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Manuscripts that are submitted for consideration must be typed, double-spaced and on one side of the page and sent in duplicate hard copy to Rabbi Cohen. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles that concern contemporary halachic issues.

More generally, it is the purpose of this Journal to study through the prism of Torah law and values major questions facing us as Jews in the twenty-first century. This encompasses the review of relevant biblical and talmudic passages and the survey of halachic literature, including recent responsa. Most importantly, the Journal of Halacha and Contemporary Society does not present itself as the halachic authority on any question. Rather, the aim is to inform the religious Jewish public of positions taken by respected rabbinic leaders over the generations.

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Nullification of a Conversion

*Rabbi Chaim Jachter**

In recent years, there has been much debate regarding *bittul geirut*, nullification of conversion. In this essay we shall first outline the mainstream approach to *geirut* standards followed by rabbinic courts whose conversions are accepted throughout the Torah world, while noting some minority opinions followed by a number of Orthodox rabbis whose conversions are regarded as more controversial. Following this introduction we shall present two case studies of *bittul geirut* that illuminate this important issue.

A Bizarre Question

Some time ago, an acquaintance approached me with a highly unusual question. Unfortunately, this young man was dating a non-Jewish woman – but she had expressed willingness to convert to Judaism. She even was willing to observe the mitzvot of the Torah, as she found the observant Jewish lifestyle highly appealing. However, a serious impediment was the fact that she unabashedly denied the existence of a Creator. The acquaintance asked if she would be eligible for conversion.

I responded that such a conversion would be patently absurd. The essence of *geirut* is expressed by the quintessential convert, the biblical character Ruth, who declared her commitment to Torah so magnificently and succinctly: "*Ameich Ami V'Eilokaiyich Elokai*," "Your nation is my nation

* This essay is adapted from Rabbi Jachter's forthcoming Volume Four of *Gray Matter*.

Dayan: Beth Din of Elizabeth; Rav: Sephardic Congregation of Teaneck; Rebbe: Torah Academy of Bergen County

and your God is my God" (*Ruth* 1:16). Indeed, Boaz (*Ruth* 2:12) so beautifully describes Ruth as "having come to seek shelter under the wings" of Hashem, the God of Israel.

The Rambam employs similar terminology.[1] He describes a convert as one who "wishes to enter the covenant, seek shelter beneath the wings of the *Shechinah* (the divine presence), and accept the yoke of Torah." The Rambam continues that such an individual requires immersion (*tevilah*) in a *mikveh* and *brit milah* (circumcision) for a male.

Accordingly, an individual who harbors no ambition to establish a close bond with Hashem is not a viable candidate for conversion. Certainly, one who is entrenched in denial of Hashem cannot be admitted by a *beit din* (Jewish court) for conversion. Even if such an individual undergoes the process of conversion with all the necessary trappings, including immersion and acceptance of mitzvot before a *beit din* consisting of Orthodox rabbis, the conversion is invalid.

There is a fundamental distinction between *geirut* and other procedures such as *kiddushin* (Jewish marriage) and *gittin* (Jewish divorce). A Jewish marriage or divorce that is conducted in full conformity with halachic standards is completely valid even if neither the man nor woman is committed to Torah observance and belief. Conversion rituals, on the other hand, are processes that must express a deep and permanent commitment to Hashem and His people in order to have any meaning.

A similar halacha exists regarding *tefillah* (prayer). One who recites every word of prayer perfectly and precisely but lacks *kavanah* (feeling or intention to connect with Hashem) does not fulfill the mitzvah of *tefillah*,[2] which is the external manifestation of an internal worship of the heart.[3] Similarly, *milah* and

1. *Hilchot Issurei Biah 13:4.*
2. Rambam, *Hilchot Tefillah* 4:1 and *Shulchan Aruch O.C.* 101:1.
3. *Ta'anit* 2a.

tevilah are meaningless unless they are external expressions of a desire "to enter the covenant, seek shelter under the wings of the *Shechinah* and accept the yoke of mitzvot."

A Delicate Balance

A *beit din* that assumes the awesome responsibility to accept *geirim* (converts) is charged with the difficult mission of striking a very delicate balance between competing principles. On the one hand, the Gemara makes a remarkable statement that "evil after evil will befall those who accept converts."[4] Tosafot (ad loc. s.v. *Ra'ah*) limit the Gemara's declaration to a *beit din* that either seeks to convince non-Jews to convert or converts individuals indiscriminately or impulsively. If, Tosafot continue, the candidate is persistent in his desire to convert, we should accept him. Indeed, I heard Rav Yosef Dov Soloveitchik declare that a non-Jew who is sincerely committed to Torah enjoys the right to be converted.

Tosafot support their assertion by citing examples of outstanding *batei din,* such as those of Yehoshua and Hillel (*Shabbat* 31a), who accepted sincere *Geirim*. Although the individuals who came to him were hardly viable candidates for conversion at first – one of them denied the validity of the Oral Law – Hillel was confident that with patience and wisdom he would be able to shepherd them to full acceptance of Torah, an expectation that he fulfilled. Moreover, Tosafot cite the example of Timnah who, according to *Sanhedrin* 99b, was unjustifiably denied conversion by our forefathers.[5] Out of bitterness, she agreed to be a concubine to Eisav's son Elifaz and bore him Amaleik, who perpetually inflicts great pain upon Israel.

Accordingly, although *batei din* must exercise caution and not hastily or indiscriminately convert candidates for *geirut*,

4. *Yevamot* 109b.
5. *Bereishit* 36:12.

they also must not reject those with genuine commitment to become successful *geirim* who will lead fully observant lives.

Hillel's non-Believing Convert – Rashi and Maharsha

Accepting the yoke of Torah is an essential component of *geirut*. The Gemara states that even if a convert is willing to accept all of the Torah except for one rabbinic precept, we do not accept him as a candidate for conversion.[6] A *giyoret* (female convert) who is a passionate vegan related to me that the *beit din* that converted her inquired whether she would be willing to partake of the *Korban Pesach* (Pesach sacrifice) when the *Beit HaMikdash* will be rebuilt despite her vegan convictions. She responded without hesitation that she would consume a *kezayit* (the minimum amount required) of the *Korban Pesach*. This answer reflected her recognition that divine commands take priority over one's ethical intuitions (manifested in biblical examples such as by *Akeidat Yitzchak*, Isaac's binding).

Accordingly, by what right did Hillel convert the man who stated that he believed only in the divine authority of the Written Law and not of the Oral Law? After all, by rejecting the Oral Law, this candidate expressed his lack of acceptance of the vast majority of mitzvot, such as lighting Chanukah candles or the proper placement of *tefillin*. Rashi[7] explains that since the candidate "did not deny the authority of the Oral Law, he merely did not believe in its divine origin; Hillel was convinced that after he would teach him that he will rely on him" and grow to believe in the authority of the Oral Law as well.

Maharsha[8] clarifies that Hillel did not convert this individual at the time that he did not yet believe in the Oral

6. *Bechorot* 30b.
7. Ibid. s.v. *Gayarei.*
8. Ibid.

Law, he merely agreed to accept him as a viable candidate for conversion. Had Hillel not accepted him as a feasible candidate, it would have been forbidden to teach him Torah, as is the ruling in the Talmud.[9] Maharsha explains that Hillel converted him only after he came to believe that even the Oral Law is from Hashem.

Hoda'at Mitzvot and *Kabbalat* Mitzvot – Rambam and Chemdat Shlomo

Rambam (ad. loc. 14:17) and *Shulchan Aruch*[10] rule that if a convert is not informed of the mitzvot the conversion is nonetheless valid *b'diavad* (after the fact). This is based on the Gemara[11] that discusses one who converted despite being unaware of the obligation to observe Shabbat. Tosafot clarify that albeit this individual certainly converted before a *beit din*, evidently the *beit din* erred and did not inform the convert of the mitzvot, and thus he did not know about Shabbat.

This ruling of Rambam appears to contradict his aforementioned assertion that acceptance of the yoke of Torah represents the essence of the *geirut*. If *hoda'at* mitzvot (informing the convert about the mitzvot) is not essential, how can the prospective convert accept the mitzvot, which constitutes the most important component of a conversion?

The *Teshuvot Chemdat Shlomo*[12] draws a fundamental distinction between *hoda'at* mitzvot and *kabbalat* mitzvot. He argues that although *hoda'at* mitzvot is not essential, *kabbalat* mitzvot is crucial. The convert's commitment to observe mitzvot signifies the core of the conversion. If in a peculiar case the *beit din* mistakenly failed to inform the convert of the Torah's obligations, the *geirut* is acceptable *b'diavad*, so long as the convert

9. *Chagigah* 13b.
10. *Y.D.* 268:12.
11. *Shabbat* 68a.
12. *Y.D.* 29-30, referenced in the *Pitchei Teshuvah* 268:9.

agrees to observe the Torah's obligations, whatever they may be. However, if the convert is not committed to accept the Torah's rules when he finds out what they are, the conversion is invalid.

The *Chemdat Shlomo*'s distinction has been accepted by the overwhelming majority of *poskim* (halachic decisors),[13] who rule that if a convert did not commit to observing the Torah, the conversion is invalid.

Rav Uzziel vs. Rav Auerbach

There are, however, a minority of *poskim* who support more lenient approaches. The primary advocate for leniency in regard to *kabbalat* mitzvot is Rav Ben-Zion Uzziel. His approach is summarized in *Piskei Uzziel* number 65:

> [Regarding] a non-Jew who has been circumcised and has immersed in a *mikveh* for the purpose of conversion...we do not require that he observe the mitzvot, and the *beit din* does not even need to know that he will observe mitzvot, for otherwise converts will not be accepted in Israel, because who can guarantee that the non-Jew will be loyal to all of the mitzvot of the Torah…the requirement to fulfill mitzvot is not an indispensable component of the conversion even *l'chatchilah* (ideally)…it is permissible to accept male and female converts, even if it is known to us that they will not fulfill all of the mitzvot, because eventually they will come to fulfill mitzvot, and we are obligated to open this door for them. And if they do not

13. These authorities include Rav Yitzchak Shmelkes (*Teshuvot Beit Yitzchak Y.D.* 2:100), Rav Avraham Yitzchak HaKohen Kook (*Teshuvot Da'at Kohen* 147), Rav Avraham Kahana-Shapiro (*Teshuvot Devar Avraham* 3:28), Rav Chaim Ozer Grodzinski (*Teshuvot Achiezer* 3:26 and 28), Rav Moshe Feinstein (*Teshuvot Iggerot Moshe Y.D.* 1:157), Rav Yosef Dov Soloveitchik (citing his father in footnote 22 to *Kol Dodi Dofeik*), Rav Shlomo Zalman Auerbach (*Teshuvot Minchat Shlomo* 1:35), and Rav Yosef Shalom Eliashiv (*Kovetz Teshuvot* 1:104).

> fulfill mitzvot, they will bear their sins and we are free from responsibility for this.

Rav Uzziel bases himself on Hillel's acceptance of converts that were not yet committed to all of the Torah's mitzvot and beliefs. Rav Uzziel understands that Hillel actually converted the men who came to him before they fully embraced Torah life. Rav Uzziel felt compelled to adopt such a lenient stance due to concern for intermarriage that would occur had lenient standards for conversion not been offered.

As noted, though, the overwhelming majority of *poskim* of the twentieth century view *kabbalat* mitzvot as the essence of *geirut*, whose absence invalidates a conversion.

Rav Shlomo Zalman Auerbach's words contrast sharply with those of Rav Uzziel:[14]

> The class of converts…regarding whom we are almost certain that they are not committed at all to fulfill and observe the mitzvot of Hashem, in such a situation, in my humble opinion, anyone who facilitates such a conversion, even if they mistakenly think that they are full-fledged converts, nonetheless even according to their approach those who convert them violate the prohibition of *Lifnei Iveir* [the prohibition to cause another person to sin], since now the convert will violate prohibitions such as Shabbat and *Kashrut* that before the conversion did not constitute violation of God's word [for him, since he was not Jewish].

Rav David Zvi Hoffman vs. Rav Herzog, Rav Feinstein, and Rav Yosef

Rav David Zvi Hoffman,[15] the leading Rav in late-nineteenth- and early twentieth-century Germany, was faced

14. *Teshuvot Minchat Shlomo* 1:35.
15. *Teshuvot Melamed Leho'il* 3:8.

with a difficult issue. A *kohen* married a non-Jewish woman in a civil ceremony and bore him a son, who received a *brit milah*. The son subsequently died, and the wife was distraught over the fact that, as far as she understood, she was not of the same religion as her deceased child. In addition to the concern over the intermarriage, there was fear that the wife would be driven to insanity were she not allowed to convert. A *chillul* Hashem [desecration of God's name] might thereby be created, as people would say that the Jews had no concern for the well-being of the wife.

However, among the halachic impediments to sanctioning such a conversion was the fact that the wife expected to remain married to her husband—but a *kohen* is forbidden to be married to a convert![16] Consequently, the conversion was cast in grave doubt in light of the talmudic text (cited above, n.6) that precludes admitting a convert who accepts all of the Torah except for even one rabbinic precept. In this situation, the wife implicitly did not accept the prohibition for a *kohen* to marry a convert.

Rav Hoffman wrote that the conversion should be discouraged by informing the woman that her son was not Jewish (as she herself was not Jewish). If, though, she would persist in her desire to convert and would express sincere belief in the God of Israel, the *geirut* may proceed. Rav Hoffman suggests two approaches to overcome the obstacle of her lack of acceptance of the prohibition to a *kohen*. First, he argues that the Gemara forbids accepting a *ger* only if he explicitly states his rejection of a particular mitzvah, which in this case, the woman did not do. Secondly, Rav Hoffman argues that the Gemara prohibits incomplete acceptance of mitzvot only when the conversion is conducted purely for the sake of the convert. In such an instance, it is better that the convert not become Jewish than become Jewish and violate any part of Jewish law. However, if the *geirut* is performed for

16. *Kiddushin* 78a).

the sake of the Jewish mate, to avoid the severe sin of his living with a non-Jew, we may disregard the Gemara's concern, inasmuch as the *beit din* acts in the interest of the convert's partner. Rav Hoffman concludes that this reasoning applies only if the couple will observe the laws of *Niddah*; otherwise, the conversion does not serve the spiritual interest of the husband.

Most *poskim*, however, do not accept Rav Hoffman's ruling. Rav Moshe Feinstein writes, "In my humble opinion, I do not see any room to permit" such a conversion.[17] Rav Yitzchak Herzog[18] and Rav Ovadia Yosef [19] also do not accept Rav Hoffman's ruling. Among their concerns are that an impression would be created that rabbis have permitted a *kohen* to marry a convert. When Rav Shlomo Goren relied upon Rav Hoffman's ruling in a widely publicized case in 1970,[20] his decision was criticized sharply by Rav Yosef Dov Soloveitchik.[21]

Rav Moshe Feinstein's "Bit of *Limmud Zechut*"

Rav Moshe Feinstein clearly states that if a convert does not intend to observe mitzvot, his conversion is invalid. He does, however, offer "a bit of a *limmud zechut*" (defense) for those Orthodox rabbis who convert individuals who clearly have no intention of observing mitzvot.[22] Rav Moshe suggests that in today's circumstances, when most Jews do not observe the Torah, many converts perceive non-observance of halacha to constitute mainstream Jewish practice. Thus, they perceive observance of mitzvot as a preferred manner of Jewish living, not as an absolute requirement. In such a situation, the convert

17. *Teshuvot Iggerot Moshe E.H.* 2:4.
18. *Teshuvot Heichal Yitzchak E.H.* 1:19.
19. *Teshuvot Yabia Omer Y.D.* 2:3.
20. *Techumin* 23:180-184.
21. See *Noraot HaRav* 5:56-58.
22. *Teshuvot Iggerot Moshe Y.D.* 1:157 and 1:160.

may be compared to the Gemara's case of one who converted amongst non-Jews and was not informed about the mitzvot, yet was considered to be a full-fledged Jew. In today's environment, it is as if the convert was not informed of the mitzvot, since many converts do not accept what they are taught about the obligation of mitzvot.

Rav Moshe Feinstein does not endorse such conversions. Rather he presents this reasoning "so that they [the rabbis involved in such conversions] should not be considered worse than uneducated." Interestingly, Rav Moshe Feinstein does not disqualify these rabbis from serving as *dayanim* (judges) due to their lenient approach to conversion. On the other hand, he does not endorse or recognize such lenient conversions. Similarly, I recall that Rav Yosef Dov Soloveitchik presented a bit of a *limmud zechut* for those who adopt the lenient approach to *geirut*, based on the aforementioned Rashi to *Shabbat* 31a. However, Rav Soloveitchik did not validate such conversions.

This contrasts sharply with the approach of Rav Moshe Shternbuch who classifies rabbis who adopt the lenient approach to conversion as disqualified from acting as judges in a rabbinic court.[23] He goes as far to suggest that even if such rabbis conduct a conversion where the convert sincerely commits to Torah observance and belief, the conversion is *invalid due to the disqualification of the rabbis*! This approach, though, seems difficult, since those who follow the lenient approach do have a few *poskim* on whom to rely. Thus, while their lenient conversions should be regarded as controversial, one who genuinely accepts mitzvot before a *beit din* consisting of rabbis who often follow very lenient standards is a valid convert, at least according to Rav Moshe Feinstein.

23. *Teshuvot VeHanhagot* 4:230.

Conclusion about Conversions

The consensus amongst *poskim* is that *kabbalat* mitzvot is an indispensable component of *geirut* and that a conversion is invalid if the convert did not intend to fully observe Jewish Law. Now we are ready to proceed with our discussion of nullifying a conversion retroactively (*bittul geirut).* Before examining this debate, we should clarify that in halacha there does exist the concept of *bittul geirut* (nullification of conversion).[24]

Bittul geirut

In 2007, the State of Israel *beit din* of Ashdod nullified a conversion that had occurred many years earlier, arguing that the *giyoret* in question had been only partially observant of mitzvot since the conversion. The woman appealed to the Israeli Rabbinic Court of Appeals,[25] where two outstanding *dayanim*, Rav Shlomo Dichovsky and Rav Avraham Sherman, disagreed whether to uphold or reject the lower *beit din*'s ruling.

A State of Israel *beit din,* known for its fairly lenient approach to conversion, once nullified a conversion that had occurred several years previously.[26] A woman and her three-year-old child had applied for conversion. Upon receiving enthusiastic endorsements of the woman's complete mitzvah observance and dedication to her daughter's Torah education, the *beit din* accepted their credentials and converted them.

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24. The subject of *bittul geirut* is very sensitive. Indeed, in 1972, when Rav Shlomo Goren invalidated the conversion of the first husband of a woman who remarried without a *get* in order to spare the children from her second marriage from being classified as *mamzeirim*, many *rabbanim* expressed severe dissent. Rav Yosef Shalom Eliashiv even resigned from the Rabbinic Court of Appeals as a result.

25. For a discussion of this institution, see *Gray Matter* 3:246-248.

26. This ruling is recorded in *Techumin* 23:186-202.

However, the Israeli Interior Ministry subsequently discovered that the woman, both before and after the conversion, had for a number of years maintained an ongoing relationship with a non-Jewish man, which included physical relations. Upon this revelation (of which, of course, the conversion *beit din* had been unaware), the Ministry submitted a request to the *beit din* to nullify the conversion. This nullification would not only have potential religious consequences, but also would result in the expulsion of the woman and her daughter from Israel, since they received automatic Israeli citizenship on the basis of their status as Jews. (We should clarify, however, that the man, who was a foreign worker in Israel, had attempted to enter a conversion program but was rejected due to his lack of Israeli citizenship. Nor could he convert in his own country (Turkey) because there was no conversion study program in that country. The linkage between conversion and Israeli citizenship makes conversion in Israel much more complex and controversial than outside of Israel).

The potential basis for nullifying the *geirut* was the woman's apparently flawed acceptance of mitzvot and the fact that her conversion had been based on her apparently deceptive presentation of being fully observant of Torah law.

The Minority Opinion

One *dayan* (judge) on the *beit din*, Rav David Bass, ruled that although he certainly would not have approved the conversion had he known of her relationship with this individual, the conversion should not be nullified *b'diavad* on the basis of the discovery. He combines five twentieth-century rulings as precedent for his approach.

He begins by citing Rav Ben-Zion Uzziel's approach that *kabbalat* mitzvot is not an indispensable component of the

conversion process.[27] Rav Bass notes that the consensus opinion rejects this approach, but he argues that it should be considered as an adjunct to a lenient ruling not to nullify the conversion. Next, he cites Rav David Zvi Hoffman's ruling[28] that a *beit din* is forbidden to accept a candidate for conversion only if he/she explicitly rejects a mitzvah. However, as long as such an explicit statement is not made, the *beit din* may perform the conversion even if it is obvious that he/she will violate one of the commandments.

The third precedent is Rav Moshe Feinstein's argument[29] that a convert who is willing to accept mitzvot but is not willing to accept proper standards of modest dress is not necessarily rejecting a mitzvah if she is willing to follow the (less than ideal) standards observed by the observant women she sees in her community. In such a situation, she does not internalize the standards espoused by the rabbis, since it is not observed by the observant women she sees. Her perception is that the rabbis are trying to impose unnecessary stringency upon her, and Rav Moshe suggests that this attitude does not constitute a rejection of a mitzvah. Thus, Rav Bass argues that since the woman in question sees Jewish women in her neighborhood who live with non-Jewish partners, she does not perceive living with a non-Jewish man as truly forbidden according to Jewish Law. He further surmises that the woman might be thinking that just as she converted, her partner will convert as well.

The fourth precedent he cites is another ruling of Rav Moshe Feinstein.[30] A woman had been warned by her boss, before conversion, that she would lose her job if she failed to appear for work on the second day of *Shavu'ot*. The woman caved in to the pressure and did go to work; years later, she asked Rav

27.*Teshuvot Mishpitei Uzziel* 2: *Yoreh Deah* 58 and *Piskei Uzziel* number 65).

28. *Melamed Leho'il* 3:8.

29. *Iggerot Moshe Y.D.* 3:106.

30. *Iggerot Moshe Y.D.* 3:108.

Feinstein if her foreknowledge that she intended to commit this violation invalidated her conversion. Rav Moshe validated her conversion, reasoning that halacha does not require a convert to be committed to observe mitzvot even in the most stressful of situations. For example, Rav Moshe argues that a candidate can be accepted for conversion even if he/she is not prepared to surrender their lives in situations where halacha demands such sacrifice. Similarly, Rav Moshe argues that halacha does not demand from the convert that at the moment of conversion, he be willing to forego his means of livelihood in order to observe halacha.

Rav Bass argues that for the woman in question, the requirement to abandon her non-Jewish partner was as difficult as demanding that she be willing to forego her employment. A lack of such intense dedication to mitzvah observance should not invalidate her conversion.

The fifth precedent is a ruling from Rav Avraham Yitzchak Kook,[31] who was asked regarding a case in Egypt where a convert was improperly withholding a *get* (Jewish divorce document) from his wife. The local rabbis wished to invalidate his conversion on the basis of his failure to observe the mitzvot, thereby permitting the wife (who retroactively would never have been his wife since he was not Jewish) to remarry without a *get*. Rav Kook, however, rejected this approach, arguing:

> As long as there was a proper articulation of acceptance of mitzvot, one can say that we disregard any thoughts the person had when making the declaration. Even if Eliyahu HaNavi will come and testify that the convert did not intend to observe the mitzvot, one's thoughts are a totally irrelevant consideration (*Devarim She'beleiv Einam Devarim – Kiddushin* 49b).

Similarly, Rav Bass argues that the fact that the woman in

31. *Da'at Kohen* 153.

question intended to continue to live with her gentile partner does not invalidate her stated acceptance of the Torah.

The Majority Opinion

Rav Yisrael Rozen, in articulating the majority opinion of the *beit din*, invalidated the conversion. Interestingly, Rav Rozen does not consider Rav Uzziel's ruling even as an adjunct consideration in a lenient ruling. Moreover, Rav Rozen argues that the fact that this woman continued to live with a non-Jew impinges on the very essence of conversion – joining the Jewish people. He views as absurd the comparison to a woman who was not committed to modest dress beyond that which her otherwise observant neighbors practiced. One cannot compare relatively minor laxity in one area of halacha to the blatant violation of one of the most basic aspects of Jewish life.

In defense of Rav Bass, one might argue that despite the astounding contradiction, some people might conduct most of their lives as observant Jews and yet live with a *nochri* partner. Nonetheless, Rav Rozen argues that there must be a limit to the degree of flexibility a *beit din* can exercise. He writes, "This case is virtually the simplest scenario that requires a *beit din* to nullify a conversion. It is difficult for me to imagine a more extreme situation."

Moreover, the woman blatantly lied to the *beit din* when it inquired as to her personal relationships. Her deception throws the validity of the conversion into doubt, since the presence and consent of *beit din* is a requirement for *geirut*.[32] Had the *beit din* known of this relationship, it would never have administered the conversion.

Let us return to clarify the principle raised by Rav Kook – *Devarim She'beleiv Einam Devarim* – literally, "things that are in

32. *Yevamot* 46b and *Shulchan Aruch Y.D.* 268:3.

the heart are nothing," which is articulated by the Gemara in *Kiddushin* 49b: A certain individual sold his property with the intention to move to Eretz Yisrael, but did not specifically condition the sale upon his successful move to Eretz Yisrael. When afterwards he was unable to move to Eretz Yisrael, he was not entitled to demand the right to repurchase the house, even though he only sold the house because of his intention to move to Eretz Yisrael. The reason for this, states the Gemara, is that *Devarim Shebeleiv Einam Devarim*, unarticulated thoughts carry no halachic significance. Thus, it would appear at first glance that we should ignore a convert's unarticulated intention to routinely violate Jewish law as long as the convert declared before *beit din* his commitment to fully observe Jewish law.

Tosafot, however, clarify that there are exceptional situations where the parties' intentions are so clear that we follow those intentions and in those situations "we assess that this was his intention". Rav Moshe Feinstein[33] applies Tosafot's rationale to a situation where it is "nearly clear" that the convert does not intend to observe Torah law. In such a case the articulated *kabbalat* mitzvot is meaningless and the conversion is invalid. Rav Moshe's example of such a conversion is when a woman converts to marry a Jewish man who does not observe Torah law. Indeed, mainstream rabbinic courts will perform a conversion in such a situation only if the intended Jewish spouse makes concrete and sustained efforts to lead a fully observant Torah lifestyle.

The 2008 Debate

We now turn our attention to the great debate between Rav Shlomo Dichovsky and Rav Avraham Sherman that erupted in 2008 regarding *bittul geirut*. This debate impacts not only the Jewish status of a mother and her children in the Ashdod area,

33. *Iggerot Moshe Y.D.* 1:157 and 159.

but also thousands of individuals who have converted through the special conversion courts established by the Israeli Chief Rabbinate. Thus, we need to embark upon discussion of this matter with full awareness of the complexities and the variety of opinions regarding an issue that has great impact on generations to come.

The Special Conversion Courts

The great immigration from Russia to Israel beginning in the late 1980s has given rise to an enormous social and halachic problem, for a great number of these immigrants are either not Jewish or only possibly Jewish. They were admitted to the country under the Law of Return, which grants automatic Israeli citizenship even to one who is married to a Jew or has only one Jewish great-grandparent. The situation of these immigrants is particularly difficult given that Israel is a Jewish State; therefore, they wished to convert to Judaism. Many also regarded themselves, out of sheer ignorance, as "Jewish" before they moved to Israel and very much wanted to be treated as Jewish by mainstream Israeli society. However, most of these people did not wish to be observant of Torah law, which creates a serious halachic problem. In an attempt to ameliorate this difficult situation, the Israeli Chief Rabbinate established special *batei* din for conversion. The goal of these courts was to facilitate large scale conversion of non-Jewish citizens of the State of Israel by somewhat relaxing the requirements of *kabbalat* mitzvot.

The Ashdod Case of 2007

A convert and her Jewish-born husband were divorced according to halacha but were denied a *beit din* ruling to that effect. The *beit din* is reported to have ruled that it was highly questionable whether the woman (and her children) was even Jewish, and as such, she could not be granted any document testifying to a Jewish divorce. The *beit din* went as far as to call into question all of the conversions administered by the

special conversion authority due to concern for lack of *kabbalat* mitzvot of the majority of those whom they converted. The ruling went even further, arguing that the *dayanim* who sat on these rabbinic courts were disqualified due to their adoption of a lenient standard regarding *kabbalat* mitzvot. Thus, by disqualifying the judges who had performed the conversions, the Ashdod *beit din* called into question the validity of a conversion even where the individual in fact did commit to a Torah-observant life and lived thereafter as an observant Jew. The basis of this ruling is the requirement that only a *beit din* can perform a valid conversion and a *beit din* consisting of disqualified judges does not constitute a legitimate *beit din*.[34]

Rav Dichovsky's Approach

The woman appealed the Ashdod *beit din*'s ruling to the Rabbinic Court of Appeals in Jerusalem. Rav Shlomo Dichovsky, a longtime member of this special *beit din*, ruled in a number of cases such as this[35] that although he would not necessarily have administered many of these conversions, he could not nullify the conversions *b'diavad*. In this case as well, Rav Dichovsky validated the conversion. While he agrees that *kabbalat* mitzvot constitutes an absolute requirement, Rav Dichovsky focuses on the possibility that during the actual moment of conversion – immersion in the *mikveh* – the convert sincerely accepted the yoke of Torah, despite the reality that she did not observe mitzvot either before or after the conversion. Rav Dichovsky writes:

> Anyone who has ever been present at a conversion is aware that it is a very emotional experience for all of those in attendance, especially, of course, for the convert. It is very likely that in that emotion of the moment of immersion, she indeed was fully committed to Torah observance and only later veered from the [Torah] path.

34. *Yevamot* 46b and *Shulchan Aruch* 368:3.

35. One such ruling appears in *Techumin* 29:267-280.

Rav Dichovsky (following Rav Kook in *Teshuvot Da'at Kohen* 153) even supports his argument from the fact that the entire Jewish people converted at Mount Sinai,[36] and this conversion was recognized by none other than Hashem, even though the Jewish people worshipped the Golden Calf only forty days after that great moment!

Rav Avraham Sherman strongly rejects Rav Dichovsky's approach. He argues:

> The test of *kabbalat* mitzvot is not measured by that moment in which she makes the oral declaration that she accepts the mitzvot, as Rav Dichovsky states. The true test is the factual circumstances, the lifestyle of the convert before the moment of immersion. Her shared life with a man who is removed from Torah and mitzvah observance and her life in a society that does not observe Torah and mitzvot reflect what occurred at the moment of acceptance of mitzvot. There is no logic and one cannot even consider removing that specific moment from the continuum of a secular lifestyle devoid of a religious life of Torah and mitzvot and declare that at that moment there was a revolutionary movement of entering the Jewish religion, its principles, beliefs, and mitzvot, when a moment after the conversion there is no expression and actualization of the religious movement that occurred in her heart.

Rav Moshe Feinstein's Ruling

Interestingly, Rav Moshe Feinstein grappled with this issue in a 1968 case that occurred in Winnipeg, Canada.[37] A non-Jewish man converted, apparently under the auspices of an Orthodox rabbi, and married a Jewish woman in an ostensibly

36. See Rambam, *Hilchot Issurei Bi'ah* 13:1-3.

37. *Iggerot Moshe Even Haezer* 3:4.

Orthodox ceremony. The rabbi, however, did not require a *brit milah,* since the man had already been circumcised. In such circumstances, rabbinic authorities disagree whether ritual removal of blood (*hatafat dam brit*) is required;[38] consequently, *hatafat dam brit* is usually performed, out of doubt.[39] Later, the couple divorced civilly, and thereafter the husband disappeared, leaving his wife without a *get*. Since the local rabbis felt that it was impossible to obtain a *get* for the wife, they asked Rav Feinstein if it was possible to invalidate the marriage by declaring the conversion null and void retroactively, due to the man's lack of *kabbalat* mitzvot.

Rav Moshe writes that if an Orthodox rabbi administered the conversion, one should assume that he properly performed the ceremony in accordance with halacha, despite the fact that his failure to require *hatafat dam brit* reflects poorly on his fidelity to halacha. Nonetheless, since in this case "We saw that he [the "convert"] did not refrain from the Torah's prohibitions even one day," it indicates that he never accepted the observance of Torah and mitzvot. However, Rav Moshe raises the possibility that at the moment of immersion he may have sincerely accepted mitzvot (similar to Rav Dichovsky's approach). Rav Moshe considers this as a possibility, since there are cases in halachic literature where the concern arises that a person experienced an immediate change of ideology. He cites the ruling of the *Shach* (*Y.D.* 1:8) validating the *Kashrut* of an animal slaughtered by a slaughterer who converted to another religion later that very day. The *Shach* assumes that the fact that he converted later that day does not reflect that the slaughterer was an apostate at the time of the slaughter.[40] Rav Moshe, however, notes that the *Shach* rules accordingly only because before the slaughter, the *shocheit* was

38. See Tosafot *Shabbat* 135a s.v. *Lo Nechleku.*

39. *Shulchan Aruch Y.D.* 268:1.

40. A slaughter performed by one who professes another religion is invalid; see *Chullin* 5a.

a Torah-observant Jew. Thus, in a conflict between the *chazakah* (status quo) prior to the slaughter and after the slaughter, the *Shach* rules we can rely on the prior *chazakah* (*chazakah d'mei'ikara*).

Accordingly, Rav Moshe suggests that since the husband was not observant either before or after the conversion, one may assume that at the time of conversion he remained the same; thus, it is obvious that the husband's acceptance was insincere and therefore invalid. Although Rav Moshe was inclined to invalidate the conversion, in actual practice he permitted the woman to remarry without a *get* only due to a *s'feik s'feika*, a double doubt – i.e., perhaps the conversion was invalid due to his insincere acceptance of mitzvot, and perhaps the conversion was invalid due to the rabbi's failure to perform *hatafat dam brit*. Most relevant to our discussion is that Rav Moshe does seem to consider the rationale of Rav Dichovsky's position as at least somewhat of a possibility. We may conclude, therefore, that in the argument between Rav Dichovsky and Rav Sherman, Rav Moshe Feinstein felt that there was "a bit of merit" to Rav Dichovsky's argument.

Invalidating the Rabbinic Courts

However, Rav Sherman's argument disqualifying the members of the special conversion *batei din* appears difficult. Rav Sherman does not cite Rav Moshe Feinstein's "limited justification" of those rabbis who adopt a lenient approach to *kabbalat* mitzvot.[41] Although Rav Moshe does not endorse the lenient approach, he does not rule that rabbis who adopt this approach are thereby disqualified from serving as *dayanim*. Moreover, Rav Moshe refrains from counseling a practicing rabbi to spurn the lenient approach to *kabbalat* mitzvot, "Since there are many rabbis who accept converts such as these, and thus I do not pronounce prohibitions [to perform such a

41. *Iggerot Moshe Y.D.* 1:160.

conversion]….You should use your best judgment on how to act in this situation." [42]

Rav Moshe understood the pressure faced by Orthodox rabbis serving less-than-Orthodox congregants, and while he does not endorse converting someone who in all likelihood will not observe mitzvot, he does not condemn it either. Orthodox rabbis are faced with the same quandary as to how to service the majority of non-observant Jews in the State of Israel. While there are certainly different approaches to this issue and the majority opinion favors the strict approach, those rabbis who adopt the lenient approach are following a legitimate minority opinion in halacha.

Moreover, even Rav Shlomo Zalman Auerbach, who strongly advocates the strict approach and criticizes those who adopt the lenient approach,[43] does not state that those who adopt the lenient approach are invalidated as *dayanim*. Moreover, the *dayanim* of the special conversion courts are following in the footsteps of Rav Ben-Zion Uzziel, who famously advocated a lenient approach to conversions. Thus, it is puzzling to find Rav Sherman condemning the rabbis of the special conversion courts as rejecting "all halachic authorities".[44] It would be more accurate to state that they reject "nearly all" *poskim*. Rav Moshe Shternbuch also does not rule decisively that the lenient *dayanim* are disqualified, for "They believe they are performing a mitzvah."[45] Indeed, Rav Gedalia Axelrod, a *dayan* in Haifa who adopts a very strict

42. *Iggerot Moshe Y.D.* 1:159.

43. *Minchat Shlomo* 1:35. Rav Shlomo Zalman contends that those who are lenient are in violation of the prohibition to cause others to sin (*Lifnei Iveir*), because according to what they believe to be the halacha, they are putting the new converts into situations in which they certainly will violate many halachot.

44. Rav Sherman himself considers Rav Uzziel as a legitimate halachic authority, as he cites him on p.43 of his lengthy responsum.

45. *Teshuvot VeHanhagot* 1:611 and 4:230.

stance towards conversion standards,[46] rules that the lenient rabbis are not disqualified.

Conclusion

Mainstream halacha recognizes a conversion only if the convert sincerely intends to lead a fully observant Torah lifestyle. A conversion conducted by Orthodox rabbis who follow the minority opinion for a convert who did not observe Torah either before or after conversion is regarded by Rav Moshe Feinstein as possibly invalid *(safeik).*[47] Therefore, someone who underwent such a conversion must reconvert when he is ready to fully observe Torah law. On the other hand, if someone was married to such a convert, the marriage can be dissolved only with a *get.*

Conversions performed by Orthodox rabbis who often adopt the lenient approach conversion are not automatically disqualified. Therefore, if a convert converts under the auspices of a *beit din* consisting of rabbis who adopt the lenient approach, but the convert himself observed Torah before and after the conversion, Rav Moshe Feinstein deems the conversion valid.

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46. See his essay in *Shurat HaDin* Vol. 3.
47. See *Iggerot Moshe Yoreh De'ah* 3:109:1.

Deactivating Implantable Pacemakers and Defibrillators in Terminally-Ill Patients

Jonathan Rosman, MD

Introduction

Pacemakers and defibrillators are cardiac implantable electrical devices (CIEDs) used to treat electrical, or rhythm disturbances of the heart (i.e. hearts that beat slowly or dangerously fast). At the end of life, patients with CIEDs occasionally request to have their CIEDs deactivated, in order to allow themselves to die "naturally."[1] The goal of this article is to delineate the medical, legal and religious issues involved with deactivating CIEDs in terminally-ill patients.

Medical Aspects of CIED

Implantable pacemakers have been available since 1959. The pacemaker system is comprised of wires, called pacing leads, which are screwed into the heart muscle. The pacing leads are then connected to a battery, or generator, which resides underneath the skin in the upper chest or pectoral region. The generator delivers energy via the pacing leads to pace or beat

1. CIEDs are the sole property of the patient. Once implanted in a patient the CIED cannot be reused to implant in another patient. The hospital and CIED manufacturer do not need the CIED, so patients are buried with their CIED.

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for the heart. The energy delivered by the pacemaker to pace the heart is minimal and causes no pain.

Beginning in the late 1970's, settings on pacemakers could be adjusted without surgically explanting the device. Portable computers called programmers communicate with CIEDs so settings can be easily altered by physicians. Pacemakers cannot technically be shut off, but they can be programmed not to pace the heart. This will be referred to as deactivating the pacemaker.

Pacemaker patients can be classified into two groups. The first group consists of patients who are dependent on their pacemakers to live. These patients are referred to as "pacemaker dependent." Deactivating pacemaker function in these patients will cause the heart to stop beating and therefore lead to their death. The second group consists of patients who receive pacemakers to improve exercise capacity and physical energy but who will not die without their pacemaker. These patients are referred to as "non-pacemaker dependent." Deactivating pacemaker function in these patients may decrease quality of life but will not lead to their death.

There is a common misconception that pacemakers do not allow patients to expire because the pacemaker will pace and beat for the heart until the battery runs out. It is for this reason that many terminally-ill patients and their families request to have pacemakers deactivated. A proper understanding of pacemaker function can usually help alleviate patient and family concerns regarding this matter. A pacemaker does not actually beat for the heart but delivers energy to make the cells of the heart contract and beat. Once a patient stops breathing and the body is unable to obtain oxygen, the cardiac cells will die. Without oxygen, the cardiac cells are unable to contract and beat even with the energy delivered by pacemakers. Therefore, patients with a pacemaker can die from their terminal illness without deactivating the pacemaker.

Implantable defibrillators have been programmable since their inception in the late 1980's. Defibrillators are implanted in the heart similarly to pacemakers. They utilize defibrillator leads and generators that deliver high amounts of energy to electrically shock or defibrillate the heart. The energy required to defibrillate the heart is approximately ten million times the energy needed to pace the heart. Defibrillation shocks are painful and may cause significant physical and psychological harm to patients.[2]

Implantable defibrillators have three basic functions. Firstly, in a patient with a fatal fast heart rhythm called ventricular fibrillation, the defibrillator can electrically shock the heart back to a normal rhythm and revive the patient. Secondly, if a patient has a potentially dangerous fast heart rhythm called ventricular tachycardia, the defibrillator will attempt to terminate this rhythm.[3] Thirdly, defibrillators have the same pacing capabilities as pacemakers and can be used to treat slow heart rhythms. Therapy for fast heart rhythms can be completely shut off and pacemaker function for slow heart rhythms can be adjusted like pacemakers not to pace the heart.

There are several classes of patients who receive implantable defibrillators. Patients who have been resuscitated from ventricular fibrillation are at high risk of recurrent episodes and benefit from defibrillators.[4] Certain cardiac diseases are

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2. Ahmad M, Bloomstein L, Roelke M, Bernstein AD, Parsonnet V. Patients' attitudes toward implanted defibrillator shocks. Pacing Clin Electrophysiol 2000;23:934-938.

Bourke JP, Turkington D, Thomas G, McComb JM, Tynan M. Florid psychopathology in patients receiving shocks from implanted cardioverter-defibrillators. Heart 1997;78:581-583.

3. The defibrillator will first try to terminate ventricular tachycardia without electrically shocking the heart. A pacing algorithm is used to overdrive and terminate the ventricular tachycardia. This is usually sufficient but if it is unsuccessful, the defibrillator will electrically shock the heart back to a normal rhythm.

4. The Antiarrhythmics versus Implantable Defibrillators (AVID)

associated with a high risk of dying from a fatal heart rhythm, and defibrillators are recommended to prevent sudden cardiac death.[5] Patients with poor heart pumping function, referred to as systolic heart failure, are at a higher risk of dying suddenly from a fatal heart rhythm. Studies done over the last 15 years have shown that implantable defibrillators prolong lives in this last group of patients.[6] The vast majority of patients in the United States with implantable defibrillators fall into this last group.

By reducing the incidence of sudden death from a fatal heart rhythm, defibrillator patients are now dying from other causes. Over the last few years there has been a significant increase in terminally-ill patients who are living with implantable defibrillators. Terminally-ill patients often have discussions with their primary care doctors regarding end of life issues. Deactivating defibrillators is often encouraged to prevent unwanted painful shocks.

Legal aspects of deactivating pacemakers

According to United States law, people have autonomy over their own body. Suicide is not a criminal offense and the US courts have upheld the rights of patients to refuse life-saving

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Investigators. A comparison of antiarrhythmic-drug therapy with implantable defibrillators in patients resuscitated from near-fatal ventricular arrhythmias. N Engl J Med 1997;337:1576-1583.

5. Zipes DP, Camm AJ, Borggrefe M, et al. ACC/AHA/ESC 2006 Guidelines for Management of Patients With Ventricular Arrhythmias and the Prevention of Sudden Cardiac Death-Executive Summary A Report of the American College of Cardiology/American Heart Association Task Force and the European Society of Cardiology Committee for Practice Guidelines (Writing Committee to Develop Guidelines for Management of Patients With Ventricular Arrhythmias and the Prevention of Sudden Cardiac Death). J Am Coll Cardiol 2006; 48:1064-1108.

6. Bardy GH, Lee KL, Mark DB, et al. Amiodarone or an implantable cardioverter-defibrillator for congestive heart failure. N Engl J Med 2005; 352:225-237.

treatments and to withdraw life-sustaining treatments.[7] However, physician-assisted suicide (except in Oregon and Washington) and euthanasia (in all states) are illegal.

Pacemakers are considered life-sustaining therapy.[8] Pacemakers perform the electrical duties of the heart but do not cure the hearts' electrical problems. Other examples of life-sustaining therapies are hemodialysis in patients with kidney disease and insulin in patients with insulin dependent diabetes mellitus. Hemodialysis performs the function of the kidneys but does not treat the kidney disease and exogenous insulin replaces the insufficient endogenous human insulin but does not reverse the underlying disease process.

Removing life-sustaining therapy will cause the patient to die from their medical illness. However, it is not the removal of therapy that kills the patient but the patient's underlying disease. This is in contrast to physician-assisted suicide and euthanasia where the intervention itself kills the patient.[9] The US Supreme Court has made a clear distinction between withdrawing life-sustaining treatment, and physician-assisted suicide, or euthanasia. In Vacco versus Quill[10] the court ruled on this difference.

> The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an

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7. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990). 497 U.S. 261 88-1503. 1990. Supreme Court of the United States. Also see medicolegal discussion regarding Terri Schiavo case in Annas GJ. "Culture of Life" politics at the bedside- the case of Terri Schiavo. N Engl J Med 1997; 337:1710-1715.

8. Lampert R, Hayes D, Annas G. HRS expert consensus statement on the management of cardiovascular implantable electronic devices (CIEDs) in patients nearing end of life or requesting withdrawal of therapy. Heart Rhythm 2010; 7:1008-1026.

9. Ibid.

10. Vacco vs Quill, 521 U.S. 793, 117S.Ct. 2293 (1997) Supreme Court of the United States.

> underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.

The act of deactivating a pacemaker does not kill the patient, but allows the patient to die from the heart's electrical problem. This is not considered euthanasia and is legally permissible.

A recent consensus statement was published by the Heart Rhythm Society to address the medicolegal issues involved in deactivating pacemakers.[11]

> A patient with decision-making capacity has the legal right to refuse or request the withdrawal of any medical treatment or intervention, regardless of whether the treatment prolongs life and its withdrawal results in death….Ethically and legally, there are no differences between refusing cardiovascular implantable electronic device (CIED) therapy and requesting the withdrawal of CIED therapy… Ethically, CIED deactivation is neither physician-assisted suicide nor euthanasia…. The clinician's intent is to discontinue the unwanted treatment and allow the patient to die naturally of the underlying disease – not to terminate the patient's life.

Legally, patients have the right to withdraw pacemaker therapy even if it will immediately lead to their death.[12] Physicians have a legal right to honor a patient's request and deactivate pacemaker therapy.[13]

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11. Lampert et al. ibid.

12. Meisel A, Snyder L, Quill T. Seven legal barriers to end-of-life care:myths, realities, and grains of truth. JAMA 2000; 284:2495-2501.

13. While the physician has the right to deactivate a pacemaker he/she is not obligated to do it. If the physician does not wish to deactivate the pacemaker they should refer the patient to someone who will deactivate the pacemaker.

Jewish aspects of deactivating pacemakers

The major principle which differentiates Judaic law from United States law is ownership of one's body. Judaism believes that our bodies and souls belong to God. In Ezekiel, God says that "all souls are mine." [14] We have no ownership rights over our own person and are not afforded the ability to decide what can be done to our bodies.[15]

In the beginning of Deuteronomy Moses exhorts the Jewish people to obey the laws of the Torah and states that "you shall greatly beware for your souls."[16] We are mandated to protect ourselves from any harm. At the end of Deuteronomy God states that "I put to death and I bring life, I strike down and I will heal, and there is no rescuer from my hand."[17] God is the only one who determines life and death. The Torah mentions the prohibition against killing numerous times and states in Leviticus that one should "not stand idly by while your neighbor's blood is shed."[18] We are instructed not only to protect ourselves but our fellow Jews as well.

The Gemara in *Shabbat* states that "He who closes the eyes of a dying person while the soul is departing, he sheds blood."[19] Rashi explains there that closing of the eyes may hasten death and is thus forbidden. The Rambam explains that one who is dying is regarded as a living person in all respects.[20] Therefore, anything that may hasten death is akin to murder. The *Shulchan Aruch* rules that even a *gosses*, a person whose death is imminent (estimated to be less than 3 days), is considered a

14. Ezekiel 18:4.
15. Rambam *Chovel Umazik* 5:1.
16. Deuteronomy 4:15.
17. Ibid 32:39.
18. Leviticus 19:16.
19. *Shabbat* 151b.
20. Rambam *Avel* 4:5.

living person in all respects.[21] The *Shulchan Aruch* rules that it is prohibited to perform certain activities with a *gosses* because it is tantamount to murder. Rabbi Moshe Iserles (Ramo) explains that in accordance with the Gemara in *Shabbat* these actions may hasten death and are thus prohibited. [22]

Rabbi Yehuda HeChasid writes that if a person is actively dying (a *gosses*) one should not prevent him/her from dying.[23] He writes that one should not place salt on the tongue of a *gosses* in an effort to delay his imminent death. In addition, he states that if someone near the house of the *gosses* is chopping wood and the noise is preventing the soul's departure, the wood chopper should be removed. However, he prohibits moving a *gosses* if the *gosses* states that his/her soul cannot depart until the body is moved to another location. Since the wood chopping is remote from the body and is not providing any mode of therapy, such an impediment may be removed even if the soul will depart faster.

The Ramo states that it is prohibited to move the body of a *gosses*. Even to remove feathers from the pillow of a *gosses* is not allowed since such movements may hasten death.[24] However, if there is something preventing a *gosses* from dying, such as salt on the tongue or an external noise, that impediment to death may be removed. While Rabbi Yehuda HeChasid does not obligate one to place salt on the tongue of the *gosses*, the Ramo allows for the removal of salt even though it may hasten death. The Ramo states that removal of salt is not considered a *maaseh*, or positive action. Rather, it is simply removing an inhibitor to death and is therefore permitted. Commentators on the *Shulchan Aruch* find this particular statement of the Ramo difficult to understand since the salt

21. *Shulchan Aruch Yoreh Deah* 339:1.
22. Ibid.
23. *Sefer Chasidim*: 723.
24. Ramo *Yoreh Deah* 339:1.

removal requires moving the mouth of the *gosses*.[25] Rabbi Shabbatai ha-Kohen, author of the *Siftei Kohen*, explains that moving the lips of the *gosses* is an insignificant movement and is therefore permitted by the Ramo.[26]

Modern-day *poskim* discuss this ruling of the Ramo. Rabbi Immanual Jakobovits reiterates that the Ramo is only referring to a *gosses* but not to terminally-ill patients who may have more than 3 days left to live.[27] Secondly, the impediments mentioned (noise and salt) do not play any role in the medical management of the patient. Removing life-sustaining therapy that is critical to the medical management of the patient would likely not be included under the Ramo's ruling. Rabbi Waldenberg similarly explains that the Ramo only allowed the removal of impediments that had no medicinal purpose but would not allow for the removal of any medical therapy even for a *gosses*.[28]

Modern-day *poskim* discuss the halachic issues involved with removing medical therapy from terminally-ill patients. Rabbi Moshe Feinstein rules that there is no obligation to prolong life in terminally-ill patients but under no circumstances can anything be done that will hasten death by even a moment.[29] Rabbi Shlomo Zalman Auerbach rules that one must never do anything to hasten the death of a terminally-ill patient.[30] Even a *gosses* must be given basic human requirements and once medical treatments have been initiated they cannot be discontinued if it will hasten death. Rabbi Waldenberg similarly rules that a patient with any spontaneous life, even a *gosses*, must be given blood, antibiotics, oxygen and food.[31]

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25. *Turei Zahav* and *Ba'er Haitev Yoreh Deah* 339:1.
26. *Yoreh Deah* 339:1.
27. Jewish Medical Ethics. NY, NY 1959 119-125.
28. *Tzitz Eliezer* 14:80,81.
29. *Iggerot Moshe Choshen Mishpat* 83:1.
30. See *Nishmat Avraham Yoreh Deah* 2:324.
31. *Tzitz Eliezer,* ibid.

The consensus from modern-day *poskim* is that it is prohibited to remove any medical therapy from patients if it will hasten death.

The removal of pacemaker function in "pacemaker dependent" patients will directly cause death. The heart will stop beating and the patient will die from the cessation of the heart's pacemaker function. Even one who may argue[32] that the Ramo would permit removing medical therapy in the case of a *gosses*, would likely not allow deactivating a pacemaker. In the Ramo's case of removing the impediment to death, the patient will die from their terminal illness. However, when deactivating a pacemaker in a terminally-ill patient, the patient will die from the loss of pacemaker function and not from the terminal illness.

The removal of pacemaker function in "non-pacemaker dependent" patients will not lead to the death and may be permitted. However, since these patients had pacemakers placed for slow heart beats to improve quality of life, deactivating pacemaker function may increase suffering. In patients who are dying from end stage heart failure, a slow heart beat may actually worsen heart failure and indirectly hasten death. These cases are complex and each patient is different, so a discussion between the physician and rabbi is needed before deactivating a pacemaker.

Legal aspects of deactivating defibrillators

As opposed to pacemaker function which is life-sustaining, defibrillator function would be considered *life saving*. Defibrillators (not including its pacemaker capabilities) are referred to as life insurance policies. If a patient has a lethal fast heart rhythm the defibrillator can convert the rhythm back to normal and save a patient's life. On an ongoing basis the

32. I am unaware of any ruling that explains the Ramo to include the removal of medical therapy.

defibrillator monitors the heart but doesn't actively do anything to prolong life or improve a patient's quality of life.

Defibrillator shocks prolong patient survival but do so by causing significant pain. Patients who are terminally ill are sicker and more prone to receive both appropriate and inappropriate shocks. One study evaluating terminally-ill patients with defibrillators noted that approximately 20% received a shock within a month of their eventual death and almost 30% within 3 months of their death.[33] By electrically shocking patients, defibrillators prevent patients from dying suddenly of a lethal heart rhythm. In patients who are suffering from a terminal illness (i.e. cancer), this *life saving* shock therapy is often viewed as unnecessarily causing additional pain and prolonging existing suffering. For this reason, patients with terminal diseases who have defibrillators often request to have their devices deactivated. Legally, patients may request to have their defibrillator deactivated and physicians may honor this request.[34]

Jewish aspects of deactivating defibrillators

Deactivating an implantable defibrillator has no immediate effect on the patient. The defibrillator does nothing active but passively watches for a potentially fatal heart rhythm. If a patient develops a dangerous heart rhythm the defibrillator when programmed off will not electrically shock the patient. The defibrillator doesn't hasten death but allows the patient to die without saving or reviving them. This is most comparable to a Do Not Resuscitate (DNR) order.

As mentioned above, it is our personal duty to protect ourselves and our fellow Jews from bodily harm. It would

33. Lewis WR, Luebke DL, Johnson NJ, Harrington MD, Costantini O, Aulisio MP. Withdrawing implantable defibrillator shock therapy in terminally-ill patients. Am J Med 2006;119:892-896.

34. Zipes et al. ibid p. 1065.

seem from the Torah that we are obligated to do everything in our power to preserve our own and our fellow Jew's life.[35] However, there may be cases where halacha would consider it medically futile to treat or resuscitate a patient and would permit doing nothing while our fellow Jew was dying.

Rav Moshe Feinstein discusses issues regarding a patient who is suffering from an underlying disease that has no curative therapy.[36] He writes that while you can't perform an act to curtail life, you need not administer medicine that can only temporarily prolong an existing life of suffering. Rav Moshe reiterates that you should do nothing but maintain the patient in their present condition. Rav Moshe writes specifically regarding cancers with no known cure, that there is no obligation to administer or receive medication that will prolong life, even for a few months, if it is a life of pain and suffering. Rav Moshe writes that if the intervention itself causes suffering, that therapy should not be administered.[37]

Rav Elyashiv is more stringent and requires one to do everything possible to prolong the life of a terminally-ill patient even if he/she is suffering.[38] However, if the treatment itself brings additional suffering, Rav Elyashiv agrees that there is no obligation to receive or administer that treatment. Rav Shlomo Zalman Auerbach similarly rules that it is permissible to withhold therapy from a terminally-ill patient if the treatment itself will cause additional pain.[39]

Halachically, defibrillator therapy in terminally-ill patients can be categorized as a painful therapy that is not directed at treating the underlying medical illness. It is often viewed as

35. Leviticus 19:16, that one should "not stand idly by while your neighbor's blood is being spilled."

36. *Iggerot Moshe Choshen Mishpat* 83-85.

37. *Iggerot Moshe Yoreh Deah* 174:3.

38. See *Nishmat Avraham Yoreh Deah* volume 2: 339.

39. *Minchat Sholmo* 91:24.

prolonging the inevitable death process. According to the aforementioned *poskim*, it would be permitted to deactivate defibrillators in patients who are suffering from their terminal illness.

Conclusion

CIEDs are implanted to prolong lives. Patients who are suffering from a terminal illness may no longer desire CIED therapy. According to United States law, it is always permissible for a patient to request CIED deactivation. It is also permissible for a physician to deactivate CIED therapy if requested by a patient. According to Jewish halacha, one does not have ownership rights over their body. Therefore, removing pacemaker therapy which is life-sustaining in a "pacemaker dependent" patient is prohibited since this will hasten death from loss of pacemaker function. Removing pacemaker therapy in most "non-pacer dependent patients" would be permitted since it will not hasten death.[40] Removing defibrillator therapy which is *life saving* is permitted in patients suffering from a terminal illness since it will not hasten death and the therapy itself causes additional suffering. A discussion between the treating physician and rabbi is critical to determine the appropriate halachic ruling for each individual case.

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40. In patients with poor heart pumping function, removal of pacemaker function even in "non-pacemaker dependent" patients may hasten death and would thus be prohibited.

This article was written in memory of Chanah bat Avraham. The author wishes to acknowledge Rabbi Joshua Flug for his helpful suggestions.

Praising God at the Zoo

By Ari Z. Zivotofsky[1]

Introduction:

The Gemara (*Berachot* 58b) quotes a *baraita* that instructs that if one sees an elephant, a monkey, or a *keepofe* (owl?) he should recite the *beracha* "*m'shaneh habriyot*." This brief talmudic statement raises several questions: Is the *beracha* (blessing) limited to just these animals or does it include other species? Furthermore, does it apply only to live animals or also to taxidermied animals or even pictures, paintings or models of such animals? Is it recited once in a lifetime or perhaps spaced by some specified interval? Is it only if one happens upon such a situation or should one seek out or even set up a sighting so that he can recite the blessing? Even more basic: Is this talmudic statement accepted as halacha and is the *beracha* standardly recited today, or was it merely an ancient suggestion that was not codified nor practiced by the Jewish people and its rabbinic leadership, or was it codified but no longer applicable in modern times?

The same Gemara gives a list of unusual humans, such as midgets and giants, upon whom this *beracha* is recited. In that context, one possible understanding of the *beracha* is that these are unfortunate people who should evoke our sympathy. In the context of animal sightings, the meaning of the *beracha* is less obvious. The Meiri (*Berachot* 58b) offers an interesting explanation. He states that it is because these animals resemble

1. The author thanks Avrohom Shimon Tendler for research assistance.

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humans in some manner that the *beracha* is recited over them. It is not clear (at least to me) how an elephant resembles a human, but clearly he felt that the *beracha* is limited to these species. Making the connection of these animals even closer to humans, Rav Betzalel Stern[2] cites *M'lechet Shlomo*, who suggests that during the flood, God punished certain people by transforming them into elephants and monkeys and that is why the *beracha* is said specifically over those species.

Tosefta K'pshuta[3] offers a novel, intriguing explanation, that he suggests may be what the Raavad intended, in order to explain why these specific animals are mentioned and why animals are listed in the middle of a list of unusual humans. He proposes that really the *beracha* is only recited over unfortunate humans and "elephant" (or "camel" in Israeli sources) is a euphemism for giant people and "monkey" is a euphemism for exceedingly ugly people.

The early talmudic commentators have little to say about this line of Gemara. That may be due to its straightforward nature or possibly because of the rarity of its application in those times. It was probably uncommon for Jews in medieval France, Germany, or Spain to see monkeys or elephants. Whatever the reason for their lack of comment, the standard halachic codifiers cite this straightforward instruction: The Rambam (*Berachot* 10:12), *Tur* (OC 225), *Shulchan Aruch* (OC 225:8), *Chayei Adam* (63:14), and *Aruch Hashulchan* (OC 225:13)[4] all rule, with no further elaboration, that if one sees an elephant or monkey[5] he should recite *m'shaneh habriyot*.

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2. *Ohalecha B'amitecha*, Jerusalem, 5762, p. 173, note 17.

3. *Zeraim* I, p. 107.

4. Interestingly, the *Ben Ish Chai* leaves this *beracha* out when he details other similar *berachot* (Year 1, *Ekev*: 13-19). Regarding the *berachot* on thunder and lightning he says that the Baghdad and Yerushalayim customs was to say them without *shem u'malchut*.

5. The third species, *keepofe*, does not appear in the later sources, although it is in the Rambam, Rif, and Rosh. Interestingly, in *Berachot* 57b in an entirely different context (dealing with dreams) there is a list of three

Regarding the unfortunate human conditions over which one recites this *beracha*, the *Mechaber* rules (ibid 9) that one says the *beracha* only the first time he sees such a condition. It would seem that the same should apply to reciting it over an elephant or monkey – one says it once in their life on the first occasion that they see the unusual creature. However, the Ramo cites an alternative position that holds that one recites it after not seeing the unusual creature for 30 days. This is similar to other laws, such as tearing *kriyah* at the *kotel*, in which 30 days represents a new beginning and thus a new obligation in the mitzvah.[6]

The seemingly obvious questions with which we opened can also be asked on the *Shulchan Aruch*, who simply cited the Gemara. Responses to those questions only begin to appear in the late 20th century.

Which species:

Rav Shlomo Zalman Auerbach addressed some of these questions (*Halichot Shlomo*, *Hilchot Tefilla* 23:35). He ruled that the *beracha* is recited over any unusual creature and not just the monkey and elephant. He notes that clearly the Meiri

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animals – elephant, monkey, and the similar sounding *Keepode*. *Keepode* is understood to be a type of weasel (in Modern Hebrew it is a hedgehog) and Rashi understands that all three are strange in appearance. Furthermore, *Keepode* as a bird appears in Isaiah 14:23 and again in 34:11, where it is together with *yanshuf*, owl. There appears to be some confusion regarding the third animal over which a *beracha* is said and *Tosefta K'pshuta* (*Zeraim* I, p. 107, note 26) cites a *geonic* tradition that in this context *keepofe* is not a bird but a small monkey, a position adopted by Rav Adin Steinsaltz. *Kaf Hachaim* 225:57 says there are 3 types of *keepofe*, 2 birds and an animal.

6. Regarding the *beracha* of "*she'ka'cha lo b'olamo*" said over unusually beautiful creatures, the *Mechaber* (ibid 10) also rules that it is said only the first time (unless one comes across an even more beautiful specimen) and in that instance the Ramo does not disagree. The rules of this *beracha* are less clear and common practice is to not recite it (*Sha'ar Hatziyun* 225:33). See *Tzitz Eliezer* 12:22 for a discussion of how often to say *m'shaneh habriyot* in the context of unfortunate humans.

understood that it was limited to just those mentioned in the Talmud, and possibly others that somehow resemble humans, but Rav Auerbach disagreed and thought the Meiri's position needed clarification. However, he said that unusual fish are excluded because all that is mentioned in the Gemara is animals.

Rav Ovadia Yosef discusses this law in a practical manner.[7] He first addressed the permissibility of even visiting a zoo, which some earlier authorities had forbidden.[8] Then, in contradistinction to Rav Shlomo Zalman, he rules that the *beracha m'shaneh habriyot* is recited only over elephants and monkeys. He also says that if one sees a parrot and is greatly awed by its beauty and majesty he should recite the complete *beracha* (including God's name) of *she'kacha lo b'olamo*. Regarding this latter *beracha* he holds that it is a one-time *beracha*; however, regarding *m'shaneh habriyot* he reports that the custom is to follow the Ramo and recite it every 30 days if the opportunity presents itself.

Rabbi Efraim Greenblatt[9] reads into the words of the *Shulchan Aruch* that the *Mechaber* holds it is specifically monkeys and elephants, but he finds that position perplexing.

Does it include dead animals?

Rabbi Efraim Greenblatt (ibid) reports that he was asked about saying *m'shaneh habriyot* over a dead animal or whether it only applies to a living animal. He responded that it seems to him that it is only over living animals but he had no proof for that. It may be that the *beracha* is not only on the form of the animal but also on its unusual behavior. The unusualness of their behavior can be seen by observing the people as they

7. *Yalkut Yosef* 225:21.

8. On this see also: Rabbi Yitzchak Nachman Eshcoli, *Tza'ar Ba'alei Chaim*, Ofakim, Israel, 5762, 6:2 (pp. 211-213).

9. *Rivevot Efrayim*, OC 6:112.

observe a monkey scampering about its enclosure or an elephant using its trunk to spray water or manipulate objects. In conclusion, Rabbi Greenblatt cites *Shut Oz Nidbiru*[10] as ruling that no *beracha* is recited over a dead creature for a purely technical reason – it is no longer a "*briyah*" and the *beracha* was instituted over an unusual "*briyah*".

Rav Betzalel Stern[11] says that it seems logical that the *beracha* is only recited over a live animal and not over a dead one, but he too offers no proof or explanation.

Rabbinic precedent:

Is there reason to strive to recite this *beracha* or is it only if one finds oneself in such a situation? It certainly seems that there is no obligation to go to a zoo based on the fact that immediately after listing the *berachot* recited upon seeing kings, the *Shulchan Aruch* (OC 224:9), based on the Gemara, says that it is a mitzvah to strive to see kings, even non-Jewish ones, and yet makes no similar statement regarding elephants and monkeys.

If that is the case, is going to the zoo a waste of time and *bittul Torah*? *Chazal* had a world view that included seeing God in all of His creations and praising Him for such. Furthermore, they saw a positive value in looking for God in His multiple works.

It is reported[12] that the Rav Yaakov Yisrael Kanievsky, Steipler Gaon, took his children to a park in Ramat Gan where they saw monkeys, and he recited with them the *beracha m'shaneh habriyot*. There are two important lessons from this report. First, the Steipler, who was known as one who did not waste any time, felt it was important for him to participate in

10. Rabbi Binyamin Zilber, Bnei Brak, 2:4:2.
11. *Ohalecha B'amitecha*, Jerusalem, 5762, 17:11 [p. 174].
12. *Orchot Rabenu*, 116 cited in *Rivevot Efrayim* OC 6:112.

raising his children, and this included taking them to the zoo. Second, the Steipler held that this *beracha* is applicable today and should be recited when the opportunity presents itself.

Minhag Yisrael Torah[13] cites several sources that had forbidden attending circuses and the like, even if the intention is to recite the *beracha* of *m'shaneh habriyot*. He then distinguishes between those that are a "*moshav leitzim*" and a modern zoo, which he says is certainly not forbidden. As a proof he cites tales of rabbis who went to zoos in order to make the *beracha* and the story of the Chida seeing strange animals at the Tower of London. It is also reported (*Yechave Daat* 3:66) that the Chida visited the London zoo specifically to see strange animals and a wondrous hundred year old eagle and that the *Trumat Hadeshen* walked on Shabbat to see a lion pair that were brought to his city.[14]

Rabbi Chaim Elazar Spira, also known as the *Minchat Elazar* and Munkatcher Rav, describes visiting a zoo in Berlin and reciting the *beracha*.[15] He recited it specifically on the monkeys (in what he calls the "apehouse") and had in mind to exempt the elephants. He discusses his doubt whether that first *beracha* indeed suffices when he later see the elephants. He does not say what he did or if he even actually saw them. But it is clear that he held, at least 100 years ago, that it is worth visiting a zoo, this *beracha* should be said, and it seems that he held that it is specifically these two species.

Contemporary recital of the *Beracha*:

On Feb 21, 2008, Rav Yuval Cherlow, Rosh Yeshiva of Yeshivat Hesder Petach Tikva and a prolific writer of online

13. Josef Lewy, 5753, volume 1, pp. 357-8.

14. Some of these stories are also cited by Rav Ovadia Yosef in a *tshuva* devoted to the permissibility of visiting zoos, *Yabia Omer* 4:OC:20.

15. *Nimukei Orach Chaim* 225, note 5.

responsa, was asked about this *beracha*.[16] He suggested that monkey and elephant were mentioned simply because subjectively they were strange to *chazal*. He then wrote that he thinks that today they are not unusual for us and therefore we should not make the *beracha*.[17] Furthermore, he says he never heard of great rabbis making the *beracha*. When a talkback several days later pointed out sources of great rabbis who made the *beracha* and that others wrote that the *beracha* should be recited today, Rav Cherlow replied that he maintained his position regarding monkeys and elephants, and said that a person has to bless only over what is unusual in his eyes, and that today the *beracha* should be said only over rare animals, and monkeys and elephants are not remarkable to most people. As has been seen, and will be shown below, this position is not shared by most other halachic authorities. The argument could certainly be made that despite the fact that elephants and monkeys are today readily accessible in zoos, they are still perceived as unusual, as demonstrated by zoos that are full of children of all ages standing and gazing in awe at the monkeys and elephants.[18] In addition, hundreds of years before *chazal*, elephants were already trained and not restricted to sub-Saharan Africa and the Indian subcontinent, as evidenced by the Greco-Syrians using them in battle. It is not unrealistic to imagine that monkeys and elephants were found in areas of Israel and Babylonia.

Rav Shlomo Zalman Auerbach treated this *beracha* as not

16. http://www.moreshet.co.il/web/shut/shut2.asp?id=99567 accessed on Dec 12, 2010.

17. For several years I was fortunate to do scientific research on monkeys at the National Institutes of Health in Bethesda, MD, and during that period I interacted daily with monkeys. Even then I found them fascinating, but clearly could not say the *beracha* daily.

18. People also gaze in awe at lions and tigers and bears and giraffes. This might indicate that a *beracha* is appropriate for them as well. And if one rules to say the *beracha* only on monkeys and elephants that might be because we are limited by *Chazal*'s instructions.

merely theoretical, but rather as quite practical, and he gave instructions to a questioner how to implement the law in practice. He advised that upon entering the zoo, a person should recite it over the first unusual creature he encounters and while reciting it, have in mind that the *beracha* should exempt all other unusual creatures he will encounter in the zoo, and then not recite it again during that visit.

Rav Simcha Benzion Isaac Rabinowitz[19] disagreed with this advice. He opined that if one does not see the monkey and elephant at the same time, then one recites the *beracha* over each one as he sees it, and there is no problem with saying the *beracha* twice. More than that, he thinks that Rav Shlomo Zalman's advice is not efficacious. Regarding *berachot* that are recited upon seeing something (*birchat ha'reiyah*), the obligation does not exist until the object is sighted, and, he says, it is meaningless to have in mind that with one recitation he intends to exempt himself from something he has not yet seen. Rather, he suggests the exact opposite of Rav Shlomo Zalman – that when one sees the first animal he should explicitly have in mind not to exempt any other animals, and then when he sees them say the *beracha* again.

Rav Rabinowitz's logic probably applies elsewhere as well. For example, the *beracha* "*oseh ma'aseh breishit*" is said over a variety of wonders (*Shulchan Aruch* OC 228:1). It seems that if one is traveling and knows that he will encounter a magnificent mountain and then a glorious fjord, the first recitation over mountains does not exempt the second sighting of fjords even if one knows it is coming. It is only when one sees and appreciates the wonder that they can and must praise God by reciting the appropriate *beracha*. And certainly if there is a predicted thunderstorm one cannot say the *beracha* on the mountain and have in mind the upcoming lightning.

It may be that the disagreement about "one *beracha* for all

19. *Piskei Tshuvot*, (Jerusalem, 5762) 225:21, vol. 2, pp. 919-920.

unusual animals" could be tied to their different positions regarding over which species the *beracha* is said. Rav Shlomo Zalman, who says it is recited over any unusual animal, may view all such animals as being in the single category that warrants a single *beracha*, much as all spectacular mountains. And he would likely rule that a traveler in the Alps indeed says a *beracha* on the first mountain and exempts all of them. On the other hand, Rav Rabinowitz holds that the *beracha* is only on elephants and monkeys, and he may therefore see them as two separate items on which the *beracha* was established, such as mountains and fjords, and therefore does not think that a *beracha* on an elephant covers seeing a monkey any more than a *beracha* on a mountain will suffice for the wonderment of seeing a fjord.

Indeed, Rav Betzalel Stern ruled the same way as Rav Rabinowitz on both issues.[20] He states that upon seeing a monkey or elephant one recites the *beracha* and, although not explicitly limiting it to those two, it seems that was his intention. And he specifies that upon seeing the first of these animals one should say the *beracha* with the specific intention of not exempting the other, and then say the *beracha* again upon seeing the second species. He cites *Nimukei Orach Chaim* (op cit) as suggesting the possibility that even if upon seeing the first one he had intent to exempt the second, it is not efficacious, and then suggests that in this regard *birchat re'iyah* may differ from *birchat hanehenin*.

Rav Eliezar Melamed rules[21] similar to Rav Ovadia Yosef that upon visiting a zoo one should recite the *beracha* once upon seeing an elephant and then again when he sees a monkey, unless he sees them simultaneously. The *beracha* is

20. Author of *B'Tzeil HaChochma* in *Ohalecha B'amitecha*, Jerusalem, 5762, 17:9-10 [p. 173].

21. Rav Eliezar Melamed, *Pninei Halacha – Berachot*, Israel, 5769, pp. 323-324. He expressed the same ideas at: http://www.yeshiva.org.il/midrash/shiur.asp?id=1671#5a accessed Dec 12, 2010.

only said on these two species and not others because that is what *Chazal* established. It should then be said again if one sees them again after 30 days.

On a practical note, it should be noted that if one is in an "unclean" environment he may not recite a *beracha*. The definition of "unclean" in relation to bathrooms and human waste is complicated by modern facilities,[22] but as regards animals, in general it is less problematic than human waste. If there is an offensive odor, then a *beracha* may not be recited. If there is no odor, a *beracha* may be recited in the presence of animal excretions, with the exception of excrement or urine of a donkey recently returned from a journey (usually not a problem in a zoo), or excrement of a cat, leopard, or "red" chicken.[23] None of these should normally be present in a monkey house or near the elephant exhibit, but one should be attuned to the possibility.

Conclusion:

The Gemara (*Rosh Hashana* 31a) says that Thursday is special because on it God created birds and fish to praise His name. Rashi (ibid s.v. *she'bara ofot*) explains that when a person sees the great variety of birds, he will give praise to their Creator.[24] Rav Betzalel Stern[25] explains that one would give praise upon seeing a great variety of fish or birds all together, however because we are unsure of the number of species required at one time to warrant a *beracha*, no *beracha* was instituted on seeing such multitudes of fish or birds. But there is no

22. On this topic see: Ari Zivotofsky, 'Your Camp Shall Be Holy': Halacha and Modern Plumbing, *The Journal of Halacha and Contemporary Society* 29:89-128, Spring 1995.

23. *Shulchan Aruch* OC 79:4-7; *Mishnah Berura*h 79:25.

24. *Avot d'Rabbi Natan* (1:8) and Rosh (*Tamid* 7:4) say that it is the birds and fish who offer praise to God and not the human observer. Cited in *Ohalecha B'amitecha*, Jerusalem, 5762, p. 172, note 14.

25. *Ohalecha B'amitecha*, Jerusalem, 5762, p. 172, note 14.

question that a person experiences wonderment and awe at seeing God's creations, as the verse (Psalms 104:24) says: "*Mah rabbu Ma'asecha Hashem*… - How many are Your works, Lord! In wisdom You made them all; the earth is full of Your creatures". A trip to the zoo should be a fun experience as well as a religious experience whereby one contemplates and appreciates God's creations. And while a *beracha* was not instituted over the variety, one was instituted over specific animals. We should be sure to avail ourselves of this opportunity to revere God and express our awe through the *beracha* that *chazal* gave us, each according to the directives of his rabbi.

Halachic Considerations in the Use of Biologic Scaffolding Materials – "Bone Grafts"

Rabbi Dr. David J. Katz

I. Introduction

In our current society, the practices of medicine and dentistry are being infused with technological innovations and improvements on a regular basis. One such breakthrough in recent times involves the use of "bone grafts"/TS (tissue scaffolds) which have been revolutionary in allowing greater acceptance and use of dental implants. It is now estimated that 50-80% of all implants are placed with an accompanying "bone graft" procedure. In a population that is aging, these procedures are becoming more and more prevalent. Until now, little has been written about the halachic implications of these procedures. This article will attempt to elucidate the theoretical and practical aspects of this treatment, explain the possible halachic difficulties that confront us, and present some solutions as expressed by halachic authorities to deal with these issues, which include:

1) Can a Jewish patient be treated with these materials?
2) Can a Kohen be the recipient of this type of graft?
3) Is there a prohibition for a Jewish practitioner to perform these procedures on a Kohen patient?

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4) Is a Kohen doctor allowed to handle these materials and perform treatment utilizing "bone graft"/T.S. substances?

II. Overview of Indications and Uses of "Bone Grafts"/ TS Material Within the Practice of Dentistry

Bone grafting and Biologic (Tissue) Scaffolding[1] are procedures performed to replace or augment lost bone. In dentistry, they are most often performed in conjunction with the placement of dental implants or in the preparation of a future implant site. When a tooth is lost due to extraction, the surrounding bone often collapses. To preserve this bone and also enhance bone fill of the extraction site, "bone grafts"/TS may be used. In severe situations, intact bone (whole sections of bone) could be used, but more commonly, a "bonelike" material (originating from a bone bank) comprised of granules is used that acts as a biologic scaffold.[2]

The procedure typically involves grafting the material to the site and suturing it closed.[3] It is usually then necessary to wait several months for the scaffolding material to integrate, resorb and remodel with the existing bone before implants are placed. In certain situations TS materials may be placed adjacent to and with the implants themselves. Implants are cylindrical, titanium, screw-like devices that are placed in the bone of the jaw with a hollow threaded middle. Bone then typically grows around and through it, which is called Osseo-integration. After several months, a post abutment is screwed into the implant, which is then covered with a new crown.

The topics discussed in this article will have similar

1. TS – Tissue Scaffolds/BSM – Bone Scaffolding Material.

2. 1. Klokkevold, PR, Jovanic, SA (2002), *"Advanced Implant Surgery and Bone Grafting Techniques*." In Newman, Taker, Carranza. *Carranza's Clinical Periodontology* (9th ed.), Philadelphia: W.B. Saunders. pp.907 – 908.

3. The use of membrane materials in some procedures and their status halachically will not be addressed in this article.

application when considering the use of "bone grafts"/TS in the repair of other bone defects of the skeletal system such as oral and cranio-maxillofacial defects, anomalies of the extremities, defects of the pelvis and spine, as well as spinal fusion procedures

III. Types of Biologic Scaffolds / "Bone Grafts" – Pros and Cons

The best material for bone augmentation procedures is the Autogenous graft – one taken from a donor site in the same patient, because it is live bone containing living cellular elements, which enhance bone acceptance and integration. All other types of grafting materials are devoid of living tissue. Donor sites (i.e. the back of the mandible, hip, tibia, bone adjacent to surgical site) of autogenous grafts are left in a state of substantial discomfort. Most patients opt not to have this type of graft, wanting to avoid the discomfort of two surgeries.

Allografts are an alternative graft material which do not require a second surgical site. Instead, bone-like material that originates from a bone bank using cadaver bone is placed. This bone is very carefully treated and placed through several procedures of breakdown, sterilization and chemical treatment. Large amounts of this material can be procured because, unlike the autogenous graft, it is not limited in the patient by site donation. Xenografts are "bone like" materials that are usually obtained from animals, mostly cow and pig. Like allografts, large amounts are available without secondary site problems and are also devoid of any living tissue. The last of these graft materials is synthetic grafts, which can also achieve successful results but with an increase in delayed healing and greater difficulty. Synthetics tend to be non-resorbable and often elicit strong inflammatory reactions.[4]

4. "Allograft vs. Xenograft – Practical Considerations for Biologic

A clinical comparison of Allografts and Xenografts is extremely important. In the absence of a distinct advantage of one over the other, there would be no halachic issue and Xenografts would be preferable (thereby avoiding any issues relating to human remains). Allografts, though, have been found to be superior in three key areas: they allow for greater fibroblast and osteoblast penetration, better bone remodeling, and less immogenic (host) response.[5] The halachic ramifications of this superiority force us to acknowledge their usefulness and find possible means to benefit from it medically .

IV. Use of Transplants/Grafts within the Framework of Halacha

Much has been written regarding cadaver transplants and grafts, and therefore I will only superficially review the halachic issues and highlights. The three main problems involve the issues of 1) *nivul hameit* 2) *issur* of *hanaat hameit* and 3) *kevurat (halanat) hameit.* The ramifications and nuances of each issue have significant impact on the acceptance or the prohibition of organ/tissue transplants.

Nivul hameit is the denigration or mutilation of the dead. The source for this prohibition is *Devarim* 21: 22-23, which forbids us to dishonor the body of an executed (hanged) criminal by leaving the corpse hanging overnight. The Gemara makes this the basis of a general principle that incorporates any act that can be interpreted as desecration of the dead.[6] Consequently, it would appear that removal of any body part from the dead is unacceptable by Jewish law, considered a violation of *nivul hameit,* and according to this view, it is therefore forbidden to

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Scaffolds", Garth Jacobsen, M.D., David Easter, M.D., FACS, University of California San Diego School of Medicine, p.6.

5. Ibid, p.5.

6. *Sanhedrin* 47a; see also *Chullin* 11b and *Sifrei Pesikta* 11.

denigrate the dead person by removing any organ/tissue. There are *poskim* who hold that any denigration of the dead is forbidden even if a transplant could save a life, arguing that since the dead are freed from observing mitzvot, the *meit* (dead person) has no mitzvah to save a life.[7] They base their opinion on the *Binyan Tzion*,[8] who forbids an autopsy on a deceased person even to save the life of a seriously ill person (*choleh lefaneinu)* whose life might be saved by the information gleaned from the autopsy. Other *poskim,* however, permit autopsies in such a case.[9] Some modern-day *poskim* have ruled that harvesting an organ to save a life does not constitute *nivul hameit* (if the donor is defined as dead by halacha).[10] Rav Ovadiah Yosef[11] discusses *nivul hameit* in regard to corneal transplants, citing both the *Sho'el U-Meshiv* and *Maharil*, who rule that *nivul* applies only when it is done without purpose and with the express intention to desecrate.[12] But when there is a worthy goal or a pressing need (i.e. restoring a patient's vision with corneal transplants), it is not considered a true *nivul* and is permitted.

The *issur* (prohibition) of *hanaat hameit* is the prohibition to benefit and make use of a deceased body, and is considered by most halachic figures to be of biblical origin (*mid'oraita).*[13] A

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7. *Tzitz Eliezer* 13:91; *Teshuvot Minchat Yitzchak* 5:8.

8. *Teshuvot Binyan Tzion*, pp.170-171 – who compares autopsies to theft, and halacha forbids stealing from the cadaver even to save a life.

9. See *Teshuvot Maharam Schick, Y.D.* 347-348; *Teshuvot Nodah BiYehudah, Y.D*. 2:210; *Chatam Sofer, Teshuvot Y.D*.336.

10. Rav Moshe Feinstein, *Iggerot Moshe*, Y.D. 2:174, ruled that it was indeed a mitzvah to donate an organ to save a life; see also Rav Shlomo Zalman Auerbach – *Minchat Shlomo* 2:97.

11. *Yabiah Omer*, *Chelek* 3, *Y.D. Siman* 23.

12. *Sho'el Umeshiv*, part I vol.231; *Maharil Sh"T, Y.D*. 31.

13. Rashi – *Sanhedrin* 47b, *Rabbeinu Tam – Sanhedrin* 48b; Ramban as mentioned in the *Kesef Mishneh – Mishneh Torah Hilchot Ma'chalot Assurot* 4:4, *Shulchan Aruch Y.D.* 79:3, *Sh"T Chatam Sofer Y.D* 336, *Schach* Y.D. 79:3.

few *poskim*, most notably Rabbi Yaakov Emden,[14] consider the issue of *hanaah* to be a rabbinic stricture (*mid'rabbanan).* The difference between these two approaches is crucial, because if we take the position that the prohibition is *mid'oraita*, it would be difficult to permit most cadaver transplants, whereas if it is *mid'rabbanan,* there is room for more leniency to permit cadaver organs for medical treatment.

Whether the body of a non-Jew is included in this prohibition is also a matter of debate. The Talmud *Yerushlami* declares that benefit from a Gentile corpse is allowable, and also according to the Vilna Gaon, citing the Rashba, the prohibition would only apply to Jews and not Gentiles.[15] Others rule that the remains of Jew or Gentile are equally forbidden.[16] *Pitchei Teshuva* Y.D. 349:1, citing the *Be'er Heitev,* compromises by ruling that Jewish dead are forbidden *mid'oraita* and Gentiles are only forbidden *mid'rabbanan.*

Another aspect of the *issur* of *hanaat hameit* deals with the concept *lo kederech hanaah* – "not the normal way of benefit". The Radbaz allowed use of an oral medicine taken from mummies based on *lo kederech hanaah.*[17] The *Mishneh LaMelech* and *Shivat Tzion* take the position that *lo kederech hanaah* is not a biblical violation.[18] The relevance of this nuance relates to whether organ transplants would constitute atypical benefit of the dead, providing a basis to permit use of human remains from a corpse for someone who is ill but not in a life-

14. Rabbi Yaakov Emden – *Sh"T Ya'avetz, Siman 41;* Ramo – *Shulchan Aruch* Y.D. 155.

15. Talmud *Yerushalmi, Shabbat*, Chapter 10 halacha 6; *Biur HaGra Devarim* 21:22-23. Among those who take a similar position are Tosafot (*Bava Kama* 10a), *Nekud*ot *Hakesef* (Y.D. 349), Radbaz (*Sh"T* #741 *Chelek* 2*), Mishneh LaMelech* (*Hilchot Avel* 14:21).

16. *Shulchan Aruch* (Y.D. 349:1). .

17. *Sh"T Radbaz, Chelek 3, Siman 348.*

18. *Mishneh LaMelech – Hilchot Avel* 14:21.

threatening position.[19] On the other hand, Rabbi Akiva Eiger[20] prohibited atypical benefit of the dead and Rav Moshe Feinstein concurs with this ruling (but did permit the beneficial use of non-Jewish bodies) as did Rav Shlomo Zalman Auerbach.[21]

The last of the major prohibitions is *kevurat* (*halanat) hameit* – burial, and in a timely manner. Here, too, there is disagreement whether the mitzvah of (timely) burial of the dead is of Torah[22] or rabbinic[23] origin, and this of course has direct bearing on any removal of tissue from the deceased (i.e. allograft). The Gemara in *Sanhedrin* 46a-b cites *Devarim 21:23* as the source for the positive commandment to bury the dead, and also states that the non-burial of body parts violates this prohibition. Further complicating the issue is whether individual body parts require burial after the corpse has been buried. The peculiar language of the Talmud *Yerushalmi*, "*tikberenu kulo veloh mikzatso*", bury him entirely, not partially", implies that there is an obligation to bury all of the body (including body parts).[24] The Ramban, *Tosafot Yom Tov*, *Shulchan Aruch, Minchat Chinuch,* Rabbi Yekutiel Greenwald, and Rav Eliezer Waldenberg are among those who hold the opinion that the individual organs would indeed need proper burial.[25] On the other hand, the *Mishneh LaMelech* interprets

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19. See *Teshuvot Har Tzvi Y.D.* 277; *Yabiah Omer* Vol. 1 218-222 (who permitted corneal transplants based on a *sefaik sefaika*-- that a) the tissue comes back to life and b) benefiting from the dead in an irregular manner is permitted; Rav Shaul Yisraeli – *Techumin* 1 pp. 237-247, *Techumin* 7, 206-218, who also cites the *Shulchan Aruch* (*Y.D*. 155:3).

20. *Y.D*.349.

21. *Iggerot Moshe Y.D. 1 Siman* 229; *Minchat Shlomo – Tanina*: 97.

22. *Tur* (362:1), *Radbaz* (Vol 2 no.780).

23. Rabbeinu Chananel (*Sanhedrin* 46b); Rambam (*Mishneh Torah, Hilchot Avel* 14:1); Rashi (*Sanhedrin* 46a).

24. *Nazi*r 7:1.

25. Ramban, *Torat Ha-Adam* 43a; *Tosafot Yom Tov*, Mishnah *Shabbat* 10:5 – rules that as long as a single organ is unburied, the obligation of burial has not yet been fulfilled; *Shulchan Aruch Y.D*. 374; *Minchat Chinuch* Mitzvah

the meaning of the Talmud *Yerushalmi* differently and opines that there is no requirement for further burial once the head and major portions of the body have been interred.[26]

Modern *poskim* have revisited this question, which arises more frequently nowadays than previously, and some have offered lenient insights. Rav Unterman suggested that once the organ or tissue is transplanted, it is no longer considered dead; thus, the prohibition of *hanaah* (making use of the dead) and the requirement of burial are no longer applicable.[27] Rabbi Meir Sternberg points out that with the eventual death of the recipient of an organ transplant, the organ will ultimately receive its burial.[28] The Mishnah in *Sanhedrin* 46a teaches that the obligation of immediate burial can be suspended in a situation where greater honor would be bestowed to the deceased by a delay. Thus, if the donation of organs or tissue brings honor and credit to the deceased, it can be argued that any delay in burial of the donated organ until the eventual death of the recipient is worthy of consideration.[29] Rabbi Yitzhak Liebes deduced from numerous sources that once the majority (*rov*) of the body has been buried, there is no longer an obligation to bury smaller body parts (the concept of *rubo kekulo*—the major part is equivalent to the whole).[30] Rav Elyashiv, though, maintains that there is an obligation to bury even the smallest of body parts and therefore ruled corneal transplants totally forbidden, rejecting all of the possible leniencies aforementioned.[31]

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537 – states that there may even be a requirement to bury less than a *kezayit* (olive size); Rabbi Yekutiel Greenwald, *Kol Bo al Aveilut* pp.46-47; Rav Eliezer Waldenberg, *Tzitz Eliezer* 13:91.

26. *Mishneh Torah, Hilchot Avel* 14.

27. *Shevet MeYehudah* pp.54-57.

28. *Noam* Vol.III p.94, Vol.II p.202.

29. Reported by Rabbi Basil Herring, *Jewish Ethics and Halacha,* p.89.

30. *Be'Inyan Hashtalat Evarim – Noam* 14 (1971) pp.51-59.

31. *Keztot Hashulchan, Siman* 138.

V-A. Cadaver Bone – Conveyance of *Tume'ah* – Defined Sizes and Measurements

A Kohen is forbidden by the Torah from becoming *tamei* (ritually impure) from a dead body. A human corpse can transmit *tume'ah* (ritual impurity) to a Kohen via *ohel* (by being under the same roof), *maga* (touch), and *masa* (lifting/carrying). Although the laws of *tume'ah* do not affect most Jews in our time, nevertheless a Kohen, in accordance with almost all rabbinic authorities, is still obligated to be strict in his observance of the laws of *tume'ah* and also to prevent himself from becoming more *tamei.* While there is a consensus that both *tume'at maga* and *masa* can be transmitted by either a dead Jew or non-Jew, there is debate in regard to *tume'at ohel,* whether the prohibition to Kohanim exists only with a Jewish corpse. *The Shulchan Aruch* rules that a Gentile corpse does not convey *tume'ah* to a Kohen in a case of *ohel,* but one should be *machmir* (strict) not to be in the same *ohel.*[32] Modern-day *poskim* are divided on *tume'at ohel* with respect to the body of a non-Jew.

A further complication arises from the additional prohibition for a Jew to transmit *tume'ah* to another Jew. This becomes significant for a doctor performing a procedure that will entail passing *tume'ah* to patients.[33] Another factor that impacts on the halachic permissibility of bone grafts is the size and measurement of bone or derivatives of bone. These issues will be crucial in our analysis of what is permissible and not permissible with "bone grafts," and therefore requires a careful delination of the laws of *tume'ah.*

The amount of dead flesh that can create *tume'ah* is a *kezayit* (size of an olive) whereas the amount of bone that conveys

32. *Shulchan Aruch, Yoreh Deah* 372:2.

33. *Iggerot Moshe* Y"D 1:230.

tume'ah via *maga* and *masa* is a *keseorah* (size of a barley grain),[34] with a different amount needed to convey *tume'at ohel*.[35] *Rekev,* loosely defined as corpse dust or corpse rot ("the desiccated powder that remains after all moisture of a corpse has evaporated"),[36] transmits *tume'ah* to a measurement of *melo tarvad* (a ladleful). The *Tosefta* (*Oholot* 2:2) explains this measurement to be the equivalent of a double handful – the amount that one could hold in two hands, or according to others,[37] a single handful.

The Mishnah in *Oholot* 2:2 continues to explain that *rekev* that is kneaded with water is not considered connected in respect to *tume'ah,* utilizing the very important principle that the particles do not recombine (*mitztaref)* for the purposes of *tume'ah.* According to the rabbis in the text, *rekev* conveys *tume'ah* via *masa* and *ohel* but not by *maga*, although Rav Shimon considers it to be completely acceptable and pure (*tahor).* The Gemara in *Nazir* 51a rules that dust of a decayed corpse contaminates only when it originates from a single corpse, but if two corpses decay together, the resulting *rekev* does not convey *tume'ah* . The Rambam rules that *rekev* of the same body in the amount of a handful (*melo chafnaim)* conveys *tume'ah* via *ohel* and *masa,* but not by *maga.*[38] *Etzem keseorah* is the rule for pieces of bone, transmitting *tume'ah* by touch (*maga)* and lifting (*masa)*. However, what happens if bone is crushed to the point that all of the pieces are individually less than the volume of a *seorah*? Do the pieces recombine and count as a volume greater than a *seorah* or are they treated as separate individual pieces even when held together? The Mishnah in *Oholot* 2:7 addresses the situation of a piece of

34. *Oholot* 2:3;*Mishneh Torah, Tume'at Meit* 4:4.

35. *Oholot* 2:3 – עצם כשעורה מטמא במגע ובמשא ולא באוהל.

36. *Oholot* – Artscroll Mesorah Publications pp.59-60.

37. *Sidre Taharot* (on *Yerushalmi Nazir* 7:2) and the *Mefaresh* **(***Masechat Nazir* 50b.

38. *Mishneh Torah, Tume'at Meit* 2:11, 3:3.

bone the size of a barley grain that was divided into two; Rabbi Akiva rules it *tamei* and Rabbi Yochanan Ben Nuri rules it *tahor*. There are those[39] who understand R. Akiva's position to include two pieces of bone of different origin that are combined, whereas others[40] interpret R. Akiva's position on *tume'ah* to relate only to two pieces that originated from the same body. The halachic implications to bone from a single donor vs. a bone bank are apparent. According to the latter approach, bone fragments from different bodies that together comprise a *seorah* would not convey any *tume'ah* when combined. The Rambam, however, ruled according to R. Akiva[41] that two pieces smaller than a *seorah* do recombine to convey *tume'ah* but only by *masa* (an important fact to remember if we are dealing with TSM from a single donor, which we will discuss later).

The Mishnah in *Oholot* 2:7 continues with another concept: if there is a quarter *kav* of bones that were crushed or pulverized into pieces much less than a *seorah,* R. Shimon rules it *tahor* and the rabbis rule it *tamei.* R. Shimon clearly holds that when pulverized, small pieces of bone do not recombine for the purpose of *tume'ah*. His position appears to dispute the previously mentioned position of R. Akiva, his *rebbi* (an unusual occurrence), who supports the idea of *mitztaref.* According to the Chazon Ish,[42] they are discussing different settings: R. Shimon is describing a situation of bone being completely pulverized into powder (*kekemach*) whereas R. Akiva is discussing a case where small pieces of bone still remain. The Brisker Rav, Rabbi Velvel Soloveitchik,[43] suggests that R. Akiva's position was limited to bones of a single corpse but R. Shimon is dealing with a situation where the bones are

39. *Mefaresh* to *Nazir* 52a, *Chazon Ish* on *Oholot* 2:7, *Sidrei Tahorot* 66b.
40. *Mishnah Achoronah Oholot* 2:7, *Chidushei Hagriz* Vol.5 on *Nazir* 52a.
41. *Mishneh Torah, Tume'at Meit* 4:4.
42. *Chazon Ish, Sidrei Tahorot* 21:12.
43. *Chiddushei HaGriz* Vol. 5, *Nazir 52a.*

of multiple corpse origin. The rabbis there maintain that a quarter *kav* of bone remains *tamei* even when pulverized and conveys *tume'ah* by *maga*, *masa* or *ohel.*

The Rambam ruled[44] that a quarter *kav* of ground bones from one body does convey *tume'ah.*[45] The straightforward reading of the Rambam– "and also a quarter *kav* of bones from one corpse that was chopped up (pulverized) and there is not among the remains a piece of bone of *seorah* size, it conveys *tume'ah* via *ohel* as if it were not chopped up" – seems to clearly state, bones that originate of one corpse. Therefore, if we were dealing with bones of multiple origin, it could be argued by some, that the Rambam would rule that they do not convey *tume'ah* at all. Finally, in a case where the corpse was burned to the extent that "the shape/figure has distorted" beyond recognition, the Rambam[46] considered the remains not capable of transmitting *tume'ah.* Additionally, if the corpse is burned to ashes, the ashes will also not render anything *tamei.*[47] [48]

V-B. Processing of Cadaver Bone for Use in Allografts

The exact processing method of human bone allograft varies. Although the procedures differ in many technical aspects, most are based on similar underlying principles; a) initial stripping from bone of all soft tissue, b) treatment of the bone with sterilizing agents, c)reduction of bone to particle size of 250-750 micrometers, d) immersing the pulverized bone in acid baths for additional demineralization.[49] The source of the

44. *Mishneh Torah, Tume'at Meit* 4:4.

45. *Tosafot Chadashim* understands the Rambam's ruling of *tume'ah* to apply only to *ohel* but not *maga* or *masa,* whereas R. Akiva Eiger, *Tiferet Yisrael Boaz* #16, understands the Rambam to be ruling with *masa* also.

46. *Mishneh Torah, Tume'at Meit* 3:9.

47. *Mishnah Oholot* 2:2.

48. *Mishneh Torah, Tume'at Meit* 3:10.

49. "The Safety of Bone Allografts Used in Dentistry," *Journal of the*

cadaver bone is usually of multiple donor origin, but there is one major manufacturer that does process BSM originating from a single corpse donor, which may have halachic ramifications, based on the understanding of the Rambam (*Tume'at Meit* 4:4) and the ruling of the *Griz* who ruled that bones originating from multiple corpses that have been crushed do not convey *tume'ah.*

VI. Highlights of Past Responsa Regarding Transplants and their Limitations

The majority of opinions that allowed organ/tissue transplantation were usually limited in application. Most have understood *pikuach nefesh* to be the overriding factor for leniency. Incorporated in this understanding was the necessity for the organ donated to have come from a non-Jew. The greater issue arises in situations which are not life threatening. The following are a sampling of thoughts by *poskim* written in the latter part of the last century, and their limitations in regard to dealing with "bone grafts", Kohanim as patients, and Kohanim as practitioners.

Rav Unterman, in a responsum regarding corneal transplants, proposed the concept that the organ transplanted is brought back to life as it is incorporated into the body.[50] As a result, all the prohibitions regarding a corpse are no longer applicable. The mechanism of his *heter* (lenient ruling) might possibly allow a Kohen to receive a graft, based on the assumption that the tissue "comes back to life" immediately upon placement.[51] However, it does not allow for a Kohen practitioner to surgically place the transplant because the tissue, prior to placement, is not yet in a state of "having come

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American Dental Association, Vol. 139, No. 9, 2008, Holtzelaw, Toscano, Eisenlohr, Callan p.5-8.

50. *Shevet MeYehuda*, p.314.

51. Rabbi Hershel Schachter relayed to me that some *poskim* do not accept this as accurate.

back to life" and would confer *tume'at masa* on the Kohen practitioner.

In another *teshuva*, Rav Tzvi Pesach Frank allowed corneal transplants, reasoning that corneas are less than a *kezayit*, which is considered the minimum measurement in this matter.[52]

In a responsum in 1958, Rav Moshe Feinstein addressed a query whether attaching a limb, tissue (*basar*), or bone of a dead person is forbidden because of the issue of benefiting from the deceased (*hanaat hameit)*.[53] After reviewing in great length and detail all of the previously discussed thoughts on *hanaat* and *linat hameit*, Rav Moshe gave his permission to allow transplants, in a situation of great need such as medicine, when using organs from a non-Jew.

In a responsum on autopsies and organ transplants, Rav Shlomo Zalman Auerbach[54] does not accept the concept of leniency if one benefits from the dead "not in the usual manner" (*hanaat hameit shelo kedarko)* and appears to forbid the transplantation of any organ, even from a tissue bank, unless there is the overriding presence of a person who is in a life-threatening predicament (*pikuach nefesh lefaneinu)*.[55] In a phone conversation with Dr. Abraham Abraham, a close confidant of Rav Auerbach,[56] he expressed his understanding of the position of Rav Auerbach, stating that this responsum was mainly concerned with observing post mortem autopsies. It was his opinion that regarding "bone grafts"/TSM he might have allowed it outside of Eretz Yisrael because the majority of bone is not from Jewish origin there. It is his understanding that the issues that Rav Auerbach raised were basically limited to Israel where the majority of the population is Jewish.

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52. *Teshuvot Har Tzvi, Y.D., Siman* 277.
53. *Iggerot Moshe*, Y.D. 1:229.
54. *Sh"T Minchat Shlomo Tanina*, 97.
55. *Nishmat Avraham* pp.343-5 vol. III.
56. On March 26, 2011.

In a responsum regarding corneal transplants, Rav Ovadia Yosef cited the opinion mentioned earlier that *nivul hameit* is restricted to situations where there is the intention to desecrate, but in settings where improvement of life are involved (such as restoring a person's vision), the prohibition of *nivul* would not apply.[57]

Rav Shaul Yisraeli wrote a *teshuva*[58] that permits skin donations even when the patient is not a *choleh lefaneinu*. He also cites the opinion of Rav Tzvi Pesach Frank that allows *hanaat hameit shelo kedarko*, and applies it to skin grafts, as well as Rav Unterman's concept of organ or tissue transplants coming back to life. Based on all of the above, he summarizes his *heter* (leniency)*:* 1) that prior to dying, the donor gave permission, and waives his honor, 2) there is no issue with skin-- it is not an integral part of the dead, 3) there is no issue of *hanaah* because it is presumed to have come from a non-Jew, and 4) the issue of *hanaah* applies only when it is done in the normal manner; therefore one is allowed to treat someone with the skin of a *meit*, not restricted by *pikuach nefesh* and even in a situation where it is not a *choleh lefaneinu*.[59] The foundation of Rav Yisraeli's *heter* is based on his belief that skin is not an integral component of the *meit*. No such supposition can be made regarding the bone of a cadaver. In addition, although Tosafot[60] and *Piskei Tosafot*[61] both ruled that it is not forbidden to benefit from the skin of a *meit*, most *poskim* have disagreed and ruled it is forbidden.[62]

In an overall analysis of previously written responsa, it is difficult to find anything substantial that has been written that offers a definitive ruling on the status of "bone graft"/TS

57. *Yabia Omer Chelek* 3, *Y.D*. 23.
58. Rav Shaul Yisraeli, *Techumin* 1 pp.237-247, *Techumin* 7 pp.206-218.
59. Idem *Techumin* 1 p.245.
60. *Niddah* 55a, *Zevachim* 71b.
61. *Niddah Siman* 97.
62. *Nishmat Avraham* Volume 2, Y.D. p. 345.

materials derived from a bone bank, in a non-*pikuach nefesh,* non-*choleh lefaneinu* circumstance. In addition, little has been written to define the status of transplants and Kohanim in a non-*pikuach nefesh* setting.

VII. Rav Moshe Feinstein's *Teshuva* Regarding a Kohen Patient in Need of a Limb, Tissue, or Bone Transplant

Rav Moshe Feinstein issued an halachic ruling[63] regarding a Kohen patient who needs a cadaver limb, body part, or bone transplant. At that time, grafting procedures were relatively new and rare,and intact bone grafts were used. Rav Moshe reviewed the sources that dealt with the status of Kohanim in the present day and ruled that Kohanim should be categorized as definite Kohanim, who are obligated to observe all of the specific laws and mitzvot biblically assigned to them whenever possible; he also discusses whether Kohanim may receive medical treatment which may be in violation of *tume'ah* on a rabbinic level. Rav Moshe applied the concept of *tume'ah biluah,* which is defined as a situation where a *tamei* object is "swallowed up", thereby becoming nullified (*batel*) as though it had been digested or otherwise destroyed. The *tamei* object consequently cannot transmit *tume'ah.*[64] The "swallowed up" *tume'ah* is viewed halachically as non-existent, and one does not acquire *tume'ah* when touched by something *tamei* in an enclosed part of his body. However, whether one can acquire *tume'ah* by carrying (*masa*) a *tamei* object in a concealed part of the body (*beit hasetarim)* is a topic of dispute among early rabbis (*Rishonim*) and may depend on whether the *tamei* object is fixed in place or left loose and moveable. Rav Moshe acknowledges this disagreement but rules according to the majority opinion that the *tume'ah* is only a problem if the object is loose; he concludes that *tume'at masa* is not a factor if

63. *Iggerot Moshe*, Y.D. 1:230.

64. *Chullin* 71A כילא עסקינו, and Rashi, ibid. *Niddah* 42b.

the object is non-moveable in a *beit hasetarim.* Conceptually, this means that once the transplanted cadaver tissue is placed inside the surgical site (the *beit hasetarim*), it no longer conveys *tume'ah* to the Kohen patient.

Citing several sources, he argues that as the surgeons make their incision to graft the tissue internally, they convey no *tume'ah* via *maga* to the Kohen patient even during its initial placement. He stresses that the area is surgically opened only with the intention of later closing the wound, and with a medical need and objective for the transplanted organ to be integrated. With this as a goal, he considers the *tume'ah* as having always been in closed setting of *beit hasetarim* which conveys no *tume'ah* if fixed in place. He says that it is possible to instruct the doctor to stabilize the leg and procedurally transplant it in such a way to prevent further movement until such time that the graft is "brought back to life". Having established the foundation for a decision, Rav Moshe ultimately rules to permit cadaver bone and ligament grafts inside the leg.

This *heter* may be a solution to the Kohen patient in the issue of *tume'ah* even in regard to the "bone graft"/TSM. There are, however, some *poskim* who contend that the graft does not immediately integrate with the recipient's body and therefore, until integration ("coming back to life") takes place, they would consider the Kohen to be in a state of *tume'ah.* In addition, this responsum does not solve the issue of the Kohen practitioner, who would be violating at least *tume'at masa,* and possibly *tume'at maga* as well.

VIII. Considerations for Possible Leniencies to Allow Biologic Scaffolds/ "Bone grafts"

The halachic problems that we encounter with the use of bone grafts are fourfold:

A) For any patient – Can a Jewish patient derive benefit from a dead person in a non-life-threatening situation?

B) Patients who are Kohanim – in addition to the above, would be potentially exposing themselves to *tume'at meit* (spiritual contamination from coming in contact with a dead body).

C) Jewish practitioners who treat Kohanim – may be forbidden to transmit *tume'ah* to a Kohen, if such is the case with "bone grafting" materials.

D) Jewish practitioners who are Kohanim would be exposed to these materials and their potential *tume'ah* (all 3 – *maga*, *masa*, and *ohel*) from the outset of the procedure and also guilty, if treating a fellow Kohen, of rendering him *tamei.*

Factors for Leniency

It may be possible to be lenient, based on a number of principles:

1) Source of bone – We might utilize the concept of *rov,* which means that an item may be nullified by the greater majority. Since the majority of the people inhabiting the world are Gentile and those who donate their bodies are likewise usually non-Jewish, we can assume that the tissue being used originates from a non-Jew. This may be cause for leniency as previously discussed.

2) Size of the bone

a) Bone, at least the size of a *seorah*, transmits *tume'ah* via touch and carrying, but not when it is simply under the same roof (*ohel),* although if there is a *rovah* (the equivalent of 6 average sized chicken eggs) of bones from one dead person, it would contaminate by *ohel* as well.[65]

b) *Etzem keseorah* – a piece of bone the size of a barley grain, that is split into two, conveys *tume'ah* via *masa* and also a *rovah*

65. *Mishnah Oholot* 2:3; *Mishneh Torah, HilchotTume'at Meit 4:4.*

of bones that were *nidakdeku* (chopped up) so that there is not a single piece the size of a *seorah,* transmits *tume'ah* via *ohel* as if it had not been chopped up.[66] The Rambam refers only to the bone originating from one *meit* and not multiple corpses. Is there room to interpret that he holds this position with pieces originating only from one *meit* but, where the source is from multiple corpses, there would be no *tume'ah*? This is the understanding of the *Griz (Chiddushei HaGriz* Vol.5 *Nazir* 52a) and the *Mishnah Acharona* (*Oholot* 2:7).[67] Since a) the individual pieces of the TSM (most originate from multiple corpses) are less than a *seorah* and b) the total graft material is definitely less than a *rovah,* and c) there is no recombination of the individual pieces,[68] there is logic to maintain that the "bone graft" / TSM does not cause *tume'ah* at all.

If the material does indeed come from one *meit,* and not a bone bank, then as long as the material used at one time is less than a *seorah,* there is no *tume'ah.* This would involve having the assistant lift the packaged material, open it and prepare it for clinical use. The practitioner would then lift and place less than a *seorah* of the graft material into the surgical site. This procedure works both for the Kohen practitioner as well as the Kohen patient. This process also makes allowances for those who do not share the same understanding of the *Griz* and *Mishnah Acharona* and also for those who are reluctant to accept the concept of *shenui.*

3) *Shenui* – If the material has undergone a significant change (*shenui*) that transforms the essence of the bone so that it will no longer be considered bone, this new entity has an altered status that is incapable of conveying *tume'ah.* The argument for such a change in status is a result of the processing of

66. *Mishneh Torah, Hilchot Tume'at Meit* 4:4.

67. Rabbi Akiva Eiger to Rambam *Hilchot Tume'at Meit* 4:4, also opines that the Rambam is only speaking of one *meit.*

68. *Mishnah Oholot* 2:2; Rambam, *Hilchot Tume'at Meit* 4:5, 4:9 "אין חבור אדם חבור".

pulverized bone that is exposed to several treatments of solvents and acids. It should be pointed out that if an intact untreated piece of bone or ground bone were placed as a graft, it would almost certainly be rejected by the recipient body's immune system. The fact that treated tissue scaffolding material is so well accepted illustrates its new status, and might therefore pose no problem of *tume'ah* for Kohanim at all.

4) *Meit shenisraf* (a corpse that has been burned) – The Rambam[69] and Mishnah *Oholot*[70] rule that a burned corpse, whose shape has been altered (*nitbalbala*) is considered *tahor,* but Rambam specifies that if the skeleton remains intact, it still conveys *tume'ah.* What this implies is that if a piece of the bone has been burned to the extent that its shape is unidentifiable, we could take a position that it does not convey *tume'ah* at all. The critical aspect is the *bilbul tzurato*--the change of shape and identity of the human corpse. As discussed previously, the harvested bones for TSM are pulverized and then exposed to solvents and high levels of acid. The acid, similar to fire, also creates burns, destroys tissue, and is capable of changing shape and form of the bone it comes in contact with. Since the bone has been totally altered and is unidentifiable from its original shape and state, it too might be incapable of transmitting *tume'ah* and might therefore be possible grounds for a lenient ruling.

5) *Nifrach Kekemach* (pulverized to be "flour like") – The sources of this are from the Gemara *Nazir* 51B, "נקטינן מת שטחנו אין לו רקב" and *Niddah* 55a "ובשר המת".[71] The Gemara in *Niddah* discusses a disagreement between R. Yochanan and Reish Lakish, and the pertinence of their debate is that if the bone is

69. *Mishneh Torah, Hilchot Tume'at Meit* 3:9-10.

70. Mishnah *Oholot* 2:2.

71. *Mishneh Torah, Hilchot Tume'at Meit* 3:10 בשר המת שנפרך ונעשה בקמח טהור. It should be noted that the Chazon Ish understands that "עצם שנטחן לקמח" – that a bone that has been pulverized to flour conveys *tume'ah* at a measurement of *rovah kav* (*Chazon Ish*, *Oholot* 21:12).

reduced to the level of flour, both agree that it is considered *tahor*. The halacha derived from here according to most authorities is that in a situation of pulverized, flour-like bone, the resulting material is *tahor*.[72] It is unclear whether we can actually consider the graft material to be like *nifrach kekemach* and *tahor*, when in fact BSM is not ground down to exactly a flour consistency and is rather granular and coarse like sand or table salt.

The *Kesef Mishneh*[73] writes that it is not necessarily actual powder consistency that renders it *tahor* but also when it is so dry that if it was pulverized it could become flour. He contends that the key factor is the degree of how dry the bone is so that it can become like powder, and not necessarily that it should be the actual consistency of flour. Therefore, regardless of whether the "bone graft" material has the consistency of coarse sand or salt, if it is as dry as flour, one could argue that it would be considered *tahor* and not capable of transmitting *tume'ah*. This might give additional strength to advocate the use of bone scaffold material without any fears to the patient or practitioner who are Kohanim, in the view of rabbis who were consulted on this matter. (See further in text, part IX).

6) *Melo Tarvad Rekev* – a ladleful of corpse powder. Some *poskim* have compared bone scaffold material to "no worse than" *rekev* (see part IX). The amount of "bone graft" material needed to reach the level that transmits *tume'ah* would have to be of a considerable size. *Rekev* is somewhat unique in that it does not convey *tume'ah* by touch, but only by *ohel* or by being carried.[74] Assuming, based on *rov*, that the *rekev* originates from Gentile corpses, it can be argued that the scaffold material would at most contaminate only by carrying, and only if there is a significant amount. Another significant point

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72. *Taharat HaKohanim Kehilchata*, Rav Moshe HaKohen Gross p.153.
" בשר המת שנפרך ונעשה כקמח פקעה ממנו טומאתו והוא טהור... אין בהם טומאת מת
73. *Hilchot Tume'at Meit* 3:10.
74. *Mishnah Oholot* 2:1; *Hilchot Tume'at Meit* 2:11, 3:3.

is that the Gemara in Nazir 51a added a qualification -- only *rekev* that originates from a single corpse transmit *tume'ah*. Therefore, if we consider BSM to be similar to *rekev*, it is questionable whether it could convey *tume'ah* at all. However, according to the Rosh,[75] the law of *rekev* applies only when the corpse dust is generated by natural decay and not grinding. The Rambam takes this same position. Some of the rabbis (see part IX) take this into account.

7*) Tume'ah Biluah* – (*tume'ah* that is "swallowed" – i.e., internal). This may allow for the grafted material to become halachically a non-factor when placed in a concealed or enclosed part of the body. The placement of the graft would be considered as a *tume'ah biluah* where the body totally encloses the transplant (and there is no issue of touch or handling). However, the application of this principle to our situation is not accepted by some *poskim* because it is predicated on the body's immediate assimilation of the graft material upon placement, which is not what actually happens. (According to Rav Hershel Schachter).[76]

The concept of *tume'ah biluah* allows the Kohen patient to be the recipient of a transplant or graft.But it does not ameliorate the problems that are still faced by the Kohen practitioner nor address the status of the scaffolding material.

IX. Current *Teshuvot* and Suggestions

The question of "bone grafts"/TSM was presented to several respected rabbis for their thinking on the questions raised herein (documentation has been transmitted to the Editor). Following is a sampling of their thoughts:

When initially contacted concerning this issue, Rabbi J. David Bleich focused on the dimension and size of the graft

75. Rosh to *Nazir* 51B – נקטינן מת שטחנו

76. Specific oral communication to me.

material. Stating first that the measurement of a *seorah* for *tume'at maga* is approximately 1/3 cm x 1 cm, he doubted the individual pieces of TSM would be of this size. In addition, the "powdered bone" that is being used would not have the volume to cause *tume'at ohel* because at its halachic worst, the material would potentially fall into the category of *rekev* which conveys *tume'ah* via *masa* and *ohel,* but at a quantity far in excess of what is typically used in the implant procedures discussed earlier. Finally, he cites the possibility that chemical processing of the bone results in a change of status which would make it analogous to ash and not corpse bone at all, which would effectively negate the issue of *tume'ah*. The only issue, according to Rav Bleich, would be if the graft material were stored in bulk form in an office setting. In regard to the initial harvesting of bone, he presumes that the donor was not Jewish, in which case, according to many authorities, there is no prohibition of use. He raised some additional issues which he considered minor or arguable.[77]

To summarize, Rav Bleich believes that there are good reasons halachically to allow use of the TS materials and there should be no fear of *tume'ah.* If it is considered bone, it is no worse than *rekev*, which would allow, but limit, the amount used in a given procedure.

Rav Dovid Cohen said that we can fundamentally take the approach of the *Mishneh Lamelech* and others, who held that deriving benefit from a Gentile corpse is only rabbinically forbidden, and that we may assume that we are dealing with

77. The benefit is *shelo kederech hanaah,* which some authorities maintain is entirely permissible, others maintaining it is permissible only with regard to non-Jewish cadavers, and yet others regard as reduced to a *d'rabbanan* in the case of a *meit akum*. Many explicitly sanction such use in cases of medical need. Rav Bleich also assumes the value of bone used is less than a *perutah*, where there is no issue of *hanaat hameit*, which many hold is entirely permissible, others hold is *d'rabbanan*. Assuming the prohibition is rabbinic, using less that the value of a *perutah shelo kederech hanaah* results in a *telat d'rabbanan*, making it permissible.

the bone of a non-Jewish donor. Furthermore, he considered the case to be one of pulverized bone which he considers incapable of transmitting *tume'ah* because the individual pieces are too small and which halachically do not recombine. He therefore feels that there would be no fear of *tume'ah* to either the patient or practitioner. In addition, Rav Cohen expressed the belief that there is additional room for leniency for the Kohen patient based on Rav Unterman's understanding that the body absorbs and incorporates the transplant, bringing the tissue "back to life" and thus obviating any concern about *tume'ah*.

After reviewing the literature provided to him on TSM, Rav Dovid Feinstein stated that he is unsure whether the material is a new entity or just bone of a dead person in a different form despite the physical changes of size, alteration of appearance and chemical modifications. He did not feel comfortable saying there is no *tume'ah* following *tochein* (grinding), and regarding the Rambam's comments on *meit shenifrach,*[78] he said that the Rambam may only be talking about a natural breakdown and not a situation where the donor bone was pulverized by man. He considers *rekev* to occur only through natural breakdown and therefore feels that any suggestion of *rekev* would be inapplicable. Regarding *meit shenisraf,* Rav Feinstein did not consider burning with acids to be the same as burning with fire, and feels there may be times where bone is left over that is still capable of conveying *tume'ah.* It is only the ashes that are definitely *tahor.* Rav Feinstein feels more comfortable taking the position that this pulverized bone is potentially capable of conveying *tume'ah* by *ohel* in the amount of a *rovah kav.* Such a large amount, he says, would allow the material to be stored in the office in moderate amounts and would not present any issue of *tume'at ohel* to the Kohen patient and doctor. There would also be no concern for *tume'at maga* because the particles of TSM do not recombine.

78. *Hilchot Tume'at Meit* 3:10.

Since *tume'at masa* cannot exceed a *seorah,* Rav Feinstein recommends that during TSM placement, the assistant lift, open and place the packaged graft material onto the surgical working pad. The Kohen practitioner would then lift and position amounts less than a *seorah* into the surgical site to avoid the concern of *tume'at masa* (and to repeat this process of placement for as many times as necessary). Rav Dovid Feinstein accepts the view of *tume'ah biluah* as proposed by his father, Rav Moshe, and therefore feels that there is no issue for the Kohen patient.

Rabbi Moshe D. Tendler initially felt this to be a case of *tochein*, where there is not enough amount of the individual pieces to convey *tume'ah*, and that these pieces do not recombine. Therefore, he concluded there is no fear of *tume'ah* to the Kohen patient or practitioner. In follow-up discussions, Rabbi Tendler subsequently took the approach similar to Rabbi Dovid Feinstein and recommended using the material in small amounts that do not exceed a *seorah.* He rejects applying the concept of *meit shenifrach kekamach*, (a body ground up like flour) saying this applies only to *basar* (flesh) and not bone. He feels *meit shenisraf (*a burned body), applies only to actual fire and not to acid. He discounts the possibility of acid being the equivalent of fire and its capacity to change the form (*tzurat tavnito),* saying that the words should be understood by their literal meaning, which he feels refers only to fire. Rabbi Tendler also expressed his reservations regarding *shenui*, change, feeling that it would not be accepted by many *poskim*.

When contacted, Rav Yisroel Belsky stated that it is assumed that the majority of bones used in grafting procedures originate from non-Jews and therefore he had no concern regarding deriving benefit therefrom. Furthermore, he felt we can assume that the bones are from several sources and having been ground down, there is no recombingation (*tziruf)* later. He does not feel comfortable with the idea of *shenui* and *panim chadashot (*alteration of status). He rejects the concept that was

utilized by Rav Chaim Ozer Grodzinski (*Achiezer*) and others to allow kosher gelatin, because he feels that there is room to advocate that the TSM is not a new entity. Instead, he argues, it may be the same product that initially existed and whose appearance and physical state is capable of being reversed. Rav Belsky expressed the belief that TSM could be used, if handled properly, utilizing similar techniques and precautions outlined earlier by Rav Dovid Feinstein.

During the course of several conversations followed by a written *teshuva*, Rav Asher Weiss discussed the permissibility of using cadaver bone in transplant situations of the jaw. In a very comprehensive manner, Rav Weiss expressed his belief that it is absolutely permitted to use the TSM. He deals with the prohibition of deriving benefit from the dead as well as the obligation to bury body parts, by referring to previously written responsa and other halachic sources. Presenting several arguments for leniency, Rav Weiss establishes that bones that originate from two corpses and were pulverized do not convey *tume'ah* according to the *Griz*. However, if the source is from one corpse, then there would be an issue of *tume'ah.* He states that at worst, the graft material would be considered like ground bone that is like flour and contaminates to a half *kav* (approximately 12 eggs). But Rav Weiss contends that there is a fundamental change in the essence of the donor bone, and we are dealing with a true *shenui* and *panim chadashot* based on 1)the fact that the the body normally rejects anything of a foreign material and yet the TSM is incorporated into the body and 2)the chemical changes of the bone as a result of acids and solvents. He also compares the BSM to "*basar min hameit sheyavesh*", where the tissue of the corpse dries entirely to the point of dust and is then considered *tahor (Niddah* 56a). Rav Asher even cites the possibility that we are dealing with the lenient laws of *meit shenisraf* (*Oholot* 2:3) due to the chemical (acid) processing, while also accepting the merits of Rav Moshe Feinstein's view of *tume'ah biluah.* Finally, he believes that the *rekev* status can only be achieved through natural decomposition and

breakdown rather than pulverization and chemical degradement and therefore the laws of *rekev* are not a consideration. In his final analysis, Rav Asher Weiss permits the use of BSM for Kohen patients and practitioners and believes that the issue of *tume'ah* should not be a factor.

Eretz Hemda, the institute for advanced Jewish studies in Jerusalem, was contacted for a halachic opinion. They expressed the opinion that in a non-life-threatening situation it is permitted to use BSM that originates from non-Jewish donors, and in a "pressing situation", there is room to be lenient even with material that originates from a Jewish one. If a Kohen practitioner would carry amounts of the BSM in a packaged vial that total more than a *seorah,* it can be still be used as long as the pulverized material does not originate from a single corpse. This same ruling also applies to the Kohen patient.

Conclusion

We have attempted in this article to clarify the multiple halachic issues of "bone grafts"/TSM in the context of dental procedures for both the general Jewish population and more specifically for Kohanim. Explanations of these difficulties as well as possible solutions have also been presented. The author acknowledges and thanks the many rabbis and *poskim* for their help, insights and receptive interaction. The material presented herein is not to be taken as halachic rulings but rather as examination and suggestions of the religious concepts involved.

The halachic authorities consulted generally agreed that it was permitted to use TS materials in the clinical settings described. Where they differed was in their interpretation of some of the halachic precedents and therefore the method of use and application. There are some that permit the outright use based on an assortment of possible reasons cited while others would allow TSM in a more restricted manner. Their

opinions are presented for the purpose of clarification, not for the purpose of issuing a halachic ruling.

Any discussion of new medical techniques must recognize that halachic principles need to be examined to determine whether new procedures can be used within the Jewish (observant) community. As in all cases of *psak*, the individual cases must be studied and evaluated on their own merit. Although G-d is the ultimate source of healing, it is our responsibility to do what we can to alleviate illness and suffering. The doctor's responsibility is to treat and heal as best as he can and the patients are obliged to seek healing in the most therapeutic way that halacha allows.

לעילוי נשמת אמי קילה בת ברוך בן־ציון – ת.נ.צ.ב.ה.

Modern Appliances versus Old Decrees: A Case Study in *Takanot Chazal*

Rabbi Mordechai Schiffamn

I. Introduction – The Power of a Decree

The Mishnah[1] states that a *Beit Din* cannot repeal a decree of another *Beit Din* unless it is greater in number and stature.[2] The Gemara[3] adds that *kol davar shebeminyan tzarich minyan acher lehatiro* – any decree made by a group of rabbis stays in effect until it is repealed by another group of rabbis. Rashi[4] and the Rosh[5] explain that this is true regardless of whether the original impetus for the decree is still applicable.[6] The

1. *Eduyot* (1:5).

2. Rabbi Ovadiah Bartenurah (*Eduyot* 1:5) explains that "greater in number" means that the second group has more rabbis than the first group, and "greater in stature" means that the leader of the second group is smarter than the leader of the first group.

3. *Beitzah* 5a.

4. Ibid., s.v. *Menah*.

5. *Beitzah* 1:3.

6. The Rambam (*Hilchot Mamrim* 2:2) contends that even in the case where the original reasoning behind the decree no longer applies, the second *Beit Din* still must be greater in number and in stature than the first *Beit Din*. The Raavad (*Hilchot Mamrim* 2:2), however, disagrees in this scenario, and only requires that the second *Beit Din* be greater in number, not in stature. See *Mishnat Yabetz* (*Choshen Mishpat* 6), *Chavatzelet Hasharon* (*Shmot* pp. 393-394), and Rabbi Elchonon Adler (*Beit Yitzchak*, vol. 34, pp. 193-209) who explain

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simple reading of the Gemara indicates that this precept applies to all decrees that were made by a group of rabbis. Additionally, there does not seem to be any other Gemara that disputes this ruling. Based on this, it seems that any time we find that a group of rabbis made a decree and we do not know that it was repealed by a later group of rabbis, the decree should still be binding regardless of how outdated and irrelevant it might seem.[7]

A practical example of this law can be found within the laws of Pesach. The law is that one is not allowed to do *melachah* (constructive activity) after midday on *erev* Pesach. The reason for this is because the Pesach sacrifice can be brought starting from midday. Tosafot[8] rule that this law is still binding nowadays even though we do not bring the Pesach sacrifice "since it was forbidden then, it is forbidden forever."

Another example can be found with regards to the laws of taking medicine on Shabbat. The Gemara[9] says that it is forbidden to take medicine on Shabbat as a preventative

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the disagreement based on the following question: When the original reasoning is no longer applicable, do we say that the original decree still stands, or do we say that the original decree automatically falls away; however, since it was already being followed, a second *Beit Din* is still needed to officially permit us to stop following it. The Rambam would say that the original decree is still in full force and would therefore fall under the rubric of the Mishnah in *Eduyot*. The Raavad, however, would say like the latter approach, and therefore the new *Beit Din* is not repealing the original act, rather they are just officially permitting us not to follow the original decree.

7. Some examples of where this issue plays a role include:
1) שמא יתקן כלי שיר (ביצה דף ל. ותוס' שם), 2) קבורה ביו"ט שני (ביצה דף ו. ותוס' שם), 3) רפואה בשבת (שבת מג:), 4) מים מגולים (תרומות ח:ד, תוס' ביצה דף ו.), 5) כתובת בנין דכרין (כתובות נב., רא"ש שם ד:כד), 6) סדין בציצית (שו"ת הרא"ש ב:ח), 7) איסור מלאכה בערב פסח אחר חצות (תוס' פסחים דף נ. ד"ה מקום), 8) שואלים ודורשים ל' יום לפני פסח (תוס' ע"ז ה: ד"ה והתנן), 9) גבינת עכו"ם מטעם ניקור (תוס' ע"ז לה. ד"ה חדא), 10) מים אחרונים (תוס' ברכות נג: ד"ה והייתם), 11) מגעת סתם יינם (תוס' ע"ז נז: ד"ה לאפוקי), 12) משא ומתן ביום אידם (תוס' ע"ז נז: ד"ה לאפוקי).

8. *Pesachim* 50a, s.v. *Makom*.

9. *Shabbat* 53b.

measure lest one comes to crush herbs, which would be prohibited under the *melachah* of *tochen*, grinding. Even though most medicines nowadays are prepared beforehand and few people grind their medicine, the majority of *poskim* assume that this decree still applies nowadays.[10]

While at first glance this seems to be a steadfast rule that we follow, some *Rishonim* (early rabbinic decisors) and later *poskim* try to limit the number of cases that we would need a new group of rabbis to repeal the original decree. For example, the Mishnah[11] prohibits drinking certain liquids that were left uncovered out of fear that a snake might have spit venom into the liquid. The general rule requiring a new group of rabbis to repeal the original decree would lead to the conclusion that uncovered water is still prohibited nowadays, even though there aren't too many snakes slithering around in our kitchens. However, Tosafot[12] state that it should be permitted to drink uncovered water nowadays. They argue that this law should not fall under the normal category of laws which require another group of rabbis, as it was only instituted out of a fear or worry (*mishum cheshashah*) and once the fear is no longer applicable, the law automatically falls away even without another group of rabbis overruling it.

There are a number of other exceptions that the *Rishonim* point out, and there are a number of explanations offered in the *Rishonim* and *Acharonim* as to why these cases do not follow the rule delineated in the Gemara in *Beitzah*.[13] However, if we were to find a decree whose original reasoning is not relevant nowadays, yet was not deemed as one of the exceptions by the earlier authorities, we would need to apply the logic and reasoning given for the other exceptions to see if

10. See "*Refuah* on the Sabbath" by Rabbi Alfred S. Cohen, *RJJ Journal of Halacha and Contemporary Society* (vol. 10, pp. 11-12).

11. *Terumot* 8:4.

12. *Beitzah* 6a, s.v. *Vehaidna*.

13. See section VII of this article where the exceptions are listed.

they would apply to this new case. If the exceptions are not relevant, then it seems we would be forced to revert back to the rule requiring a new group of rabbis to repeal the original decree, and it would still be in effect even though the reasoning behind it is no longer applicable.

II. *Takanat Ezra* – Do Laundry on Thursday

The Gemara[14] states that one of the ten decrees made by Ezra the Scribe was "*sheyehu mechabsin bechamishi beshabbat mipnei kevod Shabbat*" – "to do laundry on Thursday due to the honor of Shabbat." This decree is codified in the Rambam[15] and in the *Shulchan Aruch*.[16] This being the case, seemingly laundry day for the Jewish people should be on Thursday in order to conform to Ezra's decree. However, in modern times the reality is that many people are not careful to do their laundry on Thursday. In order to see if this is justified we first need to fully understand Ezra's rather cryptically-worded decree. We will see there are two ways of explaining what honor we are affording Shabbat by doing laundry on Thursday.

III. The Opinion of the *Eliyah Rabbah*

The *Eliyah Rabbah*[17] understands that the purpose of Ezra's decree is that we should do laundry in order to have clean clothing for Shabbat. With this understanding, Ezra's decree is similar to other mitzvot we do for the honor of Shabbat, namely doing a preparatory action on *erev* Shabbat (Friday) that would enhance our enjoyment of Shabbat.[18] However, unlike other mitzvot that we preferably do on *erev* Shabbat to

14. *Bava Kama* 82a.

15. *Hilchot* Shabbat 30:3.

16. *Orach Chaim* 242:1.

17. *Eliyah Rabbah* 242:9. The *Eliyah Rabbah* also contends that this is the opinion of Rashi *Bava Kama* 82a s.v. *U'mechabsim* who says "ומכבסים בגדיהם לכבוד שבת".

18. See *Beiur HaGra Orach Chaim* 529:1.

highlight the fact that the action is being done for the sake of Shabbat, Ezra established that we should wash our clothing on Thursday, not Friday. The *Eliyah Rabbah* explains that the reason for this was twofold. Firstly, it would assure that the laundry would be ready in time for Shabbat. Secondly, Ezra's decree would ensure that we have time to take care of other Shabbat needs on Friday.

IV. The Opinion of the *Magen Avraham*

In contrast to the *Eliyah Rabbah*, the *Magen Avraham*[19] contends that the purpose of Ezra's decree had nothing to do with having clean clothing for Shabbat; rather the rationale was to prevent laundry from being done on Friday.[20] Before the invention of the washing machine and dryer, the laundry process was a very time-consuming endeavor, and Ezra

19. *Orach Chaim* (242:3)

20. See *Machatzit Hashekel* (242:3) who explains the rationale of the *Magen Avraham* against the *Eliyah Rabbah*. If the whole purpose of the decree was to ensure having clean clothing for Shabbat, it would be superfluous, as it would be subsumed under the broader obligation of *kevod* Shabbat, honoring the Shabbat, as instructed in *Sefer Yeshayahu* and elaborated upon in the Rambam (*Hilchot Shabbat* 30:1) to have *kesut nekiyah* (clean clothing) for Shabbat. However, if one would take into account the rampant desecration of Shabbat that Ezra encountered upon his return from *Bavel* (see *Nechemiah*, chapters 10 and 13), it is possible that Ezra was not innovating a new idea; rather he was just reinforcing old Shabbat rules.

A careful reading of the Rambam might favor the *Magen Avraham*. The Rambam, *Hilchot* Shabbat 30:3 says:

"ומכבוד השבת שילבש כסות נקיה, ולא יהיה מלבוש החול כמלבוש השבת, ואם אין לו להחליף משלשל טליתו כדי שלא יהא מלבושו כמלבוש החול, ועזרא תיקן שיהו העם מכבסים בחמישי מפני כבוד השבת."

Only after detailing the requirement for clean clothing does the Rambam introduce Ezra's decree.

Rabbi Yaakov Kamenetsky (*Emet LeYaakov* p.116) adds a proof for the *Magen Avraham* from the fact that the *Shulchan Aruch* quotes this law in *Orach Chaim* 242:1 and not in *Orach Chaim* 263 where he discusses wearing nice clothing. The *Eliyah Rabbah* might counter that the *Shulchan Aruch* is just going in chronological order of Shabbat preparations.

wanted to ensure that *erev* Shabbat was spent doing things in preparation for Shabbat and not spent down by the river doing laundry. He therefore established the decree that laundry should be done on Thursday and not on Friday.[21]

V. The Practical Differences Between the Two Opinions

A. The *Mishnah Berurah*,[22] in favoring the explanation of the *Eliyah Rabbah* over that of the *Magen Avraham*,[23] writes that one should not wear the same outfit on Shabbat for a few weeks in a row. Since according to the *Eliyah Rabbah* the purpose of the decree was to have clean clothing for Shabbat, in order to fulfill the decree, our clothing must be clean.[24] However, according to the *Magen Avraham*, Ezra's decree had nothing to do with wearing clean clothing for Shabbat and therefore does not require us to make sure that our clothing is clean.[25]

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21. Rabbi Ovadiah Yosef (*Chazon Ovadiah*, Shabbat vol. 1, p. 23) contends that this is the opinion of the Meiri (*Bava Kama* 82a) as well, who says:

"שיהו מכבסין בחמישי בשבת לכבוד שבת ולא ימתינו עד ערב שבת מפני שיניחו ערב שבת כלו לצרכי הכנת שבת"

22. *Orach Chaim* (242:5).

23. See *Chazon Ovadiah* (Shabbat vol. 1, p. 23) where Rabbi Ovadiah Yosef takes for granted that the *Magen Avraham* is correct and not the *Eliyah Rabbah*.

24. The *poskim* discuss whether the clothing needs specifically to be freshly laundered or if it suffices if it is clean. See *Chut Shani* (*Hilchot Shabbat* vol. 1, p.52, footnote 11) who relates that the *Chazon Ish* was careful to wear freshly laundered clothing. However, the *Ohr Letziyon* (2:16:2) and Rabbi Chaim Pinchus Sheinberg (quoted in *Chidushei Batra* p. 10) assume that it is enough that the clothing be clean.

In terms of which types of clothing were included in the decree, see *Chut Shani* (p. 52) and *Ohr Letziyon* (2:16:2) who assume that only clothing that touches the body, as well as a shirt which is likely to get dirty, are included in the decree. However, outer garments (*begadim ha-elyonim*) do not need to be laundered for Shabbat as long as they are clean.

25. However, as explained in footnote 6, this still may be required based on the Rambam's requirement of *kesut nekiyah*.

B. Another possible difference between the two understandings is whether or not one would be permitted to do laundry on Friday for the purpose of using that laundry after Shabbat. According to the *Eliyah Rabbah*, since the whole starting point for the decree was to have clean clothing for Shabbat, in a case where the clothing is not needed for Shabbat, the laundry could be done on Friday.[26] However, according to the *Magen Avraham*, Ezra did not want anyone doing laundry on Friday regardless of when the laundry was actually needed, in order that people would have time to prepare for Shabbat.

C. The third possible difference would be a scenario where one did not do laundry on Thursday and has no clean clothing for Shabbat. According to the *Eliyah Rabbah,* one would be allowed to do laundry in this situation on Friday. Since the main focus of the decree was to have clean clothing for Shabbat, in this scenario one would have to do the laundry and hope it will dry in time for Shabbat. However, it is unclear what the *Magen Avraham* would say in this case. On the one hand, since the purpose of the decree had nothing to do with having clean clothing for Shabbat, one can conjecture that under

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26. Even though the *Eliyah Rabbah* explains that one of the reasons Ezra decreed that it be done on Thursday and not on Friday is that there will be time to prepare for Shabbat, it could be argued that this is only a consideration once there is a mitzvah that one must do laundry for Shabbat. If not for the obligation to do laundry, he would not have suggested that it be done on Thursday instead of Friday. Therefore, doing laundry for after Shabbat would not be a problem on Friday.

See *Chut Shani* (p. 51) who contends that the *Eliyah Rabbah* would consider doing laundry for after Shabbat like any other *melachah* on *erev* Shabbat that would be permissible until *Minchah Ketanah*. However, after *Minchah Ketanah* it is forbidden to perform any *melachah*. See *Yalkut Yosef* (*Shabbat*, vol. 1, 251:7) who contends that washing clothing in a washing machine is not considered a *melachah* which would be forbidden after *Minchah Ketanah* as it would at most be considered a *melechet arai,* a simple work-related action, which is not forbidden after *Minchah Ketanah.*

no circumstances can laundry be done on Friday. On the other hand, it could be that the *Magen Avraham* might agree in this special circumstance since one would otherwise have no clean clothing for Shabbat and would need to do laundry in order to fulfill the positive commandment delineated in the Rambam of having clean clothing for Shabbat.[27] In addition, it is important to note that the decree was formulated in the positive, i.e. do laundry on Thursday, and not in the negative, i.e. don't do laundry on Friday. Therefore, there may be room for leniency.[28]

VI. The Extent of the Decree

Even if we assume that the *Magen Avraham* would concede in the aforementioned scenario (IV:C), the broader question is, under normal circumstances that do not counter the performance of a mitzvah, are there are any exceptions to the decree? We generally assume that most decrees were established without any exceptions unless otherwise indicated. Is this the case here as well?[29] For example, assuming one has clean clothing for Shabbat, would it be forbidden to go to the river to wash one article of clothing on Friday?[30] If this would be forbidden, would it be forbidden to

27. *Hilchot Shabbat* (30:3). See footnote 5.

28. See *Chut Shani* (p.51) who assumes that the *Magen Avraham* would agree in this case that the laundry can be done on Friday. The *Kaf HaChaim* (242:20) also rules that it is permitted to wash one's clothing on Friday in this case.

29. In other words, even if we would be lenient where the decree would prevent a mitzvah from being done as seen in IV:C, would we be lenient with regards to non-mitzvah considerations? We already saw in IV:B that according to the *Eliyah Rabbah* there might be considerations that allow one to be lenient in non-mitzvah situations, i.e. when the clothing is not needed on Shabbat, so it could be argued that we can be lenient in other situations as well. The question is even stronger within the *Magen Avraham's* opinion.

30. See *Chut Shani* (p. 51) who assumes that this is forbidden under Ezra's decree.

wash one article of clothing in the sink of one's house? What if all other preparations are already taken care of?[31] What if there is a cleaning lady who takes the laundry to the river on Friday, leaving others free to prepare for Shabbat?[32] The answers to these questions are essential, since if the decree already has built-in leniencies, it would make it easier to be lenient in other situations. However, the difficulty with assessing these questions lies in the fact that the Gemara and *Rishonim* do not offer much on the subject.[33]

VII. The Effects of Modern Technology

One can argue that if there were laundry machines in the times of Ezra he would not have made his decree. While it is true that laundry still does take time and can be a burden, it does not take nearly as much time as it did before washing machines were invented. Even in the midst of a wash, other preparations for Shabbat can be done. Furthermore, if the laundry is started early enough on Friday, there is little question that the laundry will dry in time for Shabbat.

However, as we have seen, even if the reason for the decree is no longer relevant, the decree is still in effect without an explicit annulment by another group of rabbis. While we did mention that there are exceptions to this rule according to some *Rishonim* and early *Acharonim*, for obvious reasons they did not discuss the advent of electric washing machines. The challenge becomes whether we can find precedent in the distinctions they made that can be applied to our case of doing laundry on Thursday.

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31. See *Chut Shani* (p. 53) who is stringent in this case as well.

32. See Rabbi Menashe Klein (in a letter printed in *Piskei Teshuvot* p. 255) who assumes that it was forbidden even if there was a maidservant.

33. See Responsa *Kol Avreich* (*siman* 12), who assumes that even without the use of washing machines the decree did not apply to students studying in yeshiva who do not need to do any other preparations for Shabbat.

VIII. The Distinctions

A. As discussed earlier, Tosafot[34] assume that in a case where the law was established due to a concern (*mishum cheshashah*), then once the concern is no longer relevant the law is no longer in effect even without the ruling of another group of rabbis. Rabbi Avigdor Nebenzahl[35] uses this dictum of Tosafot as a source for leniency in our case. Since the original decree was put in place as a concern that there will not be enough time to prepare for Shabbat[36] and washing machines preclude this concern, the original decree falls away even without the ruling of another group of rabbis. Therefore, according to Rabbi Nebenzahl there is room to be lenient[37] to do laundry on Friday.[38]

B. The Radbaz[39] distinguishes between cases where *Chazal* made a decree without specifying the reasoning behind the decree at the original time of enactment, and cases where they explicitly stated the purpose of the decree at the time of enactment. In the former case the regular rules apply and we would need another group of rabbis to repeal the decree. However, in the latter case, where the reasoning was explicitly mentioned at the time of the decree, if the reasoning no longer applies, the decree falls away by itself. Based on this, Rabbi Yehoshua

34. *Beitzah* 6a s.v. *Vehaidna*.

35. In his commentary to the *Mishnah Berurah* 242:1.

36. As is explained in the *Mishnah Berurah* 242:5.

37. His exact wording is "יש מקום להתיר".

38. Taking this Tosafot to its logical conclusion, one can argue that it is also permissible to take medicine on Shabbat since there is no longer a concern of grinding herbs. However, see *Pri Chadash* (*Yoreh Deah* 116:1) who contends that we should not follow this Tosafot for determining halachic rulings.

39. *Hilchot Mamrim* 2:2.

Neuwirth[40] speculates[41] that maybe we can be lenient with regards to doing laundry on Friday since the Gemara says that the reason for the decree is *mipnei kevod* Shabbat, possibly indicating that they made the reasoning explicit at the time of the decree. If this is the case, since nowadays this reason is no longer applicable, neither is the decree.

C. The Malbim[42] proposes that if the reason for the decree was because of an external factor and that factor is no longer present, then there is no need for a second group of rabbis. An example of this would be the decree not to drink uncovered water because of concern that a snake poisoned the water. Since the decree was made based on an external factor, i.e. snakes, if the snakes are not present, the decree does not apply. However, if the reason for the decree was based on our ability to do something, even if right now we do not have that ability, there is still a concern that we will relearn that ability. Therefore we would need a second group of rabbis to overturn the decree. An example of this would be the decree not to clap or dance on Shabbat and Yom Tov.[43] Even though right now we might not know how to fix

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40. *Shemirat Shabbat KeHilchata*, vol. 2, chapter 42, footnote 13.

41. His exact wording is יש לעיין וכו'. However, he does not make clear which point of the argument he is not sure about.

42. *Artzot HaChaim* 9:41.

43. See *Beitzah* 30a where the Gemara rules that one should not clap or dance on Shabbat. The reason for this is that clapping and dancing was often accompanied by musical instruments and the rabbis were afraid that if an instrument would break someone might fix it, which would be prohibited on Shabbat. Tosafot *Beitzah,* 30a, s.v. *Shemah,* rule that the prohibition is no longer in effect since no one knows how to fix instruments anymore. The Ramo, *Orach Chaim*, 339:3, actually quotes this opinion as a possible justification for the fact that people danced and clapped on Shabbat during his time. For a halachic discussion of this topic, see "Dancing on Shabbat and Yom Tov" by Rabbi David Silverstein, *RJJ Journal of Halacha and Contemporary Society* (vol. 51, pp. 44-65).

an instrument, it is conceivable that we could learn how to do so. One can argue that Ezra's decree about laundry is similar to the former model of the Malbim since doing laundry by the river is no longer applicable and we are seemingly not concerned that there will no longer be washing machines and we will need to "relearn" the art of river washing.

D. Suggesting another possible distinction, the Malbim[44] says that in a situation where the decree was at odds with a mitzvah, *Chazal* established it with the intention that it is only applicable when the reason still applies. However, if the decree was not against a mitzvah, it remains in effect even after the reason no longer applies. Based on this, since Ezra's decree was not in opposition to any mitzvah, it would still be in full force nowadays.

E. In his third suggestion, the Malbim[45] distinguishes as follows: In a case where we know for sure that it was established as a formal decree by a group of rabbis, then another group of rabbis needs to officially repeal it. However, if we do not know that it was explicitly decreed by a group of rabbis, rather it is just something that we have become accustomed to following even though we do not know its original source, another group of rabbis is not needed. Since Ezra's decree seems to have been a formal decree made by a group of rabbis, it would need an official group of rabbis to retract it.

F. The Rosh[46] differentiates between cases where the reason behind the decree is well known and cases where the reason is not so well known. If the reason is well known, if it is no longer applicable the decree no longer applies. However, if the reason is not so well known to the

44. Ibid.

45. Ibid.

46. *Shut HaRosh* 2:8. See also *Taz Yoreh Deah* 115:10.

public, even if the reason is now irrelevant, the decree is still in force. The question is, does Ezra's decree fall under the former or latter category? On the one hand the Gemara says clearly *mipnei kevod* Shabbat, [i.e, for the honor of the Sabbath] but on the other hand the *Eliyah Rabbah* and the *Magen Avraham* dispute what this actually means. It is therefore difficult to rely solely on this Rosh and assume Ezra's decree is no longer applicable.[47]

G. At the end of the responsum the Rosh adds another possibility, namely to distinguish between a *gezeira* and a *takana*. Only a *takana* would need another group of rabbis, while a *geziera* would not. Following this, Ezra's *takana* would still be binding.

H. The Meiri[48] says that the need for another group of rabbis to repeal the decree depends on whether or not the original group of rabbis imagined a time when their decree would no longer be applicable. If, when making the decree, they thought it plausible that their decree become unnecessary, when that time comes a new group of rabbis is not needed. However, if they never imagined that the decree would become unnecessary, a new group of rabbis is required. Arguably, Ezra never imagined that the river as a laundering method would be supplanted by electronic washing machines, so the decree should still apply.

I. Tosafot[49] explain that a new group of rabbis is not

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47. In fact, as far as I have been able to determine, none of the *poskim* quote this Rosh to be lenient here. Even Rabbi Ovadiah Yosef, who is lenient about doing laundry on Friday (see VIII) does not quote the Rosh in our context, even though he quotes him numerous times in his work *Meor Yisrael* (see vol. 2 pp. 282-284) as a decisive opinion on the general subject of *kol davar shebeminyan tzarich minyan acher lehatiro*.

48. *Beitzah* 5a.

49. *Avodah Zarah* 35a s.v. *Chadah.*

needed where the original decree was limited to a specific place. Since the decree was not binding in all places, once it becomes irrelevant, it is permitted without a new group of rabbis even in the original place. However, if the decree was originally made for all places, it would need a new group of rabbis even if the reason no longer applies. This leniency has no pertinence to Ezra's decree which seemingly was made for all places.

J. In a similar manner, Tosafot[50] explain that if the original decree only applied to a certain group of people, if the reason is no longer relevant, a new group of rabbis is not needed to repeal the decree even for those people. However, it seems from Tosafot that if the decree applied to all people, even if the reason is no longer relevant it would still be in effect until a new group of rabbis repeals it. Once again, this leniency does not impact upon Ezra's decree which seemingly was made for all Jews.

IX. Contemporary *Poskim*

What emerges from this analysis is that according to most of the distinctions mentioned above, Ezra's decree should still be in full force even though the reasoning for the decree does not pose a problem for us nowadays.[51] In fact, many contemporary *poskim*, including Rabbi Nissin Karelitz,[52] Rabbi Chaim

50. *Avodah Zarah* 57a s.v. *Leafukei.*

51. Obviously, when determining the halacha, not each opinion is afforded the same weight. Additionally, it is unclear whether each opinion is working to the exclusion of the others. For example, even though Tosafot's distinction might not be applicable to our case that is not to say that Tosafot necessarily do not accept any of the other suggestions. Also, since this is a rabbinic decree, there is more room for leniency.

52. *Chut Shani* (p. 51). It is interesting to note that he does not quote any of the discussion presented about needing a new group of rabbis to repeal the decree. Rather, his stringency is based on the fact that he understands that

Pinchus Sheinberg,[53] and Rabbi Menashe Klein[54] are stringent and rule that laundry should be done on Thursday, not on Friday.[55]

According to some of the distinctions mentioned above, there is room for leniency. However, it is important to note that Rabbi Neuwirth did not rule conclusively on the matter. Furthermore, while Rabbi Ovadiah Yosef[56] says that one can be lenient to do laundry in the washing machine on Friday, he concludes that "it is more correct to do the laundry

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the original decree was that all dealings with laundry (*hitaskut bekevisah*) should be done on Thursday, not on Friday, regardless of the level of difficulty.

53. Quoted in the *Dirshu Mishnah Berurah* vol. 3, 242:1. See also *Chidushei Batra* (p. 10).

54. In a letter printed in the back of *Piskei Teshuvot* vol. 3, p. 255, Rabbi Klein presents three arguments to be stringent. Firstly, the decree was on all Jews, rich and poor alike, regardless of whether or not there was a maidservant (See V above). Therefore, since there are still poor Jews who do not have laundry machines, the original decree would still be in effect on all Jews. Secondly, there exists a concern that the washing machine will break and it will take a long time to fix, and the clothing will not be ready in time for Shabbat. Thirdly, and most importantly for him, Rabbi Klein presents an argument based on the Gemara in *Eruvin* (21b), that every decree really had 150 reasons behind it. Even though one of them is no longer applicable, we don't know what the other reasons are and therefore cannot be lenient. This is the reason the Vilna Gaon was stringent with many of the decrees even if they no longer seem to be applicable.

55. With regards to doing laundry on *leil shishi* (Thursday night), Rabbi Karelitz (ibid) is stringent as the decree was to do laundry on Thursday and *leil shishi* is not Thursday. However, the *Ohr Letziyon* (2:16:1) permits doing laundry on Thursday night. Rabbi Sheinberg (ibid) distinguishes between the winter months where most people begin their Shabbat preparations on Thursday night, where it would be forbidden, and the summer months where most people do not prepare for Shabbat until Friday, where it would be permitted.

These *poskim* also discuss whether drying clothing on Friday was included in Ezra's decree. Rabbi Sheinberg (ibid) assumes it was included, as does Rabbi Karelitz (ibid). The *Ohr Letziyon* (ibid) assumes it is permitted to dry clothing if it does not entail an excessive burden, i.e. if a dryer is used.

56. *Halichot Olam* vol. 3, p. 51.

beforehand in order for Friday to be completely free to prepare for Shabbat." Rabbi Chaim David Halevi[57] also says that one can be lenient, but it is preferable not to do so.

In a later work,[58] Rabbi Ovadiah Yosef rules even more leniently than he did previously. He says that there is absolutely no problem with doing laundry on Friday with a washing machine since it is not a burden.[59] We already saw that Rabbi Avigdor Nebenzahl[60] allows one to do laundry in a washing machine on Friday based on Tosafot in *Beitzah*.[61] Rabbi Hershel Schachter told me that he also thought that there is no problem with doing laundry on Friday with a washing machine. Either one can be lenient based on the logic of Rabbi Neuwirth, or one can suggest that Ezra's decree was specifically made on laundry that is an excessive burden, i.e., if it is done by the river. However, Ezra never made a decree on laundry that is not an excessive burden, so doing laundry in a washing machine would not be a problem.[62]

X. Further Considerations

Within the lenient opinions, another factor one might take into consideration is how much of a burden laundry is to that individual. For some, laundry entails throwing one load of clothing into the washing machine, switching the load to the dryer thirty minutes later, and then taking it out forty-five minutes later. For others, there are five loads, all of which need to be pre-soaked, ironed, folded, and put away. It is hard

57. *Mekor Chaim* vol. 3, p. 40.

58. *Chazon Ovadiah Shabbat* vol. 1, p. 24.

59. See *Yechaveh Daat* 3:18 where Rabbi Yosef discusses whether soldiers who arrive home right before Shabbat can put laundry in the washing machine right before Shabbat begins.

60. In his commentary to the *Mishnah Berurah* 242:1.

61. *Beitzah* 6a s.v. *Vehaidna*.

62. This leniency is assuming (as in section V) that the decree was not a blanket decree against all forms of laundry.

to say the latter method doesn't take away from other Shabbat preparations. If this is the case, maybe one should consider doing the laundry on a different day of the week.

In certain instances, even some of the more stringent opinions might advise doing laundry on Friday. For instance, in Eretz Yisrael, many yeshivot and seminaries do not have school on Friday. In order not to disturb the regular learning schedule, it may be advised for people working or studying in these institutions to wash their laundry on Fridays.[63]

XI. Conclusion

We have seen opinions on all points of the spectrum. Some are stringent not to allow laundry to be done on Friday under any circumstances. There are those that are stringent in general but leave room for leniency in certain situations. Some are lenient but recommend being strict where possible. Finally, some are lenient in all circumstances.

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63. See *Chidushei Batra* p. 10 who is stringent in general, but is lenient in this case. Also, see *Ohr Letziyon* (ibid) and *Chut Shani* (ibid) who permit one to wash children's clothing on Friday.

Saving Lives: Are There Limits?

Rabbi Michael Siev

On July 26, 2006, Roi Klein, a Major in the Golani Brigade of the Israeli Defense Forces, gave his life in order to save the lives of his soldiers. At the height of the second Lebanon War, a hand grenade was thrown into the house in which Klein and his soldiers were positioned in the town of Bint Jbeil. As he recited *Shema Yisrael*, Klein jumped on the grenade and absorbed the impact of the explosion, saving the soldiers under his command.

On January 2, 2007, Wesley Autrey, a New York construction worker, jumped onto the tracks at a Harlem subway station in an attempt to rescue a man who had fallen from the platform while having a seizure. Realizing that he did not have enough time to lift the man off the tracks as the oncoming train bore down on them, Autrey fell on top of the man and held him down in a drainage trench between the tracks, as the train passed just above his body. Both men were saved.

Roi Klein and Wesley Autrey have become heroes in their respective countries for the courage and selflessness that they displayed in order to save others. Neither had the time to deliberate about the proper course of action to take, and their heroic acts reflected instinctive and ingrained bravery and self-sacrifice. At the same time, their stories have also brought to the fore some important questions: What level of personal risk must one undertake in order to save another person? If one is not required to expose oneself to danger, may one decide to do so? What is the relationship between our concern

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for personal safety and for the safety of the others? This article seeks to provide a framework for understanding these issues.[1]

I. The Mitzvah of Saving Lives

The source of the mitzvah to save lives comes from the Gemara in *Sanhedrin* 73a.[2] The Gemara quotes two sources for this mitzvah:

> From where do we know that one who sees that his friend is drowning in a river or that an animal is dragging him off or that bandits are advancing on him, that he is obligated to save him? The verse [Leviticus 19:16] states, "You shall not stand by the blood of your fellow." ...[But an alternate source for] "The loss of his body from where [do we know that one is obligated to return it]? The verse states [Deuteronomy 22:2], 'And you shall return it to him.'" If from there, one would have thought that these words [apply to saving him] on his own; but to toil and hire someone, say that one is not [obligated] – it comes to teach us.

The conclusion of this Gemara text is that the basic obligation to save lives is derived from a verse regarding the mitzvah of returning lost items ("*Va-hashevoto lo*"[3]); just as one is obligated to return his fellow's lost object, one must make sure that his friend does not lose his very life. Additionally, the verse *Lo ta'amod al dam rei'echa*[4] ("You shall not stand by the blood of your fellow") teaches that if the bystander is incapable of saving the endangered person by himself, he

1. This presentation will address the mitzvah of saving the lives of other Jews, and will not address the topic of saving non-Jews.

2. See Rabbi J. David Bleich's article in *Tradition* (Winter 2006, pp. 96-98), where he contrasts this mitzvah with American law, which for the most part does not posit any obligation to save another person's life.

3. *Devarim* 22:2.

4. *Vayikra* 19:16.

must get help, even if that means hiring others who are able to save him.[5]

The Ran[6] explains further that the basic obligation of saving lives can be derived from the fact that it is even permissible to kill a *rodef*, someone actively trying to kill someone else, in order to save the *rodef*'s intended victim;[7] clearly, this halacha must posit a mitzvah of saving lives. The additional sources quoted in the Gemara cited above add a further dimension, that one is obligated to save someone even from uncertain danger.[8]

II. Your Life Comes First

Despite the general imperative to save the life of another person who is in danger, there are limits to this obligation. The Gemara in *Bava Metzia* (62a) presents a famous dispute between Rabbi Akiva and Ben Petura:

> Two that were walking on the way, and one had in his possession a flask of water; if both of them will drink they will die, and if one will drink he will arrive at civilization. Ben Petura expounded: "It is better that they both drink and die, and let one not see the death of his fellow." Until Rabbi Akiva came and taught, "'And your brother shall live with you' – your life takes precedence over the life of

5. The Rosh (ibid., 8:2) and other *Rishonim* comment that the person who is saved must reimburse his savior after the fact, and this ruling is quoted by Ramo (*Y.D.* 252:12) and *Sma* (*C.M.* 426:1).

6. *Chiddushei ha-Ran*, ibid., s.v. Gemara.

7. *Sanhedrin*, ibid.

8. Regarding the question of whether this mitzvah applies even to one who does not want to be saved, see *Minchat Chinuch* (237:2, *Kometz Mincha*, s.v. *Nireh*) who rules that the mitzvah does not apply; cf. Rav Shilo Refael, *Mishkan Shilo*, p. 212 ff., who rules similarly that we cannot force a sick person to undergo medical treatment even if it is necessary in order to save his life. However, most authorities dispute these positions – see *Teshuvot Maharam mi-Rotenburg* (4:39) and *Iggerot Moshe* (*Y.D.* 2:174, *anaf* 3, s.v. ומש"ב המנ"ח and *C.M.* 2:73, *se'if* 5).

your fellow."

This Gemara introduces a significant limitation to the mitzvah of saving others; one need not save others at the expense of one's own life. *Chayecha kodmin* – your life takes precedence. However, we still need more detail: is one allowed nonetheless to give one's own life in order to save someone else? Does *chayecha kodmin* teach that there is **no obligation** to give up your own life, or that it is **not permitted** to do so?

This question can be put into better perspective in light of a major dispute among the *Rishonim* regarding other mitzvot. Generally, danger to one's life overrides one's obligation to keep mitzvot. Although the Gemara[9] cites several sources for this principle, the most commonly cited source is the verse that states, "And you shall guard My laws and My statutes that a person shall do and live by them (*va-chai bahem*)."[10] This verse implies that we should keep mitzvot and live, but not that we must die through our keeping mitzvot. Although there are exceptional circumstances in which one must give up one's life rather than violate halacha[11] – *yehareg ve-al ya'avor* (he shall be killed and not violate) – the general policy is *ya'avor ve-al yehareg* (he shall violate and not be killed).

What if one wants to give up one's life in order to avoid an *aveira* (sin) even when one is not obligated to do so? For example, if someone threatens to kill a Jew if he does not work on Shabbat, may the Jew refuse to work at the expense of his life? Rambam[12] rules forcefully that one is not permitted to give up one's life under such circumstances. Tosafot,[13] however, argue that one is permitted to give up his life in

9. *Yoma* 85a-b.
10. *Vayikra* 18:5.
11. *Sanhedrin* 74a.
12. *Hilchot Yesodei Ha-Torah*, 5:4.
13. *Avoda Zara* 27b, s.v. *Yachol*.

order to refrain from violating the *aveira*.

How does all of this impact our discussion? Can we view *Lo ta'amod al dam rei'echa* as comparable to other prohibitions, such that Tosafot would allow one to give up one's life in order to avoid violation? Could it be that even Rambam would permit giving up one's life in order to fulfill a mitzvah if it will also save the life of another person?

In order to answer this question, we need to understand the basis of Tosafot's claim. Why is one allowed to give up one's life in cases that are *ya'avor ve-al yehareg*? Rav Yechiel Ya'akov Weinberg[14] argues that the dispute between Rambam and Tosafot is whether *va-chai bahem* is a command or an allowance. Rambam understands *va-chai bahem* as an imperative; therefore, one has no right to give up one's life when one is not obligated to do so. Tosafot understand *va-chai bahem* as an allowance; one is exempt from the other mitzvah if keeping it will result in loss of one's life. Because it is an allowance and not an obligation, one has the option not to make use of the allowance, and to remain loyal to the mitzvah even at the expense of one's life.

With this as a precedent, Rav Weinberg claims that Tosafot would understand Rabbi Akiva's rule that "your life takes precedence" in a similar way; one is **not obligated** to save another person at the expense of one's own life. However, one may choose not to take advantage of this exemption, in which case one would fulfill the mitzvah of saving lives, and would be considered "holy and pious."

Rav Moshe Shternbuch,[15] on the other hand, understands the position of Tosafot very differently and therefore arrives at a different answer to our question. In his view, the *Rishonim*

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14. *Seridei Eish*, Weingort edition (2003) 2:34, note 17. In older editions and the Mossad Harav Kook (2003) edition, vol. 1, p. 315.

15. Quoted in *Seridei Eish*, ibid. *se'ifim* 15-16; in older editions and the Mossad Harav Kook edition, vol. 1, p. 307.

who allow one to give up one's life even in a case in which the halacha is *ya'avor ve-al yehareg* allow it only because of the overriding importance of *kiddush Hashem* (sanctifying God's Name). Even if *va-chai bahem* is an allowance, he argues, if one is not obligated to give up one's life, doing so should be considered tantamount to suicide and therefore forbidden. He explains that the only reason it is not considered suicide is because the person is giving up his life for the purpose of *kiddush Hashem*. If so, this allowance cannot be extended to cases in which there is no *kiddush Hashem*. Since *kiddush Hashem* only applies in cases in which one resists being publicly forced to violate halacha, it would be forbidden to give up one's life in other circumstances, even in order to save another person's life.[16]

However, it is possible that our case is completely unrelated to the general dispute between Rambam and Tosafot. Rav

16. This view has precedent in the *Shu"t Radvaz* (4:67), who essentially agrees with Tosafot, yet rules that one who is ill and must violate Shabbat in order to save his life does not have the choice to avoid Shabbat violation, because in this case there is no *kiddush Hashem*. Apparently, it is only the overriding importance of *kiddush Hashem* that allows one to give up one's life. (See, however, *Shu"t Oneg Yom Tov*, *siman* 41 who applies the dispute between Tosafot and Rambam to cases of illness.) On the other hand, regarding the definition of *kiddush Hashem*, Radvaz claims that there is no *kiddush Hashem* in the case of the sick person because no one will find out what he did, which leaves open the possibility that if people would find out, it would be considered a *kiddush Hashem* even if no one was trying to force the person to violate halacha.

Further support for Rav Shternbuch's basic understanding of the position of Tosafot can be deduced from the *Shulchan Aruch* (Y.D. 157:1), who uncharacteristically rules, against Rambam, that one may opt to give up one's life in order to resist an *aveira*, but with Rabbenu Yerucham's (*Netiv* 18, section 3) important limitation: only if the person attempting to force the Jew to violate the prohibition is doing so for that reason alone (*le-ha'aviro al dato*), but not if he is doing so for his own benefit (*le-hana'at atzmo*). Seemingly, this difference is based on the fact that when the intent is to make a Jew violate halacha, there is a *chilul Hashem*, while this is not the case if it is *le-hana'at atzmo*.

Moshe Feinstein[17] explains that Rabbi Akiva's principle of *chayecha kodmin* teaches more than just an exemption from the obligation to save lives; the mitzvah of saving lives **does not apply at all** if it will cost the savior his own life. In fact, Rav Moshe explains, this is the very source of the dispute between Ben Petura and Rabbi Akiva. According to Ben Petura, one does not have a right to drink the water and thereby save one's own life because doing so will cost another person's life and simultaneously constitute a violation of the mitzvah to save lives.[18] Since neither person has the right to drink all the water, both should drink some of the water and thereby extend their lives at least temporarily. Rabbi Akiva disagrees because, in his view, the mitzvah to save lives does not apply at all if it will cost the savior his own life. Since the mitzvah is not applicable, the person who owns the water is under no obligation to share it with his fellow.

If this is the case, the answer to our question should be clear. It is inconceivable that one would be allowed to give up one's life in order to save someone else's life if doing so is not even a fulfillment of a mitzvah. If the mitzvah of saving lives is completely cancelled, that must indicate that not only is there no obligation to give up one's life in order to save another person's life; it is actually **prohibited** to do so.[19]

17.*Iggerot Moshe*, Y.D. 1:145.

18. Rav Moshe bases this on Rashi's explanation (*Sanhedrin* 74a s.v. *Sevara hu*) of the law that one cannot kill another person in order to save one's own life; since a life will be lost in any event, there is no justification for violating the *aveira*.

19. Although Rav Moshe does not state this explicitly in the *teshuva* quoted above, he does so in a later *teshuva* - Y.D. 2:174 *anaf* 4 (from s.v. ואף שכתבתי). He adds there that the Gemara's statement that "who says your blood is redder than his" (*Sanhedrin* 74a) is to be taken not as an expression of doubt but as a statement of fact; in a case in which you can only save your own life by killing your fellow, the other person's blood is **definitely** considered "redder" than your own, because Divine providence has decreed that the danger present itself directly to you (in the form of someone threatening your life unless you take your friend's life). He applies this back to our discussion and rules that, in cases of *chayecha kodmin* (your life takes

III. Exposing Oneself to Danger in Order to Save a Life

We have discussed above the issue of giving up one's life in order to save someone else; what about saving someone else if the attempt involves danger to one's own life, but not certain death? The *Yerushalmi*[20] states as follows: "Rav Isi was captured in Safsufa. Rabbi Yonatan said: 'The dead will be wrapped in his garment.' Rabbi Shimon ben Lakish said: 'Until I kill or am killed, I will go and save him by force.'" Whereas Rabbi Yonatan despaired of rescuing the captured Rav Isi, Reish Lakish was willing to forcefully rescue him, even though the attempt would clearly endanger his own life.[21]

On the basis of this *Yerushalmi*, the *Hagahot Maimoniot*[22] rules that one is **obligated** to save another Jew even at the risk of one's own life. The *Kesef Mishneh*[23] explains: "And it appears that the reason is because the other is definite and he is questionable." The certain demise of the person currently in danger outweighs the possible danger that faces the would-be rescuer.

This ruling is quoted in *Beit Yosef*[24] but it is left out of the

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precedence), your blood is definitely "redder" than that of your fellow, because **he** is the one in danger. Therefore, even if we have reason to believe that the rescuer's life is not as significant as the life he seeks to save (the *mishnayot* in *Horayot*, 3:7-8, do seem to assign rank to the relative value of different people's lives), it is **forbidden** for one to sacrifice one's own life in order to save someone else's life.

20. *Terumot* 8:4.

21. This is the standard interpretation of this *Yerushalmi*; see, however, *Kli Chemda*, *Parashat Ki Teitzei*, p. 193, who suggests that Reish Lakish decided to ransom Rav Isi and did not endanger his own life.

22. Quoted in *Kesef Mishneh* to *Hil. Rotzeach*, 1:14. The comment is not found there in the standard edition of *Hagahot Maimoniot*, but is found in the Constantine edition quoted at the end of the Frankel edition of *Mishneh Torah*.

23. Ibid.

24. *C.M.* 426.

Shulchan Aruch. The *Sma*[25] explains that since the major halachic decisors among the *Rishonim* – the Rif, Rambam and Rosh – did not quote the ruling,[26] it is not accepted in a normative sense. Practically speaking, one is not obligated to expose oneself to mortal danger in order to save someone else's life.

If the *Hagahot Maimoniot* presents one side of the spectrum on this issue, the Radvaz[27] seemingly advocates the opposite view. He was asked about a case in which a Jew is given the choice to allow his limb to be amputated; if he does not agree, another Jew will be killed. Is one obligated to allow one's limb to be amputated in order to save the life of his fellow Jew? The questioner suggested that perhaps one should be obligated to do so; after all, whereas one is permitted – even obligated – to violate Shabbat in order to save a Jewish life, one is not permitted to violate Shabbat in order to save a limb. This clearly proves that life outweighs limbs!

The Radvaz rules that although it would be meritorious (a *middat chassidut*) to allow one's limb to be cut off – "praiseworthy is one who is able to stand up to this" – one is not obligated to do so. Among his proofs is the fact that the Gemara[28] derives from a Scriptural verse that one is obligated to spend money in order to save a fellow Jew, and does not have such a derivation regarding limbs. Since it is a greater sacrifice to give up a limb than it is to spend money, we have no source to indicate that one is obligated to give up one's limb in order to save another Jew.[29]

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25. Ibid., *s"k* 2.

26. It should be noted that one of the *Rishonim*, the Me'iri (*Sanhedrin* 73a s.v. *Mi*), even writes explicitly that one is not obligated to risk one's life in order to save another person.

27. 3:627, quoted briefly in *Pitchei Teshuva*, C.M. 426:2.

28. *Sanhedrin* 73a.

29. One of the Radvaz's other proofs in this area is fascinating. Radvaz writes: "It states, 'Her ways are ways of pleasantness' (*Mishlei* 3:17), and it must be that the laws of the Torah are agreeable to logic and the intellect, and how can we imagine that a person will allow [others] to blind his eye or cut off his arm or leg so that they not kill his friend?" The idea of using

Radvaz concludes by stating that this is all true when it comes to losing a limb in a way which will certainly not cause danger to one's life. However, if there is a possibility that it will endanger one's life, it is no longer a *middat chassidut* to take the risk: "If there is a questionable danger to one's life, this [person who takes the risk] is a pious fool (*chasid shoteh*), for his own doubt is greater than his friend's certain [danger]." According to the Radvaz, not only is there no obligation to risk one's life in order to save one's fellow, it is actually improper to do so.

There are other *poskim* (halachic authorities) who stake out a middle ground between the diametrically opposing views of the *Hagahot Maimoniot* and Radvaz, and rule that although one is not obligated to risk one's life in order to save others, it is permissible and meritorious to do so. Netziv[30] derives this rule based on the same *Yerushalmi* that served as the basis of the opinion of the *Hagahot Maimoniot*. In his view, Rabbi Yonatan and Reish Lakish are not to be viewed as disagreeing about how realistic it was to save Rav Isi or about whether one is obligated to risk one's life in order to save another person. Rabbi Yonatan acted in accordance with the halacha, which is that one is not obligated to risk one's life in order to save another person. Reish Lakish was prepared to go beyond the letter of the law (*lifnim mi-shurat ha-din*) and risk his life, despite the fact that he was not required to do so.[31]

On a practical level, while the opinion of *Hagahot Maimoniot* does not seem to have been accepted by the majority of the *poskim*,[32] the debate continues as to whether endangering

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Deracheha darchei noam as a halachic proof may seem at first glance to be a bit surprising, but there is precedent for this in the Gemara; see *Sukkah* 32a and *Yevamot* 15a.

30. *Ha'amek She'ala*, 129:4, 147:4.

31. Netziv (Ibid., 129:4) brings further support for his view based on a story in *Niddah* 61a, as explained by Tosafot (s.v. *Amrinchu*) and Rosh.

32. However, see *Nefesh Ha-Rav*, pp. 166-7, which reports that Rav Chaim

oneself in order to save another Jew is to be considered an acceptable option or is to be discouraged. *Shulchan Aruch Ha-Rav*[33] discourages risking one's life in order to save another person, and Rav Ovadia Yosef[34] similarly rules that it is forbidden to do so. Rav Eliezer Waldenberg[35] also seems to adopt this position. On the other hand, Rav Yechiel Ya'akov Weinberg,[36] Rav Moshe Feinstein[37] and Rav Yitzchak Ya'akov Weiss[38] subscribe to the Netziv's middle position.[39]

It should be noted that no matter which opinion we accept, we will have to define what is considered a "risk" to one's life. How dangerous does a situation have to be in order to apply the aforementioned discussion? The Radvaz himself, in a later responsum,[40] significantly qualifies his earlier statement that it is irresponsible to risk one's life in order to save another person. In the later responsum he mentions only that one is not obligated to risk one's life (not that one is a pious fool for doing so). Even this exemption, however, only applies if the

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Soloveitchik and Rav Elya Chaim Meizels ruled in accordance with *Hagahot Maimoniot*.

33. *Hilchot Shabbat* 329:8.

34. *Yechaveh Da'at* 3:84.

35. *Tzitz Eliezer* 9:45.

36. *Seridei Eish* Weingort edition, 2:34 note 12; in older editions and the Mossad Harav Kook edition,vol. 1, p. 314. He cites approvingly the opinion of the *Halichot Eliyahu* in this regard.

37. *Iggerot Moshe* Y.D. 2:174 *anaf* 4.

38. *Minchat Yitzchak* 6:103.

39. It should be noted that the *Mishnah Berurah* (329:19) and *Aruch Ha-Shulchan* (*C.M.* 426:4) write simply that one is not obligated to risk one's life in order to save another person, without specifying whether doing so would be meritorious or foolhardy.

It should also be noted that although many *poskim* debate the Radvaz's conclusion regarding exposing oneself to danger, his conclusion that one is not obligated to lose a limb in order to save another person does seem to be widely accepted by later *poskim*. This ruling has become increasingly relevant in modern times as medical technology has made live donations of organs such as kidneys a viable and reasonably safe option.

40. 5:218.

rescuer himself would have only a fifty percent chance of surviving the rescue attempt. On the other hand, if the likelihood is that the rescuer himself will survive, he is **obligated** to risk his life in order to save his fellow. This theme is echoed by many later *poskim*, who write that although one is not obligated to endanger one's life in order to save another person, one should carefully determine that there really is a bona fide risk to one's life before abstaining from the attempted rescue.[41] Although the Radvaz may imply that one is obligated to take on any risk in which there is a greater than fifty percent chance of survival, later *poskim* do not clearly define the precise level of danger that must be present in order to justify abstaining from the rescue.

IV. Saving the Masses

Until now, we have been discussing the possibility of risking or giving up one's life in order to save another individual. Does the halacha change when it comes to saving a group of people or a community?

The *Or Sameach*[42] claims that there is no difference between saving an individual and saving the entire Jewish nation; one is never obligated to risk one's life in order to save others. He bases this view on a statement of the Rambam regarding an accidental murderer, who is supposed to remain in an *ir miklat* (city of refuge) until the *kohen gadol* (high priest) dies. In this context, the Mishnah[43] states:

> And he does not go out for testimony of a mitzvah and not for testimony [regarding] money, and not for

41. See *Mishnah Berurah* (ibid.), *Aruch Ha-Shulchan* (ibid.), *Pitchei Teshuva* (*C.M.* 426:1).

42. *Hilchot Rotze'ach*, 7:8. See also *Meshech Chochma, Shemot* 4:19, where Rav Meir Simcha interprets God's command to Moshe to return to Egypt in this light as well.

43. *Makkot* 11b.

> testimony [regarding] capital cases, and even if Israel needs him, and even if he is the general of Israel like Yoav ben Tzeruya – he does not go out from there forever, as it states (*Bamidbar* 35:25): "That he fled there" – there he shall live, there he shall die, there he shall be buried.

The Rambam,[44] in quoting this halacha, adds an important line: "And if he leaves, he has allowed himself to be killed." This is a reference to the rule that the close relative of the murderer's victim (the *go'el ha-dam*) may kill the murderer if he leaves the *ir miklat*. The *Or Sameach* argues that this last line of the Rambam is to be understood as the explanation of the ruling: since the murderer can be killed if he leaves the *ir miklat*, he is not to leave, even if the security of the entire nation is at stake. This indicates that individuals need not, or perhaps *should not*, risk their lives even to protect the entire nation.[45]

However, many *poskim*[46] dispute the *Or Sameach*'s reading of the Rambam. They argue that the fact that the murderer cannot leave his *ir miklat* is a unique halacha in its own right, requiring the murderer to remain in the *ir miklat* under all circumstances. The fact that the *go'el ha-dam* can kill him if he leaves is a result of this halacha, not its cause: because leaving the *ir miklat* would be unjustified, the murderer would be fair

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44. *Hilchot Rotze'ach* 7:8.

45. The implication of the *Or Sameach*'s wording is that it would be improper to risk one's life even to save the entire nation, but in *Meshech Chochmah* he writes only that one is not obligated to do so.

46. *Kli Chemda Parshat Pinchas* pp. 216-217, *Shu"t Heichal Yitzchak* O.C. 39, Rav Moshe Shternbuch (cited in *Seridei Eish* Weingort edition 2:34 *se'if* 12; in older editions and the Mossad Harav Kook edition, vol. 1, p. 306), and Rav Yechiel Ya'akov Weinberg (Weingort edition, ibid., note 12; in older editions and the Mossad Harav Kook edition, p. 314). Rav Weinberg approvingly cites the *Cheishek Shlomo*, who rules that the murderer actually **can** leave the *ir miklat* in order to save the Jewish people; see there for his reading of the Rambam. Cf. *Aruch Ha-Shulchan* C.M. 425:57, who quotes two interprestations of the Mishnah, one of which accords with the opinion of the *Or Sameach*.

game for the *go'el ha-dam*. This reading is backed up by the wording of the Rambam, who introduces his last line with "and," rather than "because," indicating that the *go'el ha-dam*'s ability to kill the murderer is not the cause of the previously mentioned halacha.

The aforementioned *poskim* dispute the *Or Sameach*'s contention that one should not risk his life even to save the entire nation, but there remains a dispute as to the extent of the individual's responsibility toward the community. Some authorities rule that it is permitted and praiseworthy to risk one's life to save the masses, but it is not obligatory to do so.[47] Others argue that one is **obligated** to risk one's life in order to save the masses.[48]

Would it be possible to go even further and argue that not only can one risk one's life but actually sacrifice one's life in order to save the masses? Possible support for such an argument can be adduced from a tragic story alluded to in the Gemara. The Gemara[49] states that the "*harugei Lod*" (those killed in Lod) have an incomparable share in the World to Come. Rashi[50] relates the story of these *harugei Lod*: A princess was found dead and the Jews of the area were blamed for the crime. The entire community was in danger of being eradicated until two innocent brothers, Pappus and Lulianus,

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47. *Tzitz Eliezer* 17:72 *se'if* 12 (based upon *Yeshuot Ya'akov*, Y.D. 157:1) and 18:1 *se'if* 9, Rav Moshe Shternbuch, quoted in *Seridei Eish*, Weingort edition ibid. *se'if* 14, Mossad Harav Kook edition vol 1, pp. 306-8.

48. *Mishpat Kohen* 143, especially s.v. ולענין הצלת כלל ישראל. Both Rav Isaac Halevi Herzog (*Heichal Yitzchak* O.C. 39) and Rav Shlomo Yosef Zevin (*Le-Or Ha-Halacha* pp. 15-16) agree, citing Rav Kook's comments in *Mishpat Kohen* as precedent. However, see *Mishpat Kohen* 144 *se'if* 9, where Rav Kook himself seems to suggest that there may not be a direct personal obligation upon each individual to risk his life in order to save the masses. *Kli Chemda* (*Parshat Pinchas* p. 216) and *Seridei Eish* (Weingort edition 2:34 note 15, Mossad Harav Kook edition vol. 1, p. 314) also agree that one is obligated to risk his life in order to save the masses.

49. *Bava Batra* 10b, *Pesachim* 50a.

50. *Ta'anit* 18b, s.v. *Be-Ludkia*.

confessed to the murder in order that they alone should be killed while the rest of the community would be spared.

There is a dispute among the *poskim* as to how to understand the details of this case and the conclusions that can be drawn from it. Rav Moshe Feinstein[51] argues that Pappus and Lulianus were not among those slated for punishment and nevertheless confessed to a crime that they did not commit. If this is the case, we have a clear proof that one may give up one's life in order to save a group of people. Of course, we would still have to define what is considered a large enough group of people to justify giving up one's life. Rav Moshe's expression is that "saving Israel is different." Does this always apply as long as those being saved outnumber those giving up their lives?[52] Does it apply only to saving an entire community?[53] Or perhaps it only applies to saving the entire nation?[54] It is not clear where to draw the line.

Other *poskim*[55] reject this proof altogether, arguing that Pappus and Lulianus may have been included in the initial framing, in which case their lives were in grave danger

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51. *Iggerot Moshe*, Y.D. 2:174 *anaf* 4, s.v. *ve-im kein.*

52. This may be the implication of *Chazon Ish*, *Hilchot Sanhedrin*, *siman* 25, s.v. בפ"ת.

53. *Seridei Eish* (Weingort edition, 2:34 note 15, Mossad Harav Kook edition vol. 1, p. 314) is unsure if an entire city is sufficient to be considered "masses" in this regard.

54. This is the conclusion of Rav Kook in *Mishpat Kohen* 143 s.v. ומש"כ בת"ר. Rav Ya'akov Navon (*Techumin*, vol. 4, p. 167) suggests a possible explanation as to why this might be the case: whereas we can always apply the reasoning of "how do you know that your blood is redder" (*Sanhedrin* 74a), even when it comes to numerous people being compared to an individual, this is not the case regarding the entire nation. On a national level, the Jewish people has its own distinct identity that is beyond the simple combination of many individuals. For precedents regarding this idea that the nation is not just a collection of individuals, see *Piskei Din Rabbaniyim*, vol. 10, p. 273.

55. Such as Rav Kook (*Mishpat Kohen* 143 s.v. ומעובדא) and Rav Moshe Shternbuch, quoted in *Seridei Eish* (Weingort edition, ibid., *se'if* 19 s.v. מ"מ; in older editions and the Mossad Harav Kook edition, vol. 1, p. 308).

anyway. According to this approach, we have no proof that one who is not currently in danger can give up his life in order to save a group of people. However, at the very least it is clear that a person whose life is in grave danger may give up his life in order to save a group of people. Presumably, because of the likelihood that he will be killed anyway, the person's action is not really regarded as giving up his life at all. Bringing imminent danger a bit closer in order to save others is permitted.

Nevertheless, Rav Moshe Shternbuch[56] offers another proof that it is permitted for anyone to give up his life in order to save the masses. We have quoted above the dispute between Rambam and Tosafot as to whether one may opt to give up one's life rather than violate a mitzvah. *Nimukei Yosef*[57] argues that even according to the Rambam, if the person is known as a righteous person and he sees that the generation is lax in a certain area of halacha, he may give up his life in order to take a stand in that area so that people will learn from him. This opinion is codified by the Ramo.[58] If one is permitted to give up one's life in order to serve as an example to the community in religious matters, certainly one may give up one's life in order to save a community from being killed.

V. Exceptional Circumstances

Our examination of this topic is not complete without discussing unique circumstances such as war. On the surface, it is difficult to understand many of the details of war according to halacha. A Jewish king may send soldiers to the battlefield even for a *milchemet reshut* (optional war), which Rambam[59] defines as a war fought to expand territory or to

56. Quoted in *Seridei Eish*, ibid.
57. *Sanhedrin* 18a in *dapei ha*-Rif.
58. *Y.D.* 157:1.
59. *Hilchot Melachim*, 5:1.

bring glory to the king. Presumably, Jewish soldiers will be killed in such wars. In fact, the Gemara,[60] in expressing that the king may enlist up to a sixth of the population in the army for a *milchemet reshut*,[61] says: "A king that **kills** a sixth of the populace is not punished." How can the king endanger Jewish lives for material gain?

The Netziv[62] offers the following explanation: The verse states that people will be held accountable for killing others: "But the blood of your souls I will demand… and from the hand of the man, each man from the hand of his brother, I will demand the soul of man." Why does the Torah specify that God will demand accountability from the hand of one's brother? Netziv answers:

> When is a person punished? At a time when it is fitting to act with brotherhood; but this is not the case in a time of war and a time to hate – then it is a time to kill and there is no punishment for this at all, because this is the way the world was established.

In other words, there is a completely different set of rules in times of war; in such times, there is no prohibition to kill, and similarly it is permitted for a king to put Jewish lives in danger. As long as a war can at least be classified as a *milchemet reshut* it is justified, and in the context of war a different set of rules apply. Essentially, war is its own reality, "because this is the way the world was established."

Similarly, Rav Avraham Yitzchak Kook[63] writes that one cannot apply the rules of war to other situations, because "war and the rules of the community are different." In such situations, Rav Kook argues, the principle of *va-chai bahem* does not apply, and it is therefore permissible to endanger

60. *Shavuot* 35b.

61. See Tosafot ibid., s.v. *Di-katla*.

62. *Ha'amek Davar*, *Bereishit*, 9:5.

63. *Mishpat Kohen* 143, s.v. ולענין הצלת כלל ישראל.

Jewish lives for reasons that would not normally justify doing so.

In addition to *va-chai bahem*, it is possible that the principle of *chayecha kodmin* is suspended during times of war as well. Rav David Pardo[64] interprets the *Sifri* as teaching that during times of war one is obligated to put one's life in danger in order to save one's comrade, even though this is not the case at other times. Rav Eliezer Waldenburg,[65] quoting all of these sources, agrees that *chayecha kodmin* does not apply during times of war. He therefore rules that a soldier is obligated to risk his life in order to save another soldier. Thus, if a soldier is wounded on the field of battle and evacuating him means exposing oneself to enemy fire, one is still obligated to do so.[66] Similarly, entering a battle situation is not considered to be akin to suicide, and it would be permissible to partake in dangerous commando operations to free hostages.

Although these sources concentrate on the issue of exposing oneself to danger, it would seem that if the principle of *chayecha kodmin* does not apply, there is room to reexamine the question of giving up one's life in order to save a comrade. Rav Moshe Feinstein's opinion, quoted above, is that *chayecha kodmin* completely eliminates the mitzvah of saving lives; in the context of war, though, if *chayecha kodmin* does not apply, the mitzvah of saving lives should still be applicable. Thus, Rav Moshe's ruling that one may not give up one's life in order to save another person requires further examination in a situation of war.

Interestingly, in a different responsum,[67] Rav Waldenburg applies his ruling regarding warfare to a completely different

64. *Sifri D'Bei Rav*, *piska* 254.

65. *Tzitz Eliezer*, 12:57.

66. This is true only if the danger is at the level of *safek piku'ach nefesh* (possibly, though not definitely, life-threatening); even during war, one is not obligated to embark upon suicidal missions.

67. *Tzitz Eliezer* 9:17, chapter 5, *se'if* 8.

context. On the assumption that normal warfare practices are enough to justify suspending the standard rules of *va-chai bahem* and *chayecha kodmin* because war creates its own reality in which it is normal to risk one's life, Rav Waldenburg suggests that the same might be true regarding the treatment of infectious diseases. Because it is standard operating procedure that doctors trained in containing infectious disease do actually attend to patients who have contracted these illnesses, and such treatment is essential to the normal functioning of the world, such treatment is to be considered "normal." Thus, even those who agree with the Radvaz and discourage putting oneself in danger in order to save another person should allow a doctor to treat patients afflicted with infectious diseases.

VI. Closing Words

Let us return to the examples that served to frame our discussion of this topic. In the case of Roi Klein, it was clear that his effort to save his comrades would cost him his own life. Under normal circumstances, the dispute cited above in Section II would be operative. Thus, Rambam would certainly rule that it is forbidden to give up one's life in order to save another person. Rav Yechiel Ya'akov Weinberg would argue that according to Tosafot it is permissible and meritorious to give up one's life in such a situation while Rav Moshe Feinstein and Rav Moshe Shternbuch would argue that even Tosafot would not allow this.

However, the circumstances surrounding Roi Klein's actions were by no means normal. It is likely that his own life would have been in grave danger even had he not jumped on the grenade, in which case his act may be viewed purely as a life-saving effort. In addition, as we discussed in Section IV, it is possible to argue that the fact that he saved a group of people elevates his situation to one of "saving the masses" and is justified. Finally, his action took place in the context of war, in which case the very principle of "your life comes first" may

not be applicable at all, as discussed in Section V.

The case of Wesley Autrey did not take place in a time of war and was an example of an individual risking his life to save another individual. This would be an example in which the dispute outlined in Section III would be applicable. According to the *Hagahot Maimoniot*, Autrey would have been obligated to make the rescue, assuming that there was a reasonable chance of his own survival. Radvaz, followed by some modern day authorities, would argue that his action was foolhardy. Many other *poskim* would rule that although he was not obligated to risk his own life, it was permitted and meritorious for him to do so.

Letters

From the Editor:

In the previous edition of the *Journal of Halacha and Contemporary Society,* Number LXI, there appeared an article on "Halacha and Bioethics" by Dr. John Loike and Rabbi Moshe D. Tendler. Inadvertently, biographical material for Rabbi Dr. Tendler was omitted: Rabbi Tendler is a Rosh Yeshiva at Yeshiva University, the Rav of the Community Synagogue of Monsey, NY, a professor of Biology at Yeshiva University, and a pre-eminent Torah scholar. We sincerely regret this oversight.

RABBI ALFRED COHEN

* * *

Rabbi Dovid Cohen wrote an all-encompassing, interesting article about an important topic (*Celiac: A Guide to Mitzvah Observance*, Volume LIX). I would like to point out a minor omission. With the mitzvah of matzah being so important, Rabbi Cohen focused on ways that the celiac can fulfill the mitzvah, such as by eating oat matzah. He neglected to discuss the ramifications of a person with celiac not eating any matzah. In such a case they will not have to *bentch* and will thus not have the hook to which the third cup of wine is attached. So as not to forfeit the rabbinic mitzvah of drinking four cups of wine at the seder and because they cannot drink the third cup with everyone else, the suggestion has been made (*HaSeder HaAruch*, p. 575) that they drink the third cup when everyone drinks the fourth cup, i.e. over *Hallel Hamitzri*, and then drink a fourth cup after *Hallel Hagadol*. This is based on the opinion of the *Mishnah Berurah* (476:17) that if *Hallel* was recited on the third cup it is acceptable, in conjunction with the opinions that *Hallel Hagadol* receives its own (fifth) cup.

ARI ZIVOTOFSKY

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