Verapo Yerape

The Journal of Torah and Medicine
of The Albert Einstein College
of Medicine Synagogue

VOLUME II

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THE MICHAEL SCHARF PUBLICATION TRUST
OF THE YESHIVA UNIVERSITY PRESS
NEW YORK

Distributed by
Sheridan Books, Inc.
100 North Staebler Road
Ann Arbor, MI 48103
Email: wprocess@sheridanbooks.com
www.sheridanbooks.com

Dedication to
Daniel Shabtai Ladell, z"l

Daniel Shabtai Ladell, in his short twenty-five years of life, managed to experience more joy and love than most people who live far longer. Daniel lived his life in the moment, without regrets, and always loving what he was doing.

Daniel's major passion in life was to study the sciences and ultimately to help people through the sciences. In addition to graduating from Yeshiva University, magna cum laude, with a major in biology and a minor in chemistry, Daniel helped start the USRP, the Undergraduate Student Research Program at Yeshiva University, where students could present and share their scientific research with other students. Daniel was extremely enthusiastic about his own scientific research. He was accepted to a summer research program at the Weizmann Institute, where he studied pancreatic cancer. He spent the following summer at Harvard Medical School working on multiple sclerosis research, and eventually published his findings in the *Journal of Neuroimmunology*. After graduation, Daniel worked at the Mt. Sinai School of Medicine, focusing on the role of the lymphatic system in cancer. His work there was recently published in *Cancer Research*. He also returned to Yeshiva University, this time as a faculty member, teaching several science labs. Daniel labored and put everything he had into all of these endeavors. He was motivated to understand and analyze every aspect of his research. He read every article that was published, and was in his lab at

all hours of the day and night. He aspired to get an MD/PhD because he so desperately wanted to continue doing research. Daniel maintained a pure, unadulterated love for the sciences as well as a yearning to deeply understand the world around him, but mostly Daniel was motivated because he cared so deeply about the people his research would ultimately help.

Daniel possessed a love for all of humanity. He traveled to Honduras for a week to help build a school for children because he cared about enhancing the quality of life for all people. Daniel often spoke about the Hondurans he interacted with and how they experienced so much joy in their lives despite having so little. Daniel also started a Citiharvest venture at Yeshiva University, volunteered at New York Presbyterian Hospital, as well as tutored local public school students. Daniel hoped to one-day work with Doctors Without Borders. He so deeply wanted to reach out to those in pain and ameliorate the world's sorrows.

Daniel firmly believed that there is something to learn from every single person, and he always saw the positive in all people and in all situations. He took great pride in all his friendships, and had so much respect and care for all of his friends. Everyone who met him was captivated by his smile, his cool attitude, and his genuine and sincere care for them. When his friend Eli Steinberger died, Daniel raised over $3600 for Chai Lifeline by running in their half-marathon in Eli's memory.

When things in life got tense, Daniel knew exactly how to ease it with his well-developed sense of humor and laughter. He never dwelled on the negative in life. For him, there was simply no time for resentment or negativity.

Instead, Daniel diffused the negative by doing something positive or channeling his energy.

Daniel lived every second of his life with fullness and happiness. He is missed terribly, but his life's legacies of passion for discovery, his deep love for humanity, his belief in the goodness of others, and his embrace of all that is positive and joyful in life, will remain with us forever.

Talya Ladell Berger

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Editors' Preface

It is interesting to note that the rabbis compare Torah to medicine in numerous contexts. To take just two examples, in *Kiddushin* 30b, God is depicted as declaring, "I created an evil inclination, and I also created Torah as its antidote." Similarly, the Talmud declares that Torah can be an elixir of life or death (Shabbat 88b). What is the significance of these intriguing comparisons? Perhaps Chazal are trying to convey that the connection between Torah and medicine runs far deeper than the surface. Not only do medicine and halakha intersect at so many points, but they are parallel as well: medicine heals the body, while Torah is the panacea of the soul. Indeed, Rambam famously develops this theme in his *Shmoneh Perakim*, arguing that just as one must turn to medical doctors to heal a physical ailment, so too one must turn to the spiritual doctors, the rabbis, to heal a spiritual ailment. Thus the chosen subject of our journal – the intersection between Torah and medicine – is not coincidental but inheres in each.

This interface has never been clearer. Over the past decades and especially the past years, the number of medically related articles in Torah journals has increased dramatically. As such, the founders of *Verapo Yerape* believe there is a strong need for an American journal dedicated solely to the interface between Torah and medicine. We are proud to present the second volume of *Verapo Yerape* with this printing. This year is an important transition from the inaugural book produced last year to an annual journal publication. We hope that this second volume of the jour-

nal will continue to receive the praise that last year's book received and to attract an even broader audience of readers who are passionate about medical ethics and halakha. We encourage our readers to view *Verapo Yerape* as a forum for cutting edge articles and high level discussion on a variety of medical Torah topics. We are constantly seeking new and exciting articles to print and look forward to contributing to the popular field of medical ethics and halakha.

This journal would not have been possible without the vision of some very special individuals, including Rabbi Alex Mondrow, Dr. Yonatan Weisen, and Dr. Judah Goldschmiedt. It was their dream as the founders of *Verapo Yerape* to produce both the original book and a yearly journal, and we are delighted to continue in their footsteps. Rabbi Dr. Eddie Reichman and Rabbi Dr. Howard Apfel also played a pivotal role with the inaugural book and this journal, including mentoring and teaching some of those who contributed articles, and to them we are thankful.

We are grateful to Michael and Fiona Scharf for their kind and generous support of this project. Their vision has brought this publication and other works of Torah U Mada scholarship into reality.

We also thank Dr. Herbert C. Dobrinsky, Mr. & Mrs. Marvin Bienenfeld, Dr. Jeffrey S. Gurock, Rabbi Yona Reiss, and Rabbi Daniel Feldman of Yeshiva University and the Rabbi Isaac Elchanan Theological Seminary for their continued encouragement of our work.

Dr. Edward Burns, Executive Dean of Albert Einstein College of Medicine, has been a pillar of support for the Einstein Synagogue, and we thank him for his continued assistance.

We also thank all those who have contributed to the journal. Your efforts in writing these articles and helping to be *marbitz torah* should serve as a *bracha* to yourselves and your families.

We would be remiss not to thank you, the reader. Without people like yourselves who are interested in the interface of Torah and medicine, who seek to approach modern quandaries within the four cubits of halakha, and who demand the most rigorous of analyses thereof, this journal would not be possible.

With heartfelt thanks,
The Editors

"Verapo Yerape," Part II: Uncovering a Latent Hashkafic Divide

Origins of the Debate: an Alternative Approach[1]

Rabbi Dr. Howard Apfel

There is a far greater *chidush* (novelty) and even more profound *hashkafic* (worldview) controversy that can be found in a more subtle dimension of the *verapo yerape* discussion. It is actually within the first approach alone (that human interference is inherently immoral) that both sides of the contemporary *hashkafic* divide most sharply reveal themselves.

To reiterate, Tosafot and Rashba (Bava Kama 85a) suggested the possibility that interfering with internal disease is being *"soter gezerat ha'melech"* (attempting to abrogate the Divine decree). The double expression "*verapo yerape*" teaches however, "*kemashmelan de'shari,*" that nevertheless it is permissible. What exactly is "*kemashmelan de'shari*" referring to? Most commentators discussing this issue assume

1 Editor's note: See the author's previous article in the first volume of Verapo Yerape: And You Shall Surely Heal (Ktav 2009).

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that the permission being referred to by these words was specifically the permission to heal the sick. Is that truly the only tenable interpretation?

In reality, careful objective scrutiny suggests that there are in fact two possibilities for interpretation of these words. First, as just mentioned – the very narrow, explicit dispensation that allows medical therapy alone. Perhaps the pragmatic concern for human health overrides the otherwise very warranted limit on human interference. In this vein, it is only *bekoshi hetiru* (with great reluctance God allowed) medical treatment. Certainly, the premise that man must not interfere with *gezerot hamelech* on the whole remains intact, and "*kemashmelan de'shari,*" relates directly and specifically to healing alone.

On the other hand, "*kemashmelan de'shari*" may instead refer to something much bigger, with far more expansive application. Perhaps the *gezeirat ha'katuv* (Biblical decree) uproots the original premise entirely. "*Kemashmelan de'shari*" doesn't just mean *shari* to engage in *refua,* rather it means *shari* to be *mevatel gezarot hamelech.* Naturally, understood that way a much broader dispensation results; a "*binyan av*" (*halachic* paradigm) so to speak, that in general allows (under suitable circumstances) the overcoming of any Divine decree that challenges us.

These markedly dissimilar interpretations of the *gezeirat ha'katuv* "*kemashmelan de'shari,*" were expressed conspicuously in our times, in different contexts, by two renowned *halachic* authorities. The first approach was most explicitly articulated by Rav Moshe Feinstein in his classic work Igerot Moshe.[2] Rav Moshe was asked if an individual

2 Igerot Moshe, Orach Chaim #90.

required intravenous therapy to fast, was he required to have an intravenous catheter placed prior to Yom Kippur in order to enable him to fast. He replied that not only is he not obligated to do so, it might even be prohibited. Among the reasons for the prohibition was Rav Moshe's analysis of Tosafot's statement about *verapo yerape*:

> "Even though [medical therapy for an illness] is considered invalidating a *gezerat ha'melech*, the Torah permitted and even obligated medical intervention just as it is allowed and obligatory to **pray** to be *mevatel gezerat ha'melech* etc. Similarly the Torah allowed medical therapy with all manner of medications to be *soter gezerat ha'melech* by natural means, *ve'hu mekavshai de'rachmana she'ain lanu laida* (and this is from the Divine mysteries that are hidden from us). Therefore it is possible that the Torah does **not** allow us to be *mevatel gezerat ha'melech* in general but rather to cure the sick from his illness **only** and not to learn a *chidush* from this that me may also be able to fast, since that might be *ke'soter gezerat ha'melech* and the *melech* does not wish him to fast."

Reminiscent of the letter by the Chazon Ish, Rav Moshe alluded here to the fact that in general the permitted activity in response to *gezerot hamelech* is strictly limited to prayer. The very narrow context of *refuat cholim* is an exceptional area where for "mysterious reasons" God allowed man to attempt to intervene. Importantly, Rav Moshe emphasized (and in fact it was his main point) that interference was strictly limited to attempting thera-

peutic activity alone.[3] Providing medical intervention in order to allow the person to fast, however, (when the *gezerat haMelech* was that he not) was strictly off limits. Only in the narrowest context of actual *refuah*, by dint of the *gezerot ha katuv*, is any natural therapeutic endeavor ever permitted.

A direct contrast to this approach was suggested by Rav Herschel Schacter in an entirely different context.[4] In an essay on the mitzvah of *yishuv Eretz Yisrael* (resettling the land of Israel) Rav Schacter responded to the well-known objection to re-settlement promoted by some, perhaps most notably the Satmer Rebbe.[5] They maintained that expulsion from our land was intended as a punishment and we are therefore not permitted to avoid God's wrath (i.e. be *mevatel* that *gezera*) by ending the exile prematurely. To this argument Rav Schacter responded as follows:

> "The foundations of this argument are very shaky. Surely Judaism does not forbid the attempt to avoid or curtail a punishment from God. Often sickness is a punishment inflicted on a person for his sins, and yet the Torah explicitly grants us license to seek

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3 Does Rav Moshe's assertion preclude preventative therapy as well? Almost certainly it does not. Rav Moshe most likely meant that it is allowable to cure illness and also to prevent it altogether but was excluding specifically non-medically related objectives. This is clearly expressed by Rav Moshe's sanctioning Tay-Sachs testing (Iggerot Moshe Even Haezer IV, # 110) which involves wound infliction on healthy individuals for the sake of disease prevention, rather than treatment. Finally, he dispels all doubt by his later explicit statement (Iggerot Moshe, Orach Chaim IV # 101): "also, in reference to what I wrote in the [earlier] response... obviously one can also take medication when he is fully healthy to prevent disease from coming."

4 Rabbi Hershel Shachter, *The Mitzvah of Yishuv Eretz Yisrael*, Journal of Halacha and Contemporary Society, 1984, p29.

5 See *Sefer Va'Yoel Moshe, Ma'amar Shlosha Shevuot*. This was also the approach of the *Minchat Elazar* (Vol. 5 #12).

a medical cure – "*Ve'rapo yerape*" from which we adduce the permission granted a physician to heal."

Apparently, Rav Schecter understood the *"kemashmelan de'shari"* of *verapo yerape* far differently than did Rav Moshe. The permission granted is not limited to medical therapy; rather, the Biblical allowance to intervene presented in the context of *refuah* serves as a paradigm for other challenging situations. The permission is not only to cure, but also to attempt to be *mevatel* other *gezerot ha'melech* in general.

Obviously, these two alternatives open up the possibility for two very different *hashkafot*. By now we are quite familiar with the message of the first approach. Disease is a punishment that is inflicted by a Divine edict and should really be addressed through repentance and prayer alone. Other human attempts at fighting disease are permitted simply out of Divine compassion for human life. Perhaps this could be understood as operating analogously to the way God places human life ahead of almost all other *mitzvoth* (commandments).[6] Viewed this way, the human therapeutic endeavor itself is more or less a necessary evil, like *chilul Shabbat* (Sabbath desecration) in the setting of *pikuach nefesh* (threat to life).

Far more challenging is elucidating the message of the second less conventional interpretation. As noted earlier, illness is viewed by the majority of rabbinic authorities as a form of Divine reprimand, or minimally, as carrying a specific moralistic Divine message. At first glance, it appears

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6 As expressed by *"ve'chai bahem"* (Yomah 85b). See also Sanhedrin 73a, in particular see Rashi's comments there on *"sevara hu"*.

quite audacious, even blasphemous to suggest a warrant, let alone a mandate, to override such decrees. It also begs the question as to why the Divine lawgiver would grant a dispensation designed effectively to eliminate His own *gezerot*. In response, however, one could reasonably argue that man is not necessarily obliged to resign himself to the full wrath of a punishment in order for its intended message to be fully delivered. Perhaps one can view these *gezerot* and, in fact, all *gezerot hamelech* as challenges placed in our lives by God's design for which we are encouraged and even expected to use all our power to overtake.

Thus we have a basic *hashkafic* debate, perhaps two different worldviews whose expression was prompted to some degree by the understanding of the Torah's intent in granting a license to heal. Yet the actual origins of this broad *hashkafic* dispute likely lay elsewhere. Since the debate culminates into a very dramatic difference of opinion as to what God expects of man (and Jews in particular) in meeting life's challenges, it is logical to assume that the discussion actually goes back to the creation of mankind and the original Divine directive to mankind at that point in time.

Although this point itself can be debated,[7] for the sake

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7 Obviously this issue is far more complex than as presented here. Even on a basic level there certainly are other opinions as to what exactly the original mandate to Adam was. For example, Rav Soloveitchik's thesis in the Lonely Man of Faith is well known. In contrast to Rav Shmulevitz suggestion, presumably, even prior to his sin, Adam (I) was commanded ***"ve'kivshua,"*** which as the Ramban (on Chumash) points out was a directive to mankind to develop the material world using all available natural resources. Some however, (see for example Rav Shimon Shwab, Collected Writings) have responded to this by noting that this directive was specifically to ***bnei Adam***. However, with the *matan Torah* the Jewish people were given a different directive; to be *"mamlechet kohanim ve'goy kadosh"* (a kingdom of priests and holy nation) which implies purely spiritual goals superseding the earlier ones. For further reading see Leo Levi in *Shaarei Talmud Torah*, pp.209-214. See also, *Chovot Ha'Levavot* (*Sha'ar Ha'Bitachon* Chapter 3).

of our discussion let us assume that the consensus rabbinic opinion on the original mandate to man is similar to that expressed by Rav Chaim Schmulevitz in his celebrated *Sichot Musar*:

> "Chazal taught (Nidah 30b) 'there are no days in which man is enveloped in goodness more the those days that he is in the womb, eating from what his mother eats, drinking from what she drinks, and being taught the entire Torah, he looks and sees from one end of the world to the other etc.' In other words all is prepared for him (the fetus) without any effort on his part, even the effort involved in eating and drinking he does not have to do. And the reason for this it appears is because in truth this is the intended state of created man, and this was the state of Adam prior to his sin."

Man was meant to live like a fetus. Passively, self sufficient with all material needs provided so that he might spend his time in purely spiritual pursuits. However, that idyllic state unfortunately soon dramatically changed as Rav Schmulevitz elsewhere elaborates:

> "The creation of man was done in a way that all his needs were prepared for him, and his place was the garden of Eden ... and he had no worries nor travail over his sustenance whatsoever; however, because of his sin the curse of *'bezeat apecha tochal lechem*, (by the sweat of his brow will he eat bread - Genesis 3:19) came upon him."

According to this it was because of Adam's sin that we lost the ideal existence and were punished with the curse of "*bezeat apecha tochal lechem*" (by the sweat of your brow shall you eat bread). At that point in time living the "good fetal life" so to speak was over, and now we would have to worry about our own sustenance and invest valuable time and considerable physical effort in order to maintain it. This of course would be true despite the fact that the quantity and quality of the provisions themselves (as already noted above) would be predetermined on *Rosh HaShana*. The fact that we have to exert ourselves over them at all is a necessary evil, now understandable as part of the curse going back to Adam's sin.

In a well know response to a question on the appropriateness of acquiring life insurance, Rav Moshe Feinstein insisted that in our times no one can assume that they merit the luxury of relying on miracles for their *parnasa* (livelihood).[8] One must make their own effort to provide not only their family's current daily needs, but possible future ones as well. What is particularly interesting and relevant to our discussion is the reason Rav Moshe relates that this is so:

> And therefore it is forbidden to depend on God sending one's *parnasa* without doing any work or business, despite the fact that one must realize that all prosperity was predetermined from his work or business come directly from God according to the amount allotted on *Rosh HaShana*, nevertheless so it is ordained by God that only by some act of work or business will He send one's *parnasa*, based on the Biblical statement: '*bezeat apecha tochal lechem*'.

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8 Igerot Moshe, Orach Chaim #111.

Not because of any direct effects of our efforts but rather as a curse or punishment we are obligated to take the compulsory measures to assure our income requirements. Any successful ventures in this regard are certainly not something to be proud of. After all "*bezeat apecha tochal lechem*" is a curse and nothing more.

We have all grown quite accustomed to this approach at least when it comes to *parnasa* and therefore applying it to other areas such as medicine does not seem like such a far stretch. Disease is a punishment from God that only he alone can remove. Again for mysterious reasons (*"kavshei derachmana"* in the words of Rav Moshe) – perhaps due to human weakness (Taz to Yoreh De'ah 336) or as part of the punishment (for example to cause the patient to have to pay out money) or perhaps merely to instill within ourselves a sense of *bechira*[9] – we have no choice but to go through the motions of procuring medical assistance by natural means. Within this worldview it is easy to understand the Chazon Ish's earlier remarks that the physician not delude himself into thinking that his efforts have made any difference in a particular patient's outcome, as he is merely an incidental, albeit necessary, component for the system to work.

Obviously in light of the other worldview described above, one would expect an alternative understanding of *"bezeat apecha"* as well. A fascinating *aggadata* (Pesachim 118b) seems to provide the ideal alternative source:

> "R' Yehoshua ben Levi said at the moment that God said to Adam *'ve'kotz ve'dardar tazmiach lach'*

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9 True *bechira* (free choice) to accomplish however, resides in the spiritual world alone. This suggestion was made by Rav Eliyahu Dessler in Michtav Me'Eliyahu Vol.6 in an essay entitled; "*Taut kochi ve'otzem yadi*". It was apparently his last recorded letter.

(thorns and thistles shall it sprout for you), his eyes welled up in tears. He said, 'Creator of the universe, my donkey and I will eat out of the same trough?' Upon hearing God say '*be'zeat apecha tochal lechem,' miyad nitkararu daato* (he was instantly relieved)."

Initially, Adam was understandably very distraught upon hearing that he would now have to eat like the beasts of the field. God however responded to his tears with an unbelievable message; "*be'zeat apecha tochal lechem.*" One might have expected Adam to grow even more distraught over the prospects of even further punishment. Yet incredibly, "*miyad nitkararu daato,*" directly upon hearing the "bad" news, he felt relief. Why would Adam be consoled by a curse to work hard for his daily bread? Is not "*be'zeat apecha tochal lechem*" part of the punishment itself? Almost certainly yes, but nevertheless Chazal recognized a positive element to it as well.

The Etz Yosef [10] explained that what bothered Adam most at first was; *"ani ve'chamori nochal me'avus echad?"* (My donkey and I will eat out of the same trough?) Specifically the Etz Yosef wrote: "*ain kevodo lihiyot shaveh lebehaima*" (it is beneath his dignity to be equated with an animal). In other words, the indignity of being likened to an animal was initially the worst part of the punishment, but now upon hearing that in the end he would not be humiliated to that degree, Adam felt considerably better. Thus Etz Yosef concludes:

"Adam harishon bachar ba'lechem ve'afalpi she'yihiyeh be'toreach, kedai shelo lehidamot le'behaima, ***ve'kavod***

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10 Commentary found in the *Ein Yaakov* by Rabbi Chanokh Zundel ben Yosef of Salant, an 18th century scholar.

> ***mihah havei"*** (Adam chose to be sustained through bread despite the travail, in order not to be comparable to an animal, **and a source of dignity it certainly was**).[11]

Admittedly, it is conceivable that the redeeming quality of *be'zeat apecha tochal lechem* implied in this midrash was simply the prospects of avoiding the indignity of comparison to the beast of the field. The "*be'zeat apecha tochal lechem*" curse in its essence remains a severe punishment, particularly when contrasted with the original fetal like state of man in *Gan Eden.* Presumably that would be the rendering of this midrash according to Rav Moshe Feinstein and Rav Chaim Schmulevetz. However, to this writer, the formulation "*ve'kavod mihah havei*" (and a source of dignity it certainly was) seems to imply more. Moreover, particularly to students of Rav Soloveitchik, that very familiar term "*kavod*" (dignity) has a singular, far more positive connotation as expressed so famously in *The Lonely Man of Faith* essay:

> "The brute's existence is an undignified one, because it is a hapless existence. Human existence is a dignified one because it is a glorious, majestic, powerful, existence. Hence, dignity is unobtainable as long as man has not reclaimed himself from co-existence with nature and has not risen from a

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11 See also Berachot (8a) where the *gemara* suggests that the reward for one who benefits from the fruits of his physical toil ("*yegiat kapecha*") is even greater than *yirat shamaim* (fear of heaven). Similarly, the Maharal on that *sugya* stated that; "since he is happy and loves the merits of his hard work, it is impossible that he won't also love He who graciously gave him this... for work is the *shlaimut* (completion) of man. Finally, for many similar sources see Leo Levi op cit. pp. 221-223.

non-reflective, degradingly helpless instinctive life to an intelligent, planned and majestic one."

Rather than merely deflecting the agony and humiliation of comparability to the beast, achieving dignity according to this formulation represents the foundation of an ideal a priori desirable existence. The realization of a majestic life (as the Rav described it) is clearly something that human beings, both collectively and individually, should continuously, and more to the point **proactively**, strive to attain. Viewed this way, "*be'zeat apecha tochal lechem*" (as a potential source for the achievement of dignity and majesty) takes on a whole new meaning. True, the *be'zeat apecha* expression itself was undeniably a response to Adam's sin and represented a significant change from the idyllic status quo that existed in *Gan Eden*. However, rather than an eternal curse designed to make us suffer, it may instead represent a historic opportunity granting us the chance to achieve greatness.

Perhaps that is expressly the way *Avinu she'bashamaim* (our father in Heaven) operates when forced to reprimand his beloved children due to their sins. Every parent who is forced to discipline a child because of a wrong doing generally has recourse to two options when contemplating the most appropriate reaction. On the one hand, instinct, perhaps even anger (if not damaged pride), generates the temptation to punish in a way that will simply inflict pain. With that approach one has accomplished at best a painful deterrent to future transgression, while at worst has created a resentful rebellious child. Alternatively, the far thinking parent will understand the advantage of instead devising a creative punishment that will give the child an opportu-

nity to correct his mistake. Surely we can assume that God would likely be dealing with us along this latter route.

One might even be able to argue that "*be'zeat apecha tochal lechem*" represents an opportunity to go **beyond** where we were **prior** to the sin. In other words, we need to ask ourselves when did we have it better, as fetuses in *Gan Eden* or as people searching for a dignified existence after the sin. Perhaps this is even the essential *nekudat ha'machloket* (point of departure) between the two world views that we have been searching for.

Interestingly, the midrash (Pesachim 118b) already noted above seemed to have addressed this final consideration as well. Immediately following the line that states: "Upon hearing God say '*be'zeat apecha tochal lechem*' he was instantly relieved," the very next line in the *gemara* continues with "and Reish Lachish said *ashreinu*" (we are fortunate). Intriguingly however, because of a *girsa* (textual variant) discrepancy we are unsure as to what exactly is the source of this fortunate state. The confusion relates to knowing exactly what the next word is supposed to be. The text presents two options: "*ashreinu* ***im*** *amadnu be'rishona*" (we are fortunate **if we remained** as in the beginning (i.e. before the sin)) or "*ashreinu* ***she'lo*** *amadnu be'rishona*" (we are fortunate **that we did not** remain as in the beginning). According to the first *girsa,* the ideal state of affairs for mankind was clearly the fetal like state that existed prior to Adam's sin. In contrast, according to the second *girsa*, we are most fortunate that things have significantly changed! This incredible *girsa* discrepancy confirms at the very least that the fundamental argument between the two contemporary world views that we have been discussing is likely a very ancient one.

Midrash, Miracles and Motherhood: The Birth of Dinah and the Definition of Maternity *Tzarich Iyun L'Dinah*

Rabbi Dr. Edward Reichman

I. Introduction

In the present age of medical discovery, with developments completely unforeseen by our predecessors, it is challenging to find legal precedent in both American law and halakhah to address the attendant legal ramifications of these new technologies. The field that perhaps best typifies this trend is the specialty of reproductive medicine and the treatment of infertility. Physicians now have the ability to manipulate the process of procreation in ways previously assumed to be relegated to God alone.

For the last few decades, rabbinic authorities have searched for legal precedent to address issues such as donor insemination, surrogacy, pre-implantation genetic diagnosis, stem cell research, and the production of artificial

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reproductive seed. As there is rarely clear and direct precedent in the Torah, Talmud or legal codes for such historically novel innovations, rabbinic authorities must expand their search to unconventional areas of rabbinic literature, such as the midrashic, aggadic, or other non-legal texts. For example, early discussions on artificial insemination focused on the story of Ben Sira, a story that while cited tangentially in halakhic sources ultimately derives from a non-halakhic and non-midrashic source.[1]

One area in which a non-halakhic source has featured prominently in the halakhic discussions is the definition of maternity in the case of surrogate motherhood.[2] The halakhic solution to the definition of maternity in such cases remains one of the most complex issues in contemporary medical halakhah. There is no consensus on this matter, and all possible legal positions have been espoused by contemporary authorities.

Of the few sources that have been found to be relevant to the halakhic discussion of maternity, we find the Biblical story of the birth of Dinah. In this essay, we analyze the rabbinic approaches to this story, as well as the incorporation of this story into the exegetical literature (*parshanut hamikrah*). We then review the uses of this story in halakhic discussions on the definition of maternity. While this story has received brief, sporadic treatment in the past, this essay provides an extensive review of the rabbinic literature on this topic.

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1 E. Reichman, "The Rabbinic conception of conception: An exercise in fertility," Tradition 31:1 (Fall 1996), 33-63.

2 Technically, a surrogate mother provides both the egg, as well as the gestation. Mary Beth Whitehead was the first American surrogate mother. A gestational host is the term for a woman who carries an embryo created from another egg donor. This essay refers to the case of a gestational host, though I use the commonly accepted colloquial term surrogate mother instead.

II. The Story of the Birth of Dinah

In *Bereishit*,[3] we read of the births of the children of Yaakov. Leah gives birth to six of the twelve tribes, and for the birth of Leah's first six children, the Torah states that she conceived (*vatahar*) and she bore (*vatailed*) a child. For the description of the birth of Dinah, however, the Torah deviates from the typical phrasing, stating, "And afterwards, she bore a daughter and named her Dinah." It is the use of the word "afterwards" (*v'achar*), as well as the change from the previous literary pattern of "she conceived and she bore" (*vatahar vatailed*) that draws the attention of the midrashim. The multitude of interpretations and versions of the events that flow from this deviation comprise the substance of this essay.

Version 1A- Gender Change through the Prayers of Rachel

We begin our analysis with *Bereishit Rabbah*:

> And afterwards she bore a child, etc., We learn, if one's wife is pregnant, and he prays 'may it be thy will that my wife bear a male child,' behold this is a prayer in vain... R' Yehuda bar Pazi says even if the woman is sitting on the birthing stool, the gender of the child can change... as it is written 'and afterwards she bore a daughter.' Dina was originally created as a male, and through the prayers of Rachel, who said, 'may Hashem add for me an additional son,' the child became a female.[4]

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3 Chapter 30.

4 Albeck, 72.

The *Midrash* adds that the matriarchs, including Rachel, were prophetesses, and that Rachel asked God for only "one" additional son, in the singular, since she knew that after the birth of Yosef only one of the total of twelve tribes was yet to be born. A number of key points can be gleaned from this *Midrash*: 1) Rachel is the one who prays; 2) The substance of the miracle was a gender change of the fetus in Leah's womb from male to female; 3) The event transpired *after* the birth of Yosef.[5]

The *Talmud Yerushalmi*'s approach is consistent with that of the *Midrash Rabbah*, and addresses the reason for the Torah's use of different phrasing for the birth of Dinah.

> In the name of Beit Yannai, the initial conception of Dinah was as a male, but after Rachel prayed, the fetus was changed to female, as it says "And *afterwards* (my emphasis), she bore a daughter and named her Dinah." *After* (my emphasis) Rachel prayed, the fetus became female.[6]

Version 1B- Gender Change through the Prayers of Leah

The *Midrash Tanchuma*[7] has a slightly different variation of the events that led up to Dinah's birth. Similar to the *Midrash Rabbah*, the discussion begins with the question of whether one can pray for the gender of a child when

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5 For further elaboration of this version, see R' Menachem Kasher, *Torah Shleimah, Vayeitzei*, 67; *Pardes Yosef, Parshat Vayeitzei*, n. 21. The *Pardes Yosef* attempts to align the commentary of *Ibn Ezra*, who claims that Zevulun and Dinah were twins, with the version that Rachel is the one who prayed for the gender change. *Chizkuni* and *Radak* also claim that Dinah was Zevulun's twin.

6 *Yerushalmi Berachot* Chap. 9, Halakhah 3.

7 *Vayeitzei*, n. 8

one's wife is already pregnant. As proof that one indeed can change the gender of the fetus through prayer, the *Midrash* brings the story of Leah. According to the *Midrash*, after she bore six sons, Leah saw through prophecy that twelve tribes would be born to Yaakov. She had already given birth to six of them, and was now pregnant with another male child. According to her calculations, the two maidservants had each given birth to two, for a combined total, with her six, of ten. If she would deliver another male child, this will leave only one male child left to be born to Rachel. Rachel would then be inferior to even the maidservants who each bore two of the tribes. Leah therefore prayed to God:

> Master of the world, if my child is a male, Rachel will then be of even lesser status than the maidservants, (who each bore two of the tribes).

The *Midrash* then continues:

> Immediately God heard her prayer and the male fetus in her womb was changed to a female.

The *Midrash* also explains why Leah chose to call the child by the name of Dinah:

> And why did Leah call the child Dinah? Because the righteous Leah stood *b'din* (in judgment) before God. God responded to her- Just as you are merciful, I will also have mercy on her (Rachel), as its say immediately thereafter, "and God remembered Rachel."

While the nature of the birth described by the *Tanchuma*, a gender change of the fetus in-utero, is identical to that of the *Midrash Rabbah*, there is one fundamental difference. In the *Tanchuma*, it is Leah who prays, as opposed to Rachel. Dinah's name conveys this fact. It also appears clear from the *Tanchuma* that Yosef was not yet born at the time of Leah's prayer, as Leah enumerates all the existing male children, and a child from Rachel is not amongst them.

The Talmud appears to follow the tradition of the *Tanchuma*,[8] and like the other sources, begins with a discussion of the effectiveness of praying for a specific gender child once a woman is already pregnant. As proof that prayer can effectuate gender change, the story of Leah is mentioned. Like the *Tanchuma*, the Talmud maintains that Leah prayed after making the calculations of how many of the tribes (*shevatim*) would be born by Rachel. Her prayers were answered and the male child in her womb converted to a female. The Talmud concludes, however, that one cannot learn the effectiveness of prayer for gender from this case, as this case was miraculous, and an exception to the natural order.

The continuation of the passage is also relevant to our discussion below. The Talmud continues that perhaps the case where Leah prayed was within forty days gestation, when one can indeed change the gender with prayer. But, the Talmud queries, can one indeed change the gender with prayer even within forty days? R' Yitzchak, son of R' Ami, states that if a man is *mazria* (emits seed) first it will be a female child, while if a woman is *mazra'at* (emits seed) first

8 *Berachot* 60a.

it will be a male child.[9] Thus, it is reproductive physiology, the seed emission, which determines gender immediately, and irrevocably, upon conception. Prayer could not possibly alter this. The Talmud responds by claiming that in a case of simultaneous seed emission (*hazra'ah*), the gender is not immediately determined, and prayer can still have an effect for forty days. This notion of gender determination associated with precedential seed emission is a key to the explication of a number of Biblical passages discussed below.

Like the *Tanchuma*, the Talmud maintains that Leah is the one who prayed, and the nature of the miracle was an in-utero gender change of the fetus from male to female.

Version 2A- Inter-Uterine Exchange of Dinah and Yosef

There is yet another variation on the birth of Dinah that is found in the *Targum Yonatan ben Uziel.*[10] It is this quite different version of the miraculous birth of Dinah that features in contemporary halakhic discussions of surrogate moth-

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9 The words *mazria* and *mazra'at* are the masculine and feminine forms of the verb to give forth seed. What exactly was meant by *Chazal* by the term *mazria*? For the male, it is clearly interpreted as the emission of reproductive seed, but for the female, it is not at all clear. *Chazal* were not aware of the woman's parallel seed emission, ovulation, although they do acknowledge a contribution of the female. Did they interpret *mazra'at* as the female climax, or as the emission of some form of seed? How is the entire principle of gender determination based on precedence of seed emission to be interpreted in light of modern medicine? This is not our focus here, and the reader is referred elsewhere. See Yaakov Levi, "*Isha ki tazria*," *Koroth* 5:9-10(July, 1971), 716-17; Julius Preuss, *Biblical and Talmudic Medicine*, Fred Rosner, trans. and ed. (Hebrew Publishing Company; New York, 1978), 390-391; N. Kass, "Sex determination: Medically and in the Talmud," *Koroth* 7:11-12(June, 1980); F. Rosner, "Sex preselection and predetermination," in his *Biomedical Ethics and Jewish Law* (Ktav, 2001), 165-173; A. Korman, *HaAdam v'Tivo biMada uvYahadut* (Tel Aviv, 2002), 112-118. For our purposes, we acknowledge that this principle of gender determination was an accepted fact by *Chazal*, and one which created a number of exegetical challenges, as we shall see below.

10 *Bereishit* 30:21.

erhood. According to the *Targum Yonatan* it is Leah who prayed, based on the same calculations of the total number of tribes, but the nature of the miracle was radically different.

> And God heeded the prayers of Leah and exchanged the fetus in her womb; and Yosef was placed in the womb of Rachel, while Dinah was placed in the womb of Leah.

Instead of a gender change in-utero, the *Targum Yonatan* describes an inter-uterine transfer or exchange. Leah and Rachel were pregnant simultaneously, with Leah carrying a female fetus and Rachel a male fetus. After Leah's prayers, the two fetuses exchanged places, with Leah giving birth to Dinah and Rachel to Yosef.[11]

The *piyyut* (liturgical poem) "*even chug*" recited on Rosh Hashanah also corroborates this version of the story.[12] The author, assumed to be R' Eliezer HaKalir, in talking about the travails of the infertile Rachel, and her ultimate blessing of fecundity, states "to appease her by exchanging Dinah for Yosef."[13] This is generally accepted as referring to the inter-uterine exchange.

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11 This version is often quoted from the *Maharsha* (*Niddah* 31a), who cites the *Paneach Raza* as also espousing the inter-uterine transfer version, and uses this version to solve a textual difficulty in the Torah raised by the account of Dinah's birth as told in *Berachot*.

12 Complete Artscroll Machzor for Rosh Hashanah (Mesorah Publications; Brooklyn, 1985), 312.

13 Regarding the value and perception of the *piyyutim* in the eyes of rabbinic authorities, R' Eliezer Fleckeles writes in the very first responsum of his *Teshuva Me-Ahavah*: "Come and see how precious were the *piyyutim* in the eyes of the holy *Rishonim* to the extent that all their writings and language were well known to them (*shegura b'fihem*), as I will show you many examples." One example R' Fleckeles cites is the case of Dinah and the use by the *Maharsha* of the language of the *piyyut* to support his thesis.

In the premier Hungarian halakhah journal *Vayelaket Yosef*,[14] in an article devoted to the analysis of the story of Dinah's birth, R' Shlomo Fisher posits a novel thesis in claiming that the passage in *Berachot* (see above) actually refers to an inter-uterine exchange, consistent with the approach of the *Targum Yonatan*, and *not* to a gender change, as is conventionally thought.[15] (More on this below.) R' Fisher bases this, in part, on two linguistic observations: 1) After recounting the incident of Dinah's birth, the *Gemara* discounts it as a proof to its question by claiming, "*ain mazkirin ma'aseh nissim*," we do not bring proof from miracles. R' Fisher points out that the word "miracles" is in the plural, implying that there was more than one miracle in this case. He considers this an allusion to the fact that there was an inter-uterine exchange, and thus two miracles that transpired- one for Leah and one for Rachel.[16] 2) When the *Gemara* recounts the nature of the miracle it states, "*miyad nehefchah l'bat*," the fetus immediately converted to a female. R' Fisher notes that the word *nehefchah* is in the feminine. Had the miracle been that the male fetus converted to a female, the phrase should have been in the masculine, *nehefach*, as it was the male fetus that converted. Rather, the meaning of the phrase is that the fetus was converted for *her*

14 *Vayelaket Yosef* 6:9(Adar, 5664) [February-March, 1904], n. 82.

15 He does not mention that his predecessor, R' Moshe Margalit, espoused the same thesis in his *Mareh HaPanim* on the *Talmud Yerushalmi*, although the latter's analysis is not as fully developed. (See below on approach to variant versions.) The *Maharsha* cited above appears to maintain this approach as well.

16 One could ask why in fact there had to be two miracles. Transferring Yosef to the womb of Rachel was necessary to accomplish the main objective of Rachel giving birth to two of the *shevatim*. Why was it necessary for Dinah to be transferred to the womb of Leah? What did this accomplish? See *Pardes Yosef*, *Parshat Vayeitzei*, n. 21 who cites the *Livyat Chen*'s answer to this question.

(Leah) into a female, after the inter-uterine exchange.[17]

R' Fisher also claims that the inter-uterine exchange can even be inferred from the Torah's language. The word that serves as the basis for the notion that Dinah's birth was unique is "*v'achar*," and "afterwards," Leah bore a daughter. The rabbis interpret the word "afterwards" to indicate after Leah made a judgment about her child. R' Fisher queries where this is alluded to in the word "*v'achar*?" All this word means is that the following transcribed events happened "afterwards." R' Fisher therefore offers a novel interpretation of the use of the word as a means of alluding to the miracle of the inter-uterine exchange. After recounting the birth of Zevulun, the Torah recounts the births of Dinah and Yosef. One would obviously think that these events occurred in sequential order. However, the introduction of the word "*v'achar*," according to R' Fisher, indicates otherwise. It means that "after" the following *group* of events transpired, namely the simultaneous pregnancies of Leah and Rachel and subsequent inter-uterine exchange of Dinah and Yosef, *then* Leah gave birth to a daughter. The word "*achar*" implies "after" all the events recounted below, including the birth of Yosef. This is not to be understood as a standard description of consecutive events; rather the whole section needs to be considered together.

Version 2B- Inter-Uterine Exchange of Dinah and Binyamin

There is one version according to which Rachel prayed after Yosef was born, and at that stage there was an inter-

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17 One could argue that the phrase should then have read "*miyad nehefchah lah l'bat*," that the child was converted *for her* into a female.

uterine transfer between Leah and Rachel. However, according to this version, it was Binyamin, not Yosef, who was switched with Dinah.[18] This version is not cited extensively in the exegetical or later halakhic literature.

Version 2C- Combination of Inter-Uterine Exchange and Gender Change

R' Avraham Yaakov HaLevi Horowitz, in his *Tzur Yaakov*,[19] offers a truly unique interpretation of the inter-uterine exchange mentioned in the *Targum Yonatan*. He claims that the physical bodies did not switch between the wombs of Leah and Rachel; rather, the male child within Leah changed to a female, and the female child within Rachel became a male. Only the souls switched after the gender changes took effect. This version contains both a gender change and an inter-uterine transfer, though the transfer was not of the physical bodies, but of the metaphysical souls. This is a synthesis of the two major versions of the birth of Dinah.[20]

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18 This is cited in the name of *Seichel Tov* by R' Menachem Kasher, *Torah Shleimah, Vayeitzei*, 67-69. R' Kasher details a number of textual variants in the *midrashim* and *Yerushalmi* about the story of Dinah's birth and raises a series of questions created by the textual inconsistencies.

19 n. 28. See below, section on ovarian transplantation, for further treatment of this source. See also, R' Meir Bronsdorfer, "Egg donation and the *yichus* of the child," (Hebrew) *Yeshurun* 21(*Nisan*, 5769) [April, 2009], 557-564, who incorporates this source into his halakhic discussions.

20 R' Tzvi Ryzman in his *Ratz KaTzvi* (E. H., chapter on *hashtalat shachlot* [ovarian transplants]) assumes that the simple meaning of the passage in *Berachot* regarding the gender change is that there was a gender change for the fetuses of *both* Leah and Rachel. Perhaps he derived this from R' Horowitz (*Tzur Yaakov*, n. 28), who he cites, and who seems to imply this as well. I have not come across this approach to the passage in *Berachot* elsewhere, and the accepted meaning of the passage is that there was only a gender change of the fetus within Leah. According to this accepted version, Rachel was not necessarily pregnant simultaneously with a female child, and there was no need for the event to involve Rachel.

Approach to the Variant Versions

R' Moshe Margalit, in his commentary *Mareh HaPanim* on the *Talmud Yerushalmi*[21] was well aware of the conflicting versions of the birth of Dinah and asserts that, for each approach, the originator of the prayer determined the nature of the subsequent miracle. According to those who maintain that Rachel is the one who prayed,[22] the prayer occurred after the birth of Yosef, and the miracle was a gender change of Leah's fetus. An inter-uterine transfer could not have been possible if Yosef was already born. According to those who maintain that Leah is the one who prayed, Rachel was pregnant, but Yosef was not yet born. The miracle was the inter-uterine exchange of Yosef for Dinah.[23]

The *Mareh HaPanim* uses this approach to interpret the conclusion in *Berachot* that we do not learn from miracles. The conclusion of the Talmud is *not* that one cannot, in general, learn from miraculous incidents, but rather, in this case, as Leah is the one who prayed, the miracle was an inter-uterine exchange. Since there was no gender change in this miracle, one of course cannot learn about the power of prayer to change gender from this incident.

The problem with this interpretation is that the passage in *Berachot* states explicitly that upon Leah's prayer, the fetus immediately converted to a female. It does not imply or state explicitly that there was an inter-uterine ex-

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21 *Yerushalmi Berachot* Chap. 9, *Halakhah* 3, s. v., "*al shem*."

22 *Midrash Rabbah* and *Yerushalmi Berachot*.

23 For another approach to the differences between the versions of the *Bavli* and the *Yerushalmi* of the birth of Dinah, and how this relates to whether Leah or Rachel prayed, see R' Yoel b. David Dispeck (1715-1793), *Pardes Dovid* (Warsaw, 1900), 47. R' Dispeck also discusses the gestational period up to which one can pray, whether up to forty days or to the time a woman sits on the birthing stool, and how this relates to the differences between the two Talmuds.

change. The *Tanchuma* also maintains that Leah prayed, yet the miracle was a gender change, not an inter-uterine exchange. The *Mareh HaPanim* was not the only one to maintain that the passage in *Berachot* in fact assumes that there was an inter-uterine exchange.[24]

III. The Story of the Birth of Dinah in Biblical Commentaries

The story of the birth of Dinah, especially the version of the inter-uterine exchange, has been mentioned by Biblical commentators throughout the centuries to either interpret cryptic phrases or to solve seeming interpretive contradictions. The following section draws on a wide array of sources that have invoked the story of Dinah's birth in their commentaries. While the focus of these sources is purely exegetical, we can nonetheless infer from a number of them the author's position on the definition of maternity in halakhah.

The Change of Language by the Birth of Dinah

As discussed above, the Torah's deviation from the phrase "and she conceived and she bore" (*vatahar vatailed*) serves as a springboard for the discussions of Dinah's unique birth. The *Da'at Zekainim MiBa'alei Tosafot*[25] follows the approach of the *Targum Yonatan* that the miracle was an inter-uterine transfer, and adds an additional textual interpretation. In the case of Dinah's birth, the Torah deviates from the typical phrasing of "she conceived and she bore," stating instead, "and afterwards, she bore a daughter

24 See position of R' Fisher, in *Vayelaket Yosef*, discussed above.

25 *Bereishit* 30:21.

and named her Dinah." While other sources focus on the use of the word "afterwards," the *Da'at Zekainim* addresses the absence of the phrase "she conceived and she bore." By the other births, Leah both conceived and bore the same child. In this case, while she conceived one child, Yosef, she gave birth to another, Dinah, as an inter-uterine exchange occurred. That is why the Torah could not say that "she conceived and she bore" a child. This was simply not true for the birth of Dinah.[26]

The naming of Yosef by Rachel

In his *Pardes Yosef*, R' Yosef Patsanovski employs the inter-uterine exchange to interpret the statements of Rachel after Yosef's birth.[27] In naming Yosef, Rachel says, "*asaf Hashem et cherpati*" –"God has brought in my disgrace."[28] According to the *Pardes Yosef*, Rachel meant that her disgrace was mitigated in front of the world, as now a child was born to her. She however knew that this was not truly her child, but one conceived in the womb of Leah. She therefore says, "*Yosef Hashem* ***li*** *ben achair*," may God add on for *me* another child, a child that I will conceive and

26 R' Chezkiya Manoach offers the same interpretation of this verse in the *Chizkuni*. This interpretation would work equally well for the other version of the miracle, that there was an in-utero gender change. In this case as well, it would be inaccurate to state that Leah both conceived and bore a female child, as she initially conceived a male child. A challenge to the interpretations of the *Da'at Zekainim* and *Chizkuni* , however, is the use of the phrase "*vatahar vatailed*" for the birth of Yosef. If indeed the deviation from the phrase "*vatahar vatailed*" is because there was an inter-uterine exchange, this should have applied equally to the Rachel's birth of Yosef. Yosef also was not both conceived and born by Rachel, and this phrase should have been omitted there as well. See also *HaTur HeArukh*, *Bereishit* 30:21.

27 *Pardes Yosef*, *Parshat Vayeitzei*, n. 21.

28 *Bereishit* 30:23-24.

will truly be mine.[29] This assumes that Rachel was aware of the exchange. This also assumes that the "genetic" mother is the halakhic mother.

The Prelude to the Rape of Dinah

Rabbi Eliezer Friedman, in an article in the halakhah journal *Tel Talpiyot*,[30] questions the motivation behind Rashi's comment on the verse that introduces the story of the rape of Dinah, "and Dinah the daughter of Leah went out" ("*vataitze Dinah bat Leah*").[31] Rashi compares Dinah's going out to Leah's going out. What bothered Rashi about the fact that Dinah was here referred to as the daughter of Leah, and not the daughter of Yaakov, to the extent that he needed to justify it by creating a comparison between Leah and Dinah. He answers that Rashi was compelled to address the fact that Dinah was called the daughter of Leah, and not Yaakov, in order to be consistent with his approach elsewhere. On the verse "in addition to Dinah *his* daughter,"[32] Rashi specifically notes that Dinah, a female, is associated with her father, based on the Talmudic principle regarding gender determination and the timing of seed emission. (See above.) Therefore, when the Torah writes "and Dinah the daughter of Leah went out," and deviates from this pattern, Rashi is compelled to find a specific reason for the change.

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29 See same idea in R' Mordechai Carlbach, *Chavatzelet HaSharon*, *Bereishit*, *Vayigash* p. 658.

30 *Tel Talpiyot* 19:7(*Tevet*, 5671) [January, 1911], n. 58, p. 55-56. R' Friedman addresses the position of Rashi and arrives at the identical conclusion as R' Fisher, though he was clearly unaware of R' Fisher's earlier lengthy contribution.

31 *Bereishit* 34:1.

32 *Bereishit* 46:15.

However, R' Friedman questions the very position of Rashi that Dinah, a female, should be associated with her father, based on *Berachot*, which states that Dinah was conceived originally as a male, only later to be converted to a female. Therefore, Dinah should not be called the daughter of Yaakov. R' Friedman therefore posits that Rashi did not accept the notion of a gender change; he accepted the version of the *Maharsha*, the *Targum Yonatan* and the *piyyut* that there was an inter-uterine exchange. Therefore, Dinah was conceived and born as a female and should rightfully be identified as the daughter of Yaakov. Therefore, when she is identified as "*Dinah bat Leah*," Dinah the daughter of Leah, this is a deviation from the accepted norm and begs interpretation. This is what led Rashi to provide the commentary that the goings out were parallel between Leah and Dinah.[33]

The Age of Yosef When He Descended to Egypt[34]

In the context of his lengthy essay on Rashi's approach to the birth of Dinah, Rabbi Shlomo Fisher utilizes the story of the inter-uterine exchange to interpret a Biblical passage.[35] He comments on the necessity of the Torah to mention the age of Yosef when he was sold by his brothers – seventeen years of age.[36] He mentions the tradition

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33 R' Friedman offers a proof that Rashi held of the inter-uterine exchange theory based on Rashi's alternate version of the text of the passage in *Berachot*.

34 See R' Yehoshua Yaakov Rabinowitz (1801-1901), *Ein Yaakov* (Pietrikov, 5655 [1895]), 17-19, for an explanation of the dreams of Yosef based on the different versions of the birth of Dinah.

35 *Vayelaket Yosef* 6:9(*Adar*, 5664) [February-March, 1904], n. 82, p. 82. More on this essay below.

36 *Bereishit* 37:2.

that all the *shevatim* were born with a female twin.[37] Since maternal siblings are forbidden to marry according to the Noachide laws, each *shevet* married a daughter from another mother. R' Fisher claims that Yosef would naturally have married Dinah, as Yosef assumed that they were from different mothers. He was unaware of the miraculous inter-uterine exchange that led to his birth. In fact, however, as both Yosef and Dinah were created from the womb of Leah, they were not only paternal siblings, they were, according to R' Fisher, maternal siblings as well. In order to prevent Yosef from the sin of elicit sexual relations (*arayot*), God arranged for him to descend to Egypt at the age of seventeen, shortly before the typical age of marriage, eighteen. This seems to imply that both conception and gestation can determine maternity, as Leah conceived Yosef, but only gestated Dinah, yet R' Fisher considers Leah to be the halakhic mother of both.

Yehuda's Appeal Not to Kill Yosef

R' Meir Simcha of Dvinsk invokes the inter-uterine exchange in at least two places in his Biblical commentary, *Meshekh Chokhmah*. In the first case, he uses it to explain an extraneous phrase in the story of Yosef and his brothers.[38] In appealing to his brothers not to kill Yosef, Yehudah

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37 See R' Fisher's article for further elaboration of this idea. He addresses whether Yosef and Dinah, who were born through unusual means, also had twins. For a review of the literature on the notion that twins were born with each *shevet*, including specific discussion about Dinah and Yosef, see M. Greenbaum, "On the twins born with the *shevatim*," (Hebrew) *Nezer HaTorah* (*Nisan*, 5768), 117-121. See also *Pardes Yosef*, *Parshat Vayeitzei*, n. 21, who incorporates the twinning tradition into his commentary on the story, and also explains the Ibn Ezra's interpretation that Zevulun and Dinah were twins.

38 See second example below.

says of Yosef, "he is our brother, our flesh."[39] The *Meshekh Chokhmah* explains the addition of the phrase "our flesh," in the following manner. According to Talmud *Niddah*, there are three partners in creation. The man contributes the white substance from which are derived the bones, etc., and the woman contributes the red material from which are derived the skin and the flesh.[40] If there was an inter-uterine exchange when Yosef was born, then he was originally conceived by Leah. It was Leah, then, the woman, who contributed his flesh. What Yehudah was alluding to was that Yosef was both their paternal sibling, "our brother," as well as their maternal sibling, "our flesh," as the flesh is derived from the mother, and they shared a common mother, Leah. This assumes that the "genetic" mother is the mother. It also assumes that Yehudah was aware of the inter-uterine transfer.[41]

The Daughters of Yaakov Comfort Him

The *Chatam Sofer* (R' Moshe Sofer) uses the story of the inter-uterine exchange to explain a very perplexing *Midrash*. When Yaakov mourns upon hearing of Yosef's disappearance, the Torah informs us that "all his sons and all his daughters arose to comfort him."[42] Many commenta-

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39 *Bereishit* 37:27.

40 For further analysis of this passage, and of the rabbinic literature that deals with the male and female contributions to the child, see E. Reichman, "The Rabbinic conception of conception: An exercise in fertility," *Tradition* 31:1 (Fall 1996), 33-63. See also, R. Kiperwasser, "'Three partners in a person': The genesis and development of embryological theory in Biblical and Rabbinic Judaism," *Lectio Difficilior* 2(2009), 1-37.

41 See *Teshuvot HaRabaz*, E. H., 5, who gives the identical interpretation of the phrase "our brother, our flesh."

42 *Bereishit* 37:35.

tors focus on the use of the plural form for daughters. As only one daughter of Yaakov, Dinah, is listed in the Torah, what could the plural term "daughters" be referring to?[43] Some introduce here the notion that each son (*shevet*) was born with a twin, therefore Yaakov actually did have many daughters.[44] The *Chatam Sofer*, however, addresses a different midrashic statement. The *Midrash* asks: "How many daughters did Yaakov have? He only had one, and even this one he would have preferred to bury." The *Chatam Sofer* posits that Yaakov associated the (supposed) death of Yosef with the bad *mazal* of Rachel. He quotes Rashi as subscribing to the story of the inter-uterine exchange that Yosef was originally conceived by Leah, only to later be transferred to the womb of Rachel. Yaakov imagined that if the transfer had not occurred, Yosef would have been born to Leah and would still be alive. The twelve tribes would then still be complete. Furthermore, even the sight of Dinah was not a comfort for Yaakov in his mourning, but rather a painful reminder of these events. In some sense, he would have preferred to have buried Dinah rather than Yosef. This is the meaning of the *Midrash*, "He only had one (daughter), and even this one he would have preferred to bury." Note that the *Chatam Sofer* also assumes that Rashi accepted the story of the inter-uterine exchange. He also assumes that Yaakov was aware of the exchange.

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43 See Rashi, *Bereishit* 37:35.

44 See M. Greenbaum, "On the twins born with the *shevatim*," (Hebrew) *Nezer HaTorah* (*Nisan*, 5768) [April, 2008], 117-121.

Shaul Ben HaKena'anit and the Marriage of Dinah to Shimon

The nature of Dinah's birth also receives attention regarding the tradition that Dinah married Shimon. Among the list of Shimon's children, we find the name *Shaul Ben HaKena'anit. Chazal* identify this child as the product of Shimon and Dinah. After being raped and kidnapped by Shechem, Dinah would only agree to leave the city of Shechem on the condition that Shimon marry her.[45] The nature of the prohibition against incest prior to the giving of the Torah is a matter of some debate, but the accepted opinion is that paternal siblings were permitted, while maternal siblings were forbidden.[46] How could Shimon then marry Dinah if they were maternal siblings?

The *Paneach Raza* (R' Yitzchak b. Yehudah Halevi) solves this problem by stating that Dinah was conceived in the womb of Rachel. This implies that he accepts the notion that there was an inter-uterine exchange. Since Dinah was conceived by Rachel, she was therefore the daughter of Rachel. As such, she was not a maternal sibling to Shimon, just a paternal sibling. This implies that it is conception (or genetics) that determines maternity.

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45 See, for example, Rashi, *Bereishit* 46:10 and *Bereishit Rabbah* 80:11.

46 See, for example, Rashi, *Bereishit* 20:12.

As this exegetical interpretation has halakhic implications, since it allowed an otherwise illicit marriage to take place, it is one of the most frequently cited sources in the halakhic literature on the definition of maternity.[47]

The List of Leah's Descendants and the Position of Rashi

In the Torah journal *Vayelaket Yosef*,[48] R' Yitzchak Maier Hacohen Schwartz poses a question for the reader. In the enumeration of the names of the people that descended to Egypt, the Torah lists the descendants of Leah in the following fashion: "These are the sons of Leah whom she bore to Jacob... in addition to Dinah his daughter."[49] Rashi

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47 It is this *Paneach Raza* which is cited by the *Maharsha* as the source of the belief that Dinah was born through an inter-uterine exchange. See also *Moshav Zekeinim miBa'alei HaTosafot*, *Tosafot Hashalem*, *Kotnot Or* and *Peirush HaTur HeArukh* on *Bereishit* 46:10.

R' Eliyahu Mizrachi suggests a different reason why Shimon was able to marry Dinah, citing opinions that marriage according to Noachide laws is permitted for even maternal siblings. R' Meir Bronsdorfer claims that Rashi was of the same opinion. According to R' Bronsdorfer, Rashi maintained that Dinah was born through a gender change, in accordance with the conventional understanding of the passage in *Berachot*. As such, Shimon and Dinah were both paternal and maternal siblings. The only way they could have married is if even maternal siblings were allowed to marry according to Noachide laws. See R' Meir Bronsdorfer, "Egg donation and the *yichus* of the child," (Hebrew) *Yeshurun* 21(*Nisan*, 5769) [April, 2009], 557-564.

See R' Shimon Oshenberg's (16th century) commentary on Rashi, *Devek Tov*, with notes of R' Aharon Walden (5674 edition), on *Bereishit* 46:10. The *Devek Tov* is quoted by Rabbi Friedman (*Tel Talpiyot* 19:7(*Tevet*, 5671) [January, 1911], n. 58, p. 55-56) as proof that Rashi accepted the version of the inter-uterine exchange. I assume his inference is from the notes on the text by R' Walden. R' Walden implies that indeed Rashi accepted the version of the inter-uterine exchange. This very passage from the *Devek Tov* was also referenced in an earlier edition of *Tel Talpiyot* by R' Moshe Yosef Roth in his halakhic discussion on the definition of maternity in a case of ovarian transplantation. (*Tel Talpiyot*, Year 17, vol. 21(*Tamuz*, 5668) [July, 1908], n. 176, p. 192.) See below. See also R' Mordechai Carlbach, *Chavatzelet HaSharon*, *Bereishit*, *Parshat Vayigash*.

48 *Vayelaket Yosef* 6:5(*Tevet*, 5664) [December, 1903], n. 49.

49 *Bereishit* 46:15.

comments on the fact that the sons are called the "sons of Leah," associated with their mother, while the daughter, Dinah is identified as "Dinah *his* daughter," associated with her father. Rashi assimilates these associations with the Talmudic passage on the physiology of gender determination and comments that the females are associated with Yaakov to teach you that if a man emits seed first, a female child will result, while if a woman is emits seed first, a male child will result. (See above.)

R' Schwartz queries how Rashi could infer the gender determination principle from this verse specifically. Rashi himself writes earlier[50] that after Leah's prayer, the child within her was changed to a female. If so, then at the time of conception, Dinah was a male. Only after Leah prayed, did the male become a female. How then can we derive from here that if a man emits first, a female child will result? This child was originally a male and should thus have been associated with the mother? R' Schwartz reports that he asked this immensely challenging question to many and had never received a satisfactory response. He beckoned any reader to respond.

Some months later, R' Schwartz received a response to his vexing question. I suspect he could not have anticipated the expansiveness of the response provided by R' Shlomo Fisher,[51] which spans fourteen double column small print pages, and presents a thesis on the resolution of this seeming internal contradiction within Rashi, as well as an explication of the *Midrashim* dealing with the miracle of the birth of Dinah.[52]

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50 *Bereishit* 30:21.

51 *Vayelaket Yosef* 6:9(*Adar*, 5664) [February- March, 1904], n. 82.

52 A full explication of his thesis is beyond the scope of this article.

R' Fisher maintains that Rashi, as well as the passage in *Berachot*, (see above) held that there was an inter-uterine exchange. In addition to other involved proofs to this thesis, he notes that remarkably, Rashi on the very next verse after the birth of Dinah cites a *piyyut* to aid his interpretation. The *piyyut* he cites is "*even chug*," the very same *piyyut* that details the birth of Dinah and maintains that she was born through an inter-uterine exchange (see above). Clearly, Rashi, who cited this very *piyyut* in the next verse, was familiar with the version of Dinah's birth elaborated therein, and concurred that it was an inter-uterine exchange. This answers R' Schwartz's question, for Dinah, according to the inter-uterine exchange explanation, was always a female, from conception, and was correctly associated with her father.

The List of Rachel's Descendants

As discussed above, in enumerating the descendants of Leah amongst the seventy people who descended to Egypt, the Torah says, "These are the sons of Jacob whom she bore (*yalda*) to Jacob." It is on this verse that Rashi cites the doctrine of gender determination based on the Talmudic passage, that males are conceived when the female emits seed first, and vice versa. This is inferred by the Torah's association of the woman with the male children- "These are the *sons* of Jacob whom *she* bore (*yalda*)."

When the Torah enumerates the descendants of Rachel, however, the language is different: "These are the *sons* of Rachel who were born (*yulad*) *to Jacob*."[53] The male children are here associated with the man. While Rashi does

53 *Bereishit 46:22.*

not comment on this deviation, the *Meshekh Chokhmah* questions why by the sons of Rachel it does not say whom *she* bore (*asher yalda*), as by Leah. He answers here as well by invoking the story of the inter-uterine exchange. Rachel initially conceived a female child, though she gave birth to a male child. The male children listed here, while all descendants of the children *born* to Rachel, were not all descendants of children *conceived* by Rachel. Yosef was the product of an inter-uterine exchange and was not the product of Rachel's seed. He was the product of Leah's seed and was only later transferred to the womb of Rachel. The Torah could therefore not use the phrase "whom *she* bore (*asher yalda*)," associating Rachel with the birth of all these male children, as this was not in fact the case.

IV. The Use of the Story of Dinah's Birth in Halakhic Discussions on the Definition of Maternity

For centuries, the story of Dinah's birth remained confined to the exegetical literature. This was to change when technological advances facilitated the possibility of surrogate motherhood. With this new treatment for infertility it was now possible for the first time to have two possible mothers- an egg donor, or genetic mother, and a birth mother. With two candidates now vying for motherhood, the very definition of maternity in halakhah was challenged. These new challenges led to the exhumation of the story of Dinah, and in particular, the version of the

inter-uterine exchange.[54] Based on the story of the inter-uterine exchange, Dinah also had two possible mothers-the "genetic" mother (Rachel, who conceived her), and the birth mother (Leah, who bore her). According to this version, who was the legal mother of Dinah? Both Leah and Rachel contributed to Dinah's birth, but which carried the halakhic seal of maternity?

Contrary to popular belief, the use of the story of Dinah for halakhic purposes did not begin with the development of surrogate motherhood in the late 20th century. The halakhic exhumation of this story began in the early 20th century with a little known halakhic chapter whose reverberations are still felt in the halakhic literature to this very day. In 1907, in the halakhic journal *Vayelaket Yosef*, a question was posed by R' Yaakov Gordon for forum discussion.

> Physicians have developed a new procedure to treat infertility through the transplantation of reproductive organs from one woman to another. Who is the halakhic mother in this case? Would it be the donor or the recipient?

This question was not fictional, but was based on a case of ovarian transplantation that had been performed successfully on an infertile woman a year earlier, with the

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54 The story of the inter-uterine exchange was also used for halakhic purposes to determine paternity in artificial insemination. See. R' Y. Z. Mintzberg, "Artificial insemination," *Noam* 1(5718) [1958], 159. To my knowledge he is the only authority to use the source in this way. This source is mentioned by R' Bick in his "Ovum donations: A rabbinic conceptual model of maternity," *Tradition* 28:1(Fall, 1993), 28-45. See comments on R' Mintzberg's analysis by R' Y. Ben-Maier, "In vitro fertilization: The relationship of the child to the gestational or biological mother," (Hebrew) *Assia* 41(*Nisan*, 5746) [April, 1986], 25-40, at n. 8.

resulting birth of a healthy child. This remarkable case and its medical, ethical and halakhic ramifications has been discussed elsewhere,[55] but for our present purposes, it is the first time in medical history that the definition of maternity became subject to debate.

In the case of ovarian transplantation, one woman's ovarian tissue, containing the genetic material, was transplanted into the abdominal cavity of another woman. This woman then conceived and delivered a child with the donor's eggs. Who would be the halakhic mother in this case? This was one of the questions considered by the rabbis of that generation. In this historical chapter we find, for the first time, the mention of the story of Dinah in a practical halakhic context.[56] The story was then revisited in the late 20th century with the development of surrogate motherhood for the treatment of infertility. This section treats these two periods separately. In the more recent discussions of surrogate motherhood, the story of Dinah is frequently mentioned, though significantly downplayed, as more primary halakhic sources have superseded the non-halakhic material.

The Halakhic Chapter of Ovarian Transplantation

In providing halakhic responses to the new procedure for the treatment of infertility, ovarian transplantation, a number of authorities in the early 20th century invoked the

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55 E. Reichman, "The halakhic chapter of ovarian transplantation," *Tradition* 33:1(1998), 31-70.

56 R' Bleich writes that the first to use the aggadic discussion of Dinah's birth in a halakhic discussion was R' Menasheh Grossberg in an article dated 5684 [1923]. See his "Maternity identity revisited," *Tradition* 28:2(Winter, 1994). R' Grossberg, like the others cited here, is addressing the case of ovarian transplantation. The literature cited here precedes 5684.

story of Dinah to solve the maternity riddle. However, despite utilizing the same story of the inter-uterine exchange, divergent conclusions were drawn.

Some used the inter-uterine exchange to assert that the birth mother is the halakhic mother. For example, R' Eliyahu Posek, author of *Mor v'Ahalot*, cites the *Targum Yonatan* and the *piyyut* "*even chug*" of R' Eliezer HaKalir confirming the inter-uterine exchange.[57] He further notes that Dinah is called the daughter of Leah and Yosef the son of Rachel. He interprets this to mean that the birth mother is the halakhic mother.[58]

R' Betzalel Zev Safran (1866-1930)[59] arrives at a similar conclusion that the birth mother is the halakhic mother based on the inter-uterine exchange of Dinah and Yosef. The Torah clearly states, "and it was that Rachel gave birth to Yosef," and also, "Dinah the daughter of Leah." The Torah teaches us thereby that the birth mother is the true halakhic mother. He adds that there is nothing that is not hinted to in the Torah.

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57 *Ohel Yitzchak*, Year 5, Vol. 4(*Tevet*, 5667) [December, 1906], p. 4. This was a response to the question posed by R' Yaakov Gordon in the previous issue of *Ohel Yitzchak*, Year 5, Vol. 3(*Kislev*, 5667) [November, 1906], p. 4. R' Gordon apparently sent this question to multiple journals. When I initially wrote on the halakhic chapter of ovarian transplantation, I was unaware of the articles in *Ohel Yitzchak* and thought the halakhic exchange in *Vayelaket Yosef*, initiated by R' Gordon's question as well, to be the first on the topic. The question of R' Gordon in *Ohel Yitzchak* (December, 1906) predates that printed in *Vayelaket Yosef* by almost a year and appeared some seven months after the case report of a successful ovarian transplantation by Dr. R T. Morris was published.

58 The *psak* of R' Posek is cited approvingly by R' Tzvi Hirsch Friedling in *HaB'er*, Year 6, vol. 3(5691) [1931].

59 *Teshuvot HaRabaz* E. H., 5. He also cites R' C. Y. D. Azulai as utilizing the inter-uterine exchange to interpret a Talmudic passage in his *Devash L'fi*, s. v., *Ayin Hara*.

R' Moshe Yosef Roth[60] brings the inter-uterine exchange discussion from the *Paneakh Raza*, who comments on the identity of *Shaul ben HaKena'anit* and the question of how Shimon could marry Dinah. The *Paneakh Raza*'s conclusion is that Dinah is halakhically the daughter of Rachel, the "genetic" mother. (See above.) R' Roth therefore concludes that the ovarian donor would be the halakhic mother.[61] The same conclusion is echoed by R' Menashe Grossberg.[62]

There is one authority that discounts the use of the inter-uterine exchange, but not on halakhic grounds; rather, on purely technical grounds based on his novel interpretation of the exchange. R' Avraham Yaakov HaLevi Horowitz, in his *Tzur Yaakov*,[63] suggests a variation on the inter-uterine exchange. He claims that the physical bodies did not switch between the wombs of Leah and Rachel; rather, the male child within Leah changed to a female, and the female child within Rachel became a male. Only the souls switched after the gender changes took effect. Therefore this story cannot be used to ascertain maternity in the case of ovarian transplantation. He bases this, in part, on the

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60 *Tel Talpiyot*, Year 17, vol. 21(*Tamuz*, 5668) [July, 1908], n. 176, p. 192.

61 See R' Menashe Klein, a contemporary *posek*, *Mishneh Halakhot Mahadura Tinyana* Y. D., 436, who discusses uterus transplantation and uses the inter-uterine exchange in his analysis.

62 See *Sha'arei Torah*, *Sha'ar Menashe* 15(5684) [1924], n. 3. R' Bleich mentions this source in his *Contemporary Halakhic Problems* 2(Ktav Publishers; New York, 1983), 91-93, but does not mention the context of this halakhic discussion and the entire chapter of ovarian transplantation. See also R' Yehonatan Halevi Eyebeshutz in *HaB'er*, Year 8, v. 3(*Sivan* 5693) [June, 1933], 80, who cites R' Grossberg. In a response to Rabbi Grossberg, R' Joshua Feigenbaum (*Sha'arei Torah* 15:4) rejects the proof of Rabbi Grossberg, claiming that one cannot derive halakhah from aggadic sources. This is also cited by R' Bleich.

63 n. 28.

time of ensoulment. The soul of a child is bestowed upon conception. Therefore, the soul of Yosef was bestowed when he was conceived by Leah. The soul was later transferred to the male child carried by Rachel.

Contemporary Discussions of Surrogate Motherhood and the Definition of Maternity

The story of the inter-uterine exchange has also been incorporated into the contemporary halakhic discussions about the definition of maternity in cases of surrogate motherhood.[64] Here, too, varying conclusions are drawn from the same sources. The story however has generally received less halakhic weight in this second, later halakhic chapter, and has been largely supplanted by more purely halakhically oriented sources, with some exceptions.

R' Moshe Hershler[65] and R' Moshe HaLevi Soloveitchik[66] utilize the story for halakhic purposes and claim that based on the inter-uterine exchange, it is the birth mother who is the halakhic mother. As the Torah says, "and afterwards she bore a daughter," this implies, R' Hershler asserts, that only after the birth of the child was Dinah halakhically called Leah's daughter. Furthermore, R' Hershler adds, we have no proof whatsoever to consider the genetic mother (or egg donor) to be the mother. R' Hershler maintains that while we generally do not derive halakha from

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64 There are dozens of articles in the halakhic literature on the definition of maternity in cases of surrogate motherhood. For reviews of the major positions, see A. Steinberg, *Entzyclopedia Hilkhatit Refuit* 2(Machon Schlesinger; Jerusalem, 1991), s.v., *hafrayah chutz gufit*; A. Avraham, *Nishmat Avraham* 3(Schlesinger Institute; Jerusalem, 2007), 30-40.

65 *Halakhah U'Refuah* 1(Jerusalem, 5740 [1980]), 319-320.

66 "Test tube babies,"(Hebrew) *Or HaMizrach* 100(5741) [1981], 122-128.

aggadic sources, we can use aggadic sources to support a logically derived conclusion (*sevarah*), as is the case here. The issue of deriving halakhah from aggadic sources pervades the discussions regarding the extrapolation from the story of the birth of Dinah to modern medical halakhah.[67]

Rabbi Avraham Yitzchak HaLevi Kilav[68] cites the inter-uterine exchange briefly, and while acknowledging that we do not derive halakhah from aggadic sources, he nonetheless derives one principle from the story- that one can only have one halakhic mother. R' Yaakov Ariel[69] likewise minimizes the utility of the inter-uterine exchange story due to its non-halakhic nature, as well as the disparate versions of the events.

R' Moshe Sternbuch rejects the application of the inter-uterine exchange to contemporary halakhah, but not due to concern about deriving halakhah from aggadic sources. He claims that we cannot derive halakhah from miraculous events. R' Sternbuch maintains that logic dictates that the egg donor should be the halakhic mother. The miraculous uprooting of Dinah from Rachel's womb severed that natural maternal connection. We therefore cannot learn from this case.

More attention is given to the story of the inter-uterine exchange by R' Yisrael Meir Lau.[70] Citing the issue of Dinah's marriage to Shimon, R' Lau marshals the inter-uterine exchange in support of identifying the genetic

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67 On this topic, see A. Steinberg, *Entzyclopedia Hilkhatit Refuit* 2(Machon Schlesinger; Jerusalem, 1991), 135, at n. 63; A. Avraham, *Nishmat Avraham* 3(Schlesinger Institute; Jerusalem, 2007), 36.

68 *Techumin* 5, 260-267.

69 *Techumin* 16, 171-180.

70 *Yachel Yisrael* 3:89.

mother as the halakhic mother. He notes that this contradicts the conclusion derived from a Talmudic source[71] that the birth mother is the halakhic mother, but posits that this latter ruling applies only when the original maternal-fetal connection was abrogated, as in the Talmudic case of conversion.

R' Lau also raises a question that challenges the veracity of the inter-uterine exchange. If, as discussed above, Shimon was able to marry Dinah because Dinah was really the child of Rachel, then Yosef should likewise be considered the legal child of Leah, in whose womb he was conceived. The Torah seems to reject both assertions. First, Dinah is referred to explicitly as "*bat Leah*," (daughter of Leah) and furthermore, the Torah refers to Binyamin as Yosef's maternal brother- "*Vayar et Binyamin achiv ben imo*" (and he saw his brother, Binyamin, his mother's son). R' Ben-Maier[72] adds another verse clearly indicating that Yosef was the child of Rachel and casting doubt on the inter-uterine exchange- "and the children of Rachel were Yosef and Binyamin."[73]

In 1981, in an early discussion on maternity in surrogate motherhood, R' Bleich mentions the inter-uterine exchange to support the position that maternal identity is determined by conception, but concludes that halakhah

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71 *Yevamot* 97b

72 R' Y. Ben-Maier, "In vitro fertilization: The relationship of the child to the gestational or biological mother," (Hebrew) *Assia* 41(*Nisan*, 5746) [April, 1986], 25-40, at n. 8. R' Ben-Maier brings an opinion from R' Shlomo Min HaHar that all these proofs are fruitless, as the terms "*ben*, " "*bat*," and "*yaldah*" do not specifically refer to a biological relationship and are used in the Torah also to refer to simply raising a child.

73 *Bereishit* 35:24.

cannot be derived from aggadic sources.[74] A decade later,[75] he cites the use of the inter-uterine exchange to support the halakhic opinion in favor of the birth mother, but does not consider the aggadic source dispositive. R' Ezra Bick addresses the story in his legal analysis and response to R' Bleich's 1991 article,[76] and brings the Tur's explanation as to how Shimon could marry Dinah as proof that maternity is derived by genetics/conception. (See above section on *Shaul ben HaKena'anit.*) While R' Bick states that "this is, to the best of my knowledge, the only classical halakhic source relevant to this question," he does not believe it sufficient to adjudicate the matter. He also accepts the principle that halakha cannot be based on aggadic sources, but limits this to directly applying halakhah from a specific aggadic statement. He does believe and advocate that aggadic principles in general be used to guide or inform halakhic decisions in cases where no other relevant halakhic material exists, as he believes to be the case for the definition of maternity.

Most recently, R' Meir Bronsdorfer,[77] despite reaffirming the principle that halakhah cannot be derived from aggadic sources, devotes a lengthy discussion to the story of Dinah and its implications for the determination of maternity. He concludes that while some erroneously infer

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74 *Tradition* 19:4(Winter, 1981), 359-360.

75 J. David Bleich, "In vitro fertilization: Questions of maternal identity and conversion," *Tradition* 25:4(Summer, 1991), 82-102. This article was a rebuttal to R' Bick's article in *Tradition* cited above. R' Bleich devotes little attention to the aggadic story of Dinah's birth in his extensive writings on the definition of maternity in halakhah and focuses primarily on halakhic material.

76 E. Bick, "Ovum donations: A rabbinic conceptual model of maternity," Tradition 28:1(Fall, 1993), 28-45.

77 R' Meir Bronsdorfer, "Egg donation and the *yichus* of the child," (Hebrew) *Yeshurun* 21(*Nisan*, 5769) [April, 2009], 557-564.

from the story of the inter-uterine exchange that the birth mother is the halakhic mother, the story actually confirms, though cannot be used to prove, that the genetic mother, or egg donor, is the halakhic mother.

V. Conclusion

In this essay, we have explored the different aggadic versions of the birth of Dinah and have discussed the use of this story both in the exegetical and halakhic literatures. With new and unforeseen advances in medicine, finding halakhic precedent is challenging. Contemporary rabbinic authorities, in the absence of other clear precedent, often turn to aggadic, non-halakhic material. While the use of this material can shed light on the issues and possibly, with limitations, may be used for halakhic purposes. However, its use is also fraught with potential difficulty. Each instance must be analyzed independently. With regard to the use of the story of Dinah for the determination of maternity in halakhah, the consensus amongst rabbinic authorities is that we do not place great weight upon this aggadic source. This is because of the general principle of not deriving halakhah from aggadic sources, coupled with the conflicting conclusions drawn from this particular source by earlier scholars. This essay clearly illustrates the latter point. Herein, we have shown that there are not only many aggadic versions of the birth of Dinah, but even those who accept the inter-uterine exchange version, derive different halakhic conclusions from the story. In sum, *tzarich iyun l'Dinah*, with its intended double entendre. Clarification is required for the law (*dinah*) of maternity in surrogate motherhood; and clarification is also required for the aggadic story of Dinah's birth.

Yichud and the Physician

Rabbi Azarya Berzon

The sensitive subject of *Yichud* in the case of a woman under the care of a male doctor has been discussed in recent responsa. Halacha classifies medical treatment as a religious obligation incumbent both upon the patient seeking help and the physician applying his knowledge and skill in an endeavor to heal. *Yichud,* on the other hand, is a religious prohibition, and cannot be treated lightly. The conflict between medical procedure and the law of *Yichud* seems to be inherent in the very nature of the two. Privacy in medical treatment is necessary both for the doctor and the patient. A physician can function at his optimum when he can give all his attention to the medical checkup, unhindered by intrusion or interference. A patient will cooperate well with the physician when he or she is at ease. In the case of a female patient, anxiety about the possibility of someone barging into the examination room while she may be undressed can be so unnerving that the next time she needs a doctor, she might decide to stay home and suffer rather than subject herself to the degrading experience of a medical checkup.

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The halacha is acutely aware of human sensitivities and has always protected the dignity of a human being. It would not allow a medical examination to be exposed to the public eye. But privacy, which is necessary for proper medical treatment, is the very essence of the prohibition of *Yichud.* The halacha, therefore, must address itself to the question of how Jewish law can obligate medical procedure and simultaneously insist on the observance of the regulations of *Yichud.*

A number of *Poskim* have suggested that a satisfactory medical examination does not require total privacy, while in the case of *Yichud* nothing less than total privacy constitutes a violation of Jewish law. Rav Eliezer Waldenberg,[1] suggests a number of permissible ways of providing limited privacy for a patient that would not constitute a violation of the law of *Yichud:* 1) the door of the examining room is closed, but not locked, and three people or a married couple are present in the waiting room; 2) even if the door is locked, if the key is in the hands of someone anywhere in the city, who can open it at any time; 3) the husband of the woman who is being examined is in the city;[2] 4) the doctor's office is located in one of the rooms of the doctor's residence. The last

1 *Tzitz Eliezer* 6:40, chapter 12

2 See also Rav S. Katz, *Kedoshim Tihiyu,* p. 148, who quotes Rav Mordechai ben Eliyahu as having applied this leniency to a doctor making a "house call" to a female patient when the door of the house is locked. Rav Eliyahu also applied the leniency of the *Doveiv Mesharim,* cited in *D'var Halacha,* p. 30, who permitted *Yichud* in a locked room when the members of the family have keys and may enter at will. See also *She'arim Metzuyatlim be'Halacha,* no. 152, par. 5.

condition would permit *Yichud* even if the door is locked.[3]

A common denominator in the permissive rulings of contemporary *Poskim* on this issue is the analogy of this situation to that of the working woman. It was common in the Egyptian community of the 16th century for Jewish women to work in the homes of non-Jews. A significant responsum written by Rav David ibn Zimra in *Teshuvot Radbaz* III, 481, justifies this practice. Radbaz employs two Halachic principles which had never before been applied to the laws of *Yichud.* The first is *"bi'avodateihu tarud",* meaning that people are so engrossed in their work that they have no interest in sexual escapades. This is based on the ruling of the Gemara in *Avodah Zarah,*[4] concerning animal breeders. Although it is forbidden to watch animals while they are mating, the prohibition does not apply in the case of a professional animal breeder. The reason given in the Gemara is *"bi'avodateihu tarud,"* that he is so absorbed in his labors that sexual thoughts do not enter his mind. Since the women were employed by men who were themselves occupied with their craft, the mood of all was impersonal and businesslike. Such an environment would tend to repress sexual interest.

The second concept is that one will not risk ruin-

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3 Rav Waldenberg assumes that the presence of the physician's wife in the same building is sufficient for a leniency. See also *Assia,* Vol. II, pp. 91-92, notes 9-13, for an explanation of the view of some *Poskim* who disagree with Rav Waldenberg. These rules apply in the case of a female doctor or nurse with a male patient. See R. Katz, ibid. Rav Moshe Feinstein , quoted in *Oholei Yeshurin,* page 3, permits *Yichud* with a doctor even if the door is locked, provided that another person is in the office. Rav Ovadiah Hadaya, in *Yaskil Avdi,* II, nos. 17 and 18, permits *Yichud* with a physician even when there are no people waiting in the office, if the examination takes place at an hour in which people generally come to visit the doctor and wait in the anteroom.

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ing his reputation and a profitable business relationship by committing a sexual offence. Ostensibly, the Radbaz derives this idea from the general principle which underlines a variety of halachot: *"chazakah al uman shelo mafsid umnato"*, i.e., a craftsman will not willfully jeopardize his reputation. A sexual offense against an employee by a non-Jew would be totally contrary to his self-interest. Although Radbaz considers his reasoning halachically sound, he does not approve of Jewish women being alone with their non-Jewish employers on the grounds that it encourages immodest behavior.

The principles employed by Radbaz to justify *Yichud* for a working woman have been utilized by the *poskim* to decide a variety of contemporary problems in *Yichud.* It is obvious that these principles apply quite well to the case of the physician. The poskim argue that: 1) a professional would not risk his reputation, and thereby his livelihood; 2) while engrossed in his work he is not disposed to sexual temptations; 3) the fear of governmental punishment will prevent him from committing sexual offenses. The

Poskim, however, did not go so far as to permit *Yichud* with a physician based solely on the principles of the Radbaz. Yet these principles weighed in to allow for leniency where additional factors prevail, and to permit *Yichud* where otherwise the Halacha would be strict. Therefore, although *Yichud* is prohibited by most *Poskim* in a situation in which outsiders would not enter a private room unless they first received permission to do so,[5] in the case of a medical examination they are willing to rely on the minority view that as long as the door is unlocked, there is

5 *D'var Halacha,* p. 27 and p. ,38, par. 8.

no *Yichud,* and the exam is permitted. This leniency is due to the fact that the Radbaz's principles apply in this case.[6]

It would not be correct to say, however, that all *Poskim* are lenient in this case. Rabbis Joseph Eliyashiv and Chaim Scheinberg permitted *Yichud* with a doctor in an unlocked room only when three other Jewish doctors or nurses are present in the clinic. This is merely an application of the general rule of a room which opens to a public area.[7] Rav A. Horowitz[8] expresses a similar view.

Rav Yitzchak Weisz[9] permits *Yichud* with a physician in only two situations: 1) the patient's husband is present in the waiting room, and the door of the examination room is slightly ajar; or 2) the patient is accompanied by another woman in the examination room. The husband of the accompanying woman must be within the city and must be aware of his wife's exact whereabouts. In this latter situation the door may be closed if there are workers who occasionally enter the examination room at will.

In *A Halachic Guide to Nurses in Hospitals,* Rav. J. Neuwirth of Jerusalem notes that observant doctors and nurses, when administering medical treatment to patients in hospital rooms, must be careful not to violate the laws of *Yichud* by locking the door. In an article in *Assia,*[10] Rav Aviner cites many sources to prove that the laws of *Yichud* apply even when the male or female patient is very ill.

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6 See *She'arim Metzuyanim be'Halacha,* no. 152, par . 3.

7 See Kiddushin 81a

8 *D'var Halacha,* p. 45, note #43

9 *Minchat Yitzchak,* VII, 73

10 Rav S. Aviner, in *Assia,* a journal of halacha and medicine, edited by Dr. A. Steinberg, vol. II, p. 92 .

To summarize this thorny question: the requirements of taking care of the sick do not in and of themselves remove the *issur* of *Yichud*. We have indicated a number of options which might be exercised in order to avoid infringement of this prohibition – measures such as leaving the door of the examination room ajar or having a companion accompany the individual who is being examined.[11]

The question of *Yichud* with a professional counselor or psychologist is a more serious one and should be examined in the light of the considerations mentioned above. The application of the principle of *"bi'avodateihu tarud"* seems less appropriate than in the case of physician, for the elements of friendship and empathy which often characterize a counselor-client relationship can engender an intimacy which demands a more stringent approach to the application of the *Yichud* laws. A study of the special laws of *Yichud* with respect to an intimate relationship such as counseling is beyond the scope of this paper.

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11 We can add to these the leniencies mentioned by the *Tzitz Eliezer* [cited at the beginning of this essay]: the door of the examining room is closed, but not locked, and three people or a married couple are present in the waiting room; if a married woman is being examined, and her husband is somewhere in the city; if the doctor's office is located in one of the rooms of his private residence.

The *Tzitz Eliezer* goes a step further and permits the examination even if the door is locked, but the key is in the hands of someone anywhere in the city who can open it at any time. It would seem that the majority of *poskim* take a stricter view and would require three conditions to be fulfilled before relying on this *heter*: a) the one possessing the key is a Jewish male; b) he is a *kasher* not a *parutz*; c) there is reason to expect that this person might enter the room during these hours.

As to the definition of a *parutz*, three opinions appear in the *Poskim:*

1) Someone who is totally ignorant of Jewish law;
2) Someone who deliberately violates Jewish law;
3) Someone who is known to be sexually immoral.

See *D'var Halacha*, pp . 113, 116, 162

"Permission Given to a Doctor to Heal" – Across the Generations and in the Thought of Rav Avraham Yitzchak Ha-Kohen Kook[1]*

Rabbi Dr. Benjamin Gesundheit, MD PhD

Rav Acha said: When going in for blood-letting one should say: "May it be Your will, O Lord, my God, that this operation may be a cure for me, and may You heal me, for You are a faithful healing God, and Your healing is true, since men have no power to heal, but this is the common practice." Abaye said: A man should not speak in this manner, for it was taught in the school of Rabbi Yishmael: [It is written:] "He shall cause him to be thoroughly healed (*ve-rapo yerape*)" (Exodus 21:19). From here

1 * This article appeared in Hebrew as "*Ha-Ra'ayah Kook al Reshut le-Rofe le-Rapot*," in *Netu'im* 10 (5763), pp. 79-96. See also www.jewishmedicalethics.org.

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> we learn that permission was given to a doctor to heal. When he gets up [after blood-letting] what does he say? Rav Acha said: Blessed be He who heals without payment. (*Berakhot* 60a)

Introduction

Many explanations have been offered for the aforementioned statement of Rabbi Yishmael. In his explanation of this short passage, Rav Avraham Yitzchak HaKohen Kook combines the interpretations of earlier commentators, Rabbi Yishmael's teachings recorded elsewhere in the Talmud, and important lessons regarding the challenges facing modern medicine.

In this article we shall analyze Rabbi Yishmael's words on several planes. Following a brief historical survey regarding the philosophical significance of the permission granted to a doctor to intervene in the treatment of a patient (I), we shall present the interpretations of Exodus 21:19 upon which Rabbi Yishmael's statement is based, and discuss his interpretation of Exodus 15:26, according to the plain sense of the verse (II). We shall then explain the approaches of four medieval exegetes to "the permission given to a doctor to heal" against the biographical and cultural backgrounds of these scholars (III) as a basis for understanding R. Kook's comments on the issue (IV). And finally we shall discuss the novelty found in this explanation, which, in our opinion, adds important and original insights regarding the permission – and duty – given to a doctor to heal in our time (V).

I. The philosophical background of "I am the Lord that heals You" and "permission given to a doctor to heal"

The specific issue of "permission given to a doctor to heal" is based on a fundamental question in the philosophy of religion regarding the relationship between Divine providence, on the one hand, and human action, on the other: Is man permitted or even obligated to intervene in his Creator's governance of the world?[2] In this introduction, we wish to offer a brief historical survey that will help us understand the issue of "permission given to a doctor to heal."[3]

Scripture emphasizes man's responsibility based on the free will granted to him. Human action and Divine providence are not contradictory, but rather complementary. Man is endowed with free will and it is incumbent upon him to choose good (Deuteronomy 30:16-19). He is forbidden, however, to rely exclusively on his own efforts and glory in his own power and might,[4] but rather he must trust in God and cast his burden upon Him.[5]

Based on this conceptual foundation, we shall try to

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2 This issue was discussed at length in both Jewish and general philosophy, and this is not the forum to present all the views on this fundamental issue. See for our purposes: E.E. Urbach, *Chazal – Pirkei Emunot ve-De'ot*, Jerusalem 5743, pp. 254-277, and especially pp. 238-239 concerning Rabbi Yishmael; A. Steinberg, "*Torat ha-Mussar ha-Yehudi*," *Encyclopedia Hilkhatit Refu'it*, VI, Jerusalem 5759, pp. 624-645; M. Eliade, "Healing," Encyclopedia of Religion, New York 1987, VI, pp. 226-234; "Medicine," IX, pp. 305-324.

3 See the comparative literature on this issue in Y. Yakobowitz, *Ha-Refu'ah ve-ha-Yahadut*, Jerusalem 5739, pp. 247-251. See also: A. Steinberg (above, note 1); idem, "*Torat ha-Mussar ha-Kelalit* (above, note 1), VI, pp. 646-688.

4 See Deuteronomy 8:17: "And you shall say in your heart, My power and the might of my hand have gotten me this wealth."

5 See Psalms 55:23: "Cast your burden upon the Lord, and He shall sustain you; He shall never suffer the righteous to be moved." See the discussion below regarding the views of Rashi and Tosafot.

define the relationship between two verses that upon first glance appear to contradict each other: "For I am the Lord that heals you" (Exodus 15:26) and "he shall cause him to be thoroughly healed" (Exodus 21:19). According to Scripture's outlook that finds expression in the verse, "he shall cause him to be thoroughly healed," it is precisely the physician who is responsible for treating the sick. As opposed to other cultures in which religious figures served as healers, Scripture distinguishes between these functions. The priests are in charge of teaching what is permitted and what is forbidden, what is ritually clean and what is ritually unclean (Leviticus 11-15), but the religious outlook of the priests does not decide or even involve itself in the medical treatment of the sick.[6]

In Egypt, in contrast, it was widely believed that healing is in the hands of the gods. The Egyptian physician-god Imhotep (2645-2663 B.C.E.) exemplifies the cult of the physician-God, and this belief, which dates back to the beginning of the history of medicine, was also widespread during Egypt's Hellenistic period. This background may help us understand why Egypt is mentioned in Exodus 15:26: "I will put none of these diseases upon you, which I have brought upon Egypt, for I am the Lord that heals you."[7]

The attitude toward medicine and the physician found in the book of Ben Sira (beginning of the second century, B.C.E.) is similar to that of his rabbinic contemporaries. Ben Sira respects the doctor's work, but at the same time

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6 See R.L. Numbers and D.W. Amundsen, Caring and Curing: Health and Medicine in Western Religious Traditions, New York 1986.

7 J. Preuss, Biblisch-talmudische Medizin, Berlin 1911, pp. 22-30.

insists that we relate to medicine and human doctors based on faith in God, Healer of all flesh.[8]

The Mishnah records a fundamental principle relating to this matter in the name of Rabbi Akiva: "Everything is foreseen [by God], yet freedom [literally, permission] is given; and the world is judged with good, yet all is according to the amount of actions" (*Pirkei Avot* 3:15). This is similar in formulation to Rabbi Yishmael's statement: "From here we learn that permission has been given to a doctor to heal."[9]

Maimonides, who was also a doctor,[10] relates to the obligation falling upon man to seek healing, similar to his duty to eat, arguing that this does not attest to a lack of faith in God, as is claimed by fools, for surely:

> According to their faulty and foolish imagination, if a person is hungry and he turns to bread and eats it, undoubtedly relieving himself from that great distress, would we say that he has removed his trust from God? Fools, say to them, just as I thank God at mealtimes for providing me with something to

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8 Ben Sira 38, 1-15 (ed. M.Tz. Segel, Jerusalem 5719, pp. 242-243). For an analysis of this passage, see H. Stadelmann, Ben Sira als Schriftgelehrter, Tübingen 1980, pp. 138-145.

9 The view of the Sages stands in contrast to the Christian view which sees faith as the only avenue toward healing. The Christian view characterized medical knowledge throughout the Middle Ages and delayed the development of medical research in the modern period as well. See: Matthew 4:23-25; 5:1-20; 10:1-8; 11:4-5; Epistle to the Corinthians 1:11, 29-30; and elsewhere. For an interpretation of these sources, see H. Strack & P. Billerbeck, Kommentar zum Neuen Testament aus Talmud und Midrasch, München 1922-1928. See also: A. Harnack, Medizinisches aus der Kirchengeschichte, Leipzig 1902, p. 96ff; C. Arturo, A History of Medicine, New York 1947, p. 242ff.

10 See F. Rosner & S. Kottek, Moses Maimonides – Physician, Scientist and Philosopher, London-New York, Aronson 1993.

> remove my hunger and maintain me, so too we should thank Him for providing a cure that heals my illness when I use it.[11]

Rav Chayyim Yosef David Azulai (Chida) writes in similar fashion:

> It seems that nowadays one should not rely on a miracle. A person who is sick must conduct himself in accordance with the way of the world to call a doctor who will heal him. He must not veer from the way of the world and assert that he is greater than the saints of [previous] generations who healed themselves by way of doctors. This borders on [the violation of] a prohibition, whether because of boasting, or because of relying on a miracle in a place of danger... Rather he should conduct himself in the normal manner of people and seek healing from a doctor. (*Birkei Yosef, Yoreh De'ah*, 336, 2)

In light of this short survey, we wish to evaluate the position of Judaism across the generations regarding the status of a physician, and especially the various understandings of Rabbi Yishmael's statement regarding the permission granted to a doctor to heal, both in the context of Jewish thought and in comparison to the general culture of the time. This will provide us with a wider context within which to examine the approach of R. Kook.

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11 Commentary to the Mishnah, *Pesachim* 4:10 (ed. R. Kafih, p. 113).

II. The biblical sources: "I am the Lord that Heals You" - "He shall cause him to be thoroughly healed"

"If you will diligently hearken to the voice of the Lord your God, and will do that which is right in His sight, and will give ear to His commandments, and keep all His statutes, I will put none of these diseases upon you, which I have brought upon Egypt, for I am the Lord that heals you" (Exodus 15:26).[12] This verse deals with God's providence and the people of Israel's obligation to keep His commandments. According to the plain sense of Scripture, healing constitutes heavenly reward for observance of the commandments, and in this context there doesn't seem to be any room for human healing – "What part do the physicians have in the house of those who do the will of God, for when a man's ways please the Lord, he need have no concern with physicians."[13]

"And if men strive together, and one smite another with a stone... and he die not, but keeps his bed: ... only he shall pay for the loss of his time, and shall cause him to be thoroughly healed" (Exodus 21:18-19). This verse establishes the injuring party's legal obligation to compensate the victim and pay him for all the damage that he caused him, including his medical bills. The Torah assumes the existence of a human doctor, and even respects his role in

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12 Similar verses: "See now that I, even I, am He, and there is no god with me: I kill, and make alive; I wound, and heal: neither is there any that can deliver out of My hand" (Deuteronomy 32:39); "Who forgives all your iniquities; who heals all your diseases; who redeems your life from the pit; who encircles you with love and compassion" (Psalms 103:3-4); "The Lord builds Jerusalem; He gathers together the outcasts of Israel. He heals the brokenhearted, and binds up their wounds" (ibid. 147:2-3).

13 The formulation of Nachmanides in his commentary to Leviticus 26:11; see below a detailed discussion of Nachmanides' position.

the halakhic framework of the laws of personal injury.[14]

The principle arising from the verse, "He shall cause him to be thoroughly healed," seems to contradict the verse, "For I am the Lord that heals you." Our commentators dealt with this contradiction and viewed the relationship between the two passages as a combination of Divine and human healing, or as a contradiction that can be resolved by dividing medicine into different realms.

According to the first approach, the two verses complement each other: Even though only God is "a faithful Healer whose healing is true,"[15] a human doctor was also granted permission – and this involves also a duty[16] - to heal. Only God is the Healer of all flesh, but through his actions, man completes the will of the Creator. According to this, man must strive to effect healing, but at the same time he must know that God is the actual source of all healing.

The biblical commentators found subtle linguistic allusions to reconcile the apparent contradiction: Exodus 15 speaks of God as healer in the *kal* conjugation – "I am the Lord that heals you (*rof'ekha*)." In contrast, the human healing in Exodus 21 is formulated in the *pi'el* conjugation: "He shall cause him to be thoroughly healed" (*ve-rapo yerape*):

All human healing in Scripture is found with a *dagesh*.

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14 *Ba'al ha-Turim* explains what is stated: "Only he shall pay for the loss of his time, and shall cause him to be thoroughly healed" – "to exclude the case where he disregarded the words of the doctor." According to this, the Torah conditions the victim's right to compensation on his turning to professional medical treatment. If the victim refuses to receive treatment, he loses his right to sue for damages. See also Preuss (above, note 6), p. 28ff.

15 Following the Gemara in *Berakhot* 60a, which combines turning to a human doctor with prayer to God.

16 Following the view of Nachmanides brought in *Shulchan Arukh, Yoreh De'ah* 336:1. See below, note 40 and discussion there.

> Thus: "We would have healed (*ripinu*) Bavel, but she was not healed" (Jeremiah 51:9). But [the healing] of the Holy One, blessed be He, is found without a *dagesh*. This is what it says: "Heal me (*refa'eni*), O Lord, and I shall be healed" (Jeremiah 17:14), and it is written: "He heals (*ha-rofe*) the brokenhearted" (Psalms 147:3), "I will heal (*erpa*) their backsliding" (Hosea 14:5), "And God healed (*vayirpa*) Avimelekh" (Genesis 20:17), "For I am the Lord that heals you (*rof'ekha*)" (Exodus 15:26). The reason for this is that human healing is only achieved through pain and effort, the person having to suffer the medicine or bitter drink. But the healing of the Holy One, blessed he He, is achieved with ease – there is no pain at all, because "the blessing of the Lord, it makes rich, and He adds no sorrow with it" (Proverbs 10:22). (Rabbenu Bachya, Exodus 21:19)[17]

According to this approach, we can add two more differences between the two verses: God is a "healer" (*rof'ekha*, a noun), as opposed to man who merely strives to heal, "He shall cause him to be thoroughly healed" (*ve-rapo yerape*, a verb). The doubling of the verb emphasizes the effort that is necessary in order for a human doctor to effect healing.[18]

According to the second approach, there is indeed a contradiction between the two passages, but there are areas where healing can only be achieved by God, and other ar-

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17 This approach is also found in the commentary of *Ba'al ha-Turim* to Exodus 15:26, and in the commentary of R. Avraham Ibn Ezra to Exodus 21:26.

18 Similar to the Sages' exposition found elsewere: "'You shall surely restore them (*hashev tashivem*)' – if he returned it and it ran away, returned it and it ran away, even four or five times, he is still bound to restore it"; and others.

eas where human healing is possible. Nachmanides explains the contradiction between the two passages by distinguishing between God's governance by way of miracles and His governance in accordance with the laws of nature.[19] Other commentators see the two verses as referring to different areas of medicine, and it is reasonable to assume that they were influenced by the spirit of their times: "As a sign that He granted doctors permission to heal external injuries and wounds. But all internal disease is in the hand of God to heal" (R. Avraham Ibn Ezra, Exodus 21:19).[20]

There is then a distinction between the healing of external wounds (surgery), which is permitted to human doctors (Exodus 21), and the healing of internal diseases, which is given over to God alone (Exodus 15). This distinction already appears in tractate *Avodah Zarah* (28a) and in the words of the *Posekim*,[21] in accordance with the perception of medicine in the eyes of the generation of Ibn Ezra and Rabbenu Bachya, who related to surgery as an autonomous discipline. The distinction between general medicine (*rofe* in rabbinic Hebrew) and surgery (*rofe uman*, like *uman* as a designation for a circumciser or a

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19 See below for a lengthy discussion of his position in his *Torat ha-Adam* and in his Commentary to the Torah.

20 (Ed. Weiser, p. 150). And so too writes R. Avraham Ibn Ezra in his commentary to Psalms 32:10: "Many are the sorrows of the wicked: but he that trusts in the Lord shall be surrounded by love" – "Rabbi Moshe said: ... 'He that trusts in the Lord' refers to one who does not rely on doctors, as did Asa. Know that Scripture only permits medical treatment in the case of a wound inflicted by man, because God alone is the healer of Israel, and His healing comes to strengthen his soul and increase his fear." See also Rabbenu Bachya on Exodus 21:19: "And that which our Sages, of blessed memory, said: '"He shall cause him to be thoroughly healed" (Exodus 21:19). From here we learn that permission was given to a doctor to heal' – this refers exclusively to an external wound about which the verse speaks, but an internal illness depends not on a doctor, but on the Healer of all flesh in whose hand is the soul of every living thing (Job 12:10)."

21 See *Tur*, *Orach Chayyim* 328, and *Bet Yosef*, ad loc.

bloodletter) resolves the contradiction between various biblical and talmudic sources, and it has practical halakhic ramifications.[22] It is interesting to note that this distinction was proposed by rabbinic authors who also engaged in medicine: R. Avraham Ibn Ezra[23] and R. Shimon ben Tzemach Duran.

The Malbim and R. Samson Raphael Hirsch resolve the contradiction between the two verses in a different manner:

> Because I am the Lord that heals you this will be a cure for illnesses of the soul... And so too the commandments that God commanded us are not for His sake, but rather for our sake to cure the illnesses of our souls. (Malbim, Exodus 15:26)

> The word "*machalah*" is used not only of bodily illness, but also of any hindrance to well being, of the mind, as in "There is none of you who worries about me" (I Samuel 22:8), of general existence, as in "And the inhabitant shall not say, I am sick" (Isaiah 33:24)... God says: The keeping of My laws protects you from such sufferings which otherwise I would have to use to educate you... (R. S.R. Hirsch, Exodus 15:26).

According to these two nineteenth-century commentators, the Torah distinguishes between bodily illness that can be healed even by human beings (Exodus 21), and illness

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22 *Responsa Tashbetz*, III, no. 82, distinguishes between these two types of treatment regarding liability for damages in the case of an error. See also *Kereti u-Peleti*, *Yoreh De'ah* 188, 5, who agrees with this distinction. See also *Responsa Tzitz Eli'ezer*, V, *Kuntrus Ramat Rachel*, nos. 20-23.

23 Regarding Ibn Ezra as a doctor, see: H. Friedenwald, The Jews and Medicine, New York 1967, p. 619ff. See also Ibn Ezra's commentary to Exodus 23:25.

of the mind, whose cure is found exclusively in the hands of God (Exodus 15). This distinction also accords with the understanding of medicine in the days of the Malbim and R. Hirsch, when psychiatry and psychology were developing as new and independent disciplines.[24] According to the modern understanding, the role of medicine is not only to treat illness, but also to prevent sickness and to preserve proper physical and mental balance.[25]

In conclusion: The verse, "He shall cause him to be thoroughly healed" (Exodus 21), implies that the practice of medicine and turning to doctors is obligatory. On the other hand, the verse, "I am the Lord that heals you" (Exodus 15), emphasizes that a human doctor serves merely as the agent of the Healer of all flesh. A doctor must fulfill the commandments of God, and one must not rely exclusively on his cures.[26] Already in Scripture then we find a certain contradiction between the two approaches, for which the commentators proposed several resolutions, as is summarized in the following table:

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24 See also *Responsa Seridei Esh*, IV, pp. 276-332, and at greater length in his book, *Li-Perakim*, Jerusalem 5763, pp. 1-172, a study of the Mussar movement and its relationship to Freudian psychoanalysis.

25 See the definition of "health" proposed by the World Health Organization that parallels this expansion: "A state of complete physical, mental and social well-being and not merely the absence of disease" (1948) and it has to take into account "the extent to which an individual or a group is able to realize aspirations and satisfy needs, and to change or cope with the environment" (1984); see below text at note 53 for a discussion of this definition in the words of R. Kook.

26 As a typical example of this approach, it is related in II Chronicles 16:12 about King Asa, who engaged exclusively in the approach of "and he shall cause him to be thoroughly healed," negating entirely the idea of "for I am the Lord that heals you": "And Asa in the thirty-ninth year of his reign was diseased in his feet, until his disease became severe: yet in his disease he did not seek the Lord, but the physicians." It stands to reason that the name "Asa" – "doctor" in Aramaic - alludes to this: he sought only the doctors – "for as his name is, so is he" (I Samuel 25:25). Interpretations of names is characteristic of the book of Chronicles, e.g. the names of Shelomo (II Chronicles 22:9); Yehoshafat (II Chronicles 11:4-10), Chizkiyahu (II Chronicles 29:4,31; 31:4; 32:5,7), and others.

Exodus 15:26	Exodus 21:18
"If you will diligently hearken to the voice of the Lord your God, and will do that which is right in His sight, and will give ear to His commandments, and keep all His statutes, I will put none of these diseases upon you, which I have brought upon Egypt, for I am the Lord that heals you."	"If he rise again, and walk abroad upon his staff, then shall he that struck him be acquitted; only he shall pay for the loss of his time, and shall cause him to be thoroughly healed."
The context: The obligation to obey God's commandments and to act in accordance with what is right in His sight. As a reward, man is promised good health by the Healer of all flesh.	In the practical context of *Parashat Mishpatim*, the Torah demands appropriate compensation for an injured party, including medical treatment provided by a human doctor.
a. Complementary relationship - God provides healing in the broad sense through balanced religious life,	but in practice, human doctors provide medical treatment to the sick who appear before them.
Linguistic support: God heals with ease – the *kal* conjugation. God is a healer (a noun)	Man heals with great effort – the *pi'el* conjugation (Ibn Ezra, Rabbenu Bachya, Tur) Man makes great efforts to heal (verb, doubled verb)
b. Contradiction between different realms Some healing is only in the hands of God,	whereas other healing was given over to human doctors.
God's miraculous governance when Israel "does the will of God"	Natural governance (Nachmanides)
Internal medicine	External wounds (Ibn Ezra, Rabbenu Bachya)
Healing of the soul	Healing of the body (Malbim, R. S.R. Hirsch

III. "Permission granted to A doctor to Heal" – according to the Rishonim[27]

According to Rabbi Yishmael, the verse, "He shall cause him to be thoroughly healed," comes to negate the view that forbids the practice of medicine and to grant a doctor permission to heal. This "permission" has great halakhic significance regarding a doctor's liability, for in the absence of such permission, a doctor would be liable for any damage that he causes his patient, as is stated explicitly in the Tosefta: "If a professional doctor treated [a patient] with the permission of the court, and caused him damage – inadvertently, he is exempt; intentionally, he is liable, for the sake of public welfare."[28] Rabbi Yishmael relates primarily to the moral dimension of "permission granted to a doctor to heal," whereas the Tosefta emphasizes the practical, halakhic dimension of a doctor who treated a patient with the permission of the court and caused him damage,"[29] but it is possible that these sources are interconnected, as we shall see below.[30]

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27 For a clarification of the views of the *Rishonim* regarding the words of Rabbi Yishmael, see R. Y.M. Lau, *Responsa Yachel Yisra'el*, II, Jerusalem 5754, pp. 310-342; A. Steinberg, "*Rofe*" (above, note 1), VI, pp. 160-168; idem., "*Refu'ah*" (above, note 1), VI, pp. 178-240.

28 Tosefta, *Gittin* 3:8, ed. Lieberman, p. 257. See also Tosefta, *Bava Kama* 9:11, ed. Lieberman, p. 44: "A qualified doctor who treated [a patient] with permission of the court, and caused [him] damage, is exempt; if he injured him more than is appropriate, he is liable" (Tosefta, *Bava Kama* 9:3). For additional sources, see: Tosefta, *Bava Kama* 6:17, ed. Lieberman, p. 24; Tosefta, *Makkot* 2:5, ed. Zuckermandel, p. 439. See the detailed halakhic discussion of A. Steinberg, "*Rofe*" (above, note 1), pp. 68-122. It should be noted that the Talmud is the earliest source in the history of medicine containing detailed discussions of a doctor's liability based on his professional training. For a historical survey, see, H.E. Sigerist, "The History of Medical Licensure," *Journal of the American Medical Association*, 14 (1935), p. 1057ff.

29 For a halakhic discussion of the relationship between the two sources and these two areas, see *Responsa ha-Tashbetz*, III, no. 82.

30 See below discussion in text at note 61.

It should be noted that the *Posekim* decided the law in accordance with the position of Rabbi Yishmael: Rif (*Berakhot* 44a), Maimonides (*Hilkhot Berakhot* 10:21), Rosh (*Berakhot* 9, no. 21), Tur and Shulchan Arukh (*Orach Chayyim* 230:4) codify only part of the talmudic passage in *Berakhot* 60a: "One who goes in to have his blood let should say: 'May it be Your will, O Lord, my God, that this operation may be a cure for me, for You heal without payment.' And when he goes out, he should say: 'Blessed are you, O Lord, who heals the sick.'"[31] The continuation of the prayer ("and may You heal me, for You are a faithful healing God, and Your healing is true") and the Gemara's explanation ("since men have no power to heal, but this is the common practice"), they all omit from their rulings. Rabbi Yishmael's opposition ("A man should not speak thus...") was accepted as law.

The halakhic authorities, both medieval and modern, who discussed Rabbi Yishmael's position regarding the permission granted to a doctor to heal, added other reasons for opposing human healing.

Rashi and Tosafot

Rashi and Tosafot dealt with the theological difficulty relating to medicine: Medical treatment, from the respective perspectives of both the doctor and the patient, is liable to be interpreted as interfering with God's providence.[32] According to them, the permission derived from the verse, "He shall cause him to be thoroughly healed," serves as an

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31 Maimonides, ibid.

32 Rashi, *Bava Kama* 85a, s.v. *nitenah reshut la-rofe'im le-rapot*": "And we do not say – the Merciful One smites and he heals." See also Tosafot, ad loc., s.v. "*she-nitenah*."

appointment of the human doctor to act as God's agent, as was explained above based on the Tosefta. Human healing does not contradict the Creator's intentions, but rather it completes them.

The approach of Rashi and Tosafot is very reasonable in light of the cultural environment in which they lived, for in medieval Europe the practice of medicine was regarded as a denial of God's will.[33] Their explanation of the words of Rabbi Yishmael is also understandable in light of another source, the midrash in which Rabbi Yishmael deals with the views that oppose the practice of medicine.[34] The formulation of this view in the midrash, "He [= God] smote and you heal?!" is very similar to the wording of Rashi: "And we do not say that the Merciful One struck and this one healed":

> It once happened that Rabbi Yishmael and Rabbi Akiva were walking in the streets of Jerusalem and a certain person was with them. They met a sick person who said to them: "O, Masters, tell me what I should do to heal myself." They said to him: "Take this and that until you recover." The person who was with them said to them: "Who smote him with disease?" They said to him: "The Holy One, blessed be He." He said to them: "And you enter into an area that is not yours? **He smote and you**

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33 See survey in E. Yakobowitz, *Ha-Refu'ah ve-ha-Yahadut – Mechkar Hashva'ati ve-Histori al Yachas ha-Dat ha-Yehudit li-Refu'ah*, Jerusalem 5739, pp. 25-47.

34 The Midrash also mentions Rabbi Akiva – Rabbi Yishmael's colleague – in whose name the following Mishnah was taught: "All is foreseen, and freewill (*reshut*) is granted" – see above, note 8.

heal!" They said to him: "What is your craft?" He said to them: "I work the land; see the sickle in my hand." They said to him: "Who created the land? Who created the vineyard?" He said to them: "The Holy One, blessed be He." They said to him: "And you enter into an area that is not yours. He created it and you eat its fruit." (*Midrash Shemuel*, 4,1 [ed. Buber, 27b]}

Nachmanides

Nachmanides' position is marked by an apparent contradiction between his commentary on the Torah and his ruling in his halakhic code, "*Torat ha-Adam.*" We shall present the contradiction between the two approaches, and after analyzing these sources, we shall propose a solution based on the position and thought of Nachmanides.[35]

Nachmanides explains the essence of the blessing that is promised to the righteous as a hidden miracle: "Reward and punishment in this world, as mentioned in the entire scope of the Torah, are all miracles, but they are hidden. They appear to the onlooker as being part of the natural order of things, but in truth they come upon man as punishment and reward [for his deed]."[36] This principle also applies to man's health:

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35 I wish to offer special thanks to Prof. David Novak for his help in analyzing Nachmanides' position. Regarding Nachmanides' views on nature and miracles, see D. Novak, The Theology of Nachmanides Systematically Presented, Atlanta 1992, pp. 77-87.

36 Nachmanides' commentary to Exodus 6:1, translated by Ch.D. Chavel, p. 65 (citations below are according to this edition). This approach is typical of Nachmanides' commentary to the Torah. See, for example, his remarks on Genesis 30:14; Exodus 4:10; Exodus 15:26; and elsewhere.

When there is a pious man who keeps all the commandments of the Lord, God will guard him from sickness, barrenness and bereavement... In general, then, when Israel is in perfect [accord with God], constituting a large number, their affairs are not conducted at all by the natural order of things, neither in connection with themselves, nor with reference to their land, neither collectively nor individually, for God blesses their bread and their water, and removes sickness from their midst, so that they do not need a physician and do not have to observe any of the rules of medicine, just as He said, "For I am the Lord that heals you" (Exodus 15:26). And so did the righteous ones act at the time when prophecy [existed], so that even if a mishap of iniquity overtook them, causing them sickness, they did not turn to the physicians, but only to the prophets, as was the case with Chizkiyah when he was sick. And Scripture states [of Asa by way of rebuke]: "Yet in his disease he did not seek the Lord, but the physicians" (II Chronicles 16:12)... This is also the intent of the Rabbis' interpretation: "'And he shall cause him to be thoroughly healed' (Exodus 21:18) - from here we learn that permission was given to a doctor to heal." They did not say "permission was given to the sick to be healed" [by the physician], but instead they stated [by implication] that since the person who became sick comes [to the physician] to be healed, because he has accustomed himself to seeking medical help

> and he was not of the congregation of the Lord whose portion is in this life, the physician should not refrain from healing him, whether because of fear that he might die under his hand, since he is qualified in the profession,[37] or because he says that it is God alone who is the Healer of all flesh, since [after all] people have already accustomed themselves [to seeking medical help]. Therefore when men contend and one smites the other with a stone or a fist, the one who smote must pay for the healing, for the Torah does not base its laws upon miracles, just as it is said: "For the poor shall never cease out of all the land," knowing [beforehand] that such will be the case. But when a man's ways please the Lord, he need have no concern with physicians.[38]

Accordingly, at a time when God's governance by way of overt miracles is not evident, an alternative natural mode of governance is available – "for the Torah does not base its laws upon miracles." On the practical plane, the Torah recognizes the need for natural governance, and for that purpose, "permission was given to a doctor to heal" based on the principle of "he shall cause him to be thoroughly healed."

Nachmanides presents a different approach in his halakhic work, *Torat ha-Adam*, where he deals with practical

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37 Here Nachmanides presents his halakhic approach, as he spells it out in his treatise, "*Torat ha-Adam*"; see below our reconciliation of the contradiction in Nachmanides' words.

38 Nachmanides, Commentary to Leviticus 26:11 (pp. 460-463).

issues.[39] Several sources indicate that Nachmanides himself practiced medicine, and so his discussion of the matter had personal significance as well.[40]

In his halakhic treatise, Nachmanides compares the role of a doctor to that of a judge, and therefore he uses the same formulation brought in tractate *Sanhedrin* (6b) regarding the parallel question concerning a judge who erred in his judgment. Just as judgment is a divinely-imposed task, so too the practice of medicine; thus a doctor may not try to evade his duty despite the uncertainties and dangers that it involves:

> Lest a doctor say: Why have all this trouble, perhaps I will err and unintentionally take a life – therefore the Torah gave [a doctor] permission to heal... It may be suggested as follows that a doctor is like a judge who is commanded to give judgment, and if he unknowingly errs, he is not liable to any punishment whatsoever. As it is said (*Sanhedrin* 6b): "And lest the judge should say: Why have all this trouble and responsibility? Therefore the verse states: 'He is with you in giving judgment' (II Chronicles 19:6). A judge has only what

39 See *Torat ha-Adam*, in: R. Ch.D. Chavel (ed.), *Kitvei Rabbenu Moshe ben Nachman*, II, Jerusalem 5724, pp. 41-43.

40 *Responsa ha-Rashba*, I, no. 120, regarding treating a non-Jew on Shabbat: "You also asked about a Jewish doctor whether or not he may treat a non-Jewish woman so that she may conceive.... I saw that Rabbenu Moshe ben Rav Nachman, of blessed memory, engaged in this practice for a non-Jewish woman for a fee." Nachmanides was familiar with medical literature: "But I did not see this in any of the medical texts that deal with this" (commentary to Genesis 30:14; and see his commentary to Genesis 45:26; Leviticus 3:9; 12:2; 13:3; Numbers 21:9. Regarding Nachmanides as a doctor, see D. Margaliyot, *Derekh Yisra'el bi-Refu'ah*, Jerusalem 5730, p. 208ff.; Y. Leibowitz, "*Netunim Refu'iyim be-Sefer Torat ha-Adam la-Ramban*," *Korot* 8, 7-8 (5743), pp. 209-215.

> he sees with his own eyes." ...But this permission is a *mitzvah*... and saving a life is a great *mitzvah*. One who is quick is praiseworthy, one who accepts questions is ignoble, one who asks questions sheds blood, and all the more so one who despairs and does nothing... And it may be suggested that since permission was given to a doctor to heal, and the Torah even casts a *mitzvah* upon him, he has nothing to fear, for if he conducts himself in what he believes is the proper manner, his practice of medicine is exclusively a *mitzvah*, for the Torah commands him to heal, and his heart forced him to err... Remedies involve the danger that that which heals one person causes another person to die. And that which they said: "The best of the doctors to Gehinnom" (*Kiddushin* 82b) – to condemn the negligent conduct of doctors and their willful acts....[41]

The permission to heal not only removes any conceivable prohibition, but also imposes a positive obligation to practice medicine. Nachmanides' understanding of the "permission given to a doctor to heal" in the sense of a duty was accepted as law by the halakhic authorities:

> The Torah gave a doctor permission to heal. This is a *mitzvah*, included in the category of saving a life. If [a doctor] refrains [from practicing medicine], he sheds blood, even if someone else is available to

41 *Sefer Torat ha-Adam* (above, note 38, pp. 42–43).

> treat [the patient], for a person does not achieve healing through everybody.[42]

Nachmanides' two treatises deal with the permission granted to a doctor to heal from two different perspectives. In his commentary to the Torah, Nachmanides explains the Torah as based on the revelation of God and the miracles that He performs, and presents the religious approach of miraculous governance. Nevertheless, "the Torah does not base its laws upon miracles," and therefore in his halakhic work, *Torat ha-Adam*, he emphasizes the permission – and even the *mitzvah* – to practice medicine.[43] His biblical commentary and halakhic treatise complement each other in accordance with their respective natures and literary contexts. At the end of his commentary to Leviticus 26:11, however, Nachmanides puts forward his halakhic position as in *Torat ha-Adam*: "A physician should not refrain from healing him, because of fear that he might die under his hand, since he is qualified in the profession."[44]

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42 *Shulchan Arukh*, *Yoreh De'ah*, 336 (beginning). Maimonides writes in similar fashion (*Hilkhot Nedarim* 6:8): ""He may personally give him medical treatment, for this is a *mitzvah*." See the halakhic discussion in A. Sofer, *Nishmat Avraham – Hilkhot Cholim Rofe'im u-Refu'ah*, Jerusalem 5743, on *Yoreh De'ah* 336:1; R. N. Lamm, "*Tippul Refu'i im Yesh bo Mitzvah*, *Halikhot ve-Halakhot*, Jerusalem 5750, pp. 180-184; R. Y.M. Lau, *Responsa Yachel Yisra'el*, II, no. 58. On the definition and various types of "permission," see *Encyclopedia Talmudit*, s.v. "*Chovah*, *Mitzvah*, *Reshut*," XII, Jerusalem 5727, p. 645ff., and especially p. 658. Linguistically, as well, the term "*reshut*" can be understood as "*mitzvah*" – see Y.N. Epstein, *Mechkarim be-Sifrut ha-Talmud u-bi-Leshonot Shemiyot*, I, Jerusalem 5748, pp. 61-68 (and so too "*rashai*" can mean "*chayyav*").

43 See R. E.Y. Waldenberg, *Responsa Tzitz Eli'ezer*, V, in *Kuntrus Ramat Rachel* (above, note 21), nos. 2, 5, 21, and in *Responsa Tzitz Eli'ezer*, XIX, nos. 41-42; R. Ovadyah Yosef, *Responsa Yechaveh Da'at*, I, no. 61; R. Aharon Lichtenstein, *Le-Birurah shel Middat ha-Bitachon*, Jerusalem 5735; F. Rosner, Jewish Bioethics, New York 1987, p. 55ff.

44 Ibid. II, p. 186.

Rashba (R. Shlomo Ben Aderet)

After a series of lengthy discussions, Rashba and other leading authorities of his generation decided to forbid the study of science and philosophy, owing to the danger that it poses to Torah study and the future of the Jewish people. The ban, however, did not include the field of medicine: "We excluded the science of medicine from our ban, even though it is taken from nature, because the Torah gave the doctor permission to heal," and "anything that effects healing is not forbidden because of Emorite ways."[45] According to Rashba's understanding in this responsum, Rabbi Yishmael's words relate to the philosophical problem of human cognition and intellect as opposed to divine revelation.

It is interesting to note that in his novellae to the Talmud, Rashba accepts the explanation of Rashi and the Tosafot regarding God's granting permission to a human doctor to heal, and in the manner of an exegete he relies also on the wording of the Torah.[46] In contrast, in the framework of his polemic regarding the study of science, he understands the permission granted to a doctor in a different manner. Rashba's two statements complement each other: The permission granted to a doctor to heal also includes the permission to engage in the study of medicine,

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45 See *Responsa ha-Rashba*, nos. 413-415.

46 Thus he writes in his novellae to *Bava Kama* 85a (ed. Lichtenstein, p. 425): "'"And he shall cause him to be thoroughly healed (*rapo yerape*)" - from here we learn that permission was given to a doctor to heal.' You might ask: Surely this is learned from '*yerape*' alone! It may be suggested that had the Torah only written '*yerape*,' I might have thought that permission was only given to heal in a case of a wound inflicted by man, but in the case of disease inflicted by heaven, it is forbidden. For He who smote is He who shall heal, and anyone who tries to heal him is regarded as nullifying a heavenly decree. Therefore, the verse had to mention healing twice to teach that in both cases permission was given to the doctor to heal."

and the use of human knowledge to heal does not contradict God's decrees.

R. Yaakov Of Orleans

> ...From here [we learn] that permission was given to a doctor to heal. R. Yaakov of Orleans raised an objection: This is obvious! Why should doctors not engage in healing? Surely it is written: "You shall restore it to him" (Deuteronomy 22:2) – and we interpret this as referring to the restoration of his body. And it is written: "You shall not stand idly by the blood of your neighbor" (Leviticus 19:16). He answered: Permission was given to heal for a wage, for we might have thought that [a doctor] is obligated to heal for free for the reason that I explained. (*Tosafot ha-Rosh*, *Berakhot* 60a, s.v. *u-mi-kan*)

According to R. Yaakov of Orleans, the allowance does not come to permit the practice of medicine, but rather it relates to a secondary issue, namely, the doctor's fee. According to him, Rabbi Yishmael deals not with the clash between religion and medicine, but rather with the economic conditions relating to the medical profession: according to him, the Torah permits a doctor to charge a fee, apparently, in order to ensure the economic security of physicians. He understands that it would have been possible to understand from the Torah's commandments "You shall restore it to him" and "You shall not stand idly by the blood of your neighbor" that one is obligated to help one's fellow for no financial gain. It is also possible that this allowance comes to circumvent the prohibition that

is implied by the principle: "Just as I teach for free, so you should teach for free" (*Bekhorot* 29a).

If the "permission" granted to a doctor to heal is also a *mitzvah*, it may be possible to explain R. Yaakov of Orleans' position as follows: "A doctor who heals for nothing is worth nothing" (*Bava Kama* 85a) – "The patient must be satisfied with his doctor. If the one who caused the injury said: 'I have a friend who can heal you for free,' he [the injured party] can argue that when a doctor does not receive a fee, his heart and mind are not focused on the needs of the patient, since he does not expect to receive a fee" (Rosh, beginning of chapter *Ha-Chovel*). According to this approach, the "permission" to heal makes it possible for a doctor to compel payment: appropriate remuneration of a doctor improves doctor-patient relationship.

Very little is known about the life of R. Yaakov of Orleans. We do know that he was one of the outstanding disciples of Rabbenu Tam. Owing to the difficulties that the Jews faced during the time of the Crusades, he allowed far-reaching leniencies in the area of taking interest.[47] He fled from France to England because of persecutions, and died a martyr's death in London in 1189.[48] Against this backdrop, it is no wonder that R. Yaakov of Orleans understood the words of Rabbi Yishmael as an allowance to charge a fee. According to the plain sense of the talmudic text, it is difficult to understood the "permission to heal" as an al-

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47 See *Mordekhai*, *Bava Metzi'a*, 455, and *Chiddushei Anshei Shem* and *Hagahah*, ad loc. R. Yosef Karo sharply disagreed with his halakhic allowances, writing: "There is no circumvention of [the prohibition of] taking interest greater than this" (*Bet Yosef*, *Yoreh De'ah* 177).

48 See E.E. Urbach, *Ba'alei ha-Tosafot*, Jerusalem 5746, pp. 142-144; and C. Roth, A History of the Jews in England, London 1949, p. 19ff.

lowance to charge for medical services, for it would seem that there is no essential connection between the practice of medicine and the charging of a fee, as we saw in the two previous explanations.

Maimonides

Maimonides understands the practice of medicine as a fulfillment of the *mitzvah* of restoring lost property: "... because it is a *mitzvah*, namely, that a doctor is obligated by law to heal the sick of Israel. This is included in what they said in explanation of the verse, 'You shall restore it to him' (Deuteronomy 22:2) – to include his body,' that if he sees that he is lost, and he can save him, he must save him with his body, or with his money, or with his knowledge" (Commentary to the Mishnah, *Nedarim* 4:4), or "He may personally give him medical treatment, for this is a *mitzvah*" (*Mishneh Torah*, *Hilkhot Nedarim* 6:8). The practice of medicine is an act of benefaction toward one's fellow, and acts of benefaction, according to Maimonides, require no justification or permission from God.[49] Maimonides does not mention Rabbi Yishmael's exposition of the verse, "He shall cause him to be thoroughly healed,"[50] for he wishes to emphasize the Torah's *mitzvah* to help one's fellow based on the law of "You shall restore it to him," and not the permission granted to engage in medicine based on Rabbi Yishmael's exposition. It should be remembered that

49 See his discussion of those who disagree with this position in his Commentary to the Mishnah, *Pesachim* 4:10, *Avodah Zarah* 4:7, and elsewhere.

50 Maimonides does, however, use the verse to derive a law based on its plain meaning: "From where [do we learn] that he is liable for the victim's unemployment expenses and medical expenses independently? For it is stated: 'Only he shall pay for the loss of his time, and he shall cause him to be thoroughly healed' (Exodus 21:19)."

Maimonides himself was a physician. He related to medicine as permitted by natural law,[51] and therefore he saw no need for a verse to refute a possible initial assumption that the practice of medicine is forbidden.[52]

IV. R. Kook's understanding of the permission to heal

In his commentary to the *Siddur*, *Olat Ra'ayah*,[53] R. Avraham Yitzchak Kook explains the blessing for healing: "May it be Your will, O Lord, my God, that this operation may be a cure for me, for You heal for free." A careful examination of his words indicates that R. Kook combines the words of the *Rishonim* cited above, and provides them with an original and comprehensive explanation in accordance with his general outlook. We shall cite his words,

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51 My revered teacher, R. Yehuda Amital, adduces proof for this understanding from a comparison of the following two rulings of Maimonides: "When a person kills a *trefah*, even though he eats, drinks and walks in the market place, he is not held liable by an earthly court for killing him. Every person is presumed to be physically sound, and a person who kills him should be executed unless it is certainly known that he is a *trefah*, and the physicians say that his infirmity does not have any remedy for humans and it will surely cause his death, if no other factor does first" (*Hilkhot Rotze'ach u-Shemirat ha-Nefesh* 2:8); and: "One should not add to these conditions that render an animal *trefah* at all. For any condition that occurs with regard to a domesticated animal, wild beast, or fowl aside from those listed by the Sages of the early generations and which were agreed upon by the courts of Israel can possibly live. [This applies] even if it is known to us according to medical wisdom that ultimately it will not live" (*Hilkhot Shechitah* 10:12). Regarding ritual slaughter, the law is determined exclusively by rabbinic rulings, and nothing must be added to it based on medical knowledge. This is not the case regarding the laws of murder, for the Torah gave a doctor permission to heal at all times. See the references to other explanations in Frankl's edition of the *Mishneh Torah*. See also D. Novak, Natural Law in Judaism, Cambridge, 1998, pp. 101-105.

52 See Maharitz Chayyot on *Bava Kama* 85a regarding the position of Maimonides. See also Z. Montner's introduction to *Pirkei Mosheh bi-Refu'ah*, Jerusalem 5721, pp. 9-24; F. Rosner & S. Kottek, Moses Maimonides – Physician, Scientist and Philosopher, London-New York, Aronson 1993.

53 Jerusalem, 5699, p. 390. The parallel passage in R. Kook's commentary to *Berakhot*, *Ayin Ayah*, is almost identical, and has no significant differences, and therefore I have not related to the minor differences in readings.

and then try to explain them based on our analysis of the talmudic passage and the interpretations of the *Rishonim.*

The issue of payment and the objective of healing

For you heal for free – for You are a faithful Healer and Your healing is true, since men have no power to heal, but this is the common practice. Abaye said: A man should not speak in this manner, for it was taught in the school of Rabbi Yishmael: [It is written:] "He shall cause him to be thoroughly healed" (Exodus 21:19). From here we learn that permission was given to a doctor to heal (*Berakhot* 60a).

A doctor who charges a fee has another objective in addition to the healing and health of the patient. But the Divine goal of the faithful Healer is solely the success and health of His creatures, health of the body and health of the soul. Accordingly, He has no other objective besides the healing itself, and He heals for free.

At the beginning of the passage, R. Kook relates to the doctor's fee. Accepting a fee for medical service has great significance, for there is a fundamental difference between God's healing and the healing of man. A human doctor will never be able to heal out of love for all men in the way that God does. This distinction expresses itself in the fact that God heals for free, because for this reason "He has no other objective besides the healing itself" and He is "a faithful Healer and His healing is true." When a human doctor engages in medicine, he requires special permission,

because he can never reach that level of God's goal. Alluding to the words of R. Yaakov of Orleans, R. Kook gives the economic explanation fundamental significance.

R. Kook makes another distinction between Divine healing and human healing: A human doctor turns to "the patient" and tries to restore "his health" by way of a "cure." "The Divine objective" turns to all types of health, "health of the body and health of the soul," and includes also "success." God seeks the health of all "His creatures," and this also includes a proper balance between body and soul, as is also accepted in modern medical literature.[54]

Physical Healing and Spiritual Healing

> Man is an organic creature; his physical faculties are joined and connected one to the other, as are his spiritual functions, and the two are connected to each other with a strong bond. Who can say that he is familiar with all the faculties of the body and soul and their relationship to the forces in the world at large? Accordingly, even if he heals one side, short and narrow, perhaps the change causes much damage on the other side, equal to the benefit resulting from his healing. Thus, it cannot be determined whether the healing is true.

R. Kook utilizes Nachmanides' explanation, according to which permission is necessary to provide all types of medical treatment, in face of the many dangers that they involve. If a doctor conducts himself in proper manner, in accordance with his abilities and medical knowledge, "he

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54 See above, note 24, for a definition of the concept of "health."

has nothing to fear," that he will perhaps err and unintentionally kill his patient, for surely it was for this reason that the Torah granted a doctor permission to heal. As a doctor, Nachmanides understood the problematic nature of every medical decision. R. Kook adds and emphasizes the complexity of man as an organic creature that is composed of body and soul and maintains a network of connections with the outside world: "Who can say that he is familiar with all the faculties of the body and soul and their relationship to the forces in the world at large?"

The Science of Medicine and Divine Governance

Therefore, since human intelligence does not fully understand healing, but experience teaches us that the science of medicine often hits the truth, we must understand that the use of human wisdom in medicine is also one of the marvels of Divine governance, and we assign the matter to supernal providence, like those things that we are utterly incapable of doing by ourselves, because You alone, O Lord, are a faithful Healer, before whom all the secrets of and connections between body and soul are revealed, and Your healing is true without causing damage somewhere else.

All human wisdom in general, and the science of medicine in particular, is uncertain,[55] especially in our time,

55 So, for example, ruled R. Yonatan Eibeshutz, *Kereti u-Peleti, Yoreh De'ah* 168:5: "Scientists and doctors have no certain knowledge, but they decided to claim certainty and absence of any doubt, even though they judge matters in accordance with their reason and appearances. Therefore, the Sages said: 'The best of doctors to Gehinnom.'"

when the science of medicine has developed in astonishing fashion into countless specialties, and treatment in one area is easily liable to cause "damage somewhere else."[56] The very "use of human wisdom in medicine" which does not consider "all the secrets of and connections between body and soul" requires Divine assistance.[57]

R. Kook deals with the issue of human cognition as opposed to "supernal wisdom between which and our wisdom there is no relationship or similarity" (*Responsa ha-Rashba*, I, no. 415). The science of medicine merits a special status in this context, for the Torah gives a doctor permission to heal. According to him, there is no contradiction between man's action and the Creator's governance; on the contrary, this combination is part of God's providence. R. Kook makes use here of Rashi and Tosafot's understanding of "the permission given to a doctor to heal": the use of human wisdom in medicine is not defined as "contradicting a royal decree" (wording of Tosafot), for it is God who "favors man with knowledge and teaches mortals understanding."[58]

R. Kook integrates Rashba's explanation with that of Rashi and Tosafot, but expands upon Rashba's comment

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56 See I. Illich, Medical Nemesis – The Expropriation of Health, Toronto-New York-London 1976; E.J. Cassel, "The Nature of Suffering and the Goals of Medicine," *New England Journal of Medicine* 306 (1982), pp. 639-645.

57 See R. Kook's comments on the same matter in "*Olat Ra'ayah*," I, pp. 273-274, regarding the "You favor man with knowledge" blessing and the "who are wise in secrets" blessing; and in his talmudic commentary, "*Ayin Ayah*," on *Berakhot* 58a.

58 This is the way that Maharsha explains the wording of the blessing, "who has formed man in wisdom": "'In wisdom' relates to man, for the Holy One, blessed be He, gave him wisdom when He created him, unlike all the other living creatures, whom He did not give wisdom." See my article, "*Asher Yatzar ha-Adam be-Chokhmah*, *Assia* 63-64 (5759), pp. 124-138, for a detailed discussion of the various explanations.

regarding human wisdom.[59] It is possible that R. Kook intentionally combined Rashba's explanation in his responsum regarding the study of science and philosophy with the explanation of Rashi and Tosafot on the Gemara, because Rashba adopted this understanding in his novellae to the Gemara (*Bava Kama* 85a).

Addition of R. Kook

Abaye said that we should not concern ourselves with the hidden connections that we cannot perceive, for if so, you nullify all of man's efforts for material and spiritual repair, for a person will be concerned in everything that he repairs and improves that perhaps he is thereby causing some damage in some hidden connection. Rather this is the principle that should not at all be questioned, that the Torah gave a doctor permission to heal because he is qualified in this profession, and "a judge has only what he sees with his own eyes." One should not raise doubts based on hidden concerns that will weaken the hands of those toiling to repair the world. Wisdom strengthens the wise (see Ecclesiastes 7:19), and the development of man's reason and all of his discoveries each in its own time – this is all the work of God, which becomes revealed in accordance with the needs of man in his time and in his generation, to which nothing should be added and nothing taken from it. For the Lord gives wisdom; out of His mouth comes knowledge and understanding (see Proverbs 2:6).

59 Note the similarity between R. Kook's wording and that of Rashba.

Despites all the uncertainties and dangers, it falls upon man "to engage in the material and spiritual repair of the world." In this passage R. Kook makes repeated use of the concept of "repair." The concept "repair of the world" is taken from the Tosefta in the same context,[60] but it is possible that the emphasis that he lays on this concept is also connected to the basic meaning of the root "*resh-peh-alef*" in Scripture – "repair."[61] The fundamental task of the doctor (*rofe*) is to engage in the "material and spiritual repair" of his patient, and in this way he engages in "repair of the world." Since medical wisdom must also take into account "the needs of man in his time and in his generation" and "the forces of the world at large," we understand the expansion of the "material and spiritual repair" of the individual into "repair of the world" on the universal level.

The requirement as formulated by R. Kook that the doctor be "qualified in this profession" is a combination of the wording of the Tosefta in *Gittin*[62] and the wording of the *Shulchan Arukh* in the context of the permission granted to practice medicine. According to the Tosefta - "If a professional doctor treated [a patient] with the permission of the court, and caused him damage – inadvertently, he is exempt; intentionally, he is liable, for the sake of public welfare." And thus rules R. Yosef Karo in the *Shulchan Arukh*: "However, he should not practice medicine unless he is qualified - for otherwise he sheds blood - and there is nobody there greater than himself" (*Shulchan Arukh*, *Yoreh De'ah* 336).

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60 Tosefta, *Gittin* 3:8, ed. Lieberman, p. 257.

61 See, for example, "And he repaired (*vayerape*) the altar of the Lord that was broken down" (I Kings 18:30); "I have repaired (*ripeti*) this water" (II Kings 2:21).

62 Above, notes 29, 59.

The change in the wording of the Tosefta introduced by R. Yosef Karo in his *Shulchan Arukh* can be explained by the period and the nature of the works: The Tosefta starts with the assumption that there exists a court that authorizes doctors to practice medicine and oversees the medical profession, whereas R. Karo comes to issue halakhic rulings for his generation, when no such court existed. Therefore, "permission of the court" is defined exclusively by professional standards ("qualified, and there is nobody there greater than himself").[63] R. Kook relates to these two possibilities and combines them: "the Torah gave permission to the doctor to heal because he is qualified in his profession."

The addition in the words of R. Kook, "a judge has only what he sees with his own eyes," is taken from *Sanhedrin* (6b), based on Nachmanides' explanation of the permission given to a doctor to heal (see discussion above). A doctor is permitted and obligated to rely on his own knowledge, and in this way he will merit "the development of man's reason."

R. Kook concludes his discussion with a citation of the words of Ecclesiastes (7:19): "Wisdom strengthens the wise." They fit in well in R. Kook's exposition based on their context in the book of Ecclesiastes.

> Be not righteous overmuch; nor make yourself overwise: why should you destroy yourself? Be not wicked overmuch, nor be foolish: why should you die before your time? It is good that you should take hold

63 See the halakhic discussions regarding the professional training that is necessary in *Responsa Tzitz Eli'ezer*, V, *Ramat Rachel*, no. 22, 1-4; *Responsa Bet Hillel, Yoreh De'ah*, no. 336; *Arukh ha-Shulchan, Yoreh De'ah*, 336:2; *Responsa ha-Chidah, Shiyyurei Berakhah, Orach Chayyim*, 328:15.

> of this; but do not withdraw your hand from that either: for he that fears God performs them all. Wisdom strengthens the wise more than ten rulers who are in a city. For there is not a just man upon earth, that does good, and sins not. (Ecclesiastes 7:16-20)

The citation from the book of Proverbs also emphasizes that the fear of the Lord precedes wisdom, and in this way God protects "those who walk uprightly": "Then you shall understand the fear of the Lord, and find the knowledge of God. For the Lord gives wisdom: out of His mouth come knowledge and understanding. He lays up sound wisdom for the righteous: he is a shield to those who walk uprightly" (Proverbs 2:5-7).

"This is all the work of God, which becomes revealed in accordance with the needs of man," for "the use of human wisdom in medicine is one of the marvels of Divine governance," and therefore the Divine permission given to a doctor to heal gives medicine Divine status. The permission to practice medicine is then a real *mitzvah*, and nothing should be added to it or taken from it (based on Ecclesiastes 3:14).[64] Based on this, the practice of medicine does not stand in contradiction to God's decrees, for surely "the development of man's reason and all of his discoveries each in its own time – this is all the work of God," and it is given by God, "for the Lord gives wisdom: out of His mouth come knowledge and understanding" (Proverbs 2:6). In the context of medicine, special importance is attached to

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64 This is the wording of the *Shulchan Arukh, Yoreh De'ah* 336: "The Torah gave a doctor permission to heal. This is a *mitzvah*, included in the category of saving a life. If [a doctor] refrains [from practicing medicine], he sheds blood."

the study of a science that leads to "the development of man's reason."[65]

R. Kook's words, "to which nothing should be added and nothing taken from it," refer to the wisdom and reason of man. The source of the prohibition is found in the Torah: "You shall not add thereto, nor diminish from it" (Deuteronomy 13:1). The use of this expression is very surprising, for the prohibitions "not to add" and "not to subtract" apply to the Torah's commandments, and not to "man's reason." But since according to R. Kook, "this is all the work of God, which becomes revealed in accordance with the needs of man," the prohibitions of adding and subtracting apply also to "man's reason," as they do to the commandments. The force of "the development of man's reason," that is, the scientific advance of human knowledge, obligates man to full observance of the Torah's commandments as they were given, for "we must understand that the use of human wisdom in medicine is also one of the marvels of Divine governance, and we assign the matter to supernal providence." According to this understanding, the prohibition of "not adding and not subtracting" applies also to human wisdom itself – "to which nothing should be added and nothing taken from it. For the Lord gives wisdom; out of His mouth comes knowledge and understanding."[66]

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65 See Maimonides' remark about the special importance attached to the science of medicine: "In this way the science of medicine will be an exceedingly great introduction to the knowledge of God and the acquisition of true success, and its study and practice will be one of the great modes of service..." (*Shemoneh Perakim*, chap. 5). See A. Steinberg, "*Limud Refu'ah, Encyclopedia Refu'it Hilkhatit*, III, Jerusalem 5759, pp. 386-399.

66 Regarding the prohibition "not to add or subtract" in the teachings of R. Kook, see *Responsa Mishpat Kohen* (*Inyanei Eretz Yisra'el*), no. 143, s.v. *vehineh hizkarti*.

The harmony and perfection of man's wisdom that was given to him by God – that itself is the permission given to a doctor to heal, and therefore there is no contradiction whatsoever between God's decrees and man's practice of medicine. Human wisdom derives from God's wisdom, in the sense of ""who has imparted of His wisdom to those who revere Him."[67] Even though human wisdom and the science of medicine are limited, a doctor is permitted to practice medicine based on the allowance given to a doctor to heal.

After surveying the various explanations offered by the *Rishonim*, it is this explanation that remains central according to R. Kook's understanding of the words of Rabbi Yishmael, and therefore he concludes his remarks with this idea. In his halakhic responsum in *Da'at Kohen* (no. 140) as well, R. Kook mentions the limitations of human wisdom as the sole explanation of the words of Rabbi Yishmael:

> The plain sense of the words of the Sages, of blessed memory, (*Bava Kama* 85a): "'He shall cause him to be thoroughly healed' (Exodus 21:19). From here we learn that permission was given to a doctor to heal" – indicates this, that the practice of medicine based on its science is uncertain. For were it certain, how could you imagine that he is not obligated to heal? Does he not violate the prohibition of "You shall not stand idly by the blood of your neighbor" (Leviticus 19:16), for any trouble that

67 See *Berakhot* 58b and R. Kook's comments in *Ayin Ayah*. Similarly we find in *Bava Batra* 12b: "Since the day when the Temple was destroyed, prophecy has been taken from the prophets and given to the wise... A wise man is even superior to a prophet, as it says: 'And a prophet has a heart of wisdom' (Psalms 90:12)."

> befalls him, even from heaven? A lion comes from heaven (see *Ketubot* 30a), but nevertheless we are obligated to rescue him, and there is no concern that "the Merciful One smote, etc.," and the same is true here. Rather the principle is that the foundations of medicine are not that clear, and he doesn't know with certainty that their assumptions are not in doubt. It was, therefore, necessary to grant permission, for no alternative is available to man.

Rabbi Yishmael and his teaching regarding the permission granted to a doctor to heal

As stated above, R. Kook provides the words of Rabbi Yishmael with a comprehensive explanation, negating any possible thought of forbidding the practice of medicine, provided that the doctor is careful to maintain a proper balance between physical and spiritual healing (see above). This explanation fits in well with Rabbi Yishmael's teachings elsewhere in the Talmud on issues regarding life and death, and physical and spiritual healing (*Avodah Zarah* 27b), and it is very possible that he himself practiced medicine.[68] Rabbi Yishmael allowed his disciples to participate in autopsies (*Bekhorot* 45a),[69] but he related to their conclusions with great caution, especially when the results

68 Rabbi Yishmael was a *kohen* – "*Yishmael kahana*" (*Chullin* 49b, *Ketubot* 105b, *Tosefta*, *Challah* 1:11) – and it was perhaps owing to the prohibition falling upon a *kohen* to contract ritual impurity that Rabbi Yishmael did not personally participate in the autopsy.

69 A slightly different reading is found in *Shittah Mekubbetzet*: "... And they found two hundred and fifty-two joints and limbs. They came and asked Rabbi Yishmael: 'How many joints and limbs are there in the human body?' He said to them: 'Two hundred and forty-eight.' They said to him: 'But surely we checked and found two hundred and fifty-two....'"

contradicted the words of the Torah, and in such a case he even called them "fools" (*Niddah* 30b).[70] Already from these sources it seems that Rabbi Yishmael tried to increase his knowledge in order to find a balance between his world of Torah and his interest in medicine. Rabbi Yishmael established the great principle concerning the saving of life, "'that you shall live through them' – and not that you shall die through them," but for this purpose one must not desecrate the name of God. Material life is not more important than the spiritual value of sanctifying the name of God, and a proper balance must be found between the two areas (*Sanhedrin* 74a). For this reason, Rabbi Yishmael forbade his nephew to seek treatment at the hands of the heretic Yaakov of the village of Sakhniya,[71] "for he was liable to be drawn in after him." Rabbi Yishmael also heaped praise upon Ben Dama for not giving up his purity "in body and in soul," and not violating the words of his colleagues: "Fortunate are you Ben Dama, for you were pure in body, and your soul left you in purity" (*Avodah Zarah* 27b). That same Ben Dama had inquired of Rabbi Yish-

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70 See also the less biting formulation in Tosefta, *Niddah* 4:17 with the variant readings, without the words "proof from fools": "Rabbi Yishmael said: A story is told of Cleopatra the queen of Alexandria that she brought her maidservants who had been sentenced to death by royal decree and tore them open, and it was found that a male embryo was fully fashioned on the forty-first day and a female embryo on the eighty-first day. They said to him: Proof cannot be brought from here. From where can proof be brought? From a woman who was newly married or from a woman whose husband returned from oversees."

71 Regarding Yaakov of the village of Sakhniya, see also *Avodah Zarah* 17a. Regarding healing through the magic and miracles of the early Christians, see E.E. Urbach, *Chazal – Pirkei Emunot ve-De'ot*, Jerusalem 5743, p. 96ff.; E. Ir-Shai, "*Ya'akov Ish Kefar Naboriya – Chakham she-Nikhshal be-Minut*," *Mechkerei Yerushalayim be-Machshevet Yisra'el*, II (2), pp. 153-168.

mael about studying Greek wisdom,[72] and Rabbi Yishmael responded by stressing the supreme importance of Torah study (*Menachot* 99b).

Elie Wiesel, an author of our time,[73] describes Rabbi Yishmael, as one who sought a balance between the external world and its inner meaning, as is it implied from what is told about Rabbi Yishmael's childhood during the period of the destruction of the Temple: Despite God's providence over all His creatures, it falls upon man to choose the good, and through his good actions, he can change his "fate" (*Gittin* 58a).[74] This outlook applies both in the national context of exile and redemption and on the personal plain in order to avoid the dangers of daily life: Even though everything is foreseen, man is given the permission and the obligation to change the world to the best of his ability, and in this way he can save himself from death (*Shabbat* 32a).

Rabbi Yishmael's view regarding the "permission given to a doctor to heal" should therefore be understood in light of his general outlook regarding the relationship between life and death and between body and soul. "Fortunate are you Ben Dama, for you were pure in body, and your soul left you in purity" (*Avodah Zarah* 27b).

As a talmudic commentator and thinker, R. Kook developed the discussion regarding the relationship between body and soul based both on the view of Rabbi Yishmael

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72 See S. Lieberman, *Yevanit ve-Yavnut be-Eretz Yisra'el*, Jerusalem 5723, pp. 225-235. Rabbi Yishmael interpreted the dreams (*Berakhot* 56b) and was intimately familiar with the personality, i.e., "the pure soul," of his sister's son (based on *Avodah Zarah* 27b).

73 See E. Weisel, *Célébration talmudique – Portraits et légendes*, Paris 1991. This understanding explains several of Rabbi Yishmael's statements, as well as his martyrdom in sanctification of God's name.

74 See the parallel source in Tosefta, *Parah* 10:3.

and on his own outlook, and in light of his understanding of the dangers of medical research in his day: "Man is an organic creature," and therefore a doctor must be given special permission to heal, in order to preserve the balance between body and soul.

V. The novelty of R. Kook's position and the message for our generation

We have attempted to present Rabbi Yishmael's teaching based on the biblical text (I) and against the philosophical background of "the permission given to a doctor to heal" (II). The *Rishonim* emphasized different aspects of the issue, requiring special permission to practice medicine – each authority according to his generation and general outlook (III). R. Kook related to the words of his predecessors and added an original explanation based on Rabbi Yishmael's own views. This explanation accords with R. Kook's general outlook and religious philosophy, and it has an important message for modern medicine (IV).

By virtue of his greatness in Halakha and Jewish thought, R. Kook was able to join together the various explanations of Rabbi Yishmael's position. "It would not be an exaggeration to say that our master, Rav Avraham Yitzchak Ha-Kohen Kook, of blessed memory, was the only Torah authority in our generation who equally mastered Halakhah and Aggadah."[75] R. Kook's explanation of the words of Rabbi Yishmael is a classic example of his genius: he interwove the words of the Written Law and its commentaries, the Oral Law and the explanations of the *Rishonim*, adding his own deep and original interpreta-

75 According to R. Sh.Y. Zevin, *Ishim ve-Shittot*, Jerusalem 1979, p. 232.

tions, and drawing important conclusions for the problem of medicine in our generation:

1. "The faithful Healer" (God) desires our health and success for no other purpose – "for You heal for free."
2. Man is an "organic creature," and any medical treatment is liable to upset the delicate balance between his physical and spiritual faculties.
3. "It falls upon man to engage in the material and spiritual repair of the world," despite the dangers inherent in the task. When a doctor practices medicine, he fulfills a Divine mission ("the use of human wisdom in medicine is one of the marvels of Divine governance").
4. The practice of medicine is conditioned on the doctor's being "qualified in his profession," and a doctor must rely on his knowledge, for "a judge has only what he sees with his own eyes."
5. Special wisdom is necessary to match medical knowledge to the needs of the individual in each generation: "This is all the work of God, which becomes revealed in accordance with the needs of man."

The discussion surrounding this issue is a clear example of R. Kook's method and genius, and his ability to combine many different sources from diverse periods and derive from them a uniform message. R. Kook himself defined his method in his *Orot ha-Torah*: "... Every element in the Torah stems from the entire Torah, both the Written Law and the Oral Law... In each particular word of the Torah and in each particular law shines infinite supernal light... to the point that a new song can stretch out over every law and every chapter."[76]

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76 See *Orot ha-Torah*, chap. 4, nos. 3-4.

Tov Shebarof'im le-Geihinom: The Best of Doctors to Geihinom[1]

Rabbi Tzvi Sinensky

I. Introduction

The *Mishnah Kiddushin* 82a records:[2]

> Abba Guryon of Tzadyon said in the name of Abba Gurya: One should not teach his son to become a donkey-rider, camel-rider, potter, sailor, shepherd or shopkeeper, for these are a bandit's professions. Rabbi Judah said in his name: The majority of donkey-riders are evil-doers; the majority of camel-riders are innocent; the majority of sailors are righteous; the best of doctors are [destined] to hell; and the *kosher* (upright) among butchers is the partner of Amalek.

The *Mishnah* is ambiguous in a number of respects. On the most basic level, the *Mishnah* fails to clarify why it

1 Several Hebrew articles have been written on this topic, and are available online. One article that I found to be of particular value is Dr. Shmuel Kotek, *Tov Shebarof'im Le-Geihinom*, available at www.medethics.org.il/articles/ASSIA/ASSIA2/R0021021.asp.

Additionally, this paper was originally presented as a class at the Albert Einstein College of Medicine Synagogue. I would like to thank all those in attendance who enhanced the quality of this presentation through their insights and observations. Many of those comments have been integrated into this presentation.

2 See also the parallel source in *Masechet Sofrim* 15:9.

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is that doctors descend to hell. What is wrong with practicing medicine?[3]

Second, although it is clear that Rabbi Judah quotes Abba Gurya as discouraging one from entering the medical profession, Abba Guryon does not record a negative opinion regarding medicine, even as he discourages one from entering various other professions. Indeed, it is clear that R. Judah and Abba Gurya disagree with respect to the camel-rider and the sailor; R. Judah offering a negative judgment and Abba Gurya viewing these professions in a positive light. Perhaps we are to infer that Abba Guryon disagrees with Rabbi Judah with respect to *tov shebarof'im* as well.

Third, it is interesting to note that whereas the doctor is referred to as "*tov*," "good," the butcher is called "*kasher*," which carries more of a religious connotation. Perhaps we should conclude that the *Mishnah* refers not to a righteous doctor, but to a doctor who possesses a high degree of expertise. What is the significance of this textual subtlety?

Finally, it is significant that R. Judah does not formulate his judgment in *halakhic* terms; his comment seems more along the lines of an *eitza tovah*, sagely advice, rather than a strict statement of *halakha*. Moreover, R. Judah does not explicitly deter every individual from entering these fields; he merely offers a judgment regarding a sizeable segment of the population. He speaks of the majority of donkey-riders and camel-riders, the best of doctors and butchers. Are we to infer that even R. Judah does not mean to discourage one from entering the field of medicine?

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3 One possible thesis, which we will not explore here, is that the *Mishnah* refers specifically to the widespread problem of charlatans, which plagued ancient Greece and Rome. This interpretation would lend an ironic meaning to the term "*tov*." Thanks to Rabbi Raphy Hulkower for raising this possibility.

Moreover, the *Mishnah* is not only unclear, it also seems to be problematic. After all, Jewish law and philosophy assign medical practice the status of a mitzvah. The *Gemara Bava Kama* 85a deduces from the phrase "*ve-rapo yerapeh* – he shall surely heal,"[4] the permissibility of medical practice. Although the *Gemara* seems to assume that one might have thought that it is prohibited to provide medical treatment,[5] the *Gemara's* conclusion seems to assert the full permissibility of such treatment. Furthermore, the *Mishnah Nedarim* 4:4 implies that one who practices medicine is not only permitted to do so but indeed fulfills a Biblical commandment! Rambam,[6] building off a passage in *Sanhedrin* 73a which states that one who saves a life fulfills the mitzvah of *hashavat aveida*, returning a lost object, asserts that one who heals another person also fulfills this mitzvah. Ramban[7] asserts that the source for this mitzvah is the verse "*ve'ahavta le-rei'acha kamocha*," you shall love your friend as yourself. It is thus clear that one who administers medical treatment fulfills a Biblical obligation. In light of these sources, it is jarring that the *Mishnah* would discourage one from entering the field of medicine. Does a doctor fulfill a Biblical obligation or does he descend to hell? There would appear to be an outright contradiction.

Before proceeding to the next section, it is also worth noting that a similar though different formulation appears in *Avot de-Rabbi Natan*:[8]

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4 Exodus 21:19

5 See Rashi s.v. *nitna*, Tosafot s.v. *she-nitna*, Rashba s.v. *ve-rapo* ad loc.; see, however, *Tosafot ha-Rosh Berachot* 60a s.v. *mi-kan*

6 *Commentary to the Mishnah*, ad loc.

7 *Torat Ha'Adam*, *Kitvei Ha-Ramban* II pg. 48

8 Chapter 36

> Seven lack a share in the world to come: a clerk, a scribe, the best of doctors, a city judge, a sorcerer, a *chazzan*[9] and a butcher.

This source both parallels and differs from the *Mishnah*. On the one hand, *Avot de-Rabbi Natan* preserves the phrase *tov shebarof'im*. Additionally, it too mentions the butcher alongside the doctor. On the other hand, the doctor here is grouped with a number of well-regarded professionals, such as the scribe, judge, and *chazzan*. As in the case of the *Mishnah*, while on the surface *Avot de-Rabbi Natan* censures all doctors, there are perhaps indications to the contrary.

In light of these observations, let us survey the range of views found in the classical commentators. We will first address the spiritual danger attendant to the medical practitioner, and we will then turn to reconciling *tov shebarof'im* with the bulk of rabbinic literature.

II. Where Can the Doctor Go Wrong?

Broadly speaking, the traditional commentators adopt two general approaches to our *Mishnah*. Many view the potential pitfall facing the doctor as an *aveirah she-bein adam la-chaveiro*, a sin between man and his fellow man, whereas others view the *Mishnah* as expressing a concern for sinfulness *bein adam la-makom*, between man and G-d.

Tosafot Ri ha-Zaken, Maharsha, Tiferet Yisrael, and Meiri[10] adopt the *bein adam la-chaveiro* perspective. Specifically, they all point to the possibility that if a doctor missteps, he is liable to cause a patient's death. Tosafot Ri ha-Zaken, for example, simply states "*she-memitin ha-choleh*," because

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9 This refers to either a cantor or sexton.

10 *Kiddushin ad loc.*

they kill the sick. Along similar lines, *Shulchan Aruch*[11] writes that one who is unqualified to provide treatment and does so anyway is considered as one who has spilled blood. The Vilna Gaon[12] explains the *Shulchan Aruch* by invoking the phrase *tov shebarof'im*, implying that the *Mishnah* intends to say that irresponsible medical treatment can lead to death.

Within this camp we find a number of variations. Maharsha stresses that the *Mishnah* refers specifically to an individual who claims an unattained level of expertise. Such an individual, in his arrogance, may come to kill an innocent patient.

Tiferet Yisrael notes that the *Mishnah* employs the term "*tov*," which is to be contrasted with the *Mishnah*'s usage of the word "*kasher*" in reference to the butcher. Tiferet Yisrael explains that this refers to a doctor who is smug in his superiority, and therefore "fails to consult with his colleagues, as befits one in whose mouth and pen reside life and death." Furthermore, following Ramban and Tashbetz, Tiferet Yisrael goes on to stress that the *Mishnah* does not intend to dissuade one from entering the medical profession so much as to warn him of the pitfalls that endanger one who enters the field.[13]

Meiri[14] adds two underlying causes for malpractice on the part of doctors, in addition to that of hubris: "The best of doctors [descends] to hell, because often he spills blood due to despair, and because he does not invest sufficient effort in the craft of medicine." Meiri identifies two scenarios: a doctor who despairs too quickly in the possibility of a patient's

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11 Y.D. 336:1

12 ibid. note 4

13 See also *Tzitz Eliezer* 5:22, who quotes Tiferet Yisrael approvingly.

14 *Kiddushin* ad loc.

recovery, and a doctor who fails to invest sufficient time and energy into determining the proper course of treatment.

An interesting variation with regard to the concern of malpractice is adopted by R. Eliezer Waldenberg.[15] R. Waldenberg understands the *Mishnah* to be condemning very specific types of egregiously unethical experimental medical practices, in which patients are killed in the interests of developing treatments that on only rare occasions extend the lives of other patients. Such a doctor, claims R. Waldenberg, is "*tov*," because he is only interested in earning recognition. Ultimately such an individual is a fame-seeking murderer and is therefore sharply censured by the *Mishnah*.

In contrast to the above commentators, Rashi introduces not only a *bein adam la-chaveiro* perspective, but a *bein adam la-makom* concern as well. His language is worth quoting in full:[16]

> "The best of doctors goes to hell – He does not fear illness, his food is that of the robust, he does not break his heart before G-d, sometimes he causes people to die, and he has the ability to heal the poor but does not."

Although Rashi mentions a number of factors, it seems that Rashi means to isolate two general dangers, one *bein adam la-makom* and the other *bein adam la-chaveiro*. First, the doctor's lack of dependency upon G-d is evident in his lack of concern for his health as well as his high dining style. Significantly, Rashi is the first commentator we have seen to highlight a *bein adam la-makom* dimension to *tov shebarof'im*.

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15 *Tzitz Eliezer* 17:66:6

16 *Kiddushin* ad loc. See also *Tosafot Yom Tov* ad loc., whose words are identical to those of Rashi.

Second, in similar fashion to other commentators, Rashi introduces the concern for malpractice. Even here, Rashi adds a dimension that is omitted by others: not only might the doctor come to kill an innocent patient, but he will also withhold treatment from those who are in need of such assistance.

Interestingly, R. Moshe Feinstein[17] distinguishes between the final two elements mentioned by Rashi. The case of a patient who dies refers to one whose doctor accidentally caused the death, while the final clause in Rashi refers to a doctor who intentionally withholds treatment. According to R. Feinstein, the difference between the two final elements in Rashi's commentary relates not only to the result (death vs. any treatment that is not provided), but also to the doctor's underlying intent (unintentional vs. intentional).

A further *bein adam la-makom* perspective is added by Maharal.[18] Maharal suggests that *tov shebarof'im* refers to a doctor who views medicine from a purely material rather than spiritual perspective, thereby denying divine providence as a crucial element in human health. Such an individual perceives reality only from the material of the material, which is ultimately comprised of nothingness, and therefore has acquired a portion in hell, a place of nothingness.

III. Squaring *Tov Shebarof'im* With Other Traditional Texts

However, we must still address the problem of reconciling the *Mishnah* with the generally favorable rab-

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17 *Igrot Moshe* Y.D. 3:36

18 *Netzach Yisrael* 30

binic view of medicine. In grappling with this apparent contradiction, commentators adopt three different approaches: 1) Some distinguish between appropriate and inappropriate instances of medical practice; 2) Others accept the simple reading of the *Mishnah*, but dismiss *tov shebarof'im* as a minority view; 3) Yet others reinterpret the *Mishnah* to be more compatible with the predominant rabbinic perspective.

R. Yonatan Eibeshutz[19] falls squarely in the first camp, resolving the contradiction by invoking the singular view of R. Avraham Ibn Ezra. In his commentary to Exodus,[20] Ibn Ezra forwards the remarkable thesis that although human intervention is permissible in the case of human-induced injury (e.g. a wound), such treatment is impermissible in the case of a naturally-contracted disease, as one would thereby contravene the divine will.[21] Similarly, claims R. Eibeshutz, the *Mishnah* in *Kiddushin* refers specifically to a naturally-contracted disease, and it is only in that case that a doctor is subject to divine censure. However, the verse "*ve-rapo yerapeh*" and the *Mishnah Nedarim* 4:4 refer specifically to medical treatment for human-induced injuries.

The second approach posits that *tov shebarof'im* is to be rejected as a non-normative view. This thesis is forwarded by R. Yaakov Tzahalon (*Otzar HaChaim*), the 17th-century Roman rabbi and doctor, who asserts that Abba Guryon indeed debates the principle *tov shebarof'im le-geihinom*. Moreover, we do not accept the view of R. Judah, whose quotation is to be rejected as a minority opinion.

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19 *K'reiti u-Pleiti* 128:5

20 *Peirush Ha-Katzar* 21:19

21 Cf. *Avnei Neizer* C.M. 193, *Yechaveh Da'at* 1:61.

However, a third group of commentators attempt to resolve the contradiction by opting to read the *Mishnah* in a less literal fashion. Interestingly, in his treatment of the laws of medicine, R. Jacob Ba'al Ha-Turim[22] asserts that a doctor who knows how to heal but refrains from doing so "is certainly liable to descend to *geihinom*."[23] In a sense, *Tur* is forwarding precisely the opposite perspective as does the *Mishnah*: one who *refrains from healing will descend to hell.* This inversion of the *Mishnah* highlights the difficulty many commentators had with the literal rendering of the *Mishnah.*

Directly addressing our *Mishnah*, Ramban[24] argues that the *Mishnah* does not preclude one from entering the medical profession, but simply serves as a reminder of the dangers involved. Indeed, a doctor who avoids the pitfall of *tov shebarof'im* receives an even greater measure of reward for avoiding the temptations that cause others to stumble.[25] In a responsa, Tashbetz[26] argues similarly that the *Mishnah* only refers to those who engage in medical malpractice, but those who avoid sin earn an extra measure of reward.

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22 *Tur* 336

23 See *Beit Yosef* ad loc., who suggests a source for the *Tur* from the Jerusalem Talmud

24 *Torat Ha'Adam, Kitvei Ha-Ramban* II pg. 48. It is difficult that R. Eibeshutz, quoted above, fails to address the views of Ramban. Indeed, R. Waldenberg (*Tzitz Eliezer* 11:42:2) suggests that R. Eibeshutz simply did not see Ramban's comments in *Torat Ha'Adam.*

25 Ramban's stated approach here is consistent with his own biography, as he practiced medicine professionally. In general, many medieval Spanish commentators – from both Muslim Spain and Christian Spain – practiced medicine, including such luminaries as Chasdai ibn Shaprut, Ra'avad I (Ibn Daud), Rambam, Rabbeinu Nissim and R. Yehuda ha-Levi. For a comprehensive treatment of the social conditions that led to this development, cf. Joseph Shatzmilller, *Jews, Medicine and Medieval Society.*

26 3:82

Shlomo Verga,[27] a 15th-16th century Jewish philosopher, historian and statesman similarly argues that the *Mishnah* in fact does not mean to discourage one from entering the medical profession. In a creative interpretation, Verga suggests that R. Judah means to say that a doctor should always proceed with caution, *as if hell is open before his feet.* In other words, a doctor must constantly remind himself that the burden of life and death lies upon his shoulders. Thus, the *Mishnah* provides a strategy for the doctor to ensure that he will discharge his duties properly, but in no way opposes entry into the profession.[28]

We have seen a wide range of sources that grapple with the meaning and implication of *tov shebarof'im le-geihinom.* Embedded in those commentaries are not only interpretations of the *Mishnah*, but also implicit philosophical statements regarding the value of medicine, as well as cautionary notes that any responsible doctor should bear in mind. It is my hope and prayer that through our study of this topic we will merit to fulfill the words of the doctor's blessing, as it appears in Responsa *Yachel Yisrael*: "May I not be included among the *tov shebarof'im le-geihinom*; rather... by caring for the souls of the Jewish nation, and by saving people from death, may I merit with G-d's help to enjoy and see the goodness of your choosing... for I have come [before you] to earn merit and to purify myself."

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27 *Shevet Yehuda*; this view is quoted in *Otzar HaChaim*, ibid.

28 According to this interpretation, *tov shebarof'im* parallels Chazal's admonition that a judge must view himself "as if a sword is placed between his legs, and the entrance to hell is open before him." See *Tzitz Eliezer* 11:42:2.

Exercise and Therapies on Shabbat

Rabbi Dovid Sukenik

Introduction

Medical research over the past few decades has indicated the importance of exercise for a person's well-being and long term health, and there has been a resultant focus on creating a lifestyle that includes an exercise routine. Medical advances in treatment of injuries and diseases have similarly placed great importance on the use of therapy techniques to help patients recover from health issues or to maintain their current state of health. This essay will address the issues that may arise when these activities coincide with Shabbat, as well as the principles of hilchot Shabbat that must be applied in such situations.

Source and Definition of the Prohibition

The Mishnah[1] writes that one may not be *mit-amel* on Shabbat. There is a dispute among the Rishonim as to what the Mishnah is referring to in this prohibition. Rashi[2] explains that one may not rub his body vigorously (*le-shafshef ba-*

1 *Shabbat* 22:6 (147a).

2 *Shabbat* 147a s.v. *aval.* See also Ran, *Shabbat* 62b in the *dapei Ha-Rif*; Rabbeinu Ovadya Bertenura *Shabbat* 22:6, s.v. *aval.*

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ko'ach); it would seem that according to Rashi, the *issur* refers to something akin to a massage. Rambam,[3] however, maintains that the prohibition forbids exercise in order to sweat.[4]

Reason for the Prohibition

Rashi[5] maintains that *hit-amlut* is an *uvda de-chol*, weekday activity, which *Chazal* prohibited. If the reason for the prohibition is *uvdin de-chol*, as Rashi suggests, there are certain instances in which the prohibition would not apply. In cases of *tza'ar* (pain), *mitzvah*,[6] and great loss[7] many *poskim* assume that there is no *issur* of *uvdin de-chol*.[8]

Rambam[9] assumes that it is forbidden because exertion in order to sweat is a form of *refuah*, which *Chazal* forbade lest we come to *shechikat samimonim*, grinding spices to create medications (thus violating the *melacha* of *tochein*).[10] If the reason for the prohibition is *shechikat samimonim*, as Rambam suggests, then there are also certain instances in which the *gezeira* does not apply. *Chazal* only applied

3 *Hilchot Shabbat* 21:28. See also Rabbeinu Chananel, *Shabbat* 147b; Aruch, *erech amel*; Maggid Mishnah, *Hilchot Shabbat* 21:28; Tur, *Orach Chaim* 328.

4 The Tosefta (*Shabbat* 17:16) seems to clearly endorse Rambam's opinion, as it states that one may not run on Shabbat in order to be *mit-amel*. In context, sweating and physical exertion fit better than massage.

5 *Shabbat* 147a, s.v. *ve-lo*; Tosafot Yom Tov, *Shabbat* 22:6. *Chemdat Zvi* 22:17 suggests that Rashi maintained that *mit-amel* is prohibited because of *uvdin de-chol* because the cases immediately preceding and following in the Mishnah are prohibited because of *uvdin de-chol*. It is difficult to assume that in between two cases of *uv-din de-chol* the Mishnah brought a case that was forbidden because of *refuah*.

6 See Bach 333; Bi'ur Halacha 333:1, s.v. *ve-chol shevut*; Mishnah Berura 254:35 and Machazeh Eliyahu 72:1.

7 Shu"t Bach (*Yeshanot*) 146 and Machazeh Eliyahu 72:2.

8 Magen Avraham 328:48; Mishnah Berura 328:136.

9 *Hilchot Shabbat* 21:28; Rabbeinu Chananel 147b; Aruch, *erech amel*.

10 *Shabbat* 53b and *Rashi*, s.v. *gezeira*.

the prohibition of *refuah* to someone with a mild ailment, not in cases of a *bari*,[11] one who is completely healthy, or a *choleh*, one who is truly ill.[12]

Shulchan Aruch's Opinion

Shulchan Aruch[13] quotes the opinions of both Rashi and Rambam. In 327:2 Shulchan Aruch writes, "He should not rub himself vigorously (with oil) but should do it gently." This follows the view of Rashi. In 328:42,[14] Shulchan Aruch writes, "One may not be *mit-amel*, which is to strain his body vigorously in order to tire himself and perspire." In this halacha, Shulchan Aruch follows the view of Rambam.

There is a dispute among the *acharonim* as to how to understand the opinion of Shulchan Aruch. Tehilla Le-Dovid[15] suggests two possibilities. One is that Shulchan Aruch strictly follows both opinions. Therefore, Shulchan Aruch does not allow a vigorous rub of the body (like Rashi's view) or exercise in order to sweat (like Rambam's view). The oth-

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11 Shulchan Aruch 328:37.

12 Ramo 328:37; Mishnah Berura 328:121.

13 Tur likewise quotes both opinions.

14 Shulchan Aruch (328:42) follows Rambam's view and forbids exercise as a form of *refuah*. Later (328:43) he notes that certain therapeutic actions are permitted because they have no connection to the grinding of *samimonim*. Why is exercise different, given that it has nothing to do with the making of medicine? Taz (328:28) explains that *samimonim* are sometimes used to induce a *choleh* to sweat. Exercise, which serves the same purpose, is therefore connected in some way to medicine and we are still concerned about *shechikat samimonim*. R. Yisroel Pinchas Bodner (*Halachos of Refuah on Shabbos* Feldheim Publishers, p. 27 nt. 70) notes that nowadays we do not have medications that induce sweat, thus exercise should be permitted. He writes, however, that no contemporary *poskim* seem to have permitted such activities based on this reasoning.

15 328:70*. Beit Yosef 328:42, Bach 328:18 and Machatzit Hashekel 328:46 note that Tur and Shulchan Aruch seem to have accepted both opinions. See also Shevet Halevi 8:84.

er possibility is that Shulchan Aruch believes that Rashi and Rambam agree regarding the halacha[16] and disagree merely regarding the explanation of the Mishnah.[17] According to these two explanations, Shulchan Aruch's view is to accept both opinions regarding the final halacha.

Be'ur Halacha[18] writes that Shulchan Aruch contradicted himself by quoting both opinions, which are opposing views. He notes that many *poskim*[19] seem to follow the opinion of Rambam. Thus, in commenting on *siman* 327 (when talking about rubbing the body vigorously),[20] Mishna Berura notes that Shulchan Aruch's view is following Rashi (whom, as he mentions in his Be'ur Halacha is not the followed opinion in this matter), whereas Rambam, (whose opinion is followed) would allow a vigorous rub of the body. According to this view, only the opinion of Rambam is accepted as final halacha.

Exercising for Pleasure

The permissibility of or prohibition against exercise on Shabbat must take into account the reason for the exercise. Many people exercise because even though they are cur-

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16 Shiltei Gibborim (62b in *dapei Ha-Rif* #2 quoted by Magen Avraham 328:46) understands that Rashi and Rambam disagree regarding the halacha. He writes that while Rashi and Tur are of the opinion that one may only rub the body softly, according to Rambam, one may even rub the body vigorously.

17 It seems that Shulchan Aruch agreed with Rambam regarding the explanation of the Mishnah because in 328:42, Shulchan Aruch writes that it is forbidden to be *mit-amel*, and them proceeds to define it. In 327:2, Shulchan Aruch merely states the law without mentioning *hit-amlut*.

18 328:42, s.v. *kedei* based on Be'ur Ha-Gra 327:2.

19 Rabbeinu Chananel, *Shabbat* 147b and Maggid Mishnah, *Hilchot Shabbat* 21:28, as well as Eliya Rabba 328:48, 327:3. Aruch Ha-Shulchan 328:52 and Kaf Ha-Chaim 328:235 also follow this view.

20 S"k 7.

rently healthy they want to stay in shape, lose weight and improve their physical appearance or because they enjoy the movement.[21] It would seem that this type of exercise would be comparable to *ma'achal beri'im*, foods eaten by healthy people, which may be consumed by a healthy person.[22] Thus, a healthy person would be permitted to exercise.

Exercising for Health Reasons

If the person is a *choleh she-ein bo sakana* (one who is ill but not dangerously so), exercise is permitted because the decree of *shechikat samimonim* was not instituted in a case of *choleh*. If however one is exercising in order to alleviate aches or pains this could be prohibited due to the decree of *shechikat samimonim*.

R. Shlomo Zalman Auerbach maintains that the exercise that was forbidden by Shulchan Aruch is not comparable to exercise which is performed nowadays.[23] Shulchan Aruch speaks of difficult exercise, such as strenuous workouts for patients who need to remove fluid from their

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21 There are two *girsa'ot* of Rambam (*Hilchot Shabbat* 21:28). In one, he writes that it is forbidden for a *choleh* to exercise, implying that it would be permitted for a *bari* (healthy person). In the second *girsa*, the reference to a *choleh* does not appear, perhaps indicating that exercise would be forbidden even for a *bari*. *Levush* writes that this *issur* applies to a *choleh*, and Eliya Rabba (328:48) infers from this that exercise would be permitted for a *bari* (healthy person), although his *girsa* of the Rambam did not limit it to a *choleh*. Tur quotes Rambam with the *girsa* of *choleh* and thus limits the prohibition to one who is ill. *Hagahot Ve-He-arot* #74 (*Arba Turim Ha-Shalem*, Mosdot Shirat Devora Edition, Machon Yerushalayim) notes that most old texts have a *girsa* of Rambam that includes the word *choleh*. The difference between the various manuscripts of Rambam has obvious implications for the permissibility of exercise for a *bari* on Shabbat.

22 Shulchan Aruch 328:37.

23 *Shulchan Shlomo, Hilchot Shabbat, siman* 328 nt. 110. R. Nissim Karelitz, *Chut Shani* vol. 4, p. 221 #2, assumes that our exercise, which is meant to strengthen muscles and not to sweat, could be considered similar to rubbing with vigor, Rashi's definition of *hit-amlut*, and is therefore still forbidden.

lungs. Today, many people enjoy exercise because it allows them to move around and stretch, similar to the case of young men who are permitted to run and jump on Shabbat provided that they enjoy it.[24]

Even in instances where exercise would be prohibited because of its healing element, there still may be an exception. R. Shlomo Kluger[25] permits a person to continue taking medicine on Shabbat if it was prescribed for consecutive days and the regiment was begun beforehand. We are not concerned about *shechikat samimonim* if a person knows in advance that he will need medicine, as he can prepare before Shabbat. We are only concerned if he finds out on Shabbat itself that he needs the medicine because in that case he might become distressed and forget that it is forbidden to grind the spices. According to this opinion, any exercise that is performed for health reasons and was started on a daily basis before Shabbat would be permitted to continue on Shabbat. It should be noted that many *poskim* disagree with the opinion of R. Kluger.[26]

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24 See Shulchan Aruch 301:2.

25 Sefer Ha-Chaim 328:37; Kuntres Chayei Nefesh, ch. 6; Sh"ut Shenot Chaim 152:4 and addition at the end of the *teshuva*. R. Kluger cites this as a "*margela be-fumei de-inshi*," a common saying. Many *poskim* follow R. Kluger's opinion. See *Shemirat Shabbat Ke-Hilchata* 34:19 and nt. 76 (see also the emendation of R. Auerbach in vol. 3 of *Shemirat Shabbat Ke-Hilchata)*; *Chazon Ish* (quoted in *Imrei Yosher, Mo'ed* 97, *Orchot Rabbeinu* vol. 1, #214 p. 155 and *Dinim Ve-Hanhagot* 15:1); R. Yosef Shalom Elyashiv, *Kovetz Teshuvot* 1:40:2; and R. Eliezer Waldenburg, *Tzitz Eliezer* 8:15:15:15-17, 12:45:5-6. *Az Nidberu* 1:31:5 considers this opinion of R. Shlomo Kluger as a possible leniency to be used in combination with other possible leniencies.

26 See Maharsham (*Da'at Torah* 328:37), R. Moshe Feinstein (*Iggerot Moshe, Orach Chaim* 3:53), and R. Moshe Stern (*Be'er Moshe* 1:33:7). See also *Avnei Yashfeh* 1:90:3; *Shraga Ha-Me'ir* 2:40; *Emek Halacha* 24; *Ohr Le-Tzion* 2:36:9; and *Be-Yitzchak Yikarei* 321:18, who all take stringent views.

Running

At this point, it would seem that running for health reasons would be forbidden unless one accepts the view of R. Kluger (which many do not) or the view of R. Aurebach (limited to those light exercises which he permitted), whereas running for pleasure or to improve appearance (by losing weight) would be permitted. There is, however, another issue related to running on Shabbat. Shulchan Aruch[27] prohibits running on Shabbat unless it is for the purpose of a *mitzvah*, such as running to shul. The reason is based on *Shabbat* 113a, which states that a person's traveling during Shabbat should not be like his travel on weekday. Shulchan Aruch also writes,[28] however, that people who enjoy jumping and running may do so on Shabbat.[29]

The *poskim* write that one may also run to escape the rain or other inclement weather.[30]

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27 301:1.

28 301:2.

29 *Magen Avraham* (301:3) writes that the Shulchan Aruch's opinion is *le-chatchila* (ideal), although he notes that Bach maintains that it is *be-dieved* and ideally should not be relied upon. Mishna Berura (301:5) quotes the opinion of Magen Avraham. See *Sh"ut Maharshag* 2:93, who writes about a situation where school teachers wanted students to come to school on Shabbat and run. His response was that the leniency of Shulchan Aruch regarding running was only in a case where the person enjoys running, not when they are forced to run.

Sha'ar Ha-Tziyun (301:9) notes that there is a dispute between Taz and Magen Avraham regarding whether or not it would be permissible to run in order to develop an appetite. Taz (301:1) is strict while Magen Avraham (301:5) would seem to be lenient. Sha'ar Ha-Tziyun remains in doubt as to whom the *halacha* follows.

30 Minchat Shabbat 301:3; Shevet Ha-Levi 1:58; Be-Yitzchak Yikareh (R. Avigdor Nevenzal) 301:6. R. Nevenzal questions whether it is permitted to run in order to prevent one's clothing from getting wet.

Walking

Ramo[31] writes that it is permitted to take walks on Shabbat. Magen Avraham[32] notes that this is permissible even if the intent is for exercise and warming up for *refuah*, whereas running (in a case that would otherwise be permitted), is prohibited if the intent is such.[33] Mishna Berura,[34] however, quotes Eliya Rabba, who maintains that if the intent were to exercise for refuah then even walking would be prohibited.[35]

Massage

R. Yechiel Yaakov Weinberg[36] writes that whether or not massage should be permissible on Shabbat should de-

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31 Ibid. See *Tosefta, Shabbat* 17:16. The *Tosefta* writes that one may not run on Shabbat in order to be *mit-amel*, but one may walk normally all day and need not worry. Chasdei Dovid interprets the Tosefta to be speaking of a case of running to do a *mitzvah*, reasoning that had it not been a case of *mitzvah*, running would be prohibited based on *Shabbat* 113a, which states that a person's traveling on Shabbat should not be like their traveling during the week. The *Tosefta* must therefore be discussing a case in which running would have otherwise been permitted (such as running to do a *mitzvah*) and is only prohibited because of the intention to be *mit-amel*. Minchas Bikkurim assumes that the reason running was prohibited in the *Tosefta* was only because there was intention to sweat, which is considered *refuah*. However, running for pleasure is permitted. Minchas Bikkurim must thus explain the *gemara* in *Shabbat* differently or not *paskin* according to it.

32 301:5.

33 Magen Avraham's comment is based on the *Tosefta, Shabbat* 17:16 (see note 32 above). Magen Avraham questions why running is evaluated differently in a case in which one enjoys running. He suggests that perhaps the case of running under discussion is one in which the person has intent for *refuah*, in which case it would be prohibited. It would seem that according to Magen Avraham, running for pleasure with no intention of *refuah* would be permitted.

34 Mishna Berura 301:7. It would seem that a brisk walk for pleasure, which does not induce sweat, would therefore be *muttar* even according to this opinion.

35 R. Binyamin Zilber (*Az Nidberu* 4:38:2) suggests that taking a walk after a meal to let food digest would be considered part of the eating process rather than exercise and would therefore be permitted even according to Eliya Rabba.

36 Seridei Aish 2:30; Nishmat Shabbat vol. 5, #216.

pend on the dispute between Rashi and Rambam regarding the prohibition of *hit-amlut.* As noted above, Rashi and other *Rishonim* interpret the prohibition of being *mitamel* as referring to vigorously rubbing the body. Presumably, this is a reference to a massage. It would seem that a soft rub would not be considered halachically problematic (although it remains unclear what is defined as "soft" and "vigorous"). However, Rambam, Rabbeinu Chananel, and the other *Rishonim,* who explain the Mishnah as referring to forms of exercise, do not have a source that prohibits massages on Shabbat (See above for a discussion of whom the *halacha* follows).

Because of the opinion of Rashi that such rubbing is considered an *uvda de-chol,* some *poskim* assume that massage is forbidden.[37] In cases of pain or discomfort, however, many *poskim*[38] assume that the prohibition of *uvdin de-chol* does not apply. Thus, if a person is very sore and a massage would help alleviate some pain, it would no longer be considered a forbidden *uvda de-chol.*[39]

However, even if the massage is not *uvda de-chol,* there might be concern for the *gezeira* of *refuah;* since alleviating pain can be accomplished through pain relief medication, we are therefore concerned about *shechikat samimonim.*[40] R. Ben-Tzion Abba Shaul permits massages on Shabbat for someone who has aches as long as there is no intent to

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37 Ketzot Hashulchan 138:10; Seridei Aish 2:30; Rivevot Efraim 1:222:1; Nishmat Avraham Orach Chaim 328:95. See also Shulchan Aruch 327:2.

38 Magen Avraham 328:48; Mishnah Berura 328:136. According to Mishna Berura mentioned earlier, we follow the view of Rambam and therefore this would not be problematic.

39 See Yesodei Yeshurun vol. 5, p. 388.

40 See Taz 328:28.

sweat.[41] His reasoning is based on a statement of Mishna Berura[42] that any *refuah* that does not have substance (*ein bo mamash*) like food or drink is not included in the *gezeira* of *shechikat samimonim* and is therefore permitted. Thus, massage would not be included in the *gezeira* of *refuah*.[43]

Physical Therapy

Now that we have established the halachic issues regarding exercise on Shabbat, we will apply these principles to performing physical therapy on Shabbat. Physical therapy may be required for numerous reasons, and it is necessary to determine the reason that the physical therapy is needed in order to understand the various opinions regarding the halachic status of such an act on Shabbat.

Physical therapy is often prescribed after a stroke or some form of paralysis. In such a case, the goal of therapy is to retrain the body to perform certain basic functions. In other cases, physical therapy is administered when muscle strengthening is necessary, such as following surgery or an accident.

Some *poskim* assume that physical therapy is permitted on Shabbat regardless of the situation.[44] They argue that the *issur refuah* on Shabbat only applies to administering medication, as *Chazal* were concerned about *shechikat sa-*

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41 Ohr Le-Tzion 2:36:11.

42 Mishna Berura 306:36.

43 See, however, Az Nidberu 2:63 who interprets the Mishna Berura's example of food and drink as natural refuah as opposed to homeopathic refuah. According to this understanding, if massage therapy were accepted as a form of refuah (as he notes that exercise is) it would be prohibited according to Mishna Berura.

44 Or Le-Tzion 2:36:12; Avnei Yashfeh 5:70:4. R. Karelitz, Chut Shani vol. 4, p. 221, writes that therapy would only be permitted in a case of *tza'ar*.

mimonim. In a case where no such concern exists, *refuah* is permitted. Physical therapy does not involve taking any medications (nor can any of the results of physical therapy be produced by medications)[45] and would therefore be permitted on Shabbat.

Some *poskim* maintain that physical therapy is permitted only for a *choleh she-ein bo sakana*, one who is ill but not dangerously so (and certainly in cases of *sakanat eiver*, threat to a limb, and *choleh she-yesh bo sakana*, dangerous illness).[46] They argue that even if the *issur refuah* applies to cases in which we are not concerned for *shechikat samimonim*, the *gezeira* does not apply to a *choleh she-ein bo sakana*. Therefore, it is permissible for a person to perform therapy in order to recover from a stroke or surgery or for other necessary strengthening.[47]

Even if physical therapy is not prohibited because of *refuah*, there still in an issue regarding the discomfort it causes. Physical therapy may be recommended for a person recovering from a broken limb. This therapy consists of rotating and flexing the injured limb, which can cause discomfort. Magen Avraham (quoting Rambam and Semag) writes[48] that on Shabbat, one may not drink something that causes diarrhea, even though it is therapeutic, because

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45 See Taz 328:28, Eliya Rabba 328:49 and Mishnah Berura 328:130. See, however, Bach 328:18.

46 R. Shlomo Zalman Aurebach, cited in Nishmat Avraham Orach Chaim 328:93; Shulchan Shlomo Refuah vol. 2, p. 219; Tzitz Eliezer 6:4; Shemirat Shabbat Ke-Hilchata 34:23; Yalkut Yosef, *Hilchot Shabbat* 301:8.

47 See Be-Ikvei Hatzon siman 10, where R. Hershel Schachter suggests that the definition of a *choleh she-ein bo sakana* refers to someone who cannot function properly in his or her current state. This definition would seemingly include many instances in which physical therapy is necessary.

48 Magen Avraham 328:49.

it is painful and we are commanded to enjoy Shabbat. Rotating the injured limb causes pain and therefore may be forbidden on Shabbat even if the *refuah* issue is resolved.[49]

Occupational Therapy

Occupational therapy is often administered to help refine fine-motor skills and to train or retrain hand muscles. A handgrip, i.e. a heavy coil spring attached to two handles, is used to strengthen hand muscles. The *poskim* discuss whether using such a device is permissible on Shabbat. A *choleh she-ein bo sakana* who must exercise with this device every day without exception would clearly be permitted to use it. What about someone who is not a *choleh*?

Tzitz Eliezer[50] is lenient for multiple reasons. Use of a handgrip does not induce sweat, nor does it tire the one who is using it. He argues that its use is not *uvda de-chol* and that it is not *avsha milsah*, an object that is obviously intended for forbidden use (since it is a small device, many or most people would not know why it is being used). Moreover, it is used by healthy people and would therefore be permitted based on the leniency of Shulchan Aruch regarding *ma'achal beri'im*.[51]

The reasoning of Tzitz Eliezer is debatable.[52] It is unclear why using such a piece of equipment is not considered *uvda de-chol*, weekday activity, as it is something that is generally used for strengthening, just like any other piece of

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49 See *Assia* 4, p. 49-57 for a discussion of this issue.

50 Tzitz Eliezer 6:4:9.

51 Shulchan Aruch 328:37.

52 See Avnei Yashfeh 5:70:3. Chemdat Tzvi 22 disagrees with Tzitz Eliezer as well.

equipment. Avnei Yashfeh[53] notes that one needs to squeeze hard in order for the handgrip to be effective. This would be comparable to Rashi's definition of *hit-amlut*, rubbing vigorously, and would thus be classified as *uvda de-chol*.

Speech Therapy

Tzitz Eliezer discusses a person who was told that he would be unable to speak clearly until he performed certain breathing exercises for an extended period of time. His doctor prescribed these exercises to be performed every day without exception. R. Waldenburg permits such exercises on Shabbat.[54] One reason for R. Waldenburg's leniency is that such an individual should be treated like a *choleh she-ein bo sakana*, as he is unable to function in a regular manner.[55] As such, the *gezeira* of *shechikat samimonim* does not apply and there is no reason to forbid such an action. It would seem that such an individual would also be entitled to the status of *sakanat eiver*. R. Chaim Naeh writes that any situation in which a limb is not functioning properly and will not start working until it is treated medically is assigned the status of *sakanat eiver*.[56] It would seem that an inability to communicate properly without speech therapy would warrant such a status.[57]

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53 Avnei Yashfeh ibid.

54 Tzitz Eliezer 12:45. See also Nishmat Shabbat vol. 5, #440; Yalkut Yosef vol. 4, p. 172. R. Nissim Karelitz (Chut Shani vol. 4, p. 152) writes that such exercises are neither *refuah* nor *uvdin de-chol*, and there is thus no reason for them to be prohibited.

55 See Be-Ikvei Hatzon siman 10.

56 *Ketzot Ha-Shulchan, Badei Ha-Shulchan* 138:18, quoted in *Shemirat Shabbat Ke-Hilchata* 33:1:5*, nt. 8.

57 There is a ramification between the two classifications: a Jew may perform a *shevut* (Rabbinic prohibition) on behalf of a *choleh she-ein bo sakana* only with a *shinui* (variation in behavior), while a *shinui* is not required in a case of *sakanat eiver*. See Shulchan Aruch 328:37 and Mishna Berura 328:57.

R. Waldenburg further writes that there is no intent to sweat in performing such exercises. He also notes that Shulchan Aruch[58] permits therapeutic activity that cannot be accomplished with medications when a person is in pain or discomfort and argues that this case is comparable. Another reason given by R. Walbenburg to be lenient in this case is based on the *chiddush* of R. Shlomo Kluger mentioned above that if one started medications before Shabbat, they may be continued on Shabbat. Since the patient began speech therapy before Shabbat, he may continue his exercises on Shabbat as well.

R. Waldenburg's final reason to be lenient in this instance is based on a *chiddush* of Kol Sofer[59] that any *refuah* that will not have an immediate effect but will rather only be noticeable after an extended period of time is permitted on Shabbat. These breathing exercises must be performed for consecutive days and there is no immediate result.

It should be noted that every case of therapy must be evaluated individually in order to determine the necessity of the therapy and the applicable halachic principles. R. Waldenburg's *teshuva* discussed a specific situation, which may not be relevant to every case of speech therapy.

Kedushat Shabbat

Ramban writes[60] that although the Torah prohibited us from performing certain acts on Shabbat, one would still

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58 Shulchan Aruch 328:43.

59 *Shabbat* #68. Divrei Yisroel (R. Weltz) 101, 103 relies on this opinion, although it is unclear what the Kol Sofer's source is. According to this line of reasoning, an argument could be made that many types of therapy are permitted on Shabbat.

60 *Vayikra* 23:24, based on *Mechilta, Parshat Bo* 9.

be able to check his grains, weigh his fruits, and perform other such activities without violating a prohibition. The Torah therefore commands the concept of *shevut*, Rabbinic decrees, which limits our activities so that Shabbat can truly be a day of rest.

R. Avrohom Danzig (author of Chaye Adam) writes[61] that it is actually the *yetzer hara*, the evil inclination, who convinces us to be *metayel* on Shabbat, even though it is a permissible form of enjoyment. R. Danzig writes that we should eat, drink, and sleep to some extent on Shabbat, but the greatest enjoyment for one's soul is the learning of Torah and performance of *mitzvot*. He notes that people who spend their week earning a livelihood should be especially vigilant to spend time learning on Shabbat because this is one's true life.

When discussing issues of physical exertion and activity on Shabbat, we must bear this in mind. Shabbat is meant to serve as a day of rest, devoted to holy endeavors and not to the mundane activities of the week. It behooves us to evaluate whether exercise and other such activities are appropriate for Shabbat and conducive to the atmosphere that we wish to create, even in cases where they are technically permissible.

Conclusion

This article has attempted to present the various opinions regarding exercise and therapies on Shabbat as it relates to both healthy and non-healthy people. Besides the technical halachic issues, we must bear in mind the sanctity of Shabbat and the purpose of the holy day. In its merit we should always be able to exercise in a preventative manner, not needing therapies to recover from illness.

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61 *Zichru Torat Moshe, siman* 10.

Driving Home on Friday for the Observant Physician: Toward a New Mindset

Jonathan Wiesen, MD

Case 1: A 76 year old male patient, with a past medical history of hypertension, diabetes, congestive heart failure and a recent stroke, was admitted to the intensive care unit (ICU) for diabetic ketoacidosis on Wednesday. He was stabilized in the ICU, with correction of his acidosis and hyperglycemia, and was transferred to the general medicine floor on Thursday. The plan on Friday morning is to continue providing intravenous hydration to the patient to correct the severe volume depletion, and to continue his insulin therapy. Sundown is 4:15 PM. The Orthodox resident completes his work and is ready to rush home at 3:40 PM, when he gets an urgent page from a nurse that the patient has started clutching his chest and experiencing a significant drop in his oxygen saturation and blood pressure, and a rise in his heart rate. The patient may be having a heart attack or may have thrown a pulmonary embolism, and the resident must now act quickly to diagnose and treat his unstable patient.

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> Case 2: An Orthodox senior resident "wrapped up" all of the outstanding issues with her patients and has arranged with her covering resident to meet at 3:30 PM for signout, as sundown is 4:15 PM. The covering resident, however, had rushed to a code blue, and was going to be late for the meeting. On the way back from the code, the resident stopped for a cup of coffee and a snack, and arrived at the call room at 4PM, leaving the Orthodox resident without enough time to properly sign out and return home before the Sabbath begins.

There is a well established moral imperative in Jewish law and tradition that life is of the utmost value.[1] So highly valued is human life that even the Sabbath and Holidays are set aside for treatment of the dangerously ill patient, even if the danger is uncertain.[2] Not only are there allowances made for the life-saving venture itself, but sources indicate that even returning from such a mission in a manner that violates the Sabbath may be permissible as well. There have been a number of comprehensive articles and responsa in recent years that address the issue of returning home on the

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1 I would like to dedicate this article to my parents and in-laws, particularly my father, the original "Dr. Wiesen," who have all provided models of halakhic precision and academic integrity that I strive to emulate. I sincerely appreciate the sources and guidance provided by Rabbi Howard Apfel MD, and Rabbi Edward Reichman MD, in preparing this article, and the insightful comments of Rabbi Michael Shmidman PhD, Rabbi A. Yehudah Warburg PhD, Dr. Chaim Trachtman, R. Tzvi Sinensky and, most notably, my wife Dr. Shira, in editing this manuscript.

See, for example, *Mishnah Sanhedrin* 4:5, that one who saves a single life is considered as though he has saved the entire world. I thank R. Ari Spiegler for pointing out to me Maimonides' slightly different formulation in *Mishneh Torah, Sanhedrin* 12:3.

2 *Yoma* 83a, 85a-b.

Sabbath after a life-saving mission had been initiated on the Sabbath.[3] Few, however, explicitly address a more common scenario, namely when the life-saving activity occurs before the Sabbath, though late enough on Friday to prevent the physician from returning home before sundown. From experience and observation, it appears that this issue is one which both resident doctors and attending physicians grapple with

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3 Briefly, here is a listing of the most relevant sources, many of which will be referenced later in the article. For excellent summations on the subject see: F. Rosner and R.W. Wolfson, "Returning on the Sabbath from a Life-Saving Mission," *Journal of Halacha and Contemporary Society*, Vol. 9 (Spring 1985): 53-67; J. David Bleich, "Returning From Missions of Mercy on the Sabbath," *Contemporary Halakhic Problems* Vol. 4: 123-144. Also see R. Yitzchak Liebes, "The Law Applying to the Return from a Life–Saving Endeavor" ("*Be-din Lashuv Limkomam Achar Ma'aseh Ha-Hatzala*") in M. Hershler, ed., *Halakha U'Refuah 3*:73-85; reprinted in his *Teshuvot Beit Avi*, O.C. 4:16; R. Moshe Feinstein, "If Members of the Ambulance Core Must Arrange Return Transportation with a NonJew" ("*Im Yesh Le-chevrat Hatzala Le-sader Ba-Shabbat She-tehei Hachzara al-yedei Nochri*). *Ibid*: 53-56, reprinted in *Igrot Moshe, Orach Chayim* 4:80; R. Feinstein, "When May Those Who Go Forth on the Sabbath on a Life-Saving Mission Return to Their Site of Origin? *Techumim* 1: 13-23; R. Chaim Pinchas Scheinberg, "Returning From a Life-Saving Mission on Shabbat" in M. Hershler, ed., *Halakha Urefuah* 5:124-133; R. M. Feinstein and Rabbi S.Z. Auerbach, "Returning of Medical Staff by Car on Sabbath After Duty" in Avraham Steinberg, ed., *Emek Halacha* 2:68-88; R. Menachem Waldman, *Techumim* 3: 38-48; R. Mordechai Halpern, "Anyone who Departs May Return to his Original Location?" ("*Kol Ha-Yotz'in Le-Hatzil Chozrin Limkoman*). *Sefer Assia* 4; Halpern, "The Travel of a Doctor Outside of the *Techum* on the Sabbath: Between Private Response and Publication in Print" ("*Nesiyat Rofeh Mi-chutz La-Techum ba-Shabbat – H-ahevdel Bein Teshuvah Ishit Le-pirsum Bidfus*), *Sefer Assia* 15:43-49. See also the responses of R. Halpern in *Sefer Assia* 7: 241-249, and *Sefer Assia* 9: 140-147.

Contemporary Responsa include: *Igrot Moshe* above; *Tzitz Eliezer* 11:39-40; *She'eilat Ya'avetz* 1:132; *Har Tzvi*, O.C. 2:10; *Minchat Shlomo* 1:7,8 and 2:29(6); R. Isaac Halevi Herzog, *Ha-Torah VeHamedinah* 5-6: 26-7, reprinted in *Teshuvot Heichal Yitzchak, O.C.*, no. 32. Finally, the interested reader is encouraged to listen to audio classes by Rabbi Howard Apfel, MD, on Yutorah.org, at http://www.yutorah.org/lectures/lecture.cfm/742257/Rabbi_Howard_Apfel/Returning_from_a_Pikuach_Nefesh_Situation_on_Shabbos and http://www.yutorah.org/lectures/lecture.cfm/722572/Rabbi_Howard_Apfel/Iyun_in_Medical_Halacha_-_returning_from_the_hospital_on_shabbas, as well as R. Yaakov Neuburger at http://www.yutorah.org/lectures/lecture.cfm/711732/Rabbi_Yaakov_B._Neuburger/Pikuach_Nefesh_&_Returning_Home_on_Shabbat.

on a weekly basis, as illustrated by the aforementioned personal anecdotes. While clearly there is no justification for driving on the Sabbath in the second case, the former is one which physicians, particularly resident doctors, encounter often.[4] This article will attempt to discuss the underlying considerations involved in this common dilemma, as well as the different options available to physicians who find themselves providing emergency medical care on Friday afternoons.

I. Returning from a Life-Saving Mission Initiated on the Sabbath[5]

While most authorities permit the violation of rabbinic prohibitions in returning from a "mission of mercy," there is disagreement as to whether biblical laws may be set aside as well.[6] The debate revolves around the application of the Talmudic law that "[the Rabbis] allowed the completion of an action (which is not necessary on a Festival) on account of its beginning (which is necessary for the enjoyment of the festival)."[7] In context, the rule appears to be a rabbinic enactment specifically allowing a short list of rabbinically prohibited actions. These prohibitions were later permitted in order to prevent certain unforeseen consequences. For example, individuals were permitted to spread the skins of ani-

4 In the second case the physician would be no different than any other traveler stuck late on the eve of the Sabbath. See A. Cohen, "*Late for Shabbat*," in *The Journal of Halacha and Contemporary Society*, vol. 42, 5-61.

5 As there have been a number of recent compositions, in both Hebrew and English, which have thoroughly analyzed this topic, I will keep my background remarks on this topic to a minimum. The reader is directed to footnote 3 for a listing of sources. The articles by Dr. Rosner and R. Bleich in particular provide excellent descriptions and analyses of the most prominent considerations in this matter.

6 Driving home involves the Biblical prohibition of *hav'arah*.

7 *Beitzah* 11b. See also *Rosh Hashana* 23b and *Eruvin* 44b-45a, which are crucial to fully understanding the background considerations and decisions.

mals slaughtered on Jewish holidays on the street so that they would be flattened underfoot by passerbys. This had previously been prohibited by a rabbinic injunction. It was discovered, however, that people had become reluctant to slaughter their animals on the holidays for fear of losing the value of the skins (which would become ruined if they could not be flattened immediately). If the animals were not slaughtered, there would not be sufficient meat for the celebratory holiday meals. Thus, it was permitted to smooth skins in this manner on *yom tov* so that people would be willing to slaughter their animals, thereby insuring an adequate supply of meat.

Taken alone, this passage would suggest that in pressing situations the rabbis have the right to annul certain rabbinic prohibitions (*isurim derabanan*), presumably under the auspices of the principle "*hem amru ve-hem amru*," i.e., the same authority that allows the Rabbis to enact a new edict allows them to repeal it as well.[8] Similarly, the Talmud in *Rosh Hashana*[9] states that there was a rabbinic injunction that allowed witnesses to the new moon to travel two thousand cubits from their current location (after travelling to Jerusalem to testify regarding the appearance of the new moon), where ordinarily they would only have 4 cubits. Furthermore, the Talmud continues, midwives who go to assist with a birth and individuals who go to save their friend from fire, captivity, drowning or plague are afforded the same dispensation.[10]

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8 See R. Shlomo Kluger, *U-vacharta ba-Chaim* 99.

9 *Rosh Hashana* 23b.

10 The allowance of two thousand cubits is likely a rabbinic law, though some believe that it is Bilical in nature. According to R. Akiva it is a Biblical prohibition; see *Chatam Sofer, O.C.* 1:203. The mechanism of this injunction is interesting, as it may function through re-establishing their area of residency; see *Ritva, Rosh Hashana* 23b, s.v. *hitkin*.

However, there is another Talmudic passage that seems to imply that even biblically prohibited actions (*isurim de'orayta*) may be permitted. The *Mishnah Eruvin* 44b states: "Anyone who departs on a life saving mission may return to his original location," a journey which would presumably involve the violation of a number of biblical prohibitions.[11] Some authorities believe that this is permitted based on the legal mechanism "allowing the completion of an action so as not to prevent its beginning." [12]

As the Talmudic texts are somewhat ambiguous, halakhic opinion is similarly divided in terms of the degree

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11 *Eruvin* 44b-45a. The Talmud continues to qualify this statement as either referring to specific situations which soldiers encounter in battle, or dependent on whether the Jews are in a position of self-government. The first modification, suggested by R. Yehudah in the name of Rav, states that "returning to their original location" is a reference to a decree allowing soldiers to bring their weapons home with them after warding off attackers. After one battle in which it appeared that the enemies were defeated, the Jewish fighters left their weapons in a house near the area where the battle concluded. The enemies, seeing their conquerors disarmed, returned to attack, causing the Jews to suffer many casualties, most self-inflicted. Therefore it was decreed that after every battle, soldiers should return home with their weapons in hand. The second explanation of the intent of the *Mishnah*, proposed by R. Nachman Bar Yitzchak, is that the allowance for those on life saving missions to "return to their original location," is only when the ruling government is antagonistic to the Jews. (This is how Rashi interprets the Talmud, whereas R. Moshe Feinstein believes the opposite, that they may return home in situations where the government is accommodating to the Jewish people, because then the rescuers will not assume that their activity will take a long time and will want to return home afterwards. See *Igrot Moshe O.C.* 4:80 for complete details of his innovative analysis of this passage.) Both opinions in the Talmud, however, assume that there is a lurking danger for which violations of biblical commandments are permitted – either because enemies might attack the unarmed Jews, or because there was perpetual danger from the ruling government. Thus, there is nothing novel to these allowances, but rather they are extensions of the well-known permission to violate the Sabbath in instances of potential danger (*safek pikuach nefesh*). See also *Shitah Mekubetzet, Beiztah* 11b, "*hiksheh ha-Rashba.*" It should be noted that Ramban there is of the opinion that Biblical violations never are permitted.

12 *Tosafot Rosh Hashana* 23b "*she-yihu*" and *Eruvin* 44b "*kol*;" *Rashba Beitzah* 11b, "*biflugtah.*" These sources imply that all persons engaging in life-saving activities may ignore even Biblical prohibitions on their return journey. See Bleich, p.129.

of activity which is allowed on the return trip from life-saving ventures:[13]

1) Some allow the physician to return home and even violate Biblical prohibitions in doing so, such as driving him or herself home.[14]

2) Others only allow one to violate rabbinic prohibitions. This would permit taking a cab or bus home (provided there is a non-Jewish driver).[15] [16]

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13 This assumes that the individual will not be called out again for another life-saving mission that Shabbat. If the physician might be called on again to travel to a medical emergency, most opinions would agree that he can return home. See *Shemirat Shabbat ke-Hilchatah* 40:67-71 and Abraham A. *Nishmat Avraham,* O.C., p.172-3, and n. 35, where he quotes both R. Feinstein and R. Auerbach; 329E, p 220. This is also the opinion of R. Nebenzahl in *Sefer Assia* vol. 1 p. 322.

14 *Chatam Sofer* (Responsa 1:203; 5:194; 6:99), R. Yaakov Emden (*She'eilat Ya'avetz, O.C.* 1:132 *s.v. udekashiya*), and R. Moshe Feinstein (see footnote 4 above). R. Feinstein's predominant belief is that one is not allowed a return journey home if the individual departs for the mission assuming that it will take a long time. If, however, it is the type of trip which is typically of a short duration, then one may return home even if it involves the violation of biblical prohibitions. If we were to prevent individuals in the latter case from returning home, that may cause them to be hesitant to attend to such situations in the future. Most medical emergencies would be categorized as requiring only a short time, and therefore the physician would be allowed to return home afterwards, even if it entails violating biblical prohibitions. It should be noted that this is not a blanket *heter*, but rather assumes that the rescuers would otherwise be enticed not to travel to the situation of danger if they would not be allowed to return home after its completion. If, however, physicians are being compensated for their work, or if they are obligated to go because of a scheduled shift, then these authorities would not necessarily allow return trips which violate biblical prohibitions, as they would be required to go even in the absence of the permission to return, and there would be no worry that they would not travel to such missions in the future.

15 R. Shlomo Zalman Auerbach (see n. 4 above and also his article in *Sefer Ha-zikaron Le-Rabbi Shneur Kotler*:123-131, and *Shemirat Shabbat Ke-hilchatah* Vol.1, 40:67-9); R. Abraham (*Nishmat Avraham,* see footnote 13; see also *Nishmat Avraham*, O.C. 329,330:7), R. Waldenberg (*Tzitz Eliezer,* n. 4).

16 R. Tzvi Pesach Frank (*Har Tzvi, O.C.* 2:10) argues that not even rabbinic prohibitions may be set aside for such a return trip. The only allowances made are those situations explicitly mentioned in the Talmud.

II. When the Life-Saving Activity Takes Place on Friday

A priori, one could argue that changing the circumstance so that the life-saving activity takes place on Friday could impact our discussion about returning home in one of two ways:

> 1) The intuitive position would be that the law would be the same, whether the patient's danger occurred on the Sabbath or immediately preceding it. The psychological and emotional considerations that would have prevented one from performing the abovementioned activities still exist when engaging in life-saving interventions before the Sabbath or holiday begins. One could conceivably hesitate to engage in life-saving activity on Friday if he or she knows that it will mean getting stuck in a hospital, just as one would not slaughter animals late in the day for the holiday if it is clear that it would involve a significant loss of the value of the skins. In order to prevent the avoidance of these important activities, there would still be an institution which allows one to violate certain prohibitions. The fact that, coincidentally, the initial event happens a few minutes before the Sabbath or holiday makes no impact on the overall considerations which led to the allowance of *hitiru sofan mishum techilatan*, i.e., allowing laws to be violated so as to prevent the future avoidance of the initial action. Anyone who has worked in the hospital on Friday understands the stress of getting one's patients taken care of before *Shabbat*, particularly during the winter months when the days are short. Every decision and intervention is taken with a mindfulness of the impending start of

the Sabbath. Thus, psychologically, the concerns that physicians have on Friday are usually resultant from their timely preparations for *Shabbat.* In a very real way, therefore, there is just as much concern for encouraging life-saving activity late on the day on Fridays before the Sabbath as there is on the Sabbath itself.

2) Alternatively, if the allowance to return home is a function of the implementation of "*hitiru sofan mishum techilatan*" (allowing the completion of an action on account of its beginning), then perhaps the mechanism cannot be instituted if there is no "*techilatan.*" In other words, this law requires that a significant "initial event" be a concern on the Sabbath, so as to allow the final event which violates a Sabbath law. Since the initial event did not occur on the Sabbath, the allowance of the "end action" which entails violation of Sabbath prohibitions is not triggered.[17]

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17 This is the opinion of R. Herschel Schachter in *Be'ikvei Ha-Tzon*, "*Hitiru Sofan Mishum Techilatan*,"p.52, based on R. Akiva Eiger's comment on the *Magen Avraham, O.C.* 497:18 (who famously states that *hitiru sofan mishum techilatan* only applies to rabbinic prohibitions). It should be noted, however, that R. Akiva Eiger's discussion centers around the rabbinic law allowing hides to be flattened underfoot so that individuals will continue to slaughter their animals on the holidays. The case in discussion is one in which there was either enough time before the holiday to complete the activity of flattening the skins, or if the initial activity of slaughtering was performed for an external reason, and not for the sake of having meat on *yom tov.* As such, there is no necessity to implement *hitiru sofan mishum techilatan* because the end activity (working the hides) is either irrelevant to the concern for the initial event (i.e. if one is slaughtering his animals anyway for an external consideration without concern of loss of the skins, we need not worry that he will not slaughter his animals on the holiday in the first place!) or could have been performed before the holiday started. In contrast, in the case of missions of mercy, there is a strong connection between the initiation of life–saving activity and becoming stuck on the Sabbath (and conversely a fear that if there is no allowance to return home that the physician would not complete his duties), and there certainly is not sufficient time before the start of the holiday to return home.

III. Toward a New Focus of the Halakhic Concern Regarding Life-Saving Missions on the Sabbath

Until this point our discussion regarding returning from a mission of mercy has focused on the institution of *hitiru sofan mishum techilatan*, and whether this would allow violations of biblical prohibitions or only those of rabbinic nature. If biblical prohibitions could be set aside, then physicians would be allowed to drive themselves home. If only the violation of rabbinic laws would be permitted, then other accommodations or means of transportation would have to be sought out. Perhaps, however, a more global consideration of the issue of returning from life-saving missions, beyond the narrow prism of this institution could shed light on the issue of returning home on *Shabbat* from a medical situation which arose before sundown.[18]

The essential component involved in all deliberations regarding life-saving missions on the Sabbath is that which is generally referred to as "*pikuach nefesh*," the accommodations made by Jewish law in order to encourage potentially life-saving action. As mentioned earlier, Jewish law maintains that the preservation of life is among the principal values in Judaism, and, accordingly, makes allowances in almost all areas of law to insure humanity's health and well being. Even in cases of remote danger, where there is only a small risk of death, halakha mandates that one violate the Sabbath for a potentially life-saving intervention.[19]

Presumably, the allowance to drive home in our case would be included in this mandate, albeit in a more indi-

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18 Those opinions that invoke the *Magen Avraham ibid.* in discussions related to our issue clearly believe that the issue exclusively revolves around the application of the rabbinic decree of *hitiru sofan mishum techilatan.*

19 *Yoma* 83a.

rect manner. Perhaps the permissibility of violating even Biblical prohibitions in returning from life-saving activities stems from a concern that failure to allow individuals this leeway now might lead to future instances of *pikuach nefesh*. If a physician is not allowed to return home from a life-saving mission and has to spend a Sabbath in the hospital away from family and religious life, he or she may, in the future, be more reluctant to help in another life-saving mission on the Sabbath. The discomfort of experiencing one Sabbath in the hospital might deter physicians enough that they will think twice before traveling to the ill on a Sabbath, knowing that such a trip may cause them to remain in the hospital for the rest of the Sabbath. This would lead to many cases of *pikuach nefesh*, where a life is in danger but no Jewish physician wants to be there to save it. Even giving doctors the benefit of the doubt and believing that they will not allow issues of personal comfort to interfere with medical care, it is undeniable that at least subconsciously it will have an impact on their decision.[20]

In recognizing that the decision to sacrifice personal comfort has at least a small impact on one's clinical decision, one may further distinguish between the ***law*** of *hitiru sofan mishum techilatan* and the ***principle*** behind it as follows:

The rabbinic ***law*** offers a blanket allowance of certain actions (i.e., the three specific examples in the Talmud in *Eruvin* 45a) because of the effects that the rabbinic prohibitions had on general society. This is a rabbinic institution which in effect repeals the previous laws which they had instituted, and therefore applies only to their laws, in

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20 Please see R. Apfel's audio classes on yutorah.org (also above footnote 3) for further development of this idea.

line with the aforementioned *Magen Avraham* (see footnote 17).

The general ***principle***, however, states that halakha is concerned for future ramifications of laws, even if in the present there is no cause for worry. While similar in rationale to the rabbinic law, the underlying logic extends even biblical laws in novel directions.

Perhaps our case of returning home from a life-saving mission on the Sabbath entails a unique and novel confluence of the concern for *pikuach nefesh* and the application of the **principle** of *hitiru sofan mishum techilatan*, where the Rabbis were concerned for future ramifications of current events. This new understanding involves applying the concern of *pikuach nefesh* to activities which are not specifically life-saving, but relate more broadly to the principle of *safek pikuach nefesh*, potential danger to one's life. The compulsion to save lives on the Sabbath would therefore allow even prohibitions which are not necessary in the immediate setting to save an endangered individual, but may in the future prevent a life-threatening situation. Life-saving activities are no longer defined as solely reactive, but can even involve proactive anticipation and avoidance of dangerous situations. Thus, we are implementing the **principle** of *hitiru sofan mishum techilatan*, that our concern is not merely for the current event, but for its implications for later human behavior in the context of *safek pikuach nefesh*, the overriding concern for human life, even in situations where there is only a small fear of danger. In regards to the issue of returning home from life-saving ventures, while allowing one to return home is in no way acutely life-saving, it may ultimately have life-saving impli-

cations if it encourages (or prevents the discouragement of) an Orthodox physician to travel to the next urgent medical situation which arises on the Sabbath. Therefore, it too falls under the rubric of *safek pikuach nefesh.*

As mentioned earlier, the concern for danger to human life would justify violation of biblical prohibitions, and this ultimately appears to be the justification for allowing such infractions in this case. In fact, a close reading of the sources who permit Biblical laws to be violated indicates that their rationale is often not the application of *hitiru sofan mishum techilatan*, but rather *she-lo le-hachshilan le'atid lavo*,[21] to prevent them from avoiding the situation (lit. to cause them to stumble) in the future. As opposed to the former, which, as explained above, may represent a rabbinic institution aimed at their own laws, the latter may represent a broader consideration for an individual's well being in the future, which would be compromised if certain allowances were not made in the present, thereby placing the discussion in the realm of *safek pikuach nefesh.*[22]

The *Chatam Sofer*, for one, appears motivated by genuine concern for endangerment of future lives. He states explicitly, "...*de-hitiru sofam mishum techilatam shema lo yeilchu* ***ve-yihiyeh sakanah le-yisraelim*** (they allowed the completion on account of the beginning, [out of concern that] perhaps they will not go [in the first place], **and it will be dangerous for the Jews**)."[23] Further, in another responsum[24] he applies the rationale of "violate one Sab-

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21 *Rosh Hashana* 23b.

22 Hence utilizing the ***principle*** of ***hitiru sofan mishum techilatan.***

23 5:194. Author's emphasis and translation.

24 6:99.

bath so that many more [future] Sabbaths can be observed" to justify the allowance of returning home after life-saving missions, which is itself one of the basic sources suggested in the Talmud[25] for the allowance of violating the Sabbath to save a life. Clearly, then, the *Chatam Sofer* believes that the permission to violate the Sabbath granted to individuals returning from missions of mercy is a direct derivation from the fundamental mandate to violate the Sabbath to save lives, and would therefore justify the violation of Biblical prohibitions as well.[26]

R. Moshe Feinstein, in his landmark discussion of the topic, similarly employs *pikuach nefesh* in justifying the violation of Bibilical prohibitions.[27] In contrasting the permission granted to witnesses of the new moon (who are also afforded certain leniencies with a similar reasoning[28]), R. Feinstein states: "[regarding the] concern that perhaps individuals will be hesitant to travel in circumstances of *pikuach nefesh*, even if it is only a small concern, we must be more mindful of it, for we violate the Sabbath [in situations of] life-endangerment even for very small concerns, as stated in the Talmud in *Yoma* 83a."[29] Hence he is directly ascribing the permission to return home to the underlying concern of *safek pikuach nefesh*, where even a very small concern warrants violation of Biblical prohibitions. R. Feinstein uses similar reasoning over the course of his

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25 *Yoma* 85b.

26 R. Auerbach believes that the *Chatam Sofer*'s dispensation is only for reporting on the new moon, which is *hutrah*, whereas *Shabbat* is *dechuyah* (and we therefore try to minimize violations).

27 *Igrot Moshe, O.C.* 4:80.

28 *Rosh Hashana* 23b.

29 *Igrot Moshe, ibid.*, p. 160. Author's translation..

article, using the concern for endangering life in the future as the foundation for his innovative opinion.[30]

The application of the leniencies related to cases of potential danger (*safek pikuach nefesh*) to driving in return trips on the Sabbath may explain a seeming contradiction in Maimonides' codification of these laws. In the second chapter of the laws of the Sabbath[31] Rambam rules that those who assist their brethren in dangerous situations may "return along with their weapons to their initial location on the Sabbath so as not to cause them to stumble in the future," implying that one may violate Biblical prohibitions upon returning from a dangerous situation. However, in chapter twenty-seven he states that "anyone who goes out to save...has two thousand cubits from the place of where the rescue took place," implying that one may not violate Biblical prohibitions upon returning from life saving situations, as the rescuer may travel only two thousand cubits and not all the way back to his original location.[32] [33] Most commentaries note this seeming contradiction in the Rambam and understand that his later law is a qualification of the earlier one and that in principle, after a mission of mercy, one may travel only two thousand cubits unless one encounters a situation similar to those de-

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30 It should be noted that R. Feinstein's decision was specifically directed towards the members of the Jewish emergency medical responders in *Hatzala*.

31 2:23. Author's translation.

32 27:17. Author's translation.

33 A similar ambiguity appears in the *Shulchan Aruch*, as he codifies the law in two different places with seemingly two distinct conclusions. *O.C.* 407:2-3 seems to indicate that one may only return up to 2,000 cubits, whereas 329:9 states *"kol ha-yotz'im le'hatzil chozrim bichlei zaynam limikomam,"* indicating that one may indeed return home after a life-saving mission even while carrying weapons, and the reason given by the *Mishnah Berurah* (*ibid.* 20) is "*she-lo le-hachshilam le'atid lavo,*" so as not to cause them to stumble in the future. R. Neuburger addresses this particular point in his audio class (see footnote 3).

scribed in *Eruvin* (i.e., if leaving one's weapons would create a situation of danger or if there is an antagonistic government in power, in which case it would be dangerous to remain in place after battle).[34] A close read of the law in chapter two, however, reveals that Maimonides inserts an additional statement that the Talmud does not. Maimonides states, "after they save their brethren they may return along with their weapons to their initial location on the Sabbath, ***she-lo le-hachshilan le'atid lavo*** (to prevent them from stumbling in the future)." Though Maimonides in these laws tends to quote directly from the Talmudic texts, here he provides a novel synthesis between the rationale of ***she-lo le-hachshilan le'atid lavo***, suggested by Raban Gamliel in the passage in *Rosh Hashana*, to the case of returning from heroic missions in tractate *Eruvin*. This crucial addition may explain the permission to return home in chapter two even if it entails the violation of Biblical prohibitions, as it falls within the confines of laws established to prevent potential dangers in the future. Chapter twenty-seven, however, deals with a case where this concern is not applicable.[35] There is, therefore,

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34 This analysis of *Rambam*'s opinion is espoused by *Maggid Mishneh; Mirkevet Hamishnah; Ma'aseh Rokeach; Yad Eitan, Sefer ha-Likutim, Shabbat* 2:23; *Eliyahu Rabbah* 407:6; R. Shlomo Kluger (above); and R. Eliezer Waldenberg, *Tzitz Eliezer* above, as referenced in Bleich, p. 133. Maimonides' explanation of the *mishna* in *Eruvin* in his *Perush Hamishnayot* also seems to fit with this explanation.

35 R. Feinstein reaches a similar conclusion in reading the Rambam, but by distinguishing between the manner in which the soldiers went out to war and to what end they believed they were fighting. In chapter two the soldiers are engaging in a type of war which would not typically last for a long time, and they therefore expect to be home soon. Therefore there is concern that if they are not allowed to return home, they will not go back in subsequent occasions. In chapter 27, however, it is recognized as the type of encounter which could take a long time, and therefore there is no expectation of an early return, and the rescuers cannot return home afterwards. This reading of the two laws allows Maimonides' laws to be taken at face value, without assuming he was vague in his conclusions, or inserting external factors in the two different chapters.

no contradiction in *Rambam's* rulings: when there is concern for potential *pikuach nefesh* in the future, then even Biblical prohibitions may be violated; however, when there is no potential future *pikuach nefesh* (i.e., the rescuers' future behaviors would not potentially be influenced by the allowance of them to return) then only rabbinic laws may be violated.[36]

If the primary consideration for violating biblical laws on Sabbath is *safek pikuach nefesh*, and that is the primary concern in determining the halakhic allowances in this case, how are we to understand the application by many authorities of the law of *hitiru sofan mishum techilatan* to the question of driving home on the Sabbath? How can a rabbinic institution law have ramifications on biblically mandated ideals? Perhaps, as suggested earlier, it is a reference to the principle behind the law, rather than the actual rabbinic enactment. As such, it is not the rabbinic mechanism undermining biblical prohibitions, but rather the principle of prospective concern which is motivating the implementation of leniencies of *safek pikuach nefesh*. Alternatively, R. Yaakov Emden[37] understands that the input of the Rabbis is crucial to the identification of a situation as *safek pikuach nefesh*. The Bible established guidelines for the preservation of life which authorize life-saving action in situations of danger. However, it is up to the Rabbis to determine whether or not there is truly potential danger in a given situation. While the Rabbis do not have the authority to directly allow the violation of *Shabbat*, they do

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36 The statement of the *Kesef Mishnah* on 2:23, who explains that the justification for the ruling there (that one can return home so as to prevent them from stumbling in the future) is *safek pikuach nefesh*, would appear to correlate with this explanation.

37 *She'eilat Yavetz, O.C. 1:132 s.v. udekashiya.*

wield the right to categorize situations as life-threatening, at which point the mechanisms and allowances of *pikuach nefesh* are implemented. Therefore, Rabbis have the authority to determine that preventing physicians from returning home after a medical crisis may involve potential danger in the future, thereby classifying it under the rubric of *safek pikuach nefesh*.

IV. Application to Our Case

In removing our initial query from the debate over the rabbinic declaration "allowing the completion of an action on account of its beginning," and into the realm of the concern for potential danger to life, a new litany of pragmatic considerations come into play. There are specific requirements necessary to identify a situation as *pikuach nefesh* such that the Sabbath can be violated. Specifically, there must be a legitimate and life-threatening medical emergency; it would otherwise not be taken care of adequately by others; and there is no worry of a slippery slope or potential abuse of the allowance. Preserving the Sabbath is of the utmost importance and its violation should never be taken lightly. In reference to our case, an honest, practical assessment of the reality of the situation is warranted to evaluate the true potential influence that the "end" may have on the "beginning." Authorities can therefore best evaluate what, if any, accommodations need to be made in order to prevent even a small chance of danger.

While physicians constantly decide which situations appear to be critical or life threatening, and when on call, which scenarios require them to leave the comfort of their homes and travel to the hospital, the deliberation is often

different on the Sabbath. It has been my personal experience, and those of my colleagues with whom I have discussed the matter, that getting stuck on Friday and having to walk home, or, worse, being stuck in the hospital the entire Sabbath, is at best uncomfortable, and certainly a prospect which is consciously and carefully avoided. While ideally the physician should block all subjective considerations during the process of clinical evaluation, human nature dictates that individual factors, including physical, emotional and religious, all ultimately weigh in and impact on the decision making process. Hence R. Feinstein's primary concern in his response was whether the individual physician believes that his of her mission of mercy will be brief or drawn out, as subsequent choices as to whether to travel to the hospital may depend on the subjective outcome of the present one.[38]

This concern is not merely theoretical. R. Bleich concludes his article with a striking report of the medical reality in the Orthodox Jewish community:

But the human condition is hardly immutable. It has been reported that in some areas *Hatzolah* has not been able to enlist sufficient number of volunteers willing to participate on *Shabbat* and *Yom Tov* because wives and families have objected to being deprived of the presence of husbands and fathers for virtually the entire *Shabbat* and *Yom Tov*. The result, it is claimed, is that lives have indeed been lost. Without passing moral and halakhic judgment upon persons who manifest a skewed priority of values, it may be argued, as noted, that under such circumstances all

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38 R. Auerbach explicitly denounces the impact that subjective factors may have on the objective clinical decision by the physician in his responsa.

agree that such volunteers may be permitted to drive home if they would otherwise not volunteer for duty on *Shabbat*. *Hatam Sofer*'s basic point, *viz.*, that the principle "Better to violate on Sabbath in order to observe many Sabbaths" is sufficiently strong to warrant any infraction which will result in preservation of life.[39]

The concern that the *Chatam Sofer* and R. Feinstein maintain regarding restrictions on return travel, specifically regarding its potential for causing future life endangerment, is rooted in an honest assessment of human psychology and decision making, and appears to be borne out in practicality. Their insight into the reality of the emotional decisions made on the Sabbath appears to address legitimate pragmatic concerns. By allowing return trips for the physician on the Sabbath, they effectively remove that issue as a consideration, allowing as close to an objective clinical decision as possible. In addressing a fundamental psychological reality, ultimately lives may be saved. Thus, these authorities are addressing "the empirical reality regarding what is necessary in order to save lives."[40] Far from ideal, it is an unfortunate concession to human nature.

With this approach there would appear to be no difference if the dangerous situation originated before the start of the Sabbath or on the Sabbath itself. There is certainly

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39 Bleich, p.143-4. R. Bleich similarly states: "It may, however, be argued that, at a time and place where it is demonstrably known that inability to return home has resulted in loss of life because would-be rescuers declined to undertake such missions, any action deemed imperative to encourage preservation of life may be sanctioned. Such dispensation would not be rooted in the discussion in *Eruvin* 45a, but in empirical reality regarding what is necessary in order to save lives (p. 141)."

40 Bleich, *ibid.* He further notes that this intervention is specifically not by way of a rabbinic decree, but rather rooted within the mandate of preserving life even at the expense of violating the Sabbath.

reason to believe that an individual would be as likely to be influenced by the start of *Shabbat*, just as he or she would be on the Sabbath itself. As such, not being able to drive home in return on Friday would likely have a similar influence on one's willingness to engage in life-saving activity, and would therefore be subject to the same deliberation as if it had originated on the Sabbath itself.[41]

V. Conclusion: Re-thinking the Issue With a New Mindset

It is important to note that just because one **can** rely on the aforementioned leniencies of violating biblical laws while returning home from a life saving mission on undertaken on Friday or the Sabbath, does not mean that one **must** or even **should**. It must be reiterated that many prominent authorities permit only the violation of rabbinic laws as opposed to biblical ones. Further, even if the weight of popular opinion was firmly behind the *Chatam Sofer* and R. Feinstein (who both allow biblical violations to be made), that does not imply that one should not make any and all attempts to minimize violations as the situation allows. In America today it is exceedingly simple to arrange for transportation in a manner which would not involve violating any biblical precepts, and therefore there

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41 From personal experience, I would suggest that a pragmatic assessment of the realities of the hospital would indicate that perhaps one is even more likely to be influenced by the onset of the Sabbath on Friday, than by not being able to return from the hospital when one has departed for the life-saving mission on Saturday. Fridays are often extremely hectic, and the Orthodox physician is often running and harried, trying to complete his or her work with enough time to return home. Conversely, one who is on call from home, and gets called into the hospital, can make a calm and rational assessment of the situation, explain the scenario to his or her family, and proceed calmly into the hospital to take the necessary actions.

may be no need to rely on this leniency. Further, the crux of the *Chatam Sofer's* and R. Feinstein's argument is indeed to prevent individuals from being influenced by the comfort factor of being stuck for the duration of the Sabbath, a consideration which would practically be mitigated in the face of numerous, halakhically valid alternatives (i.e violations of only rabbinic laws). More importantly, it is the mandate of a physician to remove the personal, subjective considerations from clinical decisions, a directive which should be maintained in the face of personal discomfort in this situation as well. Finally, one must recognize that this allowance is a concession to the human mode of thought, and certainly not an ideal halakhic construct. As R. Bleich observantly notes, "the human condition is hardly immutable."

The principal goal of R. Feinstein's approach is to prevent an Orthodox health care provider from being swayed at all by the fear of being stuck for the duration of the Sabbath. If, in theory, one could completely and convincingly eliminate the external psychological considerations from the equation, then there would be no need for R. Feinstein's leniency. In a certain sense, then, an ideal halakhic construct in this situation is one in which the physician is aware that he or she can rely on the opinion of R. Feinstein as a means of eliminating any external factors aside from his or her objective clinical judgment in making the medical decision, while in practice conceding to the majority opinion and taking a ride home from that very trip. In this halakhic reality, merely knowing that one could rely on R. Feinstein's opinion in extenuating circumstances may be enough to eliminate the concern of external subjective influences causing the clinician to avoid driving to

the hospital in the first place, even if the physician chooses not to avail him or herself of that leniency when the time to depart arrives. Similarly, the physician who is stuck in the hospital on Friday with legitimate medical emergencies should continue with a mindset which eliminates the external considerations. In any event, the complexity of the issue is great and the consequences, in terms of protecting the sanctity of the Sabbath, of the utmost importance. Any action should be taken carefully and thoughtfully, in consultation with appropriate Rabbinic resources.

Seven, Eight, and Nine: Historical and Halakhic Discussion of the Third Trimester Baby

Nava Pincus
Shuli Roditi-Kulak

Introduction

Rabbinic literature - law, lore, and philosophy – makes use of the science that is available to the Rabbis at the time. This paper will focus on one example of the influence of historical scientific beliefs on Rabbinic thought: the Rabbinic understanding of fetal gestation. Historically, it was ubiquitously believed by Rabbinic scholars that babies that gestated for either seven or nine months could survive to adulthood, while babies of eight months gestation had no chance of survival. This belief of the inviability of an "eight month baby" was maintained not only in the Jewish world, but also across Mediterranean and European cultures. This belief was incorporated into a number of significant *halakhic* rulings that dealt with topics as crucial and wide-ranging as *Hilkhot Shabbat* and *Hilkhot Yibbum*. The advances of

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medical science in the last few centuries, however, led to the adoption of a completely different understanding of gestation, with the resulting conclusion that the closer to thirty eight weeks a fetus is at birth, the stronger and healthier the baby is and the greater its chance for survival. This current medical view is in direct opposition to the Rabbinic one now embedded in Rabbinic literature and *halakha.*

This paper will focus on three issues relating to the notion of the inviability of an eight month child. First, after defining the terms, it will explore the scientific history of the "eight month baby" and its adoption in Jewish non-*halakhic* sources. Second, it will consider the entrance of this ancient scientific view into *halakhic* discourse. Finally, the paper will document the development of contemporary *halakhic* rulings in response to the current medical views on gestation.

The Scientific History of the Inviable Eight Month Baby

Seven and Eight Months: Defining the Terms

Most ancient sources indicate that the definition of the seventh month of pregnancy was counted from six full months and one day until the completion of the seventh full month. Aristotle, for instance, considered six months and a day to begin the counting of the seventh month.[1] This method of counting continued into the medieval period. Rabbi Solomon b. Isaac (Rashi) comments on Exodus 2:3, "She gave birth to [Moses] after six months and one day," to explain that Moses was born in the so-called seventh month.

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1 George, Sarah. *Human Conception and Fetal Growth; A study in the development of Greek Thought From Presocrates through Aristotle.* (PhD Thesis, University of Pennsylvania, 1982) p. 206.

This method of counting, however, seems to have been challenged by one prominent medieval rabbi. Rabbi Isaac b. Sheshet (Rivash), a 14th century *halakhic* authority, counted an eight month baby as one born after eight full months in gestation. Similarly, for Rivash, a seven month baby is one born after seven full months in gestation.[2] The fact that the same pre-modern concept was applied to various different stages of gestational development by differing rabbis indicates the flexibility and non-empirical nature of the view.

Gestational Age and the Development of the Eight Month Baby Concept

In modern medicine, gestational age is determined based on the last menstrual cycle of the pregnant mother. This method of counting was not the norm in the ancient world. There are two general theories as to how ancient societies determined the gestational age of a baby. The first is that estimates were based on reports of the timing of conception, which was believed by some in the ancient world to be "felt" by the conceiving woman. The second theory, held by Charles King, argues that infant size was used to determine gestational age.[3] As a result of this method of counting, King argues that the "seven" month fetuses refer in actuality to what is called in modern medicine "small for gestational age" (SGA) babies: smaller than usual full-term fetuses whose smaller size reflect a lack of proper nourishment in utero. Technically, SGA babies are "those whose

2 Rivash, Responsa 446.

3 King, Charles. The Eighth-month fetus: Classical sources for a modern superstition: Reply. Obstetrics and Gynecology. August 1988, Vol 72 Issue 2 ppg 286-7.

birth weight lies below the tenth percentile for that gestational age."[4] Their small size explains why the babies were thought to be premature, but their full-term development explains their higher rate of survival than real eight month babies, who had simply not fully developed. The idea of the eight month baby, for King, arose out of an imprecise measure of fetus age. This thesis may be substantiated by a Hippocratic work that states: "a minority of these seven month fetuses survive, because the manner and timing of their nourishment in the womb was such that these fetuses share all those attributes which even the most mature newborn possess."[5] What the ancient world would have called an eighth month fetus, according to King, was a baby that looked larger than the "seven month baby" but smaller than a typical looking full term infant. These eight month babies, although looking larger than the "seven month babies" were, in fact, younger since the seven month babies were truly nine month babies that looked smaller due to improper nourishment. Since the eight month babies were born prematurely, they had a smaller chance of survival.

It should be noted that despite the ingenuity of King's thesis, it has fostered some criticism. Rosemary E. Reiss[6] rejects King's explanation, based on her reading of a passage in the Hippocratic treatise *Peri Oktamenou* where the author makes clear that seven month babies are not poorly grown: "Nine month fetuses are born lean... not so the

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4 Wikipedia, "Small for Gestational Age". Reference 1: *small-for-gestational-age infant* at Dorland's Medical Dictionary

5 Lloyd GER, ed. Hippocratic Writings. New York: Harmondsworth, 1978

6 Reiss, Rosemany E. The Eighth-month Fetus: Classical sources for a modern superstition; Reply. Obstetrics & Gynecology. Aug 1988. Vol 72-Issue 2 ppg 287.

seven month fetuses which are born fleshed out and nicely plump: they have completed their time in the womb without disease."[7]

Ancient Explanations

Many ancient theories trying to explain the presumed viability of the seven month baby and the non-viability of the eight month baby exist. In Greek sources, there is a focus on the numerical superiority of the seven month fetus and the physiological inferiority of the eighth month fetus. Jewish sources explain the difference through divine intervention and language games.

The Greeks explained the notion of the viable seven month baby due to the mystical importance of the number seven in ancient times. The number seven was viewed as an integral number to the human life. According to Sarah George, Solon, an Athenian statesman, lawmaker, and kyric poet, who was also listed among the Seven Sages of the ancient world, said that a man's life was divided into periods of seven.[8] George also points out that the Hippocratic work *Sevens* "reflects early thinking about the importance of seven in the microcosm and macrocosm... to see seven as a critical number in human physiology was apparently common to all Greek ages."[9]

It is no wonder that seven would be a critical number in the life of the fetus as well. Anne Ellis Hanson writes that the viability of a seven month fetus "seems based on numerology and the number seven... the number pos-

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7 Joly R, ed. Hippocrates. Vol 11. Paris Bude, 1970. p. 170.

8 George, p. 204.

9 George, p. 205.

sessed mystical properties. Hence the seven month child was, among those early born, the one more lucky in its numbers".[10] A seven month child, according to this explanation, lives because of its association with the number seven. The eight month child did not survive because of its lack of association with seven.

The Hippocratic writer of *Fleshes* explains the association of the seven month baby with the number seven: Children born with numbers divisible by seven live; seven months equal two hundred ten days and nine months equals two hundred eighty days, assuming months of exactly thirty days. As both two hundred ten and two hundred eighty are divisible by seven, viability is strengthened. An eight month child, however, would be in gestation for two hundred forty days, which is not divisible by seven. Such a baby, according to the theory, has little support for viability.[11]

Hanson writes of another Greek explanation for the inviability of the eighth month fetus. Pregnancy in the Hellenistic world was divided into forty day periods called, in Greek, *tessarakontads*. The sixth *tessarakontad* represented the eighth month of pregnancy during which time the mother became ill with fevers due to her organs being compressed as the fetus grew to birth size.[12] The weight of the baby and its movements were believed to pull and strain the mother's umbilicus causing stress for both mother and child, while the fevers were believed to be a special danger to the fetus and were associated with resulting deformi-

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10 Hanson, Ann Ellis. "The Eight Month's Child and the Etiquette of Birth: Obsit Omen!," Bulletin of the History of Medicine 61 (1987), p. 590.

11 George, p. 208; Hanson, p. 592

12 Hanson, p. 594

ties such as lameness and blindness if born in the eighth month. If the baby was born during this time, the stress of labor would be too much for the small baby to handle and therefore it would generally die.

This latter explanation is based on observations made by ancient physicians about the activity and illnesses seen in the mother and baby during the eighth month. It is now believed, however, that women do not become ill with fevers during the eighth month any more than during the other months of pregnancy. Fetal size does not generally cause danger to the mother's organs. Additionally, when a baby becomes blind or lame, it is usually due to non-lethal vascular events that occur at any time in utero, not specifically in the eighth month.

One of the earliest Jewish traditions about seven month babies is found in Pseudo-Philo, where he writes: "And I gave him Isaac and formed him in the womb of her that bore him and commanded that it should restore him quickly and render him unto me in the seventh month. And for this cause every women that bringeth forth in the seventh month, her child shall live, because upon him did I call my glory."[13] Pseudo-Philo believed that the viability of seven month babies was established by divine decree when God decided to bring Isaac into the world in the seventh month. Because of Isaac's early birth, every child born in the seventh month is believed to have a divinely backed viability.

Genesis Rabbah (XIV, 2) also discusses the viability of the seventh month baby. "Rabbi Abbahu was asked: 'How

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13 Pseudo-Philo, Liber Antiquitatum Biblicarum, tr. M.R. James, *The Biblical Antiquities of Philo* (New York, 1971), XXIII, 8, cited in Van der Horst, Pieter. "Seven Month's Children in Jewish and Christian Literature from Antiquity," *The Jewish World in Early Christianity* (Gottington, 1990), pp. 233-247.

do we know that when the fetus is fully developed at seven months it is viable?' 'From your own [language] I will prove it to you,' replied he: 'Live, seven – Go, eight'." In greek, *zito* means "live;" moreover, the letter *zeta* has the numerical value seven. If born in the seventh month, the child lives. "Go" euphemistically means "die." In Greek *ito means* "go;" it is also associated with the letter *eta*, pronounced ita, which has the numerical value of eight. Rabbi Abbahu seems to believe in an inherent connection between language and the natural world. The fact that the Rabbis infer this ancient "fact" from the Greek language suggests that the belief itself may have been imported into Rabbinic discourse via Greek sources.

Ancient Doubts

Although the inviability of the eight month fetus and viability of the seven month fetus was widely accepted in the ancient world, not everyone was so certain that eight month babies were doomed to death. In the Hippocratic *Eight Month's Child* the writer was aware that many seven month babies did not survive and many eight month babies did. "The longer the baby was in utero," the writer argued, "the greater chance it had for surviving. Ideally, babies should be delivered after a full nine months."[14] Soranus, a Greek physician and chief representative of the school of physicians known as "Methodists," also observed the greater chance of survival for babies who were in utero longer.[15] Aristotle too writes uncertainly about the viability

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14 Hippocrates. *Eight Month Child* ed. Hermann Grensmann, *Hippokrates: iber Achtmanatskinder, uber das Siebenmonatskind,* (Berlin, 1968) 5, 90.12-16 p.92

15 Hanson 594

of the eight month child. He writes: "Other animals have a single period (of gestation), but with man there are several. Children are born at seven months and ten months and at intermediate times, and indeed eight months babies live, though less often than others."[16]

In modern times, the gestational age and months of pregnancy are not calculated from the time of conception of the fetus, but rather from the time of maturation of the unfertilized ovum or egg. The maturation process is assumed to begin fourteen days prior to conception and coincides with the first day of the mother's last menstrual period. A complete gestational term is considered to be forty weeks, which equals roughly nine complete months. Modern studies have further shown that the safest time for a baby to be delivered is between thirty nine and forty one weeks gestational age, and the farther one moves in either direction from that point, the greater risks there are to the health of the fetus.

Modern studies have not found there to be a greater risk for a child born in the eighth month compared to the seventh, and to the contrary, the earlier a child is born the greater are the changes of increased morbidity and mortality. In ancient times, both a child born in the seventh month and one born in the eighth had little to no chance for survival mostly due to respiratory distress secondary to the incomplete maturation of the child's lungs. However, with the gifts of modern science and medicine a baby now born any time after twenty four weeks (roughly five and one half months) is considered to be viable and has a chance of living a normal life.

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16 George, p. 206 n. 5

Though modern medical thought discredits the notion of a nonviable eight month baby, there are populations in India and Germany – and in the Orthodox Jewish world – who still hold on to the notion.[17]

Eight Month Babies in Pre-Modern *Halakhic* Literature

Discussion of the eight month baby comes up in two specific *halakhic* contexts in rabbinic literature, regarding *Hilkhot Shabbat* and H*ilkhot Yibbum.*

The Babylonian Talmud, Shabbat 135a states that one can disregard Sabbath law in order to prepare a seven month or a nine month male child for his circumcision, but that Sabbath law cannot be disregarded for an eight month child.

The passage continues, arguing that not only can Sabbath law not be disregarded for an eight month child, but just as a rock has the legal status of *muktza* and may not be carried on the Sabbath, so too this baby may not be carried on the Sabbath. The baby may therefore not even be nursed on the Sabbath, unless the stored up milk causes the mother's breasts unbearable physical pain.

The issue of the survivability of an eight month baby is discussed again in relation to *yibbum. Yibbum* is the biblical commandment for a man to marry the wife of his deceased childless brother. The Babylonian Talmud[18] describes the scenario where a woman becomes widowed after having given birth to an eighth month baby. The question arises as to whether the woman is still considered childless in such a case. The passage concludes that a baby born in month

17 R. Reiss and A. Ash, "The Eight Month Fetus: Classical sources for a modern superstition," Obstetrics and Gynecology. 71:2 (February 1988), pp. 270-273.

18 *Yevamot* 80b

eight of gestation is not viable and, therefore, the widow is still considered "childless" and does perform *yibbum*.

It is important to note that one school of medieval commentary, Tosafot[19], attempts to mitigate the definition of an eight month baby by arguing that fetal months cannot be measured with accuracy and because of that inaccuracy, in most cases, one would be allowed to break the Sabbath to prepare a newborn for his circumcision. This is because one could make the case that the baby's true date of conception was miscalculated and the baby is in fact a seven or a nine month baby.

Ultimately, Tosafot[20] limits the possibility of an eight month baby to two scenarios. The first is when the parents are sure of the baby's gestational age because they only had marital relations one time. The second situation is when the baby is born in what is thought to be the eight month, and lacks the developmental markers of grown hair and finger nails (if the baby did have grown hair and fingernails then he is classified as being a seven month, fully matured baby that stayed in the womb longer). In either case, the baby is taken to be an eight month baby, with the resulting *halakhic* ramifications.

Rabbi Joseph Caro (16th century), in his *Shulkhan Arukh,*[21] in part adopts Tosafot's consideration. He rules that one can only desecrate the Sabbath for a seven month baby, nine month baby or eight month baby with hair and finger nails – gestational markers which indicate the child is not necessarily doomed to die.

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19 *Yevamot* 80A

20 *Shabbat* 135a

21 *Shulchan Aruch,* 330:8-11

The concept of the eight month baby continues to be incorporated in halakhic literature as late as the 20th century, when Rabbi Israel Meir Kagan rules in his *Mishnah Berurah* that an eight month baby will "surely die."[22]

Contemporary Responses

With the knowledge and acceptance of modern medicine, contemporary Rabbis were forced to account for the conflict between the pre-modern acceptance of the inviability of eight month babies and the modern fact that such babies survive. Three major solutions to this problem have been suggested in the past century.

In the *Chazon Ish*, Rabbi Abraham Isaiah Karelitz, noting that in the twentieth century many babies born in their eighth month live full lives even without medical intervention, concludes that by some means human physiology has changed. This change in nature makes the *halakhot* of the eight month baby no longer applicable.[23]

A different solution is offered by Rabbi Isaac Jacob Weiss. Observing that babies born in the eighth month of gestation survive and live normal lives, Rabbi Weiss explains that despite the inherent inviability of eight month babies, modern medicine can cause an "eight month" baby to survive nonetheless.[24]

Finally, a similar line of reasoning is employed by Rabbi Shlomo Zalman Auerbach. Rabbi Auerbach, who, as quoted in *Shmirat Shabbat Kehilkhata*, maintains not that human physiology has changed, but that medical knowl-

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22 *Mishnah Brurah*, 330, 28

23 *Hazon Ish, Yoreh Deah*, 155:4

24 *Minhat Isaac*, 4:123:19

edge has changed. Hospitals today are more advanced and better able to save an eighth month baby.[25] Therefore, today we must save a child that can be saved. Rabbi Auerbach believes this ruling is consistent with the teachings of the Talmud, which has always held that any baby that can be saved should be saved.

Conclusion

It is an imperative value in Jewish teaching that one does not change *halakha* simply based on a changing world culture. Torah values are considered timeless and truthful, no matter how modern culture seems to evolve. While this principle is true, we can see from the study of the eight month baby that our sages were not reluctant to face the fact that certain parts of Jewish tradition were based on the known scientific information of a finite moment in time. As a result of this knowledge the sages worked to find ways to reconcile *halakhic* ideas with modern science, while still keeping true to the everlasting nature of the Torah's values.

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25 *Shmirat Shabbat Kehilkhatah*, 36:12, n. 24

Rationing During a Pandemic Flu

Aryeh Dienstag

In 1918, the "Spanish Flu" infected a third of the world's population, killing ten percent of those people.[1] Many experts fear we may be at the inception of such a pandemic.[2] The recent spread of swine flu has reminded the world that viruses can easily spread throughout the world in a pandemic manner. While the swine flu pandemic has been relatively mild,[3] there is still the possibility that swine flu may turn into a dangerous crisis. Additionally, there is also the concern that another dangerous strain of influenza might develop into a pandemic.

In particular, scientists are fearful that an avian flu, a flu that originates from birds, could create such a crisis.[4] The strain of avian flu that scientists are most fearful of is com-

1 John M. Barry, *The Great Influenza* p4 (Penguin Group, 2004). Barry calls the 1918 influenza epidemic the deadliest plague in history.

2 Leslie Loebel, Frontal lecture, *Ben Gurion University of the Negev*, 2006; Maurine Friedman, Frontal Lecture Frontal lecture, *Ben Gurion University of the Negev*, 2006.

3 Betsy McKay, As Flu Retreats Scientists Brace for its Return, *Wall Street Journal*, May 28, 2009, available at http://online.wsj.com/article/SB124346642019860251.html

4 Leslie Loebel, ad loc., Freedman Maurine, ad loc.

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monly called H5N1.[5] Nancy Cox, head of the influenza branch of the Center for Disease Control, stated that further mutation of the avian flu in Asia could precipitate the worst pandemic in human history.[6] Dr. Jai P. Narain, Director of the World Health Organization's communicable diseases department, declared in September 2005, "We may be at almost the last stage before the pandemic virus may emerge."[7] Furthermore, Dr. Marc Lipsitch of the Harvard School of Public Health noted that "We are unprepared for a new pandemic... current response plans won't do much to slow a pandemic once it is under way."[8] While this is the opinion of many experts, there are many other experts who feel this peril will never come to fruition.[9]

The prospect of a severe influenza pandemic poses a daunting public health threat to hospitals and the public. A severe influenza pandemic will put hospitals under extreme stress, as only so many beds, ventilators, nurses, and physicians will be available, and it is likely that more patients will require medical attention than can be treated. How will hospitals sort patients to determine priority for treat-

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5 Leslie Loebel, ad loc.

6 Given at a meeting of the American Association for the Advancement of Science (Feburary 2005). Printed with Permission from Dr. Cox (June 2009).

7 Lester Haines, Bird flu pandemic inevitable, says WHO, *The Register*, Science, 8 Sept. 2005. Available at http://www.theregister.co.uk/2005/09/08/bird_flu_pandemic/print.html As well as http://osd.gov.com/osd/200509_september/DHS_Daily_Report_2005-09-09.pdf.

8 Marc Lipsitch, Pandemic Flu: we are not prepared, *Medscape General Medicine*. 2005;7(2):56. Available at http://www.medscape.com/viewarticle/502709.

9 Doherty, Editorial, *Medical Journal of Australia*; Maurine Friedman, Frontal Lecture Frontal lecture, *Ben Gurion University of the Negev*, 2006; Ezekiel J. Emanuel & Allan Wertheimer, Who Should Get Influenza Vaccine When Not all Can, *Science* p854-855 vol 312, 2006.

ment? What criteria will be used to triage[10] patients? Who will develop these criteria?[11,12]

This paper is meant to launch discussion on the topic of dividing resources during a pandemic, through the lens of Jewish Law. Hopefully, such discussion will influence policy regarding such a pandemic, if God forbid, it becomes relevant.

I. Talmudic Background

There are a few passages in the Talmud, which are particularly relevant to this discussion.[13]

The Talmud states there is a prioritization hierarchy when it comes to saving lives, if all lives cannot be saved. The Talmud in Horayot states:

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10 Triage is the process of sorting patients in a time of crisis to determine who receives what level of medical attention.

11 Tabery J, Mackett CW 3rd, Ethics of triage in the event of an influenza pandemic *Disaster Med Public Health Prep.* 114-8 Jun;2(2): 2008.

12 In an article in the New York Times magazine written by Sheri Fink published on August 25, 2009 discussing the triage done at Memorial hospital in New Orleans during Hurricane Katrina. According to the article, the doctors were forced to do on the spot triage of their medical capabilities, which had been inhibited by the hurricane. Doctors were under a lot of stress and were forced to make triage decisions under the most difficult of circumstances with very little food or sleep after being strained for hours of work. In the end the triage done by the doctors turned into a slippery slope, where the doctors performed euthanasia on many of the patients (according to the article). This case illustrates the need for a triage protocol for dire circumstances, such as a disaster or a pandemic. Triage is necessary in all cases where there are not enough resources to benefit those that need them. However, with a written protocol a clear-headed approach to the triage could be formulated. Furthermore, a protocol would prevent doctors from falling down a slippery slope and committing acts which society has deemed unethical and possibly even criminal.

13 David Etengoff, Triage in Halacha: The Threat of an Avian Flu Pandemic, *Journal of Halacha and Contemporary Society*, p75-81 (RJJ, 2008); Avraham Steinberg, Priorities in Medicine, *Encyclopedia of Jewish Medical Ethics* 849-850 (Feldheim 2003); Avraham Steinberg, Allocation of Scarce Resources, *Encyclopedia of Jewish Medical Ethics* 45-46 (Feldheim 2003).

> "A man takes precedence over a woman in matters of saving life and the restoration of lost property, and a woman takes precedence over a man in respect to clothing and ransoming from captivity ... a priest takes precedence over an Israelite, an Israelite over a bastard ... this order applies only when all other attributes are equal. But if the bastard is a Torah scholar[14] and the High Priest is unlearned, the scholarly bastard takes precedence over the ignorant High Priest."[15]

It seems clear that religious scholarship and genealogy are important criteria in determining priorities.[16] However, why these criteria are used to determine priorities in life saving matters remains unclear. Maimonidies explains that although the Talmud states a Torah Scholar comes before a king, in practice a king is still saved first because the people need him.[17] This is supported by the Talmud itself who states, "if a Torah scholar dies no one can replace him, however, anyone can become a king,"[18] the Torah scholar is not saved because of his inherent holiness, rather he is saved because he is irreplaceable, which is a practical reason. In a similar vein as the Rambam, it is hard to imagine the president of the United States, or any other head of state, not being among the first to receive a flu vaccine. Further-

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14 Rabbi Yisrael Meir Kagan in his Mishnah Berurah (OC: 547:22) quotes the Magen Avraham who says there are no true Torah Scholars in our day.

15 Talmud *Horiyot* 13a, Translation by Avraham Steinberg, ad loc. p849

16 Avraham Steinberg, ad loc.

17 The order of the Talmud is to explain the importance of a Torah scholar. Maimonidies, Commentary on the Mishneh, *Horiyot* 3:8

18 Talmud *Horiyot* 13a

ing this point, Rabbi Moshe Tendler has explained[19] that human life is infinite and therefore cannot be prioritized objectively. Practically, however, society may need certain persons more than others and therefore prioritization can be used. On the other hand, Rabbi Chaim Rappaport takes a literal approach and explains that a person with a higher level of sanctity does take a greater precedence for salvation.[20] [21]

Another source is the Talmud Bava Metzia 62a, which concerns first party ownership and scarce resources[22]:

> "If two are traveling on a journey [far from civilization] and one has a pitcher of water; if both drink, they will both die, but if only one drinks he can reach civilization – Ben Peturah taught: "it is better that both should drink and die than one live and behold his companion's death." Until Rabbi Akiva came and taught: "'that your brother may live with you,' your life takes precedence over his life."

Based upon the opinion of Rabbi Akiva, the principle emerged that one's own life comes before someone else's life. Therefore, a person can, should or must save his own life before he is obligated to save the life of another.

Finally, the Talmud in Nedarim 80b discusses the case of two towns with a single water supply. According to Rabbi Yossi, the closer town is allowed to use the water not only for

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19 Presented at a symposium "Medical Ethics the Jewish Point of View" held at the Mount Sinai School of Medicine, New York, NY Nov. 17 1984; also given at a frontal lecture in Yeshiva University, winter 2004.

20 Chaim Rappaport, The Halachik Hierarchy of Triage, *Le'ala*, June 2001. Rabbi Rapport lists many proofs for his position.

21 It is interesting that this list of priorities is not mentioned in Maimonidies's *Yad Hachazaka* with regards to saving lives, even though it is mentioned in Rabbi Yossef Cairo's code of laws (*Bet Yossef Yoreh Deah* ch. 151).

22 David Etengoff, ad loc.

drinking but also for washing laundry even if it thereby deprives the neighboring town of its drinking water supply."[23] The medieval commentator Rabbeinu Nissim, commonly known as the Ran, states that the community may use the water to wash clothing because lack of clean clothing involves physical suffering. However, it is unclear if the Ran is referring to physical discomfort or to a threat to life.[24] Professor Steinberg[25] and Rabbi Moshe Tendler[26] understand that the wash is done to prevent disease. According to this interpretation the passage in the Talmud teaches that society must be concerned with the health of future generations.[27] It also demonstrates that the definition of danger is understood as broad enough to include the prevention of future danger.[28] [29]

II. Background to H5N1

Influenza is a negative-strand RNA virus from the Orthomyxovirade family. Two types of spikes project from the surface: one composed of Hemagglutinin (H protein), and second Neuraminidase (N protein). Both the H and N proteins are integral membrane proteins.[30] Hemaglut-

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23 Translation by Avraham Steinberg, Allocation of scarce resources, *Encyclopedia of Jewish Medical Ethics*, p46 (Feldheim, 2003)

24 Nedarim 80b on the page of the Talmud itself

25 Avraham Steinberg, ad loc.

26 Frontal lecture, Yeshiva Universty, Winter 2004

27 Fred Rosner, The Rationing of Medical Care: The Jewish View, *Journal of Halach and Contemporary Society* Vol 6 (1983), p31

28 Avraham Steinberg, ad loc.

29 There are various other opinions on this matter as well, for example the second town might only be subject to discomfort but not actual danger (Responsa *Iggrot Moshe, Yoreh Deah*, Part 1 # 145)

30 William Strohl, Harriet Rouse, Bruce Fisher, *Microbiology*, p385 (Lippincot Williams and Wilkins, 2001)

tinin attaches the virus to the cell membrane as it enters the cell and Neuraminidase cleaves the viral capsid from the cell membrane[31] as the virus proliferates.[32] Influenza is a lytic virus meaning that it causes damage through cell death as well as through the subsequent immune response. It generally kills by compromising the respiratory system. Influenza has an 18 to 72 hour incubation period. The incubation period is followed by an onset period typically characterized by chills, high fever, muscle aches and extreme drowsiness. The disease runs its course in four to five days. The most serious problems, such as pneumonia, occur in the very young, the elderly and people who are immunodeficient.[33]

The classification of Influenza into subtypes is done via the outer viral proteins, H and N. There are 14 H and 9 N, which have been described in animals and humans. However, among humans only three H (H1, H2, and H3) and two N (N1 and N2) subtypes have been observed. Human influenza viruses are therefore described as H1N1, H2N2, H3N2, etc.[34]

As opposed to many other viruses, influenza shows marked variation in its antigenic properties, making it harder for the immune system to identify. This variation is caused by two properties of the influenza virus, antigenic drift and antigenic shift. Antigenic drift refers to random mutations in the virus's genetic makeup, leading to new versions of the virus. This is the cause of the seasonal flu, and the reason why a single person can get influenza mul-

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31 Therefore many antivirals are neuraminidase inhibitors

32 Leslie Lobel, ad loc., Strohl, William et. all, ad loc.

33 William Strohl, et al. ad loc. p386-387

34 William Strohl, et al. ad loc. p387

tiple times in his or her lifetime. Antigenic shift refers to genetic exchanges, generally between species, and leads to a much more dangerous influenza strain that has the potential to start epidemics or even pandemics[35]. When antigenic shift occurs very often the new strain of virus does not resemble any virus the immune system has been exposed to in the past. When such a shift occurs, initially the immune system cannot produce any antibodies to combat such a virus. Antigenic shift was responsible for the 1918-1919 pandemic that was responsible for twenty million deaths worldwide.[36] The 1918 pandemic was so devastating that in the city of Pittsburgh alone there was one flu related case every 90 seconds and one flu related death every ten minutes.[37] The 1957 and 1968 pandemics were also caused by antigenic shift.[38]

What is alarming about the new strain of flu is that it contains a heamagluttinin antigen to which humanity has never been exposed, although it is endemic to the bird population. Without prior exposure to this virus, humans have little or no immune protection against it, and an influenza pandemic could ensue.[39] What makes this epidemic possibly so imminent is that it will take only one more random mutation in the current virus strain, which is in the wild, to make

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35 A worldwide epidemic

36 William Stohl, et al. ad loc. p388-389. The frozen remains of a victim from the 1918 flu were used to identify the strain (*Lancet* Newsdesk, vol. 5 Nov 2005 p678).

37 Tabery J, Mackett CW 3rd, Ethics of triage in the event of an influenza pandemic *Disaster Med Public Health Prep.* 114-8 Jun;2(2): 2008

38 William Stohl, et al. ad loc. p388-389

39 Laura A. Stokowski, Nurses and Pandemic Influenza: Are We Ready?, *Medscape Nurses*, 03/14/2007, available at http://cme.medscape.com/viewarticle/553512

it transmittable to humans on a large scale.[40] Additionally the new wild strain has many similarities to the H1N1 strain from the 1918 pandemic.[41] Furthermore, influenza is more dangerous then SARS because it has a four day incubation period when the patient unknowingly may infect many other people. In essence, influenza is the only disease that can truly become a pandemic.[42] Finally and possibly the scariest aspect of this flu, is that in more than half the cases where a human has been infected by H5N1 the victim has died.[43]

There are a few emerging approaches to preventing such a pandemic. One approach, which has historically been used to combat the flu, is a vaccine. However, there are many problems with such a method. First of all, a truly appropriate vaccine can only be made once the epidemic starts.[44] Therefore vaccine supply will be most limited during the first wave of the pandemic, when demand will be the greatest. There is an available H5N1 vaccine on the market,[45] however, it is in limited supply and can at best knock avian flu down to a regular case of the flu. Additionally, some strains of H5N1

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40 *Lancet* Newsdesk, vol. 5 Nov 2005 p678

41 *Lancet* Newsdesk, vol. 5 Nov 2005 p678

42 Leonard A Mermer, Pandemic Avian influenza, *Lancet*, vol 5 issue 11 p666-667 Novermber, 2005

43 Laura A. Stokowski, Nurses and Pandemic Influenza: Are We Ready?, *Medscape Nurses*, March 14, 2007, available at http://cme.medscape.com/viewarticle/553512. These cases have not caused pandemics because H5N1 has not mutated to a point where effective human to human transmission is possible.

44 Sido D. Mylius, Thomas J. Hagenaarus, Anna K. Lugner, Jacco Wallinga, Optimal Allocation of Pandemic Influenza Vaccine Depends on Age Risk and Timing, *Vaccine*, vol. 26 issue 29-30, 4 July 2008, p3742-3749.The flu shot that is given annually is made on a year by year basis after seeing, which particular strains are infecting humans.

45 WHO Avian Influenza Guideline, available at http://www.who.int/csr/disease/avian_influenza/guidelines/H5N1virus10March/en/index.html

have shown resistance to the vaccine.[46]

Another approach to combating a pandemic is antivirals.[47] Antivirals are medications that treat viral infections. Some antivirals are used to cure a viral illness, others are used to shorten the time of the illness and others are used prophylactically, to prevent a person from getting a viral illness in the first place.[48] Many antivirals work by blocking viral replication. The antivirals inhibit the protein mentioned above neuraminidase. This would be particularly useful for healthcare workers. The drawback to this strategy is the limited supply of antivirals.[49] Additionally, antivirals only take off one day from the course a flu infection.[50] Furthermore, it is unclear how effective antivirals will be against a deadly flu, they may change its course so that it is no longer deadly or they may be ineffective.[51]

Finally, isolation of sick and exposed patients can be used to control the spread of the pandemic.[52] This strategy

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46 Recombinomic commentary April 29, 2008Available at http://www.recombinomics.com/News/04290803/H5N1_Egypt_Vaccine_More.html

47 Upshur, Ross, STAND ON GUARD FOR THEE, Ethical considerations in preparedness planning for pandemic influenza, *University of Toronto joint center for Bioethics*, November 2005, Available at http://www.jointcentreforbioethics.ca/people/documents/upshur_stand_guard.pdf

48 Laura Newman, As Novel H1N1 Influenza Reaches Pandemic Level, Public Health Preparedness Efforts Build: The Role of Antiviral Medications, *Medscape Public Health & Prevention* 2009 Medscape, LLC, available at http://www.medscape.com/viewarticle/704751_3

49 Ross Upsher, ad loc.

50 Mary Ellen Harrod, Sean Emery, Antivirals in the management of an influenza epidemic, *Medical Journal of Australia* Volume 185 Number 10 November 20, 2006, S58-S61 available at www.mja.com.au/public/issues/185_10.../har10868_fm.pdf; Freedman, Maurine, ad loc

51 Otto Kass, Minson O'Brien, Ethics and severe pandemic influenza, *biosecurity and bioterrorism: biodefense,* 2008 Sep; 6(3):234-36; Harrod, Emery, ad loc.

52 Upshur ad loc.

was used relatively effectively with SARS. The problem with isolation is it is hard to achieve compliance.[53] Additionally, quarantine causes an ethical problem of restricting individual rights.[54]

III. Background in Secular Medical Ethics

The four concepts employed in organizing the moral interactions of the physician and patient are described as Autonomy (self-governing), Non-malfeasance (not doing harm), Beneficence (doing the most good), and Justice.[55] These principles comprised the basis for medical moral practices as early as the 1970's. Prior to this period beneficence and non-malfeasance seem to have comprised the bulk of medical-moral principles. Indeed, the Hippocratic Oath only expresses the duties of beneficence and non-malfeasance but makes no mention of providing for patient autonomy in decision making.[56]

Autonomy is a principle generally not relevant to a public health discussion. This is generally true for our discussion as well. However, one of the strategies to combat H5N1 is to isolate patients infected with the disease as well as their contacts. This mandated isolation would limit personal freedom of movement as well as other freedoms, thus impinging upon the autonomy of the patient.[57]

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53 Robin P. Silverstein, Comments on Who Should Get Influenza Vaccine When Not all Can, by Ezekiel J. Emanuel & Allan Wertheimer, *Science,* May 12, 2006 vol.312.

54 This will be discussed at length below

55 Beuachamp and Childress p61

56 JM Luce, DB White. A history of Ethics and Law in the Intensive Care Unit, *Critical Care Clinics* 25 (2009) p223;

57 Otto Kass, Minson O'Brien, ad loc.

In the case of an influenza pandemic there will also be a question of whether we value utilitarianism over egalitarianism or vice versa.[58] This is in essence a conflict between beneficence and justice. Both utilitarianism and beneficence dictate that one should save the most life possible. Additionally, utility must be judged between medical utility, which focuses on the patient and social utility, which focuses on society.[59] In a similar vein, Alison P. Gavilini, Jan Medlok, Gretchen P. Chapman claim the young should be vaccinated first because they serve as super-vectors spreading the disease at breakneck speeds. This in turn would save the most lives on a whole.[60] On the other hand, egalitarianism and justice demand all patients should be given a fair chance. Furthermore, even the definition of fair chance is debatable. "Fair" may mean that we give everyone the same amount of resources. Conversely, it may mean that we give people with unequal claims an unequal amount.[61] The National Vaccine Advisory Commission (NVAC) & Advisory Committee on Immunization Policy (ACIP) say that the ill and the elderly

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58 J Tabery, CW Mackett, Ethics of triage in the event of an influenza pandemic, *Disaster Med Public Health Prep* 2008 Jun; 2(2): p114-8.

59 For example Social utility demands saving those who are necessary to fight the epidemic (Tabery, Makett, ad loc.). Kass, Otto, O'Brien and Minson claim propose must be extended to preserve a functioning society. This includes not only medical personal, but water, electrical, transportation, gas station personal, police, fire fighters, delivery services, etc. as well. They explain this is important because of the critical relationship between social infrastucture and health (Kass et al. ad loc.).

60 Gavilini, Medlok, Chapman, Comments on Who Should Get Influenza Vaccine When Not all Can, by Ezekiel J. Emanuel & Allan Wertheimer, *Science*, May 12, 2006 vol.312.

61 *Eleventh Futures Forum on the ethical governance of pandemic influenza preparedness*, held in Copenhagen, Denmark 28–29 June 2007 by WHO Europe, available at www.euro.who.int/Document/E91310.pdf

should get resources first because they are the most prone to infection, even though they require more resources than younger and healthier patients.[62]

Ezekiel Emanuel and Allan Wertheimer propose two possible strategies to deal with an influenza pandemic. The first strategy, the "fair innings" philosophy, states that everyone has a right to a full life.[63] This would prioritize saving the lives of younger people over older people. The second strategy, which is their conclusion, is "investment refinement." This philosophy gives priority to those who have been invested into but have not reaped the rewards of such an investment. This philosophy gives priority to people between the ages of 13 and 40, in whom society has invested but has not received any returns on its investment.[64] James Tabery and Charles Makett propose that a compromise must be made between these two extremes.[65] Similarly, Kathy Kinlaw and Robert Levine of the CDC

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62 Ezekiel J. Emanuel, Wertheimer, Allen, Who Should Get Influenza Vaccine When Not all Can, *Science*, 2006, 312:854-855,

63 Harvey S. Frey comments on Emanuel and Wertheimer's article, saying a an algorithm should be used based on the odds of a person dying from the flu combined with how many years of life are being saved (Harvey S. Frey, Comments on Who Should Get Influenza Vaccine When Not all Can, by Ezekiel J. Emanuel & Allan Wertheimer, *Science*, May 12, 2006 vol.312.)

64 Emanuel, Wertheimer, ad loc. According to Emanuel and Wertheimer, vaccine production and distribution workers as well as front line case health care workers are given priority before the 13-40 year old algorithm is even calculated. In the 13-40 ages set, priority is given to key government leaders, military police and fire workers, utility and transportation workers, telecommunication workers and IT workers and funeral directors. Robin P. Silverstein wrote a response agreeing with the premise of Emanuel and Wertheimer, however, he feels children should be vaccinated first. First of all parents invest a tremendous amount into young children. Furthermore, children serve as super-vectors spreading the virus at incredible speeds and it is unrealistic to except there to be compliance with isolation of children. (comments on the article by Emanuel and Wertheimer in *Science)*

65 Tabery, Makett, ad loc.

recommend using a utilitarian approach, but which still takes into account non-malfeasance and justice.[66]

The principle of non-malfeasance may also need to be compromised in order to combat the epidemic. As an example, privacy may need to be compromised in order to create a database of people infected with the disease. Similarly, in the aftermath of Hurricane Katrina penalties were waved for failure to comply with aspects of federal privacy regulations. Non-malfeasance would dictate to minimize such infringements, possibly limiting permitted confidentially breaches to a need-to-know basis, minimizing the likelihood for harm.[67]

IV. The Ethical Questions to be Answered

The following is a list of theoretical questions that come out from the ethical dilemmas listed above, as well as other questions raised by other ethicists and public heath officials. These questions are intended as a springboard to find the rulings of various authorities of Jewish Law, and to apply these rulings to practical applications rather than simply theoretical ideas.

At the international association of bioethics, Daniel Wikler and Sarah Marchand proposed a number of questions that will arise in a flu pandemic.[68] The first question proposed by Wikler and Marchand is the previously men-

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66 Kathy Kinlaw, Robert Levine, Ethical Guidelines in Pandemic Influenza, *Ethics Subcommittee of the Advisory Committee to the Director, Centers for Disease Control and Prevention*, February 15, 2007, available at www.pandemicflu.utah.gov/docs/20070515-PanFluEthicGuides.pdf

67 Kass et al, ad loc.

68 Sarah Marchand, Daniel Wikler, Harvard School of Public Health, *Bioethics World Congress, International Association of Bioethics*, August 7, 2006.

tioned dilemma of whether to save those at the highest risk of dying or to save the most lives.[69] The second question is how to deal with the conflict between saving the most lives initially vs. saving the most lives in the long run.[70] In other words saving fewer lives initially may save more lives in the long run. This is in essence a question of vectors that will be discussed later.

Another question that arises is do we attempt to vaccinate in order to receive indirect health care benefits. An example of indirect health care benefits is vaccinating doctors and other health care professionals.[71] Do we vaccinate these individuals first? In the long run, doing so will save more lives by letting the medical system continue to operate. In answering this, one must also consider other ques-

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69 "Pandemic PTO 1: Coincidence of Saving Those at Highest Risk and Saving the Most Lives You have 1,000 vaccines to allocate. Suppose you can vaccinate either (but not both) of these groups: A: 1,000 people at high risk of dying without the vaccine (50% case mortality rate) B: 1,000 people at low risk of dying without the vaccine (2% case mortality rate). Assume that without the vaccine 30% of the 1,000 people in both groups would become sick with the flu (out of 1,000 people, 300 people would get sick). Assume that every one in both groups is fully protected by the vaccine, and that no one transmits the flu to others. To which group would you give the vaccine?" Wikler and Marchand, ad loc.

70 76 Pandemic PTO 2: Conflict between Saving Those at Highest Risk vs. Saving the Most Lives. There are two different, available life-saving treatments for different groups of people.

A: Treatment for people who with no treatment have a 50% risk of dying.

B: Treatment for people who with no treatment have a 2% risk of dying.

There is sufficient money to treat 10 people in group A. How many people in group B would need to be treated in order for you to believe that both treatment programs had equal moral priority on our scarce resources? (i) <250? (ii) 250 or more? Wikler and Marchand, ad loc.

71 In an article in *BMJ*, Daniel K. Sokol writes that will be extremely difficult to choose the general practitioners who will be the flu doctors during a pandemic flu. (Daniel K Sokol, Who Wants to be the Flu Doctor?, *BMJ*, 25 July 2009, volume 339, p200). He leaves the question as an open one. However, a possible solution would be to vaccinate those who go to work and not those who don't. This would be fair being that those who go to work need the vaccinations and those who don't go to work don't need the vaccinations.

tions. How many lives do the health care workers have to save to justify this approach? Does it make a difference if these patients are dying from the flu or other diseases? If we do vaccinate health care workers first, who are the people in the category of health care workers? Does it make a difference whether the pandemic has already started or if we are vaccinating preemptively?[72]

Another question we must ask ourselves is whether there is a value in preserving a functional society? Is there an obligation on businesses to stockpile vaccines? Do we preferentially give vaccines to the young who are necessary for society to function in the future? Similarly, do we vaccinate other necessary workers to allow society to function? Is it valid to assume that if society ceases to function more lives will be lost?

On a more philosophical plane, do we value utilitarianism, and thus desire to save the most lives, or egalitarianism and try to save those most in need? If we value utility do we value medical utility or social utility? Medical utility is the philosophy that one saves the most lives possible (irrelevant of how much a person is 'worth' to society), while social utility is the philosophy where one saves as many lives as possible where the lives one saves who are worth the most to society (the most good to the most amount of people possible, using this philospiphy we would decide how much a benefits society when we decide whether to save them).[73] Within medical utility there is a question of whether we only take into account medical means to save

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72 Mylius, Hagnearus, ad loc.

73 The Gemarah in *Horiyot*, according to one of the interpretations we mentioned, operates under the principle of social utility.

lives or we save the most lives using whatever means available, whether they be medical or non-medical.[74] Do we give some lives more value than others?

There are international questions as well. Does one country have an obligation to help off a lesser off country get vaccines at the expense of its own citizens? How should we deal with the concept of a coordinated approach by various countries together?[75]

Finally, we must address whether it is right to limit public liberty in the interest of public health?

V. Answers Gleaned from the Poskim

Regarding the topic of triage, Rabbi Avraham Yishayah Krelitz in his work the *Chazon Ish* explains that if one who is not at risk for dying of thirst has two people in front of him who are dying of thirst, "one is obligated to give the water to one person whom he picks..."[76] In other words one must work to save complete life at all costs, even if other lives will be lost more quickly. However, if the people are both going to die in any event then their lives should be equally extended as long as possible.[77]

Rabbi Ephraim Oshry takes this approach as well. During the Holocaust, a community leader asked Rabbi Oshry

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74 Although it seems obvious we would save the most lives possible, using whatever means available to us. Very often only medical means are taken into account when dividing resources. For example the Obama health care bill uses only medical means in an approach to health care and not other means such as preventative measures that also save lives.

75 WHO policy based on that of Belgium; we will get strain information from Far East. (WHO Avian Influenza Guideline, ad loc.)

76 *Chazon Ish* Glosses on Bava Metzion Siman 2 62a. This also appears in Chazon Ish Choshen Mishpat Siman 20, p62.

77 This is stated explicitly in *Chazon Ish* gloss on Rabbi Chaim Soloveitchik, as well as implied by Rabbi Krelitz's statements here.

what he should do when he is asked to send a certain amount of people to be deported to a concentration camp. Rabbi Oshri ruled it was the duty of community leaders to take courage and operate in any way they saw fit to save as many people as possible. This meant the community leaders could in essence send some people to their deaths in order to save the whole town.[78] Similarly, Rabbi Shlomo Zalman Auerbach ruled[79] that age does not go into the equation of whom one saves first. What one should only look into is the level of danger and the chance to save the most people. According to these authorities, we are required to save the most lives possible regardless of other values, such as a "fair innings" approach as mentioned above.[80]

The *Tzitz Eliezer* addresses another issue regarding triage. What if we have enough vaccines to vaccinate a hun-

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78 *Shut Mimamakim* vol. 5 Siman 1. Interestingly, Rabbi Oshry allows a person to grab a white card that would save his own life, even though it would prevent another person from being saved. He also does not mention the order of priorities of the Gemarah in Horiyot, however, we will deal with this later in the article.

79 *Minchat Shlomo Tanina*, 86:1, in the same response he mentions that it would be extremely difficult follow the gemarah in Horiyot today.

80 There are further problems with the fair chances and similar approaches. Such scenarios assume everyone is equal and deserves an equal lifespan, however, Judaism doesn't necessarily believe one person is equal to another. (This point is made very vehemently in an article written by Chaim Rapoport in, The Halachik Hierarchy for Triage: a Rebuttal of a Contemporary View, *Le'ela*, June 2001. In this article Rabbi Rapoport argues that the Talmudic statement in Tractate Horiyot is the true way to divide medical resources in contrast to many other contemporary writers). Judaism believes, it is God's job to judge to make such decisions and adjudicate such judgments, not ours. (Rabbi Shlomo Daichovsky, Priorities in public life saving, *Torah Shebaal Peh*, 31, 1990 p44 (this is also echoed in an unpublished article by R' Daichovsky written in 2009). Weinberger, Moshe, priorities in treating patients, *Assia Eimek Halacha* 1, p109-117, (1985)). Rabbi Kook goes as far to say "the worth of a person is hidden beneath the eye, there are people worth more then 600,000 and if not maybe one of his descendants maybe worth that much." (*Mishpat Cohen* 142. R' Kook uses this to argue that one person may never be sacrificed or even put in mortal danger to save a large amount of others, except in a case of war.).

dred elderly people, but the same amount of vaccines could be given to a thousand healthy people. In either case the same amount of people will be saved under the laws of probability. However, if an older person gets the disease they will definitely die and even if he gets the vaccine there is a chance he will die anyway. However, if the young person gets the vaccine he will definitely get saved – the vaccine is given to the younger person. In other words if, based on the laws of probability, the number of lives to be saved by our efforts would be equal, then we save people who will definitely be saved as opposed to the people who only have a chance of being saved. This is based on the Talmudic dictum that a "questionable claim cannot take something away from a definite claim."[81] The *Tzitz Eliezer* says this applies to medicine where he states, "we drop a *safek* and hold on to a *vadai*".[82] He bases this on the *Pri Megadim* who says, "A safek does not exist in the case of a vadai for Pikuach Nefesh."[83][84] This approach would also dictate that, all things being equal, we would give medicine to someone who is definitely in danger rather than someone who only might be in danger.[85]

One of the questions raised above was regarding the differences in rationing before a pandemic starts and after the pandemic has started already. Rabbi Shabbtai Rappaport addresses this issue in an article in Assia. Rabbi Rap-

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81 Bavli, *Pesachim* 9a; *Yevamot* 19b, 38a, 38b; *Avoda Zara* 41b; *Chulin* 10a; *Nida* 15b .

82 *Tzitz Eliezer* vol. 9 28:3

83 Beginning of Siman 328 in the *Mishbatzot Zahav*

84 Others echo this approache as well (*Minchas Shlomo, Tanina,* 86:1. Avraham Avraham, *Nishmat Avraham*, Yoreh De'ah 252:2; Rosner, Fred, Friedman, Alan, Allocation of Scarce Medical Resources and Jewish Law, *le'ela*, Aprill 1995).

85 This is the actual case the Tzitz ELiezer is dealing with, however the others seem to give this principle broader applications.

paport posits that before a pandemic, society should focus on preventative medicine,[86] while during a pandemic it is important to focus on the sick people who are in front of us. [87] Before the pandemic has started, a country with more resources that has not been hit by the pandemic may be obligated to give resources to a country that has been hit.[88] [89]

Many decisers give certain leniencies in how much Jewish law can be bent for the good of society, will only be given once the pandemic has actually started.[90] The *Tzitz Eliezer* rules that during says a physician should put himself in danger in order to stop an epidemic and save more lives, as opposed to the regular situation where a physician is prohibited from placing his life in danger to save others.[91] Rabbi Kook states, "Different rules apply when one is saving an entire nation because that is a unique case."[92] Furthermore, based on the ruling of

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86 *Tzitz Eliezer* 9:17 (in this case the Tzitz Eliezer is talking about saving one person in order to prevent a greater epidemic to occur); Rappaport, Shabttai, Priorities in Allocating Public Respurces for Medicine, *Assia,* 49-50, Tamuz 1990, p17-5.

87 Shabbtai Rappaport, ad loc.

88 Shabbtai Rappaport, ad loc.; *Shevet Miyehudah* 1:8. This is based on the opinion of the *Kuzari* that all people are considered individual organs in the body, which is a nation. Therefore nations must give charity to other nations, like all other people.

89 An issue, although not discussed directly by the Halachik decisers and therefore not really relevant for our discussion, bears some mentioning. It seems based on the ruling of Rabbi Akiva in the Talmud Bava Metziah, which is basically universally accepted; where he states one's own life takes precedence over another. A country with medication must first worry about its own citizens before attempting to aid another country.

90 *Chazon Ish Ohalot* 22:32

91 *Tzitz Eliezer* 9:17

92 Rabbi Kook in Mishpat Cohen Siman 143 p315-316, This is also said in context of a person putting himself in danger to save more lives.

Rabbi Oshri mentioned above, we can conclude, during a pandemic there is an obligation to save as many lives as possible at all costs.[93]

On the other hand, in a private communication with Rabbi Daichovsky he told the author that there is a value in saving people whom society needs in order to preserve a functional society.[94] This is based on the principle of social utility.[95] For example it would be hard to imagine a world where the president of the United States, or any other head of state, did not receive preventative care in the case of an epidemic.

At the same time, Rabbi Daichovsky told the author, we must vaccinate the super-vectors, a.k.a. young children, because they are considered *Rodfim*, one who pursues another individual to kill him. If one is obligated to kill a person so that he does not kill others, how much more so is one obligated to save a person so that he does not kill others.[96]

Rabbi Daichovsky also told the author, we vaccinate

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93 Rabbi Oshri, a loc.,

94 Rabbi Daichovsky, personal communication. Rabbi Moshe Tendler as quoted in by Fred Rosner in an article in the Journal of Halacha and Contemporary Society No. VI, 1983, p29-31; additionally stated by Rabbi Tendler in a frontal lecture at Yeshiva University, Fall 2004. This is based on the Gemarah in Horiyot 13a, and the Rambam's elucidation on the Mishnah in that place.

95 The author surmises that Rabbi Daichovsky bases his opinion on the Mishna in *Horiyot*.

96 Rabbi Daichovsky, personal communication. Rabbi Kook also implies this when he says the larger community is more important then the individual in terms of saving lives. It should be noted that Rabbi Micha Ha'Levi, the Rosh Yeshiva of Yeshivah Gevoah of Nachalat Yitzchak argues on this and and he states one saves the person who has the most risk of dying and does not look at the greater public health picture. He says the law of the pursuer only applies when a person is saved by the given action (personal communication). However, this does not seem to be the majority rule.

health care workers before anyone else. This is because health care workers are needed to fight the epidemic.[97] This can be implied from the *Tzitz Eliezer* as well; he rules that a doctor who has a medication that can save him from possible danger he should take the medication even if the medication could save a patient from definite danger. The *Tzitz Eliezer* bases this on the principle of one's own life comes before the life of someone else.[98] We can add a variety of reasons to support this position as well. First of all, health care professionals may not go to work if they are not immunized. Secondly, the health care workers are in danger's way and they may have the greatest need for the medications. Finally, the physicians have possession of the medications for a period of time; therefore, they have a special right to the medication.[99] This follows the general rule we have been speaking of until now; we use a calculus to figure out an algorithm to save the most lives. Furthermore, this answers the ethical question of whether Judaism favors egalitarians or utilitarianism when saving lives. Judaism definitely and clearly supports a utilitarian approach saving the most lives as possible.

Judaism in the practical sense does not value one life over another. The Chazon Ish says the order of priority listed in the Talmud Horiyut is what we follow when deciding

97 Rabbi Daichovsky (personal communication)

98 *Tzitz Eliezer* 9:28 part 3

99 It can be implied from the *Tzitz Eliezer* mentioned above that when a doctor receives medication to administer to a patient he is considered the possessor the medication for that period of time.

whom to save.[100] However, Rabbi Davis Etengoff in an article in the Journal of Halacha and Contemporary Society brings a large discussion among the modern authorities of Jewish law regarding whether the Talmud in Horiyot is an ideal way to divide resources in our times.[101] Furthermore, Rabbi Auerbach states it is impossible to apply these rules in our times.[102] Rabbi Feinstein seconds this approach.[103] It

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100 This is the opinion of the Chazon Ish on *Bava Metziah* 62a, this is also echoed by his opinion in *Yoreh Deah*. The Chazon Ish lists a different order of priorities in his comments on the commentary of Rabbi Chaim of Brisk on the Rambam. There he states the order of who is to be saved is not applicable. Rabbi Vosner in his *Shevat Halevi* Siman 342 states we rule according to the opinion found in Bava Metziah.

This makes sense if we assume the *Chazon Ish* is stating his own opinion in Bava Metziah and on the Shulchan Aruch and in his glosses he is stating his interpretation of the Rambam. The Rambam is silent with regards to any limitations on the rule of one shall submit to death and not transgress. This implies that in contrast to other commentators the Rambam rules one must submit to death before killing somebody even passively. Therefore, when the Rambam comes to the exegesis of Rabbi Akiva he must use this to teach, if a person is going to die he doesn't have to kill himself to save someone else, because that person would only have to give the water right back. However, all other exegetes believe a person never has to be killed before killing someone else passively. Therefore, the exegesis of Rabbi Akiva is used to teach that a saving a full life is more important then saving a partial life. This all adds up to a conclusion that if there are resources to only save one life, or to temporarily elongate the life of two people. According to the Rambam, one should divide resources equally. This is because he does not except the exegesis of temporary life being more important than permanent life. However, the rest of the commentators believe that since permanent life is infinitely more important than temporary life we follow the rules of the Talmud Horiyot (based on Moshe Weinberger, Priorities in Treatment of Patients When there is not Enough Medication, *Assia, Emek Halacha*).

It is also possible that the Rambam, as indicated by his position in his commentary on the Mishnah, and the absence of the rules of the Talmud in Horiyot in his Yad Ha'Chazakah, sees the Talmud in Horiyot as an explanation of people the nation needs at that time, not as a binding list based on priorities of holiness.

101 David Etengoff, Triage in Halacha: the Threat of an Avian Flu Epidemic, *Journal of Halacha and Contemporary Society*, No. 55, Spring 2008, p84-90

102 *Minchat Shlomo*, 86:60

103 *Iggrot Moshe* Choshen Mishpat 2 73:2. Along these lines the *Mishnah Berurah* states that we have no Torah Scholars in our time and this cannot be used as a way to decide, which person should be saved first (547:12), the Magen Avraham states this as well.

seems based on this that we cannot follow the rules of the Talmud in Horiyot on a practical level and we will not say one person has more of a right to life than another.[104] However, we do save people the community needs such as medical professionals and military professionals.[105] One exception to this is the case of a person who has less then a year to live; in this case, we will not give medication to a patient who can live at most less than a year's time.[106] [107]

VI. Conclusion

In conclusion, the issues of a possible avian or swine flu epidemic, or even pandemic, are threats the world must take seriously. Their effects may be devastating. To minimize the damages of these possible scenarios, positive action must be taken now to prepare for such a scenario. These preparations include making ethical and public health decisions now, so that a plan may be in place if such a disaster will, God forbid, occur. The Torah is not silent

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104 *Iggrot Moshe* Choshen Mishpat 2 75:2

105 Rabbi Daichovsky personal communication Shavuot 2009, Rabbi Moshe Tendler cited by Rosner F, *NY State J Med* 83:353, 1983 as well as a frontal lecture in Yeshiva University, Fall 2004.

106 *Minchat Shlomo* 86:60, *Iggrot Moshe* Choshen Mishpat 2 75:2.

107 Rabbi Moshe Sternbauch has a very novel approach to procure resources in order that they be used for a patient who can be saved as opposed to a patient who can only be given temporary life. He rules, If a ventilator is being used by a patient who has only a year to live and can be used to save someone who will have many years to live, the resources should be given to the person who has the potential to live many more years. If the resources are being given on a discrete system they should be simply be given to the 'healthy' person. However, if the therapy is continuous, such as with a respirator, a timer should be employed to stop the therapy and then it should be given to the patient who can be given many years to live. However, this may pose a problem, or even be impossible, because of the patient's family. (*Teshuvos VeHanhagos* Siman 585. The use of a timer follows the law of the state of Israel regarding turning off a respirator on terminally ill patients who request their lives to be ended).

on these issues and offers many pearls of wisdom on how to operate during such a catastrophe. This wisdom is especially relevant in the State of Israel, whose legal system of Mishpat Ivri is based upon Torah Law. The goal of this paper has been to demonstrate how Torah law may impact these ethical and public health decisions and to continue discussion on what the definitive approach of Judaism is in such a scenario. Hopefully, as scholarship continues, we will reach Halachic decisions that can be followed immediately if the unfortunate event of a pandemic.

Dead-Man's Gift: *Metzaveh Machmas Misah*

Ephraim Meth

Introduction

This volume addresses topics in medical halakhah. One important area of medical halakhah is the treatment of the terminally ill patient. While much of the literature addresses the specifics of medical care for such patients, the following essay discusses a unique aspect of Jewish law that effects the monetary transactions of the terminally ill. This essay will allow physicians to gain a broader perspective on their treatment of this patient population. Let us begin with a number of theoretical cases.

Case 1

Grandma was unwell. As the family crowded around her bedside, she spoke up and said: "After I pass on, give my diamond ring to Shaindy and my pearl brooch to Zahava."

Case 1a

Grandma never got better, and passed away three *years* later; who gets the ring and the brooch?

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Case 1b

Grandma never got better, and passed away three *days* later; who gets the ring and the brooch?

Case 1c

Grandma got better, and passed away three years later; who gets the ring and the brooch?

Case 1d

Grandma got better, but was hit by a car the next day and died; who gets the ring and the brooch?

Case 2

David had joined the army, and was boarding a military ship to Iraq. After tearful farewells, David told his parents: "Soldiering is dangerous, and I may never come home. If I don't make it, please give my stamp collection to Solly." As David feared, he never made it home. Is Solly entitled to his stamp collection?

Grandma and David, and others in similar situations, may be classified by halakhah as *metzaveh machmas misah* (hereafter MMM), literally, "one who commands because of death." MMM is one of the most idiosyncratic methods of acquisition (*kinyanim*) mentioned in the Talmud. Whereas most *kinyanim* are transacted via some mode of action, MMM is transacted via speech alone. Chazal were worried that ill people might sink more deeply into illness if they thought their verbal bequests would not be respected; hence, they decreed that verbal bequests be respected.[1] Additionally, whereas conditions are attached to most *kin-*

1 *Baba Batra* 147b, 151b

yanim via speech, the condition that MMM only takes effect if the giver dies does not require verbalization. Speech is ordinarily required to confirm that a transaction is conditional; speech is therefore not required for MMM since everyone knows *(anan sahadi)* that such gifts are only intended to take effect if the giver does not recover and dies.[2]

Rabbinic authorities (*poskim*) dispute under which circumstances one is considered MMM, and under which circumstances one is not considered MMM. This article discusses the situations where one may be MMM, and the criteria necessary for MMM to be valid. Below I enumerate nine categories where MMM can possibly be employed.

1. The most basic example of MMM is when one says, "I am giving this gift because I might die." The Mordechai[3] writes that even a healthy person who includes this formula in his gift is considered MMM. Presumably, the Mordechai understood that MMM was instituted for everyone, even though the motivation for its creation pertains only to sick people.

Alternately, the Ran (*al haRif, Gittin*) explains that any person is believed to claim that he feels on the brink of death. Similarly, *Hagahot Maimoniyot*[4] notes that a healthy person who plans to commit suicide may be MMM. His subsequent suicide reveals that he truly felt on the brink of death at the moment of his bequest. Indeed, if a healthy person stays healthy, his gift is nullified automatically, just as any MMM is nullified when the giver recovers. Hence, if the healthy person was MMM and died, presumably he

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2 Ibid. 146b, 151b

3 *Baba Metzia* 254, *Baba Batra* 591

4 *Hilchot Zechiya Umatana* 8,60

truly felt on the brink of death.[5] If he was MMM and remained alive, his gift is anyhow irrelevant.

In contrast, the Rashba[6] writes that a healthy person who includes this formula in his gift is not considered MMM. The Rashba understood that MMM is an exception to the rules of *kinyanim*, and was only instituted in exceptional situations.

According to the Rashba, only a "*shchiv mera*" (hereafter SM) may be MMM. Although the Talmud does not define or give guidelines for differentiating between ordinary ill patients and SM, the Rambam writes that an ordinary patient is not bedridden while a SM is bedridden. Presumably, Rambam inferred this from the words themselves, as "*shchiv*" derives from the root *shin-chaf-vav*, which connotes lying down, and "*mera*" is from the root *mem-resh-ayin*, the Aramaic word for illness. Moreover, the text of a SM's gift certificate begins with, "when he was sick and lying in bed..."[7] This indicates that an ordinary SM is bedridden. Hence, SM refers to one who is confined to bed on account of his illness.[8]

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5 The Hagahot Maimoniyot differentiates between forms of death that one can predict or sense in advance, such as suicide, and forms of death that are totally spontaneous and accidental, such as accidentally falling off a roof. In the former case, one's gift is respected, while in the latter case, it is not.

6 *Shut* 3,118

7 *Baba Batra* 153a

8 This is against Yitzhak Frank, *The Practical Talmud Dictionary*, who renders SM "someone gravely ill; a dying man," (p. 245) and Marcus Jastrow, *Sefer Milim*, who renders it "dangerously ill, expected to die." (p. 845) The Talmud (*Baba Batra* 153a) actually writes that most SMs are expected to live; this is why a SM must verbalize his expectation of death, as there exists no common assumption (anan sahadi) that the SM's gift is given on condition that he does not recover. Hence, the Yerushalmi (Gittin 6,5) explicitly differentiates between a SM, who must verbalize his MMM, and a mesukan, someone in danger of imminent death, whose every gift is assumed to be MMM. The SM is at an earlier stage of illness than the mesukan. However, a patient who is not bedridden is classified neither as SM nor as mesukan.

The Rambam's language suggests that the SM must be bedridden on account of his illness, not on account of his recovery. Rambam defines SM as "a patient whose entire body was weakened, whose strength was impeded **on account of his illness** to the point that he cannot walk on his feet in the marketplace, and he has fallen on the bed." He must lack strength to walk around his house or his town; if he has the strength to walk, but his doctors instruct him to remain in bed lest his recovery be impeded, he is not classified as a SM. SM status is not obtained simply when the two conditions, of illness and confinement to bed, are present; rather, SM status exists when one's illness reaches a critical threshold, which is marked by confinement to bed. Once a patient reaches this threshold, he is believed if he claims to feel on the brink of death.[9]

R. Herschel Schachter initially opined that we follow the Rashba's opinion that healthy people cannot be MMM.[10] A similar position is recorded in *Mishpetei Uziel.*[11] However, *Mishpetei Uziel* also mentions that "many latter authorities" agree with the Mordechai. Similarly, *Sefer Pischei Choshen* cites both the Mordechai's opinion and the Rashba's opinion, and does not conclusively reject either of them. I humbly suggest that we cannot rely on the Mordechai's allowance for healthy people to be MMM well in advance of their death. However, we may rely on

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9 R. Herschel Schachter initially opined that even patients on bed rest are classified as SM. Even patients on their way to recovery, given that they may experience relapse if they leave bed, can credibly claim to feel on the brink of death. However, when I showed R. Schachter the Rambam, he agreed with my reading.

10 Verbal communication

11 *Choshen Mishpat* 35

the *Hagahot Maimoniyot*'s opinion that MMM works for healthy people if they die soon after being MMM.[12]

2. When a person expresses expectancy of death prior to giving a gift (i.e. "woe, I am going to die. Here, take this gift."), even if he does not explicitly state that he is giving the gift in anticipation of imminent death, it is treated as MMM (*Baba Batra* 151b).

3. Verbal mention of death is a necessary prerequisite for MMM, opine R. Shmuel b. Chofni Gaon[13] and *Halachos Gedolos*.[14] Similarly, *Nimukei Yosef* and the Rif require verbalization of death expectancy for certain characteristics of MMM to take effect. For example, one who bequeaths money to charity via MMM may retract his donation. However, without verbalization of death expectancy one may not retract his bequest to charity. Moreover, the Rif seems to indicate that verbalization is required when one is distributing only *some* of his possessions; full MMM only exists independently of verbalization when one distributes *all* of his possessions. According to these *Rishonim*, non-verbal MMM is known as "*matnas SM*" (bedridden patient's gift).

However, many *Rishonim* accept that under some circumstances, it is common knowledge that a person is

12 When I mentioned this to R. Schachter, he agreed with my suggestion. Although halakhah seems to accord with the *Hagahot Maimoniyot*, the rules for monetary cases demand that the suing party produce totally compelling evidence to take money away from the sued party. In cases where MMM is disputed, where the gift's recipient wants to take his money from the giver's heirs, the recipient may be required to produce evidence that compellingly refutes the Rashba's position. It is unclear whether such totally compelling evidence exists. Hence, the *Hagahot Maimoniyot*'s ruling may have insufficient power to alter the outcome of real-life monetary cases.

13 cited in *Tur Choshen Mishpat* 250

14 cited in Mordechai *Baba Batra* 627

being MMM, and therefore there is no requirement of verbalization. These *Rishonim* believe that MMM and *matnas* SM are one and the same concept. For example, criminals on their way to the gallows may be MMM without any verbalization. R. Yonah[15] explains that since "they are in danger, they are closer to death than to life," and Ritva[16] similarly writes that "most of their concentration is on death, and not on life." Criminals expect imminent death, and we therefore assume that any gift they give is meant as MMM.

This ruling of R. Yonah and the Ritva, that healthy criminals on their way to the gallows may be MMM, also indicates that illness is not a necessary prerequisite for MMM. Even the Rashba allows for this exception, since criminals and SMs share the experience of credibly anticipating imminent death.

4. If one is departing for a foreign country and does not expect to return, we assume that any gift he gives is similar to MMM. The *Ketzos haChoshen* (250, 9) initially assumes that the similarity is limited, and that while the gift is automatically revoked upon the giver's return, it nevertheless cannot take effect without an ordinary *kinyan*. After all, there is no concern that this traveler will succumb to illness. The *Ketzos* concludes, however, that his gift *may* take effect without ordinary *kinyanim*. This indicates that the two properties of MMM are inseparable; whenever Chazal decreed that the gift retracts automatically if the giver

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15 *Baba Batra* 146b

16 Ibid.

survives, they also decreed the gift may be given without ordinary *kinyanim*.[17]

5. In contrast, one who is sick but expects to recover must verbalize MMM, since he does not expect imminent death. Similarly, one who is departing for a dangerous place cannot be MMM, since he expects to return.

6. The Rif implies that people departing for dangerous places, even though they expect to return, are presumed without verbalization to be MMM when giving gifts. This seems to reject the "expectation of no return" criterion for MMM suggested by R. Yonah. Instead, perhaps the Rif views a different characteristic of departing travelers' mindsets, "*behalah*" (lit. rushed confusion), as the essential criterion for MMM. *Mishpetei Uziel*,[18] in a similar analysis of this position, requires that "if he cannot command now, he will certainly or possibly be unable to say his words tomorrow." Dangerously ill patients, criminals on their way

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17 The inseparability of these two aspects of MMM may be due to the idiosyncratic nature of the retraction process. Earlier, we explained that this right of retraction is due to common knowledge (*anan sahadi*) of an implicit condition that limits the recipient's right to the gift. This follows the Talmud (*Baba Batra* 146b, 151b), which calls the right of retraction an "*umdena*," or evaluation of the giver's implicit intent, and which writes that MMM even when fortified by an ordinary kinyan may nevertheless be retracted at any time by the giver. However, the Rashba (*Shut* 1,975, *meyuchasos* 6; see also *Shut Rivash* 207) writes that retraction is not only a right that is due to *anan sahadi*. Retraction occurs automatically if the giver recovers, even if the giver explicitly stipulates that he does not want to retract the gift even if he recovers. Rashba explains that this automatic retraction is due to the verbal, non-action-based nature of MMM. Recipients of ordinary gifts derive their ownership rights from the initial act of receipt because that action is strong and does not rely merely on speech. Recipients of MMM, however, derive their ownership rights from the precipitous condition of the giver; they cannot derive their rights from the initial act of receipt, since that act was weak, it was based on speech rather than action. Hence, the recipients' rights to the gift evaporate as soon as this precipitous position disappears. Clearly, the Rashba believes that automatic retraction only exists when the *kinyan* suffices with speech.

18 *Choshen Mishpat* 35

to execution, and imminently departing travelers all share this *behalah*; therefore, they may all utilize MMM.

This interpretation of the R. Yonah/Rif debate, wherein R. Yonah adheres to an "expectation of no return" criterion while Rif adheres to a *behalah* criterion, parallels two explanations offered by Rashbam for MMM's efficacy. The Talmud writes, "*shema titaref daato alav.*" Earlier, we interpreted this to mean that Chazal were concerned lest the patient's mental condition deteriorate out of anguish that his wishes will not be fulfilled. This parallels the Rosh's position (see below), and perhaps militates for restricting MMM to patients with expectation of imminent death. Rashbam offers an alternate interpretation: that Chazal instituted MMM lest the patient's condition irreversibly deteriorate before he has the opportunity to give his gift with an ordinary *kinyan*. This parallels the Rif's position that MMM applies in dangerous situations where subsequent opportunities for ordinary *kinyanim* are seemingly absent. Hence, whether one expects imminent death or imminent departure, he may be MMM since he feels an urgent need to give gifts and ordinary *kinyanim* may not ever again be available to him.

According to this interpretation of the Rif, patients on the verge of surgery may be MMM. If the probability of fatality is higher than 50%, even R. Yonah would agree that they are considered *mesukan* (in a state of danger), and are "closer to death than to life." If, however, the perceived probability of fatality is less than 50%, and the patient enters the surgery with full intention of survival and recovery, he may still be entitled to non-verbal MMM according to the Rif. Presumably, the danger involved in an operation,

as well as the *behalah* that immediately precedes an operation, is no less than the danger and confusion involved in embarking on long sea or desert journeys. If his words are not heeded now, he may never be able to bequeath his gift.

Unlike patients entering surgery, some patients diagnosed with terminal illness may not be MMM, according to the Rif. As long as the doctors do not anticipate their imminent demise, they have enough time to arrange their bequest using ordinary *kinyanim*. If their words are not heeded now, they will still have an opportunity to bequeath on the morrow.

Nevertheless, patients who may die at any moment, even if they are not bedridden, may be MMM. If their words are not heeded now, they may have no opportunity to bequeath their possessions via ordinary *kinyanim*. Hence, they may be MMM. This line of reasoning is quoted from R. Chaim Yehudah Leib Auerbach zt"l, father of R. Shlomo Zalman Auerbach zt"l and himself a prominent halakhic authority, in *Shut Mishpetei Uziel*.

R. Auerbach adduces support for his position from the case of a descendant of Eli the high priest whose family was cursed by Hashem with premature death. This descendant constantly felt that his death was imminent and was therefore MMM. Maharit Tzahalon of Tzefat, a 16th century halakhic authority who authored many important responsa, reportedly upheld this young priest's bequest on the grounds that he could die at any moment and that if his words are not heeded now, he may never again be able to make his bequest.

Mishpetei Uziel, however, cites an alternate report of R. Tzahalon's ruling: that the priest's bequest was null and

void. Since the priest was healthy in all respects, his fear of death, even coupled with his family's curse, was insufficient to enable MMM. Hence, Mishpetei Uziel rejects R. Auerbach's ruling and writes that patients who may die any minute, as long as they are not bedridden, are not entitled to MMM.

The Maharit's responsum on this subject,[19] which Mishpetei Uziel did not have access to, actually takes a middle position. Maharit writes that according to the Rif patients whose context attests to their state of mind may be MMM. Hence, the priest descended from Eli was not entitled to MMM since there were no contextual clues. This being so, terminally ill patients may certainly be MMM, since their diagnosis clearly attests to *behalah*, or fear of imminent death.

7. The *Yerushalmi*[20] writes that a person who falls ill "*kederech haaretz*," in an ordinary manner, should be visited only by family and friends for the first three days of his illness. Afterwards, even others may visit him. However, if "*kafatz alav hacholi*," the illness comes more swiftly than usual, then everyone may visit him during the first three days. The *Yerushalmi* further notes that this halakhah of bikur cholim, visiting the ill, can be used as precedent for differentiating between dangerously ill people (*mesukan*) who may use MMM, and ordinary ill people (*shchiv mera*) who may not use MMM.

Rambam[21] does not distinguish between patients during and after their first three days of illness. Rather, Rambam dis-

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19 no. 32

20 *Gittin* 6, 5

21 *Zechiya Umatana* 8,24

tinguishes between those whose illness comes with extraordinary swiftness and strength, who are considered dangerously ill, and those whose illness comes with ordinary swiftness. For Rambam, prolonged illness does not create expectations of death; only swift illness creates such expectations.

8. In contrast, the Rosh writes that either patients past their first three days of illness or patients whose illness comes swiftly are considered dangerously ill. Prolonged illness, like swift illness, creates in its victims an expectation of imminent death.

The Rosh's position, which is codified by the Ramo[22] as binding, needs further clarification. In Talmudic times, did people who were bedridden due to inordinately swift illness expect to die within hours? Within days? Within months? Similarly, did people who were bedridden for over three days expect to die within hours, days, or months? Moreover, does the Rosh acknowledge that in addition to expectation of death, the *behalah* suffered by such patients contributes to their ability to make non-verbal MMM? Or, does the Rosh believe that expectation of death is sufficient, even when one has the leisure and presence of mind to utilize ordinary *kinyanim*?

By listing criminals on their way to the gallows together with *mesukan* patients, the Rosh perhaps means that both expectation of death within the day and rushed confusion are necessary. Alternately, the Rosh may not mean to compare these two cases with respect to their details, and only means that the cases share identical laws.

On the other hand, the fact that people who plan to imminently commit suicide may be MMM suggests that

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22 *Choshen Mishpat* 250, 5

behalah is not required.[23] Presumably, such people are not rushing and confused; they can delay their suicide by the time it takes to arrange an ordinary *kinyan.*[24] Suicidal patients may be MMM because they expect imminent death, not for any other reason. Hence, *mesukan* patients presumably can suffice with expectation of imminent death, and they do not need feelings of rushed confusion to be MMM.

These questions impact on the status of contemporary patients diagnosed with terminal illness, but assured that they will not likely die within the week, month, or year. When confined to bed, such patients clearly are classified as *mesukanim* and may utilize non-verbal MMM. When such patients are not confined to bed, they are not *mesukanim.* It is unclear, however, whether they must expect death (and experience *behalah*) to the same degree as convicted criminals, or whether a more diffuse expectation of death is sufficient.

9. Finally, bedridden patients who bequeath their entire estate are assumed, even without verbal confirmation, to be utilizing MMM. These bequests, commonly called "*matnas* SM," are no different from other forms of MMM

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23 *Baba Batra* 147a

24 Drs. D. Pelcovitz and R.H. Meth note that nowadays, most suicides are preceded by a mindset of rushed confusion. The suicidal mindset sees death as urgent. Given 24 hours, suicidal people usually temporarily shelve their plans. This being so, the ability to be MMM before suicide has no bearing on terminally ill patients who experience no behalah. However, the paradigmatic suicide for hilchos MMM is that of Achitofel, King David's advisor who defected when Avshalom usurped the monarchy (*Baba Batra* 147a; Rosh 9,18). Achitofel advised Avshalom to pursue David at once, and warned Avshalom that failure to do so would eliminate any chance of retaining the throne. When Avshalom rejected Achitofel's advice, Achitofel was confident that David would return and punish his treason. He therefore returned home, was MMM, and committed suicide. Possibly, this suicide was more akin to Roman suicides, where it was seen as a point of honor for a defeated general to kill himself. Such suicides seem not to originate from a behalah mindset, but rather from a coolly calculated implementation of a warped system of values.

that require no verbalization. Hence, such bequests neither require an action-based *kinyan*, nor have validity if the patient recovers.

In summary, three potential criteria were suggested for MMM. The first, illness that renders one bedridden, was rejected because even criminals awaiting imminent execution can utilize MMM. The second, expectation of imminent death, is accepted by R. Yonah. The degree of imminence, however, is unclear. Moreover, it is unclear whether expectation of death is sufficient, or merely necessary, for MMM. The third criterion for MMM is rushed confusion, or a sense of urgency, coupled with inability to utilize ordinary *kinyanim*. This criterion is adopted by the Rif.

Practically, this impacts a number of cases. Patients not confined to bed, but who may die at any moment, may be MMM according to both R. Yonah and the Rif, as explained by R. Yehudah Leib Auerbach. Patients who are diagnosed with terminal illness, but who will probably not die imminently, may not be MMM according to the Rif since they experience no *behalah*. However, the Rosh may uphold their MMM, since they anticipate imminent death. Finally, patients entering minor surgery may be MMM according to the Rif, since they experience *behalah*. However, they may not be MMM according to the Rosh, since they do not anticipate imminent death.