

Journal of Halacha and Contemporary Society

Number LXVI

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We dedicate
this issue of the
JOURNAL OF HALACHA AND
CONTEMPORARY SOCIETY

IN MEMORY OF
RABBI SHABSI COHEN
ישראל שבתי בן אברהם, ע"ה

A graduate of our High School
who received Semicha in our
Beth Medrash, Reb Shabsi remained
devoted through all of his days
to Torah study and service to the
Jewish people. He never wavered
in his loyalty to the
Rabbi Jacob Joseph School.

May his noble legacy remain
as a blessing to his family.



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**Rabbi Alfred S. Cohen,
Editor**

The Journal of Halacha and Contemporary Society

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TABLE OF CONTENTS

Recruiting a Surrogate for an Infertile Jewish Couple Dr. John D. Loike and Rabbi Moshe Dovid Tendler	5
May You Invite For Shabbat Someone Who May Desecrate the Sabbath To Attend? Rabbi Yosef Gavriel Bechhofer.....	23
Autopsies in the Modern Age Dr. Jonathan Rosman	39
Writing a <i>Sefer Torah</i> : Modern Permutations of a Biblical Commandment Rabbi Elchanan Poukko	59
On the Mitzvah of <i>Aliyah L'Regel</i> Today Rabbi Shimshon HaKohen Nadel	77
Letters.....	91
Yonatan Kaplan, Eli Turkel Tom Abelson, M.D, Raphael Hulkower	

The Journal of Halacha and Contemporary Society is published twice a year by the Rabbi Jacob Joseph School whose main office is at 3495 Richmond Road, Staten Island, New York, 10306. We welcome comments on the articles included in this issue and suggestions for future issues. They should be sent to the Editor, Rabbi Alfred Cohen, 5 Fox Lane, Spring Valley, New York 10977.

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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Recruiting a Surrogate for an Infertile Jewish Couple

*By Dr. John D. Loike
and Rabbi Moshe Dovid Tendler*

Introduction

Gestational surrogacy is resorted to when an infertile couple cannot gestate an embryo to term. In the past, a gestational surrogate was viewed as a woman “renting her womb and body” for nine months to gestate a non-related embryo. As stipulated in conventional surrogate contracts, once the surrogate gave birth to the child, she would give up her legal rights to the child to the genetic parents (i.e., the infertile couple). However, current scientific research reveals that the surrogate is not merely an incubator, but contributes biologically and genetically to the physiology and psychology of the fetus that is growing and developing in her uterus. This scientific research might logically and emotionally influence Jewish infertile couples to favor recruiting a Jewish woman, over a non-Jewish woman, to serve as a surrogate. There are, however, halachic reasons that

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preclude a Jewish woman from serving as a gestational surrogate.

The number of children reported to have been born via gestational surrogacy in the United States continues to increase each year. In 2011, over one thousand surrogates gave birth to children for couples whose wives could not gestate an embryo or for women who did not want to get pregnant for non-medical reasons.¹ In most of these cases the infertile couple provides their own sperm and eggs for *in vitro* fertilization (IVF) to create an embryo that is implanted and allowed to develop in the uterus of a woman serving as a surrogate.

There are many halachic issues that require resolution when gestational surrogacy is considered: a) how does halacha define motherhood; b) does surrogacy enable the infertile couple to fulfill the religious duties of *p'ru u'rnu* (procreation); c) how do the laws of inheritance and first-born status apply to the child born from a surrogate; and d) under what, if any conditions, might a child born from a Jewish surrogate be classified as a *mamzer* (bastard child)? While many of these halachic issues have been discussed,² the focus of this article is the halachic issue

1. Armour, K.L., "An Overview of Surrogacy Around the World", *Nursing for Women's Health*, 16: 231-236, 2012; <http://www.fertilitynation.com/celebrities-who've-used-surrogacy-and-other-infertility-treatments-part-1/>; <http://www.babble.com/CS/blogs/famecrawler/archive/2009/05/05/celebrities-who-have-used-surrogates.aspx>.

2. Avraham Steinberg and Fred Rosner, *Encyclopedia of Jewish Medical Ethics*, Feldheim Publishers, New York, Volume 1, pg 58 (Artificial Insemination), Volume II: pg 571-585, 2003; Rabbi Shlomo Zalman Auerbach, "Artificial Insemination," *Noam* Part 1 #165. 1958; Michael J. Broyde, "The Establishment of Maternity & Paternity in Jewish and American Law", *National Jewish Law Review* 3 (1988), 117-58; see also Michael J. Broyde's article at http://www.jlaw.com/Articles/maternity_1.html from *Journal of Halacha and Contemporary Society* vol 38, 1999; John D.

whether a Jewish woman can serve as a surrogate. While there are several ways in which a woman can serve as a surrogate, we focus on the case where a Jewish infertile couple donates their own sperm and egg for in vitro fertilization and the resulting fertilized egg is then implanted into a non-related woman who will be their surrogate.

Scientific Research on Maternal-Fetal Cell Exchange and Epigenetics

For over one hundred years, scientists believed that cells from the fetus travel across the placenta of a pregnant woman and embed in various tissues of the mother carrying the fetus. During pregnancy, these implanted fetal stem cells are thought to serve a vital biological function – to enable the mother's immune system to tolerate the fetus she is carrying and to prevent her from rejecting the fetus as a foreign tissue.³ Normally, transplanting any “foreign” tissue from one individual to another will trigger an immunological rejection of the transplanted tissue. This is why individuals who receive organ donations must take drugs that prevent their bodies from immunologically reacting to these foreign tissues.

There are other medical benefits and risks associated

Loike and Moshe D. Tendler, “Gestational Surrogacy”, 2013, *Hakirah*, in Press. See also, in this Journal, Vol. XXXVIII, “Surrogate Motherhood in the Case of High-Risk Pregnancy,” by Rabbi Eli Clark and Dr. Zeev Silverman, pg 50.

3. Dutta, P, Burlingham, WJ, “Microchimerism: tolerance vs. sensitization.” *Curr Opin Organ Transplant*, 16:359-365, 2011; Daunter, B, “Immunology of pregnancy: towards a unifying hypothesis”, *Eur. J. Obstet. Gynecol. Reprod. Biol.*, 43:81-95, 1992.

with fetal cells implanting into the host mother, embedding into various tissues (such as the brain), and remaining in these tissues for the duration of her life.⁴ Various studies have shown that a greater number of fetal stem cells implanted into the mother during her pregnancy is associated with a lower risk of this woman developing breast cancer and Alzheimer's disease later on in life. In addition, the risks of a woman developing auto-immune diseases, such as asthma, and various types of cancers, such as colon cancer, increase in those women who have had more fetal stem cells implanted during their pregnancies than other women.⁵

Not only do fetal stem cells traverse the placenta into the maternal host, but maternal stem cells cross the placenta during pregnancy from the woman into the fetus. The health benefits of maternal cell that transfer into the fetus are less understood but may also be crucial in enabling the fetus to repress immunological processes of tissue rejection and allow the fetus to remain immunologically protected from the gestating mother. There are, however, also rare health risks associated with

4. Klonisch T, and Drouin R, "Fetal-maternal exchange of multipotent stem/progenitor cells: microchimerism in diagnosis and disease.", *Trends in Molecular Medicine*, 5(11):510-8, 2009.

5. Chan, WF, et al., "Male microchimerism in the human female brain.", *PLoS One*, 7: e45592, 2012; Roy, E, et al. "Specific maternal microchimeric T cells targeting fetal antigens in β cells predispose to auto-immune diabetes in the child.", *Journal of Autoimmunity*, 36:253-262, 2011; Kamper-Jørgensen, M, "Microchimerism and survival after breast and colon cancer diagnosis.", *Chimerism*, 3:72 – 73, 2012; Kallenbach, LR, et al., "Fetal cell microchimerism and cancer: a nexus of reproduction, immunology, and tumor biology", *Cancer research*, 71:8-12, 2011; Kamper-Jørgensen, M, et al., "Opposite effects of microchimerism on breast and colon cancer", *European Journal of Cancer*, 48:2227-2235, 2012; Lepez, T, et al., "Fetal microchimeric cells in blood and thyroid glands of women with an autoimmune thyroid disease", *Chimerism*, 3:21-23, 2012.

maternal cells implanting into the fetus. Over 20 babies have been reported to be born with various types of tumors that originated from maternal stem cells that implanted into the fetus during gestation.⁶

Epigenetics is another process that biologically and genetically connects the host mother to the fetus. For centuries it has been known that the diet and lifestyle of a pregnant woman affect the health of the child to which she gave birth. Current research now reveals that the lifestyle of the pregnant mother also can affect her children, grandchildren and future descendants. The mechanisms by which environment can impact the health and personality of individuals and their future offspring is beginning to be understood through the study of epigenetics.

Epigenetics is the study of chemical processes that switch parts of the genome of the DNA off and on at strategic times in an individual's lifetime and at specific locations in a person's genome.⁷ A white blood cell, for example, requires a unique set of proteins⁸ to enable it to kill bacteria, while a peripheral nerve cell requires its own unique set of proteins to enable it to transmit sensory signals to and from the brain. Epigenetics can be

6. Isoda, T, et al., "Immunologically silent cancer clone transmission from mother to offspring.", *Proc Natl Acad Sci, U S A* 106:17882-17885, 2009; Alexander, A, et al., "Metastatic melanoma in pregnancy: risk of transplacental metastases in the infant", *J Clin Oncol*, 21:2179-2186, 2003.

7. Bird A, "Perceptions of epigenetics", *Nature*, 447:396-398, 2007; Conaway, J.W. Introduction to Theme" Chromatin, Epigenetics, and Transcription". *Annual Review of Biochemistry*, 81: 61-64, 2012.

8. The human genome has about 20,000 genes that are responsible for producing almost 200,000 proteins. Each specific cell type of the human body uses a defined set of these genes to transcribe and generate the necessary proteins to carrying all of the various cell functions that characterize each cell type.

thus be described as the software program that defines and controls the functions of each cell type in the body via the proteins that are and are not produced. Epigenetic processes are responsible for the fact that identical twins have the exact same DNA, but as they age and are exposed to unique environmental conditions, they begin to look and behave differently, and succumb to different health problems.

In other words, life-long environmental factors (such as diet, living conditions, exercise, stress, chemicals, drugs, and toxins) affect the health and personality of a person and their future offspring. Epigenetics thus provides potential answers to underlying causes of many diseases, of longevity, and of the longstanding unresolved question of how nature and nurture positively and negatively affect inheritable characteristics of an individual.⁸

Should an Infertile Jewish Couple Use a Jewish or non-Jewish- Woman as Their Surrogate?

The surrogate can no longer be viewed as merely a biological incubator but rather as an important contributor to the health and personality of the fetus she is carrying. How will this new understanding of pregnancy impact choices Jewish women may make in recruiting a gestational surrogate? In 2012, we asked over 100 Orthodox Jewish women attending our lectures on gestational surrogacy whether they would prefer a Jewish or non- Jewish surrogate. Virtually all of the women responded that if they were incapable of gestating a fetus, they would prefer recruiting a Jewish woman over a non-Jew to serve as a surrogate.

In the United States, there is no consistent national or

state policy on whether surrogacy or *in vitro* fertilization is covered by health insurance. In addition, most surrogates in the United States are married women. In Israel, infertility is covered by health insurance and more women utilize *in vitro* fertilization per capita than any other country. However, infertile Jewish couples from Israel have gone to other countries (such as India) to recruit surrogates. In 2012, over 40 heterosexual Israeli couples successfully used surrogates from abroad to have children.⁹ In addition, there have been several recently documented cases where Israeli Jewish women have served as surrogates for Israeli infertile Jewish couples.¹⁰

What are the halachic considerations in recruiting a Jewish surrogate where she did not donate her egg? While the biological and epigenetic contributions of the surrogate to the fetus/child make this an emotionally charged issue, halacha provides the following guidelines why a Jewish woman should **not** serve as a surrogate.

There are four reasons why a Jewish woman should not serve as a surrogate. First, a Jewish surrogate who receives an embryo fertilized by a man, other than the husband, may be engaging in a form of *arayot* (forbidden sexual relations).¹¹ This response in part depends upon how halacha views artificial insemination and whether

9. http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html?pagewanted=all&_r=0; <http://contexts.org/articles/spring-2012/indias-reproductive-assembly-line/>;

10. <http://www.ynetnews.com/articles/1,7340,L-3721194,00.html>

11. Avraham Steinberg and Fred Rosner, *Encyclopedia of Jewish Medical Ethics*, Feldheim Publishers, New York, Volume 1, pg 58 (Artificial Insemination) and Volume II: pg 571-585, 2003: Fred Rosner, "Artificial Insemination in Jewish Law", in *Jewish Bioethics* (Rosner and Bleich, Ed), KTAV Publishing, Hoboken, NJ, 1979. Nehemiah Zalman Goldberg, "Establishing Maternity in the Case of Fetal Implants", 5 *Tehumin* 249 (1984).

implanting an embryo into a Jewish woman is analogous to the laws of artificial insemination.¹²

A halachic issue, related to artificial insemination (A.I.), is whether sperm donated from a man other than her husband constitutes adultery? If this act constitutes adultery, then the child would be considered a *mamzer* (bastard). Many *poskim* refer to a talmudic discussion in Talmud *Chagigah* to gain insights into this question. In *Chagigah*, the Talmud explores the prohibition that a Kohen Gadol (high priest) may only marry a virgin, and raises the question whether a Kohen Gadol is permitted to marry a virgin who got pregnant as a result of entering a bath into which a man had recently discharged his semen.¹³ For the purpose of this discussion, the scientific basis whether this could actually occur is not important. Rather, the scholars of the Talmud are addressing the issue whether a “virginal” halachic status of a woman applies only to one who had sexual relations¹⁴ or even to a woman who became pregnant in the absence of sexual relations.

Various rabbinical authorities have used this talmudic discussion to analyze whether a married Jewish woman receiving artificial insemination from a man other than

12. See “Artificial Insemination,” by Rabbi Alfred Cohen, *Journal of Halacha and Contemporary Society*, Vol. XIII, pg. 43.

13. Talmud *Bavli Chagigah* 14b-15a. Rabbeinu Chananel, Talmud *Bavli Chagigah* 15a; and *Tashbezz* 3 no. 263, appear to support the science of this situation while other halachists deny the possibility of conception taking place in such circumstances. See *Otzar Haposkim* 1 no. 42.

14. Ramban (Leviticus 18:20) states that the Torah’s description of incest dwells upon the carnal act itself and is defined as penetration rather than ejaculation. Nonetheless, Ramban claims that the prohibition of adultery is in part related to the ambiguity of determining paternal identity. However, even today when genetic testing could establish paternity with an accuracy of over 98%, no rabbinical authority would allow adultery.

her husband constitutes adultery. Both Rashi, Tosafot, and *Shulchan Aruch* conclude that adultery requires sexual relations and not just pregnancy, therefore allowing the high priest to marry such a virgin.¹⁵

There are various views how to apply this talmudic discussion and other issues to the halachic issue of artificial insemination. According to some current rabbinic authorities, transferring semen from a male other than the husband into the genital tract of a married woman, i.e., artificial insemination, constitutes the biblical prohibition of adultery.¹⁶ Rabbi Teitelbaum (Satmar Rebbe) defines the halachic prohibition on adultery also within a different framework –that of causing lineage confusion, as well as forbidden intercourse.¹⁷ He concludes that artificial insemination constitutes adultery. Other rabbinical authorities maintain that in the absence of a sexual act, there can be no culpable prohibition.¹⁸ However, some scholars state that A.I. infringes upon the spirit of the law and is regarded as a form of quasi-adultery¹⁹ even though the child created via artificial insemination would not be a *mamzer*.²⁰

15. Rashi, Talmud *Bavli Shabbat* 151, (sub voce *ushmuel amar*); Tosafot, Talmud *Bavli Ketubot* 6b, (*rov beki'in*); Tosafot, Talmud *Bavli Niddah* 64b, (sub voce *sha'ani Shmuel*).

16. *Otzar ha-Poskim, Even Ha-Ezer*, I, 1:42.

17. *Responsa Divrei Yoel, Even Ha-Ezer* no. 107-10. R. Eliezer Waldenberg also adopts this view – see *Responsa Tzitz Eliezer* 9, no. 51.

18. R. Moshe Feinstein, *Iggerot Moshe, Even Ha-Ezer*, I, #10, #71, and II #11; Rabbi Shlomo Zalman Auerbach, *1 Noam*, 145, (1958).

19. Following Ramban's explication of the biblical command "You shall be holy" (Leviticus 19:2) artificial insemination may be viewed as an abomination not to be "degenerate within the bounds of biblical license". See R. Moshe Feinstein, *Iggerot Moshe, Even ha-Ezer*, II, no. 11.

20. Fred Rosner, "Artificial Insemination in Jewish Law", in *Jewish*

Even if artificial insemination is not adultery, there are other halachic concerns. Virtually all rabbinical authorities rule that a Jewish married woman whose husband is sterile cannot utilize donor sperm from a Jewish man for artificial insemination.²¹ One reason given is the concern that the resultant child will marry a relative of the sperm donor. The other reason given is because of *arayot*,²² that it is halachically prohibited for a woman to receive sperm from any man other than her husband [as discussed above]. Procreation must occur within the framework of a marital relationship that excludes a surrogate. Rabbi Yosef Eliyahu Henkin²³ explains that the biblical commandment to "be fruitful and multiply" occurs twice in the Torah. In its first occurrence (Genesis 1:28) the commandment is addressed to Adam; the second time (Genesis 9:7) it is addressed to Noah and his sons after the flood. The repetition of this commandment establishes a limitation upon the laws of procreation to take place only within the family unit in such a manner that genealogy of the offspring is known in a determinate manner.

The second reason a Jewish woman may not engage in surrogacy relates to the prohibition of *chavala* (self-injury). Normal pregnancy is a halachic medical health

Bioethics, 111 (Fred Rosner & J. David Bleich, eds., 1979); see *Responsa Seridei Esh* 3 no. 5; *Responsa Iggerot Moshe, Even Ha-Ezer* 1 no. 71; Rabbi Shlomo Zalman Auerbach, "Artificial Insemination", 1 *Noam*, 145, (1958).

21. *Tzitz Eleizer*, (part 13 #97) and *Divrei Yoel* (#107-110) are among those rabbis who state this is a biblical prohibition. *Seridei Aish* (3#5) states that it is rabbinically prohibited because it may lead to immorality. The fear is that a married woman may have an affair with a Jewish man and claim that her pregnancy was a result of IVF.

22. *Ibid.* #12.

23. See R. Yosef Eliyahu Henkin, *Ha-Ma'or, Tishrei-Heshvan* 5725, pp. 9-11, reprinted in *idem, Kol Kitvei ha-Grya Henkin* (New York, 5746) II, 100-101.

risk.²⁴ In the case of a gestational surrogate, the health risks are even greater. All surrogates must receive hormonal hyper-stimulation to prepare their bodies to accept a fertilized egg. Additional health risks to the gestational surrogate and the fetus that she will carry include a greater risk of ectopic pregnancies, miscarriages, and premature births associated with all surrogacy procedures, over that documented in normal pregnancies.

From a halachic perspective it is important to note that the medical risks that a surrogate takes on are not equivalent to those of a normal pregnancy. Any woman who serves as a surrogate could have gotten pregnant via natural means without medical interventions. It is only if this woman serves as a surrogate that she would require hormonal hyper-stimulation with its associated risks. Indeed, a sterile woman may use these procedures, despite the medical risks, because this is the only way she can get pregnant. Halacha learns an important lesson from Rachel *Imenu*, that infertility is considered, by halacha, as a medical condition that requires all parties involved to try to remedy.²⁵ Rachel's motivation was not for financial gain, but rather to contribute to the eternity of the family of Jacob, the progenitor of the Jewish nation.

In halacha, do financial gains justify the risk of injury?

24. Pregnant women are obligated to fast on Tisha Be-Av and Yom Kippur. They are not obligated to fast on the other minor fasts (*Shulchan Aruch* 554:5, 550:1). Today, in many communities it is customary for pregnant women not to fast on minor fast days.

25. In Genesis 30:1 Rachel declares "Give me children, least I die". The Talmud in *Nedarim* 64 concludes from these remarks that someone who is childless is considered to be suffering from a critical illness.

The Rambam states that a person is permitted to risk the chance of injury for financial gains. Thus, a person is allowed to be a fireman, policeman, or construction worker who builds bridges or high-rise buildings, even though these career choices are associated with a higher injury risk than a career as a university professor or Rabbi. Nonetheless, one needs to differentiate between choosing an action that is associated with a higher health risk versus (in the case of pregnancy) where the choice to get pregnant is considered a certain (*vadai*) halachic medical risk whereas a policeman may actually never encounter an actual risk (*safek*).

One could also ask, how is it halachically permissible for a married woman to undergo a certain (*vadai*) halachic medical risk, especially since here is no halachic consensus that the Jewish surrogate woman is commanded to perform the mitzvah of *p'ru u'rpu*? Various halachic authorities have argued that it is generally prohibited for a woman to gestate outside of a "marital community".²⁶ It is also significant that the Rambam includes the mitzvah of *p'ru u'rpu* within the laws of marriage. A wife who gets pregnant from her husband can incur these health risks because in the final analysis she performs the mitzvah of *p'ru u'rpu* **with** her husband.²⁷

26. See above footnote #22: see Rabbi Joseph Dov Soloveitchik, *Family Redeemed*, KTAV Publishing House, 2002, pg 31-72. See the Rosh (Talmud *Bavli Ketubot* 1:12) who states that the proper way to fulfill the mitzvah to procreate is to first get married.

27. R. Yochanan b. B'rakah in the Mishnah (65b) disputes the majority ruling that women are exempt from this mitzvah. In addition, Tosafot (Talmud *Bavli Gittin* 41b and 45b) believe that the wife fulfills with her husband another mitzvah "to populate the world". Tosafot in Talmud *Bavli Yevamot* 65b and *Ha'amek Davar* in Genesis 35:11 understand the plural language of Genesis 1:28 to mean that procreation is a blessing for both

The third reason why a Jewish woman should not serve as a surrogate is related to documented cases where the genetic father of the embryo has an illicit affair with the surrogate as a result of strong emotions that arise from his knowing that the surrogate is carrying his genetic child.²⁸ These emotional bonds between the surrogate and biological father have, in some instances, led husbands in infertile couples to divorce their wives in order to marry the surrogate. The concern that the genetic father may have an affair with the Jewish surrogate, especially if she is married, must be added to the total equation in considering a Jewish surrogate.

The final issue is related to halachic maternity – who is the halachic mother of the child born from a surrogate? Rabbinic authorities differ as to the halachic motherhood of a surrogate's child. There are four opinions on halachic motherhood derived from Talmud and Midrash.²⁹

The first position is that the genetic mother is the halachic mother. Rabbi Chaim Ozer Grodzinski in his responsa states that Nachmanides seems to be of the opinion that conception is the critical time to establish halachic motherhood. The Talmud, when discussing the law of first born, asks what the law is if one takes a fetus

husband and wife, but a commandment only for a man to procreate. Rabbeinu Nissim suggests that a wife's critical role in procreation is considered a mitzvah, and the *Responsa of the Ran* #32 states that while the wife's role in procreation is optional but not obligatory, there is a mandate for a wife to assist her husband in the mitzvah of procreation. Torah commentaries do not require the assumption of potential risk to health other than fasting on Yom Kippur, circumcision, and procreation.

28. 1999 National Conference on Reproductive Outcomes, Ann Arbor, MI and <http://www.nytimes.com/1998/10/20/science/surrogate-mothers-report-few-regrets.html?scp=1&sq=Nancy%20Reames&st=cse>; Personal communication from Dr. Nancy Reames.

29. *Ibid* #3.

from one womb and places it in the womb of another. Which womb is excused from the laws of first born?³⁰ The Talmud answers that it does not know the answer to this question (*teku*). Maimonides explains the question as follows: if one removes a fetus from its mother's womb and places it in the womb of another, it is understood that the conception-mother's next son is not considered as a first-born child; the question is whether the mother that received that fetus is also excused from this mitzvah.³¹ Thus, according to the Maimonides (and none dispute his understanding of this talmudic passage), the person in whom conception occurred is clearly the mother – when the fetus is removed within 40 days after conception. Therefore, if the surrogate is not Jewish, the child will still be Jewish based on the genetic motherhood.

The second position is that halachic motherhood is determined by the woman who delivers the child at birth.³² Thus, a child born from a Jewish surrogate would be Jewish even if the genetic mother was non-Jewish, and a child born from a non-Jewish surrogate would not be Jewish even though the genetic mother was Jewish. Several current Rabbis use different halachic paradigms to support this position.³³

The third position was essentially proposed by the *Tzitz Eliezer* (Rabbi Waldenberg) who claims that there is no

30. Talmud *Bavli Chullin* 70a.

31. *Hilchot Bechorot* 4:18.

32. Menachem ben Meir- *Beit Ha'Bechira*, Talmud *Bavli Yevamot* 78a; Rabbi Asher Ben Yechiel- *Bava Kamma* 5:2; Rabbi Shlomo ben Adret (Rashba)- 1 *Responsa* 1240; Tosafot- Talmud *Bavli Yevamot* 78a and Talmud *Bavli Sanhedrin* 80b; and Ritva- Talmud *Bavli Yevamot* 78a.

33. Eliyahu of Vilna, *Beurei Ha'Gra* commenting on *Tur, Even Haezer* ch. 15.

family relationship of a child born via IVF.³⁴ Any child born via IVF from either a Jewish or non-Jewish surrogate has no halachic mother or father. Thus, he prohibits In Vitro Fertilization for infertility.

The fourth position, articulated by Rabbi Shlomo Zalman Auerbach, notes that since there is no clear authoritative halachic precedent we must be stringent and rule that when either the gestational mother or genetic mother are non-Jewish, the child must undergo halachic conversion to be considered Jewish.³⁵

In our case of gestational surrogacy using a Jewish woman, the child would be Jewish according to position #1,2, and #4. However, if we accept Rabbi Shlomo Auerbach's position, an unusual complication arises. If a Jewish woman serves as a surrogate for two or more non-related infertile couples then the subsequent children that the surrogate gives birth to would be genetically unrelated but halachically viewed as *k'rovim* (siblings).³⁶ Assuming that these children are *k'rovim* creates halachic problems in the future when they get married and have families. One sibling may unknowingly marry a relative of the other sibling. Normally, a child born via *in vitro* fertilization could use genetic testing to ensure that a potential mate is not halachically a sibling. However, in this case, genetic testing would not be useful since children born from the same surrogate are genetically unrelated.

34. *Responsa Tzitz Eliezer*, part 15 #45.

35. *Nishmat Avraham* 4:186; See Avraham Steinberg and Fred Rosner, *Encyclopedia of Jewish Medical Ethics*, Feldheim Publishers, New York, Volume II: pg 571-585, 2003.

36. If one views both the genetic egg donor and the Jewish surrogate as the halachic mothers of the child, then the child also would not be allowed to marry any relatives of the egg donor or surrogate.

Conclusions

Surrogacy is on the rise in many countries and offers a viable solution to help infertile couples have children. Jewish infertile couples living in Israel do not have the same options of recruiting non-Jewish surrogates as do Jewish couples in the United States. However, as discussed above, there are serious halachic problems associated with recruiting a Jewish surrogate, especially if she is married. Using a non-Jewish woman as a surrogate for the Jewish infertile couple would alleviate some of the halachic concerns presented above. According to both Rabbi Moshe Feinstein and Rabbi Shlomo Zalman Auerbach, a child born using a non-Jewish surrogate would be halachically legitimate.³⁷ In addition, considering the intense emotional desires for infertile couples to have progeny, if this is the only method to have children, they permit this option to be pursued.³⁸ Even if a non-married Jewish surrogate is recruited, the resulting child would not be considered a bastard (*mamzer*). This view is based on the halachic decision from Rabbi Moshe Feinstein who states that in a case of IVF, where Jewish donor sperm was used to conceive a child for a couple whose husband was infertile, the child is not a *mamzer*.³⁹ The view of Rabbi Shlomo Zalman Auerbach that halachic motherhood must consider both the genetic and gestational mothers is most prudent, requiring the conversion of a child born from a non-Jewish surrogate. An anonymous database of children born to the surrogates should be maintained to keep track of potential non-genetic and genetic siblings.

37. Ibid #17.

38. Ibid #24.

39. Ibid #17.

Philosophically and emotionally, a Jewish couple may prefer using a Jewish woman as a surrogate because of: a) the biological and epigenetic contributions she provides to the fetus; b) the “religious conformity” of a “Jewish” fetus developing in a womb of a Jewish woman, and c) the complex halachic issues associated with assessing the status of motherhood of a genetically “Jewish fetus” born from a non-Jewish woman. However, halachic issues preclude the use of a Jewish woman as a surrogate. This situation is in part similar to the halachic prohibition of using donor sperm from a Jewish man (not the husband) for artificial insemination for a couple where the husband is sterile. Several halachic authorities such as Rabbi Moshe Feinstein⁴⁰ and Rabbi Shlomo Zalman Auerbach⁴¹ do permit artificial insemination using sperm obtained from a non-Jewish male donor. Therefore in both cases (surrogacy and sperm donation), a non-Jew is the preferred donor or surrogate.

Jewish law embraces human sensitivities and recognizes that surrogacy is an opportunity to allow an infertile couple to achieve their dream of having a biologically and genetically related child. Moreover, halacha recognizes the generosity of the non-Jewish surrogate engaging in an almost year-long process that may have life-long health risks. The surrogate not only provides her body to nurture the fetus but contributes her cells to enable the couple to have a healthy child. Recruiting a non-Jewish woman would be the best halachic option in helping an infertile couple to become a family.

40. *Iggerot Moshe, Even Ha-Ezer* Part 4 #32:5.

41. *Noam*, Volume 1 (1958) pg 145 ff.

May You Invite For Shabbat Someone Who May Desecrate the Sabbath To Attend?

Rabbi Yosef Gavriel Bechhofer

1. The Issue

Is it permissible to invite a person who does not observe the Sabbath to come somewhere on Shabbat when it is very likely that the person will desecrate the Sabbath in order to get there? Does the purpose of the invitation make a difference?

2. Rabbi Moshe Feinstein

In 1956, Rabbi Aryeh Kaplan¹ sent a query to Rabbi Moshe Feinstein: Some members of the community wanted to create an educational prayer service for children that would take place on Shabbat. However, it was clear that the children who lived at a distance from the synagogue would be driven there. Was it permissible to institute this prayer service?

1. At the time, the later-to-become-legendary Rabbi Kaplan was teaching at Eliyahu Academy, the (now defunct) non-Orthodox community day school in Louisville, KY. (There also existed at the time an Orthodox day school called Talmud Torah). Accordingly, he assumed that his students would come by car on Shabbat (<http://meirweiss.wordpress.com/2012/04/25/lost-aryeh-kaplan-part-3-2/>).

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Rabbi Feinstein² responds that it is clearly not permissible for the children – even if they are not yet of Bar Mitzvah age – to be driven to the prayer service, for education in the area of prayer certainly does not take priority over education in the area of Sabbath observance! Moreover, continues Reb Moshe, instituting such a prayer service is tantamount to directing the children to come to pray there despite the desecration of the Shabbat that is involved. Therefore, writes Reb Moshe, Rabbi Kaplan should not consent to the institution of this prayer service, which will not constitute education in mitzvah observance – but, on the contrary – education in the opposite direction.

Reb Moshe acknowledges that Rabbi Kaplan's options are limited to verbal protestations, and that in all likelihood the community will disregard Rabbi Kaplan's objections and institute this destructive prayer service that will harm the cause of Sabbath observance. Nevertheless, writes Reb Moshe, Rabbi Kaplan should consistently expound on the severity of desecrating the Sabbath. Moreover, if at any time an opportunity to cancel the prayer service arises, Rabbi Kaplan should take advantage of that opportunity. Furthermore, so long as the prayer service does exist, Rabbi Kaplan should speak with each one of the children individually and try to get them to come by foot, as perhaps such efforts might prove effective with some of the children. In this way, concludes Reb Moshe, Rabbi Kaplan will fulfill the mitzvah of *tochachah*, remonstrating with a person who is committing a transgression,³ and instruction.

2. *Iggerot Moshe* 1:98. The responsum is entitled, “*Ba’alei Battim* who want to institute a prayer service for children’s education [*chinuch ha’yeladim*], and it is clear they will come by car on Shabbat.”

3. See *Sefer HaChinuch* and *Minchat Chinuch* mitzvah 239.

3. *Lifnei Iver*

Earlier, in 1953, Rabbi Feinstein was asked by Rabbi Naftoli Carlebach of Detroit if the prohibition of *Lifnei Iver* – placing a stumbling block before a blind man⁴ – pertains to a scenario in which one invites people to come to pray in a synagogue on Shabbat knowing that they will come by car and thus desecrate the Sabbath.

Before proceeding to Reb Moshe's responsum, let us briefly review the parameters of *Lifnei Iver*. The Rabbis understand the verse as a metaphor, and that its import is a prohibition to give misleading advice (to “place a stumbling block”) to an unsuspecting individual (“before a blind man”).⁵ They further understand that the Torah here prohibits a person to facilitate the commission of a transgression by another person. The Torah itself, however, only prohibits such facilitation in cases in which the sinner could not have committed the transgression without that help. Where the sinner could have committed the transgression in any event, then the individual who facilitates the commission of the transgression violates a Rabbinic prohibition, that of *mesayei'a yedei ovrei aveirah* – assisting those who commit transgressions.⁶

4. Proselytizing

Reb Moshe⁷ responded to Rabbi Carlebach that on

4. *Vayikra* 19:14.

5. *Sifra de-vei Rav, Kedoshim* 2:14.

6. See *Avodah Zarah* 6b. See also *Shulchan Aruch, Orach Chaim* 163:2; *Yoreh Deah* 160:1 and 240:20 and *Choshen Mishpat* 70:1.

7. *Iggerot Moshe* 1:99. The responsum is entitled: “A clarification of the prohibition to invite people to come pray in a synagogue on Shabbat when it is known that they will come by car.”

account of *Lifnei Iver* it is certainly forbidden to invite individuals who live far away (i.e., so that they cannot possibly come to the synagogue without desecrating the Sabbath). Moreover, continues Reb Moshe, there is an even worse prohibition involved here, as the person issuing the invitation may be categorized as a *Meisit*, a person who proselytizes another person (or persons) to commit a transgression. Reb Moshe acknowledges that the *Meisit* described in the Torah⁸ is a person who specifically proselytizes another person to commit idolatry. Nevertheless, asserts Reb Moshe, the severity of the prohibition, the divine punishment it entails, and the unique law that proscribes defending a *Meisit* in court⁹ – all these parameters also pertain to an individual who induces another individual to commit *any* transgression.

As evidence to this understanding, Reb Moshe cites a Gemara¹⁰ in which Rav Shmuel bar Nachman states in the name of Rabbi Yonatan that the law proscribing the defense of a *Meisit* in court is derived from the case of the serpent in the Garden of Eden. In that case, an argument could have been made on behalf of the serpent that he should not be held responsible for Adam's sin. After all, when a Master (in this case, *Hashem*) and a disciple (in this case, the serpent) issue conflicting orders, whose order should the individual obey? Surely that of the Master! Why then, should the serpent have been held responsible for Adam's sin? That such a defense was not mounted on the serpent's behalf, posits Rabbi Yonatan,

8. *Devarim* 13:7.

9. See *Sefer HaChinuch* and *Minchat Chinuch* mitzvah 462.

10. *Sanhedrin* 29a.

indicates that we are proscribed from the defense of a *Meisit* in court.

Reb Moshe posits that the transgression that the serpent seduced Adam and Eve to commit was not one of idolatry, but that of eating from the Tree of Knowledge. We thus see that a person who proselytizes another person to commit *any* transgression falls into the category of a *Meisit*.¹¹ Therefore, while the death penalty specified in the Torah only pertains to the case of a person who convinces another person to commit idolatry, the other parameters apply to any case of proselytizing.

Reb Moshe further posits that the prohibition of *Lifnei Iver* pertains even to the individuals who do not live so far away that they would have to drive to the synagogue (evidently because they would not have committed the transgression if the invitation had not been issued), and it is only the characterization of *Meisit* that does not pertain in their case.

What if the synagogue does not word the promotion of its services as an invitation, but rather as a generic notice – intended primarily for those who live nearby – announcing the existence of a prayer service, and that prizes would be distributed to anyone who attends? Reb Moshe states that if it is known that those who live further away will also come – by car – then although the characterization of *Meisit* does not pertain, it is unclear whether or not *Lifnei Iver* does pertain, (i.e., whether an announcement is tantamount to an invitation).

11. See, however, *Margaliyot HaYam* ad loc. #25 who infers from the language of Rashi that the serpent was, in fact, proselytizing for idolatry, and how this may be the import of the serpent's seductive suggestion: *And you shall be as the Lord* (*Bereishit* 3:5).

Accordingly, writes Reb Moshe, it must be specified in the notice that prizes will only be distributed to individuals who come in a permissible manner – viz., by foot.¹²

5. Rabbi Shlomo Zalman Auerbach

In 1988, Rabbi Michael Schoen of Yeshivat Ohr Somayach in Jerusalem asked Rabbi Shlomo Zalman Auerbach to clarify the parameters of a prayer service targeted at individuals who are not observant with the goal of bringing them to Torah and mitzvot.

Reb Shlomo Zalman¹³ prefaces his rulings with the statement that he is basing them on Rabbi David Zvi Hoffman's¹⁴ compendium of the position taken by many great halachic authorities – viz., that people who desecrate the Sabbath in our time are treated as *tinokot*

12. Reb Moshe then addresses an inquiry by Rabbi Carlebach as to whether he should resign his membership in this synagogue – in which many of the individuals who come to pray do not conduct themselves appropriately. (While in Detroit, Rabbi Carlebach was primarily an educator in Yeshiva Beth Yehudah. For a time he also served in the rabbinate, but he later handed over the rabbinate to his uncle, an elderly rabbi and a Holocaust survivor with no means of support. Evidently, by the time he posed this query he was no longer the rabbi of the synagogue in question, but retained membership in it.) Reb Moshe responds that in his opinion Rabbi Carlebach should not resign his membership, but rather remain in order to protest the improprieties. Reb Moshe advises Rabbi Carlebach not to give up hope and not to assume that no one will heed his admonitions, as a little bit of light banishes much darkness. However, qualifies Reb Moshe, this is only so long as no change is made in the manner in which services are conducted. If changes – such as the *mechitza* being removed or the manner of prayer or Torah reading being altered – are made, then all the members who are God fearing have to resign their memberships.

13. *Minchat Shlomo*, first edition, vol. 2, 4:10. This responsum is omitted in subsequent editions of *Minchat Shlomo*, but is preserved in *Riveivot Ephraim* 7:402. Both responsa are available at hebrewbooks.org.

14. *Melamed L'Ho'il* 1:29.

she'nishbu, as if they were children who were taken into captivity at an early age, and therefore grew up ignorant of Judaism – including the laws of Shabbat and their severity. Accordingly, they are not culpable for desecrating the Sabbath to the same extent as an individual who is knowledgeable and generally observes the Sabbath. Reb Shlomo Zalman also clarifies that the following rulings are based on the purpose of the prayer service – viz., the sacred goal of bringing those who are far from Judaism close to Torah and the awe of Heaven.

Reb Shlomo Zalman then specifies four parameters:

1. It is permissible to invite an individual who lives at a distance from the prayer service's location, so long as he is offered a place to stay over Shabbat that is within walking distance of the prayer service. Once the offer is made, even if the individual declines the offer, it is not necessary to tell him to refrain from attending the prayer service. Moreover, it is not necessary to tell him that he may not arrive by car.
2. The parking lot of the location in which the prayer service takes place must be closed throughout Shabbat and/or Yom Tov.
3. It is preferable not to count an individual who still desecrates the Sabbath *in public* towards the quorum of ten men.
4. So long as there is a quorum of ten people who observe the Sabbath present – not including those who still desecrate the Sabbath in public – it is permissible to grant *aliyot* (the honor of reciting the blessings before and after a Torah portion is read) to the individuals who do not observe the

Sabbath, and also to allow any of them who are *Kohanim* to bless the congregation when the priestly blessing is recited.¹⁵

15. See also *Teshuvot V'Hanhagot* (Sternbuch) 1:358 in the case of a *Ba'al Teshuvah* who would like to invite his parents who are not observant for a meal on Shabbat.

There is a prevalent supposition that it is customary in Chabad circles to permit such Shabbat invitations based on the reasoning that since the invited individuals will drive on the Sabbath in any event, at least let them drive for a good purpose!

However, this is not the official Chabad position. From two sources it emerges that the Chabad position is that, although a direct protestation is not called for, the prohibition must be publicized.

In a 1950 letter to Rabbi Mordechai Fischer of Brantford, ON, the Lubavitcher Rebbe's personal secretary (my great-uncle) Rabbi Mordechai Hodakov wrote, in the name of the previous Lubavitcher Rebbe, Rabbi Yosef Yitzchak Schneerson: "Do not cancel the public classes on Friday night because of the worry maybe someone will drive, rather since he knows people will drive, he should figure out a way to teach them the prohibition about it, and encourage them to stop desecrating the Shabbat" (from http://www.chabadinfo.com/?url=article_en&id=28210).

In a 1957 letter, the last Lubavitcher Rebbe, Rabbi Menachem Mendel Schneerson, wrote: "[As to] how to remedy what occurred on *Simchat Torah*, that among the participants in the *Hakafot* of Yeshiva Ohalei Yosef Yitzchak were individuals who came by car: The remedy is simple, and it is astonishing that it was not carried out this year – viz., several days before the holiday notices should be placed in newspapers... [stating] that it is definitely obvious and well known that it is forbidden to travel by car on the Sabbath and on holidays, and that it is paradoxical to participate in a Torah event in a manner antithetical to the Torah" (*Likutei Sichot* vol. 34 p. 313).

Why is the reasoning cited above not addressed by the authorities we have cited in this essay?

The Gemara in several places (*Shabbat* 69a; *Shevuot* 26b) considers the status of a person who is *eino shav me'yedi'ato*, one who does not refrain when he is aware – viz., a person who committed a transgression inadvertently (*shogeig*) that had he known about it, would have committed it deliberately anyway (*meizid*). The Gemara rules that even if the transgression is one for which a person who commits it inadvertently would normally bring an atonement-offering (*chatat*), an *eino shav me'yedi'ato* may not bring that offering (this is derived from Scripture).

With the one exception of this restriction barring him from bringing atonement-offerings, an *eino shav me'yedi'ato* is exactly like any other Jew.

6. Rabbi Shmuel Halevi Wosner

Rabbi Shmuel Halevi Wosner differs with Reb Shlomo Zalman on two accounts:

In regard to the application of the category of *tinokot she'nishbu* in our day, Rabbi Wosner¹⁶ writes that it only applies to children who were born to parents who were apostates. Such children are treated as *oness* – compelled – not to accept mitzvot upon themselves.¹⁷ Rabbi Wosner includes within this category children who were raised in an environment of non-Jews, or of Jews who have cast off the yoke of Torah and mitzvot. These children, therefore, neither heard of – nor accepted – Torah, nor mitzvot, nor belief in the primary principles of Judaism.

This definition obviously circumscribes severely the number of people who can be classified as *tinokot she'nishbu*. Accordingly, most of the people that would be invited to a prayer service or to a meal on Shabbat are as culpable for desecrating the Sabbath as any knowledgeable people who observe the Sabbath.

Rabbi Wosner subsequently¹⁸ writes that it is forbidden to issue a Shabbat invitation to a person who desecrates the Shabbat if it is clear that he will drive to the location to which he is invited. Rabbi Wosner writes that this sometimes entails the prohibition of *Lifnei Iver* on a scriptural level, and other times on a rabbinic level.

Therefore, it seems logical to assume that all the normal parameters of *Lifnei Iver* apply in the case of an *eno shav me'yedi'ato*. Accordingly, no matter how many transgressions he commits on his own initiative, it remains forbidden for anyone else to cause him to commit any additional transgressions.

16. *Shevet HaLevi* vol. 8, *Orach Chaim* 165:1.

17. See *Shulchan Aruch, Yoreh Deah* 159:3 and 340:5.

18. *Shevet HaLevi*, *ibid.*, 165:6.

In a subsequent responsum,¹⁹ Rabbi Wosner writes that regardless of the issue of *Lifnei Iver*, there are additional issues of desecrating Hashem's name (*Chillul Hashem*) and rendering assistance to those who commit transgressions (*mesayei'a overei aveirah*). Therefore, there is no choice other than either to refrain from issuing invitations, or to specify that the recipient may not accept the invitation if he will not come to the location on foot.

7. A Different Form of *Lifnei Iver*

All of the aforementioned authorities touch on the issue of *Lifnei Iver* as it pertains to the prohibition of desecrating the Sabbath.

However, there is a very different form of *Lifnei Iver* that needs to be taken into account as well.

Reb Shlomo Zalman²⁰ begins a responsum on the topic of putting food and drink out in honor of a guest who you know will not make a blessing before eating or drinking, as follows (free translation):

In that which every person must assess his conduct and direct his deeds for the sake of Heaven. These are my thoughts concerning the case of a person is visited by a distinguished guest who does not observe Torah and mitzvot, but still harbors a love of Torah-true Jews, and also supports Torah institutions, etc., who the host knows will not make a blessing on his own over the food. Moreover, if the host asks his guest – even in a dignified manner – to wash his hands and recite a blessing, the guest will

19. *Shevet HaLevi*, *ibid.*, 256:2.

20. *Minchat Shlomo* 1:35:1.

perceive the request as an affront and an insult to his honor, and will become very annoyed. Yet, on the other hand, if on account of the prohibition against giving food to someone who will not wash and pronounce a blessing,²¹ a host does not conduct himself with the common courtesy of offering his guest something to eat and drink, it is possible that the guest will, Heaven forfend, become even more distant from Torah. Moreover, as a result, he may become angry and hateful towards all those who walk in the Torah's ways.

In such circumstances, I believe that, in truth, it is proper for the host to honor the guest with food and drink. The host need not concern himself with the prohibition of *Lifnei Iver*. For although we do not instruct a person to commit a minor violation so as to save other persons from a major prohibition...²² Nevertheless, this case is unique, since the only prohibition preventing the host from honoring his guest with food and drink is the potential sin of "placing a stumbling block before him." But a host does not honor his guest with food and drink will cause the guest to commit an even greater violation!²³ Accordingly, by honoring the guest with food and

21. *Shulchan Aruch, Orach Chaim* 169:2.

22. Reb Shlomo Zalman here gives an example: It is forbidden for one person to violate the "minor" prohibition against tithing *terumah* and *ma'aser* on Shabbat to prevent another person from violating the "major" prohibition against eating *tevel*, untithed produce.

23. At the end of the responsum Reb Shlomo Zalman states that the prohibition the guest will violate is *lo tisna et achicha b'levavecha*, not to hate one's fellow Jew (*Vayikra* 19:17). This is besides causing the guest to distance himself yet further from Torah and mitzvot.

drink the host commits no violation – since in extending the food and drink he is not placing a stumbling block before the guest. On the contrary, by actively placing a smaller stumbling block before him, the host is *saving* the guest from a very great stumbling block.

At the end of the responsum Reb Shlomo Zalman gives an analogy: Just as a person who amputates his friend's toe so as to save his friend's entire arm is not regarded as harming his friend, but as healing him – and is not considered as having committed a sin, but as having performed a mitzvah – so too in our case, the host is not considered to be tripping up the guest. On the contrary, he is saving the guest from the severe sin of hating the Torah and those who study it.

8. The Chazon Ish

In a footnote, Reb Shlomo Zalman notes that the *Chazon Ish*²⁴ suggests a similar line of reasoning – albeit he only applies it to a case in which the person in question *may* commit a violation, not one in which he will *definitely* commit a violation.

The issue the *Chazon Ish* deals with is the rule that prohibits certain forms of commerce with a person who is suspect about not observing the laws of *Shemittah*, the Sabbatical year. The law²⁵ is that it is not permitted to sell wine-barrels to a person who is engaged in commerce of wine that has been illegally hoarded during *Shemittah* (*meshumar*), on account of *Lifnei Iver*. However, if a

24. *Shevi'it* 12:9.

25. Mishnah, *Shevi'it* 5:7.

person is only suspected of engaging in such commerce, it is permitted to sell him wine-barrels. This holds true even in a case in which his commerce involves a large quantity of wine – even though the large quantity makes it a reasonable possibility that some of the wine in question is illegally hoarded *Shemittah* produce – so long as the issue remains in doubt. The *Chazon Ish* explains that if we were to be stringent in such circumstances, we would be putting a stumbling block in place for ourselves and for the others, for we would be curtailing our mutual benevolence and our mutual sustaining of the lives and of the peace of our brethren who are engaged in the commerce. They are – at worst – *Amei Ha'Aretz* (ignoramus) whom we are obligated both to sustain and to treat with benevolence – and certainly not to bring to greater detestation and animosity. Curtailing commerce in these circumstances would bring both sides to violate *Lo Tisna* (the prohibition to detest another Jew) and other prohibitions that are no less severe than the prohibition of *Lifnei Iver* that we are trying to prevent!²⁶

Accordingly, continues the *Chazon Ish*, our sages carefully balanced the extent to which we should penalize those who violate the laws of *Shemittah* and disassociate from them, with the extent to which we should not place before them and before ourselves even greater stumbling blocks. The balance that the sages

26. In a bracketed passage, the *Chazon Ish* notes that a similar principle serves as the basis to permit trade with idolators: Since non-Jews are required to maintain amicable relations with Jews, if we were not to treat them appropriately we would be placing a stumbling block before them! The *Chazon Ish* goes on to explain the prohibition on striking one's grown children (*Mo'ed Katan* 17a) in a similar vein. (See also the Gemara, *Chagigah* 22a, for a similar halachic issue in regard to how to relate to an *Am Ha'Aretz* – viz., whether we accept the testimony of an *Am Ha'Aretz* lest we come to animosity.)

decided upon was to forbid the sale of wine-barrels to a person who is *definitely* engaged in commerce with illegally hoarded wine, and to permit the sale when the wine *may* have been illegally hoarded.²⁷

9. Revisiting the Stringent Position and a Possible Reconciliation of the Perspectives

It is a common practice to try to reconcile positions that seem to be in conflict. On the basis of the insights we have gained both from Reb Shlomo Zalman's latter responsum and from the analysis of the *Chazon Ish*, perhaps we can go back to re-examine the rulings of Reb Moshe and Rabbi Wosner and make an attempt at reconciling the varying positions that the authorities take on this issue.

Let us put the two cases addressed by Reb Moshe in their proper context – viz., the prevailing conditions in

27. An apocryphal story is told concerning the famous 1952 visit of Prime Minister David Ben Gurion to the Chazon Ish. It is related that the Chazon Ish faced a quandary similar to the one considered by Reb Shlomo Zalman – viz., on the one hand, it would not be appropriate to host the leader of the State of Israel and not honor him with refreshments. On the other hand, it would probably be considered a *faux pas* to ask the prime minister to pronounce a blessing before partaking of the refreshments! What was the Chazon Ish to do?! According to the legend, the Chazon Ish placed refreshments on the table, but out of Ben Gurion's arm's reach. He assumed that Ben Gurion would feel it undignified to ask for the refreshments to be passed to him. In this manner the conundrum would be resolved: The refreshments would be available, as befitting the occasion, while the issue of a blessing would be moot, as the guest would not avail himself of those refreshments!

However, whether the Chazon Ish did or did not go through with this process, the fact is that Ben Gurion himself, in his diary entry on the meeting, states that it took place at a table that was completely empty (http://bengurionblog.blogspot.com/2009/06/blog-post_28.html)!

the America of the 1950s, well before the advent of systematic attempts to bring Jews who are distant from observance to Torah and mitzvot (*Kiruv Rechokim*). Moreover, let us revisit the circumstances of both inquiries – viz., situations in which the entire purpose of the prayer service in question was to promote and popularize prayer. There was no thought to use these services as stepping stones towards greater commitment and observance. Indeed, as Reb Moshe notes, by placing the value of these prayer services above the value of Sabbath observance, their implementation might be regarded as a form of proselytization away from Torah-true Judaism. It goes without saying that they were certainly “stumbling blocks” and violations of the prohibition of *Lifnei Iver*..

The case addressed by Rabbi Wosner may also be placed in a similar context: The circumstances as he describes are those of social invitations, not invitations issued with the intent of bringing the guests to greater commitment and observance.

On the other hand, in the case described in Reb Shlomo Zalman's former responsum, the explicit purpose of the prayer service is to serve as a stepping stone towards greater commitment and observance. In a manner similar to that described by the *Chazon Ish*, Reb Shlomo Zalman carefully balances the reduction of the probability of a violation taking place (by the offer of a place to stay over Shabbat) – thus “downgrading” a definite *Lifnei Iver* to a doubtful one – with the concern with the potential of committing a greater, opposite *Lifnei Iver* by alienating the not-yet-observant individual by pressing the issue. Moreover, since the purpose of the invitation is to bring the participants in the prayer service to Torah and mitzvot, such invitations – even according to Reb

Moshe – cannot be regarded as proselytizing *away* from observance, but *towards* observance.

A similar rule of thumb would apply to invitations to Shabbat meals: If they are intended for the purpose of bringing those who are invited to Torah and mitzvot, and an offer of a place to stay over Shabbat is extended to them, they would not be categorized as desecrations of *Hashem's* name but rather as sanctifications of *Hashem's* name (*Kiddush Hashem*), leading ultimately to enhanced Sabbath observance.²⁸

28. Although not brought up by the authorities that we have cited here, the principle of “desecrate for him one Sabbath so that he will come to keep many Sabbaths” (*Yoma* 85b) – which pertains both to physical and spiritual crises (see *Shulchan Aruch, Orach Chaim* 306:14 with *Magen Avraham* ad loc. #29) – may apply here as well. See also <http://www.vbm-torah.org/halakha/EducationalProgramming.htm> for different analyses of some of the responsa we have perused.

Autopsies in the Modern Age

Dr. Jonathan Rosman

Introduction

Mr. X, a 32 year old man, collapsed while playing basketball. Efforts to revive him were unsuccessful and he was pronounced dead on arrival to the hospital. The family was contacted and the treating physician recommended performing an autopsy to discover the cause of death. The autopsy was performed and revealed that the patient had a genetic cardiomyopathy (heart muscle disease) that led to sudden cardiac death. The entire family was screened for this specific genetic cardiomyopathy and those affected received implantable defibrillators to prevent sudden death.

Structural heart disease is found during autopsy to be the cause of death in 70% of young adults who die suddenly.¹ Most of these cardiac disorders are genetic and while some may be diagnosed with non-invasive imaging, gross examination and tissue analysis is often needed for definitive diagnosis.² Examining family

1. C. van der Werf, I. van Langen, A. Wilde. Sudden Death in the Young. What Do We Know About It and How to Prevent. *Circulation Arrhythmia and Electrophysiology* 2010;3:96-104.

2. D. Zipes, P. Libby, R. Bonow, E. Braunwald. *Braunwald's Heart Disease: A Textbook of Cardiovascular Medicine*, 8th ed. 2008. Volume I: 933-953.

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members for potential cardiac diseases instead of performing an autopsy is inadequate, since there are varying presentations of these cardiac diseases that may go unrecognized.³⁻⁴ It is therefore imperative to correctly diagnose the deceased so that all family members can be screened for the appropriate disorder.

Judaism believes in the sanctity of the human body.⁵ The utmost respect is given to every Jewish body from time of death until burial. An autopsy is an "examination of a corpse to discover cause of death."⁶ The act of dissection defiles the body of the deceased and is therefore usually prohibited in Judaism. Nowadays, autopsies are not performed on a routine basis. However, there are situations where a physician, patient or family member may request to perform an autopsy. The goal of this article is to delineate if and when autopsies are permissible according to Jewish law.

Burying a Jewish body

The first issue encountered with autopsies is the requirement to bury the deceased immediately. This is derived from Deuteronomy⁷ which discusses the case of

3. Ibid. Vol II: 1764-1765.

4. Blood samples from family members can detect only some genetic cardiac disorders and it takes weeks to analyze blood for these various diseases. If these tests come back negative it would be a disgrace to exhume the body for autopsy to test for familial disorders that are not picked up by genetic testing. It is therefore important to begin with the deceased and attempt to diagnose cause of death and only if that is unrevealing test family members.

5. *Zohar, Ha'ldra Rabbah*, Vol III, *Parshat Naso*. Also see *Likutei sheylot utshuvot Chatam Sofer* part 6 # 10.

6. Webster dictionary; autopsy.

7. Deuteronomy 21:23.

a man who commits a crime that is punishable by death. After the criminal is executed and hanged, the Torah states that “his body shall not remain all night upon the tree, but thou shall surely bury him that day.” The Gemara in *Sanhedrin*⁸ extends this requirement to immediately bury the deceased to include all Jewish bodies.

The Rambam⁹ classifies the requirement to bury Jewish bodies on the day of death as a *mitzvat aseh* (positive commandment) based on the latter part of the verse above, “thou shall surely bury him that day.” The *Shulchan Aruch*¹⁰ describes burial as a *mitzvat lo taaseh* (negative commandment) based on the initial part of the verse, “his body shall not remain all night...” The *Minchat Chinuch*¹¹ states that there is both a *mitzvat aseh* and *mitzvat lo taaseh* to bury a Jewish body.

Autopsies delay burial and are problematic because of the requirement to immediately bury the dead. One reason for immediate burial given by the Gemara is out of respect for the deceased.¹² Leaving the body unburied is degrading to the deceased and his/her family.¹³ However, postponing burial for purposes that would not be considered degrading to the body may then be permissible. For example, it is permitted to delay burial to await the arrival of a close relative since that is an honor for the deceased.¹⁴ In our presenting case the

8. Rashi *Sanhedrin* 46b, “ke kavor tikbirenu”.

9. Rambam, *Sefer Hamitzvot mitzvat aseh* 331.

10. *Shulchan Aruch Yoreh Deah* 357:1.

11. *Minchat Chinuch mitzvah* 336 and 337.

12. *Sanhedrin* 46b.

13. Rashi, *Sanhedrin* 46b, “lav kol kaminei”.

14. *Shulchan Aruch Yoreh Deah* 357:1.

deceased would surely have wanted the burial delayed to allow for an autopsy that could save the life of his/her relative. It is therefore possible that delaying burial for autopsy may be permitted if doing so would not be considered degrading to the deceased.

***Nivul Hamet* (Defiling the deceased)**

A second principle that prohibits routine autopsies is the obligation to respect and not degrade the body of the deceased. The Gemara in *Bava Batra*¹⁵ discusses a case where a father dies and leaves property to his son. The son immediately sells the property and soon after dies as well. The son's inheritors claim that the deceased had not reached adulthood and therefore the sale should be void and the property should belong to the father's other heirs. The buyers claim that the deceased had reached adulthood, thus the sale is legally binding and the property therefore belongs to them. Rabbi Akiva was asked whether it would be permitted to exhume the body to see if the deceased had physical signs of adulthood.¹⁶ Rabbi Akiva answered that the body should not be examined because of *nivul hamet*, or desecration of the dead. Rabbi Akiva further added that after death signs of puberty change and are unreliable in determining adulthood, and therefore examining the body would not be helpful.

Tosafot¹⁷ state that Rabbi Akiva was compelled to provide both answers because there are cases where it would have been permissible to examine the body.

15. *Bava Batra* 154 a-b.

16. The physical sign of adulthood is 2 pubic hairs.

17. *Bava Batra* 154 b.

Tosafot write that the buyers have the right to examine the body since they stand to lose money.¹⁸ Financial loss is a permissible reason to examine the body, according to Tosafot. However, suggest Tosafot, the family has a special obligation to the deceased and thus even for financial loss cannot degrade the body. Therefore, Rabbi Akiva had to bring the second answer that even for the buyers who are permitted to defile the body because of financial loss, examining the body would not help because signs of puberty change after death. According to Tosafot, the prohibition of *nivul hamet* applies only when there is no good reason to defile the deceased; but for an acceptable purpose, such as monetary loss, *nivul hamet* would not apply.

The concept of *nivul hamet* is discussed in other Gemara texts as well. The Gemara in *Brachot*¹⁹ states that one who transports bones from one place to another should not place them in a sack on a donkey because it is an act of *bizayon*, or embarrassment, to the body. The Gemara in *Chullin*²⁰ discusses a case of a man who commits murder and is liable for capital punishment. The Gemara asks why we don't check to see if the victim was a *treifa* (someone who would have died imminently due to a physical problem),²¹ in which case the accused would not

18. Tosafot also state that the family isn't permitted to examine the body because there is no financial loss to them. The family members are not actually losing something that was in their possession but are simply not receiving the field as part of their inheritance.

19. *Brachot* 18a.

20. *Chullin* 11b.

21. A *treifa* is a person who has an ailment that will lead to death within a year so the murderer is hastening death but that person was going to die anyway. While it's not permitted to kill a *treifa*, there is no capital punishment associated with it.

be liable for capital punishment. The Gemara answers that we don't check to see if the body is a *treifa* even to save the accused from receiving capital punishment because of *nivul hamet*. The Gemara explains that since we can never know for sure if the deceased was a *treifa*,²² and yet we still execute the murderer, we do not violate *nivul hamet* on the small chance that the deceased was a *treifa*.²³ Autopsies involve dissecting the deceased's body and should be prohibited because of *nivul hamet*. However, if the autopsy is done for an accepted purpose it may not be considered *nivul hamet* and thus would be permissible.²⁴

Prohibition of deriving benefit from a Jewish body

The Gemara in *Avoda Zara*²⁵ states that it is prohibited to derive *hanaah*, or benefit, from a Jewish dead body.²⁶ In accordance with this Gemara, the *Siftei Cohen*²⁷ rules that it is prohibited to derive any benefit from the body of the

22. It is possible that the deceased was stabbed in the heart and the deceased may have had a heart condition that could have killed him within a year. However, the stabbing has covered the evidence to the point that one can't tell if there was a heart condition. We still execute the murderer even though we can never know with certainty that the deceased wasn't a *treifa*.

23. This Gemara tries to prove the concept of *rov* (majority) from this case. Since we cannot violate *nivul hamet*, the murderer receives capital punishment because we go by the fact that the majority of people murdered are not *treifas*.

24. See *Tosafot Bava Batra* 154b discussed above. Financial loss to a non-family member would be an acceptable reason to examine the body.

25. *Avoda Zara* 29b.

26. This is learned through a *gezera shava* (comparison) from the case of *eglah arufah*. *Eglah arufah* is a case where a person was murdered and it is not known who murdered the person. The elders of the city closest to the corpse must bring a calf and perform a ceremony denying responsibility. It is prohibited to derive benefit from this calf.

27. *Siftei Cohen*, *Yoreh Deah* 349:1 and *Yoreh Deah* 79:3.

deceased. The purpose of autopsies is to gain knowledge from viewing, dissecting and analyzing the body of the deceased. This is not a classic form of *hanaah* since no physical or monetary gain is derived from the deceased.

The Chatam Sofer²⁸ states that routine autopsies are prohibited because of the prohibition of receiving any *hanaah* from the deceased. Rav Eliezer Waldenberg²⁹ quotes the *Machaneh Chayim* and states that only tangible forms of benefit from the deceased are prohibited. Knowledge derived from the deceased is not tangible and is therefore not prohibited.

Autopsies in Jewish History

Traditionally, autopsies were performed to define cause of death or to advance medical knowledge. Autopsies and anatomical dissection have played an integral part in advancing medical knowledge. By helping scientists better understand disease processes they have aided in discovering new treatments for various diseases and illnesses. Up until the 20th century, Jewish bodies were buried without much debate.³⁰ The last two centuries have seen a dramatic increase in medical institutions and major advances in medicine. This has returned the autopsy debate to the forefront of society and Jewish halacha.

The establishment of the state of Israel presented an even more pressing dilemma. Since the Israeli population

28. *Chatam Sofer*, *Yoreh Deah* 336. Also see *Hagahot Rabbi Akiva Eiger*, *Yoreh Deah* 349.

29. *Tzitz Eliezer* 4:14. Also see Rav Tzvi Pesach Frank, *Responsa Har Tzvi*, *Yoreh Deah* #278.

30. Rabbi Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics* 74-75.

is mostly Jewish, medical institutions could not rely solely on non-Jewish bodies for autopsies and anatomical dissection. Medical institutions and hospitals in Israel requested autopsies on Jewish bodies to better understand certain diseases and aid in discovering treatments. Medical schools in Israel requested Jewish bodies to be donated for anatomical dissection. This highly-debated topic led to many years of tension between the Rabbinate and physicians in Israel.³¹

Pikuach Nefesh (Life-Saving Situations)

Routine autopsies that determine cause of death but serve no other purpose are prohibited because of the three prohibitions outlined above (immediate burial requirement, prohibition of *nivul hamet*, and prohibition of deriving benefit from the deceased). The Gemara³² learns from the verse in Leviticus³³ that we are permitted to violate the Torah in cases of *pikuach nefesh*, where violating the Torah leads to saving the life of another Jew.³⁴ It would therefore seem that when information from an autopsy might save another's life, it should be permissible to perform that autopsy despite the three prohibitions noted above.

There is a major difference between the classic case of *pikuach nefesh* and our case of autopsy. Cases of *pikuach nefesh* generally involve violating a commandment between man and God (*bein adam lamakom*), such as

31. Ibid.

32. *Sanhedrin* 74a, see Rashi there.

33. Leviticus 18:5.

34. Except for the "big three" of worshiping idols, killing, and prohibited relations.

Shabbat, in order to save a life. Our case of autopsy involves violating a commandment between man and fellow man (*bein adam lachaveiro*). The physician who performs the autopsy may be saving one life but is doing so at the expense of degrading a fellow Jew.

There are 2 cases of violating *bein adam lachaveiro* for *pikuach nefesh* brought down in the Gemara. The Gemara in *Erechin*³⁵ discusses a case of a pregnant woman who dies. The Gemara states that it is permitted to perform a caesarean section and remove the fetus from the mother's body even on Shabbat. This would seem to prove that *nivul hamet* is permitted for *pikuach nefesh*.³⁶ However, the ruling in this case may not be applicable to autopsies. In the case of the pregnant woman, the mother's body is a physical barrier standing between the fetus and life. But in the case of autopsy, the deceased has no connection to another person who may potentially benefit in the future from information obtained from the autopsy.³⁷

Secondly, similar to our presenting case, the mother would have wanted the C-section performed to save her baby. However, the deceased may not want an autopsy performed to help save a person who is unknown to him/her.³⁸

Finally, some say that procedures that are routinely performed on live patients are not considered *nivul hamet* and can therefore be performed on the deceased.³⁹ Since a cesarean section is an accepted procedure, it is not

35. *Erechin* 7a.

36. *Mishpetei Uziel, Yoreh Deah* 28.

37. *Binyan Tzion* 171.

38. *Ibid.*

39. *Ibid, Iggerot Moshe Yoreh Deah* 151.

considered *nivul hamet* and that may be why the Gemara permits it.⁴⁰ It is therefore possible that one could permit a cesarean section on the deceased pregnant woman but still not allow autopsy in other cases of *pikuach nefesh*.⁴¹

The Gemara in *Bava Kama*⁴² discusses a question that King David posed to the Sanhendrin. The Philistines who were fighting against the Jews were hiding in stacks of barley in Jewish fields. King David asked whether it was permitted to set fire to these stacks to flush out the Philistines and save their own lives. The Sanhendrin replied that in general it is forbidden to steal money or destroy someone else's property to save one's life.⁴³ Rashi interprets the Gemara literally and states that it is prohibited to destroy personal property or steal money to save one's life. However, Tosafot and the Rosh interpret the Gemara differently. They state that the Gemara is asking whether there is an obligation to pay back the money, but it is obviously permitted to steal to save one's life. Therefore, according to Rashi, it would seemingly be prohibited to violate *bein adam lachaveiro* to perform an autopsy. However, Tosafot and the Rosh may permit autopsy for *pikuach nefesh*.⁴⁴

40. *Binyan Tzion* 171.

41. *Ibid*, *Iggerot Moshe Yoreh Deah* 151. See text below.

42. *Bava Kama* 60.

43. Since King David was king, he and his army were permitted to set fire to the fields. However, if he weren't the king it would have been prohibited.

44. It is possible that Rashi is of the opinion that stealing is a 4th prohibition (see "big three," footnote 28 above) that one is required to die rather than violate (see *Ramban* and *Shita Mekubetzet Ketuvot* 19a). Rashi may then permit violating other *bein adam lachaveiro* prohibitions for *pikuach nefesh*. It is also possible that Tosafot and the Rosh permit violating *bein adam lachaveiro* for *pikuach nefesh* only when one is able to repay what was stolen (money). However, they may prohibit violating *bein adam lachaveiro* in cases where one cannot repay what was stolen (stealing the *kavod* or dignity of the

Our autopsy case is a unique form of *pikuach nefesh*. There has been much debate among contemporary halachic authorities how to view our case of autopsy with regard to *pikuach nefesh*. I will review the major Jewish halachic responsa in order to better delineate which clinical scenarios may justify permitting an autopsy.

Halachic responsa

The *Noda BiYehudah* discusses a case regarding a patient with kidney stones who passed away following surgery that was performed in an attempt to cure his illness.⁴⁵ The physicians requested to perform an autopsy in order to better understand how to successfully perform this surgery in the future. There was no present patient dying from kidney stones but the autopsy was sure to help with future patients who would be suffering from the same disease. The *Noda BiYehudah* writes that this is not considered a case of potential "*pikuach nefesh*," since there is no "*choleh lefanenu*," or present patient with kidney stones. Implicit from this statement is that, if there were another person with a similar disease of whom one were aware, it would be permissible to perform the autopsy.

The *Chatam Sofer*⁴⁶ cites the *Noda BiYehudah* and agrees that routine autopsies are prohibited and are not considered in the realm of *pikuach nefesh*. However, he explicitly writes that if there is a *choleh lefanenu* with a similar ailment, it is permissible to perform the autopsy on the deceased in an attempt to help the other sick patient.

deceased).

45. *Noda BiYehudah Yoreh Deah* 210.

46. *Chatam Sofer, Yoreh Deah* 336.

The *Chazon Ish*⁴⁷ defines the criteria for permitting autopsies based on *pikuach nefesh* differently. He permits autopsies when there is an epidemic or any common condition since the information will surely be used. The autopsy is permitted even if there is no *choleh lefanenu* since there will undoubtedly be a similar patient in the near future who will benefit from the information. However for a rare condition, the information from an autopsy will not necessarily be utilized. It is not considered even potential *pikuach nefesh* and is therefore prohibited.

Rav Yaakov Ettlinger is more stringent. He writes that even if there is a *choleh lefanenu* it is still prohibited to perform an autopsy.⁴⁸ He quotes the Gemara in *Bava Kama*⁴⁹ and states that if one cannot steal money for *pikuach nefesh*, how much more so one cannot steal the *kavod* or dignity of another individual for *pikuach nefesh*. Rav Ettlinger states that even *Tosafot* and the *Rosh* will prohibit autopsy. *Tosafot* and the *Rosh* permit stealing for *pikuach nefesh* since one can repay the stolen money. However, one cannot repay the deceased for disgracing the body, and therefore *Tosafot* and the *Rosh* would prohibit *nivul hamet* for *pikuach nefesh*. However, Rav Ettlinger permits autopsy for *pikuach nefesh* if the deceased had consented to autopsy, since one is no longer “stealing” his/her dignity.⁵⁰

Rav Moshe Feinstein⁵¹ similarly prohibits autopsies

47. *Chazon Ish, Hilchot Aveilut* 208:7.

48. *Binyan Tzion* 170, 171.

49. *Bava Kama* 60.

50. If consent is not obtained prior to death, the family doesn't have the right to consent on behalf of the deceased, and *nivul hamet* is prohibited.

51. *Iggerot Moshe, Yoreh Deah* 151.

even with a *choleh lefanenu*. Rav Moshe writes that while there is an obligation for a physician to save someone who is sick, there is no obligation to become a physician so that at some point you may be able to save someone. Your obligation is to do all you can with the resources and abilities that you possess. Similarly in our case, Rav Moshe argues that there is no obligation on the deceased to have his body dissected and analyzed so that information gained may save another individual. And since there is no obligation, it is prohibited because of *nivul hamet*. Rav Moshe, however, permits needle aspiration or analyzing blood from the deceased.⁵² Procedures that are commonly performed on living patients are not considered *nivul hamet* and are thus permissible.

Rav Yechiel Yaakov Weinberg⁵³ broadens the *Nodah BiYehudah*'s ruling. Nowadays with availability of rapid communication, even if there isn't a known *choleh lefanenu* there will likely be someone somewhere who will benefit from the autopsy information. Therefore, if there is a disease for which the treatment has not yet been perfected, it is permissible to perform the autopsy.

Rav Eliezer Waldenberg⁵⁴ is also more lenient in permitting autopsies. He posits that if a person dies from an illness where the treatment is not established, it is permissible to perform an autopsy if:

1. there is a *choleh lefanenu* since this is considered *pikuach nefesh*, or

52. Ibid.

53. *Seridei Eish siman* 22.

54. See *Tzitz Eliezer* 4:14.

2. if the deceased had agreed to an autopsy even if there isn't a *choleh lefanenu*.⁵⁵

However, Rav Waldenberg writes that it is prohibited to learn about the body in a general manner even if the deceased had requested this.

Rav Ben-Zion Meir Hai Uziel,⁵⁶ the first Sephardi Chief Rabbi of Israel, understands *nivul hamet* differently. Rav Uziel explains that it is only considered *nivul hamet* if the autopsy is done for no purpose at all or if the primary objective is to defile the body. But if it is done for a purpose, especially when that purpose is *pikuach nefesh*, it's permissible.⁵⁷ In addition, Rav Uziel writes that the prohibition of leaving the body hanging on a tree is because of *bizayon*, or embarrassment, to the deceased. But delaying the burial for any acceptable purpose is not a *bizayon* and the deceased would not require immediate burial. Rav Uziel permits autopsies on patients with illnesses where the proper treatment is not fully understood. Even if there is no *choleh lefanenu*, there is no doubt that there will eventually be a patient with a similar disease. If autopsies are not done, it will definitely lead to the death of similar patients since we will not have learned enough about the disease to treat it properly. Rav Uziel also permits studying the body of a deceased in a general fashion, if that is the only way for Jews to learn about the particular illness. He therefore

55. In a case where there is no *choleh lefanenu* and the deceased did not agree to autopsy but the physicians are adamant to learn the proper treatment for the illness, Rav Waldenberg states that a select group of rabbis must be consulted to permit such a case.

56. *Mishpatei Uziel Yoreh Deah* 28.

57. Rav Uziel, however, prohibits the patient or family from receiving financial benefit from the autopsy since one cannot derive *hanaah* from the deceased.

permits autopsies in Israel where the population is mostly Jewish.⁵⁸

Current times

Nowadays, treatments for most diseases are well established and routine autopsies are of little benefit in advancing these treatments. In addition, there are non-invasive diagnostic modalities that can be utilized post-mortem that obviate the need for many autopsies.⁵⁹ However, there are still situations where autopsies are necessary and would seemingly be permitted for *pikuach nefesh*.

1. Epidemic/new diseases – If there are new viruses, diseases or epidemics where therapies are not known or well established, it would be similar to the *Noda BiYehudah*'s case and autopsies would be permitted because of *pikuach nefesh*.⁶⁰
2. Familial/genetic illness – patients who die of unknown causes especially from sudden death, may have inherited disorders. When imaging is unrevealing, autopsies may be required for direct visualization and to obtain targeted tissue samples to make an accurate diagnosis.⁶¹ A correct

58. *Mishpatei Uziel Yoreh Deah* 28-29.

59. Among other modalities, there are newer MRI machines specifically designed to help reveal cause of death. However, there are diseases that may require more in-depth analysis of organ tissues. In these cases classic cadaver dissection is essential for accurate diagnoses.

60. *Chazon Ish, Hilchot Aveilut* 208:7.

61. Biopsies of the heart can technically be performed without an autopsy. However, biopsies of the heart have a low diagnostic yield and a negative biopsy is insufficient to reliably exclude cardiac disease. Therefore a full heart dissection may be needed to include and/or exclude cardiac disease as cause of death.

diagnosis can save lives by identifying other family members who suffer from the same genetic disease.⁶²

3. Experimental therapies –There are patients who may be taking experimental medications or other forms of experimental therapy. It may be necessary to perform an autopsy to ensure that these treatments did not contribute to their death. This information will help other patients undergoing these experimental therapies.⁶³
4. Forensic medicine – If there is any question whether a patient was murdered, an autopsy can clarify cause of death. This may help catch a murderer and prevent future killings.⁶⁴

Other cases aside from *pikuach nefesh* where autopsies may be permissible include financial loss for non-family members,⁶⁵ the need to identify the deceased in order to allow the widow to remarry,⁶⁶ and for the study of medicine in a general fashion in Israel.⁶⁷

Medical School and Anatomy Lab

Anatomical dissection is a traditional part of medical school education. Students are assigned an unidentified

62. Rabbi Y. Arieli, *Torah SheBe'al Peh* 724, p. 40, cited in *Nishmat Avraham Yoreh Deah*, vol II 349:1.

63. Fred Rosner, Moshe D Tendler, *Practical Medical Halacha*, p. 79.

64. *Tzitz Eliezer* 4:14.

65. Tosafot *Bava Batra* 154b discussed above; see also *Choshen Mishpat* 107:2 *hagah* who states that a lender is permitted to delay a funeral, thereby causing *bizayon hamet*, in order to exact payment from the deceased's family.

66. *Shoel Umaishiv* 1st edition, part 1:231.

67. *Mishpatei Uziel Yoreh Deah* 28. Rabbi S Goren, *Meorot*, 2, 5740 (1980) 5-17.

cadaver of a person who has donated his/her body to science. This is not a problem for medical students in the United States since most bodies are not Jewish. However, this is a major problem in Israel since most bodies are Jewish.

Most modern day *poskim*⁶⁸ prohibit anatomical dissection of Jewish bodies since the information is not being used to save a *choleh lefanenu*. Some *poskim*⁶⁹ allow students to observe anatomical dissection since there is no direct *hanaah*. A minority of *poskim*⁷⁰ permit anatomical dissection on the basis that the information garnered during anatomy lab will help save future lives by educating students.

Nowadays there are computer simulators that can be used instead of cadavers for the study of anatomy.⁷¹ These are being used in medical schools as a supplement to the classic anatomical dissection. While anatomical dissection remains a traditional part of medical school, it has little practical benefit over computer simulators. Computer simulators are a viable alternative and may obviate the need for cadaver dissection.

Performing the Autopsy

If and when an autopsy is permitted according to

68. See *Noda BiYehudah Yoreh Deah* 210, *Tzitz Eliezer* 4:14, and *Iggerot Moshe Yoreh Deah* 151 among others.

69. See *Har Tzvi*, *Yoreh Deah* #278 and see *Chazon Ish*, *Hilchot Aveilut* 208:7 where he states that visual examination of the deceased is not considered *hanaah*.

70. Rabbi S Goren, *Meorot*, 2, 5740 (1980) 5-17, *Mishpatei Uziel Yoreh Deah* 28-29.

71. see www.biodigitalhuman.com as an example which is currently used as a supplement to anatomical dissection by the NYU School of Medicine.

Jewish halacha, all *poskim* agree that it must be performed with the utmost dignity⁷² and in the appropriate manner.⁷³ The autopsy should focus only on the area in question. Further dissection of other body parts to complete a full study is prohibited. A bag should be placed underneath the body to collect any fluids or body parts from the deceased. Once the autopsy is completed, all removed parts should be returned immediately to the body. The body should be buried as soon as possible after completion of the autopsy. In all cases prior to allowing the autopsy, the family, physician and Rabbi should meet to determine need for autopsy and ensure appropriate care and respect is given to the deceased during the autopsy.

Halachic Living Will

End-of-life issues often arise on an emergent basis and can cause significant stress to all parties involved. In order to make the correct medical and halachic decision regarding an autopsy, it is imperative that a discussion between the family, physician and Rabbi take place. This will ensure that unnecessary autopsies are not performed and at the same time will ensure that autopsies that may save lives are performed.

Orthodox institutions⁷⁴ have developed a legal form called a Halachic Living Will that designates an Orthodox Rabbi of one's choosing to be consulted on

72. *Mishpatei Uziel Yoreh Deah* 28.

73. Fred Rosner, Moshe D Tendler, *Practical Medical Halacha* p. 79.

74. Rabbinical Council of America, Orthodox Union, and Agudath Israel of America among others.

end-of-life matters including autopsy.⁷⁵ This ensures that the autopsy will only be performed if halachically permissible. In addition, if the autopsy is halachically indicated, the Rabbi can oversee the autopsy to ensure that it is performed according to halacha. Filling out these legal documents can help alleviate concerns regarding end-of-life issues.

Conclusion

Our patient, Mr. X, died suddenly from unknown causes. Through autopsy he was found to have died from a genetic cardiac disease. This familial disorder was found to be present in other family members and they were treated appropriately. Since the family members prior to autopsy are at risk of having a genetic disease associated with sudden death, this is a case of *pikuach nefesh*. Therefore, according to most *poskim*,⁷⁶ a focused autopsy is permitted.⁷⁷

There are three basic principles that prohibit routine autopsies: the requirement to bury the dead, the prohibitions against *nivul hamet* and deriving benefit from the deceased. Most *poskim*⁷⁸ permit autopsies in cases of *pikuach nefesh*. Autopsies for purposes other than

75. Halachic living will. See <http://www.rabbis.org/pdfs/hcp.pdf> or <http://www.jlaw.com/Forms/>.

76. All except Rav Moshe, who doesn't allow autopsies in any case, and Rav Ettlinger who doesn't allow autopsies without prior consent from the deceased.

77. Blood analysis (drug overdose is another common cause of death in young adults and can be diagnosed quickly through blood analysis) and an MRI can be performed first, since this may reveal cause of death without needing an autopsy. However, if no diagnosis is made, an autopsy to accurately diagnose cause of death should be performed.

78. All except Rav Moshe and Rav Ettlinger as cited above.

pikuach nefesh may be permitted but must be discussed with a Rabbi. The halachic living will is an ideal means to ensure appropriate decisions are made regarding an autopsy and that the proper respect is given to the deceased if an autopsy is performed.

Writing a Sefer Torah: Modern Permutations of a Biblical Commandment

Rabbi Elchanan Poupkو

Introduction

One of the lesser known mitzvot of the 613 biblical mitzvot is the mitzvah of writing a *Sefer Torah*. It is not only one of the 613 mitzvot but in fact is the very last one. The Torah tells us (*Devarim* 31:19), “*Ve-ata kitwu lachem et ha-shira hazot ve’lamdah et be’nei yisrael*”. This verse is understood by the Jewish tradition (*Mesorah*) to say that each and every Jew should write for himself a *Sefer Torah*. This mitzvah is mentioned in the Talmud and codified by the Rambam and the *Shulchan Aruch*.¹

The question that must be dealt with is why the Jewish people in the past few hundred years have not engaged in this mitzvah on an individual basis, as the nature of the mitzvah requires. Although one may suggest that the reason for this apparent widespread neglect is the great

1. *Sanhedrin* 21:b, Rambam, *Hilchot Sefer Torah* Chap. 6, *Shulchan Aruch* YD:260.

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financial expense involved in fulfilling this mitzvah, there are several reasons why this cannot be accepted as the only reason for this phenomenon. Firstly, although such a reason may have been true for almost all members of the Jewish community in the past centuries, this cannot be accepted as being the ultimate reason in the case of American Jewry in the present time. Despite the past few years of a difficult recession, it is fair to assume that there are still people in our community for whom the expense of buying a *Sefer Torah* does not exceed twenty percent of their wealth – the amount of money one is required to spend on a positive scriptural commandment.² Secondly, we do not find in all of the halachic literature dealing with this issue, suggestions of the cost being the reason for this phenomenon.³

Possible Solution

The *Shaagat Aryeh*⁴ has suggested an answer to this

2. See *Mishnah Berurah* 656:8.

3. One noteworthy exception to these arguments is the opinion of Rabbi Moshe Feinstein (*Iggerot Moshe* YD:163, based on an innovative idea discussed more in length in *Dibrot Moshe* to *Bava Kama* 69:21). Rabbi Feinstein is of the opinion that the Talmud's statement that one may not spend more than a fifth of their wealth on a mitzvah does not mean, as it is commonly understood, that one must spend up to that amount of their own wealth on a positive biblical commandment. What it means, argues Rabbi Feinstein, is that one may not spend more than that amount even if they wish. However if a positive mitzvah involves a significant expense, then even if that expense does not constitute more than a tenth of a person's wealth, one is not obligated to spend that money. This, however, is not consistent with the opinion of the *Mishnah Berurah* (OC 656:8 and in *Biur Halacha*). Rabbi Feinstein goes on to say that this may be another reason why this mitzvah is not commonly practiced. Since fulfilling this mitzvah involves a great expense, even if this expense is not more than ten percent of one's wealth, one is not obligated to spend that amount of money in order to fulfill this mitzvah, although it is permissible.

4. *She'elot U'tshuvot Siman* 36.

question that has drawn the criticism of many great scholars. We have a principle, explains the *Shaagat Aryeh*, that a *Sefer Torah* that is missing even one letter does not have the same status or *kedusha* (holiness) of a proper *Sefer Torah*. This means that one may not fulfill the obligation of reading from the Torah (*Kriat HaTorah*) from such a scroll and the *Sefer Torah* does not have the regular laws of handling and treatment resulting from the *kedusha* of a proper *Sefer Torah*.⁵ In addition to this, says the *Shaagat Aryeh*, already in the times of the Talmud the scholars of that generation were not sure which words exactly were to be spelled fully and which were not (*chaserot* and *yeterot*). This implies that even back in those days, there were certain inaccuracies and discrepancies in the exact spelling and placement of vowels in certain words in the *Sefer Torah*.⁶ It would therefore make sense, he maintains, that the original mitzvah of writing a *Sefer Torah* no longer applies nowadays since our *Sifrei Torah*

5. This is not to say that all contemporary *Sifrei Torah* are to be treated with diminished respect as we do to a *Sefer Torah* that lost some of its letters (See Ramo and *Turei Zahav* (YD 282:18)). Since the inaccuracies in our *Sifrei Torah* are not ones that we know of, we can therefore not expect them to be changed (*Iggerot Moshe* ibid).

6. An interesting halachic manifestation of this idea is found in the Ramo's ruling (OC 143:4) that we do not correct a *Sefer Torah* when we find one of the vowels missing even if we find that in a different *Sefer Torah* we see otherwise (although others argue on this ruling), because we cannot be sure which is the correct version. For a seemingly dissenting approach, see Ramban in his introduction to his commentary on *chumash*, who says that the entire Torah is an intricate composition of God's names and it is for this reason that if a *Sefer Torah* is missing even one letter it is no longer Kosher. Another controversy that seems to reflect the same question is the argument between the Abarbanel and the Radak (in the Abarbanel's introduction to *Sefer Yirmiyahu*) on the reason for the occasional discrepancies between the *ktiv* and the *kri* (the spelling and the reading) in *Tanach* (Prophetic Books of the Bible). Special thanks to Rabbi Zvi Romm, *Mara De'atra* of the Bialystoker Shul on the Lower East Side, for these comments and insights.

are probably missing some letters and can no longer be regarded as “real” *Sifrei Torah*.⁷ We no longer have “real” *Sifrei Torah*, so we no longer attempt to fulfill this mitzvah of writing a *Sefer Torah*.⁸

Criticism

This unique approach of the *Shaagat Aryeh* has drawn sharp criticism from various directions.⁹ The *Minchat Chinuch*¹⁰ challenges this idea of the *Shaagat Aryeh*, i.e., that since our *Sifrei Torah* are inaccurate with the spelling of certain words they can no longer be regarded as proper *Sifrei Torah*. The *Minchat Chinuch* maintains that if our *Sifrei Torah* can no longer be regarded as real *Sifrei Torah* then our *tefillin* cannot either – a notion that no one, including the *Sha'agat Aryeh*, would find acceptable. Since there are certain differences of rabbinic opinions (*Machloket*) regarding the spelling (*chaserot* and *yaterot*) of certain words in the Torah that are also part of the verses (*parshiyot*) of *tefillin*, following the *Shaagat Aryeh*'s line of logic, our *tefillin* can no longer be regarded as kosher either – an unacceptable idea for many reasons.¹¹

7. It should be pointed out that even according to the *Shaagat Aryeh* the obligation to write a *Sefer Torah* has not been completely removed. There is still a rabbinic obligation to write a *Sefer Torah* because otherwise the mitzvah and the Torah itself would be forgotten from the Jewish people.

8. It is interesting to note that the *Chatam Sofer* (*Teshuvot* OC 52 and 54), when discussing why is it that we do not recite a *Birkat Hamitzvot* when writing a *Sefer Torah*, also uses the same reason as the *Shaagat Aryeh* does. Since we are not familiar with the exact spelling of certain words, maintains the *Chatam Sofer*, one may not recite a *bracha* for writing a *Sefer Torah*.

9. Although having drawn all this criticism, it is important to note that this opinion of *Shaagat Aryeh* is taken quite seriously as a halachic consideration by some of the greatest rabbinic authorities (see *Iggerot Moshe* YD I:163 and 164).

10. Mitzvah 613:3 cv “*Ve'od ani chozer*”.

11. The most important of them being that although finding extensive

The *Minchat Chinuch* then goes on to explain the logical flaw in the *Shaagat Aryeh*'s calculation. There are two types of mistakes that can be found in a *Sefer Torah*, he says. One is a mistake in the actual spelling of the word that can change the meaning, like spelling the word "בַת" with an extra letter which would turn it into a different word, like "בֵית", or changing the word "בְּפִשְׁׁוֹת" into "בְּפִשְׁׁת".

The other type of mistake one can make when writing a word in the *Sefer Torah* is adding or omitting a letter which functions in the word as a vowel, like spelling the word "אַהֲרֹן" with an extra letter, making it "אַהֲרֹן", a change that although possibly being out of place does not necessarily change the meaning of the word. It is only the former type of mistake, argues the *Minchat Chinuch*, whose existence disqualifies the *Sefer Torah*. Being that the mistakes in our *Sifrei Torah* are only in *chaserot* and *yeterot*, the assumption of the *Shaagat Aryeh*, that there cannot really be a kosher *Sefer Torah* nowadays, is no longer applicable.

Rabbi E.M. Schach (1898-2001), in his magnum opus *Avi Ezri*, argues with the *Shaagat Aryeh* for a different reason. As with many other fields in Judaism, argues Rabbi Shach, the only way to know what exactly the Torah refers to is through the continuum of the Jewish tradition (*mesorah*). For example the only way to know what a *lulav* or an *etrog* is, is through our tradition of what they are.

Similarly, the only way to know what a proper *Sefer*

discussion of many intricate details in the laws of *tefillin* (such as in what order to place the *parshiyot* into the *batim* [receptacles]), there is no mention whatsoever of such a basic issue as whether our *tefillin* are actually kosher or not.

Torah is comes through our *mesorah*. Therefore, when one wants to know how a proper *Sefer Torah* should be written, they must look at what the tradition of their community is regarding this issue, and not be bothered by the fact that other communities have different traditions regarding this issue, just as one need not be bothered by the fact that other communities have different traditions regarding what a proper *etrog* is.

All this said, we are back to our original difficulty of why it is that this mitzvah of writing a *Sefer Torah* is not widely practiced.

The *Rosh*'s Solution

The *Rosh*, in his *Hilchot Sefer Torah*, says that in its simple form, the mitzvah of writing a *Sefer Torah* is fulfilled nowadays with the writing of Hebrew books, such as *chumashim*, *mishnayot*¹² and *Gemara*. This, says the *Rosh*, is because only when all *Torah* was transmitted orally and the central text used to learn from was the *Sefer Torah*, only then was the mitzvah fulfilled through writing a *Sefer Torah*. However, since nowadays most learning is done with *chumashim*, *mishnayot*, as well as later talmudic and halachic works, one fulfills the mitzvah of writing a *Sefer Torah* by writing these books.¹³

12. This term is used colloquially to refer to the Jewish literature that transmits our *Torah* through the written word.

13. This notion, that an integral part if not the very foundation of this mitzvah is the aspect of it enabling and enhancing one's ability to fulfill the mitzvah of *Talmud Torah*, is implied by the Rambam as well. The Rambam (*Sefer Hamitzvot*) when numbering the mitzvot in which men are obligated and women are not, lists the mitzvah of writing a *Sefer Torah*. The *Shaagat Aryeh* wonders why this should be the case since this mitzvah is not a time bound positive mitzvah (*mitzvah aseh she'zeman gerama*.) The *Shaagat Aryeh* then says that the only possible reason for women not to be included is

The question is, however, what does the *Rosh* mean when he makes this statement? Does he mean that in order to fulfill one's obligation to write a *Sefer Torah* nowadays one needs to write the *chumash* and other religious books (*sefarim*) in addition to the obligation of writing a *Sefer Torah*, or does he mean that the obligation to write a *Sefer Torah* is replaced with the obligation of writing other *sefarim*. This fundamental issue is debated among the *Acharonim* commenting on the *Tur*, who has quoted this *Rosh* as a halachic ruling.

The *Beit Yosef* maintains that it is obvious that the basic obligation of writing a *Sefer Torah* cannot be replaced with a different obligation, for it would be hard to imagine that a scriptural obligation, one of the 613 mitzvot, will be uprooted from its original form. It is rather, maintains the *Beit Yosef*, that in addition to writing a *Sefer Torah*, one should also write for himself other *sefarim* that will enhance their learning; since the underlying reason for writing a *Sefer Torah* is to be able to learn and gain Torah knowledge, it would make sense that where most learning is achieved via other texts, one

because this obligation is for those who are also obligated to study Torah. Since women are not obligated to study Torah, they are not included in this obligation. The *Shaagat Aryeh* then goes on to question this assumption of the Rambam and asks why is it that the mitzvah should be anything other than its simple form and obligation: to write a kosher *Sefer Torah*. Furthermore, argues the *Shaagat Aryeh*, even if indeed the essence of this mitzvah is to facilitate Torah study, why should this exclude women from being obligated in this mitzvah? Although women are not obligated to learn Torah they are still able to do so. In fact, says the *Shaagat Aryeh*, the same *Rosh* who implies that the nature of this mitzvah has to do with the study of Torah, also rules that women may recite the *bracha*, "Asher kideshanu be'mitzvotav ve'tzivanu la'asok be'divrei Torah". Therefore, they are definitely not excluded from this mitzvah. Cf. *Shelot U'Teshuvot Beit Halevi* (Soloveitchik, Vol. I: 7) who answers this question of the *Shaagat Aryeh*.

should make sure to have those texts as well, and thus fulfill the mitzvah in its fullest way.

The *Prisha*, however, maintains that the *Rosh* is introducing a much more revolutionary idea – that since the underlying reason for this mitzvah is to enable the study of Torah, now that most learning takes place from sources other than a *Sefer Torah*, the obligation is transformed to writing texts that facilitate this generation's learning. This obligation *replaces* the original form of this mitzvah.¹⁴

This ruling of the *Prisha* is codified by the *Shach* who wonders why this mitzvah is so widely neglected nowadays and concludes that people rely on this *Rosh* as the *Prisha* understands him. We don't write our own *Sifrei Torah* because most, if not all, of our learning is done with texts other than a kosher *Sefer Torah*.

Rav Moshe's Approach

Rabbi Moshe Feinstein takes a unique approach to this debate. Rabbi Feinstein maintains that there is essentially no debate between the *Beit Yosef* and the *Prisha* on the ramifications of the *Rosh*'s ruling; all agree that the *Rosh* means that nowadays one may fulfill the obligation of

14. Rabbi Shlomo Ganzfried (*Apiryon, Devarim* 31:19) makes an interesting observation on this halachic notion from the perspective of *Drush*. The verse from which we derive the commandment to write a *Sefer Torah* begins with the word "Ve'atah", which translates as "and now". Why does the verse telling us about a commandment that applies for generations use a word appropriate for discussing the present? Rabbi Ganzfried maintains it is because the verse is alluding to the fact that the mitzvah in the form of writing a proper Torah scroll will only be in place for a limited amount of time. Once *Torah Shebe'al Peh* (Oral Torah) will be in the form of written texts, then the mitzvah will be transformed to the writing of those texts, and will no longer be in its original form.

writing a *Sefer Torah* by writing the texts necessary for contemporary learning. It would make no sense to say, Rabbi Feinstein maintains, that the *Rosh* is just telling us that there is an obligation to write *chumashim* and *mishnayot* in addition to the obligation to write a *Sefer Torah* (as the *Beit Yosef* is commonly understood), for if that were the case, why would the *Rosh* find it necessary to emphasize that nowadays we no longer learn from Torah scrolls? If the *Beit Yosef* means to say this, the only issue the *Rosh* need mention is that today since we learn from texts other than the Torah scroll one should make sure, when trying to fulfill this mitzvah, to also write *chumashim* and *mishnayot* in addition to writing a *Sefer Torah*.

Out of this observation Rabbi Feinstein draws the conclusion that one may fulfill their personal obligation in one of two ways: either write a *Sefer Torah* with all requirements and all of the expenses that this entails; alternatively, one may acquire *chumashim*, *mishnayot* and other printed texts that help one fulfill the mitzvah of studying Torah (*Talmud Torah*). The *Rosh* did not come to give a substitute or a supplement to the commandment of writing a proper *Sefer Torah*. The *Rosh* tells us that nowadays one can fulfill their obligation either the way it was always done with a *Sefer Torah*, or by obtaining the means with which to fulfill the mitzvah of studying the Torah in a contemporary fashion.

The Contemporary Difficulty

There is, however, a fundamental difficulty with relying on both the *Shach* and the *Prisha* nowadays: it would seem that the logic behind the *Rosh*'s innovative interpretation of this mitzvah, the way it is understood

by the *Prisha*, is that the obligation is not defined as writing a *Sefer Torah per se* but rather to write whatever is necessary to accomplish the mitzvah of *Talmud Torah*. Thus, the unchangeable aspect of this mitzvah is that one should write the text necessary for fulfillment of the obligation of *Talmud Torah*. This line of logic would be appropriate only until the advent of the printing press. However, once the printing press has been invented and everything is printed, including texts for Torah study, we can no longer rely on this opinion of the *Shach*; how can we assume that we fulfill our obligation if we do not actually write our own *chumashim* and *mishnayot*? We are now faced with a more serious question than before. Not only do those of us who do not write their own *Sefer* not fulfill the mitzvah of writing a *Sefer Torah*, but even those who do write a *Sefer Torah* fail to fulfill this obligation since, according to the *Prisha*, the way to fulfill this obligation has been transformed and replaced by the obligation to write *chumashim*, *mishnayot* and other texts that assist our learning.

The Halachic Status of Printed Materials

A possible answer is that printing is indeed a form of writing and that one can fulfill their personal obligation with printed *chumashim*, *mishnayot* and other texts. This would seem like a reasonable argument, especially in light of the fact that many of the most prominent halachic authorities do consider printing to have the equivalent status as regular handwriting. Among these are the *Magen Avraham*,¹⁵ the *Taz*,¹⁶ and many others (cf. *Sdei*

15. OC 32:57.

16. YD 271:8.

Chemed II p69, cv “*Defus*”). Those who hold it is considered a proper form of writing do so even with regard to writing a *Sefer Torah*. What is the difference, they argue, between one who brings the letters to the parchment, as is the case when a scribe manually writes the letters, and one who “brings the parchment onto the letters”? One can therefore argue that we fulfill our obligation to write *chumashim*, *mishnayot*, and other texts that are necessary for our learning by printing and buying printed books that help us study the Torah.

This, however, cannot be considered a viable solution for several reasons. Firstly, although some of the most prominent *poskim* (deciders of halacha) have taken the lenient side on this matter, the accepted ruling is that print is indeed not considered as a proper form of writing.¹⁷ Furthermore, even if we do consider print to be an appropriate form of writing, we must bear in mind that Jews do not operate most of the printing machinery. As some *poskim* have pointed out, even if we believe print to be considered by halacha an acceptable form of writing, this would not be the case if a non-Jew is operating the machinery.¹⁸ This being the case, one would not be able to fulfill their personal obligation of writing a *Sefer Torah* by a non-Jew (who does not bear the responsibility of this obligation) executing the action necessary for its fulfillment.

Contemporary *poskim* point out another highly germane issue concerning this discussion that has become increasingly relevant in the past century. Even if we assume that printing is to be considered a proper

17. Rabbi E.Y. Waldenberg, *Tzitz Eliezer* IV 10:9.

18. *Mishneh Halachot* II 212.

form of writing, this can no longer be the case nowadays for the following reason: Those *poskim* who ruled that print can be considered a legitimate form of writing did so in an era where printing was a manual action that incorporated a direct human action (referred to in halacha as “*koach gavra*”). The ink press was manually forced upon the paper, leaving the writing on the paper. This, however, is no longer the case. Nowadays, as the printing industry uses increasingly sophisticated machinery that requires less and less human involvement, all parties would seem to agree that printing does not have the same status as hand-written documents.¹⁹

Solutions to Contemporary Difficulties

Thus we are still left with a difficult issue to resolve: how do we go about fulfilling this mitzvah nowadays? The key is in the way the *Prisha* reasons in his unique ruling: he says that since we no longer learn from an actual Torah scroll, “*Lama lanu levazot Sefer Torah be’chinam?*” That is to say, since no learning will take place with this specific *Sefer Torah*, then not only is writing it no longer a mitzvah, but insisting on using it for learning would be considered compromising the scroll’s sanctity, and writing it for that purpose would definitely not be a fulfillment of this mitzvah. Following this train of thought, we can now understand why we need not try to satisfy the *Prisha*’s ruling by manually

19. *Tzitz Eliezer* Vol.15, citing the *Chazon Ish*. It should be pointed out, however, that this does not necessarily mean that printed material has no sanctity at all. Many *poskim* point out that although we do not regard printed material as having the same status as manually written material, it still has sanctity and should be treated appropriately.

writing *chumashim* and *mishnayot*. Since one cannot fulfill this mitzvah with a text that will not serve his learning in a satisfactory way, then writing such a text is not only not a fulfillment of this commandment but it is also a compromise of the text's sanctity. In contemporary times, once we have the fruits of the printing press and all of our Jewish literature is printed, having handwritten literature is of no use since no one will bother learning from hand-written scrolls. Thus, even if one would actually produce these items manually, they would not be fulfilling the mitzvah since these texts will not be enhancing or facilitating Torah learning.²⁰

What this would seem to indicate is that the mitzvah of writing a *Sefer Torah* in modern days can no longer be fulfilled according to this commonly-accepted *Prisha*; since the obligation is to write that which enhances, facilitates and enables the study of Torah, and currently we do all that by means of printing. However, although not being able to fulfill the mitzvah, we are not in violation of it since the mitzvah in its original form cannot be fulfilled in our time and in the society in which we live.

20. A similar approach can be found in the *Iggerot Moshe*. Rabbi Moshe Feinstein (*Iggerot Moshe* OC IX:39) writes that since it would be impossible for anyone to manually write all the books necessary for their learning, and even if technically one would be able to do so, it would take him a great amount of time, then doing so is not only not a fulfillment of the mitzvah but it would even be considered *Bitul Torah*—nullifying Torah study – to do so. Since the assumption that the fundamental nature of the mitzvah is to enhance our learning, then dedicating such a great amount of time to the manual writing rather than the learning cannot be consider a proper form of its fulfillment (especially in times where great quantities of learning material can be produced speedily and at low cost).

Alternative Solutions

Alternatively, one can argue that just as we are willing to accept, according to the *Prisha*'s understanding, that the literal meaning of the mitzvah is overridden by the nature of the mitzvah (i.e. the simple obligation of writing a Torah scroll is overridden by the obligation to write texts which are more conducive to contemporary learning), so too we should be able to say that the actual execution of that mitzvah should also be able to change towards that same goal. That is, since the essence of this mitzvah is that we provide ourselves with the necessary tools to study Torah, therefore not only are the exact details of what text we are producing changeable; how we are obligated to produce texts can also be changeable.

Similarly, one can also suggest since *poskim* say that in order to satisfy this obligation of writing a *Sefer Torah* one need not actually write their own but may also do so by buying themselves their personal *Sefer Torah*,²¹ the implication is that it is not the action of writing the *Sefer Torah* that is most important but rather the final result of obtaining the *Sefer Torah* that counts. Therefore once we establish that today's necessary texts are printed *chumashim*, *mishnayot*, and other printed texts from which we learn, then buying handwritten religious texts is no longer a fulfillment of the mitzvah. Rather it is the

21. Although the Ramo (YD 270:) is of the opinion that one does not fulfill their obligation by purchasing a *Sefer Torah*, the commonly-accepted ruling among *poskim* is that of the Gra and others that one may fulfill their obligation by purchasing a *Sefer Torah* (Seridei Esh II 77:3). It should be noted that even according to the Ramo, if one asks a scribe to write a *Sefer Torah* on his behalf, then he does satisfy his obligation (cf. *Pitchei Teshuva* ibid 9). Additionally, if a person buys an incomplete *Sefer Torah* and completes it even by writing just one letter, that person has properly fulfilled their obligation even according to the Ramo.

acquisition of these modern day tools of learning (such as printed *sefarim* and perhaps even computer software that assists one's learning) that fulfill this mitzvah.

A Synagogue's Responsibility

One of the areas where the difference between having a *Sefer Torah* and not having a *Sefer Torah* manifests itself most is in the synagogue. The halacha that requires the public reading of a *Sefer Torah* on every Monday, Thursday, Shabbat, and *Yom Tov*, is one that is uniformly followed in all Orthodox synagogues. The question thus becomes: Whose obligation is it to buy a *Sefer Torah* that will enable this Torah reading? Is it the individual's or the community's obligation? Does the answer depend on the previously-discussed question as to the extent of the individual's obligation to write himself a *Sefer Torah*?

This question was addressed already in very early sources. The *Tosefta*,²² codified by the *Rif*, *Rosh*, *Rambam*, and *Shulchan Aruch*, tells us that members of a city can force one another to partake in the construction of a synagogue and in the purchase of a *Sefer Torah*. The *Shulchan Aruch* adds that the reason for this is so that whoever wants to read the *Sefer Torah* can do so.²³ One

22. *Tosefta Bava Metzia* (11:12) quoted by the *Rif* in his commentary to the *Gemara* in *Bava Batra* 7b and by the *Rosh*, *Ibid.* 1:23. It is also codified by the *Rambam* in *Hilchot Tefilla* 11:1 and *Hilchot Sh'chenim*, 6:1 and codified by the *Shulchan Aruch* OC 150:1 and CM 163:1.

23. CM 163:1. There is an important disagreement in the commentaries as to the nature of this mutual obligation of a community to buy a *Sefer Torah*. Although the *Shulchan Aruch* reasons that the obligation exists so that "whoever wishes to read the *Sefer Torah* can do so", implying that the primary reason for this possession is so that those who wish to engage in Torah study (which would therefore imply the need to purchase not only a *Sefer Torah* but other scriptures as well), the *Prisha* (CM 161:1) points out that since nowadays it is common that people have other scriptures, members of

can assume, however, that just as in the case of a synagogue, if there is an existing synagogue, there would be no justification to impose on each other to build another synagogue, so, too, if there is already a written *Sefer Torah* in the community that the owner does not mind lending to the public, there would be no need to buy a communal *Sefer Torah*. Whether there is an individual obligation to write a *Sefer Torah* or not would not matter in this case.

Conclusion

We have seen that one of the 613 mitzvot is for each individual²⁴ to write his own *Sefer Torah*. Someone who wishes to follow the simple reading of this mitzvah should write a proper and kosher *Sefer Torah*.²⁵ In this

a community cannot force one another to buy scriptures other than a *Sefer Torah*. The *Magen Avraham* (OC 160:1), on the other hand, writes that nowadays since learning is not just from a *Sefer Torah*, community members have a mutual responsibility to buy also *Gemaras*, *mishnayot*, and other texts. Both seem to agree that the obligation of community members to buy a *Sefer Torah* serves two purposes: one is to facilitate Torah learning, and the other is to facilitate the communal obligation to read from the Torah (see *Tzafnat Pa'anach*, *Tinyana* p173) and that the mutual responsibility to buy a *Sefer Torah* is one that needs to be fulfilled as long as there is no *Sefer Torah* there. It seems all agree that if there happens to be a *Sefer Torah* available for the community's use, they need not buy a new one. Support to this can be found in the *Mishnah Berurah* (OC Ibid. footnote 3) who takes the position of the *Magen Avraham*.

24. Although the *Shulchan Aruch* states that one may not fulfill their obligation with an inherited *Sefer Torah*, it is the opinion of Rabbi J.J. Weinberg (*Seridei Esh* II 77) that one may fulfill their obligation with a *Sefer Torah* they receive as a present. The reason for this, argues Rabbi Weinberg, is that whereas in the case of inheritance one did nothing in order to obtain the *Sefer Torah*, but rather merely inherited it, in the case of receiving it as a gift, one must perform an act of acquisition (*kinyan*) and thus through performing an act of obtaining the *Sefer Torah* may fulfill their own personal obligation.

25. When undertaking the fulfillment of this mitzvah there is an important

way they would fulfill their obligation the way the mitzvah is written in the verse, codified by the *Shulchan Aruch*, and understood by the *Beit Yosef*.

The common custom is not to write our own *Sifrei Torah* relying on the opinion of the *Rosh*, as understood by the *Shach*, who says that the mitzvah today is fulfilled through writing *chumashim*, *mishnayot*, and other *sefarim*. It has been suggested that according to this logic, it is impossible to fulfill this mitzvah nowadays. This is because it is unlikely that manually-written texts will be used for the sake of Torah study. Since the mitzvah is to write the text necessary for our learning and our learning is not accomplished via manually-written texts then it is no longer possible to fulfill this mitzvah.

It should be pointed out, however, that according to the common and well-accepted understanding of this *Shach*, one does fulfill this mitzvah through purchasing and obtaining *sefarim* that facilitate and enhance one's Torah study.

point one should know. There is an argument that originates from earlier *poskim* with regard to a person who wrote a *Sefer Torah* which got lost or destroyed. Do we say that once he has fulfilled the obligation he no longer needs to write a *Sefer Torah* or do we say that the essence of this commandment is that one should possess a *Sefer Torah* so that they could learn from it, and once the *Sefer Torah* is no longer in existence the mitzvah can no longer be considered fulfilled (see *Pitchei Teshuva* YD 270:3)? Following the stringent opinions, many *poskim* (Rabbi Akiva Eiger YD ibid.) maintain that, similarly, once a person takes a *Sefer Torah* and dedicates it to a synagogue, or to any other institution, the mitzvah can no longer be considered fulfilled by that person. Rabbi Moshe Feinstein (*Iggerot Moshe* OC I 52) seems to be of the opinion that once the *Sefer Torah* leaves one's possession, one can no longer be considered as having fulfilled this mitzvah. However, argues Rabbi Feinstein, we can assume that when the person gave the *Sefer Torah* to the synagogue it is impossible that he meant to relinquish his possession of this *Sefer Torah*, for then he would lose the mitzvah. Rather, he intended to merely allow the synagogue to use the *Sefer Torah* until the owners discontinue this agreement.

Additionally, Rabbi Moshe Feinstein points out that if one wishes to execute the mitzvah in a fashion that is satisfactory according to all opinions, they should in addition to buying *sefarim*, financially participate in a communal writing of a *Sefer Torah*. This way, they have partial ownership in that *Sefer Torah* and they fulfill the mitzvah according to all opinions.

Whatever position taken, whether we assume it is an individual's imperative or not, there is still an obligation for every community to have a *Sefer Torah* available for fulfilling the obligation of reading the Torah publicly (*kri'at HaTorah*), just as a community has to make sure that there is a place to pray together. If an individual has a *Sefer Torah* that they are willing to lend to the public for carrying out this obligation of *kri'at ha'Torah*, then there is no communal obligation to buy a *Sefer Torah*.

On the Mitzvah of *Aliyah L'Regel* Today

Rabbi Shimshon HaKohen Nadel

Rava expounded: What is the meaning of that which is written, 'How lovely are your footsteps in sandals, O daughter of the noble?' How lovely are the footsteps of Israel when they ascend to [Jerusalem to celebrate] the festival.

Chagigah 3a

The miraculous birth of the State of Israel, followed by the dramatic reclamation of Jerusalem and the Temple Mount, raises many practical questions hitherto only dreamed about. Among them is whether the mitzvah of *aliyah l'regel*, ascending to Jerusalem for the Three Pilgrimage Festivals, still applies today, following the destruction of the Holy Temple.

The historical record is rich with descriptions of pilgrims ascending to Jerusalem three times a year, centuries after the destruction of the Temple. But authorities debate the nature of these pilgrimages, whether they were observed in fulfillment of a mitzvah

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or perhaps a custom, perpetuating the practice observed during Temple times.

Offering *Korbanot*

Prima facie, the mitzvah of *re'iyah*, (appearing before Hashem three times a year), requires bringing an offering, as the Torah (Deut. 16:16-17) instructs:

Three times a year all your males shall appear before Hashem, your God, in the place that He will choose: On the Festival of Matzot, the Festival of Shavuot, and the Festival of Succot; and he shall not appear before Hashem empty handed, each man according to what he can give, according to the blessing that Hashem, your God, gives you.

For Rambam, in fact, the mitzvah of *re'iyah* is inextricably bound with the offering of *korbanot* (sacrifices), as those ascending to Jerusalem for the Festival (*olei regel*) are obligated to bring an *olat re'iyah*, a *korban chagigah*, and *shalmei simchah*.¹ Rambam defines the mitzvah of *re'iyah* as follows:

One should be seen in the courtyard on the first day of the festival and bring with him a *korban olah*... One who comes to the courtyard on the first day and does not offer an *olah* – not only does he not fulfill a positive command – but he violates a negative command, as it says, “he shall not appear before Me empty handed.”²

1. *Hilchot Chagigah* 1:1; *Sefer ha-Mitzvot, aseh* 52-54; *Peirush ha-Mishnah, Chagigah* 1:2.

2. *Hilchot Chagigah*, ibid. Cf. *Sefer ha-Mitzvot, lo ta'aseh* 156. As the *olat re'iyah* may be offered on the subsequent days of the festival, it would appear that the violation is in fact a failure to bring the offering as *tashlumin*.

A similar approach is taken by *Sefer ha-Chinuch*³ and *Semag*.⁴ According to this view, *aliyah l'regel* today, without the ability to offer a *korban*, would be in violation of a Torah prohibition.⁵

But according to *Turei Even*, the Talmud Yerushalmi allows for the fulfillment of the mitzvah of *aliyah l'regel* without offering a *korban*.⁶ The Yerushalmi (*Chagigah* 1:1) requires even those exempt from bringing an *olat re'iyah*, for example minors, to ascend to Jerusalem.⁷ This proves, *Turei Even* suggests, that the mitzvah of *aliyah l'regel* and offering an *olat re'iyah* are indeed two separate mitzvot.⁸ Violating the *issur* of failure to bring an *olat re'iyah* does not preclude one from fulfilling the mitzvah of *re'iyah*.⁹

R. Eliezer of Metz, in his *Sefer Yereim*, offers a novel approach. He writes that one who ascends to Jerusalem, “must bring *tzedakah* or a *korban*, as is written ‘he shall

See *Lechem Mishneh*, ad loc., based on *Semag*, *lavin*, 360. See also *Chiddushei ha-Grach al ha-Shas* (New York, 1976), pp. 64-65, and *M'ginzei ha-Grach* (Johannesburg, 1989), pp. 44-46.

3. *Mitzvah* 490.

4. *Lavin*, 360.

5. The issue of offering *korbanot* today is beyond the scope of this article, but see Rabbi J. David Bleich, “Reinstitution of the Sacrificial Order,” *Contemporary Halakhic Problems* Vol. 1 (New York: Ktav, 1977), pp. 244-269, for a full treatment of the subject.

6. *Turei Even* to *Chagigah* 2a.

7. See also *Tosafot* to *Chagigah* 2a, s.v. *hakol chayavin*; *Tosafot ha-Rosh*, ad loc.; *Peirush Rabbeinu Avraham min ha-Har*, ad loc.

8. *Turei Even* to *Chagigah* 2a. This also appears to be the position of Rashi. See *Shu"t Rabbi Akiva Yosef*, *Orach Chaim*, no. 159 and *Aruch ha-Shulchan he-Atid*, *Hilchot Chagigah* 196:8.

9. See, however, *Ridbaz* and *Tosafot ha-Rid* to the Yerushalmi, ad loc., which would appear to contradict this assumption. *Minchat Chinuch*, *Mitzvah* 489-490, suggests that the notion of fulfilling the mitzvah of *re'iyah* without a *korban* would be a “mitzvah *haba'ah b'aveirah*.” See also *Chiddushei ha-Grach al ha-Shas*, p. 64.

not appear before Me empty handed,' and as it taught in the *Sifrei*, 'empty of *tzedakah*.'"¹⁰ Accordingly, the possibility of *aliyah l'regel* today would not be prevented by the inability to bring a *korban*, as one can simply give charity.

It would seem that according to *Turei Even* and *Sefer Yereim*, the mitzvah of *aliyah l'regel* is still in effect today. Without the requisite *korbanot*, one would be considered an *oness*, (a person unable to offer them due to circumstance), but would still fulfill the mitzvah of *re'iyah*.

Living Outside the Land of Israel

In a famous passage in the Talmud (*Pesachim* 3b), R. Yehudah ben Beteira foils the plan of an Aramean who boasts how each year he ascends to Jerusalem and eats from the *Korban Pesach*. In explaining why R. Yehudah ben Beteira himself is seemingly absent from Jerusalem on Pesach, *Tosafot* posit that perhaps R. Yehudah ben Beteira did not own land in Eretz Yisrael.¹¹ This would appear to be in accord with a statement of R. Ami in the Talmud. The Torah promises, "No man will covet your land when you go up to appear before Hashem, your God, three times a year" (Ex. 34:24). Based on this verse, R. Ami taught, "Every man who has land ascends for the pilgrimage, and anyone who does not have land does not ascend for the pilgrimage."¹²

10. No. 425 (403 in some editions). Cf. *Commentary of pseudo-Raabad* to *Sifrei, Re'eh*, 143, and the glosses of the Vilna Gaon, *ad loc.* See also *Malbim* to Deut. 16:16.

11. *Ad loc.*, v. *me'eilyah*.

12. *Pesachim* 8b and *Rashi*, *ad loc.*, s.v. *k'drabi Ami*. Cf. *Yerushalmi Pe'ah* 3:7. See also *Shu't Avnei Nezer, Orach Chaim*, no. 336; *She'elat Yaavetz*, vol.1, no.

At first glance it appears that Tosafot rule like R. Ami, yet this seems to contradict comments of Tosafot elsewhere.¹³ In addition, both R. Yaakov Emden¹⁴ and *Mishneh Lamelech*¹⁵ note that it is curious that Rambam makes no mention of this exemption anywhere in his *Mishneh Torah*. The *Mishneh Lamelech* suggests that this is because among those whom the Mishnah (*Chagigah* 1:1) exempts from *aliyah l'regel*, the issue of owning land is never mentioned.¹⁶ It would appear that the halacha is not in accord with R. Ami; owning land is not a requirement for *aliyah l'regel*.¹⁷

Another explanation offered by Tosafot, as to why R. Yehudah ben Beteira was seemingly absent from Jerusalem on Pesach, is that he lived in Netzivin, which is outside the Land of Israel.¹⁸ But this, too, was never mentioned by the Mishnah (ibid.) as a valid exemption. *Mishneh Lamelech* points out that while one who is farther than 15 *mil* from Jerusalem may be exempt from *Pesach Rishon*, no source indicates that one who lives in the Diaspora is exempt from the mitzvah of *re'iyah*.¹⁹ He

127.

13. *Chagigah* 2a, s.v. *chutz* s.

14. *She'eilat Yaavetz*, vol.1, no. 127.

15. *Hilchot Chagigah* 2:1.

16. *Ibid.* See also *Tosafot* to *Chagigah* 2a, s.v. *chutz*; *Turei Even* to *Chagigah* 2a; *Tzlach* to *Pesachim* 8b; *Shu"t Chatam Sofer*, *Orach Chaim*, no. 124.

17. See *She'eilat Yaavetz*, vol.1, no. 127. See also *Meiri* to *Pesachim* 8b: "Every man is obligated to be *oleh l'regel*, whether he has land or whether he does not have land."

18. *Pesachim* 3b, s.v. *me'eilyah*. See also Netziv's *Meromei Sadeh* to *Pesachim* 3b, where he explains, based on *Arachin* 29a, that property outside the Land of Israel is not considered *karka*, but rather *metaltlin*.

19. *Hilchot Korban Pesach* 1:1. See also *She'eilat Yaavetz*, vol. 1, no. 127, where he writes that one living in the Diaspora is obligated in *aliyah l'regel*, unless the trip to Jerusalem would take longer than thirty days.

writes, “In sum, the words of Tosafot from beginning to end require, for me, [further] study.”²⁰ It would seem that living inside the Land of Israel is also not a requirement for *aliyah l’regel*.²¹

Evidence of *Aliyah*

A Midrashic statement intimates that indeed the Jewish people never ceased ascending to Jerusalem three times a year: “Just as a dove never leaves its cote, even if you remove its nestlings – so too Israel, even though the *Beit Hamikdash* was destroyed, the three pilgrimages were never nullified.”²²

In fact, evidence from the Talmud and *Rishonim* suggests that *aliyah l’regel* was a reality, even following the destruction of the Second Temple. According to Rabban Gamliel (*Mishnah Ta'anit* 1:3), we delay praying for rain in Eretz Yisrael until the 7th of Cheshvan. This is to allow *olei regel* time to travel home. Why, after the destruction of the Temple, has this practice continued? The answer, writes Rabbeinu Nissim, is that “even after the destruction, there were those who gathered together from the environs to come to Jerusalem for the *regel*, as is still done today.”²³

20. *Mishneh Lamelech*, *ibid*. See also *Tzlach* to *Pesachim* 3b; *Shu”t Nodah B’Yehudah, Mahadura Tinyana, Orach Chaim*, no. 94; *Minchat Chinuch, Mitzvah 5*.

21. Much evidence suggests that *aliyah l’regel* from the Diaspora took place during the Second Temple period. See Shmuel Safrai, “*ha-Aliyah l’Regel min ha-Tefutzot B’Yimei ha-Bayit ha-Sheni*,” *Sinai* (5719), vol. 44, pp. 325-330, and his volume on the subject, *ha-Aliyah L’Regel B’yimai Bayit Sheni* (Tel Aviv: Academon, 1985).

22. *Shir Hashirim Rabbah* 1:2; *Ibid.* 4:2. See also *Kohelet Rabbah* 11:1 and *Eichah Rabbah* 1:16.

23. Ran in the pages of the *Rif* 2a, s.v. *ikka l’meidak*. See also *Beit Yosef*,

One of the reasons given in the Talmud (*Sanhedrin* 11a) for proclaiming a leap year is if the roads and bridges are in poor condition, making *aliyah l'regel* impossible. The Talmud (ad loc.) describes a number of attempts made by Rabban Gamliel to proclaim a leap year. R. Yaakov Emden identifies this Rabban Gamliel as the Rabban Gamliel who served as *nasi* in Yavneh following the destruction of the Temple,²⁴ again suggesting that *aliyah l'regel* was taking place post-*churban* (after the destruction).

While the obligation to immerse in a mikvah prior to the *regel*, per *Rosh Hashanah* 16b, is subject to controversy, according to some opinions the obligation still applies today.²⁵ This too can be interpreted as suggesting that the mitzvah of *aliyah l'regel* still applies today.

When a husband prohibits his wife from *aliyah l'regel* by dint of an oath (*neder*), the Talmud (*Nedarim* 23a) records that R. Yossi would release him from the *neder*. Maharatz Chajes writes that R. Yossi lived after the *churban*, demonstrating that “even after the *churban*, there were those who went up to pray in Jerusalem, at the site of the Temple (*mekom hamikdash*).”²⁶ In a number of places in his glosses to the Talmud and in his responsa, Maharatz Chajes offers similar analyses, citing talmudic passages he believes suggest that the mitzvah of *re'iyah* was being

Orach Chaim 117; *Levush, Orach Chaim* 117:1.

24. *She'elat Yaavetz*, vol. 1, no. 87, 89.

25. See, for example, *Shu"t Shoel U'meishiv, Mahadura Tlita'a*, no. 123.

26. Ad loc. Cf. *Shu"t Maharatz Chajes, Kuntres Acharon, Avodat ha-Mikdash*, Chap. 3. Rav Yaakov Emden in his glosses to *Nedarim* 23a, disagrees and explains the Gemara is not referring to *aliyah l'regel*, but rather the ‘*Shabta d'Rigla*,’ the Sabbath before the festival, when the Rabbi would give his sermon. Cf. *Rosh*, ad loc.

performed centuries after the destruction of the Temple.²⁷

According to the late professor Shmuel Safrai, discussion of the redemption of *ma'aser sheni* found in the Talmuds Bavli and Yerushalmi and Tosefta also suggests that *aliyah l'regel* was taking place following the destruction of the Temple.²⁸

Sefer Chasidim describes how R. Hai Gaon would ascend to Jerusalem each year on Succot and encircle the graves on Mt. of Olives seven times on Hoshanah Rabbah, evocative of the circuits around the Temple's altar.²⁹ A Geniza fragment, published in 1973, confirms pilgrimages to Jerusalem during the Geonic Period. The fragment, which belonged to a *siddur* in the Geonic Period, instructs those who are fortunate to ascend, to rend their garments when they see Jerusalem and the place of the Temple in ruin, per *Moed Katan* 26a.³⁰

The tradition continued into the *Rishonic* Period. Writing in the 13th Century, Tanchum ha-Yerushalmi describes how pilgrims would rendezvous in Meron in order to ascend to Jerusalem together.³¹ In a travelogue from the early 14th century, a student of Nachmanides describes Jews gathering together for *Pesach Sheni*.³²

27. See, for example, *Maharatz Chajes* to *Gittin* 2a, 4b; *Shu"t Maharatz Chajes, Kuntres Acharon, Avodat ha-Mikdash*, Chap. 3.

28. "Ha-Aliyah l'Regel l'Yerushalayim l'Achar ha-Churban," *Perakim b'Toldot Yerushalayim b'Yimai Bayit Sheni* (Jerusalem: Yad Yitzchak Ben-Zvi, 1980), pp. 378-381.

29. No. 630.

30. Mordechai Margaliot, *Hilchot Eretz Yisrael Min ha-Geniza* (Jerusalem: Mossad Harav Kook, 1973), p. 139.

31. See his Commentary to Joshua, 11:5. See also Avraham Yaari, "Toldot ha-Hilula B'Meron," *Tarbiz* (5722), vol. 31, pp. 73-74.

32. Published in Avraham Yaari, *Masa'ot Eretz Yisrael* (Ramat Gan: Masada, 1976), pp. 81-98.

Ishtori ha-Parchi, who emigrated from France to Israel in the 14th Century, describes how Jews came to Jerusalem from Egypt and the surrounding areas for the festivals in order to evoke feelings of anguish over the destruction of the Temple.³³ R. Shimon ben Tzemach Duran, writing in the 15th Century, describes how he was witness to a miracle on the festival of Shavuot, just like in the Holy Temple, with the synagogues being able to hold all the *olei regel* – a sign that the redemption is near.³⁴ Writing a century later, Maharat writes that *aliyah l'regel* following the destruction of the Temple is an expression of the Jewish people's great love for the Land of Israel.³⁵

The practice of *aliyah l'regel* continues until today, as Jews from around the world ascend to Jerusalem three times a year.

Ascending to Jerusalem or to the Temple?

R. Yochanan (*Chagigah* 7a) rules that the mitzvah of *re'iyah* is to appear in the courtyard (*re'iyat panim ba'azarah*). Rambam too defines the mitzvah of *re'iyah* as appearing “in the courtyard” of the Holy Temple.³⁶

33. *Kaftor va-Ferach*, Chap. 6. Cf. *Pe'at ha-Shulchan*, *Hilchot Eretz Yisrael*, Chap. 3, no. 12 and *Beit Yisrael*, ad loc., n. 27. See also the letter of Nachmanides to his son, Nachman, published in *Kitvei ha-Ramban* (Jerusalem: Mossad Harav Kook, 2002), vol. 1, p. 378, where he writes, “Many come to Jerusalem, men and women from Damascus and Aleppo and all surrounding areas, to see the *Beit ha-Mikdash* and to cry over it.”

34. *Shu"t Tashbetz*, vol. 3, no. 201, alluding to *Avot* 5:5.

35. *Shu"t Maharit*, vol. 1, no. 114.

36. *Hilchot Chagigah* 1:1. Cf. *Hilchot Beit ha-Bechirah* 1:1, where Rambam writes that the mitzvah to build the Holy Temple is in order that we may celebrate the Three Pilgrimages there, implying that the Temple is *sine qua non* for *aliyah l'regel*. See also *Tosafot Yom Tov* to *Chagigah* 1:1, where he explains that the courtyard is *machaneh Shechinah* (sacrosanct), while the Temple Mount is only *machaneh l'vivah* (sacred).

Accordingly, R. Yisrael Meir Lau, former Chief Rabbi of Israel, writes that even according to the opinion of those that *aliyah l'regel* still applies today, appearing in the courtyard would require purification from *tum'at met*, through the sprinkling of the ashes of the red heifer.³⁷

R. Akiva Yosef Schlesinger had a novel approach. He writes that one may fulfill the mitzvah of *aliyah l'regel* today by looking at the floor of the Temple's courtyard (*azarah*).³⁸ Similarly, he ruled that one should remove his glasses, as the mitzvah is to see and be seen, per *Chagigah* 2a and 4b.³⁹ Looking at the floor of the Temple Mount from above became the practice of the inhabitants of Jerusalem, *anshei Yerushalayim*,⁴⁰ among them R. Shlomo Zalman Auerbach.⁴¹

But many of the sources cited above describe pilgrimages to the city of Jerusalem, as access to the Temple Mount itself was prohibited to them. At times, even Jerusalem was inaccessible, leaving pilgrims to gather in surrounding areas, overlooking Jerusalem.⁴² It

37. *Yachel Yisrael*, no. 14.

38. *Shu"t Rabbi Akiva Yosef, Orach Chaim*, no. 158. See also R. Moshe Sternbuch, *Moadim u'Zmanim*, vol. 7, pp. 187-188, n. 1.

39. *Shu"t Rabbi Akiva Yosef, Orach Chayim*, no. 160; *Moadim u'Zmanim*, ibid.

40. See R. Moshe Nachum Shapira, *Har ha-Kodesh* (Jerusalem, 1971), pp. 275-278. Similarly, some insist on seeing the floor of the courtyard before they rend their garments as a sign of mourning for the destruction of the Temple, per *Moed Katan* 26a. See R. Yechiel Michel Tukachinsky, *Ir ha-Kodesh v'ha-Mikdash*, vol. 3, Chap. 17, pp. 216-217.

41. As told to me by R. Auerbach's son-in-law, R. Zalman Nechemiah Goldberg, on May 10, 2013.

42. R. Yechiel Michel Tukachinsky, *Ir ha-Kodesh v'ha-Mikdash* (Jerusalem, 1979), vol. 3, Chap. 15, p. 203: "...As they were unable to enter Jerusalem, they would come to the mountains that surround her, Mt. of Olives and the *tzofim* (Mt. Scopus), to see from there the place of the Temple and to shed

would seem that these sources, which describe pilgrimages made to Jerusalem throughout the centuries, describe a *zecher l'mikdash*, a remembrance, perpetuating what was done when the Holy Temple stood.

Chovah, Mitzvah, or Minhag?

According to R. Shimon ben Tzemach Duran, the mitzvah of *aliyah l'regel* is still applicable today,⁴³ his rationale being that he rules in accord with the opinion that the Temple Mount still retains its sanctity following the destruction of the Holy Temple.⁴⁴ Others, however, rule that there is no mitzvah of *aliyah l'regel* today.⁴⁵

The position of Chatam Sofer, however, requires analysis. In his eulogy for those who perished in a devastating earthquake in the Galilee, Chatam Sofer writes that "today too there is a mitzvah of ascending to Jerusalem."⁴⁶ In a responsum, he affirms the practice of *aliyah l'regel* throughout the centuries and even suggests that one who ascends from outside of the Land of Israel receives extra reward for his travel.⁴⁷ But in another responsum, he writes, "today there is no obligation to ascend for the *regel*."⁴⁸ Perhaps a distinction may be made between obligation (*chovah*) and mitzvah (a

tears for it."

43. *Shu"t Tashbetz*, vol. 3, no. 201. See also *S'dei Chemed, Ma'arechet Eretz Yisrael*, no. 1.

44. *Ibid.*

45. See, for example, *Shu"t Nodah B'Yehudah, Mahadura Tinyana, Orach Chayim*, no. 94.

46. *Torat Moshe, Emor*.

47. *Shu"t Chatam Sofer, Yoreh De'ah*, no. 233.

48. *Shu"t Chatam Sofer, Yoreh De'ah*, no. 234.

commendable act).⁴⁹ It would appear that according to Chatam Sofer, *aliyah l'regel* today is a mitzvah while not being a formal obligation (*chovah*).⁵⁰

R. Ovadiah Yosef, too, writes, “there is no doubt that is a mitzvah to ascend to Jerusalem, even nowadays, to see the face of the Living King, to bask in the courtyards of Hashem, in synagogues and houses of study...”⁵¹ However, R. Yosef’s intent, when he writes “mitzvah,” requires further investigation, as in another responsum he assumes that *aliyah l'regel* is no longer applicable.⁵² It would seem that like Chatam Sofer, R. Yosef believes *aliyah l'regel* today is a mitzvah, while not being a *chovah*. Similarly, R. Menashe Klein, in his *Mishneh Halachot*, rules that while not a formal obligation, *aliyah l'regel* is a *kiyyum hamitzvah* and writes, “even according to those who believe there is no obligation to ascend, nevertheless if one ascends he fulfills a *mitzvah aseh d'oraita*,” a positive biblical command.⁵³ R. Klein continues and explains that by ascending to Jerusalem, one is fulfilling the mitzvah of “*kabbalat p'nei ha-Shechinah*,” receiving the Divine Presence.⁵⁴ R. Moshe Nachum Shapira suggests that *aliyah l'regel*, after the destruction of the Temple, was formerly instituted by our sages as a “*zecher l'Mikdash*,” a remembrance or commemo–ration of what was performed in the Temple.⁵⁵ In his opinion, one fulfills a

49. See R. Tzvi Pesach Frank, *Mikdash Melech* (Jerusalem, 1968), p. 11, on the position of R. Tzvi Hirsch Chajes.

50. See *Har ha-Kodesh*, p. 277.

51. *Yechave Da'at*, vol. 1, no. 25.

52. *Yechave Da'at*, vol. 2, no. 10.

53. Vol. 12, no. 482.

54. *Ibid.*

55. *Har ha-Kodesh*, p. 278.

rabbinic mitzvah when ascending.⁵⁶

But according to R. Yisrael Meir Lau,⁵⁷ R. Eliezer Waldenburg,⁵⁸ and R. Moshe Feinstein,⁵⁹ the practice of *aliyah l'regel* today is merely a *minhag*, a custom, and an expression of Jewish yearning. R. Feinstein writes:

Regarding the mitzvah of *re'iyah*: It is simple and clear that it only applies when the *Beit ha-Bechirah* is built, even if we say that the mitzvah of *re'iyah* does not depend on bringing a *korban re'iyah*. While people close to Eretz Yisrael had the custom of visiting Jerusalem, this happened in the time of the Geonim as a mere remembrance and a longing for the building of Zion and Jerusalem through the righteous messiah, for whom we constantly wait.⁶⁰

Conclusion

While according to many authorities it is not obligatory today, the practice of ascending to Jerusalem three times a year is certainly laudatory. And with the ease of travel and accessibility today, *aliyah l'regel* is “not in the heavens.” For those able to ascend to Jerusalem three times a year, it would surely serve to strengthen their bond with the Land of Israel and Jerusalem,⁶¹ until we

56. *Ibid.*

57. *Yachel Yisrael*, no. 14. See also his article “*Aliyah l'Regel k'Mitzvah ha-Teluyah Ba'aretz*,” *Torah Sheba'al Peh* (Mossad HaRav Kook: Jerusalem, 1987), vol. 28, pp. 96-103.

58. *Tzitz Eliezer*, vol. 10, 1:93.

59. *Iggerot Moshe*, *Yoreh De'ah*, vol. 3, no. 122.

60. *Ibid.*

61. See *Mishneh Halachot*, vol. 12, no. 482, where he writes that perhaps today there is even a greater obligation to ascend as it fulfills the dictum of inquiring after Zion, per *Rosh ha-Shanah* 30a.

merit to see the fulfillment of the words from our liturgy,

Restore the Priests to their service and the Levites to their song and music, and restore Israel to their dwelling places. And there we will go up and appear, and bow down before You, during the Three Pilgrimages.⁶²

The author lives and teaches in Jerusalem.

62. *Mussaf l'Shalosh Regalim.*

Letters

To the Editor

I wish to congratulate Rabbi Dr Shafran on his important contribution concerning halachic issues pertaining to physical and occupational therapies (No. LXIV). Although the author himself is not a physiotherapist, it is evident that much time was spent consulting with personnel in the profession. Interestingly, a similar paper recently appeared in the April 2013 edition of the journal of the Israeli Physiotherapy Society (Riblin M, Yaakov T, Levanon E, "Sugyot Hilchatiyot be-Limudim u-ve-Avoda be-Tehum ha-Phisiotherapia, Ketav Et le-Phisiotherapia," 15:1, April 2013, pp. 20-25.)

As a physical therapy clinician, researcher and student supervisor with 25 years experience in the profession, I wish to humbly make a few comments/remarks concerning Rabbi Shafran's review:

1. The physical therapy profession has attracted for decades both religious men and women. This is evident when attending both national conferences and update courses.

2. Strengthening one's body is one of the best proven methods of preventing osteoporosis, maintaining anaerobic conditioning, preventing falls in the elderly, and slowing the fatty infiltration within skeletal muscles during the aging process. I, therefore, cannot agree with Rabbi Shafran that the therapist's contribution in this goal is not "strictly medical". Preventative medicine is certainly of great "medical concern" and importance.

3. Rabbi Shafran suggests that a physiotherapist should only "observe body parts of the opposite gender which

are usually exposed, such as hands and face". As most of the treatments in a busy manual therapy and the rehabilitation environment involve the back and lower limbs, this is indeed a mission impossible!

4. On numerous occasions, the issue of wearing gloves, during both examination and treatment purposes, is mentioned. Palpation in medicine and orthopedics in particular, is not usually connected with locating infections, as stated by Rabbi Shafran, but rather to examine for areas of pain, swelling, joint stiffness and soft tissue spasm. This cannot be effectively executed with gloves. The fingers represent a proportionately large area within the human somatosensory homunculus, and justifiably so! Other than in the field of women's health, I cannot perceive teaching students or professionally examining patients with gloves. If we generally rely on the principle that caregivers are preoccupied with their work and that any physical contact is purely professional, it seems apparent that the whole question of gloves becomes halachically superfluous and medically contraindicated.

5. There is at present no separate school of physical therapy for men and women in Israel. However, as this profession increases in popularity and becomes a more accepted part of mainstream medical practice, separate teaching institutions are only a matter of time.

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Sports Center, Hebrew
University, Jerusalem.

* * *

Dear Rabbi Walter,

Thanks for your interesting article on this difficult topic. I just wish to add one more consideration in triage. HaRav Y. Zilberstein (שעורי תורה לרופאים סימן קנה, קנט) has stated that when the group performing the medical care is a public organization, then the Mishnah in *Horayot* is not applicable. Thus, if one belongs to a health group (e.g. *Kupat Cholim* in Israel) then one has a monetary right to services based on dues paid. Similarly, in a public hospital, one has a right to treatment based on taxes paid. Since one is entitled to medical services, the medical provider cannot use criteria based on the properties of the patient, e.g., a relative or rabbi has no precedence. This would also apply to Magen David Adom. Rav Zilberstein (שעורי תורה לרופאים סימן קס"ד) further qualified the *psak* of Rav Feinstein (חו"מ ח"ב סימן עג אות ב) that a terminal patient (חיי שעה) who got a bed in a hospital comes before a later patient who has a long-term chance (חמי עולט). Rav Zilberstein said that this applies only to a private institution; however, in a public institution, the doctors have no right to make such a decision and the patient with only a short-term prospect would be removed for the patient with the long-term chance (as long as he is not attached to life support). He further extended this (in his monthly *shiur* to doctors) to saving passengers from a sinking ship, such as the Costa Concordia, since this is part of the cost of the cruise ticket. The only criteria that can be used by such organizations are medical criteria, such as long-term life expectancy.

Sincerely,

ELI TURKEL

* * *

Dear Rabbi Cohen,

I am a long time subscriber to the *Journal of Halacha and Contemporary Society*. I also recently purchased all the back issues and donated them to my Reform synagogue, Anshe Chesed Fairmount Temple, in Beachwood, Oh.

The article in the *Journal*, Pesach 5773, Number LXV, Spring 2013, on "Writing on Shabbat for Medical Care" stimulated my writing to you to ask a question.

My mother and mother-in-law live in a Jewish Assisted Living Center, Stone Gardens, which is part of Menorah Park Center for Senior Living. My father-in-law, of blessed memory, died in July. He was very hard of hearing. He was very upset that the Menorah Park rabbi, who led second Seder last year (he was at our home for Seder), refused to use a microphone. As you are probably aware, a large number of residents of assisted living are hearing impaired. Some use hearing aids and some do not. I met with the rabbi later and he defended his reasoning for not using the microphone, but he did not convince me that other rabbis might not allow the use of the microphone.

Based on the article in this issue of the *Journal*, it is apparent that not all rabbis refuse to condone using a computer to write on Shabbat. It therefore occurred to me that those rabbis might not object to using a microphone for Seder. Is it significant that Seder is usually not on Shabbat? If they used the type of microphone that is on all the time, not voice activated, one could argue that the speaker is doing nothing different with their voice whether it is amplified or not. After all, in Jerusalem it is OK to ride an elevator on Shabbat if it is set on automatic or operated by a "Shabbos Goy."

It would also seem to me that it would be a priority for an elderly Jew with hearing loss to be able to participate in the Seder and that actions that helped to compensate for physical infirmities are OK to use on Shabbat.

I would appreciate your thoughts or perhaps an article on the subject. Thank you very much for your consideration.

TOM ABELSON, M.D.
Shaker Heights, OH 441122

* * *

Dear Dr. Abelson,

Thank you for your letter and your interest in my article. Although not directly related to the topic of writing on Shabbat, your letter and your father-in-law's unfortunate hearing impairment raise the important concern of how to assist the hearing impaired in their functioning on Shabbat and Yom Tov, when most assistive devices use electricity. I obviously cannot fully evaluate all the considerations that went into the decision of the Rabbi at the assisted living center. However, one may presuppose that a lot of his reasoning may have been based upon the fact that the use of a personal hearing aid is essentially universally accepted by modern *poskim*, while the use of a microphone raises many more halachic issues. For example, some of the reasons that hearing aids are preferable and more accepted is that the sound is not audible to others and that the person speaking does not talk directly into the instrument. While your point about leaving the microphone on and not voice activated is well taken, issues such as these would likely continue to make a personal hearing aid preferable to most halachic authorities. The topic of hearing aids on

Shabbat is well discussed in many places, including this *Journal*. See, for example, the article by Rabbi Elysha Sandler in Vol 41, Spring 2001. May you have continued success in your work and your concern for the disabled.

Sincerely,

RAPHAEL HULKOWER

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TABLE OF CONTENTS

Recruiting a Surrogate for an Infertile Jewish Couple Dr. John D. Loike and Rabbi Moshe Dovid Tendler.....	5
May You Invite For Shabbat Someone Who May Desecrate the Sabbath To Attend? Rabbi Yosef Gavriel Bechhofer	23
Autopsies in the Modern Age Dr. Jonathan Rosman	39
Writing a <i>Sefer Torah</i> : Modern Permutations of a Biblical Commandment Rabbi Elchanan Poupko	59
On the Mitzvah of <i>Aliyah L'Regel</i> Today Rabbi Shimshon HaKohen Nadel.....	77
Letters.....	91
Yonatan Kaplan, Eli Turkel Tom Abelson, M.D, Raphael Hulkower	

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