the individual's monetary worth relative to the wealth of the community? In the case of prisoners of war to be exchanged, should the Jewish community be guided by the practice of other societies who also negotiate for prisoner exchange?

Among the major halachic figures who differ on the manner of calculating the "worth" of an individual are the Maharam Lublin and the Radvaz.¹⁰ In a responsum concerning a girl who was taken prisoner by bandits and

redeem her for whatever amount is asked. See Ritva, Ran, Rambam *Ishut* 14 - 19, Rosh *Ketubot* 4:22. See also *Sh"ut Maharam Lublin* 15.

8. Rashi, *ibid*, s.v. *oh dilma*.

9. *Hilchot Matnot Aniyim* 8:12. The same is found in *Shulchan Aruch Yoreh Deah* 252:4. The *Bach* and *Yam shel Shlomo* say that it is to prevent the community's impoverishment.

10. For a brief overview of their opinions, see *Pitchei Teshuva Yoreh Deah* 252:4 &5.

could be saved by ransom, Maharam Lublin¹¹ inquires how one determines the worth of a human being, and concludes that it is based on the "market value" of the individual as a slave (in those days, apparently it was not uncommon for kidnaped individuals to be sold as slaves). He rules that the relative wealth of her family or of the community should not be factors in the equation, and he counsels not being "fooled by the accusation" that the girl had committed some offense for which she deserved to be executed. He sees this only as a pretext for extracting a large amount of money from the community, and concludes that each case has to be judged on its own merits by the rabbis familiar with "the whole situation and according to the times and the ruler," ending with a fervent prayer that the Al-mighty will say "enough" to the troubles of His people Israel.¹²

An alternate approach to determining an individual's value was taken by the Radvaz. Noting that in many cases Jews actually did redeem hostages for "more than their value", he in effect condones the practice, "let the Jews be, for they are people who do kindness, children of those who do kindness...Let them hold on to this trait. Since they are happy and rejoice in [doing it], they receive a very great [heavenly] reward...and it is a major mitzvah and they are acting properly to hold on to the trait of Avraham...as it is written, 'the generous of the nations have gathered, the people of the G-d of Avraham.'"¹³ He argues that the determining factor in deciding whether to ransom a captive

11. *Sh'ut Maharam Lublin*, 15.

12. In this responsum he also ponders whether there are circumstances when a Jew should not be ransomed. For further discussion of the question, see *Yoreh Deah* 251:2, *Ramo YD* 252:6, *Chavot Yair* 139, and *Pitchei Teshuva* 251:1.

13. *Responsa*, I:40.

cannot be the "market value" of the putative slave, since often elderly or very young captives are redeemed for amounts far in excess of what they might fetch in a slave market. What the Gemara seeks to prevent is seizure of Jews just because they are Jews. However, if bandits are out to take captives for ransom, regardless of whether they are Jews or not, then we Jews ought to be governed by the prevailing practice in society – whatever non-Jews are willing to do to retrieve their own, so too should Jews. If they ransom their people for large amounts, so should we. However, he counsels, Jews should not pay more than non-Jews do for captives in similar situations.¹⁴ If it became known that Jews do pay more, it would only encourage more kidnaping of Jews.

Based on his responsum, one could logically conclude that in a conflict which is specifically directed against Jews (such as the current state of hostility between Jews and the Arab/Muslim world), Jews should not be prepared to ransom or exchange prisoners to an extent different from what other nations do. The yardstick for how to respond in such a situation will be the question if Jews are being targeted or whether they are random victims of an evil practice. If they are not, then the Jewish community or government should respond in the same manner as others do. Indeed, that is the conclusion of the author of an article in *Techumin*¹⁵ on the question of exchanging or ransoming prisoners of war. However, he is challenged by another writer in a later edition of that journal¹⁶ who argues that the standard should not be *whether* other governments pay

14. Nevertheless, he proceeds to advance various reasons which would justify Jews' paying more than others.

15. Avraham Yitzchak Kavlev, in *Techumin* IV:p.114.

16. Natan Ortner, in No. XIII, p. 258.

for their prisoners but *how much* they pay; in other words, our rate of exchange for prisoners should not be disproportionate to what others do to get their men back. He cites Rav Kook, *zt"l*, who said that everyone knows that Jews value every other Jew's life as beyond value.

Possible Exceptions

What if the hostage or prisoner is in danger of being killed? Jewish law directs us to do everything to save a Jew's life, with the exception to three prohibitions: idolatry, murder, sexual immorality. Yet, although all hostages would seem to be in imminent danger, the Gemara has ruled that hostages should not be redeemed for an excessive amount. Should we interpret that to mean that the Gemara's rule applies only in situations where the prisoner is not in mortal danger, but if there is a threat to his life, even that talmudic rule is suspended and we should pay whatever it takes?¹⁷

17. *Sdei Chemed, Ma'aracha* I:129.

Furthermore, there is a negative commandment in the Torah, "Do not stand by idly" if someone is being killed (*lo ta'amod al dam re'acha*). The rule is that one must expend even all his money in order not to transgress a negative commandment. Does this rule apply only to a negative commandment for which there is an action involved (i.e., such as eating non-kosher food) or should it apply even in a situation where no action is taken (such as not paying a ransom)? The Meiri cites an incident recorded in the Gemara, *Bava Kamma* 80, where the rabbis got very angry with an individual for disregarding their decree not to own or keep animals (since the animals would graze in others' fields, in effect stealing from them). Although this individual kept an animal on his property because he needed its warm fresh milk to keep him alive, the rabbis did not see that as sufficient excuse to violate their decree. This would lead us to conclude that the Gemara's limit upon the amount of ransom applies even in the

Many *Rishonim* are puzzled by the apparent contradiction in the Talmud between the text we have cited, not to pay excessive ransom (*Gittin* 45a) and another talmudic lesson which reaches the opposite conclusion:

An incident happened with R. Yehoshua b. Chananya, who went to the large city of Rome. They told him [there], there is a child being held in prison [who has] beautiful eyes and is very good looking and his hair is arranged in curls...[After visiting the child and engaging him in conversation, the rabbi was so impressed that he said], "I am positive that he will be a great teacher of Torah in Israel. I swear that I will not depart from here until I ransom him for whatever amount they demand."

Subsequently, Rabbi Yehoshua did ransom him for a very large sum and the child did become a very great rabbi.¹⁸

How do we reconcile these two talmudic teachings? One says not to pay "more than he is worth", but the other indicates that the rabbi was willing to – and did – pay an exorbitant amount to ransom the child. Tosafot reason that the talmudic limit on paying excessive ransom does not apply when the captive's life is at stake.¹⁹

face of mortal danger.

See also *Sdei Chemed* IX:77.

Another source cited is *Gittin* 47a, which discusses the case of a person who sells himself and his children to Gentiles – how often they are to be redeemed. One can certainly speculate that at the very least their spiritual lives were endangered, yet the halacha is that this individual is not to be redeemed (lest he sell himself again). Nevertheless, after his death, the Jewish community is obliged to ransom his minor children.

18. *Gittin* 58a. Other sources for this topic appear also in *Yoreh Deah* 252:4.

19. *Ibid*, s.v. *kol*. An alternative answer to the contradictory

Tosafot offer an alternative explanation for Rabbi Yehoshua's disregard for the principle that hostages should not be redeemed for inordinate amounts: it was not the danger of the child's death at the hands of the Romans which prompted his action but rather his awareness that before him stood an individual whose remarkable talents would enable him to become an outstanding Torah scholar, one whose wisdom and leadership would be a tremendous boon for the entire Jewish community. In such a circumstance, the expenditure of huge sums was certainly justified.

The *Shulchan Aruch* adopts this rationale in ruling that a great scholar, or even a *potential* great scholar (*afilu eino talmid chacham ela shehu charif ve-efshar sheyiheye adam gadol*) should be ransomed at any cost.²⁰

Furthermore, the Gemara does not elucidate the essential rationale leading to the conclusion that captives ought *not* be redeemed for inordinate sums, nor does it clarify if there is a change in the mode of action in the face of possible

teachings might be that since the rabbi recognized in the child outstanding characteristics which would make him a valuable resource for the Jewish community, he was justified in paying whatever was required. In *Gittin* 48a, however, Tosafot explain that since it was an exceedingly troubled age, when Jews were being locked up all the time, his paying the huge ransom did not in any way exacerbate the problem. See also the comments of *Yam shel Shlomo*, *Gittin* 72, as well as Ramban to *Bava Bathra* 8.

20. *Shulchan Aruch* 252:4; see also Rosh to *Gittin* 45a "ve-chen talmid chacham shenishba beho lo tiken." Rashba also concurs with Tosafot, because "when a Torah scholar dies, he cannot be replaced," and therefore should be ransomed "for up to ten times" his worth. Ritva, however, in *Ketubot* 52b, writes in the name of the Ramban that there is no limit to the funds to be expended for rescue of a great scholar. Note that the *Shulchan Aruch* says only that he should be redeemed "at great cost."

death of hostages. Thus, some decisors have concluded that the rule applies across the board, regardless of the consequences for the hostages, while others do recommend a change in procedure if death is imminent.²¹

But when we take this concept of "his life is in imminent danger" and apply it to some modern situations, we have something of a quandry. Let us posit, for example, that terrorists have seized a hostage and threaten to kill him [as they did to Daniel Pearl of the Wall Street Journal], and demand that a known terrorist, being held in jail, be released in exchange for the hostage's life. Whose life should we be concerned with – the hostage himself, or possibly the many others who will be killed by that terrorist once he is released?

There is a certain amount of tension between the rights of the captive whose life is immediately in danger and the rights of the rest of the Jewish community, whose lives will immediately, upon his being freed in exchange for a known murderer, be put into imminent danger. There are two major halachic rulings in this regard, and it is difficult to know which one should guide us in this situation:

The *Nodah Biyehudah*,²² in an oft-quoted responsum,

21. See *Rosh, Gittin, Lo ifshit*; *Maharshal, ibid.*; *Ritva, vesilka beteiku*.

Sdei Chemed (part V) writes that whatever amount of money it takes to save the life of a hostage should be spent. However, he hesitates somewhat, inasmuch as rescuing one Jew in danger might lead to many others being seized and endangered. Prudence would advise not succumbing to demands for an inordinate ransom. Ultimately, he notes, most leading *poskim* have nevertheless accepted *Tosafot*'s thinking and have ruled that, if there is imminent danger to life, we have to save the hostage, regardless of the cost.

laid down a fundamental principle for sanctioning overriding a halachic rule in order to save a life: "*choleh lefanecha*", the sick person whose life will presumably be saved by suspending a halachic law, must actually "be there, before you." If we apply this principle to the case of a hostage who will be killed if his ransom is not paid, then clearly he will be saved immediately, while those others who might be more readily seized or murdered in the future are not "before you now."

On the other hand, the Chazon Ish has ruled that in time of epidemic or a prevalent disease affecting large multitudes, all people are to be considered as "sick people who are present before you now."²³ This would lead us to take into account the welfare of other Jews, not just the one taken hostage.

With this overview of the classical halachic sources in mind, let us now turn to a slightly different, albeit related, question: How do the above rules and considerations play out when the Jewish community is surrounded by belligerent neighbors or even in a state of war?

There is one important *obiter dictum* in Jewish law

22. *Yoreh Deah* 200. A patient died while being operated on for a possible kidney stone and the doctors wanted to make an autopsy to ascertain the true cause of death. The question was whether this procedure could be authorized (although autopsy is usually proscribed in Jewish law) since it would guide the doctors in their treatment of others similarly afflicted.

23. *Chazon Ish, Hilchot Aveilut* 208:7. His reasoning is that if the disease is common and endangers many persons worldwide, one may suspend the biblical prohibition of autopsy, to help doctors achieve a cure, because their new knowledge is likely to be used very soon for another victim.

Mishpat Uziel Yoreh Deah 28 says essentially the same.

whose importance, I believe, escapes many persons who are quite sincere in seeking guidance for their actions by perusing the halachic literature. That principle is, talmudic dicta and halachic research notwithstanding, *the halacha itself does not apply the same standards for individuals and for the community.*²⁴

Moreover, *the halacha itself differentiates between wartime and peace time.* Thus, what we have studied so far regarding ransom of captives very possibly ought to be disregarded by the State of Israel in the current climate of hostility it faces.

We noted earlier that Rav Yaakov Kaminetsky *zt"l* would not permit the ransoming of even so stellar a personage as the Rosh Yeshiva Rav Hutner *zt"l*. Rav Schachter explains Rav Kaminetsky's reasoning:

[He argued that] the mitzvah of *pidyon sh'vuyim* only applies in peacetime, but surely not during hostilities, when the delivery of ransom money to the enemy would strengthen their position! although a cease-fire existed at the time, the 1948 War of Independence had never really ended, for the Arabs' avowed goal to destroy the State of Israel and drive the Jews into the sea had never been renounced. In his view, although Israel was not then engaged in active battle, in the eyes of the halacha it was considered to be experiencing a mere lull in the ongoing original 1948 War of Independence.²⁵

24. This principle extends across the spectrum of Jewish law. Thus, for example, the rules of Sabbath observance would not be the same when applied to the State of Israel as when referring to a private individual.

25. Rabbi Hershel Schachter, "Land for Peace..." *JHCS* No. XVI, pp.74-5.

Furthermore, Rav Schachter contends that, [S]ince Israel's enemies (with the exclusion of Egypt) have thus far refused to sign peace treaties with her, and since their avowed aim continued to be the destruction of the State, Israel must be considered to be in a state of war.²⁶

As an example of the above: Rav Waldenberg was asked what should be done in the case of a soldier who is trapped in a place where he will surely die – should it be army policy to send in others, who are not currently in danger, to try and save him?²⁷ Although the rule of thumb is that someone should not put himself in a precarious position (*safek sakana*) to save someone who is in such danger that he will surely die (*vadai sakana*), Rav Waldenberg ruled that in wartime such considerations are suspended. He writes that the army should certainly send more soldiers to rescue the embattled ones. Aside from everything else, such a policy will surely raise morale, while the converse would have a deleterious effect on the *esprit de corps*.²⁸

26. Ibid, p.75.

27. *Sh"ut Tzitz Eliezer* 13:100 and 12:57.

28. The normative rule that one should not risk his life to save someone in mortal danger is arrived at in a roundabout manner. The Talmud *Yerushalmi* (cited in *Beit Yosef Choshen Mishpat* 426) teaches that indeed one *should* risk his life to save another, and Rav Yosef Karo, in his *Beit Yosef* commentary on the *Tur*, cites that precedent. However, in *Shulchan Aruch, Choshen Mishpat* 426, Rav Karo reverses his position, ruling that one should not endanger his own life. Despite the ruling of the *Shulchan Aruch*, the *Aruch Hashulchan, Choshen Mishpat* 426:4, did urge people to be willing to take a risk to save the life of a fellow Jew, as did the *Yam shel Shlomo, Gittin* 4:66. See also the *Responsa of Radvaz* 626, who notes that one who nevertheless does risk his life for another is a "chasid shoteh", foolishly pious. However, it is the position of Rav Waldenberg that this rule is changed during

Rav Waldenberg's ruling is a function of his position that the halacha requires accommodation to the exigencies of war (aside from the usual variations which he sees pertaining to a State as opposed to an individual). He cites a text in *Shevuot* 35b, which teaches that "a [Jewish] government which [allows even] one-sixth of its people to be killed, will not be punished." Tosafot explain that the Gemara is describing a martial situation – since it is the prerogative and responsibility of the government to wage war on behalf of the nation, then even if one-sixth of the people die in the war, the government is not considered to be "sinful".

The prerogative for a Jewish government to wage war is a topic which intrigues a number of halachic figures, because it serves as a paradigm for the powers of state. In the Torah, two types of war are discussed: (a) *milchemet mitzvah*, a war mandated by the Torah, such as the war to conquer the Land when the Jewish people entered it, or the battle against their arch-enemy Amalek, or a defensive war, and (b) *milchemet reshut*, an "optional" war, to expand the borders or for some other reason. The very fact that the Jewish state is permitted to undertake a war which is not necessary, means that inevitably Jewish people will be killed in battle for a cause that was not really required. Rav Waldenberg quotes Rav Kook as writing that,

[T]hey [the government] are not included in the general principle "*vechai bahem*" [that one should do as much as possible to assure one's life], inasmuch as they are permitted to put many persons in danger [merely] for expansion [or] communal needs.²⁹

wartime.

29. *Mishpat Kohen* 143.

Under ordinary circumstances, it would be forbidden for a person to put himself needlessly in a situation where he could lose his life. The fact that the halacha permits a government to do precisely this is proof that the government functions by different, or at least modified, rules.³⁰

The above-named principle is not a blanket exemption from the laws of the Torah for Jewish government agents. Indeed, it is limited to specific areas of activity. Thus, at the end of the first chapter of Tractate *Eruvin*, the Gemara delineates specific procedures which Jewish soldiers must follow during war. When Jews began to be conscripted into the Polish and Russian armies, the Chafetz Chaim *zt"l* wrote a handbook (*Machaneh Yisrael*) specifically to instruct them what they could or could not do while in the army. And a number of years ago, when the Governor of New York lost his wife, Rav Moshe Feinstein would not allow a major Jewish confidant of the governor to attend the religious services for her funeral.

The Netziv in his Bible commentary also indicates that

30. An example of this appears in Rambam's *Mishneh Torah*: In *Hilchot Avoda Zara* 11:1 he elaborates on the Torah admonition "bechukoteihem lo teileichu", explaining that it is prohibited for Jews to copy the dress and manners (among other things) of Gentiles. Yet, in 11:3, he writes that "a Jew who has close contact with the [Gentile] government and must meet with their kings, and he would be considered contemptible were he not to resemble them, it is permissible for him to dress in their style of clothing and to shave his face in the manner that they do." The prime commentary on Rambam, the *Kesef Mishneh*, offers a number of reasons why Rambam abrogates a Torah law. If we follow the view of Rav Waldenberg, it would eliminate any difficulty – although in general individuals are foresworn from adopting Gentile modes, the rule does not apply to someone who is acting on behalf of the Jewish community and needs to have access to the ruler.

there are different standards for war and peace: The Torah records G-d as laying out for Noah and his descendants the standards of behavior He requires, including the prohibition of murder. "However, [for the] blood of your lives I will demand [recompense]...from the hand of every person against his brother I will demand [punishment]."³¹ What this implies, explains Netziv, is that the Al-mighty will bring punishment upon a murderer, but only when they are in a relationship entailing brotherhood and amity. However, when a state of war exists, that is a time for hate and killing, and no punishment attaches to the taking of life during wartime. He notes, "for this is how the world was established...even a king of Israel is permitted to wage an optional war."³²

Based on the above, we may conclude that the usual procedures regarding ransom of hostages or rescue of captives do not necessarily apply when the Jewish state is

31. *Bereishit* 9:5. In addition to sources mentioned by others, he also quotes the Chatam Sofer, writing on *Choshen Mishpat* 44 and *Responsa Shem Aryeh, Yoreh Deah* 27; *Imrei Eish Yoreh Deah* 52; *Terumat Hadeshen* 199, cited by *Schach, Yoreh Deah* 157:1 (in our copies of the *Terumat Hadeshen*, this responsum does not appear); *Chidushei Rav Akiva Eiger, Yoreh Deah* 157; as well as numerous others who agree with his thesis. Rav Waldenberg goes so far as to apply this reasoning even to a doctor – he maintains that the halacha does not require the same from those in the medical profession as from private individuals. Thus, while one may not opt to put himself in mortal danger, yet a doctor is required to treat even those patients who are afflicted with a dangerous contagious disease. See *Tzitz Eliezer* IX, 17:5. However, note the view of Ramo on the question of visiting a person with a contagious disease, *Sh"ut Ramo* 19 (in some editions, No. 20).

32. In *Devarim* 20:8, the Netziv writes that it is precisely this theory which sanctions a Jew's volunteering for the army and not being considered culpable as a suicide.

dealing with the question of exchanging prisoners of war. It is the prerogative of the government to adopt those policies which it sees as most beneficial in the long run. Developing guidelines for such eventualities is not simple; returning those prisoners that Israel has captured in acts of hostility or terrorism means that violent enemies of Jews are being returned to society, where they may (and almost certainly will) pose a dire threat to the Jewish community. While a state desperately needs the support of its citizens, yet it also has to take into account the morale of its soldiers, who will surely lose heart if they feel their government has abandoned them once they are captured. Soldiers need to feel that they will never be forgotten and that their comrades and their leaders will never stop trying to rescue them. Soldiers who are afraid that they will be abandoned may lose heart and flee when faced with danger.

The Torah describes an elaborate ritual when the Jewish army prepared to go to war. Prior to the battle, it was announced that all those who qualified for certain exemptions (newly married, a new house, etc.) should leave. After all these had departed, it was forbidden for a soldier to leave the field of battle, for his retreat would dishearten and demoralize all his fellow soldiers. As Rashi notes, "flight is the beginning of defeat."³³

In his *Commentary to the Sheiltot*,(142) the Netziv writes that any deviation from army rules, whether by a group or by individuals, cannot be tolerated because it could lead to a breakdown of authority, possibly leading to panic, "and it is highly possible that [thereby] they would strengthen the hands of idolaters and would open the gates

33. *Devarim* 20:9. See also Rashi to *Sanhedrin* 74a: "So that the idolaters will not become accustomed to weaken the hearts for this."

of the Land of Israel – and there is no greater danger than this." Thus, although one might sympathize with the sentiments of a conscientious objector, it seems totally foolhardy and wrong to tolerate breaking the rules of army discipline.

We have heard recently about some Israeli soldiers who are defying orders regarding some of the newer settlements. Even though they justify their breaking orders by claiming that these orders are against the halacha (they claim that it is forbidden to give up any part of the Land of Israel, although that is what the government wants to do, or else they are in protest against the government's treatment of Arabs), nevertheless, the damage to the morale and discipline of the army is incalculable. Regardless of their motivation, which may be very high-minded, the damage to morale and discipline can be a disaster. Despite what Jewish law may teach in a general sense, we have seen in this study that different considerations come into play when we are dealing with a state rather than an individual and when we are involved in a war.

In conclusion, we may point to a number of principles of Jewish law which will impact on the halachic status of decisions and policies implemented by the State of Israel. First of all, in deciding whether to exchange enemy terrorists for Jewish soldiers taken prisoner, the State need not necessarily follow directives targeted for individuals or discrete communities. Moreover, a factor of overwhelming importance will be the impact of any policy not only on the soldiers but also on the populace. While the promise of exchanging prisoners certainly raises morale in the hearts of the fighting men – it may have disastrous consequences on the population of that tiny state, both psychologically, politically, and physically. The halacha is determined by balancing the need for high military morale with the need for security in the homeland and support for difficult

political and military exigencies.

Picking one's way through this minefield of negative political, social, and military consequences makes arriving at a halachic decision all the more difficult. May these dreadful burdens be lifted from our people, so that we may rejoice in the Land and Torah which *Hashem* has given us.

The Halachic Tale of Three American Birds: Turkey, Prairie Chicken, and Muscovy Duck

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Introduction

When European settlers arrived on the American shores in the 15th century, they found a whole new world of flora and fauna cultivated and domesticated by the Native Americans. Some of these plants and animals immediately found favor in their eyes as sources of food. They, too, began raising them and in many cases brought them back to Europe.¹

1. Cyrus Gordon (Cyrus H. Gordon, *Before Columbus: Links Between The Old World and Ancient America*, Turnstone Press, Ltd., London, 1971), in what can best be described as a controversial theory, purports to prove the existence of transatlantic communication (and Pacific crossings) in antiquity. There are those who assert that such ancient global communication resulted in the introduction of many of the New World animals to the Old World prior to 1492. If it did occur, it for some inexplicable reason remained a small phenomenon. For example, when turkeys were introduced after 1492 they rapidly spread to all corners of

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Jews, who rapidly followed on the heels of the other Europeans to American shores, were also greeted by this new display of nature. They not only needed to learn to cultivate, prepare, and enjoy these new delicacies, but they were also confronted with halachic questions. The many questions they faced ranged in degree of severity and difficulty of resolution. For example, the question of the kosher status of the American bison was relatively easy. Whether New World produce is considered *kitniyot* (and prohibited to Ashkenazim on Pesach) was debated years ago regarding the potato² and is currently under discussion about quinoa. (The answer seems to be negative for both.³) What blessing to make on the New World treat chocolate was also decided relatively quickly.⁴

Questions regarding the kashrut of previously unknown species of birds proved to be much more challenging, and some have remained unresolved to this

the Old World. If they were introduced pre-Columbus, they remained a local commodity and did not diffuse widely. Because of the disputed nature of this theory, despite Gordon's stature in his own field, and because of the small scale of the effect if there was one, the assumption will be that New World birds did not reach the Jews in the Old World until after 1492.

2. See *Minhag Yisrael Torah*, 336-337, whether to make an "*adama*" or "*she'hakol*" on potato and whether it should be considered *kitniyot*.

3. Corn, another New World product, is generally treated as *kitniyot*.

4. The current widespread custom to say "*she'hakol*" seems to have been arrived at rather quickly and took root. However, see the recent discussions by Rav Shlomo Zalman Auerbach, *Minchat Shlomo* 1:91:2 and Dayan Gavriel Krausz, *Mekor haBracha*, pp. 52-61, for discussions regarding the proper blessing for chocolate and their leanings towards "*borei pri ha-etz*." Rav Moshe Feinstein (*Iggerot Moshe OC* 3:31) justifies the current practice, as do Rav

day.⁵ The kosher status of birds is a much more complex issue than that of animals and fish. The Torah (Lev. 11:1-27 and Deut. 14:3-20) specifies identifying features to indicate whether a particular animal species is kosher.

Birds are categorically different.⁶ The Torah offers no identifying features to distinguish kosher from non-kosher species but simply provides a listing (Lev. 11:13-19 and Deut. 14:11-18) of the 24 species⁷ of birds that are not kosher

Shlomo Zalman Auerbach in his introduction to *Mekor Brachah* and *Shu"t Ohr L'Tzion* (2:14:5). See R. Nathan Kamenetsky, *Making of a Godol*, vol. 1, p. 139, that Rav Shlomo Zalman personally made a *borei pri ha'etz* on chocolate, although he refrained from ruling as such in practice for others, even for his grandson.

5. This same question obviously applies to the over 750 species of birds indigenous to Australia and New Zealand. Some examples include: Brown kiwi (*Apteryx australis*) – one of the three kiwi species. It is probably not kosher because, although it does not hunt, it does feed on invertebrates; Australian gannet (*Sula serrator*) and laughing kookaburra (*Dacelo gigas*) – almost definitely are not kosher since they are predatory; emu (*Dromaius novaehollandiae*) – has a peelable gizzard; and black swan (*Cygnus atratus*) and Cape Barren goose (*Cereopsis novae-hollandiae*) might very well be kosher.

6. For a discussion of this topic see: Ari Z. Zivotofsky and Ari Greenspan, "Kashruto shel haPasyon" (The kashrut of the Pheasant)[Hebrew] in *Sefer Zikaron L'Rav Yosef ben David Kafich Ztz"l*, Zohar Amar and Chananel Seri, editors, pages 107-116, 5761 (2001), published by the Office of the Campus Rabbi, Bar Ilan University; and Ari Greenspan and Ari Z. Zivotofsky, "Kashruto shel HaPasyon" (The kashrut of the Pheasant)[Hebrew] *Mesorah* (published by the Kashrut Division of the OU):18(Tishrei 5762/October 2001):87-96.

7. The term "species" is used here in a decidedly non-scientific manner. When the rabbis stated 24 "species" of birds, they meant 24 categories or broad classes of birds. Thus, for example, the Talmud (*Chullin* 63b) states that there are 100 birds in the east that are all types of *ayah*.

(*Chullin* 63b). By inference, the vast number of other bird species are kosher.⁸ Today, when the 24 non-kosher species can no longer be accurately identified, things are quite a bit more complicated.

Although the Torah did not provide physical indicators by which to identify kosher fowl, the rabbis provided four identifying features to help categorize birds. The Mishnah (*Chullin* 3:6 [59a]) states: "every bird that is 1) *dores* ("a predator") is not kosher.⁹ Every bird that has 2) an extra toe,¹⁰ 3) a *zefek* (crop, the biblical *more'eh*, e.g. Lev. 1:16), and 4) a *korkuvan* (gizzard, "pupik" in Yiddish) whose inner lining can be peeled, is kosher."

These seemingly simple rules were the source of ongoing and acrimonious debate throughout the ages,¹¹ to the point

8. Most authorities, e.g. Rashi (*Chullin* 61a); Rambam (*Maachalot Asurot* 1:15); Meiri; *Shulchan Aruch* (YD 82:1); *Chochmat Adam* (36:2). There is a dissenting opinion that says that there are non-kosher species other than the listed 24 (Tosafot and Rashba, *Chullin* 61a).

9. The definition of *dores* is mired in dispute. For a summary see: Ari Z. Zivotofsky, Is Turkey Kosher?, *The Journal of Halacha and Contemporary Society*, Pesach 5758 (XXXV):81-83.

10. The extra toe is explained by Rashi and Rav Ovadiah Mibartenura (*Chullin* 3:6) as a toe behind and above the rest, i.e. the hallux. The Ran and *Kaf haChaim* (Rav Yaakov Chaim Sofer, 1870-1939) (YD 82:9) explain it to mean that the middle of the three front toes is larger than the other two. Some have suggested that the extra toe is a kind of spur that sticks out part of the way up the leg and does not rest on the ground. The Ramban (*Chullin* 59a) flatly rejects this since pigeon, the paradigmatic kosher bird, does not have this spur.

11. In fact, most opinions fall into one of four principal explanations. A lucid review of these four opinions and how they relate to the Talmudic discussion and to halacha is given by the *Tzemach Tzedek* (YD 1:60; Rabbi Menachem Mendel Schneersohn,

that a 19th-century authority wrote: "In order to fully explain the identification of kosher birds would take a small booklet of its own" (*Minchat Chinuch*, mitzvah 157). And some *poskim* (decisors) did precisely that. Following responsum *YD*:74, Chatam Sofer (Rabbi Moses Sofer; 1762-1839) wrote several pages of explanation of the subject, followed by a note that the rest of his thoughts on this topic are in a separate monograph. The *Beit Yitzchak* at the beginning of *YD* 1:106 refers to three monographs that others had written on the subject. Similarly, Rabbi Yonatan Eibschitz wrote a monograph, *P'nei Nesher*, on the kashrut of birds.

With all the disagreement and confusion, the final halacha follows Rashi (*Chullin* 62a), who, based on the incident of the *tarnegulta d'agma* in which people ate a non-kosher bird as a consequence of applying physical characteristics as a criterion, ruled that birds may only be eaten based on a *mesorah* – oral tradition. The *Shulchan Aruch* (*YD* 82:3), and even more definitively, the *Ramo* (*ibid*), ruled that the only applicable principle is that "no bird should be eaten unless there is a *mesorah* that it is a kosher species." And this is where the problem for New World birds arises – there simply cannot be an ancient continuous unbroken tradition regarding a New World bird.¹² The three

1789-1866, 3rd Rebbe of Lubavitch).

12. Because of this rule, the number of Old World birds that are considered kosher is also rapidly shrinking. In an effort to publicly preserve many of the *mesorahs* that still exist, a learning dinner serving 13 species of known kosher birds was held in Jerusalem on 3 Tammuz 5762. See Ari Z. Zivotofsky and Ari Greenspan, "Living the Law", *Jewish Observer* 35:10(Tevet 5763/December 2002):28-31 and the letters in the Adar II 5763/March 2003 issue. On the ongoing effort to preserve these *mesorot* see Zohar Amar and Ari Zivotofsky, "Project to preserve the *mesoret* of *tahor* animals"

birds discussed in this paper, the turkey, the praire chicken, and the muscovy duck, have had quite different relationships with the kosher community.

Turkey

Turkey¹³ has gained nearly universal kosher acceptance. According to the National Turkey Federation,¹⁴ Israel leads the world in turkey consumption. At a whopping 28.8 pounds per capita annual consumption in 2001, Israelis consumed considerably more turkey than the second largest consumers, Americans, who consumed approximately 17.5 pounds per capita annually. There is no question today that turkey, the quintessential New World species which Benjamin Franklin proposed as the national bird of the United States because it is "a true original native of America" and does not have the "bad moral character" of the bald eagle, has been universally accepted as a kosher species.¹⁵ What is even more interesting and surprising is

[Heb] *Ha'Ma'ayan*, Tevet 5763[43:2]:36-40.

13. For detailed discussions regarding the kosher status of turkey see: Ari Z. Zivotofsky, "Is Turkey Kosher?" *The Journal of Halacha and Contemporary Society*, 35(Spring, 1998):79-110 and Zohar Amar, "Kashrut of the Turkey" [Hebrew], *BDD* 13(2003) (in press).

14. See their website (<http://www.eatturkey.com/> consumer/history/history.htm) for statistics.

15. There are, of course, individual exceptions. Such notables as Rav Yaakov Kamenetzky and Rav Dovid Lifshitz did not eat turkey. However, these were personal stringencies that they did not advocate for others. For example, Rabbi Nathan Kamenetsky (son of Rav Yaakov Kamenetsky) wrote (personal fax, 1/20/1998): "My father did not advocate that others abstain" (emphasis RNK). It is also reported orally but not in writing that the ShLa"H (Rabbi Isaiah ben Avraham haLevi Horowitz; 1565? - 1630) left instructions that his descendants should not eat turkey, and to this day there are members of that family who adhere to

that there were apparently no questions raised about the turkey in the period immediately following its introduction into Europe. This bird arrived from the New World sans a *mesorah* and yet seems to have made a seamless entry into the kosher kitchen.

When the question was finally discussed, most of the responsa seem to be post-facto. They were not coming to determine the turkey's status, but rather they were attempting to unravel the seeming inconsistency of accepting the requirement for a *mesorah* on the one hand and the fact that turkey was well-accepted as kosher on the other hand. In other instances, the accepted kosher status of turkey was used as part of an analysis of another bird question. Jews have probably been eating turkey for as long as their non-Jewish neighbors, since the early 16th century. Yet the reason for its acceptability does not seem to have been discussed until the late 18th century, at which time it became a controversial issue. Even at that time the issue may only have been raised because of the controversy that was then brewing in Europe regarding the status of several other birds.

When finally queried, the vast majority of halachic authorities accepted the turkey as kosher. However, a plethora of different reasons, most not fully satisfactory,

this custom. There is a similar custom among some of the descendants of the *Tosfot Yom Tov* (Rabbi Yom Tov Lippman ben Nathan ha'Levi Heller; 1579-1654). These two traditions may share a common source. There is also the "well-known" Russian family (Frankel) who, *Arugat haBosem* (*Kuntras ha'tshuvot*, 16) writes did not eat turkey. Finally, there are several prominent contemporary rabbis who do not eat turkey. All of this notwithstanding, there is no question that the overwhelming majority of Jews and of kashrut agencies treat the turkey as a kosher species.

were ultimately suggested. These include: There was an Indian *mesorah*; there is a *mesorah* of unknown origin; there is no need for a *mesorah* since it has 3 physical signs and we reject the Ramo; there is no need for a *mesorah* because it has all four signs and its *dores* status can be ascertained because it has been observed longer than 12 months; it is in the same broad category as chicken; there is a Sephardic *mesorah*; it was accepted pre-Ramo; or it hybridizes with known kosher species.

Praire chicken

The praire chicken is a brown mottled North American grouse of western prairies, sometimes called the prairie grouse or prairie fowl. The name usually refers to one of two birds, *Tympanuchus cupido* or *T. pallidicinctus* of the grouse family, that are found in western North America and have deep-chested bodies and mottled brownish plumage. Today *T. cupido* is sometimes referred to as *T. Americanus*. There are three subspecies: the Greater Prairie chicken proper (*Tympanuchus cupido pinnatus*), the Heath hen (*Tympanuchus cupido cupido*)¹⁶, and the Attwaters Prairie chicken (*Tympanuchus cupido attwateri*). The Greater Prairie chicken proper is blackish-brown, with light tawny color above and white brown barring underneath, and long erectile feathers on the side of the neck. The Greater Prairie chicken is a ground dweller whose diet consists of tree buds and grains and they can easily be kept in captivity. They are about 47cm long and weigh 800g. They belong to the order Galliformes and the family Phasiandae, as do chicken and turkey. There were at one time millions of all three subspecies; today they are all either extinct or

16. This was more common in the eastern U.S. and was hunted to extinction by 1932.

endangered.

Widespread hunting and eating of these birds in the midwestern U.S. from the mid 19th to the early 20th century brought them to the precipice of extinction. For example, for nearly a century it was a staple in the Chicago area. Despite its widespread consumption, easy capture, and ease of captive breeding, I have found no evidence, despite extensive searching, that there were any halachic queries asked regarding its status, and I have found no evidence that it was ever eaten as kosher. This, despite the large Jewish populations in some of the regions where it was consumed.

Muscovy duck

The most interesting New World species, from the perspective of its halachic story, is the muscovy duck. It is generally accepted that domestic ducks are derived from the wild mallard (*Anas platyrhynchos*; order Anseriformes, family Anatidae).¹⁷ There are seven recognized subspecies. The most prominent breed (in the US and Israel) is the Pekin breed, introduced to the West from China in the late 19th century. The common mallard *A.p.platyrhynchos* is likely the sole progenitor of the domestic form.¹⁸

There is only one exception, the most recently domesticated of waterfowl species, the muscovy duck, also

17. Information on the history of the muscovy is from R.D. Crawford, *Poultry Breeding and Genetics*, Elsevier, 1990, Chapters 1, 2, and 17.

18. A New World bird that has not (yet) seen controversy is the American black duck (*Anas rubripes*) that is indigenous to eastern North America. Hybrids between it and the domestic duck occur and are even fertile, a strong indicator that it is kosher.

known as barbarie duck.¹⁹ It is native to Mexico, Central America, and most of South America. The male weighs 2-4 kg and the female 1-1.5 kg. It is generally accepted that they were domesticated in pre-Columbian South America, where they were found in the very early 16th century by the Spaniards. There appears to have been a very early and rapid diffusion into the Old World. They were so widely diffused so early that there are even theories that they were introduced into Africa in the pre-Columbian period by trans-Atlantic Arab traders. While this theory is generally rejected,²⁰ the fact of their rapid spread is unchallenged.

The early Jewish settlers in the southern U.S. began eating muscovy duck. The muscovy has a peelable gizzard, an "extra toe", webbed feet, and a wide beak, all indicating that it is kosher. It does not have a standard crop, but has the same psuedo-crop²¹ found in other ducks and geese. Thus, these Jewish settlers treated it as kosher.

In 1860 Rabbi Yissachar Dov (Bernard) Illowy (1814-1871),²² in possession of *smicha* (rabbinic ordination) from

19. The origin of the name is lost. Some suggest it is a corruption of musk duck because of a peculiar odor that used to be emitted by older muscovies. It may derive from one of the major merchant companies of Queen Elizabeth's reign, the Muscovite Company. Alternatively, it could relate to the Muisca Indians of central Colombia.

20. Crawford, p. 34.

21. On this psuedo-crop see the discussion in I.M. Levinger, *Mazon Kasher Min Hachai (Modern Kosher Food Production from Animal Source)*, third edition, Israel, 1984) p. 36-37.

22. Rabbi Illowy was a fascinating character in American Jewish history, with a reputation as a masterful orator and staunch defender of traditional Judaism against Reform. He was born in Kolin, Bohemia, in 1814 to a family of distinguished rabbinic scholars. His great-grandfather was Rabbi Phineas Illowy, a rabbi

the Chatam Sofer and his Pressburg Yeshiva and a Ph.D. from the University of Budapest, arrived as the new rabbi in New Orleans, and declared that the muscovy duck could not possibly be treated as a kosher species because there could be no *mesorah* for it.²³

In a letter²⁴ written in beautiful biblical, poetic Hebrew Rabbi Illowy first presented the situation of Jewish life in the United States in general and in New Orleans in particular, and then explained his question regarding the muscovy duck. He outlined the history of his involvement

in Moravia, who is cited in the responsum of Rabbi Meir of Eisenstadt. His grandfather Rabbi Jacob Illowy was rabbi, *av bet din*, and *rosh yeshiva* in Bohemia. His father, Rabbi Jacob Judah, was not a rabbi by profession but had several students and was a well-respected, distinguished member of the community. Rabbi Bernard Illowy studied in the Pressburg Yeshiva, the University of Budapest, and the rabbinical school of Padua, Italy under Rav S.D. Luzzatto (Shadal; see *EJ* 11:604-607). He served as a rabbi and teacher in Europe as well as professor of French and German. He was fluent in Hebrew, Latin, Greek, German, English, French, and Italian. On account of (non-Jewish) political pressures related to the 1848 revolt of the Bohemians he was unable to take a rabbinic post in his native land. He therefore came to the U.S. where he was the first university-educated Orthodox rabbi. In his U.S. rabbinic career he served congregations in New York City, Philadelphia, St. Louis, Syracuse (NY), Baltimore, New Orleans, and Cincinnati. He died on 3 Tammuz 5631 [June 22, 1871] and was buried in Cincinnati.

23. Based on the Ramo, Rabbi Illowy stated that a *mesorah* is required. However, he did search for an opinion that would enable him to use the signs in lieu of a *mesorah*. The proof he found was quite creative and was based on the laws of "Bernacle Gans" [Goose], birds that "grow" on trees. On this topic see *EJ* 4:247.

24. See *The Controversial Letters and the Casuistic Decisions of the Late Rabbi Bernard Illowy*, by his son Henry Illowy, Berlin, 1914, pp.162-165.

and then presented the question. The letter was sent from New Orleans on Wednesday of *Parshat Bechukotai*, 5622 [May 14, 1862] and addressed to Chief Rabbi Dr. Nathan Adler of London and Rabbi Shimshon Raphael Hirsch of Germany. Almost every line in the first section is a paraphrase or a play on a biblical verse, making it almost futile to attempt its translation.

Rabbi Illowy relates that at the time it was almost 8 months that he had served as *rav* of Shaarei Chesed in New Orleans, and in that period he had been blessed with success. He proudly declares that after his first sermon forty important merchants began closing their businesses on Shabbat and more than ten families that previously ate non-kosher fully kashered their houses, such that even the most stringent person could eat there.

He then relates that on his third day in town he found that his friend was raising for food a strange looking bird known as the muscovy duck. He was unable to trace a valid *mesorah* (tradition) that permitted this bird and he thus ordered that it no longer be eaten and he so preached in the synagogue. Some of the congregants began to object to this rabbinic decree and claimed that a *mesorah* existed from the previous *chazan*, as well as in the cities of Charleston, S.C. and Jamaica. Rabbi Illowy was not impressed. He responded that those communities had never had a reputable rabbi, and as far as the *chazan*, Rabbi Illowy challenged his trustworthiness by stating that he used to run a store that sold pork on Shabbat. And, he rightly states, how could there have been a *mesorah*, which is by definition multi-generational, if these are New World birds? He further argues, (incorrectly²⁵) that the eggs of

25. Rabbi Illowy was given incorrect information. Muscovy eggs

the muscovy have the signs of non-kosher eggs (round and greenish – see *Chullin* 64a). Rabbi Illowy therefore maintained his ban, but promised to send the question to European experts for adjudication, and thus sent the letter to Rabbis Hirsch and Adler.

Rabbi Hirsch answered from Frankfurt in a short letter on *erev Shabbat Re'eh*, 5622 [Aug. 22, 1862]. He agreed with Rabbi Illowy that a *mesorah* from reliable people is required and did not exist. In this case in particular, he continued, the eggs definitively prove the muscovy are non-kosher and in such a case, even a *mesorah* would not help. Rabbi Adler wrote an even shorter letter from London on the 4th day of Av 5622 [July 31, 1862]. He apologized for the delay but he had been at the beach for several weeks. He writes that he normally would refrain from answering without hearing both sides. But in this case he investigated and found that in London the muscovy was treated as non-kosher because of a lack of *mesorah*. Thus, both of those authorities concurred with Rabbi Illowy's opinion in banning the consumption of the muscovy.

It is interesting to note that despite the popularity of muscovy duck in Europe, there are no known responsa or halachic discussions about them before Rabbi Illowy's responsa. This may be due to the facts that they have been known by a wide variety of names, their origin was a source of confusion, they were frequently grouped with domestic ducks, and that even today they are often overlooked as a separate species.

Several decades later another European transplant to

actually look very similar to chicken eggs. (Personal conversation with Stanley Searles, Curator of Birds at the Cleveland Metroparks Zoo, Oct. 6, 1997).

US shores seems to have addressed the same issue. Rabbi Leeber Cohen (born ca. 1874) studied in one of the great *mussar* yeshivot near Kiev and then served as a *rav* in the town of Kazen near Kiev from 1896-1911, before moving to the US.²⁶ Upon taking a job as rabbi in Memphis, TN, he discovered two things: First, he was receiving many queries about a new kind of goose about which he had also answered several questions in Europe, and second, that a way to advance in the US is to publish.²⁷ With that in mind, in 1916 he published *Chiddushei Chaviva*, the first half of which is devoted to the question of the new goose that was already being eaten in some areas. Based on his description of the bird, he seems to have been discussing the muscovy duck. Following a masterful analysis of the subject of which birds are kosher and what evidence may be relied upon, he concludes that based on the "egg signs" discussed in the Talmud, the bird under discussion was permitted.²⁸

In the US, questions about the muscovy persisted. Rav Gedalia Schwartz, *Av Beit Din* of the RCA and of the Chicago Rabbinical Council, reports²⁹ that in the 1950's while he was a *rav* in Providence, RI, he was asked about the kashrut of the muscovy duck and he prohibited it.

26. He served in Memphis for four years, and then out of concern for his children's Jewish education moved to NY. There, according to his grandson, Rabbi Eugene Cohen (conversation Oct. 9, 2002), he served a conglomerate of 17(!) small *shtibelach* and still barely eked out a living. He died *Erev Pesach*, 1951.

27. His grandson relates that Rabbi Leeber Cohen told him that this was told to him by the Agudas Harabonim.

28. It is quite interesting that he concludes leniently, in light of the fact that, according to his grandson, he did not eat turkey because in his small European town there were no turkeys and hence no tradition regarding their kashrut.

29. Personal communication.

The status of the muscovy duck was also under discussion in other areas of the world beyond its native U.S. and Mexico. Rav Aharon Halevi Goldman,³⁰ a rav and *shochet* in Moiesville, Argentina, discussed the issue at length.³¹ He first raised the issue in the journal *Yalkut Yosef* in 1906, 15 years after his arrival in Argentina. At that point he received contradictory reports regarding a *mesorah* on it and thus solicited assistance. He followed that with several other submissions and the following year concluded to permit the muscovy based on several points. He further reports that the Netziv had permitted it [see below], as had Rav Naftali Adler, *av bet din* of London, and the *Divrei Malkiel* in letters to him.

Concurrently, another Argentinean rabbi and *shochet* was also fighting for the kashrut of the muscovy duck. Rav Yosef Aharon Taran devoted the first section of his *Zichron Yosef* (Jerusalem, 5684 [1924]) to rebutting those who sought to prohibit it despite Rav Goldman's earlier permissive ruling. In an effort to strengthen their position, those who sought to ban it sent a pair of birds to Yerushalayim to have Rav Shmuel Salant (1816 -1909), the *av bet din*, rule on it. The male bird died en route, but the female successfully completed the lengthly journey. Rav Salant initially refrained from ruling on the matter due to his advanced age and requested that Rav Chaim Berlin, who was then visiting the city, rule on the matter. When

30. He was born in Podolia, Russia in 1854, and received *smicha* at age 18. He was invited to be the rabbi of a group of 120 families who were moving to Argentina to set up a Jewish farming community 600 km north of Buenos Aires. He selected the name of Kiryat Moshe, or Moies Ville in Spanish, named after Moshe Rabbenu. After a year of poverty, Baron Hirsch began helping them.

31. See his *Divrei Aharon* (5741, Jerusalem) YD:25-31.

Rav Berlin was fed all manner of fiction, such as that the bird breeds with snakes, he refused to rule and returned the question to Rav Salant. Rav Salant immediately ordered his *Shochet* to slaughter the bird, and on *erev Pesach* a letter was promptly dispatched to Argentina stating that the bird had been eaten following Rav Salant's ruling.

Rav Shmuel Salant committed his opinion to writing in a responsum dated 25 Kislev 5668 (1908). Rav Taran publicized in his book that letter as well as several other permissive rulings from European rabbis, including one from Rav Naftali (Herman) Adler (1839-1911), Chief Rabbi of the British Empire and son of Former Chief Rabbi Natan Adler (1803-1890), who had prohibited it years earlier.

Rabbi Israel Meir Levinger³² presents some interesting evidence from Europe and Israel. Based on the description of the bird under discussion, it appears that the *Meshiv Davar* (2:22)³³ was discussing the muscovy duck. He reports that there were some locations where it was eaten as a kosher duck, while at the same time other people were arguing against its being considered kosher because of the differences between this duck and the common duck. The Netziv notes that had he been asked *ab initio* he would have hesitated to permit its consumption because it differs from the standard duck and should therefore require its own *mesorah*. However, since it was then already widely eaten as kosher, it should not be prohibited without definitive evidence that it is indeed a non-kosher species, evidence that did not exist.

32. *Mazon Kasher Min Hachai (Modern Kosher Food Production from Animal Source*, third edition, Israel, 5745, p. 70-71).

33. Written by R. Naftali Tzvi Yehuda Berlin, the Netziv, in 5644 [1884].

Rav Tzvi Pesach Frank (1879-1960; *Har Tzvi* YD:75) reports in 1954 that 45 years earlier (i.e. 1909) an Argentinean Jew had brought a muscovy to Yerushalayim to ask about its kashrut and was told that it was kosher. Nonetheless, in 1954 Rav Frank only permitted those who already ate it to continue eating it and did not want to introduce it among those who did not eat it. His ruling notwithstanding, during the period of great economic difficulty in Israel (5709-5714/1949-1954), the muscovy was consumed in large numbers because it is able to be raised on kitchen scraps.

Rav Levinger reports that as of his writing the muscovy duck was treated as kosher in Israel based on an assortment of rulings. A *rav* in Zichron Yaakov reported to Rav Levinger that Rav Frank had permitted it to him in 5692 or 5693 (ca. 1932), and Rav Levinger was told by a *shochet* in Tiberias that he had been told by Rav Yaakov Moshe Charlap (1883-1951; a disciple and confidant of Chief Rabbi Avraham Yitzchak HaKohen Kook; see *EJ* 7:1343-1344) that it was a kosher bird.

The *Avnei Nezer* (YD:1:75) raises an important relevant point. Just as there cannot be a positive *mesorah* on a New World bird, so too there cannot be a negative one. Therefore, if it were possible to "establish" a *mesorah*, it clearly would not be contradicting a negative *mesorah*, and would be acceptable. The *Avnei Nezer* then proceeds to do just that, and permitted what may have been the muscovy duck based on the hybridization principle (discussed below).³⁴

34. Rav Eliyahu Klatzkin (1852-1932) from Lublin permitted a duck that he was asked about in 1911, and it seems that it may have been the muscovy duck. He ruled that it does not require a *mesorah* because of its similarity to known kosher ducks, and it is therefore sufficient that it has the physical signs of a kosher bird (*Dvar Halacha*, 1921, #53 [pages 37a-b]).

Rav Amitai Ben David, author of the important work *Sichat Chullin*, wrote (19 Shvat 5761) a long letter to Rav Naftali Weinberger that is appended to R. Weinberger's book *Shaleach Tishalach* (5761, Jerusalem, p. 169-187) in which he details the kosher birds. He observes (p. 180) that the muscovy had been given a defacto OK by the Netziv and the *Avnei Nezer* because it was already being eaten. In addition he states that he personally received a *mesorah* on the muscovy from his teacher who taught him *shechita*, the well-known Rav Chochaima.³⁵

Hybridization

Up to this point the universally-agreed-upon need for a *mesorah* in order to deem a bird species kosher has been discussed. However, there may be a way around this requirement. The Talmud (*Bechorot* 7a) mentions a rule known as the "hybridization principle." This principle states that kosher species cannot mate with non-kosher species; hence, the fact that a suspect species can interbreed with a known kosher species confirms the kosher status of the unknown species. In the Talmud it is not explicitly stated if this principle applies only to animals or to birds as well. Many authorities have been willing to rely on the hybridization principle to rule that a bird species is kosher even in the absence of a *mesorah*. Among them are: *Chatam Sofer* (*Yoreh De'ah* 74³⁶); *Avnei Nezer* (*Yoreh De'ah* 1:75:19-

35. Rav Ben-David confirmed this in a telephone conversation, August, 2002.

36. The *Chatam Sofer* has two paragraphs in his permissive response. In the first he bases his ruling solely on the hybridization principle. In the second paragraph he addresses the nay-sayer who does not accept that the hybridization principle applies to birds and demonstrates that he can nonetheless still support his

21³⁷); Maharsham, (*Da'at Torah, Yoreh De'ah* 82:3³⁸); Rav Shmuel Schneerson,³⁹ and *Chesed L'Avraham* (*Tinyana*,

ruling. It seems quite clear that the Chatam Sofer himself did accept that it applies to birds, but was willing to accept that others may have a lingering doubt. That is also how the *Avnei Nezer* (*Yoreh De'ah* 1:75:15) understands the Chatam Sofer. Note however that Rav Yehonatan Steif (202) and Rabbi J.D. Bleich (*Tradition* 36:2, 111) seem to understand the Chatam Sofer differently.

37. He wrote unequivocally that: "most certainly in truth with regards to birds, a pure and impure species cannot cause fertilization one in the other" (*ibid* 19). Furthermore, he held (1:75:15) that the Chatam Sofer held the principle, but had a small reservation that he, the *Avnei Nezer* (*ibid* 16), resolved. In practice (see 1:75:20) when a new species produced live offspring together with a known kosher species he relied on the hybridization principle to permit it even in the face of a great difference in characteristics of the birds, such as a difference in the sound they produce (see 1:75:3 and 1:76:2 where he describes this as a large difference). There are those (see Bleich, *ibid*) who wish to claim that in 1:76 the *Avnei Nezer* rejects the hybridization principle for birds. Based on 1:75, a *tshuva* essentially devoted to proving that very principle, it is utterly ridiculous to even suggest such a thought. Rather in 1:76 he was rejecting seven (!) proofs offered by someone else in order to permit a specific bird. In the process of tearing him down (1:76:5) he rejects the *logic* behind the other person's acceptance of the hybridization principle, not the principle. He never even mentions *Bechorot* 7b and his own basis for accepting the principle.

38. In lines 3-5 he cites the Chatam Sofer's lenient opinion. And the only supporting evidence he quotes from the Chatam Sofer is the hybridization. Others [Bleich, *ibid*, p. 110] found nothing of relevance in that quote by the Maharsham from the Chatam Sofer.

39. *Iggerot Kodesh* from *Admor Moharash mi'Lubavitch*, 5753, page 8. He was the youngest son of the *Tzemach Tzedek* and the fourth Lubavitcher Rebbe. He states that without question the principle applies to birds just as it applies to animals. The editor of the

YD:22-24⁴⁰). All of these authorities seem to view the hybridization principle as a rule separating two disjoined sets. In other words, they are not necessarily subsuming the new species under the *mesorah* of the known bird. Rather, the known bird is serving to prove that the new species is a member of the set of kosher birds.⁴¹

There is a second group of authorities who are willing to accept a weaker form of the hybridization principle.⁴² Within this group, some accept the stronger form in theory but are unwilling to apply it in practice while others are altogether unsure if it applies to birds. However, they all accept a weaker statement that states that if the unknown species freely chooses to mate with a known kosher species when offered the choice of either its own species or the other species, that is a sufficient indicator to subsume the new unknown species under the *mesorah* of the known kosher species. This group includes the Netziv (*Meshiv Davar, Yoreh De`ah*, section 2, 22)⁴³ and *Arugat Habosem* (*Kuntrus*

letters writes in a footnote that the bird in question was the turkey. Based on the stated commonality of the hybridization between the unknown bird and chickens it seems unlikely it is referring to turkey, a species that will only with great technical assistance reproduce with a chicken.

40. Written by Rav Avraham Te'omim, originally published in Lemberg, 5658 and reprinted in Jerusalem in 5727. He repeatedly defends the position based on numerous sources and seems to attribute it to *Tosafot* as well.

41. This group of authorities should be enough to dispel the notion (Bleich, *ibid* p. 112) that "no authority accepts the hybridization phenomenon as an alternative to a *mesorah* with regards to birds."

42. Note that some people, such as the *Beit Yitzchak* (1:YD:07:10) totally reject the hybridization principle for birds, and others, such as Mahari Asad (*Yehuda Ya'aleh*, 92-93 and 274), are in doubt about its applicability.

Ha'tshuvot, related to *siman* 82, pp. 342-343⁴⁴).

With regard to muscovy duck this is very important. Muscovy ducks are known to hybridize with other anseriform genera and species.⁴⁵ According to Stanley Searles, curator of birds at the Cleveland Metroparks Zoo, a big problem for him is that when muscovys and pekins freely roam the park, they will, without encouragement, crossbreed. He stated that muscovy ducks are "equal opportunity breeders" and because of this it is difficult to find a pure breed muscovy in North America. The muscovy-pekin cross is so trivial to accomplish, that it has become important to the poultry industry. Domestic drake (males) and muscovy duck yield females that are smaller than the males, have no crest, and produce numerous but small eggs that are incapable of fertilization; they yield males that are large and sometimes fertile. The reciprocal cross (muscovy male x pekin female) is the one used commercially; Male and female offspring are similar in size, both are crested, and both are usually sterile. This cross is so common that there is a name for the product: a mulard (also spelled moulard). While once *foie gras* was made from goose liver (*foie gras d'oie*), today over 70% comes from the disease-resistant, sterile hybrid, the mulard (*foie gras de canard*).

43. He writes that, according to the simple reading, the strong hybridization principle should apply. He injects a doubt into it, though by no means fully rejecting it, and then clearly states that the weaker form is indeed a sufficient proof to treat them as one species and declare the new species kosher.

44. By Aryeh Leibish, Vilna 5630, reprinted Tel Aviv 5736.

45. This cross is made easier by the fact that the domestic duck (*Anas platyrhyncha*) and the muscovy duck (*Cairina moschata*) both have 80 chromosomes.

Muscovy today

The mulard and its liver are accepted as kosher today in Israel by the chief rabbinate and are sold in large numbers by a company known as Foie Gras. If the offspring is treated as kosher, it categorically implies that the parents are also kosher species, implying the kashrut of the muscovy.

In the late 1980's various farms in northern Israel raised large numbers of muscovy ducks that were marketed by an Israeli company, Oaf Hagalil. Based on information provided by the company,⁴⁶ they sold 413 tons of muscovy in 1988, 1300 tons in 1989, and 2200 tons in 1990, worth a total of 5-6 million dollars. In one of the statements regarding muscovy issued at the time, the company states that they were under certification of the chief rabbinate of Jerusalem. We also have a copy of a letter from Rav Tzafanya Drori, chief rabbi of Kiryat Shemonah, dated 16 [Mar]Cheshvan 5750 (11/15/89) in which he states that he supervises the Oaf Hagalil plant and that the muscovy ducks slaughtered there are kosher *l'mehadrin*.

In 2003 there are no Israelis of whom we know who raise muscovy for its own sake. However, one farmer has about 200 males (and a handful of females) that he uses to interbreed with pekin females in order to produce the approximately 150,000 mulards that he sells annually, mostly to Foie Gras. We are unaware of mulard or muscovy currently being sold as kosher in other parts of the world.

Conclusion

For at least close to a thousand years the halacha has been that birds are treated as kosher only if there is a solid

46. Thanks to Rami Katzir of Oaf HaGalil for this information.

tradition (*mesorah*) regarding their acceptability. That requirement should have precluded the introduction of any New World birds into the kosher repertoire. It didn't. Some popular meat birds, such as the praire chicken, were never accepted as kosher despite their resemblance to the accepted chicken. Others, such as the turkey and the muscovy duck, are today both accepted as kosher by a large segment of the Jewish people. But their historical trail to the Jewish table was quite different. There is almost no opposition in the responsa literature to the turkey, yet the muscovy had to claw its way past numerous negative responsa until it was grudgingly accepted. The reasons for this difference are difficult even to speculate about, particularly if it is noted that the muscovy duck has a much greater similarity to the accepted mallard than the turkey has to the chicken.

The *Arugat Habosem*, in a long and detailed responsum (pp. 339-347) in which he permits a large, different type of chicken, points out (*ibid*, p. 346) that lest anyone wants to be strict and reject his permissive ruling, they perforce must also refrain from eating turkey, a bird whose permissibility is on much shakier ground than the bird he is discussing. In addition, many of the principles used to permit the turkey apply to the new bird as well.

We are not suggesting herein that the turkey be suddenly removed from the kosher kitchen; rather, that those who accept it realize that they should not perfunctorily reject other birds, such as the muscovy duck, while at the same time continuing to accept turkey as kosher.

Letters

To the Editor:

Rabbi Alfred Cohen's article on "Daat Torah" (Spring 2003) is a welcome, extensive re-examination of the subject. Rabbi Cohen provides an important Gemara and *Rishon* source – *Bava Bathra* 12a as explained by the *Ritva*—that has not been well publicized (and perhaps even inadvertently or otherwise been ignored) by those critical of the concept of *Daat Torah* throughout the years, but which apparently was significant to the author of a seminal article on the topic that appeared in a *Jewish Observer* article some years ago, authored by Rabbi Bernard Weinberger. Equally important, Rabbi Cohen steers the conversation back towards the original parameters of *Daat Torah* that Rabbi Weinberger attempted to set forth in his early piece – balancing, if you will, the place of *Daat Torah* in personal and local issues versus those with broader, national communal implications.

Yet, as wide-reaching as Rabbi Cohen's article is, it misses an important, well and long established foundation for *Daat Torah* that has been stressed only recently in English essays and *shiurim*, primarily by Rav Dovid Cohen. That is, the relationship between concepts of *Daat Torah* and *malchut* (kingship). This relationship is useful in understanding why, according to many, including Rabbi Alfred Cohen, *Daat Torah* must be followed.

In recent years, in an essay translated into English¹

1. See "Maaseh Avot, Siman Labanim" chelek aleph by Rav Dovid Cohen (English translation published by Artscroll in *Templates for the Ages* at page 33: "The Crown of Torah and the Crown of Kingship; the Hasmoneans and the Concept of Daas Torah").

and in a related taped *shiur* available for wide distribution,² Rav Dovid Cohen, a well-known and respected *posek* in Brooklyn, New York, has been a vocal proponent of the link between *malchut* and *Daat Torah* and the notion that the former is an antecedent foundation for the latter. According to Rav Dovid Cohen, based on sources dating back to the Rama Mipanu and in reliance on verses in the Torah itself, there was a fusion between the crowns of Torah and Kingship, such that our sages assumed the authority of a king, much as Moshe Rabbeinu held both Torah and royalty titles. As Rav Dovid Cohen writes in his translated essay:³ “[t]he Rabbinate as we know it [today] combines Torah authority with king authority.” Indeed, there are numerous sources – old and of more recent vintage, direct and by implication – for such an understanding of the sovereign role that *Chazal* undertook. For example, in *Gittin* 62a the Gemara calls *rabbanim*, “*melachim*.” See also “*Harrirai Kedem*” (R. Michel Shurkin’s *sefer* based on the Torah of Rabbi Joseph B. Soloveitchik, the “Rav”) at page 265, where the Rav *zt’l* compares a *mara d’atra* to a *melech*. Finally, see “*Keser Torah*: Based on the Words of Rav Hutner *zt’l*” found at <http://www.countryyossi.com/dec98/torah3.htm> (anonymous author).

Moreover, the linkage between rabbis and royalty did not appear to be a controversial point to a reviewer in *Tradition* of a 1977 book by Rabbi Mendell Lewittes, *Religious Foundations of the State of Israel* (reprinted by Aronson Press in 1994). In his volume (at 87), Rabbi Lewittes bases himself upon the Ran in *Drashot Haran*

2. “Pathways of the Prophets” tape series by Rabbi Yisroel Reisman, Tape # 137 (Siyum on Shmuel I), distributed by Agudath Israel of Madison (Brooklyn, New York).

3. See note 1.

when he states: "[I]n the absence of a kingdom, the religious authorities are able to assume the responsibilities of political leadership." Rabbi Lewittes also writes (at 56):

When the first Temple was destroyed and king and priest were banished from Israel, the prophet... assumed the whole burden of leadership . . . but when . . . the Second Temple was destroyed and again king and prophet were banished, the chief scholar was able to assume the whole burden of leadership for a vanquished but surviving people. Thus, R. Simon could now say that in Israel "there are three crowns: the crown of the Torah, the crown of the priesthood, and the crown of kingship" (*Avot* 4:13); and another Sage could add: "Torah is greater than the priesthood and kingship." (*Avot* 6:5).

When Rabbi Lewittes' book was reviewed by Rabbi Solomon J. Spiro in *Tradition* (vol. 18 no. 1, Summer 1979) Rabbi Spiro wrote: "There is little radically new, provocative or controversial in the work [!!]"

See also *Emet l'Yaakov*, the writings of Rav Yaakov Kaminetzky *zt'l*, wherein he cites the Ibn Ezra on the verse in *Shoftim* (Deut. 17, 9) "U'vata" as the source for the prohibition of being "mored b'malchut" (rebelling against a king) because the *shofet* in the second verse there is the "melech."⁴ By his comment, the Ibn Ezra appears to indicate that the principle of "lo tasur"⁵ – not deviating from the pronouncements of the "shofet" – which appears only a few verses later, applies to royal pronouncements which must be obeyed regardless of their unreasonableness (and even, according to the Ran in *Drashot HaRan*, *drasha* 11,

4. The Ibn Ezra's explanation is found in verse 9 on the words "v'el hashofet."

5. See Deut. 17:11.

with some limitations, if they are inconsistent with the laws of the Torah itself). If this thesis is correct, then rabbis today might still be able to rely on "*lo tasur*," from the *malchut* crown that they assumed (apart from, or regardless of, any application of that principle from the aspect of their *judicial* powers that may still apply to them as the inheritors of the authority of the Sanhedrin which is the classic application of "*lo tasur*") as a "justification" for their sometimes authoritarian decision-making approach.

One additional "source" for such a link between kinglike powers and rabbis might also be found in lectures of Rav Soloveitchik, including the *drasha* found in Rabbi Besdin's *Reflections of the Rav* (Vol. I) entitled "Who Is Fit To Lead The Jewish People?" at 133-37, which Hebrew version is found in *Haadam V'Olamo* ("*Hamalchut b'Yisrael*"). In that presentation, the Rav compared the quintessential *Rebbe*-teacher to a king.⁶ However, in the last paragraph in Rabbi Besdin's version – which interestingly, but for reasons unknown to this writer, is not found in the Hebrew version – the Rav distinguishes between a king and a *Rebbe*: "Kingship [because of its potentially autocratic nature] is . . . sharply circumscribed. This does not prevail in the teacher-disciple relationship, where the exercise of authority is encouraged and submission to teachers is extolled." As the Rav explained (as found in both the English and Hebrew versions) "Why is this authority of man [i.e., the *Rebbe*] over his fellow man [the student] sanctioned? . . . [T]he

6. See also the Rav's *hesped* for the Talner *Rebbe* (e.g., in "*Shiurai Harav: A Conspectus of the Public Lectures of Rabbi Joseph B. Soloveitchik*," originally published by *Hamevasser*, more recently reprinted by the *K'tav* publishing house) where he speaks of the "King-Teacher."

authority of a teacher is not imposed; no coercion or political instrument is employed. A Torah teacher is freely accepted and joyfully embraced . . ."⁷

The Rav, of course, did not use the term "*Daat Torah*." Yet, he seems to be describing one of its characteristics when discussing the submission of students to rabbinic teachers. In this sense, the Rav's description of the *Rebbe-Talmid* relationship yields the conclusion, as Rabbi Alfred Cohen writes, "that the advice given by great Torah scholars must be followed by Jews committed to Torah observance."

Nevertheless, as the Rav himself was cognizant, the best "advice" is one that is "freely and joyfully embraced," not one that is imposed by fiat. It is not surprising, therefore, that when I went to the Rav as a student at Yeshiva University seeking his advice, whether in my capacity as Editor-in-Chief of the RIETS publication "Hamevasser" to publish a potentially controversial article, the Rav told me: "I am not telling you what to do. However, if I were you I would not . . ."

Needless to say, I heeded my Rebbe's advice.

YITZCHAK KASDAN
Silver Spring, MD

7. Another foundation for *Daat Torah* as explained by Rav Aharon Lichtenstein, the Rav's son-in-law and one of the *Roshei Yesiva* of Yeshivat Har Etzion, in a lecture entitled "Daas Torah – Religious Imperative or Good Advice?" delivered in the early 1990's, is the verse in Deut.32:8, "Sh'al avicha v'yagedcha, z'keinecha v'yomru lach" ("Ask your father and he will relate it to you, and your elders and they will tell you"). A summary of Rav Lichtenstein's lecture may be found in the "Special Topics" section of "Mail-Jewish" on the web, <http://shamash.org/listarchives/mail-jewish/volume11/v11n29>.

Dear Rabbi Cohen:

In re your article on *Daat Torah*, I wish to bring to your attention a number of relevant facts: While Professor Kaplan did send to the *Jewish Observer* a response to R. Wein's article, the *Jewish Observer* refused to publish it. Since it is possible to read your footnote comment about this as a criticism of Prof. Kaplan, a clarification of this point in the next issue of your *Journal* would be appreciated. Also, it seems to me that there was an unintentional disparity between the way Prof. Kaplan's opponents were referred to (with the titles of Rabbi, Rav and R.), while Prof Kaplan (who, in addition to being an Associate Professor of Jewish Studies at McGill University, has *smicha* from RIETS and a Ph.D. from Harvard) was referred to without any title at all. Perhaps this too can be clarified.

To be frank, in our time when divisiveness and *ad hominem* attacks are so prevalent in our community, I was somewhat apprehensive about calling you. I was therefore grateful for your warm, friendly and open response. It's good to know that there are venues for disagreement to be aired in a spirit of respect and community.

Very truly yours,

JOSEPH C. KAPLAN

(*the author is the brother of Dr. Kaplan*)

* * *

Rabbi Cohen responds:

I thank Mr. Kaplan for bringing to my attention an inadvertent slight which occurred in my article. When I read Professor Kaplan's article, he was named simply as "Lawrence Kaplan", and I therefore referred to him as such. It was certainly not my intention in any way to denigrate his status. Perhaps I should have been careful to read the

biographies of the authors of the articles which appeared in the back of the volume, *Rabbinic Authority and Personal Autonomy*, and I truly apologize for my oversight.

As for the failure of the *Jewish Observer* to print his response to the negative review which it featured about Dr. Kaplan's article, I thought it was obvious that I was being critical of the *Jewish Observer* for being unwilling to air a view divergent from its own. That was my point in mentioning this – to emphasize that most discussions on the topic of *Daat Torah* are more polemic than unbiased inquiry, which pitfall I was going to try very hard to avoid. If that sentiment was not self-evident, I apologize once again to Rabbi Dr. Kaplan and to all those who may have received the wrong perception.

My thanks to Mr. Kaplan for bringing these flaws in my article to my attention.

* * *

To the Editor:

Rabbi Alfred Cohen in his recent wide ranging, erudite, and thoughtful article, "Daat Torah" (*Journal of Halacha and Contemporary Society* XLV) levels several criticisms against my own article on the subject ("Daas Torah: A Modern Conception of Rabbinic Authority," *Rabbinic Authority and Personal Autonomy*, edited by M. Sokol [Jason Aronson: Northvale, New Jersey, 1992], pp.1-60; a slightly revised and expanded Hebrew version of my article appeared in *Between Authority and Autonomy in the Jewish Tradition*, edited by A. Sagi and Z. Safrai [Ha-Kibbutz ha-Me'uhad: Jerusalem, 1997], pp.105-145). While the primary purpose of this letter is to respond to the most important of Rabbi Cohen's criticisms, I would like to begin by saying that there is not such a wide gap between my views and Rabbi Cohen's views on the subject as might appear from his article.

My article was devoted to an account and critique of the conception of *Daat Torah*, as this concept developed and was utilized in the twentieth century. Rabbi Cohen in his article, if I understand him correctly, sets forth a scaled back version of the current ideology of *Daat Torah* that served as the object of my critique. While I by no means agree with everything that Rabbi Cohen writes, several of my criticisms of the current ideology of *Daat Torah* would not apply to Rabbi Cohen's much more modest version.

To take just one example: Rabbi Cohen opposes a monolithic conception of *Daat Torah* and states that "it is painful to see that great Torah scholars ...whose opinions may be a little different are not included in a plenary council of Torah leaders." In a note he offers Rav Kook and Rav J. B. Soloveitchik as examples of such great Torah scholars. In a similar vein, Rabbi Berel Wein in his highly polemical critique of my article ("Daas Torah: An Ancient Conception of Rabbinic Authority," *Jewish Observer*, Oct. 1994) argues that *Daat Torah* allows for a multiplicity of viewpoints on an issue expressed by a range of great Torah scholars.

I am in deep sympathy with this more pluralistic and inclusive approach taken by Rabbis Cohen and Wein. However, as I sought to show in my article, the conception of *Daat Torah*, as this concept developed in the twentieth century, was in point of fact utilized to imply that only the views of a sharply delineated group of *gedolim* constitute *Daat Torah*. It thereby served precisely to delegitimate the views of other groups and their *gedolim*. I might note that the leading scholar of Haredi Orthodoxy, Prof. Menchem Friedman, has, on the basis of an exhaustive analysis of the evidence, arrived at a similar conclusion. (See the discussion of *Daat Torah* in Friedman's study, *The Haredi Society* [Jerusalem, 1991], pp.104-115.)

But the reader should not accept my word or even

Friedman's word. It suffices to cite perhaps the leading rabbinic exponent of the ideology of *Daat Torah* in our generation, the late Rav Schach. In his *Michtavim u-Ma'amarim* 4 (Bnei Brak, 1990), pp. 35-40 (#320), Rav Schach engages in an extended critique of Rav Soloveitchik's *Hamesh Derashot*. He begins by expressing his surprise that other leading rabbinic scholars have not openly taken issue with this work, given that the views set forth therein are "a complete distortion (*siluf gamur*) of *Daat Torah*." After a lengthy presentation and attempted rebuttal of Rav Soloveitchik's views, Rav Schach concludes: "It is forbidden to express such views, how much more so to put them in writing. And I am writing them here only in order to show how the study of foreign disciplines (*hokhmot hitzoniyyot*) can bring about such a distortion and decline of *Daat Torah*." I am sure that this pronouncement of Rav Schach will pain both Rabbis Cohen and Wein, as it did me. But precisely this pronouncement and others like it display the real, empirical conception of *Daat Torah* in action, as opposed to the rather ideal and idealized conception set forth by Rabbis Cohen and Wein.

I now proceed to Rabbi Cohen's criticisms. In my article I argued that the ideology of *Daat Torah* is a central element in what I referred to as the ethic of submission that characterizes the rejectionist Orthodox approach to modernity. In this context I referred to the Chazon Ish as one of the leading exponents of this ethic. Rabbi Cohen writes: "In support of his thesis that the Chazon Ish was one of the great exponents of "submissiveness" (p. 24) Kaplan cites a letter of the Chazon Ish with what he terms a "forced interpretation" of a text of the Rashba; however, a close reading of the original makes it difficult to support Kaplan's conclusions, for the Rashba says precisely what the Chazon Ish said he said."

First – a relatively minor point: In my article I always

used the term "submission" and never the term "submissiveness." Second: I did not use the letter in question to support my thesis that the Chazon Ish was one of the great exponents of the ethic of submission. Rather, in support of my thesis I cited in the body of the article a statement of the Chazon Ish declaring that "We recoil upon hearing the casting of doubt on any statement of *Hazal*, whether Halakhah or Aggadah, and view [such critical remarks] as constituting blasphemy, heaven forbid." In a footnote I observed that this claim of the Chazon Ish that all *aggadot* are authoritative results in his offering a "forced interpretation" of a text of the Rashba. Third, and most important: Contrary to Rabbi Cohen's claim, "a close reading of the original" indicates that the Rashba did *not* say "precisely what the Chazon Ish said he said," and furthermore that the Chazon Ish was well aware of this fact.

In his *Hiddushim* on *Megillah* 15a the Rashba cites a rabbinic interpretation of a verse from the book of Esther and notes that *Tosafot* raises a serious halakhic difficulty regarding this interpretation. He then cites the solution offered by *Tosafot*. After subjecting this solution to a stringent critique, he rejects it; but rather than proceeding to offer his own solution to the halakhic difficulty the Rashba concludes, "But these are words of Aggadah (*divrei Aggadah*) and we do not [need not? cannot?] resolve them (*ve-ein mityashvin bahan*)."¹ One commentator observed: "I have seen that the Rashba finds this matter to be difficult, and as a result he rejected this talmudic statement." The Chazon Ish penned the following gloss to this comment: "Heaven forbid that the Rashba rejected [this talmudic statement], but his intention is that the words of Aggadah are exceptionally hidden from us and it is difficult for us to resolve them."

All the Rashba says here is that we do not seek to resolve

words of Aggadah, but he does not explain why this is so. The first commentator understands the Rashba to mean that we *need* not resolve words of Aggadah because they are not authoritative. The Chazon Ish understands the Rashba to mean that it is *difficult for us* to resolve words of Aggadah because they are exceptionally hidden from us. Both are offering interpretations of a rather enigmatic statement of the Rashba and are *filling in* his missing rationale. Moreover, the Chazon Ish uses the phrase "his intention is...." Obviously, the Chazon Ish understood full well that while – in his view – he was spelling out the import of the Rashba's statement, the Rashba does not make this point explicitly.

Very briefly, I find the Chazon Ish's explanation of the Rashba forced for the following reasons. First, whenever the Rashba believed that aggadic comments of the Rabbis had a hidden esoteric meaning he would say so explicitly. (See the list of such statements by the Rashba in R. Aryeh L. Feldman's Introduction to his edition of the Rashba's *Perushei Ha-Haggadot* [Mossad ha-Rav Kook: Jerusalem, 1991], p. [10].) Second, the Rashba, as he states explicitly, believed that there are some *aggadot* that make only very simple, almost obvious points, but use profound or striking language to do so for rhetorical or homiletical purposes. (See *Perushei Ha-Haggadot*, pp. 3, 58-59.) Third, when a questioner confronted him with an apparent contradiction between two *aggadot* (Responsa 1:50), the Rashba first answered "*Ein meshivin min ha-haggadah*," but then proceeded to offer a possible reconciliation. I think that what the Rashba clearly means to say here is that we *need not* attempt to reconcile two conflicting *aggadot*, but that in this instance one can offer a possible reconciliation. I should further note that there is nothing particularly profound or esoteric about the reconciliation offered.

I would not have spent so much time on this point

were it not for the fact that my supposed careless reading of these texts is the only example Rabbi Cohen brings to support his contention that my article draws "faulty conclusions arising from failure to check into what was really said or written by the great sages of earlier generations." So it is important to set the record straight.

I now turn to Rav Soloveitchik's views on *Daat Torah*, an issue raised several times by Rabbi Cohen in the course of his article. In my article I argued that the concept of *Daat Torah* developed in the twentieth century primarily in the organizational and ideological context of Agudas Yisrael. When presenting therefore a particularly forceful and eloquent expression of this concept set forth by Rav Soloveitchik in an address he delivered in 1940, I thought it important to note that this address "was delivered at the second annual conference of the Agudas Yisrael of the United States, at a time, moreover, when Rav Soloveitchik was a vice president of the Agudah." Obviously, if Rav Soloveitchik at the time was a vice president of Agudah, it goes without saying that he was committed both to the organization and to its ideology – which is why I didn't feel it necessary to say it!

The above should suffice to answer the baseless and insulting accusation leveled against me by Rabbi Wein and cited by Rabbi Cohen that I in any way suggested that "Rabbi Soloveitchik would have tailored his deeply felt beliefs to accommodate his audience." That Rabbi Wein in his highly polemical and at times intemperate article should have leveled such an accusation against me is unfortunate, but, alas, not surprising. But I am both surprised and disappointed that Rabbi Cohen in his generally fair minded and level headed article appears to lend credence to this accusation.

What though was Rav Soloveitchik's view about *Daat*

Torah after 1940? As is well known, a few years after his address at the Agudah conference Rav Soloveitchik left the Agudah to join and become a leading spokesman of the Mizrachi. It is obvious that if Rav Solovetchik made this major organizational and ideological shift he must have changed his mind about some things. Was *Daat Torah* one of them? To answer this, let me cite the following unambiguous statement of R. Aharon Lichtenstein, Rav Soloveitchik's son-in-law and one of his closest and most outstanding disciples.

The Rav did not, over the course of time, continue to espouse the ideology of *Daat Torah*, which claims that all political issues contain a clear-cut halakhic dimension and therefore are subject to the binding and exclusive decisions of *Gedolei Torah*. At the start he advocated this view and presented it with passion.... But after a while he abandoned it, and during subsequent decades he advocated and even sharpened the distinction between matters of Halakhah (*divrei mitzvah*) which are subject to the rulings of rabbinic authorities, and matters of policy (*divrei reshut*) where significant consideration is to be accorded to the views and authority of other groups. At the same time, though he denied a decisive role to rabbinic authority in the political dimension, he insisted that fundamental values ... and a pure spiritual perspective, which can be provided only by *yehidei segulah*, should guide activity in this sphere. ("Divrei Hesped," *Mesorah* 9 [1994], pp. 22-23.)

On the other hand, Rabbi Cohen notes that R. Hershel Schachter, another of Rav Soloveitchik's closest and most outstanding disciples, in his important work *Nefesh ha-Rav* reports that Rav Soloveitchik would often emphasize that one is required to subjugate his will to that of his religious mentor (*lehitbatel le-rabo*). This might appear to indicate that, contrary to the view of Rabbi Lichtenstein,

Rav Soloveitchik did not change his mind regarding *Daat Torah*. In response to this let me say the following.

While this is not the place to enter into detail, I would contend that a close examination of the three passages from *Nefesh ha-Rav* referred to by Rabbi Cohen appears to indicate that Rav Soloveitchik never explicitly claimed that one is required to subjugate his will to that of his religious mentor. Rather, this claim is Rabbi Schachter's own extrapolation from or paraphrase of more limited and carefully nuanced comments that Rav Soloveitchik made about rabbinic authority. In support of my contention, I should point out that in contrast to what would appear to follow from Rabbi Schachter's claim, I have heard several leading students of Rav Soloveitchik publicly state that when they consulted him about certain issues of public policy, he would at first forcefully express his opinions on the matter in question and tell them that he expected them to accord great weight and extreme seriousness to his views. But he always concluded by saying that since these were not questions of Halakhah but issues of public policy, if in the final analysis they came to the conclusion that they did not agree with his views they should *not* feel bound by his advice. The reports by these students tally very well with Rabbi Lichtenstein's view about Rav Soloveitchik's final position regarding *Daat Torah*. In short, we appear to have here yet another example of "a clearly discernable tendency at work in *Nefesh ha-Rav* to emphasize and even at times exaggerate the traditionalist features of the Rav and minimize the more innovative and unconventional features." (See my review essay of *Nefesh ha-Rav*, "The Multi-Faceted Legacy of the Rav," *BDD* 7 [1998], p. 57.)

Though I cannot accept Rabbi Cohen's criticisms of my article, I believe that his article is an important contribution to the ongoing discussion of the critical and always relevant issue of rabbinical authority. Moreover, his willingness to

publish this reply – so unlike the unfortunate but highly revealing refusal on the part of the editors of the *Jewish Observer* to publish my reply to Rabbi Wein's critique of my article – is eloquent testimony to the inclusivist approach that Rabbi Cohen sets forth in his article with such fire and passion.

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Rabbi Cohen responds:

I thank Dr. Kaplan for addressing substantive matters in his letter, and am more than happy to respond to those remarks which concern issues raised in my article. It is my deeply felt belief that the perceived lack of clear authority as to who is entitled to set standards for Judaism or make innovations is a serious problem which causes great mischief in the Jewish world today.

I expressed the observation that, in my opinion, the opinions being written about the topic of *Daat Torah* were "based on secondary sources and feature inflammatory language..." I termed them "polemics rather than scholarship, with faulty conclusions arising from failure to check into what really was said or written by the great sages of earlier generations" (p. 67). Despite Dr. Kaplan's lengthy exposition, I find no reason not to stand by that statement. Since this is a delicate issue, I will record the texts in question, and let the facts speak for themselves.

Dr. Kaplan cites what he terms a "forced interpretation" made by the Chazon Ish of a text in the commentary of Rashba to *Megillah* 15, where the Gemara makes a

statement about the implications of the phrase "*veka'asher avaditi, avaditi*" in the discussion between Esther and Mordechai about her going to speak personally to Achashverosh. Tosafot question the Gemara's rationale, pointing out a different solution to the problem they were discussing. In his commentary, Rashba concedes that Tosafot's challenge to the talmudic logic is indeed cogent, but then he writes, *אלא שדברי אגדה הן ואין משיבין עליהם*. On this statement of Rashba, Chazon Ish comments: *חלילה שהרשב"א דחה, אלא כוונתו ז"ל שדברי אגדה הם נסתרים ממנה ביותר וקשה לו להתיישב בהן*. My understanding of this exchange is that the Rashba, in writing "*ואין משיבין עליהם*", is saying that although we may have a difficulty in understanding the words of *Chazal*, we cannot negate what they said, and essentially that is how the Chazon Ish explains the intent of Rashba—inasmuch as aggadic dicta may be highly obscure, it is difficult for us to penetrate their true meaning. But it was certainly not the contention of Rashba that our failure to comprehend justifies rejecting the Gemara's statement.

It escapes me why the Chazon Ish's reading of Rashba is a "forced interpretation." Even if one concedes that Dr. Kaplan's reading of the Rashba is equally plausible, that does not render the interpretation of the Chazon Ish "forced". (A close reading of Dr. Kaplan's letter as well as his original article seems to indicate that Dr. Kaplan was relying on a text of the Rashba cited in a footnote by the editor of the letters of the Chazon Ish, which differs from the standard text of the Rashba and might change its meaning significantly.)

Let us continue: Dr. Kaplan accuses Rabbi Wein, writing in the *Jewish Observer*, of having insulted him by accusing him in an article of implying that Rav Soloveitchik *z"l* tailored his remarks concerning *Daat Torah* to suit his audience, and he censures me for repeating that slur. I am

more than prepared to accept Dr. Kaplan's protestation that he never intended any such allegation. However, *במחייבת כבודו*, Dr. Kaplan's remarks were not made in a vacuum and certainly invite such an interpretation. After citing a *hesped* made by Rabbi Soloveitchik about Rav Chaim Ozer, Dr. Kaplan wrote,

It is no coincidence that this eulogy was delivered at the...conference of the Agudas Yisrael of the United States....Nor is it a coincidence that in the eulogy Rav Soloveitchik contrasted this type of all-embracing leadership...with the secular leadership of nontraditional movements....We have here, then, an elegant expression of the Agudah ideology of *Daas Torah*.(my underline)

Perhaps too much is being read into the repetition of the phrase "it is no coincidence", but the conclusion that some kind of pandering to the audience is being alleged is not totally out of line. I admit, however, that Dr. Kaplan's explanation is plausible and am willing to give him the benefit of the doubt and apologize.

With respect to what Rav Soloveitchik truly thought about *Daat Torah* and whether he may have changed his mind about that belief, I surely am not competent to judge. Nevertheless, it is quite a leap to conclude that the Rav left the Agudah and took up leadership of the Mizrachi because of a sea change in his mind about this specific ideology. There are surely other beliefs which could have triggered such an action. It is highly feasible that, as the realities of the Holocaust unfolded, Rav Soloveitchik may have come to believe that a pro-active position regarding Eretz Yisrael was crucial at that moment in history; he may have found the Mizrachi position on Eretz Yisrael more compatible with his own thinking during and after the World War, and made the organizational and ideological switch for that reason. I do not know. Or perhaps the Rav felt that

American Jewry required its Torah leaders to be well-versed in secular studies and felt the Mizrachi would be a better venue for that point of view. Again, I cannot presume to say. But to impute motives to the Rav in the absence of concrete evidence, and thereafter to draw conclusions from this supposed rejection of aspects of the *Daat Torah* stance of the Agudah is, in my opinion, an unwarranted and unsupported assumption. I think one can understand why I therefore termed Dr. Kaplan's statements as polemic in nature.

This polemic nature is fortified, I believe, by Dr. Kaplan's present letter. In challenging Rabbi Schachter's portrait of the Rav as evidencing "a clearly discernable tendency...to emphasize and even at times exaggerate the traditionalist features of the Rav and minimize the more innovative and unconventional features," Dr. Kaplan relies primarily on the opposing interpretation of the Rav's thinking expounded by Rabbi Lichtenstein and other *talmidim* of the Rav. (Of course, it depends which *talmidim* one asks; see, for example, the letter by Rabbi Kasdan featured above.) Why preference should be given to the views of Rabbi Lichtenstein over those of Rabbi Schachter is not apparent to me: both are outstanding *talmidei chachamim* and both had a long and close relationship with the Rav. Furthermore, Dr. Kaplan himself cites Rabbi Lichtenstein as saying about the Rav that "...though he denied a decisive role to rabbinic authority in the political dimension, he insisted that fundamental values...and a pure spiritual perspective, which can be provided only by *yehidei segulah*, should guide activity in this sphere." Doesn't this sound awfully "traditionalist"? Is it fair to accuse Rabbi Schachter of somehow trying to skew the picture? Can't this kind of characterization correctly be seen as "polemical in nature"?

Despite our continued differences of opinion, I agree with

Dr. Kaplan's assessment that we are not that terribly far apart in our beliefs, although I am not prepared to let him characterize my supposed reaction to Rav Schach's writings. His intelligent and cogent comments are deeply appreciated, as is his thoughtful and measured tone. More discussion of this important topic is certainly needed in the Jewish community; hopefully the present exchange leaves hope that it can be accomplished in an atmosphere of mutual respect and a desire to be *מרביה בכבוד שמים*.

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To the Editor:

I am writing to you regarding Rabbi Brander's article on "Gynecologic Procedures and Their Interface with Halacha" in the Fall 2001 issue of the *Journal of Halacha and Contemporary Society*. I found the article very informative and very helpful to my patients who may have bleeding following the procedures you reviewed. Although I do not *pasken* for my patients, the references in the article are very helpful for them to take back to their Rabbis when they ask a *she'ala*. However I do have concerns about one point made in the article. At the end of section VI the author cited two references (*Principles and Practice of Clinical Gynecology* by Kase and Weingold and *The ACOG Technical Bulletin number 192*) to say that the rubbing of a fibroid or polyp against the walls of the uterus or cervix may cause a hormonally-induced release of blood. This information is not factually correct, and I believe that he misinterpreted the references. Fibroids and polyps (and the uterus itself) are responsive to hormonal stimulation but are not hormonally active, and rubbing them cannot cause a hormonally-induced release of blood. However, a woman with a fibroid or polyp may have bleeding that is either related to the fibroid or polyp or is hormonal in nature, and it may not be possible for the doctor to tell the difference.

unless he/she traumatized the fibroid or polyp (as in a D&C) and the bleeding resulted immediately thereafter. It is not clear to me to what extent and in what clinical circumstances this *sofek* will make a difference in the *p'sak halacha*, but I feel that it is important to get the facts right.

Sincerely

MARK SPITZER, MD

*(The author is Professor of Obstetrics and Gynecology at
New York University School of Medicine)*

(Rabbi Brander declined to respond)

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To the Editor:

Your article, "Veal, the other white meat?", in volume XLV, cites that Rabbi Moshe Feinstein in 1982, *Iggerot Moshe, Even Haezer IV*, no. 92 "recommended that a *ba'al nefesh* refrain from the consumption of veal due to the concern of *trefot*". That being the case, how then does the Union of Orthodox Congregations Kashruth Division certify veal to be "glatt kosher" for consumption?

I anxiously await your answer.

Sincerely,

JUSTIN SCHWARTZ

(The OU has not responded to this query)

* * *

To the Editor:

The otherwise thorough article "Halacha & Technology: Erasing God's name from the computer" (Issue XLV) overlooked one critical technical aspect relating to deleting files from a computer's hard drive. By and large, when you

erase a file from your computer, nothing is actually erased!

When you delete a file the contents of the file are not actually removed from the disk. What actually happens is that the system places the hex byte code E5h into the first letter of the file name. This tag tells the system "this file has been deleted" and this space on the hard drive is now available for use by other files. The data itself stays on your drive until, at some indeterminate time in the future, the computer decides to store a new file in this space. Then and only then is the original data truly erased. (Source and more information: [www.pcguide.com/ ref/ hdd/ file/clustDeletion-c.html](http://www.pcguide.com/ref/hdd/file/clustDeletion-c.html)).

This makes the analogy between deleting computer file with God's name and erasing God's name written on your body via emersion in the mikvah even stronger. The latter is considered indirect erasure because the initial emersion does not erase the name; God's name is only erased at some indefinite time in the future. This is exactly the situation with deleting a computer file that contains God's name!

In fact, since the erasure only occurs when you next save a file that might overwrite the "deleted" data, one could argue that saving files subsequent to erasing a file with God's name in it should be forbidden in that that act might cause the erasing of God's name. But since the probability of any one (new) file being saved on any particular sector of the computer's hard drive is pretty low, and since we generally only forbid actions that might cause indirect violations if there is a very high probability or a certainty of the violation occurring ("Psik Reisha") it's hard to imagine that one could forbid saving files subsequent to erasing a file with God's name on these grounds.

The above notwithstanding, there are certain forms of

file deletion that do immediately erase data. Security programs that overwrite deleted data as files are erased (e.g., to protect state or trade secrets in case a laptop is stolen) and reformatting a hard drive do immediately and completely erase data. In these cases, the above logic would not hold. Furthermore, defragmenting your hard drive (i.e., a routine maintenance procedure that can speed up your hard drive's performance) involves moving many files to new physical locations on the hard drive and could very likely lead to God's name being erased and re-written even if you have not even deleted the file containing God's name!

(If you holds that, absent the technical issues above, erasing God's name from one's hard drive would be religiously problematic, then if a file with God's name in it find its way to your computer, I would imagine that you should avoid using programs or running procedures such as the ones mentioned above.)

In sum, the nature of file storage is such that it adds yet another compelling reason to those listed in the article to argue that erasing God's name from your hard drive is not in fact a violation of the biblical prohibition.

ANDREW ACKERMAN